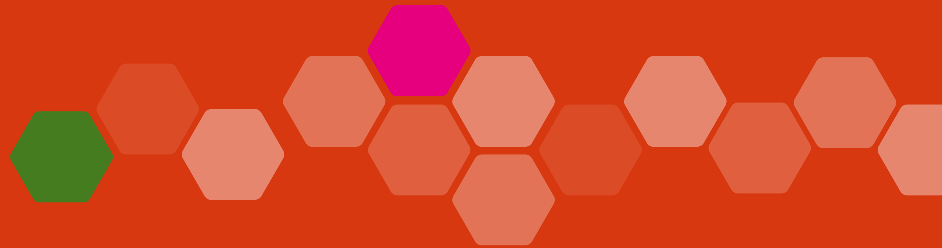
Scottish Government
Riaghaltas na h-Alba

Decision-making on Bail and Remand in Scotland: Final Report December 2023



CRIME AND JUSTICE

social research

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Executive Summary

Introduction

In late 2019, the Scottish Government commissioned an independent research study into decision making in relation to refusal of bail in Scotland. The overall aim of the research was to explore how decision making works in practice, as well as to gather perceptions on bail options. The research was carried out over two phases. Phase 1 involved online surveys of members of the Judiciary and Crown Office and Procurator Fiscal (COPFS) staff, the findings from which were published in an Interim Findings report in July 2022.

This report presents findings from Phase 2 of the research which involved a series of qualitative interviews with key justice stakeholders (Sheriffs, COPFS staff, defence solicitors and social work staff) to add breadth and context to the survey data presented in the Phase 1 report. A case study approach was taken with fieldwork carried out in six different case study areas, selected on the basis of broad geographical coverage, as well as a mix of courts (from different Sheriffdoms) where historical data (provided at the outset of the project by the Scottish Courts and Tribunals Service) showed high, medium and low levels of remand. All participation was on a voluntary, self-selection basis and all interviews were carried out on a one-to-one or two-to-one basis, using either face-to-face, online or telephone interviews. A total of 60 people took part over a six month period.

Main Findings

The research highlights that the bail and remand decision making process is complex, multi-faceted and time pressured. The 'jigsaw' of legislation, combined with circumstance and human factors, means that no two cases are ever treated the same way and no response can ever be seen as 'typical'. All participants across all stakeholder groups agreed that the decision making process was informed by multiple considerations in each case, and that there was never any one factor which was determinative in its own right. All cases were described as being unique and as being treated on the basis of the information available at the time and the merits of each individual case. Similarly, while some factors may carry more weight in some circumstances, all factors are still considered in their totality.

Findings from the research broadly fell under four key topics, these being: Legislative Grounds, Process and System Influences, Human Factors and Other Considerations. The main findings presented below are structured around these four topics, with a fifth separate dedicated section focusing on Alternatives to Remand.

(1) Legislative Grounds

The Criminal Procedure (Scotland) Act 1995 is the cornerstone of all decision making and was described by all stakeholders as the main framework within which

all decisions on bail and remand are made, being of equal relevance and influence in both summary and solemn cases.

Most respondents concurred that a combination of all of the factors set out in Section 23C of the 1995 Act, alongside the particular facts and circumstances of a case, determined all decisions about whether an accused presents a risk of re-offending and whether bail should be opposed. In general, however, the nature of the offence (especially where the accused has a history of similar, recent offending) and previous convictions were the two factors which perhaps carried the most weight in decisions to oppose bail (by COPFS) and to refuse bail (by Sheriffs).

- The **nature (including level of seriousness) of offences before the court** was described as "highly influential" in Crown decisions to oppose bail primarily because it was seen as the key indicator of the danger that the accused may present to the public and witnesses. Sheriffs also stressed that the **seriousness of the current offence was paramount in their determinations** (with decisions in solemn procedure even more likely to have seriousness at their heart than summary procedures).

- The **nature of any previous convictions of the person (including analogous offending)** was described by the Crown as "highly influential" in their case marking, and could be sufficient for opposing bail on its sole merit (especially if previous offending was very similar to the new offending). It was noted that the nature of previous convictions could demonstrate that the accused has a preferred method of offending, as well as demonstrating risk of commission of further offending and/or being of danger to the public. Offence histories were also the second most frequently cited factor influencing Sheriffs' decisions.

- **Previous behaviour whilst on bail (including compliance, previous breaches and previous breaches of other court orders)** was described by Sheriffs as being "very commonly relied upon by the Crown and the court", with COPFS respondents noting that it often indicated concerns as to commission of further offences, future failure to comply with bail conditions, failure to surrender and likelihood of custody (with breach of orders suggesting contempt of same). Similarly, solicitors noted that the record of the accused alongside their compliance with previous orders played heavily in their assessment of likelihood of bail being granted. Sheriffs confirmed that previous behaviour while on bail was considered as a key indicator of likely future behaviour in the current case.

- **How recently other offences were committed** was described as playing a key role in decisions as it could help to demonstrate any pattern of offending or risk of re-offending and whether the accused was targeting a single or multiple victims/complainers. This information was also described as useful insofar as it may yield arguments that certain specific sections of society are not safe if the accused was to be at liberty. A period of desistance following a

prolific record was not always seen as good reason to support bail, and it was noted that the weight of the record and other factors were also likely to be considered by COPFS and Sheriffs in turn.

- **Evidence of escalation of offending** was perhaps seen as slightly less influential than other features of an accused's history and was often considered only alongside other features (in particular the types of offending being escalated) to present a case for opposing bail by the Crown. For Sheriffs, escalation was also not a primary determinative factor in decisions.

- Of lower importance in the order of considerations for Sheriffs was the **risk of failure to appear at future court diets**. While previous behaviour was seen to be indicative, Sheriffs tended to note that failure to appear would need to be severe, prolonged and prolific for this to be the reason why they would remand someone to custody.

Sheriffs also cited risk to public and community safety as being key to their decision making, and possibly one of the most significant factors weighing in bail/remand decisions, after offence nature and seriousness (the two often being intertwined). Assessing whether the accused was likely to interfere with victims/witnesses was also seen as important, although it was noted that interference was 'rare' in most types of case (the exception being domestic abuse/harassment cases). Similarly, most Sheriffs cited the nature and number of previous offences and previous non-compliance with bail and other court orders as a key consideration involved in assessing 'substantial risk'.

Also in relation to legislative grounds, Section 23D of the Act (which sets out a presumption against bail for those accused of violent/sexual/domestic abuse offences or drug trafficking offences in solemn proceedings, where they have a previous conviction of a similar nature) was viewed as being interpreted very differently by different Sheriffs. Stakeholders viewed that 'exceptional circumstances' (which may allow the granting of bail in some such cases) was a (largely) undefined, fluid and subjective concept. Sheriffs and solicitors also concurred that there was a certain inevitability of bail being opposed by COPFS in Section 23D cases. It should be noted, however, that the Bail and Release from Custody (Scotland) Act 2023 (which was still being passed through parliament at the time that the research was reaching its conclusion) repeals Section 23D of the Criminal Procedure (Scotland) Act 1995.

(2) Process and System Influences

While not a key stakeholder in the decision-making process per se, **early decisions by police to liberate an accused on an undertaking** to appear at court were considered to inadvertently (although never intentionally) influence decisions in relation to bail and remand. Specifically, decisions by the police to release someone on an undertaking made it "challenging" for the Crown to oppose bail (since compliance with undertakings conditions was seen as demonstrable evidence that the accused was trustworthy and of 'good behaviour'). Discussions

with defence agents confirmed that most deliberations regarding suitability for bail were reserved for cases appearing from custody. Participants did, however, stress that police decisions to release on an undertaking did not explicitly bind COPFS case marking decisions, defence motions or Sheriff's ultimate decisions which always remained independent.

While the nature and seriousness of the current offence and previous criminal record were central to **assessing risk**, it was recognised that there may be scope for more information to help inform such assessments, especially at case marking stage. Further information related to risk, which it was suggested may assist COPFS in their initial case marking decisions included: having clear references for previous convictions to help identify patterns/types of offending; more detail about the circumstances of the offence (which is often challenging/impossible when dealing with hostile witnesses); more detail regarding protective factors which may assist the accused in complying with a bail order (if granted); better understanding of the relationship between the accused and complainer (and any 'non-criminal' yet relevant previous behaviour); knowing the position put forward in supervised bail assessments at an early stage; and views of the complainer (especially in domestic abuse cases).

Across all stakeholder groups, the main reported process or system factor influencing the decision making process was **time** - specifically the lack of time available to collect and process all necessary and appropriate evidence and information to inform case decisions. Shortage of time was compounded by the large **volume of business** and number of cases that each party was working with on a daily basis. For COPFS, the main pressure was at initial case marking stage when a lack of information in Standard Prosecution Reports (SPRs) could mean a rush to obtain additional evidence on the same day as a court appearance. For solicitors, the main challenges were finding time to meet/speak with clients appearing from police custody and especially where the former were assigned as a duty solicitor[1]. This challenge was compounded by delays to the accused being transported to court from custody, delays in centralised marking decisions arriving at court, and a lack of physical interview space available for solicitors to meet with their clients. All parties were sympathetic to the pressures of lack of time in the current system to allow respective partners the ideal space for investigation, collation and presentation of the best arguments possible and viewed this as a shared challenge.

Case marking arrangements also featured heavily in discussions around system challenges. One of the main strengths of the current COPFS case marking arrangements was perceived to be that there is a wealth of experience and knowledge within the National Initial Case Processing (NICP) team which allows for

[1] A duty solicitor is a Criminal Defence Solicitor who helps individuals if they are suspected or accused of committing a crime. Their primary role is to represent those who do not otherwise have access to a Solicitor. If an alleged offender is in police custody or appearing at court and does not have a Solicitor, they will be given the option of speaking with a duty solicitor who is on rota at that time.

cases to be marked appropriately and also quickly given the volume of cases received. Some scope for more fluid communication between NICP staff and local Deputes was, however, indicated across the research. Both Sheriffs and solicitors noted that the existing system often led to challenges in court where local Deputes could not justify or robustly defend or explain the decisions of their case marking colleagues (noting it is exceptionally rare that the person who undertakes initial case marking and makes a decision on the Crown position on bail is the same person that will appear in court). In several interviews, there was a seeming lack of confidence by some Sheriffs in the Crown's stance on bail: in effect, it was suggested that the Crown opposed bail too readily and without any stated justification.

Missing information or lack of detail regarding cases was also cited as something that hindered case marking decisions in relation to bail. In particular, the absence of a detailed and thorough Standard Prosecution Report (SPR) could result in significant time being spent by COPFS marking staff in trying to unearth the necessary detail of a case to allow informed decisions to be made. The quality of SPRs was described as "variable" across the country with no real consistency in the format, content or quality of SPRs both regionally and nationally. The consistency of reports was also not influenced by whether cases were appearing from custody, on an undertaking or warrant. In particular, COPFS staff reported that they routinely noted missing information regarding the background to an offence per se (i.e. antecedents), information regarding the current and historical relationship between the accused and complainer (including whether hostile witnesses were involved), views of the complainer, as well as lack of information relating to housing status and vulnerabilities of the accused (including any mental health concerns). Where wider situational information was available, **challenges with verifying information** (especially if taken verbally from the accused) were also raised at interview by Sheriffs and solicitors alike.

The points at which **social work input** featured in a case was also identified as a key system factor which could either ease or obstruct the decision making process. Importantly, this was one area of the current system where considerable geographical variation was noted across the six research case study areas. In two of the smaller, more rural, low/medium workload courts, examples were given of all custody cases being examined by social work teams (sometimes before case marking) to try and achieve an understanding of wider social needs presented by the accused where supervised or monitored bail could be considered. This often uncovered information which could be imparted either directly to the initial case marker or to the local Depute. In other more urban, higher workload courts, this was not achievable due to volume of business and so only certain cases (i.e. those where bail was opposed) could be scrutinised in any detail by social work staff. Views and experiences of Crown and social work interactions varied considerably by case study area and was perhaps the single biggest area in which - geographically - differences in practice affected decisions. A more consistent and direct communication route between social work and case markers would be helpful, it was suggested, and could prevent the need for some of the unstructured

discussions that were sometimes played out in court where new information is brought to the court after initial case marking.

A number of system issues also arose in relation to **breaches of bail orders** and failure to appear, these being: concerns that the accused may not sufficiently understand bail orders and the conditions of bail; concerns that the accused may not sufficiently understand the consequences of breach; and Crown, Defence and Sheriffs often not knowing or being given information relating to breaches of historical orders. Having more information available to the court and stakeholders at all stages regarding the justifications and circumstances around previous breaches was viewed as something which may be helpful to the decision-making process to prevent breaches being viewed solely in numeric terms.

While all accused were treated on a case-by-case basis, system constraints were also seen to make it **difficult for partners to adopt a person centred approach** (again, given pressures of workload, time and challenges to gathering information about the lifestyle factors, personal histories of accused and complainers, and the relationship between the two). There was often very little opportunity in the system for professional stakeholders to have direct contact with the accused and/or witnesses and complainers (as appropriate). This potentially left room for interpretation bias to creep into information presented at various stages in a case.

(3) Human Factors

Most respondents from all stakeholder groups agreed that there was a lack of consistency in decisions made by different Sheriffs, although some noted that it was largely inevitable and driven by **human variation in attitudes and perceptions and how the legislation was interpreted.** While appearing before a certain Sheriff was perceived as potentially working for or against some accused, all stakeholders agreed that this variation within decision making by Sheriffs did not affect their own actions (COPFS case marking, solicitor's client instruction, social work bail assessments, etc.). It was also something which was seen as unavoidable and unlikely to be affected by any legislative or system change.

Similarly, while Sheriffs had the ultimate responsibility in bail and remand decisions, solicitors were keen to stress that their clients (the accused) also played a key role in the process which should not be overlooked. For solicitors, **client instructions** heavily dictated the arguments that they were able to present in court and they stressed that they can only ever 'advise' about whether or not to seek bail. In most cases, especially where someone appears from police custody, it was noted that accused would seek bail irrespective of their agent's advice. Similarly, in most cases, solicitors would encourage a request for bail, even if they considered it unlikely to be granted. Sheriffs commented that they were aware of the duties of defence agents to follow client instructions and this was also factored into decisions, i.e. defence may seek bail even where they know that the application has little merit other than because of their clients' instructions.

Across interviews, comments were also made which highlighted a seeming lack of collegiality in the bail and remand decision making system, which in part was necessary and inevitable given the **adversarial nature of the justice system**. It was noted that differences in practice around the gathering and sharing of relevant information between stakeholders could introduce bias to the system. While informal sharing of information existed in some areas, this was often relationship specific and boiled down to familiarity and closeness of individual practitioners working in different courts. The adversarial nature of the system also means that partners are each contributing only 'in part' to the whole process (i.e. lack of a whole system approach). Inevitably, the decision making process requires everyone to play a unique part and while the informing of decisions falls to the court as a whole, rather than any one entity, it was noted that the Sheriffs/Judges make the final call, in essence removing any final accountability or sense of ownership on behalf of other parties.

Across the case study areas, there were also **different models of social work access** available, with some areas having a physical social work presence in court rooms each day, and others providing social workers in the court room only on request, or when giving verbal feedback would be quicker than waiting for an assessment report to be written. Where social work staff were based in courts routinely, there was consensus across all groups that their physical presence in the court room did (or could) provide clear benefits and lead to better informed and more person centred decision making.

Similarly, **attention to social work input** was flagged as something which may account for local variation in decision making quality. While in most areas social workers reported that their input was usually valued by justice partners and they felt 'heard', this was not unanimous and in one area social workers reported that they were not convinced that Sheriffs and other court officials actually 'listened' to their reported assessments.

(4) Other Considerations

The reported principles and practice of decision making varied little between **summary and solemn cases**. Among the judiciary, it was implied that the more serious the offence, the more likely a Sheriff would consider remand, and indeed the 1995 Act encourages remand post-conviction under solemn procedure, not least if the likely sentence is a custodial term. However, Sheriffs stressed that each case is acted upon on its merit and is a 'nuanced' decision in terms of weighing up the seriousness of the alleged offence versus previous record of the alleged offender (apart from in cases of exceptional circumstances in Section 23D of the Act). The main issue of concern was that the high remand populations which were often cited in different public forums could, in large part, be explained by delays in the journey time or time taken to get a case to court for solemn cases. Overall, however, it was considered that there was less ambiguity and less room for subjectivity regarding 'risk' posed by an accused in solemn cases compared to summary, and this meant that decisions to remand were often easier for all to understand.

Most stakeholders agreed that the **likely outcome of the case** (in terms of a custodial or community sentence) would also inform, but not dictate, the decision on whether to grant bail or impose remand. Sheriffs indicated that they would be unlikely to place someone on remand where the offence would not result in a custodial sentence should they be found guilty. Again, in more serious and solemn cases, it was noted that the current delays in the system meant that the use of remand was carefully considered and weighted against the likely time that could be spent on remand before the case could conclude and the likely sentence that would be imposed if found guilty. Here, however, a range of other relevant factors, such as risk to the public, risk of further offending, etc. would be equally or more important and so likely sentence would be one of many factors considered.

While **bail reviews** were considered to be uncommon and require significant material change in circumstances, the only exception was where an accused had been held on remand for a significantly long time period, and particularly where this met or exceeded any likely sentence that would be given should they be found guilty - this was said to be happening with more frequency currently due to the backlog created by COVID-19.

Bail appeals were reported to be pursued only when there was perceived to be a real risk to the public of serious harm.

Demographic and social characteristics were largely seen as secondary to offence histories and the risks posed by the accused to others, and they were generally not considered to be the determining factors in Sheriffs' decision making. It was said that these would only be considered in borderline cases in order to help assess the risk posed and whether there were mitigating circumstances for/against the use of bail/remand. The main characteristics were: gender/sex; age; housing; employment; health; substance misuse; and family/caring responsibilities.

(5) Alternatives to Remand

There was notable variation between areas both with regards to **understanding, uptake and use of bail supervision** among partners (set against the context that there is an inconsistent service across Scotland's 32 local authorities in respect of bail supervision services and, to a letter extent, EM bail). Responses were mixed among Sheriffs who were asked if they were aware and knowledgeable of bail supervision services in their area - all were aware that they existed, but some did not feel knowledgeable about exactly what they entailed. Similarly, there was considerable variation in the knowledge and confidence held by COPFS staff in different areas regarding bail supervision. Whilst most solicitors were in favour of bail supervision as an alternative to remand for clients in appropriate cases (as long as there was no evidence of 'up tariffing'), some were uncertain of the criteria used by their social work team for assessment.

There were also mixed views with regards to **effectiveness of bail supervision**. Some Sheriffs felt it was an invaluable service that could help (in some cases) to

reduce the use of remand if it could be resourced to accommodate even higher numbers of orders. For others, there was scepticism regarding if such services would ever receive the necessary backing required to be effective. Defence and social work staff agreed that supervised bail was a useful and valuable service, but stressed that effectiveness was largely dependent on the accused person's ability/motivation to engage and desist from further offending. The main thing that had caused some reservations among some solicitors in the past was a perceived limited amount of spaces in their local bail supervision scheme although in all but one area this was no longer considered to be an issue.

There were also mixed views and experiences with regard to **Electronic Monitoring on bail** (EM bail) in terms of its availability, suitability and effectiveness (while not noted in the majority of areas, respondents in some rural courts noted that bail supervision and EM bail were often not available in the geographical areas in which they worked). Sheriffs generally perceived that **EM bail** (including curfews) was a useful alternative to remand, especially where conditions not to enter particular areas were applied (including monitoring to 'stay away' from the complainer's/victim's home).

Some Deputes felt they did not know enough about how EM bail worked or knew less about EM bail compared to supervised bail. Other Crown respondents felt that EM bail was more effective than supervised bail, i.e. breach of bail conditions with electronic monitoring could be much more easily detected whereas breach of bail supervision may be more ambiguous. Others felt fully aware of the EM Bail service in their area and understood how an electronic monitoring order is imposed, but could not comment on its effectiveness. Some Deputes cited the presence of repeat breaches of EM bail that they witnessed in court as something that undermined their confidence in its efficiency (although it was not clear if this related to the efficiency of electronic monitoring of bail as an alternative to remand or efficiency of the monitoring per se).

Among solicitors, awareness of both the availability and operation of EM bail varied, both between and within areas. EM bail was, however, generally seen to be a useful alternative to remand and less intrusive and more flexible than police monitored curfews (which were dependent on limited police resources).

Where bail with **special conditions** was used, all stakeholder groups concurred that this was most effective only if the conditions were very clearly defined and stipulated (with 'vague' conditions perceived by some as "setting an accused up to fail"). Overwhelmingly, Crown respondents agreed that special conditions were a useful addition to the bail and remand process but could be more clearly explained or defined, specifically in relation to curfews and non-contact conditions (for example, not to contact a complainer via social media/text message, and not to make contact through a third party.) Among solicitors, there was concern around the potential for replication of standard conditions within special conditions. More general comments were also made in relation to the need for special conditions to be enforceable, achievable and properly monitored.

There were few suggestions put forward for **other alternatives to remand**, although some stakeholders posited that more intensive supervision, controlled housing or diversionary activity may be the best way to work with low level repeat offenders. Various stakeholders noted the need for **better access to mental health and homelessness support** for people both released on bail and released back into the community pending or following any period in custody. Several Sheriffs, COPFS staff and solicitors suggested that the under-resourcing and over-stretched nature of psychiatric/mental health services was restricting the number of people that community-based services could accommodate i.e. finite resources had to be used on those with the most acute and severe need, with borderline cases not admitted to services. While most Sheriffs concurred that a lack of community support was never a reason to place someone on remand, others did indicate that the current lack of, and overstretched nature of community-based services did mean that remand was sometimes the only realistic option available and that Sheriffs were left with no choice but to use remand for some accused persons. All stakeholders agreed that there was a **need for more proactive support and more protective measures to assist accused** (especially vulnerable accused) and to prevent the cycle of reoffending including **immediate support for people released on bail.** Though out of scope of the current research, underinvestment and lack of funding in the justice system was something which also featured in discussions as directly hindering the bail and remand decision making process.

Finally, justice partners concurred that the main potential benefit of being released on bail as opposed to being held on remand was the stability it afforded to the accused. Importantly, however, there was consensus across all justice partners that not everyone was suitable for bail, bail supervision or EM bail and that in some cases remand was the most appropriate option.

Conclusions

The research shows that decisions to remand, while often time pressured, are not made easily and there was shared acknowledgement that the legislative presumption in favour of bail should always guide decisions to keep accused in the community wherever possible, subject to suitable risk mitigations being in place. Those who took part in the current research highlighted a range of system and process changes which may better support them in their respective decision making, and these related mainly to more or better quality of information, better information sharing and more time being allowed for the same. Achieving system efficiencies would be challenging, it was noted, given the volume of criminal business being dealt with in the courts, (and insufficiency of justice partners' resources, in some cases) but continued efforts to increase transparency in the decision making process may assist in contributing to the shared goals of reducing crime, reoffending and victimisation.

Introduction

Background

In late 2019, the Scottish Government commissioned an independent research study into bail and remand decision making in Scotland. The overall aim of the research was to explore how decision making works in practice, as well as to gather perceptions on bail options. The research was designed to cover the adult criminal justice system only and to focus on both solemn and summary criminal cases[2].

The research was carried out in two phases. Phase 1 involved online surveys with members of the judiciary and the Crown Office and Procurator Fiscal Service (COPFS). An Interim Findings Report was published in July 2022 which highlighted that decisions were often complex and involved consideration of multiple factors (both legislative and other), with decisions always made on a case-by-case basis, considering the factors most relevant to the personal circumstances of the accused. This report presents findings from Phase 2 of that research which involved a series of qualitative interviews with key justice stakeholders to add breadth and context to the survey data presented in the earlier Phase 1 report.

Research Aims

The aims of the research were to assist the Scottish Government and other justice stakeholders to:

- better understand the process of bail decision making
- better understand the current system's strengths and weaknesses, and hear what criminal justice stakeholders need to best be supported in their decision making
- use this evidence to build on what is working well and inform improvements, if needed

The research was a response to various justice stakeholders' noting that the weight and combination of different factors influencing decision making were not always well understood by respective partners.

Legislative Context

In Scotland, individuals accused of any criminal offence can be allowed to remain in the community pending trial, including by granting them bail. The Criminal Procedure (Scotland) Act 1995 (the 1995 Act) provides for a presumption in favour of bail for criminal cases in Scotland and the Court must consider bail in all cases

[2] In Scotland, criminal cases are heard by a Sheriff and a jury (solemn procedure), but can be heard by a Sheriff alone (summary procedure) depending on the nature and seriousness of the alleged offence.

regardless of whether an application for bail is made. However, there are circumstances in which a presumption in favour of refusal of bail operates relating to those accused of certain serious offences and these are set out in the 1995 Act. In addition, while all offences are such that a person can be bailed, the 1995 Act sets out a number of grounds which, taken individually or collectively, may give reason to the court to justify a decision to refuse bail for an accused person in any given case.

The Scottish Parliament enacted the Bail, Judicial Appointments etc. (Scotland) Act 2000 to remove restrictions on bail from the law of Scotland so that judicial decision making was an essential part of consideration in all cases. Decisions on whether or not bail is to be granted involve the exercise of judicial discretion. The exercise of that discretion is, however, taken in the context of bail requiring to be granted unless there is good reason to refuse bail (see section 23B of the 1995 Act).

A decision on whether to grant bail is informed by a list of grounds, laid out in statute, relevant as to why bail in any given case may be refused. These grounds are set out in section 23C of the 1995 Act. In addition, the decision on whether to grant bail in certain cases is informed by specific provision for people accused of certain serious offences, in the circumstances set out in section 23D of the 1995 Act. Despite all offences being bailable and bail requiring to be granted unless there is good reason not to (subject to section 23D), significant numbers of persons are (and have historically been) remanded in Scotland.

In June 2018 the Justice Committee published a report 'An Inquiry into the Use of Remand in Scotland' that raised a number of concerns about the use of remand in Scotland's justice system. One of these concerns was the high level of remand prisoners, at around 20% of the prison population.

The 2021 Programme for Government subsequently included a commitment to introduce legislation to change the way that imprisonment is used and a 12 week public consultation was subsequently facilitated which sought views on how custody should be used in a modern and progressive society, the findings from which were used to inform the development of a new Bill.

In June 2023, the Bail and Release from Custody (Scotland) Act 2023 (which was still being passed through parliament at the time that the current research was reaching its conclusion) set out new statutory limits on the use of remand so that it is a last resort for the court, reserved for those who pose a risk to public safety, including the protection of the complainer from a risk of harm, or to prevent a significant risk of prejudice to the interests of justice in a given case. The Act repeals Section 23D of the Criminal Procedure (Scotland) Act 1995 and also seeks to give a greater focus to the rehabilitation and reintegration of people leaving prison to help them resettle in their communities. Overall, the changes (once in force) are designed to lead to greater public protection and victim safety and are intended to reduce crime, reoffending and victimisation.

Further data and evidence

There are a number of published sources that provide detail on recent and historical trends in criminal justice. The Scottish Prison Population Statistics provide annual updates on the prison population and flows in and out of custody, and the Justice Analytical Services Safer Communities and Justice Statistics Monthly Reports provide monthly snapshots of the prison population. Both series provide prison population breakdowns to allow examination of trends in remand.

The Justice Analytical Services Occasional Paper 'Sheriff Courts - remand and bail outcomes' explores bail and remand decision-making trends from 2016-2021 and the factors associated with different outcomes for the accused in criminal cases. Statistics are also available on Journey Times in the Scottish Criminal Justice System. This series assesses an accused person's criminal justice journey time from offence date to case conclusion or verdict, analysing the average length of journey and how journey times have been impacted by the COVID pandemic.

Taken together, these sources provide the context in which to read the views expressed within this research report.

Methodology

While Phase 1 of the research adopted a quantitative survey approach, Phase 2 involved qualitative interviews only.

Fieldwork was conducted across six different case study areas, which were selected on the basis that they provided broad geographical coverage, as well as a mix of courts (from different Sheriffdoms) where historical data (provided at the outset of the project by the Scottish Courts and Tribunals Service) showed high, medium and low levels of remand. The final sample included:

- Area A: High Use of Remand, Mainly Urban
- Area B: Low Use of Remand, Mainly Urban
- Area C: Medium Use of Remand, Mixed Urban/Rural
- Area D: Low Use of Remand, Mainly Rural
- Area E: High Use of Remand, Mixed Urban/Rural
- Area F: Low Use of Remand, Mainly Rural

The only 'gap' identified in the above selection was a low workload court with a high use of remand but no such courts were available for inclusion in the research on the basis that to do so would make them too identifiable. In some of the sampled courts only a small number of Sheriffs, COPFS staff, defence solicitors and social work staff would have been eligible to take part in the research, thus making them too identifiable if court and place names were disclosed. To protect anonymity of all who took part, place names were removed for analysis and reporting purposes.

Following advice from a Research Advisory Group convened to oversee the research, the main stakeholders of interest that were identified to input to the

research were members of the Judiciary, Justice Social Work staff (including both qualified social workers and other support staff), Defence Solicitors and Crown Office and Procurator Fiscal Service (COPFS) representatives. In each area, requests were made to gatekeeper organisations and representative bodies to share information about the research and invite up to three interviewees in each stakeholder group to take part, (recognising that in some areas the number of eligible staff available for interview was lower than this threshold). Advice was also given that recruitment of just one COPFS representative per case study area would be more appropriate for the research with local Procurators Fiscal Depute interviews being complemented by interviews with members of the COPFS National Initial Case Processing (NICP) team, since the majority of cases reported to COPFS are marked by this team[3] (discussed more below).

All participation was on a voluntary, self-selection basis and all interviews were carried out on a one-to-one or two-to-one basis, using either face-to-face, online or telephone interviews, depending on participants' expressed preferences. Interviews were digitally voice recorded with permission of respondents and transcripts were produced for analysis purposes.

Respondent Profiles

A total of 60 people took part in qualitative interviews over a six month period across the six case study areas. Table 1 shows the distribution of the sample by case study area and respondent type.

[3] NICP specialises in the consideration and marking of most, but not all, summary custody reports and report level reports. Until recently almost all undertaking cases were marked in the Sheriffdoms. However, this changed in August 2022 when NICP took over responsibility for the marking of undertaking cases within the Summary Case Management (SCM) pilot courts. In summary, NICP deals with: summary level custody cases, summary level report cases and summary level SCM undertakings. NICP does not however deal with all cases reported to COPFS. Taken from: Summary of Case Marking Arrangements in COPFS, Bernard, D. (2023) Procurator Fiscal, NICP (Unpublished)

Table 1: Distribution of respondents by Case Study Area and Type

Case Study Area	Judiciary[4]	Social Work[5]	Solicitor	COPFS	Total
A	2	3	3	1	9
B	3	3	4	1	11
C	2	4	3	1	10
D	2	4	3	1	10
E	3	3	2	1	9
F	2	3	2	1	8
COPFS NICP[6]	-	-	-	3	3
Total	14	20	17	9	60

Research Caveats

The main focus of the research was to better understand the process of bail decision making and the research was, by design, an exploratory study. As a result there was no attempt to evaluate or review current practice, rather to describe and present the nuanced details around how the decision making processes operate day-to-day.

While comment was made on the perceived strengths and weaknesses of the current process among those who took part, and respondents were invited to share views on what criminal justice stakeholders needed to best be supported in their decision making, the research stopped short of attempting to make recommendations for system or legislative change. Instead, it was always intended that the research would contribute to and complement wider existing evidence to allow justice partners to understand what 'works well' and inform improvements, if needed.

In a similar vein, no attempt was made to position the findings from this qualitative exercise in the context of statistical data that is already regularly and independently published with regards to such things as the current and historical number of

[4] Members of the Judiciary who took part were all Sheriffs. While no Judges took part in the interviews, Sheriffs who were interviewed worked on both solemn and summary cases.

[5] Social Work representatives included a mix of fully qualified social workers, social work assistants and court officers as well as non-social work qualified staff working in relevant support roles.

[6] The National Initial Case Processing (NICP) team within COPFS works across multiple locations.

accused released on police undertakings around the country, numbers of accused being held on remand, the number of people subject to bail supervision, EM bail, bail with special conditions, etc. or cases subject to bail review or appeal. Contextualising the findings in this way was outwith the scope of the current work but it is nonetheless stressed that the findings should be considered alongside already published evidence in the field to provide a holistic understanding of the nature and use of bail and remand.

In the absence of reliable independent data, most participants were reluctant or unable to comment on such things as the proportionate split in decisions in favour of bail and/or remand, or to offer firm estimates of their respective use between Summary and Solemn cases. Instead, much of what respondents reported was experiential learning built up over a significant number of years of shared professional practice. Where respondents presented views on the perceived use, uptake, effectiveness, etc. of various alternatives to remand, for example, this was not challenged but nor should any assumptions reported here be taken as fact.

While the research was successful in reaching a broad range of justice professionals working in key roles in the bail and remand decision making process, there was no engagement from Police Scotland. A decision was made early on that they played no substantive role in the bail and remand decision making process since all involvement would be before cases were marked by the Crown. Given some of the findings that emerged, however, it may have been useful to have included a view from the police, specifically in relation to what informs their early decisions to hold an accused in custody or release on an undertaking[7], as well as any variations in local practices regarding the format and content of reports submitted to the Crown and the sharing of information between the police and other partners, e.g. social work teams and solicitors. This is recognised as a gap in the research.

The research commenced pre-COVID and was paused during lockdown restrictions, with significant changes to the legislative context being made in the period over which the research ran. Similarly, initial hopes to triangulate survey data from Phase 1 of the research and qualitative data from Phase 2 alongside independent observation of cases progressed through court did not go ahead. This was largely due to some of the restrictions put in place during COVID-19 which prevented in-court fieldwork. Although these were removed at the time that qualitative interviews finally got underway, the project had already been re-scoped with observations being excluded due to time and practical constraints. Again, this means that it was not possible to verify some of the practices reported by staff working in local courts.

As with all qualitative exercises the number of people who took part was relatively small in comparison to the eligible population of judiciary, Crown, defence and social work. With the exception of interviews with defence solicitors (who were

[7] See: Lord Advocate’s guidelines: Liberation by the police | COPFS

contacted via a public call for participants), numbers of interviews with judiciary, Crown and social work were controlled by their respective gatekeeper organisations in line with agreed protocols for government research and were deemed to be sufficient to provide representative coverage of the wider professional groups' views and experiences (whilst minimising burdens on each organisation through their involvement with the work). While the views presented are diverse and offer a valuable and rare insight into the day-to-day practices of those involved in bail and remand decision making, they should not be interpreted as fully representative, especially given that a sampling approach to the work was undertaken.

Finally, for ease of reporting, terms used by respondents with reference to other stakeholders were left unaltered, however, this means that presentation of findings is not always consistent. For example, terms including Crown, Prosecution, Fiscal, Depute and Procurator Fiscal were all used interchangeably at times with reference to Crown Office and Procurator Fiscal (COPFS) staff. Similarly, terms including Defence and Agent were used interchangeably with reference to solicitors acting on behalf of accused (also referred to as 'clients' by both defence and social work staff). While the term 'judiciary' has also been used, in most cases, this refers only to Sheriffs as no Judges took part in the research. Appendix A provides a list of Key Terms.

With these caveats in mind, the remainder of this report sets out the findings from the research.

Setting the Scene

Roles and Responsibilities

The majority of criminal cases in Scotland are dealt with in the country's Sheriff Courts, with only the most serious cases, such as murder and rape, being heard in the High Court. Cases in the High Court, and some cases in the Sheriff Courts, are heard by a Sheriff/Judge and a jury (solemn procedure), but less serious cases are heard by a Sheriff alone (summary procedure). The maximum penalties that a Sheriff can impose in any given case are set by law, with the Scottish Sentencing Council being responsible for preparing sentencing guidelines for the courts.

Anyone appearing at court has the right to be legally represented by a solicitor to help them present their case, defend their position and guide them through court procedures[8]. Solicitors, or defence agents, may be either privately engaged by an accused appearing at court or may work for the Public Defence Solicitor's Office (PDSO) - a national team of publicly funded, specialist criminal defence lawyers who can represent clients in any court in the country.

The Crown Office and Procurator Fiscal Service (COPFS) is Scotland's prosecution service and death investigation authority. COPFS receives reports about crimes from the police and other reporting agencies and has responsibility for deciding what action should be taken, including whether there is sufficient evidence to prosecute someone in court. All COPFS decisions are made independently and in the public interest and all decisions follow the process set out in the Prosecution Code.

Routes to Court

Cases are reported to COPFS under three reporting procedures - custody cases, undertaking cases and report cases. An assessment by the marker to the Crown's attitude to the accused being admitted to bail is carried out in all custody and undertaking cases and in some report cases where the police request that a warrant for the apprehension of the accused be obtained to commence proceedings.

Custodies

In relation to custody cases, there is an expectation that all custody cases will be reported to COPFS by 9am. However, cases are frequently reported later in the day, particularly those involving more serious or complex offences. The volume of custody cases reported to call each Monday is always higher in comparison to the remaining weekdays, particularly in view of the potentially higher volume of arrests over a weekend period.

[8] See: Law Society of Scotland | Law Society of Scotland (lawscot.org.uk)

These cases, once received, are moved into geographic "trays" and markers (whether from the National Initial Case Processing (NICP), Sheriff and Jury or specialist teams) access the cases via the trays to mark them.

Upon receipt of a custody report, the legal marker is responsible for:

- careful consideration of the custody report submitted to assess the facts and circumstances of the case and the evidence available
- identification, and instruction of, any further enquiries which are necessary. Further enquiries are often instructed in a custody case to address evidential issues or to provide further information to assist the legal marker in the decision-making process
- liaison with external colleagues in cases where the accused is suffering from, or is suspected to be suffering from, a mental disorder. In such cases, the legal marker requires to request any necessary mental health assessment, monitor progress of the assessment process and discuss the results of the assessment if required
- reaching a marking decision based on the facts and circumstances of the case, the available evidence and COPFS policy including the Prosecution Code
- application of the marking decision and preparation of the case electronically. Preparation of the case involves the drafting of charges, the drafting of instructions which require to be sent to the Reporting Officer, as well as the drafting of instructions to be followed by the depute dealing with the case in the custody court including in relation to the consideration of bail.

Cases assessed as appropriate for solemn proceedings are triaged by NICP legal staff and referred to relevant specialist teams across COPFS to be marked, including Sheriff and Jury teams within each of the six Sheriffdoms and National High Court teams specialising in sexual offences, major crime and homicide. If such cases are deemed unsuitable for solemn proceedings, they are returned to NICP legal staff to be reconsidered, marked, and processed.

Administrative staff assist the legal markers in the electronic processing of custody cases. This assistance includes the generation of case-related documents including those served on the accused and those used by the Depute in the custody court. If court proceedings are taken, then the case is marked and then printed in the local office so that papers can be lodged and served at court. Overall, there are a significant number of legal and administrative work steps involved in the marking of each custody case.

Undertakings

Summary undertaking cases are marked by the NICP team. This is managed through allocated resources on a rota and the marker will mark the case from an allocated tray. Local Deputes in the six Sheriffdoms currently have responsibility for the marking of all summary undertaking cases and are generally allocated time on

rotas to mark undertaking cases in their area in advance of the court undertaking date.

Report Cases

Summary Report Cases are marked by the NICP team. Specific time is allocated to markers on the rota to allow them to mark report cases. NICP legal and administrative managers monitor the throughput of the marking of report cases to ensure they are marked timeously and within any legal time bar period. Where a report case is triaged as being appropriate for solemn proceedings, these cases are referred to the relevant team and are then marked and processed by those teams.

In reaching a view on the Crown's attitude to bail, the marker will consider a number of factors including the circumstances of the case, the accused's previous offending history, the likelihood of re-offending if at liberty and whether special conditions of bail being imposed as opposed to the accused being remanded in custody would provide sufficient safeguards against the risks present. These factors are all considered within the wider framework contained within Section 23C of the Criminal Procedure (Scotland) Act 1995.

Presentation of Arguments in Court

An accused may appear at court on several occasions - an initial hearing or first calling (the first time a case is called in court) where the case is presented, intermediate hearings where certain issues affecting the case may be considered before it goes to trial, and a trial hearing whereby decisions are made in relation to the guilt or innocence of the person involved, considering all available evidence and arguments put forward.

A separate sentencing hearing may also take place. While the law in Scotland allows anyone accused of a criminal offence to remain in the community pending trial, including by granting them bail, and the Criminal Procedure (Scotland) Act 1995 (the 1995 Act) provides for a presumption in favour of bail for criminal cases in Scotland, there are circumstances in which a presumption in favour of refusal of bail operates. At each stage of a case appearing at court, therefore, representations and decisions regarding bail (or refusal of bail) may be made. Both COPFS (represented by a Fiscal or Depute in court) and Defence present their arguments to the court in relation to whether bail should or should not be granted.

The availability of clear, relevant, reliable and good quality information and/or submissions from both the Crown and Defence is essential for assisting Sheriffs in their decision making. This includes information on not only the context, nature and seriousness of the alleged offence and the circumstances of the accused, but also Crown/Defence attitudes to the case against the stipulations of the Criminal Procedure (Scotland) Act 1995.

- Information typically provided by the **Crown** includes:
    - details of the alleged offence

- previous offences/past criminal record
    - non-compliance with court orders/information on any previous breach of bail or bail conditions, and failure to appear
    - relevant public safety information.
- Information from **Defence** typically includes:
    - extenuating circumstances surrounding the alleged offence
    - information about stability, i.e. in employment, housing, caring responsibilities.

Based on all the evidence provided, the Sheriff (or Judge in more serious cases) will make the final decision on whether to refuse bail for an accused person in any given case. Whenever the court grants or refuses bail, it must state its reasons for doing so.

Remand and Alternatives to Remand

Where a decision is made to refuse bail, an accused (or someone found guilty of a crime awaiting sentence), will be held in custody in the Scottish Prison Service (SPS) estate.

Where bail is granted, a number of standard bail conditions apply as set out in Section 24 (4) of the 1995, that the accused (a) appears at the appointed time at every diet relating to the offence with which they are charged of which they are given due notice; (b) does not commit an offence while on bail; and (c) does not interfere with witnesses or otherwise obstruct the course of justice whether in relation to themselves or any other person.

These standard conditions may be supplemented by additional special conditions of bail, by bail supervision or by Electronic Monitoring on Bail (EM bail). Responsibility for assessments for suitability for supervised bail and EM bail fall to justice social work teams in each of Scotland's 32 local authorities. Justice social work, in collaboration with partners (such as the third sector) involved in a case as appropriate, will assess people for suitability for bail supervision and EM bail based on all information available. Justice social work services also have responsibility for delivering bail supervision where granted.

Against this backdrop, the remainder of this report sets out the findings from the research. It should be noted that decision making in relation to report cases featured far less notably in discussions, not least because they were less likely to require a bail or remand decision (the court would usually ordain the accused to appear in a reported case). In contrast, custody summary cases attracted the most discussion, accounting for the bulk of court workload/initial appearances at court. It should also be noted that, while the above summary presents the 'standard' or 'typical' way in which cases get to and are handled at court, the specific inputs of different agencies to the process, and variation in local practices was something that emerged as a key finding from the research itself.

Legislative Grounds

Respondents consistently reported that The Criminal Procedure (Scotland) Act 1995 is the cornerstone of all decision making in respect of bail and remand (with Sections 23C and 23D[9] being particularly important). The Act is the central element around which all decision making is hinged and is of equal relevance and influence in both summary and solemn cases. The Interim Findings report sets out the legislation in more detail.

Section 23C Consideration

Nature (including level of seriousness) of the offences before the court

The nature (including level of seriousness) of offences was described as "highly influential" in Crown decisions to oppose bail primarily because it was seen as the key indicator of the danger that the accused may present to the public and witnesses. In some cases, the nature of the offence would be so serious that bail would be opposed on the basis of the risk to public safety even where no other factors apply, i.e. some offences would occasion an opposition based entirely on their seriousness (e.g. murder or prolonged domestic abuse):

> "…this will form part of our decision making and can often be an indicator in worsening behaviour or behaviour that has become a course of conduct, e.g. against a domestic partner. This would indicate that there is a significant risk they will reoffend and if/when they do, the level of their offending will be more serious and therefore pose a greater risk to the public and/or individuals." (COPFS)

Sheriffs also stressed that the **seriousness of the current offence** was paramount in their determinations (with decisions in solemn procedure even more likely to have seriousness at their heart than summary procedures), e.g. the nature and seriousness of the offence they have currently been charged with and whether this triggers the requirement to refuse bail in line with the 1995 Act.

The nature of any previous convictions of the person (including analogous offending)

The nature of any previous convictions of the person (including analogous offending) was again described by the Crown as highly influential in their decision making, and could be sufficient for opposing bail on its sole merit (especially if previous offending was very similar to the new offending). It was noted that the nature of previous convictions could demonstrate that the accused has a preferred method of offending, as well as demonstrating risk of commission of further offending and/or being of danger to the public:

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[9] As above, the Bail and Release from Custody (Scotland) Act 2023 repeals Section 23D of the Criminal Procedure (Scotland) Act 1995.

> "…this is most often the first and most determinative factor in our decision to oppose bail (or not) and is often the first reason cited by Sheriffs in their refusal of bail. Analogous offending is a key indicator that the accused is continuing to offend and will continue to do so if released." (COPFS)

Other considerations may include the disposal of any analogous cases and any corresponding increase in tariff of disposals to ascertain likely outcome in the current case.

While an accused having a detailed criminal history was seen as central to informing bail and remand decisions, it was noted that only in some cases did Standard Prosecution Reports (SPRs) contain conviction details from other UK jurisdictions and even less frequently was information available regarding any non-UK convictions. This was something which, if provided more routinely, would facilitate decisions for all parties.

The nature of any previous convictions of the person (including analogous offending), was also the second most frequently cited factor influencing Sheriffs' decisions. Sheriffs noted that these were considered as key risk indicators when considering bail - the only exception being if there was a long delay (see following section) between earlier and current offences. This may lead Sheriffs to request further information on changes to the accused's personal circumstances in the period between previous and current offences which may assist in decisions.

How recently other offences were committed

Again, for the Crown representatives, data regarding the recentness with which other offences had been committed was described as playing a key role in decisions as it could help to demonstrate any pattern of offending or risk of re-offending and whether the accused was targeting a single or multiple victims/complainers. This information was also described as useful insofar as it may yield arguments that certain specific sections of society are not safe if the accused was to be at liberty:

> "…this is very relevant. Where an accused's record is of some vintage this can often persuade the Sheriff that the accused can be trusted and the new offence before the court is a one-off. A period of desistance would weaken Crown opposition to bail. A very recent record, especially with analogous offending, is an important factor." (COPFS)

Any gaps in the record might also be considered alongside any lifestyle factors which may have contributed to the latest offence (e.g. recent return to drug/alcohol use, recent death in the family acting as a trigger, etc.). Consideration of the disposal of the previous analogous convictions would again be considered, it was explained.

A period of desistance following a prolific record was not always seen as a good reason to support bail and it was noted that the weight of the record and other factors were also likely to be considered:

> "…we would probably still oppose [bail] regardless of whether there's been a period of non-offending. I do think a lot of the time though you can kind of guess where the Sheriff's going to go with it if there is a significant gap, and I suppose as well, it depends on how significant your other factors are. So if you still had a case, for example, where the record for 20 years was really quite intense, a lot of analogous offending, a lot of breaches of bail and then there was a gap…it looks great. But that probably wouldn't outweigh our decision based on everything else we know about it to then not oppose bail." (COPFS)

Evidence of escalation in offending

Evidence of escalation of offending was perhaps seen as slightly less influential than other features of an accused's history and one COPFS respondent indicated that, on its own, it was not necessarily a reason to oppose bail. It could, however, be used alongside other features (in particular the types of offending being escalated) to present a case for opposing bail:

> "…I would suggest this is relevant and would be mentioned in Crown opposition to bail but I wouldn't say this is one of the key reasons which the Sheriffs would cite in their refusal of bail (that I have observed). It can be more relevant in cases where the accused's previous convictions perhaps are not as lengthy." (COPFS)

One COPFS respondent also indicated that they used this in tandem with Section 23D arguments (discussed more below) to guard against exceptional circumstances and to demonstrate "that the accused is contemptuous of the criminal justice process" (COPFS).

Previous behaviour whilst on bail (including compliance, previous breaches and failures to appear and previous breaches of other court orders)

Again, previous behaviour whilst on bail was described by Sheriffs as being very commonly relied upon by the Crown and the Court, with COPFS respondents noting that it often indicated concerns as to commission of further offences, future failure to comply with bail conditions, failure to surrender and likelihood of custody (with breach of orders suggesting contempt of same).

Similarly, solicitors noted that the record of the accused alongside their compliance with previous orders played heavily in their assessment of likelihood of bail being granted:

> "…consistently, it's substantial risk of reoffending by virtue of their record and demonstrable failures to comply with court orders. That's what I'll hear frequently from the bench, that you've been put in a position of trust before, you've not upheld that trust, so I'm not going to trust you on this occasion." (Solicitor)

Sheriffs confirmed that previous behaviour while on bail was considered as a key indicator of likely future behaviour in the current case. If an accused had complied with bail and bail conditions previously and had not committed any further offences while on bail, this would provide the Sheriff with more confidence that bail would again be appropriate. However, if an accused had multiple serious breaches of bail or bail conditions previously, or had committed further offending, then it would be felt that the accused would be unlikely to comply with bail going forward:

> "Offending whilst on bail, other convictions with a bail aggravation on the record are very relevant because they indicate to me that someone in a position of trust from the court…has continued to commit offences, the bail has not been a deterrent to reduce offending." (Sheriff)

> "…if someone has a clear pattern of breaching bail and convictions for breaching bail, then that's a warning sign… The fact that someone had a breach, or a number of breaches of bail wouldn't be enough of itself for me to tip the balance towards remand, but it would certainly be something that I would give significant weight to in deciding whether to give someone bail or not." (Sheriff)

Of lower importance in the order of considerations for Sheriffs was the risk of failure to appear at future court diets. While previous behaviour was seen to be indicative, Sheriffs tended to note that failure to appear would need to be severe, prolonged and prolific for this to be the reason why they would remand someone to custody. Sheriffs did not tend to feel that this on its own was sufficient reason to remand someone, but may be important in combination with other factors, or in a small number of particularly prolific cases - absconding by the accused which required extended police resources to find the accused was more likely to result in the use of remand rather than instances where accused simply did not turn up at court dates.

Overall, most respondents concurred that a combination of all of the factors set out in Section 23C of the Act, alongside the particular facts and circumstances of a case, determined all decisions about whether an accused presents a risk of re-offending and whether their bail should be opposed. In general, however, the nature of the offence (especially where the accused has a history of similar, recent offending) and of previous convictions were the two factors which perhaps carried the most weight in decisions to oppose bail (by COPFS) and refuse bail (by Sheriffs):

> "[previous convictions] …demonstrates a pattern and "hard-wired" behaviour of the accused. Where the Court's currency in determining bail is risk, a proven career offender is a greater risk of committing further offences." (COPFS)

> "It is hard to pick one as they are all balanced - but it is fair to say that the risk is greater with more serious cases where the accused has a track record of not adhering to bail." (COPFS)

One Depute noted that these two factors (i.e. the nature of the offence and the nature of any previous convictions) often “go hand in hand”. They suggested that, more often than not, there were links between the current case and previous offences, even where they are seemingly non-analogous. It was suggested that there can often be a pattern whereby committing offences becomes a coping mechanism for some people when things are not going well or they experience negative circumstances. Even where there has been a gap in offending, this does not necessarily mean the offender has reformed, but rather indicates periods of stability or positive circumstances over that period. Some respondents indicated that the court would acknowledge reform where necessary, but would also caveat this where needed.

Assessing Substantial Risk

Having regard to the statutory provisions of Section 23C (1) of the Criminal Procedure (Scotland) Act 1995, both Sheriffs and COPFS respondents were asked what were the main types of information that were sought in relation to assessing ‘substantial risk’ (i.e. to the accused/offender, victim/witnesses, and/or the public). Responses were common between the two groups and included:

- a detailed understanding of previous convictions
- the accused’s pending cases for which s/he is on bail/any current bail orders
- a detailed understanding of (for example) the injury caused in the current matter, or the value of property stolen
- any comments to police that the accused is going to seek retribution are relevant to potential interference with witnesses/further offending
- information regarding whether offences are aggravated[10]
- any intelligence that the accused is a flight risk will be relevant to the risk of absconding
- previous reports to police
- information provided by witnesses or complainer.

Sheriffs cited risk to public and community safety as being perhaps the main consideration, and possibly one of the most significant factors weighing in bail/remand decisions, after offence nature and seriousness. Assessing whether the accused was likely to interfere with victims/witnesses was also seen as important, although it was noted that interference was ‘rare’ in most types of case (the exception being domestic abuse/harassment cases).

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[10] Offences are considered “aggravated” - which could influence sentencing - if they involve prejudice on the basis of age, disability, race, religion, sexual orientation, transgender identity or variations in sex characteristics (sometimes described as "intersex" physical or biological characteristics). Statutory domestic abuse aggravations are also in place. For a full list of aggravators see: Criminal Proceedings in Scotland, 2021-22 - gov.scot (www.gov.scot)

When asked what further information might assist them (if available) when assessing ‘substantial risk’, COPFS respondents suggested:

- having clear references for previous convictions to help identify patterns/types of offending
- more detail about the circumstances of the offence, which is often challenging/impossible when dealing with hostile witnesses
- knowing the position put forward in supervised bail assessments at an early stage (discussed more below).

Further information regarding protective factors was also seen as something which might be helpful if it was made more routinely available:

> “Although not often included in the report, it is helpful if police highlight any protective factors which may assist the accused in complying with a bail order e.g. the accused now has settled accommodation, the accused resides with a parent / partner who is supportive of court proceedings and of ensuring the accused complies.” (COPFS)

Similarly, better understanding the relationship between the accused and complainer and any ‘non-criminal’ yet relevant previous behaviour was seen as something which may be helpful in SPRs to assist Crown assessment of risk:

> “…sometimes victims make comments to police about previous incidents that potentially don’t prove or don’t constitute offending behaviour, however, it would be useful to have this information in the remarks section so that it can be considered in terms of the accused’s likelihood to reoffend.” (COPFS)

Generally, however, COPFS respondents indicated that there was little more than is already available which would assist with assessing risk:

> “It really boils down to the current allegation and the accused’s track record to be honest.” (COPFS)

Similarly, most Sheriffs cited the nature and number of previous offences and previous non-compliance with bail and other court orders as the main considerations involved in assessing ‘substantial risk’. Most Sheriffs concurred that decision making at the first hearing (mainly at custody courts) was “fast, quick, very short, done under pressure” and they could not rely on or did not want or need additional risk assessments or guidance from external sources: i.e. “we’re the risk assessors and that’s what our job is." (Sheriff)

In terms of mitigations to manage risk in the community, both Judiciary and Crown respondents typically felt there was little more available - or conceivable - than bail supervision and EM bail, namely some form of monitoring or support. Some solicitors also viewed that remand was used as the best way to manage risk:

> "…even though they're presumed to be innocent, there's the risk and the risk has to be managed and sometimes the Sheriff will say, the best way of managing that risk, I'm afraid, is a remand." (Solicitor)

The main parties who perceived that they could offer more to existing assessment of risk were social work staff (in some, but not all case study areas). Suggestions were made that 'risk' could be built into the standard assessments/information checks being undertaken by social work staff, so that it is considered in a more consistent manner. One respondent felt that social work will often hold significant amounts of information on accused persons which the court does not always ask for, so information was not always being provided in a consistent manner:

> "…we can hold a lot of information that the court doesn't have, especially if there is social work involvement, if they're on orders already or if they do have Children and Families [involvement] or if they're on [particular programmes] or anything like that, then we can hold quite a lot of information that the court doesn't have access to but don't always ask for. And depending on how busy it is on different days, then if it's not asked for sometimes… maybe they could have got more information on the decision that they're making on that day." (Social Work)

It was felt that perhaps having more contact with different agencies would be helpful in ensuring more social work input could be provided in the assessment of substantial risk. The current system tends to mean that social work liaise mostly with defence agents, whose aim/priority is to get their client released on bail. As such, defence agents do not always want social work to provide certain, potentially negative, information and therefore will not request it:

> "I suppose it's difficult because I think, the main professionals that we deal with in the court are the defence agents, they don't always want certain information that we would hold about their clients to be shared with the court because that could be detrimental for them in court and it might affect their chances of getting out or going back to their home address or something like that." (Social Work)

Social work representatives were, however, mindful of the additional time and resources that would be needed to add further considerations to the information gathering and assessment process. Particularly where cases are being dealt with at the end of the day and assessments are sought late, there was little time available to undertake the current requirements so this would place an additional burden and time delay on the process. One also noted that GDPR requirements impacted on social work and other organisations' ability to share information in some circumstances. Another respondent highlighted particular conflicts where information is marked as confidential and not to be shared, making it difficult for social work to share highly relevant risk-based information with the court.

A few also noted at various points in interviews that social work staff try to keep reports and assessment information short and succinct, whilst including all relevant information, to ensure they are easily accessible for Sheriffs, and one was

concerned that adding more information to these might not be welcomed by Sheriffs.

Section 23D

Section 23D sets out a presumption against bail for those accused of violent/sexual/domestic abuse offences or drug trafficking offences in solemn proceedings, where they have a previous conviction of a similar nature. Where an accused has an indictment conviction for violence and is appearing on petition for a violent offence, s/he will only be granted bail in exceptional circumstances. Further detail regarding Section 23D can be found in the Interim Findings report.

This aspect of the legislation was described as facilitating COPFS case marking by removing any ambiguity around how such cases should be marked (i.e. bail will generally always be opposed), leaving decisions in the hands of the court:

> "At Court, the Crown simply advise the Court what the qualifying convictions are and then it is for the defence to put forward the exceptional circumstances that the accused should be granted bail." (COPFS)

That being said, it was recognised that Section 23D cases could still be handled very differently by different Sheriffs/Judges and that 'exceptional circumstances' was a (largely) undefined, fluid and subjective concept:

> "…[Section 23D] just moves the goalposts so that what the Defence have to do before bail can even be considered by the court is they have to make out exceptional circumstances…And it's open to interpretation of a particular Sheriff what those exceptional circumstances are." (COPFS)

This flexibility/subjectivity was not, however, necessarily viewed in negative terms and indeed it was suggested that it would be inappropriate to invite a more specific definition of 'exceptional circumstances' as Shrieval differences were part of the nature of the judicial system and it would be difficult to legislate for all possible occurrences/circumstances.

Solicitors concurred that there was an inevitability of bail being opposed in Section 23D cases and that this was likely to account for some of the recent perceived increase in the number of cases where bail was refused:

> "23D's a very real issue…over the passage of time, obviously the more people that are convicted on indictable offences, the more relevant 23D becomes because then bail's only granted in exceptional circumstances. So maybe that's accounting somewhat for the remand figures as well, that now we've got a generation's worth of people convicted of indictable offences who are always going to be up against it." (Solicitor)

Again, it should be noted that the Bail and Release from Custody (Scotland) Act 2023 repeals Section 23D of the Criminal Procedure (Scotland) Act 1995. Part 1 of

the Act also makes changes to the bail decision making framework under the 1995 Act. This includes changes to the bail test so that remanding a person in custody is reserved for those that pose a risk to public safety (including the protection of the complainer from a risk of harm) or to prevent a significant risk of prejudice to the interests of justice in a given case. At the time of writing, work was underway to ensure that remand is focused on those that pose the greatest risk to public safety and that improved support is available for people leaving prison.

Process and System Influences

The Criminal Procedure (Scotland) Act 1995 (the 1995 Act) provides the cornerstone of all decision making, complemented by national guidelines for different justice partners issued by their respective parent organisations. Throughout the research, however, a number of process and system factors linked to the design and management of the justice system as a whole were highlighted as interacting with or influencing bail and remand decisions.

Early Police Decisions

While not a key stakeholder in the decision making process per se, early decisions by police to liberate an accused on an undertaking to appear at court were considered to inadvertently (although never intentionally) influence decisions in relation to bail and remand. Specifically, some COPFS staff indicated that a decision by the police to release someone on an undertaking made it "challenging" for the Crown to oppose bail since the appearance at court of someone who may have been at liberty for several weeks who has remained "out of trouble" for the intervening period between release and appearance was seen as demonstrable evidence of being trustworthy and of 'good behaviour':

> "…they've shown an element of good behaviour by that point. So by that time, it just makes it a bit more difficult for the Crown to stand up and oppose bail from someone coming in off the street who hasn't offended for a month. Whereas if the person appears straight from custody, that makes it a bit more straightforward." (COPFS)

Similarly, discussions with Defence revealed that most 'decisions' regarding bail were reserved for cases appearing from custody with people appearing from the community often automatically receiving bail, because they had already been released by the police and were at liberty:

> "I'd probably say 60-65% of work comes from that source [custody]. The remainder will be people who have been released by the police whether to be reported and cited to attend court or given an undertaking to attend court. In those kinds of cases, bail isn't really necessarily a relevant discussion that we'll have." (Solicitor)

All respondents stressed that police decisions to release on an undertaking did not explicitly bind COPFS decisions in any way, and case markers indicated that they did and often would still consider opposing bail even for those appearing on an undertaking (stressing that all COPFS decisions were made independently on review of all available evidence with the police decision to liberate being just one factor taken into account). Indeed, several of the COPFS sample also stressed that they considered the police's view on bail as non determinative and that risk was assessed objectively by prosecutors at all times.

Section 23D cases (discussed more below) were cited as a specific example of where police may favour release on an undertaking but where bail would onwardly be opposed by the Crown:

> "I have personal experience of Section 23D applying to accused yet [the accused being] released on undertaking. [The] Sheriff will occasionally state to the accused that they were very fortunate to be liberated on an undertaking." (COPFS)

Similarly, there was disparity between Sheriffs with regards to accused appearing at court on police undertaking. Some Sheriffs suggested that police undertakings influenced them in favour of bail rather than remand, as attendance at court on an undertaking was seen as indicative of likelihood to comply (and this may also weaken any argument from the Crown that bail should be denied). For other Sheriffs, police decisions to release someone on an undertaking were seen as irrelevant to the process and, indeed, some commented that they often found police decisions to release or detain an accused to be at odds with their own ideas of what would/would not have been appropriate.

In contrast, all Sheriffs indicated that decisions by the police to hold accused in custody before their appearance made no difference to their deliberations as to bail or remand. It was noted that the person could be appearing in court from police custody for any number of reasons, and not necessarily because they posed a risk:

> "So, the fact somebody has been held in custody does not influence the likelihood of me granting bail…I start with a completely clean slate at that point. It doesn't make any difference at all." (Sheriff)

Solicitors noted that a Sheriff may decline bail for someone appearing on an undertaking, although most felt that this was very rare:

> "…it's not unheard of that Sheriffs may say, actually, I don't agree with this person being afforded his liberty, they would be entitled to consider remand in custody at that point. Very rare though. I'm aware of a particular case where that happened and it caught us all by surprise." (Solicitor)

The main reported reasons that remand would be sought for someone appearing on an undertaking were if new relevant information had been received since the point of initial liberation, or if the accused had breached the conditions of their undertaking, or committed a further offence, for example. In the absence of any significant change, however, the consensus was that it was difficult to rationalise a challenge to the police decision to liberate:

> "…without any further offending, we have to be influenced by the decision the police have made. I suppose if they're [the police] on the ground thinking they can liberate and they [the accused] don't need to be held in custody, then that's

something we have to take quite into consideration as a really significant factor when we're making our decision of what we think should happen." (COPFS)

This also echoed comments that police decisions at the point of arrest and charge were noted by COPFS in determining the level of risk posed by an accused, suggesting that the police play a critical first part in the overall assessment of risk, which may carry through to later stages as the case progresses:

> "…keeping someone in custody, really, I think leaves the Prosecutor just to make the decision and it's a bit more straightforward. Whereas if they're admitted on an undertaking, that really does influence - it can influence the Prosecutor's decision a lot more." (COPFS)

Deputes noted that the issue of accused persons being released on undertakings in potentially inappropriate circumstances was largely related to COVID-19 and trying to keep the numbers in police cells low, and they suggested that the situation was better post-COVID, although they did still occasionally come across such instances. This was echoed by some solicitors who noted that police undertakings appeared to have increased since COVID-19, and concurrently that remands had fallen. There was a perceived wariness on the part of the police to hold people in custody cells during Covid and so police undertakings were used more frequently.

Indeed, any increase in the use of police undertakings might, inadvertently, influence the frequency with which bail and remand is being used. Specifically, if more accused are released on police undertakings, the number of releases on bail following initial appearance at court should also increase. Sections 14 and 50 of the Criminal Justice (Scotland) Act 2016 provide a fundamental position whereby accused persons should not be held in police custody unless it is necessary and proportionate to do so. The impact of this legislative change and the relevant police processes and procedures connected to it may directly account for some of the perceived increase in opposition by the Crown to bail that was noted among defence and the judiciary.

Time and Volume of Business

The main process or system factor influencing the decision making process was time - specifically the time (or lack of) available to collect and process all necessary and appropriate evidence and information to inform case decisions. Shortage of time was compounded by the large volume of business and number of cases that each party was working with on a daily basis. For a number of reasons linked to pressures of time, decisions were often not being made in ideal conditions:

> "[The accused's] agent has only got the papers five minutes before the hearing. The information from the Crown is very scant because they're busy and they're dealing with lots of cases. So you get a five minute hearing to hear what little information that both sides can give you, so sometimes it's very difficult to make a decision in these circumstances." (Sheriff)

> "[T]he decision maker has to make a very quick decision - on what is a very important matter - in a short period of time. The ramifications of being remanded in custody can be huge. Is the current practice for dealing with bail applications the best way?" (Sheriff)

As the sole public prosecution authority in Scotland, COPFS receives approximately 3,000 SPRs per week[11]. The volume of custody cases reported to call each Monday is always higher in comparison to the remaining weekdays, particularly in view of the volume of arrests over the weekend period. Case markers may be dealing with multiple cases at any given time, and on any given day, depending on the nature of cases referred at any time, and there is a need for most custody cases to be marked early in the morning ahead of court starting to allow all parties a chance to read and respond to the marking as appropriate.

For COPFS, the main pressure was at initial case marking stage when a lack of information in SPRs could mean a rush to obtain further information on the same day as a court appearance:

> "The volume of business can be challenging and can sometimes mean that detail is missing from police reports. This then requires urgent follow up with police so that a decision can be made. Improvements have been made recently in police reports to try and provide more background on the accused including any mental health difficulties / neurodiversity / involvement with social work, etc., but having as much detail as possible about the accused's background assists greatly in marking a case and making decisions around issues such as whether bail is opposed." (COPFS)

Similarly, with a large number of cases calling on any one court day, solicitors mentioned that the window was tight ("a mad rush") between hearing about any custody cases they were representing and actually seeing the client and other relevant parties. Usually they heard about the case either the night before or first thing in the morning. The main challenges were finding time to meet/speak with the client and accessing information on the Crown's position in sufficient time:

> "I mean, quite often for a custody court starting at 12 o'clock, the first time I'll see the charges is about half 11. If the papers came over at 10 o'clock, and there's time to look at them, I'll have a bit better idea about what to do about asking for bail and identifying issues. The earlier you get the information, the better." (Solicitor)

> "We normally have a phone call the night before from the police to say we've got so and so in custody… and they're asking for duty [solicitor]… And then we

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[11] Summary of Case Marking Arrangements in COPFS, Bernard, D. (2023) Procurator Fiscal, NICP (Unpublished)

basically just go to court the next day and then meet the client. It depends who it is. Sometimes I've seen my colleague go to the police station to speak to the client if it's somebody who we know and if it's somebody that's vulnerable or we think would benefit from having a chat with somebody before – you know, the night before, then we would do that. But 9 times out of 10, for a custody certainly, you're just finding out on the morning." (Solicitor)

"…usually, you've been arrested the night before you appear in court the next day at most and I think that your worst possible case scenario is you could be arrested late on a Friday afternoon and appear in court on Monday. That would be the most notice I would have, would be 2 days. But even then, I wouldn't know the bail situation until I'm at court that morning. I mean, ordinarily, you can make an educated guess, you know the client, you know what their previous convictions are, you know the nature of the offence and most times I can think, well bail'll be OK or bail'll be opposed. You'd be able to work that out. But say the custody court starts at 12, quite often, I won't know the bail position till half 10, 11 o'clock, about an hour before." (Solicitor)

There were several reported issues that may narrow that window of opportunity for solicitors even further, including delays to the accused being transported to court from custody (for example, travel time was noted to take up to two hours in some rural areas, however, urban courts also noted issues with significant delays in accused persons arriving at court from custody), or if there is a delay in centralised marking decisions arriving, or if there is a 'queue' of solicitors waiting to speak to the procurator fiscal about their take on bail/remand. Late arrivals of people appearing from custody was something which was seen to have escalated since the COVID-19 pandemic:

"…people aren't even arriving until midday, 2 o'clock…if there were people who weren't there in time for court previously, certainly prior to COVID, questions were asked. (SECURITY FIRM) officers were asked to come into the court and explain the situation. Now, it just seems to be accepted." (Solicitor)

Another commonly reported issue (across both rural and urban courts) was the lack of physical interview space available for solicitors to meet with their clients, e.g. only three interview rooms for approximately 20 custody cases all of which are being heard within a 2-3 hour period. Time in interview rooms had also become more limited due to competition between defence and social work (who may be carrying out supervised bail assessments):

"…if for argument's sake I was seeing somebody in the cell area, I'm conscious of the lack of space in my local court anyway, so I know that I kind of need to get in and out because (a) I might have other people to see and (b) other people actually need to get into the room as well. And we're all sort of conscious of not holding the court up as well." (Solicitor)

From the social work perspective, it was felt that solicitors took priority, with the situation/arrangements continually changing for when and how social work could access accused persons in order to conduct interviews/carry out welfare checks and assessments. This made it very difficult for social workers to manage their time and find a system/routine that worked:

> "These booths are not only used by solicitors but they're also used by social work as well…they're getting interviewed by social work automatically now for EM bail or whatever. So that just by its very nature uses up more booths and reduces the time they're available for solicitors." (Solicitor)

One solicitor commented that interviews also often had to take place in cells rather than interview rooms, which had obvious disadvantages:

> "…cells are not particularly conducive to having a long conversation. So, it makes it difficult to spend worthwhile time with somebody in - they are literally called the dungeons - and it's cold, it's damp, it's noisy and we're dealing with people who are potentially being remanded in custody." (Solicitor)

Where an accused was on a police undertaking, both COPFS and Defence reported that this typically allowed up to 3 weeks prior to the case calling and generally allowed more time for information to be gathered. Caveats to this was where accused either did not engage with their solicitor in advance of the hearing, or did not instruct a solicitor and appeared at court on an undertaking without legal representation, in which case, a defence agent would be allocated on the day. In both situations, solicitors struggled in the same way as they did with custody cases to gather the information required:

> "…people who're appearing for a cited case have got a citation through the post or, for a bail undertaking, they will ordinarily come in and see you beforehand. So you'll get a phone call from somebody saying, I'm due at court next Thursday, can I come in and see you? So, in those situations, I would have certainly 45 minutes to an hour if I needed it with the client beforehand…the more frequent fliers - guys with a record - will quite often just turn up at court…" (Solicitor)

Only one solicitor provided a counter view that it was sometimes harder to find space and time to speak with someone at court who was appearing on an undertaking, if they had not contacted their agent before appearance:

> "You have your meeting rooms in [court] and you queue to use them. But once you're in the room with your client, it's yours until you have concluded your meeting and, with a custody appearance, you do have a captive audience and you'd get that private space. With say meeting someone that's pitched up to court for their undertaking or pitched up to court for their pleading diet with the summons, it's harder to have a constructive discussion with them in the halls of court with other people walking up and down and also just - I don't know, it's just - you can't really sit down and do it." (Solicitor)

Similarly, there was more time to speak with those appearing on citation and to inform a more holistic and person-centred account of their needs to inform any bail position:

> “And cited cases obviously it’s better because we have the full citation, we’d go through the full complaint with them at that stage and take proper instructions, as it were… And you have the advantage of time as well, so that if someone is a cited case that’s a month or so away, you have the opportunity to speak with them, ask them to maybe get character references, job references, that type of thing, speak to family members if relevant, speak to GPs, that kind of thing. It gives you a lot more time to find out more about the person.” (Solicitor)

Cases being deferred to allow more information or reports to be generated was also seen as helpful as a process factor, but not necessarily helpful for the accused and/or complainer (both of whom would be looking for cases to reach a speedy conclusion).

All parties were sympathetic to the pressures of lack of time in the current system to allow respective partners the ideal space for investigation, collation and presentation of the best arguments possible and viewed this as a shared challenge impacting Sheriffs’ decisions:

> “I think it’s endemic in the system that a defence agent only knows that their client is in custody that day, they only get to see them shortly before the case calls and their information is quite limited, sometimes they’re taking instructions from the dock. So, we work with what we’ve got and we continue cases for short periods to the end of the day or the following day to try and get the information.” (Sheriff)

Centralised Case Marking and Liaison with Local Deputes

All COPFS case marking decisions are made in accordance with the prosecution policies set by the Lord Advocate included in the Prosecution Code[12] and in internal guidance to staff known as Case Marking Instructions.

In addition to this formal guidance, the main things reported to assist decision making for Crown respondents were (in order of frequency with which they were cited):

- a clear and detailed Standard Prosecution Report (SPR), containing full information regarding the nature of the offence, including antecedents
- full details of any previous convictions (including non-Scottish PCs)
- a clear understanding of the bail orders that the accused is subject to as well as any others orders of the court
- knowing the age and vulnerability of the accused

[12] Prosecution Code | COPFS

- views of complainer/(s)/witnesses in the case
- a detailed note of any comments by the accused towards the complainer/witnesses (including any evidence of attempts to obstruct the course of justice/interfere with witnesses)
- risk the accused presents to the complainer/public at large and/or risk of reoffending
- flight risk, potential to abscond or previous failures to appear
- likely disposal of the case.

The current system of case marking entails central case markers who issue instructions to local Deputes working in court, advising on the Crown's position in relation to whether bail is or is not opposed.

One of the main strengths of the current case marking arrangements was perceived to be that there is a wealth of experience and knowledge within the team which allows for cases to be marked appropriately and also quickly given the volume of cases received. NICP deal regularly with Police Case Management Teams across the country and having a good rapport and relationship with the Police means that answers to any questions regarding a report can be timeously sought and received by the marking depute.

Some scope for more fluid communication between NICP staff and local Deputes was, however, indicated:

> "The Crown provides reasoning when marking a case about why bail is opposed for the depute in court to provide the court and this usually covers all the information they have received that is relevant to the issue of bail but is only presented when the case calls. It might be there is scope for discussions prior to a case calling so that before the bail position is finalised there is discussion about what should happen but I am unsure how that could be facilitated in a custody court when the custody marker is likely working remotely and the depute in court will likely not be the person who marked the case." (COPFS)

Indeed, there was feedback from across different stakeholder groups that there was sometimes lack of detailed understanding in court regarding case marking decisions that had been made centrally but were being presented by the local Depute (noting it is exceptionally rare that the person who undertakes initial case marking and makes a decision on the Crown position on bail is the same person that will appear in court). It was stressed that, in most cases, local Deputes would take advice from the national marking hub, on the assumption that all necessary information had already been sought and collated to inform the case marking decision.

Sometimes, local knowledge had not, however, been captured or reflected in the decision and may appear too late to allow local Deputes to present an argument that differed from the central decision - in such cases, there could be questioning in court regarding the Crown's position in the face of evidence presented by the

Defence or social work, etc. While it was always possible for the Depute in court to reassess cases based on the information that they received, the timing of such information sometimes meant there was a lack of confidence in the argument being presented by the Crown (i.e. sticking to an initial case marking decision instead of offering an alternative view):

> "…most Deputes in court will heavily rely on just what has been put in their instructions and they won't change that unless they have a very good reason for doing so because they know that the marker is the person who's read the report in detail, maybe had liaison with the police, who's had all the risks flagged to them and they will generally go with what's been put there… one of the problems is the information from Defence or social work tends to come when they're sat in the court and by which point we have already marked it. And it does put the court Depute in a bit of a difficult position because you've then got somebody who hasn't fully read the report, isn't fully aware of the circumstances being given new information but maybe less sure what to do with it because they don't know the context of all of that and whether that's something that the marker's already considered or not." (COPFS)

> "I generally wouldn't go against what the Depute who'd marked the case had instructed unless there was a really strong specific reason. But in terms of my experience, the Depute that's marked the case has had a lot more time to look at it than the person in court. So, in court, when you've got a number of papers, you're just dealing with it and getting through them." (COPFS)

COPFS respondents recognised that there could be instances of uncertainty where information available to the central marker was not clear to the local Depute and vice versa, and that some earlier discussions might be useful. Time, again, often hindered this:

> "It may be of assistance to the Defence and Court to provide information on the Crown attitude to bail to inform defence agents discussion with their clients without the need to approach the Depute in Court and make effective use of Court time. However, there may be occasions where information not available to the marker is available to the Depute in Court and they would be required to consider the matter further." (COPFS)

Similarly, some solicitors raised reservations about central marking because of the lack of local knowledge of such markers, while others suggested that experience and seniority of Deputes in court influenced how willing or likely they were to challenge central marking colleagues' decisions:

> "Sometimes that can be a bit impactful here because they don't know… the locality or they don't know the individual. Whereas sometimes if it's local Fiscals marking it, they'll know the background to somebody or they'll have a bit more information as to their circumstances." (Solicitor)

> "I think they're quite good at going against the central markers…they're - I mean, the younger ones, the more junior ones won't, but they will normally go back and speak to a senior depute in their office if they think there's a decent argument and the senior deputes are quite good at going against central markers because they have more knowledge normally of the accused and situations up here. And… if they say to us, look bail's opposed and here's why and then we're able to offer a counter argument, even if it's been marked centrally, they're quite good at going against that if they think there's a reason to." (Solicitor)

Some solicitors indicated that they were unsure how the COPFS marking process worked in terms of when and why some cases were marked locally and some centrally:

> "Truthfully, I don't understand exactly how it works because I know that sometimes things are marked here locally but sometimes they're marked at a central hub but I don't know how and why that is different." (Solicitor)

Comments were also made by solicitors that, while they would prefer a local marking arrangement, the centralised approach could work and could be more efficient than at present if it was simply better resourced:

> "I don't think there's an issue with it being done centralised if it's properly resourced. I mean, if you had a marking hub that had an extra 10 Fiscals in it, then no doubt that would be a lot better. But I think the difficulty at the minute is it's under-resourced, they prioritise courts in terms of when they start and, quite often, if there's a difficulty with a case, it gets pushed to the back of the queue and you're there all day." (Solicitor)

Both Sheriffs and solicitors noted that the present system often led to challenges in court where local Deputes could not justify or robustly defend the decisions of their central case marking colleagues. In several interviews, there was a seeming lack of confidence by some Sheriffs in the Crown's stance on bail: in effect, it was suggested that the Crown opposes bail too often and without any stated justification and that this may have some connection to the recent centralisation of marking of cases[13].

As a result, two Sheriffs suggested that the number of custody cases the Crown might oppose could be in the region of 50-65 per cent, and that Sheriffs' lack of confidence in the Crown's rationale for such opposition may mean that some Sheriffs (although by no means all) may grant bail *despite* the Crown's stance:

> "[T]he Crown too often oppose bail without proper thought being given to it. And it just delays things… and I suspect it produces inconsistency in decision making

[13] In similar vein, one Sheriff also suggested that there had been a proposal recently to centralise all custody courts, with remote hearings conducted by centralised Sheriffs, a move which had been, in their view, fortuitously dropped.

because some sheriffs will remand where others would grant bail, for example." (Sheriff)

Another Sheriff offered a perception that, sometimes, the Crown were opposing bail because they felt they had to and did not want to be seen not to (and that bail in such cases might still be granted):

> "I think there are a reasonably high percentage of cases where the opposition is unrealistic… The Crown still seem to operate on the basis that there's almost a fear of not opposing bail I think maybe, or not being seen to oppose bail now. So, on a very regular basis, the court will grant bail when it's opposed." (Sheriff)

Similar sentiments were expressed by other participants too:

> "When I started as a Sheriff, the Crown opposed bail far less often than they do now. So, there's definitely a change in Crown policy in terms of opposing bail more often, significantly more often than there was a decade ago. So, 10 years ago, if the Crown opposed bail, I would have thought very carefully about whether that meant I should grant a bail order. And now, I take it as read that the Crown will oppose bail in many cases and it rarely affects my approach one way or the other." (Sheriff)

> "You know, a Prosecutor will regularly be heard to say, I'm sorry but it's been marked that way…The Prosecutor will say, look don't look at me, I didn't mark the case. They're just a conduit for the case marker who is at a computer somewhere…I can get it. You wouldn't want to overturn a professional colleague's decision, yeah." (Solicitor)

Indeed, among the judiciary, lack of detail and poorly constructed arguments by either the Crown or Defence was seen as one of the main hindrances to effective decision making. Some felt that the quality of submissions from both Crown and Defence was highly variable and often linked to the amount of experience the individual practitioner had. In any case, Sheriffs stressed that all decisions remained autonomous. Sheriffs were also keen to stress that, while arguments in court could sometimes seem ill-founded, and there were some obvious cases where the nature of the offence was the main driver for opposing bail, there was never any reluctance to move against the Crown where appropriate, especially given the presumption in favour of bail.

One final observation regarding evidence gathering to inform case marking decisions was that the national case marking approach could sometimes mean that there was difficulty for central markers to have a rapport or relationship with police case management teams in all areas. Various stakeholders suggested that a structure of case marking, in which only a small number of Deputes might deal with cases from any given region, might afford better/more efficient relationships to be developed between COPFS case markers and police case management teams. Indeed, in smaller and lower workload courts there were several examples of close

professional working relationships between Police, Crown, Defence and Social Work. Similarly, even some of the higher workload courts which were based outside of the cities reported that the local knowledge of each of the stakeholders involved in the process was something that facilitated system efficiency.

Missing Information

For COPFS staff, while detailed Standard Prosecution Reports (SPRs) were cited as the main source of information that facilitated decision making, a lack of detail regarding cases was cited as something that hindered their case marking decisions. Indeed, the absence of a detailed and thorough SPR could result in significant time being spent by COPFS marking staff in trying to unearth the necessary detail of a case to allow informed decisions to be made. The quality of SPRs was described as "variable" with some reporting officers providing additional/essential information in the remarks section of a report, whilst others do not. COPFS staff noted that there was no real consistency in the format, content or quality of SPRs both regionally and nationally. The consistency of reports was also not influenced by whether cases were appearing from custody, on an undertaking or warrant, i.e. some SPRs for custody cases might be more detailed than those prepared for undertaking cases and vice versa. In particular, COPFS staff reported that they routinely noted missing information regarding the background to an offence per se (i.e. antecedents), information regarding the current and historical relationship between the accused and complainer (including whether hostile witnesses were involved), as well as lack of information relating to housing status and vulnerabilities of the accused (including any mental health concerns).

The absence of information from COPFS, or the need for solicitors to meet with their clients *before* papers had been received from COPFS (due to shortage of time and space, discussed above) also negatively impacted the preparation of arguments for solicitors:

> "Now, there's spending time with someone before their appearance at court and then there's spending time with someone before their appearance in court with the court papers. Now, obviously, having the papers and having a note of the bail position from the Prosecutor makes it a much more focused discussion." (Solicitor)

> "…some people with undertakings do want to come in immediately from being released from police custody and want to talk about their case. But until we have the exact papers of what they're exactly charged with, our information is still very vague…I can sort of estimate what the bail position is going to be and estimate what procedure they're going to be and give them advice on that. But until we have the actual papers in front of us, which they get from the Fiscals on the day of their undertaking, you know, it's pretty much educated guesswork." (Solicitor)

The absence of information from Crown at the point of discussions meant that meetings were perhaps unnecessarily delayed. For example, as one solicitor noted,

there may be more time to speak with an accused while they are being held in police cells over the weekend before an appearance at court on a Monday morning, but without knowing the precise charges levelled and the decision of the Crown regarding case marking, discussions with the accused may prove futile:

> "I mean, a client may say - may want to speak to a lawyer but then all that he'll be able to say to the lawyer at that point is, help, I've been held in custody. And I'll be asking, what is it that you're charged with and you're facing? And then what he may have been charged with by the police may not amount to the same as what's on the court papers…So, I would be reluctant to get into too much of an involved conversation at that time until we know what it is that the client's facing." (Solicitor)

Again, Sheriffs viewed that Defence may be in a better position to access the types of 'personal' information that was currently missing from arguments presented in court:

> "I think the defence probably can get more relevant information because they're directly dealing with their client. The Crown are often relying on information from colleagues who've made an assessment of the situation based on papers. So there's not that personal connection. So often the Crown have a formulaic submission to make, if I could put it that way." (Sheriff)

Despite the Defence having better access to client information, it was acknowledged by one Sheriff that the Defence "are always hamstrung. They don't have enough time, they don't have enough resources, particularly with the downturn or the steady erosion of legal aid fees." (Sheriff)

Relationship Data and Views of the Complainer in Domestic Abuse Cases
Absent information regarding the relationship between the accused and complainer was seen as being exacerbated if information was missing regarding who the victim had been in similar previous convictions, especially in domestic abuse cases, i.e. whether one complainer was being targeted or whether the accused was acting more sporadically. The absence of this information hindered decisions regarding risk that the accused would present if liberated and whether this was person-specific or more generalised.

The routine inclusion of domestic abuse questionnaire responses from the complainer may also be helpful in SPRs, it was suggested, although it was noted that in some domestic cases complainers may fail to co-operate with investigations which meant that gathering this and other information was often impossible. Indeed, complainers, especially in domestic abuse cases, may be unwilling to give evidence against the accused or to give detail on the incident or the seriousness of the incident which would allow COPFS to make a fully informed decision:

> "…we would potentially know that something has happened and we might not know the seriousness of it, so if we can't get to the bottom of how serious it is, we can't see how serious the risk is." (COPFS)

Several solicitors concurred that more information from complainers would be helpful, again, especially in domestic abuse cases:

> "It would be useful I think if you had that, particularly in domestic cases, if you had a wee box that said, attitude of complainer, either the complainer does want this man prosecuted and wants them kept away or the complainer doesn't want him prosecuted and wants him back home. It'd be handy to know that." (Solicitor)

In particular, it was noted that the views of the complainer could often change between the point of initial contact with the police and the accused's appearance at court, and so having 'up to date' input from complainers would be helpful:

> "…you're getting that snapshot on the custody appearance, but I think it would be beneficial if there was more views taken at various time points to see if [complainers] were still supportive of the bail conditions." (Solicitor)

Specifically, in domestic abuse cases, it was noted that special bail conditions might be applied to bail which, in practice, the complainer may find difficult to work with but which cannot be lifted without positive intervention from the complainer:

> "…once they realise that there's going to be bail conditions in force, they realise, oh I don't want this to take place, I don't want to be separated from my partner. There isn't much else that can be done after someone's appeared at court, been granted bail on these special conditions, then the opportunity to review those special conditions is kind of taken out of the Defence agent's hands because it needs some positive input from the complainer to say, I want these bail conditions lifted, I'm not in fear of the accused, I want to have - I want us to resume our relationship, etc." (Solicitor)

Views were put forward that not all relevant information in this regard was always timeously disclosed to the defence:

> "Often, we need to ask the Crown…if they have views from the complainer or other interested parties. These aren't really made readily known to us, we need to actively seek that information out…It's just a case of trying to catch the Depute before the case calls, so that could be as the court is in process or if there's a gap in proceedings, somewhere you can try and nip in and have a word, but there isn't a formal mechanism to find that out." (Solicitor)

Sheriffs concurred that more information on the views of complainers in domestic abuse cases (and more generally) would be helpful in the overall decision making process, irrespective of whether this was presented by Crown or Defence:

> "…actual information of the complainer's view [would help]…for example, often the defence say the complainer is supportive of bail and the Crown say they don't know the complainer's view or neither side know what the complainer's view is. Although the views of the complainer are only one factor that you would take into account, they are obviously an important factor in domestic cases." (Sheriff)

Housing Status Information

One of the other main types of information that were cited as frequently missing in SPRs was information relating the accused's housing status/homelessness (with comments that the Crown has to oppose bail if the accused appears to be of no fixed abode, and the Act determines that the accused requires an address in the UK):

> "…sometimes in certain cases where I've had to speak to social work for something…they've said, oh well actually, we've been able to get accommodation for them and that dramatically changes the position. But, as it currently is, there's not really a channel for that information to come back to us, if that makes sense, unless we sort of go and proactively try and seek it and have those discussions. So somewhere, from either police or social work, to have that information would be really useful." (COPFS)

Indeed, earlier communication between social work and COPFS was cited as something which may be helpful in filling this gap, in cases where the Crown opposes bail only or primarily because the person does not have an address. In such cases, earlier social work assistance in clarifying likelihood of securing/confirming stable accommodation before the case appears at court may reduce the need to remand in some cases.

Housing status was also discussed in considerably more detail in relation to alternatives to remand and supervised bail (presented below).

Other Vulnerabilities of the Accused

Solicitors also noted that information regarding such things as mental ill health or other vulnerabilities was sometimes collected by the police but either not passed to Crown and/or not shared with the Defence:

> "…the police here quite often don't pass on relevant information to the Crown. Or if they do, that's then not fed back by the Crown to us. We often have clients who have quite serious mental health issues…[in one case] all of that information was known to the police, the family had made that known to the police, etc., etc. So those kinds of things, often there is a gap in the way that information is passed." (Solicitor)

> "…whilst we get court papers with the copy complaint and the previous convictions, the police will often write remarks which it's in the SPR, the Standard Prosecution Report. Now, sometimes you'll get a friendly Fiscal who will let you

see what might be contained within those remarks…There may be sensitivities about the case but certainly, for as long as I've been doing this, the remarks section isn't something that we would normally be privy to." (Solicitor)

For solicitors, the barriers to gaining information around vulnerabilities included the narrow window to see the client (discussed above), the lack of a view from the complainer (especially in domestic abuse cases) and the need to gather more 'context' information, all of which can lead to a sense that solicitors "carry a lot more work than we're paid for" (Solicitor).

Similarly, some COPFS respondents gave examples of cases where they had proactively engaged with social work and mental health practitioners, not specifically in relation to marking decisions, but to flag other vulnerability issues which may place the person 'at risk' to themselves either if released on bail or given remand (including, for example, mental health difficulties, suicidal ideation, etc.).

Overall, there were views from both Crown and Defence that for those remanded into custody, the speed with which the case returned to court may hinder the collection of satisfactory information to support the next stage of the case, i.e. where someone is remanded the case will typically be dealt with more quickly than someone on bail, and correspondingly, there is less time for all parties to prepare for the onward progress of the case[14].

Challenges with Verifying Information

Sheriffs noted that reliable, verifiable information to provide credibility around claims of stability was clearly preferred instead of relying on anecdote/hearsay from accused. This included letters from housing providers, employers or doctors where appropriate, social work reports outlining current compliance and good progress made related to other cases/sentences, where social workers or other support workers attend court to outline what support is in place and how the accused person is cooperating with their service, etc.

For COPFS, the lack of time means it can be very difficult for defence to verify information imparted by the accused:

> "So the accused can often say that they're suffering from mental disorders and don't have capacity in terms of the offence. Whereas as part of our responsibility in terms of acting in the public interest, we'll instruct psychiatric reports where it says, well actually, it's the contrary…there are going to be situations where they put information forward on behalf of their client which is not something I think we could always accept at face value." (COPFS)

[14] Noting that all cases are required to be dealt with within the applicable custody time limits relevant to summary or solemn procedure, as appropriate.

For defence, lack of time also meant that they were forced to rely on the accused's account of such factors and present this as given in court:

> "Realistically, in almost all cases, my contact's only with the client, so it's what they're telling me. So if they tell me they're working, I'm taking that at face value they've got a job. I'm not double checking it. If they're telling me they can go and stay at their mum's house then, again, usually I would take that at face value." (Solicitor)

Discussions with defence agents revealed that this problem was compounded where an accused appears from custody and has had their property removed (including their mobile telephones):

> "…a person's mobile phone is generally taken them from, people don't really know phone numbers, that type of thing. It can often be quite difficult to contact next of kin or other family members for things like bail addresses to be checked and things. That can present difficulties." (Solicitor)

> "If the phone is a relevant production in the case, then you won't get access to the phone. Sometimes if the phone's not a relevant production and it's within their property in the cells, then you can ask the PF to authorise the opening of their property bag to switch on their phone to get a phone number, to phone somebody on the off chance that they'll pick up to provide an address." (Solicitor)

It was also acknowledged that the Crown often has more time than the Defence to gather relevant information in the limited window available for custody cases, although in many cases this was still deemed inadequate. One Sheriff posited, however, that if resources were available, Crown would be ideally placed to gather much of the 'context' data that is currently reported as missing:

> "The Crown could do more because the Crown have the facilities. The Crown have had the accused in custody probably since the previous evening. The Crown could instruct the police to obtain information about employment and thereafter provide this with confirmed information about employment… [But] it's resource driven. I think they could do that. I think that historically there's been a reluctance to do that. To a certain extent, the Crown need to sign up to the whole idea of a presumption in favour of bail… there's no reason why they shouldn't make those sorts of enquiries because it's in the public interest and they're prosecuting in the public interest." (Sheriff)

Assistance from the police in gathering much of this information would also be useful, it was suggested, especially if the accused is held in police custody for a period of time before their first appearance at court:

> "The vast majority of the time when someone's arrested, they're just booked and put through the legal process, put through the police process and held for

> court…I wouldn't think the police would go and get information to assist the person's kind of prospects of bail." (Solicitor)

Timing of Social Work Input and Sharing of Case Marking Information

In a time pressured system, it was noted by all stakeholder groups that not only lack of time presented a challenge, but also the points at which certain groups became involved in a case could be confounding. Primarily, this was linked to the time at which social work staff had a chance to review an accused's position.

Importantly, this was one area of the current system where considerable geographical variation was noted across the six research case study areas. In two of the smaller, more rural, low/medium workload courts, examples were given of all custody cases being examined by social work teams (sometimes before case marking) to try and achieve an understanding of wider social needs presented by the accused. This often uncovered information which could be imparted either directly to the NICP team or to the local Depute. In other more urban, higher workload courts, this was not achievable due to volume of business and so only certain cases (i.e. those where bail was opposed) could be scrutinised in any detail by social work staff.

In all areas, social work receive the bail opposed notifications from the Crown, either throughout the day or a complete list each morning (the latter being preferred, if possible). Notifications typically contain the accused person's name, the offence and their SCRO number. Any further contact with the Fiscal then tends to be via email where the social work team have any follow-up questions or areas for clarification. It was suggested that for more serious cases, the court based Fiscal will have marked the case, in which case the social worker can go and speak with the Fiscal, but in most other cases it has to be email contact with NICP as the case will have been marked centrally/by someone not based in the court.

Delays in receiving the bail opposed cases/lists were considered to be problematic, not only for social work (in respect of the time available for them to undertake interviews and assessments, liaise with other organisations, etc.), but also for others involved in the case:

> "…we've seen some after 5pm at night in some cases…It's been like that for years though, I mean, defence solicitors hang about for hours waiting for the papers… it's very consistently bad that way… So before I even get any notification, I'd start gathering all the information and I'd speak to the solicitor, even if they've not had the papers yet, you know. I think it's good to just sort of pre-empt things and be organised, given the delays that we often get. Yeah, it's definitely in the client's best interests but I really wish it was a lot faster. It'd make a massive difference, a massive difference." (Social Work)

One Depute working in a high workload, urban area indicated that they tended not to liaise with Justice Social Work at the point of considering bail/opposition to bail as their input at this point would not likely impact on their considerations/decision:

> "I have not engaged with CJSW [justice social work] on the consideration of bail. I assess the case from a risk-based perspective and am mindful of risks posed by repeated offenders and those who are subject to bail orders. I would unlikely be persuaded by CJSW information given the court's currency is risk (my view being that past behaviour is the best indicator of further behaviour)." (COPFS)

Another Depute working in a more rural and lower workload court highlighted that they did not engage with Justice Social Work directly as they were not marking the case, but noted that case markers did liaise with social work:

> "I personally do not generally engage with them as I am not the one marking the cases and preparing the bail instructions. I understand that custody case markers do liaise with social workers in the morning to organise CPN [Community Psychiatric Nurse] assessments/bail supervision assessments etc… From a court Depute's perspective, any engagement is limited and has never (in my experience) affected the bail instructions I already have." (COPFS)

A more direct communication route between social work and case markers would be helpful, it was suggested, and could prevent the need for some of the unstructured discussions that are currently played out in court where new information is brought to the court after initial case marking:

> "Quite often social work visit the accused in the cells before a custody calls and have helpful discussions about issues such as housing or identify concerns about the accused if they were to be remanded. However, social work are often not advised of who is marking the case and therefore this information is not fed back and it might be useful to have a channel of communication in the event that social work wish to flag a specific consideration." (COPFS)

Again, the main barrier to getting the right information from the right people was time - that narrow window when custody cases become apparent to justice social workers doing bail supervision or EM bail assessments, and the volume of cases to process. Some workers will prioritise those considered to be 'vulnerable' and those which they think are most appropriate for bail supervision, not least given an assessment can take an hour or more to complete for bail supervision/EM bail.

Additional suggestions for process improvements included the need for bail supervision to be based on a fixed period of time, rather than indefinite periods. Better communication between sheriff clerks and social work teams was also encouraged regarding updated court appearances, other charges, etc.

Breaches of Orders and Failure to Appear

Three system issues arose in relation to breaches of bail orders and failure to appear, these being:

- concerns that the accused may not sufficiently understand bail orders and the conditions of bail
- concerns that the accused may not sufficiently understand the consequences of breach
- Crown, Defence and Sheriffs often not knowing or being given information relating to breaches of historical orders.

Understanding Bail Orders and Conditions of Bail
Solicitors in particular noted that there may be some issues around accused not understanding bail orders and the conditions of their bail:

> "…by the time that someone's been granted bail, then they've got one eye on the door and they want to get out and they don't want to listen to me saying, now it's very important that you don't go into that street or it's very important that you must not reply to any phone calls that she may make with you…They get it in writing from me. A letter will follow once I've done my court clean-up, so that'd be about 3, 4 days by the time it comes out in the post [and]…Clerks will print off a bail order…It's very wordy though. I think that's something that if my voice was to be heard elsewhere, then I'd be saying, what they leave court with, the explanation of the bail conditions, is not very user friendly." (Solicitor)

For social work staff this point was not negligible and discussions focused on how easy it could be for some accused to inadvertently breach conditions of bail or have sound justifications for doing so which might be overlooked in the current process.

As an aside, some defence agents also noted that the Crown often did not have up to date information on the number and status of bail orders that an accused may currently be subject to - this occurred frequently, it was felt, and could sometimes cause confusion in court.

Understanding the Consequences of Breach
In a similar way, among solicitors, there were some concerns that some accused may not fully understand the nature and seriousness of bail orders, and that in some cases, this resulted in them being set up to fail (although little more could be done by Sheriffs or solicitors in this regard, it was stressed):

> "I think they understand what bail means, I don't think they understand the consequences of failing to follow bail orders. I don't think many people understand that…I think some Sheriffs will go into quite a bit of detail about what's expected of them in terms of being a privilege of the court which has then been extended to them but further to what's really written down, they need to read the bail order and they need to understand that they could be prosecuted

for failing to follow it and could face custody as a consequence of failing to follow bail orders. I don't know what else could be done really." (Solicitor)

Understanding Historical Breaches

While Sheriffs noted that breaches of previous court orders (including bail orders) and failure to appear were significant in influencing decisions to bail or remand, other stakeholders noted that there was often little understanding of the reasons for previous breaches, and this wider context information might, in some cases be helpful). For example, COPFS marking staff would often not receive information about the nature or reasons for previous breaches and, while it was posited that defence would be responsible for providing information regarding mitigation around the offence, solicitors would often not have sufficient time to discuss this with clients in advance of their court appearance (unless the client and their offence history was already well known to them):

> "I don't think it's that often that we would look into the circumstances of in what way they breached the bail. It's more about the fact they have done it previously." (COPFS)

> "…[multiple previous breaches of bail] would suggest to me that they can't be trusted to adhere to a bail order - they continue to offend, they continue to breach bail, be that a curfew or contacting somebody. So, the more and more they're on bail, I do think there comes a point where they can't get bail again but…I wonder if the court's maybe taking into account how vulnerable the accused is or maybe their age, they might have a real lack of previous convictions?" (COPFS)

At present, only solicitors sought to obtain information on the 'reasons' for previous breaches, and this information was often collected only if time was permitting:

> "…we often have this issue with clients between bail and the Sheriffs will say, are we anticipating that they're going to say they've not obtempered court orders in the past or failed to engage supervision, etc. or bail orders in the past. So those are things we need to understand from clients as to why they didn't engage and why they now say they would engage." (Solicitor)

Suggestions were made that more routine information on the background/nature of breaches in any police report may be helpful to case markers (especially in relation to domestic abuse offences). At present, COPFS staff reported that they may need to spend additional time proactively seeking such information to inform their decisions:

> "It just says that it's a breach, it doesn't say like any specifics. But as I say, we can go on and look through their cases, it just takes longer." (COPFS)

> "…if they've been convicted of it, then we think that, in the circumstances, there must have been enough to convict them of a breach of bail and we don't really look much further beyond that, to be honest." (COPFS)

Similarly, solicitors noted that an accused's record would be explicit in showing breaches of previous court orders but that this was not balanced with information about previous compliance:

> "…a record will quite clearly show when you breached court orders. It doesn't so obviously state when you've complied with them. I mean, you can see somebody got a community payback order 3 years ago and there's no breach on the record, so you can kind of make an assumption that they did it. But it's harder to actually state with any certainty that's what happened." (Solicitor)

Overall, having more information available to the court and stakeholders at all stages regarding the reasons and circumstances around previous breaches was viewed as something which may be helpful to the decision-making process to prevent breaches being viewed solely in numeric terms.

Non-Person Centred Approaches

At all stages of the bail and remand decision making, there were observations that, while all accused were dealt with on a case-by-case basis, it was difficult to be 'person centred' (again, given pressures of workload, time and challenges to gathering information about the lifestyle factors, personal histories of accused and complainers, and the relationship between the two).

From the very first point of police detention, it was suggested that the system and parties' decisions within it could be too "formulaic" and it was often very possible to predict police decisions (to liberate or hold in custody) and Crown marking decisions regardless of the 'person' involved (the focus being very much on the nature of the offence committed):

> "I think because they're marked centrally now, there's a lack of human touch to the way that cases are marked. It's very - the policies are quite blanket - in terms of how they're applied, it's like a blanket put over it. I don't think the way that the cases are marked really lends itself to that kind of human element, as it were." (Solicitor)

Crown, in particular, were perceived to adopt non-individualised approaches:

> "…they're not seeing people as individuals…they are seeing Mr John Smith, domestic assault, here's what we want from the Sheriff. Sheriffs, as much as I fall out with them every now and then, generally speaking, do deal with people as individuals and they are doing more so now as the years go on. And most lawyers, including myself, will deal with all our clients individually. No two are the same..." (Solicitor)

The most frequently cited example of non-tailored arguments was the perception that the Crown would almost always oppose bail in domestic abuse cases and there was perceived to be a 'blanket policy' which often gave little notice to the individual circumstances of the specific case involved:

> “I think there’s a wariness from them as to, if I do not oppose bail, this complainer in this case may complain that I did not oppose bail…So they would rather say the words, ‘oppose bail’, than have the Sheriff grant bail.” (Solicitor)

> “The main Crown opposition to bail is when it suits the government policy…That’s it. Fiscals in court at the stage of bail are puppets for government policy. So, for example, the Scottish Government is taking a robust approach to domestic offending. That’s a fantastic thing to hear. What that means is then domestic offending, bail opposed.” (Solicitor)

Only Sheriffs, who were privy to all information, were seen as adopting a more holistic approach. As a result, there were some ‘norms’ which all parties seem to have accepted as inevitable, and which act as informal precedent in making decisions, especially at short notice:

> “I think, in time, you end up becoming sort of accustomed to what is likely to happen. You’ve become used to how Sheriffs behave, how they read certain things, how they might deal with certain things, you kind of become used to it all, I think.” (Solicitor)

> “A good Sheriff knows the bail submission before you’ve made it, you know, he knows what you’re going to say about the person sitting in the dock.” (Solicitor)

The lack of person-centred approaches was compounded by the fact that there is often very little opportunity in the system for professional stakeholders to have direct contact with the accused and/or witnesses and complainers (as appropriate). This potentially left room for interpretation bias to creep into information presented at various stages in a case.

The wider system itself, and the nature of legislation directing bail and remand decisions was also seen to work against a more person-centred approach:

> “It’s not really a criticism of the court as such but legislation, criminal legislation doesn’t lend itself well to dealing with people’s mental health issues. It’s quite clumsy and it’s quite black and white, it’s quite difficult to navigate.” (Solicitor)

Human Factors

While the legislation underpins all decisions with regards to bail and remand, participants in the research identified a number of human factors which inevitably interacted with the legislative framework to influence such decisions.

Consistency and Natural Variation

Most respondents from all stakeholder groups agreed that there was a lack of consistency in decisions made by different Sheriffs, although some noted that it was largely inevitable and driven by human variation in attitudes and perceptions and how the legislation was interpreted:

> "I just think a big part of it is different Sheriffs have different views about who needs to be remanded and who doesn't. You know what certain Sheriffs that, in your view, might be more inclined towards a remand and others who wouldn't…it's not just their personal opinion but it's how they interpret the legislation and they interpret risk and risk of reoffending and danger to the public and stuff. Everyone's just got their own I suppose interpretation of what would amount to that." (COPFS)

> "Sometimes if you hear it's a particular Sheriff that's on the bench of the custody court that day, you will presume that most people are going to get bailed that day. And conversely, if it's another particular Sheriff, you can presume that most people will be looking at remand that day. So, there are some Sheriffs that are more bail heavy and some that are more remand heavy, and then a few that kind of fall in the middle." (Social Work)

> "It totally depends on the Sheriffs, to be honest with you. We've got a lot of clients that will hand themselves in on certain days because they know that certain Sheriffs are on the bench and that there's a much higher chance of them getting out than if they were to go in front of a different Sheriff, for example." (Social Work)

> "There's consistency with the Sheriffs as in you can tell which Sheriff you're more likely to get bail with than not, to some extent… There's obviously softer Sheriffs and harder Sheriffs, Sheriffs that I've seen remanding clients that another Sheriff wouldn't have done in a million years." (Solicitor)

While appearing before a certain Sheriff was perceived as potentially working for or against some accused, all stakeholders agreed that this variation within the ultimate decision making by Sheriffs did not affect their own actions (case marking, client instruction, bail assessments, etc.). It was also something which was seen as unavoidable and unlikely to be affected by any legislative or system change.

Client Instructions

Similarly, while Sheriffs had the ultimate responsibility in bail and remand decisions, solicitors were keen to stress that their clients (the accused) also played a key role in the process which should not be overlooked. For solicitors, the instructions of their client heavily dictated the arguments that they were able to present in court and they stressed that they can only ever 'advise' about whether or not to seek bail (and if it was likely to be granted).

In most cases, especially where someone appears from police custody, it was noted that accused would seek bail irrespective of their agent's advice:

> "I tend to find that the clients that are held in custody tend to be those with more of a record and, realistically, their only concern is - am I getting out? If bail's OK, they will almost always plead not guilty to get out on bail and put off the evil day basically." (Solicitor)

Similarly, in most cases, solicitors would encourage a request for bail, even if they considered it unlikely to be granted:

> "I can probably cut to the chase and say I will be guided by the client and it's very rare that I would say to a client, you should not ask for bail. It's always worth asking. There may be times that you know it's hopeless, but there are times when I've asked in hopeless cases and it's still been granted…the first question when you meet your client that they'll ask you is, am I getting out today? That's at the forefront of their mind, that they want to know are they getting out and they're not going to get out unless you ask for bail." (Solicitor)

That being said, several solicitors noted that some accused do not want bail, but want to be remanded because of either drug problems in the community, or for protection, or to 'use up' some of their months of any potential sentence:

> "…you do get people that don't want bail, particularly people who have got drug or alcohol issues. Quite often, they will want a period of enforced sobriety and you will get people that say, you know, I'm in bother with drugs, I don't want bail, I want a period of remand. That happens more often than you would think." (Solicitor)

Social workers also noted that some accused persons will not pursue a bail application as they would prefer to be remanded in order to have accommodation, food, access to medical and mental health services, etc.:

> "I mean, a lot of people that lie out on the streets, sometimes a wee stint in the prison… it's almost like respite. And that sounds awful, I don't mean to say that in a way, but it's true. I've had folk say to me 'it's alright, I've told my lawyer not to move for bail, I'll just go up the road, hen. I'll just go up the road and I'll get sorted'… Because when somebody goes up to custody… they're getting their

three square meals a day, their methadone script, there's housing services up there, there's a social work service up there, there's a gym, there's various other things. So yeah, locking somebody up is not the answer I don't believe, but following on from your question, yeah I do think that happens [remand being used due to a lack of support in the community]." (Social Work)

Sheriffs commented that they were aware of the duties of defence agents to follow client instructions and this was also factored into decisions, i.e. defence may seek bail even where they know that the application has little merit due to their obligation to put their client's case.

Adversarial Nature of the Justice System

Across interviews, comments were also made which highlighted a seeming lack of collegiality in the bail and remand decision making system, which in part was necessary and inevitable given the adversarial nature of the justice system. For example, views were put forward that while information from social work teams was undoubtedly valuable and important in informing a Sheriff or Judge's final decision, it should not necessarily influence the Crown's position as public prosecutors:

> "…the Crown have got a duty to protect the public and the Crown have got a duty to say if someone should be remanded and put the arguments forward for that…I personally never have been given a bail supervision report and went, right on the basis of that report, I no longer think that I need to oppose bail. I've always kind of taken the view - right OK, that's that. I'll put the Crown's position on bail up, the Sheriff will have that, they have the Defence submission, they'll have the bail supervision report and that will all be assistance to the Sheriff." (COPFS)

It was noted that difference in views around the gathering and sharing of relevant information between stakeholders could introduce bias to the system. The clearest example of this was that most COPFS respondents viewed that there was no room for discussions between Crown and Defence ahead of the first appearance/hearing, such is the adversarial nature of the system. It was indicated that the information put forward by the defence in the court room would be unlikely to change their decisions over bail and opposition to bail. Indeed, some COPFS respondents also noted that it would be inappropriate for them to liaise with the defence before consideration of bail as it was the court's decision to make and they should not attempt to subvert this:

> "I am not minded to accept defence submissions before considerations of bail. The Sheriff is constitutionally charged with making the decision; the PF acts in the public interest as a responsible public prosecutor in assessing risk and making submissions. To acquiesce to defence submissions outwith Court could amount to a usurpation of the function of the Court." (COPFS)

One Depute and several solicitors and social workers did, however, note that there may often be human factors that only the defence may be aware of, due to the unique nature of the relationship that they develop with their client. In such cases,

pre-court interaction between Crown and Defence may be appropriate if there was specific information that may be usefully shared. While informal sharing of information existed in some areas, this was often relationship specific and boiled down to familiarity and closeness of individual practitioners working in different courts.

Again, COPFS respondents stressed that risk was assessed objectively on the basis of the information from police, the accused's record, pending cases, etc. Interestingly, for Crown respondents, evidence presented by the police was described (both explicitly and inferentially) as being "objective" compared to that provided by, for example, Defence or social work (both of which was perceived to be more intuitive, personalised or 'accused-focused'). Information from the police was not, however, always shared in equal part with Crown and Defence (some informal relationships between the police and Defence were noted, which sometimes eased the transfer of information, but this was not routine).

The adversarial nature of the system also means that partners are each contributing only 'in part' to the whole process (i.e. lack of a whole system approach). Inevitably, the decision-making process requires everyone to play a unique part and while the informing of decisions falls to the court as a whole, rather than any one entity, it was noted that the Sheriffs/Judges make the final call, in essence removing any final accountability or sense of ownership on behalf of other parties:

> "I'm not the one making the decisions. I mean, at the end of the day, it's not my decision about whether that person is remanded. All I do is decide whether to oppose bail or not - you know, it's down to the Sheriffs." (COPFS)

Social Work Presence and Input

Across the case study areas, there were also different models of social work access available, with some areas having a physical social work presence in court rooms each day, and others providing social workers in the court room only on request, or when giving verbal feedback would be quicker than waiting for an assessment report to be written (e.g. at the end of the day). Where social workers were not physically present, it was speculated that they were too busy to be able to spare someone to be based in the court room, with a few social work respondents suggesting that it had been considered not a very good use of social workers' time. Where staff were based in courts routinely, there was consensus across all groups that their physical presence in the court room did (or could) provide clear benefits.

Indeed, one respondent suggested that the fact social workers were no longer present in their local court room could have potentially eroded the relationship between the Sheriffs and the services provided by social work. They noted that Sheriffs could no longer ask quick questions or seek instant clarification, rather they would have to suspend the hearing to get social work into the court room, and this could be creating a barrier to use:

> "I think if you're there and you've got a visible presence, then [the Sheriff will] say, this is what you're doing. And if they've got any kind of questions in the back of their mind that they would like to ask, they've not got the forum to ask because you're not there - they don't want to recall the case to get you to come in, for you to go through for a case to be recalled. Court time's really valuable." (Social Work)

There was also some notable variation in the frequency and nature of interactions between Defence and social work in different case study areas. In some cases, social workers were rarely called upon on first hearing, other than perhaps to get contact details for family members (if the accused's mobile phone had been taken from them on arrest). In others, there was regular pro-active contact from social workers to defence agents and pre-emptive action with regards to bail supervision assessments:

> "…we're a relatively small jurisdiction and they will literally pick up the phone and ask us whether or not we believe our client should be assessed for bail. So, it actually comes down to us. Ordinarily, I would say yes because it's worthwhile because most people want to ask for bail so yeah, we normally would have a discussion either on the telephone or if we see them at court early enough on, social workers would then go down and see the person." (Solicitor)

In yet other areas, contact between solicitors and social workers was described as following no regular pattern or routine:

> "This could be quite hit and miss…yes, there's a regular court social worker who will have updates as to how someone's performed on CPOs and it's useful to know if someone's complying on a CPO, then there's a good chance that they will comply with a bail order. So [here] is a bit hit and miss because the criminal justice social workers aren't as regularly in attendance at custody court as they are [elsewhere]. I think it's a scale issue. There's more bodies going through [this court] than there will be at [elsewhere], so they can free up someone from the social work team…(Solicitor)

In most case study areas, however, solicitors spoke very highly of their interactions with social work and perceived no challenges in accessing the information needed to inform their arguments. Again, in areas where there were dedicated court social workers either in the court building or in the court room on the day, this was cited as particularly good practice which facilitated the bail and remand decision making process:

> "…we have got very good and experienced court social workers. They know their job. They themselves are very good at being proactive in coming to speak to us about issues. They prepare bail supervision reports, electronic monitoring reports and there'll often be a lot of useful information in those. Yeah, it's a good relationship and it's a very helpful thing." (Solicitor)

Among social work staff, there was said to be much more engagement from the Defence compared to the Crown, as solicitors actively sought out social work to provide input for their client, either in assessments for supervised bail or EM bail, or to ask for updates on how their client was engaging with any existing order which social work was involved in. However, it was said there were sometimes conflicts in the priorities and interests between defence agents and social workers, with some defence agents trying to have cases heard quickly and before social work have had a chance to submit their reports if the defence knows they might find something which would count against their client. This aside, there were no explicit calls for more or better communication between defence and social work than is currently the case.

While in most areas social workers reported that their input was usually valued by justice partners and they felt 'heard', in one area social workers reported that they were not convinced that Sheriffs and other court officials actually *listened* to their reported assessments:

> "I still think that there's potentially been occasions where I'm like, has this report been read? But I don't have any control over that because I don't know what happens when they close the [court room] door. Because there's sometimes these… occasions where some people have been given bail supervision where we have stipulated that they were unsuitable." (Social Work)

The importance placed on social work input was also described as being variable between Sheriffs:

> "It varies between Sheriffs. Some Sheriffs we're aware of are more on board with what we can offer and what our remit is. Some are just pretty much 'absolutely not' and will only seek our advice if absolutely legally necessary. For the most part, more Sheriffs will consult us and look for what we can offer…For some Sheriffs though, they just maybe have never really got on board with social work being involved in these kinds of things…There are just some very old-fashioned - not very many, maybe one or two Sheriffs that just would prefer not to include social work in any of their decision making. They just want to make them on their own." (Social Work)

Most, however, felt that, overall, social work input was valued and taken into account where it was requested and provided, even if the Sheriff ultimately decided on another outcome.

Other Considerations

Decisions in Summary vs Solemn Cases

Among the judiciary, it was implied that the more serious the offence, the more likely a Sheriff would consider remand, and indeed the Act encourages remand post-conviction under solemn procedure, not least if the likely sentence is a custodial term. However, Sheriffs stressed that each case is acted upon on its merit and is a 'nuanced' decision in terms of weighing up the seriousness of the alleged offence versus previous record of the alleged offender (apart from in cases of exceptional circumstances in Section 23D of the Act):

> "I think it's very difficult to generalise beyond saying that, in my experience at least, I would be more likely to remand someone in a solemn case than in a summary case. I mean, in general, my personal approach in summary cases is pretty liberal when it comes to bail. Whereas in solemn cases, just because of the gravity of the offences, you have to drill down a good deal further." (Sheriff)

Decisions for the Crown in their case marking followed much the same rules, i.e. the more serious the offence and the greater likelihood of a custodial sentence, the greater likelihood of opposing bail. One perceived advantage of the solemn procedure compared to summary, however, was the function of placing an accused on petition prior to full committal, as this often gave more time for the collection of more evidence to inform decisions on opposition (or not) to bail, i.e. petition was described as an effective tool to allow for the case to call but further enquiry to be undertaken. The lapse between petition and full committal also provides an opportunity for the Crown to gather more evidence and present a corroborated argument, and provides a 'buffer' in which remand is used as a low risk option while all the facts are considered:

> "So, in considering whether I'm going to oppose bail, I don't consider the weight of the evidence. I consider the risk to the public…if we can't move to fully commit, then we can't have that person in custody, even though there might still be a risk to the public, we would have to release that person either on bail or just liberate them, even though we know there's a risk because we can't hold people in custody if there is insufficient evidence against them. But at the outset, we would pursue the case on the basis of there being one source of evidence and the possibility of obtaining further evidence by instructing further enquiries and perhaps oppose bail on the basis of risk." (COPFS)

Solicitors viewed this as a "second chance" especially if a different Sheriff was hearing the case and/or new evidence had come to light in this period to show a change in circumstance. In solemn cases, solicitors were also more likely to prepare clients that bail would be refused if a guilty plea was entered:

> "If someone is pleading guilty to a solemn matter, they may have been on bail for the duration of the case but they're now pleading guilty to a serious matter and I

would be suggesting that someone ought to be advised upon pleading guilty to accepting responsibility to committing a criminal offence that is likely to attract a custodial sentence, then they should be ready for that bail to be revoked…I would always say to somebody, depending on how severe the offence was and how bad their record was, that a Sheriff in a solemn case could well be justified in saying, you've pled guilty to this, you're now remanded in custody while we investigate the appropriate sentencing options." (Solicitor)

For social work, solemn cases were also more easy to prepare for in terms of time available to collate information. Due to the system for those who appear on a petition, an accused appears initially and then again after seven or eight days (i.e. a "7 day lie down"). Therefore, if bail is refused at the first hearing it can be reconsidered eight days later, meaning social work have longer to try and source the relevant information and evidence needed to support the use of bail or any bail conditions/supervised bail/EM bail. However, it was also noted that social work is not always alerted to this to allow them the time to gather this information and they still receive very short notice requests from the defence to conduct assessments at the last minute.

One issue that was raised by social work staff was that, in solemn cases, accused persons could be subject to a supervised bail order for too long, due to the delays in the system currently and how long they would be kept on bail. They argued that reviews should be built into the process to address effectiveness and fatigue, with an aim to moving to standard bail or bail with special conditions after a suitable period of time:

"…with regard to solemn procedure…I personally have had people on supervised bail for over 2 years, which I think is outrageous, because of the backlog in the cases going through court…One guy at the end of it was found not guilty, but he could have went to prison if he failed to attend to meet up with me because it would have been a breach of bail… Now, I think what you can do on supervised bail is limited for having an impact. I think people get fatigued… I think that's one of the things they really, really need to look at is the amount of time someone's spending on supervised bail for it to be or remain effective. Because it's quite clear that the longer someone is on it, the less impact you have and the more risk of going to custody they have if it's somebody, as I said, that has not been found guilty of anything or pled guilty to anything. If you're on community service or you're on an SDS, Structured Deferred Sentence, a review date is set by the court after 6 weeks, 3 months, etc. I think the same thing should happen for solemn procedure." (Social Work)

It should be noted that some respondents, including Sheriffs, suggested that the high remand populations which were often cited in different public forums could, in large part, be explained by delays in the journey time or time taken to get a case to court for solemn cases:

> "Getting cases to trial more quickly would make a massive difference to the remand population. When we see reports that the remand population is very high… it's mainly because of the backlog of solemn cases getting to trial at the moment because of the pandemic… but that means people are remanded for a much longer period. It's not that more people are being remanded, but those that were remanded during the pandemic and those that have been remanded since are there together waiting for their trial. And until we get the backlog cleared, there isn't an obvious answer to that. I really don't think Sheriffs have an increased tendency to remand people." (Sheriff)

Overall, it was considered that there was less ambiguity and less room for subjectivity regarding 'risk' posed by an accused in solemn cases compared to summary, and this meant that decisions to remand were often easier for all to agree with.

Likely Sentencing Outcomes

Most stakeholders agreed that the likely outcome of the case (in terms of a custodial or community sentence) would also inform, but not dictate, the decision on whether to bail or remand.

Sheriffs indicated that they would be unlikely to place someone on remand where the offence would not result in a custodial sentence should they be found guilty:

> "You're really very unlikely to remand anyone who's not ultimately going to jail if you don't think that's a likely outcome if convicted." (Sheriff)

In more serious and solemn cases, it was noted that the current delays in the system meant that the use of remand was carefully considered and weighted against the likely time that could be spent on remand before the case could conclude and the likely sentence that would be imposed if found guilty. Here however, a range of other relevant factors, such as risk to the public, risk of further offending, etc. would be equally or more important and so likely sentence would be one of many factors considered.

Solicitors too indicated that likely sentencing outcomes influenced the advice they may give their clients (and that a likely custodial sentence may result in them going against the standard rule of advising a request for bail):

> "…there's a very real occasion whereby I'll be saying to somebody that there's no point in asking for bail because you will get a sentence for this and any sentence that you get will be backdated. And if someone's released on bail and then gets a sentence, then they lose the benefit of a backdated sentence. So, I do have one eye on previous convictions and the likelihood of a custodial sentence being imposed and that would play a factor." (Solicitor)

In addition, solicitors might consider giving different advice where a custodial sentence was likely and any time spent on remand could be backdated to count towards their sentence served:

> "…if somebody's ultimately going to get the jail, then there's not really much point in them getting out in-between times, they're better getting a backdated sentence." (Solicitor)

Indeed, in general terms, the factors considered for decision making at each stage in the court process were generally considered to be consistent, particularly between the first appearance and other points pre-conviction. The main change in stance for Sheriffs occurred after conviction but before sentencing (with likely sentencing outcome impacting heavily on decisions to remand where appropriate):

> "The point of differentiation is at the point of conviction I would say, and that any difference of approach there relates to what's the likely disposal. So, if it's inevitable at the point of conviction that someone is going to get a jail sentence then, of course, I would be thinking about whether that person should be remanded at that point… you've got to the point where someone has been convicted, so some of the things that you might be thinking about in the context of remand in the earlier stage disappeared because you're dealing with someone who's not accused of an offence but has been convicted of an offence. So the balancing is perhaps rather different then." (Sheriff)

Bail Reviews

While reviews were considered to be uncommon and require significant material change in circumstances, the only exception was where an accused had been held on remand for a significantly long time period, and particularly where this met or exceeded any likely sentence that would be given should they be found guilty - this was said to be happening with more frequency currently due to the backlog created by COVID-19.

Several solicitors viewed that, because of the increase in bail applications being accepted, and a concurrent reduction in remands (at least since COVID-19), there were fewer appeals against remand. In terms of bail review hearings, which had increased since COVID-19, one solicitor said that bail variation applications were 'a contentious issue' with PFs who disagreed with solicitors often on what constituted material change. Reviews, however, might be asked for where, for example, a case had been downgraded from solemn to summary and the accused had originally been remanded; because of delays by the Crown in calling witnesses or amassing evidence (e.g., CCTV evidence), gaining accommodation or employment, and the attitude of the complainer (although it was noted, in the latter case, that the seriousness of the offence would outweigh any request by a complainer that the accused should be allowed to return to the family home).

Among Sheriffs, it was felt more likely that reviews and changes during the pre-conviction stages would most likely be to amend and update bail conditions to meet changes in circumstances (e.g. to adjust curfew times to accommodate changes to working hours) rather than to fully revoke bail or release someone from remand - although the same factors would be considered as at the initial stage of decisions, e.g. nature of offence, what risks are posed, what quantity and quality of information has been provided regarding context and lifestyle, etc.

COPFS respondents posited that there was a level of variation between different Sheriffs/members of the judiciary with regards to reviews, with some seen as more 'lenient' and others less likely to grant bail on review, but with most in the middle ground:

> "In my experience I would say, for the most part, there is a consistency and you can generally guess what the decision will be, however, there are a small number of individual Sheriffs at either end of the spectrum who tend to be more lenient or stricter respectively." (COPFS)

A final specific area in relation to existing practice which some solicitors viewed as potentially problematic was miscommunications in domestic abuse cases where complainers wished to see special conditions of bail removed, but this was not communicated to the accused's defence team:

> "…if a complainer was so minded to seek or to support the bail conditions being removed, then we're reliant on that complainer contacting the PF, contacting their own lawyer and then that filtering back to us, to say, this person does not support these bail conditions, you may wish to lodge a bail review. Now, I'm sure there are many, many times that I don't get wind that that is what they want to do and I think that's a difficulty in the system." (Solicitor)

Bail Appeals

Bail appeals were noted to be rare. Instances which might cause the Crown to appeal a decision to admit an accused person to bail, tended to focus on 'exceptional circumstances' and threats to others from the accused being on bail/in the community:

> "Where there are exceptional circumstances suggesting that the accused poses a truly significant and serious risk to a witness(es) and there is specific intelligence to that effect from the police, or there is a significant, sustained, serious course of conduct being perpetrated towards a witness. I haven't often come across cases where the Crown bail instructions note that any decision to bail an accused should be appealed…" (COPFS)

Demographic and Social Factors which Impact Decisions

When asked about other factors which may influence decision making, demographic and social characteristics were largely seen as secondary to offence

histories and the risks posed by the accused to others, and they were generally not considered to be the determining factors in Sheriff's decision making. It was said that these would only be considered in borderline cases in order to help assess the risk posed and whether there were mitigating circumstances for/against the use of bail/remand. The main nuances were:

Gender/Sex
This was not typically considered to be a major factor in the decision-making process. It was noted that the types of crimes which men and women are generally accused of varied and therefore this created differences in decision making, but this was linked to the nature of the offence rather than the accused person's gender. A person's caring responsibilities (discussed below) were also considered, and as women more often had significant caring responsibilities, this may also generate a gendered difference, but again the decisions would be driven by the caring responsibilities themselves, rather than gender:

> "A female accused is more likely to have childcare responsibilities… Female accused tend to have less serious records, shorter records and tend to be less involved in violence. These things, do tend to follow a pattern with their gender but… it's not their gender per se." (Sheriff)

Age
Most Sheriffs indicated that the age of an accused would be a relevant consideration where the accused was either very young or very old (i.e. generally aged under 21 or over retirement age):

> "…all other things being equal, I might give a young person the benefit of the doubt at a particular level of seriousness of the offence, which I wouldn't necessarily for an older person. So it's relevant to some extent." (Sheriff)

Several Sheriffs expressed a reluctance to remand 'young' people mainly because of their perceived immaturity and also some questions around breach intent (i.e. whether the consequences of previous breaches of bail or other court orders were sufficiently well understood by young people and/or if they had been breached inadvertently through lack of understanding of the severity of such breaches, etc.). The nature of offences committed by younger accused was also described as being often 'less serious' and, the presumption against shorter prison sentences meant that young people would be less likely to get a prison sentence and therefore less likely to be remanded. It was also again noted that younger accused tend not to have built up significant offending histories.

For adults at the other extreme of the age spectrum, several Sheriffs commented that criminal activity was often accompanied by co-existing issues such as homelessness, drug addictions or physical and mental health problems. These factors might often be taken into account when deciding that bail was more appropriate, especially if conditions could be put in place to ensure access to and compliance with the necessary help support required to address these wider needs.

Despite those at the lower and higher end of the age spectrum being described by several Sheriffs as being less likely to be subject to remand than those in other age groups, participants again stressed that age was never considered in isolation or as the sole determining factor.

Housing status (including homelessness)

Several Sheriffs commented on the stability of someone's housing as being an important (yet never determinative) factor and decisions would often entail consideration of the risk to someone losing a tenancy if they were remanded. Several Sheriffs noted that they may remand someone in the short term (usually overnight of for a day or two) so that housing enquiries can be made and a bail address secured:

> "…to be on bail, you need a stable address… What I have done in a small number of cases is to remand an accused person until accommodation that is suitable for that person is available." (Sheriff)

Several others (across a range of stakeholders) commented that the lack of a permanent address can present a challenge to bail. Some noted that defence agents would often use their own business address as a means of helping an accused to secure bail, however, others suggested this was no longer allowed by Sheriffs in their area/certain Sheriffs, or that the time allowed for the use of such a temporary address had reduced significantly making it difficult to secure a more permanent bail address in the interim. This highlights a possible inequity of likelihood of bail depending on the ability and willingness of solicitors to engage in such an arrangement.

Another issue, raised in connection with excluding alleged offenders from a house/street/area because of domestic assault, was that the individual in question may be deemed voluntarily homeless by the local authority, and hence not be a priority for alternative housing. One Sheriff noted that the term 'voluntarily homeless' can be open to interpretation by some local authorities more than others. Another questioned whether making somebody homeless because of special conditions on a bail order was 'proportionate'.

Employment status

Similarly, having stable employment was seen as a positive factor which was linked to stability, reduced offending, and providing community benefits. Sheriffs would typically consider whether the accused would be likely to lose their job if held on remand:

> "If someone who has a pattern of offending and is possibly on the cusp where they might make a difference in their life and they have a stable tenancy and their first job in a while, that might mitigate in favour of granting them bail because those are the things that might anchor them to a different future. So if

I'm told someone's going to lose their tenancy and their job if they're remanded and it's a borderline case, then that might tip me in favour of bail." (Sheriff)

The main caveat raised by Sheriffs was the reliability of information currently presented by the Defence in relation to employment, i.e. scepticism around Defence agents saying that their client was due to start employment "next Monday", with nothing to back that up (echoing findings linked to problems with verifiable information, discussed above). Employment status alone would never dictate a decision.

Mental or physical health concerns

Most Sheriffs agreed that mental and physical health concerns would always be taken into consideration, providing the conditions were "genuine and serious". It was also noted that, if somebody was receiving ongoing treatment in the community for mental or physical ill health, Sheriffs would be reluctant to disrupt that treatment in favour of remand (unless in exceptional circumstances and unless the commensurate care could be offered in the custodial setting). However, a lack of community and custody based services to assist with mental health needs was noted by many (discussed more below). Overall, having a physical or mental health issue did not rule out the use of remand, however, especially if provisions were available within the custodial setting and visits to hospital facilitated for treatment, etc.:

> "It might be that if someone is in the course say of medical treatment, that might make it more likely that they will get bail, all other things being equal. Again, it may not be the sole determining factor, but it's certainly relevant. The issue with mental health is even more complicated because if accused persons have complex mental health problems, what I want to know about is what, if any, treatment are they receiving and how is that going to be managed while this case is live." (Sheriff)

Drug/alcohol problems

Several Sheriffs noted that drug and alcohol problems were endemic amongst the cases before them. While again, most suggested that addictions would never be the determining factor in their decisions, this would be considered (and was likely to impact/interplay with the other legislative and demographic factors above), and the current situation could help to inform bail/remand decisions. For example, it was noted that if an accused had recently sought help for their addiction and was currently involved with support services/treatment then this could indicate greater stability and encourage the Sheriff to lean more towards the use of bail (all other things being equal):

> "I suppose it's more about how it's interplaying with the person and their behaviour. So if you're someone who has a bad record for violence and it's an offence of violence and you've got drug and alcohol problems that you're not addressing, it's a kind of aggravating factor. But if you've got drug and alcohol problems and in some way in a sense you're vulnerable because of them and

> you're thinking about - and you're open to rehabilitation opportunities, then it's a factor in favour of granting bail. So, it can increase or decrease their chances of bail depending on whether it's increasing the risk or decreasing their risk really." (Sheriff)

However, if the accused had done nothing to address their addictions, it was felt they were less likely to comply with a bail order and were more likely to reoffend. Some Sheriffs also noted that treatment can be provided in the prison while they are held on remand (although they stressed they would never be remanded for this reason).

Family commitments/caring responsibilities

Sheriffs noted that having family or caring responsibilities was used quite often by accused persons or their defence as a mitigating factor in support of bail and against the use of remand, but that this was often not well substantiated. It was again said that the situation would need to be acute for this to have an impact on decision making: for example, that an accused was a single parent and that their child(ren) would end up in care if they were to be remanded. Sheriffs typically sought information on the extent of caring responsibilities, whether anyone else was able to undertake these responsibilities, whether other services could be brought in to provide suitable care, etc. Overall, however, this was not cited as a factor which would generally weigh heavily in Sheriffs' considerations.

Again, Sheriffs stressed that demographic factors did not ever drive decisions in their own right, and that legislative criteria were always dominant in decisions:

> "All of these [demographic and personal factors] are secondary to record and risk. If the record is so bad that either Section 23D applies or there's a substantial risk of offending under S23C, it is unlikely that any of these factors would be sufficient to result in a grant of bail. If they were likely to get bail anyway, these factors wouldn't sway the decision either way. So the factors are relevant but they're relevant to a band of cases that are in the middle ground, if you like, where discretion is exercised about bail." (Sheriff)

Other stakeholder representatives concurred that decisions were typically driven by the nature of the offence in any given case rather than by demographic features of the accused. Some perceived that men possibly tended to end up on remand more frequently than women, simply due to the higher number of men going through the justice system, and because their offending tended to be more serious in general. Some comments were also made that young people tended to be remanded more often than older accused, although this was purely anecdotal and counter to the majority view offered by Sheriffs.

Alternatives to Remand

Bail Supervision

In May 2022, the Scottish Government published national guidance for Bail Supervision[15] which provided revised guidance for the operation of bail supervision and set out standards and expectations to support the consistent delivery of the service across Scotland (noting, however, that there is an inconsistent service across Scotland's 32 local authorities in respect of bail supervision services and, to a lesser extent, EM bail, which is also discussed below).

Criteria for Bail Supervision

In the case study areas selected, bail supervision was considered primarily for custody cases (as opposed to those appearing on police undertakings or on report, unless a Sheriff, Fiscal or Solicitor specifically asked for this to be done). There was, however, considerable local variation in practices with regards to screening and assessment of those held in custody. Importantly, there was no national standard screening tool that was shared by all social work teams in the different case study areas and bail assessments also included very different questions and assessment criteria[16]. For example, some contained clear checklists of information that should be sought from different partners (such as police, defence, other social work teams, etc.) whereas others did not. Some included very comprehensive lists of 'vulnerability' criteria for the accused, and others were more rudimentary. There was also no consistency in the various 'risk factors' assessed by teams in different areas.

In one area, there was also a lack of clarity as to who would initiate a request for such a programme:

> "The original consensus was the Crown should be asking social work to do supervised bail assessments in cases where bail is opposed. Then the Crown said, well we don't care, why are we going to do that?... So then nobody really knew who was meant to be asking [for] it. The Sheriffs were saying to us we should be asking for it as defence agents. I, on one occasion… was told it wasn't my place to ask for it and it should be the Sheriffs asking for it… So I don't know what the rules are on it." (Solicitor)

Despite this uncertainty, comments were also made that not all Defence agents routinely sought social work reports into the appropriateness of supervised bail and that there was perhaps scope to encourage more agents to request such assessments on a more routine basis.

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[15] Supporting documents - Bail supervision: national guidance - gov.scot (www.gov.scot)

[16] Scottish Government national guidance does, however, include an assessment template which should be used. See: Annex 4 Bail Supervision Suitability Assessment Report - Bail supervision: national guidance - gov.scot (www.gov.scot)

Confidence in Bail Supervision
In two areas, bail supervision was carried out proactively for all (or as many as possible) custody cases, often regardless of any likely Crown bail position. In most other areas, assessments were triggered by bail being opposed by the Crown. In yet others, social work involvement was very much decided on a case-by-case basis.

Responses were mixed among Sheriffs who were asked if they were aware and knowledgeable of bail supervision services in their area - all were aware that this existed, but some did not feel knowledgeable about what it entailed.
In one area, one Sheriff only used bail supervision where a defined need was being addressed and this would make the difference between being able to grant bail or not. In yet another area, there was a perception that Sheriffs hardly ever supported supervised bail assessments and, even when they did, the assessments often did not feature in final decisions around bail or remand and this perhaps made social workers reluctant to be too proactive in this area:

> "I can tell you, the majority of my cases come through (court name) and there is no account taken of bail supervision. This has been roundly dismissed by the Sheriffs as unnecessary, so it is not a factor that's taken into account at all." (Solicitor)

This contrasted with other case study areas where there was deemed to be a high uptake of assessment for supervised bail, high uptake among Sheriffs and strong levels of compliance.

Two Sheriffs were very positive about bail supervision reports and the use of the service, and felt this was an invaluable resource that could help (in some cases) to reduce the use of remand if it could be resourced to accommodate even higher numbers of orders. In these areas, there was regular and ongoing contact between Sheriffs and social work staff to help promote and explain the scheme. A further two Sheriffs commented on having a very clear framework for bail supervision in their area, which gave them confidence as they knew exactly what it would entail for each individual (and progress reports could also be requested at subsequent hearings and were readily forthcoming):

> "I have not placed many people on supervised bail but it certainly is a useful additional resource when it's available. My understanding is that it's not perhaps as widely available as it could be, and I think that it would be a positive thing to have as an option in more cases." (Sheriff)

Interviews also revealed considerable variation in the extent to which social work input was proactively sought from justice partners - while some local Deputes perceived that information from social work was "helpful" to the court, they did not deem it to be essential (with views that any relevant information could easily be imparted to Crown and Defence informally in discussions immediately prior to court

appearances). Others, including some working in both NICP and local Depute roles, preferred to routinely seek informal input from social work colleagues before making decisions. Again, this was often influenced by local arrangements in court, co-location of social work and other juridical support staff within the court building, familiarity between social work staff and other stakeholders and local practices from social work with regards to screening of all or just some custody cases for bail supervision suitability[17]:

> "…most of the people dealing with these things work with each other every day, have got quite good relationships with each other. We'll just have a discussion about it with each other and take on board any relevant information and then make a decision out of that." (COPFS)

COPFS respondents were also asked if knowing the outcome of a supervised bail assessment before attending court might impact on their bail decisions. One Depute felt this would not make any difference to their decisions, while others did not know because they were not aware of what these contained, but they thought it would be unlikely to have much impact:

> "Honest answer is I don't know. I would need to know probably more what's in them. But I think 9 times out of 10, whatever the Defence position will be probably won't change our position, even though it'll make us more aware that the Sheriff is more or less likely to do what we're asking them to do… it doesn't take away any of the reasons that we're opposing bail to start with. It doesn't change the fact they've got a horrific record, it doesn't change the fact that this is a sustained significant assault on his partner, it's happened three times before, you know. So I think there's probably limited assistance that that would give us. It probably wouldn't change our mind." (COPFS)

> "I do not have much knowledge about the bail supervision service. I think it is definitely something that defence agents are involved in more than the Crown. In my experience it has varied between courts whether you get a copy of the report or not - in the courts I am currently in, we are never provided with a copy and I wouldn't know what is involved." (COPFS)

> "I have very rarely seen a supervised bail assessment. Generally, we don't ever get to see them. The Defence will allude to them or they'll, you know, discuss them in their motion for bail, so I don't actually really know what's in them. I've heard the agents talk about them and I've heard them talk about them being suitable or not or what can be done to support them but I don't really know enough of what's in them, I don't think, to say whether or not definitely it would help us." (COPFS)

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[17] Noting that capacity of social workers to respond may vary due to differences in the availability and resourcing of services in different areas and that justice partners' understanding and awareness of social work services also varied by area.

There was also considerable variation in the knowledge and confidence held by COPFS staff in different areas regarding bail supervision. As one COPFS marker of solemn cases commented:

> "I know that there is a bail supervision team and that we can refer… but, no, I don't know too much about it other than the accused has to attend appointments and the social work department will let us know if they're not…I think bail supervision is something that's largely considered by the court as a sort of last gasp before remand. It's not something that I would tend to - it's not something I've ever asked for, bail supervision." (COPFS)

Whilst most solicitors were in favour of bail supervision as an alternative to remand, some were uncertain of the criteria used by their social work team for assessment. The main thing that had caused some reservations among some solicitors in the past was a perceived limited amount of spaces in their local bail supervision scheme but in all but one area this was no longer considered to be an issue.

One social work respondent suggested that they do not do assessments for people who are of no fixed abode, or who need a translator/interpreter, because of logistics, despite solicitors asking them to. Some implied that, despite a bail supervision assessment which was negative (i.e. the accused was deemed unsuitable), the Sheriff may grant bail supervision anyway - which in one way justified their doing the assessment in the first place, whether or not bail was opposed, but also caused them difficulties if the accused had a record of breaching supervision.

Effectiveness of Bail Supervision

Among social workers, in terms of effectiveness of bail supervision, there were also mixed views. All thought that supervised bail was a useful and valuable service, but the effectiveness of it was largely dependent on the accused person's ability/motivation to engage and desist from further offending. It was noted that some people complied well with supervised bail, attended their appointments, etc. but still ended up on remand as they committed further offences. The system for dealing with breaches, however, was said to be confusing and difficult, and therefore had resulted in a lack of motivation to report breaches in one area, although this was being addressed.

For some Sheriffs, it was felt that bail supervision was particularly useful for young accused persons, but most had concerns (due to the lack of information they had on this and the lack of reports they had received suggesting this) over the nature and frequency of the supervision that would/could be implemented. It was felt that if this simply meant a phone call or brief check-in/meeting with the accused, or was infrequent contact, then this would not give them confidence to use it. One Sheriff said they would use it more if they could be sure the accused would comply and that there would be consequences for failure to comply.

Overall, most COPFS respondents indicated that they did not feel they were in a position to comment on how effective bail supervision may be and the lack of readily identifiable evidence or statistical data to support arguments for the effectiveness of bail supervision was also cited more by COPFS than any other stakeholder group as something which undermined their confidence in it:

> "I have some knowledge of this. I am not satisfied that bail supervision makes a tangible difference, but I am not aware of the specific data on this." (COPFS)

Solicitors noted the significant variation in the availability of supervised bail and willingness of Sheriffs to request assessments in their respective areas. Despite significant variations in local practice and significant variations in perceived support for supervised bail among Sheriffs, most solicitors were supportive of the principles of bail supervision, felt that they understood the process and what it entailed, and felt that it was reasonably effective (recognising that some accused would always breach):

> "I think bail supervision's been terrific [here]. It's made a massive difference. Generally speaking, it's been really good because even if a client's found guilty after they've been on supervised bail, you'll know that they've been engaging for however many months and it often reflects quite well on them that they've been engaging quite well. I know it's perhaps seen as interventionist but I think it works." (Solicitor)

Resourcing

While some areas were already routinely assessing all those held in custody for whom bail had been opposed, those who were not and for those working in the one case study area where bail supervision was not already operational, there was some consternation amongst bail supervision/social work staff that they would be understaffed and under resourced as the new National Guidance for Bail Supervision stipulates that all bail opposed cases should be assessed on the day.

In one rural case study area, there was no capacity for bail supervision or EM bail at all:

> "Bail supervision is… not happening here… I have pushed Sheriffs here before [to ask for it] but criminal justice don't seem to be set up for various reasons to handle bail supervision cases at the moment… resources I think." (Solicitor)

In other areas where bail assessments were already taking place routinely, it was also suggested that the new guidance requiring all bail opposed cases to be assessed was unrealistic without more resources (and that this requirement may only exacerbate existing pressures on justice social work):

> "I would love bail supervision to not just be as restricted as it is at the moment. So I would like to be able to go for most young people who are in conflict with the law, not just the ones that are bail opposed... but right now…

> that would be impossible. They wouldn't get a good enough service." (Social Work)

Some social work respondents were concerned that they would not be able to see individuals three times a week, that there was limited support available from the voluntary sector, and that a successful term of bail supervision might leave accused 'up tariffed' when it came to final sentencing:

> "… in theory, if someone were on bail supervision and they were on bail supervision for say six months, you could do some work with them and if that work were effective, it might then mean when they came to sentencing, you would say, there's no need for them to be on supervision because we've done the work that we would have done on supervision. So you're actually narrowing sentencing options, aren't you?" (Social Work)

Finally, one social work respondent suggested that supervised bail clients who were also concurrently on a CPO order could 'double up' with that supervision for economies of scale.

Electronic Monitoring (EM)

Uptake

Among solicitors, awareness of both the availability and operation of EM bail varied, both between and within areas, with some feeling informed and knowledgeable about this, and others thinking this was only available in pilot areas or not fully rolled out within their area yet. EM bail was, however, generally seen to be a useful alternative to remand and less intrusive and more flexible than police monitored curfews (which were dependent on limited police resources). Again, EM bail was also not available in one of the case study areas at the time of interview, although it was expected that this may change in the foreseeable future. In another, it was available, but it was perceived that Sheriffs lacked sufficient knowledge of/confidence in it:

> "I'm not confident because I don't think enough recognition has been made of the benefits it provides…I think certainly the Sheriffs in (court name) would require some more education that this is of benefit." (Solicitor)

Since social work respondents were involved in administering the assessments, they felt knowledgeable about this and confident in advocating for EM bail. While respondents did not know officially how often EM bail was being used, as they do not receive this type of feedback/information, there were mixed perceptions on its use. Some felt that EM bail was being assessed, suggested and used quite a lot, particularly instead of or to support curfews, while others felt it was not being used as often as it could/was expected and that bail supervision was used a lot more often than EM bail:

"I think it [EM bail] has been getting used quite a lot, to be honest, recently. I think it's definitely, from what I've seen, getting used more than [police monitored] curfews now because I think [police monitored] curfews are monitored solely by Police Scotland, so that's them going… to the door. So, I think they have been using it more maybe to take a bit of the pressure off the police." (Social Work)

"I don't think it's getting used as often I think as we thought it might be." (Social Work)

Effectiveness
Sheriffs generally perceived that EM bail (including curfews) was a useful alternative to remand, especially where conditions not to enter particular areas were applied (including monitoring to 'stay away' from the complainer's/victim's home, etc.). Most noted that the 'old' system relied on the police to check whether an accused was complying with such conditions, but that the police could not check up on all bailed persons every day/night (and Sheriffs generally felt this was not a good use of police time). However, it was believed that the 'new' EM bail would provide automatic recording and notification of breaches, and would therefore be a better and more effective way of monitoring conditions and reducing the risk of reoffending as accused persons would know that breaches would be detected:

"I wasn't a great believer in curfews per se, pre-electronic monitoring, because I'm not sure it's a great use of police resources to be sending police to check on people and taking them away from other things, and they're difficult to monitor. I wasn't sure either how much protection they provided or whether they were a particularly good use of police resources. But with electronic monitoring, that I think does beef them [curfews] up significantly." (Sheriff)

One Sheriff also suggested that more advanced EM could be used to support conditions to abstain from alcohol or drugs whilst on bail. Whether this would make a difference to the bail/remand decision however, was less clear, with one respondent highlighting that this would simply monitor the bail conditions that are already imposed, it would not provide any new alternative to remand.

Again, there was notable variation in views from COPFS from different case study areas regarding EM bail. Some perceived it was a valued 'go to' for Sheriffs whereas others described it more as a 'last resort':

"I think the Sheriffs in this jurisdiction will generally use a sort of bail supervision, electronic monitoring as a sort of - I think - I mean, I can't speak for the Sheriffs but as a sort of last resort before remanding." (COPFS)

Some Deputes felt they did not know enough about how EM bail worked, and because it was newer than supervised bail, they felt they probably knew less about EM bail than supervised bail. Other Crown respondents felt that EM bail was more effective than supervised bail, i.e. breach of bail conditions with electronic

monitoring could be much more easily detected whereas breach of bail supervision may be more ambiguous, i.e. "if there's electronic monitoring, there's no ambiguity." (COPFS)

Others felt fully aware of the EM bail service in their area, but could not comment on its effectiveness. Some Deputes cited the presence of repeat breaches of EM bail that they witnessed in court as something that undermined their confidence in its efficiency ((although it was not clear if this related to the efficiency of electronic monitoring of bail as an alternative to remand or efficiency of the monitoring per se).

Some solicitors viewed EM bail as effective and perceived that breaches were less likely to be a function of the nature or operation of the scheme itself, and always more likely to be linked to human default:

> "I think knowing some of my clientele and the lifestyles that they lead, I would have my reservations that they'd be able to keep to it but, you know, that's their problem in a sense that if I get you bail with an electronic tag and you breach it, well, you know, that's your fault." (Solicitor)

Again, social workers reported different views on effectiveness and uptake of EM bail. Specific concerns included that in rural areas, bail supervision is less easily operationalised than EM bail:

> "I think there'll be an increase in uptake for EM bail… I don't see there being a huge increase in supervised bail, quite frankly… EM bail is, I think, a more realistic way of… the sheriff has that reassurance [that] that person has to stick to that curfew and it will be known if they're not." (Social Work)

Similarly, social work respondents were unsure about how effective EM bail was as they did not manage the order, and they had no feedback on breaches, etc. unless they were managing a supervised bail order which also had EM bail. However, it was generally expected that this would be fairly effective as breaches are immediately recognised, logged and investigated either by G4S in the first instance or elevated to Police Scotland if the person is either not contactable or is not present in their property when they are meant to be:

> "I think it is quite effective. I don't have any hard and fast facts in front of me with the amount of breaches and stuff, but certainly most people that I've had on it have got through it, if I've had it as part of a combined order. And I think it's more palatable as well to the accused because they can get on with their daily lives, especially if they are in employment and things like that. If they are offending when it's after hours at night, they know they can't go out and if they do go out, it's an automatic breach." (Social Work)

Other comments

A small number of Sheriffs also commented that combined use of supervised bail and EM bail was effective, i.e. electronic monitoring monitors the accused's

whereabouts so as to identify any breach of curfew or of stay-away conditions, while supervision (if run well) allows the accused to address wider criminogenic needs. While electronic monitoring was unlikely in its own right to tackle the cause of offending, dovetailing it with supervision may help.

In contrast, one Sheriff raised concern about the possible overuse of EM bail and potential for up-tariffing if not properly considered:

> "We have to be careful about not upgrading existing bail conditions unnecessarily. I think we ought to be looking at additional conditions where, but for that, you would have been remanding the person. Otherwise, what you're effectively doing is simply imposing punishment on somebody that's not been convicted…" (Sheriff)

One social work respondent perceived that EM bail counted towards one's sentence, whereas bail supervision did not, which they felt was an anomaly[18].

The only other issue of note was that there were occasions where Sheriffs ordered the use of EM bail without a social work assessment. While this was recognised as being within the Sheriffs' rights to do so, it was flagged that sometimes the social work assessment can identify issues or that an address is not suitable where the court would not have had access to this information. Making social work input a mandatory part of all EM bail decisions may be worth considering, it was suggested.

Special Conditions of Bail

The main reasons why the Crown typically seek additional or special conditions of bail include:

- to protect the complainer or witnesses - such as not to enter a street, or not to approach, contact, communicate or attempt to approach, contact or communicate in any way with them
- where the accused is targeting a specific premises/area, a condition to stay away from the premises/area
- to allow the police to monitor an accused - such as a curfew or having the accused sign on at a police station, especially where the accused's conduct is escalating.

Where bail with special conditions was used, all stakeholder groups concurred that this was most effective only if the conditions were very clearly defined and stipulated (with 'vague' conditions perceived by some as "setting an accused up to fail").

[18] At the time of publication, legislation had been passed which, when commenced, will allow EM bail to count towards an individual's sentence.

Overwhelmingly, Crown respondents agreed that special conditions were a useful addition to the bail and remand process:

> "This has the purpose of bolstering the standard conditions of bail by imposing specific conditions targeted to the most likely cause of any future reoffending." (COPFS)

There were mixed responses in relation to whether Crown would liaise with the Defence in advance about special conditions being sought. One Depute (based in an urban, high workload court) indicated that they would be unlikely to engage with the Defence in advance but this would be done in the court room with the Sheriff, while two (one urban/high workload and one sub-urban/medium workload court based Depute) noted that the defence were typically informed of special conditions that will be sought in court in advance so they can take instructions from their client. Decisions regarding if, when and what special conditions were often not collaborative, however, with Crown taking a lead, with often limited/no discussion of what might be workable or acceptable to the defence:

> "Before the case calls I would always advise the defence of the special conditions sought by the Crown. The defence sometimes approach us advising that the complainer is not supportive of bail conditions prohibiting contact but this usually does not change our mind." (COPFS)

> "It's just more a dialogue to advise the Defence, and sometimes streets are very long, so they might narrow to sections of streets, or the curfew times, perhaps… he works till say 6 o'clock at night and it takes him an hour and a half to get home, so we'd maybe seek maybe say from 8 or 9 o'clock till 7 o'clock the next day. We're a wee bit flexible with things like that. That's generally all the negotiations - occasionally the Defence will oppose these special conditions but it's up to the court to decide eventually." (COPFS)

The main view expressed by COPFS staff in relation to special conditions was the need for conditions to be more clearly explained or defined, specifically in relation to curfews and non-contact conditions. They noted that such conditions would usually simply be communicated verbally in court by the Sheriff and, although provided in writing to the accused, there was still scope for vagueness and lack of understanding. Several interviewees (from different stakeholder groups) commented on confusion regarding contact via social media as something which was increasingly leading to breaches of special conditions, i.e. an accused maintains physical distance from the complainer but may send messages via Facebook, Snapchat, What's App or Messenger, etc. Being more explicit regarding the scope and reach of non-contact was seen as something which would be helpful when special conditions are communicated at court (recognising, however, that there was a fine line between being specific and not making it confusing for the accused):

"…and they say, I didn't realise I wasn't supposed to contact them on Facebook. I thought I wasn't supposed to meet up with them or I wasn't supposed to go round to the house. So, some Sheriffs will be very specific and they say, don't approach or contact this person and that includes via text message and social media. But I wonder if that should kind of always be in it, just given how much - how many breaches are that kind of contact." (COPFS)

Among solicitors, there was concern around the potential for replication of standard conditions within special conditions:

"[In] domestic cases. Even if a person has no previous convictions and it's the first time they've ever been in court, the court will always impose special conditions on their bail order. So, they will always impose a condition that they stay away from the house and they'll always impose a condition that they stay away from the complainers. Now, I think that's wrong and there's case law that says that's wrong because you should only impose special conditions of bail when you're not assured that the standard conditions will suffice. But that is what the courts do now, they always impose them." (Solicitor)

Other Alternatives, Access to Services and Unmet Needs

While most Sheriffs viewed that there were no other alternatives to remand (other than bail with conditions/special conditions, supervised bail or EM bail), a small number suggested that certain additional input might persuade them to grant bail rather than to remand, including curfews, reporting to a police station, more information on EM bail and on the complainer's views, and bail beds/hostels. Having social workers or other support workers who could accompany an accused directly from court to access appropriate services (e.g. interventions for addictions or mental health interventions) was also mentioned by some as something which may increase their confidence to grant bail to someone with complex needs.

Examples Sheriffs cited of what needed to be in the community to give them greater confidence in bail included, first, emergency housing (in other words halfway houses, bail hostels or bail beds), effective bail supervision or EM bail, with possibly a dedicated social worker, mandatory bail supervision (including signing in at a police station - although not all Sheriffs were supportive of such signing in practices as they felt they offered little confidence that the accused was not committing other offences while on bail), and access to more treatment and support type services.

Similarly, most solicitors could not think of any alternatives, other than bail supervision and EM bail, although some suggested bail hostel equivalents and greater support with housing, such as employing an 'accommodation officer' in each local authority as a means of increasing options.

Suggestions for 'other' alternatives put forward by social work staff included diversion from prosecution (at the bail/remand stage), Restriction of Movement

Orders, deferring the case for good behaviour, bail hostels and residential rehab units.

Some Sheriffs agreed that diversionary activity may be the best way to work with low level repeat offenders but noted that significant resources would be required to establish the types of intervention required, especially those that required mental health support. Indeed, several Sheriffs suggested that the under-resourcing and over-stretched nature of psychiatric/mental health services was restricting the number of people that community-based services could accommodate i.e. finite resources had to be used on those with the most acute and severe need, with borderline cases not admitted to services. Sheriffs suggested that more resources were needed to facilitate social work support, better mental health support, community and psychiatric nurses, support from hospital based psychiatric services, support with drug and alcohol problems in the community and availability of drug treatment and testing orders, etc. Having better and more reliable information from mental health professionals was also urged:

> "…one of the big difficulties we have in the courts is the availability and the standard of community psychiatric nurse support. In my view, there is a huge gap in the people who are falling between the cracks and really need some sort of intervention in the community…but the psychiatric nurses are saying, well they're fit to plead and that's an end to it. And I think perhaps a more joined up approach might be helpful with that." (Sheriff)

One Sheriff also suggested that developing a method to enforce a 'no alcohol' restriction as part of bail conditions would be helpful. It was suggested that electronic monitoring was used in other jurisdictions to facilitate this, and it was felt this could/should be introduced in Scotland. It was also suggested that similar restrictions for cocaine and heroin were also needed due to the prevalence of these drugs and the high levels of violent crime associated with cocaine. It was felt that such technological solutions, combined with community-based supports would be a significant help.

However, it was felt by some that the level of funding required to develop such community-based services and infrastructure would be so huge it was unrealistic:

> "If you want to keep people out of prison, keep them in the community, you have to set up the same kind of conditions, mainly control of the person and their behaviour, supervision of the person and their behaviour and support of the person whilst they're in the community if you're going to in any way try and replicate the controlled environment of a prison setting… if you are really serious about keeping people out of jail and remand, you have to replicate the control and the support and supervision in the community - that's a big job and very resource-intensive." (Sheriff)

Another Sheriff noted that quite a lot was already available via supervised bail, although they conceded that this may be more relevant to post-conviction [and pre-

sentencing] as more time was available to put a package of support in place rather than necessarily when implementing bail at the first hearing. They also noted that remand may be used for a short time in such circumstances while the court waits for the report to be provided and for community-based support to be put in place. It was felt that the time spent on remand could be shortened if social work were supported to provide the reports more quickly.

Among Crown respondents, there was also a desire to see more mental health and homelessness support for people both released on bail and released back into the community pending any period in custody. Deputes highlighted there was sometimes a need to remand someone due to a lack of a bail address or to arrange/confirm the input of medical or other support services, although it was noted that use of remand in such circumstances was often short-term and only until addresses and other support could be put in place:

> "The only occasions I have seen this happen on (that I can think of) have been short term remands (usually) overnight for their safety but options are more fully explored the next day. This is usually when it is too late in the day for the particular agencies to assist - i.e. housing assistance/last minute CPN/bail supervision, etc." (COPFS)

Similarly, for defence solicitors, it was noted that much needed to be done to improve access to psychiatric assessments, mental health services and stable housing for many accused, especially repeat offenders:

> "These are people who perhaps should not be at large. There are reasons these people shouldn't be in the public in general but the difficulty is jail is not the place they should be. They should be in a secure ward in a hospital but there are so few spaces in secure wards now that unfortunately people tend to be remanded these days." (Solicitor)

Indeed, homelessness was the main factor which solicitors experienced as being responsible for some otherwise avoidable instances of remand:

> "…not often but we also see quite frequently clients being remanded because of lack of housing, stable housing, they don't have an address to go and sofa surf or, by virtue of the offence, can't go back to their home address. And I've seen a few clients over the years remanded for that and, again, the systems aren't in place to try and find alternatives to that because Sheriffs don't want to bail people to sort of care-of addresses, they want them bailed to a solid address that they know they can be found at. So, you do find clients sometimes kept in custody for that. The same often with foreign individuals, that's happened a few times as well and it's not really satisfactory." (Solicitor)

Overall, while one Sheriff stressed that a lack of community support was never a reason to place someone on remand, others did indicate that the current lack of, and overstretched nature of community-based services did mean that remand was

sometimes the only realistic option available and that Sheriffs were left with no choice but to use remand for some accused persons:

> "Our impression is there's a very overstretched community provision and where there is desperate need for support of those with chaotic lifestyles, those with mental health or drug problems, the services are just not there to be able to meet their needs." (Sheriff)

> "Remanding somebody in custody because they have nowhere else to live… should not be happening but it does happen and it happens regularly". (Sheriff)

In particular, it was felt that the long waiting lists and lack of robust community assessment, support and treatment options for both drug/alcohol issues and mental health issues meant that individuals could not be suitably monitored and supported, thereby increasing the risk of them reoffending while on bail, and therefore made the use of remand more likely. All agreed, however, that the criminal justice system should never be used as a replacement for the care system:

> "The lack of provision for people with mental health problems is appalling… We are remanding people who are mentally ill routinely when they should be getting treatment and help… support services in the community for people with mental health issues are completely and utterly underfunded, inadequate and failing these people" (Sheriff)

All stakeholders agreed that there was a need for more proactive support and more protective measures to assist accused (especially vulnerable accused) and to prevent the cycle of reoffending.

Immediate Support for People Released on Bail

A very specific issue raised by Sheriffs, defence and social workers was the issue of accused travelling to court from a police custody suite in another town/city and the problems that this could create for bail decisions (several rural police custody suites were closed during COVID-19 and never reopened). This issue was especially acute in rural areas, where it could take hours for accused to arrive in court. They would then *not* be offered a means of travelling back to their home town again, causing problems with public transport costs:

> "I was in contact with the [local police force] just a few weeks ago to say, if you're going to be taking folk up to [court], can you please give them the opportunity to get their bank cards so that they've got money to come back because sometimes they'll turn up - well, they were turning up at the criminal justice team in the court asking for a travel warrant. We can't give them a travel warrant unless they're open to us." (Social Work)

> "They're either on an order and they're entitled to [a travel warrant] or they have clear needs, i.e. mental health etc. If that fails, we are telling them to go to the Scottish Welfare Fund and ask for [an emergency payment]… I mean,

there's an option for people who are stranded to go to a railway station and say, I'm a stranded person, this is who I am and they're obliged to provide them one way transport." (Social Work)

A social worker in a sub-urban court also noted that this problem could exist for those appearing on warrants, including those brought to court from different geographical jurisdictions:

> "…a lot of people get arrested in England, it tends to be warrants, they get taken from England to Scotland to the court, you usually have to wait all day for them to get there or not even the same day but the next day. They appear, they're bailed and that's it, they're in [court], what do I do now? They've been arrested from their house with no money, no shoes even. I've had people in slippers, I've had people in their pyjamas, it's ridiculous. They don't have their glasses with them, so they can't see because the police have not taken them and the police have told them just to keep them calm - don't worry, they'll pay for your return trip when you get to Scotland. And that's not by any means automatic at all." (Solicitor)

While welfare funds were available to assist with such instances in some areas, access to this money was not always easily achieved and there was again a sense amongst some respondents that a more considered approach was needed to support those released on bail once they left the court (the absence of support often meaning that breach of bail or bail conditions was a strong possibility).

Balancing Bail and Remand

Justice partners concurred that the main potential benefit of being released on bail as opposed to being held on remand was the stability it afforded to the accused:

> "It allows the accused to keep their employment without interruption and lessens the chance they will lose their job - the same goes for their tenancies which I understand can be difficult for them to obtain and keep, especially if they are vacant for some time. Similarly it allows them to maintain relationships with friends/family/children who can continue to provide support to them. It also allows their children (if any) to maintain relationships with the accused as their parents which is often best for them in the long run. This can assist in preventing the cycle of reoffending." (COPFS)

> "Anything that allows someone to be at liberty and have those opportunities to work on themselves, I think that is always a very good positive thing. I don't think prison is particularly helpful in taking people away from their support system, taking people away from their homes. I don't see how that helps someone's wellbeing." (Solicitor)

In addition, a secondary benefit (but never a determinative factor in decisions) was that release on bail often afforded all parties more time to prepare for a case before calling in court. This did not, however, mean that bail was the preferred option and,

indeed, views were also put forward that the time requirements for remand cases to come back to court quickly could also be of benefit, i.e. requiring faster action and ensuring that the accused could be easily located.

Importantly, across all justice partners, there was also consensus that not everyone was suitable for bail, bail supervision or EM bail and that in some cases remand was the most appropriate option. Accused either posed too great a risk to the public or the complainer if they were to be released, or they had highly complex needs which could not be supported via the limited contact and scope available with supervised or other bail options.

There was also congruence across the stakeholder groups that most remand decisions were defensible and where bail was refused it was almost always for very good reason (as evidence by the low numbers of bail appeals in general) and that most Sheriffs "get it right" most of the time:

> "…most Sheriffs are looking for ways not to remand people but, at the same time, you're very aware that it's on you to try and protect the public from further offending or issues. So, you don't want to find out you've given someone bail, then they're back the next week having done something really serious and someone's been hurt." (Sheriff)

> "…the concept of remand I don't think should be demonised. The vast majority of people that get remanded are remanded for the right reasons." (Solicitor)

> "You've got to be realistic. Some people pose a real, real danger to some of the victims. In supervised bail, somebody coming to see me once a week isn't going to have any effect on his behaviour when he leaves his appointment, when he goes home and gets drunk and kicks off." (Social Work)

Discussion

This research highlights that the bail and remand decision making process is complex, multi-faceted and time pressured. The 'jigsaw' of legislation, combined with circumstance and human factors means that no two cases are ever treated the same way and no response can ever be seen as 'typical'. All participants across all stakeholder groups agreed that the decision making process was informed by multiple considerations in each case, and that there was never any one factor which was determinative in its own right. All cases were described as being unique and as being treated on the basis of the information available at the time and the merits of each individual case. Similarly no one factor routinely carried more weight than another, rather multiple factors were considered in their totality.

Understanding of the Process

Among those who took part in the research, the legislation was well understood and provided a clear framework in which decisions operate, with only some exceptions, most notably Section 23D of the Act which was seen as being very open to interpretation. The main factors influencing decisions appear to be the nature of the offence before the court, the record and previous convictions of the accused and previous breaches: in other words, remand is most likely where there is a perceived high risk of reoffending, risk to others and non-compliance with orders of the court.

The different roles and responsibilities of different justice partners in the process is also well understood, although there was not necessarily always agreement with how the process works at present and with the justifications presented by different stakeholders for their arguments: the main questions were around clarity of communications between national case markers and local Deputes in court and when in the process it may be appropriate or necessary to involve social work staff and other agencies in informing risk and bail decisions. The research suggests that there is perhaps scope for greater transparency in arguments presented by the Crown (especially in relation to cases where bail is opposed and where local Deputes may be unable to easily understand or justify the decisions of central case marking colleagues) and for more information from the Defence (around client instructions and personal circumstances). Both would help to mitigate some of the current lack of confidence reported by Sheriffs in both the Crown and Defence stance on bail.

Understanding and awareness of alternatives to remand was perhaps the main area where lack of clarity in relation to process was detrimental to decision making. Indeed, differences in experiences and understanding of alternatives to remand (both bail supervision and electronic monitoring) proved to be one of the biggest geographical variations and it seems that this is directly affecting Sheriffs' decisions. There appears to be scope for more communications around both availability and suitability of different options for accused, how they can be monitored and how effectiveness can be evidenced to achieve greater national consistency (noting that some examples of good practice in this regard already exist around the country). A better feedback loop, including routine provision of

statistics evidencing the outcomes of judicial decisions, including bail breaches and compliance with alternatives to remand would also be helpful to decision makers going forward, it seems.

Strengths and Weaknesses

The main strengths of the current system appear to be the flexibility that the legislation affords and the involvement of social work staff to provide contextual information to triangulate with offence data. There may be scope for more national consistency in social work availability and involvement in the pre-court process as well as physical presence in court, as this was very welcomed in cases where it already operated.

The main weaknesses appear to be system factors, most notably the volume of criminal business in the courts and the lack of time available to allocate to each case before the accused appears at court (especially for those held in police custody). Time is perhaps the biggest challenge faced by all and Sheriffs were keen to stress the very tight ‘window’ in which bail and remand decisions were made, especially in custody cases. Several Sheriffs commented that the time available for information to be gathered to inform decisions is often very limited due to the nature of the system and how quickly people appear in court. Lack of time (especially in respect of pre-court liaison) can lead to an absence of person-centred practice.

The second main weakness was lack of information to support decisions - the main additional information that might be helpful includes more consistent and detailed information from police on the relationship between the accused and complainer/witnesses, the position of the complainer (including any changes in position over time) and more consistent and readily available information about the accused’s personal circumstances, including any issues relating to mental ill health or unstable housing status. All parties acknowledged the gaps in provision in the community which may influence Sheriffs’ decisions to remand for the accused’s own safety or welfare, but stressed that remand should never be used in cases of unmet community need.

Geographical variation also appears to be evident from the research. While views from all stakeholder groups were largely consistent between case study areas, there were some notable differences in the views and experiences shared by defence solicitors and social workers based in different case study areas in particular. In the main, these differences related to perceptions of a less collaborative approach in the larger, urban and higher workload courts compared to the smaller, more suburban, rural and lower workload courts.

The backlog in court business (brought about by COVID-19) was also seen to have exacerbated perceptions of over-use of remand. This was relevant both in relation to how long a person may be held on remand (and the risk that this could equal or exceed the length of any likely custodial sentence for the offence), and also in the ability of accused persons to comply with bail conditions. It was argued that the high number of individuals currently being held on remand was largely due to the

delays in solemn cases proceeding to trial and the system becoming backed-up with people held on remand for longer periods. It was thus felt that Sheriffs per se have not developed an increased tendency to use remand but that the ‘system’ was creating a perception of such.

As above, lack of understanding of alternatives to remand was noted in some areas. The main barrier to more effective delivery of alternatives to remand appear to be difficulties in securing accommodation for those with no fixed abode, access to mental health assessments and services and also lack of recourse to public funds/facilities for some of the most vulnerable accused.

Though out of scope of the current research, underinvestment and lack of funding in the justice system was something which was discussed by several respondents across all stakeholder groups. Concerns included insufficient numbers of Advocates to defend and prosecute in the High Court, insufficient solicitors to defend in the Sheriff Court, lack of in-court facilities (including interview rooms and court rooms), lack of resources in justice social work departments to provide detailed reports to court and/or to have a presence in court, lack of legal aid for vulnerable accused/legal representation of custody cases and lack of resources for social work departments to operationalise alternatives to remand. Perceptions of a “huge underinvestment in the criminal justice system” permeated much of the feedback that was given and this emerged as a general theme. Under-resourcing was, it was felt, directly hindering the bail and remand decision making process.

Conclusions

The research shows that decisions to remand, while often time pressured, are not made easily and there was shared acknowledgement that the legislative presumption in favour of bail should always guide decisions to keep accused in the community wherever possible, subject to suitable risk mitigations being in place. Those who took part in the current research highlighted a range of system and process changes which may better support them in their respective decision making, and these related mainly to more or better quality of information, better information sharing and more time being allowed for the same. Achieving system efficiencies would be challenging, it was noted, given the volume of criminal business being dealt with in the courts, (and insufficiency of justice partners’ resources, in some cases) but continued efforts to increase transparency in the decision making process may assist in contributing to the shared goals of reducing crime, reoffending and victimisation.

Appendix A - Key Terms

Accused - a person alleged to have committed a crime.

Complainer - person making the allegation in a criminal case.

Complaint - a statement, made by a witness to the police, accusing a person of committing a crime.

Crown Office and Procurator Fiscal Service (COFPS) - Scotland's public prosecution service and death investigation authority. See: Crown Office and Procurator Fiscal Service (copfs.gov.uk)

Custody - when an individual is held in a police cell or in prison.

Defence agent - a designated or nominated legal representative acting on behalf of the accused who is a member of the Law Society of Scotland. See: Law Society of Scotland | Law Society of Scotland (lawscot.org.uk)

Fiscal - see Procurator Fiscal below.

High Court of Justiciary - Scotland's supreme criminal court. When sitting at first instance as a trial court, it hears the most serious criminal cases, such as murder and rape. See: About the High Court of Justiciary (scotcourts.gov.uk)

Justice Social Work - teams based in each local authority who have responsibility for delivering a range of support and other services for those involved in the justice system, including leading with Bail Supervision.

National Initial Case Processing (NICP) team - part of COPFS which has responsibility for the initial decision taken for most cases likely to be prosecuted in the summary courts. The creation of NICP was a phased project, with centralised marking structures established in the West and East at separate times. However, in 2015 whilst COPFS was still operating under a Federated structure, a national review was undertaken to assess the practicalities and benefits of establishing case marking as a national function. Following this national review the National Initial Case Processing Unit (NICP) was established and this unit became operational on 27 April 2015. From that date NICP began marking cases reported to COPFS by the police and other specialist reporting agencies, excluding custody and undertaking cases. From 16 November 2015 onwards, as part of a phased process, NICP also took responsibility for the marking of summary custodies.

Procurator Fiscal (PF) - Procurators Fiscal are civil servants qualified as Solicitors, Solicitor-Advocates, or Advocates and are independent prosecutors, constitutionally responsible to the Lord Advocate. They receive and consider

reports from the Police and other agencies and decide whether or not to raise criminal proceedings in the public interest. The Procurators Fiscal (and Procurators Fiscal Depute) prosecute all criminal cases in the sheriff courts.

Remand - the situation whereby an accused person is refused bail and held in prison awaiting trial.

Solicitor - a designated or nominated legal representative acting on behalf of the accused who is a member of the Law Society of Scotland. See: Law Society of Scotland | Law Society of Scotland (lawscot.org.uk)

Solemn proceedings - prosecution of serious criminal cases before a judge and a jury in the High Court or Sheriff Court.

Standard Prosecution Report (SPR) - cases are reported by the police or other reporting agencies to COPFS by way of a Standard Prosecution Report.
The SPR includes information on: the offence(s); the circumstances of the offence(s); an analysis of the evidence; and information on the background of the offender and, where appropriate, victims. The SPR is a nationally agreed document set which allows the transfer of information in an acceptable format and structure. See: Standard Operating Procedure (SOP) Review Template (scotland.police.uk)

Summary proceedings - Court proceedings for criminal offences that are considered less serious and are dealt with by a sheriff or a justice of the peace.

Undertakings - formal agreements/documents signed by an accused who has been arrested and released by the police on the premise that they will appear at court at an agreed date and time (also referred to as police bail).

Warrant - a legal document granted by the court that gives officers acting on behalf of Police Scotland the authority to arrest someone.

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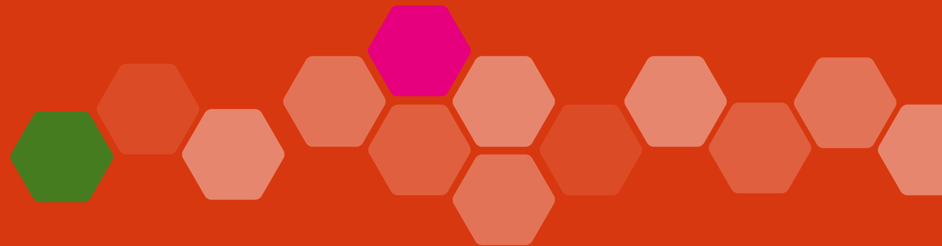

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