

Consultation on Bail and Release from Custody arrangements in Scotland

1. Introduction

Salvesen Mindroom Centre was founded in 2000. For over 20 years we have been offering advice, information and support to children and families living with learning difficulties. Today, we are the leading charity on neurodiversity in Scotland, and yearly we support hundreds of parents, carers, children and young people up to age 25, as well as the professionals who work with them.

In our work to support neurodivergent individuals, we are aware that children and young people who are neurodivergent can often come into conflict with the criminal justice system, whether through the Children's Hearings System or through arrest, prosecution and custodial detention as a young adult. There are clear systemic links that make these outcomes more likely for neurodivergent young people: children with additional support needs (ASN) are excluded from school at almost 5 times the rate of children without ASN¹, and there is a clear association between school exclusion and involvement in the criminal justice system.²

When children and young people who are neurodivergent come into conflict with the law, the situation is often extremely complex. For example, currently our team is providing support where:

Case study A – A child aged 13, with rigid thinking and who takes things literally, had over 30 concerns raised by police as well as several arrests and convictions. The child was known to the local police and the campus police officer and had been referred to the Children's Reporter. The police attended various meetings relating to the child. The child had been taking very serious risks around transport which put them and others in danger. The child had become violent without warning and on occasion had run away. The child's school regularly requested the child to be collected after incidents in school and by the time the parent contacted us for support, the child was unable to attend school.

Case study B – A care experienced young person over the age of 16 with a complex profile of needs (ADHD, autism and a global learning disability) and a history of trauma and abuse was charged with a series of offences relating to risk-taking and self-injurious behaviour caused by severe mental distress. The young person was remanded in custody, separating them from the support of their family, which led to an escalation of their self-harming and suicidality. The young person spent some time in hospital but was then returned to custody. The young person had several evaluations of their mental capacity carried out by social work and CAMHS, which suggested the young person lacked capacity, but it was unclear why several different evaluations were carried out or if the previous evaluations had been shared with the courts. The young person's behaviour that led to their offending had been triggered by being a victim of grooming, for which the perpetrator was prosecuted. It is unclear if this background was taken into account in the bail considerations.

¹ <https://www.gov.scot/publications/summary-statistics-schools-scotland/pages/1/> (Accessed 01/02/22)

² <https://www.ed.ac.uk/news/2013/exclusionprison-280213> (accessed 26/01/22)

2. Prevalence of neurodivergence in the criminal justice system

The prison population is neurodiverse. There are varying estimates of the prevalence of neurodevelopmental conditions across the prison population, including:

- A meta-analysis that found a prevalence estimate of 25.5% of prisoners with ADHD³
- A study involving 390 Scottish prisoners, of whom 32.3% with ADHD required assistance reading questionnaires⁴
- Estimated rates of autism among prisoners ranging between 3% and 27%, compared to 1% in the general population⁵
- A report in 2005 that dyslexia among offenders is between 31% and 52%. This is much higher than the general population (5-10%)⁶
- Research in the population of HMYOI Polmont finding that half of the population displayed learning difficulties⁷
- The 2019 SPS prisoner survey⁸ found that within the prisoner responses (30% of prisoners on the survey date responded), prevalence rates were reported as including Autism (4%), ADHD/ADD (8%), Dyslexia (7%), Dyspraxia (1%) as well as high rates of depression (39%) and anxiety/panic disorders (29%)

The 2019 SPS prisoner survey also found:

“Almost a quarter of those reporting in the survey had problems using a computer (24%). Just under one fifth reported problems in relation to writing and numeracy (18% & 17% respectively) and fifteen percent report issues with reading.” (Footnote 8)

In view of the very high rates of neurodivergence found in prisons, it is essential for the Scottish Government to take account of the needs, vulnerabilities and rights of all of those neurodivergent individuals who pass through the Scottish criminal justice system. Our response to the consultation brings an expert focus on this issue. However, as our responses cut across several of the themes of the document, we have not used the online response form, and instead have replied thematically as set out below.

³ Young S, Sedgwick O, Fridman M, Gudjonsson G, Hodgkins P, Lantigua M, Gonzalez RA. Co-morbid psychiatric disorders among incarcerated ADHD populations: a meta-analysis. *Psychol Med.* 2015;45(12):2499–510

⁴ Young, S., González, R.A., Fridman, M. et al. The economic consequences of attention-deficit hyperactivity disorder in the Scottish prison system. *BMC Psychiatry* 18, 210 (2018)

⁵ SLOKAN, F. and IOANNOU, M. (2021), 'I'm Not Even Bothered if they Think, is that Autism?': An Exploratory Study Assessing Autism Training Needs for Prison Officers in the Scottish Prison Service. *The Howard Journal of Crime and Justice*, 60: 546-563. <https://doi.org/10.1111/hojo.12432>

⁶ The British Dyslexia Association and HM Young Offender Institution Wetherby. *Practical solutions to identifying dyslexia in juvenile offenders*. Reading: The British Dyslexia Association, 2005

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https://www.prisoninspectorscotland.gov.uk/sites/default/files/publication_files/Report%20on%20Expert%20Review%20of%20Provision%20of%20Mental%20Health%20Services%20at%20HMP%20YOI%20Polmont%20-%20Final%20Version.pdf (Accessed 26/01/22)

⁸ <http://www.sps.gov.uk/Corporate/Publications/Publication-7196.aspx> (Accessed on 26/01/22)

3. A neurodiversity-informed approach to bail decision-making, release from prison and criminal justice

Despite the prevalence of neurodevelopmental conditions in the prison population noted above, the consultation does not contain any reference to 'neurodiversity', 'learning difficulty' or even 'disability'. While the needs of some other vulnerable prisoner groups are mentioned, such as those with mental health or substance abuse issues, the omission of any reference to disability, including 'hidden disabilities', is a significant concern. For the criminal justice system to be fair and equitable, it must consider the needs of everyone within the system.

Within the introduction of the public consultation, it is stated that one of the key intentions of the proposals is to reduce the risk of future offending. In order to achieve this aim, it is important that neurodivergent individuals are fully able to understand and participate in the criminal justice process, and that when creating new processes, consideration is given to avoiding creating additional barriers that may increase the risk of future offending.

In proposing changes to bail and remand and release from custody in Scotland, additional consideration should be given to:

- The disproportionate harm neurodivergent people can incur from even short exposure to the prison environment
- The additional barriers prisoners with neurodevelopmental conditions may face when trying to reintegrate back into their communities
- The additional impact that imprisonment on remand may have on a population who already experience significantly reduced life chances around employment, education and participation in public life

To address these concerns, we advocate a 'neurodiversity informed' approach within the criminal justice system. This means having regard to the fact that certain neurodevelopmental conditions may bring with them an inability to manage information and instructions in a typical way. It includes consideration of:

- The specific communication needs of accused persons – such as following a conversation or ability to read the written word
- The social communication difficulties of accused persons – such as displaying contrition or remorse
- The cognitive ability of accused persons – such as understanding the formal language of the courtroom
- The ability of accused persons to process and understand information - such as fully understanding conditions of bail
- The ability of accused persons to consistently follow instructions – such as attending court hearings, social work appointments etc
- The ability of accused persons to appreciate the consequences of their actions – such as the failure to observe bail or curfew conditions

4. Bail decision-making

From our experience of supporting individuals who are neurodivergent, and who may struggle to adhere to bail conditions unless they receive adequate support, we perceive there is a risk that remand may be used as an alternative to providing appropriate support in the community. Therefore, we believe that to protect those individuals, there should always be a clearly defined public safety reason in the decision to refuse bail.

The current decision-making approach where victim protection is one part of the overall decision-making process should remain in place: judges should not restrict their decision making to a victim-only perspective. Many offenders are themselves victims (see case study B above). With regard to neurodivergent individuals, who may suffer disproportionately mental health deterioration or other harms during any period of imprisonment, a simplified framework that allows the judge to weigh all factors in the balance is preferable.

In some instances, it may be helpful for information about an accused person's neurodivergence or learning difficulty to be shared with the victim, if this information was a factor in the bail decision. This may be part of a wider victim mediation approach. However, this would need to be very carefully balanced with the accused's right to privacy, especially as disclosure of any disability can lead to stigmatisation in the community.

5. Considering the age of the accused person when making bail decisions

Children

We strongly agree that legislation should explicitly require courts to take someone's age into account when deciding whether to grant them bail and that no one under 18 should be placed on remand. 16- and 17-year-olds are considered children under the UNCRC. The 2020 Independent Care Review concluded that this age group must be accommodated within Secure Care rather than Youth Offender Institutes, concluding that "being in prison-like settings is deeply inappropriate for children"⁹.

Young people aged 18-25

Extra consideration should be given to those aged 18-25 when considering bail options. The imprisonment of young people under the age of 25 in Scotland runs counter to the current scientific understanding of brain development, and also contradicts some of the aims of key Scottish Government policies of the past few decades.

Current neuropsychological understanding of brain development and cognitive maturity indicates that areas of the brain governing emotional regulation and self-control do not fully mature until the age of 25, and this cognitive maturation process can be delayed by adverse childhood experiences (ACEs). This can result in a reduced level of culpability in some cases compared to an older person committing the same offence. This understanding of cognitive development has been influential in the recent changes to Scottish sentencing guidelines for under 25s, which places

⁹ Lightowler, C. and Adamson, B. "Not cut out for prison": Depriving Children of their Childhood" <https://www.cycj.org.uk/not-cut-out-for-prison-depriving-children-of-their-childhood/> (accessed 21/01/2021)

more emphasis on community-based sentences as being a more effective strategy against reducing reoffending rates than short custodial sentences¹⁰.

Key Scottish Government policies aimed at young people over the past few decades, such as the employability and skills strategies *Opportunities for All* (16-19) and *More Choices More Chances (MCMC)*, specifically targeted support at 16-19 year olds, with some additional support for some young people aged 20-25 in targeted vulnerable groups, such as care experienced and disabled young people. These strategies were informed by social research that indicated that interventions targeted at this age range was likely to be the most effective in significantly improving the life-chances of individuals in the long-term. It was recognised that targeting support at this age group would bring significant long-term positive results for Scottish society as a whole in tackling entrenched socioeconomic inequality¹¹.

It therefore follows that remand and any time spent in custody within this age range will have a disproportionately negative effect on long-term life chances of individuals, compared to that of older adults. Neurodivergent young people and those with learning difficulties have an increased level of vulnerability and are already at a significant statistical disadvantage in terms of positive destinations for employment, education and training. It is therefore important that consideration of these potential harms plays a part in the bail-decision making process.

The unintentional consequences of certain bail conditions for young people

Evidence shows that social support networks, including friends and family members, can be a protective factor for children against reoffending and it is important that bail decisions do not have the unintended consequence of creating feelings of isolation from these networks¹².

Children of parents remanded in custody

As the most recent prisoner statistics show that 61% of prisoners in Scotland have children¹³, we strongly agree that the impact of imprisonment on an individual's children should be included in any bail considerations. Parental imprisonment can have a devastating impact on a child's life and is recognised as an Adverse Childhood Experience (ACE), which can also lead to further ACEs, such as the child being placed in care or kinship care. In cases where offenders have neurodivergent children, there may be additional challenges in finding suitable care placements that meet the child's needs. We would recommend that communication with social work to determine the impact of imprisonment on any children of the accused should be an essential part of the bail consideration, and the presence of any neurodevelopmental condition(s) should be taken into account in forming recommendations.

¹⁰ Johnston, Krista "Youthful Excess: What Price" The Law Society of Scotland (17th June 2022) (Accessed 01/02.22)

¹¹ Scottish Executive "More Choices, More Chances: A Strategy to Reduce the Proportion of Young People Not in Education, Employment or Training in Scotland" (Scottish Executive 2006) p1

¹² D, McEwan et al; "Use and Impact of bail and remand with children in Scotland" (Children and Young People's Centre for Justice, December 2020) p14

¹³ Bail and remand consultation p6

6. Communication

There is no set process for information-sharing with social work in the Scottish court system, which leads to differing approaches across local authorities, and therefore variation in the level of background information used when making bail decisions. It also leads to confusion over where the responsibility lies to initiate information-sharing.¹⁴

Sheriffs and Procurators Fiscal have identified information from social work about the background and needs of accused children as 'highly valuable', and information about the support social work could offer to the accused child as an alternative to custody was 'vital' in the deciding whether to grant the child bail. Police reports, on the other hand, were described as inconsistent in their quality and detail.¹⁵

For both adults and children, we strongly recommend that in all cases when there is a risk that the accused could be remanded in custody, courts must ask for information from social work, and social work must provide it. All relevant information about the accused must be taken into account where bail is being considered. The current inconsistency within the system, where some bail applicants will have their full background taken into consideration, and others do not, undermines fairness in the justice system, and allows potentially vulnerable people to slip through the net and end up being placed in custody inappropriately.

This position is supported by the Equality and Human Rights Commission, which has found that the current approach to information sharing with social work and other agencies means that information about an accused's disabilities is often not shared. This leads to the accused not receiving the support they need to participate in court and understand what is happening¹⁶. Additionally, the onus is on the accused person to disclose their support needs and the results indicate that this approach is not effective.¹⁷

We contend that, before any court diets, courts must always secure information from social work indicating whether the person has any communication support needs resulting from a disability (diagnosed or undiagnosed) that could affect their ability to fully understand the court proceedings. Information should be provided to the court in advance about how the communication needs of the accused person impact their ability to understand the written information (e.g. charge) or oral arguments and decisions, to allow any special measures to be made, such as a Named Supporter in court to assist the accused's understanding of the proceedings.¹⁸

¹⁴ D, McEwan et al; "Use and Impact of bail and remand with children in Scotland" (Children and Young People's Centre for Justice, December 2020) pp20-21

¹⁵ As footnote 14

¹⁶ Equality and Human Rights Commission "Inclusive justice: a system designed for all: Findings and Recommendations Report" (June 2020) p22

¹⁷ Equality and Human Rights Commission "Inclusive justice: a system designed for all: Findings and Recommendations Report" (June 2020) p19

¹⁸ Supporting Offender with Learning Disabilities (SOLD) Network and ARC Scotland – "Representing clients with communication support needs: A practice guide for defence solicitors in Scotland" (December 2020) p54

Although the practical implications of such changes to information sharing regarding background information would likely require significant restructuring and improved resourcing of criminal justice social work, these changes are necessary in order for the human rights of accused people with disabilities to be upheld.

7. Provision of accessible information

Adults with communication support needs

We support the proposal that judges must give reasons for their decision to refuse bail both orally and in writing. Accused individuals with communication support needs may find it difficult to process oral explanations given in the courtroom, or to retain the information after leaving court.

Research by the EHRC indicates that it is an ‘unfortunate reality’ that many accused people with learning difficulties and neurodevelopmental conditions lack understanding of trial and court decisions, including bail decisions¹⁹. Potentially, this lack of understanding could result in the unintentional breaching of bail conditions, and harsher penalties. For the accused who are refused bail, it is likely that a lack of understanding of the reasons for being placed on remand will cause additional distress.

In much the same way that the failure to provide a non-English speaker with an interpreter in a Scottish Court would be a fundamental breach of that individual’s human rights; a similar conclusion could be drawn from the failure to provide an individual with communication support needs with vital information about bail decisions in an accessible format that they can understand.

If the decision is taken to continue to only give the reasons for bail decisions orally, we would argue that a publicly funded service is needed to support individuals with communication support needs to interpret and understand the trial process and any bail and sentencing decisions.

Children

The importance of addressing individuals’ needs to have a complete understanding of the court process is also evidenced in findings that show that, for some children within the criminal justice system:

- complex legal language used in court caused confusion, which in turn exacerbates the anxiety they experienced in court proceedings
- confusion about bail conditions leads to unintentional breaking of the rules
- lack of accessible information about bail decisions could lead to further entanglement with the criminal justice system, and the child incurring harsher penalties²⁰

¹⁹ Equality and Human Rights Commission – “Experiences of people with a learning disability in the Scottish Criminal Justice System” (13th June 2017) p1

²⁰D, McEwan et al; “Use and Impact of bail and remand with children in Scotland” (Children and Young People’s Centre for Justice, December 2020) page 14

8. Electronic monitoring

We agree that courts should be required to consider Electronic Monitoring before deciding whether to refuse bail. Due to the potential for significant harm to neurodivergent people in custody, we welcome the exploration of alternative options. Remand to custody should always be a last resort.

However, it is important that, if this proposal is implemented, there is recognition that individuals with learning difficulties or neurodevelopmental conditions may need additional support and guidance to manage the experience of wearing an electronic monitor. For individuals who, due to their disability, experience difficulties with understanding and interpreting instructions, impulsivity, executive function difficulties, or sensory processing issues, the experience of electronic monitoring may be more challenging. Individuals who are naturally more impulsive, for example, may be more likely to break their curfew. Some individuals may find that they are unable to tolerate the sensation of wearing an electronic monitor due to sensory issues. If electronic monitoring is subcontracted to private security companies, it is important that staff in these companies receive training in supporting individuals with managing electronic monitoring conditions.

It is, however, important that neurodivergent individuals who are not able to manage electronic monitoring are not automatically refused bail. In cases where neurodivergent individuals break monitoring orders, the impact of their disability should be considered before applying penalties.

Despite the potential challenges, it should not be assumed that a neurodivergent person cannot manage electronic monitoring: decisions should be made on a case-by-case basis. Recording reasons for refusal of electronic monitoring will make the bail decision process transparent and will allow individuals to challenge decisions if they feel they are discriminatory.

We strongly agree that time spent on bail with electronic monitoring should be considered at sentencing, as the reduction of time spent in custody will lessen the harmful effects of imprisonment on neurodivergent individuals. In this case, legislation would be required to ensure that this principle is applied consistently across Scotland to avoid the risk that the availability of electronic monitoring will be based on arbitrary factors such as the availability of support services, rather than an individual's specific circumstances.

9. HDC (Home Detention Curfew)

Prisoners who are neurodivergent and/or have communication difficulties may not understand the concept of HDC, or the process to make an application. Accessible information about the availability of HDC should be provided to all prisoners and their appropriately trained personal prison officer should assist them to understand and make a decision. In addition, family members of vulnerable prisoners should be notified of the HDC process so they can support the prisoner to decide and apply as appropriate.

Many people who are neurodivergent and/or have communication difficulties may struggle to understand, or observe, the conditions attached to HDC. This puts them at risk of breach and recall, with all the negative consequences that would flow. However, with the right support those prisoners may be able to manage HDC, which would be preferable and less harmful than continuing incarceration. No eligible prisoner should be excluded from consideration for HDC because of their disability, including their cognitive ability. Rather, HDC should be available to all, with support to understand and observe the conditions, where necessary.

The appropriateness of SPS making the decision to release on HDC will depend on their ability to understand the impact of neurodevelopmental conditions upon prisoners' ability to manage the HDC conditions. Only SPS officials who have had sufficient training in neurodiversity should be empowered to make these decisions.

Similarly, the appropriateness of the Parole Board making the decision to release on HDC will depend on their ability to understand the impact of neurodevelopmental conditions upon prisoners' ability to manage the conditions attached to HDC. Only Parole Board members who have had sufficient training in neurodiversity should be empowered to make these decisions.

10. A neurodiversity-informed approach to planning for release from prison

Early release

When considering early release for prisoners on the grounds of 'good behaviour', it is important that all those providing information, or making decisions, have a knowledge of neurodivergence and learning difficulties, and the additional barriers that prisoners with these conditions may face.

Neurodivergent prisoners may find it harder to adhere to prison rules or may inadvertently break rules due to a lack of understanding. The prison environment can be overwhelming for many neurodivergent people, and due to this they may not feel able to participate in voluntary programmes, or the programme itself may not be accessible to all prisoners due to either its content or its method of delivery.

Consideration for early release should be viewed in the wider context of an individual's needs to avoid indirectly discriminating against neurodivergent prisoners who are struggling with life in prison due to their disability. For these prisoners, early release may be the most appropriate option.

Enhanced planning process

In order to support neurodivergent prisoners to successfully reintegrate into their community and reduce the risk of reoffending, we would recommend the use of an enhanced transitions planning process that is person-centred and takes into account the support needs of each individual. Staff involved in this planning process would require training in neurodiversity.

As part of the enhanced planning process potential barriers to an individual's successful reintegration into their community should be considered, and any identified barriers should be included within the plan, with suggestions for how these barriers can be addressed (for example, by support from community agencies).

An avoidable barrier to effective reintegration is the current practice of releasing prisoners on Fridays. Prisoners with communication difficulties may need one-to-one support to make appointments with benefits offices and access immediate support services. If released on a Friday, there is the risk of being unable to have the right support in place or of missing public office opening hours and then needing to wait until the following Monday to access basic essentials such as money, food or housing. Delays to engaging with core services may lead to distress and ultimately to mental health issues or reoffending. Thus, we agree with the proposal to avoid the release of prisoners on Fridays.

Reintegration into communities as part of the enhanced planning process

Enabling a prisoner to serve part of their sentence in their community could be beneficial in supporting their reintegration, if this is used as part of an enhanced transition process. Gradual reintegration back into their community may be beneficial for all prisoners, in helping to rebuild community links and maintaining their family and social connections, but may be particularly beneficial for neurodivergent prisoners, who may take longer to adapt to a change in environment or routine. A staged approach of gradual reintegration may lead to better outcomes by reducing the risk of the individual feeling overwhelmed by life outside prison.

11. Throughcare

Collaboration with public services

Individuals who are neurodivergent or have communication difficulties need specialist support. This should be guaranteed within the minimum standards of throughcare support. Relevant public services should be involved in the pre-release planning process at an early stage, and it will be important to share information regarding the prisoner's specific needs in good time for their release. This would allow the services supporting the individual time to prepare and make any necessary reasonable adjustments, which could include adapting their service provision or information to make it accessible to the individual.

Vulnerable prisoners, such as those who are neurodivergent, are likely to be in need of a range of support services and being able to access services locally is likely to help the individual to engage with the support on offer. Services should be offered by trained staff, who have enough time to spend with each individual to ensure that the released prisoner understands what help they can access. Family members or a chosen supporter should be included in the planning process.

It is important that information should be provided in an accessible format. For prisoners who have communication difficulties, it may be necessary to offer a series of appointments in order to ensure that the individual understands the information being provided. Support to complete forms should always be offered. These adaptations should apply as a minimum to:

- Housing
- Welfare Benefits
- Health
- Employment/careers advice