

## Consultation on Bail and Release from Custody Arrangements in Scotland: Questions and Respondent Information Form

The Children and Young People's Centre for Justice (CYCJ) welcomes the consultation as an opportunity for change to and alignment with the pending incorporation of UNCRC (United Nation Convention on the Rights of the Child) into Scots Law, as well as the aims of The Promise to ensure a child-friendly justice system that upholds children's rights throughout all aspects of its processes and application. It is important to acknowledge the specific protections afforded children under the UNCRC and consider how they can be better supported and responded to, as well as promoting their inclusion and participation in the justice system.

Children's need and rights within the justice system are often overlooked and systems/processes are not designed or adapted to meet their needs. To meet the promise and ensure that children understand and can participate in justice processes, we welcome this consultation and the specific questions relating to children and young people.

We would like to highlight that it would have been helpful to have accessible documents that would promote the gathering of views particularly of children, young people and young adults who have experience of bail and release, to provide a rich contribution to the consultative process. Subsequently, this may have limited the opportunity for contribution from these individuals/ group.

### 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 proposed change that bail is only refused where there is/are public safety concerns is welcomed especially in relation to children prosecuted at court as this would be in line with UNCRC Art 37b that, "*No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.*" In the latter part of Art 37b is the statement that any loss of liberty for a child should be for the shortest period and this has not been

addressed within the consultation. In relation to children on remand it could be stipulated that their loss of liberty is reviewed regularly, to actively ensure the initial remand period is used as an opportunity for services to consider additional supports that can manage any potential risk to the public from aspects of a child's behaviour.

Creating automatic reviews of children remanded beyond the 7-day further examination should be stipulated, which would ensure adherence to Art 37b and avoid arbitrary detention on remand for court scheduling. This would recognise the specific consideration children should have within the justice system and ensure statutory services are actively reviewing what alternatives they could implement with direct consideration; and whether they could manage the potential risk of harm in the community, which would have to be evidenced to the judge presiding.

Further clarity regarding the definition of "public safety concern" and how this would be measured to ensure consistency in application by judges would be welcomed. Will the public safety criteria equate to the Risk Management Authority definition of serious harm used in risk management across Scotland, and what type of assessment will be utilised, given that this relates to charges and not convictions?

We believe further consideration is required, as harm is subjective to the individual who has been harmed and can take a range of forms either individually or collectively, such as emotional and psychological, which may not be as obvious as physical harm. What one individual may experience as serious harm, another may respond to or experience differently. How will these elements be aligned with the position of public safety being the primary consideration for whether bail is granted or not? For example, in some circumstances an individual harmed may have concerns and be fearful about the release of the individual charged, yet there are no public safety concerns or consideration that the individual would act contrary to any bail conditions.

Also, it is important to recognise the need for a trauma-informed approach in responding to those harmed and those who may have caused harm. This is particularly relevant in consideration of the vast swathes of evidence from international research. It is especially crucial in relation to not only the potentially traumatic life experiences of children in conflict with the law, but also the often-traumatising impact the system has upon them as they are processed through it.

The application of a trauma-informed approach universally within the justice system reflects not just the evidence regarding children's experiences which may have contributed to their coming into conflict with the law, but is also reflected across the female and adult male population. The impact of trauma does not cease as a certain age is reached. However, the understanding and consideration of its impact on individuals may lessen either in response to the seriousness of the harm they are charged with causing, the time between their experiencing that trauma and their appearing in the justice system or lack of knowledge of the trauma someone has experienced or may still be living in.

## 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.

From the consultation we are unsure what change is proposed to the consideration of all bail decisions being made in the public interest, which includes consideration of public safety and specific victims. Thus, judges presently must have consideration within bail decisions regarding victims and have powers to make specific conditions that are reasonable over and above standard bail conditions. If reasons for or against bail were articulated and recorded, this would provide transparency in the decision making to reflect the public interest as to why there is/is not a risk to public/individual safety.

The voices of victims are important and must be heard within justice processes. However, procedural fairness and legitimacy are critical for delivery of justice, and there are concerns this would be unbalanced by adding specific considerations of identifiable victims when someone has been charged and not convicted. It is not clear what these additional protections will provide.

In addition, how would the judge hear the victim's views and what impact would it have on assessment for alternatives to remand; would it provide undue weighting?

Is this not contradictory to the purpose of removing section 23D to "unfetter" the discretion of the court in their decision making, by adding a stipulation that is already covered within existing considerations the court must make when deciding on bail?

## 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 believe this would ensure that all cases before the court are weighted on the relevance of the individual facts and context of the case and reflects the position that all cases areailable. This would not remove any protections and a more equitable application of bail considerations by removing exceptional circumstances.

#### 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.

Consistently evidence shows that substantial number of individuals appearing before the court have difficulties understanding the processes and what is happening around and to them. This is particularly relevant for children and CYCJ research has evidenced that children do not understand the processes they are subjected to when prosecuted in court and struggle to remember or understand what has been said to them irrespective of the fact whether judges make attempts to explain in a language they think the child understands. Our findings highlight that courts and other professionals are not explaining things in a manner that children can understand and their ability to retain any information is impacted by the often-traumatic experience of being in court. Further, often the professionals and family members struggle to follow what is occurring and they are in most cases the ones depended upon to support children through the process and reinforce the conditions of bail and what they mean.

Whilst proposing decisions for bail refusal should be expressed orally and in written form, this misses the point as to the prevalence of speech, language, and communication needs (SLCN), potential neurodevelopmental difficulties and traumatic brain injury, which are at higher frequency in children prosecuted in court and particularly the custodial population of children and adults. For procedural fairness and legitimacy, the way this information is provided should be done with consideration of the needs of the individuals to be meaningful and not just process

driven by what will benefit services. Evidence shows that where people feel included and understand what is happening within court processes, they are more likely to engage and comply even though they may not agree.

Written reasons ensure consistency in deliberations and provides reasoning that can be explained to the individual after their court appearance by supporting services.

The provision of written as well as oral reasons for decisions would also provide transparency and clarity as to what judges consider and influences decision for bail / not to bail, which can aid development and design of more robust alternative to remand services.

As to the concerns that recording reasons for decisions may be prejudicial for an accused at future diets, necessary safeguards must be put in place to ensure this does not occur. Conversely, there may also be potential that where bail has been refused and reasons why recorded, these are shared with an accused, who can then (alongside services) consider what steps and supports/risk management strategies could be provided to mitigate the reasons why bail was refused. In some circumstances, this may not be possible but for others it may provide opportunity to work towards someone returning to their community rather than remaining on remand unnecessarily. This links back to our response in Q1 where for children especially, all opportunities to maintain them safely in the community must be maximised and the ability to consider decisions why bail has been refused could help with this - where it is safe to do this.

### Question 5a

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

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

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

-The court **must** ask for information from social work. Social work **may** decide whether to provide it

**-The court must ask for information from social work. Social work must provide it**

Please give reasons for your answer.

We believe this should be the case for every occasion where bail is opposed and particularly every occasion when a child is appearing in court. This would ensure as full information as possible, without prejudicing the matter or any outstanding matters. Such information must provide context of that child's situation and available supports. In addition, no child should appear in court without additional

supports to aid them to navigate their court journey and ensure they understand what is happening at all stages throughout this journey. What is also required is the opportunity to hear from the child and their views on what could be the potential outcomes, and not solely through legal representatives but directly to the judge as outlined in the Council of Europe's Child Friendly Justice guidance and in line with Art 12 of UNCRC.

The Whole System Approach to children in conflict with the law has outlined since its national roll out in 2011 the level of information which should be provided to judges when children appear before them to aid bail decision making, and the processes required to ensure children are supported through their court journey. This remains disparate across the country. The current consultation would benefit from reflecting this policy and how it would uphold the rights and specific needs of children in the proposed changes. We must ensure that the needs of children appearing at court are not an add on to the considerations of the adult population.

The development and imposition of such changes requires significant consideration in relation to resources, capacity and demand. There is some disparity across the country as to the provision of court social work services and bail supervision schemes, for example. To address this inequity there must be collaboration to understand the needs of individual local authorities who provide court social work services and associated supports to ensure appropriate funding, resourcing, and capacity.

Clarity in the processes and timescales for ensuring information gathering and assessments undertaken is necessary to limit impact on court functioning as well as individuals appearing, and victims, is required.

### 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.

Please refer to Q5A with regards to our views on what is required on every occasion a child appears at court.

In this instance we would prefer ensuring the court requests and social work provides to maintain consistency across decision making in all cases. This reflects that often social work will have access to information on their systems that may be of benefit to the court, particularly with a view to public safety.

The benefits are the same as above by providing information on what could be available, with potential concerns from a social work perspective as to the ability to manage potential risk of harm.

### 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.

All alternatives must be explored before someone's liberty is removed, reflecting the seriousness of this decision which may result in loss of freedom, and loss of connection and removal from their own community and home. Evidence shows that EM is most effective when accompanied by supports to aid individuals in complying and to address other issues that may affect their ability to comply and build capacity and personal and systemic resources. This is particularly relevant for children and young people. There should be no use of EM without assessment of the wider supports required to aid them to navigate court process and bail orders. Whilst EM may prevent someone from being remanded, it is still a restrictive process, and particularly where it is being considered for use with children further safeguards are required, such as shorter review periods than would be in place for adults.

Children's development can result in changes over shorter time frames than adults as their brains are still developing. This is particularly relevant to the development of their frontal cortex, which is responsible, for executive function and hallmarks of adult capacity regarding thinking, reasoning, decision-making, and emotional self-regulation. Thus, imposition of bail conditions and use of EM should be reviewed regularly for children to ensure the restrictions are still proportionate and appropriate for managing risk to public safety and in place for the least time necessary. There continues to be children subject to bail orders for extended periods of time which increases the risk of their breaching such orders due to failure to comply, rather than risk of harm to others and accruing further offences for procedural breaches.

Whilst the use of EM is positive there must be clear guidelines and considerations in the application of this as part of bail orders with children and it is not evident this has been part of current considerations. Thus, EM and bail with children should in

no circumstances be imposed separately or combined without appropriate developmentally informed supports delivered by skilled and competent practitioners being in place.

All opportunities for someone to remain in the community must be considered and evidence provided as to why this would not be suitable, to ensure arrival at remand is the only option and clarity as to why. Specifically articulating the consideration of EM within this decision-making and why not suitable or why suitable would be welcomed. This ensures it does not become a 'tick-box' exercise and is fully considered.

Whilst present use of EM is Radio Frequency (RF), when GPS (Global Positioning Systems) becomes available this will require careful monitoring to ensure appropriate use and compliance with human rights. However, it may also create opportunity for those situations where RF is not considered a strong enough level of monitoring to oversee someone in the community, thereby increasing further opportunities for individuals to remain in their communities.

This position of having to consider EM before refusing bail would mirror the Children's Hearing System (CHS) when a child is at risk of secure care and a Movement Restriction Condition (MRC) electronic monitoring, must be considered. Within the CHS's core consideration of using an MRC should be how it will disrupt the harmful behaviour, support risk reduction and support victim safety. Alongside the MRC is the supports and other wraparound interventions required that can be utilised alongside EM to maintain a child safely in their community. Consideration of EM before bail being refused would reflect this position and clearly evidencing why it is/isn't suitable is necessary.

It is also important that the use of EM as part of bail considers the needs of those partners, family members the accused may live with and the additional pressures that may be placed on them. This relates to the creative use of EM within any restrictive practice and not merely opting for standard application of times. As with use of EM in court disposals reviews of timeframes and potential reductions could be considered, especially when in place for significant periods of time and based on risk of harm to either public safety or specific victims.

For EM to be effective as part of bail then clear guidelines and processes for breaches must be explained and shared with individuals who become subject to it. Provision of accessible materials, particularly for children, would be necessary. In addition, special consideration of how equipment is set up, and who needs to be present when it is a child accused, must be included in any guidance.

### **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.

This links to our response to Q4 and all the same caveats should be in place as to clarity and transparency of reasons. There should be different modes of communicating that considers the needs of the individuals given the prevalence of SLCN, neurodiversity and potential for traumatic brain injuries in this population. This is especially important when a child is appearing before the court.

Consideration of timescales and potential impact on court for appropriate assessments to be undertaken again requires appropriate level of resourcing, financing and capacity with practitioners that are skilled in working with children. Also, availability across the country for EM is a necessity to ensure equity and remove the postcode lottery situation.

**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 acknowledge the benefits for compliance, potentially where time on EM as part of bail can be considered in sentencing. However, the case law quoted refers to consideration of time on curfew being considered in “exceptional circumstances” but there is no clarity as what would constitute such exceptional circumstances and this proposal would seek to remove the exceptional circumstances and make it accepted practice.

We also believe that time-spent should also be considered for curfews attached to bail without EM; and that time-spent could be used for periods of community disposals as well as custody.

**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.

For fairness and legitimacy this must be consistent and legal direction should be in place to ensure this.

**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.

Given the evidence presented within this consultation as to the conversion, or lack thereof, of remand situations translating to custodial sentences, it would seem incongruent not to support legislation that prevents remand for any case where custody is not a realistic outcome of a case.

Further, where there is no other option but to remand a child then this must be to a secure unit and for the shortest time possible in line with Art 37b of the UNCRC.

**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?

The justice system as it currently operates does not uphold children's rights and requires restructuring to ensure child friendly justice that children can participate in, and understand what is happening and what is expected of them in line with UNCRC.

There is a further opportunity to consider a developmental approach that allows greater flexibility to consider capacity and ability as well as age at the pre-trial stage. This would reflect the newly implemented sentencing guidelines for young people under the age of 25 years at the date of their plea of guilty or when a finding of guilt is made against them. This would provide synergy across the court processes and importantly focus on developmental capacity being given due consideration alongside age, which is especially pertinent when a child or young adult appears before the court and especially when they are at risk of remand.

Research has consistently evidenced that the brain does not fully develop until mid-late 20s and there are a number of experiences and contexts, which can delay or disrupt that development. Whilst age can provide parameters of expectations of general behaviours and capacity for understanding of chronological ages, this must be informed by an understanding of the individual before the court and their experiences and context. Thus, this individualised approach would provide richness to the information provided to the court to aid in decision-making concerning bail or remand decisions. Provision of this for all children and young adults would be one option, and requires consideration of the demand this would place on both the court and partners as well as social work services. For this to be done meaningfully, staff that are competent and skilled working with these age groups will also have to be in place; and must be mindful of the different lens in consideration of risk practice with children, as well as the importance of a developmental, systemic and trauma-informed approach.

Ensuring such individualised context and understanding in all cases for up to 25 years would be one option. Also, provision of an appropriate adult should also be considered. Alongside a requirement to consider age and developmental capacity provision of an appropriate adult would ensure all children in the court processes are appropriately supported and enable any additional needs to be responded to in a manner that promotes their inclusion and understanding.

### **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?

Firstly, with the initial proposals that individuals should only be remanded where they pose a risk of harm to public safety and no use of remand where someone is unlikely to receive a custodial disposal if convicted, then these two factors should

reduce likelihood of individuals with roles in children's lives being separated from them. Adding the consideration of impact on children to bail deliberations would ensure this was considered and reduce the impact upon children and families.

What level of role in a child's life is to be considered: a parent, a sibling, an aunt or uncle, or a close family friend? Clarifying what/if any parameters may be required or whether it would again be on an individual basis on the circumstances of individual cases.

[European and international academic](#) research has found that parental imprisonment has been linked to problems including trauma and loss, social exclusion and increased vulnerability, financial stress, disrupted attachments, internalising behaviours (depression, anger, distress), externalising behaviours (anti-social behaviour, criminal activity, drug, and alcohol abuse), disrupted schooling, difficulties with social situations and death before the age of 65. The Human Rights Act 1998 directs all public bodies including the courts to comply with the European Convention on Human Rights (ECHR). Article 8 of ECHR states that everyone has the right to a private and family life and separating a parent from a child would interfere with the rights of the child under UNCRC. Articles of the UNCRC relevant to consider in such circumstances would be:

Article 2: Non-discrimination: The State has a duty to protect a child from punishment or discrimination, which they suffer because of the status or activities of their parents.

Article 3: In all actions concerning a child the child's best interests must be a primary consideration of the court or administrative body.

Art 9: Ensure that a child shall not be separated from his or her parents against their will.

Article 12: In all matters affecting the child, the child has a right for their views to be heard and for such views to be given due weight in accordance with the age and maturity of the child.

Article 20: A child has a right to special assistance from the State if separated from their parent.

In consideration of the intended implementation of UNCRC into Scots Law by Scottish Government, it would seem timely to include this as a consideration specifically in bail and remand decisions.

Children of Prisoners Europe (2019) suggest the court should have information on the following:

- the names and ages of the children.
- the plan for their care if their parent is imprisoned including the suitability of prospective carers in terms of finances, age, and health.
- whether siblings will be separated as a consequence of parental imprisonment; whether their education will be disrupted by parental imprisonment.
- any health or emotional needs of the children.
- whether the children will be able to visit their parent if they are imprisoned.

This also highlights that should a parent or important person in a child's life be remanded, then there must be consideration as to the facilitation of contact

between children and parents who are remanded/sentenced. There should also be the provision of appropriate child friendly conditions and spaces, and increased levels of contact through multi-modal means to reduce impact where there is no other choice.

This should be within the parameters of a bail supervision assessment or information that judges could request from justice social work to inform their decisions. It will require either specific collaboration with children's services skilled in assessing such situations or justice workers with the skills and competency required. As noted within this consultation, capacity and resources to undertake such information gathering must be sourced and available to prevent delays in court timescales.

### 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.

Ensuring appropriate supports are in place to promote reintegration is critical. Provision of consistently available proportionate scaffolding for individuals that responds to their needs and difficulties in an individualised manner to build capacity across the country would support completion of sentences in the community. Responses that place the individual and their support systems at the core to promote positive return to their homes, relationships and communities is required.

Within this consultation, retaining the use of custody for those individuals where aspects of their behaviour pose risk of serious harm raises questions as to the serving of sentences in the community. Were this the situation, with changes implemented, then the above is still appropriate, and risk of harm should not preclude someone from returning to the community. However, further consideration must be made as to the assessment of risk of harm used and ensuring a structured professional judgement (SPJ) approach is undertaken. This would reflect a wider contextual understanding of an individual prior to and during their period of custody to develop understanding of potential harm, likelihood of it occurring and interventions to reduce impact and seriousness.

There is a need for consistent responses that supports transition for individuals from custody to their communities with a variety of options to aid them in building their skills and abilities, as well as potentially including a staged approach with appropriate scaffolding to promote success.

Whilst all would be likely to benefit from some level of support to transition to their community, this must be in place for children, young people, and young adults. Under the Whole System Approach reintegration and transitions, this sought to ensure that from the earliest point when a child entered custody, whether remand or sentenced, planning took place for their return to their community. Identifying and building relationships and pathways to facilitate their access to supports relevant and meaningful for them were identified and steps for how to get there. This is similar to the ICM process but aimed at all children and at developing smoother transitions and proportionate scaffolding provided by the combination of social work services and third sector/voluntary organisations. This seems to be proposing an approach which reflects the principles of this, albeit scaled up significantly, and would require the provision of meaningful supports for all to serve parts of their sentence in the community. In addition, access to appropriate interventions to continue addressing identified areas of need, which may affect an individual's use of strategies and coping mechanisms that drive the use of harmful behaviours will also have to be scaled up and resourced.

Promoting use of third sector and voluntary organisations is required as it cannot all sit with social work services. Clear partnerships across health, education, DWP (Department for Work and Pensions), COPFS (Crown Office and Procurator Fiscal Service) (Crown Office and Procurator Fiscal Service), addressing issues of outstanding matters that can disrupt progress or destroy hope is also critical to success. This will require attention to both funding and consistency of commissioning high quality relationship-based services that takes into consideration geographical challenges also.

#### **Question 14**

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

There is considerable evidence and research to illustrate what is required to support people to successfully reintegrate back to their communities.

Consistency across the country is required as to the level of supports. Utilising third and voluntary sectors as noted in previous questions is critical, as is the collaboration and creation of pathways to address issues relating to housing, benefits, health including physical and mental health services, substance misuse issues, and employment services. Without access and pathways to the right supports for individuals and their support systems, then returning early will not necessarily break cycles of offending behaviour. Hope, opportunity and meaningful support is required. Often individuals who have experienced custody may struggle engaging with services and can be viewed through a negative lens as problematic and challenging when their responses are often stemming from anxiety, frustration, and difficulties in communicating their needs. Thus, the supports to walk alongside people are critical but also for staff and workers in these services to have a better

understanding of the challenges individuals may face leaving custody. Developing a more responsive and compassionate response would be beneficial.

Particular consideration of the needs of children and young adults is required. Due to their age and developmental stage children often have little choice over their options for reintegration e.g., housing, employment etc. Thus, specific consideration is required to ensure that their needs are being met, their rights upheld and that this is achieved in a developmentally appropriate manner. This is relevant for children irrespective of where they are held.

Custody can be a way of individuals finding security, understanding expectations, and having a roof over their head, employment, and sustenance. This needs to be available in the community to make it a less frightening and chaotic place for many.

In addition to provision of such supports is the oversight and monitoring of provision and multi-agency partners taking responsibility for provision and working together.

### 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 /

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

Yes / no / unsure

Please give reasons for your answers.

This would represent a commitment to human rights and children's rights in that loss of liberty is used for the shortest time possible. There must be recognition that this is a complex issue which requires the balancing of victim's rights and perspectives alongside the independence of the judiciary to sentence as they deem appropriate, taking into account circumstances and facts of any case, and focusing on rehabilitation.

This would require as noted a significant shift as to how risk of harm is assessed in a wider context to ensure holistic understanding of an individual. We need to seek to understand how participation and engagement during their period in custody may indicate changes which could be evidence of reduction in the concerning behaviours and underlying drivers of these. Furthermore, what opportunity have they had to evidence changes in attitudes, behaviours or coping strategies; and if they have not had such opportunity, how can this be provided?

Again, we would highlight the need for specific consideration of children and young adults and the opportunities provided for their rehabilitation. Often these are based on adult models which have been slightly adapted for children and young adults. To ensure fairness and a non-discriminatory approach these opportunities need to be specifically designed for these age groups and be developmentally appropriate. If they are not (or such interventions and supports are not available) this is inequitable and could impact on their ability to evidence change, access the community, and have improved outcomes.

There have been long-standing issues regarding individuals' ability to progress within the prison estate to access the community and evidence reduction in concerning behaviours and ability to manage in community settings. This would require a full review as to how it could function to meet the aspirations of what is proposed within this consultation, and ensure credibility in reducing and managing potential harm.

To make such changes credible also requires strong messaging and discourse with the wider public to share the evidence as to what is effective in reducing harm and offending behaviour. This necessitates opportunities to share this knowledge and evidence.

Development of systemic access to Restorative Justice (RJ) as part of rehabilitation and release pathways within this would help victims to feel included in the process.

#### **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?

This is a complex proposition from many perspectives and is likely to require engagement with the wider public to ensure the reasoning and evidence behind such changes are understood and viewed as credible and effective in reducing offending behaviour and victim numbers.

A starting point could be to review assessments as noted in previous questions, particularly to ensure an SPJ approach is taken that supports defensible decision-making. Appropriate, proportionate, and meaningful interventions should be identified to reduce risk, and build capacity and abilities within individuals and the systems around them.

If taking a human rights approach, then potential early release should be available to all where the assessment of risk of harm indicates reduction in potential harm from aspects of a person's behaviour and any such risk could be managed in the community. This will be an incredibly challenging concept and a more detailed

consideration exploring all potential scenarios and unintended consequences should be undertaken.

### 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 halfway through the sentence**

Please give reasons for your answer.

If following the intention of this consultation where the use of custody either for remand or sentence should only be where there is a risk to public safety, this raises questions for the reduction of the timeframe for release in determinate sentences to 1/3 automatic for short-term sentences.

If the expectation is that individuals serving custodial sentences are most likely to be those that pose a risk of harm to public safety, then how is it appropriate to reduce the release to 1/3 automatically? Would this attempt to shift the use of custody not necessitate consideration of the evidence as to whether risk of harm has reduced or not, as has been suggested earlier in this consultation?

Any early release must be informed by appropriate assessments, with additional supports as detailed previously as opposed to arbitrary reduction to 1/3 of sentence served. Again, there needs to be consideration of pressures and capacity upon existing services within SPS and across justice social work and third/voluntary sectors to provide the types of robust supports and interventions, as well as monitoring and supervision required, should the early release with conditions as proposed in the first option under this question be progressed.

Importantly, how should victims perceive such an arbitrary timescale without consideration of potential harm? Could there be a role for RJ in this proposal to ensure victims can be involved, should the person who caused harm also agree to participate?

### 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

The response to this question reflects that to Q17.

What would the perception of victims be, and the wider public, if arbitrary consideration for release at 1/3 of sentence served is implemented? Careful consultation and discourse will be required with victims and the public to share evidence and knowledge as to why any change to allow earlier release is being considered and progressed. Failure to do so might result in significant resistance.

As stated previously, consideration of early release should not be arbitrary but based on robust assessments of reduction in potential risk of harm should someone return to the community. This requires to be evidenced by robust SPJ assessment tools that take a holistic view and understanding of the individual to ensure defensible decisions are taken regarding risk management strategies and interventions that build on developing skills and coping strategies.

In addition to this is the necessity for consistent interventions and supports available to individuals in custody to work towards any potential early release, and access to the necessary services and supports on return to the community to promote success for the individual. The provision of all such interventions and supports must be equitable across custodial and community settings nationally.

Also, what review of progression will take place if the potential for increased numbers is progressed? Should a service be designed that can provide and promote these changes?

Again, this proposition requires greater consideration as to the potential unintended consequences and identifying solutions to the questions raised.

### Question 19

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

**Yes / No / Unsure**

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

CYCJ agrees with this proposal. Accessing appropriate services - especially housing and benefits - on the day of release can be difficult. This can be exacerbated when individuals are travelling to rural and remoter communities leaving little to no time to attend to issues with housing (for example) and subsequently having a negative impact on their release plans. Hence why it is important that pre-release plans are carefully constructed with individuals, and they are provided with as much or as little support as they require to implement these on release to maximise opportunity for success.

This could be supported through third/voluntary sectors as well as the use of peer mentors where appropriate to ensure partnership working, and taking into consideration that some individuals may prefer to be supported by such organisations where possible, rather than justice social work.

Ensuring, as noted earlier, that appropriate services and supports are working together to provide consistency for individuals in transitioning from custody to the community is critical. There should be forward planning for all individuals in a meaningful manner and recognition that the level of scaffolding for some may be higher than others at point of release, especially those who perhaps are isolated from family or friends, or have limited or no community supports.

There must be connection between interventions and supports during an individual's sentence with their pre-release planning, and post release support. There should be continuity through all aspects of someone's sentence to prepare for return to the community. This will not be achieved without multi-agency collaboration.

## **Question 20**

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

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

-**Yes** / no / unsure

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

The limited use of HDC presents an ongoing issue where a method of supporting rehabilitation is not being maximised. All prisoners should be considered for HDC unless they choose otherwise. In addition, ensuring a robust SPJ approach to

assessment of potential risk of harm and needs which is contextualised on an individualised basis is likely to support release for those individuals on HDC where the risk of harm has reduced and/or can be managed in the community

This should be considered alongside the earlier proposals where individuals are able to demonstrate commitment and attempts to address areas of concern throughout their time in custody to evidence reduction in potential harm or further offending behaviour. Also, it must also be seen in conjunction with the improved supports and planning throughout an individual's sentence to prepare for release.

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

**-Be made longer**

**-Not change**

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

If there is a move towards an evidence-based reduction of risk of harm, then surely HDC should be a tool that is utilised as appropriate and proportionate on an individual basis? As noted, EM is evidenced to be most effective with supports and thus, HDC must not be a standalone tool but provided in tandem with responsive supports and risk management strategies that are proportionate and individualised. Arbitrary timescales do not take into consideration reduction in potential harm and appropriate SPJ assessments are required to inform decisions for suitability for release on HDC. However, as noted, careful consideration must be given to victim perspectives and wider public opinion.

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

**-Yes / no / unsure**

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

As stated, this should be on a case-by-case consideration and unless legally excluded all should be considered for HDC. Whilst the limitations and challenges for assessing and developing an appropriate support and intervention plan would be limited in such short timescales this is a service and process led issue that would discriminate against individuals on very short sentences. It does raise the question as to what purpose a short sentence serves.

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

**-Yes / no / unsure**

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

There should be no exclusions, it must be equitable, and suitability based on evidence of reduced risk of harm that is manageable in the community. Previous caveats regarding assessment of risk of harm apply here also.

It may be necessary to ensure that flexible and individualised conditions can be attached to HDC to ensure all types of concerning and harmful behaviour are considered and can be supervised and managed in the community where assessed as appropriate. Closer collaboration with justice social work services in cases where particular risks of harm are assessed may serve to ensure equity for individuals in access to and supervision by HDC.

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

-Yes / **no** / unsure

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

As with other prisoners released on licence under statutory requirements, there is close and effective multi-agency working between SPS and justice social work in relation to assessing and developing interventions and risk management strategies. Where the level of risk of harm may be more complex, then this should be the case for such cases under HDC. A joint approach between SPS and justice social work would be preferable to ensure shared expertise, knowledge, and skills in developing risk management plans that are as effective as possible.

Clarity would be required as to the competence and knowledge and training of SPS staff in application of a range of SPJ risk assessment tools such as SARA V3, LS/CMI and others that may be required with wider range of complexity in relation to potential risk of harm. Subsequently, we would be of the view this responsibility is held by social work in partnership with SPS.

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

-Yes / no / **unsure**

Please give reasons for your answer.

It would seem appropriate for the PBS to make decisions on prisoners subject to licence considerations but not for short-term prisoners not in those processes. It is incongruent that a prisoner granted parole then must wait for the decision for HDC made by SPS. Surely streamlining this process for long-term prisoners is advantageous, and creates consistency in the overview, supervision and conditions that may be in place.

For short-term prisoners, the responsibility should remain with SPS.

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

-Yes / **no** / unsure

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

At the point of sentencing the court may have variable information available depending on whether a criminal justice social work report has been requested, their knowledge of the individual and information from defence solicitors. What they will not have is knowledge of how the individual will conduct themselves throughout their sentence, which will inform a significant aspect of any assessment for early release.

Thus, CYCJ would not agree that the court should determine the period an individual should spend in the community at the end of their sentence.

### **Question 21**

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

Strongly agree

Somewhat agree

Somewhat disagree

**Strongly disagree**

Please give reasons for your answer.

Any sharing of information must be proportionate and necessary and in alignment with DPA 2018, and Human Rights.

Where there are concerns regarding specific victims then appropriate actions should be taken by justice social work and police, proportionate information should be shared with victims, in addition to development of victim safety plans.

A review of the Victim Notification Scheme perhaps is more appropriate and proportionate to proactively sharing information. What would the criteria for sharing information be? Sharing information with a victim's organisation without the victim

wishing for this to be shared is inappropriate, and a breach of human rights for both the victim and the individual being released from custody.

Better provision of information to victims at the point of incidents and court, where they can contact services and initiate Victim Notification Scheme, is required.

### 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.

Evidence highlights the ongoing issues which individuals experience on release from custody, as highlighted in our response to Q14. This is particularly relevant to children and young adults who often would benefit from additional and consistent scaffolding to realise their potential. Also as previously noted the importance of following someone and walking alongside them during their journey through the justice system requires that supports need to be present at all points, working towards their return to the community.

For all children, young adults, and those with care experience there should be specific duties in place for public services to engage with pre-release planning. These duties must interface with the corporate parenting role and responsibilities for care experienced children and young adults as directed in the Children and

Young People (Scotland) Act 2014. Provision of supports needs to be effective, individualised and not merely a tick box exercise. This must also solidify partnership working for all public services and links with third/voluntary sectors, as stated in the Community Justice (Scotland) Act 2016 in facilitating the provision of a wide range of general services.

#### **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.

Please refer to Q23 and Q14

Whilst there is the duty in Community Justice (Scotland) Act 2016 as referenced above, there must be an explicit duty to engage in pre-release planning and it should be as wide as is necessary to respond to the individualised needs of people returning to their community. This must reflect a GIRFE (Getting It Right for Everyone) and GIRFEC (Getting It Right For Every Child) approach.

Such services required would be:

Housing  
Health - including mental health, Trauma services  
Benefits  
Employment  
Substance Misuse  
Education  
Social Work

For all under 18s there must be duties for these services to engage and contribute to development of pre-release plans.

In addition, oversight and governance is required to measure effectiveness and ensure responsibilities are being upheld.

#### **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.

Why would the locality of release result in a different approach being taken? All individuals released from custody, whether custodial establishment or at court, should receive appropriate supports to access the services they require. We would acknowledge that in some cases, this may be unexpected but contingency planning is embedded in justice assessments and should be no different in this context.

In addition, no child should appear at court without additional supports through either social work services or third/voluntary sectors in attendance that can provide support in court and following court, as well as providing additional information to Sheriffs as necessary to inform court decisions.

Social Work (Scotland) Act 1968 s27(1) (c) states that local authorities are responsible for providing advice, guidance, or assistance to persons who, within 12 months of their release from prison or any other form of detention, request it, including remand. Consistency in provision of support and depth of such support is variable nationally.

Specific service to provide court support, which could walk alongside individuals and not just sign-post them on, would ensure everyone can access the right support at the right time in a manner that is meaningful for them. This could utilise third sector and mentor services as previously suggested within our response.

### **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.

Revised national standards for throughcare would provide opportunity to emphasise the importance of partnership approach and necessity of multi-agency responsibility in responding to the needs of individuals in the justice system.

### **Question 27**

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

**Strongly agree**

Somewhat agree

Somewhat disagree

Strongly disagree

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

As these are different cohorts, they may need a different level of support/intervention upon release.

**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.

Making revised standards statutory provides opportunity for review to support learning and development as well as national consistency. It also ensures a collective responsibility and recognises the value of partnership working and areas of expertise coming together. As well as consistency for services it clearly outlines what individuals should expect from throughcare services and provides accountability to those who receive services.

**Question 29**

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

**Yes** / no / unsure

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

We have detailed in Q13 and 14 the level of services required to support the reintegration of individuals from custody irrespective of whether this is from remand/

short-term sentences or long-term sentences. A consistent planning process that follows an individual throughout their journey and responds to individualised needs and context with access to appropriate services and supports is required.

As previously noted, following the principles of the Whole System Approach would see that a lead professional is appointed irrespective of what route the individual has come to custody and ensure collaboration between the individual, prison staff and community-based services to prepare and work towards release with ongoing support to follow through. If throughcare mirrored this approach that would provide available, meaningful supports for all.

By ensuring a clarity and awareness of the role of throughcare, the expectations that individuals and their families should have may improve the perception and uptake of voluntary throughcare. Proactively highlighting and sharing the opportunities and benefits as well as choice in who provides the support (i.e. third sector rather than Criminal Justice social work) may also support a shift in response and understanding of what it can offer.

### Question 30

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

**Yes** / no / unsure

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

Please refer to Questions 27-29

### 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.

The passing and enactment of the Coronavirus (Scotland) Act 2020 illustrates what can be done quickly when there is an urgent need. Whilst recognising the importance of the ability to direct emergency early release of prisoners, this situation has necessitated such legislation being enacted and used once. The

provision of such an executive power would seem proactive rather than reactive and prioritise the needs of individuals who may be in custody; however, should any such exceptional circumstances arise in the future, it does seem that the probability of such powers being required is unlikely.

### 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 would be helpful to have clarity as to the definition of exceptional circumstances as opposed to specific situations. Thus, it may be helpful to consider such executive powers only being exercised where if action is not taken, then there is a risk to life and health that could be avoided by early release. Careful consideration of how this is implemented must also be explicit to ensure equity as if risk to life and health is present what criteria decided whom should be released and whom is not. Would this relate to the earlier part of the consultation, and be derived from assessments of potential risk of harm? In addition, we would query what provisions will be put in place to provide the appropriate supports to individuals released in such circumstances and their families and support networks.



## 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:

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

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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**