Scottish Sentencing Council

SCOTTISH SENTENCING COUNCIL

RESPONSE TO SENTENCING AND PENAL POLICY COMMISSION CALL FOR EVIDENCE

The Scottish Sentencing Council's evidence: introduction and context

1. The Scottish Sentencing Council is an independent, advisory body established in 2015 under the Criminal Justice and Licensing (Scotland) Act 2010. The 2010 Act provides that the Council's objectives are to: promote consistency in sentencing practice; to assist the development of policy in relation to sentencing; and to promote greater awareness and understanding of sentencing policy and practice.

2. The Council's membership is provided for within the 2010 Act. It is chaired by the Lord Justice Clerk, Scotland's second most senior judge, and (including the Chair) it has twelve members in total, six of whom are members of the judiciary, and three of whom are members of the legal profession. The other three members are an expert on victims' issues; a police officer; and one other person.

3. While the Council is pleased to provide a response to the Commission's call for evidence, it must be noted that several of the Commission's key areas of interest are outwith the Council's remit. In particular, the Council, being concerned with sentencing, has no remit in relation to bail and remand policy or practice (Theme 2 of the call for evidence) or in relation to release from prison custody (Theme 3). As such it has carried out no work in relation to these matters and the Council offers no substantive comment on them beyond noting the potential implications of any policy changes in these areas on sentencing, and/or the Council's work programme. With respect to progress on past recommendations and their implementation (Theme 4), the Council has not given any consideration to the recommendations of the McLeish Report and takes no position on relevant past recommendations of other bodies except where specifically stated. In consequence, the Council's evidence focusses primarily on Theme 1, with some limited observations made on Themes 2 and 3.

4. The Council takes an evidence-based approach to its decision-making, including in relation to its statutory objective to assist with policy development. The evidence provided in this submission is therefore drawn primarily from existing Council outputs. Many of these having been in the public domain for some time, non-exhaustive summaries of key findings and conclusions which the Council considers may be of interest to the Commission are provided. The Council recommends referring to the individual reports to gather a fuller understanding of the complexities of the issues arising.

5. Although no new substantive work has been carried out by the Council in the preparation of this submission, efforts have been made to identify within this paper areas with potential implications for the Council or its work programme that could arise from the implementation of policy in the matters being considered by the Commission.

6. The Council notes the context within which the Commission has been established. Over the past year, the Scottish Government has announced, and undertaken, a series of

actions aimed at addressing the current prison population, including amending the point of early release for certain short-term prisoners to the 40% point of their sentence under legislation commenced in February 2025, a programme of emergency release completed in summer 2024, and consideration of Home Detention Curfew arrangements. The Lord Advocate has also amended prosecution guidance in respect of the Crown's attitude to bail. The Council understands that all of these measures are considered necessary in response to a rising prison population but that it is the Government's intention to ensure a sustainable approach to reform in this area.

7. As it has stated previously, the Council agrees that criminal justice reform should be coherent and sustainable. This requires a clear understanding of the issues at hand and their causes, which in turn requires careful analysis of all available evidence. As the Council understands it, the underlying causes for the rising prison population are likely to be complex,[1] and as such it repeats its suggestion that consideration should be given to whether the information presently available to different agencies across the criminal justice system might be improved in a way which would support fully informed decision-making and policy evaluation.

8. The Council, which is committed to evidence-based decision-making and to improving the knowledge base in relation to sentencing more generally, is keen to ensure that sentencing policy and practice are based upon sound and comprehensive knowledge and understanding of a range of information and data relating to sentencing. To that end it has carried out and commissioned a considerable amount of research, data collection and analysis in the field. As reflected in the Commission's Terms of Reference, sentencing is but one aspect of what is a broad and complex picture in relation to what may drive imprisonment rates. The Council is, however, more than open to discussions about how it may contribute to efforts to improve the information available across the criminal justice system to support sustainable and effective policy in this area.

Theme 1: Community Sentencing

9. A variety of research and engagement has been carried out under the Council's auspices in relation to the operation of, and confidence in, community sentences. Related, but not limited to, the operation and delivery of community sentences are the challenges present in sentencing persons with vulnerabilities such as in relation to mental health. The Council has undertaken a range of work exploring issues arising in the sentencing of persons with mental health issues or conditions, neurodivergence and learning or intellectual disability in recent years, and has concluded that a sentencing guideline in this area would be of assistance.

Community Sentencing

Judicial perspectives

10. In early 2021 the Council carried out a research exercise with sentencers which sought to identify any gaps or barriers to provision of community-based disposals and to ascertain what might improve judicial confidence in community-based interventions.

[1] See for example the Scottish Government's *Occasional paper: Long-term drivers of and changes in the prison population* (11 June 2025), and its Prison Population Factsheet of 3 December 2024

11. The report considered views along the following themes:

- Provision of information
- Consistency and capacity
- Monitoring and management
- Legislative barriers
- Public confidence
- Impacts of the Covid-19 pandemic

An outline of key findings and conclusions emerging across these themes contained in a report on the exercise published October 2021 follows.

Provision of information

12. Sentencers generally felt that they were aware of the programmes and services available and that they can access the necessary information to make appropriate sentencing decisions, but not all feel they have a full awareness of what is available. For example, those who are new to an area, or sentencers (such as part-time sheriffs) who sit peripatetically, may not have the same level of local knowledge or engagement as those who sit regularly in a particular sheriff court or sheriffdom.

13. The Council considered that judicial awareness could be improved, and the sentencing process might therefore be expedited by: the provision of greater information in Criminal Justice Social Work Reports (CJSWRs) about available local authority and third sector initiatives; enhanced engagement with service providers; and a database of the resources available.[2]

Consistency and capacity

14. Community-based disposals, in appropriate cases, were commonly viewed by sentencers as providing a greater chance of rehabilitation and, in general terms, as a more cost-effective alternative to imprisonment. However, in a number of areas, resources were not seen to be sufficient to support effective community disposals. Urban and more central areas were regarded as having greater provision for a wider category of person or offending than rural areas.

15. There was a perceived need among sentencers for greater consistency in the provision of community-based programmes and services. These should be made available for a wider range of offending and to address a wider range of issues. Sentencers, for

[2] In relation to the database, Community Justice Scotland has since created an online version of the mapping exercise it undertook in 2019/20 which had made available to the judiciary. It is available at: https://communityjustice.scot/community-justice/community-intervention-and-support-directory/

example, observed gaps in unpaid work opportunities for specific categories of person (for example those with mental health difficulties, women and young people) or offending (for example domestic abuse). Related to this, homelessness and a lack of suitable and stable supported accommodation were seen as issues across the country which can act as impediments to the success of community-based disposals.

16. The Council identified limitations of resources to support the management and delivery of community-based disposals as one of the greatest challenges to judicial confidence in them. It considered that greater consistency in the provision of community-based disposals and a more consistent approach to the development, delivery and funding of community interventions on a national basis merited consideration. It further concluded that a more consistent approach to the development and funding of these disposals to support their more consistent provision, robust management and successful completion would be likely to enhance judicial confidence and to support an increase in the use of community-based disposals through the provision of more sentencing options.

17. The Council was of the view that consistency of provision was considered necessary to fairness, both to those who have offended and need assistance and access to treatment to move away from their offending behaviour, and to the communities affected by their offending behaviour. It was noted, however, that consistency does not, however, equate to uniformity and a balance must to be struck between ensuring local approaches can continue to be developed and maintained in accordance with local need and ensuring equality of access to non-custodial disposals. In addition, to support the swift administration of justice, it was felt that unpaid work should begin timeously and access to services should not be delayed.

Monitoring and management

18. While there is national practice guidance covering breach procedures for those involved in the delivery of community payback orders (CPOs), much of the legislative process for breaching orders relies on the discretion of supervising officers and local practice. Sentencers noted that breach proceedings have the potential to take significant periods of time to conclude and some voiced a desire for earlier reporting of breaches. While the Council considered there was merit in considering whether breach processes can be improved and made more consistent in this regard, it was also recognised that there is a limit to how swiftly a breach can be processed and that any move to encourage swifter reporting should be accompanied by efforts to improve the efficiency of breach processes. In this context, resource constraints were seen as impacting on the ability of social work to effectively monitor and manage those who have received a community disposal.

19. The Council took the view that review hearings were viewed as useful for the court in monitoring progress towards successful completion of a CPO (and that this appeared to be common practice when the person concerned is considered as at risk of non-compliance, among some other factors) but that further research into court-monitored progress and how it relates to efficacy and desistance would be worthwhile.

20. The Council suggested that providers might wish to consider incorporating empirical evidence into the planning of programmes to show the extent to which they assist with desistance and rehabilitation. What constitutes effectiveness and how it should be

measured requires careful consideration, however, and it was appreciated there may be significant challenges in seeking to define and measure success in relation to specific interventions. The Council welcomed further research into the effectiveness of community-based sentences.

Legislative barriers

21. Sentencers generally appeared to desire greater flexibility to impose an appropriate sentence for the particular case before them, and potential legislative changes to enable this should be considered. In particular, there may be a case for simplifying the legislation in relation to community sentences to enable greater flexibility in sentencing. The Council took the view that consideration should be given to whether the legislation around drug, alcohol and mental health requirements is unnecessarily rigid and capable of simplification and similarly that the legislation around programme requirements could be simplified. In particular it suggested that it might be helpful to consider precisely what information should be specified within reports for such requirements to be imposed.

22. The Council received a number of further suggestions for legislative changes, including:

- The ability to require supervision in addition to the main sentence, in summary cases (particularly but not limited to cases where a custodial sentence has been imposed).

- Removal of the distinction between a level 1 order as an alternative to a fine and a level 2 order as an alternative to imprisonment, instead allowing the sentencer to decide whether a case merits above or below 100 hours (with the need for a social work report for the imposition of orders of above 100 hours).

- Amendments in relation to breach procedures, including as to when an application to breach a CPO or restriction of liberty order (RLO) should be lodged and greater specificity around the penalties for breaching an order and the impact the breach can have on a new sentence if the order is revoked.

- Section 113(3) of the Sexual Offences Act 2003 prevents a court from imposing a CPO for breach of a sexual offences prevention order.[3] It may be that many such cases would not be suitable for a CPO but in some circumstances it may be an appropriate option which should be available to the sentencing court.

- Various suggestions for forms of hybrid sentences were also made, such as:

    - level 1 CPOs should be able to be imposed alongside compensation;

    - the ability to impose suspended sentences;

    - RLOs might usefully be imposed even where the custody threshold has not been met; and

    - A sentence allowing a combination of CPO and imprisonment.

[3] Sexual offences prevention orders were replaced by sexual harm prevention orders in March 2023

23. In respect of combined sentences, the Council was of the view that consideration should be given to enabling the use of extended sentences in certain cases where the statutory tests for public protection are not met.[4]

24. Sentencers noted that structured deferred sentences (SDS) were operating differently between local authority areas. The Council acknowledged that this approach is intended to operate flexibly, but considered that further research on its use across the country would be welcome. The Council is aware that since it carried out this exercise, research has been conducted into the Glasgow Young People's Court (which was established in June 2021) and the operation of the Youth Court Structured Deferred Sentence as part of that. The study was carried out by the Children and Young People's Centre for Justice and was published in May 2023.[5][6]

Public confidence

25. Sentencers felt that there was a lack of public awareness of, and confidence in, community disposals and the Council considered that research demonstrating the effectiveness of community-based sentences and their contribution to reducing reoffending would be welcome. It further considered that relevant national and local organisations should undertake activity to enhance public understanding of what community sentences involve and what they can achieve.

Impacts of the Covid-19 pandemic

26. Some specific issues arose in relation to the operation of community sentences in the context of Covid-19, the research having been undertaken during the pandemic, including concerns raised about the impact of the backlog and issues with service delivery generally.

Stakeholder views

27. A subsequent stakeholder event aimed at eliciting wider views on the matters described in the 2021 report was held in March 2022. Building on some of the themes emerging from the judicial research, the report of the event noted that:

- in order to achieve the aim of using custody only where there is no alternative, there needs to be access to a range of consistent, effective, and adequately-resourced alternatives, capable of maintaining the confidence of the public and the judiciary;

- gaps in provision are sometimes geographically based; but, equally, certain cohorts of offender (such as those convicted of less serious or very serious

[4] As suggested by the High Court in the appeal of *Wood, Tennant and McLean v HMA;* see also para. 81 of the Council's report for a summary of the issue

[5] https://www.cycj.org.uk/resource/glasgow-youth-court-full-report/

[6] It is further worth noting that the Female Offenders' Court at Glasgow Sheriff Court was established in January 2023, an evaluation of which is being carried out by the University of Strathclyde.

offences, and those with mental health issues) are not always sufficiently provided for;

- some suggestions to improve breach processes were made, although it was also remarked that monitoring the performance of those on an order is not simply a matter of dealing swiftly with breaches; it is also about recognising that some of those on orders were likely to require support to complete the orders; and

- consideration of success and effectiveness should include whether there was an overall benefit to communities through a reduction in reoffending; and consideration should be given to whether the present menu of sentencing options is sufficient, perhaps to include an exploration of suspended sentences (which are not available in Scotland) and greater flexibility in the powers available to courts when imposing community-based sentences.

Mental health, neurodivergence and learning or intellectual disability

28. A number of the themes arising in the Council's exploration of community sentencing have re-emerged in similar exercises carried out in relation to sentencing persons with mental health and related issues. The prevalence of mental illness, neurodivergence, neurological conditions, and learning disabilities among the offending population, coupled with the delicate balancing exercise involved in selecting an appropriate and effective sentence for convicted persons, presents particular challenges for sentencers. The Council has carried out and commissioned a range of research and engagement on this complex issue, including research with the judiciary, a stakeholder conference, and a literature review.

29. The Council hopes that a guideline can go some way to assist with sentencing decisions in these, often difficult, cases and that it will help to clarify the complex sentencing process to the public as well as those involved in criminal proceedings. It should be noted, however, that the Council expects a guideline will take some time to develop due to the range and complexity of mental health issues and related conditions that it may have to address. The Council is also of the view that a sentencing guideline in and of itself cannot resolve various systemic and procedural issues – some of which extend beyond the criminal justice system – which the judiciary and practitioners have highlighted as presenting particular challenges in this area.[7]

30. Key findings and conclusions from the most relevant research and engagement carried out by or at the instance of the Council to date are provided below.

Early stakeholder engagement

31. The Council hosted a roundtable discussion with experts and sentencers to explore mental health and sentencing in 2019. Themes arising included the effect on sentencing of issues with court reports; specifically, the effect of a lack of information about available

[7] Such as those acknowledged by The Independent Review of Learning Disability and Autism in the Mental Health Act ('the Rome Review'), the Forensic Mental Health Review, Scottish Mental Health Law Review, and as developments and the proposed Learning Disabilities, Autism and Neurodivergence Bill

disposals in criminal justice social work reports (CJSWRs), and some participants expressed concerns about delays in obtaining psychiatric and psychological reports.

32. It was suggested during discussion that without sufficient information about the types of programmes available in the community and in prisons, what exactly is involved in such programmes, how long they will take, and if there are any waiting times, that it is difficult for sentencing judges to be confident that they can determine an appropriate sentence, or that it will be effectively implemented.

33. It was noted that the availability of viable sentencing options for community disposals is one of the most important factors in whether or not a sentence will be successful. Unless there is robust management of the resources available this may continue to be an issue.

34. It was further felt that the level of resources and support available to offenders through drug treatment and testing orders, together with the multi-disciplinary approach of such orders, is not generally available to offenders with mental welfare difficulties. It was suggested that if such an approach was available, it might be more effective than a community payback order with a mental health treatment requirement.

Literature review

35. A literature review published in May 2022 explored the relationship between mental ill-health and the impact of punishment, finding that many offenders live with some degree of mental health issues, ranging from schizophrenia, to ADHD, to traumatic brain injuries. It noted that the impact of a given sentence may be different for those living with mental health issues compared to the general population. For example, prison may have a greater impact on some offenders with mental health issues, while other conditions may make it harder for offenders to engage with CPOs.

36. The review noted that the ability of courts to include within CPOs requirements to participate in rehabilitative programmes, mental health treatment or drug or alcohol treatment. A mental health treatment requirement (MHTR) obliges the offender to submit to medical or psychological treatment with a view to improving his or her mental health. The review noted that the number of offenders who receive MHTRs in Scotland is very low and that no research had at that time been carried out on their impact in relation to mental health or desistance. The Council is unaware of any such research having been carried out as yet though it may be worth noting that following its subsequent engagement with the judiciary on the wider topic of sentencing and mental health and related matters (discussed below), the Council believes it is likely that the number of CPOs which address mental health issues is under-recorded as the court may require treatment in other ways, such as via a conduct requirement.

Judicial perspectives

37. The Council carried out a survey of members of the judiciary in autumn 2023, supplemented by a series of interviews in early 2024, seeking judicial views and experiences of mental health and sentencing. Both exercises aimed as far as possible to

gather a sample that was geographically representative of the experiences of the judiciary throughout Scotland. A full report about the findings of both exercises was published in December 2024.

38. A high-level summary of the key issues raised is provided below under the following overarching themes: the statutory framework; nature and impact of mental health issues raised in court; information and resources; and availability and suitability of disposals. It should be noted that not all sentencers who took part in either exercise are necessarily of the same opinion in respect of all the matters discussed; and the views expressed to the Council are not necessarily representative of the views of the judiciary as a whole.

The statutory framework

39. The following discussion focusses mainly on Part VI of the Criminal Procedure (Scotland) Act 1995, which sets out the procedures that apply, and orders that can be made, where someone accused or convicted of an offence may have a significant mental health issue. It should be borne in mind that the majority of cases in which mental health issues are raised do not reach the threshold to be dealt with under this part of the Act.

40. There was a feeling that Part VI of the 1995 Act can be difficult to navigate and implement, but there were differing views on the extent to which challenges may result from this. A more fundamental issue raised was that Part VI of the 1995 Act is based upon the Mental Health (Care and Treatment) (Scotland) Act 2003. Many of its provisions reflect the civil disposals contained within the 2003 Act, but these are designed for those entering the mental health system rather than the criminal justice system. This can be problematic where compulsory measures or an element of punishment are required, as this may conflict with the principles underpinning the 2003 Act.

41. With the relative infrequency of relevant cases, there appears to be a lack of familiarity with the requirements of Part VI of the 1995 Act among legal and other practitioners. This might include, for example, a perceived lack of understanding of the legal options, procedures not being followed correctly, and requests for incompetent disposals.[8]

42. The Council is supportive of the suggestion to simplify legislation and procedures around mental health and sentencing, particularly to make these more accessible for those with mental health and other vulnerabilities, as well as for the public more generally. To this end it is considering what it might be able to contribute in this area. The success of changes is likely to be dependent, however, upon system-wide resource issues being addressed.

[8] The views of sentencers broadly align with what the Mental Welfare Commission for Scotland has said in relation to the mental health provisions in the 1995 Act: "These are important provisions, but are used in a relatively small number of criminal cases. Many professionals, including lawyers, doctors, and social workers, find it difficult to understand which option is most appropriate in a particular set of circumstances, and what evidence is needed for the court to make the appropriate disposal."

43. The Council also intends to engage with relevant bodies in respect of the various issues raised by sentencers regarding levels of understanding and awareness of the statutory framework among legal and medical practitioners.

Nature and impact of mental health issues raised in courts

44. Non-psychotic illnesses such as depression, anxiety disorders, and PTSD were reported as particularly common among those appearing before courts, as was substance use disorder. Neurodivergence and learning disability were also felt to be relatively common, as were personality disorders. Psychotic illnesses (such as schizophrenia and bipolar disorder), acquired brain injury, and degenerative disorders such as dementia were perceived as being less common, as were cases involving co-occurring issues.

45. Determining the precise nature, degree, and effect of mental health issues was felt to be particularly challenging, especially in relation to establishing any causal link between the issue and the offence and in determining the level of risk of reoffending. The nature and severity of issues experienced by an individual can also fluctuate, including during the course of court proceedings (particularly where there has been any delay around psychiatric assessment and/or preparation of reports), resulting in changing assessments both in a psychiatric sense and in respect of the court's view of culpability and the likely sentence. In the absence of a diagnosis, there may be concerns about the potential for individuals to exaggerate or even fabricate mental health issues in order to secure a more lenient sentence.

Information and resources

46. Delays in obtaining specialist reports about mental health are common and appear to be an enduring problem; it can sometimes take several months to receive reports, and experts often decline when asked to provide a report. It was said that the process for requesting reports is ad hoc. Delays can be especially problematic where the accused is in custody, potentially due to the time and resource implications involved in psychiatrists visiting prisons, or in some circumstances their ability to access them. This can result in longer periods of remand than would otherwise be necessary, sometimes approaching the length of a likely custodial sentence. This makes such a disposal difficult to impose, or requires consideration of bail where the court may otherwise not have been inclined to grant it.

47. At the same time, it was recognised that assessment and diagnosis can be difficult and time-consuming and cannot be rushed. Sentencers also noted that the primary duty of medical practitioners is to their patients, and that they face very significant pressures and challenges in fulfilling this duty, distinct from those relating to assessments and reports for the courts, which they are not obliged to do.

48. A lack of availability of experts (psychiatrists, psychologists, and psychiatric nurses) to undertake the necessary assessments was cited as a key reason for delays in obtaining reports.[9] It was reported that due to shortages, some courts have had to use locums,

[9] The shortage of psychiatrists was noted by the Scottish Parliament's Public Audit Committee in its report '[Adult mental health]' (February 2024). Conclusion/recommendation 29 in the Committee's report states: "The

freelancers, or retired psychiatrists to carry out assessments, who may not necessarily be best placed to do such work.

Suitability and availability of disposals

49. There was a clear sense that the options for community-based disposals are perceived as lacking. Treatment and programmes for mental health issues may not be widely available, while delays in offenders being admitted to them means they may not be feasible. It was suggested there is a need for additional options which incorporate targeted and tailored mental health treatment and programmes, and appropriate support and supervision, to make community disposals a robust and viable alternative to custody.

50. The issue of legislative and practical barriers to the imposition of community payback orders with a mental health treatment requirement (which arose in the community sentencing research) was again raised meaning these orders are not used as frequently as they might be. Further work would be required to explore the nature and impact of these barriers; the effectiveness, or otherwise, of the alternative orders courts impose when unable to make a mental health treatment requirement; and what steps can be taken to address these issues.

51. It was suggested there is a need for:

- options which incorporate targeted and tailored mental health treatment and programmes, and appropriate support and supervision;
- more structured community-based options;
- provision to include further direction on treatment within a mental health order attached to a CPO; and
- an option to require compulsory attendance at a residential centre.

52. Structured deferred sentences were felt by some to offer the possibility of a more holistic approach involving mental health and social work teams, bespoke interventions and programmes and appropriate supervision tailored to the needs of individuals, although it has been noted that there are variations in the nature and availability of structured deferred sentences in different parts of the country. A perceived under-resourcing of community services was noted as an issue.

53. Some sentencers felt that the introduction of hybrid sentences, combining custody and a form of community disposal, would provide courts with an effective option, and increase judicial and public confidence.

54. The Council considers that a number of initiatives and innovations suggested by sentencers merit further consideration, although it does not have the power to introduce any of them. In future engagement, it intends to seek views on whether, and if so how,

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Committee is deeply concerned by the workforce crisis facing psychiatrists in Scotland. It is also troubling to hear that there is an overreliance on locum psychiatrists. This approach represents poor value for money and poses a risk to the quality of the services provided."

the following suggestions, among others, might improve sentencing for individuals with mental health issues:

i. specialist mental health courts;
ii. dedicated court teams of psychiatrists, psychologists and other relevant practitioners; and
iii. use of advocacy and support workers to assist offenders with mental health issues in engaging with the sentencing process.

55. While not strictly within the scope of the questions posed within the call for evidence and while the Council's role does not extend to the provision of support to victims and witnesses, it wishes to note that it recognises the need for appropriate levels of help, information, and support to be provided to all victims and witnesses and in particular those with mental health issues.

Public perceptions

56. The Council has commissioned various studies into public knowledge and perceptions of sentencing. The following is a summary of the most relevant research published to date. The Commission will wish to note that fieldwork for a second national survey on public attitudes and understanding of sentencing, repeating elements of the first in 2019 and including specific modules exploring community sentencing, sentencing and mental health, domestic abuse, and media coverage was recently completed. The findings will be published later in the year.

2019 National survey

57. A nationally representative survey[10] (September 2019) included a component on perceptions of community sentences generally. Views on the effectiveness of community sentences were mixed. Almost half (48%) of respondents expressed a view that community sentences do not help to reduce reoffending while 40% expressed a view that they are an effective means of reducing rates of reoffending. Those with a degree or equivalent tended to be more positive about community sentences with over half of this group (54%) stating that they felt community sentences do help to reduce reoffending, compared with one third of those with a school or college qualification (33%) and just under a third of those with no formal qualifications (30%) who did not agree with this statement. One of the survey findings was that levels of confidence in the Scottish criminal justice system varied with level of education, with confidence levels higher among more highly educated respondents than among less qualified respondents, suggesting awareness-raising activity might be best focussed among the latter group and that the Council should consider how best to communicate information in an accessible way and to engage with people's concerns.

58. That survey also explored public awareness and perceptions of sentencing generally and in relation to the specific offences of causing death by careless, or inconsiderate, driving; causing death by dangerous driving; rape; historical sexual assault; and possession of

[10] Carried out by Carolyn Black, Rachel Warren, and Rachel Ormston of Ipsos MORI Scotland and Professor Cyrus Tata of the University of Strathclyde

indecent images of children. This involved participants being presented with sentencing scenarios for these offences; community sentences featured in some of these exercises.

Sentencing young people

59. The University of the West of Scotland carried out research during 2019 and 2020 exploring the opinions of young people between the ages of 14 and 25 on sentencing and the Council's draft sentencing young people guideline. Participants included young people with experience of the criminal justice system – either through receiving a conviction, or as victims of crime.

60. Across the focus groups, there was support for rehabilitation as the primary purpose in sentencing young people. However, views differed on what the next most important purpose of sentencing should be. Those with experience of the criminal justice system believed that it should be providing the person who had offended with the opportunity to make amends, while those invited to join focus groups through their involvement in youth work organisations thought that it should be protection of the public.

61. When participants were presented with a range of sentencing options a community payback order with supervision was often viewed to be the best option. This was attributed to the involvement of a social worker in the sentence, addressing the needs of the young person and providing someone to listen to them. Mentors, mentoring, and counselling were suggested as areas where the criminal justice system sometimes fell short. This was also reflected in the view held by some participants that mental health support was frequently an unmet need for those within the criminal justice system. Having an option that would provide mental health support as part of an integrated sentence was suggested by participants.

62. This research complemented a wider exercise into public perceptions of offending by young people and sentencing between 2017 and 2018. The Report of focus groups on youth offending and sentencing (December 2019) highlighted that:

- participants tended to see rehabilitation as a key goal in sentencing young people – more so than when sentencing adults, although punishment and deterrence were also important;
- successful interventions were often seen to come before sentencing, often taking the form of diversions from prosecution rather than as a result of it; and
- when undertaking the sentencing case study, participants tended to agree on a sentence that was very similar to that given by the court.

Sentencing sexual offences and domestic abuse

63. While not directly addressing the questions posed in the call for evidence, the Commission may wish to be aware of some additional research reports carried out for the Council, relating to sexual offences and domestic abuse. Given the prevalence of such offences the Commission may wish to consider their findings.

64. The first, undertaken by ScotCen Social Research in July 2021, examined public perceptions of sentencing for sexual offences. Through a series of focus groups and interviews, the research examined awareness and understanding of sexual offences among the public, views on the factors which should be taken into account when sentencing, and perceptions of current practice, including a sentencing exercise using a real world case. Survivors of sexual offences and a victim support worker also contributed to the research, sharing their views on sentencing and related experiences of the criminal justice system. A subsequent study, carried out by the Scottish Centre for Crime and Justice and published in May 2024, explored victim-survivor views of sentencing for rape and other sexual offences and described some of the difficulties they experienced in relation to the provision of information and their understanding of the sentences imposed.

65. A third study, carried out by Glasgow Caledonian University in August 2024, examined how victim-survivors of domestic abuse view sentencing in Scotland. 24 women across Scotland gave accounts of their views of sentencing domestic abuse offences, with key findings including that the victim-survivors wanted the level of harm caused by domestic abuse, and the need for their safety and protection, to be reflected in sentencing decisions, including the use of non-harassment orders. The report also highlighted that there may be communication needs to be addressed by a number of criminal justice agencies.

66. The Council has commissioned a wide range of research into public perceptions of sentencing on topics which may be of interest, such as sentencing following a guilty plea. All research reports are available through the research section of its website.

Other jurisdictions

Comparative sentencing

67. Given the Commission's interest in the experience of other jurisdictions, it may wish to be aware of two relevant reports following inquiries by the UK Houses of Parliament, to which the Council was pleased to provide evidence:

- The House of Lords Justice and Home Affairs Committee report Cutting Crime: better community sentences, was instigated by the Committee's observation that there had been a "considerable decline in the use of community orders in recent years".[11] While the inquiry related to England and Wales, it also considered evidence from other jurisdictions.

- The House of Commons Justice Committee report Public opinion and understanding of sentencing, explored public awareness and opinion of sentencing including the results of a public polling exercise commissioned by the Committee. Again, while the Committee's inquiry related to England and Wales, it considered evidence from a variety of other jurisdictions.[12]

[11] House of Lords Justice and Home Affairs Committee 1st Report of Session 2023-24 *Cutting crime; better community sentences*, published December 2023, para. 6

[12] House of Commons Justice Committee *Public opinion and understanding of sentencing* Tenth Report of Session 2022-23 Published October 2023

68. While the Council is of the view that it is helpful to learn from the experience of other jurisdictions, it is necessary to exercise a degree of caution when doing so. A Council commissioned literature review (May 2022) explored the challenges in comparing sentencing between Scotland, and England and Wales, as well as opportunities for evidence-led sentencing practice to learn from comparative studies. While concluding that direct comparisons between jurisdictions are "fraught with difficulty",[13] the authors considered that comparative research in the following areas could be useful:

    - perceptions of people who have experienced different sentences in different jurisdictions and the development of sentencing research and policy in both jurisdictions;

    - the relative effectiveness of different sanctions (suggesting in particular the broadly comparable community order (in England and Wales) and the community payback order (in Scotland) as ripe for comparison); and

    - public attitudes to and knowledge of sentencing.

69. Research into the effectiveness of comparable sanctions and into public perceptions was identified as having the potential to be of "immediate practical benefit" to sentencing research and policy in both Scotland and England and Wales.[14] In this regard, the Council is aware of two pieces of research since carried out for the Sentencing Council for England and Wales, examining the evidence on the effectiveness of sentencing. The first, *The Effectiveness of Sentencing Options on Reoffending* (September 2022), explored the efficacy of sentencing options with a "focus on reoffending and related matters such as desistance and reintegration, deterrence, cost-effectiveness, and equality".[15] The second, *Reconceptualising the effectiveness of sentencing options: four perspectives* (September 2024), is a review of research on the effectiveness of sentencing in relation to the different perspectives of sentencers, offenders, victims and the public.[16]

Theme 2: bail and remand

70. As noted above, being pre-sentence, questions of bail and remand practice or policy sit beyond the Council's remit.

71. The consideration of time spent on remand, or on electronically monitored bail, when determining sentence is a matter of law. The Commission may wish to note the terms of The sentencing process guideline, which applies to all offences sentenced in Scotland, in this regard. The sentencing process guideline describes how courts reach sentencing decisions through an eight-step process. Steps 1-4 cover determination of the headline sentence. This involves, first, assessing the seriousness of the offence with regard to the

[13] *The Methodological Challenges of Comparative Sentencing Research: Literature Review*, Dr Jay Gormley, Prof Julian Roberts, Dr Jose Pina-Sánchez, Prof Cyrus Tata and Ana Veiga, for the Scottish Sentencing Council, published May 2022, p. 3

[14] Ibid., pp. 4-5

[15] *The Effectiveness of Sentencing Options on Reoffending*, Dr Jay Gormley (University of Glasgow), Prof Melissa Hamilton (University of Surrey), Dr Ian Belton (Middlesex University) for the Sentencing Council for England and Wales (2022)

[16] *Reconceptualising the effectiveness of sentencing: four perspectives* Dr Jay Gormley (University of Glasgow) for the Sentencing Council for England and Wales (September 2024) (last accessed 27 January 2025)

culpability of the offender and the level of harm caused, or which might have been caused, by the offence; second, selection of the sentencing range; and, third, consideration of any aggravating and mitigating factors, which may move the case out of the range selected at step 2. The headline sentence is selected at step 4. Steps 5-7 cover other issues which will not apply in every case, such as the need to take into account a plea of guilty or any time spent in custody. Finally, step 8 involves the court imposing the sentence and giving reasons for its decision.[17]

72. With respect to consideration of time spent on remand, this is taken into account at step 6 of the guideline, which explains that:

> "this step applies only where:
> - the court is imposing a custodial sentence (a sentence of imprisonment or detention)
> - and any of the circumstances in section 210 of the Criminal Procedure (Scotland) Act 1995 apply: most commonly that the offender was in custody on remand awaiting trial or sentence.
>
> In these circumstances the court must, in deciding on the length and commencement date of the custodial sentence, have regard to the period of time spent in custody."

73. As of September 2026 the sentencing process guideline will have been in effect for five years. The Council intends to carry out a focussed review of this framework guideline with a view to considering whether it requires any adjustment to ensure that it remains aligned with developments in legislation (such as the creation of new statutory aggravations), case law, and sentencing practice. For example, the legislative requirement, introduced since the approval of the sentencing process guideline, for courts to have regard to time spent on electronically monitored bail when imposing a custodial sentence.

74. The Council offers no comment on the Commission's specific question of "how uses of remand may affect subsequent sentencing" except to note that the implementation of any recommendations in this regard may have implications for the planned review of the sentencing process guideline. This is just one example of the potential implications for the work of the Council of any implementation of the Commission's recommendations.

Theme 3 – Release from prison custody

75. The legislative arrangements for release from prison are a matter of penal policy and as such are for the Scottish Ministers and the Scottish Parliament and accordingly are outwith the remit of the Council.

76. In general terms, the selection of an appropriate custodial sentence will not take into account the actual, likely or potential release dates from custody, which are for the Scottish Ministers, the Scottish Prison Service or the Parole Board for Scotland, as the

[17] The closest equivalent guideline applicable in England and Wales is the General guideline: overarching principles, issued by the Sentencing Council for England and Wales.

case may be. The sentencing process guideline sets out a structure for the determination of sentence for all cases in Scotland; release from custody does not relate to the sentencing process and the guideline does not require courts to take into account actual or likely release dates from custody. Were courts to take this into account, it would defeat the purpose of legislation around prisoner release. There would also be a risk that, should legislative arrangements subsequently change, consistency in sentencing would be undermined.

77. A credible framework for release, and effective arrangements for its operation in practice, are essential to ensuring public confidence in the criminal justice system. Research carried out on behalf of the Council has found that release arrangements overall, and the reasons for releasing prisoners before the end of their sentence, are not always fully understood by members of the public, or those affected by offending behaviour.[18] The Council therefore suggests that, whatever the short- or longer term policy to be adopted in this regard, the provision of information to the public generally and to those involved in, or affected by criminal proceedings, must be borne in mind.

Conclusion

78. The Council hopes the information and evidence contained within this submission is of assistance to the Commission in its consideration of the issues before it. As noted above, this evidence provides only a summary of the findings of the most relevant research and the Council recommends referring to the individual reports cited in order to fully understand the complexities of some of the issues described therein.

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[18] See for example: *Public perceptions of sentencing in Scotland, Qualitative research exploring sexual offences*, Biggs, Reid, Attygalle, Vosnaki, McPherson and Tata (July 2021) which found "Survivors of sexual offences also perceived that even when a perpetrator is given a prison sentence, they are released before the full sentence is served, due to prison overcrowding or insufficient resources, rather than as part of a controlled and supported release in the community which takes into account public safety" (p. 72) and Reid, Biggs, Attygalle, Vosnaki, McPherson and Tata *Public perceptions of sentencing in Scotland Qualitative research exploring causing death by driving offences* (September 2020) which found "There was limited knowledge about the reasons why offenders were released before the end of their sentence, an area where providing additional information to the public and specifically to members of the family of victims during the criminal justice process, could be considered." (p. 71)