Bail and release from custody arrangements:
consultation response from Community Justice Scotland
07 February 2022

On 15 November 2021, the Scottish Government launched a consultation on proposals for reform on the arrangements for Bail and Release from Custody in Scotland.

Community Justice Scotland responded to the consultation in February 2022, highlighting the development of the proposals as key to progressing towards improving the lives of those in contact with the justice system, their families and communities.

Key points included:

- CJS welcome this opportunity to progress reform of the arrangements underpinning bail and remand, custody and release. People do better when their links with family and community are maintained and supported, and bail should be used wherever it is safe to do so. Any return from custody to home community should be accompanied by the offer of support targeted at identified needs and building on strengths.
- Victim safety considerations and risk assessment should remain central to the process, alongside meaningful support for victims and their families.
- CJS think that bail should be the default option unless there is an evidenced risk indicating custody is necessary. We recommend a review of section 23C of the Criminal Proceedings (Scotland) Act 1995 to support a consistent and robust approach to these decisions.
- A need for an enhanced evidence base for better understanding why bail and remand decisions are made by sentencers.
- Enhanced social work involvement throughout the processes is necessary for improvement, but also highlights likely resource and capacity issues, particularly for local authorities, courts and others involved in the delivery of community justice including the third sector.
- We recommend a full review of Throughcare provision, in order to better understand how provision can and must change to improve access to services and support for more people.

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.

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

CJS agrees with the logic of the proposed change as all other pertinent considerations, for example accommodation issues, attendance at court, etc., can be managed within the community as part of Bail, supported by the use of instruments such as Electronic Monitoring (EM). Such considerations already lead to release in to the community when people are made subject to an Undertaking by the Police.

However CJS also propose that rather than "public safety reasons", the test for refusal of bail should be when people are assessed as posing an imminent risk of serious harm, as described in the definition used in the Framework for Risk Assessment, Management and Evaluation (FRAME) (Risk Management Authority, 2011) (available online at https://www.rma.scot/wp-content/uploads/2018/02/FRAME_policy.pdf)

The consultation document states that: "**All decisions by the court must be made in the public interest. The law makes clear that the public interest includes the interests of public safety. This will continue to underpin the operation of the bail system**." (page 11), namely all decisions made by the Judge will remain on the basis of public interest. To introduce the premise whereby remand will only be used for those who are assessed as an imminent risk of serious harm would require a specific focus by the Judge on public protection rather than the wider aspects of the public interest.

'Public Interest' is a potentially ambiguous concept that covers myriad interests of many potential parties, including victims, the accused, children and guardians, the wider community, general public and the common good, etc., which creates a set of competing factors in the decision-making process. There is currently no evidence which demonstrates how this determination is applied nor if there is consistency in application (e.g. across the courts types) as Judges do not record the rationale in respect of their decision-making around public interest.

The specific proposal is that ***"it will no longer be appropriate that the court decide to refuse bail solely on the basis of reasons unrelated to public safety. The proposal would still allow such grounds to be included with other, public safety related grounds which, when taken together, mean the court considers refusal of bail is necessary in a given case***" (page 21). Again, CJS would support the general principle of this. Evidence in a small study of cases (page 20) would suggest that a single-factorial basis was used as rationale for remand, e.g. no fixed abode, notwithstanding 'public safety' issues. Without any robust data from Judges as to *why* they remand it is difficult to form a premise for proposed legislative change.

CJS suggest that Section 23C of the Criminal Proceedings (Scotland) Act 1995 (hereafter referred to as the 95 Act unless otherwise stated) should be revised, amended and simplified to reflect that Bail should be the outcome unless the accused meets one or more of three primary test categories below as being an evidenced / assessed:

- Risk of absconding
- Imminent risk of serious harm to people or persons
- Risk of interfering with witnesses or other named persons

If triggered, this would be sufficient evidence for the use of remand as it is based on evidenced risk to the public. Where there are exceptional circumstances not addressed by the three-point test above, the Sheriff would, specifically, record such and state which factors influenced the decision not to grant Bail.

As will be noted elsewhere in our response, the need to assess risk at this stage in court proceedings is a complex and vexing matter. It takes time to make the determination of level of risk and whether that risk is serious and imminent in nature. Given that this would be specifically in relation to public protection, it may require a different operational model which would:

- afford the time to make the necessary assessment
- give the Judge the best information
- fulfil the proposal outlined in Q2 of this consultation, and
- ensure a more standardised form of defensible decision-making in respect of the use of remand

In addition, this would also require some changes to the 95 Act. Although, as noted above, there are a number of sections which would require amendment / deletion, one specific example would be Section 23C(1)(d): "*any other substantial factor which appears to the court to justify keeping the person in custody*." Sections worded this way as this seem inconsistent with a modern, evidence-led, objective and progressive model where bail is the default position.

The 'three-point test' outlined earlier would address the issue of evidence-based remand, and assist the decision making by Judges and Procurators Fiscal as they would only be using the three-point test in respect of coming to a 'Bail Opposed' position.

This model supports and enhances Section 23D of the 95 Act as the decision is based on the evidenced / assessed risk and not simply if the case is marked as solemn.

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.

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.

The need for "protection" implies that there is an assessed risk to a person or group of people in the community. In all cases where that is so, protection must be a paramount concern. Where there is an evidenced / assessed imminent risk of serious harm to victim(s) – using the three-point test proposed in our response to Q1 – Bail would not be an appropriate outcome in such cases. This should also be the case for all witnesses who may be affected and, in particular, those who are assessed as being vulnerable.

The crime type is irrelevant in this situation as the germane point relates to risk. This refers to both the likelihood (imminence) of a harm occurring and also the nature (impact) of that harm. The matrix of likelihood and impact is complex, circumstance-dependent and unique to the person at risk of harming others – particularly where the likelihood is low (i.e. not imminent as outlined above), but the harm may be high, e.g. domestic abuse cases. It is imperative that the best information is brought before the Judge to ensure that the suitability for Bail (including any risk to actual or potential victims & witnesses) is adequately assessed (by those best positioned to do so) and the narrative of this (including any specific risk considerations) is articulated in a way that is meaningful and accessible to the Judge.

On this basis, CJS would support option A where Judges should have to have particular regard to any evidenced need to protect victim(s) and/or witnesses where risk(s) have been identified.

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 – see also response to Q1 above

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.

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

CJS agrees with the proposed change.

The stating of reasons for granting or refusal of Bail (orally, in court) is already a matter of law (Section 24(2)(A) of the 95 Act) so arguably no legislative change is required to effect this. Section 2(B), and subsequent sections, then go on to describe what the various conditions are when someone is admitted to Bail and, in common practice, the person bailed has paperwork mailed to them to that effect, i.e. explaining the standard and any additional conditions.

The key to this proposal will be in defining what data requires to be recorded, the mechanism for doing so (including timescales) and any onward access to such data. CJS would support the development of standardised recording of specific data in such circumstances while seeking assurances that all safeguards in terms of fairness, data protection, judicial process, etc. underpin this.

The recording of this data will give a better understanding of why remand is imposed rather than bail as there is a current dearth of robust or consistent data capture in respect of this. If the proposal outlined in response to Q1 above is adopted, the Judge would record the primary reason(s) for bail refusal, e.g. evidence of imminent risk of serious harm and give a brief rationale as to why they thought it germane in that specific case. Beyond this, it would allow the opportunity for Judges to share an understanding of why bail would be refused in relation to the 'public interest'. It will be through the gathering and analysis of such data that improvements can be made to processes and service delivery.

While this would be a welcome development, it has some practical issues for the court and, particularly, judges. Decisions on bail are made in the Sheriff Court. In a busy custody court there can be dozens of decisions made on a daily basis. At present the only record of the reasons for any decision is what may be manually set down in a Sheriff's notebook or incorporated into a report to the Appeal Court. This is unsatisfactory in the modern digital age. This suggests either of two means to record the reasons for remand being imposed: enhance current arrangements or introduce new measures.

Currently, as noted, the reasons for refusal of bail are stated in open court orally. The proceedings could be recorded and, thereafter, the relevant part of that recording be annotated into a standard data capture format. This may seem onerous but has the advantage of having minimal disruption in the court as it is already part of proceedings and in virtual custody arrangements would require no further equipment to be installed. However, it requires resources to be created to implement such a model.

The other option would be for to court to contiguously note the decisions being made either directly by the judge or the Clerk of Court. Again, the use of hand-held technology could be deployed and standardised recording systems utilised to make the process as efficient as possible. The impact of this, however, is that it might interrupt the court proceedings or, in some way, add to the time needed each case to electronically capture what those spoken decisions are in court.

Question 5a

Based on the information above, when a court is considering bail decisions, which of the following options do you consider preferable…
…in cases where the prosecution *opposes* bail:
-The court ***may*** ask for information from social work, but is not obligated to. Social work ***may*** decide whether to provide it
-The court ***must*** ask for information from social work. Social work ***may*** decide whether to provide it
-The court ***must*** ask for information from social work. Social work **must** provide it

Please give reasons for your answer.

-The court ***must*** ask for information from social work. Social work ***must*** provide it
Please give reasons for your answer.

Social Work (as part of a local authority) are already legislatively obliged to provide reports to court when required. In terms of the Social Work (Scotland) Act 1968 Section 27(1)(a):

"***it shall be a function of every local authority…to [make] available to any court…reports relating to persons appearing berfore*** [sic] ***the court which the court may require for the disposal of a case***". The legislation does not make a determination in respect of the term "disposal", but this has been interpreted as meaning the final outcome of the court, including acquittal or when sentence is passed. However, any request would be at the discretion of the court and only when the Judge instructed for this to happen.

On that basis, the proposed changes to Section 23B(6) of the 1995 Act (as outlined on page 25 of the consultation document) would be welcome as it would ensure the court had the option to seek the view of the local authority (and Social Work as their proxy).

CJS would support the proposition that where COPFS oppose bail (as they are entitled to do in statute) then the court should be mandated to ask for information from Social Work to ensure that the most accurate and apposite information is available for the Judge as part of the court process. This differs from the actual wording of the current provision of 23B(6) and could be amended to reflect the need for the Social Work input whenever COPFS intimate bail opposed. In order for this process to function as efficiently as possible (and in the spirit of effective partnership working) there would be a need for COPFS to make available the rationale as to why the prosecutor has taken the decision to oppose bail.

However, such a change to the current system will require a significant investment in Social Work resources to provide such services. This would be in respect of physically-located court teams, community-based activity, training, development work in processes and procedures, etc. There are also links between this and other Social Work-led activities, e.g. EM Bail assessments, etc.

Consideration may also need to be given as to whether sections of the 1995 Act requires revision in respect of cases where people appear from custody (of whatever kind), e.g. Section 22A (2)-(4), 23(7), etc. (i.e. the court addressing the issue of bail on the day the case comes before it). The nature and importance of Social Work information in determining suitability for Bail (personal circumstances, public safety, etc.) is, in many cases, complex and time-consuming as the need to come to a defensible decision on suitability is critical. Accordingly, there may be circumstances which suggest that sections of the 1995 Act should be amended to allow for an extension of temporary custody arrangements – for the shortest time possible – to ensure that the best quality of information is placed before the Judge. This would only apply where specific questions or concerns about public protection were being considered and to not do so would compromise the making of a defensible decision, e.g. in some cases when considering assessments for Electronic Monitoring. There is no doubt that there are human rights issues which would need consideration before such measures could be implemented. Currently it is sometimes necessary to continue a bail application for up to 24 hours, but this is infrequent and not the 'go-to' decision for Judges. It is also different from some people being remanded for reports as this is post-conviction and not comparable to those who are innocent until proven guilty.

An information sharing agreement between COPFS and Social Work in so far as not in existence and an obligation on COPFS to inform Social Work of a decision to oppose bail in advance of any court hearing may allow for a more speedy production of relevant information to the court and reduce the need for continuations of hearings and any consequent unnecessary deprivation of liberty. For example, if the COPFS opposed bail on the basis the person failed to attend court previously, this could be addressed in any support plan by agencies in the community.

The enhancement of Social Work roles in these processes brings questions of capacity. The most obvious of this would be in terms of Local Authorities – and in particular those who have courts within their geographical boundaries- would have to have adequate resource available to them to ensure additional processes can be sustainably implemented. However, even if there was an adequate level of resource to undertake the actions outlined, the assessment of risk, as previously described, is a time-consuming activity which must be done to the required standard.

There is also a question of capacity for CJS in the role of national trainer as this would impact both the delivery of training products and the development of policy and protocol to support such.

Question 5b

Based on the information above, when a court is considering bail decisions, which of the following options do you consider preferable…
…in cases where the prosecution *is not opposing* bail:
-The court ***may*** ask for information from social work, but is not obligated to. Social work ***may*** decide whether to provide it
-The court ***must*** ask for information from social work. Social work ***may*** decide whether to provide it
-The court ***must*** ask for information from social work. Social work **must** provide it

Please give reasons for your answer.

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

CJS suggests a variation to the first proposal outlined above. In cases where the prosecution is NOT opposing bail and the Judge is considering the imposition of further conditions ((S.24(4)(b)) to support compliance with standard conditions of bail, the position should be– similar to CJS response at Q5a – that the court should be mandated to request Social Work information in respect of bail suitability and the support arrangements in the community if the person is granted bail.

'Bail Supervision', in which Social Work is the lead agency, is not a statutory function for local authorities as there is no specific underpinning legislative mandate to undertake the activities which are commonly expected by the court when asking for such. The national guidance for Bail Supervision is currently being revised but, in essence, it is about monitoring and supporting people who have particularly complex needs which, if appropriately supported, would help the person adhere to the standard conditions of Bail.

Where the Judge is considering the imposition of further conditions, it is critical that those personal circumstances, etc. of the individual appearing before them – as compiled by Social Work – detail any vulnerability or complexity and, particularly, on the nature of support the person would require in the community.

This amended proposal would ensure that in such circumstances, the Judge is afforded the opportunity to make a more informed decision when granting bail (with whatever conditions they deem necessary) which would ensure that people, where appropriate and necessary, are afforded the support they need.

In some cases, COPFS does not oppose bail but makes a recommendation for further conditions to be imposed if bail is granted in order to reinforce specific aspects of bail, e.g. imposition of a curfew, etc. In this case, where the request is generated by COPFS and the Judge takes consideration of this, the above should also apply in such circumstances. Community-based restrictions, which might be necessary to allow the person to be bailed and remain in the community, should require an assessment of the full circumstances of that individual, e.g. in domestic abuse cases, whether the home environment is one which might sustain a curfew condition without causing further harm, etc.

If consideration is being given to a greater involvement of Social Work in the Bail process as outlined above, then there needs to be a similar focus on resources required to support 'Bail Supervision' and while Social Work are the lead agency, this is an activity that must be a priority for local Community Justice Partnerships (or locally named equivalent structures) as the support required for people with multiple complex needs is whole system in nature, i.e. it requires a coordinated local response from local community justice partners and agencies.

In addition, the same issues as noted in response to question 5a, in respect of CJS capacity apply to this response.

Overall, if the ethos of S.24 is to be realised (all offences being 'bailable') then there requires to be a much greater focus on how people are supported during the period of bail in the community – irrespective of the specifics of bail they are made subject to. Where required, people need to be supported to ensure that they attend court as directed, keep appointments, attend for treatment, etc. – and all levers of change should be used to introduce mechanisms of this nature across Scotland, e.g. peer mentoring, tailored support packages, nudge technology, etc. To negate this means that the cycle of bail / breach / custody will not be impacted upon and people will be 'trapped' in the justice system.

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.

Strongly agree

CJS strongly agrees with this.

Electronic Monitoring (EM), at its most basic, is simply a technology that tells you when a transmitting bracelet is near the monitoring station or not (Radio Frequency: RF) or where that bracelet is located during the curfew hours (GPS system).

If the court requires to consider EM as a measure to assist someone to adhere to bail conditions, it implies there is an issue for that person in doing so (otherwise standard bail would be granted). Logically, that person will require additional support in order to comply. Research shows (e.g. 'Iriss Insights 40: Electronic monitoring in the criminal justice

System' (Graham & McIvor 2017), available online https://www.iriss.org.uk/sites/default/files/2017-11/insights-40_0.pdf) that the use of technology alone does not assist with compliance, but when used as an adjunct to other forms of support, e.g. personal mentoring, etc. can optimise the use of EM as part of a package of measures to ensure adherence to bail conditions, i.e. the application of an Electronic Monitoring Order (EMO) would be most effective with additional support.

The nature and scope of support people are currently afforded varies across the landscape of bail – of which there are four circumstances (two current and two proposed):

- Standard bail
- Standard bail with an EMO
- Standard bail with further conditions
- Standard bail with further conditions and an EMO

Standard bail
Requirement to comply with the conditions of bail laid out in S.24(5)(a-e) of the 95 Act. There are no universal support provisions made specifically for people subject to standard bail.

Standard bail with an EMO
As new EMOs become an option for courts, they can run in conjunction with standard bail conditions. A breach of the EMO is not an automatic breach of bail conditions (work is ongoing in this area). The level of support is the same as noted above.

Standard bail with further conditions
The involvement of justice social work (and partners), e.g. through Bail Supervision means that regular contact and assessment address outstanding needs presented by the person on bail. This facility is now available in most local authority areas (to varying degrees) but is significantly underused in the majority of courts in Scotland. Work is ongoing to improve this situation.

Standard bail with further conditions and an EMO
If an EMO is imposed in conjunction with further conditions, and those involved being supported by justice social work (and partners), this would appear to be the optimum as EM is known to be much more effective if the necessary support is aligned with it.

In summary, the court should not only consider the issue of imposing an EMO, but also the nature of support required and available to that person if bail with EM is granted.

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.

Strongly agree

CJS strongly agrees with this proposal.

The court should not 'feel' anything in such cases, it should be guided by the available evidence of bail suitability.

If the court were of the view that the imposition of an EMO was not appropriate, for whatever reason, then they should record the rationale for this in writing (see earlier comments and suggestions of how this be done). That record should be made available to appropriate people and agencies involved in the process. If the proposal in Q6 is accepted then this links directly to Q4 earlier in this consultation in which Judges should record their rationale when refusing bail.

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.

Strongly agree

CJS strongly agrees with this proposal.

As in other responses in this consultation, it seems illogical that such a provision is not universally available in all parts of the UK.

The current position that someone on remand can have that time taken into account if sentenced to custody is a strong driver for some people not to seek bail but to spend time on remand to 'start' their sentence, i.e. they are presuming that they will receive a custodial sentence in any event. The Court has regard to time on remand and will usually back date any custodial sentence but if someone has acted in such a way to bring about remand then the Court may be justified in not backdating.

S.325 of the Sentencing Act 2020 (England & Wales legislation) provides an extremely complicated equation which determines the amount of time a person will have their time in custody abated based on the time they were subject to EM on bail. In essence, this would appear to equate to ½ a day of rebate for every day on EM bail (with caveats and exceptions). Given that in many (or even most) EM curfew arrangements the restriction will be a considerable period of the day, it would seem equitable that for every day spent on EM Bail, the person was afforded a ½ day of off-set if they receive a custodial outcome. While this general position could be the default, there is a need to review the specific circumstances in cases, e.g. an exception to this could be where the EM has a 'stay-away' requirement. In all cases, the Judge should record their rationale as to why any rebate was, or was not, applied in any particular case.

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.

Strongly agree – See answer to Q8

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.

As noted earlier in this response, there are a number of concerning aspects of the whole of section 23 of the 1995 Act in terms of wording and other issues. In particular, Section 23C(2) lists a number of "material considerations" that require to be considered prior to Bail being granted. Use of terms such as "substantial" and "the character and antecedents of the person" are, at best, unhelpful if they have no evidential / research base to support them – they may be prejudicial and disregarding of trauma.

The importance of this is further accented by this section of the 1995 Act being the critical one used by COPFS at the case marking stage to determine whether they will oppose Bail and also used as the basis for, latterly, how this is presented to the Judge in open court.

The Scottish Sentencing Council (SSC) document "Principles and purposes of sentencing: Sentencing guideline" (2018 – page 4) lists the five purposes of sentencing that may be considered as:

- Protection of the public
- Punishment
- Rehabilitation of offenders
- Giving the offender the opportunity to make amends
- Expressing disapproval of offending behaviour

When considering matters of remand, public protection is the key determinant in this case.

However, it also advises - in a sixth purpose - that to achieve the appropriate purpose of a sentence, the "*the efficient use of public resources may be considered*".

While it is recognised that a decision to remand is not a sentence, it would seem appropriate that a court should consider the 'sixth purpose' relating to the efficient use of public resources at all points in proceedings. Remand, and in particular short-term remand, would be at odds with this purpose because it is often not an efficient use of public resources where the issue of public protection is not present.

There is considerable data to show that, consistently, women on remand account for one-quarter of the female prison population, and only one-third ultimately receive a custodial sentence ('The Scandal of Remand in Scotland: A Report by Howard League Scotland' May 2021, available online at https://howardleague.scot/news/2021/may/scandal-remand-scotland-report-howard-league-scotland-%E2%80%93-may-2021).

In addition to this, work undertaken by Scottish Government's Justice Analytical Services indicate that there is a spike in release from remand at the 14/21 day stage when people are back in court.

Between 2014 and 2017, in solemn proceedings, 70% of remand cases resulted a custodial outcome, whereas in summary proceedings it was 43%, i.e. 57% of remand cases did not attract a custodial outcome [1].

[1] https://www.parliament.scot/S5_JusticeCommittee/Inquiries/R-SCTSsupplementary.pdf

At this juncture, the Scottish Government's research into the implementation and efficacy of the Presumption Against Short Sentences (of less than 12 months: PASS) is not available due to delays as a result of the pandemic. Whilst there is anecdotal reporting, there remains no robust data in respect of PASS other than the fact that some people are still being made subject to custodial sentences of less than the intended 12 month threshold. CJS supports the idea that where COPFS decides to proceed by way of Summary Complaint there is - or should be - a presumption against custody and therefore bail should not be opposed. However, it remains the case that certain circumstances, e.g. domestic abuse cases, where the individual circumstances of each case would require particularly detailed process and scrutiny with regard to the suitability of bail, etc.

In terms of Young People in the justice system, this issue becomes even more acute. This area has been widely researched and CJS are of the view that young people should not be in remand unless there is specific reason for this, namely an assessed / evidenced risk of imminent harm to people or groups in the community. Even in cases where remand is deemed necessary, young people should only ever be remanded to secure care establishments. The evidence to support this is long-standing and consistent – most of which can be found in the literature produced by the Children and Young People's Centre for Justice (CYCJ)) ('Use and Impact of Bail and Remand With Children In Scotland', CYCJ (2020)) available online at https://cycj.org.uk/wp-content/uploads/2020/12/Bail-and-Remand-in-Scotland-final-report-1.pdf)

Question 11

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

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

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

Strongly agree

Despite the positive gains made across Scotland in relation to children in conflict with the law in the last decade or so, more than one-third of children who come into contact with formal justice in Scotland are still prosecuted in court, rather than being referred to the Children's Panel, and the percentage of children held on remand in a Young Offender's Institution (YOI) has been increasing, and stood at 82% in September 2021.

UNCRC Article 37 states that children must not be deprived of their liberty unless they pose a serious and imminent risk of harm to themselves or others. However, in Scotland some children who do not pose such a risk are incarcerated in YOIs, either on remand or after sentencing. For example, research shows (As described in the evidence submission to the Justice Committee by CYCJ in relation to secure accommodation for children https://archive2021.parliament.scot/S5_JusticeCommittee/Inquiries/SCCYP-CentreForYouth.pdf) that, in some cases, judges remand children for low-level offences or minor breaches of bail, rather than because of serious risks posed by the child. This both breaches UNCRC Article 37 and does not constitute a proportionate limitation on the child's right to freedom under ECHR Article 5. The European Court of Human Rights has made the particular point that pre-trial detention of children should only be used in the most exceptional cases, stating that:

"…a very important factor… is the defendant's age: thus pre-trial detention of minors should be used only as a measure of last resort and for the shortest possible period."

S.24(1) & (2) of the 95 Act states a presumption for bail as the default – CJS would suggest there is scope for a 3rd provision in S.24 that particularly refers to those under 25 by specifically highlighting / reiterating bail as the presumption for this group of people.

This would not apply to those who are assessed as presenting an imminent risk of serious harm to others – where this is the case, children should be remanded to secure care and not a custodial establishment. The principles outlined in the recent publication by the Scottish Sentencing Council (SSC: August 2021) should be adopted when dealing with young people whereby the process must "encourage sentencers to consider which sentence would have the best impact on the physical and mental wellbeing of the young person." (page 71) as the impact of remand on young people is significant. The Scottish Sentencing Council (SSC) guidance for judges ('Sentencing young people: Sentencing guideline', available online at https://www.scottishsentencingcouncil.org.uk/media/2171/sentencing-young-people-guideline-for-publication.pdf) - which came into effect in January 2022 (viz. sections 15 – 22) – outlines the need for careful consideration when sentencing people under the age of 25. Notwithstanding that the decision to remand is not, of itself, a sentence but an outcome of court, CJS would suggest that the premise of these sections of the guidance, when seeking information and the 'appropriate' outcome at court, should apply to decisions regarding bail / remand.

CJS would also suggest a revision of S.49(1) of the 95 Act so that rather than have a procedure whereby a person under the age of 18 (who is not subject to any supervisory order, etc.) is proceeded against in the adult justice system despite ultimately the judge having discretion to remit the case back to the Children's Hearing System (CHS), a young person in those circumstances is directly referred to the CHS at the point of case marking. Not only would this keep the young person out of the adult justice system and help them address their issues, but would also free-up court time which, currently as a result of the pandemic, is at a premium. The exception to this, of course, would be where there is an assessed / evidenced imminent risk of serious harm to another.

Question 12

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

- Strongly agree

- Somewhat agree
- Somewhat disagree
- Strongly disagree

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

Strongly agree

It is acknowledged that periods of remand have a negative impact on people and families. Beyond this, the imprisonment of an adult care-giver (be it a custodial sentence or remand) is a recognised Adverse Childhood Event (ACE) and is proven to have a deleterious effect on children. CJS does not oppose the use of custody where it is merited, particularly where there is a public protection issue, but the whole justice system needs to take account of the wider picture of general impact and retain a focus on how to break the cycle of and patterns of offending. The key to long-term change lies in early and effective intervention which includes efforts to ensure that children are not exposed to ACEs – and in particular not system-delivered ACEs.

CJS would support a greater focus on children and family impact assessments when consideration is being given to a custodial outcome for parents / carers of children.

Question 13

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

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

Please give reasons for your answer.

Strongly agree

While this section of the consultation begins the focus on post-sentence custodial matters, CJS would reiterate a range of other options contained in previous CJS papers submitted to the Scottish Government which outlined community-based alternatives to custody, e.g. Enhanced Combination Orders, the introduction of suspended sentences in Scotland, etc.

Research indicates that what aids desistance from criminality is rooted in personal, familial and community-based relationships, i.e. the stronger and more meaningful these connections are, the more likely desistance is likely to occur.

These relationships are not only difficult and/or impossible when a person is in custody, but they are available and best served when the person is in the community. This is not to say that custody does not have a role to play in the wider justice system, but if the overall goal is to lessen the number of victims and heal the harm done by offending, then it would seem more logical and worthwhile to invest resources into where the relationships of desistance can flourish and contribute to the wider system outcomes.

CJS-commissioned research shows that assisting people back to their community as early as possible is an effective way to restore connections and consolidate relationships

(Report on the Anticipated Increase in Prison Populations: An Overview of Key Issues (Dr J. Gormley 2021, copy available from CJS on request)

On that basis, CJS would strongly support the proposal that enabling someone to serve part of their sentence in the community can help their reintegration – but only if that process is fully supported from pre-release and through into the community with adequate resourcing.

Question 14
What mechanisms do you think should be in place to support a prisoner's successful reintegration in their community?

The following would support successful reintegration:

- A clearer and consistent focus by partner agencies on person-centred planning and preparation for a person's return to their community which starts from the point of incarceration (particularly for those serving short-term sentences)
- Lawful information-sharing processes based on assessed levels of both risk and need
- Adequate and appropriate resourcing of the return-to-community process which is standardised across the whole of Scotland
- Inter-agency focus on the needs of children and families to support the return-to-community process
- Accountability and scrutiny mechanisms to support, review and enforce the effective functioning of return-to-community processes at both local and national levels

Question 15

Do you agree that through good behaviour, or completing education, training and rehabilitation programmes, prisoners should be able to demonstrate their suitability for …
a)…early release?
Yes / no / unsure
b)…the ability to complete their sentence in the community?
Yes / no / unsure

Please give reasons for your answers.

Early release and/or the ability to complete a sentence in the community should be predicated, primarily, on the basis that the person does not represent any imminent risk of serious harm to others in the community. If the person, while in custody engages in behaviours and activities that are positive and productive towards their rehabilitation then account should be taken of that when any decision on either option is being considered.

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?

For such a system to function effectively, two elements would require to be in place:

1) an assessment of risk and needs which informs both the level of risk the person presents and identifies any needs which the person will require support with, and

2) an assessment of the impact of any education, training and/or rehabilitation programmes undertaken – not just that they have attended such activities, but how the learning from this has embedded in terms of attitude, responses and behaviour

If such a scheme were in place, the eligibility criteria would be wide to ensure as many people as possible were given the opportunity to demonstrate their compliance, learning and personal development. Clearly, those who present as an imminent risk of serious harm would be excluded.

The primary risks would be who would undertake what type of assessment and the scale of those assessments being done. Also, authority would require to be given within the system to allow early release to happen for these reasons. There is precedent with this as Depute Governors do so with HDC, etc.

Question 17

Which of the following options in relation to automatic early release for short term prisoners would you say you most prefer?
- Automatic early release changes to earlier in the sentence, but the individual is initially subject to conditions and monitoring, until the half-way point
- Automatic early release changes to earlier in the sentence, nothing else changes
- No change: automatic early release remains half way through the sentence

Please give reasons for your answer.

None of these options are preferable, however the consultation necessitates a selection of one. This is an unsatisfactory approach to a complicated issue.

None of these options present a complete and viable approach to automatic early release that would in and of itself improve the process or result in improved outcomes for people. The first option is not doable from a resource point of view – apart from which, if the objective of "conditions and monitoring" is simply to get people to comply, then there is a real risk that all this will do is simply clog up the court system with breach applications. If there was a greater focus on, and resourcing of, the Throughcare process for people being released from short-term sentences and the bullet points in Q14 response above were implemented, then there might be consideration for such a scheme. However, 'support' cannot be mandated or foisted onto people, it must remain as a choice for the person to accept, or not, that assistance. On the basis of the above, CJS would not prefer any of the options as currently stated. CJS would, however, support earlier release on the proviso that better support and access to services was an integral part of that process.

However, it is critical how victims who have been harmed perceive such timescales in terms of 'early' release? This begs the question about a more pro-active role for Restorative Justice (RJ) at an appropriate juncture in this whole process to ensure victims have the opportunity to be engaged – on the clear basis that it is victim-led and that the person who caused harm also engages within the ambit of RJ.

Question 18

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

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

Please give reasons for your answer.

- 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

CJS would support the first two options.

Given the response made earlier in relation to desistance and support for the return-to-community process, it would seem logical where no imminent risk of serious harm has been identified and other determinates of lower risk were assessed as being protective factors, consideration by the Parole Board at an earlier stage may contribute to the overall progress towards desistance. While it is less problematic to consider particular offence types where there is no directly definable individual victim (e.g. shoplifting), the presence of harm to a specific victim (or group of such) brings a more complex dynamic into play.

On balance, where there is no direct impact on a specific victim, it would be appropriate, with regard to the above, for the Parole Board to give consideration to release on licence at a much earlier junction.

On the issue of consideration for release on licence at the 1/3 period of the sentence by the Parole Board, it is necessary to review how such a system operated previously.

The Prisoners and Criminal Proceedings (Scotland) Act 1993 introduced the mechanism that people serving long-term sentences should be released on licence – automatically – at the 2/3 stage. This was colloquially referred to "Non-Parole" licence – an erroneous title as the people were, indeed, subject to the conditions of Parole. The volume of cases which were reported back to the Parole Board and, thereafter, recalled to custody was significant. In 2015 the Scottish Government repealed that part of the 1993 Act via the Prisoners (Control of Release) (Scotland) Act 2015, which reduced the period of automatic release for those serving long-term sentences to six months before liberation (with some offence-specific considerations).

In the same regard, the proposed option for the Parole Board would, in effect, be revisiting earlier legislation but invoking a period of 2/3 of a long-term sentence being subject to Parole conditions in the community. For many people this would be of significant benefit as it allows the return-to-community processes of reintegration to begin much earlier and the opportunity to start the desistance journey much quicker than at present. However, the conditions where such circumstances are given consideration would rely heavily on a range of factors, e.g. the assessed level of risk, the presence of robust protective factors, victim safety considerations, etc. – all of which the Parole Board currently and regularly base their decisions.

On balance, where the factors outlined above are professionally and robustly assessed, CJS consider it would be appropriate, for the Parole Board to give consideration to release on licence at the 1/3 stage.

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?

Yes

CJS agrees with the principle behind this proposal.

SPS currently release 40% of people in custody on a Friday as no release occurs at the weekend. Provision is made for specific circumstances regarding this form of early release e.g. (public holidays, etc.) in the Prisoners (Control of Release) (Scotland) Act 2015. This means that 60% of releases are spread across the first four days of the working week, i.e. on average 15% per day Monday to Thursday.

The 2015 Act also allows for people to be released up to two days before their 'earliest date of liberation' in order to access community supports. Section 2 of the 2015 Act defines the situations in which this early release can be applied for and the material circumstances are considered by the Scottish Prison Service (as a proxy for Scottish Minsters as noted in the Act) as to whether to grant early release or not.

The reality of this, since the introduction of the 2015 Act, has been that there are very few applications for this form of early release made and the few applications that were made were by Local Authority Justice Social Work. SPS recognise themselves that the process for this type of early release does not work well and, aside from the very limited applications, there are technical and process issues. Data is limited, however anecdotal accounts imply a prevailing form of logic which surmises that if someone already has support from local agencies then they do not 'need' early release, whereas if someone does not have support, there is no obvious incentive in releasing them early

Given that a significant proportion of people serving short-term sentences do not avail themselves of the reintegration support services in many prisons (and the complex and varied nature of such), waiting until a Friday to release people in this group gives them no chance to access services in the community at that juncture.

There requires to be a whole system approach to addressing this matter. Firstly, it would rely on consistent quality services delivered to required standards being available in both the custodial estate and in the community to support the return-to-community processes. It would also require that, due to the needs of individuals in custody, Thursday release should be the default (i.e. no releases on a Friday) and, where there are particular issues of needs complexity, that in some cases there should be provision for the option of release on a Wednesday.

There is, potentially, a risk that Thursday would, by default, become the 'new Friday' in terms of volume of releases, i.e. it absorbs the 40% plus the 15% that is already liberated that day, and this is why the option of Wednesday release also needs to be retained. Notwithstanding, if someone is released in advance of a Friday and they recognise that they are, indeed, in need of assistance when back in the community, they have a better chance of accessing such over the Thursday / Friday.

If the 2015 Act was to be amended to reflect the 'week' of release rather than the specific date, an assessment could be made of the person's circumstances and allow a flexibility for release on a Monday (for those who are in need of greater support and engaged with support mechanisms) through to release on a Thursday (for those who are not engaged with services) as this latter release would still accommodate access to community-based services before the weekend.

Specific consideration needs to be made in respect of some of the geographical challenges that arose during the 'emergency early release' which occurred under the Coronavirus (S) Act 2020. Experience shows that there were substantial difficulties for some people when returning to rural and remote areas, e.g. ferries not running services to the isles, etc. It is critical that, while numbers are not large, equity of service is provided to those whose homes and communities are in remote and island areas (as noted in the Islands (Scotland) Act 2018).

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.

No, HDC (as defined under S.3AA of the Prisoners and Criminal Proceedings (Scotland) Act 1993 / Management of Offenders (Scotland) Act 2005) should be an automatic consideration for all people in custody. HDC should not be about category, length of sentence and/or crime type. HDC should be an automatic inclusion process that people need to be 'opted-out' (on the authority of the Deputy Governor at the Risk Management Team meeting) when such is deemed not suitable and the decision for this reported back to the person (where safety matters do not preclude this).

Criteria for unsuitability should focus on:
- Ongoing appellant status
- Assessed / evidenced as presenting an imminent risk of serious harm
- Where there is an assessed / evidenced risk of intimidation and/or harassment of specific people / groups
- Where other factors indicate that a period of HDC would not be of benefit to the person, e.g. non-engagement with support services, community-based services not in place, etc.

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.

Be made longer

CJS would support a lengthening of the time period. The arbitrary nature of the current time period being 6 months / quarter of the sentence duration has no evidential basis and appears discriminatory (as it limits opportunity because of sentence length). Similar to the suggestion made earlier in the consultation re: parole consideration, it would seem congruous that HDC should follow this and allow HDC to begin, in all cases, at the 1/3 stage of the sentence being served. Notwithstanding the criteria laid out in response a) above, this would give people the best opportunity to become involved, at the earliest possible juncture, with return-to-community processes.

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:

Yes
Notwithstanding that no-one should be serving a three month sentence (PASS guidance), CJS would support this being removed for the same reasons set out in response b) above with the same criteria outlined in order to support return-to-community processes

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:

Yes
CJS would support the revision of the exclusion list. As stated in response a) above, the rejection criteria should be based not on crime type but on the four points outlined therein.

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:

Unsure
If the suggestions at response a) above were implemented that would mean the reasons to opt-out of HDC would be based on consideration of the four criteria. Currently, the decision lies with SPS as part of the Risk Management Team process which, in most cases, is chaired by the Deputy Governor of the establishment. This is a multi-disciplinary team where key agencies are represented and key information is presented from a range of sources. To answer the consultation question posed depends on two key issues:

1. Does the RMT function as it is intended to and does it do so consistently across the prison estate?
2. Is the quality of the risk assessments / information which are presented through the RMT process of sufficient depth and quality to make defensible decisions about return to the community?

If this is not the case then a revision is required of the RMT process to establish when and by whom the decision on HDC refusal is made. The current Thematic Review being

undertaken by HMIPS may present findings that will mean we are better placed to answer these questions and improve the HDC process.

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.

No. HDC is not a function of parole (and, therefore of Parole Board Scotland: PBS) and it is not determined exclusively by the risk the person presents as there are many other factors which require to be tested through the HDC process (risk being only one of them). There is a real question around capacity regarding the volume of work that would be generated by PBS taking HDC decisions for people serving under four years if such a scheme were implemented.

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.

This already happens, to a degree, in a number of cases, e.g. extended sentences, 'punishment part' of life sentences, etc. at the judge's discretion – which are, in the main, all longer-term sentences. Asking a judge to consider this for short-term sentences, at the point of sentencing, does not seem logical as the person, when in custody, will be able to access support mechanism across a range of interventions and opportunities, e.g. therapeutic group work, education, etc. Requiring a judge to determine not only custody, but also the process and timing of rehabilitation for someone, is possibly a role conflict on the basis that judges do not, in the main, consider post-sentence rehabilitation. It could be argued that this may be the case in 'punishment' parts of life sentences, extended sentences, etc., but the judge does not determine or detail 'how' that rehabilitation should be undertaken – to do so in this context might be a conflict with one of their primary roles as sentencers.

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.

Somewhat agree

All information sharing must be lawful, i.e. the processing is both necessary and proportionate, and adhere to the rules and regulations of both the Data Protection Act 2018 and the General Data Protection Regulation (GDPR).

Regarding the question posed in the consultation, in order to share personal and sensitive information (e.g. risk issues) in a lawful way without the free, fair and informed consent of the data subject requires a legislative mandate, i.e. it is a public duty of a statutory agency to undertake this. In all other cases, it requires the data subject's consent.

When considering if information should be shared with 3rd sector agencies, the first question must be the purpose of doing so (the why) before considering what information should be shared (the what).

If the purpose is to support victims – the term 'support' being around general welfare of that person, i.e. where no assessed imminent risk of serious harm is present – the information required at this juncture, for this reason, is the release date of the data subject. It would seem entirely logical that an extension of the Victim Notification Scheme could be made to accommodate this. As the VNS is 'victim-activated' there would require to be a revision of how this operates in order to review if it is currently meeting the needs of the people it is intended for with regard to this function, e.g. it should be an 'opt-out' system.

If the purpose is to allow for safety planning to take place, it would be incumbent to assess what (if any) risk is posed by the data subject, i.e. it is necessary to assess the level and nature of any risk. If the risk assessment indicated that there was a defined risk to people/persons in the community (subsequent to the data subject's being released) then this would require some form of victim safety planning. Safety planning is, by nature, a multi-agency activity calling on the resources of a range of partners in the community and, in this particular scenario, would require to be undertaken prior to the data subject's liberation.

On that basis, it would seem logical that where an assessed level of risk indicates potential harm occurring that SPS take the lead on initial coordination of victim safety planning as the data subject would still be under their auspices in custody. There is already precedent for this with Category 3 of the MAPPA process – the primary difference in this situation (and why MAPPA processes cannot be used for this purpose in the vast majority of cases) being that the data subject would not be subject to any licence in the community, which means no ongoing intervention with the data subject. While there is currently no legislative mandate for SPS to undertake this role as outlined, there may be scope to amend legislation to allow this.

Currently, the Prisons and Young Offenders Institutions (Scotland) Rules 2011, Paragraph 130 states that, as part of pre-release preparation, SPS can: "*At an appropriate time before a prisoner is released from prison the Governor shall discuss, or arrange with some other person to discuss, with that prisoner the immediate needs or welfare issues of that prisoner upon release*." A small amendment to this section would allow SPS to have the legislative mandate to lawfully share with appropriate partners information that would support the data subject by ensuring that their release was as safe as possible, which would include ensuring that those at risk from them had appropriate safeguards in place through the victim safety planning processes.

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.

Somewhat agree
See response to Q21 above

Question 23

Which of the following best reflects your view on public service's engagement with pre-release planning for prisoners?
- Existing duties on public services to give all people access to essential services are sufficient to meet prison leavers' needs
- Existing duties are not sufficient; public services should have a specific duty to engage with pre-release planning

Please give reasons for your answer.

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

CJS would support elements of the second statement.

The CJS Outcome Activity Annual Report (OAAR) has, for a number of years highlighted that current service provision and local delivery of services do not meet the needs of people through the scheduled pre-release planning for prisoners. There are noted deficits in respect of accommodation, health treatment transfer, access to DWP benefits, etc. which occur across Scotland by varying degree. The planned pre-release process within SPS, Integrated Case Management (ICM) is, when dealing with people serving short-term sentences, largely absent across the prison estate and, where there are processes, they are inconsistent. Part of this relates to the actual functioning of ICM, but also is not well served by community-based responses and the state of preparedness of agencies to support people returning to their community.

Notwithstanding the above, the sufficiency of existing duties is not the question, it is the application, governance and scrutiny of these duties which lies at the heart of effective processes for returning people to their local areas. Again, this has been reflected on many occasions and identified by CJS as being an area for improvement for all local authority areas in Scotland - in particular how both the structure of the community justice model and the legislation that underpins it is not robust enough to effect the necessary changes.

On the question of public services having 'a specific duty' to engage with pre-release planning, this is already a legislative mandate for Local Authorities. Section 27(1)(ac) of the Social Work (S) Act 1968 states: "*the provision of advice, guidance and assistance for persons who are in prison or subject to any other form of detention*…". On that basis, it is unclear how further duties, *per se*, would lead to the necessary service provision and delivery improvements.

Beyond this, only incorporating 'public services' in this regard, runs the risk of excluding the 3rd Sector as key partners that, presently, deliver myriad diverse services across Scotland. However, the services delivered by 3rd Sector partners are not coordinated across Scotland and access is, in the main, geographically limited. In considering the role of 3rd sector, there requires to be a concurrent discussion about the model and sustainability of funding arrangements for those 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.

See response to Q23 above – it is not about another duty, it is about the enforcement, compliance and monitoring of existing duties that partner agencies are currently required to undertake. (see also Q14 response)

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.

Strongly agree

CJS would strongly agree with this proposal.

As noted in our earlier responses re: Bail, etc., the volume of people who are released directly at court (from remand) is considerable. On that basis it would seem logical to offer some form of support within the court premises in terms of supporting both the person's immediate needs, e.g. bus or train fares, etc., and also some form of link to appropriate services in their locality (which may not be where the court is located). While this service would require to be universal in provision and standardised in nature (i.e. in every court) it needs to be noted that it is a voluntary offer and take-up rates will vary.

Currently there is an information sharing agreement (ISA) between SPS and the 32 local authorities which updates, on a weekly basis, information on people (who reside in those local authority areas) that have entered custody (including those on remand) in the last seven days and who are scheduled for release in the next three months. Unfortunately, due to the immediate nature of remand release at court, this ISA – although a significant development in information sharing across Scotland - cannot account for these specific circumstances.

Another aspect of this is when people are liberated in such circumstances – and they are known to present a risk in term of child, adult or public protection - the ongoing transfer of information to protection services at a local level is not an established nor robust process. Notwithstanding the responses earlier regarding information-sharing, the need for risk-

related information sharing where there are live child, adult or public protection issues is a critical one that would form part of any revision of services and processes in this arena.

For these reasons, CJS are of this view that this is a significant issue not only in terms of ongoing support for individuals, but also a gap in the protection mechanisms in relation to harm, e.g. child protection, domestic abuse, etc.

Question 26

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

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

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

Strongly agree

CJS would strongly agree with this proposal.

Beyond the question of minimum standards, CJS would suggest that there requires to be a root and branch review of the Throughcare provision across Scotland as the current processes are uncoordinated and do not meet the needs of the people it is intended for – those serving long and short-term sentences.

Notwithstanding, the end-to-end process of Throughcare is whole system in nature and requires many agencies to come together to address the complex needs of people returning to their communities to ensure that the range of services can be appropriately accessed to deal with not only practical issues (e.g. accommodation, DWP benefits, etc.) but also health needs (e.g. access to psychiatric services, prescriptions, etc.) and support for their well-being (e.g. access to children, family, inclusion, etc.).

CJS would support minimum standards for Throughcare and that partner agencies are also included in this to ensure that those returning from custody to community have the same provision of service wherever they are in Scotland. In doing so, local authority area statutory partners must come together to coordinate and 'reach into' prisons to bring members of their own communities home in order to avoid what can be a postcode lottery of support and reintegration.

If the involved agencies are statutorily required to adhere to the principles outlined in the Q27 response below it is not necessary to define the role of each agency.

It would be more effective to define the nature of scrutiny and accountability which exist in respect of Throughcare services at both the local and national levels.

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.

Strongly agree

CJS would strongly agree with this proposal

If any revised minimum standards adhered to our previously outlined principles, there would not be a requirement to differentiate between people who are in custody for remand, short or long-term sentences. To do so may inadvertently create inequitable systems based on relatively arbitrary distinctions rather than person-centred assessment of need and risk. In designing the minimum standards, consideration must be given to potential implications of conviction status and sentence length in accessing Throughcare services, and data should be gathered to improve implementation and evaluation of standards and services, but primacy should be given to a principle-based approach.

The principles are:

- A clearer and consistent focus by partner agencies on person-centred planning and preparation for a person's return to their community which starts from the point of incarceration (particularly relates to those serving short-term sentences)
- Lawful information-sharing processes based on assessed levels of both risk and need
- Adequate and appropriate resourcing of the return-to-community process which is standardised across the whole of Scotland
- Inter-agency focus on the needs of children and families to support the return-to-community process
- Accountability and scrutiny mechanisms to support, review and enforce the effective functioning of return-to-community processes at both local and national levels

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.

Strongly agree

CJS would strongly agree that any minimum standards should be statutory.

Current provision already has some statutory functions (e.g. as outlined in S.27(1)(b)&(c) Social Work(S) Act 1968 for Local Authorities, etc.) in relation to post-custodial support, but this is not the case for most justice system-based agencies.

The imposition of a statutory function (or functions) on the currently defined eight community justice statutory partners would ensure that they were required to deliver,

specifically, Throughcare-based services that were of a particular standard which could be measured and, where necessary, improved.

However, although the Community Justice (S) Act 2016 clearly states a range of activities local justice partners require to undertake, it is clear that – despite the legislative duty – this work is not always undertaken and, when completed, is delivered to varying standards across Scotland. Even though there is a legislative requirement there is no guarantee that required action will occur.

While there is no lack of enthusiasm to see the community justice model work well for people, it is clear that in some areas coordinated activity, at a local and national level, in respect of Throughcare remains a challenge and particularly where it deals with people returning from short-term custody. The nature of Throughcare means that, intrinsically, it requires a whole system approach including support for accommodation, drug, alcohol, mental health issues to highlight a few of the problems people present with.

If there is to be a statutory element to the application of minimum standards, it would seem appropriate to review how those would be scrutinised both at the local and national levels. As CJPs are not a body corporate nor established in legislation, the statutory duty would fall onto the eight individual partners. This issue begs the question if the CJP was, indeed, a statutory requirement itself, then the mandate for the coordination of local services would be much stronger and lend weight and credibility to mechanisms of accountability which are not as strong as they could or should be presently.

It is also difficult to envisage how such a duty could be placed on 3rd Sector partners as they are, by nature, a disparate collection of agencies – and the 3rd sector are critical partners in the delivery of Throughcare services, again, particularly for those serving short-term sentences.

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?

Yes

CJS would support changes to the way Throughcare support is delivered.

First, it is necessary to delineate the systems of support in Scotland.

For someone serving a long-term sentence (4 years+), at the point of entry to the SPS estate they are allocated a social worker from the area in which they have ordinary residency. This is an established mechanism which is underpinned by the Integrated Case Management (ICM) system operated by SPS in conjunction with prison-based and community-based social work. However, this system does not function as efficiently or as effectively as it should and this is why HMIPS are currently undertaking a review of the ICM and other processes (due to report later this year).

People serving short-term sentences are not allocated a social worker from their local authority area (with a few legislative exceptions, e.g. people subject to Supervised Release Orders, etc.) and are not, in the vast majority of cases, involved in the ICM processes. Support is offered by local social work services (commonly referred to as "voluntary Throughcare" or "aftercare" – a statutory requirement IF the person asks for that service) and by 3rd sector partners through a few different models targeting specific populations, e.g. the SHINE project for women.

While the national ISA referred to earlier (between SPS and 32 local authorities) has made some impact in this, there remains no systematised or consistent mechanism to ensure that everyone returning to the community has, at least, had the offer or is able to access support services to help with their return home.

CJS would suggest that the system requires national coordination with the delivery of services being delivered locally via the CJP.

Such a model would also look at the issues around people being liberated from remand directly from court and explore what systems could be put in place to help people transition back to their communities as this is currently a significant gap in process and service delivery.

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?

Yes
See responses to Q27, Q28 & Q29

Question 31

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

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

Please give reasons for your answer

Somewhat agree

CJS would somewhat agree with this but with the necessity of specific measures being in place.

At the most basic level it seems illogical to have an Executive Power of Release (EPR) in one part of the UK and not all. However, Section 32 of the Criminal Justice Act 1982 in England is so heavily caveated (through Schedule 1 Part 1 of that Act) through the very specific offence-type restrictions that it would be difficult to see how this would be of any great use in the event of it being necessary.

The Scottish example from 2020 (under the Coronavirus Act (S) 2020) of EPR allowed for a broad spectrum of people to be released but excluded specific categories of conviction, e.g. those convicted of sexual offences, etc. – which was commented on when the matter was discussed in the Parliament. The process was further complicated through requiring SPS Depute Governors at individual establishments have a veto on release which was based on 'other' information being available which informed the Depute Governor's decision to release (or not). However, the process of release for those c. 350 people was viewed as being a success as local areas reacted effectively by putting in place exceptional measures as a response to the emergency release. Unfortunately, the vast majority of those released under these measures were soon back in the system and/or custody.

While CJS support the concept of EPR as possibly being required in specific circumstances, it would only do so if that power was applied with equity and fairness and underpinned by two specific factors:
1) there would require to be an appropriate level of support in place for people being released under EPR, and
2) any veto of release was only deployed on the basis of imminent risk of serious harm to people / groups in the community, i.e. not done by type of conviction as noted in the Scottish example and section 32 as outlined above.

While not directly related to EPR as such, the other power utilised under the Coronavirus (S) Act 2020 was a variation of unpaid work orders – specifically a 35% reduction across the board (with a few particular exemptions based on offence type) in an effort to ease pressure on social work services by reducing the unprecedented backlog of accrued hours due to the impact of the virus and Scottish Government social distancing requirements. There is merit in considering this as a potential statutory function alongside EPR as an action of last resort.

Question 32

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

Please provide details.

It is almost impossible to define specific individual circumstances where an EPR could be used, however, the principles should be:

- Where there is imminent and significant detriment to people in custody if they were to remain there
- Where it would contribute to the safety and wellbeing of Scotland