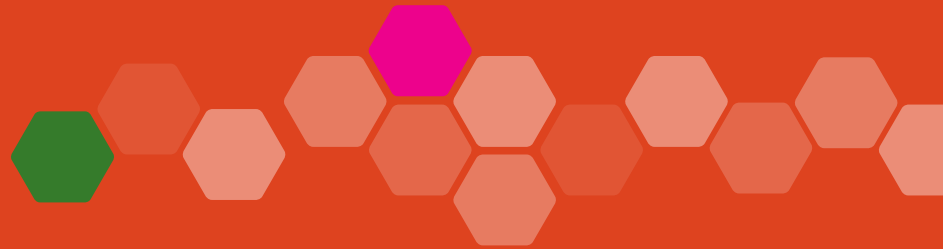




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Decision-Making on Bail and Remand in Scotland: Interim Findings Report



Crime and Justice



Decision-Making on Bail and Remand in Scotland:

Interim Findings Report

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Executive Summary

Introduction

In late 2019, the Scottish Government commissioned an independent research study into decision-making in relation to refusal of bail in Scotland. The overall aim of the research was to explore how decision-making works in practice, as well as to gather perceptions on bail options.

This report presents interim findings from the research. Specifically, it outlines the results of two online surveys - one conducted with Crown Office and Procurator Fiscal Service (COPFS) staff and one with currently serving members of the judiciary.

Methodology

Two separate online surveys were developed by an independent research team in collaboration with Scottish Government research and policy staff and other interested stakeholders. The research was staggered with the survey of COPFS staff taking place in Spring/Summer 2021 and the survey of judiciary taking place in late 2021 into early 2022. Both surveys were anonymous, and participation was voluntary.

A total of 64 COPFS staff took part and 31 members of the judiciary, including 24 Salaried Sheriffs, 5 Summary Sheriffs and 2 Senators. While the response rates for the two surveys were low, there was considerable detail and range in the feedback provided by those who did take part. There was also reasonable representation within the two samples in terms of professional experience and tenure. All sheriffdoms were also represented by at least one respondent to each survey.

The surveys included a mix of both open and closed questions. Tables and charts summarising the quantitative data were produced and qualitative data were analysed thematically to identify the main themes to emerge. All data were analysed at the aggregate level in order to uphold anonymity of individual respondents.

Key Findings - COPFS

Overall, feedback from COPFS staff working on both summary and solemn cases was fairly consistent, with similar factors identified as being the 'main' factors for opposing bail in relation to both sections 23C(1) and 23C(2) of the Criminal Procedure (Scotland) Act 1995. The other main findings include:

- the risk of the accused committing further offences if granted bail, along with evidence of previous breaches of bail, having committed the offence while on bail for another offence, the nature of any previous

convictions, and the seriousness of the offence were all flagged as key factors by the Crown in considering whether to oppose bail;

- respondents also highlighted the importance of protecting accusers, victims, witnesses and the general public when decisions are made to oppose;
- COPFS respondents reported that opposition to bail usually results from a combination of factors rather than as a result of just one ground;
- the most common special bail conditions requested included having no contact with named individuals (typically the accuser/victim or witnesses), having to stay away from specific locations, having a curfew, or having to sign on at a police station;
- awareness of bail supervision services was variable and bail supervision services were perceived as perhaps not being used to maximum effect in the justice system at present;
- the use of special bail conditions was considered to be particularly beneficial in domestic and sexual abuse cases; and
- supervised bail was seen as useful for younger accused persons and those who may need support to adhere to bail orders.

More general feedback from the Crown included systemic issues influencing decisions such as variation in practice around the use of police undertakings, a lack of time and resources to consider all the information available in a case, and a perceived lack of resourcing within social work services to offer greater capacity for supervised bail.

Key Findings - Judiciary

The judiciary who responded appeared to view past behaviour of the accused as the best predictor of future behaviour with previous analogous offending and breaches of previous orders of the court featuring strongly in decisions to refuse bail.

Grounds for refusing bail

- the various Section 23C grounds for refusing bail appear to be considered with similar frequency for both summary and solemn cases;
- the most frequently considered provision from Section 23C (1) in decisions to refuse bail in both summary and solemn cases was 'any substantial risk of the person committing further offences if granted bail';
- assessment of 'substantial risk' typically involves an assessment of previous convictions/criminal record, alongside previous compliance with bail orders and previous failures to appear;
- assessment of 'level of seriousness' typically involves reference to the level of violence used in the index offence, whether weapons were

used, the level or harm caused and wider impact of the offence on the general public;

- Section 23C (1) (d) appears to be used only rarely;
- the material considerations set out in Section 23C (2) of the Criminal Procedure (Scotland) Act 1995 which appear to feature most in judicial decision-making (for both summary and solemn cases) are those that relate to previously contravened bail orders or other court orders, whether the accused was subject to a bail order when the offences are alleged to have been committed and the nature of previous convictions;
- the age of Section 23D trigger convictions seems important in decisions to grant bail for those accused on violent/sexual/domestic abuse offences and drug trafficking offences (where there might otherwise be a presumption against bail); and
- Presumption Against Short Term Sentences (PASS) was perceived to have impacted to some degree on decisions made at the summary level, but not in solemn cases (where sentences are typically longer) although, for many, PASS simply reinforced existing practice around use of custody only where no alternatives are suitable.

Presumption in favour of bail

- a history or no/low risk offending as well as a history of compliance with bail are most likely to feature in decisions to grant bail alongside the Section 23B presumption in favour of bail;
- bail is also likely to be granted in cases where a custodial sentence would not be anticipated, if guilty; and
- there was very little evidence of age/gender of the accused influencing decisions, with caring responsibilities, employment and housing stability instead appearing to feature more in considerations.

Post-conviction bail

- roughly half of the sample noted the same considerations would feature in decisions to refuse bail both pre- and post- conviction; and
- there was some evidence that remand was more likely once the presumption of innocence was removed (post-conviction).

Input from justice partners

- most judicial decision makers reported that they were 'always' considerate of the views of the Crown and defence in assessing suitability of an accused for bail, but there were some reported limitations with the information provided by justice partners; and

- respondents were largely unassisted in their assessment of risk, and commented that professional risk assessments, especially in cases involving vulnerable accused, would be welcomed.

Bail options

- members of the judiciary appear to have greater awareness of and confidence in special bail conditions compared to supervised bail, with concerns that supervised bail services may be unable to meet demand if this was requested more frequently;
- there was reasonably strong support for alternatives to remand including electronic monitoring in particular, to assist with curfews and compliance with bail conditions; and
- perceived lack of resources (practical and financial) was seen as the single biggest barrier to greater use of alternatives to remand.

Reviews, appeals and other comments

- both the review and appeals process were seen to work well by the individual members of the judiciary who took part in this survey;
- COVID-19 was perceived to have impacted more on decision-making in solemn cases compared to summary cases;
- there may be merit in further exploring Crown guidance in relation to opposition of bail, especially as it relates to Section 23D, as well as more generally; and
- there may be merit in further research to explore how Section 23B is interpreted and applied, as it relates to remand (sometimes) being in the 'public interest'.

The judiciary survey findings suggest that Sheriffs and Senators seek to use remand only where absolutely necessary and minimising unnecessary and potentially damaging disruption to the lives of accused is a key factor in decisions (especially where the accused has caring responsibilities, stable housing/employment or is vulnerable).

Conclusions and Next Steps

Overall, respondents to both the COPFS and the judiciary survey highlighted that decisions were often complex and involved consideration of multiple factors, with decisions always made on a case-by-case basis, considering the factors most relevant to the personal circumstances of the accused.

The surveys provide valuable initial insight and learning around decisions to oppose and refuse bail and highlight a number of areas which may merit further qualitative exploration with key stakeholders in the next phase of the research.

Introduction

Background

In late 2019, the Scottish Government commissioned an independent research study into decision-making in relation to refusal of bail in Scotland. The overall aim of the research was to explore how decision-making works in practice, as well as to gather perceptions on bail options. The research was designed to cover the adult criminal justice system only and to focus on both solemn and summary criminal cases¹.

The research sought to assist the Scottish Government and other justice stakeholders to:

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

This report presents interim findings from the research. Specifically, it outlines the results of two online surveys - one conducted with Crown Office and Procurator Fiscal Service (COPFS) staff and one with members of the judiciary. The surveys were the first stage of the wider study, with subsequent stages requiring interviews with key justice stakeholders to gather qualitative feedback and add breadth and context to the survey data.

Legislative Context

The Criminal Procedure (Scotland) Act 1995² (the 1995 Act) provides that individuals accused of any criminal offence may be allowed to remain in the community pending trial on bail. Bail refers to a set of conditions imposed by the court with which the accused must comply. Section 22A (1) of the 1995 Act specifies that “the sheriff or, as the case may be, the judge shall, after giving that person and the prosecutor an opportunity to be heard, either admit or refuse to admit that person to bail.” However, there are circumstances in which a presumption in favour of refusal of bail operates relating to those accused of certain serious offences and these are set out in section 23D of the 1995 Act. In addition, while all offences are such that a person can be bailed, the 1995 Act sets out a number of grounds which,

¹ In Scotland, criminal cases are heard by a sheriff and a jury (solemn procedure) but can be heard by a sheriff alone (summary procedure) depending on the nature and seriousness of the alleged offence.

² <https://www.legislation.gov.uk/ukpga/1995/46/contents>

taken individually or collectively, may give reason to the court to justify a decision to refuse bail for an accused person in any given case.

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

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

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

The 2021 Programme for Government subsequently included a commitment to introduce legislation to change the way that imprisonment is used and it is against this backdrop that these interim findings are presented.

Methodology

Both surveys were developed by an independent research team in collaboration with Scottish Government research and policy staff and other interested stakeholders. Representatives from COPFS and the Scottish Courts and Tribunals Service (SCTS) were also involved in reviewing and testing surveys to ensure they were appropriate for the intended respondents. While design for both surveys began in February 2020, the COVID-19 pandemic created a significant delay in finalising this, both due to Scottish Government, COPFS and judiciary/SCTS priorities in dealing with the pandemic, and due to a pause on all research fieldwork within the sector.

The COVID-19 pandemic also meant that the research was staggered with the survey of COPFS staff taking place in Spring/Summer 2021 and the survey of judiciary taking place in late 2021 into early 2022.

The COPFS survey was designed to capture the views and experiences of COPFS staff on the use of bail in Scotland and on their decision-making processes when deciding whether or not to **oppose bail**. The questionnaire

sought information on the frequency with which various grounds for opposing bail were used as well as the types of factors that would be relevant, as per Sections 23C (1) and 23C (2) of the Criminal Procedure (Scotland) Act 1995. Feedback was also sought on the use of special bail conditions and supervised bail. Separate questions were included to cover both summary and solemn cases.

The COPFS survey invitation and link to the online questionnaire were advertised on COPFS's intranet to all legal staff to attract all those with the relevant experience. The survey was live for six weeks and responses were returned directly to the independent research team. All responses were submitted anonymously.

The judiciary survey focused on factors that may feature in decisions to **refuse bail**, again with a particular focus on Sections 23C (1) and 23C (2) of the Criminal Procedure (Scotland) Act 1995. In addition, members of the judiciary were asked about the frequency of use of Section 23D of the Act, as well as about their views and experiences in relation to the presumption against short term sentences (PASS), post conviction bail, input into decisions from partner organisations, the bail review and appeals processes and bail options. A short set of questions on COVID-19 was also included to allow discussion of the impact (or perceived impact) this may have had, if any, on the decision-making processes. Again, separate questions were included to cover summary and solemn cases.

An invitation inviting all currently serving Sheriffs and Senators was issued by SCTS staff working in each sheriffdom, and by the Lord President's office. Initial email invitations were staggered throughout October, November and December 2021, with reminder emails issued in each area at later dates.

Both the COPFS and judiciary surveys were designed to take no more than 30 minutes to complete and were anonymous, with no personal data being sought. Participation was voluntary. Paper copies of the questionnaires were available on request, but this option was not taken up by any respondent.

The surveys included a mix of both open and closed questions. Tables and charts summarising the quantitative data were produced and qualitative data were analysed thematically to identify the main themes to emerge, with verbatim quotes extracted to demonstrate the sentiments expressed. All data were analysed at the aggregate level in order to uphold anonymity of respondents.

Respondent Profiles

A total of 64 usable responses were received from prosecution solicitors employed by COPFS. This represents a 9% response rate, based on the number of legal staff employed by COPFS (n=685) at the time of the survey.

It should be noted, however, that not all of these staff would have been routinely involved in the marking of cases or have had relevant experience in making decisions related to bail or remand. This means that the 9% is likely to be an underestimate as the total number of eligible respondents would be less than 685 (the precise number, however, is not known).

A total of 31 valid responses were received to the judiciary survey, with responses from 24 Salaried Sheriffs, 5 Summary Sheriffs and 2 Senators. This represents a 19% response rate from Sheriffs but only a 6% response rate from Senators (i.e. 17% for the judiciary as a whole).

Of the 64 COPFS respondents, most (n=40, 62.5%) had worked for COPFS for 11 or more years, eight (12.5%) had worked for them between six and 10 years, and 16 (25%) for between one and five years. Among the judiciary who responded, there was also a reasonable spread in professional experience, with around a third having 6-10 years' experience (35%, n=11), a quarter having 11 or more years' experience (26%, n=8) and the same number having 1-5 years' experience (26%, n=8). Only four respondents said that they had less than one year of experience in their current primary appointment (13%).

Nearly half of all COPFS respondents (n=31, 49%) reported that they made decisions on both summary and solemn cases, while 28% (n=18) dealt only with solemn cases and 23% (n=15) dealt only with summary cases. All Sheriffs said that they worked on both Summary and Solemn cases in their current role.

All sheriffdoms were represented by at least one respondent in each survey (see Table 1 below).

Table 1: Distribution of respondents by Sheriffdom

Sheriffdom	COPFS N	COPFS %	Judiciary N	Judiciary %
Glasgow and Strathkelvin	11	17%	2	6%
Grampian, Highland and Islands	4	6%	4	13%
Lothian and Borders	10	16%	7	23%
North Strathclyde	6	9%	5	16%
South Strathclyde, Dumfries and Galloway	5	8%	3	10%
Tayside, Central and Fife	7	11%	9	29%
Multiple Sheriffdoms	6	9%	-	-
Scotland-wide	15	24%	-	-

Prefer not to say	-	-	1	3%
Total	64	100%	31	100%

Report Presentation and Research Caveats

While many of the questions asked across both surveys were similar in nature, they were necessarily tailored to accurately reflect the different roles fulfilled by each stakeholder group. Several questions were asked of the judiciary only, recognising that the Crown play a smaller overall role in the bail and remand decision-making process when compared to Sheriffs and Senators. Some questions were also only included in the Judiciary survey and not the COPFS survey on advice from the Crown, including questions relating to Section 23D of the legislation. In such cases, insight is only available from one viewpoint, resulting in some bias in the findings presented below. Questions which may have invited speculation about the decisions or intentions of justice counterparts were also avoided. Questions linked to COVID-19 were also excluded from the COPFS survey on the basis that the Lord Advocate's Guideline's clearly set out the Crown's operating position during the pandemic.

Similarly, the data presented below is largely descriptive rather than explanatory in nature. Again, additional context will be garnered from subsequent qualitative stages of the research, and this will include collection of data from other partners in the decision-making process, including defence agents, criminal justice social workers, police and others, to ensure that these initial findings can be contextualised and better understood.

Despite helpful support from COPFS and Scottish Courts and Tribunals Service staff in distributing the surveys, the response rates were lower than anticipated overall. This may have been due to a number of factors, including that both surveys ran in the period following significant COVID-19 interruptions across the justice system, which may have meant that courts, and members of the Crown and judiciary, were busier than they would usually have been (and had less time to dedicate to research activities). The judiciary survey was also administered at the same time as the Consultation on Bail and Release from Custody arrangements³, which may mean that some respondents opted to take part in either the survey or the consultation, rather than both. The judicial survey was also 'live' over the Christmas and New Year period, meaning that some staff may have been absent from work. Given the relatively small number of respondents, any percentages

³ [Bail and release from custody arrangements: consultation analysis - gov.scot \(www.gov.scot\)](https://www.gov.scot/bail-and-release-from-custody-arrangements-consultation-analysis)

presented are shown alongside the number of respondents who answered each question, to provide context.

While the small samples mean that the survey findings cannot be generalised too broadly, the qualitative nature of many of the questions included in the surveys, and the fact that detailed feedback was provided by those who did take part, means that the findings nonetheless provide a valuable insight into current bail and remand decision-making in Scottish courts. The remainder of this report sets out the findings from the surveys.

Opposition to and Refusal of Bail in Summary Cases

Key points:

In relation to Section 23C (1), the most commonly cited ground for opposition to bail by the Crown in summary cases was “any substantial risk of the person committing further offences if granted bail.” This was also cited as the most commonly cited ground for refusing bail by the judiciary.

The nature of the index offence and the accused’s history (either repeat offences or breaches of previous bail conditions) were also often considered by COPFS staff when opposing bail.

Factors considered by Sheriffs and Senators in determining risk include offence history, custodial history, bail history (including aggravators and failure to appear), nature of current offence and information from the Crown on witness interference and perverting the course of justice.

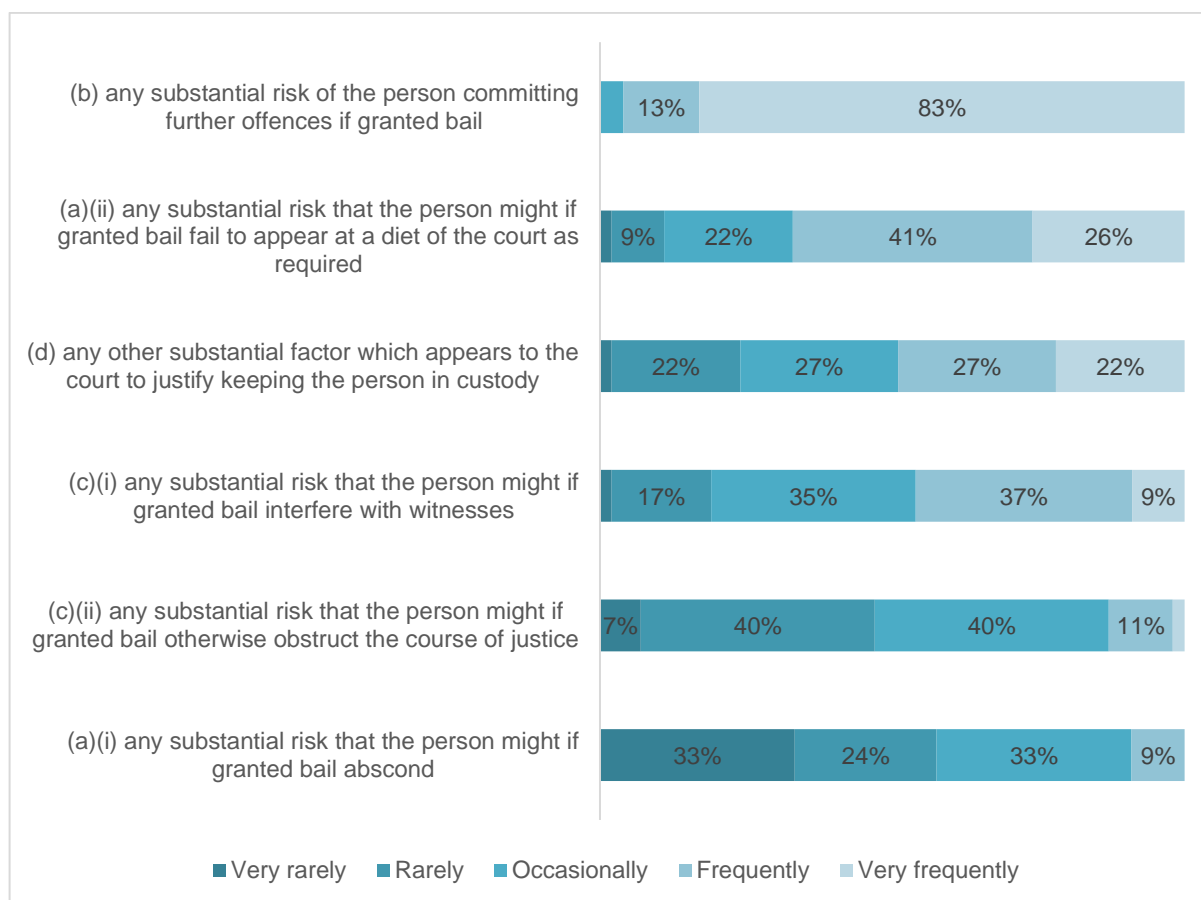
In relation to Section 23C (2), three grounds featured as being very common in informing decisions: previous breaches of bail or contravention of other court orders; whether the person was subject to a bail order when the offence(s) were alleged to have been committed; and the nature of any previous convictions.

Section 23C (1) of the Criminal Procedure (Scotland) Act 1995

COPFS respondents who indicated that they made decisions in relation to summary cases (n=46) were asked, with regard to the statutory provisions of Section 23C (1) of the Criminal Procedure (Scotland) Act 1995, to indicate how frequently each of the specified grounds appeared as the main feature in their decisions to **oppose bail in summary cases** (including cases in which there may be multiple grounds for opposition to bail).

The most commonly cited ground for opposition to bail in summary cases was ‘any substantial risk of the person committing further offences if granted bail’, with 96% of respondents citing that this featured either ‘very frequently’ or ‘frequently’ within their opposition decisions. Risk of failure to appear (s.23C(1)(a)(ii) was also cited as a main feature in decisions, with 67% of COPFS respondents citing that this featured either ‘very frequently’ or ‘frequently’ within their opposition decisions. The least cited ground for opposing bail was “any substantial risk that the person might if granted bail abscond”, with more than half of respondents (57%) saying that this ‘very rarely’ or ‘rarely’ impacted decisions (see Figure 1 below).

Figure 1: Frequency with which grounds from the statutory provisions of Section 23C (1) of the Criminal Procedure (Scotland) Act 1995, appear as the main feature in decisions to oppose bail in summary cases (n=46)

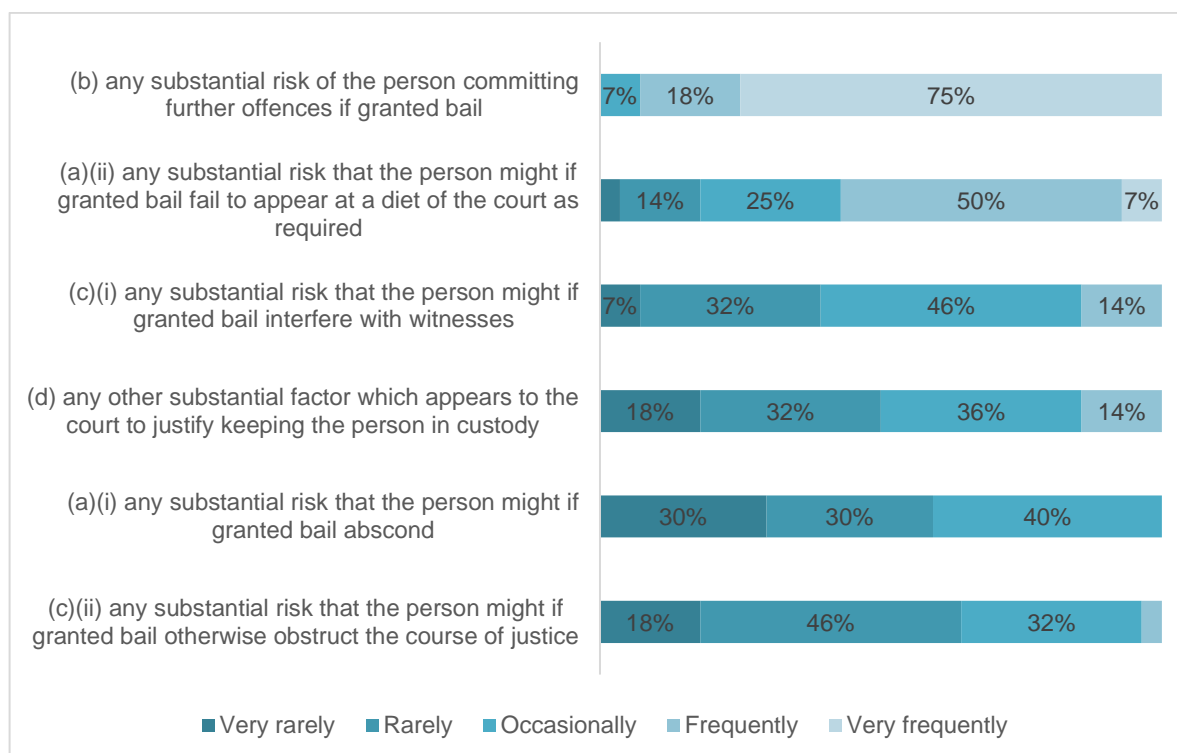


Similarly, having regard to the statutory provisions of Section 23C (1) of the Criminal Procedure (Scotland) Act 1995, judiciary respondents (n=28) were asked to indicate how frequently each of the grounds featured in their decisions to **refuse bail in summary cases**.

The most commonly cited ground for refusing bail in summary cases was ‘any substantial risk of the person committing further offences if granted bail’, with 93% of respondents citing that this featured either ‘very frequently’ or ‘frequently’ within their refusal decisions. Again, any substantial risk that the person might, if granted bail, fail to appear at a diet of the court as required was also reported to feature frequently in decisions, with just over half (57% of respondents) citing that this featured either ‘very frequently’ or ‘frequently’ within their refusal decisions (see Figure 2 below).

The least cited ground for refusing bail among the judiciary was ‘any substantial risk that the person might if granted bail otherwise obstruct the course of justice’ with more than half of respondents (64%) saying that this ‘very rarely’ or ‘rarely’ impacted decisions. Similarly, the ground ‘any substantial risk that the person might if granted bail abscond’, was cited by 60% as featuring ‘very rarely’ or ‘rarely’.

Figure 2: Frequency with which grounds from the statutory provisions of Section 23C (1) of the Criminal Procedure (Scotland) Act 1995, appear as the main feature in decisions to refuse bail in summary cases (n=28)



Additional comments in relation to Section 23C (1) provided by COPFS staff included that the nature of the offence and the accused's history (either repeat offences or breaches of previous bail conditions) were often considered when opposing bail. These concerns were particularly paramount in decisions relating to the safety of the complainer/victim, witnesses and the wider general public:

“The history of the person's adherence to court orders is an essential element in bail application. If the person has repeatedly failed to adhere to orders of the court, it has to be questioned whether the court can place their trust in the person.”

Similarly, it was also noted that, where an accused is in court for an alleged offence while they are already subject to bail conditions, this may result in opposing bail:

“I would regularly oppose bail where the accused is already subject to one or more bail orders (frequently several) or has numerous previous convictions aggravated by offending while on bail.”

There were mixed views regarding the frequency with which failure to attend at court was considered. Some mentioned this as a priority consideration, while others suggested this was less important at initial hearings, but may

become the deciding factor in revoking bail should an accused already on a bail licence miss a subsequent court hearing.

Several respondents also made the point that several factors were important and that each case was considered on its own merits:

“Bail is rarely opposed on one ground, at summary level it is very often a combination of a history of failure to appear and a criminal record for directly analogous offending, a propensity of failure to comply with court orders...breaching special conditions of bail, or the amount [number] of offences with bail aggravations showing a disregard for bail conditions... Also, if the person is on deferred sentence and under trust of court, or if they are on licence from an unexpired prison sentence. Quite often it might be the seriousness of the offence or someone who has continued to offend against the same complainer or committing the same offences despite being placed on bail. A lot of people tick a lot of these boxes. Public safety is a significant consideration in any case and underpins all considerations... It is very case specific, every case is considered on its own facts and circumstances.”

Sheriffs and Senators were also asked to provide more detailed feedback in relation to certain grounds.

Substantial Risk

For summary cases, when asked what factors they might consider relevant in determining that someone poses a ‘**substantial risk**’ (in relation to Section 23C (1)(a, b and c)), the most frequently cited factor among the judiciary was the previous criminal record of the accused. This included consideration of both the nature and number of previous convictions, including whether the accused had a history of similar offending to the current offence (including past custody for analogous offences). The nature and seriousness of the alleged offence (including number of charges) was also cited as key in assessing risk:

“The accused's record is the primary factor which informs assessment of substantial risk. The nature of the crime charged on the complaint is a significant consideration, particularly if there is a bail aggravation.”

A second frequently mentioned factor in determining risk was whether or not the accused had previously breached bail or committed offences while subject to a bail order and whether the accused was subject to existing bail orders (and, if so, how recently these had been granted). Several respondents also cited consideration of previous convictions for bail aggravated offences and failure to appear on deferred sentence or offending on licence.

The third most frequently cited factor was having a record of failing to appear, whether for the specific case, or more generally:

“I take the view that the best predictor of future behaviour will often be past conduct. Therefore, I am guided by previous criminal record, extant bail orders and whether there have been any failures to appear in the proceedings to date.”

Other Substantial Factors

When asked, for summary cases, what were considered to be the most relevant ‘**other substantial factors**’ (in relation to Section 23C (1)(d)) the main feedback from the judiciary included either that this was case specific or that this subsection was rarely applied. A small number of Sheriffs indicated that this subsection may apply if the accused posed a risk to themselves and/or there was evidence that they had little support available to them. Linked to this were considerations of whether the accused was of no fixed abode, had no fixed bail address and/or wider personal circumstances of the accused (including mental health and substance misuse disclosures). Nature and extent of previous offending was again mentioned as well as previous compliance with court orders. Two others commented that it was very difficult to answer this question as the subsection was used mainly only when other grounds provided weak justification for opposition.

Other factors mentioned by just one or two judiciary respondents each in relation to Section 23C (1)(d) focused of minimising risk of harm to others and included any particular risk to the public, the complainer, women and children if a domestic incident, if the accused cannot be trusted if at liberty (including where the offender has said something which would indicate this), and whether a custodial sentence is the likely disposal.

Section 23C (2) of the Criminal Procedure (Scotland) Act 1995

In assessing the grounds specified in subsection (1) above, the court must also have regard to material considerations in Section 23C (2) of the Criminal Procedure (Scotland) Act 1995, relevant as to question of bail.

COPFS respondents (n=46) were asked to consider the frequency with which the statutory provisions from Section 23C (2) of the Criminal Procedure (Scotland) Act 1995 appeared as the main feature in their decisions to **oppose bail in summary cases** (see Figure 3).

The most common ground for opposing bail, based on these statutory provisions, was “whether the person has previously contravened a bail order or other court order (by committing an offence or otherwise)” where 100% of respondents noted this was the main feature either ‘very frequently’ or ‘frequently’. This was followed closely by:

- whether the person was subject to a bail order when the offences are alleged to have been committed - 98% said this was a main feature either 'very frequently' or 'frequently', and
- the nature of any previous convictions of the person (including convictions outwith Scotland) - 93% of respondents said this was a main feature 'very frequently' or 'frequently'.

The only factor which featured rarely was the associations and community ties of the person - 74% of respondents indicated that this was 'very rarely' or 'rarely' the main factor influencing decisions.

Figure 3: Frequency with which material considerations from statutory provisions of Section 23C (2) of the Criminal Procedure (Scotland) Act 1995 appear as the main feature in decisions to oppose bail in summary cases (n=46)



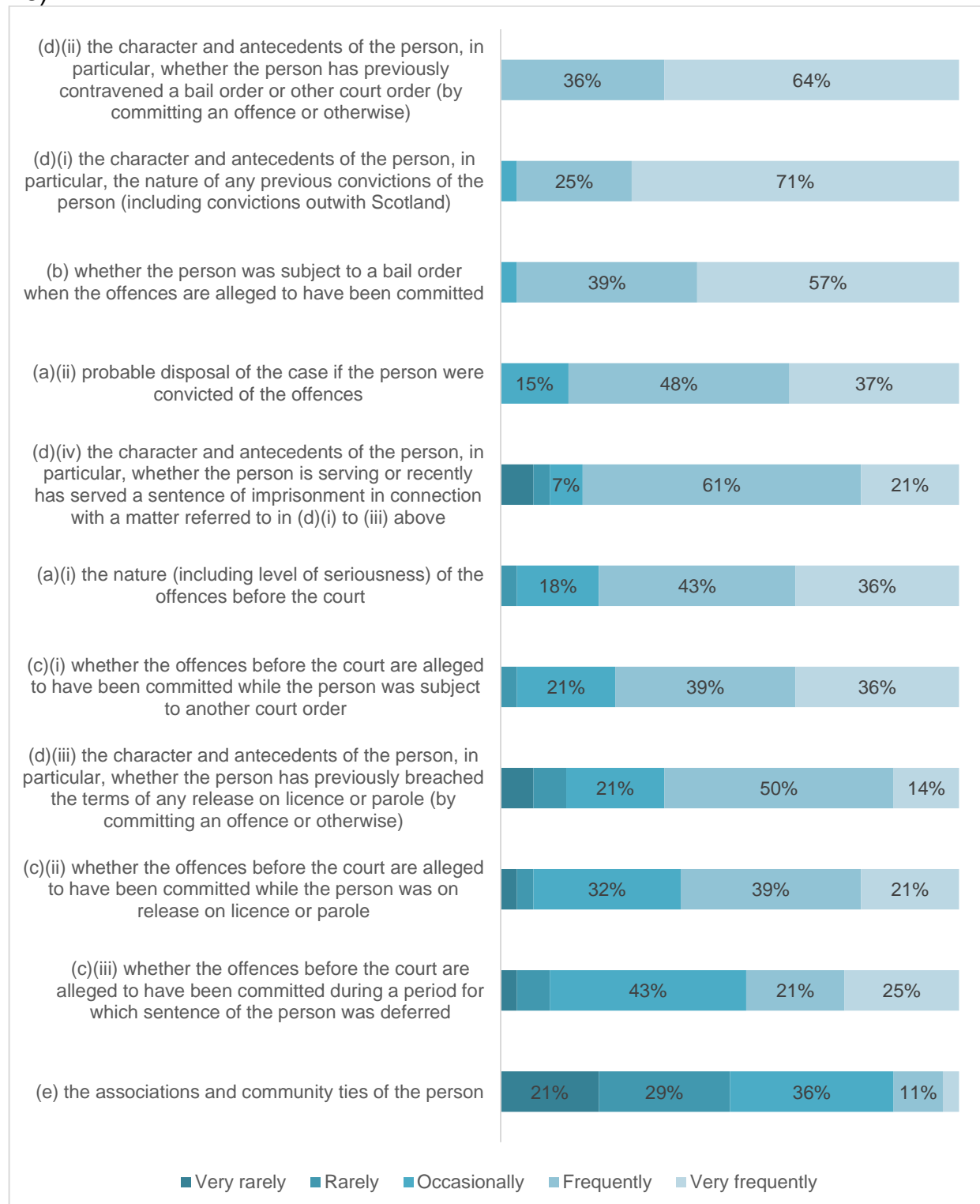
Sheriffs (n=28) were also asked the frequency with which the statutory provisions from Section 23C (2) of the Criminal Procedure (Scotland) Act 1995 appeared as the main feature in their decisions to **refuse bail in summary cases** (see Figure 4).

The most common ground for refusing bail, based on these statutory provisions, was 'whether the person has previously contravened a bail order or other court order (by committing an offence or otherwise)' where 100% of respondents noted this was the main feature either 'very frequently' or 'frequently'. This was followed closely by:

- 'the nature of any previous convictions of the person (including convictions outwith Scotland)' - 96% of respondents said this was a main feature 'very frequently' or 'frequently';
- 'whether the person was subject to a bail order when the offences are alleged to have been committed' - 96% said this was a main feature either 'very frequently' or 'frequently';
- the 'probable disposal of the case if the person were convicted of the offences' - 85% of respondents said this was a main feature 'very frequently' or 'frequently';
- whether the person is serving or recently has served a sentence of imprisonment in connection with a matter referred to in (d)(i) to (iii) - 82% of respondents said this was a main feature 'very frequently' or 'frequently';
- 'the nature (including level of seriousness) of the offences before the court' - 79% of respondents said this was a main feature 'very frequently' or 'frequently';
- 'whether the offences before the court are alleged to have been committed while the person was subject to another court order' - 75% of respondents said this was a main feature 'very frequently' or 'frequently'; and
- 'whether the person has previously breached the terms of any release on licence or parole (by committing an offence or otherwise)' - 64% of respondents said this was a main feature 'very frequently' or 'frequently'.

The only factor which featured rarely was the associations and community ties of the person - 50% of respondents indicated that this was 'very rarely' or 'rarely' the main factor influencing decisions.

Figure 4: Frequency with which material considerations from statutory provisions of Section 23C (2) of the Criminal Procedure (Scotland) Act 1995 appear as the main feature in decisions to refuse bail in summary cases (n= 28)



Level of Seriousness

Respondents were also asked to explain what factors they might consider relevant in determining the 'level of seriousness' of the offences before the court in relation to Section 23C (2)(a)(i).

Among COPFS respondents, common considerations included the use of violence, the level of injury sustained, the nature/vulnerability of the victim(s), and whether weapons were used. Considerations mentioned less often included the level of harm and/or disruption to others, value of damages, accusations of domestic abuse, whether the accused was in a position of power/trust, level of recklessness or callousness, duration and/or persistence of the offence, level of premeditation or planning, and whether drugs or alcohol were a factor. One respondent highlighted the link between offence seriousness and the risk to public safety, whilst another respondent specifically noted that this was not an important factor for them when opposing bail:

"This is not an important factor for me. All offences are 'bailable' and the person is entitled to the presumption of innocence. Bail opposition is not a punitive measure. The level of the offence should not therefore be an important factor."

Most Sheriffs and Senators suggested that considerations would include a combination of factors including:

- the general nature of the current offence;
- whether or not a weapon had been used;
- level of violence shown (particularly in domestic cases) and whether violence was unprovoked;
- damage/injuries to the complainer/impact on complainer;
- relationship to the victim(s);
- if perpetrated against a stranger;
- number of people affected;
- wider impact of the offence on the general public/public attitude to the type of offence;
- age of accused;
- whether there were multiple charges and whether there were aggravations;
- the level of planning involved;
- time and location of offence;
- persistent analogous offending; and
- whether the offence was committed while subject to an existing court order:

Three Sheriffs stressed that considerations would be entirely case specific and four suggested that they would consider the likely sentencing disposal in assessing seriousness.

Presumption Against Short Term Sentences

For summary cases, respondents to the judiciary survey only were asked if the Presumption Against Short Sentences (PASS)⁴ had impacted their decision-making around 'probable disposal of the case if the person were convicted of the offences'.

Just under a third (32%, n=10) said that it had, almost half (45%, n=14) said that it had not, and one in ten (10%, n=3) indicated that they did not know. The remaining four respondents gave no response (13%).

Among those who said that PASS **had impacted** on their decisions, several said that they were generally less likely to use remand or impose a custodial sentence unless absolutely necessary:

"Except in cases in which a remand is necessary to get the accused to come to court, I do not refuse bail if I do not think that a custodial sentence is very likely in the event of a conviction. The presumption against short sentences makes custodial disposals less likely in summary cases and therefore informs that assessment."

One explained that PASS had impacted on the level of explanation given to the accused, i.e. that there was a positive requirement to consider and explain decisions to the accused and that this may/may not favour the person, depending on all the circumstances.

Overall, those who said that PASS had impacted indicated that the presumption was taken into account when deciding on the issue of a custodial sentence being a likely outcome and that this normally operated in favour of the accused.

Among those who said that PASS **had not impacted** on their decision-making, some indicated that they had always sentenced on the basis that a custodial sentence was the last resort even before PASS:

"[PASS] has had very limited effect on my sentencing practice because I have always regarded custody as being a sentence that should only be imposed if no alternative was suitable. PASS, in effect, simply reflects widespread pre-existing sentencing practice in my view. Thus, it has a very limited effect on the bail decision-making practice."

Most other members of the judiciary indicated that PASS was only one consideration alongside many others that factored into decisions around bail and remand or indicated that their actions were guided instead by an assessment of whether a custodial sentence was/was not likely or appropriate *per se*, an assessment of likely re-offending and/or the availability of alternative disposals:

"Strictly speaking there is no presumption against short sentences. The test for any summary custodial sentence has merely been made the same as the test for

⁴ Presumption against short prison sentences of 12 months and under.

sentencing someone to custody for the first time (i.e. 'no other method of dealing with [the accused] is appropriate'). My sentencing has been negligibly affected by the so called PASS."

Character and Antecedents of the Person

Judiciary respondents were asked, for summary cases, to explain what factors they might consider relevant in determining 'the character and antecedents of the person' (in relation to Section 23C(2)(d)). Most (n=25) gave a response and the main themes (in order of frequency with which they were mentioned) were:

- accused's criminal record/previous convictions/previous custodial sentences (including analogous offending);
- history of non-compliance with court orders/offending on bail;
- personal background including whether the accused is in employment, has stable accommodation, has a partner/family and/or children or family ties (and, in domestic cases, the relationship between the accused and complainer);
- engagement or otherwise with support agencies and/or criminal justice social work and involvement in the community; and
- mental health or addiction issues or anything that may mean the accused will not be able to follow the standard conditions of bail.

Again, three respondents suggested decisions were case specific.

Associations and Community Ties of the Person

Respondents were also asked, for summary cases, to explain what factors they might consider relevant in determining 'the associations and community ties of the person' (in relation to Section 23C(2)(e)).

Many Crown respondents noted that they had never used this clause, or that it was rarely a factor for opposing bail in summary cases. Others, however, noted potential risks, such as whether the accused associated with gangs, organised crime groups or other known offenders in the area, as well as the risk of further offending, witness interference/intimidation or retribution if they were not removed from the community. A few noted that community ties were more likely to be an issue used by defence solicitors to seek bail rather than for the prosecution to oppose it. In particular, it was felt that the impact which bail/remand might have on other family members (such as children) and/or where an accused had specific caring responsibilities might be a consideration.

Among the judiciary, the main factors (in order of frequency with which they were mentioned) included:

- family support available (and caring responsibilities);
- employment status of the accused;
- roles in society, including volunteering, help given to others, etc.;

- presence of stable accommodation;
- whether the accused has clear links to Scotland and the local community;
- whether the accused has a fixed/stable address;
- gang membership/criminal ties;
- drug and alcohol issues or mental health issues leading to a chaotic lifestyle;
- religious and community associations; and
- education of the accused.

Three respondents indicated that this was a provision that they had either never used or used only once and two suggested that they perceived this provision to be unfair/irrelevant.

Other comments on Sections 23C (1) and 23C (2)

Comments from Crown respondents reiterated that opposition of bail was usually based on a combination of factors and that multiple grounds would likely apply:

“The theme is that a number of factors are normally considered together, rather than one specific ground being the main ground for opposing a person’s bail.”

The only other COPFS comment in relation to Section 23C was that, in summary cases, where the accused is under 21, there is a greater likelihood that bail will be granted, even if already subject to bail orders (although there was no explanation given as to why this may be the case).

Only three Sheriffs provided additional feedback in relation to Section 23C (1) and (2) as it relates to summary cases. This included one comment that an important consideration when considering bail or remand is the public interest, protection of the community from the activities of those whose record demonstrates that they will persistently offend despite the existence of the criminal law, threat of penal sanctions and bail or other court orders:

“There are some offenders who cannot be restrained from offending and harming the community interest except by detention.”

Another commented that they perceived the existing legislation to work well and allowed for the rights and reasonable expectations of the accused, the Crown and the public interest to be fairly balanced.

Opposition to and Refusal of Bail in Solemn Cases

Key Points:

Three specific provisions feature regularly and with similar frequency in Crown decisions for opposing bail in both summary and solemn cases i.e. risk of future offending, the presence/nature of previous convictions and contravention of bail orders (in general and at the time of the offence).

The most commonly cited ground for refusing bail in solemn cases was again 'any substantial risk of the person committing further offences if granted bail'.

The nature and level of seriousness of the offences before the court also feature more in solemn decisions compared to summary.

Factors that are frequently considered in determining risk include criminal record/nature and number of offences (including analogous offences and recent offences), breaching bail or other court orders, history of failing to appear and lack of a UK address.

For solemn cases, the nature of previous convictions, previous contravention of a bail order or other court order and being subject to a bail order when the offences were alleged to have been committed were the most frequently cited material considerations from Section 23C (2).

Respondents noted that they would most likely consider a combination of grounds rather than having one isolated reason for opposing bail.

The recency of Section 23D trigger convictions was seen as important when making decisions around bail in relevant cases, i.e. if offences were of considerable age with little or no analogous offending in the interim period, bail may be considered.

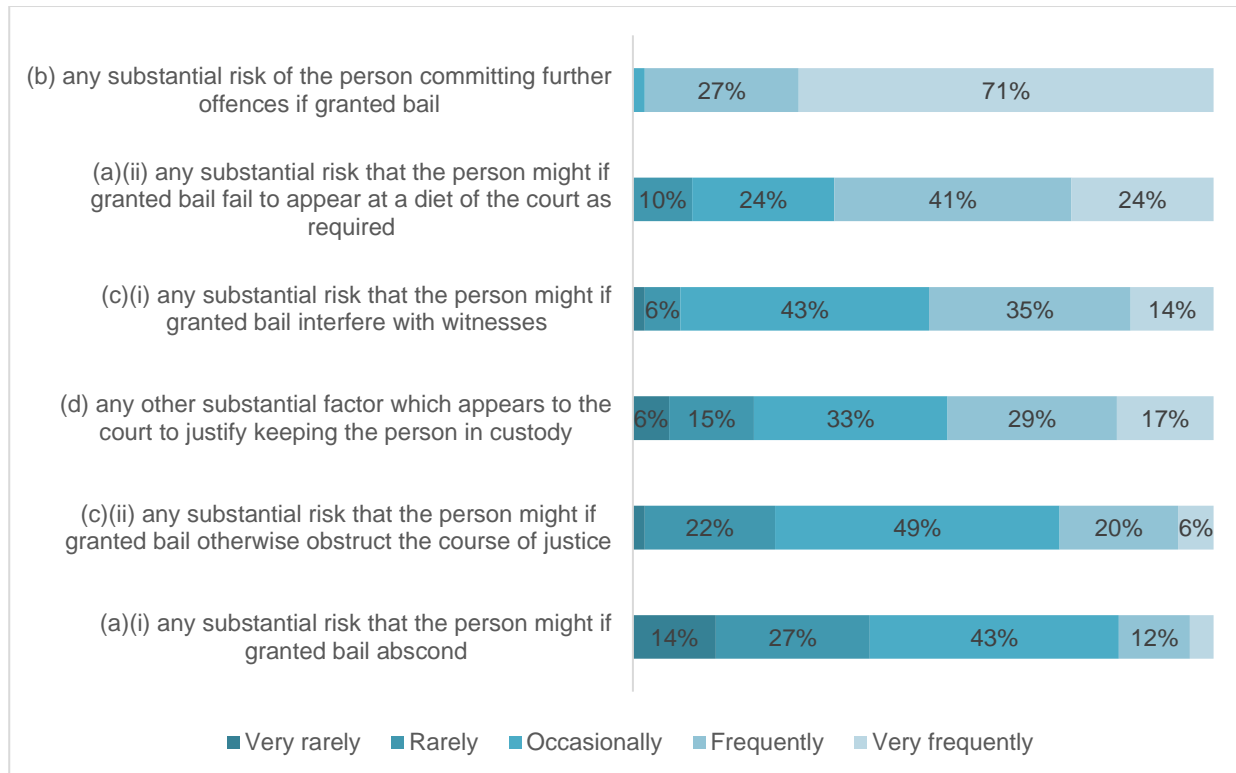
Section 23C (1) of the Criminal Procedure (Scotland) Act 1995

COPFS respondents who worked on solemn cases (n=49) were asked, with regard to the statutory provisions of Section 23C (1) of the Criminal Procedure (Scotland) Act 1995, to indicate how frequently each of the grounds appeared as the main feature in their decisions to **oppose bail in solemn cases** (including cases in which there are multiple grounds for opposition to bail).

Consistent with summary cases, the most common ground for opposing bail, based on these statutory provisions, was "any substantial risk of the person committing further offences if granted bail", with 98% of respondents indicating this was the main feature either 'very frequently' or 'frequently'. Similarly, the least common ground for opposing bail was "any substantial risk that the person might if granted

bail abscond” where 41% stated this was ‘very rarely’ or rarely’ the main feature in their decision to oppose bail (see Figure 5).

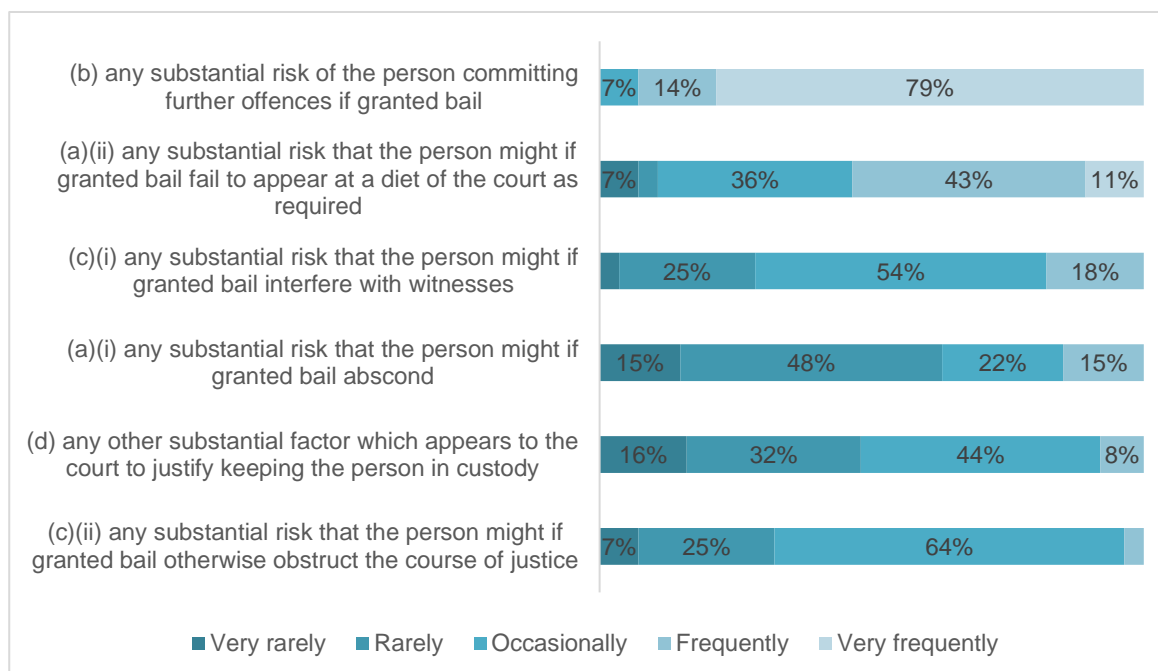
Figure 5: Frequency with which grounds, from the statutory provisions of Section 23C (1) of the Criminal Procedure (Scotland) Act 1995, appear as the main feature in decisions to oppose bail in solemn cases (n=49)



Judiciary respondents (n=28) were also asked to indicate how frequently each of the Section 23C (1) grounds featured in their decisions to **refuse bail in solemn cases**.

As with summary cases, and as with COPFS respondents, the most frequently cited ground for refusing bail in solemn cases was ‘any substantial risk of the person committing further offences if granted bail, with 93% (n=26) of respondents citing that this featured either ‘very frequently’ or ‘frequently’ within their refusal decisions. The least cited ground for refusing bail was ‘any substantial risk that the person might if granted bail abscond’, with 63% (n=17) noting this was ‘very rarely’ or ‘rarely’ cited as ground for refusing bail (see Figure 6 below).

Figure 6: Frequency with which grounds from the statutory provisions of Section 23C (1) of the Criminal Procedure (Scotland) Act 1995, appear as the main feature in decisions to refuse bail in solemn cases (n=28)



Substantial Risk

Judiciary respondents were again asked, for solemn cases, what factors they might consider relevant in determining that someone poses a ‘substantial risk’ (in relation to Section 23C (1)(a, b and c)). A total of 25 respondents gave feedback and this was, in the main, the same as that given in relation to summary cases, i.e. criminal record/nature and number of offences (including analogous offences and recent offences), breaching bail or other court orders and history of failing to appear/contempt of court convictions and lack of a UK address. Convictions for offending whilst on bail was again cited as significant:

“Where someone has a track record of failing to attend at court, particularly when in breach of bail conditions, there is a strong basis to use remand to ensure attendance for trial in a reasonable time. This is important for complainers, other witnesses and the effective administration of justice...A track record of repeated offending, particularly when on bail speaks for itself as a reason to doubt the efficacy of bail conditions in protecting the community and the integrity of the prosecution. Where the allegation is that the accused offended on bail that is plainly relevant to substantial risk of further offending.”

Less frequently mentioned considerations included whether there was any indication of ‘danger’ if released (although it was not specified if this was to the accused or others), any threats that the accused was reported to have made and any evidence of attempts to pervert the course of justice.

Overall, the main factors were listed in roughly the same order and with the same frequency as those listed for summary cases, and several respondents explicitly said as much.

Other Substantial Factors

Respondents were again asked, for solemn cases, to specify what they considered to be the most relevant 'other substantial factors' (in relation to Section 23C (1)(d)).

As with summary cases, key areas of concern for Procurators Fiscal in solemn cases included: previous offending history (and particularly patterns of repeat analogous offending); offending while on bail or otherwise failing to adhere to bail conditions or orders of the court; and whether the accused appeared to represent a danger to either the accuser/victim, witnesses, or the general public. Again, a few COPFS respondents noted that they would most likely consider a combination of grounds rather than having one isolated reason for opposing bail.

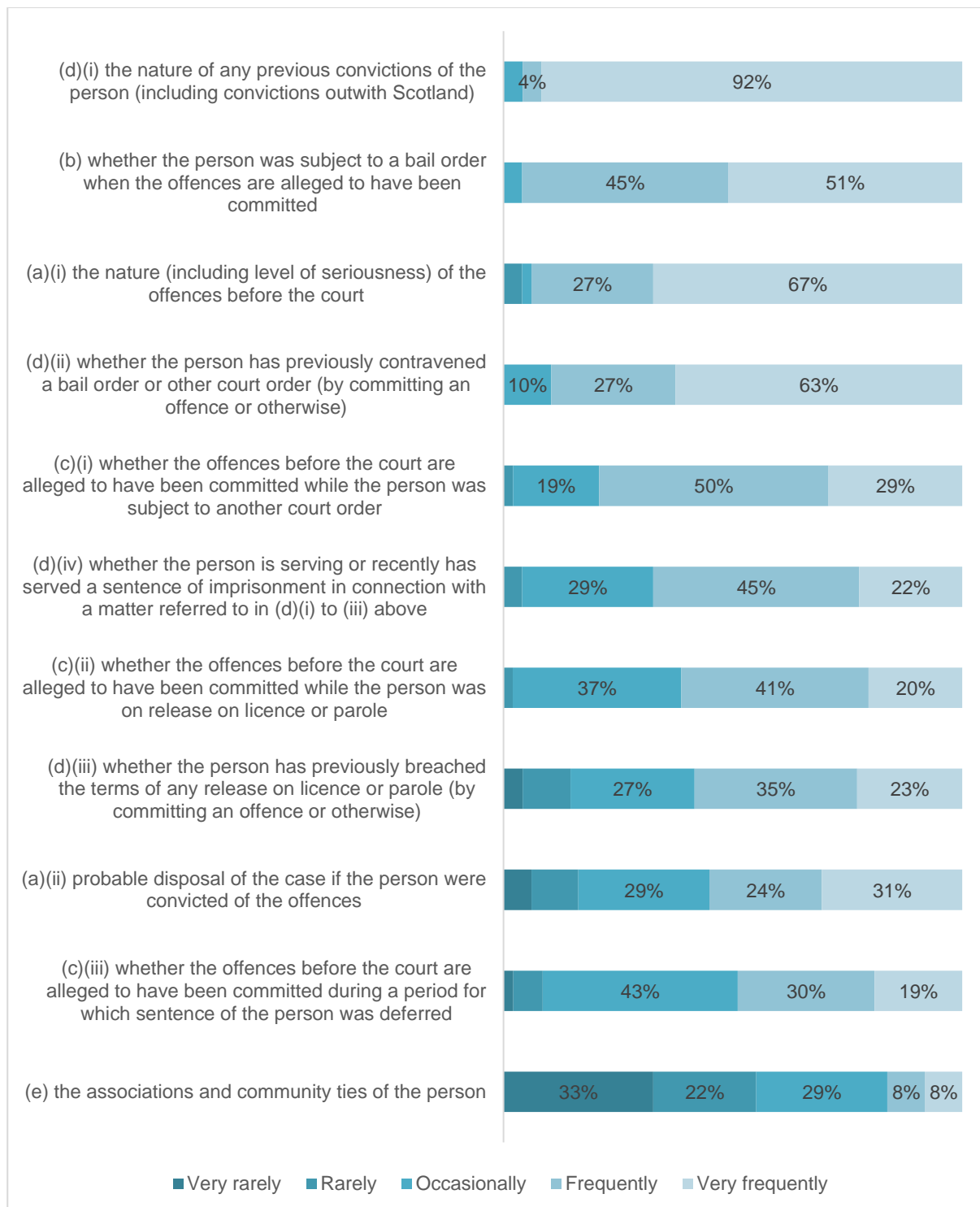
Among the judiciary, several again said these were the same considerations as summary cases, i.e. nature of current offence, criminal record, previous breaches of bail, risk to the complainer, safety of accused and likely sentence. Again, a small number commented that they felt this provision added little, especially in solemn procedure and/or commented that they rarely (if ever) used Section 23C(d).

The only two unique comments were that the views of the complainer may be considered substantial in domestic cases and that there may sometimes be reason to hold a trial very soon if, for example, a witness or evidence was likely to become unavailable in a solemn case.

Section 23C (2) of the Criminal Procedure (Scotland) Act 1995

COPFS respondents working with solemn cases (n=49) were also asked to consider the frequency with which the statutory provisions from Section 23C (2) of the Criminal Procedure (Scotland) Act 1995 appeared as the main feature in their decisions to **oppose bail in solemn cases** (see Figure 7).

Figure 7: Frequency with which material considerations from statutory provisions of Section 23C (2) of the Criminal Procedure (Scotland) Act 1995 appear as the main feature in decisions to oppose bail in solemn cases (n=49)



Again, similar to summary cases, the main factors featuring most frequently in COPFS decisions in solemn cases included:

- the nature of any previous convictions of the person (including convictions outwith Scotland) - with 96% stating this was the main factor either 'very frequently' or 'frequently' (with most citing it as a very frequent factor that was considered);

- whether the person was subject to a bail order when the offences are alleged to have been committed - with 96% stating this was the main factor either 'very frequently' or 'frequently' (but with a more equal split between the two ratings);
- the nature (including level of seriousness) of the offences before the court - with 94% stating this was the main factor either 'very frequently' or 'frequently'; and
- whether the person has previously contravened a bail order or other court order (by committing an offence or otherwise) - with 90% stating this was the main factor either 'very frequently' or 'frequently'.

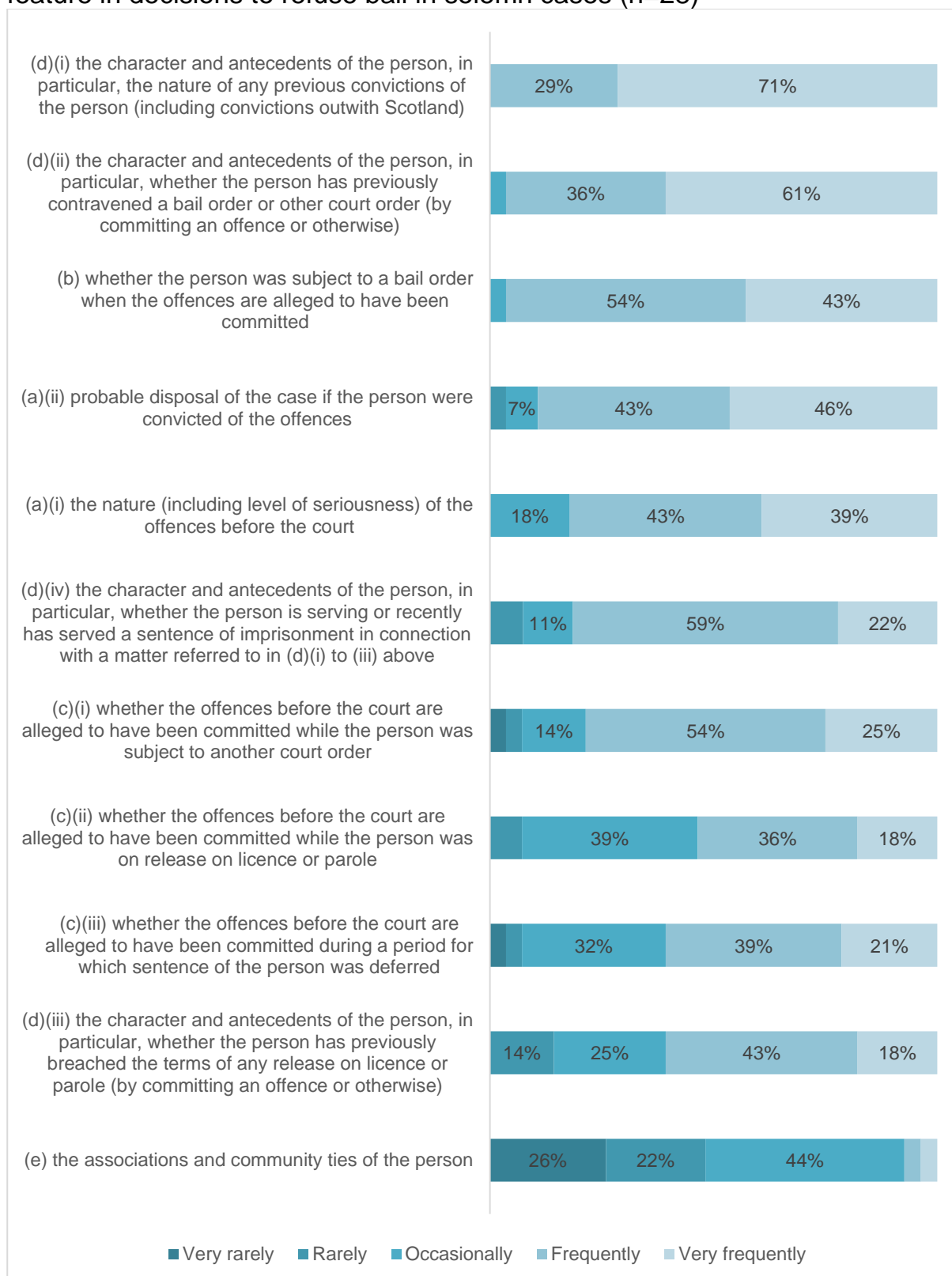
Provision (e) "the associations and community ties of the person" was again noted to feature rarely, with 55% stating this was the main factor either 'very rarely' or 'rarely'.

Sheriffs and Senators (n=28) were also asked to consider the frequency with which the statutory provisions from Section 23C (2) of the Criminal Procedure (Scotland) Act 1995 appeared as the main feature in their decisions to **refuse bail in solemn cases** (see Figure 8). As with summary cases, three grounds appeared to feature frequently in decisions, these being:

- 'the nature of any previous convictions of the person (including convictions outwith Scotland)' - 100% (n=28) said that this featured either 'very frequently' or 'frequently';
- 'whether the person has previously contravened a bail order or other court order (by committing an offence or otherwise)' - 97% (n=27) said that this featured either 'very frequently' or 'frequently'; and
- 'whether the person was subject to a bail order when the offences are alleged to have been committed' - 97% (n=27) said that this featured either 'very frequently' or 'frequently'.

The only factor which again featured rarely was the associations and community ties of the person - 48% (n=13) of respondents indicated that this was 'very rarely' or 'rarely' a factor influencing solemn decisions.

Figure 8: Frequency with which material considerations from statutory provisions of Section 23C (2) of the Criminal Procedure (Scotland) Act 1995 appear as the main feature in decisions to refuse bail in solemn cases (n=28)



Level of Seriousness

Respondents were again asked, for solemn cases, what factors they might consider relevant in determining the 'level of seriousness' of the offences before the court in relation to Section 23C (2)(a)(i). For COPFS respondents, the most frequently mentioned factors were:

- the risk the accused posed to the public, the accuser and any witnesses;
- the nature of the offence, and whether violence was involved or weapons were used;
- the severity and impact of any injuries sustained by the victim(s);
- for drug offences - the quantity/volume, value and nature of drugs involved and the accused's position in the supply chain;
- whether the offence(s) have been repeated or sustained over a long period;
- the level of vulnerability of the victim(s) or the accused's relationship to the victim(s);
- the level of premeditation or planning involved or links to organised crime;
- attempts to obstruct or pervert the course of justice, including witness intimidation; and
- the likely sentence that would be imposed.

Several judiciary respondents suggested that factors determining level of seriousness would be the same as for summary cases and would typically include the character of the offence and circumstances, schedule of previous offences, nature, level and degree of violence associated with the offence (including use of weapons), the level of planning involved (including if organised crime), impact on the complainer (including any injuries sustained) and impact on the community (including public perceptions of the offence).

Three respondents also again cited the likely disposal if convicted as something they would consider, including whether the charge was likely to result in a substantial prison sentence, the jurisdiction in which the case would be heard and the risk to the public if the accused was at liberty:

"The very fact that it is a solemn matter deems it to be serious in nature. In respect of the 'level', I may consider whether the matter is likely to end up in the High Court or not."

Presumption Against Short Term Sentences

For solemn cases, judiciary respondents were again asked if the Presumption Against Short Sentences (PASS) had impacted their decision-making around 'probable disposal of the case if the person were convicted of the offences'.

Among the 27 who responded to this question most (85%, n=23) said that it had not and only four (15%, n=4) said that it had. The main feedback amongst those who said that PASS did not feature in their decision-making was that, if the charges

were proved in solemn cases, the custodial sentence would probably exceed the PASS requirements (with solemn disposals usually being in excess of 12 months):

“If the procurator fiscal's decision-making is sound, the accused only appears under solemn procedure if a significant prison sentence...is thought likely. In that situation, the presumption has no relevance.”

Again, one respondent indicated that they always made decisions on a case-by-case basis and another indicated that prison was only ever used by them if there were no other reasonable alternatives (and so their thinking was already aligned to PASS). Others commented more generally that the same considerations as summary cases would apply (as in the previous section).

Character and Antecedents of the Person

Judiciary respondents were asked, for solemn cases, to explain what factors they might consider relevant in determining ‘the character and antecedents of the person’ (in relation to Section 23C(2)(d)). Most again cited factors similar to those cited in relation to summary cases, i.e. criminal history, analogous and similar previous convictions, especially if recent; offending on bail/breach of bail (especially breaching special conditions) and failing to comply with court orders; family circumstances, employment status and health of the accused.

Associations and Community ties of the Person

Respondents were also asked, for solemn cases, to explain what factors they might consider relevant in determining ‘the associations and community ties of the person’ (in relation to Section 23C(2)(e)).

Many COPFS respondents simply stated that the considerations were the same as outlined above for summary cases, while others specifically noted the key factors as being involved in serious and organised crime or gangs (and the role/position the accused has within this), risk posed to the complainer or key witnesses or being a threat to the local community. A few again noted that ‘community ties’ would involve factors such as whether the accused lived in the area, had family in the area (including dependents) or worked in the local area, all of which may provide an indication as to the likelihood that the accused would abscond. Only one respondent suggested that the risk of retribution against the accused from their associates or rivals might also be considered, and that the accused may be remanded for their own safety.

Most Sheriffs cross-referenced their earlier responses in relation to summary proceedings. The only comments specific to solemn cases were that the gravity of the crimes which feature in the High Court may mean that such considerations often carry little weight. Overall, however, as with summary cases, the majority of respondents to both surveys noted that the associations and community ties of the person were not factors that featured often in decisions to oppose or refuse bail in solemn cases.

Section 23D of the Criminal Procedure (Scotland) Act 1995

Section 23D of the Criminal Procedure (Scotland) Act 1995, sets out a presumption against bail for those accused of violent/sexual/domestic abuse offences or drug trafficking offences in solemn proceedings, where they have a previous conviction of a similar nature.

Members of the judiciary only were asked to indicate how frequently this ground featured in their decisions to refuse bail in solemn cases. Just under two thirds said that it featured either 'frequently', or 'very frequently' (60%, n=17) and a further third (36%, n=10) said that it featured 'occasionally'. Only one respondent said that this featured 'very rarely' in their decision-making (4%).

Respondents to the judiciary survey were also invited to list any exceptional circumstances which might lead them to consider **granting** bail in these cases and, as far as is possible, to explain why these circumstances would give them the confidence to consider bail.

The main theme to emerge was linked to the recency of the Section 23D trigger conviction. Members of the judiciary reported that, if the trigger offence was quite old/of considerable age and there had been little or no analogous offending in the interim, this may give rise to bail being given (especially if the accused was a young offender at the time of the qualifying offence but was now more mature and/or the accused had shown apparent reform):

"The most common exceptional circumstance raised by the defence is passage of time - if the accused has remained offence free since then I consider that is a factor; if not I do not consider there are exceptional circumstances."

"There has to be a point where the accused is given the same opportunity to show that he can comply with bail conditions as other accused persons."

Other exceptional circumstances (mentioned by two or three respondents each) included:

- the existence of verified or well supported evidentially extenuating personal circumstances, such as significant caring responsibilities, illness/terminal illness or significant medical needs (of the accused or someone in their care/close family member); and
- evidence of good compliance with community orders/disposals and strong likelihood of compliance with bail conditions.

Other factors mentioned by one respondent each were significant lifestyle changes (e.g. substance misuse treatment, rehabilitation), COVID and the likely sentence being less than two years, and if the accused had supported accommodation or a high level of engagement with community supports that would be lost if they were remanded. One respondent stressed that a number of factors would be considered and must be present for bail to be granted:

“[Factors] are neither exclusive nor determinative on their own and each case will turn on its own facts and circumstances, applying a holistic approach in assessing the risks set out in Section 23C.”

One respondent perceived that the attitude of the Crown to Section 23D was a major factor in bail decisions in solemn cases. They perceived that the Crown were apt to oppose bail in all matters involving either a domestic abuse offence or an offence with a domestic aggravator, even when the granting of bail for exceptional circumstances might be appropriate.

Again, three respondents commented that all cases must be dealt with on a case-by-case basis and in accordance with case law. Overall, however, the granting of bail in Section 23D cases was most likely to be linked to length of time since qualifying offence, conduct since qualifying offence and the sentence imposed in respect of qualifying offence.

Other comments on Sections 23C (1), 23C (2) and 23D

Across both surveys, few provided additional comments in relation to Sections 23C (1), (2) and Section 23D as they relate to solemn cases.

One member of the judiciary commented that existing legislation was seen to be “perfectly satisfactory” and another commented that Judges are expected to evaluate the weight to be given to any and all considerations of the particular case before the court to inform their decision-making. Another stressed that protection of community was likely to be something which featured more in solemn cases.

Three judiciary respondents commented specifically on Section 23D suggesting that it could perhaps give a time limit on the age of the qualifying initial conviction and that it was perhaps a somewhat “blunt tool”:

“Previous solemn convictions for violent or sexual offences may be indicators of likely future offending, but they do not of themselves indicate invariable bail risks. The Crown invariably invokes s23D, and sometimes the submission is simply that there is a qualifying prior conviction. In my view, that is more compelling if the prior conviction is directly analogous and relatively recent (say within the past 7-10yr).”

Two other comments were made by the judiciary to suggest that the nature of offences heard in solemn court may be indicative of the suitability of bail or remand for the accused, but also that the decision-making process itself was the same for both solemn and summary cases.

Most COPFS responses to this question again reiterated that multiple factors are often considered to be relevant in solemn cases where bail is opposed. In addition,

however, a few respondents noted that Section 23D⁵ of the Criminal Procedure (Scotland) Act 1995 often also plays a role in solemn cases.

⁵ This makes provision for the use of bail only in exceptional circumstances, in solemn courts, for particular case types, i.e. where a person is accused of, and has a previous conviction for violent offences, sexual offences, domestic abuse offences, or drug trafficking offences.

Presumption in Favour of Bail

Key point:

Factors important in considering presumption in favour of bail include low risk previous offending, the accused having a history of compliance with bail and whether a custodial sentence would/would not be anticipated, if guilty.

Section 23B of the Criminal Procedure (Scotland) Act 1995 sets out a presumption in favour of bail. Members of the judiciary were asked how important they felt a number of factors were in informing decisions on whether to **grant bail** (see Table 2 below).

Table 2: Percentage of respondents indicating importance of different factors which may influence decisions to grant bail (n=27)

	Not important at all	Not very important	Moderately important	Important	Very important
Previous offending history is low risk	-	-	7%	37%	56%
The accused has a history of compliance with bail	-	-	11%	37%	52%
A custodial sentence would not be anticipated, if guilty	-	4%	7%	33%	56%
The age of the accused	4%	7%	11%	52%	26%
The accused does not appear from custody	4%	15%	22%	41%	19%
The employment status of the accused	-	7%	30%	48%	15%
The family status of the accused (including any caring responsibilities)	-	4%	37%	52%	7%
The housing status of the accused	-	15%	41%	37%	7%
The accused has no substance misuse problem/mental health issues	4%	30%	48%	19%	-
The gender of the accused	59%	15%	19%	7%	-

The most important factors featuring in decisions were:

- previous offending history is low risk - 93% (n=25) of respondents indicated that this was 'important' or 'very important';

- the accused has a history of compliance with bail - 89% (n=24) of respondents indicated that this was 'important' or 'very important'; and
- whether a custodial sentence would not be anticipated, if guilty - 89% (n=24) of respondents indicated that this was 'important' or 'very important'.

The factor which was seen as least important in informing decisions to grant bail was the gender of the accused (with 59% (n=16) of respondents saying that this was not important at all). Indeed, three Sheriffs commented on the importance of gender impartiality (i.e. men and women should be treated the same) and age was mentioned as something which may feature only as it relates to perceived risk of future offending and how it may intersect with likely bail breach:

"Gender by itself does not inform my decision-making; but it is more common for women to have associations and community ties (e.g. childcare responsibilities) than for men to and it is also more common for women to play a lesser role in an incident than for a man to do so, which affects the assessment of seriousness."

"There is an underlying sense of proportionality which influences my ratings. The very old are likely to present less risk of causing harm if at liberty. The very young should not be remanded unless it is necessary [on] very strong grounds."

Two other respondents commented that the absence of bail breach and/or history of compliance were the two factors that were most likely to influence a decision to grant bail for the current offence (consistent with earlier comments on s.23C):

"An accused may have a lengthy record of offending, but if there are no instances of breaching bail or offending whilst on bail that is material which positively favours the grant of bail."

"Especially on summary, if the offender is not going to jail when guilty, why should he when presumed innocent spend time [on] remand with all the negative consequences of that. If they have shown in past they don't offend on bail or breach conditions, then they can be trusted that they appear to listen to the court..."

Respondents were asked if there were any other offence-related, demographic or lifestyle characteristics that they might consider when deciding whether to **grant** bail - very few provided a response and those who did generally referenced the provisions of Section 23C.

Post-Conviction Bail

Key point:

There were mixed views regarding factors that may feature in decisions to refuse bail post-conviction but evidence that remand was more likely once the presumption of innocence was removed (post-conviction).

Respondents to the judiciary survey were asked if there were any considerations, additional to those already discussed above, that featured in their decisions to refuse post-conviction bail. There was an even split in responses, with 42% (n=13) saying 'yes' and 39% (n=12) saying 'no'. The remaining 19% (n=6) did not provide a response.

Most of those who said 'yes' suggested that likely sentence was uppermost in considerations post-conviction since the individual was no longer subject to the presumption of innocence. Likelihood of custody as the outcome was increased and hence chances of bail being granted decreased:

"It is sometimes clear, especially following conviction on indictment, that the crime is so serious and the accused's criminal record so bad that, no matter what the social work report says, a non-custodial disposal is extremely unlikely. In that situation, I refuse bail."

Two respondents indicated that remand may also be used as a means of ensuring that social work reports could be obtained, post-conviction.

One respondent who said that no additional factors would be considered post-conviction also commented that if a custodial sentence was inevitable, the considerations may be weighted differently. Another indicated that while there may be no new considerations as such, there may be an argument that conviction may result in greater protection for the witness and/or the accused being needed, which may influence a decision to remand into custody.

Other factors mentioned by just one respondent each included nature and seriousness of the offence, potential for witness interference if released on bail, behaviour since the offence, whether or not the offender has been on bail throughout the case, compliance with things such as programmes linked to the offence (e.g. detox programmes, etc.) and changes in personal circumstances since the offence (e.g. having stable accommodation). One respondent also indicated that if an accused pleaded to reduced charges which materially affected the prospect of and length of a custodial sentence, bail may be granted.

Input from Partner Organisations

Key points:

Decisions regarding suitability of an accused for bail appear to be ‘always’ considerate of the views of the Crown and defence.

There was some reported inconsistency and lack of adequacy in the information provided by justice partners to support judicial decision-making.

Sheriffs and Senators reported that they were largely unassisted in their assessment of risk, and that professional risk assessments, especially in cases involving vulnerable accused, would be welcomed.

Grounds for Crown Opposition to Bail

Based on their experience, Sheriffs and Senators were asked what three grounds they perceived were given most frequently by the Crown for opposing bail. A total of 25 respondents answered this question and the three grounds that featured most across responses were: criminal record (including analogous offending) (n=23); offending whilst on bail (n=17); and nature and seriousness of offence (n=13).

Other less frequently mentioned grounds were: risk of future offending (n=7); likelihood of failing to attend/absconding (n=7); Section 23D triggers (n=3); risk of interfering with witnesses, especially in domestic cases (n=3); risk to the public or to complainers (n=2); and compliance with court orders (n=2).

Grounds for Defence Requests for Bail

Similarly, judiciary respondents were asked, other than the presumption in its favour, what were the three main reasons given by defence agents for requesting bail. The three reasons mentioned most frequently were: the prospect of remand interfering with employment/resulting in loss of employment for the accused (n=16); lack of or limited previous record (including lack of analogous offending, old criminal records/lack of recent criminal activity) (n=12); and family responsibilities/caring commitments of the accused (n=12). Availability of and willingness to comply with Special Bail Conditions was also mentioned by a number of respondents (n=10) as well as the accused living in stable accommodation which may be threatened by remand (n=7).

Information from Justice Partners

Members of the judiciary were also asked how often information requested from different justice partners was used to help inform their bail decision-making, if at all. Among the 25 respondents who answered this question, most said that information from both the Procurator Fiscal (93%) and defence (84%) ‘always’ informed their decisions.

Information from other sources that was cited as featuring in decisions included:

- social work reports (including bail supervision reports and court social worker reports regarding such things as availability of secure housing, mentoring and counselling services available, etc.);
- information from the accused's employer;
- medical reports, psychiatric reports and psychological assessments;
- letters/input from complainers (especially in domestic incidents); and
- input from family of the accused.

Timeliness and Adequacy of Information

Members of the judiciary were also asked, generally speaking, if information provided by others was timely and adequate to assist with their bail decision-making.

Among those who answered these questions (24 and 25 respectively), almost all said that information from the Crown was either 'always' or 'very often' timely (96%) as was information from defence agents (92%). Almost all also said that information from the Crown was either 'always' or 'very often' adequate (88%) as was information from the defence (80%). A reasonable proportion (20%) of respondents, however, indicated that information from the defence was only 'sometimes' adequate.

More general comments were made that:

- information sometimes comes late to the defence who have had little time to look at the background before they address the court;
- there can sometimes be a lack of information in domestic cases from agencies involved with domestic matters, including social work;
- insufficient information related to housing issues for the accused can often delay decisions;
- that defence submissions are rarely vouched;
- there can be a lack of information (from both Crown and defence) to support requests for special conditions of bail;
- Crown input can at times be too generic; and
- the extent to which information from the PF and defence agent is useful may depend on the skill of the PF and defence agent involved.

Professional Risk Assessments

Members of the judiciary were asked how important, if at all, professional risk assessments were in their bail decision-making. Feedback suggests that these were rarely sought and rarely made available (particularly post-pandemic). Several, however, commented that professional risk assessments may, if more routinely available, be of great use, especially in cases involving significant sex offences or where the court has been advised of mental health difficulties of the accused, where the accused has a substance misuse history or for other vulnerable accused.

Some commented that such assessments would be helpful particularly in solemn and more serious cases.

Bail Options

Key Points:

Among the judiciary, there was greater awareness of (and confidence in) special bail conditions compared to supervised bail, mainly due to concerns around capacity to deliver supervised bail. There was mixed awareness among COPFS staff of bail supervision services available.

Requests for special conditions of bail from the Crown in both solemn and summary cases typically involve 'non contact' conditions and special bail conditions were seen by the Crown as being particularly useful for those accused of domestic abuse.

Bail supervision was viewed by COPFS staff as particularly helpful for vulnerable accused (including young people).

There was reasonably strong support for alternatives to remand among the judiciary, including electronic monitoring in particular, to assist with curfews and compliance with bail conditions.

Among the judiciary, perceived lack of resources (practical and financial) was cited as the single biggest barrier to greater use of alternatives to remand.

Bail Supervision

Both COPFS staff and members of the judiciary were asked if there were local authority (or other) bail supervision services readily available in the area(s) that they worked in. The data show that the judiciary were more likely to know of bail supervision services being available in their area compared to COPFS staff (see Table 3 below).

Table 3: Known availability of bail supervision services in local area

Service available in local area	COPFS (n=64)	Judiciary (n=25)
Yes	39%	68%
No	17%	24%
Don't know	44%	8%

Where services were considered readily available, COPFS respondents were asked to describe briefly what the services entailed (with 21 respondents providing a response). Some respondents indicated that supervised bail was available (either provided by the local authority or SACRO), while one respondent said that a court-based bail address check service was available, but they did not know if bail supervision was offered locally.

A few suggested that bail supervision was only used for summary cases/was not suitable for use in solemn cases (but did not say why). Others outlined how the system for bail supervision worked in their areas. They included that social workers prepared reports for the court about the suitability of supervised bail and/or that social workers attended the custody court to assist if required. One suggested that bail supervision was a challenge for social work and the police (where breaches occurred).

One respondent suggested the supervised bail services in their area provided a “positive service”, while another felt they encouraged an increase in the use of bail:

“Good service in that it supplies up-to-date and accurate information for the court users (Sheriff, Fiscal and defence) and also can assist offenders with access to services.”

“It certainly seems to lead to more people being admitted to bail than would otherwise be the case as the Sheriff considers there to be sufficient oversight.”

While some felt that court based social workers were proactive in their area, or that social work were keen for supervised bail to be used more often, a few respondents indicated that they felt that bail supervision services were often under-resourced, creating problems with use:

“However, they are severely understaffed so the information is not always available timeously and cases are often dealt with without the info being available.”

One respondent also suggested that bail supervision services varied widely across the country and were not always consistent.

Sixteen judicial respondents provided further comments or descriptions of the services available to them and the main feedback was that such services were only ‘sometimes’ or ‘rarely’ available. Descriptions of services offered by respondents were very limited and most simply described this as ‘mentoring’, ‘social work supervision’ or a chance to ‘meet a social worker each week’.

Two respondents indicated that the COVID-19 pandemic had impacted on bail supervision services such that there was limited capacity to deliver services, and two others commented more generally that social work services were perhaps too stretched to deliver bail supervision:

“This is a service that is rarely offered and social workers are never around when such an assessment is required unless the accused is already one of their service users.”

“...the social work resource is very limited and they can only cope with around 1.5 cases per month on average.”

Two others commented that there were delays generally in the assessment process which perhaps prevented greater use of bail supervision:

“There can be difficulties in getting an assessment done quickly and sometimes there is not a social worker available to do it.”

“[Pre-pandemic] Services were available, but not ‘readily’. The sheriff had to seek a report on the suitability of supervised bail in the morning as the assessment took some time. On many occasions, nothing was known about any of the custodies until later in the day by which time it was too late to have an assessment carried out for that day.”

One respondent offered a view that bail supervision worked particularly well for young people and it was therefore unfortunate that it was not more readily available:

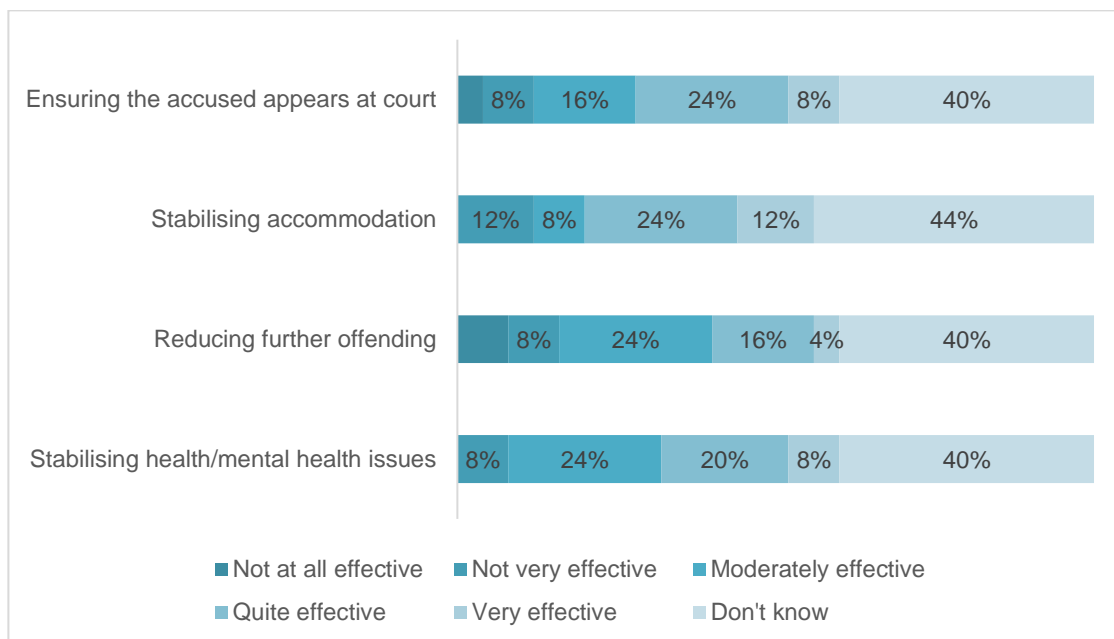
“For young accused [bail supervision] works really well but access to the assessment and use of them could be increased - most young offenders could be assisted by a steering hand through the system and monitoring to avoid repeated offences before the first court intervention.”

A further two respondents commented that services were relatively new in their area and that they therefore had little knowledge of how they operated.

Perceived Effectiveness of Bail Supervision

When asked about the perceived effectiveness of bail supervision services and support in helping to address a range of different needs, there was mixed feedback from the judiciary (see Figure 9 below). In most cases, around 40% of respondents said they were ‘unsure’ how effective bail supervision services were in addressing needs, including ensuring that the accused appears at court, stabilising accommodation, reducing further offending and stabilising health/mental health issues. Just over a third (36%) felt they may be ‘quite’ or ‘very’ effective at helping to stabilise accommodation and just under a third (32%) perceived they might be ‘quite’ or ‘very’ effective at ensuring the accused appears at court.

Figure 9: Perceived effectiveness of bail supervision services and support in addressing a range of factors (n=25)



Bail supervision and support was seen as perhaps less effective overall at helping to reduce further offending or helping to stabilise health/mental health issues, although the small sample size means that differences in ratings between categories can be attributed to the views expressed by just one or two respondents.

Only one respondent provided a comment which explicitly reflected current confidence and/or satisfaction and this was linked to bail supervision reports:

“Bail supervision reports are frequently available and provide a valuable resource in the decision-making process. It gives me confidence that the accused will be supervised/monitored/supported through the process.”

Comments received elsewhere in the survey suggested that the effectiveness of bail supervision was entirely dependent on individual accused and their compliance:

“Effectiveness of the order depends entirely on compliance by the accused - or otherwise.”

Use of Special Bail Conditions

All COPFS respondents were asked, in cases where bail is not opposed but standard bail conditions are not considered sufficient to mitigate any perceived risk, what types of special conditions of bail they found themselves asking for most often (with responses split by summary and solemn workloads, as appropriate). A large number of respondents (55/64) provided information regarding summary cases and 53/64 gave information about solemn cases.

Table 4 shows the most common requested bail conditions noted by COPFS respondents by case type. While this was asked as an open question, there was significant consistency in responses both within and between the two different case

types. The data show that conditions around protecting the complainer (or witnesses and other named individuals) were asked for most often, closely followed by conditions to stay away from a particular locus. Curfews, the need to sign on at a police station, and for the accused to surrender their passport, however, appear to be used more frequently in solemn cases compared to summary cases.

Table 4: Bail conditions requested by case type

Special Bail Condition	Summary	Solemn
Do not approach, contact or attempt to contact the complainer, witnesses or other named individuals	54	49
To stay out of certain addresses, locations or areas	49	41
Curfew	19	34
Sign on at a police station	4	10
Present at the door when visited by police	3	3
Surrender passport	2	6
Stay out of City Exclusion Zones	2	1
Surrender electronic devices/internet devices	1	2
Total Respondents	55	53

Judiciary respondents were also asked what types of special conditions of bail they used most often. In summary cases, the main special conditions were:

- keeping away from complainers, witnesses or other named persons (n=19);
- keeping away from particular locations/locus (n=17);
- curfews (n=16);
- signing on at a police station regularly (in particular where there may be a risk of failing to appear (n=5); and
- internet restrictions (for example, in online child pornography cases) (n=1).

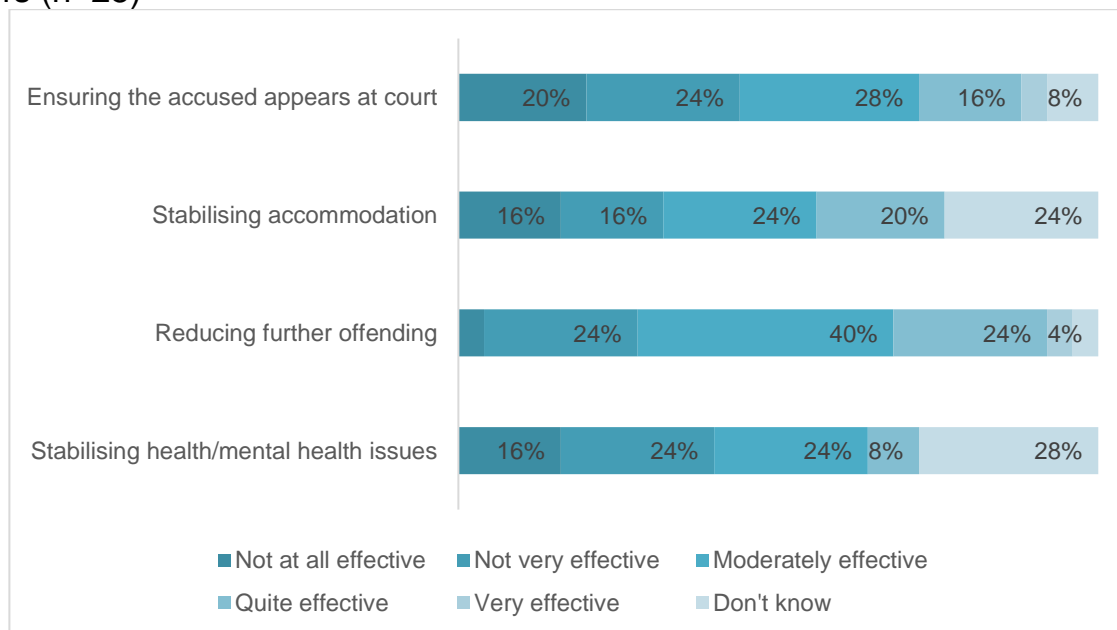
In solemn cases, the main special conditions were the same as those mentioned for summary cases. Conditions to stay away from victims, witnesses and other significant individuals (including family or associates of the complainer) featured slightly more prominently as special conditions in solemn cases. The only additional conditions for solemn cases (each mentioned by just one respondent each) were protective conditions of the complainer and surrender of passport.

Perceived Effectiveness of Special Conditions

Judiciary survey respondents were also asked how effective they thought special conditions were in addressing a range of factors (see Figure 10 below).

Respondents appeared more confident in their understanding of how effective special conditions could be (compared to bail supervision) with between 24%-40% of respondents indicating they perceived special conditions to be moderately effective at addressing all factors. Special conditions were seen as most effective at helping to reduce further offending (with 28% indicating they may be either 'quite' or 'very' effective in this regard). Again, however, small numbers of respondents overall means that variation between ratings for different categories can be attributed to ratings of just one or two respondents.

Figure 10: Perceived effectiveness of special conditions in addressing a range of factors (n=25)



Among COPFS respondents, cases where special bail was seen as particularly useful were those where the perpetrator was accused of domestic abuse (n=34). Less frequently mentioned were sexual offences/stalking (n=3), supervised bail for younger offenders (n=13) (where it was felt that additional intervention and support would result in better outcomes, especially if the young person had additional support needs), and those with conditions or issues where they might need support to comply with bail (n=4). Assault cases were also mentioned by several respondents as a case type where special bail conditions or supervised bail might be useful. A wide range of other case types or particular circumstances were also mentioned by just one respondent each.

Several respondents also caveated responses or highlighted that the use of special bail conditions or supervised bail would depend on the severity of the offence and the nature of the offender, i.e. whether they could be expected to comply with the court order or have a history of breaching bail conditions:

“Supervised bail is more often a consideration for the Sheriff and usually features in cases with young offenders. Special conditions are useful in all cases but very frequently used in relation to domestic offending or any offending where there is an established relationship between the accused and the victim (family/friends/

partners). Again, it is difficult to quantify and depends very much on the specific accused and the offence. The PF will need to consider if risk can be realistically managed by seeking special conditions.”

Barriers to Use of Bail Supervision and Special Conditions

Members of the judiciary were asked what (from a list of presented factors) they thought may act as a barrier to greater use of bail with special conditions or supervised bail in Scotland (see Table 5 below).

Table 5: Perceived barriers to greater use of supervised bail and bail with special conditions (n=23)

Potential Barriers	% of Respondents
Lack of resources to deliver alternatives to remand	74%
Lack of compliance with alternatives among accused	52%
Lack of available alternatives at the local level	48%
Lack of awareness of alternatives among procurators fiscal	22%
Lack of awareness of alternatives among judiciary	17%
Lack of research on compliance with alternatives	9%
Negative public perceptions of alternatives to remand	4%
Negative professional perceptions of alternatives to remand	-

The main perceived barrier was a lack of resources to deliver alternatives to remand, with almost three quarters of respondents citing this as an obstacle (74%). This was followed by lack of compliance with alternatives among accused and lack of available alternatives at the local level, each mentioned by roughly half of respondents as barriers to greater use. Nobody indicated that negative professional perceptions of alternatives to remand prevented their use and only one suggested that negative public perceptions may be a factor.

Three respondents cited ‘other’ barriers to use of supervised bail or special conditions. For one, likely future conduct was the biggest barrier:

“Likely future conduct of the accused judged by his/her history and characteristics. That is the biggest single reason for refusal of bail. For many, only incarceration can prevent further offending and another [reason is] actions against the public interest, such as intimidation of witnesses (which is rife and leads to many cracked trials).”

For the other two, lack of tagging/electronic monitoring facilities were cited as a barrier:

“Tagging for curfews has been enacted but not brought into force. This would make curfews far more effective, as breaches would be detected automatically without the huge resource of random police checks.”

“Use of electronic tags to secure curfew and/or not approaching complainer's property might be useful additional resource - i.e. one that might in some circumstances enable the grant of bail subject to special conditions where it would not otherwise be possible.”

When asked what they perceived was the ‘biggest barrier’, lack of resources was again cited by many:

“Additional resources are required for existing criminal justice social work. Any extension of supervised bail, which would be worth exploring, would be dependent on sufficient additional resources being available to make it work.”

Specifically, some mentioned insufficient resources to ensure compliance, with lack of compliance (and wider criminal record) also being seen as something that would render use of supervised bail or special conditions unlikely. Lack of awareness and resources for supervised bail was also cited:

“It is important to distinguish between special conditions and supervised bail. Bail with special conditions is very common in my experience; supervised bail is much less common. I think that is partly a matter of awareness, but more significantly, one of resources.”

Views were also put forward that remote monitoring (especially GPS tags) would increase effectiveness of curfews, and that increased availability of electronic monitoring (EM) for curfews would be welcomed:

“In this jurisdiction, so far as I am aware, there are no bail options other than bail itself, with or without special conditions, other than bail supervision. Electronic monitoring would be a helpful addition.”

Indeed, when asked what (from a specified list of options) may allow for greater use of bail with special conditions or supervised bail in Scotland, most respondents (83%) indicated that increased availability of EM bail would be of assistance (see Table 6 below).

Table 6: Factors perceived to allow for greater use of supervised bail and bail with special conditions (n=24)

Factors	% of Respondents
Increased availability of Electronic Monitoring (EM) bail	83%
Increased capacity of local authority bail supervision services	63%
Introduction of bail hostels or equivalent accommodation	63%

Increased availability of Remote Alcohol Monitoring (RAM)	58%
Increased capacity of third sector bail services	42%

Over half of judiciary respondents indicated that they would welcome the full range of additional supports listed (the exception being increased capacity of third sector bail services).

Reviews, Appeals and Other Comments

Key points:

Both the review and appeals processes were seen to be largely unproblematic by the judiciary although this was an area of the survey that attracted little feedback from respondents.

Some COPFS respondents viewed that the current system of bail/remand decision-making worked well, while others suggested that there were inconsistencies in the use of remand (both between areas and between individual Sheriffs, as well as over time) and between police practices in relation to undertakings (which had an onward impact on decisions).

Some COPFS respondents viewed that remand was not used in all cases where it may in fact be appropriate.

The COVID-19 pandemic was reported to have impacted more on solemn cases compared to summary (with increased propensity to grant bail).

Bail Reviews

Sheriffs and Senators were invited to provide feedback on the effectiveness of the bail review process. Only nine individuals gave a substantive response, the main feedback suggesting that the process was effective and fair with applications for review being dealt with in a reasonable time. Only one respondent suggested that reviews took time to process (which could be mitigated if the hearing could be dealt with in chambers on agreement from the Crown). Two others commented on timelines associated with reviews linked to bail conditions, and suggested that more could be done to deter an accused agreeing to bail conditions one week and then seeking a review the following week⁶.

Reviews were also described positively by Crown respondents as an opportunity for conditions to be amended or removed, but that the initial bail/remand decision afforded immediate protections for complainers, which was considered to be vitally important:

“I find for the most part the way we oppose bail allows the sheriff to have the full details to make the best decision at that time. This can of course and often does get

⁶ Recognising that where sub-section 30(2C) applies the application shall be (a) intimated by the person making it immediately and in writing to the Crown Agent; and (b) [determined] not less than 7 days after the date of that intimation. Section 30(3) of the Act also sets out that an application under this section, where it relates to the original decision of the court, shall not be made before the fifth day after that decision and, where it relates to a subsequent decision, before the fifteenth day thereafter.

reviewed further down the line and conditions can be amended or removed if needed, but it provides protection for the immediate time after the alleged incident which I think is the most important time to protect complainers.”

“I have not seen a Sheriff remand an accused in custody pending trial where there is no justifiable reason to do so. Their decisions are finely balanced upon the arguments put forward by both the Crown and the defence, and there have been no instances where I have disagreed with the Sheriff's decision to remand.”

Bail Appeals

Similarly, judiciary respondents were invited to provide feedback on the bail appeals process. Ten individuals provided a response with most again saying that the process seemed to work well from their perspective.

Two respondents commented that there should be more responsibility placed on the defence to justify bail appeals (which often appeared to be without merit) and to present them in a timely manner, and another suggested that additional information in advance in support of an appeal would be useful.

A small number of COPFS staff indicated that they felt the current system worked appropriately, and that they had generally been satisfied with the decision of the court regarding the use of bail or remand. One COPFS respondent did, however, suggest that appeal courts could be rushed meaning that not enough time is provided to fully consider/discuss all the information and make an informed decision:

“Unfortunately, the numbers being put through court and the resources available to process them leave little time for a meaningful discussion on what is most appropriate. Often the remand court is rushed, Fiscals have little or no time to consider their papers and one court must deal with a huge amount of business, frequently hearing cases well past business hours. The appeals process is also rushed, with insufficient court time allocated to ensure that all cases are properly considered.”

Consistent Practice

In other comments, several COPFS respondents suggested that there were inconsistencies or issues in the use of remand. For example, it was suggested that inconsistencies existed between areas and between individual Sheriffs, as well as over time (particularly following disruptions caused by COVID-19):

“Shrieval approaches to remand/bail conditions can and do vary which can lead to a lack of consistency and frankly quirks (and defence agents 'Sheriff shopping' so that they can increase their client's chances of being admitted to bail)...I believe that if an accused person would have been remanded pre-Covid that they ought to be remanded now too - the fact that they will have to wait longer for the case to conclude is often put forward by defence agents in support of bail which a great many Sheriffs support.”

A few COPFS respondents also highlighted inconsistencies introduced by the use of police undertakings. It was suggested that Sheriffs will often not remand accused persons where they have appeared on an undertaking, even where Section 23D should apply, i.e. that bail must not be granted except in exceptional circumstances:

“S.23D cases have [increased] astonishingly over the last two years and the dawn of the police undertaking for almost everything meant that often offenders to whom s.23D applies are released on a police undertaking. When that decision is made by Inspector level and above, often the court holds the Crown responsible for that arm of the state and will not then remand.”

One respondent also noted that, in comparison, there can be cases where people are remanded for breaching bail in minor cases due to further minor offending (e.g. in the case of minor shoplifting).

Impact of COVID-19

Respondents to the judiciary survey were asked if the effect of the COVID-19 pandemic had had any impact on their decision-making in respect of both solemn and summary proceedings. In solemn cases, 72% of respondents (n=18) said that there had been an impact compared to only 22% (n=5) who said it had impacted on summary cases.

Explanations included that, in solemn cases, long delays in cases had meant that decision makers were more inclined to grant bail especially if the likely sentence was less than 2 years. Most referenced the High Court guidance in this regard and explained that they had taken into account the likely longer period on remand and followed the High Court guidance accordingly:

“It is plain that accused persons in solemn cases are liable to be on remand for longer than pre-covid, and in some cases, for a significant period of time. This has been the subject of consideration by the High Court of Justiciary Appeal Court, and one is mindful of what that court has said about that. Thus, in cases where a custodial sentence of less than 2 years is a likely outcome, there will need to be more compelling reasons to refuse bail. Such reasons do present in some cases, but the point is that the balance may have to be struck in a different way from pre-covid times.”

The nature of the allegations, criminal record, likely length of a custodial sentence if found guilty and interference with the accused’s family/work/housing and wellbeing were all important in such considerations, but may not of themselves dictate a grant of bail (with public interest concerns still remaining). Overall, however, most stressed that the likely period to be spent on remand had to be proportionate, therefore bail may be more likely to be granted during the pandemic, in some cases.

Comments were also made that there had been less availability of information to support decisions during the pandemic (for example, no mental health, supervised

bail and domestic abuse advocacy services in court) and that this had directly impacted on decisions.

Two respondents commented that there were safeguards in place which allow review of bail to be considered if necessary.

For summary cases, most said that COVID-19 had not impacted on decisions and this was largely because most custody trials were still operating within 40 days as a matter of practice and likely remand periods were short.

Where people said that COVID-19 had impacted on decisions in summary cases (n=4), one respondent said they were now more likely to remove special bail conditions if it would mean separation from the family setting over a period of time (i.e. over a year), another said that they were more likely to grant bail because of social distancing requirements in multiple accused cases and another said that remand would be less likely if they perceived there to be a public health risk associated with COVID-19 outbreaks in prison. The final respondent again stressed that the absence of support from mental health, social work, supervised bail and domestic abuse advocacy services during the pandemic impacted on their decisions.

The only other comments offered in relation to COVID-19 and impact on bail and remand decisions were that mental health and general well-being of the accused may feature more in decision-making compared to pre-pandemic:

“In some cases, I take into account the toll on the mental health of accused persons the pandemic may have had, and I have regard to this when assessing their overall situation in relation to bail and any special conditions.”

“Much more sensitive to time scales and risk of accused being on remand for unfairly long time. Therefore, a little more likely to grant bail, especially in cases of lower seriousness.”

One respondent again stressed that each case must be considered on its own facts to address how long a person may be on remand.

Other comments

Respondents to both surveys were invited to provide any additional feedback on bail/refusal of bail in Scotland, and/or alternatives to remand (bail options) that was not covered elsewhere in the survey.

Some COPFS staff reiterated the key areas for consideration when considering whether or not to oppose bail, particularly around safety and risk of harm:

“The overriding question is one of safety, to a particular complainer or the wider public, based on the previous convictions of the accused, propensity for offending, breaching conditions of bail, all taken in light of the nature of the offence itself.”

“...remand is a significant step in my view and opposition to bail should only be sought to achieve a particular aim; not just because an accused has a ‘bad record’, but because a ‘bad record’ along with new allegations and other antecedents suggests there is a risk of harm to others or that public order has to be maintained or to ensure an accused’s attendance at any future diets, and can only be achieved by the accused being remanded.”

Similarly, two Sheriffs suggested that Section 23B(1)(a)(ii) (‘having regard to the public interest’) was a key factor influencing decisions (although not covered by the current survey), and was something which could be explored in more detail to better understand its influence:

“[s23B(1)(a)(ii)] requires consideration whether there is good reason for refusing bail having regard to the public interest...It is not enough that the situation is within one of the s23C(1) grounds. Separate consideration must also be given to whether that is good reason for refusal of bail having regard to the public interest.”

“Bail/remand decisions involve a consideration of the interests and rights of the accused as well as the public interest and especially protection of the public and particular individuals. That is a judicial decision which I believe is done well on the whole.”

A third Sheriff suggested that public interest and protecting the community from harm was often a necessary reason for use of remand:

“Proportionality is important in decision-making, but so is protecting the integrity of prosecutions and ensuring that prosecutions are concluded without delay. Remand can be necessary to ensure that the prosecution can be brought to a conclusion as well as for protecting the community from harm from the accused.”

A few COPFS respondents outlined additional options to support/complement the bail or remand options. One suggested that supervised bail needed to be more readily available as this provided “a good halfway house” between remand and bail, with them suggesting that, if it helped to rehabilitate and re-educate offenders then it was “clearly the better way to deal with those awaiting trial”. Another respondent suggested that interim GPS tagging should also be legislated for to provide another option and to allow greater numbers of people to be granted bail.

One judiciary respondent also again stressed that improvements and investments in alternatives to remand may be welcomed:

“...this is not to say that there are no improvements possible, some of which are probably capable of both reducing the rate of remand while adequately safeguarding the public and private interest. Those improvements include: bail hostels, tagging, alcohol tagging and (if feasible) drug tagging. But that all requires money and political commitment. If done, all well and good. I for one would be pleased.”

Several COPFS respondents felt that remand was not being used enough, that bail was used in sometimes inappropriate cases thus allowing those accused of serious offences to commit further offences while on bail, that bail conditions were not enforced or that breaches incurred with no real consequences, and that defence agents frequently sought to review and change special bail conditions:

“...very often it does appear as though it is nigh on impossible to have some people remanded; some people who have breached a bail order while being subject to 6/7/8+ bail orders who are then further admitted to bail tends to completely undervalue the purpose of the conditions.”

“Not enough people are remanded by Sheriffs these days... The sanctions often applied for breaching bail conditions undermine bail and its importance and effectiveness. Agents are too keen to accept special bail conditions and then seek to review these shortly afterwards.”

Other comments from COPFS respondents (raised by just one respondent each) included that issues with an accused's housing stability/status can sometimes result in periods of remand, even where bail is not opposed and that there was a need for more creative and innovative bail conditions to ensure the use of bail can be managed safely:

“I...have seen attitudes change to take domestic abuse more seriously but the drive to prevent short sentences is working against this and is giving Sheriffs an excuse not to imprison dangerous males...There is so much that can be done if we are more creative but the attitudes from the bench need to change.”

While not a key emerging theme, one judiciary respondent suggested that, if remand was seen as being 'over-used', there may be merit in exploring further the Crown's reasons for opposing bail, as well as encouraging PFs to more frequently use their flexibility to support bail:

“Procurators Fiscal... are sent into court with instructions to oppose bail...and the arguments they are required to advance are usually very one-dimensional. I understand that there is concern about the number of people who are remanded. It would be not a bad start if COPFS - which is part of the Scottish Administration - opposed bail much less frequently, especially in summary cases and allowed procurators fiscal in court a discretion to depart from their peremptory instructions if they see good reason to do so once they have heard about the accused's situation.”

Finally, one judiciary respondent also outlined that, while research to better understand bail and remand decision-making was important, caution was needed not to overstate nor oversimplify the problem of remand in Scotland:

“...it is quite wrong to jump from figures showing a rate of remand higher than many other countries to a conclusion that our rate is too high. The figures show that the great majority of accused are either bailed or ordained to appear. Remand is no more than about 15% of all cases. In my view, the law is sound.

The processes for determining bail are sound in my view. All have skilled legal representation. There is a quick effective appeal process. Those who believe that too many are being remanded would profit from spending a few solid weeks in a busy sheriff court and familiarise themselves with the large daily workload sheriffs have to deal with. They would do well to carefully examine the cases that we deal with and the circumstances of those appearing before us. They may, after a while, well conclude that on the whole, sheriffs only remand for sound reasons which usually stand up to appeal (which are not common in any event)...There ought to be a healthy amount of respect for judicial decision-making applying the law laid down by Parliament."

Conclusions and Next Steps

Conclusions

The survey findings suggest that there is considerable similarity in the legislative grounds that are considered with greatest frequency by both COPFS and the judiciary. There also appears to be no significant divergence in the decision-making processes and factors considered for both summary and solemn cases.

In particular, likely risk of reoffending seems key to both Crown decisions to oppose bail and Sheriffs/Senators' decisions to refuse it. Previous breaches of bail are viewed negatively and appear to hold significant weight in arguments presented by the Crown as well as featuring frequently as a factor informing Sheriffs/Senators' decisions. The nature of any previous convictions, and the seriousness of the presenting offence are also key in informing decisions for both parties.

Special conditions of bail appear to be viewed with reasonable confidence, especially in ensuring compliance with court orders and in protecting the public/complainers. There was less evidence across the two samples of confidence in supervised bail, with suggestions that more investment could be made to increase availability and maximise effectiveness of this option.

The geographical variation in bail/remand decision-making that was hinted at in the COPFS survey was not replicated in findings from the survey of the judiciary, for whom lack of consistency in information provided by the Crown/defence and other justice partners appeared to be a bigger issue.

Overall, respondents to both the COPFS and the judiciary survey highlighted that decisions were often complex and involved consideration of multiple factors, with decisions always made on a case-by-case basis, considering the factors most relevant to the personal circumstances of the accused.

Next Steps

The surveys provided a valuable insight into the views and experiences of the Crown and judiciary and highlight a number of areas of the current bail and remand decision-making process which may merit further exploration in order to be better understood. Engagement with a wider range of criminal justice partners in the subsequent stages of the research will be key in informing understanding of the overall bail and remand decision-making journey. Defence agents, in particular, are a voice missing from the research completed to date and the findings above suggest that garnering their views and experience would be of considerable value. Criminal Justice Social Work staff and the police, to a lesser extent, may also provide context for some of observations around supports in place to facilitate alternatives to remand.



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