

The Bail Project: An Overview

**Presentation by Professor Sean Doran, Barrister-at-Law, Northern
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1. When the Northern Ireland Law Commission was formed in 2008, it was a privilege to be appointed as a Commissioner. Through several years of working as an academic and more recently as a practitioner in this jurisdiction, I became accustomed to reading the reports of the English Law Commission in the areas of criminal evidence and procedure. Whilst admiring the obvious depth of research that had been channelled into that work, the admiration was matched at times by some frustration that in this jurisdiction it was generally our fate to follow rather than to lead when it came to forging legislative initiatives in the field of criminal justice. The establishment of the Commission, followed by the recent devolution of policing and justice, now offers a unique opportunity to engage in reform initiatives that are specifically tailored for jurisdictional needs and that are the product of locally based research and consultation.
2. Having referred to the privilege of being appointed to the Commission, I should say that it was also daunting to confront the blank canvas presented to us. In 2008, the report publication list of the Law Commission of England and Wales had topped the 300 mark and the Law Reform Commission in Dublin was at that time approaching its one hundredth project. It is a source of great encouragement now to see the Northern Ireland Law Commission reports making their way with some regularity to the library shelves and to the desks of those with a particular interest in their content. The bail consultation paper is the Commission's seventh formal publication and today marks its official launch and the beginning of a consultation period that will last until the 31st January 2011.

3. My remit today is to give you an overview of the project and I will shortly hand over to Katie Quinn, who is the project's senior lawyer and who took the lead role in authoring the paper and in managing the project on a day to day basis. Before I move on to deal with the subject matter of the report, I should say something about the respective roles of those involved in its creation. As has been mentioned before, Commissioners are not appointed on a full time basis and our role in individual projects is primarily at the level of oversight and management. Bobby Hunniford and I are the Commissioners involved in the project. As I mentioned, Katie, who is on secondment from the Law School at Queen's University, is our senior lawyer. Prior to Katie's appointment, Maria Dougan, who was on secondment from the Office of Legislative Counsel, was the lawyer dedicated to the project in its early stages. The lawyers have also been very ably assisted by one of the Commission's researchers, Joan Kennedy, whose role was to provide ongoing research support and other day to day assistance in the course of preparation of the consultation paper. Our other researchers and administrative staff - including Patricia MacBride, who has now been appointed to work on the project - also provided support and assistance to those working on the project as the need arose.

4. The paper has therefore been very much the product of a team effort and Bobby and I are immensely grateful for the unstinting efforts of the team members in bringing this paper to fruition. On the project steering group, we were also joined by Tom Haire of the Department of Justice, who provided invaluable guidance from his long experience of working in the field of criminal justice policy. You will also see from the acknowledgments in the paper that a number of individuals read and provided constructive comments on individual draft chapters and helped us in the gathering of information. I wish to record the Commission's gratitude for all of the external advice and assistance we have received to date.

5. Before I go on to introduce the contents of the paper, a question that presents itself is “Why bail reform?” The law on bail maintains an important balance between the individual right to liberty and the frequently competing interests of society in the prevention of crime, protection of the community and the effective administration of criminal justice. Decisions on bail are routinely made by the police and by the courts on a daily basis, operating rather like a hidden cog in the processing of the vast majority of individual cases. It is only a small minority of those decisions that attract broader public attention. On occasions, an individual decision may attract criticism retrospectively when an individual on bail goes on to commit a serious offence while at liberty. On other occasions, a decision to release a person on bail may cause surprise and concern among members of the public having regard to the serious nature of the index offence. Although decisions that give rise to controversy are in a small minority, perceived failings in the law of bail are often viewed by the public as symptomatic of failings in the criminal justice system as a whole. The subject of bail is therefore not only important in itself, but bail law and practice also have a broader part to play in the maintenance of public confidence in the criminal process.
6. From the Commission’s perspective, the law on bail is also a particularly suitable one for consideration, having regard to the Commission’s statutory remit. As the Chairman has indicated, section 51(1) of the Justice (Northern Ireland) Act 2002 provides that the Commission must keep the law of Northern Ireland under review, 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 the law.
7. Unlike in some other jurisdictions, the law governing the grant of bail in Northern Ireland has not been the subject of an overarching piece of

legislation. Police bail is mainly governed by the Police and Criminal Evidence (Northern Ireland) Order 1989, which itself has been the subject of many amendments driven by the constant revision and updating of the PACE legislation in England and Wales. The law governing court bail is derived from a range of sources including the common law, the inherent jurisdiction of the High Court and from statute (the most prominent being the Magistrates' Courts (Northern Ireland) Order 1981). Notably, there are no statutory grounds for the refusal of bail by the courts and, although this may not be seen as problematic from the practitioner's standpoint, it is arguably not conducive to promoting greater public understanding of the basis on which a particular decision has been made. It is also notable that the law governing the arrangements for the enforcement of bail decisions is of a somewhat technical nature. The current project will afford an opportunity for the review of the finer technical details as well as the bigger issues of principle, such as the expression of the criteria for refusal of bail in statutory format.

8. The Commission sets out the objectives of the project at paragraph 1.7. Those are (a) to 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 decisions, (d) ensure that the law on bail conforms with the requirements of the ECHR and (e) promote the development of appropriate administrative arrangements that will complement and ensure the effective working of any new or revised statutory scheme.
9. That last point is important. As an American politician once said, "One of the greatest delusions in the world is the hope that the evils in this world are to be cured by legislation" (Thomas Brackett Reed). When it comes to bail law, "evils" may be putting it too strongly, but it is trite to say that legislation alone will not of itself ensure the effective working of a system of bail decision

making in practice. In those jurisdictions that have adopted bail-specific legislation, questions continue to be asked as to whether the law is operating justly and effectively.

10. Legislation can certainly provide a framework for decision making by the police and the courts. Clearly drafted and accessible legislation alone, however, will not guarantee satisfaction with how bail works in practice. Matters such as the support for individuals on bail, the reduction of periods spent on bail and the provision of information to victims of crime on bail decisions are likely to require carefully crafted administrative rather than purely legislative solutions. Where appropriate, the consultation paper invites views on the improvement and development of administrative arrangements running in tandem with the legislative scheme. The Commission foresees the reform of bail law developing along two paths: the devising of a unified and simplified piece of legislation to govern core decision making and the development of administrative solutions to ensure that “bail works” in practice.
11. Moving on to the structure of the paper, the first chapter sets out the background to the project and its scope and objectives. The second chapter looks at the general principles that are at play when the police and the courts are tasked with making decisions on bail. Particular attention is given to the right to liberty conferred by Article 5 of the European Convention on Human Rights and to particular decisions to which Article 5 has given rise in the Northern Ireland courts since the enactment of the Human Rights Act 1998. It goes without saying that Article 5 and the accompanying jurisprudence set a template to which any reform of the law on bail in this jurisdiction must conform.
12. Chapter Three conducts a detailed analysis of the present law and practice in Northern Ireland. What can be seen in particular from that chapter is the

quite separate development of the law governing decisions taken by the police and that governing decisions taken by the courts. The chapter analyses the various stages at which bail decisions fall to be taken. It also considers in some detail the presumption in favour of bail and the grounds for refusal of bail as they operate in the different contexts. Brief reference is made to bail decision-making after the point of conviction and to the issue of adequate information on bail being made available to decision makers at the appropriate time.

13. The chapter also addresses the law governing bail conditions, sureties and security; the provisions that govern the manner in which the authorities can respond in the event of a breach of bail; the monitoring and support of persons while on bail; and the specific issues of providing information to victims and the giving of reasons for decisions. The Commission had hoped that, in the period between the publication of the consultation paper and the publication of the second edition of Barry Valentine's book on criminal procedure in Northern Ireland, the chapter might provide not only the foundation of the present project but also the most up-to-date source of reference for the law on bail in this jurisdiction. Unfortunately, however, Barry beat us to it; a copy of his admirable textbook arrived on my desk earlier this week.
14. Chapter Four addresses specifically the special provisions governing the grant of bail to children and young persons. Those provisions are set in context by reference to the relevant international principles and obligations, most notably the United Nations Convention on the Rights of the Child. Many of you will be aware that, in the context of court bail, Article 12 of the Criminal Justice (Children) (Northern Ireland) Order 1998 requires the release of a child under 18 except in certain clearly defined circumstances: namely, where the court considers that remand in custody is necessary for public protection and the offence is a serious sexual offence or offence of violence, or

where the offence charged is an indictable offence and the child was on bail at the time of commission of the offence or was found guilty of an indictable offence within a two year period before charge. That provision is to be contrasted with the position concerning police bail, where the circumstances in which a child may be detained are not defined in equivalent terms.

15. The provision governing court bail for children has attracted a range of views in the preliminary discussions the Commission has held to date. One particular issue that arises for consultation, as Katie will consider in more detail, is whether in any new legislation there should in fact be a separately worded test applying to children and young persons, or whether the same basic criteria should be applied, albeit with the decision maker being required to have regard to the individual's age when making the decision.
16. The consultation process offers an opportunity for discussion and debate on this contentious subject; as I have already indicated, the very difficult issues to which the treatment of children within the criminal justice system habitually give rise are unlikely to be resolved by the quick fix of legislation alone. Experience in the jurisdiction has demonstrated the particular value of bail support programmes in addressing issues related to offending by children and young persons. The success of any legislative scheme governing decisions on bail that affect children might well depend on the extra-statutory support that is provided to children and young persons at the very earliest stages of their coming into contact with the police and the courts.
17. I have touched upon the preliminary discussions conducted by the Commission in preparation for the production of this consultation paper. Those discussions are detailed in Chapter Five. Under the stewardship of the Commission's non-legal member Bobby Hunniford, the Commission has conducted extensive discussions with lawyers and others working within the criminal justice system and with a wide range of statutory and voluntary

bodies. The discussions have taken place both on a one-to-one basis and in a series of seminars hosted by the Commission at different venues in Northern Ireland last year and earlier this year. Those discussions proved most valuable and the Commission is thankful to those who participated in them. The purpose was to ensure that all those with an interest in this subject would have notice of the project in which we are engaged and also to ensure that our work was fully informed by the views of those with expertise and experience of this area of law and practice. I would refer you to Appendix B of the paper, which sets out a list of participants in those discussions. As that list and today's audience proves, expertise and experience is not confined to the lawyers. Bobby has, I think it is fair to say, well and truly convinced his fellow Commissioners that law reform ought not to be the sole preserve of the lawyers.

18. Following on from this launch, we will publicise the paper further at a series of four public events in the jurisdiction. These will take place at the Farset International Conference Centre, Springfield Road, Belfast on 20th October; at the Northern Ireland Council for Voluntary Action (NICVA) Office, Duncairn Gardens, Belfast on Friday 5th November; at the Cohannon Inn, Dungannon, on Wednesday 10th November; and at the Everglades Hotel in Derry on Wednesday 17th November. Those events will run from 9.30am to 12 on each day and we hope that they will attract as wide an audience as possible. Those events and the consultation period in general will afford a further opportunity for those with an interest in the subject to make known their views. Ultimately, the recommendations in the final report and the terms of the draft legislation which is intended to be published with that report will be for the Commission to determine. Some will we hope welcome our conclusions. Others will no doubt disagree with them or at least some of them. But it is our sincere hope that no one with an interest in the subject in this jurisdiction will be in a position to say that they were not consulted.

19. Before inviting Katie to address some of the concrete questions that the Commission is presenting for consultation in Chapter Seven of the paper, I will refer briefly to Chapter Six, which contains a comparative study of bail laws, practices and reform initiatives in other jurisdictions. Particular thanks are due to Joan Kennedy, whose extensive and diligent research took her as far afield as Australia, Canada, the United States and other jurisdictions from which useful material might be extracted to assist in the development of the law in this jurisdiction.

20. That research was, of course, undertaken from the library in Belfast and with the assistance of the vast electronic resources that nowadays permit easy access to a wealth of comparative material. It should also be emphasised that the notion of borrowing from the experience of other jurisdictions can sometimes be fraught with difficulty: a seemingly attractive initiative in one jurisdiction may not necessarily transfer satisfactorily to another. Notwithstanding those caveats, we hope that the material presented in Chapter Six will provide consultees with a helpful insight into the treatment of the subject elsewhere. Rather than providing a synopsis of the law and practice of the jurisdictions studied, the chapter adopts a thematic approach to the subject and seeks to draw out prominent aspects of the law and practice in discrete areas, such as the presumption of bail and the criteria for refusal, bail decision making, breach and enforcement, support for persons on bail, information for victims of crime and the rules applying to children and young persons. The Chapter provides, I think, a catalogue of interesting solutions to familiar problems.

21. This brief sketch of the paper and the background to the project is, of course, no substitute for a reading of the document itself. On behalf of the Commission, I would urge you to consider its contents, to bring it to the attention of others who might be interested and to provide your views to the Commission by the close of the consultation period on 31st January 2011. I

now have pleasure in handing over to Katie Quinn for an introduction to some of the key points on which the views of consultees are sought.

Sean Doran

30.09.10