



Northern Ireland
Law Commission
promoting law reform in Northern Ireland

Report

Bail in Criminal

Proceedings

REPORT

BAIL IN CRIMINAL PROCEEDINGS

NILC 14 (2012)

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**NORTHERN IRELAND LAW COMMISSION
BAIL IN CRIMINAL PROCEEDINGS**

CONTENTS

	PAGE
BACKGROUND TO THE COMMISSION	vi
MEMBERSHIP	vi
FOREWORD	ix
EXECUTIVE SUMMARY	xv
CHAPTER 1. INTRODUCTION	1
Background to the Project	1
Consultation and Equality Issues	2
Scope and Objectives of the Project	4
(i) Scope of the bail project	4
Bail in extradition and immigration proceedings	5
Bail under terrorism legislation	8
Other matters falling outside the scope of the bail project	8
(ii) Objectives of the bail project	9
CHAPTER 2. THE LEGAL FRAMEWORK	10
Introduction	10
Need for Bail Legislation	10
Scope of the Proposed Legislation	12
(i) A definition of bail	12
(ii) Scope of the definition of bail: Pre charge bail and street bail	14
Pre charge bail	19
(a) Removal of the power to attach conditions to pre charge bail	19

(b)	Removal of duty to surrender to custody and offence of failure to surrender	20
(c)	Creation of right to have decision to release on bail reviewed	21
	Street bail	22
	Structure and Content of Proposed Legislation	23
	Style of Proposed Legislation	25
	Conclusion	27
	CHAPTER 3. ENFORCEMENT OF BAIL	29
	Introduction	29
	Duty to Surrender to Custody	29
	Offence of Failure to Surrender to Custody	31
	Offence of Breach of Bail Conditions	33
	Arrest for Failure to Surrender to Custody	35
	Arrest for Breach of Bail Conditions	39
	Procedure on Arrest Without Warrant	42
	Search Warrants	43
	Conclusion	44
	CHAPTER 4. PERSONAL RECOGNIZANCES AND SURETIES	45
	Introduction	45
	Personal Recognizance for Bail	45
	Surety for Bail	48
(i)	The power to require a third party to secure a person's surrender to custody	49
(ii)	Extent of the obligation	53
(iii)	Suitability	54
(iv)	Liability of bail guarantor on failure to surrender	55
(v)	Payment of portion of monies in advance/restriction on financial conditions	56
	Conclusion	57

CHAPTER 5. BAIL IN RESPECT OF ACCUSED PERSONS	58
Introduction	58
The Right to Bail	59
Grounds for the Refusal of Bail	64
(i) Risk that the accused will fail to surrender to custody	66
(ii) Risk that the accused will interfere with witnesses or otherwise obstruct the course of justice	66
(iii) Risk that the accused will commit offences	66
(iv) Preservation of public order	69
(v) Risk that the accused will fail to comply with bail conditions	69
(vi) Risk that the accused will cause physical injury to another person or loss of or damage to property	70
(vii) Protection of the accused	71
(viii) Safety and/or welfare of victims	72
(ix) Public safety and/or welfare	73
(x) Public interest	73
(xi) Confidence in the administration of justice	74
Level of risk necessary to establish grounds for denial of bail	74
Additional issues	75
(i) Lack of sufficient information to make a bail decision	75
(ii) Accused already in custody	76
Factors to Consider	77
(i) Nature and seriousness of the offence	78
(ii) Strength of evidence against accused	79
(iii) Character, previous convictions and bail history	80
(iv) Community ties and associations	80
(v) Any conditions that may be imposed to reduce or eliminate any risk posed by the release of the accused person	81
(vi) Other relevant factors	82

Disclosure	83
The Imposition or Variation of Bail Conditions	85
(i) Necessity	86
(ii) Further guidance	87
Least onerous conditions	88
Consideration of accused person's understanding and/or ability to comply	89
Consideration of accused person's other commitments	90
Other matters	91
(iii) Additional provisions concerning imposition of curfew requirements	92
Duty to Provide and Record Reasons	93
Conclusion	97
CHAPTER 6. BAIL IN RESPECT OF CHILDREN AND YOUNG PERSONS	99
Introduction	99
Right to Bail and Grounds for Refusal	99
Detention Facilities for Children and Young Persons	110
(i) A 'place of safety' under PACE	110
(ii) Remand under Article 12	112
Bail Conditions	117
(i) Financial conditions	117
(ii) Further guidance on bail conditions	118
Accommodation and Support for Young Persons on Bail	122
Explaining Bail Decisions	127
Conclusion	128
CHAPTER 7. NON-LEGISLATIVE RECOMMENDATIONS	130
Introduction	130
Bail Information	130
Monitoring and Support of Persons on Bail	134

Victims of Crime	138
Conclusion	144
CHAPTER 8. CONCLUSIONS	145
(i) Simplification and accessibility	146
(ii) Consistency and transparency	146
(iii) Public understanding	147
(iv) ECHR	147
(v) Administrative arrangements	148
CHAPTER 9: LIST OF RECOMMENDATIONS	149
DRAFT BAIL BILL	159
EXPLANATORY NOTES	197
APPENDIX A: REPORT ON EQUALITY IMPACT ASSESSMENT	205
APPENDIX B: LIST OF CONSULTEES	230
TABLE OF STATUTES AND INTERNATIONAL INSTRUMENTS	232
LIST OF CASES	234
BIBLIOGRAPHY	236
NORTHERN IRELAND LAW COMMISSION PUBLICATIONS	238

NORTHERN IRELAND LAW COMMISSION

BACKGROUND

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

The Commission was established under the Justice (Northern Ireland) Act 2002. The Act (as amended by the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010) requires the Commission to consider any proposals for the reform of the law of Northern Ireland that are referred to it. The Commission must also submit to the Department of Justice programmes for the examination of different branches of the law with a view to reform. The Department of Justice must consult with the Attorney General for Northern Ireland before approving any programme submitted by the Commission. If the programme includes the examination of any branch of law or the consolidation or repeal of any legislation which relates in whole or in part to a reserved or excepted matter, the Department of Justice must consult the Secretary of State for Northern Ireland before approving that programme.

MEMBERSHIP

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

These positions are currently held by:

Chairman:	The Honourable Mr Justice McCloskey
Commissioner:	Professor Sean Doran (Barrister-at-Law)
Commissioner:	Mr Neil Faris (Solicitor)
Commissioner:	Mr Robert Hunniford (Lay Commissioner)
Commissioner:	Dr Venkat Iyer (Law Academic)
Chief Executive:	Ms Judena Goldring MA, BLegSc, Solicitor
Interim Chief Executive:	Mr Ken Millar

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Communications &
HR Manager: Cathy Lundy

Personal Secretary to
the Chairman and
Chief Executive: Paula Martin

Administrative
Officer: Joanne Kirk

Commissioners in charge of this project: Sean Doran and Robert Hunniford

The legal team for this project is:

Project lawyer: Katie Quinn

Legal researchers: Joan Kennedy (Nov 2008 to Aug 2010)
Patricia MacBride (From Aug 2010)

Legislative drafting
consultant: Ronan Cormacain LL.B, LL.M, BL

FOREWORD

As Chairman of the Northern Ireland Law Commission, it is my pleasure to present this significant report to the Government and public of Northern Ireland. The expectation that this will generate much interest in the legal profession, amongst the judiciary and in many sectors of the criminal justice system seems well founded.

The Commission is an independent statutory body, established and governed by sections 50 to 52 of and Schedule 9 to the Justice (NI) Act 2002. The creation of the Commission is one of the significant reforms of the Northern Ireland legal system effected by this ground breaking statute. By section 50, the Commission is a body corporate, consisting of a Chairman and four Commissioners appointed by the Minister for Justice. Pursuant to section 51 of the 2002 Act, the Commission is obliged to keep under review the law of Northern Ireland with a view to its systematic development and reform. Specifically, the methods prescribed for the performance of this overarching duty are codification, the elimination of anomalies, the repeal of unused legislation and the reduction of the number of separate legislative provisions. Section 51 further provides that the Commission should undertake the simplification and modernisation of the law of Northern Ireland.

By statute, each of the Commission's programmes of law reform must have the approval of the Minister for Justice. The act of granting such approval signifies, *inter alia*, ministerial acceptance that the authorised projects are of importance to Northern Ireland and that they reflect areas of the law in which an exercise of modernisation, simplification and the elimination of anomalies is considered necessary. It is for this reason that when the Commission completes any given project and presents its report, normally accompanied by draft legislation, there is a strong expectation that the Northern Ireland Assembly will legislate. The whole rationale and ethos of law reform would be dulled and undermined if this were not to occur. Furthermore, this expectation is harmonious with the legislative intention clearly underpinning the statutory provisions under which the Commission operates (contained in the Justice (NI) Act 2002).

In this jurisdiction, there is no central governing instrument of bail legislation. This contrasts with many other jurisdictions including England and Wales, where the Bail Act was introduced in 1976 and the Republic of Ireland, where legislative provision

was made for bail in 1997. In Northern Ireland, there is a patchwork quilt of statutory sources, married with the exercise of the inherent jurisdiction of the High Court. This is considered unsatisfactory, given the substantial importance of bail in the context of the administration of criminal justice and the relatively intense degree of public interest and concern which this subject routinely generates. The Commission believes that there is a persuasive case for the enactment of a unifying instrument of legislation regulating comprehensively the roles and responsibilities of the primary agencies concerned – the police, the Public Prosecution Service and the courts – coupled with some simplification and modernisation of the law in this sphere.

There is undoubtedly a substantial public interest in this project. There are various concerns about the existing law and practice in this sphere and material misunderstandings abound. In mid-project, there was a surge of publicity about the commission of offences by defendants granted bail. A newspaper publication suggested that more than 20,000 such offences – including 8 murders, 24 rapes and 150 robberies – were committed during a two year period. While no statutory scheme alone can aspire to resolve all of the difficulties that habitually arise in this area, the Commission earnestly expects that the proposed legislation will promote consistency and transparency in decision making by the police and the courts and will in turn increase public confidence in the criminal justice system.

Compilation of this report was preceded by an extensive public consultation exercise and full engagement by the Commission with all relevant stakeholders and interested parties, reflective of the diversity of the Northern Ireland community. The consultation paper was published in September 2010 and the Commission received a wide range of contributions in response. The Commission also held a number of public seminars to promote awareness of the project and encourage engagement from as wide a range of interested parties as possible. The responses and representations thereby generated have assisted the Commission greatly in its formulation of the recommendations in the final report. Strikingly, there was overwhelming support for the adoption of a dedicated Bail Act in Northern Ireland. Many consultees agreed that the current legal framework in the field of bail is complex, disjointed and outdated. Such a measure will simplify and modernise the existing law, while simultaneously promoting consistency, transparency and accessibility. It will also enhance understanding of the operation of the bail system in all quarters, thereby strengthening public confidence in the criminal justice system as a whole.

The Commission believes that the conclusions and recommendations of this report are innovative, practical and realistic. I draw attention also to the Draft Bill which accompanies this report. This addresses, in a logical and structured manner, the right of accused persons to bail; the topic of bail guarantors; enforcement following the grant of bail; and other issues – such as the repeal of street bail, police review of release on bail without charge, the necessity of providing reasons for bail decisions, including the imposition of conditions and special provision for children. Furthermore, the report proposes the abolition of personal recognizances and sureties for surrender to custody. Amongst the recommendations which were not considered appropriate for inclusion in the draft legislation I would highlight the proposals that a bail information scheme be established and a bail support programme developed. In addition, the Commission has given careful consideration to victims of crime and recommends that an extra-statutory scheme designed to ensure the provision of prompt and accurate information to victims be established.

The act of presenting this report to the Government of Northern Ireland prompts reflection on the fundamental consideration that this is a society governed by the rule of law. In his landmark publication, Lord Bingham said the following of this cornerstone principle:

The core of the existing principle is, I suggest, that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.¹

It is a fact that from time to time affected individuals and groups and public representatives express reservations about the grant of bail in particular cases. One of the aims of this report is to ensure that a new bail statute will render such concerns increasingly rare as a result of, *inter alia*, the introduction of a bail model which will attract greater confidence, respect and acceptance throughout the community. It is also appropriate to highlight that neither this report nor its accompanying draft legislation proposes any dilution of one of the outstanding strengths of the bail law system, namely decision making by a truly independent and conscientious judiciary.

The law reform proposals contained in this report and reflected in the accompanying draft legislation are the product of an extensive and robust consultation exercise.

¹ T Bingham, *The Rule of Law*, London: Allen Lane, 2010, p 8.

The Commission has taken steps to ensure that all potentially interested and affected citizens, groups, organisations and professions have had the opportunity to ventilate their views and suggestions and, hence, influence the shape and content of this report. This should provide significant reassurance to the local legislators who will make final decisions. Throughout the process culminating in this report, care has been taken to ensure that the executive has been periodically informed of the progress of the project, its evolving orientation and its possible outcomes. Thus the report will not take legislators by surprise.

Credit and appreciation are due to those who can proudly claim responsibility for the compilation of this report and its accompanying draft legislation. They are Bobby Hunniford and Professor Sean Doran, the Commissioners concerned; Katie Quinn, the senior project lawyer; Joan Kennedy and Patricia MacBride, the legal researchers; Maria Dougan, project lawyer; and Ronan Cormacain, the legislative drafter. It has been my pleasure to interact periodically with this highly committed and skilled team and I congratulate them unreservedly. They can justifiably take pride in the significant contribution which they have made to law reform in Northern Ireland.

Thanks are also due to many other individuals and organisations who have assisted in the work leading to the publication of this report. The Commission is indebted to Mr Tom Haire, Department of Justice, for his contribution to the project as a member of the Bail Steering Group. The Commission is grateful to all those individuals and organisations who took the time to respond to the bail consultation paper and to facilitate or participate in consultation meetings. Particular thanks are due to the young persons who met with the project team during the consultation period and freely expressed their views and experiences in relation to current bail laws. The Commission also had a number of useful discussions with Professor Ed Cape, University of the West of England and Ken Jones, consultant legislative counsel. Gratitude should also be expressed to the wider team within the Commission, including Sara Duddy, Rebecca Ellis, Catherine O'Dwyer and Nicola Smith, who helped in the final preparation of the document for publication.

Finally, I strongly commend this report to Government. It is blessed with the strengths, virtues and qualities already highlighted. It is further enhanced by the accompanying draft legislation, consisting of a comprehensive and modern statutory model. The process of law reform in Northern Ireland will be barren indeed if reports

of this nature do not culminate in legislation. The thorough and comprehensive process preceding this report strengthens an already formidable case for ensuing legislation. The Commission looks forward to seeing the draft bail legislation on the agenda of the Executive Committee and the Northern Ireland Assembly in the very near future. The population of this country awaits, and deserves, the bail reform legislation which we earnestly recommend to Government.

THE HONOURABLE MR JUSTICE BERNARD MCCLOSKEY
CHAIRMAN
NORTHERN IRELAND LAW COMMISSION
COURT OF JUDICATURE OF NORTHERN IRELAND

EXECUTIVE SUMMARY

Chapter 1

In chapter 1 the background to the bail project, in the context of the statutory duties of the Northern Ireland Law Commission, is discussed. It is argued that bail law and practice is a particularly suitable topic for examination by the Commission. The wide ranging stakeholder consultation and equality work carried out by the Commission during the course of the bail project is described. The scope of the bail project, which includes most issues relating to bail in criminal proceedings but which excludes bail in extradition and immigration proceedings and bail under terrorism legislation, is explained. The key objectives of the bail project, as outlined in the consultation paper, are reiterated.

Chapter 2

Chapter 2 begins with an examination of the arguments for and against the introduction of a unified Bail Act that would govern bail decision making by police officers and courts across different levels of jurisdiction. Having determined that such legislation is desirable in Northern Ireland, the scope of the legislation, including a statutory definition of 'bail' is considered. It is argued that there are sound reasons of principle for making a distinction between bail granted to persons who have not been charged with an offence and bail following formal charge. A number of amendments are made to pre charge bail powers and it is determined that powers to grant bail elsewhere than at a police station should be repealed. The structure and content of the proposed legislation is described including several provisions of general application, a statutory right to bail for accused persons and special provisions applicable to children and young persons. Finally, the clear and accessible legislative drafting style adopted in the Draft Bill is discussed.

Chapter 3

The enforcement of 'bail' as defined in the Draft Bill is considered in chapter 3. Building on the precedent of Part II of the Criminal Justice (NI) Order 2003, the Commission makes recommendations for the inclusion in the Draft Bill of a duty to surrender to custody and a simplified offence of failure to surrender to custody. The Commission discusses but ultimately decides against the creation of an offence of breach of bail conditions. The Commission recommends the consolidation, subject to some important amendments, of powers to issue warrants for failure to surrender

to custody, powers of arrest without warrant for anticipated failure to surrender and breaches of bail conditions, procedures on arrest without warrant for anticipated failure to surrender and breaches of bail conditions and powers to issue search warrants.

Chapter 4

The rationale for the longstanding powers to require a personal recognizance for bail and to require a surety or sureties for bail are considered in chapter 4. For reasons of consistency and proportionality, the Commission recommends the abolition of the powers of the courts to require a personal recognizance for surrender to custody when granting bail in criminal proceedings. It is also considered appropriate to abolish the powers of the police and the courts to require a surety for bail in criminal proceedings. This power is replaced by a new statutory regime for bail guarantors, which modernises many of the existing powers in relation to sureties for bail. Limits are placed on the imposition of bail guarantee and security conditions.

Chapter 5

In chapter 5, particular consideration is given to the right to bail of persons charged with offences and awaiting or on trial, in light of the jurisprudence of the European Court of Humans in relation to the right to liberty under Article 5 of the European Convention on Human Rights. Recommendations are made to create a statutory right to bail and statutory grounds for the refusal of bail which would apply to post charge police bail and court bail pending and during trial. It is also recommended that the Draft Bill should contain a non exhaustive statutory list of factors which decision makers should take into account when determining the issue of bail. The Commission considers briefly the issue of disclosure in the context of bail applications and decides against including in the Draft Bill a provision conferring a right to disclosure or a statutory duty to disclose in that context. A number of recommendations are made for the creation of statutory guidance on the imposition of appropriate bail conditions on accused persons. Finally, recommendations are made for the provision and recording of reasons for most bail decisions.

Chapter 6

The difficult issue of the bail or remand of children and young persons is examined in chapter 6. Consideration is given to the particular vulnerability of children and young persons in the criminal justice system, the longstanding difficulties of providing appropriate accommodation for children and young persons on bail and international

children's rights standards applicable in this context. Recommendations are made to extend to children and young persons the statutory right to bail and the statutory grounds for the refusal of bail applicable to adults, subject to some additional safeguards. In addition to the factors which must be considered when bail decisions are taken in respect of adults, the Draft Bill requires that decision makers consider the age, maturity, needs and understanding of the young person. The best interests of the child must be a primary consideration and detention should be a measure of last resort and for the shortest appropriate time. Recommendations are made to include a statutory prohibition on remand solely for accommodation reasons and to provide an appropriate range of accommodation options for children and young persons on bail. The expansion of bail support for children and young persons is also proposed. Further, it is recommended that statutory guidance on the imposition of bail conditions on children and young persons accused of offences should duplicate the adult guidance, subject to some additional safeguards. The Commission recommends that, where absolutely necessary, children and young persons accused of offences should be detained in the juvenile justice centre. Finally, recommendations are made for provision of child appropriate explanations of key bail decisions.

Chapter 7

In chapter 7, the Commission makes a number of recommendations which, in the view of the Commission, will not require statutory intervention but which are desirable to ensure the effective operation of the proposed legislative scheme. Recommendations are made to develop a bail information scheme to ensure that decision makers are provided with comprehensive, prompt and accurate bail information. Consideration is given to bail monitoring and support for persons on bail and recommendations are made to develop bail support programmes for adults. In the context of the provision of information to victims in the criminal justice system more generally, the Commission proposes that victims of crime are provided with the option of receiving prompt, consistent and comprehensible information in relation to bail decisions.

Chapter 8

In chapter 8, the Commission reflects on what may be achieved by the recommendations in this report, in light of the key objectives of the bail project.

Chapter 9

A list of the recommendations made in this report and any corresponding provisions of the Draft Bill are presented in chapter 9.

CHAPTER 1. INTRODUCTION

BACKGROUND TO THE PROJECT

- 1.1 This project to review the law and practice on bail in Northern Ireland has been carried out as part of the Northern Ireland Law Commission's First Programme of Law Reform.² The duties of the Commission are set out in the Justice (NI) Act 2002. Section 51(1) provides that the Commission must keep under review the law of Northern Ireland including in particular by (a) codification, (b) the elimination of anomalies, (c) the repeal of legislation which is no longer of practical utility, and (d) the reduction of the number of separate legislative provisions, and generally by simplifying and modernising it.
- 1.2 The bail project is the first project completed by the Northern Ireland Law Commission ('the Commission') in the field of criminal law and procedure. This report was preceded by the publication of a consultation paper in September 2010 in which the views of all interested parties on bail law and practice in Northern Ireland were invited.
- 1.3 As argued in the consultation paper, the law and practice on bail is a particularly fitting topic for examination by the Commission in light of the above statutory duties.³ The law on bail in this jurisdiction has developed on a piecemeal basis and the present legal framework derives from a range of statutory and common law sources. Some aspects of the law are complex and there are inconsistencies in statutory provision across various levels of decision making. The decision to grant or refuse bail gives rise to important matters of principle that lie at the heart of the criminal process. The bail project has sought to address the question of whether the legal framework strikes a proper balance between the right to liberty of the individual and the often competing interests of society in the prevention of crime, the protection of the community and the effective administration of justice.

² The First Programme was approved by the Secretary of State on 17th October 2009 and was subsequently laid before the Houses of Parliament and the Northern Ireland Assembly in accordance with the Justice (NI) Act 2002, ss 52(2) and 52(3).

³ See Consultation Paper, *Bail in Criminal Proceedings* (2010) NILC 7 ('Bail CP'), ch 1.

CONSULTATION AND EQUALITY ISSUES

- 1.4 In the bail consultation paper, a thorough analysis of the law and practice relating to the bail and remand of adults and children in Northern Ireland was presented.⁴ The domestic legal framework was considered alongside relevant human rights standards⁵ and comparative research in relation to bail law and reform initiatives in several other jurisdictions.⁶ This legal analysis was further supplemented by wide-ranging preliminary discussions in which the views of many individuals and organisations regarding the operation of the bail system in Northern Ireland were invited.⁷ Fifty four questions were asked of consultees in the bail consultation paper in relation to various aspects of bail law and practice in Northern Ireland.⁸
- 1.5 The consultation paper was widely circulated to groups and individuals with an interest in or knowledge of the bail system in Northern Ireland. During the consultation period, the Commission held several public meetings in order to promote awareness of the consultation process and to encourage a broad response. Meetings were held in two venues in Belfast, one in Dungannon and one in Derry/Londonderry.
- 1.6 The project team also participated in a half-day seminar addressing some aspects of the bail consultation paper with the Criminal Justice Issues Group in Hillsborough Castle on 25th January 2011. This Group comprises senior officials of the key criminal justice agencies as well as senior judges and representatives from the legal professions and voluntary sector. Several invited guests were also in attendance at the event.
- 1.7 Given the significance of the bail project for children and young persons, the Commission conducted several targeted meetings with children and young persons, including 'looked after' children and young persons and those in contact with the criminal justice system. The project team worked with Participation Network⁹ to engage directly with children and young people in relation to the bail proposals. A Children and Young People's version of the

⁴ Bail CP, chs 3 and 4.

⁵ Bail CP, ch 2.

⁶ Bail CP, ch 6.

⁷ Bail CP, ch 5.

⁸ Bail CP, ch 7.

⁹ Participation Network is supported by OFMDFM. It provides assistance to public sector organisations to enable them to engage effectively with children and young persons in relation to policies and services impacting upon their lives.

bail consultation paper, developed in partnership with Participation Network, is available on the Commission's website.¹⁰ The bail team visited Hydebank Young Offenders Centre and Woodlands Juvenile Justice Centre and, with the help of Include Youth, consulted with several young persons there. Further meetings with young persons, some of whom had experience of the care system, were carried out in Enniskillen and Derry/Londonderry with the assistance of Voice of Young People in Care ('VOYPIC') and Include Youth. VOYPIC also created a questionnaire for young persons from the Children and Young People's version of the consultation paper and posted it on their website.¹¹ The bail project received a commendation at the Northern Ireland Commissioner for Children and Young People ('NICCY') Participation Awards in November 2011 for effective engagement with young persons.

1.8 In addition to this engagement with children and young persons and in part in response to views expressed by some consultees, the Commission decided to undertake additional equality work in relation to the bail proposals following the publication of the consultation paper. A further equality screening of the bail proposals was carried out, drawing on both qualitative and quantitative data, and it was decided that the bail proposals should be screened in for Equality Impact Assessment. During the course of the preparation of the Equality Impact Assessment, the Commission identified a number of information gaps and, following discussions with the Equality Commission, undertook to gather further data on which to consult and base decisions. The Bail Equality Impact Assessment went out to consultation on 5th July 2011 with a closing date for responses of 11th October 2011.¹²

1.9 The Commission received twenty five written responses to the consultation paper. A further six responses to the consultation on the Equality Impact Assessment of the bail proposals were received. All consultation responses were considered fully by the Commission during the policy decision making process. Alongside these written submissions, the Commission also considered the notes from approximately fifteen meetings (including four discussions with children and young persons, six meetings conducted with

¹⁰ www.nilawcommission.gov.uk/bail_consultation_paper_children_and_young_persons_version.pdf

¹¹ www.voypic.org

¹² The Bail Screening Analysis and the Consultation on Equality Impact Assessment ('EQIA consultation') are available on the Commission's website: www.nilawcommission.gov.uk. The Report on the Equality Impact Assessment ('EQIA report') is available on the website and at Appendix A of this report.

persons and organisations representing many of the nine equality categories as defined in section 75 of the Northern Ireland Act 1998, four meetings with the general public and the notes from the Criminal Justice Issues Group) when formulating the bail recommendations. Once all policy decisions had been taken, instructions were prepared for legislative counsel in relation to those recommendations which, in the view of the Commission, require statutory provision. The reasoning behind the policy decisions taken by the Commission is outlined in this report.

SCOPE AND OBJECTIVES OF THE PROJECT

(i) Scope of the bail project

1.10 In the course of the bail project, bail decision making by both the police and the courts at various stages of the criminal process has been examined. Consideration has been given to powers to grant bail by the police, pre and post charge, including recently introduced powers to grant bail elsewhere than at a police station (what is often termed 'street bail'). Powers to grant bail by the courts pending and during trial, pending sentence and appeal and powers to grant compassionate bail¹³ have also been reviewed. Particular attention has been paid to the considerations that apply to persons charged with an offence by the police and to those awaiting or on trial but not yet convicted. The special considerations that may arise when decisions are taken to grant or refuse bail in respect of children and young persons have been closely examined.

1.11 While the central focus of the bail project has been the reform of the law relating to bail, matters of practice and administration have also been examined by the Commission. As argued in the consultation paper, the boundary between law and practice is not fixed and matters that are dealt with by way of statutory provision in one jurisdiction may be dealt with purely by means of administrative arrangements or through custom and practice in another.¹⁴ Where appropriate, the Commission makes recommendations in this report in relation to matters which are not considered likely to require

¹³ As discussed in the consultation paper, compassionate bail may be granted by the Crown Court and the High Court to persons on remand pending or during trial: see Bail CP, paras 3.23 and 3.26. The power to grant compassionate bail has recently been extended to the magistrates' courts: see Justice Act (NI) 2011, s 91 which was commenced on 11th June 2012. Compassionate bail cannot be granted by the courts once a person has been sentenced. Sentenced prisoners may, however, apply to the prison governor for temporary release on compassionate grounds under the Prison and Young Offenders Centre Rules (NI) 1995, r 27.

¹⁴ See Bail CP, para 1.6.

statutory provision but which are considered necessary to the effective operation of the proposed statutory regime.

- 1.12 The bail project is broad in scope, encompassing police and judicial powers at various levels of jurisdiction and both legal and administrative matters. There are, however, some matters which have been excluded from the scope of the bail project, for various reasons.

Bail in extradition and immigration proceedings

- 1.13 Although the main focus of the bail project is the reform of bail law and practice in criminal proceedings in Northern Ireland, the related issues of bail in extradition and immigration proceedings were also discussed in the consultation paper.¹⁵ It was noted that both extradition and immigration are ‘excepted’ matters for the purposes of the Northern Ireland Act 1998.¹⁶ For the reasons outlined below, the Commission has concluded that bail grantable in extradition and immigration proceedings should not be included in this report and the accompanying legislation.

- 1.14 When the Extradition Act 2003, which regulates extradition for the whole of the United Kingdom, was enacted it contained provisions amending the statutory bail regimes in England and Wales and Scotland. The effects of these amendments are that the domestic bail regimes in each of those jurisdictions apply (subject to some modifications) to the exercise of bail powers under the Extradition Act. No such provisions were introduced in Northern Ireland.¹⁷

- 1.15 While the Commission is of the provisional view that, given the approaches adopted in England and Wales and Scotland, it would be desirable, in principle, for any new bail regime in Northern Ireland to apply also to the exercise of bail powers in extradition proceedings, the question arises as to how this might be achieved. As indicated above, extradition is an ‘excepted’ matter for the purposes of the Northern Ireland Act 1998. Consequently, any provision which ‘deals with’ extradition is prima facie outside the legislative competence of the Northern Ireland Assembly.¹⁸ Section 98(2) of the 1998 Act

¹⁵ See Bail CP, paras 3.29 to 3.33.

¹⁶ Northern Ireland Act 1998, ss 4(1), 6, 98(2) and sch 2, paras 3 and 8.

¹⁷ The existence of a ‘lacuna’ in bail law in Northern Ireland was pointed out by McCloskey J in *Jose Ignacio de Juan Chaos v Spain* [2010] NIQB 68, para 34.

¹⁸ Northern Ireland Act 1998, s 6(2)(b).

provides that a provision 'deals with' an excepted matter (or a reserved matter) if it affects it other than incidentally. Separately, the 1998 Act provides that where the provision 'deals with' an excepted matter, the Assembly may still legislate on it if it is considered to be 'ancillary to other provisions (whether in the Act or previously enacted) dealing with reserved or transferred matters'.¹⁹ A provision is ancillary to other provisions if it is a provision:

- (a) which provides for the enforcement of those other provisions or is otherwise necessary or expedient for making those other provisions effective; or
- (b) which is otherwise incidental to, or consequential on, those provisions; and references in this Act to provisions previously enacted are references to provisions contained in, or in any instrument made under, other Northern Ireland legislation or an Act of Parliament.²⁰

1.16 On the question of whether a provision 'deals with' an excepted matter, guidance can be found in the judgment of the House of Lords in *Gallagher v Lynn*.²¹ Lord Atkin indicated that when considering this question, the 'pith and substance' of the legislation must be examined:

If on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorised field.²²

It may be argued, however, that the 'pith and substance' doctrine as outlined in *Gallagher v Lynn* has fallen out of favour in recent years, giving way to more literal interpretations of devolution legislation. On a literal interpretation of the Northern Ireland Act 1998, it is arguable that provision on bail in extradition proceedings would not 'deal with' an excepted matter. The statute would 'deal with' bail, as applied in extradition proceedings, but would not 'deal with' extradition *per se* - by for example purporting to regulate the transfer of accused persons across jurisdictions or encroaching upon any of the specific powers in relation to bail contained in the Extradition Act 2003. Arguably the bail regime within the proposed legislation would merely form part of the context within which extradition powers are exercised, akin to other laws regarding the functioning and procedures of the courts, but it would not form part of extradition law or 'deal with' extradition.

¹⁹ Northern Ireland Act 1998, ss 6(2) and (3).

²⁰ Northern Ireland Act 1998, s 6(3).

²¹ [1937] AC 863.

²² *Gallagher v Lynn* [1937] AC 863, 870.

- 1.17 It is possible, however, to take a different view, arguing that the inclusion of bail in extradition proceedings within the proposed legislation affects extradition more than incidentally and with the result that the proposed legislation would 'deal with' an excepted matter. If the provision is considered to 'deal with' an excepted matter, the next question is whether it can be saved on the basis that it is ancillary to other provisions contained in the proposed legislation. In view of the definition of 'ancillary' contained in the 1998 Act, it is again open to debate whether provision of this nature could be considered 'necessary' or 'expedient' for making the other provisions of the proposed legislation effective, or otherwise 'incidental to' or 'consequential on' those other provisions.
- 1.18 Although the Commission acknowledges the desirability of applying any new bail legislation to bail grantable in extradition proceedings, in light of the uncertainty surrounding the extent of the Assembly's power to legislate on this matter, the Commission has decided to exclude the topic of bail in extradition proceedings from the proposed legislation which accompanies this report.
- 1.19 Even if the view is taken that provision on bail in extradition proceedings can be made by the Assembly, the Commission is mindful that the Department of Justice may wish to consult with the relevant Whitehall Department on the practical arrangements and most suitable legislative vehicle for achieving this outcome. In reaching this conclusion, the Commission's thinking has also been informed by the fact that, when provision was made to extend the existing statutory regime on bail in Scotland to bail grantable in extradition proceedings, this was achieved by Act of the Westminster Parliament and not by Act of the Scottish Parliament, even though this occurred in 2003, post devolution of powers to the Scottish Parliament.
- 1.20 Immigration is also an 'excepted' matter for the purposes of the Northern Ireland Act 1998.²³ Bail grantable in immigration proceedings arguably falls outside of scope of the bail project with its key focus on criminal proceedings. Further, the Commission is of the view that provision on bail grantable in immigration proceedings would be considered to deal with an excepted matter and would not be considered 'ancillary to other provisions (whether in the Act

²³ Northern Ireland Act 1998, s 4(1), 6, 98(2) and sch 2, para 8.

or previously enacted) dealing with reserved or transferred matters;²⁴ therefore falling outside the legislative competence of the Northern Ireland Assembly.

Bail under terrorism legislation

1.21 Bail grantable under section 67 of the Terrorism Act 2000 is explicitly excluded from the current definition of bail set out in the Criminal Justice (NI) Order 2003 ('2003 Order').²⁵ Section 67 has expired as of the 31st of July 2007,²⁶ subject to transitional arrangements.²⁷ It was suggested in one consultation response that the enactment of a Bail Act in Northern Ireland would also require the repeal of those provisions of the Terrorism Act 2000 which do not permit pre charge bail,²⁸ on the grounds that they are not compatible with Article 5(3) of the European Convention on Human Rights ('ECHR').²⁹

1.22 As previously indicated the focus of the bail project is reform of bail law and practice in criminal proceedings in Northern Ireland. For the purposes of the Northern Ireland Act 1998 'special powers and other provisions for dealing with terrorism or subversion' are 'excepted' matters.³⁰ The Commission is of the view that provision on bail or detention of persons arrested in connection with terrorism would be considered to deal with an excepted matter and therefore would fall outside the legislative competence of the Northern Ireland Assembly.

Other matters falling outside the scope of the bail project

1.23 There are some further matters, which although falling within the broad ambit of bail in criminal proceedings, are not included in this report. These include the relationship between the magistrates' court and the High Court in relation to bail applications, the parameters of bail applications on a material change of circumstances and the creation of a right of appeal to the Court of Appeal on a point of law arising out of a bail application. It is the view of the Commission,

²⁴ Northern Ireland Act 1998, s 6(2)(b).

²⁵ Criminal Justice (NI) Order 2003, Art 3(2).

²⁶ Terrorism (NI) Act 2006, s 1(2)(b).

²⁷ Terrorism (NI) Act 2006 (Transitional Provisions and Savings) Order 2007, sch, para 1.

²⁸ Under the Terrorism Act 2000 (much of which applies to the whole of the UK) the police have no power to release suspects on pre charge bail but the police or the DPP may apply, after 48 hours detention, to the courts for a warrant to detain the suspect for up to 14 days without charge: Terrorism Act 2000, s 41 and sch 8, part 3.

²⁹ See *In the Matter of an Application for Judicial Review by Colin Duffy and others (No 2)* [2011] NIQB 16, where Morgan LCJ rejected the applicants' argument that paras 29 and 36 of Schedule 8 to the Terrorism Act 2000 are incompatible with Article 5 of the ECHR. The Supreme Court has refused leave to appeal the decision of the Divisional Court.

³⁰ Northern Ireland Act 1998, ss 4(1) and sch 2, para 17.

that it may be more appropriate for these matters to be considered and consulted on in the context of a broader examination of the jurisdiction of the courts in criminal matters.

(ii) Objectives of the bail project

1.24 In the consultation paper, the key objectives of the bail project were summarised as being to make recommendations which aim to: (i) simplify the current law and make it more accessible; (ii) provide a legal framework that will promote consistency and transparency in bail decision making; (iii) enhance public understanding of bail decision making; (iv) ensure that the law on bail conforms with the requirements of the ECHR and maintains a proper balance between the right to liberty of the individual suspect and the interest of society in the prevention of crime and in the effective administration of criminal justice; (v) promote the development of appropriate administrative arrangements that will complement and ensure the effective working of any new or revised statutory scheme.³¹

1.25 The Commission is confident that the recommendations contained within this report achieve those objectives and provide for a modern, consistent and fair bail system that will enable transparent decision making, be accessible to the community and be worthy of public confidence.³²

³¹ See Bail CP, para 1.7.

³² See Bail CP, para 7.1.

CHAPTER 2: THE LEGAL FRAMEWORK

INTRODUCTION

2.1 In this chapter, the question of whether a statutory regime for bail in criminal proceedings is necessary in Northern Ireland is discussed. Consideration is given to the parameters of such legislation and how bail in criminal proceedings should be defined. The structure and content of the Draft Bill is outlined and the style adopted in the legislation is described.

NEED FOR BAIL LEGISLATION

2.2 The law regarding bail in Northern Ireland is currently found in a range of disparate common law and statutory sources.³³ Some aspects of bail law and practice have been subject to extensive statutory intervention whereas others have received little or no legislative attention. The right to bail and the grounds for the refusal of bail by the police following charge are enshrined in statute, for example, but the presumption in favour of bail for accused persons and the grounds for its refusal before the courts are governed by longstanding common law authority.³⁴ The view was expressed in the consultation paper that bail law and practice in Northern Ireland is beset by complexity, inconsistency and uncertainty.³⁵ It was observed that Northern Ireland contrasts with most other jurisdictions, where the law governing this important aspect of criminal procedure is enshrined in legislation, either in a Bail Act or a Criminal Code.³⁶

2.3 In the consultation paper the Commission expressed the provisional view that there is a strong case for the adoption of a single unified Bail Act that would govern bail decision making by police officers and courts across different levels of jurisdiction. The views of consultees were invited in relation to this provisional position (Q 1) and regarding any potential disadvantages to this approach (Q 2).

2.4 Among those consultees who directly responded to this question, there was overwhelming support for the adoption of a dedicated Bail Act. Many

³³ Bail CP, ch 3.

³⁴ Bail CP, paras 3.34 to 3.40.

³⁵ Bail CP, paras 3.74.

³⁶ Bail CP, paras 6.5 to 6.6.

consultees agreed that the current legal framework is complex, disjointed and outdated and that the introduction of a new Bail Act presents an opportunity to bring clarity to this area of law and practice. Others argued that new legislation should simplify and modernise the law, ensuring consistency, transparency and accessibility.

- 2.5 It was maintained that a Bail Act would ensure greater understanding of the bail system among defendants and the general public and consequently may contribute to greater public confidence in the criminal justice system. Consultees also suggested that a clear and principled Bail Act may potentially reduce the remand population and lower legal costs.
- 2.6 Although consultees did not identify any particular disadvantages to the adoption of a unified Bail Act, some of the support for a statutory scheme was couched with reservations. Several consultees stressed that any new bail legislation must comply with human rights standards. Many argued that there should be special arrangements and provisions in respect of children and young persons, which take account of their particular needs and circumstances. The importance of balancing public protection and confidence in the criminal justice system with human rights principles and the particular welfare issues of children and young persons was highlighted by one consultee. It was further suggested that consideration should be given to a separate Bail Act for children and young persons. Others contended that any new Bail Act should be flexible enough to deal with diverse cases and to protect other vulnerable groups such as persons considered to have issues of 'capacity'. It was argued that bail decisions should be based on a robust assessment, taking into account the concept of 'defensible decision making'.
- 2.7 The consultation responses received have confirmed for the Commission the provisional view expressed in the consultation paper. The Commission considers that a dedicated Bail Act, regulating bail grantable by the police and the courts, will bring much needed clarity and consistency to this important aspect of criminal procedure. A modern and accessible Bail Act will, it is hoped, promote transparency and greater public understanding and confidence in the bail system. Such legislation also offers an opportunity to give full expression to human rights obligations and appropriate protection for

vulnerable groups. The Commission's recommendation for unified bail legislation is reflected in the Draft Bill with this report.

Recommendation 1

- 2.8 The Commission recommends the introduction of a single unified Bail Act which will govern bail decision making by police officers and courts across different levels of jurisdiction.**

SCOPE OF THE PROPOSED LEGISLATION

(i) A definition of bail

- 2.9 In the consultation paper, the various bail decisions which may be taken at different stages of the criminal process were considered.³⁷ Decisions may be taken, for example, in respect of pre charge bail for persons arrested other than at a police station ('street bail'), pre charge bail granted at a police station, post charge police bail, court bail (pending and during trial), bail pending sentence, bail pending appeal and compassionate bail. Accordingly, in the current model of the criminal justice system, there exists a broad array of bail decisions which can be made at different stages of the process, for different purposes and in notably different contexts.
- 2.10 It was observed in the consultation paper that, alongside the assortment of statutory provisions and common law sources, legislation was enacted in 2003 which sought to take a more integrated approach to bail.³⁸ The Criminal Justice (NI) Order 2003 introduced, for the first time in Northern Ireland, a number of general provisions concerning bail, namely a duty to surrender to custody, an offence of failing to surrender to custody and powers of arrest. For the purposes of that legislation 'bail' is defined as bail grantable under common law or statute:

(a) in or in connection with proceedings for an offence to a person who is accused or convicted of the offence, or

(b) in connection with an offence to a person who is under arrest for the offence or for whose arrest for the offence a warrant (endorsed for bail) is being issued.³⁹

³⁷ Bail CP, ch 3.

³⁸ Bail CP, paras 3.4 to 3.6.

³⁹ Criminal Justice (NI) Order 2003, Art 3(1).

- 2.11 This definition includes all bail in criminal proceedings as outlined above, with the exception of street bail.⁴⁰ Consultees were invited to respond to the Commission's provisional view that bail legislation in Northern Ireland should include a definition of 'bail', in terms similar to those of the 2003 Order, to which some general provisions of the proposed legislation, such as a duty to surrender to custody and an offence of absconding, should apply (Q 3).
- 2.12 All consultees who responded to this question, with the exception of one, agreed with the provisional view of the Commission. Consultees reasoned that a statutory definition of bail would contribute to clarity and transparency. The only consultee who opposed this provisional suggestion opined that a definition of 'bail' is unnecessary, while supporting the model of the 2003 Order in the event of a definition being included in new legislation. One consultee suggested that this definition should be broad enough to encompass 'street bail'.
- 2.13 Having considered the consultation responses, the Commission adheres to the provisional view expressed in the consultation paper. It is considered that a statutory definition of bail will ensure clarity and transparency in the new legislation. The statutory definition will establish the scope and parameters of the proposed legislation and will specify in clear and comprehensive terms the various types of bail governed thereby.

Recommendation 2

- 2.14 **The Commission recommends the inclusion in bail legislation of a definition of 'bail', in similar terms to the 2003 Order, to which some general provisions of the legislation should apply.**

*Interpretation provision,
Clause 46(1)*

⁴⁰ Street bail was introduced after the 2003 Order was made and was specifically excluded from the definition of bail at Art 3: Police and Criminal Evidence (Northern Ireland) Order 1989 ('PACE'), Art 32C(3).

(ii) *Scope of the definition of bail: Pre charge bail and street bail*

2.15 In the consultation paper, it was observed that as a result of the 2003 Order and other provisions⁴¹ pre charge bail granted at a police station is subject to essentially the same regime as bail following charge.⁴² That is, persons on pre charge bail are subject to:

- a duty to surrender to custody;
- arrest for failure to surrender;
- an offence of failure to surrender;
- the imposition of bail conditions;
- arrest for breach of bail conditions.

2.16 Further, there is no time limit on pre charge bail, in contrast with the limit of 28 days on post charge bail.⁴³ In the consultation paper, the Commission highlighted the distinction between persons who are subject to pre charge bail and those subject to post charge bail. Unease was expressed regarding the absence of any distinction between these two categories of persons in the present legislation and, in particular, the vulnerability of members of the first category to onerous bail conditions in the absence of any charge and, potentially, on the basis of very little evidence.⁴⁴

2.17 The Commission also shares concerns which have been expressed regarding current legislation which permits a suspect on pre charge bail to apply to have bail conditions reviewed and possibly varied by a custody officer⁴⁵ and/or a magistrates' court,⁴⁶ but which make no provision for review of the decision to release on bail, as opposed to release unconditionally.⁴⁷ In short, under the

⁴¹ Criminal Justice (NI) Order 2008, Art 87(2).

⁴² Bail CP, para 7.4.

⁴³ PACE, Arts 48(1) and (2). See also *R (Chief Constable of Greater Manchester Police) v Salford City Magistrates' Court and Hookway* [2011] EWHC 1578 (Admin), where the Divisional Court in England and Wales applied a literal interpretation to the PACE pre charge detention provisions and found that the detention clock continued to run even when an arrested person was released on pre charge bail. The effect of this decision was to limit pre charge bail to 96 hours. Although Parliament responded swiftly enacting the Police (Detention and Bail) Act 2011 which reversed the *Hookway* decision, the provisions of that Act do not extend to Northern Ireland. The *Hookway* interpretation of PACE was, however, rejected by Morgan LCJ in the Northern Ireland case of *In the Matter of an Application for Judicial Review by James Connelly* [2011] NIQB 62 where a contextual interpretation of these provisions was preferred.

⁴⁴ Bail CP, para 3.13.

⁴⁵ PACE, Art 48(3E).

⁴⁶ PACE, Art 48(4) and Magistrates' Courts (NI) Order 1981, Art 132A(1)(b).

⁴⁷ See E Cape and RA Edwards, "Police bail without charge: the human rights implications" (2010) 69 *Cambridge Law Journal* 529, 529.

current statutory arrangements, a person who is the subject of pre charge bail is unable to challenge the bail decision in question.

2.18 Persons released on bail elsewhere than at a police station can at present be subject only to a requirement to attend a police station and may be arrested for failure to do so.⁴⁸ It was observed in the consultation paper that the Northern Ireland Office PACE Review ('NIO PACE Review') proposed an extension to police powers to allow police officers to impose conditions on street bail and the creation of an offence of failing to answer street bail.⁴⁹ In addition to the reservations about pre charge bail granted at a police station outlined above, concerns about the responsibility which street bail powers impose upon arresting officers, who are not subject to the same level of scrutiny and control as specialist custody officers, were expressed in the consultation paper.⁵⁰ It was also observed that there is some evidence that current police powers in respect of street bail are not being utilised by police officers in Northern Ireland.⁵¹

2.19 In the consultation paper, the Commission argued that differing considerations arise in the contrasting contexts of bail before charge and bail post charge. In particular, in the former context no decision has been made to initiate criminal proceedings against the person concerned. The Commission notes that in many jurisdictions the basic choice which the police have is to charge a suspect or to release the person concerned unconditionally.⁵² In the consultation paper, the Commission invited consultees to express views on the question of whether persons released on bail without charge (including those on street bail) should, as a matter of principle, be subjected to the same regime as those on bail after formal charge (Q 4).

2.20 Most consultees who responded to this question argued that persons released on bail without charge should not be subject to the same regime as those on bail after formal charge. Some were critical of police powers in respect of pre charge bail and it was argued that it is wrong in principle to restrict the liberty of a person who had not been charged with a criminal offence. One consultee

⁴⁸ PACE, Arts 32A(3) and (4) and Art 32D.

⁴⁹ Northern Ireland Office, *Government Proposals in response to a review of Police and Criminal Evidence (PACE) in Northern Ireland* (January 2009) ('NIO PACE Review'), paras 9.3 and 9.7(b).

⁵⁰ Bail CP, para 3.13.

⁵¹ Bail CP, para 5.12.

⁵² Bail CP, para 6.6.

argued that treating persons charged and those not charged similarly in respect of bail was illogical, disproportionate and undermined the presumption of innocence. Another contended that there is a fundamental difference between a person being released on bail without charge and a person being released on bail after formal charge, in terms of the risks posed and the monitoring and support which may be necessary. One consultee argued that the current system for pre charge bail may be open to abuse and in effect permits the imposition of a sanction on a person in the absence of due process.

- 2.21 Some consultees clearly argued for the abolition of all pre charge bail powers. One consultee stated that persons not charged with offences should be released unconditionally and another contended that bail decisions should only be taken by the judiciary and that the police should not be involved in bail decision making at all.
- 2.22 Other consultees addressed the specific regime which is appropriate to persons on pre charge bail. Reservations were expressed by several consultees about onerous conditions being attached at the pre charge stage and one argued that persons on pre charge bail should not have their liberty restricted by the imposition of bail conditions. Another suggested that a person released on pre charge bail should be subject only to the requirement to attend a police station. It was argued by another consultee that any conditions attached to pre charge bail should be proportionate to the alleged offence and reflective of the fact that the person is not charged with an offence. This consultee further suggested that legislation should provide for ongoing review of bail within reasonable timescales. One consultee was critical of persons on pre charge bail being liable to prosecution for the offence of absconding, in the absence of any judicial scrutiny of the bail decision.
- 2.23 There was very limited support for treating pre and post charge bail in a similar manner. One consultee argued that the same guidance and rules should apply to pre and post charge bail and another argued that in the case of children, such similar treatment pre and post charge should be subject to ongoing assessment taking into account the level of risk to the public and vulnerability of the child. One consultee, who was in favour of maintaining the current pre charge regime, pointed out, however, that the present power to

attach conditions to pre charge bail is ineffective as the police have no meaningful mechanism to take action on breach of such conditions. This consultee argued therefore for the creation of an offence of breach of bail conditions to provide some remedy in that situation.

2.24 In relation to street bail, one consultee commended the Police Service of Northern Ireland ('PSNI') guidance on street bail including the requirements that consideration be given to the level of understanding of young persons, that a fuller explanation of the duties imposed should be provided and that shorter bail response dates may be appropriate for children. Caution was urged, however, due to the high levels of special educational or other needs among young persons who come into contact with the criminal justice system. Another consultee, who had argued that pre and post charge bail granted at a police station should be treated the same, conceded, however, that street bail may have to be subject to a different regime, as this power is used in relation to minor offences and may be exercised by a junior member of the police. It was argued that a power to attach conditions to street bail did not accord with its primary purpose of providing a simple administrative tool to deal with minor offences. Another consultee also disapproved of the creation of a power to attach conditions to street bail and called for the inclusion in legislation (rather than PSNI guidance) of the criteria for the grant of street bail and for increased oversight of the exercise of these powers. The absence of statutory grounds for the grant of street bail and of any statutory requirement to inform the arrested person of the grounds or reasons for their release on bail has also been criticised in England and Wales.⁵³

2.25 Having considered the views of consultees and the concerns expressed in the consultation paper, the Commission is of the opinion that pre charge bail and street bail should not be treated in the same way as bail following charge and other types of bail dealt with in the proposed legislation.

2.26 In relation to pre charge bail granted at a police station, the Commission considers the imposition of potentially onerous conditions for an indefinite period upon persons not charged with an offence and the possibility of prosecution for an offence for failure to surrender to pre charge bail to be

⁵³ See E Cape and RA Edwards, "Police bail without charge: the human rights implications" (2010) 69 *Cambridge Law Journal* 529, 539.

disproportionate and overly punitive. The lack of judicial oversight of the decision to release on bail rather than release unconditionally is also a matter of concern.

2.27 The responses made to the consultation paper have also confirmed the provisional view expressed by the Commission in relation to the discrete issue of street bail. Persons arrested elsewhere than at a police station for relatively minor offences are clearly in a very different position to those bailed from a police station following charge and should be treated as such. The Commission shares reservations expressed by consultees about proposals to allow conditions to be attached to street bail and considers that this proposal and the proposal to create an offence of failing to surrender to street bail are disproportionate. The absence of statutory criteria for the grant of street bail, the lack of scrutiny and control of the exercise of these powers by arresting officers and the limited use of current powers further undermine street bail provisions.

2.28 Consequently it is the view of the Commission that pre charge bail and street bail should be excluded from the definition of bail laid down in the proposed legislation. It is recommended that the statutory definition of bail should be limited to bail granted to persons who are accused or convicted of offences, including persons released under a warrant endorsed for bail. The proposed definition will include most types of bail currently included in Article 3, namely:

- post charge police bail;
- bail under a warrant endorsed for bail;
- court bail pending trial and during trial;
- bail pending sentence;
- bail pending appeal; and
- compassionate bail.⁵⁴

⁵⁴ Compassionate bail granted to remand prisoners by the High Court, Crown Court or the magistrates' court should be distinguished from the temporary release on compassionate grounds of sentenced prisoners under the Prison and Young Offenders Centre Rules (NI) 1995, r 27.

Recommendation 3

2.29 The Commission recommends that the definition of bail covers:

- **post charge police bail;**
- **bail under a warrant endorsed for bail;**
- **court bail pending trial and during trial;**
- **bail pending sentence;**
- **bail pending appeal; and**
- **compassionate bail.**

Interpretation provision, Clause 46(1)

Pre charge bail granted at a police station and bail elsewhere than at a police station should be excluded from this definition.

2.30 In addition to the exclusion of pre charge bail and street bail from the definition of bail contained in the proposed legislation, the Commission recommends several changes to current powers in respect of pre charge and street bail.

Pre charge bail

2.31 Firstly, in respect of pre charge bail granted at a police station, the Commission recommends several amendments to the Police and Criminal Evidence (Northern Ireland) Order 1989 ('PACE') to ensure that this power is not subject to the same regime as the power to grant bail following charge. It is the view of the Commission that these amendments will ensure that persons released on bail without charge will be treated in a manner proportionate to the pre charge stage of criminal proceedings. It is anticipated that police officers will continue to be able to use pre charge bail as an effective investigative tool and that persons on pre charge bail will have access to appropriate judicial oversight of the decision to grant bail.

(a) Removal of the power to attach conditions to pre charge bail

2.32 Concerns expressed in the consultation paper regarding the possibility of onerous conditions being imposed for lengthy periods upon persons on pre charge bail were confirmed by the consultation responses received. Further, as one consultee argued, the power to attach conditions to pre charge bail is ineffective in the absence of any meaningful mechanism to take action on breach of such conditions.⁵⁵ This consultee suggested that an offence of

⁵⁵ If a person on post charge bail or court bail is arrested for breach of a bail condition and the court is of the opinion that he has broken or is likely to break any condition of his bail, the court may remand the person or grant bail subject to the same or different conditions: Criminal Justice (NI) Order 2003, Art

breach of pre charge bail conditions should be created to address this difficulty. The Commission, however, is not in favour of creating an offence of breach of bail conditions.⁵⁶ In light of the concerns about imposing conditions on pre charge bail without limit of time and difficulties with enforcing such conditions, it is proposed that the power to attach conditions should be removed.⁵⁷ This recommendation is effected in clause 35 of the Draft Bill. The Commission considers that a simple power to release a person not charged with an offence under a requirement to return again to a police station is proportionate to the investigative stage of criminal proceedings. This recommendation is reflected in clause 34 of the Draft Bill. That clause inserts a new Article 47B into PACE dealing with pre charge bail. This power allows the police to effectively manage the investigation with minimal interference with the liberty of the suspect who has not been charged with any offence. Consequent upon the removal of the power to attach conditions to pre charge bail, it is also necessary to remove powers to vary those conditions⁵⁸ and to arrest for breach or anticipated breach of such conditions.⁵⁹

(b) Removal of duty to surrender to custody and offence of failure to surrender

2.33 Currently the duty to surrender to custody under Article 4 of the Criminal Justice (NI) Order 2003 applies to persons on pre charge bail, as does the offence of failure to surrender under Article 5. As a determination has not been made to initiate formal proceedings against a person on pre charge bail in relation to the substantive offence for which the person was originally arrested, the Commission considers potential liability for a criminal offence for failure to surrender to pre charge bail to be disproportionate and unduly punitive. In the view of the Commission, the new duty to surrender to custody and the offence of failure to surrender to custody should no longer apply to persons on pre charge bail.⁶⁰ It is recommended that persons released on pre charge bail should instead be subject only to a requirement to attend a police station at a specified time and a power of arrest for failure to do so. The requirement to attend a police station is contained in clause 34 of the Draft Bill. The power of arrest is reflected in clause 33 of the Draft Bill which substitutes

6(6). The police have no such power to detain if a person is arrested for breach of pre charge bail conditions.

⁵⁶ See paras 3.15 to 3.21 of this report.

⁵⁷ This power is found in PACE, Art 48(3D) as amended by Criminal Justice (NI) Order 2008, Art 87(2).

⁵⁸ PACE, Art 48(4) as amended by Criminal Justice (NI) Order 2008, Art 87(3).

⁵⁹ PACE, Art 48(5) as amended by Criminal Justice (NI) Order 2008, Art 87(3).

⁶⁰ See paras 3.2 to 3.14 of this report.

a new Article 47A into PACE dealing with the power of arrest for failure to answer pre charge bail. The enforcement provisions in Part 3 of the Draft Bill will not apply in respect of pre charge bail.

(c) Creation of right to have decision to release on bail reviewed

2.34 As indicated above, although a suspect released on pre charge bail may have bail conditions reviewed and possibly varied by a custody officer and/or a magistrates' court,⁶¹ the suspect presently has no right to have the decision to release on bail reviewed. As indicated above, the Commission recommends that the power to attach conditions to pre charge bail should be abolished and also, therefore, the power to review such conditions. It is important, however, in the view of the Commission that a suspect on pre charge bail (albeit without conditions) should have an opportunity to challenge the decision to release on bail rather than release unconditionally. While bail without conditions is clearly less onerous than conditional bail, it nonetheless represents an interference with the liberty of the suspect who must surrender to that bail at the appointed time and place. There is no time limit on pre charge bail and a suspect who surrenders to such bail may be detained without re-arrest if there is still time remaining on the detention clock. Arguably, there is also a stigma to being 'on bail', rather than simply released by the police. The Commission recommends, therefore, that PACE should be amended to include provision for a suspect released on pre charge bail to apply to a custody officer to have the decision to be released on bail, rather than simply released unconditionally, reviewed. Clause 31 gives effect to this recommendation. The Commission also recommends that a suspect released on pre charge bail should be able to appeal this decision to a magistrates' court and provision is made for this recommendation at clause 38 of the Draft Bill. Such provisions are considered necessary to ensure that there is adequate oversight of this power.

⁶¹ See also *In the Matter of Scott McHugh, An Applicant for Bail* [2011] NIQB 90 where it was decided that the High Court may, under its inherent jurisdiction, consider an application to vary bail conditions set by the magistrates' court upon hearing an application for variation of conditions imposed by a custody officer when releasing a suspect on pre charge bail.

Recommendation 4

2.35 **The Commission recommends the following amendments to the powers relating to pre charge bail granted at a police station:**

- (a) the removal of the power to attach conditions;**
- (b) the removal of the duty to surrender to custody and the offence of failure to surrender, the imposition only of a requirement to attend a police station; and**
- (c) the creation of a right to have the decision to release on bail reviewed.**

Street bail

2.36 Bail elsewhere than at a police station, in the view of the Commission, suffers from several defects. The grounds for the exercise of this power are not set out clearly in statutory form and the power itself is exercised by arresting officers outside of the safeguards and scrutiny of the custody suite. The lack of transparency inherent in the street bail provisions would be further compounded if proposals to allow conditions to be attached to street bail and to create an offence of failure to answer to street bail were implemented. As street bail provisions are directed at minor offences and given the low threshold for arrest, this power provides significant potential for net-widening.⁶² The possibility of liability for failure to answer street bail may also result in unnecessary criminalization and disproportionate impacts on children and other vulnerable groups. The imposition of potentially onerous bail conditions at this early stage in criminal proceedings is, in the view of the Commission, disproportionate.

2.37 Given the inadequacies of the current law, the problematic nature of the proposed changes and other indications that the powers are being relied on little in practice, the Commission is of the opinion that the power to grant bail elsewhere than at a police station should be repealed.⁶³ The police would instead be required to bring a person arrested for an offence at a place other than a police station to a police station as soon as practicable after arrest, as was the position before the street bail powers were introduced.⁶⁴

⁶² E Cape, "Police bail and the decision to charge: recent developments and the human rights deficit" (2007) 7 *Archbold News* 6, 7.

⁶³ The provisions on street bail (Arts 32(1) and (10), 32A, 32B, 32C, 32D) were inserted into PACE by Article 4 of the Criminal Justice (NI) Order 2004.

⁶⁴ PACE, Art 32(1), before its amendment.

Recommendation 5

- 2.38 **The Commission recommends the repeal of all police powers relating to bail elsewhere than at a police station.**

*Clause 30
and
Schedule 2*

STRUCTURE AND CONTENT OF PROPOSED LEGISLATION

- 2.39 The definition of 'bail' is fundamental to setting the parameters of the proposed legislation. The terms of that definition demonstrate clearly that it is the intention of the Commission that the main focus of the proposed legislation should be on bail following charge by the police until the case is disposed of by the courts. In the view of the Commission, bail granted following charge, pending and throughout trial and pending sentence or appeal form the core of bail in criminal proceedings. While the decision to grant or refuse bail may involve different considerations at these various stages of the proceedings, bail granted at all of these stages currently share and should continue to share some common features.
- 2.40 Consequently, a number of general provisions of the proposed legislation will apply to 'bail' as defined. Following the model of the 2003 Order, some enforcement provisions, including a duty to surrender to custody, an offence of failure to surrender and powers of arrest for breach of bail, will apply to all bail as defined in the Draft Bill. These provisions are dealt with at Part 3 of the Draft Bill. Further, the abolition of personal recognizances for bail and sureties for bail and the replacement of the latter with a new system of bail guarantors, which are effected for reasons of simplification and modernisation, will also apply to bail as defined in the Draft Bill. These changes and consequential amendments are made at Clause 43, Part 2 and Schedule 3 to the Draft Bill.
- 2.41 Alongside these provisions of general application, the proposed legislation will also address a key legislative lacuna in bail law in Northern Ireland. The grant of bail by the police following charge is regulated in some detail in PACE, whereas bail decision making by the courts pending and during trial is subject largely to common law principles. As argued in the consultation paper this has led to uncertainty and inconsistencies between police and court bail.⁶⁵ The Northern Ireland legal system is at odds with many other jurisdictions in the absence of a statutory entitlement to bail and statutory grounds for refusal of

⁶⁵ Bail CP, paras 3.74 to 3.76.

bail to accused persons pending and during trial.⁶⁶ Such persons enjoy a right to liberty under Article 5 of the ECHR. A clearly articulated statutory right to bail, subject to limited exceptions, for accused persons will, it is hoped, ensure that full expression is given to this fundamental right.

2.42 The Draft Bill, therefore, includes a right to bail for accused persons and limited grounds for the refusal of such bail in the courts: see Part 1 of the Draft Bill. Amendments are also made to bring PACE into line with these new court bail provisions, ensuring consistency between police and court bail. The statutory right to bail does not apply to all persons on 'bail' as defined in the Draft Bill but only to those accused of offences and awaiting trial or on trial. Bail decision making at other stages of criminal proceedings, including bail pending sentence and appeal and compassionate bail, will continue to be regulated by common law authority.⁶⁷

2.43 Related to the right to bail, the proposed legislation includes detailed guidance on the imposition of bail conditions on persons accused of offences, to whom the right to bail applies. Provision is also made for information and reasons for such bail decisions to be recorded and made available to an accused person on request.

2.44 The Commission acknowledges that different considerations and principles may arise in the context of bail and remand decisions in respect of children and young persons accused of offences. After careful consideration of these matters, the Commission is of the opinion that children and young persons will be best protected within the new bail system by the insertion, alongside the statutory right to bail and related provisions outlined above, of additional safeguards addressing the particular needs of and different considerations applying to children and young persons. The many clauses of the Draft Bill which make provision for children and young persons are discussed in full in Chapter 6, below.

⁶⁶ Bail CP, para 6.7.

⁶⁷ See discussion of bail decision making pending sentence and appeal and on an application for compassionate release at: Bail CP, paras 3.41 to 3.42. The rationale for excluding such decision making from the statutory regime is discussed in ch 5 below: paras 5.1 to 5.3.

STYLE OF PROPOSED LEGISLATION

- 2.45 In the consultation paper, the duty of the Commission to simplify and modernise the law of Northern Ireland was highlighted.⁶⁸ It was argued that current bail law is complex, inconsistent and difficult to understand.⁶⁹ It was observed that reform proposals in other jurisdictions have sought to simplify bail legislation focussing on plain language and clear presentation and structure.⁷⁰ The Commission invited views in the consultation paper on particular changes to the language and style of bail legislation which may be required to make it more accessible and readily understood (Q 36).
- 2.46 Almost all consultees who responded to this question agreed that it is desirable that bail law be made more accessible and comprehensible. It was asserted that such an approach would be a positive step forward and would enhance public confidence in the criminal justice system. Some consultees specifically endorsed a plain English approach to the proposed legislation, with one suggesting that consideration be given to conducting a Crystal Mark review of the proposed legislation.⁷¹ One consultee suggested that the language and style of the proposed legislation is a matter for legislative counsel.
- 2.47 It was argued by one consultee that, in addition to using plain language and a clear structure in legislation, there should be a commitment to ensuring that persons understand the bail process and any options that are available to them. It was suggested that children, persons for whom English is a second language and those with certain disabilities or illnesses may require particular assistance. Another contended that a summary of bail legislation should be provided in children and victim friendly formats.
- 2.48 The Commission has considered the views of consultees and the legislative style adopted in recent Northern Ireland statutes. Following discussions with legislative counsel, the Commission decided that the legislative drafting style should be as clear and accessible as possible, subject to the over-riding requirement that the Draft Bill be legally precise and effective. To this end,

⁶⁸ See Bail CP, para 7.35 and Justice (NI) Act 2002, s 51(1).

⁶⁹ See Bail CP, para 7.35.

⁷⁰ Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (Aug 2007), p 24.

⁷¹ The 'Crystal Mark' is a seal of approval for clarity from the Plain English Campaign: see <http://www.plainenglish.co.uk/crystal-mark.html>.

several principles have been followed. The first is that plain language techniques are used where possible. Sentences are short. The language is simple and demotic rather than archaic or 'legalese'. Where a list is necessary, the provisions are divided into subsections or paragraphs. The second is that the language is gender neutral in that it does not refer to one specific sex to the exclusion of the other. Where possible, this principle has been followed in amendments made to older legislation. Thirdly, the Draft Bill has been organised in a logical way with like provisions placed with like provisions. It has been divided into Parts and each Part has been divided into cross headings to allow for easier navigation by the reader. Where there are a great many technical or consequential amendments, they have been placed in Schedules to avoid disrupting the narrative flow of the Draft Bill.

2.49 There is an existing practical problem in the current legislation governing bail which this project also seeks to ameliorate. Much of the current law governing police bail is contained in PACE. PACE has been repeatedly amended since it was enacted in 1989. To quote Lord Brightman, this creates a drafting quagmire where 'an enactment of an earlier year is amended again and again by new Acts which add words here and delete words there, repealing one subsection and substituting a new section until the reader is totally bewildered.'⁷² The Draft Bill actually adds to this problem by making a great many further amendments to PACE, thus making it very difficult for the reader to know what the law will be as a result of the recommendations of the Commission. The solution used is a Keeling Schedule. A Keeling Schedule is used when a new statute amends an old statute. The Keeling Schedule sets out how the old statute will read after it has been amended by the new statute (also incorporating any previous amendments made to the old statute). Schedule 4 to the Draft Bill sets out how Articles 39, 47A, 47B and 48 of PACE will read after amendment by the Draft Bill (these are the Articles most heavily amended by the Draft Bill). Although Keeling Schedules are not widely used, there is precedent for them. One was used to restate provisions of the Police and Criminal Evidence Act 1984 in Schedule 2 to the Criminal Evidence (Amendment) Act 1997 in England and Wales.

⁷² Lord Brightman, 'Drafting Quagmires' (2002) 23 *Statute Law Review* 1, 1.

2.50 The Draft Bill also makes an assumption about existing legislation. It assumes that all existing legislation on bail will have been commenced by the time that this Draft Bill becomes law. This is a technical issue and the only practical impact is upon the way that amendments in the Draft Bill are framed where they amend a law that has not yet come into force.

2.51 The Commission has endeavoured to identify, as far as possible, necessary amendments consequent on the provisions of the Draft Bill, to assist the Department of Justice in taking forward its recommendations. The Commission is aware, however, of a number of other possible consequential amendments which may require further research and consideration, namely:

- Fisheries Act (NI) 1966, s 176;
- Road Traffic (NI) Order 1981, Art 181.

These particular provisions do not fit easily into the existing paradigm of bail in criminal proceedings as defined in the Draft Bill and may require closer examination.

CONCLUSION

2.52 Having considered the views of consultees and other relevant matters, the Commission is satisfied that legislation governing bail is desirable in Northern Ireland. A clear definition of bail in criminal proceedings is considered fundamental to setting the parameters of such legislation. The Commission considers it appropriate that such a definition includes bail grantable to accused and convicted persons, including compassionate bail, but excludes pre charge and street bail. The proposed legislation makes provision for the enforcement of bail in criminal proceedings as defined and modernises some aspects of the conditions under which bail in criminal proceedings may be granted.

2.53 The Commission is also persuaded that the proposed legislation should include a right to bail and grounds for the refusal of bail for accused persons. This statutory right, and related provisions on bail conditions and the recording and giving of reasons for bail decisions, is considered necessary to ensure transparency, consistency and compliance with human rights standards. Additional safeguards are also required to protect the particular interests of children and young persons.

2.54 The Commission has adopted a clear and accessible legislative drafting style in the Draft Bill which will further enhance transparency and public understanding.

CHAPTER 3: ENFORCEMENT OF BAIL

INTRODUCTION

3.1 The appropriate police and court response to breaches of bail is a matter of some concern and, if considered inadequate, can undermine confidence in the criminal justice system.⁷³ Part II of the Criminal Justice (NI) Order 2003 introduced several enforcement provisions built around the statutory definition of bail,⁷⁴ namely a duty to surrender to custody, an offence of absconding and arrest provisions. Enforcement provisions such as these are arguably essential in ensuring robust and consistent action is taken when the terms of bail are breached. As argued in the consultation paper, this legislation provides the beginnings of a single legislative framework for bail decision making by the police and the courts in Northern Ireland.⁷⁵ In this chapter, the desirability of consolidating many aspects of that legislation within the Draft Bill is examined. Consideration is also given to the need for further legislative provisions, including an offence of breach of bail conditions.

DUTY TO SURRENDER TO CUSTODY

3.2 Persons on 'bail' as defined in the Criminal Justice (NI) Order 2003⁷⁶ are currently under a duty to surrender to custody.⁷⁷ As previously outlined⁷⁸ this definition of bail includes:

- pre charge bail granted at a police station;
- post charge police bail;
- court bail pending and during trial;
- bail pending sentence and appeal; and
- compassionate bail.

3.3 Based on this definition of bail, the duty to surrender currently includes a duty to surrender at the appointed time into the custody of a court, at a police station or into the custody of a prison governor.⁷⁹

⁷³ Bail CP, paras 5.41 to 5.51.

⁷⁴ See ch 2, above.

⁷⁵ Bail CP, para 3.5.

⁷⁶ Art 3.

⁷⁷ Art 4.

⁷⁸ See paras 2.9 to 2.11, above.

⁷⁹ Criminal Justice (NI) Order 2003, Art 4.

- 3.4 In the view of the Commission the Draft Bill should also include a duty to surrender to custody, as only persons subject to this duty are liable for the offence of failure to surrender to custody.⁸⁰ The duty to surrender to custody and related offence are particularly important as it is proposed that personal recognizances for court bail will be abolished (in line with police bail: see ch 4) and consequently the sanction of estreatment of a recognizance for failure to surrender to custody will fall away.
- 3.5 Persons on post charge police bail and court bail pending or during trial are under a duty to surrender at an appointed time to a court. The duty to surrender into the custody of a prison governor was inserted by the Justice (NI) Act 2004⁸¹ to cater for remand prisoners released on compassionate bail who, although granted bail by a court, are required to surrender to a prison governor at the end of the bail period.
- 3.6 The current duty to surrender to custody includes a duty to surrender at a police station in order to provide for persons released on pre charge bail, which falls within the definition of bail.⁸² As outlined above, it is the recommendation of the Commission that pre charge bail granted at a police station (and street bail) should not be included in the definition of ‘bail’ laid down in the Draft Bill.⁸³ As a consequence of this recommendation, the duty to surrender to custody in the Draft Bill need not include a duty to surrender at a police station which is only necessary in the case of persons on pre charge bail. Persons on pre charge bail will instead be subject to a requirement to attend a police station, avoiding liability for the offence of failure to surrender to custody.

Recommendation 6

Clause 24

- 3.7 **The Commission recommends the inclusion in bail legislation of a duty to surrender to custody which includes a duty to surrender at the appointed time:**
- **into the custody of a court; or**
 - **into the custody of a prison governor.**

⁸⁰ See paras 3.8 to 3.14, below.

⁸¹ Section 12(2).

⁸² Criminal Justice (NI) Order 2003, Art 3(2)(b).

⁸³ See Recommendation 3, para 2.29, above.

OFFENCE OF FAILURE TO SURRENDER TO CUSTODY

3.8 There are, at present, two offences of failure to surrender to custody or absconding under Northern Ireland law.⁸⁴ Firstly, it is an offence to fail to surrender to custody in answer to bail without reasonable cause.⁸⁵ Secondly, it is an offence to fail to surrender to custody in answer to bail as soon as reasonably practicable after a failure to surrender with reasonable cause.⁸⁶

3.9 Concerns were expressed about the terms of this offence during the preliminary discussions which took place before the publication of the consultation paper.⁸⁷ It was suggested that the provision could be simplified to a single offence of failing to surrender to custody, with the court deciding if the accused had cause to justify this failure,⁸⁸ as is typical in some other jurisdictions.⁸⁹ However, it was noted that there have been many prosecutions under this provision in Northern Ireland⁹⁰ and an equivalent provision operates in England and Wales.⁹¹ In the consultation paper, the Commission expressed the provisional opinion that the present offence of failure to surrender to custody is satisfactory and should be retained in new bail legislation. The views of consultees were invited (Q 28).

3.10 Almost all consultees who responded to this question were in favour of retaining an offence of failing to surrender to custody. Some reservations were expressed, however. There was concern among some consultees about unnecessary criminalisation if the person is not convicted of the original offence, particularly in relation to children and young persons. One consultee argued that liability for the offence of failure to surrender should be limited, in the case of children and young persons, to those who are convicted of the original offence. One consultee noted the detrimental impact of a conviction or remand on a young person's future prospects, mental health and educational pursuits.

3.11 Some consultees argued that the two offences set out in Article 5 work well in practice and should be retained. According to one consultee, there were

⁸⁴ Criminal Justice (NI) Order 2003, Art 5.

⁸⁵ Criminal Justice (NI) Order 2003, Art 5(1).

⁸⁶ Criminal Justice (NI) Order 2003, Art 5(2).

⁸⁷ Bail CP, paras 5.42 to 5.43.

⁸⁸ Bail CP, para 5.43.

⁸⁹ Bail CP, para 6.38.

⁹⁰ Bail CP, para 3.60.

⁹¹ Bail Act 1976 (EW), s 6.

advantages to Article 5(2) in its current form in that it places an onus on the person to surrender to custody following a failure to attend with reasonable cause, instead of requiring the police to bring the person into custody. There was also some support for simplifying this offence to a single offence of failing to surrender to custody, with the court deciding if the accused had cause to justify this failure. It was argued that such an offence would be better understood by the public.

3.12 Having considered the views of consultees, the Commission is persuaded that an offence of failure to surrender to custody should be included in the proposed legislation. In the view of the Commission, such an offence provides an important incentive to ensure that persons surrender to bail, particularly in light of the abolition of personal recognizances for court bail and consequently, estreat of such recognizances. The Commission is mindful of the potential impact of such an offence on children and young persons but considers that the age, maturity, needs and understanding of the young person can be taken into account by the courts and the Public Prosecution Service for Northern Ireland ('PPS') when considering if the child or young person had reasonable cause to justify any failure to surrender.

3.13 It is the view of the Commission that simplification of this offence would enhance public understanding and transparency and it is recommended that there should be a single offence of failing to surrender to custody, with the court deciding if the accused had cause to justify this failure. The proposed offence will apply to all persons on 'bail' as defined in the Draft Bill.⁹² As pre charge bail granted at a police station is excluded from that definition, persons released on such bail will not be liable to prosecution for the offence of failure to surrender to custody if they fail to attend a police station in answer to their bail. The Commission considers that provision within Article 5(3) of the Criminal Justice (NI) Order 2003 regarding the trial and punishment of this offence is appropriate and should be replicated in the Draft Bill.

⁹² See Recommendation 3, para 2.29, above.

Recommendation 7

Clause 25

- 3.14 **The Commission recommends the inclusion in bail legislation of a simplified offence of failure to surrender to custody applicable to persons on bail.**

OFFENCE OF BREACH OF BAIL CONDITIONS

- 3.15 The possibility of creating an offence of breach of bail conditions arose during the preliminary discussions leading up to the publication of the consultation paper.⁹³ At present if a person on post charge police bail or court bail breaches a condition of that bail, he or she can be arrested and brought before a court where bail can be varied or revoked.⁹⁴ Breach of bail conditions is designated a criminal offence in some jurisdictions⁹⁵ and the NIO PACE Review proposed the introduction of an offence of breach of conditions attached to police bail.⁹⁶
- 3.16 Concern was expressed during the preliminary discussions about repeated breaches of conditions and it was argued that conditions would be taken more seriously if breach was made a criminal offence.⁹⁷ Reservations were expressed, however, about criminalising minor breaches and some suggested, therefore, that only serious or persistent breaches should result in a criminal charge.⁹⁸ On the other hand, it may be argued that penalising breach of bail conditions by means of a specific criminal offence is disproportionate and may lead to unnecessary criminalisation.⁹⁹ The creation of such an offence may also place a considerable strain on police, PPS and court resources.¹⁰⁰ Further, it has been suggested that an offence of breach of bail conditions may disproportionately impact upon certain groups such as children and those with mental health problems.¹⁰¹
- 3.17 Taking into account all of these considerations, the Commission invited views in the consultation paper on whether any new bail legislation should include an offence of breach of bail conditions (Q 30). In the Consultation on Equality

⁹³ Bail CP, paras 5.47 to 5.49.

⁹⁴ Criminal Justice (NI) Order 2003, Art 6.

⁹⁵ Bail CP, para 6.42.

⁹⁶ NIO PACE Review, para 9.7(a).

⁹⁷ Bail CP, paras 5.46 to 5.47.

⁹⁸ Bail CP, para 5.48.

⁹⁹ Bail CP, para 7.28.

¹⁰⁰ Bail CP, para 5.49.

¹⁰¹ Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (Aug 2007), p 128.

Impact Assessment ('EQIA consultation') carried out in relation to the bail proposals, the Commission expressed the provisional view that the creation of a breach of bail conditions offence may have an adverse impact on children and young persons, persons with mental health and/or learning difficulties and persons from ethnic minorities.¹⁰² Views were also invited on the provisional conclusions reached in the EQIA consultation.

3.18 Of those consultees who responded to this question in the consultation paper, the majority were not in favour of creating an offence of breach of bail conditions, largely for the reasons already outlined. There was unease about the criminalisation of persons who may be acquitted on the original charge which led to the bail decision and the disproportionate impact such an offence may have on vulnerable groups such as children and persons with mental health difficulties. It was also argued that such an offence is unnecessary as the current responses of remand or variation of bail conditions are adequate. Of those who responded to the EQIA consultation no one disagreed and several agreed with the provisional conclusion that the creation of a breach of bail conditions offence may have an adverse impact on children and young persons, persons with mental health and/or learning difficulties and persons from ethnic minorities.¹⁰³

3.19 On the other hand, there was some support for the creation of such an offence. One consultee argued that criminal liability is appropriate if conditions, imposed to ensure victim and public safety, are breached. Another consultee petitioned for an offence of breach of bail conditions for pre charge bail in particular. This consultee highlighted the current difficulty whereby the police cannot detain persons arrested for breach of pre charge bail conditions but can only release such persons again subject to the same or varied bail conditions. This situation contrasts with the position in relation to persons on post charge police bail or court bail, outlined above.¹⁰⁴ A breach of bail condition offence would, it was argued, encourage compliance with bail conditions and promote victim and public confidence in the criminal justice

¹⁰² EQIA consultation available at: http://www.niawcommission.gov.uk/bail_eqia_july_2011.pdf

¹⁰³ See EQIA report at Appendix A, paras A.39, A.63 and A.72 to A.73.

¹⁰⁴ If a person on post charge bail or court bail is arrested for breach of a bail condition and the court is of the opinion that he has broken or is likely to break any condition of his bail, the court may remand the person or grant bail subject to the same or different conditions: Criminal Justice (NI) Order 2003, Art 6(6). The police have no such power to detain if a person is arrested for breach of pre charge bail conditions.

system. Another proponent expressed caution, however, in relation to the impact of such an offence on children and persons with mental health, language or learning difficulties.

3.20 Having considered all of the arguments, the Commission is not persuaded that a breach of bail conditions offence is desirable. Concerns regarding the over criminalisation of persons for breaches of bail conditions are considered valid, particularly in light of the quantity and complexity of bail conditions which may currently be imposed. While the Commission maintains the view expressed in the EQIA consultation that the provision of bail support and guidance on the imposition of conditions may mitigate some of the adverse impact of such an offence, the potential for adverse impact on children and young persons, persons with mental health and/or learning difficulties and persons from ethnic minorities remains. Consequently, it is the recommendation of the Commission that the existing regime for dealing with breaches of bail conditions is maintained. As the Commission also recommends the removal of the power of the police to impose conditions on pre charge bail,¹⁰⁵ difficulties enforcing breach of such conditions will no longer arise.

Recommendation 8

3.21 **The Commission does not recommend the inclusion in bail legislation of an offence of breach of bail conditions.**

ARREST FOR FAILURE TO SURRENDER TO CUSTODY

3.22 Current powers of arrest for failure and anticipated failure to surrender to custody when released on bail vary to some extent depending on the type of bail the person is released on and the duty imposed upon the person on bail. The main provisions in respect of most persons released on bail are set out in Article 6 of the Criminal Justice (NI) Order 2003. These provisions concern persons released under a duty to surrender to a court and therefore encompass:

- post charge police bail;
- court bail pending/during trial;
- bail pending sentence;
- bail pending appeal.

¹⁰⁵ See paras 2.32 and 2.35, above.

- 3.23 Provision is made in Article 6 for a court to issue a warrant for the arrest of a person who fails to surrender to the custody of a court¹⁰⁶ or who absents himself from court without permission after surrendering to custody.¹⁰⁷ Provision is also made for arrest without warrant for anticipated failure to surrender to custody if a constable has reasonable grounds for believing that the person is not likely to surrender to custody¹⁰⁸ or if a surety notifies a constable in writing that the person is unlikely to surrender to custody and for that reason the surety wishes to be relieved of his obligations as a surety.¹⁰⁹ Persons arrested without warrant for anticipated failure to surrender to custody under Article 6 must be brought before a magistrates' court as soon as practicable¹¹⁰ where bail may be revoked, varied or simply renewed.¹¹¹
- 3.24 As Article 6 deals only with persons under a duty to surrender to a court, it has no application to persons on pre charge bail or compassionate bail, who would be under a duty to surrender to a police station or prison governor, respectively. Persons released on pre charge bail may be arrested without warrant for failure to attend a police station at the appointed time under PACE.¹¹² It has been proposed that a power of arrest be created for anticipated failures to attend a police station in answer to bail.¹¹³ Persons released on street bail may be arrested without warrant if they fail to attend a police station as required.¹¹⁴
- 3.25 In the consultation paper, it was noted that the Crown Court¹¹⁵ and the High Court¹¹⁶ can grant bail on compassionate grounds, requiring the person on bail to surrender to the custody of a prison governor. Since the consultation paper was published, a power has also been conferred upon the magistrates' court to grant bail on compassionate grounds.¹¹⁷ Both the High Court and the Crown

¹⁰⁶ Criminal Justice (NI) Order 2003, Art 6(1).

¹⁰⁷ Criminal Justice (NI) Order 2003, Art 6(2).

¹⁰⁸ Criminal Justice (NI) Order 2003, Art 6(3)(a).

¹⁰⁹ Criminal Justice (NI) Order 2003, Art 6(3)(c).

¹¹⁰ Criminal Justice (NI) Order 2003, Art 6(4), (5) and (5A).

¹¹¹ Criminal Justice (NI) Order 2003, Art 6(6).

¹¹² PACE, Art 47A.

¹¹³ NIO PACE Review, paras 9.12 to 9.13.

¹¹⁴ PACE, Art 32D.

¹¹⁵ Bail granted in the Crown Court does not necessarily require the defendant to surrender back into the custody of the Court: Crown Court Rules (NI) 1979, r 7 defines 'surrender to custody' as 'surrendering himself into the custody of the Court or other proper authority (according to the requirements of the order admitting him to bail) at the time and place appointed for him to do so.'

¹¹⁶ See also the meaning of 'surrender to custody' under the Rules of the Court of Judicature (NI) 1980, Order 79, r 1.

¹¹⁷ Justice Act (NI) 2011, s 91.

Court¹¹⁸ may issue warrants for the arrest of a person released on bail (including compassionate bail) on the application of a prosecutor or surety if it appears to the Court that he has failed to surrender to custody or is unlikely to surrender to custody. As Article 6 of the 2003 Order is limited to persons under a duty to surrender to a court, it appears that reliance may be had on the general arrest power under Article 26 of PACE to arrest a person who has failed to surrender to compassionate bail granted by the magistrates' courts, which amounts to an offence under Article 5. It has also been suggested that the High Court, under its inherent jurisdiction, may deal with any breaches of compassionate bail granted by the magistrates' courts.¹¹⁹

3.26 In the consultation paper, the Commission invited views on its provisional opinion that current powers of arrest for failure to answer bail are satisfactory and should be retained in any new bail legislation (Q 26). In light of the arguably different status of pre charge bail,¹²⁰ the views of consultees were also sought regarding the creation a power of arrest for anticipated failures to appear in answer to pre charge bail (Q 27).

3.27 The majority of consultees who responded to these questions were content that current powers of arrest for failure to answer bail are satisfactory. One consultee maintained that the consequences of failure to surrender to custody must be prompt and robust. Some consultees argued, however, that current powers are too wide with particular criticism levelled at the power to arrest without warrant for an anticipated failure to surrender to the custody of a court.¹²¹

3.28 Most consultees were not in favour of the creation of a power of arrest for anticipated failures to appear in answer to pre charge bail. Consultees argued that it would be disproportionate and one suggested that such a power may be subject to legal challenge. Another consultee queried the existence of any empirical evidence indicating the need for such a power and suggested that it

¹¹⁸ See Rules of the Court of Judicature (NI) 1980, Order 79, r 11 and Crown Court Rules (NI) 1979, r 16, respectively.

¹¹⁹ The Department of Justice has also indicated to the Commission that Order 79, rule 11 of the Rules of the Court of Judicature (NI) 1980 would allow both the High Court and the Court of Appeal to deal with breaches of compassionate bail granted under section 91 of the Justice Act (NI) 2011 (where the breach falls within the ambit of that Rule). The Commission has been informed that this rule will shortly be amended to make that position clear.

¹²⁰ See paras 2.15 to 2.29, above.

¹²¹ Criminal Justice (NI) Order 2003, Art 6(3).

may be abused by the police. Although there was support among some consultees for the creation of a power of arrest for anticipated failures to attend a police station in answer to pre charge bail, one such consultee cautioned that this power should be used sparingly and only on the basis of strong evidence of an anticipated failure. Another suggested that a general power of arrest (akin to PACE, Art 26) be created permitting arrest for actual and anticipated failures to surrender and breaches of conditions for all types of police and court bail.

3.29 Having considered the views of consultees, the Commission is of the opinion that current provisions regarding powers to issue warrants and arrest without warrant for failure and anticipated failure to surrender to the custody of a court should be consolidated within the proposed legislation (subject to some amendments, see below). While the power to arrest without warrant for an anticipated failure to surrender to custody is potentially far reaching, the Commission is satisfied that such a power can be exercised in a proportionate manner subject to accompanying judicial oversight: see paras 3.41 to 3.44, below. Further, rather than relying on general powers of arrest under PACE and the inherent jurisdiction of the High Court to enforce failures and anticipated failures to surrender to compassionate bail granted in the magistrates' courts, the Commission recommends that equivalent powers to issue warrants and arrest without warrant for failure and anticipated failure to surrender to the custody of a prison governor should be included in the proposed legislation.¹²² These powers will apply to compassionate bail granted in the High Court, the Crown Court and the magistrates' courts.

3.30 Finally, it is recommended that the power of arrest without warrant for failure to attend a police station in answer to pre charge bail¹²³ should be retained, subject to amendment.¹²⁴ The Commission is not in favour of creating a power of arrest for anticipated failures to attend a police station in answer to pre charge bail, however. Such a power would, in the opinion of the Commission, be disproportionate at the pre charge stage of criminal proceedings and in the absence of judicial oversight.

¹²² The Commission also recommends that provision is made for the arrest of the person were a bail guarantor for the person has applied to be discharged: see clause 26(3) and 27(3) of the Draft Bill and ch 4, below.

¹²³ PACE, Art 47A.

¹²⁴ See paras 2.31 to 2.35, above.

Recommendation 9

- 3.31 **The Commission recommends the inclusion in bail legislation of powers to issue warrants and powers to arrest without warrant for failure and anticipated failure to surrender to the custody of a court or a prison governor, along similar lines to Article 6 of the Criminal Justice (NI) Order 2003.**

Clauses 26 and 27

Recommendation 10

- 3.32 **The Commission recommends that the power to arrest without warrant for failure to attend a police station in answer to pre charge bail in PACE is retained (subject to amendment) and that no additional power to arrest for anticipated failures to attend a police station in answer to pre charge bail is created.**

Clause 33

ARREST FOR BREACH OF BAIL CONDITIONS

- 3.33 Similar to the powers governing failure to surrender to custody, current powers relating to breach or anticipated breach of bail conditions vary depending on the type of bail the person is released on and the duty imposed upon that person. Again, the main provisions in respect of most persons released on bail, that is those under a duty to surrender to a court, are found in Article 6 of the Criminal Justice (NI) Order 2003 and apply to persons on:

- post charge police bail;
- court bail pending and during trial;
- bail pending sentence;
- bail pending appeal.

- 3.34 Provision is made in Article 6 for arrest without warrant if a constable has reasonable grounds for believing that the person is likely to break or has broken any of the conditions of his bail.¹²⁵ Persons arrested without warrant for breach or anticipated breach of bail conditions under Article 6 must be brought before a magistrates' court as soon as practicable¹²⁶ where bail may be revoked, varied or simply renewed.¹²⁷

¹²⁵ Criminal Justice (NI) Order 2003, Art 6(3)(b).

¹²⁶ Criminal Justice (NI) Order 2003, Art 6(4), (5) and (5A).

¹²⁷ Criminal Justice (NI) Order 2003, Art 6(6).

- 3.35 As Article 6 deals only with persons under a duty to surrender to a court, it has no application to persons on pre charge bail or compassionate bail, who would be under a duty to surrender to a police station or a prison governor, respectively. Persons released on pre charge bail may be arrested without warrant for breach or anticipated breach of bail conditions under PACE.¹²⁸ Both the High Court¹²⁹ and the Crown Court¹³⁰ may issue warrants for the arrest of a person released on bail (including compassionate bail) on the application of a prosecutor or surety if it appears to the Court that he is in breach of any condition of his bail. Given the limitations of Article 6, it has been suggested that the inherent jurisdiction of the High Court may be relied upon to deal with breaches of conditions of compassionate bail granted by the magistrates' courts.¹³¹
- 3.36 In the consultation paper, the Commission sought the opinion of consultees in relation to its provisional view that the law concerning the power of arrest for actual and anticipated breach of conditions is satisfactory and should be incorporated within any new statutory scheme, subject to any appropriate modifications (Q 29).
- 3.37 Consultees were evenly divided on this issue. Those who were in favour of such powers argued that robust mechanisms to deal with breaches of bail were necessary. One consultee expressed support for such powers, provided there is strong evidence of the anticipated breach and subject to clarity regarding the 'appropriate modifications' which may be made to the powers. Others objected to the power to arrest without warrant for an anticipated breach of a bail condition. One consultee contended that this power is contrary to the presumption of innocence and natural justice and places too much discretion in the hands of the state, and police officers in particular. Other consultees focussed their criticisms on the power to arrest without warrant for an anticipated breach of a bail condition in the context of pre charge bail, arguing that this power afforded police officers too much discretion

¹²⁸ PACE, Art 48(5).

¹²⁹ Rules of the Court of Judicature (NI) 1980, Order 79, r 11.

¹³⁰ Crown Court Rules (NI) 1979, r 16.

¹³¹ The Department of Justice has indicated to the Commission that Order 79, rule 11 of the Rules of the Court of Judicature (NI) 1980 would allow both the High Court and the Court of Appeal to deal with breaches of compassionate bail granted under section 91 of the Justice Act (NI) 2011 (where the breach falls within the ambit of that Rule). It seems that this rule will shortly be amended to make that position clear.

with no appropriate oversight. One consultee called upon the Commission to consider the proportionality of this power.

- 3.38 The Commission has considered carefully the views of consultees and has concluded that current provisions for arrest without warrant of persons released under a duty to surrender to a court for a breach or anticipated breach of a bail condition¹³² should be consolidated within the proposed legislation (subject to some amendments, see below). While the power to arrest without warrant for an anticipated breach of a bail condition is potentially far reaching, the Commission is satisfied that such a power can be exercised in a proportionate manner subject to accompanying judicial oversight: see paras 3.41 to 3.44, below. Further, rather than relying on the inherent jurisdiction of the High Court to enforce breach or anticipated breach of conditions attached to compassionate bail granted in the magistrates' courts, the Commission recommends that equivalent powers to arrest without warrant for breach or anticipated breach of conditions attached to compassionate bail should be included in the proposed legislation. These powers will apply to compassionate bail granted in the High Court, the Crown Court and the magistrates' courts.
- 3.39 Finally, as the Commission is recommending the abolition of powers to attach conditions to pre charge bail, powers to arrest for breach or anticipated breach of such conditions would similarly fall to be abolished.¹³³

Recommendation 11

- 3.40 **The Commission recommends the inclusion in bail legislation of powers to arrest without warrant for breach and anticipated breach of conditions imposed on persons released on bail under a duty to surrender to a court or a prison governor, along similar lines to Article 6 of the Criminal Justice (NI) Order 2003.**

Clause 27

¹³² Criminal Justice (NI) Order 2003, Art 6(3)(b).

¹³³ PACE, Art 48(5). See paras 2.32 to 2.35, above.

PROCEDURE ON ARREST WITHOUT WARRANT

3.41 Persons arrested under warrant for failure to surrender to the custody of a court¹³⁴ or leaving court without permission after surrendering to custody¹³⁵ will be brought before a court as directed in the warrant. Persons arrested without warrant for anticipated failure to surrender to custody or breach or anticipated breach of bail conditions¹³⁶ must also be brought before a magistrates' court as soon as practicable after the arrest¹³⁷ by virtue of Article 6(4) of the Criminal Justice (NI) Order 2003. According to Article 6(6):

Where a person is brought before a magistrates' court under paragraph (4) the court –

- (a) if of the opinion that he –
 - (i) is not likely to surrender to custody, or
 - (ii) has broken or is likely to break any condition of his bail, may remand him in custody or commit him to custody, as the case may require, or alternatively, grant him bail subject to the same or to different conditions; or
- (b) if not of that opinion, shall grant him bail subject to the same conditions (if any) as were originally imposed.

3.42 An almost identical provision operates in England and Wales.¹³⁸ The Law Commission of England and Wales has examined the compatibility of the Bail Act 1976 in England and Wales with the ECHR.¹³⁹ In the course of that analysis the Law Commission considered the Divisional Court decision in *Haverling Magistrates*¹⁴⁰ in which it was suggested that the corresponding English provision would be incompatible with the ECHR if it was read literally, leading to the conclusion that a mere finding of a breach of a bail condition could justify detention.¹⁴¹ The Commission agrees that the correct approach is to treat a finding that the person is not likely to surrender to custody, or has broken or is likely to break any condition of his bail, as just one factor which the court must consider in determining if detention or bail subject to different conditions is justified in the particular case.¹⁴² Although the Law Commission in England and Wales concluded that no amendment to the English

¹³⁴ Criminal Justice (NI) Order 2003, Art 6(1).

¹³⁵ Criminal Justice (NI) Order 2003, Art 6(2).

¹³⁶ Criminal Justice (NI) Order 2003, Art 6(3).

¹³⁷ See also Criminal Justice (NI) Order 2003, Arts 6(5) and (5A).

¹³⁸ Bail Act 1976 (EW), s 7(5).

¹³⁹ Law Commission of England and Wales, *Bail and the Human Rights Act 1998* (2001) Law Com No 269 ('Bail and Human Rights').

¹⁴⁰ *R (DPP) v Haverling Magistrates' Court; R (McKeown) v Wirral Borough Magistrates' Court* [2001] 1 WLR 805.

¹⁴¹ *Haverling Magistrates* at [38].

¹⁴² See *Haverling Magistrates* at [38] and [41] and *Bail and Human Rights*, para 7.13.

provision¹⁴³ was necessary to ensure compatibility with the ECHR, the Commission considers that it would be prudent to clarify this issue in the context of the proposed bail legislation.

3.43 The Commission recommends therefore that the Draft Bill should include a provision which stipulates that when a person arrested without warrant for anticipated failure to surrender to custody or breach or anticipated breach of bail conditions is brought before a magistrates' court, there are two hurdles to overcome before a decision can be taken to remand or impose further bail conditions. Firstly, was the person not likely to surrender to custody, or has he broken or was he likely to break any condition of his bail? Secondly, if the answer to that question is yes, then is it appropriate to remand him or impose further conditions, after considering all relevant factors, applying the original test appropriate to the type of bail the person was on that is bail pending or during trial (where the right to bail applies), bail pending sentence or appeal or compassionate bail.

Recommendation 12

3.44 **The Commission recommends that bail legislation should require that a person arrested without warrant for anticipated failure to surrender to custody or breach or anticipated breach of bail conditions be brought before a magistrates' court as soon as reasonably practicable. If the court is of the opinion that the person was not likely to surrender to custody, or has broken or was likely to break any condition of his bail, the court must then consider if remand or bail is appropriate, taking that finding into account alongside all other relevant factors. If the court is not of that opinion, it must release the person on the same conditions (if any) as originally imposed.**

Clause 28

SEARCH WARRANTS

3.45 Provision is made in the Criminal Justice (NI) Order 2003 for a lay magistrate (subject to certain conditions) to issue a warrant for entry and search of premises for a person who is liable to arrest without warrant for anticipated failure to surrender or breach or anticipated breach of bail conditions under

¹⁴³ Bail Act 1976 (EW), s 7(5). The Law Commission recommended, however, the repeal of para 6 of Part I and amendment to para 5 of Part II of Sch 1 to the Bail Act 1976 (EW); Bail and Human Rights, para 7.35.

Article 6(3).¹⁴⁴ The Commission considers that bail legislation should include powers for lay magistrates to issue search warrants in similar circumstances.

Recommendation 13

Clause 29

3.46 The Commission recommends that bail legislation should include powers for lay magistrates (subject to certain conditions) to issue a warrant for entry and search of premises for a person who is liable to arrest without warrant for anticipated failure to surrender or breach or anticipated breach of bail conditions.

CONCLUSION

3.47 The Commission has considered carefully the views of consultees and other relevant factors in assessing provision for the enforcement of bail in criminal proceedings. The Commission acknowledges the importance of swift and appropriate action in relation to bail breaches for public confidence in the criminal justice system. Enforcement powers may, however, lead to detention or further criminalisation and consequently must be exercised in a consistent and proportionate manner. In the view of the Commission the proposed provisions strike the appropriate balance, allowing protection of the public, avoiding unnecessary criminalisation and ensuring fairness.

¹⁴⁴ Criminal Justice (NI) Order 2003, Art 6(3A) and (3B).

CHAPTER 4: PERSONAL RECOGNIZANCES AND SURETIES

INTRODUCTION

4.1 Powers to require a personal recognizance and a surety or sureties to secure a person's surrender to custody when granting bail can be traced back to the very inception of the power to grant bail.¹⁴⁵ These powers endure today alongside more modern developments such as the duty to surrender to custody, the offence of failure to surrender and powers to attach conduct conditions. In the context of this review of bail law and practice in Northern Ireland, with its focus on simplification and accessibility,¹⁴⁶ it is appropriate that fresh consideration be given to the rationale for these powers within a modern bail system and/or the need to update any aspects of these powers. The desirability of restricting the use of financial conditions, including personal recognizances, sureties and security, is also examined.

PERSONAL RECOGNIZANCE FOR BAIL

4.2 As noted in the consultation paper, a person released on court bail in Northern Ireland may be required to enter into a personal recognizance for his or her surrender to custody.¹⁴⁷ This personal recognizance for bail may or, in some circumstances, must be estreated if the person fails to surrender to custody.¹⁴⁸ It was suggested during the preliminary discussions which took place before the publication of the consultation paper that personal recognizances for bail may have lost credibility as there is a perception that recognizances are rarely, if ever, estreated.¹⁴⁹

4.3 Personal recognizances for bail have been abolished in respect of *police* bail in Northern Ireland¹⁵⁰ and all bail in criminal proceedings in England and Wales.¹⁵¹ Further, since 2003 all persons released on bail¹⁵² (with the exception of street bail¹⁵³) are under a duty to surrender to custody and if they

¹⁴⁵ See N Corre and D Wolchover, *Bail in Criminal Proceedings*, 3rd edition, New York: Oxford University Press Inc., 2004, ch 2.

¹⁴⁶ See key objectives of the bail project at para 1.24, above.

¹⁴⁷ Bail CP, para 3.47.

¹⁴⁸ Bail CP, paras 3.61 to 3.62.

¹⁴⁹ Bail CP, para 5.30.

¹⁵⁰ PACE, Art 48(3).

¹⁵¹ Bail Act 1976 (EW), s 3(2).

¹⁵² As defined at Criminal Justice (NI) Order 2003, Art 3.

¹⁵³ Bail elsewhere than at a police station is excluded from the definition of bail at Criminal Justice (NI) Order 2003, Art 3: PACE, Art 32C(3).

fail to do so, they commit an offence.¹⁵⁴ The argument was made in the consultation paper that the possibility of both estreatment of a recognizance and prosecution for an offence is a disproportionately punitive response to a failure to surrender to custody.¹⁵⁵ As a result of the inconsistency between police and court bail and concerns about over-penalising failure to surrender to court bail, the Commission expressed the provisional view in the consultation paper that the power to take a personal recognizance should be abolished in respect of court bail in line with police bail (Q 14).

4.4 Most consultees, who responded to this question, supported the abolition of the power of the courts to require a personal recognizance for bail. Several agreed that it is disproportionately punitive and arguably unnecessary to retain this power alongside the offence of failure to surrender to custody. Others complained that financial conditions, such as this, may disproportionately impact upon persons on lower incomes. It was argued by some, however, that the power to estreat a recognizance is a useful tool for the courts. One consultee contended that the personal recognizance and the offence of failure to surrender can comfortably co-exist as estreat of the recognizance marks the termination of bail whereas prosecution for the offence is a penalty for failure to surrender.

4.5 It was also observed in the consultation paper that while persons released on police bail cannot usually be required to enter into a personal recognizance,¹⁵⁶ there is provision for some children to be released by the police if the child or their parent or guardian enter into a recognizance.¹⁵⁷ The potential double sanction of estreat of a recognizance and prosecution for the offence of failure to surrender to custody appears particularly harsh when applied to children. In addition, it has been acknowledged that the courts would never estreat the recognizances in practice.¹⁵⁸ Views were invited in the consultation paper on the Commission's provisional opinion that the power to take a personal recognizance from a child should be abolished in respect of police and court bail (Q 49).

¹⁵⁴ Bail CP, para 3.60.

¹⁵⁵ Bail CP, para 3.61.

¹⁵⁶ See PACE, Art 48(3) discussed at Bail CP, para 3.47 and 4.22.

¹⁵⁷ Criminal Justice (Children) (NI) Order 1998, Arts 6 and 7.

¹⁵⁸ Bail CP, para 5.83.

- 4.6 The majority of consultees who responded to this question also approved of the abolition of the power to require a personal recognizance from a child for police and court bail. Consultees agreed that the possibility of both estreat of a recognizance and prosecution for an offence for failure to surrender to custody is particularly harsh when applied to children. It was acknowledged that the effectiveness of personal recognizances may have been undermined by perceived failures of enforcement and that there are unjustifiable inconsistencies within police and court bail. Consultees argued that children and young persons would not be able to pay if a recognizance is estreated and may even be encouraged to resort to crime or go into debt in order to get the money. One consultee pointed out that children and young persons who come into contact with the criminal justice system are more likely to be from areas of socio-economic deprivation and that personal recognizances may serve to further exacerbate poverty. Consultees asserted that children and young persons may not fully understand the undertaking being entered into and the consequences of failure to surrender. Others contended that requiring such a recognizance from a child is not compatible with children's rights standards and obligations. On the other hand, one consultee argued that for older children and young persons, who may be earning money, a personal recognizance may encourage the young person to take personal responsibility.
- 4.7 The consultation responses received have confirmed for the Commission the provisional view expressed in the consultation paper. For reasons of consistency and proportionality the Commission considers that it is appropriate to abolish the power to take a personal recognizance for court bail in criminal proceedings, bringing it into line with police bail. This abolition will apply to bail granted by a court pending trial, verdict, sentence and appeal and compassionate bail. In light of the particularly harsh impact personal recognizances may have on children, the Commission also recommends that the limited powers of the police to require children to enter into recognizances should also be abolished.¹⁵⁹ No amendment will be required in respect of post charge police bail as personal recognizances for bail have already been abolished in that context.¹⁶⁰ Recognizances in other contexts, including personal recognizances to keep the peace or to be of good behaviour and any

¹⁵⁹ Criminal Justice (Children) (NI) Order 1998, Arts 6 and 7. The Commission has decided, for other reasons, that it is appropriate to repeal these provisions (and the related Article 8) altogether: see discussion at paras 6.25 to 6.28.

¹⁶⁰ PACE, Art 48(3).

recognizances entered into by sureties, will not be affected by the abolition of personal recognizances for court bail in criminal proceedings.

- 4.8 The abolition of the power to require a personal recognizance for bail in criminal proceedings will require many consequential amendments. While the Commission has endeavoured to identify the numerous amendments required, it is considered prudent to include a power to make further amendments consequent to this abolition by way of subordinate legislation: see clause 44.

Recommendation 14

*Clause 43
and
Schedule 3*

- 4.9 **The Commission recommends the abolition of the power to require a personal recognizance for court bail in criminal proceedings.**

SURETY FOR BAIL

- 4.10 In the consultation paper, the powers of the courts and the police to require a surety or sureties to secure the accused person's surrender to custody were discussed.¹⁶¹ The comparative research and the preliminary discussions which took place before the publication of the consultation paper revealed several difficulties with the current surety system. Firstly, there is confusion surrounding the term 'surety' which is used to describe not only the person who undertakes to ensure that the person on bail will surrender to custody, but also the amount of money such person is bound by or the undertaking entered into by such a person.¹⁶² Secondly, concerns have been expressed about the level of scrutiny, both financial and otherwise, of persons to perform the role of surety.¹⁶³ Thirdly, there is uncertainty regarding the extent of the obligation imposed upon the surety that is whether the surety is or indeed should be obliged to ensure compliance with all bail conditions or merely the requirement to surrender to custody.¹⁶⁴ Fourthly, like personal recognizances (above), there are inconsistencies in provision and practice for estreat of the surety's recognizance, which have undermined the effectiveness and credibility of this bail condition.¹⁶⁵ Fifthly, there is concern that sureties, like other financial conditions attached to bail, may disadvantage persons from lower socio-

¹⁶¹ Bail CP, paras 3.48 to 3.49.

¹⁶² Bail CP, paras 5.31 and 6.28.

¹⁶³ Bail CP, paras 5.33 and 6.27.

¹⁶⁴ Bail CP, para 5.32.

¹⁶⁵ Bail CP, paras 3.62 and 5.34.

economic backgrounds.¹⁶⁶ Finally, there are inconsistencies between police and court powers to require sureties, with some court bail being restricted to surety *or* security, but police bail apparently allowing sureties and security to be required as conditions of bail.¹⁶⁷ Limitations are placed on the use of financial conditions such as security in some jurisdictions.¹⁶⁸

- 4.11 In light of all of these concerns, the views of consultees were invited in relation to the retention of the powers of the police and the courts to require a surety or sureties to secure a person's surrender to custody when releasing a person on bail in criminal proceedings (Q 15). If these powers are retained, the views of consultees were sought in relation to several aspects of these powers, namely:
- the simplification of the terminology and the term 'bail guarantor' in particular (Q 16);
 - whether sureties should be required to ensure compliance with some or all bail conditions (Q 17);
 - the need for closer scrutiny of the suitability of persons to act as sureties (Q 18);
 - the desirability of requiring sureties to pay a portion of the promised monies in advance (Q 19);
 - the desirability of mandatory estreatment for failure to surrender (Q 20);
 - the desirability of placing limits on the use of financial conditions (sureties and security) for bail in criminal proceedings (Q 21 and Q 22).

(i) The power to require a third party to secure a person's surrender to custody

4.12 The majority of consultees who expressed a view on the retention of the powers of the police and the courts to require a surety or sureties to secure a person's surrender to custody in bail in criminal proceedings were supportive. Although most of those in favour of retaining sureties did not give a reason for their position, it was argued that sureties are effective in ensuring compliance with bail and provide greater monitoring of persons on bail. One consultee asserted that persons on bail are more likely to comply with a promise to a person known to them who may lose out financially if they do not surrender to custody than with a promise made to the state.

¹⁶⁶ Bail CP, para 6.28.

¹⁶⁷ Bail CP, para 3.48.

¹⁶⁸ Bail CP, para 6.28.

- 4.13 On the other hand, some consultees objected to the power to require sureties for bail on the basis that it may disproportionately impact upon persons on lower incomes, like personal recognizances (above). One consultee argued in particular that access to financial support should not impact upon access to bail. This consultee also expressed concerns that people may agree to act as a surety unwillingly or under duress. Another consultee argued that there are fundamental problems with seeking to hold one person to account for the actions/inactions of another. This consultee suggested that professional oversight of compliance with bail may be more appropriate.
- 4.14 In the EQIA consultation carried out in relation to the bail proposals, it was observed that there were indications in preliminary discussions that persons from ethnic minorities may experience problems securing appropriate sureties if they have few family or friends in Northern Ireland and may encounter difficulties obtaining bail as a consequence. The Commission expressed the provisional view in the EQIA consultation that most of the potential policy options discussed in the consultation paper, including the retention of the power to require a surety, would not adversely impact on persons from ethnic minorities.¹⁶⁹ None of the consultees who responded to the EQIA consultation disputed this conclusion.¹⁷⁰
- 4.15 In relation to the terminology used to describe this concept, although few consultees expressed a view on this issue, there was support for simplifying the language. One consultee asserted that the term surety is misleading and another argued that simplified language would promote transparency and consistency. Several consultees favoured the term 'bail guarantor' with one asserting that this terminology would be progressive. Another offered 'responsible person' as an alternative. There was some resistance, however, from consultees who contended that the existing terminology is well understood.
- 4.16 Having considered all of the arguments, the Commission is persuaded that it is prudent to retain the powers of the police and the courts to require a third party to secure a person's surrender to custody when releasing a person on bail in criminal proceedings. While the Commission takes seriously arguments that

¹⁶⁹ See EQIA consultation, available at: http://www.nilawcommission.gov.uk/bail_eqia_july_2011.pdf

¹⁷⁰ See EQIA report at Appendix A, para A.73.

this power may impact negatively on persons from lower socio-economic circumstances and persons with few community ties, including those from ethnic minorities, it is satisfied that there are merits to this longstanding power which justify its retention, subject to significant amendments. The Commission considers persuasive the argument of many consultees that sureties are an effective tool in ensuring that persons surrender to custody and fears that, without such a power, bail decision makers may not have confidence to release persons who would otherwise be released, resulting in more remands in custody. The Commission is further convinced that difficulties with discrete aspects of the existing surety system can be rectified to ensure a more workable and transparent system: see paras 4.18 to 4.39, below. Finally, it is the view of the Commission that the potential hardships of financial conditions such as this can be mitigated by placing restrictions on the imposition of these conditions (see paras 4.37 to 4.39, below), the availability of powers to attach conduct conditions and greater access to bail support (see paras 7.12 to 7.25, below).

4.17 In Northern Ireland, sureties for bail are bound by the recognizance of the principal, that is the person who is released on bail.¹⁷¹ Consequent upon the abolition of personal recognizances for bail in criminal proceedings (see above), there will be no recognizance to bind the surety. In England and Wales, provision is made for a surety to enter into his or her own recognizance.¹⁷² Following the abolition of personal recognizances, the Commission has determined that it is not appropriate to simply make provision for a surety to enter into his/her own recognizance, as in England and Wales. This approach would continue to rely on outdated concepts and language such as 'recognizance' and 'estreat' which are used in relation to sureties for bail in criminal proceedings and other contexts. Further, such an approach would have the undesirable consequence that different rules would apply to sureties in different contexts.

4.18 Instead, the Commission has decided that the power to require a surety or sureties for bail in criminal proceedings should be abolished and replaced with a new statutory regime for bail guarantors. This regime will replicate much of the existing powers in relation to sureties for bail. The core provision will be a

¹⁷¹ See eg Magistrates' Courts (NI) Order 1981, Art 136.

¹⁷² See Bail Act 1976 (EW), s 8(3).

power to require a bail guarantor or bail guarantors to secure a person's surrender to custody in bail in criminal proceedings. This power will retain the essence of the power to require a surety for bail, that is that a suitable third party will guarantee that the person released on bail will surrender to custody and will undertake to pay a particular sum if the person does not. However, the new power will be expressed in simpler and more accessible terminology and will seek to rectify identified defects and deficiencies within the current surety system. This power will apply to all 'bail' as defined in the Draft Bill, that is police bail post charge, court bail pending trial, verdict, sentence and appeal and compassionate bail.¹⁷³

- 4.19 As indicated above, there was some support among consultees for simplifying the language relating to the surety system and for the adoption of the alternative term 'bail guarantor', in particular. Having also considered comparative material¹⁷⁴ and domestic jurisprudence,¹⁷⁵ the Commission is persuaded that the language of a 'bail guarantor', a 'guarantee' and a 'guaranteed sum' will enhance understanding of the legal concepts related to this power.

Recommendation 15

Clause 43
and
Schedule 3

- 4.20 **The Commission recommends the abolition of the powers of the police and the courts to require a surety or sureties to secure a person's surrender to custody when granting bail in criminal proceedings.**

- 4.21 The abolition of the powers of the police and the courts to require a surety or sureties to secure a person's surrender to custody when granting bail in criminal proceedings will also require numerous consequential amendments. Although the Draft Bill effects many of the required amendments, there is also a power to make further amendments by way of subordinate legislation: see clause 44.

¹⁷³ See Recommendation 3, para 2.29, above.

¹⁷⁴ See the Victorian Law Reform Commission's consideration of this issue discussed at para 6.28 of the Bail CP.

¹⁷⁵ The term 'guarantor' is used by McCloskey J in *In the Matter of James Maughan, An Applicant for Bail* [2010] NIQB 16 at [10].

Recommendation 16

4.22 **The Commission recommends the creation of powers for the police and courts to require a bail guarantor or bail guarantors to secure a person's surrender to custody when granting bail in criminal proceedings.**

*Clauses 14
and 15*

4.23 In addition to the general powers of the police and the courts to require a bail guarantor for bail in criminal proceedings, provision is made for bail to be granted by a court conditional upon a suitable bail guarantor being found: see clause 17. The Draft Bill also contains powers for the courts to vary the bail guarantee and to make the guarantee continuous: see clauses 22 and 23, respectively.

(ii) Extent of the obligation

4.24 During the preliminary discussions which took place before the publication of the consultation paper, some confusion was expressed about the extent of the obligation imposed upon a surety.¹⁷⁶ It was suggested by some that a surety is bound to ensure that the person on bail complies with all bail conditions and not simply the duty to surrender to custody. Others argued that the surety should be so bound, leading to the estreat of the recognizance of the surety if the person breached bail conditions. It was observed that in some jurisdictions sureties can be obliged to ensure that the person on bail complies with all or some bail conditions and face forfeiture if the person does not.¹⁷⁷

4.25 Several consultees who responded to this question were in favour of sureties being placed under an obligation to ensure not only that the person on bail surrenders to custody but also that he or she complies with all bail conditions. It was acknowledged, however, that an obligation to ensure compliance with bail conditions would be very burdensome for the surety and may be difficult to enforce. Some argued that sureties should be required to report any breaches or anticipated breaches of bail conditions or changes of circumstances to the police.

4.26 The Commission is persuaded that the obligation of a bail guarantor should be limited to securing that the person granted bail surrenders to custody. In the view of the Commission, the imposition of an obligation to ensure that the

¹⁷⁶ Bail CP, para 5.32.

¹⁷⁷ Bail CP, para 6.26.

person on bail complies with all or even some bail conditions would be too onerous and may dissuade suitable persons from performing the role of bail guarantor.

Recommendation 17

Clause 13

- 4.27 The Commission recommends that a bail guarantor should be defined as a person who gives a guarantee that, if a person is granted bail, that person will surrender to custody as required. The bail guarantor will undertake to pay a specified sum (the guaranteed sum) if the person fails to surrender to custody.**

(iii) Suitability

- 4.28 At present, Rules of Court provide that prospective sureties may be called upon to provide proof of identity, address and means and may be required to sign a certificate that he or she is in possession of sufficient means to pay the sum in which he or she is to be bound under the recognizance.¹⁷⁸ Concern was expressed during preliminary discussions that there is inadequate scrutiny of persons performing this role and that factors relevant to suitability are not set out in statute.¹⁷⁹
- 4.29 All of those consultees who expressed an opinion on the scrutiny of prospective sureties agreed that their suitability to perform this important role should be examined more closely. It was suggested that statutory provision should require consideration of the prospective surety's character, financial resources and relationship to the person applying for bail. One consultee argued that guidance on factors which bail decision makers may take into account in determining a person's suitability to be a surety would suffice. It was argued that when the person on bail is a child the surety role should be performed by a parent, guardian or person with parental responsibility.
- 4.30 The Commission has considered the views of consultees and has concluded that the proposed bail legislation should include provision for scrutiny of the suitability of prospective bail guarantors. When determining suitability, consideration must be given to the proposed bail guarantor's financial resources, character and relationship to the person seeking bail. Although

¹⁷⁸ See Magistrates' Courts Rules (NI) 1984, r 150(5) and Crown Court Rules (NI) 1979, r 12(1A).

¹⁷⁹ Bail CP, para 5.33.

consideration of similar matters is discretionary in some other jurisdictions,¹⁸⁰ the Commission is persuaded that for reasons of consistency, consideration of these matters should be mandatory in all cases.

Recommendation 18

4.31 The Commission recommends the inclusion in bail legislation of a requirement to consider the resources, character and closeness of a prospective bail guarantor to the person seeking bail when determining a bail guarantor's suitability to perform this role.

Clause 16

4.32 Provision is also made at clause 21 of the Draft Bill for a bail guarantor to be discharged of their responsibilities if they believe that they are no longer suitable to perform the role of bail guarantor or if they believe that the person on bail will not surrender to custody.

(iv) Liability of bail guarantor on failure to surrender

4.33 It was noted in the consultation paper¹⁸¹ that the power to order estreat of a recognizance entered into by a surety may be considered mandatory in the magistrates' court¹⁸² but is discretionary in the Crown Court¹⁸³ and the High Court.¹⁸⁴ The views of consultees were divided on this issue. Some argued that estreat of the recognizance of a surety should be mandatory when the person on bail fails to surrender to custody. Others indicated that it is important to retain discretion in order to deal with genuine cases where leniency is appropriate. It was argued by others that estreat of the recognizance of a surety is simply unfair.

4.34 In relation to the liability of the bail guarantor to pay the guaranteed sum if the person on bail fails to surrender to custody, the Commission considers that it is appropriate that the power to order forfeiture of the guaranteed sum should be discretionary, to allow consideration of all the circumstances which resulted in the failure to surrender.

¹⁸⁰ See Bail Act 1976 (EW), s 8(2) and Bail Act 1977 (Vic), s 9(2).

¹⁸¹ See Bail CP, para 3.49, n 114.

¹⁸² Magistrates' Courts (NI) Order 1981, Art 138(2A).

¹⁸³ Crown Court Rules (NI) 1979, r 13.

¹⁸⁴ Rules of the Court of Judicature (NI) 1980, Order 79, r 8.

Recommendation 19

- 4.35 **The Commission recommends the inclusion in bail legislation of provision for the discretionary forfeiture of the guaranteed sum if the person on bail fails to surrender to custody.**

(v) Payment of portion of monies in advance/ restriction on financial conditions

- 4.36 Consultees had mixed views on requiring sureties to pay a portion of the promised monies in advance. One consultee supported this measure on the basis that it would focus the surety's mind on the real possibility that the monies will be lost if the person does not comply with bail. Another pointed out that effectively bail decision makers can already request monies in advance, in the form of security. This consultee argued, however, that this should be required in all cases. Other consultees were opposed to the payment of monies in advance and one argued that it is only appropriate if the person lives outside the jurisdiction and special circumstances require it. The Commission agrees that if provision is made for a bail guarantor to pay a portion of the guaranteed sum in advance, the person on bail would in effect be required to provide two financial conditions for bail, namely a bail guarantor for a portion of a particular sum and security for the other portion of that sum.
- 4.37 It was noted in the consultation paper¹⁸⁵ that bail granted by the police may be subject to sureties and/or security¹⁸⁶ whereas surety *or* security can be required for bail in the magistrates' court.¹⁸⁷ Some of the consultees who considered the issue of placing limits on the use of financial conditions were in favour of restricting the use of such conditions to cases in which it has been decided that bail with or without other (conduct) conditions is not appropriate. Others argued that such conditions should be proportionate to the circumstances.
- 4.38 In light of the potential hardships financial conditions may inflict on persons on low incomes, the Commission considers that it is appropriate that only one such condition should be required to secure the surrender of the person to custody. The new power to require a bail guarantor should therefore be restricted to cases in which the person granted bail is not also required to

¹⁸⁵ See Bail CP, para 3.48.

¹⁸⁶ PACE, Art 48(3B) and (3C).

¹⁸⁷ Magistrates' Courts (NI) Order 1981, Arts 136 and 137.

provide security (either personally or on his behalf) to secure his surrender to custody.

Recommendation 20

- 4.39 **The Commission recommends the inclusion in bail legislation of provision permitting the imposition of a security condition as an alternative to a bail guarantor condition.**

Clause 18

CONCLUSION

- 4.40 Having considered all the evidence, the Commission is persuaded that the abolition of the power to require a personal recognizance for surrender to custody in bail in criminal proceedings is justified on the grounds of consistency and proportionality. The necessity for this power has been eroded with the introduction of the duty to surrender to custody and the related offence of failure to do so. The Commission also acknowledges problems with the longstanding power to require a surety or sureties for bail in criminal proceedings, but considers that there are merits to requiring a third party to secure a person's surrender to custody which warrant the retention of this power, subject to significant modernisation. The proposed provisions relating to bail guarantors present an accessible and modern system for the exercise of this power. In the view of the Commission, the proposed reforms mark an appropriate move away from the extensive use of financial conditions for bail, which alongside powers to attach conduct conditions and proposals to expand bail support, will reduce the potential impact of such conditions on persons on low incomes.

CHAPTER 5: BAIL IN RESPECT OF ACCUSED PERSONS

INTRODUCTION

- 5.1 In the bail consultation paper, consultees were asked about the inclusion in legislation of criteria for the grant of bail to accused persons following charge by the police up to the point of verdict (Q 5 to Q 10) and for the grant of compassionate bail, bail pending sentence and bail pending appeal (Q 11). There are currently no statutory criteria for the grant of compassionate bail, bail pending sentence and bail pending appeal in Northern Ireland.¹⁸⁸ The grant of bail to accused persons is governed by a mixture of legislation and longstanding common law authority.¹⁸⁹
- 5.2 There was much support for the creation of statutory criteria for the grant of bail to accused persons following charge by the police and pending and during trial (see full discussion, below). Views were, divided, however on the desirability and practicality of creating statutory criteria for the grant of compassionate bail, bail pending sentence and bail pending appeal. One consultee argued that bail legislation should include all aspects of bail decision making. Another contended that statutory criteria would provide a robust framework for decision making and enhance transparency. A small number of consultees favoured statutory criteria in respect of bail pending sentence and bail pending appeal, but no suggestions were made regarding the content of such criteria. In respect of compassionate bail, there was also some limited support for statutory criteria. It was argued, however, that compassionate bail is by its very nature case-specific and diverse and that it may not be possible to devise criteria which do not unduly restrict the necessary discretion of the decision maker. It was argued by one consultee that compassionate bail should be granted in cases in which a family member is terminally ill or a death has occurred. Another argued that consideration should be given to the three core grounds for the refusal of bail with a view to reaching a proportionate decision. One consultee clarified that the issue at stake in compassionate bail applications is whether the reason for the temporary release on compassionate grounds carries sufficient weight with the court to justify a departure from the previous decision to refuse bail and whether the risks posed by the release of the accused person can be reduced sufficiently to

¹⁸⁸ Bail CP, para 3.41.

¹⁸⁹ Bail CP, para 3.34 to 3.40.

permit release. Some consultees argued specifically for the retention of the status quo.

- 5.3 Having considered the views of consultees, the Commission has determined that bail legislation should not include statutory criteria for the grant of compassionate bail, bail pending sentence and bail pending appeal. Discretionary powers to grant bail in these circumstances will remain, governed by any relevant precedent, custom and practice.
- 5.4 All persons enjoy a right to liberty under Article 5 of the ECHR. Provision is made for exceptions to that right, including the lawful detention of a person after conviction by a competent court¹⁹⁰ and the lawful arrest or detention of a person on reasonable suspicion of having committed an offence.¹⁹¹ Persons arrested in relation to an offence are generally entitled to release pending trial,¹⁹² subject to a limited number of exceptions. In the consultation paper, many inconsistencies and deficiencies were identified in law and practice in relation to the grant of bail to persons accused of offences in Northern Ireland.
- 5.5 The Commission considers in this chapter the creation of a statutory right to bail which would apply to post charge police bail and court bail pending and during trial (up to verdict). Statutory grounds for the refusal of bail are discussed, as are factors which decision makers should take into account when determining the issue of bail. The imposition of appropriate bail conditions on accused persons is examined and the desirability of providing and recording reasons for bail decisions is considered.

THE RIGHT TO BAIL

- 5.6 In the consultation paper, it was noted that the well established presumption in favour of release for persons charged but not convicted of criminal offences is enshrined in statute in respect of bail granted by the police in Northern Ireland.¹⁹³ An equivalent presumption in favour of bail for accused persons operates in the courts in this jurisdiction, founded on longstanding common law authority.¹⁹⁴ The incorporation into domestic law of the ECHR has further

¹⁹⁰ Art 5(1)(a).

¹⁹¹ Art 5(1)(c).

¹⁹² Art 5(3).

¹⁹³ PACE, Art 39(1). See also Bail CP, para 3.34.

¹⁹⁴ Bail CP, para 3.37.

strengthened the right to bail.¹⁹⁵ Article 5 of the Convention provides for a right to liberty and security of the person, which may only be interfered with in specified circumstances, including the lawful arrest or detention of persons suspected of criminal offences. Accused persons have a right to release pending trial unless the state can show good reasons justifying detention.¹⁹⁶ It is common in other jurisdictions for a general right to bail or presumption in favour of bail to be included in bail legislation,¹⁹⁷ and there was much support for a statutory right to bail among those who participated in the preliminary discussions conducted by the Commission.¹⁹⁸

5.7 The Commission expressed the provisional view in the consultation paper that bail legislation should, in keeping with Article 5 of the ECHR, provide for a general right to bail or presumption in favour of bail for all persons accused of offences or awaiting trial, subject to the power of the police or the court to refuse bail (Q 5). Views were also invited on the Commission's provisional conclusion not to recommend an 'offence specific' or 'circumstance specific' approach to the entitlement to bail, whereby different principles and/or statutory provisions apply to certain offences or situations (Q 10). This approach is in evidence in other jurisdictions, where for example the presumption in favour of bail is reversed for persons accused of certain sexual or violent offences.¹⁹⁹ It has been argued, however, that such provisions are arbitrary, complicated and potentially contrary to human rights standards.²⁰⁰

5.8 There was much support among consultees for the inclusion in bail legislation of a general right to bail or a presumption in favour of bail, for a number of reasons. Several consultees suggested that it would strengthen the presumption of innocence and clarify the imposition of the burden on the state to justify any interference with liberty. Others indicated that such a statutory right would ensure compliance with human rights obligations and protect defendants, particularly young defendants. One consultee argued that the right to bail is particularly important for 'first time offenders'. Others suggested that there should be an assessment of the risk the bail applicant may pose to the public and another highlighted the importance of balancing the needs of

¹⁹⁵ Bail CP, paras 2.6 to 2.20.

¹⁹⁶ Bail CP, para 2.10.

¹⁹⁷ Bail CP, para 6.7.

¹⁹⁸ Bail CP, paras 5.13 to 5.18.

¹⁹⁹ Bail CP, paras 6.13 to 6.16.

²⁰⁰ Bail CP, paras 2.12 and 6.16.

victims with the needs of the accused person. One consultee, who was supportive of the inclusion in bail legislation of a general right to bail, suggested however that amendments must be made to Order 79 of the Rules of the Court of Judicature in order to give full effect to such a statutory right. This consultee pointed out that the Rules of the Court of Judicature require bail applicants in the High Court to submit a notice setting out 'the grounds of the application'.²⁰¹ It was argued that while it may be appropriate to require the bail applicant to give notice to the court and the prosecution of his intention to apply for bail and of a bail address and the identity of sureties, he should not be required to outline the grounds or reasons for his release. It was observed by one consultee that as the presumption in favour of bail is well established, its restatement in statutory form would not add anything significant to the law on bail.

5.9 By contrast, some consultees argued that the right to bail should not apply to all persons and that a presumption against bail may be appropriate in some cases. It was suggested that the presumption in favour of bail should be reversed in the case of violent or sexual offences, firearms offences, terrorism and kidnapping, particularly if the applicant has previous convictions for serious offences. There should also be a presumption against bail, it was argued, if the applicant has previously breached bail conditions or failed to surrender to custody. Such presumptions against bail can be justified, in the opinion of some consultees, on the grounds of victim and public safety and public confidence in the administration of justice. One consultee argued that the failure to introduce a presumption against bail for cases involving sexual offences and domestic violence may undermine the safety of vulnerable victims and witnesses and create the perception that the criminal justice system is weighted in favour of the accused. It has been suggested that the omission from bail legislation of special 'offence specific' or 'circumstance specific' rules in relation to the entitlement to bail may impact negatively on women who are victims of domestic violence or sexual offences.²⁰² The Commission sought the views of consultees on this issue in the EQIA consultation.²⁰³ None of the EQIA consultees specifically supported this view and one agreed with the Commission's provisional conclusion that 'offence

²⁰¹ Rules of the Court of Judicature (NI) 1980, Order 79, r 2. It was suggested that a similar practice has developed in the Crown Court.

²⁰² EQIA consultation, para 4.2(B)(i).

²⁰³ EQIA consultation, para 5.1.

specific' or 'circumstance specific' rules in relation to the entitlement to bail are not appropriate.²⁰⁴

5.10 The consultation responses received have confirmed for the Commission the provisional views expressed in the consultation paper. As highlighted by consultees, the presumption of innocence and the right to liberty demand that the burden should be on the state to justify the detention of an accused person pending trial. The jurisprudence of the European Court of Human Rights clearly establishes that the onus is on the state²⁰⁵ to demonstrate convincingly²⁰⁶ the grounds for continued detention. The detained person should not be called upon to show reasons for their release.²⁰⁷

5.11 Although the Commission is mindful of the particularly damaging impact of certain offences and offending on victims and the community, it is disinclined to include in bail legislation presumptions against bail for particular offences or circumstances. The Commission is persuaded that the selection of particular offences or circumstances for different treatment would result in artificial distinctions being made between different classes of offence for the purpose of bail decisions. The shifting of the onus to justify release on to the accused in some cases may also complicate bail applications and such rules may be incompatible with human rights standards. One question that arose in the EQIA consultation was whether the failure to introduce a presumption against bail for persons accused of offences related to domestic violence or sexual offences may have a potentially negative impact on women. The Commission is not persuaded, however, that it would be justified to treat persons accused of domestic violence or sexual offences differently from other accused persons and, in the view of the Commission, this approach is consistent with section 75 obligations.²⁰⁸ The creation of a statutory right to bail which applies to all persons accused of offences will mean that persons accused of domestic violence or sexual offences are treated in the same way as persons accused of all other offences: such persons may properly be denied bail if one of the grounds for the refusal of bail is established. Issues arising from the

²⁰⁴ EQIA report at Appendix A, para A.26.

²⁰⁵ See eg *Ilijkov v Bulgaria* [2001] 7 Archbold News 1; *Kokoshkina v Russia* App No 2052/08, para 74; and *Popkov v Russia* App No 32327/06, para 53.

²⁰⁶ See eg *Shishkov v Bulgaria*, App No. 38822/97, para 66; *Popkov v Russia* App No. 32327/06, para 53; and *Kokoshkina v Russia* App No 2052/08, para 74.

²⁰⁷ *Ilijkov v Bulgaria* [2001] 7 Archbold News 1 (App No 33977/96).

²⁰⁸ EQIA consultation, para 4.2.

relationship between the accused and the victim that are potentially relevant to the grounds for refusal will, of course, be factored in to the decision making process as appropriate in individual cases. Further, while it has been suggested that reverse onus provisions may create a perception that bail is more likely to be refused,²⁰⁹ evidence from Australia regarding the impact of reverse onus provisions on remand rates is inconclusive.²¹⁰

- 5.12 The right to bail included in the proposed legislation should apply to post charge police bail and court bail for all accused persons up to the point of conviction, ensuring greater consistency between police and court bail. This right will not apply to bail pending sentence,²¹¹ bail pending appeal and compassionate bail, where discretion to grant bail will remain.²¹² The Commission considers that it is appropriate that the provision should be expressed in terms of a 'right', in keeping with the right to liberty under Article 5, rather than a 'presumption'. This right will, of course, not be absolute and will be subject to police and court powers to refuse bail in certain situations.

Recommendation 21

- 5.13 **The Commission recommends the inclusion in bail legislation of a general right to bail for all persons accused of offences or awaiting trial, subject to the power of the police or the courts to refuse bail.**

*Clauses 1
and 2*

Recommendation 22

- 5.14 **The Commission does not recommend the creation of any presumptions against bail for particular offences or circumstances.**

²⁰⁹ Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (Aug 2007), p 40.

²¹⁰ See discussion of climbing remand rates in New South Wales following introduction of reverse onus provisions and high remand rates in South Australia where there are no reverse onus provisions: Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (Aug 2007), pp 44-5 and 49, respectively.

²¹¹ In England and Wales, some convicted persons also enjoy a right to bail: Bail Act 1976 (EW), ss 4(3) and (4). Although there was much support among consultees for the creation of a statutory right to bail for persons accused of offences or awaiting trial, no consultees argued that such a right was necessary for any convicted persons in Northern Ireland.

²¹² Bail decisions in these circumstances are discussed at Bail CP, paras 3.41 to 3.42.

GROUNDS FOR THE REFUSAL OF BAIL

5.15 Similar to the right to bail, the grounds upon which bail may be refused by the police are set out in statute in Northern Ireland²¹³ with many parallel grounds for the refusal of bail by the courts derived from common law authority.²¹⁴ The European Court of Human Rights has recognised at least four²¹⁵ legitimate grounds for refusing to release on bail a person suspected of having committed an offence.²¹⁶ Grounds for the refusal of bail are included in bail legislation in most other jurisdictions²¹⁷ and there was support among participants in preliminary discussions for the inclusion of such a provision in bail legislation.²¹⁸ In the consultation paper, the views of consultees were sought in relation to the inclusion in legislation of the grounds upon which the police and the courts can refuse to release on bail persons charged but not convicted of criminal offences (Q 6).

5.16 As observed in the consultation paper, it is well established throughout the world that bail may be refused if there are substantial grounds for believing that the accused will fail to surrender to custody.²¹⁹ The justification for this ground for detention is arguably found in the public interest in ensuring that the accused person does not evade justice. The refusal of bail on the grounds that the accused will interfere with witnesses or otherwise obstruct the course of justice is also common.²²⁰ This ground can be justified on the basis of the protection of the integrity of the criminal process.²²¹ Bail may be refused in many jurisdictions on the basis that the accused will commit offences while on bail, although it is arguable that this ground should be limited to a risk of the commission of particular offences only.²²² In addition to these three core grounds for the refusal of bail, which have been accepted by the European Court of Human Rights and domestic courts, powers exist in Northern Ireland and elsewhere to refuse bail on many other grounds including, among others,

²¹³ PACE, Art 39(1).

²¹⁴ Bail CP, paras 3.34 to 3.37.

²¹⁵ There is also a possible fifth ground – for the protection of the accused, in exceptional circumstances: see *IA v France* App No 28213/95, para 108. See also discussion at paras 5.32 to 5.34, below.

²¹⁶ Bail CP, para 2.13.

²¹⁷ Bail CP, paras 6.7 to 6.12.

²¹⁸ Bail CP, paras 5.13 to 5.18.

²¹⁹ Bail CP, paras 3.39 and 6.7.

²²⁰ Bail CP, paras 3.39 and 6.7.

²²¹ A Ashworth and M Redmayne, *The Criminal Process*, 4th edition, Oxford: Oxford University Press, 2010, p 234.

²²² See discussion at Bail CP, paras 3.39, 6.7 and 7.10.

the prevention of injury or damage,²²³ the likelihood that the accused will fail to comply with bail conditions,²²⁴ the protection of the accused,²²⁵ the safety or welfare of victims or others²²⁶ or the preservation of public order.²²⁷

5.17 The provisional view was expressed in the consultation paper that bail legislation should include the three core grounds for the refusal of bail outlined above, namely a risk that the accused will:

- abscond or fail to appear;
- interfere with witnesses or otherwise interfere with the administration of justice or;
- commit offences while on bail (Q 7).

Views were invited on this provisional conclusion and on the possible limitation of the third ground - the risk of the commission of offences (Q 8). Consultees views were also sought on the inclusion in legislation of further grounds for the refusal of bail (Q 9).

5.18 The consultation responses revealed overwhelming support for the inclusion in bail legislation of grounds for the refusal of bail by the police and the courts. It was maintained by some that such statutory grounds would enhance accountability, transparency and comprehensibility in the bail system. It would also promote consistency between police and court bail and reduce discriminatory or unfair decision making. One consultee contended that statutory grounds would ensure the safety of victims and the public and another suggested that clarity regarding the grounds for the refusal of bail may result in reductions in representation and hearings costs. It was argued by one consultee that any statutory grounds must be sufficiently comprehensive. One suggested that it may be appropriate to clarify the basis for continued detention at different stages of the criminal process, in terms of evidence relating to the offence. Another consultee noted that it is unnecessary to include in bail legislation the grounds for the refusal of bail, as such statutory provision would simply be a restatement of the present position.

²²³ See eg PACE, Art 39(1)(a)(ii).

²²⁴ In Northern Ireland bail may be refused in the High Court if the accused is likely to fail to comply with bail conditions: see Bail CP, para 3.38.

²²⁵ See eg PACE, Art 39(1)(a)(iv). See also *IA v France* App No 28213/95.

²²⁶ See eg Bail Act 1980 (Qld), s 16(1)(a)(ii)(B).

²²⁷ See eg *Letellier v France* (1992) 14 EHRR 83 (App No 12369/86).

5.19 When considering appropriate grounds for the refusal of bail, several consultees stressed the importance of properly assessing the bail applicant's suitability to bail and argued that release on bail subject to appropriate support and monitoring should be considered. These matters are discussed further in Chapter 7, below.

5.20 The Commission is persuaded that bail legislation should set out the grounds upon which bail can be refused to those charged but not convicted of a criminal offence. Based on consultation responses and other relevant matters, the Commission has given consideration to the inclusion in legislation of the following grounds for the refusal of bail:

(i) Risk that the accused will fail to surrender to custody

5.21 Consultees were supportive of the inclusion in legislation of this well established ground for the refusal of bail. The Commission is persuaded that this ground should be included in bail legislation.

(ii) Risk that the accused will interfere with witnesses or otherwise obstruct the course of justice

5.22 Consultees were also in favour of the inclusion in legislation of this ground for the refusal of bail. The Commission is content that this ground should be included in bail legislation.

(iii) Risk that the accused will commit offences

5.23 In the consultation paper it was observed that bail may be refused in many jurisdictions due to a risk that the accused will commit offences while on bail. It was noted that in the Republic of Ireland this ground is limited to an accused charged with a serious offence where there is a risk that he or she will commit a serious offence while on bail²²⁸ and that PACE restricts this ground to defendants arrested in respect of imprisonable offences.²²⁹ It was further noted that ECHR jurisprudence may demand some limitation on this ground.²³⁰

5.24 Consultees generally favoured the inclusion in bail legislation of this ground for the refusal of bail, however, several argued that it should be limited to a risk of

²²⁸ Bail CP, para 6.8.

²²⁹ Bail CP, para 3.35.

²³⁰ Bail CP, para 2.14.

the commission of serious offences in order to ensure that persons are not remanded to prevent minor offences. One suggested that if this ground is limited to serious offences, the definition should accord with the definition of serious offences laid down in the Criminal Justice (NI) Order 2008.²³¹ Other consultees suggested that this ground should be limited according to the impact of the anticipated offending on the local community or the risk to the public likely to be caused by the anticipated offending. Some consultees argued that it should be limited to a risk that the defendant will commit an offence related to the offence charged so that it is not used inappropriately with disproportionate effects. One consultee argued that this ground should only be relied upon to deny bail to persons on the basis of a risk that the defendant will commit offences of the same seriousness or category as the offence charged or where there is a nexus between the anticipated offending and the offence charged. This consultee reminded the Commission of the decision of the European Court in *Matznetter v Austria*²³² where it is suggested that it was decided that a risk of the commission of minor offences is insufficient to justify detention.²³³ It was argued that if this ground is not limited in statute, bail decision makers could be provided with guidance akin to that produced by the Law Commission in England and Wales. This consultee warned that this ground should be expressed as a risk that the accused will 'commit offences' while on bail and not a risk that he will commit 'further offences' or 're-offend'. Such a distinction is important to protect the presumption of innocence and to ensure that the bail decision maker is not distracted by consideration of whether the accused has committed the offence for which he is charged.

- 5.25 On the other hand, some consultees favoured the retention of a wide discretion in relation to this ground. It was argued that, while in most cases, this ground will be relied upon only when there is a risk of the commission of serious offences, discretion should be retained to enable bail decision makers to refuse bail where there is a risk of the commission of less serious offences, bearing in mind the impact of such offending on victims, public confidence in the administration of justice and the public interest.

²³¹ Criminal Justice (NI) Order 2008, sch 1.

²³² (1979-80) 1 EHRR 198 (App No 2178/64), para 9.

²³³ See, however, a differing interpretation of this and other related cases adopted by the Law Commission of England and Wales discussed at para 5.27 below.

5.26 When the Law Commission of England and Wales originally examined the compliance of the Bail Act 1976 with the ECHR, it was argued that refusal of bail to prevent the commission of offences should be limited to a real risk of the commission of a serious offence or an offence that has some connection to the offence charged.²³⁴ It was suggested in response to the consultation paper of the Law Commission of England and Wales that the ECHR jurisprudence, although arising from cases where there was a risk of the commission of serious offences, does not in fact require the limitation of this ground to serious offences only.²³⁵ It was also argued that there may be difficulties in defining a serious offence in practice.²³⁶ The Law Commission concluded in their Final Report that the anticipated offence did not have to be of any particular level of seriousness and that the refusal of bail on this ground could be justified provided it is a 'necessary and proportionate response to a real risk'²³⁷ of the commission of offences during the bail period.

5.27 The Commission is persuaded that a risk that the accused person will commit offences should be included in bail legislation as a ground for the refusal of bail. Having considered the views of consultees and the jurisprudence of the European Court of Human Rights,²³⁸ the Commission is not convinced that it is necessary to restrict the application of this ground in the legislation. While the Commission acknowledges that bail decision makers will be required to apply this ground (as with any other grounds) in a manner which is compatible with the ECHR²³⁹ it is, it believes, preferable to retain some discretion in the legislation. Therefore, although the Commission does not propose placing statutory restrictions on this ground, it should only be relied upon by bail decision makers to justify detention if it is considered a necessary and proportionate response to a substantial risk that the accused will commit an offence while on bail.

²³⁴ Law Commission of England and Wales, *Bail and the Human Rights Act 1998* (1999) Law Com No 157, paras 5.3 to 5.5 and 5.11. The Law Commission took the view, however, that the Bail Act 1976 was capable of being applied in a manner which was compatible with the ECHR, if appropriate guidance was provided to decision makers, and consequently did not need to be amended: see paras 5.15 to 5.17.

²³⁵ *Bail and Human Rights*, paras 3.7.

²³⁶ *Bail and Human Rights*, paras 3.8.

²³⁷ *Bail and Human Rights*, paras 3.9 to 3.11.

²³⁸ See eg *Matznetter v Austria* (1979) 1 EHRR 198 (App No 2178/64); *Nerattini v Greece* App No 43529/07, para 23 to 24, 33 and 34.

²³⁹ See Human Rights Act 1998, s 3(1).

(iv) Preservation of public order

5.28 In the consultation paper it was noted that the European Court of Human Rights has recognised a fourth ground for refusing bail, that is for the preservation of public order.²⁴⁰ Detention (at least for a time) for the purposes of preserving public order may be justified in exceptional cases if the gravity of the alleged offence and the public response are such that the release of the accused is likely to lead to a public disturbance.²⁴¹ This ground can be relied on if there is an actual risk of disturbance to public order to such an extent that it justifies the detention of the accused.²⁴² Detention on this basis can only continue as long as public order is actually threatened.²⁴³ There was some support among consultees for the inclusion in bail legislation of the preservation of public order as a ground for the refusal of bail, mainly on the basis that this ground has been acknowledged as legitimate by the European Court of Human Rights. There is some evidence that this ground has already been recognised in domestic courts.²⁴⁴ The Commission is persuaded that this ground should be included in legislation on the understanding that it is applied in a manner which is compatible with the Convention, including the provisos outlined above. It is, in the view of the Commission, appropriate that bail decision makers should be permitted to detain accused persons in exceptional cases where there is a serious threat to public order which cannot be avoided by other means.

(v) Risk that the accused will fail to comply with bail conditions

5.29 It was observed in the consultation paper that bail may be refused in the High Court due to a likelihood that the accused will fail to comply with bail conditions.²⁴⁵ It was observed that s 67 of the Terrorism Act 2000 (which is no longer in force) also made provision for the refusal of bail to a person charged with a scheduled offence if there were substantial grounds for believing that the person if released on bail would fail to comply with bail conditions. Similar

²⁴⁰ *Letellier v France* (1992) 14 EHRR 83 (App No 12369/86), para 51; *Smirnova v Russia* (2004) 39 EHRR 22 (App Nos 46133/99 and 48183/99), para 59; *Makarov v Russia* App No 15217/07, para 136; *Yakovlev v Russia* App No 5453/08, para 83.

²⁴¹ *Letellier v France* (1992) 14 EHRR 83 (App No 12369/86), para 51; *Makarov v Russia* App No 15217/07, para 136; *Yakovlev v Russia* App No 5453/08, para 83.

²⁴² See above.

²⁴³ See above.

²⁴⁴ See Sheil J in *In the Matter of Dennis Donaldson, An Applicant for Bail* [2002] NIQB 68, para 22.

²⁴⁵ Bail CP, para 3.38.

provisions had appeared in the Northern Ireland Emergency Provisions Acts since the early 1970s.²⁴⁶

5.30 The refusal of bail due to a risk that the accused will not comply with bail conditions is not common in other jurisdictions and there was only one consultee that supported retention of this ground. Further, the Commission is persuaded that this ground would be susceptible to challenge with reference to the ECHR. It will be recalled that section 7(5) of the Bail Act 1976 in England and Wales²⁴⁷ confers powers on the magistrates' courts to remand or impose conditions on a person on a finding that he or she has breached or is likely to breach bail conditions: see paras 3.41 to 3.42, above. As argued earlier²⁴⁸ the Commission concurs with the view of the Law Commission of England and Wales and the decision in *Havering Magistrates*²⁴⁹ that this provision would be incompatible with Article 5 of the ECHR if it was read literally, meaning that a finding of a breach of a bail condition could justify detention.²⁵⁰ In the view of the Commission a finding that the person has broken or, more significantly for present purposes, is likely to break any condition of his bail, is a factor which the court must consider in determining if detention or bail subject to different conditions is justified in the particular case,²⁵¹ but it is not a ground for detention which has been recognised by ECHR jurisprudence. The Commission does not propose, therefore, that this ground should be included in bail legislation.

(vi) Risk that the accused will cause physical injury to another person or loss of or damage to property

5.31 Currently the police can detain a person who has been charged with an offence if there are reasonable grounds for believing that detention is

²⁴⁶ In the 1973 and 1978 Emergency Provisions Acts ('EPA'), there were provisions stipulating that bail *must* be refused to a person charged with a scheduled offence unless the court was satisfied that he would comply with the conditions on which he is admitted to bail: Northern Ireland (Emergency Provisions) Act 1973, s 3(2) and Northern Ireland (Emergency Provisions) Act 1978, s 2(2) (as originally enacted). The 1978 EPA was amended by the EPA 1987, placing the onus of proof on the prosecution and providing judges with discretion to release persons charged with scheduled offences on bail except where there were substantial grounds for believing (among other matters) that the person, if released subject to conditions, would fail to comply with all or any of those conditions: Northern Ireland (Emergency Provisions) Act 1987, s 1. The 1991 and 1996 EPAs contained the same provisions: Northern Ireland (Emergency Provisions) Act 1991, s 3(3) and Northern Ireland (Emergency Provisions) Act 1996, s 3(3).

²⁴⁷ The equivalent provision in Northern Ireland is Criminal Justice (NI) Order 2003, Art 6(6).

²⁴⁸ See paras 3.41 to 3.44, above.

²⁴⁹ *R (DPP) v Havering Magistrates' Court; R (McKeown) v Wirral Borough Magistrates' Court* [2001] 1 WLR 805.

²⁵⁰ *Havering Magistrates* at [38].

²⁵¹ See *Havering Magistrates* at [38] and [41] and Bail and Human Rights, para 7.13.

necessary to prevent him from causing physical injury to any other person or from causing loss of or damage to property.²⁵² There was limited support among consultees for the retention of this ground for the refusal of bail, with one arguing that this ground should be expanded to include potential emotional, psychological and financial injury and harassment and to prevent the accused from encouraging others to engage in such behaviour. It was contended by one consultee, however, that this type of behaviour will likely involve the commission of offences and therefore will be covered by that ground for detention, as outlined above. It was argued that this could be clarified in guidance. The Commission concurs with this analysis and is content that persons who present a risk of causing injury to a person or loss or damage to property could properly be detained on the basis of a risk of the commission of offences. A risk of behaviour which would not amount to the commission of an offence would not be capable of justifying detention. In the view of the Commission it is not necessary to include the risk that the accused will cause physical injury to another person or loss of or damage to property as a separate ground for detention in the legislation.

(vii) Protection of the accused

5.32 As noted in the consultation paper, the police can detain a person who has been charged with an offence if there are reasonable grounds for believing that the detention of the person is necessary for his own protection.²⁵³ Detention for the accused's own protection was criticised as inappropriate and unfair during the preliminary discussions carried out by the Commission.²⁵⁴ Similar views were expressed by consultees with one arguing that this ground interferes disproportionately with the autonomy of the individual. It was suggested that persons subject to threats from others should be protected rather than detained. Where the accused is considered a risk to him or herself, it is more appropriate to rely on mental health legislation with suitable support and accommodation in the community, if necessary. It was argued that under the current regime persons with mental health problems may be granted bail subject to a requirement that he or she receives treatment. There were some consultees, however, in favour of including this ground in bail

²⁵² PACE, Art 39(1)(a)(ii).

²⁵³ PACE, Art 39(1)(a)(iv).

²⁵⁴ Bail CP, para 5.17.

legislation and one went further suggesting that the interests of the accused should be a ground for the refusal of bail.

5.33 There is some limited authority for detention for the accused person's own protection under European Court of Human Rights jurisprudence. In *IA v France*²⁵⁵ the European Court of Human Rights held that there may, in exceptional circumstances, be cases in which 'the safety of a person under investigation requires his continued detention, for a time at least'.²⁵⁶ In its analysis of the compatibility of the Bail Act 1976 with the ECHR, the Law Commission of England and Wales concluded that detention to protect the defendant from harm from others, or even self harm, may be compatible with the ECHR in exceptional circumstances.²⁵⁷ In relation to detention due to a risk of self harm the Law Commission suggested that this ground should only be relied upon if a medical examination is carried out promptly so that consideration can be given to the use of powers of detention under mental health legislation.²⁵⁸

5.34 Having considered the views of consultees and the human rights issues, the Commission is not persuaded that provision should be made for bail decision makers to detain persons due to a risk of harm from others or self harm. As argued by consultees, such persons should not be placed in protective custody but rather should receive adequate protection from threats from others or appropriate treatment if there is a risk of self harm. In the view of the Commission, bail legislation should not provide for the detention of accused persons for their own protection.

(viii) Safety and/or welfare of victims

5.35 As noted in the consultation paper bail can be denied in some jurisdictions due to a risk to the safety and/or welfare of a victim.²⁵⁹ There was very limited support for this ground among consultees. Like the prevention of injury or damage above, the Commission considers that much of the territory covered by this ground would be covered by the ground of the risk of the commission of offences and consequently it is not necessary to include the safety and/or

²⁵⁵ *IA v France* App No 28213/95.

²⁵⁶ *IA v France* App No 28213/95, para 108.

²⁵⁷ Bail and Human Rights, para 5.10.

²⁵⁸ Bail and Human Rights, para 5.11.

²⁵⁹ See for example Bail Act 1980 (Qld), s 16(1)(a)(ii)(B).

welfare of victims as a separate ground for the denial of bail. Further, any risk to the safety or welfare of a victim which would fall short of a risk of the commission of an offence would arguably not be considered compatible with Article 5. The Commission considers that bail legislation should not make provision for the detention of accused persons for the safety and/or welfare of victims.

(ix) Public safety and/or welfare

5.36 In the course of the preliminary discussions carried out during the preparation of the consultation paper, the view was expressed that bail decision makers should focus primarily on risks to the safety and welfare of the public.²⁶⁰ It was also noted in the consultation paper that in some jurisdictions bail can be denied due to a risk to the safety or welfare of members of the public.²⁶¹ There was some support for detention for public safety reasons among the consultation responses received. As acknowledged by consultees, it is again likely that much of the territory covered by this ground would be covered by other accepted grounds, namely the commission of offences or the preservation of public order. Any risk to the safety or welfare of the public which would fall outside of either of these grounds would arguably not be considered a Convention compatible reason for refusing bail. In the view of the Commission, bail legislation should not make provision for the detention of accused persons for public safety and/or welfare reasons.

(x) Public interest

5.37 A small number of consultees suggested that bail legislation should permit the denial of bail in the public interest. It was suggested that this ground could cover a range of circumstances including, for example, a risk of harm to the accused from other people and self harm. In the consultation paper, it was observed that in Scotland, in addition to the three core grounds outlined above, bail may be refused if having regard to the public interest, including the interests of public safety,²⁶² there is 'any other substantial factor which appears to the court to justify keeping the person in custody.'²⁶³ Although such a ground is capable of interpretation in a manner which ensures compliance with Article 5, the Commission is of the opinion that the public interest is too broad

²⁶⁰ See Bail CP, para 5.16.

²⁶¹ See eg Bail Act 1977 (Vic), s 4(2)(d)(i).

²⁶² Criminal Procedure (Scotland) Act 1995, ss 23B(1)(a)(ii) and 23B(3).

²⁶³ Criminal Procedure (Scotland) Act 1995, s 23C(1)(d).

and imprecise a ground to justify detention and may be considered to give rise to an arbitrary deprivation of liberty, contrary to the ECHR.²⁶⁴ A similar provision was struck down in Canada for being excessively vague and imprecise.²⁶⁵ In the view of the Commission, bail legislation should not provide for the detention of accused persons in the public interest.

(xi) Confidence in the administration of justice

5.38 In the consultation paper the denial of bail in Canada on the ground that detention is considered 'necessary to maintain confidence in the administration of justice'²⁶⁶ was noted. There was some limited support for this ground among consultees. Like detention in the public interest, above, the Commission considers that such a ground is too broad and imprecise to justify a deprivation of liberty. The Commission is of the opinion that bail legislation should not provide for the detention of accused persons in order to maintain confidence in the administration of justice.

Level of risk necessary to establish grounds for denial of bail

5.39 Although consultees were not directly asked in the consultation paper for their views on the level of risk which must be posed in order to justify detention, it is evident from consultation responses and the international literature that differing levels of risk may apply in this context. One consultee indicated that a 'genuine' and 'demonstrable' risk that one of the grounds for detention is made out should be required. Another suggested that there must be a 'significant risk' in order to justify detention. Others preferred instead the lower thresholds of 'likely risk' or 'reasonable grounds'. Some consultees highlighted again the importance of carrying out a full assessment of the possible risks posed by the release of an accused person before a decision is taken on bail.

5.40 According to PACE a person can be detained after charge if the custody officer has 'reasonable grounds for believing that detention is necessary' to prevent the commission of offences, interference with witnesses etc. or has reasonable grounds for believing that the person will fail to surrender to custody. In England and Wales an accused person need not be released on bail if there

²⁶⁴ '[W]here a national law authorises deprivation of liberty, it must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness.': see *Dougoz v Greece*, (2002) 34 EHRR 61 (App No. 40907/98), para 55 and *Shteyn v Russia* App No 23691/06, para 89.

²⁶⁵ *R v Morales* [1992] 3 SCR 771.

²⁶⁶ Criminal Code, RSC 1985, c C-46, s 515(10)(c), available at: <http://laws-lois.justice.gc.ca/PDF/C-46.pdf>

are ‘substantial grounds for believing’ that if released on bail the defendant would fail to surrender, commit offences or interfere with witnesses.²⁶⁷ In Scotland the test is ‘any substantial risk’²⁶⁸ and in some Australian jurisdictions an ‘unacceptable risk’.²⁶⁹ The jurisprudence of the ECHR variously refers to a ‘plausible’,²⁷⁰ ‘genuine’,²⁷¹ ‘real’,²⁷² or ‘substantial’²⁷³ risk, indicating that the level of risk required must be sufficiently high to justify an interference with the right to liberty. In the view of the Commission, ‘substantial grounds for believing’ provides an appropriately high standard for the denial of bail and is, in the view of the Commission, compatible with ECHR jurisprudence.

Recommendation 23

5.41 The Commission recommends the inclusion in bail legislation of powers for the police and the courts to refuse bail if there are substantial grounds for believing that if granted bail the accused would:

Clause 3

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

Bail may also be refused if there are substantial grounds for believing that the detention of the accused is necessary to preserve public order.

Additional issues

(i) Lack of sufficient information to make a bail decision

5.42 As noted in the consultation paper, it is common in many jurisdictions for bail decision makers to have powers to detain accused persons due to a lack of sufficient information to make a bail decision for want of time.²⁷⁴ PACE permits the detention of a person charged with an offence if ‘his name or address cannot be ascertained or the custody officer has reasonable grounds for doubting whether a name or address furnished by him as his name or address

²⁶⁷ Bail Act 1976 (EW), sch 1, para 2.

²⁶⁸ Criminal Procedure (Scotland) Act 1995, s 23C.

²⁶⁹ See for example Bail Act 1977 (Vic), s 4(2)(d)(i) and the Bail Act 1980 (Qld), s 16(1)(a).

²⁷⁰ See *Clooth v Belgium* (1992) 14 EHRR 717 (App No 12718/87), para 40.

²⁷¹ See *Toth v Austria* (1992) 14 EHRR 551(App No 11894/85), para 69.

²⁷² See *Muller v France* App No 21802/93, para 43.

²⁷³ In *Makarov v Russia* the European Court of Human Rights indicated that it is for the state to demonstrate that there was a ‘substantial risk’ of interference with witnesses: *Makarov v Russia* App no 15217/07, para 130.

²⁷⁴ Bail CP, para 6.9.

is his real name or address'.²⁷⁵ One consultee expressed concern in relation to the denial of bail due to lack of information.

5.43 The Commission considers that it is prudent to provide for the short term refusal of bail due to a lack of sufficient information, such as the identity of the accused. The Commission agrees, however, with the conclusion of the Law Commission of England and Wales that detention for such purposes²⁷⁶ should be limited to a short period (no longer than necessary to allow the information to be obtained) and that detention on this ground should not be permitted if the lack of information is due to a failure on the part of the state to act with 'special diligence'.²⁷⁷ This power will allow a bail decision maker to detain an accused person if it does not have sufficient information to determine if one of the established grounds for detention exists and therefore should be considered a deferral of the bail decision, for the purposes of the restrictions on repeat bail applications.²⁷⁸ It is considered that this provision should be broad enough to include and therefore deal with the problem presently addressed by Article 39(1)(a)(i) of PACE.

Recommendation 24

Clause 5

5.44 **The Commission recommends the inclusion in bail legislation of powers for the police and the courts to defer the bail decision and detain an accused person if there is insufficient information to determine if one of the grounds for detention is established, provided:**

- **the detention is for no longer than necessary to allow the information to be obtained; and**
- **the lack of information is not due to a failure on the part of the state to act with 'special diligence'.**

(ii) Accused already in custody

5.45 The Draft Bill should also make provision, as is common in other jurisdictions,²⁷⁹ clarifying that a person who is technically granted bail by a

²⁷⁵ See PACE, Art 39(1)(a)(i).

²⁷⁶ See Bail Act 1976 (EW), para 5, Part 1 of sch 1.

²⁷⁷ Bail and Human Rights, para 6.13.

²⁷⁸ Bail and Human Rights, para 6.2.

²⁷⁹ See eg Criminal Procedure (Scotland) Act 1995, s 23A and Bail Act 1977 (Vic), s 4(2A).

court while in custody in relation to another offence does not have to be released from custody.²⁸⁰

Recommendation 25

Clause 8

- 5.46 **The Commission recommends the inclusion in bail legislation of a provision stipulating that an accused person granted bail by a court in connection with an offence while in custody in relation to another offence does not have to be released from custody.**

FACTORS TO CONSIDER

- 5.47 It was noted in the consultation paper that the factors which may be taken into account when a bail decision is made by the police are currently laid down in statute²⁸¹ but the equivalent factors considered in the courts are not.²⁸² It is common in many jurisdictions for bail legislation to include an exhaustive or non-exhaustive list of such factors,²⁸³ including the nature and seriousness of the offence, the background and community ties of the accused and his or her bail history. The views of consultees were invited on the factors which bail decision makers may take into account when determining whether the grounds for refusing bail have been met and the inclusion in legislation of a list of such factors (Q 12).
- 5.48 Most consultees who expressed an opinion on this issue were in favour of the inclusion in legislation of a list of factors to be considered by bail decision makers. Some indicated that such a statutory list would ensure consistency, good practice and equality of treatment. Others were of the view that a list of factors enshrined in statute would enhance transparency and public confidence. The view was expressed by several consultees that such a list should not be exhaustive, but should allow the decision maker some flexibility to consider other relevant matters.
- 5.49 One consultee questioned whether the creation of a statutory list of factors would enhance the decision making process. Some consultees were not in favour of placing such factors on a statutory footing, arguing that it would be

²⁸⁰ For recent judicial discussion of this issue, see *In the Matter of an Application by BG (An Applicant for Bail)* [2012] NIQB 13.

²⁸¹ Bail CP, para 3.36.

²⁸² Bail CP, para 3.37.

²⁸³ Bail CP, para 6.17.

too prescriptive. One consultee proposed instead the drawing up of guidelines accompanied by a statutory duty to have regard to the guidelines.

5.50 One consultee highlighted the importance of considering the relevance of the factor to the ground for detention relied upon. It was argued that while the strength of the evidence, for example, may be relevant to the risk that the accused will abscond, it should not be taken into account when considering the risk of the commission of offences, as this would contravene Article 6(2) of the Convention. The jurisprudence of the ECHR indicates that all relevant factors must be considered by the decision maker:

The national judicial authorities must examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty, and must set them out in their decisions dismissing the applications for release.²⁸⁴

5.51 The Commission is persuaded that bail legislation should include a non-exhaustive list of factors which, if relevant to the question of whether any of the grounds for the denial of bail have been established, must be considered by the bail decision maker.

5.52 In relation to the factors which might be included in such a list, consultees had a number of suggestions falling broadly under the following headings:

(i) Nature and seriousness of the offence

5.53 Many consultees expressed the view that the nature and seriousness of the offence are relevant considerations when the issue of bail is being decided. This factor is included in the list of factors to be considered by custody officers in PACE.²⁸⁵ The European Court of Human Rights has acknowledged that the seriousness of the offence and the severity of the sentence can be relevant considerations in assessing a defendant's likelihood to abscond but that it cannot simply be assumed that a person facing serious charges and/or a severe sentence will abscond.²⁸⁶

²⁸⁴ See eg *Popkov v Russia* App No 32327/06, para 54 and *Kokoshkina v Russia* App No 2052/08, para 75.

²⁸⁵ PACE, Art 39(2A)(a).

²⁸⁶ *Yagci and Sargin v Turkey* (1995) 20 EHRR 505 (App Nos 16419/90 and 16426/90), para 52; *Pshevecherskiy v Russia* App No 28957/02, para 67.

5.54 Some consultees expressed the view that bail decision makers should consider victim impact statements and/or community impact statements when deciding on bail.²⁸⁷ It was noted in the consultation paper that provision is made for the views of victims to be taken into account when considering bail in some jurisdictions²⁸⁸ and some consultees argued that the voice of the victim should be heard in the bail decision making process.

5.55 The Commission is persuaded that the nature and seriousness of the offence are relevant factors when determining if one of the grounds for the denial of bail has been established. In the view of the Commission, however, a distinction must be drawn between information provided to the decision maker from victims and/or community organisations about the nature and seriousness of the offence (including its impact) and the opinions or views of victims/community groups as to whether bail should be granted. The Commission considers that the former may be relevant to the grounds for the refusal of bail but that the opinions of victims/community organisations as to whether bail should be granted are irrelevant to the bail decision, which is ultimately a police or judicial decision based on the established grounds.

(ii) Strength of evidence against accused

5.56 Several consultees suggested that the strength of the evidence against the accused may be a relevant consideration when deciding on bail. Custody officers are required to consider this factor when deciding on post charge bail.²⁸⁹ As argued above, it was stressed by one consultee that while this consideration may be relevant to the accused person's likelihood to abscond, it would conflict with the presumption of innocence in Article 6(2) of the ECHR if this factor was considered relevant to the accused person's likelihood to commit offences while on bail. The European Court of Human Rights has pointed out several times that while the strength of the evidence (and in particular, the persistence of a 'reasonable suspicion') may be relevant to the issue of bail, (after a certain period) it is not enough on its own to justify

²⁸⁷ It was also suggested in preliminary discussions that the views of victims should be considered by decision makers, particularly when setting conditions in cases involving offences against the person and domestic violence: Bail CP, para 5.63.

²⁸⁸ Bail CP, para 6.54.

²⁸⁹ PACE, Art 39(2A)(d).

detention.²⁹⁰ The strength of the evidence against the accused is, in the view of the Commission, a relevant factor when determining the issue of bail.

(iii) Character, previous convictions and bail history

5.57 Most consultees agreed that the character of the accused and any previous convictions may be relevant to a bail decision. Several consultees also suggested that prior compliance or non-compliance with bail should be considered, emphasising that consideration should be given to both positive and negative aspects of the accused person's character when considering bail. The character and antecedents of the accused person and their bail history must, if relevant, be considered by custody officers when considering post charge bail.²⁹¹ The European Court of Human Rights has accepted that previous convictions can be relevant to the bail decision but has cautioned against 'stereotyped' reasoning, leading to an automatic assumption that a person with convictions will offend while on bail.²⁹² The Commission considers that the accused person's character, including previous convictions and bail history, may be relevant to the question of whether one of the grounds for the denial of bail has been established.

(iv) Community ties and associations

5.58 Several consultees argued that the accused person's community and family ties and employment status should be considered by bail decision makers. Community ties is included in the list of factors to be considered by custody officers in PACE.²⁹³ Presumably the assumption is that a person with greater ties to the community is less likely to abscond. One consultee expressed concern that vulnerable people might be refused bail due to a lack of suitable accommodation and the possibility of remand due to a lack of accommodation came up many times in the preliminary discussions carried out by the Commission, particularly in relation to children and young persons.²⁹⁴ The European Court of Human Rights has indicated that the mere absence of a fixed residence does not create a risk of absconding and a lack of employment

²⁹⁰ See eg *McKay v United Kingdom* (2007) 44 EHRR 41 (App No 543/03), para 45.

²⁹¹ PACE, Art 39(2A)(b) and (c).

²⁹² See eg *Muller v France* App No 21802/93, para 44 and *Letellier v France* (1992) 14 EHRR 83 (App No 12369/86), para 52.

²⁹³ PACE, Art 39(2A)(b).

²⁹⁴ See para 6.4, below.

should not necessarily lead to an assumption that there is risk of the commission of offences.²⁹⁵

5.59 It has been suggested to the Commission that foreign nationals may unjustifiably be viewed by the courts as more likely to abscond and therefore refused bail. Similar assumptions may be made in respect of persons from ethnic minority groups even if they were born and have always lived in Northern Ireland. It was suggested that a broader analysis of ‘community ties’ could be adopted, which would allow decision makers to consider issues such as links with community organisations and pending asylum applications as indications of a commitment to stay within the jurisdiction (at least until an application is determined).²⁹⁶ It is arguable that the disapproval expressed by the European Court of Human Rights for stereotyped reasoning would extend to any automatic assumption that a foreign national or a person from an ethnic minority will abscond.²⁹⁷ The community ties of the accused person may, in the view of the Commission, be relevant when determining the issue of bail.

5.60 Although no views were expressed by consultees regarding the relevance of the accused person’s associations to the grounds for the refusal of bail, this factor is included in the list of factors to be considered by custody officers in PACE.²⁹⁸ It has been argued that information regarding the accused person’s criminal associations is capable of shedding light on the defendants likelihood to commit offences while on bail.²⁹⁹ The Commission considers that the accused person’s associations may be relevant to the question of whether one of the grounds for the denial of bail has been established.

(v) Any conditions that may be imposed to reduce or eliminate any risk posed by the release of the accused person

5.61 In the consultation paper, it was observed that in some jurisdictions bail decision makers must, if relevant, consider the possibility of managing any risk posed by the release of the accused person by the imposition of bail

²⁹⁵ *Pshevecherskiy v Russia*, App No. 28957/02, para 68.

²⁹⁶ See EQIA consultation, para 4.7.

²⁹⁷ See eg *Muller v France* App No 21802/93, para 44 and *Letellier v France* (1992) 14 EHRR 83 (App No 12369/86), para 52.

²⁹⁸ PACE, Art 39(2A)(b).

²⁹⁹ See N Corre and D Wolchover, *Bail in Criminal Proceedings*, 3rd edition, New York: Oxford University Press Inc., 2004, para 1.4.3.3.

conditions.³⁰⁰ It was also noted that the European Court of Human Rights stipulates that in order to be justified, detention must be shown to be necessary, consideration having been given to alternative methods of securing the accused person's attendance at trial.³⁰¹ Arguably, if the accused person poses one of the identified risks (so that release is not mandatory) the decision maker must consider if that risk can be eliminated or reduced to an acceptable level by the imposition of appropriate bail conditions, with detention only justified if it cannot.³⁰² The Commission considers that it is appropriate that bail decision makers should, if relevant, consider if any risk posed by the release of the accused person could be managed with bail conditions when considering if one of the grounds for the denial of bail has been established.

(vi) Other relevant factors

5.62 Some consultees suggested that the accused person's mental health or addiction issues should be considered by the bail decision maker when determining if the grounds for detention have been established. Another argued that consideration should be given to the remorsefulness of the accused person. One suggested that undue delay in prosecuting the case should be taken into account. Another indicated that decision makers should consider the view of the prosecution regarding the applicant's suitability to bail. As suggested above in relation to victims/community organisations, it is arguably acceptable for decision makers to consider information offered by the police/prosecution which is relevant to any of the grounds for detention but the police/prosecution view on the accused person's suitability to bail is irrelevant to the bail decision, which is ultimately a police or judicial decision based on the established grounds. Clearly, any additional factors must only be considered by the bail decision maker if relevant to one of the four grounds for the denial of bail. In the view of the Commission, bail decision makers should consider any other relevant factors when considering if one of the grounds for the denial of bail has been established.

³⁰⁰ See eg Bail Act 1977 (Vic), s 4(3)(f).

³⁰¹ See eg *Ilowiecki v Poland* (2003) 37 EHRR 24 (App No 27504/95), paras 63 to 64.

³⁰² See Bail and Human Rights, para 9A.5.

Recommendation 26

5.63 **The Commission recommends the inclusion in bail legislation of a non-exhaustive list of factors which, if relevant to the question of whether any of the grounds for the refusal of bail have been established, must be considered by the bail decision maker. The following factors should be included in this list:**

Clause 3

- (i) nature and seriousness of the offence;**
- (ii) strength of evidence against accused;**
- (iii) character, previous convictions and bail history;**
- (iv) community ties and associations;**
- (v) any conditions that may be imposed to manage any risk posed by the release of the accused person;**
- (vi) any other relevant factors.**

5.64 As argued above, the overriding test in relation to the factors for consideration is their relevance to the question of whether detention can be justified under any of the four statutory grounds. The statutory list is merely a non-exhaustive indicator of the types of considerations which may inform that question. As these factors will apply to both police and court bail in respect of accused persons, the proposed provision will replace the list of factors for the consideration of police officers following charge in PACE.³⁰³

DISCLOSURE

5.65 In the consultation paper, jurisprudence which establishes an entitlement to disclosure of material on which the prosecution may rely in objecting to bail, subject to the possibility of sensitive information being withheld in limited circumstances, was outlined.³⁰⁴ Views were invited on the inclusion in legislation of a provision incorporating a right to disclosure or a statutory duty to disclose in the context of bail applications (Q 39).

5.66 Several consultees were in favour of such a provision arguing that it would enhance equality of arms. One consultee, while in favour of a disclosure provision, highlighted the importance of protecting witnesses and other sensitive information. It was argued by one consultee, not specifically in response to the disclosure question, that current bail proceedings may not

³⁰³ PACE, Art 39(2A).

³⁰⁴ Bail CP, para 2.18.

meet the requirements of Article 6 of the ECHR in terms of being truly adversarial and ensuring equality of arms between the parties. It was suggested that accused persons and their representatives may not be aware before the bail hearing of the nature and basis of the charges and the grounds and reasons for any objections to bail. Some consultees were not in favour of the creation a right to disclosure or a statutory duty to disclose in the context of bail applications, preferring instead to leave this issue to judicial discretion. It was argued that if there is a general right to disclosure at the pre-trial stage it may be misused leading to the bail courts becoming a dry run for the ultimate trial. Another consultee suggested that bail hearings are already becoming trials within trials with the defence arguing for bail on the basis of the strength of the evidence in the case. It was argued by another consultee that disclosure is already regulated by the ECHR, the *Attorney General's Guidelines on Disclosure* and the common law and that there is no need for further statutory provision.

5.67 Having considered the views of consultees, the Commission is not persuaded that bail legislation should include a provision conferring a right to disclosure or a statutory duty to disclose in the context of bail applications. The Commission takes the view that any statutory augmentation of the right to disclosure would be more effectively accomplished in the context of the existing disclosure rules. The issue of disclosure is governed by a detailed statutory regime within the Criminal Procedure and Investigations Act 1996, reinforced by the *Attorney General's Guidelines on Disclosure*.³⁰⁵ The duty to make appropriate disclosure in situations that fall outside the statutory regime is clearly established at common law³⁰⁶ and under the ECHR.³⁰⁷ Further, it would be difficult to be prescriptive about the range of material that should be subject to a duty to disclose in the particular context of bail decision making. The Commission also notes that there is no precedent in bail legislation from other jurisdictions of a provision regulating disclosure. The Commission is content to leave for judicial determination the extent of disclosure required, should the

³⁰⁵ Attorney General's Office, *Attorney General's Guidelines on Disclosure*, available at: <http://www.attorneygeneral.gov.uk/Publications/Documents/disclosure.doc.pdf>

³⁰⁶ See *R v Director of Public Prosecutions, ex parte Lee* [1999] 2 All ER 737.

³⁰⁷ See *Garcia Alva v Germany* (2003) 37 EHRR 12 (App No 23541/94) and *Lanz v Austria* App No 24430/94.

issue arise in an individual bail hearing, to ensure fairness between the parties.³⁰⁸

Recommendation 27

- 5.68 **The Commission does not recommend the inclusion in bail legislation of a provision incorporating a right to disclosure or a statutory duty to disclose in the context of bail applications.**

THE IMPOSITION OR VARIATION OF BAIL CONDITIONS

- 5.69 There is currently little guidance for bail decision makers regarding appropriate bail conditions to impose on a particular accused person. Police powers to attach conditions (including sureties and security) are subject to a test of necessity: no conditions shall be imposed unless necessary to prevent the person from failing to surrender to custody, committing an offence while on bail or interfering with witnesses or otherwise obstructing the course of justice.³⁰⁹ The magistrates' courts, on the other hand, may impose such conditions as appear to be likely to result in the person's subsequent appearance at the time and place required or to be necessary in the interests of justice or for the prevention of crime.³¹⁰ Further, as pointed out earlier,³¹¹ it seems that both surety and security can be imposed as conditions of police bail,³¹² while bail granted in the magistrates' court is restricted to the requirement of a surety or security.³¹³ Consultees were invited to express their opinions on the Commission's provisional view that, having regard to Article 5 of the ECHR, a single test of necessity for the imposition of bail conditions should be applied to both police and court bail (Q 23).
- 5.70 It was observed in the consultation paper that there is further statutory guidance provided to bail decision makers in some jurisdictions.³¹⁴ Provision is made in some jurisdictions for persons released on bail to be subject to the

³⁰⁸ See *In the Matter of Paul Robert Dinely, An Applicant for Bail* [2000] NIQB 52 and *In the Matter of Dennis Donaldson, An Applicant for Bail* [2002] NIQB 68.

³⁰⁹ PACE, Art 48(3F).

³¹⁰ Magistrates' Courts (NI) Order 1981, Art 133.

³¹¹ See paras 4.37 to 4.39, above. The Commission has recommended that security for bail can be imposed as an alternative to the new bail guarantor condition.

³¹² PACE, Arts 48(3B) and (3C).

³¹³ Bail granted by the magistrates' court may require a recognizance to be entered into with a surety or sureties or the deposit of a sum of money or other valuable security *in lieu* of sureties: Magistrates' Courts (NI) Order 1981, Arts 136 and 137.

³¹⁴ Bail CP, para 6.33 to 6.37.

least onerous conditions necessary to ensure compliance with bail.³¹⁵ Further guidance may include mandatory conditions, or at least mandatory consideration of certain conditions, in certain circumstances.³¹⁶ It was argued during preliminary discussions that bail decision makers do not adequately consider the circumstances of the individual when imposing bail conditions, including the accused person's ability to comply with the conditions.³¹⁷ The views of consultees were invited regarding the provision of more detailed guidance for bail decision makers on the scope and appropriateness of bail conditions (Q 24) and (if desirable) whether such guidance should be placed on a statutory footing (Q 25).

(i) Necessity

5.71 Most consultees who considered the matter were in favour of a single test of necessity for the imposition of bail conditions. It was argued that such a test would promote simplicity, consistency and fairness and would ensure that bail is used in a proportionate manner. Others suggested that a necessity test would guard against the imposition of inappropriate conditions and ensure compliance with human rights standards. One consultee argued, however, that a necessity test would be too rigid and that bail conditions should be relevant and proportionate to the circumstances of each case. Another indicated that the current provisions should remain unchanged.

5.72 As noted in the consultation paper, the European Court of Human Rights stipulates that when determining the issue of release or detention, consideration must be given to alternative methods of securing the accused person's attendance at trial.³¹⁸ If bail is granted, Article 5(3) provides that release 'may be conditioned by guarantees to appear for trial.' Although the ECHR makes no explicit reference to the imposition of bail conditions for purposes other than to secure the accused person's attendance at trial, it can arguably be assumed that if detention can be justified in order to avert one of the four well established risks, so too can the imposition of conditions be justified for those purposes.³¹⁹ Bail with conditions is after all a lesser interference with the right to liberty. Indeed bail with conditions must be

³¹⁵ Bail CP, para 6.37.

³¹⁶ Bail CP, para 6.34.

³¹⁷ Bail CP, para 5.37.

³¹⁸ *Ilowiecki v Poland* (2003) 37 EHRR 24 (App No 27504/95), paras 63 to 64.

³¹⁹ See Bail and Human Rights, para 9A.3.

granted instead of detention if the conditions imposed can avert the risk posed by the release of the defendant or reduce it to an acceptable level, as detention would clearly not be necessary in such circumstances.

5.73 Having considered all the issues, the Commission is persuaded that the Draft Bill should include a single test of necessity for the imposition of bail conditions by the police and the courts. This test should stipulate that conditions can only be imposed if considered necessary for one of four purposes for which detention can be ordered, namely for the purposes of preventing the accused person from:

- failing to surrender to custody;
- interfering with witnesses or otherwise obstructing the course of justice; or
- committing offences while on bail;

or for the preservation of public order, in the limited circumstances outlined above.

Recommendation 28

5.74 **The Commission recommends the inclusion in bail legislation of a single test of necessity for the imposition of bail conditions by the police and the courts. Bail conditions may be imposed if considered necessary for the purposes of preventing the accused person from:**

Clause 6

- **failing to surrender to custody;**
- **interfering with witnesses or otherwise obstructing the course of justice; or**
- **committing offences while on bail.**

Bail conditions can also be imposed for the preservation of public order.

5.75 The proposed provision should regulate the imposition and/or variation of bail conditions by the police post charge and by the courts up to the point of verdict. This provision would not govern the imposition or variation of conditions attached to compassionate bail, bail pending sentence or bail pending appeal.

(ii) Further guidance

5.76 Consultees were also largely supportive of the development of additional guidance for decision makers on the imposition or variation of bail conditions. It was asserted that the aim of such guidance should be to ensure compliance

with bail and not to unnecessarily criminalise persons for breach of conditions or to punish or stigmatise. Guidance should ensure compliance with human rights standards and best practice in enabling compliance. It was argued that guidance in relation to conditions may improve the effectiveness, consistency and proportionality of the bail system, minimising negative impacts on persons who are presumed innocent. One consultee argued that guidance should not be too prescriptive and that it should focus on reducing risks of harm to victims, witnesses and the public. The importance of conducting a full assessment of any risks posed by the release of the defendant and the provision of accurate information to the decision maker were again highlighted.

5.77 Most consultees were in favour of such guidance having a statutory basis, arguing that it would enhance consistency. Some, however, favoured non-statutory guidance or a Code, with a statutory obligation to have regard to that guidance. The Commission is persuaded, having considered all the relevant issues, that some further statutory guidance on the imposition or variation of bail conditions by the police and the courts would be beneficial. The Commission concurs with consultees that such guidance should seek to ensure that persons on bail comply with bail conditions and surrender to custody at the appointed time and place. This guidance will apply to the imposition or variation of bail conditions on post charge police bail and on court bail pending and during trial (up to verdict), that is to persons to whom the right to bail applies. Such guidance will also seek to meet human rights obligations under Article 5 of the ECHR.

5.78 Consultees made many suggestions in relation to the content of such guidance, falling broadly into three categories:

Least onerous conditions

5.79 Many consultees were supportive of the inclusion in guidance of an obligation to impose only the least onerous conditions necessary for the purposes of bail. It was argued that such an approach is both proportionate and fair. As indicated above, it seems that ECHR jurisprudence permits only the imposition of bail conditions considered necessary for one of the four defined purposes. A bail condition would, arguably, not be considered necessary if it was more onerous than necessary to reduce or eliminate the risk in question. Indeed, it has been suggested that the imposition of disproportionate bail conditions or

more onerous bail conditions than necessary may violate the ECHR.³²⁰ Bail conditions should only be imposed which, if breached, may impact upon the level of risk posed by the release of the defendant and therefore may warrant the arrest of the defendant in pursuance of the purpose for which the condition was imposed.³²¹ Bearing these considerations in mind, the Commission is persuaded that bail legislation should include a provision stipulating that conditions attached to bail should be no more onerous than necessary (if any conditions are necessary) to reduce or eliminate the risk posed by the release of the defendant.

Recommendation 29

- 5.80 **The Commission recommends the inclusion in bail legislation of a provision stipulating that conditions attached to bail should be no more onerous than necessary for one of the four purposes outlined in Recommendation 28, above.**

Clause 6

Consideration of accused person's understanding and/or ability to comply

5.81 Several consultees highlighted the difficulties accused person's may have in understanding and complying with bail conditions. Data gathered for the purposes of the EQIA consultation indicates that children and young persons, persons with mental health and/or learning difficulties and persons from ethnic minorities may experience particular difficulties understanding and complying with bail. Several consultees argued that conditions attached to bail should be realistic and achievable and that persons granted bail should not be 'set up to fail' by conditions that are too onerous or simply impossible to comply with. Consideration should be given to the particular circumstances of the accused person in assessing his/her capacity to comply with the conditions. Several consultees argued that some people may need help, such as bail support, to comply with conditions.

5.82 The Commission considers that it is appropriate that bail decision makers consider the accused person's understanding and/or ability to comply when imposing or varying conditions. It seems futile to impose conditions which the accused person does not understand or cannot adhere to. The imposition of such conditions inevitably results in breach and arrest, leading to detention

³²⁰ Bail and Human Rights, para 9B.4.

³²¹ Bail and Human Rights, para 9B.3.

and further demands on police and court time while the question of bail is considered again. It may be appropriate for decision makers to consider support (either formal bail support: see paras 7.12 to 7.25, below, or other schemes) to facilitate compliance with conditions. Conditions imposed should be realistic and achievable.

Recommendation 30

Clause 6

- 5.83 The Commission recommends that bail legislation should require decision makers to consider the accused person's understanding or ability to comply with conditions when imposing or varying conditions.**

Consideration of accused person's other commitments

- 5.84 It was suggested by some consultees that consideration should be given to employment, education/training and family/dependant responsibilities when bail conditions are set. In the course of the section 75 meetings conducted for the purposes of the Equality Impact Assessment, it was suggested that under the current regime inadequate account may be taken of the dependant responsibilities of males when bail conditions are imposed, even though they may share or provide full time child care.³²²
- 5.85 When the curfew and electronic monitoring requirements were introduced in 2008, a provision was included which required the court to ensure that a curfew requirement, as far as practicable, does not interfere with a person's religious beliefs or with any other condition or requirement to which that person may be subject and the times, if any, at which the person normally works (or carries out voluntary work) or attends a school or other educational establishment.³²³
- 5.86 Building on the precedent of the 2008 Order, the Commission believes that it is appropriate that bail decision makers should be required to consider the accused person's commitments when imposing or varying bail conditions. Disengagement from activities, including attendance at religious services, work, education or caring responsibilities, serve to alienate and stigmatise persons on bail and may contribute to non compliance. The Commission

³²² EQIA consultation, para 4.2(A).

³²³ Criminal Justice (NI) Order 2008, Art 38(1). See also Art 38(2) which provides that 'The Secretary of State may by order provide that paragraph (1) is to have effect with such additional restrictions as may be specified in the order.'

considers that bail decision makers should be required to consider such factors, if relevant, when imposing or varying bail conditions. Decision makers should also have discretion to consider other relevant matters such as attendance at Alcoholics Anonymous meetings. As this requirement would apply irrespective of the gender of the individual the Commission expressed the provisional view in the EQIA consultation that this approach would not have a differential or adverse impact on males and may contribute to promoting equality of opportunity for males. The Commission's view was confirmed by the responses to the EQIA consultation which also favoured such a provision on the basis that it would improve compliance with conditions.³²⁴

Recommendation 31

- 5.87 The Commission recommends that bail legislation should require decision makers to consider the accused person's work, education, family commitments, religious beliefs and any other relevant commitments when imposing or varying bail conditions.**

Clause 6

Other matters

- 5.88 It was argued in preliminary discussions that bail decision makers should take into account the impact of bail and possible conditions on victims and communities when deciding on appropriate conditions, particularly in cases involving offences against the person and domestic violence.³²⁵ In some jurisdictions special consideration must be given to submissions made on behalf of a victim when imposing bail conditions.³²⁶ It was argued by consultees that when an accused person is released on bail, the conditions which they must comply with may be directly relevant to the victim of the alleged offence, particularly where the accused person resides close to the victim or is known to the victim. One suggested that community impact statements should be considered by decision makers when imposing bail conditions.
- 5.89 In the view of the Commission, it is appropriate that there should be a general requirement for bail decision makers to consider any other matters that appear to them to be relevant when imposing or varying bail conditions. This may

³²⁴ EQIA report at Appendix A, paras A.20 to A.22.

³²⁵ Bail CP, para 5.63.

³²⁶ Bail Act 1985 (SA), s 11(2a).

include, for example, information supplied by or on behalf of a complainant or victim of crime regarding the impact of particular bail conditions on them.

Recommendation 32

Clause 6

5.90 The Commission recommends that bail legislation should require decision makers to consider any other considerations that appear relevant, when imposing or varying bail conditions.

(iii) Additional provisions concerning imposition of curfew requirements

5.91 The guidance discussed above is intended to apply to post charge police bail and court bail for accused persons. In relation to the imposition of curfew and electronic monitoring requirements as bail conditions, the Criminal Justice (NI) Order 2008 sets out some additional restrictions when such requirements are imposed by the courts.³²⁷ It seems, however, that the police may impose curfew requirements without any such restrictions.³²⁸ For reasons of consistency, the Commission believes that police officers imposing curfew requirements as bail conditions should also be subject to the restrictions of the 2008 Order. Both police and courts imposing a curfew requirement should, in addition to the general guidance on the imposition of bail conditions set out in the Draft Bill, be subject to the requirements of the Criminal Justice (NI) Order 2008. As electronic monitoring requirements can only be imposed by the courts, no amendments are necessary in respect of those requirements.

Recommendation 33

Clause 37

5.92 The Commission recommends that curfew requirements imposed on post charge police bail should be subject to the restrictions imposed on the attachment of curfew requirements by the courts in the Criminal Justice (NI) Order 2008.

³²⁷ See Criminal Justice (NI) Order 2008, Arts 37 and 38. The provisions in the 2008 Order are limited to court bail: Criminal Justice (NI) Order 2008, Art 35(1)(a).

³²⁸ The police impose curfew requirements under their general power to impose bail conditions under PACE, Art 48(3D).

DUTY TO PROVIDE AND RECORD REASONS

5.93 The European Court of Human Rights demands that ‘adequate’³²⁹ reasons are provided for any decision to refuse bail and ‘abstract’ or ‘stereotyped’ explanations will not suffice.³³⁰ Reasons must be ‘relevant and sufficient’ to justify detention³³¹ and must take into account any counter-arguments put forward by the accused.³³² It is important that there is an appropriate record of the reasons relied upon by the decision maker as the European Court of Human Rights will examine these reasons closely when determining if detention was justified. Although there may not be an independent Convention requirement to record the reasons for decisions,³³³ it will be difficult for a state to establish that a decision maker had adequate reasons for their decision if there is not a sufficiently detailed record of those reasons.³³⁴

5.94 It was observed in the consultation paper that verbal reasons for the refusal of bail are usually given by the courts in Northern Ireland, although there is no general statutory obligation to provide reasons for the refusal or grant of bail or the imposition or variation of bail conditions.³³⁵ There is, however, a requirement to give reasons in open court for a decision to remand a child or young person under Article 12(1) of the Criminal Justice (Children) (NI) Order 1998.³³⁶ The police also have statutory duties to make a written record of the grounds for detaining a suspect/defendant³³⁷ and to make a record of any decision to impose or vary bail conditions.³³⁸

5.95 In other jurisdictions, statutory duties to provide reasons for bail decisions are common and may include a duty to provide reasons for a refusal of bail, a grant of bail, a grant of bail contrary to prosecution objections, a grant of bail contrary to a statutory presumption against bail, the imposition or variation of conditions or the failure to attach particular conditions.³³⁹ During the preliminary discussions carried out during the preparation of the consultation

³²⁹ *Letellier v France* (1992) 14 EHRR 83 (App No 12369/86), para 41.

³³⁰ *Letellier v France* (1992) 14 EHRR 83 (App No 12369/86), paras 51 to 52; *Clooth v Belgium* (1992) 14 EHRR 717 (App No 12718/87), para 44; *Muller v France* App No 21802/93, para 44.

³³¹ *Wemhoff v Germany* (1979-80) 1 EHRR 55 (App No 2122/64), para 12.

³³² See eg *Letellier v France* (1992) 14 EHRR 83 (App No 12369/86), paras 46 and 51.

³³³ See *Van der Tang v Spain* (1995) 22 EHRR 363, (App No 19382/92), para 60.

³³⁴ See *Bail and Human Rights*, para 10.5.

³³⁵ *Bail CP*, para 3.73.

³³⁶ *Criminal Justice (Children) (NI) Order 1998*, Art 13(1).

³³⁷ This obligation arises in respect of both pre charge (*PACE*, Art 38(4)) and post charge (*PACE*, Art 39(3)) detention.

³³⁸ *PACE*, Art 48(3H).

³³⁹ *Bail CP*, paras 6.62 to 6.64.

paper, support was expressed for greater openness and transparency in bail decision making.³⁴⁰ The Commission expressed the provisional view in the consultation paper that bail legislation should include a statutory right to reasons for a refusal of bail and a requirement for decision makers to record such decisions (Q 37). The views of consultees were invited on that issue and on the inclusion of a broader requirement to record reasons for other bail decisions, including the imposition or variation of conditions, the imposition or failure to impose certain conditions only, decisions to grant bail or decisions to grant bail contrary to prosecution objections (Q 38).

5.96 Although one consultee argued that statutory provision for a record of reasons for denying bail would not substantially improve the current situation, consultees were generally in favour of the provision of reasons for a refusal of bail for a number of reasons. Several consultees stated that the provision of reasons would promote transparency, accountability and understanding of bail decision making. It was also suggested that the availability of a record would facilitate monitoring and public scrutiny of bail practice and would promote consistency and public confidence in decision making. One consultee argued that such an approach would ensure compliance with ECHR obligations and others stated that reasons for refusal were necessary to highlight any concerns which may be addressed in further bail applications. Indeed, it was argued that the provision of reasons in the magistrates' court may allow the High Court, on a renewed application, to confine its consideration to the reasons for refusal in the magistrates' court. This, it was suggested, would be desirable to avoid the potential unfairness of an applicant being denied bail on one ground in the magistrates' court, then after making efforts to address the reasons for that decision, being refused bail on an entirely different ground in the High Court.

5.97 Some consultees had reservations, however. One consultee suggested that there should be provision to withhold reasons if their disclosure would endanger another person or persons and another argued that sensitive material may need to be protected. It was suggested that interpreters may be necessary to ensure that persons from ethnic minorities fully understand the reasons for a denial of bail. One consultee argued that only verbal reasons in

³⁴⁰ Bail CP, para 5.67.

open court should be provided because producing written records might cause considerable delay in the magistrates' courts which deals with large numbers of bail applications.

5.98 Many consultees were also in favour of the provision of reasons and a record for the imposition or variation of bail conditions for many of the reasons stated above including transparency, public confidence, scrutiny and compliance with the ECHR. One consultee argued that this should not be limited to some conditions only. It was once again suggested that sensitive material may need to be protected and one consultee argued that verbal reasons should suffice as a requirement to record reasons would lead to delay in the magistrates' courts.

5.99 Several consultees expressed approval for the creation of a requirement to record the reasons for decisions to grant bail, again citing reasons of transparency, public confidence and scrutiny. It was argued that such a requirement would provide an insight into the complexity of bail decisions to the parties and the public, which may be particularly beneficial when difficult or unpopular decisions are made. One consultee argued that reasons for granting bail are necessary for the purposes of prosecution appeals. It was suggested that reasons for granting bail are particularly important when bail is opposed and in relation to serious and/or persistent offences. One consultee argued that if there is a presumption in favour of bail, reasons for granting bail are irrelevant and another simply did not agree with the creation of a requirement to record the reasons for decisions to grant bail.

5.100 In the view of the Commission, it is a fundamental element of the right to liberty that where that right is suspended or limited, the defendant should be provided with the reasons.³⁴¹ Reasons are also important to allow the accused person to challenge the decision before a higher court if he or she wishes to do so.³⁴² The Draft Bill should impose an obligation on bail decision makers to provide reasons for a decision to refuse bail or to impose or vary conditions and for a record to be made of the decision and the reasons for it.

³⁴¹ See N Corre and D Wolchover, *Bail in Criminal Proceedings*, 3rd edition, New York: Oxford University Press Inc., 2004, para 1.6.1.1.

³⁴² See above.

5.101 It is not appropriate, in the view of the Commission, that bail legislation stipulate what form the record of the reasons should take, however. This matter may be clarified in rules of court, relying on the general power to make rules of court under the Interpretation Act (NI) 1954.³⁴³ The Commission considers, however, that provision should be made for the accused person to receive a copy of this record if he or she requests it. Access to such a record is essential if the accused person wishes to challenge the bail decision.

Recommendation 34

*Clauses 10,
11, 32
and 36*

5.102 **The Commission recommends the inclusion in bail legislation of a requirement on the police and the courts to provide reasons for the following decisions made in respect of accused persons and for a record to be made of the decision and the reasons for it:**

- **a decision to refuse bail;**
- **a decision to impose or vary bail conditions.**

Provision should also be made for the accused person to be supplied with a copy of that record on request.

5.103 In the view of the Commission, it is not essential at this stage that reasons are provided and recorded for decisions to grant bail. The Commission concurs with the conclusion of the Law Commission of England and Wales that the requirement to provide and record reasons for any grant of bail contrary to prosecution objections under the Bail Act 1976³⁴⁴ may 'promote thoughtful decision making' and is unlikely to raise any difficulties of compatibility with the Convention.³⁴⁵ However, the Commission believes that it may be appropriate to consider the provision and recording of reasons for decisions to grant bail on a future occasion when arrangements have been established for the recording of reasons for other bail decisions and such arrangements have been operating effectively in practice for some time.

5.104 Currently a record is made of the appointed time and place to surrender to custody and any conditions imposed or varied when a person is released on police bail.³⁴⁶ The accused person can request a copy of that record.³⁴⁷ For

³⁴³ Interpretation Act (NI) 1954, s 21(1).

³⁴⁴ Bail Act 1976 (EW), s 5(2B).

³⁴⁵ Bail and Human Rights, para 10.15, fn 15.

³⁴⁶ See PACE, Arts 48(2A) and (3H).

³⁴⁷ See PACE, Arts 48(2A) and (3H).

reasons of consistency, the Commission considers that an equivalent requirement to make a record of the appointed time and place to surrender to custody and any conditions imposed or varied when a person is granted bail in the courts should also be included in bail legislation. A copy of this record should be available to the accused person on request. Such a provision may enhance understanding and compliance with the terms of bail.

Recommendation 35

5.105 The Commission recommends the inclusion in bail legislation of a requirement on the courts to make a record of the appointed time and place to surrender to custody and any conditions imposed or varied when an accused person is granted bail. A copy of this record should be provided to the accused person on request.

*Clauses 9
and 11*

CONCLUSION

5.106 The Commission has considered in this chapter statutory provision for the grant of bail to persons accused of criminal offences. It is the view of the Commission that the creation of a statutory right to bail applicable to persons charged by the police and before the courts pending and during trial is compatible with Article 5 of the ECHR and will promote consistency in bail decision making. Clear statutory grounds for the refusal of bail are desirable for the same reasons. The Commission considers that it is appropriate that bail legislation includes a non-exhaustive list of factors which may be relevant to the the statutory grounds for detention. The inclusion in legislation of a right to disclosure or a statutory duty to disclose in the context of bail applications, in the view of the Commission, is not desirable.

5.107 If detention is not justified in the circumstances, an accused person may be granted bail with or without conditions. The Commission considers that it is appropriate that bail legislation offers guidance on the imposition of bail conditions on accused persons. Having considered the views of consultees and human rights obligations, the Commission is persuaded that bail conditions should only be imposed if considered necessary for one of the four purposes for which detention may be ordered. Such conditions should be no more onerous than necessary for those purposes. In order to encourage compliance with bail, decision makers must, if relevant, consider the accused person's understanding and ability to comply with conditions and any relevant

commitments the accused person may have. Decision makers may also consider any other relevant matters, including the impact of bail conditions on victims and the community, when imposing or varying conditions.

5.108 The provision and recording of reasons for key bail decisions is, in the view of the Commission, necessary to ensure compliance with the ECHR and to increase transparency.

CHAPTER 6: BAIL IN RESPECT OF CHILDREN AND YOUNG PERSONS

INTRODUCTION

6.1 As discussed in the consultation paper, the bail and remand of children and young persons requires consideration of many conflicting principles. Principles of liberty, justice and public protection must be balanced alongside principles concerning the welfare and protection of the child or young person. In this chapter, bail law and practice in relation to children and young persons accused of offences is evaluated in the context of the current aims of the youth justice system and internationally recognised children's rights standards. The test for bail for children and young persons accused of offences applied by the police and the courts is examined and the particular difficulties of locating appropriate accommodation for young persons on bail is considered. Where remand is necessary, consideration is given to appropriate detention facilities for persons under 18 years of age. The desirability of creating statutory guidance for the imposition of bail conditions on children and young persons is deliberated and the provision of child appropriate explanations of bail decisions is considered. The provision of support and accommodation for children and young persons on bail is also discussed.

RIGHT TO BAIL AND GROUNDS FOR REFUSAL

6.2 In the consultation paper, inconsistencies between the tests for bail in respect of children and young persons applied by the police and the courts were highlighted.³⁴⁸ The powers of the courts in Northern Ireland to order the detention of children and young persons accused of offences are limited in scope. Article 12 of the Criminal Justice (Children) (NI) Order 1998 provides that a court shall release a child on bail unless the court considers that it is necessary to remand him or her to protect the public and:

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

³⁴⁸ See discussion at Bail CP, para 4.27.

has been found guilty of an indictable offence within the preceding two years from the date on which he is charged with the present offence.

- 6.3 There is a strong presumption in favour of bail for young persons, with remand only available for certain offences or in certain circumstances and with an over-riding emphasis on the protection of the public. By contrast, the police enjoy broad powers to detain young persons following charge for all the same reasons as adults, with the additional power to detain a young person in their own interests.³⁴⁹ It was argued in the consultation paper that the inconsistency between the powers of the police and the courts to detain children and young persons accused of offences, coupled with the lack of availability of suitable bail accommodation for many young persons, may contribute in part to the large number of short term PACE admissions to the juvenile justice centre.³⁵⁰ By contrast, it was argued by some during preliminary discussions that there is a perception that bail is granted too readily to children and young persons with particular frustration expressed about the repeated release of children and young persons arrested in connection with persistent low level offending or breach of bail conditions.³⁵¹ Some suggested that Article 12, like Article 39(1) of PACE, should permit detention for the child's own protection.³⁵²
- 6.4 It was further argued during preliminary discussions that lack of appropriate accommodation may result in young persons being pushed unnecessarily into the criminal justice system. Besides the negative impact such detention may have on the family life, education and mental health of the child, there was concern that the deterrent effect of remand to the juvenile justice centre will be lost if children are placed there unnecessarily.³⁵³ It was noted that in at least one other jurisdiction a statutory prohibition on remand solely for accommodation reasons has been enacted.³⁵⁴
- 6.5 Some further rules restricting the detention of younger children and those arrested in connection with less serious offences are also laid down in the Criminal Justice (Children) (NI) Order 1998. Article 6 of the 1998 Order provides that a young person arrested under a warrant must be released if the

³⁴⁹ PACE, Art 39(1)(b).

³⁵⁰ Bail CP, para 4.27.

³⁵¹ Bail CP, para 5.74.

³⁵² Bail CP, para 5.74.

³⁵³ Bail CP, para 5.77.

³⁵⁴ See Children, Youth and Families Act 2005 (Vic), s 346(9); Bail CP, para 6.75.

child or his or her parent or guardian enters into a recognizance,³⁵⁵ unless arrested for an indictable offence³⁵⁶ or if the custody officer considers that the child should not be released for the protection of the public.³⁵⁷ Article 7 of the 1998 Order provides that a child who is apparently under 14 and arrested without a warrant for an offence other than homicide must be released if the child or his or her parent or guardian enters into a recognizance,³⁵⁸ unless arrested for an indictable offence³⁵⁹ or if the custody officer considers that the child should not be released for the protection of the public.³⁶⁰ These provisions, like Article 12 of the 1998 Order, reflect the principal aim of the youth justice system, as expounded in the Justice (NI) Act 2002, which is to protect the public by preventing offending by children.³⁶¹

6.6 It was noted in the consultation paper that in many jurisdictions, a test for bail similar to that laid down for adults is applied to children, subject to consideration of the special needs of young persons or general youth justice principles, such as the best interests of the child and the principle that detention should be a measure of last resort and for the shortest appropriate period of time.³⁶² Criticisms were expressed during preliminary discussions regarding the absence of any explicit reference in provisions concerning the remand of children and young persons to international principles, including detention as a measure of last resort and for the shortest time possible.³⁶³ It was also argued that children should not be remanded for welfare or care reasons.

6.7 On the basis of all these considerations, the Commission invited the views of consultees regarding the creation of a single test for bail for children and

³⁵⁵ The recognizance may be entered into with or without sureties and must be for such amount as the custody officer considers will secure the attendance of the child at the hearing of the charge: Criminal Justice (Children) (NI) Order 1998, Art 6(1).

³⁵⁶ Criminal Justice (Children) (NI) Order 1998, Art 6(3)(a) was originally limited to a 'serious arrestable offence' as defined at PACE, Art 87(as originally made). This requirement was substituted with 'indictable offence' when the concepts of 'arrestable offence' and 'serious arrestable offence' were abolished: see Police and Criminal Evidence (Amendment) (NI) Order 2007, sch 1, para 34(1).

³⁵⁷ Criminal Justice (Children) (NI) Order 1998, Art 6(3)(b).

³⁵⁸ The recognizance may be entered into with or without sureties and must be for such amount as the custody officer considers will secure the attendance of the child at the hearing of the charge: Criminal Justice (Children) (NI) Order 1998, Art 7(1) and (3).

³⁵⁹ This requirement for an 'indictable offence' replaced the original requirement for a 'serious arrestable offence' when that concept was abolished: see with the Police and Criminal Evidence (Amendment) (NI) Order 2007, sch 1, para 34(3).

³⁶⁰ Criminal Justice (Children) (NI) Order 1998, Art 7(5)(b).

³⁶¹ Justice (NI) Act 2002, s 53(1).

³⁶² Bail CP, para 6.71.

³⁶³ Bail CP, para 5.73.

young persons accused of offences which would be applied by both the police and the courts (Q 40). Views were also invited on whether a reformed test should closely mirror the test laid down for adults, subject to appropriate modification to reflect the age of the young person (Q 41). Finally, the views of consultees were sought on whether bail legislation should prohibit the detention of children and young persons solely for accommodation reasons (Q 42).

6.8 Largely for reasons of consistency and clarity, almost all consultees were in favour of the creation of a single test for bail in respect of children and young persons to be applied by the courts and the police. One consultee argued that a single test for the police and courts should lead to a reduction in PACE detention and may address inconsistencies in between police and court bail. Another consultee emphasised the importance of young persons understanding bail decisions and argued that a single test may result in uniform and fair decision making. It was argued by several consultees that this test must conform to international standards (see further, below).

6.9 Consultees were divided, however, on the issue of whether the test for bail should mirror the test laid down for adults, subject to modification reflecting the age of the young person. Some consultees were supportive of this approach with one arguing that such a test would be more readily understood by practitioners, police and the public. Several others expressed approval for such a test provided it takes adequate account of the age and ability of the young person and is compliant with human rights standards protecting children and young persons, including the United Nations Convention on the Rights of the Child ('CRC') and best practice. Particular international standards highlighted included the primacy of the 'best interests' of the child,³⁶⁴ the principle that detention is used as a measure of last resort and for the shortest appropriate period of time³⁶⁵ and the principle that, wherever possible, alternative measures such as close supervision, intensive care or placement with a family or in an educational setting or home should be used instead of detention.³⁶⁶ The particularly damaging impact of custody upon children and

³⁶⁴ *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 577 UNTS 3 (entered into force 2 September 1990) ('CRC'), Art 3(1).

³⁶⁵ CRC, Art 37(b).

³⁶⁶ *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, A/RES/40/33, 96th plenary meeting, 29 November 1985 (the 'Beijing Rules'), 1985, r 13.2.

young persons, in terms of family life, education and mental health, was stressed by several consultees. The vulnerability of children and young persons in the criminal justice system and the potential for ‘criminal contamination’ during pre-trial detention were also highlighted. One consultee argued that the fact that the age of criminal responsibility is 10 years of age makes the provision of additional support and protection for children in the bail system even more important.

6.10 Similar issues were raised by those consultees who opposed the application of the adult test for bail, subject to modification reflecting the age of the young person. Particular concerns were expressed that such a test would not comply with international standards and may take inadequate account of the child’s or young person’s individual circumstances. It was argued that children and young persons who come into contact with the criminal justice system often live in complex circumstances which may include socio-economic deprivation, poor educational attainment, learning difficulties, drug or alcohol abuse, poor mental health, periods of time in care and direct or indirect experience of sexual abuse or violence. It was argued by one consultee that it is particularly important that consideration is given to the maturity of the young person as it may impact upon the young person’s ability to participate, communicate, reason and understand the process.

6.11 The test for bail for children and young persons should, it was argued, take account of the ‘whole child’ and fully recognise the individual circumstances and background of the child or young person. It was asserted that bail decisions in respect of children should be based on a robust assessment of the child’s individual circumstances and risks and conform with the concept of defensible decision making. Consultees stressed again that the test should comply with international children’s rights standards including the ‘best interests’ principle and the principle that detention is used as a measure of last resort and for the shortest appropriate period of time.³⁶⁷ One consultee argued that Article 12 of the Criminal Justice (Children) (NI) Order 1998 should form the basis of the test for bail for children and young persons, arguing that this test complies with Article 5 of the ECHR in that it permits remand only if the child or young person poses a significant risk. It was suggested by one

³⁶⁷ CRC, Art 37(b) .

consultee that children should not have to adhere to the same rules as adults and another indicated that children should be afforded at least the same protections as adults.

6.12 Several consultees complained about the principal aim of the youth justice system being to protect the public by preventing offending by children within the Justice (NI) Act 2002.³⁶⁸ It was argued that a more child-centred approach, which takes account of the commitments made by the United Kingdom to the CRC, would be more appropriate.

6.13 There was much support, among EQIA and other consultees, for the introduction of a statutory prohibition on remand solely for accommodation reasons. It was argued that remand solely for accommodation reasons contravenes the CRC and other children's rights standards which state that detention should be a measure of last resort. Several consultees raised, in particular, the vulnerability to remand of 'looked after' children and children with unstable accommodation arrangements and argued that children should not be penalised because of a lack of state provision. One consultee asserted that the acknowledged link between state care and custody should be considered in bail decisions relating to children. It was argued that detention is not being used as a measure of last resort but rather children who are 'management problems' (rather than 'offenders') are being moved from residential care, via PACE, to the juvenile justice centre. It was suggested that remand due to lack of accommodation is also frustrating for young persons. It was argued by one consultee that the need for accommodation should be met by social services and another suggested that courts consider granting bail to the care of the appropriate authority, to ensure that any legislative 'duty to provide' is met.

6.14 Some consultees, however, were not supportive of such a provision with one consultee arguing that the acknowledged difficulties of accommodating young persons on bail will not be resolved by 'tying the hands of courts'. Another argued that discretion should be retained to allow the courts to deal with difficult cases where there is no suitable accommodation and if the young person is released to unsuitable accommodation he or she will be at risk or

³⁶⁸ Justice (NI) Act 2002, s 53(1).

present a risk to the public. It was argued that an alternative to such a prohibition may be the imposition of a statutory obligation on certain agencies to make suitable accommodation available. Several consultees expressed the view that remand for care reasons should also be prohibited.

6.15 Having considered closely the views of consultees, it seems that a test for bail for children and young persons which is applied consistently by the police and the courts is appropriate. A uniform approach may contribute to a reduction in short term PACE admissions to the juvenile justice centre and may be easier for young persons and others to understand. The consultation responses have also persuaded the Commission that any test for bail for children and young persons accused of offences must take account of the following factors:

- (i) the age, maturity, needs and understanding of the young person;
- (ii) the best interests of the child as a primary consideration;
- (iii) that detention pending trial must be used only as a measure of last resort and for the shortest possible period of time.

6.16 The Commission agrees with consultees that it is essential to consider more than just the age of the young person but that their individual circumstances should be considered by bail decision makers. In the view of the Commission decision makers should be required to consider the age, maturity, needs and understanding of the young person in all cases, not simply if the decision maker deems such factors relevant. The Commission considers that there is sufficient flexibility within these factors for decision makers to take full account of the circumstances of young persons, including, where appropriate, their 'looked after' status or other vulnerabilities.

6.17 The recent report of the Youth Justice Review team recommended the amendment of the aims of the youth justice system in the Justice (NI) Act 2002 to 'fully reflect the best interest principles as espoused in Article 3 of the UNCRC'.³⁶⁹ Article 3 provides that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

³⁶⁹ Department of Justice, *A Review of the Youth Justice System in Northern Ireland* (2011), ('Youth Justice Review'), recommendation 28, para 5.4.

The Commission welcomes the recommendation of the Youth Justice Review and proposes that the Draft Bill should expressly provide that the best interests of the child shall be a primary consideration in bail decision making. The Commission is also convinced that such legislation should incorporate the principle that detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time.

6.18 Further, the Commission is persuaded that bail legislation should include a prohibition on remand solely for accommodation reasons. In the Commission's analysis of bail and remand in respect of children and young persons, the issue of accommodation and the possibility of children (particularly 'looked after children') being placed on remand for accommodation reasons emerged as a central concern. A statutory prohibition on remand for accommodation reasons has been in place for some time in Victoria, Australia.³⁷⁰ Although statistical evidence on the effect of this provision in reducing the number of children and young persons remanded in custody in Victoria is inconclusive, the Australian Law Reform Commission recently commented that this provision is 'an appropriate legislative safeguard'.³⁷¹ The Commission considers that the Draft Bill should include a provision the objective of which is to curb the trend in welfare detention. The Commission acknowledges, however, that a statutory prohibition alone cannot eliminate detention for accommodation reasons – it must be accompanied by suitable accommodation options for children on bail: see paras 6.65 to 6.78, below.

6.19 In relation to the grounds for the detention of children and young persons, the Commission considers that it is important to remember that the minimum protections provided by the ECHR also apply to children. Although there is no explicit recognition within Article 5 that children may require additional protection in this context, it has been argued that the ECHR has and should be interpreted in a manner which provides further protection to children and young persons, drawing on other relevant international standards.³⁷²

³⁷⁰ See Children, Youth and Families Act 2005 (Vic), s 346(9). See also the earlier: Children and Young Person Act 1989 (Vic) s 129(7).

³⁷¹ Australian Law Reform Commission, 'Seen and heard: priority for children in the legal process' (ALRC Report 84, last modified 24 August 2010) available at: <http://www.alrc.gov.au/publications/report-84>, para 18.163.

³⁷² See *T v United Kingdom* (2000) 30 EHRR 121 (App No 24724/94); *V v United Kingdom* App No 24888/94; U Kil Kelly, *The Child and the European Convention on Human Rights*, England: Dartmouth Publishing Company Ltd., 1999, p 60 to 61.

6.20 Bearing all of these considerations in mind, the Commission is of the view that children and young persons should be afforded all the same protections under bail legislation that are provided to adults, in addition to a number of further important safeguards. In the view of the Commission, children and young persons should be subject to the same right to bail and grounds for the refusal of bail as adults: see paras 5.6 to 5.46, above. Decision makers should be required to consider, if relevant, the same factors they would consider in respect of adults: see paras 5.47 to 5.64, above. In addition to this, children and young persons should be afforded the further safeguards outlined above.

Recommendation 36

6.21 **The Commission recommends that the general right to bail for all persons accused of offences or awaiting trial, subject to the power of the police or the courts to refuse bail, should also apply to children and young persons accused of offences. Therefore such children and young persons should have a right to bail unless there are substantial grounds for believing that if granted bail the child or young person would:**

Clauses 1, 2, 3 and 40

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

Bail may also be refused if there are substantial grounds for believing that the detention of the child or young person is necessary to preserve public order.

Recommendation 37

6.22 **The Commission recommends that, in addition to the list of factors which, if relevant, must be considered when decision makers are determining if detention is justified in respect of adults accused of offences, decision makers must also consider the following factors when determining if detention is justified in respect of a child or young person accused of an offence:**

Clause 4

- **the age, maturity, needs and understanding of the young person;**
- **the best interests of the child as a primary consideration;**
- **that detention pending trial must be used only as a measure of last resort and for the shortest possible period of time.**

Recommendation 38

Clause 4

6.23 The Commission recommends that bail legislation should prohibit the detention of children and young persons solely on the grounds of a lack of suitable accommodation.

6.24 The Commission is confident that these proposals address the legitimate concerns expressed regarding the inappropriate use of custodial remand and the failure to meet international obligations. The Commission believes that the proposed regime will be flexible enough to allow consideration of the full circumstances of children and young persons and will also have the advantage of being easily understood. The proposed provisions will apply to children and young persons charged with an offence and who are facing trial or on trial (up to the verdict). They will not extend to children and young persons seeking compassionate bail, bail pending sentence or appeal.

6.25 Related to these recommendations, the Commission also recommends the abolition of several other provisions which appear inconsistent with other proposed provisions and which the Commission has been informed are not relied upon in practice. In particular, the Commission recommends the abolition of:

- Article 6 of the Criminal Justice (Children) (NI) Order 1998 (child arrested under warrant);
- Articles 7 and 8 of the Criminal Justice (Children) (NI) Order 1998 (child under 14 arrested for offence other than homicide);
- Article 31 of the Criminal Justice (Children) (NI) Order 1998 (remand for purpose of obtaining information).

6.26 Articles 6 and 7 of the 1998 Order require the release of children arrested under warrant and those apparently under 14 years old arrested for an offence other than homicide (who cannot be brought forthwith before a magistrates' court), if the child or his parent or guardian enters into a recognizance for such amount as the custody officer considers will secure the attendance of the child at the hearing of the charge.³⁷³ Such children do not have to be released, however, if the child was arrested for an indictable offence or if it is necessary

³⁷³ Criminal Justice (Children) (NI) Order 1998, Arts 6(1) and 7(1), (2) and (3).

to detain the child for the protection of the public.³⁷⁴ Article 8 governs the treatment of children not released under Article 7. The emphasis on the protection of the public in these provisions is not consistent with the focus in the Draft Bill on the best interests of the child as a primary consideration. Further, the Commission has recommended the abolition of personal recognizances for bail in this context: see paras 4.2 to 4.9, below. The Commission does not consider special rules such as these necessary or desirable and is of the view that all children arrested and charged with offences should be subject to the same rules, taking into account their age, maturity, needs and understanding.

6.27 Where a youth court has remanded a child for information to be obtained with respect to him or her, Article 31 of the 1998 Order permits a magistrates' court to extend, in the absence of the child, the period for which he or she is remanded.³⁷⁵ A child so remanded must be brought before the court at least once every two weeks.³⁷⁶ It appears that this provision could apply at any stage of the criminal process, not just pre-sentence and therefore it may conflict with the limited provision for remand for information in the Draft Bill: see paras 5.42 to 5.44, above. The Commission has been informed that this provision is not used in practice as it is not necessary to detain young persons to commission reports or gather information. The Commission considers that children accused of offences should be remanded for information only in the limited circumstances outlined above: see para 5.44.

Recommendation 39

6.28 **The Commission recommends that bail legislation should abolish the following provisions:**

Clause 42

- **Article 6 of the Criminal Justice (Children) (NI) Order 1998;**
- **Articles 7 and 8 of the Criminal Justice (Children) (NI) Order 1998;**
- **Article 31 of the Criminal Justice (Children) (NI) Order 1998.**

³⁷⁴ Criminal Justice (Children) (NI) Order 1998, Arts 6(3) and 7(5).

³⁷⁵ Criminal Justice (Children) (NI) Order 1998, Art 31(1).

³⁷⁶ Criminal Justice (Children) (NI) Order 1998, Art 31(2).

DETENTION FACILITIES FOR CHILDREN AND YOUNG PERSONS

6.29 Children or young persons detained by the police following charge must usually be detained in a 'place of safety'.³⁷⁷ There are separate rules for the remand of children and young persons by the courts.³⁷⁸

(i) A 'place of safety' under PACE

6.30 In the consultation paper it was noted that when a custody officer authorises the detention of a juvenile following charge under Article 39 of PACE, he or she must arrange for the juvenile to be detained in a 'place of safety', unless it is impracticable to do so.³⁷⁹ A 'place of safety' is defined as any juvenile justice centre, hospital or surgery, or any other suitable place, the occupier of which is willing temporarily to receive the arrested juvenile.³⁸⁰ The definition of 'place of safety' was amended by the Justice (NI) Act 2002,³⁸¹ to include any young offenders centre and any secure accommodation, but this amendment has not been commenced. Questions arose during preliminary discussions regarding the inclusion of a 'hospital or surgery' in this definition as young persons are not detained in hospitals or surgeries³⁸² and the Commission expressed the provisional view that references to a 'hospital or surgery' should be deleted from the definition of a 'place of safety' (Q 44).

6.31 None of the consultees who answered this question disagreed with the proposal to delete references to 'hospital or surgery' from the definition of a place of safety in PACE. One consultee argued that, unless a child or young person needs medical treatment there is no reason for them to be accommodated in a hospital or surgery. Another expressed the view that there should be a written risk assessment and written reasons when a decision is taken that any place is considered an appropriate and safe place for a young person to be received. Having considered the views of consultees, the Commission is of the opinion that the Draft Bill should amend the definition of a 'place of safety' to remove any reference to a 'hospital or surgery'.

6.32 The issue of what is meant by 'any other suitable place' was also raised by one consultee. Other consultees questioned the use of the juvenile justice

³⁷⁷ PACE, Art 39(6).

³⁷⁸ Criminal Justice (Children) (NI) Order 1998, Art 13.

³⁷⁹ PACE, Art 39(6).

³⁸⁰ PACE, Art 39(8).

³⁸¹ Justice (NI) Act 2002, sch 12, para 46.

³⁸² Bail CP, para 5.73.

centre as a place of safety - or, it was suggested, more accurately in many cases, a bed for the night - and the issue of children and young persons being remanded to the juvenile justice centre purely for accommodation reasons was again highlighted. It was argued that remand solely for accommodation reasons is contrary to children's rights standards and exposes children and young persons to damaging 'criminal contamination'.

6.33 On closer examination of the definition of a 'place of safety', the Commission has further concerns about its open-ended nature, that is including 'any other suitable place, the occupier of which is willing temporarily to receive the arrested juvenile', which contrasts with the restricted detention options available to the courts: see para 6.38, below. Other than the juvenile justice centre (and possibly secure accommodation) there do not seem to be other options for detaining, that is restricting the liberty of, young persons following charge. Nor does the Commission believe that other detention options should be developed. In the view of the Commission, if the police decide that it is absolutely necessary to detain a young person following charge, that young person should be detained in the juvenile justice centre only (subject to the proviso that it may be impracticable in some cases³⁸³). Consequently, it is the view of the Commission that the definition of a 'place of safety' should be further amended to remove the reference to 'or any other suitable place'.

6.34 The Commission is also of the view that secure accommodation and the young offenders centre should not be included in the definition of a place of safety and therefore amendments to the definition effected by the Justice (NI) Act 2002³⁸⁴ should be repealed. As discussed further below, the Commission does not consider the young offenders centre an appropriate place to detain persons under 18 years of age: see para 6.40. Further, the Commission does not consider secure accommodation suitable for detention purposes and believes that provision should be made, if absolutely necessary, for the detention of younger or more vulnerable children within the juvenile justice centre: see also paras 6.41 to 6.42, below.

6.35 Finally, it seems that the juvenile justice centre sometimes relies on the wording of Art 39(8) ('the occupier of which is willing temporarily to receive the

³⁸³ PACE, Art 39(6).

³⁸⁴ Justice (NI) Act 2002, sch 12, para 46.

arrested juvenile’) to refuse young persons admission. While the Commission is aware that there are concerns that such provision may be considered necessary by some to guard against the over use of PACE detention to the juvenile justice centre, the reality seems to be that young persons refused admission in such circumstances are not necessarily released as a consequence but rather are detained (often overnight) in police custody suites. As indicated above, the proposed legislation will contain a prohibition on detention solely for accommodation reasons which will, it is hoped, reverse the trend in ‘welfare detention’. The Commission also recommends that a range of accommodation options for young persons on bail is developed so that there are genuine alternative accommodation options available to bail decision makers: see paras 6.65 to 6.78, below. In light of these recommendations, the Commission does not consider it appropriate that the Director of the juvenile justice centre should retain any discretion to refuse admission to young persons for whom detention is considered absolutely necessary. Consequently, the reference to ‘the occupier of which is willing temporarily to receive the arrested juvenile’ should be removed from the definition of a ‘place of safety’.³⁸⁵

Recommendation 40

- Clause 39* 6.36 **The Commission recommends that bail legislation should amend the definition of a ‘place of safety’ in Article 39(8) of PACE to remove any reference to a ‘hospital or surgery’, and ‘or any other suitable place the occupier of which is willing temporarily to receive the arrested juvenile’.**

Recommendation 41

- Clause 39* 6.37 **The Commission recommends that bail legislation should repeal amendments made in the Justice (NI) Act 2002 to include secure accommodation and the young offenders centre in the definition of a ‘place of safety’.**

(ii) Remand under Article 12

- 6.38 If a court decides not to release a child or young person under Article 12 of the Criminal Justice (Children) (NI) Order 1998 there are currently several complex rules regarding where he or she can be remanded. These rules are contained

³⁸⁵ PACE, Art 39(8).

in Article 13 of the 1998 Order and have been heavily amended. Children and young persons under 17 must be committed to a juvenile justice centre³⁸⁶ or, if aged 15 or 16 and considered likely to injure themselves or other persons, a young offenders centre.³⁸⁷ Young persons who have reached 17 shall be committed to a young offenders centre³⁸⁸ or in certain strict circumstances a juvenile justice centre. Such a young person must be committed to a juvenile justice centre if after having attained the age of 17, the child is less than 17 years and six months at the time of the first decision not to release him or her on bail in relation to the present offence, if he or she has not had a custodial sentence imposed upon him or her in the last two years and if, after considering a report made by a probation officer, the court considers that it is in his or her best interests to do so.³⁸⁹ A child or young person of 17 years must also be remanded in the juvenile justice centre 'if the court has been notified by the Secretary of State that no suitable accommodation for that child is available in a young offenders centre'.³⁹⁰ In June 2008, the Prison Service (acting under delegated authority on the Secretary of State's behalf) informed the Northern Ireland Court Service that there was no longer suitable accommodation in the young offenders centre for female children aged 17 and under. The Criminal Justice (Children) (NI) Order 1998 was amended to require 10 to 13 year olds to be remanded to secure accommodation instead of the juvenile justice centre, but that amendment was not commenced.³⁹¹

6.39 During the preliminary discussions, there was criticism of the remand of some vulnerable 15 and 16 year olds to the young offenders centre on the basis of their being considered likely to injure themselves or others.³⁹² There was also disapproval of the failure to implement changes to the Criminal Justice (Children) (NI) Order 1998 which would require 10 to 13 year olds to be remanded to secure accommodation.³⁹³ The Commission invited views in the consultation paper on the inclusion in bail legislation of provisions designating where children and young persons on remand can be detained (Q 45). Views were also invited on the detention on remand of children in the young offenders centre (Q 46) and secure accommodation (Q 47).

³⁸⁶ Criminal Justice (Children) (NI) Order 1998, Art 13(1)(a).

³⁸⁷ Criminal Justice (Children) (NI) Order 1998, Art 13(1A).

³⁸⁸ Criminal Justice (Children) (NI) Order 1998, Art 13(1)(b).

³⁸⁹ Criminal Justice (Children) (NI) Order 1998, Art 13(1B).

³⁹⁰ Criminal Justice (Children) (NI) Order 1998, Art 13 (1BB).

³⁹¹ Justice (NI) Act 2002, sch 12, para 69(2).

³⁹² Bail CP, para 5.78.

³⁹³ Bail CP, para 5.78; See Justice (NI) Act 2002, sch 12, para 69(2).

6.40 Most consultees were in favour of the inclusion in bail legislation of provisions designating where children and young persons on remand can be detained and many argued strongly that children under 18 should not be remanded to the young offenders centre, not least because of the vulnerability of young persons and international obligations prohibiting the detention of children in the same facilities as adults. It was suggested that there may be an equality issue with the current situation in which boys of 17 years of age and younger can be remanded to the young offenders centre but girls of the same age cannot. Further criticism of the remand of children and young persons of 17 years and younger to the young offenders centre has also been expressed by Criminal Justice Inspection NI,³⁹⁴ the Youth Justice Review³⁹⁵ and the Review of the Northern Ireland Prison Service.³⁹⁶ The Minister for Justice confirmed to the Justice Committee on 28th June 2012 that, from November 2012, persons under 18 years old will no longer be detained at the young offenders centre. It was stated that the juvenile justice centre will be the sole justice location for the detention of children and young persons 'in all but the most exceptional circumstances'.³⁹⁷ The Commission is persuaded that children and young persons under 18 years of age should not be remanded in the young offenders centre and recommends the amendment of Article 13 of the Criminal Justice (Children) (NI) Order 1998 to remove provision for such detention.

6.41 There were some mixed views on the necessity for secure accommodation for young persons on remand. One consultee argued that secure accommodation is not designed for remand and that remanded 10 to 13 year olds would be mixing with children of all ages in secure accommodation. It was suggested that if remand is absolutely necessary, the juvenile justice centre may be the appropriate place. Again the danger of remand purely for accommodation reasons was raised and it was suggested that children be remanded into the care of child care authorities. On the other hand, it was argued that provision for the remand of 10 to 13 year olds in secure accommodation instead of the juvenile justice centre should not encourage greater detention of children in

³⁹⁴See Criminal Justice Inspection Northern Ireland, *Report on an unannounced short follow-up inspection of Hydebank Wood Young Offenders Centre* (October 2011) and Criminal Justice Inspection Northern Ireland, *Report on an announced inspection of Hydebank Wood Young Offender Centre* (July 2008).

³⁹⁵Youth Justice Review, recommendation 16.

³⁹⁶Prison Review Team, *Review of the Northern Ireland Prison Service: conditions, management and oversight of all prisons* (October 2011), recommendation 38.

³⁹⁷See

<http://www.dojni.gov.uk/index/media-centre/ford-hails-progress-on-detention-of-young-offenders.htm>

this age group, but rather would provide an alternative to the formal criminal justice setting of the juvenile justice centre (where they would mix with children up to 17 years old and be exposed to potentially harmful contact with the criminal justice system) for 10-13 year olds for whom remand is absolutely necessary.

6.42 As indicated above in relation to the 'place of safety', the Commission is persuaded that where it is absolutely necessary to remand a child or young person, the juvenile justice centre should be the only option available to the decision maker. It is proposed that bail legislation should amend Article 13 of the Criminal Justice (Children) (NI) Order 1998 removing any requirement to remand children and young persons under 18 years of age to the young offenders centre. The amendments to the Criminal Justice (Children) (NI) Order 1998 which would require remand of 10 to 13 year olds to secure accommodation (although never commenced) should also be repealed.³⁹⁸ In the view of the Commission, the priority for resources in relation to children awaiting trial should be the provision of appropriate bail accommodation, which may include secure accommodation, to facilitate the release of the child or young person pending court appearances. If the detention of younger children is absolutely necessary, it is the view of the Commission that provision could be made for such detention within the juvenile justice centre.

Recommendation 42

6.43 **The Commission recommends that bail legislation should amend Article 13 of the Criminal Justice (Children) (NI) Order 1998 to remove any provision for the remand of children and young persons under 18 years of age to the young offenders centre.**

Clause 41

Recommendation 43

6.44 **The Commission recommends that bail legislation should repeal amendments made in the Justice (NI) Act 2002 which require the remand of 10 to 13 year olds to secure accommodation.**

Clause 41

6.45 The Commission considers that it is necessary to make fresh provision for the detention of young persons who are nearly 18 years old and/or turn 18 years

³⁹⁸ Justice (NI) Act 2002, sch 12, para 69(2).

during the remand period.³⁹⁹ In line with the recommendations of the Youth Justice Review, the Commission is of the view that young persons should remain in the juvenile justice centre upon turning 18 years during the remand period unless it is in their best interests to move them to the young offenders centre. In the context of moving young persons who turn 18 years while in custody, the Youth Justice Review recommended that at a minimum, young persons should undergo a full assessment of their needs and circumstances, including their developmental age, the duration of their sentence and their capacity to 'survive' in an adult prison.⁴⁰⁰

6.46 The Commission favours a provision setting out a presumption that a young person will remain in the juvenile justice centre on turning 18 years unless it is in the person's best interests to be moved to the young offenders centre. The Commission believes that the court should consider the following factors in making that determination:

- the maturity, needs and understanding of the young person;
- the likely duration of their remand period;
- their suitability to the regime at the young offenders centre.

Recommendation 44

Clause 41

6.47 The Commission recommends that bail legislation should include a presumption that a young person on remand will remain in the juvenile justice centre on turning 18 years of age during the remand period unless it is in the young person's best interests to be moved to the young offenders centre. The Commission recommends that decision makers should be required to consider the following factors in making that determination:

- **the maturity, needs and understanding of the young person;**
- **the likely duration of the remand period;**
- **the suitability of the young person to the regime at the young offenders centre.**

6.48 The Commission considers that the movement of young persons between facilities should be kept to a minimum and that the juvenile justice centre is a more suitable environment for a young person on remand. The proposed

³⁹⁹ Criminal Justice (Children) (NI) Order 1998, Art 13(1B).

⁴⁰⁰ Youth Justice Review, para 3.10.4

provision does not explicitly make reference to consideration of the age of the young person as all persons considered under the provision will be 18 years of age or very close to it.

BAIL CONDITIONS

(i) Financial conditions

6.49 It will be recalled that for reasons of consistency and proportionality the Commission decided that the power to take a personal recognizance for court bail in criminal proceedings should be abolished: see paras 4.2 to 4.9, above. This will apply also to the grant of bail to children and young persons in criminal proceedings, that is bail granted by a court pending trial, verdict, sentence and appeal and compassionate bail. Powers to require personal recognizances for police bail under PACE have already been abolished⁴⁰¹ and the Commission also recommends the repeal of other police powers to require children and young persons to enter into recognizances: see paras 6.25 to 6.28, above. The result of all of these changes will be that children and young persons, like adults, will no longer be required to enter into a personal recognizance for bail granted by the courts or the police.

6.50 The Commission also recommends that the current surety system is replaced with new powers to require a bail guarantor or bail guarantors to secure a person's surrender to custody in bail in criminal proceedings: see paras 4.10 to 4.23, above. These powers will be similar to current powers to require a surety for bail, however, they will be expressed in simpler and more accessible terminology and will address many of the difficulties within the current surety system. The new powers will apply also to the grant of bail to children and young persons in criminal proceedings, that is post charge police bail and court bail pending trial, verdict, sentence and appeal and compassionate bail. In light of the potential hardships financial conditions may cause for persons on low incomes, the Commission recommends that the new power to require a bail guarantor should be an alternative to the requirement of security for bail. It will, therefore, not be possible to impose both such financial conditions at once: paras 4.37 to 4.39.

⁴⁰¹ PACE, Art 48(3).

(ii) Further guidance on bail conditions

6.51 As argued above,⁴⁰² there is presently little guidance for bail decision makers regarding the imposition of bail conditions on accused persons, including children and young persons. Police powers to attach conditions are subject to a test of necessity,⁴⁰³ whereas the magistrates' courts can impose such conditions as appear to be likely to result in the person's subsequent appearance at the time and place required or to be necessary in the interests of justice or for the prevention of crime.⁴⁰⁴

6.52 Further, in addition to the limited guidance which also applies to adults, curfew and electronic monitoring requirements can only be imposed upon children and young persons if the court is of the view that, if it did not attach such conditions, it would be necessary to remand the child in custody to protect the public.⁴⁰⁵

6.53 There was criticism expressed during preliminary discussions regarding the number and complexity of the bail conditions imposed on children and young persons, particularly 'looked after' children and young persons.⁴⁰⁶ The particular difficulties caused by the imposition of imprecise bail conditions on children and young persons bailed to reside in children's homes were highlighted.⁴⁰⁷ It was argued that consideration should be given to the education, employment and family needs of young persons when imposing conditions.⁴⁰⁸ In some jurisdictions youth justice principles, such as the 'best interests' of the child must be considered when imposing bail conditions.⁴⁰⁹ The views of consultees were invited on the desirability of developing detailed guidance for bail decision makers concerning the imposition of bail conditions on children and young persons accused of offences (Q 50) and whether such guidance should have a statutory basis (Q 51).

6.54 Most consultees who answered this question favoured the development of guidance on the imposition of bail conditions for children and young persons. Several consultees highlighted the difficulties children and young persons may

⁴⁰² See paras 5.69 to 5.70, above.

⁴⁰³ PACE, Art 48(3D).

⁴⁰⁴ Magistrates' Courts (NI) Order 1981, Art 133.

⁴⁰⁵ Criminal Justice (NI) Order 2008, Art 43.

⁴⁰⁶ Bail CP, para 5.85.

⁴⁰⁷ Bail CP, para 5.89.

⁴⁰⁸ Bail CP, para 5.87.

⁴⁰⁹ See Bail CP, para 6.82 and Bail Act 1992 (ACT), s 26(1)(b)(ii).

have in understanding and complying with bail conditions. Data gathered for the purposes of the EQIA indicates that children and young persons may experience particular difficulties understanding and complying with bail.⁴¹⁰ It was argued that when bail is granted to a child or young person, bail conditions should be understood by both the young person and any adults who may support the young person during their bail period. Several consultees argued that conditions attached to bail should be realistic and achievable, precise and comprehensible so that children and any adults supporting them during the bail period understand what is expected of them.

6.55 Consideration should be given to the particular circumstances, including the maturity and needs, of the young person in assessing his or her capacity to comply with bail conditions. It was contended that decision makers should consider the education, employment and family needs of young persons when imposing bail conditions. Several consultees argued that young persons may need help to comply with conditions and some suggested that the provision of bail support, if appropriate, should form part of the guidance on bail conditions for children and young persons. Some cautioned, however, that treatment or support should not be forced upon persons on bail, not least because such treatment or support is unlikely to be effective in such circumstances. It was asserted by several consultees that guidance in relation to bail conditions should be based on children's rights standards, in particular the best interests of the child and the requirement that the voice of the child should be heard in proceedings affecting them.

6.56 Consultees were generally in favour of placing such guidance on a statutory footing, for reasons of transparency, consistency, fairness and simplicity. It was contended that agencies would be more likely to comply with statutory guidance and that it would promote better understanding among children and young persons. On the other hand, it was suggested that non-legislative guidance coupled with a statutory obligation to take that guidance into account would suffice. One consultee argued that a code would be preferable as it could be written in more accessible language than statutory guidance.

⁴¹⁰ EQIA consultation, para 4.3.

- 6.57 The Youth Justice Review argued that young persons should be treated differently from adults in relation to the imposition of bail conditions and that ‘in the main, bail should be granted to young offenders without conditions.’⁴¹¹ Where conditions are considered necessary, it was suggested that relevant and proportionate conditions should be imposed, taking account of the best interests of the child.⁴¹²
- 6.58 Having considered the views of consultees, the Commission is persuaded that the imposition of complex and onerous bail conditions may pose particular problems for children and young persons. Many young persons may have difficulties understanding and complying with bail conditions and the Commission believes that decision makers should consider these issues when imposing bail conditions. Decision makers should, in particular, consider the age and maturity of the young person when assessing their understanding and ability to comply with bail conditions. Consideration may also be given to any formal or informal bail support which may be available to facilitate compliance with bail conditions.
- 6.59 The Commission also agrees with consultees that efforts should be made to minimise, as far as possible, any conflict between bail conditions and any education, employment, family or other commitments the young person may have. The Commission considers that the exclusion of children and young persons from education, employment, family and other positive influences may be particularly damaging at this early stage in their lives. As argued above in relation to adults, such disengagement may also stigmatise the young person and contribute to non-compliance with bail. In the view of the Commission, consideration of the best interests of the young person should be at the forefront of the decision maker’s mind when imposing bail conditions.
- 6.60 Bearing all of these considerations in mind, the Commission is of the view that children and young persons should be subject to the same guidance on the imposition of bail conditions that is proposed in respect of adults, alongside some further considerations. As outlined above, bail conditions should only be imposed for one of the four specified purposes which may justify detention: see paras 5.71 to 5.74, above. Conditions should be no more onerous than

⁴¹¹ Youth Justice Review, para 3.6.3.

⁴¹² Youth Justice Review, para 3.6.3.

necessary for one of those purposes: see paras 5.79 to 5.80, above. Consideration should be given, where relevant, to the accused persons ability to comply with bail conditions, their family, education, employment and other commitments and any other relevant matters: see paras 5.81 to 5.90. All of this guidance applies equally to the imposition of bail conditions on adults and children accused of offences. In addition to this guidance, the Commission is of the view that decision makers should be required in all cases involving children and young persons to consider the young person's age, maturity, needs and understanding and the best interests of the child as a primary consideration.

Recommendation 45

- 6.61 **The Commission recommends that statutory guidance in relation to the imposition or variation of bail conditions in respect of adults accused of offences should also apply to children and young persons accused of offences.** *Clause 6*

Recommendation 46

- 6.62 **In addition to that guidance, the Commission recommends that bail legislation should require decision makers, when imposing or varying conditions for children and young persons accused of offences, to consider:** *Clause 7*
- **the age, maturity, needs and understanding of the young person;**
 - **and**
 - **the best interests of the child as a primary consideration.**

- 6.63 In light of these recommendations, the Commission considers that it is also necessary to repeal current guidance on the imposition of curfew or electronic monitoring requirements on children to be released on bail under Article 12 of the Criminal Justice (Children) (NI) Order 1998. At present, such bail conditions cannot be imposed upon children unless the court is of the view that, if it did not attach such conditions, it would be necessary to remand the child in custody to protect the public.⁴¹³ Given the emphasis in the Draft Bill on the best interests of the child as a primary consideration, the reference to the protection of the public is no longer appropriate. Further, guidance on the

⁴¹³ Criminal Justice (NI) Order 2008, Art 43.

imposition or variation of bail conditions stipulates that conditions can only be imposed if considered necessary for one of the four specified purposes and must be no more onerous than necessary for those purposes: see paras 5.71 to 5.80. As indicated above, consideration must also be given to the age, maturity, needs and understanding of the child or young person and the best interests of the child as a primary consideration. In the view of the Commission children and young persons will be more than adequately protected from the unjustified imposition of onerous curfew or electronic monitoring requirements in the Draft Bill. The retention of an amended Article 43 would not add any further protection.

Recommendation 47

Schedule 7

6.64 The Commission recommends that Article 43 of the Criminal Justice (NI) Order 2008 should be repealed.

ACCOMMODATION AND SUPPORT FOR YOUNG PERSONS ON BAIL

6.65 It was acknowledged in the consultation paper that locating appropriate accommodation for young persons on bail, particularly looked after young persons, may present particular problems for bail decision makers.⁴¹⁴ Concerns have been expressed about the remand of young persons due to shortages in appropriate accommodation in the community and high numbers of PACE admissions to the juvenile justice centre.⁴¹⁵ It was suggested in preliminary discussions that bail fostering and bail hostel accommodation for young persons may contribute to a reduction in welfare detention.⁴¹⁶ Efforts have been made to address accommodation difficulties through bail support programmes in many jurisdictions and, as discussed above, in some jurisdictions bail cannot be refused solely on the basis of a lack of accommodation. The Commission is persuaded that a prohibition on the detention of young persons solely on the grounds of a lack of accommodation should be included in bail legislation in this jurisdiction: see para 6.23, above. It is acknowledged, however, that this statutory prohibition must be accompanied by appropriate accommodation options for children and young persons. Views were invited in the consultation paper on administrative arrangements which may be devised, possibly drawing on existing models

⁴¹⁴ Bail CP, para 5.77.

⁴¹⁵ Bail CP, para 4.27.

⁴¹⁶ Bail CP, para 5.82.

and/or resources, to address the issue of accommodation for young persons on bail (Q 43).

6.66 The availability of bail support services for children and young persons most at risk of remand was discussed in the consultation paper. The Bail Supervision and Support Scheme operated by the Youth Justice Agency encompasses an assessment of the needs of the young person and the development of a tailored package of support which may address accommodation issues, education, employment and drug and alcohol use. This scheme has been positively evaluated and is believed to be cost-effective.⁴¹⁷ It was suggested in preliminary discussions that bail support may be more effective than bail monitoring in ensuring young persons' compliance with bail.⁴¹⁸ It was argued that an assessment should be conducted at the earliest opportunity for all young persons facing bail or remand, or at least those for whom objections to bail are being raised.⁴¹⁹ Bail support programmes for young persons are available in other jurisdictions which address issues such as accommodation needs, addiction issues and family difficulties.⁴²⁰ Views were invited in the consultation paper on the desirability of expanding bail support for young persons, building on existing programmes and resources (Q 53).

6.67 The importance of adult supervision of a young person on bail was also acknowledged in the consultation paper.⁴²¹ The views of consultees were sought regarding the role which should be played by responsible adults during a child's period on bail (Q 48).

6.68 A range of accommodation options for young persons on bail were suggested by EQIA and other consultees. In the event of family members being unavailable to take young persons in, consultees asserted that young persons on bail should be accommodated in children's homes or secure children's homes. Other consultees argued for the use of bail fostering although several young persons suggested in consultation meetings that fostering is not suitable for all children and that developing relationships with a foster family may add to the pressure the young person is under. Bail hostels specifically for young

⁴¹⁷ Northern Ireland Office, *Evaluation of the Bail Supervision and Support Scheme*, NIO Research and Statistical Series: Report No 13 (May 2006), p 87.

⁴¹⁸ Bail CP, paras 5.91 to 5.92.

⁴¹⁹ Bail CP, para 5.93.

⁴²⁰ Bail CP, para 6.84.

⁴²¹ Bail CP, paras 6.76 to 6.77.

persons were suggested by several consultees. It was argued that accommodation options must include short term or emergency options as well as longer term accommodation for young persons. Caution was expressed that accommodation designed as an alternative to remand in custody should not be used as an alternative care setting.

6.69 The issue of appropriate resourcing for bail accommodation was emphasised and it was argued that accommodation options should be available across Northern Ireland to ensure that young persons can remain within their communities, maintain relationships and access to education and/or other services. It was argued that statutory, voluntary and community organisations may have a role to play in the provision of an appropriate range of accommodation options across Northern Ireland. It was suggested that organisations like Extern, Social Services, Mindwise, and the Youth Justice Agency might provide such services. The Youth Justice Review recommended that an appropriate mix of suitable accommodation should be available for young persons on bail.⁴²² Recommendations were also made for the establishment of 'an appropriate range of supported (and if necessary secure) accommodation, accessible at short notice, to reduce to an absolute minimum the use of Woodlands as a place of safety under PACE.'⁴²³

6.70 Many consultees were in favour of the expansion of bail support programmes for children and young persons. It was argued that such services should not be limited only to young persons at risk of remand or those already detained under PACE. Rather an assessment should be carried out in relation to all children facing a bail decision to determine if support services could facilitate release on bail. Consultees highlighted in particular the importance of bail support for looked after young persons. It was argued by one EQIA consultee that the provision of bail support services would promote equality of opportunity for young persons and young males, in particular.

6.71 Similar to the views expressed in relation to bail support for adults (see paras 7.12 to 7.25, below), it was argued that such programmes should address accommodation issues and addiction and/or mental health concerns. It was argued that help should be provided with training and employment issues and

⁴²² Youth Justice Review, recommendation 9, para 3.6.5.

⁴²³ Youth Justice Review, recommendation 8, para 3.6.1.

that bail support should include activities and/or work to keep young persons occupied while on bail. Consultees identified some additional support which may be of particular relevance to young persons such as mentoring, advocacy and support when attending court hearings. Consultees argued that some young persons may need financial assistance to attend court hearings and others suggested that reminders by way of text message may improve attendance rates.

6.72 Consultees considered several organisations suitable to provide bail support for children and young persons and the benefits of a multi-agency approach were highlighted, incorporating statutory agencies and voluntary groups. It was argued by some that bail support for children should build on the successful work of the Youth Justice Agency. Consultees stressed the importance of adequate resourcing for bail support. It was suggested that a statutory or administrative framework for bail support would ensure greater consistency in provision.

6.73 The recent report of the Youth Justice Review team recommended that the Youth Justice Agency provide bail information and support to young persons at risk of remand at their first court appearance.⁴²⁴ A pilot project providing intensive individual support to young persons (aged 13 to 21) released from police custody with a warning, caution or on bail to appear at court has recently been commenced by the charity Mindwise.⁴²⁵

6.74 In addition to support for young persons on bail, several consultees argued that parents and others taking care of young persons on bail may be in need of support while assisting young persons to comply with bail. There was general agreement among consultees that the presence of a responsible adult in a young person's life is particularly important during the bail period. One consultee pointed out the anomaly that exists whereby children and young persons detained for interview by the police must be accompanied by an appropriate adult but such children are often released on bail without any form of support. It was argued that responsible adults, either parents or bail support

⁴²⁴ Youth Justice Review, recommendation 9, para 3.6.5.

⁴²⁵ Mindwise, *Reaching Out – Empowering Young People*, available at: <http://www.mindwisenv.org/index.php/MindWise/two-big-lottery-grants-announced-for-mindwise.html>

workers, should help young persons comply with bail and attend meetings and/or court hearings.

6.75 Having considered the views of consultees, the Commission is persuaded that the provision of a range of accommodation options for children and young persons on bail would contribute significantly to reducing the numbers of children detained pending court appearances and PACE admissions to the juvenile justice centre, in particular. The Commission is persuaded that the range of accommodation options should include short term emergency accommodation and longer term solutions. Further, the options should reflect the range of needs and circumstances of children and young persons at different stages of maturity and may include bail fostering and supervised hostel accommodation. Accommodation provision should be made available across Northern Ireland to minimise disruption to the child or young person's education, employment, family and other relationships.

6.76 The Commission is also convinced that bail support programmes for children and young persons should be expanded. Such programmes may facilitate compliance with bail conditions and surrender to custody and help young persons to deal with other difficulties including accommodation, mental health and addiction issues and training and employment. The Commission considers that all children and young persons charged by the police should be assessed, at the earliest opportunity, with a view to determining if bail support may be necessary to facilitate release on bail. Support should continue to be tailored to the individual needs of young persons and may also include support for parents or other adults providing informal support during the bail period. Consideration should be given to using appropriate technologies including text messages and emails to remind young persons of court dates, bail conditions and other commitments. The Commission does not believe that it is appropriate for bail support programmes to be placed on a statutory footing, preferring instead the flexibility of a non-legislative scheme.

Recommendation 48

6.77 The Commission recommends that a range of accommodation options for children and young persons on bail be made available.

Recommendation 49

- 6.78 **The Commission recommends that bail support programmes for children and young persons are expanded to include an assessment, at the earliest opportunity, of all children and young persons charged by the police. Support services should address accommodation needs, mental health and addiction issues, training and employment and other issues. The Commission recommends that provision for bail support for children and young persons should be achieved by non-legislative means.**

EXPLAINING BAIL DECISIONS

- 6.79 It was observed in the consultation paper that some jurisdictions make express provision for the effective participation of children and young persons in proceedings which affect them.⁴²⁶ A statutory duty to explain bail decisions to young persons in language appropriate to the child's age and level of understanding is imposed upon decision makers in some jurisdictions.⁴²⁷ It was suggested during the preliminary discussions that greater efforts should be made to explain bail decisions to children and young persons in this jurisdiction⁴²⁸ and the Commission invited views on whether a statutory duty should be imposed upon decision makers to ensure that young persons understand bail decisions and conditions (Q 52).
- 6.80 Consultees were generally supportive of the creation of a statutory duty to explain bail decisions to children and young persons. Several consultees highlighted in particular the obligations under Article 12 of the CRC which include the child's right to be heard and to actively participate in judicial or administrative proceedings affecting him or her. It was argued by one consultee that understanding and participation in proceedings are essential to a fair hearing under Article 6 of the ECHR. Others argued that greater understanding of bail decisions including conditions, is likely to lead to greater compliance with bail. Consultees argued that the profile of children and young persons who come into contact with the criminal justice system (including high incidences of mental health problems, special educational needs, learning and other disabilities and poor literacy) demands that efforts are made to explain

⁴²⁶ Bail CP, para 6.85.

⁴²⁷ See eg Children Act 2001 (ROI), s 88(4).

⁴²⁸ Bail CP, para 5.88.

bail decisions to young persons. Others suggested that parents or guardians may also benefit from a plain language explanation of the bail decision.

6.81 Having considered the views of consultees, the Commission is persuaded that bail decisions should be explained to children and young persons in language that is appropriate to their age, maturity and understanding. The Commission considers that, when granted bail, an explanation should be provided of the young person's obligation to surrender to custody at a particular time and place. Further, if bail is refused, the grounds and reasons for the refusal should be explained in age appropriate language. Explanations should also be provided of bail conditions imposed, the purposes for which those conditions are imposed and the reasons why those purposes are considered relevant.

6.82 The obligation to explain these matters in language that is appropriate to the young person's age, maturity and understanding will exist alongside the requirement to provide and record reasons for these decisions, and to provide a copy of that record to the accused person on request, which applies to all persons accused of offences. In the view of the Commission clear, age appropriate explanations of key decisions will encourage young persons to engage and participate in bail proceedings, will enhance understanding of bail decisions and may improve compliance when bail is granted.

Recommendation 50

*Clauses 9,
10, 11, 32
and 36*

6.83 **The Commission recommends that the following bail decisions are explained to children and young persons in language that is appropriate to their age, maturity and understanding:**

- **the obligation to surrender to custody at a particular time and place, when bail is granted;**
- **the grounds and reasons for any denial of bail;**
- **any bail conditions imposed or varied, the purposes for which those conditions are imposed and the reasons why those purposes are considered relevant.**

CONCLUSION

6.84 The Commission has considered closely the views of consultees, international human rights standards and other relevant matters in determining the

appropriate approach to take to the difficult issue of the bail and remand of children and young persons. The Commission concurs with the Youth Justice Review that there must be a change of emphasis within the youth justice system away from the protection of the public towards greater consideration of the best interests of the child. The Commission is persuaded that children and young persons, most notably looked after children, are particularly vulnerable in the bail system and that greater efforts should be made to divert children and young persons away from the damaging environment of the juvenile justice system. It is not acceptable, in the view of the Commission, that children and young persons are detained simply because there is no suitable accommodation for them in the community. The Commission considers that the detention of children and young persons should truly be a measure of last resort where it is not possible to manage any risk posed by the child or young person in a non-custodial setting.

- 6.85 The Commission is confident that the recommendations in this report will place the best interests of children and young persons at the forefront of bail decision making and will be flexible enough to take account of the young person's circumstances including their age, maturity, needs and understanding. The proposed statutory provisions are clear and accessible and understanding will be further improved with the provision of age appropriate explanations of key bail decisions.

CHAPTER 7: NON-LEGISLATIVE INITIATIVES

INTRODUCTION

7.1 In the consultation paper, the limits to which legislation alone can successfully reform the bail system in this jurisdiction were acknowledged.⁴²⁹ Legislative proposals may require complementary administrative arrangements to ensure their effective execution. In this chapter, consideration is given to several reform proposals which, in the view of the Commission, will not require legislative provision but which would be desirable to ensure the effective operation of the proposed legislative scheme. The important issue of the provision of prompt and accurate bail information to decision makers is considered and the desirability of developing bail monitoring and bail support for adults on bail is examined. Consideration is also given to the provision of information to victims of crime affected by bail decisions. The particular issues of bail accommodation and support for children and young persons accused of offences are considered in Chapter 6.

BAIL INFORMATION

7.2 There are many considerations which may be relevant to the question of whether a person should be denied bail, such as the individual's personal circumstances, his or her record (if any) of previous offending and previous compliance with bail conditions. The importance of providing verified and prompt information to the bail decision maker was highlighted in the bail consultation paper.⁴³⁰ It was noted that unlike England and Wales, Scotland and many other jurisdictions⁴³¹ there is no formal bail information scheme in operation in Northern Ireland. Informal information gathering in relation to bail applications is conducted in some courts in Belfast by Court Liaison Officers employed by the PSNI. Although the Probation Board for Northern Ireland ('PBNI') designed a pilot bail information scheme some years ago, the scheme was not initiated at that time.⁴³² In the consultation paper, the Commission acknowledged that the objective of ensuring that decision makers have timely access to comprehensive and accurate information may not be achieved solely

⁴²⁹ Bail CP, para 2.22.

⁴³⁰ Bail CP, paras 3.43 and 5.24.

⁴³¹ Bail CP, paras 6.22 to 6.24.

⁴³² Bail CP, paras 3.44 to 3.45. The provision of bail information was considered within the Sentencing Framework Implementation ('SFI') Programme. See SFI Programme: Report on Bail Information for SFI Steering Group, 24th September 2008.

by legislative intervention. Views were invited on initiatives that might be adopted in relation to bail information and by whom such initiatives might be delivered (Q 13).

7.3 Most consultees who answered this question expressed support for the creation of an initiative to ensure appropriate bail information is provided to decision makers, mainly for reasons of efficiency, impartiality and consistency. It was stressed that such information should be comprehensive, accurate, verified and timely. One consultee emphasised, in particular, the importance of accuracy and argued that the processing of 'personal data'⁴³³ must comply with the rights and obligations of the Data Protection Act 1998. 'Sensitive personal data'⁴³⁴ should be afforded even greater protection to comply with the Data Protection Act. Another consultee highlighted the importance of maintaining the privacy of the individual with only essential information being sought and relied upon.

7.4 Several consultees stressed the importance of appropriate information sharing in relation to information of relevance to bail decisions. It was suggested by one consultee that enquiries should be made regarding the residence at any proposed bail address of a child who is known to social services. The bail court should be made aware of such information to ensure that vulnerable children are not put at risk as a result of bail decisions.⁴³⁵ Further, this consultee highlighted the wealth of information which may be held by Social Services in relation to children who are subject to ongoing or concluded care proceedings and which may be of relevance to bail decisions. It was suggested that where there are ongoing care proceedings a bail decision in respect of that child should, if possible, be taken by the judge dealing with the family proceedings. Where care proceedings have been concluded the bail court should be assisted by relevant information from the young person's social worker. Information from the bail court may also be useful to Social Services.

⁴³³ Data Protection Act 1998, s 1(1).

⁴³⁴ Data Protection Act 1998, s 2.

⁴³⁵ See also *John Smith (pseudonyms) (Application for bail)* [2011] NIQB 69, where Stephens J highlights a number of ways in which bail decisions may impact upon the interests of children including bail addresses, contact arrangements, family proceedings, and children who are or should be known to Social Services.

- 7.5 There were mixed views regarding the contribution which should be made by the Causeway project to any new bail information initiative and concerns were expressed about the role of the police in providing bail information. Other consultees were supportive of police involvement in the provision of bail information, at least in relation to criminal justice information. It was also suggested that the views of victims may be relevant to bail decisions and could be provided by community workers or Victim Support agencies.
- 7.6 A number of organisations were suggested as appropriate to deliver or contribute to a new bail information initiative, namely the Probation Board for Northern Ireland, the Youth Justice Agency and Extern. Another consultee argued that the organisation that delivers such a scheme should be independent of the prosecution and the defence. It was suggested by some that legal representatives should be more proactive in bringing information to the attention of decision makers.⁴³⁶
- 7.7 There were some conflicting views regarding the parameters of any initiative in relation to bail information. Some suggested that it should encompass no more than a report on the accused person's circumstances and background with no recommendation for or against bail or opinion regarding any risks posed by the accused. Others favoured the inclusion of an assessment of the accused person's suitability to bail and possibly a recommendation to release or detain. Some consultees argued that a bail information initiative should include consideration of supervision and support measures to facilitate release, if necessary.
- 7.8 It was suggested by some consultees that such a scheme should only operate when a person has been refused bail, when a person is applying for bail for the first time in the magistrates' court or when there are police objections to bail. Most other consultees were in favour of activating a bail information initiative at the earliest opportunity following charge in order to avoid unnecessary detention. One consultee argued that, whenever the scheme is activated, there should be sufficient time for the parties to challenge the findings of any

⁴³⁶ It has also been suggested that both prosecution and defence counsel should inform a bail court of the potential impact of a bail decision on any child: see *John Smith (pseudonyms) (Application for bail)* [2011] NIQB 69 at [10].

bail report produced. The view was expressed by several consultees that such a scheme or initiative should be placed on a statutory footing.

7.9 Having considered the views of consultees the Commission is persuaded that there is merit in the development of a bail information initiative, possibly building on the work already completed by the PBNI. It is the view of the Commission that such a scheme should operate at the earliest opportunity to avoid unnecessary detention (particularly in relation to children and young persons). The Commission considers that it may be sensible for the bail information report to include, if appropriate, any bail support arrangements which may facilitate release. In order to maximise access to relevant information, consideration should be given to ensuring that there is appropriate information sharing between relevant agencies. The privacy of the individual should be protected and relevant data protection principles should be complied with. The Commission believes that it is preferable if such a scheme is not enshrined in statute, retaining greater flexibility.

7.10 The Commission is not persuaded that a bail information initiative should make provision for an assessment of risk or a recommendation regarding the detention or release of the accused person. It is not considered desirable that someone other than the bail decision maker should have responsibility for arriving at decisions touching on risk with reference to the statutory grounds for the refusal of bail. Arguably that decision is a matter purely for determination by the bail decision maker having regard to the body of information presented to it and any submissions thereon advanced by prosecution and defence representatives. Any recommendation for the introduction of an intermediate layer of assessment at this stage of the process may have significant time and resource implications. It may be that, at some time in the future, a bail information scheme having been firmly established, some consideration might be given to an initiative of this kind.

Recommendation 51

7.11 **The Commission recommends that a bail information scheme is established to provide, at the earliest opportunity, comprehensive, verified and prompt information for bail decision makers. The Commission recommends that provision for a bail information scheme should be achieved by non-legislative means.**

MONITORING AND SUPPORT OF PERSONS ON BAIL

7.12 As observed in the bail consultation paper, although the police and the courts enjoy powers of enforcement in relation to breaches of bail,⁴³⁷ there is no statutory obligation on the police or any other organisation to monitor compliance with bail. Indeed, bail legislation in other jurisdictions does not normally make provision for monitoring or support for persons on bail.⁴³⁸ In Northern Ireland some monitoring of bail conditions is, however, carried out by the police, private firms (in relation to electronic monitoring requirements) and community groups.⁴³⁹ While some community groups expressed an interest during the preliminary discussions in becoming involved in monitoring bail conditions within their community, some reservations were voiced about such an initiative.⁴⁴⁰ Views were invited in the bail consultation paper in relation to appropriate administrative arrangements which may be devised, possibly drawing on existing models and/or resources, to address the issue of bail monitoring (Q 31).

7.13 By contrast with many other jurisdictions, there are no dedicated support programmes available for adults on bail in Northern Ireland. Bail support services are available to some young persons on bail. These programmes, delivered by the Youth Justice Agency (see para 6.66, above), are highly regarded as an effective means of ensuring compliance with bail⁴⁴¹ and it has been suggested that the cost of this scheme compares favourably with the cost of remand in custody.⁴⁴² It was argued in preliminary discussions that similar support services should be provided to adults on bail⁴⁴³ and the possibility of linking bail support to bail information schemes has been mooted.⁴⁴⁴ It was suggested that bail support programmes should address issues such as alcohol and/or drug dependency and anger issues with a view to preventing offending on bail and ensuring compliance with conditions.

⁴³⁷ Bail CP, paras 3.54 to 3.66. See also ch 3, above.

⁴³⁸ Bail CP, para 6.47.

⁴³⁹ Bail CP, paras 3.67 to 3.68.

⁴⁴⁰ Bail CP, paras 5.56 to 5.59.

⁴⁴¹ Bail CP, paras 4.24 to 4.25 and para 5.61.

⁴⁴² Northern Ireland Office, *Evaluation of the Bail Supervision and Support Scheme*, NIO Research and Statistical Series: Report No 13 (May 2006), p 87.

⁴⁴³ Bail CP, para 5.61.

⁴⁴⁴ Bail CP, para 3.45.

7.14 In other jurisdictions bail support programmes address both particular needs, such as drug⁴⁴⁵ or alcohol dependency⁴⁴⁶ and complex needs requiring integrated services.⁴⁴⁷ Practical support which may impact upon the bail decision such as accommodation issues are addressed in some jurisdictions.⁴⁴⁸ Services which may assist compliance with bail such as explanations and/or reminders of conditions and/or court dates are available in other jurisdictions.⁴⁴⁹ Views were invited on appropriate administrative arrangements which may be devised, possibly drawing on existing models and/or resources, to address the issue of bail support (Q 32).

7.15 Consultation responses revealed some support for bail monitoring, with the argument being made that effective monitoring of bail conditions may enhance community confidence and prevent offending on bail. It was suggested that greater use should be made of technology in monitoring bail compliance. One consultee argued that a statutory obligation should be imposed upon the police to monitor compliance with bail. Other consultees argued, however, that police monitoring of bail may pose resource difficulties for the police. Some consultees expressed reservations about police monitoring of bail, particularly as the police themselves will have imposed the conditions if the person is on police bail.

7.16 It was argued that it may be appropriate for other statutory or non-statutory organisations to be involved in bail monitoring. Consultees stressed that monitoring by credible community organisations should comply with human rights standards and be subject to appropriate oversight. One consultee suggested that such monitoring could incorporate restorative justice principles and others highlighted the importance of consistent provision across Northern Ireland.

7.17 Several consultees expressed the view that monitoring and support are inextricably linked and that in the context of the provision of support for

⁴⁴⁵ See eg Court Assessment and Referral Drug Scheme (CARDS) in South Australia, available at: <http://www.courts.sa.gov.au/courts/magistrates/cards.html>

⁴⁴⁶ See eg Queensland Indigenous Alcohol Diversion Program (QIADP), available at: http://www.health.qld.gov.au/atod/treatment/indigenous_alcohol.asp

⁴⁴⁷ See eg Court Integrated Services Program (CISP) in Victoria, Australia, available at: <http://www.magistratescourt.vic.gov.au/home/court+support+services/magistrates+-+court+integrated+services+program>

⁴⁴⁸ Bail CP, para 6.49.

⁴⁴⁹ Bail CP, para 6.50.

persons on bail it may be appropriate to report breaches of bail conditions to the appropriate authorities. It was suggested by some that the emphasis should be more on support than monitoring.

7.18 Although the view was expressed by some that support for persons on bail should be provided by family and friends, most consultees who answered this question were in favour of formalised bail support for adults in Northern Ireland. Many consultees argued that such schemes should be available to all adults and children, especially vulnerable adults and children. Those in favour of the development of such programmes argued that bail support programmes should aim to manage any risks posed by the individual, facilitate compliance with conditions and reduce offending on bail, failures to surrender to custody and unnecessary custodial remands. It was argued that bail support packages should be devised following an assessment of the circumstances of the individual and any risks which may interfere with compliance with bail.

7.19 Several consultees stressed the importance of the provision of appropriate accommodation as a key element of bail support. Consultees pointed out the lack of bail hostels in Northern Ireland and the particular difficulties encountered by foreign nationals, particularly persons from outside the European Union and asylum seekers, in attaining accommodation while on bail. It was argued that persons who do not pose any real risk of absconding, interfering with the administration of justice or offending on bail may be remanded simply because they cannot provide the court with a suitable bail address.

7.20 It was argued that bail support should address addiction and/or mental health issues which may impact upon offending and/or compliance with bail. One consultee who responded to the EQIA consultation argued in favour of the provision of bail support services for persons with mental health and/or learning difficulties. Suggestions were also made regarding practical support in the form of advocacy and explanations of bail and any conditions imposed. While acknowledging that voluntary engagement with bail support is preferable, one consultee argued that consideration should be given to making participation on bail support programmes compulsory in certain circumstances.

- 7.21 Consultees suggested several different organisations which may be appropriate to devise and deliver bail support programmes for adults in Northern Ireland, including PBNI, Extern and Mindwise. It was argued that given the complex needs of many persons on bail, input may be required from several different agencies, as well as voluntary and community groups. It was stressed, however, that any organisations involved in bail support must comply with human rights standards and be subject to appropriate oversight and accreditation. It was argued that any bail support programmes established must be appropriately resourced and available across Northern Ireland. Such services should be available at the earliest opportunity in order to avoid unnecessary remands.
- 7.22 Having considered the issues, the Commission considers that the development of support services for adults on bail in this jurisdiction is preferable to any increase in bail monitoring. In the view of the Commission, bail support is more likely to lead to greater compliance with bail and reduced offending while on bail. Bail support programmes may also facilitate persons to address and resolve other difficulties in their lives including homelessness and addiction. While it is the view of the Commission that such programmes should focus primarily on support, it is acknowledged that an element of monitoring may also be incorporated into the programme as breaches of the programme may be liable to be reported to the police.
- 7.23 Like bail support currently provided to children and young persons by the Youth Justice Agency, the Commission considers that services should be tailored to the individual needs of the person on bail and may address issues such as accommodation and addiction, mental health, employment and other issues. Consideration might also be given to practical support in terms of reminders and explanations.
- 7.24 The Commission believes that it may be appropriate for such bail support programmes to build on the successful Bail Supervision and Support Scheme managed by the Youth Justice Agency and to involve a multi-agency approach with input from voluntary and/or community groups. Like the bail information initiative discussed above (see paras 7.2 to 7.11), bail support services should be available at the earliest opportunity in order to avoid unnecessary custodial remands.

Recommendation 52

- 7.25 **The Commission recommends that a bail support programme should be developed for adults in Northern Ireland, addressing issues such as accommodation, addiction, mental health, employment and other issues. The Commission recommends that provision for bail support for adults should be achieved by non-legislative means.**

VICTIMS OF CRIME

- 7.26 In the consultation paper the potential importance of the bail decision for victims of crime and their families was highlighted. The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power stipulates that victims should be kept informed of developments and that the views of victims should be heard in criminal proceedings.⁴⁵⁰ PSNI and PPS policies commit those organisations to the provision of information to victims regarding bail decisions, in varying degrees of detail.⁴⁵¹ Victims may opt out of receiving information under the PSNI policy.⁴⁵²
- 7.27 Concern was expressed in preliminary discussions about the current provision of information to victims regarding bail decisions. It was argued that victims should be informed of the release of an accused person on bail and of any conditions attached, preferably before that release is effected. In light of the resource implications of keeping victims informed, it was suggested by some that information should only be provided to victims considered most in need of information and reassurance, such as victims of violent or sexual offences.⁴⁵³ In some jurisdictions, legislation has been enacted in relation to the treatment of victims in criminal proceedings, including a statutory duty to provide information to victims regarding bail decisions.⁴⁵⁴ This duty is limited in some jurisdictions to victims who have requested information, victims of particular offences or cases where particular bail conditions are imposed.⁴⁵⁵ Views were invited in the consultation paper on the inclusion in bail legislation of a duty to

⁴⁵⁰ Bail CP, para 6.52.

⁴⁵¹ See Police Service of Northern Ireland, *Policy Directive; Dealing with Victims and Witnesses*, available at: http://www.psn.police.uk/policy_directive_0506.pdf; Public Prosecution Service, *Victim and Witnesses Policy* (March 2007), available at:

http://www.ppsni.gov.uk/SiteDocuments/Victims/Victims_and_WitnessesPolicyv1.pdf

⁴⁵² See Police Service of Northern Ireland, *Policy Directive; Dealing with Victims and Witnesses* (last updated 23 April 2012) available at: http://www.psn.police.uk/policy_directive_0506.pdf

⁴⁵³ Bail CP, para 5.64.

⁴⁵⁴ Bail CP, paras 6.52, 6.55 to 6.59. Such duties, however, may not necessarily be enforceable in legal proceedings: Bail CP, para 6.52.

⁴⁵⁵ Bail CP, para 6.55.

provide information to victims (Q 33). Consultees were also asked to consider if such a duty should apply to all victims or whether it should be limited in some way (Q 34). If consultees were not in favour of a statutory duty, views were invited on (a) the terms in which existing guidance might be amended and (b) the best mechanism to ensure that the provision of information to victims of crime is fulfilled in practice (Q 35).

7.28 Many consultees were in favour of the inclusion in legislation of a duty to provide information to victims regarding bail decisions. One consultee suggested that the PSNI policy should be placed on a statutory footing. It was argued that lack of information causes victims fear and anxiety and that a statutory duty would encourage victims to participate in the criminal justice process and increase public confidence. Legislation should require the provision of information regarding the decision to release on bail and the imposition or variation of bail conditions.

7.29 Some consultees argued, however, that a statutory duty is not necessary and several others expressed no preference for the inclusion of a duty to provide information to victims in statute or administrative procedure, provided that timely, accurate and comprehensible information is provided by all agencies concerned. One consultee argued that the possibility of seeking legal redress if a statutory duty is not complied with does not offer an appropriate remedy. Another suggested that if legislation is not enacted, it would be sensible for any agency involved in the provision of information to victims to devise an information sharing protocol, to ensure compliance with the Data Protection Act 1998.

7.30 Since the publication of the consultation paper, the Department of Justice has devised a Code of Practice for Victims of Crime which describes how victims can expect to be treated by criminal justice agencies and some voluntary groups, including expectations regarding the provision of information to victims.⁴⁵⁶ The Code states that relevant information will be provided to victims in an understandable format at various stages of the criminal process. The provisions of the Code of Practice for Victims are not enshrined in statute and

⁴⁵⁶ Department of Justice, *Code of Practice for Victims of Crime* (March 2011).

it has been argued that this approach allows for greater flexibility when amending the Code to improve services for victims.⁴⁵⁷

7.31 In its analysis of the care and treatment of victims and witnesses in the criminal justice system Criminal Justice Inspection NI made a conditional recommendation that systems be put in place to support police officers in providing timely and accurate information to victims in relation to bail decisions.⁴⁵⁸

7.32 Having considered all the issues, the Commission is not persuaded that it is necessary to include in bail legislation a duty to provide information to victims. The Commission is mindful that the bail decision is only one of many decisions which may be relevant to victims in criminal proceedings. It would, in the view of the Commission, be anomalous to impose a statutory duty to provide information to victims in relation to bail decisions if there is no equivalent duty to provide information in relation to other important decisions taken in the course of criminal proceedings. Further, in those jurisdictions which have created a statutory duty to provide information to victims, the precise legal consequences of a failure to provide such information are uncertain.⁴⁵⁹ The Commission considers that the provision of relevant and timely information to victims can and should be achieved by non-legislative means.

Recommendation 53

7.33 **The Commission does not recommend the creation of a statutory duty to provide information to victims in relation to bail decisions. The Commission recommends that the provision of relevant and timely information to victims should be achieved by non-legislative means.**

7.34 Although many consultees believed that information should be provided to all victims, most agreed that the needs of victims may vary. Consultees suggested that the duty to provide information could be limited to victims of serious or violent offences, vulnerable or intimidated victims or victims with some connection to the accused. Some consultees preferred informing victims

⁴⁵⁷ Department of Justice, *Consultation on a Code of Practice for Victims of Crime* (October 2010), p 8.

⁴⁵⁸ See Criminal Justice Inspection Northern Ireland, *The care and treatment of victims and witnesses in the criminal justice system in Northern Ireland* (December 2011), para 4.60.

⁴⁵⁹ It was pointed out in the consultation paper that breaches of such legislation may not be enforceable: see Bail CP, para 6.52; Victims of Crime Act 2001 (SA), s 5; Victims of Crime Assistance Act 2009 (Qld), s 7.

only when a particular bail condition affected that victim. Another suggested that while all victims should be informed, victims of violent offences or victims believed to be at risk should be informed more promptly. Other consultees suggested that the wishes of the victim should be the paramount consideration, with information being provided to all victims who express a desire to receive such information. One consultee argued if all victims are not offered information, a perceived hierarchy of victimhood may develop.

7.35 The conditional recommendation of Criminal Justice Inspection NI suggested that victims of serious crimes should have priority in terms of receiving information regarding bail decisions.⁴⁶⁰

7.36 While the Commission agrees with consultees that the needs of victims may vary, it does not favour placing any limitation on the provision of information to victims, based on the nature of the offence or the bail condition imposed. The Commission is persuaded that the views of victims in relation to the receipt of information should be the key determinant of whether information is provided. Victims should, in the view of the Commission, be informed of the option of receiving information about key decisions, including bail decisions, and be empowered to decide if they wish to receive such information.

Recommendation 54

7.37 The Commission recommends that any non-legislative scheme for the provision of information to victims should offer information to all victims in relation to key decisions in criminal proceedings, including bail decisions, allowing victims to decide if they wish to be provided with that information.

7.38 Consultees highlighted some deficiencies in current provision for victims and recounted stories of a victim discovering that an accused person had been released on bail only when he or she encountered the accused person on the street or read about the bail decision in the newspaper. As suggested in preliminary discussions,⁴⁶¹ some consultees argued that the PSNI and PPS policies are inconsistent and not always adhered to in practice.

⁴⁶⁰ See Criminal Justice Inspection Northern Ireland, *The care and treatment of victims and witnesses in the criminal justice system in Northern Ireland* (December 2011), para 4.60.

⁴⁶¹ Bail CP, para 5.64.

- 7.39 It was suggested that the Department of Justice Victims Code should lay down appropriate guidance for the provision of information to victims and that organisational policies should set out clearly obligations to keep victims informed, with reference to accompanying measurable standards. Agencies should be closely monitored to ensure compliance with their policies and held to account by the Department of Justice and Criminal Justice Inspection NI. Consultees argued that a duty to provide information should not be limited to the bail decision and that victims should have a clear point of contact to keep them informed of all developments in the case. One consultee argued that a single criminal justice organisation should take the lead in providing information to victims. This consultee stressed, however, that effective inter-agency communication is also essential to ensure that accurate information is provided in a timely manner and that records are correctly maintained.
- 7.40 Several consultees highlighted the importance of information being provided to victims promptly and one argued that information should be provided to vulnerable and intimidated victims within one day and to other victims within five days, in accordance with the Code of Practice in England and Wales.⁴⁶²
- 7.41 One consultee argued that information should be conveyed to victims in simple, non-technical language and another suggested that complex bail conditions should be provided in writing with an appropriate explanation. Another consultee emphasised the importance of training for those in contact with victims. One consultee argued, however, that ‘safeguarding’ issues must be considered and another suggested that a risk assessment should be carried out in relation to the dangers to the victim and the person on bail of providing information to the victim. It was suggested that the privacy of the person on bail should be protected, particularly if the offence does not involve a clearly identifiable victim and that only relevant information should be provided. It was argued that the processing and sharing of information must comply with the requirements of the Data Protection Act 1998.
- 7.42 Consultees stressed the need for any scheme for the provision of information to victims to be adequately resourced. In addition to information, some consultees argued that victims should be provided with support and protection.

⁴⁶² Criminal Justice System, *The Code of Practice for Victims of Crime* (2006), paras 5.14 to 5.17.

It was further suggested that victims should receive advice on how and when to report breaches of bail.

7.43 Some consultees argued that community groups should be provided with information in relation to bail granted and conditions imposed on persons residing within the community and others suggested that such information should be publicly available.

7.44 Since the publication of the consultation paper, there have been several advances in relation to the provision of information to victims of crime including the development of Witness Care Units by the PSNI⁴⁶³ and the completion of a Justice Committee Inquiry on services to victims and witnesses.⁴⁶⁴ In addition, a proposal for an EU directive that would establish a victim's right to sufficient and clear information, including information regarding the release of the accused, has been made.⁴⁶⁵

7.45 The Commission is in agreement with consultees that the provision of information to victims of crime must be provided in a timely, consistent and comprehensible manner throughout criminal proceedings. The Commission considers that there may be merit in designating a single organisation to take the lead in the provision of information to victims and to provide a consistent point of contact. The Commission believes that consideration should also be given to protecting the privacy of the accused person and that relevant data protection principles should be complied with.

Recommendation 55

7.46 **The Commission recommends that a non-legislative scheme for the provision of information to victims should provide prompt, consistent and clearly understood information to victims throughout criminal proceedings.**

⁴⁶³ The objective of Witness Care Units is to meet the needs and expectations of victims and witnesses, including the provision of timely and accurate information, as a case progresses through the legal system.

⁴⁶⁴ Northern Ireland Assembly Justice Committee, *The Report on the Inquiry into the Criminal Justice Services Available to Victims and Witnesses of Crime* (July 2012).

⁴⁶⁵ European Commission, *Proposal for a Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime*, COM (2011) 275 final, Arts 3 to 6.

CONCLUSION

7.47 The recommendations made in this chapter are, in the view of the Commission, desirable to ensure the smooth and effective operation of the proposed legislative scheme. Without comprehensive, timely and accurate bail information, decision makers may be impeded from reaching reasonable and reasoned bail decisions. Bail support may facilitate the release of accused persons by encouraging compliance with bail and reducing offending. Consideration of the legitimate interest victims of crime may have in decisions taken in relation to the bail or release of accused persons and prompt provision of information to victims as regards those decisions is appropriate and may serve to allay fears and enhance public confidence in the administration of justice.

CHAPTER 8. CONCLUSIONS

- 8.1 The Commission's statutory duties under the Justice (NI) Act 2002 have informed the decision making process at every stage of the bail project. As noted in the introduction, section 51(1) provides that the Commission must keep under review the law of Northern Ireland including in particular by (a) codification, (b) the elimination of anomalies, (c) the repeal of legislation which is no longer of practical utility, and (d) the reduction of the number of separate legislative provisions, and generally by simplifying and modernising it. The development of the recommendations contained within this report and the Draft Bill has also been informed by wide-ranging stakeholder engagement both before and since the publication of the consultation paper.
- 8.2 The impact of the Human Rights Act 1998 and other international human rights obligations has been examined closely. Particular consideration has been given to the right to liberty under Article 5 of the ECHR. It is the view of the Commission that the recommendations contained within this report and the Draft Bill will comply with the requirements of the Human Rights Act 1998 and may enhance compliance with a number of other international human rights obligations (eg the CRC).
- 8.3 In accordance with the Commission's statutory obligations under section 75 of the Northern Ireland Act 1998, the policy issues under consideration in the bail consultation paper have been subject to an Equality Screening, a full Equality Impact Assessment ('EQIA') and consultation, the results of which are published in a report at Appendix A. On the basis of the EQIA and the consultation responses received, the Commission is content that the recommendations contained within this report and the Draft Bill will not adversely impact on any section 75 groupings and indeed may promote equality of opportunity for some section 75 categories.
- 8.4 The key objectives of the bail project, as previously outlined, are to make recommendations which aim to: (i) simplify the current law and make it more accessible; (ii) provide a legal framework that will promote consistency and transparency in bail decision making; (iii) enhance public understanding of bail decision making; (iv) ensure that the law on bail conforms with the

requirements of the European Convention on Human Rights and maintains a proper balance between the right to liberty of the individual suspect and the interest of society in the prevention of crime and in the effective administration of criminal justice; (v) promote the development of appropriate administrative arrangements that will complement and ensure the effective working of any new or revised statutory scheme.⁴⁶⁶ The Commission is confident that the recommendations contained within this report and the Draft Bill will meet the objectives set for the bail project. Some brief reflections on those objectives and the manner in which they may have been achieved through the Commission's recommendations are presented below.

(i) Simplification and accessibility

8.5 Bail law in Northern Ireland is currently found in a range of common law and statutory sources. As argued in the consultation paper, the legal framework is lacking in clarity and is often archaic in its terminology.⁴⁶⁷ The Commission has recommended the creation of a single unified Bail Act, which, it is hoped, will achieve the objective of simplification. The language and style adopted in the Draft Bill will further enhance the accessibility of the law. Efforts have been made to clarify and modernise several arguably outmoded and/or redundant concepts such as the personal recognizance for court bail and the requirement of a surety for bail. The former is arguably no longer necessary in light of the duty to surrender and the offence of failure to surrender to custody. The latter has been updated and replaced with a new more rational bail guarantor regime.

(ii) Consistency and transparency

8.6 Statutory intervention in relation to bail has occurred on a piecemeal basis and there are inconsistencies in provision across the various levels of decision making. Some aspects of the law are complex and lacking in transparency. The Draft Bill recommended by the Commission will govern both police and court bail, ensuring greater consistency in decision making. The right to bail and the grounds for the refusal of bail applicable to persons accused of offences will apply to bail granted by both the police and the courts, hopefully ensuring that a uniform approach will be taken to the release or remand of accused persons. Reasons will be required for decisions to refuse bail or

⁴⁶⁶ Bail CP, para 1.7.

⁴⁶⁷ Bail CP, para 3.74.

impose or vary conditions and a record will be required to be made of those reasons, which will be made available to the accused on request. These recommendations will promote greater transparency in decision making which in turn, it is hoped, will ensure consistency across the different levels of decision making.

(iii) Public understanding

8.7 It is further anticipated that the introduction of a modern Bail Act, using straightforward and accessible language and concepts, and promoting greater consistency and transparency in bail decision making will enhance public understanding and confidence in the bail system.

(iv) ECHR

8.8 Article 5 of the ECHR establishes a rigorous framework for the restriction by the state of the liberty of the individual. Its primary purpose is to protect persons from arbitrary deprivation of their liberty. Having considered fully the jurisprudence of the European Court of Human Rights, the Commission has made several recommendations which are designed to ensure that the Bail Act will be fully compliant with Article 5. A statutory right to bail for accused persons is recommended, subject to four grounds for refusal which have been endorsed by the European Court of Human Rights. Statutory guidance on bail conditions will ensure that such lesser restrictions on liberty will be imposed in a proportionate manner and only for legitimate purposes. The requirement of reasons for any interference with the right to liberty will also enhance compliance with Article 5.

8.9 Bearing in mind the principles of necessity and proportionality, the Commission has recommended the restriction of bail powers at the pre charge stage of criminal proceedings. The view has been adopted that the imposition of bail conditions for an indefinite period upon persons not charged with an offence and the possibility of prosecution for an offence for failure to surrender are disproportionate at this stage in criminal proceedings. The lack of judicial oversight of the pre charge bail decision has also been addressed. A number of recommendations in relation to pre charge bail have been made which, in the view of the Commission, will strike an appropriate balance between the right to liberty of the individual suspect and the interest of society in the prevention of crime and the effective administration of justice.

(v) Administrative arrangements

8.10 As argued in the consultation paper, clearly drafted and accessible legislation alone will not necessarily address all aspects of bail law and practice that may require fresh consideration.⁴⁶⁸ Alongside the many legislative recommendations made, the Commission is satisfied that the proposed statutory scheme would be greatly enhanced by the introduction of a number of practical and administrative arrangements to complement the statutory scheme. The Commission has made a number of additional recommendations in relation to bail information, support for persons on bail and the provision of information to victims.

8.11 During this review of bail law and practice, the Commission has also been mindful of the particular vulnerability of children and young persons within the criminal justice system. In the view of the Commission, greater account must be taken of the particular circumstances of young persons when taking bail decisions and additional protections must be afforded to them. The Commission has recommended that when bail decisions are taken in respect of children accused of offences consideration must be given to their age, maturity, needs and understanding and to appropriate international children's rights standards. Such standards demand that the best interests of the child must be a primary consideration and that detention should be a measure of last resort and for the shortest appropriate time. The key issue of accommodation for children and young persons on bail must be addressed and to that end, recommendations have been made to prohibit remand solely for accommodation reasons and to provide an appropriate range of accommodation options for young persons on bail. The Commission is persuaded that there are wider benefits to be gained by diverting children and young persons, where possible, away from the juvenile justice system.

8.12 In conclusion, the Commission presents the recommendations in this report confident that they will suitably form the basis of significant reform of this important aspect of the criminal justice system.

⁴⁶⁸ Bail CP, para 2.22.

CHAPTER 9: LIST OF RECOMMENDATIONS

1. The Commission recommends the introduction of a single unified Bail Act which will govern bail decision making by police officers and courts across different levels of jurisdiction.
2. The Commission recommends the inclusion in bail legislation of a definition of 'bail', in similar terms to the 2003 Order, to which some general provisions of the legislation should apply. *Interpretation provision, Clause 46(1)*
3. The Commission recommends that the definition of bail covers:
 - post charge police bail;
 - bail under a warrant endorsed for bail;
 - court bail pending trial and during trial;
 - bail pending sentence;
 - bail pending appeal; and
 - compassionate bail.Pre charge bail granted at a police station and bail elsewhere than at a police station should be excluded from this definition. *Interpretation provision, Clause 46(1)*
4. The Commission recommends the following amendments to the powers relating to pre charge bail granted at a police station:
 - (a) the removal of the power to attach conditions;
 - (b) the removal of the duty to surrender to custody and the offence of failure to surrender, the imposition only of a requirement to attend a police station; and
 - (c) the creation of a right to have the decision to release on bail reviewed.*Clauses 31, 33, 34, 35 and 38*
5. The Commission recommends the repeal of all police powers relating to bail elsewhere than at a police station. *Clause 30 and Schedule 2*
6. The Commission recommends the inclusion in bail legislation of a duty to surrender to custody which includes a duty to surrender at the appointed time:
 - into the custody of a court; or
 - into the custody of a prison governor. *Clause 24*

- Clause 25* 7. The Commission recommends the inclusion in bail legislation of a simplified offence of failure to surrender to custody applicable to persons on bail.
8. The Commission does not recommend the inclusion in bail legislation of an offence of breach of bail conditions.
- Clauses 26 and 27* 9. The Commission recommends the inclusion in bail legislation of powers to issue warrants and powers to arrest without warrant for failure and anticipated failure to surrender to the custody of a court or a prison governor, along similar lines to Article 6 of the Criminal Justice (NI) Order 2003.
- Clause 33* 10. The Commission recommends that the power to arrest without warrant for failure to attend a police station in answer to pre charge bail in PACE is retained (subject to amendment) and that no additional power to arrest for anticipated failures to attend a police station in answer to pre charge bail is created.
- Clause 27* 11. The Commission recommends the inclusion in bail legislation of powers to arrest without warrant for breach and anticipated breach of conditions imposed on persons released on bail under a duty to surrender to a court or a prison governor, along similar lines to Article 6 of the Criminal Justice (NI) Order 2003.
- Clause 28* 12. The Commission recommends that bail legislation should require that a person arrested without warrant for anticipated failure to surrender to custody or breach or anticipated breach of bail conditions be brought before a magistrates' court as soon as reasonably practicable. If the court is of the opinion that the person was not likely to surrender to custody, or has broken or was likely to break any condition of his bail, the court must then consider if remand or bail is appropriate, taking that finding into account alongside all other relevant factors. If the court is not of that opinion, it must release the person on the same conditions (if any) as originally imposed.
- Clause 29* 13. The Commission recommends that bail legislation should include powers for lay magistrates (subject to certain conditions) to issue a warrant for entry and search of premises for a person who is liable to arrest without warrant for

- anticipated failure to surrender or breach or anticipated breach of bail conditions.
14. The Commission recommends the abolition of the power to require a personal recognizance for court bail in criminal proceedings. *Clause 43 and Schedule 3*
 15. The Commission recommends the abolition of the powers of the police and the courts to require a surety or sureties to secure a person's surrender to custody when granting bail in criminal proceedings. *Clause 43 and Schedule 3*
 16. The Commission recommends the creation of powers for the police and courts to require a bail guarantor or bail guarantors to secure a person's surrender to custody when granting bail in criminal proceedings. *Clauses 14 and 15*
 17. The Commission recommends that a bail guarantor should be defined as a person who gives a guarantee that, if a person is granted bail, that person will surrender to custody as required. The bail guarantor will undertake to pay a specified sum (the guaranteed sum) if the person fails to surrender to custody. *Clause 13*
 18. The Commission recommends the inclusion in bail legislation of a requirement to consider the resources, character and closeness of a prospective bail guarantor to the person seeking bail when determining a bail guarantor's suitability to perform this role. *Clause 16*
 19. The Commission recommends the inclusion in bail legislation of provision for the discretionary forfeiture of the guaranteed sum if the person on bail fails to surrender to custody. *Clauses 19 and 20*
 20. The Commission recommends the inclusion in bail legislation of provision permitting the imposition of a security condition as an alternative to a bail guarantor condition. *Clause 18*
 21. The Commission recommends the inclusion in bail legislation of a general right to bail for all persons accused of offences or awaiting trial, subject to the power of the police or the courts to refuse bail. *Clauses 1 and 2*

22. The Commission does not recommend the creation of any presumptions against bail for particular offences or circumstances.
- Clause 3* 23. The Commission recommends the inclusion in bail legislation of powers for the police and the courts to refuse bail if there are substantial grounds for believing that if granted bail the accused would:
- fail to surrender to custody;
 - interfere with witnesses or otherwise obstruct the course of justice;
 - commit offences.
- Bail may also be refused if there are substantial grounds for believing that the detention of the accused is necessary to preserve public order.
- Clause 5* 24. The Commission recommends the inclusion in bail legislation of powers for the police and the courts to defer the bail decision and detain an accused person if there is insufficient information to determine if one of the grounds for detention is established, provided:
- the detention is for no longer than necessary to allow the information to be obtained; and
 - the lack of information is not due to a failure on the part of the state to act with 'special diligence'.
- Clause 8* 25. The Commission recommends the inclusion in bail legislation of a provision stipulating that an accused person granted bail by a court in connection with an offence while in custody in relation to another offence does not have to be released from custody.
- Clause 3* 26. The Commission recommends the inclusion in bail legislation of a non-exhaustive list of factors which, if relevant to the question of whether any of the grounds for the refusal of bail have been established, must be considered by the bail decision maker. The following factors should be included in this list:
- (i) nature and seriousness of the offence;
 - (ii) strength of evidence against accused;
 - (iii) character, previous convictions and bail history;
 - (iv) community ties and associations;
 - (v) any conditions that may be imposed to manage any risk posed by the release of the accused person;
 - (vi) any other relevant factors.

27. The Commission does not recommend the inclusion in bail legislation of a provision incorporating a right to disclosure or a statutory duty to disclose in the context of bail applications.
28. The Commission recommends the inclusion in bail legislation of a single test of necessity for the imposition of bail conditions by the police and the courts. Bail conditions may be imposed if considered necessary for the purposes of preventing the accused person from:
- failing to surrender to custody;
 - interfering with witnesses or otherwise obstructing the course of justice; or
 - committing offences while on bail.
- Bail conditions can also be imposed for the preservation of public order.
29. The Commission recommends the inclusion in bail legislation of a provision stipulating that conditions attached to bail should be no more onerous than necessary for one of the four purposes outlined in Recommendation 28, above.
30. The Commission recommends that bail legislation should require decision makers to consider the accused person's understanding or ability to comply with conditions when imposing or varying conditions.
31. The Commission recommends that bail legislation should require decision makers to consider the accused person's work, education, family commitments, religious beliefs and any other relevant commitments when imposing or varying bail conditions.
32. The Commission recommends that bail legislation should require decision makers to consider any other considerations that appear relevant, when imposing or varying bail conditions.
33. The Commission recommends that curfew requirements imposed on post charge police bail should be subject to the restrictions imposed on the attachment of curfew requirements by the courts in the Criminal Justice (NI) Order 2008.

*Clauses
10, 11, 32
and 36*

34. The Commission recommends the inclusion in bail legislation of a requirement on the police and the courts to provide reasons for the following decisions made in respect of accused persons and for a record to be made of the decision and the reasons for it:
- a decision to refuse bail;
 - a decision to impose or vary bail conditions.

Provision should also be made for the accused person to be supplied with a copy of that record on request.

*Clauses 9
and 11*

35. The Commission recommends the inclusion in bail legislation of a requirement on the courts to make a record of the appointed time and place to surrender to custody and any conditions imposed or varied when an accused person is granted bail. A copy of this record should be provided to the accused person on request.

*Clauses 1, 2,
3 and 40*

36. The Commission recommends that the general right to bail for all persons accused of offences or awaiting trial, subject to the power of the police or the courts to refuse bail, should also apply to children and young persons accused of offences. Therefore such children and young persons should have a right to bail unless there are substantial grounds for believing that if granted bail the child or young person would:
- fail to surrender to custody;
 - interfere with witnesses or otherwise obstruct the course of justice;
 - commit offences.

Bail may also be refused if there are substantial grounds for believing that the detention of the child or young person is necessary to preserve public order.

Clause 4

37. The Commission recommends that, in addition to the list of factors which, if relevant, must be considered when decision makers are determining if detention is justified in respect of adults accused of offences, decision makers must also consider the following factors when determining if detention is justified in respect of a child or young person accused of an offence:
- the age, maturity, needs and understanding of the young person;
 - the best interests of the child as a primary consideration;
 - that detention pending trial must be used only as a measure of last resort and for the shortest possible period of time.

38. The Commission recommends that bail legislation should prohibit the detention of children and young persons solely on the grounds of a lack of suitable accommodation. *Clause 4*
39. The Commission recommends that bail legislation should abolish the following provisions: *Clause 42*
- Article 6 of the Criminal Justice (Children) (NI) Order 1998;
 - Articles 7 and 8 of the Criminal Justice (Children) (NI) Order 1998;
 - Article 31 of the Criminal Justice (Children) (NI) Order 1998.
40. The Commission recommends that bail legislation should amend the definition of a 'place of safety' in Article 39(8) of PACE to remove any reference to a 'hospital or surgery', and 'or any other suitable place the occupier of which is willing temporarily to receive the arrested juvenile'. *Clause 39*
41. The Commission recommends that bail legislation should repeal amendments made in the Justice (NI) Act 2002 to include secure accommodation and the young offenders centre in the definition of a 'place of safety'. *Clause 39*
42. The Commission recommends that bail legislation should amend Article 13 of the Criminal Justice (Children) (NI) Order 1998 to remove any provision for the remand of children and young persons under 18 years of age to the young offenders centre. *Clause 41*
43. The Commission recommends that bail legislation should repeal amendments made in the Justice (NI) Act 2002 which require the remand of 10 to 13 year olds to secure accommodation. *Clause 41*
44. The Commission recommends that bail legislation should include a presumption that a young person on remand will remain in the juvenile justice centre on turning 18 years of age during the remand period unless it is in the young person's best interests to be moved to the young offenders centre. The Commission recommends that decision makers should be required to consider the following factors in making that determination: *Clause 41*
- the maturity, needs and understanding of the young person;
 - the likely duration of the remand period;

- the suitability of the young person to the regime at the young offenders centre.

Clause 6 45. The Commission recommends that statutory guidance in relation to the imposition or variation of bail conditions in respect of adults accused of offences should also apply to children and young persons accused of offences.

Clause 7 46. In addition to that guidance, the Commission recommends that bail legislation should require decision makers, when imposing or varying conditions for children and young persons accused of offences, to consider:

- the age, maturity, needs and understanding of the young person; and
- the best interests of the child as a primary consideration.

Schedule 7 47. The Commission recommends that Article 43 of the Criminal Justice (NI) Order 2008 should be repealed.

48. The Commission recommends that a range of accommodation options for children and young persons on bail be made available.

49. The Commission recommends that bail support programmes for children and young persons are expanded to include an assessment, at the earliest opportunity, of all children and young persons charged by the police. Support services should address accommodation needs, mental health and addiction issues, training and employment and other issues. The Commission recommends that provision for bail support for children and young persons should be achieved by non-legislative means.

Clauses 9, 10, 11, 32 and 36 50. The Commission recommends that the following bail decisions are explained to children and young persons in language that is appropriate to their age, maturity and understanding:

- the obligation to surrender to custody at a particular time and place, when bail is granted;
- the grounds and reasons for any denial of bail;
- any bail conditions imposed or varied, the purposes for which those conditions are imposed and the reasons why those purposes are considered relevant.

51. The Commission recommends that a bail information scheme is established to provide, at the earliest opportunity, comprehensive, verified and prompt information for bail decision makers. The Commission recommends that provision for a bail information scheme should be achieved by non-legislative means.
52. The Commission recommends that a bail support programme should be developed for adults in Northern Ireland, addressing issues such as accommodation, addiction, mental health, employment and other issues. The Commission recommends that provision for bail support for adults should be achieved by non-legislative means.
53. The Commission does not recommend the creation of a statutory duty to provide information to victims in relation to bail decisions. The Commission recommends that the provision of relevant and timely information to victims should be achieved by non-legislative means.
54. The Commission recommends that any non-legislative scheme for the provision of information to victims should offer information to all victims in relation to key decisions in criminal proceedings, including bail decisions, allowing victims to decide if they wish to be provided with that information.
55. The Commission recommends that a non-legislative scheme for the provision of information to victims should provide prompt, consistent and clearly understood information to victims throughout criminal proceedings.

Draft Bail Bill

CONTENTS

PART 1 RIGHT OF ACCUSED PERSONS TO BAIL

Right to bail

1. Right to court bail
2. Right to police bail
3. Grounds for refusing bail
4. Grounds for refusing bail: additional considerations for children
5. Bail deferred due to lack of information

Bail conditions

6. Bail conditions
7. Bail conditions: additional considerations for children

Additional provisions for court bail

8. Accused already in custody
9. Duty to state and record details of bail
10. Duty to state and record details of refusal of bail
11. Duty to state and record details of bail conditions

Interpretation of this Part

12. Interpretation of this Part

PART 2 BAIL GUARANTORS

Meaning of "bail guarantor"

13. Meaning of "bail guarantor"

Power of bail authority to require a bail guarantor

14. Power of court to require a bail guarantor
15. Power of police to require a bail guarantor
16. Suitability of bail guarantor
17. Bail guarantor not available when court grants bail
18. Bail guarantor and security for surrender to custody

Forfeiture of guaranteed sum

19. Forfeiture of guaranteed sum
20. Enforcement of forfeiture of guaranteed sum

Discharge of bail guarantor

21. Discharge of bail guarantor

Court power to vary or make guarantee continuous

- 22. Power of court to vary the guarantee
- 23. Power of court to make guarantee continuous

PART 3
ENFORCEMENT

Surrender to custody

- 24. Duty to surrender to custody
- 25. Offence of failure to surrender to custody

Powers of arrest and search

- 26. Arrest with warrant
- 27. Arrest without warrant
- 28. Procedure following arrest without warrant
- 29. Search warrants

PART 4
OTHER AMENDMENTS TO LAW ON BAIL

Amendments to police bail

- 30. Repeal of street bail
- 31. Police review of release on bail without charge
- 32. Duty to state and record reasons for refusal of bail after charge
- 33. Arrest for failure to answer bail without charge
- 34. Bail without charge
- 35. Bail after charge
- 36. Duty to state and record reasons for bail conditions
- 37. Power to impose curfew as bail condition
- 38. Court review of release on bail without charge

Amendments related to bail for children

- 39. Police detention in juvenile justice centre
- 40. Release on bail
- 41. Remand in custody
- 42. Repeal of other provisions relating to bail for children

Abolition of personal recognizances and sureties

- 43. Abolition of personal recognizances and sureties for surrender to custody
- 44. Power to make further provision in connection with section 43

PART 5
FINAL PROVISIONS

- 45. Keeling schedule
- 46. Interpretation
- 47. Minor and consequential amendments
- 48. Transitional and saving provisions
- 49. Repeals
- 50. Commencement
- 51. Short title

SCHEDULES:

- Schedule 1 Periods of imprisonment for non-payment of guaranteed sum
- Schedule 2 Amendments related to repeal of street bail
- Schedule 3 Amendments consequent upon abolition of personal recognizances and sureties
- Schedule 4 Articles 39, 47A, 47B and 48 of PACE as amended by this Act
- Schedule 5 Minor and consequential amendments
- Schedule 6 Transitional and saving provisions
- Schedule 7 Repeals

A
BILL
TO

Amend the law on bail and for connected purposes.

BE IT ENACTED by being passed by the Northern Ireland Assembly and assented to by Her Majesty as follows:

PART 1
RIGHT OF ACCUSED PERSONS TO BAIL

Right to bail

Right to court bail

1.- (1) This section applies where a person accused of an offence appears or is brought before a court, in the course of or in connection with proceedings for that offence.

(2) The accused has the right to be granted bail, unless the court refuses bail on any of the grounds set out in section 3.

(3) This section does not apply in respect of proceedings on or after the accused's conviction for the offence.

(4) Nothing in this section restricts the power of a court –

- (a) to grant bail on compassionate grounds, or
- (b) to release an accused without bail.

(5) This section is subject to Article 38 of the Magistrates' Courts (Northern Ireland) Order 1981 (restriction of bail in cases of treason).

Right to police bail

2.- For Article 39(1) of PACE (right to release from police detention) substitute –

“(1) Where a person arrested for an offence is charged with an offence, the custody officer shall order the person's release from police

detention, either on bail or without bail, unless the custody officer refuses bail on any of the grounds set out in section 3 of the Bail Act (Northern Ireland) 2013 (grounds for refusing bail).

(1B) Paragraph (1) does not apply where the person has been arrested under a warrant endorsed for bail.

(1C) Bail need not be granted and the decision to grant bail under paragraph (1) may be deferred in accordance with section 5 of the Bail Act (Northern Ireland) 2013 (bail deferred due to lack of information).”.

Grounds for refusing bail

3. - (1) Bail may be refused where the bail authority has substantial grounds for believing that the accused would, if granted bail –

- (a) fail to surrender to custody,
- (b) commit an offence while on bail, or
- (c) interfere with witnesses, or otherwise obstruct the course of justice, whether in relation to the accused’s own case or any other person’s case.

(2) Bail may be refused where the bail authority has substantial grounds for believing that the release of the accused would lead to serious public disorder.

(3) In making a decision under this section, the bail authority must have regard to any of the following considerations that are relevant –

- (a) the nature and seriousness of the offence,
- (b) the strength of the evidence against the accused,
- (c) the character and history of the accused, including –
 - (i) any previous convictions, and
 - (ii) any previous grants of bail,
- (d) the community ties and associations of the accused,
- (e) whether if bail conditions were imposed, there would no longer be substantial grounds for believing that an event of the kind mentioned in subsections (1) or (2) would occur, and
- (f) any other considerations that appear relevant.

(4) Where the accused is a child, section 4 also applies.

Grounds for refusing bail: additional considerations for children

4. - (1) This section applies where the accused is a child.

(2) Bail must not be refused on the sole ground that the child does not have any, or any adequate, accommodation.

(3) In making a decision under section 3, the bail authority must have regard to –

- (a) the age, maturity and understanding of the child,
- (b) the physical, emotional and educational needs of the child, and
- (c) the principles set out in subsection (4).

(4) Those principles are that –

- (a) a primary consideration must be the best interests of the child, and
- (b) bail can only be refused as a measure of last resort and for the shortest period of time possible.

Bail deferred due to lack of information

5.- (1) Bail may be refused and the decision to grant bail under section 1 or Article 39 of PACE may be deferred if there is insufficient information to determine whether bail may be refused on any of the grounds set out in section 3.

(2) But the decision may only be deferred –

- (a) for so long as is necessary to obtain sufficient information, and
- (b) if all reasonable steps are being, or have been, taken to obtain that information.

Bail conditions

Bail conditions

6.- (1) Where the accused is granted bail in accordance with section 1 or Article 39 of PACE, the accused may be required to comply with any condition that the bail authority considers appropriate, having regard to the following provisions of this section.

(2) A condition may only be imposed upon the grant of bail if it is necessary to do so for the purpose of –

- (a) preventing the accused from –
 - (i) failing to surrender to custody,
 - (ii) committing an offence while on bail, or
 - (iii) interfering with witnesses, or otherwise obstructing the course of justice, whether in relation to the accused's own case or any other person's case, or
- (b) preventing serious public disorder.

(3) The condition must be no more onerous than is necessary for the purpose for which it was imposed.

(4) The bail authority must have regard to any of the following considerations that are relevant –

- (a) the capacity of the accused to understand or comply with the condition,
- (b) the times at which the accused normally works (or carries out voluntary work) or attends a school or other educational establishment,
- (c) any responsibilities the accused has to family or dependants,
- (d) the accused's religious beliefs, or any other requirement or condition to which the accused may be subject,
- (e) any other responsibilities or obligations the accused has, and
- (f) any other considerations that appear relevant.

(5) This section also applies in respect of applications to vary bail conditions.

(6) Where the accused is a child, section 7 also applies.

Bail conditions: additional considerations for children

7. - (1) This section applies where the accused is a child.

(2) In making a decision under section 6, the bail authority must have regard to –

- (a) the age, maturity and understanding of the child,
- (b) the physical, emotional and educational needs of the child, and
- (c) the principle set out in subsection (3).

(3) The principle is that a primary consideration must be the best interests of the child.

Additional provisions for court bail

Accused already in custody

8. – A decision to grant bail under section 1 does not entitle the accused to be released if the accused is already –

- (a) in police detention in connection with the investigation of another offence,
- (b) in custody by reason of having been refused bail in other criminal proceedings, or
- (c) in custody in pursuance of the sentence of a court or the sentence imposed by an officer under the Armed Forces Act 2006.

Duty to state and record details of bail

- 9.-** (1) This section applies where –
- (a) a court grants bail under section 1, or
 - (b) an accused appears before the court in answer to that bail.
- (2) The court must state, in open court, the appointed time and place (if any) for the accused to next surrender to custody.
- (3) The court must cause a record to be made of the matters set out in subsection (2).
- (4) If the accused requests it, the court must cause a copy of the record to be given to the accused.
- (5) If the accused is a child, the court must explain the matters set out in subsection (2) in language that is appropriate to the age, maturity and understanding of the child.

Duty to state and record details of refusal of bail

- 10.-** (1) This section applies where a court refuses to grant bail under section 1.
- (2) The court must state, in open court –
- (a) the grounds for that refusal, and
 - (b) the reasons why it considers those grounds are applicable.
- (3) The court must cause a record to be made of the matters set out in subsection (2).
- (4) If the accused requests it, the court must cause a copy of the record to be given to the accused.
- (5) If the accused is a child, the court must explain the matters set out in subsection (2) in language that is appropriate to the age, maturity and understanding of the child.

Duty to state and record details of bail conditions

- 11. -** (1) This section applies where a court imposes or varies bail conditions under section 6.
- (2) The court must state, in open court –
- (a) the bail conditions,
 - (b) the purposes for the imposition or variation of those conditions, and
 - (c) the reasons why it considers those purposes are relevant.

(3) The court must cause a record to be made of the matters set out in subsection (2).

(4) If the accused requests it, the court must cause a copy of the record to be given to the accused.

(5) If the accused is a child, the court must explain the matters set out in subsection (2) in language that is appropriate to the age, maturity and understanding of the child.

Interpretation of this Part

Interpretation of this Part

12. - In this Part “the accused” means –

- (a) a person accused of an offence, as referred to in section 1,
- (b) a person charged with an offence, as referred to in Article 39 of PACE.

PART 2 BAIL GUARANTORS

Meaning of “bail guarantor”

Meaning of “bail guarantor”

13.- (1) A bail guarantor is a person who gives a guarantee that, if a person is granted bail, the person will surrender to custody in accordance with the grant of bail.

(2) The guarantee must specify a sum of money (“the guaranteed sum”) which the bail guarantor undertakes to pay if the person fails to surrender to custody.

Power of bail authority to require a bail guarantor

Power of court to require a bail guarantor

14.- (1) A court, before granting a person bail, may require the person to provide a bail guarantor to secure the person’s surrender to custody.

(2) Where a court issues a warrant for arrest of a person endorsed for bail, the endorsement may require that the person provide a bail guarantor to secure the person’s surrender to custody before the person is released on bail.

(3) In subsection (2) “court” includes a lay magistrate sitting out of petty sessions.

Power of police to require a bail guarantor

15.- For Article 48(3B) of PACE (bail after charge) substitute –

“(3B) The person may be required, before release on bail, to either –

- (a) provide a bail guarantor to secure the person’s surrender to custody, or

- (b) give security for the person's surrender to custody, and the security may be given by him or on his behalf."

Suitability of bail guarantor

16. - (1) A bail authority may only accept a person as a bail guarantor if satisfied that the person is suitable for that purpose.

(2) In considering suitability, the bail authority must have regard to (among other things) the proposed guarantor's –

- (a) financial resources,
- (b) character and history, including any previous convictions, and
- (c) closeness to the person seeking bail, whether by virtue of family, place of residence or otherwise.

Bail guarantor not available when court grants bail

17. - (1) This section applies where a court requires a bail guarantor to be provided but is unable to release the person because no bail guarantor is available.

(2) This section also applies where a court issues a warrant for arrest of a person endorsed for bail, where the endorsement requires that the person provide a bail guarantor.

(3) The court must fix the guaranteed sum for the purpose of enabling the guarantee to be entered into subsequently.

(4) The guarantee may subsequently be given before a person, or description of persons –

- (a) specified by the court, or
- (b) prescribed by rules of court.

(5) Where that person declines to accept the guarantee in accordance with section 16, the person proposing to act as bail guarantor may apply to –

- (a) the court which fixed the guaranteed sum, or
- (b) a magistrates' court for the petty sessions district in which the person resides,

for that court to accept the guarantee.

(6) That court must accept the guarantee if satisfied of the suitability of the proposed guarantor.

(7) Where a guarantee is accepted otherwise than before the court that fixed the guaranteed sum, the same consequences follow as if it had been accepted before that court.

(8) In subsection (2) "court" includes a lay magistrate sitting out of petty sessions.

Bail guarantor and security for surrender to custody

18. - (1) Where a statutory provision provides that a bail authority may impose a security bail condition, the bail authority may, in the alternative, impose a bail condition that the person must provide a bail guarantor.

(2) Where a statutory provision provides that a bail authority may impose a bail condition that the person must provide a bail guarantor, the bail authority may, in the alternative, impose a security bail condition.

(3) A bail authority must not impose both –

(a) a security bail condition, and

(b) a bail condition that the person provide a bail guarantor.

(4) In this section “security bail condition” means a condition that the person, or another person on the person’s behalf, must give security for the person’s surrender to custody.

Forfeiture of guaranteed sum

Forfeiture of guaranteed sum

19.- (1) Where the person fails to surrender to custody, a court may order that the guaranteed sum be forfeited from the bail guarantor.

(2) The court may order that forfeiture extends to whatever lesser amount it thinks fit.

(3) Before ordering forfeiture, the court must grant the bail guarantor an opportunity to make representations as to why the guaranteed sum should not be forfeited.

(4) The court may by order –

(a) allow time for payment,

(b) direct that payment is to be made by instalments of amounts and on dates specified in the order.

(5) In this section “court” means –

(a) the court at which the person should have surrendered to custody,

(b) in a case where the person is released on bail by a court on compassionate grounds, that court, or

(c) a magistrates’ court for the petty sessions district in which the bail guarantor resides.

Enforcement of forfeiture of guaranteed sum

20.- (1) This section applies where a bail guarantor fails to comply with a court order forfeiting a guaranteed sum.

- (2) The following courts may enforce that court order –
 - (a) the court which made the order, or
 - (b) a magistrates' court for the petty sessions district in which the bail guarantor resides.
- (3) The court enforcing the order may issue a warrant to levy the amount forfeited by distress and sale of property of the bail guarantor.
- (4) In default of distress, the court may issue a warrant committing the bail guarantor to prison for a period not exceeding that set out in Schedule 1.
- (5) Where part of the amount forfeited has been paid, the period of imprisonment must be reduced by the same proportion as the proportion that the amount paid bears to the total amount forfeited.
- (6) Where the bail guarantor is imprisoned but the amount forfeited is subsequently paid, the bail guarantor must be immediately released.
- (7) Where the bail guarantor is imprisoned but a proportion of the amount forfeited is subsequently paid, the period of imprisonment must be reduced in accordance with subsection (5).

Discharge of bail guarantor

Discharge of bail guarantor

- 21.-** (1) A bail guarantor may be discharged as a bail guarantor in accordance with this section.
- (2) The bail guarantor must apply in writing –
 - (a) where the bail guarantor condition was imposed by a court, to that court,
 - (b) where the bail guarantor condition was imposed by a lay magistrate sitting out of petty sessions, to the court at which the person is under a duty to surrender to custody,
 - (c) where the bail guarantor condition was imposed by a custody officer, to that custody officer, or another custody officer serving at the same police station, or
 - (d) to a magistrates' court for the petty sessions district in which the bail guarantor resides.
 - (3) The application must state that the bail guarantor believes that –
 - (a) the person granted bail will not surrender to custody, or
 - (b) the bail guarantor is no longer suitable to act as bail guarantor for the person.
 - (4) The court or custody officer (as the case may be) may, upon considering the application, discharge the bail guarantor.

- (5) Discharge may be delayed until after the person has been arrested.

Court power to vary or make guarantee continuous

Power of court to vary the guarantee

- 22.** - (1) A court may vary the terms of the guarantee as they relate to –
- (a) the time and place the person must surrender to custody, and
 - (b) the court to which the person must surrender to custody.

(2) Where a court varies a guarantee in the absence of the bail guarantor, it must inform the bail guarantor of the variation.

Power of court to make guarantee continuous

23. - (1) A court may provide that the reference, in a guarantee, to surrendering to custody in accordance with the grant of bail, includes a reference to surrendering to custody at every time and place to which, during the course of proceedings, a hearing may be adjourned.

(2) The court may only make this provision if the bail guarantor is before the court.

PART 3
ENFORCEMENT

Surrender to custody

Duty to surrender to custody

24. - (1) A person who is released on bail is under a duty to surrender to custody.

(2) In this Act “surrender to custody” means surrendering, in accordance with the requirements of the grant of bail –

- (a) into the custody of the court at the time and place appointed to do so, or
- (b) into the custody of the governor of the prison at the time and place appointed to do so.

Offence of failure to surrender to custody

25. - (1) Where a person is released on bail and fails without reasonable cause to surrender to custody, the person is guilty of an offence.

- (2) A person guilty of an offence under this section is liable –
- (a) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum or to both,
 - (b) on a conviction on indictment, to imprisonment for a term not exceeding 3 years or to a fine or to both.

Powers of arrest and search

Arrest with warrant

26.- (1) A court may issue a warrant for the arrest of a person released on bail if the person –

- (a) fails to surrender to custody, or
- (b) leaves the court at any time after surrendering into the custody of the court and before the court is ready to begin or resume hearing of the proceedings.

(2) Subsection (1) does not apply where the person leaves in accordance with permission given by or on behalf of the court.

(3) A court may issue a warrant for the arrest of a person released on bail if a bail guarantor for the person has applied to be discharged as a bail guarantor under section 21.

(4) In subsection (3) “court” includes a lay magistrate sitting out of petty sessions.

Arrest without warrant

27.- (1) A constable may arrest without warrant any person who has been released on bail if either of the following subsections apply.

- (2) The constable has reasonable grounds for believing that the person –
 - (a) is not likely to surrender to custody, or
 - (b) is likely to break, or has broken, any bail condition.

(3) A bail guarantor for the person has applied to be discharged as a bail guarantor under section 21.

Procedure following arrest without warrant

28.- (1) A person who is arrested under section 27 must be brought before a magistrates’ court as soon as practicable after the arrest and in any event not later than the next day following the day of the arrest.

(2) Where the day next following the day on which that person is arrested is Christmas Day, Good Friday or a Sunday, the person must be brought before the court not later than the next following day which is not one of those days.

(3) This section does not require a person to be brought before a court at any time when the person is in hospital and is not well enough to appear.

(4) Where the person was arrested under section 27(3), the court must consider afresh whether the person should be granted bail.

(5) Where the person was arrested under section 27(2), and the court is of the opinion that the person –

- (a) was likely to surrender to custody, or

- (b) was unlikely to break, or did not break any bail condition,

the court must grant the person bail subject to the same conditions (if any) as were originally imposed.

(6) Where the court is not of that opinion, the court must consider afresh whether the person should be granted bail.

Search warrants

29.- (1) Upon application by a constable, a lay magistrate may issue a search warrant, if subsections (2) to (4) are satisfied.

(2) The person must be a person liable to arrest under section 27.

(3) The lay magistrate must be satisfied that there are reasonable grounds for believing that the person is to be found on the premises.

(4) The lay magistrate must be satisfied that any of the following apply –

- (a) it is not practicable to communicate with any person entitled to grant entry to the premises,
- (b) entry to the premises will not be granted unless a warrant is produced, or
- (c) the purpose of the search of the premises may be frustrated or seriously prejudiced unless a constable arriving at the premises can secure immediate entry to them.

(5) In this section, a search warrant means a warrant authorising a constable to enter premises specified in the application for the warrant (if need be by force) and search them for the purpose of arresting a person.

PART 4 OTHER AMENDMENTS TO LAW ON BAIL

Amendments to police bail

Repeal of street bail

30.- (1) Omit Articles 32A to 32D of PACE (bail elsewhere than at police station).

(2) Schedule 2 (which makes further amendments related to the repeal of street bail) has effect.

Police review of release on bail without charge

31.- In PACE after Article 38 (duties of custody officer before charge) insert-

“Review of release on bail without charge

38A.- (1) Where a custody officer has released a person on bail without charge, that custody officer, or another custody officer serving at the same police station may -

- (a) at the request of the person, review the decision to release the person on bail, and
- (b) if it appears appropriate to do so, discharge the grant of bail in relation to that person.

(2) Where the custody officer discharges a grant of bail under paragraph (1), the person shall be treated as having been released without bail at the time of discharge.”.

Duty to state and record reasons for refusal of bail after charge

32. - In Article 39 of PACE (duties of custody officer after charge) –

- (a) in paragraph (3) after “make a written record of the grounds for the detention” insert “and the reasons why those grounds are applicable”,
- (b) in paragraph (4) after “informed by the custody officer of the grounds for his detention” insert “and the reasons why those grounds are applicable”,
- (c) after paragraph (4) insert –

“(4A) Where the person is an arrested juvenile, the custody officer shall explain the matters set out in paragraph (4) in language that is appropriate to the age, maturity and understanding of the arrested juvenile.”,

- (d) after paragraph (5) insert –

“(5A) If the person charged requests, the custody officer shall cause a copy of the written record to be given to that person as soon as practicable after the record is made.”.

Arrest for failure to answer bail without charge

33.- For Article 47A of PACE (power of arrest for failure to answer police bail) substitute –

“Power of arrest for failure to answer bail without charge

47A.- (1) A constable may arrest without warrant any person who, having been released on bail without charge, fails to attend at the police station at the time appointed to do so.

(2) A person who is arrested under this Article shall be taken to the police station appointed as the place at which the person is required to attend as soon as practicable after the arrest.

- (3) For the purposes of –

- (a) Article 32 (subject to the obligation in paragraph (2)), and
- (b) Article 33,

an arrest under this Article shall be treated as an arrest for an offence.”.

Bail without charge

34.- In PACE after Article 47A insert-

“Bail without charge

47B.- (1) Where a person is released on bail without charge, that person is subject to a requirement to attend at a police station and at a time appointed by the custody officer.

(2) No other requirement may be imposed as a condition of bail.

(3) The custody officer shall make a record of the police station and time appointed under paragraph (1), and if the person requests, the custody officer shall cause a copy of the record to be given to that person as soon as practicable after the record is made.

(4) A person who has been required to attend at a police station is not required to do so if the person is given notice in writing that attendance is no longer required.

(5) Where it appears to the custody officer that the person is, by reason of illness or other unavoidable cause, unable to appear at the police station at the time appointed, the custody officer may extend the time for whatever further period appears reasonable in the circumstances.

(6) Where a person is detained under Article 38(3), any time during which the person was in police detention prior to being granted bail shall be included as part of any period which falls to be calculated under this Part.

(7) Nothing in this Article shall prevent the re-arrest without warrant of the person if new evidence justifying a further arrest has come to light since the release.

(8) Where the person is re-arrested, the provisions of this Part shall apply as they apply to a person arrested for the first time, but this paragraph does not apply to a person who is arrested under Article 47A or has attended a police station in accordance with the grant of bail (and who accordingly is deemed by Article 35(8) to have been arrested for an offence).”.

Bail after charge

35.- Article 48 of the Police and Criminal Evidence (Northern Ireland) Order (bail after arrest) is amended as follows –

(a) for the title substitute “**Bail after charge**”,

(b) for paragraph (1) substitute –

“(1) The duty of a person who is released on bail under Article 39 to surrender to custody under section 24 of the Bail Act (Northern Ireland) 2013 consists of a duty to appear before a magistrates’ court at the time and place the custody officer appoints.”,

- (c) in paragraph (1A) for “A person released on bail and subject to a duty to appear before a magistrates’ court in accordance with paragraph (1)(a)” substitute “The person”,
- (d) in paragraph (2) omit “under sub-paragraph (a) of paragraph (1)”,
- (e) in paragraph (2A) omit “(a) or (b)”,
- (f) in paragraph (3D) omit “Article 38(2) or (7)(b) or”,
- (g) omit paragraphs (4) to (11),
- (h) omit paragraph (13).

Duty to state and record reasons for bail conditions

36.- In Article 48 of PACE (bail after charge) after paragraph (3H) insert –

“(3I) Where a custody officer varies any conditions of bail or imposes conditions under paragraph (3AA), (3B), (3D) or (3E), the custody officer shall –

- (a) tell the person concerned the purposes for the variation or imposition of those conditions, and the reasons why those purposes are relevant,
- (b) make a record of those purposes and reasons, and
- (c) at the request of the person to whom bail was granted, cause a copy of the record to be given to that person as soon as practicable after the record is made.

(3J) Where the person is an arrested juvenile, the custody officer shall explain the matters set out in paragraph (3I)(a) in language that is appropriate to the age, maturity and understanding of the arrested juvenile.”.

Power to impose curfew as bail condition

37. – In the Criminal Justice (Northern Ireland) Order 2008 after Article 35 (powers to impose curfew or electronic monitoring requirements) insert –

“Power of police to impose curfew requirement

35A.- Subject to the following provisions of this Chapter, a curfew requirement may be made a condition of bail granted by a custody officer under Article 48 of the Police and Criminal Evidence (Northern Ireland) Order 1989 (bail after charge).”.

Court review of release on bail without charge

38. - In the Magistrates’ Courts (Northern Ireland) Order 1981 after Article 132A (power to grant bail where police bail has been granted) insert –

“Power to release without bail where police bail without charge granted

132B.- (1) Where a custody officer has released a person on bail without charge in accordance with Part V of the Police and Criminal Evidence (Northern Ireland) Order 1989, a magistrates' court may –

- (a) on application by or on behalf of that person, review the decision to release the person on bail, and
- (b) if it appears appropriate to do so, discharge the grant of bail in relation to that person.

(2) Where a magistrates' court discharges a grant of bail under paragraph (1), the person shall be treated as having been released without bail at the time of discharge.”.

Amendments related to bail for children

Police detention in juvenile justice centre

39. – For Article 39(8) of PACE (definition of place of safety where children may be detained) substitute –

“(8) In paragraph (6) “place of safety” means a juvenile justice centre.”.

Release on bail

40.- For Article 12 of the Criminal Justice (Children) (Northern Ireland) Order 1998 (release on bail) substitute –

“Release on bail

12. - Where a court remands or commits for trial a child charged with an offence, section 1 of the Bail Act (Northern Ireland) 2013 (right to court bail) applies.”.

Remand in custody

41. - For Article 13 of the Criminal Justice (Children) (Northern Ireland) Order 1998 (remand in custody) substitute –

“Remand in custody

13.- (1) Where a court decides, in accordance with the Bail Act (Northern Ireland) 2013, not to release a child, it shall make an order committing the child to a juvenile justice centre.

(2) Where a person committed to a juvenile justice centre under subsection (1) turns 18, the person must remain in the juvenile justice centre for the duration of the remand period, unless the court considers it in the best interests of the person to make an order committing the person to a young offenders centre.

(3) In making a decision under subsection (2) the court must have regard to –

- (a) the maturity and understanding of the person,
- (b) the physical, emotional and educational needs of the person,

- (c) the likely duration of the remand period, and
- (d) the person's suitability to be in the young offenders centre.

(4) An order under this Article shall commit the person for the period for which the person is remanded or until the person is brought back before the court.

(5) Where a court remands a person for a further period such that the total period for which the person is remanded in custody will exceed three months, the court shall give reasons for doing so in open court.”.

Repeal of other provisions relating to bail for children

42. - Omit the following provisions of the Criminal Justice (Children) (Northern Ireland) Order 1998 –

- (a) Article 6 (child arrested in pursuance of a warrant to be released),
- (b) Article 7 (child apparently under 14 arrested without warrant for offence other than homicide to be released),
- (c) Article 8 (child not released under Article 7), and
- (d) Article 31 (extension of remand of child for purpose of obtaining information).

Abolition of personal recognizances and sureties

Abolition of personal recognizances and sureties for surrender to custody

43. - (1) No recognizance for a person's surrender to custody may be required from the person.

(2) No surety for a person's surrender to custody may be required from the person.

(3) This section does not affect recognizances or sureties otherwise than in respect of bail.

(4) Schedule 3 (which makes amendments consequent upon the abolition of personal recognizances and sureties) has effect.

Power to make further provision in connection with section 43

44. - (1) The Department of Justice may by order make such further provision as it thinks fit –

- (a) in consequence of section 43, or
- (b) for giving full effect to section 43.

(2) An order under this section may amend, repeal or modify any statutory provision made before the coming into operation of this Act.

(3) An order under this section may make supplemental, incidental, consequential, transitional or saving provision.

(4) An order must not be made under this section unless a draft of the order has been laid before, and approved by a resolution of, the Assembly.

PART 5 FINAL PROVISIONS

Keeling schedule

45. - Articles 39, 47A, 47B and 48 of PACE, as amended by this Act, are set out in Schedule 4.

Interpretation

46.- (1) In this Act, except where otherwise provided, “bail” means bail grantable under the law –

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

(2) In subsection (1) “law” includes common law.

(3) In this Act –

“bail authority” means the court or person by whom bail is grantable,

“bail guarantor” has the meaning given in section 13,

“child” means a person under the age of 18,

“lay magistrate sitting out of petty sessions” has the same meaning as in the Magistrates’ Court (Northern Ireland) Order 1981,

“PACE” means the Police and Criminal Evidence (Northern Ireland) Order 1989,

“statutory provision” has the same meaning as in section 1(f) of the Interpretation Act (Northern Ireland) 1954, and

“surrender to custody” has the meaning given in section 24.

(4) For the purposes of this Act any of the following are to be treated as a conviction –

- (a) a finding of guilt,
- (b) a finding under Article 51 of the Magistrates’ Courts (Northern Ireland) Order 1981 (remand for inquiry into physical or mental condition) that the person charged did the act or made the omission charged,

- (c) a finding mentioned in Article 50A(1) of the Mental Health (Northern Ireland) Order 1986 (not guilty by reason of insanity, or unfit to be tried etc.),
- (d) a conviction of an offence for which an order is made placing the offender on probation or discharging the offender absolutely or conditionally.

(5) Any substitution of “bail guarantor” for “surety or sureties” made by this Act to any statutory provision does not mean that “bail guarantor” is limited to the singular in that statutory provision.

Minor and consequential amendments

47. - The statutory provisions mentioned in Schedule 5 have effect with the amendments specified there.

Transitional and saving provisions

48.- Schedule 6 (transitional and saving provisions) has effect.

Repeals

49. - The statutory provisions mentioned in Schedule 7 are repealed to the extent specified in the second column of that Schedule.

Commencement

50.- (1) This Act comes into operation on such day or days as the Department of Justice may by order appoint.

(2) An order under this section may contain such transitional or transitory modifications of this Act as appear to the Department to be necessary or expedient in connection with any provision brought into operation by the order.

Short title

51.- This Act may be cited as the Bail Act (Northern Ireland) 2013.

SCHEDULES

SCHEDULE 1

PERIODS OF IMPRISONMENT FOR NON-PAYMENT OF GUARANTEED SUM

Section 20

Amount forfeited	Maximum period of imprisonment
Not exceeding £200	7 days
exceeding £200 but not exceeding £500	14 days
exceeding £500 but not exceeding £1,000	28 days
exceeding £1,000 but not exceeding £2,500	45 days
exceeding £2,500 but not exceeding £5,000	3 months
exceeding £5,000 but not exceeding £10,000	6 months
exceeding £10,000	12 months

SCHEDULE 2

AMENDMENTS RELATED TO REPEAL OF STREET BAIL

Section 30

Police and Criminal Evidence (Northern Ireland) Order 1989 (NI 12)

1.- In Article 20 (entry and search after arrest) for paragraph (5) substitute-

“(5) A constable may conduct a search under paragraph (1) –

- (a) before the person is taken to a police station; and
- (b) without obtaining an authorisation under paragraph (4),

if the presence of that person at a place other than a police station is necessary for the effective investigation of the offence.”.

2. - Omit Article 20(5A).

3. - Article 32 is amended as follows –

(a) for paragraph (1) substitute –

“(1) Where a person –

- (a) is arrested by a constable for an offence; or
- (b) is taken into custody by a constable after being arrested for an offence by a person other than a constable,

at any place other than a police station, the person shall be taken to a police station by a constable as soon as practicable after the arrest.”,

(b) omit paragraphs (1A) and (1B),

(c) in paragraph (2) for “paragraph (1A)” substitute “paragraph (1)”,

(d) for paragraph (10) substitute –

“(10) A person arrested by a constable at a place other than a police station shall be released if a constable is satisfied, before the person arrested reaches a police station, that there are no grounds for keeping the person under arrest.”,

(e) omit paragraph (10A),

(f) for paragraphs (13), (13A) and (14) substitute –

“(13) Nothing in paragraph (1) shall prevent a constable delaying taking a person who has been arrested to a police station if the presence of that person elsewhere is necessary in order to carry out such investigations as it is reasonable to carry out immediately.

(14) Where there is a delay in taking a person who has been arrested to a police station after arrest, the reasons for the delay shall be recorded when the person first arrives at a police station.”,

(g) in paragraph (15) for “paragraph (1A) or Article 32A” substitute “paragraph (1)”.

4.- In Article 35 (limitations on police detention) for paragraph (8) substitute –

“(8) For the purpose of this Part a person who returns to a police station to answer to bail or is arrested under Article 47A shall be treated as arrested for an offence and the offence in connection with which the person was granted bail shall be deemed to be that offence.”.

5.- In Article 36(1) (designated police stations) for “Articles 32(3), (5) and (6), 32A(5) and 32D(2)” substitute “Article 32(3), (5) and (6)”.

6.- In Article 37 (custody officers at police stations) omit paragraphs (7A) and (7B).

7.- In Article 42(2) (calculation of periods of time) omit sub-paragraph (ba).

Police (Northern Ireland) Act 2003 (c.6)

8.- In Schedule 2, in paragraph 22 (powers of escort officer to take arrested person to prison) in sub-paragraph (1)(a) for “paragraph (1A) of Article 32” substitute “paragraph (1) of Article 32”.

Criminal Justice (Northern Ireland) Order 2004 (NI 9)

9.- Omit Article 4 (bail elsewhere than at a police station).

10.- Omit Article 9 (amendments related to bail elsewhere than at a police station).

11.- Omit Schedule 1 (amendments related to bail elsewhere than at a police station).

Justice Act (Northern Ireland) 2011 (c. 24)

12.- In section 75 (arrest for failure to comply with conditional cautions) –

- (a) omit subsection (3)(b),
- (b) in subsection (3)(c) omit “Article 32D or”,
- (c) in subsection (8)(a) omit “or (b)”.

13.- Omit section 76(2)(b) (application of bail elsewhere than at police station to conditional cautions).

SCHEDULE 3
AMENDMENTS CONSEQUENT UPON THE ABOLITION OF PERSONAL
RECOGNIZANCES AND SURETIES

Section 43

Habeas Corpus Act (Ireland) 1781 (c. 11)

1. - In section II at the end insert “. But no recognizance or surety is required where the person is under a duty to surrender to custody within the meaning of the Bail Act (Northern Ireland) 2013.

Fines Act (Ireland) 1851 (c. 90)

2. - In section 10 (estreat of recognizances) omit “, or to appear to answer to any complaint as to an indictable offence”.

Indictments Act (Northern Ireland) 1945 (c. 16)

3. - In section 5(5)(c) omit “, and as to the enlargement of recognizances and otherwise”.

Visiting Forces Act 1952 (c. 67)

4. - In section 5(1)(b) omit “recognisance or”.

Interpretation Act (Northern Ireland) 1954 (c. 33)

5. - In section 42(4) in the definition of committed for trial omit “upon a recognizance”.

Judicature (Northern Ireland) Act 1978 (c.23)

6. - In section 25 –

- (a) for subsection (4) substitute -
“(4) Where a person who has been convicted or sentenced –
 - (a) by a magistrates’ court, or

- (b) on appeal, by a county court,

applies for an order of certiorari to remove the proceedings of the magistrates' court or the county court to the High Court, the High Court may release the person on bail, subject to a duty to surrender to custody within ten days after the judgment of the High Court is given, unless the conviction or sentence is quashed by that judgment.”,

- (b) for subsection (6) substitute

“(6) Rules of court may authorise the recommittal of persons applying for an order of certiorari.”.

7. - In section 51 –

- (a) in subsection (1) for “Any condition of a recognizance” substitute “A grant of bail”,
- (b) in subsection (1) for “the condition” substitute “the grant”,
- (c) omit subsection (3),
- (d) for subsection (5)(a) substitute –
 - “(a) allowing the court to consent to a person giving security;”,
- (e) in subsection (5)(b) for “a recognizance shall be entered into or other security given” substitute “security shall be given”,
- (f) in subsection (5)(c) for “a recognizance is to be entered into or other security given” substitute “security is to be given”,
- (g) in subsection (5)(c) omit “recognizance or”,
- (h) omit subsection (5)(e),
- (i) omit subsection (6),
- (j) for subsection (7)(b) substitute –

“(b) the officer in charge of the station shall release the person from custody, subject to the person fulfilling any requirement as to a bail guarantor within the meaning of the Bail Act (Northern Ireland) 2013.”.

Magistrates' Courts (Northern Ireland) Order 1981 (NI 26)

8. - In Article 25(1) omit “Without prejudice to the power of a court of summary jurisdiction under Article 138 to estreat a recognizance to appear,”.

9. - In Article 37(3) omit the words from “that is to say” in sub-paragraph (b) to the end of paragraph (3).

10. - In Article 37(4) –

- (a) after “release that person” insert “on bail”,
- (b) omit “upon his entering into a recognizance pursuant to paragraph (3)(b)”.

11. - In Article 40(1) omit “whether or not he has been bound by recognizance to appear,”.

12.- In Article 47(1) omit from the words “that is to say” in sub-paragraph (b) to the end of paragraph (1).

13. - In Article 48 for “any recognizance or condition of bail may provide” substitute “, the grant of bail may provide”.

14. - In Article 49 omit “and any recognizance requiring or conditioned for the appearance of the accused before the court shall be deemed to be varied so as to require the appearance of the accused at every time and place to which he is so remanded”.

15.- In Article 51 -

- (a) in paragraph (2) for “the recognizance” in each place that it occurs, substitute “the grant of bail”,
- (b) in paragraph (4) –
 - (i) omit “on his entering a recognizance”, and
 - (ii) for “the recognizance” in both places that it occurs, substitute “the grant of bail”.

16. - In Article 129(1) for “released on his entering into such recognizance as may be specified in the endorsement; and the endorsement shall fix the amounts in which the principal and the sureties, if any, are to be bound or the amount of any security permitted to be deposited in lieu of sureties” substitute “released on bail”.

17. - After Article 129(1) insert –

“(1A) The endorsement that the person be released on bail may be subject to the person –

- (a) providing a bail guarantor (within the meaning of the Bail Act (Northern Ireland) 2013) for the person’s surrender to custody, or
- (b) in lieu of a bail guarantor, providing security for surrender to custody.”.

18. For Article 129(2) substitute –

“(2) Where a warrant has been endorsed for bail as described in paragraph (1A), the person shall be taken to a police station upon arrest, and the custody officer there shall, subject to the requirements of the

endorsement being satisfied, release the person from custody as directed in the endorsement.”.

19. - In Article 132 for “without requiring him to enter into any recognizance” substitute “without bail”.

20. - Omit Article 134 and the cross head immediately preceding it.

21. - For Article 138 substitute –

“Estreating of recognizances

138. - (1) Recognizances entered into before, or in connection with, proceedings pending in or before a magistrates’ court may, without prejudice to any other mode of enforcement, be enforced by a court of summary jurisdiction.

(2) Paragraph (2B) applies where –

- (a) a recognizance to keep the peace or to be of good behaviour has been entered into before a magistrates’ court; or
- (c) any other recognizance may be enforced by a court of summary jurisdiction.

(2B) If the recognizance appears to the magistrates’ court to be forfeited, the court may order the estreat of the recognizance on each person bound by it, whether as principal or surety, but, in a case falling within paragraph (2)(a), the court shall not order the estreat of the recognizance except on complaint.

(3) The power of the court under paragraph (2B) to order the estreat of the recognizance includes power to order the estreat of the recognizance to such lesser amount as the court thinks fit and power to remit payment of the amount due under the recognizance.

(4) Upon ordering the estreat of a recognizance the court may issue a warrant –

- (a) to levy the amount forfeited by distress and sale of the property of any person bound by the recognizance, and
- (b) in default of distress to commit such person to prison as if for default in the payment of a sum adjudged to be paid by a conviction;

and accordingly the period for which such person may be committed shall not exceed that specified in Schedule 3.”.

22. - In Article 148(1) –

- (a) for “released” substitute “released on bail”,
- (b) omit sub-paragraphs (a) and (b),
- (c) in sub-paragraph (c) omit “and in either case”.

Criminal Justice (Serious Fraud) (Northern Ireland) Order 1988 (NI 16)

23. - In Article 4 –

- (a) in paragraph (3) omit the tailpiece,
- (b) in paragraph (6) omit sub-paragraph (b) and the word “and” immediately preceding it.

Police and Criminal Evidence (Northern Ireland) Order 1989 (NI 12)

24. - In Article 48 omit paragraphs (3) and (12).

Children’s Evidence (Northern Ireland) Order 1995 (NI 3)

25. - In paragraph 2 of Schedule 1 –

- (a) omit sub-paragraph (2),
- (c) omit sub-paragraph (5)(b) and the word “and” immediately preceding it.

Criminal Justice (Children) (Northern Ireland) Order 1998 (NI 9)

26. - In Article 10A(11)(b) omit “(in which case any recognisance requiring or conditioned for the appearance of the child before the court shall be deemed to be varied so as to require his appearance at the time and place to which he is so remanded)”.

Criminal Justice Act 2003 (c. 44)

27. - In section 96(13) for the amendment to Article 48 of PACE substitute –

“(b) Article 48 of that Order has effect as if for paragraphs (1), (1A) and (2) there were substituted –

“(1) A person who is released on bail shall be subject to a duty to appear before the Crown Court at such place as the custody officer may appoint and at such time not later than 24 hours after the person is released as that officer may appoint.”, and”.

Criminal Justice (Northern Ireland) Order 2003 (NI 13)

28. - Omit Article 24.

SCHEDULE 4

ARTICLES 39, 47A, 47B AND 48 OF PACE AS AMENDED BY THIS ACT

Section 45

Duties of custody officer after charge

39. - (1) Where a person arrested for an offence is charged with an offence, the custody officer shall order the person’s release from police detention, either on bail or

without bail, unless the custody officer refuses bail on any of the grounds set out in section 3 of the Bail Act (Northern Ireland) 2013 (grounds for refusing bail).

(1B) Paragraph (1) does not apply where the person has been arrested under a warrant endorsed for bail.

(1C) Bail need not be granted and the decision to grant bail under paragraph (1) may be deferred in accordance with section 5 of the Bail Act (Northern Ireland) 2013 (bail deferred due to lack of information).

(2) If the release of a person arrested is not required by paragraph (1), the custody officer may authorise him to be kept in police detention.

(3) Where a custody officer authorises a person who has been charged to be kept in police detention, he shall, as soon as practicable, make a written record of the grounds for the detention and the reasons why those grounds are applicable.

(4) Subject to paragraph (5), the written record shall be made in the presence of the person charged who shall at that time be informed by the custody officer of the grounds for his detention and the reasons why those grounds are applicable.

(4A) Where the person is an arrested juvenile, the custody officer shall explain the matters set out in paragraph (4) in language that is appropriate to the age, maturity and understanding of the arrested juvenile.

(5) Paragraph (4) shall not apply where the person charged is, at the time when the written record is made –

- (a) incapable of understanding what is said to him;
- (b) violent or likely to become violent; or
- (c) in urgent need of medical attention.

(5A) If the person charged requests, the custody officer shall cause a copy of the written record to be given to that person as soon as practicable after the record is made.

(6) Where a custody officer authorises an arrested juvenile to be kept in police detention under paragraph (1), the custody officer shall, unless he certifies that it is impracticable to do so, make arrangements for the arrested juvenile to be taken to a place of safety and detained there; and it shall be lawful to detain him in pursuance of the arrangements.

(7) A certificate made under paragraph (6) in respect of an arrested juvenile shall be produced to the court before which he is first brought thereafter.

(8) In paragraph (6) “place of safety” means a juvenile justice centre.

Power of arrest for failure to answer bail without charge

47A. - (1) A constable may arrest without warrant any person who, having been released on bail without charge, fails to attend at the police station at the time appointed to do so.

(2) A person who is arrested under this Article shall be taken to the police station appointed as the place at which the person is required to attend as soon as practicable after the arrest.

(3) For the purposes of –

(a) Article 32 (subject to the obligation in paragraph (2)), and

(b) Article 33,

an arrest under this Article shall be treated as an arrest for an offence.

Bail without charge

47B.- (1) Where a person is released on bail without charge, that person is subject to a requirement to attend at a police station and at a time appointed by the custody officer.

(2) No other requirement may be imposed as a condition of bail.

(3) The custody officer shall make a record of the police station and time appointed under paragraph (1), and if the person requests, the custody officer shall cause a copy of the record to be given to that person as soon as practicable after the record is made.

(4) A person who has been required to attend at a police station is not required to do so if the person is given notice in writing that attendance is no longer required.

(5) Where it appears to the custody officer that the person is, by reason of illness or other unavoidable cause, unable to appear at the police station at the time appointed, the custody officer may extend the time for whatever further period appears reasonable in the circumstances.

(6) Where a person is detained under Article 38(3), any time during which the person was in police detention prior to being granted bail shall be included as part of any period which falls to be calculated under this Part.

(7) Nothing in this Article shall prevent the re-arrest without warrant of the person if new evidence justifying a further arrest has come to light since the release.

(8) Where the person is re-arrested, the provisions of this Part shall apply as they apply to a person arrested for the first time, but this paragraph does not apply to a person who is arrested under Article 47A or has attended a police station in accordance with the grant of bail (and who accordingly is deemed by Article 35(8) to have been arrested for an offence).

Bail after charge

48.- (1) The duty of a person who is released on bail under Article 39 to surrender to custody under section 24 of the Bail Act (Northern Ireland) 2013 consists of a duty to appear before a magistrates' court at the time and place the custody officer appoints.

(1A) The person shall be deemed for the purpose of Articles 48 and 49 of the Magistrates' Courts (Northern Ireland) Order 1981 to have been remanded on bail.

(2) The time to be appointed shall be either the date of the next petty sessions at the place appointed or a date not later than 28 days from the date on which the person is released.

(2A) The custody officer shall make a record of the time and place appointed under paragraph (1) and if the person released on bail so requests, the custody officer shall cause a copy of the record to be given to that person as soon as practicable after the record is made.

(3A) Except as provided by this Article –

- (a) no security for his surrender to custody shall be taken from him;
- (b) he shall not be required to provide a bail guarantor for his surrender to custody; and
- (c) no other requirement shall be imposed on him as a condition of bail.

(3AA) Except as provided by this Article and Article 35A of the Criminal Justice (Northern Ireland) Order 2008 (power of police to impose curfew requirement), no curfew requirement shall be imposed upon a person as a condition of bail.

(3B) The person may be required, before release on bail, to either –

- (a) provide a bail guarantor to secure the person's surrender to custody, or
- (b) give security for the person's surrender to custody, and the security may be given by him or on his behalf.

(3D) He may be required to comply, before release on bail under Article 39(1) or later, with other conditions in accordance with section 6 of the Bail Act (Northern Ireland) 2013 (bail conditions).

(3E) Where a custody officer has granted bail he or another custody officer serving at the same police station may, at the request of the person to whom it is granted, vary the conditions of bail; and in doing so may impose conditions or more onerous conditions.

(3F) Where a custody officer grants bail to a person no conditions shall be imposed under paragraph (3AA), (3B), (3D) or (3E) except in accordance with section 6 of the Bail Act (Northern Ireland) 2013.

(3G) Paragraph (3F) also applies on any request to a custody officer under paragraph (3E) to vary the conditions of bail.

(3H) Where a custody officer varies any conditions of bail or imposes conditions under paragraph (3AA), (3B), (3D) or (3E), he shall make a record of the decision and shall, at the request of the person to whom bail was granted, cause a copy of the record to be given to that person as soon as practicable after the record is made.

(3I) Where a custody officer varies any conditions of bail or imposes conditions under paragraph (3AA), (3B), (3D) or (3E), the custody officer shall –

- (a) tell the person concerned the purposes for the variation or imposition of those conditions, and the reasons why those purposes are relevant,
- (b) make a record of those purposes and reasons, and
- (c) at the request of the person to whom bail was granted, cause a copy of the record to be given to that person as soon as practicable after the record is made.

(3J) Where the person is an arrested juvenile, the custody officer shall explain the matters set out in paragraph (3I)(a) in language that is appropriate to the age, maturity and understanding of the arrested juvenile.

(14) In this Article “bail guarantor” has the meaning given in the Bail Act (Northern Ireland) 2013 and that Act makes further provision in respect of bail guarantors including the suitability of persons to be bail guarantors and forfeiture of guaranteed sums from bail guarantors.

SCHEDULE 5 MINOR AND CONSEQUENTIAL AMENDMENTS

Section 47

Fines Act (Ireland) 1851 (c. 90)

1. - In section 4 after “warrants issued to the constabulary for the levy of any penal sums under this Act” insert “or under the Bail Act (Northern Ireland) 2013”.

2. - After section 10 insert –

“Forfeiture of guaranteed sums under the Bail Act (Northern Ireland) 2013

10A. - In this Act, except in section 3, references to penal sums shall be taken to include references to any guaranteed sums forfeited by a bail guarantor in accordance with the Bail Act (Northern Ireland) 2013.”.

Administration of Justice Act (Northern Ireland) 1954 (c. 9)

3. - In section 20(5) (definition of fine) after “every fine, amercement, penalty” insert “, forfeited guaranteed sum (within the meaning of the Bail Act (Northern Ireland) 2013)”.

Magistrates’ Courts (Northern Ireland) Order 1981 (NI 26)

4. - In Article 29(1)(h) for “Article 5(1) or (2) of the Criminal Justice (Northern Ireland) Order 2003 (absconding by person admitted to bail)” substitute “section 25 of the Bail Act (Northern Ireland) 2013 (offence of failure to surrender to custody)”.

5. - Article 133 is renumbered as paragraph (1) and after that paragraph as renumbered insert –

“(2) But paragraph (1) does not apply in respect of bail granted to accused persons under section 1 of the Bail Act (Northern Ireland) 2013.”.

Police and Criminal Evidence (Northern Ireland) Order 1989 (NI 12)

6. - In Article 35(1) at the end insert “and the provisions of the Bail Act (Northern Ireland) 2013”.

7. - Article 48 (bail after charge) is amended as follows –

(a) in paragraph (3A)(b) for “a surety or sureties” substitute “a bail guarantor”,

(b) after paragraph (3A) insert –

“(3AA) Except as provided by this Article and Article 35A of the Criminal Justice (Northern Ireland) Order 2008 (power of police to impose curfew requirement), no curfew requirement shall be imposed upon a person as a condition of bail.”

(c) in paragraph (3D) for the words from “such requirements” to the end substitute “other conditions in accordance with section 6 of the Bail Act (Northern Ireland) 2013 (bail conditions).”,

(d) in paragraph (3F) for the words from “unless it appears” to the end substitute “except in accordance with section 6 of the Bail Act (Northern Ireland) 2013.”,

(e) in paragraph (3F) before “(3B)” insert “(3AA), ”,

(f) in paragraph (3H) before “(3B)” insert “(3AA), ”,

(g) at the end insert –

“(14) In this Article “bail guarantor” has the meaning given in the Bail Act (Northern Ireland) 2013 and that Act makes further provision in respect of bail guarantors including the suitability of persons to be bail guarantors and forfeiture of guaranteed sums from bail guarantors.”.

8. - In Article 48A(1) for “Article 48(3C)” substitute “Article 48(3B)(b)”.

SCHEDULE 6
TRANSITIONAL AND SAVING PROVISIONS

Section 48

General

1. - A grant of bail to a person made before the appointed day is not affected by this Act.

2. - But, subject to the other provisions of this Schedule, this Act applies from the time the person first –

- (a) appears or is brought before a court,
- (b) attends at a police station, or
- (c) is arrested,

(whichever comes soonest) after the appointed day.

Warrants

3. - Any warrant for arrest or for entry and search of premises, in respect of the grant of bail, issued before the appointed day, is not affected by this Act.

Bail before charge

4. - In relation to a person released on bail without being charged with an offence before the appointed day, then after the appointed day the following cease to apply –

- (a) any bail condition imposed under Article 48 of PACE before it was amended by this Act,
- (b) any duty to surrender to custody under Article 4 of the Criminal Justice (Northern Ireland) Order 2003,
- (c) the offence of absconding by a person released on bail under Article 5 of the Criminal Justice (Northern Ireland) Order 2003, unless the person absconded before the appointed day.

5. - In relation to a person released on bail without being charged with an offence before the appointed day, then after the appointed day, the following applies –

- (a) that person is subject to Article 47B of PACE (bail before charge) as inserted by this Act, with the following modifications –
 - (i) the police station and time appointed by the custody officer under paragraph (1) are deemed to be the police station and time appointed by the custody officer under Article 48(1)(b) of PACE before it was amended by this Act,
 - (ii) paragraph (3) does not apply,
- (b) that person may be arrested under Article 47A of PACE as amended by this Act.

Street bail

6. - Any grant of bail under Article 32A of PACE made before the appointed day lapses when –

- (a) the person attends at a police station, or
- (b) the person has been arrested under Article 32D of PACE.

Recognizances and sureties

7.- Any recognizance or surety given before the appointed day is not affected by this Act, and without prejudice to the generality of the foregoing, nothing in this Act affects the exercise of any power to –

- (a) enforce (by warrant or otherwise) any such recognizance or surety after the appointed day,
- (b) estreat any such recognizance or surety after the appointed day,
- (c) enlarge any such recognizance or surety in the absence of the person or surety after the appointed day.

8. - Where, before the appointed day, a court has –

- (a) given a direction that the recognizance of a person to whom it has granted bail may be entered into before another court or person, or
- (b) endorsed a warrant for the arrest of a person with a direction that the person be released on entering into such recognizance as is specified in the endorsement,

the recognizance may be entered into and taken after the appointed day in accordance with the direction and paragraph 7 applies to such a recognizance as it applies to a recognizance entered into before the appointed day.

9. - Where a person has been granted bail before the appointed day and the recognizance or any surety is conditioned for appearance before a court, then when the person first appears or is brought before a court after the appointed day –

- (a) the recognizance is discharged, and
- (b) the surety is discharged.

Appointed day

10. - In this Schedule “the appointed day” means the day on which this Act comes into operation.

SCHEDULE 7

REPEALS

Section 49

Short Title	Extent of repeal
Fines Act (Ireland) 1851 (c. 90)	In section 10 the words “, or to appear to answer to any complaint as to an indictable offence”.
Indictments Act (Northern Ireland) 1945 (c. 16)	In section 5(5)(c) the words “, and as to the enlargement of recognizances and

	otherwise”.
Visiting Forces Act 1952 (c. 67)	In section 5(1)(b) the words “recognisance or”.
Interpretation Act (Northern Ireland) 1954 (c. 33)	In section 42(4) in the definition of committed for trial the words “upon a recognizance”.
Judicature Act (Northern Ireland) 1978 (c. 23)	In section 51 – (a) subsection (3), (b) in subsection (5)(c) the words “recognizance or”, (c) subsection (5)(e), (d) subsection (6).
Magistrates’ Court (Northern Ireland) Order 1981 (NI 26)	In Article 25(1) the words “Without prejudice to the power of a court of summary jurisdiction under Article 138 to estreat a recognizance to appear,”. In Article 37(3) the words from “that is to say” in sub-paragraph (b) to the end of paragraph (3). In Article 37(4) the words “upon his entering into a recognizance pursuant to paragraph (3)(b)”. In Article 40(1) the words “whether or not he has been bound by recognizance to appear,”. In Article 47(1) from the words “that is to say” in sub-paragraph (b) to the end of paragraph (1). In Article 49 the words “and any recognizance requiring or conditioned for the appearance of the accused before the court shall be deemed to be varied so as to require the appearance of the accused at every time and place to which he is so remanded”. In Article 51(4) the words “on his entering a recognizance”. In Article 132A(1)(a) the words “(other than under Article 38(2) or (7)(b))”. Article 134 and the cross head immediately preceding it. In Article 148(1) – (a) sub-paragraphs (a) and (b), (b) in sub-paragraph (c) the words “and in either case”.
Criminal Justice (Serious Fraud) (Northern Ireland) Order 1988 (NI 16)	In Article 4 – (a) in paragraph (3), the tailpiece, (b) in paragraph (6), sub-paragraph (b) and the word “and”

<p>Police and Criminal Evidence (Northern Ireland) Order 1989 (NI 12)</p>	<p>immediately preceding it.</p> <p>Article 20(5A). Article 32(1A), (1B) and (10A). Articles 32A to 32D. Article 37(7A) and (7B). In Article 38(14), in the definition of “arrested juvenile” the words “and is not excluded from this Part by Article 52”. Article 39(1A) and (2A). Article 42(2)(ba). In Article 48 – (a) in paragraph (2) the words “under sub-paragraph (a) of paragraph (1)”, (b) in paragraph (2A) the words “(a) or (b)”, (c) paragraph (3), (d) paragraph (3C), (e) in paragraph (3D) the words “Article 38(2) or (7)(b) or”, (f) in paragraph (3F) the words “, (3C)”, (g) in paragraph (3H) the words “, (3C)”, (h) paragraphs (4) to (13). Article 52.</p>
<p>Children’s Evidence (Northern Ireland) Order 1995 (NI 3)</p>	<p>In Schedule 1, in paragraph 2- (a) sub-paragraph (2), (b) sub-paragraph (5)(b) and the word “and” immediately preceding it.</p>
<p>Police (Amendment) (Northern Ireland) Order 1995 (NI 17)</p>	<p>Article 6. Article 7(1) and (3)(c).</p>
<p>Criminal Justice (Children) (Northern Ireland) Order 1998 (NI 9)</p>	<p>In Article 2(2) the definition of “custody officer”. Articles 6 to 8. In Article 10A(11)(b) the words “(in which case any recognisance requiring or conditioned for the appearance of the child before the court shall be deemed to be varied so as to require his appearance at the time and place to which he is so remanded)”. Article 31. In Schedule 5, paragraphs 34 and 35.</p>
<p>Terrorism Act 2000 (c. 11)</p>	<p>In Schedule 15, paragraph 18.</p>
<p>Justice (Northern Ireland) Act 2002 (c. 26)</p>	<p>In Schedule 12, paragraphs 46, 68 and 69.</p>

Criminal Justice (Northern Ireland) Order 2003 (NI 13)	Articles 3 to 7. Article 8(1)(a) and (d). Article 24.
Criminal Justice (Northern Ireland) Order 2004 (NI 9)	Article 4. Article 9. Schedule 1.
Justice (Northern Ireland) Act 2004 (c. 4)	Section 12.
Criminal Justice (Northern Ireland) Order 2005 (NI 15)	Article 16(1). Article 21(1).
Police and Criminal Evidence (Amendment) (Northern Ireland) Order 2007 (NI 2)	Article 24. In Schedule 1, paragraph 34.
Criminal Justice (Northern Ireland) Order 2008 (NI 1)	Article 43. Article 87. Article 96(2) and (3).
Justice Act (Northern Ireland) 2011 (c. 24)	In section 75 – (a) subsection (3)(b), (b) in subsection (3)(c) the words “Article 32D or”, (c) in subsection (8)(a) the words “or (b)”. Section 76(2)(b) and (3)(b).

BAIL BILL

EXPLANATORY NOTES

INTRODUCTION

This commentary has been prepared by the Commission in order to assist the reader of the Draft Bail Bill. It does not form part of the Bill.

PART 1

The criminal process can be divided into several periods:

1. After arrest but before a person is charged by the police;
2. After the person is charged by the police;
3. After the person appears before the court;
4. After the person is convicted.

Part 1 governs the second and third periods: after a person is charged with an offence, but before the person is convicted of the offence. It makes provision for the general right to bail of all persons who are accused of an offence. It sets out the grounds on which bail can be refused. It then sets out rules on when bail conditions can be imposed. Unless expressly stated otherwise, the same rules apply whether the bail authority (that is the person making the decision about bail) is a court or the police. This Part governs adults, with additional provision for children.

Much of the substance of this Part is already covered by the current law, either in statute or in the common law. This Part takes much of the existing law and restates it in one place.

Clause 1

Whenever an accused appears before a court, the accused has the right to be released on bail. This right ends when the person has been convicted of the offence. This clause does not affect existing powers to release unconditionally or to grant bail on compassionate grounds.

Clause 2

This clause gives exactly the same right as under clause 1, the only difference being that this right applies to persons in police custody after they have been charged with an offence.

Clause 3

This clause sets out the only four reasons for refusing bail to the accused. If the bail authority believes that there is a strong probability of one of the four risks occurring, bail may be refused. The clause also sets out some factors which are to be considered when making this decision.

Clause 4

If the accused is a child, there are some additional factors which must be considered when deciding whether or not to grant bail. Bail cannot be refused simply because the child will have no suitable accommodation if released on bail.

Clause 5

Sometimes the police or courts do not have enough information upon which to base the decision to grant or refuse bail. This clause allows them to defer this decision

until they have enough information. However, they cannot unreasonably delay this decision.

Clause 6

Bail conditions can only be imposed for four reasons. These reasons are the same as the reasons for refusing bail. The bail condition can only be imposed if it is necessary to stop one of those four risks from occurring. The clause also gives further guidance on imposing conditions, such as considering any family or job responsibilities the person may have.

Clause 7

If the accused is a child, there are some additional factors which must be considered when imposing bail conditions.

Clause 8

Where a court grants bail to an accused, but the person is already in custody for some other reason, this clause states that the person does not have to be released.

Clause 9, 10, 11

These clauses impose a duty on the court to give details to the accused about bail. If bail is granted, the accused must be told the date and place of the next court appearance. If bail is refused, the accused must be told why it was refused. If bail conditions are imposed, the accused must be told what the conditions are, and why they are imposed. The court must record all these details and give a copy of the record to the accused if requested. Similar duties are imposed upon the police in Part 4 of the Bill.

Clause 12

This clause utilises the generic term 'the accused' to cover people charged with an offence by the police and people accused of an offence who appear before a court.

PART 2

This Part applies to all stages of criminal proceedings after the person has been charged by the police that is it also covers bail granted after a person is convicted by a court. This Part introduces an entirely new term into the law – the bail guarantor. The bail guarantor is a person who guarantees that, if a person is granted bail, the person will surrender to custody, and if the person does not, the bail guarantor will pay a specified sum. Both the police and the courts can require a bail guarantor before releasing a person on bail. If the person fails to surrender to custody, the guarantor can have money forfeited.

Previously the functions of a bail guarantor were carried out by what was called a surety. This Bill (in clause 43) repeals powers to require a surety for bail in criminal proceedings. However, most of what relates to sureties now relates to bail guarantors.

Clause 13

This clause sets out three important concepts: the bail guarantor, the guarantee, and the guaranteed sum. The bail guarantor is the person who promises that the person seeking bail will surrender to custody if granted bail. The guarantee is the name of the promise that the guarantor gives. The guaranteed sum is the amount of money that the guarantor promises to pay if the person fails to surrender to custody.

Clause 14

A court can require a bail guarantor before granting a person bail. This also includes where a court is issuing a warrant for arrest endorsed for bail.

Clause 15

The police can require a bail guarantor before granting a person bail. This is done by way of insertion into PACE.

The insertion into PACE also deals with a further point, that a bail guarantor is an alternative to requiring a person to provide security for surrender to custody. Security differs in one key respect to the guarantee. With the guarantee, the guarantor promises to pay if the person fails to surrender. With security, the money is deposited before the person is released on bail. Clause 18 replicates this point for court bail.

Clause 16

Only suitable persons can act as bail guarantors. They should have the capacity to pay the guaranteed sum if the person fails to surrender to custody. They should be of good character and they should have a connection to the person seeking bail.

Clause 17

This clause governs the situation where the court is willing to grant bail but there is no suitable person present to act as guarantor. It also includes where the court issues a warrant for arrest endorsed for bail. The court must set the guaranteed sum with a view to the person being released when a suitable bail guarantor can be found. When a bail guarantor is found, the person can then be released on bail. The clause also sets out the procedure for that guarantor to give the guarantee.

Clause 18

This clause provides for bail guarantors and security for surrender to custody to be alternative bail conditions. Many statutes have historically made provision for security. As bail guarantors are a new concept, those statutes can now be read as allowing bail guarantors in the alternative. Bail authorities cannot impose both security and bail guarantors as a bail condition.

Clause 19

If the person fails to surrender to custody, a court can forfeit the guaranteed sum from the bail guarantor. The guarantor must first have an opportunity to argue why the money should not be forfeited. The court has a certain amount of discretion about whether to forfeit the entire amount, or just a part of it. It can also allow time for payment, or allow the money to be paid in instalments.

Clause 20

This clause only applies where a bail guarantor has failed to pay an amount forfeited under clause 19. The court can enforce payment by ordering that the bail guarantor's goods be seized and sold. In extreme cases, if this does not raise enough money, the bail guarantor can be jailed for a period set out in Schedule 1. The period of imprisonment is reduced if the guarantor pays a proportion of the guaranteed sum, and the guarantor must be released immediately if all the guaranteed sum is paid.

Clause 21

The bail guarantor may have reason to believe that, despite various promises given by the person granted bail, the person will fail to surrender to custody. If so, the bail guarantor can seek to discharge their responsibilities by informing the police or the

court. The bail guarantor may have other reasons for seeking to discharge their responsibilities, for example if they no longer live near the accused, or their financial circumstances have changed and they could no longer afford the guaranteed sum. If the responsibilities are discharged, the bail guarantor is no longer liable if the person granted bail fails to surrender to custody. The person granted bail may be arrested as a result of this application for discharge. The discharge may be delayed until the person is actually in custody.

Clause 22

This clause grants the court the power to vary a guarantee so that it also applies to the accused surrendering at a different time or place, or at a different court. It replicates the historic power that courts had to 'enlarge a recognizance', for example where a case was being transferred from one court to another, or where separate trials were being ordered for different offences.

Clause 23

The magistrates' court already has the power (in Article 48 of the Magistrates' Courts (NI) Order 1981), when it grants bail, to make bail continuous. This means that bail need not specifically be re-granted each time the accused appears before the court, rather the accused is released on on-going bail, under a duty to surrender to the court at each fresh hearing. This clause makes a similar provision for bail guarantors. When accepting the guarantee, the court may provide that guarantors need not turn up at each hearing to re-give their guarantee – the guarantee extends to every hearing that the accused is obliged to attend.

PART 3

Part 3 applies to all stages of criminal proceedings after the person has been charged by the police that is it also covers bail granted after a person is convicted by a court.

This Part governs enforcement of the grant of bail. It does so in two ways, firstly by imposing a duty on persons released on bail to surrender to custody (with a corresponding offence of failure to surrender to custody), secondly, by regulating the powers of arrest for failure to comply with the grant of bail.

Clause 24

If a person is released on bail, they are under a duty to turn up at court hearings, as directed in the grant of bail. Occasionally, the court will release a person for a short time on compassionate bail. On these occasions, the person is obliged to return to prison after the bail ends.

Clause 25

This clause makes it a crime to fail to surrender to custody.

Clause 26

If a person who has been released on bail fails to turn up at court (or absents themselves from court without permission), the court may issue a warrant for the person's arrest.

Clause 27

The police have powers to arrest a person without a warrant. This power can be exercised if the person is not likely to surrender to custody or has broken or is likely to break a bail condition. It can also be exercised if a bail guarantor wants to be discharged as a bail guarantor.

Clause 28

If a person is arrested without a warrant, the person must be brought before a court as soon as possible. The court may decide to release the person on bail again, or they may remand the person in custody.

Clause 29

A police officer can seek a search warrant under this clause. The search warrant can be used to search buildings to find a person who has broken (or is likely to break) the terms of the grant of bail. A lay magistrate can authorise the search warrant.

PART 4

This Part makes many amendments to the current law of bail. It amends three principal areas: police bail, bail relating to children and the law on recognizances and sureties. This Part works in the main by making amendments to PACE or to the Criminal Justice (Children) (NI) Order 1998.

Clause 30

Articles 32A to 32D of PACE allowed the police to release a person on bail without first taking the person to a police station. This was known as 'street bail'. This clause repeals that power and Schedule 2 makes amendments consequent upon that repeal.

Clause 31

The police may release a person on bail without charging the person. If released on bail without charge, the person is still under a requirement to attend at a police station. (The requirement to attend is contained in clause 34). This clause allows a person to apply to the police to review this decision. Upon review, the police can release the person unconditionally that is release without bail.

Clause 32

This clause increases the duties on custody officers to give and record reasons for refusing bail to a person. This aligns the treatment of the accused by the police and by the courts (see clauses 9, 10, 11).

Clause 33

This clause replaces the power of arrest for failure to answer police bail with a specific power of arrest for persons who are released on bail without charge, but fail to attend at a police station in accordance with that grant of bail. The power of arrest for persons released on bail after charge is set out in Part 2 of this Bill.

Clause 34

This clause further regulates release on bail for a person who has not been charged with an offence. The key change here is that no bail conditions can be imposed, other than the obligation to attend at a police station to answer that bail. Another key change is that the person is no longer under a 'duty' to attend at a police station and therefore cannot be liable for the offence of failure to surrender to custody. This clause and the next clause divide the old Article 48 of PACE into two. Previously, that Article dealt both with bail before charge and bail after charge. As these two types of bail are now quite different, the new Article 47B deals with bail before charge and the amended Article 48 deals with bail after charge.

Clause 35

This clause amends Article 48 of PACE so that it now deals solely with bail after charge. The parts relating to bail before charge have been removed and placed in Article 47B of PACE.

Clause 36

This clause enhances the rights of accused persons to be told of the reasons for bail conditions being imposed. This aligns the treatment of the accused by the police and by the courts (see clauses 9, 10 and 11).

Clause 37

The police now have express power to impose a curfew as a bail condition upon an accused, subject to the guidance set out in the Criminal Justice (NI) Order 2008.

Clause 38

Clause 31 allows an accused to apply to the police to review release on bail without charge. This clause allows the accused to appeal to a magistrates' court about the decision to release on bail without charge.

Clause 39

Previously when the police detained a child following charge, the child could be placed in a juvenile justice centre, a hospital or surgery or any other suitable place. This clause limits this list of places. Now, the police can only detain children following charge at a juvenile justice centre.

Clause 40

Article 12 of the Criminal Justice (Children) (NI) Order 1998 set out criteria for releasing a child on bail. These criteria have now been superseded by the general right to bail together with the grounds for refusing bail set out in this Bill. This clause therefore amends Article 12 so that it simply points the reader towards this Bill.

Clause 41

Article 13 of the Criminal Justice (Children) (NI) Order 1998 sets out where a child remanded in custody would be detained. It made different provision depending on the age of the child. This clause amends Article 13 so that the child must be sent to a juvenile justice centre. If the child turns 18 while still remanded in custody, the court must keep the person in the juvenile justice centre unless it is in the person's 'best interests' to move them to the young offenders centre.

Clause 42

This clause repeals other provision relating to bail for children. The grounds for refusing bail for children and adults are now aligned, with the additional provisions for children set out in clauses 4 and 7.

Clause 43

Previously, part of the grant of bail was that a person enter into a recognizance to surrender to custody, and that the person would forfeit money if they failed to surrender to custody. A surety could be made a party to that recognizance, so that the surety would also lose money if the person failed to surrender to custody. With the criminal offence of failure to surrender to custody and the introduction of bail guarantors, the personal recognizance and surety are no longer necessary. This clause therefore abolishes them. There are a large number of amendments to other statutes in consequence of this abolition. Those amendments are set out in Schedule 3.

However, this abolition only affects their use for bail in criminal proceedings. It will not affect matters such as a recognizance to be of good behaviour, a recognizance for a witness to attend a hearing or a recognizance to prosecute an appeal.

Clause 44

This clause allows for subordinate legislation to amend other legislation in consequence of the abolition of the personal recognizance and sureties for bail.

PART 5

This Part deals with standard technical provisions contained in Bills, such as the name of the Bill, how to interpret it, when the Bill commences etc.

Clause 45

This Bill makes multiple amendments to PACE. PACE has itself been amended numerous times before this Bill was made. This clause therefore restates various Articles of PACE, as they have been amended by the Bill, so that the reader can see how the law will look once the Bill is enacted. The restatement appears in Schedule 4.

Clause 46

This clause defines various terms which have been used throughout the Bill. The key definition is of 'bail'. Bail essentially means bail in criminal proceedings at all stages from the person being charged with an offence to the person being convicted of the offence. It does not include the period before a person is charged with an offence. By definition, it only applies to proceedings for an offence, therefore it will not include immigration or extradition proceedings.

In other legislation, there is generally a reference to 'surety or sureties'. This Bill replaces those references with a reference to a 'bail guarantor'. This clause also states that this new reference is not intended to mean that bail guarantors can only be in the singular.

Clause 47

Many of the main changes made by this Bill have consequential effects on other pieces of legislation. This clause allows Schedule 5 to set out all those consequential changes.

Clause 48

This clause allows for transitional provisions in Schedule 6. Transitional provisions cover the change from the old regime to the new regime.

Clause 49

This clause allows for the repeal schedule in Schedule 7. Schedule 7 deletes all references in the older legislation that is now no longer needed.

Schedule 1

This Schedule sets out the period for which a bail guarantor can be imprisoned if the bail guarantor does not pay any guaranteed sum which the court has ordered to be forfeited. It follows the time periods set out in Schedule 3 to the Magistrates' Court (NI) Order 1981 where a person fails to pay a fine.

Schedule 2

This Schedule makes amendments consequent upon the repeal of street bail.

Schedule 3

This Schedule makes amendments consequent upon the abolition of personal recognizances and sureties.

Schedule 4

This Schedule restates certain provisions of PACE as they have been amended by this Bill.

Schedule 5

This Schedule sets out other amendments made to other legislation as a consequence of this Bill.

Schedule 6

This sets out temporary provisions for the phasing in of this new regime on bail. The basic principle is that bail granted before this Bill comes into operation is valid, but that it should be replaced with bail under the new regime as soon as persons come before a court or attend at a police station.

Schedule 7

This Schedule sets out the repeals made by this Bill.

APPENDIX A: REPORT ON EQUALITY IMPACT ASSESSMENT

INTRODUCTION

(i) Section 75 of the Northern Ireland Act 1998

A.1 Section 75 of the Northern Ireland Act 1998 requires public authorities (in this instance, the Commission) to ensure that they carry out their functions having due regard to the need to promote equality of opportunity between:

- persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;
- between men and women generally;
- between persons with a disability and persons without; and
- between persons with dependants and persons without.

Without prejudice to the obligations set out above, the Commission is also required to have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group. The Commission's Draft Equality Scheme sets out how the Commission fulfils these obligations in carrying out its functions.

(ii) Equality Screening Analysis

A.2 The Commission conducted an Equality Screening Analysis (the 'Screening exercise') of the proposals outlined in the Consultation Paper: *Bail in Criminal Proceedings* (the 'consultation paper'). The Screening exercise revealed that it was reasonable to give further consideration to the question of whether the proposals for the reform of bail law and practice may potentially impact on equality of opportunity and/or offer opportunities to better promote equality of opportunity for the following section 75 groupings:

- *Gender*: males as suspects, defendants and prisoners; males and females as victims of violent and sexual offences.
- *Age*: children and young adults as suspects, defendants and prisoners; children and young adults as victims of violent and sexual offences.
- *Religion*: Catholic persons as suspects, defendants and prisoners.
- *Marital Status*: single persons as suspects, defendants and prisoners.
- *Disability*: persons with mental health problems and/or learning difficulties as suspects, defendants and prisoners.
- *Racial group*: persons from ethnic minorities as suspects, defendants and prisoners.

- *Dependants*: persons with dependant children as suspects, defendants and prisoners.

Young men and boys were identified as an important multiple identity grouping on whom the proposals for the reform of bail law and practice may potentially have a significant impact.

- A.3 On the basis of these findings, the Commission decided to conduct an Equality Impact Assessment ('EQIA') on these issues. The full Equality Screening Analysis Form can be viewed on the Commission's website: www.nilawcommission.gov.uk Hard copies can also be made available on request.

AIMS OF THE POLICY

- A.4 The bail project deals with the reform of bail law and practice in Northern Ireland. A full discussion of the issues under consideration by the Commission can be found in the consultation paper. Furthermore, a summary of the issues and the objectives of the bail project can be found in the Consultation on Equality Impact Assessment (the 'EQIA consultation'). The EQIA consultation is available on the Commission's website: www.nilawcommission.gov.uk

AVAILABLE DATA AND RESEARCH

- A.5 A summary of the data and research which was relied on by the Commission when carrying out its Screening exercise and EQIA can also be found in the EQIA consultation.
- A.6 During the course of the preparation of the EQIA, the Commission identified a number of information gaps and, following discussions with the Equality Commission, undertook to gather further data on which to consult and base decisions. In particular, it was decided that additional information may be required in relation to the following section 75 groupings:
- (i) Racial group: ethnic minorities;
 - (ii) Disability: mental health and/or learning difficulties;
 - (iii) Multiple identity grouping: young men.
- A.7 The Commission directly engaged with a range of representative organisations and individuals to discuss the potential impact of the proposals on individuals within these section 75 groupings. Young men and boys were identified in the

Screening exercise as the largest multiple identity grouping affected by any reform of bail law and practice. The Commission sought to gather information on the potential impact of the bail proposals on young men with the help of the Probation Board for Northern Ireland ('PBNI').

A.8 The Commission expressed the view in the EQIA consultation that the overall outcome of the bail project – in terms of simplification, accessibility, modernisation and improving efficiency and effectiveness – will have a positive impact on all, including persons represented by the section 75 groupings.

CONSULTATION

(i) The consultation process

A.9 The formal consultation period for the EQIA consultation commenced on 5th July 2011 with a closing date for responses of 11th October 2011. The Commission sought to consult as widely as possible on the findings included in the EQIA consultation and the provisional conclusions reached. The Commission invited all interested parties to respond to the consultation and forwarded a copy of the EQIA consultation by email or in hard copy to all interested consultees, including representatives of section 75 stakeholder groups, the Equality Commission and any interested members of the public. The EQIA consultation was also made available on the Commission's website.

A.10 Although the Commission endeavoured to engage with all interested parties and organisations during the preparation of the consultation paper, during the consultation period which followed its publication and during the preparation of the EQIA, the Commission also committed to facilitating any further individual consultation meetings requested by representatives of stakeholder groups or other interested parties as a result of the EQIA consultation.

(ii) Consultation responses

A.11 At the close of the consultation period, six responses were received. Consultees welcomed the publication of the Screening exercise and the EQIA consultation and praised their high standard. In particular the Commission was applauded for its direct engagement with children and young persons in relation to the bail proposals and for the production of a Children and Young People's

version of the bail consultation paper.⁴⁶⁹ One consultee particularly approved of this engagement, given the Commission's statutory obligations under section 75 and the government's obligations under Article 12 of the United Nations Convention on the Rights of the Child (the 'CRC'). Another consultee observed the efforts made by the Commission to consult with a range of ethnic and religious minority groups and to consider any concerns raised.

A.12 The Commission was praised for its work in gathering additional data for the purposes of the EQIA. It was argued that the collection of data for the purposes of the promotion of equality of opportunity is part of ensuring compliance with section 75. The inclusion of data relating to the multiple identity grouping, young men, was particularly commended.

A.13 The approach taken by the Commission to the assessment of impacts (see EQIA consultation, para 4.1), focussing both on proposals which have the least differential impact on section 75 groupings and those which offer the greatest opportunity to promote equality of opportunity, was also praised. It was suggested, however, that the Commission should have committed in its EQIA to recommending all policy options which promote equality of opportunity rather than just giving consideration to all such policy options.

A.14 One consultee asserted that the bail proposals have been thoroughly assessed from the perspectives of section 75 groups. Some consultees expressed general support for the approach of the Commission and agreed that the outcome of the bail project – in terms of simplification, accessibility, modernisation and improving efficiency and effectiveness – should have a positive impact on all, including persons represented by the section 75 groupings. One observed that there do not appear to be any unjustified adverse impacts upon members of section 75 groups.

A.15 Comments made by consultees in relation to the impact of the bail proposals on particular section 75 groupings are dealt with below, in the context of the findings included in the EQIA consultation and the provisional conclusions reached.

⁴⁶⁹ See

www.nilawcommission.gov.uk/bail_consultation_paper_children_and_young_persons_version.pdf

(iii) Conclusions

A.16 The Commission considered the findings of the EQIA consultation when finalising its policy recommendations in relation to the bail proposals in accordance with schedule 9, para 9(2) of the Northern Ireland Act 1998. The policy decisions taken by the Commission in light of these responses are discussed in full in the Report: *Bail in Criminal Proceedings* ('Bail Report') and are outlined briefly below. The Bail Report is available on the Commission's website and hard copies are available on request.

CONSULTATION RESPONSES AND CONCLUSIONS

(i) Approach adopted to assessment of impacts

A.17 On the basis of the available data and research, the Commission considered in the EQIA consultation⁴⁷⁰ any differential and/or adverse impact the bail proposals may have on any of the section 75 groupings and any opportunities which may be available to promote equality of opportunity. As the bail proposals were not settled at that time, mitigation and/or alternative policies were not considered separately. Rather the potential impacts of all reform options were considered with a view to identifying those proposals which would have the least differential impact on section 75 groupings and/or would offer the greatest opportunity to promote equality of opportunity.

A.18 In the following section, the provisional views expressed by the Commission in relation to any differential and/or adverse impact the bail proposals may have on any of the section 75 groupings and any opportunities which may be available to promote equality of opportunity are considered in light of the responses received to the EQIA consultation. The policy decisions taken by the Commission are outlined in brief.

A.19 As indicated in the EQIA consultation, the persons most affected by bail decisions are suspects, defendants and prisoners and victims of alleged crimes.

⁴⁷⁰ EQIA consultation, para 4.1.

(ii) Findings and conclusions

Gender

(a) Defendants, suspects and prisoners

A.20 Quantitative data gathered for the purposes of the Screening exercise⁴⁷¹ indicated that males are disproportionately represented in the suspect, defendant, offender and prison populations, compared to the general population, and therefore it seems that males are likely to experience the impact of any changes to bail law and practice, including the positive impacts outlined above, in greater numbers than females. Although males are more likely to be the subject of a bail/remand decision, qualitative data revealed little differential impact (in terms of differing needs, experiences or priorities) for males on the basis of their gender. It was, however, suggested in the PBNI focus group discussion that, under the current regime, inadequate account is taken of the dependant responsibilities of males when decisions are taken on the conditions which may be attached to bail. It was asserted that males may share or provide full time child care and that this should be considered when bail conditions are imposed, as it is likely it would be if the bail applicant was female. The Commission invited views in the consultation paper on the introduction of detailed guidance for bail decision makers regarding the imposition of bail conditions. The Commission considered the inclusion in such guidance of a requirement to ensure that bail conditions do not, as far as practicable, interfere with other legitimate pursuits including care/dependant responsibilities, irrespective of the gender of the applicant. The Commission expressed the provisional view in the EQIA consultation that this potential policy option would not have a differential or adverse impact on males and may contribute to promoting equality of opportunity for males.

A.21 Some of those who responded to the EQIA consultation were supportive of the inclusion in guidance on the imposition of bail conditions of a requirement to ensure that bail conditions do not, as far as practicable, interfere with other commitments including care/dependant responsibilities agreeing that this would ensure greater enjoyment of equality of opportunity by young men with dependants. It was argued that such guidance may also result in fewer young men with dependants breaching bail conditions as their particular

⁴⁷¹ Screening exercise, para 1.11.

circumstances and responsibilities will be considered when bail conditions are imposed.

A.22 In light of the responses to the EQIA and the consultation paper, the Commission has determined that it is appropriate to include in bail legislation guidance on the imposition or variation of bail conditions on accused persons, including a requirement, where relevant, to consider the accused person's commitments. It is the view of the Commission that as the requirement to consider the family or dependant responsibilities of the person, if relevant, when imposing or varying conditions will apply irrespective of the gender of the person, this approach will not have a differential or adverse impact on males and may contribute to promoting equality of opportunity for males. This policy decision is discussed further at paras 5.84 to 5.87 of the Bail Report.

(b) Victims

A.23 Some of the proposals for the reform of bail law and practice may also have a significant impact on victims of crime. Although victims are a very diverse group, quantitative data⁴⁷² indicates that victims of violent crime are more likely to be male and victims of sexual offences and domestic violence are more likely to be female.

A.24 The Commission identified the following potential issues for victims of crime:
Limitations on the presumption in favour of bail: It was suggested in a consultation meeting that the provisional view of the Commission not to include in bail legislation different 'offence specific' or 'circumstance specific' rules in relation to the entitlement to bail may impact negatively on women who are victims of domestic violence or sexual offences. However, the Commission argued in the EQIA consultation that if such special rules are not recommended, persons accused of domestic violence or sexual offences would be treated, for the purposes of their entitlement to bail, in the same way as persons accused of all other offences. The Commission expressed the provisional view that this approach is consistent with section 75 obligations and that there is no justification for treating persons accused of domestic violence or sexual offences differently from other accused persons. Moreover, the Commission was supportive of arguments that such presumptions against bail

⁴⁷² Screening exercise, para 1.11.

and other special rules are arbitrary, complicated and potentially contrary to human rights standards.

A.25 *Keeping victims informed*: The Commission invited views in the consultation paper on the creation of a statutory duty to provide information to victims regarding bail decisions. Views were also sought in relation to limiting such a duty to certain offences (such as violent or sexual offences), particular bail conditions or to victims who request information. The Commission expressed the provisional view in the EQIA consultation that none of these potential policy options would result in differential impact on any of the section 75 groupings. It was suggested that there may be opportunities to promote equality of opportunity for male and female victims of violent or sexual offences if a requirement to provide information is focussed on those offences.

A.26 One EQIA consultee agreed with the Commission's conclusion that 'offence specific' or 'circumstance specific' rules in relation to the entitlement to bail are not appropriate. No other views were expressed on this issue. The EQIA consultation responses have confirmed for the Commission the conclusion that bail legislation should not include different 'offence specific' or 'circumstance specific' rules in relation to the entitlement to bail. Although it has been argued that the absence of such rules may impact negatively on women who are victims of domestic violence or sexual offences, evidence indicates that reverse onus provisions do not necessarily make a grant of bail less likely.⁴⁷³ The Commission maintains the view expressed in the EQIA consultation that it is consistent with section 75 obligations that persons accused of domestic violence or sexual offences would be treated, for the purposes of their entitlement to bail, in the same way as persons accused of all other offences. Further, the Commission is persuaded that the differential treatment of some accused persons in terms of the entitlement to bail is arbitrary, overly complicated and potentially incompatible with human rights standards. This policy decision is discussed further at paras 5.6 to 5.14 of the Bail Report.

A.27 In the view of the Commission none of the other bail proposals would adversely impact upon persons on the basis of their gender. The Commission has not

⁴⁷³ Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (Aug 2007), pp 44-5 and 49.

identified any further opportunities to promote equality of opportunity for persons on the basis of their gender.

Age

(a) *Defendants, suspects and prisoners*

A.28 Quantitative data gathered for the purposes of the Screening exercise⁴⁷⁴ indicated that young adults are disproportionately represented in the defendant, offender and prison populations, compared to the general population. Although young adults are likely to experience the impact of any changes to bail law and practice, including the positive impacts outlined above, in greater numbers than older persons, qualitative data revealed no differential impact (in terms of differing needs, experiences or priorities) for young adults on the basis of their age.

A.29 Qualitative data⁴⁷⁵ indicates, however, that children and young persons (under 18), particularly those from a care background, may have different needs, experiences and priorities in relation to bail and remand. The concerns of persons under 18 years of age were given separate and particular consideration in the development of the bail proposals.

A.30 The Commission has identified the following potential issues for children and young persons:

Particular vulnerability of children and young persons: It was suggested in preliminary discussions and consultations that young persons are particularly vulnerable in the criminal justice system generally and in relation to bail and remand in particular. The negative impact of remand on children and young persons, in terms of family life, education and mental health, was highlighted. The current system for remanding young persons by the police and the courts has been criticised for failing to adequately protect the rights of children as laid down in the CRC, especially the failure to consider primarily the best interests of the child and the principle that detention should be used as a measure of last resort and for the shortest appropriate time. The Commission considered these issues in its consultation paper and invited views on whether a reformed test for the remand of children and young persons should mirror the adult test, subject to appropriate modification to reflect the age of the young person. The

⁴⁷⁴ Screening exercise, para 1.11.

⁴⁷⁵ Screening exercise, para 1.11.

Commission also had discussions with the Youth Justice Review team regarding the protection of the rights of children and young persons within the youth justice system more broadly. As with adults, the Commission is concerned that bail decision makers consider all relevant matters when deciding on the bail or remand of a child or young person. Views were invited in the consultation paper on the desirability of creating statutory guidance on the factors which should be taken into account when bail decisions are made and bail information initiatives which might be adopted to facilitate this decision. The Commission expressed the provisional view in the EQIA consultation that none of these potential policy options would adversely impact on children and young persons and offer significant opportunities to promote equality of opportunity for children and young persons. There may also be opportunities to further fulfil international obligations under the CRC within a revised test for bail for children and young persons.

A.31 *Comprehension and participation in the bail process:* It was suggested that many young persons have difficulty understanding the bail process and, in particular, bail conditions which may be imposed upon them. Some young persons also reported that they found it difficult to fully participate in bail proceedings and felt that they had no voice. The Commission considered these issues in its consultation paper and invited views on a number of proposals which may address these concerns. Firstly, the Commission's provisional proposals relating to the simplification of both the form and substance of bail law and practice in Northern Ireland will, it is hoped, improve understanding of the process for all persons, including children and young persons. Secondly, the Commission invited views in the consultation paper regarding the creation of a statutory duty to provide reasons for bail decisions which would increase transparency and accountability and a requirement that bail decision makers make efforts to ensure that young persons understand bail decisions and conditions. Thirdly, the Commission invited views on the role which may be played by responsible adults during the bail period and the desirability of expanding bail support for young persons.

A.32 The Commission expressed the provisional view in the EQIA consultation that none of these potential policy options would adversely impact on children and young persons and may offer opportunities to promote equality of opportunity for children and young persons. The Commission considered there to be an

opportunity to enhance compliance with the ECHR if the proposal to create a statutory duty to provide reasons for bail decisions is recommended. It was also suggested that there may be opportunities to further fulfil international obligations under the CRC if proposals to enhance the participation of children and young persons in bail proceedings are recommended.

A.33 *Accommodation on bail and remand:* Concerns have been expressed regarding accommodation for young persons on bail and it was suggested that, under the current regime, young persons may be remanded due to the lack of a suitable bail address. It was suggested that this is a particular problem in relation to 'looked after' children. Quantitative data revealed high numbers of PACE and remand admissions to the juvenile justice centre and many admissions of children and young persons from a care background. The Commission considered these issues in the consultation paper and invited views on whether decision makers should be prohibited from remanding young persons solely on the grounds of a lack of accommodation and on how the issue of accommodation for young persons on bail should be addressed. The Commission considers the provision of suitable bail accommodation as central to reform of bail law and practice in relation to children and young persons and is keen that young persons are not unnecessarily drawn into the criminal justice system due to a lack of suitable accommodation. The Commission considered a range of potential recommendations (including a prohibition on remand solely for accommodation reasons and the creation of additional accommodation options for young persons) with a view to ensuring that young persons are not remanded for accommodation reasons. The Commission expressed the view in the EQIA consultation that none of these potential policy options are likely to adversely impact on children and young persons and indeed represent significant opportunities to promote equality of opportunity for children and young persons.

A.34 There was also some unease expressed about the facilities used to detain young persons denied bail, particularly the use of the young offenders centre for some 15 and 16 year olds. The Commission invited views about the inclusion in legislation of provisions designating where children and young persons could be detained on remand, such as the juvenile justice centre, the young offenders centre and secure accommodation. The Commission expressed the view in the EQIA consultation that the policy options under

consideration were unlikely to adversely impact on children and young persons and may represent significant opportunities to promote equality of opportunity for children and young persons. It was argued that there may be opportunities to further fulfil international obligations in relation to the detention of children and young persons.

A.35 *Compliance with bail*: It has been suggested that complex and often inappropriate bail conditions may be imposed upon children and young persons, under the present regime, which frequently result in breaches and ultimately detention. In light of these considerations, the Commission invited views on whether there should be more guidance for decision makers regarding the imposition of conditions on young persons and if so, whether such guidance should be placed on a statutory footing. The Commission also expressed the provisional view that the power to take a personal recognizance should be abolished in respect of children (and adults). In considering the possible introduction of an offence of breach of bail conditions, the Commission has given thought to the disproportionate impact that such an offence might have on children and young persons as highlighted by the Victorian Law Reform Commission.⁴⁷⁶ Finally, the Commission invited views on the role which may be played by responsible adults during the bail period and the desirability of expanding bail support for young persons, which may assist young persons in complying with their bail.

A.36 The Commission expressed the provisional view in the EQIA consultation that the creation of a breach of bail conditions offence may have an adverse impact on children and young persons. While the availability of bail support and additional guidance on the imposition of bail conditions may mitigate some of the adverse impact of this potential proposal, the Commission undertook to give consideration to recommending an alternative policy of retaining the current system for dealing with breaches of bail conditions. Under the existing regime persons arrested by the police for breaching post charge bail conditions are brought before a court and may be remanded or released on bail under the same or different conditions, but will not face prosecution for a separate offence. It was argued that none of the other potential policy options would

⁴⁷⁶ Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (Aug 2007), p 128.

adversely impact on children and young persons but rather represent significant opportunities to promote equality of opportunity for children and young persons.

A.37 One EQIA consultee agreed that proposals to simplify bail law will be of benefit to children and young persons. Another expressed approval for the creation of a statutory duty to provide reasons for bail decisions and agreed with the Commission's view that this recommendation will enhance compliance with the ECHR.

A.38 There was support for a prohibition on remand of young persons solely for accommodation reasons, particularly in relation to 'looked after' children and young persons. Consultees also agreed that recommendations should be made for additional accommodation options for young persons on bail.

A.39 One consultee argued that the abolition of the power to take a personal recognizance in respect of adults and children will not discriminate against children and young persons. Several consultees agreed with the provisional view of the Commission that the creation of a breach of bail conditions offence may have an adverse impact on children and young persons. It was argued that the existing arrangements for dealing with breaches of bail conditions should remain.

A.40 It was also argued that bail support should be expanded to include all children and young persons on bail. Bail support, it was suggested, is essential to allowing children and young persons access to a range of services to address their needs and to ensure compliance with bail. Such support services should address accommodation issues and include bail mentoring and bail fostering. It was argued that bail support services would promote equality of opportunity for young persons and young males, in particular.

A.41 In relation to detention facilities for children and young persons, one consultee pointed out that it is inappropriate to detain not only 15 and 16 year olds but also 17 year olds in the young offenders centre, which is a category C prison. It was argued that the detention of any children, that is those under 18 years of age (CRC, Art 1), at this facility breaches international children's rights standards, particularly the obligation to detain children separately from adults under the CRC, Art 37(c).

A.42 The Commission has considered closely the impact of the bail proposals on children and young persons.⁴⁷⁷ Having considered the views of consultees, the Commission is persuaded that the introduction of a modern and accessible Bail Act, which gives full expression to human rights obligations and appropriate protection for vulnerable groups, will improve understanding of the bail process for all persons, including children and young persons thereby promoting equality of opportunity. This policy decision is discussed further at paras 2.2 to 2.8 of the Bail Report.

A.43 It is considered that recommendations that the police and the courts should provide and record details of bail, grounds and reasons for refusing bail and purposes and reasons for the imposition of bail conditions will further enhance understanding of the bail process thereby promoting equality of opportunity for children and young persons. It is the view of the Commission that recommendations for the provision of explanations to young persons which take account of their age, maturity and understanding will further enhance equality of opportunity. These policy decisions are discussed further at paras 5.93 to 5.105 and 6.79 to 6.83 of the Bail Report.

A.44 The Commission takes seriously the concerns of consultees regarding the inappropriate use of custodial remand and the potential failure to meet international children's rights standards. The Commission considers that the application of the adult right to bail, subject to the four ECHR grounds for refusal, in addition to further safeguards for children offer the greatest opportunity to promote equality of opportunity. Such further safeguards will require consideration of the age, maturity, needs and understanding of the young person, the best interests of the child as a primary consideration and the principle that detention should be a last resort and for the shortest appropriate period. In order to address the particular issue of welfare detention the Commission recommends the inclusion in legislation of a prohibition on remand solely for accommodation reasons. The Commission also recommends the development of a range of bail accommodation options for children and young persons. These policy decisions are discussed further at paras 6.2 to 6.23 and 6.65 to 6.78 of the Bail Report.

⁴⁷⁷ See Bail Report, ch 6.

A.45 In relation to bail conditions, having considered the views of consultees, the Commission maintains the view expressed in the consultation paper that the power to take a personal recognizance from a child should be abolished in respect of police and court bail. This policy decision is discussed further at paras 4.2 to 4.9 of the Bail Report.

A.46 The views of consultees have also confirmed for the Commission that the creation of a breach of bail conditions offence may have an adverse impact on children and young persons. Therefore the Commission does not recommend the creation of such an offence. This policy decision is discussed further at paras 3.15 to 3.21 of the Bail Report.

A.47 The Commission is persuaded of the need for adequate bail support for children and young persons, at the earliest opportunity and recommends the expansion of bail support programmes for children and young persons. This policy decision is discussed further at paras 6.65 to 6.78 of the Bail Report.

A.48 Having considered all the arguments, the Commission is firmly of the view that no under 18 year olds should be detained in Hydebank young offenders centre on remand and recommends the amendment of legislation providing for such remand. This policy decision is discussed further at paras 6.29 to 6.48 of the Bail Report.

(b) Victims

A.49 Quantitative data⁴⁷⁸ indicates that victims of violent and sexual offences are more likely to be younger than older. The Commission has identified the following potential issues for children and young adults who are victims of violent or sexual crime:

Limitations on the presumption in favour of bail: The Commission has considered whether its provisional determination not to include in bail legislation different ‘offence specific’ or ‘circumstance specific’ rules in relation to the entitlement to bail may impact negatively on children and young adults who are victims of violent or sexual offences. As indicated above in relation female victims of domestic violence or sexual offences, the Commission is of the opinion that there are sound arguments for treating persons accused of all

⁴⁷⁸ Screening exercise, para 1.11.

types of offences similarly, for the purposes of their entitlement to bail. The Commission expressed the provisional view in the EQIA consultation that this policy approach would not adversely impact on children and young adults.

A.50 *Keeping victims informed*: The Commission invited views in the consultation paper on the creation of a statutory duty to provide information to victims regarding bail decisions. Views were also sought in relation to limiting such a duty to certain offences (such as violent or sexual offences), particular bail conditions or to victims who request information. The Commission expressed the provisional view in the EQIA consultation that none of these potential policy options would result in differential impact on any of the section 75 groupings. It was argued that there may be opportunities to promote equality of opportunity for children and young adult victims of violent or sexual offences if a requirement to provide information is focussed on those offences.

A.51 One consultee agreed with the Commission that policy options regarding keeping victims informed of bail decisions would not result in differential impact on any of the section 75 groupings and that there may be opportunities to promote equality of opportunity for children and young adult victims of violent or sexual offences if a requirement to provide information is focussed on those offences.

A.52 Having considered the views of consultees, the Commission considers that information regarding bail decisions should be offered to all victims, allowing the victim to decide if they wish to receive information. The Commission does not consider that this policy would have any adverse impact on children and young persons. This policy decision is discussed further at paras 7.26 to 7.46 of the Bail Report.

A.53 In the view of the Commission none of the other bail proposals would adversely impact on children and young persons. The Commission has not identified any further opportunities to promote equality of opportunity for children and young persons.

Religion

A.54 Quantitative data gathered for the purposes of the Screening exercise⁴⁷⁹ indicated that there are slightly higher proportions of Catholic persons in the defendant, offender and particularly the prison populations than there are in the general population. The Commission found no evidence, however, of different needs, experiences or priorities for persons in respect of bail and remand on the basis of religion. The Commission expressed the provisional view in the EQIA consultation that none of the bail proposals would adversely impact on persons of different religious belief.

A.55 One consultee agreed with the provisional view of the Commission that none of the bail proposals would adversely impact on persons of different religious belief. No other views were expressed by consultees on this issue. The responses to the EQIA consultation have confirmed for the Commission the provisional view that none of the bail proposals would adversely impact on persons of different religious belief. Further, the Commission has not identified any opportunities to promote equality of opportunity for persons of different religious belief.

Marital status

A.56 Quantitative data⁴⁸⁰ indicated that single persons are disproportionately represented in the defendant, offender and prison populations, compared to the general population. Although single persons are likely to experience the impact of any changes to bail law and practice, including the positive impacts outlined above, in greater numbers than other persons, qualitative data revealed no differential impact (in terms of differing needs, experiences or priorities) for single persons on the basis of their marital status. It was suggested in the EQIA consultation that more defendants, offenders and prisoners are single because more defendants, offenders and prisoners are young, as discussed above. The Commission expressed the provisional view in the EQIA consultation that none of the bail proposals would adversely impact on persons of different marital status.

A.57 One consultee agreed with the provisional view of the Commission that none of the bail proposals would adversely impact on persons of different marital status.

⁴⁷⁹ Screening exercise, para 1.11.

⁴⁸⁰ Screening exercise, para 1.11.

No other views were expressed by consultees on this issue. The responses to the EQIA consultation have confirmed for the Commission the provisional view that none of the bail proposals would adversely impact on persons of different marital status. Further, the Commission has not identified any opportunities to promote equality of opportunity for persons of different marital status.

Disability

A.58 Quantitative data gathered for the purposes of the Screening exercise⁴⁸¹ indicated that there are high concentrations of mental health and/or learning difficulties among the offender and prison populations. It was also suggested in responses to the bail consultation that proposals for the reform of bail may raise equality issues for persons with learning disabilities, special educational needs, mental health problems and otherwise vulnerable adults or persons with issues of capacity.

A.59 The Commission has identified the following potential issues for persons with mental health and/or learning difficulties:

Bail information: The Commission is concerned that bail decision makers are provided with all relevant information, including information regarding the applicant's mental health or learning difficulties if pertinent to the issue of bail, and views were invited in the consultation paper on bail information initiatives which might be adopted. The Commission also invited views on the desirability of creating statutory guidance on the factors which should be taken into account when bail decisions are made and noted that provision is made in some other jurisdictions for consideration to be given to the special needs of persons with mental health or learning difficulties when deciding on bail.⁴⁸² The Commission expressed the provisional view in the EQIA consultation that these proposals would not adversely impact on persons with mental health and/or learning difficulties and may represent significant opportunities to promote equality of opportunity for such persons.

A.60 *Comprehension and participation in the bail process:* It has been suggested that persons with mental health and/or learning difficulties may have difficulty understanding the bail process and, in particular, bail conditions which may be

⁴⁸¹ Screening exercise, para 1.11.

⁴⁸² See eg Bail Act 1978 (NSW), s 32(1)(b)(v). See also Bail Act 1978 (NSW), s 37(2A) which provides that, when imposing bail conditions on persons with intellectual disabilities, consideration must be given to the capacity of the person to understand or comply with such conditions.

imposed upon them. The Commission's provisional proposals relating to the simplification of both the form and substance of bail law and practice in Northern Ireland will, it was argued, improve understanding of the process for all persons, including persons with mental health and/or learning difficulties. The possible creation a statutory duty to provide reasons for bail decisions may also increase understanding. The Commission expressed the provisional view in the EQIA consultation that the bail proposals would not adversely impact on persons with mental health and/or learning difficulties and may offer opportunities to promote equality of opportunity for such persons. The Commission argued that there may be an opportunity to enhance compliance with the ECHR if the proposal to create a statutory duty to provide reasons for bail decisions is recommended. (See also 'Compliance with bail' below.)

A.61 *Compliance with bail:* Persons who are vulnerable due to their age, mental health and/or learning difficulties receive the support of an appropriate adult while they are in police custody. However, if such persons are released on bail they may not receive any support in complying with their bail conditions and surrendering to custody at the appropriate time and place. It has been suggested that persons who are vulnerable due to mental health and/or learning difficulties may benefit from advocacy support, help with complying with bail conditions, avoiding offending and finding suitable bail accommodation. The Commission invited views in the consultation paper regarding the expansion of bail support (which is currently available only for some children and young persons) to include adults.

A.62 In considering the possible introduction of an offence of breach of bail conditions, the Commission is mindful of the impact that such an offence might have on persons with mental health and/or learning difficulties as highlighted by the Victorian Law Reform Commission.⁴⁸³ The Commission expressed the provisional view in the EQIA consultation that the creation of a breach of bail conditions offence may have an adverse impact on persons with mental health and/or learning difficulties. While the availability of bail support and additional guidance on the imposition of bail conditions may mitigate some of the adverse impact of this potential proposal, the Commission committed to considering an alternative policy of retaining the current system for dealing with breaches of

⁴⁸³ Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (Aug 2007), p 128.

bail conditions. Under the present regime persons arrested by the police for breaching post charge bail conditions are brought before a court and may be remanded or released on bail under the same or different conditions, but will not face prosecution for a separate offence. It was argued that none of the other potential policy options would adversely impact on persons with mental health and/or learning difficulties but rather may offer opportunities to promote equality of opportunity for such persons.

A.63 One consultee agreed with the provisional view of the Commission that the creation of a breach of bail conditions offence may have an adverse impact on persons with mental health and/or learning difficulties. This consultee was also supportive of the provision of bail support services for persons with mental health and/or learning difficulties.

A.64 Consultation responses have confirmed the view of the Commission that the creation of a breach of bail conditions offence may have an adverse impact on persons with mental health and/or learning difficulties. Therefore the Commission does not recommend the creation of such an offence. This policy decision is discussed further at paras 3.15 to 3.21 of the Bail Report.

A.65 The Commission is persuaded of the merits of providing bail support to some adults on bail, including persons with mental health and/or learning difficulties, and recommends the development of bail support programmes for adults. This policy decision is discussed further at paras 7.12 to 7.25 of the Bail Report.

A.66 In the view of the Commission none of the other bail proposals would adversely impact on persons with mental health and/or learning difficulties. The Commission has not identified any opportunities to promote equality of opportunity for persons with mental health and/or learning difficulties.

Racial group

A.67 Although quantitative data⁴⁸⁴ indicates that the vast majority of the defendant, offender and prison population can be classified as 'white', preliminary discussions and consultations with ethnic minorities and organisations representing the interests of differing racial groupings indicates that persons

⁴⁸⁴ Screening exercise, para 1.11.

from different racial groups may have different needs, experiences and priorities in relation to bail and remand. The Commission considered these issues in the development of the bail proposals and invited views on a range of proposals which may enhance equality of opportunity for many of these groups.

A.68 The Commission has identified the following potential issues for persons from differing racial groupings:

Bail information: It was suggested to the Commission that, under the current bail regime, foreign nationals may unjustifiably be viewed by the courts as more likely to abscond and therefore be refused bail. It was reported that similar assumptions are made in respect of persons from ethnic minority groups even if they were born and have always lived in Northern Ireland. It was suggested to the Commission that a broader analysis of 'community ties' could be adopted, which would allow decision makers to consider issues such as links with community organisations and pending asylum applications as indications of a commitment to stay within the jurisdiction (at least until an application is determined). The Commission considered these issues and invited views in its consultation paper on the desirability of creating statutory guidance on the factors which should be taken into account when bail decisions are made and bail information initiatives which might be adopted to facilitate this decision. The Commission expressed the provisional view in the EQIA consultation that these potential proposals would not adversely impact on persons from ethnic minorities and may offer opportunities to promote equality of opportunity for such persons.

A.69 *Comprehension and participation in the bail process:* It was suggested that due to language issues some persons from ethnic minorities may need additional support when making a bail application, understanding the reasons for the decision and any conditions imposed upon them. The Commission's proposals relating to the simplification of both the form and substance of bail law and practice in Northern Ireland will, it is hoped, improve understanding of the process for all persons, including persons from differing racial groupings. The possible creation of a statutory duty to provide reasons for bail decisions may also increase understanding. The Commission expressed the provisional view in the EQIA consultation that the bail proposals would not adversely impact on persons from ethnic minorities and may offer opportunities to promote equality of opportunity for such persons. The Commission considered there to be an

opportunity to enhance compliance with the ECHR if the proposal to create a statutory duty to provide reasons for bail decisions is recommended. (See also 'Bail conditions and compliance with bail' below.)

A.70 *Bail accommodation*: Focus group discussions with persons from ethnic minorities and organisations representing their interests indicated that such persons may encounter difficulties accessing appropriate bail accommodation as they may have limited family and friends in this jurisdiction. Persons from outside the EU may, it has been suggested, experience particular problems as hostels may refuse them a bed because of concerns that they will not be paid if the person is not in receipt of state benefits. The Commission invited views in the consultation paper regarding the grounds upon which bail may be refused by the police and the courts and is keen that persons should not be remanded for accommodation reasons. In relation to children and young persons, the Commission invited views on whether decision makers should be prohibited from remanding young persons solely on the grounds of a lack of accommodation and on how the issue of accommodation for young persons on bail should be addressed. The Commission also undertook to consider making recommendations to address accommodation issues for other groups if necessary. It was argued that these proposals will not adversely impact on persons from ethnic minorities.

A.71 *Bail conditions and compliance*: It was reported that some persons from ethnic minorities may experience problems securing appropriate sureties if they have few family or friends in Northern Ireland and may encounter difficulties obtaining bail as a consequence. It was also suggested that members of the travelling community may be treated differently to non-travellers, under the current bail regime, being required to provide cash as security before they are released on bail, a requirement which is rarely demanded of other bail applicants. The Commission invited views on whether there should be more guidance for decision makers regarding the imposition of bail conditions and if so, whether such guidance should be placed on a statutory footing. The Commission also invited views in the consultation paper on the expansion of bail support (which is currently available only for some children and young persons) to include adults.

- A.72 It was suggested in focus group discussions carried out for this EQIA that due to language and comprehension issues the introduction of an offence of breach of bail conditions may have an adverse impact upon persons from ethnic minorities. While the availability of bail support and additional guidance on the imposition of bail conditions may mitigate some of the adverse impact of this potential proposal, the Commission undertook to consider recommending an alternative policy of retaining the current system for dealing with breaches of bail conditions. Under the present regime persons arrested by the police for breaching bail conditions are brought before a court and may be remanded or released on bail under the same or different conditions, but will not face prosecution for a separate offence. The Commission expressed the provisional view in the EQIA consultation that none of the other potential policy options would adversely impact on persons from ethnic minorities and may offer opportunities to promote equality of opportunity for such persons.
- A.73 One consultee expressed approval for the conclusions of the Commission in relation to the impact of the bail proposals on persons from different racial groups. This consultee was particularly supportive of consideration of the accommodation needs of persons from different racial groups. Another consultee expressed slight concern that consideration was not given to persons from ethnic and religious minorities as potential victims of hate crime. It was argued that a possible reason for low reporting of hate crime may be fear of retribution, including from alleged perpetrators on bail.
- A.74 As indicated above, the Commission has decided against the creation of a breach of bail conditions offence. Such an offence may, in the view of the Commission, have an adverse impact upon persons from ethnic minorities. This policy decision is discussed further at paras 3.15 to 3.21 of the Bail Report.
- A.75 The Commission is persuaded of the merits of providing bail support to some adults on bail, including where necessary persons from ethnic minorities, and recommends the development of bail support programmes for adults. It is recommended that such support may address accommodation issues. This policy decision is discussed further at paras 7.12 to 7.25 of the Bail Report.
- A.76 In the view of the Commission none of the other bail proposals would adversely impact on persons from ethnic minorities. The Commission has not identified

any further opportunities to promote equality of opportunity for persons from ethnic minorities.

Dependants

A.77 Quantitative data gathered for the purposes of the Screening exercise⁴⁸⁵ indicated there may be more persons with dependant children in the offender population. As noted above, it has been suggested that inadequate account is presently taken of the dependant responsibilities of males when decisions are taken on the conditions which may be attached to bail. The Commission invited views in the consultation paper on the introduction of detailed guidance for bail decision makers regarding the imposition of bail conditions. The Commission considered the inclusion in such guidance of a requirement to ensure that bail conditions do not, as far as practicable, interfere with other legitimate pursuits including care/dependant responsibilities. The Commission expressed the provisional view in the EQIA consultation that this potential policy option would not adversely impact on persons with dependant children and may offer opportunities to promote equality of opportunity for such persons.

A.78 There was support among consultees for the inclusion in guidance on the imposition of bail conditions of a requirement to ensure that bail conditions do not, as far as practicable, interfere with other commitments including care/dependant responsibilities. As indicated above, the Commission considers that bail legislation should include guidance on the imposition of bail conditions on accused persons, including a requirement, where relevant, to consider the accused person's family or dependant responsibilities. This policy decision is discussed further at paras 5.84 to 5.87 of the Bail Report.

A.79 In the view of the Commission none of the other bail proposals would adversely impact on persons with dependants. The Commission has not identified any further opportunities to promote equality of opportunity for persons with dependants.

⁴⁸⁵ Screening exercise, para 1.11.

Sexual orientation

A.80 From the limited data available,⁴⁸⁶ the Commission expressed the provisional view in the EQIA consultation that the proposals under consideration would not adversely impact on persons on the basis of their sexual orientation. One consultee agreed with this conclusion and no other views were expressed by consultees on this issue. The responses to the EQIA consultation have confirmed for the Commission the provisional view that none of the bail proposals would adversely impact on persons on the basis of their sexual orientation. Further, the Commission has not identified any opportunities to promote equality of opportunity for persons on the basis of their sexual orientation.

Political opinion

A.81 From the limited data available,⁴⁸⁷ the Commission expressed the provisional view in the EQIA consultation that the proposals under consideration would not adversely impact on persons on the basis of their political opinion. One consultee agreed with the Commission and no other views were expressed. The responses to the EQIA consultation have confirmed for the Commission the provisional view that none of the bail proposals would adversely impact on persons on the basis of their political opinion. Further, the Commission has not identified any opportunities to promote equality of opportunity for persons on the basis of their political opinion.

MONITORING

A.82 Although the Commission has responsibility for devising this policy the decision to implement any recommendations lies with the responsible NI Department. Where a Department has implemented a recommendation, the duty to monitor the implemented policy/legislation for adverse impact on the promotion of equality of opportunity will lie with that Department.

⁴⁸⁶ Screening exercise, para 1.11.

⁴⁸⁷ Screening exercise, para 1.11.

APPENDIX B: LIST OF CONSULTEES

WRITTEN RESPONSES

British Irish Rights Watch

Children's Law Centre

Committee on the Administration of Justice (CAJ)

Community Restorative Justice Ireland

Criminal Bar Association of Northern Ireland

Department of Health, Social Services and Public Safety

Extern

Hon Mr Justice WBS Stephens

Include Youth

Information Commissioner's Office

Lord Chief Justice's Office

Mindwise

Northern Ireland Association for the Care and Resettlement of Offenders (NIACRO)

Northern Ireland Commissioner for Children and Young People (NICCY)

Northern Ireland Council for Ethnic Minorities (NICEM)

Northern Ireland Prison Service (NIPS)

Police Service Northern Ireland (PSNI)

Probation Board for Northern Ireland (PBNI)

Public Prosecution Service Northern Ireland

Sinn Féin

Upper North Belfast Community Police Liaison Committee (UNBCPLC)

Victim Support Northern Ireland

Voice of Young People in Care (VOYPIC)

Youth Justice Agency of Northern Ireland

Women's Aid Federation Northern Ireland

CONSULTATION MEETINGS

Belfast Islamic Centre

Chinese Welfare Association

Indian Community Centre

Northern Ireland Community of Refugees and Asylum Seekers

Probation Board for Northern Ireland focus group

Meeting with young people at:

Hydebank, Young Offenders Centre

Woodlands, Juvenile Justice Centre

VOYPIC, Enniskillen

Include Youth, Derry/Londonderry

Public Meeting, Farset International, Belfast

Public Meeting, NICVA, Belfast

Public Meeting, Cohannon Lodge, Dungannon

Public Meeting, Everglades Hotel, Derry/Londonderry

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Criminal Justice (Northern Ireland) Order 2003 (SI 2003 No 1247 (NI 13))
Criminal Justice (Northern Ireland) Order 2004 (SI 2004 No 1500 (NI 9))
Criminal Justice (Northern Ireland) Order 2008 (SI 2008 No 1216 (NI 1))
Fisheries Act (Northern Ireland) 1966 (c 17)
Human Rights Act 1998 (c 42)
Interpretation Act (Northern Ireland) 1954 (c 33)
Justice (Northern Ireland) Act 2002 (c 26)
Justice (Northern Ireland) Act 2004 (c 4)
Justice Act (Northern Ireland) 2011 (c 24)
Magistrates' Courts (Northern Ireland) Order 1981 (SI 1981 No 1675) (NI 26))
Northern Ireland Act 1998 (c 47)
Northern Ireland (Emergency Provisions) Act 1973 (c 53)
Northern Ireland (Emergency Provisions) Act 1978 (c 5)
Northern Ireland (Emergency Provisions) Act 1987 (c 30)
Northern Ireland (Emergency Provisions) Act 1991 (c 24)
Northern Ireland (Emergency Provisions) Act 1996 (c 22)
Police and Criminal Evidence (Northern Ireland) Order 1989 (SI 1989 No 1341 (NI 12))
Police and Criminal Evidence (Amendment) (Northern Ireland) Order 2007 (SI 2007 No 288 (NI 2))
Road Traffic (Northern Ireland) Order 1981 (SI 1981 No 154 (NI 1))
Terrorism Act 2000 (c 11)
Terrorism (Northern Ireland) Act 2006 (c 4)
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England and Wales

Bail Act 1976 (c 63)
Criminal Evidence (Amendment) Act 1977 (c 17)
Data Protection Act 1998 (c 29)
Extradition Act 2003 (c 41)
Police (Detention and Bail) Act 2011 (c 9)
Police and Criminal Evidence Act 1984 (c 60)

Scotland

Criminal Procedure (Scotland) Act 1995 (c 46)

Republic of Ireland

Children Act 2001, No 24 of 2001

Australia

Bail Act 1977 (Vic)
Bail Act 1978 (NSW)
Bail Act 1980 (Qld)
Bail Act 1985 (SA)
Bail Act 1992 (ACT)
Children and Young Person Act 1989 (Vic)

Children, Youth and Families Act 2005 (Vic)
Victims of Crime Act 2001 (SA)
Victims of Crime Assistance Act 2009 (Qld)

Canada

Criminal Code, RSC 1985, c C-46

Rules and Practice Directions

Crown Court Rules (Northern Ireland) 1979 (SR 1979 No 90)
Magistrate's Court Rules (Northern Ireland) 1984 (SR 1984 No 225)
Prison and Young Offenders Centre Rules (Northern Ireland) 1995 (SR 1995 No 8)
Rules of the Court of Judicature (Northern Ireland) 1980 (SR 1980 No 346)

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European Commission, *Proposal for a Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime*, COM (2011) 275 final

United Nations Convention on the Rights of the Child, opened for signature 20 November 1989, 577 UNTS 3 (entered into force 2 September 1990)

United Nations Standard Minimum Rules for the Administration of Juvenile Justice, A/RES/40/33, 96th plenary meeting, 29 November 1985

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In the Matter of Paul Robert Dinely, An Applicant for Bail [2000] NIQB 52

In the Matter of an Application for Judicial Review by Colin Duffy and others (No 2) [2011] NIQB 16

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Matznetter v Austria (1979-1980) 1 EHRR 198 (App No 2178/64)

McKay v United Kingdom (2007) 44 EHRR 41 (App No 543/03)

Muller v France App No 21802/93

Nerattini v Greece App No 43529/07

Nikolova v Bulgaria (2001) 31 EHRR 3 (App No 31195/96)

Popkov v Russia App No 32327/06

Pshevecherskiy v Russia App No 28957/02

Shteyn v Russia App No 23691/06

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NILC 7 – Consultation Paper: Bail in Criminal Proceedings (2010)

NILC 8 – Report: Land Law (2010)

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