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## Submission on Assessment of the Efficacy of Irish Bail Laws

to Lorcan Staines S.C.

18 July 2025

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# Assessment of the Efficacy of Irish Bail Laws

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## About the Law Society

The Law Society of Ireland (the **Law Society**) is the educational, representative and professional body of the solicitors' profession in Ireland. The Law Society delivers high-quality legal education and training and places significant emphasis on civic engagement, supporting local community initiatives and driving diversity and inclusion. The Law Society is committed to participating in discussion and advocacy on the administration of justice and the effective implementation of public policy.

The Law Society appreciates the opportunity to provide this submission regarding the assessment of efficacy of the Irish bail laws.

## Introduction

This submission will focus on specific issues arising from the experience of our members. While a brief summary of the legal and procedural context will be included it is not intended to serve as a detailed outline of the Irish bail laws landscape.

Irish bail laws are articulated around common law and also statutory provisions - Bail Act 1997 (as amended) (the **Act**). The bail laws seek to balance concurrent interests such as protection of the public interest (for example by holding an accused on remand) and the accused's constitutional right to liberty. The Irish bail framework is grounded on a presumption of bail. This presumption places Ireland, and common law systems, as an outlier in Europe where other states have no such entitlement to bail<sup>1</sup>.

The burden of proof of the objection to granting bail on the basis of the risk that an accused will either abscond, interfere with witnesses or commit a serious offence while on bail, rests on the prosecution. The associated risks will be assessed by the court on a balance of probabilities. It has been reported that in practice the legal representation of the applicant for bail will have to put forward evidence or reassurance to rebut the risks alleged by the prosecution.

The Law Society reaffirms the importance of preserving the current legal paradigm centred around the *prima facie* entitlement to bail and the necessity to avoid preventive detention.

It is noted that while the terms of reference for the present assessment of the efficacy of Irish bail laws concern bail for summary offences only, we note that Mr Staines S.C. had signalled an intention to request them to be extended to indictable offences. The Law Society supports this extension of the terms of reference. The difference between bail in summary or indictable matters is merely artificial as both types of offences are governed by the same bail regime. Most of the instances of bail granted for indictable offences are granted by the District Court before being extended by a higher court. Therefore, it makes considerable sense to not limit the review to the bail regime for summary offences only.

This submission is divided into four parts as follows:

- I. Granting bail,
- II. Enforcement of bail,

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<sup>1</sup> See [Fair Trials, "Assessing Flight Risk in pre-trial detention decision-making: a European Comparative study", June 2024](#), p. 36.

- III. Commission of offence while on bail, and
- IV. Conclusion and recommendations.

## I. Granting bail

*“A court’s jurisdiction to grant bail is as old as the common law itself”<sup>2</sup>*

Where the presumption is to remand an accused person on bail, this presumption can be rebutted by the court when the prosecution discharges the standard of proof for objections either set out in *AG v. O’Callaghan*<sup>3</sup> or listed in section 2(1) of the Act.

Bail can be granted by the District Court, the trial court or any of the superior courts. The High Court has the particularity of having various jurisdiction in matter of bail (appeal of District Court’s decision, residual jurisdiction for trial court, first instance etc.).

### *Bail granted by members of An Garda Síochána*

The power of An Garda Síochána to release an accused person on bail (called **station bail**) is not expressly restricted. Station bail can be granted by a member of An Garda Síochána to a person in-custody at a garda station<sup>4</sup> unless this person is charged with one or more of the offences listed in section 29 of the Criminal Procedure Act 1967.

When considering a request to grant station bail, there is no requirement on An Garda Síochána to take into consideration previous convictions (including conviction for an offence committed while on bail) or the fact that the accused person/applicant is already on bail in other matters. In practice, it has been observed that station bails are mainly granted in cases concerning summary offences and occasionally in indictable cases where the accused person has no previous convictions. The practice seems to be, in some parts of the country, to not grant station bail for domestic violence offences.

The option of station bail is a necessary relief valve to avoid overflowing of the court system with bail application. However, there might be some merit in introducing guidelines to constrict the granting of station bail for an accused person who has previously committed offences while on bail. In such a scenario the decision on the granting of bail would be at the discretion of the court.

### *Challenges encountered by a court in granting bail to an accused with previous conviction(s) for offence(s) committed while on bail*

When an accused person brings an application for bail it is open to An Garda Síochána to object to bail. The prosecution can raise two types of objections: *O’Callaghan* rules (flight risk and interference with witnesses) or section 2 of the Act (risk of commission of a serious offence). It is for the prosecution to prove the likelihood of the risk(s) alleged. The court will assess independently, on the balance of probabilities, whether the alleged risk is proven.

In order to reach their decision, the court must be provided with concrete evidence, including information in relation to previous convictions or past breaches of bail conditions. In practice,

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<sup>2</sup> See *Walsh on Criminal Procedure*, Dermot P.J. Walsh MRIA, 3<sup>rd</sup> edition, p.1827.

<sup>3</sup> *A.G. v. O’Callaghan* [1966] IR 501.

<sup>4</sup> Section 31(1) of the Criminal Procedure Act 1967.

the member of An Garda Síochána giving evidence will, where applicable, provide a list of the previous convictions to the judge. This list is based on data extracted from the PULSE records<sup>5</sup>. It is our understanding that PULSE does not include information such as whether the offence was committed on bail or whether that applicant had previously breached bail in another case. To obtain this information the Garda would need to check individual charges and bail to know if bail conditions have been breached.

Practitioners have indicated that, in practice, it is not uncommon for the list of previous convictions to be inaccurate. Further, we believe that unless the member giving evidence had an opportunity to contact colleagues directly involved in the other matter(s) being prosecuted against the applicant they would not necessarily know if an applicant who was already on bail in another case complies with the conditions imposed on them by the court.

More generally, practitioners' experience has been that there can be disparities in the approach adopted by members of the Gardaí regarding the issue of bail: bail packs (detailed written bail objections) are not always provided, or in some circumstances bail packs are provided without sufficient time for consideration. Practitioners have also noted that certain cases would give rise to objections to bail in one District but not in another. The absence of a consistent approach from the prosecution contributes to there being a lack of legal certainty and clarity.

In the context of the assessment of the efficacy of bail laws, the Law Society recommends that there be a formal requirement for an improvement in the quality of information provided to the court regarding previous convictions and compliance with bail conditions for accused already on bail in other matters or who have previously been granted bail prior to finalisation of a criminal matter. The need for the provision of full and precise information to the court is important in order for the court to be in a position to accurately assess the risk of the applicant to not comply with bail conditions. In parallel, the provision of guidelines or/and increased training to members of An Garda Síochána would likely assist in harmonising the approach of An Garda Síochána towards bail applications and would likely result in an improvement of the quality of the information that is provided to the court.

Once the objections to bail have been laid down by the prosecution, the applicant or their legal representative will normally make submissions to attempt to address and alleviate those concerns. There is a heavy burden on the legal representation to propose bail conditions or alternatives to detention. For example, it is not uncommon for solicitors to contact family members or friends to assess their willingness to consent to be a surety or to provide a bail address. This type of preparatory work that is carried out by the legal representative is particularly important in circumstances where the applicant has previously breached their bail. Upon committal, remand prisoners are granted a limited number of phone calls, this number should be increased to facilitate the making of calls that specifically relate to the securing a potential surety or a place of address and ultimately securing of bail.

Lastly in this section, we would like to re-state that systematic remand, even for accused persons with a history of committing offence while on bail, would be a breach of their entitlement to bail and their constitutional rights.

### *The use of electronic monitoring for bail*

Section 6B of the Act (inserted by the Criminal Justice Act 2007 and subsequently amended) provides a legal framework for the electronic monitoring of accused admitted to bail and charged with a serious offence. The section has not yet been commenced.

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<sup>5</sup> Electronic system used by An Garda Síochána to for recording data.

Under section 6B (as amended), an application for electronic monitoring can only be made by the prosecutor. The Law Society understands that the scope for making an application for electronic monitoring was narrowed following the recommendation made by the Oireachtas Committee on Justice during the pre-legislative scrutiny stage of the Criminal Justice Act 2017. The revised section 6B restricts the court from granting bail with electronic monitoring in circumstances where the prosecution has not applied for that particular condition.

In addition, the Act precludes an applicant for bail from being able to request electronic monitoring. The legislation seems to separate the adjudication on an application for bail from the addition of electronic monitoring to strengthen bail condition. It is the Law Society's view that the option of applying for electronic monitoring should be open to the accused. We would also suggest that the use of electronic monitoring should be available for the court to order on its own initiative. A limitation of excessive electronic monitoring would be ensured by a requirement for systematic consultation, by the court, with the prosecution.

It is concerning that since its enactment in 2007 section 6B of the Act is yet to be commenced. It is not currently possible to avail the possibility of electronic monitoring on bail despite the existence of a legal framework for the last 18 years.

The Law Society calls for section 6B to be commenced, and that appropriate resources be allocated for its effective implementation.

In a context where there are delays between the moment a person is charged with an offence and the finalisation of the case at first instance<sup>6</sup>, and the overcrowding of remand prison facilities<sup>7</sup>, the use of electronic monitoring for accused person on bail would help alleviate pressure on prison capacity.

### *Improving the reach of bail supervision outside of the jurisdiction*

The Criminal Justice (Mutual Recognition of Decisions on Supervision Measures) Act 2020 (the **2020 Act**) transposes the Council Framework Decision 2009/829/JHA<sup>8</sup> which allows for the recognition and execution in another European Union (**EU**) member state of a decision on supervision taken in Ireland. Commonly referred as the European Supervision Order (**ESO**), this instrument provides for the possibility for an accused on bail to reside outside the jurisdiction while remaining monitored on bail by the local authorities.

This procedure is scarcely used despite its advantage in cases where the risk of absconding is a concern to the court. The experience from practitioners strongly suggests that there is a lack of knowledge of the instrument and of the applicable procedures to be adhered to<sup>9</sup>. We are aware of one instance in which the High Court stated that the fact that the unknown delay for securing the recognition of the decision under the 2020 Act, and the lack of clarity around

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<sup>6</sup> The average disposition time of 1<sup>st</sup> instance criminal courts in Ireland in 2024 was 525 days. See [Courts Service Annual Report 2024](#).

<sup>7</sup> Occupancy level of the Irish prison was of 101% in 2023, 109% in 2024 and 116% on 27.06.2025 according to figures provided by the Irish Prison Service. Remand prisoners represent between 18 to 20% of the prison population. See <https://www.prisonstudies.org/country/ireland-republic>.

<sup>8</sup> [Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention](#).

<sup>9</sup> [Improving judicial assessment of flight risk - domestic research report, Irish Council for Civil Liberties and Fair Trials International](#), April 2024, p.19 confirming the lack of awareness around ESO.

the process to be followed, led them to refuse the application for supervision abroad (bail was ultimately granted)<sup>10</sup>.

It has been noted that the nationality remains an important deciding factor in refusing bail on the basis of the flight risk<sup>11</sup> despite the clear recommendation by the EU Commission that:

*“Member States should also ensure that pre-trial detention decisions are not discriminatory and are not automatically imposed on suspects and accused persons based on certain characteristics, such as foreign nationality”<sup>12</sup>.*

As an indication, foreign prisoners represented 14.6 % of the prison population in Ireland in 2023<sup>13</sup>.

Therefore, it is clear that it would be beneficial (at least in prison capacity terms) for the supervision on bail outside the jurisdiction to be availed of as an effective option. There is considerable scope to improve practitioner knowledge of the instrument and the associated practical procedures.

## **II. Enforcement of bail**

A breach of a bail condition does not automatically lead to an arrest or the revocation of bail. The entitlement to bail and presumption of innocence remain key principles in our justice system. In the application of these principles, any revocation of bail or granting and enforcement of an arrest warrant must be ordered by a judge following a formal application by the prosecution. Proof must be established by the prosecution that one or more of the bail conditions have been or will be imminently breached.

Absconding is the only breach of a bail condition that can directly lead to a new charge. Section 13(1) of the Bail Act 1997 provides that failure to appear in court, without a reasonable excuse, is an offence. In practice, failure to appear without a reasonable excuse does not always lead to a charge under section 13(1).

The violation of other bail conditions such as abiding by a curfew, residing at a specific address, not entering in contact with a witness or not appearing in a specific area can be grounds for revocation of bail. The sanction for an accused person breaching their bail conditions is thus, not to be charged with a separate offence, but their remand in custody.

The violation of bail condition does not need to have already happened to lead to an arrest. The court has a power to issue an arrest warrant when there is evidence put before them by a member of An Garda Síochána or a surety that the accused is about to breach any of the bail conditions of the recognisance.

Taking in consideration the various possibilities to sanction a potential or actual breach of bail conditions and the experiences reported by our members, the Law Society believes that, from an enforcement perspective, the bail laws as currently framed are aligned to the objectives.

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<sup>10</sup> *Crespo v DPP* (April 2024) (*ex tempore*).

<sup>11</sup> *ibid* p.21.

<sup>12</sup> [Commission Recommendation \(EU\) 2023/681 of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions](#), recital 23.

<sup>13</sup> <https://www.prisonstudies.org/country/ireland-republic>.

### III. Commission of offence while on bail

The current legislation penalises the commission of offence by an accused while on bail by considering it as being an aggravating factor, and provides for the imposition of a consecutive sentence.

Section 11(1) of the Criminal Justice Act 1984 (the **1984 Act**) provides that any sentence of imprisonment passed on a person for an offence committed while on bail should be consecutive to any sentence imposed on them for a previous offence. This provision departs from the situation where a second offence was not committed while bail, indeed, in this scenario, the custodial sentence can run concurrently.

Section 11(4) of the 1984 Act adds that where a court imposes a sentence for an offence committed while on bail the fact that the offence was committed while on bail should be treated as an aggravating factor. The sentence imposed for an offence committed while on bail will thus be higher than the sentence imposed in the absence of such factor.

The existence of this double mechanism seems appropriate in the view of the Law Society. The aggravation of the sentence and the fact that it be imposed concurrently provide a proportional punishment and deterrent.

The Law Society would urge caution if consideration were being given to the potential for proposing the introduction of a mandatory minimum sentence or a presumptive minimum term of imprisonment for offence committed while on bail. In respect of the constitutionality of mandatory or presumptive minimum sentences we would refer to the decisions of the Supreme Court in *Ellis v Minister for Justice*<sup>14</sup> and the High Court in *McManus v Minister for Justice*<sup>15</sup>. As described in *Walsh on Criminal Procedure*<sup>16</sup>:

*“While the legislature can determine the penalty to apply to all persons convicted of a particular offence, determining the appropriate sentence to apply to one (or a group) of those persons by reference to their circumstances (or the circumstances in which the offence was committed) is part of the administration of justice entrusted to the courts by the Constitution.”*

### IV. Conclusion and Recommendations

The Irish bail laws offer a unique entitlement to bail to an accused person which should be protected. While there is scope for certain aspects of the granting of bail to be improved, the enforcement procedures appear adequate to their aims.

In the context of the assessment being conducted by Mr. Staines S.C., the Law Society would like to suggest that the review consider the following Law Society recommendations:

1. Improve the quality of the information provided to the court concerning (a) any previous convictions of the accused applicant for any offence committed while on bail, and (b) compliance with current bail conditions imposed on the accused applicant for bail in other matters.

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<sup>14</sup> [2019] 3 IR 511 concerning mandatory minimum sentence.

<sup>15</sup> [2021] IEHC 385 concerning presumptive minimum sentence.

<sup>16</sup> *ibid*, p. 2457.

2. Promote the harmonisation of the approach to bail by members of An Garda Síochána to enhance legal certainty.
3. Consider reviewing the guidelines regarding the release of accused person on bail by members of An Garda Síochána where the accused had previously committed offences while on bail.
4. Consider providing extended access to controlled land-line telecommunication to the accused person to secure surety or bail person.
5. Commence section 6B of the Act (as inserted by Criminal Justice Act 2007 s.11) and secure the provision of adequate resources for its effective functioning.
6. Consider extending to the applicant the possibility to request electronic monitoring on bail, and consider empowering the court to order electronic monitoring of its own volition after consultation with the prosecution.
7. Encourage the greater use of the Criminal Justice (Mutual Recognition of Decisions on Supervision Measures) Act 2020, and provide clear information on the procedure to be followed by the practitioners and the court.

The Law Society appreciates the opportunity to provide this submission. The Law Society, in particular through its Criminal Law Committee and its Policy Department, remains available to assist Mr Staines S.C. in relation to any matter relating to his review of the efficacy of bail laws.

For further information on any aspect of this submission, please contact the Policy Department of the Law Society of Ireland at: [PolicyTeam@LawSociety.ie](mailto:PolicyTeam@LawSociety.ie)