



Northern Ireland
Law Commission

promoting law reform in Northern Ireland

Consultation Paper

Bail in Criminal Proceedings

NILC 7 (2010)

CONSULTATION PAPER

BAIL IN CRIMINAL PROCEEDINGS

NILC 7 (2010)

Northern Ireland Law Commission
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THE NORTHERN IRELAND LAW COMMISSION BAIL IN CRIMINAL PROCEEDINGS

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BACKGROUND TO THE COMMISSION

The Northern Ireland Law Commission ('the Commission') was established in 2007 following the recommendations of the Criminal Justice Review Group (2000). Its purpose is to keep the law of Northern Ireland under review and to make recommendations for its systematic development and reform.

The Commission was established under the Justice (Northern Ireland) Act 2002. The Act requires the Commission to consider any proposals for the reform of the law of Northern Ireland that are referred to it. The Commission must also submit to the Department of Justice programmes for the examination of different branches of the law with a view to reform. The Department of Justice must consult with the Attorney General for Northern Ireland before approving any programme submitted by the Commission.

MEMBERSHIP

The Commission consists of a Chairman, who must hold the office of judge of the High Court, and four Commissioners, one of whom must be a person from outside the legal professions. The Chairman and Commissioners are appointed on a part-time basis. There is also a Chief Executive, who is appointed from the legal professions.

These positions are currently held by:

Chairman:	The Honourable Mr Justice McCloskey
Chief Executive:	Ms Judena Goldring MA, BLegSc, Solicitor
Commissioner:	Professor Sean Doran (Barrister-at-Law)
Commissioner:	Mr Neil Faris (Solicitor)
Commissioner:	Mr Robert Hunniford (Lay Commissioner)
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Sean Doran and Robert Hunniford

Legal team for this project

Project lawyer: Katie Quinn

Lawyer: Maria Dougan (April 2008 – February 2009)

Legal Researcher: Joan Kennedy

RESPONDING TO THE CONSULTATION PAPER

This consultation seeks the views of consultees on the desirability of reforming the law and practice on bail in Northern Ireland. Interested parties are invited to comment on the questions raised. As well as being available in hard copy, this Consultation Paper is available on the Commission's website:
www.nilawcommission.gov.uk.

This document can be made available in an alternative format or language. Please contact us to discuss how we can best provide a copy of this Consultation Paper that meets your needs.

The formal consultation period for this Consultation Paper commences on 1st October 2010 and the closing date for responses is 31st January 2011.

Responses should be sent to:

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CONSULTATION PROCESS

1. Consultation Criteria

This consultation is being conducted in line with the following seven consultation principles contained in the 'Code of Practice on Consultation' which has been adopted across government:

- Formal consultation should take place at a stage when there is scope to influence the policy outcome.
- Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
- Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
- Consultation documents should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
- Keeping the burden of consultation to the minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
- Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
- Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

Further information on these consultation criteria is available at www.bre.berr.gov.uk.

If you have any queries about the manner in which this consultation has been carried out, please contact the Commission at the following address:

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2. Consultation responses: Confidentiality and Freedom of Information

Freedom of Information Act 2000

The Freedom of Information Act 2000 gives the public a right of access to any information held by a public authority: in this case the Commission. The right of access to information includes information provided in response to a consultation. The Commission will treat all responses as public documents in accordance with the Freedom of Information Act 2000 and may attribute comments and include a list of all respondents' names in any final report.

If you wish to submit a confidential response, you should clearly mark your submission as 'confidential'. The Commission cannot automatically consider as confidential information supplied to it by you in response to a consultation.

PREFACE AND ACKNOWLEDGEMENTS

The Northern Ireland Law Commission is an independent body, established under the Justice (Northern Ireland) Act 2002, charged with the statutory responsibility of modernising and simplifying the law. The law reform projects upon which the Commission is engaged at any given time require the approval of the Department of Justice. At present, the Commission is engaged in its First Programme of Law Reform. This programme contains five projects, which were selected following a public consultation exercise. The purpose of that exercise was to enable interested members of the public, groups, organisations and professions to propose particular areas of the law as candidates for reform. This stimulated a substantial response, culminating in recommendations from the Commission to the Secretary of State (who was then the relevant responsible Minister) and ensuing ministerial approval for the First Programme.

The publication of this Paper marks the commencement of a formal period of public consultation during which the Commission hopes to receive a wide range of views from those with an interest in the administration of criminal justice. It will be noted that the Commission has also conducted extensive preliminary discussions with a view to ensuring that the issues raised in the Paper are fully informed and relevant to those concerned with the law and practice of bail: see Appendix B.

This is the Commission's first project in the area of criminal justice. Bail decision making by the police and the courts attracts considerable public interest. The subject gives rise to fundamental questions concerning the often competing interests of individual liberty and the effective administration of justice. Bail decisions frequently provoke broader debates about the capacity of the criminal justice system to deliver fair and transparent outcomes. While the focus of this project is limited to reform of the law on bail in Northern Ireland, it is hoped that the modernisation and simplification of this aspect of the law can contribute more broadly to promoting public confidence in the administration of criminal justice. This Consultation Paper provides a platform for reasoned discussion by all interested parties of the appropriate statutory framework to be adopted for decision making in this significant area of law and practice.

When the process of consultation is complete, the Commission will work towards the publication of a final report to the Department of Justice, which it is intended will be accompanied by draft legislation. The quality and strength of that report will depend to an important extent on the engagement that precedes it. I would therefore request that you read this Consultation Paper and respond accordingly.

Thanks are due to a wide range of individuals who have assisted in the work leading to publication of the Paper. The Commission is indebted to Mr Tom Haire, Department of Justice, for his contribution to the project as a member of the Bail Steering Group. The following have helpfully read and provided constructive comments on draft chapters of the Paper: District Judge Connor, The Honourable Mr Justice Hart, Ms Terese Henning, University of Tasmania, Professor Jill Hunter, University of New South Wales, Dr John Kremer, Queen's University Belfast, and Mr Barry Valentine. Particular thanks are due to Una Corrigan of the Northern Ireland Courts and Tribunal Service who provided valuable information and Chris Gregg, Patricia MacBride and Nicola Smith who helped in the final preparation of the document for publication. The Commission is also grateful to all those who took part in the preliminary discussions on the subject.

Finally, I would ask you to note that the final date for responding to the Consultation Paper is **31st January 2011**. Please see page ix for further details.

On behalf of the Northern Ireland Law Commission, I look forward eagerly to receiving your views, suggestions and comments.

The Honourable Mr Justice Bernard McCloskey
Chairman
Northern Ireland Law Commission

EXECUTIVE SUMMARY

Chapter 1

In Chapter 1 the background to the bail project, including the statutory duties of the Northern Ireland Law Commission, is discussed. The importance of bail in the criminal process and the suitability of bail law and practice as a topic for reform are set out. The scope of the project, which includes bail granted by the police and the courts and bail decisions in respect of both adults and children, is outlined. The particular emphasis of the project on the bail and remand of persons charged with an offence by the police but not yet convicted is highlighted. It is explained that, although the primary focus of the bail project is on reform of the law relating to bail, matters of practice and administration are also considered in the Consultation Paper. The key objectives of the bail project are outlined.

Chapter 2

Chapter 2 addresses the rationale of bail and remand. Consideration is given to balancing the competing interests of the right to liberty and the presumption of innocence against the public interest in the effective prosecution of offences and public safety. The impact of human rights obligations on the bail system is also considered in Chapter 2, with particular emphasis on Article 5 of the European Convention on Human Rights (the 'ECHR'). The relevant rights incorporated into the proposed Bill of Rights for Northern Ireland are also highlighted. Finally, it is noted that complementary administrative arrangements may need to be designed to ensure the effective operation of any new statutory scheme.

Chapter 3

Chapter 3 examines bail law and practice in Northern Ireland in some detail. The complex legal framework, encompassing a range of statutes and common law sources, is noted at the outset. The powers of the police to grant bail both pre and post charge are outlined and the jurisdiction to grant bail in the various courts is considered. Powers to grant bail in immigration and extradition proceedings are outlined in brief. The presumption in favour of bail and some accepted grounds for refusal are considered and several uncertainties and inconsistencies between police and court bail are highlighted. Bail decisions at other stages of the criminal process, such as bail pending sentence, appeal and

compassionate bail are discussed briefly. Consideration is given to the importance of accurate bail information and the various initiatives which have been examined in Northern Ireland are explored.

The conditions which may be imposed upon a person before they are admitted to bail are described and further inconsistencies in the legal framework are underlined. The consequences of breaching bail by failing to surrender to custody, breaching bail conditions or offending on bail are examined. The monitoring and support of persons on bail are described in a further section. Communication with victims affected by bail decisions is then considered and inconsistencies in the obligation to provide reasons for bail decisions are highlighted.

Chapter 4

In Chapter 4 the rationale of bail and remand is revisited in the context of children and young persons. Youth justice policy in Northern Ireland is outlined and there is a brief discussion of relevant international principles and obligations, with particular emphasis on the United Nations Convention on the Rights of the Child (the 'CRC'). The powers of the police and the courts in relation to the bail and remand of children and young persons are set out and some inconsistencies are highlighted.

Chapter 5

Chapter 5 describes in detail the discussions which took place during a range of meetings and seminars conducted by the Commission between April 2008 and February 2010. Many individuals and organisations with a professional and personal interest in bail and the criminal justice system in Northern Ireland participated in these discussions. Topics discussed included the legal framework for bail, bail decision making, bail conditions, breach of bail, bail monitoring and support, the role of victims, awareness, transparency, and public confidence. The particular issues affecting children and young persons were also discussed.

Chapter 6

In Chapter 6 the findings from the comparative study of bail provisions in several other jurisdictions are presented. In keeping with the other chapters of the report, bail law and practice in the comparative jurisdictions is examined under the following headings: the legal framework; bail decision making; bail

conditions, surety and security; breach of bail; bail monitoring and support; the role of victims; awareness, transparency, and public confidence. Separate consideration is given to the bail and remand of children and young persons.

Chapter 7

After consideration of the current law and practice, the preliminary discussions and the comparative material, the Commission invites the views of consultees on a range of issues relating to bail law and practice in Chapter 7.

CHAPTER 1. INTRODUCTION

BACKGROUND TO THE PROJECT

- 1.1 The Northern Ireland Law Commission (the 'Commission') has undertaken the present project to review the law on bail in Northern Ireland as part of the Commission's First Programme of Law Reform. The First Programme was approved by the Secretary of State on 17th October 2009 and was subsequently laid before the Houses of Parliament and the Northern Ireland Assembly in accordance with sections 52(2) and 52(3) of the Justice (Northern Ireland) Act 2002.
- 1.2 The duties of the Commission are set out in the Justice (Northern Ireland) Act 2002. Section 51(1) provides that the Commission must keep under review the law of Northern Ireland with a view to its systematic development and reform, including in particular by (a) codification, (b) the elimination of anomalies, (c) the repeal of legislation which is no longer of practical utility, and (d) the reduction of the number of separate legislative provisions, and generally by simplifying and modernising it.
- 1.3 Having regard to the above statutory duties, the law on bail presents as a particularly suitable subject for consideration by the Commission. The present legal framework derives from a range of statutory and common law sources. It will be seen that some aspects of the law are complex, that there are certain inconsistencies in the statutory provisions that apply across the various levels of decision making and that development of the law has occurred on a piecemeal basis. In terms of the importance of the subject, it is clear that the decision to grant or refuse bail gives rise to important matters of principle that lie at the heart of the criminal process. The project addresses the question of whether the existing provisions on bail strike a proper balance between the right to liberty of the individual and the often competing interests of society in the prevention of crime, protection of the community and the effective administration of justice.
- 1.4 The bail project represents the first project conducted by the Commission in the field of criminal law and procedure and the publication of this Consultation Paper is particularly timely

in light of the recent transfer of policing and justice powers to the Northern Ireland Assembly and Executive on the 12th April 2010. As a consequence, the Department of Justice is now responsible for most policing and justice functions, which were previously the responsibility of the Northern Ireland Office.

SCOPE AND OBJECTIVES OF THE PROJECT

- 1.5 Bail decision making by both the police and the courts is examined in the bail project, encompassing pre and post charge police bail and court bail. The project concentrates in particular on the considerations which apply to persons charged with an offence by the police but not yet convicted. Specific consideration is also given to the bail and remand of children and young persons.

- 1.6 Although the main focus of this project is reform of the law relating to bail, matters of practice and administration are also considered in the Consultation Paper. The boundary between law and practice is not fixed and matters that are dealt with by way of legislative provisions in one jurisdiction may be dealt with purely by means of administrative arrangements or through custom and practice in another. An example is the provision of reasons for the refusal of bail in the courts, which in Northern Ireland is a matter of practice (para 3.73) but in some jurisdictions is required by legislation (paras 6.62 to 6.64). Where appropriate, the Commission may wish to consult on the possibility of placing current matters of practice on a statutory footing. Further, the Commission may also invite the views of consultees on issues which are likely to form the basis of purely administrative arrangements but which are considered essential to the effective operation of the statutory regime. Any proposals developed as a result of those consultations will be drawn to the attention of the relevant bodies for their consideration.

- 1.7 The key objectives of the bail project are to make recommendations which aim to: (a) simplify the current law and make it more accessible; (b) provide a legal framework that will promote consistency and transparency in bail decision making; (c) enhance public understanding of bail decision making; (d) ensure that the law on bail conforms

with the requirements of the European Convention on Human Rights (the 'ECHR') and maintains a proper balance between the right to liberty of the individual suspect and the interest of society in the prevention of crime and in the effective administration of criminal justice; (e) promote the development of appropriate administrative arrangements that will complement and ensure the effective working of any new or revised statutory scheme.

PHASES OF THE PROJECT

- 1.8 The publication of this Consultation Paper marks the completion of the first phase of the bail project. For the purposes of this paper, the Commission has conducted a thorough analysis of the law and practice relating to the bail and remand of adults and children in Northern Ireland. Extensive comparative research has been carried out in relation to bail law and reform initiatives in several other jurisdictions and the obligations imposed by relevant human rights instruments have been considered. In addition to this legal analysis, the Commission has engaged in wide-ranging preliminary discussions in which the views of many individuals and organisations regarding the operation of the bail system in Northern Ireland have been canvassed. The Commission regards these discussions as of great value in ensuring that the content of the Consultation Paper is relevant to and informed by those with an interest in the subject.
- 1.9 The Consultation Paper is structured as follows. In Chapter 2, we consider the general principles underpinning bail decision making. Chapter 3 contains an exposition and analysis of the present law and practice in this jurisdiction. Chapter 4 is devoted to the specific provisions on children and young persons. Chapter 5 summarises the views expressed by interested parties in preliminary discussions on the subject. Chapter 6 presents a comparative study of bail law and bail reform projects in other jurisdictions. Drawing on the various issues raised in the previous chapters, Chapter 7 sets out the questions for consultation. The procedure and timeframe for responding to the Consultation Paper are outlined above: see p ix.

1.10 The Consultation Paper will be followed by an analysis of the views expressed by consultees and the publication of a Final Report accompanied by draft legislation for government consideration.

CHAPTER 2. BAIL: GENERAL PRINCIPLES

RATIONALE OF BAIL AND REMAND

- 2.1 The presumption in favour of bail has a long history in Anglo-Irish criminal procedure.¹ During periods when defendants were subjected to extensive delays awaiting travelling justices, and detention was expensive and often ineffective, the release of accused persons into the custody of friends or family pending trial presented a convenient solution. Originally the key issue in considering the release of a defendant pre-trial was securing their attendance at trial but in more recent times other objectives, such as preventing the commission of further offences, have become accepted as valid grounds for the refusal of bail.
- 2.2 A range of important and often competing interests fall for consideration when addressing the issues of bail and remand. Of primary significance is the right to liberty of the individual and the presumption of innocence but these principles must be assessed alongside other important concerns. The public clearly have an interest in the effective prosecution of offences and therefore bail can usually be denied if there is a risk that the accused will abscond or interfere with the administration of justice. The public interest in protecting the community from crime may also justify remand in custody if considered necessary to prevent the commission of further offences. These three grounds, subject to some qualifications, are generally accepted as adequate justifications for the refusal of bail in most jurisdictions.² Pre-trial detention for other reasons, such as the protection of the accused, remains contentious.
- 2.3 The decision to release an individual accused of a criminal offence requires consideration of the various risks involved, such as the risk that the individual will abscond whilst on bail, reoffend or interfere with the course of justice. In order to justify any infringement of a person's right to liberty there

¹ For an outline of the origins of the right to bail in England, see N Corre and D Wolchover, *Bail in Criminal Proceedings* (3rd ed 2004). See also D Walsh, *Criminal Procedure* (2002), ch 10 for a discussion of bail in the Republic of Ireland.

² See ch 6.

must be convincing evidence of a significant risk.³ Remand in custody is only appropriate where it is concluded that the risk cannot be managed in the community, even with the attachment of appropriate conditions. Such risks are notoriously difficult to predict but the consequences for the accused, the community, potential victims and the criminal justice system can be profound if erroneous determinations are made.

- 2.4 Besides the obvious hardships of imprisonment, remand in custody may have serious implications for an accused person, damaging their relationships and employment prospects and placing them at a disadvantage in mounting their defence.⁴ Evidence from elsewhere also suggests that the risk of suicide and self harm is greater among remand prisoners than those serving a sentence imposed by a court.⁵
- 2.5 On the other hand, communities may suffer if bailed defendants fail to honour their conditions and commit further offences, intimidate witnesses or fail to appear at court. The risks involved in both bail and remand are undoubtedly more acute the longer the delay between charge and trial and therefore it is essential that prosecutions are dealt with in a prompt manner with the minimum of delay.⁶

BAIL AND HUMAN RIGHTS

- 2.6 Article 5 of the European Convention on Human Rights, now incorporated into domestic law by the Human Rights Act 1998, provides that '[e]veryone has the right to liberty and security of the person' and that persons should only be deprived of their liberty in specific situations and in accordance with procedures prescribed by law. Article 5 of

³ A Ashworth and M Redmayne, *The Criminal Process* (3rd ed 2005), p 211.

⁴ See Ashworth and Redmayne, above, p 209 and F Brookman and H Pierpoint, "Access to legal advice for young suspects and remand prisoners" (2003) 42(5) *Howard Journal of Criminal Justice* 452.

⁵ See A Liebling and H Karup, *Suicide Attempts and Self-Injury in Male Prisons* (Home Office, 1993).

⁶ Criminal Justice Inspection Northern Ireland has made a number of recommendations to reduce avoidable delay in the processing of criminal cases: see Criminal Justice Inspection Northern Ireland, *Avoidable Delay* (May 2006) and Criminal Justice Inspection Northern Ireland, *Avoidable Delay* (June 2010).

the Convention sets up a rigorous framework for the restriction by the state of the liberty of the individual. It is not appropriate here to discuss in detail the extensive jurisprudence generated by Article 5. Instead the fundamental principles which apply to the issue of bail and remand are outlined and a number of leading domestic cases interpreting Article 5 are discussed.

- 2.7 The primary purpose of Article 5 of the European Convention is to protect persons from arbitrary deprivation of their liberty. Article 5 lays down an exhaustive list⁷ of situations in which detention may be justified, including the lawful arrest or detention of persons suspected of criminal offences.⁸ Suspects should be brought promptly before a judge or other judicial officer and are entitled to trial within a reasonable time or release pending trial.⁹
- 2.8 In the Northern Ireland case of *McKay v United Kingdom*¹⁰ the European Court of Human Rights ruled that the court reviewing detention does not have to be the same court charged with granting or refusing bail. The applicant in *McKay* complained about the procedure under section 67 of the Terrorism Act 2000 whereby the magistrate who reviewed the lawfulness of his initial detention was precluded from considering the issue of bail, as the applicant was charged with a scheduled offence. The applicant had to wait another 36 hours until the High Court could hear his bail application, despite the fact that the police were satisfied that there was no terrorist element to the offence and had made no objection to bail. Several judges in the European Court of Human Rights disagreed with the interpretation of the majority concluding that the court which reviews the initial

⁷ *Engel v Netherlands* (1979-80) 1 EHRR 647 (App No 5100/71), para 57.

⁸ European Convention of Human Rights 1950, Council of Europe ('ECHR'), art 5(1)(c).

⁹ ECHR, art 5(3). Despite the wording, a prompt trial is not an alternative to release pending trial: *Wemhoff v Germany* (1979-80) 1 EHRR 55 (App No 2122/64).

¹⁰ (2007) 44 EHRR 41 (App No 543/03).

detention should have 'full jurisdiction'¹¹ to release the accused with or without conditions.¹²

2.9 The importance of judicial supervision of detention was recently highlighted in another Northern Ireland case, *In the Matter of an Application for Judicial Review by Colin Duffy and others*.¹³ Kerr LCJ, referring to the judgment of the European Court of Human Rights in *McKay*, concluded that Article 5(3) of the Convention demanded that any review of the lawfulness of detention under the Terrorism Act 2000 must also encompass an examination of the lawfulness of the original arrest. If such examination was not required, a person could be detained under the 2000 Act for up to 28 days without any judicial scrutiny of the lawfulness of his or her initial arrest. It was acknowledged that a review of the lawfulness of an arrest would not require a detailed analysis of the information which led to the arrest decision and may be subject to limitations, for public safety reasons, in many arrests involving terrorist offences.

2.10 The European Court of Human Rights has confirmed that a person charged with an offence should always be released pending trial unless the state can show 'relevant and sufficient' reasons to justify detention.¹⁴ In the domestic case of *In the Matter of an Application by Martin Shaw for Judicial Review*¹⁵ it was decided that section 67(3) of the Terrorism Act 2000, which precluded the court from granting bail where there were substantial grounds for believing that the applicant would, among other things, commit further offences, was compatible with Article 5. The provision required the production of sufficient evidence to satisfy the court that one of the consequences listed would occur.

2.11 In *Gault v United Kingdom*¹⁶ the European Court of Human Rights concluded that the reasons put forward by the

¹¹ Above, see the Joint Separate Opinion of Judges Rozakis, Tulkens, Botoucharova, Myjer and Ziemele, p 841.

¹² Since the *McKay* judgment, the Terrorism Act 2000, s 67 has expired (see Terrorism (NI) Act 2006), subject to transitional arrangements laid down in the Terrorism (NI) Act 2006 (Transitional Provisions and Savings) Order 2007.

¹³ [2009] NIQB 31.

¹⁴ *Wemhoff v Germany* (1979-80) 1 EHRR 55 (App No 2122/64), para12.

¹⁵ [2003] NIQB 68.

¹⁶ App No 1271/05.

Northern Ireland Court of Appeal when refusing to release the applicant on bail pending a retrial did not constitute relevant and sufficient reasons to justify the detention. The reasons relied upon by the Court of Appeal were that the retrial would be prompt and that there was a material difference between the applicant's third trial and her earlier two trials which justified her detention pending that trial although she had been granted bail pending the earlier trials. The European Court pointed out that it is well established that Article 5(3) of the ECHR does not allow states to choose between trial within a reasonable time and release pending trial¹⁷ and that it could not be concluded that the 'material difference' identified by the Court of Appeal meant that there was a greater risk that the applicant would abscond before the third trial.

2.12 Detention must be shown to be required having considered alternative methods of securing the accused person's attendance at trial.¹⁸ The detained person should not be called upon to show reasons for their release.¹⁹ If bail is granted, Article 5(3) provides that release on bail 'may be conditioned by guarantees to appear for trial.'

2.13 The European Court of Human Rights has acknowledged four legitimate grounds for refusing to release on bail a person suspected of having committed an offence. These grounds are:

- risk that the accused will fail to appear for trial;
- risk of interference with the course of justice;
- risk of commission of offences;
- preservation of public order.²⁰

2.14 In relation to the refusal of bail on the basis that the accused will commit offences, there is some uncertainty regarding the limits of this ground. In its initial consideration of compliance with the ECHR of the Bail Act 1976, the Law Commission of

¹⁷ Relying on *McKay v United Kingdom* (2007) 44 EHRR 41 (App No 543/03).

¹⁸ *Ilowiecki v Poland* (2003) 37 EHRR 24 (App No 27504/95).

¹⁹ *Ilijkov v Bulgaria* [2001] 7 Archbold News 1 (App No 33977/96).

²⁰ These four grounds were acknowledged by Sheil J in *In the Matter of Dennis Donaldson, An Applicant for Bail* [2002] NIQB 68, para 22, citing A Lester and D Pannick, *Human Rights Law and Practice* (1999), pp 123-4.

England and Wales suggested that this ground may need to be limited in scope to a risk of the commission of a serious offence which would be likely to attract a custodial sentence and/or an offence that has some nexus with the offence charged.²¹ The Law Commission was of the view, nonetheless, that an amendment to the Bail Act was not required as the provisions in question were capable of being applied in a manner which was compatible with the ECHR, if appropriate guidance was provided to decision makers.²² It was concluded, however, in the final report that the feared offence did not have to be of any particular level of seriousness and that the refusal of bail on this ground could be justified provided it is a necessary and proportionate response to a real risk that the accused would commit an offence while on bail.²³

2.15 Detention for the purposes of preserving public order may be justified in exceptional cases if the nature of the alleged offence and the public response are such that the release of the accused is likely to lead to a public disturbance.²⁴

2.16 The Convention demands certain procedural safeguards which must be adhered to on an application for bail.²⁵ The court determining the bail application must be impartial²⁶ and independent of the prosecuting and investigating authorities²⁷ and the applicant must be able to participate in the hearing.²⁸ In the Northern Ireland case of *In the Matter of Paul Robert Dinely, An Applicant for Bail*²⁹ it was decided that the applicant's right to participate in the proceedings was satisfied by the attendance of his legal representatives and his own participation via live television link. It was asserted that although there is no general right to be

²¹ Bail and the Human Rights Act 1998 (1999) Law Commission Consultation Paper No 157, paras 5.3 to 5.4 and 5.11.

²² Above, paras 5.16 to 5.17.

²³ Bail and the Human Rights Act 1998 (2001) Law Com No 269, paras 3.9 to 3.11.

²⁴ *Letellier v France* (1992) 14 EHRR 83 (App No 12369/86).

²⁵ ECHR, arts 5(3) and 5(4).

²⁶ *Huber v Switzerland* App No 12794/87.

²⁷ *De Jong, Baljet and Van Den Brink v Netherlands* (1986) 8 EHRR 20 (App No 8805/79).

²⁸ *Winterwerp v Netherlands* (1979-80) 2 EHRR 387 (App No 6301/73).

²⁹ [2000] NIQB 52.

physically present, it may be appropriate in some cases to require the attendance of the applicant at court. In general, however, it seems that the requirements of Article 5(4) will usually be satisfied if the judge deciding the issue of bail hears representations from the applicant or his or her legal representative.

- 2.17 The applicant must have access to legal assistance if necessary for an effective bail application³⁰ and the procedure must be adversarial, ensuring equality of arms between the parties, including adequate time³¹ and information to make an effective challenge to detention.³² The issue of disclosure of information necessary to challenge the lawfulness of detention arose in the Northern Ireland cases of *Dinely*³³ and *Donaldson*.³⁴
- 2.18 In *Dinely*, Campbell LJ concluded that although there is no general right to disclosure of all police files or disclosure equivalent to that provided before trial, the applicant was entitled to disclosure of any information relied on by the prosecution in objecting to bail, provided there was no good reason for withholding this information, such as the protection of a witness. The Court accepted however that each case had to be considered on its own merits and that there may be cases in which broader disclosure may be necessary.
- 2.19 The role of the judge in ensuring equality of arms between the parties to a bail application was further highlighted in *In the Matter of Dennis Donaldson, An Applicant for Bail*.³⁵ In that case the applicant had been denied bail largely on the basis of intelligence material relied on by the prosecution and read by the judge but not disclosed to the defence. Relying on decisions of the European Court of Human Rights in *Garcia Alva v Germany*³⁶ and *Lanz v Austria*,³⁷ Sheil J concluded that, if relied upon by the prosecution in objecting

³⁰ *Winterwerp v Netherlands* (1979-80) 2 EHRR 387 (App No 6301/73).

³¹ *Farmakopoulos v Belgium* (1993) 16 EHRR 187 (App No 11683/85).

³² *Lamy v Belgium* (1989) 11 EHRR 529 (App No 10444/83).

³³ See n 29 above.

³⁴ *In the Matter of Dennis Donaldson, An Applicant for Bail* [2002] NIQB 68.

³⁵ Above.

³⁶ (2003) 37 EHRR 12 (App No 23541/94).

³⁷ App No 24430/94 (final decision on 30 April 2002).

to bail, such intelligence material would have to be disclosed to the defence. It could, however, be edited to protect the identity of informants or other sensitive information not relied on by the prosecution in the bail application. Any dispute regarding the extent of disclosure should be resolved by the judge, ensuring fairness between the parties.

2.20 Adequate reasons for bail decisions must be provided by the court³⁸ and ‘abstract’ or ‘stereotyped’ explanations will not suffice.³⁹ For example, it cannot be assumed that those charged with serious offences are more likely to abscond⁴⁰ or that those with prior convictions will commit offences while on bail.⁴¹ Each case must be examined on its own facts.⁴²

2.21 The proposed Bill of Rights for Northern Ireland would include the protections laid down in Article 5 of the European Convention on Human Rights in addition to a number of further protections against the arbitrary deprivation of liberty.⁴³ Provisions relating to bail would include a right to consult promptly and privately with a legal representative and prompt access where appropriate to a medical practitioner, the right to be visited by a family member under appropriate supervision and an obligation on public authorities to take all appropriate measures to reintegrate into society those who have been held in detention.

³⁸ *Letellier v France* (1992) 14 EHRR 83 (App No 12369/86).

³⁹ *Clooth v Belgium* (1992) 14 EHRR 717 (App No 12718/87), para 44.

⁴⁰ *Yagci and Sargin v Turkey* (1995) 20 EHRR 505 (App No 16419/90).

⁴¹ *Muller v France* App No 21802/93 (decision on 17 March 1997).

⁴² In *Duffy*, n 13 above, it was decided that the rather brief reasons given by a judge in granting warrants for the extension of detention under the Terrorism Act 2000 were sufficient, in the context of the submissions put to the court by the police outlining their view that further detention was necessary and of which the applicants and their legal advisers were aware.

⁴³ Northern Ireland Human Rights Commission, *A Bill of Rights for Northern Ireland – Advice to the Secretary of State for Northern Ireland* (10 December 2008). Note that the Northern Ireland Office initiated a consultation on the proposals from the Northern Ireland Human Rights Commission: *A Bill of Rights for Northern Ireland: Next Steps*, Northern Ireland Office (November 2009). In its Consultation Paper the Northern Ireland Office indicated that it did not support the inclusion in any Bill of Rights for Northern Ireland the wide range of rights proposed by the Northern Ireland Human Rights Commission. However, although the consultation period ended on 31 March 2010, the Northern Ireland Office has not, as at the date of our Consultation Paper, given any further indication of its decision in regard to a Bill of Rights for Northern Ireland.

LEGAL AND ADMINISTRATIVE SOLUTIONS

2.22 It should be noted that, in considering the reform of the law of bail, it is necessary to have regard not only to the statutory framework, but also to administrative and practical arrangements that may complement the legislative scheme. Clearly drafted and accessible legislation alone will not necessarily address all aspects of this area of practice that may require fresh consideration. In England and Wales and the Republic of Ireland, where bail legislation has been enacted (albeit limited in certain respects), concerns nonetheless arise about whether the law is operating justly and effectively in practice. Matters such as the support for individuals on bail and the reduction of periods spent on bail are likely to require carefully crafted administrative rather than purely legislative solutions. This Consultation Paper discusses where appropriate whether there is a need for complementary administrative arrangements to be developed in conjunction with the proposed legislative provisions.

CHAPTER 3. BAIL LAW AND PRACTICE IN NORTHERN IRELAND

INTRODUCTION

- 3.1 The purpose of this chapter is to set out the law and practice governing bail in Northern Ireland.¹ It will be seen that the present legal framework is derived from a disparate array of statutory and common law sources. In the course of this exposition, an attempt will be made to identify areas in which present law and practice might be improved in terms of its consistency, clarity and accessibility.
- 3.2 The chapter is structured initially by reference to the various stages at which bail may be granted in criminal proceedings: from the grant of bail by the police, through to the jurisdiction of the magistrates' court, the Crown Court, the High Court and the Court of Appeal. The chapter then addresses the law governing the grant of bail in immigration and extradition cases. The general principles which apply to the grant of bail by the police and the courts to persons charged with criminal offences but not convicted is considered in some detail, followed by a brief account of bail decision making at other stages of the criminal process. Bail decision making, the attachment and variation of conditions, breach of bail, monitoring and support of persons on bail, the role of victims and reasons for bail decisions are discussed in subsequent sections.

THE LEGAL FRAMEWORK

- 3.3 There is no specific legislation which comprehensively governs the grant or refusal of bail in Northern Ireland. Rather, the law on bail in this jurisdiction is derived from a range of common law and statutory sources, usually specific to the person or authority tasked with granting or refusing bail in a particular context.² This disjointed approach to bail may be problematic, not least in terms of its complexity and the

¹ The focus of this chapter is on bail and remand in respect of adults. Bail law and practice relating to children and young persons is discussed in ch 4.

² See eg police bail under the Police and Criminal Evidence (NI) Order 1989 ('PACE (NI)') and magistrates' court bail under the Magistrates' Courts (NI) Order 1981.

potential for inconsistency across various bail decision makers.

- 3.4 Some efforts have been made in recent years to take a more unified approach to bail in this jurisdiction. The Criminal Justice (Northern Ireland) Order 2003 introduced a number of general rules regarding the enforcement of most types of bail. For the purposes of the 2003 Order 'bail' is defined as bail grantable under common law or statute:

(a) in or in connection with proceedings for an offence to a person who is accused or convicted of the offence, or (b) in connection with an offence to a person who is under arrest for the offence or for whose arrest for the offence a warrant (endorsed for bail) is being issued.³

This definition of bail mirrors that in the Bail Act 1976⁴ in England and Wales and includes all types of bail except what is termed 'street bail', as introduced by the Criminal Justice (Northern Ireland) Order 2004.⁵ The now abolished category of bail in respect of scheduled offences under section 67 of the Terrorism Act 2000 was also excluded from the general definition of bail laid down in the 2003 Order.⁶

- 3.5 The Criminal Justice (Northern Ireland) Order 2003 made several important amendments to the law on bail, but significantly for our present purposes, this legislation laid down for the first time in Northern Ireland some principles of general application to both police and court bail, namely a duty to surrender to custody in respect of persons released

³ Criminal Justice (NI) Order 2003, art 3(1).

⁴ Bail Act 1976, s 1. This definition has, however, been supplemented in England and Wales as a result of the Extradition Act 2003, s 198(2).

⁵ Street bail was introduced with the Criminal Justice (NI) Order 2004, art 4 amending PACE (NI), art 32. PACE (NI), art 32C(3) excludes 'street bail' from the ambit of the Criminal Justice (NI) Order 2003, part 2.

⁶ Criminal Justice (NI) Order 2003, art 3(2) excluded bail under the Terrorism Act 2000, s 67 from the enforcement rules laid down in the Criminal Justice (NI) Order 2003, part 2. Similar enforcement rules for those granted bail under the Terrorism Act 2000, s 67 were then brought in with the Justice (NI) Act 2004, s 11 (and sch 2). The Terrorism Act 2000, s 67 has expired as of 31 July 2007 (see Terrorism (NI) Act 2006), subject to transitional arrangements laid down in the Terrorism (NI) Act 2006 (Transitional Provisions and Savings) Order 2007.

on bail⁷ and an offence of failure to surrender to custody.⁸ The 2003 Order marked a move towards a comprehensive consideration of bail at all levels of the criminal justice system and provided the beginnings of a single legislative framework for bail decision making by the police and the courts.

- 3.6 Both the police and the courts have jurisdiction to grant bail at various different stages of the criminal process. The police may release on bail a person arrested either at a police station or elsewhere and both pre and post charge. The courts may grant bail to persons awaiting trial, during their trial and pending appeal. Some courts also have jurisdiction to grant compassionate bail. In the following sections, the different powers which apply at various stages of the criminal process are outlined and particular attention is paid to the criteria that apply to the grant or refusal of bail by the police and courts from the point at which a suspect is charged with an offence to the disposal of their case.

POLICE BAIL

- 3.7 The police enjoy wide-ranging powers to release on bail those arrested on suspicion of having committed an offence. The police must also release a suspect arrested on a warrant 'backed for bail' by a magistrate, when the warrant is executed.⁹ Police powers in respect of bail have been expanded in recent years to include both pre and post charge bail granted at a police station and what is sometimes termed 'street bail.' The law regarding police bail is predominantly laid down in the Police and Criminal Evidence (Northern Ireland) Order 1989 ('PACE (NI)'), which has been subject to extensive and frequent amendment since its enactment over twenty years ago.

Pre charge bail: persons in police custody

- 3.8 When a person has been brought to a police station following arrest, decisions concerning the person's release fall to be taken by the custody officer and a person cannot be kept in detention except in accordance with the provisions of Part V

⁷ Under the Criminal Justice (NI) Order 2003, art 4 a person released on bail has a duty to surrender to a court, police or prison governor at an appointed time.

⁸ Criminal Justice (NI) Order 2003, art 5.

⁹ Magistrates' Courts (NI) Order 1981, art 129. See para 3.19 below.

of PACE (NI).¹⁰ An arrested person's release must be ordered if the custody officer becomes aware that the grounds for detaining the person have ceased to apply and is not aware of any other grounds on which continued detention could be justified.¹¹ The person must be released without bail,¹² unless it appears to the custody officer that further investigation is required of matters in connection with which the person was in detention or that proceedings may be taken against the person in respect of any such matter. If that is the case, the person will be released on bail if the custody officer considers that to be the appropriate course, having regard to all the circumstances.¹³

- 3.9 When a custody officer determines that there is insufficient evidence to charge an arrested person,¹⁴ Article 38(2) of PACE (NI) requires that the person be released on bail or without bail, unless the custody officer has reasonable grounds for believing that further detention without charge is necessary to secure or preserve evidence or to obtain evidence by questioning the person. If there is sufficient evidence to charge, then the custody officer must charge the arrested person or release the person without charge, either on bail or without bail.¹⁵ It would not be appropriate in the course of this paper to examine the rules governing the period of time for which a suspect may be detained and the extension of that period. Suffice to say that at the expiration of the permitted period of detention, if the suspect has not been charged, then he or she must be released at that time either on bail or without bail.¹⁶

¹⁰ PACE (NI), art 35(1).

¹¹ PACE (NI), art 35(2).

¹² PACE (NI), art 35(5).

¹³ PACE (NI), art 35(6).

¹⁴ That is, a person arrested without a warrant or under a warrant not endorsed for bail: PACE (NI), art 38(1)(a).

¹⁵ PACE (NI), art 38(7).

¹⁶ PACE (NI), arts 42(5) and (6). Different provisions apply to the extension of pre charge detention in respect of persons arrested under the Terrorism Act 2000, s 41: see also Terrorism Act 2000, sch 8.

Pre charge bail: persons arrested other than at a police station

3.10 Until 2004, when a person was arrested without warrant at a place other than a police station, there was a rigid requirement on the police to take the person to a police station as soon as practicable after arrest.¹⁷ This obligation was time-consuming for police officers, demanding that they take the suspect to a police station, often in order to subsequently release him or her on bail. Consequently, PACE (NI) was amended in 2004 to allow police officers to release persons arrested elsewhere than at a police station on bail at any time before they arrive at a police station.¹⁸ This power has become known as ‘street bail.’

3.11 A person released on street bail under Article 32A of PACE (NI) must be required to attend a police station and no other requirement may be imposed as a condition of bail.¹⁹ The police officer granting bail must give the person a notice in writing informing the person that he or she is required to attend a police station and the time and location for attendance.²⁰

3.12 The criteria used for the grant of street bail are not laid down in legislation but Police Service of Northern Ireland (‘PSNI’) guidance²¹ indicates that a range of factors must be considered by a constable in making this determination, including:

- the nature and seriousness of the offence, including any impact on the victim, bystanders or the suspect;
- the need to preserve evidence;
- the likelihood that the suspect would interfere with witnesses if released;
- the likelihood that the suspect would attend the police station;

¹⁷ PACE (NI), art 32(1), before its amendment.

¹⁸ PACE (NI), art 32A inserted by the Criminal Justice (NI) Order 2004, art 4(2).

¹⁹ PACE (NI), arts 32A(3) and (4).

²⁰ PACE (NI), art 32B.

²¹ Police Service of Northern Ireland, *Service Procedure: Street Bail* (SP 4/2005 as amended). Similar guidance was provided in England and Wales in Home Office circular, *Criminal Justice Act 2003: Bail Elsewhere than at a Police Station* (HO 61/2003).

- the vulnerability and awareness of the suspect;
- the likelihood that the suspect will continue to commit the offence or a further offence;
- whether the officer is satisfied that the suspect has provided a correct name and address.

3.13 A number of criticisms have been made in the English context of the power to grant bail pre charge and, in particular, bail other than at a police station.²² Street bail can be granted by police officers of any rank and consequently will often be granted by constables, instead of specialist custody sergeants who grant bail at a police station. Further, as street bail is granted by the arresting officer, the decision is not subject to the same scrutiny as bail granted by a custody officer. It has been suggested that, given the low threshold for arrest, such powers have significant potential for net-widening.²³ These difficulties may potentially be aggravated if police powers in respect of street bail are expanded in line with recent proposals,²⁴ to allow the imposition of conditions and the creation of an offence of failure to surrender. Concern has been expressed that the expansion of police powers in respect of bail pre charge may result in individuals being subjected to lengthy periods on bail subject to onerous conditions with little opportunity to hear the case against them or present their own side of the story.²⁵ It has been suggested, however, that the proposed safeguard of review by the magistrates' court would provide adequate protection from such abuses.²⁶

²² E Cape, "Police bail and the decision to charge: recent developments and the human rights deficit" (2007) 7 *Archbold News* 6.

²³ See Cape, above, p 7.

²⁴ A review of PACE (NI) was commenced by the Northern Ireland Office ('NIO') in February 2004 and culminated in 2007 in the Police and Criminal Evidence (Amendment) (NI) Order 2007 and revised PACE (NI) Codes of Practice. A further review of PACE (NI) was commenced in 2007 with a view to maintaining parity with the Police and Criminal Evidence Act 1984 in England and Wales and meeting the needs and expectations of the criminal justice system in the 21st century. The latest proposals are outlined in NIO, *Government Proposals in response to a review of Police and Criminal Evidence (PACE) in Northern Ireland* (January 2009) ('NIO PACE (NI) Review').

²⁵ E Cape, "Police bail and the decision to charge: recent developments and the human rights deficit" (2007) 7 *Archbold News* 6, p 7.

²⁶ N Corre and D Wolchover, 'Noter-Up' to *Bail in Criminal Proceedings* (2004), p 264, para 6.2.1.3: see <http://www.davidwolchover.co.uk/docs/Bicp.doc>.

Bail following charge

- 3.14 When a person in police detention has been charged with a criminal offence, the question then arises as to whether the person should be released or kept in detention pending the first court appearance. The release on bail of a person who has been charged with a criminal offence is governed by Article 39 of PACE (NI) (duties of custody officer after charge). If the person charged was arrested other than under the authority of a warrant endorsed for bail,²⁷ it falls to the custody officer to determine whether the individual should be released or kept in detention. Article 39 provides that the custody officer shall order the release of the person charged from police detention, either on bail or without bail, unless one of a number of conditions set out in Article 39(1)(a) and (b) applies.²⁸ Where a person is released on bail and placed under a duty to appear before the magistrates' court that person is deemed, for the purposes of Articles 48 and 49 of the Magistrates' Court (NI) Order 1981, to have been remanded on bail by the court.²⁹

COURT BAIL

- 3.15 Unlike the law on police bail which is largely found in one statute, the law on court bail is derived from a wide range of sources including the common law, statute and the inherent jurisdiction of the High Court.

Power to grant bail in the magistrates' court

- 3.16 The authority of the magistrates' court to release a person on bail is laid down in the Magistrates' Courts (Northern Ireland) Order 1981. As a court of summary jurisdiction, the magistrates' court deals with a wide variety of offences and provision is made for bail decisions to be made in the magistrates' court in a range of different circumstances and

²⁷ PACE (NI), art 38(14): 'endorsed for bail' means endorsed with a direction for bail in accordance with the Magistrates' Courts (NI) Order 1981, art 129.

²⁸ It should be noted that a person charged may be released without bail under PACE (NI), art 39(1). This would be appropriate where the offence is of a minor nature and where there is no reason to fear that the person will not turn up in court.

²⁹ PACE (NI), art 48(1A). The Magistrates' Courts (NI) Order 1981, arts 48 and 49 deal with continuous bail and remand in case of illness or accident, respectively.

for the possibility of release without bail for less serious matters.³⁰

3.17 The main jurisdiction to grant bail in the magistrates' court is found in Article 47 of the Magistrates' Courts (Northern Ireland) Order 1981. Article 47(1) provides that, when a person appears before a magistrates' court for a criminal offence, the court in *adjourning* the proceedings may remand the accused in custody or on bail, 'that is to say, take from him a recognizance conditioned for his subsequent appearance before such court'.³¹ This power allows for a person to be remanded in custody or on bail to appear again before the same or another magistrates' court. Where a person is remanded on bail, any recognizance or condition of bail may provide for the person's future appearances in court in connection with the proceedings, with the court having power to vary the order on those future appearances.³² It is not proposed in the course of this paper to discuss the prescribed periods of remand. Suffice to say that remand in custody should not exceed eight days or where the accused is before the court and he or she consents, the court has previously remanded the accused in custody for the same offence or the accused is already serving a custodial sentence, twenty-eight days.³³ Where a person is admitted to bail, the prescribed period may be extended with the consent of the prosecution and defence.³⁴ The court also has power to order an accused person to be brought before it at any time before the expiration of the remand period.³⁵ Any person who is remanded in custody by a magistrates' court must be informed that he or she can apply to the High Court for bail.³⁶

³⁰ Magistrates' Courts (NI) Order 1981, art 132 provides that a District Judge or a lay magistrate before whom an arrested person is brought may, where satisfied that the offence is not of a serious nature, release the person from custody without requiring the person to enter into any recognizance.

³¹ Magistrates' Courts (NI) Order 1981, art 47(1)(b). If a person is remanded in custody, the court may certify its consent to bail with the recognizance to be taken subsequently: Magistrates' Courts (NI) Order 1981, art 47(1).

³² Magistrates' Courts (NI) Order 1981, art 48.

³³ Magistrates' Courts (NI) Order 1981, art 47(2).

³⁴ Magistrates' Courts (NI) Order 1981, art 47(4).

³⁵ Magistrates' Courts (NI) Order 1981, art 47(5).

³⁶ Magistrates' Courts Rules (NI) 1984, r 51(1).

3.18 In addition to the broad powers to grant bail when adjourning proceedings under Article 47, the Magistrates' Courts (Northern Ireland) Order 1981 makes provision for other bail decisions to be taken in the magistrates' court. Article 37(3) of the 1981 Order provides that the magistrates' court has jurisdiction to commit a person, either in custody or on bail, for trial before the Crown Court. According to Article 37(4), this power ceases on the 'first sitting of the court before which he is to be tried,' that is the next sitting of the Crown Court after the date of his or her committal.³⁷ Any person who is committed for trial in custody must be informed that he or she can apply to the Crown Court (where such right exists) or the High Court for bail.³⁸

3.19 Article 129 of the 1981 Order provides that a lay magistrate on issuing a warrant for a person's arrest may by endorsement on the warrant direct that the person shall be released on bail when the warrant is executed.³⁹ The magistrates' court also has power to grant bail pending an appeal to the County Court or by way of case stated to the Court of Appeal.⁴⁰ Until recently, the magistrates' court was precluded from granting bail in respect of scheduled offences⁴¹ and it remains the case that persons charged with treason⁴² can only be granted bail by the High Court or the Secretary of State.⁴³

3.20 The prosecution may apply to the magistrates' court for reconsideration of a decision by the magistrates' court or the police to grant bail in criminal proceedings in connection with

³⁷ This interpretation is derived from internal guidance provided to the Commission from the Lord Chief Justice's Office entitled 'Bail Procedure in Criminal Proceedings in Northern Ireland' (February 2009).

³⁸ Magistrates' Courts Rules (NI) 1984, r 51(2).

³⁹ The person must enter into such recognizance as specified in the endorsement.

⁴⁰ Magistrates' Courts (NI) Order 1981, art 148. If release from custody is refused or the amount of the recognizance or any security is fixed at an excessive sum, the appellant must be informed that he or she can apply to the High Court for bail: see the Magistrates' Courts (NI) Order 1981, art 148(2) and Magistrates' Courts Rules (NI) 1984, r 161.

⁴¹ See the Terrorism Act 2000, s 67 which expired on 31 July 2007, subject to transitional arrangements laid down in the Terrorism (NI) Act 2006 (Transitional Provisions and Savings) Order 2007.

⁴² Or any offence under the Treason Felony Act 1848.

⁴³ Magistrates' Courts (NI) Order 1981, art 38.

an offence which is punishable on indictment.⁴⁴ Such an application can only be made on the basis of information which was not available when the original decision was taken⁴⁵ and the magistrates' court may vary bail conditions, add conditions to unconditional bail or withhold bail.

- 3.21 The Department of Justice is presently considering proposals to confer powers on the magistrates' courts to grant compassionate bail.

Power to grant bail in the Crown Court

- 3.22 Section 51(4) of the Judicature (Northern Ireland) Act 1978⁴⁶ provides that the Crown Court can admit to bail any person who has been committed in custody for appearance before the Crown Court or any person in the custody of the Crown Court pending disposal of his or her case. The phrase 'in the custody of the Crown Court' appears to include both persons committed on bail who surrender to the custody of the court and those committed in custody who are brought before the court by prison authorities.⁴⁷ The Crown Court can therefore grant bail to a defendant who has appeared before the Court but has not yet been arraigned. Once a person has been sentenced the Crown Court can no longer grant bail.⁴⁸

- 3.23 Bail granted in the Crown Court does not necessarily require the defendant to surrender back into the custody of the Court.⁴⁹ The Crown Court can therefore grant compassionate bail whereby the defendant would surrender to the custody of

⁴⁴ Magistrates' Courts (NI) Order 1981, art 133A.

⁴⁵ Magistrates' Courts (NI) Order 1981, art 133A(3).

⁴⁶ As amended by the Criminal Justice (Serious Fraud) (NI) Order 1988, art 12, sch, and the Children's Evidence (NI) Order 1995, art 6, sch 2, to include those committed to custody in relation to whose case a notice of transfer has been given under Criminal Justice (Serious Fraud) (NI) Order 1988, art 3 (serious and complex fraud) or Children's Evidence (NI) Order 1995, art 4 (certain cases involving children).

⁴⁷ In the case of *R (Caherty) v Belfast Justices* [1978] NI 94 it was decided that once committed for trial, a bailed defendant is no longer in the custody of his sureties but is in the legal custody of the court until responsibility for his appearance is resumed by his recognizance and that of his sureties.

⁴⁸ *R v Russell* [2001] NICA 45.

⁴⁹ Crown Court Rules (NI) 1979, r 7 defines 'surrender to custody' as 'surrendering himself into the custody of the Court or other proper authority (according to the requirements of the order admitting him to bail) at the time and place appointed for him to do so.'

a prison governor. Like the magistrates' court, the Crown Court on issuing a warrant for a person's arrest may endorse the warrant for bail.⁵⁰

- 3.24 The Department of Justice is currently considering proposed legislative amendments that would confer powers upon the Crown Court to hear bail applications after a refusal of bail in the magistrates' court, where there has been no material change of circumstances. At present such repeat bail applications are heard in the High Court and this jurisdiction would remain under the proposed amendments.

Power to grant bail in the High Court

- 3.25 The jurisdiction of the High Court to grant bail falls within the inherent jurisdiction of the Court and the procedures to be followed are found in Order 79 of the Rules of the Court of Judicature (NI) 1980. The High Court does not act as an appellate court in relation to refusals of bail, but as mentioned above in relation to the magistrates' court, persons who are refused bail by the magistrates' court or the Crown Court⁵¹ can apply for bail afresh in the High Court,⁵² although the High Court will normally refuse to entertain an application which should properly be brought to the Crown Court. The jurisdiction of the High Court to grant bail ceases once a person has been sentenced.⁵³

- 3.26 Like the Crown Court, the High Court can also grant compassionate bail whereby the person is under a duty to surrender to the custody of a prison governor.⁵⁴ If bail is refused in the High Court, a further application can be made on the basis of a material change in circumstances⁵⁵ or new information brought to the attention of the Court.⁵⁶ There is

⁵⁰ Judicature (NI) Act 1978, s 51(7).

⁵¹ *R v Reading Crown Court ex parte Malik* [1981] QB 451.

⁵² The requirement that bail in respect of persons charged with scheduled offences must be determined by the High Court no longer exists: see the Terrorism Act 2000, s 67 which expired on 31 July 2007, subject to transitional arrangements laid down in the Terrorism (NI) Act 2006 (Transitional Provisions and Savings) Order 2007.

⁵³ *Ex parte Blyth* [1944] KB 532.

⁵⁴ See the meaning of 'surrender to custody' under the Rules of the Court of Judicature (NI) 1980, order 79, r 1.

⁵⁵ *In re Beck* [1993] 2 BNIL 24.

⁵⁶ *In the Matter of Dennis Donaldson, An Applicant for Bail* [2002] NIQB 68.

no right of appeal to the Court of Appeal from a decision of the High Court in relation to bail.⁵⁷

3.27 The Justice (NI) Act 2004 introduced a prosecution right of appeal to the High Court against a grant of bail by the magistrates' court.⁵⁸ This right can only be exercised when a defendant is granted bail when charged with, or convicted of, an offence punishable by imprisonment or in connection with proceedings under the Extradition Act 2003⁵⁹ and the prosecution made representations objecting to bail before it was granted.⁶⁰ The prosecution must give oral notice of appeal to the magistrates' court at the conclusion of the proceedings in which bail is granted and before the person is released from custody.⁶¹ On receiving such notice the magistrates' court must remand the person in custody pending the disposal of the appeal.⁶² Written notice must then be served within two hours⁶³ and the appeal must be commenced within 48 hours of the provision of oral notice.⁶⁴ The appeal is by way of a rehearing and the High Court may remand the person in custody or grant bail with or without conditions.⁶⁵ There can be no appeal from a decision of the High Court under this provision.⁶⁶

⁵⁷ Judicature (NI) Act 1978, s 35(2)(a). See also *In the Matter of Dennis Donaldson, An Applicant for Bail*, [2002] NIQB 68, para 3. Technically an appeal may lie to the Supreme Court if the decision is considered to involve a point of law of general public importance which ought to be considered by the Supreme Court: Judicature (NI) Act 1978, s 41.

⁵⁸ Justice (NI) Act 2004, s 10.

⁵⁹ Justice (NI) Act 2004, s 10, ss (1) and (1A). This right of appeal extends to decisions of the County Court to grant bail in proceedings under the Extradition Act 2003: s 10A.

⁶⁰ Justice (NI) Act 2004, s 10(3).

⁶¹ Justice (NI) Act 2004, s 10(4).

⁶² Justice (NI) Act 2004, s 10(6). If the prosecution fail to give written notice of appeal as required, the appeal will be deemed to be disposed of: Justice (NI) Act 2004, s 10(7).

⁶³ Justice (NI) Act 2004, s 10(5).

⁶⁴ Excluding weekends, Christmas Day, Good Friday and a bank holiday: Justice (NI) Act 2004, s 10(8).

⁶⁵ Justice (NI) Act 2004, s 10(9).

⁶⁶ Justice (NI) Act 2004, s 10(10).

Power to grant bail in the Court of Appeal

- 3.28 The Court of Appeal may, if it thinks fit, grant, vary or revoke bail pending the determination of an appeal before it.⁶⁷ The Court of Appeal also has jurisdiction to grant bail upon ordering a retrial,⁶⁸ quashing an interim hospital order under Article 45 of the Mental Health (Northern Ireland) Order 1986,⁶⁹ quashing a finding of unfitness to be tried⁷⁰ and allowing leave to appeal or an application for leave to appeal to the Supreme Court.⁷¹

Immigration and extradition proceedings

- 3.29 Bail decisions may also be taken by the appropriate authority in the context of immigration and extradition proceedings. Both immigration and extradition fall within the ambit of 'excepted matters' for the purposes of the Northern Ireland Act 1998.⁷² The relevant provisions of the applicable Westminster legislation are noted in summary.
- 3.30 The grant of bail in the context of immigration proceedings, applicable across the United Kingdom, is governed by Schedule 2 to the Immigration Act 1971. A person who is being examined by an immigration officer for the purpose of determining whether the person may validly enter the United Kingdom can be detained pending the examination and pending the decision to grant or refuse leave to enter. Alternatively, such a person can be temporarily admitted without being detained or released from detention, subject if necessary to residence, reporting and other restrictions. If detained, a person may be released on bail, on entering into

⁶⁷ Criminal Appeals (NI) Act 1980, s 17.

⁶⁸ Criminal Appeals (NI) Act 1980, s 7(2)(a).

⁶⁹ Criminal Appeals (NI) Act 1980, s 10(5). If the Court of Appeal does not pass any sentence or make any other order, the Court may direct that the appellant be admitted to bail or kept in custody pending being dealt with by the Crown Court.

⁷⁰ Criminal Appeals (NI) Act 1980, s 13A(6). If the Court of Appeal allows an appeal against a finding that the appellant is unfit to be tried, the appellant may be tried for the offence with which he was charged and pending such trial, the Court may order that the appellant be admitted to bail, taken into custody or detained under the Mental Health (NI) Order 1986.

⁷¹ Criminal Appeals (NI) Act 1980, s 35.

⁷² Northern Ireland Act 1998, s 4(1) and sch 2, para 3 (extradition within international relations) and para 8 (immigration). Such matters consequently fall outside the legislative competence of the Northern Ireland Assembly: Northern Ireland Act 1998, s 6(2)(b).

a recognizance, by a senior immigration officer or by the Asylum and Immigration Tribunal.⁷³

- 3.31 Extradition proceedings throughout the United Kingdom are governed by the Extradition Act 2003 which includes a power to grant bail to a person whose extradition is sought by a requesting State. In Northern Ireland, the Recorder of Belfast has been designated as the ‘appropriate judge’, to use the terminology employed in the legislation, to hear such cases.⁷⁴ The statutory scheme provides for an initial hearing before the appropriate judge to determine whether the person brought before the court is in fact the person identified in the warrant, further possible interim hearings and ultimately the substantive hearing. The judge has specific power to grant bail throughout those proceedings⁷⁵ and, further, if an extradition order is made, to remand the person on bail pending extradition to the requesting State.⁷⁶
- 3.32 In the event of an appeal by the requested person to the High Court, the legislation is silent on the matter of bail pending the appeal as distinct from bail pending the process of extradition.⁷⁷ It would appear that, while bail might be granted to an appellant by the High Court in the exercise of its inherent jurisdiction, that jurisdiction would not extend to *revocation* of bail granted by the appropriate judge following the making of an extradition order.⁷⁸ Where the requesting State is appealing against the appropriate judge’s order of discharge at the extradition hearing, the jurisdiction to grant or refuse bail remains vested in that judge until the determination of the appeal.⁷⁹ The High Court may grant bail

⁷³ See Immigration Act 1971, sch 2, paras 21 to 25, which include provisions on the imposition of conditions, sureties and enforcement.

⁷⁴ Extradition Act 2003, s 67(1)(c). For a recent detailed exploration of the bail provisions in the legislation and their application in the particular context of Northern Ireland, see *Jose Ignacio de Juana Chaos v Kingdom of Spain* [2010] NIQB 68.

⁷⁵ Extradition Act 2003, s 7(9) (bail on adjournment of preliminary hearing); s 7(10) (later grant of bail where requested person remanded in custody); s 8(1)(d) (bail where identity established and matter must proceed to hearing); s 8(2) (later grant where person remanded); s 9(5) (bail on adjournment of substantive hearing); and s 9(6) (later grant where person remanded).

⁷⁶ Extradition Act 2003, ss 21(4) and (5).

⁷⁷ Extradition Act 2003, ss 26 and 27.

⁷⁸ *Juana Chaos v Kingdom of Spain* [2010] NIQB 68.

⁷⁹ Extradition Act 2003, ss 30(2) and (3).

on determination of an appeal in favour of the requesting State or later if the person is remanded in custody on determination of the appeal.⁸⁰ There is also a specific provision dealing with bail in the event of an appeal or application for leave to appeal by the requested person to the Supreme Court.⁸¹

- 3.33 It is notable that the Extradition Act 2003 made specific amendments to the legislative schemes governing the grant of bail in criminal proceedings in England and Wales and Scotland, in order to incorporate bail decision making in the context of extradition proceedings.⁸² No equivalent amendments were made to the bail provisions of the Criminal Justice (Northern Ireland) Order 2003, although this may have been attributable to the timing of the implementation of the two pieces of legislation.⁸³

PRESUMPTION IN FAVOUR OF BAIL AND GROUNDS FOR REFUSAL

- 3.34 As indicated above, once a person has been charged with an offence, Article 39 of PACE (NI) provides that the custody officer *shall* order the release of the person charged from police detention, either on bail or without bail, unless one of a number of conditions set out in Article 39(1)(a) and (b) applies. Effectively therefore the presumption is that the person will be released unless one of the conditions is satisfied.

- 3.35 If the person charged is not a juvenile,⁸⁴ the legislation prescribes the following situations in which release is not required:⁸⁵

- a. Where the person's name or address cannot be ascertained or the custody officer has reasonable

⁸⁰ Extradition Act 2003, ss 29(7) and (8).

⁸¹ Extradition Act 2003, s 32(1).

⁸² Extradition Act 2003, ss 198 (EW) and 199 (Scotland).

⁸³ See *Juana Chaos v Kingdom of Spain* [2010] NIQB 68, para 34.

⁸⁴ If the person arrested is a juvenile, there is an additional basis for continued detention, namely where the custody officer has reasonable grounds for believing that the person ought to be detained in his or her own interests: see ch 4.

⁸⁵ It should be noted that a person may be lawfully released even if one of the grounds for continuing to detain the person is satisfied: PACE (NI), art 39(2).

grounds for doubting that the name or address supplied is genuine.

- b. If the person has been arrested for an imprisonable offence and the custody officer has reasonable grounds for believing that detention is necessary to prevent the person from committing an offence.⁸⁶ An imprisonable offence is defined for this purpose as an offence for which a person over the age of 21 years is liable, on first conviction, to a term of imprisonment.⁸⁷
- c. Where the custody officer has reasonable grounds for believing that the detention of the person is necessary to prevent him from causing physical injury to any other person or from causing loss of or damage to property.
- d. Where the custody officer has reasonable grounds for believing that the person arrested will fail to appear in court to answer to bail or that detention is necessary to prevent the person interfering with the administration of justice or with the investigation of offences or of a particular offence.
- e. Where the custody officer has reasonable grounds for believing that the detention of the person is necessary for his or her own protection.⁸⁸

3.36 When making a decision as to whether detention is necessary to prevent the commission of offences, to prevent the person from causing injury or damage, or from interfering with the administration of justice or the investigative process or whether the person may fail to appear, the custody sergeant must have regard to such of the following considerations as appear to him to be relevant: (a) the nature and seriousness of the offence; (b) the character, antecedents and community ties of the person; (c) the

⁸⁶ This provision did not appear in PACE (NI) as originally enacted and was inserted by Police (Amendment) (NI) Order 1995, art 6(2).

⁸⁷ PACE (NI), art 39(1A).

⁸⁸ The ground of detention for the person's own protection was inserted as a separate ground by the Criminal Justice (NI) Order 2003, art 7(a).

person's record of fulfilling obligations when previously on bail; (d) the strength of the evidence and any other consideration which appears to be relevant.⁸⁹

3.37 There is no equivalent statutory presumption in favour of bail granted by the courts, although it is well established that a similar presumption operates in this context, strengthened in recent years by the right to liberty under Article 5 of the European Convention on Human Rights.⁹⁰ The grounds for the refusal of bail by the courts are also not enshrined in statute but correspond to a large extent with the principles applicable to police bail as set out in PACE (NI). Bail can be refused by the courts if there are substantial grounds for believing that the accused will fail to surrender to custody,⁹¹ will interfere with witnesses or otherwise obstruct the course of justice⁹² or commit offences while on bail.⁹³ Factors which the court may consider in determining if a refusal of bail is justified include the nature and seriousness of the offence, the character and community ties of the person, previous criminal history, the opposition of the Crown and any undue delay in the proceedings.⁹⁴

3.38 Although the provisions have now expired, the Terrorism Act 2000 laid down statutory grounds for the refusal of bail in the High Court in relation to persons charged with scheduled offences. Section 67 of the Act provided that a judge may⁹⁵ admit a person to bail 'unless satisfied that there are substantial grounds for believing that the person, if released on bail (whether subject to conditions or not), would:

- (a) fail to surrender to custody,
- (b) commit an offence while on bail,
- (c) interfere with a witness,

⁸⁹ PACE(NI), art 39(2A).

⁹⁰ See paras 2.6 to 2.20.

⁹¹ *In re Robinson* (1854) 23 LJQB 286; *State v Purcell* [1926] IR 207.

⁹² *People v O'Callaghan* [1966] IR 501.

⁹³ *Philips* (1947) 32 Cr App R 47. For a general discussion of these issues, see BJAC Valentine, *Criminal Procedure in Northern Ireland* (2nd ed 2010).

⁹⁴ See Valentine above, para 5.01.

⁹⁵ The power to grant bail was discretionary in this context.

(d) otherwise obstruct or attempt to obstruct the course of justice, whether in relation to himself or another person, or

(e) fail to comply with conditions of release (if any).⁹⁶

The additional ground for the refusal of bail due to the likelihood that the accused will fail to comply with bail conditions is now well established in the High Court.

3.39 While the core grounds for the refusal of bail (i.e. a risk that the accused will fail to surrender to custody, will interfere with witnesses or otherwise obstruct the course of justice or commit further offences) are well settled, the possibility of bail being refused in the courts on other grounds, such as the protection of the accused, a risk of injury to a person or damage to property or the likelihood that the accused will not comply with bail conditions, is less clear. Further, within the established grounds, there is inconsistency in the respective legal provisions applicable to the police and the courts for the refusal of bail on the basis of a risk that the accused will commit offences. This ground is limited in PACE (NI) to defendants arrested in respect of imprisonable offences⁹⁶ but no equivalent restriction operates in respect of court bail.

3.40 The absence of a definitive statutory statement of the law relating to the grant and refusal of both police and court bail has the potential to result in uncertainty, a lack of transparency and the possibility of inconsistency in decision making.

BAIL AT OTHER STAGES OF THE CRIMINAL PROCESS

3.41 Different considerations will apply to decisions to grant or refuse bail at other stages of the criminal process, such as bail pending sentence, bail pending appeal and compassionate bail, when the presumption of innocence and therefore the right to liberty may not apply. Although various courts have jurisdiction to grant bail in these circumstances, there is no guidance in Northern Ireland setting out the appropriate criteria which should be applied to these decisions.

⁹⁶ PACE (NI), art 39(1)(a)(ia).

3.42 In England and Wales, the right to bail laid down in the Bail Act 1976 extends to convicted persons whose cases are adjourned to enable inquiries or reports to be made for the purposes of sentencing.⁹⁷ No such right exists in the context of bail pending appeal, where it appears the court must consider if there are 'exceptional circumstances'⁹⁸ which justify the grant of bail such as a likelihood that the appeal will be successful or a risk that the sentence will have been served by the time the appeal is heard.⁹⁹ According to a subsequent *Practice Direction*,¹⁰⁰ however, the length of time which might pass before the hearing of the appeal is only one factor to consider, provided a successful appeal is likely. It has been argued that further guidance in relation to the grant of bail pending appeal is needed.¹⁰¹

BAIL DECISION MAKING

3.43 As indicated above, there is a range of issues which may be considered by the police or courts when deciding whether to grant or refuse bail. It is essential that the necessary information is verified and provided to the bail decision maker in a timely manner in order that the correct outcome is achieved. Unlike England and Wales, Scotland and several other jurisdictions¹⁰² there is no formal bail information scheme in operation in Northern Ireland to ensure that reliable information is available to decision makers. In some parts of Belfast, however, informal information gathering in relation to bail applications is carried out by a Court Liaison Officer employed by the PSNI. Information is gathered and verified in relation to community ties, bail address and any offending or bail history and this information is conveyed to the court and legal advisers.

3.44 In 2006, the Bail Action Group, a multi-agency group tasked with developing an action plan aimed at improving the bail system, invited the Probation Board for Northern Ireland ('PBNI') to examine the possibility of introducing a bail

⁹⁷ Bail Act 1976 (EW), s 4(4).

⁹⁸ *R v Watton* (1979) 68 Cr App R 293, p 297.

⁹⁹ *R v Watton*, above.

¹⁰⁰ *Practice Direction (Crown Court: Bail Pending Appeal)* [1983] 1 WLR 1292.

¹⁰¹ I Dear and D Herling, "Bail from the magistrates pending appeal against sentence: a flawed jurisdiction" [2000] *Criminal Law Review* 987.

¹⁰² See paras 6.22 to 6.24.

information scheme in Northern Ireland. It was proposed that a bail information scheme should operate initially as a two year pilot project.¹⁰³ The proposed scheme aimed to provide enhanced verified information to the courts to assist with bail decision making. It was proposed that the scheme would operate at the point of first application for bail in the magistrates' court and that a concise, standardised report would be prepared for the court, highlighting factors that may be relevant to the bail decision.

- 3.45 Although the PBNI bail information scheme was not initially envisaged to include bail support, it was suggested that bail support may be considered as the scheme is rolled out. The proposed scheme has not been adopted at this time.

BAIL CONDITIONS, SURETY AND SECURITY

- 3.46 A person released on bail may be required to enter into a recognizance, with or without a surety and/or security, and may be required to abide by certain other conduct conditions¹⁰⁴ while on bail. Examples of such conduct conditions include residing at a named address, abiding by a curfew between certain hours, not going to a specified place and reporting to a police station at prescribed times.

Personal recognizance

- 3.47 When the PACE (NI) legislation was originally enacted it provided simply that a person released on bail could be required to enter into a recognizance conditioned upon his or her attendance at court or at a police station.¹⁰⁵ Recent amendments to the legislation¹⁰⁶ have removed the requirement to enter into a personal recognizance¹⁰⁷ and

¹⁰³ The provision of bail information was considered within the Sentencing Framework Implementation ('SFI') Programme. See SFI Programme: Report on Bail Information for SFI Steering Group, 24th September 2008.

¹⁰⁴ The term 'conduct conditions', as opposed to financial conditions such as surety and security, is used in some Australian jurisdictions (see eg the Bail Act 1992 (ACT), s 25) and will be adopted for the purposes of this Consultation Paper.

¹⁰⁵ PACE (NI), art 48(3) (original version).

¹⁰⁶ Criminal Justice (NI) Order 2003, art 8(1)(c), substituting PACE (NI), art 48, paras (3) to (5); Criminal Justice (NI) Order 2005, art 21(2), inserting PACE (NI), art 48(1A); Criminal Justice (NI) Order 2008, art 87, inserting paras (4) to (5A) into PACE (NI), art 48 and making other related substitutions.

¹⁰⁷ PACE (NI), art 48(3) as inserted by Criminal Justice (NI) Order 2003, art 8(1)(c).

have replaced it with a duty to surrender to custody which applies to persons released on both police and court bail.¹⁰⁸ The power to require a personal recognizance remains in respect of court bail¹⁰⁹ although it is not essential to the grant of bail.¹¹⁰

Surety and security

- 3.48 Alongside the requirement to enter a recognizance, bail granted by the courts may be subject to the provision of sureties or security and recent amendments to PACE (NI) also permit the imposition of such conditions on police bail.¹¹¹ Unlike court bail,¹¹² however, police bail does not seem to be restricted to the requirement of a surety *or* security, but seems instead to allow sureties and/or security to be required as conditions of bail.
- 3.49 Prospective sureties may be called upon to provide proof of identity, address and means and may be required to sign a certificate that he or she is in possession of sufficient means to pay the sum in which he or she is to be bound under the recognizance.¹¹³ If the accused fails to appear a court may order estreat of the recognizance entered into by the

¹⁰⁸ Criminal Justice (NI) Order 2003, art 4. Persons released on street bail are not subject to this duty but will be required to attend a police station: PACE (NI), art 32A(3).

¹⁰⁹ See eg Magistrates' Courts (NI) Order 1981, art 47(1)(b).

¹¹⁰ Crown Court Rules, r 11 and Rules of the Court of Judicature (NI) 1980, order 79, r 6 allow the provision of security for the grant of bail instead of a recognizance.

¹¹¹ PACE (NI), arts 48(3B) and (3C) inserted by Criminal Justice (NI) Order 2003, art 8(1)(c). The security may be given by him/her or on his/her behalf and a magistrates' court may order forfeiture of the security in appropriate cases: PACE (NI), art 48A inserted by Criminal Justice (NI) Order 2003, art 8(2).

¹¹² Bail granted by the magistrates' court may require a recognizance to be entered into with a surety or sureties or the deposit of a sum of money or other valuable security *in lieu* of sureties: Magistrates' Courts (NI) Order 1981, arts 136 and 137.

¹¹³ See the Magistrates' Courts Rules (NI) 1984, r 150(5) and the Crown Court Rules (NI) 1979, r 12(1A).

surety.¹¹⁴ Only 17 estreatment orders were made against sureties between 2008 and 2009.¹¹⁵

Conduct conditions

3.50 The power to attach other conditions, long enjoyed by the courts, has only recently been conferred upon the police, although the terms of the court and police powers vary somewhat. Police powers to attach conditions (including sureties and security) to bail are subject to a strict test of necessity: no conditions shall be imposed unless *necessary* to prevent the person from failing to surrender to custody, committing an offence while on bail or interfering with witnesses or otherwise obstructing the course of justice.¹¹⁶ By contrast (without prejudice to any other power to impose conditions as to bail), the magistrates' court may impose such conditions as appear to be *likely* to result in the person's subsequent appearance at the time and place required or to be *necessary* in the interests of justice or for the prevention of crime.¹¹⁷ The wording of the Magistrates Court (Northern Ireland) Order clearly differs from the more recently introduced police provisions with the latter requiring the custody officer to be satisfied that the conditions are *necessary* for the prescribed purposes and the former permitting the imposition of conditions that appear to be *likely* to result in the person's subsequent appearance or to be *necessary* in the interests of justice or prevention of crime. A general test of necessity to be applied to the imposition of any conditions on the grant of both police and court bail would arguably be more desirable for the purpose of ensuring compliance with Article 5 of the European Convention on Human Rights.¹¹⁸

3.51 At present, conduct conditions cannot be attached to street bail which may only be subject to the requirement to attend a

¹¹⁴ The power to order estreat of a recognizance entered into by a surety seems to be mandatory in the magistrates' court (Magistrates' Courts (NI) Order 1981, art 138(2A)) but discretionary in the Crown Court (Crown Court Rules (NI) 1979, r 13) and the High Court (Rules of the Court of Judicature (NI) 1980, order 79, r 8).

¹¹⁵ Figures provided to the Commission by the Northern Ireland Courts and Tribunals Service.

¹¹⁶ PACE (NI), art 48(3F).

¹¹⁷ Magistrates' Courts (NI) Order 1981, art 133.

¹¹⁸ See ch 2 above.

police station.¹¹⁹ In a recent review of the PACE (NI) provisions,¹²⁰ the Northern Ireland Office proposed that police officers should be allowed to attach such conditions to street bail,¹²¹ as in England and Wales.¹²² It was proposed that such conditions would be imposed only for the purposes of securing the suspect's surrender to custody; preventing the commission of further offences on bail; preventing interference with witnesses or obstruction of justice; or for the suspect's own protection.

3.52 Although most bail conditions can now be imposed by both the police and the courts, the imposition of curfew and electronic monitoring requirements is limited to court bail.¹²³ A curfew requirement is defined as a requirement that a person remain for specified periods at a specified place and is limited to between 2 and 12 hours in duration in any one day.¹²⁴ Before a curfew is imposed consideration must be given to the suitability of the place proposed to be specified in the requirement, including the views of persons likely to be affected by the enforced presence there of the person subject to the requirement.¹²⁵ Efforts must also be made to ensure that the curfew requirement does not conflict with the accused's religious beliefs, any other conditions, employment or educational commitments.¹²⁶ Electronic monitoring may be used to ensure the accused person's compliance with a curfew requirement or any other requirement relating to a person's whereabouts.¹²⁷ An electronic monitoring requirement can only be imposed with the consent of any person (other than the accused) without whose co-operation it would not be practicable to secure the monitoring¹²⁸ and if there is adequate provision for such electronic monitoring in

¹¹⁹ PACE(NI), arts 32A(3) and (4).

¹²⁰ See NIO PACE (NI) Review.

¹²¹ NIO PACE (NI) Review, para 9.3.

¹²² See Police and Justice Act 2006, s 10 and sch 6.

¹²³ Criminal Justice (NI) Order 2008, art 35(1)(a).

¹²⁴ Criminal Justice (NI) Order 2008, arts 37(1) and (2).

¹²⁵ Criminal Justice (NI) Order 2008, art 37(3).

¹²⁶ Criminal Justice (NI) Order 2008, art 38.

¹²⁷ Criminal Justice (NI) Order 2008, art 39.

¹²⁸ Criminal Justice (NI) Order 2008, art 40(2).

the area in which the place proposed to be specified in the requirement is situated.¹²⁹

- 3.53 Bail conditions imposed by either the police or the courts may be reviewed and possibly varied. In relation to police bail, both pre and post charge bail may be varied by a custody officer¹³⁰ or the magistrates' court¹³¹ at the request of the person on bail. Such conditions may also be further reviewed by the magistrates' court if they have already been varied by a custody officer.¹³² Court bail may be varied by the court which granted bail, on application by the defendant, the prosecutor or a surety.¹³³

BREACH OF BAIL

- 3.54 An individual may 'breach' bail in a number of ways by, for example, failing to surrender to custody at the appointed time and place, failing to adhere to bail conditions or committing offences while on bail.

Failure to appear

- 3.55 A number of consequences may flow from the failure of a person on police or court bail to surrender to custody. Traditionally a failure to surrender to custody was enforced by the issuing of an arrest warrant by the court and the estreat of the recognizance entered into by the defendant. Recently, however, the police have been given greater

¹²⁹ Criminal Justice (NI) Order 2008, art 41. Further, curfew or electronic monitoring requirements cannot be imposed upon children unless the court is of the view that, if it did not attach such conditions, it would be necessary to remand the child in custody to protect the public: Criminal Justice (NI) Order 2008, art 43. See para 4.23.

¹³⁰ PACE (NI), art 48(3E). The police may, in exercising this power, impose conditions or more onerous conditions.

¹³¹ PACE (NI), art 48(4) provides for variation of *pre charge bail* and Magistrates' Courts (NI) Order 1981, art 132A(1)(a) allows variation of conditions of *post charge bail*.

¹³² Magistrates' Courts (NI) Order 1981, art 132A(1)(b). Oddly, the power of the police to vary both pre and post charge bail, the power of the magistrates' court to vary post charge bail and the power of the magistrates' court to vary pre and post charge bail previously varied by the police are all subject to a specific power to impose more onerous conditions than those previously imposed, however, the power of the magistrates' court to vary pre charge bail contains no such provision. The power to impose more onerous conditions may be implied for pre charge bail, however, as it is not explicitly prohibited.

¹³³ Rules of the Court of Judicature (NI) 1980, order 79, r 12, Crown Court Rules (NI) 1979, r 17, Magistrates' Courts (NI) Order 1981, arts 48 and 133A.

powers to arrest without warrant for a failure to surrender and such a failure has been designated a criminal offence. This new regime has not replaced the old arrest warrant/estreatment regime, however, and the result is an enforcement framework which may at times be inconsistent and potentially unduly punitive.

3.56 As indicated above, the Criminal Justice (Northern Ireland) Order 2003 introduced general provisions regarding the enforcement of court and police bail (except street bail). This legislation provides for a general duty to surrender to the police or into the custody of a court or a prison governor at an appointed time¹³⁴ and an offence of absconding by a person released on bail.¹³⁵ A distinction is drawn between the powers of arrest pertaining to persons released under a duty *to surrender into the custody of a court* and other persons on bail. Persons charged with offences and those on trial will usually be under a duty to surrender to the custody of a court. Persons released on pre charge bail will usually be placed under a duty to attend a police station and those on compassionate bail may be under a duty to surrender into the custody of a prison governor.

3.57 If a person released under a duty *to surrender into the custody of a court* fails to surrender at the appointed time or upon surrendering absents him or herself from the court without permission, the court may issue a warrant for his or her arrest.¹³⁶ Further, the police may arrest without warrant a person under a duty to surrender into the custody of a court if the police officer has reasonable grounds for believing that he or she is unlikely to surrender to custody or if a surety notifies a police officer in writing that the person is unlikely to surrender to custody and the surety wishes to be relieved of

¹³⁴ Criminal Justice (NI) Order 2003, art 4.

¹³⁵ Criminal Justice (NI) Order 2003, art 5.

¹³⁶ Criminal Justice (NI) Order 2003, arts 6(1) and 6(2). Arguably, however, the courts were already empowered to issue a warrant for the arrest of a person who failed to appear: see the Magistrates' Courts (NI) Order 1981, art 25(1), Crown Court Rules (NI) 1979, r 16, Rules of the Court of Judicature (NI) 1980, order 79, r 11.

his/her duties.¹³⁷ A lay magistrate may issue a warrant authorising a police officer to enter and search premises if there are reasonable grounds for believing that a person liable to arrest for an anticipated failure to surrender is present.¹³⁸

- 3.58 In the recent NIO PACE (NI) Review, it was proposed that a power of entry without warrant should be conferred upon the police where it is necessary to enforce bail and a reasonable suspicion exists.¹³⁹ A person arrested under Article 6(3) of the 2003 Order must be brought before a magistrates' court as soon as practicable after the arrest and not later than the next day.¹⁴⁰ If the magistrates' court is of the opinion that the person is not likely to surrender to custody the court may remand or commit him or her to custody or grant bail under the same or different conditions.¹⁴¹
- 3.59 By contrast with the provisions relating to persons released on bail under a duty to surrender into the custody of a court, the police power of arrest without warrant in respect of persons released under a duty *to attend a police station* (pre charge bail), only arises in respect of actual and not anticipated failures to surrender.¹⁴² It has been proposed that a power of arrest be created for anticipated failures to attend

¹³⁷ Criminal Justice (NI) Order 2003, art 6(3). A lay magistrate may also issue a warrant for the arrest of a person released on bail to appear at a magistrates' court or on committal for trial, if a surety complains on oath that he or she is about to abscond: Magistrates' Courts (NI) Order 1981, art 134(1).

¹³⁸ Criminal Justice (NI) Order 2003, art 6(3A). At least one of the conditions of the Criminal Justice (NI) Order 2003, art 6(3B) must also be met before such a warrant is issued, namely, that is not practicable to communicate with any person entitled to grant entry to the premises, that entry to the premises will not be granted unless a warrant is produced or that the purpose of a search may be frustrated or seriously prejudiced unless a police officer can secure immediate entry.

¹³⁹ NIO PACE (NI) Review, para 9.11.

¹⁴⁰ Criminal Justice (NI) Order 2003, art 6(4). Where the next day is Christmas Day, Good Friday or a Sunday, he shall be brought before a magistrates' court not later than the next day which is not one of those days: Criminal Justice (NI) Order 2003, art 6(5). A person does not have to be brought before a magistrates' court if he or she is in hospital and is not well enough: Criminal Justice (NI) Order 2003, art 6(5A).

¹⁴¹ Criminal Justice (NI) Order 2003, art 6(6)(a). If the court is not of that opinion, it shall grant him bail subject to the same conditions (if any) as originally imposed: Criminal Justice (NI) Order 2003 art 6(6)(b).

¹⁴² PACE (NI), art 47A.

a police station in answer to bail.¹⁴³ Persons released on street bail may be arrested without warrant if they fail to attend a police station as required.¹⁴⁴

3.60 A failure to surrender to custody may further result in the prosecution of the person for an offence of failing to surrender to custody under Article 5 of the Criminal Justice (NI) Order 2003. Article 5 creates two offences relating to breach of bail – failing to surrender to custody in answer to bail without reasonable cause and failing to surrender to custody in answer to bail as soon as reasonably practicable after a failure to surrender with reasonable cause. There were 327 prosecutions for failure to surrender to custody disposed of by the courts between 2008 and 2009.¹⁴⁵ This offence applies to all types of bail, with the exception of street bail,¹⁴⁶ although the creation of an offence of failing to answer street bail has recently been proposed.¹⁴⁷

3.61 Finally, in addition to the possibility of a criminal charge, if a person is on court bail, any recognizance entered into by him or her may be estreated by the court. It will be recalled that personal recognizances have been abolished in respect of police bail and therefore this sanction cannot be imposed upon a person released on police bail. There were 169 estreatment orders made against defendants between 2008 and 2009.¹⁴⁸ Arguably, the possibility of both prosecution for the offence of absconding and the estreatment of a recognizance may be a disproportionate response to a breach of court bail and once again brings court bail out of line with police bail.

3.62 If a person on bail fails to appear before a magistrates' court contrary to a condition of his or her recognizance, the court *must* order the estreat of the recognizance and direct the issue of a summons to any surety requiring the surety to appear to show cause why he or she should not pay the

¹⁴³ NIO PACE (NI) Review, para 9.13.

¹⁴⁴ PACE(NI), art 32D.

¹⁴⁵ Figures provided to the Commission by the Northern Ireland Courts and Tribunals Service.

¹⁴⁶ PACE (NI), art 32C(3).

¹⁴⁷ NIO PACE (NI) Review, para 9.7(b).

¹⁴⁸ Figures provided to the Commission by the Northern Ireland Courts and Tribunals Service.

amount by which he or she is bound.¹⁴⁹ The court also has power to order the estreat of the recognizance to such lesser amount as it sees fit or to remit payment of the amount due.¹⁵⁰ The power to order estreat of a recognizance entered into by the accused also appears to be mandatory in the Crown Court¹⁵¹ but discretionary in the High Court.¹⁵² Any security provided for the defendant's surrender to custody may be forfeited if he or she fails to appear.¹⁵³

Breach of bail conditions

- 3.63 The police enjoy further powers of arrest both with¹⁵⁴ and without warrant in respect of persons in breach of or likely to breach bail conditions and again a distinction is drawn between persons released under a duty to surrender into the custody of a court and persons released to attend a police station. The police may arrest without warrant a person under a duty *to surrender into the custody of a court* if the police officer has reasonable grounds for believing that he or she has broken or is likely to breach any bail conditions.¹⁵⁵ A lay magistrate may issue a warrant for entry to premises in order to enforce this arrest power¹⁵⁶ and it was recently proposed that the police should be able to enter premises without a warrant where it is necessary to enforce bail and a reasonable suspicion exists.¹⁵⁷ A person arrested under this provision must be brought before a magistrates' court and if the court is of the opinion that the person has broken or is likely to break any conditions of his or her bail, the court may

¹⁴⁹ Magistrates' Courts (NI) Order 1981, art 138(2A). The court may proceed in the absence of any surety if it is satisfied that he or she has been served with the summons: see also Magistrates' Courts Rules (NI) 1984, r 11(3B).

¹⁵⁰ Magistrates' Courts (NI) Order 1981, art 138(3).

¹⁵¹ Criminal Justice (NI) Order 2003, art 24. The Court, however, appears to enjoy a discretion as to how to exercise this power under the Fines Act (Ireland) 1851, s 10.

¹⁵² Rules of the Court of Judicature (NI) 1980, order 79, r 8.

¹⁵³ PACE(NI), art 48A, Crown Court Rules (NI) 1979, r 14 and Rules of the Court of Judicature (NI) 1980, order 79, r 9.

¹⁵⁴ A warrant may be issued in the Crown Court or the High Court for the arrest of a person who appears to be in breach of any condition of his or her bail: Crown Court Rules (NI) 1979, r 16 and Rules of the Court of Judicature (NI) 1980, order 79, r 11.

¹⁵⁵ Criminal Justice (NI) Order 2003, art 6(3).

¹⁵⁶ Criminal Justice (NI) Order 2003, art 6(3A). There are some limitations on the exercise of this power: see n 138 above.

¹⁵⁷ NIO PACE (NI) Review, para 9.11.

remand or commit him or her to custody or grant bail under the same or different conditions.¹⁵⁸ In practice, difficulties can arise in relation to proof of breach of conditions as the police officer who detected the alleged breach may not be available to attend court and a written statement may be unacceptable to the defence.

3.64 Article 48(5) of PACE (NI)¹⁵⁹ provides for arrest without warrant for anticipated and actual breaches of conditions of pre charge bail, that is persons released under a duty to attend a police station. Further, if proposals allowing the attachment of conditions to street bail are implemented, it is proposed in the NIO PACE (NI) Review that police officers should also have a power of arrest for breach of conditions of street bail.¹⁶⁰

3.65 The Review also proposes strengthening the enforcement of bail by making it an offence to breach conditions attached to police bail.¹⁶¹ There are no equivalent proposals in respect of breaches of conditions attached to court bail, however, and therefore if implemented this proposal would arguably lead to an unjustifiable distinction being drawn between the enforcement of police and court bail.

Committing offences on bail

3.66 The usual principles regarding the grant or refusal of bail also apply when the bail applicant was on bail at the time of the commission of the alleged offence. The fact that the defendant was on bail is just one of the considerations which the court takes into account in determining the issue of bail. If convicted of the latter offence, however, the court must treat the fact that the offence was committed while the defendant was on bail as an aggravating factor when passing sentence.¹⁶²

¹⁵⁸ Criminal Justice (NI) Order 2003, art 6(6)(a). If the court is not of that opinion, it shall grant him bail subject to the same conditions (if any) as originally imposed: Criminal Justice (NI) Order 2003, art 6(6)(b).

¹⁵⁹ Inserted by Criminal Justice (NI) Order 2008, art 87.

¹⁶⁰ NIO PACE (NI) Review, para 9.6.

¹⁶¹ NIO PACE (NI) Review, para 9.7(a).

¹⁶² Criminal Justice (NI) Order 1996, art 37(2). See also *R v Gorski* [2009] NICC 76.

MONITORING AND SUPPORT OF PERSONS ON BAIL

- 3.67 There is no statutory obligation on the police or any other organisation to monitor compliance with bail. The police and the courts, however, do enjoy certain powers to enforce compliance, as outlined above.¹⁶³ Depending on resources and other priorities the police may monitor compliance with bail conditions, such as curfews, geographical exclusions and reporting to police stations. Private organisations contracted to provide electronic monitoring services notify the police of breaches of electronic monitoring requirements.
- 3.68 In conjunction with the PPS, some monitoring of bail is carried out by the West Belfast Community Safety Forum (the 'WBCSF'). Under this arrangement, a nominated person from the WBCSF may contact the PPS with enquiries about the persons on bail in the local community and the conditions (if any) attached to that bail. Any breaches of bail detected by the WBCSF are reported to the police.
- 3.69 Unlike other jurisdictions, there are no dedicated bail support programmes available for adults on bail in Northern Ireland. Such support is available for some young persons on bail¹⁶⁴ and the possibility of developing such programmes for adult defendants was recently considered by the PBNI.¹⁶⁵

VICTIMS OF CRIME

- 3.70 The decision to grant or deny bail may be of particular concern and relevance to victims of crime and their families. Both the PPS and the PSNI have policies concerning the treatment of victims and witnesses in the criminal justice system which specifically refer to the issue of bail. As the first point of contact with victims of crime, the PSNI Policy Directive, *Dealing with Victims and Witnesses* highlights the key role the police play in seeking the views of victims and providing information and explanations to them. It is envisaged that this role will be performed by the police until the case is passed to the prosecutor.

¹⁶³ See paras 3.54 to 3.65.

¹⁶⁴ See paras 4.24 to 4.25.

¹⁶⁵ SFI Programme: Report on Bail Information for SFI Steering Group, 24th September 2008. See paras 3.44 to 3.45.

3.71 The PSNI policy states that the police should keep victims informed of developments in their case, including the decision to grant bail to a defendant and any conditions attached. Victims should also be informed of any decision to remand the defendant in custody and the date on which the defendant will appear in court. These requirements are not limited to serious cases but apply to all victims, unless they have specified that they do not wish to be contacted. Information should be provided to victims at the earliest opportunity. Once the defendant has appeared in court or, in report cases, a file has been sent to the PPS, the responsibility for keeping victims informed of developments passes to the PPS.

3.72 The PPS *Victims and Witnesses Policy* includes a commitment to ensuring that victims are kept informed of the progress of their case at key milestones in the prosecution process, although there is no explicit pledge to inform victims of bail decisions, conditions and hearing dates, as specified in the PSNI policy. The policy also provides that the PPS will draw all relevant matters to the attention of the court including any information which suggests that there is a risk of interference with a victim.

REASONS FOR DECISIONS

3.73 A final anomaly in the provision for police and court bail relates to the duty to provide reasons for bail decisions. Although verbal reasons for the refusal of bail are usually given by the courts in Northern Ireland, there is no statutory obligation on the courts to provide reasons for the refusal or grant of bail or the imposition or variation of bail conditions. By contrast, PACE (NI) imposes a duty on police officers to make a written record of the grounds upon which a person is detained¹⁶⁶ and the imposition or variation of any conditions attached to bail.¹⁶⁷

¹⁶⁶ This obligation arises in respect of both pre charge (PACE (NI), arts 38(4) and (5)) and post charge (PACE (NI), arts 39(3) and (4)) detention. Subject to some limitations, the written record must be made in the presence of the person concerned who must be informed of the grounds for his detention: PACE (NI), art 38(5) (pre charge detention) and art 39(4) (post charge detention).

¹⁶⁷ PACE (NI), art 48(3H). The custody officer must supply the person on bail with a copy of that record as soon as practicable, if requested.

PRELIMINARY CONCLUSIONS

- 3.74 In the Commission's view, bail law and practice in Northern Ireland is beset by significant potential for complexity, uncertainty and inconsistency. An examination of the legal framework reveals many discrepancies between police and court bail, in particular. The grant and refusal of bail by the courts has been subject to limited statutory intervention. Further, given the nature of bail proceedings, the higher courts have not frequently been called upon to analyse the principles at play in bail decision making. Arguably, the resultant legal framework is lacking in clarity and often archaic in its terminology and machinery. There is uncertainty at the heart of the court bail system due to the absence of statutory grounds for the refusal of bail, which although possibly unproblematic for practitioners, results in bail decision making by the courts which is often not clearly understood by the general public. The continued reliance, in contrast to police bail, on antiquated concepts such as personal recognizances and estreatment is arguably a further weakness in the court bail system. These mechanisms may be difficult for the public to understand and may also be redundant in light of recent provisions imposing a duty upon persons released on bail to surrender to custody and an offence of failure to surrender.
- 3.75 Police bail, governed predominantly by PACE (NI), has been the subject of many legislative amendments resulting in bail provisions which, although arguably not easily distilled, reflect a more modern language and approach to bail. It is questionable, however, if some of the recent PACE (NI) amendments and proposals strike the appropriate balance between the right to liberty of the individual suspect who has not been convicted of an offence and the competing interests of society in the prevention of crime and the effective administration of justice.
- 3.76 A new statutory framework for the grant of bail by the police and the courts in Northern Ireland could address many of the uncertainties and inconsistencies which may exist within the current legal framework. Such legislation could both simplify the existing statutory framework and improve consistency across all levels of decision making, thereby enhancing public understanding of and confidence in bail decisions. A

review of bail law would also provide an opportunity to give full expression to the human rights obligations contained in the European Convention on Human Rights and consideration of the protection of victims and the public. As evident from the above discussion, however, legal provisions alone may not provide a solution for all of the difficulties to which the issue of bail can give rise. Any statutory provisions must be accompanied by complementary administrative arrangements designed to ensure the effective operation of the system in a consistent manner across the jurisdiction.

CHAPTER 4. CHILDREN AND YOUNG PERSONS

INTRODUCTION: RATIONALE OF BAIL AND REMAND REVISITED

- 4.1 The issues of bail and remand in respect of children require consideration of several conflicting principles. In addition to the difficult balance which must be struck between principles of liberty, justice and public protection,¹ policies surrounding children have long emphasised the importance of considering the welfare of the young person.² Views have changed over the years as to the status which should be afforded to each of these often irreconcilable principles³ and current thinking on the approach to children in the criminal justice system is illustrated in the Justice (Northern Ireland) Act 2002.
- 4.2 The principal aim of the youth justice system, as expounded in the 2002 Act, is to protect the public by preventing offending by children.⁴ All persons and bodies exercising functions in relation to the youth justice system must have regard to this aim, with a view to encouraging children to recognise the effects of crime and to take responsibility for their actions.⁵ The legislation emphasises that regard must also be had to the welfare of children affected by the exercise of youth justice functions, with a view to promoting their personal, social and educational development.⁶ The principle that delay in dealing with children is likely to prejudice their welfare is highlighted.⁷ 'Children' are defined as persons under the age of 18.⁸

¹ See ch 2.

² For an outline of the historical development of youth justice policy and legislation in Northern Ireland and England and Wales, see D O'Mahony and R Deazley, *Juvenile Crime and Justice* (Review of the Criminal Justice System in Northern Ireland, Research Report 17, March 2000).

³ See O'Mahony and Deazley, above, p 68.

⁴ Justice (NI) Act 2002, s 53(1).

⁵ Justice (NI) Act 2002, s 53(2).

⁶ Justice (NI) Act 2002, s 53(3).

⁷ Justice (NI) Act 2002, s 53(3).

⁸ Justice (NI) Act 2002, s 53(6).

INTERNATIONAL PRINCIPLES AND OBLIGATIONS

- 4.3 The United Kingdom has ratified several international human rights instruments which protect the rights of children. The most significant of these is the United Nations Convention on the Rights of the Child (the 'CRC') which lays down minimum standards for the protection of the economic, social, cultural and political rights of children. The CRC has not been incorporated into domestic law like the ECHR and consequently, although the United Kingdom is bound by its terms under international law, it is not directly enforceable in the courts. The exact persuasive weight afforded to the CRC in the Northern Ireland courts is uncertain.⁹
- 4.4 Several other non-binding principles and standards relating to children have been adopted by the United Kingdom, including the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the 'Beijing Rules'), the United Nations Guidelines for the Prevention of Juvenile Delinquency (the 'Riyadh Guidelines') and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the 'JDL Rules'). Many of the principles enunciated in these instruments are reflected in the CRC.
- 4.5 A child, according to the CRC, is any person under the age of 18.¹⁰ Several of the protections afforded to both children and adults under the ECHR are mirrored in the CRC but the overall emphasis of this Convention is different, with a central focus being placed on the best interests of the child.¹¹ Like Article 5 of the ECHR, the CRC provides that no child shall be deprived of his or her liberty unlawfully or arbitrarily but it then goes further, in stating that custody should be used

⁹ *In the Matter of TB v A Community and Hospitals Trust* [2001] NIFam 22 Gillen J stated that it is incumbent upon the courts to take into account the views and wishes of children in line with the CRC, art 12. In the later case of *In the Matter of an Application for Judicial Review by the Northern Ireland Commissioner for Children and Young People of decisions made by Peter Hain, the Secretary of State and David Hanson, the Minister of State* [2007] NIQB 115, para 110 Gillen J expressed the view that while international treaties such as the CRC may 'colour' the approach of the courts they are not part of the domestic law and 'do not affect domestic law unless incorporated into it by some legislative act'.

¹⁰ Unless domestic law defines a child as below this age: CRC, art 1.

¹¹ CRC, art 3(1) states that the best interests of the child shall be a primary consideration in all actions concerning children.

'only as a measure of last resort and for the shortest appropriate period of time.'¹² The Beijing Rules stipulate that a young person should not be deprived of his or her liberty unless 'adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response.'¹³

- 4.6 Article 37(c) of the CRC states that every child deprived of liberty must be treated in a manner which takes account of his or her age and shall be detained separately from adults, unless it is in the best interests of the child not to be so detained. Children must be given the right to maintain contact with their family while in custody, save in exceptional circumstances.¹⁴ Children in custody should be provided with prompt access to legal and other appropriate assistance and must be able to challenge the lawfulness of their detention before a competent authority and receive a prompt decision on any challenge.¹⁵ Article 12 provides that children have a right to be heard in any proceedings affecting them, either personally or through a representative.
- 4.7 The proposed Bill of Rights for Northern Ireland¹⁶ includes many of the protections granted to children under the CRC, including a right not to be detained except as a measure of last resort and for the shortest appropriate time. The proposed Bill of Rights also enshrines the right to be detained separately from adults and treated in a manner and in conditions which pay due regard to a child's age. Children or vulnerable adults being questioned, detained or charged also enjoy a right, under the proposed Bill of Rights, to have a legal representative and an appropriate adult in attendance to represent their best interests. The proposed Bill emphasises the importance of due regard being paid to the age, understanding and needs of children alleged or proven to have infringed the criminal law.

¹² CRC, art 37(b).

¹³ United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the 'Beijing Rules'), 1985, r 17.1 (c).

¹⁴ CRC, art 37(c).

¹⁵ CRC, art 37(d).

¹⁶ See para 2.21.

THE LEGAL FRAMEWORK: THE STATUTORY PRESUMPTION

4.8 The main provisions concerning the bail and remand of children by the courts in Northern Ireland are found in the Criminal Justice (Children) (Northern Ireland) Order 1998. Article 12 of the 1998 Order provides that a court *shall* release a child on bail *unless* the court considers that it is necessary to remand him or her to protect the public and:

- the young person is charged with a sexual or violent offence or an offence where in the case of an adult similarly charged he or she would be liable on conviction on indictment to imprisonment for 14 years or more or;
- the offence charged is an indictable offence and the child either was on bail on any date on which he is alleged to have committed the offence or has been found guilty of an indictable offence within the period of two years ending on the date on which he is charged with the present offence.

4.9 A 'child' is defined as a person who is under the age of 18.¹⁷ 'Sexual offence' in this context means rape or an offence under a number of listed statutory provisions.¹⁸ 'Violent offence' means an offence which leads or is intended or likely to lead to a person's death or to physical injury to a person and includes an offence under section 20 of the Children and Young Persons Act (Northern Ireland) 1968 or an offence which is required to be charged as arson.¹⁹

4.10 An 'indictable offence' is an offence which may be tried on indictment in the Crown Court. When Article 12 was originally enacted, it stipulated that a young person could be remanded in custody if the court considered it necessary to remand him or her to protect the public and the offence charged was an *arrestable offence* and the child either was on bail or had

¹⁷ Criminal Justice (Children) (NI) Order 1998, art 2(2) as amended by Justice (NI) Act 2002, sch 11, para 17.

¹⁸ Criminal Justice (Children) (NI) Order 1998, sch 1, para 1.

¹⁹ Criminal Justice (Children) (NI) Order 1998, sch 1, para 2.

been found guilty of an *arrestable offence* within the previous two years.²⁰ An 'arrestable offence' was defined as:

- an offence for which the sentence is fixed by law;
- an offence for which a person of 21 years of age or over may be sentenced to imprisonment for a term of five years or;
- certain other listed offences.²¹

The requirement of an 'arrestable offence' in Article 12 was substituted with an 'indictable offence' in 2007 when the concept of an 'arrestable offence' was abolished by the Police and Criminal Evidence (Amendment) (Northern Ireland) Order 2007.²² The test for the remand of young persons under Article 12 is less stringent as a result with remand now possible if the child is charged with an indictable offence and was on bail or has a previous conviction for an indictable offence in the previous two years, provided the court is of the view that it is necessary to remand him or her to protect the public. Even so, the 1998 Order establishes a strong presumption in favour of bail for young persons, with remand only available for certain offences and in certain circumstances and with an over-riding emphasis on the protection of the public.

- 4.11 If a court decides not to release a young person under this provision, children under 17 must be committed to a juvenile justice centre²³ or, if aged 15 or 16 and considered likely to injure themselves or other persons, a young offenders centre²⁴ for the remand period or until he or she is brought back before the court.²⁵ Children who have reached 17 shall be committed to a young offenders centre²⁶ or in certain strict circumstances a juvenile justice centre. Such a child shall be committed to a juvenile justice centre if less than 17 years and six months at the time of the first decision not to release

²⁰ See the Criminal Justice (Children) (NI) Order 1998, art 12 (as originally made).

²¹ See PACE (NI), art 26 (as originally made).

²² Police and Criminal Evidence (Amendment) (NI) Order 2007, sch 1, para 34(4).

²³ Criminal Justice (Children) (NI) Order 1998, art 13(1)(a).

²⁴ Criminal Justice (Children) (NI) Order 1998, art 13(1A).

²⁵ Criminal Justice (Children) (NI) Order 1998, art 13(1C).

²⁶ Criminal Justice (Children) (NI) Order 1998, art 13(1)(b).

him or her on bail in relation to the present offence, if he or she has not had a custodial sentence imposed upon him or her in the last two years and if, after considering a report made by a probation officer, the court considers that it is in his or her best interests to do so.²⁷

4.12 The Justice (Northern Ireland) Act 2002 contains provisions which would amend the 1998 Order to commit 10 to 13 year olds on remand to secure accommodation, instead of a juvenile justice centre.²⁸ These provisions have not been commenced.

4.13 Where a youth court has remanded a child for information to be obtained in respect of him or her, a court of summary jurisdiction or district judge (magistrates' courts) acting for the same petty sessions district may extend the period for which he or she is remanded in the absence of the child.²⁹ A young person remanded in such circumstances must be brought back before the court at least once every two weeks.³⁰

4.14 An obligation may be imposed upon a parent or guardian of a child brought before a court in any proceedings against him or her or for any other reason, requiring the parent or guardian to attend the court during all the stages of the proceedings.³¹ An obligation to attend must be imposed at any stage where the court thinks it desirable, unless it is considered unreasonable to require the attendance of the parent or guardian.³² Further, a lay magistrate may require by summons any parent or guardian of a child in relation to whom any proceedings are pending to produce the child before a court of summary jurisdiction.³³ Failure to comply with such a summons without reasonable excuse is an offence.³⁴

²⁷ Criminal Justice (Children) (NI) Order 1998, art 13(1B).

²⁸ Justice (NI) Act 2002, sch 12, para 69(2).

²⁹ Criminal Justice (Children) (NI) Order 1998, art 31(1).

³⁰ Criminal Justice (Children) (NI) Order 1998, art 31(2).

³¹ Criminal Justice (Children) (NI) Order 1998, art 15(a).

³² Criminal Justice (Children) (NI) Order 1998, art 15(b).

³³ Criminal Justice (Children) (NI) Order 1998, art 14(1).

³⁴ Criminal Justice (Children) (NI) Order 1998, art 14(2).

POLICE BAIL

- 4.15 As with adults, if a child is arrested by the police and brought to a police station, the police have powers to release or detain him or her both before and after charge.

Pre charge bail: persons in police custody

- 4.16 If a custody officer determines that there is insufficient evidence to charge an arrested juvenile,³⁵ Article 38(2) of PACE (NI) requires that the person be released on bail or without bail, unless the custody officer has reasonable grounds for believing that further detention without charge is necessary to secure or preserve evidence or to obtain evidence by questioning the person. Where a juvenile arrested without a warrant is not released under this provision, it is the duty of the custody officer to inform the arrested juvenile that he has reasonable grounds for believing that his detention is necessary in connection with an offence and to state the offence.³⁶ The custody officer is also under a duty to take such steps as are practicable to ascertain the identity of a person responsible for the welfare of the arrested juvenile³⁷ and to inform that person, as soon as it is practicable to do so, of the arrest and of the alleged offence.³⁸

³⁵ 'Arrested juvenile' is defined for the purposes of PACE (NI), part 5 as a person arrested with or without a warrant who appears to be under the age of 18 and is not excluded by virtue of PACE (NI), art 52: PACE (NI), art 38(14). PACE (NI), art 52 states that part 5 of the Order does not apply to a child apparently under the age of 14 who is arrested without a warrant for an offence other than homicide and to whom the Criminal Justice (Children) (NI) Order 1998, arts 7 and 8 accordingly apply.

³⁶ PACE (NI), art 38(11)(a).

³⁷ Persons who may be responsible for the welfare of an arrested juvenile, for the purposes of this provision, are his or her parent or guardian and any other person who has for the time being assumed responsibility for his or her welfare: PACE (NI), art 38(13).

³⁸ PACE (NI), art 38(11).

Pre charge bail: persons arrested other than at a police station

- 4.17 In relation to street bail,³⁹ PSNI guidance outlines that particular consideration should be given to the level of understanding of a juvenile⁴⁰ when deciding if street bail is appropriate. It is also suggested that the level of risk to the safety and welfare of a juvenile or vulnerable person should be assessed. If the young person is to be released on street bail, the police officer should explain the decision, issue the street bail notice and release the young person as soon as possible. In addition to issuing a notice, a verbal explanation should be given to the young person making clear that they have not been discharged, that court or other disposal action may be taken against them and that they are required to attend a police station on a specified date. Consideration should be given to setting shorter bail response dates for juveniles and the custody officer should be informed of any arrangements for appropriate adults or legal representatives to attend. Parents, guardians or other carers of young persons under 18 years of age should be contacted by telephone as soon as practicable and informed of the arrest, the details of the offence and the grant of street bail. A copy of the bail notice outlining the requirement to attend a police station should then be forwarded to them.

Bail following charge

- 4.18 In addition to the grounds for the refusal of bail after charge laid down in respect of both adults and juveniles under Article 39(1)(a) of PACE (NI)⁴¹ juveniles once charged must be released, either on bail or without bail, unless the custody officer has reasonable grounds for believing that the person ought to be detained in his or her own interests.⁴² Where a custody officer authorises the detention of a juvenile under Article 39, he or she must arrange for the juvenile to be detained in a 'place of safety', unless impracticable to do so.⁴³ A 'place of safety'⁴⁴ is defined as any juvenile justice

³⁹ See paras 3.10 to 3.13.

⁴⁰ Or other vulnerable persons who would normally require the assistance of an appropriate adult and those thought to be under the influence of drink or drugs: see Police Service of Northern Ireland, *Service Procedure: Street Bail* (SP 4/2005 as amended).

⁴¹ See paras 3.34 to 3.35.

⁴² PACE (NI), art 39(1)(b).

⁴³ PACE (NI), art 39(6).

centre, hospital or surgery, or any other suitable place, the occupier of which is willing temporarily to receive the arrested juvenile.⁴⁵ It is the duty of the occupier of that place to make available to the young person such advice and assistance as may be appropriate in the circumstances.⁴⁶

Further provisions

- 4.19 Some additional rules restricting the detention of younger children and those arrested in connection with less serious offences are laid down in the Criminal Justice (Children) (Northern Ireland) Order 1998. Article 6 of the 1998 Order provides that a young person arrested under a warrant must be released if the child or his or her parent or guardian enters into a recognizance,⁴⁷ unless arrested for an indictable offence⁴⁸ or if the custody officer considers that the child should not be released for the protection of the public.⁴⁹
- 4.20 Article 7 of the 1998 Order provides that a child who is apparently under 14 and arrested without a warrant for an offence other than homicide must be released if the child or his or her parent or guardian enters into a recognizance,⁵⁰ unless arrested for an indictable offence⁵¹ or if the custody

⁴⁴ The definition of 'place of safety' under PACE (NI), art 39(8) was amended by Justice (NI) Act 2002, sch 12, para 46 to include any young offenders centre and any secure accommodation. This amendment has not yet come into force.

⁴⁵ PACE (NI), art 39(8).

⁴⁶ PACE (NI), art 40(5).

⁴⁷ The recognizance may be entered into with or without sureties and must be for such amount as the custody officer considers will secure the attendance of the child at the hearing of the charge: Criminal Justice (Children) (NI) Order 1998, art 6(1).

⁴⁸ Criminal Justice (Children) (NI) Order 1998, art 6 was originally limited to a 'serious arrestable offence' as defined at PACE (NI), art 87(as originally made). This requirement was substituted with 'indictable offence' when the concepts of 'arrestable offence' and 'serious arrestable offence' were abolished: see Police and Criminal Evidence (Amendment) (NI) Order 2007, sch 1, para 34(2).

⁴⁹ Criminal Justice (Children) (NI) Order 1998, art 6(3).

⁵⁰ The recognizance may be entered into with or without sureties and must be for such amount as the custody officer considers will secure the attendance of the child at the hearing of the charge: Criminal Justice (Children) (NI) Order 1998, art 7(3).

⁵¹ This requirement for an 'indictable offence' replaced the original requirement for a 'serious arrestable offence' when that concept was abolished: see with the Police and Criminal Evidence (Amendment) (NI) Order 2007, sch 1, para 34(3).

officer considers that the child should not be released for the protection of the public.⁵² If a child apparently under 14 and arrested without a warrant for an offence other than homicide is not released under Article 7, he or she must be brought before a magistrates' court as soon as is practicable and within 36 hours from the time of his or her arrest.⁵³ This requirement does not apply if a police officer of a rank not below that of superintendent certifies to a magistrates' court within 36 hours that by reason of illness or accident the child cannot be brought before the court.⁵⁴ The child must be moved to a juvenile justice centre until he or she can be brought before a magistrates' court,⁵⁵ unless it is impracticable to move the child to a juvenile justice centre or it is inadvisable by reason of character or state of health.⁵⁶ Once the child has been brought before the magistrates' court or a certificate is produced before the court outlining that the child cannot be brought before it by reason of illness or accident, the court may remand the child.⁵⁷

4.21 In addition to the provisions relating to pre charge detention outlined above, the 1998 Order stipulates that when a child is in police detention, reasonable efforts must be made to ascertain the identity of a person responsible for the welfare of the child⁵⁸ and to inform him or her as soon as practicable that the child has been arrested and why, and where the child is being detained.⁵⁹ The 1998 Order further provides that children detained by the police must be separated from

⁵² Criminal Justice (Children) (NI) Order 1998, art 7.

⁵³ Criminal Justice (Children) (NI) Order 1998, art 8(1). Criminal Justice (Children) (NI) Order 1998, art 7(2) provides that: '[i]f the child cannot forthwith be brought before a magistrates' court, the custody officer shall inquire into the case.'

⁵⁴ Criminal Justice (Children) (NI) Order 1998, art 8(2).

⁵⁵ Criminal Justice (Children) (NI) Order 1998, art 8(3).

⁵⁶ Criminal Justice (Children) (NI) Order 1998, art 8(4).

⁵⁷ Criminal Justice (Children) (NI) Order 1998, art 8(6).

⁵⁸ For the purposes of this provision, persons responsible for the welfare of a child are his or her parent or guardian or any other person who has for the time being assumed responsibility for his or her welfare: Criminal Justice (Children) (NI) Order 1998, art 10(3). In the case of a child being looked after by an authority, both the parent or guardian and the authority must be informed: Criminal Justice (Children) (NI) Order 1998, art 10(5). If the child is subject to a supervision order or a probation order his or her supervisor or probation officer must also be informed: Criminal Justice (Children) (NI) Order 1998, art 10(4).

⁵⁹ Criminal Justice (Children) (NI) Order 1998, arts 10(1) and (2).

persons charged with any offence other than an offence with which the child is jointly charged,⁶⁰ unless that person is a parent or guardian of the child, a relative of the child or a child.⁶¹ If possible, girls detained by the police should be under the care of a woman.⁶²

BAIL CONDITIONS, BREACH, MONITORING AND SUPPORT

Personal recognizance

- 4.22 Although persons released on police bail cannot usually be required to enter into a personal recognizance,⁶³ both Articles 6 and 7 of the 1998 Order stipulate that a child must be released in the circumstances outlined if he or she or their parent or guardian enter into a recognizance. Children can also be required to enter into a personal recognizance for court bail.⁶⁴ There are therefore inconsistencies both between police and court bail and within police bail in respect of children. As outlined in respect of adults, a child who fails to appear may be liable to prosecution for failing to surrender to custody,⁶⁵ and, depending on the provision under which they are released on bail, to the estreat of their recognizance. This double sanction appears particularly harsh when applied to children.

Conduct conditions

- 4.23 Both the police and the courts may attach conditions to a grant of bail to a child, however, as with adults, curfew and electronic monitoring requirements can only be imposed upon children by a court.⁶⁶ These requirements can be imposed if the court is of the view that, if it did not attach such conditions, it would be necessary to remand the child in custody to protect the public.⁶⁷

Bail support

- 4.24 Bail support services are provided to children and young persons in Northern Ireland by the Youth Justice Agency.

⁶⁰ Criminal Justice (Children) (NI) Order 1998, art 9(1).

⁶¹ Criminal Justice (Children) (NI) Order 1998, art 9(2).

⁶² Criminal Justice (Children) (NI) Order 1998, art 9(3).

⁶³ See PACE (NI), art 48(3) discussed at para 3.47.

⁶⁴ See eg Magistrates' Courts (NI) Order 1981, art 47(1)(b) and para 3.47.

⁶⁵ Under the Criminal Justice (NI) Order 2003, art 5. See also para 3.60.

⁶⁶ Criminal Justice (NI) Order 2008, art 35(1)(a). See also para 3.52.

⁶⁷ Criminal Justice (NI) Order 2008, art 43.

The Bail Supervision and Support Scheme is targeted at 10 to 17 year olds who are at most risk of being remanded in custody, failing to surrender to custody or committing offences while on bail. Children accepted onto the scheme are assessed and packages are tailored to the level of support required and the particular needs of the young person, including accommodation issues, training and employment, drug and alcohol use and counselling. Young persons must agree to the conditions of the scheme and sign a contract. When consent is given the bail supervision and support team make a submission to the court providing verified and accurate information about the child or young person and their suitability to the scheme. The objectives of the scheme are to reduce the use of custodial remand, reduce offending on bail, reduce delays caused by failures to surrender to custody and ensure young persons comply with their bail conditions. Failures to comply with the scheme are reported to the police and bail may be varied or revoked by the court. Intensive supervision and support, including up to 25 hours of direct contact with the young person, is provided by Extern under the 'Inside Out' programme.

- 4.25 The Bail Supervision and Support Scheme has been positively evaluated and is believed to make a valuable contribution to the youth justice system in Northern Ireland.⁶⁸ The scheme is believed to be effective in addressing issues such as accommodation, offending and education, reducing offending on bail and improving compliance with bail conditions. It is reported that the cost of the scheme compares favourably with the cost of custodial remand.⁶⁹

REASONS FOR DECISIONS

- 4.26 In addition to the obligations imposed upon the police to keep a written record of the grounds upon which a person is detained and the imposition or variation of any conditions attached to bail,⁷⁰ there is a statutory obligation on a court if it decides *not to release* a young person under Article 12 of the 1998 Order to give reasons for the decision in open court.⁷¹

⁶⁸ Northern Ireland Office, *Evaluation of the Bail Supervision and Support Scheme*, NIO Research and Statistical Series Report No 13 (May 2006).

⁶⁹ See above.

⁷⁰ See para 3.73.

⁷¹ Criminal Justice (Children) (NI) Order 1998, art 13(1).

Further reasons must be provided by the court if the child's period in detention is extended to exceed three months.⁷²

PRELIMINARY CONCLUSIONS

4.27 Like bail in respect of adults in Northern Ireland, it would appear that legal provision for the grant of bail to children in this jurisdiction has significant potential for inconsistencies. Two distinct regimes exist side by side and different rules apply to the grant of bail to children by the police post charge and the grant of bail by the courts. The Criminal Justice (Children) (Northern Ireland) Order 1998 sets up a strict regime for the grant of bail by the courts and, in relation to some children, bail granted by the police, which adheres to the stated aim of the youth justice system of protecting the public by preventing offending by children. Alongside this regime the police enjoy broad powers to detain young persons charged with offences under PACE (NI). Children who do not fall within Articles 6 and 7 of the 1998 Order may, if charged, be refused bail for a range of reasons laid down in Article 39 of PACE (NI), including their own interests. It has been reported that there are high numbers of PACE (NI) admissions to the juvenile justice centre⁷³ and the broad powers conferred upon the police under PACE (NI), coupled with a lack of suitable alternative accommodation for young persons, may be contributing to this problem. Statistics also indicate that a large proportion of such admissions are subsequently released by the courts,⁷⁴ and the application of differing standards by the police under PACE (NI) and the courts under the 1998 Order arguably plays a part in this anomaly.

4.28 Further questions arise about the justification for the remand of many young persons by the courts in Northern Ireland with very few children placed on remand eventually receiving

⁷² Criminal Justice (Children) (NI) Order 1998, art 13(2).

⁷³ 48% of all admissions to the juvenile justice centre between January 2006 and October 2007 were under PACE (NI): see Criminal Justice Inspectorate, *Inspection of Woodlands Juvenile Justice Centre* (May 2008), ('CJI Inspection of Woodlands Juvenile Justice Centre'), p 4.

⁷⁴ 42% of PACE (NI) admissions to the juvenile justice centre between January 2006 and October 2007 were later released by the courts: see CJI Inspection of Woodlands Juvenile Justice Centre, p 4.

custodial sentences.⁷⁵ The focus of juvenile justice policy in Northern Ireland on the protection of the public by preventing offending by children rather than on the 'best interests' principle as avowed in the CRC has been the subject of some criticism.⁷⁶ Pre-trial detention, it has been argued, is not being used as a measure of last resort for young persons in Northern Ireland.⁷⁷

⁷⁵ Only 8% of children remanded by the courts to the Juvenile Justice Centre between January 2006 and October 2007 ultimately received a custodial sentence: see CJI Inspection of Woodlands Juvenile Justice Centre, p 4.

⁷⁶ Committee on the Rights of the Child, *Consideration of Reports submitted by States Parties under Article 44 of the Convention, Concluding Observations: United Kingdom of Great Britain and Northern Ireland* (October 2008), para 26 and the Northern Ireland Human Rights Commission, *Still in our care: Protecting children's rights in custody in Northern Ireland* (September 2006), p 19.

⁷⁷ Committee on the Rights of the Child, *Consideration of Reports submitted by States Parties under Article 44 of the Convention, Concluding Observations: United Kingdom of Great Britain and Northern Ireland* (October 2008), para 77.

CHAPTER 5. PRELIMINARY DISCUSSIONS

INTRODUCTION: MEETINGS AND SEMINARS

- 5.1 This chapter presents a summary of comments and issues raised in preliminary discussions which took place from April 2008 to February 2010 with a range of individuals and organisations with a professional or personal interest in bail and the criminal justice system in Northern Ireland. The Commission observed widespread willingness to participate in meetings and seminars across a variety of agencies and individuals which, it is believed, is indicative of the growing interest across the community in this area of law.
- 5.2 Preliminary discussions took the form of individual meetings and group seminars attended by invited individuals and organisations. The Commission was cognisant of section 75 of the Northern Ireland Act 1998 when inviting stakeholders to participate in the meetings and seminars and efforts were made to ensure representation from all appropriate groups. Some key organisations who were invited were unable to attend but it is hoped that they will submit their views in response to this Consultation Paper (see Appendix B for a full list of those who participated in discussions).
- 5.3 The Commission proactively sought the views of a selection of professional representatives who work within the criminal justice system and groups such as parents, community representatives and offenders who have first hand experience of the bail process. Issues surrounding the bail and remand of young persons were discussed with youth justice agencies, interest groups, young offenders and their families and a separate section in this chapter is devoted to their particular concerns.
- 5.4 The individual meetings followed a standardised format, eliciting comments on a range of issues including the legal framework, bail decision making, bail conditions, breach of bail, bail monitoring and support, the role of victims, awareness, transparency and public confidence.
- 5.5 In addition to these individual meetings, three seminars were held in Belfast, Derry/Londonderry and Dungannon. These seminars sought to draw out the full range of views on the

topic of bail in Northern Ireland and to allow for further analysis and exchange of opinion between interested parties. The locations for the seminars were selected in order to obtain the views of persons both within and outside the greater Belfast area and in both urban and rural areas. Seminars lasted half a day and began with a number of presentations introducing the bail project and the work which had been conducted to date, the current law and comparative perspectives. Participants were then divided into small groups and asked to consider a number of questions relating to bail, encompassing the legal framework, delay, breach of bail, bail monitoring, the needs of victims and bail and young persons. The seminars concluded with a feedback session for the whole group.

- 5.6 An additional focus group discussion was held in February 2010. This focus group was attended by invited district judges, prosecutors, defence lawyers, police and persons working within the youth justice system and focussed on bail decision making, bail information and conditions.
- 5.7 The views outlined in this chapter represent opinions expressed by interested parties during the course of these preliminary discussions. Views expressed by participants are not attributed to individuals or groups. None of the views expressed in this chapter are attributable to the Commission.
- 5.8 The publication of this Consultation Paper provides a further opportunity for all individuals and organisations to submit their views on the law and practice relating to bail in Northern Ireland for the consideration of the Commission.

THE LEGAL FRAMEWORK

Legislation dedicated to bail

- 5.9 Many participants in the individual meetings and seminars commented that the present law relating to bail and remand in Northern Ireland would benefit from simplification. Several spoke of the complexities of the current law and there was broad support for the idea of clarifying the law and codifying it into a single Bail Act, containing the statutory grounds for the refusal of bail. Concern was expressed by some that there were inconsistencies in the decision making of the various parties tasked with determining the issue of bail and

it was hoped that legislation could help to ensure a uniform approach by the police and the courts. Participants were in agreement that bail legislation should not only aim to simplify the law but should also endeavour to make the law more transparent and accessible to all.

- 5.10 Several participants expressed unease about the degree of discretion presently enjoyed by bail decision makers. It was suggested that decisions focussed too much on the individual rights of the offender rather than those of the victim. There was support for the idea of a unified bail code which might reduce discretion and lead to greater uniformity in decision making and certainty in the law. Some participants, however, stressed the importance of retaining a degree of flexibility so that justice could be delivered in all cases.
- 5.11 Participants agreed that legislation should endeavour to strike an appropriate balance between the right to liberty of the individual and the protection of the community and, in the view of some participants, the victim in particular. The importance of respecting human rights was highlighted by some, with particular concern expressed for the rights of victims and children.
- 5.12 The view was expressed by some participants that recently created police powers to grant bail to persons arrested elsewhere than at a police station¹ ('street bail') are not being utilised by the police.

Presumption in favour of bail and grounds for refusal

- 5.13 It will be recalled that there is no general right to bail enshrined in statute in Northern Ireland² and a number of participants felt that it would be beneficial to have such a right set out in a codifying Act, as it is in many other jurisdictions.³ Some participants believed that a provision outlining a clear presumption in favour of bail would be advantageous. A number of members of the legal profession asserted that as result of Article 5 of the ECHR and the presumption in favour of bail, the onus is clearly on the state

¹ See paras 3.10 to 3.13.

² See paras 3.34 to 3.40.

³ See para 6.7.

to justify detention.⁴ Concern was expressed that an accused person should not have to bring a bail application in order to discover the objections to bail and the nature of the case against them.

5.14 Although the PACE (NI) lays down the grounds upon which bail may be refused by the *police* in Northern Ireland, there are no general statutory grounds for the grant or refusal of bail by the *courts*.⁵ Case law indicates that bail may be refused by the courts if there is good reason to believe that the accused will not appear for trial, will interfere with witnesses or otherwise obstruct the course of justice or commit further offences. It was agreed by those participants working in the criminal justice system that any codifying statute should prescribe clearly the grounds upon which bail may be refused in order to promote greater consistency and transparency in decision making.

5.15 Some criticism was made of the perceived practice by judges of pre-empting at an early stage the likelihood of a custodial sentence and granting or denying bail on that basis. This, it was argued, gives repeat offenders the signal that bail will always be granted for less serious offences. Some suggested that bail should not be granted where the offence has been admitted regardless of the likely sentence.

5.16 There was a view held by some participants that bail should not be granted to persons who had previously abused bail, by breaching conditions, committing further offences or failing to appear. Others were of the view that the refusal of bail should be focussed predominantly on risk to the safety and welfare of the public, a factor which it was suggested is currently given insufficient weight by the courts.

5.17 Some participants had concerns about the use of remand in custody for the safety of the accused,⁶ which was criticised as an inappropriate and unfair response to such a threat.

5.18 Other participants were opposed to the enactment of an automatic presumption in favour of bail for certain offences

⁴ See paras 2.10 to 2.12.

⁵ See paras 3.34 to 3.40.

⁶ PACE (NI), art 39(1)(a)(iv).

such as serious violent or sexual offences, including domestic violence. Some participants from the legal profession suggested, however, that a presumption against bail for certain offences may conflict with the ECHR. It was suggested that the courts should continue to have discretion to grant bail no matter what the offence and that the nature of the alleged offence should not be the sole factor in determining the success of a bail application.

BAIL DECISION MAKING

General issues

- 5.19 Some representatives from the police and the legal profession expressed concern about the lack of experience of police officers objecting to bail at court. It was suggested that generic reasons were given for bail objections with no evidence of offending history or intelligence to support them. It was asserted in particular that inadequate consideration was given to the suitability of bail conditions to individual applicants. The view was expressed that more training and guidance should be given to police officers in relation to bail applications.
- 5.20 Some participants expressed the opinion that for reasons of consistency, objections to bail should be put forward by police officers instead of Crown counsel in the High Court, as is the case in the magistrates' court. It was suggested that it would be beneficial for the court to hear the evidence first hand from the police officer in charge of the case, who may have a better knowledge of the relevant facts than Crown counsel.
- 5.21 Other members of the legal profession and previous offenders voiced concern about the lack of input from the accused during the decision making process. It was suggested that it would be helpful for the court to ask the accused if they understood the bail conditions under consideration, rather than simply imposing conditions which the accused may not understand or be capable of complying with.
- 5.22 Concern was also expressed about the control exerted by the legal profession over the bail decision and it was suggested that there should be greater input from

government bodies, community and voluntary organisations. The possibility of conducting an assessment of a person's suitability for bail at an early stage was raised and several participants asserted that the views of the alleged offender and the victim should be considered when deciding on the grant of bail and selecting appropriate conditions.

- 5.23 Some confusion and dissatisfaction was expressed about the possibility that persons refused bail in the magistrates' court can apply for bail afresh in the High Court when there is no change of circumstances. Others defended this facility on the basis that more information may be available to the High Court and that there was generally more time to consider the bail application, ensuring justice is done.

Bail information

- 5.24 Participants were in agreement that the provision of accurate, relevant and verified information is crucial to the bail decision. Concern was expressed by some participants that information furnished to the court on behalf of bail applicants is not subject to independent verification and may on occasions be unreliable. It was suggested that full checks should be carried out on all information provided by the accused including the bail address, other persons residing at the address and whether the consent of the householder had been obtained.
- 5.25 Although there is no formal bail information scheme in Northern Ireland, several participants expressed favourable opinions about the informal information gathering scheme in operation in Belfast.⁷ It was reported that the police managing this scheme provide reliable and timely information to the court and lawyers in relation to bail objections. It was suggested that such a scheme might be rolled out to other parts of Northern Ireland, although there were mixed views as to whether the police were the most suitable organisation to run such a scheme. There were general concerns about whether the current system for listing bail applications allows sufficient time for relevant information to be compiled and verified.

⁷ See para 3.43.

- 5.26 Some participants had reservations about the introduction of a formal bail information scheme and queried what status a report produced under such a scheme would have before the court. The possibility of piloting a bail information scheme in the youth court was mooted.
- 5.27 A common concern among participants was the inadequacy or inaccuracy of information held by the police and the courts in relation to individual offenders. Existing information systems do not collate information relating to offending whilst on bail, breach of bail conditions, the number of times an accused person has been granted bail or has breached bail or if the accused is currently on bail. It was suggested that the Causeway project⁸ may address some of these issues.
- 5.28 Most participants were in agreement that more time should be made available to verify information and substantiate submissions provided to the court. It was reported that the police sometimes detain suspects overnight in order to give them time to collect and verify information relevant to the bail decision. Adjournments due to lack of information were also said to be common in the High Court.

BAIL CONDITIONS, SURETY AND SECURITY

- 5.29 It will be recalled that, although bail may be unconditional, a person released on bail may be required to enter into a recognizance, with or without a surety and/or security, and may be required to abide by certain other conduct conditions.

Personal recognizance

- 5.30 A recognizance is an undertaking entered into by the accused or another person (a surety) to pay a particular sum if the accused fails to surrender to custody. Most participants, with the exception of some members of the legal profession, were of the view that the use of a personal recognizance when granting bail is ineffective, as it was suggested that the courts rarely, if ever, order the recognizance to be estreated. It was reported, therefore, that personal recognizances have, to some extent, lost credibility and are largely ignored by persons released on bail.

⁸ Causeway is a collaboration between criminal justice agencies in Northern Ireland which aims to ensure that accurate, consistent and up-to-date information is available to the agencies.

Surety and security

- 5.31 A surety is a person who gives an undertaking to the court to ensure that an accused will surrender to custody. The surety agrees to pay a particular sum if the accused fails to appear. The operation of the surety system and the terminology which surrounds it caused confusion for some participants. It was suggested that the term 'surety' is often used to describe not only a person who enters an undertaking to ensure that the accused will return for trial but also the amount of money the surety is bound by or the undertaking entered into (the recognizance, above).
- 5.32 There was also confusion about the extent of the obligation imposed upon the surety, with some participants questioning if the surety is bound to ensure that the accused complies with *all* bail conditions or just the obligation to appear at court. Some suggested that the surety should ensure that all conditions are complied with and that their recognizance should be estreated if the accused breaches bail conditions.
- 5.33 Concerns were raised by participants and examples given of inappropriate persons acting as sureties. Some participants were of the view that the factors relevant to suitability to perform the role of surety, such as financial resources, character and previous convictions, should be set out in legislation. Other participants stressed that the person who acts as surety should have sufficient influence over the accused to ensure compliance with bail. It was reported that presently no financial checks are carried out on persons acting as sureties where a recognizance is entered into for less than £1000. This practice was criticised and it was suggested that checks should be carried out on the financial status of all sureties, regardless of the amount of the recognizance. It was further proposed that there should be a statutory requirement that a portion of the amount should be paid upfront. Such a provision, it was suggested, would serve to emphasise the seriousness and implications of performing the role of surety.
- 5.34 Several participants complained that the courts rarely, if ever, order the estreat of recognizances entered into by sureties when an accused fails to appear and that it is consequently an inadequate control on bail. Some participants further

suggested that the surety system is ineffective in ensuring compliance with bail as an accused who breaches bail is not required to pay any money personally and therefore has no incentive to abide by their bail.

- 5.35 It was suggested that there may be inconsistency between the police and the courts in the use of sureties and security, with the police making greater use of security as a condition of bail and the courts more often seeking a surety. The police are particularly likely to require security if the accused lives outside the jurisdiction.

Conduct conditions

- 5.36 In relation to bail conditions, a common view amongst participants was that although their potential scope is very wide the actual conditions which are imposed by the courts are frequently inadequate as they fail to provide sufficient control over the accused to prevent him or her breaching the conditions or committing further offences.
- 5.37 The view was expressed that bail conditions should be appropriate to the offence committed and take into account the personal circumstances of the accused. Several examples were given of inappropriate bail conditions, such as a night time curfew for a person accused of shoplifting. It was highlighted that a common bail condition, prohibiting the consumption of alcohol, is nearly impossible for a person with an alcohol addiction to abide by, particularly if support is not provided. It was also suggested that restricting an accused from entering a particular area may be inappropriate if they work or attend school in that area or their family, who may exert a positive influence upon the accused, reside there. Rather than imposing the same standard conditions upon most bail applicants, it was felt that bail conditions should be realistic and tailored to the circumstances of the particular accused.
- 5.38 The imposition of electronic monitoring conditions ('tagging') was supported by some participants but it was acknowledged that its utility is limited as it can only alert the police that the person has left their home but can not indicate where they are.

- 5.39 Some participants, including persons who had been on bail, expressed the view that bail conditions were much more likely to be adhered to if they had a clear connection with the offence charged, justifying the imposition of the particular condition. The importance of clarity in bail conditions was also emphasised so that all parties were aware of what was expected of them and what would constitute a breach of bail.
- 5.40 It was suggested that the procedure to vary bail conditions should be reviewed. At present an application to vary or revoke conditions is always heard by a magistrates' court even if the original decision to grant bail was made in the High Court. It was suggested that it would be preferable for the court that made the original bail decision to deal with any applications to vary it.

BREACH OF BAIL

- 5.41 Many participants were of the view that breaches of bail, whether by failing to surrender to custody, failing to abide by bail conditions or committing an offence, must be taken seriously. There were varying views on what the appropriate response should be to each type of breach, however, and particular concern was expressed in relation to low level criminality and offenders who consistently breach bail conditions.

Failure to appear

- 5.42 It will be recalled that Articles 5(1) and 5(2) of the Criminal Justice (NI) Order 2003 created two new offences relating to breach of bail – failing to surrender to custody in answer to bail without reasonable cause and failing to surrender to custody in answer to bail as soon as reasonably practicable after a failure to surrender with reasonable cause.⁹ Concern was expressed about the practical operation of these provisions. It was suggested that in addition to the original offence(s) an accused who failed to surrender would also be charged with two offences of failing to appear, with the court then selecting the most appropriate charge. Each subsequent failure to appear would result in an additional two charges and this could lead to a dramatic increase in the number of charges against one accused. It was reported

⁹ See para 3.60.

that as a result of the administrative difficulties in processing the substantial number of charges no proper procedure has developed to deal with these offences thus rendering the legislative provisions ineffective.

- 5.43 Some representatives from the police advocated that Article 5(1) and 5(2) should be abolished and replaced with one offence of 'failing to surrender to answer bail' and that it should then be for the court to decide if the accused had cause to justify this failure.

Breach of bail conditions

- 5.44 Confusion was expressed about the action a member of the public could take if they observed an accused person breaching bail conditions. It was suggested that it should be made clear to whom a member of the public can report an alleged breach of bail and what the response will be.
- 5.45 Community groups indicated a desire to be informed of decisions to grant bail to persons in their community and any conditions imposed as it was suggested that they could assist in monitoring compliance with bail and report any breaches to the police. Some participants also felt that clubs, pubs and hotels should be aware of conditions imposed on accused persons in their area so that they could report breaches and also to ensure that they were not assisting accused persons to breach bail.
- 5.46 If a breach of bail was reported, however, considerable concern was expressed about the inadequate response of the authorities. Such reported breaches did not always result in an arrest and even if brought before a court the accused was frequently released again with the same or similar conditions. Some were of the view that if a person was found in breach of their bail conditions a number of times, their bail should automatically be revoked.
- 5.47 It was suggested that consideration should be given to creating a separate offence of breaching a bail condition. This would mean that in addition to potentially having bail revoked, an accused would also face the prospect of an additional criminal charge for not adhering to bail conditions. Some participants made a comparison between bail

conditions and conditions attached to an Anti Social Behaviour Order ('ASBO'). It was stated that although an ASBO is a civil order, breach of conditions attached to an ASBO is a criminal offence. Breach of bail conditions is not treated in the same way and several participants felt that this inconsistency was unjustifiable. It was asserted that bail conditions would be treated more seriously if breaches were criminalised.

5.48 Caution was expressed, however, about the possibility of criminalising minor or technical breaches, such as being ten minutes late for a curfew and some participants were of the opinion that only serious or persistent breaches of bail conditions should result in a criminal charge.

5.49 Some police representatives suggested that if there were to be an offence of breach of a bail condition the legislation would have to be drafted clearly and a proper procedure put in place to avoid the difficulties of the absconding offences under Article 5 of the 2003 Order. Others felt that such a new offence would cause a significant increase in work for the police, PPS and magistrates' courts without significant benefit to the community. Several participants were of the view that provided there was an appropriate and prompt judicial response to breach of conditions, such as the imposition of stricter conditions or remand, it did not necessarily have to result in a criminal charge. A few suggested that breach of conditions should be treated as an aggravating factor when the original charge(s) are disposed of, but this approach is clearly problematic if the accused is found not guilty of the original charge(s).

Committing offences on bail

5.50 There was considerable concern about the commission of further offences by persons who had been released on bail and there was agreement among participants that a firm approach should be taken to such offenders. Many participants expressed approval for provisions which require the courts to treat the fact that an offence was committed on bail as an aggravating factor when sentencing.¹⁰ It was asserted that this approach raises the status of bail in the

¹⁰ See para 3.66.

eyes of the accused, addresses the breach of trust involved and enhances public confidence.

- 5.51 Some participants viewed the repeated granting of bail to the same accused as a 'revolving door' as there appeared to be no deterrent to reoffending. More consideration should be given to the accused person's potential to reoffend and it was suggested that clear guidelines and criteria would enhance consistency.

MONITORING AND SUPPORT OF PERSONS ON BAIL

Bail monitoring

- 5.52 There was a general feeling of dissatisfaction and disillusionment with the perceived failure to adequately enforce bail conditions and many participants were of the view that the imposition of conditions is pointless if they are not effectively monitored. Although it was reported that bail conditions imposed upon serious offenders are frequently monitored by the police, it was acknowledged that bail monitoring is inevitably subject to resource constraints.
- 5.53 Curfews appear to be the most frequently monitored bail conditions and participants from the legal profession raised concerns about the disruptive effect of curfew checks on other members of the household and neighbours, particularly young children. An example was cited of an individual who was threatened by his neighbours because of the time and frequency of his curfew checks. Some former offenders stated that the police rarely made more than one curfew check a night and therefore once the police had called, they could leave their house with impunity.
- 5.54 The importance of monitoring bail conditions in border areas was highlighted. It was reported that some offenders released on bail in Northern Ireland had moved across the border to the Republic of Ireland, putting themselves outside the jurisdiction of the Northern Ireland legal system.
- 5.55 Some participants believed that it should be made clear in legislation that it is the role of the police to carry out bail checks. Others suggested that bail monitoring should be contracted out to external agencies, such as community

groups, as police resources are already overstretched. This suggestion elicited mixed responses.

- 5.56 Several community groups expressed an interest in becoming involved in monitoring bail conditions imposed on residents in their area and some viewed this as a way of promoting greater community involvement in the criminal justice process.
- 5.57 There were varying views on what form this monitoring would take, however. Some suggested that community groups should carry out bail checks as the police currently do and that they should report any alleged breaches of bail conditions to the police. Others proposed that community groups should be able to apply to court to have bail conditions varied if they are being routinely breached or are considered inappropriate. A few participants opined that community groups should be more proactive in ensuring alleged offenders adhered to bail conditions, only resorting to police involvement if there are serious or persistent breaches.
- 5.58 On the other hand the view was expressed that close monitoring by communities might serve to antagonise some alleged offenders, such as young persons, who may perceive the community as being against them. Concerns were also expressed about the possibility of a system of vigilante justice developing, particularly in communities where there is distrust of the police.
- 5.59 Many participants were surprised to learn of the arrangement between the PPS and a Community Safety Forum in Belfast whereby bail information, including bail conditions, relating to individuals in the community is passed to the Community Safety Forum on request.¹¹ Although any breaches of bail detected under this scheme are to be reported to the police, several participants had concerns that such a practice could give rise to vigilante action. There was, however, some support among participants for the idea that the grant of bail and bail conditions should routinely be made public so that

¹¹ See para 3.68.

the community could help the police by notifying them of any breaches.

Bail support

- 5.60 Several participants suggested that even more important than bail monitoring, which focuses largely on catching persons out, is the need for greater support and supervision for persons released on bail. It was asserted that effective bail monitoring should be supplemented with personal support for those on bail to protect them from negative influences, to help them break the cycle of offending and to assist them to abide by bail conditions, especially if drug or alcohol support is needed. Bail support, it was suggested, would be particularly beneficial for alleged domestic violence offenders providing them with an opportunity to address their violent or aggressive behaviour.
- 5.61 Many participants spoke favourably about bail supervision and support schemes currently available to young persons¹² and it was proposed that such support should also be available to adults.
- 5.62 The importance of providing appropriate accommodation, such as bail hostels, for persons released on bail was also highlighted. It was asserted by several participants that many accused persons are remanded simply because they cannot provide a bail address.

VICTIMS OF CRIME

Views of victims

- 5.63 Several participants agreed that the views of victims should be considered in bail decisions, especially in setting bail conditions in cases of offences against the person and domestic violence.

Informing victims

- 5.64 Dissatisfaction was expressed about the current provision of information to victims and several participants stressed the need to inform victims and their families promptly of developments in 'their' case and in particular of the release of the accused on bail and of any conditions imposed. This

¹² See paras 4.24 to 4.25.

information should ideally be shared with the victim prior to the release of the accused and the victim should be advised to report any alleged breach to the police. The resource implications of such an information scheme were highlighted and the possibility of only providing bail information to victims considered most in need of information and reassurance, such as victims of violent or sexual offences, was mooted. Concern was expressed about the different level of information provided to victims by the PSNI and PPS as the case passes through the normal processes of investigation and judicial hearing, and it was suggested that the PSNI policy is not always complied with in practice.

AWARENESS, TRANSPARENCY AND PUBLIC CONFIDENCE

- 5.65 Several participants felt that there was little understanding of the bail process amongst the public and that widespread promotion of what bail means is necessary to increase the public's understanding and confidence in the process.
- 5.66 In order to increase transparency, accessibility and public confidence, it was suggested that bail legislation should be accompanied by user friendly guidance, including for example, a plain language explanation appropriate for children.

Reasons for decisions

- 5.67 It was suggested by some that greater openness and transparency could be achieved by the provision of fully reasoned decisions which in turn would lead to better public understanding and appreciation of the legal system. If accused persons know why bail has been refused, they will be in a better position to address particular areas of concern, making a future grant of bail more likely. It was highlighted by others, however, that the provision of reasons may prove difficult within the time constraints imposed upon bail decision makers.

Consideration of particular groups

- 5.68 The importance of awareness among those working within the criminal justice system was also highlighted and it was suggested that all agencies involved in the system should receive training on issues affecting section 75 groups.¹³
- 5.69 It was suggested that foreign nationals were unjustifiably viewed by the courts as more likely to abscond from Northern Ireland and were therefore more likely to be refused bail. Additional difficulties may arise with such persons due to language issues or problems securing appropriate sureties when they have few family or friends in Northern Ireland and it was suggested that there is insufficient support for such persons when making a bail application. It was reported that similar assumptions about the likelihood of absconding are often made in respect of persons from ethnic minority groups even if they were born and have always lived in Northern Ireland.
- 5.70 Travellers were also keen that there should be awareness of the traveller culture, in particular that settled travellers may have been born in Northern Ireland and lived in a permanent house for many years but still classify themselves as travellers by culture. This awareness should be reinforced to those involved in the criminal justice system so that travellers are not treated differently to the non-traveller community unless their background is relevant to the bail decision. It was reported that members of the travelling community are always required to provide cash as security before they are released on bail, a requirement which is less frequently demanded of other applicants.

Delay

- 5.71 General dissatisfaction was apparent regarding delay within the criminal justice system and, in particular, long periods spent on remand or on bail pending the disposal of a case.

¹³ Northern Ireland Act 1998, s 75 places a statutory obligation on public authorities in carrying out their various functions relating to NI, to have due regard to the need to promote equality of opportunity between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation; between men and women generally; between persons with a disability and persons without and between persons with dependants and persons without. See also Appendix A.

Protracted periods on bail were thought to place communities and victims at risk due to the increased likelihood of breaches of bail conditions and reoffending and were considered to significantly reduce public confidence in the criminal justice system. The inadequacy of the support provided to persons on bail was believed to contribute to the non-appearance of accused persons for court dates and consequently further delay within the system.

CONSIDERATIONS CONCERNING CHILDREN AND YOUNG PERSONS

- 5.72 The detention of young persons pending trial provoked much debate among participants and there were criticisms of the length of time spent on bail and remand.

The legal framework

- 5.73 Several participants from children's organisations suggested that the law should be amended to clarify that the remand of children and young persons should be a measure of last resort and for the shortest time possible and that children should not be remanded for welfare or care reasons. Concern was expressed about Article 39 of PACE (NI) which allows for the detention of a child in the juvenile justice centre pending a court appearance if the child has been charged with an offence, bail cannot be granted and no alternative place of safety can be found. A 'place of safety' is defined as any juvenile justice centre, hospital or surgery, or any other suitable place, the occupier of which is willing temporarily to receive the arrested juvenile¹⁴ and it was suggested that this definition may need to be reviewed as young persons are not detained in hospitals or surgeries.
- 5.74 On the other hand, there were many participants who believed that the criteria for the remand of young persons under Article 12 are too strict with the result that too few young people are placed on remand. The public perception, according to some, is that bail is too readily granted despite children repeatedly breaching conditions and reoffending. Particular frustration was expressed about bail being granted to young persons engaged in persistent low level offending, which caused great distress in communities, largely because

¹⁴ See para 4.18.

the offences would not attract custodial penalties. In contrast to the views expressed by participants from children's organisations, some participants from the legal profession recommended a change to the wording of Article 12 to allow for the remand of a young person not only for the public's protection but also for the child's own protection.

Bail decision making

- 5.75 Some young persons complained that their views were not being taken into account by legal representatives when attending court with their parents or guardians. It was suggested that children were being excluded from discussions surrounding legal instructions and the suitability of bail conditions. Some parents, however, suggested that *their* views were not always taken into account by the court when considering the suitability of bail conditions for other members of the family.
- 5.76 There was some support for the introduction of bail information and support schemes to provide the courts with information and advice to assist them with bail decisions in respect of young persons. In terms of what factors the decision maker should take into account, it was suggested that young persons from unstable backgrounds could be disadvantaged if their family and/or community background was taken into account when the decision to grant or deny bail was considered.
- 5.77 Although there was agreement that the lack of a bail address should not cause a young person to be remanded, it was acknowledged that accommodating young persons accused of criminal activity can pose serious problems for bail decision makers, particularly when parents or other carers are unwilling or unable to accommodate them. Concerns were raised that a shortage of places in suitable accommodation was resulting in young persons being pushed unnecessarily into the criminal justice system, with particular anxiety being expressed about high numbers of PACE (NI) admissions to the juvenile justice centre. There was some concern that the deterrent effect of remand to the juvenile justice centre will be lost if children are placed there unnecessarily. It was suggested that there should be greater

cooperation with social services in securing alternative accommodation.

- 5.78 The failure to implement changes to the Criminal Justice (Children) (Northern Ireland) Order 1998¹⁵ to allow 10 to 13 year olds to be remanded to secure accommodation, instead of the juvenile justice centre, was particularly criticised. There was also criticism of the remand of some children aged 15 and 16 years old to the young offenders centre if they are considered likely to injure themselves or others.¹⁶
- 5.79 It was suggested, however, that the remand system may be used to gain respite from potentially difficult young people. An example given was of a parent or carer calling the police on a Saturday evening reporting an alleged criminal act which results in the arrest of the young person and their detention until a court hearing on Monday, thus removing the child from the home and giving the parents or carers respite over the weekend.
- 5.80 There was particular anxiety about children from care backgrounds and it was suggested that the rules of some children's homes are too strict, resulting in the criminalisation and often remand of children for matters which, if they had occurred in the family home, would not even be reported or would be dealt with by way of summons. There were suggestions that children who are disruptive in care homes are moved unnecessarily into the criminal justice system.
- 5.81 Concern was expressed about the impact of remand on the educational development of young persons and it was suggested that a duty should be placed on the Department of Education to provide education to young persons on remand.
- 5.82 It was suggested that greater use should be made of bail fostering and mentoring schemes to ensure children are not remanded purely on welfare grounds. It was reported that some bail fostering places are not being used because children are unwilling to be placed in homes some distance from their community and are therefore uncooperative with

¹⁵ See para 4.12.

¹⁶ See para 4.11.

the scheme. The possibility of bail hostel accommodation specifically for young persons was also mooted.

Bail conditions, surety and security

- 5.83 There was some unease expressed regarding the possibility of a child being required to enter into their own recognizance in order to secure their release on bail.¹⁷ Although, it was reported that the police would not require a child to enter into a recognizance, it seems that in the youth court it is common for young persons to sign a recognizance for around £50 to £75. It was acknowledged, however, that such a recognizance would never be estreated by the court.
- 5.84 It is very common for parents or guardians to act as sureties for young persons on bail. In addition to the general concerns regarding the surety system expressed above, it was suggested that parents or guardians acting as sureties for young persons are often reluctant to report breaches of bail for fear that their recognizance will be estreated. It will be recalled that sureties are not bound to ensure that the accused complies with *all* bail conditions but just the obligation to appear at court. It seems, however, that many parents mistakenly believe that they are bound to ensure compliance with conditions and there was some support for a change in the law to place such an obligation on parents or guardians acting as sureties for young persons.
- 5.85 The most frequent bail conditions imposed on young persons by courts include curfew, restrictions on entering specific areas and restrictions on associating with some of their peers. Participants suggested that young persons are being subjected to too many complex bail conditions, particularly children in care, and several participants complained therefore that children are being set up to fail. The view was expressed that bail conditions for young persons should be kept to a minimum and that any conditions imposed should be directed clearly at the objective to be achieved (namely the attendance of the accused at court and/or the prevention of re-offending or interference with the administration of justice). Some participants considered that bail conditions

¹⁷ See para 4.22.

imposed on children are sometimes used as a means of pre-sentence punishment.

- 5.86 There was criticism of electronic monitoring or ‘tagging’ of young persons as it is viewed by some as unfairly labelling children. Although legislation states that curfew or electronic monitoring requirements cannot be imposed unless the only other alternative would be to remand the child in custody,¹⁸ it was suggested that, in practice, these conditions are imposed much more frequently. Some parents, however, were supportive of electronic monitoring as an effective means of ensuring adherence to a curfew requirement without the disruption of police checks.
- 5.87 It was highlighted that the court, when considering the conditions to be imposed on a young person, should take into account the need to strengthen and preserve the relationship between the child and their family, the desirability of allowing the child to live at home and continue their education, training or employment and the need to minimise the stigma to the child resulting from a court determination.
- 5.88 As with adults, it was opined that bail conditions should be realistic and clearly articulated so that young persons are fully aware of their obligations while on bail. Although it was reported that children are asked in court if they understand the bail conditions imposed upon them, the possibility of involving an agency such as VOYPIC (Voice of Young People in Care) to discuss and explain bail conditions was raised.
- 5.89 Particular concerns were expressed about children released to reside in children’s homes being required as a condition of their bail to abide by the rules of the home. Some suggested that this type of condition prejudices children in care as it implies that a breach of a minor rule would result in the remand of the young person. Other participants complained that such conditions are problematic as they result in uncertainty for both the young person and the staff regarding whether a breach of bail had occurred if a common practice in the home, such as cleaning up after oneself, is not

¹⁸ See para 4.23.

adhered to. It was suggested that staff in children's homes use their discretion in deciding whether to report breaches of bail conditions to the police but it was suggested that staff are unsure about the level of discretion they can exercise in such situations. It was reported that staff are also mindful of disrupting the relationships forged with young persons by reporting breaches.

Breach of bail, monitoring and support

- 5.90 Several young persons expressed a lack of respect for bail conditions imposed by the courts, stating that the likelihood of being caught in breach of conditions was low and even if detected the court's response to the breach would be minimal, if any. This perceived lack of an effective response to breach of bail was considered by some participants to contribute to persistent low level criminality in certain communities.
- 5.91 Some young persons suggested that bail monitoring, in particular curfew checks by the police, antagonised them and made them even more determined to breach their conditions.
- 5.92 The importance of support while on bail was highlighted and there were very positive reports regarding the support and supervision which is currently available through the Youth Justice Agency. Most participants felt that this type of support should be made automatically available to all young persons and not just for those most at risk of remand.
- 5.93 It was suggested that an assessment should be conducted at the earliest opportunity for all young persons facing bail or remand, or at least those for whom objections to bail are being raised. Such an assessment could determine the level of support (if any) required, taking into account such considerations as the seriousness and persistence of offending, the educational, training or employment requirements of the young person and any mental health, drug or alcohol difficulties they may have.

PRELIMINARY CONCLUSIONS

- 5.94 The preliminary discussions conducted by the Commission revealed a great deal of public interest in the bail system in Northern Ireland. Although a wide range of often conflicting

opinions were expressed, some fundamental themes emerged and many interesting ideas were put forward.

5.95 Most participants were in agreement that the current law on bail is complex and inaccessible and there was much support for the notion of devising a unified legislative framework which would seek to simplify this area of law. The possibility of the creation of a statutory right to bail or presumption in favour of bail was met with approval by many participants but there were some reservations about conferring such a right or presumption on persons charged with particularly serious offences. Participants suggested variously that previous bail history and the safety and welfare of the public should inform the decision to grant or deny bail. There were, however, misgivings regarding the refusal of bail for the protection of the accused and the grant of bail based on the improbability of the imposition of a custodial sentence. There was some concern about whether bail decision makers are receiving all the information necessary to make accurate decisions and whether there was sufficient input from defendants, victims and relevant organisations. There were mixed views regarding the introduction of a bail information scheme but there was general agreement that efforts should be made to collate and ensure the accuracy of information already held on computer systems.

5.96 There was some dissatisfaction expressed with the conditions attached to bail. Personal recognizances were considered by many to be ineffective and several problems with the surety system were highlighted. Conduct conditions were criticised by some as often inappropriate or unenforceable and it was suggested that such conditions should be clear, realistic, suitable to the particular accused and justified by the offence charged. Most participants felt that a firm stand must be taken when bail is abused, not least to promote public confidence in the criminal justice system. There were concerns about the operation of the recently introduced offence of failure to surrender and there were mixed views regarding the creation of an offence of breach of bail conditions. Bail monitoring was broadly supported but views differed significantly regarding what form it should take. Most participants were in favour of the introduction of bail support programmes for adults on bail and it was suggested

that suitable accommodation should be available for persons released on bail.

- 5.97 Many participants argued that the views of victims should be considered in bail decisions and that victims should be provided with information throughout the investigation and prosecution of the offence. It was suggested by some, however, that consideration might be given to limiting the provision of information to victims of certain offences only, due to resource constraints.
- 5.98 It was suggested that efforts should be made to promote greater public understanding and confidence in the bail system. The provision of reasons for bail decisions would go some way to improving public understanding, it was opined. The importance of fairness and equality of treatment within the bail system was stressed by several participants. Concern was expressed about delay within the criminal justice system and the long periods some defendants spent on bail or remand.
- 5.99 The issue of the bail or remand of young persons produced several contrasting opinions. Some participants argued that children are afforded inadequate protection under the current test for bail while others suggested that the test is too stringent making it very difficult to remand. As with adults, there was concern regarding the participation of young persons in decisions affecting them and the provision of reliable information to the decision maker. Accommodation for young persons on bail and remand was highlighted as a crucial issue, particularly in relation to children already in the care system. Additional problems with the imposition of several, often complex, bail conditions on young persons were highlighted and the importance of ensuring that young persons fully understand the obligations imposed upon them was stressed. Monitoring and/or support for young persons on bail were considered by many participants to be essential.

CHAPTER 6. COMPARATIVE PERSPECTIVES

INTRODUCTION: THE COMPARATIVE STUDY

- 6.1 Law reform projects often benefit from comparative analysis. Examination of jurisdictions facing similar challenges and concerns can be informative in suggesting possible ways forward or pitfalls to be avoided. In considering the reform of the bail system in this jurisdiction, studies were conducted of bail law and practice in several other jurisdictions.
- 6.2 Preliminary research was conducted on the following jurisdictions: England and Wales, the Republic of Ireland, Scotland, Australia, New Zealand, Canada, South Africa, the United States of America, Hong Kong and some Continental European jurisdictions. Jurisdictions with dedicated and/or detailed legislation on bail were examined closely, as were jurisdictions that had undergone extensive reform initiatives in this area.
- 6.3 In this chapter we do not attempt to describe in full the bail law and practice in each of the jurisdictions examined.¹ Rather, we have attempted to extract lessons regarding particular aspects of the bail systems of the jurisdictions examined. Consequently, law and reform initiatives on bail and remand are presented thematically with a view to informing consultees of the range of approaches which may be taken to various aspects of this subject.
- 6.4 The chapter should be read with two caveats. First, the comparative research conducted for this chapter was exclusively library based. Secondly, although comparative analysis can be invaluable in informing law reform, caution must always be exercised when seeking to 'transplant' legal rules and procedures from often very different legal systems.² These warnings in mind, the comparative research

¹ For an overview of the bail systems of many of the countries examined see: Law Reform Commission of Ireland, *Report on an Examination of the Law on Bail* (1995).

² For a discussion of the perils of legal transplants in the evidentiary context, see M Damaška, "The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments" (1997) 45 *American Journal of Comparative Law* 839.

conducted offers many interesting ideas and possible solutions that may enhance the consultation process.

THE LEGAL FRAMEWORK

- 6.5 Several of the jurisdictions examined have dedicated bail legislation, including the Republic of Ireland,³ England and Wales,⁴ New Zealand⁵ and all Australian states and territories.⁶ In Scotland,⁷ Canada⁸ and most Continental European jurisdictions provisions governing bail are found in criminal codes or general criminal legislation.
- 6.6 Many of these Acts are comprehensive in scope, governing both bail in respect of adults and children⁹ and bail granted by the police and the courts.¹⁰ Although the police may grant bail *before charge* in England and Wales,¹¹ bail legislation in several other jurisdictions affords no such powers to the police. If a decision is taken not to charge a person, in many jurisdictions, the police must release the person unconditionally.¹² The discussion which follows focuses on bail granted by the police or the courts *post charge*, as this is the subject matter of bail legislation in most jurisdictions.

³ Bail Act 1997 (Republic of Ireland) ('Bail Act 1997 (ROI)').

⁴ Bail Act 1976 (England and Wales) ('Bail Act 1976 (EW)').

⁵ Bail Act 2000 (New Zealand) ('Bail Act 2000 (NZ)').

⁶ Bail Act 1980 (Queensland) ('Bail Act 1980 (Qld)'), Bail Act 1978 (New South Wales) ('Bail Act 1978 (NSW)'), Bail Act 1982 (Northern Territory) ('Bail Act 1982 (NT)'), Bail Act 1977 (Victoria) ('Bail Act 1977 (Vic)'), Bail Act 1992 (Australian Capital Territory) ('Bail Act 1992 (ACT)'), Bail Act 1982 (Western Australia) ('Bail Act 1982 (WA)'), Bail Act 1985 (South Australia) ('Bail Act 1985 (SA)'), Bail Act 1994 (Tasmania) ('Bail Act 1994 (Tas)').

⁷ Criminal Procedure (Scotland) Act 1995.

⁸ Criminal Code (Canada) ('Criminal Code (Can)').

⁹ See eg the Bail Act 1978 (NSW) and Bail Act 1992 (ACT).

¹⁰ See eg the Bail Act 1985 (SA) and the Bail Act 2000 (NZ).

¹¹ Like Northern Ireland, provision is made in England and Wales for the police to grant bail to arrested persons *not charged* with criminal offences if in police custody and to persons arrested other than at a police station: Police and Criminal Evidence Act 1984 (EW), ss 30 and 37. See also paras 3.8 to 3.13.

¹² See eg the Republic of Ireland and the Australian states and territories.

Presumption in favour of bail and grounds for refusal

- 6.7 A right to bail or a presumption in favour of bail is enshrined in statute in many jurisdictions.¹³ Such rights or presumptions are of course not absolute¹⁴ and almost all of the jurisdictions examined specify in legislation the grounds upon which bail can be refused.¹⁵ Bail can commonly be refused in many jurisdictions if there are 'substantial grounds for believing'¹⁶ or an 'unacceptable risk'¹⁷ that the accused will:
- abscond or fail to appear;
 - interfere with witnesses or otherwise interfere with the administration of justice or;
 - commit further offences.
- 6.8 In some jurisdictions the refusal of bail on the basis of the risk of the commission of offences is restricted. In the Republic of Ireland bail may only be refused on this basis if there is a risk that a person charged with a serious offence will commit a serious offence while on bail.¹⁸
- 6.9 Provision is also commonly made for bail to be refused if the applicant is already serving a custodial sentence¹⁹ and if the court has not had time to obtain sufficient information to make a decision.²⁰
- 6.10 Some jurisdictions lay down additional grounds for the refusal of bail, which emphasise the safety or welfare of alleged

¹³ See eg the Bail Act 1976 (EW), s 4, the Criminal Procedure (Scotland) Act 1995, s 23B, the Bail Act 1977 (Vic), s 4, the Bail Act 1980 (Qld), s 9 and the Bail Act 2000 (NZ), s 7.

¹⁴ In New Zealand, however, there is an absolute right to bail for non-imprisonable offences: Bail Act 2000 (NZ), s 7(1).

¹⁵ In the Republic of Ireland one of the grounds for the refusal of bail (the commission of serious offences: Bail Act 1997 (ROI), s 2) is laid down in statute while the others are governed by common law. All of the grounds for the refusal of bail are governed by common law in Tasmania, Australia despite the enactment of a Bail Act in 1994.

¹⁶ See the Bail Act 1976 (EW), sch 1, part 1, para 2.

¹⁷ See the Bail Act 1977 (Vic), s 4(2)(d)(i) and the Bail Act 1980 (Qld), s 16(1)(a).
¹⁸ Bail Act 1997 (ROI), s 2.

¹⁹ See the Bail Act 1976 (EW), sch 1, part 1, para 4.

²⁰ See eg the Bail Act 1976 (EW), sch 1, part 1, para 5 and the Bail Act 1977 (Vic), s 4(2)(d)(iii).

victims or others²¹ or even the protection of a person's property.²²

- 6.11 The protection of the accused, or their welfare if a juvenile, can also justify the denial of bail in other jurisdictions.²³ In Australia's Northern Territory, legislation prescribes that bail decision makers must take into account the interests of the accused, having regard to the potential length of time in custody and the conditions under which he or she would be held, any reasons that the accused should be at liberty including the preparation of his or her defence and whether the accused is incapacitated by intoxication, drugs or injury or otherwise in need of physical protection.²⁴
- 6.12 Broader grounds for the refusal of bail are stipulated in some jurisdictions. In Scotland, the overriding test for the refusal of bail is the 'public interest', including the interests of public safety.²⁵ In addition to the three common grounds outlined above, bail may be denied if having regard to the public interest there is 'any other substantial factor which appears to the court to justify keeping the person in custody.'²⁶ In Canada bail may be refused if detention is considered 'necessary to maintain confidence in the administration of justice.'²⁷

Presumption against bail

- 6.13 The application of different rules for different types of offences or offenders is increasingly common in many jurisdictions. In England and Wales, for example, there is a presumption *against* bail for persons charged with or convicted of homicide or rape who have a previous

²¹ See eg the Bail Act 1980 (Qld), s 16(1)(a)(ii)(B). The Bail Act 1985 (SA), s 10(4) declares that a bail decision maker must give *primary* consideration to the need that the victim may have, or perceive, for physical protection from the accused. See also the Bail Act 1977 (Vic), s 4(2)(d)(i) which allows for the refusal of bail on the basis of an unacceptable risk to the safety or welfare of members of the public.

²² Bail Act 1982 (WA), s 6A(4)(a)(iii).

²³ See eg the Bail Act 1976 (EW), sch 1, part 1, para 3 and Bail Act 1980 (Qld), s 16(1)(b).

²⁴ Bail Act 1982 (NT), s 24(1)(b).

²⁵ Criminal Procedure (Scotland) Act 1995, ss 23B(1)(a)(ii) and 23B(3).

²⁶ Criminal Procedure (Scotland) Act 1995, s 23C(1)(d).

²⁷ Criminal Code (Can), s 515(10)(c).

conviction for such offences, which permits the granting of bail only in exceptional circumstances.²⁸

6.14 An even more complex legislative framework is in operation in New South Wales, Australia. In this jurisdiction depending on the offence and/or the circumstances of the alleged offender there may be:

- a right to bail;²⁹
- a presumption in favour of bail;³⁰
- no presumption or a neutral presumption in respect of bail;³¹
- a presumption against bail;³²
- a presumption against bail requiring proof of exceptional circumstances.³³

6.15 Presumptions against bail are evident in many jurisdictions particularly in respect of violent or sexual offences,³⁴ domestic violence,³⁵ drugs offences,³⁶ firearms offences,³⁷ and/or when the accused has particular previous convictions³⁸ or was on bail at the time of the alleged offence.³⁹

6.16 Reverse onus provisions can place a significant burden upon the applicant to prove to the court that their right to liberty should not be restricted and consequently care must be taken to ensure that such provisions do not conflict with

²⁸ See the Criminal Justice and Public Order Act 1994 (EW), s 25.

²⁹ Bail Act 1978 (NSW), s 8.

³⁰ Bail Act 1978 (NSW), s 9.

³¹ Bail Act 1978 (NSW), ss 9A and 9B.

³² Bail Act 1978 (NSW), ss 8A to 8F.

³³ Bail Act 1978 (NSW), ss 9C and 9D.

³⁴ See eg the Criminal Justice and Public Order Act 1994 (EW), s 25 and the Bail Act 1978 (NSW), ss 9C and 9D.

³⁵ See eg the Bail Act 1992 (ACT), s 9F which provides that bail cannot be granted to a person accused of a domestic violence offence unless the bail decision maker is satisfied that the person poses no danger to a protected person, including the victim.

³⁶ Bail Act 1978 (NSW), s 8A(1)(a).

³⁷ Bail Act 1978 (NSW), s 8B.

³⁸ See eg the Criminal Justice and Public Order Act 1994 (EW), s 25 and the Bail Act 1978 (NSW), ss 8C and 9D.

³⁹ See eg the Bail Act 1976 (EW), sch1, part 1, para 2A and the Bail Act 1977 (Vic) s 4(4)(a).

human rights principles.⁴⁰ Despite the appeal of such provisions to both politicians and the public it has been suggested that the ad hoc prescription of different tests for different offences or circumstances is inconsistent and unnecessarily complicates bail decision making.⁴¹

Factors to be taken into account

- 6.17 Most jurisdictions lay down a non-exhaustive list of factors which may be taken into account by a bail decision maker when determining whether the grounds for refusing bail have been met.⁴² Relevant considerations often include the nature and seriousness of the offence and probable punishment, the character, background and community ties of the accused, the strength of the prosecution case and the accused's previous bail history. More detailed, but exhaustive, lists of considerations are prescribed in some jurisdictions.⁴³ Some factors are elevated as being of particular importance in particular contexts. For example, in New Zealand if the applicant is charged with certain domestic violence offences, the court's 'paramount consideration' must be the need to protect the victim.⁴⁴

BAIL DECISION MAKING

- 6.18 As indicated above, most legislation in respect of bail prescribes the considerations or factors which may be taken into account when making this important decision. This information is crucial to the correct determination of a bail application. It is essential as a starting point that criminal justice agencies have up-to-date information on bail status, previous convictions and other relevant information about the applicant for bail.⁴⁵

⁴⁰ See the history of the Criminal Justice and Public Order Act 1994 (EW), s 25 in N Corre and D Wolchover, *Bail in Criminal Proceedings* (3rd ed 2004), pp 46-52.

⁴¹ Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (Aug 2007), ch 3.

⁴² See eg the Bail Act 1980 (Qld), s 16(2), the Bail Act 1976 (EW), sch 1, part 1, para 9 and the Bail Act 1977 (Vic), s 4(3).

⁴³ See eg the Bail Act 1978 (NSW), s 32 and the Bail Act 1982 (NT), s 24.

⁴⁴ See the Bail Act 2000 (NZ), s 8(5).

⁴⁵ Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (Aug 2007), ch 4.

- 6.19 In order to inform the bail decision, some jurisdictions allow the court to request information from the prosecution and/or defence⁴⁶ or to make other inquiries.⁴⁷ Provision may be made for the court to request the verification of information supplied by the accused and/or an assessment of their suitability to particular bail conditions such as electronic monitoring.⁴⁸ In Queensland, Australia the court may take into account information provided by a community justice group in the applicant's community when the applicant to bail is an indigenous person.⁴⁹
- 6.20 In the Republic of Ireland, if charged with a serious offence, the applicant to bail must provide the prosecutor with certain information relating to themselves including their income, assets and previous criminal and bail history.⁵⁰ If charged with a serious offence, a statement in evidence from a high ranking police officer that in his or her opinion the refusal of bail is reasonably necessary to prevent the commission of a serious offence shall be admissible as evidence that refusal of bail is reasonably necessary for that purpose.⁵¹ Several jurisdictions have specifically relaxed the usual rules of evidence for the purposes of bail applications.⁵²
- 6.21 In Scotland, legislation provides explicitly that the view of the prosecutor is not determinative of the bail decision.⁵³ In South Australia it is an offence to provide false information on a bail application.⁵⁴

⁴⁶ See eg the Criminal Procedure (Scotland) Act 1995, s 23B(6). The Criminal Procedure (Scotland) Act 1995, s 23B(7) provides that: 'whether that party gives the court opinion as to any risk of something occurring (or any likelihood of something not occurring) is a matter for that party to decide.' The Bail Act 1982 (WA), s 23 provides that the accused does not have to provide information for his or her bail application.

⁴⁷ See the Criminal Code (Can), s 518 and the Bail Act 1985 (SA), s 9(1)(a).

⁴⁸ Bail Act 1982 (WA), ss 24 and 24A.

⁴⁹ Bail Act 1980 (Qld), s 15(1)(f).

⁵⁰ Bail Act 1997 (ROI), s 1A. It is an offence to knowingly provide false or misleading information: Bail Act 1997 (ROI), s 1A(11).

⁵¹ Bail Act 1997 (ROI), s 2A.

⁵² See eg the Bail Act 2000 (NZ), s 20 and the Bail Act 1982 (WA), s 22.

⁵³ See the Criminal Procedure (Scotland) Act 1995, s 23B(5).

⁵⁴ See the Bail Act 1985 (SA), s 22.

Bail information schemes

- 6.22 Although generally not provided for within statute, many of the jurisdictions examined operate ‘bail information schemes’ to aid the court in determining the issue of bail. The concept of a bail information scheme was first developed in Manhattan, New York in the early 1960s at the Vera Institute of Justice. The Manhattan Bail project involved interviewing bail applicants about their community ties, verifying the information obtained and scoring the flight risk posed by the applicant. A recommendation was then made to the court on the basis of this score. A similar system, which includes the monitoring of outcomes, continues to operate in New York under the auspices of the Criminal Justice Agency. A points based system is utilised on the basis of verified information and the applicant’s prior criminal history. A recommendation may be made for or against release or a view expressed about flight risk if released. No recommendation is made if there is insufficient information.
- 6.23 Different types of bail information schemes are found in other jurisdictions. In England and Wales, bail information schemes can be court or prison⁵⁵ based and target persons likely to be remanded in custody on their first or second appearance in court. The scheme is operated by trained probation or prison officers who collect and verify information about the applicant’s community ties and produce a written report for the prosecution and defence. No recommendation is made and the information is relayed to the court by the parties to the proceedings.
- 6.24 Bail assessment programmes similar to those in England and Wales are also in evidence in Scotland and Australia. Bail information assessments are sometimes linked to supervision and support services so that factors tending against the grant of bail can be addressed and a package devised that would help the applicant successfully complete their bail.⁵⁶

⁵⁵ According to HM Prison Service, *Prison Service Order No. 6101*, it is ‘mandatory’ for all penal establishments in England that hold remand prisoners to have a Bail Information Scheme, although there is no statutory obligation to that effect.

⁵⁶ See the Bail Information and Supervision Scheme in Scotland.

BAIL CONDITIONS, SURETY AND SECURITY

Personal recognizance

- 6.25 It is common in many jurisdictions that an accused may be required to enter into a recognizance or undertaking to appear at trial before being admitted to bail.⁵⁷ Such recognizance may be estreated if the accused fails to appear or, in some jurisdictions, fails to comply with bail conditions.⁵⁸ In the Republic of Ireland there was a requirement that a portion of the monies must be paid upfront, but this provision was amended as it proved unworkable in practice.⁵⁹

Surety

- 6.26 Provision for another person to act as a 'surety' to ensure the attendance of the accused at trial is common in many jurisdictions. Originally the only obligation on sureties was to ensure that the accused appeared for trial.⁶⁰ Recently, however, with the expansion of bail conditions, the role of the surety has been enlarged in several jurisdictions to include ensuring that the accused complies with some or all of their bail conditions.⁶¹ It is generally accepted that estreatment or forfeiture may result if the accused fails to appear at trial⁶² and in some jurisdictions, if he or she breaches bail conditions.⁶³
- 6.27 In several jurisdictions, statutory provision is made for the financial resources, character and relationship to the accused of any surety to be examined by the court.⁶⁴ In a recent review of bail legislation in Victoria, Australia there

⁵⁷ See the Criminal Procedure Act 1967 (ROI), s 22 and the Criminal Code (Can), s 515(2). An accused person cannot be released on their own recognizance in England and Wales: Bail Act 1976 (EW), s 3(2). There is, however, a duty to surrender to custody: Bail Act 1976 (EW), s 3(1).

⁵⁸ See the Bail Act 1997 (ROI), s 9.

⁵⁹ Bail Act 1997 (ROI), s 5.

⁶⁰ See generally M Hale, *History of the Pleas of the Crown*, (1736), vol 2, ch 15.

⁶¹ For a discussion of this issue, see: NM Myers, "Shifting Risk: Bail and the Use of Sureties" (2009) 21 *Current Issues in Criminal Justice* 127.

⁶² See eg the Bail Act 1978 (NSW), s 53A and the Bail Act 1980 (Qld), s 32.

⁶³ See the Bail Act 1997 (ROI), s 9 and the Bail Act 1982 (NT), s 40. Mandatory requirements for forfeiture for breach of bail conditions have been criticised as unduly harsh: Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (Aug 2007), p 145.

⁶⁴ This requirement is mandatory in all cases in the Republic of Ireland: see the Bail Act 1997 (ROI), s 7. See also the Bail Act 1976 (EW), s 8(2) and the Bail Act 1977 (Vic), s 9(2).

were criticisms of the assessments of sureties in that jurisdiction, particularly in relation to the lack of information, regarding matters such as previous convictions. It was suggested that sureties should be required to provide proof of identity so that criminal records could be checked and that they should be required to attest to a number of matters, including any previous convictions.⁶⁵ It is an offence for a surety to provide false information in Victoria which may result in the forfeiture of the bail and the arrest of the accused.⁶⁶ It is also an offence in some jurisdictions for a person to indemnify a surety.⁶⁷

6.28 The relevance and effectiveness of sureties was recently examined by the Victorian Law Reform Commission in Australia. Although the Victorian Commission had doubts about the surety system, it decided that the system should be retained, albeit under a different name. The principal reasons for the preservation of the surety system were:

- difficulties in obtaining statistics about the use of sureties and their effectiveness;
- the risk that more persons would be denied bail if sureties were abolished; and
- the longevity of the surety system.

It was determined, however, that the term surety was misleading and it was suggested that it should be replaced with 'bail guarantor'.⁶⁸ This report also proposed that the amount promised should be called the 'guaranteed amount' and the recognizance would be called the 'bail guarantee condition'. As persons on low incomes may find it difficult to meet financial conditions, the Victorian Law Reform Commission also recommended that security or sureties should only be considered after bail with or without other conditions has been explored. It was also suggested that

⁶⁵ Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (Aug 2007), p 138.

⁶⁶ Bail Act 1977 (Vic), s 9(6).

⁶⁷ See eg the Bail Act 1976 (EW), s 9 and the Bail Act 1992 (ACT), s 51.

⁶⁸ Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (Aug 2007), p 134. This term is already in use in South Australia: see the Bail Act 1985 (SA), s 7.

only one such requirement i.e. security or surety, should be imposed.⁶⁹

- 6.29 Provision is made in some Australian jurisdictions for an 'acceptable person' to acknowledge that they know the accused and that they believe the accused is likely to comply with their bail, but with no undertaking to ensure the accused will appear or promise to pay if he does not.⁷⁰

Security

- 6.30 In most jurisdictions the deposit of a sum of money or other valuable security may be accepted in lieu of⁷¹ or in addition to sureties.⁷² In Australian Capital Territory a bail decision maker must not require security or a deposit if the applicant does not have adequate means.⁷³ Remand or alternative conditions may be imposed if the applicant is unable to comply with a security or deposit requirement.⁷⁴ In Scotland a deposit of money can only be required for bail if the 'special circumstances' of the case require it.⁷⁵

Conduct conditions

- 6.31 In addition to financial conditions, courts have discretion to impose additional conduct conditions upon bail including for example, residence or reporting requirements, contact restrictions or surrender of passport, and a non-exhaustive list of such conditions is provided in most Bail Acts.⁷⁶ Conditions requiring accused persons to attend treatment, support or rehabilitation programmes may be imposed in many jurisdictions.⁷⁷ Caution has, however, been expressed that such bail conditions, which may involve serious interventions in the lives of individuals, may blur the

⁶⁹ Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (Aug 2007), p 120.

⁷⁰ See eg the Bail Act 1978 (NSW), s 36(2)(b) and the Bail Act 1982 (NT), s 27(2)(b).

⁷¹ See eg the Criminal Procedure Act 1967 (ROI), s 26.

⁷² See the Criminal Code (Can), s 515(2)(e) and the Bail Act 1977 (Vic), s 5(1)(d).

⁷³ Bail Act 1992 (ACT), s 25(7).

⁷⁴ Bail Act 1992 (ACT), s 25(8).

⁷⁵ Criminal Procedure (Scotland) Act 1995, s 24(6).

⁷⁶ See the Bail Act 1997 (ROI), s 6(1)(b) and the Criminal Code (Can), s 515(4).

⁷⁷ See eg the Bail Act 1992 (ACT), ss 25(4)(c) and (d) and the Bail Act 1978 (NSW), s 36A.

boundaries between bail and sentencing.⁷⁸ Common conditions such as a ban on alcohol or drugs have been criticised as being unduly punitive and, in the absence of support services for addicts, such conditions are believed to inevitably lead to breaches.⁷⁹

6.32 Other conditions such as ‘home detention’ or bail to a community hostel are also available in several jurisdictions. ‘Home detention’ is a condition whereby the accused is confined to a particular address which they are only allowed to leave for specified purposes, such as employment.⁸⁰ Conditions requiring residence at a bail hostel may also include a requirement that the accused abide by the rules of that hostel.⁸¹

Guidance on appropriate conditions

6.33 Bail in some jurisdictions *must* be made subject to certain requirements in addition to the requirement to appear at court. In the Republic of Ireland, for example, there is an additional requirement that the accused does not commit an offence while on bail,⁸² although arguably such a requirement serves no useful purpose as it merely forbids already unlawful behaviour.⁸³ In Scotland, the following list of standard conditions must be imposed in all cases if bail is granted:

- the requirement to appear at proceedings;
- the requirement that the accused does not commit an offence while on bail;
- the requirement that the accused does not interfere with witnesses or otherwise obstruct the course of justice;

⁷⁸ A Frieburg and N Morgan, “Between bail and sentence: the conflation of dispositional options” (2004) 15 *Current Issues in Criminal Justice* 220.

⁷⁹ Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (Aug 2007), p 125.

⁸⁰ See eg the Bail Act 1985 (SA), s 11(2)(ia).

⁸¹ See eg the Bail Act 1982 (WA), sch 1, part D, cl 2(6) and Bail Act 1976 (EW), s 3(6ZA).

⁸² Bail Act 1997 (ROI), s 6(1)(a).

⁸³ For a discussion of the futility of conditions banning already illegal behaviour: see the Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (Aug 2007), p 125.

- the requirement that the accused does not behave in a manner which causes, or is likely to cause, alarm or distress to witnesses;
- the requirement that the accused makes themselves available to enable enquiries or reports.⁸⁴

6.34 Mandatory conditions are required in some jurisdictions if the accused is charged with particular offences. For example, in Canada an accused charged with certain violent and other offences must have conditions imposed which restrict the possession of weapons, ammunition or explosives, unless it is not required in the interests of the safety of the accused or the safety and security of the victim or any other person.⁸⁵ Consideration must also be given to imposing conditions which ensure the safety and security of victims, witnesses and other persons if the accused is charged with certain listed offences.⁸⁶ Specific conditions which may be imposed upon persons accused of domestic violence offences, including restrictions on contact with certain persons and entry to certain places, are listed in the Bail Act in Australian Capital Territory.⁸⁷

6.35 There are often restrictions on the imposition of curfew and electronic monitoring requirements upon persons on bail. In England and Wales, among other restrictions, electronic monitoring can only be imposed if bail would not be granted without it.⁸⁸

6.36 In some jurisdictions bail must be granted without conditions unless the imposition of conditions is necessary for particular purposes. For example in New South Wales, Australia, bail should be unconditional unless conditions are deemed necessary for the purpose of promoting effective law enforcement, the protection and welfare of the community or

⁸⁴ Criminal Procedure (Scotland) Act 1995, s 24(5). There is an additional standard condition which must be imposed if bail is granted to an accused charged with a sexual offence which prohibits the accused from communicating with the complainer (other than by way of a solicitor) with a view to taking a statement for the purposes of his or her defence: Criminal Procedure (Scotland) Act 1995, s 24(5)(e).

⁸⁵ Criminal Code (Can), s 515(4.1).

⁸⁶ Criminal Code (Can), s 515(4.2).

⁸⁷ Bail Act 1992 (ACT), s 25(4)(f).

⁸⁸ Bail Act 1976 (EW), s 3AB.

any specially affected person or the prevention of further offending by treatment or rehabilitation of the accused.⁸⁹

- 6.37 In addition to a general test of necessity,⁹⁰ some jurisdictions specifically require that an accused person must be subject to the least onerous conditions necessary to ensure their compliance with bail. In Canada and Queensland, Australia, for example, the various forms of release are listed in a sliding scale ranging from release on one's own recognizance through to release with sureties and/or security and there is an obligation upon the court to impose the least onerous conditions necessary.⁹¹

BREACH OF BAIL

Failure to appear

- 6.38 In addition to the possibility of estreatment of a recognizance, failing to appear is an offence in most jurisdictions⁹² and the police usually enjoy a power to arrest the absconder with⁹³ or without warrant.⁹⁴ The police can also often arrest for anticipated failures to appear.⁹⁵ In England and Wales, there are two offences in relation to failure to appear at court - failing to surrender to custody in answer to bail without reasonable cause⁹⁶ and failing to surrender to custody in answer to bail as soon as reasonably practicable after a failure to surrender with reasonable cause.⁹⁷ A single offence, placing an onus on the accused to show a reasonable excuse or cause, is common in other jurisdictions.⁹⁸

⁸⁹ Bail Act 1978 (NSW), s 37(1).

⁹⁰ See also eg the Bail Act 1976 (EW), s 3(6).

⁹¹ Criminal Code (Can), ss 515(2) and (3) and Bail Act 1980 (Qld), s 11 which requires the imposition of conditions no more onerous than necessary 'having regard to the nature of the offence, the circumstances of the defendant and the public interest.'

⁹² See eg the Bail Act 1976 (EW), s 6 and the Bail Act 1978 (NSW), s 51.

⁹³ See eg the Bail Act 1976 (EW), s 7(1) and the Bail Act 1978 (NSW), s 50(1)(b)(i).

⁹⁴ See eg the Police and Criminal Evidence Act 1984 (EW), s 46A(1) and the Bail Act 1978 (NSW), s 50(1)(a).

⁹⁵ See eg the Bail Act 1976 (EW), s 7(3)(a) and the Bail Act 1978 (NSW), s 50(1).

⁹⁶ Bail Act 1976 (EW), s 6(1).

⁹⁷ Bail Act 1976 (EW), s 6(2).

⁹⁸ See eg the Bail Act 1978 (NSW), s 51(1) and the Bail Act 1977 (Vic), s 30(1).

6.39 In New South Wales the penalty for failure to appear is the same as for the offence for which bail was granted but must not exceed 3 years imprisonment or a fine of a specified amount.⁹⁹ A sentence imposed for failure to appear may¹⁰⁰ or in some jurisdictions must¹⁰¹ be required to run consecutively to any other sentence imposed upon the accused.

6.40 Courts generally have discretion to remand persons suspected or found to have absconded while on bail but in some jurisdictions, there is a presumption that such persons will be remanded if the original charges are of a particular type¹⁰² or if they do not show adequate cause that detention is not justified.¹⁰³

6.41 Clearly, the risk that an accused will not return for trial is a concern in all jurisdictions when bail is being considered and, as indicated above, the presumption in favour of bail is removed in some jurisdictions if the accused has a prior conviction for absconding.¹⁰⁴

Breach of bail conditions

6.42 In most jurisdictions the police have the power to arrest a person who has breached their bail conditions or is believed likely to breach their bail conditions and such persons are brought before a court where their bail may be revoked, varied¹⁰⁵ or simply renewed on the same terms. In some jurisdictions, however, breach of bail conditions¹⁰⁶ or some

⁹⁹ Bail Act 1978 (NSW), s 51(2).

¹⁰⁰ Bail Act 1978 (NSW), s 51(8).

¹⁰¹ See eg the Bail Act 1980 (Qld), s 33(4).

¹⁰² See eg the Bail Act 1982 (NT), s 38(2A): 'the court must revoke bail if: (a) the person was charged with a serious violence offence and released on bail despite a presumption against bail; and (b) the court finds that the person has breached a bail undertaking or a condition of bail.'

¹⁰³ See eg the Criminal Code (Can), s 515(6)(c).

¹⁰⁴ See eg the Bail Act 1978 (NSW), s 9B(2).

¹⁰⁵ See eg the Bail Act 1978 (NSW), s 50.

¹⁰⁶ See eg the Criminal Procedure (Scotland) Act 1995, s 27(1)(b), the Bail Act 1980 (Qld), s 29; the Criminal Code (Can), s 145(3); the Bail Act 1985 (SA), s 17(1) and the Bail Act 1994 (Tas), s 9.

specific bail conditions¹⁰⁷ is an offence. The Victorian Law Reform Commission recently considered the issue of criminalising breaches of bail conditions. For a range of reasons, including the impact on police and court resources and the disproportionate impact such an offence would have on certain groups such as children and those with mental problems, it was decided not to propose the creation of such an offence.¹⁰⁸

- 6.43 In some jurisdictions, if bailed in respect of particular offences a breach of conditions must result in remand¹⁰⁹ or a breach of conditions in respect of any offence will cause bail to be revoked, unless the accused shows cause that detention is not justified.¹¹⁰
- 6.44 The usual presumption in favour of bail is removed in some jurisdictions if the accused is charged with the offence of breach of a bail condition¹¹¹ or has previously breached bail conditions.¹¹² The bail history of an accused, including any breaches of conditions, will usually be considered in any subsequent bail applications.¹¹³

Committing offences on bail

- 6.45 The commission of offences while on bail is a matter of concern in all jurisdictions examined and it will be recalled that bail may be denied for the purposes of preventing offending. In several jurisdictions the presumption in favour

¹⁰⁷ See eg the Bail Act 1982 (WA), s 51(2a) which provides that breach of conditions imposed to ensure that the accused does not endanger the safety, welfare or property of any person or does not interfere with witnesses or otherwise obstruct the course of justice is an offence.

¹⁰⁸ Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (Aug 2007), p 128.

¹⁰⁹ See the Bail Act 1982 (NT), s 38(2A).

¹¹⁰ See eg the Criminal Code (Can), s 524(8).

¹¹¹ See the Bail Act 1980 (Qld), s 16(3)(d). See also the Bail Act 1985 (SA), s 10A(2)(b) where there is a presumption against bail in respect of persons taken into custody in relation to an offence of breach of bail conditions relating to the physical protection of the victim, contrary to the Bail Act 1985 (SA), s 17.

¹¹² See the Bail Act 1992 (ACT), s 9(1)(a) where the right to bail for minor offences is removed if the accused has previously failed to comply with an undertaking to appear, or a bail condition imposed, in relation to the same or a similar offence.

¹¹³ See the Bail Act 2000 (NZ), ss 8(2)(e) and 38(6). Bail Act 2000 (NZ), s 38 provides for the recording of breaches of bail conditions.

of bail is removed if the accused was on bail at the time of the alleged offence.¹¹⁴

- 6.46 In some jurisdictions sentences imposed in respect of offences committed while the accused was on bail must be consecutive to any other sentences passed.¹¹⁵ In others the fact that the accused was on bail at the time of the commission of the new offence is considered an aggravating factor when the accused is sentenced in respect of the new offence.¹¹⁶

MONITORING AND SUPPORT OF PERSONS ON BAIL

- 6.47 Bail legislation does not usually prescribe the form which any monitoring or support for persons on bail will take. As indicated above, however, legislation usually confers upon police officers a power of arrest for breach or anticipated breach of bail conditions or failure to appear. Further, many statutes provide for the imposition of bail conditions which require assessment for or participation in bail support programmes.¹¹⁷

Bail support

- 6.48 In an effort to divert persons from custody and address factors which may place persons at risk of failing to appear or offending while on bail, a range of support programmes are in place in many of the jurisdictions examined. Some support programmes are aimed at persons with particular needs, such as drug¹¹⁸ or alcohol dependency¹¹⁹ while other

¹¹⁴ See eg of the Bail Act 1976 (EW), sch1, part 1, para 2A, the Bail Act 1980 (Qld), s 16(3)(a) and the Bail Act 1977 (Vic), s 4(4)(a).

¹¹⁵ See eg the Criminal Justice Act 1984 (ROI), s 11(1). There are, however, some limits placed upon this requirement: Criminal Justice Act 1984 (ROI), s 11.

¹¹⁶ See eg the Criminal Procedure (Scotland) Act 1995, s 27(3).

¹¹⁷ See eg the Bail Act 1978 (NSW), s 36A. It has been suggested that voluntary rather than mandatory participation in such programmes is preferable as the accused person on bail is presumed innocent: Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (Aug 2007), p 122.

¹¹⁸ See eg Court Assessment and Referral Drug Scheme (CARDS) in South Australia.

¹¹⁹ See eg Queensland Indigenous Alcohol Diversion Program (QIADP).

programmes are broader in nature, providing integrated services to meet complex needs.¹²⁰

6.49 Bail hostels are available in many jurisdictions to meet the accommodation needs of persons at court.¹²¹ In New South Wales a statutory duty is imposed upon the Minister for Corrective Services to ensure that adequate bail accommodation is available.¹²²

6.50 Simple assistance to persons on bail such as clear and accessible explanations of bail conditions and reminders of court dates are being trialled in some jurisdictions. There are two initiatives in place in New South Wales. First, there is a scheme whereby persons on bail are provided with a small pocket book outlining bail conditions, court dates etc. If bail conditions are varied the person is provided with an updated pocket book. Therefore, if such a person is arrested by the police, the police will have access to the most up to date bail information even if such information has not yet been updated on the police computer systems. Secondly, under another initiative, persons on bail are sent text messages outlining bail conditions and reminding him or her of court dates.¹²³

6.51 In a recent review of evidence-based programmes for adult offenders, it was suggested that interventions that focus on support and treatment rather than monitoring and surveillance are most successful in preventing reoffending.¹²⁴

¹²⁰ See eg Court Integrated Services Program (CISP) in Victoria, Australia and the Bail Support Scheme pilot in the Yorkshire and Humberside region in England.

¹²¹ There is a large network of bail hostels in England and Wales.

¹²² Bail Act 1978 (NSW), s 36(2B).

¹²³ This information was provided in an email from a member of staff at the Department of Justice and Attorney General, New South Wales dated 14 April 2010.

¹²⁴ S Aos, M Miller and E Drake, *Evidence-Based Adult Corrections Programs: What Works and What Does Not* (Washington State Institute for Public Policy, January 2006). In this study 291 evaluations conducted in relation to corrections programmes throughout the United States and other English-speaking countries are reviewed. Although bail programmes are not the focus of the study, both custodial and non-custodial interventions are discussed.

VICTIMS OF CRIME

- 6.52 The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power lays down fundamental principles for the treatment of victims. Of particular relevance to the bail process, it is stated that victims should be kept informed of developments and that the views of victims should be heard in criminal proceedings.¹²⁵ A Code of Practice for Victims of Crime has been laid down in England and Wales and legislation on the treatment of victims has been enacted in several other jurisdictions.¹²⁶ Breaches of such codes or statutes are generally not legally enforceable¹²⁷ although the principles outlined may be of persuasive weight in legal proceedings.¹²⁸

Consideration of victims

- 6.53 Provision is made in many jurisdictions for victims' concerns to be considered when a decision is taken on bail. It will be recalled that several jurisdictions provide for the refusal of bail for the protection or welfare of the *community* and some specifically lay down that bail should not be granted if there is an unacceptable risk that the accused if released would endanger the safety or welfare of the *victim*.¹²⁹ In Northern Territory the bail decision maker must consider any risks to the safety or welfare of the alleged victim, their close relatives or, if the victim is a child, their carers.¹³⁰ Particular consideration must be given to the safety and welfare of the victim if he or she is a child or the alleged offence is a serious sexual or violent offence.¹³¹ In South Australia bail decision makers must give primary consideration to the need that the

¹²⁵ UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985, principles 6(a) and (b).

¹²⁶ See eg the Victims of Crime Assistance Act 2009 (Qld) and the Victims Rights Act 2002 (NZ).

¹²⁷ See eg Victims of Crime Act 2001 (SA), s 5 and Victims of Crime Assistance Act 2009 (Qld), s 7.

¹²⁸ The English Code is admissible as evidence in legal proceedings and may be taken into account in any decisions made: Criminal Justice System, Code of Practice for Victims of Crime (2006) ('Code of Practice for Victims of Crime'), principle 1.3.

¹²⁹ See eg the Bail Act 1980 (Qld), s 16(1)(a)(ii)(B).

¹³⁰ Bail Act 1982 (NT), s 24(1)(e). This provision also requires consideration of any other person whose safety or welfare could, in the circumstances of the case, be at risk if the accused person were to be released on bail.

¹³¹ Bail Act 1982 (NT), s 24(4). Special considerations are laid down in relation to the safety and welfare of child victims: Bail Act 1982 (NT), s 24(5).

victim may have, or perceive, for physical protection from the accused.¹³² If charged with domestic violence offences the need to protect the victim is the paramount consideration¹³³ in some jurisdictions and in others bail cannot be granted unless the bail decision maker is satisfied that the person poses no danger to a protected person, including the victim.¹³⁴

Views of victims

6.54 In some jurisdictions the attitude of the alleged victim of the offence to the grant of bail may be taken into account when deciding on bail¹³⁵ and in others prosecutors are obliged to inform the court of any concerns expressed by the victim¹³⁶ and these matters must be considered when deciding on bail.¹³⁷ In South Australia the court is required to give special consideration to submissions made on behalf of the victim when deciding on appropriate conditions.¹³⁸ In New Zealand the prosecutor must ascertain and inform the court of the views of the victim if the offence is one of sexual assault, serious injury or any offence which has resulted in the victim having ongoing and reasonable fears for their safety or that of their family and such views must be taken into account when considering a bail application.¹³⁹

¹³² Bail Act 1985 (SA), s 10(4).

¹³³ Bail Act 2000 (NZ), s 8(5).

¹³⁴ Bail Act 1992 (ACT), s 9F.

¹³⁵ Bail Act 1977 (Vic), s 4(3)(e). It has been suggested, however, that victims are often not informed of this provision and therefore they do not get the opportunity to express their views: see Victorian Law Reform Commission, *Review of the Bail Act: Consultation Paper* (Nov 2005), p 28.

¹³⁶ See eg the Bail Act 1992 (ACT), s 23A which provides that the prosecutor must tell the court about any concern of which the prosecutor is aware expressed by a victim about the need for protection from violence or harassment by the accused person. See also the Bail Act 1982 (NT), s 24(6) which provides that if an alleged victim expresses concern to the prosecutor that the release of the accused person on bail could lead to a risk to the alleged victim's safety or welfare, the prosecutor must, wherever practicable, inform the authorised member or court about that concern and the reasons for it.

¹³⁷ Bail Act 1992 (ACT), s 23A.

¹³⁸ Bail Act 1985 (SA), s 11(2a).

¹³⁹ Victims Rights Act 2002 (NZ), s 30 and Bail Act 2000 (NZ), s 8(4).

Informing victims

6.55 Provision may also be made for police or prosecutors to keep victims informed of bail decisions. The duty to provide information varies in different jurisdictions and may encompass:

- a general duty to provide information to all victims;
- a duty which arises in respect of particular offences or particular bail conditions or;
- a duty that arises only if the victim has requested information.

6.56 In England and Wales the Code of Practice for Victims of Crime requires the police to notify victims of bail decisions, whether this information has been requested or not. This information should be given to vulnerable or intimidated victims within one day and other victims within five days.¹⁴⁰

6.57 In New South Wales, a victim must be informed of the outcome of a bail application if the charge is one of sexual assault or serious personal violence.¹⁴¹ The victim must also be informed of any special bail conditions imposed to protect the victim or the victim's family.¹⁴²

6.58 In some jurisdictions the obligation to inform only arises if the victim requests this information¹⁴³ or otherwise expresses concern. In Queensland, for example, a duty is imposed upon the investigating agency to inform the victim, if so requested, of the outcome of a bail application including any condition that may affect the victim's safety or welfare, so far as is reasonably practicable.¹⁴⁴ In Australian Capital Territory all reasonable steps must be taken to inform the victim about the outcome of a bail application as soon as practicable if he

¹⁴⁰ Code of Practice for Victims of Crime, principles 5.14 to 5.17.

¹⁴¹ Victims' Rights Act 1996 (NSW), s 6.13. The Victim Information and Advice service in Scotland is also limited to certain serious offences. See <http://www.copfs.gov.uk/Victims/VIA/via-services/>

¹⁴² Victims' Rights Act 1996 (NSW), s 6.12.

¹⁴³ See eg the Victims of Crime Act 2001 (SA), s 8(1)(d) and the Victims' Charter Act 2006 (Vic), s 10.

¹⁴⁴ Victims of Crime Assistance Act 2009 (Qld), s 11(1)(g). This provision also includes any application for variation of the condition.

or she has expressed concern about the need for protection from violence or harassment by the accused.¹⁴⁵

- 6.59 A complex structure for the provision of information to victims is in place in New Zealand. Alongside a general duty to inform victims of the grant of bail to an accused,¹⁴⁶ victims of certain serious offences¹⁴⁷ can elect to receive additional information including the bail of the accused and any conditions that relate to the safety of the victim and their family or prohibit contact with the victim and their family.¹⁴⁸

AWARENESS, TRANSPARENCY AND PUBLIC CONFIDENCE

- 6.60 Efforts are apparent in several jurisdictions to make the complex bail system more accessible and comprehensible to accused persons, victims and the general public.

Accessibility

- 6.61 Proposed reform of the Bail Act in Victoria, Australia, for example, emphasises the use of plain language and clear presentation and structure. It is proposed that terms such as 'remand' should be clarified and archaic terms such as 'surety', replaced.¹⁴⁹ Legislation in some other jurisdictions has already incorporated a more user-friendly style. In Australian Capital Territory, for example, some illustrations are provided of how particular provisions operate in practice.¹⁵⁰

Reasons for decisions

- 6.62 In line with human rights standards most jurisdictions now require that bail decision makers provide reasons for their decisions. The provision of reasons is generally accepted as appropriate as the bail decision may involve a restriction or

¹⁴⁵ Bail Act 1992 (ACT), s 47A.

¹⁴⁶ Victims' Rights Act 2002 (NZ), s 12(1)(e)(iii).

¹⁴⁷ Sexual assault, serious injury or any offence which has resulted in the victim having ongoing and reasonable fears for their safety or that of their family: see the Victims' Rights Act 2002 (NZ), s 29.

¹⁴⁸ See the Victims' Rights Act 2002 (NZ), ss 31 and 34. The victim can also receive information about a range of other matters: see Victims' Rights Act 2002 (NZ), ss 35-38.

¹⁴⁹ Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (Aug 2007), ch 8.

¹⁵⁰ See the Bail Act 1992 (ACT), s 9G.

suspension of the fundamental right to liberty and reasons are essential to any meaningful challenge to the decision. It will be recalled that the European Convention on Human Rights demands the provision of adequate, and not abstract or stereotyped, reasons for the grant or refusal of bail.¹⁵¹

6.63 There is a statutory duty to provide reasons for the refusal of bail by a court¹⁵² or the police¹⁵³ in most jurisdictions. In some jurisdictions there may also be an obligation to provide reasons for any grant of bail,¹⁵⁴ a decision to grant bail contrary to prosecution objections¹⁵⁵ or a decision to grant bail where there is a statutory presumption against bail.¹⁵⁶

6.64 Reasons may also be required when conditions are attached to a grant of bail or such conditions are varied.¹⁵⁷ In New South Wales, reasons must be recorded for a failure to attach particular conditions requested by the accused and their substitution with other conditions.¹⁵⁸ In that jurisdiction, if conditions are attached to bail, the reason for not granting unconditional bail must be recorded.¹⁵⁹ In other jurisdictions reasons must be provided for not imposing less onerous conditions than those imposed.¹⁶⁰ As indicated earlier, in some jurisdictions there is a presumption that conditions or certain conditions will be imposed upon persons accused of particular offences and there is a duty to provide reasons if such conditions are not imposed. In Canada, for example, reasons must be provided if conditions restricting the possession of weapons, ammunition or explosives are not attached to bail granted to a person accused of certain violent and other offences.¹⁶¹

¹⁵¹ See ch 2.

¹⁵² See eg the Bail Act 1976 (EW), s 5(3)(a) and Bail Act 1985 (SA), s 12(1).

¹⁵³ See eg the Bail Act 1992 (ACT), s 27(1)(b).

¹⁵⁴ See eg the Criminal Procedure (Scotland) Act 1995, s 24(2A).

¹⁵⁵ See eg the Bail Act 1976 (EW), s 5(2A).

¹⁵⁶ See eg the Bail Act 1978 (NSW), s 38(1A) and the Criminal Code (Can), s 515(6.1).

¹⁵⁷ See eg the Bail Act 1976 (EW), ss 5(3)(b) and (c).

¹⁵⁸ See eg the Bail Act 1978 (NSW), s 38(3).

¹⁵⁹ See eg the Bail Act 1978 (NSW), s 38(2).

¹⁶⁰ See eg the Bail Act 1992 (ACT), s 27(2)(b).

¹⁶¹ Criminal Code (Can), ss 515(4.1) and (4.12). See also the Criminal Procedure (Scotland) Act 1995, s 24(2B) which imposes a duty to explain why further conditions are not imposed on bail granted to a person accused of a sexual offence.

Explanations in ordinary language

- 6.65 In addition to the duty to give reasons, courts in Scotland are required, when granting bail, to explain to the accused, if present, in ordinary language the effect of the conditions imposed, the requirement to notify the court of a change in the 'domicile of citation'¹⁶² and the impact of a breach of either of these requirements.¹⁶³ A written explanation of these matters in ordinary language must also be provided to the accused, whether or not they are present.¹⁶⁴

Consideration of particular groups

- 6.66 Finally, in addition to the bail support programmes outlined above, provision is made in some bail legislation for the views or needs of particular groups, such as indigenous persons,¹⁶⁵ persons with mental illness¹⁶⁶ or intellectual difficulties¹⁶⁷ to be considered in bail decisions.

CONSIDERATIONS CONCERNING CHILDREN AND YOUNG PERSONS

The legal framework

- 6.67 Legal provisions regulating the grant of bail to children and young persons¹⁶⁸ are contained within general bail legislation

¹⁶² This is the address to which formal communications relating to the case will be sent.

¹⁶³ Criminal Procedure (Scotland) Act 1995, s 25(A1).

¹⁶⁴ Criminal Procedure (Scotland) Act 1995, s 25(B1).

¹⁶⁵ In Queensland, the court may take into account information provided by a community justice group in the accused's community when the accused is an indigenous person: Bail Act 1980 (Qld), s 15(1)(f).

¹⁶⁶ See eg the Bail Act 1978 (NSW), s 32(1)(b)(v) which provides that, when deciding on bail, consideration must be given to any special needs of a person with mental illness or intellectual difficulties, an indigenous person or a person under the age of 18.

¹⁶⁷ See eg the Bail Act 1978 (NSW), s 37(2A) which provides that, when imposing bail conditions on persons with intellectual disabilities, consideration must be given to the capacity of the person to understand or comply with such conditions.

¹⁶⁸ Definitions of children and young persons vary in different jurisdictions. Eg in the Republic of Ireland the age of criminal responsibility is 12 (see the Children Act 2001 (ROI), s 52(1)). There are, however, some exceptions to this general rule: Children Act 2001 (ROI), s 52(2) whereas in Scotland it is eight (see the Criminal Procedure (Scotland) Act 1995, s 41). As the age of criminal responsibility is beyond the scope of this paper, for the purposes of this chapter, various aspects of the law regarding the bail or remand of children in several jurisdictions will be examined without reference to the precise definition of 'child' or 'young person' in those jurisdictions.

in many of the jurisdictions examined.¹⁶⁹ In others, however, the law regarding the bail or remand of children is set out in other legislation dealing with broader issues of youth justice and the welfare of children.¹⁷⁰ Wherever the provisions are laid down, however, the test for bail is usually altered for children and young persons and may involve a completely different test to that set out for adults or at least some modification of that test.

6.68 In England and Wales a child can be detained for all of the same reasons outlined for an adult but also for their own welfare.¹⁷¹ In Queensland, although the actual test for bail for children¹⁷² is very similar to that laid down for adults,¹⁷³ it is contained within specific juvenile justice legislation encompassing overriding principles which promote the protection of the public and the rights of the child.¹⁷⁴ Similarly, the Bail Act 1977 in Victoria applies also to children, subject to a number of principles laid down in the Children, Youth and Families Act 2005.¹⁷⁵ This legislation emphasises that detention should only be used in exceptional circumstances¹⁷⁶ and sets limits on the periods for which young persons can be remanded.¹⁷⁷

6.69 In contrast to the approach in England and Wales, children cannot be detained in the Republic of Ireland solely for care or protection reasons.¹⁷⁸ Statutory recognition is given to the rights of children to participate and be heard in any proceedings including criminal proceedings¹⁷⁹ and the principle that detention should be a measure of last resort.¹⁸⁰ The courts in the Republic of Ireland are also charged with

¹⁶⁹ See eg the Bail Act 1976 (EW).

¹⁷⁰ See eg the Children Act 2001 (ROI).

¹⁷¹ Bail Act 1976 (EW), sch 1, part 1, para 3 .

¹⁷² Juvenile Justice Act 1992 (Qld), s 48.

¹⁷³ Bail Act 1980 (Qld), s 16.

¹⁷⁴ Juvenile Justice Act 1992 (Qld), s 3 and sch 1.

¹⁷⁵ Children, Youth and Families Act 2005 (Vic), s 346(6). Similarly in Canada, the bail provisions of the Criminal Code apply equally to children unless they are inconsistent with or excluded by the Youth Criminal Justice Act 2002 (Can), s 28.

¹⁷⁶ See eg the Children, Youth and Families Act 2005 (Vic), s 345.

¹⁷⁷ Children, Youth and Families Act 2005, (Vic), s 346.

¹⁷⁸ Children Act 2001 (ROI), s 88(10)(a).

¹⁷⁹ Children Act 2001 (ROI), s 96(1)(a).

¹⁸⁰ Children Act 2001 (ROI), s 96(2).

having due regard to the child's best interests, the interests of victims and the protection of society.¹⁸¹ Pre-trial detention for child protection, mental health or other social reasons is also prohibited in Canada.¹⁸² Further, when considering whether the detention of a young person is necessary for the protection or safety of the public¹⁸³ there is an express presumption in favour of bail if the young person could not, if found guilty, be committed to custody.¹⁸⁴ Young persons who would otherwise be remanded may be placed in the care of a responsible person with the agreement of both the young person and the responsible person.¹⁸⁵

- 6.70 A unique system for dealing with offending by young persons is in existence in Scotland which involves the diversion of most children from the formal criminal process into the Children's Hearing System, where the paramount concern is the welfare of the child¹⁸⁶ and pre-trial detention is rare.¹⁸⁷
- 6.71 Provision is made in some jurisdictions for additional or special considerations to be taken into account by the decision maker when deciding on the issue of bail in relation to children and young persons. In New South Wales, for example, all of the factors relevant to the grant of bail to adults must be considered in respect of children in addition to any 'special needs'¹⁸⁸ that may arise due to their age. In Australian Capital Territory, the criteria for the grant of bail to adults must be considered alongside youth justice principles enshrined in statute and any report prepared in relation to the child.¹⁸⁹ The 'best interests' of the child must be a primary

¹⁸¹ Children Act 2001 (ROI), s 96(5).

¹⁸² Youth Criminal Justice Act 2002 (Can), s 29(1).

¹⁸³ Regard must be had to all the circumstances including any substantial likelihood that the accused will commit a criminal offence or interfere with the administration of justice: Criminal Code (Can), s 515(10)(b).

¹⁸⁴ Youth Criminal Justice Act 2002 (Can), s 29(2).

¹⁸⁵ Youth Criminal Justice Act 2002 (Can), s 31(1).

¹⁸⁶ Children (Scotland) Act 1995, s 16(1). Provision is also made for the views of young persons to be heard and taken into account: Children (Scotland) Act 1995, s 16(2).

¹⁸⁷ See M Burman, P Bradshaw, N Hutton, F McNeill and M Munro "The End of an Era? – Youth Justice in Scotland" in J Junger-Tas and S H Decker, *International Handbook of Juvenile Justice* (2006), p 439.

¹⁸⁸ Bail Act 1978 (NSW), s 32(1)(b)(v).

¹⁸⁹ Bail Act 1992 (ACT), s 23(1).

consideration.¹⁹⁰ The youth justice principles¹⁹¹ referred to emphasise, among other matters, the importance of young persons:

- participating in proceedings;
- being dealt with in a way that takes account of their age, maturity, developmental capacity and needs; and
- being provided with opportunities to develop in socially responsible ways.

The importance of legal advice and dealing with children in a prompt manner are also highlighted. Detention must be a measure of last resort and for the minimum time necessary. Particular reference is made to ensuring that the principles enunciated are interpreted consistently with relevant human rights instruments such as the CRC.¹⁹²

Bail decision making

6.72 Timely and accurate bail information is essential in the context of bail applications relating to children. In Australian Capital Territory, a criminal court dealing with a child may order that the chief executive responsible for the children's legislation¹⁹³ provide the court with a report about the child or young person.

6.73 Alongside the bail information schemes in place in many jurisdictions, bail advocacy services for young persons are available in Victoria and provide decision makers with advice regarding the suitability of young persons for bail and the availability of appropriate support services. Appropriate bail conditions may also be recommended.

6.74 Accommodation for young persons appears to influence bail decision making in most jurisdictions. Children in England and Wales not released on bail may be remanded to local authority accommodation¹⁹⁴ with conditions, similar to bail

¹⁹⁰ Bail Act 1992 (ACT), s 23(2).

¹⁹¹ See the Children and Young People Act 2008 (ACT), s 94.

¹⁹² Court Procedures Act 2004 (ACT), s 74D.

¹⁹³ See the Children and Young People Act 2008 (ACT).

¹⁹⁴ Children and Young Persons Act 1969 (EW), s 23(1).

conditions, attached¹⁹⁵ and each local authority has a duty to receive and provide accommodation for such remanded children.¹⁹⁶ Children of 12 and over who are believed to pose a risk of serious harm to the public or a risk of serious offending and who meet certain other requirements may be remanded to secure accommodation.¹⁹⁷ Provision is also made for some young persons to be remanded to a remand centre or prison.¹⁹⁸ Alternatives to custodial remand, including remand fostering schemes and bail hostels, are available in parts of England and Wales.

6.75 It will be recalled that some jurisdictions specify that children cannot be remanded for care reasons¹⁹⁹ whereas others allow detention for the welfare of the child.²⁰⁰ Legislation in Victoria, Australia provides that bail cannot be refused solely on the basis that a child does not have accommodation²⁰¹ and support services are in place in several jurisdictions to locate appropriate accommodation for young persons on bail.²⁰²

6.76 Difficulties may also arise in identifying responsible adults to supervise young persons on bail. In Western Australia it is a condition of bail granted to children that a responsible person undertakes to ensure that the child complies with their bail.²⁰³ There are, however, limits on this requirement in respect of some older children²⁰⁴ and, if participating in a supervised bail programme, a bail coordinator may assume the role of responsible person in order to facilitate bail.

6.77 In some jurisdictions parents or guardians are placed under a duty to attend criminal proceedings in respect of their child. In

¹⁹⁵ Children and Young Persons Act 1969 (EW), s 23(7).

¹⁹⁶ Children Act 1989 (EW), s 21(2).

¹⁹⁷ Children and Young Persons Act 1969 (EW), ss 23(4), (5) and (5AA). This may also include remand in a secure training centre: Children and Young Persons Act 1969 (EW), s 23(7A).

¹⁹⁸ Crime and Disorder Act 1998 (EW), s 98.

¹⁹⁹ Children Act 2001 (ROI), s 88(10)(a).

²⁰⁰ Bail Act 1976 (EW), sch 1, part 1, para 3.

²⁰¹ Children, Youth and Families Act 2005 (Vic), s 346(9).

²⁰² See eg the Central After Hours Assessment and Bail Placement Service (Vic) (CAHABPS) and the Youth Bail Accommodation Support Service (Qld).

²⁰³ Bail Act 1982 (WA), sch 1, part C, cl 2(2)(b).

²⁰⁴ Bail Act 1982 (WA), sch 1, part C, cl 2(4).

the Republic of Ireland, for example, parents or guardians are required to attend all stages of any proceedings against a child for a criminal offence²⁰⁵ and a warrant may be issued for their arrest if they fail to do so.²⁰⁶

Bail conditions, surety and security

6.78 Most jurisdictions take cognisance of the different level of maturity and understanding of young persons when setting out the conditions which may be attached to bail.

6.79 In several jurisdictions children or their parents or guardians may be required to enter into a recognizance or undertaking for the grant of bail.²⁰⁷ An undertaking may be taken from a parent or another person if the child does not have the capacity or understanding to enter into an undertaking.²⁰⁸ In the Republic of Ireland, a recognizance taken from the parent or guardian of a child may require the appearance of both the *parent* and the child.²⁰⁹

6.80 The requirement which may be imposed on accused adults in the Republic of Ireland to provide a portion of their recognizance in advance does not apply to children.²¹⁰

6.81 It is common for parents or guardians to act as sureties for young persons and in some jurisdictions such sureties may be required to ensure that the young person not only surrenders to custody but also complies with other bail conditions imposed.²¹¹ In England and Wales, such a requirement cannot be imposed upon the surety if the young person will turn 17 before they are due to surrender to custody.²¹² The surety cannot be required to enter into a recognizance of any more than £50 to ensure compliance

²⁰⁵ Children Act 2001 (ROI), s 91(1). See also the Criminal Procedure (Scotland) Act 1995, s 42(2).

²⁰⁶ Children Act 2001 (ROI), s 91(2).

²⁰⁷ See eg Children Act 2001 (ROI), s 68 and the Criminal Procedure (Scotland) Act 1995, s 43(1).

²⁰⁸ See eg the Children, Youth and Families Act 2005 (Vic), s 346(10).

²⁰⁹ Children Act 2001 (ROI), s 68(2).

²¹⁰ Bail Act 1997 (ROI), s 5(4).

²¹¹ See eg the Bail Act 1976 (EW), s 3(7).

²¹² Bail Act 1976 (EW), s 3(7)(a).

with conditions and cannot be bound to secure compliance with any conditions he or she does not consent to.²¹³

6.82 In Australian Capital Territory, when attaching conditions to bail, regard must be had to established youth justice principles²¹⁴ and primary consideration must be given to the best interests of the child.²¹⁵ Bail conditions in the Republic of Ireland, which may include residence and educational requirements, are also imposed 'in the interests of the child.'²¹⁶ Conditions requiring treatment or rehabilitation cannot be imposed upon children in New South Wales²¹⁷ and there are restrictions on the imposition of electronic monitoring requirements on children in several jurisdictions.²¹⁸ Like bail conditions imposed upon adults, there is a requirement in some jurisdictions that the least onerous bail conditions necessary are imposed upon children.²¹⁹

Breach of bail, monitoring and support

6.83 There is further recognition in some jurisdictions of the difficulties which young persons may have in complying with bail and the conduct conditions attached to bail in particular. For this reason children may not be liable for an offence of breach of bail which applies to adults in some jurisdictions.²²⁰

6.84 There are also extensive bail support packages in place in many jurisdictions to facilitate young persons in successfully completing their bail and addressing difficulties in their lives.²²¹ The Central After Hours Assessment and Bail Placement Service ('CAHABPS') in Victoria is an after hours service available to young people aged between 10 and 18 years who are being considered for remand by the police or are in need of bail accommodation. The police must contact CAHABPS if they are considering remanding a young person

²¹³ Bail Act 1976 (EW), s 3(7)(b).

²¹⁴ Children and Young People Act 2008 (ACT), s 94.

²¹⁵ Bail Act 1992 (ACT), s 26(1)(b)(ii).

²¹⁶ Children Act 2001 (ROI), s 90.

²¹⁷ Bail Act 1978 (NSW), s 36A(6).

²¹⁸ See eg the Bail Act 1976 (EW), s 3AA.

²¹⁹ See eg the Juvenile Justice Act 1992 (Qld), s 52(5)(a).

²²⁰ Bail Act 1980 (Qld), s 29(2)(a).

²²¹ See eg the Intensive Supervision and Surveillance Programme (ISSP) in England and Wales.

after hours. An assessment is conducted and advice provided regarding the young person's suitability for bail. Referrals may also be made to other support services. The Intensive Bail Supervision Programme in New South Wales provides courts with targeted assessments and bail action plans in respect of young persons. The programme uses intensive supervision and intervention, which may include accommodation, drugs and alcohol supervision or family support.

Involving children in the process

- 6.85 As indicated above provision is made in several jurisdictions for children to participate and be heard in proceedings which affect them, including bail proceedings.²²² There may also be a requirement to explain the bail decision to the young person in age appropriate language. In the Republic of Ireland, for example, the court, when remanding a child, must explain the reasons for its decision in open court in language that is appropriate to the child's age and level of understanding.²²³

PRELIMINARY CONCLUSIONS

- 6.86 The comparative analysis conducted offers many interesting approaches and initiatives for consideration. The law regarding bail in criminal proceedings, including statutory grounds for the refusal of bail, has been placed on a statutory footing in almost all jurisdictions examined. Most jurisdictions include a right to bail or presumption in favour of bail and there are some common grounds for the refusal of bail in most jurisdictions, namely a risk that the accused will fail to surrender, interfere with the administration of justice or commit offences. Other grounds found in some jurisdictions emphasise the protection of the victim and/or the public or the interests of the defendant. Broader grounds focussing on public interest or confidence in the administration of justice are in evidence in a few jurisdictions. Special rules, including presumptions against bail, in respect of particular offences or particular circumstances are prevalent in many jurisdictions, with an onus being placed upon the applicant for bail to prove 'exceptional circumstances' justifying release in some

²²² See eg the Children Act 2001 (ROI), s 96(1)(a).

²²³ See eg the Children Act 2001 (ROI), s 88(3).

instances. There is, however, evidence that these contentious provisions are falling out of favour in some jurisdictions.²²⁴

- 6.87 Most bail legislation prescribes the factors which may be considered by the decision maker in determining the issue of bail and many have initiatives in place to ensure the provision of verified and timely information for such purposes. Statutory powers to request information are favoured in some jurisdictions whereas non-statutory bail information schemes are preferred in others. Such bail information schemes may also consider support issues aimed at facilitating the grant of bail. It is common in most jurisdictions to attach financial and/or conduct conditions to the grant of bail although some jurisdictions have retreated somewhat from reliance on financial conditions. The discretion of the bail decision maker in relation to the imposition of conditions is restricted in many jurisdictions by mandatory conditions and obligations to consider the least onerous conditions necessary according to a scale set down in statute.
- 6.88 Failure to surrender to custody is an offence in most jurisdictions but the criminalisation of breach of bail conditions, although in evidence in some jurisdictions, remains more contentious. Such breaches of bail may also prohibit a subsequent grant of bail in some jurisdictions. Support programmes for persons on bail are common in many jurisdictions and increasingly address the full range of issues which may affect a person's ability to successfully remain on bail, including accommodation, dependency and mental health issues. Simple reminders and explanations relating to bail are provided in some jurisdictions. There are few programmes which focus exclusively on supervision or surveillance.

²²⁴ Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (Aug 2007), ch 3. Lawyers, prison staff and the Director of Public Prosecutions in New South Wales have offered their support to a lobby group called the Bail Reform Alliance which criticises the many presumptions against bail in that jurisdiction and is calling for a change in the law: see J Gibson, "Cowdery backs call to change bail laws" *Sydney Morning Herald*, April 9, 2010: see <http://www.smh.com.au/nsw/cowdery-backs-call-to-change-bail-laws-20100408-rv5q.html>

- 6.89 Bail provisions in most jurisdictions acknowledge the special position occupied by the victim in bail proceedings and criminal proceedings generally. At a minimum most legislation encompasses an undertaking, albeit not a legally binding one, to keep victims informed in relation to the grant of bail to a defendant. This duty to keep victims informed may be limited to victims of particular offences or those victims who request such information. Consideration of the safety and welfare of victims and their views may be taken into account in bail decision making in some jurisdictions.
- 6.90 Recent reviews and reform initiatives have acknowledged the complex language and concepts that inhabit this area of law. There is evidence of efforts to simplify the terminology surrounding the bail system and to make the law more accessible. The duty to provide reasons for bail decisions is well established in most jurisdictions and a further obligation to provide explanations in ordinary language is also imposed in some jurisdictions.
- 6.91 All jurisdictions examined treat children in the bail system differently to adults. A common approach is to apply the same or a similar test for bail laid down in respect of adults but to impose, in addition to this, consideration of statutory youth justice principles. Such principles frequently echo CRC principles which emphasise detention as a last resort and for the shortest possible time, consideration of the best interests of the child and the participation of the young person in the proceedings. In many jurisdictions there is a prohibition on the remand of young persons for care, welfare or mental health reasons.
- 6.92 The importance of accurate and timely bail information is again highlighted in relation to young persons. Assessments, aimed at identifying appropriate bail conditions and support packages tailored to the individual young person, are available in some jurisdictions. Particular efforts have been made in many places to address the accommodation needs of young persons applying for bail. The importance of adult supervision and engagement is recognised in most jurisdictions.

CHAPTER 7. ISSUES TO BE CONSIDERED

INTRODUCTION: QUESTIONS FOR CONSULTEES

- 7.1 In this chapter the current law and practice relating to bail in Northern Ireland is considered in light of the views expressed in the preliminary discussions, the comparative analysis conducted and the relevant human rights standards identified. The views of consultees are sought in relation to a range of possible provisions and initiatives, with a view to informing the recommendations which will be published in the Commission's Final Report. The Commission also welcomes the views of consultees in respect of any other bail related matters not specifically addressed in the following questions. In line with the Commission's duties under the Justice (NI) Act 2002 and appropriate human rights standards, the overall aim of the bail project is to devise recommendations for a modern, consistent and fair bail system which enables transparent decision making, is accessible to the community and is worthy of public confidence.

THE LEGAL FRAMEWORK

- 7.2 The law governing the grant or refusal of bail by the police and the courts in Northern Ireland is found in an assortment of disparate sources. The grounds for the refusal of police bail are enshrined in statute but the refusal of bail in the courts is governed by several common law authorities some of which date back as far as 150 years (paras 3.34 to 3.40). The Commission is of the view that the present arrangements are complex, inconsistent and lacking in transparency. Many other jurisdictions have placed the law governing bail on a statutory footing, either in a Bail Act or a Criminal Code (para 6.5).

Q 1: The Commission has reached the provisional view that there is a strong case for the adoption of a single unified Bail Act that would govern bail decision making by police officers and courts across different levels of jurisdiction. Do consultees agree that this would be desirable?

Q 2: Do consultees see any disadvantages to the adoption of a single Bail Act?

7.3 Decisions regarding the grant or refusal of bail are taken at several different stages of the criminal process. Different considerations will arise, for example, in respect of pre charge bail for persons arrested other than at a police station ('street bail'), pre charge bail granted at a police station, post charge bail, court bail (pre verdict), bail pending sentence, bail pending appeal and compassionate bail. The Criminal Justice (Northern Ireland) Order 2003 introduced, for the first time in Northern Ireland, a number of general provisions regarding bail, namely a duty to surrender to custody and an offence of failing to surrender to custody in answer to bail. For the purposes of that legislation 'bail' is defined in Article 3 as bail grantable under common law or statute:

(a) in or in connection with proceedings for an offence to a person who is accused or convicted of the offence, or (b) in connection with an offence to a person who is under arrest for the offence or for whose arrest for the offence a warrant (endorsed for bail) is being issued.

This definition includes all types of bail except street bail, which was introduced after the 2003 Order was made and was specifically excluded from the definition (para 3.4).

Q 3: The Commission is of the provisional opinion that bail legislation in Northern Ireland should include a definition of 'bail', in similar terms to Article 3 above, to which some general provisions of the legislation, such as a duty to surrender to custody and an offence of absconding, should apply. Do consultees agree?

7.4 A number of amendments have been made to PACE (NI) in recent years which allow the police to attach conditions to both pre and post charge bail and to grant bail other than at a police station (paras 3.10 to 3.12 and 3.50 to 3.51). Failure to answer both pre and post charge bail has also been designated a criminal offence (para 3.60). Similar amendments in England and Wales have been the subject of some criticism (para 3.13). It has been argued that police powers to attach conditions to pre charge bail may result in individuals being subjected to onerous bail conditions for

protracted periods on the basis of little evidence, albeit with the possibility of review by the magistrates' court (para 3.13).

- 7.5 Persons released on street bail can at present be subject only to the requirement that they attend a police station and may be arrested for failure to do so (paras 3.10 to 3.11). Recent proposals to government would extend police powers to allow police officers to impose conditions on street bail and create an offence of failing to answer street bail (paras 3.51 and 3.60). In addition to the concerns outlined above in relation to pre charge bail granted at a police station, the creation of such powers in respect of street bail may be criticised due to the responsibility these powers confer upon arresting officers who are not subject to the same level of scrutiny as custody officers who may grant bail at a police station (para 3.13). There is also some evidence that current police powers in respect of street bail are not being utilised by police officers in Northern Ireland (para 5.12).
- 7.6 Different considerations arguably arise in the context of bail after charge and bail before charge, when a determination has not yet been made to initiate formal proceedings against a suspect. At present persons released on police bail both pre and post charge may have conditions attached to their bail, are under a duty to surrender to custody and may be prosecuted for failure to do so. Recent proposals to government would extend this regime to street bail also. In many jurisdictions, the police do not enjoy powers to release on bail persons not charged with criminal offences at the police station or elsewhere, but rather they are obliged to release such persons unconditionally (para 6.6).

Q 4: The Commission seeks the views of consultees on whether persons released on bail without charge (including those on street bail) should, as a matter of principle, be subject to the same regime as those on bail after formal charge.

- 7.7 The presumption in favour of bail for persons accused but not convicted of criminal offences is an important and longstanding principle of Anglo-Irish criminal procedure (para 2.1). There is a statutory presumption in favour of the release of persons charged with offences by the police and an

equivalent presumption operates in the context of court bail prior to conviction (para 3.34 to 3.40). The right to bail has been reinforced in recent years with the incorporation into domestic law of the European Convention on Human Rights (paras 2.6 to 2.20). Article 5 of the Convention provides for a right to liberty and security of the person, which may only be interfered with in specified circumstances, including the lawful arrest or detention of persons suspected of criminal offences. Accused persons have a right to release pending trial unless the state can show good reasons justifying detention. In many other jurisdictions a right to bail or a presumption in favour of bail is laid down in statute (para 6.7). Many of those who participated in the preliminary discussions conducted by the Commission were in favour of placing a right to bail or a presumption in favour of bail on a statutory footing, imposing a clear onus on the state to justify any interference with this right (paras 5.13 to 5.14).

Q 5: The Commission is of the provisional view that bail legislation should, in keeping with Article 5 of the European Convention on Human Rights, provide for a general right to bail or presumption in favour of bail for all persons accused of offences or awaiting trial, subject to the power of the police or the court to refuse bail. Do consultees agree?

7.8 The grounds upon which the *police* may refuse to release a person charged with a criminal offence are set out in the Police and Criminal Evidence (Northern Ireland) Order 1989 (paras 3.34 to 3.35). Similar grounds for the refusal of bail by the *courts* prior to conviction are derived from the common law (para 3.37). The European Court of Human Rights has recognised four legitimate grounds for refusing to release on bail a person suspected of having committed an offence (para 2.13). The precise grounds upon which bail may be refused to persons accused but not convicted of criminal offences is included in bail legislation in most jurisdictions examined (paras 6.7 to 6.12) and participants in preliminary discussions opined that such a provision would enhance consistency and transparency (para 5.13 to 5.14).

Q 6: Do consultees agree that bail legislation should set out the grounds upon which the police and the courts can refuse to release on bail persons charged but not convicted of criminal offences?

7.9 The Commission welcomes views on the precise content and wording of the grounds for refusing bail. It is common ground in all jurisdictions that bail may be refused if there are substantial grounds for believing that the accused will fail to surrender to custody (paras 3.39 and 6.7). It is also widely accepted that bail can be refused if there is a substantial risk that the accused will interfere with witnesses or otherwise obstruct the course of justice (paras 3.39 and 6.7). Both of these grounds are accepted by the European Court of Human Rights (para 2.13).

7.10 Bail may also be refused in many jurisdictions on the basis of an unacceptable risk that the accused will commit offences while on bail. It may be necessary, however, to place some limits on the applicability of this ground. It was suggested at one time that compliance with the ECHR required a risk of the commission of a serious offence and/or an offence that has some nexus with the offence charged, although that interpretation has since been revisited (para 2.14). PACE (NI) provisions restrict this ground to defendants arrested in respect of imprisonable offences (para 3.35) and in the Republic of Ireland bail may only be refused on this basis if the accused is charged with a serious offence and there is a risk that he or she will commit a serious offence while on bail (para 6.8).

Q 7: The Commission is of the provisional view that bail legislation in Northern Ireland should specifically prescribe three of the current grounds for the refusal of bail, namely, a substantial risk that the accused will:

- abscond or fail to appear;
- interfere with witnesses or otherwise interfere with the administration of justice or;
- commit offences while on bail.

Do consultees agree?

Q 8: The Commission welcomes the views of consultees on whether the third ground, the commission of offences on bail, should be limited in scope.

7.11 In addition to the grounds outlined above, the police in Northern Ireland may refuse to release a person on bail if there are reasonable grounds for believing that detention is necessary to prevent him or her from causing physical injury to any other person or from causing loss of or damage to property. Further grounds for police bail following charge include the protection of the accused or, if the accused is a juvenile, his or her own interests (paras 3.35 and 4.18). Bail may be refused in the High Court if there are substantial grounds for believing that the accused will fail to comply with bail conditions (para 3.38). The European Court of Human Rights also recognises that the refusal of bail may be justified on the basis of the preservation of public order (para 2.13).

7.12 An examination of other jurisdictions reveals other justifications for pre-trial detention including the safety or welfare of victims or others, the interests of the accused, public interest concerns or confidence in the administration of justice (para 6.12). Provision is made in some jurisdictions for the refusal of bail if the accused is already serving a custodial sentence or if there is insufficient time to obtain the information necessary for a decision (para 6.9).

7.13 Concern was expressed in preliminary discussions that inadequate consideration is currently given to the protection of the public in bail decision making. Some participants were uneasy with the detention of persons for their own protection (para 5.17).

Q 9: The Commission seeks the views of consultees on the inclusion in legislation of further grounds for the refusal of bail.

7.14 There was some support in preliminary discussions for the proposition that persons accused of certain types of offences should not enjoy a presumption in favour of bail, although others had human rights concerns about such provisions (para 5.18). This approach is common in many jurisdictions

where special rules are laid down in respect of particular offences or circumstances. For example, in some jurisdictions the presumption in favour of bail is reversed for persons accused of certain sexual or violent offences with the result that the accused may have a significant burden to persuade the bail decision maker that their right to liberty should not be restricted (paras 6.13 to 6.15). It has been argued, however, that such provisions are arbitrary, complicated and potentially contrary to human rights standards (paras 2.12 and 6.16).

Q 10: The Commission is not inclined to recommend an ‘offence specific’ or ‘circumstance specific’ approach to the entitlement to bail, whereby different principles and/or statutory provisions apply to certain offences or situations. Do consultees agree with this provisional position?

7.15 There is currently no statutory guidance in relation to decisions to grant compassionate bail, bail pending sentence and bail pending appeal in Northern Ireland (para 3.41). Some limited direction can be gleaned from authorities in England and Wales (para 3.42).

Q 11: The Commission invites the views of consultees on the desirability of including in bail legislation statutory criteria for the grant of compassionate bail, bail pending sentence and bail pending appeal.

7.16 At present the factors which may be taken into account when a bail decision is made by the police are laid down in statute (para 3.36) with similar factors considered in the courts (para 3.37). Exhaustive or non-exhaustive lists of such factors are included in bail legislation in many jurisdictions (para 6.17). Common factors include the nature and seriousness of the offence, the background and community ties of the accused and his or her bail history.

Q 12: The Commission welcomes the views of consultees regarding the factors which bail decision makers may take into account when determining whether the grounds for refusing bail have been met. Do consultees agree that a list of such factors should have a statutory basis?

BAIL DECISION MAKING

7.17 In order for any bail decision making process to work effectively, it is essential that the decision maker is provided with comprehensive and accurate information on matters relevant to the decision, such as the individual's record (if any) of previous offending, previous compliance with bail conditions, the individual's medical history and home circumstances and victim-related information that is relevant to the bail decision (paras 5.24 to 5.28). A range of approaches to the gathering and receipt of bail information is evident locally and across several jurisdictions (paras 3.43 and 6.22 to 6.24). The Commission recognises that the objective of ensuring access to comprehensive and accurate information may not be achieved solely by legislative intervention, but will require clear and effective administrative procedures to be adopted by the relevant agencies.

Q 13: The Commission welcomes views on what initiatives might be adopted in relation to bail information and by whom they might be delivered.

BAIL CONDITIONS, SURETY AND SECURITY

7.18 Persons released on *court* bail in Northern Ireland may be required to enter into a personal recognizance for their surrender to custody (para 3.47), which may or, in some circumstances, must be estreated if he or she fails to surrender to custody (paras 3.61 to 3.62). Such personal recognizances have been abolished in respect of police bail in Northern Ireland and indeed all types of bail in England and Wales (para 6.25). Regardless of whether an accused person has entered into a recognizance, since 2003 all persons released on bail (with the exception of street bail) are under a duty to surrender to custody and if they fail to do so, they commit an offence (para 3.60). The possibility of

both estreatment of a recognizance and prosecution for an offence is arguably a disproportionately punitive response to a failure to surrender to custody (para 3.61).

Q 14: The Commission is of the provisional view that the power to take a personal recognizance should be abolished in respect of court bail in line with police bail. Do consultees agree?

7.19 An accused person may be required before release on bail to provide a surety or sureties to secure his or her surrender to custody. There are arguably a number of difficulties with the present surety system. Firstly, there is considerable confusion surrounding the term 'surety' which seems to be used variously to describe the person who undertakes to ensure that the accused will surrender to custody, the amount of money such person is bound by or the undertaking entered into by such a person (paras 5.31 and 6.28). Secondly, there is arguably inadequate scrutiny of the appropriateness, both financial and otherwise, of persons to perform the role of surety (para 5.33 and 6.27). Thirdly, there is uncertainty regarding the extent of the obligation imposed upon the surety, i.e. whether the surety is or indeed should be obliged to ensure compliance with all bail conditions or merely the requirement to surrender to custody (para 5.32). Fourthly, there is confusion in relation to the mandatory or discretionary nature of the power to order estreat of a recognizance and it has been suggested that recognizances entered into by sureties are rarely estreated if the accused fails to appear, undermining the effectiveness and credibility of this bail condition (paras 3.49 and 5.34). Fifthly, there is concern that sureties, like other financial conditions attached to bail, may disadvantage persons from lower socio-economic backgrounds (para 6.28). Finally, there is inconsistency between the powers of the police and the courts to require sureties with court bail being restricted to the requirement of a surety or security, but police bail apparently allowing sureties and/or security to be required as conditions of bail (para 3.48).

7.20 Despite these difficulties, sureties remain a common bail condition in many jurisdictions (para 6.26). Close consideration was recently given to the abolition of the power

to require a surety or sureties by the Victorian Law Reform Commission in Australia but ultimately it was decided to preserve this longstanding power. Recommendations were, however, made to simplify and modernise the terminology (suggesting its replacement with the term 'bail guarantor'), and to examine more closely the suitability of sureties and their ability to pay (para 6.28). It was also proposed that, given the difficulties which persons on low incomes may have in meeting financial conditions, sureties and security should only be considered after bail with or without other conditions has been considered and that only one such requirement i.e. security *or* surety, should be imposed (para 6.28).

Q 15: In light of the issues outlined, do consultees believe that the power to require a surety or sureties to secure the accused's surrender to custody should be retained in Northern Ireland?

Q 16: If the power to require a surety or sureties is retained, do consultees believe that the terminology should be simplified? Do consultees favour the term 'bail guarantor'?

Q 17: Do consultees think that provision should be made for sureties to be placed under an obligation to ensure compliance with some or all bail conditions?

Q 18: If the surety system is preserved, do consultees believe that there should be closer scrutiny of the suitability of persons to act as sureties?

Q 19: If the surety system is retained, do consultees believe that a portion of the promised monies should be paid in advance?

Q 20: Do consultees believe that estreatment for failure to appear should be mandatory?

Q 21: If the power to require a surety or sureties is retained, do consultees think that any limit should be placed on the imposition of the requirement for a surety?

7.21 In Northern Ireland, as in most other jurisdictions, the accused (or another on his or her behalf) may be required to give security for his or her surrender to custody in lieu of or in addition to a surety or sureties (paras 3.48 and 6.30). In some jurisdictions limitations are placed on the use of financial conditions such as security (para 6.30).

Q 22: Do consultees think that any limits should be placed on the power to require the provision of security for surrender to custody?

7.22 Once a person has been arrested and brought to a police station, both the police and the courts have the power to attach conduct conditions to any grant of bail (para 3.50). At present, it would appear that there is some inconsistency in the provisions governing the imposition of bail conditions. The power to attach conditions to police bail (including sureties and security) is subject to a test of necessity. Conditions can only be imposed if they are considered *necessary* to prevent the person from failing to surrender to custody, committing an offence or interfering with witnesses or otherwise obstructing the course of justice. The equivalent power in the magistrates' court provides that the court may impose such conditions as appear to be *likely* to result in the person's subsequent appearance at the time and place required or to be *necessary* in the interests of justice or for the prevention of crime (para 3.50).

Q 23: The Commission is of the provisional view that having regard to Article 5 of the European Convention on Human Rights, a single test of necessity for the imposition of bail conditions should be applied to all decision makers. Do consultees agree?

7.23 In addition to a test of necessity, bail legislation in some jurisdictions stipulates that a person released on bail must be subject to the least onerous conditions necessary to ensure their compliance with bail (para 6.37). Provision is made in other jurisdictions for the imposition of certain mandatory conditions, or at least the consideration of certain conditions, if the accused is charged with particular offences (para 6.34). One concern expressed to the Commission is that too often

bail conditions have insufficient regard to the particular circumstances of individuals subject to them, including their ability to comply (para 5.37). For example, the imposition of a ban on the consumption of alcohol on persons suffering from alcohol dependency has been criticised as unrealistic and likely to result in breach of bail conditions (para 5.37 and 6.31).

Q 24: The Commission welcomes views on whether more detailed guidance should be devised for decision makers concerning the scope and appropriateness of bail conditions.

Q 25: Further, if consultees regard such guidance as desirable, views are sought on whether such guidance should have a statutory basis.

BREACH OF BAIL

7.24 Much of the law regarding the enforcement of bail (excluding street bail) has recently been incorporated into a single piece of legislation with the Criminal Justice (Northern Ireland) Order 2003. This legislation provides for a general duty to surrender to the police or into the custody of a court or a prison governor at an appointed time, an offence of failure to surrender to custody by a person released on bail and powers of arrest for failure to answer bail and breach of bail conditions (paras 3.54 to 3.65).

7.25 The police in Northern Ireland enjoy similar powers of arrest in respect of bail breaches to those enjoyed by many police forces in other jurisdictions (para 6.38). There are powers to arrest persons who have failed to appear at a police station or in court in answer to bail. Persons released by the police or the courts under a duty to surrender to a court may also be arrested for anticipated failures to appear. The NIO PACE (NI) Review has proposed that an equivalent power of arrest be created for anticipated failures to attend a police station in answer to pre charge bail (para 3.59).

Q 26: The Commission is of the provisional opinion that current powers of arrest for failure to answer bail are satisfactory and should be retained in any

new or revised bail legislation. Do consultees agree?

Q 27: In light of Q 4 above about the possible different status of bail granted without charge, do consultees believe that an additional power of arrest for anticipated failures to appear in answer to pre charge bail should be included in legislation?

7.26 There are two offences in Northern Ireland relating to failure to appear in answer to bail. Firstly, it is an offence to fail to surrender to custody in answer to bail without reasonable cause. Secondly, it is an offence to fail to surrender to custody in answer to bail as soon as reasonably practicable after a failure to surrender with reasonable cause. Although some concerns were expressed about the terms of this offence in preliminary discussions (paras 5.42 to 5.43), there have been many prosecutions under this provision (para 3.60) and an equivalent provision operates in England and Wales (para 6.38). It was argued, nonetheless, that the offence could be simplified to a single offence of failing to surrender to custody, with the court deciding if the accused had cause to justify this failure (para 5.43), as is typical in some other jurisdictions (para 6.38).

Q 28: The Commission is of the provisional opinion that the present offence of failure to surrender to custody is satisfactory and should be retained in any new or revised bail legislation. Do consultees agree?

7.27 In common with other jurisdictions, the police in Northern Ireland also have a power to arrest for anticipated and actual breaches of bail conditions (paras 3.63 to 3.64). This important power permits the police to bring persons in breach of conditions before a court where their bail may be revoked, varied or simply renewed.

Q 29: The Commission adopts the provisional view that the law concerning the power of arrest for actual and anticipated breach of conditions is satisfactory and should be incorporated within

any new statutory scheme, subject to any appropriate modifications. Do consultees agree?

7.28 An issue raised in preliminary discussions concerns the fact that there is no specific criminal offence of breach of bail conditions (paras 5.47 to 5.49). Some jurisdictions criminalise breach of bail conditions (para 6.42) and it is noted that the NIO PACE (NI) Review proposes the introduction of a specific offence of breach of conditions attached to police bail (para 3.65) but no equivalent proposals have been made in respect of court bail. On the one hand, it has been suggested that breach of conditions requires a more robust enforcement mechanism than the present approach of conferring a power on the court to vary conditions or remand in custody (para 5.46). On the other hand, it may be argued that penalising breach of bail conditions by means of a specific criminal offence would be disproportionate and may lead to unnecessary criminalisation: for example, a person might be convicted solely for breach of conditions and be acquitted in respect of the original offence. Furthermore, such an offence may disproportionately impact upon certain groups such as children and those with mental health problems (para 6.42).

Q 30: The Commission welcomes the views of consultees on whether any new bail legislation should include an offence of breach of bail conditions.

MONITORING AND SUPPORT

7.29 Where bail conditions are imposed, questions then arise as to (a) what arrangements should be in place to facilitate compliance and (b) the responsibility for managing such arrangements and liaising with the relevant authority to provide ongoing information on compliance.

7.30 Some dissatisfaction was expressed in preliminary discussions about bail monitoring carried out by the police, in particular the disruptive nature of bail checks for curfew requirements (para 5.53). Alongside the monitoring carried out by the police, the Commission has been provided with information on monitoring initiatives confined to certain

geographical areas that may provide a basis for a more structured approach across the jurisdiction (para 3.68).

Q 31: Consultees' views are sought on appropriate administrative arrangements which may be devised, possibly drawing on existing models and/or resources, to address the issue of bail monitoring.

7.31 There were positive views expressed about the existing support programmes in place for young persons on bail and it was suggested that such programmes should also be available for adults on bail (paras 4.24 to 4.25 and 5.61). Such programmes were considered highly valuable in addressing a range of issues relating to offending such as drugs, alcohol and issues which place persons at greater risk of remand, such as accommodation difficulties (para 5.60). Bail support programmes are widely utilised in other jurisdictions (para 6.48)

Q 32: Consultees' views are sought on appropriate administrative arrangements which may be devised, possibly drawing on existing models and/or resources, to address the issue of bail support.

VICTIMS OF CRIME

7.32 The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power stipulates that victims should be kept informed of developments and that the views of victims should be heard in criminal proceedings (para 6.52). There are policies in place in both the PSNI and the PPS which touch upon the treatment of victims in the context of bail decision making.

7.33 The PSNI Policy Directive, *Dealing with Victims and Witnesses* provides for bail information to be given to victims in the context of other information relating to the progress of criminal proceedings (para 3.71). Such information should be provided to all victims, unless they have notified the police that they do not wish to be informed. It was suggested in preliminary discussions, however, that this policy is not

always followed in practice (para 5.64). The PPS *Victim and Witnesses Policy* states that victims should be kept informed of the progress of their case but there is no specific reference to the provision of information relating to bail decisions (para 3.72).

7.34 Legislation in relation to the treatment of victims in criminal proceedings has been enacted in several jurisdictions and some jurisdictions have placed a duty to provide information to victims on a statutory footing (although such duties may not necessarily be enforceable in legal proceedings: para 6.52). A duty to provide information may be of general application or may arise only in relation to particular offences or bail conditions or if the victim has requested information (para 6.55).

Q 33: The Commission welcomes the views of consultees on whether a duty to provide information to victims should be included in any new bail legislation?

Q 34: If consultees favour the inclusion of such a statutory provision, the Commission seeks views on whether such a duty should apply to all victims or whether it should be limited in some way.

Q 35: If the statutory route is not justified, do consultees have views on (a) the terms in which existing guidance might be amended and (b) the best mechanism to ensure that policies on the provision of information to victims of crime are complied with in practice?

AWARENESS, TRANSPARENCY AND PUBLIC CONFIDENCE

7.35 The Commission has a duty under section 51(1) of the Justice Act (NI) 2002 to keep the law of Northern Ireland under review with a view to its systematic development and reform, which includes a general duty to simplify and modernise the law. It could be argued that the current law on bail in Northern Ireland is complex, inconsistent and at times

archaic (para 3.74). Not surprisingly, many people struggle to comprehend bail proceedings and the decisions taken within them (para 5.95). Efforts have been made in other jurisdictions to demystify the bail process and to simplify the language and legislation pertaining to it (paras 6.61 and 6.65).

Q 36: The Commission welcomes the views of consultees on particular changes to the language and style of bail legislation which may be required to make it more accessible and readily understood.

7.36 The jurisprudence of the European Convention on Human Rights requires that adequate reasons are given for bail decisions (para 2.10). PACE (NI) imposes a duty on the police to take a written record of decisions to detain suspects or to impose or vary bail conditions (para 3.73). No specific duty to provide reasons is imposed upon the courts in this jurisdiction although in practice reasons are routinely provided. In other jurisdictions, there may be a duty to provide reasons for any refusal of bail, any grant of bail, a grant of bail contrary to prosecution objections or a grant of bail contrary to a statutory presumption against bail (paras 6.62 to 6.63). In relation to bail conditions, reasons may be required for the imposition or variation of conditions or the failure to attach particular conditions (para 6.64). There was support among participants in preliminary discussions for more openness and transparency in bail decisions (para 5.67).

Q 37: The Commission is minded to recommend the inclusion in legislation of a provision enshrining a statutory right to reasons for a refusal of bail and a requirement on decision makers to duly record decisions concerning bail. Do consultees agree that such a provision should be included in bail legislation?

Q 38: Do consultees consider that a broader requirement to record the reasons for bail decisions should be imposed, including:

- (a) a duty to provide reasons for imposing or varying bail conditions;**
- (b) a duty to provide reasons for imposing or failing to impose certain conditions only;**
- (c) a duty to provide reasons for all decisions to grant bail or decisions to grant bail contrary to prosecution objections.**

7.37 The issue of disclosure of material to the defence in the context of bail decisions has been the subject of judicial decisions that establish, in keeping with the individual's Article 5 rights, an entitlement to disclosure of material on which the prosecution may rely in objecting to bail, subject to the possibility of sensitive information being withheld in limited circumstances (paras 2.18 to 2.19).

Q 39: The Commission welcomes views on whether it would be appropriate to include a provision conferring a right to disclosure or a statutory duty to disclose in the context of any new or revised statutory scheme on bail.

CONSIDERATIONS CONCERNING CHILDREN AND YOUNG PERSONS

7.38 Bail in respect of children and young persons, like that in respect of adults, is subject to some inconsistencies. Article 12 of the 1998 Order mandates release on bail by a court except in very limited circumstances, namely where the offence falls within a prescribed category and where it is necessary to remand the child or young person to protect the public (paras 4.8 to 4.10). By contrast PACE (NI) provides that young persons charged with offences must be released (with or without bail) unless the custody officer has reasonable grounds for believing that one of the reasons in Article 39(1)(a) has been satisfied or the young person ought to be detained in his or her own interests (para 4.18). Further provision is made for the release of most children apparently under 14 years of age and children arrested under warrant (paras 4.19 to 4.21). There have been criticisms of the test for bail (para 5.74) and concern about high numbers of PACE (NI) admissions to the juvenile justice centre followed by release by the courts (para 4.27).

Q 40: The Commission invites the views of consultees on whether the test for the remand of children and young persons who have been charged with offences but not convicted should be amended to incorporate a single test which would be applied by both the police and the courts.

7.39 In many jurisdictions, a test similar to that laid down for adults is applied to children but that test is subject to consideration of the special needs of young persons or, more commonly, general youth justice principles (para 6.68). Such principles often emphasise many of the protections afforded to children under the CRC and may include consideration of the best interests of the child and the principle that detention should be a measure of last resort and for the shortest appropriate period of time (para 6.71). Detention for care reasons is explicitly prohibited in some jurisdictions (para 6.69). It has been suggested that the law relating to the bail and remand of children charged with offences in Northern Ireland places insufficient emphasis on these principles (para 4.28).

Q 41: The Commission seeks the views of consultees on whether a reformed test for the remand of children and young persons by the police and the courts should closely mirror the grounds for the refusal of bail laid down for adults, subject to appropriate modification to reflect the age of the young person.

7.40 Difficulties in locating appropriate accommodation for young persons often impact upon bail decision making, particularly for children who are in care (paras 5.77 and 6.74). Efforts have been made to address accommodation difficulties through bail support programmes in many jurisdictions and in some jurisdictions bail cannot be refused solely on the basis of a lack of accommodation (para 6.75). The possibility of bail hostels for young persons in Northern Ireland was raised in preliminary discussions (para 5.82).

Q 42: The Commission invites the views of consultees on whether bail legislation should prohibit the remand of young persons solely on the grounds of a lack of accommodation.

Q 43: Consultees' views are sought on appropriate administrative arrangements which may be devised, possibly drawing on existing models and/or resources, to address the issue of accommodation for young persons on bail.

7.41 A young person denied bail under PACE (NI) must be detained in a 'place of safety', which is defined as any juvenile justice centre, hospital or surgery, or any other suitable place, the occupier of which is willing temporarily to receive the arrested juvenile (para 4.18). Questions arose during preliminary discussions regarding the suitability or utility of including a 'hospital or surgery' in this definition as young persons are not detained in hospitals or surgeries (para 5.73).

Q 44: The Commission is of the preliminary view that the definition of the 'place of safety' should be reconsidered, deleting references to a 'hospital or surgery' which arguably serve no useful purpose. Do consultees agree?

7.42 Although most young persons on remand are accommodated in the juvenile justice centre, provision is made for the remand of some 15 and 16 year olds to the young offenders centre if they are considered likely to injure themselves or others (para 4.11). This practice was criticised in preliminary discussions (para 5.78). There was also disapproval of the failure to implement changes to the Criminal Justice (Children) (Northern Ireland) Order 1998 to allow 10 to 13 year olds to be remanded to secure accommodation, instead of the juvenile justice centre (para 5.78).

Q 45: The Commission invites the views of consultees on the inclusion in bail legislation of provisions designating where children and young persons on remand can be detained.

Q 46: Are consultees of the opinion that children should never be detained in the young offenders centre?

Q 47: Are consultees persuaded that legislation providing for secure accommodation for young persons on remand is necessary?

7.43 The importance of adult supervision while on bail is acknowledged in many jurisdictions. Parents or guardians must attend criminal proceedings relating to their children in some jurisdictions (para 6.77). Parents or guardians may be required to enter into a recognizance for the grant of bail or, if performing the role of surety, may consent to ensure compliance with some or all bail conditions, in addition to ensuring that the child surrenders to custody (paras 4.19 and 6.81). In some jurisdictions bail for children and young persons is conditional upon a responsible adult undertaking to ensure that they will comply with their bail conditions (para 6.76).

Q 48: The views of consultees are sought regarding the role which should be played by responsible adults during a child's period on bail.

7.44 Children released on court bail and police bail under Articles 6 and 7 of the 1998 Order may be required to enter into a personal recognizance for their surrender to custody, which may be estreated if they fail to surrender (para 4.22). Concern has been expressed about requiring a child to enter into such a recognizance and it was suggested that estreat would never be ordered in practice (para 5.83).

Q 49: In conformity with Q 14 above, the Commission is of the provisional opinion that the power to take a personal recognizance from a child should be abolished in respect of police and court bail. Do consultees agree?

7.45 The maturity and understanding of young persons is considered in many jurisdictions when setting out the conditions which may be attached to bail (para 6.78). Concern was expressed in preliminary discussions regarding the number and complexity of the bail conditions attached to bail granted to children, particularly children in care, which was seen as setting children up to fail (para 5.85). It was suggested that consideration should be given to the

education, employment and family needs of the young person when imposing conditions (para 5.87). In some jurisdictions youth justice principles, such as the 'best interests' principle must be considered when attaching conditions to a young person's bail (para 6.82).

7.46 Curfew and electronic monitoring requirements can only be imposed upon children in Northern Ireland if the court is of the view that, if it did not attach such conditions, it would be necessary to remand the child in custody to protect the public (para 4.23). There are similar limitations in other jurisdictions (para 6.82).

7.47 Particular concerns have been expressed about imprecise bail conditions being imposed upon children released to reside in children's homes, leaving staff and children in an uncertain situation (para 5.89). It was suggested that bail conditions should be realistic and efforts should be made to explain the obligations imposed in a comprehensible and child-friendly manner (para 5.88).

Q 50: The Commission seeks the views of consultees on the desirability of developing detailed guidance for bail decision makers concerning the imposition of bail conditions on children.

Q 51: Further, if consultees regard such guidance as desirable, views are sought on whether such guidance should have a statutory basis.

7.48 Provision is made in some jurisdictions for a duty to be placed on decision makers to explain the bail decision to the young person in age appropriate language (para 6.85) and it was suggested in preliminary discussions that greater efforts must be made to explain decisions and conditions imposed (para 5.88).

Q 52: The Commission invites views on whether a statutory duty should be imposed upon decision makers to make efforts to ensure that young persons understand bail decisions and conditions.

7.49 Bail support programmes for young persons are common in many jurisdictions and aim to facilitate young persons in successfully completing their bail and address a range of difficulties in their lives (para 6.84). Building on the positive work of the Youth Justice Agency, it has been suggested that bail support programmes for young persons should be more widely available and that bail fostering and mentoring should be utilised (para 5.82).

Q 53: Consultees' views are invited on the desirability of expanding bail support for young persons, building on existing programmes and/or resources.

EQUALITY IMPACT SCREENING

Q 54: The Commission has conducted an initial screening exercise of its provisional views (see Appendix A) and the views of consultees are invited on the preliminary conclusions reached.

APPENDIX A: CONSULTATION ON EQUALITY IMPACT SCREENING

INTRODUCTION

- A.1 Section 75 of the Northern Ireland Act 1998 requires public authorities (in this instance, the Northern Ireland Law Commission) to ensure that they carry out their functions having due regard to the need to promote equality of opportunity between:
- persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;
 - between men and women generally;
 - between persons with a disability and persons without; and
 - between persons with dependants and persons without.
- A.2 Without prejudice to the obligations set out above, the Commission is also required to have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group.
- A.3 An initial screening of the provisional views contained in this Consultation Paper has been carried out by the Commission. Consultees are invited to comment on the conclusions drawn from this initial screening.

BACKGROUND TO THE PROJECT FOR SCREENING PURPOSES

- A.4 The duties of the Commission are set out in the Justice (Northern Ireland) Act 2002. Section 51(1) provides that the Commission must keep under review the law of Northern Ireland with a view to its systematic development and reform, including in particular by: (a) codification, (b) the elimination of anomalies, (c) the repeal of legislation which is no longer of practical utility, and (d) the reduction of the number of separate legislative provisions, and generally by simplifying and modernising it.

- A.5 The current project on bail was included within the Commission's First Programme of Law Reform, as approved by the Secretary of State on 17th October 2009 and subsequently laid before the Houses of Parliament and the Northern Ireland Assembly in accordance with sections 52(2) and 52(3) of the Act.
- A.6 This Consultation Paper makes proposals concerning the reform of the law and practice of bail in Northern Ireland and invites consultees' views thereon. The key objectives of the bail project are to make recommendations which aim to: (a) simplify the current law and make it more accessible; (b) provide a legal framework that will promote consistency and transparency in bail decision making; (c) enhance public understanding of bail decision making; (d) ensure that the law on bail conforms with the requirements of the European Convention on Human Rights and maintains a proper balance between the right to liberty of the individual suspect and the interest of society in the prevention of crime and in the effective administration of criminal justice; (e) promote the development of appropriate administrative arrangements that will complement and ensure the effective working of any new or revised statutory scheme.
- A.7 The Commission is seeking the views of consultees regarding the desirability of enacting bail legislation for Northern Ireland that would incorporate a statutory right to bail and statutory grounds for the refusal of bail. Such legislation may also regulate the imposition of bail conditions and breach of bail, information to be provided to victims and the giving of reasons.
- A.8 Specific consideration is also given to the existing remand and bail provisions in respect of children and young persons found in the Criminal Justice (Children) (Northern Ireland) Order 1998. Views are sought concerning the provision of additional safeguards for children and young persons in accordance with relevant international instruments.

POTENTIAL IMPACT OF PROPOSALS

A.9 The individuals and organisations that proposals made as a result of this consultation process are most likely to impact upon are as follows:

- (i) suspects, defendants and their families;
- (ii) victims of crime, potential victims and their families;
- (iii) investigators, including the police;
- (iv) lawyers acting in criminal cases;
- (v) magistrates and judges in criminal cases;
- (vi) the training and supervisory bodies of lawyers, magistrates and judges;
- (vii) other statutory and non statutory agencies who work within the criminal justice system;
- (viii) the public generally, with regards to public confidence in the criminal justice system;
- (ix) the Northern Ireland Assembly; and
- (x) the Northern Ireland Prison Service.

RESPONSIBILITY FOR DELIVERY

A.10 The Commission will send its recommendations, accompanied by draft legislation, in a Final Report to the Department of Justice pursuant to section 52(1) of the Justice (Northern Ireland) Act 2002. The Department of Justice is then responsible for laying a copy of the report before the Northern Ireland Assembly. The Department of Justice would be responsible for the introduction of a Bill to the Northern Ireland Assembly and the passing of legislation would ultimately be a matter for the Assembly. Where the Commission suggests the adoption of appropriate administrative arrangements to complement the statutory scheme, the possible adoption of such measures would be a matter for the relevant public authorities (including the PSNI, PPS and Probation Service).

LINKAGES TO OTHER NORTHERN IRELAND DEPARTMENTS/NON DEPARTMENTAL PUBLIC BODIES ('NDPB')

A.11 The Department of Justice has an interest in the matter and communications have been maintained with the Department through a dedicated liaison officer.

DATA AVAILABLE TO FACILITATE SCREENING

A.12 The Commission has consulted the relevant agencies listed in Appendix 4 of the Equality Commission Practical Guidance on Equality Impact Assessment ('EQIA') and has had regard to data relating to the functioning of the criminal justice system as a whole. The Commission has also liaised with the following agencies with a view to obtaining any statistical information on bail decision making that may facilitate screening from a section 75 perspective:

- Northern Ireland Prison Service;
- Police Service Northern Ireland;
- Northern Ireland Statistics and Research Agency;
- Northern Ireland Court Service;
- Department of Justice.

A.13 There is, however, very limited statistical information available specifically in respect of bail decision making that is reflective of the section 75 demographics. As part of this consultation, consultees are invited to provide the Commission with any data which they consider to be of relevance to this initial screening exercise and any further screening exercise or full EQIA.

PRELIMINARY VIEWS ON SCREENING

A.14 It is the Commission's intention that the outcome of the present project will be to simplify the law on bail in Northern Ireland and to make it more accessible. It is envisaged that reform will remove existing anomalies and in doing so modernise the law and practice in respect of bail in this jurisdiction. The Commission has consulted on the use of terminology that will be understood clearly by the public. It is intended that the draft legislation that will accompany the final report will conform to plain language standards and avoid undue technicality. Reform of this area of law will also, it is hoped, serve to enhance the efficiency and effectiveness of its operation within Northern Ireland. It is the Commission's view that the outcome of this project - in terms of simplification, accessibility, modernisation and improving efficiency and effectiveness – will be to the benefit of all, including persons represented by the section 75 categories.

- A.15 In the course of its work towards the preparation of this Consultation Paper, the Commission held preliminary discussions with a wide range of stakeholders, fully reflective of the section 75 categories: see Chapter 5 and the list of participants in Appendix B. There was widespread support for the objectives of the project.
- A.16 The Commission also envisages that reform of the law on bail in Northern Ireland has the potential to enhance public confidence in the administration of criminal justice. There is statistical evidence for the proposition that fear of crime is a particular concern for the population of Northern Ireland.¹ In preliminary discussions, some concern was voiced about the commission of offences by persons on bail. While no programme of reform could aspire to eradicate offending while on bail, the Commission takes the view that reform of the law, accompanied by suitable administrative arrangements for bail monitoring and bail support, has the potential to reduce such offending and consequently to allay the concerns associated with it. In addition to that, it is hoped that increased understanding of the law will also have the effect of enhancing public confidence.
- A.17 The Commission is of the view that the proposals contained within this paper will not impact adversely on any of the section 75 categories. It is acknowledged that reform of the law on bail is likely to impact upon young males to a greater extent than other sectors of society. That is attributable to the higher representation of young males within the criminal justice system as a whole and does not, in the Commission's view, raise a difficulty with reference to section 75.

EQIA RECOMMENDATION

- A.18 The Commission is aware that full EQIA procedures should be carried out on proposals considered to have significant implications for equality of opportunity. The impact of the project in relation to social need, effect on people's daily lives, effect on economic, social and human rights and its

¹ D Quigley and R Freel, *Perceptions of Crime: Findings from the 2008/09 Northern Ireland Crime Survey* (Northern Ireland Office, 2010).

significance in terms of strategic importance and expenditure has been assessed as follows.

Prioritisation Factors	Significant impact	Moderate impact	Low impact	No impact
Effect on people's daily lives			√	
Effect on economic, social and Human Rights		√		
Significance in terms of strategic importance		√		
Significance in terms of expenditure			√	

- A.19 A full screening form can be made available on request to the Commission. The Commission will consider whether a full EQIA is required after the consultation responses have been received and analysed.

THE CONSULTATION PROCESS

- A.20 The Commission is continuing to collect data and any other relevant information that may inform further consideration of section 75 obligations. The Consultation Paper represents only the initial views of the Commission in respect of the proposals outlined. The Commission welcomes any additional views expressed by consultees

and will have due regard to those views when making its final recommendations.

APPENDIX B: PARTICIPANTS IN PRELIMINARY DISCUSSIONS

African Cultural Centre

An Munia Tober

Children's Law Centre

Church of Ireland

Committee on the Administration of Justice

Community Development Officers Northern Ireland

Community Restorative Justice

Contact Youth Counselling

Criminal Bar Association of Northern Ireland

Criminal Justice Inspection Northern Ireland

Department of Justice (since 12th April 2010, previously the Northern Ireland Office)

District Judges (Magistrates' Courts)

District Policing Partnerships

Extern

Fermanagh Women of the World

Health Promotion Agency

Include Youth

Institute for Conflict Research

Lakewood Centre

Lesbian, Gay and Bisexual Group

Maghaberry Prison

Multi Cultural Resource Centre

North Belfast Parents Group

Northern Ireland Alternatives

Northern Ireland Association for the Care and Resettlement of Offenders

Northern Ireland Commissioner for Children and Young People

Northern Ireland Community Foundation
Northern Ireland Council for Ethnic Minorities
Northern Ireland Council for Voluntary Action
Northern Ireland Courts and Tribunals Service
Northern Ireland Housing Executive
Northern Ireland Prison Service
Northern Ireland Statistics and Research Agency
Probation Board Northern Ireland
Police Ombudsman for Northern Ireland
Public Prosecution Service
Police Service of Northern Ireland
Social Services Inspectorate
The Law Society of Northern Ireland
UK Border Agency
Victim Support Northern Ireland
Woodlands Juvenile Justice Centre
Women's Aid
Youth Justice Agency

LIST OF ABBREVIATIONS

ACT	Australian Capital Territory
ASBO	Anti Social Behaviour Order
CAHABPS	Central After Hours Assessment and Bail Placement Service
Can	Canada
CARDS	Court Assessment and Referral Drug Scheme
CISP	Court Integrated Services Programme
CRC	Convention on the Rights of the Child
ECHR	European Convention on Human Rights
EQIA	Equality Impact Assessment
EW	England and Wales
ISSP	Intensive Supervision and Surveillance Programme
NDPB	Non Departmental Public Body
NIO	Northern Ireland Office
NIO PACE (NI) REVIEW	NIO, Government Proposals in response to a review of Police and Criminal Evidence (PACE) in Northern Ireland
NSW	New South Wales
NT	Northern Territory
NZ	New Zealand
PACE (NI)	The Police and Criminal Evidence (Northern Ireland) Order 1989
PBNI	Probation Board for Northern Ireland
PPS	Public Prosecution Service

PSNI	Police Service of Northern Ireland
QIADP	Queensland Indigenous Alcohol Diversion Programme
Qld	Queensland
ROI	Republic of Ireland
SA	South Australia
SFI Programme	Sentencing Framework Implementation Programme
Tas	Tasmania
Vic	Victoria
VOYPIC	Voice of Young People in Care
WA	Western Australia
WBCSF	West Belfast Community Safety Forum

GLOSSARY OF TERMS

Abscond: Failure to surrender to the custody of a court, the police or a prison governor (according to the requirements of a grant of bail) at an appointed time.

Adjournment: A suspension of legal proceedings to a later date.

Adversarial: A system of justice in which opposing parties present their arguments before an impartial arbiter, usually through the examination and cross-examination of witnesses and the presentation of other evidence.

Appellate court: A court which reviews the decision of a lower court.

Arraignment: A formal procedure in the Crown Court whereby the court clerk reads the indictment and calls upon the accused personally to plead guilty or not guilty to each count.

Arrest warrant: Authorisation granted by a court to the police to arrest a person and bring them before the court.

Bail: The temporary release of a person suspected or convicted of an offence by the police or the courts under a duty to surrender to custody at an appointed time and place. The term 'remanded on bail' is often used in this context.

Bail hostel: Premises for the accommodation of persons remanded on bail.

Committal: A decision by the magistrates' court that there is a prima facie case for an accused to answer on trial on indictment in the Crown Court. Once an accused is committed for trial, the case is transferred from the magistrates' court to the Crown Court.

Common Law: The body of law established in judicial decisions rather than statutory laws.

Compassionate bail: Bail granted by a court in exceptional circumstances, such as the funeral of a close relative.

Crown Court: A court with jurisdiction to hear serious criminal cases (usually indictable offences) which are committed for trial and are usually tried before a judge and jury.

Custodial remand: The detention of a person in prison while awaiting trial or sentence. The term 'remanded in custody' is often used in this context.

Custodial sentence: A punishment of imprisonment imposed by a court upon a convicted person.

Custody officer: An appointed police officer (of no less than the rank of sergeant) who, among other duties, determines whether or not an arrested suspect should be detained or released and whether sufficient evidence exists to charge the suspect with an offence.

Equality of arms: A principle which demands that each party to legal proceedings is provided with a reasonable opportunity to present their case under conditions that do not place them at a substantial disadvantage in relation to their opponent.

Estreatment / estreat: A formal legal procedure for extracting a recognizance from a person on bail or a surety for bail. The outcome of an order for estreat is that the person on bail and/or the surety must pay all or part of the amount promised in the recognizance.

Extradition: A legal process whereby one nation surrenders a suspected or convicted offender at the request of another nation.

Forfeiture: Loss of security provided for the surrender of an accused to custody.

High Court: Also known as the High Court of Justice, this is a superior court which deals with high value cases and has a supervisory jurisdiction over subordinate courts and tribunals.

Incorporation into domestic law: The embodiment in domestic legislation of an international treaty (such as the European Convention on Human Rights incorporated by the Human Rights Act 1998) with the result that the treaty can be relied upon by individuals in domestic courts.

Indemnify: To guarantee any loss which another might suffer.

Indictable offence: A criminal offence that may be tried on indictment in the Crown Court.

Indigenous person: A person from an ethnic group which inhabits a geographic region with which they have the earliest known historical connection. Aboriginal persons and Torres Strait Islanders are indigenous to the Australian continent.

Interim hospital order: A temporary hospital order made by a court in respect of a person convicted of certain offences where there is evidence that the offender is suffering from mental illness or severe mental impairment which may warrant a hospital order being made.

Jurisdiction: The power of a court to hear and decide a case or issue an order. Alternatively, the territorial scope of the competence of a legislature or the territory within which a court may exercise its power over a subject or person.

Jurisprudence: A collection of judgments that together form a body of law on a particular legal topic.

Magistrates' Court: A court of summary jurisdiction where a District Judge hears less serious criminal cases and conducts preliminary hearings in more serious criminal cases.

Non-custodial sentence: A criminal sentence other than a sentence of imprisonment, such as a fine, community service or probation.

Police bail: Bail granted by the police at a police station where a suspect is released with or without being charged and is under a duty to surrender to the custody of a court or at a police station at an appointed time.

Post charge bail: Police bail granted by a custody officer to a person after charge requiring the person to surrender to the custody of a court at an appointed time.

Pre charge bail: Police bail granted by a custody officer to a person after arrest but without charge which usually requires the person to return to a police station at an appointed time.

Probation: A sentence which may be imposed by a court instead of imprisonment or in addition to imprisonment that involves the supervision of the offender by a probation officer in the community.

Prosecution: The pursuit of legal proceedings, particularly criminal proceedings, wherein formal charges are pursued against an offender to final judgment. The party who pursues that final judgment is commonly known as the prosecution. In Northern Ireland, that role is usually performed by the Public Prosecution Service.

Ratification: A formal procedure whereby a state expresses consent to be bound by an international treaty.

Recognizance: An undertaking by a person to forfeit a sum of money in the event that he or she fails to abide by the conditions of an agreement.

Referendum: The submission of measures proposed or passed by a legislative body to the vote of the electorate for approval or rejection.

Restorative justice: A theory of justice that focuses on the needs of victims and offenders through mediation, reparation, and victim empowerment.

Security: Money or valuables lodged with a court by a person on bail which may be forfeited if he or she fails to surrender to custody.

Street bail: The power of the police to release a person following arrest but before charge without the need to take him or her to a police station.

Summary offence: An offence that is normally triable in a magistrates' court.

Summons: A court order which may direct a person to appear in court at a particular time to answer a specified allegation.

Surety: A person who enters into an undertaking to ensure the surrender of another person to custody (or his or her compliance with other conditions) or forfeit a specified sum of money.

Warrant backed for bail / warrant endorsed for bail: An arrest warrant endorsed by a court ordering that the subject of the warrant be released on bail once arrested.

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Bail Act 1982 (WA)
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Juvenile Justice Act 1992 (Qld)
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Victims of Crime Assistance Act 2009 (Qld)
Victims' Rights Act 1996 (NSW)
Victims' Charter Act 2006 (Vic)

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NILC 3 – Supplementary Consultation Paper: Land Law (2010)

NILC 4 – Consultation Paper: Vulnerable Witnesses in
Civil Proceedings (2010)

NILC 5 – Consultation Paper: Business Tenancies (2010)

NILC 6 – Consultation Paper: Second Programme of
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