Northern Ireland Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Northern Ireland Law Commission Report on Bail in Criminal Proceedings

25 April 2013

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Mr Paul Givan (Chairperson)
Mr Raymond McCartney (Deputy Chairperson)
Mr Stewart Dickson
Mr Alex Easton
Mr Tom Elliott
Mr William Humphrey
Mr Seán Lynch
Ms Rosaleen McCorley
Mr Jim Wells

Witnesses:

Professor Sean Doran	Northern Ireland Law Commission
Ms Katie Quinn	Northern Ireland Law Commission

The Chairperson: I welcome Professor Sean Doran, commissioner, and Katie Quinn, a member of the legal staff of the Northern Ireland Law Commission. The meeting will be recorded by Hansard and published in due course. I will hand over to you now, professor, to take us through your presentation.

Professor Sean Doran (Northern Ireland Law Commission): Thank you very much. I should say that I was a commissioner with the Northern Ireland Law Commission from 2008 through to early March 2013, so this is possibly my last official engagement as a commissioner. Beside me is my colleague Katie Quinn, whose time at the commission has also come to an end with the conclusion of the bail project. We both worked on the project, which commenced in 2008 and was completed, as you are aware, in September 2012.

I am not sure whether members of the Committee have a copy of the report, which was published in September last year. I should perhaps give the general background to it. You may be aware that the Law Commission, which was established in Northern Ireland in 2008, comprises a barrister, a solicitor, a legal academic and a non-legal appointee and is chaired by a High Court judge. Those are all part-time appointments, and commissioners have played the role of overseeing individual projects. The day-to-day responsibility for the project, such as for drafting, chairing sessions and co-ordinating is undertaken by legal staff in the commission, and Katie Quinn was the senior lawyer on the bail project. It was the first project undertaken by the Northern Ireland Law Commission in the area of criminal law and procedure and was the result of a fairly extensive consultation process. We published a consultation paper in September 2010, and that was followed by a four-month consultation process. There was then a lengthy consideration of the various written and oral representations that we received. Also, a legislative draftsman was engaged, and he has drafted a Bill to accompany the report. So this is the product of a fairly lengthy process of consultation, research and focused study.

I will introduce you, very briefly, to the report itself. It comprises an executive summary, eight substantive chapters and a ninth chapter that summarises the 55 recommendations. That is accompanied, as I mentioned, by a draft Bill, which extends to 49 clauses and seven schedules. There are also explanatory notes to the Bill and, finally, an equality impact assessment. I should say that, throughout the process, the project was overseen by a steering group on which there was a representative from the Department of Justice because we wanted to ensure that none of the proposals would come as a surprise.

We took soundings from many sources, and appendix B to the report lists the consultees and various consultation meetings that we had. I emphasise that the report is the product of the work of an independent Law Commission, so we had to take stock of all of the views that we received.

The Chairperson: Members, some of you are looking for the report. It was advised that, if members wanted the report, they could find copies in the Committee rooms. You do not have the full report.

Professor Doran: As an independent Law Commission, we took stock of all of the views that we received, but we had to determine which recommendations we felt would most effectively achieve the aims of the project. I will briefly go through those aims, which are outlined at paragraph 1.24 of the report. The key objectives were summarised as being to make recommendations that:

> *"(i) simplify the current law and make it more accessible; (ii) provide a legal framework that will promote consistency and transparency in bail decision-making; (iii) enhance public understanding of bail decision-making; (iv) ensure that the law on bail conforms with the requirements of the European Convention on Human Rights and maintains a proper balance between the right to liberty of the individual suspect and the interest of society in the prevention of crime and in the effective administration of criminal justice; (v) promote the development of appropriate administrative arrangements that will complement and ensure the effective working of any new or revised statutory scheme."*

As I said, there are 55 separate recommendations in the report. I do not propose to go through those one by one, but I thought that I might ask my colleague Ms Quinn to give the Committee examples of how we feel the legislation should serve to meet the objectives that we set out at the beginning of the report. Is that an approach that commends itself to the Committee?

The Chairperson: That is fine, yes.

Ms Katie Quinn (Northern Ireland Law Commission): I will not touch on every aspect of the bail report in this brief tour of some of its aims. I will just give you some examples of the flavour and our approach. As Sean said, the bail project had five key aims and objectives, the first one being to simplify the law. That objective resonates with the overall objectives of the Law Commission, which include making recommendations to simplify and modernise the law. With that in mind, we looked at long-standing features of bail law and whether they needed to be retained as they were; changed or modernised; or abolished, if they no longer served an appropriate function. In particular, we looked at the necessity to retain the powers of the courts to require a personal recognisance for surrender to bail. That is, essentially, the promise by persons on bail that they will return for a further court date or, if they do not do so, forfeit an amount of money. That is a very long-standing feature of most bail systems. Indeed, the requirements for a personal recognisance and a surety, which is when someone else promises to forfeit money should the accused not return, are both cornerstones of all bail systems.

So we looked very closely at whether there was any need to modernise or change those features. We looked at personal recognisance in light of modern bail developments in this jurisdiction and elsewhere. In particular, we looked at the fact that, when bail was originally devised, personal recognisance and surety were the main bail conditions, but, in more recent times, the courts and the police have been able to attach a range of what the report calls "conduct conditions", such as geographical exclusions; the requirement to report daily or every few days to a police station; or a requirement to stay away from individuals.

Also in more recent times, persons on bail have been subject to a statutory duty in this jurisdiction to surrender to custody and, therefore, commit an offence if they fail to do so. In light of that, prior to the report and, indeed, in our early discussions, some consultees suggested to us that there may be a

double penalty: a person who fails to surrender risks having money taken from them and also commits an offence. So we looked at whether it was necessary to retain the personal recognisance.

We also looked at that in light of the fact that the police no longer have the power to require a personal recognisance in this jurisdiction. That was abolished a few years ago, but the courts can require that, so there is an inconsistency there. Essentially, we thought that we would either have to bring back the police power or get rid of the courts' power so that there was consistency between the police and the courts. Bearing all of that in mind, we thought it appropriate to abolish the personal recognisance. As I said, persons released on bail are under a duty now to surrender to custody. As they commit an offence if they fail to do so, we felt that it was disproportionate that they could also lose money. That is one of our recommendations, and we believe that it is a suitable way of simplifying and modernising the law and bringing court bail and police bail into line so that there is greater consistency.

In light of the modern developments with the duty and the offence, we felt it no longer necessary to have personal recognisance. We considered this a simplification of bail law and a moving away from outdated concepts such as personal recognisance and estreatment, which is the terminology for how the money is forfeited in those circumstances. These are concepts that people find difficult to understand because of the language used, and, for that reason, we thought that it was a suitable simplification of the law.

Related to that, we also make several recommendations to modernise the surety system. We are not abolishing the surety system, but we recommend that the terminology, particularly that surrounding the surety system, be updated. We suggest instead the use of the terminology "bail guarantor". People more easily understand that a bail guarantor is a person who makes a guarantee or an undertaking to the court and that bail guarantors will do their best to ensure that the accused surrenders to custody and understand that they will forfeit a sum of money if they do not. Consultees considered it very important to retain that particular power. Many seemed to believe that having a surety or, as we call it, a bail guarantor, was a very persuasive means of making the accused return to court.

The second aim is consistency and transparency. Obviously, some of the simplification that I mentioned will also have the impact of ensuring greater consistency between police bail and court bail. In our consultation paper, we outline a range of inconsistencies that we found between the bail powers of the police and those of the court. The report contains more details, but I will highlight, for example, some of the grounds for the refusal of bail. Under the Police and Criminal Evidence (Northern Ireland) Order 1989 (PACE), if detention is considered necessary, the police have the power to refuse bail for the person's own protection. No explicit, equivalent power is afforded to the courts, so there is an inconsistency. Persons may be refused bail on that ground post-charge, but, when they go to court, the court does not have exactly the same power to refuse bail on the same statutory footing. We thought that we should iron out those inconsistencies between police and court powers.

With that in mind, in the report, we recommend a statutory right to bail, in keeping also with article 5 of the European Convention on Human Rights, and that that statutory right to bail should apply to persons granted bail by the police post-charge and by the courts. We also recommend statutory grounds for the refusal of bail and that those should be the same for the police and the courts. So there are a number of recommendations that will ensure that type of consistency between police powers and court powers.

The third aim of the project was to promote public understanding. I am sure that you will all agree that people are interested in bail. The public have views on it, but they find some decisions hard to understand. We sought to devise a modern and consistent bail system that people would find easier to understand. We went to considerable lengths to do that when we were writing the report. Also, as bail decision-makers will have to rely on the bail legislation, we went to considerable lengths to ensure that the draft Bill was expressed in straightforward and accessible language and style. It has been drafted using plain language techniques and gender-neutral language, and it is presented in a logical structure that is easy to navigate.

In the Bill, we use one particular device to ensure the understanding of lawyers and non-lawyers alike. That is what is called a Keeling schedule. When a particular area of law is heavily amended, it can often be hard to work out what the law should finally look like when all the amendments have been added to a particular provision. A Keeling schedule puts all the amendments into the legislation and shows what the Bill should look like when amended. We did that for only two provisions, but those are two very heavily amended provisions of PACE. The police feel very strongly about having a bang up-to-date version of what the law is in a particular area. The two provisions, article 39 and article 48 of PACE, are set out in the Keeling schedule as they would look when all the amendments are made. It

was the commission's view that this, coupled with the plain language approach in the Bill, would promote greater understanding of the bail legislation and the wider bail system.

Fourthly, we were under an obligation to ensure that any proposed bail legislation conformed with the European Convention on Human Rights. We made a number of recommendations to ensure that that was the case. As I stated, we recommend a statutory right to bail and statutory grounds for the refusal of bail. We also recommend that reasons be given for bail decisions made by the police and the courts. We do not make a recommendation on how those reasons are given or recorded. It is really for the organisations themselves to resolve how that should be done. However, we state that reasons should be given for bail decisions. That conforms with the obligation under the ECHR convention that, if you deprive persons of their liberty, they should know the reasons why. That is not least for the purposes of a challenge. It is also simply because you are restricting a very important freedom, and reasons should be given in that case.

Finally, as Sean mentioned, at a very early stage in the bail report, we acknowledged that legislation alone will not be a panacea to resolve all the issues in the bail system. So, we also made a number of recommendations that complementary administrative arrangements should be brought in alongside the legislation. I will highlight that, in particular, we made recommendations on bail information schemes and bail support. In the context of a broader obligation to keep victims informed throughout the criminal justice system, we also advocated that they be given appropriate information about bail decisions and about whether a person has been released.

I hope that that has given you some flavour of the recommendations.

Professor Doran: Part of our statutory duty is to seek to make recommendations for the reform of the law through the elimination of anomalies and through the reduction of the number of separate legislative provisions that there are in a particular area. At the moment, bail law in Northern Ireland has been described as somewhat of a patchwork quilt of different legislative provisions. This is an attempt not only to improve the law as it stands but to bring together the various disparate legislative sources that exist and tailor them specifically to this jurisdiction's requirements. The approach that we recommend through the Bill is, we suggest, a much more user-friendly and tidy approach to the subject than currently exists in this jurisdiction's legislative framework.

The Chairperson: Thank you very much. I have a couple of questions to ask before I bring other members in. I am sure that you will be happy to answer them. Where consistency of approach is concerned, I picked you up as saying that that involved issues such as the police having a power that the courts do not. That was the consistency that you were talking about, rather than a concern about judges not taking a consistent approach to granting or refusing bail. Was that ever on the radar or part of any discussion in the Law Commission?

Professor Doran: The number one priority was to ensure that bail decisions were made consistently throughout the criminal justice process. We felt that it was anomalous to have slightly different conditions applying in the context of police bail to those applying in the context of court bail, but we did not specifically address consistency between judges. However, it is obvious that, if one has a clear legislative structure such as this, that should promote consistency in decision-making. The clearer the legislative framework, the more likely that decisions will be made on a consistent basis.

The Chairperson: Is it fair to say that the judiciary would welcome that simple piece of legislation to ensure they are consistent?

Professor Doran: We hope so.

The Chairperson: OK. The Department is consulting on a no real prospect part of the clause.

Professor Doran: I should say that we have not seen the Department's paper. It may well be that, at some stage, we will have the opportunity to have a look at that paper and perhaps comment on it. Obviously, our role in the law reform process essentially ends once we produce the recommendations on the final report. So, unfortunately, we have not had sight of the further paper that I think is due to be presented to you today.

The Chairperson: I will ask officials from the Department about that — they are forewarned. A lot of the consultation is pretty much what is in your report, but part of it is on no real prospect. The purpose

of that is to discourage the use of remand where the alleged offender is unlikely to be committed to custody following a sentence. So, they are wanting to consult on putting this provision so that you will get bail if there is no real prospect of your getting a custodial sentence. To be clear, is that an area that you have ever looked at?

Professor Doran: Not specifically, no.

The Chairperson: Was it an area that was ever brought up as one that should be looked at?

Professor Doran: I cannot recall that in the consultation.

Mr Dickson: Thank you for coming to talk to us about this matter. It is clearly to be welcomed that there will be clarification. I appreciate that bringing together various pieces of law from various parts is always beneficial. My question is pertinent to the Committee's work, and you referred to it at the end of your presentation. It relates to how victims and witnesses are treated in the bail process, primarily in the way that the court or the police explain the situation to victims. That is because, from their perspective, understanding the process is vital. If the public do not understand it and if you are either the victim of or a witness to a particular crime, it is important that, at the very least, you have an understanding of what the process is all about.

Ms Quinn: Obviously, we considered victims. Victims are dealt with in a chapter in the report. We were somewhat constrained. In some other jurisdictions, victims have a statutory right to information about bail decisions, particularly in some of the Australian jurisdictions. However, we were conscious that we could not include a right to information about bail decisions if you did not have a right to information about convictions, release dates or anything like that. So, we were aware that anything that we recommended would have to fit in with a broader policy on information to victims. It would be very disappointing for a victim to get gold-star treatment in relation to bail information but to not get the same treatment at another stage of the criminal process. Therefore, our recommendations were made in the light of that, and we stressed that we believed that it was very important that victims should be kept informed not only of decisions to release individuals but of possible bail conditions that might be of relevance to the victim. We felt that that was very important.

We also felt that information from the victim about how a condition might impact on them should be taken into account, not the opinion of the victim about whether bail should be granted. The courts assured us that they would take those things into account. However, we did not do anything on the statutory side in that area simply because we felt that it had to fit in with a consistent approach to information being given to victims on charging, release and all those things. Nevertheless, we stated very clearly that we thought that information from victims should be fed into the bail decision, particularly in relation to conditions, and that they should be kept informed about decisions that affect them.

Mr Dickson: Again, if I —

Professor Doran: Sorry; I was just going to follow on from that. You will find that in recommendations 53 to 55, and particularly in recommendation 54, which states:

> *"The Commission recommends that any non-legislative scheme for the provision of information to victims should offer information to all victims in relation to key decisions in criminal proceedings, including bail decisions, allowing victims to decide if they wish to be provided with that information."*

So, I think that, throughout the project, we were very conscious of the need to keep victims informed, but we made a judgement call to the effect that, in the context of the legislation, we did not think that it was appropriate to include a statutory right to information on bail alone.

Mr Dickson: I understand where you are coming from; that would take you outside a raft of other areas of concern. However, it should be cited as good practice.

Ms Quinn: Yes, absolutely. The literature that I read on the statutory right to bail in other jurisdictions suggested that it is very difficult to enforce in practice. Even those jurisdictions that have something in statute are possibly saying that it is not the best approach. I think that the best approach is probably something that is more flexible, such as a code that all the criminal justice agencies could sign up to.

Ms McCorley: Go raibh maith agat. Thank you for your presentation. I can see that it would be important for witnesses and victims to be informed about bail conditions, and you are saying that they should be. There are cases where, say, beleaguered communities are afflicted by prolific offenders who have long lists of offences and who seem to go into a revolving-door system. Those communities fail to understand that and speak out about it frequently. Do you think that it would be appropriate for there to be a public pronouncement about whether somebody should or should not have been granted bail?

Professor Doran: I think that it is inevitable that there will be public reaction to the grant of bail in individual cases. I know that this may sound like a bit of a cliché, but one needs to be aware of the fact that each case is different and the court will have to take a multiplicity of factors into account when making the decision on whether to grant bail in an individual case. I think that, inevitably, there will be public concern about decisions that have been taken in individual cases, particularly, of course, in retrospect when it transpires that an individual who has been released on bail goes on to commit another offence. At the end of the day, one cannot expect an item of legislation alone to allay all concerns on that matter. However, through legislation of this kind, one can hope to promote a greater public understanding of the basis on which individual decisions are made.

Where a decision to refuse bail is made, it will, clearly, have to refer to the criteria that are set out in the statute. If a person is granted bail, the clear implication is that the criteria for remanding in custody have not been met in that individual case. So, I think that having a clear code, if you like, to govern decision-making will ultimately, hopefully, assist in public understanding of how the bail system works.

Ms McCorley: That is very helpful and is to be welcomed. To follow on from that, each case is taken on its individual aspects and on the facts of that case alone. If someone complains about two completely different cases, where one bail applicant was refused bail and the other was granted bail, it is pretty pointless if the cases are not comparable.

Professor Doran: That is right. Quite often, however, cases appear to be superficially similar, and then one will find that, in fact, there are particular circumstances attaching to a particular case that justify taking a different course.

Mr Elliott: I want to ask about the bail guarantor. Does that mean that bail will no longer have to be paid over for the release of someone who is in custody?

Ms Quinn: We recommended having a bail guarantor to modernise the terminology on the surety. Essentially, the surety would remain, but under the new name of bail guarantor. Did you mean the personal recognisance?

Mr Elliott: I was thinking that, in the case of a person from another jurisdiction, the courts will quite often demand that bail is paid before the person is released.

Ms Quinn: We retained the power to require security. So, that is still there. The personal recognisance was simply the promise that you would pay if you did not surrender. We got rid of that, but the requirement to put money up front remains.

Mr McCartney: Thank you very much for the presentation. I just want to ask a couple of general questions. We can see the objectives that you set yourselves, and we can see clearly how they will be realised through the piece of work that you carried out.

Sean, you mentioned that you had not seen the Department's draft.

Professor Doran: No, unfortunately, we have not.

Mr McCartney: The process is that the Minister or the Department have to approve this piece of work before you carry it out. Have you agreed in principle to carry it out?

Professor Doran: Absolutely.

Mr McCartney: Is it a bit strange that, as part of the process, you do this piece of work and the Department then issues a draft consultation document but does not come back to you to ask whether it is broadly in line with what you recommended?

Professor Doran: No, not necessarily. We have to put forward proposals for individual projects to be adopted as part of our work programme, and the Minister has to approve them. However, we are, essentially, an independent law reform body, and our work formally reaches its conclusion when we produce our final report.

Obviously, we understand that, following on from that, there will have to be a further process of consultation before any Bill of this kind would ever reach the statute book. So, that is not something that surprises or concerns me in particular.

Mr McCartney: No, I understand that, but would you then become a consultee?

Professor Doran: Not formally, I would not have thought. I suppose that we are now in a slightly curious situation, in that my term as a law commissioner has come to an end, as has that of my colleague Mr Hunniford, who also played a leading role in this project. We are no longer law commissioners, and Katie Quinn's post at the commission came to an end at the conclusion of this project. So, those who were intimately involved in the bail project are no longer with the commission.

Mr McCartney: The Department's draft document states:

"the Department is minded to broadly accept the Commission's proposals".

However, "minded" and "broadly" supportive are not defined. If you, as someone who did this piece of work, saw this draft proposal and saw that it was completely off-skew with your recommendation, would you theoretically have a mechanism that you could use to tell the Minister that?

Professor Doran: Personally and professionally, one would obviously be disappointed if a piece of work were to be entirely rejected. I am glad to hear that that is not the case. On the other hand, one would possibly expect some changes to be suggested. As an independent law commission, I do not think that we necessarily expect our proposals to be adopted wholesale in all cases. However, given that government approval is given to embarking on a course that leads to a report of this kind and that we seek to liaise closely with the Department throughout the process, our aim is, obviously, to ensure that our proposals will ultimately find their way on to the statute book. I am not sure whether that fully answers your question.

Mr McCartney: That is fine. It is just the process that interests me. It is broadly accepted in principle. Until you said that today, I had thought that you had seen the draft document.

Professor Doran: Yes.

Mr McCartney: If only to give the Department a sense that it is going in the right direction.

Professor Doran: It raises an interesting general question about the Law Commission's role once the final report has been published.

Mr McCartney: I will go back to the objectives, which Rosie raised to some extent. Ensuring consistency and transparency is not an easy task if every case is taken on its individual merits. Do you envisage a situation where a lawyer, in making a case for bail, will remind a judge that he granted bail the previous week to a person in exactly the same circumstances? That lawyer could then say, "I hope that you will be consistent transparent in giving my client bail.". Could that happen, or does that scenario go beyond what we are talking about?

Professor Doran: The position on a bail decision is that the individual circumstances of cases are very varied. It is very unusual to find two cases at that stage of the criminal process that are four-square with each other. Having a clear framework for decision-making should ultimately promote consistency of decision-making across the board at the level both of police and court bail.

Mr McCartney: I have a final question. Was there any particular reason for our not having a single approach to bail, or was it just not felt necessary until now?

Professor Doran: It just appears to have been something of an anomaly, because the Bail Act 1976 governs the law in England and Wales, and there is bail legislation in the Republic of Ireland and in many other jurisdictions. The best way of putting it is that it is just something of an anomaly.

The Chairperson: I have a final question. Was this produced in September 2012?

Professor Doran: That is right.

The Chairperson: The Bill obviously suggested there should be a Bill on bail. How soon do you think the Assembly should deal with this, pass it and bring it into effect?

Professor Doran: Very quickly, because the rationale for producing a draft Bill is that this is not only a report on a particular subject but legislation that is, from our point of view, ready to go. Obviously, we understand that there will be a further consultation process, but, as far as the commission is concerned, we commend the legislation as a complete piece of work that could provide the legislative foundation for decisions on bail in this jurisdiction.

The Chairperson: What is your view on the fact that the Department is minded not to bring this forward until the new mandate?

Professor Doran: I am not sure that I should necessarily express a view on that. All that I can say is that, as far as the commission is concerned, we commend the recommendations to government. If one looks at the legislation, one will see that a great amount of effort has been put into ensuring that this is an entirely complete piece of work. Reference has been made to previous legislation, in which, where needed, the schedules ensure that the necessary amendments would take place on implementation of this Bill. So, we put it forward as the final word on the subject, but we understand that, almost inevitably, some further changes will be suggested, I suppose.

The Chairperson: You said "further changes". I am reading that you anticipate those being pretty marginal and that it would be tinkering around the edges.

Professor Doran: We would hope so, but I keep coming back to our role as an independent law reform commission. We put forward the proposals, the recommendations and, in appropriate cases, draft legislation. The responsibility for implementing those then passes to others.

The Chairperson: Would it be fair to say that the Department must not have confidence in the Law Commission? You produce a report, and you have a Bill with schedules, clauses and explanatory notes. Literally, it is a copy-and-paste exercise for the Department. You have done all the work. You have carried out the policy development and engagement, and you provided the expertise on it. You said that you are the "final word" so far as being the authority on these issues is concerned. It was produced in September 2012, and, at this stage, the indications are that the Department intends to start the process in the Assembly in spring 2015.

Professor Doran: I think that saying that the Department intends to bring it forward is inconsistent with the suggestion that there is any lack of confidence in the commission. I am reassured by the fact that the Department intends to bring the legislation forward.

The Chairperson: The time lag seems incredible to me.

Professor Doran: I think that that is a question that would perhaps be better put to others, because that is something over which I have absolutely no control.

The Chairperson: You are not going to comment on the confidence that the Law Commission has in the Department's getting this through quickly enough. You are confident in your position, but the length of time that the Department is talking about taking before the process on this is started seems pretty bizarre. It seems very strange to me.

Professor Doran: Again, it is entirely a matter for the Department.

The Chairperson: Diplomatic throughout. Thank you very much.