# Criminal Justice Committee

# 1st Meeting, 2022 (Session 6), Wednesday 11 January 2023

# Bail and Release from Custody (Scotland) Bill

# Note by the clerk

## Background

1. The Committee is continuing to take evidence on the Bail and Release from Custody (Scotland) Bill at Stage 1 of the Parliament's legislative process.

2. The Bill proposes changes to the law in two main areas:

   - decisions about granting bail to people accused of a crime
   - arrangements for the release of some prisoners and the support that is provided to those who leave prison

3. When a person accused of a crime appears in court, the court has to decide whether they should be remanded in custody or remain in the community on bail while they await their trial.

4. Part 1 of the Bill makes changes to the current law relating to bail in four areas:

   - requiring justice social work to be given the opportunity to provide information to the court when making decisions about bail
   - changing the test that the court must apply when making decisions about bail
   - requiring the court to record reasons for refusing bail
   - allowing time spent on electronically monitored bail to be counted as time served against a custodial sentence

5. Part 2 of the Bill makes changes to some prisoner release arrangements and the support provided to those being released. These include:

   - preventing prisoners from being released on:
     - Fridays or the day before public holidays (adding to the existing requirement that prisoners are not released on Saturdays, Sundays and public holidays)
     - Thursdays in some circumstances

- replacing home detention curfew for long-term prisoners with a new system that will allow them to be temporarily released to support their reintegration – subject to risk assessment and consultation with the Parole Board
- giving the Scottish Ministers power to release certain prisoners early in emergency situations to protect the security and good order of prisons or the health, safety or welfare of those in prison
- requiring certain public bodies (for example local authorities and health boards) to engage in release planning for prisoners
- requiring the Scottish Ministers to produce minimum standards for throughcare support, provided to prisoners throughout their time in prison and during their transition back into the community
- allowing victim support organisations to receive certain information about prisoners, including about the release of prisoners

# Finance and Public Administration Committee

6. The Finance and Public Administration Committee is responsible for scrutinising Financial Memorandums (FMs) to Bills. The Committee ran a call for views on the FM for the Bail and Release from Custody (Scotland) Bill between July and September 2022 and received three responses, from Victim Support Scotland, Police Scotland and Glasgow City Health and Social Care Partnership.

7. The Finance and Public Administration Committee wrote to the Criminal Justice Committee to highlight the contents of these responses and refer them for its consideration as part of evidence taking at Stage 1.

8. These responses have been published on the Scottish Parliament's call for views website.

# Today's meeting

9. At today's meeting, Members will hear from the following witnesses—

Panel 1

- **Kate Wallace**, Chief Executive, Victim Support Scotland (*see Annex for written submission*)
- **Emma Bryson**, Speak out Survivors

Panel 2

- **Dr Hannah Graham**, Senior Lecturer, Sociology, Social Policy & Criminology, University of Stirling (*see Annex for written submission*)
- **Professor Fergus McNeill**, Professor of Criminology & Social Work, University of Glasgow (*see Annex for written submission*)
- **Professor Lesley McAra**, Professor of Penology, Edinburgh Law School, University of Edinburgh

10. Where an organisation has provided a submission to the Committee's call for views on the Bill, this can be found below at the Annex.

# Previous witnesses

11. At previous meetings, the Members have heard from the following witnesses—

**14 December 2022**

Panel 1

- Charlie Martin, Stakeholder and Policy Lead, Wise Group
- Lynne Thornhill, Director of Justice Services, SACRO
- Tracey McFall, Member of Executive Committee of the Criminal Justice Voluntary Sector Forum

Panel 2

- Gillian Booth, Justice Service Manager, South Lanarkshire Council
- Sandra Cheyne, National CIAG Policy & Professional Practice Lead, Skills Development Scotland
- Rhoda Macleod, Head of Adult Services (Sexual Health, Police Custody & Prison Healthcare), Glasgow Health & Social Care Partnership

Panel 3

- Sharon Stirrat, Justice Social Work Policy and Practice Lead, Social Work Scotland
- Keith Gardner, CJS Specialist Adviser, Community Justice Scotland
- Suzanne McGuiness, Executive Director of Social Work, Mental Welfare Commission for Scotland

**Clerks to the Committee**
**January 2023**

# Annex: Written Submissions

# Panel 1

**Written submission from Victim Support Scotland (VSS)**

*About VSS*

Victim Support Scotland (VSS) is the leading charity dedicated to helping people affected by crime across Scotland. Victim Support Scotland provides information, practical help, emotional support and guidance through the criminal justice system. We offer support to people who directly experience any type of crime including murder, terrorism, rape and sexual assault, domestic violence and hate crime. Our support also extends to friends and families of victims.

VSS are grateful to the Criminal Justice Committee for the opportunity to make comment on the provisions within the Bail and Release from Custody (Scotland) Bill. We thank the Committee for setting out the questions outlined in its call for evidence, and we will answer the ones we believe directly affect victims of crime and their families. We will also seek to support our position with comments and opinion from individuals we support with lived experience of the issues contained within the provisions of this Bill.

*Do you have any comments on the general approach taken in relation to the use of bail and remand?*

It will be a concern to the public in general and victims of crime specifically that the provisions relating to bail narrows the court's discretion to refuse bail. That is, no doubt, with the intention of reducing the prison population. We are concerned that this reduction in a judge's decision-making discretion will lead to increased danger to victims of crime and their families. We do appreciate that victims of crime (Complainers) are specifically mentioned in the public safety test when considering a decision to refuse bail. We would argue that the legislation should have victim (complainer) safety as a primary consideration in the public safety test that judges are required to consider.

*Do you have any comments on the general approach taken in the Bill to the arrangements for the release of prisoners?*

We warmly welcome the proposed section 11 of the Bill which will provide information to Victim Support Organisation (VSO's) when prisoners are being released. This will allow VSO's to either find out at the same time, or instead of a victim of crime if they elect the VSO to receive that information on their behalf. This will allow, if operated properly, greater support for victims of crime or their families pre and post release of individuals being released for prison. We do have concerns about how this will operate in practice and will highlight these concerns in the relevant question below.

*Do you have any comments on the practical implementations of the proposed changes in the Bill, including resource implications?*

VSS does have concerns regarding the practical implementation of section 11 of the proposed Bill, which is the sharing of information relating to prisoner releases with VSOs. The release of perpetrators of crime from prison is often a significant cause of trauma to victims and their families. We would, however, make comment that for this provision to work effectively there needs to be a significant overhaul of the Victim Notification Scheme (VNS). VSS welcomes the Scottish Government's announcement of an independent review of the VNS announced on the 31 March, which we believe is well overdue.

The VNS has long been seen as an outdated and archaic system that needs overhauled. We have heard of too many instances where victims have received letters about the release of offenders with no prior warning and no offer of support. We hope that the provisions of this Bill will improve the information flow between criminal justice organisations responsible for the management of the VNS and now with VSOs, if the provisions within this proposed Bill become law.

*Input from justice social work in relation to bail decisions*

VSS on balance welcomes this provision but we have concerns regarding how this legislation will be implemented operationally. Overall, we do believe that having criminal justice social work involved has the potential to lead to more stringent measures in place surrounding bail decisions. We would caveat our support with the need for assurance that justice social workers would be professionally trained and have sufficient resources to cope with the demand.

We have a concern that the legislation says that the Sheriff or Judge must also give an officer of a local authority an opportunity to provide (orally or in writing) information relevant to that determination.1 Our concern is that if there are resource pressures on the criminal justice social work then reports will not be given to the court leaving Sheriffs or Judges with a lack of information prior to making these decisions. We also want to avoid the providing of reports to the court becoming a tick box exercise again due to time and resource pressures on criminal justice social workers.

There needs to be sufficient resources allocated to these roles to ensure that sheriffs and judges have access to all available information. We would also want to see a consistent and robust risk management process implemented to ensure that there is a strong focus on ensuring that accused/perpetrators are not being let out on bail when it may impact the safety and security of a victim of the crime or the wider public.

In the Scottish Governments 'Vision for Justice,' it states that "We must hear the voices of victims. To support victims in their journey to healing and recovery we must offer approaches to justice which place victims at the heart."2 To ensure that this process is in line with the Vision for Justice we would also like to see a requirement that the views of victims of the crime perpetrated be considered within the risk assessment process.

*Grounds for refusing bail*

As we have previously mentioned, we do have concerns that these provisions will reduce the discretion that judges will have when considering refusing bail. The explanatory notes accompanying the Bill at para 14 states that “it narrows the court’s discretion to refuse bail.” We believe that this may, without a rigorous risk assessment process and assessment having taken place, lead to increased danger to victims of crime and their families. We believe that the safety of the complainer and public safety should be a primary consideration when deciding whether to remand or bail an accused person.

In relation to limiting the grounds for refusal of bail in summary cases, the phrase less serious is used. We believe that it should not just be the specific charge that that should be considered in summary cases. There should be a more holistic approach taken including whether the person has previously failed to attend court (including for summary cases) but also the specific risk that they may pose to individual victims of crime. We know from our experience that the risk to victims increases after a perpetrator has been arrested. Again, we would highlight the need for training for those in the justice social work tasked with providing a risk assessment to the court.

The policy memorandum accompanying the Bil in para 139 “makes clear the concept of victim safety should involve an assessment by the court of any substantial risk of both physical and psychological harm to the alleged victim. By recognising the concept of victim safety is multi-faceted in nature and encapsulates more than physical harm in addition to explicitly requiring the court to consider victim safety as a specific factor in the bail decision, the protection afforded to complainers through the new bail test will be enhanced.” We welcome the approach that victim safety does not just involve physical safety but psychological harm that may be caused to victims of crime or their families. We hope that Sheriffs and Judges will be provided with clear guidance on how these considerations should be factored into the new bail test.

We would add that where a decision is being made to release an accused person on bail then there should be a mechanism in place to take cognisance of the views of the victim of crime or their family. A victim of crime will be in the best position to advise on safety planning when considering any bail provisions designed to keep them safe. This should include:

* Curfew conditions including locations the accused should not approach
* Restrictions on contacting the victim of crime or their family

The unfortunate reality of more individuals being released on bail that would otherwise be remanded will mean an increase of individuals who commit crime whilst on bail. The numbers of individual committing ether breaches of bail or offending whilst on bail is already at unacceptable levels. A freedom of information response by the Scottish Government indicated that there are thousands of individuals charged with breaching their bail conditions or committing other offences whilst on bail.

*Removal of bail restrictions*

We do have significant concerns regarding the removal of the restriction on granting bail for certain solemn offences. We believe that the current exceptional circumstances test in section 23D of the Criminal Procedure (Scotland) Act 1995 provides sufficient latitude to judges to allow bail should the specific circumstances of the case allow it. The current restriction contained within section 23D was inserted to emphasise the seriousness and risks associated with cases involving Violence against Women and Girls (VAWG) and Domestic Abuse. These cases have significant risk associated with them and the safety of victims should be at the heart of any decision to release a person on bail. The removal of this restriction and reliance on the new all-encompassing bail test does little to show victims of these types of crime that their safety is being protected under the law.

*Stating and recording reasons for refusing bail*

VSS believes that it is always beneficial to the victim to have written evidence and transparency of information for decisions of bail. However, we believe that this should not stop at the reasons for refusing bail, but also that written reasons for when bail is granted should also be provided. In the interests of transparency victims of crime should be entitled to know why the decision to bail the accused has been made. There are instances where the granting of bail has led to the direct detriment of the victim, particularly because they are informed too late that the perpetrator has been released, and in instances where the perpetrator lives nearby to the victim.

We have supported our position on recording the reasons for bail with a comment from a person supported by VSS as follows “When bail was granted to the perpetrator, it made me and my mother’s situation worse, as the offender ramped up her appalling behaviour. Bail is too easily granted as is and needs to be taken more seriously so perpetrators are held accountable, instead of having a slap-on-the-wrist punishment instead of jail time.”

*Consideration of time spent on electronically monitored bail in sentencing*

VSS believe that decisions surrounding sentencing should consider the severity of the crime, victim safety and victim protection, rather than time spent subject to electronic monitoring. Time spent on electronic monitoring should be no substitute for time that should have been spent in prison as part of a sentence.

*Prisoners not to be released on certain days of the week*

VSS agrees with this proposal. Releasing prisoners on a Friday is not practical for either the prisoner the victim of crime or their family. Support services may not always be available depending on the time of the release on a Friday which can increase risks to victims of crime and their families.

*Release of long-term prisoners on reintegration licence*

VSS fully understands the need for prisoners to be reintegrated into the community. This, however, should be done after a robust risk assessment. We would want to

ensure that the current risk assessment process conducted for Home Detention Curfew (HDC) is continued when considering individuals for release under this new scheme.

The guidance7 produced for agencies involved in that process was updated and made stronger after recommendations made in two separate inspection reports by Her Majesty's Inspectorate for Constabulary in Scotland (HMICS)8 and Her Majesty's Inspectorate for Prisons in Scotland (HMIPS)9. The guidance for agencies includes SPS (Scottish Prison Service), Police Scotland, Criminal Justice Social Work, Parole Board now has more detailed focus on risk and not just on the behaviour of the subject whilst they have been in prison.

We believe that a more holistic risk-based approach, with information fed in from a variety of sources, leads to better decisions being made regarding the suitability of individuals for release.

VSS believe that there should be statutory presumptions against the release of individuals where their index offence relates to a crime of violence. This would not preclude an individual being released but the multi-disciplinary team assessing the individual's suitability for release would need to satisfy themselves that the prisoner was of minimal risk to a victim of crime or the wider public. This would be a similar approach taken when considering an individual for a release on bail.

VSS also believe that victims of crime should have equal consideration and support mechanisms in place when the perpetrator of the crime against them is being considered or prepared for release. When perpetrators of crime are released from prison this can have a traumatising effect on a victim of crime or their family.

*Emergency power to release prisoners early*

During the Covid 19 pandemic emergency legislation allowed for the emergency early release of some categories of prisoner to mitigate the spread of the coronavirus. Whilst this dealt with the specific issues related to the pandemic, it did not sufficiently consider the significant welfare and communications issues related to notifying the victims of crimes committed by those perpetrators. This caused a surge in victim trauma, and it sent many victims of crime into an agitated state.

VSS saw a significant increase in safeguarding issues directly related to the emergency release of prisoners. We would like to see the legislation detail that victim safety considerations should be a priority before any individual is released from prison and that support is put in place for victims prior to perpetrators being released from custody.

*Duty to engage in planning for the release for prisoners*

With regards to the duty to engage in release planning there are several persons that are required to comply with a request to engage in the development of a release plan. VSS believe that relevant victims organisations should also be involved in the development of any release plan. Any release plan should also take cognisance of any

safety considerations of a victim or their family. Any plans developed without consideration of the victim, or their family may be detrimental to their safety.

*Throughcare support for prisoners*

In relation to throughcare support standards there several named bodies that the Scottish Ministers must consult. We believe that Victim Support Organisations (VSOs) should also be consulted on these standards as they will no doubt have impacts for victims of crime or their families.

*Provision of information to victim support organisations*

VSS strongly supports this provision in the Bill. We have always strongly advocated that some victims of crime require support in the lead up to and after an individual is released from prison. As we have previously indicated, for this provision to work effectively there needs to be a significant overhaul of the VNS system. There are countless examples of victims of crime, who have signed up to the scheme, either not being told of a pending release or being told in a manner that is not trauma informed with no support mechanism or even offer of support in place for them.

We also see those issues continuing as if victims of crime are not told then a VSO is also unlikely to be told. The legislation or subsequent regulations need to be clear on allowing information and data sharing between criminal justice bodies managing the VNS scheme and nominated VSO's.

VSS believe that for information on a prisoner to be passed to a VSO then there should be consent given from the victim of crime or their family. We do not believe that a VSO should have access to such information without the victim of crime or their family allowing them to have such access.

# Panel 2

**Written submission from Dr Hannah Graham and Professor Fergus McNeill**

*Do you have any comments on the general approach taken in relation to the use of bail and remand?*

In response to the Call for Views, this evidence submission is co-written in an individual capacity as criminologists working in academia, whose research interests, publications, teaching, policy and public engagement are relevant to issues considered in this Bill. One of us (Graham) holds a public appointment, but these views are not representative of nor expressed in that capacity. One of us (McNeill) worked for 10 years in frontline roles in Justice Social Work and drug rehabilitation, in addition to his subsequent experience as an academic.

Overall, the general approach taken in the Bill is sensible and constructive. We welcome the fact that bail reform and release and reintegration supports are featuring on the Parliamentary legislative agenda. This view does not preclude the need for thoughtful scrutiny of details of what the Bill proposes, nor does it imply there is no scope for making amendments/additions to further improve the Bill. Proposals in the Bill span multiple areas of Scottish Justice and, as such, our submission raises some relevant wider issues, for context.

Bail reform is very often listed as a priority in decarceration strategies and literature, because it is crucial in changing who enters custody, when and why. We strongly agree that reform to the legal framework in which bail decisions are made is needed to try to address the long-standing issue of overly high rates of remand in Scotland. The importance of adequately resourced community-based supports for people on bail should also be acknowledged.

The available international evidence makes clear that decarceration – whether through efforts at the front end with bail reform, or at the back end with release from prison – need not be causally associated with increases in crime. The relationship between incarceration/decarceration rates and crime rates is complex, and certainly not as strong in how they might indirectly influence one another compared to other factors. Examples from different jurisdictions which have seen a significant drop in prison populations are not associated with rising crime trends and threats to public safety (e.g., Boone, Pakes and van Wingerden, 2022; Schrantz, DeBor and Mauer, 2018 ; Lappi-Seppälä, 2000, 2011 ).

The views of complainers or victims about decarceration proposals (including those in this Bill) should not be misrepresented as homogenous or oversimplified; it is not the case, either nationally or internationally, that victims and their advocates are necessarily opposed to reducing prison populations. In research, victims commonly report that they want to be heard and to be treated with respect in justice processes, and, crucially, they do not want other people to suffer victimisation. There is less consensus among victims on how best to secure that goal. Some victims oppose decarceration proposals, because they see imprisonment as necessary either as punishment or for public safety, or both. Others feel differently. Internationally, some

victim groups and advocates argue that prisons do not secure justice for victims and do not make us safer; instead, they call for decarceration and more community-based safety solutions and supports (for example, Alliance for Safety and Justice, 2016 , 2020 ; Sered, 2017 ; Pali and Canning, 2022 ). Pursuing safer communities and fewer victims in future are at the heart of these viewpoints.

*Do you have any comments on the practical implementations of the proposed changes in the Bill, including resource implications?*

In considering the practical implementation of proposals in this Bill, it is worth examining the detail and context of how remand is currently used. We are confident that some evidence submissions and Committee discussions will focus (rightly) on individuals who have served lengthy periods on remand and how this situation can be alleviated and prevented. This is a pressing matter of access to justice. Very short periods of remand are worth considering, too. For example, a significant number of individuals spent 1 day or less (n=194) or 2-7 days (n=764) on remand in custody within a one year period (2020-2021) (Scottish Government Justice Analytical Services, 2022). Aspects of this Bill, in interaction with provisions in the Management of Offenders (Scotland) Act 2019 (regarding electronically monitored bail) may potentially result in still more use of very short periods of remand, depending on judicial uses of EM bail. Use of electronic monitoring ('tagging') and curfews with bail involves risk assessment. Extensive thought has gone into developing practice guidance and implementation in this regard. Local variations in the capacity of Justice Social Work services may mean that this EM bail assessment can be done swiftly in Glasgow and yet may take longer in, for example, Aberdeenshire. As a result, there may be places where considering EM bail results in more initial instances of remand for one or more days while the assessment and decision are made. While we support the introduction of electronically monitored bail as a direct alternative to custodial remand, the potential for such variations in practical implementation should be acknowledged and, where possible, addressed.

In the introduction and practical implementation of electronic monitoring (EM) bail (since May 2022), it is also crucial to recognise and reduce the risk of 'net-widening'; i.e., where, rather than diverting people from unnecessary remand, EM bail is used for people who might not have been remanded in custody in the first place. Poorly targeted use of EM bail wastes justice resources, as well as exposing accused individuals to unnecessary restriction. We note that the Bill frames consideration of EM bail in the decision-making process in proximity to or as a step prior to refusal of bail and a duty to state reasons (section 2AA)(a)(iii), but the overarching point remains that effective targeting (to avoid net-widening) requires clear guidance and effective collaboration. Early indicators of judicial perspectives on bail and remand decision-making in Scotland seem to suggest, at least among some, an appetite for greater use of EM with bail, for different reasons (Skellington Orr et al., 2022). Nonetheless, there will be many cases in which electronic monitoring does not need to be added as a condition of bail, and should not be added. A common warning and net-widening critique offered by criminologists who research electronic monitoring, including world-leading EM expert Professor Mike Nellis, is summarised well by a Belgian colleague, Professor Tom Daems (2020): 'alternatives can become additives'. Indeed, the Council of Europe (2014) rule 3 on electronic monitoring specifically warns against risks of net-widening at the pre-trial stage:

‘Practice shows that it has been used on people who pose only low risks, merely because it is perceived as a useful additional form of control. In particular, in some pre-trial cases, the judiciary has prescribed electronic monitoring to suspects who would not normally be remanded in custody because they do not present a risk of flight or of interfering with the course of justice. This is not to be encouraged, either at the pre-trial (or indeed sentencing) stage, particularly in view of its costs and intrusiveness’ (Council of Europe, 2014).

Another contextual aspect is worth acknowledging: The distinctive value of the third sector in supporting bail, throughcare, desistance and community reintegration (Helminen, 2016 ; Tolland, 2016 ; McIvor, Graham and McNeill, 2019 ) can and should, where necessary, complement the bail, throughcare and reintegration support offered by Justice Social Workers or throughcare support prison officers, for example. The third sector are key players in community justice and careful consideration of their capacity is relevant to the practical implementation of this Bill, if passed into an Act. Do they have enough resources? Is their support consistently available across Scotland? How are they and those they work with affected by short-term funding cycles, with a workforce often on 12-month contracts?

*Input from justice social work in relation to bail decisions*

We support this proposal of giving Justice Social Workers the opportunity to provide information relevant to bail decisions. Their professionalism and multi-faceted skillset means they are well positioned to offer useful information to the court. Justice Social Workers having the time and capacity to do so, due to reasons of workload and geographic variations in timely availability to the courts, will be priority topics for the Committee to consider. We note the substantial caveats and earnest warnings on matters of resources and capacity by Social Work Scotland in their written submission to the Scottish Government consultation preceding the Bill.

The interim findings from a small Scottish study of decision-making on bail and remand are relevant here (Skellington Orr, Wilson Smith and Barry, 2022). The input of Justice Social Workers is valued in promoting engagement with and compliance of the accused, and their professional ability to offer informed views on risk assessment and vulnerability is recognised. However, judicial participants in this study indicated that a ‘perceived lack of resources (practical and financial)’ were seen as ‘being the single biggest barrier to greater use of alternatives to remand’ in the bail and remand decision-making process (Skellington Orr et al., 2022: 45). Some offered views of Justice Social Work not consistently being available to get assessments done in a timely manner and being too stretched and lacking the capacity to deliver bail supervision. This varies by local area. Similarly, participants from the Crown Office and Procurator Fiscal Service (COPFS) commented on a perceived lack of resourcing, specifically within Justice Social Work services. Clearly, there are resource implications of these proposed reforms for Justice Social Work, and this will affect their capacity to undertake what is proposed in section 1 of the Bill.

*Grounds for refusing bail*

We support changing the legislative framework through clarifying and narrowing the grounds on which bail can be refused. It is a step in the right direction. The proposed two-part test for grounds for refusing bail, centring on public safety and risk of harm, is reasonable. It is constructive that safety considerations of complainers are acknowledged within this.

Action to address problems of remand is long overdue in Scotland. Numerous academics have raised concerns about overly high uses of remand and prison conditions before and during the coronavirus pandemic, especially in relation to impacts on health, human rights, equalities, and family relationships. Over the years, the same concerns have been raised by organisations ranging from the Sentencing Commission for Scotland (2005) and Audit Scotland (2008), to the Scottish Human Rights Commission and HM Inspectorate of Prisons for Scotland, and independent charity Howard League Scotland. Years ago, in the 'McLeish Report' of the Scottish Prisons Commission (2008), 'the remand problem' was described as a 'problematic and largely unnecessary use of prison' in cases of people who do not 'present a real risk to our safety', alongside cases of what they call 'the warehousing problem – a place to hold the damaged and traumatised.' Sadly, these observations and critiques remain applicable now, even after 14 years of efforts to reduce the prison population.

Whether the independent Scottish judiciary and courts will substantively change historically high uses of remand remains yet to be seen, and any change may be incremental. However, legislative limits on its use are one way of seeking to achieve change, alongside offering more extensive and effective supports for bail and access to relevant services (e.g., mental health, alcohol and drugs, social care, welfare, debt and financial inclusion) in local communities.

*Stating and recording reasons for refusing bail*

We agree with the proposed change, so that judges and the court must state and record reasons when they refuse bail to an accused person. The Scottish judiciary are skilful and precise in their communication, and the reasoning informing their decisions is of interest, given the gravity of refusing bail and remanding people in custody when there has not been a conviction. It seems likely that stating and recording their reasons for refusing bail will contribute towards improved procedural fairness, and it may provide important intelligence about what, in the view of judges, prevents them from using bail. Victim Support Scotland's point that more transparency and access to judicial reasoning (orally and in writing) may also be of interest to complainers and families is a fair observation.

*Consideration of time spent on electronically monitored bail in sentencing*

We strongly agree that time spent on bail with electronic monitoring and a curfew condition should be taken into account at the point of sentencing. Like being remanded in custody, these measures have substantive and punitive effects which it would be wrong to ignore at the point of sentencing. This was one of the findings and recommendations of a major European comparative research project on electronic monitoring, involving five jurisdictions: Scotland, England and Wales, Germany,

Belgium and the Netherlands (Hucklesby et al., 2016; McIvor and Graham, 2016). The proposed calculation in 210ZA(3) of treating two days on EM bail as the equivalent of one day in custody seems reasonable, though the judiciary and court retain discretion for deciding.

European Rules for Electronic Monitoring state: 'National law shall regulate the manner in which time spent under electronic monitoring supervision at pre-trial stage may be deducted by the court when defining the overall duration of any final sanction or measure to be served' (rule 17; Council of Europe, 2014). This proposal in section 5 of the Bill appears to do that.

*Prisoners not to be released on certain days of the week*

We welcome and strongly support this proposal in the Bill. One of us (Graham) has already called for the end of Friday releases and releases immediately before public holidays in articles in Scottish newspapers in recent years (Rodger, 2019; Aitchison, 2020). Similarly, Nacro have been campaigning for ending Friday releases in the context of England and Wales. Fridays are reported to be busy days in prisons and in local authorities and community justice, and there are real risks of being released often with too much to do and not enough time to access supports and services. Nacro's campaign features voices of prison leavers who speak to how Friday release is often counterproductive:

"Most services close at midday on Friday."

"If you are released on a Friday and there are issues they are not likely to be resolved until following Monday, leaving the weekend to panic/stew/worry which could easily lead to reoffending."

"I ended up at a night shelter, probation was closed, the Council official had left until Monday…"

- direct quotes from prison leavers (quoted in Nacro, 2021).

More recently, the Scottish Drugs Deaths Taskforce (2021) have recommended ending Friday releases for similar reasons, drawing attention to the risks to health and welfare and the views of service providers and people with lived experiences. We agree with the Taskforce that 'Friday liberations create unnecessary risks.' Similarly, in their Review of Throughcare for Justice Social Work, the Care Inspectorate (2021: 5) indicated that Friday releases were not particularly conducive to timely access to supports for reintegration, finding that 'meeting crucial needs was made more difficult when individuals were released on a Friday or some distance from their home area.' Furthermore, important opportunities to build rapport and offer practical throughcare supports might be better maximised by mentors and others working in the third sector if they are not facing a busy day of liberations on Fridays, with few services open to refer or take people to, especially later in the day.

The Scottish Prison Service and community justice partners have not made enough use of discretionary existing provisions in law to avoid Friday releases that have been available to them since 2015 – a point which has been raised more than once by MSPs

in the Scottish Parliament. The proposal in this Bill of making Fridays an 'excepted day' should promote more consistency in practice.

This practice of making early release available to avoid Friday release already happens in some other jurisdictions. In New Zealand, there are 'non-release days', which includes Fridays (NZ Department of Corrections, 2022). If an individual's release date falls on a non-release day, then their actual release date will be the nearest preceding Wednesday, Tuesday or Monday. There are equivalences with the 'excepted day' and 'suitable release day' provisions in this Bill.

*Release of long-term prisoners on reintegration licence*

This is an interesting proposal and we look forward to hearing discussions of the detail of how it will be implemented, if passed. The Bill's Policy Memorandum is well founded in its emphasis that the vast majority of people will return to communities at some point, underscoring the need to improve supports for that process of release and reintegration. Salient questions and context are relevant here: What are the key ingredients needed to enable people to desist and reintegrate after prison? What does this proposed reintegration licence do to enable these things? Or, put simply, what is reintegrative about a reintegration licence? Both of us have written extensively on rehabilitation, desistance and reintegration, including multiple books, meaning these questions and topics are of significant interest.

Though obvious, it is worth stating clearly that imprisonment is inherently 'dis-integrative' and 'de-habilitating'. By its nature, imprisonment separates people from important social relationships and supports and (by virtue of processes of institutionalisation) it often diminishes people's personal resources, capacities and skills (Schinkel and McNeill, 2015). This is precisely why (1) we should use imprisonment as sparingly as possible; (2) we should progress people in prison to release as quickly as possible (to minimise these harms and their enduring effects); and (3) we should provide timely and effective support with rehabilitation and reintegration both during and after imprisonment.

The proposals in section 7 are broadly in line with these important and evidence-based principles, insofar as they clarify arrangements for early release of short and long-term prisoners in certain circumstances. For those serving long-term sentences, the effect of the Bill (section 7(4) and 7(5)(3AB)) is to replace the (current) possibility of release on HDC with release on a 'reintegration licence' pending a potential parole date. Though we will welcome more detail of how this will work, this proposal of integrating uses of electronic monitoring with supervision and support seems to be broadly coherent with what has been recommended in Scottish and European EM research (McIvor and Graham, 2016; Hucklesby et al., 2016).

The judicious use of the proposed measure has potential to better inform Parole Board decision-making (since progress on the reintegration licence can be assessed as part of their decision-making) and to better prepare long-term prisoners for parole, by facilitating their gradual return to the living in the community, but under strict conditions and with control measures in place.

The Bill also proposes certain exclusions from such release in relation to certain categories of prisoners. It might be useful to seek further clarification of the rationales for these three exclusions: in particular, why exclude people subject to mental health orders rather than requiring case-by-case assessment of risks? Are these exclusions driven by public protection concerns or by concerns about public acceptability of the early release on licence of such categories of prisoners? Both concerns may be legitimate, of course, but both should also be approached in an evidence-based manner, in our view.

It is worth noting that almost all prison sentences in Scotland are completed in the community under some kind of release licence, with or without active supervision (McIvor, Graham and McNeill, 2019 ). Indeed, this is the common practice in most advanced democracies (see Dünkel et al., 2019 ). It is usually justified both in terms of mitigating the adverse impacts of imprisonment and in terms of public safety: Releasing people without adequate planning, care and support (and, if necessary, supervision) represents a failure of the state to properly complete the process of punishment, which it has a duty to do in the best interests of both the community and the punished person. As a matter of justice, this kind of supervision and support cannot be added on to a prison sentence without violating the principles of parsimony and proportionality, so it must be seen as a necessary and important part of the prison sentence, not as its termination nor as its displacement by a community-based measure.

Section 7 then, like any early release arrangement, should not be misrepresented as reducing sentence lengths or severity, nor as exposing the public to additional risks. Rather, it is an option that is better seen as a technical measure linked to professional decision-making about how best to enable safe release and reintegration.

A final reflection is that what is proposed in section 7 in the Bill seems to bear some resemblance to early release mechanisms (up to 6 months, 9 months or 12 months before the regular date of early release) available elsewhere in Europe, for example, in Finland, Austria, Lithuania, France, Sweden, Switzerland and the Netherlands (Dünkel and Weber, 2019 ). It is worth summarising an example here, to offer some insights that may be relevant to discussions of section 7 of the Bill and its implementation, if passed. In Finland, ‘supervised probationary liberty’ (also called ‘probationary liberty under supervision’ in the Finnish Criminal Code, the Act of Probationary Liberty under Supervision 629/2013 and the Imprisonment Act ) is an early release programme with a legislative basis that has been available since 2006-2007. Designed for long-term prisoners, it is available up to six months prior to normal conditional release from prison. The target group for probationary liberty is those serving over four years, typically for serious violent offences (including homicide) and aggravated drug-related offences, and people on life sentences (Lappi-Seppälä, 2009 ). Electronic monitoring is used in all cases of supervised probationary liberty in Finland, but it is combined with activities and supports focused on reducing reoffending, promoting rehabilitation and social integration (Linderborg, Tolvanen and Andersson, 2020 ). People on probationary liberty can live at home, at a halfway house or in a residential rehabilitation centre. Part of this form of early release is the expectation of spending time working or doing productive activities. There is the capacity for cooperation and information sharing on sentence planning for these individuals pre-release and post-release with social, health, housing and employment authorities (from 2023 onwards,

this type of activity will be coordinated with 22 ‘wellbeing services counties’ across Finland , a responsibility previously held by local authorities). Supervision of those on probationary liberty by probation staff ‘differs markedly from regular parole’, in that it is more intensive and individualised to the sentence plan and reintegration needs of the person leaving prison (Lappi-Seppälä, 2019: 115 ). The decision-making authority for granting supervised probationary liberty is held by professionals working in an Executive agency, such as input from prison-based staff and a decision by Assessment Centre staff in Rikosseuraamuslaitos (in English: Prison and Probation Service of Finland). In 2016, 690 prisoners were released on supervised probationary liberty in Finland, with a daily average of approximately 200 on this measure, which equates to 7% of the daily prison population (Lappi-Seppälä, 2019). Prisoners released through probationary liberty under supervision commit fewer new offences than other types of released prisoners (Rikosseuraamuslaitos, 2022).

Villman’s (2022) research with people on probationary liberty in Finland offers insights into what enables reintegration and desistance and what can, in some cases, hinder it while on this form of early release. Villman’s (2022) study finds that people released on probationary liberty with EM express positive views about it as an idea or option, especially if compared to still being in prison, and this is consistent with findings in other research literature. The aspects of probationary liberty that enable their reintegration and desistance processes are the practical support that ease the release process, and the social interaction and integration that can come from it, e.g., within the requirement of work or other productive activities, or being able to take part in rehabilitation and recovery-oriented activities in the community. Some participants spoke of wanting the support to reintegrate after years in prison:

‘It helps to surmount the re-entry, like after many, many years in prison, it helps you to see how things are nowadays. ’Cause after this many years, everything has changed; places, things, how to function in society, all these things. It changes so quickly that you are completely out of it. Early release with EM can help with those things and ease the release’ (participant in Villman, 2022: 9).

However, in some cases, the intensity of the supervision and strict requirements of this form of early release, and the barriers to gaining meaningful or ‘real’ work are frustrating for some individuals (Villman, 2022). One participant offered a view of probationary liberty that encompassed both helpful aspects and a sense of pressure from strict requirements and surveillance, saying ‘it’s a good thing but it surprised me how mentally hard early release with EM was’ (in Villman, 2022: 12). In Scotland, it is worth considering in more detail what elements and supports should be incorporated if reintegration licences are to be successfully introduced.

*Emergency power to release prisoners early*

In our view, the powers created by section 8 represent a pragmatic and sensible development, which, we hope, will draw on lessons learned during the COVID-19 pandemic. The penal codes of many countries make provision for the use of executive release is certain circumstances, such as civil emergencies. Our understanding is that this power is available to the Government in England and Wales, for example. The measures in the Bill to exclude certain categories of prisoner from such release, and to

allow risk-based judgements to over-ride executive release in certain cases, seem commensurate with the careful use of such a power.

*Duty to engage in planning for the release for prisoners*

This proposal is welcome; improving release planning for people leaving prison is something we support. More detail of what this section of the Bill will mean in practice is of interest. There is scope to be bolder and go further with this proposal, yet resources and capacity are pragmatic concerns. What happens if those persons and bodies with a duty to engage do so, but there are still significant gaps in access to service provision and support for some people leaving prison? Seeking a more collaborative and coordinated approach in this area is the right direction. What impact that has on post-release outcomes and timely access to universal services will be of interest.

*Throughcare support for prisoners*

We agree that the availability and consistency of throughcare support should be improved across Scotland. Our response to this question is inter-connected with our response to the question on section 9 of the Bill about a duty to engage in release planning for prisoners.

A recent Review of Throughcare in Scotland found that:

‘there were systemic barriers, beyond the control of community justice social work, which were getting in the way of successful reintegration. For example, it was not routinely possible for services to reserve the safest, most suitable accommodation prior to release. This meant that individuals leaving custody without an address had the anxiety of not knowing where they would be sleeping on the day of release’ (Care Inspectorate, 2021: 5).

The Throughcare Review also identified major gaps and barriers to accessing services that are needed for reintegration, particularly with accessing mental health services and social security benefits such as Universal Credit. Waiting times are an acute issue.

Similar issues are acknowledged in a recent themed visit report on mental health support in Scotland’s prisons by the Mental Welfare Commission for Scotland (2022), which has a chapter specifically on liberation arrangements and throughcare. Liberation at short notice is identified as a ‘significant challenge’, with variations across prisons resulting in ‘a lack of joined up and accessible throughcare and aftercare mental health support for prisoners on release’ (page 71). The report quoted a psychiatrist’s perspective, which is illustrative of these issues:

‘On the matter of liberation, this has always appeared to happen in a chaotic fashion, with prisoners leaving to no registered GP or address. This means that potentially prisoners are leaving with no means of getting their medication beyond about a weeks’ supply, no GP to pass over any care needs to, and often no address to be able to refer to a community team, or even just to pass information over. It also does not promote stability of mental health if prisoners are leaving with no address or GP. If prisoners are leaving at their EDLs this is often known in advance, it seems like it should be possible

to plan liberation better and give prisoners a better opportunity to succeed in the community' (Psychiatrist quoted in Mental Welfare Commission for Scotland, 2022: 71).

On the same theme, Scotland's National Action Plan for Human Rights (SNAP 2 , 2019: 29) specifically mentions people with mental health problems as one of the groups whose views and human rights need to be better prioritised in Scottish Justice, in prisons and communities.

In light of these issues, are there other persons or public bodies which should be considered for inclusion in section 10 the Bill? We are aware that the Bill's Explanatory Notes states that 'executive agencies are not statutory bodies', as well as the differentiation of types of bodies listed in the National Public Bodies Directory. However, we would like to press the question of whether certain persons and public bodies (such as Social Security Scotland and the DWP; or Scottish Prison Service) should be added to lists in section 10 of the Bill of needing to be consulted 34B(4) and/or having a 'duty to comply' 34C(2) with the proposed Throughcare Support Standards? If charities/the third sector can be added to 34B(4), then why are these bodies omitted? Furthermore, why are relevant bodies with scrutiny and oversight functions not directly named in the list 34B(4) of those to be consulted on the development and publication of 'Throughcare Support Standards'? There may be sound reasoning for this, but we believe it is worth examining in more detail. We ask the Criminal Justice Committee to consider whether public bodies such as the Care Inspectorate, HM Inspectorate of Prisons for Scotland, the Mental Welfare Commission for Scotland, the Scottish Human Rights Commission and/or the Equality and Human Rights Commission should be named in relevant parts of section 10 as having to be consulted by Scottish Ministers. Several of these bodies are members of the UK National Preventive Mechanism (NPM), which promotes and monitors compliance with international standards and human rights legal obligations, including OPCAT (UN) and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (Council of Europe).

Finally, we wish to explicitly recommend that Scottish Ministers should consult people with lived experience and their families (including their representatives/groups) on the proposed Throughcare Support Standards. This may or may not need to be stated in section 10 on the face of the Bill, but it is important and worth directly acknowledging here.

*Do you have any other views on the Bill?*

It will take more than legislation alone to make progress in these areas. In considering making progress towards decarceration and enabling reintegration, the Committee might consider what levers do the Scottish Prison Service already have within their power and are they using them effectively? There are wider contextual and systemic factors which may have significant influence on the extent to which people are well prepared for release and reintegration and on the numbers/use/uptake of some proposals in the Bill. For example:

- Open Estate: Why is use of the Open Estate plummeting, when it is designed and intended to prepare people serving long sentences for release? The SPS

Open Estate has a design capacity of 285 people. In June 2021, the Open Estate was operating at 52% capacity, with 150 people, and a year later in June 2022, the Open Estate was operating at 36% capacity, with 104 people (SPS, 2022).

- Temporary Release: To what extent is temporary release on licence being used for reintegrative purposes (including those listed in Part 15, rule 136 of the Prisons and Young Offenders Institutions (Scotland) Rules)? Why is there no publicly available data on the use of this mechanism by the Scottish Prison Service? In various other jurisdictions, temporary release is used as a graduated, structured form of preparation for community reintegration.

- Progression: One of the most pressing and critical issues in Scottish prisons is progression (through the sentence towards release) – or rather the lack of it. People in Scottish prisons are frustrated about the lack of opportunities for rehabilitation and for preparation for release and reintegration. The pandemic may have exacerbated these problems, but their existence precedes it. Nearly every recent prison monitoring or inspection report by HM Inspectorate of Prisons for Scotland (HMIPS) lists problems with progression and access to opportunities and activities to prepare for release. Recent figures released in an FOI response (SPS, 2022 ) show that there have been 1,146 prisoner complaints about progression and 352 complaints about prisoner programmes in the years 2019-2021. The Throughcare Review by the Care Inspectorate (2021) identified progression as one of the areas that needs further exploration in order to ensure best practice in supporting throughcare, acknowledging that the forthcoming thematic review of progression led by HM Inspectorate of Prisons for Scotland (HMIPS) will help to inform understanding in this area. We believe these issues and influences are also relevant in the context of Parliamentary discussions of this Bill. Delaying progression (through the failure to provide adequate opportunities for people in prison) is one contributing cause of our high prison population and of overcrowding; it is also a waste of public resources and of human potential. It undermines legitimacy and fairness in the administration of justice, which is likely to undermine the effectiveness of sentences. In this respect, keeping people locked up longer than necessary does not service the public interest or keep the public safe.

- Staff Absence: High numbers of prison staff absence have been recorded in recent years; for example, 1,050 staff were absent in April 2020 and 810 staff were absent in January 2022 (SPS, 2022). It is a priority issue for the Scottish Prison Service, and has been the subject of discussion by Audit Scotland (2019) and the Parliament's Public Audit Committee in the context of the high prison population. Staff absence has direct influences on things like access to purposeful activity, rehabilitative programmes, preparation for release and throughcare, when there are not enough prison staff to operate a full or normal regime. It may affect capacity to meaningfully engage with a few proposals in the Bill.

Although they have different remits, a cognate question is: what levers do Community Justice Scotland and community justice partnerships (CJPs) have within their power

and are they using them effectively? This is asked constructively in the spirit of exploring what more could be done to lead improvement and availability of community-based supports for bail, throughcare and reintegration and to pursue decarceration. Our understanding is that this is an area that Audit Scotland will be continuing to explore in the short- to -mid-term, in the context of court backlogs, the high prison population, and pressures on community justice partners. Building on the work that they have already done to date, are there powers afforded to Community Justice Scotland in the Community Justice (Scotland) Act 2016 that might be further developed and exercised in tandem with the practical implementation of this Bill, should it be passed into an Act?

The Scottish Government and Scottish Parliament often speak of Scotland's place in Europe. It is time for Scotland to better live up to its obligations and shift its course in this area of prisons and decarceration. Being a nation that imprisons its people at a higher rate than most other European nations is not compatible with the aspiration that we are sure members of the committee share; for Scotland to be a safe, humane and rights-respecting democracy.

We are grateful for the opportunity to offer our views in response to this Call for Views, and we will take a keen interest in the Parliamentary deliberations and scrutiny of this Bill. The Committee and Members are welcome to contact us regarding any of the list of sources of evidence referenced and any further details of what has been said in this submission. Thanks.

**Dr Hannah Graham**
Senior Lecturer in Criminology,
Scottish Centre for Crime and Justice Research (SCCJR), University of Stirling.

**Prof Fergus McNeill**
Professor of Criminology and Social Work,
Scottish Centre for Crime and Justice Research (SCCJR), University of Glasgow.

**8th September 2022.**