



Law Society
of Scotland

Bail and Release from Custody (Scotland) Bill

Stage 1 Briefing

16 March 2023



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.

The Bail and Release from Custody (Scotland) Bill¹ (the Bill) was introduced by the Cabinet Secretary for Justice and Veterans, Keith Brown MSP on 8 June 2022. In February 2022, we responded² to the Scottish Government consultation on Bail and Release from Custody Arrangements in Scotland³. In September 2022 we responded⁴ to the Criminal Justice Committee's call for evidence on the Bill. We gave evidence before the committee on 18 January 2023⁵. We note the Stage 1 report of the Criminal Justice Committee has now been published⁶.

We now welcome the opportunity to provide comment on the Bill ahead of the Stage 1 debate which is due to take place on 16 March 2023.

If you would like to discuss this briefing or if you would like more information on the points that we have raised, please do not hesitate to contact us. Contact details can be found at the end of the paper.

Our comments

We reiterate our comments as set out in our earlier written and oral evidence.

We note that the Bill proposes to make changes to the existing law in two main areas –

1. In respect of decisions about granting bail to people accused of a crime before a trial has taken place
2. In respect of arrangements for the release of prisoners including the support that it provided to them on

¹ [Bail and Release from Custody \(Scotland\) Bill \(parliament.scot\)](#)

² [22-02-07-crim-consultation-response-bail-and-release-from-custody-arrangements-in-scotland.pdf \(lawscot.org.uk\)](#)

³ [Bail and release from custody arrangements: consultation - gov.scot \(www.gov.scot\)](#)

⁴ [22-09-08-crim-response-bail-and-release-from-custody-scotland-bill.pdf \(lawscot.org.uk\)](#)

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

⁶ [Bail and Release from Custody \(Scotland\) Bill Stage 1 Report | Scottish Parliament](#)

release.

The Bill comprises of 15 Sections and is divided into 3 parts.

Part 1 of the Bill relates to bail decisions and relevant information to inform Sheriffs and Judges as well as determinations and written reasons for refusing bail (section 1 and 4) removal of restrictions on bail in certain solemn cases (section 3) as well as consideration of time spent on electronically monitored bail (Section 5)

Part 2 of the Bill relates to provisions in respect of release from custody including provision that prisoners are not released on certain days of the week (section 6), the release of prisoners on long term licence (section 7) the power to release prisoners early (section 8) and provisions in respect of release planning and throughcare (sections 9 and 10). Part 2 of the Bill also includes provisions in respect of information that can be provided to victims support organisations (section 11).

Part 3 of the Bill sets out the general provisions including the ancillary provisions, interpretation and short title.

We have the following comments to put forward for consideration.

Specific comments on the Bill

Part 1

We are of the view that that the basis for this legislation lies in the significant number of accused persons who appear from custody and are remanded whilst awaiting sentence or trial. We note that the remand population in Scotland has grown significantly since the beginning of 2022 with untried prisoners making up 29% of the prison estate⁷. This poses particular difficulties for those managing the prison population.

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 at court at a later date, consistent with the right to liberty under Article 5 of the European Convention on Human Rights⁸.

In effect, those now appearing from custody only do so where the police 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

⁷ [Justice Analytical Services \(JAS\): Safer Communities and Justice Statistics Monthly Data Report: February 2023 edition - gov.scot \(www.gov.scot\)](https://www.gov.scot/Justice-Analytical-Services-(JAS)-Safer-Communities-and-Justice-Statistics-Monthly-Data-Report-February-2023-edition)

⁸ [European Convention on Human Rights \(coe.int\)](https://www.coe.int/) at Article 5

either the complainer or the public. The framework for the Police decision making includes the Lord Advocate's Guidelines on Liberation by the Police⁹.

Nevertheless, the proposals in this Bill are welcomed as they contain some significant improvement to the current arrangements.

In respect of section 1 of the Bill we welcome the proposals to amend section 22A of the Criminal Procedure (Scotland) Act¹⁰ which would require staff from Criminal Justice Social Work services to be given the opportunity to provide information to the court to assist in making decisions on bail. We note that criminal justice social work staff play an important part in allowing the bench to make informed decisions on bail¹¹. We note that this will require substantial additional funding and personnel which is noted within the Bill's Financial Memorandum. In particular, we note the estimated additional costs of circa £700,000 per year¹² for SCTS and £2.5 million for Local Authorities¹³ Given the static funding position as set out in the most recent Scottish Government budget¹⁴ we would express concern as to how the proposals in section 1 will impact upon resources in the current financial climate.

In respect of section 2 (1) and (2) of the Bill, we note that each case appearing before the court is different in its own facts and circumstances and that Sheriffs and Judges currently give consideration to these matters and grant bail in each case on the basis of its own particular merits.

Section 3 of the Bill proposes to abolish section 23D of the Criminal Procedure (Scotland) Act 1995¹⁵. We welcome this proposal. We are of the view that section 23D inhibits autonomy of Sheriffs and Judges in making decisions on bail in solemn cases. 23D is a general provision that does not empower the court to make informed decisions relating to bail¹⁶.

Section 4 of the Bill proposes that Sheriffs or Judges should provide written reasons for refusing bail. Whilst we acknowledge that this will have an impact upon court resources and judicial time, we are of the view that it does seem appropriate that the reasons for depriving a person of their liberty should be recorded within the proceedings and set out in writing. As a result, and as noted in the Stage 1 report at paragraph 205¹⁷ we support the provisions set out in section 4 of the Bill.

Section 5 of the Bill relates to time spent on electronically monitored bail. We are of the view that time spent by the accused on electronically monitored bail should be taken into account at the point of

⁹ [Lord Advocate's guidelines: Liberation by the police | COPFS](#)

¹⁰ [Criminal Procedure \(Scotland\) Act 1995 \(legislation.gov.uk\)](#)

¹¹ [Bail and Release from Custody \(Scotland\) Bill Stage 1 Report \(azureedge.net\)](#) at para 70

¹² [Financial Memorandum \(parliament.scot\)](#) at paragraph 54 to 62

¹³ [Financial Memorandum \(parliament.scot\)](#) at paragraph 82

¹⁴ [Scottish Budget: 2023-24 - gov.scot \(www.gov.scot\)](#) at table 8.14

¹⁵ [Criminal Procedure \(Scotland\) Act 1995 \(legislation.gov.uk\)](#)

¹⁶ [Bail and Release from Custody \(Scotland\) Bill Stage 1 Report \(azureedge.net\)](#) at page 28

¹⁷ [Bail and Release from Custody \(Scotland\) Bill Stage 1 Report \(azureedge.net\)](#) at paragraph 205

sentencing. Often, an accused can be on electronically monitored bail with stringent conditions attached (for example curfew conditions or exclusion zones) for many months in advance of a trial.

Part 2

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 crime¹⁸. 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, its operation 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. We would suggest that some form of post legislative scrutiny by the lead committee to ensure that the Bill has achieved its intended outcomes.

Section 6 of the Bill sets out that prisoner should not be released on certain days of the week. We support the proposals set out in section 6 and consider these to be an appropriate step, provided that no person exceeds the duration of their sentence as a result.

Section 7 of the Bill relates to the release of long term prisoners on a reintegration licence. We acknowledge that good behaviour, completion of education or rehabilitation programmes whilst in prison demonstrates an individual's suitability for early release or the opportunity to complete their sentence within the community. We consider it important to note 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.

Section 8 of the Bill relates to the emergency power to release prisoners early. We support the provisions set out in section 8 of the Bill and agree that there should be an emergency power of release in exceptional circumstances where it would not be possible to safely manage the prison estate. This could include circumstances such as those faced during the pandemic or other emergencies. We welcome the definition of emergency situation as noted within section 8(2) of the Bill which inserts section 3C(7) into the Bill amending the Prisoners and Criminal Proceedings (Scotland) Act 1993.

Section 10 of the Bill relates to throughcare support and the necessary support standards. We note from the Bill 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 on release. As such, we welcome this proposal. However, we do note that this will depend on providing Public Services with adequate funding and personnel. We welcome the inclusion of the standards to be placed in legislation.

¹⁸ [Scottish Crime and Justice Survey - gov.scot \(www.gov.scot\)](https://www.gov.scot/resources/documents/2021/02/Scottish-Crime-and-Justice-Survey-2019-20.pdf) at page 9

This may assist in ensuring that services are available on a local basis across Scotland, but also to standards which have been set nationally to ensure a consistent approach. We note that throughcare services can prevent reoffending¹⁹.

Section 11 of the Bill relates to the provision of information to victim support organisations. We note that the Bill amends section 16ZA of the Criminal Justice (Scotland) Act 2003 to allow supporters or organisations assisting with safety planning or representation, access to information pertaining to the prisoner's release from custody. We consider that there is no section of the Bill relating to wider data sharing and are of the opinion that this would need to be included to ensure that there is a lawful basis for the processing of information, that the information shared is proportionate and that this information is held only for so long as is relevant for that processing.

Part 3

Part 3 of the Bill sets out the general provisions including the ancillary provisions, interpretation and short title.

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



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