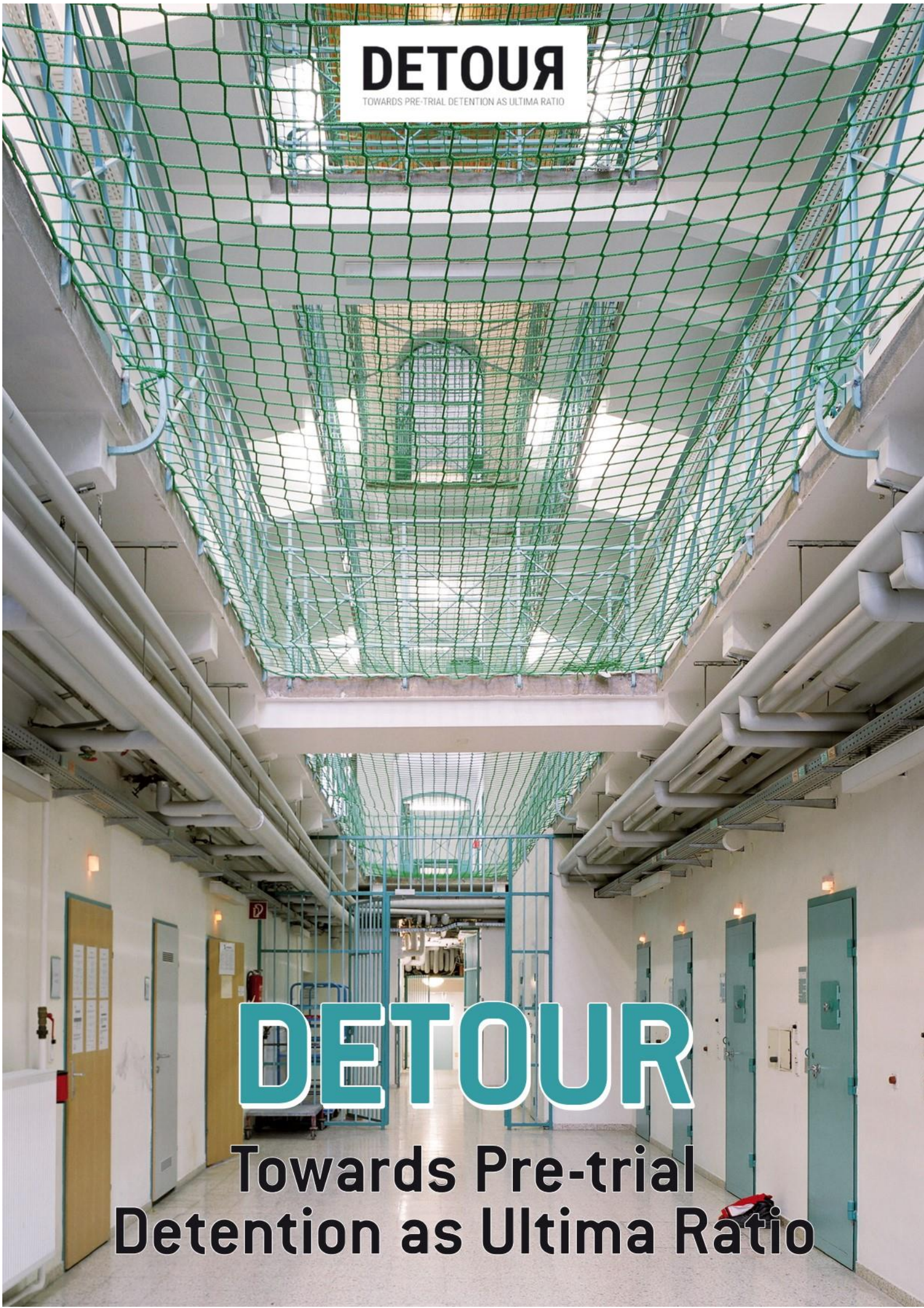

DETOUR

Towards Pre-trial Detention as Ultima Ratio

Trinity College Dublin

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TOWARDS PRE-TRIAL DETENTION AS ULTIMA RATIO

DETOUR –

Towards Pre-trial Detention as Ultima Ratio

Second National Report

Expert Interviews

Ireland

David Perry and Mary Rogan, Trinity College Dublin, November 2017

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1. Introduction

Ireland is a common law jurisdiction, which has the presumption of innocence, the right to liberty and the right to a fair trial guaranteed within its Constitution. The long-established alternative to pre-trial detention in Ireland is bail. As will be described below, this usually comes with conditions attached, but support services and intensive supervision of those on bail is not practiced widely with adults. It is important to clarify terminology at the outset. While the term *bail* in other contexts often refers to the actual financial guarantee provided to secure attendance at trial, the term *bail* in the Irish context is used to describe the alternative to custody in its entirety. An accused person who is granted bail or is "on bail“ is simply a person who is not held in pre-trial detention while the charges against him or her are pending before the courts. Conditions, including those of a financial nature, may be attached to the accused's bail.

As part of the legal framework in Ireland, an individual charged with a criminal offence may be released on "station bail" at the discretion of the Gardaí. If there are prosecution objections to bail, however, the accused person must be brought before the courts for a judge to determine whether bail should be granted or the individual should instead be held in pre-trial detention. In most cases, this application will be heard initially in the District Court, with a right of appeal and full rehearing before the High Court. Irish law provides that a person charged with a criminal offence has a *prima facie* entitlement to bail. As a result, an accused person may only be lawfully detained pending trial or sentence where the prosecution can establish that bail should not be granted on one of three specific grounds: that there is a probability the accused will fail to appear in court if granted bail; that it is reasonably probable that the accused will pervert the course of justice by interfering with witnesses, evidence or jurors; or that there is a real risk that the accused will commit serious offences

if granted bail. The first two of these grounds arise out of the Supreme Court decision in *People (Attorney General) v. O'Callaghan*. The second comes from section 2 of the Bail Act 1997.

This report sets out findings from interviews with judges, lawyers (both prosecution and defence), and staff of the Probation Service on the use of pre-trial detention and bail in Ireland. The report begins by describing the methodology adopted in the interview process, before presenting the findings and analysis of those interviews.

2. Methodology

Interviews were conducted with 26 individuals. This comprised six judges, eight lawyers working either in the Office of the Director of Public Prosecutions or barristers working mainly as prosecutors, ten lawyers who work mainly as defence lawyers, but including some with experience of working as prosecutors, and two senior staff members from the Probation Service.

In Ireland, barristers may practise both as prosecutors and defence representatives. Barristers who wish to act on behalf of the prosecution must be accepted onto what is known as a prosecution panel, from which the Office of the Director of Public Prosecutions may instruct a barrister to act on its behalf in the case. We have characterised barristers as defence or prosecution barristers on the basis of their primary experience as either a prosecution or defence lawyer. Amongst the prosecution lawyers interviewed, participants came from the Office of the Director of Public Prosecutions, as well as from amongst practising barristers. Those working in the Office of the Director of Public Prosecutions are officials with legal training and professional qualifications and experience.

Amongst the defence lawyers interviewed, there was a mixture of experience in the District Court, Circuit Court and High Court, with most practitioners having experience of both the District Court and the High Court. The particularly active role of the defence lawyer in Ireland meant that the perspective of the defence practitioner is especially important to include in the analysis.

Amongst judges, all had many years of experience both as judges and practitioners prior to becoming judges, on both prosecution and defence sides. Judges were from a mixture of District Court and Superior Court backgrounds. All had extensive experience of bail applications.

It should be noted that probation officers do not play a role in the bail process in Ireland as it currently stands; nevertheless, interviews were conducted with two probation officers to obtain their views as to potential developments in the future.

2.1. Recruitment

Invitations to participate were circulated across the country, with offers made by the researchers to travel to wherever suited a possible interviewee. In the end, almost all of those interviewed. The sample was, in the end, largely composed of practitioners and judges based in the Dublin courts. This was inevitable insofar as the High Court was concerned, as it exclusively deals with bail matters in Dublin. The High Court deals with bail applications from individuals based in Dublin as well as those coming from applicants from outside Dublin, and therefore sees a nationwide sample of cases.

2.2. Ethical issues

Ethical approval for the interviews was granted by the Trinity College Dublin School of Law's Research Ethics Committee in advance of the interviews commencing.

Participants have been assigned a participant number to safeguard confidentiality. Interviews were transcribed and de-identified to remove any features e.g. location, nature of work etc which might inadvertently identify a person. Any identifying information about cases was also removed.

2.3. Analysis

The interviews were conducted in accordance with a set of guidelines, which were drafted at a Steering Group Meeting for the DETOUR project in Bucharest in September 2016, and which were adapted for the Irish context by the researchers. The guidelines provided a framework for questioning, but were departed from when matters needed to be clarified or a participant directed the researchers towards a relevant topic. Use was also made of a "vignette": whereby, participants were presented with a fact pattern and asked to judge whether or not bail was likely to be granted or not, and the difference that changes in certain factors would make.

Interviews were transcribed and coded, with the researchers acting as peer-coders and auditors, and discussing the themes arising and the application of codes. Codes were re-analysed to group together in themes. A thematic analysis was employed, with the structure of the questions guiding the analysis, but also allowing themes to emerge from the data. Nvivo software was used for coding and analysis. Research reflections and memos were also kept.

3. Findings: Overall Reflections on the Bail Process

3.1. A focus on liberty: but with conditions attached

The comparatively low use of pre-trial detention in Ireland is reflected in the perceptions of participants, who viewed the system as favouring liberty over detention. This was quite strongly expressed amongst all participants and across prosecution lawyers, defence lawyers and judges. Participants from all backgrounds also felt that this focus on liberty was a good thing, rather than something to criticise. Pre-trial detention was generally not considered to be used too frequently in Ireland.

> "I would have thought that it's quite easy for people to get bail, particularly in respect of summary offences. I think it seems to be easy even in respect of Circuit Court matters to get, to get bail as well, I don't think it's overly used at all." **(Defence Practitioner 2)**

> "For the everyday, relatively minor offence, I would assess the approach as relatively lenient." (**Defence Practitioner 6)**

> "I think the majority of people would get bail." **(Defence Practitioner 9)**

3.2. Presumption in favour of bail and the constitutional position

Participants considered that the basis for the comparatively liberal regime in Ireland was the constitutional position of bail. The presumption of innocence, as well as the presumption in favour of bail set down in the *O'Callaghan* case were strongly expressed as reasons for the position in Ireland. It was clear that the presumption in favour of bail established by the Supreme Court and

reiterated in several cases was not merely a presumption on paper, but a real influencing factor behind the use of bail in Ireland.

> "We have a written constitution that clearly states that, and it has been interpreted by the Superior Courts, stating that there is a presumption of innocence and there is constitutional right to bail. I think we are very lenient." **(Judge 6)**

> "Essentially, it starts with the presumption that somebody will get bail." **(Judge 3)**

> "There is obviously a constitutional presumption from what I've seen that's taken very seriously by the judiciary." **(Prosecution Practitioner 2)**

> "Certainly the first thing that always comes to my mind that there is a presumption in favour of the applicant for bail on the basis of *O'Callaghan*. So, every applicant does have a constitutional advantage of getting bail, get bail fixed…" **(Prosecution Practitioner 1)**

The position concerning bail was described by participants as being a kind of default setting in favour of bail, or bail being 'the norm'. Participants were generally agreed that the manner in which all parties – prosecution, defence and judges – approached bail applications, was to view such applications through the lens of liberty. Bail is considered to be the most likely outcome, with some extra steps required on the part of the prosecution and judge in order to impose pre-trial detention. As one judge put it: "admission to bail is what's to be expected, that's the norm" **(Judge 2).** A prosecutor said: "so the default position is that a person will be entitled to bail … it's the default position is the difference, isn't it." **(Prosecution Practitioner 3)**

Participants tended to agree that judges in Ireland were generally minded or inclined to grant bail. This then places a heavy burden on the prosecution to make out a case for pre-trial detention.

> "It's a serious application by the State to deprive somebody of their liberty and I have to keep in mind number one the presumption of innocence and number two constitutional right to bail and that is the whole system and that's how it works". **(Judge 6).**

> "I think that when you put a strong presumption on liberty, pending trial, you know, it's a valuable right, …. So I mean, there's a very high presumption in favour of bail in Ireland … I mean, there's a very strong constitutional imperative in Ireland that people shouldn't be a long time in custody pending trial, unless there's a good reason for it". **(Judge 4).**

Another key factor mentioned by participants was the respect afforded to the presumption of innocence in the Irish bail system. Defence practitioners stated that they referred to the presumption of innocence in their applications for bail as a matter of course. Judges and prosecutors also described the effect of the presumption as being meaningful:

> [the system] it is underpinned … by the presumption of innocence **(Prosecution Participant 4).**

A small number of participants took a different view as to the nature of the bail regime in Ireland, with one (**Prosecution Practitioner 6)** stating that most applicants for bail are refused, contrasting this with what the practitioner saw as a public view that the bail regime is very lax and liberal. It was also clear that some participants, particularly defence lawyers, considered that there

were certain instances where people were denied bail when they shouldn't have been, citing this as an example of judicial variation:

However, when asked to comment on the bail regime in general, participants clearly considered the bail regime in Ireland, on the whole, to be one which is liberal, with bail a "default" (**Probation Participant 1**) setting. The lens through which the pre-trial process is one of liberty, rather than detention. This, however, requires further consideration as the system in Ireland involves bail being invariably granted with conditions attached, some of which might be quite stringent. This matter is returned to below.

4. Recent Developments in Bail Law

Participants acknowledged that the Bail Act 1997, which permitted bail to be refused on grounds of a risk of the commission of serious offences, was a significant development in Irish law, but there was complexity in participants' views of how it had affected matters in practice. Participants did not feel that section 2 had made a major impact on decision-making concerning pre-trial detention, a matter returned to below when assessing the grounds for detention.

Practitioners were asked whether they had noticed any changes in the bail laws over the course of their experience, and particularly in the years since the Bail Act 1997. The consensus amongst those who expressed an opinion was that there had been no significant changes to the law itself, and that there was little use even of provisions which were intended to make bail harder to get (e.g. the recent amendment relating to bail for repeat burglars):-

> "Has it changed? I don't really think so, it's just as lenient now as it was, certainly whenever I first started" **(Defence Practitioner 5)**

> "So, I don't know if recent legislative change or proposed legislative change has made that much impact ...I couldn't say if there was any great changes over the years, and I've been doing it for years now." **(Defence Practitioner 1)**

> "I don't think that the bail laws have, the laws are in place anyway, the provision that are in place have been tightened, I mean there's a number of provisions that are still there that are never ... it seems to be the same old same old really." **(Defence Practitioner 2)**

It was clear from participants that they did not consider section 2 of the Bail Act to have made a major impact on bail practice, and the risk of reoffending ground was not one which was being relied on with a great deal of frequency, or strength. Past behaviour, rather than the risk of future offending, still determines the majority of Irish applications concerning pre-trial detention.

While participants generally felt that legislation designed to make it more difficult to obtain bail when the offence charged is one of burglary, and where the applicant has a prior history of burglary, had not made a great impact in the courts, burglary was, however, an offence referred to quite often by participants when discussing the factors which might influence a judge when deciding whether or not to grant bail. Burglary was considered an offence which judges would be concerned about granting bail. While this is so, the vignette, which concerned a burglary offence, nonetheless was considered by most participants to be likely to result in bail. Defence participants considered that burglary of an occupied dwelling could make it more likely that a prosecutor would object, thus requiring the court to make a decision. Participants also noted the fact that the house was occupied would be a matter weighing in the mind of the judge, and that the circumstances meant the offence was serious, however, past behaviour was again a strongly countervailing factor in the decision-making process. For those participants

who felt pre-trial detention would be ordered in the circumstances outlined in the vignette, the burglary offence and a prior offence of burglary, were key factors.

An extremely strong theme to emerge from the interviews, however, was the influence of not turning up for court in the past, or getting 'bench warrants' i.e. warrants for arrest made by a judge when a person fails to turn up in court. This past behaviour was clearly the most strongly weighted factor in decisions concerning bail and pre-trial detention, overriding even the seriousness of the offence for most participants.

Participants felt that there were regular media outcries concerning bail in Ireland, and that the political environment could be one in favour of pre-trial detention. Some defence participants considered that a high profile case e.g. of a serious offence being committed on bail, or a particular type of offence being prominent in the news, could influence how a judge would decide a case. Defence participants noted that they would be apprehensive about making an application for bail in the immediate aftermath of heightened media interest, and that this might last for a couple of weeks. Some participants felt that the biggest impact of such concerns would be felt amongst the police, with the police becoming more reluctant to consent to bail in cases which followed a high profile incident.

> "...[C]ertainly if there's been something in the media about an offence that was particularly grievous that was committed while on bail, you'll notice a shift, won't you, following couple of weeks, you know, anybody who's coming in on similar charges, the Court's going to be very concerned." **(Defence Practitioner 7).**

This feeling was expressed mainly by defence practitioners, who felt that a particular type of offence following a high-profile incident of a similar nature,

especially concerning organised crime, might make it more difficult for their client to obtain bail. However, other participants, from both prosecution and defence backgrounds, felt that judges were not influenced by media pressure or public concern. The constraining effect of the legal principles guiding the use of bail was cited in a vivid manner by one participant:

> "I think the simple fact of the matter is that, you know, it's like, you know, plumbers debating conduit piping. They may have their own individual opinions but at the end of the day you have to plumb in a toilet right and that's the way it's kind of regarded." **(Prosecution Practitioner 2)**

Other prosecution participants considered that judges did not take into account media outcry in their decision-making:

> "I think obviously judges, you know, like anyone else would be aware of the political climate, but I've never got the impression that judges have responded or reacted, good, bad or indifferent to any particular political debate on the issue" **(Prosecution Practitioner 6)**.

Judges also stated that they disregarded media concern when deciding on cases. For example, Judge 6 stated:

> "... it never influenced me. ... I couldn't care less; it was all about what was before me. I always made sure that I intellectually detached myself from my own subjective views and dealt with these matters objectively".

While it was broadly felt that media outcry did not influence judicial decision-making, there was a concern that it did influence prosecutorial practice. Some

practitioners noted that concern about public backlash or comment contributed to the Gardaí objecting to bail in the first place:

> "Any time someone commits an offence while on bail, if that comes to media attention, there's something said about it. … Where I have noticed it is recently in relation to Guards" **(Defence Practitioner 1).**

Other participants noticed that there would be more reluctance on the part of the prosecution to consent to bail where there were sensitive features of a case which might give rise to media interest and negative media commentary. Objections were more likely to be forthcoming, in the views of the participants, in such cases.

Prosecution lawyers generally felt that media interest in cases did not influence their practice; one participant stated: "a media case it doesn't influence us I have to say, it doesn't. That's not something we would take into account … Maybe that's a bad thing that we're immune to media and public opinion" **(Prosecution Practitioner 3).** One participant did, however, feel that prosecution practice was subtly influenced by media attention. This was expressed as being manifested in a tendency to put up an objection to bail which might not be strongly made, but which shifts the burden of the decision-making onto the judge. The risk of fallout from a decision to grant bail is then taken out of the hands of the prosecution:

> "The view from the state is very much, if there is a risk let it be with the judge, let it not be with us if things go wrong. I think there is also an attitude, let us not be subject to negative media coverage as well. I think that is the underlying fact". **(Prosecution Practitioner 5)**

Again, it was felt that this feeling of pressure from possible media reaction was coming mainly from the police.

The political climate surrounding bail was also explored with participants. Most participants felt that when bail was a matter under consideration by politicians, the inclination would be towards custody rather than bail. Participants generally felt that amendments made to the bail laws were politically motivated, with a 'tough on crime' approach, and were done so to at least appear as if it was more difficult to get bail.

> "every time I see a new Bail Act I kind of feel it's like a, it's tightening" **(Probation Participant 2)**

> "perhaps the political parties are guilty of scaremongering to a certain extent as well in pushing forward their agendas. I think that they would be more in favour of preventative detention rather than obviously more relaxed bail laws". **(Defence Practitioner 2).**

Interestingly, the view expressed by some participants that the amendments to the bail laws concerning burglary were 'window-dressing' and for political gain without any practical impact is reflected in other aspects of Irish criminal justice policy and practice. Some participants felt that judges were not affected by heightened media interest in or criticism of the bail laws. Prosecution lawyers tended to feel that judges were unaffected by media criticism, and that they just got on with their job and applied the law. For example, one participant put it as such: "I've never seen any evidence of any judge coming in then and reacting to that. They would simply be applying the law as it stands" **(Prosecution Practitioner 6).**

The dynamic revealed here is interesting, as it suggests that there is a feeling amongst participants that the media and political climate is one rather hostile to the liberal bail regime in Ireland, and that this feeling can crystallise into objections to bail being forthcoming in particular cases. This suggests that

judges in Ireland are upholding a regime which favours liberty in spite of popular and political pressure. The system operating in Ireland, therefore, is one which is very much led by judges, and which largely turns on the judicial decisions of the Supreme Court.

While the perception that the bail system in Ireland was generally one which prioritised liberty, there was also a feeling that attitudes towards bail might be changing amongst the judiciary in Ireland in the very recent past. As such, there is a concern that the judicial attitude to bail in Ireland may be changing. As detailed further below, when considering future directions, participants expressed some fears that the liberal regime in Ireland may not endure forever.

Some practitioners expressed the view that judicial attitudes towards bail had changed recently, as some recently appointed judges were more reluctant to grant bail than longer-serving judges:-

> "I think perhaps some of the new appointments have been tougher to get bail in respect of. And I guess that comes down to an experience level of them in that perhaps one might see that if they see a warrant coming into court, they view that more seriously than the District Court judges or the Circuit Court judges who have been around for years." **(Defence Practitioner 2)**

4.1. Summary

- Participants generally felt that the bail regime in Ireland was quite liberal, with priority given to the presumption of innocence and the right to liberty. As will be detailed below, however, while participants recognised that the conditions placed on liberty when bail was granted could be onerous, participants did not think of conditions as deprivations of liberty as such.

- The Irish Constitution has been interpreted to include a presumption in favour of bail. This was viewed as being influential in practice, and was taken seriously by prosecutors, defence practitioners and judges.
- Prosecutors, defence lawyers and judges tend to start out their analysis of whether or not bail should be granted from the position that bail ought to be granted.
- Bail is considered to be the norm in Ireland, with some special factors needed to merit pre-trial detention.
- Participants generally felt that bail practice had not changed considerably in Ireland over the past twenty years or so, but some did express concern that there may be more use of pre-trial detention in the future.
- Participants felt that there was a generally hostile media and political climate towards bail, particularly where burglary is concerned.
- Participants felt, generally, that judges were not influenced by this climate.

5. Basis for decision-making

This section of the report examines the grounds and influential factors which participants considered guide decision-making around bail and pre-trial detention in Ireland.

5.1. Decisions on Pre-trial Detention by Gardaí

A number of participants stressed that an accused person need not necessarily go to court in order to get bail. Instead, the Gardaí (police) have the discretion to grant "station bail" in respect of most charges, and a bail application will only come before court where a decision is made to refuse to grant station bail**.** For prosecution practitioners in particular, the effect of this system was viewed as substantial, accounting for many decisions to grant bail. The Garda decision

at the outset of a criminal investigation to grant bail is an important one, as it means there is an additional player and set of factors involved in this early decision-making process. This aspect of the bail regime requires further attention. The effect of the station bail process is that the Office of the Director of Public Prosecutions will only become involved in decision-making once there has been an initial decision by the police not to grant station bail.

More generally, it was clear, especially from prosecution participants, that the attitude of the police is influential in decisions on whether or not they should object to bail. However, it was also apparent that prosecution practitioners did feel able to resist what might be an over-zealous approach to objecting to bail on the part of the police. In this way, the prosecution plays an important filtering role in decisions on bail. This self-restraint emerged as a strong feature within interviews and suggests that all players in the Irish system show a commitment to the principle that bail should be the 'default', save where some kind of serious counterweighing factor exists. The prosecution authorities exhibit an influence on the police which can mitigate a police approach which might give rise to more objections to bail. The relationship between police and the Office of the Director of Public Prosecutions, and with barristers acting on behalf of the Office of the Director of Public Prosecutions is complex, but it does appear that the latter two players exert a mediating effect in decisions whether or not to apply for bail.

Participants suggested certain factors might influence a Garda's attitude towards bail. These included those factors which might be expected, such as the seriousness of the charge and the applicant's prior history, but also other, more subtle influences:-

> "There's a number of factors. Obviously the nature of the charges, the seriousness of the charges. The Applicant's record. Those are the most normal issues obviously. But sometimes you know Guards can take a

particular view because the alleged offence might have occurred in their area, so they will, they might know the individual concerned, they might know his or her family, their objection might not be as strong in particular circumstances. …But usually what dictates an objection is the applicant's record obviously and the nature of the charges, the strength of the evidence, the usual factors." **(Prosecution Practitioner 6)**

"Level of cooperation when interviewed. You make admissions. Attitude, if they're a difficult punter [person] to deal with. If they're recidivist, but… If they're a harmless recidivist they might get bail.." **(Prosecution Practitioner 8)**

Defence practitioners, when asked about the same issue, stressed the importance of the individual relationship between the accused and Garda as a determining factor in whether bail would be objected to or not:-

"It's going to depend on relationship the accused person has with the prosecutor, a lot's going to go down to that." **(Defence Practitioner 5)**

Participants also considered that less experienced gardaí may feel pressure at times to object to bail in order to be able to tell their superiors that they made the objection, rather than because of any strong feeling that bail should not be granted. The role of possible media outcry in such a decision was also considered a factor.

Prosecution practitioners stressed that once the Gardaí decide to object to bail, very considerable weight is giving to this objection and it will generally be maintained by the legal representatives for the prosecution in the District Court and on appeal to the High Court. One prosecution participant described the influence of the Gardaí in the following terms: "hugely and massively"

(**Prosecution Practitioner 3**)**.** The legal practitioners acting for the prosecution will "rarely really second guess" the Garda attitude which was initially taken **(Prosecution Practitioner 2)**. Prosecution practitioners were aware that the police were closer to the offence and the offender than they would be, and would have intelligence and information which might be driving an objection to bail which the prosecution authorities would not have. As such, the prosecution authorities felt the position of the police deserved a lot of weight.

However, it was very clearly the case that the view of the police would not be determinative, and that the prosecution authorities may advise the police that their objections to bail will not stand up, or that conditions of bail might be appropriate to agree with the defence. The complexity of this relationship was exemplified in the views of one prosecution practitioner, who, when asked if the Garda view would be decisive said it would be, but then went on to say that prosecutors will also:

> "take a view, we'll listen to the position, the facts, and if we think well that's just not going to cut the mustard with regard to a bail application, that this person maybe should be entitled to bail, then we're going to have to advise the Gardai accordingly. So in fact unfortunately there's no set structure to it" **(Prosecution Practitioner 1)**.

This complexity was repeated in most interviews with prosecution practitioners, who felt that the Garda position on whether there should be objections to bail was a very strong factor weighing in their assessment, it was not determinative. In other words, the prosecution authorities were viewed as being very far from a rubber-stamping exercise for the police. If the prosecution practitioner felt that the Garda objection was well founded, then the objection would be pursued, however, if the objection was considered to be weak, prosecution practitioners would advise the Gardaí of this, and suggest

that objections should not be made. As one practitioner put it: “we're not simply mouthpieces for Gardaí bringing objections, we do have to exercise our judgment” **(Prosecution Practitioner 6)**. Another participant put it thus:

> "You as a barrister, as a prosecutor, you should take an instruction saying this Guard is, this is your objection, there is no evidence in support of that. It's up to you as a prosecutor to be firm with the Guards and say no, we're not advancing that because there's no evidential basis for it. And that's as simple as that." **(Prosecution Practitioner 8)**

5.2. The Legal Grounds

The legal framework governing bail and the use of pre-trial detention comes from a mixture of the principles established in the *O’Callaghan* case, the Bail Act 1997, and interpretations of the law in subsequent cases. The grounds on which a person can be denied bail and placed into pre-trial detention are, essentially, that: the person will not turn up for trial; that the person will interfere with witnesses (under *O’Callaghan*); or that the person will offend while on bail (under section 2 of the Bail Act 1997).

A strong theme to emerge from the interviews, across participants from all backgrounds, was that this legal framework did guide decision-making on bail, and that the grounds were taken seriously. Participants felt that these were ‘real’ grounds, and that other factors, not contained within the law, were not especially determinative of decisions concerning bail. While, as will be seen, participants felt other matters could influence individual cases, there was a strong belief on display that the legal framework was the basis for decision-making.

> “… obviously there’s certain things that you are and you aren’t allowed to bring in, the 1997 Bail Act tells us what we’re allowed and the

> O'Callaghan case. So, it's not random, they're very specific, the factors that we have to rely on or not rely on" **(Prosecution Practitioner 3)**

> "So in written down terms but on the ground they are the parameters so it's not that they're just written they're very much enforced" **(Prosecution Practitioner 4)**

It was also clear that, amongst these grounds, the most important one was the likelihood of turning up for trial. The impact of the introduction of a ground which allows pre-trial detention to be ordered in circumstances where a risk of offending while on bail is established was not considered to be highly significant. It was evident that the *O'Callaghan* decision and grounds continues to dominate practice in the area of bail in Ireland. One judge put it very simply:

> " … the be all and end all of bail in Ireland is the O'Callaghan case. And it's, you know, quoted in criminal courts across the country every day of the week again and again and again and it's taken seriously". **(Judge 3).**

The *O'Callaghan* principles for the denial of bail were very much to the forefront in participants' responses to being asked what the grounds for pre-trial detention in Ireland were. Section 2 was also a prominent response, but it was clear that the *O'Callaghan* principles remain dominant in participants' thinking. As one prosecution participant stated: "It's really you know… Someone who won't show up" **(Prosecution Participant 7)**.

5.3. The effect of section 2 and the risk of offending ground

Participants were asked to consider what the effect of section 2 (which allows bail to be denied on the basis of a risk of offending while on bail) had been on

bail practice in Ireland. Participants generally felt that the impact of section 2 had been fairly muted. Risk of offending was not always advanced as an objection to bail in the participants' experiences. In addition, it was felt that where section 2 was advanced as an objection, it was often as a kind of 'kitchen sink' approach i.e. that the prosecution was throwing everything at their objections because their *O'Callaghan* ground was fairly weak, or else was not being advanced seriously, or else being advanced by an inexperienced prosecutor in appropriately. The impressions of two participants were that section 2 objections were advanced in about 50% of cases. However, section 2 was generally, but not exclusively, felt not to have led to a very pronounced increase in the numbers of applications for bail which were denied. In addition, it was generally felt that the denial of bail on the grounds of a risk of offending was still fairly unusual to see on its own in a judge's reasoning, and that such cases would often have been denied on the *O'Callaghan* ground anyway. As one participant said: "I think that O'Callaghan is still the main game in town" (**Prosecution Practitioner 4),** while another said: "So you have then one bail application, sometimes O'Callaghan and/or Section 2. But certainly my experience is bench warrant history [is the main factor]". **(Prosecution Practitioner 1).**

A judge described this ambivalence about the impact of section 2 as follows:

> "…it would be naïve to think it [Section 2] hasn't had some impact. But, in truth, very often the sort of cases where the State will have cogent evidence of a likelihood of reoffending are also cases where there will be a pattern of multiple offences in the past with, you know, arising often from a chaotic lifestyle. So the occasions when bail is opposed purely on Section 2 grounds and not on O'Callaghan grounds I would have thought are rare enough. The bulk of times what you hear is counsel is saying we're opposing bail on both O'Callaghan and, and I would say in

> the bulk of occasions when bail is then refused it's on the basis of a crossover." **(Judge 3).**

A defence participant expressed similar views:

> "You know section two of the Bail Act came in and everybody thought that was going to be the end of bail and all that, I think that my own experience if a Judge was going to refuse bail in this case anyway they would have done it whether it was under section two or O'Callaghan …" **(Defence Practitioner 8)**

Participants suggested that the reasons for the fairly limited impact of section 2 on judicial decision-making included the fact that the evidential requirements under section 2 were quite significant, and that *O'Callaghan* covered most situations anyway. One judge, for example, noted that a simple fear of offending was not enough under the legislation, and would not be enough to convince a judge to deny bail. This judge referred to section 2 as being a very high bar. Another judge also felt that the nature of the offences which can give rise to a section 2 application were fairly restrictive, and the factors which must be weighed in the application meant that it was not an easy test for the prosecution to pass.

Another judge also referred to the high hurdles under section 2:

> " … it's still the case that if someone is seeking to deny bail on the bases of a likelihood of committing further offences faces a very significant hurdle in order to achieve that". **(Judge 3).**

Where section 2 was considered to have had an effect was in situations where the accused person was a drug user who had a track record of committing

offences while on bail. For those individuals, section 2 had, in the views of participants, led to more refusals of bail.

> "Well I think how section two affects you is where you have someone that's a drug addict and out of control and who's admitted to being and then committing further offences while on bail, that's where it kicks in". **(Judge 4)**

A small number of participants did feel that section 2 had led to more refusals, with one participant saying this had become noticeable in the very recent past.

5.4. Influential Factors

Practitioners invariably described previous bail history and previous convictions for offences committed on bail as influential factors in the decision to apply pre-trial detention, albeit with some differences in the significance placed on same depending on the judge hearing the case. A history of not turning up to court and receiving bench warrants was the factor with the most weight for participants.

> "Certainly with *O'Callaghan* most, if not all, District Court judges focus on bench warrant history i.e. the likelihood of a person not going to turn up and/or interference with witnesses. But in my experience what a judge is listening to is bench warrant history." **(Prosecution Practitioner 1)**

> "Usually it boils down to their previous record of attending court, have they answered bail in the past. … certainly warrants is a big issue. Bench warrants, having previously been issued." **(Prosecution Practitioner 6)**

> "Warrant history. Always warrant history. It's the first question asked: how many warrants? … But the first thing is always warrant history." **(Defence Practitioner 10)**

This was also reflected amongst judges:

> "I think first and foremost would be warrant history, people who have failed to appear in the past and how many times that they have failed to appear, that would be significant". **(Judge 2)**

> "And if it's the case that, you know, that you don't treat the courts with respect, if you don't turn up for your court cases, it's likely to have an impact if you're charged in the future". **(Judge 3)**

The number of warrants i.e. the number of occasions where the person had failed to attend court was, for many participants, a much more important factor even than the number of prior convictions.

Participants generally felt that a person appearing before court with no prior convictions and no prior history of failing to attend court was very likely to be given bail. The more evidence of past failures to turn up for court, the less weight the presumption in favour of bail would have. As one judge put it:

> "if there's a consistent pattern where particularly where bench warrants are taken, perhaps very recently in 2017 without any adequate – and adequate is important – explanation then I can't see any conditions that I can without somebody else being creative for me, I can't see any conditions that I can come up with that is going to ensure somebody's going to show up to court". **(Judge 5).**

For this judge, it was very difficult to shape a set of conditions which could guarantee that a person would turn up for court in such scenarios, and pre-trial detention was the only mechanism which would guarantee the person's appearance. Other judges also referred to prior examples of not turning up for court as being a factor weighing heavily in their analysis. Bench warrants were of such importance that some participants felt that this factor alone could sway a court, particularly at District Court level: "If it's just on bench warrant history, the courts don't tend to require huge, substantial arguments in relation to it. It's either you have a significant history or not" **(Defence Practitioner 4)**.

As described below, the bench warrant history was a preoccupation for participants when examining the vignette scenario. Participants wanted to know what the bench warrant history was, and most participants felt that the lack of a mention of bench warrant history meant that bail was more likely than not to be granted.

This focus on bench warrant history suggests an interesting feature of the Irish system. The bail regime in Ireland is, primarily, focused on past behaviour, and, specifically, past failures to comply with bail conditions. A risk of offending is not so important under the Irish system in most cases, and, as such, the bail system is not especially future oriented. Practitioners in the Irish system examine past failures to turn up for court as evidence to predict the likelihood of turning up for court in the future. However, this is the primary calculation entered into by participants in Ireland, rather than an examination of a risk of future criminal behaviour in the form of committing criminal offences. One judge put this in very clear terms:

> "Well generally speaking you're looking to the past, I mean there are exceptions, I'll come to those in a moment, but generally speaking you're looking to the past. So if somebody has a track record that

involves not presenting themselves for their trial, if there's a history of interfering with witnesses or whatever, well that person is clearly going to encounter difficulties in hoping to be admitted to bail. Conversely, is somebody has been charged with offences in the past and has always turned up for his cases in the past or if there's never been any, you know, hint of interference with witnesses or destruction of evidence or anything like that, that's obviously going to weigh". **(Judge 3).**

5.5. The seriousness of the charge

A number of practitioners stressed that the seriousness of the charge is another important factor which can influence whether or not bail is granted, and that judges take a particularly dim view towards granting bail where a person is alleged to have been injured or affected in some way by the criminal conduct in question:-

"They will take into account the seriousness of the charge. And even though they do say, still maintain the presumption of innocence, it is a factor where they say how serious is the charge … Certainly anything involving a person, an injured party, would tend to be regarded by the courts as being more serious." **(Defence Practitioner 4)**

"I mean it's much easier to get bail on public order charges than it would say for example on burglaries or something like that" **(Defence Practitioner 2)**

The seriousness of the offence was also considered to make it more likely that the prosecution would advance objections to bail.

> "So, like, serious offending, regardless of bail history, the State will generally object. The Guard will generally object" **(Prosecution Practitioner 7)**.

However, there was also complexity here as some participants noted that people on very serious charges, are granted bail in Ireland. Again, we see the role of prior history and bench warrants coming into play. The focus on the likelihood of turning up for trial means that the seriousness of the offence is not a determinative factor. In addition, the seriousness of the offence might mean that objections to bail will more likely be made, but not necessarily that bail will be refused. Some participants felt that where the offence was serious, the prosecution would be inclined to leave it up to the judge to decide the matter.

Most participants considered that public order offences were minor, and that bail would be likely to be granted in such cases. Participants were also asked whether or not they saw different treatment of different types of offences. Defence practitioners noted offences connected to organised crime activities meant that the applicant was much less likely to obtain bail. Participants felt again, however, that much depended on the judge and the other factors involved, particularly prior history. Offences involving violence generally were also considered to be more likely to be subject to pre-trial detention.

5.6. Length of time until the trial

The general consensus amongst practitioners was that the amount of time a person could expect to spend in pre-trial detention was not a material factor in the decision of whether or not to grant bail if the case was being prosecuted summarily in the District Court: "I don't think it's a matter that has a profound influence on a judge, certainly not in the District Court." **(Prosecution Practitioner 1)** Conversely, it was seen as a matter given some weight if the

case was being prosecuted in another court, such as the Circuit Court or Central Criminal Court (for more serious offences), where waiting times could be expected to be longer:-

> "So if they suddenly know that they're going to be going to a specific circuit for a specific crime and that that's a year and a half down the road then … it may be one that the judge will – the judge will consider that in terms of granting them bail." **(Prosecution Practitioner 3)**

A judge noted this factor as being relevant to the analysis:

> "Now on a serious offence if there is say, for instance, that they're being sent forward or whatever one of the considerations that I would also have would be if I'm told it's going to be a year before this person gets a trial". (**Judge 2)**

Another judge also strongly criticised the length of time until trials take place and the lack of judges available to hear cases **(Judge 1).**

Prosecution participants were also clearly conscious of the length of time a person might spend in custody while awaiting trial on a serious matter. There was a feeling that courts were concerned that the length of time spent in pre-trial detention may in fact be longer than any eventual sentence. Prosecutors felt that asking a court to detain a person for more than a year (because of the length of time it takes to commence a trial) would require a strong case. It was not clear, however, that this factor was one regularly articulated by judges when making their decisions on bail. For one prosecution practitioner, it was definitely an influential factor, but rather unspoken: the "elephant in the room" **(Prosecution Practitioner 4).** This participant advocated quicker trials as a key reform for the Irish system. This sense that this factor was an unspoken one was also referred to by a defence practitioner, who felt that

judges were making silent calculations about whether the offence was worth a year in custody, when this was the length of time the person could spend in pre-trial detention. As this participant stated: "the length of time that somebody would spend on remand is something that is never really verbalised by the Judge, I don't think they feel comfortable utilising that" **(Defence Practitioner 8).**

Defence practitioners also reported that the length of time until trial was a matter they would bring to the court's attention, and noted that the legal framework permitted them to reapply for bail after certain time periods.

5.7. Other factors

Participants noted other factors which could be influential. These factors tended to emerge in discussions of whether there were noticeable differences in the treatment of particular groups when it came to decisions on bail.

5.7.1. Housing and homelessness

There was no clear consensus amongst participants as to whether a person without stable housing was more or less likely to be denied bail. It was clear, however, that, in the participants' experiences, a lack of housing and accommodation was a problem encountered regularly in the courts, and that this was a growing problem.

Judges did not consider a lack of a stable address made it more likely that they would refuse bail.

> "I can't recall any occasion when somebody would be refused bail because they couldn't provide an address". **(Judge 3).**

> "I never refused bail because somebody is homeless. That would be I think prejudicial to those that are homeless. The fact that somebody is homeless, am I supposed to deprive them of their freedom? You don't do that." **(Judge 6)**

Defence participants, however, did relate instances where they felt their clients had been denied bail because of a lack of housing. Some felt that a lack of housing when combined with a poor record of turning up for trial made it likely that bail would be refused.

It was also clear that efforts were made by both prosecution and defence practitioners to arrive at practical solutions in cases where applicants did not have an address. Prosecution participants expressed concern that if a person was denied bail on the basis of a lack of address, this would be a ground for judicial review. Participants reported that the matter might be briefly adjourned on the day of the hearing to allow time for an address to be sourced, or for accommodation in a homeless shelter to be arranged. Defence practitioners played an active role in attempting to create such solutions. A lack of housing in Ireland was cited as a major problem for defence practitioners. Defence practitioners also reported suggesting sign on conditions and being contactable by mobile phone as substitutes for a fixed address. This was also reflected in the viewpoint of a judge:

> "If you conclude that he's a candidate for bail I think he will usually find a way of, you know, putting the mechanics in place or it's, you know, one of the hostels or with a relative". **(Judge 3).**

5.7.2. Foreign nationals

Participants tended to discuss the question of how residence and nationality related to the likelihood of being placed in pre-trial detention in the terms of

"flight risk", a valid criterion under the *O'Callaghan* principles. Some participants, primarily on the defence side, referred to discrimination faced by foreign nationals in the courts.

There was a feeling amongst some participants that being a foreign national made it more likely they would not obtain bail:

> "But it is of course difficult to deal with someone who has no address here, it presents certainly a flight risk". **(Defence Practitioner 1)**

> "If they are charged with serious offences I suppose the State would object to bail and, to be honest, if they have no roots in this country and they are only in this country a couple of months, they have no families here, they could just disappear; that would be a decision under the O'Callaghan Rules. I have to listen to that very carefully" **(Judge 6)**.

> "I do think that certainly residential status, identity status and permanency are matters that certainly go against a person when they're applying for bail in the District Court and the High Court" **(Prosecution Practitioner 1)**.

> "But yes, you do, and certainly we have files and you can see from a name that the person is not from Ireland and you really wonder will that person turn up and that's absolutely your first thought" **(Prosecution Practitioner 5)**.

However, it was also clear that the simple fact of being a foreign national, especially those from the European Union, was not felt by most participants to be the reason why bail is denied. Where a person was a foreign national, but had significant ties to the state, and had been in Ireland for a long time,

participants largely felt that they were in no different a position to an Irish person. One judge put it thus:

> "… there are people who could be living here for 10 years and again more serious charges and you treat them if they're not a flight risk you treat them in exactly the same way as you treat you know Irish people because they're here and a lot of them are residents here or they'd have family members here. They've family members here for the most part then they're not going to present a flight risk because they have connections so they work here or something like that. So you treat them exactly the same" **(Judge 5)**.

For those people who do not have well-established links in the state, there was a definite perception amongst participants that bail would be much more difficult to obtain. This was especially the case if the person had limited means, and could not offer a substantial financial surety.

In both cases, defence practitioners reported offering a condition that the person would surrender his or her passport, with prosecutors saying that the surrender of a passport would be sought in circumstances where the person's links with Ireland were minimal. When discussing individuals with limited links to the state, a particular situation was mentioned quite frequently. Participants reported seeing instances where individuals flew into Ireland with the specific purpose of committing crimes and then flying out again. Participants felt that in those cases, bail was extremely unlikely to be granted.

There was also a feeling amongst participants that there was a discernible difference in treatment between individuals from the European Union and those outside the European Union. The presence of the European Arrest Warrant was seen as providing comfort to judges.

> "If you're coming back to comfort I think there is the perception that the EU has a framework there and so therefore much easier you know with your European Arrest Warrant and … there's a structure there of course you know and then contrast that then with the non-EU, the asylum application, the asylum, the refugee applicant, you know much more suspicion around them". **(Defence Practitioner 8)**

> "Certainly you have sometimes Chinese, some African …, I think the African countries are at a disadvantage because they tend to have less money and less identity documents. And as a result because of the bail criteria they kind of find themselves, particularly in the lack of identification, could find themselves in custody for, you know, periods of time so I think they're at a disadvantage yeah". **(Prosecution Practitioner 1)**

> "Now within Europe that's not such a big deal because of the European Arrest Warrant system and we've frequently used that to bring people back in order to, you know, to appear in court here. So, in terms of an EU national, it's not that major a deal. In terms of somebody else who's not in the EU, I think there's probably a heightened perception that there's a bigger risk. But again, that can be dealt with by more stringent conditions". **(Prosecution Practitioner 2)**.

The European Arrest Warrant was viewed as an effective tool and a very useful procedure. Participants were very familiar with it.

It must also be noted that some defence participants felt that a small number of judges did exhibit prejudice towards applicants from outside Ireland, and that if a person did not appear to 'look' Irish, the judge would embark on enquiries about their legal status, even if the person was in fact an Irish citizen.

5.7.3. Men and women

Participants did not express strong views that men and women were treated differently in bail applications on the whole. As one participant put it:

> "I don't think personally... that they [judges] look on race or geography or gender. I genuinely don't believe they do, I don't believe they do." **(Prosecution Practitioner 3)**

However, caregiving responsibilities, which primarily fall upon women, were viewed as making it more likely that a person would get bail.

> "Women with children and women who are the sole carer of children will be given bail more easily, quite simply, full stop, end of story..." **(Prosecution Practitioner 3)**

> "Females tend to get treated more leniently as well, where they tend to have personal reasons for kids, for example, that they feel that if they put them in custody you're jeopardising the children's lives as well as the mother's. They tend to get dealt with more leniently." **(Defence Practitioner 4)**

5.7.4. Drug use

Many participants linked lack of compliance with bail conditions and non-attendance in court with drug addiction. Drug addiction was considered to be very widespread amongst defendants, such that those who were not using drugs were the exception rather than the rule (**Defence Practitioner 5).** One judge put the dilemma as follows:

> "The amount of addiction …, it is just frightening, of sixty, seventy, eighty per cent maybe of the people who are up there, have addiction problems of one type of another. So, and you see, their lives become so chaotic that they mightn't intentionally want not to turn up, but they just don't get it together. And the only… sometimes the only way to get them to turn up for their trial, you've so many warrants out, is that they're kept in custody until the whole thing is sorted out". **(Judge 4).**

It was again clear that efforts were made by defence practitioners to propose solutions to the court in the form of conditions which could address the concerns a court would have about granting bail. Participants noted that a particularly effective solution was to obtain a place in a drug treatment programme, which, for one prosecution participant "almost guarantees" **(Prosecution Practitioner 6)** bail. The influence of such a programme was noted by judges also:

> "Now where you in the throes of an addiction, that's difficult and that's why if there's a residential treatment programme and there aren't that many of them but there are some, or something like that, … what we often do is you grant bail on the basis that somebody would access a residential programme". **(Judge 5).**

Participants also noted the relevance of drug addiction in an analysis under section 2 of the Bail Act 1997 when discussing the vignette, though it was not the first or the primary factor in the analysis of any participant. Indeed, one judge stated that drug use should be considered only where it led to failure to turn up for a trial, and that the inclusion of drug use as a factor in itself was problematic **(Judge 2**).

5.8. The Role of Conditions

The role of alternatives to pre-trial detention will be explored further below. However, the question of the factors which influence decision on whether or not to grant bail was also clearly linked to the question of the conditions which might be attached to bail. Participants stressed that, in certain cases, it might be possible to offer a specific condition which would meet the bail objections which had been raised and thus influence a court to grant bail.

> "There's any number of conditions that can be put forward by an applicant to try and convince a court or satisfy a court that they will observe their bail conditions. I wouldn't say there's any particular one, but again, depending on the individual case, there might be a very tailored, specific condition that's offered." **(Prosecution Practitioner 6)**

> "If you have a flight risk objection for someone from out of this jurisdiction, and you can say look, here's my passport, I can give an undertaking not to apply for any travel documents, and I also have someone who act as a surety. They're very persuasive. Or I have an address, so I have some stability. But something like a passport in a flight risk will be a very persuasive condition. You might also have a case where there's a history between parties of violence and they may be living in a certain area. If an incident happened in [one city], you might say to the court, well look, there's been a history here but I'm willing to reside in [another city] with a cousin and I'll keep out of [a wide geographical area]. That has proven in the past to be very persuasive." **(Prosecution Practitioner 8)**

There seems to be a genuine effort on the part of all participants in the bail process at least to consider possible conditions in most cases which could lead

to a grant of bail, and therefore lessen the impact of factors which lead to pre-trial detention. This was very strongly expressed by some practitioners.

5.9. Judicial variation

A very strong theme to emerge from interviews with practitioners concerned judicial variation. There was a strong feeling that, while the general principles concerning bail were very well established in Ireland, the result in any particular case depended in many instances on the views of the judge hearing the case.

The sense of variation in judicial practice was also noticed by prosecution participants:

> "There are certainly Judges who are more lenient, no question. There is a variation and it comes down to individuals." **(Prosecution Practitioner 4)**

> "[There is a] massive, massive disparity. Some… Some [judges] are very conservative and then some are less conservative" **(Prosecution Practitioner 8)**

There were many stories reported by participants of examples of particular 'pet peeves' which judges had, or factors which meant individual judges would always refuse bail. Variation was also reported regarding the types of conditions individual judges would prefer to impose, as well as in the treatment of particular types of offences, and different groups of individuals. Differences between judges were also reported when it came to the extent of reasons being provided for decisions.

A large-scale quantitative study would be required to test these positions, but it is very clear that judicial variability is viewed as a prominent issue in the Irish system.

The effects of judicial variation were also striking. Defence practitioners reported that they would tend to avoid making an application for bail before judges with a reputation for being more likely to put a person in pre-trial detention. Judicial variation was considered to be more pronounced at the District Court. Practitioners also commented that some new appointments to the court may have no prior experience of bail law, and received no training for the role. In such circumstances, new appointments could take a particularly hard-line or lenient approach to bail, but one which was seen as often not consistent with their colleagues.

> "Who you're going to be before I think plays a huge part on whether or not you're even going to make an application for bail". **(Defence Practitioner 7).**

> "And if you get a short remand into another District Court date it's probably the wiser thing to do rather than having to wait a week and a half to get a High Court bail date". **(Defence Practitioner 6)**

> "Practitioners on the other side would say that they would perhaps ask for an adjournment of a case rather than try and make an application, even if it's only for a week in order to try and avoid a particular judge. And that is an issue". **(Prosecution Practitioner 2).**

It is of concern that defence practitioners feel it necessary to advise their clients to spend even a short period of time in custody because they have predicted that there is no chance of obtaining bail before a particular judge.

When speaking to judges, there was a sense in which their practice operated in some isolation. It was not clear that there are many opportunities for judges to benchmark their practice against that of their colleagues, nor to examine evidence of how bail practice is operating in general. One judge said, when referring to the judge's practice of giving a good deal of time to each bail application: "the way I do it, I don't know the way anybody else does it" **(Judge 5).** Another judge, when asked about the effect of section 2 of the Bail Act 1997 said:

> "Well you see I don't, I can just only speak for myself because I genuinely, I genuinely don't know, no" **(Judge 2).**

Practitioners and judges felt that there was a need for more support for judges, and more opportunities for judges to engage in opportunities to learn about overall trends in judicial practice:

> "Be it seminars or conferences or whatever, absolutely that would be, to me anyway that would be really important, you know". **(Judge 2).**

5.10 Summary

- Participants noted that the police in Ireland have a lot of influence over the use of pre-trial detention as they can grant "station bail" at a very early stage of a criminal prosecution.
- Participants felt that the view of the police also has an effect on whether or not the Office of the Director of Public Prosecutions will object to bail.
- Prosecutors felt that, while the view of the police was important, they would advise the police if the grounds for an objection to bail were very weak, and police objections would not be determinative.
- The legal framework for the use of pre-trial detention in Ireland, coming from the *O'Callaghan* case decided by the Supreme Court and section 2

of the Bail Act 1997 were viewed as the guiding principles for decisions on bail in Ireland. These are real ground rules for the decision-making process, which all parties consider in their work.

- The most important ground, in the view of participants, is whether or not the person will turn up for trial.
- The risk of offending while on bail, introduced as a ground by section 2 of the Bail Act 1997, was viewed as not having a major effect on the decisions concerning pre-trial detention.
- While the risk of offending ground was regularly made as an objection, it was not always made by prosecutors. Where it was made, it was felt that this was when the case was weak overall.
- It was felt that denial of bail on the grounds of a risk of offending was still quite unusual as the sole reason for the use of pre-trial detention, and such cases would probably have been denied on the basis of the *O'Callaghan* principles anyway.
- Participants felt that the standard for a denial of bail on the grounds of a risk of offending was quite high, and difficult to prove.
- For most participants, the most important factor in decisions on whether or not to use pre-trial detention was the history of not turning up for trial previously (known as taking "bench warrants").
- Prior history of committing offences on bail is also very influential.
- Less important than these two factors, but still relevant to the decision-making process, are: the seriousness of the charge; the length of time until the trial; and the strength of the evidence.
- Some participants felt that not having a stable address and being homeless meant it was much more likely that a person would be put into pre-trial detention, but others, including judges, disagreed.
- Being from outside Ireland and from a member state of the European Union was viewed as being a neutral factor, but there was a greater concern that the person was a flight risk in such cases. However, being from outside the European Union was viewed as making it more likely

a person would be put in pre-trial detention. The European Arrest Warrant was cited as a key factor in this regard.

- Having no, or very few, connections with Ireland meant it was much more likely that the person would be put in pre-trial detention in the view of the participants.

6. Less severe measures: bail conditions

If we look at this issue from the perspective of alternatives to pre-trial detention, then the sole alternative to pre-trial detention in Ireland is bail, whether that is granted by the police (station bail), or by the courts. As has been seen above, participants do not view bail as an alternative to pre-trial detention, but, rather, that pre-trial detention is the alternative to bail.

In such a scenario, the conditions which apply to a grant of bail can be considered as varieties of alternatives to pre-trial detention. It is quite striking that participants consider the Irish approach to pre-trial detention to be one which favours liberty, but do not talk of conditions on bail as restrictions on liberty. This is most interesting, as many of the conditions are, in fact, quite intrusive, and place significant restrictions on the individual's liberty and freedom to choose where and when to go, where to live, with whom to associate and so on.[1] These conditions may also affect family members or others, especially, for example, when a person agrees that the applicant for bail may live with them.

While on the face of it, it may appear that there is a straightforward decision to be made between liberty and detention in the Irish case, in fact, there is a decision to be made between detention and *gradations* in the restriction of liberty. Participants felt it would be extremely unlikely that an individual

[1] The authors wish to thank Miranda Boone in particular for prompting these reflections.

would receive no conditions if granted bail by the courts (the matter might be different, and fewer conditions imposed, when the police are deciding whether or not to grant bail). The question is, at the court level, what conditions would be imposed, rather than if they would be should bail be granted. It is therefore important to recognise that the Irish system involves significant restrictions on liberty in the form of bail conditions. This is an important point to remember when comparing the Irish approach to that of other jurisdictions: there is a well-developed and long-established system for placing restrictions on a person who is not placed in pre-trial detention. This is also a significant point for the players in the Irish criminal justice system to remember – it may appear as if bail is liberty *simpliciter*, but usually, it is not. The most common conditions will now be analysed in turn.

6.1. Financial guarantees

Practitioners emphasised that when bail is granted by the Irish courts, it may be made the subject of an "own bond" monetary amount, a cash lodgement, or an independent surety. In these cases, the accused person or the individual putting up money as a guarantee that the person will attend trial, is liable to lose the money should the accused person fail to turn up for trial.

Many participants expressed the view that if the accused person could offer to put forward a sum of money or an independent surety as a condition of bail, this would be highly influential in persuading a judge to grant bail:-

> "A significant independent surety will, in most cases, I think, get you bail… somebody putting forward an amount of money, an independent surety, it's very persuasive." **(Defence Practitioner 1)**

> "…The thing that would get bail granted is an independent surety, if there's somebody else that's willing to either lodge money or the person

themselves, I think cash probably speaks more than anything in a bail application in respect of most matters anyway, particularly some of the more minor matters." **(Defence Practitioner 2)**

The point was made by one participant that judges do not expect colossal sums of money to be put forward: "We never encounter that, an America type bond where you're looking for incredible amounts that doesn't seem to arise and I think that's a good thing, you know." **(Prosecution Practitioner 1)**

The role of the independent surety was viewed as a mechanism for using family supports as a factor in granting bail:

> "Serious offences, the court might want to see if there's family support and that's why an independent surety might be imposed. The surety's job is not only just to lodge money, but it's to make sure that they have an obligation that a person turns up to court..." **(Prosecution Practitioner 8)**

Defence practitioners did note that the emphasis on financial bail could disadvantage accused people who are of limited means, even though judges are obliged to inquire into an individual's means, and ensure that any amount of bail is not beyond those means.

6.2. Standard versus tailored conditions

Practitioners felt that there was a fairly standard list of conditions, which would be applied in most cases. These were: signing on, curfews, residence restrictions, and a mobile telephone condition:

> "The general conditions of bail would be [a] residence condition, a sign on condition, a curfew condition, and now, with the curfew, almost *pro*

forma, comes a telephone condition. Provide a mobile phone number to the Gardaí within 24 or 48 hours of release to be answerable at all times… There are pro forma conditions of bail imposed in everything that you have to show up, not commit further offences, be of good behaviour. " **(Prosecution Practitioner 7)**

"Probably a few of those are almost always applied. And I suppose they are fundamental bail conditions. You can't really grant anybody bail and not require them to sign on at a Garda station at least once a week. That would almost be applied in all cases." **(Prosecution Practitioner 6)**

"They're pretty standard. In the High Court, if you get bail, you're signing on a daily basis. Curfew. Mobile phone has become the *de rigeueur* condition." **(Prosecution Practitioner 8)**

The prevailing view amongst practitioners was that these standard conditions tended to be imposed in a *pro forma* manner to all persons granted bail by the Irish courts, regardless of whether there was a need for same in the particular circumstances of the case. A number of practitioners highlighted issues in particular with the imposition of curfew conditions:-

"I have no difficulty saying that some of the conditions are just put there, sometimes there's no real reason for them, you know." **(Prosecution Practitioner 1)**

"There is a kitchen sink approach sometimes, which there shouldn't be." **(Prosecution Practitioner 3)**

"[Conditions are imposed] by and large probably in a blanket way… it's almost like a ticking the box exercise when they're putting conditions on the bail bond, I think too often irrelevant conditions are attached to

> a bail bond that of course the clients are willing to, or the applicants are willing to abide by because it doesn't matter, it's not relevant to them, so the likes of a curfew I think that's too readily applied to conditions where it doesn't apply to the offence at all, the substantive events." **(Defence Practitioner 2)**

Certain practitioners made the point that this suite of standard conditions was often imposed because it was requested by the prosecution once a judge had decided to grant bail, and was generally acceded to by the judge:-

> "There's kind of a compensation effectively to the Director, since the judge has granted bail in the teeth of objections." **(Defence Practitioner 1)**

> "Some judges would take the view that well the Garda wants the condition, therefore the Guard gets the condition, no matter how reasonably you can suggest that the condition is disproportionate… Once a Guard suggests it, it becomes very difficult to take the condition away even if it has no relevance whatsoever to the offence…" **(Defence Practitioner 4)**

Practitioners emphasised that this was not necessarily correct as a matter of law, as there would need to be an evidential basis for the conditions imposed: "Bail isn't a reward, there has to be an evidential basis for refusing or granting and if it does grant then each of the conditions. It can't just be, tick the bail box, now I can say whatever I want." **(Defence Practitioner 1)** It was usually seen as the job of defence practitioners to object in these circumstances. However, it was suggested that this might difficult as successful bail applicants were often so "grateful that they got bail or so grateful that the application is over, that the torture is over that you can just see them agreeing to everything." **(Defence Practitioner 1).**

Practitioners emphasised that the courts would occasionally go beyond imposing these standard conditions and impose further "tailored" conditions where necessary in the circumstances of the particular case **(Defence Practitioner 5).** As practitioners noted:-

> "...[D]epending on the individual case and the nature of the allegation and the State concerns, the DPP concerns, more tailored conditions can be applied..." **(Prosecution Practitioner 6)**

These tailored conditions might involve an obligation to refrain from contacting and stay away from injured parties, co-accused persons or witnesses to the case; to stay away from the area where an offence was alleged to have been committed; to hand in travel documentation and not apply for any further travel documentation; and to undergo mental health and drug treatment. **(Defence Practitioner 1; Prosecution Practitioner 7)**

In addition, other practitioners took the view that "standard" conditions were never imposed in a *pro forma* manner, but always met a particular need:-

> "No, they're genuinely tailored. I mean there's a standard list, basically, of conditions that have been effectively approved by the High Court in the past, so District Court judges and High Court judges will know that if they put these conditions in place, they're very unlikely to be, they're very unlikely to be reviewed in respect of them." **(Prosecution Practitioner 2)**

The view expressed by judges was that any conditions imposed should be realistic in light of the accused person's circumstances and match a particular need in the case:-

"I think what's important is that you impose conditions that, looking at the person concerned, they can sensibly comply with them. I mean if you say to a person who has a drink problem, you can't drink, or if someone has a drug problem you can't do drugs, well you have to say you can't do drugs because it's illegal, but sometimes, on appeal, you get conditions which are unrealistic conditions. My view is you should impose realistic conditions, and the realistic conditions are to make sure that the person turns up for trial and that they're not committing crime on bail." **(Judge 3)**

"You do apply the conditions to the person as you think fit which is why although there are standard conditions you vary them, you'd rarely have the same set of conditions in every case." **(Judge 5)**

"[I]f the State look for conditions... I want to know why are they setting that condition. Had this person not turned up before in court, have there been bench warrants. Nothing happens in a vacuum. They have to prove that there is a reason they are making this application for this particular condition. The same applies to curfews. Again curfews are a far greater restriction on freedom than are signing on conditions. So if for instance they want a curfew between 10pm and 8am, and this one was shoplifting at 2pm, I would refuse." **(Judge 6)**

However, some defence practitioners criticised some of the conditions imposed on occasion by judges, remarking that conditions like staying sober or being polite were "not feasible" and "just ludicrous" **(Defence Practitioner 5),** and that "some of the conditions can be very ignorant of the economic status of the people involved" **(Defence Practitioner 7).** Being required to keep a mobile phone in credit was mentioned in this regard. Another participant expressed concern over the ability of the bail conditions

that can be imposed by a court to properly address some of the concerns that might arise in a particular case:-

> "I think that bail, like a lot of remedies I suppose, is a fairly blunt instrument and there are times where a problem raises its head that the bail laws as we have them, the reliefs that are available and the conditions that are available don't really address the logistic concerns that a court might have in relation to bail." **(Defence Practitioner 1)**

There were mixed views as to whether bail conditions were generally understandable to the persons subject to same, or whether they might encounter difficulties complying with them. Some practitioners remarked that certain conditions were unclear and difficult to comply with, and that the "disorientating" nature of legal proceedings contributed to a lack of understanding **(Defence Practitioner 1).** Others remarked that conditions were "quite self-explanatory" and that, by and large, accused persons do understand their conditions **(Defence Practitioner 2).**

Some defence participants and one judge reported that people could face the difficulty of not being provided with a pen in a Garda station and therefore be unable to sign on.

> “DP5: You’ll hear these awful things of course, when I couldn’t sign on because I forgot to bring my pen, and they wouldn’t give me a pen.
>
> DP7: And they don’t often, I have seen that myself, they don’t give them a pen.
>
> DP6: Like I’ve given my pen to someone before because you know …”

6.3. Other conditions and future developments

A complaint put forward by some practitioners was that there is a limited set of conditions that can be offered by an applicant seeking bail:-

> "You come with a very limited toolbox as an applicant representative. You only have so many rabbits in that box which would… Your biggest one is money and after that there's maybe around eight conditions between, you know, stay away, staying in, staying at a certain place and all of those. So, there's very rare that you'll come up with something surprising." **(Defence Practitioner 1)**

A judge also complained very pointedly about the lack of creativity amongst defence practitioners when putting forward solutions which would address the judge's concerns about flight risk and reoffending.

Participants were asked about two specific conditions: electronic monitoring and bail hostels.

6.4. Electronic monitoring

Electronic monitoring is not applied at present at the pre-trial stage in Ireland. Participants expressed very mixed views about whether electronic monitoring would be a good thing for Ireland, and whether it would reduce the amount of pre-trial detention in Ireland. A particularly interesting perspective which emerged concerned the idea that defendants might seek electronic monitoring as an alternative to pre-trial detention, and seek a review or appeal of an outcome where pre-trial detention was ordered and electronic monitoring not used.

A common view expressed by practitioners was that electronic tagging would be quite similar to the curfew and mobile phone conditions which are frequently imposed as conditions of bail by the Irish courts at present. For that reason, it was not seen as representing a significant departure from current bail practice.

> "I think 90% of the benefit it affords is provided for by the mobile phone condition, which is just an eminently sensible way of just getting around the absence of electronic tags." **(Prosecution Practitioner 7)**

However, participants were very divided on whether electronic tagging would actually be useful in Ireland. Some felt it would make no difference whatsoever. Participants generally did not mention electronic tagging spontaneously as an area which would be a good reform to bail practice in Ireland, and there was no sense that practitioners or judges were crying out for the introduction of electronic monitoring.

There were mixed feelings as to whether the availability of electronic tagging would be a useful development which could lead to more people receiving bail and lead to a greater rate of compliance with bail conditions. Some participants felt that electronic tagging might give judges more confidence to impose restrictions on movement, and be more likely to grant bail. One practitioner described the need for electronic monitoring as a "no brainer" **(Prosecution Practitioner 4)**, which would lead to more bail being granted. Another prosecution practitioner felt that the defence would be more likely to seek electronic monitoring than the prosecution:

> "I think that ultimately that if the goal is to have as many people who are presumed innocent of offences out on bail, while upholding the aim of reducing crime, I think that electronic tags really assist that. I think that they would be used by… I think the provision of electronic tags

would be used by applicant counsel to say that he should get bail but he should be tagged, in cases where maybe at the moment people are routinely refused for that [risk of reoffending under section 2]". **(Prosecution Practitioner 7).**

"Very useful for the recidivist person, whose committing crime regularly. Very useful process. Because you could then consider letting them out once they're being monitored." **(Judge 4)**

There were contrasting views expressed as to whether compliance with bail conditions was likely to be supported by electronic monitoring:

"I think that psychologically people who think that they're being monitored might feel… might not… I think the people who breach their curfews or certain conditions of bail do it because they're not being watched. I think if that feeling of being watched might… Yeah." **(Defence Practitioner 9)**

"I think it might result in more breaches of bail, rather than people getting bail… If some people who got bail were to be electronically tagged, I think they'd be the people who would get bail anyway, so I don't know how much of a benefit it would be, because I don't think the bail laws are that restrictive." **(Defence Practitioner 10)**

Other practitioners said there should be an emphasis on the reasons behind people do not turn up for trial or offend on bail e.g. addiction problems, rather than investing in an electronic tag. As one probation practitioner said: "But like it's about what's going on in people's heads more than what's, you know, that you need to be working on" **(Probation Participant 2).**

The cost of electronic monitoring was also raised as a concern.

There were also reports from practitioners that some applicants for bail had sought electronic monitoring already, but could not get it as the facilities did not yet exist at the pre-trial stage. Considerably more thought is needed in Ireland, and the experiences of other countries should be reviewed carefully, before electronic monitoring is introduced in practice in Ireland.

6.5. Bail hostels

While the lack of housing was seen as a major problem for most defendants, and bail hostels might resolve this issue for many individuals, participants also expressed some concerns about how bail hostels would operate in practice.

> "It might alleviate some of the constraints of signing on in a Garda station or whatever but even if it doesn't alleviate them, it's a second, effectively it's a second boulder and it's another brick effectively for getting bail and helping the prosecution to monitor the individual." **(Defence Practitioner 2)**

> "I think that would be of enormous help because what you have are people going from hostel to hostel, they're sleeping on the street and they will tell you then in a lot of occasions that that's the reason they didn't show up or they'll tell you they were under threat and they couldn't abide by conditions and stuff like that but I actually think a bail hostel would be, it would serve a very useful purpose for those people who are living homeless effectively. I think it would… It also means that the system would be easy to monitor …." **(Judge 5)**

Some participants expressed concern however over how these institutions would be operated, however. For instance, one comment made about bail hostels was as follows:-

"I mean, I don't know, are we getting into kind of quasi pre-detention kind of scenario where they're not in a prison like Cloverhill with all its facilities and ending up in a hostel? ...And let's also remember because you have the likes of the, well I suppose the mixture of the more serious criminals. Like are they going to put, would white collar criminals be going there as well, you know." **(Prosecution Practitioner 1)**

"It depends on again how it's funded. If it's looked after well, if it turns into a doss-house, they might as well get rid of it because there are already plenty of wet and dry hostels around the city and that's what it'll turn into. Bail hostel is not an answer. I mean, you know, it is a halfway house, that's what it is, but you're going to have people, you know, perhaps, you know, people who are addicts, who are trying to get clean and the opposite way around, you know." **(Prosecution Practitioner 2)**

Generally, bail hostels were viewed as being a measure of last resort for people with no other option. The need to ensure that there were other supports for the individual e.g, addiction services was also frequently mentioned by participants.

6.6. Summary

- The role of conditions attached to bail is very important in Ireland, and certain conditions are viewed as meaning that bail is more likely to be granted. Financial bail and an independent financial guarantee are viewed as highly persuasive. Having a place on a residential drug treatment programmes is also viewed as very important where there is evidence of addiction.

- For the vast majority of cases, it is not the position that a person granted bail has no restrictions on his or her liberty. Rather, when a person is granted bail there are restrictions imposed, of various degrees, on an individual's liberty.
- It is therefore the case that the decision for judges in Ireland is not between liberty *simpliciter* and detention, but rather, between detention and gradations of restrictions on liberty. Some of those restrictions can be onerous.
- It is recommended that the players in the Irish criminal justice system also bear in mind that the conditions imposed can be significant in both number and depth. Further research on how those conditions are experienced and monitored is recommended.
- There was a view that the standard conditions where bail is granted are: signing on regularly with the police, being subject to a curfew, being contactable by mobile phone, and staying away from certain areas or people. Many participants, especially defence practitioners, criticised a tendency to impose conditions which are unnecessary, and disproportionate. This was especially the case when there were strong objections to bail by the prosecution.
- There was a clear sense from prosecutors and defence lawyers that there was a good deal of variation amongst judges in their approach to bail in Ireland.
- The lack of electronic monitoring at the pre-trial stage was not viewed as a major problem in Ireland, with many participants saying that a police-monitored curfew and the requirement to be contactable by mobile phone amounted to the same thing.
- There were mixed views on whether electronic monitoring would be valuable. Some participants felt that it would lead to more granting of bail, and that defendants may seek electronic monitoring instead of bail. Others feared that most people would be subject to electronic monitoring, even when it wasn't needed.

- Bail hostels were viewed with some caution. Participants acknowledged that they could assist where a person was homeless, but expressed concern that they might become quasi-prisons and that addressing the lack of housing in other ways should be a priority.

7. The Role of the Actors in the Decision-Making Process

Participants were asked for their views on who the major actors were in the bail process in Ireland and the respective functions that each actor played. There were varying views expressed about who was most dominant in the procedure. However, the dynamic between these actors which emerged from the interviews may explain the manner in which pre-trial detention is used in Ireland. The role of prosecution self-restraint is particularly interesting, as it suggests that prosecutors in Ireland are not invariably in favour of pre-trial detention, and their role acts to limit the use of pre-trial detention.

The role of each of the actors will now be described.

7.1. Role of the prosecutor

Participants described the prosecution as playing the role of setting out objections to bail in accordance with the legal criteria permitting the use of pre-trial detention in Ireland. One practitioner described the prosecution's role during a bail hearing as follows:-

> "It'd be up to the prosecution to object to bail. They'll set out their objections, they will give evidence as to why they don't think someone's likely to show up, or interfere with evidence, or whatever the reason is that they're going to look to deny bail, they'll give their evidence on that." **(Defence Practitioner 3)**

Practitioners described that, in setting out the bail objections, the prosecution will provide the court with details in relation to the nature of the charges at issue, the evidence supporting the charge, and the particular circumstances of the offender. As a prosecution practitioner put it:-

> "They're presenting the charge first of all. They give an outline of the allegation that the applicant faces before the court. So that's very relevant in terms of strengths and weaknesses of the prosecution case. They have to establish that there is a strong case and evidence in support of that charge... They need to present an outline of the allegation and then the circumstances of the offender. That's previous convictions, warrants, drug addiction, financial circumstances, previous dealings with Gardaí, previous bail history, whether or not he complied with conditions." **(Prosecution Practitioner 8)**

One practitioner made the point that in carrying out this function, the prosecution is not acting in a disinterested manner or simply tendering evidence without trying to achieve a particular result. Instead, it is trying to have bail refused:-

> **"**The State's role generally would be more, general prosecutorial role. Their job is to set out the evidence. Unlike sentencing, they're very much agitating for a particular result. It's very rarely in a case that in a bail application the State is saying this is the evidence, they're actually arguing – as they're entitled to – for the refusal of bail." **(Prosecution Practitioner 7)**

Another prosecution practitioner was keen to emphasise, however, that whilst the prosecution agitate for a certain result, a refusal of bail is not seen as a "victory":-

> "...That's really where the case is won or lost, even though that's not the appropriate terminology in the context of, certainly from the prosecution side. It's not like we regard these things as victories or anything like that. You're just putting the case up before the court." **(Prosecution Practitioner 6)**

Certain practitioners made the point that in the District Court, the prosecution is generally represented by an individual member of An Garda Síochána, and that these members can differ greatly in terms of how bail objections are presented.

7.2. Role of the defence

Practitioners described the role of the defence as trying to reveal holes in the case made by the prosecution; to add context to the information that has been put forward; and to put forward suitable conditions that would mean the accused could be safely released on bail:-

> "In respect of the defence, obviously, their role is to apply for bail, to put the circumstances before the court, to explain as much of the previous history as they can to the court and to assuage the court's fears or the Guard's fears and put forth any conditions that they see fit to getting bail." **(Defence Practitioner 2)**

> "The defence perspective is to put forward the bail application, and all of the reasons, and your client's case." **(Defence Practitioner 4)**

7.3. Role of the judge

The role of the judge was seen as being a type of referee between the prosecution and defence, deciding on whether to grant bail based on the

evidence and arguments put forward by these two sides, and providing a reasoned legal ruling. Practitioners were generally agreed that it was inappropriate for a judge to go beyond this role. As one practitioner stated:-

> "In respect of the judge, my view is that the judges shouldn't embark on their own enquiries in respect of a bail application. I think that's entirely a matter for the practitioners and that whilst it's not a rubberstamping exercise, they have to weigh up all the factors and that's the height of what they should do on the evidence that is before them." **(Defence Practitioner 2)**

In similar terms, another practitioner noted that "the judge is there maybe just as an umpire." **(Prosecution Practitioner 1)**

All participants were agreed that the judge enjoys considerable discretion under law in making a decision on whether or not to impose pre-trial detention.

Judges accepted that there was this degree of discretion:-

> "You've a very wide discretion, you've a very wide discretion. You do have to take into account, they're really the things you have to take into account, is there a probability that the objections which are being put forward, that the concerns are genuine, that they're well founded, is there a probability then that the person won't abide by conditions or won't show up and if you come to the conclusion that there is a probability and it's not hard in a lot of cases to come to that conclusion, if you come to that conclusion then what conditions can you reasonably set, that will meet those concerns. That's what it really comes down to." **(Judge 5)**

Other judges noted that the "ground rules" **(Judge 3)** i.e. the legal framework bounded a judge's discretion, but within that, there remained a good deal of scope for a judge to make his or her decision.

7.4. Dominance

Judges and practitioners were asked whether they thought that any of the three major actors dominated proceedings or held the upper hand in some way, or whether there was a fair balance between the roles played by each of them. This line of questioning produced very mixed responses, with no clear prevailing consensus. Some respondents were clearly of the view that bail hearings in Ireland are balanced as between all of the major actors, as evidenced by the following quotations:-

> "...I think there's generally a good balance between the parties. Both sides are heard... and there seems to be enough safeguards in relation to it to make it reasonably fair." **(Defence Practitioner 1)**

> "Generally speaking, it's a pretty level playing field, the Guard says his bit and the [defence] solicitor will say their bit. Generally everyone has their say, I think." **(Defence Practitioner 3)**

> "Evenly matched with, obviously the prosecution having the advantage of access to garda records". **(Judge 4)**

Other respondents felt, however, that the prosecution plays a dominant role in proceedings. One practitioner stressed that judges "will always take the Guard's word" and will not second-guess evidence which has been given **(Defence Practitioner 10).** Another noted that, as an applicant for bail, "you're usually facing an uphill battle" as the prosecution has "all the ammo to

work with" **(Prosecution Practitioner 8).** Another practitioner described matters as follows:-

> "Definitely the prosecution is playing a more dominant role. They're going in almost with the view that their influence can predetermine the matter. The choice of how they bring the application, whether under O'Callaghan or s. 2, makes a massive difference in certain courts and they know that. And they also know that if they say that there are strong objections in the case, that they've already got the judge on side, that it's a more serious matter than it ought to be." **(Defence Practitioner 4)**

Some practitioners felt that the defence was actually in the dominant position during bail hearings. **(Defence Practitioners 2 and 9)** Others still felt that the judge had the most prominent role to play:-

> "The judge is able to give instruction in relation to the procedure of the case. So, they can cut short cross-examination. They can rule on the evidence. They can call witnesses of their own motion. The judge is appropriately the dominant actor in terms of the bail application." **(Prosecution Practitioner 7)**

The relative dominance of the parties was seen as being different in the District Court as compared with the High Court. The prosecution was viewed as having more influence at District Court level, while the judge was seen as more dominant, or else the process was more balanced, at High Court level.

Participants were also asked specifically whether the status of a person as a prosecutor meant that individual had additional sway with a judge, something of interest from a comparative perspective. Responses to this were again linked to the theme of judicial variation, with some participants saying that there were some judges were more “pro-prosecution” and others who were not.

However, there was also a clear view expressed by many participants that the decisive matters in bail applications were the evidence before the court and the legal framework.

> "Well I think clearly judges aren't robots so, and I can't say that every judge will decide the case the same way, and I have no doubt that there are judges who are, you know, more open to their prosecution arguments and others who would be more resistant, but the actual law is clear". **(Judge 3)**

Prosecution practitioners felt strongly that their role as prosecutors was to be truthful to the court and not to secure pre-trial detention at any cost.

7.5. Prosecution self-restraint and the relationship with the police

A very interesting theme to arise from the interviews was what may be described as prosecution self-restraint. The prosecution in Ireland seem to take a position that, if there are reasonable grounds for bail, they will generally not oppose bail and, instead, seek to agree conditions for release. This emerged from the interviews as being a key factor in ensuring that pre-trial detention is not over-used in Ireland. This can apply at the earliest stage, through station bail, but also, interestingly, through consent to bail at the court stage.

It is difficult to ascertain the precise extent of the practice whereby bail can be agreed between the parties, however, from the interviews, it appears to be a widely used practice.

> "There's almost always discussion going on outside the courtroom. More often than not I think bail will actually be agreed, in the sense that the Guards will say that if you consent to various conditions we'll

> consent to bail, and a lot of the time there is consent to that, and that will have been discussed outside of court" **(Defence Practitioner 3)**.

Prosecutors did not have a major difficulty with this system, considering it to be an efficient use of time and resources, and a way of ensuring that pre-trial detention was not unnecessarily used. There was a clear sense that prosecution participants were open to discussions about negotiating bail conditions:

> "If there's a chance of getting bail and it's not a very, very serious offence and you don't have the Guards absolutely gung ho to say there's no way this can happen you'll work around it". **(Prosecution Practitioner 4).**

The work of defence lawyers was crucial in this process, with evidence from the interviews that defence lawyers were very active in their pursuit of a possible bail agreement. Defence lawyers reported placing a lot of emphasis and putting a lot of time into having discussions with Gardaí or with the representatives of the prosecution before a case is called on. Defence practitioners generally saw conversations with the prosecution as an essential part of their strategy to represent their client in a bail application. Defence lawyers would use these conversations to establish what the objections were, and whether there were conditions which would be acceptable to the prosecution. There would then be over-and-back discussions between the prosecution and defence in an effort to get agreement on bail.

> "if you can obviously tee it up outside the court, that's the ideal scenario" **Defence Practitioner 2)**.

Defence practitioners reported that their strategy would also involve seeking to persuade the prosecutor that they could be sensible or practical about the matter, and come to an agreement. Defence practitioners also felt that police

prosecutors might be more amenable to agreement if the court was going on for a long time. Even if bail couldn't be agreed outright, defence practitioners felt that informal conversations might result in a Garda stating that s/he would agree to a particular condition, which in turn would indicate to a judge that the objection to bail was not so serious. Prosecution practitioners also described this practice:

> "I always go prepared into an application, so if bail is granted I know exactly what sort of conditions the state is seeking without having to go to and fro. Right. One has to be careful in relation to that, because it can indicate some sort of consent. But if managed carefully it is the best approach". **(Prosecution Practitioner 5).**

Most participants stated that it would be unlikely for a judge to probe a consent application for bail. Most judges, the participants felt, would simply accept the consent order and move on. Some judges confirmed this practice:

> MR: would you be likely to probe consent?
> **Judge 1:** No, no. No.

> "I think, by and large, the view is that criminal trials are adversarial as the decision to seek bail or to resist bail is part of the adversarial process. And if the parties have a common position it would be rare for a judge to go behind it.". **(Judge 3).**

Other participants noted that judges will sometimes question consent to bail. Judges may seek more information and reasons as to why the prosecution is consenting, however, it was felt that judges would only very rarely refuse bail when consent was forthcoming from the prosecution. If a judge did so, it was felt that there was a strong likelihood that the accused would seek release under the *habeas corpus* procedure in the Irish constitution on the basis that

they were unlawfully detained. Some participants felt that it was appropriate for the judge to question the basis for consent, especially where objections might have been expected. One judge also put it thus: “well just because the Gardai come in and say I’m consenting I’m not a rubberstamp, you know” **(Judge 2)**.

It was felt by some participants, however, that in the recent past consent was becoming more difficult to obtain on the part of the prosecution, especially in the High Court. This was considered to be linked to the fact that the number of cases being dealt with the in High Court was lower than had been the case previously, and there may be more time to deal with the issue in the court itself.

Two practitioners remarked that it is much more difficult for the prosecution and defence to agree bail on consent in the High Court than was previously the case:-

> "I think a lot more could be done on consent because I think the practitioners are experienced, the Guards out there are experienced … I think that there used to be much more done on consent than there is now." **(Defence Practitioner 1)**

> "[Whether to put forward bail objections] is more out of our hands than it has been in previous years… probably because of media reports on people on bail committing serious crimes. … The last few years, a trend, and I think it is borne out by, you know, negative criticism against the gardai, In relation to some high profile cases where people were on bail and committed serious offences whilst on bail… I think that has affected the level of consents. … The State is not prepared to take the risk, where there is, you know, threat to life potentially if bail is granted." **(Prosecution Practitioner 5)**

Another factor which is related to the question of consent orders is what can be described as a certain element of collaboration between defence and prosecution in Ireland. Practitioners felt judges appreciated it when practitioners made an effort to establish the facts and issues between each other before a hearing, as this made the matter run more smoothly. Defence and prosecution practitioners were also quite comfortable in talking to each other in an effort to negotiate conditions in a suitable case, or to at least exchange information which might make the hearing more efficient. At High Court level, where the prosecution would usually be represented by a barrister, the fact that barristers could represent the defence in one case and the prosecution in another was also considered to be a factor which gave rise to a more balanced approach to bail applications.

> "I think it provides a useful perspective. I mean as … yeah, I think it provides a useful perspective. I think it also counts against the possibility that people will perhaps make decisions for the wrong reasons." **(Prosecution Practitioner 2).**

> "But in fairness to the prosecution certainly that we deal with in the CCJ (Criminal Courts in Dublin), by and large they're I would say, very, very fair, I think you know in terms of dealing with them on a daily basis, I would say they're very fair and … you know they respect us for the most part and we respect them and there is almost a collaboration together to move things along as smoothly as possible" **(Defence Practitioner 6)**.

> "The people you're dealing with in, you know, defence practitioners on a daily basis are going to be who you're dealing with on the next case, the next day. Nobody's going to be unnecessarily antagonistic" **(Prosecution Practitioner 6)**.

7.6. Active defence

Another key theme to emerge from the interviews was that of a generally very active defence in Ireland. It was a core function of defence lawyers to apply for bail, when instructed to do so, on behalf of their client. Defence lawyers are also paid under the legal aid scheme in the vast majority of cases. One judge particularly drew attention to the fact that the vast majority of applicants for bail would be represented by a solicitor, and noted that it would be within this judge's practice to ensure that a person who wasn't represented did receive the benefit of a lawyer, unless the person was absolutely adamant they did not want representation. The legal aid system was considered by one judge to be an important factor which supported balance in the system:

> "I mean if I had somebody, and I mean the best senior counsel in the Law Library, and legal aid are representing very often there isn't an inequality of arms." **(Judge 6)**.

Defence lawyers become involved at an early stage in the proceedings, with solicitors generally receiving information that a person is in custody in a Garda station during the period of detention. The solicitor may see the person during that period of detention, or on the morning of the bail application. Barristers would tend to be briefed by solicitors in a fairly short time period before the application would be made. During this period, defence lawyers would spend their time seeking information and instructions from their client, engaging in conversations with the prosecution, and checking out things like an address, or the possibility of getting a place on a drug treatment programme in order to offer bail conditions which might be agreeable to the prosecution and/or the judge. Defence lawyers cross-examine prosecution witnesses, putting possible conditions to them upon which bail might be granted. Defence lawyers also reported citing the presumption of innocence and the presumption in favour of bail in their applications on a regular basis. One defence lawyer referred to

the strategy of putting forward conditions as a way of providing "comfort and security" to judges, and to assuage their fears that granting bail might be a risk (**Defence Practitioner 8).**

The reputation of defence lawyers was also cited as an important factor by a number of participants. It was felt that defence lawyers who were considered trustworthy and who took their professional obligations seriously would be respected by a judge, who might take more account of their proposals for admitting a person to bail. As one prosecution practitioner put it, a skilled defence lawyer can play a very important role in undermining the objections to bail:

> "You'll hear the defence put forward their case. And they'll chip away, or put some colour and context on the objections. And all of a sudden, you'll have a different view of the strength of the prosecution case. And it is amazing to see defence barristers, how they are able to put context and, suddenly, what you thought was a black and white case, has just different shades of grey, you know?" **(Prosecution Practitioner 6).**

Other participants noted the important role defence lawyers have to play in ensuring that conditions attached to bail are not disproportionate. Defence lawyers reported questioning the need for conditions, though some practitioners felt that defence lawyers could do more in this respect.

There was also some criticism of defence lawyers for not putting forward practical and workable suggestions for conditions which could lead to a person being granted bail.

> "How can I craft a set of conditions what can I do, give me something to craft, give me something to craft with. … it's not up to me to craft

> something, …, it's a lazy approach to throw it up and say yes you can impose conditions that [the accused will] meet" **(Judge 5).**

7.7. Probation

Probation staff are not formally involved in the pre-trial decision-making process in Ireland. Probation staff are engaged, formally speaking, after conviction, providing pre-sentence reports and working with offenders during their sentence.

However, while probation staff are not formally involved in the pre-trial process it was clear from interviews with senior probation staff that this dividing line between pre- and post-conviction work was not so defined in practice. Informality is a rather strong feature of the Irish criminal justice system in general, and this was also borne out in the area of bail and pre-trial detention.

Probation participants noted that there were situations in which probation staff would become involved at the pre-trial stage. Participants reported that judges might take a flexible approach to a case whereby they would adjourn the matter for a period, during which the individual would be made subject to probation supervision, and then dismiss the case. As one participant put it:

> "it's still there very much set in stone that we're post decision. Now that is, that works fine when you're in an adult court but it doesn't work well, it doesn't work really in an Irish court system. … in theory we're post trial but in practice, because of the way the courts operate and judicial discretion, then there comes of a lot of what is in effect pre decision but actually is conducted post decision which is then reversed". **(Probation Participant 2).**

Another participant noted that a person might be on bail for one alleged offence, but under probation supervision for a different offence, and there could be a blurring of boundaries for the probation staff member in such a scenario also. A judge might order an assessment of the person, find that s/he is doing well on supervision and then make a decision to keep the person on bail on the other matter.

Participants also noted that a social work approach was being conducted with children on bail, through an organisation called 'Extern'. This project involves a child being placed on bail, but subject to intensive supports from a key worker. Probation participants noted that this work wasn't being carried out directly by the Probation Service, but involved a way in which the service was becoming involved indirectly in the pre-trial phase.

Participants were asked whether or not they saw the need for probation staff to become more involved in the pre-trial process. Most practitioners and judges were wary of more involvement, citing concerns that it would act to erode the presumption of innocence to involve an agency in dealing with offending-related activity before guilt was established.

> "I just think, you see the other problem is that the presumption of innocence applies so if they're engaging with some kind of quasi probation service, the probation service tends to be when someone has been before the courts and taken a certain course though" **(Prosecution Practitioner 1).**

Probation participants also recognised this concern, suggesting that their involvement could "muddy the waters" **(Probation Participant 1)** and policymakers would have to be careful of the parameters for the involvement of the Probation Service. This concern was also considered to apply to a situation where the Probation Service could be involved in assessing risk of

reoffending, which set "all kinds of alarm bells" going for one probation participant **(Probation Participant 1).** Net-widening was also a very strong concern, with the view expressed that probation involvement might become a standard condition, even when not really needed.

Practitioners and judges also cited concerns that the Probation Service is not currently adequately resourced as reasons to tread carefully in introducing more probation involvement. Probation staff said such work would be completely unfeasible with current resources.

Many participants did note, however, that there was a need to provide supports to individuals at the pre-trial stage who had addiction and other problems. The Extern project mentioned above was very positively regarded by defence practitioners. This work was viewed as especially necessary with young people, especially those who may not have strong parental supports. Probation participants also felt that, where the goal is the reduction of reoffending, then creative ways to ensure that should be applied, which may involve working with people before a conviction is recorded.

7.8. Summary

- It is the role of the prosecutor to object to bail on established legal grounds. There was evidence that prosecutors apply a kind of self-restraint in bail applications. Prosecutors do not object in every case, and will consent to bail if the objections are not strong enough to merit pre-trial detention. Consent to bail remains quite a widespread feature of Irish bail practice at the District Court level.
- Judges were viewed as having very wide discretion, within the legal guidelines.

- There were different views expressed as to who the dominant parties were in decisions on pre-trial detention. Many participants felt that the proceedings were quite evenly balanced.
- Defence lawyers play a very active role in decision-making concerning pre-trial detention. As well seeking to undermine the prosecution's objections to bail, defence lawyers also play a key role in suggesting conditions which would alleviate the court's concerns about granting a person bail.
- Probation staff are not formally involved at the pre-trial stage, but could be informally e.g. if a person was serving a sentence for another offence, or if a judge decided to adjourn the matter under supervision for a period.
- There were concerns expressed about more involvement by probation staff in the pre-trial process as this may erode the presumption of innocence. Resources were also considered to be insufficient at present.
- Participants generally agreed, however, that matters such as drug addiction and mental health did require assistance at the pre-trial stage.

8. Practical Operation of Bail Hearings and Procedural Aspects

Practitioners were asked about various practical difficulties which might arise in bail hearings in the courts. One practitioner explained that there were sometimes difficulties in acquiring all relevant information needed for a bail application before it was heard, with little information being forthcoming from the prosecution, and that the system of relying on informal talks to obtain this information was not always satisfactory:-

> "The opportunity for counsel to be discussing matters is one that's limited, it's short, people are generally busy out there... It's not a matter for me, but it'd be a lot easier if there was just *pro forma*, these are the

> general objections, these are the additional grounds, here you are. They should be given in every case." **(Prosecution Practitioner 7)**

Other participants also referred to a lack of consistency in how objections under section 2 of the Bail Act were provided to the defence.

A number of defence practitioners also stressed the limited time which they would usually have to prepare the bail application. One practitioner noted that "in both the District Court and the High Court list, applications are done on the hoof and you don't have a lot of time for instructions generally." **(Defence Practitioner 1)** Another noted that on some occasions in the District Court, "you're looking at having maybe an hour to prepare, maybe less." **(Defence Practitioner 4).** One prosecution practitioner remarked that these time constraints and the business of defence practitioners can have a detrimental effect:-

> "Very often it's a two minute job, it's very quick. They're in the list with a load of people and certainly there are times when the client doesn't get the best representation, that does happen." **(Prosecution Practitioner 4)**

The time pressure on defence practitioners was also evident when they were asked to describe how they would approach preparation for a bail application in the case of the vignette. Practitioners reported that they would have perhaps only a few minutes' notice, and would seek to adjourn the matter briefly while they spoke to the accused person, and crucially, the prosecution.

Participants remarked that recent changes which had been introduced into Irish bail procedure – in terms of requiring accused persons who are appealing to the High Court to swear a detailed affidavit – had caused some difficulty and

potentially caused a drop off in the number of applications being made to the High Court. As one practitioner put it:-

> "The procedural changes that have happened recently have made it more difficult in some ways for people to apply for bail because they have to swear, that person has to swear a detailed, true affidavit. It's difficult if they're in prison to do that because it's very difficult for the defence solicitors to go and find them, to get prison visiting slots, sometimes they mightn't get for two weeks or whatever so that's always difficult. It has meant that a number of bails that were let's say dealt with this year has been, in the High Court has been down about a thousand, which in Ireland is huge, it's I think a third, maybe 40%. So in some ways you could say that that is good so there're less people applying for bail, is that good or is that bad? One wonders because they've a constitutional right to bail." **(Prosecution Practitioner 3)**

Another practitioner summarised the impact of these procedural changes, which were viewed as providing more structure and rigour in the bail application process, by saying that:-

> "In fact, it's actually made a big, big difference because the list has gone from something close to maybe 70 or 80 applications a week down to maybe ten of 15... There will always be certain circumstances in which there are emergencies and I think by and large from what I can see, those are still being accommodated but it's stopped all of the messing." **(Prosecution Practitioner 2)**

One judge noted the time pressures involved in the High Court bail list, remarking that decisions are to be given "on spot" due to the number of bail applications appearing in the list and the length of time required to hear each one, leaving "no luxury of time" to consider decisions and an element of fatigue

setting in. Other judges felt that they gave whatever time was necessary for an application, but acknowledged that there may be time pressure in court. Comments were also made regarding the shortage of information provided to the judge in advance of the application. A judge noted that it would be helpful to receive additional information in advance:-

> "Well if you had what [you would] describe as the file in relation to the personal circumstances of the person, how many times they've offended previously, what the nature of that offending was, have they spent time in custody because if they've spent time in custody say in the last three or four years, … Now I think it would be, you'd be less rushed in yourself in terms of what you have to consider, because you'd have made notes on all of your cases. You'd have your file, you'd have all your notes made and when you come to the actual hearing there might be something that's in the back of your brain that you want to query because you've had time again to think about it I think it would be helpful. To have advance, in relation to the personal circumstances, to have advance notice of that I think." **(Judge 5)**

Another judge felt that the caselaw surrounding bail was not frequently referred to by practitioners, saying that "nobody has ever quoted a case to me" **(Judge 1)**. The lack of a consolidated caselaw on bail was viewed as a serious deficiency by a number of judges.

It was clear that judges, especially in the District Court, are often operating in extremely busy lists, and the burden on judges was another theme to emerge from the interviews. As well as time pressure, and sometimes a lack of information, the emotional toll of dealing with difficult cases and the responsibility of deciding on liberty was also evident. Judges did not complain about this, feeling it to be part of their role and duty, but it was clear that deciding on bail could have an emotional effect on them:

> "and I don't normally … you'd never hear me say anything like this but it is very taxing". **(Judge 5)**

Doing many cases over a course of successive days in the bail lists also contributed to fatigue. Frustration could also set in:

> "And, you know, and you will be told on … [in hearings], you know, quite a number of times during the day that yes somebody has, you know, many, many previous convictions, perhaps running into dozens, some committed on bail, some, well some involving the issue of bench warrants as that particular case was processed or whatever. But you're told but he's about to, you know, turn over a new leaf or it's, you know, he'd been addicted to drugs all his life but he's determined to stop now. Yeah and in truth, you know, I think a lot of people probably are genuine when they say that but their ability to deliver may not be great". **(Judge 3)**

Judge 1 suggested that doing the bail list too often and for too many days in a row over a long period could lead to judges becoming "paranoid", and that taking such lists for one day a month would counter this.

One judge showed frustration at encountering people with very long records of previous offending, which, in the judge's view, indicated a lack of personal responsibility being taken by the individual for their behaviour.

9. Procedural Safeguards and Controls

It was clear that participants felt that Irish regime for bail provided an accused with a number of opportunities to make the case for bail, with various avenues for appeal and review. For example, one judge noted as follows:-

> "An accused person has a regime which is certainly, in my view, in Ireland very adequate to put the case if they wish to be admitted to bail pre-trial. There's the opportunity initially in the District Court. There then might be a hearing on a return for trial. There might be a hearing in the Circuit Criminal Court when the matter has been adjourned on a number of occasions, there might be a renewal of an application for bail. And then there's the jurisdiction of the High Court on appeal to the High Court, and the High Court at first instance on murder with a right of appeal to the Court of Appeal." **(Judge 3)**

Practitioners put the matter in the following terms:-

> "If, you know, the District Court judge makes a mistake, and it does happen from time to time otherwise there would be no High Court bail applications, bottom line is they're getting out." **(Prosecution Practitioner 2)**

> "I think that you have the District Court at first instance. You can apply for bail on refusal to the High Court. In effect that's a de novo hearing. And there's a further right of appeal thereafter. And that is always the case. You know, so if a mistake is made, if an error is made, there's certainly, there is that appeal process there. ... So in overall terms, I think the system is good, I think it is fair, and I think it serves the public pretty well." **(Prosecution Practitioner 6)**

A clear theme to emerge was that the effect of possible review and appeal was a looming presence for judges, and contributed to greater consideration of the possibility of bail. Judges reported, and were viewed by practitioners, as being almost kept in check' by this possibility. The effect of a possible review of District Court decisions was viewed as meaning judges gave more extensive

reasoning for refusing bail, and were more careful to ground their refusal in the legal principles.

Some defence practitioners felt that reviews had a very direct impact:

> "Judges are actually looking and I've seen it so many times, a Judge will look at a particular practitioner and think 'Would they article 40 me on this if I get this wrong' and those people will get bail because again it's about that self-preservation" **(Defence Practitioner 8).**

An overzealous objection to bail which was upheld by a judge on insubstantial grounds was also considered by practitioners to be very likely to fall once reviewed by the High Court.

One prosecution practitioner even noted a willingness on the part of the prosecution to take such applications to undo errors where they had arisen in the bail process:-

> "...[W]here we have found that somebody is in custody improperly, for whatever reason, we have taken our article 40 applications to get them out." **(Prosecution Practitioner 2)**

9.1.Summary

- Many participants referred to time pressure in preparing for a pre-trial detention hearing. Defence lawyers often had very little time to prepare; this was especially the case at the District Court level.
- Some judges felt that more information in advance of the case and time to consider the matter would also help their decision-making.
- There was also a burden on judges evident. The weight of responsibility was clearly felt by judges. There is also a concern that judges can do too

many pre-trial detention hearings in a row, leading to fatigue and frustration.

- The possibility of review and appeal was an influential factor, and viewed as a constraining factor in the use of pre-trial detention. The possibility of appeal and review were considered important safeguards for liberty.
- Having legal representation paid for by the state where the defendant cannot afford it was also considered to be a very important protection.

10. European Aspects

There was generally extremely low awareness of the European Supervision Order amongst practitioners and judges. Only two practitioners who were interviewed were aware of the existence of the European Supervision Order. "I've never heard of it" **(Defence Practitioner 6)** perhaps sums up the general feeling in this regard. One participant who had heard of the Order remarked as follows:-

> "Well my assessment, this is just my own take on it, is that the awareness of it is very low and I would think, certainly from where I'm sitting, and I think here in Ireland it would be seen as - and I could be wrong, but this is my take on it - I think it would be seen here as, it's a police thing." **(Probation Participant 1)**

There were mixed views as to whether implementation of the European Supervision Order would be useful in practice. One practitioner noted that, at present, the Irish courts require persons living in Northern Ireland to travel south of the border to sign on at a Garda station. Implementation of the Order was seen as making a difference to this situation:-

> "If they could sign on in Belfast or in their own city, it would be a lot easier… … At least if we had some form of supervision up there as well, that you could… It would be easier for the courts to grant bail knowing that there was a mutual recognition of the conditions, or supervision of them." **(Defence Practitioner 4)**

Generally speaking, most participants felt that European Supervision Order would be of benefit. The concerns which were expressed about the practical operation of the Order revolved mainly about a lack of trust about how conditions would be monitored in the other country, how well the Gardaí could monitor conditions here in the context of limited resources, and which jurisdiction would be responsible for varying any conditions if the need arose. One participant made a recommendation about the practical application of the Order:

> "If that decision is transferred to a single court which has got direct access to all the other European networks and can tell you on the phone if you go there we can do this, this and this and these are the conditions and this is who you talk to and that's what you do. Then it gets done much more quickly" **(Probation Participant 2)**.

While participants had very limited knowledge of the European Supervision Order, a very interesting practice was revealed in the interviews. Irish practitioners and courts are already applying an informal version of the European Supervision Order in practice. Several participants recounted instances where a person from outside Ireland was granted bail and allowed to go back to another country, with sometimes very creative solutions developed to deal with the question of monitoring and compliance. This was especially evident where the accused person was from Northern Ireland. One practitioner described conditions being imposed to sign on at a Garda station close to the

border with Northern Ireland so that the person wouldn't have so far to travel to sign on every week, or more frequently.

This informal approach is quite characteristic of the Irish criminal justice system, with practitioners and judges coming up with sometimes ingenious methods to ensure a person can get bail, even where they are outside the jurisdiction for long periods. These ad hoc arrangements were generally viewed favourably by participants. As one participant put it:

> "And in a way, because we have fixed things and because we make solutions and because we have a common law approach because in a way the common law approach allows you to kind of way well there's nothing to stop us doing this". **(Probation Participant 2).**

The European Supervision Order was viewed as peculiarly appropriate to Ireland given the close connections and border with Northern Ireland. One participant noted that people with family connections in Northern Ireland (which are quite common) were sometimes the subject of objections to bail on the grounds that they had links with another jurisdiction. This could be addressed with the European Supervision Order.

Practitioners were fully aware of the European Arrest Warrant system and many expressed the view that it was very significant in the context of bail proceedings. In some situations, it might assist a foreign national in getting bail:-

> "If the perceived flight risk, if the country is a non-European Arrest Warrant country, that will be a big factor as well. The European Arrest Warrant has been held by bail judges in the last few years to be a very effective tool. A person comes from Poland or other Eastern European

countries, that will be a factor in their favour in getting bail, because it's a very effective procedure." **(Prosecution Practitioner 8)**

"A good point that you can raise if someone is considered a flight and it's because they're from France or from a Member State then, judges often reassure, and I've heard judges refer to the efficiencies of the EAW system. And in fact it's much less of an issue. I think they do take some comfort that the EAW system does seem to be very effective. So there's often someone from another Member State, the flight risk issue is less troublesome for someone who's from further afield, Brazil or you know wherever." **(Defence Practitioner 1)**

10.1. Summary

- There was generally extremely low awareness of the European Supervision Order.
- There were interesting examples related of the Irish courts taking an informal approach to situations where a person needed to go back to another country. A kind of 'shadow' European Supervision Order seems to be in place for some cases, especially regarding Northern Ireland.
- Most participants felt that the European Supervision Order would be of benefit.
- Concerns expressed about the European Supervision Order included: questions of trust in the monitoring of conditions in other jurisdictions; confusion as to the responsible agency to deal with matters; and who would be responsible for varying conditions when changes needed to be made.
- Participants were very familiar with the European Arrest Warrant, and considered it to be working well. Participants felt its existence made it easier for EU nationals to obtain bail.

11. Vignette

As part of the interview process, participants were presented with a fact pattern in the following terms, adapted for the Irish situation:-

> "The applicant for bail is a 23 year old male. He is unemployed and currently lives with his parents in the Ballyfermot area.
>
> He is a charged with the offence of burglary, contrary to s. 12 (1)(a) of the Criminal Justice (Theft and Fraud Offences) Act 2001. The allegation is that the applicant broke into an occupied dwelling at 3 a.m. in the morning by breaking through a front window and proceeded to remove items of property while the two homeowners and their 4-year-old daughter were asleep. It is alleged that the applicant stole several items of expensive jewellery, a laptop and a sum of money from the house, with the total value of the property amounting to €3,000.
>
> The homeowners discovered that their property had been burgled and contacted the Gardaí. Gardaí say that they identified the applicant as the suspect based on CCTV footage, and subsequently arrested him.
>
> The applicant has one previous conviction for which he received a suspended sentence two years ago."

Participants were informed that the prosecution were objecting to bail on the basis of flight risk and risk of commission of serious offences. They were asked whether they thought bail was likely to be granted based on the facts provided; the facts that influenced their thinking in that regard; and whether certain changes in the facts would affect that initial decision.

11.1 The grounds and influential factors

Participants framed their responses to the vignette in terms of the legal framework, clearly looking for possible objections to bail on the grounds of the *O'Callaghan* principles and section 2. This framework directed their analysis. Participants did examine both grounds, but *O'Callaghan* was slightly more dominant in their thinking and responses.

Most participants responded under the legal headings for reasons to order pre-trial detention. Participants first analysed the case under the heading 'likelihood of not turning up for trial' (from the *O'Callaghan* case) and then for risk of reoffending (section 2 of the Bail Act 1997). The likelihood of ordering pre-trial detention was considered even lower under the risk of reoffending ground. This is consistent with participants' views that the two legal grounds are the main basis for making decisions on pre-trial detention in Ireland. It is also consistent with the view expressed by participants that the introduction of the risk of reoffending ground has not made a huge difference in Ireland.

By far the most influential factor for participants, and the factor always mentioned was the person's prior record of turning up for court on bail. Many of the participants noted that it was hard to categorise the applicant as a flight risk as there was no mention of a warrant history. There was general consensus that the seriousness of the offence was relevant but that the actual history of the applicant was more important. As one participant put it, "[there is] absolutely no doubt that the presumption in favour of bail has not been rebutted in this case because of his record". **(Defence Participant 1)**

The lack of a long criminal history was very influential.

> "His lack of any real previous, for me personally, that would be what I'd be focussing on. And I think any fears that the, I would say that I think

any of the fears that the prosecution would more than likely bring up, I'd say that could all be met with conditions" (**Defence Practitioner 7)**

"The fact that he only has one previous conviction would go a long way … " (**Defence Practitioner 10).**

"The fact that he has one previous conviction, don't know what that is, very relevant" **(Prosecution Practitioner 8)**

"And the… on the face of it, the issues which you're considering to be in favour of bail is that his criminal record isn't too severe" **(Judge 3)**

Defence practitioners said that they would be focusing on the person's lack of previous convictions in their bail application.

Participants were, however, generally more interested in the person's prior record of turning up for trial, than the previous conviction history. Participants very clearly wanted to know if the accused had a prior record of not turning up for trial.

"Warrant history would be another factor, or whether or not you've complied with your terms during that and what the previous conviction is for, that would make a big difference". **(Defence Practitioner 4)**

"No previous failures to turn up for court, therefore no *O'Callaghan* grounds" **(Judge 1).**

"And certainly, he doesn't appear to have taken any bench warrants, so that's a weakness". **(Prosecution Practitioner 8).**

Participants also examined the risk of interfering with witnesses, with most considering that conditions to stay away from the area where the offence allegedly took place could address those concerns.

The seriousness of the offence was referred to by several participants, but was not nearly as influential a factor as warrant history and previous criminal record. Participants generally felt that the circumstances of the offence, especially as the house was occupied, meant the offence was a serious one. For those participants who felt bail would be refused, or who were somewhat unsure, the facts of the case were the most influential factors.

Participants also mentioned the strength of the evidence frequently as a factor, with the CCTV evidence being viewed as fairly strong, though it was noted that no evidence was found on the person. Participants also queried whether or not admissions had been made. It was noted, however, by four participants that the person retained the presumption of innocence.

The risk of reoffending was not a particularly predominant ground in the analysis of participants. Two judges mentioned it specifically, with one noting that the bar under section 2 was quite high. Prosecution participants also felt that the section 2 grounds would be difficult to establish:

> "well there's a potential objection under section 2 potentially but it's not enormously strong". **(Prosecution Practitioner 2)**

> "And in relation to s. 2, looks weak enough as well I'd have to say. He only has one previous conviction and there's nothing to suggest that that's for an offence he committed while on bail in relation to that matter". **(Prosecution Practitioner 6).**

> "very thin" **(Judge 1).**

Prosecution self-restraint, the active defence and the role of conditions were also evident in the responses to the vignette.

Prosecution participants in particular noted that they would be reluctant to even advance an objection to bail in the circumstances. It was by no means evident that prosecution practitioners would invariably object in the case. Instead, it was clear that prosecutors would engage in their own calculation as to whether objections to bail should be put forward. Defence practitioners noted that they would be seeking information from their client concerning the prior record, and would be seeking to put forward conditions which might meet the concerns of the judge.

One defence practitioner described the calculation made about conditions in very interesting terms:

> "Really because his record is so… Because his record really isn't bad, there should be minimum threshold conditions. But because the offence is quite serious, then you know, you have to take a certain pragmatic view where you're getting… You're being… You're lowering your standard in terms of what you really think the conditions should be in terms of his record in exchange for getting bail. And a curfew would be at least one because this happened in the night". **(Defence Practitioner 1).**

> "You're going to have to offer sign on, curfew, and probably cash". **(Defence Practitioner 2).**

Participants displayed again the complex relationship between the question of bail being granted and the conditions on which it would be granted. Conditions

are extremely important to the decision whether or not to grant bail in the first place.

Participants also noted the possibility of family support as the applicant was living with his parents, and that a residence condition could be offered. Having family support also suggested that the person was stable, as one judge said: "could he be supervised at home, is there a family there to keep an eye on him?" **(Judge 4).**

Responses to tweaking the scenario in different ways were also revealing. Most participants felt that being a foreign national would not change their conclusion, and that the person remained likely to get bail. The issue of flight risk might be heightened, but it was felt that surrendering travel documents could get around the issue. Participants did not ask whether the person was a foreign national spontaneously.

Participants noted that drug addiction was a factor which could be considered under section 2. The lack of evidence in the original scenario of a drug addiction was mentioned by many participants, and it was felt that it would be a factor against the applicant, but not decisive.

When asked what would make a difference, some participants thought that if the previous conviction was for burglary, this would make it more likely that pre-trial detention would be ordered. This was not a strongly held view for a lot of participants, however.

11.1. Outcome

Nearly all participants were of the view that bail would be granted if the case was heard by a court, based on the facts as presented. Many of the participants noted that it was hard to categorise the applicant as a flight risk as there was

no mention of a warrant history, and that the risk of commission of further offences was low given that there was only one previous conviction. There was general consensus that the seriousness of the offence was relevant but that the actual history of the applicant was more important. As one participant put it, "[there is] absolutely no doubt that the presumption in favour of bail has not been rebutted in this case because of his record". **(Defence Participant 1)**

The overwhelming view amongst those who considered pre-trial detention would not be ordered was because of the person's previous record. A prior record of one offence, and no evidence of previously not turning up for trial or committing offences while on bail were the predominant factors giving rise to this conclusion. The previous conviction was considered to be relatively minor as it did not result in imprisonment. Some participants were very strongly of the view that pre-trial detention would not be ordered in the scenario.

> "You would say there's a prospect of a strong bail application there". **(Defence Practitioner 4).**

> "So all one can say in a position like this you'd be very, very unlikely to even put forward the case that he wouldn't get bail". **(Prosecution Practitioner 4).**

> "I would be reluctant to run this one probably, I would be saying the judge might think we're kind of wasting the court's time here". **(Prosecution Practitioner 5).**

Other participants put emphasis on the fact that the applicant was young, had an address, and would likely experience significant delay in going forward for trial to the Circuit Court, as factors in favour of granting bail.

Two participants expressed some uncertainty and a desire to see more information. Another participant felt that the circumstances of the offence, breaking into an occupied dwelling with a child asleep, meant that a judge would refuse bail.

11.2. Summary

- The majority of participants felt that pre-trial detention would not be ordered in this scenario. Many felt the chances of pre-trial detention were extremely low.
- Participants used the legal grounds to direct their reasoning.
- Most participants felt that the lack of a prior history of not turning up for trial was a very influential factor, and made it very likely that bail would be granted.
- Most participants felt that a risk of reoffending was not a strong ground in the case.
- The lack of a long record of prior criminal convictions was also considered to be a very influential factor.
- The offence was generally viewed as serious, but was usually outweighed by the lack of a history of failing to turn up for court.
- It was felt that the likely conditions which would be offered and ordered in this case were: a financial guarantee; a curfew; signing on; and staying away from the injured party.
- Strict conditions were viewed as a genuine alternative to pre-trial detention.
- A previous record of burglaries was viewed as making it more likely that bail would be denied, but many participants felt that this would not be determinative.
- Being a foreign national, especially an EU national, was not viewed as being especially decisive.

- Having a drug addiction was considered a factor making it more likely that bail would be denied, but this was not viewed as being especially decisive.

12. Conclusion and future directions

Participants in Ireland generally feel that the liberty of the individual is prioritised in decision-making on pre-trial detention in Ireland. However, it was also the case that the conditions imposed on individuals who do get bail can be quite significant in number and onerous in operation. It is not the case that the decision-making process in Ireland which is a binary one between liberty and detention. Rather, the decision is one between detention and gradations of restrictions on liberty short of detention. It must be borne in mind that the vast majority of people on bail are subject to conditions: it is not the case that the Irish system prioritises liberty absolutely and entirely. The extent and nature of conditions may be overlooked when looking at rates of pre-trial detention in isolation.

While several participants pointed to examples of particular conditions being disproportionate, participants generally did not consider the system of conditions itself to be a core reason why pre-trial detention is not used as frequently in Ireland as elsewhere. Participants generally take these conditions for granted, rather than thinking of them as a system of graduated restrictions on liberty. The binary approach of 'bail' 'no bail' is deeply entrenched in the thinking of the players. This has, perhaps, led to a situation where the presence of the regulation on liberty and activity imposed through conditions is overlooked. It may be the case that it is the presence of this well-established system of conditions is the reason for low levels of pre-trial detention, combined with, rather than coming exclusively from, a prioritisation of the right to liberty under the Irish Constitution. The variety of conditions available: curfews, restriction on places of residence, restrictions on activities,

restrictions on behaviour, and the ability to tailor these to the particular situation (due to the flexibility and discretion built into the Irish system) may be something other countries which to examine in efforts to bring down their pre-trial detention rates.

Another defining feature of the Irish system is the focus on past behaviour and the overwhelming importance of turning up at trial. The bail regime in Ireland focuses primarily on past behaviour, specifically past failures to turn up for trial, as ways to predict the likelihood of turning up for trial. The emphasis on bail practice concerns predictions on whether or not the person will turn up for trial. The risk of reoffending is not such an important ground in Ireland as elsewhere.

Finally, another central feature of the system is that all parties to the proceedings tend to play by these ground rules, with a good degree of prosecution self-restraint in evidence. Prosecution self-restraint and a willingness to accept bail (with conditions generally) seems to be another reason influencing low pre-trial detention rates in Ireland.

Participants were asked to consider future developments in bail law and practice in Ireland and recommendations they would make for change. While the bail regime in Ireland at present can be considered relatively mild, there is evidence from participants that the future for Irish bail law may be one in which a tougher approach becomes evident. Some participants warned that they had noticed a greater likelihood on the part of the prosecution, especially the police, to object to bail, especially if the circumstances were sensitive. A political climate hostile to bail was also noted. It was also felt that judicial practice, especially at High Court level, was also resulting in fewer bail applications being granted. This was attributed in part to it being more difficult to make bail applications, and hearings were more in-depth and contested.

> "There's been a large change in emphasis over the last number of years. I'm not sure if you're able to do a statistical analysis of it, in terms of… the amount of applications coming to the High Court is vastly reduced. And what I would presume that means is that a lot of people who… would have applied previously, and would have maybe had a chance now know that the attitude has changed somewhat" **(Prosecution Practitioner 7)**.

> "We're probably going to move towards more pre-trial detention in honesty" **(Defence Practitioner 4).**

> "I do think that the trends from a media perspective and a political perspective is to produce the opportunities for bail as opposed to, you know, adhering to the presumption of innocence". **(Prosecution Practitioner 1).**

One participant also expressed concern that, post-Brexit, Ireland may adopt a more "Europeanised" approach to criminal justice, and that the flexibility which allows for a liberal approach to bail may be reduced.

The relatively low rates of pre-trial detention in Ireland should therefore not be taken for granted. The recent re-emergence of the use of electronic monitoring for people on bail must also be considered carefully to assess the necessity for it. In other places, electronic monitoring was introduced in an effort to remove people from the pre-trial detention system, in Ireland this does not appear to be the driving force. Careful consideration of the possibility of net-widening, and the attendant cost, is necessary. There must be careful evaluation of the data in existence concerning bail to examine what the likely numbers who would receive electronic monitoring would be, with the attendant costs and effects.

Participants also had ideas for how to improve the system in Ireland. Many participants felt quicker trials were needed. There was widespread consensus that there was a need for more support for judges in the form of education and sharing of information and practice. Training for the police was also suggested. Consolidation of the law was also mentioned frequently.

12.1. Summary

- The legal culture which favours bail in Ireland continues to be strong and shared by all of the players in the criminal justice system.
- The extensive use of conditions, some of which are quite onerous and restrictive of liberty cannot be overlooked in an assessment of the comparatively low rates of pre-trial detention in Ireland. This system of graduated deprivations of liberty is a clear feature of the Irish system, and one almost taken for granted.
- It is not the case that, for most cases before the courts in Ireland, that the decision is being made between liberty *simpliciter* and pre-trial detention, rather it is between pre-trial detention and varying levels of restrictions on liberty.
- The risk of not turning up for trial continues to be the most important ground on which pre-trial detention can be denied in Ireland. The risk of reoffending ground, while used, is not viewed as being very extensively used or needed in the Irish courts.
- Concerns were expressed by many participants that Ireland may be becoming more in favour of pre-trial detention, and this was evident within political and media discourse.
- Some participants felt that recent High Court practice was also leading to more denials of bail applications.
- Participants shared mixed views on the possible role of electronic monitoring. Ireland should be careful in how electronic monitoring is introduced, to ensure that it is an alternative to pre-trial detention,

rather than something which is added on to bail conditions unnecessarily.

- More support for judges to share practice, to find out about international developments, as well as educational opportunities were recommended.

The DETOUR-Consortium

DETOUR
TOWARDS PRE-TRIAL DETENTION AS ULTIMA RATIO

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