



Law Society
of Scotland

Scottish Parliament Justice Committee Call for Evidence

Decision-making process around Bail and Remand
in Scotland

7 March 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

We refer to our original paper 'Use of Remand in Scotland'.¹ We welcome the opportunity to include further observations in the light of the evidence sessions held on 16 January and 6 February 2018. We understand that the evidence session on Tuesday, 13 March is focused on the decision-making process around bail and remand in Scotland.

Decision making process around bail

Part 111 of the Criminal Procedure (Scotland) Act 1995 outlines the procedures that apply to the consideration of the grant of bail. There are a number of factors that affect whether a person will be admitted to bail. It is inevitably a complex situation when the issue of whether bail should be granted is in doubt. We would echo Police Scotland's submission that remand is permitted as a breach of Article 5 of the European Convention on Human Rights only where it is proportionate, necessary, legitimate and subject to appropriate scrutiny.²

In the majority of cases calling in court, the court will grant bail on standard and where appropriate, additional conditions of bail.

With regard to the remainder of cases where the issue of whether to grant bail is an issue, in a number of these cases, the question of remand may be relatively clear-cut. That decision to remand may well be based on factors such as the actual nature of the offence, the risk of reoffending, the previous record and the need for witness protection.

¹ http://www.parliament.scot/S5_JusticeCommittee/Inquiries/Remand-LSS.pdf

² http://www.parliament.scot/S5_JusticeCommittee/Inquiries/Remand-PS.pdf (paragraph 3)

It is essential that the person being remanded is told in terms that are understandable to them why bail is not considered to be appropriate. This will be stated in open court as the interests of justice requires. That stresses the need for transparency in relation to the decision making process as well as providing the means to lodge and the basis for any appeal. The information as to why bail has been refused should be readily available from the court records, to allow for the identification of the commonly arising categories and the circumstances in which bail is being refused. The number of bail appeals that are made as well as the success or otherwise of such appeals would be information that should be available from the Scottish Courts and Tribunal Service. It could be analysed further.

There seems to be no suggestion that the actual decision making process with regard to bail is in any way flawed.

Interest instead has tended to focus on the numbers of persons that are being remanded. The effect of a remand on their personal and working life will be considerable and there is ample evidence to suggest that this can include loss of jobs, benefits and accommodation as well as the negative and irreversible impact of their families.

We would add the following specific comments:-

Criminal Justice (Scotland) Act 2016 (2016 Act): Before any decision is needed to be taken as to the grant of bail, the person will usually have appeared from custody, either on a new matter or in relation to a warrant (where these may be either initiating or relate to a failure previously to appear).

We noted in our earlier submission that changes were about to come as a result of the Criminal Justice (Scotland) Act 2016. These are now in force since 25 January 2018. That Act reforms and modernises the system for arrest and custody procedures in Scotland, while upholding human rights practice in the questioning, arrest and detention of suspects.

Section 7 of the 2016 Act does include a presumption on liberty which starts at the police station. Authorisation to keep anyone at the police station must be sought as soon as reasonably practical.³ The police's powers thereafter permit investigative liberation on a police undertaking which can include release on conditions under section 26 of the 2016 Act. These conditions which may be imposed are substantially similar to those currently available in relation to the grant of bail. These include a requirement to appear in court, not to commit any offences, not to interfere with witnesses and specific conditions about needing to be in a certain location at any time.

Since the 2016 Act came into force, the numbers being reported in custody are understood to have fallen. It will be some time before the true effect of these reforms can be fully ascertained.

³ Section 7(2) of the 2016 Act

Presumption against short sentences: When unveiling its Programme for Government, the Scottish Government announced that the presumption against short prison sentences (currently set at three months) would be extended. The presumption will be that three months will now refer to sentences of twelve months or less. Where a person who has spent time on remand is thereafter sentenced, the expectation would be that such period of remand will be taken in account in any custodial sentence that is imposed. Where the presumption changes, then the expectation is that there will be even fewer custodial offences imposed for summary offences.

That will have a knock-on effect in that the judges will be considering other viable options such as community based sentence disposals with prison sentences requiring justification and being the last resort.

Provision of Information: We note with interest the evidence presented by Karyn McCluskey Chief Executive, Community Justice Scotland which indicated:

*'I have to say that the people who are really good are the defence agents. I was impressed by the quality of the defence agents that I saw in the court. They knew their clients well and understood their journey, and they represented them very well. They highlighted opportunities in third sector services and other services that are out there. I came away thinking that I must contact more defence agents to tell them what is available. The procurators fiscal and the sheriffs did not always know everything that was available. The defence solicitors were very good. They had done research and knew exactly what was available, and they made suggestions to the court.'*⁴

The solicitor is in an excellent position to speak for and to represent their client. They are the ones who will put forward the case for being freed on bail and whose judgement will be reflected on marking any appeal if required. Their plea as far as bail is concerned, will include the 'standard' information as to their present circumstances in relation to family and work commitments. But that will and does go further to offer what has been referred to as a holistic approach which recognises that the client may struggle to attend appointments and recall dates to appear in court due to health and lifestyle choices.

The solicitor should be aware of any projects run locally which may offer necessary support in ensuring that they attend court when required and to encourage them to stay away from places where they may be likely to reoffend.

The solicitor too has a role in ensuring that bail conditions are not undertaken lightly. Both they and the judiciary have to ensure that the client understands the importance of the conditions and that there must be compliance, as otherwise, a remand on this or the next occasion may be the only option. Experience has shown that lack of supervision while on bail may well lead to repetition of the offending behaviour or failures to appear in court.

⁴ <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11357&mode=pdf>

Continuity of approach: Community courts do have positive outcomes through continuity of approach. It allows the same members of the judiciary to deal with the same people over a period of time and is able to promote personal understanding and support for these offenders.

Though not directly relevant to the question of bail, the support and encouragement for those attending such courts may well reduce their likelihood of offending at least for the time when they are receiving such intense court support. This is about the creation of the relationships between those coming into contact with the court system and those in court, be it the judiciary or the solicitor as discussed above.

The use of such courts is extending, with an alcohol court now having been added to the specialist domestic and drugs courts. Mirroring the effects of the support available from the operation of such courts must help, as they provide a range of measures that can help reduce the numbers of those being placed on remand.

In conclusion, we support the views that have indicated that there should be a greater use and knowledge of all range of options to avoid the use of remand.



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