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Impact Of Bail Reforms On Summary Justice Reform

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IMPACT OF BAIL REFORMS ON SUMMARY JUSTICE REFORM

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The views expressed in this report are those of the researcher and do not necessarily represent those of the Scottish Government or Scottish Ministers.

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EXECUTIVE SUMMARY

Introduction

In December 2009, the Scottish Government commissioned independent research to explore the impact of bail reforms on summary justice reform (SJR), the findings of which are presented here.

Although changes to bail were not originally part of SJR, they occurred at around the same time, and their aims and objectives were regarded as having the potential to impact on the achievement of the objectives of SJR. With this in mind, the purpose of this research was not to evaluate the bail reforms directly, but to determine the impact of the bail reforms on SJR as well as on the summary justice system more generally.

Aims and Objectives

The Criminal Proceedings etc. (Reform) (Scotland) Act 2007 brought forward reforms to the operation of the bail and remand system in Scotland. The main purpose of the 2007 Act was to codify, clarify and strengthen the existing law on bail in order to bring about increased transparency and improved consistency in bail decisions. The Act did not change the fundamental aspects of bail such as the presumption in favour of bail, the circumstances in which bail may be refused, and the considerations that the court will consider in determining bail.

The Act did, however, introduce a number of specific changes, these being:

- to increase the maximum penalties for breach of bail conditions so that tougher action could be taken against those who breach their bail;
- to ensure that bail decisions were entirely a matter for the court to make, even where the Crown did not oppose bail - this was a reversal of the previous position where if the Crown did not oppose bail then it was granted by the court;
- to ensure the court gave reasons for all bail decisions so that the process for judges granting or refusing bail was more transparent; and
- to tighten the process for granting bail for the most serious cases.

There were three specific objectives for the evaluation in relation to the reforms to bail, these being to explore if the reforms to bail had contributed to:

- reduced instances of breach of bail conditions (especially failure to appear) from pre-reform levels[1];
- making bail decisions more transparent and consistent; and
- ensuring that accused are given an ordinary language explanation of the conditions of bail and the consequences of breaching bail.

[1] While the bail reforms had a specific objective to reduce breach of bail overall, the focus on failure to appear was a specific objective of this evaluation since it was considered most relevant to the SJR objective of effective court hearings.

It was against these three specific criteria that the evaluation of the impact of the bail reforms was carried out.

Methodology

A combination of methods were used to collect data to inform the evaluation including analysis of performance data, collection of primary qualitative data from interviews with a number of stakeholders and direct observation of proceedings in court on days and in sessions where bail orders were granted. Interviewees included Judges, Sheriffs, Justices of the Peace (JPs), Procurators Fiscal, defence agents and the police. A short face-to-face survey of accused who had previously been given bail orders was also carried out at a number of court sites in selected case study areas.

Unlike many of the other parts of summary justice reform, such as those to direct measures, legal aid, disclosure, undertakings and lay justice, the bail reforms also applied to solemn cases (i.e. those heard before a sheriff and jury if the case goes to trial, or in the High court). As a result, attempts were made to canvass the views of a small number of victims in solemn cases who had been involved in (now closed) cases where the accused had been given bail. Short one-to-one interviews were carried out with victims, and the data was considered alongside data generated from victims involved in summary cases (reported separately as part of the SJR Victims, Witnesses and Public Perceptions evaluation[2]). This aside, the main focus of the evaluation was on summary business.

Main Findings

Bail orders and use of special conditions

The number of bail orders made by the Scottish courts has fallen year on year since 2006/07. This drop mirrors an overall drop in the numbers of persons proceeded against in court, which was also at its lowest in 2010/11 since 2002/03. Although differences in the way that data is recorded means that it is not possible to say precisely whether the proportionate use of bail orders has varied over time, the data strongly indicates that the decrease in bail orders may simply reflect a corresponding drop in recorded crime and lower numbers of cases coming to court overall. The trends in the data therefore suggest that the proportionate use may be unchanged and this is not unexpected since the reforms to bail did not seek to increase or decrease bail *per se.*

The majority of bail recipients receive only one bail order in a year, with one in four having been released on bail on more than two occasions in the same year. This percentage has remained relatively steady over time, confirming the static level, pre and post-reform, of the judiciary granting bail to those who have already previously been released on bail.

The main offences for which bail orders have been granted are crimes of dishonesty, common assault and breach of the peace. There has been no real change in the

[2] Available at: http://www.scotland.gov.uk/Resource/0038/00386764.pdf

types of charge for which orders are granted post-reform which is perhaps not surprising, since this was not something that the reforms sought to change.

On average, just over half of all bail orders had special conditions attached. The lack of pre-reform data, however, means that it is not possible to say if there was an immediate impact of the reforms on use of special conditions. Interview data suggested that the judiciary is making noticeably more use of special conditions over time, and this is something that the Procurators Fiscal interviewed welcomed.

Compliance with bail

The numbers of convictions for breach of bail overall (including both summary and solemn cases) have increased quite notably over time. Possible reasons for this include the use of special conditions, police and the courts having a 'tougher' attitude to breach, or a core of accused not taking bail seriously. This means that the policy objective of reducing the extent to which bail is breached by the accused does not, *prima facie,* appear to have been met. With the numbers of bail orders falling overall, and breaches not showing a corresponding downward trend, it appears that proportionately bail breaches have gone up. Due to differences in data recording for these two measures, it was not possible to say conclusively if this was the case.

The police, defence agents and Procurators Fiscal who were interviewed generally perceived that there had been no real decrease in the numbers of bail breaches that they were witnessing, in particular for orders with a curfew attached. This point was also made by a number of the accused who were interviewed.

When looking at breaches for failure to appear (FTA) separately from other types of breach however, it shows that there has been a drop in the numbers of people failing to appear (FTA) at the intermediate, trial and sentencing diet since the reforms were implemented (in summary cases). This improvement in FTA figures may be considered as a positive contributor to the wider SJR objectives - not only of improved court efficiency and effectiveness, but also in the reduction in inconvenience or time wasted by victims and witnesses in attending court.

The data for summary and solemn cases show that most failures to appear are dealt with by way of a monetary penalty (i.e. a fine) with fewer attracting community or custodial sentences. Although the number of custodial and community sentences has remained fairly steady post-reform, with only a slight recent lowering of numbers, there has been quite a noticeable increase in the numbers of FTAs dealt with by way of monetary and other penalties (though overall numbers are still low).

Procurators Fiscal and defence agents were of the view that harsher sentencing was being applied to breach of bail orders and conditions overall, with both groups of interviewees perceiving that custodial sentences were being used more often for breach of bail post-reform. Quantitative data also show that breach of bail is being treated more seriously post-reform to a degree, with increased custodial sentence lengths being applied (mainly for non FTA breach), and an attitude of non-tolerance of repeat breaches of bail among the judiciary.

Bail appeals and the bail appeal process

Quantitative data showed that there was considerable fluctuation in the number of bail appeals over time. The data also show that the majority of bail appeal applications are refused, and there has been no real change in that situation in recent years.

Changes to the bail appeals process, in terms of the obligation of the court to provide verbal explanations to the accused and written explanations to the appellate court, were perceived to have had only a small impact on operational practice with Sheriffs and JPs commenting only that there is now slightly more paperwork to do.

Although procedurally the bail appeal system was perceived by professional stakeholders to be fairer now that written explanations were required, Sheriffs explained that they were reliant on happenstance to know the outcome of appeals and disappointment was expressed about the lack of feedback regarding bail appeals.

Views of victims and the accused

While most accused who were surveyed generally understood why they had received a bail order, those who were less habitual offenders commented that they found the system as whole, including the explanation of bail and its conditions, difficult to understand and often had to rely heavily on their defence agent to explain where they were supposed to go and what they were supposed to do and when (both at court and after their court appearance on bail). Whilst defence agents were not unwilling to provide this additional support, and recognised their responsibilities to do so, there was some suggestion from accused and defence agents that the level of information still being sought by accused after their court appearance was quite notable. Given that the statutory responsibility sits with the judiciary to provide explanations regarding bail and bail conditions, and that the judiciary reported that such explanations were being given, it perhaps suggests a mismatch in what is deemed to be 'ordinary language' and understandable between judiciary and accused. That said, it was also recognised that, for some, even greater clarity in the explanations would not necessarily result in all accused paying attention, understanding and remembering explanations given in court and thus the demand would still be placed on defence agents.

The accused group interviewed reported that they found some conditions (e.g. curfews) more challenging to comply with than other conditions (such as not to approach a particular person) and considered that they would be more likely to breach these stringent conditions.

For the most part, accused were aware of the severity with which breach of bail was treated and considered this to be important in their decision not to breach their order. This was mostly the case for those who were not repeat offenders. Repeat offenders were also aware of the gravity of breaching bail conditions but some advised that this was less likely to deter them.

Therefore, while the reformed bail system does go some way to deter a large number of accused from breaching the conditions of their bail, mostly due to their

fear of being remanded if they were detected and arrested, this may not be enough to deter some repeat offenders from offending whilst on bail, and it appears that something else would be required to tackle this group of persistent offenders.

Impact on workloads and overlaps with wider SJR

For the police, the reforms to bail were seen to have had a negligible impact on their operational role and most commented that they had been more directly affected by changes to undertakings. Police did comment that they welcomed the opportunity to play a greater role in decision making regarding bail, by providing more detailed reports to the court ahead of court hearings with regards to the accused.

On practice in court, Procurators Fiscal noted that post-reform, more Sheriffs were asking them to explain further, or to clarify, their reasons for opposing bail, which many noted was the main difference in the courtroom. This suggests that the changes to the Act in this regard are being realised in practice.

Fair to victims, witnesses and the accused

Professional interviewees were of the view that, as the bail procedures are set out in a more standardised way post-reform, this brings about fairness to all those involved in the justice system, with bail decisions based on evidence and justified in an open courtroom. In this way, the specific policy objective of increased transparency and consistency that applied to bail may have contributed to the wider SJR objective of a system that is perceived as fair to all those involved.

Effective in deterring, punishing, and helping to rehabilitate offenders

Overall, qualitative evidence from the evaluation seems to suggest that bail orders are not being taken any more seriously by accused post-reform. With a core of accused receiving two or more bail orders in the course of a year (around 1 in 4) and with breach rates showing an upward trend, this suggests that reforms are not necessarily contributing to reduced re-offending.

Efficient in the use of time and resources

One of the issues emerging from this evaluation is that, while it was always known that Sheriffs offering a full explanation of the bail order and conditions in court would be time consuming, the actual time was even greater than originally anticipated among those interviewed. Sheriffs and defence agents alike commented that it can be very time consuming, especially if there are special conditions attached. This said, it was accepted that it was necessary as part of the legislation and that it was valuable in cases where the accused heard and understood what was expected of them.

More generally, all interviewees (professional stakeholders as well as victims and accused) felt that there were often delays in the summary justice system in terms of adjournments due to FTA, although equated these more to the system overall rather than the reforms to bail specifically.

Quick and simple in delivery

The reforms to bail were not intended to improve the speed or simplicity of the system, other than in the provision of ordinary language explanation to accused (as discussed above). Overall, interviews revealed no suggestions for how the process of bail could be quicker in delivery, other than removing the need for lengthy explanations of special conditions during court time. Overall, therefore, it seems that the bail process, in itself, is not negatively impacting on the objectives of SJR other than, perhaps, continued waste of court time resulting from adjournments due to the failure of the accused to appear at court and time required to deal with breach of bail conditions.

Meeting the Bail Reform and Wider SJR objectives

The first specific objective of this evaluation was to explore if there had been a reduction in instances of breach of bail conditions (especially failure to appear) from pre-reform levels. The numerical data analysis suggests that non-FTA breach rates have, in fact, increased post-reform. There was generally a perception among interviewees, particularly the police, that breach rates were still high. Furthermore, the use of special conditions may be a factor affecting breach rates, especially where such conditions are proactively policed. This was highlighted in particular by defence agents as well as some accused who were interviewed who found their conditions to be unreasonable and challenging to adhere to.

When looking solely at failure to appear, rates have dropped slightly over time. It may be that reduced instances of FTA are linked to the general downward trend in cases coming to court (although this same argument cannot be applied to breach rates overall, since they have increased). If there has been a proportional drop in FTA, it may be argued that this, in part, is contributing to the wider SJR objective of more effective court hearings. That said, from the data available, it is not possible to say if this can be directly attributed to the reforms to bail.

The second objective of the evaluation was to explore whether and to what extent bail decisions are more transparent and consistent post-reform. Although there is no specific KPI data that can be used to measure progress against the objective, interviews with the judiciary suggest that they are accepting of the need to provide more detailed verbal explanations and written reports regarding bail decisions but that there may be room for further consistency in decision making.

The third specific objective for this evaluation was to explore whether the reforms had ensured that accused are given an ordinary language explanation of the conditions of bail and the consequences of breaching bail. Again, there is no quantitative data available with which to measure progress against this objective, but feedback from interviews does suggest that explanations are being given. That being said, interview data also shows that while some habitual offenders are clear on their conditions of bail, some first time accused report not fully understanding their conditions of bail. This perhaps suggests that more can be done to improve the quality and clarity of these explanations.

Messages for policy

Some defence agents are still undertaking a notable role in providing explanations to accused regarding their bail and bail conditions. Although this complements the work of the judiciary, and legal advice is a fundamental requirement of defence agents, the extent to which accused are relying on defence agents instead of listening to and understanding the judiciary in court may suggest that there is some scope to further improve the way in which explanations are communicated in court.

Many repeat attendees at court (including repeat offenders) are familiar with bail conditions and the consequences of breach, however, the current system of providing 'ordinary language' explanations in court does not seem to be offering the level of clarity required for those who have not had previous involvement in the court system. These accused welcomed the prospect of more targeted information, that would provide a greater understanding of the summary justice system and restrictions placed upon them, which may also make the system more efficient and effective. This information seems to be required about the system as a whole, not just about bail.

Although, procedurally, changes to the bail appeal system are welcomed as an improvement towards system transparency, it seems that there may be scope to further improve this specific component of the bail system by ensuring that members of the judiciary receive feedback on the quality and usefulness of the reports that they prepare. This feedback may allow for further improvements to be made such that these reports operate to their maximum utility.

Police, the judiciary, Procurators Fiscal, defence agents and victims all shared a view that, for some accused, bail conditions would always be breached and would never be taken seriously. This view was also reflected in some interviews with accused, primarily those who were repeat offenders. This suggests that there may be a need for different strategies for dealing with repeat offenders other than those already set out.

Finally, it seems that, in some cases, the use of special conditions attached to bail may not be working to improve system efficiencies. Special conditions are undoubtedly valuable in cases where the accused would otherwise have been remanded, affording a greater degree of control over the behaviour of the accused, as well as providing a valuable victim, witness and public protection and reassurance tool. In cases where special conditions are ignored or prove too challenging, however, it may be generating an increased court workload which might otherwise have been avoided had alternative decisions to bail been used (including custody, standard conditions, supervised bail, or being released without bail conditions to await citation). It seems, therefore, that the use of special conditions in some cases may be causing tension between efficiency and public protection. The overriding message appears to be that special conditions need to be carefully considered and be relevant and proportionate to the specific case.

Conclusion

In sum, the research has shown that the reforms to bail have not impacted greatly on its use. Although there have been fewer orders granted, that may reflect wider summary justice system changes as well as a drop in court workloads *per se.* Convictions for breach have increased overall, contrary to the aim of the reforms to reduce breach. This perhaps suggests that bail is not being taken seriously by accused, though it may also reflect a tougher approach to breach on the part of justice professionals. There has, however, been some reduction in failure to appear, though it is unclear if this numerical drop represents a proportional drop.

There is some scepticism regarding the effectiveness of special conditions, especially in light of a core of accused who continue to breach standard and/or special conditions regardless of the perceived consequences. The value of special conditions in appropriate cases is, however, still recognised. Treating breach of bail seriously is also prominent in the minds of the judiciary and appears to be occurring in practice. The provision of ordinary language explanations does appear to be taking place, but does not appear to be translating into full understanding of bail and bail conditions among all accused and there may be scope for greater clarity here. The increased transparency in the bail appeals system is, however, being perceived as a system improvement among professionals. Overall, while almost all of those interviewed viewed the current system of bail as fair, they questioned its effectiveness, especially in terms of deterring future breach amongst repeat offenders.

1 INTRODUCTION

1.1 In December 2009, the Scottish Government commissioned independent research to explore the impact of bail reforms on summary justice reform (SJR), and the findings are presented here.

1.2 Although changes to bail were not originally part of SJR, they occurred at around the same time, and their aims and objectives were regarded as having the potential to impact on the achievement of the objectives of SJR.

1.3 As such, the research is part of a wider package of work to evaluate SJR in Scotland, and this report sits alongside a number of other individual evaluations of reforms to: direct measures; criminal legal assistance and disclosure; fines enforcement; undertakings and lay justice. An evaluation of the impact of the whole package of reforms on the experiences and perceptions of victims and witnesses, and the perceptions of the general public was also commissioned. Each of these evaluations reported separately, and this report focuses solely on the reforms to bail.

1.4 With this in mind, the purpose of this research was not to evaluate the bail reforms directly, but to determine the impact of the bail reforms on the summary justice system.

Summary Justice Reform

1.5 In 2001, the Scottish Ministers established an independent committee, chaired by Sheriff Principal John McInnes, to review the operation of the summary criminal justice system in Scotland, and to explore ways that it could be improved. The McInnes Committee concluded that the summary justice system was in need of a comprehensive overhaul. In particular, it highlighted:

- problems with the overall speed in dealing with cases;
- wasted court attendances for victims and witnesses;
- little difference in the way that minor and more serious cases were being dealt with by the system;
- no incentives to encourage defence agents to deal with cases quickly;
- inconsistencies in the way that the police, courts and Procurators Fiscal dealt with cases; and
- waste of public funds.

1.6 The McInnes Committee report, which represented a wide range of interests and experience in summary justice, was published in March 2004. Following consideration of the Committee's report and an extensive public consultation, Scottish Ministers published *Smarter Justice, Safer Communities: Summary Justice Reform Next Steps* in March 2005, outlining the government's proposals for summary justice reform, with a *Summary Justice System Model Paper*, published in September 2007, providing further details. The reforms that required legislation formed the basis of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007. Subsequently, a package of changes or

'reforms' were introduced. These are referred to as 'Summary Justice Reforms' or 'SJR'.

Aims and Objectives of SJR

1.7 The overarching objectives of SJR were to achieve a summary justice system that is:

- fair to the accused, victims and witnesses;
- effective in deterring, punishing and helping to rehabilitate offenders;
- efficient in the use of time and resources; and
- quick and simple in delivery.

1.8 The following intended outcomes of SJR were also identified in the Summary Justice System Model Paper (2007):

- the removal of a significant number of appropriate cases from the court through a greater use of non court options or alternatives to prosecution including adult warnings, fixed penalty notices and Fiscal direct measures;
- for cases that do come to court, those cases will come to court more quickly;
- improved case handling, namely:
    - o early, effective preparation of cases;
    - o more effective court hearings;
    - o cases will be dealt with at the earliest possible stage in proceedings;
- appropriate allocation of case to forum[3], including sufficient use of better-trained lay Justices;
- to make a contribution to reducing re-offending by dealing with cases at the earliest possible stage in proceedings; and
- to reduce inconvenience for victims and witnesses.

Bail Pre-Reform

1.9 In 2003, the Scottish Executive established the Sentencing Commission, comprising experts in the legal field and people involved with managing offenders and supporting victims. One of the first tasks undertaken by the Commission, on request of the Scottish Executive, was to examine the use of bail and remand in Scotland. In 2005, the Commission reported its findings to the Executive[4], and made 38 recommendations which sought to reduce breach of bail, promote more consistent decision making on bail and to improve public confidence in the system. Specifically, the recommendations were designed to achieve:

- a reduction in offending on bail;
- a reduction in failures to appear in court;
- a reduction in the remand population, without compromising public safety;

[3] 'Appropriate allocation of case to forum' refers to cases being heard where there is the best match between offence seriousness and the sentencing powers of the court.
[4] Sentencing Commission for Scotland (2005) Report on the Use of Bail and Remand available at: http://www.scotland.gov.uk/Resource/Doc/925/0116775.pdf

- a general improvement in the consistency of decision making on bail and remand; and
- greater public awareness of the way in which the bail system works.

1.10 Emphasis in the Commission's report was placed on re-establishing respect for the law, on tougher, more consistent handling of bail breaches and failure to appear, and a need for consistent implementation of existing rules, as well as of the new provisions.

1.11 In September 2005, the Scottish Executive published the Bail and Remand Action Plan[5] which reflected the findings from the Commission report. The focus of the 25 point plan of action was on better initial targeting of bail and remand, ensuring more consistent and transparent decision making with regards to bail, to make clear to accused that bail must not be abused, to reduce the scope for re-offending on bail, ensuring a speedier and more robust approach to breach of bail and ensuring that those on bail would be supervised effectively.

1.12 The report also set out for the first time some extended measures to change bail in response to public concern around grant of bail for serious repeat offenders, as well as making provision for the use of drug treatment and testing as a condition of bail. The action plan recognised that it would not be possible to change the way in which bail operated without corresponding improvements to the criminal justice system as a whole. As a result, the plan was developed with close consideration of the *Smarter Justice, Safer Communities: Summary Justice Reform Next Steps* proposals.

Reforms to Bail and their Overlap with SJR

1.13 The Criminal Proceedings etc. (Reform) (Scotland) Act 2007 brought forward reforms to the operation of the bail and remand system in Scotland. The main purpose of the 2007 Act was to codify, clarify and strengthen the existing law on bail in order to bring about increased transparency and improved consistency in bail decisions. The Act did not change the fundamental aspects of bail such as the presumption in favour of bail, the circumstances in which bail may be refused, and the considerations that the court will consider in determining bail.

1.14 The Act did, however, introduce a number of specific changes, these being:

- to increase the maximum penalties for breach of bail conditions so that tougher action could be taken against those who breach their bail;
- to ensure that bail decisions were entirely a matter for the court to make, even where the Crown did not oppose bail - this was a reversal of the previous position where if the Crown did not oppose bail then it was granted by the court;
- to ensure the court gave reasons for all bail decisions so that the process for judges granting or refusing bail was more transparent; and
- to tighten the process for granting bail for the most serious cases.

[5] Bail and Remand Action Plan available at:
http://www.scotland.gov.uk/Resource/Doc/69582/0017987.pdf

1.15 There were three specific objectives for the evaluation in relation to the reforms to bail, these being to explore if the reforms to bail had contributed to:

- reduced instances of breach of bail conditions (especially failure to appear) from pre-reform levels[6];
- making bail decisions more transparent and consistent; and
- ensuring that accused are given an ordinary language explanation of the conditions of bail and the consequences of breaching bail.

1.16 It was against these three specific criteria that the evaluation of the impact of the bail reforms was carried out. The scope of the evaluation was not, therefore, of reforms to bail as a whole, but rather of these specific aspects of the reforms. The evaluation also explored the use of increased sentencing powers for breach of bail.

Bail in Operation

1.17 Bail can be granted in both summary and solemn cases in Scotland. It can be awarded by Judges, Sheriffs and Justices of the Peace (JPs) respectively at the High Court, Sheriff Court or JP court level. The award of bail involves the liberation of an accused at first calling, or any subsequent appearance, in court, on the standard conditions[7] that the accused:

- appears at the appointed time at every diet relating to the offence with which they are charged of which they are given due notice or at which they are required by the Act to appear;
- does not commit an offence while on bail;
- does not interfere with witnesses or otherwise obstruct the course of justice whether in relation to themselves or any other person;
- does not behave in a manner which causes, or is likely to cause, alarm or distress to witnesses;
- makes themselves available for the purpose of enabling enquiries or a report to be made to assist the court in dealing with them for the offence for which they are charged; and
- where the (or an) offence in respect of which they are admitted to bail is one to which section 288C of the Act applies (in relation to certain sexual offences), does not seek to obtain, otherwise than by way of a solicitor, any precognition of a statement by the complainer in relation to the subject matter of the offence.

1.18 The Criminal Proceedings etc. (Reform) (Scotland) Act 2007 enhanced these conditions such that:

- when granting bail, the Judge, Sheriff or JP is obliged to explain to the court (including the accused) the effect of bail conditions imposed and the consequences of breaching those conditions. On granting bail the judiciary are

[6] While the bail reforms had a specific objective to reduce breach of bail overall, the focus on failure to appear was a specific objective of this evaluation since it was considered most relevant to the SJR objective of effective court hearings.
[7] As set out in the Criminal Procedure (Scotland) Act 1995.

also required to take into account the views of the prosecution and defence, by virtue of the 2007 Act.

- the standard condition of bail prohibiting interference with a witnesses is supplemented by a further condition which makes clear that any behaviour causing or likely to cause alarm or distress to witnesses is also prohibited; and
- where the accused changes address, they must apply to the court within seven days for permission to change the domicile of citation accordingly. Failure to do so constitutes an offence.

1.19 In addition to the standard conditions of bail, a number of 'special conditions' may also be attached to a bail order at the time it is granted. These may include, for example, restrictions on where an accused can go or a home curfew. Special conditions are often used in cases where the accused would otherwise have been remanded. Attaching special conditions to a bail order allows a greater degree of control of accused's behaviour which may prevent further criminal activity while the order is in place. Importantly, applying special conditions may afford some additional protection and reassurance to victims and witnesses (and society at large) where they curtail the movement of offenders in and around the vicinity of those affected by crime. Special conditions which preclude a person from approaching stated persons or making contact with stated persons are also often used for domestic abuse cases as a protective measure for victims.

1.20 Most police forces have plans in place specifically in relation to policing of special bail conditions. Whilst this pro-active policing of special bail conditions may, therefore, result in a higher number of breaches being detected, their use does permit detection of behaviour that is disallowed so that it can be dealt with in order to protect victims, witnesses and the public and prevent future offending.

1.21 A bail order constitutes a written notification given to the accused when bail is granted, usually at the first appearance at court. Where an accused on bail fails to appear, or breaches a condition of bail, this is prosecuted as a separate offence under the Criminal Procedure (Scotland) Act 1995. Where the person on bail commits a further offence whilst on bail, it is regarded as bail aggravation and is not prosecuted as a separate offence. Instead, the original sentence can be supplemented and enhanced penalties imposed for that offence.

1.22 A bail order is deemed to be breached if the accused fails to meet any of the conditions attached to that order. The maximum penalty available for breaching bail was increased as part of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 from 3 to 12 months imprisonment for summary cases. For solemn cases, the Act increased the custodial penalty for failure to appear or other breach from 2 to 5 years.

1.23 Where a custodial sentences is imposed for the main offence for which the accused appears at court, section 27 (9A) of the Act sets out that a consecutive sentence should normally be imposed for related bail breaches.

1.24 The Criminal Proceedings etc. (Reform) (Scotland) Act 2007 sets out that bail is to be granted unless there is a good reason for refusing. This presumption in favour of bail is regarded as necessary to fulfil European Convention of Human Rights responsibilities. The grounds for determining whether there is a good reason for refusal are set out in the Act.

1.25 In terms of the decisions on whether an accused is granted bail, the Act makes it clear that the decision on bail (and the imposition of bail conditions) is for the court alone and that the attitude of the prosecutor (who has a right to be heard and can oppose bail) does not restrict the exercise of the court's discretion. This is a reversal of the previous position where, if the prosecutor did not oppose bail, then the court concluded that bail should be granted.

1.26 The prosecution and defence may appeal bail decisions. Where an appeal is lodged, the judge granting or refusing bail must send a report to the High Court for consideration at the appeal. All bail appeals are dealt with by the High Court of Justiciary (the appellate court).

Methodology

1.27 Four case study areas were selected for the research, these being Ayrshire, Central, Lothian and Borders, and Glasgow and Strathkelvin Local Criminal Justice Board (LCJB) areas. The areas were chosen primarily to reflect different geographies as well as different workload volumes and characteristics. All areas handled both summary and solemn business.

1.28 An evaluation of undertakings was also commissioned, and the data for this and the undertakings evaluations were collected simultaneously. This was because bail and undertakings are relevant to the same part of the summary justice system (i.e. pre-court up to first hearings – although bail can extend through to the sentencing diet), involve similar processes, and, in the main, affect the same principal stakeholders.

1.29 A combination of methods were used to collect data to inform the evaluation including analysis of performance data held on the Scottish Government's Criminal Justice Board Management Information System (CJBMIS) and the Monitoring Workbook. This includes data from all partner agencies involved in the administration of summary justice including Association of Chief Police Officer in Scotland (ACPOS), the Scottish Court Service (SCS) and the Crown Office and Procurator Fiscal Service (COPFS). Additional data that was not held on the system was also obtained from the SCS and the Scottish Government to inform the work.

1.30 Secondary data analysis was complemented by collection of primary qualitative data from interviews with a number of stakeholders. Interviewees included Judges, Sheriffs, Justices of the Peace (JPs), Procurators Fiscal, defence agents and the police. A short face-to-face survey of accused who had previously been given bail orders was also carried out at a number of court sites.

1.31 Unlike the summary justice reforms, the bail reforms also applied to solemn cases (including sheriff and jury trials). As a result, attempts were made to canvass the views of a small number of victims who had been involved in (now closed) solemn cases where the accused had been given bail. Short one-to-one interviews were carried out with victims, and the data was considered alongside data generated from victims involved in summary cases (reported separately as part of the SJR Victims, Witnesses and Public Perceptions evaluation).

1.32 A full methodology is presented in Appendix A.

Research Caveats

1.33 The research used both quantitative and qualitative data, and limitations of both sets of data must be recognised. Although a considerable volume of data exists around bail orders, bail breaches, failure to appear and convictions and sentencing for bail breaches, data was not available in all cases to allow pre and post reform comparisons to be made. Specifically, data relating to use of special conditions, warrants for failure to appear at the local level and bail appeals was not available pre-reform and so the analysis is restricted to the period following the implementation of the reforms. Similarly, much of the data that is available in different units of analysis and it was not possible to always consider the proportionate use of, for example, bail orders against the numbers of persons prosecuted in court or the number of bail breaches as a proportion of all orders granted. Again, this is recognised throughout the report and attempt is made instead to compare broad trends between different datasets.

1.34 The qualitative data that is reported comes from representatives from various criminal justice agencies. It was not possible to recruit equal numbers of participants from each agency in each of the four selected case study areas and the sample was biased by an element of self-selection that occurred as the research progressed. This means that, for some groups (particularly Procurators Fiscal), there is no geographical spread of views and comments made reflect only those of the group who took part and do not necessarily reflect those of the agencies represented. As with all qualitative research, however, the key aim was to generate understanding of the issues. To this end we report the range of perceptions we found from interviewees and do not aim to report these views as being representative of all such participants in the justice system.

1.35 A cost exercise was initially planned as part of the work, but this proved difficult to achieve given a lack of data available on costs associated with various aspects of summary justice process delivery. As a result, the researchers have only been able to reflect on possible costs and savings that may occur in different bail scenarios and it is recognised from the outset that there will be many assumptions in this analysis.

1.36 Finally, it is important to stress that the interpretation and reflections on the research findings set out in this report are those of the researchers, and not of the Scottish Government. Further, the views put forward by the various

respondents which are presented in this report are those of the individuals who took part, and should not be taken as being representative of the organisations for whom they worked. With these caveats in mind, the remainder of this report sets out the findings of the evaluation.

2 BAIL ORDERS AND USE OF SPECIAL CONDITIONS

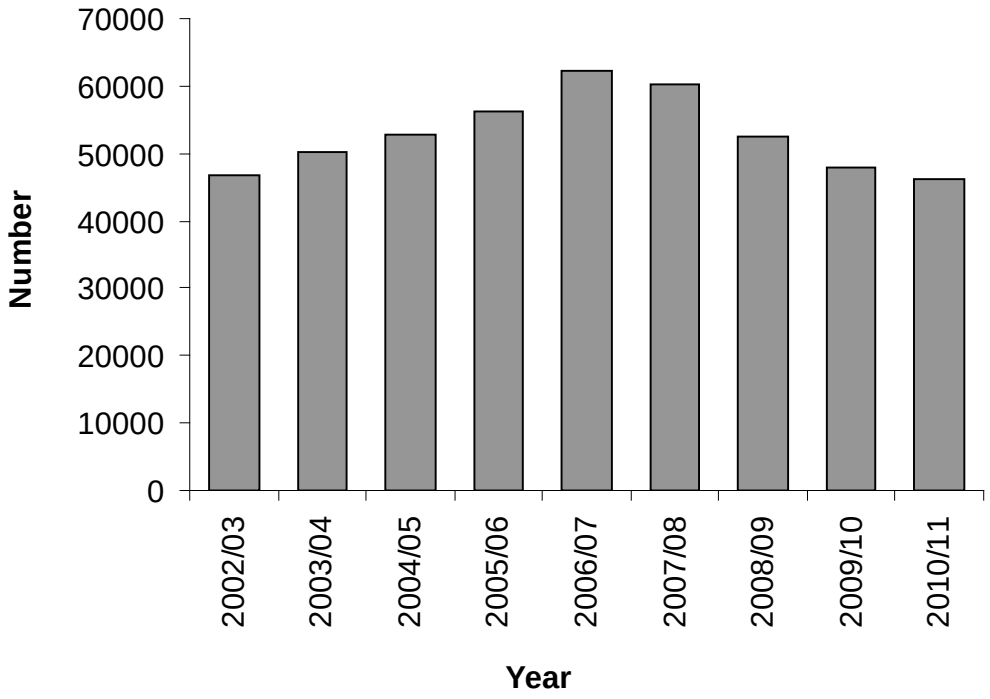
2.1 Although the reforms to bail did not intend to impact on the frequency of its use, this chapter provides a summary of the extent to which bail is used in the criminal justice system in Scotland to provide context for the remainder of the report.

2.2 This chapter also explores the extent to which special conditions are used alongside bail and provides a summary of changes to the use of special bail conditions over time, post-reform.

Number of Bail Orders Granted

2.3 The Scottish Government publishes annual statistics on criminal proceedings concluded in Scottish courts, and data for the nine year period from 2002/03 to 2010/11 is shown in Figure 2.1 below. Table B.1 in Appendix B shows the raw data.

Figure 2.1 Bail Orders granted in Scotland



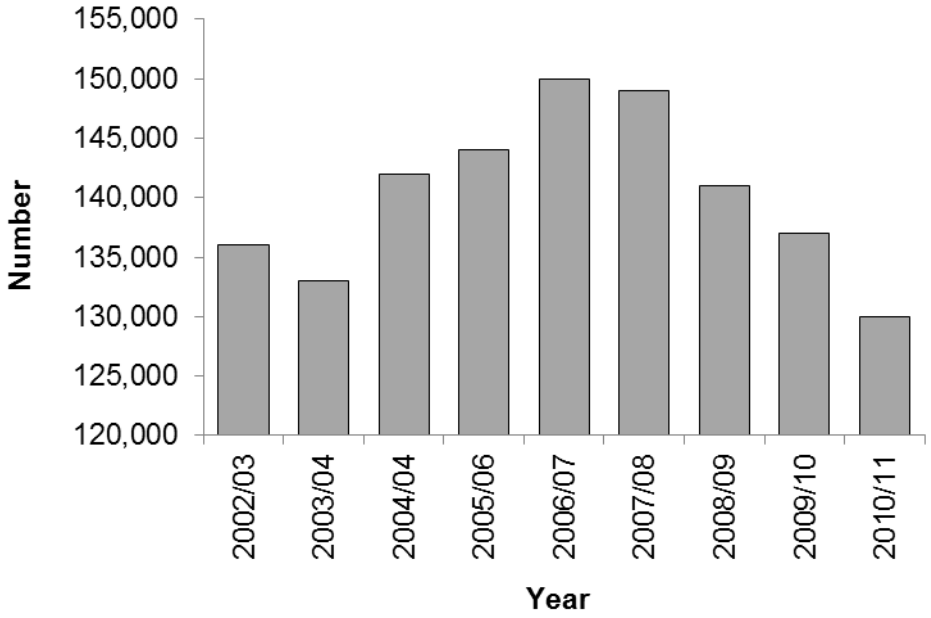
2.4 The 2010/11[8] publication showed that the total estimated number of bail orders granted by Scottish courts in 2010/11 was 46,221. This is the lowest

[8] See Criminal Proceedings in Scotland 2010/11 available at: http://www.scotland.gov.uk/Resource/Doc/933/0124072.pdf

number recorded in the nine year period and continues a year-on-year decrease since 2006/07.

2.5 This clear drop in the overall number of cases going to court mirrors a corresponding drop in the numbers of persons proceeded against in court, which was also at its lowest in 2010/11 since 2002/03, as shown in Figure 2.2 and Table B.2 in Appendix B.

Figure 2.2 Persons Proceeded Against in Court, 2002/03 to 2010/11



2.6 Although differences in the way that data is recorded means that it is not possible to say precisely whether the proportionate use of bail orders has varied over time, the data strongly indicates that the decrease in bail orders may simply reflect a corresponding drop in recorded crime and lower numbers of cases coming to court overall. The trends in the data therefore suggest that the proportionate use may be unchanged and this is not unexpected since the reforms to bail did not seek to impact on the frequency of bail *per se.*

Multiple Bail Orders

2.7 Scottish Government data also shows that the 46,211 bail orders granted in 2010/11 were issued to 33,713 individuals with:

- 77% of individuals receiving one bail order;
- 15% receiving two;
- 5% receiving three; and
- 3% receiving more than three.

2.8 This shows that the majority of bail recipients receive only one bail order in a year, with one in four having been released on bail on more than two occasions in the same year. This percentage has remained relatively steady over time, confirming the static level, pre and post-reform, of the judiciary

granting bail to those who have already previously been released on bail. Again, this is not unexpected since the reforms sought primarily to strengthen existing law on bail in order to bring about increased transparency and improved consistency in bail decisions rather than affect its use. The data should also be considered in the context that alternatives to bail are limited – custodial remand is expensive and tends to be reserved for cases where public protection is a concern and releasing accused without bail conditions to await citation to appear may not always be appropriate.

Orders Awarded in Different Court Types

2.9 Table 2.1 shows the breakdown of bail orders granted at the national level by court type and covers the nine year period from 2002/03 to 2010/11 (thus showing both pre and post-reform data). Data is again taken from the Criminal Proceedings in Scotland 2010/11 publication.

Table 2.1 Bail Orders Made by Type of Court, National

	02/03	03/04	04/05	05/06	06/07	07/08	08/09	09/10	10/11
All Courts	46,795 *100%*	50,155 *100%*	52,820 *100%*	56,233 *100%*	62,283 *100%*	60,355 *100%*	52,592 *100%*	47,921 *100%*	46,221 *100%*
High	226 *0%*	359 *1%*	345 *1%*	294 *1%*	434 *1%*	305 *1%*	279 *1%*	261 *1%*	252 *1%*
Sheriff	41,379 *88%*	43,273 *86%*	46,757 *89%*	50.272 *89%*	55,443 *89%*	54,089 *90%*	47,545 *90%*	43,133 *90%*	41,710 *90%*
District/JP	5,190 *11%*	6,523 *13%*	5,709 *11%*	5,647 *10%*	6,400 *10%*	5,958 *10%*	4,767 *9%*	4,522 *9%*	4,256 *9%*

2.10 Historically, most bail orders are granted by Sheriff courts with JP courts (previously District courts) and the High court granting the remainder. This reflects the relative business volumes dealt with by these courts, with fewer orders being issued by the High court since they deal with only a small proportion of cases and the most serious offences, some of which will also be least suitable for bail. Sheriff court orders typically account for around 90% of all orders granted and the data shows that there has been little variation in the proportionate use of bail orders between court jurisdictions over time.

Crime Types

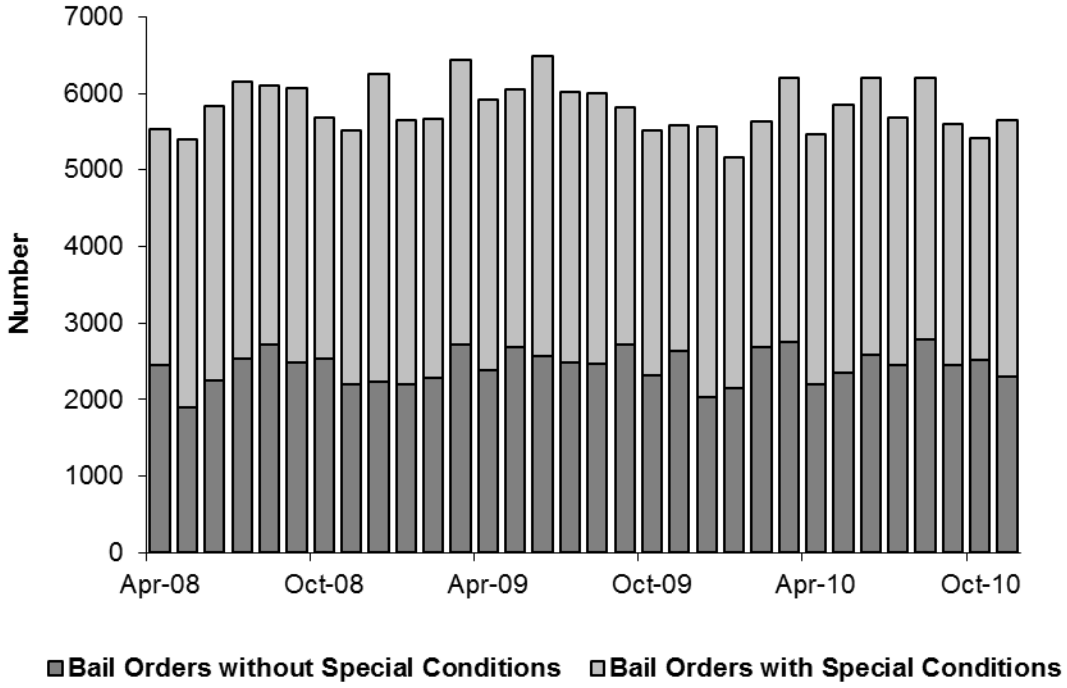
2.11 National statistics are available to show the bail orders made against the main charge for which the accused first appeared at court[9]. This data shows that, over time, the main offences for which bail orders have been granted are crimes of dishonesty, common assault and breach of the peace. The data show that there has been no real change in the types of charge for which orders are granted post-reform which is perhaps not surprising, since this was not something that the reforms sought to change.

[9] See Criminal Proceedings in Scotland 2010/11 available at: http://www.scotland.gov.uk/Resource/Doc/933/0124072.pdf

Bail Orders with Special Conditions

2.12 In addition to the standard conditions of bail set out in Chapter 1, a number of 'special conditions' may be attached to a bail order at the time it is granted. These may include, for example, restrictions on where an accused can go or a home curfew. Although data is not currently available from the Scottish Court Service or other organisations on the different types of special conditions awarded, Figure 2.3 shows the aggregate number of bail order cases nationally where special conditions were attached to the bail order. The raw data is shown in Appendix B, Table B.3.

Figure 2.3 Number of Bail Orders with and without Special Conditions



2.13 The data show that, in the 32 month period from April 2008 to November 2010, on average, just over half of all bail orders had special conditions attached. The average across the period was 58% and there was little variance in this distribution over the three year period post-reform. The proportionate use of special conditions does not seem to be affected by the overall drop in bail orders being awarded overall. The lack of pre-reform data also means that it is not possible to say if there was an immediate impact of the reforms on use of special conditions.

2.14 Interestingly, qualitative data from professional interviewees suggests that they perceived an increase in the number of special conditions attached to orders in recent years:

"I think that what has happened is that there are more conditions being attached to bail than ever there were in the past…I think that it's the same people that were always getting bail, and still getting bail, but with more conditions, like curfews, and things. [Defence Agent]

"I think there have been more special conditions, especially in relation to domestic violence, I can't think of a case there where there hasn't been a special condition added". [Procurator Fiscal]

2.15 Procurators Fiscal in particular noted the increase in the use of special conditions post-reform, with courts using conditions for a wider set of offences. These Procurators Fiscal could see the benefit in special conditions and welcomed their use:

"I think that the special conditions can be very useful in making it absolutely clear to people what the score is. I think it's a useful tool so people are reminded what their responsibilities are". [Procurator Fiscal]

Summary

2.16 Overall, the context data shows that there has been a reduction in the number of bail orders granted by the courts which mirrors a wider reduction in the court caseloads *per se*. Although it is not possible to say conclusively if the proportionate use of bail orders has changed post-reform, the trends in the numbers of persons prosecuted in courts and in the use of bail orders suggest that there has not been a notable change.

2.17 Although the data do not tell us anything conclusive about the use of special conditions pre and post-reform, interview data does suggest that the judiciary may be making noticeably more use of special conditions over time, and this is something that Procurators Fiscal seemed to welcome.

2.18 Having set the context of the evaluation, in terms of the use of bail and special conditions, the remainder of the report explores the extent to which the main policy objectives for the bail reforms have been met as well as their overlap with wider SJR objectives.

3 COMPLIANCE WITH BAIL

3.1 One of the specific policy objectives of the reforms to bail was to reduce instances of breach of bail conditions from pre-reform levels. Within that, the evaluation focused on reduced instances of failure to appear (in summary cases only) as it was considered that this was most relevant to the SJR objective of effective court hearings, as well as to reduce inconvenience to all those who attend court (including victims and witnesses) where cases are adjourned due to failure to appear by the accused. Data to explore if this has been achieved is presented in this chapter.

Breach of Bail by FTA and Breach of Conditions

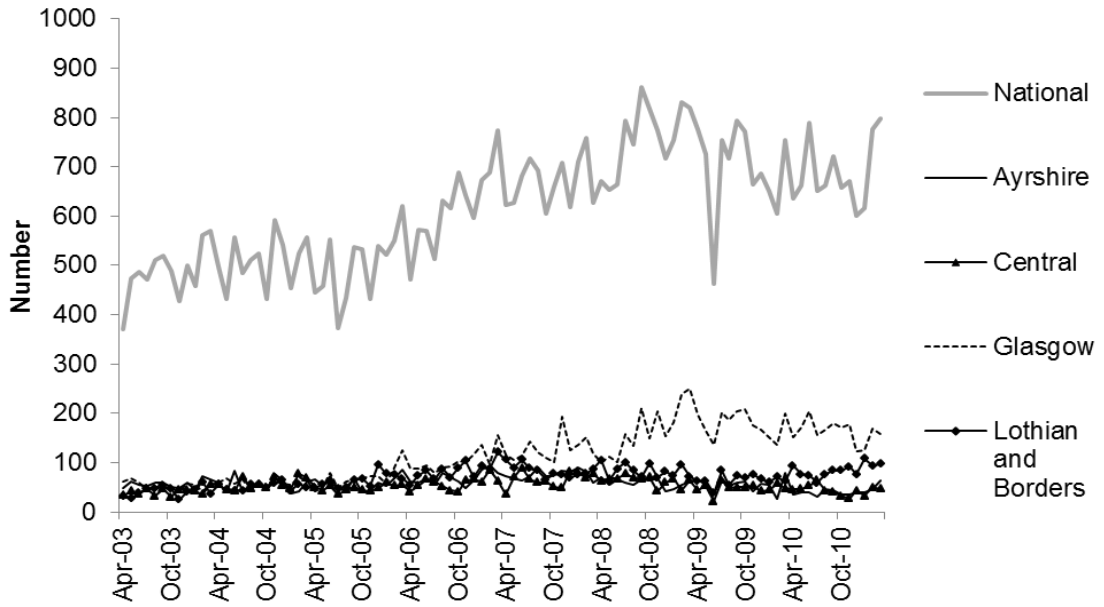
3.2 The main source of statistical information showing the extent to which bail is breached by accused is data in relation to convictions for breach of bail. This national data relates only to breach by way of failure to appear and failure to comply with conditions, since offending whilst on bail is treated as an aggravator to the original offence, as described in Chapter 1.

3.3 Failure to appear will always be recorded and so this may appear to be a more significant factor determining convictions for breach compared to failure to meet conditions, simply due to data capture limitations. For the purposes of this report convictions for breaching bail is taken as the best proxy for actual breach.

3.4 Figure 3.1 shows the numbers of convictions for breach of bail in each of the case study areas and nationally for the nine year period from 2002/03 to 2010/11 with data again taken from the Criminal Proceedings publication[10].

[10] Data relates to both summary and solemn cases. See Criminal Proceedings in Scotland 2010/11 available at: http://www.scotland.gov.uk/Resource/Doc/933/0124072.pdf

Figure 3.1 Number of Convictions for Breach of Bail by LCJB Case Study Area and Nationally



3.5 At the national level, there has been a slight upward trend in the number of convictions for breach of bail over time.

3.6 In Ayrshire, Central and Lothian and Borders the numbers of convictions for breach of bail (including failure to appear) have remained fairly steady over time with just some small peaks at random points in time, most notably in Lothian and Borders towards the end of 2010 and the beginning of 2011.

3.7 There is a slight upward trend over time in Glasgow and Strathkelvin, and, although the number of breaches is consistently higher, this area also has the highest number of bail orders imposed, on the basis that it deals with around 23% of all summary business in the country. Patterns in Glasgow and Strathkelvin match closely those at the national level most probably because these areas grant the highest numbers of bail orders and so actually drive the national trend.

3.8 Table 3.1 shows the number of bail breaches due to failure to appear separately from breach due to other reasons (i.e. non FTA breach or re-offending). Again, data covers both solemn and summary cases. It shows that, while non-FTA breach has increased quite notably over time, there has been a decrease in failure to appear. This downward trend was already evidenced pre-reform and, despite a peak in FTA during 2008/09, FTA has been decreasing again in recent years.

Table 3.1 Number of Convictions for Breach of Bail Nationally

	01/02	02/03	03/04	04/05	05/06	06/07	07/08	08/09	09/10	10/11
FTA	4,092	3,577	3,367	2,786	2,250	2,317	2,167	3,083	2,708	2,526
Other Breach	1,353	1,957	2,473	3,316	3,746	5,121	5,858	6,015	5,655	5,715
Total	**5,445**	**5,534**	**5,840**	**6,102**	**5,996**	**7,438**	**8,025**	**9,098**	**8,363**	**8,241**

3.9 The upward trend in national bail breaches when set against the downward trend in the total number of bail orders imposed suggests a higher proportion of bail breaches over time, although differences in the way that data are captured means that we cannot say conclusively if this is the case. What we can say, however, is that the overall bail reform objective of reducing the extent to which bail is breached by the accused does not appear to have been met, since there have been increases in the number of bail breaches post-reform, especially when removing FTA from the analysis. Some of this rise in breach rates may be a reflection of the police and courts treating breach more seriously post-reform and, as a result, more people being arrested and charged with the offence. The increase here would therefore reflect an increase in reinforcement and punishment activity among criminal justice professionals (i.e. a change in justice system practice) rather than reflecting a change in behaviour of accused (i.e. a greater propensity to breach).

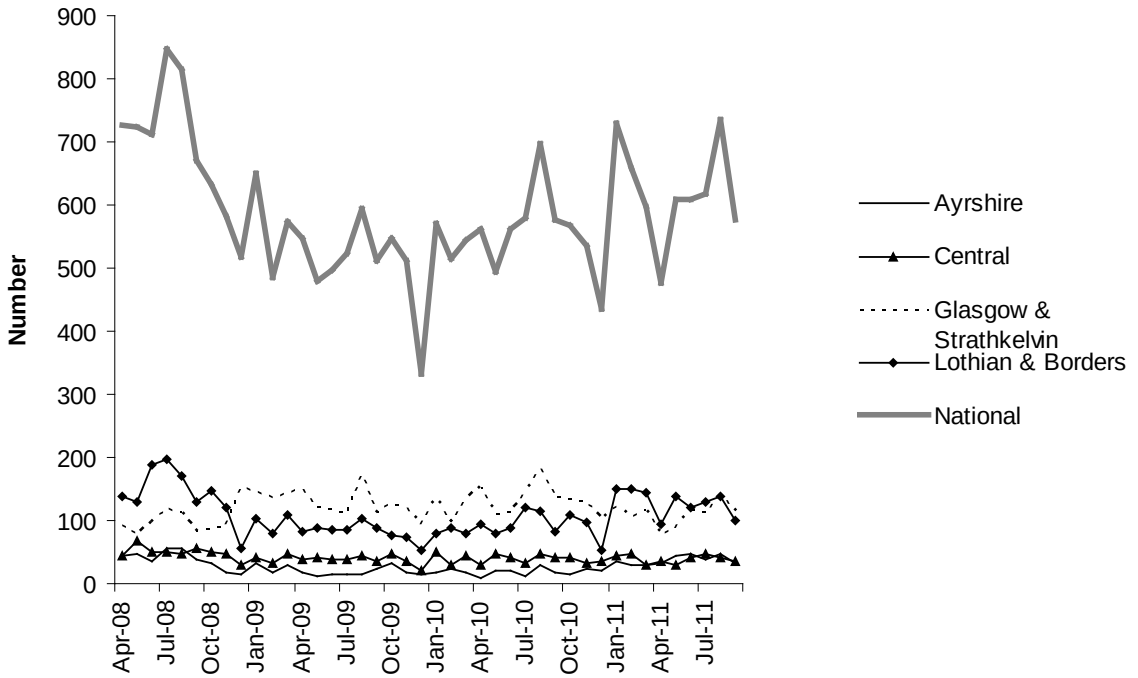
3.10 Overall, there were 8,241 other bail-related offences in 2010-11 (other than committing an offence while on bail, which is discussed below). This includes breach of bail conditions, such as failure to appear in court after being granted bail. As a percentage of bail orders granted, this is around 18% or one in five of all orders granted.

Warrants for Failure to Appear

3.11 A specific focus of the research evaluation was to assess specifically how, if at all, failure to appear in summary cases had changed since the implementation of the reforms.

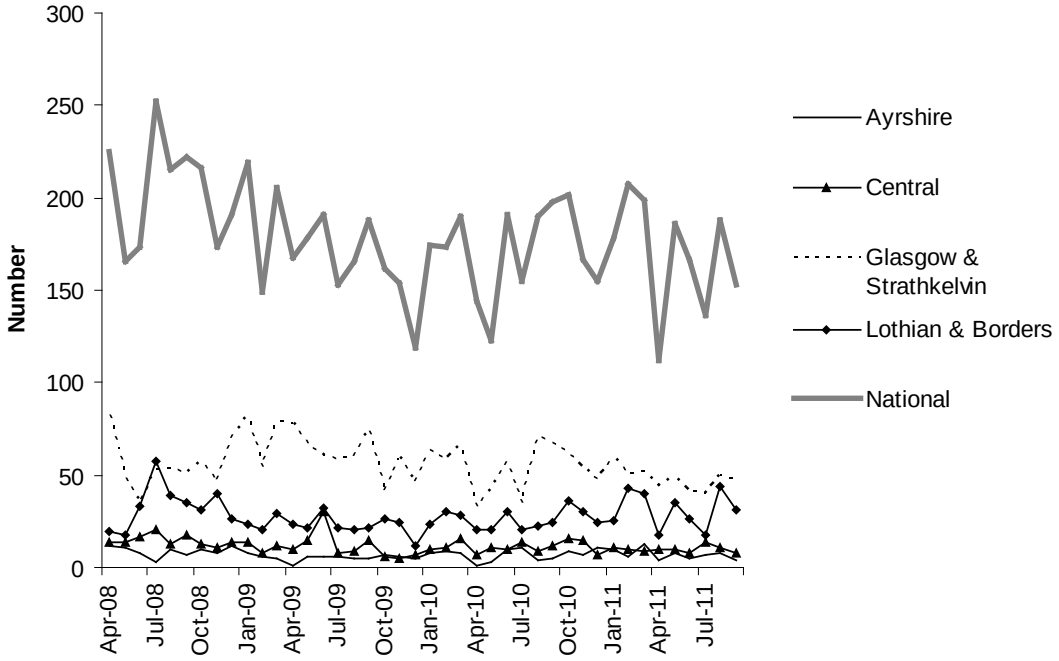
3.12 Indicator data is available for failure to appear where the accused was on bail at three stages in the court process, these being intermediate, trial and sentencing diets. Data for each of these indicators is shown for each of the case study areas in Figures 3.2 to 3.4 below. Again, it is worth stressing that data is not available for the period immediately prior to the reforms and so it is not possible to say anything about any immediate impact of the reforms on failure to appear, but the data does show the level of failure to appear over time since the reforms' implementation.

Figure 3.2 Failure to Appear at Intermediate Diet by LCJB Case Study Area and Nationally



3.13 The intermediate diet is the stage in proceedings that follows the original appearance in court by the accused when they will have been granted bail, at which defence and prosecution are required to indicate whether they are ready to proceed to trial. The data above shows that there was a drop in the number of persons failing to appear at this court diet from the time at which records began (i.e April 2008), and this continued for an 18-month period before rising again throughout 2010/11.

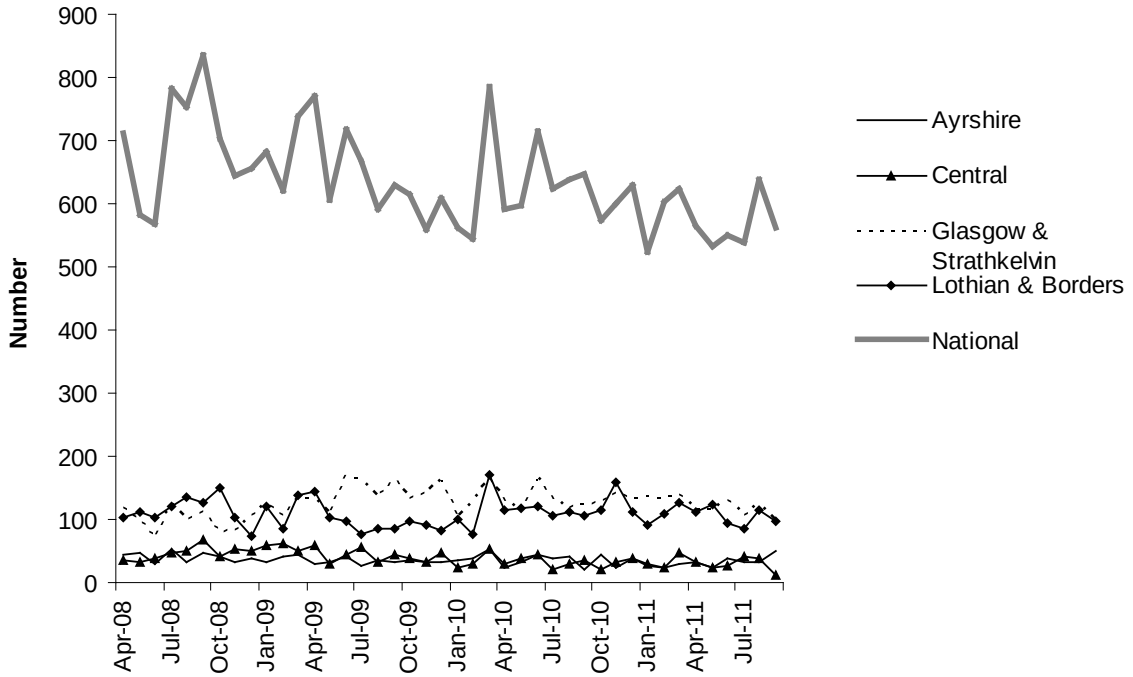
Figure 3.3 Failure to Appear at Trial Diet by LCJB Case Study Area and Nationally



3.14 If evidence is to be led, the trial diet is the stage at which this will take place and is, therefore, the stage in proceedings where failure to appear by the accused will cause the most disruption. This is because witnesses are likely to have been cited to attend at the diet, and may be asked to return at a later date if the case is adjourned due to failure to appear by the accused.

3.15 Again, the data show that there has been a clear drop in the numbers of people failing to appear at this diet since the reforms were implemented, although there do remain some peaks and troughs in the data at different points in time.

Figure 3.4 Failure to Appear at Sentencing Diet by LCJB Case Study Area and Nationally



3.16 The sentencing diet is the stage in proceedings when the final disposal is decided. FTA at this stage of proceedings is, in particular, unwelcome for victims for whom knowing sentencing outcomes seems to be a key driver of satisfaction with the system (see the separate evaluation of Victims, Witnesses and Public Perceptions). Delaying sentencing decisions by failing to appear may lead to negative perceptions of the system by victims who are seeking early case closure, as well as being an inconvenience and waste of court time and resources for prosecution, defence and court staff. Data show that, as with the intermediate and trial diet, there has been a drop in the numbers of people failing to appear at this diet and this again bodes well for the aims of SJR.

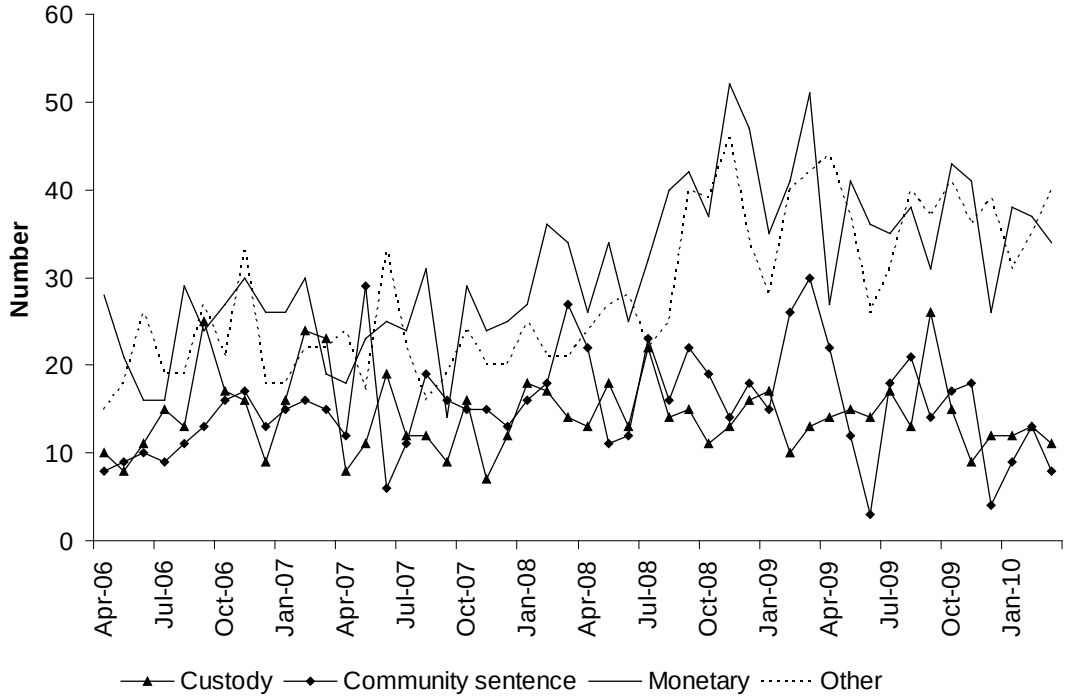
3.17 It may be that reduced instances of FTA are linked to the general downward trend in cases coming to court (although this same argument cannot be applied to breach rates overall, since they have increased). If there has been a proportional drop in FTA, it may be argued that this, in part, is contributing to the wider SJR objective of more effective court hearings. That said, from the data available, it is not possible to say if this can be directly attributed to the reforms to bail.

3.18 The following section provides a broader context for the reduction in FTA in terms of convictions and penalties given for failures to appear.

Penalties for Breach of Bail

3.19 Figure 3.5 shows the number and type of penalties given for failure to appear at the national level for all courts.

Figure 3.5 Main penalty for breach of bail for failure to appear



3.20 The data show that most failures to appear are dealt with by way of a monetary penalty (i.e. a fine) with fewer attracting community or custodial sentences. 'Other' penalties include compensation orders, although their use is rare in these circumstances. Although the number of custodial and community sentences has remained fairly steady post-reform, with only a slight recent lowering of numbers, there has been quite a noticeable increase in the numbers of FTAs dealt with by way of monetary and other penalties (though overall numbers are still low).

3.21 Data is also available that shows the average value of penalty imposed for breach of bail by way of failure to appear. The average penalties by type for the five year period from 2003/04 to 2009/10 is shown in Table 3.2 below.

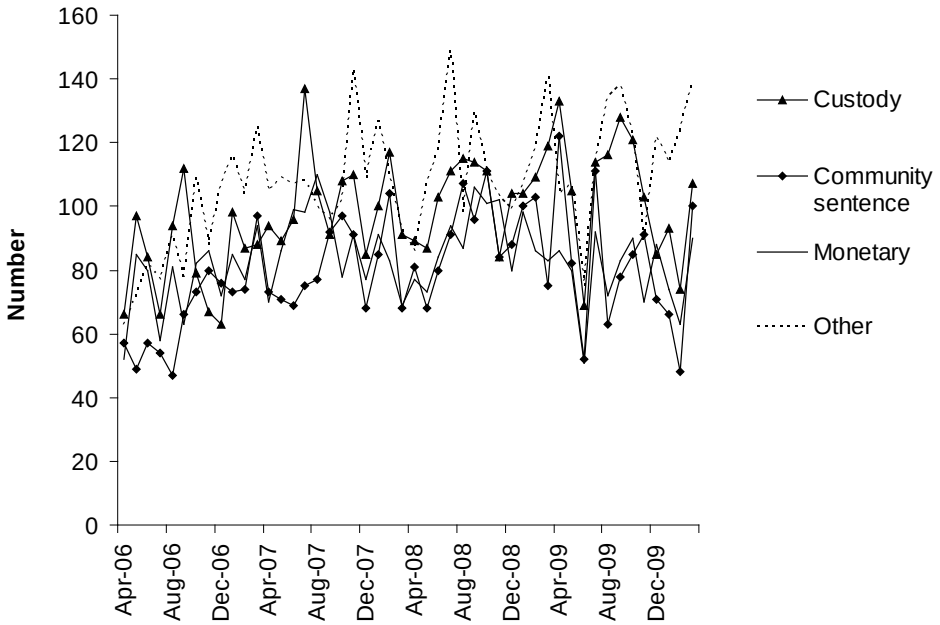
Table 3.2 Average value of penalties imposed for breach of bail by way of Failure to Appear[11]

	03/04	04/05	05/06	06/07	07/08	08/09	09/10
Custodial Sentence (days)	62	68	75	56	106	79	75
Community Service Order (hours)	116	136	140	143	125	135	127
Fine (£s)	120	132	163	139	175	154	150

3.22 The data show that the average custodial sentence given for failure to appear on bail doubled between 2006/07 and 2007/08, the time during which the reforms came into place. Thereafter, the average dropped to levels similar to those pre-reform, although was still slightly greater. There have been no great changes in the average values for all other penalties.

3.23 Figure 3.6 shows the main penalties given for bail offences, other than failure to appear or re-offending. It shows that breach of other bail conditions are dealt with in a variety of ways with no obvious patterns in terms of the most frequently used penalty over time, except for an overall increase in each.

Figure 3.6 Main penalty for offences other than FTA or re-offending



[11] Due to small numbers, data on compensation orders is not shown.

3.24 Again, data are also available for the average penalties imposed for these breaches and Table 3.3 below shows the average penalties by type for the five year period from 2003/04 to 2009/10.

Table 3.3 Average value of penalties imposed for breach of bail other than for Failure to Appear or Re-offending[12]

	03/04	04/05	05/06	06/07	07/08	08/09	09/10
Custodial Sentence (days)	64	66	65	63	64	77	80
Community Service Order (hours)	132	125	120	112	121	120	117
Fine (£s)	182	183	176	164	181	174	170

3.25 The data show that the average custodial sentence has increased post-reform, although the average values for all other penalties have remained largely unchanged. This shows that longer average custodial sentences are being given for breach of bail post-reform – this is consistent with the increased penalties introduced by the reforms.

Aggravated Bail

3.26 As described in Chapter 1, where a person on bail commits a further offence whilst on bail, it is regarded as bail aggravation and is not prosecuted as a separate offence. Instead, the original sentence can be supplemented and enhanced penalties imposed for that offence.

3.27 Table 3.4 below shows the number of offences with a charge proved with a bail aggravator recorded for the period 2004/05 to 2010/11 for all courts[13]. It shows that, consistently, fewer than 1 in 5 offences have a bail aggravator attached and, although the percentage of cases with bail aggravators increased to a small degree in 2007/08 and 2008/09, it has since reduced again.

Table 3.4 Convictions for offences with a Bail Aggravator recorded, 2004/05 to 2010/11

	04/05	05/06	06/07	07/08	08/09	09/10	10/11
Bail Aggravator Recorded	25,543	25,799	29,026	30,592	32,618	24,326	24,017
All Offences	188,182	182,377	188,585	185,131	174,505	163,456	154,023
Percentage of Offences with a Bail Aggravator	14%	14%	15%	17%	19%	15%	16%

[12] Due to small numbers, data on compensation orders is not shown.
[13] Source: http://www.scotland.gov.uk/Topics/Statistics/Browse/Crime-Justice/Datasets/OffAgg1011

Perceptions of Breach of Bail and Sentencing for Breach

3.28 As part of the stakeholder interviews, staff were asked to comment on whether they perceived there had been any impact of the reforms to bail on breaches of bail. Participants were also asked whether they perceived that there had been an increase in the length of sentences or other disposals used for breach of bail.

Breach of Bail

3.29 The police who were interviewed generally perceived that there had been no real decrease in the numbers of bail breaches that they were witnessing. Despite generally viewing bail conditions as tougher post-reform, the police uniformly asserted that some offenders were recidivist offenders who were 'in and out jail all their lives' and would take 'no notice' of bail conditions. This was used as an explanation for breach:

"Most of these are recidivist offenders, the fact that they are under bail conditions doesn't really make any difference to them, they just see it as a hazard of their existence that they get caught now and again. Then they get out on bail and then it's back to square one." [Police]

3.30 Some police officers considered that breach rates, especially failure to appear, may have increased in recent years. While the numeric data does support an overall increase in breach, this does not, appear, however, to be accounted for by failure to appear. FTA in isolation reduced slightly in numbers, though whether it has reduced proportionately is less clear.

3.31 A common assertion from the police was that bail (and special conditions) may be being used too widely. A view was put forward that, *"because everyone receives bail"*, it *"makes a mockery of the system"*, especially if a person has two or more bail orders and receives yet another, when they have already evidenced an inability to adhere to their conditions:

"In the custody suite, I see people who have 2 or 3 bails on their records, so perhaps the special conditions they have been given are not appropriate as they are breaching them." [Police]

3.32 Again, these views differed from the numeric data which actually show a drop in the number of bail orders awarded and so the main issue, perhaps, is that police were perceiving too great a use of bail orders for persons who had already received a bail order. Indeed, the data does show that around 1 in 4 of all accused given bail have received two or more orders in one year and this has been fairly consistent over time, as discussed in Chapter 2.

3.33 Among some Sheriffs and JPs, there was also some perception that breach of bail was increasing over time. This was in part attributed to the overzealous use of bail and special conditions in some cases for what were perceived to be less serious offences:

"That's the downside of bail. It's a double or quits. It's an exponential game and people can end up in a detention sentence, really for doing nothing….you can end up criminalising people, and ramping up the punishments for the kernel. And really, the criminal kernel is not really that serious". [Sheriff]

"I think there have been an awful lot more insignificant bail cases and breaches of bail". [Sheriff]

3.34 Some Sheriffs reported being very careful in their use of special bail conditions, and there was a keen awareness among some interviewees that being overzealous with bail conditions may result in more people returning to court because they were unable to comply.

3.35 Curfews, in particular, were seen as being challenging for some lower tariff offenders and some members of the judiciary explained that the use of curfews as a bail condition seemed to inappropriately curtail people with already chaotic lifestyles. Consequently, some members of the judiciary expressed that they were reserving curfews for higher risk (especially public risk) offenders.

3.36 Similarly, some defence agents and Procurators Fiscal considered that breach rates had not fallen, in line with the quantitative data. It was perceived that this was especially true for cases where curfews were attached. One defence agent stated:

"I think what happens is that it brings a lot more cases into court because most of the conditions are ones that everyone knows they will breach". [Defence Agent]

3.37 One of the areas that the judiciary and defence agents both commented on as being problematic with regard to bail conditions was domestic abuse cases. While both acknowledged that the intention of special bail conditions to protect victims in domestic abuse cases was well founded, it was suggested that sometimes victims failed to support the special conditions and this may be resulting in some breaches of bail:

"…and what we get also is the complainer contacting us, the defence lawyer, saying that they want them [their partner and accused] back, and we put in an appeal letter and the Crown comes back and says "It's not your decision". [Defence Agent]

3.38 Overall, therefore, professionals expressed that breach of bail may not have improved over time and this was attributed largely to failure among accused to comply with special conditions. In some cases, this failure was due to lack of willingness to comply, whereas in others, it was perceived as being due to offenders finding conditions too challenging to comply with. There was some appetite for releasing some accused without special conditions in order to remove this, although these views were expressed by a minority of interviewees and, overall, it was recognised that bail conditions provided a useful public protection tool that was less costly than the alternative of

remand. The overriding message appears to be that special conditions need to be carefully considered and be relevant to the specific case.

Sentencing for Breach

3.39 Although some Sheriffs and JPs stated that they were reluctant to impose bail conditions without good reason (and perceived that some colleagues were using them perhaps too widely), where conditions were breached, there seemed to be consensus around the need to award longer sentences to act as a deterrent to future breach and offending:

"Yes, I am using the increased sentencing powers and I think it's a nonsense if you don't send out the message. I think I do award harsher sentences for breach of bail in general and I also think you have to make it consistent, which I always do". [Sheriff]

"I think when you are reading out the specific punishment for breach of it……the fine or the imprisonment or both…..that registers, particularly when you add the fact that this would be in addition to whatever they were sentenced to, if found guilty of the original offence that this was a totally separate punishment and related to breach in bail only, I think once that message gets into their head it makes them do pay attention". [JP]

"I am taking breach of bail into account now when we are passing a sentence which we maybe didn't do in the past". [JP]

3.40 Generally, Procurators Fiscal and defence agents were also of the view that stronger repercussions were being applied to breach of bail orders and conditions, both perceiving that the remanding of an accused was being used more often for breach of bail post-reform:

"Where I find the Sheriffs much harder is that when people are breaching bail, they are generally remanding them in custody instead of just letting them out, so that's a change". [Defence Agent]

3.41 In this respect, the qualitative and quantitative data were mutually supportive around increased sentencing being used for breach of bail post-reform.

Summary

3.42 Overall, both the quantitative and qualitative data suggest that there has been no reduction in the overall number of breaches in the period since the reforms were implemented – indeed, the opposite is true with an increase in bail breaches overall.

3.43 When looking at FTA, although there has been a numerical reduction, it is not possible to say if this drop has been proportional given reduced numbers of cases coming to court overall. If there has been a proportional drop in FTA, it may be argued that this, in part, is contributing to the wider SJR objective of

more effective court hearings. That said, from the data available, it is not possible to say if this can be directly attributed to the reforms to bail.

3.44 The quantitative and qualitative data both show that breach of bail is being treated more seriously post-reform with increased custodial sentences being applied, and an attitude of non-tolerance of repeat breaches of bail among the judiciary.

4 TRANSPARENCY AND SUMMARY BAIL APPEALS

4.1 One of the specific bail reform objectives was to make bail decisions more transparent and consistent. In order to achieve this, there were two key changes to bail, these being:

- when granting bail, the Judge, Sheriff or JP is obliged to explain to the court (including the accused) the effect of bail conditions imposed and the consequences of breaching those conditions (i.e. to provide an ordinary language explanation); and
- the Judge, Sheriff or JP is required to state the reasons for their decision in relation to bail. They are further required, under the reforms, to provide to the appellate court (the High Court) written reasons for any decision that is under appeal.

4.2 These changes impact on SJR to the extent that greater transparency is fair to victims, witnesses and the accused, which is one of the overarching objectives of SJR. Although improved consistency was not a specific objective of SJR, improved consistency that may result from these reforms does arguably impact on overall better handling of cases, which was a SJR objective.

Ordinary Language Explanations

4.3 On ordinary language explanations, most members of the judiciary commented that this was something they had *"always provided"*, although there was perhaps a greater awareness of the need to ensure that their explanations were given consistently:

"… I spend more time now explaining bail conditions which is something I didn't do so much of before, so that's a definite change…." [Sheriff]

"Before, you would release someone on bail and they could get a copy of the conditions at the back of the room on the way out, now there is [a] process where you have got to read out all these conditions and in the past quite often if you were about to do that a lawyer would stand up and say it's ok I will explain the conditions to my client. Now you are not allowed to do that, now you go through (the conditions) and check (the accused) understand them". [JP]

4.4 Some contrary views were put forward by a small number of Procurators Fiscal that suggested that the explanations were not as clear and consistently delivered as they might be and, as a result, many accused were reliant on their defence agents to explain bail and bail conditions instead:

"Some (accused) have problems, and you can see why they don't really understand what the Sheriff is saying, no matter how much simple language they use, so it's then down to their solicitor to explain to them exactly what it means after court". [Procurator Fiscal]

4.5 A small number of Sheriffs commented that they felt that the balance of responsibility for them to explain bail and bail conditions to accused instead of defence agents was not quite right although opposing views were also put forward by Procurators Fiscal and defence agents who stated that they felt there was too great a reliance on the defence agent to provide information to clients about bail decisions:

"It has been a fetish of new legislation to put in that you'll explain things to the punter. Don't leave it to the busy lawyer." [Sheriff]

"I think there's still an awful lot of Sheriffs that just say "You're getting put on bail." A lot of them will say, "Has your solicitor explained the conditions to you?", and they [the accused] say "Yes", but we haven't". [Defence Agent]

4.6 While Sheriffs acknowledged that the legal responsibility of ordinary language explanation was falling to them, defence agents also seemed to suggest that they were still being expected to actually provide explanations, because Sheriffs were not doing so in simple enough terms. This suggests the risk of a gap in some cases if both Sheriffs and defence agents perceive that one another will provide the required information to the accused, but neither in fact do.

4.7 Where Sheriffs were meeting their obligations to provide ordinary language explanations, there was also some suggestion that this may not be the most productive use of their time. Again, this was raised by members of the judiciary and defence agents alike:

"The only changes that I'm concerned with are the ones that affect me directly. One is to explain bail to people in court which is a complete and utter waste of my time, although I do it because that's what the law says. The solicitor ought to be able to explain to them privately what the conditions of bail are and why I'm supposed to sit there and explain bail to people is beyond me, unless the government want to make it look like something is happening. It takes up a lot of my time and is a complete waste of time, because the punters don't want to know about transparency in bail conditions, they want to know "Am I getting out or am I not?"" [Sheriff]

"I think there are some Sheriffs who labour all of the conditions, but while they do that, I don't think it has any effect. Because, when you say they [the accused] are getting bail, that's all they want to hear." [Defence Agent]

4.8 Among police, the judiciary and defence agents there was general cynicism regarding the impact that clearer explanation would have on accused:

"I'm sure their solicitors go into great detail too, but many of them have been on bail before and many of them are on bail when they are granted bail again, so they know the conditions of the bail. The forms

that they sign are relatively clear and they know the consequences". [Sheriff]

4.9 Although there were some comments that accused may not hear or understand explanations given regarding bail when offered, it was generally acknowledged that, where explanations were provided by the judiciary, there was little else the judiciary or defence agents could to do make the process of bail any easier to understand:

"All the Sheriffs are careful to provide a full explanation and they [the accused] get it written down too, so I'm not sure what else they can do. [Defence Agent]

4.10 Thus, despite attempts to provide greater detail, and to achieve greater transparency, it seems that this has not, in the minds of professionals interviewed, necessarily impacted positively on accused behaviour. That said, the value and necessity of clearly setting out the conditions of bail and consequences of breach were still recognised as essential to a fair system.

Number of Summary Bail Appeals

4.11 Table 4.1 shows the number and proportion of summary bail appeals at the national level for the period April 2008 to September 2011[14]. It shows that there has been little change in the numbers of bail orders appealed in the period since the reforms, and that, consistently, around 4% of bail orders are appealed.

Table 4.1 Number and Proportion of Bail Appeals, April 2008 to September 2011, National

	April 2008/ March 2009	April 2009/ March 2010	April 2010/ March 2011	March 2011/ September 2011
Number of Bail Appeals	2557	2800	2640	1329
Proportion of Bail Appeals	4%	4%	4%	4%
Number of Orders	70,294	69,973	69,581	35,525

4.12 Interviews with professionals also did not provide any evidence of overall impact of increased transparency or consistency on bail appeals. Indeed, changes to the bail appeals process, in terms of the obligation of the court to provide verbal explanations to accused and written explanations to the appellate court, were perceived to have had only a small impact on operational practice with Sheriffs and JPs commenting only that there is now slightly more paperwork to do:

"We all complete a bail form on the day when the case is being dealt with and that is for the purposes of an appeal. It gives the reasons for refusing bail and it allows bail appeals to be dealt with easily and that is a change because we didn't do that previously. We may have

[14] Pre-reform data is not available.

thought it and followed the same sort of protocols, but we did not actually write it down". [Sheriff]

"We now have to fill in a form for every single case where bail is refused because if it is appealed to the Bail Judge in the High Court in Edinburgh, he or she needs to see why the Sheriff refused bail and that form assists that review exercise. That's the only change; in the paperwork". [Sheriff]

4.13 Despite the additional work, the process seemed to be welcomed by Sheriffs as a means of ensuring that fuller and more consistently presented evidence could be provided to assist with the appeal process and so this does suggest a system improvement as a result of the reforms.

4.14 Judges interviewed as part of the research were positive when considering this aspect of the reforms. Pre-reform, Judges would only receive an account from an Advocate who was instructed by a defence agent that the bail had been refused, which was considered by Judges to be 'third hand'.

"There was no information from the Sheriff who had refused bail which was pretty unsatisfactory". [Judge]

4.15 Post-reform, Judges report that they are receiving reports from Sheriffs outlining reasons for refusing bail, which they find useful when considering the case:

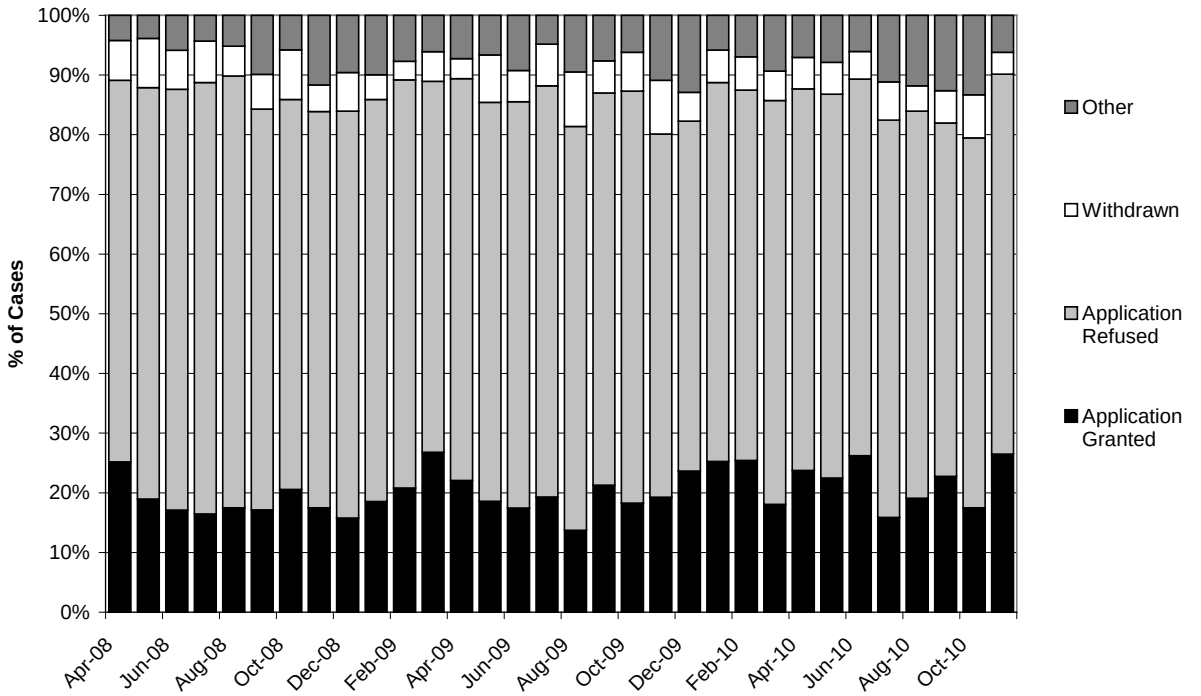
"We're now getting the reasons why the Sheriff refused bail from the Sheriff himself which is a big improvement from our point of view in helping us make a decision about whether that was justified. That's a huge improvement". [Judge]

"Now with these improvements, it's a much more reasoned appeal". [Judge]

Outcome of Summary Bail Appeals

4.16 As part of the evaluation, a request was made to the Scottish Court Service for information on the outcome of bail appeals. Figure 4.3 shows the percentage of cases over time which result in the bail appeal application being granted, refused, withdrawn or otherwise dealt with.

Figure 4.3 Outcome of Bail Appeals at the National Level



4.17 The data show that the majority of bail appeal applications are refused, and there has been no real change in that situation in recent years. The proportion of cases where bail appeals are granted is around 25% and, again, this has not changed noticeably over time.

4.18 As described in Chapter 1, all bail appeal reports go to the High Court for consideration. In interviews, it became clear that it is not always made known to the judiciary whether their decisions are upheld, such that there is little feedback for decision makers about the outcome of bail appeals.

4.19 Although procedurally the bail appeal system was perceived by professional stakeholders to be fairer now that written explanations were required, Sheriffs explained that they were reliant on happenstance to know the outcome of appeals and disappointment was expressed about the lack of feedback regarding bail appeals:

"Sadly, despite promises at the inception of the legislation, I get no feedback from the appeal court, and I have no idea whether my attitude in individual cases to bail is, in their view, right or wrong…If I'm doing something wrong, I would like to know. If I'm doing something right, I would, like everyone else, like to get some positive feedback". [Sheriff]

4.20 While recognising judicial independence, there was also some suggestion among those interviewed that some initial bail decisions may be influenced by anxieties about the likelihood of appeals, such that some members of the judiciary will support Crown decisions in order to avoid any later conflict:

"I think also, some of my colleagues who are not comfortable [with bail] simply follow the Crown every time. If the Crown oppose bail, they will refuse it". [Sheriff]

4.21 Procurators Fiscal were of the view that the number of bail appeals had not varied significantly since the reforms were introduced, and that appeal was often down to the defence agent rather than any changes to the bail process:

"You do get the agents who appeal everything regardless of whether their clients really want them to…there is nothing that makes me think that there's a lot more or a lot less". [Procurator Fiscal]

Summary

4.22 Qualitative data shows some difference in views among the judiciary and defence agents with regards to who is providing the greatest role in offering ordinary language explanations to accused. Both parties do seem to agree, however, that despite attempts to provide greater detail, and to achieve greater transparency, this may not be having the desired effect on improved offender compliance.

4.23 Neither the quantitative nor qualitative data show that there has been any real change in the number or outcome of bail appeals in the period since the reforms. Although it seems that bail appeal reports are a welcomed addition to the system among members of the judiciary, there is a desire for greater feedback to be provided to members of the judiciary on whether their bail decisions have been upheld.

5 VIEWS OF VICTIMS AND THE ACCUSED

5.1 As part of the evaluation, a small number of accused and victims were invited to comment on the use of bail in cases with which they had been involved (see Appendix A for full methodology). This was considered to be essential since the reforms to bail would only have an impact if the changes were perceived and felt in real terms by the accused. The reforms were intended to directly impact on the behaviours of accused, specifically to ensure that they had a greater understanding of the stipulations of bail and to decrease breach rates.

5.2 Although a separate evaluation of the experiences of victims was carried out for SJR as a whole, it did not cover victims of crime in solemn bail cases, and so this evaluation sought to capture their views to explore how they perceived the reforms to bail.

5.3 Recognising that the samples were small (see Appendix A), the views presented here nonetheless provide a system user perspective that is missing from the data gleaned from criminal justice professionals. The data covers the views of solemn victims only and a fuller account of victims, witnesses and general public perceptions of the summary justice system overall can be found in the separate SJR evaluation report which focussed on these groups[15]. It is important to stress that, although the focus of this evaluation was bail, some comments about understanding of the wider summary justice system were also presented, and so are included here for context.

Understanding Bail Orders

5.4 Almost all accused remembered that they were first told about their bail order in the court. A number of accused said that they could not remember exactly what the Sheriff had said, but that this was explained further by their defence agent out of the courtroom.

5.5 Victims and supporters of victims varied in how they found out that the accused in their case had been given bail. These included a phone call by the police; seeing the accused in the street; and hearing by word of mouth that the accused had been given bail. Those who were telephoned by the police were grateful for being kept updated, while those who heard by other means were unhappy that they were not informed sooner in order to prepare themselves:

"I would liked to have heard sooner so I could have worked out how to keep away from them". [Victim]

"I wanted to know that they were released on bail so I could have looked out for them". [Victim]

5.6 Again, this reflects data from the victims, witnesses and general public perceptions evaluations, where interviewees for the most part, felt uninformed

[15] Available at http://www.scotland.gov.uk/Resource/0038/00386764.pdf

of the progress or outcome of a case. This is something that interviewees from both evaluations considered could be improved upon, though was not something that the bail or SJR reforms sought to address.

5.7 All accused stated that they understood the reason for the bail decision, and the conditions that were applied, and they felt that no further information was required. Additionally it was made clear to accused what the consequences of breaching bail would be, with most citing another appearance at court or being remanded as the most likely outcomes. Several accused stated that they had been through the court system several times and so were well aware of the process:

"I've had so many bails, I know the conditions like the back of my hand". [Accused]

"I know them [the standard conditions] off by heart by now". [Accused]

5.8 The overwhelming majority of accused thought that it was right for them to be granted bail, primarily because they were aware that the alternative was being remanded until trial:

"Of course it was right, I wanted bail, I would have been given the jail otherwise". [Accused]

"I would have got remanded if I didn't get bail". [Accused]

5.9 While most accused who were surveyed generally understood why they had received a bail order, those who were less habitual offenders commented that they found the system as whole, including the explanation of bail and its conditions, difficult to understand and often had to rely heavily on their defence agent to explain where they were supposed to go and what they were supposed to do and when (both at court and after their court appearance once on bail). In these cases, accused stated that while they may not have understood what the Sheriff said to them, their defence agent explained it to them afterwards to ensure they understood. First time accused stated:

"I couldn't hear what he [the Sheriff] said but it didn't matter because what I did hear, I didn't understand…but I was too scared to say. My solicitor explained it all anyway". [Accused]

5.10 This supported views expressed by defence agents and Procurators Fiscal who felt that, in some instances, bail could be made clearer by the judiciary, some of whom assume the accused in the dock has been through the process before and will therefore understand what they are being told, and it was down to defence agents to further explain the terms of the bail to their clients.

5.11 Whilst defence agents were not unwilling to provide this additional support, and recognised their responsibilities to do so, there was some suggestion from accused and defence agents that the level of information still being sought by accused after their court appearance was quite notable. This often meant that defence agents were having to build in additional time for meetings

with clients. Given that the statutory responsibility sits with the judiciary to provide explanations regarding bail and bail conditions, and that the judiciary reported that such explanations were being given, it perhaps suggests a mismatch in what is deemed to be 'plain English' and understandable between judiciary and accused. That said, it was also recognised that, for some, even greater clarity in the explanations would not necessarily result in all accused paying attention, understanding or remembering explanations given in court and thus the demand would still be placed on defence agents.

Special Conditions

5.12 Around half of the accused interviewed had special conditions attached to their bail. Of these, the most frequently cited conditions included not being allowed to go into a specific area, street or shop and not being allowed to contact a specific person. A handful of accused also had a curfew attached to their bail.

5.13 Generally victims interviewed were unaware if the accused had been released on bail with any special conditions. Those who stated that they had been contacted (either by the police or a relevant victim and witness support, information or advice organisation) were told that there was a condition that the accused must not approach them, while the other victims interviewed only thought that this *may* have been a condition. It is important to note that Victim Information and Advice (VIA) - the Crown Office and Procurators Fiscal information service for witnesses and victims deemed vulnerable – does proactively provide information and advice to vulnerable victims. This may include information about whether an accused has been released on bail, as well as updates about the outcome of court diets, but only after the accused has pled not guilty[16].

5.14 There was a feeling among victims that attaching special conditions was more beneficial than having only standard conditions, although some victims were dubious as to whether the accused would pay any attention to or have any respect for the special conditions. Comments included:

"He [the accused] came straight round to my house so he ignored that he wasn't supposed to contact me. It did no good". [Victim]

"I saw them on the street but it [the special condition] was better than not having one at all. That might be why they [the accused] didn't come up to me". [Victim]

5.15 At the time of their release on bail, when the accused accepted their special conditions, a number of them highlighted that there were conditions that they thought they would struggle to keep to. In particular, with reference to not being able to go into a specific area or street, accused said that they found

[16] The exception being custody cases where vulnerable victims are updated on the outcome if the accused pleads guilty. Custody cases are those where a person who has been arrested is held in a police cell or on remand in prison ahead of trial or sentencing.

this difficult because a family member/friend lived in the relevant street, or because a local shop was in this street.

5.16 With reference to not being allowed to contact a specific person, this was mentioned to be difficult by accused if custody and care of children was involved, or if the accused and the named person lived in the same area and were likely to 'bump into each other'.

5.17 Curfews were cited to be difficult as accused felt it was 'impossible' to be in their home from 7pm to 7am. One accused stated:

"I breached my bail conditions because I just couldn't keep to the curfew. It's too difficult to do, there should be some leeway". [Accused]

"You can't stick to them. There's just no way you can be in by 7(pm) every night". [Accused]

5.18 In some of these instances, accused stated that they telephoned the police to inform them that they would be leaving their home due to special circumstances, however, they were then charged with breach of bail regardless. Additionally, one accused said that they had to give up a part-time job because of their curfew and found this unfair (although it should be noted that being on remand would have had the same implications).

5.19 Despite concerns about being able to comply with their bail conditions, none of these accused explained their concern to anyone, except some who spoke to their defence agent. These accused stated this was because they felt there was *"no room for negotiation"* with reference to the conditions the Sheriff attached, and they felt that if they did not accept the conditions, bail would not be granted. In such cases, they accepted the conditions knowing that they would not comply with them.

5.20 All victims stated that they understood why the accused had been given bail. Victims generally stated that they would have preferred that the accused was remanded. However, most also noted that they realised this was neither feasible nor fair in response to the crime committed.

5.21 With this in mind, it can be concluded that accused generally found some conditions (e.g. curfew) more challenging to comply with than other conditions (such as not to approach a particular person). It was with regard to this condition that accused felt they were more likely to breach their order.

Breach of Bail

5.22 Around three quarters of accused interviewed stated that they managed to keep to their bail order/special conditions of their bail. Self-reported compliance by accused was mostly in cases where there were only standard conditions applied to the bail order. A number of accused who had special conditions attached stated that they had found it challenging to comply with their conditions and, as a result, had a breach marked against them.

5.23 The most frequently cited reason for breaching bail was that the accused was charged with another offence whilst on bail. Other reasons included that the accused did not keep to the special conditions attached and, for example, broke their curfew, approached the victim, or entered the area they were not allowed to enter. A handful of accused stated that they had also breached their bail order by failing to appear at court.

5.24 All accused stated that they felt that breach of bail was treated quite or very seriously. Many were aware that breaching their bail conditions would most likely mean that they would be remanded in custody. It was felt that failure to appear was treated very seriously, and most accused who were surveyed knew that this would more than likely mean another charge against them.

5.25 Some accused felt that how seriously breach of bail was treated depended on the Sheriff who was sitting on that particular day, and also on the seriousness of the breach, for example, if breach was because of being charged with a serious offence.

5.26 Such views were similar to those of the judiciary and defence agents who also expressed the view that decision making varied among members of the judiciary.

Bail System

5.27 Opinion was divided on whether accused perceived the bail system to be tough. For those who did, they stated that this generally made them more likely to attend court when they were supposed to. Additionally, those on special conditions stated that they found it to be challenging and those with a curfew were more likely to say that they found the bail system to be tough in comparison to accused on standard conditions, or to those who had received numerous bail orders.

5.28 In fact, most of those accused who had several bail orders in the past stated that they did not consider the bail system to be particularly tough, especially in cases where they breached their bail condition and were given another bail order (for less serious offences). One accused stated:

"I breached my bail and was given another bail. I was lucky that time but I've been out on hundreds of bails anyway, so no, it's not tough". [Accused]

5.29 Therefore, for the most part, accused were aware of the severity with which breach of bail was treated and considered this to be important in their decision not to breach their order. This was mostly the case for those who were not repeat offenders. For others, although they were aware this was the case, a stiff penalty for breach of bail did not seem to deter them. These accused also considered themselves to be part of the group known as 'frequent offenders' being *"in and out of this place all the time"*.

5.30 Knowledge was again mixed among victims as to whether they knew if the accused had broken their bail order and conditions. For those who stated that

the accused had not breached their bail, most felt this was because they had taken the order seriously, perhaps because they knew the alternative was prison. For those who stated that the accused breached their order, they felt this was because of the lack of respect the accused had for the victim and for the justice system more generally. These victims stated that breach should be dealt with by imprisonment or at least another appearance in court and a sentence for this breach.

Summary

5.31 While most accused who were surveyed generally understood why they had received a bail order, those who were less habitual offenders commented that they found the system as whole, including the explanation of bail and its conditions, difficult to understand.

5.32 Accused seemed to find some conditions (e.g. curfews) challenging to comply with. While defence agents and Procurators Fiscal seemed to suggest that failure to comply was linked to lack of the discipline and commitment to comply with the order, accused suggested that in some cases it was for more practical reasons.

5.33 For the most part, accused were aware of the severity with which breach of bail was treated and considered this to be important in their decision not to breach their order. This was mostly the case for those who were not repeat offenders. Repeat offenders were also aware of the gravity of breaching bail conditions but some advised that this was less likely to deter them. Alternative strategies are perhaps required for persistent offenders.

6 IMPACT ON WORKLOADS AND OVERLAPS WITH WIDER SJR

6.1 Although the reforms to bail were not a part of the summary justice reform package as a whole, it was expected that their introduction, at the same time as SJR, may impact on SJR to the extent that bail is a core part of the summary justice process.

6.2 This chapter sets out some of the ways in which reforms to bail were perceived by those interviewed to have impacted on the wider programme of SJR as well as initially exploring the impact of the reforms to bail on professionals' workloads more generally.

Impact on Workloads

6.3 For the police, the reforms to bail were seen to have had negligible impact on their operational role and most commented that they had been more directly affected by changes to undertakings. Police did comment that they welcomed the opportunity to play a greater role in decision making regarding bail, by providing more detailed reports on the accused to the court ahead of court hearings.

6.4 Where police did provide comments on changes brought about by bail reforms, these were most often linked to the changes in conditions attached to bail. Some police officers considered that the conditions that were being imposed on accused released on bail were tougher and more diverse compared to pre-reform. Other police officers commented that bail would appear to be more structured, for example, with more conditions being imposed making it more restrictive for offenders.

6.5 Similarly, for Procurators Fiscal, the reforms were not seen to have made an impact on workload with regard to bail, with Procurators Fiscal following the same processes and procedures as pre-reform. The only way Procurators Fiscal interviewed felt that their workload had increased was assessing the additional form the police fill in with regard to the possibility of releasing an accused on a bail order. While not overly time consuming, and not a direct result of the reforms, this is another form that Procurators Fiscal have to take into account when coming to a view on whether they oppose the release of the accused on bail (albeit the final decision still lies with the judiciary).

6.6 Among Sheriffs and Justices of the Peace (JPs), only a few felt that there had been any significant changes to their practices, either in respect of decisions to grant bail or to provide the obligatory ordinary language explanations that are required.

6.7 On orders granted, some Sheriffs suggested that the reforms were influencing practice in the court, although not necessarily in a positive direction. Indeed, a view was asserted that bail was perhaps being used inappropriately to the detriment of summary justice and the wider SJR policy objective of more effective court hearings, in situations where the accused could simply have been released without bail:

"The heart of it is to use bail sparingly and tactically and proportionately, no more than necessary. Otherwise, you are creating a climate in which people will inevitably breach bail but not necessarily in a way that it is a danger to the public. And therefore, we are creating a mountain of rubbish really, or poor cases, that are clogging up the court, and preventing the authorities from dealing with the real criminals". [Sheriff]

6.8 On practice in court, Procurators Fiscal noted that post-reform, more Sheriffs were asking Procurators Fiscal to explain further, or to clarify, their reasons for opposing bail, which many noted was the main difference in the courtroom:

"We would always give the court as much information as possible and refer to reports, etc. so we don't do anything differently in court really, no". [Procurator Fiscal]

"We would have always addressed the questions of bail prior to the changes…the criteria are the same things that we may have opposed bail on before the reforms…the only exception may be when the reforms first came in and we were asked by Sheriffs to justify our decision to oppose bail a lot more, that's died down a bit now". [Procurator Fiscal]

6.9 Attitudes were expressed by several stakeholders that COPFS had hardened their attitude to bail post-reform such that more requests to refuse bail were being heard in court. This view was not shared by Procurators Fiscal who stated that they followed the guidelines in terms of supporting or opposing bail. In addition, Procurators Fiscal noted that they have on occasion not opposed the application for bail, only for it to be refused by the Sheriff:

"One wonders when a Sheriff refuses bail when we have not opposed it because they are not in receipt of the same papers that we have stating the history of the person in question. They are independent, I'm not saying that's right or wrong, it was just something we have to get used to". [Procurator Fiscal]

6.10 The Criminal Proceedings etc. (Reform) (Scotland) Act 2007 sets out that bail is to be granted unless there is a good reason for refusing. This presumption in favour of bail is regarded as necessary to fulfil European Convention of Human Rights responsibilities. The grounds for determining whether there is a good reason for refusal are also set out in the Act.

6.11 The judiciary, Procurators Fiscal and defence agents acknowledged that there was still some considerable variation in bail decision making across the country:

"Some Sheriffs are tougher on people who have been out on bail several times, they would remand them even when we don't oppose bail, but that's very Sheriff dependent". [Procurator Fiscal]

"It's a question of risk assessment, training, confidence. I see wide disparities among colleagues". [Sheriff]

6.12 Domestic violence cases in particular were considered by defence agents to be treated very differently between jurisdictions with a lot of use of discretion by Sheriffs despite national guidelines.

6.13 Perceptions of special conditions and their utility also seemed to vary somewhat between police and the judiciary. While both police and the judiciary recognised the potential value of special conditions, the police were more likely to express views that they provided a clear operational framework in which to police accused. For the police, the use of special conditions, even where there may be an expectation that they may be breached, was still functional in allowing problematic behaviour to be identified and controlled. In contrast, some members of the judiciary perceived that accused may be being policed overzealously in some cases and put forward views that a more flexible approach to policing some special conditions may be required, to allow discretion in some cases. Both groups of interviewees did agree, however, that special conditions must be tailored to the offender.

6.14 It is interesting to note that some police expressed views that they should not get 'too involved' in understanding bail, and that the judiciary perhaps felt that police have a different understanding of bail which was leading to unnecessary re-arrests. This was considered to have improved slightly due to police being able to fill in a recommendation form to be passed to Procurators Fiscal stating whether they felt the accused should be released on bail or not. Police officers welcomed this as they often deal with the accused on a one to one basis and felt that they have a 'closer relationship' and 'insider knowledge' to better judge the likelihood of conforming to a bail order if imposed. This is where inter-agency working was seen to be working well to those involved in the process.

Fair to Victims, Witnesses and the Accused

6.15 Although there was little dispute that bail orders were being granted appropriately, or in a way that was fair to accused, there was some suggestion among professional stakeholders that a large proportion of accused awarded bail orders simply failed to understand the explanations given or, when they did understand the explanations, were not motivated to comply due to wider personal and social challenges:

"I think they understand it…but a very high percentage of people going through the court are either of very low intelligence, have got psychiatric problems, addictions problems, which means that they don't think past the next five minutes. So, if you tell them that "If you breach these bails conditions, you're getting shot", they don't think about it. They don't have that thought process." [Defence Agent]

6.16 It was suggested by defence agents that nothing further could be done by the judiciary in this regard, but that this may be a wider system issue still to be addressed.

6.17 Interestingly, the greater role of the police in providing information to support decisions regarding bail was viewed by one officer as contributing to one of the wider overarching objectives of SJR to be fair to victims, insofar as the police may now be in a better position to inform Sheriffs and JPs about consequences/impacts of incidents on victims as part of their reports:

"I mean officers are now thinking about bail whereas they never did before and we will put in recommendations that the accused be granted bail on certain conditions which I think is something that the officers never thought of before. So it is helping them think about the victim rather than just the process." [Police]

6.18 Procurators Fiscal interviewed were of the view that, as the bail procedures are set out in a more standardised way post-reform, this brings about fairness to all those involved in the justice system, with bail decisions based on evidence and justified in an open courtroom. In this way, the specific policy objective of increased transparency and consistency that applied to bail may have contributed to the wider SJR objective of a system that is perceived as fair to all those involved.

Effective in Deterring, Punishing, and Helping to Rehabilitate Offenders

6.19 Again, although the bail reforms did not specifically attempt to improve system effectiveness, many of the accused interviewed as part of this evaluation commented that they had been given several bail orders in the past and were still appearing back at court again, which may suggest that reforms to bail have not necessarily contributed to the SJR intended outcome of reducing reoffending. This view was supported when speaking with victims who felt that the system could not be effective when so many re-offenders are *"let out on bail."*

6.20 This reflected interviews with professionals who considered that accused take bail orders no more seriously at present than they did pre-reform. Police in particular noted the high numbers of people they were charging with offences who already had outstanding bail orders.

6.21 Overall, qualitative evidence from the evaluation seems to suggest that bail orders are not being taken any more seriously by accused post-reform. With a core of accused receiving two or more bail orders in the course of a year (around 1 in 4) and with breach rates increasing, this suggests that reforms are not necessarily contributing to system effectiveness in deterring, punishing and helping to rehabilitate offenders.

Efficient in the Use of Time and Resources

6.22 One of the issues emerging from this evaluation is that, while it was always known that the time required in court for Sheriffs to offer a full explanation of the bail order and conditions would be time consuming, the actual time was even greater than originally anticipated among those interviewed. Sheriffs and defence agents alike commented that it can be very time consuming, especially if there are special conditions attached. This said, it was accepted

that it was necessary as part of the legislation and that it was valuable in cases where the accused heard and understood what was expected of them:

"It's putting Sheriffs in a very difficult position because…it's taking forever to explain all the conditions and all the add ons, and the accused will just say 'Aye' cause they know that they're getting out of the jail. The drive to explain things almost has the opposite effect because it just confuses things..." [Defence Agent]

6.23 More generally, all interviewees (professional stakeholders as well as victims and witnesses) felt that there were often delays in the summary justice system, although equated these more to the system overall rather than the reforms to bail specifically.

Quick and Simple in Delivery

6.24 Bail reforms did not intend to improve either the speed or simplicity of the system, other than in the provision of ordinary language explanation to accused (as discussed above). Overall, interviews revealed no suggestions for how the process of bail could be quicker in delivery, other than removing the need for lengthy explanations of special conditions during court time. Overall, therefore, it seems that the bail process, in itself, is not negatively impacting on the objectives of SJR.

Meeting the Intended Outcomes

6.25 In addition to the overarching objectives, a number of specific intended outcomes were also set out for SJR (see Chapter 1). One of the intended outcomes of SJR was improved case handling, including more effective court hearings. While court hearings may have become more effective post-reform interviewees considered that there was still room for improvement. Professional interviewees expressed the view that bail and bail conditions could be explained more clearly to accused and to victims, and interviewees considered that even more could be done in court to ensure the accused understand their conditions of bail. Having said that, some interviewees were of the view that if an accused is a habitual offender, no amount of explaining will change their actions and that something else would have to be done to tackle this "don't care" attitude to the criminal justice system.

6.26 Furthermore, qualitative data from the evaluation suggests that one outcome of the reforms is that more work is coming to court due to breach of special bail conditions. Many professionals commented that they perceived an increase in cases coming to court and it was suggested that this increase was linked to an increase in the use of special conditions. Whilst it not suggested that this should be a basis for reducing the use of special conditions, it does perhaps suggest that there is a need to ensure that special conditions are always appropriate for individual cases and used as a proportionate response. The main purpose of special conditions, to provide a clear framework in which accused can act on liberation and to protect the public, victims and witnesses must, of course, remain central to any consideration of their application.

7 COST EXERCISE

Introduction

7.1 The changes to bail were not intended to lead to savings and, indeed, it was envisaged that they would either be cost neutral or would incur costs. In order to assess the monetary impacts of the reforms to bail, a separate cost exercise was built into the evaluation. The evaluation had the specific remit of exploring the likely impact of the reforms to summary bail in monetary terms for breach of bail and, in particular, failure to appear in summary cases.

7.2 While increasing the transparency and consistency of bail decisions and the provision of ordinary language explanations to accused may contribute to reduced breach rates, in themselves they do not offer any direct financial benefits.

7.3 At the outset a cost-benefit type approach was preferred where the benefits could be quantified and monetised and then compared against the monetised increased costs associated with the reforms. As the research progressed, however, it became clear that there was a lack of reliable and available data to allow monetised values to be assigned to the benefits identified or, indeed, to produce an estimate of the costs associated with the reforms. This meant that a full economic analysis could not be done.

7.4 As a result, the cost exercise instead had to focus on identifying and summarising the workloads associated with the reforms to bail, and in particular the breach of bail, for each of the main agencies involved (ACPOS, COPFS, SCS, SPS and the police). Costs associated with the defence were also considered.

Main Costs Associated with Bail

7.5 The main roles of each agency were considered to be largely unchanged post-reform, with the main activity being as follows:

7.6 For **COPFS**, attendance of Procurators Fiscal at preliminary court hearings where bail is granted, and attendance at subsequent court hearings for breach of bail hearings which may not have been required had the accused been remanded in custody. In both scenarios, background preparatory work is required to determine if the Crown will oppose bail or not. These costs will occur regardless of whether the accused is released on bail or remanded in custody and so the only additional cost for bail cases occurs if the accused breaches bail and this requires a separate attendance (and Crown preparation and attendance) at court. Additional costs may include VIA costs to allow staff to notify vulnerable victims and witnesses of bail decisions.

7.7 For the **SCS,** the main costs are use of court time for the scheduling of cases appearing on first calling, which occurs regardless of how the accused appears (i.e. from custody, on citation or by way of undertaking). Costs at preliminary hearings include payment of support staff (e.g. court clerks) and accommodation costs. Administration costs include the printing and issuing of

hard copies of bail orders to the accused at the time that the order is granted. Costs of subsequent court appearances by the accused for breach of bail represent additional costs which may not have occurred if the accused had been remanded in custody or released without bail. If the breach relates to commission of a further offence, the likelihood is that the case will end up in court in any event and so, as such, there is no absolute cost to SCS.

7.8 Failure to appear will only potentially impact on court time (and costs) to any significant extent in the case of trial diets. This is because if a trial is the only one scheduled for a day in court, and the accused fails to appear, this may result in wasted court time since no other business could be brought forward to fill that time (unlike pleading or intermediate diets). Interviews with professionals suggested that this would occur only infrequently since most courts will schedule a number of summary trials for each trial court on the basis that some will be 'churned' for a variety of reasons, including failure to appear by the accused. As a result, the main wastage occurs only in terms of time spent by both Procurators Fiscal and defence agents in preparing for the case that is adjourned and in preparing for a second time when it is recalled. In this scenario, SCS also incurs costs in terms of preparation for both callings in court.

7.9 Additional costs will also be incurred by the **judiciary** for churned cases and the other main costs to the judiciary will be bail appeal costs. The requirement of the judiciary to complete bail appeal *pro formas* to be sent to the High Court is something that is new post-reform and so the administration and staff time costs of this are also new. Some of the judiciary reported that they were spending additional time preparing supplementary notes or reports to be sent with bail appeals and so, although the volumes may not be large, the efforts made to ensure good quality reporting may mean that the time inputs are high per case.

7.10 For the **Scottish Prison Service** and their escort contractors the main costs of bail are in the transport of accused to court for their first (bail) hearing, where they have not been released by the police to be cited to attend or released on an undertaking. This cost is incurred regardless of whether the accused was subsequently released on bail or returned to custody. Additional costs would have to be borne by the SPS if the number of bail orders reduced significantly and were replaced by prison remands but the KPI data do not suggest that this is the case (nor should it be expected to be).

7.11 The main additional costs to the SPS will occur therefore in cases of refusal of bail by Sheriffs or JPs such that accused require to stay in custody on remand ahead of their trial, as well as in cases of breach where prison sentences may be imposed. Indeed, the KPI data show that there has been a slight increase in the use of custodial sentences for breach other than offending on bail or failure to appear in recent years, possibly as a result of the bail reforms, and so this cost would be borne by SPS.

7.12 For the **police** there is little operational involvement in the administration of bail, and the main costs associated are managing prisoners held in police custody ahead of bail hearings. Evidence from interviews suggests that the

police proactively police bail conditions, and so the costs here are likely to increase if bail orders and use of conditions also increase. The other main area of costs for police is the execution of failure to appear warrants for bail recipients. The KPI data shows that there has been no notable change in the number of warrants issued for failure to appear and so, again, there are likely to be no additional costs or savings from the reforms in this regard.

7.13 When speaking with **defence agents,** views were put forth that they may be spending considerable time speaking with accused to try and explain bail and bail conditions. Accepting that it is their duty to provide legal advice to clients, and to provide pre- and post-court appearance advice, the additional time spent repeating explanations of bail and bail conditions (even where this had already been provided by the judiciary) was nonetheless a resource intensive task. Some defence agents also perceived that custodial sentences or higher monetary penalties may be being used for breach of bail conditions. This may have contributed to an increase in the overall costs in legal aid terms of cases involving breach of bail.

Potential Savings

7.14 The reforms to bail sought to reduce breach of bail. Although the data from the evaluation suggests that FTA has reduced, overall, a reduction in breach has not been achieved. Had there been a reduction, potential savings would have been reduced custody costs for prison sentences given for breach, reduced costs of re-offending on bail, and reduced police and court costs associated with administering some breach of bail cases. The reduction in FTA does, however, potentially mean reduced costs in issuing warrants for failure to appear and some avoided churn, along with the associated costs.

7.15 Feedback from a small number of interviewees, primarily defence agents, also suggests that, in some cases, granting bail may not be necessary at all. Instead, there was some appetite for releasing some accused without bail, which may save money both in terms of initial administration costs, but also in terms of likely future breaches (since there would be no conditions to breach). These things are difficult to quantify but it seems that among some members of the judiciary and defence agents, it is deemed that some 'low risk' offenders could be removed from the cycle of bail and breach of bail if the conditions of their release were relaxed. This would clearly only be appropriate, however, in low risk cases.

Data Items Required for a Cost Analysis

In order to attach some tangible measure of costs and savings which may result from changes in the number of bail orders, appeals, FTAs and other breaches, it would be necessary to generate monetary figures for:

- custody costs (per day) to consider the additional expense of keeping an accused in custody instead of releasing them on bail as well as additional costs incurred for prison sentences given for breach of bail;

- costs of preparing and issuing bail orders in court (administration, accommodation and staff costs, excluding judicial costs) as well as administering new cases in court for breach of bail;
- legal aid costs for accused released on bail;
- costs of preparing bail appeal reports for submission to the High Court (staff time); and
- cost of preparing and issuing warrants for failure to appear whilst on bail.

7.16 Other items which would allow a greater picture of the overall costs and savings associated with bail may include an analysis of the financial penalties that are imposed on accused for breach which are actually recouped by the courts. A better understanding of levels of offending whilst on bail would also allow values to be placed on the likely cost of offending to society for people released on bail who may otherwise have been remanded in custody. It would be interesting to explore if these costs outweigh those of custody costs.

8 DISCUSSION

Main Findings

8.1 The main findings from the evaluation are that:

- The number of bail orders made by the Scottish courts has fallen year on year since 2006/07. This drop mirrors an overall drop in the numbers of persons proceeded against in court, which was also at its lowest in 2010/11 since 2002/03 (although it is not possible to say if the proportionate use of bail orders has changed over time).
- The majority of bail recipients receive only one bail order in a year, with one in four having been released on bail on more than two occasions in the same year. This percentage has remained relatively steady over time, confirming the static level, pre and post-reform, of the judiciary granting bail to those who have already previously been released on bail.
- In terms of special conditions attached to bail orders, while professional interviewees anecdotally reported an increase in the number of special conditions being granted, the quantitative data show that there has been little variance over the three year period post-reform. The lack of pre-reform data means it is not possible to say whether the reforms had any immediate impact and there is also a lack of data on the nature of special conditions awarded. Special conditions, however, are used in over half of bail orders imposed, highlighting the value the judiciary attach to being able to impose specific conditions in certain cases in addition to standard conditions of bail.
- With regard to special conditions, some accused and defence agents commented that these special conditions can be challenging to keep to, in particular, in relation to curfews. These interviewees also considered that these 'difficult' special conditions are more likely to be a reason for breach of bail conditions.
- The number of appeals has fluctuated over time, however, there has been no obvious increase post-reform. Qualitative data suggests that more feedback on the outcome of appeals would be welcomed by the judiciary who made bail decisions.
- The numbers of convictions for breach of bail overall have increased quite notably over time. Possible reasons for this include the use of special conditions, police and the courts having a 'tougher' attitude to breach, or a core of accused not taking bail seriously.
- When looking at breaches for FTA separately from other types of breach, however, it shows that there has been a drop in the numbers of people failing to appear at the intermediate, trial and sentencing diet since the reforms were implemented, which may again reflect the downward trend in numbers of people proceeded against.
- For those convicted of breach of bail, quantitative data show that most failures to appear are dealt with by way of a monetary penalty, with the average custodial sentence increasing slightly post-reform for those convicted of breach of bail other than for failure to appear or re-offending.
- Interviewees considered that ordinary language explanations and reasons behind bail decisions were more frequently given by the judiciary when imposing bail and special conditions than pre-reform, although some defence agents and members

of the judiciary questioned the value in spending time providing these explanations during court time.

- While habitual offenders fully understood the reasons for bail decisions and the consequences of breach, a number of accused reported that they did not fully understand what they were being told in court. Habitual offenders also seemed less daunted by the consequences of breaching bail.
- Overall, there seems to be no change in the consistency of bail decisions, with almost all professional groups, as well as accused suggesting that decisions do still vary among members of the judiciary.

Meeting the bail reform and wider SJR objectives

8.2 The first specific objective of this evaluation was to explore if there had been a **reduction in instances of breach of bail conditions (especially failure to appear) from pre-reform levels.** The numerical data analysis suggests that non-FTA breach rates have, in fact, increased post-reform. There was generally a perception among interviewees, particularly the police, that breach rates were still high. Furthermore, the use of special conditions may be a factor affecting breach rates, especially where such conditions are proactively policed. This was highlighted in particular by defence agents as well as some accused who were interviewed who found their conditions to be challenging to adhere to.

8.3 When looking solely at failure to appear, rates have dropped slightly over time. It may be that reduced instances of FTA are linked to the general downward trend in cases coming to court (although this same argument cannot be applied to breach rates overall, since they have increased). If there has been a proportional drop in FTA, it may be argued that this, in part, is contributing to the wider SJR objective of more effective court hearings. That said, from the data available, it is not possible to say if this can be directly attributed to the reforms to bail.

8.4 Data from the victims, witnesses and public perceptions evaluation also supports the idea that failure to appear and breach has not decreased post-reform. Staff from victim and witness support, information and advice organisations (for example, Victim Support Scotland) who were interviewed for that evaluation suggested that tactics are still often employed by accused to try and avoid prosecution, and that failure to appear (especially in cases with multiple accused), is a strategy that is still frequently used to try and avoid justice. These staff also suggested that accused are still often perceived by victims and witnesses as breaching bail conditions, with disregard for the consequences of doing so. The same sentiment was also expressed here.

8.5 The second objective of the evaluation was to explore **whether and to what extent bail decisions are more transparent and consistent post-reform.** Although there is no specific KPI data that can be used to measure progress against the objective, interviews with the judiciary suggest that they are accepting of the need to provide more detailed verbal explanations (if a little sceptical about their effectiveness) and to provide written reports regarding

bail decisions. There may be room, however, for further consistency in decision making.

8.6 The third specific objective for this evaluation was to explore whether the bail reforms had **ensured that accused are given an ordinary language explanation of the conditions of bail and the consequences of breaching bail.** Again, there is no quantitative data available with which to measure progress against this objective, but feedback from interviews does suggest that explanations are being given. That being said, interview data also shows that while some habitual offenders are clear on their conditions of bail, some first time offenders report not fully understanding their conditions of bail. This perhaps suggests that more can be done to improve the quality and clarity of these explanations.

8.7 For those who are convicted of breach of bail, quantitative data show that most failures to appear are dealt with by way of a monetary penalty. The average custodial sentence for breach of bail other than for failure to appear or re-offending has increased to a small degree post-reform, although the average values for all other penalties has remained largely unchanged. This is consistent with interview data, in particular with defence agents noticing a small increase in custodial sentences for offenders who breached their bail conditions. Interviews with the accused found that they mostly considered that breach of bail would be treated seriously, and would result in a custodial sentence.

Messages for Policy

8.8 Some defence agents are still undertaking a notable role in providing explanations to accused regarding their bail and bail conditions. Although this complements the work of the judiciary, and legal advice is a fundamental requirement of defence agents, the extent to which accused are relying on defence agents instead of listening to and understanding the judiciary in court may suggest that there is some scope to further improve the way in which explanations are communicated in court.

8.9 Many repeat attendees at court (including repeat offenders) are familiar with bail conditions and the consequences of breach, however, the current system of providing 'ordinary language' explanations in court does not seem to be offering the level of clarity required for those who have not had previous involvement in the court system. These accused welcomed the prospect of more targeted information, that would provide a greater understanding of the summary justice system and restrictions placed upon them, which may also make the system more efficient and effective. This information seems to be required on the system as a whole, not just on bail.

8.10 Although, procedurally, changes to the bail appeal system are welcomed as an improvement towards system transparency, it seems that there may be scope to further improve this specific component of the bail system by ensuring that members of the judiciary receive feedback on the quality and usefulness of the reports that they prepare. This feedback may allow for

further improvements to be made such that these reports operate to their maximum utility.

8.11 Police, the judiciary, Procurators Fiscal, defence agents and victims all shared a view that, for some, bail conditions would always be breached and would never be taken seriously (and, indeed, the rising in breach rates may suggest that bail conditions are not being taken seriously by some). This view was also reflected in some interviews with accused, primarily those who were repeat offenders. This suggests that there may be a need for different strategies for dealing with repeat offenders other than those already set out, since their flouting of the law may act to undermine public confidence in the system.

8.12 Finally, it seems that, in some cases, the use of special conditions attached to bail may not be working to improve system efficiencies. Special conditions are undoubtedly valuable in cases where the accused would otherwise have been remanded, affording a greater degree of control over the behaviour of the accused, as well as providing a valuable victim, witness and public protection and reassurance tool. In cases where special conditions are ignored or prove too challenging, however, it may be generating an increased court workload which might otherwise have been avoided had alternative decisions to bail been used (including custody, standard conditions, supervised bail, or being released without bail conditions to await citation). It seems, therefore, that the use of special conditions in some cases may be causing tension between efficiency and public protection. The overriding message appears to be that special conditions need to be carefully considered and be relevant and proportionate to the specific case.

Conclusion

8.13 In sum, the research has shown that the reforms to bail have not impacted greatly on its use. Although there have been fewer orders granted, that may reflect wider summary justice system changes as well as a drop in court workloads *per se*. Convictions for breach have increased overall, contrary to the aim of the reforms to reduce breach. This perhaps suggests that bail is not being taken seriously by accused, though it may also reflect a tougher approach to breach on the part of justice professionals. There has, however, been some reduction in failure to appear, though it is unclear if this numerical drop represents a proportional drop.

8.14 There is some scepticism regarding the effectiveness of special conditions, especially in light of a core of accused who continue to breach standard and/or special conditions regardless of the perceived consequences. The value of special conditions in appropriate cases is, however, still recognised. Treating breach of bail seriously is also prominent in the minds of the judiciary and appears to be occurring in practice. The provision of ordinary language explanations does appear to be taking place but does not appear to be translating into full understanding of bail and bail conditions among all accused and there may be scope for greater clarity here. The increased transparency in the bail appeals system is, however, being perceived as a system improvement among professionals. Overall, while almost all of those

interviewed viewed the current system of bail as fair, they questioned its effectiveness, especially in terms of deterring future breach amongst repeat offenders.

APPENDIX A – Methodology

Core Approach

The evaluation comprised a mixed methods approach that combined analysis of secondary data, collection of primary qualitative data from interviews and questionnaires, and a parallel cost-benefit analysis exercise. A staged approach was taken so that findings from early stages could inform the design and content of the later stages.

Secondary Data Analysis

Secondary data analysis focussed mainly on data from the Criminal Proceedings in Scottish Courts dataset as well as Key Performance Indicator (KPI) data from the Scottish Government's Criminal Justice Board Management Information System (CJBMIS) and the Monitoring Workbook. This included data from all partner agencies involved in the administration of bail including ACPOS, the SCS and COPFS.

Following initial analysis of the KPI data and discussions with key stakeholders, four case study areas were selected in which to concentrate the qualitative research. These were based upon Local Criminal Justice Board (LCJB) areas, and were Ayrshire, Central, Lothian and Borders, and Glasgow and Strathkelvin.

Interviews with Key Stakeholders

In-depth interviews were conducted with a range of key stakeholders. This included one interview with a Judge, 10 interviews with Sheriffs, six interviews with Justices of the Peace, nine interviews with Procurators Fiscal, nine interviews with defence agents, and 20 interviews with senior police officers (Inspectors and Sergeants).

As part of the evaluation, a survey was also undertaken with a small number of accused in four courts within case study areas who had previously been released on bail. Using this approach, a total of 27 accused were interviewed.

Unlike the summary justice reforms, the bail reforms also applied to solemn cases. As a result, attempts were made to canvass the views of a small number of victims who had been involved in (now closed) solemn cases where the accused had been given bail. Short one-to-one interviews were carried out with six victims, and the data was considered alongside data generated from victims involved in summary cases (reported separately as part of the SJR Victims, Witnesses and Public Perceptions evaluation).

Cost-benefit Analysis

A limited cost-benefit exercise was also attempted to assess whether the benefits i.e. savings generated by the reforms to bail, were sufficient to outweigh the corresponding burdens arising from the reforms. This encountered several challenges, not least being a lack of available data to inform its execution rendering a full economic analysis not possible. Instead, the evaluation considered the likely impact of the reforms on the workloads of the main criminal justice agencies involved

in the administration of bail, as well as the impacts on failure to appear and repeat rescheduling of cases which may all have associated costs to the system.

APPENDIX B

Table B.1 Number of Bail Orders Granted, 2002/03 to 2010/11, National

	02/03	03/04	04/05	05/06	06/07	07/08	08/09	09/10	10/11
N	46,795	50,155	52,820	56,233	62,283	60,355	52,592	47,921	46,221

Table B.2 Number of Persons Prosecuted, 2002/03 to 2010/11, National

	02/03	03/04	04/05	05/06	06/07	07/08	08/09	09/10	10/11
N	136,000	133,000	142,000	144,000	150,000	149,000	141,000	137,000	130,000

Table B.3 Bail Orders with and without Special Conditions, April 2008 to November 2010, National

	April 2008/ March 2009	April 2009/ March 2010	April 2010/ November 2010
Bail Orders with Special Conditions	28,456 *(40%)*	29,849 *(43%)*	19,621 *(43%)*
Bail Orders without Special Conditions	41,838 *(60%)*	40,124 *(57%)*	26,438 *(57%)*
All Orders	70,294	69,973	46,059

Note: Differences in the total number of bail orders shown in Tables B.1 and B.3 arise from differences in the data sources and associated differences in the way that data are captured and coded. Data in Tables B.1 and B.2 are taken from the Criminal Proceedings in Scottish Courts dataset, and data in Table B.3 comes from the Scottish Court Service.

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