



Law Society
of Scotland

Consultation Response

Bail and Release from Custody Arrangements in Scotland

February 2022



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Criminal Law Committee welcomes the opportunity to consider and respond to the Scottish Government consultation: Bail and Release from Custody arrangements in Scotland. The committee has the following comments to put forward for consideration.

General comments on the proposals

The committee notes that the basis for this consultation lies in the significant number of accused persons who appear from custody and are remanded whilst awaiting sentence or Trial. However, since the Covid-19 pandemic, the numbers of people appearing from custody have reduced significantly. The majority of those arrested for an offence are now released either for a report to the Procurator Fiscal or on police bail in the form of an undertaking to appear. The significant reduction in the numbers of accused appearing from custody is likely to have an impact upon the numbers of those on remand.

In effect, those now appearing from custody only do so where the police have taken a view on matters. That is to say that they have assessed the offence to be of such seriousness to merit being kept in custody or they have considered that there is a significant risk to either the complainer or the public.

Nevertheless, this consultation is welcomed as it does contain some significant improvement to the current arrangements.

We note the findings of Scottish Crime and Justice Survey 2019/20, which found that 35% of the public were confident that appropriate sentences are given which fit the crime¹. As the survey report notes, it is unclear whether this indicates that sentences are too lenient or too severe, which would need to be explored in a future survey. It is crucial that there is public confidence in the justice system and its outcomes. The proposals regarding release from custody, if implemented, will need to be adequately communicated to the public and accompanied by research to understand whether the objectives of these reforms are being achieved.

¹ [Scottish Crime and Justice Survey 2019/20: Main Findings \(www.gov.scot\)](http://www.gov.scot)

The presumption against short sentences

The proposals in relation to bail are set out in detail in section 4.2 of the report. We note that there is reference within the proposals to a presumption against imposing short sentences following the Scottish Parliament order of June 2019². We suggest that it would be prudent to take account of the latest guidelines from the Scottish Sentencing Council which come into effect in all courts in Scotland from 26 January 2022³. These guidelines apply to anyone under the age of 25 at the date of their plea of guilty or when a finding of guilt is made against them.

Failure to appear

We also note that reference is made to Section 23C (1)(a) of the Criminal Procedure (Scotland) Act 1995⁴. This section of the act applies where there is a substantial risk that the accused person might, if granted bail, abscond or fail to appear. The consultation suggests that Judges should never refuse bail if their reason for doing so is only related to the efficient operation of the courts and that the individual concerned does not pose a significant risk to public safety if they remain in the community. The report states at page 19 that *“while these are matters for the court, there are statutory powers available for Trials to proceed in the absence of an accused. It may be a consequence of the proposal... that the court may seek to consider proceeding with Trials in the absence of the accused in a greater number of cases”*.

We disagree with the proposal. We note from practise that in circumstances where an accused person has breached several bail orders, has no fixed abode and there is no local authority housing available then remand is often the only option available to the court. If accused persons who fall into this category are to be granted bail, the chances of them appearing at a Trial Diet would appear to be slim. The suggestion that defence solicitors will be conducting a Trial in the absence of the accused is unrealistic. Accused persons falling into this category will be the type of client who fail to provide instruction for Pre-Intermediate Diets, Intermediate Diets and Trial Diets. We are of the view that this proposal could result in serious and significant implications for our Criminal Justice System.

² [The Presumption Against Short Periods of Imprisonment \(Scotland\) Order 2019 \(legislation.gov.uk\)](#)

³ [sentencing-young-people-guideline-for-publication.pdf \(scottishsentencingcouncil.org.uk\)](#)

⁴ [Criminal Procedure \(Scotland\) Act 1995 \(legislation.gov.uk\)](#)

Consultation questions

Question 1 - Which of the following best reflects your view on the changes proposed above regarding when judges can refuse bail:

- A) I agree with the proposed change, so that judges can only refuse bail if there are public safety reasons for doing so
- B) I disagree with the proposal, and think the system should stay the same as it is now, so judges can refuse bail even if public safety is not one of their reasons for doing so
- C) I am unsure

Please give reasons for your answer.

We **agree** with the proposed changes subject to those with No Fixed Abode.

Question 2 – Which of the following best reflects your view on the changes proposed above regarding how judges consider victim protection when making decisions about bail:

- A) I agree with the proposed change, so judges should have to have particular regard to the aim of protecting the victim(s) when making bail decisions.
- B) I disagree with the proposal, and think the system should stay the same as it is now, where judges consider victim protection as part of the overall decision-making
- C) I am unsure

Please give reasons for your answer.

We disagree with the proposed changes. Each case appearing before the court is different. We note that judges currently give consideration to these matters and grant bail in each case on the basis of their own particular merits.

Question 3 - To what extent do you agree or disagree that the court should be empowered to make decisions on the question of bail in all cases using a simplified legal framework?

- Strongly agree
- Somewhat agree
- Somewhat disagree
- Strongly disagree

Please give reasons for your answer.

Here, the suggestion is to abolish section 23D of the Criminal Procedure (Scotland) Act 1995. We welcome this proposal and **strongly agree**.

Question 4 - Judges must give the reasons when they decide to refuse bail to an accused person. Which of the following best reflects your view on how those reasons should be communicated:

- A) I agree with the proposed change, so judges must give reasons both orally and in writing
- B) I disagree with the proposal, and think judges should continue to give reasons orally only
- C) I am unsure

Please give reasons for your answer.

We appreciate that any requirement for Judges to provide written reasons for remand decisions will create additional time and pressure constraints on custody courts. Conversely, given that a person's liberty is to be taken from them, it does seem appropriate that written reasons for this should be provided. As such we **agree** with the proposed change.

Question 5a - Based on the information above, when a court is considering bail decisions, which of the following options do you consider preferable...

...in cases where the prosecution opposes bail:

- The court may ask for information from social work, but is not obligated to. Social work may decide whether to provide it
- The court must ask for information from social work. Social work may decide whether to provide it
- The court must ask for information from social work. Social work must provide it

Please give reasons for your answer.

We note that the proposed involvement of Social Services applies in some jurisdictions in Scotland including Ayrshire and that this works well in practice. We welcome this proposal and note that there is reference within the consultation paper to additional funding requirements. We state that there should be no doubt in the Government's mind that this will require substantial additional funding.

We are of the view that where the prosecution opposes bail that the court **must** ask for information from Social Work. Social Work **may** decide whether to provide it.

Question 5b - Based on the information above, when a court is considering bail decisions, which of the following options do you consider preferable...

...in cases where the prosecution is not opposing bail:

- The court may ask for information from social work, but is not obligated to. Social work may decide whether to provide it

- The court must ask for information from social work. Social work may decide whether to provide it
- The court must ask for information from social work. Social work must provide it

Please give reasons for your answer.

Where the prosecution are not opposing bail, we are of the view that the court **may** ask for information from Social Work but Social Work **are not obligated to provide it**. Social Work **may** decide whether to provide it.

Question 6 - To what extent do you agree or disagree that courts should be required to consider Electronic Monitoring before deciding to refuse bail

- Strongly agree
- Somewhat agree
- Somewhat disagree
- Strongly disagree

Please give reasons for your answer.

We welcome the proposed expansion of this initiative and **strongly agree** that the courts should be required to consider electronic monitoring before deciding to refuse bail. We consider that a record of reasons should be provided.

Question 7 - When a court decides to refuse bail, to what extent do you agree or disagree that they should have to record the reason they felt electronic monitoring was not adequate in this case?

- Strongly agree
- Somewhat agree
- Somewhat disagree
- Strongly disagree

Please give reasons for your answer.

As above.

Question 8 - To what extent do you agree or disagree that time spent on bail with electronic monitoring should be taken into account at sentencing?

- Strongly agree
- Somewhat agree
- Somewhat disagree
- Strongly disagree

Please give reasons for your answer.

We **strongly agree** that time spent on bail should be taken into account at sentencing. Often the accused can be on bail with stringent conditions attached for many months. Electronic monitoring whilst on bail is the equivalent of a Restriction of Liberty Order (ROLO).

Question 9 - If time on electronic monitoring is to be taken into account at sentencing, to what extent do you agree or disagree that there should be legislation to ensure it is applied consistently:

- Strongly agree
- Somewhat agree
- Somewhat disagree
- Strongly disagree

Please give reasons for your answer.

We **strongly disagree** that legislation is required to ensure that electronic monitoring is applied consistently. If it were not being applied consistently there are inbuilt safeguards within the justice system and the Appeal Courts would deal with that. In addition, we note that the Scottish Sentencing Council would take these matters into account.

Question 10 – Based on the information above, please use this space if you would like to make any comments about the idea of a law in Scotland that would prevent courts from remanding someone if there is no real prospect that they will go on to receive a custodial sentence in the proceedings.

We have no comment to make here.

Question 11 - To what extent do you agree or disagree that legislation should explicitly require courts to take someone's age into account when deciding whether to grant them bail?

- Strongly agree
- Somewhat agree
- Somewhat disagree
- Strongly disagree

Please give reasons for your answer. If you agreed, how do you think age should be taken into account when deciding whether to grant someone bail?

We **strongly agree** that legislation should explicitly require courts to take an accused person's age into account when deciding whether to grant bail.

Question 12 - In principle, to what extent do you agree or disagree that courts should be required to take any potential impact on children into account when deciding whether to grant bail to an accused person?

- Strongly agree
- Somewhat agree
- Somewhat disagree
- Strongly disagree

Please give reasons for your answer. Do you have any comments on how such a requirement could best be brought in?

As above.

Question 13 - To what extent do you agree or disagree that, in general, enabling a prisoner to serve part of their sentence in the community can help their reintegration?

- Strongly agree
- Somewhat agree
- Somewhat disagree
- Strongly disagree

Please give reasons for your answer.

We **somewhat agree** with the proposals as set out in paragraph 5.2 of the consultation paper. We somewhat agree that, in general, enabling a prisoner to serve part of their sentence in the community can aid reintegration back into society. Although not dealt with in this consultation we wonder whether consideration should be given to allowing courts in Scotland, as they do in England, the power to impose a prison sentence and then to suspend that, or part of that on the basis of the accused person's good behaviour during the relevant period.

Question 14 - What mechanisms do you think should be in place to support a prisoner's successful reintegration in their community?

We note the recent Scottish Government consultation on the National Strategy for Community Justice and broadly agree with this approach, that there should be services available locally across Scotland, set to effective national standards, developed in partnership and, most importantly, adequately resourced to ensure successful reintegration and lower likelihood of reoffending.

Question 15 - Do you agree that through good behaviour, or completing education, training and rehabilitation programmes, prisoners should be able to demonstrate their suitability for...

a)...early release? Yes / no / unsure

b)...the ability to complete their sentence in the community? Yes / no / unsure

Please give reasons for your answers.

We believe that these are the types of evidence that would demonstrate an individual's suitability for early release, or to complete their sentence in the community. It remains important that each individual's circumstances are determined on their own merit, and that these activities do not become a 'tick box' exercise to demonstrate suitability.

Question 16 - Do you have any comments on how you envisage such a process operating in the Scottish justice system?

- Who should be eligible to earn opportunities in this way?
- What risks do you see with this approach, or what safeguards do you feel would need to be in place?

As above, it is important that the circumstances of each individual are considered rather than the application of a default policy.

Question 17 - Which of the following options in relation to automatic early release for short term prisoners would you say you most prefer?

- Automatic early release changes to earlier in the sentence, but the individual is initially subject to conditions and monitoring, until the half-way point
- Automatic early release changes to earlier in the sentence, nothing else changes
- No change: automatic early release remains half way through the sentence

Please give reasons for your answer

We have no comment to make here.

Question 18 - Currently long-term prisoners can be considered for release by the Parole Board for Scotland once they have completed half of their sentence. Which of the following options would you say you most prefer?

- Change to allow some long-term prisoners to be considered by the Parole Board earlier if they are assessed as low risk
- Change to automatic consideration by Parole Board once one third of the sentence is served for all long-term prisoners
- No change: automatic consideration by Parole Board once half of sentence is served for all long-term prisoners

Please give reasons for your answer.

We have no comment to make here.

Question 19 - Do you agree that the Scottish Government should ban all prison releases on a Friday (or the day before a public holiday), so people leaving prison have greater opportunity to access support?

- Yes / No / Unsure

Please give reasons for your answer.

If you agree, what wider changes would be needed to ensure people leaving prison have access to the support they need?

Yes. We believe that this is an appropriate step provided that no person exceeds the duration of their sentence as a result.

Question 20 - Below is a list of some of the features of the current HDC system, and potential changes that could help to increase usage of HDC (or similar). Please indicate your view on each of these potential changes.

a) - Prisoners must actively apply for HDC. Should HDC be considered automatically for some categories of prisoners instead?

- Yes / no / unsure

Please give reasons for your answer, or share any comments you would like to make on which categories of prisoner you think might be automatically considered.

Yes. We note that page 41 of the consultation paper refers to “home detention curfew and electronically monitored release”. The Consultation indicates “We are considering reforms to release arrangements; it would be valuable to consider whether greater use could be made of electronic monitoring as a way of ensuring compliance with condition of release...”. There is reference to other jurisdictions where sentences can be automatically split between custody and community sections. Again, this would be something we would welcome.

b) - The maximum length of time allowed on HDC is 6 months (or 1 quarter of the sentence). Do you think that this should:

- Be made longer
- Not change

Please give reasons for your answer, or share any comments you would like to make on how long you think is appropriate.

Our view would be, the proportion of a custodial sentence, which could be served in the community should be taken by the courts only. This would all be part of the sentencing process. This already applies in certain cases, where courts impose the custodial punishment part of a sentence, and then an extended sentence. This may also help to address the issues emerging from the Crime and Justice survey around public perception of the suitability of sentences.

c) - The minimum sentence for which HDC can be considered is 3 months. Should this limitation be removed?

- Yes / no / unsure

Please give reasons for your answer, or share any comments you would like to make on what sentence length you think is appropriate:

We have no comment to make here.

d) - There is currently a list of exclusions that make someone ineligible for HDC. Should this list be reviewed with the intention of expanding eligibility for HDC?

- Yes / no / unsure

Please give reasons for your answer, or share any comments you would like to make on what criteria are relevant to whether someone should be eligible for HDC:

We have no comment to make here.

e) - Currently, SPS make decisions to release prisoners on HDC following a risk assessment and engagement with community partners. Do you think this responsibility should remain with SPS?

- Yes / no / unsure

Please give reasons for your answer, or share any comments you would like to make on the role of SPS in determining release on HDC:

We have no comment to make here.

f) - Do you think decisions on whether to release prisoners on HDC (or similar) should be taken by the Parole Board for Scotland in future – even for those prisoners serving less than 4 years?

- Yes / no / unsure

Please give reasons for your answer.

We have no comment to make here.

g) - Do you think decisions about the length of time an individual would serve in the community at the end of their custodial sentence should instead be set by the court at the time of sentencing?

- **Yes / no / unsure**

Please give reasons for your answer, or share any comments you would like to make on what role the courts could have in determining the proportion of sentence an individual could serve in the community.

We have no comment to make here.

Question 21 - To what extent do you agree or disagree that the Scottish Government should consider whether information on individuals being released from custody can be shared with third sector victim support organisations, for example, to enable them to provide proactive support to victims and carry out safety planning?

- **Strongly agree**
- **Somewhat agree**
- **Somewhat disagree**
- **Strongly disagree**

Please give reasons for your answer.

Wider data sharing would need to be carefully considered, to ensure that there is a lawful basis for the processing, that the information shared is proportionate and that this information is held only for so long as is relevant for that processing.

Question 22 - In addition to information on individuals being released, to what extent do you agree or disagree that victims and victims support organisations should be able to access further information?

- **Strongly agree**
- **Somewhat agree**
- **Somewhat disagree**
- **Strongly disagree**

Please give reasons for your answer. If you agree, please state what information should be provided and for what purpose.

As above, there would need to be clarity around what additional information was to be shared, the proportionality and relevance of that information and its retention.

Question 23 - Which of the following best reflects your view on public service's engagement with pre-release planning for prisoners?

- Existing duties on public services to give all people access to essential services are sufficient to meet prison leavers' needs
- Existing duties are not sufficient; public services should have a specific duty to engage with pre-release planning

Please give reasons for your answer.

We have no comment to make here.

Question 24 - If public services had an additional duty to engage in pre-release planning for prisoners, which services should that duty cover?

Please list each service and what each should be required to do.

We have no comment to make here.

Question 25 - To what extent do you agree or disagree that support should be available to enable prisoners released direct from court to access local support services in their community?

- Strongly agree
- Somewhat agree
- Somewhat disagree
- Strongly disagree

Please give reasons for your answer. If you agree, please explain how you envisage that support would look and which bodies you feel should be involved.

We have no comment to make here.

Question 26 - To what extent do you agree or disagree that revised minimum standards for throughcare should incorporate a wider range of services?

- Strongly agree
- Somewhat agree
- Somewhat disagree
- Strongly disagree

Please give reasons for your answer. If you agree, please list the services you think these standards should cover and what you think their role should be.

We note the suggestion that there should be a general duty on public services, to ensure the public and third sector services are aware of and able to meet the needs of individuals released from custody at short notice by the court. So often those who serve short sentences are released without any form of support

packages available to them. As such, we welcome this proposal. However, this will depend on providing Public Services with adequate funding.

Question 27 - To what extent do you agree or disagree that revised minimum standards for throughcare should differentiate between remand, short-term and long-term prisoners?

- Strongly agree
- Somewhat agree
- Somewhat disagree
- Strongly disagree

Please give reasons for your answer. If you agree, please state how you think these standards should differ for each cohort.

We have no comment to make here.

Question 28 - To what extent do you agree or disagree that revised minimum standards for throughcare should be statutory?

- Strongly agree
- Somewhat agree
- Somewhat disagree
- Strongly agree

Please give reasons for your answer.

If public bodies are to have a wider role in meeting the needs of people released from custody, it would be appropriate for the standards to be placed in legislation (potentially with the scope for these to be amended from time to time by regulations). This may assist in ensuring that services are available locally across Scotland, but also to standards set nationally, to ensure a consistent approach.

Question 29 - Do you think other changes should be made to the way throughcare support is provided to people leaving remand/short-term/long-term prison sentences?

- Yes / no / unsure

Please give reasons for your answer. If you think other changes should be made, can you provide details of what these changes could be?

We have no comment to make here.

Question 30 - Should other support mechanisms be introduced/formalised to better enable reintegration of those leaving custody?

- Yes / no / unsure

Please give reasons for your answer. If you think other mechanisms should be introduced, can you provide detail of what these could be?

We have no comment to make here.

Question 31 - To what extent do you agree or disagree with the introduction of an executive power of release, for use in exceptional circumstances?

- Strongly agree
- Somewhat agree
- Somewhat disagree
- Strongly disagree

Please give reasons for your answer.

We agree that there should be an executive power of release. This should not be as broad a power as in England and Wales, where 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. Rather, this should be allowed in exceptional circumstances in which it would otherwise not be possible to safely manage the prison estate. This could include circumstances such as faced during the pandemic, or fire, flooding or other emergencies noted in the consultation paper.

Question 32 - If an executive power of prisoner release was introduced for use in exceptional circumstances, what circumstances do you consider that would cover?

Please provide details.

As above, we believe that the power should be used only in exceptional circumstances and, without which, the safe management of the prison estate would not be possible.



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