

Regulatory Impact Statement

Bail Amendment Bill

Agency disclosure statement

This Regulatory Impact Statement (RIS) was prepared by the Ministry of Justice (MOJ).

It provides an analysis of options to address a range of problems identified in the Government's Review of Aspects of the Bail System. Problems relate to: bail for defendants charged with serious class A drug, violent and sexual offences and young defendants under 20; perceptions that bail may be granted in return for information; high rates of failure to answer bail; an outdated approach to offences that are bailable as of right; and the non-legislative nature of the electronically monitored bail (EM bail) regime. The specific problems are listed at paragraph 11.

The expected fiscal costs and benefits of options can only ever be approximate as there is no foolproof way of predicting:

- How the policy change will influence the Court's exercise of discretion.
- Which defendants will offend on bail, and the extent to which serious offending on bail is reduced.

Accordingly, there are a number of assumptions and caveats used to assess the fiscal costs and benefits of each option (see Appendices 1 and 2).

In addition to fiscal implications, policy options that involve increasing the use of reverse burdens of proof in bail decisions are likely to have effects that the Government has said will require a particularly strong case before regulation is considered. Reverse burdens of proof may override the following fundamental common law principles and rights guaranteed by the New Zealand Bill of Rights Act 1990:

- A person charged with an offence is to be considered innocent until proven guilty.
- No person shall be arbitrarily detained.

Amendments to youth justice provisions may also have implications for New Zealand's obligations under the United Nations Convention on the Rights of the Child to ensure that children under the age of 18 are detained only as a last resort and for the shortest possible period.

The public provided feedback on the majority of the issues discussed in this document following the release of the public consultation document *Bail in New Zealand: Reviewing aspects of the bail system* in March 2011. Government agencies were consulted on the content of that document, as well as this RIS. If a Bill is introduced to implement any of the options discussed in this RIS, the public will have a further chance to comment when the Bill is considered by a select committee.

An implementation period may be required to enable operational changes to be made as a result of legislative amendments. MOJ intends to work with other Justice sector operational agencies to ensure that implementation needs are adequately identified and taken into account prior to the introduction of a Bill to Parliament.

Rajesh Chhana, General Manager, Crime Prevention and Criminal Justice

Status quo and problem definition

Status quo

1. Over two-thirds of defendants prosecuted require a decision on bail. In 2009, 127,489 defendants were prosecuted and 91,497 had a decision on bail (72%). The basic decision is whether the defendant should be imprisoned or allowed to remain in the community until their case is resolved. There are three options:
 - **Release at large:** the defendant is released without any conditions, except a requirement that they attend their scheduled Court hearings.¹
 - **Release on bail:** the defendant is released but must comply with specified conditions in addition to the requirement that they attend their scheduled Court hearings.
 - **Remand in custody:** the defendant is detained in prison.
2. Of all the defendants who had a decision on bail in the six years from 2004 to 2009, 85% were released on bail for the whole period until their case was resolved, 3% were remanded in custody for the whole period, and 12% spent some time in custody and some time on bail. In that period, 17% of all defendants who spent time on bail committed an offence on bail. More information about the overall rate of offending on bail is provided in Appendix 3.

Legislative test for bail

3. New Zealand's bail system is governed by the Bail Act 2000. In most cases, the starting point is that the defendant should be released on reasonable conditions unless there is just cause to remand him or her in custody. Bail is not automatically denied for any offence.
4. In deciding whether there is just cause to remand a defendant in custody, the Court must consider the risk that the defendant may:
 - fail to appear in Court;
 - interfere with witnesses or evidence; or
 - offend while on bail.
5. The Court can take into account any information it considers relevant, including the defendant's criminal history, the seriousness of the offence charged, the defendant's previous behaviour on bail and the length of time before the matter comes to trial.
6. If the prosecution opposes bail, it usually must prove that the defendant should not be granted bail. However, in some situations where the defendant has a history of serious offending, especially a history of offending while on bail, the defendant must prove that he or she should be granted bail. This is called a *reverse burden of proof*.
7. One situation when a reverse burden of proof applies is when a defendant is charged with an offence specified in section 10 of the Bail Act and has a previous conviction for one of those offences (the two offences do not have to be the same). The specified offences are:
 - a) murder or attempted murder;
 - b) manslaughter;
 - c) sexual violation (rape or unlawful sexual connection);

¹ For the purposes of this RIS, "release at large" and "release on bail" have been combined into one category called "bail".

- d) wounding with intent or injuring with intent;
- e) aggravated wounding or injury;
- f) commission of a crime with a firearm or using a firearm against a law enforcement officer; and
- g) robbery or aggravated robbery.

Police bail

8. Decisions on bail are generally made by the Courts. However, Police may grant “Police bail” for up to seven days if a person who has been arrested and charged cannot be brought before a Court immediately. Police bail is an option for all but the most serious charges, such as rape and murder.²

Bail conditions and electronically monitored bail

9. It is a mandatory condition of bail that the defendant attends his or her scheduled Court appearances. In addition, the Police or the Court may impose any other conditions considered reasonably necessary to ensure that the defendant attends Court, does not interfere with witnesses or evidence, and does not offend while on bail. Common conditions include curfews, non-association conditions and conditions not to consume alcohol.
10. Electronically monitored bail (EM bail) is a bail condition that requires a defendant to stay at a particular residence at all times unless absent for an approved purpose, such as work. Compliance is monitored through an electronic bracelet attached to the defendant’s ankle. EM bail is only imposed if the defendant would otherwise have been remanded in custody. There is no legislation governing EM bail. It is imposed in accordance with common law, and managed operationally by Police.

Problem

11. In its 2008 manifesto, the National Party made an election commitment to review a number of specific aspects of the bail system. In 2010, MOJ reviewed these aspects and identified the following problems:
- Relatively high rates of offending on bail by defendants charged with serious class A drug offences.
 - The potential public safety risk and negative impact on victims and/or their friends and family that may result if defendants charged with murder or other serious violent or sexual offences are released on bail.
 - Relatively high rates of offending on bail by defendants aged 17 to 19 years old who have previously been imprisoned.
 - Lack of powers for Police to effectively enforce bail conditions imposed on young defendants under 17 years old.
 - A perception that defendants may be granted bail in return for providing information to Police.
 - The disruption to Court schedules and waste of resources arising from defendants failing to answer bail.
 - An outdated approach to specific offences that are bailable as of right.
 - The possibility for inconsistent practices to develop throughout the country as a result of electronically monitored bail being imposed under a generic power for the Court to impose bail conditions.

² The Criminal Procedure (Reform and Modernisation) Bill will allow Police to grant bail for any offence, for up to 14 days.

12. For clarity, the status quo for each issue and associated problems are presented alongside the analysis of feasible options in the Regulatory Impact Analysis section.

Objectives

13. The Government's objective is to ensure that New Zealand's bail laws strike the appropriate balance between the following competing factors:

- protecting the safety of the public and the integrity of Court proceedings; and
- recognising a person's right to be presumed innocent until proven guilty and not to be arbitrarily detained.

14. Options must be considered within the following constraints:

- The practicalities and cost of remanding defendants in custody. Costs to the justice sector increase as more defendants are remanded in custody. It is important to ensure that proposals do not unduly add to the existing fiscal pressures faced by the wider justice sector.
- New Zealand's domestic and international human rights framework, including the Government's obligations under the New Zealand Bill of Rights Act 1990 (NZBORA), the International Covenant on Civil and Political Rights (ICCPR) and the United Nations Convention on the Rights of the Child (UNCROC).

Consultation

Public consultation

15. The public consultation document *Bail in New Zealand: Reviewing aspects of the bail system* was released on 15 March 2011. The document outlined the existing bail system, the Government's identified areas of review, and problems identified. The document also invited the public to make submissions on preliminary proposals relating to each problem.

16. The Minister of Justice issued a press statement when the document was released and MOJ wrote to 79 key stakeholders to specifically invite their feedback. Key stakeholders included the Judiciary, the New Zealand Law Society, Community Law Centres, the Public Defence Service and other organisations and groups with an interest in criminal justice matters. The public had until 16 May 2011 to make submissions on the document. MOJ received 49 submissions prior to that deadline. A summary of submissions is available alongside this RIS at www.justice.govt.nz.

Inter-agency consultation

17. New Zealand Police, the Department of Corrections, the Ministry of Social Development (Child, Youth and Family), Te Puni Kōkiri, the Ministry of Pacific Island Affairs, the Crown Law Office, the Law Commission, the Ministry of Women's Affairs, the Treasury and the Department of the Prime Minister and Cabinet were consulted on the options contained in this RIS.

Regulatory Impact Analysis

Key considerations

18. The following key considerations apply across the majority of the issues discussed in this document. They must be kept in mind when analysing the options presented.

Public safety and preventing offending on bail

19. The more restrictive the test for bail, the more likely a defendant will be remanded in custody, reducing the opportunity to offend and create a public safety risk. However, there is no foolproof way to identify which defendants will offend on bail. There is little public safety benefit if a defendant remanded in custody would not have offended while on bail.

20. A reverse burden of proof is unlikely to change the court's decision on bail for defendants who pose little risk of offending, absconding or interfering with witnesses. However, in marginal cases, a reverse burden increases the likelihood that the defendant will be remanded in custody. This is because it is more difficult to prove why the defendant should be released on bail than rebut the prosecution's arguments about why the defendant should not be released.

Criminal process rights

21. It is a fundamental principle of New Zealand's criminal justice system that anyone charged with an offence is entitled to be presumed innocent until proven guilty, and may not be arbitrarily detained. Any person charged should be released on reasonable terms and conditions unless there is just cause for remanding them in custody. These rights are guaranteed by NZBORA and the ICCPR, and the bail system requires that they be taken into account when Courts make decisions about bail. These rights may only be restricted so far as is demonstrably justified in a free and democratic society.

22. New Zealand also has obligations under UNCROC to ensure that children under 18 are not detained or imprisoned except as a last resort and for the shortest appropriate period of time. These obligations are reinforced by the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), which provide that "wherever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home".

Costs and benefits

23. Increasing the number of defendants held in custody will create additional fiscal cost for the Department of Corrections. Unless otherwise stated, no additional financial costs are expected for other agencies in the Justice sector.

24. Where additional defendants are remanded in custody, costs to the Justice sector may be partially offset by efficiency gains to Police due to fewer defendants being on bail and requiring monitoring. However, savings will generally be small.

25. The main benefits of increasing the number of defendants remanded in custody are the increase in public safety and financial savings resulting from reduced offending on bail. While it is not possible to estimate with certainty the nature and type of offences that will be committed on bail, it is assumed that offences in the future will be similar to those committed previously. Information about the methods used to estimate the fiscal and social costs and benefits of each option is provided in Appendix 2.

26. In addition to the fiscal costs of remanding additional defendants in custody, there are other unquantifiable costs. Remanding a defendant in custody removes a potentially productive member from society, affecting their employment and income

as well as their personal relationships. It also exposes individuals to the negative influences of other offenders while in prison. For these reasons, the decision to remand a defendant in custody should not be made lightly.

A. Defendants charged with serious class A drug offences³

STATUS QUO

27. In most cases the court must release a defendant charged with serious class A drug offending on bail unless the prosecution can prove that there is a risk that the defendant will fail to appear in Court, interfere with witnesses or evidence, or offend while on bail. However, a defendant charged with a drug dealing offence who has a previous conviction for a drug dealing offence may only be granted bail by the High Court.
28. The Government is currently considering the recommendations in the Law Commission's report *Controlling and Regulating Drugs: A Review of the Misuse of Drugs Act 1975*, which recommends an overhaul of current drug laws, including less punitive justice sector responses. The Government tabled its response to the report in Parliament on 6 September 2011.
29. The Law Commission noted that a significant portion of offenders appearing before the criminal courts have alcohol and drug dependencies or abuse issues, and noted that imposing punitive sanctions and remedial measures is not always appropriate to address these issues. Options considered in this RIS seek to ensure that therapeutic approaches to drug offending remain available to defendants charged with serious class A drug offences.

Rate of remand

30. Of the 2869 defendants charged with serious class A drug offences between 2004 and 2009, 667 (23%) were remanded in custody until their case was resolved, 887 (31%) were on bail for the entire period, and 1315 (46%) spent part of the period remanded in custody and part on bail.

PROBLEM

31. In the period 2004 – 2009, 34% of defendants charged with serious class A drug offences offended while on bail (twice the general rate of offending on bail, which was 17%).
32. The offending on bail was relatively serious. Almost half (46%) of the defendants who offended on bail received a sentence of imprisonment for that offending, and almost one third (27%) of those prison sentences were for two years or longer.
33. The rate of offending on bail varied slightly depending on the offending history of the defendant – 38% of defendants who had a previous conviction for serious class A drug offences or serious violent or sexual offences offended while on bail, in contrast to 33% of defendants without previous serious convictions.

³ In this document, "serious class A drug offences" are defined as offences charged under one of the following provisions in the Misuse of Drugs Act 1975:

- s 6(1)(a) (import into or export from New Zealand of any class A drug).
- s 6(1)(b) (produce or manufacture any class A drug).
- s 6(1)(c) (supply or administer, or offer to supply or administer any Class A drug to any other person, or otherwise deal in any such drug).
- s 6(1)(f) (possess any Class A drug for the purpose of supply).

OPTIONS AND ANALYSIS

A. Defendants charged with serious class A drug offences		
Options	Benefits	Costs
<p>Status quo:</p> <p>Make no legislative amendments</p>	<ul style="list-style-type: none"> Compliant with defendants' criminal process rights. Ensures that the focus of the bail decision is the defendant's risk of failing to appear in court, interfering with witnesses or evidence, or offending on bail. 	<ul style="list-style-type: none"> High rate of offending on bail by these defendants may continue.
<p>Option one: [preferred option]</p> <p>Reverse the burden of proof for defendants charged with serious class A drug offences</p>	<ul style="list-style-type: none"> Estimated 7% reduction in offences committed on bail by defendants charged with serious class A drug offences per year. Savings to public and private sector through reduced costs of crime of \$92,000 per year. 	<ul style="list-style-type: none"> Could result in a significant number of defendants being held in remand who would not have offended on bail or would not be convicted of the offence charged. Likely to be the least justifiable infringement on defendants' criminal process rights. Fiscal cost to the Department of Corrections due to increased defendants in custody of \$774,000 per year, or the equivalent of 8.5 prison beds.
<p>Option two:</p> <p>Amend section 10 of the Bail Act to reverse the burden of proof for defendants charged with serious class A drug offences who have a history of serious violent, sexual or class A offending</p>	<ul style="list-style-type: none"> More principled approach to imposing a reverse burden of proof as it takes prior conduct into account as evidence of the defendant's future risk. Estimated 1% reduction in offences committed on bail by defendants charged with serious class A drug offences per year. Savings to public and private sector through reduced costs of crime of \$12,000 per year. 	<ul style="list-style-type: none"> Likely to infringe on defendants' criminal process rights under NZBORA and ICCPR. Cost to the Department of Corrections due to increased defendants in custody of \$91,000 per year, or the equivalent of 1 prison bed.
<p>Option three:</p> <p>Prohibit defendants charged with serious methamphetamine offences who are remanded in custody from applying for release on EM bail⁴</p>	<ul style="list-style-type: none"> Recognises that methamphetamine is a highly addictive and harmful drug. Savings to public and private sector through reduced costs of crime of \$38,000 per year. Savings to Police of \$130,000 per year through reduced EM bail population. 	<ul style="list-style-type: none"> Does not recognise the harm posed by other class A drugs, for example heroin and cocaine. Given the low rate of offending on EM bail by these defendants, may result in many defendants being remanded in custody unnecessarily. Disallowing EM bail in circumstances where it would sufficiently manage the defendant's risk awaiting trial may amount to an infringement of the defendant's criminal process rights. Cost to the Department of Corrections due to increased defendants in custody of \$364,000 per year, or the equivalent of 4 prison beds.

34. Due to the high rate of offending on bail by defendants charged with serious class A drug offences (regardless of the defendants' previous serious offending history), MOJ prefers option one.

B. Defendants charged with murder

STATUS QUO

35. If a defendant charged with murder is not subject to a reverse burden of proof for another reason (for example because of repeat serious offending or repeat sentences of imprisonment), the standard test for bail applies. That is, the court must release the defendant on bail unless the prosecution can prove that there is a

⁴ In this RIS, serious methamphetamine offences are supply and possession for supply, manufacture, and importing or exporting methamphetamine. Methamphetamine charges made up the vast majority (91%) of all serious class A drug charges in the six year period 2004 – 2009.

risk that the defendant will fail to appear in Court, interfere with witnesses or evidence, or offend while on bail.

Rate of remand

36. Most defendants charged with murder are remanded in custody. Of the 409 people charged with murder between 2004 and 2009, 62% were remanded in custody for the entire period until their case was resolved, 5% were on bail for the entire period, and 33% spent part of the period remanded in custody and part on bail.

Offending on bail

37. Of the 156 defendants charged with murder who spent at least some time on bail, 21 (14%) were convicted of at least one offence committed while on bail. Offences committed on bail were generally low-level; with the exception of three defendants who committed serious violent offences while on bail for murder (this includes one defendant who while on bail for murder, committed a second murder).

PROBLEM

38. Murder is the most serious offence in New Zealand law, but is subject to the same tests for bail as other, less serious offences. Releasing a defendant charged with murder on bail may risk public safety and negatively impact the victim's family and friends.

OPTIONS AND ANALYSIS

<i>B. Defendants charged with murder</i>		
Options	Benefits	Costs
<p>Status quo: Make no legislative amendments</p>	<ul style="list-style-type: none"> Relatively low existing rate of offending on bail by these defendants may indicate that the existing law is operating effectively. May not be particularly onerous for the prosecution to prove that the defendant should be remanded in custody because the nature and seriousness of the charge is taken into account in the bail decision. Ensures that the focus of the bail decision is the defendant's risk of failing to appear in court, interfering with witnesses or evidence, or offending on bail. Compliant with defendants' criminal process rights. 	<ul style="list-style-type: none"> Rate of offending on bail may continue. Releasing defendants charged with murder on bail will continue to be an affront to the family and friends of victims.
<p>Option one: Remove bail eligibility for defendants charged with murder</p>	<ul style="list-style-type: none"> Provides peace of mind to the families and friends of murder victims, and gives weight to the seriousness of the murder charge. Assumes that all offending on bail by defendants charged with murder is avoided. Savings to public and private sector through reduced costs of crime of \$41,000 per year. 	<ul style="list-style-type: none"> Will infringe defendants' criminal process rights under NZBORA and ICCPR. May also be unreasonable given the high percentage of bailed defendants who are not found guilty of the charge, and the fact that the time between when the charge is laid and the trial can be significant. Fiscal cost to the Department of Corrections due to increased defendants in custody of \$1.3m per year or the equivalent of 14 additional prison beds.
<p>Option two: [preferred option] Impose a reverse burden of proof on defendants charged with murder</p>	<ul style="list-style-type: none"> Estimated 15-18% reduction in offences committed on bail by defendants charged with murder per year. Savings to public and private sector through reduced costs of crime of \$6000 - \$7000 per year. 	<ul style="list-style-type: none"> Likely to infringe defendants' criminal process rights under NZBORA and ICCPR. Families and friends of victims would still face uncertainty about whether the defendant will be released on bail. Fiscal cost to the Department of Corrections due to increased defendants in custody of between \$182,000 and \$273,000 per year or the equivalent of 2 to 3 additional prison beds.

39. MOJ prefers option two and considers that it strikes the best balance between recognising the seriousness of a murder charge, the importance of public safety, and the defendant's criminal process rights.

C. Defendants charged with serious violent or sexual offences⁵

STATUS QUO

40. In the six year period 2004 to 2009, 3028 defendants qualified for the reverse burden of proof in section 10 of the Bail Act (see paragraph 7). Of these, 351 (12%) were remanded in custody for the entire period until their case was resolved, 885 (29%) were on bail for the entire period, and 1792 (59%) spent part of the period remanded in custody and part on bail.

EM bail for defendants charged with serious violent and sexual offences

41. The public consultation document discussed whether EM bail was appropriate for defendants charged with serious violent or sexual offences (SVSOs), and asked the public whether these defendants should continue to be eligible for EM bail. Between 25 September 2006 and 31 December 2010, the Courts heard 1080 applications for EM bail from 984 defendants charged with SVSOs. EM bail was granted to 514 of these defendants.
42. The rate of offending on bail by defendants granted EM bail was low. At 31 December 2010, 6% of defendants had been convicted of offences committed while on EM bail, and another 4% were facing charges for offences allegedly committed while on EM bail. In comparison, the overall rate of offending on all types of bail by defendants charged with SVSOs from 2004 to 2009 was 22%.⁶
43. The most common offences committed on EM bail by defendants charged with SVSOs were acts intended to cause injury (committed by eight defendants), followed by burglary (four defendants) and theft (four defendants). Where a specific sentence was recorded for the offending on EM bail, 15 defendants received a sentence of imprisonment for that offending.⁷ Only one of the sentences imposed was for two years imprisonment or more.

PROBLEM

44. When a defendant charged with a SVSO is released on bail, this is likely to be upsetting for the victim of the alleged offence, and may lead the victim to fear for his or her safety. The Government wants to ensure that the test for bail for defendants charged with such serious offences is appropriate, and that high risk defendants do not have the opportunity to offend or victimise while waiting for their case to be resolved.
45. Section 10 recognises that a major indicator of risk is the defendant's previous behaviour. However, the list of offences contained in section 10 has not been reviewed since the Bail Act was enacted. The list does not reflect the risk posed by defendants charged with other non-specified SVSOs in the Crimes Act 1961 who have a history of serious offending.

⁵ For the purposes of this RIS, "serious violent and sexual offences" are all violent and sexual offences with a maximum penalty of five years or more in the Crimes Act 1961, excluding low volume offences where less than 200 people in total were charged between 2004 and 2009. Low volume offences are excluded because there is not enough data to draw conclusions about the risk posed by defendants charged with these offences.

⁶ Between 2004 and 2009, 40,296 defendants charged with serious violent and sexual offences spent time on bail. Of those, 8984 committed an offence on bail.

⁷ For 21 of the 30 defendants convicted of offending on EM bail, information is available about the specific sentence imposed for the offending on EM bail. For the remaining nine, an overall sentence may have been recorded for both the original offence and the offending on bail.

46. Table 1 provides a high level summary of the rate and seriousness of offending on bail by defendants who:

- in the six year period 2004 to 2009, were charged with SVSOs that are not currently on the list in section 10; and
- had a previous conviction for either a specified offence, or for the offence charged.

Table 1 gives an indication of the risk posed by defendants who, if the offence in question was added to the list in section 10, would be subject to a reverse burden of proof in the future. The seriousness of the offending is assessed by the percentage of defendants who received a sentence of imprisonment for offending on bail, and the percentage who received a sentence of imprisonment of two years or more for offending on bail.

Table 1: Offending on bail by defendants charged with non-specified SVSOs in the six year period 2004 – 2009, who have a previous conviction for the offence charged, or an offence listed in section 10 of the Bail Act

Non-specified serious violent and sexual offences in the Crimes Act (charge)	Defendants who spent time on bail for the charge	Incidence and seriousness of offending on bail		
		Defendants who spent time on bail and were convicted of offending on bail	Defendants who spent time on bail who were imprisoned for offending on bail	Defendants who spent time on bail and were imprisoned for 2+ years for offending on bail
1. Assault with intent to rob	37	46%	30%	3%
2. Aggravated burglary	83	46%	21%	4%
3. Demanding with intent to steal	99	44%	23%	2%
4. Assault with a weapon	1202	33%	16%	1%
5. Threatening to kill or cause grievous bodily harm	1399	31%	15%	1%
6. Kidnapping including abduction for sex/marriage	115	30%	18%	4%
7. Sexual conduct with child under 12	32	28%	16%	6%
8. Sexual conduct with young person under 16	64	27%	16%	3%
9. Indecent assault	360	21%	7%	1%
10. Attempted sexual violation	10	0%	0%	0%

OPTIONS AND ANALYSIS

C. Defendants charged with serious violent and sexual offences		
Options	Benefits	Costs
<p>Status quo: Make no legislative amendments</p>	<ul style="list-style-type: none"> • Most compliant with defendants' criminal process rights. • Ensures that the focus of the bail decision is the defendant's risk of failing to appear in court, interfering with witnesses or evidence, or offending on bail. 	<ul style="list-style-type: none"> • Rates of offending on bail by defendants charged with non-specified SVSOs who have a history of serious offending may continue.
<p>Option one: Add SVSOs with rates of offending on bail of 40% or more to the list in section 10 of the Bail Act The following three offences would be added: assault with intent to rob, aggravated burglary, and demanding</p>	<ul style="list-style-type: none"> • Targets defendants with the highest rates of offending on bail. • Estimated 3% reduction in offences committed on bail by defendants charged with SVSOs per year. • Savings to public and private sector through reduced costs of crime of \$478,000 per year. 	<ul style="list-style-type: none"> • Likely to be the most justifiable limitation on defendants' criminal process rights. • Fiscal cost to the Department of Corrections due to increased defendants in custody of \$2.5m per year or the equivalent of 27 additional prison beds.

with intent to steal (nos. 1 - 3)

Option two:

Add SVSOs with rates of offending on bail of 30% or more to the list in section 10 of the Bail Act

The following six offences would be added: assault with intent to rob, aggravated burglary, demanding with intent to steal, assault with a weapon, threatening to kill or cause grievous bodily harm and kidnapping (including abduction for sex or marriage). (nos. 1 - 6)

- Estimated 6% reduction in offences committed on bail by defendants charged with SVSOs per year.
- Savings to public and private sector through reduced costs of crime of \$1m per year.

- Some limitation on criminal process rights.
- Fiscal cost to the Department of Corrections due to increased defendants in custody of \$5.3m per year or the equivalent of 58 additional prison beds.

Option three: [preferred option]

Add SVSOs to the list in section 10 where 3% or more of defendants charged are sentenced to two years imprisonment or more for offences committed on bail

The following five offences would be added: sexual conduct with a child under 12, kidnapping (including abduction for sex or marriage), aggravated burglary, sexual conduct with a young person under 16 and assault with intent to rob. (nos. 1, 2, 6, 7, 8)

- Targets the most serious offending on bail, as indicated by the sentences imposed for the offending, and is therefore expected to be the most cost effective option in terms of the benefits achieved through reduced costs of crime.
- Estimated 3% reduction in offences committed on bail by defendants charged with SVSOs per year.
- Savings to public and private sector through reduced costs of crime of at least \$579,000 per year.

- Some limitation on criminal process rights.
- Fiscal cost to the Department of Corrections due to increased defendants in custody of \$3m per year or the equivalent of 33 additional prison beds.

Option four:

Add all SVSOs in the Crimes Act to the list in section 10, except for low volume offences

All ten offences in table 1 would be added to section 10

- Will subject the highest number of defendants to a reverse burden of proof.
- Estimated 7% reduction in offences committed on bail by defendants charged with SVSOs per year.
- Savings to public and private sector through reduced costs of crime of \$1.2m per year.

- Additional public safety benefit between this option and options two and three is marginal, because defendants charged with the additional offences have a low rate of offending on bail.
- Includes offences that have differing "degrees of seriousness" such as indecent assault, which can cover a range of conduct.
- Of options one to four, likely to be the least justifiable limitation on criminal process rights as affects defendants less likely to offend on bail.
- Fiscal cost to the Department of Corrections due to increased defendants in custody of \$6m per year or the equivalent of 66 additional prison beds.

Option five:

Prohibit defendants charged with SVSOs who are remanded in custody from applying for EM bail

- Provides the most peace of mind to victims of high risk defendants, as defendants would not be able to apply for EM bail once remanded in custody.
- All offending on EM bail by defendants charged with SVSOs is avoided.
- Savings to public and private sector through reduced costs of crime of \$74,000 per year.
- Savings to Police of \$600,000 per year through reduced EM bail population.

- Given the low rate of offending on EM bail by these defendants, may result in many defendants being remanded in custody unnecessarily.
- Prevents the Court from striking a balance between the safety and the community and the defendant's criminal process rights.
- Of all options, likely to be the least justifiable limitation on criminal process rights as no consideration is given to the defendant's offending history (indicating individual risk) before the option applies.
- Fiscal cost to the Department of Corrections due to increased defendants in custody of \$2.6m per year, or the equivalent of 29 prison beds.

47. MOJ prefers option three, as it targets defendants with the highest rates of serious offending on bail. MOJ considers this option is likely to provide the most value in reducing the cost of offences committed on bail.

D. Young defendants aged 17 to 19 years old

STATUS QUO

48. New Zealand’s criminal justice system requires children and young people to be dealt with differently from adults. Defendants under 17 at the time of the offence, and under 18 at the time the charges are laid, are generally dealt with by the Youth Court under the youth justice provisions of the Children, Young Persons, and Their Families Act 1989 (the CYPFA).

49. Defendants aged 17 or over at the time of the offence, or who were under 17 at the time of the offence and turn 18 before the charges are laid, are tried in the adult jurisdiction and bail decisions are made under the Bail Act. Section 15 of the Bail Act protects these young defendants through a strong presumption in favour of bail for defendants aged 17 to 19 inclusive, subject to any conditions the Court sees fit. The Court may only remand a defendant of this age in custody if it is satisfied that no other course of action is acceptable in the circumstances, or if a reverse burden of proof applies.

50. The effect of the presumption in favour of bail for defendants aged 17 to 19 is that some are granted bail in circumstances where they would have been remanded in custody if they had been older. This includes defendants with a history of serious offending who may have served a prison sentence for prior offending.

PROBLEM

51. In the period 2004 – 2009, over half (54%) of young defendants who had served a previous prison sentence were convicted of offending on bail.⁸ In comparison, less than a quarter (22%) of young defendants who had not previously been sentenced to imprisonment were convicted of offending on bail. Offences committed on bail by those with a previous prison sentence were also generally more serious.

OPTIONS AND ANALYSIS

D. Young defendants aged 17 to 19 years old		
Options	Benefits	Costs
<p>Status quo:</p> <p>Make no legislative amendments</p>	<ul style="list-style-type: none"> The relative immaturity and vulnerability of young people is protected by a decreased likelihood of being remanded in custody. Compliant with defendants’ criminal process rights. Compliant with New Zealand’s international obligations in relation to principles of youth justice and the treatment of children and young people. 	<ul style="list-style-type: none"> The high rate of offending on bail by young defendants who have previously been sentenced to imprisonment may continue.
<p>Option one: [preferred option]</p> <p>Remove the strong youth presumption in favour of bail for defendants who have previously been sentenced to imprisonment (instead apply the standard adult tests for bail)</p>	<ul style="list-style-type: none"> Estimated 2-7% reduction in offences committed on bail per year by defendants aged 17 – 19 who have previously served a prison sentence. Savings to public and private sector through reduced costs of crime of between \$14,000 and \$44,000. 	<ul style="list-style-type: none"> Could result in domestic and international criticism due to New Zealand’s obligations relating to children and young people. Fiscal cost to the Department of Corrections due to increased defendants in custody of between \$182,000 and \$546,000 per year, or the equivalent of 2 to 6 additional prison beds.

⁸ The proportion of young defendants with previous prison sentences is small as the Courts generally try to avoid imprisoning young people. Between 2004 and 2009, this group made up less than 3% of all defendants aged between 17 to 19 who had a decision on bail. Of these, 62% spent at least some time on bail.

52. Given the significantly higher rate of offending on bail by the small group of defendants aged 17 to 19 who have previously served a prison sentence, and the seriousness of that offending, MOJ prefers option one.

E. Young defendants under 17 years old

STATUS QUO

53. One of the fundamental principles guiding Youth Court decisions is that children and young people should be kept in the community as far as this is practical and in keeping with public safety.
54. Section 214 of the CYPFA requires that if a defendant under 17 years of age breaches his or her bail conditions, Police can only arrest the defendant without a warrant if it is considered necessary to ensure that the defendant does not abscond, interfere with witnesses or evidence, or offend. Nothing in section 214 prevents the Police from arresting a child or young person without a warrant if they have reasonable cause to suspect that the child or young person has committed a purely indictable offence, and that the arrest is required in the public interest.
55. Youth Court Judges have the ability to issue an arrest warrant for a child or young person for any breach of a bail condition under section 36 of the Bail Act. However, this power is used sparingly.

PROBLEM

56. Arrest without a warrant will usually be an option for a serious breach of bail conditions by a defendant under 17. However, for less serious breaches, there is little Police can do to address the breach.
57. The Principal Youth Court Judge and Police have noted that there are children and young people who are aware of the difficulties faced by Police when it comes to arresting young defendants, and therefore some treat the terms of their bail with an element of disregard. The New Zealand Police Association commented in their submission that the inability of their members to arrest a child or young person for any breach of bail conditions effectively “renders bail conditions virtually meaningless as a means of controlling behaviour and mitigating risk to the community.”

OPTIONS AND ANALYSIS

E. Young defendants under 17 years old

Options	Benefits	Costs
<p>Status quo:</p> <p>Make no legislative amendments</p>	<ul style="list-style-type: none"> The relative immaturity and vulnerability of young people is protected. Most compliant with New Zealand’s international obligations relating to children and young people. Most compliant with the principles of youth justice contained in the CYPFA. 	<ul style="list-style-type: none"> The supposed casual attitude of young defendants towards bail conditions may continue. Police will continue to face difficulties in addressing breaches of bail conditions by young defendants.
<p>Option one:</p> <p>Allow Police to arrest a defendant under the age of 17 without a warrant for breach of bail conditions under any circumstances, as is the case for those over the age of 17</p>	<ul style="list-style-type: none"> Will have the most significant impact on compliance with bail conditions by children and young people. 	<ul style="list-style-type: none"> Could result in a number of low risk defendants being arrested and held in Police custody for minor or inadvertent breaches of bail conditions. Minor costs for Police due to the requirement to keep children and young people in custody separate from adults. Likely to result in domestic and international criticism due to New Zealand’s obligations relating to children and young people.

Option two: [preferred option]

Allow the Court to detain a defendant under 17 who has already significantly or repetitively breached a condition of bail, and is likely, in the Court's opinion, to significantly breach a condition of that bail again. Empower Police to return the defendant to a place where he or she will comply with their curfew, or to the people charged with the defendant's care.

- Will have some impact on compliance with bail conditions by children and young people.
- Gives the Court the opportunity to examine and address serious or repetitive breaches of bail conditions.
- Gives Police the ability to ensure a greater compliance with curfew conditions without exposing the child or young person unnecessarily to formal parts of the criminal justice system.
- Likely to have some costs for Police due to the requirement to keep children and young people in custody separate from adults.
- Could result in domestic and international criticism due to New Zealand's obligations relating to children and young people.

58. MOJ prefers option two as it is likely to improve compliance with bail conditions by children and young people, while preventing low risk defendants from being arrested and held in Police custody for a minor or inadvertent breach of conditions.

F. Ensuring bail is not granted in return for information

STATUS QUO

59. In the normal course of Police considering whether to oppose bail, co-operation with authorities, especially in relation to the defendant's own case, will often be relevant. If a defendant is co-operative, this may indicate a lower risk that he or she will fail to appear in Court, interfere with witnesses or evidence, or offend while on bail. However, this is considered in the context of all the relevant information about the defendant, such as his or her criminal history (if any).

60. Police advise that bail is not offered in return for information. There are operational safeguards to ensure that co-operation with authorities does not inappropriately influence decisions on whether to oppose bail. Further, the Court is not normally advised of whether a defendant has provided information to the Police at the time the bail decision is made. The Court will decide whether the defendant should be released on bail or remanded in custody, based on the defendant's risk of failing to appear in Court, interfering with witnesses or evidence, or offending while on bail.

PROBLEM

61. In January 2008, a defendant in custody provided information to Police about the high profile theft of war medals from the Waiouru Army Museum. The defendant was subsequently released on bail, prompting speculation that Police had agreed to the defendant's release on bail in return for information. As part of its law and order policy leading up to the 2008 general election, the Government stated that it would look into this issue and ensure that this did not happen.

OPTIONS AND ANALYSIS

F. Ensuring bail is not granted in return for information

Options	Benefits	Costs
Status quo: Make no legislative amendments	<ul style="list-style-type: none"> • No regulatory intervention needed. 	<ul style="list-style-type: none"> • Potential public perception that bail may be granted inappropriately.
Option one: [preferred option] Specify in the Bail Act that bail is not to be granted in return for information	<ul style="list-style-type: none"> • Provides a clear "best practice" statement in legislation, and emphasises that the primary concern in bail hearings is the defendant's risk. 	<ul style="list-style-type: none"> • Creates no additional cost to the Justice sector, as it merely codifies the status quo.

62. MOJ prefers option one as it gives the clearest statement of the Government's policy to ensure that defendants are not granted bail in return for information.

G. Failure to answer bail

STATUS QUO

63. A defendant 'fails to answer bail' if he or she does not appear in Court at the scheduled time. Failing to answer bail is an offence punishable by a fine of up to \$1000 for Police bail, or up to one year imprisonment or a fine of up to \$2000 for Court bail.⁹ If a defendant fails to answer bail, a warrant is in most cases immediately issued for his or her arrest.
64. Where it appears that the defendant's failure to answer bail was not intentional (for example, because the defendant was sick or did not understand what was required), he or she will be spoken to by the Police and/or the Court. The defendant is not usually charged with failure to answer bail and, in most cases, will be released on bail again with a new hearing date.
65. MOJ has observed an increase in the number of people failing to answer bail over the last decade, especially in major centres.¹⁰ The number of people convicted of failure to answer Police bail increased by about 40% over the decade 1999 to 2009, from 1170 in 1999 to a high of 1671 in 2006.
66. The number of people convicted of failure to answer Court bail doubled over the decade, and until 2007, the number of people convicted of failure to answer Court bail rose at a faster rate than the number of people prosecuted each year. The number rose from 2384 in 1999, or approximately 1 person in every 50 people prosecuted, to a high of 5082 in 2007 or 1 in every 25 prosecuted.
67. The number of convictions for failure to answer Police bail has been declining since 2007, and since 2008 for failure to answer Court bail. In 2009, 4423 people were convicted of failure to answer Court bail. This is approximately 1 person in every 33 people prosecuted. There are also a range of other initiatives and operational improvements in progress that are likely to further reduce the number of defendants who fail to answer bail.

Monetary bonds and sureties in the District Court

68. Prior to 1987, the District Court had the option to require a monetary bond or surety of a defendant released on bail.¹¹ They were abolished for the following reasons:
 - Effectiveness not established through research in New Zealand at the time.
 - Potentially discriminatory against those on a low income and those with few community links, or whose friends or relatives have little money.
 - Undesirable lending practices can develop, as evidenced internationally.
 - Difficult and costly to enforce.
69. Monetary bonds and sureties are currently available for Police bail and bail granted by the High Court. Police advise that monetary bonds and sureties are seldom, if ever, imposed for Police bail because they are difficult to enforce. The High Court occasionally imposes monetary bonds and sureties, but these are often for significant sums (usually at least \$1000 and often \$10,000 or more) and are usually part of a wider package of conditions.

⁹ The maximum penalty for failure to answer Court bail is higher because failure to comply with a direction of a Court is considered to be more serious than failure to comply with a direction of a member of the Police.

¹⁰ The extent of the increase cannot be quantified except in relation to those convicted of failure to answer bail, which may only represent a small percentage of those who actually fail to answer bail.

¹¹ A monetary bond is a guarantee from the defendant that he or she will attend Court. The defendant usually deposits money with the Court but in some cases the defendant's bond is a promise to pay a certain amount if he or she does not attend Court. A surety is a guarantee from someone other than the defendant that they will pay a specified amount if the defendant does not attend Court.

PROBLEM

70. Failure to answer bail disrupts Court schedules and wastes judicial, Police and prosecution time and resources. In some situations, especially at the trial stage, a defendant's failure to attend Court will also significantly inconvenience victims, witnesses and jurors.

OPTIONS AND ANALYSIS

G. Failure to answer bail		
Options	Benefits	Costs
<p>Status quo: Make no legislative or operational changes</p>	<ul style="list-style-type: none"> The downward trend in the rate of failure to answer bail seen since 2007 may continue and be further reduced by the initiatives contained in the CPRAM Bill and other operational improvements. 	<ul style="list-style-type: none"> The supposed casual attitude of defendants to Court appearances may continue without further intervention. If the high rate of failure to answer bail continues, there will be continued costs to the Justice sector due to the wastage and delays caused by non-appearances.
<p>Option one: [preferred option] Increase the maximum penalty so that failure to answer Police bail is punishable by up to three months imprisonment as an alternative to the \$1000 maximum fine</p>	<ul style="list-style-type: none"> Allows the Court to impose a wider range of appropriate sentences, including community-based sentences. May have some deterrent effect and reduce the number of defendants who fail to answer bail. Does not significantly curb judicial discretion. 	<ul style="list-style-type: none"> No additional cost is expected as it appears that the Court may already be taking defendants' failure to answer bail into account as an aggravating factor when imposing sentences for other offences.
<p>Option two: Require Courts to impose cumulative sentences for failure to answer bail on any other sentence the defendant is subject to</p>	<ul style="list-style-type: none"> May have some deterrent effect as it would be clear that failure to answer bail will result in a distinct penalty. 	<ul style="list-style-type: none"> Could set a precedent for other reforms to the criminal justice system, leading to major fiscal impacts and potentially disproportionate penalties. Some fiscal costs as would likely result in additional cumulative short sentences of imprisonment being imposed.
<p>Option three: Require defendants who fail to answer bail to be automatically remanded in custody and would no longer be eligible for bail</p>	<ul style="list-style-type: none"> Provides the most incentive for defendants to ensure they appear at their scheduled court appearance. 	<ul style="list-style-type: none"> Would result in a large number of low risk defendants being remanded in custody unnecessarily because the court would not have the discretion to consider all relevant circumstances and respond appropriately when the failure to appear was unintentional or inconsequential. Could be particularly unfair when the defendant is not likely to be sentenced to imprisonment for the offence charged.
<p>Option four: Introduce legislation and operational guidelines to allow the District Court to impose monetary bonds and sureties If this option is not adopted, monetary bonds and sureties for Police bail would also be abolished as it is considered inappropriate for Police to be able to require a bond or surety in a situation where the District Court cannot. The High Court would retain the ability to impose monetary bonds and sureties.</p>	<ul style="list-style-type: none"> May be some fiscal benefits arising from reduced appeals in cases where bail is denied in the District Court, but considered appropriate by the High Court when the availability of a monetary bond or surety is taken into account. 	<ul style="list-style-type: none"> The reasons for abolishing monetary bonds and sureties in 1987 still appear to be relevant. May shift the Courts' emphasis in bail decisions from an assessment of the defendant's likelihood of absconding, interfering with witnesses or offending while on bail. Potentially undesirable side effects, such as encouraging defendants to turn to undesirable loan methods, or the development of a culture of heavy-handed bail bondsmen. In family violence situations, could place extra financial hardship on abused women and families. Fiscal costs associated with re-establishing bonds and sureties, as well as ongoing administration and enforcement costs for MOJ.

Criminal Procedure (Reform and Modernisation) Bill

71. The Criminal Procedure (Reform and Modernisation) Bill (the CPRAM Bill) introduces a range of reforms intended to make Court processes more efficient and to remove unnecessary hearings, complexity and delay. The CPRAM Bill was introduced in November 2010 and is currently awaiting its second reading.
72. A faster, less complex system may indirectly reduce the number of defendants that fail to answer bail. In addition, the following proposals will help lessen the inconvenience and costs caused by a defendant failing to answer bail:
- Proceeding in the absence of the defendant once a plea has been entered, unless this would be contrary to the interests of justice.
 - Clarifying Registrars' powers to withdraw warrants to arrest where the defendant makes a voluntary appearance at Court after failing to appear.
 - New incentives and sanctions to promote compliance with procedural obligations.

Police reviews of warrants to arrest

73. New Zealand Police have introduced a number of improvements relating to warrants to arrest, including an electronic case management system, updated procedural guidelines and a process that prioritises warrants to arrest on the basis of the defendant's risk. The improvements will mean that warrants for higher risk defendants, including those who have failed to answer bail, will receive a faster and more intense response. This is expected to reduce the ability and incentive to abscond.

Operational improvements

74. The public consultation document expressly asked for views on non-legislative improvements that could help to reduce the number of defendants who fail to answer bail. Six submitters suggested ways that Courts could improve their methods of reminding defendants to turn up to their scheduled court appearances. Ideas included completing a survey of the reasons why defendants fail to answer bail, and introducing text message reminders of scheduled court dates.
75. MOJ continually looks for ways for Courts to improve service delivery and submitters' suggestions will be considered amongst ongoing work to improve operational efficiency and reduce delays in the court system.

Conclusion

76. MOJ considers that ongoing operational improvements and the initiatives to be introduced under the CPRAM Bill will help to ensure that the rate of failure to answer bail continues to drop in future years. However, MOJ considers it appropriate to implement option one, to give Courts a wider range of options to deal with defendants who fail to answer Police bail.
77. Based on the criticisms of District Court monetary bonds and sureties, MOJ does not consider option four to be appropriate. MOJ therefore also recommends the abolition of monetary bonds and sureties for Police bail, as it is not appropriate for Police to require a bond or surety in a situation where the District Court cannot. The power of the High Court to impose bonds and sureties would not be affected.

H. Offences that are bailable as of right

STATUS QUO

78. A defendant who is bailable as of right may not be remanded in custody, regardless of the risk of offending on bail, interfering with witnesses or evidence, or failing to appear in court. Defendants who are bailable as of right may still be subject to bail

conditions to mitigate those risks, and they will lose their bailable as of right status if they breach their conditions (and may be remanded in custody).

79. A defendant is bailable as of right if he or she has no convictions for an offence punishable by imprisonment and is charged with an offence that is either:
- a) not punishable by imprisonment; or
 - b) punishable by less than three years imprisonment, unless the offence is assault on a child, assault by a male on a female, or contravention of a protection order; or
 - c) listed in section 7(3) of the Bail Act (“the listed offences”).
80. The listed offences are all contained in the Crimes Act and are as follows:
- a) s 111 False statements or declarations
 - b) s 151 Duty to provide the necessaries of life
 - c) s 152 Duty of parent or guardian to provide necessaries
 - d) s 153 Duty of employers to provide necessaries
 - e) s 154 Abandoning child under 6
 - f) s 190 Injuring by unlawful act
 - g) s 202 Setting traps, etc
 - h) s 249 Acknowledging instrument in false name
 - i) s 262 Taking reward for recovery of stolen goods
 - j) s 280 Imitating authorised marks
 - k) s 281 Imitating customary marks.
81. The listed offences are not frequently charged. In the period 2004 – 2009, 582 defendants were charged with one of the listed offences. Of these, an average of 18 defendants per year had no previous convictions for an offence punishable by imprisonment and were therefore bailable as of right.

PROBLEM

82. Some of the current references in section 7(3) are outdated due to previous legislative changes.¹² Further, the offences listed in section 7(3)(d) to (g) can encompass behaviour that causes serious harm to others, to the extent that it may be inappropriate that defendants charged with these offences are bailable as of right, despite having no significant history of offending.
83. Finally, between 2004 and 2009, 32 of the 109 (29%) who were bailable as of right under section 7(3) were convicted of an offence committed while on bail. Offences committed on bail by these defendants were generally of low seriousness, except for a small number of violent and sexual offences.

¹² Section 7(3)(h) to (k) was not consequentially amended when the Crimes Act 1961 was amended in 2003. Section 7(3)(b) and (c) may also need amending as sections 151 and 152 of the Crimes Act are amended by the Crimes Amendment Bill (No 2). These sections will no longer contain offences per se. Instead, section 195 will make it an offence to fail to perform these duties, or engage in intentional behaviour, to the extent that the individual’s conduct is a major departure from a reasonable standard of care, and is likely to result in serious harm. The penalty for the offence will also increase from 5 to 10 years imprisonment. It is not appropriate to replace references to sections 151 and 152 with a reference to section 195 because this could make defendants charged with harmful intentional conduct bailable as of right.

OPTIONS AND ANALYSIS

H. Offences that are bailable as of right

Options	Benefits	Costs
<p>Status quo:</p> <p>Correct the cross-references in section 7(3)(h) to (k) but make no substantive amendments to section 7(3) of the Bail Act</p>	<ul style="list-style-type: none"> Greater recognition of the defendant's criminal process rights as he or she will be granted bail, and any risk will be managed by bail conditions. 	<ul style="list-style-type: none"> Some defendants may be granted bail despite being sufficiently high risk to warrant being remanded in custody.
<p>Option one: [preferred option]</p> <p>Repeal section 7(3) of the Bail Act</p>	<ul style="list-style-type: none"> Allows the Court to remand defendants currently bailable as of right under section 7(3) in custody in the rare cases where it is appropriate. May have marginal public safety benefits as may help to avoid more serious offences being committed on bail by these defendants. 	<ul style="list-style-type: none"> No measurable additional fiscal cost to the Justice sector due to the very low volume of defendants likely to be affected.

84. MOJ prefers option one because it will allow Courts to remand the defendant in custody where no set of conditions would be adequate to manage the defendant's risk.

I. Electronically monitored bail

STATUS QUO

85. EM bail is not specifically covered in legislation. The Bail Act gives the Courts a generic power to impose bail conditions and EM bail is imposed as a condition under that power. There is guidance in common law for the courts and Police practice is guided by operational manuals and instructions.

EM bail in practice 2006 – 2010

86. Between 25 September 2006 (when EM bail was formally introduced as a condition of bail) and 31 December 2010, the Courts heard 2254 applications for EM bail from 2039 defendants. EM bail was granted in 1135 of the 2254 cases (50%), to 1079 defendants.

87. As at 31 December 2010, there were 175 people on EM bail across the country and the average period that defendants spent on EM bail was just over 132 days (around four and a half months).

PROBLEM

88. Continuing to use the generic power to impose EM bail risks inconsistent practices developing in different parts of the country, both in how Courts impose EM bail and in how Police manage defendants subject to EM bail. This may mean that two defendants in similar circumstances face different outcomes depending on the Court they appear in.

OPTIONS AND ANALYSIS

I. Electronically monitored bail

Options	Benefits	Costs
<p>Status quo:</p> <p>Do not set the EM bail regime out in legislation</p>	<ul style="list-style-type: none"> Maintains flexibility in the regime, allowing it to develop without amendments being required to legislation. 	<ul style="list-style-type: none"> Risks inconsistent practices developing in different parts of the country, and inconsistent outcomes for defendants.
<p>Option one: [preferred option]</p> <p>Set the EM bail regime out in legislation, specifying matters such as when the Court can impose EM bail, EM bail conditions, and how time spent on EM bail can be taken into account at sentencing</p>	<ul style="list-style-type: none"> Ensures consistent practices for imposing and enforcing EM bail in Courts across the country. May lead to fewer appeals as the decision-making would be more transparent. 	<ul style="list-style-type: none"> No additional cost to the Justice sector is expected as legislation is intended to codify the status quo.

89. MOJ prefers option one, as it will ensure a consistent approach to the application of EM bail.

Conclusions and recommendations

90. The following table summarises MOJ's preferred options.

Issue	MOJ's preferred option
A. Defendants charged with serious class A drug offences	Option one: Reverse the burden of proof for defendants charged with serious class A drug offences
B. Defendants charged with murder	Option two: Impose a reverse burden of proof on defendants charged with murder
C. Defendants charged with serious violent or sexual offences	Option three: Add SVSOs to the list in section 10 where 3% or more of defendants charged are sentenced to two years imprisonment or more for offences committed on bail
D. Young defendants aged 17 to 19 years old	Option one: Remove the strong youth presumption in favour of bail for defendants who have previously been sentenced to imprisonment (instead apply the standard adult tests for bail)
E. Young defendants under 17 years old	Option two: Allow the Court to detain a defendant under 17 who has already significantly or repetitively breached a condition of bail, and is likely, in the Court's opinion, to significantly breach a condition of that bail again. Empower Police to return the defendant to a place where he or she will comply with their curfew, or to the people charged with the defendant's care
F. Ensuring bail is not granted in return for information	Option one: Specify in the Bail Act that bail is not to be granted in return for information
G. Failure to answer bail	Option one: Increase the maximum penalty so that failure to answer Police bail is punishable by up to three months imprisonment as an alternative to the \$1000 maximum fine (and abolish monetary bonds and sureties for Police)
H. Offences that are bailable as of right	Option one: Repeal section 7(3) of the Bail Act
I. Electronically monitored bail	Option one: Set the EM bail regime out in legislation, specifying matters such as when the Court can impose EM bail, EM bail conditions, and how time spent on EM bail can be taken into account at sentencing

Implementation

91. If Cabinet agrees to make changes to the bail system, a Bail Amendment Bill will be introduced to Parliament in early 2012. MOJ will work with other Justice sector operational agencies to ensure that implementation requirements are identified early, and are taken into consideration when determining the appropriate commencement date for the Bill.

Monitoring, evaluation and review

92. Two years after implementation, MOJ will re-assess the rates of offending on bail by defendants affected by these proposals. If necessary, further advice will be provided to the Minister of Justice at that time.

Appendix 1: Notes on statistics

The statistics count people

The statistics in this document count people, as opposed to charges or cases. A person is counted once in each year that they are charged with a new offence, regardless of the number of charges and whether they relate to one or more cases.

The statistics cover the period 2004 to 2009

With two exceptions, the statistics in this document count people charged with offences in the six year period from 2004 to 2009 (inclusive). The two exceptions are the statistics used to assess options relating to:

- failure to answer bail – statistics are from the period 1999 to 2009 (inclusive)
- EM bail – statistics are from 25 September 2006 (when EM bail was formally introduced as a condition of bail) to 31 December 2010 (inclusive).

The starting point of 2004 was chosen because the Courts' computer system was replaced in mid 2003 and the new system produces more relevant data.

The end point of 2009 was chosen because offending on bail statistics are recorded against the year that the person was charged with the original offence(s) and are delayed for two years to allow investigative and court processes to be completed. For example, a person charged with an offence in November 2008 (and counted in the 2008 statistics) may have offended on bail in July 2009 and been convicted of the offence committed on bail in February 2010.

Offending on bail statistics exclude failure to answer bail

The offending on bail statistics exclude people whose most serious (and probably only) offence committed on bail was failure to answer bail. Failure to answer bail is different to other kinds of offending on bail and is dealt with separately in this RIS.

Offence categories

This document uses the Australian and New Zealand Standard Offence Classification (ANZSOC) to categorise offences. This is different to the offence categories used in the public consultation document, and may mean that the statistics in the two documents are not directly comparable. More information about ANZSOC is available from www.stats.govt.nz.

Statistics rounded to the nearest whole number

The statistics in this document are rounded to the nearest whole number. This may mean that some percentages do not add to exactly 100%.

Statistics may not be comparable to previous statistics

The statistics in this document may not necessarily be comparable to other statistics on bail previously released by MOJ due to:

- Differences in the way the data is counted. For example, the offending on bail data in this document counts offending on bail against the year of the original charge, whereas some previous statistics have counted the offending on bail against the year it occurred.
- Differences in the data. The statistics in this document come from the Courts' computer system, which is continually updated. The data can change over time for a number of reasons, such as successful appeals.

Statistics only show reported offences

Offending on bail statistics only reflect circumstances where the offending is reported or detected, and the defendant is convicted of the offence committed on bail. This may not give the full picture of offending on bail for a variety of reasons, for example the victim may not report the offence, or the defendant may not be apprehended for the offence.

Appendix 2: Assumptions used in estimating fiscal costs and benefits

Impact of a reverse burden of proof

- The average impact of imposing a reverse burden of proof on a subgroup of defendants that 5% of the defendants will shift from spending time on bail to spending time in custody.
- For example, for a subgroup of defendants, 75% of defendants currently spend time on bail pending trial (that is, they are on bail only or spend time on bail and in custody), and 25% are currently remanded in custody only pending trial. Imposing a reverse burden of proof on this subgroup will mean that 70% now spend time on bail pending trial, while 30% are now remanded in custody only.
- The size of the subgroup affected will determine the exact number of defendants who are now remanded in custody due to the reverse burden of proof.
- This effect is approximate. It was calculated by comparing the remand rates for defendants charged with serious violent and sexual offences specified in section 10 of the Bail Act and who have a previous conviction for a specified offence (and are therefore subject to a reverse burden of proof) with the remand rates for defendants charged with other (non-specified but comparable) serious violent and sexual offences and who have a previous conviction for a specified offence.

Costs

- The average cost of remanding a defendant in custody for a year is \$91,000, or \$249 a day.
- Excluding fixed costs such as staff salaries, the average cost of EM bail is \$28 per defendant per day. This includes costs paid to the contracted monitoring company, and some vehicle costs.
- There will only be additional costs to the Department of Corrections if a defendant is remanded in custody and is not convicted, or is convicted but not sentenced to imprisonment. This means the time spent in custody is not ultimately credited against an eventual sentence of imprisonment.
- The conviction rate and rate of imprisonment that was applied varied depending on the subgroup analysed. For example, when assessing the cost of the proposal to remove bail eligibility for defendants charged with murder, the 2004 - 2009 conviction rate for defendants charged with murder who spent time on bail was taken into account, and it was assumed that all defendants convicted of an offence relating to the murder charge would be sentenced to imprisonment.

Benefits

- The estimated percentage reduction in defendants who spend time on bail will result in an equivalent percentage reduction in the number of offences committed on bail. In most cases this will lead to a low estimate of the benefits of each option, as it is expected that the defendants affected by each option would in fact be those with the highest risk of offending on bail.
- The fiscal benefit of avoiding an individual offence committed on bail is avoiding the cost to the public and private sector of the offence, as estimated in the New Zealand Treasury 2006 Working Paper *Estimating the costs of crime in New Zealand 2003/04*, and adjusted for inflation.
- The average cost for the category of offence (for example, \$15,000 as the cost of an offence against the person) was used rather than the cost of individual offences (for example, \$4.8m as the cost of a homicide). This is to avoid the risk that rare offences with very high fiscal costs will significantly skew the data.

Appendix 3: Overall rate and nature of offending on bail

Figure A3.1: Proportion of defendants released on bail or remanded in custody in the six year period 2004 - 2009

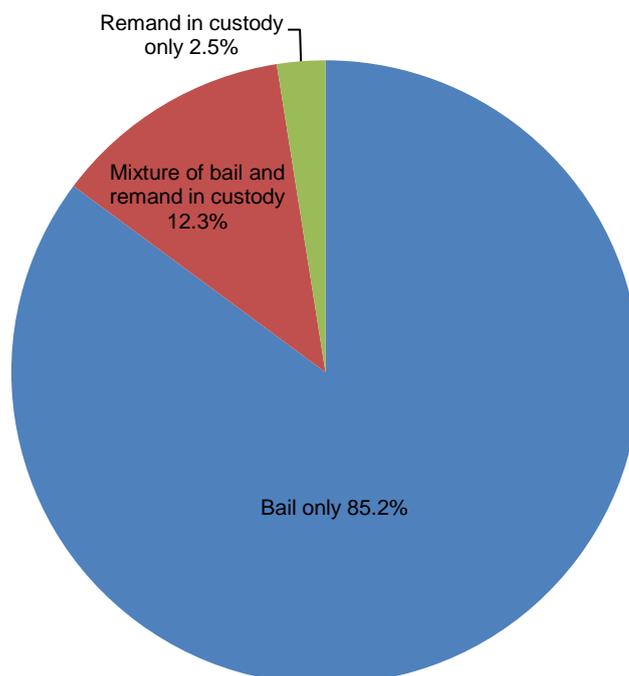


Table A3.1: Number of defendants who spent time on bail and number who were convicted of offending on bail in the six year period 2004 – 2009

Year	Number of defendants who spent time on bail	Number of defendants who were convicted of offending on bail	Proportion of defendants who spent time on bail and were convicted of offending on bail
2004	71197	11171	15.7%
2005	69866	11261	16.1%
2006	73824	12965	17.6%
2007	80859	14411	17.8%
2008	84424	15591	18.5%
2009	88966	16334	18.4%
Total	469136	81733	17.4%

Figure A3.2: Most serious offences committed on bail, as a proportion of all defendants who offended on bail in the six year period 2004 – 2009

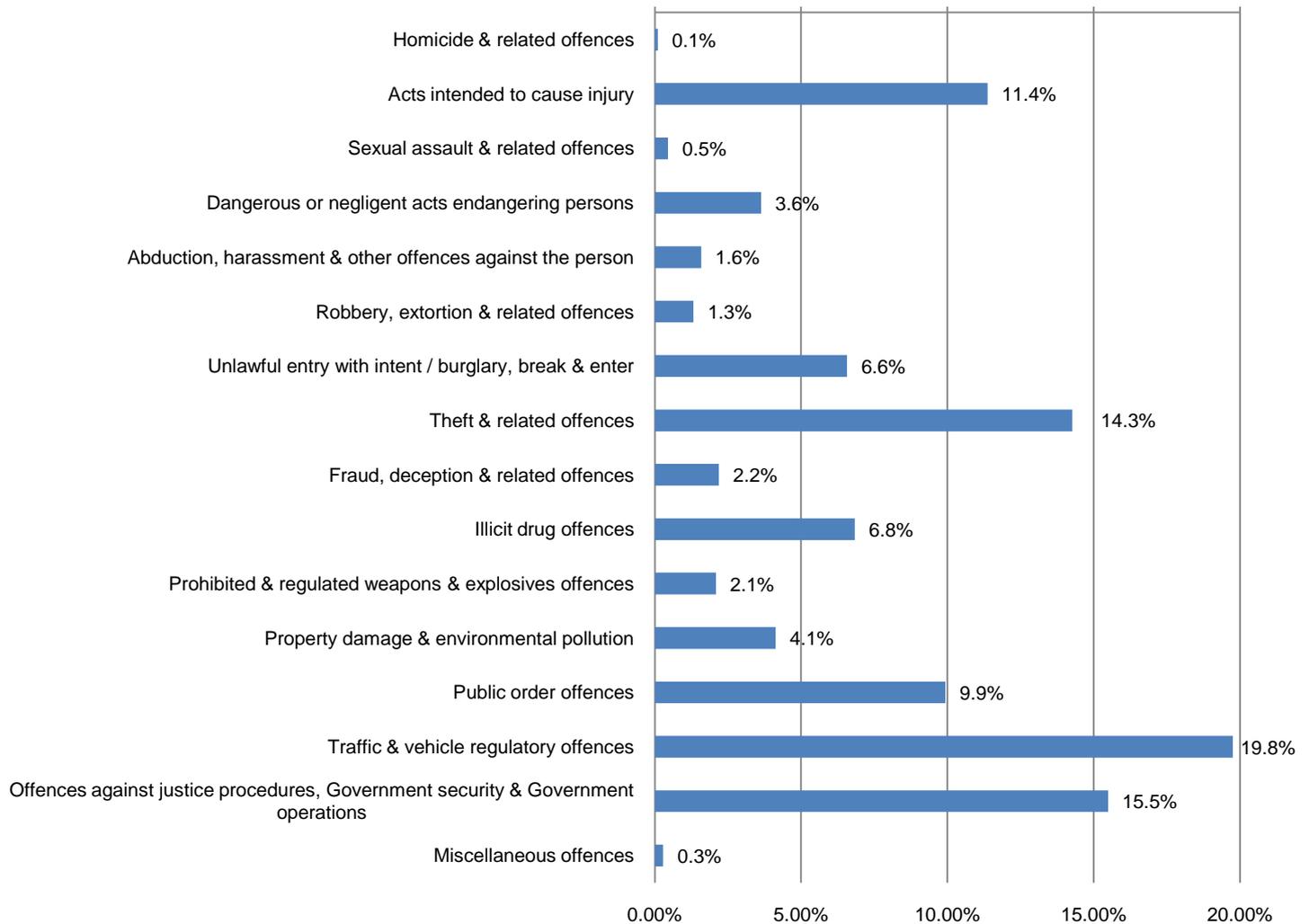


Figure A3.3: Most serious sentences imposed for offences committed on bail, as a proportion of all defendants who offended on bail in the six year period 2004 – 2009

