

THE SENTENCING COMMISSION
FOR SCOTLAND

REPORT ON
THE USE OF BAIL AND REMAND

2005

FOREWORD

I have pleasure in presenting the report of the Sentencing Commission for Scotland into the use of bail and remand. This is our first report. The topic was identified by the Scottish Executive as one to which it attached priority when it set up the Commission in November 2003.

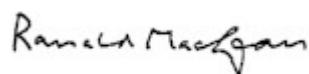
Our review of this complex area of our law and practice, in which there are obvious competing interests, has been thorough. We have required to keep foremost in our minds the cardinal principle of our criminal justice system that an accused person is presumed to be innocent until proved guilty. There is a difficult but necessary balance to be struck between, on the one hand, protecting the right of accused persons to be treated reasonably and fairly, and, on the other hand, recognising the interests of public safety and the smooth operation of judicial proceedings. It might have been easy to secure one or other of these interests but the challenge is to secure both.

In this report we have made almost 40 recommendations. We believe that taken as a whole they should make a material improvement. We accept that dealing more robustly with those who fail to observe the conditions under which they are granted bail could cause some short term increase in the prison population but we consider that the greater transparency which we are encouraging in the process and procedures should mean that the lost respect for the law in this area is restored with the consequence of reducing offending by those on bail and a reduction in the numbers who fail to appear when required to do so.

I am very grateful to my colleagues on the Commission who have given their time to produce this report. They are all busy people in their own walks of life, some of whom had not previously encountered this area of our criminal justice system. Further, the Commission very much appreciated the time taken by those who responded to our consultation paper on the subject which we issued last June. We have taken account of the views of those who commented on the questions we posed.

For the most part we are unanimous in the recommendations that we make. Where that is not the case, we say so. It is not surprising that views on how to make improvements in the criminal justice system are not necessarily the same.

Finally, I would like to thank the members of our secretariat for the contributions that they have made to the completion and presentation of this report.



Rt Hon Lord MacLean
Chairman
April 2005

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PART ONE: INTRODUCTION

1.1 The Sentencing Commission for Scotland (“the Commission”) is an independent body set up by the Scottish Executive under its policy statement “A Partnership For A Better Scotland.” The Commission was launched in November 2003 with a remit to review and make recommendations to the Scottish Executive on a number of topics including the use of bail and remand. We were asked to consider the latter as a matter of priority. This Report sets out our findings and recommendations for changes to the arrangements, statutory or otherwise, governing this matter.

1.2 The members of the Sentencing Commission, appointed by the Scottish Ministers, are:

The Rt Hon Lord MacLean (Chairman)

Members

The Rt Hon The Lord Mackay of Drumadoon

Sheriff Charles Stoddart: Sheriff of Lothian and Borders

Sheriff Rita Rae QC: Sheriff of Glasgow and Strathkelvin

Mr Bill Gilchrist: Area Procurator Fiscal, Lothian and Borders (at Edinburgh) (formerly Deputy Crown Agent)

Chief Constable David Strang: Chief Constable of Dumfries and Galloway Police

Mr Alex Prentice: Advocate Depute (formerly of McCourts Solicitors)

Ms Valerie Stacey QC: Vice-Dean of the Faculty of Advocates

Mr Jim Dickie: Director of Social Work at North Lanarkshire Council

Councillor Eric Jackson: Chair of the Social Work Committee of East Ayrshire Council

Ms Bernadette Monaghan: Director of Apex

Ms Kaliani Lyle: Chief Executive of Citizens Advice Scotland

Mr David McKenna: Chief Executive of Victim Support Scotland

Professor Neil Hutton: Co-Director of the Centre for Sentencing Research at the University of Strathclyde

Professor Chris Gane: Chair of Scots Law at Aberdeen University

Professor David McCrone: Department of Sociology at Edinburgh University

Mrs Sue Brookes: Governor at HMI Cornton Vale

The Commission has a secretariat of five: Mr Alan Quinn (Secretary), Mrs Kay McCorquodale (Solicitor), Mrs Diane Machin (Principal Researcher), Mrs Rona Tatler (Assistant Secretary) and Ms Taryn Forrest (Office Manager).

1.3 The impetus for our review of bail and remand stems from the apparent general concern about:

- the number, and on occasion the gravity, of offences being committed by those granted bail;
- the time that those accused of criminal charges (sometimes of a serious nature) remain on bail awaiting trial or the disposal of any subsequent appeal;
- the incidence of those on bail threatening witnesses directly and indirectly;

- the fact that some accused persons are not being prosecuted and punished for offences committed while on bail or for breach of bail conditions;
- the disruption to the efficient administration of justice by those who, after being granted bail, fail to appear at court when required by their bail order to do so;
- the size of and growth in the prison population, which is the result of the numbers of those who are being remanded in custody.

1.4 At our first meeting in November 2003 we discussed the general purposes and principles of our remit as it related to these concerns. At subsequent meetings we built on this initial work by debating at length the operation of the existing arrangements, looking at what could be done to balance the need for fairness to an unconvicted person against the importance of protecting the public from harm and ensuring that the process of justice is not disrupted by those who breach bail orders. We noted that remanding someone in custody can sometimes be counter-productive and especially disruptive to the lives of those who are eventually acquitted or given a non-custodial sentence. We examined the available, though sadly incomplete, statistical information and looked at arrangements elsewhere. We noted in particular that records do not appear to be kept of the number of those who do not attend court when required to do so, nor of the number of non-appearance warrants issued nor of the number outstanding at any one time. In order to observe at first hand the bail process, some members of the Commission observed a busy custody court in Glasgow Sheriff Court and a sitting of the High Court of Justiciary conducted by a single judge dealing with bail appeals. We also visited the 218 Time Out Centre described in paragraphs 4.32 to 4.36 of our Consultation Paper.

1.5 We agreed that in order to inform our thinking we should consult interested parties including the judiciary, the legal organisations, the police, the local authorities and the voluntary sector. We considered that the most effective way to do that was to issue a Consultation Paper in which we posed key questions identified by us.

1.6 A sub-group of the Commission was established in March 2004 to finalise the drafting of the Consultation Paper, which was published on 28th June 2004. A copy has been reproduced at Annex A to this report. The individuals and others to whom it was sent are listed at Annex B. We posed a series of 37 questions focusing on:

- The issues and the law
- The role of the police and the procurator fiscal in relation to bail
- Court decisions pre-trial and during trial
- Reviews and appeals in respect of pre-trial decisions
- Breach of bail
- Bail post-conviction

Respondents could opt to address all or only some of the questions posed.

Outcome of the Consultation

1.7 The consultation period ended on 30 September 2004. We are most grateful to those who took the time to let us have their comments on the issues that we raised but feel obliged

to record our disappointment with the modest number of responses received. Just over 10% of those to whom we issued our Consultation Paper in fact replied.

1.8 An analysis of the consultation responses was carried out by Linda Nicholson of The Research Shop, a Scottish firm specialising in public sector social research. A copy of her report is appended to this report at Annex C and is available on our website www.scottishsentencingcommission.gov.uk. Also available on the website are copies of those responses which the writers were content should be made available to the public.

1.9 A number of overarching themes emerged from the consultation responses. These included the perception that bail is not respected by alleged offenders and that the system appears to be too lenient; the view that bail and remand issues cannot be tackled in isolation from the criminal justice system as a whole; and a general concern that the number of people remanded to custody should not increase as a result of any changes made.

1.10 Our recommendations, which are summarised at Part Nine, have regard to the range of views that we received in response to the series of questions that we posed in our Consultation Paper.

Our Aims

1.11 The main objectives of our review have therefore been to seek to achieve:

- a reduction in offending by those who are granted bail;
- a reduction in the number of individuals released on bail who fail to appear in court when required to do so or otherwise breach the conditions of bail; and
- a reduction in the remand population, without compromising the safety of the public.

1.12 We hope that the recommendations made in this report will lead to these objectives being achieved and will also result in a general improvement in the consistency and the effectiveness of decision making in relation to bail and remand.

PART TWO: THE EXTENT OF THE PROBLEM

2.1 Our review has convinced us that there is a serious problem in this area of the criminal justice system and that the law, procedures and practices in relation to bail and remand have resulted in a loss of public confidence. Compelling evidence for this proposition was not hard to find. In our Consultation Paper we referred to some published research and to certain statistics, but these do not go very far. Recently published provisional figures for 2004 record that the average daily population of remand prisoners increased by 3% between 2003 and 2004 to 1,253 out of a total average daily population of 6,805 (Provisional Prison Statistics Scotland, 2004, published by the Scottish Prison Service on 25 February 2005). Indeed, the available statistical information (such as it is) fails to reveal the true extent of the problem where the law on bail is not observed nor properly enforced. There is an obvious human and financial cost in terms of time and inconvenience caused by breaches of bail, not to mention the risks to public safety and good order which arise when bail conditions are flouted. Likewise, there is a human and financial cost where accused persons are remanded in custody unnecessarily. All of this became apparent to us before we consulted on the matter; in responding to our questions, our consultees suggested various areas for improvement of the law and practice; and we were ourselves able to find many stark instances of a failing system. We found that in some instances the law itself was unclear; that reasons for bail decisions were not always apparent; and that sanctions for breach of bail were not always applied, or were applied inconsistently. Breaches of bail in its many forms, such as non-appearance, the commission of further offences and other failures to observe bail conditions all figured highly in our analysis, as did the procedures and practices used by courts and other bodies.

2.2 In respect of non-appearance, we assessed the problem as endemic. Accused persons on bail frequently fail to turn up for court hearings. In these cases non-appearance warrants are usually issued, but their enforcement is not always carried out with due alacrity. When the accused is arrested and brought back before the court, in many instances bail is granted on a second or subsequent occasion. In the summary courts this is often because the Crown does not object, something which under the present law obliges the court to grant bail again. Further non-appearances may then occur; and proper sanctions are sometimes overlooked. It is also a sad fact that to many accused individuals, arrest and punishment are simply occupational hazards and it is apparent from discussions that we have had with prisoners on visits that we have made to Saughton, Shotts, Barlinnie and Cornton Vale prisons that some simply play the system to their best advantage. The comments received from the Glasgow Bar Association in response to Parts One and Two of our Consultation Paper (comments confirmed to us from other sources and in any event well known to the judicial and other legal members of the Commission) illustrate the problem. In short, it seems that a substantial number of accused individuals fail to appear in court when ordered to do so not from a fear of being sentenced but from a lack of interest and respect for the authority of the court. Either they will be arrested on a warrant or if the case is continued, they may attend court if they can be bothered. There is no real fear of punishment for such a failure to attend.

2.3 As noted at paragraph 1.4, we have been unable to obtain statistical information confirming the number of warrants issued for failure to appear by persons on bail. The figure for England and Wales has recently been estimated at 60,000. That would suggest that the figure in Scotland could be several thousand at any one time. What we do know – as we have pointed out in Part One of our Consultation Paper - is that over 9,000 of those given bail each year are likely to offend while on bail; and around 4,000 will offend more than once while on

bail. Assessing the risk of offending on bail or of non-appearance is a difficult process, as is managing that risk where bail conditions are imposed. An easy solution would be to remand more accused persons in custody. That would ensure their appearance in court and would prevent those concerned from offending while on bail. But to do so would exacerbate the already burgeoning prison population, though this may be necessary in the short term if it could be shown to be of long-term benefit.

2.4 It is not just the bail system prior to trial that is open to abuse: so too is the system of interim liberation in the event that a custodial sentence is imposed and an appeal is lodged. The potential for abuse often arises in summary cases, but occasionally it also arises in solemn appeals against sentence. Summary appeals ought to be dealt with expeditiously, but there are often delays; the consequence is that many appellants are granted interim liberation to prevent the situation where the sentence would otherwise have been served before the appeal can be determined. We understand that a significant number of those freed on interim liberation then fail to turn up for their appeal hearings. Their appeals are normally refused for want of insistence but the authorities then have the problem of locating the appellants, re-arresting them and re-processing them back into prison, to spend a comparatively short period of time before their summary sentence expires. Moreover, there are occasions when appellants who have attended the High Court for the hearing of their appeals then leave the Appeal Court before their case is called or recalled, as the case may be. Warrants for their arrest are granted and in due course are enforced, but normally the appellants suffer no penalty whatsoever for having acted in breach of the conditions attached to their interim liberation.

2.5 We stress that many, but by no means all, of the problems of bail and remand arise in summary cases which are dealt with in the District and Sheriff Courts. It is a regrettable fact that the term “summary justice” has become a misnomer. In this regard we note and **support**, those recommendations made by the Summary Justice Review Committee, chaired by Sheriff Principal McInnes, which are designed to ensure:

- Cases reach court more quickly.
- Cases are prepared earlier and more effectively by both sides.
- Those who plead guilty do so at the appropriate time.
- Trials are efficient, requiring attendance only of those witnesses whose evidence is in contention.

2.6 But the actual (and potential for) abuse of the bail system, the degree of offending while on bail and the defects in the relative law, procedure and practice lead us to the view that there is a very strong case for the whole system to be strengthened, so as to encourage and maintain respect for the process. What needs to be addressed are the practical consequences of the current manifold failures by accused persons to adhere to bail conditions. In particular, the ways in which bail conditions are enforced and how sanctions for non-compliance are applied need to be radically improved. In addition, other recommendations that we have made should lead to a more detailed scrutiny of cases before remand is ordered, thereby reducing the number of those being remanded.

2.7 Although strictly speaking it is outwith our terms of reference, we **strongly support** the objective of a speedy appeal system, particularly in the context of summary cases, and have noted the recommendation made by the McInnes Committee for the establishment of a Summary Appeal Court.

PART THREE: GENERAL ISSUES OF BAIL AND REMAND

3.1 In Part Two of our Consultation Paper we described the present law under reference to Part III of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) and Article 5 of the European Convention on Human Rights. We dealt there with the current law and practice in relation to bail conditions, both standard and special; the existing power of the Crown to liberate an accused who has been remanded in custody without bringing him/her back to court; and we highlighted the legal requirements as to the time within which trials must commence, whether or not the accused is in custody; and how these time limits are to be adjusted following the coming into force of the Bonomy reforms. We stressed that under the current law, the attitude of the Crown to the question of bail is crucial.

Summary of Views Expressed

3.2 In our Consultation Paper we invited views on what steps could be taken to reduce the number of offences committed by those on bail. Three main themes dominated the responses. We have already mentioned the first two, being the need to ensure that the bail system is properly respected and the need to reduce the length of time between a case first being called and final disposal. A third theme was the need to increase the availability of better targeted bail supervision. We also asked what steps could be taken to (i) ensure that those granted bail appear in court when required to do so, (ii) reduce the number of those remanded in custody without jeopardising public safety, creating a risk of further offending or hindering the smooth operation of judicial proceedings, and (iii) promote more widespread understanding about the decision making process in relation to bail and remand.

3.3 Many respondents considered that impressing upon those granted bail the seriousness of breaching conditions and providing more opportunities for bail supervision would help to ensure that those granted bail appear in court when required to do so. Around one third recommended that consideration be given to the use of electronic monitoring of those on bail. Several respondents suggested greater pro-activity by criminal justice agencies in reminding accused persons of forthcoming court dates. Two key steps suggested to reduce the number of those remanded in custody without posing a risk or hindering the smooth operation of judicial proceedings, were the more consistent availability of bail supervision and bail hostels, and better-targeted support services. Respondents considered that the promotion of a greater understanding of bail and remand decision-making could result from greater openness and transparency in the process, organised media campaigns and public relations strategies, making the criteria for decision-making more explicit and widely known and providing information to victims via Victim Support Scotland.

3.4 Consultees were also asked whether they considered that the criteria to be taken into account by the court in deciding whether to grant bail should be prescribed in statute and, if so, whether that would promote consistency in decision-making. Views were relatively evenly split between those advocating statutory prescription, those against the proposal and those who could see both advantages and disadvantages. The most commonly cited advantages were the promotion of consistency and greater transparency. The most commonly cited disadvantage was the perceived reduction in judicial flexibility and discretion.

3.5 We also invited views on whether the range of standard bail conditions is adequate and, if not, what additional ones might be added to the standard list. We also asked whether

there should be additional special conditions to those commonly encountered. Two thirds of respondents considered that the current range of standard bail conditions is adequate. Of the few additional standard conditions identified, the most common were a requirement for those on bail to notify the court of any change of address and to report regularly to their solicitor, the police or criminal justice social work. Potential additional special conditions identified included remote monitoring, agreeing to bail supervision and complying with its requirements, engaging with relevant support services, not entering licensed premises, refraining from drinking alcohol, and in the case of alleged sex offenders, refraining from contact with unsupervised children.

What Needs to be Done

3.6 Before addressing what steps we think can be taken to improve the current arrangements, it is important to stress that there are certain aspects that cannot be changed. Firstly, all crimes (including murder) are now bailable. Secondly, the gravity of an alleged offence is not a good enough reason (on its own) for refusing bail and ordering a remand in custody. Finally, the basic tenet of our criminal justice system is that an accused is innocent until proved guilty. Under the current law, a court must consider the question of bail (without the need for any application) on the first (but not on any subsequent) occasion on which the accused appears in custody.

3.7 We consider that to meet one of the general aims of our review, namely, to reduce the number of offences committed by those on bail, the following steps require to be taken. Firstly, measures should be introduced to reduce the period of time a person remains on bail without the charge being determined. Currently many months elapse between a grant of bail at the start of the process and the point at which the case is finally concluded, either by trial or after appeal. This problem is particularly acute in summary cases but occurs also in cases tried before a jury. The longer someone is on bail, the greater the opportunity for breach of bail, whether by the commission of further offences or otherwise. Secondly, we see considerable potential for enhanced provision of bail supervision and electronic monitoring. We described the current provision in our Consultation Paper and consider (subject to what we say in paragraph 3.9 below) that this should be made more widely available. Thirdly, we consider that a range of simple practical measures should be introduced to remind persons on bail of their obligations under the law, not least to attend court when required to do so. We regard many of the present practices as inadequate. In the following paragraphs we expand on these proposals.

3.8 As noted at paragraph 2.5 the term “summary justice” has become a misnomer. It is unsurprising, given the time that can pass before a summary prosecution is finally determined, that there will be instances of further alleged offending by those on bail; that court dates will be “missed” (either by accident or design); or that circumstances will change, rendering the original bail decision inappropriate. We understand that the Scottish Executive is currently considering the proposals made by the McInnes Committee on Summary Justice and hope that a decision on how to proceed will be made soon. Turning to solemn cases, the law already recognises that a bail order may last so long that it requires to be revisited before a trial. We note that under s.72A(9) of the Criminal Procedure (Amendment) (Scotland) Act 2004 (“the 2004 Act”) the High Court of Justiciary must, when fixing a trial diet at a preliminary hearing held under the Act, review any bail conditions previously imposed and may, if appropriate, fix different bail conditions. Similar powers are given by s.19(2) of the 2004 Act to the sheriff presiding at a first diet in indictment proceedings in the sheriff court.

In this way, courts will be able to monitor a bail order during its currency, a potentially useful tool in ensuring compliance.

3.9 We are aware that there is some evidence that the rate of offending by those in respect of whom bail supervision is ordered is lower than that of those for whom there is no supervision; and we were impressed by our visit to the 218 Time Out Centre in Glasgow. We **recommend** that the Scottish Executive should gather detailed evidence on the effectiveness of bail supervision and if that evidence supports the information that currently exists, the extent of such schemes should be widened and the necessary investment made so as to enable supervision to be available on a larger scale. In courts where bail supervision is already available, we further **recommend** that where the procurator fiscal opposes the grant of bail, the court should be obliged to consider whether the accused would be suitable for bail subject to supervision before it makes any decision to remand the accused in custody.

3.10 The 2004 Act provides for electronic monitoring as a condition of bail. Under the Act this is available only in cases where a person has been refused bail and then applies, following that refusal, for bail with an electronic monitoring condition. The court, on that person's application, will consider whether the imposition of an order restricting his/her movements by electronic monitoring would enable that person to be released on bail. This provision therefore only comes into play when a court has considered and rejected the option of bail on other conditions and concluded that the person should be remanded in custody. The provisions are intended to offer an additional bail condition in cases where the court would otherwise have imposed a custodial remand and not as an additional measure in cases where the individual would, in any case, have been granted bail.

3.11 The court also has the power under the 2004 Act to impose a remote monitoring restriction at its own hand without an application from the accused. This power will only be available in cases of rape and murder. This provision has been included to try to ensure that the court will use this power as a means of tightening the conditions attached to the granting of bail rather than to allow an accused person to be released on bail when he/she would otherwise be remanded. The provision extends to offenders convicted pending sentence and those convicted and/or sentenced pending appeal. These provisions are more stringent, as the court must justify its non-use of remote monitoring in these cases.

3.12 We are aware that the Scottish Executive plans to pilot and evaluate these provisions, following which Ministers will take decisions on whether to make the remote monitoring scheme available in all courts. If the outcome of the piloting is positive, we **recommend** that resources are made available to allow the scheme to be extended to all courts as soon as reasonably practicable. We further **recommend** that in principle electronic monitoring as a condition of bail should **not** be restricted only to those who would otherwise be remanded in custody and that a court should be able to order an electronic monitoring condition in any case where it considers that this would improve the prospects of an accused person not offending while on bail or of appearing in court when required to do so.

3.13 Many accused live chaotic lifestyles and simply do not record anywhere or remember when they have a court appearance. Further there appears to be no uniformity of practice across courts in the matter of informing an accused of the time and date of their next court appearance, beyond the ordinary oral intimation made by the clerk of court. We do not think that accused persons generally pay sufficient attention to what is said to them by the clerk; all that many are interested in is whether or not they are to be bailed and they rely on receiving a

confirmatory letter from their solicitor. Nor does the standard form of bail order served on the accused even record the date of their next appearance. These defects in practice can easily be remedied, for example, by the clerk of court providing those granted bail with a written note or card before they leave the court stipulating the details pertaining to their next court appearance. This is already done in some summary courts. We also think that courts could institute a reminder system, for example by electronic means where practicable, of intimating court dates direct to accused persons in summary cases set down for trial as an additional prompt and to re-enforce the need to attend and we **recommend** that steps are taken to achieve this.

3.14 We see a case for redesigning the current form of bail order, which is now computer generated and sets out bail conditions with less than adequate emphasis. At one time it was common practice for the sheriff or magistrate, when granting bail, to read out all the bail conditions from the Bench and require the accused to consent orally, but this practice has largely died out, particularly in some busy summary courts. Where it is done, it has the potential for delay; often the person granted bail signifies his/her written consent to the bail conditions in the cell area after their court appearance. We doubt whether many accused persons really absorb what is said to them by anyone at this point in the process, beyond the fact that bail is being granted. In particular a bail order should specify the date of the accused's next court appearance in summary cases and we so **recommend**.

3.15 On improving public awareness of the law and arrangements governing the grant and refusal of bail, we consider that the courts should always give reasons for their decisions, for that is part of the judicial function. We so **recommend**. These reasons should be of sufficient clarity for the public, especially victims, as well as the accused, to understand why the decision to grant bail or to remand in custody has been taken. It is appreciated that this could increase the time taken to dispose of cases in what are already busy custody courts but we believe it is essential in the interests of justice that no-one is in any doubt why particular decisions have been made. The reasons may be brief, but they must have substance. They should be recorded in writing or on tape, so that they are available for any court dealing with a review of the decision or an appeal against it. But they should be kept in such a separate form which ensures that, in summary cases which proceed to trial, they do not come to the attention of the trial sheriff or magistrate.

3.16 As part of our review we visited a sitting of the daily custody court at Glasgow Sheriff Court. We were struck by the mechanistic nature of the proceedings and questioned if all that was involved was necessary. For example, each accused appeared separately. If the procurator fiscal did not oppose bail it was granted without any further discussion – in conformity with the current law – and the individual was then informed orally of the conditions of bail and when the next court appearance would be. It does seem to us that procedural arrangements could be devised to speed up these formalities. We also consider that there should be a limit put on the number of bail applications that a sheriff (or magistrate) is expected to dispose of in a single sitting. We **recommend** that consideration should be given by sheriffs principal to devising appropriate court programming procedures to address these issues.

3.17 We have carefully considered whether the provision in statute of the criteria to which a court must have regard in deciding whether or not an accused should be granted bail would, amongst other things, improve transparency and perhaps consistency in decision-making. The majority view of the Commission, with a strong dissenting minority, was that the

disadvantages of this step, including the risk of a loss of flexibility and the prospect of a preponderance of legal challenges that the courts had failed to interpret the legislation fairly and properly, are not sufficiently persuasive to outweigh what we believe are distinct advantages. It would be for the High Court to develop detailed guidance on the interpretation of the statutory criteria. We therefore **recommend** that the law should be amended so that the current factors, as set out in Part Two of our Consultation Paper, to which a court must have regard in deciding whether or not to grant an accused bail are included in statute.

3.18 We do not consider that the factors which influence the police in deciding whether or not to liberate an accused, with or without a written undertaking, or detain them in custody to be brought before a court, or those that influence the Crown in deciding whether or not to oppose bail, should be incorporated into statute. We consider that these procedures operate satisfactorily under the administrative guidelines issued to Chief Constables and procurators fiscal by the Lord Advocate. Some of those who opposed the recommendation in the preceding paragraph regarded it as illogical for the factors to which the police and the Crown must have regard in deciding whether to liberate an individual, remaining a matter for administrative guidance. They did not, however, argue for the procedures operated by the police and the Crown to be made subject to statutory provision.

3.19 We further consider that there should be no change to the law that enables the Crown to liberate at any time a person who has previously been remanded in custody by a court. To constrain the Crown in this respect would be to interfere with its role as public prosecutor. It must be free to decide if and how to proceed in the public interest and must retain its residual right to liberate anyone accused of crime. However, the Crown has to accept responsibility for its decision and must be prepared to explain its decision publicly if required to do so. If the Crown decides to liberate a person, that is the Crown's decision and not that of the court; too often the courts are held accountable for decisions that were not of their making.

3.20 We consider that the list of current standard bail conditions is broadly adequate given that they can be supplemented with special conditions as and when necessary. We do, however, consider that there would be merit in requiring an accused to notify the court of any change of residential address and we **recommend** that this should be incorporated as a standard condition. At present, there is no such obligation; under the current law the court may, but only on the written application by the accused, amend the bail address. We further **recommend**, in the light of persuasive views expressed to us by police officers on a visit to Strathclyde Police E Division, that the commonly-used special condition which prohibits an accused from approaching a particular person(s) should be modified to include, where appropriate, a prohibition on the accused from visiting a particular area, as opposed to a particular address. This would enable the police to take action against an accused for breach of such a condition without having to rely on any civilian witness who might fear intimidation or otherwise be reluctant to report the breach of bail.

3.21 We have also noted the concern that has been expressed by a small number of our consultees relating to what appears to be the routine remanding in custody of an accused with no fixed abode. Someone in this situation may have an itinerant or unstable lifestyle, but this is not universally the case. We therefore **recommend** that every case of this kind should be considered on its own facts and circumstances.

PART FOUR: ROLE OF THE POLICE AND THE PROCURATOR FISCAL

4.1 In our Consultation Paper we set out the factors which the police take into account when deciding whether to liberate an accused following arrest. The police have the choice of the following options:

- Liberate the accused on a written undertaking to appear at court at a specific time and date;
- Liberate the accused without any written undertaking (ie if the procurator fiscal decides to take criminal proceedings against the accused he/she will require to cite the accused to attend court);
- Detain the accused in custody and bring him/her before a court on the next day on which the court is sitting to dispose of criminal business.

The Lord Advocate has issued Guidelines to Chief Constables setting out the circumstances in which accused persons should not be liberated. These are set out at 3.8 of our Consultation Paper.

4.2 If the police decide to release an accused on an undertaking or liberate him/her for report, they have no power under the law at present to impose conditions on the accused's release.

4.3 In all cases in which accused persons are apprehended by the police and detained in custody, the procurator fiscal may order the accused's liberation without bringing the accused before the court. The procurator fiscal will do so if satisfied that there is insufficient evidence or that a prosecution would not be in the public interest. In addition, the procurator fiscal may authorise liberation where there is a need for further enquiries to be conducted.

4.4 If the procurator fiscal decides to take proceedings against an accused person, he/she must then decide whether or not to oppose bail. The four principal reasons for opposing bail are as follows:

- Where the circumstances or nature of the offence are such that there is reason to believe that the accused is a danger to the public or himself/herself;
- Where there are reasonable grounds to suspect that the accused may intimidate or threaten witnesses, or interfere with or dispose of evidence or whether there is any other risk of prejudice to enquiries still to be made if he/she is released;
- Where from the criminal record of the accused and/or the number of current charges it is obvious that he/she is carrying on a career of crime;
- Where there are reasonable grounds to suspect that the accused intends to abscond or where he/she has a history of failing to appear at court.

Summary of Views Expressed

4.5 In our Consultation Paper we invited views on whether the police and the procurator fiscal should be able to impose conditions on individuals whom they liberate without their appearing in court and, if so, what they should be. We also sought comments on whether the factors taken into account by procurators fiscal in deciding whether to oppose bail were the right ones and, if not, what they should be. Lastly, we sought views on whether the criteria

that the police and procurators fiscal take into account in deciding whether to liberate an accused pending appearance in court should be prescribed by statute.

4.6 A majority of respondents were opposed to the proposition that police and procurators fiscal should be able to impose conditions on an accused person who is liberated without appearing in court. Some argued that the court was the appropriate place for decisions to be taken which could affect a person's liberty. On the other hand, some respondents were in favour of this proposition where the accused person agreed to the conditions and could apply to the court for a review of the conditions. Some consultees were in favour of the proposition, but only within the context of clear guidelines on appropriate conditions or where only standard conditions could be applied.

4.7 The vast majority of respondents approved of the factors which the procurator fiscal takes into account in deciding whether to oppose bail, although many were concerned about the opposition to bail in cases where the accused has no fixed abode.

4.8 On the question of statutory criteria, consultees were evenly split between those who considered that the criteria should be prescribed in statute and those against the proposition. Those in favour suggested that this would promote consistency in decision making and facilitate a greater clarity and transparency in the criteria taken into account. Those who opposed statutory prescription felt that this would reduce flexibility and restrict opportunities to take into account unforeseen circumstances.

What Needs to be Done

4.9 We have carefully considered the current arrangements. We have considered whether it would be appropriate to give the police the power to impose conditions on an accused person liberated for report or on an undertaking. Although this proposal did not attract support from consultees, the majority of the Commission can see no objection in principle to the police being allowed to impose bail conditions, especially where the accused is being released on an undertaking to appear at a specified court at a specified time. A person liberated on such an undertaking commits an offence if he/she fails without reasonable excuse to appear at court. At present if the accused refused to give such an undertaking he/she would be detained in custody and brought before the court on the next lawful day. While a minority of us felt that because issues of individual liberty were at stake, any bail conditions should be imposed by a court, the majority could see no reason why the police should not be allowed to make release on an undertaking conditional on the accused also agreeing to comply with certain bail conditions. If the accused refused to accept the conditions, he/she would be detained in custody and brought before the court. At the very least, we do not believe there could be any objection to the accused being required to accept the standard conditions of bail. These require the accused to appear at court, not to commit an offence while on bail and not to interfere with witnesses or otherwise obstruct the course of justice. The accused is already required to give an undertaking that he/she will appear in court at the specified time; and a breach of the other conditions would involve the commission of an offence quite apart from the breach of bail. In any event, we doubt whether an accused unwilling to give an undertaking in relation to these matters ought to be liberated by the police.

4.10 The advantage in imposing these standard conditions on an accused liberated on an undertaking is that any offence committed in breach of the bail order would be recorded as

such, and this would assist the police and the court in future cases when considering whether the accused was a person who could be trusted to comply with bail conditions. It would also give the police the power to arrest without warrant an accused who has been released on bail where the police have reasonable grounds to suspect the accused of breaching bail.

4.11 We accept, however, that the imposition of such standard conditions would be of limited value. It would be of greater benefit to victims, and possibly help prevent further offending, if the police could attach special conditions of bail, such as that the accused should not have contact with a victim or visit a particular place. As with the standard conditions, the accused need not accept such special conditions, in which case he/she would be detained in custody and brought before the court where the procurator fiscal will have the option of opposing bail or seeking the imposition of the special conditions. We therefore **recommend** that when the police liberate an accused on an undertaking to appear in court, they should be given the power to impose both standard and special conditions of bail with the accused's agreement.

4.12 We have considered whether the procurator fiscal should also be given a power to impose conditions on an accused whom they liberate from custody. The Lord Advocate already has the power to admit an accused person to bail. However, this power is rarely used and appears only to have been exercised in the case of accused persons who have been remanded in custody by a court. We are not aware of the power ever having been exercised in relation to an accused person liberated from police custody on the instructions of the procurator fiscal. As such liberation is normally instructed where the procurator fiscal has decided to take no proceedings or where there is a need for further enquiry before a decision on proceedings can be taken, we see no advantage in the procurator fiscal being given the power to impose conditions on the accused.

4.13 On the question of prescribing in statute the criteria that the police and procurators fiscal take into account in deciding whether to liberate an accused person, or the criteria that procurators fiscal take into account in deciding whether to oppose bail, we see no persuasive case for change. We debated whether this would improve consistency but were not persuaded that there would be any meaningful improvement brought about by such a change. Both the police and procurators fiscal are already subject to guidelines issued by the Lord Advocate. The Lord Advocate's Guidelines reflect the factors which will be taken into account by a court in deciding whether or not to remand an accused in custody. If the criteria to which a court must have regard are prescribed in statute, we would have no doubt that the Lord Advocate's guidelines would reflect the statutory criteria. Compliance with the Lord Advocate's guidelines should ensure that a consistent approach is taken to these matters by both the police and procurators fiscal. We therefore **recommend** that the observance of the Lord Advocate's guidelines is closely monitored by Her Majesty's Chief Inspector of Constabulary and the Crown Office and Procurator Fiscal Service Inspectorate and that any evidence of inconsistency in their application is brought to the attention of the Lord Advocate.

PART FIVE: COURT DECISIONS - PRE-TRIAL AND DURING TRIAL

5.1 We have already outlined the legal principles which the court will apply in making its decision on whether bail should be granted prior to trial and, if it should, what conditions might be attached to the bail order. But the information before the court in order to allow it to exercise its discretion at this stage is seriously limited. As we have indicated, if the Crown does not oppose bail, it will be granted. It is only where bail is opposed by the Crown that the court will require to make a decision. This is not widely understood outside legal circles.

5.2 As we said in our Consultation Paper, bail hearings are normally short in duration. The sheriff or magistrate will have a copy of the petition, or in summary cases, the complaint. There may be a written bail application, although this is not needed on the first occasion on which the accused appears from custody. Any such written application is uninformative; all that is contained in it is the fact of application and no written grounds setting out why bail should be granted are included. This is no doubt because the accused has a general right to bail, which should only be refused for good reason.

5.3 Oral argument is presented by the procurator fiscal and then by the accused's solicitor. No evidence on oath is taken. If the ground of opposition is based on the accused's record, then the Crown will place before the court a print-out of the relevant details obtained from the Scottish Criminal Records Office and the procurator fiscal will highlight (orally) whatever factors in the accused's record are deemed significant, such as the analogous nature of previous convictions, a course of criminal conduct, previous failures to appear, previous breaches of bail and similar features. If the opposition is based on other grounds such as an apprehension that the accused will interfere with witnesses, the Crown will outline its reasons for its view. The procurator fiscal will explain why a remand in custody is sought. The accused's solicitor will respond on all relevant matters, including the personal circumstances of the accused. He/she will explain what these are and, if possible, will produce any documents which show that, for example, the accused is working, or has a fixed address. If a Bail Information Scheme or Bail Supervision is available in the particular court, then a written report will usually be lodged. The court will then make its decision.

Summary of Views Expressed

5.4 In our Consultation Paper we invited views on what information consultees considered should be available to the court in making a bail decision and what further categories of information might assist the court in making decisions on bail applications, reviews and appeals. If additional information should be made available we asked how that could speedily be done. Respondents specified a range of information which they considered should be available to the court in making bail decisions. Most commonly mentioned were address details, criminal record, lifestyle/family circumstances, history of bail experience, offence details, physical and mental health, risk posed to the public and likely impact on alleged victims. A few respondents urged that more time be allocated to verify information provided to the court and that there should be more information-sharing between relevant criminal justice agencies. Of those who suggested how information could be made speedily available to the courts, views focused on greater use of Bail Information Services and sharing of information, perhaps by electronic means.

5.5 We then asked consultees what factors should be taken into account by the court in its decision to grant or refuse bail. A recurring response was that the current factors which the

court takes into account when it decides whether or not to grant bail are sufficient, backed up by verification and risk assessment. When asked if the court should be obliged to grant bail where the procurator fiscal has not opposed it, the majority view was that the court should not be so obliged. In addition the majority view was that if the court has refused bail then the procurator fiscal should not thereafter be able to admit such a person to bail.

5.6 With regard to consistency in decision making, all but one of the respondents recognised the need to take action to improve consistency in decision making relating to the grant or refusal of bail. Amongst the suggestions made for improving consistency were the production of guidance, the formal, systematic recording of reasons for decisions and better training of those involved.

5.7 Respondents suggested two main ways to help those on bail complete their period on bail satisfactorily. Firstly, implementation of individually tailored, needs-based supports on a graduated scale and secondly, supports aimed at tackling offending behaviour, for example, by addressing health or accommodation problems. In general it was thought that rather than considering different kinds of support on bail depending on gender or age of the accused person, bail support packages should be tailored to individual needs. Secondly, respondents suggested that fewer persons would commit offences when on bail if the time between being granted bail and being tried was shorter than is presently the case.

5.8 When asked for ideas as to the extent and manner in which bail information and bail supervision schemes might be developed, a dominating theme from respondents was for existing priority target groups for bail supervision schemes to be widened or abolished so that such schemes can be considered for all cases in which the procurator fiscal intends to oppose bail. In addition the idea of making bail hostels and other accommodation for those on bail more available was given a cautious welcome by the majority of those who commented. Many respondents wished to see the 218 Time Out initiative considered for male accused with the majority of respondents agreeing that the types of supervision and support facilities that are available to female accused may assist male accused.

5.9 Finally, we asked whether reasons for bail and remand decisions should routinely be provided and formally recorded. The vast majority of those who commented recommended routine provision and formal recording of reasons for bail and remand decisions.

What Needs to be Done

5.10 We consider that the information available to the court is generally satisfactory. It goes without saying that it is vital to the proper administration of justice that both sides are heard so as to ensure that in any case where the Crown is opposing bail an informed decision is taken by the court. However, we see the benefit of Bail Information Schemes and **recommend** that such schemes should be available in all courts.

5.11 We consider that where the procurator fiscal does not oppose bail prior to the trial, the court should be obliged to grant it and we **recommend** that statutory provision should be made to remove any uncertainty about that. Some of us are of the opinion that in a case where an accused is appearing before the court accused of breach of bail or following the grant of a non-appearance warrant, the Crown should address the court on its reasons for the decision not to oppose bail. The failure of the Crown to give reasons in such instances is a

matter of considerable and widespread concern and we invite the Lord Advocate to reflect upon that.

5.12 Where a court has refused bail an accused should, as now, be able to be liberated by the Crown. We consider that it must be the unfettered prerogative of the Crown to decide if and how to continue with proceedings.

5.13 We consider that improvements need to be made to reduce the perceived inconsistencies in the grant and refusal of bail. We **recommend** that these be addressed in a number of ways. Firstly, there must be consistent application of the Lord Advocate's guidelines to procurators fiscal. We have dealt with this in Part Four and in the recommendation at para 4.13 on the monitoring by the COPFS Inspectorate. Secondly, there is a need for more training for the professional judiciary by the Judicial Studies Committee, including the provision of briefing material on the use of bail information and bail supervision schemes. We **recommend** that all judges, sheriffs and magistrates should have training devoted to the issues in bail decisions. Next, we think that inconsistencies in the grant/refusal of bail could be reduced by the systematic recording of reasons for decisions, a matter already discussed in Part Three in the context of public awareness. Finally, we **recommend** that the High Court should issue up-to-date guidance on the issues surrounding bail decisions by courts. The "Wheatley Guidelines" were issued over 20 years ago and have been largely overtaken by events.

5.14 As part of our review we made a visit to observe the facilities at, and operation of, the "218 Time Out" centre in Glasgow. We **recommend** that facilities mirroring these should be made available across the country for all classes of accused persons, male and female. We believe that the availability of such facilities would enable the number of those being remanded in custody to be reduced.

5.15 During a trial an accused person who is on bail is required to attend court each day and is free to leave at the end of the court day. His/her bail is continued by the court, but the Crown does not normally oppose its continuation. If at the end of the Crown case it is accepted that there is a sufficiency of evidence against an accused, the Crown will on some occasions change its attitude and seek to have the court withdraw bail on the ground that there is an increased risk that the accused might abscond. The court requires to hear the agent or counsel for the defence and may allow bail if the judge forms a view that the risk of absconding is not high. There is little to assist the court in making an assessment of risk. We therefore invite the Lord Advocate to consider issuing guidance to prosecutors on how to approach the issue of the renewal of bail during a trial.

PART SIX: REVIEWS AND APPEALS IN RESPECT OF PRE-TRIAL DECISIONS

6.1 As we explained in our Consultation Paper, after the court has taken an initial decision as to whether an accused person, appearing from custody, should be granted bail pending trial, both the Crown and the accused are entitled to have that decision reconsidered. There are two different procedures that can be followed - a bail review by the court that took the original decision and a bail appeal to the High Court of Justiciary.

Bail Review

6.2 Sections 30 and 31 of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) lay down the procedure for bail reviews. The provisions of Section 30 allow an accused, who has been refused bail or who has failed to accept the conditions of bail the court has imposed or in respect of whom the money bail ordered has not been deposited, to seek a review of the court’s original decision. Such an application by the accused can be brought before the court that made the original decision, but not before the fifth day after the original decision or before the fifteenth day after any subsequent decision reviewing the original decision. The court has power to review its earlier decision and to admit the accused to bail or fix bail on different conditions. The statutory provisions apply to bail before trial and bail between conviction and sentence.

6.3 The provisions of section 31 allow the Crown to seek a review of any decision to grant bail to an accused, where the Crown is in a position to place before the court material information that was not available to the Crown when bail was originally granted to the accused. An application for review at the instance of the Crown can be lodged at any time. When dealing with such an application, the court has power to withdraw the grant of bail and remand the accused in custody or to grant, or continue the grant of bail, on the same or on different conditions.

6.4 In our Consultation Paper we did not pose any questions which dealt specifically with the procedures for bail reviews carried out by the same court that granted or refused an earlier application for bail. During the preparation of this report we have gained the impression that, with the exception of hearings at which the court is provided with a report on an accused prepared by a Bail Information Scheme, or is considering granting bail subject to a condition requiring supervision under a Bail Supervision Scheme, comparatively little use is made of the procedures for reviewing earlier decisions on bail. No such applications came before the court during the visits which some of our members made to the Custody Court in Glasgow Sheriff Court and to the hearing of bail appeals in the High Court. Nor was the possibility of greater use of the statutory review procedures flagged up in the responses we received to our Consultation Paper.

6.5 Whether or not such procedures could be invoked in an individual case is, of course, almost entirely dependent on the circumstances of that case. Nevertheless, we consider it appropriate to raise the issue as to whether greater recourse could be made to applications under both these sections. In Part One of this report, we discussed the concerns relating to the current use of bail and remand in Scotland. These include, on the one hand, the size and growth of the prison population partly as a result of the number of accused persons being remanded in custody pending trial, and, on the other, the actual and apprehended behaviour of accused who are admitted to bail.

6.6 As far as accused persons are concerned, it is possible to envisage cases in which an application to admit the accused to bail might be presented to the court and viewed by the Crown and/or the court in a somewhat more favourable light if it came some days or weeks after the initial apprehension of the accused and his/her first appearance in court. Within a comparatively short period of time after an accused's first appearance in court, the nature and gravity of the alleged offence(s) may have become clearer to both the Crown and those representing the accused. That may enable the Crown to reconsider its original opposition to the accused being granted bail. Furthermore, within a short period of time following an initial refusal of bail, the personal circumstances of the accused, such as the most suitable bail address the accused has to offer, could also have been clarified. That might enable additional special conditions to be suggested to the court. The fact that the holding of a review would allow the Crown and an accused's representative a longer period of time to consider what information to place before the court could assist the court to make better informed decisions, resulting in fewer accused persons being remanded in custody unnecessarily.

6.7 We understand why accused persons who have been refused bail pending trial may be anxious to appeal immediately to the High Court. When they do so, however, their appeals tend to be dealt with on the basis of the same limited information as was available to the Crown, their legal representatives and the court when their bail applications were initially dealt with. For that reason, we raise the question whether one way of seeking to ensure that accused persons are not remanded in custody pending trial for any longer than necessary, might be the greater use of the review procedure provided for by section 30.

6.8 We consider that more appropriate use of that review procedure might be encouraged by additional procedure rules and the issuing of guidelines by the High Court, when the opportunity of doing so arises in an appeal before that court. Procedure rules could deal with practical matters, such as the making of a written record of the reasons for all decisions to grant or refuse bail and the lodging of a written application setting out the factual basis upon which a review is sought. Guidance could cover issues such as whether, and if so, to what extent the accused would have to demonstrate that there had been a change in circumstances since the application for bail was initially dealt with. On the other hand, we are conscious that accused persons should not be encouraged to pursue applications for review of bail which have no prospects of success. That is a factor that we would expect the High Court of Justiciary to deal with in any guidance it may issue. We accordingly **recommend** that the High Court of Justiciary should consider issuing additional procedure rules and guidance relating to the conduct of bail reviews in terms of section 30.

6.9 One respondent made an interesting suggestion relating to those accused facing solemn proceedings, who are placed on supervised bail. Such accused may remain on bail for many months. The suggestion was that the grant of supervised bail to such accused should be the subject of review, to ascertain whether, in the light of the accused's conduct since release on bail, all that was now required was bail on standard conditions. As the resources available for supervised bail are limited, such reviews, after say two or three months could well make it possible to place more accused on supervised bail during the initial months after their arrest and first appearance in court. The supervision and support an accused receives during those initial few months may then make it possible to lift the special condition of supervision. We **recommend** that bail review for an accused placed on supervised bail should be encouraged. The practicalities for the holding of such reviews would require to be explored by the Scottish Executive, the Scottish Court Service and the Judiciary, with the assistance of local criminal justice boards. If the initiative for the holding

of such a review was to come from the organisation responsible for supervising the accused, then it is possible that the exhibition of a favourable report by that organisation to the accused, the Crown and the court might make it possible for the conditions of bail to be varied, without there being any necessity for a further court hearing to take place.

6.10 As far as a bail review at the instance of the Crown under section 31 is concerned, we are conscious of the fact that such a review cannot be sought unless the Crown is able to place before the court material information that was not available to it when the accused was first granted bail. It appears to us that the provisions of section 31 could be of relevance at different stages of criminal proceedings against an individual accused. At the stage of an accused's first appearance in Court, when bail is being applied for the first time, the Crown has to determine its attitude to the granting of bail. The Crown frequently has to do so in the light of limited information about the circumstances of the alleged offence and the alleged offender.

6.11 The fact that the Crown could seek a review of any grant of bail, in the event of subsequent conduct on the part of the accused, such as further offending or interference with witnesses, might in some cases weigh in favour of bail being agreed to at the accused's initial appearance from custody. If the accused's conduct whilst on bail gives rise for concern, a review of the decision to grant bail could be sought by the Crown, even although the Crown was not minded to, or in a position to, prefer additional charges against the accused. Equally, however, such a review could be sought in cases in which the accused has re-offended whilst on bail. Accordingly, a bail review at the instance of the Crown might provide one mechanism for dealing with the problem of accused persons, who, having been granted bail on one summary complaint, subsequently end up facing further charges on multiple other complaints, which are then set down for intermediate diets and trials on different dates. In our view, greater reliance upon the existence of the provisions of section 31 by the Crown might on the one hand enable the Crown to agree to bail in more cases than it currently does, whilst at the same time afford the Crown a mechanism for taking swifter and more positive action to accelerate criminal proceedings against those who have been granted bail and appear to be re-offending or otherwise breaching the conditions of bail. This important issue is one we address more fully in Part Seven. At this point we **recommend** that the Crown reviews its policy in relation to bail reviews under the provisions of section 31 and considers whether it should make that policy public.

Bail Appeals

6.12 In our Consultation Paper, we noted that views differ as to whether a bail appeal to the High Court of Justiciary amounts to a rehearing of the original application for bail or whether the High Court Judge is concerned only with determining whether the decision taken at first instance was one which the decision maker was entitled to make in the exercise of his/her discretion. We also noted that a decision to allow or refuse bail is (i) one made by weighing up the factors said by the Crown to militate against the accused person's right to bail and (ii) not a decision reached by the application of a formula. For those reasons, we recognised that it was possible for a High Court Judge to reach the conclusion that, whilst he/she might have made a different decision, the decision made by the lower court, whether to grant or refuse bail, was one which lay within the spectrum of reasonable decisions. In our Consultation Paper we stated that we understood that some High Court Judges took the view that in such a situation they should not interfere with the discretion of the decision-maker at first instance. On the other hand, we indicated that other High Court Judges appeared to take

the view that, possibly because the liberty of the subject was in issue, they should rehear the whole question whether the accused should be granted bail and could substitute their own decision on that question.

6.13 Against that background, we posed the following questions:

On what basis should the High Court deal with an appeal in respect of bail – as a review of the exercise of discretion by the sheriff or magistrate or by assessing the case afresh, which might include information additional to that which the sheriff or magistrate considered?

Do you consider that it would be helpful to have more Judicial guidance from the appeal court on issues relating to the grant and refusal of bail?

If so, on which particular issues?

Summary of Views Expressed

6.14 Those who responded to our Consultation Paper were almost evenly split between those who considered that a bail appeal to the High Court of Justiciary should be limited to a review of the decision previously taken by the sheriff, stipendiary magistrate or justice, in the exercise of their discretion, and those who considered that the High Court of Justiciary should consider the question of bail afresh. There are also, of course, a few cases in which the initial application for bail comes before a High Court Judge, in which event an appeal lies to an Appeal Court of three High Court Judges.

6.15 In addition, the vast majority of respondents to the Consultation Paper considered that the High Court of Justiciary should provide much fuller judicial guidance on issues relating to the grant and refusal of bail. In particular, more detailed guidance was requested in respect of issues such as the criteria that ought to be considered when the grant of bail is being considered, the interpretation and application of such criteria and the weight to attach to different factors such as the age of the accused and any delay between the date of the offence and the commencement of criminal proceedings.

What Needs to be Done

6.16 In our view, the first issue that requires to be clarified is the role of the High Court Judge at a bail appeal, whether the appeal is being heard by one Judge or before a bench of three or more Judges, as occasionally occurs. The key question is whether a bail appeal should only involve the High Court of Justiciary reviewing the decision of the judge at first instance, with a view to determining whether that decision was one that fell within the reasonable exercise of the lower court's discretion, or whether the bail appeal should permit a complete re-hearing of the issue as to whether or not the accused should be granted bail.

6.17 In considering this important issue, we are conscious of the fact that if bail appeals are to involve a full re-hearing, rather than be restricted to a review of the lower court's decision, that may encourage more bail appeals to be taken. We are also conscious that some accused persons may consider, and may indeed be advised, that they have nothing to lose by appealing and thereby obtaining a re-hearing of their applications for bail. In addition to such considerations, we have had the opportunity of hearing applications for bail being dealt with

at first instance and on appeal and we have had the opportunity of considering what the various respondents have said on this key issue. Having taken account of all we have seen and learnt about the current system of bail and remand in Scotland, we have reached the conclusion that when the High Court of Justiciary is dealing with appeals against the grant or refusal of bail, it is in the public interest that the High Court should be able to consider the issues involved afresh.

6.18 We have reached that conclusion for the following reasons:

- (a) The decision as to whether an accused person should be granted bail or remanded in custody pending trial is an important decision;
- (b) A decision to refuse bail is important from the point of view of the accused, who suffers a loss of liberty in respect of an alleged offence, to which the presumption of innocence attaches, and who, by reason of a loss of employment or other social consequence of being remanded in custody, may find himself/herself at a disadvantage as to possible disposals in the event of conviction, compared with what might have been the position had bail had been granted;
- (c) A decision to grant bail can have significant consequences for members of the public if the accused, once released from custody, re-offends or otherwise breaches the conditions of bail;
- (d) Bail appeals are normally heard within a very few days of the decisions being appealed against. Those appearing for the Crown and the accused are rarely in a position to provide the High Court Judge(s) with full details of the information placed before the court of first instance. On occasion, they proffer factual information that may not have been, or definitely was not, before the lower court. The reasons why bail was granted or refused in the lower court are not currently recorded in full in the court minutes. In such circumstances we consider that it must be difficult, if not impossible, for the High Court Judge(s) to confine the hearing of a bail appeal to a review of the exercise of discretion of the sheriff or magistrate at first instance, as opposed to undertaking a complete re-hearing of the questions as to whether, and, if so, on what conditions, the accused should be admitted to bail.

6.19 In our recommendation 7 we have recommended that reasons should always be given for the decision to grant bail or to remand an accused person. In addition to this we **recommend** that the law should be clarified so that a bail appeal on behalf of either the Crown or the accused does involve a complete re-hearing of the questions whether, and if so on what conditions, the accused should be admitted to bail.

6.20 We also **recommend** that the High Court of Justiciary should issue practice guidance for practitioners about the matters that should be borne in mind and followed when preparing for and taking part in bail appeals. Guidance about the prior exchange of additional written material or information that is going to be placed before the High Court is an example of what might be covered. A requirement to lodge written grounds of appeal could be of assistance in restricting bail appeals which have little chance of success.

6.21 More generally, we consider that judicial guidance relating to the granting of bail on appeal that was given prior to incorporation of the European Convention for Human Rights into our domestic law and the enactment of the Bail, Judicial Appointments etc. (Scotland)

Act 2002 ought now to be revisited. It is clear that respondents to our Consultation Paper would welcome fuller and up-to-date guidance and we can understand why.

6.22 In our recommendation 9 we have recommended that the factors that a court must have regard to in deciding whether or not to grant an accused bail should be included in statute. Following on from this we **recommend** that the High Court of Justiciary should issue at the earliest opportunity guidance about the factors to which the court will have regard and the approach that the High Court will take in dealing with such appeals. Such guidance would not only be of benefit to members of the judiciary, lawyers, and accused persons, who may be involved in bail appeals. It would also help to inform members of the public, including politicians and members of the media, about how important decisions relating to bail are approached and taken.

6.23 Whilst we were very impressed with the manner in which the Sheriff and the High Court Judge handled the large number of bail applications and bail appeals that were placed before them, we were concerned that almost invariably they were being asked to consider the contents of papers that they had never had the prior opportunity to read. We fully appreciate that in relation to accused persons appearing from custody for the first time, it would in most instances be impracticable to give the judge at first instance advance sight of papers that may have to be taken account of when deciding upon an application for bail. That does not apply to papers relating to bail reviews and bail appeals. We accordingly **recommend** that programming procedures should be evolved in the High Court of Justiciary to ensure that those members of the judiciary who are to hear bail reviews and bail appeals, are given a sufficient opportunity to look through the relevant papers before hearing bail reviews and bail appeals.

6.24 Bearing in mind the recommendation we have already made that reasons for the grant or refusal of bail should be stated by the judge and minuted in the case papers, we also **recommend** that similar procedures be followed at bail reviews and bail appeals.

6.25 One issue that was raised during the course of our consultation exercise was whether it might be possible to achieve greater consistency within the decisions taken at bail appeals. Bail appeals take place in the High Court of Justiciary virtually every day on which the court is sitting. Whilst the number of appeals varies, it is not uncommon for the Judge to whom bail appeals are allocated to hear more the thirty appeals, before returning to other judicial duties. We understand that most High Court Judges are allocated bail appeals, in accordance with a rota, and that as a consequence it is unlikely that any one Judge will deal with bail appeals for more than two weeks within a calendar year. We are informed that in the not too distant past, most of the bail appeals were dealt with by the Lord Justice Clerk and, in his absence, by a limited number of Inner House Judges.

6.26 We do not consider that it would appropriate for us to trespass at this stage onto the allocation of judicial duties. The listing of cases is a matter for the Judiciary themselves. We can well see that in the sheriff court and the district court it may be desirable, if not also unavoidable, that the vast majority of sheriffs should be expected to deal with applications for bail on behalf of those appearing from custody. We can also envisage that if the Scottish Executive implements the recommendation of the McInnes Committee as to the establishment of a Summary Appeal Court, the opportunity might be taken to devolve bail appeals relating to summary criminal proceedings to such a court. That would undoubtedly limit the number of bail appeals to be dealt with by the High Court of Justiciary.

Nevertheless, we anticipate that, for the foreseeable future, it will be necessary for the High Court of Justiciary to handle significant numbers of bail appeals. In these circumstances, and bearing in mind the desirability of achieving consistency in decision making, wherever practicable, we **recommend** that the High Court of Justiciary should review the procedures it currently follows for listing the hearings of bail appeals.

6.27 The McInnes Committee Report recommends the setting up of a Summary Appeal Court. We **recommend** that if a Summary Appeal Court is established, the members of that court should have power to deal with bail appeals relating to summary criminal proceedings. In view of the fact that bail appeals in some summary criminal proceedings may be linked to matters over which the High Court has jurisdiction, such as bail appeals relating to solemn proceedings involving the same accused or appeals against conviction in summary proceedings, we **recommend** that the High Court of Justiciary should retain jurisdiction to deal with all bail appeals.

PART SEVEN: BREACH OF BAIL

7.1 As noted in our Consultation Paper, breach of bail is a serious problem. A significant number of offences are committed by persons already on bail; there are many instances in which accused persons fail to appear in court on the due date; and there are repeated cases in which a person on bail breaches other conditions of bail.

7.2 Prior to 1 April 1996, any breach of bail was regarded as a separate offence and made the subject of a separate charge. That only applies now where the breach of bail is constituted by a failure to appear, or where there is a breach of any condition *other than* the commission of a further offence. Where the person on bail commits a further offence on bail, that is regarded as an aggravation of the new offence. It is not prosecuted as a separate charge, but provided the wording of the new charge makes it clear that the offence was committed while on bail, then the court can impose enhanced penalties in respect of the new offence.

Summary of Views Expressed

7.3 We sought views on whether the commission of an offence on bail should be prosecuted as a separate offence rather than as an aggravation of the new offence. We also sought views on the stage in the process at which other breaches of bail should be dealt with. Finally, we asked for views on whether there should be a presumption against bail where a person has breached a condition of bail or is alleged to have committed an offence while on bail.

7.4 The majority of those who responded were of the opinion that breach of bail involving the commission of an offence while on bail should be treated as an aggravation of the new offence rather than prosecuted as a separate offence. It was also suggested that if offending while on bail could be treated as an aggravation, the sentencing judge should make clear what part of the overall penalty was imposed in response to the bail aggravation. Arguments in favour of handling bail offences as separate offences focused on marking their gravity and signalling that such behaviour will not be tolerated. On the issue of timing, responses were split between those advocating dealing with other breaches of bail at the same time as the original offence was dealt with and those favouring handling other breaches as soon as possible and separate from the original offence. Finally, only a minority of respondents favoured having a presumption against bail where a person has breached a condition of bail or is alleged to have committed an offence while on bail.

What Needs to be Done

7.5 We considered that to restore respect for the bail system by those who abuse it, it is essential that police, prosecutors and courts adopt a consistent approach when dealing with breaches of bail. In our Consultation Paper we noted that research has found that there were variations of practice across courts in relation to the imposition of increased sentences for offences committed on bail. We also noted that there is an absence of judicial guidelines about the level of sentences that are appropriate when substantive offences include bail aggravations and for offences involving the breach of bail conditions.

7.6 With regard to the police approach to breaches of bail conditions we note that the Lord Advocate's Guidelines to Chief Constables provide that an accused person should not

be liberated for report where the offence is alleged to have been committed while the accused was on bail. We **recommend** that such a presumption against liberation by the police should apply to any offence involving a breach of a bail condition.

7.7 It is also essential that procurators fiscal should consistently apply the Lord Advocate's Guidelines when deciding whether or not to oppose bail. We also think it important that there should be a presumption in favour of proceedings where an accused person is alleged to have breached a condition of bail. Where an offence is alleged to have been committed while on bail, we understand that it is normal practice for the procurator fiscal to specify that the new offence has been aggravated by being committed while on bail. It is less clear, where the breach involves a failure to appear at court, that proceedings for this offence will be taken. If an accused fails to appear at court, a warrant for his/her arrest will be granted. When arrested, the accused will appear on the original complaint. In the case of a non-appearance on indictment, the accused will not necessarily be brought before the court but will be returned to prison. In both summary and solemn cases, if there are to be proceedings for the breach offence, the procurator fiscal will require to add the failure to appear charge to a new complaint or indictment. In summary proceedings, the failure to appear charge could appear on a separate complaint or be added to a new complaint combining both the original charges and the new failure to appear charge. We **recommend** that the Lord Advocate gives consideration to adopting a policy under which, where there is sufficient evidence to prove that the accused has failed without reasonable excuse to appear in court, there should be a presumption in favour of criminal proceedings being taken in respect of that offence.

7.8 It would appear particularly in relation to summary proceedings, that when a charge relating to the failure to appear is included in a new complaint, a plea of not guilty to that charge is frequently accepted by the procurator fiscal as part of a plea negotiation in which the accused offers to plead guilty to the original charge. The decision on whether or not to accept such a plea is a matter for the Lord Advocate or procurator fiscal. For our part, we **recommend** that the Lord Advocate gives consideration to issuing an instruction to procurators fiscal that there should be a presumption against accepting a not guilty plea to a charge of failure to appear in court.

7.9 We also consider it essential that the court should adopt a consistent approach to the imposition of penalties for breach of bail. Those who abuse bail either through further offending or failure to observe bail conditions or court appearance dates must **always** be the subject of a disposal by the court and we so **recommend**. That is not to suggest that incarceration of those concerned is always the answer but they cannot be allowed to continue to flagrantly ignore the system. It may be that a more robust approach will result in an increase in the remand population in the short term but we believe that the adoption of such an approach would in the longer term have a positive impact on the prison population by restoring respect for bail conditions.

7.10 On the question of whether committing an offence while on bail should be prosecuted as a separate offence rather than as an aggravation of the new offence, we consider that current arrangements are satisfactory but we **recommend** that the court should always state explicitly what has been done in respect of the aggravation. We found evidence to suggest that such breaches of bail are not routinely dealt with, and that section 27(6) of the 1995 Act is not always observed.

7.11 Since we consider that the commission of an offence while on bail should continue to be dealt with as an aggravation, that breach will thus be dealt with at the same time as the original offence. By contrast, for a breach constituted by a failure to appear, which will be the subject of separate proceedings, we consider that such cases should be dealt with as soon as possible after the accused's arrest, which itself should be effected speedily. We see no reason why proceedings for this offence should be delayed by a practice of dealing with it at the same time as the proceedings for the original offence. Different considerations apply in the case of solemn proceedings and we make no recommendation in relation to the timing of breach proceedings in cases where the accused has been prosecuted on indictment. However, in the case of summary proceedings, we **recommend** that the charge of failing to appear should continue to be dealt with on a separate complaint but that proceedings for such a failure should be dealt with as quickly as possible so that the court has the option of imposing a penalty for the failure to appear as soon as possible after the accused's apprehension.

7.12 We have considered whether there should be a presumption against bail being granted to a person who is alleged to have committed an offence while on bail or who has failed to appear when required to do so without reasonable excuse. Such breaches of bail are factors which will influence the court's decision on whether to remand the accused in custody. The court would normally do so unless satisfied that there was no significant risk that the person would re-offend or fail to appear again if released. However, we do not consider it would be appropriate to require that an accused should always be remanded in custody as a result of an allegation that he has breached a bail condition. The court would have to have regard to the seriousness of the original offence, and where it was alleged that the accused had committed an offence while on bail, the seriousness of the subsequent offence. It would not normally be considered appropriate to remand an accused in custody where the original or subsequent offence was one which was unlikely to attract a custodial sentence in the event of conviction. We do not therefore consider that there should be a presumption in favour of remand in custody where an accused was alleged to have breached a bail condition. However, we **recommend** that before an accused who is alleged to have breached a bail condition is again released on bail, the court must first obtain an assessment of the accused's suitability for bail from a Bail Supervision Scheme. This ties in with our recommendation 1, namely for bail supervision arrangements to be made readily available across the country, should the evidence support it.

PART EIGHT: BAIL POST-CONVICTION

Bail Prior to Sentence

8.1 Once an accused person has been convicted of the charge(s) against him/her, whether following trial or in terms of a plea of guilty, it is frequently necessary to adjourn the case before any sentence can be imposed. This normally occurs to enable the court to obtain social enquiry, medical or other reports in respect of the accused. Such reports deal with the various disposals, both custodial and non-custodial, which may be appropriate in the circumstances of the particular case. In the opening paragraphs of Part Seven of our Consultation Paper, we dealt with the preparation of such reports and the fact that in certain instances such reports are best prepared whilst the accused was at liberty in the community. On cause shown, an accused can now be remanded in custody for as long as eight weeks, pending the preparation of reports. Nevertheless, bail is frequently sought by accused persons awaiting sentence, in respect of the intervening period between conviction and sentence.

8.2 We understand that this is an area in which some judicial guidance has been given. We **recommend** that such judicial guidance, relating to the granting of bail to an accused between conviction and sentence, should be kept up-to-date. An accused person who has been convicted is in a different position to an accused awaiting trial. The accused no longer enjoys the presumption of innocence. The factual circumstances giving rise to the accused's conviction are not only before the court, they are public knowledge. Likewise any previous convictions will be before the court and may also have become known to witnesses and other members of the public. In these circumstances, it is clearly desirable that judges act in as consistent a manner as possible in deciding whether an accused should be remanded in custody, pending sentence, and in explaining that decision to the accused person and the wider public.

Bail Pending Appeal (Interim Liberation)

8.3 If a custodial sentence is imposed on an offender, he/she may decide to appeal against the conviction and/or the sentence imposed. An appellant against conviction or sentence is able to apply for bail during the period before the appeal is heard. An appellant released on bail, pending the hearing of an appeal, is granted interim liberation.

8.4 Applications for interim liberation are frequently made by those, who receive short terms of imprisonment or detention, following conviction on summary complaint. Such appellants are normally released on interim liberation for the simple reason that if they were not, they would be liable to have served their sentences in full before the hearing of their appeals took place. Indeed, some of our respondents pointed out that it is not unknown for accused persons, who had been remanded in custody prior to summary trials, to be sentenced to prison following conviction and yet immediately be released on interim liberation, pending their appeals.

8.5 Appellants, who have been convicted on indictment and are serving longer terms of imprisonment, also apply for interim liberation. Whilst many appellants who have been convicted on indictment are refused interim liberation, some appellants convicted of serious offences and serving periods of imprisonment extending to several years are granted interim liberation.

8.6 In our Consultation Paper we asked the following questions in relation to Interim Liberation:

Do you consider that it would be helpful to have more Judicial guidance from the appeal court on issues relating to the grant and refusal of interim liberation?

If so, on which particular issues?

Do you consider that the criteria to be taken into account by the court in deciding whether to grant interim liberation should be prescribed in statute?

8.7 There was a significant level of support amongst those who responded to the question, for the issuing of further judicial guidance. There was also considerable support for efforts being taken to speed up the appeal process.

8.8 We **recommend** that as soon as practicable the High Court of Justiciary should issue detailed guidance relating to interim liberation. Such guidance would be of considerable assistance to members of the Judiciary in their efforts to achieve a consistent approach when dealing with applications for interim liberation. However, we also consider that such guidance would be of benefit to appellants and their legal advisers. Hopefully, it would make the whole process of interim liberation better understood by those who have been the victims of crime or who take an interest in the criminal justice system.

8.9 Our respondents suggested that there were a number of issues with which such judicial guidance might deal. These include (a) whether criteria should be laid down against which all applications for interim liberation should be assessed, (b) the factors that ought to be taken into account by the court when dealing with applications for interim liberation, including the nature and the gravity of the charge(s) of which the appellant has been convicted, (c) whether, and if so in what circumstances, appellants who had been refused bail pending trial should be granted interim liberation, (d) the approach that should be adopted in respect of applications for interim liberation from appellants who are serving short sentences of detention or imprisonment, (e) whether there should be a presumption in favour of granting interim liberation to those appellants who have been convicted in summary proceedings, (f) at what stage in the appeal procedure should an application for interim liberation be considered by the court, (g) the relevance to such applications of whether the appellant has been granted leave to appeal, (h) whether, if leave to appeal has not yet been granted, the judge dealing with an application for interim liberation must be satisfied that the appeal is arguable, (i) whether a judge, required to deal with an application for interim liberation, should be given the opportunity to read all the papers relating to the appeal before the hearing on interim liberation takes place and (j) whether supervised bail should be an option to be considered in respect of an appellant applying for interim liberation. When asked whether the criteria to be taken into account by the court should be prescribed in statute, respondents were evenly split between those who favoured statutory prescription of the criteria and those who did not. We incline to the view that the laying down of such criteria should be left to the High Court of Justiciary.

8.10 We strongly support the objective of a speedy appeal system, particularly in the context of summary cases, and we have noted the recommendation made by the McInnes Committee for the establishment of a Summary Appeal Court.

8.11 Irrespective of whether a Summary Appeal Court is to be created, many of our respondents are clearly looking to the High Court of Justiciary to deal with criminal appeals more speedily than has proved to be possible in recent years. In the course of preparing this Report, we have not had the opportunity to investigate the causes for such delays as have occurred. All we have before us are the anecdotal comments of respondents and the statistics published by the Scottish Executive and in the annual reports of the Scottish Court Service. We are informed that progress in addressing the backlog of criminal appeals has been achieved in recent months and we commend those involved for doing so. We **recommend** that every effort be made by the High Court of Justiciary and the officials of the Scottish Court Service to build on the encouraging progress that has been achieved.

PART NINE: SUMMARY OF RECOMMENDATIONS

References in brackets after each recommendation relate to the paragraph of the report which records the recommendation in more detail.

1. We **recommend** that the Scottish Executive should gather detailed evidence to enable a decision to be made about expansion of the arrangements for bail supervision and if the evidence supports it, bail supervision arrangements should be made readily available across the country. (3.9)
2. We **recommend** that where the procurator fiscal opposes the grant of bail, the court should be obliged to consider whether the accused would be suitable for bail subject to supervision before it makes any decision to remand the accused in custody. (3.9)
3. We **recommend** that if the outcome of piloting electronic monitoring of those on bail is positive, it should be extended across all courts as soon as reasonably practicable. (3.12)
4. We **recommend** that a court should be able to order an electronic monitoring condition in any case where it considers that this would improve the prospects of an accused person not offending while on bail or of appearing in court when required to do so and should not be restricted only to those who would otherwise be remanded in custody. (3.12)
5. We **recommend** that practical steps are taken to remind accused persons of court appearance times and dates. (3.13)
6. We **recommend** that the current form of bail order is redesigned and that it specifies the date of the accused person's next court appearance in summary proceedings (3.14).
7. We **recommend** that to improve public awareness of decision making, reasons should always be given for the decision on whether to bail or remand an accused person and that steps are taken to ensure that those reasons are kept separate to ensure that, in summary cases that proceed to trial, they do not come to the attention of the trial sheriff or magistrate. (3.15)
8. We **recommend** that consideration should be given by sheriffs principal to devising court programming procedures to speed up the court process in the custody courts and to limit the number of bail applications a sheriff or magistrate is expected to consider in a single sitting. (3.16)
9. We **recommend** that the current factors to which a court must have regard in deciding whether or not to grant an accused bail, should be included in statute. (3.17)
10. We **recommend** that a requirement on an accused person to notify the court of any change of residential address should be added to the list of the standard conditions of bail. (3.20)
11. We **recommend** that the current bail condition prohibiting contact with a named individual(s) is modified to include, where appropriate, a prohibition on the accused from visiting a particular area, as opposed to a particular address. (3.20)

12. We **recommend** that the customary practice of remanding in custody those accused persons of no fixed abode should cease and that every case should be considered on its own facts and circumstances. (3.21)

13. We **recommend** that, if the Scottish Executive is minded to accept the recommendation of the McInnes Committee (no.44) relating to the release of an accused on an undertaking to appear at a particular court on a particular date at a particular time, when the police liberate an accused on such an undertaking, they should be given the power to impose both standard and special conditions with the accused's agreement. (4.11)

14. We **recommend** that there should be close monitoring by Her Majesty's Chief Inspector of Constabulary and the prospective independent inspectorate for the Crown Office and Procurator Fiscal Service of compliance with the Lord Advocate's guidelines governing the roles of the police and procurators fiscal in relation to bail. (4.13)

15. We **recommend** that Bail Information schemes should be available in all courts. (5.10)

16. We **recommend** that a court should be obliged to grant bail to an accused person whose release on bail is not opposed by the Crown and that statutory provision should be made to remove any uncertainty about that. (5.11)

17. We **recommend** that to help reduce inconsistencies in the grant and refusal of bail the following practical steps should be taken (5.13):

- Consistent application of the Lord Advocate's guidelines to procurators fiscal.
- More training for the professional judiciary by the Judicial Studies Committee, including information relating to the use of bail information and bail supervision schemes.
- Provision of up-to-date guidance from the Appeal Court (to replace the "Wheatley Guidelines").

18. We **recommend** that to enable the number of persons remanded in custody to be reduced, facilities similar to those provided at "218 Time Out" in Glasgow should be available in other parts of the country for young and adult, male and female accused persons. (5.14)

19. We **recommend** that the High Court of Justiciary should consider issuing additional procedure rules and guidance relating to the conduct of bail reviews in terms of section 30 of the Criminal Procedure (Scotland) Act 1995. (6.8)

20. We **recommend** that bail review for an accused placed on supervised bail should be encouraged. (6.9)

21. We **recommend** that the Crown reviews its policy in relation to bail reviews under the provisions of section 31 of the Criminal Procedure (Scotland) Act 1995 and considers whether it should make that policy public. (6.11)

22. We **recommend** that the law should be clarified so that a bail appeal on behalf of either the Crown or the accused does involve a complete re-hearing of the questions as to whether, and if so on what conditions, the accused should be admitted to bail. (6.19)
23. We **recommend** that the High Court of Justiciary issue practice guidelines for practitioners as to the matters that should be borne in mind and followed when preparing for and taking part in bail appeals. (6.20)
24. We **recommend** that the High Court of Justiciary issue at the earliest opportunity guidance as to the factors to which the court will have regard and the approach that it will take in dealing with bail appeals. (6.22)
25. We **recommend** that programming procedures should be evolved in the High Court of Justiciary to ensure that those members of the judiciary who are to hear bail reviews and bail appeals are given a sufficient opportunity to look through the relevant papers before hearing bail reviews and bail appeals. (6.23)
26. We **recommend** that reasons should always be given for the decision in a bail review and bail appeal. (6.24)
27. We **recommend** that the High Court of Justiciary should review the procedures it currently follows for listing the hearings of bail appeals. (6.26)
28. We **recommend** that if a Summary Appeal Court is established, it should have power to deal with bail appeals relating to summary criminal proceedings but that the High Court of Justiciary should retain jurisdiction to deal with all bail appeals. (6.27)
29. We **recommend** that there should be a presumption against the police liberating for reporting a person who is alleged to have committed an offence involving a breach of a bail condition. (7.6)
30. We **recommend** that the Lord Advocate gives consideration to adopting a policy under which where there is sufficient evidence to prove that the accused has failed without reasonable excuse to appear in court, there should be a presumption in favour of criminal proceedings being taken in respect of that offence. (7.7)
31. We **recommend** that the Lord Advocate gives consideration to issuing an instruction to procurators fiscal that there should be a presumption against accepting a not guilty plea to a charge of failure to appear in court. (7.8)
32. We **recommend** that those who abuse bail through further offending or otherwise should always be the subject of a court disposal. (7.9)
33. We **recommend** that the court should always state explicitly what has been done in respect of a bail aggravation. (7.10)
34. We **recommend** that in summary proceedings a charge of failing to appear in court when required to do so should be dealt with on a separate complaint and that the proceedings for such failure should be dealt with as quickly as possible. (7.11)

35. We **recommend** that before an accused who is alleged to have breached a bail condition is again released on bail, the court must first obtain an assessment of the accused's suitability for bail from a Bail Supervision Scheme. (7.12)

36. We **recommend** judicial guidance relating to the granting of bail to an accused between conviction and sentence should be kept up-to-date. (8.2)

37. We **recommend** that as soon as practicable the High Court of Justiciary should issue detailed guidance relating to interim liberation. (8.8)

38. We **recommend** that every effort should be made by the High Court of Justiciary and the Scottish Court Service to build on the improvements made in recent months in addressing the backlog of criminal appeals. (8.11)

**THE SENTENCING COMMISSION
FOR SCOTLAND**

THE USE OF BAIL AND REMAND

CONSULTATION PAPER

CHAIRMAN'S FOREWORD

The Sentencing Commission for Scotland, which I chair, is an independent body which was set up by the Scottish Executive under its policy statement "A Partnership For A Better Scotland". The full membership of the Commission is listed in Appendix 1 to this paper. The Commission, which was launched in November 2003, has been given the remit to review and make recommendations to the Scottish Executive on:

- the use of bail and remand;
- the arrangements for early release from prison, and supervision of short term prisoners on their release;
- the basis on which fines are determined;
- the effectiveness of sentences in reducing re-offending;
- the scope to improve consistency of sentencing.

The Commission has been invited by the Scottish Executive to review and make recommendations on the use of bail and remand as a matter of priority.

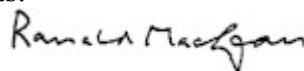
The challenge in reviewing bail and remand is to balance the rights of the accused with interests of public safety and the smooth operation of judicial proceedings. People must not be deprived of their liberty without good reason before they are found guilty of an offence. On the other hand, it is necessary to protect the public from accused persons who there is good reason to believe may commit further offences or attempt to intimidate witnesses while on bail. It is also necessary in the interests of the administration of justice to remand in custody those who there is good reason to suppose may abscond or simply fail or refuse to appear at court.

In carrying out our review the Commission will analyse the situation thoroughly, identifying the key issues and determining whether beneficial change could be promoted by legislation, guidance, improved information, procedural change, including change to bail appeal and review arrangements, service resource provision or other means.

This consultation document seeks your views on the key questions that we have so far identified. We recognise that there may be other factors involved and so you should not feel constrained to confine your response only to the questions listed.

The document is in eight parts and we suggest that in order to fully understand the complex processes and procedures and the roles undertaken by the various players, you should study the document in its entirety before turning to address the questions in Part Eight.

We look forward to receiving your comments.



**Rt Hon Lord MacLean
Chairman**

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PART ONE: THE ISSUES

Introduction

1.1 The impetus for the Sentencing Commission's review of the use of bail and remand stems from the priority attached to the matter by the Scottish Executive and the apparent general concern about:

- the number, and on occasion the gravity, of offences being committed by those given bail;
- the time that those accused of serious charges remain on bail awaiting trial;
- the incidence of those on bail threatening witnesses directly and indirectly;
- the fact that some accused persons are not being prosecuted and punished for offences committed while on bail or for breach of bail conditions;
- the disruption to the efficient administration of justice by those who, after being granted bail, fail to appear at court when required by their bail order to do so;
- the size of and growth in the prison population, which is being fuelled by the numbers being remanded in custody.

1.2 The information in the following paragraphs sets the broad statistical context within which the use of bail and remand is being considered. Most of the statistics are drawn from published criminal justice statistical bulletins up to 2002 and many have been rounded up or down to provide a general picture of trends. They do not give a complete account but they illustrate the scale of changes and the challenges and implications for any programme of reform.

Trends in Crime and Convictions

1.3 Like many other jurisdictions, Scotland has seen a long term trend of increasing numbers of recorded crimes and offences, with under 200,000 in 1950; just over half a million in 1970; just under 1 million in 1993; and around 936,000 in 2002. Year on year, recorded crimes and offences do, of course, fluctuate up and down. The decade 1993 to 2002 saw a low of 907,500 in 1997 and a high of 964,000 in 1994. The annual average of around 935,400 was, however, higher than the annual average of 885,100 for the decade 1983 to 1992.

1.4 Not all recorded crimes and offences are cleared up by the police. In 2002, almost 682,000 crimes and offences were cleared up, that is, there was sufficient evidence to bring a criminal charge.

1.5 A great many offences (340,000 in 2002) are associated with motor vehicle contraventions and are dealt with directly by the police. In consequence, therefore, because of the range of alternatives to prosecution, just less than 300,000 crimes and offences were reported to procurators fiscal in 2002. A proportion of these were also considered by

procurators fiscal as being suitable for disposal in ways other than formal prosecution, for example, by way of a fiscal fine.

1.6 As a result of these various processes, just under 143,000 persons were proceeded against in 2002 in Scottish criminal courts and the number of persons proceeded against has shown a downward trend as the use of alternatives to prosecution has been extended. In 1993, around 184,500 persons were proceeded against in the courts. This figure decreased every year to the year 2000 when it stood at 137,000 but increased again in 2001 to 139,600 and in 2002 to an estimated 142,900.

1.7 In line with this downward trend in persons proceeded against in court, the number of convictions has also gone down over time. The number of custodial sentences has, however, increased. The annual average number of convictions for the 10 year period 1973 to 1982 was 193,000 and the number of custodial penalties was 9,860. The decade 1983 to 1992 saw a decrease in convictions to around 167,400 but an increase in custodial sentences to around 12,890. Finally, in the decade 1993 to 2002 there was an annual average of around 141,300 convictions and around 16,140 custodial sentences. The figures for the year 2002 are 125,000 convictions and over 16,800 custodial sentences.

The Use of Bail

1.8 Available statistics on bail are not currently considered by the Scottish Executive to be entirely reliable and those published in an annex to the research report on “Offending on Bail: An Analysis of the Use and the Impact of Aggravated Sentences for Bail Offenders” were, therefore, described as “experimental”. Given this level of qualification, the statistics which follow should be seen as giving only a general impression of the volume of bail cases and their nature. The figures used here cover the years since 1995 only.

1.9 For the years 1995 to 1999, the available figures suggest a steady state, with the number of bail orders averaging around 34,000 and the number of individuals bailed averaging 24,000.

1.10 Thereafter, the figures increased each year to reach 51,000 bail orders for 32,000 individuals in 2002. The fact that these figures have shown increases since the year 2000 may reflect actual increases but it is also known that recording practices have improved with the advent of electronic recording.

1.11 If approximately 32,000 individuals were given a bail order in 2002, this represents something like 22% of persons proceeded against in the courts. Of the almost 32,000 individuals, 70% received only one bail order; 16% (or just over 5,000 individuals) received two; and the remaining 14% (or over 4,400) received three or more bail orders. On the basis that there were around 51,000 bail orders in 2002, it can be estimated that around 9,500 accused persons (30% of those given a bail order) received over half (26,500) of the bail orders and around 2,240 accused (7% of those given an order) received almost 20% (9,880) of the bail orders.

The Crimes and Offences for Which Bail is Given

1.12 Those given a bail order during 2002 were charged with approximately 115,000 crimes and offences or, on average, between 3 and 4 charges per person. Those given a bail order will, of course, have initially been held in custody by the police. It is not possible, from a consideration of the main charge only, to be clear about the levels of seriousness involved. Around one in ten persons (or very roughly just over 3,000) were charged with a crime involving an assault, including homicide, serious assault, sexual assault and robbery. A further 5% of charges (involving about 1,500 accused) involved handling an offensive weapon and 15% of charges (or almost 5,000 accused) related to simple assault.

1.13 A much larger proportion of persons with a bail order, over one quarter (around 8,000), had been charged with a crime of dishonesty such as housebreaking, shoplifting, theft of a motor vehicle or fraud.

1.14 Around one in ten charges (roughly 3,000 accused) were for a breach of the peace, about 5% were for vandalism (around 1,500 accused), and a further 10% (roughly 3,000) were for crimes against public justice.

1.15 The figures so far account for very roughly three quarters of the charges against those bailed in 2002. The remainder include motor vehicle offences (around 10% or about 3,000 accused), drugs offences (about 5% or roughly 1,500 persons), and a variety of other matters such as fireraising, drunkenness, other unspecified crimes and a variety of miscellaneous offences.

Offending While on Bail

1.16 Recent research by Aberdeen University - "Offending on Bail: An Analysis of the Use and the Impact of Aggravated Sentences for Bail Offenders" - published in March 2004 by the Scottish Executive has estimated that over one-quarter of those bailed offended while on bail. This figure did, however, range from 19% in one sheriff court to 36% in another. This study was limited to a small sample of courts and the results cannot, therefore, necessarily be presumed to be representative of the Scottish picture as a whole.

1.17 Given the qualifications about the available statistics and research on bail, the following analysis should be seen as, at best, only giving a very general indication of numbers. If around 32,000 persons are bailed each year then the research from Aberdeen University would seem to suggest that, very broadly, 9,300 will offend while on bail. From press coverage alone it is known that some of these incidents will involve very serious crimes. The research suggests that the percentage of those offending while on bail had changed little since 1995. About 40% of those who offended on bail were accused of more than one such offence. This would amount to approximately 3,700 bailees nationally.

1.18 The research found that those most likely to offend on bail had been bailed for a crime of dishonesty. In those cases around 40% re-offended. If, very crudely, one quarter of those bailed had been accused of dishonesty, then approximately 3,200 bail offenders will have been bailed for a crime of dishonesty.

1.19 The Aberdeen research suggests that where an offence committed on bail had been proved or admitted, around one quarter of the sentences for the original charge had been

increased because of the offending while on bail. In 9 out of 10 of these increased sentences, the level of additional sentence (time in prison or amount of fine) was less than half of the total sentence. The research again found wide variations between courts in the rates at which they increased sentences to reflect offending while on bail.

Other Forms of Bail Abuse

1.20 Those on bail can, of course, abuse the conditions of their bail order in ways other than offending. For example, there are many cases where an accused fails to attend a trial or court hearing, which, apart from being contrary to the interests of justice, cause unnecessary distress to victims and inconvenience for witnesses as well as a waste of tax-payers' money, time and capacity in the justice system. There are no readily available figures on the number of outstanding warrants held by the police for the apprehension of accused persons who have failed to appear in court after being granted bail but it is believed that the number may run into thousands.

The Pressure on Prisons

1.21 The average daily prison population has increased by almost one quarter over the last 30 years. In the decade 1973 to 1982 the average was around 4,800; in the following decade it was about 5,600; and over the period 1993 to 2002 the average has been almost 6,000. The last decade has seen a 14% increase, from 5,637 in 1993 to 6,404 in 2002.

1.22 Those given a custodial sentence make up the majority of the daily prison population and numbers have increased by 19% over the last 30 years. In the decade 1973 to 1982 the daily average number of sentenced prisoners was roughly 4,100 or 86% of the daily average; for the decade 1983 to 1992 it was about 4,200 or 83%; and for 1993 to 2002 it was almost 5,000 or 83% of the daily population. The last decade has seen an 11% increase from 4,686 in 1993 to 5,180 in 2002.

1.23 Over that 30 year period, the average daily remand population, that is, untried prisoners and prisoners awaiting sentence, increased by around one third. The figures were: 727 for the decade 1973 to 1982; 886 (a 22% increase) in the period 1983 to 1992; and 993 (or a further 12% increase) in the decade 1993 to 2002. The last decade has seen an increase of 29%, from 948 to 1,222. In 2002, over 19% of the average daily prison population comprised prisoners detained on remand.

1.24 Looking at the daily average figures does not, however, give a picture of the volume of receptions being handled by prisons. For example, sentenced receptions have increased over the last three decades by about 10% from an average of around 17,800 in the period 1973 to 1982, to about 20,500 between 1983 and 1992 and then dipping to around 19,500 between 1993 and 2002. Over that same period the number of remand receptions has remained relatively static with around 15,700 between 1973 and 1982 and 1983 to 1992 and about 15,000 over the period 1993 to 2002. The last two years for which figures are available have, however, seen a marked increase with 15,443 remands in 2001 and 18,726 in 2002.

1.25 Of the remand receptions into prisons, untried prisoners constituted 78% in 1982; 89% in 1993; and 79% in 2002. The average over the decade 1993 to 2002 has been around 83% (12,472) for untried prisoners. The number of untried prisoners over that decade has,

however, fluctuated up and down, with the lowest being 10,874 in the year 2000 and the highest being 14,773 in the year 2002.

1.26 While untried prisoners constitute the major proportion of remands, a steady increase in the annual number of tried prisoners remanded to await sentence has also added to the burden of receptions.

1.27 In the decade 1993 to 2002, there was an annual average of 2,624 prisoners who had been remanded while awaiting sentence. They constitute, therefore, something less than one in five of all remands, and one in ten of all receptions. Their numbers have, nevertheless, increased over the last decade, from a low of 1,459 in 1993 to 3,582 in 2001 and 3,953 in 2002.

Summary of the Statistics

1.28 The long-term trend has been one of increasing crime. The use of alternatives to prosecution has, however, caused a decrease in the numbers of crimes being handled in court. At the same time, however, the use of custodial sentences has increased.

1.29 Against this background, the available statistics suggest that just over 30,000 accused persons are bailed in a year and those persons account for over 50,000 bail orders. Around 10,000 people are bailed more than once in a year.

1.30 Bail is given for a wide variety of crimes and offences. For roughly 3,000 accused persons the charge is one involving violence. For many (in the region of 8,000), however, the charge is for something less serious such as breach of the peace or vandalism. Equally, around 8,000 have been charged with a crime of dishonesty.

1.31 Over 9,000 of those given bail are likely to offend while on bail; over 3,000 of these will have been bailed for charges involving dishonesty and around 4,000 will offend more than once while on bail.

1.32 Where an offence committed on bail is proved, the sentence is increased in a minority of such cases.

1.33 A major source of pressure on prison resources is the volume of receptions. Immediate custodial disposals are a significant part of that pressure. The problem that the remand population creates for the prison system is not new but is significant and has increased over the most recent years. In 2002, about 20% of the average daily prison population comprised prisoners detained on remand.

1.34 Given that the substantial majority of those held on remand were unconvicted, a large number of those admitted to prison are being detained without being convicted of a crime or offence. In this regard, it has been estimated that about half of those remanded go on to be convicted and receive a custodial sentence.

Time Spent on Remand

1.35 The average period spent on remand is around 23-24 days, resulting in a high throughput of remand receptions into prisons. This places a considerable strain on prisons because of the comprehensive nature and complexity of the initial reception and processing procedures. In the year 2002 there were more receptions of remand prisoners than there were of persons sentenced to terms of imprisonment. The Prisons and Young Offenders (Scotland) Rules 1994 (SI 1994 No.1931 (S.85)), as amended, regulate various matters relating to the detention of persons on remand. Appendix 3 to this paper sets out the basic provision that those concerned can expect during their detention in custody.

Our Aims

1.36 The “drivers” for the Commission’s review of this important aspect of its remit are to seek to achieve

- a reduction in offending by those who are granted bail;
- a reduction in the number of individuals released on bail who fail to appear in court when required to do so; and
- a reduction in the remand population, without compromising the safety of the public.

1.37 We hope that it may also be possible to achieve a general improvement in the consistency and the efficiency of decision making in relation to bail and remand.

1.38 The Commission is anxious to hear suggestions on how each of these aims can be achieved and to hear views on whether they should be prioritised.

PART TWO: THE LAW

2.1 The law on bail in Scotland has come a long way from the time when the deposit of a sum of money with the Court was the only precondition of release from custody if a bail application was granted. Two significant reforms are worthy of note: firstly, the Bail etc (Scotland) Act 1980 provided for a system of release conditions which in practice do not normally include the deposit of money; and secondly, several provisions of the Bail and Judicial Appointments etc (Scotland) Act 2000 were designed to ensure that the Scots law on bail conformed to the European Convention on Human Rights (“the Convention”). The Convention creates the guarantee of bail for persons detained pending trial unless the domestic court is satisfied that there are relevant and sufficient reasons to justify continued detention. The current statutory law is contained in Part III of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”), which is reproduced in Appendix 2. In compliance with the Convention, this means that the Court must consider bail for every accused person irrespective of the nature of the alleged offence: in other words no bail is not an option.

2.2 Under Article 5 of the Convention, the consideration of bail pre-conviction must involve a court hearing. Article 5 provides:

“5(1). Everyone has the right to liberty and security of person. No-one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on a reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.....”

(3). Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

(4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

2.3 Article 5(3) of the Convention entitles States to provide for a system of release conditions and the European Court of Human Rights has taken a wide and pragmatic view of this. Its case law indicates some broad categories of what are considered to be ‘relevant and sufficient’ reasons for the refusal of bail, but these are neither exhaustive nor prescriptive. States are accorded a “margin of appreciation” (in other words, a certain amount of discretion) in formulating their domestic law where this involves balancing individual rights and community interests.

Danger of Flight

2.4 Here, there must be evidence to demonstrate that there is a real risk of the accused absconding: for example, where the accused faces a heavy sentence on conviction, or where he has no strong family or community ties. Other factors the Court might consider include the character of the accused and the extent of his assets.

2.5 It is not sufficient, therefore, for the Court simply to proceed on the view that the accused *may* abscond.

Risk of Interference with the Course of Justice

2.6 There must be a clear belief and supporting evidence that the accused will interfere with the course of justice, for example by destroying incriminating documents or threatening witnesses.

Prevention of Crime

2.7 There must be a reasonable expectation that the accused will commit further crimes while on bail; this might be based on past history of offending. The domestic court should also consider the likely seriousness of the consequences of these crimes. However, the gravity of the offence that the accused is alleged to have committed is not a reason in itself for the refusal of bail.

2.8 These general principles must always be applied when bail is considered by Scottish courts. Under section 3 of the Human Rights Act 1998, courts in Scotland must (so far as possible) interpret domestic law in such a way as is compatible with the Convention; this general interpretative duty thus applies to Part III of the 1995 Act.

The 1995 Act

2.9 Under s. 22A of the 1995 Act, the Sheriff or Magistrate must consider the question of bail automatically and without the need for application on the first (but not on any subsequent) occasion when the accused appears from custody. Both sides must be given an opportunity to be heard and the question of bail must be decided within 24 hours, failing which the accused must be liberated. Section 23 deals with the situation where a bail application requires to be made before or after the accused is committed for trial and s. 23A makes it clear that a person may still be granted bail for a new offence even if he is in custody having been refused bail for something else, or where he is serving a sentence of imprisonment. So the Court will still have to consider the question of bail, even although a grant of bail cannot be given immediate effect. If bail is granted, the accused is liberated on a bail order under s.24, which deals generally with bail and bail conditions. Breach of bail is covered in ss. 27 and 28, while ss. 30-32 deal with rights of review and appeal.

2.10 If bail is granted, it is always conditional. The deposit of money bail, although still competent, is highly unusual in practice. The normal bail order contains a number of standard conditions and may contain additional special conditions imposed to ensure that the standard conditions are observed.

2.11 The standard conditions which the Court will impose are conditions that the accused

- appears at the appointed time at every diet relating to the offence with which he is charged, of which he is given due notice;
- does not commit an offence while on bail;

- does not interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person; and
- makes himself available for the purpose of enabling enquiries or a report to be made to assist the Court in dealing with him for the offence with which he is charged.

2.12 In addition, in the case of a sexual offence, it is a standard condition that the accused will not seek personally to take a precognition (a pre-trial statement) from the complainer.

2.13 There is no statutory list of additional special conditions, but in practice the following are often encountered:

- that the accused will reside at a given address in the United Kingdom;
- that he will not approach any person named in the charge or involved in the case;
- that he will not alter his appearance;
- that he will stay away from named places;
- that he will observe a curfew, restricting his whereabouts to his bail address between certain hours;
- that he will surrender his passport;
- that he will report to the police at regular intervals.

2.14 The conditions must be specified in the order granting bail and must be accepted by the accused. A copy of the order must be given to the accused before he is released.

2.15 We deal later with the factors that the Court will take into account in determining whether or not to grant bail and the information that is available to the Court. But at this stage we should stress two matters. First, under current law the attitude of the Crown to the question of bail is crucial. If the Crown does not oppose bail pending trial then the Court will normally grant it irrespective of the charge or any other circumstance. Secondly, if the only consideration before the Court is the gravity of the charge, bail will usually be granted; the seriousness of the alleged crime is not sufficient, by itself and in the absence of any other relevant factor, to prevent bail being granted. So, for example, murder is aailable crime. But in such serious cases, there are often factors other than the gravity of the offence which are relevant to the Court's decision, for example, if the nature of a murder suggested that the accused would present a risk of further serious offending.

Power of the Crown to Liberate

2.16 The Crown has the power to order the liberation of an accused remanded in custody by the Court without bringing the accused back before the Court. This power is exercised:

- where the Crown decides, for whatever reason, to abandon proceedings against the accused; or

- where proceedings cannot be concluded within the statutory time limits (see below).

2.17 The Lord Advocate also has the power to admit an accused to bail (section 24(2) of the 1995 Act) but this power is rarely used.

Time Limits

2.18 There are various time limits relating to the prosecution and trial of alleged offenders: the main ones for the purposes of the issues addressed in this paper are as follows:

Solemn Procedure

2.19 Where an accused is remanded in custody on petition, committing him for trial under solemn procedure, he may not be detained in custody for a total period of more than 110 days without being brought to trial. In the event that the trial does not start within that time, he must be liberated and cannot be prosecuted at a later date. The period of 110 days may be extended on application to the High Court of Justiciary but only in very limited circumstances.

2.20 If an accused is granted bail, then his trial on indictment must start within 12 months otherwise he must be discharged immediately and cannot be prosecuted thereafter for the alleged offence on indictment. The 12 month time limit may be extended by the trial court, but only on “cause shown”. In the event that prosecution on indictment becomes time-barred, the accused may, however, be prosecuted under summary procedure if that is competent for the alleged offence in question.

Summary Procedure

2.21 Where a person is remanded in custody in respect of an alleged offence which is being proceeded against under summary procedure, the trial must start within 40 days. If the trial does not start within 40 days, just as in solemn proceedings, the accused must be released immediately and cannot be prosecuted at a later date for the alleged offence. The 40 days can however be extended on application to the sheriff but only in very limited circumstances.

The Criminal Procedure (Amendment) (Scotland) Act 2004

2.22 These rules relating to time limits will be substantially altered when the relevant provisions of the Criminal Procedure (Amendment) (Scotland) Act 2004 come into force.

European Convention on Human Rights

2.23 It is generally thought that these time limits more than meet the minimum criteria implied by the European Convention on Human Rights.

PART THREE: THE ROLE OF THE POLICE AND THE PROCURATOR FISCAL IN RELATION TO BAIL

3.1 When an accused appears in court he will do so in response to either a complaint (summary proceedings) or petition (solemn proceedings). In the case of both summary and solemn proceedings, there are various methods used to secure an accused's attendance at court. An accused may be arrested under a warrant or at common law and brought to court in custody. Alternatively, an accused may be released by the police on an undertaking to appear in court a few days later, or he may appear at court following an agreement with his legal representative that he will do so at a particular time, or he may simply be sent a citation (a written instruction to appear).

3.2 Irrespective of the method by which the accused is brought to court, once he has appeared in relation to a complaint or petition, the Court will have to decide whether to grant bail or remand the accused in custody pending further proceedings. It would be unusual, however, for the issue of bail to arise in the case of someone who appears in answer to a citation. It would be even more unusual for such a person to be remanded in custody. In summary proceedings, in addition to the options of bail or remand, the Court may simply order an accused to appear at a subsequent calling of the case. In solemn proceedings, where the accused appears on petition, a bail order will always be made unless the accused is remanded in custody.

3.3 As it is unusual, therefore, for an accused who does not initially appear before the Court in custody to be remanded in custody by the Court pending further proceedings, it is worth examining the reasons why some accused appear before the Court in custody, while others appear on an undertaking, by arrangement or in answer to a citation.

Arrest

3.4 In Scotland, offenders may be apprehended by the police under a warrant obtained from the Court by the Procurator Fiscal or without a warrant where the police are acting under powers conferred by common law or statute. Before making an arrest without warrant a police officer is required to consider the nature of the crime, the circumstances in which the crime was committed, the character of the offender and the evidence available.

3.5 Police officers have power at common law to arrest without warrant any person where this is necessary in the interests of justice. Where a person has committed a minor crime or statutory offence such as simple theft or a road traffic contravention, arrest is not usually necessary and the case will usually be dealt with by citation. However, arrest will be appropriate where it is necessary to prevent the arrestee absconding, committing further crimes, or hindering the course of justice by, for example, interfering with witnesses or disposing of stolen property or of evidence.

Procedure Following Arrest

3.6 If an accused is arrested, the police have the choice of the following options:

- liberate the accused on a written undertaking to appear at court at a specific time and date;

- liberate the accused without any written undertaking (ie if the Procurator Fiscal decides to take criminal proceedings against the accused he will require to cite the accused to attend court);
- detain the accused in custody and bring him before a court on the next day on which the Court is sitting to dispose of criminal business.

3.7 If the accused has been arrested under a warrant, the police will almost always detain the accused in custody although in exceptional circumstances (eg for medical reasons) the accused may be liberated and arrangements made for his attendance at court.

Lord Advocate's Guidelines

3.8 As will become apparent, the reasons for refusing to liberate an accused are similar to those which will influence the Procurator Fiscal's decision on whether or not to seek to have the court remand the accused in custody. The Lord Advocate has issued Guidelines to Chief Constables setting out the circumstances in which accused persons should not be liberated:

- Where there is reason to believe the accused may be a danger to himself or the public or the charge is of a serious nature justifying proceedings on petition.
- Where there is reason to believe that the accused will commit another crime if released.
- Where the offence is alleged to have been committed while the accused was on bail.
- Where there is reason to believe that the accused will interfere with witnesses.
- Where the accused has previously been liberated on an undertaking to appear in court and the subsequent allegation is during the period of liberation.
- Where the offence is alleged to have been committed while the accused was on probation, community service, deferred sentence or licence.
- Where the accused has a history of non-appearance at court.
- Where the accused's liberation may impede ongoing enquiries or recovery of property.
- Where the accused is of no fixed abode and there is reason to believe that he/she may abscond.
- Where continued detention is necessary for further enquiry (eg to find missing property, carry out a medical examination of the accused or conduct an identification parade).
- Where there are doubts as to the accused's identity.

3.9 The seriousness of the offence may provide sufficient reason for the accused to be detained in custody by the police even if it would not, in the absence of other factors, normally lead to the person being remanded by the Court. This is to allow the Court to make the decision in such cases, since an accused released by the police is almost never subsequently remanded in custody.

3.10 If the police wish to release a person who is accused of a serious offence likely to be prosecuted on petition, the Procurator Fiscal is always consulted before the person is released.

3.11 If the police decide to release an accused on an undertaking or liberate him for report, they have no power under the law at present to impose conditions on the accused's release.

Procurator Fiscal's Attitude to Bail

3.12 If the Procurator Fiscal decides to take proceedings against an accused person, he will decide whether or not to oppose bail and, in doing so, he will take into account the same factors which will be taken into account by the Court in deciding whether or not to remand an accused in custody (see Part Four).

Liberation by Procurator Fiscal

3.13 In all cases in which accused persons are apprehended by the police and detained in custody, it is in the discretion of the Procurator Fiscal to authorise temporary liberation after a consideration of the available evidence. The Procurator Fiscal need not take proceedings, and will only do so where there is a sufficiency of evidence and the Procurator Fiscal is satisfied that a prosecution would be in the public interest. If there is insufficient evidence, the Procurator Fiscal has no option but to liberate the accused. In some cases the Procurator Fiscal may want further enquiries to be made, the outcome of which may determine whether or not there is sufficient evidence. If the case only merits summary proceedings, the Procurator Fiscal will liberate the accused while those further enquiries are undertaken. In serious cases which may merit solemn proceedings, the Procurator Fiscal may either liberate the accused while the enquiries are undertaken, or, if there is a *prima facie* case against the accused, bring the accused before the Court on a petition. At that stage, opposition to bail would be appropriate where enquiries are not complete and detention of the accused is essential to allow the remaining enquiries to be made (such as holding an identification parade, taking a sample of blood or the psychiatric examination of the accused).

Summary Cases

3.14 Where the offence in question cannot be punished by imprisonment, or where it is thought unlikely that the Court would impose a custodial sentence, the Procurator Fiscal would not normally oppose bail. In addition, the Procurator Fiscal will give consideration to what special or additional conditions of bail might make it possible for him to agree bail where otherwise he would have opposed it. Generally, substantial reasons must exist before opposition to bail in summary cases will be justified.

Solemn Cases

3.15 As indicated above, the Procurator Fiscal may require to oppose bail at first appearance on petition, even although it is not intended to oppose bail when the case comes back to court a week later so that the accused can be committed for trial. This will only be done where further specific enquiries require to be made and it is necessary for the proper pursuit of those enquiries that the accused should remain in custody.

Opposition to Bail: General Principles

3.16 The Procurator Fiscal will have regard to the likelihood of the accused absconding, the character of the offence charged and the previous record of the accused. The four principal reasons for opposing bail are as follows:

- Where the circumstances or nature of the offence are such that there is reason to believe that the accused is a danger to the public or himself.
- Where there are reasonable grounds to suspect that the accused may intimidate or threaten witnesses, or interfere with or dispose of evidence or where there is any other risk of prejudice to enquiries still to be made if he is released.
- Where from the criminal record of the accused and/or the number of current charges it is obvious that he is carrying on a career of crime.
- Where there are reasonable grounds to suspect that the accused intends to abscond or where he has a history of failing to appear at court.

Dangerousness

3.17 In determining whether or not the accused is a danger to the public or himself, the Procurator Fiscal will have regard to the nature of the offence and the accused's record. The Procurator Fiscal will have regard not only to the seriousness of the offence, but to the apparent motivation and the likelihood of the circumstances re-occurring. For example, a wife assaulting her husband with a knife as a result of provocation may be a very serious offence with grave consequences but the likelihood of the offence being repeated while the accused is on bail may be remote, especially if a special condition of bail is imposed prohibiting the accused from having any contact with the victim.

3.18 In assessing whether the accused is a danger to the public or himself, the Procurator Fiscal would make use of any psychiatric assessment or psychological profiling of the accused. The psychiatrist or psychologist may be in a position to offer an assessment of the risk of the accused re-offending.

Interference with Witnesses

3.19 Opposition to bail because of a fear that the accused may intimidate witnesses will be based generally on specific information disclosed to the police. For example, witnesses may be able to speak to the accused having threatened witnesses with violence. In addition, the accused may have previous convictions for intimidating or threatening witnesses.

Further Offences

3.20 Where it is thought that the accused is likely to commit further offences if released on bail, the Procurator Fiscal would normally oppose bail, unless the re-offending was likely to involve relatively minor offences. The assessment of whether the accused was likely to re-offend would be based on an examination of the accused's record and the nature of the outstanding charges. For example, if the accused over a period of years had been repeatedly convicted of theft by housebreaking, and now faced a number of similar charges, it would be reasonable to infer that the accused was carrying on a career of crime. Releasing the accused on a bail condition that he should not re-offend would not normally be thought sufficient to prevent the accused from committing further offences.

3.21 However, likelihood of re-offending is only one of the factors which will be taken into account by the Procurator Fiscal. If the accused has a record of committing relatively minor breaches of the peace, it might be reasonable to anticipate that he may continue to commit such offences while on bail. However, if the accused was not likely to receive a custodial sentence for the latest offence, the Procurator Fiscal would be unlikely to oppose bail, even although further re-offending was foreseeable.

Absconding

3.22 The assessment of whether the accused is likely to abscond will normally be based on either the accused's record (eg previous convictions for failing to appear at court) or specific information obtained by the police pointing to the accused's intention to abscond (eg accused apprehended in possession of passport and large quantity of cash indicating intention to leave the country).

3.23 Bail is also likely to be opposed where the accused does not have a fixed abode. An accused released on bail must specify a domicile of citation which, by virtue of Section 25 of the Criminal Procedure (Scotland) Act 1995, should be his normal place of residence or such other place as the Court may, on cause shown, direct. If an accused does not have a fixed abode, he may have difficulty in providing a domicile of citation. In addition, this is generally thought to be a factor relevant to an assessment of the likelihood of the accused failing to appear at court.

Breach of Trust

3.24 Where it is alleged that the offence has been committed while the accused is on bail, the Procurator Fiscal is likely to oppose bail on the basis that the latest alleged offence is evidence of the fact that the accused is unlikely to comply with the standard bail condition that he should not re-offend while on bail. Similar considerations apply where the accused was on license or parole or deferred sentence or where the accused was on probation or subject to a Community Service Order.

3.25 As with the likelihood of re-offending, the fact that the accused was subject to some outstanding court order would not of itself result in the Procurator Fiscal opposing bail. He would have regard to the seriousness of the offence with which the accused was charged, whether it was analogous to the offence subject to the outstanding court order, and the seriousness of that offence. For example, if an accused has been released on bail after being charged with a series of housebreakings, the Procurator Fiscal would not necessarily oppose

bail simply because the accused had now been charged with committing a minor breach of the peace.

PART FOUR: COURT DECISIONS - PRE-TRIAL AND DURING TRIAL

Pre-Trial

4.1 We have already outlined the legal principles which the Court will apply in making its decision on whether bail should be allowed prior to trial and, if it should, what conditions might be attached to the bail order. But the information before the Court in order to allow it to exercise its discretion at this stage is seriously limited. As we have indicated, on the basis of caselaw, if the Crown does not oppose bail, then it will normally be granted. It is only where bail is opposed by the Crown that the Court will require to make a judgement.

4.2 Bail hearings are normally short in duration. The Sheriff or Magistrate will have a copy of the petition, or in summary cases, the complaint. There may be a written bail application, although this is not needed on the first occasion on which the accused appears from custody. Any such written application is uninformative; all that is contained in it is the fact of application and no written grounds setting out why bail should be granted are included. This is no doubt because the accused has a general right to bail, which should only be refused for good reason.

4.3 The bail hearing will thus concentrate on the Crown's grounds of opposition, whatever they are. Oral argument is presented by the Procurator Fiscal and then by the accused's solicitor. No evidence on oath is taken. If the ground of opposition is based on the accused's record, then the Crown will place before the Court a print-out of the relevant details obtained from the Scottish Criminal Records Office and the Fiscal will highlight (orally) whatever factors in the accused's record are deemed significant, such as the analogous nature of previous convictions, a course of criminal conduct, previous failures to appear, previous breaches of bail and similar features.

4.4 No other documents will normally be put before the Court by the Crown, but the Fiscal will explain why a remand in custody is sought. The accused's solicitor will respond on all relevant matters, including the personal circumstances of the accused. If a Bail Information Scheme or Bail Supervision is available in the particular court, then a written report will usually be lodged.

4.5 It is not just in a busy Custody Court that the Court will make a quick decision. The cogency of the arguments on both sides will usually be capable of immediate assessment, with a decision being given without the Sheriff or Magistrate leaving the Bench. A short (sometimes extremely short) period of contemplation is frequently the norm.

4.6 Once the decision is made, it is announced from the Bench and recorded by the Clerk of Court. It is common (and good practice) to give oral reasons for the decision, but these are not usually recorded by the Clerk. This has important ramifications if the bail decision is made the subject of appeal (see Part Five).

4.7 If bail is refused, the accused is immediately taken into (or returned to) custody. If bail is granted, the Court will either do so on the standard conditions alone, or with the addition of one or more of the special conditions already discussed. In fixing special conditions, the Court will bear in mind that these are supplementary to the standard conditions and are imposed (at least in part) to ensure observance of the standard conditions.

4.8 As we have said in Part One and elsewhere, all crimes are nowailable, including cases of murder. Even in respect of this most serious of criminal charges, accused persons are sometimes released on bail, something which we know has been the subject of adverse comment in some quarters.

4.9 But Article 5 of the ECHR is of universal application. In such cases, special conditions are sometimes fixed, particularly in relation to residence at a particular address, so as to minimise distress to the families of victims.

Bail During Trial

4.10 Practice varies in relation to the continuation of bail during a trial which lasts more than one day. In some courts bail is automatically continued overnight, without any oral or other application, unless the Crown opposes this. In other courts, there is a fresh bail hearing in such cases, with the issue being reconsidered before each overnight adjournment. Sometimes the Crown takes the view that when a *prima facie* case against the accused has emerged in the course of the evidence, bail ought to be withdrawn since there is thought to be a heightened risk that the accused will abscond and thus defeat the ends of justice; sometimes courts agree with this stance.

Bail Information and Supervision Schemes

4.11 Bail Information and Supervision Schemes are designed to minimise the numbers of accused persons held on remand pending trial or for reports after conviction, who, subject to safeguards in respect of public safety, could be released on bail pending their further court hearing. Courts routinely take advantage of these schemes in appropriate cases whenever they are available.

Objectives

4.12 The objectives of a Bail Information Scheme are:

- to assist Procurators Fiscal and the Courts through verification of information in respect of cases where bail might otherwise have been opposed or refused;
- to allow through provision of verified information more informed bail decisions to be made, recognising that in certain instances this could lead to refusal of bail.

4.13 The objectives of a Bail Supervision Scheme are:

- to increase the confidence of courts of successful completion of bail periods through the availability of supervised bail with the intention of reducing the numbers of accused remanded to custody;
- to encourage the use of non-custodial disposals by sentencers as a result of experience of successful completion of periods on bail supervision;
- to be able to offer viable bail options to those already remanded to custody.

Principles of Service Provision

4.14 Bail Information and Supervision Schemes are expected to be an integral part of court social work services. Bail supervision should not supplant standard bail but rather provide an additional option for courts: ie, it needs to be targeted on those whose application for bail would otherwise have been unsuccessful. The priority for social work departments is to work with the Procurator Fiscal in identifying where bail is to be opposed and where the option of bail supervision would reduce opposition to bail.

Targeting

4.15 The Scottish Executive's aspiration is that Bail Information and Supervision Schemes should be provided in all sheriff courts, both solemn and summary, and in Glasgow Stipendiary Magistrates Court. Priority requires to be given to those with mental health problems, women accused, single parents, and young people aged between 16-17.

Bail Information

4.16 The requirement for a contact address for the Court is a key issue in the decision on whether or not to grant bail. Many individuals have fairly loose accommodation arrangements, which require confirmation for the purposes of the Court. Where there is some risk involved in granting bail, particularly in cases where previous offending suggests the risk of offending whilst on bail, there may be external supports available that might serve to reduce the risk, such as moving to stay with a family member for the period of bail. Such action needs to be checked and agreed with the accused's family. It is important that the physical and mental health of the accused is reported explicitly in all cases. Old offences involving drug misuse are normally relevant, particularly where life-style changes have stabilised the problem. Positive health information may be relevant where previous history may have negative implications. Family commitments, particularly child care or care of vulnerable adults, may have implications for the decision to grant bail and full information on this is required. Details of the accused's financial circumstances and of any current supervision need to be covered.

Assessment/Reporting

4.17 The scheme requires that the provision of information to the Court should be confined to factual matters. It is not an assessment of an individual's suitability for bail. However, the following issues must be assessed:

- whether the case for bail would be strengthened with bail supervision, in which case a detailed assessment will be required;
- the potential risk to others; and
- the potential risk of self harm.

4.18 Bail decisions involve public protection; therefore it is an important principle that all relevant information, whether positive or negative, is reported to the Court.

Bail Supervision

4.19 Bail supervision combines the provision of verified information to the Court with a package of monitoring, support and possibly accommodation aimed at providing the opportunity for bail to an individual who would otherwise be remanded.

4.20 Bail supervision is a costly resource and local authorities which implement such a scheme have to set a ceiling on the number of cases they can support at any one time.

4.21 Assessment for bail supervision needs to take account of the following:

- nature of the charges and any outstanding charges, including breaches of bail;
- public safety;
- previous offending;
- previous response to supervision;
- suitability of accommodation;
- problem areas in the individual's life that may require support during the bail period;
- any drug or alcohol issues;
- employment and commitments for child care or dependents;
- willingness to agree to the conditions of the scheme.

4.22 A written report has to be provided to the Court.

4.23 Arrangements for supervision of those released on bail should make provision for their:

- being seen by the supervisor within one hour of release from custody unless an alternative arrangement has been agreed;
- reporting to their supervisor a minimum of three times a week. However, some flexibility is permitted during the latter stages of solemn cases and/or where the accused is in employment. Other contact is dependent on the conditions set out for the particular bail order;
- conforming with the plan set out for the bail period. This may include the provision of specific support packages, advice and guidance on issues such as housing, welfare benefits or education and links to other agencies;
- receiving home visits on a regular basis.

4.24 It is further necessary that bail supervision arrangements harmonise with any other supervision arrangements already in place.

Special Bail Conditions

4.25 Special bail conditions which may be imposed normally require a more detailed assessment.

4.26 For example, the Glasgow Bail Supervision scheme is able to undertake the monitoring of the imposition of a curfew by carrying out random checks undertaken by a voluntary sector provider. It is important that before any such requirement is set in place that the likely impact on the family or others with whom the accused is living is fully explored.

Availability of Bail Information and Supervision Schemes

4.27 As noted above, the aim of Bail Information and Supervision Schemes is to minimise the numbers of accused or convicted offenders being remanded in custody.

4.28 According to an audit carried out by the Scottish Executive in 2003, Bail Information and Bail Supervision Schemes operated in almost all areas, although some did not cover every sheriff court and some provided only a bail information or a bail supervision service. The areas without any schemes at all were Dumfries and Galloway and the Western Isles.

4.29 At the time of the audit, the Edinburgh, Lothian and Borders Partnership was not providing a bail information or supervision service to Linlithgow or the Borders Sheriff Courts and the Lanarkshire Grouping was not providing services to Airdrie or Lanark Sheriff Courts. The Tay Partnership provided only a residential bail supervision service for Perth Sheriff Court. Finally, the Ayrshire Partnership provided bail supervision only for solemn court cases.

4.30 There appeared to be wide variations in the nature and levels of services offered to the courts. For example, Lanarkshire, which covers Hamilton Sheriff Court, had 600 requests for bail information, whereas in Edinburgh there were only 142 requests. On the other hand, Lanarkshire had bail supervision capacity for only 10 bailees whereas Edinburgh had 150.

4.31 Across the whole of Scotland in 2002/3 there were around 4,450 requests for bail information. Over three-quarters of these were in Glasgow. Across Scotland, there was capacity for 740 bailees and between them Glasgow, Edinburgh and the Forth Valley had 60% of that capacity.

218 Time Out Centre

4.32 In its report – “A Better Way” – published in February 2002, the Ministerial Group on Women Offending developed a proposal for a “time out” centre for women over 18 years of age involved with the criminal justice system. Ministers accepted the proposal and, in partnership with others, the Scottish Executive established such a centre for women in Glasgow. The centre is known as “218 Time Out”. It combines a residential unit with 14 beds and a day centre. It is for use by:

- women offenders 18 years old or above;

- women assessed as particularly vulnerable to custody or re-offending;
- women whose substance misuse is unknown or uncertain.

4.33 The Centre has been operational since December 2003 and its primary purpose is to reduce the female prison population in Cornton Vale. Referral to the centre can come through a number of routes, for example from social work, from Procurators Fiscal, through self referral, or from courts as a condition of bail or post-sentence. The centre also operates as a residential alternative to remand.. The centre is designed to:

- provide a safe environment;
- address offending behaviour;
- tackle causes of offending;
- help women to avert crises in their lives;
- enable women to move on and re-integrate fully into society.

4.34 It is not a prison in the community. It is provided by criminal justice social work, health and housing services and provides help in the community, allowing women to maintain important family and community links. The Centre includes a residential unit:

- available 24 hours a day, every day of the year;
- where women stay for a short period of time;
- to which admissions are planned, mainly court referrals;
- with a six-bed detoxification unit and an eight-bed supported accommodation unit which are projected to be used by 85 and 50 women, respectively, annually.

4.35 The centre also runs day services operating from 9.00 am to 9.00 pm, 7 days a week offering: assessments, counselling, referrals and group work, access to other services such as welfare rights, health and employment/training facilities and space for child care. It is expected to be used by 400 women annually.

4.36 218 Time Out is the only centre of its type in Scotland.

Criminal Procedure (Amendment) (Scotland) Act 2004

4.37 The Criminal Procedure (Amendment) (Scotland) Act 2004 includes provisions on bail which are not yet in force.

4.38 Section 24A of the 1995 Act, as inserted by the 2004 Act, provides that where an accused person has been refused bail that person may apply for bail subject to a remote monitoring restriction. The Court will be required to consider such an application. This

provision therefore only comes into play when a Court has considered and rejected the option of bail on other conditions and concluded that the person should be remanded in custody.

4.39 The Court will also have the power to impose a remote monitoring restriction at its own discretion, following its decision to grant bail in cases involving rape or murder. This power is a means of tightening conditions attached to the granting of bail, rather than to allow an accused person to be released on bail when he would otherwise be remanded. The provision extends to offenders convicted pending sentence and those convicted and or sentenced pending appeal. In post conviction cases, if the Court grants interim liberation and does not impose a remote monitoring as a condition, it must give a reason(s).

PART FIVE: REVIEWS AND APPEALS IN RESPECT OF PRE-TRIAL DECISIONS

5.1 After an initial decision has been made either to grant or to refuse bail, both the Crown and the accused person are entitled to have that decision reconsidered. This may be by two different methods, firstly by review, and secondly by appeal.

Review of Decision

5.2 An application for review by an accused person may seek the granting of bail when it has been refused, or may seek the alteration of conditions on which bail has been allowed. The application is made to the Court which made the original decision. (Thus application may be to the High Court if the decision complained of was made by that Court.) It is inherent in the concept of review that the Court is asked to look again at its own decision because the circumstances have changed. This is explicit in the case of the Crown, where the legislation provides that the Crown can seek a review where it puts before the Court information not available at the first hearing. That is construed as meaning not available to the Crown, rather than meaning information which the Crown had but chose not to place before the Court. So far as the accused person is concerned the legislation is not explicit but a Court will not change its own decision without good reason to do so. Reasons may be personal such as illness in the family, or may be related to the circumstances of the alleged offence, such as the fact that a person from whom the accused is to be kept separate has moved away from his or her address.

Appeal Against Decision

5.3 The other method by which a Court decision can be reconsidered is by appeal. Most decisions to grant or refuse bail are made by sheriffs, or by magistrates sitting in the district court. Either the Crown or the accused person may appeal that decision to a judge of the High Court, who will usually determine the case sitting alone, although occasionally the case will be heard by three judges. This will happen where an unusual point of principle arises or where the Crown appeals against the decision of a single High Court judge. As we note in Part Two, the decision to grant or refuse bail is a decision within the discretion of the judge at first instance. An appeal may be on grounds relating to the way in which the decision was taken, for example that the decision-maker failed to hear both sides, or may relate to the substance of the decision. Appeals on grounds of the way in which the decision was taken will be far fewer than appeals on the substance of the decision. A person accused of a crime is entitled to bail unless there is reason to the contrary, and so a decision-maker at first instance is entitled to refuse bail only if he or she has information which gives grounds for refusal.

5.4 The Crown can appeal against the granting of bail, or against an order ordaining a person to appear (that is, liberating him without putting him on bail), or against the failure to include a particular condition of bail. The High Court judge who hears the appeal will have before him a copy of the complaint or petition, and a note of the decision made. The Crown Office receives from the Procurator Fiscal who appeared at first instance a report of what Crown and defence said, and what if anything was said by the decision-maker by way of reasons for his or her decision. As we say in Part Four, these reasons are not formally minuted and practice varies as to the stating of reasons. At the hearing of the appeal an advocate depute appears for the Crown, and he or she will have the note from the Procurator Fiscal. An advocate or solicitor advocate who will usually be someone other than the person

who appeared at first instance represents the accused person. He or she will have a letter from the solicitor who did appear and will have such information as that person had, plus any other information about personal circumstances or anything else which has come to hand since. On some occasions references or letters offering employment to the accused person are produced.

5.5 The procedure followed is that the person appearing for the party who is appealing addresses the Court first, explaining what the decision complained of is and stating why it is said to be the wrong decision. If any new information is available he or she gives it to the court and if appropriate explains why it was not available in the court below. If the opposing party seeks time to check information this may be granted by continuing the case for 24 hours, but this does not often happen. The other lawyer then addresses the court, if called on to do so. He or she will usually tell the Court, from the note from the procurator fiscal or from the defence solicitor, what the reason was for granting or refusing bail or imposing a particular condition, and will draw the Court's attention to the record, or lack of a record, or whatever else is the reason for the decision complained of.

5.6 Views differ on whether the appeal is a rehearing of the original application or if the Appeal Court judge is concerned rather in checking that the decision at first instance was one which the decision maker was entitled to make in the exercise of his or her discretion. The decision to allow or refuse bail is one to be made by weighing up the factors said by the Crown to militate against the accused person's right to bail. Thus it is not a decision made by formula and it is possible for an appeal judge to see that while he or she may have made a different decision, the decision which was made is within the spectrum of possible decisions. Some judges take the view that in such a situation they will not interfere with the discretion of the decision-maker at first instance. Others appear to take the view that, perhaps as the liberty of the subject is in issue, they should rehear the case and may substitute their own decision. Experience tends to show that the contrast does not often arise in sharp relief as described above. Most High Court judges give the reason for the decision they make orally; this is not officially minuted. While it is usually clear to the persons present why a decision has been made it may be that a requirement to state the reasons and to have that minuted should be made.

5.7 If the accused person's advisers have more information at the appeal hearing than they had at first instance then the Appeal Court will generally listen to that information and will not take a technical point that the decision should be made the subject of review rather than appeal. Nor is the Crown inclined to take such a point against an accused person. The appeal process operates flexibly and allows the parties to bring information to the Court and have the matter decided without undue formality. There are many cases to be disposed of each morning but due to the expertise of the participants the relevant information is usually sifted quickly and placed before the Court succinctly. This is essential as the decisions need to be made with no delay so that accused persons are either liberated or advised that the appeal is refused. They are not brought to court for the hearing. If a person is allowed bail at first instance and the Crown mark an appeal, then he is not liberated pending the hearing of the appeal.

McInnes Report Recommendations

5.8 As noted above, at present all appeals in summary cases from decisions taken in the sheriff court or district court are made direct to the High Court of Justiciary. The report of

the Summary Justice Review Committee, chaired by Sheriff Principal John McInnes, recommends the establishment of a summary criminal appeal court to hear appeals against sentence in the lower courts, with appeals against conviction, acquittal or lenient sentence in the summary courts continuing to be referred directly to the High Court. This is intended to ease the burden on the current system, and it would seem likely that appeals against bail in summary cases could also be heard in the new court if this is set up.

5.9 We have also noted the recommendations of the Review pertaining to dealing with multiple offences against an accused and the observation made that the delay in proceedings against an accused who is on bail allows such an individual to commit other offences, leading to yet more cases. If implemented, those recommendations may reduce some of the concerns about granting of bail that the public currently hold.

PART SIX: BREACH OF BAIL

6.1 Breach of bail is a serious problem. A significant number of offences are committed by persons already on bail; there are many instances in which accused persons fail to appear in court on the due date, whether for trial or sentence, and there are repeated cases in which a person on bail breaches other conditions of his bail order, such as a curfew condition, or one which requires him to stay away from particular locations.

6.2 Prior to 1st April 1996, any breach of bail was regarded as an offence quite separate from that which had originally resulted in the bail order. Such breaches were always made the subject of separate legal proceedings. Now, that only applies where the breach of bail is constituted by a failure to appear, or where there is a breach of any condition *other than* the commission of a further offence. Where the person on bail commits a further offence on bail, then that is regarded as a “bail aggravation”, in respect of the new charge: it makes it worse. It is not prosecuted separately, but provided the wording of the new charge is supplemented by written details of such an aggravation, then the Court can impose enhanced penalties for the offence. There are detailed legal provisions about how the Court is to do this, including the situation where the offender has committed a new offence in the face of several bail orders pronounced at different times by different courts.

Sanctions for Breach of Bail

6.3 For breaches of bail other than those constituted by the commission of a further offence, the Court may impose a complete range of custodial or non-custodial penalties, while for bail aggravations, any period of imprisonment (or fine) may be increased within statutory limits to reflect the aggravation of the original offence. But Courts sometimes look at the offences and the aggravations “in the round”, by imposing a global penalty without specifying a particular portion of the sentence in respect of the aggravation. This will usually be done where the selected penalty for the original offence takes the form of some sort of supervision, whether by probation, community service or otherwise. But where imprisonment is imposed, Courts often use their powers to increase the period and to specify what proportion of the whole sentence is referable to the aggravation.

6.4 It has to be said that if imprisonment (or increased imprisonment) were to be the only available sanction for breach of bail, then there would be a huge increase in the prison population. It should also be recognised that some failures to appear are not the result of a deliberate attempt to thwart the course of justice, but are the product of chaotic lifestyles, the absence of household routines, record-keeping and the like. None of these factors *excuse* such breaches of bail, but they are a fact of life and cannot be ignored in assessing appropriate penalties. At the other end of the scale are of course the “bail bandits”, whose repeated offending on bail rightly attracts great public condemnation.

6.5 The nature of the sanctions, a separate penalty or an increased sentence for the original offence, that exist to punish those who commit a breach of their bail order, depends on the nature of the breach. There is no consistent approach taken by the Courts in dealing with breaches and it is a matter for the discretion of the individual sentencer.

6.6 The recent research has indicated that the change in the law from April 1996 has not resulted in any reduction in the amount of offending on while on bail.

Inconsistency

6.7 Research published by the Scottish Executive in March 2004 - "Offending On Bail: An Analysis Of The Use And The Impact Of Aggravated Sentences For Bail Offenders" – found that there were variations of practice across the seven courts included in the study in relation to the imposition of increased sentences for offences committed on bail. One sheriff always passed an increased sentence but others informed the researchers that their decision depended upon the circumstances of the individual case. It was not the practice of all the sentencers interviewed to state in open court that they had increased the sentence and by what amount. Some indicated that they would be more likely to pass an increased sentence where the offence committed on bail was analogous to the original offence. For others, a factor of significance would be a history of breaches of bail.

6.8 Statistics show that across Scotland around 120,000 convictions were recorded in 2001 and of these 7,900 (7%) had a bail aggravated sentence recorded. For most (58%) of these aggravated sentences, no additional penalty was imposed.

6.9 In this regard, we note that there is an absence of judicial guidelines about the level of sentences that are appropriate when substantive offences include bail aggravations and for offences involving the breach of bail conditions. The absence of such guidelines may contribute to a lack of consistency in the sentences imposed in such cases.

PART SEVEN: BAIL POST-CONVICTION

Bail Prior to Sentence

7.1 Once an accused person has been convicted of (or has pleaded guilty to) the charge(s) against him, it is frequently necessary to adjourn the case prior to sentence being imposed. This is often done so that the Court can obtain background or other reports on the accused dealing with the various disposals, both custodial and non-custodial, which may be appropriate in the particular case. In such situations bail is often sought during the intervening period, whether or not bail has previously been allowed.

7.2 Unlike the pre-trial situation, once the accused has been found (or pleaded) guilty, the presumption of innocence no longer applies and the protections of Article 5 of the Convention no longer apply. Furthermore, the Crown has no *locus* on the matter of bail. Adjournments for reports at this stage are always of a fixed length, typically three or four weeks, so the accused will usually be back in court quickly unless there are delays on the part of those preparing the reports or the accused fails to co-operate with them. If the accused is bailed for reports, one of the bail conditions is that the accused must co-operate; if he fails to do without reasonable excuse, he will be in breach of bail. If, however, he is remanded in custody for reports, then his whereabouts and accessibility should not be in doubt, and in such cases the remand period is often limited to two or three weeks.

7.3 In dealing with the question of bail prior to sentence, Courts are influenced by the nature and circumstances of the charge(s) which have resulted in conviction or plea of guilty; in contested cases the evidence will have been made patent, while in relation to pleas of guilty, the full circumstances of the offences will have been narrated by the Crown. The procedural history of the case, including any previous failures to appear, or other breaches of bail, will be a matter of court record, and the previous criminal history (if any) of the accused will be known to the Court by that stage. Likewise, mitigating circumstances may also have been put forward by the accused, although it is common for the defence to reserve its position on such matters until any reports which have been ordered are available.

7.4 In making the bail decision, the Court will also be influenced by the fact that many pre-sentence enquiries which have to be made by Social Workers and other professionals will be less valuable if they are constricted by considerations of time and unavailability of pertinent information. The work done will often be much more useful to the Court if it is done while the accused is at liberty; he and his family can be visited in their home setting; his employment history (if any) can be properly explored; his attitude to the offence and the assessment of the risk of re-offending can be examined; and all the available sentencing options can be canvassed. While many of these enquiries can be carried out while the accused is in custody, many Courts take the view that they are better conducted while the accused is on bail; in some cases, such as where the accused is being assessed as to his suitability for a Drug Treatment and Testing Order (DTTO) the extensive assessment process (involving input from various professionals) can *only* be carried out while the accused is on bail.

7.5 On the other hand, in some cases a custodial disposal is inevitable, or even mandatory. Nonetheless, in some such cases, adjournment prior to sentence is still necessary, such as where reports are needed prior to sentencing a sex offender or where no previous

custodial sentence has been imposed, but the crime now committed is so serious that custody is the only option.

7.6 If bail is refused pre-sentence, the accused may appeal to the High Court against the decision, but the Crown has no right of appeal against the grant of bail at this stage.

Interim Liberation After Sentence

7.7 If a custodial sentence is passed on an offender, he may decide to appeal against the conviction which resulted in that sentence, or that sentence itself, or both. The procedures for such appeals are beyond the scope of this paper, but frequently an appellant will apply for bail during the period before the appeal is heard. Currently, all criminal appeals from all criminal courts in Scotland are heard by the High Court of Justiciary sitting in Edinburgh. The workload of the Appeal Court is very heavy and often many months elapse before an appeal can be determined.

Appeals in Solemn Proceedings

7.8 If an appellant in such cases seeks interim liberation pending his appeal, the application will be dealt with (in the first instance) by a single Judge of the High Court in much the same way as bail appeals brought prior to trial and irrespective of whether the original proceedings were in the High Court or the Sheriff Court. The application must contain a statement of reasons why interim liberation should be granted. As a result of a recent change in the law, the Crown now has the right to be heard in opposition to the application. In all cases it is normal for the bail judge to scrutinise the grounds of appeal against the conviction or sentence itself, in order to ensure that interim liberation is not granted to someone who has frivolous grounds of appeal against the decision of the trial court. Only in exceptional circumstances will interim liberation be considered in the absence of any grounds of appeal at all. Some judges may allow interim liberation where there are grounds of appeal which, on the face of it, would warrant the quashing of the conviction, or where in sentence appeals there is a reasonable prospect of a custodial sentence being quashed; however, the practice in these matters is not uniform. If the single judge grants interim liberation, the prison is informed and the appellant is released that day; if interim liberation is refused, the appellant has a further right of appeal to a Bench of three High Court Judges.

Appeals in Summary Proceedings

7.9 If the accused is convicted in summary proceedings before the Sheriff or in the District Court, he must seek interim liberation from the particular Sheriff or Magistrate who imposed the custodial sentence upon him. The application must be disposed of within 24 hours. The papers will normally be put before that Sheriff or Magistrate in chambers; if he decides to grant interim liberation, then that decision is made immediately and without a hearing; if however he is inclined to refuse bail, good practice dictates that a hearing be fixed when oral representations can be made on behalf of the appellant. The Crown has no *locus* to be heard on these matters. Frequently, however, it is impractical to arrange for decisions on interim liberation to be taken by the same person as imposed the sentence; often such decisions have to be taken by another sheriff or magistrate, since the deployment of judicial resources throughout the summary courts does not always result in the original judge being

available within the time limit. If interim liberation is refused, there is a right of appeal to the High Court; such an appeal must be taken within 24 hours.

The Particular Problem of Short Custodial Sentences

7.10 If a short custodial sentence is imposed (such as three months' imprisonment or less) and the proceedings are made the subject of an appeal, then unless bail is granted, it is likely that the sentence will have been served by the time the High Court can deal with the case. This has become a recurring problem in recent times and has, we think, resulted in grants of bail purely for pragmatic reasons rather than for reasons of substance. We note from Chapter 31 of the Summary Justice Review that there is a proposal to establish a new Summary Appeal Court which might deal with cases more speedily, but its establishment (if the proposal is accepted) is clearly some way off, and any resulting implications for the system of bail will require to be addressed.

7.11 In the context of bail pre-sentence and interim liberation after sentence, we note that here too there is an absence of judicial authority about when bail should or should not be granted, which may contribute to the lack of consistency in dealing with such cases.

PART EIGHT: CONCLUSION AND QUESTIONS

8.1 In the foregoing parts of this Consultation Paper we have sought to provide an outline of the law, procedures and practices relating to bail and remand in Scotland. The Commission's purpose in conducting a review is to see if changes can be made that would bring about improvements to the system. What we seek is a bail and remand system which strikes the right balance between the rights of individuals, the safety of the public and the efficient and effective administration of justice by achieving the following aims:

- ensuring that accused persons are remanded in custody only where there is good reason(s) to do so;
- ensuring that accused persons attend for trial;
- ensuring public safety during the court process by preventing offending on bail;
- preserving the integrity of the court process by ensuring that victims and witnesses are adequately protected;
- applying appropriate sanctions for breach of bail.

8.2 In the final part of the paper we have set out the key questions which we consider need to be addressed. Please do not feel obliged to answer all of them unless you wish to. We would of course welcome all views and suggestions for improvement on any aspect of the present arrangements that we may have overlooked.

8.3 It would be helpful if you would provide a reason(s) for your views.

General Questions Arising from Parts One and Two

What steps do you consider could be taken to reduce the number of offences committed by those on bail?

What steps do you consider could be taken to ensure that those granted bail appear in court when required to do so?

What steps do you consider could be taken to reduce the number of those remanded in custody without jeopardising the safety of the public, creating a risk of further offending or hindering the smooth operation of judicial proceedings?

What steps do you consider could be taken to promote more widespread understanding amongst the public, the media and politicians about what is involved in decision making in relation to the use of bail and remand?

Questions Arising from Part Two

Do you consider that the criteria to be taken into account by the Court in deciding whether to grant bail should be prescribed in statute?

Do you consider that enacting such statutory criteria would promote consistency in decision making?

Do you consider that the range of standard bail conditions is adequate?

If you do not, what additional standard conditions do you consider should be imposed?

Do you consider that there should be additional special conditions in addition to those referred to in Part Two?

Questions Arising from Part Three

Do you consider that the police and Procurator Fiscal should be able to impose conditions on an accused person who is liberated without appearing in court?

If you do, what conditions do you consider they should be able to impose?

Do you consider that the factors taken into account by the Procurator Fiscal in deciding whether to oppose bail are the right ones?

If you do not, what factors do you consider should be taken into account?

Do you consider that the criteria which the police and procurator fiscal take into account in deciding whether to liberate an accused pending appearance in court should be prescribed by statute?

Do you consider that enacting such statutory criteria would promote consistency in decision making?

Questions Arising from Part Four

What information do you consider should be available to the Court in making a bail decision?

Do you consider that further categories of information might assist the Courts in making decisions on bail applications, reviews and appeals?

If you do, how do you consider that this information could speedily be made available?

What factors should be taken into account by the Court when it decides whether or not to grant bail?

Do you consider that if the Procurator Fiscal does not oppose bail prior to trial the Court should be obliged to grant it?

If a person has been refused bail by the Court, do you consider that the Procurator Fiscal should thereafter be able to admit such a person to bail?

Do you consider that steps could be taken to improve consistency in decision-making relating to the grant or refusal of bail?

What supports should be available to a person on bail to try to ensure that he or she completes the period on bail satisfactorily?

Do you consider that there should be different kinds of support on bail for adults of either sex, or young people?

Do you have any ideas as to the extent and manner in which bail information and bail supervision schemes might be developed?

Do you consider that greater availability of bail hostels and other accommodation providing support to accused persons on bail would enable the Courts to release more accused on bail?

Do you consider that the types of supervision and support facilities that are available to female accused who seek and are granted bail would assist male accused?

Do you consider that reasons for bail and remand decisions should routinely be provided and formally recorded?

Question Arising from Part Five

On what basis should the High Court deal with an appeal in respect of bail – as a review of the exercise of discretion by the Sheriff or Magistrate or by assessing the case afresh, which might include information additional to that which the Sheriff or Magistrate considered?

Do you consider that it would be helpful to have more judicial guidance from the Appeal Court on issues relating to the grant and refusal of bail?

If so, on which particular issues?

Questions Arising from Part Six

Do you consider that committing an offence while on bail should be prosecuted as a separate offence rather than as an aggravation of the new offence?

*At what point in the process should **other** breaches of bail be dealt with?*

Do you consider that there should be a presumption against bail where a person has breached a condition of bail or is alleged to have committed an offence on bail?

Questions Arising from Part Seven

Do you consider that it would be helpful to have more judicial guidance from the Appeal Court on issues relating to the grant and refusal of interim liberation?

If so, on which particular issues?

Do you consider that the criteria to be taken into account by the Court in deciding whether to grant interim liberation should be prescribed in statute?

HOW TO CONTACT US AND WHERE TO SEND RESPONSES

Your response can be sent electronically or by post. You can answer any or all of the questions posed in Part 8 and make any comments that you think are pertinent to the Commission's review of this matter.

Please submit your responses as soon as possible. The closing date for responses is 30 September 2004. All responses will be acknowledged electronically or by post.

Comments sent by post should be addressed to:

The Sentencing Commission for Scotland
Room 1N.11
St Andrew's House
EDINBURGH
EH1 3DG

Telephone: 0131 244 3228
Fax : 0131 244 3234

Comments sent by email should be addressed to:

sentencing.commission@scotland.gsi.gov.uk

A copy of the consultation document is available on:

www.scottishsentencingcommission.gov.uk

Confidentiality

Responses which are not marked as confidential will be published on the Sentencing Commission website. Please complete the Respondee Information Form to tell us how you wish your response to be treated.

THE SENTENCING COMMISSION FOR SCOTLAND: MEMBERSHIP AND SECRETARIAT

The members of the Sentencing Commission, appointed by the Scottish Ministers, are:

The Rt Hon Lord MacLean (Chairman): Lord MacLean was appointed a Judge in 1990 and on his appointment to the Appeal Court in 2001 became a Privy Counsellor. He was admitted to the Faculty of Advocates in 1964 and appointed Queen's Counsel in 1977. He served as an Advocate Depute from 1972 to 1975 and was Home Advocate Depute from 1979 to 1982. He has served on the Parole Board, Scottish Legal Aid Board, the Council on Tribunals and the Stewart Committee on Alternatives to Prosecution.

In January 1999 he was appointed Chair of a committee established by the Secretary of State for Scotland to review the sentencing and treatment of serious sexual and violent offenders including those with personality disorders. The resulting report was implemented in the Criminal Justice (Scotland) Act 2003.

The Rt Hon The Lord Mackay of Drumadoon: Lord Mackay was appointed a Judge in March 2000. He previously served as Solicitor General for Scotland in 1995 and as Lord Advocate from 1995 to 1997. He was made a life peer in 1995 and became a Privy Counsellor in 1996.

Sheriff Charles Stoddart: Sheriff Stoddart has been Sheriff of Lothian and Borders since 1995. He was previously Sheriff of North Strathclyde at Paisley from 1988 to 1995. He was Director of Judicial Studies in Scotland from 1997 to 2000.

Sheriff Rita Rae QC: Sheriff Rae was appointed Sheriff of Glasgow and Strathkelvin in 1997. She was made a QC in 1992. She was appointed a Temporary Judge in February 2004. She is a member of the Parole Board, SACRO and the Scottish Association for the Study of Delinquency.

Mr Bill Gilchrist: Mr Gilchrist joined the Procurator Fiscal Service in 1976. He has served as Head of the Policy Unit at Crown Office and as Head of the Fraud and Specialist Services Unit. He was also Regional Procurator Fiscal in Paisley before his appointment as Deputy Crown Agent.

Chief Constable David Strang: Mr Strang has been Chief Constable of Dumfries and Galloway Police since 2001. He was previously Assistant Chief Constable, Lothian and Borders Police, after eighteen years in the Metropolitan Police.

Mr Alex Prentice: Mr Prentice of McCourts Solicitors is a Solicitor Advocate and former president of the Edinburgh Bar Association. He is a member of the Criminal Law, Human Rights, and Rights of Audience committees of the Law Society of Scotland.

Ms Valerie Stacey QC: Ms Stacey was called to the Bar in 1987 and took silk in 1999. She served as Chair of the Social Security Appeals Tribunal from 1987 to 1993, an Advocate Depute from 1993 to 1996 and as a Temporary Sheriff from 1997 to 1999.

Mr Jim Dickie: Mr Dickie has been Director of Social Work at North Lanarkshire Council since 1996. (Past President of Association of Directors of Social Work)

Councillor Eric Jackson: Councillor Jackson is Chair of the Social Work Committee of East Ayrshire Council, is COSLA spokesperson on social, is a Justice of the Peace and is a member of the Visiting Committee at HMP Kilmarnock.

Ms Bernadette Monaghan: Ms Monaghan has been Director of Apex since March 2002. She was a member of the Children's Panel for 9 years. She is on the Board for Families Outside, is secretary of the Edinburgh branch of the Scottish Association for the Study of Delinquency and is a member of the Visiting Committee at HMYOI, Polmont.

Ms Kaliani Lyle: Ms Lyle is Chief Executive of Citizens Advice Scotland. She was a leading anti-apartheid campaigner and Chief Executive of the Scottish Refugee Council.

Mr David McKenna: Mr McKenna was appointed Chief Executive of Victim Support Scotland in 2001 having previously been Principal Officer of Victim Support Strathclyde from 1986 to 1993 and Director of Operations of Victim Support Scotland from 1993 to 2000.

Professor Neil Hutton: Professor Hutton's main research interest is in sentencing and he is co-Director of the Centre for Sentencing Research at the University of Strathclyde. He is a leading member of the team which has developed the Sentencing Information System for the High Court in Scotland. He is a board member of SACRO.

Professor Chris Gane: Professor Gane has held the Chair of Scots Law at Aberdeen since 1994, prior to which he was Professor of Law at the University of Sussex. His research interests are Domestic Criminal Law and Procedure, International Criminal Law and Human Rights.

Professor David McCrone: Professor McCrone is a professor in the Department of Sociology at Edinburgh University. His expertise includes the sociology of Scotland.

Mrs Sue Brookes: Mrs Brookes has been Governor at HMI Cornton Vale since July 2002. She was previously Deputy Governor at HMP Glenochil from 1998 - 2002, and has held various other posts in the Scottish Prison Service.

The Commission has a secretariat of four: Mr Alan Quinn (Secretary), Dr Joe Curran (Principal Researcher), Dr Beth Staffell (Policy Adviser) and Ms Taryn Forrest (Office Manager).

CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

Sections concerning bail (as amended) (abstracted from UK Statute Law Database)

**PART III
BAIL**

Consideration of bail on first appearance

22A

(1) On the first occasion on which –

(a) a person accused on petition is brought before the sheriff prior to committal until liberated in due course of law; or

(b) a person charged on complaint with an offence is brought before a judge having jurisdiction to try the offence,

the sheriff or, as the case may be, the judge shall, after giving that person and the prosecutor an opportunity to be heard and within the period specified in subsection (2) below, either admit or refuse to admit that person to bail.

(2) That period is the period of 24 hours beginning with the time when the person accused or charged is brought before the sheriff or judge.

(3) If, by the end of that period, the sheriff or judge has not admitted or refused to admit the person accused or charged to bail, then that person shall be forthwith liberated.

(4) This section applies whether or not the person accused or charged is in custody when that person is brought before the sheriff or judge.

Bail applications

23

(1) Any person accused on petition of a crime shall be entitled immediately, on any (other than the first) occasion on which he is brought before the sheriff prior to his committal until liberated in due course of law, to apply to the sheriff for bail, and the prosecutor shall be entitled to be heard against any such application.

(2) The sheriff shall be entitled in his discretion to refuse such application before the person accused is committed until liberated in due course of law.

(3) Where an accused is admitted to bail without being committed until liberated in due course of law, it shall not be necessary so to commit him, and it shall be lawful to serve him with an indictment or complaint without his having been previously so committed.

(4) Where bail is refused before committal until liberation in due course of law on an application under subsection (1) above, the application for bail may be renewed after such committal.

(5) Any sheriff having jurisdiction to try the offence or to commit the accused until liberated in due course of law may, at his discretion, on the application of any person who has been committed until liberation in due course of law for any crime or offence, and having given the prosecutor an opportunity to be heard, admit or refuse to admit the person to bail.

(6) Any person charged on complaint with an offence shall, on any (other than the first) occasion on which he is brought before a judge having jurisdiction to try the offence, be entitled to apply to the judge for bail and the prosecutor shall be entitled to be heard against any such application.

(7) An application under subsection (5) or (6) above shall be disposed of within 24 hours after its presentation to the judge, failing which the accused shall be forthwith liberated.

(8) This section applies whether or not the accused is in custody at the time he appears for disposal of his application.

Bail and liberation where person already in custody

23A

(1) A person may be admitted to bail under section 22A or 23 of this Act although in custody –

(a) having been refused bail in respect of another crime or offence; or

(b) serving a sentence of imprisonment.

(2) A decision to admit a person to bail by virtue of subsection (1) above does not liberate the person from the custody mentioned in that subsection.

(3) The liberation under section 22A(3) or 23(7) of this Act of a person who may be admitted to bail by virtue of subsection (1) above does not liberate that person from the custody mentioned in that subsection.

(4) In subsection (1) above, "another crime or offence" means a crime or offence other than that giving rise to the consideration of bail under section 22A or 23 of this Act.

Bail and bail conditions

24

(1) All crimes and offences are bailable.

(2) Nothing in this Act shall affect the right of the Lord Advocate or the High Court to admit to bail any person charged with any crime or offence.

- (3) It shall not be lawful to grant bail or release for a pledge or deposit of money, and –
- (a) release on bail may be granted only on conditions which subject to subsection (6) below, shall not include a pledge or deposit of money;
 - (b) liberation may be granted by the police under section 21, 22 or 43 of this Act.
- (4) In granting bail the court or, as the case may be, the Lord Advocate shall impose on the accused –
- (a) the standard conditions; and
 - (b) such further conditions as the court or, as the case may be, the Lord Advocate considers necessary to secure –
 - (i) that the standard conditions are observed; and
 - (ii) that the accused makes himself available for the purpose of participating in an identification parade or of enabling any print, impression or sample to be taken from him.
- (5) The standard conditions referred to in subsection (4) above are conditions that the accused –
- (a) appears at the appointed time at every diet relating to the offence with which he is charged of which he is given due notice;
 - (b) does not commit an offence while on bail;
 - (c) does not interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person;
 - (d) makes himself available for the purpose of enabling enquiries or a report to be made to assist the court in dealing with him for the offence with which he is charged; and
 - (e) where the (or an) offence in respect of which he is admitted to bail is one to which section 288C of this Act applies, does not seek to obtain, otherwise than by way of a solicitor, any precognition of or statement by the complainer in relation to the subject matter of the offence.
- (6) The court or, as the case may be, the Lord Advocate may impose as one of the conditions of release on bail a requirement that the accused or a cautioner on his behalf deposits a sum of money in court, but only where the court or, as the case may be, the Lord Advocate is satisfied that the imposition of such condition is appropriate to the special circumstances of the case.
- (7) In any enactment, including this Act and any enactment passed after this Act –
- (a) any reference to bail shall be construed as a reference to release on conditions in accordance with this Act or to conditions imposed on bail, as the context requires;

(b) any reference to an amount of bail fixed shall be construed as a reference to conditions, including a sum required to be deposited under subsection (6) above;

(c) any reference to finding bail or finding sufficient bail shall be construed as a reference to acceptance of conditions imposed or the finding of a sum required to be deposited under subsection (6) above.

(7A) In subsection (5)(e) above, “complainer” has the same meaning as in section 274 of this Act.

(8) In this section and sections 25 and 27 to 29 of this Act, references to an accused and to appearance at a diet shall include references respectively to an appellant and to appearance at the court on the day fixed for the hearing of an appeal.

Bail conditions: supplementary

25

(1) The court shall specify in the order granting bail, a copy of which shall be given to the accused –

(a) the conditions imposed; and

(b) an address, within the United Kingdom (being the accused's normal place of residence or such other place as the court may, on cause shown, direct) which, subject to subsection (2) below, shall be his proper domicile of citation.

(2) The court may on application in writing by the accused while he is on bail alter the address specified in the order granting bail, and this new address shall, as from such date as the court may direct, become his proper domicile of citation; and the court shall notify the accused of its decision on any application under this subsection.

(3) In this section "proper domicile of citation" means the address at which the accused may be cited to appear at any diet relating to the offence with which he is charged or an offence charged in the same proceedings as that offence or to which any other intimation or document may be sent; and any citation at or the sending of an intimation or document to the proper domicile of citation shall be presumed to have been duly carried out.

Breach of bail conditions: offences

27

(1) Subject to subsection (7) below, an accused who having been granted bail fails without reasonable excuse –

(a) to appear at the time and place appointed for any diet of which he has been given due notice; or

(b) to comply with any other condition imposed on bail,

shall, subject to subsection (3) below, be guilty of an offence and liable on conviction to the penalties specified in subsection (2) below.

(2) The penalties mentioned in subsection (1) above are –

(a) a fine not exceeding level 3 on the standard scale; and

(b) imprisonment for a period –

(i) where conviction is in the district court, not exceeding 60 days; or

(ii) in any other case, not exceeding 3 months.

(3) Where, and to the extent that, the failure referred to in subsection (1)(b) above consists in the accused having committed an offence while on bail (in this section referred to as "the subsequent offence"), he shall not be guilty of an offence under that subsection but, subject to subsection (4) below, the court which sentences him for the subsequent offence shall, in determining the appropriate sentence or disposal for that offence, have regard to –

(a) the fact that the offence was committed by him while on bail and the number of bail orders to which he was subject when the offence was committed;

(b) any previous conviction of the accused of an offence under subsection (1)(b) above; and

(c) the extent to which the sentence or disposal in respect of any previous conviction of the accused differed, by virtue of this subsection, from that which the court would have imposed but for this subsection.

(4) The court shall not, under subsection (3) above, have regard to the fact that the subsequent offence was committed while the accused was on bail unless that fact is libelled in the indictment or, as the case may be, specified in the complaint.

(4A) The fact that the subsequent offence was committed while the accused was on bail shall, unless challenged –

(a) in the case of proceedings on indictment, by giving notice of a preliminary objection under paragraph (b) of section 72(1) of this Act or under that paragraph as applied by section 71(2) of this Act; or

(b) in summary proceedings, by preliminary objection before his plea is recorded, be held as admitted.

(5) Where the maximum penalty in respect of the subsequent offence is specified by or by virtue of any enactment, that maximum penalty shall, for the purposes of the court's determination, by virtue of subsection (3) above, of the appropriate sentence or disposal in respect of that offence, be increased –

(a) where it is a fine, by the amount for the time being equivalent to level 3 on the standard scale; and

(b) where it is a period of imprisonment –

(i) as respects a conviction in the High Court or the sheriff court, by 6 months; and

(ii) as respects a conviction in the district court, by 60 days, notwithstanding that the maximum penalty as so increased exceeds the penalty which it would otherwise be competent for the court to impose.

(6) Where the sentence or disposal in respect of the subsequent offence is, by virtue of subsection (3) above, different from that which the court would have imposed but for that subsection, the court shall state the extent of and the reasons for that difference.

(7) An accused who having been granted bail in relation to solemn proceedings fails without reasonable excuse to appear at the time and place appointed for any diet of which he has been given due notice (where such diet is in respect of solemn proceedings) shall be guilty of an offence and liable on conviction on indictment to the following penalties –

(a) a fine; and

(b) imprisonment for a period not exceeding 2 years.

(8) At any time before the trial of an accused under solemn procedure for the original offence, it shall be competent –

(a) to amend the indictment to include an additional charge of an offence under this section;

(b) to include in the list of witnesses or productions relating to the original offence, witnesses or productions relating to the offence under this section.

(9) The penalties provided for in subsection (2) above may be imposed in addition to any other penalty which it is competent for the court to impose, notwithstanding that the total of penalties imposed may exceed the maximum penalty which it is competent to impose in respect of the original offence.

(10) A court which finds an accused guilty of an offence under this section may remit the accused for sentence in respect of that offence to any court which is considering the original offence.

(11) In this section "the original offence" means the offence with which the accused was charged when he was granted bail or an offence charged in the same proceedings as that offence.

Breach of bail conditions: arrest of offender, etc

28

(1) A constable may arrest without warrant an accused who has been released on bail where the constable has reasonable grounds for suspecting that the accused has broken, is breaking, or is likely to break any condition imposed on his bail.

(2) An accused who is arrested under this section shall wherever practicable be brought before the court to which his application for bail was first made not later than in the course of the first day after his arrest, such day not being, subject to subsection (3) below, a Saturday, a Sunday or a court holiday prescribed for that court under section 8 of this Act.

(3) Nothing in subsection (2) above shall prevent an accused being brought before a court on a Saturday, a Sunday or such a court holiday where the court is, in pursuance of the said section 8, sitting on such day for the disposal of criminal business.

(4) Where an accused is brought before a court under subsection (2) or (3) above, the court, after hearing the parties, may –

(a) recall the order granting bail;

(b) release the accused under the original order granting bail; or

(c) vary the order granting bail so as to contain such conditions as the court thinks it necessary to impose to secure that the accused complies with the requirements of paragraphs (a) to (d) of section 24(5) of this Act.

(5) The same rights of appeal shall be available against any decision of the court under subsection (4) above as were available against the original order of the court relating to bail.

(6) For the purposes of this section and section 27 of this Act, an extract from the minute of proceedings, containing the order granting bail and bearing to be signed by the clerk of court, shall be sufficient evidence of the making of that order and of its terms and of the acceptance by the accused of the conditions imposed under section 24 of this Act.

Bail: monetary conditions

29

(1) Without prejudice to section 27 of this Act, where the accused or a cautioner on his behalf has deposited a sum of money in court under section 24(6) of this Act, then –

(a) if the accused fails to appear at the time and place appointed for any diet of which he has been given due notice, the court may, on the motion of the prosecutor, immediately order forfeiture of the sum deposited;

(b) if the accused fails to comply with any other condition imposed on bail, the court may, on conviction of an offence under section 27(1)(b) of this Act and on the motion of the prosecutor, order forfeiture of the sum deposited.

(2) If the court is satisfied that it is reasonable in all the circumstances to do so, it may recall an order made under subsection (1)(a) above and direct that the money forfeited shall be refunded, and any decision of the court under this subsection shall be final and not subject to review.

(3) A cautioner, who has deposited a sum of money in court under section 24(6) of this Act, shall be entitled, subject to subsection (4) below, to recover the sum deposited at any diet of the court at which the accused appears personally.

(4) Where the accused has been charged with an offence under section 27(1)(b) of this Act, nothing in subsection (3) above shall entitle a cautioner to recover the sum deposited unless and until –

(a) the charge is not proceeded with; or

(b) the accused is acquitted of the charge; or

(c) on the accused's conviction of the offence, the court has determined not to order forfeiture of the sum deposited.

(5) The references in subsections (1)(b) and (4)(c) above to conviction of an offence shall include references to the making of an order in respect of the offence under section 246(3) of this Act.

Bail review

30

(1) This section applies where a court has refused to admit a person to bail or, where a court has so admitted a person, the person has failed to accept the conditions imposed or that a sum required to be deposited under section 24(6) of this Act has not been so deposited.

(2) A court shall, on the application of any person mentioned in subsection (1) above, have power to review its decision to admit to bail or its decision as to the conditions imposed and may, on cause shown, admit the person to bail or, as the case may be, fix bail on different conditions.

(3) An application under this section, where it relates to the original decision of the court, shall not be made before the fifth day after that decision and, where it relates to a subsequent decision, before the fifteenth day thereafter.

(4) Nothing in this section shall affect any right of a person to appeal against the decision of a court in relation to admitting to bail or to the conditions imposed.

Bail review on prosecutor's application

31

(1) On an application by the prosecutor at any time after a court has granted bail to a person the court may, where the prosecutor puts before the court material information which was not available to it when it granted bail to that person, review its decision.

(2) On receipt of an application under subsection (1) above the court shall –

(a) intimate the application to the person granted bail;

- (b) fix a diet for hearing the application and cite that person to attend the diet; and
 - (c) where it considers that the interests of justice so require, grant warrant to arrest that person.
- (3) On hearing an application under subsection (1) above the court may –
- (a) withdraw the grant of bail and remand the person in question in custody; or
 - (b) grant bail, or continue the grant of bail, either on the same or on different conditions.
- (4) Nothing in the foregoing provisions of this section shall affect any right of appeal against the decision of a court in relation to bail.

Bail appeal

32

- (1) Where, in any case, bail is refused or where the accused is dissatisfied with the amount of bail fixed, he may appeal to the High Court which may, in its discretion order intimation to the Lord Advocate or, as the case may be, the prosecutor.
- (2) Where, in any case, bail is granted, or, in summary proceedings an accused is ordained to appear, the public prosecutor, if dissatisfied –
- (a) with the decision allowing bail;
 - (b) with the amount of bail fixed; or
 - (c) in summary proceedings, that the accused has been ordained to appear,
- may appeal to the High Court, and the accused shall not be liberated, subject to subsection (7) below, until the appeal by the prosecutor is disposed of.
- (3) Written notice of appeal shall be immediately given to the opposite party by a party appealing under this section.
- (4) An appeal under this section shall be disposed of by the High Court or any Lord Commissioner of Justiciary in court or in chambers after such inquiry and hearing of parties as shall seem just.
- (5) Where an accused in an appeal under this section is under 21 years of age, section 51 of this Act shall apply to the High Court or, as the case may be, the Lord Commissioner of Justiciary when disposing of the appeal as it applies to a court when remanding or committing a person of the accused's age for trial or sentence.
- (6) In the event of the appeal of the public prosecutor under this section being refused, the court may award expenses against him.

(7) When an appeal is taken by the public prosecutor either against the grant of bail or against the amount fixed, the accused to whom bail has been granted shall, if the bail fixed has been found by him, be liberated after 72 hours from the granting of bail, whether the appeal has been disposed of or not, unless the High Court grants an order for his further detention in custody.

(8) In computing the period mentioned in subsection (7) above, Sundays and public holidays, whether general or court holidays, shall be excluded.

(9) When an appeal is taken under this section by the prosecutor in summary proceedings against the fact that the accused has been ordained to appear, subsections (7) and (8) above shall apply as they apply in the case of an appeal against the granting of bail or the amount fixed.

(10) Notice to the governor of the prison of the issue of an order such as is mentioned in subsection (7) above within the time mentioned in that subsection bearing to be sent by the Clerk of Justiciary or the Crown Agent shall be sufficient warrant for the detention of the accused pending arrival of the order in due course of post.

Bail: no fees exigible

33

No clerks fees, court fees or other fees or expenses shall be exigible from or awarded against an accused in respect of a decision on bail under section 22A above, an application for bail or of the appeal of such a decision or application to the High Court.

ARRANGEMENTS FOR PERSONS REMANDED IN CUSTODY

The Prisons and Young Offenders (Scotland) Rules 1994 (SI 1994 No.1931 (S.85)), as amended, regulate various matters relating to the detention of persons on remand. Those concerned can expect the following basic provision during their detention in custody:

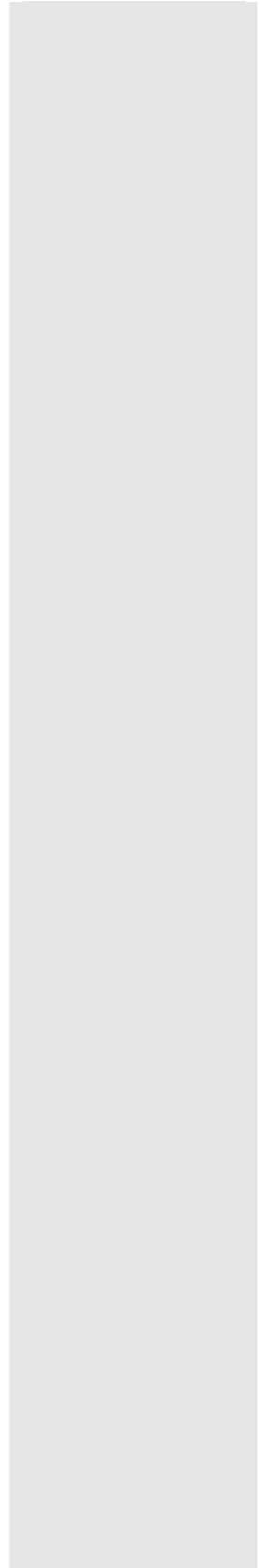
- a secure, safe environment;
- decent accommodation (appropriate clothing, bed clothes, furnishings etc);
- meals (balanced diet appropriate to the needs of individuals with regards to health and religion);
- visits (family contact, legal), access to telephone and other correspondence;
- ACT (suicide prevention);
- healthcare admission interview;
- interview by a doctor;
- detoxification & substitute prescribing;
- short-term needs assessment;
- induction programme;
- accommodation needs actioned;
- social work interview – only for Schedule 1 and sex offenders;
- employment benefits surgery;
- addictions testing;
- harm reduction session;
- opportunity to practice religious beliefs;
- access to library service.

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Enable
Age Concern Scotland
Turning Point Scotland
Fairbridge in Scotland
University Law and Social Work Departments

**THE USE OF BAIL AND
REMAND: ANALYSIS OF
CONSULTATION RESPONSES**



**THE USE OF BAIL AND REMAND: ANALYSIS OF
CONSULTATION RESPONSES**

Linda Nicholson
The Research Shop

The Sentencing Commission for Scotland
2004

ACKNOWLEDGEMENTS

Thanks are expressed to all of the respondents who took the time and care to respond to the consultation. Every reply has been examined thoroughly and every effort made to represent accurately the wide range of views and opinions expressed. Copies of full non-confidential responses can be accessed on The Sentencing Commission for Scotland website. Thanks also go to The Sentencing Commission Secretariat for liaison over the management of the consultation responses.

Linda Nicholson
November 2004

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EXECUTIVE SUMMARY

The Scottish Sentencing Commission consultation on The Use of Bail and Remand took place between 28 June 2004 and 30 September 2004. A consultation paper was issued to which 48 responses were received from a range of individuals and organisations with an interest in the use of bail and remand in Scotland.

This report presents an analysis of the responses to the consultation. The findings will inform the Sentencing Commission's report and recommendations to the Scottish Executive.

Despite a relatively modest volume of submissions, the response to the consultation was encouraging in terms of its representation of a wide range of perspectives from a variety of agencies and individuals with an interest in criminal justice. Responses from local government comprised the largest category of submissions (44%). No obvious gap in respondent category was identified.

The consultation document posed a relatively large number of questions (37 in total) which focused on the following aspects of the court process:

- The issues and the law
- The role of the police and the Procurator Fiscal in relation to bail
- Court decisions pre-trial and during trial
- Reviews and appeals in respect of pre-trial decisions
- Breach of bail
- Bail post-conviction

Respondents could opt in to addressing all or some of the questions posed and a summary of the views submitted is below. In addition, a number of overarching themes emerged from responses. Recurring themes included the perception that bail is not respected by alleged offenders and that the system appears to be too lenient; the view that bail and remand issues cannot be tackled in isolation from the criminal justice system as a whole; and a general concern that the numbers of people remanded to custody should not increase as a result of any changes made.

SUMMARY OF VIEWS EXPRESSED

General Issues of Bail and Remand (Chapter 3)

Q1: WHAT STEPS DO YOU CONSIDER COULD BE TAKEN TO REDUCE THE NUMBER OF OFFENCES COMMITTED BY THOSE ON BAIL?

- Respondents considered the 3 main steps which could be taken to reduce the number of offences committed by those on bail to be to increase the respect shown by courts and accused persons for bail and its conditions; to reduce the time between a case first being called and trial/sentence; and to increase the availability of better targeted bail supervision
- Around one-third of those who commented made a recommendation for consideration to be given to the use of electronic monitoring of people on bail

Q2: WHAT STEPS DO YOU CONSIDER COULD BE TAKEN TO ENSURE THAT THOSE GRANTED BAIL APPEAR IN COURT WHEN REQUIRED TO DO SO?

- Many consultees considered that impressing upon bailees the seriousness of breaching conditions and providing more opportunities for bail supervision would help to ensure that those granted bail appear in court when required to do so
- Several respondents suggested greater pro-activity by criminal justice agencies in reminding accused persons of forthcoming court dates would help to reduce non-attendance rates

Q3: WHAT STEPS DO YOU CONSIDER COULD BE TAKEN TO REDUCE THE NUMBER OF THOSE REMANDED IN CUSTODY WITHOUT JEOPARDISING THE SAFETY OF THE PUBLIC, CREATING A RISK OF FURTHER OFFENDING OR HINDERING THE SMOOTH OPERATION OF JUDICIAL PROCEEDINGS?

- More consistently available bail supervision and bail hostels and better targeted support services for those on bail were 2 key steps which respondents thought could reduce the number of those remanded in custody without posing a risk or hindering the smooth operation of judicial proceedings

Q4: WHAT STEPS DO YOU CONSIDER COULD BE TAKEN TO PROMOTE MORE WIDESPREAD UNDERSTANDING AMONGST THE PUBLIC, THE MEDIA AND POLITICIANS ABOUT WHAT IS INVOLVED IN DECISION MAKING IN RELATION TO USE OF BAIL AND REMAND?

- Consultees considered that the promotion of a greater understanding of bail and remand decision making could follow from greater openness and transparency regarding decision making, organised media campaigns and public relation strategies, making the statutory criteria for decision making more explicit and widely known and providing information to victims via victim support

Issues of Law (Chapter 4)

Q5: DO YOU CONSIDER THAT THE CRITERIA TO BE TAKEN INTO ACCOUNT BY THE COURT IN DECIDING WHETHER TO GRANT BAIL SHOULD BE PRESCRIBED IN STATUTE?

Q6: DO YOU CONSIDER THAT ENACTING SUCH STATUTORY CRITERIA WOULD PROMOTE CONSISTENCY IN DECISION MAKING?

- Of those who provided commentary on whether criteria to be taken account by the court in deciding whether to grant bail should be prescribed in statute, views were relatively evenly split between those advocating statutory prescription (38%), those against the proposal (34%) and those who envisaged both merits and disadvantages (28%)
- The most commonly cited advantages of statutory prescription were the promotion of consistency and greater transparency in court decision making
- The most commonly cited disadvantage was the likely reduction in judicial flexibility and discretion that consultees envisaged would ensue

Q7: DO YOU CONSIDER THAT THE RANGE OF STANDARD BAIL CONDITIONS IS ADEQUATE?

- Of those who commented, almost two-thirds (63%) considered that the current range of standard bail conditions is adequate

Q8: IF YOU DO NOT, WHAT ADDITIONAL STANDARD CONDITIONS DO YOU CONSIDER SHOULD BE IMPOSED?

Q9: DO YOU CONSIDER THAT THERE SHOULD BE ADDITIONAL SPECIAL CONDITIONS IN ADDITION TO THOSE REFERRED TO IN PART TWO?

- Of the few additional standard conditions identified as required by consultees, most commonly raised were the need for bailees to notify the court of any change of address and to report regularly to their solicitor, the police or Criminal Justice Social Work
- Potential additional special conditions were identified as including remote monitoring, agreeing to bail supervision and complying with its requirements, engaging with relevant support services, not entering licensed premises, refraining from drinking alcohol, and in the cases of alleged sex offenders, no contact with unsupervised children

The Role of the Police and the Procurator Fiscal in Relation to Bail (Chapter 5)

Q10: DO YOU CONSIDER THAT THE POLICE AND THE PROCURATOR FISCAL SHOULD BE ABLE TO IMPOSE CONDITIONS ON AN ACCUSED PERSON WHO IS LIBERATED WITHOUT APPEARING IN COURT?

- Of the respondents who provided a view, 45% were against police and Procurators Fiscal being able to impose conditions on an accused person who is liberated without appearing in court; 38% agreed to these powers; and 17% did not provide a clear recommendation
- It was considered by many that the court was the appropriate place for such decisions which may affect a person's liberty, may have implications for other agencies and which may lead to criminal proceedings should conditions be breached
- A minority of consultees were in favour of the police and Procurators Fiscal imposing conditions where the person agreed to these and could apply to the court for a review of the conditions

Q11: IF YOU DO, WHAT CONDITIONS DO YOU CONSIDER THEY SHOULD BE ABLE TO IMPOSE?

- Of those who advocated allowing the police and Procurators Fiscal to impose conditions, most recommended confining the choice of conditions to those already in the standard list of conditions available to the court

Q12: DO YOU CONSIDER THAT THE FACTORS TAKEN INTO ACCOUNT BY THE PROCURATOR FISCAL IN DECIDING WHETHER TO OPPOSE BAIL ARE THE RIGHT ONES?

- The vast majority (93%) of those who commented considered that the factors which the Procurator Fiscal takes into account in deciding whether to oppose bail are the right ones

Q13: IF YOU DO NOT, WHAT FACTORS DO YOU CONSIDER SHOULD BE TAKEN INTO ACCOUNT?

- Many consultees were concerned about the opposition to bail in cases where the accused has no fixed abode and suggestions were made to address this

Q14: DO YOU CONSIDER THAT THE CRITERIA WHICH THE POLICE AND PROCURATOR FISCAL TAKE INTO ACCOUNT IN DECIDING WHETHER TO LIBERATE AN ACCUSED PENDING APPEARANCE IN COURT SHOULD BE PRESCRIBED BY STATUTE?

- Views were exactly evenly split between those who recommended statutory prescription of the criteria which the police and Procurator Fiscal take into account in deciding whether to liberate an accused pending appearance in court, and those against their prescription in statute

Q15: DO YOU CONSIDER THAT ENACTING SUCH STATUTORY CRITERIA WOULD PROMOTE CONSISTENCY IN DECISION MAKING?

- Many respondents considered that enacting such statutory criteria would promote consistency in decision making. However, others were of the view that this would reduce flexibility and restrict opportunities to take local concerns or unforeseen circumstances into account in decision making

Court Decisions Pre-Trial and During Trial (Chapter 6)

Q16: WHAT INFORMATION DO YOU CONSIDER SHOULD BE AVAILABLE TO THE COURT IN MAKING A BAIL DECISION?

- Respondents specified a range of information which they considered should be available to the court in making bail decisions. Most commonly mentioned were address details, criminal record, lifestyle/family circumstances, history of bail experience, offence details, physical and mental health, risk posed to the public and likely impact on alleged victims

Q17: DO YOU CONSIDER THAT FURTHER CATEGORIES OF INFORMATION MIGHT ASSIST THE COURTS IN MAKING DECISIONS ON BAIL APPLICATIONS, REVIEWS AND APPEALS?

- A few consultees urged that more time be allocated to verify information provided to the court and that there should be more information sharing between relevant criminal justice agencies

Q18: IF YOU DO, HOW DO YOU CONSIDER THAT THIS INFORMATION COULD SPEEDILY BE MADE AVAILABLE?

- Of those who suggested how information could be made speedily available to courts, views focused on greater use of Bail Information Services and sharing of information, perhaps by electronic means

Q19: WHAT FACTORS SHOULD BE TAKEN INTO ACCOUNT BY THE COURT WHEN IT DECIDES WHETHER OR NOT TO GRANT BAIL?

- A recurring response was that the current factors which the court takes into account when it decides whether or not to grant bail are sufficient, backed up by verification of details and risk assessment

Q20: DO YOU CONSIDER THAT IF THE PROCURATOR FISCAL DOES NOT OPPOSE BAIL PRIOR TO THE TRIAL THE COURT SHOULD BE OBLIGED TO GRANT IT?

- The majority view was that the court should not be obliged to grant bail in situations where the Procurator Fiscal has not opposed it

Q21: IF A PERSON HAS BEEN REFUSED BAIL BY THE COURT, DO YOU CONSIDER THAT THE PROCURATOR FISCAL SHOULD THEREAFTER BE ABLE TO ADMIT SUCH A PERSON TO BAIL?

- The majority view was that if the court has refused bail then the Procurator Fiscal should not thereafter be able to admit such a person to bail

Q22: DO YOU CONSIDER THAT STEPS COULD BE TAKEN TO IMPROVE CONSISTENCY IN DECISION-MAKING RELATING TO THE GRANT OR REFUSAL OF BAIL?

- All but one of those who responded recognised the need to take action to improve consistency in decision-making relating to the grant or refusal of bail
- Amongst the suggestions made for improving consistency were the production of guidance, the formal, systematic recording of reasons for decisions and better training of those involved

Q23: WHAT SUPPORTS SHOULD BE AVAILABLE TO A PERSON ON BAIL TO TRY TO ENSURE THAT HE OR SHE COMPLETES THE PERIOD ON BAIL SATISFACTORILY?

- Two main ways to help those on bail complete their period on bail satisfactorily were identified as implementing individually tailored, needs-based supports on a graduated scale and supports aimed at tackling offending behaviour, for example, by addressing health or accommodation problems

Q24: DO YOU CONSIDER THAT THERE SHOULD BE DIFFERENT KINDS OF SUPPORT ON BAIL FOR ADULTS OF EITHER SEX, OR YOUNG PEOPLE?

- In general, rather than considering different kinds of support on bail depending on gender, or age of the accused person, respondents advocated tailoring bail support packages to individual needs, whatever the gender or age of the alleged offender

Q25: DO YOU HAVE ANY IDEAS AS TO THE EXTENT AND MANNER IN WHICH BAIL INFORMATION AND BAIL SUPERVISION SCHEMES MIGHT BE DEVELOPED?

- A dominating theme was for existing priority target groups for bail supervision schemes to be widened or abolished so that such schemes can be considered for all cases in which the Procurator Fiscal intends to oppose bail

Q26: DO YOU CONSIDER THAT GREATER AVAILABILITY OF BAIL HOSTELS AND OTHER ACCOMMODATION PROVIDING SUPPORT TO ACCUSED PERSONS ON BAIL WOULD ENABLE THE COURTS TO RELEASE MORE ACCUSED ON BAIL?

- The idea of making bail hostels and other accommodation for those on bail more available was given a cautious welcome by the majority of those who commented

Q27: DO YOU CONSIDER THAT THE TYPES OF SUPERVISION AND SUPPORT FACILITIES THAT ARE AVAILABLE TO FEMALE ACCUSED WHO SEEK AND ARE GRANTED BAIL WOULD ASSIST MALE ACCUSED?

- Many respondents wished to see the 218 Time Out initiative considered for male accused with the majority of those who responded agreeing that the types of supervision and support facilities that are available to female accused may assist male accused

Q28: DO YOU CONSIDER THAT REASONS FOR BAIL AND REMAND DECISIONS SHOULD ROUTINELY BE PROVIDED AND FORMALLY RECORDED?

- The vast majority of those who commented (84%) recommended routine provision and formal recording of reasons for bail and remand decisions

Reviews and Appeals in Respect of Pre-Trial Decisions (Chapter 7)

Q29: ON WHAT BASIS SHOULD THE HIGH COURT DEAL WITH AN APPEAL IN RESPECT OF BAIL – AS A REVIEW OF THE EXERCISE OF DISCRETION BY THE SHERIFF OR MAGISTRATE OR BY ASSESSING THE CASE AFRESH, WHICH MIGHT INCLUDE INFORMATION ADDITIONAL TO THAT WHICH THE SHERIFF OR MAGISTRATE CONSIDERED?

- Views were almost evenly split between those who considered that when the High Court deals with an appeal in respect of bail this should be on the basis of a review of the previous exercise of discretion by the sheriff or magistrate (46%), and those who recommended assessing the case afresh (54%)

Q30: DO YOU CONSIDER THAT IT WOULD BE HELPFUL TO HAVE MORE JUDICIAL GUIDANCE FROM THE APPEAL COURT ON ISSUES RELATING TO THE GRANT AND REFUSAL OF BAIL?

- The vast majority of those who commented (89%) considered that more judicial guidance from the Appeal Court on issues relating to the grant and refusal of bail would be helpful

Q31: IF SO, ON WHICH PARTICULAR ISSUES?

- More guidance was requested on a variety of issues including the criteria for decision making, the interpretation of the criteria and the weight to attach to different factors such as age and offence

Breach of Bail (Chapter 8)

Q32: DO YOU CONSIDER THAT COMMITTING AN OFFENCE WHILE ON BAIL SHOULD BE PROSECUTED AS A SEPARATE OFFENCE RATHER THAN AS AN AGGRAVATION OF THE NEW OFFENCE?

- The majority view (67%) was for dealing with an offence committed while on bail as an aggravation of the new offence rather than prosecuting it as a separate offence
- Handling bail offences as aggravations of the new offence was seen as avoiding placing pressure on already busy courts and reducing the possibility of causing further delays
- Respondents urged that in dealing with bail offences as aggravations, the sentencing judge should make clear what part of the overall penalty was imposed in response to the bail offence
- Arguments in favour of handling bail offences as separate offences focused on marking their gravity and signalling that such behaviour will not be tolerated

Q33: AT WHAT POINT IN THE PROCESS SHOULD OTHER BREACHES OF BAIL BE DEALT WITH?

- Responses were split between those advocating dealing with other breaches of bail at the same time as the trial for the original offence and those favouring handling other breaches as soon as possible and separate from the original offence

Q34: DO YOU CONSIDER THAT THERE SHOULD BE A PRESUMPTION AGAINST BAIL WHERE A PERSON HAS BREACHED A CONDITION OF BAIL OR IS ALLEGED TO HAVE COMMITTED AN OFFENCE ON BAIL?

- A slight majority view (52%) was not in favour of a presumption against bail where a person has breached a condition of bail or is alleged to have committed an offence on bail

Bail Post-Conviction (Chapter 9)

Q35: DO YOU CONSIDER THAT IT WOULD BE HELPFUL TO HAVE MORE JUDICIAL GUIDANCE FROM THE APPEAL COURT ON ISSUES RELATING TO THE GRANT AND REFUSAL OF INTERIM LIBERATION?

- Almost all (85%) of those who provided a view stated that it would be helpful to have more judicial guidance from the Appeal Court on issues relating to the grant and refusal of interim liberation

Q36: IF SO, ON WHICH PARTICULAR ISSUES?

- Amongst the particular issues on which guidance was requested were the circumstances

in which to make a presumption in favour of bail, and the factors to take into account in deciding on interim liberation

Q37: DO YOU CONSIDER THAT THE CRITERIA TO BE TAKEN INTO ACCOUNT BY THE COURT IN DECIDING WHETHER TO GRANT INTERIM LIBERATION SHOULD BE PRESCRIBED IN STATUTE?

- Respondents were evenly split between those who favoured statutory prescription of the criteria to take into account by the court in deciding whether to grant interim liberation and those against such a proposal

CHAPTER 1: BACKGROUND TO THE CONSULTATION

THE CONSULTATION

The Use of Bail and Remand consultation was launched by the Sentencing Commission for Scotland on 28 June 2004. Copies of the consultation paper were distributed to a wide range of people and organisations in the public, academic and voluntary sectors¹. The Sentencing Commission was set up in November 2003 and was invited by the Scottish Executive to review and make recommendations on the use of bail and remand as a matter of priority. The consultation paper set out the background to their review, the operation of the current procedures and practices relating to bail and remand in Scotland and the Commission's objectives. It sought views on the key questions that the Commission considered needed to be addressed and invited views and suggestions for improvements on any aspect of the current arrangements that may not have been covered through the questions listed.

The consultation period ran from 28 June 2004 until 30 September 2004 although a small number of responses were received shortly after this date and have been included in this analysis. A press release helped publicise the consultation paper which was made available on the Sentencing Commission for Scotland website. In announcing the consultation the Chairman of the Commission, Lord MacLean said:

“The challenge for the Commission in reviewing bail and remand is to balance the rights of the accused with interests of public safety and the smooth operation of judicial proceedings. People must not be deprived of their liberty without good reason before they are found guilty of an offence.

On the other hand, it is necessary to protect the public from accused persons who there is good reason to believe may commit further offences or attempt to intimidate witnesses while on bail. It is also necessary in the interests of the administration of justice to remand in custody those who there is good reason to suppose may abscond or simply fail or refuse to appear at court.

In carrying out our review the Commission needs to analyse the situation thoroughly, identifying the key issues and determining whether beneficial change could be promoted by legislation, guidance, improved information, procedural change, including change to bail appeal and review arrangements, service resource provision or other means.

This consultation document seeks views on the key questions that we have so far identified. We recognise that there may be other factors involved and so responses do not need to be confined only to the questions on which we seek views.”

By the final cut-off date for analysis, 48 responses to the consultation had been received and have been included in this analysis.² This report presents an analysis of these 48 responses. The findings will inform the Sentencing Commission's report and recommendations due for completion by the end of 2004.

¹ Annex 1 contains the original distribution list.

² Annex 2 contains a list of respondents.

CONTEXT

The Sentencing Commission for Scotland, chaired by Rt Hon Lord MacLean, is an independent, judicially-led body which was set up by the Scottish Executive under its policy statement, “A Partnership for a Better Scotland”. The Commission was launched in November 2003 and given the remit to review and make recommendations to the Scottish Executive on:

- The use of bail and remand
- The arrangements for early release from prison, and supervision of short term prisoners on their release
- The basis on which fines are determined
- The effectiveness of sentences in reducing re-offending
- The scope to improve consistency in sentencing

The particular impetus for the Sentencing Commission’s review of the use of bail and remand stemmed from the priority attached to the matter by the Scottish Executive and the apparent general concern about a number of specific issues:

- The number, and on occasion the gravity, of offences being committed by those given bail;
- The time that those accused of serious charges remain on bail awaiting trial;
- The incidence of those on bail threatening witnesses directly and indirectly;
- The fact that some accused persons are not prosecuted and punished for offences committed while on bail or for breach of bail conditions;
- The disruption to the efficient administration of justice by those who, after being granted bail, fail to appear at court when required by their bail order to do so;
- The size of and growth in the prison population, which is being fuelled by the numbers being remanded in custody.

In seeking to address these issues the Commission stressed the importance of striking the right balance between the rights of individuals, the safety of the public and the efficient and effective administration of justice. To help achieve this they considered it vital to hear the views of others involved in what they saw as a complex area of criminal law.

The remainder of the report documents the consultation process (Chapter 2), and the findings to emerge from the detailed analysis of responses (Chapters 3-10).

CHAPTER 2: THE CONSULTATION PROCESS

TIMING OF CONSULTATION

The consultation became “live” on 28 June 2004 and closed on 30 September 2004 although responses received shortly after this deadline have been included in the analysis. The scale of the consultation was wide in terms of distribution to stakeholders but relatively moderate in terms of the volume of responses received for a consultation of this nature. Staff in the Scottish Sentencing Commission’s Secretariat supported the exercise.

NATURE OF CONSULTATION

The consultation document comprised 39 pages (excluding appendices) and was divided into 8 parts. It set out the background to the review, the operation of the current procedures and practices relating to bail and remand in Scotland and the Commission’s objectives. Part 8 of the document posed 37 questions to which responses were invited. These focused around:

1. The issues and the law
2. The role of the police and the Procurator Fiscal in relation to bail
3. Court decisions pre-trial and during trial
4. Reviews and appeals in respect of pre-trial decisions
5. Breach of bail
6. Bail post-conviction

NATURE OF RESPONSES

The structure of the consultation document provided a significant steer in promoting some consistency in form of response. Although no formal consultation response form was provided, submissions tended to be tightly structured around the consultation questions posed. Submissions arrived either by email or hard copy. Most ranged from one page to three pages in length, although a few respondents submitted over 10 pages of comments.

The consultation was dominated by responses from organisations as opposed to individuals. Some respondents exercised their right to remain anonymous and for their responses to be withheld from the public domain. An analysis of the “anonymous” responses is included (although anonymised) here but the full response will not be made available for public scrutiny.

THE RESPONDENTS

The full list of respondents is documented at Annex 2. Respondents could be grouped into broad categories as shown in Table 1.

Table 1: Respondents by Category

Respondent Category	No. of Responses	% of Responses
Local Government	21	44
Legal	12	25
Individual Sentencers	4	8
Police Bodies	3	6
Voluntary Sector	3	6
Other organisations	4	8
Other individual	1	2
TOTAL	48	100

NB Percentages may not total 100% exactly due to rounding

Responses from local government comprised the largest category of submissions (44%). One quarter of responses were provided by legal organisations such as courts and representative legal establishments. Overall, 90% of responses were submitted by organisations with the remaining 10% representing individual views although all of these were based on extensive professional experience of the criminal justice system.

Naming Respondents

After discussion with the client consultation team, it was agreed to preserve the anonymity of individual respondents and organisations by attributing their comments and quotes to the grouped respondent category to which they fit along with the addition of their unique reference number. In this way, individual requests for anonymity are met, but a further depth is added to the analysis by providing some contextual information about the respondent type. The terms used to describe the different category of respondent are as follows:

LG	Local Government
Leg	Legal
Pol	Police Bodies
Vol	Voluntary Sector
Sent	Individual Sentencers
Oth	Other Organisations
Indiv	Other Individual

Where similar views have been expressed by a small number of respondents, each of these consultees is referenced. Where many respondents have expressed the same view the text refers to this without referencing all relevant responses separately.

APPROACH TO ANALYSIS

Analytical Framework

An electronic Excel database was used to store and assist in the analysis of the responses. This database enabled the storage of either free text or numerical data in a systematic manner whilst providing the flexibility for framework amendments should they be required as the work progressed.

The fields used to record the material were based on the questions set out in the consultation document. Once responses had been examined, a small number of additional fields were added to accommodate the further themes which arose. The result was a comprehensive list of fields which formed the headings for the consultation database of responses.

Quantitative Material

Although much of the analysis was based on descriptive free text, some limited scope existed for quantitative analysis and this was exploited. This involved approximate counts of the numbers of respondents who commented on particular topics and, within these groups, the numbers of respondents holding particular views. However, because of the open nature of the consultation, which did not require people to provide a response on every issue and the approach of many consultees in providing more general comments rather than responding to each question posed, **quantification of responses was not appropriate in all instances and should be treated as simply indicative and illustrative rather than absolute.** In addition, it should be noted that **any statistics quoted here cannot be extrapolated to a wider population outwith the consultation population.**

Factual Accuracy

The views presented in this analysis have not been vetted in any way for factual accuracy. The opinions and comments submitted to the consultation may be based on fact or may, indeed, be based on what respondents perceive to be accurate from their perspective, but which others may interpret differently. It is important for the analysis to represent views from all perspectives. The report may, therefore, contain analysis of responses which may be factually inaccurate, but are objective in terms of their reflection of strongly held perceptions.

RESPONDENTS VIEWS ON THE CONSULTATION EXERCISE

Several respondents from a range of different respondent categories commented on the consultation document itself and/or the consultation process. Many respondents praised the consultation paper with typical comments being:

“a helpful and comprehensive exposition of the principles on which bail may be granted.....welcome this opportunity to comment on an issue that has a very direct bearing on ..day to day work” (10 LG)

“There has obviously been a great deal of work already undertaken and there is a wealth of information contained in the consultation papers” (19 LG)

“we consider that the consultation document sets out a clear and useful description of processes relating to the operation of bail and the roles of the various parties involved” (36 LG)

“the first seven (sections of the paper) set up with commendable clarity the existing law and practice” (42 Leg)

Two respondents, however, expressed their concerns over the membership of the Sentencing Commission itself, arguing for its greater representation of victims of crime (14 Oth, 31 Vol).

The following 8 Chapters document the substance of the analysis, presenting the main issues, arguments and recommendations contained in the responses. These follow the ordering of questions raised in the consultation document.

CHAPTER 3: GENERAL ISSUES OF BAIL AND REMAND

The consultation stated:

The available statistics suggest that just over 30,000 accused persons are bailed in a year and those persons account for over 50,000 bail orders. Around 10,000 people are bailed more than once in a year.

Bail is given for a wide variety of crimes and offences. For roughly 3,000 accused persons the charge is one involving violence. For many (in the region of 8,000), however, the charge is for something less serious such as breach of the peace or vandalism. Equally, around 8,000 have been charged with a crime of dishonesty.

Over 9,000 of those given bail are likely to offend while on bail; over 3,000 of these will have been bailed for charges involving dishonesty and around 4,000 will offend more than once while on bail.

Those on bail, can, of course abuse the conditions of their bail order in ways other than offending. For example, there are many cases where an accused fails to attend a trial or court hearing, which, apart from being contrary to the interests of justice, cause unnecessary distress to victims and inconvenience for witnesses as well as a waste of tax-payers' money, time and capacity in the justice system.

Q1: WHAT STEPS DO YOU CONSIDER COULD BE TAKEN TO REDUCE THE NUMBER OF OFFENCES COMMITTED BY THOSE ON BAIL?

Thirty-seven respondents (77%) addressed this question.

Three main themes dominated the responses. These were the need for courts and accused persons to show greater respect for bail and its conditions; the need to reduce the length of time between a case first being called and trial/sentence; and increasing the availability of better targeted bail supervision.

Respect for Bail

A concern was expressed that there had been an erosion of the *gravitas* which bail once held (2 Leg, 23 Leg, 43 Leg) and that it should be made very plain to those granted bail that breaches would be taken very seriously. One suggestion was for the conditions of bail and repercussions of breach to be talked over with the accused person in a one-to-one meeting out of the court setting (5 Leg), with it made clear that a breach of bail would result in a stiffer sentence (49 Leg).

Respondents stressed that for bail to maintain credibility there had to be certainty that offending whilst on bail would attract a judicial response (5 Leg) and that the matter would be taken seriously (31 Vol). It was recommended that there should be presumption against bail for any further offences (34 Pol).

Calls were made for a more consistent application of principles relating to offending whilst on bail (10 LG). The introduction of a statutory minimum penalty for such offences was recommended (18 Leg) with the suggestion that 3 breaches in one year should lead to

automatic remand. Respondents saw the need for “punitive” sentences for those who offended on bail (7 Pol), and sentences for such offences running consecutively rather than concurrently (16 Oth). One view was that those accused of breaches should be sent to a higher court in order to allow for harsher sentencing (31 Vol).

It was considered that prompt action to deal with offending whilst on bail could have a positive impact (2 Leg, 10 LG, 23 Leg, 36 LG, 43 Leg) with breaches of bail, “*meticulously policed and dealt with as soon as possible*” (23 Leg). One view was the accused should be fast-tracked to court to deal with the alleged subsequent offence (5 Leg). Several respondents emphasised that all breaches of bail should be reported to the police (26 LG, 28 LG, 31 Vol, 46 LG).

Time Reduction for Completion of Cases

A recurring theme emerging from many responses from a range of sectors was the recommendation for a reduction in time between a case first calling and the trial/sentence for that case. One relevant comment was:

“The goal should be to get ... people through the court system as quickly as possible and endeavour to address their offending rather than to reduce offending on bail as an end in itself” (27 Indiv)

One suggestion was for the introduction of a target time limit for cases where an accused is bailed, in line with time limits for those remanded in custody (4 LG).

Better Targeting and Availability of Bail Supervision

Many respondents, particularly from the local government sector, perceived better targeting and a greater availability of bail supervision as ways in which offending on bail could be addressed. The resource implications of extending availability of bail supervision were acknowledged by some who argued for more discriminating use of the resource by, for example, improving the quality of risk assessment of accused persons (11 LG, 19 LG, 26 LG, 28 LG, 36 LG, 45 Leg).

It was suggested that the advantages of bail supervision should be promoted amongst sentencers and Procurators Fiscal (24 LG, 25 LG).

A related issue which emerged repeatedly in responses from a variety of sectors was for the early referral of those on bail to appropriate support agencies which could help with any problems of homelessness, addiction and mental health. One consultee emphasised the importance of what they described as “front loading” the system with an investment of effort in treatment and support in the early stages of bail predicted to deliver returns in the form of lower breach rates (45 Leg).

A few consultees stressed that conditions attached to bail should be tailored more closely to the circumstances of the individual accused person (27 Indiv, 41 LG).

Other Comments

Of the remaining comments, that most frequently made was a recommendation for

consideration to be given to the use of electronic monitoring of people on bail. Just under one-third (30%) of those who commented raised this as a possibility. Greater use of curfews for bailees was suggested by a small minority (5 Leg, 17 LG, 41 LG) along with increased use of bail hostels (15 LG, 24 LG, 25 LG). The use of money bail was raised in this context by one respondent (38 Sent) and the possibility of sentencing incentives for compliance with bail conditions by another (34 Pol).

Finally, a call was made for the cessation of what was seen as the unhelpful practice of dropping the prosecution of alleged bail offences in return for the accused person tendering a guilty plea for the substantive charge (31 Vol).

Q2: WHAT STEPS DO YOU CONSIDER COULD BE TAKEN TO ENSURE THAT THOSE GRANTED BAIL APPEAR IN COURT WHEN REQUIRED TO DO SO?

Twenty-two respondents (46%) addressed this question.

Many of the previous views relating to impressing upon an accused person the **seriousness of the breach and providing more opportunities for bail supervision** were repeated in response to this question. Consultees emphasised that the court had to make clear that failure to appear was not acceptable (49 Leg) and constituted a contempt of court (7 Pol). A few respondents considered that attendance rates may improve if there was a certain consequence of failure to show (5 Leg, 18 Leg) and greater consistency in how this was dealt with (27 Indiv). It was suggested that a sentence should be imposed for failure to attend at the time of tendering a guilty plea (1 Leg).

One view was that such a breach of bail should result in automatic remand (18 Leg). Another, that prompt follow-up action to apprehend the accused rather than letting the matter slip would pay dividends (40 Sent). Indeed, one consultee considered that people failed to appear simply from lack of interest in attending (13 Leg) demonstrating perhaps their view of the matter as insignificant.

Many respondents from a variety of sectors considered that effective bail supervision held the key to reducing the rates of failure to attend court. A few consultees (2 Leg, 15 LG, 23 Leg, 43 Leg, 45 Leg) highlighted the use of bail hostels as having the potential to address the problem of non-attendance with one view that a standard condition of bail should require the accused person to live at the bail address until trial (45 Leg).

Other innovative suggestions were made:

Greater Pro-activity in Reminding of Court Dates

Several respondents suggested greater hand-holding of accused persons regarding their forthcoming court dates. Consultees recommended stamping the relevant dates onto all of the related court papers (6 LG, 46 LG) and providing confirmation of the dates to the accused person in writing (4 LG). One view was that court dates should be emphasised to the accused person before they left the court (45 Leg). Bailees with literacy difficulties could be helped with court appearance correspondence as part of a bail supervision scheme (11 LG) with others sent instructions relating to their attendance in the days just before the court date (6 LG, 27 Indiv). A scheme whereby young people were reminded of forthcoming court dates was suggested (32 LG). A few consultees recommended that part of the bail supervision

service could include the individual's collection from home and delivery to court at the prescribed time (26 LG, 28 LG).

Establish an Attendance Routine

Another innovative suggestion was for attendance routines to be established during the time on bail. For example, a standard condition of bail could be to attend regular appointments with the individual's agent (5 Leg). The accused person could be required to report to court before the due date to confirm subsequent attendance (15 LG), or report to the police a few days prior to court appearance (16 Oth, 48 Oth). Any failure to meet these requirements was perceived as offering useful early warning to the court of the likelihood of non-attendance.

Other Comments

One suggestion was for the provision of incentives for appearance on the correct date (17 LG, 41 LG). Another consultee urged that the practice should stop whereby solicitors instruct their clients not to turn up depending on which sentencer is in attendance (4 LG).

A different perspective was provided by a minority of respondents who cautioned that considering the chaotic lifestyles of many accused people some degree of non-attendance was perhaps inevitable (2 Leg, 23 Leg, 27 Leg, 42 Leg, 43 Leg).

Q3: WHAT STEPS DO YOU CONSIDER COULD BE TAKEN TO REDUCE THE NUMBER OF THOSE REMANDED IN CUSTODY WITHOUT JEOPARDISING THE SAFETY OF THE PUBLIC, CREATING A RISK OF FURTHER OFFENDING OR HINDERING THE SMOOTH OPERATION OF JUDICIAL PROCEEDINGS?

Once again, many of the views provided previously for the first 2 questions were also relevant to this issue. Some consultees repeated the points they had already made, others referred to them or simply omitted any further comment, thus making it inappropriate to provide a definitive count of the number responding directly to this question.

Comments which were repeated comprised the need for more consistently available bail supervision and bail hostels and better targeted support services for those on bail. Once again, there was much support for greater consideration of the use of electronic monitoring, perhaps linked with a curfew or form of bail supervision. However, one contrasting view was to doubt the usefulness of such monitoring as providing no personal support to the bailee and doing nothing to protect them from any negative influences which affected them previously (47 Leg).

A few respondents expressed views not previously made. Some argued for stiffer and more innovative use of conditions of bail (5 Leg, 27 Indiv, 49 LG) such as curfews and regular reporting to the police (5 Leg) or being required to live with a responsible relative such as an aunt (27 Indiv). However, one respondent cautioned that imposing more conditions of bail would inevitably result in greater levels of breach and more work for the police (7 Pol).

A call was made for the availability of more finance to support community resources to enable more "risky" people to remain within the community (19 LG). Another consultee considered that by making the process of bail and remand and the criteria for eligibility for bail more transparent, fewer people would be remanded in custody (48 Oth). A further view

was that furnishing the court with more background information on the accused person may result in higher levels of bail (48 Oth).

Not all respondents agreed with what they saw as the premise of the question, that there should be a reduction in the number of those remanded in custody. One consultee stressed that this was not desirable as it would almost certainly jeopardise the safety of the public (40 Sent). Another requested that the issue of the rights of offender and the rights of victims be redressed:

“What is being completely overlooked is that complainers also have human rights (in addition to those of the accused) and that the courts have an obligation to ensure that their rights are respected as equally as those of an accused” (31 Vol)

This consultee gave as an example domestic abuse cases in the context of which they considered that bail should be denied to protect the alleged victim. A final view was that a robust system already exists and needs no amendment provided that the Lord Advocate guidelines and the set criteria for granting bail are adhered to (34 Pol).

Q4: WHAT STEPS DO YOU CONSIDER COULD BE TAKEN TO PROMOTE MORE WIDESPREAD UNDERSTANDING AMONGST THE PUBLIC, THE MEDIA AND POLITICIANS ABOUT WHAT IS INVOLVED IN DECISION MAKING IN RELATION TO USE OF BAIL AND REMAND?

Twenty-four respondents (50%) addressed this question.

A few consultees agreed that, *“bail appears to occupy a minor position in the public eye”* (3 LG, 10 LG) and that there seemed to be generally very little public support or understanding relating to the benefit of maintaining accused people in the community rather than on remand (30 LG). However, one respondent argued against the premise of the question in disputing the need for any wider promotion of understanding (40 Sent). This consultee considered that any promotion would have only a temporary effect and any queries regarding decision making can be:

“easily ascertained by persons who genuinely wish to know by for example, a simply phone call to any criminal lawyer or a quick look at a basic textbook on criminal procedure” (40 Sent)

All other respondents made suggestions for the promotion of more widespread understanding, with 3 main themes dominating: working towards a greater openness and transparency in decision making; use of media campaigns; and introducing formal public relations strategies.

Greater Openness and Transparency

Courts were urged to be more open about decision making (5 Leg, 20 Vol) with reasons for decisions on bail and remand being stated in open court (17 LG, 41 LG, 48 Oth, 49 Leg) and the media being permitted to report them (48 Oth). A typical comment was:

“we see the open release of information regarding the reasons behind such decision (to release on bail) as being the key to better public understanding and appreciation of our legal system” (16 Oth)

One consultee argued that by facilitating greater insight into certain court decisions, speculation and misinterpretation could be reduced (34 Pol).

Other respondents called for the formal recording of bail decisions to allow for public scrutiny (15 LG, 18 Leg), the annual publication of use of bail and remand by Scottish courts (18 LG) and the regular publication of court inspection reports (49 Leg).

Media Campaigns

Many consultees took up the theme of providing the public with educational information regarding bail and remand decision making via various media. Leaflets were suggested (6 LG, 11 LG, 45 LG) and local or national press (6 LG, 22 Vol). One recommendation was for the production of a “simplified flow chart” containing information extracted from the consultation document (19 LG). Another more general recommendation was for a concerted media campaign and educational programme (15 LG). A final suggestion was that greater use be made of popular TV soaps to educate people on legal matters (16 Oth).

Public Relations Strategies

A recurring theme was to advocate the use of professional public relations personnel in promoting understanding of court decision making amongst the media and public. A few consultees recommended the appointment of trained public relations officers (20 Vol, 27 Indiv) who could address the need for “*education, education, education*” in the way decisions are made (27 Indiv).

One respondent suggested that the Scottish Courts Service should produce, on a national or local basis, a public relations strategy in consultation with partners such as Criminal Justice Services, Procurators Fiscal, Victim Support, sheriffs and the police (4 LG). Others recommended greater use of public discussions (10 LG) and reference groups (20 Vol) in facilitating greater public understanding of court decision making. The recent appointment of a media advisor to assist the judiciary was welcomed as helping courts to present information to the public and politicians in a balanced and responsible fashion (47 Leg).

Other Comments

Other ideas for promoting understanding were provided by respondents. These included making statutory criteria for decision making more explicit and widely known (17 LG, 18 Leg, 31 Vol, 41 LG); providing information to victims via victim support and other victim focused initiatives (5 Leg, 11 LG, 34 Pol); galvanising the help of support services in communicating positive messages about community disposals (11 LG); and undertaking comprehensive research projects which compare the effectiveness of bail and remand across all courts (19 LG, 31 Vol).

SUMMARY POINTS

- Respondents considered the 3 main steps which could be taken to reduce the number of offences committed by those on bail to be to increase the respect shown by courts and accused persons for bail and its conditions; to reduce the time between a case first being called and trial/sentence; and to increase the availability of better targeted bail supervision
- Around one-third of those who commented made a recommendation for consideration to be given to the use of electronic monitoring of people on bail
- Many consultees considered that impressing upon bailees the seriousness of breaching conditions and providing more opportunities for bail supervision would help to ensure that those granted bail appear in court when required to do so
- Several respondents suggested greater pro-activity by criminal justice agencies in reminding accused persons of forthcoming court dates would help to reduce non-attendance rates
- More consistently available bail supervision and bail hostels and better targeted support services for those on bail were 2 key steps which respondents thought could reduce the number of those remanded in custody without posing a risk or hindering the smooth operation of judicial proceedings
- Consultees considered that the promotion of a greater understanding of bail and remand decision making could follow from greater openness and transparency regarding decision making, organised media campaigns and public relation strategies, making the statutory criteria for decision making more explicit and widely known and providing information to victims via victim support

CHAPTER 4: ISSUES OF LAW

The consultation stated:

The law on bail in Scotland has come a long way from the time when the deposit of a sum of money with the Court was the only precondition of release from custody if a bail application was granted. Two significant reforms are worthy of note: firstly, the Bail etc (Scotland) Act 1980 provided for a system of release conditions which in practice do not normally include the deposit of money; and secondly, several provisions of the Bail and Judicial Appointments etc (Scotland) Act 2000 were designed to ensure that the Scots law on bail conformed to the European Convention on Human Rights (“the Convention”). The Convention creates the guarantee of bail for persons detained pending trial unless the domestic court is satisfied that there are relevant and sufficient reasons to justify continued detention. The current statutory law is contained in Part III of the Criminal Procedure (Scotland) Act 1995. In compliance with the Convention, this means that the Court must consider bail for every accused person irrespective of the nature of the alleged offence: in other words no bail is not an option.

Q5: DO YOU CONSIDER THAT THE CRITERIA TO BE TAKEN INTO ACCOUNT BY THE COURT IN DECIDING WHETHER TO GRANT BAIL SHOULD BE PRESCRIBED IN STATUTE?

Q6: DO YOU CONSIDER THAT ENACTING SUCH STATUTORY CRITERIA WOULD PROMOTE CONSISTENCY IN DECISION MAKING?

Of the 29 respondents (60%) who provided commentary, consultees were relatively evenly split between those advocating prescription in statute (38%), those against the proposal (34%) and those who saw both its merits and disadvantages (28%).

Perceived Advantages of Statutory Prescription of Criteria

The most commonly cited advantages of prescribing in statute the criteria to be taken into account by the court in deciding whether to grant bail were the promotion of consistency and greater transparency in court decision making. This was considered by one consultee to be especially important in relation to decisions made by part-time sheriffs who may have little experience of criminal courts (38 Sent).

Other merits of statutory prescription were seen as:

- Facilitating the promotion of public understanding of decision making (11 LG, 16 Oth)
- Maintaining public confidence in the system (37 Sent)
- Reminding sentencers of the tests to be applied in each case (38 Sent)
- Helping to establish habits of properly stating reasons for decisions (38 Sent)

A few consultees, though advocating statutory prescription, suggested that some lee-way be built in, perhaps by including one criterion which permitted flexibility according to individual or local circumstances (17 LG, 18 Leg, 41 LG).

Perceived Drawbacks of Statutory Prescription

The most commonly cited drawback of statutory prescription of criteria was the likely reduction in judicial flexibility and discretion that consultees considered would ensue. One pertinent comment was that prescriptive criteria would be:

“unduly restrictive and could only result in a mountain of case law to achieve the flexibility necessary to ensure fairness” (1 Leg)

Another respondent remarked that in their view there would always be the exception to the criteria set out in any statutory list (13 Leg).

Other drawbacks of statutory prescription were seen as:

- Uncertainty regarding the interpretation of the criteria (47 Leg)
- Always requiring a “catch all” criteria to allow for flexibility (27 Indiv)

A few respondents stressed that they considered the current criteria to be sufficiently well-known and unproblematic so as not to need any further formalising (40 Sent, 42 Leg, 47 Leg). Others argued that although they were against statutory prescription of criteria, they saw merit in emphasising the desirability of consistency (19 LG) and recommended that advisory guidance on best practice be developed (5 Leg, 13 Leg).

Other Comments

A few consultees remarked that for courts which appeared to produce a higher than average level of remands, then perhaps this should be a matter for the Sheriff Principal rather than introducing statutory criteria (26 LG, 28 LG). A further suggestion was for general principles to be enshrined in statute accompanied by guidance for more specific circumstances (45 Leg).

The consultation stated:

If bail is granted, it is always conditional. The deposit of money bail, although still competent, is highly unusual in practice. The normal bail order contains a number of standard conditions and may contain additional special conditions imposed to ensure that the standard conditions are observed.

Q7: DO YOU CONSIDER THAT THE RANGE OF STANDARD BAIL CONDITIONS IS ADEQUATE?

Q8: IF YOU DO NOT, WHAT ADDITIONAL STANDARD CONDITIONS DO YOU CONSIDER SHOULD BE IMPOSED?

Of the 30 respondents (62%) who provided commentary, almost two-thirds (63%) considered that the current range of standard bail conditions is adequate, with the remainder (37%) advocating strengthening these conditions.

A few of the consultees who were content with the current range of standard bail conditions qualified their support by stating that they were adequate for *most* cases (26, LG, 28 LG) and constituted a minimum level (16 Oth) which could be supplemented by additional special conditions as required (1 Leg, 20 Vol, 32 LG, 33 Pol).

Amongst those respondents who considered the standard range of bail conditions to be inadequate, one perceived the current list to be “*sparse and bland*” and called for the language used to be less vague and more meaningful (45 Leg). Another considered the standard conditions to provide neither sufficient control over the accused person nor provide sufficient emphasis of the serious nature of the situation (48 Oth).

Of the few additional standard conditions identified by consultees, most commonly cited were the need for bailees to notify the court of any change of address (4 LG, 5 LG, 24 LG, 25 LG, 49 Leg) and to report regularly to their solicitor, the police or Criminal Justice Social Work (5 Leg, 17 LG, 31 Vol, 41 LG, 48 Oth).

Other suggestions were for electronic monitoring of accused persons to be standard (17 LG, 41 LG) or for the individual to be required to live at a stated address whilst on bail (5 Leg, 45 Leg) and for them to observe a curfew (5 Leg).

Q9: DO YOU CONSIDER THAT THERE SHOULD BE ADDITIONAL SPECIAL CONDITIONS IN ADDITION TO THOSE REFERRED TO IN PART TWO?

A small number of respondents suggested additional special conditions for consideration. These included remote monitoring (15 LG, 26 LG, 28 LG, 32 LG), agreeing to bail supervision and complying with its requirements (26 LG, 28 LG, 32 LG), engaging with relevant support services (26 LG, 28 LG), not entering licensed premises (4 LG), refraining from drinking alcohol (4 LG), and in the cases of alleged sex offenders, no contact with unsupervised children (4 LG, 6 LG).

More general comments were made urging an increased use of additional conditions, with Procurators Fiscal encouraged to be more active in seeking them (2 Leg, 23 Leg, 43 Leg) and judges more proactive in setting them (27 Indiv).

A few respondents saw no need to restrict the additional special conditions to a specified list but rather leave this open in order to tailor conditions to particular circumstances (33 Pol, 45 Leg, 47 Leg). One comment was that any special condition should be competent as long as it is, “*proportional, justifiable and necessary in the circumstances*” (33 Pol).

SUMMARY POINTS

- Of those who provided commentary on whether criteria to be taken account by the court in deciding whether to grant bail should be prescribed in statute, views were relatively evenly split between those advocating statutory prescription (38%), those against the proposal (34%) and those who envisaged both merits and disadvantages (28%)
- The most commonly cited advantages of statutory prescription were the promotion of consistency and greater transparency in court decision making
- The most commonly cited disadvantage was the likely reduction in judicial flexibility and discretion that consultees envisaged would ensue
- Of those who commented, almost two-thirds (63%) considered that the current range of standard bail conditions is adequate
- Of the few additional standard conditions identified as required by consultees, most commonly raised were the need for bailees to notify the court of any change of address and to report regularly to their solicitor, the police or Criminal Justice Social Work
- Potential additional special conditions were identified as including remote monitoring, agreeing to bail supervision and complying with its requirements, engaging with relevant support services, not entering licensed premises, refraining from drinking alcohol, and in the cases of alleged sex offenders, no contact with unsupervised children

CHAPTER 5: THE ROLE OF THE POLICE AND THE PROCURATOR FISCAL IN RELATION TO BAIL

The consultation stated:

If an accused is arrested, the police have the choice of the following options:

- liberate the accused on a written undertaking to appear at court at a specific time and date;
- liberate the accused without any written undertaking (ie if the Procurator Fiscal decides to take criminal proceedings against the accused he will require to cite the accused to attend court);
- detain the accused in custody and bring him before a court on the next day on which the court is sitting to dispose of criminal business.

If the police decide to release an accused on an undertaking or liberate him for report, they have no power under the law at present to impose conditions on the accused's release.

In all cases in which accused persons are apprehended by the police and detained in custody, it is in the discretion of the Procurator Fiscal to authorise temporary liberation after a consideration of the evidence. The Procurator Fiscal need not take proceedings, and will only do so where there is sufficiency of evidence and the Procurator Fiscal is satisfied that a prosecution would be in the public interest.

Q10: DO YOU CONSIDER THAT THE POLICE AND THE PROCURATOR FISCAL SHOULD BE ABLE TO IMPOSE CONDITIONS ON AN ACCUSED PERSON WHO IS LIBERATED WITHOUT APPEARING IN COURT?

Of the 29 respondents (60%) who addressed this question, 45% were against the police and Procurators Fiscal having such powers, 38% agreed with their being able to impose conditions and 17% did not provide a clear view.

Views Against the Proposition

Of the few respondents who provided a rationale for their opposition to the proposition that police and Procurators Fiscal should be able to impose conditions on an accused person who is liberated without appearing in court, some argued that court was the appropriate place for such decisions (27 Indiv, 37 Sent) which could affect a person's liberty (13 Leg, 42 Leg). It was considered that an accused person is vulnerable without legal representation in a police station and any conditions set by the police and Procurators Fiscal would be appealable in the High Court (2 Leg, 23 Leg, 43 Leg, 47 Leg). It was pointed out that a breach of conditions set by the police or Procurator Fiscal could result in criminal proceedings (47 Leg) and suggested that conditions set in this manner would be out of step with the presumption of innocence until proved guilty (19 LG).

One exception to these views was recommended by two respondents who suggested that police and Procurators Fiscal should be able to impose a condition of participating in intensive bail supervision (26 LG, 28 LG).

Concerns were raised over who would monitor adherence to any conditions set in this way and the degree to which such conditions may impinge on other agencies' resources without their prior consent (6 LG).

Views in Favour of the Proposition

Emerging from the few comments recorded, some respondents were in favour in those circumstances where the accused person agreed to the conditions (4 LG, 18 LG) and could apply to the court for a review of the conditions (40 Sent). One remark was that the proposed practice could offer some respite to victims (7 Pol) and provide the police and Procurator Fiscal with a degree of control over the accused (48 Oth).

Some consultees qualified their support. A few were in favour within the context of clear guidelines on appropriate conditions (7 Pol, 20 Vol) or where only standard conditions could be applied (37 Sent). Another provided support subject to considerations of proportionality and compliance with ECHR in terms of the accused being brought promptly before a competent legal authority (45 Leg).

Q11: IF YOU DO, WHAT CONDITIONS DO YOU CONSIDER THEY SHOULD BE ABLE TO IMPOSE?

Of the few suggestions made, most were for conditions along the lines of the standard list available to the court (4 LG, 15 LG, 16 Oth, 18 Leg, 20 Vol). Other suggestions included reporting to the police (17 LG, 41 LG, 48 Oth), limited exclusions from places or activities (17 LG, 41 LG) or if the person consents, the requirement to attend a specialist agency (20 Vol). Bail supervision was perceived not to be a suitable condition for application by police or Procurator Fiscal (4 LG) nor was "bail monitoring" (11 LG).

A few respondents stressed that any such conditions should be time limited (17 LG, 41 LG, 45 Leg).

The consultation stated:

The Procurator Fiscal will have regard to the likelihood of the accused absconding, the character of the offence charged and the previous record of the accused. The four principal reasons for opposing bail are as follows:

- Where the circumstances or nature of the offence are such that there is no reason to believe that the accused is a danger to the public or himself.
- Where there are reasonable grounds to suspect that the accused may intimidate or threaten witnesses, or interfere with or dispose of evidence or where there is any other risk of prejudice to enquiries still to be made if he is released.
- Where from the criminal record of the accused and/or the number of current charges it is obvious that he is carrying on a career of crime.
- Where there are reasonable grounds to suspect that the accused intends to abscond or where he has a history of failing to appear at court.

Q12: DO YOU CONSIDER THAT THE FACTORS TAKEN INTO ACCOUNT BY THE PROCURATOR FISCAL IN DECIDING WHETHER TO OPPOSE BAIL ARE THE RIGHT ONES?

Q13: IF YOU DO NOT, WHAT FACTORS DO YOU CONSIDER SHOULD BE TAKEN INTO ACCOUNT?

Of the 29 respondents (60%) who addressed these questions, the vast majority (93%) considered that these factors are, in general, the right ones with the remaining respondents (7%) not providing clear support or opposition.

However, many respondents, whilst expressing support for the current factors, highlighted their concern over the incidence of cases in which bail is opposed where the accused has no fixed abode (20 Vol, 24 LG, 25 LG, 30 LG, 32 LG, 36 LG). Several suggestions were made for countering this, for example, by referring such cases to bail information and supervision schemes (24 LG, 25 LG, 46 LG), accepting another valid address such as that of the solicitor (30 LG, 32 LG) or SACRO (32 LG), and requiring the accused person to report regularly to the police (32 LG) or some other contact in the community (36 LG) whilst on bail.

Other factors to take into account were identified by a small minority of consultees. These included taking into account the potential impact on victims, especially in cases of alleged domestic or child abuse (31 Vol, 41 LG); taking account of personal circumstances such as being a carer (30 LG); and previous failure to respond to bail supervision by non co-operation or committing a further offence (4 LG). One comment was that better quality of background information was required on which to base decision making (47 Leg, 48 Oth), with the observation made that the introduction of the Integration of Scottish Criminal Justice Information Systems (ISCJIS) should help with linking information between partners in the future (34 Pol).

Q14: DO YOU CONSIDER THAT THE CRITERIA WHICH THE POLICE AND PROCURATOR FISCAL TAKE INTO ACCOUNT IN DECIDING WHETHER TO LIBERATE AN ACCUSED PENDING APPEARANCE IN COURT SHOULD BE PRESCRIBED BY STATUTE?

Q15: DO YOU CONSIDER THAT ENACTING SUCH STATUTORY CRITERIA WOULD PROMOTE CONSISTENCY IN DECISION MAKING?

Of the 26 respondents (54%) who expressed a view, consultees were exactly evenly split between those who considered that the criteria should be prescribed in statute and those against the proposition.

Views in Favour of Statutory Prescription

Many respondents agreed that enacting such statutory criteria would promote consistency in decision making. Other merits were also identified. These included facilitating a greater clarity and transparency in the criteria taken into account (18 Leg, 45 Leg); providing more help in cases of alleged domestic abuse and sexual offences (4 LG, 31 Vol); and promoting the routine recording and reviewing of decisions (20 Vol, 38 Sent).

Views Against Statutory Prescription

The disadvantage most commonly cited was that statutory prescription would reduce flexibility (6 LG, 26 LG, 28 LG, 47 Leg) and restrict opportunities to take into account local concerns or unforeseen circumstances (34 Pol). One consultee remarked that in their view there would always be cases which would not fit within specified rules (13 Leg).

One view was that statutory prescription may result in more complex cases not receiving the appropriate assessment they demanded (11 LG). Another was that such a move may increase levels of unhelpful litigation (5 Leg).

Two respondents from the police body sector argued that no further legislation was necessary on account of the availability of the Lord Advocate's guidance with its flexibility to accommodate revision if required (7 Pol, 33 Pol).

SUMMARY POINTS

- Of the respondents who provided a view, 45% were against police and Procurators Fiscal being able to impose conditions on an accused person who is liberated without appearing in court; 38% agreed to these powers; and 17% did not provide a clear recommendation
- It was considered by many that the court was the appropriate place for such decisions which may affect a person's liberty, may have implications for other agencies and which may lead to criminal proceedings should conditions be breached
- A minority of consultees were in favour of the police and Procurators Fiscal imposing conditions where the person agreed to these and could apply to the court for a review of the conditions
- Of those who advocated allowing the police and Procurators Fiscal to impose conditions, most recommended confining the choice of conditions to those already in the standard list of conditions available to the court
- The vast majority (93%) of those who commented considered that the factors which the Procurator Fiscal takes into account in deciding whether to oppose bail are the right ones
- Many consultees were concerned about the opposition to bail in cases where the accused has no fixed abode and suggestions were made to address this
- Views were exactly evenly split between those who recommended statutory prescription of the criteria which the police and Procurator Fiscal take into account in deciding whether to liberate an accused pending appearance in court, and those against their prescription in statute
- Many respondents considered that enacting such statutory criteria would promote consistency in decision making. However, others were of the view that this would reduce flexibility and restrict opportunities to take local concerns or unforeseen circumstances into account in decision making

CHAPTER 6: COURT DECISIONS PRE-TRIAL AND DURING TRIAL

The consultation stated:

Bail hearings are normally short in duration. The Sheriff or Magistrate will have a copy of the petition, or in summary cases, the complaint. There may be a written bail application, although this is not needed on the first occasion on which the accused appears from custody. Any such written application is uninformative; all that is contained in it is the fact of application and no written grounds setting out why bail should be granted are included. This is no doubt because the accused has a general right to bail, which should only be refused for good reason.

The bail hearing will thus concentrate on the Crown's grounds of opposition, whatever they are. Oral argument is presented by the Procurator Fiscal and then by the accused's solicitor. No evidence on oath is taken. If the ground of opposition is based on the accused's record, then the Crown will place before the Court a print-off of the relevant details obtained from the Scottish Criminal Records Office and the Fiscal will highlight (orally) whatever factors in the accused's record are deemed significant, such as the analogous nature of previous convictions, a course of criminal conduct, previous failures to appear, previous breaches of bail and similar features.

No other documents will normally be put before the Court by the Crown, but the Fiscal will explain why a remand in custody is sought. The accused's solicitor will respond on all relevant matters, including the personal circumstances of the accused. If a Bail Information Scheme or Bail Supervision is available in the particular court, then a written report will usually be lodged.

Q16: WHAT INFORMATION DO YOU CONSIDER SHOULD BE AVAILABLE TO THE COURT IN MAKING A BAIL DECISION?

Thirty-three responses (69%) contained commentary of relevance to this question.

Although it was generally acknowledged that the time available for bail decisions to be made could be very restricted, one consultee argued that this was not acceptable and that:

“reasons of expediency and the need to progress a busy court must not take precedence over the safety of victims and witnesses” (31 Vol)

Several respondents commented in broad terms that the information should be as full as possible (18 Leg, 19 LG, 27 Indiv, 45 Leg, 49 Leg), or as currently provided (7 Pol, 42 Leg).

Other respondents specified particular types of information which they considered should be available to the court in making bail decisions. These are listed below in order from most frequently mentioned to those receiving fewer mentions:

- Address details
- Criminal record
- Lifestyle/family circumstances
- History of bail experience
- Offence details

- Physical and mental health including any addictions
- Risk posed to the public
- Likely impact on alleged victims

Types of information mentioned by only one or 2 respondents included the employment status of the alleged offender, their caring responsibilities, their vulnerability (for example, any learning difficulties), likelihood of self-harm, current medical treatment and the attitude of the local community. For those already on a community disposal, it was suggested that information from the supervising officer would be of value.

Other comments were that information from bail information schemes should help in furnishing the court with better quality information; and that information from Criminal Justice Social Work Services could perhaps be enhanced by, for example, further work to provide these services with access to the ISCJIS system.

Q17: DO YOU CONSIDER THAT FURTHER CATEGORIES OF INFORMATION MIGHT ASSIST THE COURTS IN MAKING DECISIONS ON BAIL APPLICATIONS, REVIEWS AND APPEALS?

Responses to the previous question overlapped with those addressing this one. A few additional points were raised over and above those already made. A few respondents urged that more time should be allocated to verify information provided to the court (5 Leg, 6 LG, 19 LG). It was remarked that the accused person's situation was not static and that better sharing of information between relevant agencies would help in providing an up-to-date and accurate picture (17 LG, 41 LG). Increased use of ISCJIS was mentioned in this regard (19 LG).

It was recommended that more information on the support services required for particular bail conditions would be of assistance to courts (15 LG), with closer liaison arrangements between judges, Procurators Fiscal, Social Work, and the voluntary sector seen as important in ensuring the court is aware of the services available at any time (31 Vol).

A further emphasis was placed by some consultees (4 LG, 24 LG, 25 LG, 33 Pol) on courts making greater use of information from alleged victims.

Q18: IF YOU DO, HOW DO YOU CONSIDER THAT THIS INFORMATION COULD SPEEDILY BE MADE AVAILABLE?

In comparison with others, this question attracted relatively little response. Thirteen responses (27%) provided relevant commentary.

Responses were divided largely between those considering that greater use of Bail Information Services was the key to making information available more speedily (11 LG, 15 LG, 35 LG, 45 Leg) and those recommending that the better sharing of information between criminal justice agencies, perhaps by electronic means would assist (5 Leg, 6 LG, 19 LG, 28 LG, 47 Leg). The use of ISCJIS was raised in this regard (19 LG), as was accessibility by bail information officers to a database of Social Enquiry Reports and probation reports (47 Leg).

Other suggestions were for using resources better and focusing more closely on gathering information on high risk accused persons (26 LG, 28 LG); for transmitting information via a brief sheet supplied by a supervising officer (if there is one) (19 LG); via bail reports (49 Leg); via court information officers (48 Oth); and from the police via the Procurator Fiscal (4 LG).

Q19: WHAT FACTORS SHOULD BE TAKEN INTO ACCOUNT BY THE COURT WHEN IT DECIDES WHETHER OR NOT TO GRANT BAIL?

Again, relatively few respondents addressed this question directly. Fourteen consultees (29%) provided a response although it appeared that many others considered that their responses to previous questions (particularly questions 16 and 17) covered this issue adequately.

The most common response was that the current factors which the court took into account were sufficient (5 Leg, 19 LG, 27 Indiv, 40 Sent, 47 Leg), backed up by verification (5 Leg, 34 Pol) and risk assessment (5 Leg). It was suggested that the current Lord Advocate's Guidelines to Chief Constables on bail decisions could be followed by the courts (15 LG). One respondent argued that where evidence is available, the defence should be required to substantiate its submissions to the court, or for the Crown to present evidence of opinion such as remarks contained in the standard police report which may assist in the decision making process (35 Pol).

Other factors identified were information from the alleged victims (4 LG, 11 LG, 34 Pol); the level of risk posed by the alleged offender (6 LG, 11 LG, 35 LG, 49 Leg); the likelihood that the accused will appear for future court dates (6 LG, 49 Leg); the accused person's employment status (11 LG, 35 LG); any current medical treatment being received by the accused (6 LG, 11 LG); the existence of any dependents (11 LG, 35 LG); the seriousness of the offence (6 LG); the ability of the accused to cope in a custodial remand setting (11 LG); the likely loss of temporary accommodation (35 LG); and the accused person's compliance with previous and current statutory supervision (6 LG).

A final view presented was that all cases are different and the prescription of factors to take into account was inappropriate (37 Sent).

Q20: DO YOU CONSIDER THAT IF THE PROCURATOR FISCAL DOES NOT OPPOSE BAIL PRIOR TO THE TRIAL THE COURT SHOULD BE OBLIGED TO GRANT IT?

One third of respondents (16) provided a clear view in response to this question. The majority of these (69%) considered that the court **should not be obliged** to grant bail in situations where the Procurator Fiscal has not opposed it.

It was remarked that the court holds the ultimate responsibility for the decision on bail (40 Sent) and as a public authority in terms of ECHR legislation, must be satisfied in itself that it is discharging its duties appropriately (45 Leg). One comment was that the Procurator Fiscal may have a different agenda to that of the court (49 Leg). Another suggested that the court should make its own decision where information is brought to the court from a source other than the Procurator Fiscal (7 Pol). However, whilst advocating retaining the court discretion on bail, one respondent considered its application to be difficult to envisage in practice as the court was unlikely to have any further information on which to base a decision running contrary to that of the Procurator Fiscal (45 Leg).

Amongst the minority of respondents who recommended that the court be obliged to follow the decision of the Procurator Fiscal in this regard, it was remarked that the court is not in a position to undertake its own enquiries (47 Leg) and that the Procurator Fiscal will have already considered all matters and taken into account circumstances of which the judge may not be aware (13 Leg). One respondent recommended such an obligation should exist only in the district court (1 Leg).

Q21: IF A PERSON HAS BEEN REFUSED BAIL BY THE COURT, DO YOU CONSIDER THAT THE PROCURATOR FISCAL SHOULD THEREAFTER BE ABLE TO ADMIT SUCH A PERSON TO BAIL?

Of the nineteen (40%) consultees who responded to this question, the majority (68%) considered that if the court has refused bail then the Procurator Fiscal **should not** thereafter be able to admit such a person to bail.

The view was presented that bail should be refused only by the judge in the presence of the defence agent, and with the reasons explained (2 Leg, 23 Leg, 43 Leg). Permitting the Procurator Fiscal thereafter to admit an accused person to bail was seen as encouraging the Fiscal to object to bail in the first instance for “safety’s sake” knowing that the accused could later be released (1 Leg), and undermining the court’s decision (18 Leg). However, it was suggested that in cases of changes in circumstances, the appeal mechanism could be used (49 Leg) or Procurators Fiscal could apply to the court in writing putting the case for the subsequent granting of bail (4 LG).

In contrast, a minority of respondents argued that in exceptional circumstances (for example, if the Crown case appears poor) (5 Leg, 13 Leg) or where there was reasonable cause to review the decision (such as a material change in circumstances) (17 LG, 41 LG, 45 Leg) the Procurator Fiscal should be able to admit a person to bail following the refusal of bail by the court. One respondent recommended that the rationale for the new decision should be formally recorded (15 Leg) and the practice should comply with Article 5 of the ECHR (45 Leg).

Q22: DO YOU CONSIDER THAT STEPS COULD BE TAKEN TO IMPROVE CONSISTENCY IN DECISION-MAKING RELATING TO THE GRANT OR REFUSAL OF BAIL?

Twenty-one respondents (44%) addressed this question.

All but one recognised the need to take action to improve consistency. The need was perceived to be all the more pressing in relation to female alleged offenders in the view of one consultee (31 Vol).

Most of those who commented suggested that consistency could be improved by the production of guidance (11 LG, 45 Leg) from the High Court (5 Leg, 7 Pol) or Appeal Court (6 LG), or via good practice documents (34 Pol), national standards guidelines (48 Oth) or memorandum from the Sentencing Commission or Lord Justice General (47 Leg). It was suggested that feedback from the Appeal Court on outcomes would provide useful information to sentencers which would promote consistency in future decisions (27 Indiv).

Another recurring theme was that the formal, systematic recording of reasons for decisions made would help ensure future consistency in decision-making (2 Leg, 18 Leg, 23 Leg, 34 Pol, 43 Leg). One respondent argued that making this practice routine should improve consistency and efficiency of decision-making and make it “*clear to all that the fiscal and the judge would be working to the same criteria*” (23 Leg).

Others recommended that better training of those involved in the criminal justice system would contribute to greater consistency of practice (27 Indiv, 45 Leg, 47 Leg). A specific example was for the introduction of “bail exercises” along the lines of sentencing exercises currently carried out at courses organised by the Judicial Studies Committee (27 Indiv).

A few consultees suggested that a higher quality of information provided on the alleged offender would promote consistency in their subsequent treatment (6 LG, 17 LG, 41 LG). Others argued for making the factors to be considered statutory in this respect (18 Leg, 49 Leg). A final recommendation was for Scottish Courts Administration to publish information on an annual basis on the use of bail and remand by all Scottish courts (35 LG).

Q23: WHAT SUPPORTS SHOULD BE AVAILABLE TO A PERSON ON BAIL TO TRY TO ENSURE THAT HE OR SHE COMPLETES THE PERIOD ON BAIL SATISFACTORILY?

Seventeen respondents (35%) addressed this question.

Two main themes dominated. Firstly, consultees recommended that the identification of appropriate supports should be needs-based, and tailored to the individual following an assessment report. It was argued that support should be provided on a graduated scale (5 Leg, 34 Pol) with an alleged offender also able to request support via their solicitor (16 Oth). One comment was that support should be based on need and not simply what happened to be available (15 LG).

Secondly, respondents considered that support for accused people should be aimed at tackling their offending behaviour, for example, by addressing their physical or psychological problems, or their accommodation difficulties.

Other recommendations were for increased funding for and greater availability of bail supervision schemes (4 LG, 9 LG, 32 LG, 45 Leg, 46 Leg, 48 Oth). One comment was that:

“our experience indicates that supervision and support via a Bail Supervision Order may have a positive effect upon persons who would otherwise default on their obligations” (9 LG)

Although an alternative view was provided by 2 respondents who argued that such schemes could be problematic and result in breached orders (3 LG, 10 LG). Likewise, the use of Bail Hostels attracted both recommendation (47 Leg) and caution regarding appropriate funding, number of participants, the seriousness of the charges they faced, their appropriate interaction with relevant agencies and negative neighbourhood reactions to their location (5 Leg).

The remaining views were in favour of supported accommodation along the lines of 218 Time Out (15 LG), the availability of counselling for alleged offenders (27 Indiv) and appropriate skills training (27 Indiv).

Q24: DO YOU CONSIDER THAT THERE SHOULD BE DIFFERENT KINDS OF SUPPORT ON BAIL FOR ADULTS OF EITHER SEX, OR YOUNG PEOPLE?

Seventeen respondents (35%) provided commentary of relevance to the question.

Most of those who responded agreed that bail support packages should be tailored to individual needs following an assessment of needs. One consultee remarked that whilst people may face similar difficulties, their needs in relation to addressing these could be different (35 LG). Others commented that by focusing on the needs of alleged offenders, a graduated system of bail supervision could be applied depending on the level of support required (5 Leg, 34 Pol).

Whilst one respondent considered that gender should not be a key variable in the decision on appropriate support (27 Indiv), others argued that male and female needs were different (19 LG) and that a national network of small, local, women-only supervision centres may be required for those who come into contact with the criminal justice system (22 Vol). A particular need was identified for more accommodation options for accused men over 21 years in the Edinburgh area (27 Indiv).

Young people were viewed as needing special treatment by a few respondents (26 LG, 28 LG), although one cautioned that research suggested they may not take bail supervision as seriously as they should (31 Vol). Another stressed that young people should be prioritised where their behaviour has the potential to be changed (27 Indiv). A final view was that for some young alleged offenders, all that they may require is to be reminded of court dates and provided with support when they appear at court (32 LG).

Other consultees highlighted types of accused persons whom they thought may require special attention regarding support on bail. The groups included those abusing harmful substances, people who have mental health problems (26 LG, 28 LG) and vulnerable people (15 LG, 31 Vol). One respondent urged that care should be taken not to mix vulnerable people with “career” offenders (15 LG). Another suggested that a scheme like 218 Time Out may be particularly apt for vulnerable alleged offenders (31 Vol).

The consultation stated:

Bail Information and Supervision Schemes are designed to minimise the numbers of accused persons held on remand pending trial or for reports after conviction, who, subject to safeguards in respect of public safety, could be released on bail pending their further court hearing. Courts routinely take advantage of these schemes in appropriate cases whenever they are available.

Bail Information and Supervision Schemes are expected to be an integral part of court social work services. Bail supervision should not supplant standard bail but rather provide an additional option for courts: ie, it needs to be targeted on those whose application for bail would otherwise have been unsuccessful. The priority for social work departments is to work with the Procurator Fiscal in identifying where bail is to be opposed and where the option of bail supervision would reduce opposition to bail.

The Scottish Executive's aspiration is that Bail Information and Supervision Schemes should be provided in all sheriff courts, both solemn and summary, and in Glasgow Stipendiary Magistrates Court. Priority requires to be given to those with mental health problems, women accused, single parents and young people aged between 16-17.

Q25: DO YOU HAVE ANY IDEAS AS TO THE EXTENT AND MANNER IN WHICH BAIL INFORMATION AND BAIL SUPERVISION SCHEMES MIGHT BE DEVELOPED?

Nineteen responses (40%) contained commentary of relevance to this question.

The theme which dominated most of the responses was a recommendation to widen or abolish the existing priority target groups for bail supervision schemes and increase funding so that such schemes can be considered for all cases in which the Procurator Fiscal intends to oppose bail. One consultee urged that such schemes could be developed to:

“make them more grounded in the fabric of court process rather than an add on”
(30 LG)

It was argued that without appropriate funding to underpin these schemes, they would not be able to function properly, a situation which may bring into disrepute the whole bail system (34 Pol). Another consultee suggested that the value of bail information would diminish if there was limited access to the support services identified as necessary (20 Vol).

Another theme raised by a few respondents focused on the importance of reflecting on the effectiveness of the current schemes in order to inform the future development of such schemes (4 LG, 35 LG). It was suggested that the Sentencing Commissioners visit bail schemes to get feedback on their operation (20 Vol).

Others recommended that efforts to improve collaborative working practices between criminal justice agencies would facilitate the development of bail information and supervision schemes (20 Vol, 30 LG, 35 LG). For example, it was suggested that Procurators Fiscal could be more proactive (35 LG) or give earlier warning (20 Vol) to criminal justice social work staff regarding their intention to oppose bail. One view was that there should be a shared responsibility between agencies for the outcome of such schemes with access for all to ISCJIS (35 LG).

Other suggestions for development of bail information and supervision schemes included:

- Swifter responses to any breaches that occur (30 LG, 36 LG)
- Introduction of national standards (4 LG)
- Introduction of guidelines to sentencers (6 LG)
- Greater consistency across courts in their use (9 LG, 36 LG)
- Develop more initiatives like 218 Time Out (15 LG)
- Learn lessons from the Supervised Attendance Order (49 Leg)
- Consider differences in geography and understand that specialist schemes in cities may have little relevance elsewhere (9 LG)
- Permit remote monitoring along with bail supervision (6 LG, 15 LG)

A contrasting view was expressed by one respondent (31 Vol) who raised their concern that bail information and supervision schemes were targeted to those whose bail application would otherwise have been unsuccessful. It was argued that if the Crown had not considered them to be safe on the streets then a supervised scheme was unlikely to have a deterrent effect nor render their behaviour safe so should not be a viable option. This consultee also expressed “grave reservations” as to the probity and appropriateness of providing this scheme in cases of solemn procedure.

Q26: DO YOU CONSIDER THAT GREATER AVAILABILITY OF BAIL HOSTELS AND OTHER ACCOMMODATION PROVIDING SUPPORT TO ACCUSED PERSONS ON BAIL WOULD ENABLE THE COURTS TO RELEASE MORE ACCUSED ON BAIL?

Twenty-one consultees (44%) provided a response to this question. Many respondents provided both support and raised concerns regarding bail hostels, but on balance, the majority (76%) gave the idea of expanding their availability a cautious welcome.

Amongst those who favoured greater availability, some qualified their encouragement by urging appropriate resourcing (27 Individ, 34 Pol) of what was seen as a relatively expensive option (4 LG, 19 LG). Others envisaged that 24-hour supervision would be important (15 LG, 16 Oth, 49 Leg) with prompt action by the police in the event of any breach of bail conditions (16 Oth, 34 Pol). One specific concern raised was that accepting bail hostel accommodation may result in alleged offenders losing their current tenancy and housing benefit (35 LG).

Consultees identified a range of disadvantages which they associated with bail hostels. A few remarked that bringing together alleged offenders in such accommodation served to perpetuate or encourage criminal tendencies (6 LG) especially amongst young people (20 Vol). It was suggested that crime in the vicinity of hostels can increase and local residents become wary of their presence (16 Oth). One respondent described the pressure placed upon councils not to place sex offenders in such accommodation (6 LG).

Again, some respondents remarked on what they perceived to be the expense of running bail hostels (6 LG, 20 Vol). Others argued that rather than operating bail-only hostels for which there may be limited demand, it may be better to provide general criminal justice supported accommodation (17 LG, 41 LG). Two consultees (26 LG, 28 LG) considered that greater availability of bail hostels would not meet the needs of rural areas nor would they help with compliance with bail conditions.

Q27: DO YOU CONSIDER THAT THE TYPES OF SUPERVISION AND SUPPORT FACILITIES THAT ARE AVAILABLE TO FEMALE ACCUSED WHO SEEK AND ARE GRANTED BAIL WOULD ASSIST MALE ACCUSED?

Seventeen consultees (35%) addressed this question.

Those respondents who chose to respond appeared, in general, to be consultees who wished to see the 218 Time Out model of support considered for male alleged offenders. One comment was that there are a number of men who live chaotic lifestyles and projects such as 218 Time Out may be of considerable assistance to them (15 LG). Overall 11 of the 17 consultees (65%) who responded agreed that the types of supervision and support facilities

that are available to female accused may assist (or sometimes be of assistance to) male accused.

One contrasting viewpoint was that individual needs rather than gender should determine the nature of supervision and support facilities available to those on bail (6 LG). Other respondents commented that it was as yet too early to say whether the 218 Time Out initiative should be rolled out further (26 LG, 28 LG, 32 LG, 36 LG). A final view was that even if shown to be effective in Glasgow, the 218 Time Out scheme may not replicate so effectively in other areas (35 LG).

The consultation stated:

Once the decision is made (regarding bail or remand) it is announced from the Bench and recorded by the Clerk of Court. It is common (and good practice) to give oral reasons for the decision, but these are not usually recorded by the Clerk. This has important ramifications if the bail decision is made the subject of appeal.

Q28: DO YOU CONSIDER THAT REASONS FOR BAIL AND REMAND DECISIONS SHOULD ROUTINELY BE PROVIDED AND FORMALLY RECORDED?

Of the 25 consultees (52%) who responded, the vast majority (84%) considered that the reasons for bail and remand decisions should routinely be provided and formally recorded. Indeed, one respondent suggested that not giving oral reasons for bail and not usually recording these by the clerk was “*astounding*” and constituted a “*serious omission and failure of practice*” (31 Vol).

Several respondents specified what they saw to be the advantages of providing and formally recording such decisions. These included the promotion of transparency (20 Vol, 32 LG, 41 LG, 45 Leg); educating the public (16 Oth, 28 LG) and increasing public confidence in the judiciary (16 Oth, 32 LG); providing guidance for future decisions (35 LG, 48 Oth); promoting consistent practice across different criminal justice agencies (11 LG, 32 LG, 34 Pol); and providing information of use in any subsequent appeals and reviews of decisions (49 Leg).

Four respondents argued against the routine provision and formal recording of bail and remand decisions. Two consultees perceived that there would be practical difficulties in ensuring adequate time for recording what could be very complex decisions (42 Leg, 47 Leg). One respondent expressed concern about the possibility of sentencing judges being influenced by references contained in any formal recording of bail and remand decisions (13 Leg). Finally, one consultee described having mixed views on the benefits of recording of decisions, stating that they did not see the need for such a practice as bail was granted usually when none of the reasons for refusal existed (40 Sent).

SUMMARY POINTS

- Respondents specified a range of information which they considered should be available to the court in making bail decisions. Most commonly mentioned were address details, criminal record, lifestyle/family circumstances, history of bail experience, offence details, physical and mental health, risk posed to the public and likely impact on alleged victims
- A few consultees urged that more time be allocated to verify information provided to the court and that there should be more information sharing between relevant criminal justice agencies
- Of those who suggested how information could be made speedily available to courts, views focused on greater use of Bail Information Services and sharing of information, perhaps by electronic means
- A recurring response was that the current factors which the court takes into account when it decides whether or not to grant bail are sufficient, backed up by verification of details and risk assessment
- The majority view was that the court should not be obliged to grant bail in situations where the Procurator Fiscal has not opposed it
- The majority view was that if the court has refused bail then the Procurator Fiscal should not thereafter be able to admit such a person to bail
- All but one of those who responded recognised the need to take action to improve consistency in decision-making relating to the grant or refusal of bail
- Amongst the suggestions made for improving consistency were the production of guidance, the formal, systematic recording of reasons for decisions and better training of those involved
- Two main ways to help those on bail complete their period on bail satisfactorily were identified as implementing individually tailored, needs-based supports on a graduated scale and supports aimed at tackling offending behaviour, for example, by addressing health or accommodation problems
- In general, rather than considering different kinds of support on bail depending on gender, or age of the accused person, respondents advocated tailoring bail support packages to individual needs, whatever the gender or age of the alleged offender
- A dominating theme was for existing priority target groups for bail supervision schemes to be widened or abolished so that such schemes can be considered for all cases in which the Procurator Fiscal intends to oppose bail
- The idea of making bail hostels and other accommodation for those on bail more available was given a cautious welcome by the majority of those who commented
- Many respondents wished to see the 218 Time Out initiative considered for male accused with the majority of those who responded agreeing that the types of supervision and support facilities that are available to female accused may assist male accused
- The vast majority of those who commented (84%) recommended routine provision and formal recording of reasons for bail and remand decisions

CHAPTER 7: REVIEWS AND APPEALS IN RESPECT OF PRE-TRIAL DECISIONS

The consultation stated:

After an initial decision has been made either to grant or to refuse bail, both the Crown and the accused person are entitled to have that decision reconsidered. This may be by two different methods, firstly by review, and secondly by appeal.

Views differ on whether the appeal is a rehearing of the original application or if the Appeal Court judge is concerned rather in checking that the decision at first instance was one which the decision maker was entitled to make in the exercise of his or her discretion. The decision to allow or refuse bail is one to be made by weighing up the factors said by the Crown to militate against the accused person's right to bail. Thus it is not a decision made by formula and it is possible for an appeal judge to see that while he or she may have made a different decision, the decision which was made is within the spectrum of possible decisions. Some judges take the view that in such a situation they will not interfere with the discretion of the decision-maker at first instance. Others appear to take the view that, perhaps as the liberty of the subject is in issue, they should rehear the case and may substitute their own decision.

Q29: ON WHAT BASIS SHOULD THE HIGH COURT DEAL WITH AN APPEAL IN RESPECT OF BAIL – AS A REVIEW OF THE EXERCISE OF DISCRETION BY THE SHERIFF OR MAGISTRATE OR BY ASSESSING THE CASE AFRESH, WHICH MIGHT INCLUDE INFORMATION ADDITIONAL TO THAT WHICH THE SHERIFF OR MAGISTRATE CONSIDERED?

Of the 27 consultees (56%) who commented, 24 provided a clear recommendation on how the High Court should deal with an appeal in respect of bail. Views were almost evenly split between those who considered that the High Court should review the previous exercise of discretion (46%) and those who recommended assessing the case afresh (54%).

Three respondents stated simply that greater clarity is required on this issue with current ambiguities leading to possible inconsistencies in practice (2 Leg, 23 Leg, 43 Leg).

Assessing the Case Afresh

Amongst the 13 consultees (from a variety of respondent sectors but not including individual sentencers) who recommended the assessment of cases afresh, their main argument constituted the opportunity this would provide for obtaining and using additional information on the accused and their circumstances. It was remarked that some risk factors were dynamic and subject to change (17 LG, 41 LG) and that information may have been incomplete previously (47 Leg).

Two respondents suggested that assessing the case afresh would promote consistency in practice (26 LG, 28 LG).

Review of the Exercise of Discretion

Again, the 11 respondents who favoured reviewing the exercise of discretion represented a variety of consultee sectors, including, notably, individual sentencers.

A recurring theme was that cases should not be assessed afresh as this would open up possibilities for alleged offenders' manipulation of the situation by always appealing (27 Indiv, 40 Sent) in order to get a "*second bite at the cherry*" (31 Vol).

Another argument was that assessing cases afresh would undermine the authority of the deciding judge (5 Leg, 31 Vol) and that if additional information had come to light, then this should be addressed by the original court (18 Leg) which would be familiar with local circumstances with which the High Court should not interfere (40 Sent). Finally, hearing cases afresh was criticised as likely to tie up court time unnecessarily (31 Vol).

One respondent described how in some courts the practice of bail review has been established in relation to consideration of supervised bail for a remanded person. This permits the original sentencer to continue to be involved in the bail process and still allows for later appeal to the High Court (30 LG).

Q30: DO YOU CONSIDER THAT IT WOULD BE HELPFUL TO HAVE MORE JUDICIAL GUIDANCE FROM THE APPEAL COURT ON ISSUES RELATING TO THE GRANT AND REFUSAL OF BAIL?

Of the 19 respondents (40%) who addressed this question, the vast majority (89%) considered that more judicial guidance from the Appeal Court on issues relating to the grant and refusal of bail would be helpful.

The most frequently made comment was that such guidance would promote consistency of practice amongst the lower courts (4 LG, 18 Leg, 26 LG, 27 Indiv, 28 LG, 46 LG). The production of more guidance was viewed as helpful in making court processes more open and transparent (4 LG) and would aid particularly with the interpretation of criteria to apply and the services to be considered in bail and remand decision making (20 Vol). A few respondents argued that having more judicial guidance would serve to improve public confidence in court decision making (28 LG, 28 LG, 46 LG).

It was acknowledged however, that guidance could not cover every eventuality (15 LG) and that to be effective, guidance should be followed at both the Appeal and the lower courts (5 Leg).

The 2 dissenting voices argued that such guidance would not be necessary on account of the rules already being covered in statute (16 Oth) and on grounds that previous guidelines on bail and bail appeals (Lord Justice-Clerk Wheatley following the introduction of the Bail (Scotland) Act 1980) are seldom referred to now (40 Sent). This consultee recommended achieving greater consistency by restricting the number of appellate judges to a small panel.

Q31: IF SO, ON WHICH PARTICULAR ISSUES?

A variety of issues was suggested by a small proportion of respondents (21%).

- Criteria for decision making (4 LG, 18 Leg)
- Interpretation of the criteria to be taken into account (49 Leg)
- Circumstances found at appeal that were not previously taken into consideration (15 LG)

- Weight to attach to different factors such as age of accused and offence (27 Individ, 45 Leg)
- The grounds on which a decision can be appealed (31 Vol)
- Circumstances in which the court's decision should be "interfered" with (38 Sent)
- Whether the High Court should deal with an appeal as a review or by assessing the case afresh (47 Leg)
- "All" bail issues (4 LG, 18 Leg)

SUMMARY POINTS

- Views were almost evenly split between those who considered that when the High Court deals with an appeal in respect of bail this should be on the basis of a review of the previous exercise of discretion by the sheriff or magistrate (46%), and those who recommended assessing the case afresh (54%)
- The vast majority of those who commented (89%) considered that more judicial guidance from the Appeal Court on issues relating to the grant and refusal of bail would be helpful
- More guidance was requested on a variety of issues including the criteria for decision making, the interpretation of the criteria and the weight to attach to different factors such as age and offence

CHAPTER 8: BREACH OF BAIL

The consultation stated:

Breach of bail is a serious problem. A significant number of offences are committed by persons already on bail; there are many instances in which accused persons fail to appear in court on the due date, whether for trial or sentence, and there are repeated cases in which a person on bail breaches other conditions of his bail order, such as a curfew condition, or one which requires him to stay away from particular locations.

Prior to 1st April 1996, any breach of bail was regarded as an offence quite separate from that which had originally resulted in the bail order. Such breaches were always made the subject to separate legal proceedings. Now, that only applies where the breach of bail is constituted by a failure to appear, or where there is a breach of any condition *other than* the commission of a further offence. Where the person on bail commits a further offence on bail, then that is regarded as a “bail aggravation”, in respect of the new charge: it makes it worse. It is not prosecuted separately, but provided the wording of the new charge is supplemented by written details of such an aggravation, then the Court can impose enhance penalties for the offence. There are detailed legal provisions about how the Court is to do this, including the situation where the offender has committed a new offence in the face of several bail orders pronounced at different times by different courts.

Q32: DO YOU CONSIDER THAT COMMITTING AN OFFENCE WHILE ON BAIL SHOULD BE PROSECUTED AS A SEPARATE OFFENCE RATHER THAN AS AN AGGRAVATION OF THE NEW OFFENCE?

This question attracted a relatively high response rate of 70% (34) of all respondents. Of the 33 who provided a clear view, two-thirds favoured dealing with an offence committed while on bail as an aggravation of the new offence, whilst the remaining 33% recommended prosecuting as a separate offence. Individual sentencers were represented amongst the latter group but not the former.

In favour of Aggravation of the New Offence

One main theme dominated the responses. This was that handling bail offences in this way avoids placing extra pressure on already busy courts and reduces the possibility of causing further delays (4 LG, 17 LG, 24 LG, 25 LG, 32 LG, 41 LG, 46 LG).

Other respondents favoured this approach but urged that judges should make clear to the offender why their final penalty has increased and what part of the overall penalty was imposed in response to the offence committed on bail (1 Leg, 3 LG, 10 LG, 26 LG, 28 LG, 34 Pol, 36 LG). It was recommended that this should be formally recorded (15 LG).

A few consultees stated that this approach had been successfully tried and tested (5 Leg, 47 Leg) and had built up a volume of associated case law (5 Leg). Another view was that dealing with offences committed on bail as bail aggravations served to link more clearly the breach and the new offence (20 Vol).

In Favour of a Separate Offence

Arguments in favour of handling offences committed on bail as separate offences focused on marking their gravity (2 Leg, 12 Leg, 23 Leg, 40 Sent, 43 Leg, 48 Oth) and signalling that such behaviour will not be tolerated (7 Pol, 38 Sent). Typical comments included:

“Our justices have often expressed the view to me that breach of bail simply libelled as an aggravation of an offence and not treated as a separate offence trivialises bail, particularly in the eye of the alleged offender...for bail to serve any useful purpose and for the conditions to have any credibility at all, that breach of bail should be a separate offence with robust penalties enforced by the court” (12 Leg)

“the courts are merely paying lip service to the normal need for an increased penalty where a bail aggravation is admitted or proved” (40 Sent)

Respondents argued that the credibility of bail would suffer if the breach was not treated separately (30 LG) and that handling the offence in this way would ensure that the offence was dealt with and be seen to be dealt with (7 Pol). A separation of the offence was also viewed as advantageous in promoting public understanding of the way it was handled (45 Leg).

General Comments

One view was that the handling of the bail offence did not really matter so long as it attracted a substantial extra penalty (13 Leg). Other comments related to perceived inconsistencies in current practice (27 Indiv, 30 LG) and the need for guidelines on the level of additional penalties to be applied for offences committed whilst on bail (24 LG, 25 LG, 30 LG, 46 LG).

Q33: AT WHAT POINT IN THE PROCESS SHOULD OTHER BREACHES OF BAIL BE DEALT WITH?

Twenty consultees (42%) responded to this question.

Responses were split largely between those advocating dealing with other breaches at the same time as the trial for the original offence (45%) and those favouring handling other breaches as soon as possible and separate from the original offence (35%). Of the remaining respondents, 15% recommended dealing with other breaches after the trial for the original sentence or “*at the end of the process*”. One consultee commented that the sentence for other breaches should run consecutively rather than concurrent with that imposed for the original offence (16 Oth).

One reason was provided in support of handling other breaches along with the original offence – to reduce the need for deferments and multiple reports (6 LG). A few arguments were outlined in favour of dealing with other breaches promptly and separately from the original offence:

- To reinforce the need to comply with bail conditions (5 LG)
- To protect alleged victims especially if they are children or abused women (4 LG)

- To reinforce the connection between the breach and the response to the breach and to reduce the opportunity for abuse of the system (34 Pol)

One argument for dealing with the breach at the end of the process was that the judge could at that point have a complete picture of the offending behaviour and a full range of disposals at hand (45 Leg).

Q34: DO YOU CONSIDER THAT THERE SHOULD BE A PRESUMPTION AGAINST BAIL WHERE A PERSON HAS BREACHED A CONDITION OF BAIL OR IS ALLEGED TO HAVE COMMITTED AN OFFENCE ON BAIL?

Twenty-eight respondents (58%) addressed this question. Of the 27 respondents who provided a recommendation, the slight majority view (52%) was not in favour of a presumption against bail where a person has breached a condition of bail or is alleged to have committed an offence on bail. Just over one-third of respondents (37%) advocated a presumption against bail in these circumstances, although many acknowledged that this option still allowed for bail in particular circumstances. The remaining 11% of respondents argued that any presumption against bail would depend on certain features of the case.

Those in favour of a presumption against bail perceived the benefits to include raising the status of bail in the eyes of the offender (2 Leg, 23 Leg, 43 Leg); responding to the disquiet which could follow repeated granting of bail for one individual (7 Pol); and addressing the breach of trust and disregard for the court decision shown by the alleged offender (31 Vol).

Respondents argued that there should be a presumption against bail in circumstances where victims may be at risk otherwise (4 LG, 32 LG), where serious offences have been alleged (4 LG), or where 3 or more breaches have occurred (18 Leg).

Calls were made for greater consistency in the handling of breaches of bail. Two respondents highlighted the need for judicial guidelines (32 LG, 34 Pol); another respondent suggested the introduction of a system of warnings similar to those contained in the National Standards for probation and community service (20 Vol).

SUMMARY POINTS

- The majority view (67%) was for dealing with an offence committed while on bail as an aggravation of the new offence rather than prosecuting it as a separate offence
- Handling bail offences as aggravations of the new offence was seen as avoiding placing pressure on already busy courts and reducing the possibility of causing further delays
- Respondents urged that in dealing with bail offences as aggravations, the sentencing judge should make clear what part of the overall penalty was imposed in response to the bail offence
- Arguments in favour of handling bail offences as separate offences focused on marking their gravity and signalling that such behaviour will not be tolerated
- Responses were split between those advocating dealing with other breaches of bail at the same time as the trial for the original offence and those favouring handling other breaches as soon as possible and separate from the original offence
- A slight majority view (52%) was not in favour of a presumption against bail where a person has breached a condition of bail or is alleged to have committed an offence on bail

CHAPTER 9: BAIL POST-CONVICTION

The consultation stated:

Once an accused person has been convicted of (or has pleaded guilty to) the charge(s) against him, it is frequently necessary to adjourn the case prior to sentence being imposed. This is often done so that the court can obtain background or other reports on the accused dealing with the various disposals, both custodial and non-custodial, which may be appropriate in the particular case. In such situations bail is often sought during the intervening period, whether or not bail has previously been allowed.

If a custodial sentence is passed on an offender, he may decide to appeal against the conviction which resulted in that sentence, or that sentence itself, or both. Frequently an appellant will apply for bail during the period before the appeal is heard.

Q35: DO YOU CONSIDER THAT IT WOULD BE HELPFUL TO HAVE MORE JUDICIAL GUIDANCE FROM THE APPEAL COURT ON ISSUES RELATING TO THE GRANT AND REFUSAL OF INTERIM LIBERATION?

Q36: IF SO, ON WHICH PARTICULAR ISSUES?

Twenty-five consultees (52%) chose to respond to these questions. Of the 20 respondents who provided a clear view, almost all (85%) stated that it would be helpful to have more judicial guidance from the Appeal Court on issues relating to the grant and refusal of interim liberation. The remaining 3 respondents (15%) (including 2 sentencers) considered more guidance to be unnecessary.

Those in favour of more judicial guidance viewed the advantages as helping to promote consistency (18 Leg, 20 Vol) and “*making these processes clearer, simpler and less confusing*” (28 LG). Others considered that more guidance would educate the public (16 Oth) and benefit both judges and defence agents (13 Leg).

A few respondents suggested issues which they wished to see covered in more guidance. These included:

- When to make a presumption in favour of bail (for example, in summary cases? Where a short custodial sentence has been passed and there is not a risk to public safety?) (27 Indiv, 45 Leg, 47 Leg)
- What factors to take into account in deciding on interim liberation (18 Leg, 39 Sent)
- How to deal with circumstances found at appeal that were not previously taken into account (15 Leg)
- Dealing with those persons who meet the criteria for extended sentence/lifelong restriction of liberty/life sentence/sex offenders where a condition of interim liberation is to be placed on bail supervision (26 LG)

Other Comments

A few other relevant comments were made concerning the granting and refusal of interim liberation. Two respondents highlighted circumstances in which they considered interim

liberation not to be an option. These were in cases of domestic abuse (31 Vol) and where the offender was likely to receive a custodial sentence (34 Pol). Others recommended that courts should be able to call on the services of bail information and supervision schemes to aid in informing interim liberation decisions (24 LG, 25 LG, 32 LG).

One view was that applications for interim liberation should be heard by a judge who has no previous dealings with the case so that decisions cannot be influenced by any resentment at being appealed (13 Leg).

Finally, 2 respondents welcomed the proposals for a new summary appeal court (24 LG, 32 LG).

Q37: DO YOU CONSIDER THAT THE CRITERIA TO BE TAKEN INTO ACCOUNT BY THE COURT IN DECIDING WHETHER TO GRANT INTERIM LIBERATION SHOULD BE PRESCRIBED IN STATUTE?

Overall, only 14 respondents (29%) provided a view and were evenly split between those who favoured prescription in statute and those (including 3 sentencers) who were against such a proposal.

A few of those in favour of statutory prescription of criteria considered that this would facilitate consistency of practice (16 Oth, 45 Leg). Another comment was that such prescription should be tempered with some allowance within the criteria for individual discretion according to circumstances (15 LG, 18 Leg).

Amongst those opposing statutory prescription of criteria one view was that rulings from the Appeal Court could be more responsive to new circumstances than could legislation which would be slower to update (39 Sent). Another view was that a smaller panel of appellate judges may be effective in promoting consistency (40 Sent).

SUMMARY POINTS

- Almost all (85%) of those who provided a view stated that it would be helpful to have more judicial guidance from the Appeal Court on issues relating to the grant and refusal of interim liberation
- Amongst the particular issues on which guidance was requested were the circumstances in which to make a presumption in favour of bail, and the factors to take into account in deciding on interim liberation
- Respondents were evenly split between those who favoured statutory prescription of the criteria to take into account by the court in deciding whether to grant interim liberation and those against such a proposal

CHAPTER 10: GENERAL COMMENTS

In the course of responding to the specific questions posed in the consultation document many respondents provided additional, more general commentary regarding use of bail and remand. A number of the main recurring themes highlighted by respondents are documented here for information:

- Perception that bail is not respected by alleged offenders and that the system is too lenient
- The use of bail and remand cannot be seen in isolation from the criminal justice system as a whole
- Concerns that the numbers of people remanded to custody should not increase

Many respondents stressed what they saw as the need to strengthen and raise the credibility of bail. Typical comments were:

“in our view this (the large number of offences committed by people on bail) alone is clear evidence that bail has fallen into disrepute” (7 Pol)

“One of the main problems experienced in District Court is the number of people who are on bail who go on to commit a further offence during this period. It appears that offenders are not taking the conditions of bail seriously” (18 Leg)

“The meaning of bail is largely ignored and the courts do little to restore the notion that bail is a privilege and not an entitlement. This has led to “revolving door” justice where the same offenders repeatedly appear in court, only to be released again” (33 Pol)

It was argued that offending behaviour must be seen to have consequences and that if courts do not make clear reference to additional sentences imposed for breaches of bail then offenders may not understand that their breach of bail has been responded to (3 LG). One respondent suggested that the system appears to provide an incentive to commit further offences whilst on bail with offenders considering offences on bail as a kind of “free go” with resulting sentences minimal (16 Oth).

Several consultees however, pointed out that in their view issues of bail and remand sat within the context of a wider criminal justice system with the answers to some current difficulties lying with other parts of the system. For example, opportunities for addressing offending behaviour could present and be taken up at various stages of the system.

Despite general calls for strengthening the system of bail, many respondents expressed concerns that there should not be an increase in the use of remand as a result of any changes made. Several outlined areas where they considered that potential lay for improvements which would facilitate increased confidence in bail for high risk individuals who were otherwise likely to be remanded. Key amongst these were the expansion and appropriate resourcing of bail information and supervision schemes, prompt and firm response to breaches of bail and greater consistency in the handling of such cases by courts.

ANNEX 1: ORIGINAL DISTRIBUTION LIST

Minister for Justice
Lord Advocate
Crown Office
Scottish Prison Service
Scottish Court Service
Her Majesty's Chief Inspector of Prisons
Her Majesty's Chief Inspector of Constabulary
Social Work Services Inspectorate
Mental Welfare Commission
Parole Board for Scotland
Care Commission
Equal Opportunities Commission
Commission for Racial Equality
Disability Rights Commission
Scottish Parliament Information Centre
Clerks to the Justice 1 & 2 Committees
Scottish Members of the European Parliament
Lord Justice General
Lord Justice Clerk
Sheriffs Principal
Sheriffs
Sheriffs' Association
Part-time Sheriffs
Part-time Sheriffs Association
Clerks to Justices
District Courts Association
Convention of Scottish Local Authorities
Local Authority Chief Executives
Directors of Social Work
Association of Directors of Social Work
British Association of Social Workers
Association of Visiting Committees
Faculty of Advocates
Law Society of Scotland
Society of Solicitor Advocates
Procurator Fiscal Society
Association of Chief Police Officers, Scotland
Association of Scottish Police Superintendents
Scottish Police Federation
SACRO
APEX Scotland
Citizens Advice (Scotland)
Victim Support (Scotland)
Victims Forum for Scotland
Howard League (Scotland)
Scottish Consortium on Crime and Criminal Justice
Prison Reform Trust
Scottish Human Rights Centre

Liberty
Scottish Council for Voluntary Organisations
Scottish Civic Forum
Scottish Drugs Forum
Scottish Council on Alcohol
Scottish Youth Parliament
Cranston Drug Services
HOPE
Families Outside
Children 1st
Barnardos
NCH Action for Children
Who Cares? Scotland
Capability Scotland
Enable
Age Concern Scotland
Turning Point Scotland
Fairbridge in Scotland
University Law and Social Work Departments

ANNEX 2: LIST OF RESPONDENTS

Aberdeen District Court
Aberdeen City Council Criminal Justice Social Work
Aberdeen City Council Housing and Social Work
Angus Council Social Work
Association of Chief Police Officers in Scotland
Association of Directors of Social Work
Association of Scottish Police Superintendents
CARE
City of Edinburgh Council Social Work
City of Edinburgh District Court
CoSLA
District Courts Association
Dumfries and Galloway District Court
Dundee City Council
Dundee City Council Social Work
East Lothian Council Community Services
East Lothian District Court
Faculty of Advocates
Falkirk Council Criminal Justice Service
Fife Council Social Work
Fife Neighbourhood Watch Association
Glasgow Bar Association
Glasgow City Council Social Work
Inverness Prison Visiting Committee
Justice for Victims (Scotland)
Law Society of Scotland
Midlothian Council Social Work
North and South Lanarkshire Council Social Work
Orkney Council Criminal Justice Service
Prison Reform Trust
Renfrewshire District Council Criminal Justice Services
Renfrewshire District Court
Scottish Association for the Care and Resettlement of Offenders
Scottish Borders Council Social Work
Scottish Police Federation
Scottish Womens Aid
Sheriffs' Association
South Ayrshire Council Social Work
South Ayrshire District Court
South Lanarkshire Council Social Work
South Lanarkshire Justice's Committee
West Dumbartonshire Council
West Lothian Council Community and Support Services
In addition 5 individual responses were submitted.

