

## **Bail & Release from Custody Consultation**

### **Risk Management Authority Submission**

#### 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.

#### Response:

We would agree with this proposed change which indicates a shift towards a presumption for bail rather than refusal. This would support more effective use of remand, which as noted by Malloch (2013) “*internationally, evidence shows that remand is one of the most counterproductive uses of prison*” (p.15). The Justice Committee: Inquiry into use of remand in Scotland (2018) also highlighted that remand levels in Scotland are high, and that the use of remand may be particularly high given the high proportion that don’t go onto receive a custodial sentence; “*71.1% of accused remanded in solemn proceedings in Sheriff Courts (2014-17) received a custodial sentence. 42.82% of accused remanded in summary proceedings over the same period were given a sentence of detention*” (p.6). They also highlighted a concerning use of remand for women.

As highlighted throughout our response to this consultation we would stress the importance and relevance of evidence based and proportionate risk assessment and management informing defensible decision making and discussions around public safety. We would suggest that decisions around whether an individual should be granted bail should consider two aspects; does the individual pose a risk to the public and, if so, what can be done to safely manage the risks posed. In relation to manageability, the Framework for Risk Assessment, Manageability, and Evaluation (FRAME) (Risk Management Authority (RMA), 2011) indicates that the degree of management should be proportionate to the degree of risk posed, and that the degree of intervention should not exceed (or indeed fall short of) what is necessary to address the assessed risk. We emphasise the importance of proportionality in relation to any decision relating to risk and manageability in that we must respond to risk sufficiently and in a manner that is respectful of rights and is evidenced-based.

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.

Response:

Victim safety planning measures should be a part of any consideration on manageability of risk. It is a set of risk management activities where attention should be drawn to the safety of specific individuals or groups who may potentially be victimised, with a view to devising preventative or contingency strategies (RMA, 2011). We would emphasise that the degree of management, whether this be in the form of victim safety planning or other types of risk measures (i.e. supervision, monitoring, and/or intervention) should be proportionate to the degree of risk posed.

In response to later questions we emphasise the role of considering if an individual may present a risk of serious harm. The definition of risk of serious harm is *“there is a likelihood of harmful behaviour, of a violent or sexual nature, which is life threatening and/or traumatic and from which recovery, whether physical or psychological, may reasonably be expected to be difficult or impossible”*. This definition is not referencing the specific victim(s) as each individual experiences will be different and influenced by a multitude of factors. Rather this definition asks assessors to consider what might be reasonable expected in terms of the potential impact on the likely victims, which is informed through risk assessment. As such victim information and protection should be an important component within decisions regarding risk and manageability (i.e. public safety). As stated in FRAME (RMA, 2011) *“collaborative and effective risk management requires a commitment to including all relevant parties appropriately: agencies, the victim and their representatives, and the individual”* (p.36).

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.

Response:

If this relates to removing Section 23D of the Act – which relates to certain offences and presumption again bail – then we would support the use of a simplified legal framework. This should be about proportionate and evidence-based decision-making rather than offence-specific decision-making.

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.

Response:

Within FRAME one of the key foundations and principles related to communication of risk. Within this there are key principles relating to transparency and consistency; stating that *“transparency and inclusiveness require clear, meaningful communication...the language of risk must be shared and understood”* (p.14). Recording of decisions should promote transparency in decision-making and can be responsive to the needs of victims, individuals, professionals and the public. Having decisions presented orally and recorded in written form supports communication both at an event but also post-sentencing where it can be referred back to for purpose of clarity. It also supports defensible decision-making, which as Kemshall (2008) states includes decisions being recorded, communicated and thoroughly evaluated. We would suggest that the most desirable outcome would be for decisions to be recorded in all instances as opposed to just in cases of refusal.

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.

Response:

Our wider response to this consultation focuses on the role of risk assessment in underpinning these decisions. As such, information from social work is crucial. In order for defensible decisions to be reached all reasonable steps must be taken, reliable assessment methods must be used, and information must be collated and thoroughly evaluated (Kemshall, 2008). Therefore to consider these decisions on bail, in the context of decisions based on risk and manageability, there must be social work contribution.

#### 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
- **Unsure**

Please give reasons for your answer.

#### Response:

As highlighted throughout this response the level of assessment conducted should be proportionate to the presenting concerns. As such there may be instances where it is clear that there are no potential indicators of serious harm and therefore further information is not required from social work. However if bail decisions are to be based around risk and manageability then the appropriate level of assessment should be used to inform these decisions not solely when opposing them. Our responses to the later questions in this consultation will explore the idea of depth of risk assessment in more detail.

#### 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.

#### Response:

We acknowledge that electronic monitoring is one alternative to remand and as highlighted by Tata (2015a), *“it seems strange that we resort to custodial remand when electronic monitoring is available as a means of control which is less stigmatising, allows the maintenance of relationships, employment, training, and is far less expensive”* (p.11). Therefore when considering someone’s suitability for bail or bail supervision it would be advisable for the courts to have electronic monitoring as a consideration regarding manageability. As such we would suggest that electronic monitoring should be approached as a potential risk management strategy that can be used when it is assessed as potentially relevant and proportionate to manage the identified risk(s). We would hold the position that it is level of risk and manageability that drive the decisions regarding suitability rather than specific offences. It would be defensible for consideration to be given to all appropriate community alternatives to remand and for decisions to be based on risk and manageability, and then recorded and communicated following the decision.

### 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.

### Response:

As indicated under our response to Question 4 we would support the recording of decisions both orally and in written form. As a matter of course this should include a summary of why the disposal reached was considered suitable and proportionate to the identified risk and manageability.

### 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.

### Response:

We have no response to this question.

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.

Response:

We have no response to this question.

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.

Response:

Prison should be used as a last resort and, as discussed in our later responses, in relation to those individuals who present an assessed risk of serious harm. Based on this, we would support the proposal that remand should not be used if there it is not likely or realistic that the individual will go onto receive a custodial sentence. Alternatives to remand should be used where it is clear that an individual does not present a risk of serious harm.

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?

Response:

As indicated in our response to other questions, decisions on granting bail should be underpinned by risk and manageability. Age is a legitimate consideration in relation to risk. The age-crime curve is one of the most consistent findings in studies of offending (e.g. Farrington, 1986) and indicates that whilst offending rates can peak in teenage years, many individuals then stop offending in their early 20s. As such the justice system should be designed to support early ages as much as possible with even more emphasis placed on

seeking alternatives to custody. Remand decisions can have significant consequences for young people, including deprivation of liberty and the resulting knock on effect onto relationships and support (Van den Brink & Lubow, 2019). Furthermore the same study, and the Youth Justice Board (2021), have indicated that young people who are remanded into custody are more likely to receive a custodial sentence after conviction. There is also significant evidence that remand disproportionately affects young people who already have a marginalised position in society (Goldson & Kilkelly, 2013; Nowak, 2019). Decisions taken on young people should be responsive to their stage of development, acknowledging their ongoing brain development, and proportionate to the assessed risk and manageability.<sup>1</sup>

### 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?

### Response:

We have no response to this question.

### 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.

### Response:

We would agree with this proposal above and would see risk assessment and management planning throughout an individual's journey from custody through to release into the community as central to this process to support successful reintegration. There are a number of key mechanisms that we consider relevant to supporting an individual's successful reintegration into their community –

- Risk assessment and management

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<sup>1</sup> For specific consideration of the use and impact of bail and remand on children in Scotland access the 2020 publication by the Children and Young People's Centre for Justice (CYCJ). Available here - [Use and impact of bail and remand with children in Scotland \(strath.ac.uk\)](#)

- Throughcare Services
- Quality Assurance
- Effective Supervision
- Partnership-working
- Desistance Factors
- Resource Management

For more information and details on the areas above please refer to our response to Q14 of this consultation.

#### Question 14

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

#### Response:

There are a number of key mechanisms that we consider relevant to supporting an individual's successful reintegration into their community –

- Risk assessment and management
- Throughcare Services
- Effective Supervision
- Partnership-working
- Desistance Factors
- Quality Assurance
- Resource Management

#### Risk Assessment and Management

Throughout an individual's journey from custody through to release into the community, risk assessment and management planning is required to support successful reintegration. This should include identifying and targeting specific and relevant individual needs and the design of services based on aggregated risk and need profiles of the relevant offending population.

Risk assessment and management within Scotland is underpinned by the policy approach detailed in FRAME, with the aim of having: *"A consistent shared framework that promotes defensible and ethical risk assessment and management practice that is proportionate to risk, legitimate to role, appropriate for the task in hand and is communicated meaningfully"* (p.10). This policy was developed by a wide range of justice agencies in Scotland and includes key principles and approaches that should underpin effective risk assessment and management. The guiding principles are –

- Balancing rights – risk assessment and management should be cognisant of the competing rights of victims, individuals who offend, and the public, whilst promoting humane, ethical practice, effective interventions and public protection.
- Proportionality - the depth of risk assessment should be commensurate to the level of concerns, and the degree of risk management should be proportionate to the degree of risk posed. It is unethical to impose a degree of intervention which exceeds that necessary to address the assessed risk, and equally it is unacceptable in terms of public safety to fall short of the indicated level.

- Collaboration – risk assessment and management should be collaborative activities in relation to working with other professionals, within teams and with the individual who is the focus of attention.
- Evidence-based practice – an evidence-based approach draws on the best available research evidence, valuing the knowledge and experience of the practitioner, is concerned with the values and engagement of the individual, and measures and reports on outcomes.

Risk assessment itself should also be a structured process which follows the key elements of identification, analysis, evaluation and communication to determine the risks/needs present to then outline how these can be addressed and safely managed within the community (Standards & Guidelines for Risk Management; RMA, 2016). This includes gathering and evaluating information, analysing the relevance of information in relation to an individual's risk, evaluating this against the relevant risk criteria (dependent on the purpose of a risk assessment) and then communicating the outcome of this meaningfully to relevant parties.

Risk management should follow from and be informed by risk assessment and is the set of activities needed to minimise the likelihood or degree of harm to others. It should be composed of supervision, monitoring, intervention and victim safety planning strategies, and where there is a risk of serious harm, a contingency plan.

In order to support reintegration it is fundamental that there is adherence to the core Risk-Need-Responsivity (RNR) model (e.g. Bonta & Andrews, 2017) with the intensity of service corresponding with risk level, targeting of criminogenic needs and adaptation of the style and mode of service according to relevant characteristics. Evidence from Bonta and Andrews (2007) has demonstrated that when all three principles are evident in a rehabilitation programme average recidivism differences are found. They reported differences between the treated and non-treated individuals who have offended of 17% when delivered in residential/custodial settings, and 35% when delivered in community settings. Furthermore, they report an accumulating effectiveness of treatment when there is increased adherence to each of the core RNR principles.

Recent findings from the Care Inspectorate (2021a) report on justice social work practice in throughcare within Scotland suggests adherence to the risk principle, with high correlations found between identified risk/needs and the intensity of supervision. Previous findings from the Care Inspectorate (2014) – who explored assessment and case management in criminal justice social work – suggested there may be variability around adherence to the need principle in Scotland, findings from this report noted a need for greater consistency in assessments of risks, needs and strengths and to ensure these factors are addressed appropriately in case management plans. Findings from the 2021 Care Inspectorate throughcare report recorded variability in the quality of LS/CMI assessments of risk and need and the associated case management plans, with under half rated as good or better. The report notes that “*plans were often not sufficiently focused on the individual’s risks and needs in a community setting*” (p.7), it is suggested that some of this variability could be attributed to lengthy delays in receiving the record between prison to the community. Additionally, the 2021 report advised that the management of risk was a “*significant strength*” and that risk management plans were of a consistently high standard.

## Throughcare Services<sup>2</sup>

Fundamental to the success of reintegration and desistance from offending is the continuity of care from prison to the community. This should be underpinned by proportionate and evidence-based risk assessment and management. It should also adhere to the RNR principles, and as highlighted by the Scottish Government (2015), *“Report of the Ministerial Group on Offender Reintegration”*, should identify areas of risk/needs as early as possible in an individual’s sentence. This is try and ensure co-ordinated and holistic throughcare support is accessible, particularly for those with complex or multiple needs (Community Justice Glasgow, 2020). Key findings from Bramley et al’s (2019) study on severe and multiple disadvantage reported *“the fundamental inability of local and national service systems to address the needs of people who present with a range of complex and interacting needs, especially if accompanied by the challenging forms of behaviour that often manifest in people coping with the long-term effects of sustained trauma...”* (p.32). As noted by Malloch (2013) *“ensuring services are available and accessible at the point when a service user is ready to make changes in their lives was a point that practitioners considered to be important”* (p.8). It has previously been suggested by the Ministerial Group on Offender Reintegration (2015) that *“there is a plethora of support and services provided to support those leaving custody that often work in a 9-5 culture which often does not sit well with the sometimes chaotic lifestyles of the services users they are targeting. This may need to be more flexible if we want to provide the most effective support targeted at individual need”* (p.7).

Flexibility and ‘timeliness’ of service response, particularly for those with severe and multiple disadvantage, ensures that services are available to support the individual at the point they are ready and motivated to change and engage in treatment rather than experiencing delays which could mean the opportunity for progress is lost (Bramley et al., 2019). Holistic interventions that address multiple criminogenic needs are more likely to be effective, even more so for women and young people, in reducing reoffending (Sapouna, Bisset, Conlong & Matthews, 2015). Sapouna et al., (2015) go on to say that continuity and consistency of service provision with appropriate sequencing of services should be intrinsic to this.

National Outcomes and Standards for Social Work Services in the Criminal Justice system were updated in 2010 (Scottish Government, 2010a). This update was intended to provide a clear *“framework for professional accountability, supported by strong governance and leadership, towards the outcomes of community safety, justice and social inclusion”* (p.6). It was intended that that these standards would be kept under review and developed on the basis of further research, practice experience and policy. A range of supplementary guidance was published in support of these standards in relation to court reports and community supervision. However, the guidance in relation to throughcare has not been updated since 2004 (Scottish Government, 2004). Aspects of this guidance are inconsistent with the 2010 standards and subsequent developments in policy and practice.

Throughcare issues around access and availability of service provision has previously been identified as impacting on desistance from offending (Scottish Government, 2015). Challenges outwith justice social work have been identified as impacting on throughcare. This includes access to safe and suitable accommodation on day of release and access to funds, as well as barriers in accessing mental health services (Care Inspectorate, 2014). Those with lived experience note that *“timely access to mental health provision and purposeful use of time were viewed as key for reducing the likelihood of recall”* (Care Inspectorate, 2014, p.4). These issues will be even more acute for those who have served short term prison sentences and are subsequently released with statutory or voluntary throughcare in the community as they tend to have higher and more complex needs (Malloch, 2013).

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<sup>2</sup> Access to and availability of throughcare services in Scotland can be assisted by the Community Justice Scotland online provision. Available at – [Community Support Services - Community Justice Scotland](#).

Provision of services to address needs such as housing, substance abuse and mental health are important to supporting an individual's successful reintegration into the community. Housing was identified as the most frequent issue for service users involved in the Throughcare Support Service (TSS) (Reid-Howie Associates Ltd., 2017) and a recent survey carried out to inform the Prevention Review Group reported nearly half of prisoners reported losing their accommodation whilst in custody (Dore, 2019). Evidence from Dore (2015) suggests that barriers to housing are most acutely felt by those on remand, very short-term sentences, homeless on entry to prison, or by women. Further to this Dore (2015) noted *"multiple studies suggest that providing temporary accommodation in hostel-type accommodation is rarely appropriate and increases the likelihood of reoffending"* (p.5). Although accommodation does not have direct impact on reoffending it is considered a necessary condition for reducing reoffending and supporting the individuals desistance journey (Sapouna et al., 2015).

There have been attempts made to address issues around housing for those leaving custody with the introduction of Sustainable Housing On Release for Everyone (SHORE) standards. These standards look to ensure that the housing needs of individuals in prison are handled at an early stage, in a consistent way across Scotland, regardless of geography. There is a recognition within these standards that stable accommodation reduces the likelihood of reoffending and in line with desistance theories one of the principles is *"stickability – persevering when the individual chooses to disengage"* (p.7). Although these principles are seen positively it has been suggested there is a long way to go until implementation of these (Dore, 2019) and the findings on the implementation review of SHORE standards is currently underway.

Problems with drug use have frequently been reported by those within custody, with over 40% of respondents to the 2019 SPS Prisoner Survey stating drug use was a problem for them in the community, and 4 in 10 advising they would take help offered to them either in prison or in the community (Carnie & Broderick, 2019). Evidence from the "what works" report highlighted that reduced or stabilised substance misuse through appropriate addictions support, is an important factor associated with reduced chances of reoffending (Sapouna et al., 2015). Furthermore, respondents to the Scottish Drug Deaths Taskforce (SDDT) Report on Drug Reform (2021) *"agreed incarceration seemed ineffective at breaking cycle of addiction and repeat offending however community-based sentence that address both drug use and offending behaviour in conjunction with one another could be more effective"* (p.9). Respondents to this survey also noted that current drug legislation remains a barrier to providing a public health approach due to the continued focus on incarceration. Perhaps a new approach is needed to support successful reintegration and to avoid punitive and ineffective incarceration particularly for drug related crimes at the point of sentencing. A multi-faceted public health approach such as that adopted by Portugal back in 2000 may be the way forward. The results have been very encouraging with a dramatic drop in overdoses, HIV infection and drug-related crime (Ximene, Oliveira, & Lameria, 2021). In tandem with legislative change, Portugal also developed harm reduction structures and supports that allow for psychological assessment to inform appropriate psychosocial interventions.

The contribution of Throughcare Support Officers (TSO) within the Scottish Prison Service in assisting those leaving custody has been recognised (e.g. HMIPS, 2020) and the overall finding of the evaluation of this service (Reid-Howie Associates Ltd., 2017) was deemed to be very positive, both in terms of the views of the service and its impact. The TSO role is primarily to engage the service user prior to, on and after release to complete an individualised plan and to advocate and enable the individual to engage with appropriate services and supports. Those eligible for this service are those serving short-term sentences and who are not covered under other arrangements such as SHINE, New Routes or statutory supervision. The strengths of this service in providing a structured, planned and co-ordinated approach which

allowed flexibility and a commitment on “not giving up” on people was noted. Findings also indicated increased motivation and self-efficacy among service users to support their desistance journey and “*the importance of gate pick-up was stressed frequently*” (p.24). It was acknowledged that it was too early to reach definitive conclusions about the impact on desistance and longer term outcomes such as reintegration and reoffending. The TSO service was suspended in September 2019 due to the increased prison population and pressures from COVID-19, SPS advised that the service would relaunch “*when it makes operational sense to do so*”<sup>3</sup> however this service still remains paused. There have been calls for this to be reinstated at the earliest opportunity, the recent HMIPS report (2020-21) noted that “*In all establishments the absence of the TSO role was keenly felt during the pandemic. While there are services providing throughcare support, the absence of the TSO was perceived as a significant gap in provision at a crucial time*” (p.25).

Another relevant model of throughcare was the PSP model adopted in HMP Low Moss, this was deemed to be effective due to the staffing model, co-location and the duty system which was seen as a key difference that enabled a “*responsive and person centered service*” (Low Moss Public Social Partnership, 2020, p.3). Over the course of 2016-19 it was noted that over 400 cases were successfully completed. It was also noted that at the core of the PSP approach is a mentoring service which provides a full assessment of need to then inform an individualised care plan with work starting early on in the sentence and a continuity of worker between prison and community. This supports the earlier statements made regarding the significance of early assessment of risk/needs to develop an individualised management plan to ensure continuity of support and care. The evaluation of the PSP model (Low Moss Public Social Partnership, 2020) indicated improvements in personal outcomes and a reduced level of incarceration for those who accessed this service in comparison with the general prison population. This service ended in April 2020 with mentoring services being delivered through the New Routes Public Services Partnership (PSP), this has since been expanded to a national throughcare support service for men, which has been supported by an increase in investment to £3.7m in 2020-21.<sup>4</sup>

The New Routes PSP is a mentoring relationship which aims to develop motivation, attitudes and life skills and address the individual’s criminogenic needs. Males over the age of 16 years who are serving short-term prison sentences and who are not engaged with other throughcare support services are eligible and support starts 6 months pre-release and up to 12 months after release. Over 4000 people have been worked with since this began in 2013 and findings indicate that over 70% of customers have evidenced improvements in their situations.<sup>5</sup> Another national throughcare mentoring service, specifically provided to women, is SHINE which is provided as a PSP delivered by Sacro.<sup>6</sup> This has been operational since 2013 and is available across Scotland with the latest SHINE Annual Report for 2018-19 reporting “*69% of service users seeing five or more outcome improvements*” (p.3).

### Effective Supervision

The necessity of on-going clinical support for practitioners to ensure adherence to the RNR principles has been evidenced by Andrews and Bonta (2006) who reported the effectiveness of treatment delivered in the real world is about half of the effect of the experimental, demonstration program. In order to address this Bonta, Rugge, Scott, Bourgon and Yessine (2008) developed the Strategic Training Initiative in Community Supervision (STICS). This

<sup>3</sup> Wilson, L (2021). Holyrood article titled ‘*Prison throughcare programme remains closed months after temporary suspension*. Available from <https://www.holyrood.com/news/view/prison-throughcare-programme-remains-closed-months-after-temporary-suspension>

<sup>4</sup> Answered by Justice Secretary Humza Yousaf on 2<sup>nd</sup> December 2020 as part of written questions and answers (Question ref. S5W-33343). Available at – [Written question and answer: S5W-33343 | Scottish Parliament Website](#)

<sup>5</sup> Presentation on the The New Routes PSP. Available at – <https://socialworkscotland.org/wp-content/uploads/2020/02/New-Routes-1219.pptx>.

<sup>6</sup> Available at – <https://www.sacro.org.uk/services/criminal-justice/shine>

training was found to be particularly relevant with regards to the content discussed within supervision sessions with positive effects on recidivism being found. Bonta et al., (2008) found a 25% recidivism rate for clients whose probation officers had received STICS training in comparison with nearly 40% for those untrained (with a mean follow up time of 2 years).

The importance of social bonds and supervisory relationships, as supported by a What Works Review (Sapouna et al., 2015) and RNR model (e.g. Bonta & Andrews, 2017), is also supported by the recent Care Inspectorate report (2021b) whereby people involved with statutory supervision benefited from a consistent and respectful relationship which was seen as transformative. Furthermore, a recent evaluation of the large scale implementation of STICS across British Columbia by Bonta, Bourgon, Rugge, Pedneault, and Lee (2021) demonstrated similar findings with lower recidivism rates for those with STICS trained officers (43%) in comparison with untrained officers (61%). They also advised “*addressing procriminal attitudes/cognitions in supervision sessions with clients and the use of cognitive interventions were particularly important in the reduction of recidivism*” (p.5).

It is important to acknowledge that there has also been research in this area that hasn't established a link to reduced recidivism. A recent Swedish study by Sutton et al., (2020) evaluated the implementation of Krimstics (a variation of STICS) and although they found increased adherence to RNR principles, they also noted that this had no effect on recidivism after a 24 month follow up period. They acknowledged that limitations that may have impacted on the results in terms of the use of a non-experimental method and the final reduced data sample.

### Partnership-working

Partnership working is essential to the assessment and management of risk and the “*degree of communication, co-ordination and collaboration will be commensurate to the risk and complexities of the case*” (RMA, 2011, p.78). As highlighted by the recent Criminal Justice Committee (2022) report there is a lot of work being undertaken in isolation, which needs to be co-ordinated. Partnership working, particularly with regards to active and alert risk management for those who pose a risk of serious harm, should involve clear and effective leadership with appropriate governance and accountability structures in place to support this (RMA, 2016). A key issue outlined in Malloch's (2013) report on effective throughcare was whether strong relationships existed between statutory and third sector agencies. It was suggested that Link Centres within prisons were useful for building relationships across agencies particularly to develop a shared understanding of roles and remits. The recent Care Inspectorate report (2021b) on justice highlighted the benefits of collaboration between community partners and criminal justice social work to try and overcome barriers for those upon release, e.g. securing accommodation. Further to this, Community Justice Glasgow (2020) recognised that co-ordinated working relationships across public and private sector partners allowed for early release planning for those subject to emergency COVID-19 release powers. As advised within Bramley et al., (2019) a whole systems approach is needed for those who have experienced severe and multiple disadvantage with collaboration and co-ordination at all levels.

A shared language of risk is also an important aspect of partnership working, FRAME acknowledges the importance of a shared understanding of the language of risk and an understanding of the roles and responsibilities within a multi-agency context. Furthermore, Community Justice Glasgow (2020) noted that “*regular, shared communication is also central to good working relations*” (p.4). The use of shared language and agreed definitions supports clear and meaningful communication across professional disciplines (RMA, 2016). Issues arise where multiple risk levels with differing definitions are used to discuss risk within multi-agency forums therefore, it is important that strategic working groups e.g. the MAPPA

Strategic Oversight Group are in place to support agreed and consistent risk definitions to aid in defensible decision making.

### Desistance Factors

The stigma experienced by those involved with the justice system can also create an additional barrier to reintegration into the community which can impact on the likelihood of individuals asking for help or accessing services (Scottish Drug Deaths Taskforce, 2021). The Stigma Strategy by the Drug Death Task Force (2020) recognised the importance of stigma as a key underlying component of the current drug death crisis. Research suggests that individuals who offend who feel a welcomed part of society are less likely to reoffend compared to those who feel stigmatised (Sapouna et al., 2015). Related to this Armstrong, Chistyakova, Mackenzie, and Malloch (2013) recognised that *“those with sexual offences often experience stigma and marginalisation within local communities when they are identified as a direct result of their perceived risk as well as a degree of uninformed community prejudice”* (pp. 76-77). Circles of Support & Accountability by Sacro<sup>7</sup> acknowledges that social isolation and loneliness are key factors in increasing the risk of reoffending. Those at high risk of committing further sexual offences are eligible to volunteer to be part of a circle with trained volunteers who create a supportive social network which acts as an additional component to risk management arrangements. The review of Fife Circles of Support by Armstrong and Wills (2014) noted that of the four men within the study none as yet had been reconvicted. There were issues highlighted with regards to a lack of male volunteers, unstable financial arrangements and the provision of on-going training. Armstrong et al., (2008) highlight the difficulty with isolating the role of a community-based approach such as Circles on individuals who offend behaviour given *“the community is not just the setting of ‘treatment’ it is also an agent and target of change”* (p.70). However, they note that emerging research mostly from Canada indicated lower general reoffending rates for those involved in circles.

To support successful reintegration we also need to understand recall policies and whether these processes take account of the journey to desistance which Tata (2016) advises is not linear with lapses/relapses as an inevitable part of this. As such, he proposes that the way we approach breaches in the community should be looked at with increased use of electronic monitoring instead of custody for those who have difficulty complying (Tata, 2016). Furthermore, Weaver, Tata, Munro, and Barry (2012) acknowledge the importance of understanding “early release”, recall policy and legislation as part of the *“wider context of the politics of sentencing...release on license and subsequent recall are also forms of re-sentencing”* (p.86).

### Quality Assurance

Effective reintegration is assisted through quality assurance such as on-going clinical supervision and self-evaluation which occurs at the practitioner, agency and multi-agency level to ensure the quality of assessment and management practices (RMA, 2016). A key component in quality assurance relates to organisations responsibility to ensure practitioners involved in risk assessment and management are adequately and appropriately trained (RMA, 2011). Research evidence suggests that when practitioners are well trained and exhibit ‘core competencies and practices effective outcomes are more likely to be achieved (RMA, 2011). Further evidence from the recent Care Inspectorate Report (2021a) indicated a need for a clear learning and development pathway for staff with throughcare responsibility. As recommended by Bramley et al., (2019) a lot can be achieved through workforce development and service design.

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<sup>7</sup> Available at – [Circles of Support and Accountability | Sacro](#)

As part of the training we provide to justice social work in 2019 we introduced a post-training requirement for trainees to compile an RMP on a real 'live' case. This was aimed at supporting transfer of learning into practice following the training. We found that training itself, whilst it has significantly improved knowledge and confidence over the past 5 years of delivering it, was not leading to sufficient quality in post-training RMP's. However our process was such that we allowed participants to re-submit following feedback on the strengths and developmental points. This led to an extremely significant improvement in the quality of RMP's at point of resubmission; emphasising the importance of processes like peer support and quality assurance.

### Resource Management

All of these themes are underpinned by an understanding of the wider resourcing issues, current pressures and funding arrangements for statutory and non-statutory services involved in supporting an individual's successful reintegration. The suggested approaches above require adequate resourcing and funding and an appreciation of the increased impact on community based justice services, particularly justice social work. Recent CJSW statistics (2019-20) advised that the commencement of statutory throughcare cases have remained around 1000 cases for the last 7 years but fell to the lowest (910 cases) in 2019-20 with voluntary throughcare accounting for around 2000 cases (Scottish Government , 2021a). Social Work Scotland (SWS) raised concerns within their Justice Submission (SWS, 2019, p.5) on the 2020-21 budget that *"the actual cost of delivering CJSW services in line with National Outcomes and Standards for social work services in the criminal justice system and associated Scottish Government practice guidance... statutory community supervision (e.g. Throughcare services both during a prison sentence and post release) has not been accurately costed this century."* SHINE note that referrals have risen 10% from the previous year and that the current funding arrangements present challenges. Short-term funding arrangements, particularly for third sector agencies, make longer term planning and provision of services more challenging (Malloch, 2013).

Recent statistics published by Scottish Government (2019) noted that statutory throughcare accounted for an estimated total expenditure of £9.4m of the overall £112.7m ring-fenced funding provided to CJSW. This equates to an estimated £9000 unit expenditure in comparison to over £37,000 per prisoner place therefore, the evidence base is clear that community-based interventions are more effective in reducing reoffending and appear to be more cost effective than incarceration. There is a need for a national approach to throughcare to enable successful reintegration which does not lie with any single agency and is somewhat dependent on wider social justice issues such as poverty, inequality etc. (HMIPS, 2020). As advised by the recent Criminal Justice Committee (2022) report a whole-systems approach should be adopted which looks at what is provided, allocation of funding and how this can be improved in terms of efficiency and effectiveness.

### 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.

Response:

We would agree with the proposal above that individuals should have the ability to ‘earn’ the opportunity for earlier release or to serve the remainder of their sentence in the community, based on an approach that is underpinned by individualised risk assessment. As the consultation notes *“such an approach would balance the continuing need to punish an individual through loss of liberty, with flexibility for a positive response to dynamic efforts by the individual in custody to the reasons why they committed their offence”* (p.37).

There are a number of key themes/areas that we consider relevant to this question -

- Risk assessment and management including LS/CMI
- Role of prison
- Challenges with current prison model
- UK and international examples of penal policy

Risk assessment and management

Decision making should be risk based and therefore needs to be underpinned by proportionate and evidence-based risk assessment and management from admission to custody onwards, to assess whether the individual continues to pose a risk of serious harm. Risk of serious harm is defined within the RMA Standards & Guidelines for Risk Management (2016) as *“the likelihood of harmful behaviour, of a violent or sexual nature, which is life threatening and/or traumatic, and from which recovery, whether physical or psychological, may reasonably be expected to be difficult or impossible”*.

In addition, because risk is dynamic it means that assessment needs to be an ongoing process with risk assessment being subject to regular review, so that any significant changes from the time of sentencing and throughout an individual’s time in custody are appropriately captured and evaluated in relation to risk.

Defensible risk-based decision making involves applying the fundamentals of risk practice outlined earlier within our response to Q14 in terms of the principles of FRAME (RMA, 2011) and adherence to the Risk-Need-Responsivity model (e.g. Bonta & Andrews, 2017). The focus within custody would be on supporting individuals to reduce and/or manage their risk of serious harm with methods such as individual supervision pathways being used to target indicators of risk of serious harm. The role of prison based social work in relation to this process would need to be explored further, with the model of supervision taking into account the literature on effective community supervision models (e.g. STICS, which was outlined previously in more detail within our response to Q14).

Balanced risk assessment that considers relevant risk and protective factors should also be incorporated into this process to provide meaningful opportunities within custody for individuals to build their assets, strengths and protective factors. FRAME (RMA, 2011, p.22) defines strengths as *“...positive characteristics or circumstances that can make an individual more resilient to adverse circumstance, and predispose towards or encourage non-criminal behaviour and/or help to promote desistance from further offending.”* Protective factors are defined as *“...circumstances, relationships or characteristics that have a mitigating effect on risk of serious harm. When present, they act to prevent or interrupt the occurrence of an episode of potentially seriously harmful behaviour; as such they have an important role in risk management”* (p.23). A constructive and balanced approach to risk management planning should also focus on *“promoting positive change”* (RMA, 2016, p.9). Whereby *“...decisions*

*are transparent, accountable, proportionate, balanced and holistic...*” in which “...*the rights of the individual are more likely to be upheld*” (RMA, 2011, p.35).

The consultation notes “*eligibility for such processes could be restricted, either by excluding certain types of prisoner, or through individual assessment*” (p.37). We would have concerns about eligibility or exclusion for potential community release being determined by offence type exclusively, rather than on the basis of risk. As indicated we would advise that decisions around release into the community are based on the assessment and management of risk of serious harm. This would also involve reviewing the case management model within custody to ensure there is co-ordinated and holistic throughcare support in place prior to release into the community to address the identified areas of risk and needs to reduce the likelihood of further offending and support successful reintegration (further details on throughcare suggestions can be found in our response to Q14).

The consultation question suggests that “*good behaviour*” could be used to demonstrate an individual’s suitability for release into the community however, using a shared language of risk which supports the understanding of those involved would be advised (RMA, 2011). Terminology similar to that of “*good behaviour*” was previously adopted as part of the probation order legislation (Section 229 of Criminal Procedure (Scotland) Act 1995) which stated that the individual requires to comply with such requirements “*conducive of securing the good conduct of the offender...*” this was subsequently replaced by the Community Payback Order (CPO) legislation in which the commission of a new offence was not an automatic breach (as noted in Kirk V.HM Advocate (2012)).

As highlighted within FRAME (RMA, 2011) the language of risk must be shared and understood, if an evaluation of risk is against subjective or unclear decision making criteria such as being of “good behaviour”, this could cause misinterpretation and misunderstanding across various agencies. As outlined within the evaluation stage of the risk assessment process within the Standards & Guidelines for Risk Management (RMA, 2016) the decision making criteria will vary depending on the purpose of the risk assessment and the circumstances and context of the individual. Defining the decision making criteria to enable consistent and defensible decisions would be necessary and we would propose that an evaluation of risk of serious harm with an appropriate determination of the level of risk of serious harm, if deemed necessary should be undertaken to provide an indication of the level of intervention and planning required if released into the community.

#### Level of Service/Case Management Inventory (LSCMI)

The Level of Service/ Case Management Inventory (LS/CMI) is a comprehensive general offending risk/ need assessment and case management planning method. This approach is used in Scotland, both within a custodial and community context, to aid decisions on the level and focus of intervention with people (aged 16+). The process for administering the LS/CMI system in Scotland for justice social work follows a tiered approach in the community, which enables three levels of assessment of risk in terms of likelihood and impact (RMA, 2014). Within the current model practitioners predominantly complete an initial assessment and scan for risk for most court report cases as part of a Criminal Justice Social Work Report (CJSWR), to inform the court of the suitability of sentencing disposals. Figures from the LS/CMI In Practice National Report on CJSW (RMA, 2014) note that of the 40,719 records within the available dataset, 80% (32,973) of these had an initial assessment (scan for risk) completed.

There is currently provision for an examination level of assessment (LS/CMI 1-8 which could include a full risk of serious harm assessment; if so this would be a scrutiny level of risk) to be undertaken at the court report stage. The CJSWR Guidance (Scottish Government, 2010b) notes that “*in order to assess serious harm and imminence properly, it is unlikely to be possible to undertake this assessment within the normal 3-4 week deferment*” (p.37). It is

unclear how frequently an examination or scrutiny depth of risk assessment is completed for court report purposes. As such there may be benefits in exploring the current frequency with which this provision is enacted and the related resource implications.

We would propose that the appropriate depth of assessment to determine whether an individual poses a risk of serious harm would need to take place at the pre-sentence stage. An example of such an approach is the recently developed assessment framework for those convicted of indecent images of children which we will be piloting in Scotland between April 2022 to April 2024. The conclusion of this framework is aimed at identifying an appropriate and proportionate management response based on the level of risk (i.e. routine, intensive or heightened measures). This framework includes the proposal that if you conclude a scan level of assessment (i.e. the initial assessment) and there are remaining concerns regarding potential additional risk/s or a potential risk of serious harm, then consideration should be given to a more in-depth assessment to more defensibly inform decisions. More widely (for this consultation) this principle would applied as follows –

- An initial assessment (with LSI-R:SV) is applied (i.e. scan level of assessment). If the conclusion is that there are no concerns regarding risk of serious harm then this depth of assessment is sufficient.
- If there are concerns regarding potential risk of serious harm then an LSCMI 1-8 can be conducted (i.e. an examination level of assessment). This will inform a decision on whether there are indicators of serious harm. If at the end of this there are no indicators then this depth of assessment is sufficient.
- If there are indicators of serious harm then a fuller risk of serious harm analysis can be undertaken (i.e. a scrutiny level of assessment). This will inform whether the person presents a risk of serious harm, to what level, and if so what are the management recommendations.

This approach aligned with the sentencing process would provide a defensible method of identifying those who present a risk of serious harm prior to considering prison as a disposal. We provide cursory data below that gives an indication of the numbers that would relate to each depth of assessment within the prison population. More detailed and structured examination of this data would enhance this picture considerably. However the general principle is one of a tiered approach whereby the majority who enter this process conclude at the end of a scan level of assessment, with the numbers declining at each decision point thereafter.

We acknowledge that this approach may have an impact on resourcing and time to complete CJSWR's and as such, scoping and development work is required to understand the relationship between the tiers of assessment (scan, examine & scrutinise) at the court report stage and how these can support defensible risk based decision making when determining the appropriate sentencing options.

As highlighted this approach would inform defensible decision making as to whether the individual poses a risk of serious harm, and if so to what level (i.e. low, medium, high or very high) and whether this will require active and alert multi-agency risk management planning. The MAPPA Guidance (Scottish Government, 2016) defines the risk of serious harm levels as follows;

- **Low:** current evidence does not indicate likelihood of causing serious harm
- **Medium:** there are indicators of risk of serious harm but the individual is stable in the context of community management unless there is deterioration

- **High:** there are identifiable indicators of risk of serious harm. The potential event could happen at any time and the impact would be serious
- **Very High:** there is an imminent risk of serious harm. The potential event is more likely than not to happen imminently and the impact would be serious

At the sentencing stage the focus would be about whether the risks posed can be effectively managed in the community this would mean “front loading” evidence-based risk assessment earlier on in the process to ensure that only those who pose a risk of serious harm would be considered for a custodial sentence.

For those who receive a custodial sentence the further risk of serious harm assessment would be used to inform an appropriate management plan (case or risk management plan depending on the outcome of the assessment) from admission into custody. Preparation for the community should start from admission to custody onwards, with the focus throughout an individual’s sentence being about readiness for release. This process would be informed by ongoing reassessment which focuses on testing and monitoring of formulation<sup>8</sup> and which includes an appropriate assessment of protective factors to determine what reduced risk would look like. The further risk of serious harm assessment and risk management plan should be used as the centre point for decisions around readiness for release into the community and to ensure collaboration with all relevant partners is commensurate to the risks posed. We acknowledge that this proposal has the potential to carry significant resource, funding and role implications which would need to be explored further as part of the implementation process. The RMA has previously contributed to the development of the assessment method used by Justice Social Work and would be able to support further development.

Cursory examination of a snapshot of the custodial data within the centralised LS/CMI system<sup>9</sup> provides some useful indications of the potential implications of the proposed process in terms of the prison population. There are significant caveats when interpreting the LS/CMI data provided;

- The data is based on first full custodial LS/CMI assessments which have been completed over different time periods (ranging from 2014-2021) .
- The quality of assessments cannot be determined quantitatively via this aggregated LS/CMI data.
- The data provides information on those within custody who would be subject to enhanced Integrated Case Management (ICM) processes and who have had different depths of assessment completed at that stage.
- These figures will not be reflective of the current custodial prison population subject to enhanced ICM processes and/or who require an LS/CMI assessment to be completed.
- This data will only capture those individuals where an assessment exists.

Exploration of the custodial LS/CMI dataset provided the following information;

- 3780 first full LS/CMI 1-8 assessments were present within the custodial dataset (overall data sample).

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<sup>8</sup> Formulation is about organising risk-relevant information to tell a meaningful story about an individual. It should provide a clear explanation, written in everyday language, of the onset, development, occurrence and maintenance of offending behaviour, based on the facts of the case and empirically supported theory. It is a narrative account of the interaction and respective role of the identified relevant risk and protective factors. It should link assessment to management by identifying meaningful and individual targets for change (Standards & Guidelines for Risk Assessment Report Writing; RMA, 2018).

<sup>9</sup> Accessed on 19/11/2021

- Of the 3780 LS/CMI 1-8 assessments undertaken, just under 30% (1076) had indicated a further risk of serious harm assessment was required.
- Where a further risk of serious harm assessment was required nearly 75% (799) had a full risk of serious harm assessment completed.
- Once the assessor has scrutinised the risks posed they are then required to make a decision on the level of risk of serious harm (agreed definitions as outlined within the MAPPA Guidance; Scottish Government, 2016).
- Of those where a full risk of serious harm assessment had been completed (1076), 96% (766) were deemed to be medium or above risk of serious harm.
- The following proportions were found when broken down by risk of serious harm level:
  - **Low:** 4% (33) were deemed to be low
  - **Medium:** 52% (413) were deemed to be medium
  - **High:** 36% (285) were deemed to be high
  - **Very High:** 9% (68) were deemed to be very high

Therefore, the data suggests that of the overall custodial data sample of 3780 first full LS/CMI assessments undertaken 20% (766) of those were deemed to pose a risk of serious harm. This provides some indicative figures however, LS/CMI data could be explored further to ascertain the impact of any proposed changes to risk practice within custody and the evaluation of risk of serious harm, and at what level, as the decision-making criteria around release into the community.

### Role of Prison

Integral to any proposal around release from custody arrangements is to determine what is the role of prison, as noted by the SWS Justice Submission (SWS, 2019, p.7) “*Scotland needs first to agree and articulate what the role of prison is*” and then focus on policies to achieve this. The potential commission of offences by individuals, particularly those experiencing severe and multiple disadvantage, in order to gain access to a ‘safe place’ with ‘care’ and access to much needed services highlights the issues with the role of prison (Bramley et al., 2019). Tata (2016) suggests two fundamental principles to the use of imprisonment; “*first, the test for imprisonment should depend on the seriousness of offending and risk of harm. Secondly, addressing personal needs should not be a ground for imposing a prison sentence*” (p.24). We would agree with Tata's principles of imprisonment being focused around seriousness and harm - hence why we believe risk of serious harm to be a pivotal criteria in these questions.

The Scottish Sentencing Council (SSC) (2018) guidelines which outline the purposes of sentencing note that punishment is one of five purposes, this also includes protection of the public, rehabilitation, opportunity to make amends and expressing disapproval of offending behaviour. As such, these are the kinds of things prison can be used for however, evidence has demonstrated the effectiveness of community based services and interventions in comparison with those in custody (Bonta & Andrews, 2017). The “What Works” paper produced by Scottish Government also reported the effectiveness of prison as mixed with many studies finding community sentences more effective in reducing reoffending than short-term prison sentences as there was more opportunity for rehabilitation (Sapouna et al., 2015). It was noted that “*...imprisonment can increase long term reoffending by weakening of social bonds and decreasing job stability*” (p.25). Further to this, Smith, Goggin, and Gendreau (2002) found that imprisonment was not associated with any decreases in recidivism and in fact imprisonment was associated with a 3% increase in recidivism. As advised by Tata

(2015b) we need to acknowledge that no matter how constructive a prison regime may be, that community based supports are a far better way to help address the needs of low level individuals who have offended who are struggling to cope with life in the community. As such, prison sentences should not be used a 'last resort' (Bramley et al., 2019) for those with multiple disadvantage and chaotic lifestyles, to achieve structure or to access much needed services, as community based services should be adequately and appropriately resourced and funded to provide this. In relation to sentencing perhaps we could adopt Tata's (2016) suggestion "...to exclude certain purposes (such as rehabilitation) as a ground for imposing imprisonment, and begin careful work to specify certain kinds of cases as normally non-imprisonable" (p.3).

The most effective solutions to the questions posed in this consultation require a significant amount of justice reform. This would be from sentencing through to reintegration as they all have to 'speak to one another'. This would start with policy reform. There is a need to tackle "front-door judicial sentencing and back-door release decision-making together as part of an integrated strategy" as suggested by Weaver et al. (2012, p.4).

### Challenges with current prison model

There are inherent issues and challenges present within the current prison model that must be recognised to determine potential solutions or suggestions for how this could be changed or improved. The key themes relate to;

- (A) Prison Population
- (B) Sentence Management
- (C) Progression
- (D) Offending Behaviour Programmes
- (E) Language of Risk

#### (A) Prison Population

According to the World Prison Brief (2021)<sup>10</sup> Scotland currently has the highest imprisonment rate in Western Europe, at 138 per 100,000 population. Recent SPS population statistics for 2019-20 indicate the annual average prison population is around 8,200. A significant proportion of this figure relates to those on remand given the World Prison Brief statistics rank Scotland as 24<sup>th</sup> in Europe for the highest percentage of all prisoners comprised of pre-trial detainees. Prison population projections to 2020-21 suggest an annual average prison population of 9,500 (Scottish Government, 2012), the 2018-19 audit of the SPS noted that one of the factors influencing growth in prison population is longer sentences, as the number of custodial sentences is generally declining sentence length has increased 21% over past decade. Recent reconviction statistics published by Scottish Government (2021b) noted that "offenders released from a custodial sentence in 2018-19 had one of the highest reconviction rates and average number of reconvictions of any disposal." The reconviction rate for individuals who offend released from custody in 2018-19 had increased since the last year to over 43% with those serving short-term custodial sentences having much higher reconviction rates. Given the suggested proposals for bail reform in recognition of the high remand population in Scotland are covered elsewhere in the consultation and in our responses provided to these questions we will not explore this further and will instead focus on the sentenced prison population.

In conjunction with a continued rise in the prison population there also appears to be emerging differences in the demographics of this population. SWS (2019) recently highlighted that the prison population appears to be ageing, this appears to be supported by recent prison

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<sup>10</sup> World Prison Brief statistics (accessed on 17/11/2021 at [https://www.prisonstudies.org/highest-to-lowest/pre-trial-detainees?field\\_region\\_taxonomy\\_tid=14&=Apply](https://www.prisonstudies.org/highest-to-lowest/pre-trial-detainees?field_region_taxonomy_tid=14&=Apply)).

population statistics (Scottish Government, 2020a) which indicated the numbers of individuals held as sentenced in the '60+ years' group has more than doubled between 2009-10 and 2019-20, rising from 264 to 533. SWS (2019) also noted that there are "... *significant levels of need in terms of mental health, addiction, learning disability and neuro-diversity*" within the prison population. The 2019 SPS Prison Survey (Carnie & Broderick, 2019) emphasised that the number of individuals reporting to have a disability or long-term illness in prison has increased over recent years with over one third reporting to have a disability and over 40% reporting have a long term illness. The balance between the needs of justice and the need for care of older people in custody (Howard League, 2014) within prisons is challenging, and as suggested within the HM Inspectorate of Prisons in Scotland study (HMIPS, 2017) there is a pressing need for a clear strategic approach across key agencies. The study raised important questions about how the custodial environment can support older prisoners experiences of loneliness and isolation as well as addressing complex health and social care needs and suitable accommodation and activities for less mobile prisoners.

On-going evidence-based risk assessment whilst in custody to evaluate whether the individual continues to pose a risk of serious harm will support defensible decision-making. A determination can then be made as to whether the identified risks/needs could be better and more adequately addressed within the community through a holistic support package and management plan.

#### (B) Sentence Management

The current prison model within Scotland could be described as 'procedural imprisonment' whereby sentence type/length dictates access to mechanisms which are characterised by lengthy programme waiting lists and multiple processes e.g. Integrated Case Management, LS/CMI, Progression etc. being built on top of each other. As noted by Tata (2015a) "... *length of sentence is a very crude proxy for seriousness of offending and risk of serious harm*" (p.5). Instead we propose that access to services and processes within custody should be informed by proportionate and evidence based risk assessment and management to evaluate whether the individual poses a risk of serious harm to then inform manageability within custody and community based contexts.

#### (C) Progression

We would propose that the current standardised progression routes could be changed to allow for individualised pathways in order to address issues such as those noted within the recent recommendations from the Podmore report (Podmore, 2020) that "*greater emphasis should be given to seeking out prisoners for whom such progress is appropriate in relation to the point of their sentence and according to their need*" (p.6). The report highlights concerns that progression opportunities will default to compliant prisoners who self-refer rather than those who need proactive support and guidance. Opportunities for progression for those serving short-term sentences may be unduly delayed by the provision that they must serve a minimum of three months within custody to allow sufficient time for adequate assessment to be carried out. Podmore (2020) recommended that guidance should allow for a "fast track" progression process if staff working with the individuals in custody deem it to be appropriate and to the benefit of the individual. By ensuring proportionate and evidence based risk assessment and management is undertaken throughout an individual's time in custody this should allow for defensible decision-making with regards to access or release to the community. Furthermore, an overall review of all core processes within custody such as LS/CMI and Integrated Case Management (ICM) should be undertaken to ensure it is clear whilst in custody where an individual is within their sentence, what decision is being made and on what basis. There is an indication within the SPS Annual Delivery Plan 2020-22 (SPS, 2020, p.6) that they will "*Develop and embed a revised framework for Risk, enhancing SPS wide understanding and application of: The Guiding Principles, The Language of Risk and The Practice Standards*

(RMA, FRAME 2011)” which could provide an opportunity to explore this further. Access to programmes also influences progression and we will now go into this in further detail below.

#### (D) Offending Behaviour Programmes

Access and availability of key programmes within custody has been a significant issue with the current prison model, HMIPS Annual Report (2020-21) raised major concerns with lengthy waiting lists for many key programmes. Access to programmes appears to be a particular challenge for the older prison population (60+yrs) as it was noted that 95% of this population in 2017 did not take part in offending behaviour programmes. Furthermore, concerns were raised that women do not have access to as wide a range of programmes and opportunities as males such as in HMP Edinburgh. Accessibility to programmes is also dependent on what prison an individual is serving their sentence within, many individuals require to transfer to other prisons to secure access to programmes, this can be frustrating and can impact on community ties for the individual. HMIPS (2020) also highlighted difficulties experienced in transferring prisoners to the relevant establishments to complete the programmes due to national population issues. The national COVID-19 restrictions appear to have exacerbated an already challenging situation with considerable backlogs and waiting lists (Scottish Government, 2020b). An extensive accumulation of assessments related to programmes to either assess the requirement for programme work (General Purpose Assessment – GPA) or to assess risk/needs following completion of recommended programme work (Post-Programme Reports) were also acknowledged within the report. Given these assessments and programmes are currently used to inform decisions around progression and/or community release this is a concerning picture.

The overreliance on offending behaviour programmes within the current prison model to address identified risk/needs has considerable implications on proposals around release from custody, particularly for those serving short-term sentences. As noted by Bonta & Andrews (2017) there are issues with adherence to RNR principles in correctional treatment particularly the provision of services to higher risk cases whereby they are less likely to voluntarily enter programmes and are more likely to drop out. A recent meta-analysis on the effectiveness of psychological interventions in prison by Beaudry, Yu, Perry, and Fazel (2021) found that when smaller studies (<50 in treatment group) were excluded there was no significant reduction in recidivism. Results indicated that CBT interventions were not associated with recidivism and they also noted that reductions in reoffending were found for therapeutic community programmes, although this was only based on two studies. Furthermore, they note that “...*in-prison interventions might not be effective unless they are linked with interventions that target the psychosocial needs of released individuals*” (p.768) and stress the importance of community aftercare to maintain gains delivered in prison. The report suggests that psychological interventions that combine prison and community-based services should be prioritised for research and that further research on understanding how the prison environment may impact on treatment effects, given prisons are not primarily therapeutic communities, should be undertaken.

As suggested in our earlier response to Q14 of this consultation, the continuity of care from custody into the community, which provides holistic throughcare support for the individual is important to supporting successful reintegration and desistance. As noted earlier on we believe a move away from the current model of ‘procedural imprisonment’, whereby sentence length seems to dictate assessment and access to services/supports is needed. We propose instead ensuring that the focus is on early and on-going proportionate and evidence based risk assessment to understand the risks/needs of the individual in order to provide appropriate and timely access to services and supports from point of entry into custody onwards to adequately prepare the individual for release into the community. Learning could be taken from models such as STICS with these principles applied throughout custody and community.

#### (E) Language of Risk

Communication and language of risk within custody is also important to consider within the current prison model and how this relates to the context of risk within custody versus the community. HMIPS (2010) previously raised concerns in their review of progression regarding misunderstandings of the Prison Supervision System (PSS). Historically PSS was based on assessing the level of supervision required for security reasons within prison however, the report advised there was a “*lack of clarity among staff in relation to the difference between level of supervision in the prison, level of risk of reoffending and level of risk of harm. These terms were being used interchangeably by some staff and therefore inappropriately in discussions about risk and community access*” (p.38). They recommended that the current PSS system be reviewed as soon as possible to separate internal compliant behaviour within prison from the level of potential risk presented by an individual who has offended once released back into the community. This also raises concerns with the current standardised progression routes within custody in which low supervision level, as determined by PSS, is one of the essential criteria for consideration to progress. There are a number of criteria outlined within Section 17 (2) of the Prison Rules (2011) when assigning the appropriate supervision level via PSS including the prisoners conduct in custody and trustworthiness and stability which all relate to the amount of supervision the individual requires in prison and as noted by HMIPS (2010) the PSS “*is not sufficiently geared to take account of public protection issues as against that of compliant behaviour in secure custody*” (p.38).

#### UK examples of penal approaches

FRAME (RMA, 2011) recognises the contribution of learning from national and international research and practice to inform policy decisions relating to risk assessment and management. As such, an evidence-based approach should be adopted when considering proposals on release from custody arrangements and the future model of penal policy. There are some notable examples of practice within the UK and internationally which we regard as relevant to consider and explore in relation to Scottish justice.

Psychologically Informed Planned Environments (PIPE's) created by National Offender Management Service (NOMS) in England and Wales could be explored as part of an overall redesign of the prison model. Turley, Payne and Webster (2013) state that “*PIPEs are designed to have a particular focus on the environment in which they operate, and actively recognise the importance and quality of relationships and interactions*” (p.2). PIPE's are explained as an environmental approach to enhance the core work within prison and community (probation) settings; where additional psychological or “psycho-social” considerations are required these are not deemed as treatment interventions themselves. As part of this staff members receive additional training to develop an increased psychological understanding of their work (National Offender Management Service; NOMS, 2012). For prison settings, the PIPE model is applied in progression units and individuals do not need a diagnosed personality disorder to be considered for inclusion in these units. There are a number of applications as part of the implementation of PIPEs;

- preparation (which focuses on motivation/engagement/barriers to treatment),
- provision (during treatment to provide an environment supportive of treatment aim/progress),
- progression (post treatment to consolidate learning into practice) and
- approved premises (approved community PIPE places).<sup>11</sup>

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<sup>11</sup> For more information on PIPE's access the following online resources by the Ministry of Justice and Department of Health – A guide to Psychologically Informed Planned Environments (PIPEs) ([PIPEGuide\\_May2012v2.pdf](#)), and Psychologically Informed Planned Environments (PIPEs) ([The personality disorder strategy \(lemosandcrane.co.uk\)](#))

Each application provides a different function in the overall pathway of services. Through training and clinical supervision, at the individual and group level, the staff group develop the psychological and social environment of the unit to provide a positive and enabling environment. As noted by HM Prison & Probation Service (HMPPS) the primary outcomes of PIPE's are to reduce the likelihood of reoffending, improve psychological health, develop the workforce, improve the individual who has offended quality of relationships and skills and improve institutional behaviour.

Turley et al's (2013) qualitative research focused on several sites to examine the key enabling features of PIPES. Key findings indicated that staff actions and behaviours were crucial, whereby staff looked to understand individuals who have offended challenging behaviour and to ensure respectful communication. The physical environment was also identified as an important enabling factor given the PIPE units provided a distinct area which helped prisoners form a cohesive group. The relationships and regular interactions with personal officers or key workers were viewed positively. There were challenges acknowledged around balancing the supportive role with that of monitoring and the limitations of PIPE units in addressing ongoing complex and problematic behaviours.

Another promising approach within the UK is the development of Dangerous and Severe Personality Disorder (DSPD) Units, initially set up in 2010 after it was recognised that there was a particular group of men for whom no services were available, in prison or the NHS, that would enable them to reduce the risk that they posed. This particular group of men were those with a diagnosis of severe personality disorder whose offending was linked to their personality psychopathology and who were particularly likely to commit offences of serious interpersonal violence (Saradijan, Murphy, & Casey, 2010).

Four high secure units have been established across prison and hospital settings, with the Fens Unit being one of these which exists within HMP Whitemoor. The Fens Unit is an adapted prison wing with no special facilities, criteria for entry are usually those who are viewed as a management problem, comprised mostly of those who have been violent in custody and spent time in segregation units. If deemed suitable, individuals will engage in a 5 year treatment programme. The primary aims within the Fens Unit are related to high quality assessments and services around health and a reduction of risk to enable successful reintegration.

Saradijan et al's (2010) report on the first cohort of 18 men who completed treatment at the Fens Unit noted that the descriptive data seems to show a reduction of risk based on certain measures (VRS & HCR-20) however, they were unable to measure long term outcomes such as reoffending. Findings also indicated much higher than normal attendance rates with 95% attendance in all interventions and a drastic reduction in the number of incidents in prison. The profile of this cohort were those with evidence of early onset offending, with offences for violence and sexual violence, and whose scores indicated a high risk of reoffending, severe personality disorder and a link between personality disorder and offending.

The Fens Unit offers various programmes, both at an individual and group level including schema therapy and psycho-education which are informed by individual formulation. As well as formal interventions which directly target relevant factors, there are also daily observations and addressing of behaviours by staff. Similar to the PIPEs unit described earlier on, there is a recognition of the importance of interpersonal relationships and as such interactions with staff are seen as necessary for change on an emotional as well as a cognitive level. Further research by Saradijan, Murphy, and McVey (2013) found that most of these men have been successfully managed in lower security conditions following completion of treatment within the Fens Unit. They noted that treatment allows for changes in motivation and individual relapse prevention plans are devised as part of this which may account for the findings reported.

We have stressed the importance of organisational oversight, governance and quality assurance in our earlier response to Q14 however, we would like to briefly cover this again. We would like to highlight the work of Bonta and Andrews (2017) in Canada on measuring adherence of the Risk-Need-Responsivity model through the Correctional Program Assessment Inventory (CPAI-2010; Gendreau, Andrews, & Theriault, 2015). The inventory includes a number of items on areas such as organisational culture, programme implementation/maintenance, client risk/needs practices and communication and evaluation. They note that research findings suggested higher CPAI scores were associated with lower recidivism rates. We would suggest exploring this further as part of wider proposals on prison reform, this would also include reviewing existing roles and responsibilities across agencies within custody, to ensure there is a clear understanding of each other's role in contributing to risk assessment and management.

Scoping work to determine the effective and efficient use of current roles and responsibilities could be undertaken such as, prison based social work could be responsible for risk assessment and management including programme delivery with psychology as a specialist service responsible for treatment managing and the environmental approach and related training such as that outlined in PIPEs and DSPD units. Professionalisation of the front-line workforce within SPS as previously outlined within SPS Value Proposition (SPS, 2016) could be taken forward, which outlined the vision of prison officers working towards the status of "Justice Professional", integral to case management and the process of change for individuals. The SPS have reported they are in the process of developing and implementing an *"Improvement Framework which will connect with HMIPS reporting, be underpinned by self-evaluation and quality indicators and be supported by a set of outcomes, indicators and management information"* (SPS, 2021, p.32) and we look forward to seeing this in due course.

#### International examples of penal policy

International practices in penal policy are also relevant to consider as part of proposals on custody and release arrangements. For example, the Netherlands approach to prisoners with mental illness involves streamlining individuals into specific care pathways prior to entering prison and then upon admission to custody ensuring individuals are seen promptly by a psychologist or psychiatrist to allow the proper care needed. The most severe cases or those who refuse treatment can be sent to the Penitentiary Psychiatric Centre (PPC) to provide structure and routine and to manage the vulnerabilities the individual may have.<sup>12</sup>

The Finnish model of penal policy has yielded positive results in reducing the prison population with Finland currently reported as one of the countries with the lowest prison populations. World Prison Brief current figures indicate Finland have a prison population rate of 50 per 100,000 of the national population, whereas Scotland is currently more than double this figure 136 per 100,000. A third of prisons within Finland are "open prisons", where individuals are subject to electronic monitoring but can leave for school/work and have access to mobile phones and bank accounts, the philosophy being about rehabilitation. Recidivism for those in open prisons is much lower and eligibility is not determined by offence type, with many individuals having violent convictions (Moore, 2021). The requirements for placement into an "open prison" is; suitability, motivation, readiness to comply and abstinence. Participation in activities offered such as education, vocational training, work, programmes is required. Research suggests reductions in recidivism for those in the final phase of unconditional imprisonment called "probationary liberty upon supervision", whereby the individual is placed outside prison under supervision by electronic monitoring or other means for the last 6 months

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<sup>12</sup> For an example of a study looking at the Dutch System see McInerney, 2006. Available at [Dutch TBS forensic services: a personal view - McInerney - 2000 - Criminal Behaviour and Mental Health - Wiley Online Library](#)

before conditional release or release at sentence end.<sup>13</sup> Findings also indicated that around 85% of “probationary liberties” are completed successfully.

It is interesting to note that within Finland there are no private prisons and Lappi-Seppälä (2012) noted there are no plans on that direction. It is noted that private prisons would not meet the demands of the Finnish constitution as any “*task involving significant exercise of public powers can only be delegated to public authorities*” (p.12). The relevance of individualised sentence plans being core throughout an individual’s time in custody and which are based on structured risk and needs assessment are integral to Finland’s prison model. It is suggested that long-term criminal policy and law reforms led to the significant decrease in the prison population from 1970’s onwards, with Finland’s approach to justice particular importance on evidence and research in order to shape Finnish criminal policy. Penal policy is connected to social policies in Finland and there appears to be a political will and consensus with clear sentencing principles and criteria to avoid disparity in sentencing. There is evidence within Scotland that some of the features of Finnish penal policy are already present such as the Scottish Sentencing Council’s recent work on publishing guidelines on sentencing and the current consultation is a step in the right direction. However, as noted by the recent report of the Criminal Justice Committee (2022) we cannot keep scrutinising the same issues and recommending changes without seeing signs of substantive progress and we have outlined our suggestions above on how this could be achieved.

#### Question 16

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

#### Response:

There are a number of key mechanisms and considerations that we believe are relevant to such a process operating within the Scottish Justice system –

- Risk assessment and management
- Reflecting on the role of prison
- Challenges with the current prison model e.g. progression, prison population, offending behaviour programmes
- Learning from national/international examples of penal policy
- Quality assurance
- Effective supervision
- Throughcare services
- Partnership-working

We have outlined these in detail within our earlier responses to Q14 and Q15 however, we have provided some key messages and themes below.

The process we have proposed would involve risk assessment and management being central to the decision making within the Scottish justice system from sentencing through to release into the community. With regards to sentencing decisions, consideration would only be given to a custodial sentence where the necessary depth of assessment concludes that the individual poses a risk of serious harm and there are concerns about manageability in the community.

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<sup>13</sup> Presentation by RISE (Criminal Sanctions Agency) titled “*Open Prisons: Part of Finnish Penal System*” (Available here – <https://www.europris.org/wpcontent/uploads/kms/294/2251/Open%20prisons%20in%20Finland.pdf>)

For those who then receive a custodial sentence under the newly proposed process the risk assessment carried out at sentencing would then follow the individual into custody where it is reviewed and revised to produce a proportionate management plan (Case Management/Risk Management Plan) at the earliest opportunity. An appropriate depth of assessment within custody would be undertaken to evaluate whether the individual continues to pose a risk of serious harm including an appropriate determination of the level of risk of serious harm, if deemed necessary, to then provide an indication of the level of intervention and planning required if the individual was to be released into the community.

Risk based decisions should involve an evaluation of risk of serious harm as this decision making criteria enables consistent and defensible decisions on community release and which are analogous with the multi-agency language of risk within Multi-Agency Public Protection Arrangements (MAPPA).

As part of the overall considerations of how effective risk assessment and management principles should underpin and operate within the Scottish Justice system we believe it may also be important to look at the current decision making processes within MAPPA. The MAPPA National Guidance (Scottish Government, 2016) advises “*the fundamental purpose of MAPPA is public protection and managing the risk of serious harm. MAPPA is not a statutory body in itself but is a mechanism through which the responsible authorities discharge their statutory responsibilities and protect the public in a coordinated manner*” (p.3). There are three categories of individuals who have offended who are currently included in the provision of MAPPA; registered individuals with sexual offences, mentally disordered restricted patients and other risk of serious harm individuals who have offended. The vast majority of those managed under MAPPA fall within this first category in which offence type, in this case convictions for sexual offences, determines inclusion.

There are currently three management levels within MAPPA: routine risk management (level 1), multi-agency risk management (level 2) and multi-agency public protection panels (MAPPP). Figures from the MAPPA National Report for 2020 to 2021 (Scottish Government, 2021c) show that “*on 31st March 2021, three quarters of Registered Sex Offenders (RSOs) (75% or 4,358 RSOs) were in the community being managed, with the vast majority (97% or 4,234 RSOs) of these being managed at Level 1. The remaining 117, or 3%, were being managed at level 2 or level 3*” (p.15). This would seem to indicate that a large proportion of those within MAPPA are managed at level 1, which are those who require routine risk management where the risks posed can be managed by one agency. This is a significant number and proportion of individuals where offence type is the primary determinant of inclusion under MAPPA. Much like we propose for sentencing, decisions around inclusion into MAPPA should be based on risk. The MAPPA extension which was implemented back in 2016, has a number of criteria which are based on the outcome of evidence based risk assessment and management and which are not solely based on offence type (i.e. must present a high or very high risk of serious harm through assessment, and requires active and alert multi agency risk management). We suggest that learning from the implementation of the MAPPA extension, particularly in relation to its application of principles regarding risk, could be used to inform a review of the MAPPA criteria and processes for those convicted of sexual offences.

We would also propose changes to the current prison model which would involve a move from “procedural imprisonment”, in which sentence length dictates assessment and accessibility to interventions/services, to risk assessment and management planning being undertaken upon admission to custody and throughout an individual’s time in custody to inform decisions around release. There could be a continuity of care throughout custody and upon release into the community, with decision making being underpinned by appropriate, proportionate and evidence based risk assessment and management. The principles of FRAME (RMA, 2011) and adherence to the Risk-Need-Responsivity model (e.g. Bonta & Andrews, 2017) would be

integral to the overall approach to risk assessment and management. Preparation for the community should start from admission to custody onwards, with the focus throughout an individual's sentence being about readiness for release. For those individuals deemed to pose a risk of serious harm at a particular level, the process going forward would be informed by continual reassessment which focuses on testing and monitoring of formulation, which would also include the development of a psychologically and trauma informed environmental approach to support change and desistance (Bramley et al., 2019).

For those individuals currently serving a custodial sentence who are then assessed as not, or no longer posing a risk of serious harm there would be co-ordinated and holistic throughcare support accessible and available to address the identified areas of risk/needs through a management plan.

Quality assurance which occurs at the practitioner, agency and multi-agency level would need to be in place to ensure the quality of risk assessment and management practice processes. This would include on-going clinical supervision, adequate training, appropriate governance and oversight to be in place to support the proposed process. As suggested by Anderson, et al., (2015) long-term outcomes around reducing reoffending, increasing reintegration and reducing the prison population "*churn*" will only be achieved if there is ongoing scrutiny and analysis and "*system-wide commitment to partnership working and continuous improvement*" (p.8). Furthermore, they suggest there is a need for a shared vision and that "*the change itself would require robust strategy, energy, collaboration, and, perhaps most importantly, bold leadership and financial investment*" (SWS, 2019, p.7).

We recognise that what we suggest is essentially justice reform with a detailed review from sentencing through to reintegration and recall mechanisms so that all of these processes and policies speak to one another. Policy change is a necessary precursor to enable a justice environment where system changes are more likely to succeed.

The Presumption Against Short Sentences (PASS) legislation within Scotland is a recent and relevant example of policy change on sentencing and judicial decision making which could usefully inform current proposals within this consultation regarding the use of remand and bail. The extension of PASS came into effect in July 2019 in which a court must not pass a custodial sentence of 12 months or less unless it is of the opinion that no other disposal is appropriate. This legislation was brought in to encourage a reduction in short-term custodial sentences and increase community sentences which have been found to be more effective. Anderson et al's (2015) evaluation of the impact of the initial PASS legislation for the presumption against custodial sentences of 3 months or less noted a fall in sentences of 3 months or less accompanied by an increase in 3-6 months and 6 months to 2 years, suggesting "up-tariffing" may have taken place. Findings within the report also suggested that sheriffs did not believe PASS influenced their decision making as they already used short prison sentences very rarely. Monitoring information provided by SG on the extension of PASS in 2019 (Scottish Government, 2021d) noted that although it was too early to evaluate the impact of PASS on sentencing/disposals, community disposals had reached their highest level (since April 2017) and the number of custodial sentences of 12 months or less had decreased (since April 2017). Monitoring information provided by SG for 2020 (Scottish Government, 2021d) highlighted that the effects of the pandemic were difficult to separate from the impact of PASS on short sentences due to the current backlog of court cases however, the numbers of custodial sentences of 12 months or less, and the proportion of these in overall disposals, had been reducing during the period between implementation of PASS and lockdown in March 2020. Sentencing policies such as PASS on its own, will not be enough to significantly reduce the very high prison population therefore, as noted by Graham and McNeill (2019) "*wider sentencing and penal reform is needed to maximise diversion and decarceration*" (p.1).

Therefore, proposals around release from custody should be considered as part of a wider cohesive model of change which also considers sentencing, assessment and management, provision of throughcare. As suggested by SCCJR (2021, p.1) within their recent submission to the Criminal Justice Committee “*prisons operate within, and are profoundly influenced by, developments in the wider justice system; and the justice system is in turn influenced by wider social developments and associated policies.*” Proposals should also recognise the contribution of learning from national and international research and practice to inform policy decisions relating to risk assessment and management and the overall sentencing process. For example; England and Wales environmental approach within prisons, Portugal’s decriminalisation of illegal drugs and public health approach to substance misuse or Holland’s mental health support pathways for those sentenced to prison. As highlighted by the Scottish Drug Deaths Taskforce report (2021) “*it is important that any approach considered is tailored to Scotland and not lifted wholesale from another country*” (p.35).

### Question 16a

Who should be eligible to earn opportunities in this way?

#### Response:

We have outlined a proposed decision making process that could be adopted when considering “eligibility” for release into the community in our earlier response to Q15. However, to summarise briefly we would propose that decisions around release into the community are based on the assessment and management of risk of serious harm. Defining the decision making criteria to enable consistent and defensible decisions would be necessary therefore, we would propose that an evaluation of risk of serious harm with an appropriate determination of the level of risk of serious harm, if deemed necessary, should be undertaken to provide an indication of the level of intervention and planning required if released into the community.

### Question 16b

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

#### Response:

We would suggest consideration of the following risks/safeguards as part of the overall proposed approach to the changes proposed –

- Stigma
- Resource Management
- Quality Assurance
- Effective Supervision
- Partnership-working

We have outlined the above areas in more detail within our earlier responses to Q14 & Q15. However to summarise, the existing pressures across key justice agencies, particularly justice social work, needs to be understood and adequate funding/resourcing needs to be in place to support the overall proposed approach. This would also require scoping of existing roles and responsibilities and service availability to avoid duplication, ensure clarity and accountability and support collaborative partnership working.

Appropriate training, clinical supervision and overall quality assurance mechanisms would also need to be in place. Stigma experienced by those involved with the justice system could also create an additional barrier to reintegration into the community which can impact on the likelihood of individuals asking for help or accessing services.

The role that the media has within the justice system needs to be understood and how this can contribute to public debate about public protection is important. The Scotland Choice Report (The Scottish Prisons Commission, 2008) highlighted that many justice professionals are reluctant and fearful to engage with the media however, they propose “...a much more open dialogue between justice professionals and the media in which all parties play their respective parts responsibly and constructively” (p.32). We would support Graham and McNeill’s (2010) previous advice which advocates for improving public awareness of sentencing and the need for justice reform in Scotland. Similar to the evidence and recommendations from the Scotland Choice Report (2008) we would advocate for a Finnish type approach to crime, politics and the media with the absence of direct political control over criminal justice and an attitude within the Finnish media which tends not to sensationalise crime stories.

Finally, consideration of the interconnectedness of all of the areas mentioned above and wider justice policy reform should also be acknowledged.

#### 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.

#### Response:

Across our responses to Q13-18 we have stated the importance of decisions being based on individualised risk assessment and management rather than by sentence length. We would agree that consideration for release at an earlier point with appropriate assessment to evidence defensible decision making should be given. There are a number of key mechanisms and considerations that we believe are relevant to this proposal –

- Risk assessment and management
- Reflecting on the role of prison
- Challenges with the current prison model e.g. progression, prison population, offending behaviour programmes
- Learning from national/international examples of penal policy
- Quality assurance
- Effective supervision
- Throughcare services
- Partnership-working

For more information and details on the areas above please refer to our responses to Q14 & Q15 of this consultation.

### 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.

### Response:

The consultation notes “*Parole Board may recommend release if they feel that the individual does not pose an unacceptable risk to the public*” (p.38). It is unclear how this criteria would be determined and there is also reference within this proposal of “...*assessed as low risk*”. It is unclear what is meant by these terms and as highlighted within FRAME (RMA, 2011) the language of risk must be shared and understood, if an evaluation of risk is against subjective or unclear decision making criteria this could cause misinterpretation and misunderstanding across various agencies. Defining the decision making criteria to enable consistent and defensible decisions would be necessary and we would propose that an evaluation of risk of serious harm with an appropriate determination of the level of risk of serious harm, if deemed necessary, should be undertaken. Therefore, consideration of the reduction of risk and manageability within the community would underpin decision making around release from custody into the community.

For more information and details on the proposed process/model for prison please see our response to Q15 of this consultation.

### 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?

### Response:

We would support this proposal given recent evidence suggests that releases on a Friday (or public holiday) can create difficulties for individuals to access crucial services upon release (Care Inspectorate, 2021). Furthermore, the Scottish Drug Deaths Taskforce (2021) have noted that the majority of service providers highlighted the issue of Friday liberations leaving people vulnerable to relapse due to the limited availability of services at weekends. Friday (or public holiday) liberations from custody appear to create unnecessary risk which could be mitigated by the introduction of the suggested proposal to ban these. We also acknowledge that appropriate planning and resourcing of this proposed change would be required, given the increased demand on throughcare agencies/services as a consequence of this being implemented.

### 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.

We would support HDC (in its current form) being automatically considered for individuals. We are aware through contribution at HDC working groups that one of the barriers to HDC are the numbers of individuals who do not apply for HDC. Automatic consideration would be an effective solution to this barrier. Risk assessment is then the process undertaken to determine if the individual is suitable for HDC.

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.

We do not have any specific views on this proposal. We do, however, acknowledge that the assessment process can take approximately 12 weeks to complete. Therefore there appears to be some logistical advantages in making the time allowed on HDC longer.

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:

We are not aware of the numbers of individuals that this would impact upon. We would also acknowledge that there is a need to balance the resource taken to undertake the assessment

in relation to the window of opportunity this may then provide for the individual to access HDC. For example if the assessment takes longer than the individual's sentence then this creates a disadvantage for individuals who aren't able to access HDC due to sentence length.

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:

Currently HDC includes a number of presumptions against that 'rule out' individuals based on a number of factors. In line with our response throughout this consultation we would remove these presumptions as the process is underpinned by risk assessment. The management of individuals should not be determined by a type of offence or sentence, but rather be informed by individual assessment that informs a proportionate risk management response.

An approach defined by offence type is not evidence-based. Reoffending rates for those convicted of contact sexual offences going on to commit further contact sexual offences has consistently been found to be low; 5% (Jung, Ennis, Stein, Choy, & Hook, 2013), 5.7% (Faust, Bickart, Renaud, & Camp, 2015), 9.2% (Seto & Eke, 2005), and between 0.4% and 1.9% depending on whether there are child or adult victims (Howard, Barnett, & Mann, 2014). We can compare these figures to the reconviction statistics for 2018-19 in Scotland (Scottish Government, 2021b). Within these statistics the general reoffending rate across the entire sample was 28.3% within a year. The highest reconviction rate was related to those who had been convicted of crimes of dishonesty at index conviction (45.6%). In comparison sexual crime was the lowest reconviction rate at 10.4%; with 1.8% relating to further sexual crime, which would be roughly aligned with the studies reported above on rates of reoffending for sexual crimes. Interestingly, those convicted of violent offending (21.8% for any offence; 8.6% for further violent offence/s) or intimate partner violence (17.7% for any offence; 6.9% for further IPV offence/s) had higher rates of reoffending. This is a useful comparison from the perspective of offence behaviours that may merit consideration of further investigation regarding risk of serious harm. It is acknowledged that both violent and sexual offending would generally require a significant depth of risk assessment regarding potential risk of serious harm, inclusive of considerations regarding the potential physical and psychological harm to victims, in order to consider the potential suitability of HDC as a feasible risk management strategy.

Risk assessment is a structured process aimed at estimating the likelihood and impact of an offence, and could be used to assess the suitability of HDC for individuals regardless of their offence type.

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:

The important underpinning principle in relation to this question is that those undertaking the risk assessment are appropriately trained and supported. We have previously undertaken training with SPS staff aimed at them having the responsibility for the HDC assessment. It is also important to note that the decision should be reached through appropriate lines of

accountability, and can involve a case discussion depending on the complexity of the case. Research evidence suggests that when practitioners are well trained and exhibit 'core competencies and practices' (Dowden & Andrews, 2004), effective outcomes are more likely to be achieved (Bonta et al., 2010).

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.

Similar to our previous answer the primary body / responsible agency is not as important as the underpinning principles and processes. The decision regarding HDC should be underpinned by consideration of risk and manageability (as we have discussed throughout the consultation).

Consideration could also be given to HDC being used a risk management measure which may be suitable for some and not for others; similar to our commentary on electronic monitoring. Under our proposals the 'management plan' for every individual in custody would be the central point for decision-making. HDC could be an option for sentencers, much like bail supervision, or it could be a possible option to support reintegration into community as part of someone's management plan. This would also reduce potential repetition and multiple assessments being undertaken. We have the view that altering the justice system in the manner we have suggested would potentially render the current approach to HDC unnecessary. The implications in relation to this would need wider consideration and discussion.

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.

Response:

We do not have a response to this question.

### 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.

Response:

We would agree with this proposal to support victim safety planning to facilitate effective risk management and information sharing practices. We welcome the review of the Victim Notification Scheme by Scottish Government to consider an alternative model that increases numbers, rather than the early opt out approach currently in place. We would suggest that the opt-out process could change to a later stage such as at point of release from custody to allow victims to access support services if required and that information sharing within VNS could operate similar to Multi Agency Public Protection Arrangements (MAPPA) with the relevant Memorandum of Understanding (MOU) in place. Furthermore, FRAME (RMA, 2011) recognises that risk assessment and management “...takes cognisance of the competing rights of victims, individuals who offend, and the public, whilst promoting humane, ethical practice, effective interventions and public protection” (p.33). As such, this proposal would support the guiding principle within FRAME of balancing rights whilst maintaining a focus on the protection of the public.

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.

Response

We have nothing further to add to this response.

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.

Response

This change would support the detail we have provided elsewhere in this consultation on the importance of effective throughcare and continuity of risk assessment and management planning through sentencing, custody and release into the community.

#### 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.

#### Response

We do not significant detail to add to this response. However we recognise that an approach of detailing services individually may lack feasibility. One option is to consider whether duties could fall upon 'those with functions under the plan'. Should a management plan become the central document throughout an individual's assessment, then this should identify (from the assessment) who is necessary to effectively manage the identified risk/s. Whilst for OLR's the Criminal Justice (Scotland) Act 2003 highlights 2 functions that relate to risk assessment and management –

- Section 5(2) highlights that any person having functions in relation to the assessment and management of risk is to have regard to such guidelines and standards in the exercise of those functions.
- Section 6(4) states that the risk management plan may provide for any person who may reasonable be expected to assist in the minimisation of risk to have functions in relation to the implementation of the plan.

Taking this approach of linking the RMP to those with functions may be a more realistic and meaningful option than listing individual services (as these may also be subject to the outcomes of individual assessments and management plans). In our experience of overseeing the OLR sentence this kind of legislative underpinning is beneficial.

#### 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.

#### Response

As indicated throughout our responses to this consultation the appropriate risk management strategies (including supportive measures) should be highlighted from the risk assessment. These should be the needs linked to an individual's offending and require a response in order to try and reduce the likelihood of future offending. Therefore if someone is released from

court then it is important that the assessment and management recommendations are shared with those highlighted as having a function in relation to minimising risk. These agencies will vary depending on the outcomes of the individual risk assessment.

#### 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.

#### Response:

We would agree with this proposal and would welcome the review of the throughcare standards as part of this given these were last updated in 2010. As highlighted within the recent Care Inspectorate throughcare report (2021) *“the existing national standards and guidance for throughcare, while still underpinning practice, were viewed by staff as dated as they had not been kept pace with developments in research and practice”* (p.10).

We would suggest that the implementation and on-going monitoring/evaluation of these standards is integral to its success. The implementation review of the Sustainable Housing On Release for Everyone (SHORE) standards is currently underway (Dore, 2019) and the findings from this may helpfully inform considerations in this area. For further details on our response to throughcare related matters please see our earlier response to Q14.

#### 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.

#### Response:

We would agree with this proposal in principle however, as previously indicated in our earlier responses, it is important that decisions are based on individualised risk assessment and management rather than by sentence length. For further details on our response to throughcare related matters please see our response to Q14.

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 disagree

Please give reasons for your answer.

Response:

We would agree with this proposal given the current throughcare standards are not statutory and as such, there is no legislative requirement for agencies/services to “have regard” to these standards or for a power of direction to be issued. In our experience of having responsibility for administering and overseeing the standard setting, accreditation and approval processes that support the Order for Lifelong Restriction (OLR) this has worked well. (for further details on statutory standards for those subject to an OLR see [Standards & Guidelines for Risk Management \(2016\)](#)) Legislation such as that for the OLR sentence within Section 5 (2) of the Criminal Justice (Scotland) Act 2003 ensure that “*Any person having functions in relation to the assessment and minimisation of risk is to have regard to such guidelines and standards in the exercise of those functions*”.

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?

Response

We have provided significant detail throughout this consultation on how throughcare support should be integrated into considerations regarding risk assessment and management.

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?

Response

There are a number of key mechanisms that we consider relevant to supporting an individual's successful reintegration into their community, please see our response to Q14 & Q15 of this consultation for more information.

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
- **Unsure**

Please give reasons for your answer.

Response:

We have no response to this question.

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.

Response:

We have no response to this question.

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