

Bail and Release from Custody (Scotland) Bill – Call for Views

Submission to the Scottish Parliament Criminal Justice Committee

by Dr Hannah Graham, University of Stirling, and Prof Fergus McNeill, University of Glasgow.

In response to the [Call for Views](#), this evidence submission is co-written in an individual capacity as criminologists working in academia, whose research interests, publications, teaching, policy and public engagement are relevant to issues considered in this Bill. One of us (Graham) holds a public appointment¹, but these views are not representative of nor expressed in that capacity. One of us (McNeill) worked for 10 years in frontline roles in Justice Social Work and drug rehabilitation, in addition to his subsequent experience as an academic.

General Approach of the Bill

The Scottish Government states that the proposals in the Bill are underpinned by a commitment to public safety and the protection of victims and are intended to lead to a reduction in the risk of future reoffending, leading to fewer victims in the future.

Question: Do you have any comments on the general approach taken in the Bill to the following?

1. The use of bail and remand
2. Arrangements for the release of prisoners

- Overall, the **general approach** taken in the Bill is sensible and constructive. We welcome the fact that bail reform and release and reintegration supports are featuring on the Parliamentary legislative agenda. This view does not preclude the need for thoughtful scrutiny of details of what the Bill proposes, nor does it imply there is no scope for making amendments/additions to further improve the Bill. Proposals in the Bill span multiple areas of Scottish Justice and, as such, our submission raises some relevant wider issues, for context.
- **Bail reform** is very often listed as a priority in decarceration strategies and literature^{2 3 4}, because it is crucial in changing who enters custody, when and why. We strongly agree that reform to the legal framework in which bail decisions are made is needed to try to address the long-standing issue of overly high rates of remand in Scotland. The importance of adequately resourced community-based supports for people on bail should also be acknowledged.
- The available international evidence makes clear that **decarceration** – whether through efforts at the front end with bail reform, or at the back end with release from prison – need not be causally associated with increases in crime. The relationship between incarceration/decarceration rates and crime rates is complex, and certainly not as strong in

¹ Dr Graham is a member of the Scottish Sentencing Council, an independent advisory body.

² Pettus-Davis, C., Epperson, M., and Grier, A. (2017) *Guideposts for the Era of Smart Decarceration: Smart Decarceration Strategies for Practitioners, Advocates, Reformers and Researchers*, Florida, US.

³ Epperson, M., and Pettus-Davis, C. (eds.) (2017) *Smart Decarceration: Achieving Criminal Justice Transformation in the 21st Century*, Oxford: Oxford University Press.

⁴ United Nations Office on Drugs and Crime (UNODC) (2013) [Handbook on Strategies to Reduce Overcrowding in Prisons](#), Vienna.

how they might indirectly influence one another compared to other factors. Examples from different jurisdictions which have seen a significant drop in prison populations are not associated with rising crime trends and threats to public safety (e.g., Boone, Pakes and van Wingerden, 2022; Schrantz, DeBor and Mauer, 2018⁵; Lappi-Seppälä, 2000, 2011⁶).

- The views of complainers or victims about decarceration proposals (including those in this Bill) should not be misrepresented as homogenous or oversimplified; it is not the case, either nationally or internationally, that victims and their advocates are necessarily opposed to reducing prison populations. In research, victims commonly report that they want to be heard and to be treated with respect in justice processes, and, crucially, they do not want other people to suffer victimisation. There is less consensus among victims on how best to secure that goal. Some victims oppose decarceration proposals, because they see imprisonment as necessary either as punishment or for public safety, or both. Others feel differently. Internationally, some victim groups and advocates argue that prisons do not secure justice for victims and do not make us safer; instead, they call for decarceration and more community-based safety solutions and supports (for example, Alliance for Safety and Justice, 2016⁷, 2020⁸; Sered, 2017⁹; Pali and Canning, 2022¹⁰). Pursuing safer communities and fewer victims in future are at the heart of these viewpoints.

Question: Do you have any comments on the practical implementations of the proposed changes in the Bill, including resource implications?

- In considering the practical implementation of proposals in this Bill, it is worth examining the detail and context of how remand is currently used. We are confident that some evidence submissions and Committee discussions will focus (rightly) on individuals who have served lengthy periods on remand and how this situation can be alleviated and prevented. This is a pressing matter of access to justice. Very short periods of remand are worth considering, too. For example, a significant number of individuals spent 1 day or less (n=194) or 2-7 days (n=764) on remand in custody within a one year period (2020-2021) (Scottish Government Justice Analytical Services, 2022). Aspects of this Bill, in interaction with provisions in the *Management of Offenders (Scotland) Act 2019* (regarding electronically monitored bail) may potentially result in still more use of very short periods of remand, depending on judicial uses of EM bail. Use of electronic monitoring ('tagging') and curfews with bail involves risk assessment. Extensive thought has gone into developing practice guidance and implementation in this regard. Local variations in the capacity of Justice Social Work services may mean that this EM bail assessment can be done swiftly in Glasgow and yet may take longer in, for example, Aberdeenshire. As a result, there may be places where considering EM bail results in more initial instances of remand for one or more days while the assessment and decision are made. While we support the introduction of electronically monitored bail as a direct alternative to custodial remand, the potential for such variations in practical implementation should be acknowledged and, where possible, addressed.

⁵ Schrantz, D., DeBor, S., and Mauer, M. (2018) *Decarceration Strategies: How Five US States Achieved Substantial Prison Population Reductions*, Washington DC: The Sentencing Project.

⁶ Lappi-Seppälä, T. (2011) '[Explaining Imprisonment in Europe](#),' *European Journal of Criminology*, 8(4): 303-328.

⁷ Alliance for Safety and Justice (2016) [Crime Survivors Speak: The First Ever National Survey on Victims' Views on Safety and Justice](#), Oakland, California.

⁸ Alliance for Safety and Justice (2020) [Effective Reentry Partnerships between Corrections and Community](#), Oakland, California.

⁹ Sered, D. (2017) [Accounting for Violence: How to Increase Safety and Break Our Failed Reliance on Mass Incarceration](#), New York: Vera Institute.

¹⁰ Pali, B., and Canning, V. (2022) 'Challenging co-optive criminalisation: Feminist-centred decarceration strategies for interpersonal and sexualised violence,' *The Howard Journal of Crime and Justice*, 61(1): 68-86.

- In the introduction and practical implementation of electronic monitoring (EM) bail (since May 2022), it is also crucial to recognise and reduce the risk of ‘net-widening’; i.e., where, rather than diverting people from unnecessary remand, EM bail is used for people who might not have been remanded in custody in the first place. Poorly targeted use of EM bail wastes justice resources, as well as exposing accused individuals to unnecessary restriction. We note that the Bill frames consideration of EM bail in the decision-making process in proximity to or as a step prior to refusal of bail and a duty to state reasons (section 2AA)(a)(iii), but the overarching point remains that effective targeting (to avoid net-widening) requires clear guidance and effective collaboration. Early indicators of judicial perspectives on bail and remand decision-making in Scotland seem to suggest, at least among some, an appetite for greater use of EM with bail, for different reasons (Skellington Orr *et al.*, 2022). Nonetheless, there will be many cases in which electronic monitoring *does not* need to be added as a condition of bail, and *should not* be added. A common warning and net-widening critique offered by criminologists who research electronic monitoring, including world-leading EM expert Professor Mike Nellis¹¹, is summarised well by a Belgian colleague, Professor Tom Daems¹²: ‘alternatives can become additives’. Indeed, the Council of Europe (2014) rule 3 on electronic monitoring specifically warns against risks of net-widening at the pre-trial stage:

‘Practice shows that it has been used on people who pose only low risks, merely because it is perceived as a useful additional form of control. In particular, in some pre-trial cases, the judiciary has prescribed electronic monitoring to suspects who would not normally be remanded in custody because they do not present a risk of flight or of interfering with the course of justice. This is not to be encouraged, either at the pre-trial (or indeed sentencing) stage, particularly in view of its costs and intrusiveness’ (Council of Europe, 2014).
- Another contextual aspect is worth acknowledging: The distinctive value of the third sector in supporting bail, throughcare, desistance and community reintegration (Helminen, 2016¹³; Tolland, 2016¹⁴; McIvor, Graham and McNeill, 2019¹⁵) can and should, where necessary, complement the bail, throughcare and reintegration support offered by Justice Social Workers or throughcare support prison officers, for example. The third sector are key players in community justice and careful consideration of their capacity is relevant to the practical implementation of this Bill, if passed into an Act. Do they have enough resources? Is their support consistently available across Scotland? How are they and those they work with affected by short-term funding cycles, with a workforce often on 12-month contracts?

¹¹ Nellis, M (2015) *Standards and Ethics in Electronic Monitoring: Handbook for Professionals Responsible for the Establishment and Use of Electronic Monitoring*, Strasbourg: Council of Europe.

¹² Daems, T. (2020) *Electronic Monitoring: Tagging Offenders in a Culture of Surveillance*, Basingstoke: Palgrave Macmillan.

¹³ Helminen, M. (2016) ‘Nordic and Scottish Civil Society Organisations Working with Offenders and the Effects of Service Delivery: Is Pursuing Mission Impossible Whilst Bidding for Contracts?’, *The Howard Journal of Crime and Justice*, 55(1-2): 73-93.

¹⁴ Tolland, H. (2016) [‘She helps me cope’: An exploration of the experiences of women at the Sacro women’s mentoring service](#), PhD thesis, Faculty of Social Sciences, University of Stirling.

¹⁵ McIvor, G., Graham, H., and McNeill, F. (2019) ‘Prisoner Resettlement in Scotland’ in Dünkel, F., Pruin, I., Storgaard, A., and Weber, J. (eds.) *Prisoner Resettlement in Europe*, London: Routledge.

Specific Proposals in the Bill

Section 1: Input from Justice Social Work in relation to bail decisions: What are your views on this proposal?

Section 1 of the Bill seeks to encourage input from justice social workers in relation to court decisions on whether pre-trial bail should be granted and under what conditions.

We support this proposal of giving Justice Social Workers the opportunity to provide information relevant to bail decisions. Their professionalism and multi-faceted skillset means they are well positioned to offer useful information to the court. Justice Social Workers having the time and capacity to do so, due to reasons of workload and geographic variations in timely availability to the courts, will be priority topics for the Committee to consider. We note the substantial caveats and earnest warnings on matters of resources and capacity by Social Work Scotland¹⁶ in their written submission to the Scottish Government consultation preceding the Bill.

The interim findings from a small Scottish study of decision-making on bail and remand are relevant here (Skellington Orr, Wilson Smith and Barry, 2022¹⁷). The input of Justice Social Workers is valued in promoting engagement with and compliance of the accused, and their professional ability to offer informed views on risk assessment and vulnerability is recognised. However, judicial participants in this study indicated that a 'perceived lack of resources (practical and financial)' were seen as 'being the single biggest barrier to greater use of alternatives to remand' in the bail and remand decision-making process (Skellington Orr *et al.*, 2022: 45). Some offered views of Justice Social Work not consistently being available to get assessments done in a timely manner and being too stretched and lacking the capacity to deliver bail supervision. This varies by local area. Similarly, participants from the Crown Office and Procurator Fiscal Service (COPFS) commented on a perceived lack of resourcing, specifically within Justice Social Work services. Clearly, there are resource implications of these proposed reforms for Justice Social Work, and this will affect their capacity to undertake what is proposed in section 1 of the Bill.

Section 2: Grounds for refusing bail: What are your views on this proposal?

Section 2 seeks to narrow the grounds upon which a court may decide to refuse bail by:

- ***adding a specific requirement that reasons for refusing bail must include that this is necessary in the interests of public safety (including the safety of the complainer) or to prevent a significant risk of prejudice to the interests of justice***
- ***limiting the circumstances in which grounds for the refusal of bail in summary procedure (less serious) cases may include a risk that the person might abscond or fail to appear.***

We support changing the legislative framework through clarifying and narrowing the grounds on which bail can be refused. It is a step in the right direction. The proposed two-part test for grounds for refusing bail, centring on public safety and risk of harm, is reasonable. It is constructive that safety considerations of complainers are acknowledged within this.

¹⁶ Social Work Scotland (2022) [submission](#) to Scottish Government consultation.

¹⁷ Skellington Orr, K., Wilson Smith, E., and Barry, M. (2022) [Decision-Making on Bail and Remand in Scotland: Interim Findings Report](#), Edinburgh: Scottish Government.

Action to address problems of remand is long overdue in Scotland. Numerous academics^{18 19 20 21} have raised concerns about overly high uses of remand and prison conditions before and during the coronavirus pandemic, especially in relation to impacts on health, human rights, equalities, and family relationships. Over the years, the same concerns have been raised by organisations ranging from the Sentencing Commission for Scotland²² (2005) and Audit Scotland²³ (2008), to the Scottish Human Rights Commission and HM Inspectorate of Prisons for Scotland, and independent charity Howard League Scotland²⁴. Years ago, in the ‘McLeish Report’ of the Scottish Prisons Commission²⁵ (2008), ‘the remand problem’ was described as a ‘problematic and largely unnecessary use of prison’ in cases of people who do not ‘present a real risk to our safety’, alongside cases of what they call ‘the warehousing problem – a place to hold the damaged and traumatised.’ Sadly, these observations and critiques remain applicable now, even after 14 years of efforts to reduce the prison population.

Whether the independent Scottish judiciary and courts will substantively change historically high uses of remand remains yet to be seen, and any change may be incremental. However, legislative limits on its use are one way of seeking to achieve change, alongside offering more extensive and effective supports for bail and access to relevant services (e.g., mental health, alcohol and drugs, social care, welfare, debt and financial inclusion) in local communities.

Section 3: Removal of bail restrictions in certain solemn cases: What are your views on this proposal?

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Section 4: Stating and recording reasons for refusing bail: What are your views on this proposal?

Section 4 seeks to expand the current requirements for a court to state its reasons for refusing bail and to require the recording of reasons.

We agree with the proposed change, so that judges and the court must state and record reasons when they refuse bail to an accused person. The Scottish judiciary are skilful and precise in their communication, and the reasoning informing their decisions is of interest, given the gravity of refusing bail and remanding people in custody when there has not been a conviction. It seems likely that stating and recording their reasons for refusing bail will contribute towards improved procedural fairness, and it may provide important intelligence about what, in the view of judges, prevents them from using bail. Victim Support Scotland’s point²⁶ that more transparency and

¹⁸ Gormley, C., Schinkel, M., Barkas, B., Casey, R., Cornish, N., and McNeill, F. (2020) ‘Criminal Justice Involved’ (Chapter 5) in Armstrong, S., and Pickering, L. (eds.) (2020) [Left Out and Locked Down: Impact of COVID-19 Pandemic for Marginalised Groups in Scotland](#), Glasgow.

¹⁹ Schinkel, M. (2020) [‘Mental Health in Scottish Prisons Under Pressure During Lockdown’](#), Glasgow.

²⁰ Tweed, E., Gounari, X., and Graham, L. (2021) ‘Mental Wellbeing Among People in Prison in Scotland: An Analysis of Repeat Cross-Sectional Surveys,’ *Journal of Public Health* 43(2): 188-195.

²¹ Morrison, K., and Graham, H. (2022) ‘Scotland’ (Chapter 36) in Dünkel, F., Harrendorf, S., and van Zyl Smit, D. (eds.) *The Impact of COVID-19 on Prison Conditions and Penal Policy*, London: Routledge.

²² Sentencing Commission for Scotland (2005) *The Sentencing Commission for Scotland Report on the Use of Bail and Remand*, Edinburgh.

²³ Audit Scotland (2008) [Managing Increasing Prisoner Numbers in Scotland](#), Edinburgh.

²⁴ Howard League Scotland (2021) [The Scandal of Remand in Scotland: A Report](#), Edinburgh.

²⁵ Scottish Prisons Commission (2008) [Scotland’s Choice](#), Edinburgh. (page 13).

²⁶ Victim Support Scotland (2022) [submission](#) to Scottish Government consultation on the Bill.

access to judicial reasoning (orally and in writing) may also be of interest to complainers and families is a fair observation.

Section 5: Consideration of time spent on electronically monitored bail: What are your views on this proposal?

Section 5 would require a court, when imposing a custodial sentence, to have regard to any period the accused spent on bail subject to an electronically monitored curfew condition. It generally provides for one-half of the period to be deducted from the proposed sentence, whilst allowing a court to disregard some (or all) of the time on bail where it considers this appropriate.

We strongly agree that time spent on bail with electronic monitoring and a curfew condition should be taken into account at the point of sentencing. Like being remanded in custody, these measures have substantive and punitive effects which it would be wrong to ignore at the point of sentencing. This was one of the findings and recommendations of a major European comparative research project on electronic monitoring, involving five jurisdictions: Scotland, England and Wales, Germany, Belgium and the Netherlands (Hucklesby *et al.*, 2016²⁷; McIvor and Graham, 2016²⁸). The proposed calculation in 210ZA(3) of treating two days on EM bail as the equivalent of one day in custody seems reasonable, though the judiciary and court retain discretion for deciding.

European Rules for Electronic Monitoring²⁹ state: 'National law shall regulate the manner in which time spent under electronic monitoring supervision at pre-trial stage may be deducted by the court when defining the overall duration of any final sanction or measure to be served' (rule 17; Council of Europe, 2014). This proposal in section 5 of the Bill appears to do that.

Section 6: Prisoners not released on certain days of the week: What are your views on this proposal?

Section 6 seeks to improve access to services for prisoners upon release by bringing forward their release date where they would otherwise fall on certain days (e.g. Fridays).

We welcome and strongly support this proposal in the Bill. One of us (Graham) has already called for the end of Friday releases and releases immediately before public holidays in articles in Scottish newspapers in recent years (Rodger, 2019³⁰; Aitchison, 2020³¹). Similarly, Nacro³² have been campaigning for ending Friday releases in the context of England and Wales. Fridays are reported to be busy days in prisons and in local authorities and community justice, and there are real risks of being released often with too much to do and not enough time to access supports and services. Nacro's campaign features voices of prison leavers who speak to how Friday release is often counterproductive:

"Most services close at midday on Friday."

²⁷ Hucklesby, A., Beyens, K., Boone, M., Dünkel, F., McIvor, G., and Graham, H. (2016) [Creativity and Effectiveness in the Use of Electronic Monitoring: A Case Study of Five Jurisdictions](#) [comparative research report], Leeds.

²⁸ McIvor, G., and Graham, H. (2016) [Electronic Monitoring in Scotland](#) [country report], Stirling.

²⁹ Council of Europe (2014) [Recommendation CM/Rec\(2014\)4 on Electronic Monitoring](#).

³⁰ Rodger, H. (2019) '[Exclusive: Scottish Prison Service 'ignoring' law to tackle reoffending](#),' *Herald Scotland*, 27/10/2019.

³¹ Aitchison, J. (2020) 'City inmates set up to fail after release with race against time for services' *Glasgow Times*, 1/2/2020.

³² Nacro (2018) [Barriers to Effective Resettlement: Friday Prison Releases \[Policy Briefing\]](#), London.

“If you are released on a Friday and there are issues they are not likely to be resolved until following Monday, leaving the weekend to panic/stew/worry which could easily lead to reoffending.”

“I ended up at a night shelter, probation was closed, the Council official had left until Monday...”

- direct quotes from prison leavers (quoted in Nacro, 2021³³).

More recently, the Scottish Drugs Deaths Taskforce³⁴ (2021) have recommended ending Friday releases for similar reasons, drawing attention to the risks to health and welfare and the views of service providers and people with lived experiences. We agree with the Taskforce that ‘Friday liberations create unnecessary risks.’ Similarly, in their Review of Throughcare for Justice Social Work, the Care Inspectorate (2021: 5) indicated that Friday releases were not particularly conducive to timely access to supports for reintegration, finding that ‘meeting crucial needs was made more difficult when individuals were released on a Friday or some distance from their home area.’ Furthermore, important opportunities to build rapport and offer practical throughcare supports might be better maximised by mentors and others working in the third sector if they are not facing a busy day of liberations on Fridays, with few services open to refer or take people to, especially later in the day.

The Scottish Prison Service and community justice partners have not made enough use of discretionary existing provisions in law to avoid Friday releases that have been available to them since 2015 – a point which has been raised more than once by MSPs³⁵ in the Scottish Parliament. The proposal in this Bill of making Fridays an ‘excepted day’ should promote more consistency in practice.

This practice of making early release available to avoid Friday release already happens in some other jurisdictions. In New Zealand, there are ‘non-release days’, which includes Fridays (NZ Department of Corrections, 2022³⁶). If an individual’s release date falls on a non-release day, then their actual release date will be the nearest preceding Wednesday, Tuesday or Monday. There are equivalences with the ‘excepted day’ and ‘suitable release day’ provisions in this Bill.

Section 7: Release of long-term prisoners on reintegration licence: What are your views on this proposal?

Section 7 seeks to replace the current possibility of release on home detention curfew (HDC) for long-term prisoners (those serving a fixed term of four years or more). It would be replaced with a new system of temporary release under what the policy memorandum refers to as a reintegration licence.

Release on reintegration licence:

- ***would include a curfew condition and be subject to supervision by justice social work***
- ***could not occur earlier than 180 days before the half-way point of the sentence (the earliest point at which a long-term prisoner may be released on parole) and could last for up to 180 days***
- ***could be used prior to the Parole Board deciding whether to grant release on parole as well as in the run-up to the start of parole where this has already been granted.***

³³ Nacro (2021) [Friday Prison Releases: Collective Voices \[Briefing Update 2021\]](#), London.

³⁴ Scottish Drugs Death Taskforce (2021) [Report on Drug Law Reform](#), Edinburgh.

³⁵ Herald Scotland (2019) ‘[SNP Justice Minister urged to intervene over prison service failure to use reoffending legislation](#)’, *Herald Scotland*, 3/11/2019.

³⁶ New Zealand Department of Corrections (2022) [Prison Operations Manual](#) [Section R.07.04].

This is an interesting proposal and we look forward to hearing discussions of the detail of how it will be implemented, if passed. The Bill's Policy Memorandum is well founded in its emphasis that the vast majority of people will return to communities at some point, underscoring the need to improve supports for that process of release and reintegration. Salient questions and context are relevant here: What are the key ingredients needed to enable people to desist and reintegrate after prison? What does this proposed reintegration licence do to enable these things? Or, put simply, what is reintegrative about a reintegration licence? Both of us have written extensively on rehabilitation, desistance and reintegration, including multiple books³⁷, meaning these questions and topics are of significant interest.

Though obvious, it is worth stating clearly that imprisonment is inherently 'dis-integrative' and 'de-habilitating'. By its nature, imprisonment separates people from important social relationships and supports and (by virtue of processes of institutionalisation) it often diminishes people's personal resources, capacities and skills (Schinkel and McNeill, 2015). This is precisely why (1) we should use imprisonment as sparingly as possible; (2) we should progress people in prison to release as quickly as possible (to minimise these harms and their enduring effects); and (3) we should provide timely and effective support with rehabilitation and reintegration both during and after imprisonment.

The proposals in section 7 are broadly in line with these important and evidence-based principles, insofar as they clarify arrangements for early release of short and long-term prisoners in certain circumstances. For those serving long-term sentences, the effect of the Bill (section 7(4) and 7(5)(3AB)) is to replace the (current) possibility of release on HDC with release on a 'reintegration licence' pending a potential parole date. Though we will welcome more detail of how this will work, this proposal of integrating uses of electronic monitoring with supervision and support seems to be broadly coherent with what has been recommended in Scottish and European EM research (McIvor and Graham, 2016; Hucklesby *et al.*, 2016).

The judicious use of the proposed measure has potential to better inform Parole Board decision-making (since progress on the reintegration licence can be assessed as part of their decision-making) and to better prepare long-term prisoners for parole, by facilitating their gradual return to the living in the community, but under strict conditions and with control measures in place.

The Bill also proposes certain exclusions from such release in relation to certain categories of prisoners. It might be useful to seek further clarification of the rationales for these three exclusions: in particular, why exclude people subject to mental health orders rather than requiring case-by-case assessment of risks? Are these exclusions driven by public protection concerns or by concerns about public acceptability of the early release on licence of such categories of prisoners? Both concerns may be legitimate, of course, but both should also be approached in an evidence-based manner, in our view.

It is worth noting that almost all prison sentences in Scotland are completed in the community under some kind of release licence, with or without active supervision (McIvor, Graham and McNeill, 2019³⁸). Indeed, this is the common practice in most advanced democracies (see Dünkel *et al.*, 2019³⁹). It is usually justified *both* in terms of mitigating the adverse impacts of imprisonment *and* in terms of public safety: Releasing people without adequate planning, care and support (and, if necessary, supervision) represents a failure of the state to properly

³⁷ For example, we are the authors or editors of several books on these topics: Graham (2016) *Rehabilitation Work: Supporting Desistance and Recovery*; Graham and White (2015) *Innovative Justice*; McNeill (2019) *Pervasive Punishment: Making Sense of Mass Supervision*; Burke, Collett and McNeill (2019) *Reimagining Rehabilitation: Beyond the Individual*; Ugwudike, Graham, McNeill, Raynor, Taxman and Trotter (2019) *The Routledge Companion to Rehabilitative Work in Criminal Justice*.

³⁸ McIvor, G., Graham, H., and McNeill, F. (2019) 'Prisoner Resettlement in Scotland' in Dünkel, F., Pruin, I., Storgaard, A., and Weber, J. (eds.) *Prisoner Resettlement in Europe*, London: Routledge.

³⁹ Dünkel, F., Pruin, I., Storgaard, A., and Weber, J. (eds.) (2019) *Prisoner Resettlement in Europe*, London: Routledge.

complete the process of punishment, which it has a duty to do in the best interests of *both* the community *and* the punished person. As a matter of justice, this kind of supervision and support cannot be added on to a prison sentence without violating the principles of parsimony and proportionality, so it *must* be seen as a necessary and important *part of the prison sentence*, not as its termination nor as its displacement by a community-based measure.

Section 7 then, like any early release arrangement, should not be misrepresented as reducing sentence lengths or severity, nor as exposing the public to additional risks. Rather, it is an option that is better seen as a technical measure linked to professional decision-making about how best to enable safe release and reintegration.

A final reflection is that what is proposed in section 7 in the Bill seems to bear some resemblance to early release mechanisms (up to 6 months, 9 months or 12 months before the regular date of early release) available elsewhere in Europe, for example, in Finland, Austria, Lithuania, France, Sweden, Switzerland and the Netherlands (Dünkel and Weber, 2019⁴⁰). It is worth summarising an example here, to offer some insights that may be relevant to discussions of section 7 of the Bill and its implementation, if passed. In Finland, 'supervised probationary liberty' (also called 'probationary liberty under supervision' in the Finnish Criminal Code, the Act of Probationary Liberty under Supervision 629/2013 and the *Imprisonment Act*⁴¹) is an early release programme with a legislative basis that has been available since 2006-2007. Designed for long-term prisoners, it is available up to six months prior to normal conditional release from prison. The target group for probationary liberty is those serving over four years, typically for serious violent offences (including homicide) and aggravated drug-related offences, and people on life sentences (Lappi-Seppälä, 2009⁴²). Electronic monitoring is used in all cases of supervised probationary liberty in Finland, but it is combined with activities and supports focused on reducing reoffending, promoting rehabilitation and social integration (Linderborg, Tolvanen and Andersson, 2020⁴³). People on probationary liberty can live at home, at a halfway house or in a residential rehabilitation centre. Part of this form of early release is the expectation of spending time working or doing productive activities. There is the capacity for cooperation and information sharing on sentence planning for these individuals pre-release and post-release with social, health, housing and employment authorities (from 2023 onwards, this type of activity will be coordinated with 22 'wellbeing services counties' across Finland⁴⁴, a responsibility previously held by local authorities). Supervision of those on probationary liberty by probation staff 'differs markedly from regular parole', in that it is more intensive and individualised to the sentence plan and reintegration needs of the person leaving prison (Lappi-Seppälä, 2019: 115⁴⁵). The decision-making authority for granting supervised probationary liberty is held by professionals working in an Executive agency, such as input from prison-based staff and a decision by Assessment Centre staff in Rikosseuraamuslaitos (in English: Prison and Probation Service of Finland). In 2016, 690 prisoners were released on supervised probationary liberty in Finland, with a daily average of approximately 200 on this measure, which equates to 7% of the daily prison population (Lappi-Seppälä, 2019). Prisoners released through probationary liberty

⁴⁰ Dünkel, F., and Weber, J. (2019) '(Early) Release, Probation and Collateral Consequences (Directives) After Release' in Dünkel, F., Pruin, I., Storgaard, A., and Weber, J. (eds.) *Prisoner Resettlement in Europe*, London: Routledge.

⁴¹ [Imprisonment Act \[English language translation\]](#), Ministry of Justice, Finland.

⁴² Lappi-Seppälä, T. (2009) '[Imprisonment and Penal Policy in Finland](#),' *Scandinavian Studies in Law*, 54: 333-379.

⁴³ Linderborg, H., Tolvanen, M., and Andersson, P. (2020) [Probation in Europe: Finland \(chapter\)](#), Utrecht: Confederation of European Probation (CEP).

⁴⁴ Email correspondence (2022) with senior staff from Rikosseuraamuslaitos/Prison and Probation Service of Finland.

⁴⁵ Lappi-Seppälä, T. (2019) 'Prisoner Resettlement in Finland' in Dünkel, F., Pruin, I., Storgaard, A., and Weber, J. (eds.) *Prisoner Resettlement in Europe*, London: Routledge.

under supervision commit fewer new offences than other types of released prisoners (Rikos-seuraamuskaitos, 2022).

Villman's (2022⁴⁶) research with people on probationary liberty in Finland offers insights into what enables reintegration and desistance and what can, in some cases, hinder it while on this form of early release. Villman's (2022) study finds that people released on probationary liberty with EM express positive views about it as an idea or option, especially if compared to still being in prison, and this is consistent with findings in other research literature. The aspects of probationary liberty that enable their reintegration and desistance processes are the practical support that ease the release process, and the social interaction and integration that can come from it, e.g., within the requirement of work or other productive activities, or being able to take part in rehabilitation and recovery-oriented activities in the community. Some participants spoke of wanting the support to reintegrate after years in prison:

'It helps to surmount the re-entry, like after many, many years in prison, it helps you to see how things are nowadays. 'Cause after this many years, everything has changed; places, things, how to function in society, all these things. It changes so quickly that you are completely out of it. Early release with EM can help with those things and ease the release' (participant in Villman, 2022: 9).

However, in some cases, the intensity of the supervision and strict requirements of this form of early release, and the barriers to gaining meaningful or 'real' work are frustrating for some individuals (Villman, 2022). One participant offered a view of probationary liberty that encompassed both helpful aspects and a sense of pressure from strict requirements and surveillance, saying 'it's a good thing but it surprised me how mentally hard early release with EM was' (in Villman, 2022: 12). In Scotland, it is worth considering in more detail what elements and supports should be incorporated if reintegration licences are to be successfully introduced.

Section 8: Emergency power to release prisoners early: What are your views on this proposal?

Section 8 seeks to give the Scottish Government a regulation making power to release groups of prisoners in emergency situations. It could be used in relation to those serving custodial sentences, with various restrictions, but would not apply to prisoners held on remand. Examples of emergency situations could arise where the spread of an infection might present significant harm to health, or an event leads to part of a prison becoming unusable.

In our view, the powers created by section 8 represent a pragmatic and sensible development, which, we hope, will draw on lessons learned during the COVID-19 pandemic. The penal codes of many countries make provision for the use of executive release in certain circumstances, such as civil emergencies. Our understanding is that this power is available to the Government in England and Wales, for example. The measures in the Bill to exclude certain categories of prisoner from such release, and to allow risk-based judgements to over-ride executive release in certain cases, seem commensurate with the careful use of such a power.

⁴⁶ Villman, E. (2022) 'Early Release from Prison with Electronic Monitoring: Hook for or Hindrance to Change?' *Criminology and Criminal Justice*, [advance access online].

Section 9: Duty to engage in release planning for prisoners: What are your views on this proposal?

Section 9 seeks to facilitate the development, management and delivery of release plans for prisoners – both sentenced and remand. A release plan would deal with:

- ***the preparation of the prisoner for release***
- ***measures to facilitate the prisoner's reintegration into the community and access to relevant general services (e.g. housing, employment, health and social welfare)***

This proposal is welcome; improving release planning for people leaving prison is something we support. More detail of what this section of the Bill will mean in practice is of interest. There is scope to be bolder and go further with this proposal, yet resources and capacity are pragmatic concerns. What happens if those persons and bodies with a duty to engage do so, but there are still significant gaps in access to service provision and support for some people leaving prison? Seeking a more collaborative and coordinated approach in this area is the right direction. What impact that has on post-release *outcomes* and timely access to universal services will be of interest.

Section 10: Throughcare support for prisoners: What are your views on this proposal?

Section 10 would require the Scottish Government to publish, and keep under review, minimum standards applying to throughcare support for both sentenced and remand prisoners. Throughcare support covers a range of services, provided in custody and during transition back into the community, which can help in the successful reintegration of people on release. The new standards would replace existing ones which are more narrowly focused on services provided by justice social work.

We agree that the availability and consistency of throughcare support should be improved across Scotland. Our response to this question is inter-connected with our response to the question on section 9 of the Bill about a duty to engage in release planning for prisoners.

A recent Review of Throughcare⁴⁷ in Scotland found that:

‘there were systemic barriers, beyond the control of community justice social work, which were getting in the way of successful reintegration. For example, it was not routinely possible for services to reserve the safest, most suitable accommodation prior to release. This meant that individuals leaving custody without an address had the anxiety of not knowing where they would be sleeping on the day of release’ (Care Inspectorate, 2021: 5).

The Throughcare Review also identified major gaps and barriers to accessing services that are needed for reintegration, particularly with accessing mental health services and social security benefits such as Universal Credit. Waiting times are an acute issue.

Similar issues are acknowledged in a recent themed visit report on mental health support in Scotland's prisons by the Mental Welfare Commission for Scotland (2022⁴⁸), which has a chapter specifically on liberation arrangements and throughcare. Liberation at short notice is identified as a ‘significant challenge’, with variations across prisons resulting in ‘a lack of joined up and accessible throughcare and aftercare mental health support for prisoners on release’ (page 71). The report quoted a psychiatrist's perspective, which is illustrative of these issues:

⁴⁷ Care Inspectorate (2021) [Community Justice Social Work: Throughcare Review](#), Dundee.

⁴⁸ Mental Welfare Commission for Scotland (2022) [Mental Health Support in Scotland's Prisons 2021: Under-Served and Under-Resourced](#), Edinburgh.

'On the matter of liberation, this has always appeared to happen in a chaotic fashion, with prisoners leaving to no registered GP or address. This means that potentially prisoners are leaving with no means of getting their medication beyond about a weeks' supply, no GP to pass over any care needs to, and often no address to be able to refer to a community team, or even just to pass information over. It also does not promote stability of mental health if prisoners are leaving with no address or GP. If prisoners are leaving at their EDLs this is often known in advance, it seems like it should be possible to plan liberation better and give prisoners a better opportunity to succeed in the community' (Psychiatrist quoted in Mental Welfare Commission for Scotland, 2022: 71).

On the same theme, Scotland's National Action Plan for Human Rights (SNAP 2⁴⁹, 2019: 29) specifically mentions people with mental health problems as one of the groups whose views and human rights need to be better prioritised in Scottish Justice, in prisons and communities.

In light of these issues, are there other persons or public bodies which should be considered for inclusion in section 10 the Bill? We are aware that the Bill's Explanatory Notes states that 'executive agencies are not statutory bodies', as well as the differentiation of types of bodies listed in the National Public Bodies Directory. However, we would like to press the question of whether certain persons and public bodies (such as Social Security Scotland and the DWP; or Scottish Prison Service) should be added to lists in section 10 of the Bill of needing to be consulted 34B(4) and/or having a 'duty to comply' 34C(2) with the proposed Throughcare Support Standards? If charities/the third sector can be added to 34B(4), then why are these bodies omitted? Furthermore, why are relevant bodies with scrutiny and oversight functions not directly named in the list 34B(4) of those to be consulted on the development and publication of 'Throughcare Support Standards'? There may be sound reasoning for this, but we believe it is worth examining in more detail. We ask the Criminal Justice Committee to consider whether public bodies such as the Care Inspectorate, HM Inspectorate of Prisons for Scotland, the Mental Welfare Commission for Scotland, the Scottish Human Rights Commission and/or the Equality and Human Rights Commission should be named in relevant parts of section 10 as having to be consulted by Scottish Ministers. Several of these bodies are members of the UK National Preventive Mechanism (NPM), which promotes and monitors compliance with international standards and human rights legal obligations, including OPCAT (UN) and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (Council of Europe).

Finally, we wish to explicitly recommend that Scottish Ministers should consult people with lived experience and their families (including their representatives/groups) on the proposed Throughcare Support Standards. This may or may not need to be stated in section 10 on the face of the Bill, but it is important and worth directly acknowledging here.

Section 11: Provision of information to victim support organisations: What are your views on this proposal?

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⁴⁹ Scottish Human Rights Commission (2019) [Proposal for Scotland's second National Action Plan for Human Rights \(SNAP 2\)](#), Edinburgh.

Other Views

Do you have any other views on the Bill?

It will take more than legislation alone to make progress in these areas. In considering making progress towards decarceration and enabling reintegration, the Committee might consider what levers do the Scottish Prison Service already have within their power and are they using them effectively? There are wider contextual and systemic factors which may have significant influence on the extent to which people are well prepared for release and reintegration and on the numbers/use/uptake of some proposals in the Bill. For example:

- **Open Estate:** Why is use of the Open Estate plummeting, when it is designed and intended to prepare people serving long sentences for release? The SPS Open Estate has a design capacity of 285 people. In June 2021, the Open Estate was operating at 52% capacity, with 150 people, and a year later in June 2022, the Open Estate was operating at 36% capacity, with 104 people (SPS, 2022⁵⁰).
- **Temporary Release:** To what extent is temporary release on licence being used for reintegrative purposes (including those listed in Part 15, rule 136 of the *Prisons and Young Offenders Institutions (Scotland) Rules*)? Why is there no publicly available data on the use of this mechanism by the Scottish Prison Service? In various other jurisdictions, temporary release is used as a graduated, structured form of preparation for community reintegration.
- **Progression:** One of the most pressing and critical issues in Scottish prisons is progression (through the sentence towards release) – or rather the lack of it. People in Scottish prisons are frustrated about the lack of opportunities for rehabilitation and for preparation for release and reintegration. The pandemic may have exacerbated these problems, but their existence precedes it. Nearly every recent prison monitoring or inspection report by HM Inspectorate of Prisons for Scotland (HMIPS) lists problems with progression and access to opportunities and activities to prepare for release. Recent figures released in an FOI response (SPS, 2022⁵¹) show that there have been 1,146 prisoner complaints about progression and 352 complaints about prisoner programmes in the years 2019-2021. The Throughcare Review by the Care Inspectorate (2021) identified progression as one of the areas that needs further exploration in order to ensure best practice in supporting throughcare, acknowledging that the forthcoming thematic review of progression led by HM Inspectorate of Prisons for Scotland (HMIPS) will help to inform understanding in this area. We believe these issues and influences are also relevant in the context of Parliamentary discussions of this Bill. Delaying progression (through the failure to provide adequate opportunities for people in prison) is one contributing cause of our high prison population and of overcrowding; it is also a waste of public resources and of human potential. It undermines legitimacy and fairness in the administration of justice, which is likely to undermine the effectiveness of sentences. In this respect, keeping people locked up longer than necessary does not service the public interest or keep the public safe.
- **Staff Absence:** High numbers of prison staff absence have been recorded in recent years; for example, 1,050 staff were absent in April 2020 and 810 staff were absent in January 2022 (SPS, 2022). It is a priority issue for the Scottish Prison Service, and has been the subject of discussion by Audit Scotland (2019⁵²) and the Parliament's Public Audit Committee in the context of the high prison population. Staff absence has direct influences on things like access to purposeful activity, rehabilitative programmes, preparation for

⁵⁰ Scottish Prison Service (2022) [Public Information Page \(PIP\) Quarter 1 2022](#).

⁵¹ Scottish Prison Service (2022) [FOI response \[HQ21322\]](#).

⁵² Audit Scotland (2019) [The 2018-2019 Audit of the Scottish Prison Service](#), Edinburgh.

release and throughcare, when there are not enough prison staff to operate a full or normal regime. It may affect capacity to meaningfully engage with a few proposals in the Bill.

Although they have different remits, a cognate question is: what levers do Community Justice Scotland and community justice partnerships (CJPs) have within their power and are they using them effectively? This is asked constructively in the spirit of exploring what more could be done to lead improvement and availability of community-based supports for bail, throughcare and reintegration and to pursue decarceration. Our understanding is that this is an area that Audit Scotland⁵³ will be continuing to explore in the short- to -mid-term, in the context of court backlogs, the high prison population, and pressures on community justice partners. Building on the work that they have already done to date, are there powers afforded to Community Justice Scotland in the *Community Justice (Scotland) Act 2016* that might be further developed and exercised in tandem with the practical implementation of this Bill, should it be passed into an Act?

The Scottish Government and Scottish Parliament often speak of Scotland's place in Europe. It is time for Scotland to better live up to its obligations and shift its course in this area of prisons and decarceration. Being a nation that imprisons its people at a higher rate than most other European nations is not compatible with the aspiration that we are sure members of the committee share; for Scotland to be a safe, humane and rights-respecting democracy.

We are grateful for the opportunity to offer our views in response to this Call for Views, and we will take a keen interest in the Parliamentary deliberations and scrutiny of this Bill. The Committee and Members are welcome to contact us regarding any of the sources of evidence referenced and any further details of what has been said in this submission. Thanks.

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⁵³ Audit Scotland (2021) [Community Justice: Sustainable Alternatives to Custody](#), Edinburgh.