

CAJ's submission no. 278

**CAJ's Response to the
Consultation on
Bail in Criminal Proceedings**

January 2011

Promoting Justice /
Protecting Rights

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What is the CAJ?

The Committee on the Administration of Justice (CAJ) was established in 1981 and is an independent non-governmental organisation affiliated to the International Federation of Human Rights. CAJ takes no position on the constitutional status of Northern Ireland and is firmly opposed to the use of violence for political ends. Its membership is drawn from across the community.

The Committee seeks to ensure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its responsibilities in international human rights law. The CAJ works closely with other domestic and international human rights groups such as Amnesty International, Human Rights First (formerly the Lawyers Committee for Human Rights) and Human Rights Watch and makes regular submissions to a number of United Nations and European bodies established to protect human rights.

CAJ's activities include - publishing reports, conducting research, holding conferences, campaigning locally and internationally, individual casework and providing legal advice. Its areas of work are extensive and include policing, emergency laws and the criminal justice system, equality and advocacy for a Bill of Rights.

CAJ however would not be in a position to do any of this work, without the financial help of its funders, individual donors and charitable trusts (since CAJ does not take government funding). We would like to take this opportunity to thank Atlantic Philanthropies, Barrow Cadbury Trust, Hilda Mullen Foundation, Joseph Rowntree Charitable Trust, Oak Foundation and UNISON.

The organisation has been awarded several international human rights prizes, including the Reebok Human Rights Award and the Council of Europe Human Rights Prize.

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31 January 2011

Dear Ms Quinn,

Consultation Paper: Bail in Criminal Proceedings

Thank you for inviting the Committee on the Administration of Justice (CAJ) to make a submission to the Northern Ireland Law Commission's consultation on the reform of bail law and practice in Northern Ireland.

As you are aware, CAJ is an independent human rights organisation with cross community membership in Northern Ireland and beyond. It was established in 1981 and lobbies and campaigns on a broad range of human rights issues. CAJ seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the Government complies with its obligations in international human rights law.

Introduction

We commend the Law Commission for its extensive work on this issue and note that the thoroughness of the consultation document may be an indication of the engagement of the Commission with stakeholders since beginning the consultation process in 2009. We are further pleased to see the commitment of the Commission to ensuring that the law on bail conforms to the requirements of the European Convention on Human Rights (ECHR) and to the principles of transparency and accountability. Scrutiny of the current provisions offers an opportunity to both centralise current bail provisions and highlight any weaknesses within the system.

We are particularly encouraged by the fact that the Law Commission has directly engaged with young people for this consultation, through the use of the Participation Network. This represents a real commitment to a stakeholder group which is often ignored in such processes. We appreciate the tone, ease of comprehension and layout of the Children and Young

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People's Version of the consultation document. However, although it may be available on the Participation Network website, a brief outline of how of how the Children and Young People's version was disseminated and how young people's views were otherwise gathered would have been welcome. We were also disappointed to find no mention of human rights in this version, particularly as young people often have a basic understanding of human rights and it may have been useful to link this into the document.

The need to reform bail is particularly relevant in Northern Ireland due to the wide range of sources from which bail provision is drawn and the extended delays within the criminal justice system, which can mean long periods on bail or remand. The Justice Minister indicated on 21 September 2010 that 58.2% of the total population at Maghaberry Prison were non-convicted prisoners on remand, (see Assembly debate on 21 September 2010). The impact of remand on an individual's private and family life, employment prospects and mental health can be significant. Remand also represents a substantial resource burden on the Prison Service. Bail thus operates as a valid alternative to remand. However, this alternative requires a concise framework in which to operate.

There is a need for the public to be more aware of how the bail process functions to debunk some of the myths which currently surround it. There is a clear need for better public understanding about the bail process, particularly in light of disproportionate media coverage of crimes committed by individuals on bail.

CAJ support the balancing of the rights of the defendant with those of the victim and the wider community but note it is important that the presumption in favour of bail is protected. Like others, CAJ is in favour of placing a right to bail or a presumption in favour of bail on a statutory footing, imposing a clear onus on the state to justify any interference with this right, (paras. 5.13 to 5.14). The burden should remain with the state to prove why an individual should be detained, and not placed on the applicant. (para. 6.16) The proceedings to determine bail should adhere to the principles set out by the European Convention, cited in the consultation document: independent, impartial and with the participation of the accused.

Overall aim

As Chapter 3 of the consultation document clearly indicates, the current bail framework is inconsistent, disparate and opaque. For these reasons, an attempt to draw together the various sources for the bail process into a Bail Act could achieve this goal. Such an Act should contribute to more uniform

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and transparent decision-making across both the courts and the police. Equally, a Bail Act should make a positive contribution to building public confidence in the criminal justice system. It would also be beneficial to bring Northern Ireland in line with other jurisdictions, for instance, with regard to the provision of bail information schemes, which we believe have an important role to play in making the best decisions on bail.

The inclusion of a definition of bail in the Bail Act would be useful, as would an explicit statement on the presumption of bail. We agree that the proposed legislation should set out the grounds upon which the police and the courts may refuse to release an individual on bail.

The duty on the state to outline when and why bail has been refused, combined with a duty to record reasons for the refusal of bail may contribute to the monitoring of the use of the legislation. This in turn would be an important contribution to make to accountability and oversight.

Types of bail

CAJ would like to see the criteria for setting 'street bail' to be moved from the PSNI's guidance and placed in statute (para.3.12). We have concerns that the issuing of street bail is not the subject of appropriate scrutiny and would welcome the addition of oversight to this process (para. 3.13). As a result of these concerns, we do not endorse any proposals to extend the conditions a police officer is able to apply to street bail.

We believe that Court bail would benefit from being placed in statute as this would assist in the closing of ground between police and court bail. We also advocate that guidance should be created for pre-sentence bail and bail pending appeal.

Bail process

CAJ advocate the giving of reasons with regard to bail decisions. This should be a requirement, which should be set out in legislation. This would serve to enhance public scrutiny of the system as well as reduce the disparity between court and police bail.

Risk must be carefully evaluated by the police and courts. However, we are supportive of the principle that the risk must be significant to prevent the granting of bail.

With regard to para.7.16, although CAJ believes that there may be benefit in having a list of factors which should be taken into consideration when determining whether bail should be refused, we hold that there should be some room for discretion by the decision maker.

The provision of accurate and clear information to bail decision-makers is vital for the transparent operation of the bail framework. We support the idea of a formal bail information scheme and, in light of the need for consistency across the system, emphasise the importance of having a mechanism which can verify the information put forward in the bail information scheme. We question whether this could be based on the Causeway project and, like others (para. 5.25) query whether the PSNI is the correct agency to be running the scheme.

It would be useful to know why the proposed Probation Board pilot bail information scheme has not been implemented (para 3.44) and the current status of this scheme.

In relation to those facing drug charges, the PSNI have complained that they are not able or have chosen not to submit evidence opposing bail as this is often based on intelligence and there is a reluctance by the PSNI to have this tested in court, (see Northern Ireland Affairs Committee, 8th report, October 2003). However, it is only fair that such evidence can be tested: the need for equality of arms within the criminal justice system generally and the bail system is well established. The reliance by the police on evidence which cannot be tested in court nor be made available to the defence does not adhere to this principle. CAJ acknowledges that there is no general right for the defendant to be in possession of all the information held about them, but believes that the assumption should always be that information would be shared.

CAJ agrees with the Law Commission (para 7.23) that there would be benefit to the application of a single test of necessity for the imposition of bail conditions by all decision makers. The simplification of the system should encourage fair and proportional use of bail and remand. This concept of fairness applies to the idea that an individual should be subjected to the least onerous conditions necessary. The aim here should be to ensure bail compliance, not unnecessarily criminalise individuals via bail breaches. We concur with the potential difficulties of imposing an alcohol ban on someone suffering from alcohol dependency; should such criteria be used, it must be complemented by support to the individual to facilitate compliance. To this end, CAJ advocate the provision of detailed guidance for decision-makers concerning the scope and appropriateness of bail conditions. Included within this guidance should be relevant human rights standards and best practice on

enabling bail compliance. CAJ consider that this guidance should be placed on a statutory basis.

Bail support

The absence of bail support is clearly problematic and CAJ wholly agrees with the inclusion of such provisions in the possible Bail Act. An acknowledgement of the contributing factors to bail breaches, such as substance abuse, should enable the relevant agencies to develop effective strategies to ensure bail compliance. This in turn can reduce the amount of bail breaches and thus reduce pressure on the criminal justice system.

CAJ has commented above on the importance of balancing the rights of the defendant with those of the victim. The provision of information to all victims, regardless of the offence, on bail decisions and the nature of the conditions applied to bail is important. This commitment should be included in the Code of Practice for Victims, currently under review by the Department of Justice. There may be practical lessons to learn from the Victim Information Scheme managed by PBNI.

CAJ believes that there should be a duty to provide information to victims and that this should be set out in legislation. This reflects the need to keep victims informed regarding developments in their case, and contributes to the building of confidence in the justice system. Where there may be concerns for an individual's safety, victim awareness will mean that relevant advice and protection can be sought. With regard to whether the duty should apply to all victims, CAJ advocate that this should be the case. We understand that this may place an undue resource burden on the PSNI and thus understand that this duty may be curtailed to only victims of crimes say involving violence.

Breaching bail

The breaching of bail conditions is an area which causes controversy, particularly considering the public perception that the courts do not respond appropriately to such breaches. CAJ do not necessarily advocate making a breach of bail conditions a criminal offence in itself due to concerns that this would be disproportionate and lead to the excessive criminalisation of individuals. Our submissions to recent consultations by the Department of Justice have pointed to a need to reduce the number of individuals, including fine defaulters, in prison for short-term sentences, and the need to maximise alternative, non-custodial disposals. There is also the need to reduce the disparity between the consequences for breaching court and police bail.

CAJ highlight the power given under Article 48(5) of PACE (NI) which provides for arrest without warrant for anticipated breaches of conditions of pre-charge bail. “Anticipated” concentrates a great deal of power in the hands of the police in this situation. We hope that if this power is continued, then it is subject to appropriate oversight.

The creation of a statutory obligation for the monitoring of bail compliance by the police has the potential to prevent re-offending and increase confidence in the bail system. However, there will be a resource implication for the police, which may mean that such monitoring may be restricted to only those charged or suspected of the most serious offences.

We note the work of the West Belfast Community Safety Forum in relation to bail (para 3.68) and hope that there may be the potential to expand this model across Northern Ireland. The involvement of appropriate community organisations may lead to the possibility of using community restorative justice principles and mediation, which may reduce the risk of bail breaches. Equally, the involvement of community organisations may provide support for those bailed individuals at risk of breaching their conditions. However, the “subcontracting” of bail support to community organisations must be subject to appropriate checks and monitoring as well as compliance with the relevant human rights standards and oversight.

Bail and young people

We have concerns at the remand of young people by the courts and the police in Northern Ireland especially considering the principle laid out in Article 3 of the *United Nations Convention on the Rights of the Child* of the need to consider the best interests of the child. The use of remand for young people can have a devastating and disproportionate effect on their lives, including disrupting their education and undermining family relationships. As such, we hope that the presumption of bail will be employed with equal, indeed more, vigour as is applied to adult bail.

Children and young people are particularly vulnerable within the criminal justice system and, as is outlined in the consultation, their particular needs should be taken into account. We highlight the need for any bail conditions imposed on children to be clearly explained to both the young person and their relevant guardian. Part of our concern at the use of street bail for young people is that the significance and consequence of the process may not be fully apparent to them. We note that the level of understanding by the young person is a factor taken into account by the PSNI when issuing street bail in

this scenario. However, we believe it is important to keep the use of street bail on young people under review.

Additional support should be made available to the child or young person to prevent breaches of bail conditions. We also advocate a move away from the current focus of protecting the public from offending children, toward a focus which is more child-centred and takes into account the commitments made by the UK to the *United Nations Convention on the Rights of the Child*. As part of this commitment, appropriate accommodation for children and young people on bail or seeking bail should be made available; stopping the lack of accommodation from being a reason for preventing bail. It is important that, within the bail framework, there is an acknowledgement of the serious impact remand could have on a young person and the need to consider their best interests.

CAJ also agrees with the comment made by the Law Commission about the particularly harsh penalties which may apply should a young person fail to appear at court. Again we emphasise the need to move away from the unnecessary criminalisation of children and relying too heavily on custodial disposals. We point to the comments at para 4.27, which indicate that a large proportion of admissions to juvenile justice centres were subsequently released by the Courts. Of concern to CAJ is the impact that such an admission can have on a young person's family life, educational prospects and mental health. This consultation process offers an excellent opportunity to reconsider how the criminal justice system treats young people. A more equal, consistent and child-centred approach can contribute to reduce youth offending and there is value in developing this approach further here.

We would like to emphasise our support for the consultation submission made by Include Youth and we re-iterate the point that Northern Ireland needs a juvenile justice system which places the rights of the child at its core. Such a system would use pre-trial detention as a measure of last resort; forbid the use of detention solely for care or protection issues; and prohibit children from being detained in the Young Offenders' Centre. We also strongly advocate that a *consistent approach as to how the various individuals and agencies that have decision-making powers within the criminal justice system apply legislation and rules to children and young people*.

We hope that the Law Commission will communicate with the Youth Justice Review Team to specifically discuss these issues.

Equality

The proposal put forward by the Law Commission seeking to codify and centralise the bail system does not appear to create significant equality concerns, however, the absence of data on bail decision-making, in relation to the section 75 groups, undermines the ability to comment in this area. This indicates a need for the Department of Justice and relevant agencies to monitor the impact of bail on these groups so that any disproportionate impact may be observed and mitigated.

Conclusion

CAJ welcome the acknowledgement of the need to simplify and modernise the law with regard to bail legislation. Efforts to demystify the bail process, to make the language and the construct of relevant legislation accessible and comprehensive can only be a positive step forward. Such transparency should improve public confidence in the bail system particularly, and the criminal justice system more generally.

Thank you for the opportunity to make a submission to this Review.

Yours sincerely,

Jacqueline Monahan, PhD
Criminal Justice Programme Officer