FOREWORD

I have pleasure in presenting the report of the Sentencing Commission for Scotland on its review of the law governing early release from prison and the supervision of prisoners on their release. This is our second report. The subject with which it deals was identified by the Scottish Executive as one to which it attached priority.

The early release of prisoners is a subject that generates a great deal of controversy in and out of Parliament. It is also a complex area of our law. The main features of the current statutory regime were introduced by the Prisoners and Criminal Proceedings (Scotland) Act 1993. Subsequently, that Act has been amended on a number of occasions.

The regime introduced by the 1993 Act derives substantially from recommendations made by a Review Committee under the chairmanship of Lord Kincraig, which published its report in 1989 (Cm 598). Amendments to the 1993 Act have been enacted for a number of reasons. These include changes designed to secure compliance with the European Convention on Human Rights, changes prompted by decisions of our domestic courts and the European Court of Human Rights, as well as policy decisions of various administrations. Partly as a result of these amendments, many find the operation of the present statutory provisions very difficult to understand. The position has been further complicated by the enactment, during the course of our deliberations, of the Management of Offenders etc. (Scotland) Act 2005. We are aware, also, of certain statements made by Ministers to the effect that automatic early release must end. We have noted these statements, but our recommendations reflect our view of how the release and post-release supervision of prisoners can best be regulated.

We consider that the keys to improving this aspect of our criminal law are simplicity and clarity. We also believe that the greater transparency which we are recommending should help create a regime that is understandable. Such understanding is vital if confidence in this aspect of our criminal justice system is to be restored and maintained. As our consultations showed, victims of crime and their families, the public, the media, and some criminal justice practitioners find it difficult to comprehend some of the existing statutory provisions and their practical effect. In short, our recommendations are designed to put forward a system in which the sentences imposed by the courts will mean what they say.

I am grateful to my colleagues on the Commission for their work in producing the recommendations contained in this report. The members of the Commission appreciate the time taken by those who responded to our consultation paper and those who agreed to meet us to discuss matters which we had under consideration. We have taken into account the variety of views expressed to us in formulating our recommendations.

Finally, I would like to thank the staff in our secretariat for the contributions that they have made to the preparation and presentation of this report.

Rt Hon Lord Macfadyen

Chair
December 2005

CONTENTS

PART ONE: INTRODUCTION

1.1 The Sentencing Commission for Scotland ("the Commission") is an independent body set up by the Scottish Executive under its policy statement "A Partnership For A Better Scotland." The Commission was launched in November 2003 with a remit to review and make recommendations to the Scottish Executive on a number of topics including the law governing the early release from prison and the supervision of prisoners on their release. This Report sets out our findings and recommendations for changes to the arrangements, statutory or otherwise, governing this matter.

1.2 The members of the Sentencing Commission, appointed by the Scottish Ministers, are:

The Rt Hon Lord Macfadyen (Chair): High Court Judge
The Rt Hon The Lord Mackay of Drumadoon: High Court Judge
Sheriff Charles Stoddart: Sheriff of Lothian and Borders
Sheriff Rita Rae QC: Sheriff of Glasgow and Strathkelvin
Mr Bill Gilchrist: Area Procurator Fiscal, Lothian and Borders (at Edinburgh) (formerly Deputy Crown Agent)
Chief Constable David Strang: Chief Constable of Dumfries and Galloway Police
Mr Alex Prentice: Advocate Depute (formerly of McCourts Solicitors)
Ms Valerie Stacey QC: Vice-Dean of the Faculty of Advocates
Mr Jim Dickie: Director of Social Work at North Lanarkshire Council
Councillor Eric Jackson: Chair of the Social Work Committee of East Ayrshire Council
Ms Bernadette Monaghan: Director of Apex Scotland
Ms Kaliani Lyle: Chief Executive of Citizens Advice Scotland
Mr David McKenna: Chief Executive of Victim Support Scotland
Professor Neil Hutton: Dean of the Faculty of Law, Arts and Social Sciences at the University of Strathclyde
Professor Chris Gane: Chair of Scots Law at Aberdeen University
Mrs Sue Brookes: Governor at HMI Cornton Vale
Professor David McCrone: Department of Sociology at Edinburgh University (until April 2005)

1.3 The Commission has a secretariat of five: Mr Alan Quinn (Secretary), Mrs Kay McCorquodale (Solicitor), Mrs Diane Machin (Principal Researcher), Mrs Rona Tatler (Assistant Secretary) and Ms Taryn Forrest (Office Manager).

The Case For Change

1.4 The deficiencies in and criticisms of the current statutory regime for the early release of prisoners may be summarised as follows:

- There is a lack of clarity in how the regime operates
- The regime is too complicated
- Sentences do not mean what they say

- Early release is in many instances automatic and takes place irrespective of the risk to the public from the prisoner re-offending or the prisoner's behaviour in custody
- The regime focuses on offenders to the exclusion of victims
- No explanation of the practical effect of the sentence is given by the sentencer at the point of sentencing
- There is a lack of clarity about how the regime contributes to the wider agenda of reducing re-offending.

1.5 In order to inform our thinking on what changes and improvements should be made to the current arrangements we decided to consult interested parties including the judiciary, legal organisations, the police, local authorities and the voluntary sector. We considered that the most effective way to do that was to issue a Consultation Paper in which we posed key questions identified by us. The paper was issued on 21st June 2005 and was posted that day on our website (www.scottishsentencingcommission@gov.uk). We also decided that it would be productive to hold face-to-face discussions with certain interested parties.

1.6 We posed 32 questions in our Consultation Paper pertaining to:

- The principle of the early release of prisoners
- The scope of schemes for the early release of prisoners
- The administration of schemes for the early release of prisoners
- The role of the sentencing judge in the early release of prisoners
- Sanctions for re-offending or breach of conditions of licence during the period before the expiry of the original sentence.

Respondents could choose to address all or only some of the questions posed.

Outcome of the Written Consultation

1.7 The consultation period ended on 30 September 2005. We are most grateful to those who took the time to let us have their comments on the issues that we raised but feel obliged to record our disappointment with the modest number of responses received, especially from the judiciary. Less than 10% of those to whom we issued our Consultation Paper replied. We are also very grateful to those with whom we met. We found these discussions particularly useful in formulating our recommendations. Prior to embarking on this consultation we made a series of visits to prisons where we took the opportunity to discuss the early release system with groups of prisoners and prison staff.

1.8 A summary of the responses to the key questions contained in the Consultation Paper is at Part Four and a detailed analysis of the consultation responses is at Annex A. Also available on our website are copies of those responses whose authors were content that they should be made available to the public.

1.9 We hope that the recommendations that we make in this Report, which take into account what we have heard from consultees, will contribute to promoting confidence in this very important aspect of our criminal justice system.

Remit

1.10 We are continuing to work on the outstanding aspects of our remit, namely:

- The basis on which fines are determined; and
- The scope to improve consistency in sentencing.

We expect to publish reports on both of these matters by the Spring of 2006.

1.11 We are also considering the publication, in due course, of a paper pertaining to our examination of the principles and purposes of sentencing. Although not a topic within our remit, we consider that it underpins much of the work we are doing In this regard we have noted that in various jurisdictions around the world, including England and Wales, New Zealand, and Canada, the purposes and principles of sentencing are now enshrined in legislation.

PART TWO: SUMMARY OF KEY RECOMMENDATIONS

Introduction

2.1 To address the deficiencies recorded in paragraph 1.4 we make the undernoted recommendations which we consider will fulfil our objectives to create a regime that will:

- Make a substantial contribution to the promotion of public confidence in the criminal justice system;
- Be expressed in clear statutory provisions that are easy to understand;
- Enable the punishment of offenders in a manner proportionate to the gravity of their offending;
- So far as possible promote the rehabilitation and resettlement of offenders;
- Promote the deterrence of offenders from further offending and contribute to the deterrence of would-be offenders from becoming involved in crime; and
- Improve the protection of the public.

Recommendations

General

- ❖ At the time when a custodial sentence is imposed the sentencer should explain the effect of the sentence so that the offender, the victim, the media and the public at large are in no doubt about what the sentence means in terms of the time to be served in custody and that which may be served in the community (paragraph 5.6).

- ❖ We also regard it as vital that, where the court imposes a sentence which has a custodial part and a community part or the imposition of a period of supervision, the overall sentence must be proportionate to the gravity of the offending (paragraph 5.7).

- ❖ We regard it as vital that steps be taken, by statute or otherwise, to make it explicit that the term of custody imposed on an offender by the sentencer should be the minimum period that requires to be served to satisfy the criminal justice requirements of punishment and deterrence and the protection of the public (paragraph 5.8).

- ❖ The legislation governing a new statutory regime should expressly provide that a sentencer, when having regard to sentences imposed under the previous regime, must also have regard to the rights to early release under that previous regime (paragraph 5.8).

- ❖ We recommend that there should be a regime for those sentenced to terms of 12 months or less and a separate regime for those sentenced to terms of more than 12 months, as detailed below (paragraph 5.9).

Prisoners Sentenced to 12 Months or Less

- ❖ For those sentenced to 12 months or less we recommend (except for those referred to immediately below) that they should serve, in custody, the full term ordered by the court, but that they should be eligible for conditional release on Home Detention Curfew ("HDC"), after serving not less than one-half of the term (paragraph 5.12).

- ❖ For those offenders sentenced to 12 months or less, but for whom more robust supervision measures than HDC are required, we recommend that the courts should be given the power, to be exercised at the time when the custodial sentence is imposed, to order a period of supervision in addition to the term in custody. That power should be exercisable in cases where the courts are satisfied that the offender presents a substantial risk of re-offending and causing harm to the public. We suggest that, in assessing that risk, regard should be had to whether the offender:

    - Is a persistent minor offender with a chaotic lifestyle;
    - Is especially vulnerable and would benefit from the support of a supervising officer in order to lead a law-abiding life; or
    - Is a young offender (i.e. a person aged between 16 and 21 years) who requires supervision on release (paragraph 5.14).

- ❖ We recommend that the period of supervision should be not less than 12 months and not more than 2 years (paragraph 5.15).

Prisoners Sentenced to More than 12 Months

- ❖ We recommend that sentences should be in two parts: a custodial part and a community part. The court should be required to impose as the custodial part the minimum term that it considers the prisoner requires to serve in custody for the purposes of punishment, deterrence and public protection. The community part should normally bear a fixed proportionate relationship to the custodial part. However, we also recommend that the court should be given the power to order at the time of sentence a longer community part (subject to a maximum which should be set by statute) in those cases where it considers that there is likely to be, at the end of the normal custodial part, an ongoing risk of re-offending. We further recommend that the court should also have the power to order that there should be no community part or that it should be shorter than the fixed proportion of the custodial part. This is so as to accommodate those cases where no period on licence is deemed to be necessary either for the purpose of public protection or for providing support to the offender in his or her resettlement in the community; and those in which only a short period on licence, with or without supervision, is judged to be necessary. The prisoner would only be released on licence at the end of the custodial term if the risk of re-offending and any consequent risk to the public was judged to be acceptable (paragraphs 5.19 and 5.20).

- ❖ We recommend for those sentenced for a statutory offence that the aggregate term of the custodial and community parts of the sentence should not exceed the maximum term of imprisonment provided for in the statute in respect of that offence. The lengths of the respective custody and community parts of a sentence should be left to

the discretion of the sentencer. If, in such cases the sentencer did not otherwise direct, the community part should bear the fixed proportionate relationship to the custodial part as prescribed in the legislation (paragraph 5.19).

Sheriffs' Sentencing Powers

- We recommend that sheriffs' sentencing powers should be revised so that the maximum custodial part that a sheriff should be able to order should be 3 ½ years. The maximum community part that a sheriff should be able to impose could be limited to 5 years (paragraph 5.25).

Recall to Custody for breach of Licence or HDC

- We recommend that the power to recall a person to custody for breach of licence or an HDC order should be vested solely in the Scottish Ministers. The Parole Board's function in recall cases should be confined to one of reviewing the justification for the decision to recall and to decide whether or not the person should be immediately re-released (paragraph 5.30).

Return to Custody by the Courts

- We recommend that there should be no power mirroring that contained in section 16 of the 1993 Act in the new statutory release regime. We do not consider, however, that there would be anything to prevent a court considering that the fact an offence had been committed during service of the community part of a previous sentence was a factor that justified increasing any custodial sentence for the new offence (paragraph 5.36).

Single-Terming of Sentences

- We recommend that single-terming of sentences should be abolished. We recommend that concurrent and part-concurrent sentences should run in parallel with each other and have their own sentence end dates (paragraph 5.38).

PART THREE: THE EXISTING LAW AND REGIME

3.1 We provided a full description of the law governing the early release of prisoners, with various examples of how it operates in respect of the different classes of prisoners, in Part Two of our Consultation Paper. What follows below is a summary.

3.2 Discretionary early release on licence (parole) has operated in Scotland since 1967. The existing statutory regime is contained in the Prisoners and Criminal Proceedings (Scotland) Act 1993 ("the 1993 Act"), as amended. The 1993 Act has been frequently amended since it came into force on 1st October 1993, most recently by the Management of Offenders etc. (Scotland) Act 2005 ("the 2005 Act") which received Royal Assent on 8th December 2005. The 2005 Act introduces a scheme of Home Detention Curfew. It also ends unconditional early release for sex offenders serving sentences of 6 months or more and less than 4 years. We were informed by the Executive of its intention to introduce these measures in the 2005 Act. We declined to offer comment on HDC other than to note what was planned. As regards the changes to the statutory provisions relating to the release of sex offenders, we informed the Scottish Executive that we could not support this change in the law because, in essence, we did not consider that there was objective evidence to show that the risk presented by sex offenders was greater than that presented, for example, by violent offenders.

3.3 With the exception of these recent changes, early release from prison is governed by sentence length. The current arrangements are:

- A short term prisoner (i.e. one sentenced to a term of less than four years) is released automatically and unconditionally after serving one-half of the sentence imposed. The prisoner may be returned to custody if convicted of a further "imprisonable offence" before the original sentence has expired if the court orders this in terms of section 16 of the 1993 Act. The period of return to custody may be for up to the balance of the original sentence (from the date of the new offence to the sentence end date of the original sentence). Since a short term prisoner is not released on licence neither the Scottish Ministers, nor the Parole Board, have power to recall a short-term prisoner to custody (unless he or she is released on licence on compassionate grounds). Figures are not routinely kept on how frequently the power in section 16 of the 1993 Act is used by sentencers although it is not thought to be often.

- A long term prisoner (i.e. one sentenced to a term of four years or more) may be released on licence after serving one-half of the sentence imposed if this is recommended (in effect directed) by the Parole Board because it is satisfied that the risk is acceptable. If not released before then, the prisoner must be released on licence on reaching the two-thirds point of the sentence imposed. A prisoner released on licence is liable to recall to custody for breach of licence by the Scottish Ministers (with or without a recommendation from the Parole Board), subject to review by the Parole Board, and may be detained until the sentence end date. As is the case with short-term prisoners, a court can also return a long-term prisoner, under section 16 of the 1993 Act, if he or she is convicted of a further imprisonable offence.

- An extended sentence prisoner is one in respect of whom a court decides to impose a period of supervision where otherwise there would be none or a longer period of supervision than otherwise would be applicable. An extended sentence can be imposed on a sex offender, convicted on indictment, sentenced to a custodial term of any length, and on a violent offender who would otherwise be sentenced to a custodial term of four years or more. All prisoners subject to an extended sentence are released on licence. Where the "custodial term" is less than four years the prisoner is released automatically at the half-way stage of the custodial term and is on licence until the end of the "extension period". Thereafter, during the remainder of the sentence (equal to half of the "custodial term"), the prisoner is "at risk" of being returned to custody by the courts under section 16 of the 1993 Act in the same way as any other short-term prisoner. Where the "custodial term" is four years or more the prisoner may be released after serving half of this term, if the Parole Board recommends (in effect, directs) early release. If the Board does not recommend early release the prisoner will be released after serving two-thirds of the "custodial term". In either case the licence, unless previously revoked, does not expire until the end of the full extended sentence imposed by the court. Such prisoners are liable to recall for breach of licence conditions and on return to custody have their cases reviewed by a tribunal of the Parole Board.

- A life prisoner is one sentenced to life imprisonment for murder (mandatory) or for a crime other than murder (discretionary) and has a "punishment part" set by the court. This is the period that the court considers appropriate to satisfy the requirements for retribution and deterrence, ignoring the period of confinement, if any, which may be necessary for the protection of the public. The punishment part for a discretionary life prisoner has to be fixed having regard to the early release provisions pertaining to short and long-term prisoners, as appropriate. Accordingly, when imposing a punishment part for a discretionary life prisoner, the court is required to take into account the fact that if it had imposed a determinate sentence, depending on its length, the prisoner would be eligible for automatic or discretionary release at one-half or two-thirds of the determinate term. The prisoner is reviewed for release by the Parole Board after serving the punishment part in full and will continue to be confined for the protection of the public, if this is deemed necessary by a tribunal of the Parole Board. Further reviews of a life prisoner's case are undertaken on a date determined by the Parole Board, subject to each review taking place at not more than two yearly intervals. Life prisoners who breach the terms of their life licence (which exists to the end of the person's natural life) are liable to be recalled to custody by the Scottish Ministers, with or without a recommendation from the Parole Board. On return to custody the grounds for a prisoner's continued detention are reviewed by a tribunal of the Parole Board.

3.4This description of the release arrangements that currently apply identifies the differences that exist between the different classes of prisoner and some of the complexities of the current system.

3.5As we pointed out in our Consultation Paper, the main criticism of early release, apart from its complexity, is that sentences passed by the courts do not mean what they say. Those sentenced to less than four years do not serve any more than half their sentence in prison and those sentenced to four years or more are always released from prison on licence, after serving no more than two-thirds of their sentence. It is argued that this results in a loss of confidence in the criminal justice system, especially when someone released early from prison, whether or not on licence, commits another serious offence.

3.6 The situation has been further complicated by reductions in sentence for a guilty plea under section 196 of the Criminal Procedure (Scotland) Act 1995. This can result in some offenders who would have been "long-term prisoners" (i.e. sentenced to four years or more) being "short-term prisoners" (sentenced to less than four years). As "short-term prisoners" they have the right to be automatically and unconditionally released at half sentence. "Long-term prisoners", on the other hand, have no right to be released until two-thirds of the sentence has been served. It has been put to us that the operation of sentence discounts in combination with early release represent a "double-whammy" for victims. For example, it is perfectly understandable how a victim who is made aware that the sentence which would have been imposed on the offender has been discounted to 3 years from 4 years, on account of a plea of guilty, and that the offender will serve only 18 months in custody, before being automatically released, will feel aggrieved. Victims have informed us that they feel the system is weighted heavily in favour of the offender and that it is dishonest.

3.7 In this context it is noteworthy that in giving evidence to the Justice 1 Committee on 10th December 2003, during Stage 1 of the (then) Criminal Procedure (Amendment) (Scotland) Bill, Professor Martin Wasik, Chair of the Sentencing Advisory Panel (and an observer to the more recently established Sentencing Guidelines Council) in England and Wales, commented:

> "…….The research that we have done suggests that there are two things that make the public more cynical about sentencing than anything else does. The first is the fact that because there is a reduction by way of early release, the sentence does not mean what the judge says—the judge says five years, but everybody knows that it is not five years but something else. That is the number 1 one thing about which the public are sceptical, and the second is the reduction for a guilty plea. Those two things together exacerbate the lack of public confidence in the system."

3.8 A further critical commentary on the existing arrangements was made in the report of the Commission of Inquiry into Alternatives to Prison, chaired by the Rt Hon Lord Coulsfield, published in 2004[1], which records:

> "There is a lack of clarity about the true length of custodial sentences as a result of parole and executive release. The public would certainly find it much easier if sentences "meant what they said". We accept that changing the current system would

[1] Esmee Fairburn Foundation 2004 "Crime, Courts and Confidence - Report of an Independent Inquiry into Alternatives to Prison" The Stationery Office

not be straightforward. There is clearly a place for early release as an incentive for good behaviour and a need for assessing risks to the public when considering the release of dangerous offenders. But these are not reasons for failing to make the system more transparent."

3.9 The report went on to record:

"Lack of clarity about the true effect of sentences, for example, as a result of the use of executive release, may produce mistrust. This is the reasoning which gives rise to our doubts about the whole system of discretionary early release on home detention curfew and underlies our reservations about the likely public attitude [in England and Wales] to the extension of automatic release, whether on strict supervision or not."

3.10 A further complication in the operation of early release law is where a prisoner is serving more than one sentence. Section 27(5) of the 1993 Act, as amended by section 111 of the Crime and Disorder Act 1998, provides that for sentences imposed on or after 30 September 1998 consecutive terms of imprisonment and terms which are wholly or partly concurrent shall be treated as a "single term" of imprisonment if, in essence:

- the sentences were passed at the same time; or
- where the sentences were passed at different times, the person has not been released from an earlier sentence.

3.11 This can sometimes have the effect, referred to as "single-terming", that a second sentence imposed during a period of imprisonment for an earlier offence can be entirely absorbed in the first sentence which may not have been the court's intention. An example of this, as provided in Part Five of our Consultation Paper, is reproduced below :

Example of Single-Termed Sentence

20 March 2003 - Sentenced to 3 years 8 months imprisonment to run from that date – the sentence end date is 19 November 2006 and the automatic release date is 18 January 2005.

17 January 2005 - Sentenced to 10 months imprisonment to run from that date – the sentence end date is 16 November 2005.

The single term of the sentence runs from 20 March 2003 to 19 November 2006.

Before the second sentence was imposed, the prisoner was serving a sentence of 3 years 8 months from 20 March 2003. As a short-term prisoner, the automatic release date of that sentence would fall on 18 January 2005. Despite having a concurrent 10 months sentence imposed on 17 January 2005 (the day before the automatic release date of the first sentence), the prisoner will still be released on 18 January 2005 because the second sentence does not extend the single term.

3.12 We should point out that an outcome such as that shown above does not occur where a court orders that a sentence should commence on the expiry of all sentences previously imposed (but see paragraph 5.37).

Home Detention Curfew

3.13 Section 15 of the 2005 Act introduces a discretionary power to release prisoners on HDC. This allows the Scottish Prison Service, on behalf of the Scottish Ministers, to release prisoners, sentenced to less than 4 years, on licence a short time before they would be eligible for automatic release or, in the case of long-term prisoners, eligible for release on the direction of the Parole Board. The length of the HDC period varies according to the sentence length, but cannot be less than 14 days nor more than 135 days. The prisoner must be serving a sentence of at least three months, and must spend at least four weeks in custody. Certain classes of prisoner are excluded entirely. These cover situations where the prisoner may be considered as a high risk, where special arrangements are already in place or where the prisoner has failed to comply with a previous licence and include, *inter alia*, extended sentence prisoners, prisoners subject to a supervised release order, prisoners subject to the notification requirements of Part 2 of the Sexual Offences Act 2003, prisoners liable to removal from the United Kingdom and prisoners who have been released during the currency of their sentence but who have been returned to custody under section 16 of the 1993 Act.

Conditions of Licence and Supervision Arrangements

3.14 Licence conditions, with the exception of the single statutory condition that requires a prisoner released on licence to be under the supervision of a local authority social worker, are determined by the Parole Board.

3.15 Some conditions are common to the great majority of licences, for example, those that require the prisoner:

- to comply with the instructions of his or her supervising officer and notify that officer of any change of address;
- to be of good behaviour and keep the peace; and
- not to travel outside Great Britain without the approval of his or her supervising officer.

3.16 The Parole Board often directs the imposition of licence conditions which are tailored to individual prisoners, for example, that require the prisoner:

- to reside only in accommodation approved by his or her supervising officer;
- to undertake an assessment for drug or alcohol counselling; and
- not to approach, speak or communicate in any way directly or indirectly with any child under a particular age without the prior approval of his or her supervising officer (this condition is frequently imposed in child sex offender cases).

3.17 As noted above, prisoners released on licence are supervised by a social worker. Minimum standards of supervision are laid down in National Standards For Throughcare (http://www.scotland.gov.uk/library5/justice/noswsst-00.asp) which state that "effective throughcare for prisoners and their families requires contact to be established between the prospective client(s) and the local authority as soon as possible". Supervising officers

have an important role to play in establishing that contact early and sustaining productive links, wherever possible, throughout the custodial term and period of extended supervision.

3.18 The overall aims and objectives of the work of the supervising officer throughout the period of custody and after release are:

- the rehabilitation and re-settlement of the offender – this will include providing support to secure appropriate housing, find employment, address any substance misuse and to encourage the offender to make a positive contribution to the community;
- the prevention or reduction of further offending – this will involve participation in specific programmes, work with other agencies to address criminogenic needs and monitoring and managing compliance with licence conditions; and
- the protection of the public from harm from the offender – this will involve liaison with police, health officials etc., and monitoring and managing compliance with licence conditions.

3.19 During the prison term contact by the supervising officer with the offender's family may provide them with access to relevant services, including practical assistance, a clearer understanding of the nature and consequence of the sentence and supervision period and assist in developing a more receptive attitude towards the value of supervision on the part of the prisoner. This activity has a clear and positive potential in promoting the social inclusion of the offender, thereby assisting the achievement of the above aims and objectives.

3.20 On release on licence a prisoner must be seen by his or her supervising officer within 24 hours at which time the prisoner is informed of the frequency of contact over the first three months. In all cases the supervising officer must meet the prisoner at least once a week during the first month and at least fortnightly during the next two months. After three months the frequency of meetings is formally reviewed. In all cases, with the exception of extended sentence prisoners for whom different arrangements apply, in the four to six month period after release the prisoner must be seen at least monthly. After six months another formal review is held and these continue to be held at six monthly intervals for as long as the licence is in force for the first three years. After three years, assuming the licence is still in force, reviews are held annually.

3.21 As far as extended sentence prisoners are concerned formal reviews must take place at three monthly intervals for the first two years after release and should be held at not less than six monthly intervals thereafter.

Comparative Law

3.22 Part 3 and Appendices 4 and 5 of our Consultation Paper provided details of early release regimes in England and Wales and in some overseas jurisdictions. Reference should also be had to the Council of Europe Recommendation (Rec (2003) 22) of the Committee of

Ministers to Member States on Conditional Release (Parole) adopted by the Committee of Ministers on 24th September 2003, as described in Annex B.

PART FOUR: SUMMARY OF THE MAIN MESSAGES TO EMERGE FROM OUR CONSULTATION

4.1 A detailed analysis of the written responses to our Consultation Paper is at Annex A. This part of our report provides a summary of the points made in the responses.

4.2 The overwhelming majority of respondents to our Consultation consider that the law should continue to provide that part of a sentence should be served in the community. They consider that the arguments in favour of such a regime are in essence to maintain good order in prisons, to encourage prisoners to address their offending behaviour by participation in prisoner programmes, and to provide a prisoner after release with compulsory supervision and support (in the case of long-term prisoners).

4.3 The majority do not consider that the size of the prison population should determine the existence and nature of the release regime although a number note the potential impact on the population that would arise from the abolition of *automatic* early release.

4.4 Only a very small minority felt that it was important that the early release regime in Scotland should be closely related to that operating in other parts of the UK.

4.5 There was a mixed response to the question pertaining to the aggregation of sentences and it appeared that a number of respondents did not grasp the significance of "single-terming", though strictly on the figures there were, overall, more respondents in favour of "stand alone" sentences.

4.6 As regards the criteria for early release, there was a wide variety of responses. Some respondents, but not a majority, specifically mentioned risk to the public, but others mentioned broader issues such as 'risk assessment', or seriousness of the offence. A number referred to behaviour in prison. There does not appear to be a clear understanding of the basis on which prisoners are released early at present, and little agreement on what should be the primary criterion for early release.

4.7 On the case for and against there being different schemes applying to short and long-term prisoners, a number considered the current division at four years to be an artificial one. However, others suggested it would need to continue for pragmatic reasons, for example, the impracticality of operating discretionary release, involving the Parole Board, for the large number of short-term prisoners.

4.8 By a small majority, consultees did not consider the release of prisoners should be the subject of an exercise of discretion (in other words they thought it should continue to be automatic) but a large number (though a minority) advocated that no prisoners should be given automatic early release and all should be the subject of an exercise of discretion. A number of respondents felt that automatic and/or unconditional early release should continue for offenders who pose little or no risk to the public, who were felt to be the majority of short-term prisoners. Some respondents felt that from a purely pragmatic point of view it is simply not possible to make all early release discretionary either

because there would be a significant increase in the prison population or because resources do not exist and are not likely to be found to enable every prisoner to be assessed for suitability for early release. A third view was that the existing procedures for the early release of long-term prisoners should be retained (i.e. automatic release on licence at two-thirds of sentence) on the basis that it is more sensible to have high risk offenders re-integrated into the community on supervision rather than releasing them at the end of sentence with no supervision.

4.9 Several respondents indicated that while all early release should not be discretionary, neither should it be automatic in the form that it is at present. Rather, the system should be changed to one of two-part sentencing whereby offenders are sentenced to a period in custody followed by a period on supervision in the community.

4.10 Many of those who were of the view that all early release should be discretionary expressed strong views that automatic early release should be discontinued since it results in the true length of prison sentences bearing little resemblance to the sentence imposed by the court. It was suggested that this undermined the authority of the court, and had no value in terms of prisoner management since prisoners are released early irrespective of their behaviour in prison.

4.11 As regards the points at which prisoners should become eligible to be considered for early release, some thought the status quo (i.e. 50% and two thirds) as good as any whereas others thought that they should be later in the sentence and a few thought they should be sooner.

4.12 On the administration of early release schemes, the vast majority advocated no change, in other words discretionary release, and the conditions governing release should be determined by the Parole Board.

4.13 Opinion was almost evenly divided on whether or not sentencers should have regard to early release schemes when imposing a custodial sentence.

4.14 Some respondents were against the proposition that the sentencing judge should require to explain in open court what the sentence meant in practice but a significant majority of those who answered the question were in favour of such an innovation. It is of note, however, that judicial respondents were, in the main, firmly against the suggestion.

4.15 Most respondents thought that the Appeal Court could usefully offer guidance to sentencers on the operation of early release.

4.16 On sanctions for re-offending or breach of licence conditions, most respondents simply advocated a continuation of the existing arrangements.

Meetings held with interested parties

4.17 As noted earlier, in addition to the written consultation, we held meetings with some of the main parties interested in this aspect of our criminal justice system, namely the Victims' Forum, Families Outside, the Law Society of Scotland, the Faculty of Advocates, the Prison Governors' Association, the Parole Board and the senior judiciary. An informal meeting was held with Scottish Executive Justice Department officials. It had been hoped also to meet the Sheriffs' Association and the Association of Directors of Social Work but this did not prove possible.

4.18 Our recommendations, which are summarised at Part Two, have regard to the range of views that we received in response to the series of questions that we posed in our Consultation Paper and take into account the views that were expressed at the meetings which we held with interested parties.

PART FIVE: OUR RECOMMENDED REGIME

Offenders Sentenced to Short Periods of Imprisonment

5.1 Before setting out our proposed new regime we wish to make some observations about a view which was expressed to us by some of our consultees to the effect that very short sentences of imprisonment should be abolished. It is a view with which some members of the Commission sympathise. Some proponents of this view advocate that sentences of less than three months should not be imposed, whereas others go further and contend there should be no sentences of less than 6 months. It is argued, by those who advocate the abolition of very short sentences, that insufficient use is being made by sentencers of community penalties. They regard community penalties as more appropriate, proportionate and effective sanctions than very short custodial sentences. They further point out the inability to effect change in the relevant offenders through programme work in prison because their time in custody is too short. They suggest that programme work in the community is more effective in reducing re-offending than that carried out in prison. They also point out that the overcrowding in prisons that results from the presence of large numbers of short-term prisoners prohibits work being done with long-term prisoners to address their more serious offending behaviour. They also draw attention to the disproportionately heavy financial burden of processing very short term prisoners into and out of prison.

5.2 There are, however, those on the Commission, and elsewhere, who oppose such an idea. They argue that the reason that Scotland's prison population is so high is because the crime rate is also high. They maintain that the elimination of short sentences would deprive sentencers of a form of punishment that is necessary to denounce certain criminal behaviour and would simply lead to an upward drift in sentence length.

5.3 Moreover, some Commission members consider that it is necessary to make clear to those who will not respond to community punishments that their criminality will not be tolerated. They point out that the public should not be expected to put up with criminal behaviour indefinitely from such individuals. There comes a time when they need to be removed from society, albeit for a short period, so that the victims of their offending can enjoy some respite.

5.4 There is undoubtedly a debate to be had on this issue but it is not one that we consider is so fundamental to the issue of early release that we require to address the matter any further in the context of this report.

Objectives of the New Regime

5.5 Our objectives in this review, as set out at paragraph 2.1, have been to recommend a regime that will:

- Make a substantial contribution to the promotion of public confidence in the criminal justice system;

- Be expressed in clear statutory provisions that are easy to understand;
- Enable the punishment of offenders in a manner proportionate to the gravity of their offending;
- So far as possible promote the rehabilitation and resettlement of offenders;
- Promote the deterrence of offenders from further offending and contribute to the deterrence of would-be offenders from becoming involved in crime: and
- Improve the protection of the public;

5.6 We believe that first and foremost there must be clarity in sentencing. Sentences need to mean what they say and to have their practical effect explained to all concerned when they are imposed. That means the offender, the victim, the media, and the public at large should be in no doubt what the sentence means. Unless that can be achieved, there will be no alleviation, still less elimination of the current level of dissatisfaction with the present system.

5.7 We also believe that it is important that in determining what sentence should be imposed, the sentencer should have regard to the proportionality of the sentence to the gravity of the offending. Other factors may, of course, be relevant to sentencing, but where a sentence takes the form, which we recommend below, of a custodial part and a community part, it is the overall sentence, not merely the custodial part that should be taken into account in considering the application of the principle of proportionality.

5.8 We should record, however, that there appears to be no consensus amongst members of the judiciary, including those we have consulted, as to whether a prisoner's rights under the current early release regime should be taken into account in determining what sentence to impose. So as to avoid an increase in the length of time most offenders serve in custody, we regard it as vital that steps be taken, by statute or otherwise, to make it explicit that the term of custody imposed on an offender by a sentencer should be the minimum period that requires actually to be served by that offender to satisfy the criminal justice requirements of punishment and deterrence and the protection of the public. Such an approach should result in custodial terms imposed under our proposals being in the range of one-half to two-thirds of the nominal custodial sentences that are currently imposed for the like crimes. Our proposals are intended to result in an increase in the length of time offenders serve in custody only where there is a substantial risk of the prisoner re-offending and further detention after the expiry of the term of custody is therefore necessary to protect the public from further harm. We therefore recommend that, in any new statutory regime, Parliament expressly provides that a sentencer, when having regard to sentences imposed under the previous regime, must also have regard to the right to early release under that previous regime. Accordingly, it will be appropriate for sentencers acting under the new regime, when relying on sentences imposed under the previous regime, to recalibrate those sentences and reduce them by the extent necessary to reflect the accused person's entitlement to early release when those sentences were imposed. We recognise that, in the absence of measures to improve consistency in sentencing, there is a risk that some sentences will not be properly recalibrated. Such a development is likely to generate an increase in appeals against sentence, and it would

therefore be for the appeal court to enforce the statutory requirement to recalibrate sentences.

The New Regime

5.9 We propose that there should be a regime for those sentenced to terms of 12 months or less and a separate regime for those sentenced to terms of more than 12 months. We consider that this is a sensible cut-off point, given that it is proposed that sentences available under summary procedure, for common law offences, should be increased to a maximum of 12 months (see paragraph 4.50 of Smarter Justice, Safer Communities: Summary Justice Reform – Next Steps[2]).

Prisoners Sentenced to 12 Months or Less

5.10 At the moment individuals sentenced to terms of 12 months or less (apart from (1) those in respect of whom an extended sentence is imposed (2) those in respect of whom a supervised release order is imposed and (3) prospectively, under the provisions of the 2005 Act, sex offenders sentenced to 6 months or more but less than 4 years) are released unconditionally once they have served 50% of their sentence. In other words, they are not released on licence and are not subject to any form of conditions governing their behaviour during the remaining second half of their sentence. They can be returned to custody by the courts to serve the balance of the original sentence under section 16 of the 1993 Act if they commit another imprisonable offence before the expiry of the original sentence, as described at paragraph 5.33. For whatever reasons, there does not appear to be any consistency in the use that sentencers make of their statutory powers under section 16 of the 1993 Act. Furthermore, prisoners are now released automatically at the 50% point given that the provision enabling the imposition of added days, under the prison disciplinary procedure, is no longer in operation. Prospectively, also as a result of the 2005 Act, those prisoners sentenced to 3 months or more, apart from those falling within the exceptions summarised at paragraph 3.13, will be eligible for release on HDC before they reach the half-way point of their sentence.

5.11 While ideally we would have wished the same system to apply to all prisoners sentenced to a determinate term whereby sentences should be in two specified parts – a custody part and a community part - this is simply impractical given the brevity of some short sentences and the number of prisoners involved. We are aware that in 2003 of the 16,581 proceedings that resulted in a custodial sentence, 53% (almost 9,000) were for three months or less.

5.12 For those sentenced to 12 months or less we therefore recommend (except for those referred to in paragraph 5.13) that they should serve, in custody, the full term ordered by the court, but that they should be eligible to be considered for conditional release, on HDC, after serving not less than one-half of the term. The decision on whether or not to release on HDC should be taken by the Scottish Ministers and, for our part, we do not

[2] http://www.scotland.gov.uk/Publications/2005/03/20888/55023

consider that any class or category of offender should be excluded from consideration. We do, however, recognise that the practicalities involved in very short sentences might well mean that the time involved in properly assessing risk and making the practical arrangements for electronic monitoring may preclude consideration for release on HDC being given to those imprisoned for very short terms. If HDC cannot be considered and authorised, then sentences of 12 months or less should be served in full.

5.13 We do not consider that the existing exclusions contained in the 2005 Act, as summarised at paragraph 3.13, should operate, so far as they are proposed to apply to offenders sentenced to 12 months or less. We consider that the decision on whether or not it is appropriate to release an offender on HDC should be taken exclusively on the ground of risk, having regard to the following considerations:

- Protecting the public at large;
- Preventing re-offending by the prisoner; and
- Securing the successful re-integration of the prisoner into the community.

If, having regard to these matters, the risk is deemed to be unacceptable this should result in the prisoner serving the full term in custody.

5.14 We consider that there are some offenders sentenced to 12 months or less for whom more robust supervision measures than those available under HDC are required. For that reason we recommend that the courts should be given the power, to be exercised at the time when the custodial sentence is imposed, to order a period of supervision in addition to the term in custody in cases where they are satisfied that the offender presents a substantial risk of re-offending and causing harm to the public. We suggest that, in assessing that risk, regard should be had to whether the offender:

- Is a persistent minor offender with a chaotic lifestyle;
- Is especially vulnerable and would benefit from the support of a supervising officer in order to lead a law-abiding life; or
- Is a young offender (i.e. a person aged between 16 and 21 years) who requires supervision on release.

5.15 We recommend that the period of supervision should be not less than 12 months and not more than 2 years. This would allow a sufficient time for the supervising officer's support and advice to make an impact on the offender's lifestyle. Those in respect of whom the court decides these measures are necessary should not be eligible to be considered for release on HDC.

5.16 The proposed arrangements governing those who fail to complete satisfactorily a period on HDC or under supervision are recorded in the section on Recall to Custody.

Prisoners Sentenced to More than 12 Months

5.17At present (with the exception of extended sentence prisoners, those in respect of whom a supervised release order is imposed and prospectively sex offenders sentenced to six months or more but less than four years) prisoners who are sentenced to less than four years are released unconditionally and automatically at 50% of the sentence imposed by the court. The powers available to the courts under section 16 of the 1993 Act apply to them but for the most part they are released early without any legal disabilities. This group, by and large, will also be eligible for release on HDC before they have served one-half of their sentence.

5.18Those sentenced to four years and more may be released, on licence, after serving 50% of their sentence, if this is recommended (in effect directed) by the Parole Board, and must be released on licence when they have served two-thirds of their sentence. The provisions of section 16 of the 1993 Act apply to them and they are also liable to be recalled to custody, to serve up to the sentence expiry date, if they breach the conditions of their licence. Under the provisions of the 2005 Act, prisoners whose release at half sentence is recommended by the Parole Board will be eligible for HDC.

5.19For this class of offender we recommend that sentences should be in two parts: a custodial part and a community part. The court should be required to impose as the custodial part the minimum term that it considers the prisoner requires to serve in custody for the purposes of punishment, deterrence and public protection. The community part should normally bear a fixed proportionate relationship to the custodial part. The fixed proportion to be adopted is a matter of policy to be set in the legislation. It might be equal in length to the custodial part. However, we also recommend that the court should be given the power to order at the time of sentence a longer community part (subject to a maximum which should be set by statute) in those cases where it considers that there is likely to be, at the end of the custodial part, an ongoing risk of re-offending. It should also have the power to order that there should be no community part or that it should be shorter than the statutory fixed proportion of the custodial part. This is so as to accommodate those cases where no period on licence is deemed to be necessary either for the purpose of public protection or for providing support to the offender in his or her resettlement in the community; and those in which only a short period on licence, with or without supervision, is judged to be necessary. In respect of those sentenced for a statutory offence we recommend that the aggregate term of the custodial and community parts of the sentence should not exceed the maximum term of imprisonment provided for in the statute in respect of that offence. We recommend that for statutory offences the lengths of the respective custody and community parts of a sentence should be left to the discretion of the sentencer. If, in such cases the sentencer did not otherwise direct, the community part should bear the fixed proportionate relationship to the custodial part as prescribed in the legislation.

5.20The offender will serve the whole of the custodial part in custody. On completion of that term we propose that the decision should be taken by the Scottish Ministers on whether the offender requires to be detained, during all or part of the community part, because the continuing risk of re-offending and any consequential risk to the public is considered to be unacceptable. The test by which the unacceptability of the risk to the public would be determined - which under the present regime depends upon the class to which a prisoner

belongs - is a matter of policy to be set in the legislation. We envisage that that decision should take into account, amongst other factors, the prisoner's behaviour and attitude whilst in custody, including the prisoner's co-operation with, and participation in, offending-behaviour programmes. If it were considered that there was no need for continuing detention the prisoner should be released on licence, with conditions, and a decision would need to be taken on whether or not a condition of supervision by a supervising officer, such as a social worker, should be imposed as part of the licence conditions. We do not consider that such supervision will be needed in every case. We consider that there are cases where supervision will neither be needed for public protection nor required to assist and support the offender, for example, in the case of some offenders imprisoned for road traffic offences. Where a prisoner wishes to challenge the inclusion of a condition(s) in his or her licence, the Parole Board should be invited to review the matter.

5.21 Where the Scottish Ministers determine that a prisoner does present an unacceptable risk of re-offending and a consequential risk to the public and so should not be released at the end of the custodial part, the prisoner should have the right to appeal to the Parole Board. If the Parole Board is satisfied that the prisoner does not require to be confined further and orders his or her release, its decision should be binding on the Scottish Ministers. The Board should also decide, in these cases, whether the licence of the prisoner should contain a supervision condition or not. The Parole Board's decision on this matter should also be binding on the Scottish Ministers. Where the Board does not order the prisoner's release, the prisoner should have the right to a further review of his or her case 12 months after the disposal of his or her appeal to the Parole Board, or earlier, if so directed by the Parole Board.

5.22 A sentence structured in this way would mean that "early release" would cease for all prisoners given a custodial sentence on indictment. This new system would mean that there would be a specified minimum period to be served in custody from which the prisoner could not be released before that period had expired, and a maximum period on licence, with or without supervision. The prisoner would only be released on licence at the end of the custodial term if the risk was judged to be acceptable. It would be possible, therefore, for a prisoner to be detained throughout the community part of the sentence if that risk was deemed unacceptable. The safeguard for the individual prisoner in such cases would be that he or she could only be detained during the community part of the sentence if the Parole Board judged the risk to be unacceptable.

5.23 If adopted, these changes would mean that the provisions governing extended sentences would be superseded. In paragraph 5.19 we have suggested that the maximum length of the community part of a sentence should be set in statute. An option in this regard would be to apply the current limits that apply to the supervision periods of extended sentences (see section 210(A)(3) of the Criminal Procedure (Scotland) Act 1995, as amended). That would mean the maximum community part that could be imposed in the sheriff court would be 5 years and in the High Court of Justiciary 10 years.

5.24 The arrangements governing those who fail to complete satisfactorily a period on licence are recorded in paragraphs 5.28 to 5.31.

Sheriffs' Sentencing Powers

5.25 As a consequence of these recommendations, we recognise that it is appropriate to restate the sentencing powers of sheriffs when they are dealing with cases on indictment. At present, the maximum term of imprisonment which may be imposed by a sheriff in a case being heard on indictment is 5 years. However, in practice, the maximum term that a person sentenced to 5 years will actually spend in custody before acquiring the right to be released, is 3 years 4 months. We therefore recommend that the maximum custodial part that a sheriff should be able to order under our proposed new regime should be 3 ½ years. As noted at paragraph 5.23, we suggest that the maximum community part that a sheriff should be able to impose could be limited to 5 years.

Prisoners Sentenced to Life Imprisonment

5.26 When the High Court imposes a life sentence it must state the "punishment part" of that sentence. This is the part of the sentence that the prisoner must serve, to satisfy the interests of retribution and deterrence, before he or she has the right to have the grounds for his or her continued detention reviewed by the Parole Board. If the Board is satisfied that the prisoner no longer requires to be confined for the protection of the public it will direct his or her release on life licence. There are particular statutory provisions that apply when the court is imposing a life sentence for a crime other than murder (a discretionary life sentence) which require it to take into account the early release provisions that apply to prisoners sentenced to a fixed sentence.

5.27 Our proposals for two-part sentences for those sentenced to 12 months or more, under which the prisoner will serve a minimum term in custody that is decided by the court and will then serve a period on licence in the community, may remedy what some considered was an anomalous and unfair regime that applied to mandatory life prisoners. A consequence of there being no release before the minimum term in custody has been served may mean, we suggest, that the provisions governing the calculation of the punishment part for discretionary life sentences can be amended to bring them into line with the provisions regulating the fixing of custodial parts.

Recall to Custody for Breach of Licence or HDC

5.28 The existing statutory provisions governing those prisoners released on licence mean that they are liable to be recalled to custody by the Scottish Ministers (in effect the Justice Department of the Scottish Executive). The revocation of a released prisoner's licence may be done with or without a recommendation from the Parole Board. Section 17 of the 1993 Act provides that the Scottish Ministers may revoke a licence and recall the person to custody

"if revocation and recall are, in their opinion, expedient in the public interest and it is not practicable to wait such a recommendation".

5.29 Also, in terms of that section, the Scottish Ministers must refer the case of a person recalled to custody to the Parole Board so that the Board can consider whether the person should be immediately released on licence. Where the Board orders that such a person be released on licence, the Scottish Ministers are obliged to comply with the order.

5.30 The current arrangements mean that the Parole Board has the power to order recall and the power to direct that a person who has been recalled be immediately re-released. Although subordinate legislation provides that the members of the Board who ordered recall cannot be involved in the decision on whether or not to direct immediate re-release, we consider that the present arrangement is potentially open to an allegation of an appearance of bias. It goes without saying, of course, that we do not have any doubts about the integrity of Parole Board members who carry out these distinct functions and that there is no question of actual bias. We consider that the situation is easily remedied. We recommend that the power vested in the Parole Board, in effect, to direct licence revocation and recall should be removed and be the function of the Scottish Ministers alone. The Board's function in recall cases should be confined to one of reviewing the justification for the decision to recall and to decide whether or not the person should be immediately re-released. This would be in line with changes to the parallel statutory procedures in England and Wales.

5.31 At present, where a person is released on licence and breaches a condition or conditions of that licence, he or she is liable to be recalled to custody. Where the individual is recalled to custody he or she has the right to have his or her continued detention immediately reviewed by the Parole Board. We envisage that these statutory arrangements will continue to operate unchanged.

5.32 So far as HDC is concerned, in accordance with the provisions contained in the 2005 Act, the Parole Board has no role in the decision about whether a person who has committed a breach of the HDC Order should be recalled to custody. The Board's role in such cases is exclusively to review such decisions. As regards our recommendations for the application of HDC, we would see the role of the Board in this context as being exactly the same as provided for in the Act.

Return to Custody by the Courts

5.33 Section 16 of the 1993 Act provides that where a person commits an imprisonable offence before the expiry of a custodial sentence previously imposed, a court may order the person to serve the balance of the original sentence before beginning to serve any sentence for the new offence. This provision is essentially a punitive one. It allows the court to punish an offender for committing a further offence during the currency of an earlier sentence as well as for the further offence itself.

5.34 Under our recommended new sentencing regime, where all sentences of over 12 months and some of 12 months or less, will have a minimum custodial part and a community part, we do not consider that the exercise of the power under section 16 of the 1993 Act is appropriate. This is because the prisoners concerned will serve the whole of the minimum custodial term (in other words the punitive part of the sentence) in prison and any return to prison thereafter will be because the person has breached the conditions of his or her licence and in so doing presents an unacceptable risk. In our view that system points to decisions on returning people to custody being left to the Scottish Ministers, with reviews of such decisions being carried out by the Parole Board.

5.35 We appreciate that the two-part sentence approach will not apply to the majority of those sentenced to 12 months or less. Some of them will serve their entire sentence in prison whilst other will be released on HDC. We consider, however, that it is in the interests of simplicity not to preserve the section 16 power for this category of prisoner. We consider that it would simply cause confusion, and, in any event, those released on HDC will be liable to recall to custody, if they commit a breach of any of the conditions attached to the HDC Order.

5.36 We recommend, therefore, that there should be no power mirroring that in section 16 of the 1993 Act in the new statutory regime. We would add that we do not consider, however, that there would be anything to prevent a court considering that the fact an offence had been committed during service of the community part of a previous sentence was a factor that justified increasing any custodial sentence for the new offence.

Single-Terming Sentences

5.37 We have previously described in this Report, and in our Consultation Paper, the effect of single-terming sentences as provided by section 27(5) of the 1993 Act. This is a very complex provision that can have undesirable and unintended consequences.

5.38 We recommend that single-terming of sentences should be abolished. Instead we recommend that concurrent and part-concurrent sentences should "stand alone". By that we mean that concurrent and part-concurrent sentences should run in parallel with each other and have their own sentence end dates. This would not, of course, prevent the courts from ordering that a sentence should commence at the end of an existing sentence (i.e. that sentences should run consecutively), provided that a prisoner has not been released from custody from an existing sentence at the time the further sentence is

imposed, as provided for by section 204A of the Criminal Procedure (Scotland) Act 1995, as inserted by section 112 of the Crime and Disorder Act 1998.

Supervision of Released Prisoners

5.39 Under our proposed regime for those sentenced to more than 12 months (and certain offenders sentenced to less than 12 months), substantial numbers of prisoners will be subject to release on licence, with standard and offence-specific conditions, on completion of their minimum custodial term or later. We do not suggest, however, that every prisoner will require to be supervised when released to serve the community part of the sentence. We have proposed that the decision on supervision should, for the most part, be taken by the Scottish Executive or the Parole Board depending upon who orders the prisoner's release.

5.40 In our Consultation Paper we also invited views on who should be responsible for supervising prisoners on release and what form and level of supervision should be carried out.

5.41 The vast majority of respondents regarded local authority criminal justice social work services as being the most appropriate body to supervise prisoners granted early release. Others identified different organisations as being better placed to undertake this task, including a probation service and the new Community Justice Authorities. There was a suggestion that it does not matter who provides the supervision as long as it is efficient in helping offenders return to the community and in monitoring and reducing risk. So far as the level of supervision is concerned some considered the standards laid down in the National Standards for Throughcare were appropriate and others pointed out that the level of supervision required had to be tailored to the risk that the individual presented.

5.42 We consider that the impact supervision can have on reducing further offending needs to be kept in perspective. More can be expected than can realistically be achieved. Supervision does not mean surveillance. The level of monitoring of an individual's behaviour needs to be proportionate.

Resources for Recommended Regime

5.43 It was stressed to us by the Scottish Executive Justice Department that our review should focus on developing what we considered would be an improved regime and that we should not seek to work out the resource implications. It was explained that the overarching requirement is to have a system that put public safety at its forefront. We have not, therefore, sought to try to model the effects of our proposed regime on the size of the prison population or on the number of offenders who will be released on licence, with or without supervision.

5.44 We are conscious, however, that the adoption of our recommended regime may in the short-term result in increased prisoner numbers, although if the courts modify their sentencing in the manner we have suggested in paragraph 5.8, such an increase should be mitigated. Adoption of the recommended regime would also mean a greater demand for post-release supervision, although, as we have pointed out, we do not consider that every

prisoner on release needs to be supervised whilst serving the community part of his or her sentence.

Information on Sentencing and the Release of Prisoners

5.45 Although there is a plethora of information available from a variety of sources about sentencing and the release of prisoners, there is, undoubtedly, a lack of understanding about these and other aspects of the criminal justice system in Scotland amongst both the public and the media in this country.

5.46 If the changes that we are recommending in this report are taken forward, or for that matter if alternative measures are introduced, we consider it is vital that these are well publicised and communicated as widely as possible. We do not think it necessary in this report to stipulate who should publicise what. There are roles to be played in this regard by a number of agencies both within and outwith central and local government, perhaps most notably by the courts and the Parole Board. This is a matter that we may return to in the context of our consideration of the scope to improve consistency in sentencing.

ANNEX A

EARLY RELEASE FROM PRISON AND SUPERVISION OF PRISONERS ON THEIR RELEASE: WRITTEN CONSULTATION

ANALYSIS OF RESPONSES

Introduction

The consultation on the early release from prison and supervision of prisoners on their release was launched by the Sentencing Commission for Scotland on 21 June 2005. Over 800 copies of the consultation paper were distributed to a wide range of individuals and organisations in the public, private, voluntary and academic sectors. A full list of individuals and organisations to whom the consultation paper was sent can be seen at Appendix 1. The consultation paper was also posted on the Commission's website. The consultation period ran until 30 September 2005 but replies continued to come in after this date. All replies received up to 7 October have been included in this analysis. It was not possible to include the small number of replies that came in after 7 October.

The Consultation Paper contained 32 questions that the Commission considered to be key to its deliberations on early release. These focused on:

- The principle of the early release of prisoners.
- The scope of schemes for the early release of prisoners.
- The administration of schemes for the early release of prisoners.
- The role of the sentencing judge in the early release of prisoners.
- Sanctions for re-offending or breach of conditions of licence during the period before expiry of original sentence.

Recipients of the consultation paper were invited to submit their views on all or some of the questions and their views and suggestions for improvements on any aspect of the current arrangements not covered by the questions. By the final cut-off date for analysis a total of 50 responses had been received to the written consultation exercise.

The Respondents

The majority of respondents to the written consultation (n=35, 70%) were organisations, while 15 (30%) were individuals. Respondents could be grouped into broad categories as shown in Table 1.

Respondent type	**Number**	**%age of respondents**
Criminal justice organisations	12	24%
Local authority	11	22%
Voluntary sector	11	22%
Other national organisation	1	2%

Individuals (Parole Board)	8	16%
Individuals (sentencers)	4	8%
Other individuals	3	6%
Total	**50**	**100%**

'Criminal Justice Organisations' refers to a variety of bodies working within the field of criminal justice such as legal bodies, police organisations, bodies representing sentencers and the Scottish Prison Service; 'local authority' includes responses that came from local authorities as a whole and bodies representing local authorities such as inter-authority criminal justice partnerships and COSLA; 'voluntary sector' includes both large national organisations and small, single issue campaigning organisations. The Parole Board took the view that they were not able to submit a single 'corporate' response because the views and opinions of individual members were diverse. Instead, the Board encouraged its members to submit their own individual responses and eight of the 24 members did so. A full list of those respondents who agreed to their details being made available is attached at Appendix 2.

In order to preserve anonymity where this was requested individual respondents are not identified in the analysis. Instead, where contextual information adds to the analysis, respondents are identified according to the category they fall into as follows:

Criminal justice organisations	CJ Org
Local Authority	LA
Voluntary Sector	Vol
Other national organisation	Nat Org
Individuals (Parole Board)	Ind
Individuals (sentencers)	Ind
Other individuals	Ind

Approach to Analysis

The responses to the consultation are qualitative in nature and have been analysed for themes, views and ideas. Limited quantitative analysis was undertaken to provide information on numbers and profile of respondents to each question. Very few respondents answered all of the questions. Some went through the questions in the order that they appeared in the consultation paper; others provided a general view on the early release system, parts of which sometimes related directly to specific questions and other parts of which did not. The responses have not been vetted for factual accuracy and it is possible that some views, while firmly held and forcefully expressed, are not factually correct. This does not preclude them from being included in the analysis since the analysis seeks to represent all views and opinions submitted to the consultation whether based on fact or on respondents' perceptions.

Analysis of Responses

The principle of the early release of prisoners

The consultation paper set out the provisions governing the early release of prisoners and noted that discretionary early release of prisoners on parole was first introduced in 1967 and applied to prisoners serving a determinate sentence of 18 months or more who had served one-third of sentence or one year, whichever was the longer period. Prisoners sentenced to less than 18 months were released unconditionally after serving one-third of sentence. The report of the 1989 Kincraig Committee resulted in the provisions being amended so that prisoners sentenced to less than four years are released automatically at half of sentence, while those sentenced to four years or more become eligible to be considered for release on parole at half of sentence and are automatically released on non-parole licence at two-thirds of sentence.

Question 1 of the consultation paper asked whether the law should:-

> **(a) require every prisoner to serve the whole period specified in the sentence of imprisonment in prison, or**
> **(b) continue to provide that part of the sentence should be served in the community?**

A total of 40 respondents submitted a view on this question. Of these, the vast majority (37, 92.5%), were of the view that the law should continue to allow prisoners to serve part of their sentence in the community. However, seven respondents (four Ind; one CJ Org; one LA; one Vol) qualified their responses with comments that (a) early release should not be automatic; (b) the decision should be based on an assessment of the risk to the public posed by the offender; and/or (c) only those who had shown remorse for their actions and a 'suitable attitude' to change and release should be considered for early release. Four respondents (two CJ Org, one Vol and one Ind) suggested that while the law should continue to provide that part of the sentence should be served in the community, we should move to a system of two-part sentences under which judges clearly explain to offenders, victims and the public, what part of the sentence is custodial and what part will or may be community based.

> "By the use of .. a formula clearly setting out the minimum time to be served as well as the conditions attending early release the public cannot claim to be misled about sentences. This type of formula is currently used in imposing the punishment part in life sentences. Indeed it would reflect a common approach to all sentences if the minimum time to be served inside is seen as a declared component of each and every sentence of imprisonment." (CJ Org 045)

The three respondents who did not think that prisoners should be able to continue to serve part of their sentence in the community were a criminal justice organisation, an individual and a voluntary sector organisation. The reasons given were that it would be more effective if the whole period specified could be served in prison and that early release works against

the principle of clarity in sentencing because when a custodial sentence is imposed victims and the public legitimately expect that the offender will serve the sentence in custody.

Question 2. What are the arguments in favour of schemes for the early release of prisoners?

Forty respondents (80%) addressed this question. Four views on the arguments in favour of early release were common:

1. Early release provides an incentive to good behaviour in prison and therefore aids prison management. A number of respondents expressed a view that early release, at least where it is discretionary as is currently the case for long-term prisoners, is something that is aspired to by prisoners and provides a motivation for complying with prison discipline.

   > "Early release has the capacity to induce long-term changes in the attitude and lifestyle of prisoners, which can only be beneficial to the communities we live in. With no incentive will come a lack of will to change, little compliance with correctional programmes and a very dangerous response from criminals in danger of being imprisoned. If there are no significant losses to incur by unruly behaviour within prison, there is more likely to be an upsurge in unruly behaviour." (Ind 007)

2. Early release provides an incentive to prisoners to tackle their offending behaviour. Where early release is discretionary and dependent on progress within prison and an assessment of risk and suitability for release, this provides offenders with an incentive to participate in offending behaviour courses and programmes, to address the causes of their offending and to begin to understand the impact of their offending behaviour on their victims. In the longer term this increases community safety since the likelihood of re-offending on release will have been reduced as a result of the offender having done work to address their offending behaviour.

   > "the possibility [of early release] provides an incentive for prisoners to participate in programmes designed to tackle offending behaviour – this should help to reduce the risk of re-offending" (Vol 019)

3. Early release provides an opportunity for prisoners to be 'tested' in the community under conditions in which they are provided with support. Supervision is important in facilitating prisoners' reintegration into the community. The possibility of recall to custody should the prisoner re-offend or exhibit behaviour which suggests they continue to pose a risk provides a safety net for the public and can act as an incentive to prisoners to not re-offend.

   > "….the current scheme provides for a level of compulsory statutory supervision of a prisoner within the community, from their Earliest Date of Release (EDR) to their Sentence End Date (SED), during which time the prisoner is aware that he or she is under threat of recall if they fail to comply appropriately with licence conditions. ….there is some evidence that indicates that those who cooperate fully with supervision, secure appropriate accommodation, avail themselves of employment opportunities and cooperate with offence-focussed counselling, are less likely to reoffend,…." (Ind 010)

4. Early release reduces prison overcrowding. Scotland has one of the highest rates of imprisonment per head of population in Europe and our prisons are overcrowded. Early release impacts on the size of the prison population and is a mechanism for limiting overcrowding.

> "there is a strong possibility that abolition of early release would lead to an even larger prison population that at present. The financial, personal and social costs would be severe." (Vol 019)

A number of additional themes were identified by respondents, although less frequently than the four identified above. These were:

- Early release facilitates the maintenance of family ties by reducing the time that prisoners spend in jail away from their families, and providing a goal for prisoners to work towards with the support of their families. In the longer term this can impact on community safety as strong family ties reduce the likelihood of re-offending.
- Early release allows for the possibility that people can and do change. It enables people who were regarded as posing a high risk to the public at the outset of their sentence but who have taken positive step to address their offending behaviour to be released under conditions in which they can be tested.
- Early release allows for discretion to be exercised in relation to risk – it enables an offender who has taken steps to address their offending behaviour and thus reduce the risk that they pose to the public to be released sooner than an offender who has committed a similar offence but taken no steps to address their offending behaviour and who continues to pose an unacceptable risk to the public.

Overall, the majority of arguments in favour of early release identified by respondents relate to opportunities and advantages that the system can afford to offenders and/or society in general. However, the advantages afforded to the prison system, through better discipline and the reduction of overcrowding were also recognised and regarded as being important.

Question 3. What are the arguments against schemes for the early release of prisoners?

Forty-one respondents (82%) addressed this question. Three arguments against schemes for early release were commonly identified by respondents. These were:

1. Early release schemes are perceived negatively by victims and the general public. Early release is regarded as defeating the ends of justice by allowing offenders not to serve the full sentence of imprisonment imposed by the court. This undermines public confidence in the criminal justice system and reduces its credibility.

> "Early release works against the principle of clarity in sentencing. When a custodial sentence is imposed, those present in court and those reading about the sentence later legitimately expect that the offender will serve that particular sentence in custody. The

judicial system inadvertently deceives victims and the public by reducing that sentence disproportionately." (Vol 044)

2. Early release puts the public at risk by releasing prisoners before the end of their sentence where those prisoners re-offend. Some respondents argue that some re-offending would not occur at all if prisoners were not released early on licence, while others argue that early release simply allows re-offending to occur sooner than it would have done if early release did not exist. Several respondents suggested that current methods of risk assessment are not sufficiently robust to ensure that high risk offenders are identified and as such, there is a danger that those who pose a risk to the public are also being released early.

   "The lack of any tangible and consistent application of a risk management strategy to determine which offenders are suitable for early release is a major argument against any form of early release and offenders who still present a major danger to the public are being released without adequate or credible supervision and monitoring." (Vol 050)

3. Automatic early release provides no incentive to prisoners to behave within prison or to change their offending behaviour. As such, it undermines the deterrent impact of the penal system.

   "Where offenders are released of right half way into their sentence this fundamentally undermines the deterrence of the penal system. …..early release schemes undermine public confidence in the system of justice and can result in a released prisoner going on to commit further crimes even before their original sentence date has expired." (CJ 039)

Two additional themes that were identified less frequently by respondents were:

- The unconditional early release of short-term prisoners is problematic because it allows prisoners who may well continue to pose a risk to the public to be released with no monitoring, supervision or support and this does nothing to assist with addressing offending behaviour.
- Early release presents a 'double whammy' to victims in cases where the offender has already been given a sentence discount for a plea of guilty. One respondent illustrated this point with an example of an offender sentenced to six years in custody, discounted by a third from nine years in recognition of an early plea of guilty. If the prisoner is then released at 50% of sentence he/she spends only three years in custody – a significantly shorter period than the court regarded the offence as meriting. It was suggested that victims in particular can find it very difficult to understand why offenders should be entitled to two discounts off the length of the sentence.

Overall, the arguments against early release focus primarily on the need to protect the public for as long as possible from those offenders who present a risk and the impact on public perceptions of the criminal justice/court system when offenders serve significantly less time in custody than the court appeared to intend.

Question 4. What significance, if any, should the overall size of the prison population have in determining the existence and nature of schemes for the early release of prisoners?

Forty-one respondents submitted a view on this question. Of these, 26 (63%) felt that the size of the prison population should be of no significance in determining the existence and nature of schemes for early release. Some respondents were firmly of this view and expressed opinions that the size of the prison population should never be a relevant factor in determining whether to provide early release. Several indicated that the size of the prison population is distinct from, and should always be kept distinct from, a consideration of the appropriate punishment for the crime. Other respondents, however, qualified their view that the size of the prison population should not be of significance by saying that this would be the ideal situation but that resource constraints, the capacity of the prison estate and the current size of the prison population mean that in reality any early release scheme cannot ignore the size of the prison population.

> "While in principle the question of whether prisoners should be released early should be a completely separate issue from the ability of prisons to accommodate them, in reality, the fact that Scotland has now one of the highest custody rates in Western Europe and Scotland's prisons are overcrowded, is in danger of clouding the issue….." (Vol 024)

Fifteen respondents (37%) expressed a view that the size of the prison population should be of significance in determining the nature of any early release scheme. Several expressed a view that it is entirely appropriate for early release schemes to be used to assist in reducing the size of the prison population. One felt that the overall size of the prison population ought to be a matter of public concern and that truth in sentencing is 'an expensive luxury'. A number of others adopted a position that imprisonment is used too frequently in Scotland and early release can and should be used as a mechanism, along with other criminal justice and sentencing policies to reduce the size of the prison population.

> "From a pragmatic point of view , prison population size will have an impact on penal policy. Overcrowding will inevitably impact on the day-to-day running of institutions and the scope for undertaking effective interventions with prisoners. This in turn impacts on effective community reintegration, public protection and reduction of reoffending. Early release schemes allow the above areas to be built on, while also providing a mechanism to keep prison populations within workable levels." (LA 042)

Question 5. What steps, if any, should be taken, and by what body, to publicise and explain the reasons for any early release regime?

Thirty-eight respondents (76%) addressed this question. All but three felt that steps should be taken to publicise and explain early release. Of the three that did not (two Ind and one Vol), two indicated that if early release was done away with there would be no need for publicity while one suggested that publicity will make little difference since the public only hear what

they want to hear. Among those respondents who felt that there should be publicity, the most common suggestion for who should be responsible for this (n=15) was the Scottish Executive (SE). A number identified the SE as the only organisation that should be responsible for this publicity, while others felt that the SE should share responsibility with other criminal justice organisations such as the Scottish Prison Service, the Parole Board, Scottish Courts Service and local authorities.

> "The general responsibility for policy explanation should lie with the Scottish Executive and key related bodies. These would include the Scottish Prison Service and the Parole Board for Scotland and local authorities who supervise the various forms of licence or order post release." (LA 036)

Five respondents suggested that sentencers should be responsible for publicising and explaining early release, in the sense that they should explain the nature of the sentence passed and what part of it will or may be served in the community. Several suggested that all parts of the criminal justice system should be responsible for publicising and explaining the reasons for early release:

> "It is the responsibility of all agencies involved in criminal justice to ensure that the public of all ages are well informed and educated about all aspects of Justice. These agencies include Ministers, the Parole Board, local authorities, the Scottish Prison Service, Penal Reform Groups and the Judiciary." (Vol 024)

A number of respondents suggested that publicity about early release may be a responsibility that should fall to the new Criminal Justice Authorities and/or the National Advisory Board on the Management of Offenders once these organisations are fully operational and their roles and responsibilities have become clear. Two respondents suggested that 'a time limited group like HEBS' (Health Education Board for Scotland, now known as Health Scotland) could be established with a specific remit of educating the public on early release regimes and other aspects of the criminal justice system.

In terms of the steps that should be taken to publicise and explain early release, few respondents put forward concrete ideas. A number of general suggestions were made about the need for 'a major campaign of public education' or 'a broad strategy to educate and inform the public on penal policies' but few clear proposals emerged. One respondent suggested that the court system should adopt a co-ordinated strategy:

> "The sentencing judge should, as a matter of course, explain the nature of the sentence passed and what part of it will or may be served in the community and why that is the case. The Public Information Officer for the judiciary should also as a matter of course explain the nature of any sentence which is the subject of public interest and the reasoning behind it. Victim Support organisations should receive this information as should any individual victim who registers an interest. It is difficult to envisage the Public Information Officer replicating the High Court role in the sheriff courts due to the volume of business in the latter. However, arrangements should be

> put in place for every court to assist communication with the media and provide support in those cases where the sentence might be seen as contentious." (Vol 019)

One respondent suggested that the Scottish Executive should consider a similar approach to that taken in Canada in 1996, which embarked on 'a programme of public education' about the need for sparing use of custody. The Scottish Executive programme should include regimes for early release.

In summary, the vast majority of respondents agreed that there is a need to publicise and explain early release regimes, the Scottish Executive was most commonly considered to be the appropriate organisation to undertake the task, but concrete ideas on how this should be done were absent.

Question 6. What relationship, if any, should schemes for the early release of prisoners in Scotland have to those which apply to prisoners in other parts of the UK?

Thirty-seven respondents answered this question. Of these, over half (n=21, 57%) felt that there need not be a relationship between the early release scheme in place in Scotland and that in place in other parts of the UK. These respondents can be separated into two groups, however, those who think Scotland need not have any regard to regimes elsewhere:

> "Scotland should continue to determine its own criminal justice system and should have no relationship with other schemes within the UK." (Ind 007)

and those who think that we need to be aware of what happens elsewhere but apply whatever approach is most appropriate for Scotland:

> "…whilst paying heed to the systems for early release in other Anglophone common law based systems, Scotland should apply such system of early release as is perceived to be in the best interests of the Scottish population." (Ind 010)

Sixteen respondents thought there should be a relationship between schemes for early release in Scotland and those in place in other parts of the UK.

> "Early release schemes should be broadly similar unless separate legal systems dictate different arrangements." (LA 037)

Three respondents specifically mentioned the issue of cross-border transfers as being a reason why regimes in the various jurisdictions need to be comparable.

> "There are some prisoners who are subject to cross-border transfers or are imprisoned in one part of the UK although coming from another area…. For such prisoners it would make sense for early release systems to be closer in the way they operate." (CJ Org 017)

Overall, the consensus across the responses was that while Scotland should learn from good practice, wherever it exists, and while we should seek to harmonise our system with the rest of the UK in so far as is practicable, the primary approach should be one of Scottish solutions for Scottish problems.

Question 7. Should multiple sentences be aggregated to form a single term, in accordance with section 27(5) of the 1993 Act, or should sentences stand alone and run in parallel with each other?

Thirty-two respondents answered this question. Of these, three fifths (n=20, 62%) believed that sentences should stand alone and run in parallel. Three justifications were commonly mentioned:

- many respondents expressed strong views that every crime an offender is convicted of should receive a discernable punishment that has some impact.

  > "[Single terming] means that early release during consecutive sentences effectively releases a prisoner without having served any part of a particular sentence. ….this undermines the ethos of justice, appearing that the prisoner has been released without any penalty for that particular crime. The combination of early release and reduction in sentence for a guilty plea can result in a time served that is vastly below public expectations." (Vol 044)

- Single terming is so complex that it is a difficult system to manage and its outcomes are often incomprehensible.

- In the interests of openness and transparency in sentencing single terming should end since it results in some sentences bearing little or no resemblance to the term imposed by the court.

Six respondents (19%) felt that the court should be able to exercise discretion over the status of the sentence according to the individual circumstances of the case. It was suggested that while single terming can result in sentences that have no practical effect being imposed, a blanket removal of single terming may also result in injustices since circumstances may arise where it is appropriate to combine multiple sentences. For example, one respondent suggested that if an offender was convicted of a number of offences that had arisen from a single incident the court may wish to, and should have the discretion to, impose an aggregated sentence, while in cases where an offender was convicted of entirely separate offences the court should have the discretion to order the sentences to run in parallel.

> "Making all sentences concurrent may remove the possibility of the court imposing a sentence whose effect is proportionate to the offence. But the present requirement to impose either a concurrent or consecutive sentence does not offer the court the degree of discretion it requires over the effect of its sentences. [We] would favour a scheme which allows the court to determine the extent of overlap between 'parallel' sentences

….possibly through control of the start date for the second or subsequent sentence." (Vol 030)

Six respondents (19%, three Ind and three LA) indicated that aggregation of sentences should continue but none gave reasons why this should be the case, beyond saying that 'aggregation makes matters simpler'.

It was clear from the responses to the consultation paper that the complexities and implications of single-terming were not widely understood.

The scope of schemes for the early release of prisoners

Question 8. What should be the criteria for early release?

Forty respondents (80%) addressed this question which threw up a wide variety of responses. A number of respondents who represented particular perspectives put forward views of what the criteria should be that were defined by the perspectives that they represented. For example, those organisations representing victim's views felt that acknowledgement of the offence, empathy for the victim and recognition by the offender of the impact of the crime on victims should be pre-requisites for early release.

"A major factor in early release must be the acknowledgement of the crime committed and its impact on the victim, prisoner, society and remorse and empathy for the victim (s)." (Vol 043)

A total of 16 respondents identified risk of harm to the public or the community as being an important criterion in making decisions on early release, with a number of respondents suggesting that this should be the sole criterion for the decision on whether to release an offender. Several additional respondents identified a general concept of 'risk assessment' as being the primary criterion in determining whether an offender should be released early. Eleven respondents identified good behaviour in prison and compliance with the prison discipline regime as being the primary criterion, indicating a view that early release should be earned rather than being automatic. Two Local Authority respondents felt that the criteria for early release should be determined by the objectives of the sentence at the time of imposition by the sentencer. Seriousness of the offence was identified by a number of respondents as a factor that should be taken into consideration. Having served a minimum of 80% of sentence was proposed by one respondent as being a minimum requirement, while two indicated that the offender must have served a minimum of 50% or 66% of sentence before becoming eligible to be considered for early release.

The very mixed range of responses to this question indicate that the decision on whether to grant discretionary release to an offender is regarded as being based on a wide variety of considerations and is potentially complex. The majority of respondents felt that a range of factors should be taken into account but the basis on which decisions to grant prisoners early release are currently made does not appear to be widely understood.

Question 9. Should there be the same or separate schemes for short-term and long-term prisoners?

Thirty-seven respondents answered this question. Of these, four-fifths (n=28, 76%) felt that there should be separate schemes for short and long-term prisoners. A number of those who responded in this way qualified their responses by stating that they had adopted a pragmatic stance. They believed that in an ideal world all prisoners should be subject to the same scheme of supervised release. However, the practical realities of resource constraints meant that it is unrealistic to expect that all prisoners could be supervised on release.

> "In an ideal world, the same scheme should operate for all sentences, but that would be inordinately expensive and impracticable. The majority of short-term prisoners, however undesirable their conduct may be, do not present a serious threat to the safety of the public. The distinction between long and short term prisoners should therefore be maintained." (Ind 033)

A number of respondents indicated that the distinct differences between short and long-term prisoners meant that a 'one-size fits all' approach would be inappropriate. Some indicated that short-term prisoners should be treated differently to long-term prisoners because, generally speaking, short-term prisoners do not pose the same level of risk and do not require supervision on release. Conversely some respondents argued that long-term prisoners generally do require supervision and public safety issues would arise if they were to be released early without supervision.

Nine respondents (24%, four Ind; two CJ Org; two Vol and one LA) felt that the early release scheme should be the same for all prisoners. Several indicated that all prisoners should be subject to the same scheme of earned early release under which all prisoners have the same opportunities to apply for early release. One respondent suggested that employing the same scheme of early release for all prisoners would assist in promoting uniformity and clarity in the sentencing process. One suggested that while short and long-term prisoners should be subject to the same scheme, distinctions should be drawn between serious violent/sexual crimes and 'non serious' crimes.

Overall, there was strong support in favour of maintaining separate regimes for short and long term prisoners, although in many instances, this support was based on practical considerations and a view that it is simply not possible to provide the same regime for all prisoners.

Question 10. If separate schemes for "short-term" and "long-term" prisoners are retained should the current distinction between the two types of prisoner be kept (i.e. 4 year threshold) or should it be revised and, if so, how?

Just half of the respondents (n=25) addressed this question. Of these, 11 (44%) felt that the current distinction between short and long-term prisoners should be retained. Several indicated that they thought the four year threshold was adequate or 'about right' while one

suggested that while four years seems somewhat arbitrary, the resource implications of revising it would be such that a change could not be justified.

Over half of the respondents, (n=14, 56%), felt that the current distinction of four years should be revised. However, there was little consensus on how it should be revised. Several suggested that the distinction should be increased to five years to reflect the new sentencing powers of the sheriff court, while a number proposed that the distinction should be revised downwards to three or two years or 12 months.

Six respondents put forward new models for early release, based on revised distinctions between short and long-term prisoners. Five of these are outlined below, the sixth respondent did not agree to their response being made public:

1. Respondent 009 Individual

   Sentences of less than 12 months - unconditional early release at half sentence.
   Sentences of 12 months to four years - conditional early release, with first consideration by local early release panel at half sentence.
   Sentences of more than four years - current arrangements. (i.e. conditional early release with first consideration by Parole Board at half sentence).

2. Respondent 019 Voluntary Sector organisation

   Short term sentences of less than 12 months - unconditional early release at half sentence.
   Medium term sentences of 12 months to four years - automatic release at half sentence subject to standard conditions and on supervision.
   Long term sentences of over four years - current arrangements (i.e. conditional early release with first consideration by Parole Board at half sentence).

3. Respondent 022 Individual

   Short term sentences of less than five years - sentencer to set punishment part at end of which prisoner will be released unless Scottish Ministers think they pose an unacceptable risk, in which case they will be referred to the Parole Board for review.
   Long term sentences of five years and over - sentencer to set total sentence length and specify punishment part at end of which prisoner will be considered by Parole Board for consideration for release.

4. Respondent 029 Local Government

   Short term sentences of less than five years - no early release
   Long term sentences of five years and over - conditional early release with first consideration at two thirds of sentence.

Sex offenders and serious violent offenders - no early release and extended supervision on release for a minimum of 12 months and up to half the length of the custodial sentence.

5. Respondent 047 Criminal Justice Organisation

No prison sentences of less than six months.
Sentences of six months up to two years - discretionary early release at two-thirds of sentence, subject to Home Detention Curfew and compulsory supervision for a least six months.
Sentences of two years and over - discretionary release on parole at two-third of sentence.

Overall, a majority of respondents to this question were in favour of revising the current distinction of four years between short and long-term prisoners but there was little consensus over how the threshold should be revised.

Question 11. What is the justification for (1) discretionary and (2) automatic early release?

Twenty-three respondents answered the first part of this question on the justification for discretionary early release. Four themes emerged which, inevitably, were similar to those that emerged in response to question one which asked about the arguments in favour of early release:

1. A number of respondents argued that discretionary release can be justified because it allows for the possibility that people can change. It was suggested that it is not possible to predict at the time of sentencing how each prisoner will progress and discretionary early release allows their progress or lack of it to be recognised.

> "At the time of sentencing, it is impossible for any sentencer to predict how a prisoner will progress and develop in custody. Some who might, ….appear hardened to the penal system do take steps to address their personal difficulties, undertake relevant coursework, develop skills in prison, and have a satisfactory home life available at the half-way point of their sentence. At that stage, keeping someone in custody whose risk can be managed in the community must be seen as counter-productive, both in terms of economics and in terms of penal policy." (Ind 010)

2. Discretionary early release, at least in the form that it takes at present, enables prisoners to be supported and supervised in the community, which allows their progress to be monitored and the possibility of recall to custody provides a safety net for the community.
3. It allows release decisions to be taken on the basis of an assessment of risk and therefore allows low risk prisoners and those whose risk can be managed in the community to be released early and all prisoners to be released at the most appropriate point.

4. Discretionary early release provides prisoners with an incentive to co-operate with the sentence management regime and participate in addressing offending behaviour programmes, which in turn reduces risk to the community.

Two respondents to this question, both individuals, indicated that they do not think there is any real justification for discretionary early release.

Just 18 respondents addressed the second part of this question on the justifications for automatic early release. Six of these respondents indicated that there is no justification for automatic early release. The remainder felt that it can be justified because:

1. It limits the amount of time lower risk offenders spend in prison;
2. It is a pragmatic response to managing the size of the prison population;
3. It provides an incentive for good behaviour within prison; and
4. It allows prisoners to be 'tested' in the community while they are subject to licence conditions.

Overall, while the number of responses to this question was low, the majority of those who did respond could see some justification for discretionary early release but little justification for automatic early release.

Question 12. Should different schemes of early release operate for different classes of prisoner? In other words should the nature of the offence have a bearing on the timing of release?

Thirty-three respondents answered this question. Three-quarters of these (n=25, 76%) were of the view that there should not be different schemes of early release for different classes of prisoners. A number of respondents expressed the view that the nature of the offence is given adequate consideration at the time of sentencing and that this is the correct point for differentiating between different crimes.

> "…the nature of the offence should not have a bearing on the time of release. Such an approach would create difficulties of definition even within one category such as sex offender. The duration of the sentence and the nature of post-release supervision should continue to be decided at the point of sentence when specific measures to deal with specific risks can be employed." (Vol 019)

Many respondents indicated that the primary factors in determining whether a prisoner should be released early should be risk of re-offending and risk to the public, rather than nature of the offence per se. It was suggested that an assessment of dangerousness should apply to all prisoners irrespective of length of sentence and offence and that it is this assessment of risk posed to the safety of communities, not the nature of the offence, which should determine release eligibility. While each case should be considered on its merits and all prisoners should be eligible to apply for early release on a uniform basis, the over-riding priority should be public safety and confidence.

> "Different schemes should not exist for different groups of offenders, but the timing of release should be related to the risk of re-offending and/or harm posed to communities. Release should not be automatic unless risks can be safely managed and resources are available to undertake this task." (LA 046)

One respondent suggested that the same early release criteria should operate for everyone as differentiating between different classes of offence would be inherently unfair.

Eight respondents (24%) felt that there should be different schemes of early release for different classes of prisoner. These respondents reflected the spectrum of respondent types (three LA; two CJ Org; two Vol and one Ind). One singled out sex offenders as requiring different treatment and three identified sexual and serious violent offenders. One identified life sentence prisoners and those who pose a serious risk to the public, one identified 'the most dangerous offenders', one suggested offenders should be differentiated according to the degree of violence they had used and one suggested that first offenders and persistent re-offenders should be treated differently.

Overall, the majority of respondents felt that there was no justification for subjecting different classes of prisoners to different early release regimes.

Question 13. Should all early release of prisoners be discretionary? In other words should there be no automatic, unconditional release for short-term prisoners at half-sentence; and automatic, conditional release for long-term prisoners at two-thirds of sentence?

Thirty-one respondents addressed this question. Of these, a small majority (n=17, 55%) indicated that they did not think all early release should be discretionary. A range of arguments were put forward to justify this position (i.e. that some form of automatic release should continue to exist). Firstly, a number of respondents felt that automatic and/or unconditional early release should continue for offenders who pose little or no risk to the public, who were felt to be the majority of short-term prisoners.

> "There is good evidence that the imposition of statutory supervision in respect of low risk individuals can make matters worse rather than better in relation to the likelihood of future offending. It follows therefore that automatic unconditional release for low level and low risk short-term prisoners is sustainable." (LA 036)

Secondly, some respondents felt that from a purely pragmatic point of view it is simply not possible to make all early release discretionary either because there would be a significant increase in an already overcrowded prison population or because resources do not exist and are not likely to be found to enable every prisoner to be assessed for suitability for early release.

> "All early release should not be discretionary. To administer such a scheme would be extremely demanding of resources because it would require either an extension of the Parole Board in some form or extensive use of administrative release, most probably

> involving prison governors. The latter would be a major additional burden on SPS and [we] would not want to see decisions of this kind passing to service providers." (Vol 019)

A third view was that the existing procedures for the early release of long-term prisoners should be retained (i.e. automatic release on licence at two-thirds of sentence) on the basis that it is more sensible to have high risk offenders re-integrated into the community on supervision rather than releasing them at the end of sentence with no supervision.

Several respondents indicated that while all early release should not be discretionary, neither should it be automatic in the form that it is at present. Rather, we should move to a system of two-part sentencing whereby offenders are sentenced to a period in custody followed by a period on supervision in the community.

> "A scheme which would have the advantage of more transparency as far as the public is concerned would be …..to replace automatic early release periods with a court determined 'punishment part', the remainder of the sentence to be served in the community." (Vol 019)

Fourteen respondents (45%) felt that all early release of prisoners should be discretionary. Many expressed strong views that automatic early release should be discontinued since it results in the true length of prison sentences bearing little resemblance to the sentence imposed by the court, which undermines the authority of the court, and has no value in terms of prisoner management since prisoners are released early irrespective of behaviour in prison.

> "Definitely nothing automatic (all forms of early release ought to be, as it were, earned). There should be an incentive towards good behaviour (or modified behaviour) and willingness should be shown to engage in programmes, etc. Prima-facie, the length of the sentence ought to be what it says it is, but there should also be rewards and reductions available for working towards good citizenship." (LA 016)

Overall, a small majority of respondents felt that there should continue to be automatic early release in some cases. Many respondents, however, indicated that this view was based on the practical reality of limited resources – the prison estate and the current size of the prison population would make a large increase in the number of prisoners extremely difficult to manage.

Question 14. If early release were to continue to exist at what point of the sentence should a prisoner be eligible to be released early?

Twenty-nine respondents addressed this question. Five respondents expressed a view that we should move to a system of sentencing whereby sentencers specify minimum custodial terms to be served by offenders, after which they would be eligible to apply for early release. As such, there would be no fixed point of sentence for early release.

> "….the present form of imprisonment with automatic early release should cease and be replaced by a sentence of custody of the same length as the present custodial or punishment part (one half) of sentences of imprisonment together with a sentence of supervision. There should be no increase in the time spent in custody in consequence of the change. Discretionary detention (rather than release) should operate after the end of the custodial or punishment part and should be applicable only where risk to the public is an issue." (Vol 030)

A further two respondents suggested that the point of early release should be determined by assessments of risk. Of those who specified fixed points, six felt that there should be no change to the current arrangements (i.e. automatic early release of short-term prisoners at half sentence, discretionary early release of long-term prisoners at half sentence and automatic early release at two-thirds of sentence). Several of these respondents suggested that there should be no change because the impact on the prison population would be detrimental:

> "There may be a legitimate concern that a half point of release for short term prisoners is perhaps too generous, particularly compared with the previous one third remission. ….Any increase from 50% would increase the prison population generally which in Scottish terms is already uncommonly high, particularly for short-term prisoners. For that reason it may be best to leave the eligible thresholds for early release as they currently are." (LA 036)

Five respondents suggested that prisoners should be eligible for early release at 50% of sentence, but the majority indicated that this should be discretionary release in all cases. However, 11 respondents suggested that the earliest point of release should be increased – six proposed increasing the point to two-thirds of sentence and five proposed 75%, 80% or five-sixths of sentence. Two of these respondents indicated that the existing model should be retained but the release points should be raised so that discretionary release is available at two-thirds of sentence and automatic release at five-sixths. Many of the respondents indicated that early release, at whatever point they had proposed, should be discretionary.

Question 15. How should the early release arrangements for determinate prisoners interact with the statutory arrangements governing the release of prisoners sentenced to life imprisonment?

Twenty-two respondents answered this question and views were almost equally divided. Twelve respondents (54%) expressed a view that the early release arrangements governing the release of both groups of prisoners do not need to interact. Some indicated that the two groups of prisoners are distinct and should be treated as such:

> "Determinate prisoners and life prisoners should be treated as two separate and distinct entities at all times. It is unrealistic and draconian to apply life licence rules on individuals who are not serious, persistent offenders." (Ind 007)

Others suggested that it would be too complicated to attempt to operate the same system for both groups of prisoners and the current systems operate adequately.

Ten respondents indicated that the same system of early release should operate for both groups of prisoners. A number expressed a preference for applying the system under which life sentence prisoners are released to all determinate sentence prisoners i.e. consideration for release by the Parole Board after serving a minimum period in custody.

> "There is an argument that the combination of the punishment part and the discretionary early release part used for lifers is a good operating principle and that it could be extended to other categories of prisoner." (Vol 019)

One respondent felt that bringing the systems for the two types of prisoners into line would simplify the system and remove 'iniquitous anomalies' (CJ 045). Two respondents suggested that the test for continued detention should be the same for both determinate and life sentence prisoners and should be based on the risk of the offender causing harm or suffering to the public.

Overall, there was no consensus on how the rules governing the early release of determinate sentence prisoners should interact with the arrangements governing the release of life sentence prisoners. None of the respondents identified the current anomaly between the systems that require life sentence prisoners to serve their punishment parts in full while determinate sentence prisoners require to serve a minimum of half but no more than two-thirds of their sentence in custody.

The administration of schemes for the early release of prisoners

16. If early release is not to be automatic, who should decide if prisoners are to be granted early release?

Thirty-seven respondents addressed this question. Over two-thirds (n=26, 70%) indicated that they believe the Parole Board is the most appropriate body to make decisions on the early release of prisoners. Most respondents did not explain why they felt that the Parole Board is best placed, however, several suggested that release decisions need to be taken by an independent body that is publicly accountable and the Parole Board meets these criteria.

> "A fair, independent and impartial Tribunal, consisting of persons with the competencies appropriate to the task. The Parole Board is best suited to the task. The Tribunal must be independent of the Executive." (Ind 033)

Five respondents (13%) suggested that the decisions should be made by the Parole Board in consultation with other bodies that have responsibility for the management and supervision of prisoners; and a further four suggested that some other body should make the decisions. These included the Risk Management Authority, the sentencing judge and the prison service. Two respondents indicated that they believed automatic early release should be retained for short term prisoners and as such, no-one need make decisions about their release.

Overall, the majority of respondents regarded the current position of the Parole Board making decisions on early release as being satisfactory.

17. What roles, if any, should be played by the Scottish Executive, the Scottish Parliament, the Scottish Prison Service, the Parole Board, the Risk Management Authority and social work agencies.

Twenty-four of the respondents to the consultation paper did not provide a response to any part of this question. Of those who did, thirteen respondents (50%) answered the entire question and 13 (50%) answered parts of it.

Twenty-one respondents expressed a view on the role played by the Scottish Executive (SE). Three thought that the SE has no role to play in early release regimes. A number of respondents saw the SE's role as being largely strategic – it was suggested that they should be responsible for the provision of the general framework within which the early release regime operates, they should set the broad criteria for early release and they should provide National Objectives and Standards for the supervision of prisoners on release. Some saw the SE as being responsible for the provision of resources of all kinds including funding the provision of early release support programmes and ensuring that the Parole Board is provided with the necessary information to enable them to make decisions on early release.

> "Each of these entities, apart from the Parole Board, has a contribution to make in ensuring that the Parole Board is provided with all the information it needs to make a sound assessment of the risk presented by the individual prisoner." (Ind 033)

Three respondents indicated that the role of the SE, together with that of each of the other agencies, is prescribed by legislation and does not need to change at present. One suggested that each of the agencies should be clear about their roles, remits and boundaries and should be in regular discussion with service providers to ensure that there are no gaps in service provision. A further respondent suggested that it is desirable to avoid penal policy becoming overtly political and as such, the primary roles in the provision of early release schemes should be undertaken by operational agencies.

Eighteen respondents expressed an opinion on the role played by the Scottish Parliament. The majority felt that the Parliament should be responsible only for passing the necessary legislation and beyond that should have no role in questions of early release. One respondent suggested that the Parliament should have an interest in monitoring the practicalities of any early release scheme and should be able to call for evidence to establish how the scheme is operating in practice to ascertain whether statutory obligations are being fulfilled.

Twenty-four respondents submitted views on the role played by the Scottish Prison Service (SPS). Eight identified the SPS's role in the early release process as being specifically about the provision of information and assessments to the Parole Board to enable them to make decisions on early release. Others identified their role as being about undertaking risk and needs assessments, providing advice and information and feeding into reports that are taken into consideration in the early release decision making process. This tended to be described

in general terms rather than being described as a service that is provided to the Parole Board. Several others described the SPS's role in much more generic terms as being about looking after or managing prisons and prisoners and risk management. Two respondents indicated that the SPS should have no part in individual release decisions.

> "The Scottish Prison Service is not the appropriate agency to make the decision about whether a prisoner should be released. Its expertise is primarily in the area of Security and Containment. It has yet to prove its credentials with regard to the reduction of re-offending." (Vol 024)

Twenty-three respondents expressed a view on the role of the Parole Board. A number identified their role simply as being to make decisions on the discretionary release of prisoners. Others characterised it as being about assessing the risk posed by prisoners and evaluating the reports provided by the SPS to determine whether continued detention can be justified. Two respondents suggested that the Parole Board is appropriately placed to specify the conditions that should apply to any early release on licence.

> "The Parole Board should determine whether Early Release is granted, should specify conditions and reasons and should indicate why assessment recommendations have or have not been followed." (LA 037)

Twenty-one respondents commented on the role of the Risk Management Authority (RMA). Perhaps unsurprisingly given that this is a recently established body, respondents did not demonstrate a great deal of knowledge of its precise remit. Several respondents commented that as the RMA is a new body it is important to clarify what its role is in relation to the other agencies involved in the early release process. Some respondents described the RMA's role in very broad terms such as being to work alongside the Parole Board or to 'advise but not take any action'. A number of respondents made reference to its role in assessing the risks posed by offenders – one felt that the RMA should be responsible for developing risk management tools, while another felt that it should be responsible for ensuring that the risk management tools that are used are appropriate and gender specific. Three respondents felt that the RMA should be responsible for providing national guidance and advice on methods of assessing risk and managing high risk offenders in the community.

> "The Risk Management Authority have a critical role in providing advice on risk assessment (static and dynamic), risk management plans and advice on the most dangerous offenders across Scotland. The role of the Risk Management Authority should include the provision of a 'clearing house' facility for Criminal Justice Social Workers attempting to accommodate offenders who cannot return to their own communities…." (LA 046)

Twenty-five respondents submitted views on the role of social work agencies. Ten indicated that they saw social work agencies' role as being primarily about the provision of advice and information on prisoners to the Parole Board to enable them to make decisions on early release. Two respondents identified social work agencies as being responsible for the provision of risk assessments. Others identified social work agencies' role as being about the

supervision, support and management of released prisoners, while one identified both this and the provision of information as being part of their role.

18. What conditions should apply to those released early on licence?

Thirty-four respondents answered this question. The responses were mixed – a small number of respondents, some of whom were concerned with particular types of offences, identified specific conditions that they felt should apply to release licences:

> "Offenders must not be allowed to go near the home, workplace, school etc. of the victim, or their family, where appropriate and must be prevented from making contact in any form. Association with people or social situations implicated in the offending should also be disallowed and a curfew set to limit their freedom of movement."
>
> (Vol 050)

The majority of respondents, however, expressed views about the purpose of release conditions rather than identifying specific conditions that should apply to released prisoners. Eight respondents suggested that conditions that are intended to reduce the risk posed by the prisoner, whether risk to the public or risk of re-offending, should apply to those released early on licence. Some suggested that the conditions should also aim to address the individual's offending behaviour and its underlying causes. Two respondents suggested that every prisoner should be subject to generic or standard conditions such as being of good behaviour and keeping the peace, and should also be subject to individual conditions specific to their circumstances. Four respondents indicated that the current standard licence conditions are satisfactory. One respondent emphasised that the body making decisions on licence conditions should have discretion to impose whatever conditions are relevant to the specific circumstances of the case.

> "The semi standardised conditions which are used at the moment seem appropriate, i.e. keep the peace and be of good behaviour, comply with instructions of his or her supervising officer etc. It is desirable that the Parole Board or any other authority vested with responsibility to define conditions should have flexibility and discretion in applying unique conditions relative to the circumstances of the case in question." (CJ 023)

Several respondents indicated that whatever release conditions are imposed on prisoners, they must be reasonable and proportionate. One expressed concern that 'an over-sufficiency of additional conditions' will simply result in greater recall since it will be harder for prisoners to comply with all of the conditions.

The wide variety of responses to this question suggests that most respondents were not especially knowledgeable about the conditions that are currently applied to early release licences.

19. Who should decide what the conditions should be?

Fewer than half of all respondents (n=24) addressed this question. Of these, four-fifths (n=19, 79%) regarded the Parole Board as being the most appropriate body to decide on the conditions of early release, although the majority did not provide any explanation of why this should be the case. The few respondents who did give a justification referred to the independence of the Parole Board and its track record to date in making decisions about release conditions:

> "At present these decisions are made by the Parole Board, based upon thorough scrutiny of a comprehensive dossier, covering the entire period since the offender was sentenced. Each participating member of the Board has a vote on whether to impose additional conditions to the seven standard supervision conditions, and if so, what they should be. I am not convinced that there is a need to set up any other body to make such decisions. I have yet to see and evidence that the Board fails to discharge its functions appropriately." (Ind 010)

Several respondents emphasised that while the Parole Board is the appropriate body to make decisions about licence conditions, it must do so on the basis of advice and information from other agencies involved in the management and assessment of prisoners, in particular, the Scottish Prison Service and the Risk Management Authority.

> "The Parole Board for Scotland should continue to decide what additional conditions should be. These should be based on integrated assessments of risks and needs and a realistic knowledge of effective practice in community based supervision, together with an appraisal of actual available resources. Clearly the work of the Risk Management Agency will be increasingly influential in informing and developing such practice." (LA 036)

Five respondents (21%) felt that a body other than the Parole Board should be responsible for deciding on licence conditions. Suggestions were the sentencer, the Justice Minister, the police in conjunction with other supervisory agencies and that there should be a standard set of conditions devised by criminal justice practitioners and agreed through public consultation that should be applied to every released prisoner. None of these respondents gave an explanation of why they felt these bodies should be responsible for deciding licence conditions. Those who did not think the Parole Board should decide on the conditions for early release were three individuals, a criminal justice organisation and a voluntary sector organisation.

20. Should all prisoners granted early release be under supervision on release?

Thirty-five respondents answered this question. Of these, three-fifths (n=21, 60%) indicated that they did not think all prisoners granted early release should be under supervision. Two objections to the supervision of all prisoners released early were identified: firstly, a number of respondents indicated that the resource implications of supervising all released prisoners are such that this approach is simply unrealistic:

> "We do not agree that all prisoners granted early release should be supervised on release, given the very high & increasing level of imprisonment in Scotland and therefore the demands on resources that such a change would require." (LA 014)

Secondly, a number of respondents indicated that many prisoners represent a low risk, many of whom are serving short-term sentences, and that it would be a waste of resources to subject these prisoners to unnecessary supervision. Some respondents suggested that the need for supervision should be based on assessment of risk in all cases, while others suggested that no prisoners released from short sentences should be supervised.

> "Supervision should be targeted following assessment of needs. Most short term prisoners will not present a great risk to local communities on release. Criminology and Criminal Justice research indicates that compulsory supervision is most effective when targeted at higher risk offenders." (Vol 040)

Fourteen respondents (40%) expressed the view that all prisoners released early should be supervised, although the majority did not provide reasons for their view. However, justifications that were given included that supervision would ease the transition from prison to reintegration into the community, which is of crucial importance in the reduction of re-offending, and that it would be better and safer for victims if released offenders were certain to be supervised.

There were some differences between the profile of those respondents in favour of all early release being supervised and the profile of those against. Equal numbers of individuals and criminal justice organisations were in favour and against, but slightly more voluntary sector organisations were against and twice as many local authorities were against all early release being supervised than were in favour.

21. Who should be responsible for supervising prisoners granted early release?

Twenty-nine respondents addressed this question. Of these, the vast majority (n=24, 83%) regarded criminal justice social work services as being the most appropriate body to supervise prisoners granted early release. Again, very few respondents provided an explanation of why they felt this body would be most appropriate. Several emphasised that criminal justice social work organisations should work in close collaboration with other relevant agencies such as the police, the courts and victim organisations.

Five respondents (17%) identified other organisations as being better placed to undertake this task, including a probation service, the new criminal justice authorities and a suggestion that it does not matter who supervises as long as the supervision is efficient in helping offenders return to the community and in monitoring and reducing risk.

22. What form and level of supervision should be operated in respect of prisoners granted early release?

Thirty-one respondents submitted views on this question, which varied widely. The most common view was that the form and level of supervision should be based on an assessment of the risk posed by the prisoner and should be tailored to minimise that risk.

> "The nature and level of supervision should be determined by good risk assessment and assessment of needs in support plans." (Vol 040)

The second most commonly held view was that appropriate forms and levels of supervision are laid down in the National Standards for Throughcare which provide an adequate framework for minimum levels of supervision. One respondent, however, felt that the National Standards require to be revised to allow more frequent supervision of prisoners since at present, they 'leave too much scope for interpretation in terms of levels of supervision.' A number of respondents suggested that supervision should take whatever form and level is necessary to ensure that the licence conditions imposed by the Parole Board can be adhered to. This should also ensure that the public are protected from the risk posed by the prisoner.

> "The form of supervision will essentially be that required to secure compliance with the licence – always providing that the licence conditions have been properly tailored to suit the offender and reduction in risk. But the aim of supervision should also be to aid the re-integration of the offender in society both as a means of reducing risk and as a desirable objective in its own right. ….The depth or intensity of supervision will depend on the level of risk as assessed from time to time." (Vol 030)

Several respondents indicated that they did not think it is possible to specify generic forms and levels of supervision since every prisoner and their circumstances are different and supervision should take whatever level and form is most appropriate for each individual case.:

> "All offenders must be under supervision, the degree and nature of which will vary dependent upon the nature and severity of their offence and the risk they represent." (Vol 050)

Five respondents identified specific forms of supervision that they thought should be in place. Two of these suggested that all prisoners released early should be subject to electronic tagging. Other forms suggested included weekly attendance at a social work office and attendance at group work sessions to address issues of anger, low self-esteem, empathy etc.

> "Supervision should be maintained until the sentence has expired and beyond if need be. Quarterly reports, home visits, groupwork and individual counselling should be part of supervision – even more so in the case of serious violent, sexual crime and crime relating to drug abuse but it must be structured around the individual's livelihood. Ex-prisoners who are fit and able but refuse to contribute to the labour market, should be made to undertake supervised community work." (Ind 007)

Overall, the responses to this question suggest that the majority of respondents see value in the level and form of supervision being specifically tailored to individual prisoner's circumstances within the broad framework provided by the National Standards for Throughcare.

The role of the sentencing judge in the early release of prisoners

23. Should the sentencing judge be required to take account of the terms of the current schemes for the early release of prisoners in determining what sentence to impose?

Thirty-six respondents answered this question and opinion was almost evenly divided. Just over half of the respondents (n=19, 53%) indicated that the sentencing judge should be required to take account of current early release schemes in deciding on sentence. These respondents were mostly of the view that sentencers already take early release into account when deciding on sentence length and that it is proper that they should do so. They tended to be of the view that a judge who sentences an offender, for example, to six years does so in the knowledge and with the intention that the offender will spend at least three but no more than four years in prison. One respondent suggested that current sentence levels have been developed in full knowledge of the current provisions for early release and as such, any change to these provisions will have important implications for sentencing practice.

> "It is arguable that this already happens to some extent when prison sentences are imposed. It is not easy to see how sentencers can ignore what they know are the existing early release procedures." (LA 014)

Seventeen respondents (47%) thought that the sentencing judge should not be required to take the terms of the current early release regime into consideration when deciding on sentence. Most expressed strong views that the sentence imposed should be determined in accordance with the seriousness of the crime and the circumstances of the case with no consideration given to the impact of current early release policy.

> "….the role of the sentencing judge is to set the appropriate sentence for the offence at hand and should not be required to take into account any early release scheme when determining what sentence to impose." (CJ 039)

24. Does the Appeal Court have a role to play in issuing guidance on this topic for sentencing judges?

Twenty-seven respondents submitted views on this question. The majority (n=20, 74%) were in favour of guidance on early release being made available to sentencing judges but opinion was divided on the source of this guidance. Most of these respondents (n=14) suggested that the Appeal Court has a role to play in issuing guidance on the topic, with a number suggesting that it is ideally placed to produce such guidance.

> "The Appeal Court is a useful mechanism which is independent and well informed to provide guidance which would lead to greater consistency in *approach* to sentencing, especially if more sophisticated sentencing models are to be put in place."
>
> (CJ Org 045)

Others, however, suggested that while guidance would be highly desirable, the appropriate body to produce such guidance is the legislature rather than the Appeal Court.

> "The provision of guidance in relation to sentencing generally sits more appropriately with the legislature. The body which approves legislation should be the same body which provides guidance on its enactment. With the ever-increasing use of custodial disposals perhaps the key requirement in this regard, at present, is guidance on the use of custody generally." (LA 037)

Six respondents indicated that they did not see any need for the Appeal Court to issue guidance on early release. Several referred to the way in which the law has traditionally evolved in Scotland through decisions of the Appeal Court and suggested that guidance on early release can be provided, whether expressly or by implication, through Appeal Court rulings. One respondent suggested that the role of the Appeal Court in this area should be explored as part of a more wide-ranging review of sentencing as a whole.

Overall, while the majority of respondents were in favour of guidance on early release being made available to sentencers, the Appeal Court is not necessarily seen as being the most appropriate body to produce this guidance.

25. Does the Scottish Parliament have any role to play in enacting statutory guidance on this topic for sentencing judges?

Thirty-two respondents answered this question. Given that the responses to the previous question indicated that the Appeal Court was not necessarily seen as the most appropriate body to issue guidance, it might be expected that the Scottish Parliament would be seen as more appropriate. However, views on this question were again broadly divided. Thirteen respondents (41%) felt that the Scottish Parliament should have a role in enacting statutory guidance on early release.

> "….there should be a clear policy, backed up by law and statutory guidance to reverse the continuing upward trend of Scotland's rate of imprisonment. Within this context the scheme of early release, including the need for statutory guidance for sentencers should be considered." (LA 014)

Fifteen respondents (47%) indicated that the Scottish Parliament should not have a role in enacting statutory guidance on early release. A number referred to the need to retain a separation of powers and expressed concern that if Parliament were to issue guidance, this would fetter the discretion and independence of the judiciary and make the sentencing process overtly politicised.

> "[This organisation] supports the separation of powers between the executive and the Justiciary. However, it may be appropriate to give guidance without fettering the discretion of judges." (CJ Org 023)

One respondent suggested that simplifying the early release regime which is currently extremely complex, so that it is more readily understandable, would remove any need for Parliament to enact statutory guidance. Several others expressed a view that rather than providing guidance, the role of the Parliament should be to provide the courts with a comprehensive and coherent sentencing framework within which to operate.

> "It is not for Parliament to give guidance to Judges, but rather to establish a rational sentencing system for judges to apply in individual cases." (Ind 022)

Overall, a small majority of respondents were against the suggestion that the Parliament should have a role in enacting statutory guidance on early release. Given the response to the previous question, however, which suggested that while most respondents were in favour of guidance being made available, the Appeal Court was perceived as not being the most appropriate body to issue it, this raises the question of who should be responsible for issuing any guidance. One respondent to the current question suggested that 'professional guidance' should be provided, perhaps by a Sentencing Committee.

26. Should a sentencing judge require to explain, in open court, what the sentence being imposed will mean in terms of when the accused may or will be released from prison?

Forty respondents addressed this question. Of these, two-thirds (n=27, 68%) were in favour of sentencing judges explaining the sentence in open court. The majority of these respondents were of the view that this would be a positive move that would go a long way towards ensuring transparency and openness in sentencing and in increasing public understanding of and confidence in sentencing.

> "It is probably one of the main causes of frustration for the public, that the sentence passed in court is not fully understood. The public simply wants the terms of the sentence spelled out, in straightforward language. A short explanation from the sentencer, about the reasons for remission would also aid understanding. This change alone would help greatly in public understanding of the criminal justice system…" (Vol 024)

Thirteen respondents (32%) were against the proposal that sentencing judges should explain in open court what the sentence will mean. These respondents put forward a number of reasons including:

- the decision on point of release should be determined by behaviour in custody and the offender's attitude and, therefore, the sentencing judge would not be able to say precisely how long the offender would spend in custody;
- the judiciary should not have to explain the effect of policy decisions;

- it would be more constructive for sentencers to explain why a custodial sentence is necessary and what it is intended to achieve;
- having to explain the sentence would have the effect of weakening the authority of the court, and;
- the parole system may attract adverse media and victim attention if it had to be explained in open court.

Two respondents suggested that the current early release provisions are so complicated that in many instances it is not possible to explain at the point of imposition what the sentence means. One suggested that it would be necessary to explain all of the possible options for release to the offender and this would be more confusing for both the offender and the victims. A further respondent suggested that the sentencer should provide a written explanation to the relevant parties.

In terms of the profile of respondents those who were not in favour of the proposal that sentencers should explain their sentences in open court were five individuals, four criminal justice organisations, three local authorities and one voluntary sector organisation.

27. If early release is to be discretionary, what role, if any, should the sentencing judge play in informing/being consulted about/taking the decision to release a prisoner early?

Thirty-two respondents answered this question. Of these, over two-thirds (n=22, 69%) felt that the sentencing judge should either have no role in the decision to release a prisoner early, because there would be no obvious benefit in this, or that their role should be limited to the current one of providing the Parole Board with a report on the circumstances of the case in all cases resulting in a sentence of four years or more. A number of respondents indicated that they could see no value in extending the sentencer's role beyond this, since the sentencer would have no knowledge of the prisoner's progress and circumstances in the period between sentence and consideration for release.

> "The sentencing judge has no role to play at the early release (*sic*) as many changes may have taken place meantime. He can only say what the situation was at sentence." (Ind 032)

Six respondents (18%) indicated that the sentencing judge should have a role in the decision to release a prisoner early. A number of these indicated that the sentencer's role should take the form of specifying the minimum period to be served in custody. Two suggested that the sentencer should play a major role in the release decision at the point when the prisoner is considered for early release, one of whom suggested that the sentencer should sit on the panel considering early release. A further four respondents (12%) indicated that the role of the sentencer in the early release decision would be dependent upon the scheme in place.

> "This will …. be dependent on the format of any new system and provided it is transparent and well published, the role of the sentencing judge should automatically follow." (LA 041)

Overall, the majority of respondents were of the view that the sentencer need not have any greater role in the early release process than they currently have.

Sanctions for re-offending or breach of conditions of licence during the period before the expiry of original sentence.

28. What should happen to a prisoner granted early release who commits a breach of licence conditions before the expiry of the original sentence?

Thirty-nine respondents submitted views on this question. Fourteen respondents (36%) were of the view that the sanctions imposed on a prisoner for a breach of licence conditions should very much depend on the nature of the breach. A number indicated that rather than having a fixed sanction, the court or the Parole Board should have discretion to determine what sanction is most appropriate in light of the nature of the breach and the risk the prisoner poses to the public. Some emphasised that there should not necessarily be a presumption that breach will result in recall to custody, while others felt that while discretion should exist there should be a presumption that breach will result in recall unless this would be manifestly disproportionate to the nature of the breach.

> "The nature of the breach of licence conditions needs to be taken into consideration, which is consistent with the current system. …. Breach of licence should not be an automatic recall to custody, but other community alternatives should be considered, with public safety being the primary concern." (LA 046)

Nine respondents (23%) indicated that the provisions that exist at present for dealing with breach of licence conditions are adequate and they did not see any need for change. Seven indicated that the sanction for breach should be recall to custody or revocation of the licence, apparently irrespective of the nature of the breach. Several suggested that any breach of licence conditions represents a breach of trust and should be regarded as being sufficiently serious to merit a return to custody. A number of respondents expressed a view that a prisoner who breaches their licence conditions should be both returned to custody and have an additional sentence imposed on them. Some specified that a new penalty should only be imposed where the prisoner has committed an offence but others appeared to suggest that an additional sentence should be imposed for any breach:

> "The offender should be made to serve the rest of the original sentence remaining at the time of early release and be given an additional sentence for breaching the licence conditions." (Ind 006)

With regard to prisoners who commit further offences while released on licence, one respondent suggested that a new offence of 'offending while on licence' should be created. Several others suggested that re-offending while on licence should be an aggravation so that the offender receives a more severe penalty for the offence because it is aggravated by the fact that he or she was on licence at the time.

Overall, views on the appropriate sanction for breach of licence were mixed, although the greatest proportion of respondents were of the view that discretion should be possible so that the sanction reflects the nature and severity of the breach.

29. Does the Appeal Court have a role to play in issuing guidance for sentencing judges on the imposition of appropriate sanctions on those convicted of a new offence before the expiry of the original sentence?

Twenty-nine respondents answered this question. Opinion was almost evenly divided. Fifteen respondents (52%) expressed a view that the Appeal Court does have a role in issuing guidance for sentencers on the imposition of sanctions on those convicted of a new offence before expiry of the original sentence. It was suggested that guidance would be helpful to sentencers and would contribute towards consistency of approach. One respondent felt that guidance is desirable and in the absence of a Sentencing Council it would be appropriate for the Appeal Court to issue such guidance.

> "….guidance by the Appeal Court helps in providing a national and consistent approach to the considerations and policies to be applied in exercising discretion, whilst maintaining that vital independent discretion of the individual judge of first instance." (CJ 045)

Twelve respondents (41%) indicated that they did not think the Appeal Court has a role in issuing guidance on sanctions for re-offending while on licence. It was suggested that such an approach is neither desirable nor necessary and could interfere with the discretion of the sentencer. It was suggested that the Appeal Court already, whether expressly or by implication, issues guidance within its judgements and there is no need to change this approach. One respondent suggested that guidelines could lead to injustices and that the existing mechanisms for appeal provide sufficient safeguards.

> "….each case must turn on its own circumstances, and laying down guidelines would likely lead to anomalous and possibly unjust results. The Crown can always go to the Appeal Court if it thinks a sentence is unduly lenient." (Ind 033)

Overall, while a small majority of respondents would be in favour of the Appeal Court issuing guidance on sanctions for offending while on licence, almost equal numbers would not wish to see this introduced.

30. Should the court have a discretion as to the period for which the prisoner should be returned to prison or should the court be required to return the prisoner to prison to serve the whole 'un-served period' of the original sentence, between the date of the commission of the new offence and the expiry of that original sentence?

Thirty-one respondents addressed this question. Of these, almost three-quarters (n=23, 74%) felt that the court should have discretion over the period for which prisoners who breach their licence conditions should be returned to prison. Most respondents suggested that the court should be able to take the nature and circumstances of the breach and the offender's circumstances into consideration in deciding both the appropriate sanction for the breach and in determining the duration of any sanction. One respondent suggested that a system which

requires all prisoners to be recalled to serve the remaining period of their sentence in full for any breach would give rise to grave injustices.

> "Our view is that discretion is always the best of the two options. We advocate discretionary release so by parity of reasoning we advocate discretionary recall. Each individual, and the circumstances of their offending, (indeed the gravity of the new offence itself) will vary so wildly that automatic recall and full service of the remainder of the sentence will throw up substantial injustices….." (CJ Org 045)

One respondent, however, adopted a much harder line and proposed that the court should have discretion to extend the original sentence for breaching the licence conditions, as well as imposing an additional penalty for the new offence.

Seven respondents (23%) were of the view that the courts should have no discretion over the period for which the prisoner should be returned to custody. As with question 28, several indicated that any breach should be treated as a breach of trust and as an indication that the prisoner is not suitable for early release and the offender should be returned to prison to serve the remainder of their sentence in full.

> "If the conditions of a licence have been breached, the only appropriate penalty is to recall to custody and imposition of the remainder of the original sentence." (CJ 027)

However, several suggested that the court should be responsible only for the decision to recall, with the decision on the length of time for which the offender should be returned to custody being the responsibility of the Parole Board.

The seven respondents who felt that the court should not have discretion over the length of recall were three individuals, two criminal justice organisations and two voluntary sector bodies.

Overall, the majority of respondents felt that the court should have discretion over the period for which the prisoner should be returned to prison as recall for the entire un-served period may not always be appropriate.

31. Should there be any other statutory sanction(s) for breach of licence other than recall to custody?

Thirty-six respondents submitted views on this question. The majority (n=21, 68%) were of the view either that there should be other statutory sanctions for breach of licence or that recall to custody should not be inevitable. Respondents indicated that the court and/or the Parole Board should be able to exercise discretion over the nature of the sanction for breach, with many suggesting that less severe sanctions should be available. Suggestions put forward included electronic monitoring, weekend detention, more stringent reporting requirements, fines and an extension of the supervision period.

> "The court would benefit from maximum discretion in the disposing of the breach of licence, which could indicate the seriousness or extent of any given breach. The potential for interim sanction by way of additional community disposal or other penalty short of recall, may well be worth considering." (LA 036)

Although the majority of respondents felt the courts should have discretion to allow for the possibility of less severe sanctions being imposed, one suggested that there should be other statutory sanctions to allow for more severe penalties.

> "Consideration should be given to creating a statutory offence for a breach of licence, attracting an additional penalty on top of the original sentence. This would reflect the legislator's and the communities' concerns regarding re-offending while on licence." (CJ Org 027)

One respondent suggested that the courts should have access to other statutory sanctions to enable them to recognise that in some instances the original licence conditions imposed on the prisoner may have been inappropriate, making it more likely that they would be breached. Providing the court with other sanctions would allow them to vary the licence conditions.

> "Since some licence conditions may prove to have been inappropriate, or otherwise cause unexpected adverse consequences, other statutory sanctions should be within the court's powers of discretion, e.g. a revised requirement for community service or reparation, an additional requirement to use alcohol/drugs/anger management treatment." (Ind 009)

Ten of the respondents to this question (32%) indicated that there should not be any other statutory sanctions for breach of licence. Most did not provide an explanation for their views, although one suggested that recall to custody is the only effective sanction that released prisoners are likely to pay any regard to and two indicated that the current system appears to be adequate. One respondent suggested that there should not be any other statutory sanctions because it is likely that these would be even more draconian and have the effect of extending the sentence beyond its original end date.

> "Given the fact that, by definition, every determinate sentence has an end date, it is difficult to see the legal or logical justification for creating a new sanction that may operate to extend a sentence beyond its final date. As far as other sanctions are concerned, the Parole Board has the power (albeit it is rarely used) to direct electronic tagging of offenders on licence who are non-compliant. Perhaps this power should be used more than it is at present." (Ind 010)

Overall, the majority of respondents were in favour of providing the courts with a greater range of sanctions for use in cases of licence breach and enabling the exercise of discretion according to the circumstances of the case.

32. Should the Parole Board issue fuller and better publicised guidance as to the circumstances in which they will recall prisoners on early release to prison?

Thirty-six respondents answered this question. Almost all of these (n=34, 94%) agreed that the Parole Board should issue fuller and better publicised guidance on the circumstances under which they will recall released prisoners. Respondents expressed a consensus that this

would be of benefit to prisoners, supervising officers, victims and the general public. Many respondents suggested it would contribute to clarity and transparency in the way the Parole Board operates and a number indicated that it would help to inform the public and dispel some of the misconceptions about the way in which the parole system operates.

> "The Parole Board is open and fair and answerable. Its policies need to be understood and backed by the whole of the criminal justice stakeholding community. It must be open to explaining itself, its criteria, its successes and its failures if it is to maintain public confidence." (CJ Org 045)

Just two respondents, both individuals, indicated that they did not think the Parole Board should issue fuller and better publicised guidance. One indicated that it is sufficient to explain the parole system in full to the prisoner early in their sentence. The second felt that it would be difficult to publicise the circumstances of recall other than to say decisions are based on risk to the public, because every case is different.

Conclusions

When viewed as a whole it is clear that the questions posed in the consultation paper were challenging for many of the respondents. The complexity of the current early release provisions means that few individuals or organisations appear fully to understand its operation. Few respondents were willing and/or able to express an opinion on each question and in many instances respondents did not clearly explain their views.

However, taken as a whole the responses to the consultation exercise create an impression of an early release system that respondents envisage should have the following characteristics:

- the law should continue to allow prisoners to serve part of their sentence in the community but automatic early release at half sentence should be removed;
- any early release should be discretionary;
- prisoners should become eligible to be considered for discretionary early release at somewhere between two-thirds and five-sixths of sentence (although some would wish to see the eligibility point retained at 50% of sentence due primarily to resource constraints);
- the sentencer should explain in open court what the sentence being imposed means in terms of the period that will be spent in custody and the period that may be served on discretionary early release;
- all long-term prisoners, however they are defined, should be subject to supervision on release;
- any breach of the terms of early release should be dealt with swiftly and while in many cases return to prison for the remainder of the sentence will be appropriate, the court should have the power to impose alternative sanctions where they can be justified;
- guidance should be available to sentencers on early release and sanctions for recall; and,

- guidance and information from the Parole Board on the recall of prisoners to custody should be much more widely and freely available.

Diane Machin
Principal Researcher
Sentencing Commission Secretariat

APPENDIX 1

CONSULTATION PAPER - DISTRIBUTION LIST

Minister for Justice
Lord Advocate
Crown Office
Scottish Prison Service
Scottish Court Service
Her Majesty's Chief Inspector of Prisons
Her Majesty's Chief Inspector of Constabulary
Social Work Services Inspectorate
Mental Welfare Commission
Parole Board for Scotland
Care Commission
Equal Opportunities Commission
Commission for Racial Equality
Disability Rights Commission
Scottish Parliament Information Centre
Clerks to the Justice 1 & 2 Committees
Scottish Members of the European Parliament
Lord Justice General
Lord Justice Clerk
Sheriffs Principal
Sheriffs
Sheriffs' Association
Part-time Sheriffs
Part-time Sheriffs Association
Clerks to Justices
District Courts Association
Convention of Scottish Local Authorities
Local Authority Chief Executives
Directors of Social Work
Association of Directors of Social Work
British Association of Social Workers
Association of Visiting Committees
Faculty of Advocates
Law Society of Scotland
Society of Solicitor Advocates
Procurator Fiscal Society
Association of Chief Police Officers, Scotland
Association of Scottish Police Superintendents
Scottish Police Federation
SACRO

APEX Scotland
Citizens Advice (Scotland)
Victim Support (Scotland)
Victims Forum for Scotland
Howard League (Scotland)
Scottish Consortium on Crime and Criminal Justice
Prison Reform Trust
Scottish Human Rights Centre
Liberty
Scottish Council for Voluntary Organisations
Scottish Civic Forum
Scottish Drugs Forum
Scottish Council on Alcohol
Scottish Youth Parliament
Cranston Drug Services
HOPE
Families Outside
Children 1st
Barnardos
NCH Action for Children
Who Cares? Scotland
Capability Scotland
Enable
Age Concern Scotland
Turning Point Scotland
Fairbridge in Scotland
University Law and Social Work Departments
PETAL (People Experiencing Trauma & Loss)

APPENDIX 2

RESPONDENTS TO CONSULTATION PAPER

Respondee Name
Prison Reform Trust
Equal Opportunities Commission
The Sheriff's Association
David Hannah
Alan Thomson
Scottish Campaign Against Irresponsible Drivers
David Turner
East Dunbartonshire Justices of the Peace Committee
Tayside Criminal Justice Partnership
Families Outside
ADSW Criminal Justice Standing Committee
Argyll, Bute and Dunbartonshire Criminal Justice Social Work Partnership
Aberdeen Prison Visiting Committee
Association of Visiting Committees for Scottish Penal Establishments
Moira Anderson Foundation
SACRO
Cornton Vale Over 21s Visiting Committee
West Lothian Community Health and Care Partnership
Professor J McManus
Scottish Police Federation
Scottish Forum for Community Justice
Lord Coulsfield
ACPOS
Orkney Islands Council, Department of Community Social Services
City of Edinburgh Council
Howard League Scotland
Ms Johann Findlay
South Lanarkshire's Social Work Resources
Perth & Kinross Council
Association of Scottish Police Superintendents
NCH Scotland
Aberdeen City Council and Aberdeen Community Safety Partnership
Criminal Justice Northern Partnership
Open Secret

Victim Support Scotland
Faculty of Advocates Criminal Bar Association
Forth Valley Criminal Justice Group
Scottish Prison Service
Scottish Women's Aid

Note: A further nine individuals submitted responses but did not wish their names to be made available.

ANNEX B

COMPARATIVE LAW

1. In Part 3 and in Annexes 4 and 5 of our Consultation Paper we provided some details of the early release regimes operating in England and Wales and in some overseas jurisdictions. At the time of publication we were not aware of the Council of Europe Recommendation (Rec (2003) 22) of the Committee of Ministers to Member States on Conditional Release (Parole) ("the Recommendation"). The Recommendation was adopted by the Committee of Ministers on 24th September 2003 at the 853rd meeting of the Ministers' Deputies. The main details of the Recommendation are described below. Prior to adoption of the Recommendation the 46 member states of the Council of Europe were asked to provide details of the provisions that they had in place governing the early release of prisoners. We understand that 35 member states responded. Each made some provision. Tournier (2004)[3], in an article based on the preparatory work for the Recommendation, pointed out that three models of conditional release (parole) operated in member states: (1) a discretionary release system (most frequent on the Continent); (2) a mandatory release system, developed in Sweden; and (3) the "mixed release system" found, for example, in England and Wales, where automatic early release operated for prisoners serving short sentences and discretionary release for those serving longer sentences. The position in Scotland was not referred to specifically but it, of course, was broadly similar to that in England and Wales.

2. The Recommendation invites member states in the light of various factors to introduce conditional release in their legislation if it does not already provide for this measure. Some of the reasons given for adoption of the Recommendation that are recorded in the document are as follows:

- conditional release is one of the most effective and constructive means of preventing reoffending and promoting resettlement, providing the prisoner with planned, assisted and supervised re-integration into the community;
- it should be used in ways that are adapted to individual circumstances and consistent with the principles of justice and fairness;
- the financial cost of imprisonment places a severe burden on society and research has shown that detention often has adverse effects and fails to rehabilitate offenders; and
- it is desirable to reduce the length of prison sentences as much as possible and conditional release before the full sentence has been served is an important means to that end.

3. Tournier reports that in the explanatory memorandum appended to the Recommendation, the following potential weaknesses in discretionary release systems are recorded:

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[3] Tournier, P.V. (2004) – Systems of Conditional Release (Parole) in the Member States of the Council of Europe. New French Journal of Criminology Vol. 1. At: http://champpenal.revues.org/document378.html

- an absence of explicit criteria for granting conditional release rendering decision making erratic;
- disparities in decision making when more than one body is involved in deciding on conditional release;
- assessments of the likelihood of relapse into crime, made without the assistance of scientific risk instruments, may prove to be unreliable;
- uncertainty about the date of release making it difficult to make practical release arrangements for prisoners; and
- the possibility that the foregoing factors lead to reduced confidence in the system and reduced motivation on the part of prisoners to co-operate in observance of conditions and the requirements of supervision.

4. It records that mandatory release systems, on the other hand, risk presenting the following weaknesses:

- knowing with certainty the date for conditional release reduces motivation on the part of prisoners to take part in programmes and courses designed to enable them to lead crime and drug-free lives after release from prison;
- knowing for certain the date of release leads to worsened behaviour by prisoners during their stay in prison;
- the lack of the possibility to withhold conditional release leads to a marked increase in crime in the community being committed by conditionally released prisoners; and
- the mandatory release will lead judicial authorities to impose longer custodial sentences.

5. Tournier records that "these assertions are mostly hypotheses, and some are very difficult to prove empirically". He observes that

> "the Recommendation is therefore perfectly correct in stressing the need to develop research on the different systems, and above all, the need to communicate their findings to political officials as well as to criminal justice system actors and to all citizens in the countries involved."

He points out that

> "one of the difficulties involved in conducting such comparative studies should not be underestimated: a study of conditional release, how it is granted and how effective it is cannot be isolated from the rest: that is, it must take into account the entire scene with respect to proceedings for mitigating sentences."

6. Tournier concludes:

> "Perhaps one positive consequence of the September 2003 Recommendation will be to further convergence in the evolution of national systems toward a solution incorporating the best of each of them, so that sentence enforcement will be more convincingly committed to respecting human rights."