SPARC Response to Parole Reform in Scotland: A consultation on proposals for legislative change - 13th October 2017

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About SPARC

SPARC (Scottish Prisoner Advocacy and Research Collective) is a research and advocacy collective who campaign for reform in the use of imprisonment. Our method is political and academic, drawing on rigorous research and insider perspectives of prisons in Scotland to reduce excessive use of punishment.

Who we are: SPARC comprises people inside and outside of prisons who are researchers, social justice advocates and people with experience of imprisonment. The diversity of our perspectives has been missing in contemporary prison debates, as has a grassroots strategy of pursuing penal change. These both are necessary for achieving meaningful penal reform in Scotland.

Why prison reform?: Scotland has one of the highest imprisonment rates in western Europe, despite the absence of evidence demonstrating that the use of imprisonment reduces crime or makes community safer. Moreover, prison is an inherently harmful institution: it damages imprisoned people; it disrupts and burdens their families; it disintegrates communities. An excessive reliance upon imprisonment undermines civic life, and many damaging aspects of life in prison remain hidden from public view. Therefore, its use must be regularly scrutinized, reviewed and justified.

What we do: We conduct research and advocacy through collective action. Our work aims to expose injustices within the prison system and highlight alternative practices which can contribute to a more socially just Scotland.

You can find out more about SPARC at:
https://scottishprisoneradvocacy.wordpress.com/about/

We have provided answers to the following questions:

- Governance of the parole board: 4, 7, 9
- Tests that the parole board apply in determining whether to release: 11
- Timescales for subsequent reviews following initial consideration for parole: 12
- Way in which information is supplied to the parole board: no questions answered
- Administrative Procedures for Considering Cases: 14, 20, 21, 22

Governance of the parole board

4. Prescribed membership of the Parole Board

Currently membership of the Parole Board must include a Lord Commissioner of Justiciary, a registered medical practitioner who is a psychiatrist, a person appearing to Scottish Ministers to have knowledge and experience of the supervision or aftercare of discharged prisoners and a person appearing to have made a study of the causes of delinquency or treatment of offenders.

We believe that in practice, as the number of members has grown to meet demand, the wide experience, knowledge and skills of Parole Board members has lessened the need for specific experience and knowledge to be prescribed.

We propose to review the requirement that membership of the Parole Board includes certain prescribed members.

Question 4: Do you agree that the current requirements regarding the membership of the Parole Board should be reviewed?

Yes

Question 4a: Please give reasons for your answer to Question 4

The current membership requirement of a psychiatrist is out of step with contemporary understanding about the best means of assessing a person's readiness for release. The dominance of psychiatric knowledge in criminology (traced to the 19th century and beginning to fade by the 1970s at the latest) has given way to much more multi-disciplinary contributions from fields such as sociology, public health, social work, education and community development. This is not a recommendation of any particular designation of medical or other 'offender' expert on the panel but to indicate that the narrow understanding of criminal offending in terms of psychiatric frames is quite a dated one. We also would reject designation of an expert from or certified by the RMA as a replacement of the 'psychiatrist' role on the Parole Board.

7. Setting licence conditions for extended sentence prisoners

Where a person receives an extended sentence and the custodial part of that sentence is less than four years but the extension period results in a total combined sentence above four years, Scottish Ministers may only impose licence conditions, as recommended by the Parole Board.

In the majority of other cases involving a custodial sentence which is less than four years, the responsibility for setting licence conditions lies with Scottish Ministers alone. In neither case does the Parole Board have a role in the decision to release the prisoner.

We propose that the Parole Board no longer recommend licence conditions in such cases. Instead we propose that Scottish Ministers would set licence conditions in these cases. The Parole Board would still be required to provide advice to Scottish Ministers should the Scottish Ministers request it.

Question 7: Do you agree that for extended sentence prisoners where the custodial part is less than four years, the Parole Board no longer recommends licence conditions and that Scottish Ministers should set licence conditions for those prisoners?

No

Question 7a: Please give reasons for your answer to Question 7

It is not clear what the effect of this transfer would be, the reasons for proposing it, nor the practical implications this would have for who provides recommendations as to licence conditions, and the lack of transparency in the phrasing of this question is disappointing. 'Scottish Ministers' is likely to mean an increase of discretionary power for either or both the SPS or CJSW. While there may be good reasons for this, these need to be spelled out. Our overriding concern is to address the significant decline in release recommendations by the Parole Board for both determinate and particularly for indeterminate sentences and the increase in recall rates. Granting of parole has declined significantly over time as the table shows: life sentenced prisoners in 2015-16 had only a 12% chance of release compared with life sentenced prisoners in the mid-1990s who had nearly a 1 in 3 chance of being granted parole. In addition, the Scottish Prisons Commission (2008) Report reported that 'Astonishingly, the number of people recalled on licences has soared by nearly 1,000%' between 1997/8 and 2006/7 (2008, p.12). This is the main concern that any reform of parole should be driven by. There is no evidence that the nature of crimes committed in more recent times is of a categorically more severe nature than crimes committed 20 years ago, nor that the people who are committing serious offences now are somehow of a different and more dangerous nature than those in the past.

	1994	2003	2010	2015-16
Determinate Sentence				
considered	692	766	483	480
Release recommended	368	345	124	125
release rate	53%	45%	26%	26%
Life Sentence				
considered	119	212	263	366
Release recommended	34	55	48	44
release rate	29%	26%	18%	12%

NB: 2010 and 2015-16 data separate extended sentences from determinate sentences, and these are not included in the table. Source: Parole Annual Reports, 2003, 2010 and 2015-16.

Therefore, we strongly adopt the position that it is critical that no changes are introduced that further increase the likelihood of recall, or reduce the likelihood of achieving parole in the first place. As Weaver et al. (2012) have highlighted, risk aversion and attempts to increase credibility and legitimacy on the system can lead to the imposition of increasingly onerous licence conditions, which are difficult for the person to comply with and in turn make breach more likely. A myriad of different orders and conditions can also prove confusing. Their article on 'The Failure of Recall to Prison' concluded that "the re-imprisoning of offenders following breach of overly onerous conditions, whilst disrupting any ongoing and promising interventions with those individuals in the community, will only serve to prolong the revolving prison door syndrome." (2012, p.95)

9. Reference to 'immediate release' - initial consideration of release following recall

Where a prisoner has been released on licence and that licence is subsequently revoked, the Parole Board will consider the revocation of that licence. Upon their consideration of the case, where the Parole Board directs the immediate release of the prisoner, the legislation provides that the Scottish Ministers give effect to that direction.

In all other cases of prisoner release involving the Parole Board, Scottish Ministers will release the prisoner as soon as practically possible following a direction to do so by the Parole Board. The reference in relation to immediate release of recalled prisoners sets an expectation that can cause practical difficulties.

We propose that the release of a prisoner, whose licence has been revoked, should be as soon

as practically possible, as in other cases involving the Parole Board.

Question 9: Do you agree that the release of a prisoner, whose licence has been revoked, should be as soon as practically possible as in other cases involving the Parole Board?

No

Question 9a: Please give reasons for your answer to Question 9

We are concerned about potential consequences in the terminological changes which suggest a downgrading of urgency of release. In the cases in question, as we understand it, the person has erroneously had their licence revoked which may have severe, negative consequences for their attempts to get on with their lives outside the prison, for example removing them (temporarily, but potentially with permanent consequences if the time period is extended) from employment or education and taking them away from their families. While we accept that all efforts must be undertaken to ensure adequate arrangements are in place for release, a failure to release the person in a timely manner following the decision is likely to increase the perceptions of unfairness and have potentially counterproductive consequences in terms of motivation and compliance (Liebling, 2007).

Tests that the parole board apply in determining whether to release

11. Tests for release

In terms of the decisions to be made by the Parole Board there are currently two tests which must be met before releasing or re-releasing certain categories of prisoners.

One of these tests is in relation to the release of life and OLR prisoners and provides that a direction to release cannot be made unless the Parole Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined. The second test is concerned with the re-release of extended sentence prisoners and provides that that a direction to re-release cannot be made unless the Parole Board is satisfied that it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined .

There are no specific tests concerning decisions to be made by the Parole Board for the release, re-release or recall of other types of prisoners.

We propose to introduce a common test to be applied in all release, re-release and recall cases considered by the Parole Board.

Question 11. Do you agree that a common test should be applied in all release, re- release and recall cases considered by the Parole Board?

Unable to say

Question 11a: Please give reasons for your answer to Question 11

We support the desire for *clarity* in regards to the test applied by the parole board and so a clear rationale must be given for any differentiation between the tests, if these remain. However, it is impossible to adopt a position for or against a common test without knowing what this test is. In particular the language of 'public protection' or 'serious harm' would benefit from reflection and clarification. The Figure below shows trends in use of parole recall, making clear that sustained increases in recall of people to prison.

	2005-06	06-07	07-08	08-09	09-10	10-11	11-12	12-13	13-14
CJSW Parole Caseload	1325	1192	1103	1047	984	875	917	921	949
Parole Recalls ADP	397	515	611	600	622	682	702	713	
Parole Recalls Receptions	26%	39%	37%	40%	45%	59%	54%	49%	50%
Recall ADP/Parole caseload	30%	43%	55%	57%	63%	78%	77%	77%	73%

Caseload includes 'Throughcare in Community' table snapshot at 31 March for 'Parole' and 'Life' categories. Source: CJSW Annual Statistics
Recall data source: Prison Statistics Scotland

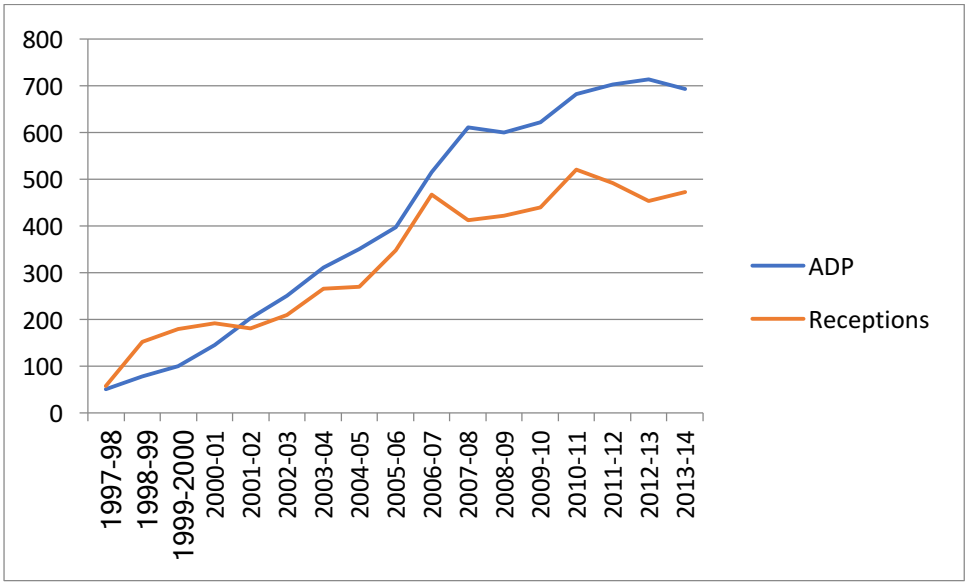

Figure 1. Numbers of Prison Receptions for and Average Daily Population in Custody due to Parole Recall (1997-2014); Source: Prison Statistics Scotland

Following Padfield and Maruna (2006) and Weaver et al. (2012) – and supported by our own experience –it is highly unlikely that any increases in recalls or decreases in release rates are a consequence of a dramatic shift in behaviour of ex-prisoners and prisoners. Rather other factors, such as risk aversion and a broader punitive turn, are likely to play a role. In addition, recent human rights legal action (Brown v Ministers) addressed the particular situation of extended sentence prisoners who remain in prison due to inability to enrol in 'offender' programmes due to lack of capacity and long waitlist backlogs (Brown's 40-day sentence became a five year period of custody). We are concerned about any changes to the tests applied which will contribute to either (i) further increase in the number/proportion of recalled prisoners or (ii) increase in the number of prisoners serving over their tariff/ beyond the expiry of the court imposed punishment part of the sentence or (iii) the average length of time spent over tariff/ beyond the expiry of the court imposed punishment part of the sentence. **Any move towards a common test should be a move towards the lowest threshold test (for the ex/prisoner to 'pass').**

We are particularly concerned about broad references to the necessity of ongoing imprisonment to 'protect the public' and to the risk posed of further offending or (undefined) harm (Parole Board Scotland Rules (2001)) which appear to lack clarity and transparency. As Weaver et al. (2012) have highlighted "risk assessment is far from accurate, often overrating the risk of reoffending and confusing criminogenic and non-criminogenic needs" (p.92). Elsewhere we have argued that "a focus on risk [in prisoner progression] opens up a route for treating rehabilitative issues punitively" (SPARC, 2017). We are aware that some people held in prison are concerned that any attempts to make positive changes in their lives lead, perversely, to the potential for the accumulation of new risks; so that a stable and supportive relationship or commencement of education means that any decision to withdraw from the education programme or to end the relationship (or indeed the mere threat of this happening) is treated as a risk.

Research has shown the critical importance of prisoner perceptions of fairness in the prison experience. In an edited collection on parole, Alison Liebling writes that: "there are reasons to believe that a prison experience that is perceived as reasonably fair and respectful will be less painful and damaging than one that is unfair and hostile" (2007, p.70) … "being treated unfairly leads to negative consequences - non-compliance, and importantly, distress. We need just institutions of criminal justice if we are to avoid, hypocrisy, disaffection and further damage" (p.71) This finding was reiterated by research on prisoners' views of risk assessment (Attrill and Liell, 2007). Our experience suggests that being held significantly

beyond the tariff / punishment part of the sentence is a significant contributor towards perceptions of unfairness. This is particularly the case where the person is considered not to have met any test through no fault of their own but because the prison has not facilitated adequate progression due to space, delays or for being downgraded for behaviour that is non-criminal. The same can be said if failures on parole are due to a failure of criminal justice social work services to provide appropriate support; English research suggests that those offenders more likely to be recalled are also the most disadvantaged (Collins, 2007). In these circumstances, there needs to be accountability.

A final point we wish to insert is about the balance of responsibilities assigned to prisoners, on the one hand, and prisons and parole on the other. As noted, the sustained and substantial increase in recall as well as decrease in parole release recommendations cannot be attributed entirely, or even significantly, to the behaviour or increasing seriousness of people coming through prisons. Given this, system behaviour appears to be the more important factor, which this consultation presumably recognises. While altering the tests for release may have some role to play, arguably a more significant factor will be questioning the extent to which prisoners have the burden of establishing their declining risk to communities or whether it is more appropriate to place the burden on the Prison Service and Parole Board to establish a prisoner's risk has *not* decreased and so justifies continued detention. This is the position argued by leading researchers in England including Nicola Padfield and Nick Hardwick[1].

Timescales for subsequent reviews following initial consideration for parole

12. Review Periods

Currently Life and OLR prisoners, who are refused release on parole licence at first consideration, are subsequently considered for release on parole licence no later than every two years. Recalled prisoners serving extended sentences are entitled to require Scottish Ministers to refer their case for consideration by the Parole Board, initially at any time upon the revocations, and thereafter annually during the currency of the recall. In practice, such prisoners are considered annually. There are no specific parole review periods set out for other relevant categories of prisoners. In practice these prisoners cases are currently reviewed approximately on an annual basis. We believe that it may be helpful to specify clear timescales for further reviews following initial consideration. Given the length of sentences involved, we believe the current two year review timescale for life and OLR prisoners is appropriate. For all other types of prisoners a one year timescale may be appropriate. We

[1] http://www.lse.ac.uk/Events/2017/06/20170622t1900vWT/What-if-we-rethought-parole

propose to introduce clear timescales for all parole considerations following initial consideration.

Question 12: Do you agree that the current provisions whereby Life and OLR prisoners, following initial consideration, are considered for release on parole licence every two years are appropriate?

Yes

Question 12a: Please give reasons for your answer to Question 12:

Consideration every two years *may* be appropriate in most cases. However, in cases where the person is not considered ready for parole because the prison has not facilitated adequate progression due to space, delays or for being downgraded for behaviour that is non-criminal, we suggest that reviews should happen more quickly and there should be sufficient accountability mechanisms so that the prison addresses any issues in a timely manner.

Additionally, we argue that any recommendation given by the Parole Board with regards to life serving prisoners being in the best possible position for release by their next review date is followed. It is our experience that too often life serving prisoners are sent to the Top End facility after a parole review in closed conditions advising they be in the Open Estate within 18 months, to find that the Top End do not need to abide by it. Their line of reasoning being that 12 months of supervised community access followed by 12 months of unsupervised access is required to ensure public safety. In these cases, 12 months or 24-month review dates are irrelevant as the life serving prisoner will effectively be given a longer sentence by a Hall Manager who knows the life serving prisoner will usually only be released from the Open Estate.

Question 12b: Do you agree that all prisoners, apart from Life and OLR prisoners, should be considered annually for parole following a first decision not to release on parole licence?

Yes

Question 12c: Please give reasons for your answer to Question 12b

Administrative Procedures for Considering Cases

14. Use of live link

Currently the chairman of the tribunal or the chairman of the oral hearing may allow the use

of a live link (such as a video link) in the taking of evidence of the prisoner concerned, or a witness. In order for the live link to be used it must be considered by the Parole Board, to be in the interests of justice to do so. Use of live link results in significant administrative efficiencies for the Parole Board, although there may be occasions, for example where a prisoner has communication difficulties, where it is recognised that using live link would impact on the fairness of the proceedings. We propose that a live link cannot be used where it would be unfair on the prisoner concerned, or the witness, to do so.

Question 14: Do you agree that a live link cannot be used where it would be unfair on the prisoner concerned, or the witness, to do so?

Yes

Question 14a: Please give reasons for your answer to Question 14

We agree with this statement, since replacement technology should not be used where it is unfair on the prisoner or witness to do so, since procedural justice and perceptions of fairness are critical in the prison experience (Liebling, 2007 – see response to question 11). We are concerned that in framing the question, there is a narrow construction of situations in which use of live link will impact on fairness (e.g. where a prisoner has communication difficulties). However, audiovisual technology can present issues for many prisoners and careful consideration of the impact should be given. For example, research on the use of audiovisual technology from Australia (McKay, 2016) found that "audio permeability" posed an issue, whereby noise from the prison can act to "fram[e] the prisoner in the context of their detention, intrud[e] on legal process, and affect […] prisoners' comprehension and participation" (p.21). We suggest that video-link should never be used where the person in prison requests that they attend in person.

However, it is also critical that a request by the prisoner should not lead to any additional time spent in prison as worries from life serving prisoners who have been told they will be taking part in an audiovisual hearing include concern that if they complain, the process for getting a hearing in person will set them back months and that their request may also paint them in a bad light to the people who have the power to grant them their liberty.

20. Composition of Parole Board members for oral hearings and tribunals

Currently a casework meeting can sit with a minimum of two Parole Board members but oral hearings and tribunals are required at the outset to sit with three Parole Board members (this can be reduced to two in certain circumstances, such as in the event of the death or

incapacity or unavailability of a member appointed the tribunal or oral hearing). We are seeking views as to whether the minimum number of members required for oral hearings and tribunals should be changed to two members.

Question 20: Do you agree that oral hearing and tribunal considerations should mirror that of casework meetings, so that they could be conducted with two Parole Board members?

No

Question 20a: Please give reasons for your answer to Question 20

To the extent that the reduction in the number of Parole Board members is proposed so as to streamline and speed the process of conducting hearings, we are in support of such a change. However, this also reduces the decision-making power to two people expanding the power of discretion. This underlines the need to ensure that Parole Board members are well trained and their approaches are calibrated and consistent. We are not entirely convinced that this change will reverse the disturbing trend of declining parole release recommendations. It might very well sustain this increase if more fundamental issues such as the turn to a risk-based paradigm of decision-making (e.g. through the creation of the RMA and use of risk management packages like LSCMI) are not also confronted.

21. Breach Considerations - Imminent Risk of Serious Harm to the Public

Where a supervising officer (local authority social worker) believes an individual who has been released on licence has breached the conditions of their licence and that the Parole Board should consider recalling them to custody the officer submits a breach report to Scottish Ministers. A decision to recall that individual in such a case requires two members of the Parole Board (in exceptional circumstances these two members may decide an oral hearing is required, requiring three members). We are proposing that if there is an imminent risk of serious harm to the public a single Parole Board member can take a decision to recall. In exceptional circumstances this single member may still decide that an oral hearing requiring three members is required.

Question 21: Do you agree that a single Parole Board member could take a decision on a recall consideration?

No

Question 21a: If you have answered No, please give reasons for your answer to Question 21

Please also see response to the previous question. The desire for efficiency and expediency should never come at the expense of due process. We suggest that this places too much responsibility in the hands of one person, and in doing so may lead to increased negative consequences of risk averse practices.

Question 22: Please tell us about any potential impacts, either positive or negative, that you consider any of the proposals in this consultation may have on anyone (including custody or community facing) or any organisation affected by the parole process.

In our response to questions 9 and 11 we argue that unwarranted delays in the process of release are not only unjust, but they are also unproductive. Such delays undermine the perceived legitimacy of the criminal justice system and therefore damage both motivation for compliance with its demands, and also the desire to make positive change, as a large body of scholarly work on both legitimacy and procedural justice demonstrates (see, for example, Sparks, Bottoms and Hay 1996, Liebling 2011, Tyler 1990; Sunshine and Tyler 2003; Bradford and Myhill 2015).

We have also noted in our response the need for clarity in both the definitions of key terms and processes that inform parole in Scotland. Here, we wish to bring these points together to highlight that the provision of comprehensible, accurate and timely information is a crucial component of legitimacy. If decision makers are unable to communicate why particular (and also potentially adverse or unpopular) decisions have been taken, then the legitimacy of both the decision and the criminal justice agency in question will likely be damaged (Bottoms and Sparks 1997). We would therefore encourage the committee to ensure that this process of consultation, and any changes that result from it, are clearly communicated to prisoners who may be affected in way which is accessible and meaningful.

However, it is not only individual prisoners who are impacted by the parole process. There is a growing body of evidence that families very often take on a substantial caring burden in supporting a person in custody (Condry 2007), but that this also frequently involves families acting as "auxiliary parole officers" in that they take on much of the work of co-ordinating legal efforts and attempting to ensure that the person in question complies with their parole conditions upon release (Comfort 2008). This is difficult, demanding and often distressing work, frequently undertaken by families with few resources. Therefore it is essential that accurate information about the parole process (and any reforms) is communicated not only to prisoners, but also to families. While we appreciate that specific details and personal information may not be shared with families without consent, clear information about processes should be provided to families.

This is particularly important given the current emphasis placed on risk in criminal justice processes in Scotland, which often manifests in professionalised language and terminology which can be difficult for families to navigate. Providing this information is not only important for normative reasons, as families will also draw their own conclusions as to how just and legitimate they perceive the criminal justice system to be (Jardine, forthcoming). Given that the clear connections between legitimacy and compliance, and that many individuals leaving prison will return to their families, it is clearly undesirable to cultivate a perception amongst these families that the criminal justice system is unfair and lacking in legitimacy.

References

Attrill, G. and Liell, G. (2007) Offenders' views on risk assessment, in Padfield, N. (ed.) *Who to Release?: Parole, Fairness and Criminal Justice*. Cullompton, Devon: Willan Publishing.

Bradford, B. and Myhill, A. (2015) Triggers of change to public confidence in the police and criminal justice system: Findings from the Crime Survey for England and Wales panel experiment, *Criminology and Criminal Justice*, 15(1): 23-43.

Bottoms, A. and Sparks, R. (1997) How is Order in Prisons Maintained?, in Liebling, A. (ed.) *Security, Justice and Order in Prison: Developing Perspectives*, Institute of Criminology Cropwood Conference Series. Cambridge: University of Cambridge.

Comfort, M. (2008) *Doing time together: love and family in the shadow of the prison*, Chicago, London: University of Chicago Press.

Condry, R. (2007) *Families Shamed: The Consequences of Crime for the Relatives of Serious Offenders.* Devon: Willan Publishing.

Jardine, C. (forthcoming) Eroding legitimacy? The impact of imprisonment on relationships between families, communities and the criminal justice system, in Condry, R. and Scharff-Smith, P (eds.) *Prisons, Punishment and the Family: Towards a New Sociology of Punishment*. Oxford: Oxford University Press.

Liebling, A. (2007) Why fairness matters in criminal justice, in Padfield, N. (ed.) *Who to Release?: Parole, Fairness and Criminal Justice*. Cullompton, Devon: Willan Publishing.

Liebling, A. (2011) Distinctions and distinctiveness in the work of prison officers: Legitimacy and authority revisited. *European Journal of Criminology,* 8(6): 484-499.

McKay, C. (2016) Video Links from Prison: Permeability and the Carceral World. *International Journal for Crime, Justice & Social Democracy*, 5(1): 21.

Padfield, N. and Maruna, S. (2006) The revolving door at the prison gate: Exploring the dramatic increase in recalls to prison. *Criminology and Criminal Justice*, 6(3): 329-352.

Scottish Prisons Commission (2008) *Scotland's Choice*. Edinburgh: Scottish Prisons Commission.

Sparks, R., Bottoms, A. and Hay, W. (1996) *Prisons and the Problem of Order*. Oxford: Oxford University Press.

Sunshine, J. and Tyler, T. R (2003) The role of procedural justice and legitimacy in shaping public support for policing. *Law and Society Review*, 37(3): 513-548.

Tyler, T. R. (1990) *Why people obey the law*. New Haven: Yale University Press.

Weaver, B., Tata, C., Munro, M. and Barry, M. (2012) The Failure of Recall to Prison: Early Release, Front Door and Back Door Sentencing and the Revolving Prison Door in Scotland. *European Journal of Probation* ,4(1): 85-98.