Criminal Justice Committee

3rd Meeting, 2022 (Session 6), Wednesday 25 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

- **John Watt**, Parole Board for Scotland
- **Mark McSherry**, Risk Management Authority
- **Jim Kerr**, Interim Deputy Chief Executive, Scottish Prison Service

Panel 2

- **Kenny Donnelly**, Crown Office and Procurator Fiscal Service
- **David Fraser**, Executive Director Court Operations, Scottish Courts and Tribunals Service

10. The Crown Office and Procurator Fiscal Service 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

11 January 2023

Panel 1

- Kate Wallace, Chief Executive, Victim Support Scotland
- Emma Bryson, Speak out Survivors

Panel 2

- Dr Hannah Graham, Senior Lecturer, Sociology, Social Policy & Criminology, University of Stirling
- Professor Fergus McNeill, Professor of Criminology & Social Work, University of Glasgow
- Professor Lesley McAra, Professor of Penology, Edinburgh Law School, University of Edinburgh

18 January 2023

Panel 1

- Stuart Munro, Convenor of the Criminal Law Committee, Law Society of Scotland
- Fred Mackintosh KC, Faculty of Advocates
- Joanne McMillan, Committee Member, Glasgow Bar Association

Panel 2

- David Mackie, Howard League Scotland
- Professor Nancy Loucks, CEO, Families Outside
- Wendy Sinclair-Gieben, HM Chief Inspector of Prisons, HMIPS

Panel 3

- Chief Inspector Nick Clasper, Policy and Partnerships, Criminal Justice Services Division, Police Scotland

Clerks to the Committee
January 2023

Annex: Written Submission

Panel 2

Written submission by the Crown Office and Procurator Fiscal Service

Overview

The Crown Office and Procurator Fiscal Service (COPFS) note that the Bail and Release from Custody (Scotland) Bill proposes to change the way imprisonment is used in Scotland and refocus the use of pre-trial remand in custody, with an emphasis on remand being reserved for those who pose a risk to public safety and, to a more limited extent, those who wilfully fail to attend court diets or pose a risk to the administration of justice. The Bill also places greater focus on the rehabilitation and reintegration of people leaving prison, to help them resettle in their communities.

The Bill was introduced at a critical time. Court backlogs, exacerbated by the Coronavirus pandemic, have led to an increase in case journey times and a resultant increase in the length of pre-trial remand periods.

During the Coronavirus pandemic, the number of people appearing from custody has reduced. The majority of accused persons are released by Police Scotland subject to an undertaking to appear at a specified court or for report to the Procurator Fiscal.

This submission focusses on the aspects of the Bill which relate to the system of prosecutions in Scotland and the work of COPFS.

Clause 1

Decisions on Bail: Relevant information from officer of local authority

Clause 1 of the Bill proposes to amend section 22A of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) to add an officer of the relevant local authority as a party that the court requires to seek information from (orally or in writing) prior to determining, at first appearance, whether to admit a person to bail. This is in addition to hearing submissions from the prosecutor and the accused, or a legal representative for the accused.

It is worth highlighting that the practical implementation of this proposed clause would require an appropriate member of local authority social work staff to be available to all courts in Scotland at any time that decisions on bail are being made at first appearance. Notably, in addition to cases where the accused is in custody at first appearance, this would include cases where the accused is at liberty and answering an undertaking to appear at a court. This may lead to an increase in the length of time taken for courts to process the first appearance of an accused person, whether the accused person is appearing from custody or otherwise.

It should be noted that in many cases where the accused is in custody, and in the majority of undertaking cases, bail is not opposed by the Procurator Fiscal. In such circumstances, the court is nevertheless required to consider whether or not to grant bail irrespective of whether or not the Procurator Fiscal opposes bail (section 23B(5) of the 1995 Act). The clause requires that an officer of the relevant local authority is given the opportunity to provide information relevant to the determination of bail to the court in every case where the court is considering bail. The court may require to adjourn, presumably with the accused remanded in custody meantime, in order to seek relevant information from an officer of the relevant local authority before a determination could properly be made, in the event that such an officer is unavailable. This may particularly be the case in smaller courts where there is not always a permanent social work presence in the court building.

It is also notable that the recent 'Decision-Making on Bail and Remand in Scotland: Interim Findings' report, by Justice Analytical Services, published on 27 July 2022, highlighted that concern exists regarding current social work capacity to deliver enhanced bail services and that service provision can be geographically inconsistent. The commitments in the Bill are significant and would require to be appropriately resourced. Alternatively, there is a risk that the provisions will have a negative impact on the efficient running of courts.

Clause 2 - Determination of good reason for refusing bail

Proposed section 23B(1A)(b)(i) of the 1995 Act - Statutory definition of "the interests of public safety"

Broadly, the proposal is that the principal reason for a court to refuse to admit a person to bail should be on the basis of any reason(s) related to "public safety".

Other considerations would remain relevant but usually only where public safety grounds existed.

Public safety, however, is neither a self-explanatory concept nor a concept that the criminal courts have significant experience adjudicating. In the absence of a statutory definition of, "the interests of public safety", it is likely that prosecutors, defence practitioners, officers of the local authority, and in turn courts, will experience significant issues in defining same. This will likely present difficulty for practitioners in presenting relevant submissions to the court and for courts to consistently apply the law.

In the short term, it is likely that the Sheriff Appeal Court will be called upon to shape and define what amounts to "the interests of public safety". This uncertainty is likely to be resource intensive and unwelcome when combined with a change in approach. For example, the concept of "public safety" is easily understood where it relates to an accused person who has a history of violence and is facing a charge involving a further allegation of violence. It is less clear, however, whether an accused person with a history of dishonesty, including theft by domestic housebreaking, who engages in further alleged housebreaking, perhaps at commercial premises, can be said to pose a risk to public safety.

Theft by housebreaking is primarily a charge of dishonesty. Nevertheless, the security of a property may have been overcome in circumstances where it was unknown whether an occupier was within. Such a danger is a harm which the public may, in appropriate circumstances, expect protection from and which they may regard as impacting on public safety.

In such an example, the accused person may also have a history of failing to appear at court diets and for offending whilst on bail. However, these factors, at least as they relate to summary proceedings, would not be relevant in the absence of factors related to public safety.

Without the concept of “public safety” being properly defined there is a risk that prosecutors, and in turn courts, cannot satisfy themselves that opposition to bail is competent, in the circumstances of a case. This creates significant challenge associated with attaching the appropriate weight to the factors relevant to the consideration and determination of bail.

It is acknowledged that the concept of “public safety” exists currently in section 23B(3) of the 1995 Act. Public safety has not, however, prior to this Bill, been the overriding ground relevant to the question of bail to the extent that its existence is the decisive factor between refusal of bail being competent or otherwise.

There are significant issues in failing to define “public safety” and understanding its scope.

Clause 2

Proposed section 23B(8) – statutory definition of “complainer”

Whilst COPFS broadly welcomes the concept of, “complainer”, being defined in the Bill, the definition is narrowly drafted as being the person against whom the offence to which the proceedings relate is alleged to have been committed. Where the facts and circumstances of an offence do not relate to an individual, but relate, for example, to a number of individuals (who may, or may not, be known to each other), a school premises, an official public office, or where the identity of the person against whom the alleged offence relates is meantime to the prosecutor unknown, it is not clear how “including the safety of the complainer from harm” should properly be interpreted.

The definition may be more meaningful if “complainer” was defined in the plural, however, there are practical benefits to a wider definition of “complainer” being considered.

Clause 2(2)

Proposed section 23B(1A)(b)(ii): “Prejudice to the interests of justice”

For the purposes of subsection 23B(1A)(b)(ii) the Bill states that, “prejudice to the interests of justice”, may be the course of justice in the proceedings being prejudiced as a result of, “withholding of evidence”.

It is not clear how, “withholding of evidence”, should properly be construed. One interpretation is that it refers to a person (not the accused person) withholding evidence whether that be withholding evidential material, physical evidence, biological evidence or otherwise, from the police or another investigating body. It may also include the risk that a person will not provide parole evidence to a court.

Another interpretation, however, would be that it includes the accused person themselves, “withholding evidence”, and thus prejudicing the interests of justice. The standard of proof in criminal proceedings is an evidential burden which falls upon the Crown. An accused person is, under most circumstances, not obliged to produce or provide evidence. It does not appear appropriate that this should be a factor relevant to the determination of bail.

Clarity in this regard would be beneficial.

Clause 2(3)

Proposed section 23C(1A): Grounds relevant as to question of bail

At present, in any proceedings in which a person is accused of an offence, the court is required to assess all available information, with a view to determining whether there is a good reason for refusing bail, having regard to the relevant risks identified by section 23C of the 1995 Act. Importantly, the current legislative framework provides that there is a presumption that bail is to be granted to an accused person unless there is a good reason for refusing bail.

In all cases, the court requires to have regard to the public interest. Public interest in this context includes, without prejudice to the generality of that expression, reference to the interest of public safety. Section 23C of the 1995 Act sets out the grounds which are relevant to the question of bail, all of which require to be carefully considered by the court after hearing submissions from the Crown and the defence.

This allows the court to protect the public interest, effectively manage risk presented by accused persons and simultaneously manage the justice system efficiently.

The proposed section 23C(1A) narrows the court’s discretion in this regard, relative to summary proceedings, where the court may take account of any such risk only where the accused person has previously failed to appear at a relevant diet, or the proceedings relate to an offence in terms of section 27(1)(a) of 150(8) (failing to appear at court without reasonable excuse).

It is noted that this statutory limitation will curtail the discretion of the court to refuse bail. In relevant summary proceedings it would require the court to grant bail to a person accused of an offence where the court could not be satisfied that refusing bail was necessary in the interests of “public safety” (as above), albeit that the accused person may have a lengthy history of failing to appear at court diets, and/or may have attempted, or indicated an intention to, evade justice by frustrating the justice process.

The experience of prosecutors is that accused persons regularly attempt to evade justice and they do so on a daily basis, in a wide variety of cases, by failing to appear

at court diets, without reasonable excuse, having been given due notice thereof. It is also a frequent occurrence in summary custody courts for an accused person to appear on a “new” matter which calls in court alongside separate ongoing court proceedings where a pattern of failing to appear can clearly be demonstrated. Accused persons do so in cases where, *prima facie*, there is no basis to remand on grounds of public safety.

Clause 2(3) arguably fails to take sufficient account of the impact an accused person’s attempt(s) to evade, or failure to cooperate with, the justice system has on victims and witnesses, including the requirement for witnesses to attend trial diets on repeated occasions and the associated anxiety and trauma which accompanies this lawful requirement, as well as the danger that the quality of victim or witness evidence will diminish over time.

A risk exists that the proposed section 23C(1A) does not recognise the reality of the risk to confidence in the justice system if a summary court cannot remand an accused person in custody, in circumstances where there may be clear information, or evidence, that an accused person is a flight risk, has a history of breaching bail orders, offending whilst on bail or the person is actively evading justice. Notwithstanding the seriousness of the alleged offence(s), accused persons who fall into any, or all, of the aforementioned categories, would still require to be granted bail if proceedings are raised on summary complaint and public safety grounds do not exist.

Failure to effectively mitigate this risk may result in further delays and inefficiencies being incorporated into the criminal justice system and have negative resource implications for those who work within it. It may also impact negatively on public confidence in the justice system.

Clause 11 – Provision of information to victim support organisations

At paragraph 321 the Policy Memorandum describes that the proposed amendments will allow victims to nominate a VSO/supporter to receive the information provided to victims under sections 16, 17, 17A of the Criminal Justice (Scotland) Act 2003 and 27A of the Victims and Witnesses (Scotland) Act 2014. However, sections 16ZA(1)(b), 17ZA(1)(b) and 27B(1)(b) of the draft Bill appear to enable the VSO/supporter to seek the relevant information directly from the Scottish Ministers without involvement of the victim. This may not be an accurate reflection of the policy intention.

The ability of the VSO/supporter to seek information directly without the involvement of the victim will make it essential that the vetting process to be conducted by SPS, as described in paragraph 326 of the Policy Memorandum, is clear and robust.

Separately, section 17ZA does not replicate all the criteria set out in section 16ZA so there does not appear to be a threshold which the supporter/VSO needs to reach in order to receive the information under section 17ZA. It may be that fully replicating sections 16ZA(1)(b), 16ZA(2) and 16ZA(3) in section 17ZA would be helpful in this respect.

Similarly, section 27B does not include an equivalent provision to that set out in section 16ZA(3).