

# The Sentencing Commission for Scotland

## The Use of Bail and Remand

Consultation Paper

## CHAIRMAN'S FOREWORD

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

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

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

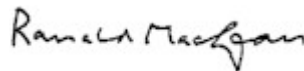
The challenge in reviewing bail and remand is to balance the rights of the accused with interests of public safety and the smooth operation of judicial proceedings. People must not be deprived of their liberty without good reason before they are found guilty of an offence. On the other hand, it is necessary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

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

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

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

We look forward to receiving your comments.



**Rt Hon Lord MacLean**  
**Chairman**



## CONTENTS

Part One: The Issues

Part Two: The Law

Part Three: The Role of the Police and the Procurator Fiscal in Relation to Bail

Part Four: Court Decisions - Pre-Trial and During Trial

Part Five: Reviews and Appeals in Respect of Pre-Trial Decisions

Part Six: Breach of Bail

Part Seven: Bail Post-Conviction

Part Eight: Conclusion and Questions

How to contact us and where to send responses

Appendix 1: The Sentencing Commission for Scotland: Membership and Secretariat

Appendix 2: Part III of the Criminal Procedure (Scotland) Act 1995

Appendix 3: Arrangements for Persons Remanded in Custody



## **PART ONE: THE ISSUES**

### **Introduction**

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

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

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

### **Trends in Crime and Convictions**

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

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

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

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

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

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

### **The Use of Bail**

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

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

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

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

## **The Crimes and Offences for Which Bail is Given**

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

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

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

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

## **Offending While on Bail**

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

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

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

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

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

### **Other Forms of Bail Abuse**

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

### **The Pressure on Prisons**

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

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

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

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

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

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

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

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

### **Summary of the Statistics**

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

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

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

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

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

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

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

## **Time Spent on Remand**

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

## **Our Aims**

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

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

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

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

## PART TWO: THE LAW

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

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

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

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

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

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

### ***Danger of Flight***

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

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

### ***Risk of Interference with the Course of Justice***

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

### ***Prevention of Crime***

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

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

### **The 1995 Act**

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

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

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

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

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

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

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

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

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

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

### **Power of the Crown to Liberate**

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

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

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

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

### **Time Limits**

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

### **Solemn Procedure**

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

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

### **Summary Procedure**

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

### **The Criminal Procedure (Amendment) (Scotland) Act 2004**

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

### **European Convention on Human Rights**

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

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

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

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

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

### **Arrest**

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

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

### **Procedure Following Arrest**

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

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

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

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

### **Lord Advocate's Guidelines**

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

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

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

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

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

### **Procurator Fiscal's Attitude to Bail**

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

### **Liberation by Procurator Fiscal**

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

### **Summary Cases**

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

## **Solemn Cases**

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

### **Opposition to Bail: General Principles**

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

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

### **Dangerousness**

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

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

### **Interference with Witnesses**

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

## **Further Offences**

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

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

## **Absconding**

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

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

## **Breach of Trust**

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

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

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

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

### **Pre-Trial**

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

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

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

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

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

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

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

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

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

### **Bail During Trial**

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

### **Bail Information and Supervision Schemes**

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

### **Objectives**

4.12 The objectives of a Bail Information Scheme are:

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

4.13 The objectives of a Bail Supervision Scheme are:

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

## **Principles of Service Provision**

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

### **Targeting**

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

### **Bail Information**

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

### **Assessment/Reporting**

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

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

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

## **Bail Supervision**

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

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

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

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

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

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

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

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

### **Special Bail Conditions**

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

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

### **Availability of Bail Information and Supervision Schemes**

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

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

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

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

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

### **218 Time Out Centre**

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

- women offenders 18 years old or above;

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

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

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

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

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

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

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

#### **Criminal Procedure (Amendment) (Scotland) Act 2004**

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

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

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

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



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

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

### **Review of Decision**

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

### **Appeal Against Decision**

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

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

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

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

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

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

### **McInnes Report Recommendations**

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

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

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



## PART SIX: BREACH OF BAIL

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

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

### Sanctions for Breach of Bail

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

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

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

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

## **Inconsistency**

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

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

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

## PART SEVEN: BAIL POST-CONVICTION

### Bail Prior to Sentence

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

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

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

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

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

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

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

### **Interim Liberation After Sentence**

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

### **Appeals in Solemn Proceedings**

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

### **Appeals in Summary Proceedings**

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

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

### **The Particular Problem of Short Custodial Sentences**

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

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



## **PART EIGHT: CONCLUSION AND QUESTIONS**

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

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

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

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

### **General Questions Arising from Parts One and Two**

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

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

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

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

### **Questions Arising from Part Two**

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

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

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

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

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

### **Questions Arising from Part Three**

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

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

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

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

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

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

### **Questions Arising from Part Four**

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

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

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

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

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

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

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

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

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

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

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

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

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

### **Question Arising from Part Five**

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

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

*If so, on which particular issues?*

### **Questions Arising from Part Six**

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

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

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

### **Questions Arising from Part Seven**

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

*If so, on which particular issues?*

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



## HOW TO CONTACT US AND WHERE TO SEND RESPONSES

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

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

Comments sent by post should be addressed to:

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

Telephone: 0131 244 3228  
Fax : 0131 244 3234

Comments sent by email should be addressed to:

[sentencing.commission@scotland.gsi.gov.uk](mailto:sentencing.commission@scotland.gsi.gov.uk)

A copy of the consultation document is available on:

[www.scottishsentencingcommission.gov.uk](http://www.scottishsentencingcommission.gov.uk)

### **Confidentiality**

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



**THE SENTENCING COMMISSION FOR SCOTLAND: MEMBERSHIP AND SECRETARIAT**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**CRIMINAL PROCEDURE (SCOTLAND) ACT 1995**

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

**PART III  
BAIL**

**Consideration of bail on first appearance**

**22A**

(1) On the first occasion on which –

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

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

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

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

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

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

**Bail applications**

**23**

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

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

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

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

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

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

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

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

### **Bail and liberation where person already in custody**

#### **23A**

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

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

(b) serving a sentence of imprisonment.

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

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

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

### **Bail and bail conditions**

#### **24**

(1) All crimes and offences are bailable.

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

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

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

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

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

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

### **Bail conditions: supplementary**

#### **25**

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

(a) the conditions imposed; and

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

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

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

### **Breach of bail conditions: offences**

#### **27**

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

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

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

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

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

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

(b) imprisonment for a period –

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

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

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

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

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

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

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

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

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

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

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

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

(b) where it is a period of imprisonment –

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

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

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

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

(a) a fine; and

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

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

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

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

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

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

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

### **Breach of bail conditions: arrest of offender, etc**

## **28**

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

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

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

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

(a) recall the order granting bail;

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

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

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

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

### **Bail: monetary conditions**

## **29**

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

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

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

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

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

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

(a) the charge is not proceeded with; or

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

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

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

### **Bail review**

#### **30**

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

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

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

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

### **Bail review on prosecutor's application**

#### **31**

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

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

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

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

### **Bail appeal**

#### **32**

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

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

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

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

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

**Bail: no fees exigible**

### **33**

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

### ARRANGEMENTS FOR PERSONS REMANDED IN CUSTODY

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

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

