JUDICIARY OF
ENGLAND AND WALES

Response to Ministry of Justice Consultation Paper *Bail and Murder* (CP11/08)

This response reflects the views of the President of the Queen's Bench Division, the Senior Presiding Judge, the Vice-President of the Court of Appeal (Criminal Division) and the Judges of the Court of Appeal (Criminal Division) who make up the Rose Committee.

Introduction

1. The overarching question arising out of the cases of *Weddell* and *Peart* is whether they have revealed a fault in the system because the provisions of the Bail Act are defective, or whether, alternatively, they illustrate that – however tragic the particular result – wholly unexpected events sometimes occur that cannot be prevented by legislative intervention. It seems to us that, in different ways, the two cases serve to demonstrate the latter point: some crimes cannot be predicted, and, in consequence, they will not be prevented by implementing reforms to the legislative regime which governs bail. This observation does not lead, of itself, to the automatic conclusion that changes are unnecessary.

2. It is inconceivable that judges, faced with an application for bail in a murder case, do anything other than address the issues and the merits with the very greatest care. Given this offence is at the top of the calendar of seriousness, and bearing in mind the relatively exceptional nature of these applications and the pressing public concerns, judges will apply, as a matter of course, a rigorous approach to the exercise of their discretion as defined by statute. These applications are only dealt with by senior members of the judiciary who have been personally authorised to deal with murder cases. In our view, it would be unhelpful to make cosmetic changes to the current provisions in order to give emphasis to the importance of the exercise or to identify the central issues involved: these are already conspicuously self-evident.

The Questions and Responses

Question 1: Is any change to the law governing bail necessary?

3. See the general observations above and the answers to the questions below.

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

4. Paragraphs [31] and [32] of the Consultation Paper discuss the possibility that any attempt to restrict bail to only those cases where exceptional reasons can be identified justifying the defendant's release would be to no effect. The effect of Article 5 (3) of the European Convention of Human Rights and Fundamental Freedoms, in this context, was explained by Lord Brown of Eaton-Under-Heywood in *R (O) v Crown Court at Harrow* [2007] 1 A.C. 249:

   > "*The two key requirements imposed by article 5(3) are, first, that the prosecution must bear the overall burden of justifying a remand in custody – it must advance good and sufficient public interest reasons outweighing the presumption of innocence and the general presumption in favour of liberty; and, secondly, that the judge must be entitled to take account of all relevant considerations pointing for and against the grant of bail so as to exercise effective and meaningful judicial control over pre-trial detention."* [28]

5. The likely interpretation of a provision based on s 25 of the 1994 Act is a matter on which the Government will need to take legal advice. If it is the case that adding an "exceptional circumstances" requirement would not contribute materially, then at most it would serve to "remind" the courts of the risks normally posed by those who are charged with these offences, thereby "assisting the court to adopt a proper approach" to bail in their cases (see *R (O) v Crown Court at Harrow* [34]). Such reminders and assistance, for the reasons set out above, are unnecessary.

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

6. The essence of this proposal is that instead of amending the test, the factors specified in the Bail Act to be taken into consideration should be amplified. It is suggested that *"The objective would be to highlight the need to take full account of the risks, including the risks to public safety, that are highly likely to be involved in granting bail in murder cases. The exceptional nature of the crime and the mandatory life sentence that it carries mean that often (though not of course in every case) there could be considered a greater risk than usual that defendants will abscond, or harm themselves, or obstruct the course of justice. While there may not be a high risk of further offending, the court must have regard not only to the probability of a defendant's committing an offence if bailed but also the potential seriousness of any offence that he might commit"* [33].

7. The authors of the Consultation Paper point out, however, that the Bail Act already provides the following in Schedule 1, paragraph 9 (for

decisions made under the "Exceptions to right to bail"), namely *"... the court shall have regard to such of the following considerations as appear to it to be relevant, that is to say – a) The nature and seriousness of the offence or default (and the probable method of dealing with the defendant for it)..."* [34]. Furthermore, as we have explained above, it will not assist the specialist judges who deal with these cases to spell out for their consideration matters that will be in the absolute forefront of their minds in any event when taking these difficult decisions. Given "the nature and seriousness of the offence" must be taken into account, the judge's approach to an application of this kind will not be enhanced by the introduction of statutory provisions that explain that murder is a particularly serious offence or that the risks that attend on a decision to grant bail in this type of case are likely to be higher than with a lesser level of offending.

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

8. This question is introduced in the following way *"It is arguable that the specified considerations should also include the risk of harm to the public. Whilst the risk that a defendant would commit further offences is a ground for refusing bail, the legislation makes no distinction between offending that is likely to lead to harm and that which is not."* [35]

9. An amendment of this kind is unlikely to assist. Given the accused is charged in these cases with causing terminal harm to the victim, it is wholly unrealistic to suppose that the judge will not focus, first and foremost, on the risk of harm to others (be it physical or psychological). Put broadly, a judge in this situation will be directing his or her attention with great care on the risk of serious, "harmful" consequences if he or she orders release (as opposed to the possibility of a more minor, non-violent infraction of the criminal law). Any material risk of harm will lead to the defendant being remanded in custody.

10. For similar reasons, we do not consider in the context of an investigation into the grant of bail in murder cases that it would be useful to amend s. 14 Criminal Justice Act 2003 to include "a likelihood of injury" to the provision that restricts the opportunity for bail when the offence was committed whilst the accused was already on bail. As set out above, the judge in these circumstances will concentrate pre-eminently on the risk of harm to the public.

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?

11. This proposal is, with respect, unnecessary and potentially confusing. There is a specific provision that relates to defendants who are assessed as being in need of protection. In Schedule 1 (under the heading "*Exceptions to right to bail*") at paragraph 3 it is set out that "*The*

defendant need not be granted bail if the court is satisfied that the defendant should be kept in custody for his own protection…". It would be confusing, given this free-standing provision, then to duplicate it in provisions that address other circumstances when bail can be refused. An amendment to this schedule is unnecessary and would render the statute more difficult to understand and apply.

Question 6: Should there be any limitation on the right of the CPS to make representations against the grant of bail after a defendant has been convicted?

12. In light of the amended guidance to prosecutors, to the effect that it is open to them to make representations as to whether a defendant ought to be granted bail following a conviction (whether or not the defendant has a right to bail), and given that any reticence on the part of prosecutors in this area historically was no more than a matter of convention, legislative intervention appears to be unnecessary. Indeed, as the authors of the Consultation Paper observe "*The CPS will keep the revised guidance under review to see whether any other changes are necessary."* [44] In the absence of any evidence of a need for further intervention, and since this is under review, legislation at this point in time would be premature and unjustified.

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

13. There is no evidence of which we are aware that suggests that the CPS are failing to appeal when it would be appropriate for them to do so, or that the guidance to prosecutors on this issue is producing inappropriate results.

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

14. Save for exceptional circumstances – for instance, where it was clear that a convicted accused will not attend for sentence – it would generally be inappropriate for a defendant who is clearly going to receive a non-custodial sentence to be remanded in custody. Under the present dispensation there is nothing to prevent the CPS from bringing any exceptional circumstances to the attention of the court, or from opposing the grant of bail, on the basis of identified and sustainable grounds.

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?

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

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

15. Under the present legislative framework, an allegation that a defendant has breached the conditions of his or her bail (whether granted in the magistrates' court or the Crown Court) must be dealt with by the justices (Bail Act 1976, s. 7 (3) and (4)). The Divisional Court in *R (on the application of John Ellison) v Teesside Magistrates' Court* [2001] EWCA Admin 11 has confirmed that the jurisdiction to deal with the alleged breach of conditions must be exercised by the justices, although if the breach is proven (and if the accused has been committed for trial) they may remand or commit him or her in custody to await trial at the Crown Court or until further order ([7] and [9]). Therefore, at present the justices alone decide whether a breach has occurred, and, if established, the appropriate disposal (viz. whether to withdraw bail, or to continue bail, with or without conditions: Bail Act 1976, s. 7 (5)).

16. Although there is an element of inflexibility about this procedure (particularly since a judge cannot reserve any breach of conditions to the Crown Court), given that it is open to the justices to remand the accused in custody to the Crown Court if the breach is proven, and in the absence of any evidence that magistrates' courts are dealing with breach allegations inappropriately, we can find no basis for taking steps at this stage to change a law which has normally operated satisfactorily for a long period of time. In any event, there may be mechanisms for altering practice in this area which would not require legislative amendment and which should be explored before any statutory option is considered.

17. There are additional objections to adopting this approach with other grave offences, such as manslaughter or rape. Given the wide variety of circumstances in which these offences are committed, and bearing in mind the existing pressures on the Crown Court and the High Court Bench, removing this jurisdiction from the magistrates' courts would be unduly onerous, and, similarly, for these lesser (though grave) offences no justification for this change has been established.

18. We anticipate very considerable problems would arise if this is made discretionary and a judge is given the option of reserving alleged breaches of bail to the Crown Court. The accused must be brought, following arrest, before a court within 24 hours (Bail Act 1976 s.7 (4)), and it is highly likely that if this change is implemented there will be an imperfect record as to whether or not a judge has transferred jurisdiction to the Crown Court. As present, there is certainty: the defendant must be brought before a magistrates' court; if an option is created, there is likely to be confusion because the arresting officers may well be unaware which court is seised of the breach proceedings, with serious consequences if the 24 hour period is exceeded because the defendant has been taken to the wrong court (see *R (on the application of John Ellison) v Teesside Magistrates' Court* [13]).

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?

19. Whilst this proposal has the clear attraction of seeming to coincide with common sense, there may be problems in terms of how this information will be relayed to the court. If sensible and convenient methods can be established for keeping judges "up-to-date" in this way, the suggestion could be given further consideration. However, this would not require legislation.

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?

20. In our experience, it is not unusual for the release of a defendant to be made contingent on a particular event, such as confirmation of the suitability of a proposed home address or a suggested surety, the availability of a place at a bail hostel or the installation of the equipment for electronic tagging. Sometimes the primary assessment as to whether the condition has been met will be made by someone other than the judge (e.g. a police officer or a probation officer), although their decision is susceptible to review by the court. We can recall no occasion on which these steps have been challenged on the basis of being inconsistent with present legislation and in our view they assist the proper functioning of the bail system: a decision to grant bail is often dependent on the court's ability to impose conditions, some of which will only be met, and sometimes can only be met, after a decision in principle has been made.

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

21. Given the number of bail decisions that are made by judges every year, it would be unrealistic and prohibitively costly to provide them with "feedback" on later events in cases when they granted bail. Furthermore, we doubt whether this procedure would secure any useful end, given that bail decisions are essentially fact-dependent.