



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

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Introduction

1. JUSTICE is an independent all-party legal and human rights organisation, which aims to improve British justice through law reform and policy work, publications and training. It is the UK section of the International Commission of Jurists.
2. We are grateful for the opportunity to respond to this consultation, and are happy for our responses to be made public.

General remarks

3. The consultation arises from concern following the cases of Gary Weddell, who killed his mother-in-law and committed suicide while on bail for the murder of his wife, and Anthony Leon Peart, who committed manslaughter on the grounds of diminished responsibility having that day been released from prison and while an arrest warrant was outstanding against him.
4. While it is natural for public concern to be heightened following cases of this nature we emphasise the following points regarding these cases and bail in murder cases generally:
 - the Weddell case is acknowledged in the consultation paper to have been an unusual one; without more, it should not lead to the conclusion that the law is at fault, as it may be that the risk posed by this defendant was not accurately assessed;
 - Peart's case history is complex; it primarily shows failings on the part of the criminal justice system to ensure the proper monitoring of bail and proper communication between judicial areas. We recommend that action be taken as a matter of urgency to ensure that these failings are remedied;
 - the primary purposes of custodial remand are to protect the public and to ensure the integrity of the judicial process. These factors are affected by the severity of the charge but are not solely determined by it. Since, in addition, there are some other offences that may be committed at as serious a level as murder, it is illogical to make the test for bail in murder cases distinct from that in other cases.

Q1: Is any change to the law governing bail necessary?

5. We do not support any changes to the law for bail in murder cases alone, since for the reasons set out in this response we believe it is illogical to treat murder separately from other offences.
6. The conclusion that we believe should be drawn from the cases of Weddell and, in particular, Peart, is that the law governing bail is mostly adequate but that operational failures can and have resulted in the public being insufficiently protected. The Peart review team state that:¹

the most striking feature of our findings does not relate to the systems and processes which were then in operation (some of which could be stronger), but to the attitudes and cultures of the CJS [criminal justice system] to the handling of cases involving the commission of further offences while the defendant is on bail and the degree of tolerance towards non-compliance with bail conditions. As is so often the case, there are also lessons to be learned about improving the quality of information available and strengthening procedures for communicating between different criminal justice agencies.

7. We quote this paragraph at length because we think it extremely important for the maintenance of the rule of law that police, prosecutors and the courts service ensure that their operating procedures relating to bail are tightened up and that court orders as to bail and its conditions are fully enforced. We are extremely concerned that more than 4 years after the report of the Bichard Inquiry the criminal justice system still finds it so difficult to respond to offenders who commit offences in different police force areas and to ensure that records can be appropriately accessed by forces, court and prison staff in different areas.
8. We emphasise that the right to liberty as guaranteed by Article 5 European Convention on Human Rights applies in criminal proceedings no matter how serious the charge and that bail can only be withheld where there are 'relevant and sufficient' reasons.² For this reason we would be wholly opposed to any blanket restriction of the right to bail in murder or other serious cases: such a restriction would either be

¹ A review to ascertain the circumstances in which Anthony Leon Peart, also known as Anthony Leon Joseph, came to be at liberty on 29 July 2005, Criminal Justice Joint Inspection report, published April 2008, (henceforth 'the Peart review'), Foreword by HM Chief Inspectors.

incompatible with Article 5 or would have to be read down under s3 Human Rights Act 1998 to render it compatible, with the effect that in reality it would make little if any legal difference to the current test.

9. While, therefore, there could be refinements to the law of bail as a whole (for example, asking the court to have regard to the physical or mental injury likely to be occasioned where there is a substantial risk that the defendant will commit further offences while on bail), we do not believe that specific reforms in the law of bail in murder cases are needed. We do believe that the existing reverse presumptions in relation to bail (for example, under s25 of the 1994 Act, para 2A, 6 and 6A of Part I of Sch 1 to the Bail Act) are inappropriate in the light of Article 5 ECHR and since they must be read down under s3 HRA are confusing and superfluous. They should therefore be removed.

Q2: Should the statutory test be amended along similar lines to section 25 of the 1994 Act?

10. Were the statutory test to be amended along similar lines to s25 of the 1994 Act, the provision would in our view have to be, in the same way, read in accordance with Article 5 ECHR so as to mandate the grant of bail in cases where the court on full information is left unsure as to whether the conditions for withholding bail are satisfied.³ Such an amendment is therefore undesirable, whether applied to murder or to any other category of case. The primary position, under Article 5 ECHR, is that bail should be granted unless there are relevant and sufficient reasons to withhold it. The title of the offence alone cannot constitute such reasons.
11. Further, to make such an amendment in relation to murder alone would not be logical, for the reasons that we set out our response to Q3 below. The consideration of bail should not be determined by the title of the offence alleged: this will be a relevant factor, but not the only nor even sometimes the most relevant.

Q3: Should courts be required to have regard to the fact that the defendant is accused of murder?

² *Wernhoff v Germany* (1979) 1 EHRR 55.

³ *Cf R (O) v Crown Court at Harrow* [2007] 1 AC 249.

12. The fact that the defendant is accused of murder may be relevant to the consideration of bail in the following ways:

- murder is the most serious of the offences against the person. This may be relevant to whether the defendant is likely to present an ongoing risk to the public and to the severity of that risk;
- murder attracts a mandatory life sentence. The severity and inevitability of this sentence if convicted may make the defendant more likely to abscond or self-harm or interfere with witnesses/justice (the likely tariff if convicted will also be relevant);

The strength of the case against the defendant will be highly relevant to both these considerations.

13. We think it very likely that the courts will, whether specifically directed to do so or not, have regard to the fact that the defendant is accused of murder in considering whether to grant bail. To require them to do so in the legislation would therefore be superfluous. It would also be anomalous, in that similar considerations would not apply where, for example, an alternative charge (eg conspiracy to cause an explosion) alleges the deliberate taking or attempted taking of multiple lives and may indicate a greater risk to the public. Similarly, in the case of some other offences (for example, some terrorist offences, serious sex offending, large-scale importation of controlled drugs, etc.) the defendant will have been advised that either a very lengthy determinate sentence or a life/indeterminate sentence is very likely upon conviction. The European Court of Human Rights has stated that the risk of absconding cannot be gauged solely on the basis of the severity of the sentence faced by the applicant.⁴

14. It therefore makes much more sense to ask a court to have regard to:

- the risk presented by the defendant to the public (both in terms of likelihood and severity of potential further offending), and
- the risk that the defendant will abscond, self-harm or interfere with witnesses/justice (again both in terms of likelihood and severity).

⁴ *Muller v France*, judgment of 17 March 1997, Reports of Judgments and Decisions 1997-II, para 43.

The offence of which the defendant is accused will in most cases be relevant to these considerations but may not even be the most relevant of a number of factors.

Q4: Should courts be required to have regard specifically to whether further offending is likely to cause physical or mental injury?

15. In our view, the risk of physical or mental injury, and the severity of any injury, caused by any further offending by the defendant is highly relevant to the consideration of bail. Of course, this does not apply only to cases of murder – and some defendants charged with other crimes may present a greater risk than some defendants charged with murder. It would be illogical, therefore, for courts to have specific regard to this factor in murder cases alone.

16. Currently, bail can be withheld when there is a substantial risk that the defendant would commit further offences whilst on bail, that cannot be adequately addressed through the imposition of conditions upon bail. However, we believe that in deciding whether to withhold bail upon this ground, the court should consider the nature of the offences which there is a substantial risk that the defendant might commit, both in terms of their severity and whether they are likely to cause physical or mental injury. This could help to reduce unnecessary custodial remands. Guidance could indicate that where there is a substantial risk of minor re-offending against property, for example, this is unlikely to necessitate a remand in custody.

Q5: 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?

17. The considerations listed in paragraph 9 will often be relevant to the question of whether it is necessary to remand the defendant in custody for his own protection (or in the case of a child, his welfare). We would therefore welcome their application to decisions to remand defendants in custody for their own protection, since it is clear in the text of paragraph 9 that both the court shall have regard to those of them that appear to it to be relevant, and that they may have regard to any others that appear to be relevant.

Q6: 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?

Q7: Should the CPS be encouraged to make greater use of their right of appeal against bail post-conviction?

Q8: 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?

18. We note that the Peart review concluded that:

we are of the view that the right of the prosecution, at least by clear implication, to formally oppose bail post-conviction was recognised by virtue of the provisions of the Bail (Amendment) Act 1993.⁵

[we] recommend that the CPS review its guidance to prosecutors on the Bail Act 1976 and related provisions to ensure it reflects correctly the prosecutor's role in deciding issues of bail or custody post conviction.⁶

A court considering bail at any point including post-conviction should do so upon the fullest possible information. Since the defence are not obliged to reveal information which may be prejudicial to their client, in our view the prosecution should draw any appropriate information to the attention of the court - for example, the fact that the defendant may come into contact with a victim or witness in the case at a particular bail address, or that since giving evidence a witness alleges that associates of the defendant have made threats against him.

19. In our view, it is not appropriate for government to 'encourage' the CPS to make greater use of a particular legal power, but the CPS should, we believe, appeal against the grant of bail post-conviction in circumstances where it is their reasonable opinion that there is a substantial risk that the defendant may abscond or commit further offences involving a risk of non-negligible physical or mental harm.

20. The circumstances where the CPS should seek a custodial remand post-conviction where it is clear that the offender will not be sentenced to imprisonment are rare, but this may be justified where, for example, the defendant is likely to be sentenced to a residential programme of drug treatment and, if released into the community before his place becomes available he presents a substantial risk of further, drug-related

⁵ Peart review, para 3.11, p24.

⁶ Ibid, para 3.17, p25.

offending. Such a custodial remand should be short in duration and relevant assessments/arrangements should be made as soon as possible.

Q9: 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?

Q10: Alternatively, should such hearings take place in the Crown Court where the judge making the original grant of bail so directs?

Q11: Should such arrangements extend to manslaughter or other grave offences such as rape?

21. We agree that following arrest for breach of bail, bail hearings for defendants charged with murder should be heard in the Crown Court. We believe that it should remain optional for the judge to reserve such hearings to himself as this may not be necessary in all cases and may clog up court lists unnecessarily if it is mandated where it is unnecessary.

22. However, this consideration should apply not only to murder cases but to all very serious cases. One way of establishing which offences it should apply to might be to mandate Crown Court hearings in all indictable only cases, and in either way cases where the judge so directs.

23. We are aware that currently, the resources of the Crown Courts are limited and that some courts are experiencing severe delays in listing cases. We emphasise that it is vital that the criminal courts are properly funded and resourced so that justice can be done and so that the UK complies with its obligations under Article 6 ECHR to bring cases to trial within a reasonable time. It is very important that the listing of breach of bail hearings in indictable only cases in the Crown Court should not result in unacceptable delays to these hearings or to other cases.

Q12: 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?

24. We agree that courts should be aware of local police practices regarding monitoring of bail conditions. However, we emphasise that the grant of bail should not be a 'postcode lottery' according to the resources or diligence of the local force in relation to bail monitoring. In the Peart case, for example, a reporting condition was imposed at Bow Street Magistrates' Court but despite 'extensive enquiries' the review team 'can find no record of the defendant complying with the bail reporting condition, or of any action being taken by the Metropolitan Police as a result of any non-compliance with this requirement'.⁷ This is not acceptable. The full range of statutory bail conditions must be available and functioning in all force areas and must be policed. If this is not already a legal obligation upon police forces it must be made one. The right to liberty should not be compromised because police forces are not performing their duties in relation to bail. Further, the rule of law and public protection are compromised if bail is granted in the mistaken belief that conditions imposed will be monitored and enforced. The appropriate resources must be made available for effective monitoring and enforcement.

Q13: 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?

25. In our view, it is acceptable in appropriate cases for bail hearings to be adjourned for a short period to enable further information to be obtained to allow the court to make a fully informed decision as to bail. Schedule 1 Paragraph 5 of the Bail Act 1976 already provides for this circumstance. In relation to addresses for residence, we agree with the Peart review that:

*one option is for there to be a single point of contact at the relevant police station through which any request to verify details can be made*⁸

*[we recommend] where there is any doubt as to the suitability of an address put forward as a place of residence, the prosecution team should provide the court with sufficient information to enable it to make an informed decision; and suitable mechanisms should be in place to enable necessary checks to be made promptly.*⁹

26. In the Peart case, one street name recorded by the court as the defendant's address did not exist. This may have been due to human error in recording it but it could have been promptly verified in just a few minutes by access to an online mapping website or other similar resource. All court buildings have or should have access to resources

⁷ Ibid, para 2.13, p6.

⁸ Ibid, para 3.5, p23.

⁹ Ibid, para 3.6, p24.

that would allow them to quickly verify addresses put forward as to whether they exist or not, either online or by telephone. Where the defence gives notice of the address the police could do this before the hearing; if the address is given without notice then it could be done by court staff with perhaps a very short adjournment, if necessary.

27. Verifying whether the defendant does indeed, or has permission to, reside at the given address is more complex. If notice is given before the hearing then this should be verified by the police before the hearing. In less serious cases, the production of an up-to-date recent utility bill, rent agreement, council tax bill etc, could suffice as could the production of the occupier with proof of address to give evidence at the bail hearing that the defendant has permission to reside there. Further, it could be provided that where the defendant gives an address without notice at court, if he does not provide proof of address or produce the occupier with proof of address to say that he has permission to reside there, there may be an adjournment until later that day or such slightly longer time as necessary so that verification can take place. Literature for defendants and their solicitors could advise them of this.

28. Finally, in serious cases or where there are already reasonable grounds to suspect that the address provided is not truly one occupied by the defendant or where he has permission to reside, the address should be visited and verified as a matter of course by police.

29. In relation to bail hostels and other residential places, it is preferable for the bail hearing to be adjourned for a short period while it is ascertained whether a place is available rather than for bail to be granted subject to a place being made available. We emphasise that the right to liberty for those without their own accommodation should not be a postcode lottery and that a proper network of bail hostels, mental health treatment facilities and drug/alcohol treatment facilities should be financed and resourced appropriately. Similar concerns apply to other bail conditions.

Q14: Do you think that feedback would be of any use, and if so how could it be achieved?

30. Each bail decision must be made for reasons closely connected with the individual case and individual offender, rather than on the basis of statistics regarding rates of

breach of bail in certain classes of case. We are therefore wary of providing courts with feedback of this nature in order to assist them in future bail decisions.

31. It may be useful, however, for courts to be provided with information regarding how bail conditions are monitored and policed in their area so that they can be aware if improvements are needed and can make specific orders in this regard where this proves necessary.

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