Ministry of JUSTICE

CRIMINAL JUSTICE SYSTEM
Working together for the public

Bail and murder, CP11/08

List of questions for response

We would welcome responses to the following questions set out in this consultation paper. Please email your completed form to: bailconsultation@cjs.gsi.gov.uk or fax to: 020 7035 8601. Thank you.

Question 1. Is any change to the law governing bail necessary?
Comments: No. There is in essence nothing wrong with the present state of the law. Courts in possession of all the facts are equipped to balance the risk to the community against the individual's right to liberty. There is nothing to suggest that a difference in the law would have affected the decisions reached in the cases of Peart and Weddell; neither can courts protect against future actions which on the facts before them simply cannot be anticipated. What is required though is action by in particular courts, CPS and the Police to remedy the continuing "lackadaisaical or nonchalant approach within the CJS to many routine aspects of the handling of cases" referred to in the Peart Review conclusions. It is clear to those of us who sit daily in the magistrates' courts from our meetings with relatively senior CPS and court legal staff that they are not even aware of the review's conclusions and recommendations. In our experience, there continues daily in magistrates' courts to be a lack of diligence in verifying suggested bail conditions and scant evidence of prompt and thereafter effective enforcement of those conditions. It is not unheard of for a defendant to surrender in answer to bail and for it to become evident in court that whilst on bail conditions have been broken; appropriate action is not always taken - namely the immediate arrest of the defendant pursuant to section 7 of the Bail Act 1976 - be it because of a lack of police resources or a lack of knowledge on the part of prosecutors and legal advisers as to the correct procedure to be adopted. CPS lawyers routinely provide the court with a Court/Defence/Probation print from the PNC of previous convictions which does not include up-to-date details of the last period in custody nor impending prosecutions for which the defendant may already be on bail either to the court or to return to a police station. These details are shown on the Prosecutor's print but prosecuting lawyers and/or associate prosecutors often do not volunteer and/or check such facts themselves; unless benches request or are prompted by a legal adviser to requests these details, the decisions they

make are based on inadequate information. The police often bail offenders who are already subject to and have offended on bail; indeed it is not uncommon to witness in court the non-attendance of defendants bailed by the police for offences which include failure to surrender to bail. A failure by the police to understand the provisions of the Bail Act 1976 and their application is evident in some areas, as is their refusal to accept assistance offered both by court and CPS staff to engage in joint training for those responsible for making/advising on decisions as to bail.

Question 2. Should the statutory test be amended along similar lines to Section 25 of the 1994 Act?

Comments: No. As well as the points made in paragraph 32 of the consultation, not seeking in any way to detract from the seriousness of the consequences of murder, one questions the justification for such an approach being taken in relation to murder and not also in relation to other serious charges where sometimes purely fortuitously a death has not resulted e.g. section 18 Offences Against the Person Act 1861.

Question 3. Should courts be required to have regard to the fact that the defendant is accused of murder?

Comments: This adds nothing to the current requirement to have regard to the nature and seriousness of the offence and we would repeat the comments made in response to Question 2 above as to whether there is any real justification for taking a different approach in relation to murder as opposed to other offences.

Question 4. Should courts be required to have regard specifically to whether further offending is likely to cause physical or mental injury?

Comments: Whilst paragraph 36 indicates that courts already give due weight to the risk of serious violence, where this is a relevant factor in the case, attention might more readily be directed to the relevant factors were there to be a specific requirement to have regard to the risk of further offending causing physical **or** mental injury. However, it should not be the case that a remand in custody on the ground of commission of further offences should be precluded in the absence of such a risk. The approach suggested in paragraphs 36 and 37 is potentially based on a false premise and would lead to results which, it is suggested, the public would not welcome. Simply because courts would be required to have regard to

whether further offending would be likely to cause injury does not necessarily mean that the end result would be more people being remanded in custody. If custody could be avoided because any further offending was not likely to result in injury, repeat offenders could re-offend on bail with relative impunity.

Question 5. Should the considerations listed in paragraph 9 of Schedule 1 to the Bail Act also apply to decisions to remand defendants in custody for their own protection?

Comments: Yes, in an effort again to direct attention to what might be **some** of the relevant factors.

Question 6. Should there be any limitation on the right of the Crown Prosecution Service (CPS) to make representations against the grant of bail after a defendant has been convicted?

Comments: No. The key issues are for prosecution lawyers to recognize potentially relevant information, to ensure it is available and furnish the same to the court so that an informed decision can be made.

Question 7. Should the CPS be encouraged to make greater use of their right of appea against bail post-conviction?

Comments: No, if it risks flooding the Crown Court with unnecessary applications. Prosecutors must, however, be able to readily identify cases which have the potential to satisfy the “grave concern” test.

Question 8. Are there any circumstances in which it would be appropriate for the CPS to seek a custodial remand post-conviction where it is clear that the offender will not be sentenced to imprisonment?

Comments: Yes, namely where there is a substantial likelihood of the defendant failing to surrender, committing offences or interfering with a complainant. A huge amount of time and public money would be wasted tracing and arresting defendants who failed to surrender in respect of such offences. Some offences which might not result in a sentence of imprisonment nonetheless cause the public very real concern; spree offenders would be at liberty to continue to offend if granted bail simply because their offending would be unlikely

to be visited with a sentence of imprisonment. Defendants whose offending does not warrant imprisonment can be dealt with in the community and persuaded not to re-offend because of the significant consequences of breaking the requirements of a community order or the penal sanctions for breach of an ancillary order. The risk of the same offenders committing offences whilst on bail, however, is less likely to be diminished if the only power in the court is first to impose conditions upon their bail and in the event of breach to remand them in custody for what may be a very short period of time before sentence.

Question 9. Should bail hearings following arrest for breach of bail in respect of all defendants charged with murder be heard in the Crown Court, if possible by the same judge?

Comments: No. Aside from the fact that death has resulted in a case of murder there is no apparent justification for adopting a different approach in relation to murder as opposed to any other case where a judge of the Crown Court has granted bail.

Question 10. Alternatively, should such hearings take place in the Crown Court where the judge making the original grant of bail so directs?

Comments: Whilst this may seem an attractive proposition, we question if clear records of whether bail decisions have been reserved to a Crown Court judge would be nationally available to the police - a defendant may be arrested away from the area in which he was bailed. Perhaps an alternative would be for there to be a requirement, in the case of a defendant taken before a magistrates' court in respect of a breach of bail granted by the Crown Court, for the magistrates' court - before forming an opinion as to whether the defendant has broken conditions of bail or, where the breach is admitted, before re-admitting the defendant to bail - seeking the consent of the Crown Court to determining the issue of breach/re-admitting the defendant to bail. In the absence of such consent the defendant would be committed back to the Crown Court in custody for the Crown Court judge to form an opinion as to whether there had been a breach and if so whether the defendant should be re-admitted to bail or detained in custody.

Question 11. Should such arrangements extend to manslaughter or other grave offences such as rape?

Comments: No, because of the difficulty in determining what constitutes a grave offence? Death results in charges of causing death by dangerous driving for example, so should such charges be included? The definition of "grave crime" in the Youth Court results in the situation where racially aggravated criminal damage falls within its ambit.

Question 12. Should courts be made aware of local police practices regarding monitoring of bail conditions, so that these can be taken into account in determining the adequacy of bail conditions?

Comments: No. Monitoring of bail conditions should not be an issue of a "post code lottery"; all police forces should monitor and enforce conditions, which are orders of the court, promptly and effectively.

Question 13. Do you think it is appropriate for courts to impose conditions that must be met by the police (or others) before the defendant is released on bail?

Comments: No, the court is thereby transferring to another what is its own judicial responsibility. As stated in paragraph 54 in the examples cited, the proper course is for the court to remand the defendant in custody during the period of an adjournment for appropriate enquiries to be carried out.

Question 14. Do you think that feedback would be of any use, and if so how could it be achieved?

Comments: Some degree of feedback is and would be helpful. The police do on occasion provide feedback on the number of defendants who fail to answer bail/offend whilst subject to bail when local concerns in this regard arise. It should be relatively easy for them to provide such details and indeed details of how many defendants offend when subject to conditional bail. It is questionable whether information could be provided easily as to whether particular conditions are likely to be satisfactory in avoiding the risks posed by particular defendants. Feedback would require not only details of the conditions attached but the court's reasons for attaching them. A defendant may have offended at night time and be bailed subject to a curfew to prevent similar offending; s/he may then offend in a completely different way during the day time and that does not necessarily mean that the

curfew was not an effective means of preventing night time offending.

About you

Please use this section to tell us about yourself

Full name	Anne Arnold
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	District Judge (Magistrates' Courts) – on behalf of Legal Committee of the District Bench of the Magistrates' Courts.
Date	7th September, 2008.
Company name/organisation (if applicable):	Contact address: Portsmouth Magistrates' Court
Address	The Law Courts,
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Postcode	PO1 2DQ
If you would like us to acknowledge receipt of your response, please tick this box	√(please tick box)
Address to which the acknowledgement should be sent, if different from above	As above

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

I am a representative of the Legal Committee of the District Bench of the Magistrates' Courts and the response is made on behalf of all District Judges (Magistrates' Courts) in England and Wales.

The Committee notes once again that the consultation period allowed for this matter was barely in excess of the 12 week minimum period provided for by Criterion 1 of the Code of practice on consultation issued by the Cabinet Office in January 2004. This period, beginning on 17th June and ending on 12th September, 2008 covers a period when many will be on holiday and the committee therefore wonders what steps have been taken to supplement this consultation pursuant to paragraph 1.6 of Criterion 1.