

BAIL AND RELEASE FROM CUSTODY (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. As required under Rule 9.3.3 of the Parliament’s Standing Orders, this Policy Memorandum is published to accompany the Bail and Release from Custody (Scotland) Bill introduced in the Scottish Parliament on 8 June 2022.

2. The following other accompanying documents are published separately:

- Explanatory Notes (SP Bill 16-EN).;
- a Financial Memorandum (SP Bill 16-FM);
- a Delegated Powers Memorandum (SP Bill 16-DPM);
- statements on legislative competence by the Presiding Officer and the Scottish Government (SP 16-LC).

3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government’s policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

POLICY OBJECTIVES OF THE BILL

4. The provisions of this Bill are intended to introduce a number of reforms designed to deliver on the Scottish Government’s commitment to refocus how imprisonment is used. They are intended to ensure that, as much as possible, the use of custody for remand is a last resort for the court, and to give a greater focus to the rehabilitation and reintegration of individuals leaving custody. This supports the commitment in the Programme for Government to:

‘introduce legislation in this parliamentary term to change the way that imprisonment is used, with consultation on initial proposals relating to bail and release from custody law this autumn’¹

¹ [Scottish Government - Programme for Government 2021-22 \(p100\) \(https://www.gov.scot/publications/fairer-greener-scotland-programme-government-2021-22/documents/\)](https://www.gov.scot/publications/fairer-greener-scotland-programme-government-2021-22/documents/)

5. The provisions are also underpinned by a commitment to public safety and the protection of victims and are intended to lead to a reduction in the risk of future reoffending, leading to fewer victims in the future.
6. The Bill has 3 parts: the substantive provisions are contained in Parts 1 and 2, whilst Part 3 contains some standard ancillary and final matters. Part 1 covers bail law reform including adjustments to the legal framework within which courts make decisions as to whether people accused of criminal offences are remanded in custody² or granted bail. Part 2 reforms mechanisms governing release from custody and the support provided to people leaving prison, with an emphasis on reintegration into communities.
7. The provisions in Part 1 focus on the use of bail and remand in recognition of the negative impact that short periods of imprisonment can have – particularly for those who have not been convicted of crime.
8. These provisions make changes to the bail decision-making framework so that remanding a person in custody is reserved for those who pose a risk to public safety (including victim safety) or for when it is necessary to prevent a significant risk of prejudice to the interests of justice in a given case.
9. The overall policy intention of refocusing the bail decision-making framework in this way is to limit the use of remand to those who may be said to pose a risk of serious harm, making bail (with appropriate support and supervision in the community as needed) the option for those accused of offences who do not pose such a risk.
10. The provisions in Part 2 focus on arrangements around release from prison custody, with an emphasis on providing greater opportunities to support the reintegration of people leaving prison to reduce the risk of future offending and to enable people to move on towards more positive outcomes.
11. These provisions reform some of the mechanisms governing release from custody, including how support for those leaving custody could and should be provided. The vast majority of people currently detained in prison will return to their communities at some point, so it is essential that effective release processes which focus on supporting successful reintegration are in place.
12. Part 2 also provides for the provision of certain information relating to the release of prisoners to Victim Support Organisations to inform the support they provide to their clients.
13. In addition, Part 2 contains a provision which enables the Scottish Ministers to release groups of eligible prisoners in emergency situations to protect the security and good order of prisons and the health, safety and welfare of prisoners and prison staff.

² Under the Criminal Procedure (Scotland) Act 1995, the term ‘remand’ can describe an accused person being remanded in custody or remanded on bail. References throughout this document to ‘remand’ relate to a person being remanded in custody.

POLICY CONTEXT

14. The Scottish Government supports the use of prison as being necessary for those who pose a risk of serious harm. However, it is also recognised that imprisonment damages the connections that prevent people from offending or reoffending, such as family relationships, accommodation and employment. Short-term imprisonment in particular, is not effective in addressing the underlying causes of offending.

15. The Scottish Government knows that, for those leaving prison, effective support to enable them to reintegrate and make positive connections in their communities helps to prevent reoffending and supports more positive outcomes for them and those around them. A reduction in reoffending also means less crime and fewer victims.

16. In order to see reductions in reoffending and victimisation, with the associated damage to people and communities, there needs to be a more decisive shift away from the use of custody, including for remand, towards community-based interventions which do more to address the underlying causes of offending. More also needs to be done to ensure that consistent, timely services are available to support people on their release from prison at the point that they need them.

17. A justice system which more effectively addresses the reasons why people offend and provides greater opportunities for rehabilitation benefits everyone and will lead to fewer victims in the future.

18. The framework within which decision-making for bail occurs and arrangements around release from prison custody are two areas which have the potential to contribute to starting a shift in how imprisonment is used in a modern and progressive Scotland.

19. The Scottish Government acknowledges that legislation alone cannot deliver the changes the Scottish Government wants to see. Legislative reforms must be supported by the availability of consistent, robust alternatives to remand and effective and timely reintegration support for those leaving custody across Scotland. The Scottish Government is already investing in these services and will continue to work with partners across the sector to identify opportunities to build on good practice.

20. The Scottish Government also knows that community-based interventions are more effective at reducing re-offending, which is estimated to cost the Scottish economy around £4 billion per annum³. Therefore, investing in improved support for people in contact with the justice system, including those leaving prison, which aims to reduce their risk of reoffending is a more cost effective approach, delivering better outcomes for individuals and communities.

21. Justice agencies are essential in supporting the aims of the provisions within the Bill. However, they cannot do this alone. Wider partners, including NHS, local government, third sector organisations and mainstream public services play a vital role via decision-making,

³ Costs of the criminal justice system in Scotland dataset: 2016-17 - (<https://www.gov.scot/publications/costs-of-the-criminal-justice-system-in-scotland-dataset-2016-17-published-december-2019/>)

resourcing and delivery of public services. This is in line with the Christie principles⁴ of integrating service provision, prioritising expenditure to prevent negative outcomes, reducing duplication and becoming more efficient and empowering individuals and communities.

22. The aims of the Bill also link to the Scottish Government's priority to build strong, responsive public services by responding to the evidence about what works to reduce reoffending and preventing people from re-entering the justice system.

Wider policy context

23. On 8 February 2022, the Scottish Government published a new Vision for Justice in Scotland⁵, following collaboration across the justice sector. The Vision sets out the ambition that the people of Scotland live in a just, safe and resilient society, where they will be supported in rehabilitation by the most effective means, primarily remaining in their communities with support and opportunities for fair work, employment and housing. Through this Vision, steps will be taken collectively with all those covered by the Vision e.g. justice agencies to seek to improve public safety, support victims and reduce rates of victimisation.

24. In delivering 'The Vision', the Scottish Government recognises important questions need to be asked about how custody should be used in a modern and progressive Scotland, now and in the future. It is of course important that the justice system has all of the tools at its disposal at each stage of the criminal justice process to protect the public, keep our communities safe and enable the proper administration of justice.

25. The Vision acknowledges that, while prison will always be necessary, a person-centred approach should be taken in respect of rehabilitation so that people are supported in the most appropriate and effective setting. As part of this, the balance should be shifted so that custody is reserved only for times when no other alternative is appropriate.

Under 18s in custody

26. Despite an over 80 per cent reduction⁶ in the number of young people sent to custody over the past decade, young people being held in custody, especially those on remand, remains an issue of concern. While the overall numbers of under 18s in custody are small, the proportion held on remand is higher than that in the wider prison population. The reforms in the Bill apply generally and so will benefit under 18s as well as adults.

27. The policy aims of this Bill also support the wider Scottish Government priorities of reducing child poverty and delivering The Promise⁷, particularly in terms of the impact of parental imprisonment and the damaging impact of imprisonment on families.

⁴ The 'Christie principles' originate from the report of the Christie Commission on the future delivery of public services (2011) – (<https://www.gov.scot/publications/commission-future-delivery-public-services/>)

⁵ The Vision for Justice in Scotland - (<https://www.gov.scot/publications/vision-justice-scotland/documents/>)

⁶ Provided via Scottish Government Criminal Proceedings management information which does not form part of the published Criminal Proceedings bulletin

⁷ The Promise Scotland is responsible for driving the work of change demanded by the findings of the Independent Care Review which concluded in February 2020 – (<https://thepromise.scot/the-promise>)

28. The *Children's Care and Justice Bill – Consultation on Policy Proposals*⁸ launched on 30 March 2022. The proposals reflect important elements of the Scottish Government commitment to 'Keep the Promise'. They align with and support the achievement of the Youth Justice Vision published in June 2021 and the Vision for Justice in Scotland. The consultation seeks views on a range of areas, including:

- maximising use of the welfare-based children's hearings system by raising the maximum age of referral to the Principal Reporter, supporting a presumption against children being subject as far as possible to the criminal justice system;
- where children do come into contact with the criminal justice system, helping ensure they are treated in a way that is trauma-informed and accounts for their age and stage of development;
- ending the placement of children in Young Offenders Institutions without delay, with deprivation of liberty a last resort and enabling more children to access secure care or other residential or community-based alternatives; and
- enhancing the rights to appropriate protection, support and information for victims, irrespective of the age of the person who has caused the harm or the system dealing with their case.

National Strategy for Community Justice

29. The Scottish Government is revising the current National Strategy for Community Justice and launched a public consultation⁹ on key aspects of the revised strategy on 13 April 2022 to seek views from a broad range of partners, ahead of finalising and publishing the new strategy in mid-2022. The revised strategy will focus on setting out the national aims and priority actions for community justice. The strategy will be followed by a Delivery Plan containing a series of tangible actions that partners will take to achieve the national aims and priority actions.

Scottish Parliament Criminal Justice Committee report - Judged on Progress

30. The Criminal Justice Committee recently published their report '*Judged on Progress: The need for urgent delivery on Scottish justice sector reforms*'¹⁰, which included findings in relation to the high numbers of prisoners on remand and specific concerns surrounding the impact a period of remand can have.

31. In particular, the cross party Committee report put forward a recommendation of a 'reduction in the overall numbers held on remand in prisons'. Given the nature of the decision-making in this area of law where decisions are made on a case-by-case basis by independent courts, the Scottish Government would not wish to explicitly seek such an outcome. However, it is very much the case the provisions in the Bill are aimed at supporting decision-making of the

⁸ SG Children's Care and Justice Bill consultation paper - (<https://www.gov.scot/publications/childrens-care-justice-bill-consultation-policy-proposals/>)

⁹ SG National Strategy for Community Justice consultation paper - (<https://www.gov.scot/publications/national-strategy-community-justice-revision-consultation/>)

¹⁰ Criminal Justice Committee's *Judged on Progress* report - (<https://www.parliament.scot/-/media/files/committees/criminal-justice-committee/judged-on-progress-the-need-for-urgent-delivery-on-scottish-justice-sector-reforms.pdf>)

independent courts to seek to give greater opportunity and reassurance for people accused of criminal offences to remain in the community where possible.

32. The report also raised concerns about the lack of support for those before, during and after their prison sentences, including putting in place the necessary support prior to the release of prisoners. The Committee recommended that consideration needed to be given to improving support prior to release in terms of access to suitable housing, health care and addiction support, if required.

33. It is the view of the Scottish Government that the provisions within this Bill respond to the Committee's concerns in this area.

CONSULTATION AND EVIDENCE

Overview of consultation

34. On 15 November 2021, the Cabinet Secretary for Justice and Veterans launched a public consultation on proposals around bail and release from custody arrangements.¹¹ This consultation was separated into two parts: the first part focussed on proposals surrounding bail and remand, and the second part on proposals in relation to the release of prisoners.

35. The consultation exercise ran from 15 November 2021 to 7 February 2022, with 142 written responses submitted in total. A total of 68 responses were received from individuals (48% of responses) and 74 responses from organisations (including public sector and partnership bodies, third sector bodies and other organisations). The analysis of responses¹² showed that there were no noticeable differences in the themes to emerge between organisations and individuals.

36. Overall, there was support for almost all of the proposed reforms to bail law contained in the consultation. However, there was considerably more divergence in the views offered in relation to the consultation proposals around release from custody, with some proposed reforms being almost unanimously supported and others attracting less support. The views offered were extremely valuable in helping inform decisions to be made and helped inform the approach taken in the Bill.

37. Alongside the consultation process, officials engaged with external stakeholders to highlight the proposals, seek feedback and encourage responses. This included providing a link to the consultation to over 300 representatives from approximately 150 external stakeholder organisations, as well as conducting more focussed discussions with representatives from a number of these stakeholder organisations, including but not limited to:

- Community Justice Scotland;
- COSLA;

¹¹ SG Bail and Release from Custody consultation paper - (<https://www.gov.scot/publications/consultation-bail-release-custody-arrangements-scotland/>)

¹² SG Bail and Release from Custody consultation analysis report - (<https://www.gov.scot/publications/bail-release-custody-arrangements-scotland-consultation-analysis/>)

- Criminal Justice Voluntary Sector Forum;
- Howard League Scotland;
- Parole Scotland/Parole Board for Scotland;
- Police Scotland;
- Scottish Courts and Tribunals Service;
- Social Work Scotland; and
- Victims Organisations Collaborative Forum Scotland

38. Officials also arranged and attended focus groups with stakeholder groups, including academics, in order to provide further information on the proposals. In addition, a focus group was arranged with survivors of domestic abuse and, separately, with workers in this area to hear their views on the proposals. These sessions were confidential, but each were extremely valuable in helping inform development of policy around a number of proposals in the Bill.

39. In addition, a survey was conducted alongside the consultation in order to seek the views of individuals with relatable experience of the criminal justice system. This survey was shared through the Third Sector Voluntary Mentoring partnerships, who provide support and mentoring to individuals who have been released from custody after serving a short sentence. This allowed the opportunity for the mentors to provide support to the individuals in completing the survey.

40. In total, there were 94 responses to the survey. The survey contained 12 closed and 14 open questions which followed the same themes as the consultation.

41. In the responses to the open questions of the survey, many issues were raised which are important for those involved in a court process, but were not directly covered in the consultation as being planned for this Bill.

42. The responses to this survey were not included in the consultation analysis but will inform the ongoing development of policy in this area.

43. Further and more specific information on the results of the consultation is provided throughout this document, setting out in many areas the views of consultees alongside information on the policy objectives, key information and alternative approaches considered.

Contextual evidence

Prison population

44. While the main drivers of the Bill are improving outcomes for individuals and communities, the provisions should also be seen against the backdrop of Scotland's high imprisonment rate, which is currently the highest in Western Europe.¹³

45. In 2019-20 the proportion of the average daily prison population on remand in Scotland was around 19%. This figure, which included both those accused of offences and those convicted and awaiting sentence, is higher in Scotland than in many other jurisdictions. Comparisons across jurisdictions are not exact, however, published population snapshots from England and Wales suggest the proportion of the prison population held on remand was between 11% and 12% in the same year¹⁴, considerably lower than in Scotland.

46. More recent data (as at 31 December 2021) which reflects, in part, the impact of the coronavirus pandemic on throughput of criminal cases in the courts shows that 24% of Scotland's untried prisoners were on remand, compared with 16% in England.¹⁵ The World Prison Brief ranks 57 European jurisdictions by the percentage of pre-trial (remand) detainees as a proportion of all prisoners in that jurisdiction. When considering Scotland's position in these rankings, the picture is mixed with Scotland at number 22, compared with number 45 for England and Wales (February 2022).¹⁶

47. The number of custodial sentences given each year has fallen by over 4000, from over 15,000 a year in 2010/11 to 11,000 in 2019/20¹⁷. This was mainly driven by a drop in short-term sentences of 12 months, or less, and represents substantially fewer people experiencing the disruption to employment, housing and family life, which is inherent to such sentences. This has not, however, resulted in an overall reduction in the prison population. Although far fewer people are sent to prison each year, those who are, on average, receive longer sentences.

Demographics of prison population

48. As highlighted in the Hard Edges Scotland¹⁸ report by Lankelly Chase, published in 2019, many people in contact with the justice system have already experienced severe and multiple

¹³ Council of Europe Annual Penal Statistics: Space I report - (https://wp.unil.ch/space/files/2022/04/Aebi-Cocco-Molnar-Tiago_2022_SPACE-I_2021_FinalReport_220404.pdf)

¹⁴ Scottish Prison Service statistics: Legal Status 2019/20 - (<https://www.gov.scot/publications/scottish-prison-population-statistics-legal-status-2019-20/pages/4/>) and UK Gvt quarterly Offender Management Statistics - (<https://www.gov.uk/government/collections/offender-management-statistics-quarterly>), both accessed 27 July 2021

¹⁵ SG Coronavirus (COVID-19): Justice Analytical Services data report - (<https://www.gov.scot/collections/coronavirus-covid-19-justice-analytical-services-data-report/>), and UK Gvt quarterly Offender Management Statistics - (<https://www.gov.uk/government/statistics/offender-management-statistics-quarterly-july-to-september-2021/offender-management-statistics-quarterly-july-to-september-2021>), both accessed 28 February 2022

¹⁶ World Prison Brief Pre-trial detainees / remand prisoners | (https://www.prisonstudies.org/highest-to-lowest/pre-trial-detainees?field_region_taxonomy_tid=14&=Apply), accessed 15 February 2022

¹⁷ SG Criminal Proceedings in Scotland Statistics 2019/20 - (<https://www.gov.scot/publications/criminal-proceedings-scotland-2019-20/pages/2/>)

¹⁸ Hard Edges Scotland report - (<https://lankellychase.org.uk/wp-content/uploads/2019/06/Hard-Edges-Scotland-full-report-June-2019.pdf>)

disadvantage, including homelessness, substance misuse, mental ill health and domestic violence or abuse.

49. Individuals from the 10% most deprived areas are over-represented in prison arrivals by a factor of three¹⁹, a finding consistent across the last decade. Care experienced people are also disproportionately represented within the prison population, with around a quarter of the prison population report being in care as a child, rising to just under half when looking specifically at young people in custody.

50. Research²⁰ published in 2021 found that around 78% of women in prison in Scotland have a history of significant head injury, most of which occurred in the context of domestic abuse lasting over several years. Almost all participants in the study (95%) reported a history of abuse, with more than half reporting sexual abuse in childhood.

51. In the latest Addiction Prevalence Testing study carried out by the Scottish Prison Service in 2018/19²¹, of the 1017 tests carried out on arrival in prison, 71% were positive for illegal drugs (including cannabis). Scottish Prison Health Care Network data also shows that 25% of prisoners are on some kind of opioid substitution therapy (OST).

52. Individuals arriving in prison are asked to provide an address. Where they do not, they are registered as no fixed abode. The proportion of individuals arriving in prison who report having no fixed abode has increased over the past decade, from 4.4% to 7.5%.²²

53. Statistics show that younger people are far more likely to be imprisoned than older people. However, in the past ten years this difference has narrowed with the average age of individuals spending time in prison rising from 31.8 in 2010/11 to 35.9 in 2019/20. The proportion aged 55 or older has more than doubled in ten years from 3.3% to 7%.²³

54. Following several years of sustained decrease, the prison population has risen sharply since 2017/18 to an annual average of around 8,200 in 2019/20.²⁴ The rise has been amongst the population of adult men only, with the average number of women in prison remaining stable since 2013/14 and the number of young persons (under 21) continuing a downwards trend.

55. The prison population was substantially impacted during the Covid pandemic. Between March 2020 and May 2020, the prison population fell from just over 8,000 to just under 6,900. From the end of May 2020 the prison population began to rise rapidly, driven almost entirely by a

¹⁹ Scottish Prison Population statistics 2019/20 (<https://www.gov.scot/publications/scottish-prison-population-statistics-2019-20/pages/1/>)

²⁰ Associations between significant head injury and persisting disability and violent crime in women in Scotland (Tom McMillan) - ([https://www.thelancet.com/journals/lanpsy/article/PIIS2215-0366\(21\)00082-1/fulltext](https://www.thelancet.com/journals/lanpsy/article/PIIS2215-0366(21)00082-1/fulltext))

²¹ Scottish Prison Service: Addiction Prevalence Testing 2018/19 - (<https://www.scotpho.org.uk/media/1863/scottish-prisons-summary-data-2018-final-version.xlsx>)

²² *ibid*

²³ Scottish Prison Population statistics 2019/20 (<https://www.gov.scot/publications/scottish-prison-population-statistics-2019-20/pages/1/>)

²⁴ Scottish Prison Population statistics 2019/20 (<https://www.gov.scot/publications/scottish-prison-population-statistics-2019-20/pages/1/>)

growth in the remand population. Since autumn 2020 the prison population has been broadly stable between 7,300 and 7,600.

56. However, the remand population has grown from levels considered high pre-pandemic (around 1,500) to new historic highs (fluctuating between around 1,800 and 2,200 since September 2020). By contrast, the sentenced population has remained at a lower level than the immediate pre-pandemic period (remaining broadly stable between 5,300 and 5,600 since May 2020, over 1,000 lower than the average daily population in 2019-20). As of 1 April 2022, around 29% of the prison population were held on remand.²⁵

Wider impact of imprisonment

57. We know that imprisonment has a wider impact than just on the individual. Almost two thirds of respondents (61%) to the most recent SPS Prisoner Survey²⁶ reported having children themselves. There are an estimated 20,000-27,000 children who are affected by parental imprisonment each year in Scotland²⁷. Parental imprisonment is recognised as an Adverse Childhood Experience (ACE) and is known to significantly impact long-term health and wellbeing and negatively affect both attainment in school and later life experiences.

Criminal justice system overview

58. It should be noted that the coronavirus pandemic and associated measures had an impact on many areas of criminal court process during 2020/21, resulting in a lower volume of cases going through courts, as well impacting on social work capacity.²⁸ Some caution is therefore advised in interpreting figures contained within the following paragraphs for the period 2020/21, particularly in terms of how they compare with previous years.

59. While the number of people convicted in court fell 4% between 2018/19 and 2019/20, and the number of convictions resulting in a custodial sentence decreased by 9%, the average length of custodial sentence increased by 9%. This increase in average sentence length is the largest seen in the past decade. It is driven by fewer short sentences being given out rather than an increase in longer sentences.²⁹

60. The number of bail orders issued in 2019/20 decreased by 16% from 34,735 issued in 2018/19 to 29,150 in 2019/20. Over the last decade, the number of bail orders issued has fallen by 37%, from 46,221 bail orders in 2010/11³⁰.

²⁵ SG Coronavirus (COVID-19): Justice Analytical Services data report - (<https://www.gov.scot/publications/coronavirus-covid-19-justice-analytical-services-data-report-march-2022/pages/12/>)

²⁶ Scottish Prison Service: Prisoner Survey 2109 - (<http://www.sps.gov.uk/Corporate/Publications/Publication-7196.aspx>)

²⁷ McGillivray, C “*Rendering Them Visible; A Review of Progress Towards Increasing Awareness and Support of Prisoners’ Families* (2016) (<https://www.familiesoutside.org.uk/content/uploads/2016/04/Rendering-Them-Visible-FINAL.pdf>)

²⁸ SG Criminal Justice Social Work Statistics 2020/21 - (<https://www.gov.scot/publications/criminal-justice-social-work-statistics-scotland-2020-21/>)

²⁹ SG Criminal Proceedings in Scotland Statistics 2019/20 - (<https://www.gov.scot/publications/criminal-proceedings-scotland-2019-20/pages/2/>)

³⁰ *ibid*

61. Over the most recent ten years for which data are available, total recorded crime in Scotland has decreased by 22%. It remains at one of the lowest levels since 1974 and is around half the level (246,511) it was at the peak of recorded crime in 1991 (572,921)³¹. While police-recorded sexual crimes were down 2% from 2019/20 to 2020/21, an increase of 78% was seen between 2011/12 and 2020/21.

62. According to the Scottish Crime and Justice Survey 2019/20³², the majority of adults (88.1%) were not victims of any crime in 2019/20. The survey also found that victimisation has become less common over the last decade, with the proportion of adults experiencing crime decreasing from one in five to one in eight between 2008/09 and 2019/20. However, the likelihood of experiencing any crime was higher among those living in urban areas and/or the 15% most deprived areas of Scotland.

63. The survey also found that crime was concentrated among victims of multiple victimisation. 3.6% of adults were victims of two or more incidents, accounting for over half (57%) of all crime in the year the survey covered. The concentration of violent crime among repeat victims (those experiencing two or more violent crimes) was also particularly pronounced.

64. Recent statistics on reconviction rates show that between 2017/18 and 2018/19 there was an increase of 1.9 percentage points in the percentage of people reconvicted within a year, rising from 26.4% in 2017/18 to 28.3% in 2018/19³³. While reconviction rates are still lower than they were ten years ago, this increase is contrary to the decreases seen in most years over the past decade. Individuals released from short custodial sentences have higher reconviction rates than those released from longer sentences.

Community Justice interventions

65. As noted above, it is recognised that legislation alone cannot support a shift from custody to community and that there must also be robust community justice interventions consistently available across Scotland. To support this, the Scottish Government provides £119m every year for community justice services. To support pandemic recovery work, an additional £11.8m was invested in 2021-22, which increased to an additional £15m in 2022-23. This investment supports a range of community justice services, including those set out below.

66. Bail supervision is a social work or third sector service that supports people to comply with the conditions of their bail. It is intended to provide a robust and credible alternative to remand, whereby individuals accused or convicted of an offence are assessed as needing a level of supervision, monitoring and support to adhere to their bail conditions. It helps minimise the numbers of individuals held on remand in custody pending trial or for reports after conviction, who could be released on bail subject to safeguards in respect of public protection. To support the

³¹ SG Recorded Crime in Scotland Statistics 2020/21 - (<https://www.gov.scot/publications/recorded-crime-scotland-2020-2021/pages/1/>)

³² SG Crime and Justice Survey findings 2019/20 - (<https://www.gov.scot/publications/scottish-crime-justice-survey-2019-20-main-findings/pages/2/>)

³³ SG Reconviction Rates in Scotland 2018/19 cohort - (<https://www.gov.scot/publications/reconviction-rates-scotland-2018-19-offender-cohort/>)

ongoing development of bail supervision services across Scotland, the Scottish Government recently published revised national guidance³⁴ and provided an additional £3.2m to local authorities in 2022/23 to enhance bail assessment capacity and support the availability of bail supervision and electronically monitored bail in Scotland.

67. The use of electronic tagging rose 44% between 2013/14 and 2019/20³⁵, demonstrating it is now a well-known and trusted measure in respect of certain current orders and licences, including use with:

- Restriction of Liberty Orders;
- Home Detention Curfew;
- Restricted Movement Requirements as part of Community Payback Orders and Drug Treatment and Testing Orders;
- parole or non-parole licence; or
- use if determined by the Children's Hearing system.

68. Electronic monitoring allows for swift responses from police and other justice partners if requirements or conditions are breached. Completion rates of electronic monitoring orders remain high, with an average of around 80% of Restriction of Liberty Orders completed³⁶.

69. The Management of Offenders (Scotland) Act 2019 allows for expanding the capability and availability of electronic monitoring across Scotland. As such, there is ongoing work to extend the availability of electronic monitoring across a wider range of orders and licences, in order to further support our aims of rehabilitation and public safety. The Scottish Government is working with Police Scotland, social work and other justice partners to ensure the justice system is well-prepared for the further extension of electronic monitoring, including allowing it as part of bail, temporary release and expanding use for some other community orders. Most relevant to this Bill, electronic monitoring of conditions of bail has been available from 17 May 2022.

70. Justice Social Work provide a throughcare service to all those who are subject to statutory supervision³⁷ on release from prison. This throughcare begins at the start of the sentence and is implemented by the Scottish Prison Service's Integrated Case Management process.

71. Commencements for statutory throughcare in custody have generally remained around 1000 cases over the past six years but fell to 630 cases in 2020/21. This is likely due to the impact of the coronavirus pandemic. Commencements for statutory throughcare in the community has

³⁴ Bail supervision: National guidance - (<https://www.gov.scot/publications/bail-supervision-national-guidance/>)

³⁵ From management information provided to Scottish Government via G4S contractual reporting requirements, which shows that in 2013/14 the new orders received was 3312 and in 2019/20 this rose to 4798 - a rise of just over 44%.

³⁶ From management information provided to Scottish Government via G4S statistical bulletin which shows that, in the period April 2021 to March 2022, around 80% of Restriction of Liberty Orders were completed

³⁷ Section 27(1)(ac) of the Social Work (Scotland) Act 1968 provides that each local authority in Scotland shall provide supervision, advice, guidance and assistance to persons who are in prison and who either resided in their area immediately prior to such imprisonment or intend to reside in their area on release from prison, and who are required to be under supervision on licence following their release. Section 27(1)(b) of that Act provides that those services should continue to be provided to those persons following their release.

also remained around 1000 cases in recent years but fell to 870 cases in 2020/21, again this is likely due to the impact of the pandemic.³⁸

72. Part of statutory throughcare involves preparing reports to inform temporary release from prison on home leave and liberation on licence. In 2020/21, 940 home leave reports were produced, a fall of 41 per cent from the previous year.

73. Voluntary throughcare services are also available to those who are not subject to supervision on release from prison and are provided by the local authority. These services can be requested while an individual is in custody or up to 12 months after release³⁹. The number of voluntary throughcare cases in 2020/21 was 1410, 30 per cent lower than in 2019/20.

74. In addition to the support provided by local authorities, the third sector play a critical role in throughcare support. The Scottish Government provides £3.7m each year to support the two national prisoner throughcare mentoring services delivered by the third sector. These services provide support to men and women leaving short sentences (and remand in the case of women). There is also a third specialist service for young people.

PART 1 OF THE BILL (SECTIONS 1-5) – BAIL

Key background and policy context

75. Decisions by the court in relation to bail is a key point in any criminal justice process. This decision is made in individual cases both at the pre-conviction stage (where the accused person is subject to the presumption of innocence) and post-conviction stage (when the presumption of innocence no longer applies and the person has been convicted of a criminal offence). The reforms in the Bill relate to the determination of the question of bail pre-conviction.

76. At the pre-conviction stage of a criminal court process, a person has not been convicted of a crime and important questions of principle arise about the appropriate use of custody, which involve fundamental decisions over a person's liberty. When a person has been accused of committing a criminal offence and a criminal justice process is underway, one of the first questions to be addressed is what should happen to that accused person as the criminal justice process proceeds.

77. Depending on the stage of the criminal justice process, decisions about a person's liberty can be made by the police, the Crown Office and Procurator Fiscal Service (COPFS) or the court.

78. At the police stage, prior to initial consideration by COPFS or the court, a person may be permitted to stay in the community, either with or without conditions, through release on an undertaking to appear at court at a specified date and time at some point in the relatively near future. In addition, the police may opt to report a person to COPFS in respect of alleged offending behaviour and allow the person to remain without conditions in the community pending a decision

³⁸ SG Criminal Justice Social Work Statistics in Scotland 2020/21 - (<https://www.gov.scot/publications/criminal-justice-social-work-statistics-scotland-2020-21/pages/10/>)

³⁹ See section 27(1)(c) of the Social Work (Scotland) Act 1968

by independent prosecutors within COPFS as to what action, if any, should be taken in the public interest. Alternatively, a person may be detained in police custody in order to be brought swiftly before the court in respect of the alleged offence(s).

79. When a person is reported to COPFS by Police Scotland from custody, independent prosecutors within COPFS will carefully consider the terms of the police report and may liberate an accused person from custody so that the matter does not call in court. This may be done for various reasons including for further inquiries; to proceed by way of a direct measure as an alternative to prosecution in court; or to take no action.

80. Where criminal proceedings are raised by COPFS, at the court consideration stage (however the person has appeared i.e. whether from the community or from police custody), a person may be permitted to remain in the community subject to conditions (through being admitted to bail) or without conditions (through being ordained to appear). Alternatively, the person may be remanded in custody pending trial.

81. All crimes and offences are bailable in that anyone accused of a criminal offence may be admitted to bail.⁴⁰ In addition to the court, the Lord Advocate retains the right to admit to bail any person charged with any crime or offence.

82. At present bail requires to be granted to an accused person unless there is good reason not to⁴¹. Within this context, significant numbers of persons are remanded in Scotland at the pre-conviction stage. The focus of the provisions in the Bill are to respond to concerns about the use of remand at this point in criminal proceedings.

83. Concerns about the use of remand in Scotland have increased in recent years. In the *Report of its Inquiry into the Use of Remand*, published in June 2018, the Scottish Parliament Justice Committee found that, “the overwhelming view of witnesses was that, while the use of remand is necessary in certain circumstances, it is currently used too frequently.”⁴²

84. During the coronavirus pandemic the number of individuals held on remand in Scotland reached historically high levels in 2020, and remained high during 2021 and into 2022.

85. In all the circumstances both pre-pandemic and throughout, remand prisoners form a higher proportion of the custodial population in Scotland than in England and Wales, and many other jurisdictions. This raises important questions about the appropriate use of remand in Scotland, including what measures can be taken to preserve public and victim safety, enable access to justice, and support people accused of crimes to remain safely in the community.

⁴⁰ Section 24(1) of the Criminal Procedure (Scotland) Act 1995 - <https://www.legislation.gov.uk/ukpga/1995/46/section/24>

⁴¹ Subject to section 23D of the Criminal Procedure (Scotland) Act 1995 and having regard to the public interest, per section 23B(1) of the Criminal Procedure (Scotland) Act 1995 - <https://www.legislation.gov.uk/ukpga/1995/46/section/23B>

⁴² Justice Committee’s *An Inquiry into the Use of Remand in Scotland* report - <https://digitalpublications.parliament.scot/Committees/Report/J/2018/6/24/An-Inquiry-into-the-Use-of-Remand-in-Scotland#Executive-Summary>

86. Measures such as the loss of liberty of accused persons are rightly there to help secure these outcomes when necessary. However, underpinning the bail reforms in this Bill is the recognition that spending short periods in custody can be damaging, is particularly disruptive for individuals, and can be ineffective in promoting better outcomes for victims and accused persons alike, both in the short and long term.

87. In the context of Scotland’s high overall prison population, there is recognition of the need to explore what steps can be taken to move towards appropriately refocusing the use of remand as part of the criminal justice process.

88. The reforms contained in Part 1 of the Bill seek to address these questions by refocusing the way bail law operates so that those who do not pose a risk to public safety or the delivery of justice are managed safely in the community and are not remanded in custody, in line with the transformative aims of the Vision for Justice in Scotland.⁴³

Current legal framework for bail decisions

89. The legal framework for bail decisions is contained in the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”). All persons accused of any criminal offence can be granted bail, as set out in section 24 of the 1995 Act.⁴⁴ This provision reflects the position in the European Convention on Human Rights (“the Convention”).⁴⁵ Article 5(3) of the Convention states that, “Everyone arrested or detained...shall be entitled to trial within a reasonable time, or to release pending trial.”⁴⁶ The Convention allows for remand, however, and the jurisprudence of the European Court of Human Rights establishes that detention may be justified by “relevant and sufficient” reasons.⁴⁷

90. Decisions on whether or not bail is to be granted involve the exercise of judicial discretion. The exercise of that discretion sits with a legal framework for decision-making contained in the 1995 Act, wherein there is an overarching presumption for the granting of bail unless there is good reason to refuse bail.⁴⁸

91. A decision on whether to grant bail is informed by a list of grounds, laid out in section 23C of the 1995 Act, as to why bail in any given case may be rejected. These grounds are set out below. In addition, the decision on whether to grant bail in certain cases is informed by a specific limitation on bail for people accused of certain serious offences, in the circumstances set out in section 23D of the 1995 Act.⁴⁹

⁴³ *ibid*

⁴⁴ Section 24 of the Criminal Procedure (Scotland) Act 1995 - (<https://www.legislation.gov.uk/ukpga/1995/46/section/24>)

⁴⁵ European Convention on Human Rights - (https://www.echr.coe.int/documents/convention_eng.pdf)

⁴⁶ *ibid*

⁴⁷ *Wemhoff v Germany*, (1979-80) 1 EHRR 55, Judgment, para 12; *Yagci and Sargin v Turkey*, (1995) 20 EHRR 505, para 50

⁴⁸ Section 23B(1) of the Criminal Procedure (Scotland) Act 1995 - (<https://www.legislation.gov.uk/ukpga/1995/46/section/23B>)

⁴⁹ Section 23D of the Criminal Procedure (Scotland) Act 1995 - (<https://www.legislation.gov.uk/ukpga/1995/46/section/23D>)

92. Accordingly, while all offences are such that a person can be bailed, section 23C of the 1995 Act⁵⁰ sets out a number of grounds which, taken individually or collectively, may give reason to the court to justify a decision to refuse to admit an accused person to bail in any given case. Throughout the Policy Memorandum these will be referred to as the ‘section 23C grounds’ and these are:

- any substantial risk that the person might if granted bail—
 - abscond; or
 - fail to appear at a diet of the court as required;
- any substantial risk of the person committing further offences if granted bail;
- any substantial risk that the person might if granted bail—
 - interfere with witnesses; or
 - otherwise obstruct the course of justice,in relation to themselves or any other person;
- any other substantial factor which appears to the court to justify keeping the person in custody.

93. When the court is assessing grounds that may be relevant in a given case for refusing to grant bail, the court must have regard to all material considerations including the following—

- the –
 - nature (including level of seriousness) of the offences before the court;
 - probable disposal of the case if the person were convicted of the offences;
- whether the person was subject to a bail order when the offences are alleged to have been committed;
- whether the offences before the court are alleged to have been committed –
 - while the person was subject to another court order;
 - while the person was on release on licence or parole;
 - during a period for which sentence of the person was deferred;
- the character and previous behaviour of the person, in particular –
 - the nature of any previous convictions of the person;
 - whether the person has previously contravened a bail order or other court order (by committing an offence or otherwise);
 - whether the person has previously breached the terms of any release on licence or parole (by committing an offence or otherwise);
 - whether the person is serving or recently has served a sentence of imprisonment in connection with a matter referred to immediately above;
- the associations and community ties of the person.

⁵⁰ Section 23C of the Criminal Procedure (Scotland) Act 1995 - <https://www.legislation.gov.uk/ukpga/1995/46/section/23C>

94. All decisions by the court must be made having regard to the public interest.⁵¹ The current law makes clear that the public interest includes the interests of public safety.⁵² In determining the question of bail, the court must also consider the extent to which the public interest could, if bail were granted, be safeguarded by the imposition of bail conditions.⁵³

SPECIFIC PROVISIONS

95. Provisions in the Bill relating to bail can be broadly split into four distinct areas. These are:

- Reform to the legal framework within which bail decisions are made;
- Enhanced role for justice social work in provision of information to the court;
- Recording of reasons when bail is refused; and
- How periods on electronically monitored bail conditions affects time served for custodial sentences

Reform to the legal framework within which bail decisions are made

Section 2 – DETERMINATION OF GOOD REASON FOR REFUSING BAIL

Policy objectives

96. For those accused of criminal offences, the Bill makes provision to refocus the legal framework within which bail decisions are made by a criminal court, so that the use of custody is limited to those accused persons who pose a risk to public safety, which includes victim safety, or to when it is necessary to prevent a significant risk of prejudice to the interests of justice in a given case. Accused persons who do not pose a risk to public safety or the delivery of justice should be admitted to bail as the criminal justice process proceeds.

97. The benefits of this change, having regard to evidence which demonstrates the damaging effects of short periods in custody, will be to seek to reduce the undue use of custody for people not convicted of an offence who do not pose a risk to public safety or the delivery of justice.

Key information

98. Section 2 of the Bill makes adjustments to the test for entitlement to bail contained within section 23B of the 1995 Act to reflect the overarching policy that a risk to public safety or the delivery of justice must require to exist in order to justify remand in a given case.

99. For all first appearances in criminal proceedings and at any subsequent point in the criminal justice process where the court must determine the question of whether or not to admit an accused to bail, bail decisions will be made within a new reformed bail test.

⁵¹ Section 23B(1) of the Criminal Procedure (Scotland) Act 1995 - (<https://www.legislation.gov.uk/ukpga/1995/46/section/23B>)

⁵² *ibid*, Section 23B(3)

⁵³ *ibid*, Section 23B(2)

100. In order to aid understanding and accessibility of the operation of the new bail test contained in the Bill, a description of the decision-making process for the court is as follows.

Step 1

101. The first step of the bail test is that the court assesses whether one or more of the section 23C grounds apply. The list of grounds in section 23C is exhaustive and contains grounds which fall into two categories.

102. The first category requires there to be a “substantial risk” of something adverse happening if the accused were to be granted bail – namely, the accused absconding or failing to appear at court, committing further offences, interfering with witnesses or otherwise obstructing the course of justice. The second category requires there to be some other “substantial factor” which justifies remanding the accused in custody.

103. If the court reaches a view that none of the section 23C grounds apply, bail must be granted.

104. If the court reaches a view that one or more of the section 23C grounds apply, the court moves to the second step of consideration of the bail test.

Step 2

105. The second step of the bail test is that the court assesses whether refusing bail is necessary either in the interests of public safety, including the safety of the complainer from harm, or to prevent a significant risk of prejudice to the interests of justice.

106. As part of how the court reaches a view as to whether refusing bail is necessary under the second step, it should be noted the court is required to have regard to the public interest including the extent to which the public interest could be safeguarded by the imposition of bail conditions.

107. Where the court is satisfied that the public interest lies in favour of bail, which may include the view that the public interest could be safeguarded through the imposition of conditions, bail may not be refused.

108. Where the court is not satisfied that the public interest could be safeguarded including through the imposition of conditions, bail may be refused and the accused remanded in custody on the basis of the court considering it necessary in the interests of public safety (including complainer safety) or to prevent a significant risk of prejudice to the interests of justice.

109. As noted above, the second step of the bail test requires consideration by the court whether refusing bail is necessary either in the interests of public safety, including the safety of the complainer from harm, or to prevent a significant risk of prejudice to the interests of justice.

110. In considering the first element (of this second step) relating to public safety, harm is defined as meaning physical or psychological harm. Psychological harm is defined as including fear, alarm and distress.

111. In considering the second element (of this second step) relating to interests of justice, prejudice to the interests of justice means the accused person evading justice as a result of either the proceedings being delayed or discontinued. It also means the course of justice in the proceedings being impeded or prejudiced as a result of the destruction, concealment or withholding of evidence, the giving of false or misleading evidence or the quality or sufficiency of evidence being diminished.

112. Accordingly, the first element of step 2 (the interests of public safety) and the second element of step 2 (to prevent a significant risk of prejudice to the interests of justice) set out above are separate but equal considerations in any given case. One, both or indeed neither may apply depending on the individual facts and circumstances.

113. In assessing the question of bail, the new bail test seeks to more closely link the section 23C grounds with the serious harmful impact that may or may not arise from the risks mentioned in those grounds e.g. the adverse, harmful impact upon the system's ability to deliver justice in the case of someone who, for example, poses as substantial risk of interfering with witnesses.

114. As a matter of policy, the operation of the new bail test is intended to allow for a greater appreciation in decision-making that those who pose limited or no risks to public safety or to the delivery of justice, but who may need effective support and supervision, can appropriately remain in the community during a criminal court process. This would be done in such a way to ensure risks relating to breaching bail conditions are addressed through support and supervision being provided, instead of being remanded in custody.

The new bail test – a significant risk of prejudice to the interests of justice

115. In addition to public safety considerations and no matter the availability of further conditions of bail linked to specific support in the community such as through bail supervision schemes, the bail test recognises that some accused persons will actively and wilfully choose not to attend court or who will seek to deliberately frustrate the criminal justice process.

116. For such accused persons, who could be said to have a disregard for the authority of the court, it is accepted that remand in custody or the threat of remand is unfortunately often the only enabling mechanism to secure their future attendance at trial to allow the criminal justice process to properly proceed unfettered by any undue influence of the accused person. To ensure the justice system as a whole can operate to provide access to and the delivery of justice in these circumstances, the bail test provides a discretion to the court in both summary and solemn criminal proceedings to remand where it is not necessary in the interests of public safety but instead is necessary to prevent a significant risk of prejudice to the interests of justice. The nature of this discretion is different depending whether it is a summary case or a solemn case.

117. As described above, prejudice to the interests of justice is defined as meaning the accused person evading justice as a result of the proceedings being delayed or discontinued. This could be caused, for example, through the accused person posing a substantial risk of absconding or failing to appear at court.

118. Prejudice to the interests of justice is also defined as meaning the course of justice in the proceedings being impeded or prejudiced as a result of the destruction, concealment or withholding of evidence, the giving of false or misleading evidence, or the quality or sufficiency of evidence being diminished. This could be caused, for example, through the accused person posing a substantial risk of interfering with witnesses or obstructing the course of justice.

119. The assessment of prejudice to the interests of justice involves the court making a risk assessment as to the overall effect of the actions of the accused. If the court considers there is a significant risk of prejudice arising to the interests of justice, then refusal of bail can be justified if it is necessary to prevent that risk.

120. For solemn proceedings, the Bill enables the court to refuse bail to an accused person where at least one of the section 23C grounds applies and, having regard to the public interest, it is considered necessary to refuse bail to prevent a significant risk of prejudice to the interests of justice.

121. For summary proceedings, the Bill provides the court with the same power to refuse bail to prevent a significant risk of prejudice to the interests of justice as with solemn proceedings, but with an additional prerequisite that the court may only take account of the ground in section 23C(1)(a) as part of the bail test in certain circumstances.

122. The section 23C(1)(a) ground is any substantial risk that the person might if granted bail abscond or fail to appear at a diet of the court as required.

123. Certain circumstances need to arise in order for discretion to be available to a summary court to refuse bail on the basis of the ground in section 23C(1)(a).

124. These circumstances are (1) if an accused person had been admitted to bail or ordained to appear in summary proceedings and goes on to break the trust afforded to them by subsequently failing to appear at a future court hearing relating to the original substantive offences upon which they were granted bail or ordained to appear or (2) if the accused is appearing before the court on a complaint charging a failure to appear offence under section 27(1)(a) or 150(8) of the 1995 Act. So in those specific circumstances, if refusal of bail by the court is considered necessary to prevent a significant risk of prejudice to the interests of justice, the court can reach that determination and elect to remand the accused in custody.

125. The distinction in approach here between summary and solemn proceedings recognises that the nature and gravity of offences under solemn procedure are more serious, where it may be appropriate in the public interest to remand on the section 23C(1)(a) ground (failure to appear) to secure the continued delivery of justice from the outset of a case.

126. This approach has been taken to balance the overarching policy objective of minimising the use of short periods on remand pre-conviction, which should be reserved only for those who mainly pose a risk to public safety, whilst ensuring the court retains a power to remand those who it considers pose a substantial risk of preventing the delivery of justice if admitted to bail.

Alternative approaches

127. Making no changes to the law on bail was considered. However, meaningful change in how custody is used for those accused of offences was felt to require specific legislative reform to refocus how courts can use custody as part of their decision-making.

128. The reforms to the decision-making framework for questions of bail proposed by the Bill are in response to the concerns which have been raised in relation to the increased remand population and the calls for action in this area. This includes calls from the cross party Criminal Justice Committee report calling for a ‘reduction in the overall numbers held on remand in prisons’ in their *‘Judged on Progress: The need for urgent delivery on Scottish justice sector reforms’*⁵⁴ report. Changes to bail law are considered necessary, in conjunction with the other measures in the Bill and other non-legislative policies, to provide the circumstances which may help facilitate change in the way the independent court makes decisions about the use of custody within the criminal justice system which can lead to better outcomes for individuals, their families, victims of crime and communities.

129. Another alternative approach to the reforms proposed by the Bill which was considered was to require public safety grounds to exist in every case before the court, both summary and solemn, in order to justify remand, with no option to remand on non-public safety grounds. This was explored during the consultation exercise, which sought views on the circumstances in which the court should be able to refuse bail. While just under two thirds of respondents supported proposals that a need to protect public safety must be present to justify refusal of bail, some respondents highlighted that flexibility would be needed in the system to allow those with repeated breaches of bail/failures to appear to be remanded in order to maintain confidence in and the proper functioning of the justice system as a whole.

130. It was recognised, particularly amongst legal and justice sector respondents, that there are those accused persons who pose no or low public safety risks but habitually fail to cooperate with orders of the court through deliberate failures to appear. The Scottish Government recognises the ability of accused persons to deliberately evade justice is not in the interests of complainers, witnesses nor the wider public interest and it is important a limited discretion is retained by the courts to remand on non-public safety grounds, as part of the wider package of bail reforms in the Bill.

Consultation

131. The Scottish Government undertook a 12 week consultation from 15 November 2021 seeking views on the use of remand and arrangements around release from custody.

132. Just under two thirds of respondents (63%) agreed with the proposal that judges should only refuse bail if there were public safety grounds for doing so. This was largely on the basis that they perceived it would help to reduce the numbers of people being held on remand in Scotland, which many perceived was currently (and historically) too high. Several respondents stressed that

⁵⁴ Criminal Justice Committee’s *Judged on Progress* report - (<https://www.parliament.scot/-/media/files/committees/criminal-justice-committee/judged-on-progress-the-need-for-urgent-delivery-on-scottish-justice-sector-reforms.pdf>)

they viewed community interventions and community support as being more appropriate than the use of remand for those who do not pose a risk/significant risk to the public, with suggestions that there needed to be greater public awareness raising of the credibility of community options as an alternative to remand. Indeed, some argued that the link between imprisonment and ‘public safety’ may be false and that community interventions may in fact provide a ‘safer’ option than remand. Such measures would, however, need to be properly resourced to provide the required confidence in their effectiveness.

133. Among those who disagreed with the proposal, the main view was that victim and/or witness safety should be paramount in decision-making rather than safety of the general public alone. In contrast, a small number suggested that safety/protection for the accused may also sometimes warrant use of remand, especially if community support was lacking and a period of imprisonment may help them to stabilise.

Considerations of safety of complainer from harm

Policy objectives

134. As part of how a court determines the question of bail for an accused person, the Bill makes provision for the consideration of the safety of complainers from harm in a given case to be explicitly recognised as forming part of the court’s consideration of whether it is necessary to refuse bail in the interests of public safety.

135. This will be achieved through it being specified that when assessing public safety as part of the court’s consideration of the question of bail through the bail test, the concept of public safety includes the safety of the complainer from harm, with the definition of harm including both physical harm and psychological harm.

136. The benefits of this change will be to recognise explicitly the safety of complainers is a specific factor in the court’s decision-making when assessing public safety to determine the question of bail, which encapsulates both physical and psychological harm.

Key information

137. At present all bail decisions by the court must be made in the public interest and the current law makes clear that the public interest includes the interests of public safety.⁵⁵

138. The Bill adjusts section 23B of the 1995 Act so as to specifically include the concept of victim safety (referred to in the Bill as ‘complainer safety’) as a factor for the court’s consideration within public safety when making a determination on a person’s entitlement to bail. In this context, assessment of victim safety relates to the specified complainer(s) in the proceedings before the court, if any, in each individual case.

139. The Bill makes clear the concept of victim safety should involve an assessment by the court of any substantial risk of both physical and psychological harm to the alleged victim. By recognising the concept of victim safety is multi-faceted in nature and encapsulates more than

⁵⁵ Section 23B(3) of the Criminal Procedure (Scotland) Act 1995 - (<https://www.legislation.gov.uk/ukpga/1995/46/section/23B>)

physical harm in addition to explicitly requiring the court to consider victim safety as a specific factor in the bail decision, the protection afforded to complainers through the new bail test will be enhanced.

Alternative approaches

140. An alternative approach would be to do nothing and rely on the existing provision within the 1995 Act contained in section 23B and section 23C which, respectively, require the court to give consideration to the interest of public safety when assessing the overall public interest and any substantial risk that the person might if granted bail interfere with witnesses or commit further offences. While not explicit, it is acknowledged that victim safety considerations are already encapsulated by this more generic existing provision. The Scottish Government considers while references to public safety in the current law would include the victim(s) against whom offence(s) have allegedly been committed, a new explicit recognition that the concept of public safety includes the protection of victims from harm would help ensure that the interests of victims were emphasised as part of the court's consideration of whether public safety grounds require a decision to refuse bail.

141. By being clear what is meant by victim safety, it also provides an opportunity for bail law to reflect more recent legislative developments which emphasise victim safety considerations extend beyond mere physical safety and incorporates what may be termed 'psychological harm'. This is consistent with, for example, the modern understanding of domestic abuse as contained in the Domestic Abuse (Scotland) Act 2018, which legislated for a new, standalone offence of domestic abuse that encapsulates coercive and controlling behaviours by alleged perpetrators, in addition to physical harm.⁵⁶

Consultation

142. This area was explored during the consultation exercise, which sought views on whether the court should have particular regard to victim safety when making their bail decision. Two thirds of respondents (66%) agreed that the court should have particular regard to victim safety when making bail decisions. This was seen as important in protecting the rights, needs and safety of victims as well as adding more transparency to the decision-making process, potentially bolstering public confidence in the justice system. A small number (who disagreed or were unsure) suggested that the proposal may be unnecessary as bail conditions can be (and often are) already imposed that restrict a person's contact with the victim or witness(es) in a case and/or other curfews and restrictions imposed.

Section 3 – REMOVAL OF RESTRICTION ON BAIL IN CERTAIN SOLEMN CASES

Policy objectives

143. It is proposed to simplify the legal framework within which the court makes a decision on the question of bail.

144. This will be achieved through removal of the rule that bail is only to be granted in exceptional circumstances in solemn proceedings involving persons accused of certain serious

⁵⁶ Domestic Abuse (Scotland) Act 2018 - (<https://www.legislation.gov.uk/asp/2018/5/contents/enacted>)

offences, namely a drug trafficking, violent, sexual or domestic abuse offence, where they have a previous conviction (or convictions) on indictment for such an offence. This will mean decisions on the question of bail in all cases will be made within an adjusted framework based on the new bail test (see section 2 of the Bill) which has considerations of public safety and delivery of justice as the focus of the decision-making process and where remand can be imposed if the court considers it necessary through the operation of the bail test.

145. The benefits of this change will be to simplify the legal framework on bail so as to aid decision-making of the court and wider understanding as to how decisions of bail are made in each and every case before the court.

Key information

146. A long-standing aspect of the criminal justice system in Scotland is that decision-making is undertaken by the independent agencies and bodies involved in the administration of justice. The independent criminal court sits at the heart of decision-making on the question of bail with the responsibility residing with the court, informed by the facts and circumstances of the case before them and relevant views from key parties such as the prosecution, defence and, through the reforms in this Bill, increasingly justice social work.

147. The importance of independent decision-making has been regularly emphasised over many years. The then Scottish Executive was clear, in its ‘Bail and Remand Action Plan’ published in 2005, that independent court decision making was an essential feature of the bail system, while MSPs of all parties have commented on the importance of not unduly fettering the discretion of the court in a variety of criminal court contexts including the bail decision. In line with this approach, the legal framework within which the independent court makes their decision on the question of bail lays out general grounds relevant to this question. These grounds are relevant for all bail decisions.

148. While all offences are bailable, with legislation setting out the grounds on which a court may determine that there is a good reason for refusing bail, there is also additional statutory provision operating in respect of accused persons in solemn proceedings who meet certain criteria relating to the seriousness of the offence with which they are accused. By virtue of section 23D of the 1995 Act, in the cases described in that section, bail can only be granted if there are exceptional circumstances justifying bail. Case law has indicated that this existing additional statutory provision operates within the context of the general grounds relevant to the question of bail.⁵⁷

149. Section 3 of the Bill repeals section 23D of the 1995 Act as part of a simplification of the legal framework so as not to unduly fetter the discretion of the court in their decision-making.

150. This will enhance the role of the court as the decision-maker within a simplified legal framework whereby if grounds exist relevant to the question of bail, they will inform each and every bail decision made by the court, without the need for additional statutory provision relating

⁵⁷ The courts have indicated that in section 23D cases: ‘... What the court is required to do is assess all the information before it with a view to determining whether there is good reason for refusing bail having regard to the relevant risks and the relevant level of these risks as identified in section 23C.’ (*M v. Watson* [2009] HCJ 3, per Lord Brodie at paragraph 27).

only to specific types of cases. If, in any given case, the court applies the new bail test and reaches a view that bail should be refused, the simplified legal framework will allow for such an outcome.

Alternative approaches

151. An alternative approach which was considered was to retain section 23D within the amended framework for bail decision-making. This approach was rejected on the basis retaining section 23D would not deliver upon the policy aim of simplifying the legal framework on bail.

152. The Scottish Government considers the benefits of a simplified framework are that the court's discretion is not limited in relation to specific types of cases through the exceptional circumstances test in cases to which section 23D of the 1995 Act currently applies. Instead the court will make an individualised assessment of an accused person's suitability to remain in the community when they enter the criminal justice process having regard to the individual facts and circumstances of each case.

Consultation

153. During the consultation exercise, the majority of respondents supported this proposal, with 77% of respondents agreeing with the change which empowers the court to rely, in all cases, on the general grounds relevant in reaching the decision to the question of bail. Respondents indicated this supported evidence-based, rather than offence-based, decision-making.

154. 23% of respondents disagreed or strongly disagreed with this proposal. Of those that strongly disagreed (10%) they felt the current framework was robust and worked well (and did not need to be further simplified), and that the proposed changes would interfere with judicial independence. Specifically in relation to section 23D, some expressed concerns about the possible removal of the restriction on bail for those accused of sexual violence or domestic abuse who already have convictions for similar crimes, and felt that the current provision worked well.

Enhanced role for justice social work in provision of information to the court

Section 1 – DECISIONS ON BAIL: RELEVANT INFORMATION FROM OFFICER OF LOCAL AUTHORITY

Policy objectives

155. When the court is considering the question of bail for the first time in a criminal justice process, the Bill makes provision to enhance the role of justice social work so they can better inform the decision to be made by the court.

156. This will be achieved by giving a new explicit right for justice social work to offer information to the court to help inform the court's decision on the question of bail on an accused's first appearance. There will also be an explicit provision enabling the court to proactively seek information from justice social work on a question of bail (in line with existing provision in relation to the prosecutor and the defence).

157. The benefit of this change will be to facilitate improved and informed decision-making by the court on the question of bail.

Key information

158. Section 22A(1) of the 1995 Act provides for the general right for parties to be heard during consideration of bail on first appearance⁵⁸. At present this right is given to the prosecutor and the accused person (or in practice their agent), where the court must give those parties the opportunity to be heard before the sheriff or judge decides to admit or refuse to admit the person to bail. This general right to be heard is further supplemented by section 23B(4) of the 1995 Act⁵⁹, where the court is required to give the prosecutor and accused person an opportunity to make ‘submissions’ in relation to the question of bail, which can be seen as arguments and opinion for or against the granting of bail.

159. While not provided for directly in the 1995 Act, the Scottish Government understands in practice that in many circumstances the court may also seek information from justice social work. However, this practice is inconsistent and can be dependent on certain factors, such as the availability of a justice social worker in the court (linked to the resources of the local authority), and the culture and relationships between the court and justice social work.

160. It is considered there is particular value in justice social work involvement at the initial stage, when a person who has just entered a criminal justice process and not convicted of an offence will first be considered for possible loss of liberty by the court. This would be from the perspective of a general right to be heard rather than to make submissions for or against bail, recognising the role of justice social work in informing in a neutral manner the decision to be made by the court. Accordingly, section 1 of the Bill inserts a new subsection (1A) into section 22A of the 1995 Act so that justice social work must be given an opportunity to provide the court with relevant information on the question of bail on the accused’s first appearance. The provision does not require justice social work to provide information but ensures the court must give them an opportunity to do so, enabling the court to have access to as full information as possible at this stage.

161. Additionally, section 23B(6) of the 1995 Act⁶⁰ provides the court with the power to ask the prosecutor or the accused person’s solicitor/counsel for information relevant to the question of bail to help make a decision, including on the question of any bail conditions. This operates in addition to the general right of parties to be heard and the requirement for the court to give the prosecutor and the accused person an opportunity to make submissions on the question of bail.

162. Section 1(3) of the Bill adds justice social work (as an officer of a local authority) to section 23B of the 1995 Act, alongside the prosecutor and the accused’s representative, and provides for an associated right of reply by the Crown and defence to any information provided. This makes clear to the court that the presiding sheriff or judge has the ability to seek relevant information

⁵⁸ Section 22A(1) of the Criminal Procedure (Scotland) Act 1995 - <https://www.legislation.gov.uk/ukpga/1995/46/section/22A>

⁵⁹ Section 23B(4) of the Criminal Procedure (Scotland) Act 1995 - <https://www.legislation.gov.uk/ukpga/1995/46/section/23B>

⁶⁰ Section 23B(6) of the Criminal Procedure (Scotland) Act 1995 - <https://www.legislation.gov.uk/ukpga/1995/46/section/23B>

from justice social work to inform bail decisions. Whether or not justice social work are asked for additional information will be a matter for the court's discretion.

163. As applicable to the prosecutor or defence under the current terms of section 23B(6), if the court makes such a request, justice social work would be required to comply and provide the court with the information sought. This forms part of the overarching policy of enabling the court to have as rich a set of information as possible before it in order to inform the question of bail.

164. Relevant information which justice social work may be able to provide, or which the court may proactively request from justice social work, could include matters about the accused, such as addiction issues, home life, what a remand decision might mean for parental responsibilities etc. Elevating the role of justice social work better empowers the court to receive a more holistic picture of the accused person prior to fundamental questions being determined that impact on an accused person's liberty.

165. These changes to the decision-making framework in the 1995 Act therefore formalise, make more consistent and encourage cultural change for both the court and justice social work in terms of the role justice social work play in informing the critical bail decision.

Alternative approaches

166. One alternative approach considered was to differentiate between the role of justice social work depending on whether the Crown position on the question of bail was opposed or unopposed. If bail was opposed, the court would be required to ask justice social work for information relevant to the question of bail and justice social work would be required to provide it. Conversely, if bail was unopposed, the court would be required to ask justice social work for information relevant to the question of bail and justice social work may provide it.

167. While it is recognised the question of remand would be actively considered by the court in the event the Crown opposed bail, where information (if held) by justice social work would be of particular value, ultimately the Scottish Government considers the preferred approach is for justice social work to be capable of providing relevant information to the court whether or not bail is actively opposed by the Crown. This is having regard to the independent role of the court, where the attitude of the prosecutor towards a question of bail does not restrict the court's exercise of its discretion in determining whether an accused person should be bailed or remanded. In addition, it is also considered justice social work have a valuable role to play in helping inform the court whether or not further special conditions of bail are necessary, in addition to the standard conditions of bail, regardless of whether the court is considering refusal of bail in the first instance.

168. Another alternative approach considered was to mandate the court to ask justice social work for information relevant to the question of bail in every court hearing where bail is considered (i.e. not restricted to first appearances) and to require justice social work to always provide such information. As a bail application may be made by an accused at any hearing following their initial remand in custody without notice, this would involve a justice social work presence at all court hearings.⁶¹

⁶¹ Per Section 23 of the Criminal Procedure (Scotland) Act 1995 - <https://www.legislation.gov.uk/ukpga/1995/46/section/23>

169. This approach was rejected as it was ultimately considered a balance required to be struck between enabling justice social work to provide qualitative information to inform the bail decision by the court with the proportionate use of resources. The Scottish Government considers that balance is achieved by ensuring (1) justice social work is always given the opportunity to provide information relevant to the question of bail when a person first enters the criminal justice process, where the court is giving initial consideration to the status of the accused person (which can be described as a critical juncture) and (2) for all future court hearings, enabling the court to request specific information from justice social work to help determine the question of bail.

170. The blanket approach of mandating justice social work to provide information in every case was also rejected on the basis it was considered that retaining flexibility in the operation of the role of justice social work is important for workability.

171. Accordingly, for all first appearances when the court is giving consideration to the question of bail, while justice social work must always be given the opportunity to provide relevant information to the court, it is not obligated to do so. This ensures that where justice social work consider they hold relevant information to assist the court in determining the question of bail, they have an opportunity to furnish the court with said information, without compelling justice social work to do so where none is held or practicably attainable.

Consultation

172. The role of justice social work in informing the bail decision was explored during the consultation exercise. The consultation questions differentiated between when bail is opposed by the prosecution and when bail is unopposed. Two thirds of respondents (66%) preferred the option that the court must ask for information from social work and that social work must provide it when the prosecution opposes bail. Those who indicated that they preferred this option typically commented that involvement from social work usually meant that more evidence-based, proportionate and appropriate decisions could be made and better outcomes achieved for all.

173. When a court is considering bail decisions in cases where the prosecution is not opposing bail, there was less agreement around the preferred option. Almost half of respondents urged that flexibility should be included in such cases with both the court and social work having discretion to act (i.e. the court may ask for information from social work, but is not obligated to. Social work may decide whether to provide it.) The main reasons for this difference (compared to cases where bail was opposed) was that, if bail is not being opposed it was presumed that the risk to victims and the public would be low, and so the information may be superfluous. Some felt only if the court was actively considering remand should requesting further information from justice social work be considered, while others suggested it may also be useful for the court to request information in specific types of cases, including domestic abuse cases and sexual offences involving physical contact, or where there were concerns for the accused or others. Suggestions were also made that requesting reports in cases where bail is not opposed may assist if the court is considering the imposition of further conditions to support compliance with bail conditions.

Recording of reasons when bail is refused

Section 4 – REFUSAL OF BAIL: DUTY TO STATE AND RECORD REASONS

Policy objectives

174. When the court has decided to refuse bail, the Bill makes provision requiring the court to record the grounds upon which bail is refused in the court record of proceedings.

175. Where electronic monitoring for bail is not deemed appropriate and bail is refused, it will also be an explicit requirement for the court to explain why the possibility of electronic monitoring was not taken up.

176. When refusing bail solely on the ground there is a substantial risk of absconding or failing to appear, the court will also be required to state the reasons why it considers it necessary to refuse bail.

177. The benefits of these changes are to reflect the seriousness of a decision to place an accused person in custody at the pre-conviction stage of the criminal justice process and emphasise the measures available to help support accused persons remaining in the community. Over time, the recording of reasons will also improve transparency and general understanding of this part of the court's decision-making process at a critical point when a person not convicted of any offence loses their liberty.

Key information

178. It is a current requirement that whenever a court grants or refuses bail, it shall state its reasons for doing so.⁶² Reasons by the court are given orally.

179. In the same way as is required when departing from the statutory presumption against short sentences (section 204 of the 1995 Act), the Scottish Government considers that when the court refuses bail for accused persons it should be required to continue to state its reasons for coming to the conclusion that no other method of dealing with the person is appropriate, and for those reasons to be entered in the record.

180. Accordingly, section 4 of the Bill places a duty on the court in any proceedings in which bail is refused in relation to an accused person to state, in particular, the grounds on which the court has determined there is good reason for refusing bail and to have those grounds entered in the record of the proceedings. Also, in any given case where bail is refused solely on the ground specified in section 23C(1)(a) (significant risk of absconding or failing to appear), the court must state and record the reasons why it considers this to be necessary (for instance, why it considers the imposing of bail conditions would be unlikely to secure the accused person's future attendance at court, as an alternative to remand).

⁶² Section 24(2A) of the Criminal Procedure (Scotland) Act 1995 - <https://www.legislation.gov.uk/ukpga/1995/46/section/24>

181. This helps further align with what may be described as a more general move towards setting out reasoning of decisions made by the court. For example, the Post-Corroboration Safeguards Review chaired by Lord Bonomy recommended in April 2015 that, “It should be mandatory for the presiding judge to deliver orally in open court, and have minuted, brief reasons for the verdict, whether conviction or acquittal, including on the sustaining of a no case to answer submission, in every summary case.”⁶³

182. Electronic monitoring is an established part of the justice system in Scotland and allows a reliable way of monitoring compliance with a range of orders and licences. The Scottish Government’s intention is to expand the use of electronic monitoring more generally, both in terms of the policy on its use and through in future deploying newly available technology such as satellite tracking (GPS).

183. Where an order or licence contains a particular requirement or condition, such as a curfew, then electronic monitoring can provide an enhanced capability for the monitoring of that aspect of the order or licence. The use of electronic monitoring can therefore help support the underpinning aims of bail orders of the court, which contain certain standard conditions and may contain further special conditions of bail, for example, not to enter specified locations or a curfew.

184. With the existing requirement that bail should be refused only if there are good reasons to do so while having regard to the public interest, section 4 of the Bill also provides that the court must provide reasons why electronic monitoring was not deemed appropriate or would not adequately safeguard the public interest in any given case.

Alternative approaches

185. An alternative approach considered was to maintain the current practice that the courts must give oral reasons only. However, such an approach would not deliver the policy intent of both emphasising the importance of a decision to refuse bail through a formal requirement to state and record the grounds and reasons for doing so; and enabling a better understanding of the reasons why remand is used over time.

186. This issue was explored in the consultation exercise with the majority of respondents (76%) agreeing with the proposal that the court must give reasons where it decides to refuse bail to an accused person, both orally and in writing. The main reason for agreement was that it would help the accused (and other parties) better understand the decisions that were made, with several respondents agreeing that verbal decisions may not always be taken on board or be properly heard/understood at the time they are delivered.

187. Another alternative approach considered was to require the court to record reasons for all bail decisions, and not just those where remand decisions are made. While one victim advocacy organisation suggested during the consultation exercise that the proposal could go further to include written reasons when bail is granted, not only when it is refused, the Scottish Government considers it is appropriate that the measure has an emphasis on decisions to refuse bail. This is in order to emphasise to the court the importance and gravity of a decision to refuse bail which will

⁶³ <https://www.gov.scot/Resource/0047/00475400.pdf> (webarchive.org.uk), ch. 14.

result in the deprivation of a person’s liberty at the pre-conviction stage of proceedings when the person has not been convicted of a criminal offence.

Consultation

188. As set out above, during the consultation exercise the majority of respondents agreed with the proposal that judges must give reasons when they decide to refuse bail to an accused person, both orally and in writing. In addition, there was considerable agreement with the proposal that, when a court decides to refuse bail, they should have to record the reason they felt electronic monitoring was not adequate. Many reiterated comments made in response to previous questions that there should be accountability, openness and transparency in all bail and remand decision-making. Those who disagreed felt that judges should not be continually questioned, as it was their job to independently ‘judge’ and as such they should be trusted to use their discretion. A small minority disagreed because they did not support electronic monitoring per se.

How periods on electronically monitored bail conditions affects time served for custodial sentences

Section 5 –TIME SPENT ON ELECTRONICALLY MONITORED BAIL

Policy objectives

189. The Bill provides that, at the sentencing point of the criminal justice process, time spent by an accused person on electronically monitored bail awaiting trial or sentence may be accounted for against any eventual custodial sentence.

190. This will be achieved by requiring the court to have regard to any period of time spent on bail subject to a qualifying electronically monitored curfew condition with the court being required to determine if some, all or none of that time should count as time served against a custodial sentence.

191. The benefit of this approach is to recognise the restriction of liberty imposed through electronically monitored bail in a way that ensures there is consistency and fairness in how courts determine the relevance of time spent on bail subject to electronically monitored conditions for sentencing purposes.

Key information

192. As part of the implementation of the Management of Offenders (Scotland) Act 2019 (“the 2019 Act”), a number of new uses of electronic monitoring are due to be introduced. This included, in May 2022, the use of electronic monitoring with bail. Where the use of bail interacts with other areas of the criminal justice system and process, the Scottish Government considers there is benefit in making additional legislative provision, including through this Bill, to support the policy aim of making greater and more effective use of electronic monitoring.

193. One such area relates to sentencing powers. Courts at present have a broad ability to take into account a range of factors at the point of sentencing. At the moment, time spent in custody awaiting trial or sentence can be one of those factors under section 210 of the 1995 Act.

194. Periods of bail subject to conditions that are electronically monitored, as a new feature, may be something that courts take into account at sentencing. Current case law suggests that periods of bail subject to curfew conditions can be considered in “exceptional circumstances.”⁶⁴ When electronic monitoring is used to monitor compliance with a bail condition such as a curfew, that bail condition can be said to be more restrictive than it would have been without such monitoring, as it involves the wearing of a tag at all times enabling constant monitoring of the person during their full curfew period with all absences readily detectable. In some other jurisdictions, such as England and Wales, there exists a statutory provision whereby periods of time spent on bail subject to an electronically curfew condition is accounted for against the eventual sentence: generally two days on an electronically monitored curfew condition equates to one day spent in custody.

195. Section 5 of the Bill makes similar provision in Scots law by requiring the court, when passing a sentence of imprisonment or detention, to consider if, and to what extent, the period of time spent subject to electronically monitored bail is to factor into the sentence. Section 5 of the Bill sets out the prerequisites for a qualifying curfew condition and the steps the court must follow in making this assessment. But ultimately the discretion remains with the court to determine, based on the individual facts and circumstances of each case, how much, if any, of a period on electronically monitored bail should be taken into account and treated as time served against the custodial sentence passed.

196. This measure recognises that electronic monitoring of a condition is more enforceable, and therefore more robust, than a curfew condition which is not electronically monitored. Accordingly, it provides more definite assurance as to whether an accused has complied with the curfew condition such that days subject to electronically monitored bail should be counted as time served.

197. The Scottish Government recognises that while there is a restriction on movement and impact on a person’s liberty by virtue of being on electronically monitored bail, this does not involve the same degree of deprivation of liberty as being on remand in custody. To acknowledge the difference in impact on a person’s life, the Bill provides a conversion of electronically monitored bail days to custody days on a two to one ratio, so that two days on an electronically monitored curfew condition equates to one day spent in custody. This ensures that, when the court determines a period of electronically monitored bail is appropriate to factor into the sentence in a given case, there is a prescribed formula for the court to apply to convert the relevant period of electronically monitored bail into an equivalent portion (if not all) of the sentence that is to be treated as time served. This provides for consistency and fairness in the sentencing process.

Alternative approaches

198. An alternative approach considered was not to introduce such a measure on the basis that time spent subject to electronically monitored bail might not be deemed to be a direct equivalent to remand. However, such an approach would not recognise, as it is in England and Wales, the restriction of movement which electronically monitored bail imposes, in addition to the fact that use of electronically monitored bail provides a degree of certainty of compliance with conditions

⁶⁴ McGill v HM Advocate, 2014 S.C.C.R. 46

(namely the curfew condition). As noted above, the provision does not directly equate time spent on electronically monitored bail with time spent on remand.

199. Another alternative approach considered was to provide the power for the court to account for time served subject to electronically monitored bail, but leave it entirely to the court's discretion how to account for that period in terms of time served. It was decided preferable that the provision in the Bill should give discretion to the court as to how much of the time an individual spends on electrically monitored bail is taken into account at the point of sentencing. However, it was considered appropriate to have a standard formula for how that time is considered in respect of time served in order to support consistency of approach across all courts.

Consultation

200. During the consultation exercise, 65% of respondents agreed (somewhat or strongly) with the proposal that time spent on bail with electronic monitoring could be taken into account at sentencing.

201. Those who agreed felt that electronically monitored bail was still a restriction of liberty and as such should definitely be counted, in the same way that time spent on remand would be taken into account, so as to bring parity. Several suggested that this proposal would work as an incentive for compliance, and several also viewed that compliance with electronic monitoring during the bail period could provide evidence of an individual's likely engagement with community based sentencing. Others welcomed this proposal specifically because it would bring comparability with other jurisdictions, which they felt was important in the interests of fairness.

202. Those who disagreed (both 'somewhat' or 'strongly') mainly did so on the basis that electronically monitored bail was only a partial removal of liberty and thus not comparable with time spent in prison. Others felt that electronically monitored bail should not be treated differently from any other form of bail (e.g. curfew without electronically monitoring where similar reductions were not applied), and that considerations made on time spent 'pre-sentence' and 'post-sentence' should be kept separate.

PART 2 OF THE BILL (SECTIONS 6-11) – RELEASE FROM CUSTODY

Key background and policy context

203. The provisions in this part of the Bill are intended to improve opportunities for the successful reintegration of people leaving prison, including improving the provision of throughcare support.

204. This includes providing increased opportunity for structured and monitored temporary release in the community to support successful reintegration for certain prisoners through a replacement to the current system of Home Detention Curfew (HDC) for long-term prisoners. The vast majority of people currently detained in prison will return to their communities at some point, and so it is essential that effective release processes which focus on supporting successful reintegration are in place. This will support them to have the best possible opportunity to form positive connections with their community, access housing and employment and continue to

receive support for addiction and mental health problems. This, in turn, reduces the risk of reoffending.

205. Supporting successful reintegration of people leaving prison also improves outcomes for communities. By providing more effective support to people leaving custody, they are given their best chance to move on from offending behaviour which keeps our communities safer. Conversely, if an individual's release isn't planned for – if they can't access services which meet their needs, keep them and others safe and support them to make positive choices – it increases the risk of reoffending and the likelihood of re-entering the justice system.

206. This part of the Bill is also intended to provide opportunities to prevent reoffending by strengthening release planning and throughcare support and broadening those responsibilities out to non-justice agencies to improve access to services.

207. The Bill also includes provisions to allow sharing of certain information with victim support organisations in relation to prisoner releases to inform the support they provide to their clients.

208. The Bill also provides for a wider prisoner release power for use in emergency situations in order to protect the security and good order of prisons and the health and safety of prisoners and prison staff.

SPECIFIC PROVISIONS

Section 6 – PRISONERS NOT TO BE RELEASED ON CERTAIN DAYS OF THE WEEK

Policy objectives

209. It is proposed to further restrict the days of the week on which individuals can be released from prison custody so that releases do not take place on Fridays or the day before a public holiday.

210. Altering these release arrangements will have the benefit of ensuring that individuals are not released from prison on a Friday or the day before a public holiday reflecting that access to services in the community are more limited at the weekend and on public holidays. This provision is also intended to support all those being released from prison having the same opportunity to access the services they need at the point of release.

Key information

211. At present, a prisoner's earliest date of liberation may fall on any day of the week. However, under section 27(7) and (8) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 ("the 1993 Act"), prisoners cannot be released from custody at the weekend or on public holidays. Where an individual is scheduled to be released on one of these days, their release is automatically moved to the first available earlier day. This generally means that a prisoner who is due to be released over the weekend is released on the Friday before.

212. Concern had previously been raised by some justice organisations and community based services that individuals who are released on a Friday (or days prior to a public holiday) may be comparatively disadvantaged, as mainstream public services could be less available, or even unavailable, to them. This often means that the individual may be unable to access services that are important for their reintegration into the community until several days after their release, causing unnecessary risk and potentially resulting in return to custody.

213. Section 26C of the 1993 Act provides the Scottish Ministers with the discretion to bring forward a prisoner's release date by up to two days where to do so would benefit their reintegration into the community. This is applied on a case by case basis, with the Scottish Prison Service accepting applications from external organisations seeking to change an individual's release date. This requires the organisation to state the reasons why the change will make a practical improvement in the circumstances of the individual's release. This allows the Scottish Prison Service to form an opinion as to whether it would be better for that individual's re-integration into the community to be released on the earlier day.

214. There have been calls in recent years, including from the Scottish Drugs Deaths Taskforce who believe that Friday liberations from custody create unnecessary risk, to provide a more blanket approach to banning release on a Friday or the day before a public holiday.

215. In its *Report on Drug Law Reform*⁶⁵, published in September 2021, the Taskforce notes:

“A specific challenge raised by the majority of service providers was the issue of Friday liberations. It was highlighted that this can leave people particularly vulnerable to relapse as there are limited available services at the weekend. In some cases, support will have been in place for the 12 weeks prior to release, however the day of release is often crucial for putting in place the basic building blocks for life outside of prison. As well as needing to attend mandatory appointments with relevant probation staff, prison leavers may need to do a range of things including finding somewhere to live and registering for benefits. Those with health needs also often require access to immediate support and medication. This is critical for people who use drugs as release from prison has been shown to be a time of high risk for drug related death, due to reduced drug tolerance and access to support networks.”

216. In light of the concerns raised around liberations on a Friday or dates prior to a public holiday, it is considered that release on these days should be prohibited. Instead, the individual is to be released on the last preceding day which is not one of those days.

217. Section 6 of the Bill amends section 27(7) of the 1993 Act to the effect where a prisoner would fall to be released on an “excepted day” the release of the prisoner is to be brought forward to the last preceding day which is a “suitable release day”.

218. The excepted days are:

⁶⁵ Scottish Drug Deaths Taskforce: Report on Drug Law Reform - (<https://drugdeathstaskforce.scot/media/1259/drug-law-reform-report-sept-6th-21.pdf>)

- a Friday;
- a Saturday;
- a Sunday;
- a public holiday; and
- the day before a public holiday.

219. This may have the inadvertent effect that a larger volume of prisoners will be released on a Thursday, compressing several days of release into a Thursday (given that will be the last preceding non-prohibited day). This risks overloading community services (such as housing) which are required to provide support for people leaving prison, and potentially reducing the level of support available.

220. As such, section 6 also amends section 27(7) so that where a prisoner would be due to be released on a Thursday, the release of that prisoner is to be brought forward to the last preceding suitable release day (i.e. Wednesday). This does not affect those cases where the release of the prisoner has been brought forward to Thursday by virtue of the situation outlined above.

221. Although this may mean additional numbers of prisoners being released on a Wednesday than at present, section 26C of the 1993 Act remains available so that a particular prisoner's release date can be moved up to a further 2 days if it would better support their reintegration.

222. Examples of how this may work in practice are outlined below:

- Prisoner A is due to be released on a Friday – their release date is automatically moved to the preceding Thursday (release date brought forward by 1 day)
- Prisoner B is due to be released on a Saturday – their release date is automatically moved to the preceding Thursday (release date brought forward by 2 days)
- Prisoner C is due to be released on a Sunday – their release date is automatically moved to the preceding Thursday (release date brought forward by 3 days)
- Prisoner D is due to be released on a Monday which is a public holiday. Their release date is automatically moved to the preceding Thursday (release date brought forward by 4 days)
- Prisoner E is due to be released on a Thursday. Their release date is automatically moved to the preceding Wednesday (release date brought forward by 1 day)

Alternative approaches

223. One alternative considered was to retain the current position on the availability of flexible release (under section 26C of the 1993 Act) whereby only those that satisfy the specific assessment criteria would be permitted a change in their release date. This approach provides assistance to those who request it, but does not address any wider concerns regarding general access to services, specifically on a Friday.

224. It was considered whether the Scottish Government should utilise the flexible release process on a mass scale to change all Friday liberations, but this is not permitted in the current legislation, the effect of which is that cases must be managed on a case by case basis.

225. It was deemed appropriate to continue plans to make best use of the current flexible release provision, in conjunction with applying the new legislation contained in this Bill to create a presumption against the release of prisoners on Fridays, or immediately before public holidays. This decision took into consideration feedback from key partners in the provision of throughcare, various third and public sector service providers, as well as evidence from the Drugs Death Taskforce. Their feedback indicated that flexible release should be broadened to ensure that the difficulties linked to accessing services experienced by those individuals leaving custody are minimised as much as possible, particularly on Fridays. Responses in the consultation were supportive of a presumption against Friday Releases, with ongoing work still being undertaken to maximise the use of flexible release across the week, on a case by case basis.

Consultation

226. Question 19 in the consultation asked whether respondents agreed that the Scottish Government should ban all releases on a Friday (or the day before a public holiday) so people leaving prison had greater opportunity to access support. There was considerable agreement with this proposal, with 76% of those who answered the question agreeing there should be a ban.

227. The majority of those who agreed felt the proposal would ensure a more comprehensive preparation plan for release to take place, including collaboration with addiction services or housing providers in arranging appointments. Those who did not agree felt that support should be available regardless of the day of the week an individual was released upon, or that the support should be provided in the prison prior to release.

Section 7 – RELEASE ON LICENCE OF LONG-TERM PRISONERS

Policy objectives

228. This section of the Bill removes long-term prisoners (serving a determinate term of four years or more) from the Home Detention Curfew (HDC) mechanism and establishes a new approach to temporary release for this cohort. HDC will continue as at present for short-term prisoners.

229. The Bill will introduce two specific approaches to how long-term prisoners could be released on licence (reintegration licence) in advance of their Parole Qualifying Date (PQD) or release at subsequent review if not released at PQD. The PQD for long-term prisoners is the half-way point of their licence:

a) In advance of the Parole Board’s consideration of a prisoner at PQD (or subsequent review if not released at PQD)

The Bill provides an ability for the Scottish Ministers (Scottish Prison Service in practice) to release certain long-term prisoners on a reintegration licence in advance of their Parole Qualifying Date (PQD) or in advance of a subsequent review if not released at PQD. This

will be subject to risk assessment and consultation with the Parole Board and will take place in advance of the Parole Board's consideration of a prisoner's release. For the purposes of the reintegration licence, the Scottish Ministers, and not Parole Board will decide whether the prisoner is to be released on a reintegration licence in this instance.

This approach is intended to better support the reintegration of certain long-term prisoners, for example by providing the individual with the opportunity to make positive connections in their community, including links to community-based support services. It is also intended to provide further evidence to the Parole Board to inform decisions on whether to recommend release of a long-term prisoner under section 1(3) of the 1993 Act.

A number of statutory exclusions will apply. These are:

- individuals who are convicted of terrorist offences under section 1AB of the 1993 Act;
- individuals who are liable to removal from the United Kingdom (within the meaning of section 9 of the 1993 Act);
- individuals who are serving an Extended Sentence; and
- individuals who are subject to a Hospital Direction or a Transfer for Treatment Direction;

b) Following the Parole Board's recommendation to release a long-term prisoner at PQD

The Bill provides for the Parole Board for Scotland to direct the Scottish Ministers to release a long-term prisoner on a reintegration licence where the Board has already recommended the prisoner for release at the prisoner's PQD. This is where the recommendation is made in advance of that date, allowing release on a reintegration licence between then and the PQD.

This is intended to better support the reintegration of certain long-term prisoners by providing them with a managed return to their communities.

Statutory exclusions, such as those outlined under a) above, will not apply to this cohort, as the Parole Board's consideration of cases is not subject to statutory exclusions.

230. Under both a) and b) above, time spent in the community on a reintegration licence will be subject to conditions including curfew (which can be monitored by electronic monitoring), supervision by justice social work and any other conditions which the Scottish Ministers consider to be necessary and proportionate. The licence would also state the period of time the individual was permitted to spend in the community, up to 180 days.

231. If an individual failed to comply with the conditions of their reintegration licence, they could be recalled to custody and the information would be provided to the Parole Board to inform their decision as to whether to recommend release at PQD.

Key information

232. In certain circumstances, some prisoners may be released to serve part of their sentence in the community. At present, Home Detention Curfew (HDC) is the main mechanism for this and provides a route for appropriately assessed individuals to serve a proportion of their custodial

sentence in the community on licence conditions, including a curfew condition, which is electronically monitored.

233. The principal purpose behind HDC is to provide those leaving prison with a managed return to their communities ahead of release. HDC provides structure, through curfew and monitoring and by doing so can support compliance with release conditions and encourage successful reintegration.

234. Home Detention Curfew is available to both short-term prisoners (those serving under four years) and long-term prisoners (as noted above, those serving a determinate sentence of four years and over). In the case of long-term prisoners, they are eligible to be released on HDC provided they have been recommended for release by the Parole Board at the half way point of their sentence. Some statutory exclusions and a risk assessment process applies. The Bill will remove long-term prisoners from HDC but not change the approach to Home Detention Curfew for short-term prisoners and HDC will continue to operate as it does now for that cohort.

235. The release of short- and long-term prisoners is treated differently at present, with long-term prisoners only eligible for release on HDC if the Parole Board has recommended their release at the PQD. It is recognised that few long-term prisoners access HDC. The approach under this Bill is intended to provide increased opportunities for long-term prisoners to access structured and monitored temporary release as part of the support for their reintegration. This will be subject to different risk assessment processes to HDC and the Parole Board will be consulted on the individual's suitability, given the Board's expertise in risk-based decision making in relation to long-term prisoners.

Alternative approaches

236. One alternative approach was to amend the system of HDC so that short-term prisoners were 'presumed suitable' for release on HDC unless subject to statutory exclusions. This approach was intended to increase the opportunity for short-term prisoners to be released on HDC.

237. On balance, it was felt that the existing legislation provides the Scottish Ministers with the ability to make some changes under secondary legislation, for example to the list of statutory exclusions, time limits on HDC etc. Such secondary legislation is subject to affirmative procedure. This provides some scope to amend the approach to HDC for short-term prisoners, if the Scottish Ministers feel that is appropriate and subject to Parliamentary approval, without requiring primary legislation. Furthermore, given the statutory Operating Protocol for HDC has been in place since 2019, it was felt that focus should be given to reviewing the protocol and the risk assessment process put in place for HDC since that point to consider how it is operating in practice and where any improvements can be made.

238. It was felt that the focus in the Bill should be on long-term prisoners, to provide further opportunities to support their successful reintegration in order to reduce the risk of future reoffending.

239. A further alternative approach was to provide the Parole Board for Scotland with the ability to direct temporary release in advance of their consideration of a case at either PQD or subsequent

review. It was felt that the Parole Board taking decisions to temporarily release an individual in advance of the Board's consideration of whether to recommend release at PQD (or subsequent review) was not in line with the role and remit of the Parole Board. However, given the Board's expertise in risk-based decision-making it was considered appropriate that before the Scottish Ministers release a prisoner under new section 3AB(1) of the 1993 Act must consult the Parole Board.

Consultation

240. The consultation asked a number of questions relating to the release of prisoners.

241. This included question 13 which sought views on whether, in general, respondents felt that enabling a prisoner to serve part of their sentence in the community can help their reintegration. Of those who responded 54% strongly agreed, 24% somewhat agreed, 7% somewhat disagreed and 15% strongly disagreed.

242. The majority of respondents agreed (strongly or somewhat) with this proposal, however, while organisational respondents were primarily in favour of a prisoner serving some of their sentence in the community, individuals were more ambivalent. It is worth noting that many responses referenced that resourcing would be required to make supervision and reintegration meaningful. In addition, respondents also highlighted they felt the type of crime and the risk level posed by any individual was also an important factor to be considered in this proposal.

243. Question 15 sought views on whether through good behaviour, or completing education, training and rehabilitation programmes, prisoners should be able to demonstrate their suitability for a) early release or b) the ability to complete their sentence in the community.

244. The majority of those who responded to this question were supportive of these proposals, with 54% saying 'they agreed that prisoners should be able to demonstrate their suitability for both early release and serving their sentence in the community. It is, however, worth mentioning that for parts a and b of question 15, almost a quarter of those who responded did not agree, and another quarter were unsure. There was general view that risk assessments would still need to remain in place.

245. While the Bill does not include provisions for early release of short-term prisoners and does not bring forward the PQD for long-term prisoners, the responses to this question were relevant in informing the approach to the reintegration licence.

246. Questions 20a to 20g of the consultation focussed specifically on the Home Detention Curfew (HDC) scheme. The consultation listed a number of features of the current system along with potential changes which could help to increase the use of HDC (or similar scheme).

An overview of the results of the consultation responses are laid out below:

- should some categories of prisoners be considered automatically for HDC rather than having to actively apply? **(Yes 51%, No 27%, Unsure 22%)**;

- should the current maximum length of time allowed on HDC (6 months) be increased or remain unchanged? (**Increased 53%, Unchanged 47%**);
- should the limitation on the minimum sentence for which HDC can be considered (3 months) be removed? (**Yes 39%, No 33%, Unsure 28%**);
- should the current list of exclusions that make someone ineligible for HDC be reviewed with the intention of expanding eligibility for HDC? (**Yes 51%, No 27%, Unsure 22%**);
- should responsibility for decision-making in relation to whether someone is released on HDC remain with SPS? (**Yes 43%, No 23%, Unsure 34%**); and
- should the decision on whether to release on HDC – even for those serving under four years – be taken by the Parole Board for Scotland in future? (**Yes 27%, No 39%, Unsure 34%**);

247. While the majority of respondents felt that the HDC scheme should be applied automatically instead of being via application, the responses on whether the 6 month maximum should be increased were more evenly split with marginally more thinking it should be increased.

248. In terms of whether the list of exclusions that make someone ineligible for HDC should be reviewed, over half of respondents felt that it should, with a few suggesting that there should be no exclusions at all. Some respondents felt each case should be judged on its own merits rather than there being a blanket ban on specific offenders receiving HDC.

249. In relation to whether decision-making for HDC should remain with SPS or transfer to the Parole Board for Scotland, views were split but ultimately more respondents felt that SPS should continue in the role.

Section 8 – POWER TO RELEASE EARLY

Policy objectives

250. The provision allows that the Scottish Ministers may, by regulations, provide that a person who falls within a description specified in the regulations is to be released from prison early.

251. In order to make such regulations a series of tests must be met. The regulations may only be made if it is necessary and proportionate, in response to the effect an emergency situation is having or is likely to have on a prison or prisons generally; and for the purpose of protecting the security and good order of a prison, or the health safety or welfare of prisoners or those working in a prison.

252. ‘Emergency situation’ as defined in this Bill means:

- the incidence or spread of infection, contamination or the source of contamination which presents or could present significant harm to human health in Scotland (whether from risks originating there or elsewhere);
- an event or situation which has resulted in any prison (or part of a prison) to which the regulations relate being unusable; or

- any other event or situation which is reasonably considered by the Scottish Ministers to place at significant risk – i) the security and good order of a prison or prisons generally, ii) the health, safety and welfare of prisoners, or those working, in any such prison.

253. With regard to Parliamentary scrutiny, these regulations would be subject to affirmative procedure unless, for reasons of urgency, it is necessary to use a “made affirmative” procedure. This means that they can be made and come into force before the Parliament has had the opportunity to approve them as they would under the affirmative procedure. Exercising the power under the made affirmative procedure would allow emergency release under this provision to happen quickly. In such an event, the SSI containing the regulations must contain a declaration that the Scottish Ministers are of the opinion that because of the urgency it is necessary to depart from the affirmative procedure and provide a separate explanation to the Parliament of their reasons for that opinion. In such situations, the series of tests outlined here would still apply. Under this procedure the Parliament is required to approve the regulations at the end of the period of 28 days beginning with the day on which they are made otherwise the regulations cease to have effect.

Key information

254. The Scottish Ministers do not currently have a general executive release power to release groups of prisoners should the need arise. Existing executive release powers such as compassionate release relate to the consideration of specific individual cases. This means should an operational emergency arise within Scottish prisons which places the security and good order of prisons or the health, safety and welfare of prisoners and prison staff at risk, new emergency legislation would be required to facilitate the release of groups of prisoners, which has resource and time implications, potentially exacerbating the issues related to the operational emergency.

255. Such an executive release power exists in other jurisdictions. For example, the UK Government has a longstanding power under Section 32 of the Criminal Justice Act 1982⁶⁶ which empowers the Secretary of State to order that specified persons who are serving a sentence of imprisonment are to be released from prison earlier than they would otherwise be released. The power can only be exercised if the Secretary of State is satisfied that it is necessary to do so in order to make the best use of the places available for detention.

256. The Coronavirus (Scotland) Act 2020⁶⁷, as extended by the Coronavirus (Extension and Expiry) (Scotland) Act 2021⁶⁸, provided a narrow power to release groups of prisoners, who fall within a particular category specified in regulations, from prison early. However, this must be in response to the effect that coronavirus is having or is likely to have on a prison or prisons generally and for no other purpose.

257. The power in the Coronavirus (Scotland) Act 2020, as extended by the Coronavirus (Extension and Expiry) (Scotland) Act 2021, is time limited and at present will expire in September 2022.

⁶⁶ Section 32 of the Criminal Justice Act 1982 - (<https://www.legislation.gov.uk/ukpga/1982/48/section/32>)

⁶⁷ Coronavirus (Scotland) Act 2020 - (<https://www.legislation.gov.uk/asp/2020/7/schedule/4/part/8>)

⁶⁸ Coronavirus (Extension and Expiry) (Scotland) Act 2021 - (<https://www.legislation.gov.uk/asp/2021/19/contents/enacted>)

258. A temporary replacement for the power has been included in the Coronavirus Recovery and Reform (Scotland) Bill, but (if passed by Parliament) will expire on 30 November 2023 (although there is scope for further extension by regulations until 2025 at the latest). This temporary power relates only to the specific impact of coronavirus on a prison or prisons and no other purpose.

259. Section 8 of this Bill amends the Prisoners and Criminal Proceedings (Scotland) Act 1993 by inserting a new section, after section 3B, containing a permanent power for the Scottish Ministers to release groups of prisoners specified by regulations early.

260. Regulations made under this power will be required to specify a date on which a person is to be released from prison or provide for how that date should be determined. The regulations must also include a backstop date which is the latest date by which a person can be released under the regulations. That date can be within the period of 180 days beginning with the day that the regulations are made. Further regulations made under this procedure cannot provide for the release of a person more than 180 days earlier than they would otherwise have been released.

261. The power will be applied in relation to groups of prisoners without requiring individual assessments to be carried out to determine whether they should be released. When the power is exercised, the classes of prisoners who will be eligible for release under the regulations will be contained in the regulations.

262. The following statutory exclusions will apply:

- a life sentence prisoner;
- an untried prisoner;
- a terrorist prisoner within the meaning of section 1AB of the 1993 Act;
- a person due to serve a terrorism sentence within the meaning of section 1B of the 1993 Act but is not yet serving it;
- a person liable to removal from the United Kingdom for the purposes of section 9 of the 1993 Act;
- a person subject to a supervised release order under section 209 of the 1995 Act;
- a person serving a sentence imposed under section 210A of the 1995 Act (extended sentences for sex, violent and terrorist offenders);
- a person who is the subject of proceedings under the Extradition Act 2003;
- a person subject to the notification requirements of Part 2 of the Sexual Offences Act 2003;
- a person serving a sentence of imprisonment or detention for an offence under section 1(1) of the Domestic Abuse (Scotland) Act 2018;
- a person serving a sentence of imprisonment or detention for an offence that is aggravated as described in section 1(1)(a) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016;

- a long-term prisoner, unless that prisoner has been recommended for release by the Parole Board at the date on which the regulations are made.

263. With regards to any long-term prisoners who may be released under this power, the Scottish Ministers will have discretion on whether to impose standard conditions in addition to the conditions recommended by the Parole Board. These would apply to the released prisoners between the date on which they are released under the executive release power and the date on which they would otherwise have been released following the Parole Board's recommendation.

264. Prison Governors will also be provided with a veto which permits them to prevent a person from being released under this power if they consider that the person would, if released, pose an immediate risk of harm to an identified person.

Alternative approaches

265. The Scottish Ministers have powers in terms of section 39(6) of the Prisons (Scotland) Act 1989 to create a regime of temporary release for sentenced prisoners, which could theoretically be activated in emergency situations. However, the prisoners would be required to return to prison at a later date to complete the remainder of their sentences, and it would not be permissible to run this temporary release up to the scheduled end of a prisoner's sentence. In light of this, these temporary release arrangements would be likely to create substantial practical difficulties for the prison, and badly disrupt the lives of the released prisoners, at a time when the priority would be to reduce operational demands on the prison service and enable them to respond to the underlying crisis.

266. A further alternative could be not to introduce a wider permanent emergency release power and to bring forward emergency legislation should such a release be required in future in order to protect the security and good order of prisoner and the health, safety and wellbeing of prisoners and prison staff. As noted above, such an approach would cause an undue delay at a time of crisis and increase the risk to both prisoners and staff. It is also not considered to be the best use of Parliament's time.

Consultation

267. Questions 31 and 32 of the consultation focussed on an executive power of release for use in exceptional circumstances. The first of these questions asked whether respondents agreed such a power should be introduced and the second asked what circumstances respondents considered the power would cover.

268. The response to Question 31 was mixed. While 60% either agreed or strongly agreed with the proposal, 12% somewhat disagreed and 28% strongly disagreed. Several respondents drew attention to the release power which was contained within the Coronavirus (Scotland) Act 2020 which was drawn up and enacted as a matter of urgency in order to ease pressure on the prison estate. Some respondents called for greater clarity on what was meant by 'exceptional circumstances' and the Bill includes detail of the kinds of emergency situations where this power could be used.

Section 9 – DUTY TO ENGAGE IN RELEASE PLANNING

Policy objectives

269. The objective of this section is to improve the provision of support for individuals leaving prison – whether on remand or detained following conviction or sentence. This will be achieved by ensuring identified public bodies have specific duties to engage with release planning at an earlier point in an individual’s sentence and for these partners to have regard to the role that the third sector might play in the development, management and delivery of prisoner release plans.

270. This will have the benefit of supporting a more consistent approach to release planning and ensuring that the key role of the third sector in providing support to people leaving prison is recognised.

Key information

271. Planned, structured and supported reintegration back into the community gives the opportunity for those who have offended to turn their lives around, creating a safer and fairer society for all.

272. The picture across Scotland on release planning is mixed, with differing approaches and levels of co-ordination depending on the type of prisoner, and different service offers for individuals seeking voluntary assistance.

273. In preparation for an individual’s release, the Scottish Prison Service offer to engage with each prisoner in release planning. Where the individual wishes to do so, SPS will work with them to identify their support needs, and which public services they will need to engage with on release. The longer that the individual is in prison, the more scope there is to plan for release.

274. Periods of remand and short custodial sentences offer much less scope for release planning. Prisoners released from short sentences (unless they were convicted of a sexual offences and sentenced to more than 6 months) are not subject to supervision and there is no mandated support. All engagement with support services is voluntary. In contrast, those serving longer sentences can be involved in more detailed preparations (including temporary releases, and time in the open estate) alongside the work of the Parole Board, and the role of justice social work in supervising the individuals’ compliance with release conditions and any other post-release orders.

275. There are existing duties on public bodies to provide essential services to members of the public who require them (i.e. those who are unintentionally homeless, in need of medical care, entitled to benefits or other welfare). These duties are not specific to those leaving prison however. There are good practice examples of services engaging in pre-release planning but this is not a consistent picture.

276. The Community Justice (Scotland) Act 2016 (“the 2016 Act”) sets out a list of community justice partners for the purposes of that Act. This includes each local authority; each health board; the chief constable of Police Scotland; Skills Development Scotland; the Scottish Courts and

Tribunals Service; and the Scottish Ministers (in practice the Scottish Prison Service and Crown Office and Procurator Fiscal Service).

277. These partners are under a duty to co-operate with each other and Community Justice Scotland in the exercise of their respective functions in relation to community justice. That co-operation may include co-ordinating activities, providing advice and assistance, sharing information and funding activities together.

278. ‘Community justice’ as defined in the 2016 Act includes:

- managing and supporting persons who have been convicted of an offence with a view to them not offending in the future, or if that is not realistic, reducing further offending by them;
- arranging relevant general services in ways which facilitate persons who have been convicted of an offence accessing and using them;
- preparing persons who have been convicted of offences and sentenced to imprisonment or detention in penal institutions for release;
- facilitating the provision of relevant general services which persons mentioned above are likely to need immediately following their release; and
- giving effect to post-release control requirements.

279. ‘Relevant general services’ are services and support provided to people generally in relation to housing, employment, education, children, physical or mental health, social welfare and any other matter which may affect the likelihood of future offending. Post-release control requirements are requirements for a person to be under supervision following release due to an enactment, court order or licence condition.

280. While the duties in the 2016 Act support requires the named partners to co-operate in preparing convicted persons for release from custody and in the provision of services post-release, it does not require them to engage in pre-release planning at an early point in an individual’s sentence. As noted above, while there are good examples of early pre-release planning, this is not a consistent picture. There is also no equivalent duties to co-operate in preparing persons on remand for release from custody and in the provision of services to them post-release.

281. Section 9 of the Bill therefore amends the 2016 Act by inserting a new section, after section 34, which places a duty on identified partners to engage with release planning for prisoners (including those on remand) when requested to do so by the Scottish Ministers (as the Scottish Prison Service). In practice this request will be issued at an earlier point in an individual’s sentence.

282. The identified partners are:

- each local authority;
- each health board;
- the chief constable of the Police Service of Scotland;

- Skills Development Scotland; and
- an integration joint board established by virtue of section 9 of the Public Bodies (Joint Working) (Scotland) Act 2014.

283. The engagement by identified partners will involve providing input into the development, management and delivery of the individual's plan within a timescale set by the Scottish Ministers when making their request.

284. In complying with this duty, each identified partner must have regard to the role which third sector bodies are able to play in the development, management and delivery of the release plan and may commission services from, or co-ordinate with existing services provided by, third sector bodies, as they consider appropriate to meet the needs of the individual to whom the release plan relates.

Alternative approaches

285. One alternative considered was to continue the current approach of the Scottish Government working with public and third sector service providers across a range of sectors to improve the co-ordination and engagement of services for those leaving custody. This would utilise current legislation, and work within the bounds of current duties that have been places on individual public services to meet the needs of the public, in this instance, those leaving custody.

286. The Scottish Government will continue this work to build and improve services and service provision. However, such existing measures, while helpful, do not necessarily support the consistent and early engagement of universal community-based services in pre-release planning. That was a position reflected in the responses to the consultation.

287. A further alternative considered was for the Scottish Government to pursue individual and separate changes to the legal duties placed upon public bodies, in order to develop release planning. This may improve individual service level agreements, but may not co-ordinate services as intended. It would also lack the potential to establish a wider, clearer statement regarding release planning for all public services and service providers – which a shared duty would demonstrate.

Consultation

288. Question 23 in the consultation asked whether respondents felt existing duties on public services to give all people access to essential services were currently sufficient to meet prison leavers' needs, or whether public services should have a specific duty to engage with pre-release planning. This was followed up with Question 24 asking what any additional specific duty should cover in terms of each service and what they should be required to do.

289. The majority (74%) who answered this question agreed that a specific duty to engage in pre-release planning was required. Those who supported this duty felt that the public services would require more resources to fulfil that obligation, and that collaboration between local authorities and the third sector would be key, rather than either being 'lead partner'.

290. The minority of respondents who felt the existing duties were currently sufficient believed so on the basis that if planning could be implemented at the start of the sentence, in collaboration with community partners, then the existing duties should be adequate.

291. In relation to which services should be included in an additional duty, the most commonly cited service was housing, followed by health, then benefits/banking, employment and social work support. Other services mentioned included education, family support and police liaison.

Section 10 – THROUGH-CARE SUPPORT

Policy objectives

292. This section of the Bill establishes a duty on the Scottish Ministers to publish statutory minimum standards for through-care support which relevant named bodies must have regard to when providing through-care support for individuals leaving prison. This is intended to promote a consistent approach to the provision of through-care support across Scotland.

Key information

293. Through-care is the co-ordinated provision of support to a person beginning when they first enter prison either sentenced following conviction on or remand, throughout their period of imprisonment and during their transition back into the community.

294. Effective through-care can support an individual's successful reintegration by offering guidance and advice to assist their continued rehabilitation and desistance – as well as practical assistance, such as access to accommodation, healthcare, social supports, education or employability support on release. The support provided should be based on the specific needs of the individual.

295. Prisoner through-care can be undertaken in several different forms – whether as a specialised service supporting the through-care process specifically, as one part of the wider justice services supporting and supervising individuals after release, or through engagement with wider universal public or voluntary services.

296. Local authorities currently have a duty to provide voluntary support to prisoners leaving custody following a period of remand or a short-term sentence should the individual request it (with the exception of short-term sex offenders who are subject to statutory supervision upon release) within 12 months of leaving prison. They also must provide statutory supervision for prisoners leaving long-term sentences to ensure that the individual is complying with the conditions of their release.

297. As well as requesting through-care support from their local authority, short-term prisoners may also receive through-care assistance from a range of third sector services. Both local authority-led and third sector services for short-term prisoners are voluntary.

298. There are existing national standards for the provision of through-care – both to prisoners who are required to engage with these services as part of a licence or because they request such a

service. These standards were published in 2004⁶⁹ and were intended to ensure that a consistently good quality of service is provided across Scotland. Under these standards, the term ‘throughcare’ is used to describe the provision of a range of social work and associated services to prisoners and their families from the point of sentence or remand, during imprisonment and following release into the community.

299. These existing standards are very focussed on the role of justice social work in delivering throughcare. Given the evidence which shows that individualised holistic interventions which address multiple criminogenic needs are more effective at reducing reoffending, it is considered that revised minimum standards for throughcare should encompass a broader range of services.

300. Section 10 of the Bill amends the 2016 Act by inserting a new section, after section 34, which places a duty on the Scottish Ministers to publish standards on the throughcare support to be provided to those who have been remanded in custody or subject to a custodial sentence before, during and after release, thereby providing these standards with a statutory basis. This new section also places a duty on the Scottish Ministers to review these standards at regular intervals and either publish revised standards or a statement indicating they do not consider they should be revised.

301. In preparing, reviewing and revising these standards, the Scottish Ministers must consult a list of identified partners including:

- Community Justice Scotland
- each local authority;
- each health board;
- the chief constable of the Police Service of Scotland;
- Skills Development Scotland;
- an integration joint board established by virtue of section 9 of the Public Bodies (Joint Working) (Scotland) Act 2014;
- third sector bodies involved in community justice and the provision of throughcare support; and
- such other persons as the Scottish Ministers consider appropriate

302. Within this section, ‘throughcare support’ means:

- the provision of advice and guidance;
- the provision of, and facilitation of access to, opportunities to participate in activities designed to eliminate or reduce future offending;
- the provision, and facilitation of access to, emotional and practical support;
- the provision of help, including in particular to:

⁶⁹ National Objectives for Social Work Services in the Criminal Justice System: Standards Throughcare (<https://www.webarchive.org.uk/wayback/archive/20150218230122/http://www.gov.scot/Publications/2004/12/20473/49294>)

- access and make use of relevant general services and any relevant specialist services which are available; and
- engagement in release planning

303. Section 10 of this Bill also inserts a further new section into the 2016 Act, after Section 34. This places a duty on a number of partner bodies who, in exercising functions relation to the provision of throughcare support, must have regard to the published standards. The identified partners are:

- each local authority;
- each health board;
- Skills Development Scotland;
- an integration joint board established by virtue of section 9 of the Public Bodies (Joint Working) (Scotland) Act 2014; and
- the Scottish Ministers.

Alternative approaches

304. Consideration was given to only revising the existing national throughcare standards which apply to justice social work. Work is commencing to review the operational throughcare guidance for justice social work, in recognition of the changes in practice and policy since 2004. However, it was recognised that effective throughcare requires a wider range of services, including non-justice services, and that in order to better meet the needs of people leaving prison, standards should be developed which apply to a wider range of universal services.

305. Therefore, the consultation and this Bill have sought to open up the consideration of the delivery of throughcare, recognising the importance of a holistic approach that can recognise and address the wider criminogenic needs of individuals in the prison system. This reflects all aspects of throughcare provision from preparation for release, interaction with housing, benefits and welfare services, healthcare, substance misuse services, social care, and training and employability

306. This was supported within the consultation responses, whereby throughcare provision and support were deemed an important part of re-integration into society.

307. The existing model sets basic requirements for certain throughcare services, but leaves the responsibility for the development and delivery of these services to local authorities and their partners. Without taking away from the importance of local direction and accountability, the Bill proposes to establish minimum standards for the delivery of throughcare, which partners must comply with when providing throughcare support to people before, during and after release from prison in order to support greater consistency of delivery, and equity of access.

Consultation

308. Questions 26 to 28 of the consultation focussed on minimum standards for throughcare, asking to what extent respondents agreed or disagreed with the following: that revised minimum standards for throughcare should incorporate a wider range of services; that revised standards

should differentiate between remand, short-term and long-term prisoners; and that revised standards should be statutory.

309. The vast majority of respondents who answered the first of these questions either somewhat agreed or strongly agreed that revised minimum standards should incorporate a wider range of services (94%), especially if services were to be tailor-made and based on individual need. Some respondents also felt that in order to meet these standards, the services would need to receive increased resources.

310. Around two thirds of respondents (65%) agreed with the proposal that revised standards should differentiate between remand, short-term and long-term prisoners. While there was feeling that prisoners should be considered as individuals and this should be based on needs and risk, it was acknowledged that different groups had different needs and may require different versions of the same services. Some respondents felt there should be different standards entirely for different groups of prisoners.

311. The majority of respondents (84%) who answered the question in relation to whether the revised standards should be statutory felt that they should. Some saw a tension between ‘statutory’ standards for services and ‘voluntary’ participation in those services as well as the feasibility of placing statutory duties on third sector organisations. However, the majority agreed that statutory standards would enable consistency across all local authorities.

Section 11 – PROVISION OF INFORMATION TO VICTIM SUPPORT ORGANISATIONS

Policy objectives

312. This section is intended to allow information about the release (and attached conditions), death, absconding, transfer and return to custody of prisoners to be provided to Victim Support Organisations (VSOs) to enable a VSO to work proactively with a victim to provide support including safety planning. In practice this section will enable a victim registered with the Victim Notification Scheme (VNS) to nominate a VSO to receive information about the prisoner in their case. The victim will be able to decide whether they wish the VSO to receive the information on their behalf, or if they wish to receive the information as well. This section will also provide VSOs with the right to ask for information about a prisoner’s release in a specific case where they were providing support to the victim. This is intended to support a more trauma-informed approach to how this information is shared with victims.

Key information

313. Section 16 of the Criminal Justice (Scotland) Act 2003 (“the 2003 Act”) introduced the right for a victim to be provided by the Scottish Ministers with certain information in relation to the release of the person who perpetrated (and was convicted and sentenced for) the offence against them in certain circumstances. This includes where individuals have been sentenced to imprisonment or detention for a period of 18 months or more, to life imprisonment or under sections 205 (person under 18 convicted of murder) and 208 (detention of children convicted on indictment) of the 1995 Act.

314. The victim has to intimate to the Scottish Ministers that they wish to receive this information. Where the victim has died, the information may be provided to any or all of the four highest qualifying persons who are:

- the victim's spouse or civil partner;
- the victim's cohabitee;
- son, daughter or other persons in relation to whom the victim has had parental responsibilities or rights vested by the Children (Scotland) Act 1995; and
- father, mother or other persons in whom parental responsibilities or rights were vested by the Children (Scotland) Act 1995;
- the victim's brother or sister;
- the victim's grandparent;
- the victim's grandchild;
- the victim's uncle or aunt;
- the victim's nephew or niece.

315. Where the victim died as a child, the information can be provided to any other person who, immediately before the offence was perpetrated, cared for the child. Where the victim is incapable by virtue of a mental disorder or inability to communicate, the information can be provided to the highest ranked qualifying person from the list above. If the qualifying person is a child who has not attained the age of 12, the person who cares for that child is to be provided with the information.

The information to be provided under section 16 of the 2003 Act is:

- the date on which the convicted person is released (other than being granted temporary release);
- if the convicted person dies before the date of release, the date of death;
- that the convicted person has been transferred to a place outwith Scotland;
- that the convicted person is for the first time entitled to be considered for temporary release by virtue of the prison rules;
- that the convicted person is unlawfully at large from a prison, young offenders institution or hospital;
- that a person who has been released has subsequently been returned to a prison, young offenders institution or hospital;
- where the convicted person is liable to be detained in a hospital under a hospital direction or transfer for treatment direction, that a certificate has been granted for the first time which suspends the person's detention and does not impose a supervision requirement, or that that certificate has been revoked.

316. Section 17 of the 2003 Act provides a number of further rights for victims. This includes where a person entitled to receive information under section 16 of the Act intimates to the Scottish

Ministers that they wish to be afforded the opportunity to make representations as to the release of the convicted person as well as the conditions which might be specified upon that person's release licence. The victim, or qualifying person, is therefore entitled to be informed of the consideration of the convicted person for release on licence in addition to the information provided under section 16.

317. The specific points in time at which information can be provided to the victim or qualifying person under section 17 are:

- firstly, where the Parole Board for Scotland is to consider whether, or direct that, the convicted person is to be released, the Scottish Ministers must notify the victim of the time by which they need to make representations if they are to be considered by the Parole Board. The Parole Board is then required to inform the victim 1) whether or not it has recommended or directed that the convicted person is to be released, 2) if it has recommended or directed release, to inform the victim as to whether the convicted person will be required to comply with licence conditions, 3) inform the victim about conditions which relate to the convicted person's contact with them or their family, and 4) such other information as the Parole Board considers appropriate. The Parole Board is required to provide this information whether or not representations were made by the victim.
- secondly, where a person is required to be released on licence and it is simply for the Parole Board to recommend conditions to be included in the licence, the Scottish Ministers are under the same duties in relation to the victim as set out above. In such cases, the Parole Board is only required to inform the victim about points 2) and 3) above.
- thirdly, where the Parole Board is not involved in setting the licence conditions attached to the convicted person's release, the Scottish Ministers are still required to notify the victim of the time by which they are required to make representations. The Scottish Ministers are then required to provide the victim with information as to whether the convicted person is to comply with conditions and inform the victim about conditions which relate to contact with them or their family.

318. Section 17A of the 2003 Act provides that where a victim has intimated their wish to receive information that the convicted person is eligible for the first time to granted temporary release under the Prisons and Young Offenders Institutions (Scotland) Rules 2011, they must be given the opportunity by the Scottish Ministers to make written representations about the conditions that the victim considers should be imposed in relation to that temporary release. The Scottish Ministers are required to fix the time within which the written representations should be made by and to tell the victim the time fixed.

319. Section 27A of the Victims and Witnesses (Scotland) Act 2014 provides a further route by which a victim can obtain information in relation to the release of the perpetrator of the offence against them. This applies only in cases where the convicted person is sentenced to less than 18 months' imprisonment or detention. The victim may request that the Scottish Ministers notify them of the convicted person's release and any conditions imposed on them which are for the

protection of the victim. The victim may also request that they be advised of the convicted person's escape from prison.

320. Some of the rights to request and receive information detailed above are administered through the VNS. The VNS is operated by the Scottish Prison Service, but other justice partners such as the Crown Office and Procurator Fiscal Service, Scottish Courts and Tribunals Service and the Parole Board for Scotland are also involved in administering the scheme. In practice, victims receive information from the Scottish Prison Service. The legislation outlined above does not preclude a victim who is not registered with the VNS from requesting at any time information which they have the right to receive.

321. The amendments made by this Bill to the 2003 Act and the 2014 Act will allow victims to nominate a VSO to receive the information provided to the victim under sections 16, 17 and 17A of the 2003 Act and section 27A of the 2014 Act.

322. Victims with a right to intimate their wish to receive information will have four options:

- 1) request and receive the information themselves (as now);
- 2) request that information is received only by a VSO nominated by them;
- 3) request that both they and the VSO nominated by them receive the information at the same time; or
- 4) make no request for information to be received, either by themselves or the VSO (in essence, opting out by making no request)

323. Although SPS takes great care to handle each case with sensitivity, the current system of victims being contacted directly has received criticism that it can potentially have the effect of re-traumatising a victim. It is also considered that the current system is operating inefficiently, with some victims not being informed timeously of information they are entitled to receive.

324. Providing victims with the option of using VSOs to request and receive the information that victims are currently entitled to is a way of allowing that information to be delivered to the victim in a more trauma-informed manner, and as part of an immediate conversation or series of conversations between the VSO and the victim about ways in which that VSO can proactively support the victim.

325. The support provided by VSOs would include safety planning, helping victims registered under part 2 of the VNS scheme (which deals with the information to be provided under section 17 of the 2003 Act and the rights to be offered the opportunity to make representations) to engage with SPS and the Parole Board for Scotland, and providing psychological support to victims in relation to the potential trauma caused by the release of the convicted person. Where victims are already receiving support from a VSO, the release information will prompt consideration of what additional support the victim may need as a result of the release.

326. Any VSO which receives information about a prisoner under this Bill will need to have in place the mechanisms required to process that data in accordance with the law. The VSO will also need to be able to deliver the support a victim might require. In order to ensure that prisoner

information is only shared with organisations who have a direct role in the support of the victim in an individual case, the Bill provides that only VSOs which have been prescribed by regulations made by the Scottish Ministers can be nominated by victims to receive information or to request the information themselves. When the VSO has been nominated by the victim, SPS will conduct a vetting process before providing the information to the VSO to ensure that the VSO is providing support services in relation to the offence perpetrated against the victim. When the VSO requests the information itself, the vetting process will require the VSO to demonstrate that they are providing support services to the victim in relation to the offence perpetrated against them and that the information is required for the purpose of providing the victim these support services. This will ensure that the policy intention of facilitating better support for victims can be delivered, whilst also helping to ensure the sharing of information about prisoners is carried out in accordance with the law.

Alternative approaches

327. The Scottish Government considered whether the policy intention of ensuring victims can access appropriate support and advice (including safety planning where relevant) in a timely fashion could be met by making provision so that victims would be entitled to additional information about the release of a prisoner (question 22 of the consultation on this Bill refers). While that approach could mean that a victim felt better informed, ultimately additional information might not necessarily provide greater opportunity for a victim to access support (although this could be case-specific). Furthermore, additional information might not make a material difference to the nature of support that a victim might have access to, giving rise to data protection questions about the proportionality of sharing the information.

328. A further alternative considered by the Scottish Government was a more wide-ranged package of changes to the operation of the VNS. The VNS is the vehicle through which this legislation is delivered operationally. It enables eligible victims to register with it and then to receive certain information about an individual in custody, such as the date of release or when they become eligible for temporary release. In addition to this, VNS letters, which are issued by SPS, provide information on support services which victims can access if they choose to.

329. However, in April 2022, the Scottish Government instigated an independent review of the VNS. This is expected to take 12 months and may result in changes being made to its operation. The Scottish Government considers that it should await the outcome of this review before considering broader changes to the operation of the scheme. However, the legislation underpinning the VNS required amendment to allow information to be provided to VSOs.

Consultation

330. Question 21 in the consultation asked whether respondents agreed or disagreed whether information on individuals being released from prison custody could be shared with third sector victim support organisations, for example to enable them to provide proactive victim support to victims and carry out safety planning.

331. The vast majority of respondents (88%) agreed or strongly agreed with this proposal. Some respondents felt that while victims are the focus of much activity around conviction and sentencing, they, and the agencies supporting them, can be lost in the release arrangements.

332. The main reservations related to GDPR concerns and prisoners' rights. The need for the Scottish Government to be transparent about why such information needed to be shared was raised, as was the need to balance the risk to victims with the rights of prisoners. The small number of respondents who provided a reason for disagreeing with the proposal felt that it would be a breach of privacy or could lead to inadvertent (or otherwise) media coverage which could encourage vigilantism.

333. Question 22 in the consultation sought views on the extent to which respondents agreed or disagreed with the proposal that victims and victim support organisations should be able to access further information. A majority of respondents agreed or strongly agreed with this proposal (76%), citing the potential benefits to a victim of additional information being made available (e.g. in safety planning).

334. Of the respondents who disagreed or strongly disagreed with this suggestion (being 24% of those who replied to this question), it was suggested that the information already available to victims might be sufficient. These respondents also raised questions about the particular nature of further information that might be provided, and whether this might mean better support for a victim in practice.

335. As explained previously, an independent review of the VNS has been launched. The purpose of this is to ensure that the VNS is fit for purpose and supports victims effectively. Given the points raised about the particular type of information that could potentially be provided to a victim or a victim support organisation in response to question 22, the Scottish Government considers that it will be appropriate to revisit this matter after the review has concluded. As stated above, the Scottish Government does not wish to progress measures in this Bill that might undercut or pre-empt the investigations and conclusions of that review, and notes that absence of provision in this area is not a barrier to delivering the provisions in this Bill on information sharing with VSOs.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

336. An Equality Impact Assessment (EQIA) has been carried out on the policies in the Bill. As a result of this impact assessment, it has been concluded that the Bill will not have a negative effect on equal opportunities, and should have a positive impact in helping to promote equality of opportunity and good relations for people with protected characteristics under the Equality Act 2010.

337. The policy underpinning the bail reforms (Part 1) will apply to anyone who is arrested in connection with an alleged criminal offence and who proceeds through the criminal justice process. Anyone accused of an offence may possess any and multiple of the protected characteristics. However, as the bail measures are not targeted at a specific group, it is anticipated that they will have a minimal impact in respect of the protected characteristics.

338. Almost all the release reforms in Part 2 apply to anyone who has been held in prison custody and is being released back into the community. This is with the exception of section 7 which relates to long-term determinate sentenced prisoners only. As with those accused of an offence, those being released from prison may possess any and multiple of the protected characteristics. However, their needs on release may be different depending on their age, disability or sex.

339. Overall the legislation is anticipated to have a positive impact on the equality groups identified, with particular implications for children and young people, women and girls and those with additional support needs arising from disability or age.

Human rights

340. The Scottish Government is satisfied that the provisions of the Bill are compatible with the European Convention on Human Rights (ECHR). The provisions in parts 1 and 2 have been developed taking account of the requirements of the ECHR.

341. In general, the subject matter of the Bill falls within the ambit of Article 5 of the ECHR (the right to liberty and security).

342. Article 5(1) of the Convention provides for the right to liberty and security. A person can only be deprived of their liberty in certain specified circumstances and in accordance with a procedure prescribed by law. The law on bail, in particular the rules governing when bail can be refused, is clearly relevant to considerations of deprivations of liberty. However, the Scottish Government does not consider that section the provisions of Part 1 of the Bill raise issues under article 5. The specified circumstances on which a person may be deprived of their liberty include the lawful arrest or detention of a person effected for the purpose of bringing the person before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent the person committing an offence or fleeing after having done so (article 5(1)(c)). Additionally, article 5(3) provides that everyone arrested or detained in accordance with the provisions of article 5(1)(c) shall be brought promptly before a judge or other office authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial. The jurisprudence of the European Court of Human Rights has established that detention pre-trial can be justified by relevant and sufficient reasons (see, for example, *Wemhoff v Germany* (1979-80) 1 EHRR 55, Judgment, para 12; *Yagci and Sargin v Turkey* (1995) 20 EHRR 505, para 50.

343. As described above, sections 2 and 3 of the Bill propose adjustments of the decision-making framework on questions of bail. The effect of these changes is to narrow the circumstances in which bail can be refused by: introducing the necessity test in new section 23C(1A)(b) of the 1995 Act; introducing the qualification on relying on the ground in section 23C(1)(a); repealing section 23D of the 1995 Act. As this is a narrowing of the circumstances in which bail can be refused, the Scottish Government does not consider that any issues arise under article 5(1)(c) or (3) of the Convention.

344. Some of the provisions in the Bill involve treating different categories of prisoners differently to others, on the basis of their category of sentence or their index offence. For instance, the provisions relating to the release of long-term prisoners on a reintegration licence or the power to release prisoners early in emergency situations include statutory exclusions. This raises the question as to whether issues are raised under article 14 of the Convention. Article 14 prohibits discrimination in the enjoyment of other Convention rights. The difference in treatment must be within the “ambit” of another Convention right – in this case, article 5. It is not clear that all the exclusions are such that there is differential treatment on the grounds of “other status” (in the meaning of that term for the purposes of article 14) or that prisoners in that category are in analogous situation to prisoners who are eligible. To the extent that an exclusion does amount to differential treatment that engages article 14 the Scottish Government considers that such exclusions are justified on the grounds of public safety concerns owing to the increased risks posed by certain categories of prisoner and the risk of absconding by certain categories of prisoner.

345. The power to release prisoners early in emergency situations also raises issues with articles 2, 3 and 8 of the ECHR for a variety of different people. Article 2 protects the right to life, article 3 prohibits degrading or inhuman treatment or punishment and torture, and article 8 protects the right to private life, which includes an individual’s physical integrity. The Scottish Government considers that the provision in the Bill is capable of being exercised compatibly with each of these rights. The exclusions noted above prevent higher risk categories of prisoner from release under the power and the governor veto can be exercised if they become aware of an immediate risk of harm to an identified individual from a person eligible for release under the power. The exercise of the power will also protect the rights of prisoners both being released and who remain in custody as the release due to the purposes required for the power to be exercised (protecting the security and good order of prisons, or protecting the health, safety and welfare of prisoners and those working in the prison).

346. Some of the provisions in the Bill create new data processing, mainly the sharing of personal data. This raises the question as to whether issues are raised under article 8 of the ECHR. Article 8 protects (among other things) the right to private life. The Scottish Government considers that although the new data processing created by the Bill interferes with individuals’ article 8 rights that interference is justified by the legitimate aims of protecting public safety and preventing disorder and crime. They also consider that the measures are in accordance with the law and that the interference is proportionate having regard to the aim pursued.

Island communities

347. The Scottish Government is satisfied that the Bill has no differential effect upon island or rural communities. The provisions in the Bill are intended to benefit all communities across Scotland, regardless of location. While there are specific considerations for island communities in relation to some of the provisions, these are likely to be able to be addressed at a local level. No markedly different or unique impacts were identified for island communities. A partial Islands Community Impact Assessment has been carried out, which addresses the impacts of the Bill in line with available evidence and consultation input.

Local government

348. A significant number of the provisions in this Bill, particularly those in Part 2, are likely to have an impact on local government. Local authorities have responsibility for the provision of justice social work services as part of their wider duties in relation to social work. This includes responsibility for the assessment, support and supervision of individuals involved in the criminal justice system.

349. The sections of the Bill which will impact local authorities are laid out below:

- Section 1: Decisions on bail: relevant information from officer of local authority
- Section 6: Prisoners not to be released on certain days of the week
- Section 7: Release on licence of long-term prisoners
- Section 8: Power to release early
- Section 9: Duty to engage in release planning
- Section 10: Throughcare support

350. Further details on how these sections of the Bill will impact local authorities are contained within the relevant sections of this document and the Financial Memorandum.

351. The financial implications for local authorities are set out in the Financial Memorandum accompanying the Bill.

Sustainable development

352. The Bill is expected to have a positive social impact by contributing to ongoing efforts to reduce levels of crime. The provisions in the Bill are underpinned by a commitment to public safety and the protection of victims. As such, it is intended that the provisions will lead to a reduction in the risk of future offending, meaning fewer victims in the future. This will be achieved by providing more opportunities for rehabilitation and improved support for reintegration.

353. In addition, the Bill is intended to have a positive economic impact over time. As noted above, reoffending costs the Scottish economy an estimated £4bn p.a. In general terms, it is anticipated that over the longer-term, greater use of non-custodial options within the criminal justice system will lead to reductions in offending and re-offending. This is when compared with the use of custody. There is, for example, clear evidence that use of custody for short periods is less effective in terms of offending and re-offending than use of community based options. While use of remand is distinct from use of short custodial sentences (i.e. decisions are made on a different basis), underpinning the bail reforms is the specific concern about the undue, harmful impact on people losing their liberty for short periods in terms of impact on employment, family relationships etc.

354. Taking a longer term view, it is hoped these positive impacts in terms of offending and re-offending will help reduce levels of crime, future victimisation and ultimately require less criminal

justice system time (police, prosecutors and the courts) to be spent on dealing with crime as there will be less of it.

355. The potential environmental impact of the Bill has been considered and no significant environmental effects are expected. A pre-screening report confirmed that the Bill has no significant impact on the environment and consequently that a full Strategic Environmental Assessment did not need to be undertaken.

356. Based on the above, the Scottish Government is satisfied that the Bill has no negative effect on sustainable development.

Data protection

357. A copy of the Data Protection Impact Assessment, which includes an Article 36(4) Enquiry Form, will be published on the Scottish Government's website. This assessment provides details of the impact of the Bill's provisions on data protection.

358. Data Protection considerations are relevant for the following sections of the Bill:

- Section 1: Decisions on bail: relevant information from officer of local authority;
- Section 4: Refusal of bail: duty to state and record reasons;
- Section 9: Duty to engage in release planning; and
- Section 11: Provision of information to victim support organisations

359. The Bill provides and strengthens the legal gateways of some bodies to access and process some personal data. The bodies who will be data controllers already process information of the nature provided for in the Bill and, as a result, many already have suitable controls and information sharing agreements in place.

This document relates to the Bail and Release from Custody (Scotland) Bill (SP Bill 16) as introduced in the Scottish Parliament on 8 June 2022

BAIL AND RELEASE FROM CUSTODY (SCOTLAND) BILL

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