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Criminal Justice Committee

Bail and Release from Custody (Scotland) Bill Stage 1 Report

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Contents

Criminal Justice Committee

To consider and report on matters relating to criminal justice falling within the responsibility of the Cabinet Secretary for Justice and Veterans, and functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.


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INTRODUCTION

1. The Bail and Release from Custody (Scotland) Bill ("the Bill") was introduced on 8 June 2022.

2. The Criminal Justice Committee was designated as the lead committee on the Bill.

3. The Bill proposes to make changes to the law in two main areas—

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

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

5. Part 1 of the Bill would make 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.

6. Part 2 of the Bill would make changes to prisoner release arrangements and the support provided to those being released. These include—

   - preventing prisoners from being released on certain days,
   - 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.

7. According to the Policy Memorandum published by the Scottish Government, the policy objectives of the Bill are—

> "…to introduce a number of reforms designed to deliver on the Scottish Government's commitment to refocus how imprisonment is used. They are intended to ensure that, as much as possible, the use of custody for remand is a last resort for the court, and to give a greater focus to the rehabilitation and reintegration of individuals leaving custody."

Evidence

8. The Committee received a substantial amount of useful written and oral evidence on the proposals in the Bill. This can be found on a dedicated page on the Scottish Parliament website.

9. **We thank everyone who contributed their input and expertise which has helped shape our views on the Bill.**

10. As well as hearing views in a formal setting, the Committee undertook a programme of engagement work on the Bill to inform our thinking—

- We held informal discussion sessions with the survivors of serious crime to discuss their views on the criminal justice system and the issues covered by the Bill,
- We held informal meetings with the Shine Women's Mentoring Service and the Council of Voluntary Organisations (East Ayrshire) Ltd to discuss their work and the challenges of supporting prisoners on their release,
- We held an informal meeting with prosecutors to discuss their decision-making processes when deciding whether or not to oppose bail,
- We visited Glasgow Sheriff Court to view the proceedings of a typical busy custody court.

11. **We are very grateful to all those who facilitated this engagement work and who took the time to meet with members of the Committee.**

Finance and Public Administration Committee

12. The Committee received a letter from the Finance and Public Administration Committee drawing our attention to the three submissions it had received in response to its call for views on the Bill's Financial Memorandum.

13. These submissions focused on the resource implications of the proposals in the Bill. The question of resourcing is an issue which we deal with in our own report.

Delegated Powers and Law Reform Committee

14. The Committee also received a report on the Bill from the Delegated Powers and Law Reform (DPLR) Committee on the delegated powers in the Bill.

15. The DPLR Committee was content with the majority of the delegated powers in the Bill.

16. However, the DPLR Committee made recommendations in relation to the delegated powers in sections 8 and 11. Section 8 includes a new emergency power to release prisoners early. Section 11 covers the provision of information to victim support organisations.

17. **We will refer to these recommendations of the DPLR Committee in the relevant sections of our report.**

Policy Memorandum

18. Under Standing Orders Rule 9.6.1, the lead committee scrutinising a Government Bill is required to consider and report on its Policy Memorandum.

19. The Committee does not have any specific points to raise on the contents of the Policy Memorandum.

20. The Committee does, however, comment on the policy objectives of the Bill. This is discussed later in this report.

Adviser

21. The Committee appointed an adviser, Chris Miller, an advocate, to provide advice on the legislative framework for the granting of pre-trial bail. We thank Chris for his useful input.

Information available to the Committee

22. In this report, we will discuss each of the main sections of the Bill in turn.

23. However, we first wish to make some observations about the information available to the Committee and how this has impacted on our scrutiny of the Bill. This has particularly impacted on our examination of the provisions in Part 1 of the Bill.

Anticipated reductions in numbers on remand

24. Our first observation is that the Scottish Government has not given an indication of what specific reduction it anticipates seeing in the remand population as a result of the proposals in the Bill, neither has it set out any target or detailed modelling as to what reductions it is aiming for or we could expect to see.

25. The Cabinet Secretary for Justice and Veterans indicated that the Bill aims to reduce the overall remand population. He told the Committee—

> "If you look back into the history of the issue, you will see that there have been a number of attempts to try—almost by persuasion and by respecting the independence of the courts—to achieve the reduction on the number of people on remand for the best of reasons, but that those has not been effective. We believe that legislation is required." [1]

26. The Cabinet Secretary also noted that the Bill was a response to the Committee's Judged on Progress Report in January 2022. The Committee's report stated—

> "A priority issue this parliamentary session for organisations in the justice sector must be addressing the high numbers of prisoners on remand and improving the experience of those prisoners who must be held on remand. Our predecessor committee reviewed the situation back in 2018 and, over three years on, there is no discernible sign of substantive progress on the numbers being held despite the concern of many. That cannot continue." [2]

27. However, the Cabinet Secretary was also clear that—

> "We have not said that the primary purpose of the bill is to reduce the numbers in prison. We have not made that statement. I think that there have been some indicative figures of what a reduction might look like by one of our stakeholders, but the purpose is to make sure that only the people who need to be held in custody are held in custody. That is the primary purpose of the measures, and we think that this legislation is the best way to do that." [3]

28. Philip Lamont, a Scottish Government official, noted that "the Government has not predicted in the financial memorandum that there will be a particular reduction in the use of remand." [4]

29. We also note that witnesses were not in a position to specify what the optimum level of the remand population should be.

30. Sharon Stirrat of Social Work Scotland commented—

> "I do not have an answer on what the number should be, but I agree with what everyone has said: 30 per cent of the population is definitely very high." [5]

31. Keith Gardner of Community Justice Scotland told us—

> "It is difficult to put a number on it. It is more about appropriate use. There is no question that remand, in some cases, is necessary. It is trying to find the necessity in that that is problematic." [6]

Reasons for increase in remand figures

32. Our second observation is that we have heard various explanations of why the remand population may have increased in recent years.

33. In considering this evidence, we are conscious of the need to distinguish between data relating to—

- the number of people remanded,
- the remand population – a product of the number of people remanded and the length of time spent on remand,
- the proportion of the prison population held on remand – affected by the level of use of both remand and custodial sentences.

34. One factor mentioned by witnesses has been recent increases in the number of people accused of violent and sexual offences. These individuals are, on balance, more likely to be remanded due to the serious nature of their crimes.

35. Kate Wallace of Victim Support Scotland noted—

> "…when you look at the numbers, you see that the increase in the remand population is being driven by the number of people who have been accused of sexual offences, which increased by more than 20 per cent in 2021-22, and the number of people who have been accused of violent offences, which went up by nearly 10 per cent." [7]

36. We also heard that the presumption against short sentences has had an impact on the percentage of the overall prison population on remand. The Cabinet Secretary for Justice and Veterans noted—

> "Bear in mind that, these days, since the presumption against short sentences was passed, a far greater proportion of the prison population in Scotland comprises violent and sexual offenders." [8]

37. An additional factor mentioned by a number of the witnesses was the impact of court backlogs caused by COVID, meaning that people are being held longer on remand whilst they await their case coming to court.

38. Kenny Donnelly of the Crown Office and Procurator Fiscal Service explained—

> "My understanding of the data is that fewer people have been remanded in custody in the past two or three years than was the case before the pandemic.

> The remand population is increasing because people are spending longer on remand as a result of the backlog and the inability to get through business." [9]

39. Jim Kerr from the Scottish Prison Service told us—

> "It is fair to say that our experience is that the past two or three years have disproportionately affected the number of people who are being held on remand in Scotland. Having said that, the historical trend in our use of remand as a justice disposal has been upwards. As an indicator, in 2019, we peaked at 1,600 people or thereabouts being held on remand." [10]

40. The Cabinet Secretary for Justice and Veterans noted that the pandemic had played a role in increasing remand numbers but was not the only factor at play. He said—

> "The length of time on remand, as I have just conceded, has been exacerbated by the pandemic. That is true of every jurisdiction. The concerns about the high levels of remand in Scotland, however, predate the pandemic. The 2018 report of this committee's predecessor said exactly that, but it has been said many times." [11]

Availability of statistical information

41. The final observation we wish to make is that we have faced challenges in obtaining accurate and clear information on the reasons for remand and the characteristics of Scotland's remand population.

42. Professor Fergus McNeill of the University of Glasgow noted—

> "We need analysts to give us detail on which aspects of the current remand population have grown, which are falling and which categories they are in." [12]

43. Wendy Sinclair-Gieben, HM Chief Inspector of Prisons Scotland, told us—

> "The gathering of data and statistics to inform why it is happening—why bail is being refused and why people are on remand—is really important That would really help. Although some statistics are gathered, they are by no means enough, and they are not publicly available in a way that would enable us to analyse them and draw some conclusions." [13]

44. We also note the importance of interpreting statistics in such a way that the information is useful for policy-making.

45. One example of this is the extent to which the use of remand is used in summary as well as solemn cases.

46. In April 2022, the Scottish Government published a paper analysing decisions on bail and remand in the sheriff courts, which found that remand was significantly more likely in solemn procedure cases, 40% compared to 7.7% of relevant summary cases. This is perhaps not surprising given that more serious cases are likely to be dealt with under solemn procedure.

47. However, it should be noted that during the five-year period April 2016 to March 2021 there were significantly more summary than solemn cases (315,740 versus 47,501).

48. As a result, even though remand was used in a smaller percentage of summary cases, the total number was significant given the overall volume of summary cases.

49. Philip Lamont, a Scottish Government official noted that—

> "…the undue harm that can be caused through a short period in custody, even if it is proportionately quite a small number in absolute numbers, can be significant given the volume of summary cases that go through the courts each year." [14]

50. This is an example of where it is important for statistics to be closely examined and set in context.

Views of the Committee

51. The Committee notes that the Scottish Government has not set a specific target for the number of cases where it is expected that the outcome would be different under the revised bail test. Judicial independence has sometimes been cited as a reason why such targets cannot be set. This is perhaps understandable, but it makes it harder for us to scrutinise the potential impact of the Bill and whether it will in fact make any substantive difference to the numbers of people being granted bail where they would previously have been remanded.

52. The Committee has sought to understand more about the characteristics and patterns of alleged offending behaviour of Scotland's remand population. In particular we have been interested to understand the reasons why Scotland's remand population has increased in recent years. We also note that data shows that Scotland has one of the highest rates of remand compared to other countries in the UK or the EU. [15] Is it a result of more serious crimes coming to court than was previously the case? Has the presumption against short sentences had an impact? Is it a result of the COVID backlog leading to individuals spending longer on remand which has the effect of increasing overall numbers? Is it a mixture of these or other factors?

53. Knowing this information is important because it helps our assessment of whether the provisions in the Bill are likely to be effective in reducing numbers on remand. The Bill has, in part, been introduced in response to concerns about the number of people being held on remand. The Policy Memorandum states that one of the Scottish Government's objectives is to reiterate that, as much as possible, the use of remand is a last resort for the courts. We do note, however, that it is already the case that there is a presumption that bail is to be granted unless certain conditions apply. On our visit to Glasgow Sheriff Court, we saw how this principle was being applied in practice.

54. We also note that the question of what constitutes the 'ideal' size of the remand population is not necessarily an easy one to answer, due to the complexity of different factors affecting numbers of individuals on remand and people's views on the purpose of remand and who should be held in this state.

55. Despite sourcing some statistics about the use of remand in Scotland, we have felt some frustration at not receiving complete answers to the key questions we have outlined above.

56. The Cabinet Secretary has argued that the Bill is necessary because concerns about high remand levels, which pre-dated COVID. Indeed, he noted that they were highlighted in a report by our predecessor committee in 2018. This is an issue which we returned to in our *Judged on Progress* report last year. In light of this, the Cabinet Secretary's position is that addressing the COVID backlog will not, in itself, be sufficient to address concerns about remand in Scotland.

57. We have no doubt that COVID has had an impact in increasing overall number of individuals on remand. However, we have not received sufficient evidence which properly quantifies what its actual impact has been on remand numbers. This has made it harder for us to understand whether the provisions in the Bill are necessary to reduce numbers on remand or whether non-legislative measures could just as readily affect change. In general terms, we think that policy-making is made easier if this kind of statistical analysis is made available.

58. We recommend that the Scottish Government, Scottish Prison Service and the Scottish Courts and Tribunals Service work with the Committee to agree what type of data needs to be collected and how frequently, in order that future decision-making can be based on a detailed understanding of: (a) the reasons why people are remanded; and (b) the numbers being held on remand, by crime, by gender, geographical area, length of remand periods etc.

59. That said, despite the limitations in statistics available to us, it is our role to make our best assessment of what the impact of the Bill will be, based on the evidence we have received. This is what we will go on to do in this report.

PART 1 OF THE BILL: BAIL

Section 1 - Input from justice social work in relation to bail decisions

60. Section 1 of the Bill seeks to enhance the role of justice social work where bail is being considered.

61. The Bill would require a court to give justice social work the opportunity to provide relevant information when the court is considering bail for the first time, and separately would allow the court to request further information from justice social work when considering bail on other occasions throughout the life of a case. The change seeks to support better informed decisions on bail at the pre-conviction stage of proceedings.

62. According to the Policy Memorandum, relevant information which justice social work may be able to provide, or which the court may proactively request from justice social work, could include matters about the accused, such as addiction issues, home life, what a remand decision might mean for parental responsibilities etc.

63. The Policy Memorandum states that “justice social work have a valuable role to play in helping inform the court whether or not further special conditions of bail are necessary, in addition to the standard conditions of bail."

64. The Policy Memorandum contends that—

> “Elevating the role of justice social work better empowers the court to receive a more holistic picture of the accused person prior to fundamental questions being determined that impact on an accused person’s liberty.”

65. The Policy Memorandum also clarifies that—

> “The blanket approach of mandating justice social work to provide information in every case was also rejected on the basis it was considered that retaining flexibility in the operation of the role of justice social work is important for workability.”
>
> “Accordingly, for all first appearances when the court is giving consideration to the question of bail, while justice social work must always be given the opportunity to provide relevant information to the court, it is not obligated to do so…”

Views on the proposals in the Bill

66. A number of witnesses who gave evidence to us on the Bill made the point that courts should have access to as much relevant information as possible when taking decisions on bail.

67. Tracey McFall of the Criminal Justice Voluntary Sector Forum told us—

> “When someone is in custody, it is really important to try to get the whole

> picture… It could be that they have lost their tenancy or have problems with drugs and alcohol. If they are a woman, there could be domestic violence issues." [16]

68. This view was echoed by Lynne Thornhill of Sacro. Rhoda MacLeod of Glasgow City Health and Social Care Partnership commented that "access to good health information on the individual concerned is pivotal when you are making a risk assessment". [17]

69. We heard a number of witnesses stress the valuable role justice social work can play in informing court decisions.

70. Stuart Munro from the Law Society of Scotland noted—

> "…we are often dealing with incredibly difficult, vulnerable people, who often have mental health or addiction difficulties. Without the information that comes from social work, it is difficult to expect judges to make the right decisions." [18]

71. Keith Gardner from Community Justice Scotland commented that he supported section 1 of the Bill because it will allow for professional social work input at the right time in the process.

72. Professor Lesley McAra of the University of Edinburgh told us—

> "I think that the intent is good. The notion of having strong information and robust risk assessments as part of bail decisions is very welcome, and I welcome those aspects of the bill." [19]

73. However, we also heard that at present there were inconsistencies in the provision of justice social workers across courts.

74. Tracey McFall of the Criminal Justice Voluntary Sector Forum explained the potential impact of these differences—

> "Not all courts have criminal justice-based court social workers. That in itself creates an inequality because, if the sheriff does not have the information that he needs in order to make the decision on a community disposal, he may have no option but to remand in order to get a report done." [20]

Resources

75. We heard a number of views that the enhanced role for justice social work which is envisaged in the Bill will have resource implications.

76. For example, increases in justice social work resources are likely to be required in order to provide the required information in bail assessments, as well as to support the availability of special bail conditions.

77. Professor Nancy Loucks from Families Outside made the point that if support is not available in the community then this could reduce the confidence of courts to use non-custodial options.

78. Tracey McFall of the Criminal Justice Voluntary Sector Forum told us that the issue of resources “is huge”. She went on to say that “it is an elephant in the room, and it has to be looked at". [21]

79. This view was echoed by a number of other witnesses, including Sharon Stirrat from Social Work Scotland and Professor Lesley McAra of the University of Edinburgh.

80. Gillian Booth of South Lanarkshire Council indicated that the council would look for additional funding from the Scottish Government. She commented that “there is very little scope left, nationally, in our budgets to sustain the potential volume of work from the assessments”. [22]

81. The Committee heard from some local authorities that the Financial Memorandum did not accurately reflect the financial implications of the Bill for them.

82. For example, the City of Edinburgh Council submission argued that the estimate in the Financial Memorandum that an additional two minutes of court time would be necessary per case was “a significant underestimation of the information sharing process in terms of the impact on justice social work”. The submission argued that the total time could be up to 15 minutes.

83. A submission from Inverclyde Health and Social Care Partnership argued that the estimation of 90 minutes per bail assessment was “on the conservative side” and that anecdotal evidence was more suggestive of an average assessment time of 120 minutes.

84. The written submission from COSLA stated—

> “This Bill will have resource implications for local authorities, many of which are not straightforward to estimate. We would strongly suggest that some type of detailed financial assessment of the Bill’s impact on local authorities, and specifically justice social work and housing, is required before relevant sections of the Bill are implemented, if we are to ensure that councils are fully resourced and able to deliver the increased demands that will be placed upon them through this Bill."

Operational implications

85. We also heard some concerns about the practical implications for the operation of courts of the enhanced role for justice social work.

86. Sharon Stirrat from Social Work Scotland noted—

> “Some courts run multiple hearings so, even if someone is in court, it is impossible for that person to be available in every court, and sometimes there can be some distance between the justice social work office and the local court. That is more of a challenge in rural areas." [23]

87. Dr Hannah Graham of the University of Stirling noted the “acute time pressures at the point of bail and remand decision making”. [24]

88. David Fraser of the Scottish Courts and Tribunals Service noted that if justice social

work report were required in every case that would create the potential for reports not being available when they were required in the court. This might lead to waits for reports to become available and cases could therefore be adjourned and recalled. He noted—

> "If the case related to an individual who was being held in custody, they might have to be held for additional time. That goes against the policy intention, which is to have fewer people on remand." [25]

Involvement of other organisations and individuals

89. We heard from several organisations who argued that, in addition to justice social work, other organisations and individuals should have a role in bail assessments.

90. Charlie Martin of the Wise Group felt that involving support workers would "give the background to the journey travelled". [26]

91. Suzanne McGuiness from the Mental Welfare Commission for Scotland argued that it is important that the sheriff be provided with all information about the person's mental ill health.

92. Kate Wallace of Victim Support Scotland argued that victims should be consulted by justice social work prior to any decision being made on remand or bail. She also argued that victims and complainers should be consulted on bail conditions as that will have a direct impact on them.

93. Emma Bryson of Speak out Scotland told us—

> "Nobody is better placed to understand the specific risk posed by a particular offender than the person who was the victim of their offending." [27]

94. At one of the informal meetings the Committee held with the survivors of crime, the following point was made—

- Sheriffs should take into consideration the risk posed to the victims, and their families, to inform bail decisions. Victims should be able to make a victim impact statement at the earliest opportunity which the sheriff should take into consideration to inform their initial decision to grant bail. Impact statements could also be given by other people who may be at risk or in fear if the accused is given bail, for example their children. Sheriffs would then be in a better position to consider whether contact between the accused and their children is safe and appropriate.

95. Chief Inspector Nick Clasper of Police Scotland told us—

> "When it comes to issues such as domestic abuse, we specifically give the Crown information on the victim's view of bail and any conditions that they feel may be appropriate. That is also covered as part of the standard prosecution report." [28]

96. Other organisations who mentioned the possibility of increased third sector involvement included the Criminal Justice Voluntary Sector Forum and Families Outside.

97. This was also raised at the informal meeting committee members held with the Council of Voluntary Organisations (East Ayrshire) Ltd.

National Care Service

98. A Bill providing for the establishment of a National Care Service is currently before the Scottish Parliament. The Bill would allow the Scottish Government to bring justice social work into the National Care Service, removing them from local authority responsibility.

99. The Committee took the opportunity to ask some witnesses whether justice social work should form part of the proposed new National Care Service.

100. Keith Gardner of Community Justice Scotland noted that a reference group has been formed specifically consider that question and that no decision has been made yet.

101. Sharon Stirrat of Social Work Scotland noted that she is part of this group, but its work is at an early stage.

102. Dr Hannah Graham of the University of Stirling told us that—

> "In my submission to the Scottish Government's consultation on the national care service, I said that not enough thought, planning and detail had gone into considerations around the inclusion or exclusion of justice social work." [29]

103. The Committee has recently published a report to the lead committee on the National Care Service (Scotland) Bill on the provisions in the Bill affecting criminal justice. This report sets out the Committee's position on the Bill, namely that it is not yet convinced of the merits of transferring criminal justice social work services to a National Care.

Views of the Scottish Government

104. The Committee raised with the Cabinet Secretary for Justice and Veterans the concerns which have been expressed about the resourcing of the proposals in the Bill. He commented—

> "We recognise that the enhanced role of justice social workers set out in the bill carries resource implications. Those were set out in the financial memorandum, which was informed by engagement with Social Work Scotland and the Convention of Scottish Local Authorities.
>
> I do not have to tell anyone here, I hope, that the financial landscape is extremely challenging, and we will need to continue to make difficult choices. Despite those challenges, we have continued to protect the community justice budget, such that, in 2023-24, the Scottish Government intends to invest a total of £134 million in community justice services, including £123 million for local authorities. We will continue to engage with Social Work Scotland and COSLA on the future resourcing requirements of the bill." [30]

105. The Cabinet Secretary also noted that any delays in receiving the justice social

work reports should be viewed in context—

> "Let us say, however, that there was a delay in receiving a justice social work report—for a case for which there would not previously have been a report—and that that person could then get bail. That delay of hours—possibly a day—must be compared with the number of days, weeks or months, even, that somebody might be on remand. There is a substantial benefit to be had there". [31]

Views of the Committee

106. The Bill would require a court to give justice social work the opportunity to provide relevant information when the court is considering bail. The new bail test will include an assessment of the risk to public safety of the accused. We discuss the new bail test later in this report. Justice social work will clearly have an important role in informing this risk assessment. In addition, information from justice social work can help the courts decide whether special bail conditions should be imposed.

107. In other words, for the Bill to work as intended, it is not simply the case of making the necessary changes to the legislation which sets the bail test. This change needs to be accompanied by an enhanced role for justice social work in order to realise the full potential of the Bill. Section 1 of the Bill seeks to facilitate this enhanced role.

108. We note that courts commonly seek input from justice social work before bail decisions. Indeed it is the case that sheriffs, where they deem it necessary, already do delay court proceedings in order to receive more information. It is also the case that in recent years there have been more ways in which those on bail might be supervised and/or supported. However, we heard that there may also be inconsistencies in the input of justice social work across the country. Resources also may be allocated differently in courts across the country.

109. We also heard calls for other organisations and individuals, including third sector organisations and victims of crime, to have a chance to input into decisions on whether to grant bail. We heard, for example, during our visit to CVO (East Ayrshire) that, because they work so closely with offenders, third sector bodies can provide a level of information and insight that justice social work may never be able to obtain as often these clients do not trust official organisations. We note the evidence from Police Scotland that in certain cases they have the opportunity to give the Crown information on the victim's view of bail and any conditions that they feel may be appropriate.

110. The Committee notes the vulnerable nature of many women prisoners; offending patterns among women; the high percentage of women in prison who have suffered brain injuries as a result of repeated domestic abuse; and the high percentage of women in prison who are mothers. On 25 January 2023, Jim Kerr, interim deputy chief executive of the Scottish Prison Service, confirmed that approximately 36% of women prisoners are on remand, which is higher than the figure for prisoners who are men.

111. We also heard from Howard League Scotland that there are too many cases – particularly involving women – where people are remanded because of a lack of criminal justice social work reports. This can have serious implications for those with caring responsibilities for children or elderly people. Whilst the courts may already take any potential impact on children into account when deciding whether to grant bail, we note the views of Sheriff David Mackie, speaking on behalf of Howard League Scotland and not on behalf of the judiciary, that "there is merit in considering the inclusion in the bill of a specific reference to the rights of children". We note his suggestion that the expression 'intimate partners' should be referred to in the Bill, to recognise victims' concerns and the risk of harm to complainers.

112. The new requirements in the Bill, by which justice social work has the opportunity to input in each case, were generally welcomed in principle. The hope is that this will encourage the more widespread adoption of existing good practice.

113. However, some practical concerns about this section of the Bill were raised in two broad areas. First, there were concerns about the impact on courts schedules and the time taken to process cases. This might have unintended consequences, for example the accused being remanded overnight due to the time taken to gather the necessary information. Unless there are good reasons for doing so which would be in the person's interests, this would be unacceptable. We heard there were different views about how much additional time might be required on average for each case to obtain the input of justice social work.

114. The second area of concern has been around resources. The Cabinet Secretary has acknowledged that sufficient resources for justice social work will need to be increased in light of the new requirements in the Bill. He has stated that an increase in funding is planned. However, some local authorities felt that the Scottish Government's Financial Memorandum underestimates the level of resources which will be required or that the required level of resource required could not be quantified. We also note that if justice social work is to move to the proposed National Care Service this may have resource implications.

115. We heard concerns that if the necessary resources are not available, there is a risk the policy objectives of the Bill will not be achieved. For example, if courts do not receive the necessary input from justice social work in decision-making, there may be less use made of special bail conditions as courts take a more risk-averse approach. In practice this could mean remanding individuals rather than imposing bail.

116. The Committee highlights to the Scottish Government these concerns about resourcing as potentially affecting the ability of the Bill to deliver its policy objectives. The Scottish Government must provide a clear indication at Stage 1 that the necessary resources will be provided to make these provisions work in practice. The Committee will carefully examine future budget allocations as part of the budget process to ensure that the resources have been made available are sufficient. We noted in our recent pre-budget report our concerns about the challenges facing criminal justice budgets over the next few years and the potential impact of below inflation settlements in many parts of the portfolio, such as community justice, that will be important in relation to the ability to implement the changes proposed by this Bill.

Section 2 - Grounds for refusing bail

117. Section 2 of the Bill seeks to change the grounds upon which a court may decide to refuse bail. It does this in two ways:

- Solemn and summary cases - adding a specific requirement that reasons for refusing bail must include a determination that this is necessary in the interests of public safety, including the safety of the complainer, or to prevent a significant risk of prejudice to the interests of justice.
- Summary cases - limiting the circumstances in which a risk that the accused might abscond or fail to appear can be used as a ground for the refusal of bail.

118. The Policy Memorandum explains the purpose of these provisions is—

> "….to refocus the legal framework within which bail decisions are made by a criminal court, so that the use of custody is limited to those accused persons who pose a risk to public safety, which includes victim safety, or to when it is necessary to prevent a significant risk of prejudice to the interests of justice in a given case."

119. The Policy Memorandum goes on to state that—

> "Accused persons who do not pose a risk to public safety or the delivery of justice should be admitted to bail as the criminal justice process proceeds.
>
> The benefits of this change, having regard to evidence which demonstrates the damaging effects of short periods in custody, will be to seek to reduce the undue use of custody for people not convicted of an offence who do not pose

a risk to public safety or the delivery of justice."

Views on the proposals in the Bill

120. The new bail test set out in section 2 is a key provision in the Bill which attracted a number of comments in written and oral evidence.

General views

121. The Committee received different views as to whether, in principle, the proposed new bail test should be supported.

122. The Lord President (the head of Scotland's judiciary) noted in a letter to us—

> "It is difficult to see how the proposed new structure will make any practical difference in outcomes. The overarching test, that bail is to be granted unless there is a good reason to refuse it, remains the same." [32]

123. The Lord President went on to say—

> "The prescriptive nature of what is proposed is likely to make submissions to the local sheriffs lengthier, increase the time taken to determine the issue of bail result in some accused persons being detained unnecessarily while inquiries are carried out, produce more errors, increase the opportunities for appeals and add to the heavy burden on the sheriffs and the staff who are tasked with the management of what can be extremely busy custody courts." [33]

124. On the other hand, the proposals were supported by organisations including the Faculty of Advocates, Community Justice Scotland, and Social Work Scotland.

125. Mark McSherry of the Risk Management Authority told the Committee—

> "We welcome the public safety test. We believe that there is a precedent for it and that we can work to address some of the questions that arise about the issue during the passage of the bill." [34]

126. Professor Lesley McAra of the University of Edinburgh told us—

> "I hope that the bill will both support victims of crime and, equally, help to reduce the remand population so that petty persistent offenders do not get caught up in the remand system but might have supervision that diminishes their risk of continuing to offend on bail." [35]

127. However, some organisations expressed concerns about the proposals in this section of the Bill. A written submission from Victim Support Scotland noted—

> "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."

128. The written submission from the Scottish Police Federation said that the proposals would be "as unwelcomed by communities plagued by repeat offenders as they will

be to police officers who work tirelessly to keep these communities safe".

129. Another point made by some witnesses was that any bail arrangements will inevitably involve an element of risk. Sheriff David Mackie, speaking on behalf of Howard League Scotland and not on behalf of the judiciary, commented—

> "Decades ago, we, as a society, made a decision in relation to mental health to do away with large residential institutions and move to care in the community. That was a risk that society was prepared to take and tolerate at that time. The same issue arises in relation to offending." [36]

130. Kenny Donnelly of the Crown Office and Procurator Fiscal Service noted that "the framework has to reflect the risk appetite of Government and the Parliament when it comes to what the basis for opposing bail will be…". [37]

131. Professor Lesley McAra of the University of Edinburgh also made the point that when we are considering issues of remand we should remember that more than half of people who were remanded in custody do not end up with a custodial sentence.

132. The Cabinet Secretary for Justice and Veterans provided his perspective on the new bail test—

> "The bill proposes a more prescriptive bail test, which some witnesses mentioned during your evidence sessions. I say up front that it is prescriptive, but it is prescriptive with a purpose; namely, to ensure that remand is used only as a last resort. Where public and victim safety requires remand, or where the delivery of justice in a case requires remand, the bail test allows the court to use remand." [38]

133. The Cabinet Secretary also commented on the question of whether it is necessary to tolerate an element of risk when it comes to granting bail. He commented—

> "I acknowledge…that risk is a part of the justice system. It is part of every justice system that I know of. I am happy for anybody to point to me a justice system—whether it is parole boards, courts or other parts of the system—that does not have to balance risks on a regular basis. I acknowledge the risks that are there, but we are trying to minimise those risks." [39]

134. In addition to general views on the principle of the new bail test, we also heard a number of views about what the practical effect would be of the new test.

Public safety test

135. One of the main concerns we heard was about an alleged lack of clarity in the Bill about what is meant by the term 'public safety'. This is not defined in the Bill.

136. Public safety is a key element of the new bail test. The Committee is aware that 'public safety' is an important consideration under the current bail test (see section 23B(3) of the 1995 Act) but also that it would arguably play a more central part of the proposed revised test.

137. A number of individuals and organisations were concerned that, without a clearer

understanding of what is meant by public safety, it is uncertain what the impact of the new bail test will be in practice.

138. Dr Hannah Graham of the University of Stirling commented—

> "Clarity is precious. My personal view [...] is that more detail is needed. The public safety test question is a legal question, but it has real consequences for people with lived experience, for the accused, for victims, and for the wider community in Scotland." [40]

139. Fred Macintosh KC from the Faculty of Advocates told us "if it is intended to be a change, it should be more overt, but, if it is not intended to be a change to the test, it is all pointless". [41]

140. Lynne Thornhill of Sacro commented that—

> "…what we mean by 'public safety' is critical. Across different justice sectors and organisations currently, the test can look a little bit different. The critical bit is about getting agreement on what the test looks like." [42]

141. Joanne McMillan of the Glasgow Bar Association wondered, in the absence of clarity on what is meant by public safety, whether sheriffs will, ultimately, apply the same tests and consider the same factors when taking bail decisions that are already in place.

142. The written submission from the Crown Office and Procurator Fiscal Service argued that there "are significant issues in failing to define 'public safety' and understanding its scope".

143. Kenny Donnelly of the Crown Office and Procurator Fiscal Service argued that a definition would provide clarity on the parliamentary intention behind the provision for the courts to apply. He noted that—

> "Different sheriff courts or, indeed, different sheriffs in the same court might take a different view of what public safety encompasses".
>
> "The issue for me is that sheriffs could broaden the definition of 'public safety' for other crimes in some jurisdictions and not in others. That would lead to inconsistency, confusion and, ultimately, inefficiency." [43]

144. A couple of specific examples were raised with us where witnesses felt the new bail test could be clearer.

145. First, whether someone accused of a crime such as housebreaking could be remanded on public safety grounds if the allegations did not involve any violence towards a person?

146. Second, in what circumstances (if any) would it be possible to remand a person accused of relatively minor non-violent offending (e.g. shoplifting) if further similar offending whilst on bail seemed likely on the basis of previous criminal convictions?

147. We heard that ultimately questions about the interpretation of the new bail test may be decided by the courts via appeals of bail decisions. However, Kenny Donnelly

raised concerns about this prospect—

> "Court time would then be taken up in interpretation and issuing judgments to clarify what the position should be and, all the while, people would either get bail or not get it because of a different interpretation of the law." [44]

148. We asked some witnesses if public safety is to be further defined, what that definition should be. Fred Macintosh KC explained that this was not something on which the Faculty of Advocates had a view. Sheriff David Mackie, speaking on behalf of Howard League Scotland, also declined to offer a definition. Mark McSherry of the Risk Management Authority felt that a definition might be something for guidance.

149. We asked the Cabinet Secretary for Justice and Veterans for his views on whether the term "public safety" should be subject to further definition—

> "The words 'public safety' have been part of bail law since 2007... Nobody indicated at that time the need for a statutory definition. I am not aware of any cases where the lack of a statutory definition has caused an issue. That is the context of the debate that members have been having." [45]

150. He explained the Scottish Government's approach to the definition of "public safety"—

> "The bill does not include a statutory definition of 'public safety', but there is a definition, which is the ordinary meaning of the words. In legislation, where the ordinary meaning of words is meant to apply, it is common practice not to include statutory definitions.
>
> "…the ordinary-meaning definitions reflect the policy intention of the meaning of the phrase 'public safety' in the bill. As such, we have to ask what benefit is to be gained by adding a statutory definition. It is worth pointing out that including a statutory definition is not without risk. There may be unintended consequences if the definition is limited unnecessarily." [46]

Absconding or failing to appear at court

151. A separate concern about the new bail test which was raised with us related to the proposal that in summary cases, a risk of an accused absconding or failing to appear at court, if granted bail, would only be allowed as a legitimate ground for remanding the accused in two situations—

- the accused has failed to appear at a previous court hearing in the case,
- the case against the accused includes a charge of failing to appear in court.

152. Kenny Donnelly of the Crown Office and Procurator Fiscal Service explained his view is that—

> "There is a risk—it could be seen as more than a risk—that that provision will result in more people not turning up for diets and, as a result, victims and witnesses having to be countermanded as witnesses and re-cited to attend on another day. That would not be good for the efficient running of the court

> service or for victims and witnesses with regard to the impact that it would have on them." [47]

153. In relation to the concerns about the proposed new limitations on the extent to which the risk of a failure to appear can be used a ground for the refusal of bail in summary cases, the Cabinet Secretary told us—

> "That is a legitimate concern, but what we are saying is that the safety test will dominate in that area. When we talk about the administration of justice—we can get the exact words; I could not put my finger on those right away—we are also potentially talking about things such as jury tampering or the intimidation of witnesses. It is also about continued and wilful non-appearance at court." [48]

Perspectives of victims of crime

154. The Committee also heard views about the implications of the new bail test from the perspective of the victims of crime.

155. Kate Wallace of Victim Support Scotland felt the inclusion of the concept of public safety was helpful. She went on to say—

> "It is also helpful that the bill mentions not only public safety but the safety of individual complainers and victims. Often, people think about public safety in general terms, rather than thinking about the safety of individual complainers. In the context of crimes such as stalking, it is useful to include both concepts." [49]

156. Emma Bryson from Speak out Survivors offered a similar perspective. She told us—

> "We broadly welcome the introduction of the public safety element, because from the general public's point of view, that is the purpose of remand, which absolutely needs to be stated.
>
> There is a difference between the concept of public safety, which is about keeping the general public safe from various forms of harm, and the safety of individual victims and complainers. That is a very different kettle of fish." [50]

157. However, Kate Wallace of Victim Support Scotland had concerns that if the new bail test led to more individuals on bail, this could impact on crime levels, as the necessary resources to monitor and support these individuals are not available. She commented—

> "Without any change to what is in place around bail—supervision, monitoring, management and support—yes, logic tells us that more people will be put at risk, there will be more victims of crime and more lives will be ruined. However, there is an opportunity to change the supervision, management and monitoring around bail. That would require a significant amount of resource and a significant number of different approaches that, it appears to me, we do not have in Scotland." [51]

158. This point about the need for close supervision of individuals on bail was also raised

at the informal meetings the Committee held with the survivors of crime. The following is an extract from the note of the meeting—

- Both women said that the accused being managed by the criminal justice system – by electronic tag, tracking and monitoring, and with serious consequences implemented for breach of bail conditions – would help to provide them with the reassurance they need about their personal safety and that of their children. It is not the victim's responsibility to manage the whereabouts of the accused. This needs to change. The accused should be held accountable for their actions.

Arrangements for case-marking

159. A final point the Committee wishes to highlight is about the arrangements for the marking of cases by prosecutors before they come to court for the first time. This issue is not directly related to a provision in the Bill but does affect how bail decisions are taken in court and so has been of interest to the Committee.

160. The Crown Office and Procurator Fiscal Service National Initial Case Processing Unit is responsible for marking almost all summary level cases across Scotland. Case marking takes place at centralised hubs.

161. Joanne McMillan of the Glasgow Bar Association commented that the prosecutors in the hubs do not have the benefit of the bail supervision report or of having spoken to the defence agent to find out whether there is an explanation behind it. Instead, the prosecutors set out the bail position and, if the sheriff grants bail, whether that should be appealed. This decision is then read out in court by fiscal who, in her view, has no discretion to take a different decision.

162. She commented—

> "You could have the most exceptional set of circumstances and explain that to the fiscal. Although the fiscal might completely understand where you are coming from, they will say that their hands are tied, because someone else—they might be more senior than them—has marked that and they cannot overrule them. That has taken away people's ability to make decisions at a local level to expedite matters." [52]

163. A similar point was made by Fred Mackintosh KC of the Faculty of Advocates.

164. Kenny Donnelly from the Crown Office and Procurator Fiscal Service responded to these concerns. He noted that there is nothing to prevent a depute fiscal in court, on hearing representations, from departing from the instruction that was given by the marking depute. However he also commented that in a busy court although—

> "...they might empathise with points that are raised by the defence, they would have to look at the whole picture in order to make a different decision, and they do not have time to do that." [53]

165. Kenny Donnelly expressed the view that centralised case-marking was not a factor in the concerns which had been raised, because it is a long-standing position that when fiscals are in a custody court, they do not mark the cases.

Views of the Committee

166. There have been differences of views from our witnesses about what the impact of the changes to the bail test will be. It has not been entirely clear to some observers if the proposed change is intended to be a minor reframing of the rules, or a more fundamental reform. Some witnesses argued that a narrowing of the grounds for bail will inevitably lead to significantly more individuals being granted bail. This has been a particular concern for organisations representing the victims of crime. Others, including the Lord President, have argued that the revised bail test would make little practical difference to outcomes.

167. We heard that some of the uncertainty regarding the likely impact of the revised bail test may be a result of the focus on 'public safety' and a lack of a common understanding of how that is to be interpreted. For example, it has been unclear to some witnesses whether it would be possible to remand a persistent shoplifter by reference to the public safety test. It was also not clear whether some offences, like housebreaking, would raise public safety concerns, or whether such a judgement would be taken on a case-by-case basis. Additionally the Crown Office has raised concerns about the proposed new limitations on the extent to which the risk of a failure to appear can be used a ground for the refusal of bail in summary cases.

168. It is not the job of this Committee to provide a legal analysis of how the new bail test will be applied in certain scenarios. Our role is to highlight where concerns have been raised by interested parties about the potential for different interpretations of the bail test in certain scenarios.

169. If the concept of public safety is capable of being widely interpreted, in practice, there might not be an appreciable difference to the outcome of bail decisions. Judges might feel they have the latitude to take the same decisions as they would have taken under the current bail test. Furthermore if different judges interpret public safety in different ways there might also be a risk of inconsistency of decision-making. We heard that ultimately some of these issues may be clarified via case law arising from appeals but this may take time to resolve itself.

170. That said, providing a definition of public safety on the face of the bill, or in a guidance note, would not be without its own risks. If the definition is too tightly drawn or, alternatively, too widely defined, then this risks significantly increasing or decreasing the numbers of individuals granted bail.

171. We note the Senators of the College of Justice's response to the consultation on the Bill, in which it was noted that the varying interpretations of what is meant by

public safety has the potential to substantially narrow the court's power to remand in custody. The Committee has heard evidence that a failure to provide guidance on what is meant by public safety could lead to uncertainty and appeals. The Committee considers that, whilst well intentioned, the Bill fails to address the concerns of Lord Carloway that the legislation will "introduce an unnecessary, cumbersome and artificial process" without changing outcomes in bail decision making. For some members, the factors that judges need to take into account would be preferable on the face of the bill.

172. As we have discussed elsewhere in the report, the actual impact of the changed wording of the bail test may depend on the resources made available to justice social work. If justice social work is well resourced then courts may feel better informed about the likely risks posed in individual cases and better able to judge that the accused poses no risk to public safety and therefore can be released on bail. It is also the case that if resources are made available to facilitate the option of special bail conditions then this is likely to have an impact on the numbers of individuals granted bail. Adequately resourced support and supervision for those on bail can help to ensure the public (including, most importantly, complainers) are protected and that the accused appears in court as required. In the previous section of the report, we discuss the importance of the necessary resources being made available by the Scottish Government.

173. It is also the case that some of the factors which impact on the outcomes of bail decisions are not necessarily a product of the bail test in legislation. For example, it does not appear that fiscals in court have much latitude to depart from the decision as to whether or not bail is opposed previously made by senior colleagues at the earlier case-marking stage, but nonetheless there is an accepted link between a bail decision and the attitude of the Crown in relation to the case.

Section 3 - Removal of bail restrictions

174. Section 3 of the Bill seeks to repeal section 23D of the Criminal Procedure (Scotland) Act 1995 which restricts the granting of bail in certain solemn cases. Section 23D currently provides that bail is only to be granted in exceptional cases if the accused is being prosecuted under solemn procedure for—

- a violent, sexual or domestic abuse offence and has a previous conviction under solemn procedure for any such offence; or
- a drug trafficking offence and has a previous conviction under solemn procedure for such an offence.

175. With the repeal of section 23D, decisions on the question of bail in all cases would be made under the new bail test. We discussed the new bail test in the previous section of this report.

176. According to the Policy Memorandum, the new bail test "has considerations of public safety and delivery of justice as the focus of the decision-making process" and remand can be imposed if the court considers it necessary.

177. The Policy Memorandum notes that "the benefits of this change will be to simplify the legal framework on bail so as to aid decision-making of the court and wider understanding as to how decisions of bail are made in each and every case before the court".

178. The wording of the text that is being repealed from the Criminal Procedure (Scotland) Act 1995 is as follows—

"23D Restriction on bail in certain solemn cases

(1) Where subsection (2) or (3) below applies, a person is to be granted bail in solemn proceedings only if there are exceptional circumstances justifying bail.

(2) This subsection applies where the person—

(a) is accused in the proceedings of an offence falling within subsection (3A); and

(b) has a previous conviction on indictment for an offence falling within subsection (3A).

(3) This subsection applies where the person—

(a) is accused in the proceedings of a drug trafficking offence; and

(b) has a previous conviction on indictment for a drug trafficking offence.

(3A) An offence falls within this subsection if it is—

(a) a violent offence,

(b) a sexual offence, or

(c) a domestic abuse offence.

(4) For the purposes of this section—

"drug trafficking offence" has the meaning given by section 49(5) of the Proceeds of Crime (Scotland) Act 1995 (c. 43);

"domestic abuse offence" means—

(a) an offence under section 1(1) of the Domestic Abuse (Scotland) Act 2018, or

(b) an offence that is aggravated as described in section 1(1)(a) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016;

"sexual offence" has the meaning given by section 210A(10) and (11) of this Act;

"violent offence" means any offence (other than a sexual offence) inferring

personal violence.

(5) Any reference in this section to a conviction on indictment for a type of offence includes—

(a) a conviction on indictment in England and Wales or Northern Ireland for an equivalent offence;

(b) if the court considers appropriate a conviction in a member State of the European Union which is equivalent to conviction on indictment for an equivalent offence.

(6) Any issue of equivalence arising in pursuance of subsection (5) above is for the court to determine.

(7) This section is without prejudice to section 23C of this Act."

179. The Bill proposes that the new bail test will be relied upon instead of the current section 23D.

180. The key provisions of the new bail test are as follows—

"23B Entitlement to bail and the court's function

(1) Bail is to be granted to an accused person unless the court determines that there is good reason for refusing bail.

(1A) The court may determine that there is good reason for refusing bail only if it considers that—

(a) at least one of the grounds specified in section 23C(1) applies, and

(b) having regard to the public interest, and having considered the imposition of bail conditions in accordance with subsection (2), it is necessary to refuse bail—

(i) in the interests of public safety, including the safety of the complainer from harm, or

(ii) to prevent a significant risk of prejudice to the interests of justice.

23C Grounds relevant as to question of bail

(1) In any proceedings in which a person is accused of an offence, the following are grounds on which it may be determined that there is good reason for refusing bail—

(a) subject to subsection (1A), any substantial risk that the person might if granted bail—

(i) abscond; or

(ii) fail to appear at a diet of the court as required;

(b) any substantial risk of the person committing further offences if granted bail;

(c) any substantial risk that the person might if granted bail—

(i) interfere with witnesses; or

(ii) otherwise obstruct the course of justice, in relation to himself or any other person;

(d) any other substantial factor which appears to the court to justify keeping the person in custody.

(1A) When determining whether there is good reason for refusing bail in summary proceedings, the court take account of any such risk as is mentioned in subsection (1)(a) only where—

(a) the person may has previously failed to appear at a relevant diet, or

(b) the proceedings relate to an offence under section 27(1)(a) or 150(8)."

181. A “Keeling schedule” provided by the Scottish Government which illustrates the proposed changes made to previous Acts by the Bill as introduced can by found on the Scottish Parliament website .

Views on the proposals in the Bill

182. The Committee heard concerns about the proposal to repeal section 23D from organisations representing victims of crime.

183. One of the main concerns expressed was that this would remove a safeguard for the safety of victims in cases involving sexual offences and domestic abuse.

184. Written evidence from Scottish Women’s Aid stated—

> “The statutory provision in favour of remand (section 23D) was inserted to emphasise the seriousness and risks associated with cases involving gender-based offending and domestic abuse and serve as an additional safeguard to remind judges of this matter…”
>
> “Far from acting as a protection to victims, the proposal in the Bill would, in effect, allow bail to be granted to convicted repeat and serial abusers of domestic abuse, including those who have perpetrated sexual assaults against women and who present a particular danger to women’s safety. Given women’s experiences of abusers being given bail, women need as much protection as the law can afford them.”

185. Written evidence from Rape Crisis Scotland noted its “significant concerns” at the removal of “an important safeguard”. These concerns were also echoed in the evidence we received from Victim Support Scotland and Speak Out Survivors.

186. Emma Bryson from Speak Out Survivors told us that—

> “We certainly have concerns about repealing section 23D, because it was specifically intended to address violence against women and girls, and we would very much like to see something replace that." [54]

187. On the other hand, the Committee heard views in favour of the repeal of section 23D.

188. One argument we heard was that the existence of section 23D can lead to "arbitrary" decisions being taken, and that decisions on bail should be left to the discretion of the court.

189. Stuart Munro of the Law Society of Scotland cited the following example—

> "At a practical level, if, say, a 45-year-old man is accused of a domestic violence offence and he had a conviction on indictment for domestic violence 20 years ago, the court would not be allowed, in principle, to grant bail, unless the exceptionality test was met. If, on the other hand, that 45-year-old man had half a dozen convictions in the past three years but all on summary complaint, section 23D would not kick in." [55]

190. He described section 23D as "a pretty arbitrary, one-size-fits-all kind of solution that does not really assist the court to make proper judgments as to who could or could not be trusted with being admitted to bail and let back out into the community". [56]

191. Fred Macintosh KC, on behalf of the Faculty of Advocates, expressed similar views that section 23D should be repealed.

192. The Committee questioned witnesses on whether the provisions in the new bail test would provide the necessary safeguards if section 23D was to be repealed.

193. Sheriff David Mackie, speaking personally whilst representing Howard League Scotland, supported the removal of section 23D. He felt that the provisions in the Bill would provide sheriffs and judges with the necessary discretion to address the concerns of victims.

194. Fred Macintosh KC had a similar view, telling the Committee "the most dangerous people, about whom victims groups are worried, will probably be remanded anyway, and I do not think that that will change". [57]

195. Mark McSherry of the Risk Management Authority welcomed the proposed removal of section 23D on the basis that risk, rather than offence type, should be the principal consideration in bail decisions. He told the Committee—

> "Our view is that we should remove the very broad categories and replace them with in-depth understanding of the risk that an individual poses. We should not just consider the index offence." [58]

196. A written submission from the Justice Services for Young People and Adults of the City of Edinburgh Council stated that "each case should be considered on its own merit with no blanket decision-making being applied across cases".

197. Written evidence from Sacro supported the proposal to repeal section 23D provided there was a risk assessment which took account of the implications of granting bail. The Sacro submission also noted victim's perspective is important.

198. We asked the Cabinet Secretary about some of the concerns which had been expressed by organisations representing the victims of crime about the repeal of

section 23D. He noted that public safety will be "at the heart of the new bail test". He went on—

> "Although it will be for the courts to decide, virtually anybody who was refused bail under section 23D would likely be refused bail under the new test. That will bring more consistency and specifically includes the concept of victim safety, which is important to your point about victims of domestic abuse being a factor when making a determination on a person's entitlement to bail. It goes further in saying that any assessment of the risks should include physical and psychological harm to the victim." [59]

Views of the Committee

199. The Committee has been acutely aware of the concerns expressed by organisations representing victims of crime regarding the proposal to repeal section 23D. The Committee has explored with a number of witnesses what the impact of the repeal of section 23D will be and how, in practice, it will impact on bail decisions. The Committee notes that there appears to be a view from many observers that the removal of section 23D would not impact on how the courts take into account the safety of victims. Furthermore we heard arguments that the removal of section 23D could bring some advantages in terms of better decisions by courts as it would allow judges to exercise a degree of discretion.

200. The Committee's main focus in examining this proposal has been to satisfy ourselves that the repeal of section 23D will not lead to adverse effects on the safety of victims, particularly in relation to cases of domestic abuse and violence against women and girls. We have listened carefully to the reassurances we have been given from a number of organisations and individuals about the impact of the repeal. Whilst some members of the Committee are persuaded that the focus on public safety in the new bail test, including the reference to the safety of the complainer, will provide the necessary safeguards for the repeal of section 23D to go ahead, others do not hold this view given the conflicting views we heard.

201. However it is clear that organisations representing the victims of crime are not convinced by the repeal. The Scottish Government must have dialogue with them to provide the necessary reassurance regarding the impact of the repeal.

Section 4 - Stating and recording reasons for refusing bail

202. Section 4 of the Bill seeks to expand the current requirements for a court to state its reasons for refusing bail and to require the recording of those reasons.

203. The courts would need to address certain issues when explaining their reasons for refusing bail. This would include, amongst others, stating why concerns about release on bail could not be adequately addressed by requiring the accused to be electronically monitored as part of a special bail condition.

204. The Policy Memorandum explained the rationale behind this proposed change, namely that it will—

> "…reflect the seriousness of a decision to place an accused person in custody at the pre-conviction stage of the criminal justice process and emphasise the measures available to help support accused persons remaining in the community. Over time, the recording of reasons will also improve transparency and general understanding of this part of the court's decision-making process at a critical point when a person not convicted of any offence loses their liberty."

Views on the proposals in the Bill

205. A number of organisations commented on this provision in their responses to the Committee's call for views. Many of them were supportive, including (for example) the Wise Group, West Lothian Council, the Law Society for Scotland, the Children's and Young People's Centre for Justice, and Social Work Scotland.

206. The written submission from Sacro noted that the proposal was consistent with a human rights approach and "provides a level of accountability when someone is being deprived of their liberty".

207. The Criminal Justice Voluntary Sector Forum written submission argued that the reasons for denying bail should be recorded in clear, accessible language to make it easy for people to understand.

208. A written submission from the Justice Services for Young People and Adults of the City of Edinburgh Council supported the provision in the Bill, but noted that some information might need to be withheld, for example in certain domestic abuse cases to protect the victim.

209. Kate Wallace of Victim Support Scotland felt that written reasons why bail had be granted should be provided as well as the reasons why bail had been denied.

210. On a practical level, David Fraser of the Scottish Courts and Tribunals Service explained the likely impact of the requirements under this section of the Bill—

> "The SCTS thinks that a requirement for manual recording would create the potential for courts to run for longer. We might also have to make changes to COPII—our criminal operations digital case management system—so there would be a cost incurred not just in terms of the time that it takes courts to run but in adapting our system so that it could record that." [60]

211. There were some views not in favour of the provision. The written submission from the Scottish Police Federation stated that—

> "SPF are perplexed as to the purpose of this measure. Our experience is that a discussion on the eligibility and rationale for being granted bail, or not, takes place in the presence of the accused (the only person for whom it matters)

and that this would be recorded in the court proceedings in any event.

212. Joanne McMillan of the Glasgow Bar Association expressed the view that it is not necessary to provide a written explanation unless an appeal is being made. She noted that sheriffs are already under pressure with their workload.

213. The Cabinet Secretary for Justice and Veterans explained the rationale behind the proposal in the Bill. He argued that the written recording of reasons would provide "a seam of really rich information" which over time would lead to greater refinement of those decisions. [61]

Views of the Committee

214. The Committee understands that the primary rationale for this provision is to provide a resource for future research on bail and remand. This of course has value. The Committee has made the case earlier in this report for the importance of having access to better data relating to the use of remand.

215. However, the Committee has also noted that concerns have been expressed about the time taken in court to fulfil the requirements of this section. We also understand that the reasons for refusal of bail are, as standard, set out verbally in the court room. Furthermore, it is already the case that a written explanation of reasons is given in the event of an appeal against a bail decision.

216. As such we are not clear that the case has been made for the requirement in the Bill for a written statement on all occasions where bail has been denied. We would ask the Cabinet Secretary to rethink the wording of this section so that we do have the opportunity to monitor decision-making without making this too onerous.

Section 5 - Consideration of time spent on electronically monitored bail in sentencing

217. Section 5 of the Bill would require a court, when imposing a custodial sentence, to have regard to any period the person spent on bail subject to an electronically monitored curfew condition. This could be pre-trial bail or bail whilst awaiting sentence.

218. The Bill generally provides for one-half of that period to be deducted from the proposed sentence, whilst allowing a court to disregard some (or all) of the time spent on such bail where it considers this appropriate. Where the sentencing court does disregard any part of the period on such bail, it would need to state its reasons

for doing so. The Bill does not seek to provide any guidance on what might amount to a valid reason.

219. Our understanding is that this is likely to arise where a person has failed to comply with bail conditions. Presumably, the nature of any such failure would be taken into account by the court when deciding whether to disregard any period of bail (including the length of time to be disregarded).

220. The Policy Memorandum states—

> "The benefit of this approach is to recognise the restriction of liberty imposed through electronically monitored bail in a way that ensures there is consistency and fairness in how courts determine the relevance of time spent on bail subject to electronically monitored conditions for sentencing purposes."

Views on the proposals in the Bill

221. A number of the responses to the Committee's call for views supported this proposal including (for example) South Lanarkshire Council, Families Outside, Sacro and the Law Society of Scotland. The submission from Social Work Scotland stated—

> "Given the punitive, restrictive and intrusive nature of EM [electronic monitoring] it is right that the court considers this when imposing a prison sentence."

222. The proposal was not, however, supported by Victim Support Scotland, Scottish Women's Aid and Rape Crisis Scotland.

223. Kate Wallace of Victim Support Scotland told us—

> "A custodial sentence is completely different from electronic monitoring at home, so we continue to disagree with others on that." [62]

224. In her comments, Kate Wallace also stated that "there is an opportunity to change the supervision, management and monitoring around bail". [63]

225. The written submission from Scottish Women's Aid stated—

> "EM is only a partial inconvenience to the movements of the accused, is not in any way comparable to time spent on remand and should not be treated any differently from any other form of bail."

226. The Committee asked the Cabinet Secretary for Justice and Veterans for his comments on the concerns raised that an electronically monitored curfew is not comparable to time spent on remand. He argued—

> "…if you put somebody on bail and subject them to electronic monitoring, you are impacting on and curtailing their rights in a number of ways, such as their right to freedom of movement and their right not to be monitored by the state. We need to recognise that. Leaving the courts with the discretion to recognise that is important, and it is done in other jurisdictions, so I am supportive of that being taken into account." [64]

227. The Policy Memorandum states that the discretion remains with the court to determine, based on the individual facts and circumstances of each case, how much, if any, of a period on electronically monitored bail should be taken into account and treated as time served against the custodial sentence passed. If the court determines a period of electronically monitored bail is appropriate to factor into the sentence in a given case, the Bill provides a conversion of electronically monitored bail days to custody days on a two to one ratio.

Views of the Committee

228. Our view is that sheriffs and judges are best placed to determine the extent to which time spent on electronic monitoring should be deducted from the length of custodial sentences.

229. The Committee is content that if the Bill allows time spent on electronic monitoring to be taken into account, and if the court so decides, this would be a helpful change. There is an important principle that the courts be given a degree of discretion to determine such matters themselves.

PART 2 OF THE BILL: RELEASE FROM CUSTODY

Section 6 - Prisoners not to be released on certain days of the week

230. Section 6 of the Bill seeks to improve access to services in the community for prisoners upon release.

231. It does this by further restricting the days on which prisoners are released from custody, thereby bringing forward the release dates of affected prisoners to days on which accessing services may be easier.

232. The Bill proposes to add Fridays and the day before a public holiday to the list of days where release must be brought forward. This would apply automatically without any process of application or assessment.

233. It would also bring forward Thursday releases by a day for those prisoners who, before the application of the above rules, were due to be released on a Thursday. This is intended to help avoid too great an increase of Thursday releases (which might overload relevant services on that day).

234. The Policy Memorandum explained the overall purpose behind the provisions—

> "Altering these release arrangements will have the benefit of ensuring that individuals are not released from prison on a Friday or the day before a public holiday reflecting that access to services in the community are more limited at the weekend and on public holidays. This provision is also intended to support all those being released from prison having the same opportunity to access the services they need at the point of release."

Views on the proposals in the Bill

235. Rhoda MacLeod of Glasgow City Health and Social Care Partnership welcomed the proposals to bring forward release dates to avoid releases before weekends or public holidays as—

> "those times create real problems for risk management and safety of patient care, particularly if they need to be linked into alcohol and drug recovery services. People can easily fall through the net if that connectivity is not provided." [65]

236. Similarly, Joanne McMillan of the Glasgow Bar Association told the Committee that there is "definitely value" in Thursday (or earlier in the week releases) as when prisoners are released on a Friday with no accommodation or access to their prescriptions "it is only a matter of time before the phone goes and they are back in custody". [66]

237. Gillian Booth of South Lanarkshire Council and Sandra Cheyne of Skills

Development Scotland thought that there should be a “targeted” or “person centred” approach to decisions around release days depending on the health and support needs of the individual.

238. In their written submission, Social Work Scotland said that it strongly supports the proposal, and stated that it “will significantly improve the ability of services to plan for the reintegration of people leaving prison”.

239. Rape Crisis Scotland noted that the proposed changes could also benefit victims of crime in accessing support services around the time an offender is released from prison.

240. Scottish Women’s Aid’s written submission was also supportive but with the proviso that notice of any change to an individual’s release date should be given to victims and their support organisations several weeks in advance.

241. Other written responses expressing support for the proposals include those from the Scottish Drugs Forum, Sacro, Dr Hannah Graham and Dr Fergus McNeill, COSLA, Community Justice Scotland, the Faculty of Advocates, the Law Society of Scotland, Families Outside, Howard League Scotland, Police Scotland and Victim Support Scotland.

242. The submission from the Criminal Justice Voluntary Sector Forum indicated support but highlighted some practical challenges—

> “it will have resource implications for third sector (and other) partners, as it will require them to squeeze 5 days’ worth of current liberation support each week (e.g. gate pick-ups, accompanying people to appointments, providing emotional and practical support) in to 4 days of current staffing capacity.”

243. The Wise Group raised similar concerns in their written evidence around the ability of third sector providers to cope with increased numbers of prison liberations in a shorter weekly timeframe. They also noted that there may "be further difficulties in accessing the universal services such as housing, benefits, health services etc, if all of these are also going to be busier Monday-Thursday.”

244. Their submission also stated that, in order to tackle the issue in the long term, properly co-ordinated release planning across public sector and universal services is needed and that having equitable access to services such as their New Routes Mentoring scheme “would go a long way to realising that the problem of Friday releases is not actually a problem if the resources are in place to properly co-ordinate, plan and implement a prisoner’s release irrespective of the day of the week.”

245. The written evidence submitted by HM Inspectorate of Prisons for Scotland also noted that some of the risks of Friday releases could be mitigated if “robust release planning was engaged."

246. While the Scottish Police Federation’s submission stated that “a better solution would be for support services to work 7 days a week rather than simply a Monday to Friday existence”.

247. When questioned on this, the Cabinet Secretary for Justice and Veterans told the Committee—

> "If somebody thinks that the Friday release change is not the appropriate way in which to go and their idea is to provide seven-days-a-week or 24-hour services, they should by all means lodge an amendment. They would have to quantify the cost of that, which would not be nugatory—it would be substantial. There would also be real questions for the people who would have to provide those services overnight or seven days a week. We do not directly control some of those services. They are provided by the third sector. I think that the proposed route is better." [67]

Views of the Committee

248. The Committee recommended in its *Judged on Progress* report that consideration should be given to changing the legislation governing Friday liberations and therefore welcomes the proposed changes. Releasing prisoners on a Friday can deem some individuals vulnerable to reoffending as they may be unable to access important services before the weekend. Friday releases can also impact victims and families where they may require support associated with an individual's release. This may be difficult to access or not available at all.

249. However, we note there may be significant practical challenges and additional resources required for some public and third sector service providers to continue to allow effective levels of frontline liberation support to be offered in a shorter weekly time frame.

250. On balance, until there are adequate resources for public and third sector service providers to be adequately informed prior to release so that they can provide support whenever it is required, then Friday releases should be avoided.

Section 7 - Release of long-term prisoners on reintegration licence

251. Section 7 of the Bill seeks to replace the possibility of release on home detention curfew (HDC) for long-term prisoners with a new system of temporary release under what the policy memorandum refers to as a 'reintegration licence' (the term is not used in the Bill).

252. The proposed change would not affect short-term prisoners, who would still be covered by rules allowing for release on HDC.

253. Existing provisions allowing for the release of prisoners on HDC can be used in relation to both:

- short-term prisoners - custodial sentences of less than four years
- long-term prisoners - custodial sentences of four years or more (not including life sentences), provided that release at the parole qualifying date has been recommended by the Parole Board for Scotland.

254. The Policy Memorandum explained that the approach under this Bill is intended to—

> "…provide increased opportunities for long-term prisoners to access structured and monitored temporary release as part of the support for their reintegration. This will be subject to different risk assessment processes to HDC and the Parole Board will be consulted on the individual's suitability, given the Board's expertise in risk-based decision making in relation to long-term prisoners."

255. In evidence, John Watt, Chair of the Parole Board for Scotland told us—

> "The difference that the bill will make is that it will allow the board to direct temporary release on certain conditions, if it recommends release on parole licence. It does not have that power just now." [68]

256. He indicated that he was content with what was being proposed in the Bill on the basis that it allows for better integration into the community if a prisoner can talk to social work, addiction support, their general practitioner or others before the point of release on parole licence.

257. However, John Watt raised one particular legal point with the Committee which he felt could be addressed in the Bill—

> "We suggest that the bill should include a provision to allow the board to revisit a recommendation to release on parole licence where there are changes in material circumstances between the recommendation and the release date. Otherwise, we will have the major problem of having two live decisions." [69]

258. A change of material circumstances might include (for example) misbehaviour in the community by the prisoner.

259. The Cabinet Secretary for Justice and Veterans responded to this suggestion from John Watt—

> "There is no plan to amend the bill, because the issue that has been raised by the chair of the Parole Board is not a result of the bill... That is the existing situation. We are willing to be and are engaged in discussions with the chair and, I think, the Parole Board—I am happy to confirm that—on the issue. It opens up other issues, which is why it is probably not suitable to be dealt with in the bill, but it is a live issue that we have been and are discussing with the chair." [70]

Views of the Committee

260. Section 7 of the Bill provides for the release of long-term prisoners on reintegration licence. It provides for this in two situations – before and after the Parole Board has recommended release on parole. In relation to the second situation, the Board advised us that it will need a power to reverse its decision on parole if the offender fails to comply with the conditions of release on reintegration licence.

261. The Cabinet Secretary indicated that the legislative gap identified by the Parole Board is not something which has arisen as a result of this Bill. Nevertheless the Cabinet Secretary indicated that he is engaged in discussions with the Parole Board about this issue. The Committee welcomes this commitment and hopes a satisfactory resolution can be reached using this bill to affect the necessary change if appropriate. The Committee would welcome an update on this in the Government's response at Stage 1.

Section 8 - Emergency power to release prisoners early

262. Section 8 of the Bill seeks to give the Scottish Government a regulation making power to release groups of prisoners earlier than would be the case under normal rules on early release. Use of the proposed power would be restricted to situations where the Scottish Government is satisfied that it is a necessary and proportionate response to the impact of an emergency situation on prisons.

263. The Bill provides some examples of what is meant by an emergency situation, including—

- the spread of an infection which could present significant harm to human health
- an event which has resulted in part of a prison becoming unusable.

264. The Policy Memorandum states—

> "Existing executive release powers such as compassionate release relate to the consideration of specific individual cases. This means should an operational emergency arise within Scottish prisons which places the security and good order of prisons or the health, safety and welfare of prisoners and prison staff at risk, new emergency legislation would be required to facilitate the release of groups of prisoners, which has resource and time implications, potentially exacerbating the issues related to the operational emergency."

265. The Coronavirus (Recovery and Reform) (Scotland) Act 2022 contains a temporary power to release prisoners where it is a necessary and proportionate response to the impact of COVID-19 on prisons. This provision will expire on 30 November 2023 (although there is scope for further extension by regulations until 2025 at the latest).

This temporary power relates only to the specific impact of coronavirus on a prison or prisons and no other purpose.

Views on the proposals in the Bill

266. A number of responses to the Committee's call for views were supportive of this proposal in the Bill, including Sacro, Social Work Scotland and the Wise Group.

267. The written submission from Dr Hannah Graham and Professor Fergus McNeill argued that—

> "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."

268. The written submission from the Children's and Young People's Centre for Justice indicated that it did not oppose the provision in the Bill, but felt that the state of the prison estate should not be used as a reason for early release.

269. However, the Justice Services for Young People and Adults at the City of Edinburgh Council did not support the introduction of an executive power of release and felt an application should be made on a case-by-case basis for exceptional circumstances.

270. The written submission from Victim Support Scotland indicated that during the COVID pandemic, it saw a significant increase in safeguarding issues directly related to the emergency release of prisoners. The submission stated—

> "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."

271. The Committee asked the Cabinet Secretary for Justice and Veterans if the Scottish Government had any plans to amend the Bill to mirror the restrictions which were added to the Coronavirus (Recovery and Reform) (Scotland) Bill during stage 3 proceedings. The Cabinet Secretary told the Committee—

> "That is a fairly good prediction…. We are looking at how we can proceed at stage 2, as well." [71]

272. The Delegated Powers and Law Reform Committee commented on the delegated powers in this section in its report on the Bill.

273. Regulations under this section will be subject to the affirmative procedure unless the regulations do not provide for the release of a person more than 180 days before they would otherwise be released, and that they contain a statement of urgency by the Scottish Ministers that it is necessary to make the regulations without their being subject to the affirmative procedure. The regulations, in this case, will be subject to the made affirmative procedure.

274. The Delegated Powers and Law Reform Committee was involved in an exchange of correspondence with the Scottish Government about the appropriateness of the use of these delegated powers. This exchange is outlined in the DPLR Committee's report.

275. The DPLR Committee reached the following conclusion in relation to this section of the Bill—

> "The majority of the Committee is content with the explanation provided by the Scottish Government and accepts the power in principle. The majority of the Committee is also content that the exercise of the power will be subject to the affirmative procedure but may be subject to the made affirmative in specified circumstances and by reason of urgency." [72]

Views of the Committee

276. The Committee notes the scrutiny of the delegated powers provisions in this section by the Delegated Powers and Law Reform Committee and draws the attention of the Parliament to that Committee's report.

277. The Committee asked the Cabinet Secretary if the Scottish Government was seeking to amend the Bill to mirror restrictions on the use of the existing COVID-19 power of emergency release which were added during stage 3 of the Coronavirus (Recovery and Reform) (Scotland) Bill. These were to restrict the period of early release to no more than 180 days and to prevent the release of prisoners who were serving sentences for domestic abuse offences. The Cabinet Secretary indicated that this was under consideration and the Committee would be supportive of such amendments.

278. The Committee is not wholly persuaded of the necessity to permanently enshrine the power to release prisoners early into the Bail and Release from Custody (Scotland) Bill. This power is already included in the Coronavirus (Recovery and Reform) Act 2022 and a permanent entrenchment should not be considered until this power has been evaluated as part of the post-legislative scrutiny of that legislation.

Sections 9 and 10 - Duty to plan for the release for prisoners; Throughcare support for prisoners

279. Sections 9 and 10 are broadly related, as they both deal with the support given to prisoners to prepare for release and then are supported in the community. We will therefore consider them together.

280. Section 9 of the Bill seeks to facilitate the development, management and delivery of personal release plans for prisoners. A release plan would deal with elements of reintegration and throughcare for both remand and sentenced prisoners—

- the preparation of the prisoner for release

- measures to facilitate the prisoner's reintegration into the community and access to relevant general services (e.g. housing, employment, health and social welfare).

281. The Scottish Ministers (in practice the Scottish Prison Service) would be able to require various organisations to engage in this work. The identified partners are—

- each local authority
- each health board
- the chief constable of the Police Service of Scotland
- Skills Development Scotland; and
- an integration joint board established by virtue of section 9 of the Public Bodies (Joint Working) (Scotland) Act 2014.

282. The Policy Memorandum states that—

> "This will have the benefit of supporting a more consistent approach to release planning and ensuring that the key role of the third sector in providing support to people leaving prison is recognised."

283. Section 10 of the Bill deals with throughcare support for both remand and sentenced prisoners.

284. The Bill would require the Scottish Government to publish, and keep under review, minimum standards applying to throughcare support. In doing so, the Scottish Government would be required to consult the following—

- Community Justice Scotland
- local authorities
- health boards
- integration joint boards (where established by local authorities and health boards to plan health and social care services)
- Police Scotland
- Skills Development Scotland
- third sector bodies involved in community justice and the provision of throughcare support
- such other persons as the Scottish Ministers consider appropriate.

285. It would also require various bodies to comply with those standards when providing throughcare support. The identified partners are—

- each local authority
- each health board

- Skills Development Scotland
- an integration joint board established by virtue of section 9 of the Public Bodies (Joint Working) (Scotland) Act 2014; and
- the Scottish Ministers.

286. The Policy Memorandum states that—

> "This is intended to promote a consistent approach to the provision of throughcare support across Scotland."

Views on the proposals in the Bill

287. The Committee has heard clear evidence of how important it is for prisoners to access services such as housing, healthcare and benefits on release.

288. In addition we heard from organisations such as the Wise Group about the use of mentors to help prisoners successfully reintegrate into society.

289. We heard from a number of witnesses, for example, HM Chief Inspector of Prisons Scotland and Stuart Munro of the Law Society of Scotland, that successful rehabilitation of prisoners can help prevent reoffending, and ultimately prevent the creation of further victims of crime.

290. Committee member held informal meetings with the Shine Women's Mentoring Service and the Council of Voluntary Organisations (East Ayrshire) Ltd to discuss the valuable work that they undertake supporting newly released prisoners in the community.

291. These meetings were very useful in allowing committee members to hear first-hand about the practical challenges which prisoners can face in accessing support before and after release.

292. At an informal meeting with the Shine Women's Mentoring Service, the following points were raised in the discussion—

- There is a need to have someone who is accountable for providing support to women on release in order to ensure delivery of that support. The existence of guidance that particular support should be provided is not sufficient.
- Sometimes when a person is released they face so many practical difficulties that it seems to them that it is easier to be rearrested. A particular problem that women face is a lack of safe housing on release. Some sheriffs take the view that the safest place for a women is in custody due to a lack of any better alternative option. Some women have questioned why they have been released when no support is in place, such as access to prescriptions or accommodation.
- In terms of rehabilitation outside prison, there are pockets of expertise and funding but provision is patchy between local authorities. Some women are reluctant to keep going to rehabilitation programmes on release from prison. It is important to minimise the gap between release from prison and the restarting

of rehabilitation programmes. A couple of days can be long enough to return to previous patterns of behaviour.

- A challenge can be not knowing if and when a women is due to be released. Sometimes Shine are not notified of a women's release or they are released to a non-safe location. An example of poor practice is when a women is released from court with no prior warning after 4.30pm.

293. At the informal meeting with the Council of Voluntary Organisations (East Ayrshire) Ltd (CVO EA), the following points were made—

- There is a strong need for a fully developed support plan to be in place for a prisoner before release. Putting this in place perhaps 1 month prior to release, with pre-release access to prisoners for CVO EA staff in the prison would be of great use.

- Access to decent housing remains one of the main problems, and also a scarcity of transitional housing for addicts. Often, the local housing offered is uninhabitable and not appropriate, leading to reoffending.

- The notification periods and quality of information provided by SPS to CVO EA remains poor, with often very little notice of a prison pick-up.

294. The proposals in the Bill for release planning and minimum standards of throughcare support were generally supported by those who provided their views, including representatives from Community Justice Scotland, the Law Society for Scotland and HM Chief Inspector of Prisons Scotland.

295. The written submission from Social Work Scotland stated—

> "National standards bring consistency and coordination; they are an easy reference point and set clear expectations. Our expectation is that the setting of minimum standards for identified public bodies by placing a duty on identified partners to engage with release planning for all prisoners, particularly short-term and remand prisoners, will similarly lead to improvements and provide a means to measure and benchmark performance."

296. Whilst the proposals in the Bill were generally supported in principle, a number of witnesses made the point that delivering practical improvements would remain a challenge.

297. Professor Fergus McNeill of the University of Glasgow cautioned "we must not underestimate the complexity of the task of supporting people in those transitions". [73]

298. Keith Gardner of Community Justice Scotland noted that "as with many of these things, it is not just about standards; it is about how they are implemented and monitored and the feedback for improvement". [74]

299. The issue of the availability of resources to support prisoners on release was mentioned by some witnesses. Lynne Thornhill of Sacro told us—

> "Mentors can work with individuals, support them and bring them to statutory services that provide, for example, housing or mental health support, but if the housing stock is not there or the waiting lists for mental health provision are too long, no amount of relational or mentoring support can plug that gap." [75]

300. Sheriff David Mackie, speaking on behalf of Howard League Scotland, noted that in the current economic climate, many third sector organisations face "existential problems" due to funding issues. [76]

301. A written submission from Justice Services for Young People and Adults, the City of Edinburgh Council stated that if standards for throughcare are to be enshrined in law, it is likely that additional resources would be required to support service improvements.

302. We also heard that legislation might not, in itself address, some of the practical barriers to providing joined-up support to prisoners on release. One such barrier cited by Rhoda MacLeod of Glasgow City Health and Social Care Partnership was the challenges getting newly released prisoners registered with a GP. She also noted there were also problems with out-dated IT systems not communicating with each other, making joint working difficult.

303. A number of other witnesses commented that the role of the third sector was a vital one and should be emphasised to a greater extent. This view was expressed Professor Nancy Loucks of Families Outside.

304. One specific point raised with us is that the third sector are not specified in the Bill as an "identified partner" who have a statutory duty to engage with release planning. Tracey McFall of the of the Criminal Justice Voluntary Sector Forum made the point that the third sector needed to be "around the table as soon as possible"—

> "Proposed new section 34A is on the duty to engage in release planning, and everybody has talked about how critical the third sector is in that process. The third sector is not named in that section." [77]

305. The Committee asked the Cabinet Secretary for Justice and Veterans about the resourcing of these provisions in the Bill. He commented—

> "Most local authorities, where they have responsibilities, are resourced to provide those services in any event. It may change some configuration, and, of course, we are always willing to look at resource implications for it… The idea is to make sure that it is joined up across the country. I think—I hope—that it is uncontentious to say that we have to better prepare people if we are to reduce crime in future." [78]

Views of the Committee

306. The Committee heard about a number of examples of best practice in which third sector and public sector organisations have undertaken valuable work with

prisoners to support their reintegration into the community. We commend this work.

307. However we also heard of many cases of where difficulties have arisen for prisoners, for example where they have experienced challenges in accessing benefits, health care and housing. It is clear that the support given to a prisoner in the immediate period prior to and following their release is crucial in determining how well they reintegrate back into the community. Unfortunately where there is a gap in the provision of this support, prisoners can be left in a vulnerable position which can sometimes lead them to drift back into criminal behaviour or being preyed upon by other criminals.

308. The principles behind these provisions of the Bill were broadly supported by witnesses who gave evidence to the Committee. There was a generally shared view that a duty to engage in release planning and to set minimum standards of throughcare support will be helpful in encouraging a joined up and consistent approach to the support given to prisoners.

309. We also welcome the provisions in section 9 and 10. They will provide an extra focus and structure to the arrangements for supporting prisoners on release. We hope they will help avoid the sorts of 'gaps' in the provision of support which we have heard about.

310. However, we also heard that the success of these provisions in practice will depend on adequate resources being allocated to supporting prisoners. We heard that successful reintegration into the community is often best achieved through personal one-on-one support tailored to each prisoner. This, of course, is resource intensive.

311. The provisions in the Bill are to be welcomed, but the policy objective of reducing reoffending and supporting reintegration into the community will not work in practice unless the required resources are made available. The Committee has made similar statements about the resources that will be needed to implement Part 1 of the Bill.

312. We have also noted the calls that the "third sector" should be specified on the face of the Bill as an identified partner who must engage in release planning. We are in favour of a greater role for third sector bodies as partners in release planning.

313. Section 34A(4) of the Bill contains reference to third sector bodies, and we ask the Scottish Government to comment at Stage 1 as to whether this wording is sufficient to achieve the goal of greater third sector involvement or it needs to be strengthened.

Section 11 - Provision of information to victim support organisations

314. Section 11 of the Bill seeks to provide that information about a prisoner's release, that can already be given to a victim of that prisoner, can also be given to a victim support organisation (VSO) to inform the support it provides to the victim. It would also allow such an organisation to request that information.

315. The new provisions will operate in conjunction with the current Victim Notification Scheme (VNS), allowing a victim to nominate a victim support organisation to receive information about the release of the prisoner in their case.

316. The Policy Memorandum explains the rationale for the proposed changes, namely that it "is a way of allowing that information to be delivered to the victim in a more trauma-informed manner, and as part of an immediate conversation or series of conversations between the VSO and the victim about ways in which that VSO can proactively support the victim".

317. The Policy Memorandum also explains that in April 2022, the Scottish Government instigated an independent review of the VNS. This is expected to take 12 months and may result in changes being made to its operation. The Scottish Government's position is that it will await the outcome of this review before considering broader changes to the operation of the scheme. However, the legislation underpinning the VNS required amendment to allow information to be provided to VSOs.

318. Kate Wallace of Victim Support Scotland welcomed what the Bill is attempting to do, but raised concerns that it might lead to information being shared without the consent of the victim of crime or their family.

319. In its written submission, the Faculty of Advocates commented—

> "Faculty would suggest that the Scottish Ministers have a duty of care to vulnerable victims to ensure that unsuitable organisations do not seek to present themselves as offering support when they are either incapable of providing support or have an interest that is at variance with the interest of the victim."

320. The Cabinet Secretary for Justice and Veterans told us—

> "The concerns expressed, if I am right, are about the idea that victims should consent to any information being shared. As I am sure that you would agree, there is no track record of victims' organisations acting against the interests of victims. It is a bit more complex than it first appears, but we are willing to have further discussions on it." [79]

321. The Delegated Powers and Law Reform Committee commented on the delegated powers in this section in its report on the Bill.

322. The DPLR Committee was involved in an exchange of correspondence with the Scottish Government about why the negative procedure is used when specifying the description of persons that may be supplied with information regarding prisoners in the specified circumstances set out in the Bill, and whether affirmative procedure may be more appropriate.

323. The DPLR Committee reached the following conclusion on the use of delegated powers in this section—

> "The majority of the Committee considered that, given the matters that are set out on the face of the Bill that will be subject to full parliamentary scrutiny, the limited circumstances in which this power will be used, and the use of parliamentary time, the negative procedure is an appropriate level of parliamentary scrutiny in these circumstances." [80]

324. As well as the specific provisions in the Bill, the Committee heard a number of views about the standard of information provided to the victims of crime. Kate Wallace from Victim Support Scotland and Emma Bryson from Speak out Survivors both raised concerns about the way in which victims of crime are sometimes provided with information as their case progresses through the criminal justice system.

325. We reproduce below some extracts from the notes of the informal meetings the Committee held with the survivors of crime which provide some examples of where they considered poor communication had occurred—

- The women described the communication from the courts as "very poor", or as "no communication at all".

- In one instance the accused was given bail and released, with the woman only finding out from one of her relatives who had been contacted by the accused. The court service had not informed her. In another instance, the woman was informed of the decision in a letter from the court two weeks later.

- In a third example, the woman turned up to court after travelling a long distance, to be told the case had been postponed. The communication before, during, and after court hearings and trials from the court service and Crown Office needs to improve. It should be consistent and timely. Victims should be provided with an allocated named contact person that they can call and/or meet

- The COPFS Victim Information and Advice (VIA) service is overstretched, understaffed and under resourced. It is failing victims and families. There is a huge inconsistency in the level of service, both within sheriffdoms and across the wider country. Families often feel abandoned and must actively chase VIA for information on the progress of a case, as opposed to VIA contacting victims/ families at least once every six weeks with updates.

- There was always a need to chase up information and seek out further information by telephone as written correspondence did not contain the required information, especially around bail conditions. Some of the information

provided was confusing, and inaccurate. There was not a proactive approach to the release of information about developments; there was always a requirement to chase for information which should have been provided as a matter of course. The correspondence was impersonal and non-empathetic and made her feel like she was the person on trial.

326. Emma Bryson of Speak out Survivors commented that there are lots of examples of good practice in communicating with the victims of crime which can have a positive impact. However when information is not provided in a timely fashion or key information is not explained or arrives in an unexpected letter, this can be very damaging.

Views of the Committee

327. The Committee notes the scrutiny of the delegated powers provisions in this section by the Delegated Powers and Law Reform Committee and draws the attention of the Parliament to that Committee's report.

328. The proposal in this section of the Bill to allow a victim support organisation to receive information about the release of a prisoner appears to have been welcomed in principle.

329. However, the Committee notes that some victim organisations have raised concerns about information being shared under section 11 of the Bill without the consent of the victim.

330. The Cabinet Secretary told us that there is no track record of victims' organisations acting against the interests of victims. Nevertheless, he indicated that he would be willing to have further discussions about these organisations' concerns.

331. The Committee welcomes this approach and hopes that a satisfactory resolution can be reached.

332. The Committee notes that an independent review is underway of the Victim Notification Scheme. We recommend that the review takes into account the evidence we heard from survivors of crime about their concerns about the current victim notification arrangements. The Committee heard evidence of numerous deficiencies with the current victim engagement in the justice system, in particular for bail decisions and reports that victims were having to police bail conditions. Therefore, the Committee asks the Scottish Government to consider whether further information can be provided to victims to give them confidence that bail

conditions are being policed and where necessary action taken in the case of a reported breach.

GENERAL PRINCIPLES OF THE BILL

333. At Stage 1, the lead committee's role is to consider and report to the Parliament on the general principles of the Bill – that is, on the principal purposes of the Bill, rather than the fine detail.

334. In our view, the principal purposes of the Bill are to makes changes to the use of custody for remand and to give a greater focus on reintegration of prisoners on release.

335. All members agreed that there are some useful provisions in the Bill. Fulton MacGregor, Rona Mackay, Audrey Nicoll, and Collette Stevenson support the general principles of the Bill. Katy Clark, Jamie Greene and Russell Findlay do not. Those not supportive believe that there is a lack of sufficient explanation about the Bill's intended purpose, its effects and detail about how some of the provisions will be delivered. Pauline McNeill was of the view the Bill should only proceed if Ministers address the issues outlined by Members not supporting the general principles.

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