

LAW SOCIETY SUBMISSION



RECOMMENDATIONS FOR AMENDMENTS TO THE BAIL (AMENDMENT) BILL 2016

DEPARTMENT OF JUSTICE AND EQUALITY
OIREACHTAS SELECT COMMITTEE ON JUSTICE AND EQUALITY

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ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

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Introduction

This submission is based on the views of members of the Law Society's Criminal Law Committee. The Committee is comprised of solicitors who have extensive experience and expertise in the practice of criminal law and a comprehensive understanding of the manner in which the Irish criminal justice system operates.

This submission details the views of the Law Society in relation to the specific provisions contained in the Bail (Amendment) Bill 2016 as initiated (the 'Bill') which proposes amendments to the Bail Acts 1997 and 2007.

The Tánaiste and Minister for Justice and Equality explained, when introducing the Second Stage of the Bill to the Dáil, that the focus of the Bill is to implement commitments on bail in the Programme for Government. These commitments provide:

“stricter bail terms for repeat serious offenders, strengthening Garda powers to deal with breaches of bail, increasing the use of curfews and introducing electronic tagging for those on bail where requested by the Gardaí.”

The Law Society believes that it is important that the Bill achieves the right balance between increasing protections for the public and victims of crime while, at the same time, protecting the rights of those facing criminal charges.

The Law Society is conscious that some people continue to commit serious crime while on bail and this necessitates a strengthening of the bail laws as envisaged in the context of factors for refusing bail and the conditions which can be attached. In tandem with this is the proposal to introduce a statutory basis upon which victims of crime can contribute to a court's consideration of bail eligibility. A central tenet of this discussion is the need to ensure that the Constitutionally-enshrined principles of criminal justice are respectfully navigated.

The Law Society urges caution when incorporating victim rights into the criminal process including the pre-trial stage. It is crucial that fair procedures as guaranteed by the Constitution, European Convention on Human Rights and EU Charter on Fundamental Rights are applied both to the complainant and the accused.

This means that, on occasion, the Oireachtas will be required to make a binary choice between competing needs, interests and rights so as to ensure respect for the rule of law and Constitutionally-protected principles of criminal justice. It is in the context of balancing these, at times, divergent goals that the Law Society wishes to, without any disregard for differing criminal justice objectives, contribute to the debate about bail law reform in Ireland

Executive Summary – Recommendations

The Law Society would like to make the following recommendations:

1. Consider the benefits of providing more clarity about how persistent serious offending will be considered as a bail factor
2. Consider clarifying the meaning of “any person” and “the community” in the context of the likelihood of the danger posed by an accused?
3. Ensure that the new bail conditions prohibiting driving and introducing curfews do not unnecessarily interfere with a potentially innocent accused’s employment and family life
4. Protect the role of the courts in being the ultimate decision-maker regarding the return to custody of people on bail
5. Enable all accused persons to be eligible to apply for bail on condition of electronic tagging
6. Ensure the protection of the presumption of innocence
7. Ensure the new requirement that courts provide reasons for granting bail does not interfere with an innocent person’s ability to access bail and the courts power to grant bail
8. Ensure criminal trials are processed as quickly as possible: this is especially important for people who are denied bail

1. Clarity required about how persistent serious offending will be considered as a bail factor
 - 1.1. Section 2(ii) of the Bill envisages the courts being able to take into account the extent to which the number and frequency of previous convictions of the accused for serious offences might indicate persistent serious offending (where it has taken into account one or more of the factors provided in section 2(a) to (f)) as follows:

“(ii) the extent to which the number and frequency of any previous convictions of the accused person for serious offences indicate persistent serious offending by the accused person”.
 - 1.2. The Law Society recommends greater clarity in relation to the terms “frequency of any previous convictions” and “persistent serious offending”. A definition of the terms would assist in the objective of ensuring Constitutionally-enshrined due process principles, such as innocent until proven guilty, are not statutorily diminished.

2. Clarity required on the meaning of “any person” and “the community” in the context of the likelihood of the danger posed by an accused.
 - 2.1. Section 2(iii) of the Bill will also introduce a new power for the courts to take into account the likelihood of any danger to “any person” or “the community” that could be caused by the release on bail of the accused (where it has taken into account one or more of the factors provided in section 2(a) to (f)) as follows:

“(iii) the nature and likelihood of any danger to the life or personal safety of any person or danger to the community that may be presented by the release on bail of a person charged with an offence punishable by imprisonment for a term of 10 years or by a more severe penalty.”
 - 2.2. Section 2(iii) extends the factors affecting court decisions to grant bail to include, for the first time, danger posed to an unidentified person or class of persons by the inclusion of the words “the community”.
 - 2.3. During the Second State Debate on the Bill, it was suggested by some TDs that this provision was connected with gangland crime.
 - 2.4. Section 9A(1) of the Bill also creates a new court power to hear complainant evidence in bail applications and this includes evidence “from the person in respect of whom the offence is alleged to have been committed as to...(b) the nature and seriousness of any danger to **any person** that may be presented by the release of the accused person on bail.” This provision replicates the phrase “any person” used in section 2(iii) and, therefore, will also merit clarification. The provision of evidence in relation to “any person” may also present rules of evidence issues.

2.5. The Law Society recommends greater clarity is required for the terms “any person” and “the community”, to ensure the protection of important criminal justice principles. If there is a nexus between section 2(iii) and section 9A(1)(b) and gangland crime, it may be necessary to specify this as being the provision’s specific remit.

3. Ensure that the new bail conditions prohibiting driving and introducing curfews do not unnecessarily interfere with a potentially innocent accused’s employment and family life

3.1. Section 3 of the Bill proposes increases in the range of conditions which a court can attach when granting bail to include prohibiting the accused from driving where the offence charged is a serious road traffic offence (section 3(a)(vii)) and the imposition of a night-time curfew (section 3(a)(viii)).

3.2. During the Second State Debate of the Bill, Deputy Jim O’Callaghan noted that bail conditions “come with a benefit to the accused. If they are set the accused is not remanded in custody but gains the benefit of bail.” Deputy O’Callaghan also enquired as to whether a discretion will be available, for example, when a person’s employment requires them to work outside of the curfew hours.

3.3. Both of these new bail conditions have the potential to interfere with an innocent person’s ability to continue to work and/or drive in circumstances where they may need to for work.

3.4. Accordingly, the Law Society recommends that the Bill requires the courts to consider the impact of these conditions on a potentially innocent person and/or their family. The geographical distance of an accused from public transport can, on occasion, be an important consideration. It will also be necessary to ensure that the Bill does not restrict court discretion in relation to the setting of potentially life-changing bail conditions.

4. Protect the role of the courts in being the ultimate decision-maker regarding the return to custody of people on bail
 - 4.1. Section 3 introduces a Garda power of arrest without warrant where a condition of bail is breached. The Gardaí already have, under section 6 of the Bail Act 1997, a power to arrest a person on bail who is about to contravene a condition of bail, but **only on foot of a warrant** of arrest issued by the court.
 - 4.2. The Law Society is cognisant that there are legal constraints on the extent to which a person can be arrested by Gardai without a warrant even while on bail. Section 3 contains a new statutory power of arrest without warrant of a person on bail who is contravening a condition of bail and where the arresting garda considers arrest to be necessary to prevent harm to, interference with or intimidation of the victim of the alleged offence, a witness to the alleged offence, or any person with whom the person on bail is not permitted to have contact as a condition of bail.
 - 4.3. The Tánaiste indicated that:

“This is very much in line with the Criminal Justice (Victims of Crime) Bill that we will be introducing in which we consider this very much from the victim's perspective or lens and in terms of providing for his or her safety.”
 - 4.4. The Law Society welcomes this victims-based objective.
 - 4.5. The Society also recommends a review of section 3 to ensure that it protects the role of the courts in being the ultimate decision maker about the return to custody of a person on bail; a person who may be innocent.
 - 4.6. Section 6(8) of the Bail Act 1997 requires Gardai to bring an arrested person to court “as soon as practicable”, but this safeguard was designed to apply in circumstances where a warrant had already issued. In the context of the new power to arrest without warrant while on bail, section 6(8) may not provide adequate protection. It may be necessary to prescribe a statutory minimum time between arrest without warrant and attendance at court. Accordingly, the Law Society recommends that the wording of section 6(8) in relation to bringing an arrested person to court “as soon as practicable” should be strengthened.
 - 4.7. In addition, the Law Society recommends the inclusion of a statutory provision to require Gardai to provide evidence to the court about why they formed the opinion that a person was “about” to contravene bail conditions.

5. Enable all accused persons to be eligible to apply for bail on condition of electronic tagging

5.1. Section 11 of the Criminal Justice Act 2007 inserted section 6B into the Bail Act 1997 and introduced provision to facilitate the electronic tagging of people released on bail pending trial. However, section 6B has not yet been commenced. Section 4 of the Bill proposes an amendment of section 6B to restrict electronic tagging as a bail condition to circumstances where the prosecution apply for it.

5.2. The Tánaiste explained the rationale for this restriction as follows:

“During the pre-legislative scrutiny of the Bill the justice committee expressed the view that the use of electronic monitoring was an acceptable alternative to pre-trial detention but recommended that it not be used excessively. That is the key point. The aim of the provision included in the Bill is that it will be used appropriately. It is worth noting that the Bill will limit the use of electronic monitoring to cases in which the prosecution applies for it.”

5.3. As a consequence, section 4 of the Bill prohibits an accused person who may be innocent from applying for release pending trial with the use of electronic tagging in circumstances where they might otherwise be denied bail. This will also likely restrict the courts from granting bail on condition of electronic tagging in circumstances where the prosecution has not applied for electronic tagging as a condition.

5.4. The Law Society recommends that the Oireachtas and the Department consider the implications of restricting electronic tagging as proposed by section 4 of the Bill.

6. Ensure the protection of the presumption of innocence

6.1. Section 5 inserts a new section 9A which will enable courts to hear victim evidence.

6.2. A safeguard is proposed which enables courts to order, “in the interests of justice”, that any information provided by a complainant not be published or broadcast.

6.3. The Law Society recommends consideration be given to whether additional safeguards might be necessary to ensure criminal justice principles such as the presumption of innocence in the context of complainant evidence. For example, might it be necessary to clear the court for such testimony? Might it be necessary that a different Judge hears complainant evidence in bail applications than the Judge who ultimately hears evidence at trial?

7. Ensure the new requirement that courts provide reasons for granting bail does not interfere with an innocent person's ability to access bail and the courts power to grant bail
 - 7.1. Section 6 proposes the insertion of a new section 9B which will require courts to give reasons for their decision to either grant or refuse bail.
 - 7.2. The Tánaiste described the purpose of section 6 as follows:

*“Section 6 requires a court to give reasons for its decision to grant or refuse bail or impose conditions of bail. Deputies and members of the public often raise this issue and ask why was such a person given bail. The objective of this provision is to promote the greatest possible transparency in the hearing of bail applications and the greatest possible understanding of decisions of the courts. This is a very important provision in people having an increased understanding of why and how courts make decisions in different cases. These are clear and focused **provisions which will enhance the powers of courts in deciding whether to grant bail** and which will improve the legitimate control which they may exercise over those granted bail. They will enhance the protection of victims of crime and those at risk of crime, while respecting the rights of those accused of crimes.”*
 - 7.3. Every person is presumed innocent until, after a fair trial, they are found guilty. This is a fundamental principle of criminal justice which enjoys Constitutional protection. Detention without bail is a form of preventive detention, which is detention without trial. Article 5(1) of the European Convention on Human Rights allows for the deprivation of liberty **when** it is reasonably considered necessary to prevent a person committing an offence or fleeing afterwards. Article 40.4.6 of the Constitution similarly provides “**provision may be made by law for the refusal of bail** by a court to a person charged with a serious offence where it is reasonably considered necessary to prevent the commission of a serious offence by that person.”
 - 7.4. The maintenance of the presumption of innocence requires the prevention of an unwelcome nexus between (1) the new requirement that courts provide reasons for granting bail and (2) the actual power of a court to grant bail.
 - 7.5. The proposal to require Courts to provide their rationale for granting bail may diverge from what is envisaged by Article 40.4.6 of the Constitution. In addition, it would represent a significant departure by obliging a court to explain itself when affording an accused their Constitutional rights.
 - 7.6. The Law Society believes that it is important to ensure that the new requirement that courts provide reasons for granting bail does not interfere with an innocent person's ability to access bail and the courts power to grant bail. Accordingly, the Law Society recommends consideration of section 6 of the Bill to ensure that -

- (1) a nexus is not developed between the actual grant of bail and the giving of reasons for such a decision, without which an accused would be interned without trial; and
- (2) the giving of reasons for granting bail is Constitutionally sound, within the meaning of Article 40.4.6

8. Ensure criminal trials are processed as quickly as possible: this is especially important for people who are denied bail
 - 8.1. The Law Society believes it is important that criminal trials are expedited as quickly as possible. This is especially important for people who are denied bail and in light of the proposed expanded factors upon which bail can be denied.
 - 8.2. Accordingly, the Law Society recommends that mechanisms and resources which ensure that criminal trials are processed as quickly as possible are implemented in tandem with new preventive detention factors such as those proposed by the Bill.

For further information please contact:

Cormac Ó Culáin
Public Affairs Executive
Law Society of Ireland
Blackhall Place
Dublin 7
DX 79

Tel: 353 1 6724800
Email: c.oculain@lawsociety.ie