

Rùnaire a' Chaibineit airson Ceartas agus Seann-ghaisgich
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Audrey Nicoll MSP
Convener
Criminal Justice Committee

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Dear Convener

BAIL AND RELEASE FROM CUSTODY (SCOTLAND) BILL: STAGE ONE REPORT

Thank you for your Committee's detailed consideration of this Bill and for your Stage 1 Report.

I attach the Scottish Government's response to the points and recommendations made in the Stage 1 Report.

As I said in my oral evidence before the Committee, on 1 February 2023, the provisions within this Bill seek to reduce crime and reoffending by ensuring remand is used only where public and victim safety requires it or where delivery of justice requires it and by ensuring more consistent support for those released from prison custody.

I hope that the detail provided in this response addresses the concerns of Members on certain elements of the Bill and that it will enable members of the Committee to support the general principles of the Bill at stage 1.

I look forward to exploring the issues raised in your report during the Stage 1 debate on 16 March 2023 and to continue working with the Committee on this important Bill at Stage 2, should Parliament endorse the general principles at Stage 1.

KEITH BROWN

RESPONSE

This paper provides the Scottish Government's response to the specific points and recommendations made by the Criminal Justice Committee in their Stage 1 Report.

For ease of reference, the Committee's points or recommendations are shown in bold text boxes and numbered in line with the report. The Scottish Government's response is given directly underneath those boxes. This response uses headings from the Stage 1 report.

INFORMATION AVAILABLE TO THE COMMITTEE

51. The Committee notes that the Scottish Government has not set a specific target for the number of cases where it is expected that the outcome would be different under the revised bail test. Judicial independence has sometimes been cited as a reason why such targets cannot be set. This is perhaps understandable, but it makes it harder for us to scrutinise the potential impact of the Bill and whether it will in fact make any substantive difference to the numbers of people being granted bail where they would previously have been remanded.

52. The Committee has sought to understand more about the characteristics and patterns of alleged offending behaviour of Scotland's remand population. In particular we have been interested to understand the reasons why Scotland's remand population has increased in recent years. We also note that data shows that Scotland has one of the highest rates of remand compared to other countries in the UK or the EU. 15 Is it a result of more serious crimes coming to court than was previously the case? Has the presumption against short sentences had an impact? Is it a result of the COVID backlog leading to individuals spending longer on remand which has the effect of increasing overall numbers? Is it a mixture of these or other factors?

53. Knowing this information is important because it helps our assessment of whether the provisions in the Bill are likely to be effective in reducing numbers on remand. The Bill has, in part, been introduced in response to concerns about the number of people being held on remand. The Policy Memorandum states that one of the Scottish Government's objectives is to reiterate that, as much as possible, the use of remand is a last resort for the courts. We do note, however, that it is already the case that there is a presumption that bail is to be granted unless certain conditions apply. On our visit to Glasgow Sheriff Court, we saw how this principle was being applied in practice.

54. We also note that the question of what constitutes the 'ideal' size of the remand population is not necessarily an easy one to answer, due to the complexity of different factors affecting numbers of individuals on remand and people's views on the purpose of remand and who should be held in this state.

55. Despite sourcing some statistics about the use of remand in Scotland, we have felt some frustration at not receiving complete answers to the key questions we have outlined above.

56. The Cabinet Secretary has argued that the Bill is necessary because concerns about high remand levels, which pre-dated COVID. Indeed, he noted that they were highlighted in a report by our predecessor committee in 2018. This is an issue which we returned to in our *Judged on Progress* report last year. In light of this, the Cabinet Secretary's position is that addressing the COVID backlog will not, in itself, be sufficient to address concerns about remand in Scotland.

57. We have no doubt that COVID has had an impact in increasing overall number of individuals on remand. However, we have not received sufficient evidence which properly quantifies what its actual impact has been on remand numbers. This has made it harder for us to understand whether the provisions in the Bill are necessary to reduce numbers on remand or whether non-legislative measures could just as readily affect change. In general terms, we think that policy-making is made easier if this kind of statistical analysis is made available

58. We recommend that the Scottish Government, Scottish Prison Service and the Scottish Courts and Tribunals Service work with the Committee to agree what type of data needs to be collected and how frequently, in order that future decision-making can be based on a detailed understanding of: (a) the reasons why people are remanded; and (b) the numbers being held on remand, by crime, by gender, geographical area, length of remand periods etc.

59. That said, despite the limitations in statistics available to us, it is our role to make our best assessment of what the impact of the Bill will be, based on the evidence we have received. This is what we will go on to do in this report.

We note that the Committee has observed that we have not set a specific target for the number of cases where it is expected that the outcome of the bail decision would be different under the revised bail test.

The Financial Memorandum accompanying the Bill explained the reasons why no target was set in this regard:

“18. In considering the costs relating to adjusting the criteria used by the court when they make their bail decisions, it is not possible to estimate the impact the provisions will have on the number of people held on remand.

19. While the overarching aim of the provisions is to refocus how custody is used at the initial point of the criminal justice process when a person is accused of a criminal offence, no target or goal as to impact on use of custody is set through operation of the provisions. This reflects the independent operation of the criminal justice system where targets or goals would not be appropriate.

20. The number of individuals held on remand at any given time is subject to a wide range of factors relevant to the question of bail, including the nature of the offences accused persons have been charged with, the previous convictions of accused persons and other factors which vary from case to case. There is also uncertainty as to the length of time a person if remanded will remain on remand. More fundamentally, it is also not possible to assess the specific impact of these reforms on independent decision-making of the court.”¹

¹ [Financial Memorandum \(parliament.scot\)](https://www.parliament.scot/Financial-Memorandum)

The new bail test is at the heart of the Bill. It is proposed to reform bail law to set clear parameters for courts to exercise their discretion in individual cases. In particular, the new bail test seeks to establish clear statutory limits as to the circumstances when remand should be imposed and when bail should be granted.

The bill does this by adding a new element to the current bail test in section 23B of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) so that bail may only be refused where it is necessary to do so:

- in the interests of public safety, including safety of the complainer from harm, or
- to prevent a significant risk of prejudice to the interests of justice.

Our intent with the new bail test is to focus the use of remand so it is a last resort at the pre-conviction stage of the criminal justice process when the person has not been convicted of an offence.

The current test uses the risk of an adverse event happening (e.g. an accused person committing an offence while on bail) as the main way of determining whether remand should be used.

What this Bill seeks to do and, in particular, what the new bail test seeks to do, is combine in the test a requirement for the court to use its judgement to determine the risk of an adverse event happening (e.g. offending while on bail) with the likely impact of such an event (e.g. a danger to public safety).

Professor Fergus McNeill put it in his evidence to the Committee as follows:

“... The Bill would shift the judgement from being about the mere likelihood of an offence to involving consideration of the likely gravity of reoffending and its potential impact.”²

We are clear remand will continue to be needed and the new bail test explicitly recognises this.

There are occasions where remand is necessary to protect public safety and victim safety because of a risk of an adverse event e.g. further offending. The new bail test allows for this.

There are occasions where remand is necessary to protect the integrity of the criminal court process to ensure justice can be delivered e.g. by preventing a person from wilfully failing to appear at trial. The new bail test allows for this.

These are the situations where remand can and should be used as a last resort. Otherwise, bail should be the default with such conditions or supervision requirements as the court considers necessary to impose.

This approach is embedded in the new bail test that the Committee is being asked to assess as to the principle of how remand should be used.

When the representative of Community Justice Scotland, Keith Gardner, was asked by the Committee about a suitable level for remand, Mr Gardner responded as follows:

² [Official Report \(parliament.scot\)](#), at page 23

“... It is difficult to put a number on it. It is more about appropriate use. There is no question that remand, in some cases, is necessary.”³

We agree with this statement with the new bail test as proposed in the Bill designed to set appropriate limits on the use of remand while recognising remand is and will always be necessary.

In respect of the recommendation in paragraph 58 regarding reasons for remand decisions and numbers on remand, we offer views below in response to the comments made on Section 4 of the Bill.

PART 1 – BAIL

Section 1 (Input from justice social work in relation to bail decisions)

106. The Bill would require a court to give justice social work the opportunity to provide relevant information when the court is considering bail. The new bail test will include an assessment of the risk to public safety of the accused. We discuss the new bail test later in this report. Justice social work will clearly have an important role in informing this risk assessment. In addition, information from justice social work can help the courts decide whether special bail conditions should be imposed.

107. In other words, for the Bill to work as intended, it is not simply the case of making the necessary changes to the legislation which sets the bail test. This change needs to be accompanied by an enhanced role for justice social work in order to realise the full potential of the Bill. Section 1 of the Bill seeks to facilitate this enhanced role.

108. We note that courts commonly seek input from justice social work before bail decisions. Indeed it is the case that sheriffs, where they deem it necessary, already do delay court proceedings in order to receive more information. It is also the case that in recent years there have been more ways in which those on bail might be supervised and/or supported. However, we heard that there may also be inconsistencies in the input of justice social work across the country. Resources also may be allocated differently in courts across the country.

109. We also heard calls for other organisations and individuals, including third sector organisations and victims of crime, to have a chance to input into decisions on whether to grant bail. We heard, for example, during our visit to CVO (East Ayrshire) that, because they work so closely with offenders, third sector bodies can provide a level of information and insight that justice social work may never be able to obtain as often these clients do not trust official organisations. We note the evidence from Police Scotland that in certain cases they have the opportunity to give the Crown information on the victim’s view of bail and any conditions that they feel may be appropriate.

³ [Official Report \(parliament.scot\)](http://parliament.scot), at page 41

110. The Committee notes the vulnerable nature of many women prisoners; offending patterns among women; the high percentage of women in prison who have suffered brain injuries as a result of repeated domestic abuse; and the high percentage of women in prison who are mothers. On 25 January 2023, Jim Kerr, interim deputy chief executive of the Scottish Prison Service, confirmed that approximately 36% of women prisoners are on remand, which is higher than the figure for prisoners who are men.

111. We also heard from Howard League Scotland that there are too many cases – particularly involving women – where people are remanded because of a lack of criminal justice social work reports. This can have serious implications for those with caring responsibilities for children or elderly people. Whilst the courts may already take any potential impact on children into account when deciding whether to grant bail, we note the views of Sheriff David Mackie, speaking on behalf of Howard League Scotland and not on behalf of the judiciary, that “there is merit in considering the inclusion in the bill of a specific reference to the rights of children”. We note his suggestion that the expression ‘intimate partners’ should be referred to in the Bill, to recognise victims’ concerns and the risk of harm to complainers.

112. The new requirements in the Bill, by which justice social work has the opportunity to input in each case, were generally welcomed in principle. The hope is that this will encourage the more widespread adoption of existing good practice.

113. However, some practical concerns about this section of the Bill were raised in two broad areas. First, there were concerns about the impact on courts schedules and the time taken to process cases. This might have unintended consequences, for example the accused being remanded overnight due to the time taken to gather the necessary information. Unless there are good reasons for doing so which would be in the person’s interests, this would be unacceptable. We heard there were different views about how much additional time might be required on average for each case to obtain the input of justice social work.

114. The second area of concern has been around resources. The Cabinet Secretary has acknowledged that sufficient resources for justice social work will need to be increased in light of the new requirements in the Bill. He has stated that an increase in funding is planned. However, some local authorities felt that the Scottish Government’s Financial Memorandum underestimates the level of resources which will be required or that the required level of resource required could not be quantified. We also note that if justice social work is to move to the proposed National Care Service this may have resource implications.

115. We heard concerns that if the necessary resources are not available, there is a risk the policy objectives of the Bill will not be achieved. For example, if courts do not receive the necessary input from justice social work in decision-making, there may be less use made of special bail conditions as courts take a more risk averse approach. In practice this could mean remanding individuals rather than imposing bail.

116. The Committee highlights to the Scottish Government these concerns about resourcing as potentially affecting the ability of the Bill to deliver its policy objectives. The Scottish Government must provide a clear indication at Stage 1 that the necessary resources will be provided to make these provisions work in practice. The Committee will carefully examine future budget allocations as part of the budget process to ensure that the resources have been made available are sufficient. We noted in our recent pre-budget report our concerns about the challenges facing criminal justice budgets over the next few years and the potential impact of below inflation settlements in many parts of the portfolio, such as community justice, that will be important in relation to the ability to implement the changes proposed by this Bill.

We note that much of the discussion in respect of the role of justice social work relates not to the specifics of the provisions in the Bill, but rather how the vision for an enhanced role for justice social work can be delivered operationally in terms of impact on the criminal court and impact on justice social work itself. We agree these are key issues relating to how the benefits of section 1 of the Bill can be delivered.

In particular, we agree with the view of the Committee that for the Bill to work as intended, it is not simply the case of making the necessary changes to the legislation which sets the bail test. This has to be accompanied by an enhanced role for justice social work in order to realise the full potential of the Bill; and with that enhanced role comes resource implications.

When I gave evidence on 1 February 2023, I explicitly recognised that the enhanced role of justice social work in the Bill carries resource implications. These were set out in the Financial Memorandum accompanying the Bill and were informed by Scottish Government engagement with Social Work Scotland and COSLA.

As I indicated, however, the financial climate the public sector is operating in means the reality is that there are real challenges in relation to budgets and this is likely to continue for some years to come. That means that difficult decisions will need to be made about prioritisation of scarce resources.

In spite of these challenges, we hope it is of reassurance to the Committee that the Scottish Government has continued to protect the community justice budget. In 2023-24 the Scottish Government will invest a total of £134m in community justice services. This includes £123m to local authorities for delivery of relevant services.

In this context, we will consider carefully how best the benefits of the Bill can be delivered in conjunction with the resourcing challenges. For example, the phasing of the implementation of the Bill in line with future budget allocations and in discussion with stakeholders will likely be necessary. As part of this necessary planning for implementation, we assure the Committee that we will continue to engage closely with Social Work Scotland and COSLA on the future resourcing requirements of the Bill.

On the Committee's comments regarding the possible resource implications if justice social work is to move to the proposed National Care Service (NCS), we can confirm no decision has been taken on whether justice social work will be part of a NCS. As we have outlined to the Committee, we are committed to gathering further evidence and engaging with justice social work staff and service users to help inform that decision.

This programme of research and consultation is being developed with justice agencies and will ensure that we have a robust understanding of the strengths and practical implications of different options for delivering justice social work in the future, whether this is within or out-with the infrastructure of a NCS.

A key part of this work is to establish ways in which different delivery options could further strengthen justice social work services in meeting the needs of the future, including fully delivering upon the provisions contained within this Bill.

Whilst where justice social work may or may not sit is clearly an important decision, we consider it is also important the necessary skills and capacity are in place across Scotland to deliver effective justice social work services including the enhanced role envisaged by the Bill. This is why we have continued our support for justice social work to develop best practice and build capacity where possible.

Turning to paragraph 111 of the report, we note the Committee has highlighted the views of Sheriff David Mackie, speaking on behalf of Howard League Scotland, that,

“there is merit in considering the inclusion in the bill of a specific reference to the rights of children⁴.”

We appreciate why this issue has been raised. However we do not consider an explicit reference is needed as the UNCRC Bill will, when implemented, require all ‘public authorities’ to adhere to the UNCRC requirements and this includes having as a primary consideration in their decision-making the best interests of the child.

The judiciary are included within the definition of a ‘public authority’. As such, in the bail decision-making context this means the new bail test will require decisions to be made with a primary consideration being the best interests of any children.

Also in paragraph 111, we note the Committee has referenced Sheriff Mackie’s suggestion that the expression ‘intimate partners’ should be referred to in the Bill, to recognise victims’ concerns and the risk of harm to complainers.

Again, we appreciate why this issue has been raised. However, it is worth noting the new bail test already recognises that the court’s consideration of public safety includes the safety of the complainer from harm when making decisions on remand.

Crucially, safety of the complainer from harm is specifically defined in the Bill as safety from both physical and psychological harm, aligning with the definitions in the Domestic Abuse (Scotland) Act 2018. The addition of psychological harm is designed to explicitly recognise our current understanding of the totality of domestic abuse (and other types of offending which cause non-physical harm) so that the court is required to give consideration to these factors when making its bail decision.

Turning to paragraph 113, we note the Committee’s reference to some practical concerns about section 1 of the Bill and in particular the concerns about:

- the impact on court schedules and the time taken to process cases, and

⁴ [Official Report \(\[parliament.scot\]\(https://www.parliament.scot\)\)](https://www.parliament.scot/Official-Reports/Official-Reports-2018/Official-Report-2018-19-2018-2019-2019-2020-2021-2022-2023-2024-2025-2026-2027-2028-2029-2030-2031-2032-2033-2034-2035-2036-2037-2038-2039-2040-2041-2042-2043-2044-2045-2046-2047-2048-2049-2050-2051-2052-2053-2054-2055-2056-2057-2058-2059-2060-2061-2062-2063-2064-2065-2066-2067-2068-2069-2070-2071-2072-2073-2074-2075-2076-2077-2078-2079-2080-2081-2082-2083-2084-2085-2086-2087-2088-2089-2090-2091-2092-2093-2094-2095-2096-2097-2098-2099-2100-2101-2102-2103-2104-2105-2106-2107-2108-2109-2110-2111-2112-2113-2114-2115-2116-2117-2118-2119-2120-2121-2122-2123-2124-2125-2126-2127-2128-2129-2130-2131-2132-2133-2134-2135-2136-2137-2138-2139-2140-2141-2142-2143-2144-2145-2146-2147-2148-2149-2150-2151-2152-2153-2154-2155-2156-2157-2158-2159-2160-2161-2162-2163-2164-2165-2166-2167-2168-2169-2170-2171-2172-2173-2174-2175-2176-2177-2178-2179-2180-2181-2182-2183-2184-2185-2186-2187-2188-2189-2190-2191-2192-2193-2194-2195-2196-2197-2198-2199-2200-2201-2202-2203-2204-2205-2206-2207-2208-2209-2210-2211-2212-2213-2214-2215-2216-2217-2218-2219-2220-2221-2222-2223-2224-2225-2226-2227-2228-2229-2230-2231-2232-2233-2234-2235-2236-2237-2238-2239-2240-2241-2242-2243-2244-2245-2246-2247-2248-2249-2250-2251-2252-2253-2254-2255-2256-2257-2258-2259-2260-2261-2262-2263-2264-2265-2266-2267-2268-2269-2270-2271-2272-2273-2274-2275-2276-2277-2278-2279-2280-2281-2282-2283-2284-2285-2286-2287-2288-2289-2290-2291-2292-2293-2294-2295-2296-2297-2298-2299-2300-2301-2302-2303-2304-2305-2306-2307-2308-2309-2310-2311-2312-2313-2314-2315-2316-2317-2318-2319-2320-2321-2322-2323-2324-2325-2326-2327-2328-2329-2330-2331-2332-2333-2334-2335-2336-2337-2338-2339-2340-2341-2342-2343-2344-2345-2346-2347-2348-2349-2350-2351-2352-2353-2354-2355-2356-2357-2358-2359-2360-2361-2362-2363-2364-2365-2366-2367-2368-2369-2370-2371-2372-2373-2374-2375-2376-2377-2378-2379-2380-2381-2382-2383-2384-2385-2386-2387-2388-2389-2390-2391-2392-2393-2394-2395-2396-2397-2398-2399-2400-2401-2402-2403-2404-2405-2406-2407-2408-2409-2410-2411-2412-2413-2414-2415-2416-2417-2418-2419-2420-2421-2422-2423-2424-2425-2426-2427-2428-2429-2430-2431-2432-2433-2434-2435-2436-2437-2438-2439-2440-2441-2442-2443-2444-2445-2446-2447-2448-2449-2450-2451-2452-2453-2454-2455-2456-2457-2458-2459-2460-2461-2462-2463-2464-2465-2466-2467-2468-2469-2470-2471-2472-2473-2474-2475-2476-2477-2478-2479-2480-2481-2482-2483-2484-2485-2486-2487-2488-2489-2490-2491-2492-2493-2494-2495-2496-2497-2498-2499-2500-2501-2502-2503-2504-2505-2506-2507-2508-2509-2510-2511-2512-2513-2514-2515-2516-2517-2518-2519-2520-2521-2522-2523-2524-2525-2526-2527-2528-2529-2530-2531-2532-2533-2534-2535-2536-2537-2538-2539-2540-2541-2542-2543-2544-2545-2546-2547-2548-2549-2550-2551-2552-2553-2554-2555-2556-2557-2558-2559-2560-2561-2562-2563-2564-2565-2566-2567-2568-2569-2570-2571-2572-2573-2574-2575-2576-2577-2578-2579-2580-2581-2582-2583-2584-2585-2586-2587-2588-2589-2590-2591-2592-2593-2594-2595-2596-2597-2598-2599-2600-2601-2602-2603-2604-2605-2606-2607-2608-2609-2610-2611-2612-2613-2614-2615-2616-2617-2618-2619-2620-2621-2622-2623-2624-2625-2626-2627-2628-2629-2630-2631-2632-2633-2634-2635-2636-2637-2638-2639-2640-2641-2642-2643-2644-2645-2646-2647-2648-2649-2650-2651-2652-2653-2654-2655-2656-2657-2658-2659-2660-2661-2662-2663-2664-2665-2666-2667-2668-2669-2670-2671-2672-2673-2674-2675-2676-2677-2678-2679-2680-2681-2682-2683-2684-2685-2686-2687-2688-2689-2690-2691-2692-2693-2694-2695-2696-2697-2698-2699-2700-2701-2702-2703-2704-2705-2706-2707-2708-2709-2710-2711-2712-2713-2714-2715-2716-2717-2718-2719-2720-2721-2722-2723-2724-2725-2726-2727-2728-2729-2730-2731-2732-2733-2734-2735-2736-2737-2738-2739-2740-2741-2742-2743-2744-2745-2746-2747-2748-2749-2750-2751-2752-2753-2754-2755-2756-2757-2758-2759-2760-2761-2762-2763-2764-2765-2766-2767-2768-2769-2770-2771-2772-2773-2774-2775-2776-2777-2778-2779-2780-2781-2782-2783-2784-2785-2786-2787-2788-2789-2790-2791-2792-2793-2794-2795-2796-2797-2798-2799-2800-2801-2802-2803-2804-2805-2806-2807-2808-2809-2810-2811-2812-2813-2814-2815-2816-2817-2818-2819-2820-2821-2822-2823-2824-2825-2826-2827-2828-2829-2830-2831-2832-2833-2834-2835-2836-2837-2838-2839-2840-2841-2842-2843-2844-2845-2846-2847-2848-2849-2850-2851-2852-2853-2854-2855-2856-2857-2858-2859-2860-2861-2862-2863-2864-2865-2866-2867-2868-2869-2870-2871-2872-2873-2874-2875-2876-2877-2878-2879-2880-2881-2882-2883-2884-2885-2886-2887-2888-2889-2890-2891-2892-2893-2894-2895-2896-2897-2898-2899-2900-2901-2902-2903-2904-2905-2906-2907-2908-2909-2910-2911-2912-2913-2914-2915-2916-2917-2918-2919-2920-2921-2922-2923-2924-2925-2926-2927-2928-2929-2930-2931-2932-2933-2934-2935-2936-2937-2938-2939-2940-2941-2942-2943-2944-2945-2946-2947-2948-2949-2950-2951-2952-2953-2954-2955-2956-2957-2958-2959-2960-2961-2962-2963-2964-2965-2966-2967-2968-2969-2970-2971-2972-2973-2974-2975-2976-2977-2978-2979-2980-2981-2982-2983-2984-2985-2986-298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- possible unintended consequences, for example, the accused being remanded overnight due to the time taken to gather the necessary information and this being unacceptable unless there are good reasons for doing in the person's interests.

We would make some observations in response.

On the time taken to process cases, we acknowledge some additional time may be added to bail hearings and this is reflected in the Financial Memorandum. This additional time is designed to help improve the quality of information available for the court to make its bail decisions. In this context, there has been support from many of those giving evidence for the principle of enhanced involvement of justice social work to better inform the decision-making process.

It is worth confirming more generally that there are no changes proposed in the Bill to the overall timescales within which the bail decision has to be made by the court. This means that any additional time given to justice social work to provide information to the court could not delay the court's initial decision on bail beyond the time permitted by section 22A of the 1995 Act.

Depending on the specific timings of first appearance in any given case, this is a period of approximately 24 hours possible deferral. If justice social work indicate a period of 24 hours will suffice, the court could elect (as noted by the Committee) to recall the case the following day and remand the accused in custody overnight. This will ultimately be a matter for the independent court to decide, based on the facts and circumstances of each case.

With regards the possible unintended consequences of such an approach articulated at paragraph 113 of the Committee's report, it is important to note that this does not mean a person is being remanded for a period of 24 hours who would otherwise automatically be at liberty in the community.

When a person first appears before the court and the question of bail is considered, in general terms the bail decision-making context can be said to fall within one of three categories, each of which involves a weighing-up exercise by the court, where the court must consider a number of different and often competing interests.

There may be:

- no good reason for refusal of bail and the person must, as a result, be permitted to stay in the community (in line with the overarching and long-standing presumption for bail, which the Bill does not seek to change);
- good reason for refusal of bail having regard to the list of factors set out in section 23C of the 1995 Act and, under the new bail test, either a risk to public safety or the delivery of justice being present;
- what could be described as 'edge' cases where remand is in the uppermost of the court's mind due to good reason being identified for refusal of bail, but there may be information available to adjust the court's decision-making in favour of bail.

In the final scenario, if the court opts to defer the initial bail decision for a short period to obtain information from justice social work, this may result in a person being admitted to bail and gaining their liberty pre-trial following receipt of the additional information (and the consideration of that information against the new bail test). This short period on remand could be compared to the situation where there was an absence of such information being provided with the effect that an accused person may have been remanded pending trial, the court having made its initial bail decision upon the information available at the time of first calling.

We acknowledge there is a balance to be struck between ensuring the continuing efficiency of court proceedings and ensuring the court has the best information available to help inform the crucial bail decision.

We consider that the enhanced role of justice social work will not mean generally that people will be remanded when they would not ordinarily be remanded at present. Instead, we consider it provides an opportunity for some accused persons to be able to remain in the community with bail conditions through fuller and more diverse information being provided to the court at the outset of proceedings to help it make its bail decision.

Finally, we note comments made about how it is envisaged the enhanced role of justice social work will work in practice. Clearly, section 1 of the Bill aims to improve operational practice across Scotland by upscaling and standardising existing best practice in this area i.e. where justice social work already provide beneficial input to bail decisions.

We consider evidence the Committee heard from the Glasgow Bar Association was helpful in this regard, where collaborative working and the feeding in from third sector organisations during this process was articulated:

“... I had a case recently of a female who had gone into the 218 project. I do not know whether any of you is familiar with it, but the 218 project in Glasgow is a third sector organisation that deals with women and women’s issues. It deals with people who have addictions, and there have been recent cases as part of these bail supervision orders. In the case that I had, the accused was bailed to the 218 project. In addition to the supervised bail report, the social workers were involved, along with me and the 218 project, in having the client assessed for the 218 project. It meant that she went there on a residential basis and was given treatment for various things within that forum, which is really positive.”⁵

In addition, we note that Keith Gardner of Community Justice Scotland provided valuable information about the role of justice social work when he attended Committee on 14 December 2022:

“... We support the proposal because it will allow for professional social work input at the right time in the process. That will give a balance of information, because one of the many things that social work, particularly justice social work, is good at is the assessment of need. That involves dynamic information based on assessment with the person there and then, as well as looking at their historical information, because, unfortunately, for many people, it will not be their first time going through the system, which will have dealt with them before.”⁶

⁵ [Official Report \(parliament.scot\)](#)

⁶ [Official Report \(parliament.scot\)](#)

Section 2 – Grounds for refusing bail

166. There have been differences of views from our witnesses about what the impact of the changes to the bail test will be. It has not been entirely clear to some observers if the proposed change is intended to be a minor reframing of the rules, or a more fundamental reform. Some witnesses argued that a narrowing of the grounds for bail will inevitably lead to significantly more individuals being granted bail. This has been a particular concern for organisations representing the victims of crime. Others, including the Lord President, have argued that the revised bail test would make little practical difference to outcomes.

167. We heard that some of the uncertainty regarding the likely impact of the revised bail test may be a result of the focus on ‘public safety’ and a lack of a common understanding of how that is to be interpreted. For example, it has been unclear to some witnesses whether it would be possible to remand a persistent shoplifter by reference to the public safety test. It was also not clear whether some offences, like housebreaking, would raise public safety concerns, or whether such a judgement would be taken on a case-by-case basis. Additionally the Crown Office has raised concerns about the proposed new limitations on the extent to which the risk of a failure to appear can be used a ground for the refusal of bail in summary cases.

168. It is not the job of this Committee to provide a legal analysis of how the new bail test will be applied in certain scenarios. Our role is to highlight where concerns have been raised by interested parties about the potential for different interpretations of the bail test in certain scenarios.

169. If the concept of public safety is capable of being widely interpreted, in practice, there might not be an appreciable difference to the outcome of bail decisions. Judges might feel they have the latitude to take the same decisions as they would have taken under the current bail test. Furthermore if different judges interpret public safety in different ways there might also be a risk of inconsistency of decision-making. We heard that ultimately some of these issues may be clarified via case law arising from appeals but this may take time to resolve itself.

170. That said, providing a definition of public safety on the face of the bill, or in a guidance note, would not be without its own risks. If the definition is too tightly drawn or, alternatively, too widely defined, then this risks significantly increasing or decreasing the numbers of individuals granted bail.

171. We note the Senators of the College of Justice’s response to the consultation on the Bill, in which it was noted that the varying interpretations of what is meant by public safety has the potential to substantially narrow the court’s power to remand in custody. The Committee has heard evidence that a failure to provide guidance on what is meant by public safety could lead to uncertainty and appeals. The Committee considers that, whilst well intentioned, the Bill fails to address the concerns of Lord Carloway that the legislation will “introduce an unnecessary, cumbersome and artificial process” without changing outcomes in bail decision making. For some members, the factors that judges need to take into account would be preferable on the face of the bill.

172. As we have discussed elsewhere in the report, the actual impact of the changed wording of the bail test may depend on the resources made available to justice social work. If justice social work is well resourced then courts may feel better informed about the likely risks posed in individual cases and better able to judge that the accused poses no risk to public safety and therefore can be released on bail. It is also the case that if resources are made available to facilitate the option of special bail conditions then this is likely to have an impact on the numbers of individuals granted bail. Adequately resourced support and supervision for those on bail can help to ensure the public (including, most importantly, complainers) are protected and that the accused appears in court as required. In the previous section of the report, we discuss the importance of the necessary resources being made available by the Scottish Government.

173. It is also the case that some of the factors which impact on the outcomes of bail decisions are not necessarily a product of the bail test in legislation. For example, it does not appear that fiscals in court have much latitude to depart from the decision as to whether or not bail is opposed previously made by senior colleagues at the earlier case-marking stage, but nonetheless there is an accepted link between a bail decision and the attitude of the Crown in relation to the case.

We note the various views offered in relation to the new bail test contained in section 2.

The new bail test in the Bill is intended to refocus how imprisonment is used to ensure that, as much as possible, the use of custody for remand is a last resort for the court, and to encourage more people to remain in the community pre-trial who do not pose a risk to public safety or a risk to the delivery of justice

What lies at the heart of the bail test is an absolute commitment to public safety – including victim safety – intended to lead to a reduction in the risk of further offending and ultimately fewer victims in the future.

As indicated above, we are clear remand will always continue to be needed and the new bail test explicitly recognises this.

There are occasions where remand is necessary to protect public safety and victim safety because of a risk of an adverse event occurring e.g. further offending. The new bail test allows for this.

There are occasions where remand is necessary to protect the integrity of the criminal court process to ensure justice can be delivered e.g. a person wilfully failing to appear at trial. The new bail test allows for this.

These are the situations where remand can and should be used as a last resort. Otherwise, bail should be the default.

Within this context, we would offer the following specific comments responding to various issues.

We note the views offered by the Lord President in his brief written response to the call for evidence.

In respect of the views offered by the Lord President, we acknowledge the new bail test is more prescriptive. This is because it adds two new specific public interest considerations where either must be present in order for bail to be able to be refused.

These considerations are:

- the interests of public safety, including the safety of the complainer from harm, and
- remand being necessary to prevent a significant risk of prejudice to the interests of justice.

This approach is a policy choice taken to deliver a more focused bail test ensuring remand can only be used as a last resort.

Where one or both of these public interest considerations apply in a given case and bail is refused, the court must explain the reasons why and enter those reasons in the formal record of proceedings.

In line with the Committee's wish for greater information to be available as to how remand is used, this policy approach is designed to improve understanding as to how remand is used in Scotland.

As discussed in relation to section 1 of the Bill, the Bill envisages an enhanced role for justice social work to better inform the bail decision being made by the court. This will have an impact on proceedings in court and this is acknowledged in the Financial Memorandum. We are seeking to strike an appropriate balance in this area so that when decisions are being made at the outset of the criminal justice process about a person's liberty and the risk they may pose to the public, including to victims, the court has access to as full information as is possible to inform their decision.

We note the comments on outcomes arising from the new bail test. As is made clear above, the purpose of the new bail test is to focus the decision-making of the court so that remand is used as a last resort. For the reasons offered above as to why setting a target would not be appropriate or possible, we would not wish to indicate a view on outcomes – the new bail test is proposed on the basis of policy as to the appropriate use of remand.

More generally, it should be noted the new bail test will also impact on other decision-making in this area. For example, the Crown Office and Procurator Fiscal Service indicated in their evidence that:

“... It's a matter for the Crown in appropriate cases where there are good grounds and good reasons to consider that bail may be refused, to make those grounds available to the court and for the court to make the decision and that will be the case irrespective of what the framework is.

The legislative framework will just shape the basis upon which we will oppose bail and the number of cases in which we oppose bail. It will shape it because there will be certain instances where it will not be open to us to oppose bail anymore. The decision will still ultimately rest with the court.”⁷

⁷ Kenny Donnelly (Crown Office and Procurator Fiscal Service), Criminal Justice Committee Evidence Session – 25 January 2023

In helping to understand the potential impact of the new bail test on judicial decision-making, we note the Lord President's comments in his response on behalf of the Senators to the Scottish Government Consultation on the policy for the Bill.

These comments in particular related to the concept of public safety, which is an area the Committee have considered, and were as follows:

*"... If the concept of public safety is to mean, for example, the protection of the public from any offending behaviour, then the outcome regarding remand in custody may be little different from at present. If, on the other hand, it is to be understood as referring to safety in the ordinary sense (ie freedom from injury, danger or risk) then many offenders who appear in the summary courts charged with crimes of dishonesty or public disorder, and who pose a substantial risk of continuing to offend whilst awaiting trial, will require to be released on bail. It is therefore clear that the proposal, depending on how exactly the concept of public safety is to be defined, has the potential to constitute a substantial narrowing of the court's power to remand in custody."*⁸

We have detailed below views on the definition of 'public safety,' to help put these comments and other comments made on public safety in context.

In my opening remarks at Committee on 1 February, I indicated the Bill does not include a statutory definition of public safety and instead the policy is that the ordinary meaning of the words apply.

For the word 'safety', the Oxford English Dictionary meaning is:

"the state of being protected from or guarded against hurt of injury; freedom from danger."

While not a definition of "public safety", the phrase 'in order to protect the public from serious harm' has been held in case law as meaning either the public in general or a section of the public, as the context requires.

Therefore offences the nature of which pose a risk to safety of the public – either generally or sections of the public or individual members of the public - would be those that would threaten to cause hurt, injury or which present a danger.

Taken together, these ordinary meaning definitions reflect the Scottish Government's policy intention of the meaning of the phrase 'public safety' in the Bill.

We note the Committee has discussed whether there should be a statutory definition. We note it is acknowledged that the inclusion of a statutory definition is not without risk and that there may be unintended consequences if the definition is limited unnecessarily, or conversely, interpreted too widely.

One option we note the Committee refers to is to provide a definition of the meaning of public safety in a guidance note. It is the case that I gave an on-the-record explanation at the Committee on 1 February and this same definition is detailed above in this letter. While it would not be appropriate for us to give formal guidance to the judiciary about how to interpret law, we will consider carefully how best we can further aid understanding for users of the legislation.

⁸ [20220818_Lord President \(4\).pdf](#), at page 3

We note the Committee's views around how the public safety test will be applied in practice to certain categories of case, for example, theft or domestic housebreaking. In this regard we would like to draw the Committee's attention to the evidence you heard from Mark Sherry, Chief Executive of the Risk Management Authority (RMA) and Sheriff David Mackie, representing Howard League Scotland, which the Scottish Government agrees with.

The RMA highlighted the importance of the 'real world risk' posed by each individual accused in the community being the principal consideration, rather than remand decisions being made by broad offence type. Mark McSherry said the following:

*"... risk and the consideration of that risk are key, not just the type of offence."*⁹

Similarly, David Mackie highlighted that legislation does not and should not seek to address every possible bail scenario:

"... There is no attempt in legislation to establish a detailed list of regulations that addresses or attempts to address every possible scenario. The approach starts with the European convention on human rights, which says that everybody is entitled to bail.

That is the starting point; every person accused of an offence is entitled to bail, full stop.

Our legislation then addresses the exceptions—the reasons to justify the withholding of freedom. The bill resets the bar, in effect, in that it restates the principles that decision makers, judges and sheriffs take into account when they decide on bail.

*Nuances in individual cases are addressed through the information that is available to the decision maker. Rather than being concerned about creating legislation that endeavours to address every circumstance, the judges and sheriffs are provided with wide discretion in addressing these issues."*¹⁰

In paragraph 167, we note reference is made to the differentiation between summary and solemn proceedings when it comes to the ability of the court to remand on 'failure to appear' grounds.

As the Committee will be aware, under section 2 of the Bill, in summary cases the court can consider this ground where the accused has failed to appear at a previous hearing of the case (so not at the first calling of a case) or where the charge before the court the accused is appearing in respect of is a failure to appear offence. If neither of these situations arise, this ground cannot be used to justify a refusal of bail.

The Bill does not make this distinction in solemn cases so the court can cite a failure to appear ground as part of the reasoning why refusal of bail is justified from the outset of a case.

⁹ [Official Report \(parliament.scot\)](#), at page 20

¹⁰ [Official Report \(parliament.scot\)](#), pages 48-49

In operating the new bail test, the court's ability to tackle habitual non-compliance with the criminal justice process is dealt with through the newly proposed section 23B(1A) of the 1995 Act, inserted by section 2 of the Bill. This part of the new bail test specifically provides the court with the power to remand a person to prevent a significant risk of prejudice to the interests of justice. In a summary case, this could be, for example, where the court considers an accused person has wilfully failed to appear at court in an attempt to evade justice by delaying the proceedings and preventing the case going to trial.

The distinction in approach between summary and solemn cases recognises that the nature and gravity of offences under solemn procedure are the most serious, where the Scottish Government considers it may be appropriate in the public interest to remand on failure to appear grounds to secure the continued delivery of justice from the very outset of a case.

The new bail test seeks to balance the overarching policy objective of ensuring remand is used as a last resort, whilst also ensuring the court in summary cases still retains the power to remand those who it considers poses a risk to the delivery of justice. For example, where an accused person breaches the trust afforded to them by the court through failing to appear at a future hearing after being admitted to bail.

We agree with the points the Committee raise at paragraph 172 with regards to the importance of adequate resourcing for justice social work, and for bail services specifically. As noted earlier in this response, we have continued to protect the community justice budget against a backdrop of significant financial constraints. In 2023/24, we will invest £134m in community justice services, including £123m allocated to local authorities – with a specific investment of £3.2m for bail assessment and bail supervision services. That is having an impact with more local authorities establishing a bail supervision service, alongside the ongoing roll out of electronically monitored bail services,

Section 3 – Removal of bail restrictions

199. The Committee has been acutely aware of the concerns expressed by organisations representing victims of crime regarding the proposal to repeal section 23D. The Committee has explored with a number of witnesses what the impact of the repeal of section 23D will be and how, in practice, it will impact on bail decisions. The Committee notes that there appears to be a view from many observers that the removal of section 23D would not impact on how the courts take into account the safety of victims. Furthermore we heard arguments that the removal of section 23D could bring some advantages in terms of better decisions by courts as it would allow judges to exercise a degree of discretion.

200. The Committee's main focus in examining this proposal has been to satisfy ourselves that the repeal of section 23D will not lead to adverse effects on the safety of victims, particularly in relation to cases of domestic abuse and violence against women and girls. We have listened carefully to the reassurances we have been given from a number of organisations and individuals about the impact of the repeal. Whilst some members of the Committee are persuaded that the focus on public safety in the new bail test, including the reference to the safety of the complainer, will provide the necessary safeguards for the repeal of section 23D to go ahead, others do not hold this view given the conflicting views we heard.

201. However it is clear that organisations representing the victims of crime are not convinced by the repeal. The Scottish Government must have dialogue with them to provide the necessary reassurance regarding the impact of the repeal.

We note the comments of the Committee. We acknowledge that the Scottish Government requires to continue the ongoing engagement with groups representing the victims of crime regarding the repeal of Section 23D and how the new bail test has public safety and victim safety at the heart of how it operates.

Section 4 – Stating and recording reasons for refusing bail

214. The Committee understands that the primary rationale for this provision is to provide a resource for future research on bail and remand. This of course has value. The Committee has made the case earlier in this report for the importance of having access to better data relating to the use of remand.

215. However, the Committee has also noted that concerns have been expressed about the time taken in court to fulfil the requirements of this section. We also understand that the reasons for refusal of bail are, as standard, set out verbally in the court room. Furthermore, it is already the case that a written explanation of reasons is given in the event of an appeal against a bail decision.

216. As such we are not clear that the case has been made for the requirement in the Bill for a written statement on all occasions where bail has been denied. We would ask the Cabinet Secretary to rethink the wording of this section so that we do have the opportunity to monitor decision-making without making this too onerous.

We note the comments offered by the Committee. As with other aspects of the Bill, we want to strike an appropriate balance in delivering a more effective bail regime coupled with efficiency in operational delivery.

Our initial reaction is that we consider the requirement to record reasons why remand has been used to be an important aspect of Section 4. We note the Committee has, at paragraph 58, indicated its wish for *‘... a detailed understanding of the reasons why people are remanded’*. In order to deliver this, requiring the recording of reasons in the court record of proceedings would seem an effective way of delivering this policy. We note this recommendation was made in the context of the Committee’s observation at paragraph 41 that *‘(the Committee) has faced challenges in obtaining accurate and clear information on the reasons for remand and the characteristics of Scotland’s remand population.’*

We also note considerable support for the recording of reasons for remand, for example, Wendy Sinclair-Gieben, HM Chief Inspector of Prisons Scotland, told the Committee:

“The gathering of data and statistics to inform why it is happening—why bail is being refused and why people are on remand—is really important. That would really help. Although some statistics are gathered, they are by no means enough, and they are not publicly available in a way that would enable us to analyse them and draw some conclusions.”¹¹

However, we acknowledge the views that have been expressed about the time taken in court to fulfil the requirements of section 4. In particular, section 4 as it is provided for in the Bill requires the court, when refusing bail, to state particular reasons for its decision:

¹¹ [Official Report \(parliament.scot\)](#), at page 47

- Firstly, it must state the grounds on which it determines (in accordance with new section 23B(1A) of the 1995 Act) that there is good reason for refusing bail.
- Secondly, if refusing bail solely on the ground specified in section 23C(1)(a) of the 1995 Act (that is, substantial risk of absconding or failing to appear), it must state why it considers that the necessity test in new section 23B(1A)(b) is met; and
- Thirdly, it must state its reasons for refusing to grant bail subject to an electronic monitoring requirement under Part 1 of the Management of Offenders (Scotland) Act 2019 – more specifically, its reasons for considering either that imposing bail conditions subject to such a requirement would not be appropriate, given the accused’s circumstances, or that doing so would not be enough to properly safeguard the interests of public safety or justice as mentioned in new section 23B(1A)(b)(i) or (ii).

The court must then ensure that those specific grounds and reasons are added to the record of the proceedings.

We will consider carefully as to whether to re-assess what information requires to be recorded over and above the reasons why remand has been used.

Referring back to paragraphs 52 and 58, and the call from the Committee for better information to be available about the numbers of people on remand, we note that a substantial volume of the information requested is already published in the annual official statistics on the prison population¹² and the monthly report on safer communities and justice statistics.¹³

The annual official statistics provide information on the average daily remand population, the number of individuals remanded to custody, and the number of arrivals to remand over the course of the previous financial year.

These figures are disaggregated by index offence category and group, gender, and local authority. Completed periods in custody in each year are also analysed to provide information on the length of time individuals are held on remand.

Historical trends are provided for all of the above information, and accompanying narrative contextualises and explains the trends reported (see sections 1 and 10 of the 2021-22 release)¹⁴.

The monthly report provides a single-day snapshot of the remand population levels, contextualised in a description of recent trends (covering March 2020 onwards). Time held on remand to date and index offence category for all remand arrivals during the month are also provided.

On the reasons why people are remanded and in addition to the benefits of section 4 recording requirements, we commissioned a research study into decision-making on bail and remand in December 2019. Fieldwork was paused during the pandemic but resumed in 2021. Interim findings were published in July 2022¹⁵ and the project is due to conclude in June 2023.

¹² <https://www.gov.scot/collections/scottish-prison-population-statistics/#scottishprisonpopulation>

¹³ <https://www.gov.scot/collections/justice-analytical-services-safer-communities-and-justice-statistics-monthly-reports/>.

¹⁴ <https://www.gov.scot/publications/scottish-prison-population-statistics-2021-22/>

¹⁵ <https://www.gov.scot/publications/decision-making-bail-remand-scotland-interim-findings-report/pages/1/>

We would be happy to work with the Committee to further explore the available data.

Section 5 – Consideration of time spent on electronically monitored bail in sentencing

228. Our view is that sheriffs and judges are best placed to determine the extent to which time spent on electronic monitoring should be deducted from the length of custodial sentences.

229. The Committee is content that if the Bill allows time spent on electronic monitoring to be taken into account, and if the court so decides, this would be a helpful change. There is an important principle that the courts be given a degree of discretion to determine such matters themselves.

We note the Committee's views in this area.

PART 2 – RELEASE FROM CUSTODY

Section 6 - Prisoners not to be released on certain days of the week

248. The Committee recommended in its Judged on Progress report that consideration should be given to changing the legislation governing Friday liberations and therefore welcomes the proposed changes. Releasing prisoners on a Friday can deem some individuals vulnerable to reoffending as they may be unable to access important services before the weekend. Friday releases can also impact victims and families where they may require support associated with an individual's release. This may be difficult to access or not available at all.

249. However, we note there may be significant practical challenges and additional resources required for some public and third sector service providers to continue to allow effective levels of frontline liberation support to be offered in a shorter weekly time frame.

250. On balance, until there are adequate resources for public and third sector service providers to be adequately informed prior to release so that they can provide support whenever it is required, then Friday releases should be avoided.

We welcome the Committee's support for this provision and would agree with these recommendations. As noted in the Committee report and Policy Memorandum, this provision is intended to improve access to support services for people leaving prison. It recognises the challenges of accessing services on a Friday, public holiday and weekend. Accessing these services can also be more difficult for those who have to travel long distances from the prison to their Local Authority area.

This provision should be considered alongside sections 9 and 10. Together these sections are intended to improve pre-release planning and access to consistent throughcare support to better enable reintegration

We also note the points raised by Victims Support Organisations (VSOs) that this change will also be beneficial for victims, enabling them to access support services on the day of or immediately following release of the prisoner in their case.

“VSS agrees with this proposal. Releasing prisoners on a Friday is not practical for either the prisoner, the victim of crime or their family. Support services may not always be available depending on the time of the release on a Friday which can increase risks to victims of crime and their families¹⁶”

We also note that VSOs highlighted the importance of ensuring that victims are made aware of the prisoner’s release date and if that date will change due to the impact this provision. We do not consider that specific amendment is necessary to allow for this to happen. Release will continue under Part 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 and, therefore, notification under the Victim Notification Scheme will apply. Section 6 does not amend that process, therefore, victims registered with the scheme will continue to be informed of the release date associated with their case.

We note the views put forward in some of the evidence you have considered that it would be preferable if support services available whenever they may be required, including later on Friday, over public holidays and weekends. As noted by several witnesses during the evidence sessions, there would significant operational and financial implications to ensuring services are provided 7 days a week and out of standard working hours. These services are varied, and include statutory and non-statutory services including justice social work, health and social care services, third sector services and public transport.

The proposal within the Bill attempts to achieve the same aim, which is improving access to support which will better encourage successful reintegration and reduce the risk of reoffending.

We note that some witnesses indicated that further limiting the days of the week on which people can be scheduled for liberation from custody may have resource implications for some services. We will work with partners during implementation planning to continue to review any resource implications of this change.

Section 7 - Release of long-term prisoners on reintegration licence

260. Section 7 of the Bill provides for the release of long-term prisoners on reintegration licence. It provides for this in two situations – before and after the Parole Board has recommended release on parole. In relation to the second situation, the Board advised us that it will need a power to reverse its decision on parole if the offender fails to comply with the conditions of release on reintegration licence

261. The Cabinet Secretary indicated that the legislative gap identified by the Parole Board is not something which has arisen as a result of this Bill. Nevertheless the Cabinet Secretary indicated that he is engaged in discussions with the Parole Board about this issue. The Committee welcomes this commitment and hopes a satisfactory resolution can be reached using this bill to affect the necessary change if appropriate. The Committee would welcome an update on this in the Government’s response at Stage 1.

¹⁶ [Response 730510038 to Bail and Release from Custody \(Scotland\) Bill - Scottish Parliament - Citizen Space](#)

We noted the views provided by John Watt, Chair of Parole Board for Scotland, during his evidence to the Committee – including that he was supportive of section 7 in principle,

“because it allows for much better integration into the community if the prisoner can talk to social work, addiction support, GP, etc. in the community before they get to the point of actual release on parole licence”¹⁷.

He also noted that allowing temporary release of certain long-term prisoners in advance of the Parole Board’s consideration of whether to recommend release on parole licence will provide further evidence for the Parole Board to inform those decisions.

We also note the specific points Mr Watt raised about the limits on the Parole Board’s ability to review a decision to recommend release on parole. In the event of an adverse development occurring between the point at which the recommendation to release is made by the Board and the point at which the person is released, currently, there is no ability for the Parole Board to review their decision. Mr Watt specifically highlighted the potential difficulties this could cause if the Parole Board had directed release on a reintegration licence under section 3AB(3) after making the decision to recommend release on parole and the individual was subsequently recalled from their reintegration licence. In that instance, the Board could not review its decision to recommend release on parole licence.

As I confirmed during my evidence to the Committee, this situation is not as a direct consequence of the Bill but reflects case law. However, this Bill does provide an opportunity to consider this and develop a possible solution. We are having constructive and ongoing dialogue with the Parole Board to consider whether a stage 2 amendment might be possible to address this issue.

At this time we cannot say with certainty what might be possible at stage 2 but would like to reassure the Committee this is under active consideration.

Section 8 - Emergency power to release prisoners early

276. The Committee notes the scrutiny of the delegated powers provisions in this section by the Delegated Powers and Law Reform Committee and draws the attention of the Parliament to that Committee’s report.

277. The Committee asked the Cabinet Secretary if the Scottish Government was seeking to amend the Bill to mirror restrictions on the use of the existing COVID-19 power of emergency release which were added during stage 3 of the Coronavirus (Recovery and Reform) (Scotland) Bill...The Cabinet Secretary indicated that this was under consideration and the Committee would be supportive of such amendments.

278. The Committee is not wholly persuaded of the necessity to permanently enshrine the power to release prisoners early into the Bail and Release from Custody (Scotland) Bill. This power is already included in the Coronavirus (Recovery and Reform) Act 2022 and a permanent entrenchment should not be considered until this power has been evaluated as part of the post-legislative scrutiny of that legislation.

¹⁷ [Official Report \(parliament.scot\)](https://www.parliament.scot/Official-Reports/2022/20220901)

We note that the Committee are not wholly persuaded of the necessity to provide an emergency release power within the Bail and Release from Custody (Scotland) Bill – and that this should not be considered until the emergency release power in the Coronavirus (Recovery and Reform) (Scotland) Act 2022 (the 2022 Act) has been evaluated as part of the post-legislative scrutiny of the 2022 Act.

We would highlight in response that emergency release powers exist in many other jurisdictions, including England and Wales. Scotland is an outlier in not having such a power – which can only be exercised by the Scottish Ministers if they are satisfied that it is a necessary and proportionate response to an emergency situation affecting a specific prison or prisons more generally. The purpose of using this power must be to protect the security and good order of any prison, or the health, safety or welfare of prisoners or prison staff.

As the Committee is aware, the emergency release power within the 2022 Act is temporary and cannot be extended beyond November 2025. Furthermore, the power within the 2022 Act only permits prisoner release as a result of the impact of covid on a prison and not, for example, in the case of any other spread of infection or contamination or fire, flood or other incident which would make a prison or part of a prison unusable.

Without a wider, permanent emergency release power available to Scottish Ministers, bespoke legislation would be required in the event of an emergency as described above putting the lives of prisoners and prison staff at risk by not being able to act immediately and placing additional pressures on the Parliament.

In its response to the Committee's call for views, the Wise Group provided the following:

“If the pandemic has taught us anything, it is that we can never be complacent or unprepared for what exceptional circumstances may befall society, so it makes complete sense to have an executive power of release to be used in extenuating circumstances, particularly if there is a risk to the safety or good order of prisons or a threat to the health and safety of staff and prisoners.”¹⁸

We would also draw the Committee's attention to the safeguards on the face of the Bill. That includes the list of statutory exclusions which would prevent specific groups of prisoners from being considered under any early release process and the prison governors' power to veto the early release of any eligible prisoner where this would present a known risk to a specific individual. Long-term prisoners could only be released under this mechanism if their release at their Parole Qualifying Date had already been recommended by the Parole Board at the point of the emergency release process.

Furthermore, in response to recommendation 277, as noted by the Committee during my evidence session, the emergency prisoner release provision within the 2022 Act was amended at Stage 3 (28 June 2022) to include additional statutory exclusions for people serving sentences following conviction of an offence under section 7(1) or 17(1) of the Domestic Abuse (Protection) (Scotland) Act 2021, and also to limit release under this power to prisoners with 6 months or less left to serve.

These provisions are not reflected within Section 8 of this Bill currently as the Bill was introduced in early June, ahead of Stage 3 of the 2022 Act. We will consider what changes are required to the Bill at Stage 2 to reflect that.

¹⁸ [Response 458975064 to Bail and Release from Custody \(Scotland\) Bill - Scottish Parliament - Citizen Space](#)

I am grateful for the Delegated Powers and Law Reform Committee's (DPLRC) consideration of the Delegated Powers Memorandum to this Bill, including the points raised in relation to section 8 and the proposal to use the made affirmative procedure by reason of urgency.

As noted in the DPLRC's report, the affirmative procedure will be the default procedure if the Scottish Ministers exercise this power. However, as with the powers in the Coronavirus (Scotland) Act 2020 and the 2022 Act, this Bill allows that this power may be exercised subject to made affirmative procedure by reason of urgency.

We thought carefully about the use of the made affirmative when drafting this Bill. This drew on our experience from the use of the similar power in the Coronavirus (Scotland) Act 2020 and the consideration of the made affirmative procedure in relation to the 2022 Act to align as closely as possible with the four principles underpinning the DPLRC's consideration of making provision for the use of made affirmative procedure.

In the evidence the Scottish Government provided to the DPLRC, we provided detail on how we would intend to apply the four principles— in the event of made affirmative procedure being required by reason of urgency.

We note that the DPLRC's report on Stage 1 of this Bill, in relation to section 8 and the use of made affirmative procedure, stated that:

"The majority of the Committee is content with the explanation provided by the Scottish Government and accepts the power in principle. The majority of the Committee is also content that the exercise of the power will be subject to the affirmative procedure but may be subject to the made affirmative in specified circumstances and by reason of urgency" ¹⁹

Sections 9 & 10 - Duty to plan for the release for prisoners; Throughcare support for prisoners

306. The Committee heard about a number of examples of best practice in which third sector and public sector organisations have undertaken valuable work with prisoners to support their reintegration into the community. We commend this work.

307. However we also heard of many cases of where difficulties have arisen for prisoners, for example where they have experienced challenges in accessing benefits, health care and housing. It is clear that the support given to a prisoner in the immediate period prior to and following their release is crucial in determining how well they reintegrate back into the community. Unfortunately where there is a gap in the provision of this support, prisoners can be left in a vulnerable position which can sometimes lead them to drift back into criminal behaviour or being preyed upon by other criminals.

308. The principles behind these provisions of the Bill were broadly supported by witnesses who gave evidence to the Committee. There was a generally shared view that a duty to engage in release planning and to set minimum standards of throughcare support will be helpful in encouraging a joined up and consistent approach to the support given to prisoners.

¹⁹ [Bail and Release from Custody \(Scotland\) Bill at Stage 1 \(azureedge.net\)](#)

309. We also welcome the provisions in section 9 and 10. They will provide an extra focus and structure to the arrangements for supporting prisoners on release. We hope they will help avoid the sorts of ‘gaps’ in the provision of support which we have heard about.

310. However, we also heard that the success of these provisions in practice will depend on adequate resources being allocated to supporting prisoners. We heard that successful reintegration into the community is often best achieved through personal one-on-one support tailored to each prisoner. This, of course, is resource intensive.

311. The provisions in the Bill are to be welcomed, but the policy objective of reducing reoffending and supporting reintegration into the community will not work in practice unless the required resources are made available. The Committee has made similar statements about the resources that will be needed to implement Part 1 of the Bill.

312. We have also noted the calls that the “third sector” should be specified on the face of the Bill as an identified partner who must engage in release planning. We are in favour of a greater role for third sector bodies as partners in release planning.

313. Section 34A(4) of the Bill contains reference to third sector bodies, and we ask the Scottish Government to comment at Stage 1 as to whether this wording is sufficient to achieve the goal of greater third sector involvement or it needs to be strengthened.

We welcome the Committee’s support for the principles of these provisions. We also note the Committee’s recommendation to ensure sufficient resources are in place to enable the successful implementation of these provisions.

We recognise the excellent work already underway to support people leaving prison by the third sector and other partners, supported by ongoing Scottish Government investment in this area. That includes £3.7m p.a. to support third sector voluntary throughcare services.

As we are all aware, this is an exceptionally challenging period of economic upheaval, which is having an impact on available funding. Despite this, the Scottish Government have continued to protect the community justice budget. In 2023/24, we will invest a total of £134m in community justice services. That includes £123m to local authorities and £11m to third sector organisations.

Ongoing consideration of resourcing to support the implementation of this Bill is a priority and, to inform that, we will continue to engage with partners in the implementation planning for both sections 9 and 10.

As the Committee will note, section 10 specifically places a requirement on Scottish Ministers to consult with named partners in of the preparing, revising and reviewing the statutory throughcare standards which will include consideration of any resource requirements.

Turning to the Committee’s recommendation 313 and whether the wording in section 34A(4) is sufficient to achieve the goal of greater third sector involvement or whether it needs to be strengthened.

As noted above, we are clear that the third sector play a vital role in supporting people leaving prison. The fact that the third sector aren't specifically named on the face of the Bill is not reflective of a view that this support isn't important. The 'third sector' encompasses a wide range of organisations, both local and national with different constitutions, structures and specialisms. There is not one statutory definition for these services which is why the Bill does not specifically list them on the face of the Bill as a statutory partner at section 9 or section 10.

Instead, as the Committee note, Section 34A(4) of the Bill states that in complying with a request by the Scottish Ministers to engage in the development, management and delivery of a release plan, statutory partners:

- a) Must have regard to the role which third sector bodies are able to play in the development, management and delivery of the release plan;
- b) May commission services from, or co-ordinate the existing services provided by, third sector bodies as the person (statutory partner) considers appropriate to meet the needs of the individual to whom the release plan relates.

That is a similar approach taken within the Community Justice (Scotland) Act 2016²⁰ and is intended to emphasise the clear role that the third sector can and should play. We will continue to work with third sector and other partners during implementation planning to ensure that we take all opportunities to highlight and support the critical role of the sector.

Section 11 - Provision of information to victim support organisations

327. The Committee notes the scrutiny of the delegated powers provisions in this section by the Delegated Powers and Law Reform Committee and draws the attention of the Parliament to that Committee's report.

328. The proposal in this section of the Bill to allow a victim support organisation to receive information about the release of a prisoner appears to have been welcomed in principle.

329. However, the Committee notes that some victim organisations have raised concerns about information being shared under section 11 of the Bill without the consent of the victim.

330. The Cabinet Secretary told us that there is no track record of victims' organisations acting against the interests of victims. Nevertheless, he indicated that he would be willing to have further discussions about these organisations' concerns.

331. The Committee welcomes this approach and hopes that a satisfactory resolution can be reached.

²⁰ [Community Justice \(Scotland\) Act 2016 \(legislation.gov.uk\)](http://legislation.gov.uk)

332. The Committee notes that an independent review is underway of the Victim Notification Scheme. We recommend that the review takes into account the evidence we heard from survivors of crime about their concerns about the current victim notification arrangements. The Committee heard evidence of numerous deficiencies with the current victim engagement in the justice system, in particular for bail decisions and reports that victims were having to police bail conditions. Therefore, the Committee asks the Scottish Government to consider whether further information can be provided to victims to give them confidence that bail conditions are being policed and where necessary action taken in the case of a reported breach.

Providing victim support organisations with information about prisoner release will help ensure they are able to provide victims with the most effective support possible. It is intended to help support a more trauma-informed approach to how this information is shared and allow victim support organisations to work proactively with a victim on matters such as safety planning.

As you note at recommendation 327, the Delegated Powers and Law Reform Committee's (DPLRC) considered the delegated powers within section 11. We would note that the Committee supported the power within section 11 to modify definition of "support services" and to make ancillary provision (s16ZA(6)).

The DPLRC sought further clarification on s16ZA(2)(a) which provides Scottish Ministers with the power to prescribe description of persons to whom information can be provided and to make ancillary provision. Specifically, the DPLRC sought further detail on why the Scottish Government considered that negative procedure was appropriate when specifying the description of persons that may be supplied with information regarding prisoners in the specified circumstances set out in the Bill, and whether affirmative procedure may be more appropriate.

The Bill provides the parameters for sharing information with victim support organisations (VSOs). That includes what information can be shared and for what purpose. However, these provisions simply replicate the existing provisions in the Criminal Justice (Scotland) Act 2003 that govern the information-sharing with victims.

Rather than expanding the type of information that is to be made available, the Bill expands the category of person to whom this information can be made available to (i.e. VSOs). This expansion is provided on the face of the Bill and is thus subject to full Parliamentary scrutiny as the Bill progresses through Parliament.

To be provided with information, this new category of person will also have to provide "support services" (as defined in the Bill) to the victim and the Scottish Ministers will have to be satisfied that the person requires the information to provide those services to the victim. This provides additional safeguards for the information being shared. The Scottish Government therefore consider that the description of bodies for the purposes of those provisions, which will have been subject to full Parliamentary scrutiny, can appropriately be subject to negative procedure. For example, many VSOs are non-statutory services and could change their name to reflect changing requirements. If that was to happen then this organisation would need to be prescribed by regulations to reflect the change. Affirmative procedure would not be appropriate for that, as it would still be the same organisation.

We note that the DPLRC's report on Stage 1 of this Bill stated that:

“The majority of the Committee is content with the explanation provided by the Scottish Government. The majority of the Committee also accepts the power in principle and is content that the exercise of the power will be subject to the negative procedure, unless modifying primary legislation in which case subject to affirmative procedure”²¹

With regard to recommendations 329-331 regarding the potential for victim information to be shared with a VSO without the consent of the victim, we would like to reassure the Committee that we have listened to these concerns and are having further discussions with Victim Support Organisations. We will consider what changes may be needed to the Bill as a result.

In paragraph 332, the Committee has recommended that the Review of the Victim Notification Scheme (VNS) take into account the evidence that the Committee heard from survivors of crime about the concerns they have about the current scheme. Noting that the Review is independent of the Scottish Government and that the scheme deals with victim information at the point of release or when decisions on parole are being taken (rather than in the context of bail), I can confirm that officials have sent the Stage 1 Report to Alastair MacDonald and Fiona Young (respectively chair and vice-chair of the Review), drawing their attention to this recommendation.

In addition, we would be happy to incorporate this element of the recommendation into any relevant future work considering the VNS Review’s report. Finally, the Committee may wish to note that we intend to advise it when the Review publishes its report, in the same way that we did when the Review was launched last year.

We would also like to provide the Committee, and all victims of crime, with assurance that bail conditions are policed and that action is taken in the case of reported breaches. Anyone who breaches the terms of their bail is committing a criminal offence and may be arrested and prosecuted for a breach of bail offence.

For individuals who are subject to bail supervision, with or without an electronic monitoring requirement, national guidance sets out a framework for managing breach of these conditions. This guidance includes detail on how to manage restrictions intended to prevent access to victims/potential victims. The guidance is clear that the safety of any potential victim is paramount and the police must be made aware of a breach as soon as possible in order to ensure appropriate victim safety considerations. The guidance states that in cases involving domestic abuse, stalking and other serious offences including sexual and/or violent offending, any breach of a bail condition which is intended to prevent access to victims is to be acted on immediately. In cases involving a serious concern for public safety (such as increased risk to a victim) immediate direct contact with Police Scotland is warranted (i.e. via a 999 call).

It should also be noted the independent Crown Office and Procurator Fiscal Service provide a Victim Information and Advice service (VIA) to victims in criminal court cases. COPFS is responsible for operational decisions regarding VIA, however, we note that VIA includes information and advice in relation to where bail is a relevant consideration in a case. The COPFS will refer victims who require additional support to the service: this can include people under 18 or over 60, or victims of domestic abuse or stalking. VIA supports victims in understanding the criminal justice system, and can provide information about hearing dates, bail decisions, verdicts and sentences, or why no proceedings have been taken (where relevant). Specifically in respect of bail, VIA can help the victim understand the effect of

²¹ [Bail and Release from Custody \(Scotland\) Bill at Stage 1 \(azureedge.net\)](#)

court decisions, including relevant conditions that may be attached to an accused's person bail. VIA can also direct victims to other sources of support: for examples, organisations like Victim Support Scotland.

OTHER ISSUES

Financial resources and the financial memorandum

We note the points the Committee raises regarding the potential financial impacts of the Bill. The Financial Memorandum which supports this Bill was informed by engagement with a range of stakeholders, including Crown Office and Procurator Fiscal Service, the Scottish Courts and Tribunals Service (SCTS), the Scottish Prisons Service, Social Work Scotland and the Convention of Scottish Local Authorities (COSLA).

The Financial Memorandum provides estimates for the ongoing costs relating to the changes set out in the Bill and one-off implementation costs. We note that several committee witnesses have raised concerns regarding the financial implications relating to the implementation of the Bill's provisions, especially relating to enhanced and additional roles for Justice Social Work. We welcome the additional responses which were received from SCTS, City of Edinburgh Council, Inverclyde Health and Social Care Partnership and Social Work Scotland.

We will continue to work with these organisations on the costs and in setting out appropriate implementation plans for the Bill and if necessary the Scottish Government will publish a revised Financial Memorandum following Stage 2.

It's clear, however, that we're entering an exceptionally challenging period of economic upheaval, which will inevitably have an impact on available funding.

While funding for community justice services is constrained by those circumstances, we have continued to protect the community justice budget. In 2023-24, the Scottish Government will invest a total of £134 million in community justice services. That includes £123 million to local authorities – including a specific investment of £3.2 million to support bail assessment and supervision services – and £11m to third sector services.

GENERAL PRINCIPLES OF THE BILL

333. At Stage 1, the lead committee's role is to consider and report to the Parliament on the general principles of the Bill – that is, on the principal purposes of the Bill, rather than the fine detail.

334. In our view, the principal purposes of the Bill are to make changes to the use of custody for remand and to give a greater focus on reintegration of prisoners on release.

335. All members agreed that there are some useful provisions in the Bill. Fulton MacGregor, Rona Mackay, Audrey Nicoll, and Collette Stevenson support the general principles of the Bill. Katy Clark, Jamie Greene and Russell Findlay do not. Those not supportive believe that there is a lack of sufficient explanation about the Bill's intended purpose, its effects and detail about how some of the provisions will be delivered. Pauline McNeill was of the view the Bill should only proceed if Ministers address the issues outlined by Members not supporting the general principles.

As the Committee correctly notes at point 334 above, as set out in the Policy Memorandum²² which accompanies the Bill, the intended purpose of the Bill is two-fold.

The Bill intends to refocus how remand is used, with an emphasis on reserving remand for those who pose a risk to public and victim safety and, in certain circumstances, to the delivery of justice.

The Bill also intends to improve the support provided to prisoners on release, in order to better enable their successful reintegration.

It intends to achieve these aims in a number of ways as detailed in this response.

It is hoped that, in addition to the evidence I provided the Committee on 1 February, and the evidence you heard from stakeholders, that the information within this response provides further clarity to members in relation to the purpose and effect of this Bill; and the intended delivery of the various measures insofar as is possible at this stage. I hope that the information I have provided here addresses the issues raised and enables members of the Committee to support the general principles of the Bill at stage 1.

²² [Policy memorandum \(parliament.scot\)](https://www.parliament.scot/policy-memorandum)