



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

**February 2022**

## **The NPM Scottish Sub Group**

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

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

The NPM Scottish Sub Group is made up of:

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

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

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

## **Introduction**

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

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

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

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

---

<sup>1</sup> Aebi, M. F., & Tiago, M., - "Council of Europe Annual Penal Statistics: Prison populations", Council of Europe, 2020.

<sup>2</sup> See most recently the 2019 "Report to the United Kingdom Government on the visit to the United Kingdom by the European Union Committee on the Prevention of Torture 2019"

<sup>3</sup> Her Majesty's Inspectorate of Prisons for Scotland, "HM Chief Inspector Annual Report 2020-2021"

<sup>4</sup> UK NPM Scottish Sub Group, "Scotland's Progress in the Prevention of ill-treatment in places of detention", 2021

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

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

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

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

---

<sup>5</sup> UN High Commissioner for Human Rights, "Human Rights Implications of over-incarceration and overcrowding", 2015

<sup>6</sup> See 4 at p39

<sup>7</sup> DLA Piper, "A global analysis of prisoner releases in response to COVID-19", 2020

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

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

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

## **Human Rights Framework**

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

---

<sup>8</sup> Scottish Prison Service, “SPS Prison Population”, available at: [www.sps.gov.uk/Corporate/Information/SPSPopulation.aspx](http://www.sps.gov.uk/Corporate/Information/SPSPopulation.aspx)

<sup>9</sup> See 3 above

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

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

Article 3 of the ECHR states:

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

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

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

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

---

<sup>10</sup> See 4 above

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

Article 5 of the ECHR states:

“Everyone has the right to liberty and security of persons. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

a) the lawful detention of a person after conviction by a competent court;

...

c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;...”

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

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

Article 14 of the ECHR states:

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

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

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

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

Rule 88 and 90 relate to the role society should have in including prisoners in the community. Rule 88 – “treatment of prisoners should emphasize not their exclusion from the community, but their continuing part in it. Community agencies should, therefore, be enlisted wherever possible to assist the prison staff in the task of social rehabilitation of the prisoners.”

Rule 90 – “The duty of society does not end with a prisoner’s release. There should, therefore, be governmental or private agencies capable of lending the released prisoner efficient aftercare directed towards the lessening of prejudice against him or her and towards his or her social rehabilitation”

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

---

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



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

## Consultation on Bail and Release from Custody arrangements in Scotland

### Questions and Respondent Information Form

#### Question 1

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

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

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

C) I am unsure

Please give reasons for your answer.

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

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

We believe the Risk Management Authority definition of “imminent risk of serious harm” should be considered for adoption as the threshold for refusing bail. The use of a robust risk assessment model would provide assurance whilst also seeing the impact on reducing the remand population.

This model would allow for informed and evidenced decision making for the judiciary, while preserving the presumption of liberty in the majority of cases.

## Question 2

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

- A) I agree with the proposed change, so judges should have to have particular regard to the aim of protecting the victim(s) when making bail decisions.
- B) I disagree with the proposal, and think the system should stay the same as it is now, where judges consider victim protection as part of the overall decision-making
- C) I am unsure

Please give reasons for your answer.

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

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

## Question 3

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

- Strongly agree
- Somewhat agree
- Somewhat disagree
- Strongly disagree

Please give reasons for your answer.

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

#### Question 4

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

- A) I agree with the proposed change, so judges must give reasons both orally and in writing
- B) I disagree with the proposal, and think judges should continue to give reasons orally only
- C) I am unsure

Please give reasons for your answer.

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

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

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

#### Question 5a

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

...in cases where the prosecution *opposes* bail:

---

<sup>12</sup> See for example CYCJ, "Supporting all Under 18s in the Court System", Issue Sheet 88, 2020

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

Please give reasons for your answer.

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

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

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

### Question 5b

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

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

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

Please give reasons for your answer.

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

### Question 6

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

Strongly agree  
Somewhat agree  
Somewhat disagree  
Strongly disagree

Please give reasons for your answer.

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

---

<sup>13</sup> See for example "Community Justice Social Work: Throughcare Review", Care Inspectorate, September 2021

**Question 7**

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

Strongly agree  
Somewhat agree  
Somewhat disagree  
Strongly disagree

Please give reasons for your answer.

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

**Question 8**

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

Strongly agree  
Somewhat agree  
Somewhat disagree  
Strongly disagree

Please give reasons for your answer.

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

**Question 9**

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

Strongly agree

Somewhat agree  
Somewhat disagree  
Strongly disagree

Please give reasons for your answer.

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

### Question 10

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

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

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

---

<sup>14</sup> Scottish Justice Committee, 'An Inquiry into the Use of Remand in Scotland' (SP Paper 363; Scottish Parliament, 2018)



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

### Question 11

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

Strongly agree

Somewhat agree

Somewhat disagree

Strongly disagree

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

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

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

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

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

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

### Question 12

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

Strongly agree  
Somewhat agree  
Somewhat disagree  
Strongly disagree

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

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

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

<sup>15</sup> CYPC, Letter to Scottish Parliament Criminal Justice Committee, available at <https://www.cypcs.org.uk/wp-content/uploads/2022/01/Children-and-Young-Peoples-Commissioner-Scotland-Letter-to-Scottish-Parliament-Justice-Committee13October2021-1.pdf>

<sup>16</sup> Children of Prisoners Europe, “Keeping Children in Mind”, 2019

<sup>17</sup> Independent Care Review, “Evidence Framework”, 2020

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

### Question 13

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

Strongly agree

Somewhat agree

Somewhat disagree

Strongly disagree

Please give reasons for your answer.

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

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

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

---

<sup>18</sup> See 12 above

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

#### **Question 14**

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

As above, and:

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

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

### Question 15

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

a)...early release?

Yes / no / unsure

b)...the ability to complete their sentence in the community?

Yes / no / unsure

Please give reasons for your answers.

Behaviour in prison is not necessarily an indicator of suitability in the community.

Nor should it be a sole focus of assessment. The starting point for such an assessment is that all individuals should be eligible and then a formal accredited risk assessment carried out. Bearing this in mind, we would suggest engagement in these processes demonstrate some willingness to address offending behaviour, but would caution the weight attributed to participation. Again, an accredited risk assessment model is the most satisfactory method for assessing suitability for early release or community sentence.

### Question 16

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

Who should be eligible to earn opportunities in this way?

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

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

### Question 17

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

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

Please give reasons for your answer.

The NPM would support early release with the increased provision of Throughcare support. As mentioned consistently throughout this response – we do not support arbitrary time definitions such as ‘half way points’ or one-third of the way through a sentence. Instead we favour robust and accredited risk assessment processes that are person centric. Subjecting an individual to conditions and monitoring on release could be effective but care would have to be taken not to clog up the courts with breach applications.

### Question 18

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

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

Please give reasons for your answer.

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

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

### Question 19

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

Yes / No / Unsure

Please give reasons for your answer.

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

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

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

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

## Question 20

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

**a)** - Prisoners must actively apply for HDC. Should HDC be considered automatically for some categories of prisoners instead?

-Yes / no / unsure

When a short term prisoner is eligible for HDC it is automatically flagged up in PR2, the SPS prison database, and a form is sent to the prisoner to ask if they wish to apply. For those on parole they can apply for HDC once parole has been agreed. An automatic consideration without input from agencies would not be desirable as

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

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

**b)** - The maximum length of time allowed on HDC is 6 months (or 1 quarter of the sentence). Do you think that this should:

- Be made longer
- Not change

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

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

- Yes / no / unsure

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

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

- Yes / no / unsure

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

---

<sup>19</sup> Scottish Human Rights Commission, “Human Rights and Emerging Technologies in Policing Issue Paper”, May 2021.



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

-Yes / no / unsure

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

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

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

-Yes / no / unsure

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

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

-Yes / no / unsure

Yes. See above.

## Question 21

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

Strongly agree

Somewhat agree

Somewhat disagree

Strongly disagree

<sup>20</sup> HMIPS, "Report On The Review Of The Arrangements For Home Detention Curfew Within The Scottish Prison Service", October 2018

<sup>21</sup> HMICS, "Strategic review – an independent assessment of Police Scotland's response to a breach of Home Detention Curfew (HDC)", October 2018

Please give reasons for your answer.

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

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

### Question 22

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

Strongly agree  
Somewhat agree  
Somewhat disagree  
Strongly disagree

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

[See above.](#)

### Question 23

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

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

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

Please give reasons for your answer.

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

#### **Question 24**

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

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

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

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

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

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

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

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

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

### **Question 25**

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

Strongly agree  
Somewhat agree  
Somewhat disagree  
Strongly disagree

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

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

### Question 26

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

Strongly agree  
Somewhat agree  
Somewhat disagree  
Strongly disagree

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

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

### Question 27

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

Strongly agree  
Somewhat agree  
Somewhat disagree  
Strongly disagree

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

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

### Question 28

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

Strongly agree  
Somewhat agree  
Somewhat disagree  
Strongly agree

Please give reasons for your answer.

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

#### **Question 29**

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

As above.

#### **Question 30**

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

No further comment.

#### **Question 31**

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

Strongly agree  
Somewhat agree  
Somewhat disagree  
Strongly disagree

Please give reasons for your answer.

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

**Question 32**

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

Please provide details.

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



## CONSULTATION ON BAIL AND RELEASE FROM CUSTODY ARRANGEMENTS

### RESPONDENT INFORMATION FORM

**Please Note** this form **must** be completed and returned with your response.

To find out how we handle your personal data, please see our privacy policy:

<https://www.gov.scot/privacy/>

Are you responding as an individual or an organisation?

☐ Individual

☒ Organisation

Full name or organisation's name

National Preventive Mechanism Scottish Sub Group

Phone number

07780222248

Address

C/O Her Majesty's Inspectorate of Prisons for Scotland, Saughton House,  
Broomhouse Drive, Edinburgh

Postcode

EH11 3XD

Email

Sam.gluckstein@gov.scot

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

- ☒ Publish response with name  
☐ Publish response only (without name)  
☐ Do not publish response

#### Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.



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