These notes relate to the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 (asp 6) which received Royal Assent on 22 February 2007

CRIMINAL PROCEEDINGS ETC. (REFORM) (SCOTLAND) ACT 2007

EXPLANATORY NOTES

INTRODUCTION

Part 1 - Bail

Section 1 – Determination of questions of bail

4. This section inserts into the 1995 Act three new sections setting out the legislative framework for bail decisions. At present, the substantive law on bail is still largely common law. Statute determines whether a crime is bailable, when bail may be applied for and the standard conditions on which bail may be granted but not the general right to bail or the reasons for refusal (the Lord Justice-Clerk Wheatley in *Smith v M 1982 JC 67*).

5. The provisions set out in statute the current common law by setting out a general entitlement to bail, the circumstances in which bail may be refused and a non-exhaustive list of the considerations that will be relevant to the court in its assessment of whether the circumstances in which bail may be refused are applicable in any particular case.

New Section 23B

6. New section 23B relates to the role of the court in determining questions of bail for an accused person at the pre-conviction stage.

7. Subsection (1) makes it clear that bail is to be granted except where certain grounds for refusing bail (set out in more detail in new section 23C and section 23D) apply and where the court having regard to the public interest considers there is good reason to refuse bail. This reflects the position in relation to detention of an accused person set out in Article 5 of the European Convention on Human Rights, the general principles of Scots common law and the case law of the European Court of Human Rights. For example, *McIntosh v McGlinchey 1921 JC 75* provides that bail must be granted unless "in the exercise of its discretionary right of refusal and looking to the public interest and securing the ends of justice, there is good reason why bail should not be granted". See also *Young v HMA, 1988 SCCR 517* and *Smirnova v Russia application No 46133/99 and 48183/99 July 24th 2003.*

8. Subsection (2) makes it clear that in determining the question of bail, the court must consider whether the public interest could be secured by the imposition of bail conditions rather than detention. In applying the 'public interest' test the court will take into account the interests of justice, since it must be in the broader public interest that individual court decisions reflect the interests of justice.

9. Subsection (3) makes it clear that references to the public interest include reference to the interests of public safety.

10. Subsection (4) provides that the prosecutor and the accused have the right to make submissions to the court on the question of bail pre-conviction.

11. Subsection (5) makes clear that the decision on bail (and the imposition of bail conditions) is for the court and the court alone, and that the attitude of the prosecutor (who has a right to be heard and who can oppose bail) does not restrict the exercise of the court's discretion. This provision reverses the currently understood position in Scots law set out in *Spiers v Maxwell 1989 SLT (N) 282* and the more recent decision by the High Court of Justiciary in *M.A.R v Dyer, 4 November 2005* where the court concluded that if the prosecutor did not oppose bail it should be granted.

12. If the prosecutor does not oppose bail the court will have only limited information about the accused recorded on the petition or complaint, although they will be able to see from the terms of the complaint alleged bail aggravations and any bail breaches with which the accused is charged. Subsections (6) and (7) therefore place beyond doubt the right of the court to seek information relevant to the bail decision of the prosecutor or the accused's legal representative. Examples of relevant information might be the accused's previous convictions, which would show whether s/he has previously breached bail. Subsection (7) gives those parties the right to decide whether or not to offer any opinion on the risks attached to the bail decision. This is designed to give them discretion where they wish to express an opinion, but to ensure that they cannot be pressed into giving one where they do not wish to do so, risk being a matter for the court to determine.

New Section 23C

13. New section 23C sets out the grounds for refusal of bail. These reflect the grounds recognised under Scots common law and ECHR case law. In each case the grounds for refusal apply only where there is a 'substantial risk' of an adverse outcome; the ECHR case law makes clear that a risk must be identifiable and supported by evidence (for example, evidence relating to the previous conduct of the accused).

14. The grounds listed are that a person might, if granted bail;

- Abscond;
- Fail to appear at a future court hearing;
- Commit further offences;
- Interfere with witnesses or otherwise obstruct the course of justice.

15. Subsection (1)(d) gives the court the right to refuse bail on the grounds of 'any other substantial factor which appears to the court to justify keeping the person in custody.' This is designed to ensure that the court has sufficiently flexible discretion, but exercise of that discretion will be constrained (as it already is) by ECHR case law. Other factors recognised by ECHR case law, although they will rarely be applicable, include the preservation of public order and the protection of the accused. These factors might, for example, apply where individuals on serious terrorism charges appear before the court.

16. Subsection (2) gives an illustrative and non – exhaustive list of material considerations to which the court must, where they exist and are relevant, have regard when taking the bail decision. The considerations identified are;

- The nature and seriousness of the alleged offences;
- The probable disposal of the case if the individual were convicted (a strong likelihood of a serious custodial sentence, for example, would be relevant here);
- Whether the individual was on bail, or was subject to other court orders or sentences, when the offences with which they are charged were allegedly committed;

- The individual's character and antecedents, including the nature of any previous convictions (including convictions from outside Scotland) and of any previous breaches of court orders or the terms of any release on licence or parole; and
- The individual's associations and community ties (for example whether there is a secure potential bail address and family support for the accused).

17. These reflect the considerations already taken into account under Scots common law. The subsection makes it clear that the court can also take any other material considerations which it identifies into account.

New Section 23D

18. Section 23D sets out particular serious types of cases in relation to which bail is to be granted only in exceptional circumstances. A similar exceptional circumstances test operates in England and Wales under section 25 of the Criminal Justice and Public Order Act 1994. Section 23D reflects the fact that under article 5(3) of the ECHR, detention would usually be justified when someone with a previous conviction for a grave offence is charged with a second such crime on the basis that this demonstrates a need to prevent further offences whilst on bail. It would therefore only be exceptionally that detention was not justified under the Convention. Subsections (2) and (3) apply:
    - Where an individual is on a serious charge (to be heard before a jury) of a violent or sexual offence and has a previous serious conviction for a violent or sexual offence; and
    - Where an individual is on a serious charge of drug trafficking and has a previous serious conviction for drug trafficking.

19. The section also defines the terms 'drug trafficking offence' 'sexual offence' and 'violent offence'. The definition of drug trafficking covers a wide range of drug related offences, including production and supply of controlled drugs, and any involvement in or offer to supply and possession with intent to supply such drugs. Sexual offence is defined by reference to section 210A(10) and (11) of the 1995 Act which does not include prostitution.

20. The court is also entitled to take into account convictions for similar serious offences in England, Wales, Northern Ireland and any other state of the European Union. The court is specifically given discretion to determine whether a conviction in another jurisdiction is equivalent to a conviction on indictment in Scotland for one of the offence types listed.

21. Subsection (7) makes it clear that this section is without prejudice to the wider factors and considerations to be taken into account in relation to every bail decision which are set out in new Section 23C.

Section 2 – Bail and bail conditions

22. This section makes a series of changes to sections 24 and 25 of the 1995 Act.

23. Subsection (1)(a) inserts new subsections into section 24 of the 1995 Act. Section 24(2A) provides that where the court grants or refuses bail, it must state its reasons for that decision. This will apply to any bail decision in the 1995 Act. At present there is no formal requirement for judges to give reasons. Strasbourg case law makes clear that when a court considers it appropriate to detain a person it must set out the reasons for their decision – see *Vehbi Selcuk v Turkey 2006, application No 00021768/02*

24. Section 24(2B) of the 1995 Act provides that when a court, in solemn or summary proceedings, grants bail to a person accused of a sexual offence, without imposing any further ("special") conditions, it must explain why it did not consider such conditions necessary. Examples of further conditions might involve a requirement not to contact

named persons or enter a particular house, street, or area; or to attend a named police office at defined intervals (perhaps weekly). This is a non-exhaustive list.

25. Subsection (1)(b) amends section 24(4)(b)(ii) so that the court can attach additional conditions to a bail order to facilitate an identification parade or other identification procedure.

26. Subsection (1)(c) adds an additional standard bail condition to the list at section 24(5) that requires the accused not to cause alarm or distress to witnesses. At present, the only standard condition relating to witnesses requires the accused not to "interfere with witnesses". This condition will not always deal adequately with the sort of behaviour that can be of concern as it may require the accused to threaten or intimidate the witness in some way specifically intended to deter them from giving evidence rather than general abuse *per se*. This provision therefore makes clear for the avoidance of doubt that in relation to witnesses, all behaviour which causes or is likely to cause alarm or distress is prohibited.

27. Subsection (2) amends section 25 of the 1995 Act. Subsection (2)(a) creates new subsection (A1), which provides that when bail is granted to an accused who is present in court, the implications of the conditions of bail and the consequences of their breach, should be explained by the court to the accused. New subsections (B1) and (C1) further provide that in all cases the bail conditions and consequences of bail breach should be given to the accused in written form, whether as part of the bail order or in another document.

28. The court must also explain the need to seek the court's consent in certain circumstances to a change in the 'domicile of citation'. This will be the address contained in the bail order and is the address at which formal communications relating to the case will be sent to the accused. This need not be the address at which s/he normally resides – it may, for example, be care of his or her solicitor. Under the law as it stands the accused may ask the court to alter his or her domicile of citation, but is under no obligation to do so if s/he moves house.

29. However, subsection (2)(c) inserts into section 25 of the 1995 Act two new subsections providing that where the domicile of citation is the accused's normal place of residence, and the accused moves house, the accused must within 7 days apply to the court for consent to alter the domicile of citation accordingly. Failure so to do is an offence, and penalties for that offence are prescribed.

Section 3 – Breach of bail conditions

30. This section amends sections 27 and 28 of the 1995 Act which set out the powers and penalties at the disposal of the court when bail is breached.

31. Subsection (1)(a) increases the custodial penalty available in the sheriff summary court for failure to appear at a hearing or breaching a condition of bail from 3 to 12 months.

32. Subsection (1)(b) inserts a new subsection (4B) to bring the offence under section 27(1)(a) of the 1995 Act of failure to appear in line with the provision which already exist in relation to offences on bail under section 27(3). Where the defence does not challenge the prosecution assertion that the individual;

- was on bail;
- was subject to particular bail conditions;
- failed to appear at a diet; or
- was given due notice of a diet

that assertion shall be held to be admitted, and the prosecution is not separately required to prove the assertion.

33. Subsection (1)(c) relates to the situation in which an offence has been committed while on bail, and the court is therefore required under section 27 to have regard to that fact when sentencing after conviction. In such cases, section 27 allows the court to impose an aggravated sentence reflecting the breach of trust involved, and section 27(5) makes clear that such a sentence can exceed the maximum penalty for the offence committed currently available.

34. At present the judge who imposes an aggravated sentence under this section must explain the nature and extent of the difference from the sentence which the accused would have received had s/he not been on bail. But where the judge decides not to add any element to the sentence reflecting the bail breach, there is no obligation to explain why. Subsection (1)(c) creates such an obligation, providing that where the judge decides not to increase the sentence to reflect the bail breach, an explanation must be given.

35. Subsection (1)(d) increases the maximum custodial penalty for offences of failure to appear/breach of bail in solemn cases from 2 to 5 years. Subsection 1(e) amends section 27(9). At present, section 27(9) allows the court to impose a penalty for the section 27(2) offence of failure to appear or to comply with a bail condition in addition to the penalty for the original offence and regardless of whether the total of the two penalties would exceed the maximum penalty that the court is competent to impose for the original offence. The amendment alters this discretion by requiring the court in all cases to impose a section 27(2) penalty in addition to any penalty for the original offence. Subsection (1)(f) makes further provision by inserting a new section 27(9A) which makes it clear that the reference to a section 27(2) penalty being imposed "in addition" to the penalty for the original offence means that the court is required to impose consecutive sentences where the penalties are imprisonment or detention. This will apply whether or not the sentences relate to the same complaint or indictment and whether or not they are imposed at different times. New section 27(9B) makes it clear that this obligation is subject to the usual restriction in section 204A of the 1995 Act where a court is prevented from imposing a sentence that is consecutive to any sentence from which the person has already been released.

36. Subsection (2) amends section 28 of the 1995 Act. At present, section 28 gives a constable power to arrest without warrant an accused who has been released on bail where the constable has reasonable grounds for suspecting that the accused has broken, is breaking, or is likely to break any condition imposed. The accused is brought before a court and after hearing parties, the court may recall the bail order, release the accused or vary the bail order.

37. However, where there has been a bail breach, an accused will not necessarily be arrested under section 28. It would be possible for the accused to be arrested without warrant for the section 27(1) offence of breaching bail (the police have powers to arrest without warrant for statutory offences punishable by imprisonment). Alternatively, the accused may have been arrested for committing a separate substantive offence (whether common law or statutory). It may be discovered later that the circumstances of the offence show that the accused also breached a bail condition. Alternatively a police officer may arrest a person known to have an outstanding warrant. It may subsequently be discovered that the place the person was seen is one which that person is prohibited from entering in terms of a bail order. In all these cases proceedings under section 28 are barred because the arrest was for something else.

38. Subsection (2) is therefore directed at widening out the existing section 28 powers to ensure that a person can be detained and brought before a court under section 28 for breaching bail even although the person was arrested for a breach of bail under section 27 or was arrested in relation to a separate substantive offence and it turns out that the circumstances of that offence show that the person was breaching bail. The amendment ensures that whenever the police arrest someone in these circumstances they may detain them in custody and make use of the provisions set out in section 28(2)

– (6) of the 1995 Act to bring that individual to court for the court to consider recalling or altering the bail order.

Section 4 – Bail review and appeal

39. This section makes a number of amendments to sections 30 and 32 of the 1995 Act which relate to the processes by which bail decisions may be reviewed or appealed.

40. Subsection (1) amends section 30 of the 1995 Act. Subsection (1)(a) inserts a new subsection (1A) into section 30 of the 1995 Act, placing beyond doubt the right of an accused who has accepted their bail conditions to seek a review. Subsection (1)(b) clarifies the evidence which will be required when an individual seeks a review of the decision to refuse bail, or of the bail conditions imposed. At present the individual does not have to put any new information before the court; in future, the court which reviews the original decision will only be able to grant bail, or alter an existing bail order, where there is a material change in the person's circumstances or the person puts before the court material information which was not available to the court which made the original order.

41. Subsection (2) makes a series of alterations to section 32 of the 1995 Act which, as read with section 24(7) deals with appeals against bail decisions and the conditions imposed. At present there is no requirement on the judge who made the original decision on bail to provide the appeal court with a reasoned account of why that decision was made. These changes alter that position.

42. New subsection (3A) provides that the notice of appeal should be lodged with the clerk of the court from which the appeal is to be taken. The clerk of that court is, in turn, obliged by subsection (3B) to send a copy to the judge who took the original decision, with a request for a report of the judge's reasons. The clerk must also send the notice of appeal to the Clerk of Justiciary. The Clerk of Justiciary must, on receipt of the notice of appeal, in terms of subsection (3F), fix a diet for the bail appeal hearing without delay.

43. Meantime, subsections (3C), (3E) and (3G) require the judge whose decision is being appealed to provide the clerk of court with a report of the reasons for the decision. That report must be sent by the clerk to the Clerk of Justiciary, and in turn the Clerk of Justiciary must send a copy of the report to the accused or his solicitor, and to the Crown Agent.

44. Subsection (3H) covers what happens if the judge's report is not produced in time for the hearing – bail appeals are heard within days and there may be circumstances (for example, judicial illness) where the report is not available. To avoid undue inflexibility these provisions therefore give the High Court sitting as a bail appeal court power to hear the appeal without the judge's report if that report is not available, as well as power to insist that it be produced within a given time. These amendments are based on similar requirements that are imposed in relation to appeals in general in section 113 of the 1995 Act. In line with the practice for general appeals, subsection (3I) provides that the judge's report is to be available only to the High Court and the parties to the case but with scope for an Act of Adjournal to prescribe other persons who may get access.

Section 5: Attitude of prosecutor after conviction

45. Section 5 introduces new section 32A into the 1995 Act.

46. Subsection (1) of new section 32A confirms that following conviction where a question of bail is being considered by the court (including consideration of bail conditions), the prosecutor and the convicted person have a right to make submissions on the question of bail post-conviction. The traditional position has been that the Crown will not make submissions at this stage.

47. Notwithstanding this right, subsection (2) confirms that the court's discretion in relation to determining the question of bail is not restricted in any way by the attitude of the prosecutor. This is in keeping with other similar provisions in the Act.

48. Subsection (3) refers to section 245J of the 1995 Act. Section 245J details how the court decides questions of bail where a probationer or offender appears before it in respect of an apparent failure to comply with a requirement of a court disposal such as a probation order or a drug treatment and testing order. These orders will all by their nature be made after a plea of guilty or a finding of guilt. Currently under section 245J the prosecutor has the right to be heard in relation to any appeal of the court's decision on bail but not its initial determination. This amendment both clarifies that the Crown does not have a right to be heard in connection with initial bail applications under section 245J, and removes the requirement for the Crown to be heard in relation to any bail appeal arising out of that section.

Section 6 – Time for dealing with applications

49. Subsection (1) amends section 22A of the 1995 Act to provide that when an accused first appears in court from custody, a decision must be taken on his admittance to or refusal of bail by the end of the following day. At present that decision must be taken within 24 hours, which has to be interpreted literally. This means that a case which called at 14.20 on Wednesday and was continued overnight would have to be dealt with by 14.20 on the Thursday even if there were priority cases to be called that day. The change gives a little more flexibility while still ensuring that the court can only keep someone in custody for one night before taking a substantive decision on whether to grant or refuse bail.

50. Similar changes are made by subsections (2) and (3) in respect of the procedure where an accused seeks bail at any hearing other than the first one in the case (section 23 of the 1995 Act) and where bail is sought pending the hearing of a stated case (section 177 of the 1995 Act).

51. And, in respect of all three procedures, the Act is amended to clarify that for these purposes Saturdays, Sundays and court holidays are not to be regarded as the following day, unless the court is sitting on one of those days.

52. Subsections (4), (5) and (6) bring the process for appealing against the refusal of bail (under sections 200(9), 201(4) or 245J) into line with the other instances of this nature in the 1995 Act. Section 200(9) covers remand for inquiry into the physical or mental condition of the accused; section 201(4) covers adjournment before sentence; and section 245J covers breach of certain court orders (such as probation and community service orders). These amendments provide that an appeal in relation to bail must be lodged with the clerk of the court from which the appeal is taken. Provision is made that the clerk of court must in turn send the note of appeal to the Clerk of Justiciary.