

Scottish Government Consultation

“Prison population and penal reform – working towards a sustainable prison population”

Response of the Senators of the College of Justice

Question 1: Please share any views you have on the proposal that justice social work reports should be mandatory in all cases where a short custodial sentence is being considered.

The term “Justice Social Work Report” does not exist in law but is used to describe ‘social background reports’ which local authority workers prepare and submit to courts in carrying out their duties under section 27(1)(a) of the Social Work (Scotland) Act 1968 (the 1968 Act).

We do not think the proposal is necessary. The proposal may have unintended consequences in respect that more JSWRs will require to be prepared if it is implemented. Existing legislation provides that a JSWR is required before sentencing to a term of imprisonment where the offender has not served a prison sentence before. Sentencers retain the discretion to order a JSWR where the offender has served a sentence of imprisonment before. When sentencing a serial offender who is already serving a sentence of imprisonment or has multiple convictions for analogous offences and breaches of court orders, it may seem to a sentencer, for good reason, that a JSWR is unnecessary.

A JSWR is labour intensive and requires a good deal of research (and, where possible, cross-checking of information across a range of sources). The court is empowered to adjourn a case before sentence “*for the purpose of enabling enquiries to be made or of determining the most suitable method of dealing with [a] case*” (s.201(1) of the Criminal Procedure (Scotland) Act 1995). More complex reports will require more time to gather information, undertake risk assessments and address suitability for specific offence-focussed programmes. The 1995 Act sets out the circumstances whereby a court must obtain and consider a report from an officer of the local authority (s.203).

The following list reflects the circumstances under which the court is required to obtain a report as is specified in section 27(1)(b)(i) to (vi) of the 1968 Act, in cases in which a person is:

- under the supervision of a court
- subject to supervision following release from prison or detention
- subject to a community payback order with an unpaid work or other activity requirement
- subject to a supervision and treatment order
- under 16 years of age and subject to a restriction of liberty order
- aged 16 or 17 years and subject to a Compulsory Supervision Order imposed by Children’s Hearings Scotland.

A report is required when the court is:

- passing an extended sentence
- making a supervised release order
- making a community payback order (an exception to this is a CPO with a Level 1 unpaid work requirement only).

Section 203(1A) of the 1995 Act provides that if there is already a report as to the character of the offender prepared within 3 months of conviction, the court need not obtain another report unless it considers it appropriate to do so. Under section 203(1B), the court retains the discretion not to obtain a report if satisfied, having regard to the likely method of dealing with the offender, that the report would not be of any material assistance. A court might, for example, take the view that a report would be of no assistance, where an offender has already served significant time on remand far in excess of any short custodial sentence, and the court considers the most appropriate disposal is immediate release.

It seems to us that the current legislative scheme ensures that JSWRs will be obtained when they are required and the court retains a discretion to obtain JSWRs to determine the most suitable method of dealing with a case. The Scottish Sentencing Council's Sentencing Young People Guideline, approved by the High Court of Justiciary and effective from 26th January 2022, means that JSWRs are more likely to be obtained in cases involving those under the age of 25.

There would be significant resource implications should JSWRs be mandatory in all circumstances where a short custodial sentence is being considered. Any expansion in the circumstances in which a JSWR is required is likely to increase pressures on court time, programming, and preparers of these reports; impact the quality of reports; create additional administrative work; and delay case progression. This in turn may adversely affect victims with increased anxiety and trauma whilst awaiting sentence and increased cost from continued hearings.

Question 2: Please share any views you have regarding the most effective ways to improve judicial and public confidence in community sentencing options - including their content, local availability and outcomes.

This was looked at by the Scottish Sentencing Council. The Council produced a paper in 2021 on community disposals which can be found at [Judicial perspectives of community-based disposals](#). The Council's national surveys on public understanding and perceptions of sentencing in Scotland (from 2019 and 2025) are also of relevance. It will be instructive to consider the Council's recommendations based on their research.

Taken from the first of these papers, the Council found that: -

1. Judicial awareness could be improved, and the sentencing process might therefore be expedited, by the provision of greater information in Criminal Justice Social Work Reports (i.e. JSWRs) about available local authority and third sector initiatives, enhanced engagement with service providers, and a database of the resources available.
2. There was a perceived need among sentencers for greater consistency in the provision of community-based programmes and services. These should be made available for a wider range of offending and to address a wider range of issues. Sentencers have, for example, observed gaps in unpaid work opportunities for specific categories of person (for example those with mental health difficulties, women and young people) or offending (for example domestic abuse).

3. One of the greatest challenges to judicial confidence in community-based disposals concerns limitations of resources to support their management and delivery. A more consistent approach to the development and funding of these disposals to support their more consistent provision, robust management and successful completion would enhance judicial confidence and might be expected to support an increase in the use of community-based disposals through the provision of more sentencing options.
4. While there is national practice guidance for those involved in the delivery of community payback orders (CPOs) which covers breach procedures, much of the legislative process for breaching orders relies on the discretion of supervising officers and local practice. Sentencers have noted that breach proceedings have the potential to take significant periods of time to conclude and some have voiced a desire for earlier reporting of breaches.
5. Sentencers generally desire greater flexibility to impose an appropriate sentence for the particular case before them and potential legislative changes to enable this should be considered. There may be a case for simplifying the legislation in relation to community sentences to enable greater flexibility in sentencing.
6. There is a lack of public awareness of, and confidence in, community disposals. Research demonstrating the effectiveness of community-based sentences and their contribution to reducing reoffending would be welcome. Relevant national and local organisations should undertake activity to enhance public understanding of what community sentences involve and what they can achieve.

Improving public confidence in community disposals will depend on convincing the public that they are credible, effective, and properly enforced.

In order to improve public confidence, information could be published showing completion rates, reoffending rates, employment outcomes, and victim perception. This should be done independently to avoid perceptions of bias. Rehabilitation and public safety should be principal drivers of community sentences showing how addressing addiction, mental health issues, housing and unemployment reduces future offending.

Visibility could be improved by means of community payback work being visible in local communities. Communities could be empowered to suggest local projects that offenders can support, thereby demonstrating tangible benefits to neighbourhoods affected by offending. The completion of projects by people serving community sentences could be published. The work done would be clearly shown with before and after images prominent in the messaging. The work undertaken would require to be of benefit to the community.

With regard to improving judicial confidence in community sentences, it is clear from the Scottish Sentencing Council's research that limitation of resources to support the management and delivery of community-based disposals is one of the greatest challenges to judicial confidence in them. Sufficient resources are fundamental to consistent provision of community disposals, a higher level of management and a wider range of provision. The use of structured deferred sentences and problem-solving courts, such as drugs/alcohol courts, domestic abuse or female offender courts, have been recognised as successful initiatives in the

reduction of reoffending and promotion of community disposals, all of which are resource-dependent.

It is axiomatic that judicial confidence in community-based disposals is linked to effectiveness. Many offenders will have a criminal record containing multiple breaches of community-based disposals and court orders which sentencers will require to take into account when determining sentence. Short-term sentences are imposed against such a background as a last resort. Expanding the presumption against short sentences risks undermining the effectiveness of community disposals: removing the possibility of a short custodial sentence for non-compliance may weaken a significant incentive to comply with the order.

Question 3: Please share any views you have on the proposal that the legislative test in the presumption against short sentences should be strengthened.

The presumption provides that: *“A court must not pass a sentence of imprisonment for a term of 12 months or less on a person unless the court considers that no other method of dealing with the person is appropriate”* and *“[w]here a court passes such a sentence, the court must –*

- (a) state its reasons for the opinion that no other method of dealing with the person is appropriate, and*
- (b) have those reasons entered in the record of the proceedings.”*

(see ss. 204(3A) and (3B) of the 1995 Act).

It is a presumption, not a prohibition, and it is for the court to decide on the most appropriate sentence based on the facts and circumstances in any given case. The test is clear and unambiguous. It is well understood by sentencers.

The judiciary have no views on whether the test should be altered so that custody should only be imposed in “exceptional circumstances”, which is a policy decision for the Scottish Government and not one for the judiciary.

However, we would observe that “exceptional circumstances” is not a test with any fixed criteria but rather a description of a category of case whose features are sufficiently unusual to take it outwith the ordinary run of cases. It may therefore not provide much clarity or transparency about when short sentences will be imposed. The existing statutory formulation requires the court to address directly whether there is another method of dealing with the offender and seems to us to be clearer. We would also observe that there will be cases which are not exceptional where a custodial sentence is the only sentence which could appropriately be imposed. The alternative of specifying the particular circumstances in which a short sentence should be imposed would arguably be clearer to sentencers. We note the suggestion in the UK Sentencing Review 2025 as to when “exceptional circumstances” might be found, but would observe that providing defined exceptions on the face of the legislation would be more transparent than it being explained elsewhere. However, as stated, this is a policy choice for the Scottish Government.

Question 4: What do you consider would be the most effective way to strengthen the legislative test?

This is not a question for the judiciary. It is a policy choice for the Scottish Government.

Question 5: Please share any views you have on the proposal that when sentencing a person to a short sentence, sentencers should have an obligation to set out in writing the specific details regarding what other options have been considered, and why they concluded these would not have been suitable.

This proposal seems to be data driven (paragraphs 60 and 61 of the consultation document). However, as the consultation document recognises, this would create a significant increase in work in already busy courts. This appears to be recognised at paragraph 62 of the consultation document where it is stated:

“We are mindful that any additional recording requirement would take up valuable court time. The courts will have already considered why a short custodial sentence is necessary, and why alternatives are not appropriate given the facts and circumstances of the particular case. However, requiring these to be written down may require some additional time for consideration. Given the large volumes of cases that proceed at summary courts even a small delay could accumulate over the course of each day.”

We would endorse these views.

Existing legislation already requires the court when passing a custodial sentence to which the presumption applies, to state its reasons and for these to be recorded. The sentencer states orally in open court what the reasons are for imposing custody and why a community disposal is not available. Requiring a court to provide written reasons for every short sentence would be onerous and require significant additional judicial resources without any real benefit.

Increasingly, (most frequently in solemn cases) sentencers prepare detailed written sentencing statements which address the specific circumstances of the individual and the offence they have committed, including where a custodial sentence is considered the only appropriate disposal. Many of these are published on the Judiciary Scotland website and reported, at least to some extent, in the media.

It is often possible to explain, by reference, for example, to the gravity of an offence, why a custodial sentence is considered the only appropriate disposal, without having to list and exclude every other possible sentencing option.

In any event, should the sentence be the subject of an appeal, the sentencer would require to state in a report to the Appeal Court why the [short] custodial sentence was necessary, and why alternatives were not appropriate given the facts and circumstances of the case.

Question 6: Do you have any other comments in relation to the potential impact on victims, equality or human rights of these measures to further strengthen and support the use of the presumption against short sentences?

It is well recognised that victims have human (Convention) rights (X and Y v Netherlands [1985] 8 EHRR 235; Series A No 91; [1986] 8 EHRR 235; Doorson v Netherlands (1996) 22 EHRR 330; HMA v A S 2003 SCCR 551; Schatschaschwili v Germany (2016) 63 EHRR 14; Gafgen v Germany (2011) 52 EHRR 1). This law is still developing domestically and internationally.

There is a further critically important aspect to the Convention’s declaration of individual rights which is the state’s positive obligation to secure and protect those rights, not merely to

avoid infringing them. This is referred to as effective criminal sanctions. This is encapsulated in Article 13 of the Convention, which states that:

“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy...”

The court is of course a public authority and is required to act in accordance with Convention rights.

It is therefore axiomatic that in determining public policy and legislating to achieve it, the rights of victims must be taken into account.

Question 7: Please share any views you have on the proposal that the presumption against short periods of imprisonment of 12 months or less be extended to 24 months or less.

This is a policy issue for the Scottish Government and not one for the judiciary to comment on.

Question 8: Please share any views you have on the proposal that if the presumption against short sentences is extended to 24 months or less, summary sentencing powers should also be increased so that the maximum custodial sentence is also 24 months.

We agree that if the presumption against short sentences was extended without adjusting summary sentencing powers in sheriff courts, cases where a custodial sentence of between one and two years is anticipated would frequently be dealt with at sheriff and jury level. This is undesirable on cost and resource grounds. Cases that are unlikely to result in prison sentences of more than two years could benefit from being dealt with in the same court and under the same procedure. This would also assist prosecutors in making decisions, leading to efficiencies (cost, resource and expedition) in the justice system.

Question 9: Do you have any other comments in relation to the potential impact on victims, equality or human rights of the proposals related to extending the Presumption Against Short Sentences (PASS) from 12 to 24 months?

We would repeat the points made in response to Question 6.

Question 10: Please share any views you have on how effective CPOs are in their current form and whether the legislation underpinning them is appropriate.

The Scottish Sentencing Council issues paper ‘Judicial perspectives of community-based disposals’¹ highlighted that community-based disposals (CPOs are the most common), in appropriate cases, are commonly viewed by sentencers as providing a greater chance of rehabilitation and, in general terms, as a more cost-effective alternative to imprisonment.

¹ [20211028-judicial-perspectives-of-community-based-disposals-ssc-issues-paper.pdf](https://www.scotscot.nhs.uk/2021/10/28-judicial-perspectives-of-community-based-disposals-ssc-issues-paper.pdf)

The issues paper identified greater consistency in the provision of community-based programmes and services; and the provision of suitable and sufficient resources to support their management and delivery as important from the perspective of sentencers.

Statistics suggest that CPOs are, predominantly, effective in their current form.

Only 28.6% of those given a CPO were reconvicted within a year², however, it should be noted that only 71% of CPOs were successfully completed in the latest available statistics³.

However, research by the Scottish Sentencing Council suggests that the judiciary perceives a need for greater flexibility in the options available as well as simplification of the legislative provisions for imposing various requirements (e.g. programme, mental health, alcohol and drug).

Question 11: To what extent do you think the current framework allows sufficient flexibility to tailor CPOs to individual circumstances, including the roles of both sentencers and justice social workers?

See answers to Question 2 and 10. One of the biggest challenges to effective community orders is limitation of resources. As is outlined in the Scottish Sentencing Council Research, there are geographical gaps in provision, with urban areas regarded as being able to make greater provision than rural ones and gaps in provision for women, young people and those with mental health issues.

Whilst the court will take into account social workers' assessments of what might be suitable to include within a CPO, we are of the view that the requirements of a CPO should remain a matter for the sentencer in order to maintain accountability as well as confidence in the effectiveness of these sentences.

Question 12: Please share any views you have on how the current CPO legislative framework could be improved to ensure CPOs are a credible alternative to custodial sentences.

You may wish to consider:

- removing any unnecessary or ineffective requirements.
- adding new or revised requirements.
- addressing practical or legislative barriers to the use of existing requirements.
- any other changes.

² See [Reconviction Rates in Scotland: 2022 to 2023 Offender Cohort - gov.scot](#) at page 13

³ [Justice Social Work Statistics in Scotland: 2024-25 – Part 2 - gov.scot](#) at paragraph 5.5

Unnecessary or ineffective requirements

See answers to Questions 10 and 11. We can offer no view in relation to 'ineffective requirements', however, statistics suggest that a number of the existing requirements are not commonly used⁴ (e.g. alcohol treatment; drug treatment; mental health treatment and residence). This is an issue which should be further explored to determine, for example, if resourcing is the cause.

New or revised requirements

We have no new requirements to suggest. The low uptake of the requirements set out above suggest that, if they are to be retained, revised requirements may be appropriate.

Practical or legislative barriers to the use of existing requirements

Again, the low uptake of the requirements set out above suggest that there may be barriers to their use. For example, the requirement of a written report (or oral evidence) by an approved medical practitioner to permit the imposition of a mental health treatment requirement may be a barrier (although we expressly do not take issue with such a requirement).

Any other changes

We have no other changes to suggest.

Question 13: Please share any views you have on the extent to which CPOs provide sufficient support to address the underlying causes of offending behaviour and whether there are any barriers to ensuring support needs are met.

We have no views to offer in relation to this question.

Question 14: Please share any views you have on the introduction of an Enhanced Combination Order model in Scotland.

In your response, please consider which elements (for example, psychological assessment or restorative approaches) would be most valuable, and any potential benefits or challenges.

We note the Sentencing and Penal Policy Commission's description of the use of enhanced combination orders in Northern Ireland. We do not express any view on the introduction of these in Scotland, which is a matter of policy. However, it seems to us that the ongoing delays

⁴ See [5. Community payback orders - Justice Social Work Statistics in Scotland: 2024-25 – Part 2 - gov.scot](#) – Chart 8 (page 17)

and difficulties in obtaining psychological and psychiatric reports would require to be addressed for such a proposal to be effective. We agree with the comments by SCTS about the current challenges in obtaining such reports and the need for a regulated or national process to do so.

We offer no view on whether a restorative approach should be included in such orders, which is also a policy choice. We note, however, the success of such initiatives in other jurisdictions, particularly in Canada (see Alberta Restorative Justice Pilot Project⁵; R v Lariviere (2021) ABQB 432; R v Rabbit (2023) ABKB 706 and the experience of the Alberta and Calgary Drug Treatment Court which integrates restorative justice with addiction plans).

Psychological assessment is not a sentencing option. As matters currently stand, if a court is of the view that a psychological assessment is appropriate it will request one. In this regard, we note the comments made by the SCTS, with which we concur.

Question 15: Please share any views you have on the proposal to amend how CPOs are set out in law, so they are clearly framed as a sentence that can be used where justice social work intervention could address the underlying causes of offending behaviour.

We offer no view in relation to this proposal, other than to observe that a CPO need not only be used as an alternative to imprisonment (see s. 227A(1), (3) and (4) of the 1995 Act). We would also observe that any extension of the use of community disposals will, potentially, have significant implications for social work departments.

Question 16: Please share any views you have on what changes, if any, would be required to make CPOs suitable and effective for more serious offending behaviour.

For CPOs to be suitable for more serious offending behaviour (and we offer no view in relation to the appropriateness of that), it would be necessary to increase the available maximum period for supervision and maximum hours of unpaid work and expand the use of electronic monitoring and programme requirements.

Question 17: Please share any views you have on the proposal that there should be more opportunities to incentivise good behaviour on CPOs through reductions in, or early discharge from, unpaid work or supervision requirements.

⁵ [RJ Pilot – Honourable Beverley Browne – Wiyasôw Iskweêw – Restorative Justice Committee Pilot Project](#)

Please give reasons for your answer including any views for how this could be achieved in practice, as well as any alternative suggestions to enable incentivisation of good behaviour on CPOs.

We take no view on the appropriateness of this proposal. If this proposal increases compliance with and progress on CPOs and reduces re-offending it may be of benefit, but we note that there does not appear to be any research or data as yet available from implementation of the English scheme or otherwise to support its use. We also observe that if courts are to take more of a role in early discharge and variation of orders this will require additional court resources.

Question 18: What changes, if any, do you believe are needed to improve breach processes for CPOs to ensure timely, proportionate, and consistent responses to non-compliance?

The current breach provisions in respect of CPOs⁶ are, where the breach is not admitted, acknowledged to be cumbersome and productive of delay. We support proposals to increase the speed and efficiency with which breaches are managed by the court. However, it should ultimately be for the court to determine if the order has been breached and if so, how that should be addressed.

Question 19: Please share any views you have on retaining Drug Treatment and Testing Orders as a distinct community disposal for addressing substance-related offending.

Please give reasons for your answer, including:

- **views on whether they should be reformed or replaced;**
- **views on the current effectiveness of DTTOs;**
- **how they compare to alternative disposals, including Community Payback Orders (with or without treatment requirements);**
- **what a future community sentence for individuals whose offending is related to substance use should look like.**

We recognise that DTTOs are, now, rarely imposed in the High Court of Justiciary and, therefore, would defer to the views of the sheriffs who impose such orders.

That said, we recognise that the number of DTTOs imposed has fallen significantly over the past 10 years⁷. This, coupled with the very small number of CPOs that contain a drug

⁶ See s.227ZC of the 1995 Act

⁷ See [Justice Social Work Statistics in Scotland: 2023-24 - Part 2](#) – Chart 10 (page 23)

treatment requirement⁸ strongly suggests that the issue of suitable court disposals for offenders with drug issues requires closer examination.

Question 20: Do you have any other comments in relation to the potential impact on victims, equality or human rights of these proposals to enhance and strengthen community sentences?

No.

Question 21: Please share any views you have on the proposal that there should be a formal mechanism to enable bail cases with an electronic monitoring requirement to be brought back before the court or dealt with administratively in chambers. This would be used when administrative issues arise that may prevent the order being monitored, and currently require judicial consideration, but where there may be no evidence of criminality.

It would not be appropriate to comment on the policy choices reflected in these proposals which are for Ministers and Parliament. However, we can see merit in establishing a formal mechanism to bring matters back before the court where judicial consideration is required.

Such a process could provide a proportionate means of addressing practical issues relating to the operation of electronic monitoring, while maintaining appropriate judicial oversight. It may also allow changes to be considered by the court without matters automatically being treated as compliance failures.

However, it is unclear how far such matters could be dealt with administratively. We would observe that decisions to vary or review electronically monitored bail conditions are likely to require judicial consideration, particularly where issues of public protection, victim safety, or risk arise, as will usually be the case where an electronically monitored bail order has been made. Any reform may require new procedures, court rule changes, and additional judicial and staff resources.

Question 22: Please share any views you have on the proposal that there should be a power of arrest for breaching the order or licence relating to an exclusion zone.

It would not be appropriate to comment on the policy merits of these proposals. However, we note that the inclusion of a power of arrest may enhance the effectiveness and enforceability of such orders, and in doing so may help to promote confidence among victims, the public

⁸ See [Justice Social Work Statistics in Scotland: 2023-24 - Part 2](#) – Chart 8 (page 17)

and justice partners in their operation. Any decision on whether such a power should be introduced is ultimately a matter for Ministers and Parliament.

Question 23: Please share any views you have on the proposal that there should be other improvements to the system of electronic monitoring either to help facilitate any of the other reforms in this paper, or more broadly.

There may be benefits in the use of GPS monitoring where it provides a more effective means of monitoring compliance with conditions and more comprehensive information to the court. Enhanced monitoring capabilities may support confidence in the operation and enforceability of electronic monitoring. Expanding electronic monitoring is likely to require improvements to digital systems and information sharing across justice partners.

Question 24: Do you have any other comments in relation to the potential impact of these electronic monitoring proposals on victims, equality or human rights?

No.

Question 25: Please share any views you have on the proposal that people should not be remanded to custody unless they have a reasonable prospect of a custodial sentence of 24 months or more.

Please give reasons for your answer, including whether there are any circumstances in which remand should remain available even where such a sentence is unlikely.

The likely length of any custodial sentence will obviously be a matter which can be considered at the point of any decision on bail. Any unexpected delay in proceedings may also allow a refusal of bail to be reconsidered, in particular if there is any other change in circumstances.

Cases where a sentence of under 24 months is likely will still include some serious offending.

There may be circumstances, in particular where there is a risk of further offending or a flight risk, where bail might properly be refused even with the prospect of a sentence of less than 24 months. If there were to be a presumption in favour of bail where a sentence of under 24 months was likely, it would be necessary to allow for exceptions based on risk and likelihood of further offending, for example, where the accused was already subject to bail orders or other court orders.

Question 26 – Do you have any other comments in relation to the potential impact of this bail and remand proposal on victims, equality or human rights?

No.

Question 27: Please share any views you have on the proposal that the automatic release point for long-term prisoners (excluding those on extended sentences) should be amended to the two thirds point. Please include what the potential impacts could be on reoffending and rehabilitation into the community.

As with other areas covered by this consultation, the law regarding the automatic release of long-term prisoners has changed significantly in a short number of years.

Some of the history of parole and early release is included in the 1989 Kincaig Report⁹ which might usefully be revisited by the Scottish Government as it contains discussion of many of the issues and arguments which recur every time there is a consultation on sentencing and public safety.

A useful starting point on the law is section 1(2) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 which provided for release on licence by the Secretary of State *“[a]s soon as a long-term prisoner has served two-thirds of his sentence”*. Subsection (3) allowed for release on licence by the Secretary of State *“if recommended to do so by the Parole Board”* ... *“[a]fter a long-term prisoner has served one-half”* of his sentence.

After amendment in 2016, section 1(2A) amended this section so that *“[a]s soon as a long-term prisoner has only 6 months of the prisoner’s sentence left to serve, the Scottish Ministers must release the prisoner on licence”*. While the Policy Memorandum for the relevant legislation (Prisoners (Control of Release) (Scotland) Act 2015) stated that it would *“help reduce reoffending and improve public safety through making changes in two areas of the system of prisoner release”*, it is clear that it was largely about contributing to the *“Scottish Government’s national outcome of helping people live their lives safe from crime, disorder and danger by ending automatic early release for the offenders who are likely to pose the biggest risks to public safety and who currently receive automatic early release”*.

As stated in the Memorandum (paragraph 11), *“In any system of early release, there is a risk of prisoners going on to commit further offences and concerns are often expressed whenever such individual circumstances arise, in particular where the further crimes are serious. However, these concerns are often significantly heightened when a prisoner who commits a further offence has benefitted from being released automatically from prison early”*.

The proposed change therefore seeks to return the law on the automatic release of long-term prisoners to where it was just over 10 years ago with the risk of detracting from public protection and reducing public safety.

⁹ Parole and Related Issues in Scotland, Report of the Review Committee chaired by The Honourable Lord Kincaig, March 1989 Cm 598

Resources, including suitably qualified and experienced staff, are key to most efforts towards reducing reoffending and encouraging rehabilitation. Simply changing the automatic early release provisions for long-term prisoners as proposed, whilst the immediate impact may be to reduce the prison population, is likely to increase the risk of reoffending and, without greater resources (for example, supervision, support, community programmes to address specific underlying causes such as addiction), unlikely to bring about any increase in rehabilitation in the community.

Question 28: Please share any views you have on the proposal that if amending the automatic release point for long-term prisoners to the two-thirds point, those subject to extended sentences should be included.

An extended sentence may be imposed in terms of section 210A of the 1995 Act where the court considers *“that the period (if any) for which the offender would, apart from this section, be subject to a licence would not be adequate for the purpose of protecting the public from serious harm from the offender”*. The extended sentence is the aggregate of a custodial term and an extension period of additional supervision of up to 10 years.

These sentences are imposed to address several purposes and principles of sentencing with risk of serious harm to the public from the individual the key element. It makes no sense to have an automatic element to release in these cases where the sentence selected anticipates a risk of serious harm to the public which is likely to persist beyond a full custodial term (or a full term less 6 months). In these cases, there should be no increase in the automatic element of release.

Question 29: Please share any views you have on the proposal to amend the definition of short-term prisoners from “less than four years” to “less than five years”.

This proposal may make sense for a number of reasons, not least the maximum sentencing powers of the sheriff court. It also mirrors some of what was said in the Kincaig Report¹⁰. However, this would be a significant change which ought to be better researched and subject to greater consultation and consideration as regards all implications of such a change. One implication, which could potentially be addressed, is that more offenders who have committed quite serious crimes may not have access to rehabilitative programmes in prison before they are released.

¹⁰ Parole and Related Issues in Scotland, Report of the Review Committee chaired by The Honourable Lord Kincaig, March 1989 Cm 598

Question 30: Do you have any other comments in relation to the potential impact of these proposals regarding prisoner release arrangements on victims, equality or human rights?

Some of these proposals, in particular the suggestion of earlier automatic early release for some or all long-term prisoners (including those subject to extended sentences) have the potential to increase the risks for victims and possible future victims. As recognised above, a properly functioning justice system must have regard to the rights of victims and the safety of the public. The proposals appear to be directed more to trying to address prison numbers than a system-wide consideration of how to address reoffending and rehabilitation.

Question 31: Do you have any comments on the overall package of reforms contained within this consultation, potential interactions, and whether taken together they would help work towards achieving a sustainable prison population?

As with many of the issues covered in this consultation, existing problems seems to relate not only to prisoner numbers but also to inadequate resources and insufficient staff in key areas – all aspects of social work, including probation supervision, psychology, addiction services, etc. If these were in place, regardless of the arrangements for, and timing of, early release, the various systems would almost certainly work better. Merely accelerating automatic early release, without additional resources and personnel, will not improve matters for society, victims or those who offend. If anything, it is likely to make matters worse.

The proposed package of reforms addresses a number of important issues. As with previous changes in this area, prison capacity and overcrowding appear to be the main drivers for the consultation. While the situation may be urgent, the initial 25-day period for consultation (extended for this response but shorter still than the usual 3 month period for consultations) neglects or addresses only superficially other issues which should be key aspects of sentencing and release arrangements, for example, public safety, public and judicial confidence and rehabilitation. While other consultations have addressed aspects of the proposals, this consultation should be used as an opportunity to consider the “overall package” as opposed to the individual aspects which may have been previously considered.

Early release and bail are areas which have been subject to piecemeal reform over the last 33 years, with significant changes during that period, some of which were also designed to tackle issues around prison capacity and overcrowding. The most recent of these changes regarding early release occurred only in November 2024, when the Scottish Government modified the release point for some short-term prisoners from 50% to 40% and implemented emergency early release measures.

While the issues of prison capacity and overcrowding may be urgent, we consider that more research and time is required to look carefully at the law in these important areas, rather than making quick but far-reaching changes in the law (without sufficient evidence) which may

have to be revisited within a short number of years. We have in mind a review similar to the review on Parole and Related Issues chaired by Lord Kincaig in 1988/89 which reported in March 1989¹¹.

While this would mean that more time would be required to come up with a package of proposals, it is better that it is done properly having regard to public safety and public and judicial confidence in options and arrangements for sentencing and bail.

Piecemeal reform to try to address overall prisoner numbers has not worked to achieve its stated aims. There is no reason to think that the proposed changes will work any better, beyond a possible initial reduction in prisoner numbers.

Without more thorough consultation and consideration there is a real risk that changes in the law may, as an unintended consequence of measures designed largely to reduce prisoner numbers, adversely impact on public safety as well as public and judicial confidence in these areas.

It appears to us that arrangements for early release are not well understood by the public. Frequently, media reports include suggestions that all prisoners will obtain automatic early release after serving only 50% of their sentence. The fact that some will do so, or that some may now obtain release even earlier, and that some long-term prisoners might do so on the basis of a decision by the Parole Board for Scotland merely adds to scope for understandable confusion about an area of the law which has changed so frequently in a relatively short period of time.

Public confidence in the criminal justice system and the courts is essential. Transparency and clarity in sentencing are critical but are made more difficult due to the complicated and confusing legal landscape in this important area. The courts already have a clear focus on ensuring that public confidence is secured through greater transparency and clarity in sentencing, for example in increased use of detailed sentencing statements and the televising of sentencing in appropriate cases, as well as the ongoing work of the Scottish Sentencing Council which has a statutory objective to “*promote greater awareness and understanding of sentencing policy and practice*” (section 2(c) of the Criminal Justice and Licensing (Scotland) Act 2010).

Without great care and more detailed consideration of these proposals, existing confusion about sentencing and the various forms of early release may well increase with a consequent reduction in both public confidence in the courts and respect for the rule of law.

¹¹ Parole and Related Issues in Scotland, Report of the Review Committee chaired by The Honourable Lord Kincaig, March 1989 Cm 598