

Consultation on Proposals to Strengthen The Presumption Against Short Periods of Imprisonment: An Analysis of Responses

**CONSULTATION ON PROPOSALS TO STRENGTHEN
THE PRESUMPTION AGAINST SHORT PERIODS OF
IMPRISONMENT: AN ANALYSIS OF RESPONSES**

**Alison Platts & Jennifer Waterton
Griesbach & Associates**

Scottish Government Social Research
2016

Table of contents

EXECUTIVE SUMMARY	1
Background	1
Views on extending the presumption (Q1, 2 and 3)	1
Factors relevant to sentencing and the use of custody (Q4, 5 and 6)	2
The use of remand (Q7)	3
Information and evidence	3
1 INTRODUCTION	4
Introduction	4
Background	4
The consultation	5
The analysis	6
2 THE CONSULTATION RESPONSES AND RESPONDENTS	8
Number of responses received	8
Standard, non-standard and campaign responses	9
3 EXTENDING THE PRESUMPTION AGAINST SHORT PRISON SENTENCES (Q1)	10
Reasons for agreeing with the proposal	11
Reasons for disagreeing with the proposal	15
4 SENTENCE LENGTH ON WHICH THE PRESUMPTION SHOULD BE BASED (Q2)	16
Extension to 12 months	17
Extension to 9 months	18
Extension to 6 months	18
Other general comments on the length of extension	19
5 CONCERNS ABOUT EXTENDING THE PRESUMPTION (Q3)	20
Concerns of those supportive of the proposal / a move away from custodial sentences	20
Concerns of those opposed to the extension	23
6 CONSIDERATION OF SPECIFIC CIRCUMSTANCES IN IMPOSING A CUSTODIAL SENTENCE (Q4)	24
Seriousness of offence and risk to individual / public safety	24
Impact on dependent children and families	25
Other circumstances mentioned on a widespread basis	25
Factors mentioned on a more limited basis	26
Sentencing decisions and the wider criminal justice system	26
7 OFFENCES TO WHICH THE PRESUMPTION SHOULD NOT APPLY (Q5)	28
Opposition to exemption of specific offences from the presumption	28
Exemption of offences involving violence	29
Exemption of other types of offences	29
Other (wider) points raised	29
8 CIRCUMSTANCES IN WHICH A CUSTODIAL SENTENCE SHOULD NEVER BE CONSIDERED (Q6)	30
Views of those specifying circumstances	30
Views of those not specifying circumstances	31

9	LEGISLATIVE MECHANISMS TO DIRECT THE USE OF REMAND (Q7)	32
	The rationale for the use of remand	32
	Concerns about the current use of remand	33
	Alternatives to remand	34
	Legislative mechanisms	35
10	OTHER COMMENTS ON THE USE OF SHORT-TERM IMPRISONMENT (Q8)	37
	ANNEX 1: ORGANISATIONAL RESPONDENTS	39
	ANNEX 2: RESPONSE RATE FOR INDIVIDUAL CONSULTATION QUESTIONS	41

Glossary

Bangkok Rules: The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the 'Bangkok Rules') were adopted in 2010 and set out global principles and standards with regard to the distinct considerations that should apply to the treatment of women prisoners and offenders: <http://www.un.org/en/ecosoc/docs/2010/res%202010-16.pdf>

Commission on Women Offenders: The Commission on Women Offenders was established in June 2011 to look at ways to improve outcomes for women in the criminal justice system. The Commission was chaired by The Right Hon Dame Elish Angiolini DBE QC, and operated independently of the Scottish Government. The Commission reported in February 2012: <http://www.gov.scot/About/Review/commissiononwomenoffenders/finalreport-2012>

CPO: The Community Payback Order (CPO) was introduced in Scotland in 2011 and replaced Community Service Orders, Probation Orders and Supervised Attendance Orders. A CPO can consist of a number of different requirements (e.g. unpaid work, supervision, treatment for addictions) tailored specifically to each offender based on the nature of their crime and the underlying issues.

CJSW: Criminal Justice Social Work.

GIRFEC: Getting It Right For Every Child (GIRFEC) is the Scottish Government's policy framework for improving the wellbeing of children and young people: <http://www.gov.scot/Topics/People/Young-People/gettingitright>

McLeish Commission: The Scottish Prisons Commission, chaired by Rt Hon Henry McLeish, was appointed by the Scottish Government in 2007 to examine Scotland's use of prison in the 21st century. It published its report, *Scotland's Choice – Report of the Scottish Prisons Commission*, in 2008: <http://www.gov.scot/Resource/Doc/230180/0062359.pdf>

SPS: The Scottish Prison Service (SPS) is an agency of the Scottish Government with responsibility for running prisons in Scotland.

EXECUTIVE SUMMARY

1. The Scottish Government is considering strengthening the presumption against short periods of imprisonment. A consultation paper was published on 25 September 2015 with a closing date of 16 December 2015. The consultation received 63 responses. One organisation submitted two responses and these were amalgamated into a single response. The analysis carried out was thus based on 62 responses – 42 from organisations and 20 from individuals. Organisational respondents included third sector bodies, local authority and local partnership bodies, national public bodies and professional bodies.

Background

2. The Scottish Government is committed to reducing the use of short custodial sentences, with the aim of using prison primarily for those individuals who have committed serious offences and those cases involving issues of public safety. Recent policy has encouraged the use of non-custodial sentences, and underlined the need to address the underlying causes of offending behaviour through community justice services and support.
3. The Criminal Justice and Licensing (Scotland) Act 2010 introduced a presumption against sentences of less than three months, requiring the court to (i) only pass a sentence of three months or less if no other appropriate disposal is available and (ii) record the reasons for this. The use of short-term sentences has, however, remained relatively stable, and the consultation sought views on options for strengthening the presumption in order to make it more effective.
4. The consultation paper outlined relevant evidence, as well as the reasons for a move away from short-term sentences. It then invited views on (i) the proposal to extend the current presumption (ii) a number of additional considerations relevant to reducing the use of short sentences and the use of remand.

Views on extending the presumption (Q1, 2 and 3)

5. There was strong support across all types of respondent for the proposal to extend the presumption against the use of short prison sentences beyond the current 3 months – 85% agreed with the proposal, 5% disagreed and 10% neither agreed nor disagreed.
6. There was a high degree of consensus in the views of those who supported extending the presumption. Respondents were critical of the current levels of imprisonment in Scotland, and highlighted four main issues: inappropriate use of imprisonment in cases which did not involve serious offences or risk to public safety; the detrimental impact of imprisonment on the lives of offenders and their families; the relative merits of community and custodial sentences in addressing offender needs, supporting rehabilitation, reducing reoffending and protecting public safety; and the cost to the public purse. They thought extending the presumption would help achieve a reduction in the use of custodial sentences and would be in line with a generally more progressive approach to criminal justice policy. Some respondents argued further for a more

fundamental review of criminal justice policy, and the role of prison within that, in order to address offender needs and thus reduce reoffending.

7. Of those who agreed with the proposal, a large majority (84%) favoured a presumption against sentences of less than 12 months; levels of support for a presumption against sentences of less than 9 months and 6 months were 7% and 9% respectively. Most thought an extension to 12 months would make the biggest difference to sentencing practices and offender outcomes.
8. There was a clear view amongst respondents, however, that extending the presumption would not achieve the policy aim of reducing the use of short-term sentences unless steps were also taken to bring about changes in sentencing practices and / or there was a commitment to developing and resourcing robust and evidence-based community justice services.
9. Those generally supportive of extending the presumption nevertheless stressed (i) the need to continue to prioritise public safety – the need to protect victims, and victims of domestic violence in particular, was noted; (ii) the importance of taking account of public perceptions and understanding of any policy change; and (iii) the need to address issues related to non-compliance with community sentences.
10. Those explicitly disagreeing with the proposal were all individuals who wished to see a ‘tougher’ stance on crime which, for them, meant longer prison sentences. They were concerned about losing what they saw as the deterrent effect of prison, and about the appropriateness and effectiveness of community sentences, particularly for those who had committed violent offences.
11. Most of those neither agreeing nor disagreeing with the proposal made similar points to other respondents. Two additional concerns were, however, raised. These related to the potential impact of extending the presumption on the sentencing of those convicted of domestic violence offences; and the potential impact of increased use of community alternatives on court business.

Factors relevant to sentencing and the use of custody (Q4, 5 and 6)

12. Questions 4 to 6 asked about factors relevant to the sentencing process (circumstances which a judge should have regard to when considering a custodial sentence; offences to which the presumption should not apply; circumstances in which a custodial sentence should never be used). There was a great deal of commonality in the points raised in response to these questions.
13. The following points were frequently made by respondents who were generally supportive of reducing the use of short custodial sentences:
 - Custodial sentences should only be used in serious cases and cases involving risk of serious harm to individuals or to a community. Custodial sentences were thus seen as appropriate in cases involving violence, and domestic violence in particular.

- Each case should be considered on its merits in determining an appropriate sentence.
 - Key factors which should be considered in deciding on a sentence included: the seriousness of the crime and / or the risk to public safety; the impact on dependent children; the personal and social circumstances and vulnerabilities of the offender; and the interests of the victim.
 - Prison should never be used solely as a means of dealing with people's personal, social, or health needs, and a custodial sentence should never be imposed because of a lack of community alternatives.
 - Prison is particularly unsuitable for women, especially those with caring responsibilities and / or dependent children; young people; those affected by health and social problems, including addictions; those otherwise vulnerable or at risk.
 - Other factors which should be taken into account included: the pattern of offending; the attitudes and motivations of the offender; compliance with previous community sentences; the likely impact on reoffending; the interests of the wider community; the impact on the public purse.
 - The Scottish Sentencing Council should be charged with issuing guidance and identifying best practice on the use of short prison sentences.
14. Those opposed to extending the presumption restated their views on the need for tough deterrent sentences, determined by the seriousness of the offence and the criminal history of the offender.

The use of remand (Q7)

15. Question 7 asked for views on legislation to direct the use of remand. Here respondents echoed points made in response to questions on short custodial sentences, and expressed concern about the numbers held on remand and the impact that this had on individuals. They also noted that many of those on remand did not go on to receive a prison sentence. Respondents thought remand was used inconsistently and inappropriately (i.e. when there was no risk to public safety) and wished to see community alternatives used instead – there were calls for the development of services and increased resources. There were, however, mixed views on the merits of legislation to direct the use of bail: some supported this; other thought the necessary legislation was already in place; while others still argued that legislation on its own would not be enough to bring about change in practice.

Information and evidence

16. Across all the questions, respondents highlighted the importance of learning from approaches to criminal and penal policy in other countries, of ensuring that both policy and practice in the area were informed by sound evidence and information, and of communicating clear messages to increase understanding about sentencing policy and maintain public confidence in the justice system.

1 INTRODUCTION

Introduction

1.1 This report presents findings from an analysis of responses to the Scottish Government's consultation on proposals to strengthen the presumption against short periods of imprisonment.¹ The consultation paper was published on the Scottish Government website on 25 September with a closing date of 16 December 2015. A total of 63 responses were received.²

Background

1.2 The Scottish Government has a stated commitment to reducing the use of short-term custodial sentences, with the aim of using prison primarily for those individuals who have committed serious offences and those cases involving issues of public safety. Recent policy has emphasised the use of non-custodial sentences, and the need to address the underlying causes of offending behaviour through enhanced community justice services and support. This broad approach is in line with evidence on offending and reoffending. Recent Scottish Government statistics have, for example, shown lower reconviction rates amongst those given community disposals compared to those given custodial sentences.³ Short sentences are disruptive to social and community ties which support desistance and also provide little opportunity for addressing needs whilst in custody.⁴ Further, keeping people in prison is costly to the public purse.⁵ There are, thus, clear reasons for moving away from the use of short-term sentences.

1.3 The Criminal Justice and Licensing (Scotland) Act 2010 introduced a presumption against sentences of less than three months. The Act requires the court to (i) only pass a sentence of three months or less if no other appropriate disposal is available and (ii) record the reasons for this view. However, despite the introduction of this presumption, the use of short-term sentences has remained relatively constant in the years since 2010. Sentences of six months or less continue to account for around two-thirds of all sentences imposed,⁶ and research undertaken to evaluate the impact of the presumption reported that it did not feature prominently in sentencing decision-making.⁷ The Government has therefore consulted on options for strengthening the presumption and further reducing the use of short-term sentences.

¹ https://consult.scotland.gov.uk/community-justice/short-periods-of-imprisonment/consult_view.

² One respondent submitted two separate online responses; these were amalgamated into a single composite response, and the analysis in this report is thus based on 62 responses.

³ <http://www.gov.scot/Publications/2015/03/9783>.

⁴ <http://www.gov.scot/Resource/0047/00476574.pdf>.

⁵ http://www.audit-scotland.gov.uk/docs/central/2012/nr_121107_reducing_reoffending.pdf.

⁶ <http://www.gov.scot/Topics/Statistics/Browse/Crime-Justice/PubCriminalProceedings> .

⁷ <http://www.gov.scot/Publications/2015/03/3800>.

- 1.4 Reducing the use of short sentences fits in with the Scottish Government's wider aims of reforming the criminal justice and penal systems, and with its policy objective of reducing reoffending. The Government, along with its partners, has adopted a 'whole system' approach to criminal justice reform, involving a range of projects, as set out in *The Strategy for Justice in Scotland (2012)*.⁸ These include an increased emphasis on the use of alternatives to custody; the introduction of new community disposals including Community Payback Orders; increased emphasis on providing services and support to help individuals address offending behaviour (both in custody and in the community); further development of electronic monitoring; the establishment of an improvement project focused on further reducing the use of remand and short sentences; and a continuing shift in the role of the Scottish Prison Service (SPS).⁹

The consultation

- 1.5 The consultation paper published by the Government outlined relevant evidence, and the arguments in support of a move away from short-term sentences. In stating its own position, the Government indicated continuing endorsement of the views of the Scottish Prisons Commission (the McLeish Commission), as set out in the recommendations contained in their 2008 report:¹⁰

'...imprisonment should be reserved for people whose offences are so serious that no other form of punishment will do and for those who pose a threat of serious harm to the public.'

'...paying back to the community should become the default position in dealing with less serious offenders.'

- 1.6 The consultation paper invited views on (i) the proposal to extend the current presumption against short-term sentences via secondary legislation, and (ii) a number of additional options relevant to reducing the use of short sentences and the use of remand. The consultation paper indicated that the proposed extension to the presumption against short sentences should be considered within the wider context of other ongoing reform in the justice area (see paragraph 1.4 above).
- 1.7 The paper contained eight questions – two questions comprising a closed tick-box question followed by a space for further comment and six open questions. Questions covered the following: extending the presumption against short sentences (Questions 1, 2, 3); judicial considerations in imposing custodial sentences (Question 4); use of short sentences in specific

⁸ <http://www.gov.scot/Publications/2012/09/5924>.

⁹ <http://www.sps.gov.uk/Corporate/Publications/Corporate9.aspx>.

¹⁰ <http://www.gov.scot/Publications/2008/06/30162955/0>.

circumstances (Questions 5 and 6); and the use of remand (Question 7 – incorporating two related open questions). A final question (Question 8) asked respondents to provide any other comments on the use of short-term imprisonment. The online questionnaire (see paragraph 1.8 below) contained additional questions on the consultation process.

- 1.8 The consultation paper was distributed to relevant stakeholders including local authorities and local partnership bodies; third sector agencies; professional bodies in the justice system; national public bodies; and academic and research bodies. It was also available on the Scottish Government website, on the publications page, and via the Consultation Hub where the option of completing an online questionnaire was available.

The analysis

- 1.9 The aim of the analysis was to present the full range of respondent views on (i) the proposal to extend the current presumption against short sentences and (ii) other issues relevant to sentencing policy and practice as highlighted in the consultation questions. This involved both quantitative and qualitative analysis of the responses, with the emphasis on the latter.
- 1.10 Quantitative analysis was carried out in relation to the two closed questions included in the consultation (Question 1 and Question 2) and the results of this are presented in tables in Chapters 3 and 4 of this report. Some respondents made comments in relation to these questions without also selecting a tick-box response at the initial part of the question. In these cases, where it was clear from a respondent's comments what their answer to the closed question was, the response to the closed question has been imputed and included in the quantitative tables.
- 1.11 Qualitative analysis focusing on identifying the main themes and the full range of views submitted was also undertaken.
- 1.12 As with all consultation exercises, the findings presented – both quantitative and qualitative – describe the views of the respondents to the consultation and should not be taken as indicative of views in the wider population.
- 1.13 The structure of the remainder of the report is as follows:
- Chapter 2: The consultation responses and respondents
 - Chapter 3: Extending the presumption against short prison sentences (Q1)
 - Chapter 4: Sentence length on which the presumption should be based (Q2)
 - Chapter 5: Concerns about extending the presumption (Q3)

Chapter 6: Consideration of specific circumstances in imposing a custodial sentence (Q4)

Chapter 7: Offences to which the presumption should not apply (Q5)

Chapter 8: Circumstances in which a custodial sentence should never be considered (Q6)

Chapter 9: Legislative mechanisms to direct the use of remand (Q7)

Chapter 10: Other comments on the use of short-term imprisonment (Q8).

- 1.14 Annexes to the report present a list of all organisational respondents (Annex 1), and details of the consultation questions and the number of responses to each question (Annex 2).

2 THE CONSULTATION RESPONSES AND RESPONDENTS

2.1 This chapter provides information about the respondents to the consultation and the nature of the responses received.

Number of responses received

2.2 The consultation received 63 responses.¹¹ One organisation submitted two responses and these were amalgamated into a single composite response. The analysis in the remainder of the report is thus based on 62 responses – 42 from organisations and 20 from individuals. See Table 2.1.

Table 2.1: Number of respondents

Type of respondent	Number	%
Organisations	42	68%
Individuals	20	32%
Total	62	100%

2.3 Table 2.2 below provides a breakdown of the number and type of organisational respondents who participated in the consultation.

Table 2.2: Number of organisational respondents

Type of respondent	Number	%
Third sector organisations	15	36%
Local authority and local partnership bodies	13	31%
National public bodies	3	7%
Professional bodies	3	7%
Other organisations*	8	19%
Total	42	100%

*Other organisations' comprises: two academic and research bodies, two faith groups, three campaign groups (all from different sections of the same organisation) and one interest group.

2.4 The largest group of organisational respondents was from the third sector. Respondents in this group included penal reform organisations, organisations providing support and services for offenders and their families, as well as those providing support and services to victims of crime. 'Local authority and local partnership bodies' comprised local authorities and criminal justice social work teams, alcohol and drug partnerships, and community safety partnership bodies. Within this category, Scotland's eight community justice authorities submitted a joint response; while one local community justice authority also

¹¹ Non-confidential responses are published on the Scottish Government Consultation Hub: <https://consult.scotland.gov.uk/community-justice/short-periods-of-imprisonment>.

submitted a separate response. 'National public bodies' comprised one from the health sector and two from the justice sector, and 'professional bodies' comprised one legal and two social work bodies.

2.5 Forty organisational respondents were based in Scotland, with the remaining two based in England.

2.6 A full list of organisational respondents is included at Annex 1.

Standard, non-standard and campaign responses

2.7 Most respondents (54 out of 62; 87%) submitted their response using the standard consultation questionnaire provided, or submitted written responses which followed the structure of the consultation questionnaire. Twenty-two respondents (35%) submitted their response through the online facility.

2.8 Eight respondents submitted free-text responses (i.e. non-standard responses) presenting views which were relevant to the issue under consultation but not following the structure of the consultation questionnaire. Comments in these responses were allocated to relevant questions and included in the analysis. Comments not relating to any of the consultation questions were noted, and analysed separately.

2.9 The majority of respondents answered all of the consultation questions. The number of respondents answering each question ranged from 71% (44 out of 62) for Question 2 (tick-box question) to 97% (60 out of 62) for Question 3. Full details of the numbers responding to individual questions are shown at Annex 2.

2.10 Six respondents (three organisations and three individuals) submitted identical or near identical responses.¹² In addition, a number of other responses contained common text and phrasing suggesting a degree of discussion and collaboration in developing responses.

2.11 Respondents referred to a range of research evidence and examples of initiatives in other jurisdictions in their answers to the consultation questions. This report, however, does not reproduce the evidence cited in any detail, or comment on its merits, and cannot vouch for the examples cited.

¹² This response originated with the Women for Independence group, and the three organisational responses using the same text came from (i) Women for Independence (national group) and (ii) two Women for Independence local groups. Each of these responses is included separately in the counts presented in the quantitative tables, and the points made in the response are considered alongside other views in the qualitative analysis.

3 EXTENDING THE PRESUMPTION AGAINST SHORT PRISON SENTENCES (Q1)

- 3.1 The overall aim of the consultation was to seek views on the Scottish Government’s proposal to extend the current presumption against short custodial sentences of less than 3 months.
- 3.2 The first question in the consultation paper asked respondents to indicate agreement or disagreement with this proposal and invited them to provide comment in support of their view:

Question 1: Should the presumption against the use of short periods of imprisonment of three months or less be extended? Yes / No

You may wish to provide information to support your views, for example, what do you consider to be the key factors for or against the proposal?

- 3.3 Table 3.1 below presents the views of all 62 respondents in relation to the initial tick-box question, and shows that a large majority of respondents (53 out of 62; 85%) agreed with the proposal to extend the presumption against short sentences. Just three respondents (3 out of 62; 5%), all individuals, explicitly disagreed with the proposal. Sixty respondents provided written comments.

Table 3.1: Should the presumption against the use of short periods of imprisonment of three months or less be extended?

	Yes		No		Other response		Total	
	n	%	n	%	n	%	n	%
Third sector	13	87%	0	0%	2	13%	15	100%
Local authority and local partnership bodies	13	100%	0	0%	0	0%	13	100%
National public body	2	67%	0	0%	1	33%	3	100%
Professional body	3	100%	0	0%	0	0%	3	100%
Other	8	100%	0	0%	0	0%	8	100%
Individual	14	70%	3	15%	3	15%	20	100%
Total	53	85%	3	5%	6	10%	62	100%

The table includes three imputed ‘yes’ responses.

- 3.4 Six respondents (three individuals and three organisations) did not complete the initial tick-box question, or otherwise indicate clear agreement or disagreement in their written answers (shown in Table 3.1 as ‘other response’). The points made by such respondents often coincided with comments provided by other respondents; where this was the case, their views are included in the general analysis presented in the chapter.

3.5 Two of the organisational respondents who did not indicate agreement or disagreement with the proposal focused on specific issues and their perspectives and views are summarised briefly here:

- Considerations relating to domestic abuse: One third sector organisation argued strongly that any presumption against short prison sentences should not apply to cases involving domestic violence. They felt that perpetrators of such crimes did not fit the profile of other types of offenders, and that the availability of custodial sentences encouraged reporting and provided important protection for victims in such cases. They were concerned that any extension to the presumption could have the effect of removing the sanction of custody from most domestic violence cases prosecuted under summary proceedings. This respondent did not comment on the wider merits of the proposal – other than acknowledging that a general presumption would be beneficial to women offenders – but noted that they were opposed to any extension unless it included a specific exemption for domestic abuse cases.
- The impact on court business: One national public body did not offer a substantive view on the proposal to extend the presumption against short sentences but outlined the impact that any change could potentially have on court business. This, they suggested, would include increased court time and resources in: explaining community disposals and associated conditions to those convicted; holding follow-up review, variation and breach hearings; and recording the reasons for using custodial sentences. (The potential cost implications of introducing additional legislative mechanisms for directing the use of remand were similarly noted.)

Reasons for agreeing with the proposal

3.6 The analysis of comments from those who agreed with the proposal indicated a high degree of consensus across all subgroups.

3.7 Respondents often commented on the current situation regarding the use of imprisonment in Scotland. They noted the high rates of imprisonment relative to other countries; the perceived inappropriate use of imprisonment (in cases involving non-violent and low risk offenders; vulnerable offenders including women, young people, and those with mental health problems; others with personal and social needs); and the fact that that the majority of all sentences imposed by the courts (two-thirds) in Scotland are for 6 months or less.¹³

3.8 Respondents generally welcomed the proposed extension to the presumption against short sentences as a positive step in addressing this situation. They noted that the movement away from the use of custodial sentences and

¹³ <http://www.gov.scot/Topics/Statistics/Browse/Crime-Justice/PubCriminalProceedings>.

towards an increased emphasis on addressing the needs of offenders in the community was supported by evidence on reducing reoffending and saw extending the current presumption as being in line with a more progressive approach to criminal justice policy which they supported.

3.9 Respondents thought that extending the presumption would be important in further defining custody as the 'option of last resort', and in encouraging new thinking about dealing with offenders.

3.10 Respondents were critical of the use of imprisonment in general, and short sentences in particular. Their criticisms focused on four inter-related issues:

- Inappropriate use of (short) custodial sentences: Respondents pointed out that few of those given short custodial sentences had committed serious or violent offences, or posed a risk to public safety. Rather, they had committed low level crimes, and their offending was typically linked to disadvantage, social circumstances, mental health problems and addictions.
- The impact on those given short sentences: Respondents frequently argued that short custodial sentences were disruptive and damaging to the lives of those convicted. Custodial sentences resulted in broken family, social and community ties, and loss of accommodation and employment. They also had a serious impact on families and children. Prison also exposed those convicted to criminal influences and cultures. The return to the community could be difficult and those given short-term sentences were not entitled to statutory support on release from prison.
- The relative merits of custodial and non-custodial sentences: Although the positive steps taken by SPS and partner organisations to improve prison regimes and prisoner support were acknowledged, there was a clear view that short custodial sentences were not 'fit for purpose'. Short sentences were described as (i) disruptive to the lives of those affected; (ii) not providing the opportunity for rehabilitation – it was pointed out that the current 3-month presumption could result in people serving as little as 6 weeks in prison if they were given a sentence of 3 months; and (iii) not enhancing public protection in any meaningful way. In contrast, respondents argued that community disposals were less disruptive to individuals and families, provided opportunities to address rehabilitation needs, and could enhance community safety through changed behaviours – the community benefit of the unpaid work carried out as part of a Community Payback Order was also noted. Respondents cited research evidence which showed lower reoffending rates and better offender outcomes amongst those receiving community as opposed to custodial disposals.
- Cost: Respondents highlighted the fact that custodial sentences were much more expensive than community alternatives, and represented a

poor use of public resources. Many respondents provided figures for the relative costs of community and custodial services. It was noted that less use of short-term sentences would result in significant cost savings (and potentially a reduction in the number of prisons across the country). This would allow resources to be transferred to the community to fund alternatives to custody, while also freeing up SPS resources to deal more effectively with those serving longer sentences.

- 3.11 In discussing their views on the use of imprisonment, some respondents focused on women or young people. Women, in particular, were seen as being particularly likely to be given inappropriate short sentences and as being particularly disadvantaged by time spent in custody. The associated negative impact on children and families was also noted. Recent initiatives to consider and enhance the response to female offending – including the work of the Scottish Government appointed Commission on Women Offenders – were often cited as providing evidence and insights in this area.¹⁴
- 3.12 Respondents supported the proposed extension of the presumption against short sentences as a means of dealing with the issues noted above, reducing ‘churn’ in the prison system, and achieving better outcomes for offenders and communities.

Conditions for achieving policy success

- 3.13 Respondents were clear that extending the presumption would not, in itself, achieve the policy aims of a reduction in the use of short sentences and / or a reduction in offending. Respondents highlighted the limited impact of the current 3-month presumption in reducing the number of short sentences imposed, and the apparent use of ‘up-tariffing’ to avoid the presumption (i.e. the imposing of longer sentences than would have been the case had the presumption not been in place).
- 3.14 Respondents identified two key factors in achieving success:
- The role of the judiciary in implementing the presumption: Respondents often noted that sheriffs needed to change their sentencing practices. Some suggested that the government might need to take steps to encourage this. Others saw a role for the new Scottish Sentencing Council in providing guidance, training and oversight. A third suggestion focused on the removal of custody from the sentencing options available in summary cases.
 - The availability of adequate and effective services and support in the community: Respondents were agreed that any presumption against short periods of imprisonment had to be accompanied by high quality

¹⁴ Commission on Women Offenders (2012):
<http://www.gov.scot/About/Review/commissiononwomenoffenders/finalreport-2012>

community-based sentences and person-centred interventions, and that sheriffs had to be made fully aware of the options available.

- 3.15 These issues are returned to in Chapter 5 where the concerns of respondents are discussed.

Calls for a more ambitious approach

- 3.16 Although respondents were generally supportive of a move away from the use of short custodial sentences, there was also a strong view expressed by many that extending the current presumption was not ambitious enough. Such respondents called for a broader rethink of the approach to criminal justice and penal policy which would incorporate a movement away from the use of custodial options towards greater reliance on community justice services. They advocated further reflection on the drivers of offending and the nature of rehabilitation and desistance, and the role of prisons in the criminal justice system.
- 3.17 Respondents made frequent reference to the sentiments expressed by the McLeish Commission that the justice system should ‘punish serious offenders, protect the public and rehabilitate offenders’ and that prison should be for ‘those who have committed serious crime and constitute a danger to the public’.¹⁵ In line with these views, respondents argued that there was no reason for non-violent / low risk offenders to be given custodial sentences and / or that no one should be in prison for their own rehabilitation.
- 3.18 Amongst respondents advocating a more substantial shift in approach, there was a wish to see community disposals as the ‘default’ position. There were calls for a system based on defining those offences which should be regarded as normally ‘non-imprisonable’, or a system based on a presumption *in favour of community disposals*.
- 3.19 One individual respondent expanded further on the need to ‘relinquish the paradigm of prison as a last resort’ as follows:

‘This [paradigm] in fact ends up meaning that imprisonment is the default: the back-up which is always available when other ‘alternatives’ do not appear to prove themselves. Under this paradigm prison never has to be proved to work.’

The importance of an evidence-based approach

- 3.20 Respondents frequently backed up their arguments with reference to research evidence, statistics and recommendations from official commissions and reports. They cited, for example, the evidence base on the importance of

¹⁵ Scottish Prisons Commission (2008) *Scotland’s Choice – Report of the Scottish Prison Commission*: <http://www.gov.scot/Resource/Doc/230180/0062359.pdf>

addressing offender needs in order to reduce reoffending, and research findings indicating lower recidivism rates for those given community as opposed to custodial sentences.

- 3.21 Alongside this, respondents also emphasised the importance of ensuring that policy and practice in the area was firmly evidence-based. They stressed the need for further research to understand sentencing decisions and the impact of different sentence types and the need to focus on 'what works' in terms of developing community interventions. There were calls to transfer lessons from the work of the Commission on Women Offenders to all offender groups, and to learn from successful approaches elsewhere (e.g. Belgium, Germany, England and Ireland).

Caveats to support

- 3.22 Some of those who were broadly supportive of extending the presumption nevertheless noted caveats to their position, essentially arguing for a system that continued to take account of the circumstances of individual cases.

Caveats included the following:

- Support was offered on the basis that the policy operated as a *presumption* and not a *ban*.
- There should be defined exceptions, e.g. for violent offenders, including perpetrators of domestic violence and repeat offenders.
- Courts should still be required to take account of the nature of the offence / offender.

- 3.23 A few respondents also stressed that it would be important that the public still perceived justice to be done.

Reasons for disagreeing with the proposal

- 3.24 Those respondents – all individuals – who disagreed with the proposal all expressed similar views. They thought that current sentencing – and the use of community disposals – was too lenient, specifically in relation to persistent offenders and violent offenders. Respondents generally argued for greater use of tougher custodial sentences which they believed would cut crime in the short term by removing offenders from the community and in the longer term by changing offender behaviour and acting as a deterrent.

4 SENTENCE LENGTH ON WHICH THE PRESUMPTION SHOULD BE BASED (Q2)

4.1 Question 2 asked those who agreed that the presumption should be extended to indicate the length of sentence on which they would like to see the presumption based. Three options of 6, 9 and 12 months were offered, and respondents were invited to provide additional comments in support of their views.

Question 2: If you agree that the presumption against short periods of imprisonment should be extended, what do you think would be an appropriate length? 6 months / 9 months / 12 months?

4.2 A total of 44 respondents provided an initial tick-box response at Question 2. Table 4.1 below shows that a large majority of respondents (37 out of 44; 84%) favoured extending the presumption to cover sentences up to 12 months; three respondents (3 out of 44; 7%) favoured an extension to 9 months, and four (4 out of 44; 9%) favoured an extension to 6 months.

Table 4.1: Question 2 – If you agree that the presumption against short periods of imprisonment should be extended, what do you think would be an appropriate length?

	12 months		9 months		6 months		Total	
	n	%	n	%	n	%	n	%
Third sector	9	82%	0	0%	2	18%	11	100%
Local authority and local partnership bodies	12	100%	0	0%	0	0%	12	100%
National public bodies	1	50%	1	50%	0	0%	2	100%
Professional bodies	2	67%	0	0%	1	33%	3	100%
Other organisations	5	100%	0	0%	0	0%	5	100%
Individuals	8	73%	2	18%	1	9%	11	100%
Total	37	84%	3	7%	4	9%	44	100%

The table includes one imputed '6 month' response.

One response was excluded from the analysis as the accompanying comment indicated a misinterpretation of the question.

4.3 Forty-six respondents provided comments relevant to the appropriate length of extension and their views are presented in the following sections which look in turn at support for extensions of 12 months, 9 months and 6 months.¹⁶ A final section looks at other more general comments relevant to the length of sentence on which the presumption should be based.

4.4 The analysis presented focuses on comments specific to the different options offered at Question 2. Respondents often restated points already made in explaining their overall support for extending the presumption (see Chapter 3 above), and these views are not repeated in detail here.

¹⁶ Three respondents who did not support the proposed extension to the presumption provided comments at Question 2 – their comments were general and have been analysed along with Question 1 comments.

Extension to 12 months

4.5 As noted above, the majority of respondents expressed support for extending the presumption to 12 months (see Table 4.1). They offered the following inter-related reasons for their preference:

- Prison should be reserved for those committing serious offences / those posing a risk to the public; those committing less serious / non-violent offences should be given community sentences.
- Cases dealt with under summary procedure were, by nature, less serious and an extension to 12 months, which would align with current sentencing powers in summary cases, was therefore seen as logical.
- An extension to 12 months would avoid the problem of 'up-tariffing' given that longer sentences were outwith the sentencing power of the summary courts.
- An extension to 12 months would provide the greatest opportunity to make a difference and realise the full benefits of any reform in terms of: reducing churn in the prison system; freeing up capacity to work with serious offenders in custody; financial savings and / or releasing resources for developing interventions and services in the community; offender outcomes and reoffending rates.
- An extension to 12 months would encourage more innovative thinking regarding non-custodial options and highlight the need to select tailored community interventions.
- An extension to 12 months would be in line with other progressive developments in the criminal justice field (e.g. initiatives to improve the response to women offenders) and a wider ambition to move away from the use of custodial sentences and reassess the place of prison in penal policy.

4.6 A few respondents explicitly noted that their support for an extension to 12 months took account of and / or assumed continuation of the current practice of early release after serving half the imposed sentence.

Caveats and qualifications

4.7 Respondents offered a number of caveats and qualifications to their support for an extension to 12 months, as follows:

- Any extension to the presumption against short sentences needed to be accompanied by the development and adequate funding of robust community-based alternatives.
- The presumption should be extended beyond 12 months and / or there should be a more radical review of sentencing policy and practice.

- The policy should continue to operate as a *presumption*. Respondents supported the broad policy aim of a shift to community rather than custodial sentences, but wished the courts to continue to be able to consider the circumstances of a case (including the history of the offender and the risk of reoffending) and impose a custodial sentence if deemed appropriate.

Extension to 9 months

4.8 Those favouring an extension to 9 months (three respondents) offered similar views to those supporting an extension to 12 months, but made the following specific points in support of their preference:

- Sentences of less than 9 months were seen as ‘pointless’; they were disruptive to the lives of those affected and did not allow sufficient time for rehabilitation work to be carried out.
- An extension to 9 months would account for the majority of short-term sentences currently handed out.
- An extension to 9 months would offer a balance between avoiding low impact short sentences and retaining the deterrent effect of the threat of a custodial sentence.

Extension to 6 months

4.9 Those favouring an extension to 6 months (four respondents) made the following points:

- An extension to 6 months would be in line with the McLeish Commission’s recommendations.
- An extension to 6 months would take account of two-thirds of current sentences, and three-quarters of sentences in the case of women.
- An extension to 6 months would provide a balance between dealing with the worst and most recurrent summary offenders and other summary offenders where custody was not deemed appropriate; or between achieving the stated policy aims and the need to empower the courts to respond to circumstances of individual cases.
- An extension beyond 6 months may be open to public criticism if it was perceived as being too lenient on offenders.
- Sentences longer than 6 months should only be used in specific circumstances (cases involving violence or significant breaches of peace, for repeat offenders), and should not include time served on remand.

Other general comments on the length of extension

- 4.10 A small number of additional points were made by respondents that were not exclusive to any of the individual options presented. These largely focused on the importance of being guided by the evidence base in revising the presumption, although one respondent specifically thought that there was insufficient evidence to support one option over the others. Other respondents noted the importance of carrying out further work to understand why the current presumption had been ineffective, and monitoring the impact – on sentencing practices, prison populations and outcomes for offenders – of any change introduced.
- 4.11 One additional point made was that the question of how far the current presumption should be extended could not be considered in isolation, without knowing what other steps would be taken alongside this (e.g. in developing and resourcing community-based alternatives).

5 CONCERNS ABOUT EXTENDING THE PRESUMPTION (Q3)

- 5.1 Question 3 in the consultation paper asked respondents to outline any concerns they had about extending the presumption against short sentences:

Question 3: Do you have any specific concerns in relation to a proposed extension of the period covered by the presumption against short sentences?

- 5.2 Sixty respondents (all but two of the respondents) answered this question and the chapter presents an analysis of the comments provided. The views of those agreeing with the proposed extension to the presumption are presented first. The views of those supportive of the move away from the use of custody but expressing reservations about the presumption as a means of achieving that are included in this section. The views of those opposed to extending the presumption are then presented in a separate section.
- 5.3 Many of the points made reflected the views expressed at Questions 1 and 2.

Concerns of those supportive of the proposal / a move away from custodial sentences

- 5.4 The analysis of responses to Question 1 showed that the majority of respondents were in favour of extending the presumption (or supported the principle of moving away from the use of short sentences or custody in general), and all but one of these respondents provided comments at Question 3. Two of these respondents noted simply that they had no concerns. The analysis thus focuses on the views of those respondents who (i) indicated concerns alongside their overall support for the proposed extension, or (ii) indicated support for the principle of moving away from the use of short sentences, but had reservations about the presumption as a means of achieving this.
- 5.5 In many cases, respondents did not discuss specific concerns, but used their response to this question to call for a more fundamental shift in approach to penal policy in general and the use of custody in particular. These points are covered in Chapter 3 and are not covered again here.
- 5.6 Most of the concerns of those who were broadly supportive of the proposal focused on the need to address potential obstacles to achieving the aims of the policy. There were two prominent themes in the responses: the role of the judiciary; and the need to develop and fund robust alternatives to custody. These two issues are linked, but are discussed separately below, before summarising other points raised by respondents.

The role of the judiciary

- 5.7 Respondents were concerned that the current 3-month presumption had had only limited impact on sentencing practices, and that this would continue unless other factors were addressed. Respondents were particularly concerned that the following practices might be used to avoid the presumption:
- Up-tariffing – the practice of imposing longer sentences to avoid the presumption had been observed as a feature under the current presumption
 - Remitting cases to a higher court with greater sentencing powers
 - The Police and Procurator Fiscal Service storing up offences to increase the chance of a custodial sentence being imposed on an individual
 - Increased use of remanding individuals in custody as a way of imposing a period in custody.
- 5.8 There was also concern about the possibility of increased requirements being attached to community sentences, leading to an increased chance of breaches.
- 5.9 Some respondents doubted that the presumption could be successful while the summary courts retained the power to impose a custodial sentence. Others, however, emphasised the need for ‘guidance, training and oversight’ for the judiciary with a view to encouraging the use of community sentences, and many saw this as a role for the new Scottish Sentencing Council.
- 5.10 Respondents also thought it was important that sentencers were fully aware of local interventions and services. Directories of services and court liaison staff were specific suggestions for ensuring that courts were well informed and advised.
- 5.11 There was, however, a less commonly expressed view that it was important for the courts to retain the flexibility to award a custodial sentence in appropriate circumstances.

Providing robust alternatives to custodial sentences

- 5.12 Respondents frequently stated that the success of the presumption depended on the availability of a range of robust, adequately funded, evidence-based community alternatives to custodial sentences. This was seen as crucial in order to gain the confidence of the public and the judiciary and to bring about changes in sentencing practices.
- 5.13 Respondents sought assurances about the provision of additional resources and / or the transfer of resources from SPS to allow for the necessary

planning, development and expansion of community services. There were several calls for a transfer of resources in advance of the introduction of any extended presumption.

- 5.14 There was a specific concern that under-resourced community services would lead to poor outcomes for offenders and communities, and thus undermine the case against using short sentences.
- 5.15 Respondents were keen to see the development of a wide range of community justice services and interventions. They stressed the importance of a whole system strategic approach incorporating features such as:
- Partnership working
 - Early intervention, preventative work and diversion from prosecution
 - A wide range of person-centred interventions to address offender needs
 - Greater use of options such as electronic monitoring, restriction of liberty orders, and / or restorative justice.
- 5.16 Respondents also emphasised the importance – and the associated resource requirements – of carrying out full and effective needs and risk assessments prior to sentencing, and of subsequent management and supervision of those undertaking community sentences. Some suggested that greater use of review hearings had a part to play in managing offenders given community sentences.
- 5.17 Third sector agencies also highlighted the need to (i) consider the role that non-statutory as well as statutory services could play in meeting offender needs, and (ii) recognise and address the negative impact of short-term funding on voluntary sector projects and programmes.
- 5.18 Respondents emphasised the importance of adopting effective, evidence-based interventions and services. There were calls for initial mapping work, strategic planning, and piloting and evaluation of community options.

Other concerns expressed by respondents

- 5.19 A number of other concerns were also expressed, each put forward by a few respondents only. These included the following:
- **Public safety:** There were some concerns expressed about increased risk to public safety and the need to ensure that any increase in use of community disposals also incorporated adequate protection for the public, and victims of crime in particular. There were particular concerns about protecting victims of domestic violence (see paragraph 3.5. above). Respondents stressed that any increase in use of community disposals would have to take full account of the need to protect public safety and

provide respite for communities through appropriate measures such as electronic monitoring and restriction of liberty orders. Two respondents expressed explicit concerns that a presumption based on either (i) sentence length rather than offence / offender characteristics or (ii) a 12-month minimum in particular was too crude and risked encompassing too many cases involving a risk to public safety.

- **Public perceptions:** Several respondents stressed the importance of taking account of public perceptions and ensuring that people understood the rationale for greater use of community disposals and did not see it as representing a 'soft' approach to crime. The importance of providing victims of crime with reassurance and adequate information was specifically noted.
- **Compliance with community sentences:** Two points were made: (i) in order to be credible, an increased use of community sentences would need to be accompanied by increased efforts to ensure compliance; and (ii) any breaches of community sentences would require a robust and consistent response. There were, though, mixed views on whether breaches should also be covered by any presumption against short sentences. Although some felt this may provide grounds for imposing a custodial sentence, respondents more commonly thought that the seriousness / public protection test should still have to be met. In addition, one respondent argued that reoffending while serving a community sentence should not be treated as a breach of the order.

Concerns of those opposed to the extension

5.20 The minority of respondents (all individuals) opposed to extending the presumption against short sentences all outlined concerns at Question 3. Their concerns reflected points made in response to earlier questions and focused on:

- The removal of the punishment and perceived deterrent effect provided by prison and the adverse impact this might have on offending rates
- The perceived inappropriateness of community disposals for some offenders (violent offenders, including perpetrators of domestic violence, repeat offenders, those whose offending was linked to alcohol) and the need to protect victims
- Scepticism about the community-based alternatives that would be available
- The inability of offenders to pay fines (seen by respondents as the main alternative to prison).

6 CONSIDERATION OF SPECIFIC CIRCUMSTANCES IN IMPOSING A CUSTODIAL SENTENCE (Q4)

- 6.1 Question 4 of the consultation asked about what consideration a sentencing judge should give to specific circumstances in imposing custodial sentences:

Question 4: Do you think there are any specific circumstances to which a sentencing judge should be required to have regard to when considering the imposition of a custodial sentence?

- 6.2 Fifty-eight respondents offered comments at Question 4. In many cases respondents used the question to discuss the circumstances which they thought were important for sentencing judges to consider without explicitly stating that they thought judges should be *required* to have regard to them.
- 6.3 Organisational respondents often implied that many specific circumstances were already taken into account by a sentencing judge, whose role was to weigh and balance a large number of factors (including retribution, deterrence, protection, rehabilitation, reparation etc.) in reaching a conclusion about whether or not to impose a custodial sentence. Sometimes, but by no means always, organisations listed the circumstances and factors which they saw as relevant to sentencing. In contrast, individuals were more likely to simply list the entire range of factors that they thought were relevant to a decision to impose a custodial sentence. Despite this difference in approach, there was a great deal of commonality in the answers given by organisations and by individuals.
- 6.4 Two factors were mentioned repeatedly across all respondent subgroups – these were (i) the seriousness of the offence, the harm caused and the associated ongoing risk to public safety; and (ii) the impact on dependent children. Other factors (see paragraphs 6.10–6.16) were mentioned on a widespread basis, but not so frequently. A third group of factors (see paragraph 6.17) were each mentioned by a few respondents. Each of these is looked at in turn in the following sections. A final section in the chapter looks at other comments relating to sentencing decisions.

Seriousness of offence and risk to individual / public safety

- 6.5 Respondents across all subgroups were clear that a custodial sentence should be imposed if serious harm had been caused and / or there was a continuing risk to individual and / or public safety. If no such risk could be identified then respondents were of the view that a community sentence would be more appropriate.
- 6.6 Respondents sometimes raised this point in relation to the type of offence, particularly in relation to domestic abuse and domestic violence. These were highlighted as offences which would require the judge to give consideration to a custodial sentence.

Impact on dependent children and families

- 6.7 The importance of taking into account the impact of a custodial sentence on any dependent children – and families more generally – was raised repeatedly across all subgroups. Respondents sometimes said that they felt that the impact on dependent children was not always fully taken into account at present. It was thought that a more robust assessment of impact on dependent children, based on GIRFEC (Getting It Right For Every Child) principles, was required.¹⁷ Several respondents highlighted the principles contained in the United Nations Bangkok Rules in relation to the sentencing of women with dependent children.¹⁸
- 6.8 Many of the comments about dependent children were made in the context of concern about the treatment of women within the criminal justice system, although taking account of the family circumstances of men was also mentioned occasionally.
- 6.9 A few respondents suggested the use of family or child impact assessments as part of the sentencing process.

Other circumstances mentioned on a widespread basis

- 6.10 Other factors and circumstances mentioned by respondents related to the impact on the offender, and the impact on the victim.

The impact on the offender

- 6.11 Respondents highlighted a range of personal and social characteristics and vulnerabilities which they thought should be taken into account in sentencing convicted offenders. Most commonly respondents focused on gender, and called for consideration of alternatives to custody for women. They highlighted the disproportionate impact that a custodial sentence could have on women, whose offending was often low level and related to personal and social circumstances (previous abuse, addictions, poverty and inequality, mental illness and self-harm etc.), and the potential benefits of community disposals.
- 6.12 Both organisations and individuals whose main concern was with the treatment of women within the criminal justice system suggested that the sentencing judge should ask the question ‘Is this in the public interest? Is a custodial sentence more or less likely to reduce the chance of reoffending?’
- 6.13 Age, mental and physical health, learning disabilities, addictions etc. were other factors noted by respondents as relevant to sentencing.

¹⁷ *Getting It Right For Every Child* (GIRFEC) is the Scottish Government’s policy framework for improving the wellbeing of children and young people: <http://www.gov.scot/Topics/People/Young-People/gettingitright>

¹⁸ *The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders* (the ‘Bangkok Rules’) (2010): <http://www.un.org/en/ecosoc/docs/2010/res%202010-16.pdf>

- 6.14 Respondents highlighted the need to take account of the likely impact of a custodial sentence on the individual and their social and community ties, e.g. accommodation, employment, social networks, all of which were seen as important to desistance. Several respondents referred to the ‘revolving door’ of repeated short-term prison sentences and highlighted the importance of breaking away from this pattern.
- 6.15 There was a general consensus across subgroups that a custodial sentence should not be imposed in order to meet personal or social needs or to provide rehabilitation for an individual. It was thought that this principle should be promulgated through guidance.

Impact on the victim

- 6.16 The vulnerability of the victim and the impact on them were thought to be important factors in determining whether a custodial sentence should be imposed. Several organisations called for the use of a victim impact statement or similar mechanism.

Factors mentioned on a more limited basis

- 6.17 A large number of more specific factors and circumstances were raised by a few respondents only. These covered:
- The criminal history of the offender – e.g. whether the crimes committed are of increasing seriousness and whether the individual has a history of violence
 - The potential deterrent impact of a custodial sentence
 - The attitude of the offender towards their behaviour and towards engaging with community-based programs in the past
 - The human rights of the offender
 - The impact on the public purse.

Sentencing decisions and the wider criminal justice system

- 6.18 Several respondents stressed the importance of a judge having access to (i) a criminal justice social work (CJSW) report containing a comprehensive account of all relevant factors and a full risk assessment and (ii) the full range of community options. Respondents also argued that:
- A custodial sentence should never be imposed solely because of a lack of availability of non-custodial alternatives.
 - A custodial sentence should not be imposed if the needs of the offender can be better met in the community.
 - A custodial sentence should only be imposed if all community-based alternatives have been considered.

- 6.19 While one respondent said there should be no restrictions on a judge's options, another (a local authority / partnership body) suggested that the 'burden of proof' should be altered from 'why an alternative to custody is suitable' to 'why an alternative to custody is not suitable'. It was thought this was needed to bring about the changes which were being looked for.
- 6.20 Respondents also wished to see additional support for sentencers. Some suggested the development of an 'information hub' so that judges could assess the alternative options available. Others saw the introduction of the Scottish Sentencing Council as a welcome development. They thought the Scottish Sentencing Council could play an important role in providing guidance on sentencing – they drew attention to the provision of sentencing guidance in England and Wales – and reducing the use of custodial sentences.
- 6.21 Some respondents reiterated their overall views on the need for clarity about the role of imprisonment in the criminal justice system, and for individual sentencing decisions to be guided by this.

7 OFFENCES TO WHICH THE PRESUMPTION SHOULD NOT APPLY (Q5)

- 7.1 Question 5 in the consultation document asked for views on any offences to which the presumption against imposing a short custodial sentence should not apply:

Question 5: Do you think there are specific offences to which the presumption should not apply (i.e. offences which could still attract a short custodial sentence)?

- 7.2 Fifty-five respondents answered this question. However, the comments provided by respondents indicated that not all had answered the question in the same way. Whilst the question asked about 'offences which *could* still attract a short custodial sentence', it appeared that a substantial minority of respondents took the question to mean 'are there specific offences which should *automatically* attract a short custodial sentence'. This rather different interpretation needs to be borne in mind when considering the responses.
- 7.3 Nine respondents simply answered 'No', without expanding further. Analysis of the comments submitted by other respondents, however, identified two main themes in relation to this question: (i) the importance of judging each case on its merits, and not identifying specific categories of offences which should be exempt from the presumption; and (ii) the identification of crimes involving violence against a person – and particularly sexual violence against women – as offences which could (or indeed should) attract a short custodial sentence. These are discussed in turn below.

Opposition to exemption of specific offences from the presumption

- 7.4 Respondents of all types expressed the view that no specific offences should be exempt from the presumption against short custodial sentences.
- 7.5 Respondents commonly argued that judgements should be made on a case by case basis, taking account of circumstances such as: the nature of the offence and the pattern of offending; the personal characteristics, attitudes, motivation and previous convictions of the offender; compliance with previous community sentences; the likely impact on reoffending; and the interests of, and risks to, the victim and the wider community. Some respondents highlighted the importance of judicial discretion in balancing competing concerns and noted that the present presumption allowed this.
- 7.6 A few respondents noted that developing a list of excluded offences would be problematic and would raise issues of credibility and sustainability over time.
- 7.7 Other respondents emphasised their general opposition to the use of short custodial sentences, and stated that:

- There are no circumstances in which a short custodial sentence is beneficial.
- The burden of proof should be on why a custodial sentence is appropriate.
- Short sentences are, by definition, for non-violent, non-serious offences and such cases should be diverted to alternatives.

Exemption of offences involving violence

- 7.8 Respondents across all subgroups expressed the view that offences involving violence should be exempt from the presumption against short custodial sentences. Individuals and organisations with a focus on women were particularly likely to express this view.
- 7.9 Whilst some respondents talked in general terms about ‘violence to a person’, most discussed this category of offences in the context of violence against women, and specifically sexual violence and domestic abuse. It was thought that this type of offender could not be managed within the community and that a (short) custodial sentence would therefore be appropriate.

Exemption of other types of offences

- 7.10 Some respondents argued that ‘serious’ offences should be excluded. Other more specific offence types were also mentioned. These included:
- Theft, housebreaking, burglary, fraud
 - Offences against children and vulnerable adults
 - Hate crimes
 - Assaults on members of the emergency services
 - Animal cruelty / wildlife offences
 - Drink driving, extreme speeding, and serious road traffic accidents.

Other (wider) points raised

- 7.11 A few respondents suggested that this was a question which should be directed towards the Scottish Sentencing Council, which could provide guidance. For one ‘other’ organisational respondent the context for this was that the ‘presumption against’ did not represent a permanent solution to the question of short custodial sentences. One respondent argued for a second consultation on this question at a later date.
- 7.12 A few respondents also used this opportunity to emphasise the importance of developing different approaches and more robust alternatives to custody, and to reiterate the importance of full up-to-date reports being available to support the decision-making process.

8 CIRCUMSTANCES IN WHICH A CUSTODIAL SENTENCE SHOULD NEVER BE CONSIDERED (Q6)

- 8.1 Question 6 in the consultation document asked about any circumstances in which a custodial sentence should never be considered:

Question 6: Do you think there are any circumstances in which a custodial sentence should never be considered?
--

- 8.2 Fifty-six respondents offered views at Question 6. Most identified specific circumstances in which a custodial sentence should never – or should not normally – be considered. The views of this group are presented below, followed by the views of those who did not identify circumstances in which custodial sentence should not be considered.

Views of those specifying circumstances

- 8.3 The circumstances in which respondents thought a custodial sentence should not be considered fell into a number of (sometimes overlapping) categories: the economic, social, and health and wellbeing circumstances of the offender; demographic subgroups; offence types; and wider criminal justice concerns. These are discussed in turn below.

Social and economic circumstances of offenders

- 8.4 Respondents (both individuals and organisations) identified a range of social and economic circumstances as making a custodial sentence inappropriate. They identified the following groups who they thought should not be given custodial sentences: people with caring responsibilities; people in poverty or without the financial resources to care for children and families; people working in the sex industry; people with mental health and behavioural problems, including those where a compulsory treatment order is required; people with drug and alcohol problems; people with disabilities and / or physical health conditions; and people who are otherwise vulnerable or at risk.

Demographic subgroups

- 8.5 The demographic subgroups identified by respondents as being inappropriate for the consideration of a custodial sentence were: women, pregnant women, transgender people, and young people (under 18 or under 25). One third sector respondent argued specifically that no one aged under 18 should be held in custody, and that the GIRFEC principles should be followed when dealing with young people in the criminal justice system.

Offence types

- 8.6 The types of offence which respondents identified as being unsuitable for the consideration of a custodial sentence included: minor offences; non-violent

crimes or crimes where no serious harm was caused or there was no serious risk to the victim or the community; first offences; and offences related to addictions, and other health and social problems. Those identifying more specific offences suggested the following: minor assaults; minor public order offences, stealing or shoplifting, especially involving low value items or where the offence was motivated by the need to feed a family; fraud; and not wearing a seat belt. One national public body urged further consideration of the use of custodial sentences for minor drug offences as a separate matter.

- 8.7 Respondents were also often opposed to custody for non-payment of fines and financial penalties (parking tickets, council tax demands, speeding etc.).

Wider criminal justice concerns

- 8.8 There were a number of scenarios related to wider criminal justice concerns which respondents thought should never lead to the consideration of a custodial sentence. One respondent argued simply that a custodial sentence should only be used if it was 'in the public interest'. Others described situations where community alternatives have not been exhausted; where the individual is already responding to community interventions; where the individual can be successfully managed in the community; and situations where the individual has been on bail. Respondents also argued that the absence of community-based services should never provide the justification for a custodial sentence.
- 8.9 In offering their views on the circumstances in which custodial sentences should not be considered, some respondents referred to the role of the judiciary in delivering this. Two points were made: that the onus should be on the court to explain why the use of custody is essential in any case; and that an approach based on specifying circumstances in which custody should not be used may not be realistic if 'sheriffs are against it'.

Views of those not specifying circumstances

- 8.10 Those respondents not outlining circumstances in which custodial sentences should not be considered offered three different views:
- Some restated their support for the principle that custody should be reserved for serious offences / offenders and cases involving risk to public safety, and should not be used where it might 'do more harm than good'.
 - A few respondents expressed reservations about specifying circumstances: they argued that 'every case is different'; or emphasised the importance of not limiting the decision-making of the sentencing judge.
 - Two (individual) respondents thought that there were no circumstances in which a custodial sentence should never be considered; for these respondents the decision whether or not to impose a custodial sentence would depend on the previous convictions.

9 LEGISLATIVE MECHANISMS TO DIRECT THE USE OF REMAND (Q7)

- 9.1 Question 7 in the consultation document asked whether the Scottish Government should also consider legislative mechanisms to direct the use of remand:

Question 7: Do you think that the Scottish Government should also consider legislative mechanisms to direct the use of remand? If so, do you have any views on what such a legislative mechanism might include?

- 9.2 Fifty-five respondents provided comments at this question. Respondents were, however, more likely to discuss their views on the use of remand in general – and in particular their wish to see the use of remand reduced – than to discuss issues relevant to legislative mechanisms for directing its use.
- 9.3 Notwithstanding this comment, the responses to this question addressed four key themes, namely: the rationale for the use of remand; concerns about the current use of remand; alternatives to remand; and legislative mechanisms. These are discussed in turn below.

The rationale for the use of remand

- 9.4 The views of respondents on the use of remand very much reflected their views on the use of short-term prison sentences. They generally thought remand should be reserved for serious offences and cases involving serious risk for individuals and / or communities. They noted that, as with other short periods in prison, remand disrupted lives and had a negative impact on individuals, children and families; it also exposed individuals to criminal behaviours while providing little in the way of treatment and rehabilitation.
- 9.5 A substantial minority of respondents, particularly those from third sector organisations as well as some individuals, argued that remand was inappropriate for certain groups of vulnerable individuals: e.g. the homeless or those of ‘no fixed abode’, those with addictions, and those with mental and other health problems. Respondents were particularly concerned about women being placed on remand, and drew attention to the provisions of the Bangkok Rules in this area.
- 9.6 Respondents identified a range of specific circumstances in which they thought remand was justified. These included
- Cases involving issues of public protection
 - Cases involving serious harm or violence
 - Cases in which victims and / or witnesses required reassurance or protection – domestic violence cases were particularly noted
 - Cases in which there was a serious risk of the individual ‘taking flight’

- When other community-based options had previously been unsuccessful.
- 9.7 Even in these cases it was thought the period of remand should be as short as possible, with the time between arrest and trial reduced. Moreover it was important to make sure that any extension of the presumption against short custodial sentences did not result in an increased use of remand.
- 9.8 A few respondents offered fuller comment on the rationale for using remand in particular as follows:
- One third sector organisation discussed the important role of remand in relation to protecting the interests of victims, witnesses and the public as follows:

‘...appropriate use of remand plays an essential role in the protection of victims, witnesses and members of the general public. The period of time after a person has been charged with an offence can be particularly dangerous for victims and witnesses, who may be at risk of intimidation and retaliation. The protection of victims and witnesses should be a prominent factor in deciding whether or not the accused person should be remanded. Engagement with victims and witnesses should occur to ensure that an adequate risk assessment is conducted. In addition, the victim’s safety concerns should be discussed with the victim to ensure that they are informed of the status of the offender and that adequate protection is in place.’
 - One professional body stressed that the only legal grounds for using remand was to ensure attendance at court without further offences being committed.
 - One organisational respondent (categorised as ‘other’) made the point that there is no single organisation with responsibility for remand. The implication of this was that this had led to a deficit in understanding the rationale for the use of remand.

Concerns about the current use of remand

- 9.9 Respondents from all subgroups expressed concern about the current use of remand. They were firmly of the opinion that too many individuals were currently remanded into custody and that the use of remand must be reduced. There were frequent references to the fact that it was common for those remanded in custody to not receive a prison sentence following conviction, and frequent citing of statistics providing evidence on this. Respondents also made repeated reference to Scottish Government reports and commissions, including the McLeish Commission, which called for reductions in the number of accused held on remand.
- 9.10 Respondents also voiced some more specific concerns, based on their perceptions of how remand was currently used:

- Remand was, too often, used unnecessarily as a way of responding to the needs of the accused, or as a way of providing public protection or respite when other community-based options could fulfil the purpose.
- The current high use of remand, like the current high use of short custodial sentences, reflected a failure to properly invest in alternative arrangements.
- Remand was, reportedly, used in some instances to give a ‘taster of punishment’ and sheriffs should be dissuaded from this.

9.11 The following additional points were also made by respondents:

- Those held on remand were generally not able to access programs available to those serving sentence following conviction, and this should be addressed (see paragraph 9.19). However, respondents also wished to emphasise the difference between being in custody on remand and being in custody serving a sentence (in that those on remand have not been convicted of any crime).
- The need for remand and the need for a custodial sentence on conviction (and the length of sentence imposed) should be considered separately.

Alternatives to remand

9.12 Respondents from all subgroups thought that alternatives to remand were underused. They thought that the needs of the accused and the demands of public / victim safety could be met through the appropriate use of community measures. Respondents referred to a range of options which might be used in place of remand. These included various forms of supervised bail, electronic monitoring, curfews, restrictions on movement, bail hostels and alcohol bracelets – respondents called for the use of such measures to be combined with appropriate management and supervision and the provision of relevant services and interventions. Respondents stressed that full needs and risk assessments would have to be undertaken to allow this to happen safely and effectively, and that CJSW services would need to be properly resourced to do this.

9.13 Respondents from third sector, local authority and partnership bodies, and ‘other’ organisations quoted figures on the use of supervised bail in Scotland which demonstrated highly variable use across the country. Respondents said it was not clear why these disparities existed and it was thought this should be addressed. It was thought that bail supervision schemes could be effective in dealing with many more individuals, and there were calls for more consistent provision and resourcing of such schemes.

9.14 Whilst there was widespread support for greater use of alternatives to remand, some organisations focused on concerns related to domestic violence and made the point that in these cases the use of electronic

monitoring may not always be appropriate. In these circumstances the importance of protecting both the victim and the accused was noted.

Legislative mechanisms

9.15 Respondents offered a range of views on the need for legislation to direct the use of remand. Some thought that legislation was required, while others favoured other means to bring about change in practice.

9.16 Two different views were offered by justice bodies in Scotland. One national public body stressed that legislation on its own would not be sufficient to bring about change, while the view of one professional body was that necessary legislative mechanisms were already in place. They gave their views as follows:

‘Legislative mechanisms alone would not be enough to change how remand is used in Scotland. Rather this would require a ‘whole system’ approach involving the key agencies involved in the justice process.’

‘The legislative mechanism referred to in the question is already in place [via the Criminal Procedure (Scotland) Act 1995] and accordingly any future legislation emanating from this consultation should not impact on this.’

Another individual respondent with a professional role in the justice system suggested that the criteria set out in the Criminal Procedure (Scotland) Act 1995 had led to an increase in the use of remand and should be revisited.

9.17 Those advocating legislation put forward two options. A range of respondents, including individuals, third sector, and ‘other’ organisations, discussed the recent introduction of legislation in England and Wales which appeared to have reduced the use of remand.¹⁹ This had introduced a test of ‘no real prospect of custody’ arising at the trial. Respondents suggested that the Scottish Government should learn from this and consider introducing something similar. An alternative suggestion was that of legislating to remove remand as an option in the summary courts.

9.18 Those favouring other means of achieving change in the use of remand suggested mechanisms such as policy directives, training for the judiciary or, most commonly, guidance issued by the Scottish Sentencing Council.

9.19 Some respondents also made suggestions about specific remand-related issues which might be covered in legislation:

- Legislation should require that electronic monitoring be assessed and demonstrated impractical before remand in custody can be imposed.

¹⁹ Bail Act 1976 18 Schedule 1, Part 1, Section 3 (amendment introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012).

- Legislation could be used to ensure that remand can only be considered where an offence is prosecuted under solemn (not summary) procedures and / or where the risk of harm to the public is assessed as serious.
- Legislation (or perhaps guidance) would be useful to keep remand and convicted offenders separate, and to allow remand prisoners access to treatment programs and services. (This was currently not the case.)

10 OTHER COMMENTS ON THE USE OF SHORT-TERM IMPRISONMENT (Q8)

10.1 Question 8 in the consultation document asked whether respondents had additional comments on the use of short-term imprisonment:

Question 8: Do you have any additional comments on the use of short-term imprisonment?

10.2 Forty-seven respondents provided additional comments at Question 8. In their responses, many respondents restated points that they had already made earlier in their responses. The main points which respondents recapped were that:

- There needs to be additional resources for community alternatives to short-term imprisonment. In many cases, respondents talked about a transfer of resources from the prison sector. This was linked to a view that sentencing judges needed to have the full range of community options available to them and that there should be a presumption in favour of community sentences for all non-serious non-violent crimes.
- Short-term prison sentences are not effective as a means of reducing offending; they are also extremely expensive when compared with community alternatives. Community sentences have better outcomes than short-term prison sentences and sheriffs should have regard to the public purse and value for money when deciding what sentence to impose.
- Custodial sentences should only be used to reduce the risk of serious harm to (a) person(s) or to a community. Prison is never appropriate as a means of dealing with people's personal, social, or health needs. It is particularly unsuitable for women, especially those with caring responsibilities and / or dependent children.
- Greater use should be made of social work / CJSW reports and review hearings when considering the best option for an individual offender, and managing community sentences imposed.
- The Scottish Sentencing Council should be charged with issuing guidance and identifying best practice in relation to the use of short prison sentences.
- Each case is unique and should be considered on its merits by the sentencer. A blanket approach is not appropriate.
- The Scottish Government should be tougher on all types of crime, and those convicted of crimes should be given tougher sentences.

- 10.3 Respondents also referred to initiatives in other countries which they suggested might provide lessons for Scotland.²⁰ These included:
- America – where programmes specifically aimed at women offenders provide community-based alternatives to prison
 - Belgium – where the Police have established Young People’s Units which combine training in enforcement with wider social work and child development qualifications have been developed
 - Finland – where the law envisages that all sentences up to two years will be commuted to intensive forms of community supervision
 - Germany – where sentences of under 12 months are suspended.
- 10.4 As far as further research was concerned, it was suggested that more evidence (and better dissemination) was required in relation to sentencing, community-based practice, and desistance from offending in order to improve understanding amongst practitioners.
- 10.5 Finally, there were also calls for the public to be better informed about the negative social and financial consequences of short-term imprisonment, and the rationale for using community disposals. Some respondents referred to this as the need for a ‘public information campaign’ whilst others couched the requirement in more general terms.

²⁰ This analysis project did not involve verifying the relevance and / or effectiveness of any initiatives cited by respondents.

ANNEX 1: ORGANISATIONAL RESPONDENTS

Local authorities and local partnership bodies (13)

- Aberdeenshire Alcohol and Drug Partnership
- Aberdeen City Council
- Aberdeenshire Council Adult Services
- Argyll, Bute and Dunbartonshire Criminal Justice Social Work Partnership
- City of Edinburgh Council
- Community Justice Authorities – joint response
- Cosla
- Falkirk Council
- Glasgow Community Justice Authority
- Midlothian Community Safety and Justice Partnership
- Perth and Kinross Council
- Scottish Borders Community Justice Group
- West Lothian Council

Third sector agencies (15)

- Apex Scotland
- Barnardo's Scotland
- Criminal Justice Voluntary Sector Forum
- Edinburgh Cyrenians
- Families Outside
- Howard League Scotland
- Positive Prison? Positive Futures...
- Prison Reform Trust
- Recruit with Conviction
- Sacro
- Scottish Women's Aid
- Scottish Women's Convention
- Up-2-Us
- Victim Support Scotland
- The Wise Group

Professional bodies (3)

- Law Society of Scotland
- Scottish Association of Social Workers (SASW) (part of BASW)
- Social Work Scotland

National public bodies (3)

- HM Chief Inspector of Prisons for Scotland
- NHS Health Scotland
- Scottish Courts and Tribunal Service

Other (8)

- Centre for Youth and Criminal Justice
- Scottish Consortium on Crime and Criminal Justice
- Women for Independence Angus Branch
- Women for Independence Glasgow East End Branch
- Women for Independence
- Joint Faiths Board on Community Justice
- Quaker Peace & Social Witness: Crime, Community and Justice Sub-Committee
- Scottish Working Group on Women Offenders

Total number of organisational respondents: 42

ANNEX 2: NUMBER OF RESPONSES TO INDIVIDUAL CONSULTATION QUESTIONS

	Consultation question	Number of responses received	% of all 62 responses
Q1	Should the presumption against short periods of imprisonment of three months or less be extended? (Yes / No)	58*	94%
	You may wish to provide information to support your views, for example, what do you consider to be the key factors for or against the proposal?	59	95%
Q2	If you agree that the presumption against short periods of imprisonment should be extended, what do you think would be an appropriate length? 6 months / 9 months / 12 months?	44*	71%
	Comments	46 ⁺	74%
Q3	Do you have any specific concerns in relation to a proposed extension of the period covered by the presumption against short sentences? Comments	60	97%
Q4	Do you think there are any specific circumstances to which a sentencing judge should be required to have regard to when considering the imposition of a custodial sentence? Comments	58	94%
Q5	Do you think there are specific offences to which the presumption should not apply (i.e. offences which could still attract a short custodial sentence)? Comments	55	89%
Q6	Do you think that there are any circumstances in which a custodial sentence should never be considered? Comments	56	90%
Q7	Do you think that the Scottish Government should also consider legislative mechanisms to direct the use of remand? If so, do you have any views on what such a legislative mechanism might include? Comments	55	89%
Q8	Do you have any additional comments on the use of short-term imprisonment? Comments	47	76%

*Includes imputed responses.

+Excludes responses from three respondents who did not support the proposed extension to the presumption – their comments were general and are analysed along with Question 1 comments.



© Crown copyright 2016

OGL

This publication is licensed under the terms of the Open Government Licence v3.0 except where otherwise stated. To view this licence, visit nationalarchives.gov.uk/doc/open-government-licence/version/3 or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: psi@nationalarchives.gsi.gov.uk.

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

This publication is available at www.gov.scot

Any enquiries regarding this publication should be sent to us at
The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

ISBN: 978-1-78652-156-9 (web only)

Published by The Scottish Government, March 2016

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA
PPDAS67548 (03/16)

W W W . G O V . S C O T