

Consultation on Bail and Release from Custody arrangements in Scotland

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1. Ministerial Foreword

Scotland is a modern and progressive society. Our overarching aim for the Justice System in Scotland is to improve public safety, support victims and reduce rates of victimisation. Evidence shows that this is best achieved by reducing crime, reducing reoffending, and having fewer people experiencing crime. As part of that aim, this consultation asks important questions about how custody should be used in Scotland, now and in the future.



How we treat people who come into contact with the criminal justice system says a lot about who we are as a society. It is, of course, important that measures such as loss of liberty are there to protect the public. Keeping our communities safe and protecting victims must remain a priority for us all. However, we must also recognise the severe and multiple deprivation experienced by many people who come into contact with the criminal justice system – and the damaging impact that imprisonment can have on individuals, their families and wider communities. I am clear that the criminal justice system must balance protecting the public with providing real opportunities to support and rehabilitate those who offend. This consultation seeks views on how this could be done differently in future.

This is smart, compassionate justice that emphasises the need to protect victims, ensure public safety and give those who have offended the support they need to make different choices so they can make a positive contribution to our communities. We are seeking views on two particular parts of the justice system: bail/remand and release from custody to inform the development of legislation in this area.

The reforms we are proposing are intended to change the way bail law operates so that those who do not pose a risk of serious harm are managed safely in the community and are not remanded in custody. This is in response to the concerns which have been raised in relation to the increased remand population and the calls for action in this area. I share those concerns and I am determined that steps are taken to address this.

We are also consulting on changes to the way release from prison custody processes operate with an emphasis on enabling better reintegration. This includes a focus on the support provided to people leaving prison so that they don't reoffend. This recognises that, too often, we see people cycle back into the criminal justice system and into prison because they cannot access the support they need in the community. Collectively, we can do better.

These are complex issues, with no easy answers. But, if we want to see real change in the way we treat people in contact with the criminal justice system and better outcomes for individuals, their families, victims of crime and communities, then we need to be bold.

Thank you for reading this consultation, I would like to see as wide a range of responses as possible and your views will be critical in informing our next steps.

Keith Brown

Cabinet Secretary for Justice and Veterans

2. Consultation Process

Responding to this Consultation

The consultation will run for 12 weeks from the date of publication.

For the closing date and in order to respond to this consultation, please use the Scottish Government's consultation hub Citizen Space, which you can access online at <https://consult.gov.scot/justice/bailandreleasefromcustody>

You can save and return to your responses while the consultation is still open. Please ensure that consultation responses are submitted before the closing date above.

If you are unable to respond using our consultation hub, please complete the Respondent Information Form to:

Future of Custody Team
Community Justice Division
Scottish Government
Room GWR, St Andrews House
Regent Road
EDINBURGH, EH1 3DG

Handling your response

If you respond using the consultation hub, you will be directed to the About You page before submitting your response. Please indicate how you wish your response to be handled and, in particular, whether you are content for your response to be published. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

If you are unable to respond via Citizen Space, please complete and return the Respondent Information Form included in this document.

To find out how we handle your personal data, please see our privacy policy: <https://www.gov.scot/privacy/>

Next steps in the process

Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public at <http://consult.gov.scot>. If you use the consultation hub to respond, you will receive a copy of your response via email.

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published where we

have been given permission to do so. An analysis report will also be made available.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to the contact address above or at futureofcustody@gov.scot

Scottish Government consultation process

Consultation is an essential part of the policymaking process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work.

You can find all our consultations online: <http://consult.gov.scot>. Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post.

Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

3. Introduction

We want to reduce crime and reduce re-offending so that there are fewer victims. That is why we are seeking views on a range of proposed reforms relating to the law governing the use of bail and remand, and release from prison custody. This is the first stage in a longer-term consideration of how custody is used in Scotland both now and in the future.

The proposals within this consultation are underpinned by a commitment to public safety and the protection of victims. Along with protection of victims being at the forefront of the operation of the reforms, the proposals are intended to lead to a reduction in the future risk of reoffending which will mean fewer victims in the future. This will be achieved by providing more opportunities for rehabilitation and improved support for reintegration, as well as considering whether remand can be used differently with an emphasis on protecting public safety.

We recognise that prison is, and always will be, necessary for those who pose a risk of serious harm. However, we also recognise that imprisonment damages the connections that prevent people from offending or reoffending, such as family relationships, accommodation and employment. Short-term imprisonment, including remand, is not effective in addressing the underlying causes of offending.

We know that for those leaving prison, effective support to enable them to reintegrate and make positive connections in their communities helps to prevent reoffending and supports more positive outcomes for them and those around them.

We believe the time is right to reassess the role that prisons and the use of imprisonment should play in a modern and progressive Scotland. A justice system which more effectively addresses the reasons why people offend and provides greater opportunities for rehabilitation benefits all of us and will lead to fewer victims in the future.

The impact of the pandemic has forced us to look differently at how the justice system operates in Scotland. We have the opportunity to take a transformative approach, delivering better outcomes for everyone involved in the justice system, as well as for communities and public services.

In order to do that, we need to ask questions about how custody could and should be used in a just and fair society.

The use of bail/remand and arrangements around release from prison custody are two areas which we feel have the potential to contribute to this shift in how imprisonment is used. This consultation seeks as wide a range of views as possible on proposed reforms in these areas.

Our proposals are aimed at making a real difference to the lives of individuals affected by imprisonment and by doing so, we can reduce reoffending, leading to fewer victims in the future. As highlighted in the Hard Edges¹ report published in 2019, many people in contact with the criminal justice system have already

¹ Hard Edges Scotland, Lankelly Chase (2019) (<https://lankellychase.org.uk/publication/hard-edges-scotland/>)

experienced severe and multiple disadvantage, including homelessness, substance misuse, mental ill health and domestic violence or abuse. Individuals from the 10% most deprived areas are over-represented in prison arrivals by a factor of three² – a finding consistent across the last decade. Care experienced people are disproportionately represented within the prison population. Around a quarter of the prison population in Scotland report being in care as a child, rising to just under half when looking specifically at young people in custody.³

In the latest Addiction Prevalence Testing study carried out by the Scottish Prison Service in 2018/19, of the 1017 tests carried out on arrival in prison 71% were positive for illegal drugs (including cannabis)⁴. Scottish Prison Health Care Network Data also shows that 25% of prisoners are on some kind of Opioid Substitution Therapy (OST).

Research published earlier this year found that around 78% of women prisoners in Scotland have a history of significant head injury – most of which occurred in the context of domestic abuse which lasted over several years⁵

We also know that imprisonment has a wider impact than just on the individual. Almost two thirds of respondents (61%) to the most recent SPS Prisoner Survey reported having children themselves.⁶ There are an estimated 20,000 -27,000 children who are affected by parental imprisonment each year in Scotland⁷ – which is a recognised Adverse Childhood Experience (ACE) and is known to significantly impact long-term health and wellbeing and negatively affect both attainment in school and later life experiences.

The reforms we are proposing in this paper focus on the use of bail and remand, in recognition of the negative impact that short periods of imprisonment have – particularly for those who have not been convicted of a crime. The paper also considers arrangements for release from custody, with an emphasis on providing greater opportunities to support reintegration to reduce the risk of future offending and to enable people to move on towards more positive outcomes.

Everyone should have the right to feel safe in our communities, particularly those who have been victims of crime. We are committed to putting victims' rights at the heart of justice and strengthening how justice and wider public services support people who have been affected by crime.

Through the Victims Taskforce, individuals have told us⁸ that 'feeling safe' is a key concern following an experience of crime or during ongoing criminal justice

² Scottish Prison Population Statistics 2019-20 (<https://www.gov.scot/publications/scottish-prison-population-statistics-2019-20/pages/1/>)

³ SPS Prisoner Survey 2019 (<http://www.sps.gov.uk/Corporate/Publications/Publication-7196.aspx>)

⁴ SPS Addiction Prevalence Testing Stats 2018/19 (<https://www.scotpho.org.uk/behaviour/drugs/data/availability-and-prevalence>)

⁵ MacMillan Tom (2021) Associations between significant head injury and persisting disability and violent crime in women in prison in Scotland ([https://www.thelancet.com/journals/lanpsy/article/PIIS2215-0366\(21\)00082-1/fulltext](https://www.thelancet.com/journals/lanpsy/article/PIIS2215-0366(21)00082-1/fulltext))

⁶ 17th Prisoner Survey 2019 (<http://www.sps.gov.uk/Corporate/Publications/Publication-7196.aspx>)

⁷ McGillivray, C. (2016) Rendering Them Visible: A Review of Progress towards Increasing Awareness and Support of Prisoners' Families (<https://www.familiesoutside.org.uk/content/uploads/2016/04/Rendering-Them-Visible-FINAL.pdf>)

⁸ Themes from 'Victims Voices' feedback presented at the Victims Taskforce - December 2020 (<https://www.gov.scot/publications/victims-taskforce-papers-december-2020/>)

processes. Feedback around feeling safe has also arisen with regards to decisions to do with bail, and around prisoner release and parole.

Decisions on whether an individual is released on bail or remanded in custody can have a direct impact on victims, who may fear for their safety or the threat of repeat victimisation. In addition, there can be significant emotional and practical implications for victims as a result of the release of an individual from custody.

Victims have also told us about the importance of receiving adequate levels of information about what is happening at each stage of their experience of the justice system and what support is available to them. This includes information in relation to decisions on bail and remand and on the release of prisoners and parole decisions. A lack of clear information at the right times is a significant issue of concern for victims.

It is therefore important that this consultation considers issues relating to bail, remand and prisoner release from a victim's perspective and takes into account the views of both victims and organisations who support them.

This consultation focuses on proposed legislative reform. However, we know that legislation alone cannot deliver the changes we want to see – although it provides a clear signal of intent. Any legislative reforms must be supported by the availability of consistent, robust alternatives to remand and effective and timely reintegration support for those leaving custody across Scotland. The Scottish Government is already investing in these services and we intend to continue to expand their availability, working with partners across the sector.

The recently published Programme for Government⁹ committed to a substantial expansion of community justice services supporting diversion from prosecution, alternatives to remand, and community sentencing. Expanding the availability and consistency of justice services in the community is vital to enable further shifts away from disruptive and ineffective short custodial sentences and periods of remand.

Justice agencies are critical in supporting the aims of these proposed reforms. However, they cannot do this alone. Wider partners, including NHS, local government, third sector organisations and mainstream public services play a critical role - through their decision-making, resourcing and delivery of public services. This is in line with the Christie principles¹⁰ of integrating service provision, prioritising expenditure to prevent negative outcomes, reducing duplication and becoming more efficient and empowering individuals and communities.

If we truly want to see reductions in reoffending and victimisation, with the associated damage they do to people and communities, then we need to drive a more decisive shift away from the use of custody, including for remand, towards community interventions which do more to address the underlying causes of offending. We also need to do more to ensure that consistent, timely services are available to support people on their release from prison – at the point that they need

⁹ A Fairer, Greener Scotland: Programme for Government 2021-22
(<https://www.gov.scot/publications/fairer-greener-scotland-programme-government-2021-22/>)

¹⁰ Christie Commission on the future delivery of public services
(2011)(<https://www.gov.scot/publications/commission-future-delivery-public-services/documents/>)

them. This is in line with the evidence of what works to reduce reoffending¹¹ – with a focus on holistic interventions that better address the underlying causes of offending.

The reforms proposed in this consultation intend to support those aims and we would welcome as wide a range of views as possible to inform how we take this forward.

This consultation provides the starting point for a wider debate on the future use of imprisonment in Scotland, including on matters of sentencing, albeit these are not the main focus of the suggested proposals laid out here.

Nevertheless, should you wish to provide views or suggestions in relation to sentencing, or on proposals relating to bail/remand or release from custody that are not already covered in this consultation, you are welcome to do so.

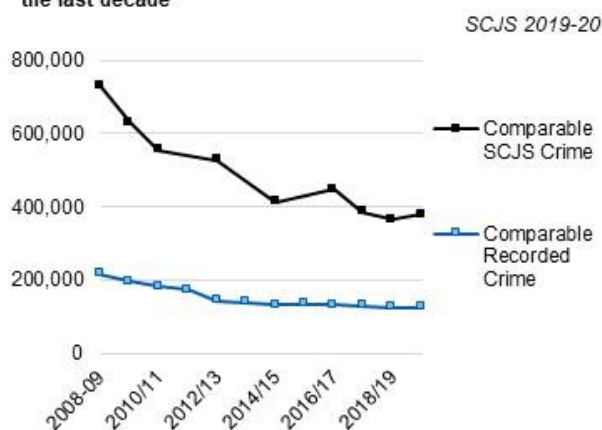
¹¹ <https://www.gov.scot/publications/works-reduce-reoffending-summary-evidence/>

Figure 1 – Remand in Scotland

Remand in Scotland

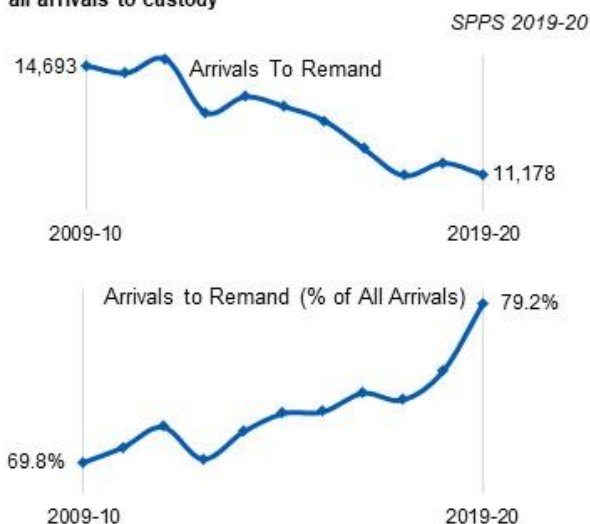


► **The volume of crime in Scotland has continued to fall over the last decade**

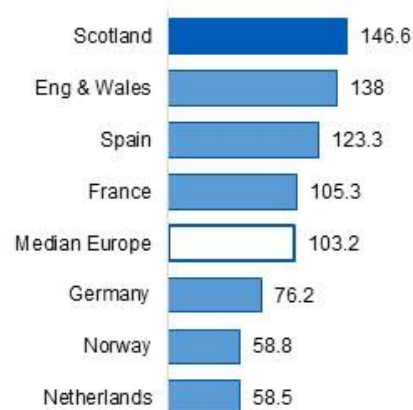


Trends show falling rates of crimes recorded by police (lower), and in the estimate of comparable offences, including unreported, from the Scottish Crime and Justice Survey (upper)

► **The number of arrivals to remand has fallen since 2009-10, but arrivals to remand comprise an increasing majority of all arrivals to custody**



► **Yet Scotland's rate of imprisonment (per 100k population) remains high relative to the rest of Western Europe**



► **In August 2021, more than 1 in 4 prisoners were held on remand, compared to around 1 in 5 in 2019-20**



Sources SCJS: Scottish Crime & Justice Survey 2019-20, <https://bit.ly/39c7UAq>
 SPACE-I: Council of Europe prison population statistics, <https://bit.ly/2VNVcos>
 SPPS: Scottish Government Prison Population Statistics 2019-20, <https://bit.ly/3kelARK>
 SPS PR2: Scottish Prison Service Prisoner Records systems ad-hoc analysis

4. Section 1: Bail

4.1 Introduction

Decisions in relation to bail and remand is a key point in the criminal justice process. The bail proposals discussed are all focused on seeking to reduce the chances of future crimes being committed with the effect of fewer future victims of crime.

When a person has been accused of committing a criminal offence and a criminal justice process is underway, the question arises what should happen to that accused person as the criminal justice process proceeds.

Depending on the stage of the criminal justice process, decisions in this regard can be made by the police or the court. The person may be permitted to stay in the community – either with or without conditions – or the person may be held in some form of custody (remanded).

While it is often the case that accused persons are allowed to remain in the community without conditions (which is known as being ordained to appear), they may remain in the community with conditions. Prior to initial consideration by a court, this can be done through release by the police on an undertaking. Once a case is heard in court, release could occur through bail being granted by the court. They may also be remanded in some form of custody.

The following material explores the legal framework within which courts make decisions as to whether or not bail should be granted. This includes in relation to the operation of the legal framework for under 18s as well as for adults. Where a specific issue relates to under 18s, the text makes that clear. Otherwise, reference to the policies discussed should be taken to affect under 18s as well as adults unless the text indicates otherwise.

Associated with the legal framework for bail decisions, there is also material relating to the operation of certain processes once bail is granted¹².

The paper suggests reforms to be considered in the context of seeking to make the best and most appropriate use of custody, while continuing to take account of public safety.

In accordance with long-standing provisions of the law of Scotland, reinforced by the European Convention on Human Rights, individuals accused of any criminal offence can be allowed to remain in the community pending trial including by granting them bail. However, there are circumstances in which a presumption in favour of refusal of bail operates relating to those accused of certain serious offences and these are set out in the [Criminal Procedure \(Scotland\) Act 1995 \(the 1995 Act\)](#).

In addition, while all offences are such that a person can be bailed, the 1995 Act sets out a number of grounds which, taken individually or collectively, may give

¹² Undertakings are not part of the discussion of the current possible reforms.

reason to the court to justify a decision to refuse bail for an accused person in any given case. These grounds are:

- any substantial risk that the person might if granted bail—
 - abscond; or
 - fail to appear at a hearing of the court as required;
- any substantial risk of the person committing further offences if granted bail;
- any substantial risk that the person might if granted bail—
 - interfere with witnesses; or
 - otherwise obstruct the course of justice, in relation to themselves or any other person;
- any other substantial factor which appears to the court to justify keeping the person in custody.

When the court is assessing grounds that may be relevant in a given case for refusing to grant bail, the court must have regard to all material considerations including the following—

- the—
 - nature (including level of seriousness) of the offences before the court;
 - probable disposal of the case if the person were convicted of the offences;
- whether the person was subject to a bail order when the offences are alleged to have been committed;
- whether the offences which the court is considering are alleged to have been committed—
 - while the person was subject to another court order;
 - while the person was on release on licence or parole;
 - during a period for which sentence of the person was deferred;
- the character and previous behaviour of the person, in particular—
 - the nature of any previous convictions of the person;
 - whether the person has previously contravened a bail order or other court order (by committing an offence or otherwise);
 - whether the person has previously breached the terms of any release on licence or parole (by committing an offence or otherwise);
 - whether the person is serving or recently has served a sentence of imprisonment in connection with a matter referred to immediately above;
- the associations and community ties of the person.

All decisions by the court must be made in the public interest. The law makes clear that the public interest includes the interests of public safety. This will continue to underpin the operation of the bail system.

What this consultation considers are changes in this area of law, reflecting changes that have recently been made in how sentencing policy and practice operates in the courts, especially those courts that deal with less serious offending (the non-jury courts known as the summary courts). The focus of any changes is to reduce the future chances of crimes being committed with associated fewer victims of crime.

The changes reflect wider understanding about the lack of effectiveness of short periods in custody, in terms of addressing the underlying causes of offending behaviour.

The proposed changes also reflect development of the practice of management of risk in Scotland, and recognise 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.

There is a new recently published vision for youth justice which, along with other policy approaches, is focused on keeping under 18s out of the criminal justice system as much as possible. Where interaction with the criminal justice system arises, the bail proposals discussed in this consultation help emphasise the importance of people, including young people, being kept out of custody if at all possible.

At the heart of the proposals being discussed on bail law reform is the question of what is an appropriate use of custody for individuals, especially for those not convicted of any criminal offence¹³. As can be seen above, bail law operates within the public interest. Through the proposals offered, this part of the consultation explores what the public interest may be in the bail system reflecting an approach in the use of custody which could result in a necessity for sufficient public safety grounds to arise in any given case before custody can be used.

Such an approach would allow for a greater appreciation that those who pose limited or no risks to public safety, but who may need effective support and supervision, can remain in the community. This would be done in such a way to ensure risks relating to breaching non-public safety bail conditions (e.g. attending trial) are addressed through support and supervision being provided. This would be instead of being remanded in custody.

4.2 Proposals

The reforms discussed in this paper are:-

- The need to protect public safety is a required ground that must be present to justify refusal of bail;
- Requiring the court to have particular regard to victim safety when making their bail decision;
- Empowering the court to rely, in all cases, on the general grounds relevant in reaching the decision to the question of bail;
- Where a court refuses bail, requiring the court not only to give, but also to record, explanations for that decision;
- Improving the provision of information to inform decisions in relation to the question of bail including enhanced involvement by justice social work;
- Before a decision to refuse bail is finalised, making it an explicit requirement for the court to consider the use of electronic monitoring as a means of the accused remaining in the community;

¹³ Although the significant majority of those held on remand are pre-trial, the proposals will also apply to those convicted but not yet sentenced.

- A number of miscellaneous issues relating to the relationship between bail and electronic monitoring; and
- A number of miscellaneous issues affecting the bail decision process.

4.3 Background

All persons accused of any criminal offence can be granted bail. This is set out in section 24 of the Criminal Procedure (Scotland) Act 1995 (the 1995 Act)¹⁴. This provision reflects the position in the European Convention on Human Rights (“the Convention”). Article 5(3) of the Convention states that “Everyone arrested or detained...shall be entitled to trial within a reasonable time, or to release pending trial”¹⁵. The Convention allows for remand however: the jurisprudence of the European Court of Human Rights establishes that detention may be justified by “relevant and sufficient” reasons¹⁶.

The Scottish Parliament enacted the Bail, Judicial Appointments etc. (Scotland) Act 2000¹⁷ to remove restrictions on bail from the law of Scotland so that judicial decision-making was an essential part of consideration in all cases¹⁸.

Decisions on whether or not bail is to be granted involve the exercise of judicial discretion. The exercise of that discretion is, however, taken in the context of bail requiring to be granted unless there is good reason to refuse bail (see section 23B of the 1995 Act).

A decision on whether to grant bail is informed by a list of grounds, laid out in statute, relevant as to why bail in any given case may be rejected. These grounds are set out above (and in section 23C of the 1995 Act).

In addition, the decision on whether to grant bail in certain cases is informed by specific provision for people accused of certain serious offences, in the circumstances set out in section 23D of the 1995 Act.

Despite all offences beingailable and bail requiring to be granted unless there is good reason not to (subject to section 23D), significant numbers of persons are remanded in Scotland.

In the Report of its Inquiry into the Use of Remand¹⁹, published in June 2018, the Scottish Parliament Justice Committee found that “the overwhelming view of witnesses was that, while the use of remand is necessary in certain circumstances, it is currently used too frequently”.

¹⁴ <https://www.legislation.gov.uk/ukpga/1995/46/section/24>

¹⁵ https://www.echr.coe.int/Documents/Convention_ENG.pdf

¹⁶ *Wemhoff v Germany*, (1979-80) 1 EHRR 55, Judgment, para 12; *Yagci and Sargin v Turkey*, (1995) 20 EHRR 505, para 50.

¹⁷ <http://www.legislation.gov.uk/asp/2000/9/contents>

¹⁸ This followed similar changes by the then UK Government in 1998 which adjusted section 25 of the Criminal Justice and Public Order Act 1994, which had imposed an absolute prohibition in England and Wales on bail on a charge of murder, attempted murder, manslaughter, rape, or attempted rape, where the accused had a prior conviction for such an offence, in light of Article 5(3).

¹⁹ <https://digitalpublications.parliament.scot/Committees/Report/J/2018/6/24/An-Inquiry-into-the-Use-of-Remand-in-Scotland#Executive-Summary>

As noted at Figure 1, the number of arrivals to remand has actually fallen since 2009-10 (from 14,751 to 11,246 in 2019-20), but the data shows that arrivals to remand comprise a rising majority of arrivals to custody over the same period. The figure was 69% in 2009-10 and 79% in 2019-20²⁰. This increase means four-fifths of all arrivals to custody are remand whereas a decade prior the equivalent proportion was much nearer to two-thirds.

While this change in proportion may be largely explained by the greater reduction in sentenced arrivals to custody over the same time period, it does highlight the pressure that remand places on the prison estate and its resources.

The number of under 18s in custody overall has dropped dramatically over the last 13 years down from 223 in 2008 to just 15 on the 31 July 2021. However, the number on remand remains high as a proportion of those in custody with 9 out of the 15 under 18s in custody being there on remand²¹.

In 2019-20 the proportion of the average daily prison population on remand in Scotland was around 19%. This figure is higher in Scotland than in many other jurisdictions. Comparisons across jurisdictions are not exact but published population snapshots from England and Wales suggest that the proportion of the prison population held on remand was between 11% and 12% in the same year²², much lower than Scotland.

The World Prison Brief ranks 57 European jurisdictions in terms of the percentage of all prisoners comprised of pre-trial (remand) detainees. When comparing with jurisdictions across the world, the picture is mixed with, in February 2020, Scotland number 35 in the list in the percentage of all prisoners comprised of pre-trial detainees. England and Wales was number 52²³.

Concern around about the impact that remand can have on individuals has heightened during the Covid pandemic, with the number of individuals held on remand in Scotland reaching historically high levels in 2020 and remaining so during 2021. While arrivals to custody have fallen further (both sentenced and remand) during the pandemic²⁴, the effect of the pandemic has generally been to increase both the percentage of prisoners on remand and the absolute numbers, with more individuals coming into the system than the relatively restricted number of trials that has taken place has been able to deal with in the same time-frame.

²⁰ <https://www.gov.scot/publications/scottish-prison-population-statistics-legal-status-2019-20/>

²¹ <https://www.gov.scot/publications/scottish-prison-population-statistics-2019-20/pages/3/>

²² <https://www.gov.scot/publications/scottish-prison-population-statistics-legal-status-2019-20/pages/4/> and <https://www.gov.uk/government/collections/offender-management-statistics-quarterly> both accessed 27 July 2021

²³ http://www.prisonstudies.org/highest-to-lowest/pre-trial-detainees?field_region_taxonomy_tid=14&=Apply, accessed 14 February 2020

²⁴ <https://www.gov.scot/publications/coronavirus-covid-19-justice-analytical-services-data-report-july-2021/> See the Scottish Government monthly reports on the Justice System during the Covid-19 pandemic

As at 31 March 2021, 26% of Scotland’s prisoners were on remand, compared to 16% in England²⁵. Data accessed in July 2021 shows Scotland’s ranking on the World Prison Brief is at number 27 while England and Wales is at 46.

In all the circumstances both pre-pandemic and through the pandemic, remand prisoners form a higher proportion of the custodial population in Scotland than in England and Wales and many other jurisdictions.

In the context of Scotland’s high overall prison population (i.e. remand and sentenced), there is recognition of the need to explore whether steps can be taken to move towards appropriately refocusing the use of remand as part of the criminal justice process. Any refocusing would be to reduce the levels of crime in the future so as to result in fewer victims.

As noted above, the exact reasons for the high number of remand decisions in Scotland are complex and reflect a variety of factors, including the changing nature of offending. The Justice Committee report on the use of remand set out information about decision making in this respect²⁶, suggesting that generally a decision to remand is not made on the basis of any single one of the criteria set out as being grounds relevant to the bail decision, but rather where several of these criteria come into play at once.

In January 2020, the Scottish Government commissioned further exploratory research which is intended to highlight the specific reasons behind remand decisions. This research was paused due to the pandemic. However, fieldwork recommenced in Spring 2021 and is currently progressing in stages in line with ongoing restrictions.

Particular concern has been expressed in respect of persons remanded who either eventually receive a short sentence upon conviction or no prison sentence at all. For example, the Justice Committee reported that “*only 30% of women remanded in custody go on to receive a custodial sentence*”²⁷.

Looking further at custodial experiences or journeys that begin in remand, it has been shown that around one third of remand journeys in 2019-20 involve an individual entering and leaving custody as ‘untried’²⁸. These remand-only journeys are typically associated with short periods in custody, with a median of 21 days in 2019-20²⁹.

Further insight is afforded through figures provided to the Justice Committee for the purposes of the Justice Committee’s report by the Scottish Courts and Tribunals Service (SCTS). These data suggest that, in the period 2014–17, 28.9% of cases where the accused was remanded in sheriff solemn proceedings, and 57.2% of

²⁵ <https://www.gov.scot/publications/coronavirus-covid-19-justice-analytical-services-data-report-march-2021/pages/17/> and <https://www.gov.uk/government/statistics/offender-management-statistics-quarterly-october-to-december-2020> accessed 27 July 2021

²⁶ <https://digitalpublications.parliament.scot/Committees/Report/J/2018/6/24/An-Inquiry-into-the-Use-of-Remand-in-Scotland>, para 36ff

²⁷ <https://digitalpublications.parliament.scot/Committees/Report/J/2018/6/24/An-Inquiry-into-the-Use-of-Remand-in-Scotland>, para 42

²⁸ <https://www.gov.scot/publications/scottish-prison-population-statistics-legal-status-2019-20/>

²⁹ The exact final outcomes of these cases cannot be determined from the data held by the Scottish Government.

those where the accused was remanded in sheriff summary proceedings, did not give rise to a sentence of detention as an outcome of the case³⁰.

In the period 2014-17, by combining the figures above (and reflecting proportionately far more summary cases took place) more than half of those sentenced after being on remand in the criminal courts (excluding the High Court) did not receive a custodial sentence.

Some caution should be exercised in interpreting what this data may mean. One reason why the 'conversion rate' (i.e. the proportion of remand cases that lead to a custodial sentence upon conviction) may be seen as relatively low is because the courts take into consideration the time an individual may have already spent detained on remand, when it comes time for sentencing. The court may consider that the time spent on remand is sufficient for the crime of which they have been convicted and thus do not impose a custodial sentence which would have been imposed but for the period already spent on remand. Also, the court may still impose a custodial sentence but give a shorter sentence than it otherwise would have done.

The conversion rate in the Justice of the Peace court is particularly low, at 16.6% over the period 2014-17³¹. Thus, to some extent, at least, reducing the figures of those kept on remand through more accused persons being bailed could, in part, result in either higher numbers serving custodial sentences upon conviction than otherwise would have been the case, or serving longer custodial sentences than otherwise would have been the case, or a combination of both.

Nevertheless, it is recognised that the conversion rate is not a comparison of like-for-like. It can be recognised that decisions on whether to refuse bail are appropriately arrived at on different considerations from those of sentencing. Even where an accused person is not convicted or receives a shorter or different sentence, that does not mean that the decision initially to remand that person was not justified under the current operation of bail law.

It is an inevitable and appropriate part of any justice system that some people refused bail will ultimately not be convicted or, if convicted, will not receive a custodial sentence. The aim is to ensure that the refusal of bail (i.e. use of remand) is appropriate and proportionate at the point in proceedings the decision is made for remand to be used, consistent with the law and relative to the likely final outcome of the criminal proceedings.

The Justice Committee's report on its inquiry into remand was followed on 3 October 2018 by a Scottish Parliament debate³². As with the report itself, contributors to this debate discussed the numbers of persons held on remand, the difficulties faced by women in particular on remand, and a concern that remand was being over-used, particularly in cases where public safety was not a major issue and instead was being used to ensure that those with 'chaotic lifestyles' attended court for trial.

³⁰ https://www.parliament.scot/S5_JusticeCommittee/Inquiries/R-SCTSsupplementary.pdf

³¹ https://www.parliament.scot/S5_JusticeCommittee/Inquiries/R-SCTSsupplementary.pdf

³² OR at <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11709&i=106021>

The Committee report and the subsequent debate helped to inform the Scottish Government's decision to commission the research mentioned above, which is expected to provide additional evidence and insight on decision making in relation to remand and use of alternatives.

Young people

Specifically in relation to under 18s, there is recent bail and remand research from the Children and Young People's Centre for Justice³³. This was published in December 2020 and aimed to develop understanding of the use of remand, the decision-making process and the experience of under 18s, their families and practitioners.

This report highlighted issues that apply generally to those involved in bail proceedings e.g. ensuring the court had appropriate information. It also highlighted some specific findings such as young people requiring to be remanded should go to secure care and not to a young offenders institution.

There is also other evidence that suggests the availability and barriers to providing alternatives to remand have a particular resonance for those under 18 including a lack of credible alternatives that could manage levels of risk in the community.

Presumption Against Short Sentences

In June 2019, the Scottish Parliament approved the Presumption Against Short Periods of Imprisonment (Scotland) Order 2019³⁴ ("the 2019 Order"), which extended the previously-existing presumption against short sentences ("PASS") from 3 months or less to 12 months or less.

The effect of this legislation is that a court must not pass a sentence of imprisonment for 12 months or less on a person unless it considers that no other sentence is appropriate. The court must record the reasons for its sentencing decision, where it imposes a sentence of imprisonment of 12 months or less.

While the 2019 Order is relevant for all levels of court, it is most relevant in the summary courts given the general jurisdictional sentencing limit in the summary courts is, with certain very limited exceptions, 12 months. In other words, in almost every case heard in a summary court, there is a presumption against the imposition of a custodial sentence as a disposal.

In the course of his appearance before the Justice Committee to discuss the 2019 Order, on 11 June 2019, the then Cabinet Secretary for Justice Humza Yousaf MSP drew parallels with remand. He said:-

During the Committee's evidence-taking sessions, the issue of remand has been raised in recognition of the fact that its impact can be similar to that of short custodial sentences... Last year, following the committee's inquiry into the use of remand in Scotland, it made a number of recommendations and observed that, in summary cases, the conversion rate of remand to custodial sentences was relatively low. In responding to that report and in delivering

³³ <https://www.cycj.org.uk/resource/use-and-impact-of-bail-and-remand-in-scotland-with-children/>

³⁴ <http://www.legislation.gov.uk/ssi/2019/236/introduction/made>

our programme for government commitments on bail supervision, guidance and funding, we have taken action. However, we are open to considering on a cross-party basis further options that could help to respond to the high proportion of prisoners who are held on remand³⁵.

In view of the concerns about what appears to be the relatively high number of prisoners on remand especially in the summary courts, and the appreciation of the damaging effect of short periods of imprisonment which has led to the PASS, views are sought on a number of matters both directly and indirectly reflective of the underlying policy underpinning for the operation of PASS; namely that short periods in custody can be counterproductive unless they are absolutely justified. These matters are:-

- The need to protect public safety is a required ground that must be present to justify refusal of bail;
- Requiring the court to have particular regard to victim safety when making their bail decision;
- Empowering the court to rely, in all cases, on the general grounds relevant in reaching the decision to the question of bail;
- Where a court decided to refuse bail, requiring the court not only to give, but also to record, explanations for that decision;
- Improving the provision of information to inform decisions in relation to the question of bail including enhanced involvement by justice social work;
- Before a decision to refuse bail is finalised, making it an explicit requirement for the court to consider the use of electronic monitoring as a means of the accused remaining in the community;
- Introducing a requirement for people leaving remand to receive support for the process of reintegration into the community;
- A number of miscellaneous issues relating to the relationship between bail and electronic monitoring; and
- A number of miscellaneous issues affecting the bail decision process.

As outlined above, this consultation considers changes in this area of law reflecting wider understanding about the lack of effectiveness of spending short periods in custody including the disruptiveness of such periods of custody for individuals and the lack of effectiveness in terms of outcomes in using custody for short periods.

At the heart of the proposals being discussed on bail law reform is the question of what is an appropriate use of custody for individuals not convicted of any criminal offence. As can be seen above, decisions on whether to grant or refuse bail take place in a framework that requires regard to be had to what is in the public interest. Through the proposals offered, this part of the consultation explores what the public interest may be in the bail system reflecting an approach in the use of custody which could result in a necessity for sufficient public safety grounds to arise in any given case before custody can be used.

Such an approach would allow for a greater appreciation that those who pose limited or no risks to public safety, but who may need effective support and supervision can remain in the community. This would be done in such a way to ensure risks relating to breaching non-public safety bail conditions (e.g. attending

³⁵ <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12181&mode=pdf> Col 3

trial) are addressed through support and supervision being provided. This would be instead of being remanded in custody.

4.4 Public safety becomes a necessary ground for refusing bail and victim safety is further emphasised as a relevant consideration

One of the grounds relevant for the question of bail, set out in section 23C(1)(a) of the 1995 Act, is a substantial risk that the person might, if granted bail, abscond or fail to appear.

It is recognised that where bail is refused, the court is likely to have a range of reasons for doing so. Nevertheless, research by Professor Neil Hutton cited in the Justice Committee's report showed that out of 60 cases examined, a single reason for remand was given in five cases. Three of those cases was where the accused was of no fixed abode, and one of those cases was that he was likely to abscond³⁶.

From this limited data, it would appear that a ground unrelated to public safety may be the only factor in at least a small number of cases where bail is refused. Failure to attend without reasonable excuse is a separate criminal offence – in which there would be separate consideration of whether an accused should remain in the community or be remanded in custody. Separately, the continuation of bail for the original offence would be for the court to determine.

It is proposed that use of remand should be adjusted so that any decision to refuse bail must be justified on public safety grounds.

The ground set out in section 23C(1)(a) of the 1995 Act relating to absconding or failure to appear is not directly related to public protection or safety and instead is focussed on the efficient operation of the justice system. There is obvious merit in helping ensure achievement of the efficient operation of the justice system. Helping ensure trials take place with the accused person in attendance benefits users of the criminal justice system including victims. However, this must be balanced against the negative impact of undue use of remand, given what is known about the disruptiveness of short periods of custody and, in this context, deprivation of liberty being imposed on those not convicted of any offence.

As such, it is proposed that judges should never refuse bail if their 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 remain in the community.

In many cases, this will require enhanced support for individuals to remain in the community through the use of bail supervision schemes and the introduction of electronic monitoring for bail. This proposed policy reflects views expressed in the Justice Committee report about the use of remand, and in the subsequent parliamentary debate on the Committee's report.

While these are matters for the court, there are statutory powers available for trials to proceed in the absence of an accused. It may be a consequence of the proposal

³⁶ <https://digitalpublications.parliament.scot/Committees/Report/J/2018/6/24/An-Inquiry-into-the-Use-of-Remand-in-Scotland#Data-on-the-reasons-for-remand>, paras 55 and 56.

above that the court may seek to consider proceeding with trials in the absence of the accused in a greater number of cases.

In summary, it is proposed that it will no longer be appropriate that the court decide to refuse bail solely on the basis of reasons unrelated to public safety. The proposal would still allow such grounds to be included with other, public safety related grounds which, when taken together, mean the court considers refusal of bail is necessary in a given case.

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 noted above, all crimes are bailable. In any given case, bail is to be granted to an accused person except where grounds exist relevant to the question of bail and such grounds, along with regard to the public interest, mean there is good reason to refuse bail³⁷.

When the court is considering the question of bail, the court is required to consider the extent to which the public interest could, if bail were granted, be safeguarded by the imposition of bail conditions. The public interest includes the interests of public safety.

In order to further emphasise the importance of considering the safety of the victims against whom offence(s) have allegedly been committed, a possible additional element could be added to the requirements falling on the court. Where public safety is being assessed as part of the wider consideration of the public interest, it is proposed to require the court to have particular regard to the aim of protection of the victim(s) of the offence(s) with which the accused person is charged.

While references to public safety in the current law would include the victim(s) against whom offence(s) have allegedly been committed, a new requirement for the court to have particular regard to the protection of victims would help ensure that the interests of victims were further emphasised as part of the court's consideration of whether public safety grounds require a decision to refuse bail. This is

³⁷ This is subject to provision in section 23D of the 1995 Act which provides that bail is only to be granted in exceptional circumstances in respect of individuals charged with certain offences where prior convictions for such offences exist.

particularly relevant for certain crime types where there is more likely to be an identified victim.

In summary, it is proposed that the court would be required to have particular regard to the aim of protecting victim(s) against whom offences have allegedly been committed when assessing the interests of public safety and the wider public interest.

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.

4.5 Empowering the court to rely, in all cases, on the general grounds relevant in reaching the decision to the question of bail

A key long-standing aspect of the criminal justice system in Scotland is that decision-making is undertaken by the independent agencies and bodies involved in the administration of justice. The criminal court sits at the heart of decision-making on the question of bail with the responsibility residing with the court informed by the facts and circumstances of the case before them and relevant views from key parties such as the prosecution, defence and justice social work.

The importance of this independent decision-making has been regularly emphasised over many years. The then Scottish Executive were clear in their 'Bail and Remand Action Plan' published in 2005 that independent court decision-making was an essential feature of the bail system while MSPs on all parties have commented on the importance of not unduly fettering the discretion of the court in a variety of criminal court contexts including the bail decision.

In line with this approach, the legal framework within which the independent court makes their decision on the question of bail lays out general grounds relevant to this question. These grounds are relevant for all bail decisions to be made.

While all offences are bailable, with legislation setting out general grounds on which a court may determine that there is a good reason for refusing bail, there is also current additional statutory provision operating in respect of accused persons who meet certain criteria relating to the seriousness of the offence with which they are accused. This provision creates a presumption in favour of remand in relevant cases (section 23D of the 1995 Act). A decision to grant bail in these cases can be justified; however only if 'exceptional circumstances' exist.

Case law has indicated that this existing additional statutory provision operates within the context of the general grounds relevant to the question of bail. The courts have indicated that: ‘... *What the court is required to do is assess all the information before it with a view to determining whether there is good reason for refusing bail having regard to the relevant risks and the relevant level of these risks as identified in section 23C*’³⁸.

As part of a simplification of the legal framework so as not to unduly fetter the discretion of the court in their decision-making, it is possible for section 23D to be removed. This would enhance the role of the court as the decision-maker within a simplified legal framework whereby if grounds exist relevant to the question of bail, they will inform each and every bail decision made the court without the need for additional statutory provision relating only to specific types of cases.

In summary, this proposal is to adjust the bail law framework to further empower the court to simply consider the question of bail in the same way for all cases using the general grounds relevant for the question of bail contained in provisions in section 23C.

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.

4.6 Requirement to give written reasons for remand decisions

It is a requirement that whenever a court grants or refuses bail, it shall state its reasons (section 24(2A) of the 1995 Act). Reasons by the court are given orally.

There is reason to believe this is not a very efficient way of transmitting information. The *Evaluation of the Impact of Bail Reforms on Summary Justice Reform* published in 2012³⁹ found that accused individuals did not always listen to, or if they did listen, fully understand, what was being said to them.⁴⁰

The 1995 Act seeks to ensure the PASS is adopted by requiring a court to, as well as stating its reasons, set out *in writing* its reasons for any departure from the PASS.

³⁸ *MM v Procurator Fiscal* 2009 S.C.C.R 847, at page 858

³⁹

<https://www.webarchive.org.uk/wayback/archive/20161007190437/http://www.gov.scot/Publications/2012/03/5346/6>

⁴⁰ *Ib.*, ch. 4

In the same way as is required when departing from the PASS, it is suggested that courts refusing bail for accused persons should be required to state their reasons for coming to the conclusion that no other method of dealing with the person is appropriate, and entering those reasons in the record. This will reflect appropriately the seriousness of a decision to place someone in custody even though they have not yet been convicted of a crime.

To put this into context, there is more generally a move towards setting out reasoning of decisions made by the court. For example, the *Post-Corroboration Safeguards Review* chaired by Lord Bonomy recommended in April 2015 that, “It should be mandatory for the presiding judge to deliver orally in open court, and have minuted, brief reasons for the verdict, whether conviction or acquittal, including on the sustaining of a no case to answer submission, in every summary case”⁴¹.

There is a suggestion that recording reasons may potentially be prejudicial to the accused. The SCTS provided a written submission to the Justice Committee’s inquiry where it observed that recording reasons could be prejudicial to the accused at a future diet⁴². It is understood this is because reference might be made in court minutes to a schedule of previous convictions prior to a trial.

It is recognised that this objection has force in the case of bail decisions that it does not have in that of sentencing decisions. However, it is suggested steps could be taken to ensure any information prejudicial to the accused is not seen by the jury in a solemn case. In addition, for summary cases, there is no danger of a jury being influenced by reference to a schedule of previous convictions, since there is no jury. It is expected courts do nothing other than to take the presumption of innocence very seriously indeed and, as such, it is not considered a reason not to proceed with this proposal.

In summary, it is proposed courts should be required to provide written reasons for decisions to refuse bail for an accused person and for these reasons to be recorded.

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.

⁴¹ <https://www2.gov.scot/Resource/0047/00475400.pdf>, ch. 14.

⁴² https://www.parliament.scot/S5_JusticeCommittee/Inquiries/R-SCTS.pdf, p1

4.7 Provision of information to inform decisions in relation to the question of bail

There was a considerable focus in the inquiry undertaken by the Justice Committee on the importance of justice social work's involvement in informing decisions on the use of bail. This was to help ensure all appropriate information was available to help inform the decision.

It is proposed that justice social work services should be added to those persons from whom, under section 23B(6) of the 1995 Act, a court can request information for the purpose of determining a question of bail.

At present information may, in statutory terms, be requested only from the prosecution and/or the defence. Under section 23B(7) of the 1995 Act, it is up to those parties to determine whether to provide information if requested.

While, in practice, it is understood some courts will on occasion seek information from justice social work, it is considered that explicit inclusion in statute would act as a clear prompt for the court to consider input from justice social work before making their bail decision.

This would be relevant in all cases, but could be especially relevant where a court was able to be assured that an element of bail supervision could be available and this information may help adjust how a court may otherwise decide the question of bail.

In addition to adding justice social work services, alongside the prosecution and defence, as those the court *may* seek information from, it is proposed to recast this as a requirement that the court *must* ask for this information. It would remain up to the relevant parties (prosecution, defence and – if added – justice social work) whether they were able to provide information relevant to the bail question in a given case. This change in emphasis would make clear that while the decision on bail remains for the court, there is a statutory requirement that key interests of the prosecution, defence and justice social work would always be asked for their views before the court makes its decision.

In cases where the prosecution oppose bail, it is proposed that there would be a requirement that justice social work always offer information to the court to inform the question of bail.

In suggesting this, it is expected that greater engagement and communication would benefit consideration being given on whether bail is appropriate in a given case. This would be directly required in respect of information provided to the court, but would also likely arise from this requirement through closer engagement and communication between the prosecution and justice social work prior to the court's consideration of the question of bail. While such engagement and communication may already occur in some occasions, engagement and communication could assist both the prosecution in informing their decision whether to oppose bail and justice social work as to what information they provide to the court.

It is worth noting that the Scottish Government encourages consultation with justice social work in relevant cases. For example, the current guidance on bail supervision, published in January 2019, recommends regular judicial engagement. This guidance is currently being reviewed (due for publication later this year), and will reinforce the importance of judicial engagement. The Scottish Government is providing £1.65m over three years across local authorities to encourage greater availability of bail, supervised by justice social work, as an alternative to remand. (N.B. Future funding to further incentivise the development of bail supervision services will be subject to review and consideration as part of budget setting processes).

In summary, it is proposed adding justice social work as a party the court seeks information from prior to making their bail decision in a case. It is proposed to require the court to always ask justice social work (and the prosecution and defence) in every case. In cases where the prosecution will be opposing bail, it is proposed that justice social work are required to provide information to the court.

Question 5a

Based on the information above, 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.

Question 5b

Based on the information above, 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.

4.8 Electronic monitoring and bail

Electronic monitoring (EM) is an established part of the justice system in Scotland and allows a reliable way of monitoring compliance with a range of orders and licences. The Scottish Government's intention is to expand the use of EM more generally, both in terms of policy of its use and through deploying newly available technology such as satellite tracking – GPS. Where an order or licence contains a particular requirement or condition, such as a curfew, then electronic monitoring can provide an enhanced capability for the monitoring of that aspect of the order or licence. The use of electronic monitoring can help support the underpinning aims of those orders and licences, across a diverse range of policy use.

It is proposed that there is an explicit requirement that the use of EM be considered, before a court decides to refuse bail in any case. The use of EM to monitor compliance with bail conditions may alleviate any concerns with granting bail in a particular case.

With the existing requirement that bail should be refused only if there are good reasons while having regard to the public interest, it is considered that an explicit requirement to consider the use of EM before a refusal of bail decision could operate as a final step before such a decision can be confirmed. Use of EM would only be expected to be considered where it was available and the circumstances were assessed as suitable.

Linked to a court providing written reasons for a refusal of bail, it is also proposed that, in any provision requiring the consideration of EM, similar wording could be used requiring reasons to be given by the court where bail is refused despite the availability of EM to monitor compliance with bail conditions.

In short, it is proposed that an explicit requirement is added requiring consideration to be given to use of EM for bail prior to a decision to refuse bail and, where EM for bail is not deemed appropriate and bail is refused, for the court to explain why the possibility of EM was not taken up.

It is acknowledged obtaining information about the suitability of a person and/or a household for EM may impact on the operation of courts considering bail and, in particular, require greater input from justice social work. This is in line with a determination for relevant information to be available for the court to inform their decision relating to bail.

As such, it is considered some additional time to assess suitability may be beneficial if that is considered necessary in a case. There is work being progressed through the implementation project for EM bail whereby justice social work offers an assessment of suitability for EM bail in cases where the prosecution intend to oppose bail. This work will benefit the court in having as much relevant information as possible available when ultimately determining whether to make use of EM bail when releasing an accused person on bail.

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.

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.

As part of the implementation of the Management of Offenders (Scotland) Act 2019 (“the 2019 Act”), a number of new uses of electronic monitoring, including use with bail, are due to be introduced. Where the use of bail interacts with other areas of the criminal justice system/process, there may be benefit in further considering whether additional legislative provision would support the policy aim of making greater and more effective use of EM within the criminal justice system.

The most significant of these relate to sentencing powers. Courts have a broad ability to take into account a range of factors at the point of sentencing. At present, time spent on remand can be one of those factors. Periods of bail subject to conditions that are electronically monitored, as a new feature, may be something that courts take into account at sentencing. Current case law suggests that periods of bail subject to curfew conditions can be considered in “exceptional circumstances” (McGill v HM Advocate, 2014 S.C.C.R. 46.)

When electronic monitoring is used to monitor compliance with a bail condition such as a curfew, that bail condition may be considered as being more restrictive than it would have been without such monitoring.

In some other jurisdictions such as England and Wales, there exists a statutory provision whereby periods of time spent on bail subject to an electronically monitored curfew condition are credited against the eventual sentence: generally 2 days on an electronically monitored curfew condition equates to 1 day time served in custody.⁴³

⁴³ See section 325 of the Sentencing Act 2020 - <https://www.legislation.gov.uk/ukpga/2020/17/section/325>. The provision applies in respect of bail

The approach of legislating in this area would provide for a consistent approach to be taken to these questions and help to ensure no unfairness would arise in how courts determine the relevance of time spent on bail subject to electronically monitored conditions for sentencing purposes.

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.

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.

4.9 Other Views

The Scottish Government would welcome any other views consultees may wish to offer on some other issues as detailed below.

Prospect of a custodial sentence

In England and Wales, schedule 11 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012⁴⁴ made various changes to the Bail Act 1976⁴⁵. The effect is, in various circumstances where the Bail Act 1976 would permit the use of remand, it is not permitted where “*it appears to the court that there is no real prospect that the defendant will be sentenced to a custodial sentence in the proceedings*”.

This policy is not proposed among the suggestions in this paper, as in practice it does not appear to have led to a notable reduction in the number of untried persons

subject to a “qualifying curfew condition”, which means a curfew condition requiring the person granted bail to remain at one or more specified places for a total of not less than 9 hours in any given day (see section 326 of the Act).

⁴⁴ <http://www.legislation.gov.uk/ukpga/2012/10/contents/enacted>

⁴⁵ <http://www.legislation.gov.uk/ukpga/1976/63/contents>

on remand⁴⁶. It is also worth noting that the proportion of the remanded prison population in England and Wales who have been charged with a summary offence has been more than double the proportion imprisoned as a result of actually committing a summary offence⁴⁷. It is not necessarily a straightforward exercise to forecast the development and outcome of a criminal case.

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.

Young people affected by the decision of bail

Currently the age of the accused is not a specific statutory consideration for decisions on the grant or refusal of bail. While consideration of the age of the accused may indirectly be relevant when, for example, considering previous convictions (as young people may generally have fewer, if any, previous convictions), it may be that age should be more explicitly included as a ground relevant to the bail decision. This is relevant in connection with the incorporation of the UNCRC into Scots law and, more generally, in seeking to advance children's rights such as through Promise Scotland⁴⁸.

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?

Some decisions made within the justice system impact on children, for example a decision to refuse bail for someone with caring responsibilities for children. It has been suggested that issues of this nature should be taken into account when decisions are made. It is not clear exactly how these factors could be included explicitly within the grounds relevant to the bail decision, but views would be welcome on the principle of such a step and, if in support, any details on how it could be achieved.

⁴⁶ http://www.transformjustice.org.uk/wp-content/uploads/2018/03/TJ_March_13.03-1.pdf, p8

⁴⁷ *ib.*, p9

⁴⁸ <https://thepromise.scot/change-programme-one-pdf.pdf#:~:text=The%20promise%20identified%20which%20organisations%20that%20have%20the,t here%20are%20connections%20that%20need%20to%20be%20made.>

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?

5. Section 2: Release from Custody

5.1 Introduction

This consultation seeks views on proposed reforms to the mechanisms governing release from custody, including how support for those leaving custody could and should be provided. As with the reforms relating to bail law, the underlying aim of these proposals is to reduce reoffending, leading to fewer victims in future.

We also recognise that for victims of crime, particularly where there is a risk of re-victimisation, the point at which the person who committed a crime against them is released can be a stressful and frightening time. Ensuring that victims and support organisations have the information they need to undertake proactive safety planning where necessary is important in empowering them to make decisions. We are therefore seeking views on how to support that information flow.

The vast majority of people currently detained in prison will return to our communities at some point, and so it is essential that effective release processes which focus on supporting successful reintegration are in place.

This benefits the individual by giving them the best possible opportunity to form positive connections with their community, access housing and employment and continue to receive support for addiction and mental health problems.

It also benefits society. By providing more effective support to people leaving custody, they are given their best chance to move on from offending behaviour which keeps our communities safer.

Conversely, if an individual's release isn't planned for, if they can't access services which meet their needs, keep them and others safe and support them to make positive choices, then we are not setting them up to successfully reintegrate into the community and they are likely to reoffend and cycle back through the justice system. Nobody benefits from that.

Therefore this consultation seeks views on a range of options to improve support for people leaving prison, with a focus on reducing reoffending. It also seeks views on the point at which release should take place and whether, in some circumstances, more people serving custodial sentences could be supported to serve part of their sentence in the community with the aim of enabling their reintegration.

We are also seeking views on whether Scottish Ministers should have an executive release function which would enable them to release groups of eligible prisoners in response to exceptional circumstances – with the aim of ensuring the ongoing security and good order of prisons and the health and wellbeing of prisoners and prison staff.

5.2 Proposals

The reforms discussed in this paper are:-

- Providing Victim Support Organisations with information about the release of prisoners to enable proactive safety planning to be undertaken;
- Giving certain categories of prisoner the ability to demonstrate their suitability for earlier release or to serve the remainder of their sentence in the community following successful completion of programmes etc;
- Bringing forward the point at which short-term prisoners are automatically released (either unconditionally or subject to conditions);
- Bringing forward the point at which long-term prisoners can first have their case heard by the Parole Board;
- Amending or replacing the current model of Home Detention Curfew;
- Providing Courts with the ability to determine the proportion of a custodial sentence that an individual should serve in the community whilst subject to conditions (monitored via electronic monitoring) at the point of sentencing, with an emphasis on supporting reintegration;
- Altering current flexible release arrangements so that release no longer happens on a Friday or in advance of a public holiday in order that people leaving prison can access support at the point of release;
- Placing specific duties on public bodies to engage with pre-release planning for prisoners;
- Introducing a support service for prisoners released direct from court to enable their reintegration;
- Revising throughcare standards for people leaving remand, short-term and long-term sentences and seeking views about which services these standards should apply to in addition to justice agencies; and
- Introducing wider power of executive release to enable Scottish Ministers to release groups of prisoners in exceptional circumstances.

5.3 Background

The current system in Scotland broadly separates out different lengths of custodial sentence into three categories so that they are enforced in different ways and are subject to different release processes:

- Determinate short-term – fixed sentences of less than 4 years;
- Determinate long-term – fixed sentences of 4 years or more; and
- Indeterminate – life sentences, Orders for Lifelong Restriction.

The proposals in this consultation relate to determinate sentenced prisoners only.

Determinate short-term sentences

Almost all persons serving determinate short-term sentences are automatically released at the half-way point of their sentence⁴⁹. Most are released unconditionally. Depending on their offence and the sentence imposed, some of

⁴⁹ Prisoners and Criminal Proceedings (Scotland) Act 1993
(<https://www.legislation.gov.uk/ukpga/1993/9?wrap=true>)

those persons released at the half-way point will be required to comply with conditions and supervision.

Persons serving determinate short-term sentences may access voluntary throughcare services if they wish to and these are provided by a range of sources. They can request throughcare support from their local authority if they wish (which local authorities have a statutory duty to provide⁵⁰, although the scope and form of support service may vary), or they can accept support offered by a range of third sector organisations (including the national third sector throughcare mentoring services funded directly by the Scottish Government).

Determinate long-term sentences

Almost all persons serving determinate long-term sentences can be considered by the Parole Board for Scotland for release from the half-way point of their sentence.⁵¹ The Parole Board may recommend release if they feel that the individual does not pose an unacceptable risk to the public. If the Board does not recommend release, the individual's case generally returns to the Board for consideration every 12 months until their liberation date.

If an individual is still in custody with 6 months left on their sentence, they are automatically released under licence conditions until their sentence end date (to ensure that they will be subject to supervision in the community for at least that period of time).

There is an exception to this however where a prisoner is serving an extended sentence. An extended sentence is imposed by the court and consists of a custodial sentence and a period of supervision in the community after the custodial sentence has expired. Such a sentence is imposed where the court considers that a specific enhanced risk arises with the person which requires extended supervision. For these individuals, there is no automatic early release at all and instead they will serve their entire custodial sentence in custody if release is not recommended by the Parole Board.

Local Authorities have a statutory responsibility to provide supervision by Justice Social Work officials for those released from sentences of 4 years or more (either determinate long-term or indeterminate), and/or who are sentenced to post-release orders by the court (e.g Supervised Release Orders)⁵². This supervision will confirm whether the individual is fulfilling the conditions of their parole or post-

⁵⁰ www.legislation.gov.uk/ukpga/1968/49 Section 27(1)(c) provides that 'It shall be a function of every local authority under this Part of this Act to provide a service for the following purposes, that is to say: the provision of advice, guidance and assistance for persons in their area who, within 12 months of their release from prison or any other form of detention, request such advice, guidance or assistance'

⁵¹ Prisoners and Criminal Proceedings (Scotland) Act 1993
(<https://www.legislation.gov.uk/ukpga/1993/9?wrap=true>)

⁵² www.legislation.gov.uk/ukpga/1968/49 Section 27(1)(b)(ii) provides that that It shall be a function of every local authority under this Part of this Act to provide a service for the following purposes, that is to say the supervision of, and the provision of advice, guidance and assistance for(ii)persons in their area who, following on release from prison or any other form of detention, are required to be under supervision under any enactment or by the terms of an order or licence of the Secretary of State or of a condition or requirement imposed in pursuance of any enactment

release order – and may also provide advice and support to the individual on other issues relating to throughcare.

Indeterminate sentences

Prisoners serving indeterminate sentences must serve the punishment part imposed by the court at the point of sentencing before being eligible to be considered by the Parole Board for release.⁵³ There is no automatic early release for indeterminate sentences with release only ever occurring on a discretionary basis at the direction of the Parole Board. Individuals released as part of serving indeterminate sentences will be subject to licence conditions supervised by local authority justice social work. This consultation does not seek views on the release mechanisms relating to individuals serving indeterminate sentences.

Home Detention Curfew

In certain circumstances and ahead of the forms of release described above, some prisoners may be released to serve part of their sentence in the community. Home Detention Curfew (HDC) is the main mechanism for this and provides a route for appropriately assessed individuals to serve a proportion of their custodial sentence in the community on licence conditions, including a curfew condition, which is electronically monitored.

The principal purpose behind HDC is to provide those leaving prison with a managed return to their communities ahead of release under one of the forms described above. HDC provides structure, through curfew and monitoring and by doing so can support compliance with release conditions and encourage successful reintegration.

Home Detention Curfew is available to short and long term prisoners provided they:

- (in the case of short-term prisoners) Are serving sentences of three months or more;
- Have served one quarter (25%) of their sentence;
- Are not subject to the following statutory exclusions:
 - Individuals who are required to register as sex offenders;
 - Individuals who are subject to an Extended Sentence;
 - Individuals who are subject to a Supervised Release Order;
 - Individuals who are subject to a Hospital Direction (including Transfer for Treatment);
 - Individuals who are convicted of terrorist offences under section 1AB of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (“the 1993 Act”);
 - Individuals who have been confirmed as “to be deported” by the UKBA.
 - Individuals who are serving a non-offence term (if the individual pays the balance of the financial penalty imposed or serves the non-offence term he/she will cease to be excluded)

⁵³ Prisoners and Criminal Proceedings (Scotland) Act 1993
(<https://www.legislation.gov.uk/ukpga/1993/9?wrap=true>)

- For long-term prisoners (and in addition to the criteria noted above), have been pre-approved for release on parole at the half-way point of their sentence by the Parole Board for Scotland.

Provided the above conditions are met, individuals can be considered for release on HDC following an assessment of risk undertaken by the Scottish Prison Service, in co-operation with social work officials for the area the prisoner wishes to be released to. HDC is granted in the period leading up to the halfway stage of a prisoner's sentence. The minimum period for which a prisoner can be released on HDC is 14 days and the maximum period is 180 days.

HDC therefore provides a critical release mechanism and is an approach used in other jurisdictions. The approach to HDC in Scotland was reviewed in 2019 and substantial additional risk assessment mechanisms were introduced at that stage.

The numbers of prisoners currently released on HDC in Scotland is consistently low – around 50 at any given time.⁵⁴ Prisoners are not required to apply for HDC if they do not wish to, and at present there is no scope to arrange for HDC unless the prisoner can indicate the address they will live at following release. Given the important role supported release can have in enabling successful reintegration, we believe the time is right to consider how we use HDC and whether a different approach is needed in future.

Flexible release

The date of a prisoners' earliest date of liberation may fall on any day of the week, but prisoners are not released from custody on weekend days or public holidays. Those whose scheduled liberation date falls on those days will have their release date automatically moved to the first available earlier day. Most commonly, this sees prisoners whose release date falls on a Saturday or Sunday being released on the Friday before.

Previous concerns had been raised amongst some justice organisations and community based services that some individuals released from prison on Friday (or other dates prior to public holidays or weekend days) may be comparatively disadvantaged, as mainstream public services may be less available, or unavailable, to them.

In response, the Scottish Government introduced provisions within the [Prisoners \(Control of Release\) \(Scotland\) Act 2015](#) (which came into force on February 2016). That Act amended the 1993 Act to provide a discretion to bring forward a prisoner's release date by up to two days where it would benefit their reintegration into the community. For example, from a Friday to a Wednesday. This is applied on a case by case basis, with SPS accepting applications from external organisations seeking a change to the release date of an individual. These applications require the organisation to state the reasons why the change will make a practical improvement in the circumstances of the individual's release.

The number of prisoners whose release date is moved under this legislation is low and there have been calls to review this process to ensure that more prisoners can

⁵⁴ SPS Prison Population (<https://www.sps.gov.uk/Corporate/Information/SPSPopulation.aspx>)

access it – for example by removing the application process and imposing a blanket ban on release on a Friday or the day before a public holiday.

This consultation seeks views on how this approach could be reviewed to ensure the safety and successful reintegration of those leaving prison.

5.4 Future approaches to release

Mechanisms relating to release from custody are complex and must strike the balance between the need to protect the public, to reflect the underlying purpose of the sentence imposed and to provide the best opportunity for rehabilitation and successful reintegration. The intention of any amendments to the existing system would be to ensure that rehabilitation and successful reintegration remain a priority, to reduce the risk of reoffending and future victimisation. Consideration must be given to how the individual's management in custody and the point of eventual release can produce the best outcomes for individuals and communities.

This consultation asks for your views on what could be done differently and what the opportunities are for change.

5.4.1 Point at which prisoners can be released/considered for release

Some of those being held in custody either may have never posed any risk of serious harm to the public or may no longer present a risk of serious harm to the public but, due to the current release arrangements, will continue to be held and may not become eligible for release, or consideration for release by the Parole Board for Scotland, for many years. This reflects arrangements whereby the time spent in custody for different lengths of determinate sentences generally require a minimum of one half of the sentence to be spent in custody as a punishment (through loss of liberty) for offending behaviour.

Having different processes around release from custody which were more flexible and risk based could create circumstances where certain prisoners who do not or no longer pose a risk of serious harm could be permitted to serve the remainder of their sentence in the community. This would produce a structured basis for prisoners to complete their sentence, and still allow a punishment to be imposed (through loss of liberty) but would support better reintegration in order to reduce the risk of future reoffending.

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.

Question 14

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

5.4.2 Opportunities to demonstrate suitability to be considered for earlier release

In some other jurisdictions, prisoners can demonstrate their readiness for earlier release through good behaviour, or to “earn” the right to be considered for earlier release through successfully completing relevant programmes and other activities available to them – such as participating effectively with counselling or groupwork to address factors contributing to their previous offending, education (such as support for literacy and numeracy) and life skills classes or vocational training.

This consultation asks for your views on a proposed approach, where engagement in, and progress on, these programmes, training and other relevant activities could be used to demonstrate potential readiness for release. This evidence could then help inform decisions regarding:

- whether long term prisoner cases would be heard earlier by the Parole Board;
- whether short-term prisoners would be released in advance of the half-way point of their sentence;
- whether prisoners would be presumed suitable for release on EM.

Such an approach would balance the continuing need to punish an individual through loss of liberty, with flexibility for a positive response to dynamic efforts by the individual in custody to the reasons why they committed their offence. The flexibility could be used where such engagement by the individual means the extent of the punishment originally imposed (i.e. the length of the loss of liberty) no longer requires to be as lengthy to reflect the progress made by the individual.

Designing such an approach would require complex considerations and, for short-term prisoners, would need to take clear account of any risks posed by the individual. Long-term prisoners would still have their case considered by the Parole Board, who already take engagement and progress on programmes etc into consideration. Eligibility for such processes could be restricted, either by excluding certain types of prisoner, or through individual assessment. It would also require sufficient resource for the Prison service and partners to ensure that timely access to the required programmes and services was available to all prisoners.

However, such a model could provide increased support for rehabilitation and improve prisoners' motivation to engage with services to address the underlying causes of their offending behaviour. It could also provide a mechanism so that those who do not, or no longer pose a risk of serious harm could be considered for earlier release, or to serve the remainder of their sentence in the community.

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.

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?

5.4.3 Release for determinate sentences

As noted above, there are different release mechanisms depending on the length of sentence a prisoner is serving.

Almost all prisoners serving less than four years are released automatically at the halfway point of their sentence. Those prisoners serving four years or more are eligible to have their case considered by the Parole Board at the halfway point of their sentence. At that point, the Parole Board may recommend release if they feel that the individual does not pose an unacceptable risk to the public.

The operation of release reflects punishment (through loss of liberty) in each custodial sentence imposed. The trigger point of the halfway point of sentence for, at the very least, consideration of release can be interpreted as the punishment element of the sentence (i.e. the period when loss of liberty has to occur).

Since these periods have been established, further policy has developed as to the principles and purposes of sentencing. In particular, the Scottish Sentencing Council has developed a sentencing guideline⁵⁵. This guideline clearly lays the different purposes of sentencing which, while including punishment, extends well beyond those narrow confines.

Alongside punishment, purposes of sentencing are protection of the public, rehabilitation of offenders, giving the offender the opportunity to make amends and expressing disapproval for the offending behaviour. These purposes may carry

⁵⁵ [guideline-principles-and-purposes-of-sentencing.pdf \(scottishsentencingcouncil.org.uk\)](https://www.scottishsentencingcouncil.org.uk/guideline-principles-and-purposes-of-sentencing.pdf) – Guideline applying since 26 November 2018.

different weights in cases with different facts and circumstances. Looking afresh at the release point for different determinate sentences allows reflection of this important work by the Scottish Sentencing Council which can inform the consideration to release points from sentences.

There is no fundamental reason why this need for an expression of punishment through release policy must be set at half of the custodial sentence to be served prior to consideration for release or release itself. It could be a different proportion and certainly the work of the Scottish Sentencing Council makes clear punishment is only one of 5 core purposes of sentencing.

This consultation seeks views as to whether release law could be adjusted so the points at which a prisoner is automatically released (for short-term prisoners) or considered for release (for long-term prisoners) could be altered in some or all cases.

A more flexible system which allows for greater discretionary decision-making, informed by any risks posed by an individual, with a greater emphasis on supporting their readiness for release may be more effective in supporting reintegration.

For example, what this could mean in practice is that short-term prisoners could be automatically released earlier than the half-way point of their sentence, e.g. at the 1/3 point.

Under this approach, individuals who meet certain criteria could be released from custody earlier than half-way but be subject to post-release conditions (and have those conditions monitored using electronic monitoring) until the half-way point of their sentence when they would be unconditionally released - although they would be subject to recall to custody if they commit another offence before their sentence end date.

This option could allow better opportunities for monitored reintegration by ensuring more prisoners were released in a gradual, structured fashion. This could be further supported by providing the individual with specific throughcare support to address their needs, and to make links to services in their community.

Alternatively, such release could happen unconditionally (i.e. without any conditions) and would operate in the same way as currently, just at an earlier point in the sentence.

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.

Similarly, a prisoner serving a sentence of four years or more could have their case brought before the Parole Board for consideration before the half-way point of their sentence. This could either be done on the basis of risk assessments carried out in custody which indicate that the individual no longer poses a risk of serious harm. Or could be done more automatically, by amending legislation so that cases are considered by the Parole Board at the 1/3 point of the sentence (or a different fraction) rather than at halfway. The Parole Board would still have responsibility for deciding whether or not to direct release, but the first consideration would take place at an earlier point in the sentence.

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.

5.4.4 Flexible Release arrangements

The flexible release provisions inserted into the 1993 Act by the [Prisoners \(Control of Release\) \(Scotland\) Act 2015](#) are intended to support the successful reintegration of people leaving prison by enabling organisations who provide support to the individual to submit an application to SPS to have the release date moved by up to 2 days.

In practice, this is used infrequently and there have been calls, from the Drugs Deaths Taskforce amongst others, to expand the use of this approach by imposing a blanket ban on release on a Friday or the day before a public holiday in order that people leaving prison can access the services they need at the point of release⁵⁶. This recognises the vulnerability of people leaving custody which can manifest in a number of ways, from difficulty accessing accommodation or benefits to drug-related or other harms.

This consultation seeks therefore views on whether such a blanket ban should be imposed. And what changes would need to be made to ensure that the relevant services were available at the point of liberation from custody recognising that, even if an individual was released earlier in the week, they may still experience the same difficulties or harms if the services they need are not available.

⁵⁶Scottish Drugs Death Taskforce: Report on Drug Law Reform (Sep 2021) (<https://drugdeathstaskforce.scot/media/1248/drug-law-reform-report-sept-6th-21.pdf>)

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?

5.4.5 Home Detention Curfew and electronically monitored release

In some other jurisdictions, sentences can be automatically split between custody and community sections (with community sections being administered as home detention, and/or community sentencing).

As we are considering reforms to release arrangements, it would be valuable to consider whether greater use could be made of electronic monitoring as a way of ensuring compliance with conditions of release so that certain prisoners could serve a proportion of their sentence in the community.

As detailed above, at present Home Detention Curfew (HDC) provides the main mechanism for eligible determinate sentenced prisoners to serve a proportion of their sentence in the community, subject to licence conditions which include curfew – monitored using electronic monitoring devices. By creating a structured release process, HDC is intended to support a prisoner's rehabilitation and reintegration at the end of their sentence.

Decisions about whether to release an individual on HDC are for SPS, on the basis of risk assessment and in consultation with partners. Under the current process, participation in HDC is optional, and depends on prisoners actively making an application, regardless of their suitability. HDC is also currently limited to six months or the last quarter of the prisoners sentence – whichever is less. The assessment process for HDC has been amended in the last two years, with the intention of providing a detailed case-by-case assessment of each application.. At the moment, around 50 prisoners are released on HDC at any one time, when previously the numbers were around 200, so the current impact of this mechanism is limited. Therefore, the time is right to consider whether the current system should be amended or replaced.

Scottish Ministers currently have powers to amend the statutory framework for HDC via subordinate legislation⁵⁷. This could include shortening the minimum length of sentence to which HDC can be applied (currently 3 months), or increasing the maximum period a prisoner can spend on HDC (currently 180 days). These powers would also allow adjustments to be made to the list of statutory exclusions from HDC (as listed at section 3.3 above).

⁵⁷ See s.3AA(6) of the 1993 Act - [Prisoners and Criminal Proceedings \(Scotland\) Act 1993 \(legislation.gov.uk\)](#).

Beyond that, changes could also be made to the decision-making process in relation to HDC and the level of risk assessment required. This would not require legislation.

This consultation seeks views on whether HDC should be amended or replaced. And, more broadly, seeks views on when and how decisions about the length of time an individual spends in the community at the end of their sentence should be taken and by who.

One option could be to replace the current model of HDC and move towards a model where certain categories of prisoner are presumed suitable unless there was a specific reason why this should not take place (e.g. known risk to an individual(s). This could continue to be a mechanism which is administered by the Prison Service or which could be administered by another body (e.g. Parole Board for Scotland).

An alternative could be that decisions on the proportion of a custodial sentence which could be served in the community (subject to conditions and monitored by EM) are no longer taken by SPS but are taken by the courts at the point of sentencing.

This approach would involve the courts determining the proportion of a custodial sentence which an individual would serve in prison, and what proportion they would in the community whilst subject to conditions, including a curfew (compliance with which could be electronically monitored) or conditions on their behaviour, activity or location. For example, the court could decide that an individual could serve 1/3 of their sentence in custody and 2/3 in the community subject to conditions. This determination could be made by the court at the point of sentencing with the option to return the individual to court to have the conditions varied up or down if circumstances change (for example, on the basis of risk assessment conducted in custody). This approach to review is currently used for Supervised Release Orders.

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.

(Question 20 continued)

c) - The minimum sentence for which HDC can be considered is 3 months. Should this limitation be removed?

-Yes / no / unsure

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.

5.5 Support and information for victims

There are processes in place whereby information relating to the release of an individual from custody can be shared by SPS with local authorities and ultimately Justice Social Work departments. This is to enable local authorities to carry out statutory duties such as providing housing support to individuals in the community and enable Justice Social Work departments to deliver mandatory supervision and voluntary throughcare to those leaving custody.

Information about the release of individuals from custody is not routinely shared with other organisations, and any proposals to do so would need to comply with UK data protection laws.

Some victim support organisations have proposed that they could benefit from receiving notification of individuals being released to enable effective safety planning with victims, either on a routine basis or in relation to specific cases in which they are providing support. This would enable these organisations to ensure that they could provide effective support at the right time and in an informed fashion. It would also provide reassurance to the victim. However as it would involve sharing personal data with a third party, the legal basis and operational practice required to enable this information sharing would have to be carefully considered.

An additional consideration relates to the Victim Notification Scheme (VNS). The VNS enables eligible victims who are registered with the Scheme to receive certain information about an individual in custody, such as the date of release or when they become eligible for temporary release. In addition to this information, VNS letters, which are issued by SPS, provide information on support services which victims can access if they choose to.

Some victim support organisations have suggested that the VNS could take a more trauma-informed approach to victim care and support. For example, by victim support organisations potentially being provided with advance notice of an individual's release (or when they are eligible for temporary release) enabling them to proactively contact the victim and offer emotional and practical support.

The Scottish Government has committed to undertake a review of the VNS to investigate where improvements could be made. The review may enable potential changes to the sharing of information on the release of individual's from custody to be explored in detail. In advance of the review, however, this consultation seeks views on the potential for further information to be shared with victims and victim support organisations, and the wider considerations that would need to be taken into account.

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.

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.

5.6 Support for people leaving prison

Whenever it is necessary to place an individual in custody, we believe it is important that they should be guided and supported to assist their reintegration upon their release, to enable their continued rehabilitation and help them desist from future offending. This will be a key part of their time in prison, and efforts to reintegrate them back into the community should begin whilst in custody, and continued after their release. While justice social work services have a key part to play in these processes and do a huge amount of work to support those leaving custody, wider public and third sector services also have essential roles to play. This includes ensuring that each individual's needs for support with housing, welfare and benefits, employability and employment, health, addictions or mental health support are recognised and addressed, both whilst in custody and after release. The availability, scope and delivery of such services are not within the direct control of justice social work services or other justice bodies.

The [Community Justice \(Scotland\) Act 2016](#) recognises that there are many different bodies (public, private and third sector) that must be involved in the planning, design and delivery of services for people who have committed offences. This includes national organisations such as the Scottish Prison Service (SPS) and local bodies such as Community Justice Partnerships, Alcohol and Drug Partnerships and local authority justice social work departments – working alongside universal public services – with shared responsibility for the planning and delivery of community justice priorities. The third sector also plays an important role by providing specialist services aimed at reducing re-offending. This shared responsibility is underpinned by the duty of public services to provide essential services to members of the public that require them, such as providing access to benefits, accommodation to individuals who are unintentionally homeless, or the provision of healthcare. This includes individuals being released from custody, who may be in particular need and be particularly vulnerable.

Structured reintegration back into the community gives the opportunity for those who have offended to realise their potential and turn their lives around, creating a safer and fairer society for all.

5.6.1 Pre-release planning

In preparation for an individual's release, SPS will offer to engage with each prisoner in pre-release planning. Where the individual wishes to do so, SPS will offer to work with them to identify their support needs, and which public services they will need to engage with on release— and then to assist them in making contact with public and third sector services. The longer that the individual is in prison, the more scope there is to plan for release.

Periods of remands and short custodial sentences offer much less scope for pre-release planning. In contrast, those serving longer sentences can be involved in more detailed preparations (including temporary releases, and time in the open estate) alongside the work of the Parole Board, and the role of justice social work in supervising the individuals' compliance with release conditions and any other post-release orders.

There are existing duties on public bodies to provide essential services to members of the public who require them. These duties are not specific to those leaving prison however. There are good practice examples of services engaging in pre-release planning but this is not a consistent picture. This consultation seeks views on whether a further duty which specifically highlights the need for public bodies to engage with pre-release planning for those leaving custody would be beneficial in supporting successful reintegration.

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.

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.

5.6.2 Release direct from court

In some instances, for example where an individual has been serving a period of remand and does not receive a custodial sentence (they are either found not guilty, sentenced to time already served, or to a community sentence), they may be released direct from court, or will be released immediately afterwards from prison. In these instances, the limited opportunity for pre-release planning and the lack of notice before an individual is released means that sometimes they cannot link to or access the services they need in their communities.

In these examples, the individual is not necessarily subject to any supervision by justice social work or other statutory requirements and so it is difficult for SPS to take action to provide the individual's details to relevant local services. This can mean that individuals released in this way may not, for example, have support to access local housing or health services on release.

SPS have tried to address this by agreeing with GeoAMEY that they will provide liberation packs to those individuals released at court. These information packs relate to the local area within which the individual is being liberated. However, without structured support available at that time, some of these individuals may not link to the services they need, potentially putting themselves and others at risk.

This consultation seeks views on whether a specific support service should be available to those who are released direct from court (or immediately from custody). This service could liaise both with SPS in terms of any assessed needs (e.g. health, housing, benefits) and risks, along with any previous contact with community services which could be re-established. The service could help refer individuals onto the correct services in their local communities.

Alternatively, rather than a separate support service, there could be scope to draw upon the general duties of public services (or a new specific duty to address the needs of individuals leaving custody – as discussed above) – to ensure that public and third sector services are aware of and able to meet the needs of individuals released from custody at short notice by the court.

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.

5.6.3 Throughcare support

Throughcare is the coordinated provision of support to a person beginning when they first enter prison, throughout their period of imprisonment and during their transition back into the community. Part of this work is delivered alongside the statutory supervision of certain prisoners undertaken by Justice Social Work. There are also a broader range of throughcare activities delivered by local authority (including, but not limited to, Justice Social Work), NHS and third sector organisations which engage with other prisoners on a voluntary basis, before and after their release.

This consultation is not seeking views on the statutory duties of Justice Social Work to supervise individuals after release to determine if they are complying with

conditions of release or other orders – but is focused on other activities to advise, guide or otherwise support the individual’s reintegration.

Voluntary throughcare support may be provided by dedicated services, which can provide direct support as well as helping link an individuals to the community-based services they need, or by community-based universal services proactively reaching into prisons to engage with prisoners prior to their release and continuing to engage with them thereafter. It may also be delivered through a combination of these two approaches.

Effective throughcare can support an individual’s successful reintegration by offering guidance and advice to assist their continued rehabilitation and desistance – as well as assistance with practical problems, such as access to accommodation, healthcare, social supports, education or employability support etc on release. The support provided should be based on the specific needs of the individual.

Local authorities (via justice social work) currently have a duty to provide voluntary support to prisoners leaving custody following a period of remand or a short-term sentence should the individual request it (with the exception of short-term sex offenders who are released on licence at the half-way point of their sentence and so are subject to statutory supervision on release).

This support is provided under the terms of section 27(1)(c) of the Social Work (Scotland) Act 1968⁵⁸ (the 1968 Act) which states that local authorities are responsible for ‘the provision of advice, guidance or assistance for persons in their area who, within 12 months of their release from prison, or any other form of detention request such advice, guidance or assistance’.

Local Authorities must also provide statutory supervision for prisoners leaving long-term sentences as set out in section 27(1)(b) of the 1968 Act. This is based on ensuring that the individual is complying with the conditions of their release, and any other post-release orders – but beyond that can involve advising and guiding individuals how to engage with other agencies which will help them resolve any problems, and help them to resettle in the community.

As well as requesting throughcare support from their local authority, short term prisoners may also receive throughcare assistance from a range of third sector services – including from the national prisoner throughcare mentoring services delivered by the third sector and funded by the Scottish Government.

Both local authority-led and third sector services for short term prisoners are voluntary, and there is no requirement for individuals serving short sentences to access or comply with pre-release planning, or to engage with any throughcare service after their release if they do not wish to do so. However, ensuring that consistent support is available to those who ask for it, no matter where they live, is important in ensuring equity.

There are existing national standards for the provision of throughcare⁵⁹ – both to prisoners who are required to engage with these services as part of a licence or because they request such a service. These standards were published in 2004 and

⁵⁸ [Social Work \(Scotland\) Act 1968 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/1968/27)

⁵⁹ <https://www.webarchive.org.uk/wayback/archive/20150219131557/http://www.gov.scot/Publications/2004/12/20473/49295>

were intended to ensure that a consistently good quality of service is provided across Scotland. Under these standards, the term ‘throughcare’ is used to describe the provision of a range of social work and associated services to prisoners and their families from the point of sentence or remand, during imprisonment and following release into the community.

These existing standards are very focused on the role of justice social work in delivering throughcare. Given the evidence which shows that individualised holistic interventions which address multiple criminogenic needs are more effective at reducing reoffending, this consultation seeks views as to whether revised minimum standards for throughcare should encompass a broader range of services.

This builds on the examples of other structures that have been developed to support greater consistency and equity of access to services, and the promotion of good practice. For example, the Sustainable Housing for Everyone on Release (SHORE) standards⁶⁰ which were published in 2016 and aim to ensure that the housing needs of individuals in prison are handled in a consistent way across Scotland, and the Medication Assisted Treatment standards⁶¹ which support the consistent delivery of safe, accessible, high-quality drug treatment across Scotland.

The Justice Committee’s inquiry into the use of remand in Scotland in 2018⁶² highlighted an absence of support when people are released from remand. As noted previously, between 2014-17, more than half of those sentenced after being on remand did not receive a custodial sentence. Short periods of imprisonment, including on remand, are extremely disruptive and break links with housing, employment, family and wider community support.

Therefore, ensuring that consistent support is available for prisoners leaving remand, including in cases where release occurs straight from court, would be beneficial in supporting successful reintegration and reducing the risk of re-offending.

This consultation also seeks views on whether revised minimum standards for thoroughfare should differentiate remand, short-term and long-term prisoners to ensure that the most appropriate and relevant support is provided.

⁶⁰ SHORE standards (<https://www.sps.gov.uk/Corporate/Publications/Publication-5363.aspx>)

⁶¹ Medication Assisted Treatment (MAT) Standards: access, choice, support (<https://www.gov.scot/publications/medication-assisted-treatment-mat-standards-scotland-access-choice-support/>)

⁶² <https://sp-bpr-en-prod-cdnep.azureedge.net/published/J/2018/6/24/An-Inquiry-into-the-Use-of-Remand-in-Scotland/JS052018R07.pdf>

Question 26

To what extent 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.

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.

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.

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?

5.7 Executive Release power

Scottish Ministers do not currently have a general executive power that would allow them to permanently release groups of prisoners, even in an emergency situation which puts the security and good order of prisons and the safety and wellbeing of prison staff and prisoners at risk. Such a power exists in England and Wales under Section 32 of the Criminal Justice Act 1982⁶³ which empowers the Secretary of State to order that specified persons who are serving a sentence of imprisonment are to be released from prison earlier than they would otherwise be released. The power can only be exercised if 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.

An “Executive release” provision would provide Ministers with the power to direct the release of a specified, limited group of prisoners if certain conditions are met. It is intended to provide a mechanism to enable release of a number of prisoners in response to exceptional circumstances when they can no longer be managed safely in the prison estate.

The risk of the absence of such a power was highlighted early in the Covid-19 pandemic, when emergency legislation had to be swiftly sought to enable Ministers to order a limited early release of prisoners to support security and good order in prisons, and protect the health and welfare of prisoners and prison staff in response to the effects coronavirus was having.

There are limitations in how this emergency power could be used, with certain categories of prisoners who are not eligible for release, and the requirement for Ministers to put the full regulations for any process before the Parliament for approval. Any use of the power must be necessary and proportionate to the effects coronavirus is having or is likely to have on prisons.

This power has been used once (at the time of writing) in May 2020 and provided for the release of 350 short term prisoners who were nearing the end of their sentence (all with 90 days or less to serve).

However, the provision in the [Coronavirus \(Scotland\) Act 2020](#) only allows for the release of prisoners during and as a result of the coronavirus pandemic. Should it ever be necessary to release a group of prisoners in response to exceptional circumstances which put the security and good order of a prison or prisons at risk (such as another public health emergency, or catastrophic damage to a prison due

⁶³ <https://www.legislation.gov.uk/ukpga/1982/48/section/32>

to fire or flooding, resulting in it being unsafe for habitation or overcrowding), the powers under this Act would not be available.

Scottish Ministers do have powers in terms of [section 39\(6\) of the Prisons \(Scotland\) Act 1989](#) to create a regime of temporary release for sentenced prisoners, which could theoretically be activated in such an emergency. However, the prisoners would be required to return to prison at a later date to complete the remainder of their sentences, and it would not be permissible to run this temporary release up to the scheduled end of a prisoners' sentence. In light of this, these temporary release arrangements would be likely to create substantial practical problems for the prison, and badly disrupt the lives of the released prisoners – at a time when the priority would be to reduce operational demands on the prison service and enable them to respond to the underlying crisis.

It is essential that our prisons are safe and well run – to ensure the well-being of prisoners and staff. In circumstances where prisons become unsafe and put those living and working there at risk, it is the duty of Government to act to restore good order and enable the prison authorities to manage the situation effectively.

We are therefore seeking views on whether a wider executive release power should be available, should Scottish Ministers be required to react immediately in exceptional circumstances. This could include, for example, a prison (or part of a prison) becoming uninhabitable due to fire or flood, or a prison becoming unsafe due to overcrowding.

The intention is that this power would only be used in exceptional circumstances such as those outlined above, where it would be a contingency measure to ensure the safe operation of the prison estate.

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.

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.



CONSULTATION ON BAIL AND RELEASE FROM CUSTODY ARRANGEMENTS

RESPONDENT INFORMATION FORM

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To find out how we handle your personal data, please see our privacy policy:
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Full name or organisation's name

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The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

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We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Yes

No



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