

Criminal Justice Committee

4th Meeting, 2021 (Session 6), Wednesday 15 September 2021

Prisons and prison policy

Written submissions

1. The Criminal Justice Committee is holding a roundtable meeting about prisons and prison policy.
2. Written submissions have been provided by the following organisations who will be attending the roundtable meeting—
 - HM Inspector of Prisons Scotland
 - Howard League
 - Parole Board for Scotland
 - Scottish Centre for Crime and Justice Research (two submissions)
3. In addition, the Committee has received a submission from Families Outside.
4. These submissions are attached.

**Clerks to the Committee
September 2021**

Written Submission from Her Majesty's Chief Inspector of Prisons for Scotland

Introduction

I am grateful for the opportunity to provide the Criminal Justice Committee with my views on the current challenges in the prison system and efforts to tackle prison population and reduce reliance on remand, reduce reoffending and preventative action. I must firstly say that COVID-19 presented one of the biggest challenges to Scotland's Justice system and the expert predictions of catastrophe in a contained environment, e.g. epidemiologists at University College London suggesting that uncontrolled outbreaks of COVID-19 could lead to the deaths of up to 800 people from the prison population. The reality of a low number of deaths, despite large outbreaks, resilient and co-operative staff and prisoner population is to be applauded.

It is my view that there are a number of key strategic challenges facing Scotland's prison system at present:

- Overcrowding with an anticipated continued rise and the very real risk of a sudden rise with the impact of COP 26.
- Extraordinarily high remand figures, although currently static the privations they endure contravenes human rights.
- Changing demographic with an aging population and challenging SOCG cohort.
- Substance misuse, a punitive and prevention approach that is facing a more extreme challenge.
- Health and Mental Health.
- Children in prison likely to contravene UNCRC and taking up disproportionate cell space.
- A fragile organisation with aging infrastructure, staff 'bulge', and interim management structures.
- Critical inspections and other reports, e.g. CPT report with three key messages, women and mental health, long-term carousel of segregation and overcrowding.

A bold and brave transformational agenda, including removing children from prison, considering recovery as a presumption of liberty, and a full review of the out-of-date Prison Rules could allow Scotland to lead the way again in enlightened justice and penology.

Overcrowding.

A comparison of data provided by the World Prison Brief shows that Scotland has one of the highest imprisonment rates (143 prisoners per 100,000) of Northern European countries (Scottish Centre for Crime and Justice Research (SCCJR), 2019). In Iceland for example in comparison, the figure per 100,000 is at 37, Northern Ireland is 76, and England and Wales 140.

In the 2018/19 audit of the Scottish Prison Service (SPS), 1st Report, 2020 (Session 5) I made the statement that “The choice is stark - either we put fewer people in prison or we recognise that we have to pay for the prison population that we do have”.

A rising prison population can only impact adversely on the ability of the SPS to manage regimes safely, provide meaningful and purposeful activity to all those who could benefit from it, and allow prisoners to access programmes that could assist with their rehabilitation or which may be required before seeking parole.

Overcrowding results in more prisoners being locked up in their cells longer than necessary and increases tensions within establishments, which in turn increases pressures on staff.

In summary, overcrowding is a significant and enduring issue compounded by retaining the primary surge capacity for Scottish prisoners in a building that is not fit-for-purpose and with little extra capacity across the estate that is usable. The prison population is well above the optimum single cell capacity necessary for reducing virus transmission risk and ensuring decency and human rights compliance. The 2008, Scottish Prisons Commission Report, set out an ambitious vision of penal reform including a significant reduction in the prison population to an aspirational figure of 5,000 and it has never been achieved; despite the continued rhetoric of reducing the population.

Challenges of an aging prison population

The 2017 and 2020 reports published by HMIPS made reference to the growing number of older prisoners in custody which had ‘increased in one year by a fifth’. Three years later in 2020, the number of older prisoners in Scotland’s prisons had further increased by 46%.

This stark increase showed that the prison population is changing in Scotland and some decisive action is required to meet the complex social care and rehabilitative needs of both accommodation and care of this aging population. The population pressure on the prison system as a whole, inhibits access to the too limited accessible cellular accommodation.

Access to offending behaviour programmes for this group of prisoners was reported as particularly difficult, with many prisoners saying that they did not wish to be transferred a long distance from their ‘home’ establishment. The majority of this population did not take part in offending behaviour programmes, having a consequential effect on those applying for parole and progression, creating a bottleneck in closed prisons.

Remand and non offence protection

Whilst the overall prison population is lower than pre-pandemic levels, the number of people held on remand remains at an historic high.

- In July 2021 the population increased to 7,548 from a low of 7,000 after the

- welcome emergency release
- 2,088 were on remand: 1,740 (23%) untried and 348 (5%) awaiting sentence
 - 65% of arrivals were untried (599 of 919), and 19% awaiting sentence (178)

The tension between Articles 2, 3 and 8 in the current pandemic is fundamentally the difficulty of ensuring that transmission of the virus is minimised (Article 2) against the definition of ill treatment (Article 3), and the need to respect family life (Article 8).

The Council of Europe (CoE) in March 2020 (Annex C) issued a [Statement of Principles](#) relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic. The CoE acknowledged the clear imperative to take firm action to combat Covid-19, but reiterated that protective measures must never result in inhuman or degrading treatment of persons deprived of their liberty.

The introduction of in-cell telephony, and virtual visits transformed the communication possibilities and were very much welcomed. We now need to go further. Whilst I absolutely accept the untenable position that establishments were experiencing in managing the fallout from the pandemic, the measures imposed placed a significant challenge to human rights compliance and rehabilitative activity, with far too many prisoners locked in a cell not considered big enough to hold two people for 22 or more hours a day.

One of my repeated findings is the cultural acceptance of a hierarchy of entitlement in prisons where in Scotland remand prisoners and those labelled 'non-offence protection' are rarely afforded access to rehabilitative activity. For them 22 hours a day locked up in a room often not designed for one but holding two is routine.

There is no doubt that significantly increasing the use of Bail and GPS Electronic Monitoring that can monitor drug and alcohol use, combined with greater viability of support for substance misuse, diversion for mental health, reducing the backlog in the courts and a presumption of liberty for children will all play their part in reducing the remand population.

Modernisation of the prison estate - a fragile estate

The ageing infrastructure and general condition of some of Scotland's prison buildings are evidently ill-suited to a modern prison system, not least at HMPs Barlinnie, Castle Huntly, Dumfries, Greenock, Inverness and Perth.

We welcome the very significant investment that has been made over the last decade in the infrastructure of Scotland's prisons. Many of Scotland's prisons are modern and fit-for-purpose, but Scotland still has some antiquated Victorian prison establishments that are breaching human rights guidelines on cell size, are expensive to maintain, do not provide for the changing demographics of an aging population or childcare and have limited surge capacity. The concerns about a rising prisoner population and overcrowding simply reinforce the need to ensure appropriate investment in vital new prison infrastructure, and adequate maintenance of ageing establishments until they can be replaced.

HMIPS are firmly of the view that an estate optimisation plan should be developed for each of these sites by way of articulating short, medium and long-term objectives to improve living conditions for prisoners and working conditions for prison staff.

Reforms to the prison regime

Single cell occupancy is the aspirational norm of any enlightened penology and in a pandemic is a necessary adjunct to inhibiting virus transmission. Achieving in-cell sanitation in the older prisons was a huge stride forward; the introduction of in-cell showers into the older Victorian estate is costly and must be laid against new build costs. The introduction of in-cell telephony, and virtual visits transformed the communication possibilities and were very much welcomed. The introduction of in-cell technology to reduce the administration burden on staff, allow for in-cell learning and support by, for example, health staff is the next step.

Detention offers a unique opportunity to overcome social, criminogenic and community barriers to living a crime free life. For example, the opportunities afforded by HMP YOI Polmont for young people are evidence-based, leading edge and impressive. However, the attendance at the remarkable opportunities remains consistently low. Other prisons, for example, HMP Barlinnie simply do not have the resources to offer work, education and rehabilitative activity to its entire population. This is compounded by a cultural acceptance that remand prisoners should not be actively encouraged to attend the opportunities available.

Substance Misuse

Those countries that have successfully reached a sustained drop in their prison population and a reduction in drug-related deaths have almost uniformly taken the bold decision, as well as other strategies, to decriminalise or de-penalise substance misuse, often unpalatable concepts in our current climate. Prohibition and punishment have not been effective in tackling substance misuse where it is a major contributor to the prison population and unanticipated deaths. The relatively recent rise in the use of novel psychoactive substances is placing immense pressure on prisons who have a continued focus on prevention of contraband and punishment. Our prisons are overcrowded, with limited meaningful activity, drugs easily available, and insufficient recovery provision. There is an alternative view - too many drug users are cycling in and out of prison. Dame Carol Black's report calling for a public health approach - <https://www.gov.uk/government/publications/review-of-drugs-phase-two-report> - that called for greater support in the community with cross-department co-operation and investment is also corroborated by other academic research. The review recognises the "significant investment, but the payoff is handsome: currently each £1 spent on treatment will save £4 from reduced demands on health, prison, law enforcement and emergency services".

Additional Challenges

Health and Mental Health: discussion on alternatives needs to take place around the location of prisoners with mental health issues. Visibly HMIPS experience a high

proportion of apparently mentally unwell prisoners, many of whom are located in segregation. We find prison used as a 'place of safety' and lengthy periods of waiting for those who require in-patient care. Women in particular are at the extreme end of the waiting times and if requiring high secure in-patient treatment are transferred to England. Recruitment and retention of clinical staff is consistently challenging, psychosocial interventions are repeatedly found to be inadequate and all provision varies between health boards generating concerns.

Purposeful and rehabilitative activity

One of the national themes that has arisen from prison monitoring is the equity of regimes for different groups of prisoners, including remand prisoners. Independent Prison Monitors (IPMs) continue to note concerns about the different levels of access to and engagement in activities available. A demographic review linked to an estate review should inform the type and scope of purposeful and rehabilitative activity required. The inadequate current provision that overall does not cater for the identified criminogenic need, population density, recovery need, Scotland's skill shortages and key life skills, despite significant efforts by the SPS.

Progression – the prisoner journey

Progression has been, and continues to be, an issue raised regularly and plaintively with IPMs and prisoners alike. The national COVID-19 restrictions have exacerbated what was already a challenging situation with considerable backlogs and waiting lists. In response, we have commenced a thematic progression review and I am aware that the SPS is making every effort to overcome the issues.

Fragile management and staffing

The SPS have an interim CEO who during the pandemic has ensured stability and cohesive management. She is supported by a raft of management staff who are also interim. This is compounded by a 'staff bulge' where a considerable portion of experienced prisoner facing staff are due to retire. The pressures from these issues however committed the teams, are immense. HMIPS have frequently noted the good staff prisoner relationships and their positive impact on safety and security. Stabilising the management structure, workforce capacity modelling and continuing to recruit are essential for the future.

Children in prison

The visionary approach taken with the Children's hearing system and subsequent strategies is to be applauded for the incredible reduction in the number of children currently in prison. However, the proportion of children on remand has risen.

It is worth remembering, however, that the Edinburgh Study¹ evidenced that contact with the criminal justice system is often detrimental to young people's wellbeing and development.

¹ [Delivering Justice for Children and Young People: Key Messages from the Edinburgh Study of Youth Transitions and Crime — University of Edinburgh Research Explorer](#)

We as a society can consider to have failed if a young person enters prison but if detention is the only safe alternative; they deserve the best we can offer to help them move on from offending. The impact of COVID-19 was huge for all prisoners with heavy restrictions on their regime and access to support. For children and young people the detrimental impact was exacerbated and our report on the health and wellbeing of people under the age of 18 will be published later this year.

Childhood has been accorded special status in international human rights law and in anticipation of the human rights framework, preparation to comply with UNCRC is key. We welcome the commitment to embed the human rights based approach in the Promise, Youth Justice Strategy and other reviews including the HMIPS 2019 report on mental health for young people. We welcome the plans to ensure compatibility between Scots Law and international human rights law and specifically UNCRC. Perhaps now is the time to also consider being the first UK nation to remove children from prison.

Deaths of prisoners in custody and post release

This is an area of concern for HMIPS and we are concerned it is also linked to the rise of NPS availability. We will be urging the Cabinet Secretaries of Justice and Health to commission a prevention of deaths in custody and post-release, thematic review. This will also be a recommendation from our Death in Custody Review that looks at the aftermath of a death in custody which is due to be published later this year.

Wendy Sinclair-Gieben
HM Chief Inspector of Prisons for Scotland
September 2021

Written submission from the Howard League Scotland

The overall number of people sent to prison in Scotland, including the challenges of an ageing prison population and the likely future trends in prisoner numbers

It's clear that the numbers of people sent to prison [remains the most pressing concern facing imprisonment in Scotland](#). All of the other issues to be discussed in this session are exacerbated by this issue: upholding prisoners' human rights becomes harder; rehabilitation becomes harder; maintaining the physical and mental health of prisoners and prison staff becomes harder; keeping up staff morale becomes harder; and sustaining positive relationships between prisoners and prison staff becomes harder.

As the recent follow up the CPT report by the NPM Scottish sub-group [said](#) "... this report raises serious concerns. We call on the Scottish Government to implement the outstanding recommendations as soon as possible, *in particular taking note of the need for a concerted effort to effectively apply the presumption of liberty*" [our emphasis]. They also noted that some of their recommendations [have not been implemented](#) for decades.

There are various reasons for the increasingly high prison population: longer sentences for more serious crimes; changes to automatic early release; over-use of remand; systematic issues with progression; and under-resourcing of non-custodial alternatives. There are also gaps in the provision of holistic social justice support as highlighted in the historical under funding of drug and alcohol services (and related shameful drug deaths across Scotland). Howard League Scotland remains unconvinced that the issue of a rebalancing of custodial and non-custodial sentences can be tackled in isolation of this.

If we want to deal with (rather than simply acknowledging) this problem, the judiciary have to be involved more concretely. We have a prized tradition of judicial independence in Scotland, and Howard League Scotland would vigorously seek to defend that independence. But we need a big, serious public conversation about sentencing and remand in Scotland; and that can hardly begin if the judiciary are not in important ways involved in it. We need to develop ways of convening such conversations that enable people with knowledge and experience on sentencing to participate, without compromising the autonomy of the judicial role. Would not this round table have benefited from involving representatives of Scottish judiciary, for example?

Howard League Scotland welcome the recent Programme for Government's recognition that the Scotland must move towards a position where prison is for 'only for those who pose a risk of serious harm'. In the future legislation proposed to address this aspiration we urge the Government to keep in mind the

recommendations, above, *“for a concerted effort to effectively apply the presumption of liberty.”*

One of the consequences of the above is the aging prisoner population. As highlighted in recent HMIPS thematic reports, the needs of this population are quite distinct from the rest of the population and not always adequately served in over-stretched and very old prisons. Despite the requirement for equivalence of care, it is telling that in the general population, “old age” is generally defined as pertaining to those aged over 60 years old, whilst in the prison population it is used to classify those over 50 years old i.e. health-related needs of prisoners are advanced by around 10 years, relative to people in the general population.

The ability to support social, as well as health, care is often hampered in the prison environment, as acknowledged in the recently announced [national care service consultation](#) which proposes that the health and social care for those who need it, are provided by this single service.

Howard League Scotland was very supportive of the Scottish Sentencing Council’s draft ‘Sentencing Young People Guideline and would similarly suggest that it may be appropriate that the advanced age of an individual be taken into account during sentencing. (Whilst it may be still be necessary to punish individuals for past crimes, if the risk they currently pose is low, that could also be reflected in their sentence.)

The care for older and infirm prisoners also has implications for the prison estate, where numerous full inspections by HMIPS have highlighted the woeful provisions for prisoners with mobility issues. (These included instances where cells were not accessible and thus people had to “launch” themselves from their wheelchairs onto their beds.) Whilst the recently published Programme for Government 2021-22, pledges an investment of £500million to modernise the prison estate over this Parliament and replace HMP Barlinnie and HMP Inverness by 2026, it cannot be overlooked that the former was declared unfit for purpose circa 25 years ago. There is also no mention of HMP Greenock, which HMIPS has also described in the same terms - thus we can only assume that prisoners will be provided with an alternative to its unsatisfactory conditions well into the post-2026 Parliamentary session at the earliest.

Recent reforms have tinkered at the edges of addressing the problem of the prison population – the presumption against short term sentences legislation (PASS) has been welcomed, although it was largely concerned with the churn of prisoners, rather than being specifically aimed at reducing the prison population. The available data does not yet allow us to fully determine its success or not, but it is worth noting comments from Audit Scotland’s Community Justice [report](#), which showed enormous geographic variation in the use of non-custodial sentences and which strongly

suggested that this came down to individual sentencers' decision making, rather than any legislative imperative.

The number of people on Home Detention Curfew (HDC) remains stubbornly high, despite changes to guidance removing the presumption against it, which suggests that decision-makers are either astonishingly risk-averse or that the process itself contains too many obstacles or potential points of failure.

As an executive agency of the Scottish Government, SPS, is often put in an invidious position where it is expected to absorb the numbers of people referred to it - however high in number and however many of them should not be there. That the Scottish Government's aspiration to use imprisonment only for those who pose a risk of serious harm, quoted above, is described in the same document as a "long-term aim", is bewildering. This is a serious and urgent issue.

Remand levels and potential ways of reducing the number of those on remand, including the use of electronic monitoring/curfews as a condition of bail

Our [report](#) "The Scandal of Remand in Scotland" outlines the unacceptable situation where there has been a significant rise in the number of people held on remand in Scotland (currently at approximately 24% of the prison population), particularly amongst young people. The average duration of time spent on remand has increased substantially, with stays of more than 120 days accounting for 6% of people on remand in 2009-10, rising to more than 17% in 2019-20. Delays in trials due to the pandemic may mean that time spent on remand has increased even further, however, recent data from March 2021 shows that a significant proportion of the remand population were accused of non-violent offences. Many of them could therefore have awaited trial in non-custodial settings such as community-based bail accommodation. Crucially, 57% of people held on remand do not go on to be given a prison sentence. They are either found not guilty or receive a community sentence, underlining that remand is grossly over-used in Scotland.

Whilst the stigma of imprisonment doesn't differentiate between those convicted or on remand, the experience of prison for those remanded can be significantly poorer, with more time spent in cells and fewer opportunities for work or education. During lockdown, this is most certainly the equivalent of solitary confinement as defined as torture by the United Nations.

We hear anecdotally of people still being remanded into custody because they have no fixed abode – the fact this still happens in 2021 is shameful. We are told that operationally the Scottish Government is not ready to implement the legislation that would allow Electronic Monitoring as a community-based alternative to remand, though work is ongoing in this regard. This must be actioned as a priority.

If the current approach of ‘suggesting’ this option to the judiciary does not change behaviour, then the Scottish Government will need to *use*, not simply *discuss* different methods. We say this whilst acknowledging the announcement that legislation will be introduced in this parliamentary term to “change the way that imprisonment is used, with consultation on initial proposals relating to bail and release from custody law this Autumn”. We are supportive of consultation on such issues, although we would not like this to be used to delay vital reform.

The need for modernisation of the prison estate and the capital budget of the Scottish Prison Service

As noted in answer to the first point, the prison estate requires urgent modernisation. We know that capital expenditure on the prison estate is not popular amongst the general public, but that does not negate its importance. We need smaller and better prisons, not fewer and bigger ones. The new National Facility and Community Custody Units (CCUs) in the women’s estate show willing in this area, but they are long overdue and not enough detail has been shared to know if the vision of ‘reimagining the women’s estate’ will be achieved in reality. Most concerningly, the CCUs will only be able to take a fraction of the women currently (and projected) to be in prison.

If the Scottish Government is committed to social equality across a range of areas (such as education and health), then it must also be committed to this in justice, and that means spending money on this too. With time, budgets will decrease as the prison population decreases, but not immediately.

The status of reforms to the prison regime such as more single cell occupancy, greater provision of in-cell telephony, additional rehabilitation programmes, the development of a new health and wellbeing strategy for Scotland’s prisons, and (more generally) the emphasis on human rights in prisons.

The answer to this question depends very heavily on levels of overcrowding – it is virtually impossible to be creative about all of these questions in the context of an overcrowded prison estate when the focus of work for the prison is just getting through the days safely. It’s almost meaningless to say ‘yes, we need more: single cell occupancy, greater provision of in-cell telephony, additional rehabilitation programmes, the development of a new health and wellbeing strategy for Scotland’s prisons, and (more generally) the emphasis on human rights in prisons’, when all of it is predicted on a significantly lower prison population. In SPS’s defence, it does not have the thinking or breathing space in which to do this to the level required and is perpetually “boxed in” by its remit to accept admissions without question.

[Research](#) shows that single cell occupancy is associated with improved quality of prison life for those in custody and we’ve also seen that this is important for reasons

of public health. The benefits of in-cell telephony is also underpinned [by research](#) looking at mental health for young people, and this has been praised by recent HMIPS reports. We clearly hope that the current use of mobiles remains. Stories such as [this](#) are misplaced – they relate to the ongoing use of illegal phones in custody, and *not* the provision of mobiles by the state.

In order to get a true picture of the prison regime (not just during the pandemic, which has [recently been described](#) by a prison charity as “magnifying the existing horrors” of day-to-day prison life), data must be made available either publicly or to the Criminal Justice Committee on an ongoing basis. It should not be the case that organisations like Howard League Scotland need to highlight gaps and errors in the small amount of data that is available on the SPS website, or to have had to call for its publication in the first place.

The various challenges which have been identified as facing the SPS, such as drug use and smuggling; the demand for education/purposeful work; demands on rehabilitation services and post-release support and co-ordination; and the activities of organised criminal gangs in prisons.

There is little research published on the topic of SOC in prisons in the Scottish context, but we hear from those working in the SPS how much of a challenge dealing with issue is. This issue can further victimise the already vulnerable, leading to prisoners getting into debt and this passing between prison and the community, often involving the prisoner’s families too. The solutions to these problems should be both situational (additional security measures within the prison), and more holistic (having fewer people in prison who are vulnerable to drug abuse in the first place; better support for treating addiction in prisons and the community). In relation to potential additional security measures, these must not come at the expense of the human rights of those in custody, and the rights and dignity of those who visit them.

Connected with that issue is that of rehabilitation services in prison including education and purposeful work. If people in custody have more hope in the future, they are less likely to for example, use drugs in prison, thus furthering the power of SOC groups operating there. That ¼ of those released from prison reoffend within one year of being released from prison is due to many factors beyond their experience of imprisonment alone. However, it is undeniable that the services in prison play a significant role as well. Work in prison should be meaningful, and [connected with the real world of work opportunities in the community](#), so that when released, people have the skills, and potentially also the qualifications, to gain work there. Prison work should also be adequately remunerated, it is not acceptable [that people in custody are exploited because they have no other choice](#).

Re post-release support and co-ordination, it appears that there are no plans to reinstate the SPS Throughcare Support Officers and thus the responsibility for this

now lies primarily with the third sector. In many respects this is an abdication of responsibility on the part of the Scottish Government, which belies its overall aim to reduce reoffending by understanding crime's links to trauma, housing, benefits, addiction and mental health support.

Deaths of prisoners in custody and post-release

While deaths in custody are subject to a FAI, these inquiries must be properly funded to reduce the significant backlog which exists, so lessons can be learned as quickly as possible following any deaths. Although there is little research on this issue in Scotland, [research](#) from England & Wales has found that rates for people just released from custody were far higher than in the general population. Therefore, we also argue that it is vitally important to investigate deaths in prison post release, as illustrated [in this recent case](#). The state's responsibility cannot simply stop at the prison gates.

Written submission from the Parole Board for Scotland

1. The Parole Board for Scotland is Scotland's parole court. We are a Tribunal NDPB and independent from Scottish Ministers. Our primary role is to determine whether it is safe for offenders to serve the rest of their sentence into the community under the supervision of a social worker.
2. We occupy a critical, judicial, inquisitorial decision making point in the system as all long term and life sentence prisoners will have their cases considered by the Board. Our decisions rely on information from social work, SPS, health professionals, COPFS and the police and we therefore have a wide ranging and well informed perspective on how the system operates, and how it could be improved, at the point where a prisoner is eligible for consideration for early release.
3. We have set out below a brief summary of some of our thoughts. These are of course constrained by the requirement for brevity but I would be happy to expand on any of what follows at the roundtable or future discussions.

Progression in the community

4. Our view is that the binary choice between prison and the community is too blunt. It leads to significant numbers of offenders being incarcerated for longer than would be necessary if there was a broader choice of options that allowed safe transition and management within the community without impacting on public protection.
5. The Board considered that building risk management capacity within the community as key. The development of a 'halfway house' model where residential services would allow for a higher degree of supervision, monitoring and support would address this issue. Such provision could be differentiated to address different levels of risk and specialisation (for example mental health, drugs or complex needs).
6. The same argument applies to the consideration of recall to prison where licence conditions are breached. The options currently are limited. The availability of options involving higher levels of supervision as described above would undoubtedly reduce the numbers recalled to prison.
7. Whilst requiring investment up front there would be significant savings from a reduced prison population and potentially from lower recidivism by avoiding the 'cliff edge' of release at sentence end with little or no supervision.

Supervision in the community

8. The Board is aware that local authority capacity to carry out effective supervision is stretched. We believe this is partly a resource issue but would welcome a wider look at alternative models for supervision including a national rather than devolved service, with the option for more intensive and active 24/7 supervision where required. We wonder whether there is an enhanced role for prison officers, who will have built relationships with prisoners, to be involved in some aspects of

community supervision. There may be benefit in looking afresh at what the role of a parole supervising officer should look like and the attributes and powers such an officer should have.

9. There could also be merit in introducing “Parole Reviews”, where the Board would review the progress that an offender has made while on licence. This would allow problems to be detected and addressed at an early stage (perhaps avoiding recall to prison), as well as providing an incentive for the offender to engage and abide by licence conditions.

Access to Programmes

10. Participation in offence focused work provides valuable evidence in the Board’s decision making process. It is clear from our experience that there are significant and systemic issues around prisoners’ ability to access and participate in relevant and timely programme work.
11. Whilst we believe that a more individualised approach to programme work is a worthy aspiration the key issue at the moment is the availability of any provision. Without adequate access to offence focused work prisoners are unable to address their risk, progress to more open conditions and as a result the Board’s ability to release is often curtailed.

Preparation for Release on Parole licence

12. Too often it is evident that prisoners have little knowledge of how the parole process works or what is required to provide evidence that would support their release. In our view preparation for parole should start on day 1 of sentence. The Prisoners and Criminal Proceedings (Scotland) Act 1993 empowers Scottish Ministers to appoint Parole Advisers to carry out this function but this has never been done. The Board would support the appointment of parole advisers and believe education and preparation of prisoners about their journey to release would positively impact release rates.

First Grant of Temporary Release.

13. The Board observes that there are frequently significant delays in granting FGTR. Again, evidence from testing in the community provides valuable evidence to inform the Board’s decision making. One option for the future of FGTR would be to give the Parole Board responsibility for decision making. This would replicate the situation in England and Wales, where the Parole Board makes decisions on progression to open conditions. The Board’s core business is the assessment of risk and therefore we would have the expertise to undertake such decision making. The Board’s independence is also an argument for this approach.

Integration of Parole and SPS processes

14. The Board is dependent on Scottish Ministers to provide information for parole considerations. Such information often comes from risk management assessment activity undertaken in prisons and often the timing of such activity is not aligned with parole processes. This means that critical reports which could lead to

release decisions are frequently timed to be produced after parole consideration dates and are therefore not available to the Board.

Reducing churn

15. Delays in completing parole hearings and making a release decision can mean that prisoners spend more time in prison than necessary. Improved quality of information available to the Board will reduce deferrals and speed up release decisions. Better quality dossiers and speedier provision of information from other parts of the criminal justice system will also reduce delays.

The Aging prison population

16. There is a growing issue around the release of elderly prisoners with significant and complex needs, particularly amongst the sex offender population. Difficulties in accessing care services in a safe environment in the community frequently lead to a decision not to release on parole. A potential solution is the development of specialist accommodation and resources for this group. The Board is concerned that a failure to address this need, and continued imprisonment as a result, has a Human Rights dimension.

Capability across the system

17. Organisational boundaries can be obstacles to the effectiveness of the whole system. The Board is aware that in other jurisdictions (for example, Canada) boundaries are more permeable and it is much easier for professionals to share information and gain work experience between court services, the police, criminal justice social work, and the prison service, encouraging deeper knowledge and understanding, more effective working, and better decision making. A systems approach rather than the current departmentalized way of working would serve to solve many existing problems.

The Parole Board as a resource

18. The Prisoners and Criminal Proceedings (Scotland) act 1993 allows Scottish Ministers to consult the board on **any matters** relating to the early release or recall of prisoners. There is considerable expertise amongst Board members who are drawn from a range of professional backgrounds. Whilst our role to date has been largely confined to the consideration of individual cases we believe we can make a wider contribution to the development of the justice system through the provision of advice and expertise on issues of release and public safety.

John Watt

Chairperson, Parole Board for Scotland
6 September 2021

Written submission from Scottish Centre for Crime and Justice Research

The [Scottish Centre for Crime and Justice Research \(SCCJR\)](#) is a collaboration between the Universities of Glasgow, Edinburgh, Stirling, and Strathclyde. The SCCJR aims to produce research that informs policy and practice and advances our understanding of justice. We welcome the opportunity to make a short evidence submission to the Committee.

This paper was prepared by Dr Hannah Graham, University of Stirling, Dr Steve Kirkwood, University of Edinburgh, Professor Margaret Malloch, University of Stirling and Professor Fergus McNeill, University of Glasgow.

Prisons and Penal Policy in Context

Issues of prisons and prison policy involve varying degrees of complexity that will likely be explored in the roundtable discussion, but it is crucial to recognise that 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.

Scotland's high rates of punishment are an outlier: According to the World Prison Brief (2021), Scotland currently has the highest imprisonment rate in Western Europe, at 138 per 100,000 population. We also have the 5th highest 'probation rate' (i.e. the proportion of the population subject to community sanctions and measures) ([SPACE II, 2020](#)) and the 6th highest 'total correctional population' rate (combining the numbers in prisons and on community sanctions) in all of Europe, at 379 people per 100,000. Five times as many people are subject to penal control in Scotland as in Norway or Finland, more than twice as many as in Ireland, and – perhaps surprisingly – our correctional population rate is 125% that of England and Wales.

These figures may seem paradoxical in a country in which penal policy, for much of the last 120 years has been seeking to reduce the prison population. In an award-winning book¹, McNeill (2018) has argued that the paradox stems, in part, from a mistaken assumption that diversifying and expanding 'alternatives' to imprisonment would reduce its use. The reality is that, in Scotland (and in many other jurisdictions) such diversification and expansion of 'alternatives' has occurred *at the same time as* growth in prison populations – meaning that mass incarceration and mass supervision have developed hand-in-hand. These challenges notions of Scotland being a progressive, welfare-oriented, rights-respecting nation.

Here, we wish to highlight ten key themes and issues for the Committee's consideration:

1. **Incarceration and inequality:** In terms of its distribution within Scotland, imprisonment rates vary but are closely linked with inequality, poverty, and neighbourhood deprivation ([Matthews, 2019](#); [Scottish Government, 2020](#)). Looking across nations, comparative analyses of penal systems (e.g. [Lappi-Seppälä, 2011](#); Cavadino and Dignan, 2005) also suggest that, in general, nations with higher levels of inequality and lower levels of welfare provision tend to have higher prison populations.

¹ *Pervasive Punishment: Making sense of mass supervision* recently won the European Society of Criminology's 2021 Book Award.

2. **Dis-proportionality of prison as a response to low level offending:** Using custody for crimes that are not serious is short-sighted and costly. In recent years, thousands of people have been given short prison sentences for the crime of shoplifting. During the COVID-19 pandemic, numerous people accused of low-level offences have been remanded in custody (see [Justice Analytical Services, 2020-2021](#)). Yet there remains a stark lack of research on judicial decision-making on remand and sentencing and on prosecutorial (COPFS) decision-making on case marking and influencing bail/remand and sentencing.
3. **Accommodating a complex and changing prison population:** Prison numbers and dynamics have been affected by more convictions and imprisonment for sexual offences, domestic abuse, and organised crime (Audit Scotland, 2019). More people in prison associated with organised crime emphasises the need for violence prevention (including high value contract violence), preventing staff misconduct and corruption, and raises the challenge of disrupting the running of criminal enterprises from prison ([Cavanagh, Hamilton-Smith and Mackenzie, 2016](#); [SPS, 2020](#)). More broadly, the estimated percentage of the total prison population 'requiring to be accommodated separately' (for reasons like crime type, protection status, gender, age, health) is 58% ([Scottish Prison Service, 2021](#)).
4. **Life imprisonment – time in custody:** More people are serving life sentences in Scotland as a proportion of the national population than in any other country in Europe ([van Zyl Smit and Morrison, 2020](#)). In recent years, the 'punishment part' of a life sentence – minimum time served in prison before release on licence – has risen steadily. In seeking to explain this, criminologists point to punitiveness and to concerns around risk and public protection.
5. **Overcrowding:** Human rights groups and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) ([National Preventive Mechanism, 2021](#)) have expressed significant concern about overcrowding across Scotland's prison estate on several occasions. Overcrowding adversely affects prisoners in a wide variety of ways; it also hamstrings the rehabilitative efforts of prison staff and other agencies trying to do constructive work with them, for example, related to education or rehabilitation. In broad terms, more over-crowded prisons struggled to provide constructive regimes.
6. **Meaningful work, purposeful activity and employability:** Much more needs to be done to develop employment and training in prisons, collaborating with the third sector, business and civil society to prepare for release ([Piacentini, Weaver and Jardine, 2018](#); [Bailey-Noblett, 2020](#)). Purposeful activity hours have reportedly dropped in recent years. Where positive initiatives or projects in this area do exist, there may still be issues like equitable access and provision across the estate, eligibility criteria, and funding. Considering the future, where prisoners may work (in prisons or on temporary release) to help address labour shortages in the UK, they must not be exploited but, arguably, should have workers' rights, proper pay, and pay tax and national insurance ([Crook, 2021](#)).
7. **Disability and head injury in prisons:** Research and independent scrutiny identify a range of issues encountered by people with learning disabilities in Scottish prisons, including sentence planning in custody failing to take proper account of disability, making it hard for affected prisoners to comply and to

progress to release ([Gormley, 2021](#); [Equalities and Human Rights Commission, 2017](#)). Capacity for tailored responses to this group is important. A study of women in Scottish prisons found that almost 80% have a history of significant head injury ([McMillan et al., 2021](#)), with domestic abuse victimisation a common cause.

8. **Deaths in custody and post-release:** There are concerns about a small but sharp rise in prison deaths in 2021 amid COVID restrictions, raising questions of access to support and healthcare ([Goodwin, 2021](#)). An example from an English prison illustrates how death prevention implicates inter-connected issues: Following a scathing review of its mental health provision and putrid conditions, HMP Liverpool drastically reduced deaths in custody and self-harm by taking a 'zero suicide approach'. Prisoner numbers were cut by 500 to reduce crowding, leadership issues were addressed and a new governor appointed, and a refurbishment programme started, and staff time was dedicated to regular observations and support of prisoners identified as being at risk ([Pilling, 2021](#)). In historical context, longitudinal data linkage using a national cohort study of Scottish prisoners found post-release deaths are most frequent in the first two weeks after liberation, and mortality rates (post-release) for people who had been imprisoned were higher than for the general population ([Graham et al., 2015](#)). To focus on one issue, in 2016, just over half of the national cohort of drug-related deaths (399, 53%) that year had 'ever been in prison' ([Barnsdale et al., 2018: 24](#)).

A research team led by SCCJR colleague, Professor Sarah Armstrong and others from the University of Glasgow, are currently preparing to publish analysis of 15 years of deaths in custody and the Fatal Accident Inquiries (FAI's) which are completed as a result of these deaths. The findings will be published in Sept/Oct and we understand the team have prepared separate written evidence to the Committee on this issue.

9. **Breach and recall to prison:** Various criminologists have analysed longstanding issues of parole, non-compliance, and recall to prison ([Weaver et al., 2012](#); [Kelly et al., 2020](#)). Drivers of recall include the number and stringency of licence conditions, various systemic and social-structural factors, and a propensity of professionals to use recall due to risk aversion, rather than in pursuit of risk reduction ([Barry, 2021](#); [Weaver et al., 2021](#)). Completion rates of Home Detention Curfews (early release on licence with electronic monitoring) are fairly high ([McIvor and Graham, 2016](#); G4S, 2021).
10. **Lived experience:** There is much more scope and opportunity for the Scottish Prison Service, Scottish Government, and Scottish Parliament to listen to, learn from and act on issues raised by people with lived experiences of imprisonment and reintegration. These citizens remain relatively seldom asked and seldom heard in justice debates, in contrast to victims (notwithstanding the many victims in prisons), justice workers, and their representatives. Few other groups in Scottish society have decisions and policies made about them without consultation. Good practice examples of this include initiatives by Prison Reform Trust like the [Prisoner Policy Network](#), User Voice [Councils and Consultations](#), and mechanisms for co-producing justice and desistance ([Weaver, 2013](#); [Weaver et al., 2019](#)).

Reducing the Prison Population

There are three ways to reduce prison populations:

1. Send fewer people to prison.
2. Send people to prison for shorter times.
3. Release people earlier.

Option 1 has been attempted in Scotland for many decades. Despite legislation being passed in 2016 promoting the use of Community Payback Orders (CPO) as a default sanction, rather than imprisonment, Audit Scotland state that they have found little evidence of a shift away from custody. Measures like the introduction of CPOs, the presumption against short prison sentences, use of electronic monitoring and curfews, and attempts to modernise the prison estate have not yet produced a significant reduction in the prison population.

Efforts to displace ineffective and damaging short sentences with community-based measures are appropriate, but they will have to be much more carefully targeted and much better well-resourced than in the past if the careless penal expansion discussed above is to be avoided. More generally, maximising diversion at all stages of the criminal justice system -- as has been done with some success in youth justice -- as well as addressing inequality and the social harms it produces will be required (for a range of potential diversion and decarceration strategies and restorative solutions spanning Options 1-3, see McNeill, 2018; [Kirkwood, 2018](#); Graham, [2020a](#); [2020b](#); [Nascimento, 2021](#)).

But, crucially, even if Option 1 were to be pursued more comprehensively and successfully with respect to short sentences, its impact on the overall prison population will be limited if Options 2 and 3 are not also addressed.

The Remand Population

Remand is a longstanding issue that has been further exacerbated during the pandemic. In June 2021, remand made up over 26% of the total prison population, with remand in the young person's estate and women's estate higher still, at 52% and 32.3% respectively ([Scottish Prison Service, 2021](#)). There are concerns about the anguish and uncertainty that remand creates; it entails prolonged waiting in extremely difficult conditions and while facing uncertainty. The prospect of waiting for up to two years or longer for trial raises critical questions of access to justice, human rights, proportionality, procedural fairness, wellbeing, and the impact on complainers/victims, staff, and families.

The Justice Committee (2018) report into the use of remand in Scotland found that 28% of those remanded via solemn proceedings in Sheriff Courts, and 57% of those remanded in summary proceedings, did not go on to receive a custodial sentence. 70% of women who were remanded did not receive a custodial sentence. Evidently, this begs the question of why remand was considered necessary and appropriate in the first place.

Bail Supervision provides an opportunity to support and monitor those who would otherwise be remanded while awaiting trial or sentence. However, it is not widely or consistently used. The report by Community Justice Scotland ([2021, p. 45](#)) stated: 'Overall, however, the provision of support is inconsistent across Scotland. For example, there is no universal bail supervision and support intervention, and much of what is delivered is specific to certain criteria or target groups.' Therefore, there is

scope to better understand the processes leading up to people being remanded, with the potential to inform reductions in the use of remand, including by increasing availability of Bail Supervision as an alternative to remand across the country.

Prison Conditions and Regimes

The COVID-19 Pandemic has contributed to a considerable worsening of the circumstances in prisons, which were already challenging for prisoners and prison staff in many institutions. Prison financial and operational pressures before and during the pandemic have been associated with high staff absence and sickness rates, the legacy of PFI schemes and private prison costs, overcrowding and paying for 'renting' extra capacity in private prisons ([Audit Scotland, 2019](#); [BBC, 2020](#)).

As already noted, COVID-related delays in court proceedings have led to many prisoners being held on remand beyond the normal maximum statutory time limits, which were suspended by coronavirus emergency legislation. Third sector organisations and defence lawyers have reported that some prisoners are pleading guilty to offences they did not commit, in order to avoid extended remand in custody (Fair Trials, 2021; Moir, 2021).

New research on lockdown conditions reveals prisoner experiences of spending long periods (up to 23 hours a day) in cells, unable to participate in health and fitness, work, or education opportunities ([Armstrong and Pickering, 2020](#)). A Scottish prisoner described lockdown in a cell – eating, sleeping, toileting in the same confined space – as 'very cage like', and another described it as 'very hard', 'lonely', 'boring' and 'tense' (in [Maycock, 2021](#): 8). This is likely to have a significant impact on mental and physical health.

Families are profoundly affected by imprisonment and policy decisions made by authorities ([Barkas et al., 2021](#)). With a human rights obligation to support family contact during the pandemic, the Scottish Prison Service introduced provision of mobile phones and virtual visits. While these initiatives are welcome, they can only try to ameliorate the suffering that separation entails; pandemic restrictions have intensified that suffering and distress for those on both sides of prison walls ([Maycock and Dickson, 2021](#); Morrison and Graham, 2021). Some prisoners told researchers they were advised to phone the Samaritans helpline instead of looking for support within the prison, but struggled to afford to do so ([Schinkel, 2020](#)). Former Cabinet Secretary Humza Yousaf and the Prison Service ([2020](#)) provided numbers of calls to Samaritans using these restricted mobiles, with over 5,200 calls in a few months in mid-2020.

Prisons, Rehabilitation and Reintegration

Prisons are, by their nature, not the best setting for the learning and development that rehabilitation requires. Many criminologists concur that, for people who have been involved in persistent offending, the process of 'desistance' from crime (ceasing *and* refraining from offending) involves and requires physical and psychological maturation, the development of normative social ties (for example involving family or work), a change in a person's identity (i.e. away from a criminalised identity and towards a more positive one), and the alteration of habits and routines. Imprisonment, however, tends to slow maturation, to sever social ties, to stigmatise and reinforce a criminalised identity, and to entrench institutional routines. In other words, prisons are as likely to 'dehabilitate' as to rehabilitate,

diminishing life chances rather than enhancing people's capacity to live well (McNeill and Schinkel, 2016).

Ending or reducing the suffering that imprisonment entails, and addressing its debilitating, incapacitating effects, also depends on enabling progression towards release. Yet the failure to provide timely access to rehabilitative programmes both before and especially during the pandemic will also impact on progression for long-term prisoners. The Parole Board for Scotland is required to assess the risks that prisoners might pose, if released, and to consider whether they have engaged in prisons with opportunities that might reduce such risks. But if those opportunities are not being provided (for example, via rehabilitative programmes), then prisoners are effectively denied progression. Lengthening the time prisoners will spend in prisons adds to their suffering and that of their families; it is also a waste of public resources.

By way of analogy, imagine the public outcry if Scotland pursued an education policy which kept our young people in school until they achieved certain exam results, but failed to run any classes to support their learning.

Even if prisons were not overcrowded, and even if they were able to provide meaningful and timely opportunities for people in prison to pursue their development and prepare for release, the transition from prison to community is an extremely challenging one for many people; and the pandemic has exacerbated these challenges (Armstrong and Pickering, 2020). Released prisoners are forced to contend not only with the enduring ill-effects of imprisonment on them (e.g. institutionalisation, ill-health, etc.), but also with adverse impacts on their relationships with family and friends, with legal (and illegal) discrimination against them in the labour market, with problems accessing public services, with unmet basic, material needs (for example, for housing and a decent level of income), and with disorientation that arises from returning to a world that has moved on in their absence (e.g. in relation to digital technologies) ([Rubio Arnal, 2021](#)). Given all of these pressures, it is not surprising that many report disappointment that their efforts to transform themselves and lead productive lives are met with a brick wall of social exclusion (Nugent and Schinkel, 2016).

Women and Imprisonment

Considerable attention has been given to the prison estate for women over recent years by the Scottish Government, Parliament, and Prison Service. Many reports have made detailed recommendations on how best to reduce the number of women in custody (latterly, the Commission on Women Offenders, 2012) with the current development of HMP Cornton Vale and plans in place for SPS Community Custody Units. However, to date, attempts to reduce the number of women in prison have had limited impact. The European Committee for the Prevention of Torture has raised concerns about uses of segregation, access to activities for women held in male prisoners, and treatment and support for mental distress.

Conclusion

Given all these issues, we consider Cabinet Secretary Keith Brown's (2021) remark, "I don't think we should be afraid of radical solutions", to be highly salient. The need to make more substantive progress in prisons and penal policy is longstanding and is now more urgent than ever. The future vision for and delivery of criminal justice needs to be radically different. We hope this submission is useful to the Committee

and would be happy to elaborate on any of these issues in writing and or in person.
References for works cited are available on request.

Written submission from Families Outside

Families Outside is a national independent charity that works solely on behalf of children and families affected by imprisonment in Scotland. We do this through provision of a national freephone helpline for families and for the professionals who work with them, as well as through development of policy and practice, delivery of training, and face-to-face support.

We are grateful for the opportunity to contribute to this series of Evidence Sessions. A number of the issues we raise here are linked, so we have tried to order these by the Evidence Session where they will be covered.

Impact on Children and Young People

At the outset of the lockdown restrictions, prison visits were suspended, which meant that visits between children and young people and their parent in prison ceased. Visits resumed between August and December 2020 with some localised restrictions before being suspended again at the beginning of 2021 in line with the lockdown restrictions between January and April. While Families Outside has welcomed the easing of restrictions more recently which allow physical contact of children under 12, hugs, and more relaxed visits, there is no doubt that the loss of personal contact has had an underlying impact on children.

On 24th March 2021, we wrote an open letter to the then Cabinet Secretary for Justice, Humza Yousaf MSP,¹ following the publication of research from Dr Shona Minson. The research, *The impact of COVID-19 prison lockdowns on children with a parent in prison*,² highlighted the negative impact of prison lockdowns on children's individual relationships with a parent in prison and on their health and wellbeing.

The research mirrored some of the impacts the COVID-related restrictions had on the children and young people we have supported. Children affected by imprisonment are already at increased risk of isolation and loneliness, but the closure of schools and other activities has exacerbated these feelings. A number of families we support also had no access to a laptop or other suitable device and/or a reliable internet connection, so many children fell behind on school work and other virtual opportunities to connect with their peers.

Parental imprisonment is one of the ten Adverse Childhood Experiences (ACEs) identified as increasing the risk of long-term negative impacts on a child's health, wellbeing, and development.³ Families have experienced increased anxiety and

¹ 2021, Families Outside. "Open letter on the impact of the lockdown restrictions on children affected by imprisonment." Available at: <https://www.familiesoutside.org.uk/content/uploads/2021/03/letter-to-Cab-Sec-Justice-lockdown-restrictions-and-prisoners-children.pdf>

² 2021, Minson, S. "The impact of COVID-19 prison lockdowns on children with a parent in prison." Available at: <https://shonaminson.files.wordpress.com/2021/03/minson.s.-the-impact-of-covid-19-prison-lockdowns-on-children-with-a-parent-in-prison.pdf>

³ Felitti, V. J., Anda, R. F., Nordenberg, D., Williamson, D. F., Spitz, A. M., Edwards, V., Koss, M. P., & Marks, J. S. (1998). Relationship of childhood abuse and household dysfunction to many of the leading

concern for their loved ones in prison due to the lack of information and knowledge they have had at various stages of the pandemic. Through April until June 2020, families had very little access to information about how the prison regime had adapted to ensure people in prison were safe. As has been common during the pandemic, but was particularly the case during the first lockdown, people in prison were spending upwards of 23 hours a day locked in their cell. This limited the time available for them to use hall telephones and contact their families, having to choose between this and other activities such as washing. A number of families reported having no contact for several weeks, which significantly increased the anxiety and stress already being experienced by families and children affected by imprisonment. During the first lockdown families only knew that their loved one was locked up for such long periods of time after being told directly by the family member where contact had been possible.

The introduction of in-cell telephony has helped to maintain telephone communication since its introduction in June and July last year. We have included further details and views on these further in this response.

Since the initial lockdown The Scottish Prison Service (SPS) and Scottish Government have improved their communication to families, however, we believe there is still more that could be done. Even after the most recent easing of restrictions within prisons, much of the communication in plain English to families came from Families Outside through our established Helpline, website, and social media channels.

While the increased contact through in-cell telephony and improved communication has certainly helped to support families, we still have concerns on the ongoing health and wellbeing impacts for children and young people affected by imprisonment. We also have concerns at the point of release from prison. Since March 2020, prisons have had very restricted regimes and family contact has been severely restricted. Liberation from prison will be an even greater adjustment for people returning from prison to the community and to the family home. There is a need for greater support in preparation for release to support this adjustment for both the person held in prison and their wider family.

In our open letter to the then Cabinet Secretary, we set out four broad actions to support children and young people affected by imprisonment in Scotland: provide a clear prison route map for restriction easing; reintroduce in-person visits; return to a normal prison regime; and clear communications. As indicated earlier, in-person visits have been reintroduced, while we remain in communication with the Scottish Government and SPS to achieve the other actions as restrictions continue to ease and the SPS returns to a pre-COVID regime.

Over the last few months, a collaboration between Families Outside, Crossreach, and the Scottish Government has been formed to explore the issues affecting children and young people further and to propose actions. This is being led by the

causes of death in adults: The Adverse Childhood Experiences (ACE) Study. *American Journal of Preventive Medicine*, 14(4), 245–258. [https://doi.org/10.1016/S0749-3797\(98\)00017-8](https://doi.org/10.1016/S0749-3797(98)00017-8)

Office of the Scottish Government's Chief Social Work Advisor. Key themes that have arisen from this collaboration are: increased data collection, as at present nobody has responsibility for recording the number of children and young people affected by parental imprisonment; ensuring a clear roadmap of restrictions, as the justice system continues to ease restrictions at a slower pace than in the community to minimise COVID-19 transmission; reopening prison regimes, particularly in relation to restarting children's visits and confirming the future of video calls and in-cell telephony for the long term; ensuring that holistic parenting and relationship support is in place for children and families affected by imprisonment; and the need for further research on the impact of imprisonment, specifically on children and young people.

Video Calls ('Virtual Visits') and In-Cell Telephony

Families Outside welcomed the implementation of video calls ('virtual visits') and in-cell telephones in the summer of 2020. These technologies helped to maintain family contact during the COVID-19 lockdown restrictions and have supported contact for families who have long distances to travel between home and the prison; for families who are anxious about COVID transmission on public transport or during the prison visit; and for families with mobility issues. Families Outside is clear that these technologies can never replace in-person prison visits but can complement them.

It should be noted that throughout the pandemic, virtual visits were not available from cells and access to virtual visits relied upon escort. This meant that even as in-person visits were suspended for substantial period of time, virtual visits were also routinely suspended in response to outbreaks of COVID-19 in prisons and have not been available to people in prison when required to self-isolate.

We are also coming across instances where there is a delay in providing in-cell mobiles upon admission to prison custody. Families Outside have supported families with significant concerns about their family member's mental health when no phone has been available for allocation to them, despite the obvious benefits as this would facilitate access to the Samaritans Helpline as well as family contact.

To implement these technologies, the Prisons and Young Offenders Institutions (Scotland) Rules 2011 were amended by Scottish Statutory Instrument (SSI) 2020/175⁴. At present, this SSI is considered as part of the wider Coronavirus legislation and thus is reported on in the bi-monthly Coronavirus legislation to Parliament. There have been strong indications from the Scottish Government and the SPS that these technologies will remain for the long-term, however, we have raised concerns that in legislation these technologies are tied up in Coronavirus legislation rather than being in the Scottish Prison Rules in their own right.

Families Outside responded to the consultation conducted by the SPS which was referenced in correspondence to the Criminal Justice Committee⁵ earlier this year.

⁴ 2020, The Scottish Government. "SSI: No 175." Available at: <https://www.legislation.gov.uk/ssi/2020/175/contents/made>

⁵ 2021, The Scottish Parliament. "Coronavirus and the welfare of prison officers and the prison population." Available at: <https://www.parliament.scot/chamber-and-committees/committees/current-and-previous->

The SPS consulted on a proposal to revoke a number of amendments made by SSI 2021/122⁶. In our response to the SPS, we have called for a wider review of the Prison Rules to take account of new ways of working during the COVID pandemic; to take account of UNCRC incorporation; and to consider human rights further. This would provide a clear and transparent process for retaining the legal mechanism for video calls and in-cell telephony within the Prison Rules.

Families Outside believes we need to be ambitious in the use of in-cell telephony and video calls going forward. As we have highlighted above, family contact has been severely disrupted over the duration of the pandemic. We feel that video calls could be used to support child/parent relationships and the ongoing responsibilities of parents in prison. These could enable a parent in prison to attend school parents' evenings or medical appointments, for example. Consideration should also be given to adopting practice already in place in Northern Ireland where video calls can take place from a cell. This would support family contact during periods of self-isolation if this is an ongoing requirement and at other times of ill health and end of life care.

UNCRC Incorporation

In the last session of Parliament, the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill was passed unanimously.⁷ Although there has been clear direction from the Scottish Government to continue preparations for implementation, there is still significant work to be carried out across the justice system.

In adult criminal courts, the children and dependents of accused parents have no mechanism to make their voices heard as required by Article 12 of the UNCRC.⁸ The current amendments still in place in the Prison Rules that allow Governors to restrict in-person prison visits challenges UNCRC Articles 5, 9, 18, and 20 due to the impact on a child's ability to have contact with their parent. Engagement with third sector organisations from public agencies to date has been on an ad-hoc basis. Families Outside has been calling for clear and transparent processes on engagement on UNCRC incorporation in public agencies. This not only helps to ensure that the UNCRC is incorporated across the public sector and children's rights are realised,

[committees/session-6-criminal-justice-committee/correspondence/2021/coronavirus-and-the-welfare-of-prison-officers-and-the-prison-population](https://www.scottish.parliament.uk/committees/session-6-criminal-justice-committee/correspondence/2021/coronavirus-and-the-welfare-of-prison-officers-and-the-prison-population)

⁶ 2020, The Scottish Government. "SSI:No 122." Available at:

<https://www.legislation.gov.uk/ssi/2020/122/article/2/made>

⁷ 2021, The Scottish Parliament. "Official Report Meeting of the Parliament (Hybrid) 16 March 2021." Available at:

<https://archive2021.parliament.scot/parliamentarybusiness/report.aspx?r=13202&i=119544&c=2330747&s=UNCRC>

⁸ 1989, United Nations. "Convention on the Rights of the Child." Available at:

[https://downloads.unicef.org.uk/wp-content/uploads/2016/08/unicef-convention-rights-child-uncrc.pdf?_adal_sd=www.unicef.org.uk.1597140360559&_adal_ca=so%3DGoogle%26me%3Dorganic%26ca%3D\(not%2520set\)%26co%3D\(not%2520set\)%26ke%3D\(not%2520set\).1597140360559&_adal_cw=1596716964410.1597140360559&_adal_id=a2a78a19-b795-4761-8f44-24bf4fbb0412.1596716964.3.1597140357.1596716964.56c41c82-6004-4f34-b621-0136e1165c53.1597140360559&_ga=2.221778843.2030880991.1597140356-339403836.1582731365](https://downloads.unicef.org.uk/wp-content/uploads/2016/08/unicef-convention-rights-child-uncrc.pdf?_adal_sd=www.unicef.org.uk.1597140360559&_adal_ca=so%3DGoogle%26me%3Dorganic%26ca%3D(not%2520set)%26co%3D(not%2520set)%26ke%3D(not%2520set).1597140360559&_adal_cw=1596716964410.1597140360559&_adal_id=a2a78a19-b795-4761-8f44-24bf4fbb0412.1596716964.3.1597140357.1596716964.56c41c82-6004-4f34-b621-0136e1165c53.1597140360559&_ga=2.221778843.2030880991.1597140356-339403836.1582731365)

but ensures that the role that organisations like ours can play in supporting children's rights delivery is also realised.

SPS Family Strategy

The current SPS Family Strategy⁹ comes to an end next calendar year. Families Outside is keen to see the SPS devise and publish the process they will undertake to redevelop this and begin work on the new strategy.

The current Strategy has been successful with COVID having an impact on the deliverability of some actions. We are keen to see the UNCRC, the recommendations from The Promise, and learning from COVID reflected within the next Strategy.

A key strength of the current Strategy is that it is in line with the *Framework for the support of families affected by the Justice System*.¹⁰ Families Outside has undergone a process of updating the Framework to include recent developments including The Promise recommendations. We anticipate that the updated Framework will be launched in the next few weeks, which can help inform the new SPS Family Strategy.

Prison Population

Recognising the negative impact of imprisonment on families, and particularly children, Families Outside has a strong interest in the growing calls and action to reduce the prison population and promote the use of appropriate non-custodial sentences, particularly for parents with dependent children. At the beginning of the COVID pandemic, the Scottish Government took a number of decisions to support a rapid reduction in the overall prison population, reaching a low of 6,869 people in May 2020.¹¹ Since this time, the prison population has risen again, with the prison population stabilising at between 7,300 and 7,600 people in prison over the last few months, and is projected to rise as court activity resumes in earnest.

Families Outside, along with a number of organisations, is increasingly concerned of the growing number of people being held on remand in Scotland. Since March 2020, the remand population in Scotland has increased by approximately 50 per cent, and more than one in four people in prison in Scotland are now held on remand, with long delays for those awaiting trial. For the 16 – 17-year old population, approximately 60% are being held on remand, although we note that this is a slight improvement over the last few months. As a result of larger numbers and extended periods of remand, increasing numbers of families are anxious and unable to plan for the future. When a person is remanded, it often disrupts the wider family left behind, who often face an immediate loss of income and uncertainty about housing coupled with concerns for the person in prison. We have worked with many families whose

⁹ 2017, Scottish Prison Service. "SPS Family Strategy." Available at: <https://www.sps.gov.uk/Corporate/Publications/Publication-5042.aspx>

¹⁰ 2019, Families Outside. "Framework for the support of families affected by the Justice System." Available at: <https://www.familiesoutside.org.uk/content/uploads/2017/12/Framework-for-all-Professionals.pdf>

¹¹ 2021, SPS. "SPS Prison Population." Available at: <https://www.sps.gov.uk/Corporate/Information/SPSPopulation.aspx>

loved one had been held on remand for months at a time. At worst, children are separated indefinitely from parents held in prison who will either not be convicted at all, or who will not receive a custodial sentence.

It is important to reflect that the nature of prisons has changed due to the COVID-19 pandemic. There have been significant changes and restrictions to the prison regime to reduce COVID transmission. As referenced earlier in this response, at a number of stages during the COVID pandemic, people in prison were locked up for over 23 hours a day, which is significantly more than before the pandemic. Measures to suppress COVID transmission have impacted on family contact and attendance at programmes and training impacting on the ability of the SPS to 'rehabilitate' those who are imprisoned. Given that there is likely to be an impact on the prison system and regime over the long term, there is a need to rethink why and how we use prison sentences in Scotland. Families Outside feels that a particular re-think on remand is required.

In the long term, we would welcome robust action by the Scottish Government to reduce both the wider prison population and the remand population in Scotland. Families Outside believes that, in line with comparative international human rights law, community-based sentences should be used wherever possible to prevent people entering prison in the first place, exhausting these before prison custody is even considered.

Community Custody Units (CCUs)

Families Outside has welcomed the CCU approach being developed by the Scottish Government and SPS. The first CCU is set to be open next year, which could be a transformative experience of women and mothers held in custody.

We understand that the SPS is set to publish its next Women's Strategy over the next few months which will set the strategic vision for supporting women in custody. This will help inform the operation of CCUs. Families Outside is keen for preparation on the launch of CCUs to start and to involve third sector organisations.

CCUs will obviously offer a new way of supporting women in custody and will change the focus of imprisonment to rehabilitation and preparing for post-custody. CCUs will also offer a new opportunity for mothers and their children that could improve parent/child relationships. We are keen for opportunities for longer visits and for children to be able to stay with their mother overnight where this is in the child's best interests to be available as quickly as possible once CCUs become operational.

One key decision in this area is how the Scottish Government's Visitor Centre policy will apply at CCUs. The existing model in place at 12 prisons in Scotland could serve as a basis, but the provision would need to support children and young people staying overnight, so an enhanced model that includes direct youth work and parenting support may be required.

Families Outside is grateful for the opportunity to feed in to the Criminal Justice Committee's initial Evidence Sessions. We look forward to working with Committee members over this Parliamentary Session in tackling the issues facing Scotland's

justice system and to deliver for children and families affected by imprisonment. We are more than happy to discuss the issues raised in this response further.

Submission to Criminal Justice Committee regarding deaths in custody

Sarah Armstrong, Betsy Barkas, Deborah Kinnear and Linda Allan (all University of Glasgow)

6 September 2021

A team based at Glasgow University are planning major research into the Fatal Accident Inquiry (FAI) system, and as part of this has completed an initial review of nearly 15 years' (2005-2019) of published determinations, covering 196 deaths in custody. We will be publishing these findings and holding an event with stakeholders in late September/early October to present and discuss these. (For further information or to attend this event, please contact enquiries@sccjr.ac.uk; for information about the research presented in this briefing, please contact sarah.armstrong@glasgow.ac.uk or Betsy.Barkas@glasgow.ac.uk.)

We would like to share with the Committee some of the major issues identified so far:

Reform of the FAI system has been followed by worsening outcomes for those dying in custody

Despite major reform to the FAI process (independent review in 2009, subsequent statutory change in 2016 and further follow-up reviews by the Inspectorate of Prosecution):

- FAIs are taking longer today than before legislative change in 2016: between 2005-08, the average time between the death of a person in custody and the publication of the FAI determination was 509 days; between 2016-19 it was nearly 700 days (with many FAIs for deaths in these years yet to be published).
- The Sheriff presiding has the power to make certain findings: whether there were any defects in any system that resulted in the death, and whether any reasonable precautions taken could have prevented the death.
- In over 90% of all FAIs no finding of a reasonable precaution is made, no finding of defect is made and no recommendations are made to improve practice or prevent death.
- There is a smaller chance in recent years of a finding being made than before legislative change in 2016.
- Families are rarely involved in FAIs in terms of being legally represented, present at inquiries or to provide evidence; their involvement in all these ways has declined since 2016.
- Significant differences between Sheriffdoms mean it is more than twice as likely that a finding will be made in some Sheriffdoms than others.

Despite the aims of reform to ensure FAIs are 'effective, efficient and fair' (Lord Cullen, 2009), rates of deaths for three major categories (self-inflicted deaths, drug deaths and deaths classed as 'natural causes') are all rising.

In the following we elaborate some of these issues in more detail and raise concerns that they implicate which are to be explored in the planned research study.

Timing and delay

- Delays in FAI hearings as well as the way these are drawn out, once begun, could exacerbate grief and trauma for loved ones.
- Delayed timescales also undermine the possibility for scrutiny of any problems that are unearthed.
- In some cases, several more deaths have occurred at an institution by the time the FAI happens.

- Performance targets around reducing delay focus on internal agency processes (such as a target for reporting a death to the Scottish Fatal Incidents Unit) and do not address overall time scales.

Statutory provision and structural organisation

- Findings of defects and precautions are narrowly defined and provided for in the law. Example: Where a young man in his 20s died from a heart attack lasting 12-24 hours, a system defect identified was the lack of paper in an electrocardiogram printer.
- In another example: A Sheriff made no findings of defect or precaution in the case of a man who died after 29-30 hours of agonising pain. The Sheriff found that obtaining earlier medical assistance would have saved him 'a great deal of suffering' but could not establish that it would have prevented the death. No finding of a reasonable precaution or defect in a system was made. In order to make a finding Sheriffs require evidence to have been submitted establishing that that an action could have prevented the death. There seems to be inconsistency in the standard of proof, some seemingly requiring proof beyond a reasonable doubt, which is difficult to establish.
- Scotland has a system, possibly unique in the world, where investigations are led by legal rather than medical professionals.
- In the vast majority of FAls nearly all the facts are agreed prior to the hearing and out of sight of the public. This happens via a joint minute, which is an agreed statement typically used in legal proceedings over non-contentious issues. In FAls they generally are made between the prosecutor leading the investigation and the agencies responsible for the care of the person who died. Our analysis suggests many joint minutes involve issues which have been contested and questioned by Sheriffs and parties.

'Natural' causes

Deaths classified as due to 'natural causes' often are considered less complex and concerning than other deaths and are targeted for more routine and expedited investigation (see Inspectorate of Prosecution, 2019). This involves fewer witnesses and less chance of Sheriffs querying the joint minute. We found numerous cases raising concerns about these so-called 'natural' deaths.

- Excluding suicides, homicides and drug-related deaths, the average age of a person who died in prison from 2005-2019 was 51 years old, significantly younger than the average age of death in the general population, as well as for deaths due to causes such as heart disease, heart attack and diabetes.
- There is often a problematic assumption that prisoners are inherently 'unhealthy' individuals, which serves to detract from any scrutiny of the prison environment or structural factors.
- Our analysis raises questions about the delivery of appropriate healthcare, including palliative care, to prisoners.
- Under human rights and national law, medical care delivered in a prison setting should not be substantively different to the community, yet our analysis suggests that a different standard of care and expectation of treatment outcome has been normalised in the prison setting.

Drug deaths and drug issues

- Our analysis has raised serious concerns with the ways in which prisoners with drug issues are treated. There seems to be a problematic tendency to dismiss complaints or concerns

from some individuals as 'drug-seeking behaviour', delaying or leading to inappropriate treatment.

- Example: a man complaining of extreme pain and claiming to have a recurrence of previous meningitis, died of meningitis while staff initially ignored him, then treated him with Narcan, and shackled him after he'd lapsed into a coma prior to death.
- There also are concerns about the lack of scrutiny of the ways that drug withdrawal is being managed within prisons. Example: A woman experiencing such severe withdrawal that she was vomiting, sweating, shaking and barely able to stand or walk requested but had not received withdrawal support at the time she hanged herself. A Crown expert testified these symptoms should have been managed in hospital; the Sheriff made no findings.

Self-inflicted deaths

- Rates of suicide are much higher in prison than in the general population and are increasing. FAIs, by focusing on individual cases, are not able to problematise this nor interrogate the structural issues underlying these.
- Rather than revealing serious concerns about the mental wellbeing of prison population, suicides are normalised, and seen as regrettable but inevitable.
- There are particular concerns about the ways that young people are treated, as most are assessed as 'not at risk' despite histories of prior suicide attempts and concerns raised by families.

Re-traumatisation of families

A major aspect of inquiry in the planned study is the experience of families when the death of their loved one is investigated. A [current review](#) commissioned by Government focuses quite specifically on the immediate aftermath of a death in prison aiming to make recommendations on putting 'appropriate and transparent arrangements in place'. There is no consideration of the FAI itself, including how it impacts on families or how it works to improve practice or prevent deaths. Nor does the current review address concerns and treatment of families while their loved one is still alive.

Critical issues remain to be explored regarding:

- The re-traumatisation potential of the FAI itself which forensically reviews the distress and dying moments of a loved one, as well as due to delays and the stop-start nature of many hearings.
- The treatment of families by agencies involved in investigations and during the FAI.
- The treatment of families who raise concerns about loved ones while they are in custody.

What, ultimately, are FAIs for?

A foundational question for the planned research is to understand what FAIs are for, and to assess what they achieve. At this stage, key lines of inquiry are:

- Prevention of death? The rates of deaths due to all causes has been rising since the FAI process was reformed.
- Due process and transparency? It takes many years for most deaths to be investigated, where most of the issues are decided behind closed doors and most evidence is not available to the public.
- Dignified treatment and closure for families? Most wait years only to see that in more than 90% of cases no findings will be made.

If one were asked to design a system of inquiry into death that stretched and deepened family suffering, that insulated systems against structural change, that maximised expenditure and did not stand in the way of rising death rates, it is hard to imagine a better model than what Scotland currently has. It is far from clear why the aspiration to produce justice and prevent death seems so far from achieving this. Research will allow us to explore the nuance and complexities of these issues to better understand their causes as well as the impacts of the present system on families and the public in whose name they are carried out.

References

Inspectorate of Prosecution (2019) *Follow-up Review of Fatal Accident Inquiries*, Edinburgh: Scottish Government.

Lord Cullen of Whitekirk (2006) *Review of Fatal Accident Inquiry Legislation – The Report*, Edinburgh: Scottish Government.