FACULTY OF ADVOCATES

RESPONSE ON BEHALF OF THE FACULTY OF ADVOCATES

IN RELATION TO

THE CONSULTATION BY THE SCOTTISH PARLIAMENT CRIMINAL JUSTICE COMMITTEE INTO THE BAIL AND RELEASE FROM CUSTODY (SCOTLAND) BILL

Part 1 – Bail

General Approach

1. Faculty welcomes the general approach taken in part 1 of the bill in respect of the use of bail and remand. If the intention of the Government and Parliament is to reduce the use of remand and limit it to those accused persons who pose a significant risk to public safety or to the proper administration of justice then the reinforcement of the presumption in favour of bail that is provided for by this part of the bill is, subject to comments of detail and clarification below, to be welcomed.

Specific proposals

Clause 1: Input from justice social work in relation to bail decisions

2. Faculty welcomes this clause and the introduction of a formal requirement that the court consider information from a justice social worker when making a decision regarding bail at first appearance. This will help give effect to the

principle that bail is only refused where there is a good reason for doing so and will provide an additional safeguard against the damaging effects of short periods of custody on persons who are presumed by the law to be innocent until proven guilty.

3. Faculty would point out that the production of such "Bail Information Reports" was something close to standard practice in sheriff courts across the country until around a decade ago and these were found useful by sheriffs and both prosecution and defence lawyers. In recent years it seems that fewer such reports are being produced. If this new clause is to have the intended effect, it will be necessary to provide the resources to ensure that there are sufficient criminal justice social workers to produce reports in the numbers required.

4. However, Faculty would point out that many of the same considerations will apply where an accused person seeks bail at a later hearing on the basis of a material change of circumstances using the Bail Review provisions under section 30 of the Criminal Procedure (Scotland) Act 1995 or where the prosecutor seeks to review bail under section 31. Faculty would suggest that the scope of clause 1 be expanded to enable the court to request such additional information from a justice social worker during such a review procedure.

Clause 2: Grounds for refusing bail

5. Faculty supports the proposed changes to the bail test in section 23B of the

1995 Act. It has long been the case that an accused should be granted bail unless it can be shown that there are good grounds for not granting it (Lord Justice-Clerk Wheatley in *Smith v M* 1982 JC 67 p. 68), but the proposed new structure to section 23B could well have the effect of making it more difficult for a court to refuse bail. This is because whilst it will remain the case under subsection 23B(1A)(a) that bail can be refused if one of the specific grounds identified in section 23C of the 1995 Act are engaged, the proposed new subsection 23B(1A)(b) will be more tightly drawn than the older section 23B(1). The existing requirement that there be "good reason for refusing bail" is broad. For example, the court decision in *Smith v M* is authority that a breach of the trust of the court (such as offending whilst on bail or licence) currently creates a reverse presumption that bail should be refused. The proposed change tightens and narrows that requirement so that the court may only refuse bail if it considers it necessary, firstly in the interests of public safety, or secondly to prevent a significant risk of prejudice to the interests of justice. Whilst in many cases accused persons who are alleged to have breached the trust of the court by offending will meet the requirements of the new subsection 23B(1A)(b), not all will.

6. Furthermore as the twin requirements of the new section 23B(1A)(b) are more focused on the risk that the accused will do something undesirable, there will be greater scope for the use of special conditions of bail for the purposes of section 23B(2) to protect the public interest, so that bail can be granted. If the

relevant considerations of (i) public safety; or (ii) risk of prejudice to the interests of justice, can be allayed by such conditions, there is less scope for the court to refuse bail.

7. Faculty welcomes the proposed change to prevent the reason in section 23C(1)(a) being applied to accused persons in summary proceedings who have never failed to appear at court. This change should help to ensure that in summary proceedings accused persons are not remanded and their lives disrupted, on the basis of a speculative fear that they will not attend at court.

Clause 3: Repeal of section 23D

8. Faculty welcomes the repeal of section 23D. This will end the situation whereby bail can only be granted to accused persons in solemn proceedings who have certain broadly analogous solemn convictions if there are exceptional circumstances. The experience of those members of Faculty who practise in this area is that section 23D has probably ensured the remand of accused persons who would not otherwise have been remanded. Although the number has not been large over the years, these would typically have been persons in their thirties or older who had acquired a qualifying solemn conviction when much younger or persons who had, unusually, received a non-custodial disposal for their previous qualifying solemn conviction. It is difficult to see how such persons would pose a real risk to the public interest if at liberty, and to that extent it is likely that the proposed change will result in more accused who

would previously have been remanded due to section 23D, being admitted to bail.

Clause 4: Stating and recording reasons for refusing bail

9. Faculty is supportive of this clause. There is no good reason why a court should not be required to state its reasons for refusing bail. An accused person is innocent until proven guilty. They and the wider public need to know the basis of any deprivation of their liberty.

10. That said, it is significant that, quite properly, the right to appeal a decision on the question of bail under section 32 is not subject to any requirement of leave. This means that if a court does not give reasons when bail is refused there is little reason for an accused not to appeal. In any such appeal the sheriff must produce a report for the Sheriff Appeal Court. Some of these reports are brief in the extreme. The problems in the current system have been judicially noted by the Sheriff Appeal Court in the unreported case of *Munro v Procurator Fiscal, Dumbarton* SAC/2021/000109/BA, in which it was accepted that a lack of clarity in the report of a first instance decision-maker in terms of whether the bail test had been properly applied, entitled the Bail Appeal Court to consider the question of bail de novo. It is entirely unsatisfactory that certain reports are unclear as to why bail has been refused in a given situation. A duty to give reasons at the time will help to ensure that there is a clear rationale for the refusal of bail.

11. Accordingly, a formal public statement of the reasons for refusal of bail or imposition of special conditions would not only ensure an accused and their legal representatives understand the decision, but would also ensure that the defence can make an early assessment of whether to appeal under section 32. Similarly, the giving of reasons may also prevent unnecessary Crown Bail Appeals which have the effect of retaining an accused person in custody until the appeal has been determined.

12. There are, however, issues with the level of detail that is to be required by the proposed subsection 2AA. Faculty believes that given the importance of the requirement in subsection 23B(2) to consider whether any risks may be allayed by the imposition of bail conditions, the new subsection 2AA should also require the court to explain why they consider that such conditions would not be sufficient to allay such risk. If special conditions of bail would be sufficient to allay the risks posed by the accused, and there is no inference which may be drawn that such special conditions would not be obtempered, there is no justifiable basis for remanding a criminal accused. Faculty would accordingly propose the extension of the proposed subsection (2AA) in this regard to include the duty to give reasons (if refusing bail) as to why special conditions would not have been sufficient.

Clause 5: Consideration of time spent on electronically monitored bail in sentencing

13. Faculty agrees with the intention of this clause but sees no good reason why, if

credit is to be given to persons who have spent time on electronically monitored bail, that credit should not also be given to those placed on a bail curfew without electronic monitoring. Such curfews can last many months and in some cases for a year or more. In *McGill v HM Advocate* 2014 S.C.C.R. 46 the High Court of Justiciary Appeal Court decided that *"a normal night-time curfew condition, which has been in effect for a period of some months, should not be regarded as something which requires to be reflected by way of a reduction in sentence"* on the grounds that it was imposed *"for the protection of the public and not as a punishment for the offender"*. Faculty considers it unlikely that the re-introduction of electronic monitoring of bail (previously introduced by section 17 of the Criminal Procedure (Amendment) (Scotland) Act 2004 and repealed by section 59 of the Criminal Justice and Licensing (Scotland) Act 2010) will prevent some sheriffs choosing to impose curfew conditions that are not electronically monitored as special conditions of bail. Accused persons subject to the onerous, but justified, interference in their liberty caused by simple curfews are just as significantly affected as those who will have their liberty restricted by the revived electronically monitored bail. The intention of the proposed new section 210ZA could be equally well accommodated by adding a period of time spent on a qualifying curfew (without reference to electronic monitoring) to section 210(1) of the Criminal Procedure (Scotland) Act 1995.

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Part 2 – Release from Custody

General Approach

14. Faculty notes that it is proposed to introduce these changes by amendment to the Prisoners and Criminal Proceedings (Scotland) Act 1993. This is a complex piece of legislation that is already difficult to understand and apply. These amendments do not make easy reading. They require care, and good understanding of the whole scheme of the 1993 Act, to properly understand. Faculty is concerned that adding further complexity to the 1993 Act will simply make that legislation harder to understand and do nothing to assist the public in understanding the system for the early release of prisoners.

15. The opportunity could be taken to add clarity to the 1993 Act. If, as appears from the Explanatory Note, the intention is that section 3AA of that Act will now only regulate Home Detention Curfew for short-term prisoners then the section title should be changed to "**3AA – Power to release short-term prisoners on Home Detention Curfew**". Similarly, the new section 3AB should be titled "**3AB - Power to release long-term prisoners on Reintegration Licence**".

Specific Proposals

Clause 6: Prisoners not to be released on certain days of the week

16. Faculty welcomes the proposal to limit the release of prisoners on Fridays (or Thursdays where they would otherwise be released on Friday, Saturday,

Sunday, a public holiday, or the day before a public holiday). The problem of prisoners being released and then being unable to find housing or access to support services is a significant issue. Subject to resources being made available for the housing of released prisoners, this proposal has the potential to benefit both those prisoners and the wider society.

Clause 7: Release of long-term prisoners on reintegration licence

17. Faculty has concerns with this proposal. If we understand it correctly it is designed to create the means to release long-term prisoners on a reintegration licence up to 180 days before the halfway point in the sentence in order to assist with their re-integration into society. Faculty welcomes the principle but has some concerns about how the new sections 3AB and 3AC are structured.

18. Faculty understands that the current practice is for the Scottish Ministers to refer long-term prisoners to the Parole Board for Scotland sufficiently far in advance of their half time qualifying date to enable the Parole Board to make a decision in good time, so that prisoners suitable for release on licence can be released on their parole qualifying date. The proposal is that the Scottish Ministers could then release those prisoners on a special Reintegration Licence up to 180 days before their half time qualifying date. This is an idea that could well have merit. The problem is that these proposed provisions appear to also permit the release of prisoners who have yet to have their half time release considered by the Parole Board under section 1(3) with the possibility that

those prisoners might find their “Reintegration Licence” revoked if the Parole Board later decides that they should not be released on a conventional section 1(3) licence.

19. Where a prisoner is released early on a Reintegration Licence, but then commits a further offence or breaches a licence condition, then it would be understandable that they be returned to prison. Faculty is, however, concerned that the proposed test for the Scottish Ministers releasing prisoners under section 3AB(4) is different to the test generally used by the Parole Board when making a direction under section 1(3). This is that the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined. This must raise the possibility that a prisoner on a Reintegration Licence might be returned to prison after a section 1(3) parole hearing because when the Scottish Ministers decided to release him on that Reintegration Licence the desirable need to see his successful re-integration into the community was a mandatory consideration under section 3AB(4), but would not necessarily have been as significant at a section 1(3) parole hearing. The same test should be used by both the Scottish Ministers and Parole Board on every occasion when consideration is being given to releasing a long-term prisoner on licence, that is; whether it is no longer necessary for the protection of the public that the prisoner should be confined.

20. Faculty notes that the Scottish Ministers acknowledge the Parole Board's

expertise in risk-based decision-making and would wish to be required to consult the Board prior to releasing a prisoner, but are proposing to create a system of Reintegration Licences that has the potential to be inconsistent. Given that the Parole Board is the independent tribunal with overall responsibility for releasing prisoners on licence based on whether the risk they pose can be safely managed in the community, Faculty believes that the new clause should be structured in such a way that release on an Reintegration Licence up to 180 days before a prisoner's half time qualifying date can only occur once the Parole Board has already directed release under section 1(3).

Clause 8 - Emergency power to release prisoners early

21. Faculty has some concerns about this proposed change.

22. Faculty recognises that these proposals arise in the wake of the Covid-19 pandemic and seek to ensure that the prison system is ready for the next pandemic or similar emergency. Given that duties of care are owed towards those in custody, and those who work in Scotland's prisons and young offender's institutions, Faculty agrees that in the event of a further public healthcare emergency, appropriate steps to ensure the health and safety of both prisoners and prison staff are necessary.

23. Faculty welcomes the way that the clause restricts the power of the executive and allows for parliamentary scrutiny of the necessary regulations, even if they are described in the inevitably subjective terms of "necessary" and

"proportionate".

24. Of greater importance, not least for the public perception of early prisoner release and the risk of a devaluation of the sentences imposed by the courts, is that it does seem that the only long-term prisoners who could be released under these provisions are those who do not pose a risk to an identified person and whose release has already been recommended by the Parole Board at the date of the creation of the regulations. Faculty welcomes this restriction.

25. Faculty does have concerns about the limiting of the restriction in proposed section 3C(4)(b) to prisoners not considered to pose an immediate risk of harm to an identified person. Faculty would draw the Committee's attention to this provision. It might be considered more appropriate to replace "an identified person" with "the public". As currently framed, a generalised risk of harm, as opposed to a specific risk of harm, would be insufficient for the governor to block release. This might come as a surprise to the public at large.

26. Faculty welcomes the oversight of the Scottish Parliament and the use of the affirmative procedure for approval of regulations, as even in the sort of extreme situation that would bring about such regulations, the need for democratic accountability remains important.

Clause 9 - Duty to engage in planning for the release for prisoners

27. Faculty welcomes the creation of this statutory duty, but would observe that

whilst investment in release planning is highly likely to result in a reduction to re-offending, effective planning will be a substantial cumulative cost to the bodies listed in proposed new subsection 34A(2). It will be necessary to ensure that those bodies have the resources to enable them to deliver effective release planning.

Clause 10 - Throughcare support for prisoners

28. Faculty does not feel able to comment on the merits of the proposed new duty.

Clause 11- Provision of information to victim support organisations

29. Faculty broadly welcomes these proposals as they should help to ensure that victims of crime can receive support from victim support organisations when there is a prospect that a relevant offender is to be released. Faculty is, however, concerned that the Bill does not set out the criteria to be satisfied before a requesting supporter can obtain information in relation to a convicted person in terms of proposed sections 16ZA(1)(b) and 17ZA(1)(b) (amending the Criminal Justice (Scotland) Act 2003) and section 27B(1)(b) (amending the Victims and Witnesses (Scotland) Act 2014).

30. There is a clear basis for allowing victims to decide to whom information about offender release should be provided. However, if a supporter can decide they should receive such information independent of the wishes of the victim, Faculty considers that there is a risk that such a power could be improperly

used (in the absence of express criteria grounding such power in the interests of the victim). The Bill provides a rationale for the supporter to act under these sections, and should also restrict the power of any supporter to gather protected information independently of the needs and welfare of the victim.

31. Furthermore Faculty is concerned that proposed subsection 16ZA(3) unreasonably restricts the ability of the Scottish Ministers to take the view that an organisation that claims to be a victim support organisation is not a suitable organisation to receive information. 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. The proposed drafting of this clause limits the ability of the Scottish Ministers to afford protection to victims in this respect.

32. Faculty also considers that no good reason has been given for the Scottish Ministers to be able to modify this act in the manner proposed in proposed subsection (7).