

# Bail and Release from Custody (Scotland) Bill

## [As amended at Stage 2]

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## Revised Explanatory Notes

### Introduction

1. As required under Rule 9.7.8A of the Parliament's Standing Orders, these revised Explanatory Notes are published to accompany the Bail and Release from Custody (Scotland) Bill (which was introduced in the Scottish Parliament on 8 June 2022) as amended at Stage 2. Text has been added or deleted as necessary to reflect the amendments made to the Bill at Stage 2 and these changes are indicated by sidelining in the right margin.
2. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.
3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section, or a part of a section, does not seem to require any explanation or comment, none is given.

### The Bill: An overview

4. Part 1 of the Bill reforms the legislative framework for bail decisions in respect of accused persons awaiting trial. It amends Part 3 of the Criminal Procedure (Scotland) Act 1995 to (a) enable the court to receive information from justice social work to help inform its decisions on bail, (b) limit the circumstances in which the court may refuse bail, and (c) require the court, when it refuses or grants bail, to state and record particular reasons for its decision. Part 1 also amends Part 11 of that Act to require the court, when it passes a custodial sentence on a person, to have regard to any time spent by the person on certain bail conditions while awaiting trial or sentence. Finally, it requires the Scottish Ministers to prepare and publish a report that sets out certain information on bail and remand which covers the 3-year period after the new bail test comes into force.

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5. Part 2 of the Bill makes a number of changes related to the release of prisoners. Section 6 makes provision to avoid prisoners being released on days when there might be difficulties accessing support services to assist with their reintegration. Linked with that, sections 9 and 10 will require planning to take place for the release of prisoners and for standards applicable to throughcare support provided to prisoners from the point they are imprisoned (whether on remand or after sentencing) until after their release to be drawn up and published. Section 7 will provide a replacement, for long-term prisoners, for release on “home detention curfew” (currently provided under section 3AA of the Prisoners and Criminal Proceedings (Scotland) Act 1993), while section 8 will put on a permanent footing the Ministerial power to release groups of prisoners early in response to an emergency situation (for example, a public health emergency like the coronavirus pandemic). This will eventually take the place of the narrower and time-limited power related to the pandemic originally included in the Coronavirus (Scotland) Act 2020 and currently included in the Coronavirus (Recovery and Reform) (Scotland) Bill (at paragraphs 24 and 25 of the schedule of that Bill). Section 7A will provide the Parole Board for Scotland (“the Parole Board”) with power to review its decisions to recommend or direct the release of prisoners on licence in certain circumstances. Finally, section 11 will modify the law on the provision of information about prisoners (mainly to do with their release and consideration for release) and offenders subject to certain mental health disposals (relating mainly to certain decisions about their management) to victims of crime by providing for such information to be provided to organisations supporting individual victims so that those organisations can do so more effectively.

6. Part 3 of the Bill contains general provisions about interpretation, ancillary provision, commencement and the short title.

## The Bill: Section by section

### Part 1: Bail

#### **Section 1—Decisions on bail: information from officer of local authority**

7. Section 1 enables the court to receive information from a justice social worker (referred to as “an officer of a local authority”<sup>1</sup>) to help inform its decision on whether to grant bail to a person accused of or charged with an offence.

8. Section 1(2) amends section 22A of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”). Section 22A of the 1995 Act deals with the court’s first consideration of bail. It requires the court before which an accused person first appears to give both the

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<sup>1</sup> See [section 307\(1\) of the Criminal Procedure \(Scotland\) Act 1995 \(legislation.gov.uk\)](#) for a definition of “local authority”.

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accused and the prosecutor an opportunity to be heard, and then either admit or refuse to admit the accused to bail. Section 1(2) adds a new subsection (1A) to section 22A of the 1995 Act. This further requires the court, before deciding on bail, to give a justice social worker an opportunity to provide information relevant to that decision. A justice social worker who wishes to take up that opportunity may give the information orally or in writing.

9. Section 1(3) amends section 23B of the 1995 Act. Section 23B regulates the court's consideration of bail, whether it is on an accused person's first appearance (in accordance with section 22A) or in relation to a subsequent bail application made under section 23. It establishes the general entitlement to bail and sets out the decision-making process that the court must follow before granting or refusing bail. Section 23B(6) enables the court, as part of that process, to request further information from the prosecutor or the accused's legal representative to assist it in reaching a decision on bail. But section 23B(7) makes it clear that, while the court may seek either party's view as to the potential risks associated with granting bail, that party is not compelled to give such a view. Section 1(3)(b) and (c) extends section 23(6) and (7) of the 1995 Act so as to allow the court to request additional information from a justice social worker to help inform its decision on bail. Like the parties to the proceedings, a justice social worker is not obliged to give a view on potential risks.

10. Section 1(3)(a) amends section 23B(4) of the 1995 Act in consequence of these changes. Section 23B(4) requires the court to give the prosecutor and the accused an opportunity to make submissions in relation to the question of bail. The duty is expanded to explicitly include giving the parties the right to make submissions in relation to any information provided by a justice social worker (whether under the new section 22A(1A) or in response to a request under section 23B(6) as amended). This expressly entitles either party to verify, challenge or otherwise comment on any information which a justice social worker may provide that is relevant to the court's decision on bail.

11. Section 1(5) amends section 27(1) of the Social Work (Scotland) Act 1968. Section 27(1) lists the various justice-related purposes for which every local authority must provide a service. The list is extended to include the provision of information, in accordance with section 22A(1A) or 23B(6) of the 1995 Act, that is relevant to a court's decision on whether to grant bail to persons accused of or charged with an offence.

## **Section 2—Determination of good reason for refusing bail**

### **Changes to the bail test in section 23B of the 1995 Act**

12. Section 2 reframes the test which the court must apply when considering whether to grant bail to a person accused of or charged with an offence. As mentioned in paragraph 10 above, section 23B of the 1995 Act sets out that test. Section 23B(1) entitles an accused person to bail except where, by reference to section 23C (grounds relevant to question of bail) and having regard to the public interest, there is good

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reason for refusing bail. This is subject to section 23D of the 1995 Act, which restricts bail in certain solemn cases (this is explained further in paragraph 22 below).

13. Section 2(2)(a) amends section 23B of the 1995 Act. It replaces subsection (1) of that section with new subsections (1) and (1A). New section 23B(1) restates the general entitlement to bail. It provides that bail is to be granted to an accused person unless the court determines that there is good reason for refusing bail. New section 23B(1A) sets out the sole basis on which the court may determine that there is good reason for refusing bail. Although it involves a similar two-part test to the one that currently applies under section 23B(1), it narrows the court's discretion to refuse bail.

14. The first part of the test remains the same. Under new section 23B(1A)(a), the court may refuse bail only if it considers that at least one of the grounds specified in section 23C(1) of the 1995 Act applies. Section 23C(1) lists specific grounds for refusing bail. The list is exhaustive and contains grounds which fall into two categories. 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. In assessing the grounds for refusal, the court must have regard to all material considerations. Section 23C(2) of the 1995 Act provides an illustrative list of examples. They include: the nature of the offences before the court; the probable disposal of the case if the accused were convicted of the offences; the question of whether the accused was subject to a bail order, or some other court order, when the offences are alleged to have been committed; the character and antecedents of the accused; and the associations and community ties of the accused.

15. The second part of the test, however, limits the circumstances in which the court may refuse bail. If the first part of the test is met, then under new section 23B(1A)(b), the court may refuse bail only if it considers it necessary to do so for one (or both) of the public interest reasons specified. The first reason is that it is necessary in the interests of public safety, including the safety of the complainer from harm. In this context, "harm" means physical or psychological harm and "psychological harm" includes fear, alarm and distress (see new section 23B(8), added by section 2(2)(c) of the Bill). The second reason is that it is necessary to prevent a significant risk of prejudice to the interests of justice. The expression "prejudice to the interests of justice" is defined to mean either (a) the accused person evading justice as a result of the proceedings being delayed or discontinued, or (b) the course of justice in the proceedings being impeded or prejudiced as a result of various adverse outcomes relating to the availability, veracity, quality and sufficiency of evidence (see new section 23B(9) and new section 23B(10), which further defines what is meant by the "quality" of evidence, both added by section 2(2)(c) of the Bill).

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16. In considering whether the “necessity test” under new section 23B(1A)(b) is met, the court must still have regard to the wider public interest. In doing so, it must continue to consider the extent to which the public interest could (if bail were granted) be safeguarded by imposing bail conditions (see sections 23B(2) and 24(4) and (5) of the 1995 Act). So, where one of the grounds for refusal in section 23C of the 1995 Act applies, the court may refuse bail only if it considers that imposing bail conditions would not adequately safeguard the interests of public safety or (as the case may be) justice as set out in new section 23B(1A)(b)(i) or (ii).

17. Finally, as a consequential amendment, section 2(2)(b) repeals the definition of “public interest” in section 23B(3) of the 1995 Act given that it has been incorporated into the necessity test in new section 23B(1A)(b)(i).

### Change in how section 23C(1)(a) of the 1995 Act applies in summary cases

18. Section 2(3) limits the extent to which the court may refuse bail, in summary proceedings, on the ground specified in section 23C(1)(a) of the 1995 Act. The section 23C(1)(a) ground is based on a substantial risk that the accused, if granted bail, might abscond or fail to appear at court diets as required.

19. Section 2(3)(b) adds a new subsection (1A) to section 23C of the 1995 Act. This provides that, when deciding on bail in summary cases, the court may only consider the section 23C(1)(a) ground of refusal in two sets of circumstances. The first is where the accused has failed to appear at a previous hearing of the case, having been granted bail or been ordained to appear (such a hearing is referred to as a “relevant diet”). The second is where the accused is appearing before the court on a complaint charging an offence under section 27(1)(a) or 150(8) of the 1995 Act. Section 27(1)(a) makes it an offence for an accused who has been granted bail to fail, without reasonable excuse, to appear at a court diet as required. Section 150(8) makes it an offence for an accused to fail, without reasonable excuse, to appear at a court diet of which the accused has been given due notice.

20. Section 2(3)(c) adds a new subsection (3) to section 23C of the 1995 Act. This defines “relevant diet” for the purposes of new section 23C(1A).

### **Section 3—Removal of restriction on bail in certain solemn cases**

21. Section 3 repeals section 23D of the 1995 Act. Section 23D makes special provision in relation to certain solemn cases – that is, those cases where a person is accused of a drug trafficking offence, a violent offence, a sexual offence or a domestic abuse offence and has a previous conviction on indictment for an offence of that kind. It provides that, in those cases, a person is to be granted bail only if there are exceptional circumstances justifying bail. The repeal of that section means that the general bail test in new section 23B(1) and (1A) will apply to those cases instead. Accordingly, in

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applying that test, the court may refuse bail in those cases (as in any case) if it determines that there is good reason for doing so.

## **Section 4—Refusal of bail: duty to state and record reasons**

22. Section 4 expands on the court’s general duty under section 24(2A) of the 1995 Act to state its reasons whenever it grants or refuses bail.

23. Section 4(2) adds a new subsection (2AA) to section 24 of the 1995 Act. This requires the court, when refusing bail, to state particular reasons for its decision. Firstly, it must state the grounds on which it determines (in accordance with new section 23B(1A) of the 1995 Act) that there is good reason for refusing bail. Secondly, when refusing bail solely on the ground specified in section 23C(1)(a) of the 1995 Act (that is, substantial risk of absconding or failing to appear), it must state why it considers that the necessity test in new section 23B(1A)(b) is met. And, thirdly, it must state its reasons for refusing to grant bail subject to an electronic monitoring requirement under Part 1 of the Management of Offenders (Scotland) Act 2019 – more specifically, its reasons for considering either that imposing bail conditions subject to such a requirement would not be appropriate, given the accused’s circumstances, or that doing so would not be enough to properly safeguard the interests of public safety or justice as mentioned in new section 23B(1A)(b)(i) or (ii). The court must also ensure that the grounds mentioned in new section 24(2AA)(a)(i) are added to the record of the proceedings. This means that the specific grounds on which the court determines that there is good reason for refusing bail must be both stated in open court and recorded in the court minutes.

24. Section 4(3) amends section 24(8) of the 1995 Act. Section 24(8) provides that references to certain expressions within sections 24, 25 and 27 to 29 are to be read in a way which means these sections can apply in relation to interim liberation cases. The amendment expressly disapplies this provision in relation to new section 24(2AA). This ensures that the duty in new section 24(2AA) applies only in relation to pre-trial/pre-conviction bail decisions.

25. Section 4(2A) and (2B) amends subsection (2B) of, and adds a new subsection (2C) to, section 24 of the 1995 Act. Section 24(2B) provides that where the court grants bail on standard conditions to a person accused of a sexual offence, it must state why it considers in the circumstances of the case that it is not necessary to impose any additional (“special”) conditions of bail. Such special conditions of bail may include, for example, protective conditions that preclude an accused person from (a) approaching or contacting, or attempting to approach or contact, a named complainer, and/or (b) being at or entering a complainer’s home address. New section 24(2C) extends the requirement to state reasons under section 24(2B) so that it applies also where the court grants bail on standard conditions to a person accused of an offence involving domestic abuse or an offence of stalking.

## **Section 5—Time spent on electronically monitored bail**

26. Section 5 adds a new section 210ZA to Part 11 of the 1995 Act (sentencing). This makes similar provision to section 210 of the 1995 Act. Section 210 requires the court, when passing a custodial sentence on a person for an offence, to have regard to any period of time which the person has spent in custody awaiting trial or sentence and to backdate or reduce the term of the sentence as appropriate. New section 210ZA similarly requires the court, when passing a custodial sentence on a person, to have regard to any period of time which the person has spent on “qualifying bail” awaiting trial or sentence. That period is referred to as “the bail period” and is defined in new section 210ZA(6)(b).

27. New section 210ZA(6)(a) defines “qualifying bail” by reference to two criteria. Firstly, to qualify it must be bail subject to a curfew condition – that is, a condition which requires the person to remain at one or more specified places for a total period of at least 9 hours in any given day. The 9-hour period need not be continuous, as the curfew hours will likely straddle different days by running through the night and into the next morning. Secondly, the person’s compliance with that condition must be electronically monitored in accordance with Part 1 of the Management of Offenders (Scotland) Act 2019.

28. New section 210ZA(2) requires the court, when passing a custodial sentence, to have regard to the bail period and to specify a period of time which is to be treated as “time served” towards the sentence. That period is referred to as “the relevant period” and is to be calculated in accordance with new section 210ZA(3). Unless the relevant period is nil, the court must direct that the person is to be treated as having served the equivalent period as a portion of the sentence passed. The Scottish Prison Service will take account of that direction when calculating the person’s release date. Where the relevant period matches or exceeds the sentence passed, however, the court must direct that the person is to be treated as having served the sentence in full.

29. New section 210ZA(3) sets out what the relevant period to be specified by court is to be. It may be one-half of the bail period (this effectively treats a day spent on qualifying bail as the equivalent of half a day spent in custody). Alternatively, it may be one-half of whatever portion (if any) of the bail period that the court decides is appropriate to specify. The court has discretion, therefore, to disregard all or part of the bail period if it considers it appropriate to do so in the circumstances of the case. Where it does disregard all or part of the bail period, the court must (under new section 210ZA(4)) state its reasons for this.

30. In cases where a person has additionally spent a period of time in custody (or detained in hospital) while awaiting trial or sentence, new section 210ZA(5) makes it clear that section 210 of the 1995 Act is to continue to apply to that period in the usual way.

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31. New section 210ZA(7) and (8) enables the Scottish Ministers to amend the section by regulations subject to the affirmative procedure<sup>2</sup>. In particular, it confers a power to modify the meaning of “qualifying bail”, “the bail period” and “the relevant period”. This would allow the Scottish Ministers to extend new section 210ZA to apply to other types of bail, or to change how the period to be treated as “time served” is to be calculated. It also confers a power to further modify new section 210ZA, or to modify any other legislation, to make any additional provision that is considered appropriate. To ensure the effectiveness of any future modification, the regulation-making power includes the power to make ancillary provision.

## **Section 5A—Report on bail and remand**

32. Section 5A imposes a duty on the Scottish Ministers to prepare and publish a report setting out certain information on bail and remand. They must do so as soon as reasonably practicable after the end of the reporting period, which is the 3-year period after section 2 (which reframes the bail test) comes into force.

33. Section 5A(2) lists specific information which the report must set out for each year of the reporting period. In relation to remand, this includes: the average daily remand population; the number of individuals who entered the remand population by reference to particular factors; and an analysis of the length of time that individuals spent within the remand population. In relation to bail, it includes: the number of bail orders made by reference to the offence or type of offence in respect of which bail was granted; the number of convictions for bail-related offences; and the number of convictions for offences committed while on bail. Section 5A(4) defines what is meant by “remand population” and “bail-related offence”.

34. However, section 5A(3) enables the Scottish Ministers to include any other information that they consider appropriate. It also gives them the discretion to prepare and publish the report in whatever form they think is most appropriate, including publishing it as part of another document.

## **Part 2: Release from custody**

### **Section 6—Prisoners not to be released on certain days of the week**

35. Section 6 amends section 27 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (“the 1993 Act”) by amending subsection (7) and inserting new subsections (7A) and (7B) after subsection (7).

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<sup>2</sup> See [section 29 of the Interpretation and Legislative Reform \(Scotland\) Act 2010 \(legislation.gov.uk\)](#) for details of the affirmative procedure.



36. Section 27(7) of the 1993 Act prevents the release of prisoners on certain days. Section 6 of the Bill expands on that by adding Fridays and the day before public holidays to the list of days on which prisoners are not to be released. These days, which are referred to as “excepted days”, are a Friday, Saturday, Sunday, public holiday and the day before a public holiday. If a prisoner would have been released on any of the excepted days, they are instead to be released on the last preceding day which is a suitable release day. A suitable release day is a day which is not an excepted day (so a day which is not a Friday, Saturday, Sunday, public holiday or the day before a public holiday).

37. Section 6 of the Bill also provides that a prisoner is not to be released on a Thursday unless they fall to be released on a Thursday only because they were due to be released on an excepted day and a Thursday is the last preceding day which is a suitable release day. In any other case, a prisoner who is due to be released on a Thursday is instead to be released on the last preceding day which is not an excepted day or a Thursday (normally the immediately preceding Wednesday).

38. Examples of how this may work in practice are set out 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)

## **Section 7—Release on licence of long-term prisoners**

39. Section 7 makes a change to the regime for release of long-term prisoners under Part 1 of the 1993 Act. Currently, long-term prisoners, recommended by the Parole Board for release on parole licence at the half-way point of their sentences (the “parole qualifying date”), can be released on licence under section 3AA for a period of time before that date. Short-term prisoners can also be released on licence under section 3AA. A licence under section 3AA must include a “curfew condition” as set out in section

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12AB of the 1993 Act (as well as “standard conditions” prescribed under section 12AA<sup>3</sup> and may include other conditions the Scottish Ministers consider appropriate, having regard to any recommendations by the Parole Board). A curfew condition is one which requires the person to remain in a specified place for specified periods of time (often the person’s home), or which requires the person to stay away from a specified place or class of place at specified times or for periods of time. Release under section 3AA is known as release on “home detention curfew”.

40. Section 7(5) will insert a new section 3AB into the 1993 Act making different provision for the temporary release of long-term prisoners. Section 7(4) amends section 3AA so that such prisoners are no longer covered by that section and will no longer be eligible for release on home detention curfew. Section 3AA will continue to apply to short-term prisoners.

41. New section 3AB will provide for the temporary release of long-term prisoners on licence in two circumstances. First, it will permit the Scottish Ministers (in practice, the Scottish Prison Service) to release a long-term prisoner on temporary licence at any stage of the prisoner’s sentence after the prisoner has reached a point 180 days before the prisoner’s parole qualifying date, provided the Parole Board has not recommended the prisoner be released on parole licence. See section 3AB(1) and (5). Secondly, it will require the Scottish Ministers to release a long-term prisoner on licence where the Parole Board, having recommended the prisoner’s release on parole licence, directs them to do so. See section 3AB(3) and (5).

42. Before releasing a prisoner under section 3AB(1), the Scottish Ministers must have regard to the matters mentioned in section 3AB(4) and consult the Parole Board under section 3AB(2). An amendment of section 12(4A) of the 1993 Act (made by section 7(7)(b)) will require Ministers to have regard to any recommendations the Board makes when consulted under section 3AB(2) as to the conditions which should be included in the licence under which the prisoner will be released.

43. As for licences granted under section 3AA, licences granted on release of a prisoner under section 3AB(1) must include the standard conditions and a curfew condition (as a result of amendments made by section 7(8) to section 12AA of the 1993 Act).

44. The Scottish Ministers are to specify the period for which the prisoner is to be released on licence under section 3AB(1) (the “release period”) up to a maximum of 180 days. Where they specify a shorter period, they may extend the period later up to that maximum. A long-term prisoner released on licence under section 3AB(1) will be required to return to prison on the expiry of the release period (as a result of

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<sup>3</sup> See the Home Detention Curfew (Prescribed Standard Conditions) (Scotland) (No. 2) Order 2008 (SSI 2008/125) - [here](#).

amendments made by section 7(6) to section 11 of the 1993 Act). Such a prisoner will also be obliged to return to prison if, while released on licence, the Parole Board decide not to recommend that the prisoner be released on parole licence. That might happen where the Board considers the prisoner's case in the period leading up to the prisoner's parole qualifying date or, where the prisoner was not recommended for release at that date, at a subsequent review.<sup>4</sup>

45. A person who fails to return to prison in those circumstances is, by virtue of new subsection (3D) (added to section 11 of the 1993 Act by section 7(6)(b)), deemed to be unlawfully at large and commits an offence (as a result of an amendment made by section 7(13) to section 32A of the Prisons (Scotland) Act 1989).

46. A person released under section 3AB(1) need not return to prison on the expiry of the release period where the person is otherwise released under Part 1 of the 1993 Act. For instance, a prisoner might be released on licence under section 3AB(1) before the prisoner's parole qualifying date. While so released, the Parole Board may decide to recommend that the prisoner be released on licence under section 1(3) from the parole qualifying date. As new section 11(3C)(a)(iii) of the 1993 Act provides (as added by section 7(6)(b)), the person's release on section 3AB licence will come to an end but be replaced by release on licence under section 1(3) from the parole qualifying date.

47. Certain long-term prisoners are excluded from release on licence under section 3AB(1), namely, prisoners subject to extended sentences under section 210A of the 1995 Act,<sup>5</sup> prisoners subject to certain mental health orders and prisoners liable to be deported on their release from prison (see section 3AB(9)(a) to (c)), as well as terrorist prisoners (see section 3AB(10)).

48. The Scottish Ministers must also release a long-term prisoner on licence under section 3AB(3) where the Parole Board directs them to do so, having recommended the release of the prisoner on parole licence, the prisoner having served one half of the prisoner's sentence. In so directing the release, the Parole Board must have regard to the matters mentioned in section 3AB(4). As for release under section 3AB(1), the prisoner cannot be released before the point 180 days before the prisoner's parole qualifying date. Licences granted on release of a prisoner under section 3AB(3) must include a curfew condition but not the standard conditions (as a result of amendments made by section 7(8) to section 12AA of the 1993 Act). The Parole Board will determine what the other licence conditions are (as a result of section 12(3)(b) of the 1993 Act). The Parole Board will also specify the release period, and may extend that period, up to the maximum of 180 days (see section 3AB(6) and (7)). Unless revoked,

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<sup>4</sup> Including on a review undertaken by virtue of section 3B of the 1993 Act, when it is brought into force. Section 3B was inserted by the Management of Offenders (Scotland) Act 2019, section 51(3).

<sup>5</sup> Such as prisoners convicted of certain sexual, violent or terrorism offences – see section 210A(10) of the 1995 Act.

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the licence granted by virtue of section 3AB(3) will come to an end on the date on which the Parole Board recommends the person be released on parole licence (see section 11(3C)(b)), as it will be effectively replaced from that date by the parole licence.

49. Terrorist prisoners are excluded from release on licence under section 3AB(3), as they are from release under section 3AB(1) (see section 3AB(10)). The other exclusions in section 3AB(9) do not apply, however, to release under section 3AB(3).

50. Section 7(5) also inserts new section 3AC into the 1993 Act, giving the Scottish Ministers power, by regulations, to change a number of matters mentioned in section 3AB, namely, the period before a prisoner's parole qualifying date during which a prisoner cannot be released on licence under section 3AB, the maximum period for which a prisoner can be released, and the prisoners excluded from release under section 3AB(1).<sup>6</sup>

51. Section 7(10) and (11) amend, respectively, sections 17 and 17A of the 1993 Act, which deal with revocation of licences and recall of persons released on licence to prison on such revocation. The effect of these amendments is that section 17 will apply to licences granted in relation to prisoners released under section 3AB(3) and section 17A will apply to licences granted to prisoners released under section 3AB(1).

52. Section 7(12) amends section 21A of the 1993 Act, which requires the Scottish Ministers to prepare and keep under review an operating protocol covering the risk assessments and other matters that are involved before a prisoner is released on home detention curfew under section 3AA and the procedures for monitoring persons so released. That protocol will now also be required to cover release of prisoners under new section 3AB.

53. In relation to monitoring of persons released on licence, section 7(14) will amend section 7 of the Management of Offenders (Scotland) Act 2019 so that prisoners released under section 3AB can be made subject to a requirement to submit to electronic monitoring in accordance with Part 1 of that Act.

## **Section 7A – Review of recommendations and directions by Parole Board**

54. Section 7A amends the 1993 Act to make provision for the review, by the Parole Board, of its decisions to recommend or to direct the release on licence of a prisoner under Part 1 of that Act. A review can take place in three circumstances.

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<sup>6</sup> But the power does not extend to modifying section 3AB(10), so terrorist prisoners will remain excluded from release under section 3AB.

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55. The first circumstance is where a long-term prisoner, who has been released on licence under section 3AB(3),<sup>7</sup> has been recalled to prison and the licence under section 3AB(3) has been revoked. Release on licence under section 3AB(3) will occur where the Parole Board has recommended a prisoner be released on parole at a future date and where the Board directs the Scottish Ministers to release the prisoner in advance of that date.

56. Section 7A(2) amends section 17 of the 1993 Act (which deals with prisoners whose licences have been revoked and who have been recalled to prison) so that the Parole Board can, if it wishes, take the opportunity to review its earlier decision to recommend that the prisoner be released on parole. That review can take place whether or not the Board is also considering the prisoner's case by virtue of a referral to the Board under section 17(3) of the 1993 Act.

57. The second circumstance is where a long-term prisoner, who has been released on licence under section 3AB(1),<sup>8</sup> and who subsequently has been recommended by the Parole Board for release on parole at a future date, has, before that date, been recalled to prison and the licence under section 3AB(1) has been revoked. Release on licence under section 3AB(1) will occur where the Scottish Ministers exercise their discretion to release a prisoner on licence in a case where the Parole Board has not yet recommended that the prisoner be released on parole.

58. Section 7A(3) amends section 17A of the 1993 Act (which deals with prisoners whose licences under section 3AA<sup>9</sup> or 3AB(1) have been revoked and who have been recalled to prison) so that the Parole Board can, if it wishes, take the opportunity to review its earlier decision to recommend that the prisoner be released on parole. That review can take place whether or not the Board is also considering the prisoner's case by virtue of a referral to the Board under section 17A(3) of the 1993 Act.

59. Finally, section 7A(4) inserts new section 17B into the 1993 Act for the third circumstance. That section provides that where the Parole Board has recommended or directed that a prisoner be released on licence under any provision of Part 1 of the Act, but the prisoner has not yet been released on licence, the Board may review its decision if new information which the Board considers has a significant bearing on the suitability of the prisoner for release on licence comes to the attention of the Board.

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<sup>7</sup> As inserted into the 1993 Act by section 7.

<sup>8</sup> Again, as inserted into the 1993 Act by section 7.

<sup>9</sup> Release under section 3AA of the 1993 Act is known as release on home detention curfew. As a result of this Bill, release on home detention curfew will only be available for short-term prisoners.

## **Section 8—Power to release early**

60. Section 8 amends the 1993 Act to make provision for the early release of prisoners in emergency situations.

61. Section 8(2) inserts new sections 3C to 3E into the 1993 Act. New section 3C creates a new power for the Scottish Ministers to make regulations which provide for defined groups of persons to be released early from prison. The regulations must either specify a release date or make provision for the calculation of the date, with a latest release date of not more than 180 days after the day the regulations are made.

62. Under section 3C(2), the Scottish Ministers may not make regulations under subsection (1) of that section unless they are satisfied that doing so is necessary and proportionate where there is an emergency situation effecting a specific prison, or prisons generally. “Emergency situation” is defined in subsection (7), and includes the incidence or spread of infection or contamination, or a situation resulting in part of the prison estate being unusable. Under subsection (2) the Scottish Ministers must also be satisfied that making the regulations will protect the security and good order of the relevant prison, and the health, safety, and welfare of prisoners and staff.

63. Section 3C(3) allows the Scottish Ministers to provide that any long-term prisoners released by virtue of the regulations would be released on licence, and to specify standard conditions which must be included in any such licence. Section 3C(3A) restricts eligibility for release by virtue of the regulations to prisoners with not more than 180 days left to serve of their sentence.

64. Section 3C(4) provides for the prisoners who would be excluded from being released by virtue of the regulations. Subsection (4)(a) refers to the list of classes of prisoner set out in subsection (5), including life prisoners, untried prisoners, prisoners serving extended sentences, prisoners subject to Sex Offender Notification Requirements, prisoners serving sentences for certain domestic abuse offences, and terrorist prisoners. Subsection (5)(k) provides that only long-term prisoners who have been recommended for release at the date on which the regulations are made will be released by virtue of the regulations. Subsection (4)(b) gives prison governors a right to veto the release of any person detained in their prison who would otherwise be released by virtue of the regulations, if they consider that that person poses an immediate risk of harm to a particular person or an identified group of people.

65. New section 3D makes provision for the parliamentary scrutiny to which regulations made under section 3C will be subject. Under subsection (1), the regulations will be subject to the affirmative procedure, unless subsection (2) applies. Subsection (2) applies if the instrument containing the regulations includes a statement of urgency by the Scottish Ministers. If that requirement is met, then subsection (3) will apply and the regulations will be subject to the made affirmative procedure.

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66. New section 3E makes provision for prisoners released by virtue of the regulations to be deemed, for the purposes of the 1993 Act, to have been released under the specified provision of that Act.

67. Section 8(3) inserts a new subsection into section 12 of the 1993 Act, with the effect that subsection (3)(b) of that section, which prevents the inclusion of licence conditions which have not been recommended by the Parole Board, will not apply to standard conditions in licences granted by virtue of the regulations.

68. Section 8(4) inserts new section 12ZA after section 12 of the 1993 Act. The new section makes provision for the standard conditions to be contained in licences granted by virtue of the regulations. Subsection (1) provides that the standard conditions remain in force, unless cancelled, until the date on which the released person would otherwise have been released under section 1(3). This is the date on which they will move to a standard parole licence. Subsection (2) states that the standard conditions may include a curfew condition. A curfew condition is one which requires the person to remain in a specified place for specified periods of time (often the person's home), or which requires the person to stay away from a specified place or class of place at specified times or for periods of time.

## **Section 9—Duty to engage in release planning**

69. Section 9 amends the Community Justice (Scotland) Act 2016 (“the 2016 Act”) by inserting a new section 34A after section 34. Section 34A imposes a duty on certain persons to engage in the development, management and delivery of a release plan if requested to do so by the Scottish Ministers. A “release plan” is defined in subsection (7). It is a plan to prepare individuals for release (after they have been remanded in custody or imprisoned or detained in a penal institution) and to facilitate their reintegration into the community and their access to relevant general services. The term “relevant general services” is given the same meaning as in section 1 of the 2016 Act and includes, for example, services and support provided to people generally in relation to housing, employment and social welfare.

70. In practice, it is expected that the Scottish Prison Service will represent the Scottish Ministers in making requests to engage in release planning and in release planning itself. The Scottish Prison Service is not a statutory body as such, being an Executive Agency of the Scottish Ministers, so is not normally mentioned in legislation. But it carries out the statutory and other functions of the Scottish Ministers in relation to prisons and prisoners. It is also expected that Social Security Scotland will engage in release planning, although not mentioned in the list of persons in section 34A(2) on whom the duty to engage (on request) is imposed. Social Security Scotland is also not a statutory body but is an Executive Agency of the Scottish Ministers. As the request to engage in release planning is issued by the Scottish Ministers, they will already be engaged in the appropriate capacity. The list of persons in section 34A(2) may be modified by regulations made by the Scottish Ministers.

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71. Subsection (4) of section 34A provides that a person complying with a request to engage in release planning must have regard to the role which third sector bodies are able to play in relation to the release plan. The person may, if appropriate, commission services from, or co-ordinate with existing services provided by, third sector bodies.

## **Section 10—Throughcare support**

72. Section 10 amends the 2016 Act by inserting new sections 34B and 34C which deal with throughcare support. Throughcare support is defined in new section 34B(6) as the provision of certain types of support in relation to individuals who have been remanded in custody or sentenced to imprisonment or detention in penal institutions, from the point they are imprisoned or detained (whether on remand or after sentencing) until after their release, and the engagement in release planning under section 34A. The types of support are listed in paragraphs (a) to (e) of the definition.

73. Section 34B(1) requires the Scottish Ministers to publish standards applicable to throughcare support within one year of the section coming into force. Subsection (2) sets out the type of provision to be included in the standards. They must make provision for minimum standards and outcomes to be met by providers of throughcare support. Subsection (3) provides that the Scottish Ministers must keep the standards under review and may publish amended standards. Subsection (4) requires the Scottish Ministers to consult the persons listed in subsection (4) in preparing, reviewing and revising the standards. This includes persons providing support services to victims. A definition of support services is included in subsection (6), and the Scottish Ministers have the power, under subsection (8), to amend that definition.

74. Section 34C creates a duty to comply with the standards published or revised under section 34B. The duty is imposed on the persons listed in subsection (2) and the duty applies when they exercise functions relating to the provision of throughcare support. Subsection (3) provides that the list of persons in subsection (2) may be modified by regulations made by the Scottish Ministers.

## **Section 11—Provision of information to victim support organisations**

75. Section 11 will amend the Criminal Justice (Scotland) Act 2003 (“the 2003 Act”) and the Victims and Witnesses (Scotland) Act 2014 (“the 2014 Act”) so that information about prisoners and offenders subject to certain mental health disposals, which can be provided to victims of the offences they have committed, can also be provided to “victim support organisations” providing assistance to those victims.

76. Section 11(2) inserts a new section 16ZA into the 2003 Act. Under this section, victim support organisations can be provided with the information mentioned in section 16(3) where either the victim has requested this or the organisation itself has done so and the Scottish Ministers are satisfied that the victim consents to the organisation



being given the information. A “victim support organisation” (called a “supporter” in the section) is a person of a description prescribed by the Scottish Ministers by regulations under section 16ZA(2)(a) who provides support services to a victim of crime. “Support services” is defined in section 16ZA(5). Section 16ZA(6) provides Ministers with a regulation-making power under which that definition can be amended.

77. The information that can be provided to a victim support organisation is set out in section 16(3) of the 2003 Act and is information about the dates on which the prisoner is to be or may be released from prison, whether or not the prisoner has died, if the prisoner has been transferred outside Scotland, if the prisoner is unlawfully at large, the date a prisoner released or unlawfully at large is returned to prison, and if the prisoner is made subject to various orders relating to mental health and detained in hospital rather than prison.

78. Section 11 also inserts a new section 17ZA into the 2003 Act. This makes provision for victim support organisations which is equivalent to that made in relation to victims of crime by section 17 of the 2003 Act, other than in one respect. Section 17 requires a victim to be provided with the opportunity to make representations to the Scottish Ministers and the Parole Board where a prisoner is being considered for release. To facilitate that, the victim is informed of a number of matters, including dates by which such representations need to be made. Section 17ZA will enable victim support organisations to receive such information so that they can provide support services to victims. As with section 16ZA, the Scottish Ministers and the Parole Board will be required to provide the information to a victim support organisation where the victim request this or where the organisation itself does so and the victim consents. But a victim support organisation does not, by virtue of section 17ZA, have the right to be given an opportunity to make representations about the release of a prisoner. Only the victim has that right.

79. Further amendments are made to section 17A of the 2003 Act, which deals with the victim’s right to information where a prisoner is being considered for temporary release, so that a victim support organisation can also be given this information. As with sections 17 and 17ZA, however, only the victim will have the right to be given an opportunity to make representations about the release.

80. Section 11 also inserts two new sections into the 2003 Act which make provision for information to be provided to victim support organisations where the offender involved has been made subject to certain mental health orders under the criminal justice system (instead of being sentenced to imprisonment).

81. Under new section 16D, a victim support organisation (a “supporter”) can be provided with the information mentioned in section 16C(2) of the 2003 Act about an

offender who has been made subject to a compulsion order and a restriction order.<sup>10</sup> The information in section 16C(2) is similar to the sort of information mentioned in section 16(3) which is provided in relation to prisoners, but tailored to the particular circumstances of an offender subject to the relevant mental health orders. So it includes information as to whether an order has been varied or revoked, whether the offender has been conditionally discharged (and the conditions of that conditional discharge), or whether the offender, having been released, has been recalled to hospital. As with new section 16ZA, the organisation can be given information where either the victim has requested this or the organisation itself has done so and the Scottish Ministers are satisfied that the victim consents.

82. Under new section 17DA, the supporter can be given information about decisions mentioned in section 17B(5) of the 2003 Act made in relation to the offender if nominated by the victim to receive that information or if the supporter asks for it (and the Scottish Ministers are satisfied that the victim has consented to the supporter being given the information). Those decisions are - a decision by the offender's responsible medical officer to suspend, for the first time, the offender's detention without imposing a supervision requirement; a decision by the Mental Health Tribunal about what (if any) conditions to impose on the patient's conditional discharge; and a decision by the Scottish Ministers to impose, alter or remove a condition which is (or would be) relevant to the victim.

83. Section 17DA also gives the supporter the right to information that the victim would be entitled to receive under section 17D, namely that the Court of Session has, on appeal against a decision of the Mental Health Tribunal mentioned in section 17B(5), made an order which requires the offender to continue to be detained and that the compulsion order, restriction order, hospital direction or transfer for treatment direction to which the offender is subject is to continue in effect.

84. The 2003 Act provisions relate to prisoners serving sentences of 18 months or more and to prisoners serving life sentences. Section 27A of the 2014 Act makes provision where prisoners are serving sentences of less than 18 months. Section 27A gives victims the right to be informed of the prisoner's release from prison or if the prisoner has escaped from prison.

85. Section 11(7) will amend the 2014 Act to insert a new section 27B which will make provision similar to section 16ZA of the 2003 Act for the provision of information to victim support organisations where prisoners are serving less than 18 months. As with section 16ZA, a victim support organisation will be provided with information where either the victim has requested this or the organisation itself has done so and the Scottish Ministers are satisfied that the victim consents. The information provided by

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<sup>10</sup> Under Part 6 of the Criminal Procedure (Scotland) Act 1995.

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virtue of section 27B is the same information as is provided under section 27A, namely information about the prisoner's release or escape from prison.

## Part 3: Final provisions

### Section 13—Ancillary provision

86. Section 13 enables the Scottish Ministers, by regulations, to make various types of ancillary provision if they think it appropriate to give full effect to the Bill. This includes the power to make different provision for different purposes, and to modify any other legislation (whether primary or secondary) as well as the Act itself. Regulations made under this section that amend the text of primary legislation are subject to the affirmative procedure.<sup>11</sup> Otherwise, they are subject to the negative procedure.<sup>12</sup>

### Section 14—Commencement

87. Section 14 sets out when the provisions of the Bill, once enacted, come into effect as a matter of law. It provides that the sections on interpretation, ancillary provision and the short title, as well as the commencement section itself, take effect on the day after Royal Assent. The other sections of the Bill will take effect in accordance with regulations made by the Scottish Ministers.

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<sup>11</sup> See [section 29 of the Interpretation and Legislative Reform \(Scotland\) Act 2010 \(legislation.gov.uk\)](#) for details of the affirmative procedure.

<sup>12</sup> See [section 28 of the Interpretation and Legislative Reform \(Scotland\) Act 2010 \(legislation.gov.uk\)](#) for details of the negative procedure.

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# Bail and Release from Custody (Scotland) Bill

## [As amended at Stage 2]

### Revised Explanatory Notes

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