IPRT Opening Statement on
Bail (Amendment) Bill 2017
3 December 2018

About IPRT

Established in 1994, the Irish Penal Reform Trust (IPRT) is Ireland's leading non-governmental organisation campaigning for rights in the penal system and the progressive reform of Irish penal policy. Our vision is one of respect for human rights in the penal system, with prison as a sanction of last resort. We are committed to respecting the rights of everyone in the penal system and to reducing imprisonment. We are working towards progressive reform of the penal system based on evidence-led policies and on a commitment to combating social injustice.

IPRT publishes a wide range of policy positions and research documents; we campaign vigorously across a wide range of penal policy issues; and we have established IPRT as the leading independent voice in public debate on the Irish penal system.

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Summary

1. The commission of offences on bail is of course a matter of concern for this Committee who will have the safety of the community at the forefront of their minds. While pre-trial detention has an important part to play in some criminal proceedings, there is already a robust bail system in place. It is our view that this Bill:
    - **raises constitutional and human rights issues;**
    - **is likely to place further pressure on an already overcrowded prison system;**
    - **will have significant cost implications; and**
    - **is extremely unlikely to fulfil its promise to deliver safer communities.**

Constitutional Issues – section 2

2. It is important to note that the Court *already has* the power to refuse an application for bail under the 1997 Act (as amended) where the Court is satisfied that such refusal is reasonably necessary to prevent the commission of a serious offence.

3. In response to concerns over a perceived increase in offending by people while on bail, Article 40.4.6, the Sixteenth Amendment of the Constitution, was inserted in 1996 as a result of a referendum. Section 2(1) of the Bail Act, 1997 gave effect to this amendment, providing that:

    > *"Where an application for bail is made by a person charged with a serious offence, a court may refuse the application if the court is satisfied that such refusal is reasonably considered necessary to prevent the commission of a serious offence by that person."*

4. In addition, under the Criminal Justice Act 1984 (as amended), a sentence for an offence committed while on bail should be consecutive to the sentence for the original offence and an offence committed while on bail would be an aggravating factor in the sentencing for that offence (as inserted by Bail Act 1997).

5. However this proposed amendment goes much further changing the permissive verb "the Court may" in section 2 of the Bail Act 1997 to the directive verb "the Court shall", and taking the provision well beyond what was envisaged.

6. The provisions in section 2(a) oblige the court to refuse bail if it "is satisfied that such refusal is reasonably considered necessary to prevent the commission of a serious offence by that person". This precludes the court from considering other relevant factors such as the length of time to trial or the personal circumstances of the accused, including serious illness or disability. This is inconsistent with the right to personal liberty acknowledged in Article 40 of the Constitution or with Articles 5 and 6(1) of the ECHR.

7. The Irish Human Rights Commission[1] has previously observed[2] that *"refusal of a bail application being a responsibility that rests under law with the judiciary alone."* We support this interpretation of the law as it relates to bail and it is our view that the clear intention within this amendment is to directly fetter the judiciary in their constitutional function of adjudicating bail applications which directly affect the right to liberty.

[1] Now the Irish Human Rights and Equality Commission

[2] See Observations on the Criminal Justice Bill 2007, Irish Human Rights Commission, 29 March 2007, page 17

8. In our view the amendment is both unnecessary, unconstitutional and potentially also contrary to Article 5 ECHR. To justify the detention of a person who is presumed innocent, there must be "*a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty*".[3] It follows that a system of mandatory detention on remand is incompatible with Article 5(3) of the Convention.[4]

Section 2(b) – Fettering discretion of judiciary

9. This new proposed amendment again requires (rather than permits) the Court to refuse an application for bail in certain circumstances. While lawful grounds for ordering pre-trial detention do include the risk that the suspect will commit further offences[5], the individual should only be detained if one of these grounds applies *and a condition of bail could not mitigate the risk in question*. The authorities must consider measures to counteract any risks, such as requiring security to be lodged, the imposition of strict bail conditions or court supervision.[6]

10. The mere fact of having committed an offence previously is not a sufficient reason for ordering pre-trial detention, no matter how serious the offence and the strength of the evidence against the suspect.[7] The proposed amendment goes so far as to effectively negate the presumption of bail for certain types of accused, **and arguably creates a legislative presumption in favour of preventive detention founded on a presumption of guilt.** The proposed amendment again fetters the Courts discretion in conducting such an assessment.

Electronic Monitoring – Section 3

11. Section 11 of the Criminal Justice Act 2007 inserted a new section 6B (Electronic monitoring of certain persons admitted to bail) into the Bail Act 1997. This section made provision for the introduction of electronic monitoring as a condition of bail. However, according to the response to a PQ last year "*due to operational issues regarding electronic monitoring in general, these provisions have not yet been brought into operation*"[8].

12. Section 3 of the Bill would require a court to impose electronic monitoring on any accused person admitted to bail in respect of a charge of burglary of a dwelling who also has one prior conviction for a burglary of a dwelling.

13. This proposed amendment makes electronic monitoring a mandatory condition of bail, where an application for bail is made by a person who satisfies the relevant criteria. The formulation of this amendment (1) does not meet the proportionality test and (2) misunderstands the way that electronic monitoring actually functions.

14. In balancing the accused's right to liberty with the rights of the public, the court is obliged to impose conditions that restrict the right of liberty by the minimum extent necessary in order to achieve the legitimate aim. If the imposition of electronic monitoring is mandatory, then the court would be precluded from considering alternatives that may achieve the desired outcome in a less restrictive manner. This falls foul of the proportionality test.

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[3] *Ilijkov v Bulgaria* (2001).
[4] *Caballero v UK* (2000) 30 EHRR 693.
[5] *Muller v. France*, App 21802/93, 17 March 1997, para 44.
[6] *Tomasi v France* (1992) 15 EHRR 1.
[7] *Tomasi v France,* App 12850/87, 27 August 1992, para 102.
[8] http://www.justice.ie/en/JELR/Pages/PQ-07-03-2017-114

15. The amendment suggests that the person's movements shall be electronically monitored "*so that his or her compliance with the condition that he or she shall not commit an offence while on bail can be established*". This effectively suggests that electronic monitoring can prevent all offending or provide conclusive evidence that an offence has or has not been committed. This is not in fact the case. Electronic monitoring is not a panacea.

16. "Electronic monitoring" is a general term referring to forms of surveillance with which to monitor the location and movement of the tagged person. They usually comprise a device attached to a person and are monitored remotely. Research[9] from the UK on the use of electronic tagging there (as an alternative to imprisonment on conviction) highlighted the challenges of such technology, including continuing inaccuracies in information conveyed by the courts to the probation service or electronic monitoring provider, which were serious enough to undermine the efficient management of cases.

17. In February 2014 the Council of Europe adopted Recommendation CM/Rec(2014)4[10] on the use of electronic monitoring, representing the first guidance on this internationally. The recommendations therein include (but are not limited to) the following:
    - that decisions to impose or revoke electronic monitoring shall be taken by the judiciary, without discrimination and at pre-trial stage with special care not to widen the net[11] [underline added]
    - that type and modalities of tagging need to be proportionate to the offences alleged in terms of duration and intrusiveness
    - that it is imperative to take into account the impact they have on families and other third parties, as well as age, disability or other relevant personal circumstances of each suspect
    - conditions of execution should not be so restrictive as to prevent a reasonable quality of everyday life in the community
    - Electronic monitoring confining offenders to a place of residence without the right to leave it should be avoided as far as possible in order to prevent the negative effects of isolation, in case the person lives alone, and to protect the rights of third parties who may reside at the same place.
    - National law needs to regulate how time spent under electronic monitoring supervision at pre-trial stage may be deducted from any final sanction; and
    - Particular attention shall be paid to regulating strictly the use of data collected in the framework of electronic monitoring

18. It is notable that the Council of Europe specifically found that such decisions should be taken independently by the judiciary, not the legislature. It is equally notable that none of these identified safeguarding factors appear to have been included in this Bill.

19. IPRT believes that that any interference with rights to liberty and privacy must be proportionate and justified in the circumstances of the particular case. While some provision for electronic tagging may be useful as a genuine alternative to imprisonment on remand if

[9] It's Complicated: The management of electronically monitored curfews, HMI Probation, June 2012, http://www.justiceinspectorates.gov.uk/probation/wp-content/uploads/sites/5/2014/03/electronic-monitoring-report-2012.pdf

[10] https://wcd.coe.int/ViewDoc.jsp?id=2163631

[11] "Widening the net" refers to the practice by which instead of electronic monitoring being a genuine alternative to pre-trial detention it instead becomes a widely imposed condition of bail

properly resourced, and if applied only in those cases where the only other option would have been imprisonment, the preferable option would be the provision of effective bail supports and services[12].

Pressure on the Prison System

20. On 23 November 2018, six of Ireland's twelve Irish prisons were operating at or over capacity and holding close to 4,000 prisoners in total. Most importantly, the main remand prison (Cloverhill) is already at capacity at 100%. Limerick female prison is at 154% capacity and the Dóchas is at 123% capacity. Increasing the number of pre-trial detainees will push these numbers even higher[13] with resulting impact for those serving sentences of imprisonment. Exposure to prison itself is damaging to offenders and makes people more likely to re-offend, not less likely.

Costs Implications

21. While there is no information available in respect of the likely cost implications of these provisions, it is worth noting that in 2017 the average cost of an "available, staffed prison space" in an Irish prison was €68,535 per year[14], not including education costs.

22. In addition to the efficacy of bail supports and services as an alternative (see more below), research has also shown that such schemes are more cost effective than custodial remands. In Ontario, Canada, for example, bail supervision and verification programmes cost approximately $3 a day per client in comparison to custody costs of $135 a day per inmate.[15] Similarly in Scotland, off-setting the cost of supervised bail against the reduction in prison costs from reduced use of remand over a three-year period resulted in a net benefit of between £2 million and £13 million.[16]

No provisions included on bail support schemes

23. The most effective way to improve compliance with bail conditions lies in the provision of bail supports schemes which
    - allow the accused to remain within their community
    - address offending-related behaviour where that is relevant
    - encourage attendance at court
    - increase court efficiency
    - decrease the number of remands and
    - result in cost savings

[12] Observations of the Criminal Justice Bill 2007, Irish Human Rights Commission, 29 March 2007, page 19. The form of intrusion involved in electronic monitoring may infringe the right to privacy under Article 40.3.1, personal liberty under Article 40.4.1, and bodily integrity under Article 40.3.2. Provisions of the European Convention on Human Rights are also relevant; the most applicable provisions to the surveillance of offenders through electronic monitoring are individual liberty under Article 5, the right to private and family life under Article 8, and the right of freedom of peaceful assembly and association under Article 11.

[13] See https://www.irishprisons.ie/information-centre/statistics-information/2015-daily-prisoner-population/2018-prison-populations/

[14] https://www.irishprisons.ie/wp-content/uploads/documents_pdf/IPS-annualreport-2017.pdf

[15] Department of Justice, Canada, *The Final Report on Early Case Consideration of the Steering Committee on Justice Efficiencies and Access to the Justice System*. See also Tanner, Wyatt and Yearwood, "Evaluating Pre-trial Service Programmes in North Carolina" (2008) 72(1) *Federal Probation* 18-27.

[16] Scottish Government Social Research, *Supervised Bail in Scotland: Research on Use and Impact* (2012), at p.18.

24. Given all the foregoing, it is extremely regrettable that the *Bail (Amendment) Bill 2017* does not include any statutory provision whatsoever for bail supports, which represent a crucial issue in any discussion on bail and pre-trial detention.

Conclusion

25. IPRT believes that any reform of national bail laws requires careful consideration of applicable due process principles, constitutional implications and international human rights obligations, both universal and regional. In our view this Bill raises constitutional and ECHR issues, will contribute to further prison overcrowding, and is unlikely to fulfil its promise to deliver safer communities.

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