

Bail in Criminal Proceedings: Issues for Consultation

**Presentation by Ms Katie Quinn, Senior Principal Legal Officer,
Northern Ireland Law Commission,
30th September 2010, Inn of Court, Belfast**

In this short presentation, I wish to highlight some selected issues on which views are invited in the Bail Consultation Paper. Before I do that, however, I would like to say a few words about my role in the Bail project.

When I joined the Commission in August 2009, the Bail project had been underway for some time. Many important preliminary discussions had taken place and much research material had been gathered on bail law and practice both in Northern Ireland and further afield. My role at that time was to distil these materials in a clear and accessible account of the current law and to identify difficulties, issues and possible alternatives for the consideration of consultees. Bail law and practice presented a particularly challenging topic for analysis as many of the governing rules are largely taken for granted by practitioners but on closer examination the law regulating this area proved to be intricate and difficult to navigate. Coming from an academic perspective, the input of practitioners, policy makers and other experts (including those involved in the criminal process as either victims or alleged offenders) proved invaluable in this exercise and brought home to me (and the Commission) the importance of looking past the legislation and case law and examining the operation of the law in practice: the *law in action*, as it is sometimes called. I hope the Consultation Paper does justice to the realities of decision making in this complex area of law but we would of course welcome any further perspectives or observations.

Before I go to outline some selected headline topics addressed in the Consultation Paper, I would like to reiterate again the full range of issues that are discussed in the Paper. Drawing on the analysis of law and practice, the

preliminary discussions, the comparative material and relevant human rights standards, the matters addressed within the Consultation Paper fall broadly within the following areas:

1. The legal framework (including the right to bail and the grounds for refusal)
2. Bail decision making (including provision of information to decision makers)
3. Bail conditions (including personal recognizances, sureties, security and other bail conditions)
4. Breach of bail (including powers of arrest and offences)
5. Bail monitoring and support
6. The position of victims of crime vis-à-vis bail decision making
7. Awareness, transparency & public confidence (including the provision of reasons)
8. The particular concerns that arise in respect of children and young persons

Under these various headings, consultees are invited to give their views on over 50 specific questions on bail law and practice within the Consultation Paper. The Commission also welcomes views on other bail related matters not specifically addressed in those questions. Within the time constraints of this presentation, I do not propose to summarise the Paper or all questions for consultation, but rather to dwell on some selected aspects which I anticipate may be of particular interest to this audience. In the next twenty minutes or so, I propose to discuss briefly the following issues:

1. The right to bail
2. Bail information
3. Bail conditions
4. Breach of bail
5. Bail support

6. The provision of information to victims

7. The test for bail for children and young persons

I will begin with a topic which arguably forms the cornerstone of any bail law - the right to bail. In Northern Ireland, the presumption in favour bail for persons charged but not convicted of criminal offences can be traced to the Police and Criminal Evidence (NI) Order 1989 (PACE (NI)) in respect of bail granted by the police and longstanding common law authority in respect of bail granted by the courts. This right to bail has also been significantly strengthened in recent years by the incorporation into domestic law of the European Convention on Human Rights and the Article 5 right to liberty, in particular. Despite the differing sources, therefore, the right to bail is well established in this jurisdiction. The *grounds* for the refusal of pre trial bail, by the police and courts, however, are not so precisely defined as one might expect, given the important issues at stake in bail decision making.

It is common ground that bail can be refused by both the police and the courts where there are substantial grounds for believing that the accused will:

- fail to surrender to custody;
- interfere with witnesses or otherwise obstruct the course of justice or;
- commit offences while on bail.

In addition to these grounds PACE (NI) permits the refusal of bail by the police for a number of other reasons, including the accused's own protection. On the court side, it is well established in the High Court that bail can be refused if there is a likelihood that the accused will fail to comply with bail conditions. Overlying this difference of emphasis between the legislation which regulates police bail and practice in the courts, the European Convention jurisprudence offers a further ground for the refusal of bail, namely the preservation of public order.

The grounds upon which a person charged but not convicted of a criminal offence may be denied their liberty in this jurisdiction are arguably uncertain and potentially inconsistent. An example of this inconsistency can be seen in the differing powers available to the police and the courts to grant bail. Legislation provides the police with authority to deny bail to a person charged with an offence on the grounds that detention is considered necessary for the accused's own protection, but no equivalent power is conferred upon the courts. Further, the High court may deny bail on the basis that the accused is unlikely to comply with bail conditions, whereas the police are provided with no such authority at an earlier stage in the proceedings.

The Commission is of the view that there is a case for the enactment of a statutory right to bail for persons charged but not convicted of criminal offences which would apply to both police and court decisions. The Commission is also of the provisional view that the grounds upon which bail could be refused by the police and the courts should be set out in legislation, as is common in almost all jurisdictions examined during our comparative analysis.

If the fundamental proposition that a right to bail and the grounds for refusal of bail should be enshrined in statute is accepted, the Commission welcomes views on the precise wording and content of those grounds. Consultees are invited to consider whether the three established grounds outlined earlier should be retained in their current form. The denial of bail for the prevention of offences, although well established, remains a contentious issue in some quarters. We would also ask consultees to consider whether any or all of the additional grounds currently applied by the police and the courts or set out in Convention jurisprudence should be included in legislation and if any other grounds should be introduced. In some jurisdictions, for example, bail can be denied in order to secure the safety or welfare of victims.

The question of the grounds upon which a person can be denied bail is pivotal to any bail legislation and will, to a large extent, determine the issue of whether an appropriate balance has been struck between the individual right to liberty and the interests of society in the prevention of crime, the protection of the community and the effective administration of justice.

This issue leads to consideration of another significant topic addressed in the Consultation Paper, namely bail information. The proposition that bail decision makers must have access to comprehensive, accurate and timely information in order to reach a fair and just decision regarding the liberty an individual is largely uncontroversial. It is also important that the parties to the proceedings have access to relevant information. Such information might include previous convictions or bail history, personal, employment or medical considerations or victim related information. In many jurisdictions 'bail information schemes' have been introduced to facilitate decision makers in determining the issue of bail. No such formal scheme exists in Northern Ireland although informal information gathering is carried out by Court Liaison officers in Belfast and the possibility of devising a formal bail information scheme was recently considered by the Probation Board for Northern Ireland.

The Commission acknowledges that the objective of ensuring that bail decision makers have access to accurate and comprehensive information may not require legislative intervention. Therefore the Commission invites views on appropriate administrative arrangements which might be adopted in relation to the provision of bail information and by whom such a scheme might be delivered. Such bail information arrangements may build on existing models or resources and may address not only the individual's suitability for bail but also appropriate bail conditions or support which may facilitate release.

The next issue I wish to address follows on neatly from the issue of bail information and concerns the conditions which may be attached to bail. This is a topic which gave rise to much debate during the preliminary discussions conducted by the Commission. During these discussions views were expressed that bail conditions are often inappropriate or ineffective. Some participants suggested that bail conditions should be realistic and tailored to the circumstances of the accused and the offence charged.

In our analysis of bail conditions in Northern Ireland and elsewhere, the Commission adopted a distinction, common in other jurisdictions, between 'financial conditions' such as recognizance, surety and security and 'conduct conditions' such as reporting conditions or geographical exclusions. Financial conditions may, for obvious reasons, be difficult for some accused persons to fulfil and in several jurisdictions there are limits placed on the powers of bail decision makers to impose such conditions. It is common in some jurisdictions for a statutory obligation to be imposed requiring the imposition of the least onerous conditions necessary to ensure compliance with bail, based on an established sliding scale of bail conditions. After considering these issues and those raised in preliminary discussions, the Commission invites views on whether detailed guidance should be provided to bail decision makers on the imposition of bail conditions. Further, if such guidance is considered necessary, should it have a statutory basis?

The one aspect of bail laws which arguably attracts the most public attention is the perceived flouting of bail by persons released by the police or the courts. Breach of bail can take several forms and consideration is given in the Consultation Paper to failures to surrender to custody, breaches of bail conditions and offending while on bail. The police obviously enjoy powers of arrest in respect of these breaches and it is an offence to fail to surrender to custody, but the question of whether a breach of a bail condition, such as a curfew or a geographical exclusion, should be criminalised produced a finely

balanced debate. While on the one hand, there is much support for a robust response to breaches of conditions, it has been suggested that such an offence would disproportionately impact upon children and others who may have difficulties understanding or complying with bail conditions. It may also result in unnecessary criminalisation with the possibility of acquittal on the original charge but conviction for the breach. The Commission would ask consultees to consider if it is appropriate for breach of bail conditions to be made a criminal offence in any new or revised bail legislation.

Compliance with bail leads me conveniently onto my next discrete point, that is, support for persons on bail. The Commission noted during our preliminary discussions the favourable views expressed in relation to the bail support provided by the Youth Justice Agency to some children and young persons released on bail. Such schemes, which are common for both adults and young person in other jurisdictions, may address such issues as accommodation, drug or alcohol dependency and education or employment. Bail support at the earliest opportunity may contribute to a decrease in the remand population as well as a reduction in offending on bail and breaches of bail conditions. The Commission welcomes the views of consultees on administrative arrangements which may be developed to ensure support for persons on bail, possibly building on existing models and resources.

Leaving aside support for the *accused* for a moment, the Commission is mindful of the impact of bail decisions on another key player in the criminal process, the victim of an alleged offence. The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power stresses, among other matters, the importance of victims being kept informed of developments in criminal proceedings. It is clearly undesirable that the victim of an alleged offence should be ignorant of the release of an accused, particularly if the offence is a violent or sexual one. It is also self evident that

victims may need to be informed of bail conditions which directly affect them, such as a geographical exclusion or a no contact condition.

Currently, arrangements for the provision of information to victims in Northern Ireland are dealt with in internal policies adopted by the PSNI and the PPS. These policies vary somewhat in their emphasis with the PSNI policy specifically stating that the police should keep victims informed of decisions to grant or deny bail, and any conditions attached whereas the PPS policy contains a more general commitment to ensure that victims are kept informed of the progress of their case. Legislation concerning the treatment of victims in criminal proceedings has been enacted in several other jurisdictions. The Commission wishes consultees to consider if a statutory duty to provide information to victims in relation to bail decisions is desirable in Northern Ireland or if this objective may be met by streamlining existing guidance.

Whichever route is deemed appropriate, consultees are also asked to consider if such information should be provided to *all* victims, only victims of particular offences (such as murder or rape) or those affected by particular bail conditions (a no contact condition) or only those victims who expressly request information.

Although victims may not be perceived by some as central to bail decision making, the consideration given to the safety and welfare of victims in such decisions may impact greatly upon public confidence in bail decisions and the criminal justice system as a whole.

Finally, I wish to turn to the separate but related issue of bail in respect of children and young persons. In addition to the fine balance which must be struck between liberty, justice and public protection, bail decisions in respect of children must also take account of the interests of the child. As many of

you will be aware bail decisions relating to children have been subject to significant statutory intervention in relatively recent years. Article 12 of the Criminal Justice (Children) (Northern Ireland) Order 1998 lays down a distinct test for the remand of children and young persons by the courts, requiring their release unless the offence falls within a prescribed category *and* it is necessary to remand the child or young person to protect the public. The test for bail under Article 12 has been widely criticised, with suggestions being made that it is both too lenient and too strict.

Further, like the test for bail in respect of adults, there is some variation between the powers available to the police in respect of children and those available to the courts. Article 12 provides that a court must release a child or young person on bail unless the offence is a sexual, violent or other serious offence or the offence is an indictable offence and the child was either on bail at the time of commission or has been found guilty of an indictable offence within the previous 2 years. In addition to these requirements the court must deem it necessary to remand the child or young person to protect the public. By contrast PACE (NI) provides that children or young persons charged with most offences must be released unless one of the grounds outlined for adults exists i.e. there are reasonable grounds for believing that he or she will fail to surrender to custody, interfere with the administration of justice or commit offences while on bail. But PACE (NI) also provides for the detention of children or young persons in their own interests. The Commission invites views on whether there should be a single test for bail which both the police and the courts could apply to children and young persons charged with offences but not convicted?

If a single test is desirable, a further question arises as to whether children and young persons should be subject to the same test for bail applied to adults. In several other jurisdictions examined by the Commission children and young persons are subject to the same test for bail that is applied to

adults, subject to modification to reflect the age of the young person. Such modification might include consideration of principles laid down in the United Nations Convention on the Rights of the Child such as the 'best interests' principle and the principle that detention should only be used as a last resort and for the shortest appropriate time. It has been suggested that the current system for the detention of young persons in Northern Ireland takes inadequate account of these principles. The Commission welcomes views on this issue.

Legislation has also been utilised to address other concerns relating to children and young persons in other jurisdictions. Statutory provisions prohibit the detention of young persons solely for care or protection reasons or because there is a lack suitable accommodation. While such provisions are attractive in their clarity, it is arguable, however, that suitable accommodation and support for such young persons must be in place before any such legislative enactment could take effect. Views of consultees on the provision of accommodation and support services to children and young persons suspected of involvement in criminal activities are welcomed.

In conclusion, I reiterate that the issues discussed in this brief presentation provide only a flavour of the detail discussed within the Consultation Paper. The nature and complexity of bail law and practice and the possible reform options are set out there in detail and consultees are invited to consider 54 questions relating to the reform of bail law and practice in Northern Ireland. On behalf of the Commission, I would encourage you all to give the Paper close examination and to bring it to the attention of any other interested parties. As already mentioned, the closing date for the bail consultation is **31 January 2011**. After that date, the Bail team will have the task of analysing the responses received, formulating recommendations and drafting the Final Report accompanied by draft legislation. As outlined in the Chairman's Preface "the quality and strength" of the Final Report will depend to a large

extent on the responses to the consultation. I look forward to hearing your views.