

Alastair Macfie
Senior Clerk
Criminal Justice Committee

By email:

22 February 2023

Dear Alastair,

I write following the Stage 1 evidence session on the Bail and Release from Custody (Scotland) Bill on 1 February 2023, in which the Cabinet Secretary for Justice and Veterans and supporting SG officials attended to give evidence.

The Scottish Government agreed to write with some further details on an aspect of the Bill relating to bail. This was following a question from Jamie Greene MSP about how the proposed bail test operates for summary cases.

In the Bill there is a differentiation between summary and solemn proceedings when it comes to the ability of the court to remand on failure to appear grounds.

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

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

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

This approach reflects the feedback received in the Scottish Government consultation. Initially, there was no proposal for the new bail test to include an acknowledgement of the administration of justice and instead remand was proposed to be available to the court only where a person posed a risk to public (including victim) safety. Adjustments were made in response to feedback from the judiciary and others that it was important for the court to retain the ability to remand a person unlikely to voluntarily attend for trial in order to secure the continued delivery of justice.

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

The new bail test therefore seeks to balance the overarching policy objective of minimising the use of short periods on remand pre-conviction, whilst also ensuring the court in summary cases still retains the power to remand those who it considers poses a risk to the delivery of justice. For example, where an accused person breaches the trust afforded to them by the court through failing to appear at a future hearing after being admitted to bail.

I hope this is helpful to the Committee.

Yours sincerely

Lindsay Mackay

Criminal Justice Division