

SENTENCING FOR BAIL ACT OFFENCES

THE PANEL'S ADVICE TO THE SENTENCING GUIDELINES COUNCIL

FOREWORD BY THE CHAIRMAN

In this latest advice to the Sentencing Guidelines Council, the Sentencing Advisory Panel proposes guidelines on sentencing adult defendants who fail to surrender to custody at a police station or a court following time spent on bail.

Bail Act offences are committed in large numbers each year and are a major cause of disruption, delay and unnecessary cost for the criminal justice system. Although, as we report in our advice, a determined effort continues to be made by various agencies to encourage defendants to turn up at the time and place stated, a swift, rigorous and consistent response to Bail Act offences is needed to reinforce the message that such offending behaviour will be punished. This, in turn, may help to discourage future offending.

The advice confirms the general principle that sentencing for a Bail Act offence should normally be a separate exercise, carried out as soon as is practicable, and not dependent upon the nature of the original offence charged or the outcome of the investigations or trial in relation to that offence. The sentence for a Bail Act offence should be commensurate with its seriousness, taking into account the reason why the offender failed to surrender and the degree of harm both intended and caused. For the purposes of this advice, the term 'harm' is used not only to cover the harm caused to individual victims and witnesses but the consequential drain on police and court resources and the wider negative impact on public confidence in the criminal justice system.

The advice concludes that the approach to sentencing should generally be the same whether bail was granted by the police or by a court. A number of factors are identified as aggravating an offence, including a history of committing Bail Act offences and going to great lengths to evade being brought to justice and to cause maximum disruption. The fact that an offender has a chaotic lifestyle, often put forward as personal mitigation, may be a fact to take into account when considering whether to grant bail in the first instance but the Panel has concluded that this should not be regarded as a mitigating factor when deciding sentence.

Where it proves possible to conclude a trial in the absence of a defendant this also should have no bearing on the sentence passed for the Bail Act offence.

Professor Martin Wasik
Chairman of the Sentencing Advisory Panel

SENTENCING FOR BAIL ACT OFFENCES

The Panel's Advice to the Sentencing Guidelines Council

Introduction

1. Following a request from the Sentencing Guidelines Council, the Sentencing Advisory Panel has produced Advice on sentencing for offences of failing to surrender to bail, contrary to sections 6(1) and 6(2) of the Bail Act 1976.

2. These offences are sentenced in large numbers every year and it is apparent that different approaches to sentencing have developed. Some of those who responded to the Panel's consultation pointed to the number of offenders whose only sanction is to be re-bailed by the court to appear at a later date and decried this as failing to bring offenders to justice.

3. In our consultation we drew attention to current or recent bail information and diversion schemes and other government initiatives designed both to reduce the likelihood of Bail Act offences being committed and also to ensure that those who do fail to surrender are brought to justice in a timely fashion. An updated summary of current initiatives is at Annex B. Much can be achieved by speedy and effective enforcement and by helping to support and motivate those identified as being at risk of failing to surrender to bail and it follows that sentencing is not the only tool available to secure compliance. A prime objective should be to prevent Bail Act offences being committed in the first place but all efforts to ensure compliance need to be supported by a consistent sentencing regime for those who do offend. This, in turn, needs to be widely and clearly understood if it is to be effective; defendants should be left in no doubt about the consequences of failing to surrender when called upon to do so.

4. Lord Woolf CJ emphasised the need to deal effectively with those who fail to surrender to bail when he said:

“The failure of the defendants to comply with the terms of their bail by not surrendering can undermine the administration of justice. It can disrupt proceedings. The resulting delays impact on victims, witnesses and other court users and also waste costs. A defendant’s failure to surrender affects not only the case with which he is concerned, but also the courts’ ability to administer justice more generally by damaging the confidence of victims, witnesses and the public in the effectiveness of the court system and the judiciary.”¹

5. The Panel’s Advice proposes a consistent and rigorous response to Bail Act offences with a view to ensuring that they are dealt with expeditiously, treated seriously and sentenced accordingly.

6. The majority of those who responded to our consultation agreed with our observation that, whilst the primary purpose of sentencing for these offences is to punish an individual offender for flouting the authority of the police or the courts and to encourage his or her future compliance, there are wider issues to be taken into account. A consistent approach to sentencing that treats these offences with a sufficient level of seriousness can send a message that deters others from failing to surrender to bail, encourages general compliance with the authority of the police and the courts and helps to maintain public confidence in the criminal justice system.

7. Sentencing for a Bail Act offence must be proportionate to the seriousness of the offence committed and the purposes of sentencing in an individual case will depend to some extent upon the circumstances of the offence and the offender. This Advice proposes a general approach to sentencing and identifies various aggravating and mitigating factors that are likely to influence the choice of disposal in an individual case.

¹ Practice Direction (Consolidated: Criminal) 2002 (as amended), Part 1, para. 13.2 /www.hmcourts-service.gov.uk/cms/files/consolidated_criminal_practice_direction_0603028doc

8. The considerations for sentencers dealing with Bail Act offences committed by youths will differ markedly from those relevant for adult offenders and this Advice relates to the sentencing of adult offenders only. The Panel intends to consider a wide range of issues relating to the sentencing of youths at a later date.

9. Section One of this Advice provides background information about Bail Act offences; Section Two develops general principles of sentencing; Section Three sets out the Panel's proposals for sentencing, including the effect of conducting a trial in the absence of the defendant.

SECTION ONE: THE OFFENCE

10. A person released on bail by the police or by a court is under an obligation to surrender to custody at the place and on the date and time given. If the person does not attend as specified without reasonable cause, an offence is committed. If a person has reasonable cause for failing to surrender to custody there is a subsequent obligation to attend the place named when bail was granted as soon after the time specified as is reasonably practicable.

11. Bail may be granted unconditionally or it may have conditions attached to it; common conditions are a curfew, a requirement to report to a police station or a residence requirement. An offender who fails to comply with a condition is liable to immediate arrest and return to court but does not commit an offence.

12. Section 6 of the Bail Act 1976 states:

“1) If a person who has been released on bail in criminal proceedings fails without reasonable cause to surrender to custody he shall be guilty of an offence; and

2) If a person who:

(a) has been released on bail in criminal proceedings, and

(b) having reasonable cause therefor, has failed to surrender to custody, fails to surrender to custody at the appointed place as soon after the appointed time as is reasonably practicable, he shall be guilty of an offence.”

13. An offence under subsection (1) or (2) is punishable either on summary conviction or, in the Crown Court, as if it were a criminal contempt of court. The maximum sentence in a magistrates' court is 3 months imprisonment.² If the matter is committed to the Crown Court for sentence, or dealt with as for contempt of court, the maximum sentence is 12 months' custody. In respect of contempt of court procedures, the sentence is subject to the usual appellate procedures.³

² S.34, Police and Justice Act 2006 amends various sections of the Criminal Justice Act 2003 to make it clear that this maximum sentence is not affected by the general provisions relating to custodial sentences of less than 12 months

³ Administration of Justice Act 1960, s.13

Police Bail

14. Normally, a person who has been arrested is taken to a police station but, in certain circumstances, it is now possible for a person to be arrested and bailed elsewhere.⁴ If the police have sufficient evidence, the person arrested will be charged and either released on bail or retained in custody until the first court hearing.⁵

15. The procedure relating to the charging of offenders was changed in January 2004.⁶ The police can now release a defendant suspected of having committed an offence without charge and on bail to appear at the police station at a later date for the purpose of enabling the Director of Public Prosecutions (or his representative) to decide whether there is sufficient evidence to charge the person with an offence. This means that, in future, there are likely to be more occasions where an offender is bailed to return to the police station and, consequently, a higher number of prosecutions for failing to surrender to police bail in addition to prosecutions for failure to surrender to a court.

Court Bail

16. If a court case needs to be adjourned, there may be many circumstances in which the court will have the power to remand the defendant. Where that power exists, the court has the option of releasing the defendant on bail or of remanding him or her in custody. In circumstances where there is an obligation on the court to remand a defendant, there is a general right in favour of bail.⁷ Bail may only be refused in the circumstances set out in schedule 1 to the Bail Act 1976; the grounds vary depending on whether or not the offence is imprisonable. However, the general right to be granted bail has been curtailed in prescribed situations and is further qualified by provisions in the Criminal Justice Act 2003.⁸

⁴ Criminal Justice Act 2003, s.4

⁵ in line with the provisions in section 3 of the Bail Act 1976 and Part IV of the Police and Criminal Evidence Act 1984

⁶ Police and Criminal Evidence Act 1984, s.37(7) as amended by Criminal Justice Act 2003, sched.2, para.2.2

⁷ Bail Act 1976, s.4(1)

⁸ S.14 provides that, where bail is sought for an offence committed whilst on bail for another offence, it will not be granted unless the court is satisfied that there is no significant risk of re-offending. Section 15 provides that a defendant who failed to answer bail without reasonable excuse may not be granted bail unless the court is satisfied that there is no significant risk of failure to appear again. These provisions were implemented on 1 January 2007 but only for cases where the original offence carries a maximum sentence of life imprisonment.

SECTION TWO: PRINCIPLES OF SENTENCING

SERIOUSNESS

17. The Criminal Justice Act 2003 (the Act) establishes seriousness as the key determinant of the appropriate sentence for an offence: a community order can be imposed only if a court considers that the offence is serious enough to justify it⁹ and a custodial sentence can be imposed only if a court considers that a community order or a fine alone cannot be justified in view of the seriousness of the offence.¹⁰ The Sentencing Guidelines Council has published a definitive guideline on seriousness that guides sentencers through the process of determining whether the respective sentencing thresholds have been crossed.¹¹

18. The Act states that, when assessing the seriousness of any offence, the court must consider the offender's culpability and any harm which the offence caused, was intended to cause or might foreseeably have caused.¹² The term 'harm' when applied to Bail Act offences is used in its widest sense to include not only the harm caused to individual victims and witnesses but the consequential drain on police and court resources and the wider negative impact on public confidence in the criminal justice system.

19. The degree of harm caused by Bail Act offences is variable and, although the range of levels of culpability is likely to be quite narrow, inevitably the reasons behind the decision not to surrender to bail will be diverse. Where there is an imbalance between culpability and harm, the Council Guideline on assessing seriousness¹³ requires culpability to be the starting point. The Panel can see no reason why this general principle should not apply to Bail Act offences. In an individual case, a court will need to consider:

- a) **in relation to culpability:** was the failure to surrender intentional and, if so, what was the level of harm intended?

⁹ Criminal Justice Act 2003, s.148(1)

¹⁰ *ibid.* s.152(2)

¹¹ *Overarching Principles: Seriousness* published on 16 December 2004; www.sentencing-guidelines.gov.uk

¹² Criminal Justice Act 2003, s.143(1)

¹³ *Overarching Principles: Seriousness*, page 5, published December 2004; www.sentencing-guidelines.gov.uk

- b) **In relation to harm:** did the failure to surrender significantly impede the course of justice, for example did it avoid charges being brought, delay a trial or inconvenience victims or witnesses?

The assessment of seriousness will also need to take into account the various aggravating and mitigating factors discussed in paragraphs 31 to 41 below.

Culpability

20. There is an obvious obligation on a person who is granted bail to surrender to custody at the police station or the court but the assessment of offender culpability needs to encompass two aspects. The first consideration is the immediate reason why the defendant failed to appear, which can range from forgetfulness (arguably comparable to the category of culpability described as “negligence” in the Council guideline on seriousness¹⁴) or fear of the outcome of the trial through to an intentional act calculated to cause inconvenience. Where the failure to surrender was deliberate, the second and key question is whether it was designed to disrupt the system to the defendant’s advantage or whether the defendant simply gave no thought at all to the consequences. The reason why the defendant failed to surrender and his underlying intention, if any, in committing a Bail Act offence, will be relevant considerations when assessing the seriousness of the offending behaviour.

21. It is often stated that the reason why an offender failed to surrender to custody is that he or she has a chaotic lifestyle and was simply incapable of remembering the obligation or of making arrangements to appear. The degree to which this might mitigate the culpability of the defendant is discussed at paragraphs 38 to 39.

22. In relation to failure to surrender to police bail, it is worth recalling what is noted in paragraph 12: that police bail is now granted in a wide range of circumstances, including where a defendant is merely suspected of a crime and there is insufficient evidence to bring a charge. **Where a defendant who fails to surrender to police bail is subsequently released without charge, the decision not**

¹⁴ *ibid.* page 4.

to surrender to custody may be regarded as less culpable. The Panel understands that it is currently not the practice to bring charges for the Bail Act offence in such cases; we can see no reason why that practice should change and our Advice is based on the assumption that this approach will continue to be adopted.

Harm

23. Some degree of harm, even if only a minor delay or inconvenience to the authorities, will always be caused when a defendant fails to surrender to custody. The harm that the offence might foreseeably have caused¹⁵ must also be taken into account when assessing offence seriousness and is linked to the assessment of culpability discussed in paragraph 19, but the degree of harm *actually* caused by a Bail Act offence will vary considerably depending on the particular circumstances of the offence.

Police or Court bail

24. Failure to surrender to police bail results in police time being wasted and the course of justice being impeded; it can also, potentially, result in victims and witnesses being distressed and concerned about their safety and the ability of the system to protect the public and deliver justice.

25. Failure to attend court for any reason inevitably delays justice; it wastes public money in the form of court time and the resources of the prosecution, the police and the defence. The level of harm is likely to be assessed as high where an offender fails to appear for sentence and is also seen to be flouting the authority of the court. This may be the case particularly where the avoidance of sentence results in the consequential avoidance of ancillary orders such as disqualification from driving or from working with children or vulnerable adults, the payment of compensation or registration as a sex offender. This may mean that the offender is free to operate without sanction and continues to present a risk of harm to the public.

¹⁵ Criminal Justice Act, s.143(1)

26. Where a defendant fails to appear for a first court hearing but attends shortly afterwards, the only harm caused is likely to be the financial cost to the system. Procedural delays may also be caused by the prosecution, the defence or the Courts Service at various stages of the process and, where a case could not have proceeded even if the defendant had surrendered to bail, this should be taken into account when assessing the harm actually caused by a Bail Act offence.

27. Where a defendant appears for trial on the wrong day but enters a late guilty plea, enabling the case to be disposed of (albeit with some delay and disruption), the harm caused by the delay may, to some degree, be offset by the benefits stemming from the change of plea.

28. The most serious harm is likely to result when a defendant fails to appear for trial, especially if this results in witnesses being sent away. Where the court decides not to proceed to trial in the absence of the defendant (see the discussion at paragraphs 69 to 75), interference with the course of justice may be particularly acute where there is subsequently a long gap between the offence and the trial, since the memories of the victim and/or witnesses may become less certain with the passage of time. Victims and witnesses, many of whom find the prospect of preparing for and attending court daunting, are likely to be caused distress and/or inconvenience; many witnesses may find it more difficult to attend court on the second or subsequent occasion, to the extent that they may not even appear at all. In such circumstances the harm is very high because justice will be prevented. Victims of violent or sexual offences are particularly likely to be distressed to learn that the accused is 'at large' in defiance of the court.

29. In general terms, the Panel takes the view that the same approach to sentencing should be adopted whether the offence involves a failure to surrender to a police station or a court and the sentencing proposals are predicated on that approach. However, in practical terms, the harm resulting from failure to surrender to police bail can often be less than that resulting from failure to appear in court and this must, on a case by case basis, be taken into account when assessing the seriousness of an individual offence. The degree of harm caused will depend on a number of aggravating and mitigating factors discussed at paragraphs 31 to 41 below.

Sections 6(1) or 6(2)

30. When a defendant commits an offence of failing to surrender to custody contrary to section 6(2), initially there will have been a reasonable cause for that failure. It can be argued that an offence under section 6(1) is more serious, involving as it does a deliberate flouting of the law, whereas an offence under section 6(2) may be committed for a number of reasons. However, failing to surrender as soon as is reasonably practicable once the offender is able to do so carries its own level of culpability (see discussion that follows) and can add further to delays and wasted resources, causing victims and witnesses to be inconvenienced. The Panel's view is that, generally, the same approach to sentencing should be taken when dealing with offences contrary to sections 6(1) and 6(2), although, as with the comparison between failing to surrender to a police station and failing to appear in court, it is inevitable that the actual degree of harm caused will impact on the severity of the sentence.

Recommendation 1

The approach to sentencing for a Bail Act offence should generally be the same whether the offence was committed under section 6(1) or 6(2) of the Bail Act 1976 and whether the defendant failed to surrender to a police station or to a court. It will be influenced more by factors relating to harm and culpability than by the sub-section under which the offence arises or whether the bail was granted by the police or by a court.

Aggravating factors

31. In our consultation paper, we discussed certain aggravating factors that are particularly likely to be present in relation to an offence of failing to surrender to bail.

32. Defendants who repeatedly fail to attend court are likely to receive more severe sentences,¹⁶ to reflect the fact that, as some of those who responded to the

¹⁶ R v O'Hara [2003] 2 Cr App R (S) 25, R v Goodwin [2004] EWCA Crim 1488 and R v Olokun [2005] EWCA Crim 1100

consultation expressed it, these defendants have “played the system” and “shown a total disregard for the authority of the courts”. It must be borne in mind also that section 143(2) of the Criminal Justice Act 2003 provides that relevant previous convictions are to be treated as an aggravating factor when assessing the seriousness of any offence.

33. The period of time for which a defendant absconds is also likely to influence the court when considering sentence. In *McKendrick*,¹⁷ for example, the Court upheld a custodial sentence of 10 months for a defendant who had been at large for almost 23 years, ruling that the sentencing judge was entitled to impose a sentence at the top end of the range (the defendant had pleaded guilty) because of the period during which the defendant had absconded and the impact this had had on the victim.

34. Whilst being absent for a long period of time will aggravate an offence, the fact that a defendant arrives at court only a few days, or even only a few hours, late, is not a factor that will necessarily mitigate sentence; in many cases, the harm will already have been done (for example, the trial may have been put back, witnesses may have been inconvenienced and there may be an increased likelihood that witnesses will fail to attend at a future hearing).

35. Leaving the jurisdiction has been cited as an aggravating factor in a number of cases.¹⁸ This is often linked to other actions designed to avoid the jurisdiction of the court such as changing identity and appearance.

36. The Panel considers that the following aggravating factors are particularly relevant to an offence of failing to surrender to bail:

- Repeat offending
- Determined attempt to avoid the jurisdiction of the court
- Offender’s absence causes a lengthy delay to the administration of justice

This list must be read in conjunction with the generic list of aggravating factors in the Council guideline *Overarching Principles: Seriousness*.¹⁹

¹⁷ [2005] 2 Cr App R (S) 68

¹⁸ see *R v Deeley* [1998] 1 Cr App R (S) 113 and *R v Nere* (1986) 8 Cr App R (S) 270

Mitigating factors

37. We considered two possible areas of mitigation in our consultation paper. The majority of those who responded agreed that prompt voluntary surrender, which saves police time in tracing and arresting offenders and may be an indication of remorse, might mitigate sentence in certain circumstances. However, this must be weighed against the degree of harm caused by the offence, which may still be significant. A distinction needs to be drawn between surrender initiated by the offender, which merits consideration as a mitigating factor, and surrender in response to follow up action, which has no significance.

38. Respondents were divided over whether an offender's chaotic lifestyle should be of any significance at all for sentencing purposes or should be considered as a matter of personal mitigation. Having considered all the arguments put forward, the Panel takes the view that the responsibility for surrendering to bail must ultimately rest with the defendant and has concluded that a chaotic lifestyle should have no bearing. The Panel has noted the comments of the Court of Appeal in the recent case of *Sutton*²⁰ where a custodial sentence of 28 days' imprisonment for a third offence of failing to surrender was upheld. The Court said

"...where, as here, this is a man who knows perfectly well what his obligations are in relation to court appearances, and who had breached them and been dealt with mercifully on two previous occasions, and who did not pretend to have any other explanation for his failure than the disorganisation which has led to problems on two previous occasions, it appears to us entirely right that the judge should mark his third breach by a substantive period in custody."

39. What becomes apparent when considering cases of this sort is that a defendant's disorganised or chaotic lifestyle, which may be due to a dependency on drugs or alcohol, should be recognised and taken into account when making the original decision to grant bail.

¹⁹ *Overarching Principles: Seriousness*, pages 6-7, published 16 December 2004, www.sentencing-guidelines.gov.uk

²⁰ [2006] EWCA Crim 1487

Recommendation 2

The fact that an offender has a disorganised or chaotic lifestyle should not normally be treated as mitigation.

40. A number of respondents suggested additional mitigating factors for inclusion in the guideline; some of these would amount to a defence and some are already covered by the existing Council guideline.²¹ Some pointed to the fact that the Magistrates' Court Sentencing Guidelines include *genuine* misunderstanding as a mitigating factor and suggested that this should be retained. This must be differentiated from a mistake on the part of the defendant, where the error must be regarded as his or her own responsibility.²²

41. The Panel considers that the following mitigating factors are particularly relevant to an offence of failing to surrender to bail:

- Prompt voluntary surrender
- Genuine misunderstanding (where this is not sufficient to amount to a defence)
- An inability to comprehend the requirements of bail for example, the offender has genuine literacy or language difficulties and no steps have been taken by the police or the court to address this (where this is not sufficient to amount to a defence)

This list must be read in conjunction with the generic list of mitigating factors in the Council guideline *Overarching Principles: Seriousness*.²³

²¹ *Overarching Principles: Seriousness*, pages 6-7, published 16 December 2004, www.sentencing-guidelines.gov.uk

²² see, for example, *Laidlaw v Atkinson* Queen's Bench Division CO/275/86

²³ pages 6-7, published December 2004, www.sentencing-guidelines.gov.uk

SENTENCING FOR A BAIL ACT OFFENCE

42. Prior to January 2004, sentencing practice in the Crown Court was governed by the Consolidated Criminal Practice Direction issued on the 8th July 2002.²⁴ Sentencing practice in magistrates' courts was governed by guidance contained in the *Magistrates' Court Sentencing Guidelines*,²⁵ which recommended that, for a first offence of failing to surrender, a community penalty (specifically a curfew order) might be an appropriate starting point (in the previous edition of the Guidelines, the suggested starting point had been a fine; a new edition of the Guidelines is currently being drafted by the Panel).

Practice Direction 2004

43. On 22 January 2004, Lord Woolf CJ issued an amendment to the Consolidated Criminal Practice Direction, entitled "Bail: Failure to Surrender and Trials in Absence." This has now been incorporated as section 13 in Part 1 in the most recent version of that Practice Direction published on 28 March 2006.

44. Since this Practice Direction appeared to provide for a different approach from that suggested by the *Magistrates' Court Sentencing Guidelines*, further consideration was given to this issue by the Magistrates' Association and the Justices' Clerks' Society. This resulted in a further paper being issued in October 2004 with the agreement of the Lord Chief Justice.

45. That paper emphasised the importance of a court dealing promptly with a Bail Act offence and of a separate sentence being imposed. This is also in the PD at I.13.5. Recognising that the appropriate sentence will depend on all the circumstances of the case, the paper confirmed that a custodial sentence is "likely to be the appropriate response if an offender has a history of failure to answer to bail" and that, where the sentence for the original offence is custodial, the sentence for the Bail Act offence will be ordered to be consecutive.

46. However, drawing attention to earlier guidance against the "over-use of custodial sentences", the paper concluded that "the guideline of a community

²⁴ [2002] 1 WLR 2870

²⁵ January 2004, para.31

sentence referred to in the national Sentencing Guidelines is appropriate for a first time offender.” In a letter appended to the paper, the Lord Chief Justice confirmed his agreement with that conclusion and confirmed that the approach in the Practice Direction set out earlier in this paragraph “was not directed to offenders with whom magistrates are normally concerned”.

47. Responses to our consultation indicate support for the principles established in the Practice Direction and joint MA/JCS paper. Our proposals are based on these key principles; we consulted upon, and now take the opportunity to clarify, some areas of uncertainty.

When to sentence

48. The key principle of the Practice Direction is that the courts should *deal with* defendants who fail to surrender to custody *as soon as is practicable* even if the trial or other hearing for the offence that led to the grant of bail is adjourned. The Direction identified the following factors as being relevant to the decision as to what is practicable:

- when the proceedings in respect of which bail was granted are expected to conclude;
- the seriousness of the offence for which the defendant is already being prosecuted;
- the type of penalty that might be imposed for the breach of bail and for the original offence;
- any other relevant circumstances.

Some of those who responded to the Panel’s consultation suggested that sentencing practice has changed in the Crown Court since the Direction was issued, with more Bail Act offences being sentenced on the first occasion that the offender appears before the court, regardless of whether sentence is being passed for the offence in relation to which bail was granted (the original offence). The Panel agrees that Bail Act offences should be dealt with *as soon as is practicable* but the meaning of ‘dealt with’ needs to be clear in any guideline (see Recommendation 3).

49. The Panel accepts that whether or not the defendant is guilty of a Bail Act offence should be determined as soon as possible. It will be central to the issue of whether bail should now be granted or refused. A trial on this issue is normally short. It should be held on the first appearance after arrest or surrender, unless an adjournment is necessary, for example for the defence to obtain medical evidence.

50. When there is a plea or finding of guilt, the Panel takes the view that sentence should be imposed *as soon as practicable*. The point at which it becomes possible to sentence an offence and the point at which it is practicable to do so will vary enormously from case to case; a decision about timing is best made according to individual circumstances.

51. A key relevant circumstance is whether the substantive offence is to be adjourned, either for a pre-sentence report or for trial, and whether the remand is to be on bail or in custody. Where the defendant is remanded in custody, the sentencing options for the Bail Act offence are limited. Where the defendant is to regain his or her liberty, there is the possibility of a non-custodial sentence. A community order, including an electronically monitored curfew requirement and, perhaps, a supervision requirement or an activity requirement, may be helpful in ensuring attendance at future court hearings. In more serious cases, a suspended sentence order could serve the same purpose. These are circumstances that militate in favour of sentencing without delay or with a short delay for a pre-sentence report.

52. On the other hand there is an argument that all outstanding matters should be dealt with on one sentencing occasion, particularly where the totality of offending may affect sentence type (for example where two or more offences together pass the custody threshold, but individually do not). There will also be circumstances where the harm caused by the failure to surrender cannot be assessed at an early stage (for example where witnesses may no longer be available).

53. Having considered the various arguments, the Panel considers that sentence for a Bail Act offence should be delayed only rarely, such as when

sentence for the substantive offence is imminent, or more time is necessary to assess the seriousness of the Bail Act offence.

Recommendation 3

A court should normally determine guilt on the first appearance after arrest or surrender. Sentence for a Bail Act offence should be delayed only in exceptional circumstances, for example when sentencing for the original offence is imminent or where the court would be better placed to assess the harm caused by the Bail Act offence during the substantive proceedings for the original offence. In all other circumstances, Bail Act offences should be charged, tried and sentenced as soon as is practicable.

Acquittal of the original offence.

54. A number of Court of Appeal cases²⁶ have established the principle that the seriousness of failure to surrender is not reduced by subsequent acquittal of the original offence. The Panel has considered whether to recommend a change in practice. At first sight it seems harsh that a defendant before the court for an offence of which he is not guilty should be punished for the ancillary offence of failure to surrender. However, the culpability of breaching bail is the same and the likely harm - delay, distress and inconvenience to witnesses, and additional costs – is the same. Moreover, one of the most serious effects of a Bail Act offence can be that the trial cannot take place because of the failure to surrender. It would be invidious and impossible for the court to distinguish between genuinely innocent defendants and those who have escaped conviction for the original offence. The Panel has, therefore, concluded that acquittal of the original offence should not be a mitigating factor for failure to surrender to custody.

Recommendation 4

Acquittal of the original offence does not mitigate the offence of failure to surrender to custody.

²⁶ *R v Neve* (1986) 8 Cr App R (S) 270, *R v Kohli* (1983) 5 Cr App R (S) 175 and *R v Clarke* [2000] 1 Cr App R (S) 224

Seriousness of the original offence

55. The Court of Appeal has often stated that *“There is no substance whatsoever in the submission that a sentence for failure to surrender to bail should be proportionate to the gravity of the counts on the indictment”*.²⁷ Even so, the Panel has thought it right to consider whether the seriousness of the original offence is relevant to sentence for an ancillary failure to surrender.

56. Failure to surrender to custody is an offence in its own right and, as for any other offence, the sentence imposed should not be disproportionate to the seriousness of the offending behaviour. If Recommendation 3 is adopted, and sentence for a Bail Act offence is imposed as soon as practicable, in many cases the Bail Act offence will be sentenced in advance of the offence in relation to which bail was granted. Thus it will be sentenced in its own right according to the assessment of its seriousness, without reference to the seriousness of, or the likely sentence for, the original offence. As already noted, the defendant may be acquitted of the original offence.

57. It can be argued that there is a greater public interest in bringing to justice the perpetrator of a more serious offence than a less serious one, increasing the seriousness of absconding for a more serious offence. On the other hand, the interests of an individual victim in seeing a case brought to justice may be as important in an offence that carries a comparatively low sentence as one that carries a high sentence (for example, a mother whose child has been injured by a car, whether the defendant is charged with careless driving or grievous bodily harm with intent).

58. Similarly, much of the harm that comes from failure to surrender – justice delayed or undermined; distress or inconvenience to witnesses; cost – is not necessarily related to seriousness of the original offence. The sense of security of a victim of domestic violence can be completely undermined by the offender appearing to remain in control by not attending trial, as can the victim of harassment, even where the maximum sentence is six months’ imprisonment; this may be more serious than someone absconding when charged with a significant

²⁷ See, for example, *R v McKinnon and White* [2003] 2 Cr App R (S) 29 and *R v Uddin* (1992) 13 Cr App R (S) 114

fraud. Public protection may be compromised to a greater degree by the absconding of a person who has committed a non-imprisonable driving offence (who would face disqualification) than the absconding of a persistent shoplifter.

59. The Panel has concluded that the seriousness of the original offence is not of itself a factor that affects sentencing for failure to surrender. However, the specific nature of the original offence may have implications for public protection and safety and the offender's failure to surrender might cause fear and distress to witnesses. The nature of the original offence might also affect cost - a lengthy aborted trial in the Crown Court will be more expensive than a short hearing in a magistrates' court, for example; all of these have the potential to affect public confidence in the system. It follows that the nature, as opposed to the seriousness, of the original offence may be a relevant factor that affects sentence.

Recommendation 5

Whilst the seriousness of the original offence does not of itself aggravate or mitigate the seriousness of the offence of failing to surrender to custody, the nature of the original offence may be relevant to assessing the likelihood of harm caused by the failure to surrender.

Consecutive/concurrent custodial sentences

60. Where a determinate custodial sentence is imposed for the original offence and a custodial sentence is also deemed appropriate for a Bail Act offence, a court must decide whether the sentences should be concurrent or consecutive. The 2004 Practice Direction states:

"If the disposal of the breach of bail is deferred, then it is still necessary to consider imposing a separate penalty at the trial and the sentence for the breach of bail should usually be custodial and consecutive to any other custodial sentence"

61. Upholding that principle in *McKinnon & White*,²⁸ where both defendants had received custodial sentences for the original offence and a further custodial

²⁸ [2003] 2 Cr App R (S) 29

sentence for the failure to surrender, the Court of Appeal stated that “in most cases it is difficult to see how a custodial sentence can be avoided” and that “we are in no doubt that in principle a sentence for failing to surrender should always be served consecutively to any other sentence imposed at the same time for another offence”.

62. Earlier, in *Gorman*,²⁹ the Court had stated that, where a court was imposing a total sentence as long as 12 months for (a) substantive criminal offence(s), it would seldom be appropriate to add very short consecutive sentences for offences such as failing to surrender to bail and that the two short sentences of seven days should have been ordered to be served concurrently. However, in *McKinnon & White*, the Court clarified this by saying:

“...those remarks must be regarded as confined to the peculiar circumstances of that case.....They should not be taken as indicating that if a substantial sentence is imposed in respect of another offence or offences there should not be a consecutive sentence for a failure to surrender. However, in any individual case.....the court may consider that in the particular circumstances a sentence for failing to surrender to bail should be ordered to be served concurrently.”

63. Recent sentencing statistics³⁰ suggest that, where two custodial sentences are imposed, the sentence for the Bail Act offence is normally ordered to run consecutively to the sentence for the original offence. Although the majority of those who responded to the Panel's consultation accepted this as a general principle, a number pointed to the need to be mindful of the totality principle and the statutory requirement to avoid disproportionate sentences. The Panel accepts that these factors cannot be overlooked and that they are a valid consideration when sentencing.

Recommendation 6

Where determinate custodial sentences are being imposed for a Bail Act offence and the original offence at the same time, the normal approach should be for the sentences to be consecutive. However, a court must

²⁹ (1993) 14 Cr App R (S) 120

³⁰ Data relating to 2004 obtained from the Office for Criminal Justice Reform

always be mindful of the totality principle and may impose sentences concurrently where to do otherwise would result in an overall sentence wholly disproportionate to the combined seriousness of the offences.

Choice of sentence

64. Given that the majority of Bail Act offences should be sentenced earlier than, and independently of, the offence in relation to which bail was granted, a court is most likely to be deciding the appropriate sentence for a Bail Act offence according to an assessment of its seriousness without reference to the original offence (see also Annex A). Guidance is needed on appropriate disposals for this type of offending behaviour.

65. Our consultation sought views on the circumstances in which a fine, a community order or a custodial sentence should be imposed for a Bail Act offence; responses varied markedly. Some of those who responded suggested that it was never appropriate to impose custody for a Bail Act offence, given that “prison places are supposed to be reserved for serious, dangerous and seriously persistent offenders”. The Panel takes the view that this approach would seriously underestimate the degree to which Bail Act offences undermine the Criminal Justice System and considers that a custodial sentence must be available as a sentencing option.

66. Other respondents pointed to the fact that the starting point of a community order in the Magistrates’ Court Sentencing Guidelines is widely regarded to be appropriate and should be retained. The Panel’s proposals do not rule this out as a sentencing option but care must be taken to ensure that a community order is a suitable sentence for an individual offender.

67. A number of respondents felt that the starting points suggested in the consultation paper were too high and advocated wider use of fines. Conversely, others remarked that many defendants who fail to surrender to bail will not have the means to pay a fine and that those who do have funds are most unlikely to pay. The Panel has considered all suggestions very carefully before framing the sentencing proposals that follow.

68. We have concluded that the starting point for a first offence that causes relatively little harm and involves no aggravating factors should be a community order. The presence of any mitigating factors or matters of personal mitigation might reduce a sentence to a fine (subject to the ability to pay) or a conditional discharge. Aggravating factors linked to culpability are identified; where present, these could increase the severity of the sentence within its own threshold or move a sentence across a sentencing threshold as appropriate.

Conducting trials in the absence of the defendant

69. A defendant has a duty to surrender to bail and a right to be present at his or her trial. However, where a defendant is absent voluntarily, having breached the duty to surrender, a court may proceed to hear a case in the defendant's absence. In a magistrates' court this is a statutory power.³¹ While some sentences may be imposed in a defendant's absence, it is not possible to impose a custodial sentence or a community order.

70. There is more encouragement now than in the past to proceed in the absence of the defendant. The 2004 Practice Direction reinforced this approach by referring to the judgment in *Jones*³² where the defendant, having pleaded not guilty upon arraignment, failed to surrender for trial. The House of Lords largely upheld the decision of the Court of Appeal, which had identified the factors to be taken into account before proceeding in the absence of the defendant. These include:

- the conduct of the defendant;
- the disadvantage to the defendant;
- the public interest;
- the effect of any delay; and
- whether the attendance of the defendant could be secured at a later hearing.

³¹ Magistrates' Courts Act 1980, s.11

³² [2003] AC 1

71. Additional factors for a magistrates' court to consider were identified in *Shirzadeh v Maidstone Magistrates' Court*³³ as including:

- there is less risk of either a magistrate or a district judge drawing an impermissible inference from a defendant's absence than would be the case with a jury; and
- in a magistrates' court the finder of fact may ask questions and test the evidence of prosecution witnesses.

72. The overriding concern of the court, again emphasised in the Practice Direction, is to ensure that a trial conducted in the absence of the defendant is as fair as circumstances permit and, in particular, that the defendant's rights under Article 6 of the European Convention on Human Rights (ECHR)³⁴ are not infringed.

73. When considering the impact that proceeding to trial in the absence of the defendant may have on the harm arising from a Bail Act offence, and the degree to which this should influence sentence, it must be borne in mind that the position in a magistrates' court is different from that in the Crown Court not least because an appeal against conviction from a magistrates' court can result in a re-hearing, whereas that is not the case after a jury trial. There is also the discretionary power under Section 142 of the Magistrates' Courts Act 1980 to set aside a conviction and order a re-hearing in a magistrates' court. If an application to set aside a conviction is successful, witnesses will be required to give evidence again at a later date.

74. Nevertheless, in general terms, where a case proceeds to trial in the absence of the defendant, the primary harm (both potential and actual) caused by the Bail Act offence will have been largely avoided.

75. However, the harm has only been reduced or avoided because of a decision made by the judge or magistrates; the intentions of the defendant remain unchanged and the fact that the trial goes ahead is not linked to offender

³³ [2003] EWHC 2216 (Admin)

³⁴ Right to a fair trial

culpability. In terms of culpability, the Panel can see no reason why the defendant should receive any credit for a decision that is outside his or her control, a view supported by the majority of those who responded to our consultation.

Recommendation 7

Where it has proved possible to conclude proceedings in the absence of the defendant, this should have no bearing on the assessment of culpability of the offender.

SECTION THREE: THE PANEL'S PROPOSALS

The following starting points are for a first time offender who deliberately fails to surrender to custody, giving no thought to the consequences. Sentences increase in line with the degree of harm. Starting points do not take account of the nature of the original offence. Any sentence passed is intended to be in addition to the sentence for the original offence.

The meaning of 'range', 'starting point' and 'first time offender' can be found at Annex C.

Only the most common aggravating and mitigating factors specifically relevant to Bail Act offences are included in the guideline. When assessing the seriousness of an offence, the courts must always refer to the full list of aggravating and mitigating factors in the Council guideline on Seriousness.³⁵

*A previous conviction that is likely to be "relevant" for these purposes is one which demonstrates a failure to comply with an order of a court.

It is recognised that the offender's position as the sole or primary carer of dependant relatives may be treated as personal mitigation when deciding sentence. It is included here, however, as a mitigating factor that may need to be taken into account when the defendant claims that his or her caring responsibilities are the reason why he or she failed to surrender to bail.

³⁵ *Overarching Principles: Seriousness*, pages 6-7, published 16 December 2004, www.sentencing-guidelines.gov.uk

FAILING TO SURRENDER TO CUSTODY: BAIL ACT 1976, ss. 6(1) and 6(2)

Maximum penalty: 3 months imprisonment in a magistrates' court; 12 months imprisonment in the Crown Court.

Nature of harm	Sentencing starting point and range	Aggravating factors	Mitigating factors
<p>Either</p> <p>a) trial adjourned and witnesses sent away resulting in:</p> <p>i) reduction in quality of evidence presented and/or</p> <p>(ii) distress to victims or witnesses</p> <p>or</p> <p>b) significant delay to administration of justice, including sentence, in this case or in other cases</p>	<p>Starting point - 6 weeks imprisonment</p> <p>Sentencing range – Community order (MEDIUM) to 3 months imprisonment (in a magistrates' court) or to 12 months imprisonment (in the Crown Court)</p>	<ul style="list-style-type: none"> • lengthy absence • serious attempts to evade justice • previous relevant* convictions and/or repeated breach of court orders or police bail • deliberate attempt to seriously undermine the course of justice 	<ul style="list-style-type: none"> • caring responsibilities# • genuine misunderstanding • prompt voluntary surrender • inability to comprehend bail requirements
<p>Failure to surrender to the court on the day of the trial; trial proceeds in the absence of the defendant</p>	<p>Starting point – Community Order (HIGH)</p> <p>Sentencing range – Community Order (MEDIUM) to 6 weeks imprisonment</p>	<ul style="list-style-type: none"> • lengthy absence • serious attempts to evade justice • previous relevant* convictions and/or repeated breach of court orders or police bail • deliberate attempt to seriously undermine the course of justice 	<ul style="list-style-type: none"> • caring responsibilities# • genuine misunderstanding • prompt voluntary surrender • inability to comprehend bail requirements
<p>Failure to surrender to the police or the court otherwise than at trial</p> <p>and</p> <p>no significant delay to the administration of justice</p>	<p>Starting point - Community order (LOW)</p> <p>Sentencing range – Fine Band C to Community Order (MEDIUM)</p>	<ul style="list-style-type: none"> • previous relevant* convictions • deliberate attempt to seriously undermine the course of justice 	<ul style="list-style-type: none"> • caring responsibilities# • genuine misunderstanding • prompt voluntary surrender • inability to comprehend bail requirements
<p>Surrenders later on day but case, or preparation of case, proceeds as planned</p>	<p>Starting point – Fine Band B</p> <p>Sentencing range Fine Band A to Band C</p>	<ul style="list-style-type: none"> • previous relevant* convictions • deliberate attempt to seriously undermine the course of justice 	<ul style="list-style-type: none"> • caring responsibilities# • genuine misunderstanding • inability to comprehend bail requirements

CURRENT SENTENCING PRACTICE

Current sentencing practice suggests that much depends upon whether a Bail Act offence is sentenced in a way that causes it to be counted as the principal offence (i.e. it is assessed as having been more serious than the original offence or the defendant is acquitted of that offence) or as the subsidiary offence (i.e. it is less serious than the original offence for which bail was granted).

Subsidiary offences

Figures for 2004³⁶ show that most Bail Act offences are counted as a subsidiary offence - 62% in 2004 - of which 96% were sentenced in a magistrates' court. The choice of disposal in magistrates' courts was spread fairly evenly, with 27% resulting in a fine, 24% a community order and 26% a custodial sentence. In the Crown Court, the largest number – 58% - resulted in a custodial sentence; 17% resulted in a community order and a fine was imposed in only 1% of cases. The most common custodial sentence imposed both in a magistrates' court (50%) and in the Crown Court (51%) was between 15 days' and a month's imprisonment. 39% of custodial sentences imposed in a magistrates' court were for a period up to and including 14 days.

Principal offences

The majority (98%) of principal Bail Act offences were sentenced in a magistrates' court and the largest percentage (56%) received a fine. Only 10% were given a custodial sentence, the most common sentence (56%) being a period of up to and including 14 days. In the Crown Court, only 7% of offenders were given a fine and the largest percentage (48%) received immediate custody. Although the maximum sentence in the Crown Court is 12 months' imprisonment, historically it has been rare for a court to impose the maximum sentence and the most common custodial sentence (39%) was between 15 days' and 1 month's imprisonment.

³⁶ Home Office Sentencing Statistics, published 27 October 2005

Between 1999 and 2004 the average monetary value of fines imposed in magistrates' courts for principal Bail Act offences has gradually increased and the average length of custodial sentences has gradually decreased. In the Crown Court the average value of fines has fluctuated markedly but there has been a similar gradual increase in average custodial sentence lengths.

Having established that sentences for a Bail Act offence and the original offence should, as far as possible, be determined on their own facts, the Panel has concluded that it is immaterial to our proposals whether the Bail Act offence is the principal or subsidiary offence (see paragraph 64 of this advice).

Background and initiatives

Operation Turn-up

'Operation Turn-up', an initiative of the National Criminal Justice Board was launched in January 2005. Under the scheme there was a 'zero-tolerance' policy for people failing to surrender to custody. The press notices that accompanied the launch of the operation stated that this initiative heralded a clear change in how failing to surrender offences are dealt with and was designed to deter defendants from such offences by demonstrating that robust and immediate action will be taken. During the operation, a concerted effort was made to find defendants with outstanding failing to surrender warrants and to bring them before the courts. A press release issued on 23 March reported that the Attorney General considered the operation a success and that "hundreds of bail dodgers had been rounded up to face justice." It was also said that 'Operation Turn-up' had not been a "quick fix solution" and that the success of the operation "needed to be built and improved upon".

The initial Operation Turn-up was judged a great success and has launched a continual reduction in the backlog of failure to appear warrants (31% as at October 2006).

Operation Turn-up 2 focussed on the issue of out of area warrants and launched the *No Boundaries* project (see below).

Operation Turn-up 3 will focus on a core of difficult to execute warrants and look to employ new tools to locate difficult to trace individuals. There are no immediate plans to start this project.

Inter-agency Bail Agreements

The National Audit Office report *Facing justice: tackling defendants' non-attendance at court* recommended that Local Criminal Justice Boards should develop local protocols "to cover the monitoring of bail conditions ... clarifying where responsibilities lie throughout the process across the CJS". A template, which can be adapted to suit local circumstances, has been approved by the National Criminal Justice Board; it sets out the responsibilities of each agency in managing bail from charge onwards in order to reduce the likelihood of the defendant failing to appear at court.

The agreement also provides a framework within which agencies can discuss how bail is working; establishing a regular mechanism for discussing bail problems and identifying solutions will be as important as the agreement itself.

Agreements have now been implemented in thirty-two areas.

Telephone Reminders

A pilot was conducted in 3 criminal justice areas (London – Camberwell Green, Tower Bridge; Devon and Cornwall; Thames Valley) to explore the use of telephone reminders in increasing defendant attendance at court. Adult defendants in all cases listed for trial in magistrates' courts were targeted for a telephone reminder, with court staff collecting the phone number and making the calls.

The reminder scheme was implemented successfully in the three pilot areas. Although the pilot did not provide sufficient evidence to prove that issuing telephone reminders increases defendant attendance, there were some promising results.

Guidance on how to implement such a scheme was issued nationally in July 2006.

Sureties & Securities Pilot

A two month pilot was conducted to test the use of securities as a condition of police bail. This was managed across three areas – Leeds, Stoke on Trent and City of London. The level of use of securities and sureties was not high across the areas, so it has not been possible to draw any firm conclusions.

No Boundaries

This is an ongoing initiative aimed at addressing the issue of 'out of area' Failure to Appear warrants – when a defendant has failed to appear at court in one region, but resides in another. The arrest warrant is 'exported' to the force covering the area in which the defendant lives, but these have traditionally been awarded a low priority as they do not form part of the receiving force's warrant management targets.

No Boundaries aims to improve the data available on numbers and movement trends of out of area warrants (it is a data requirement for forces to report against 'imported' and 'exported' warrants from April 2007). Workshops have been conducted to identify challenges in this area and best practice has been shared nationally.

It has not been possible thus far to assess the impact of this initiative as reporting is currently on a voluntary basis.

Limiting the use of warrants with bail

There was a commitment in the Home Office's review *Rebalancing the criminal justice system in favour of the law abiding majority* to limit the use of Failure to Appear warrants with bail. This is primarily to speed the return to court of defendants who fail to appear. A consultation paper has been published outlining legislative options. (www.cjsonline.org/the_cjs/whats_new/news-3489.html)

At the same time, investigation work is being completed into good practice around the use of warrants backed for bail and this is due to be published in spring 2007.

Adult bail supervision scheme

We reported in our consultation paper that the Youth Justice Board has had some success in improving the attendance of young defendants at court but that there were no similar schemes available for adults.

In partnership with voluntary sector agencies the National Offender Management Service (NOMS) has established a pilot bail accommodation and support scheme in Yorkshire and Humberside serving 6 magistrates' courts – Bradford, Leeds, Sheffield, Hull, York and Scarborough. This seeks to reduce the remand population whilst providing effective management of bail to minimise the risk of offending and failure to attend during the bail period. The scheme is live in the first 3 courts and will commence in the others in February 2007. Data is being collected on breaches and failure to attend and the scheme will be fully evaluated. At this stage it is too early to say what the implications for failure to attend are.

Electronic Monitoring (Tagging) of adults on bail

As a result of NOMS' renegotiation of contracts, the cost of tagging on bail was reduced from April 2005. Courts were invited to make greater use of tagging on bail for adults through HMCS Business Item 241 issued through Area Directors on 5 September 2005. Lord Justice Thomas also wrote to courts about tagging and in September 2006 NOMS issued Home Office Circular 25/2006 titled 'Electronic Monitoring On Bail For Adults – Procedures' which sets out the arrangements and procedures that agencies and the suppliers will follow when a court requests that a defendant be tagged.³⁷

Tagging ensures that any breaches of curfew are identified. It supports effective breach action and encourages compliance and attendance at court. The caseload of adults tagged on bail has increased from 165 on 30 September 2005 to 1,685 on 31 December 2006. The risk of failure to attend must be increased for those who would have been remanded in custody but would be reduced for those who would have been bailed without tagging. NOMS is not yet able to say what the net impact has been.

³⁷ The Circular is on the Home Office website at <http://www.knowledgenetwork.gov.uk/HO/circular.nsf/79755433dd36a66980256d4f004d1514/688e17dbbf7c9a1802571d300444a2c?OpenDocument>

MEANING OF “RANGE”, “STARTING POINT” AND “FIRST TIME OFFENDER” WITHIN SENTENCING GUIDELINES COUNCIL GUIDELINES

A Council guideline is generally for a *first time offender* convicted after a trial. It commonly provides a *starting point* based on an assessment of the seriousness of the offence and a *range* within which sentence will normally fall for most cases.

Assessing the seriousness of the offence

1.
 - a) A typical Council guideline will apply to an offence that can be committed in a variety of circumstances with different levels of seriousness. It will apply to a **first time offender** who has been convicted after a trial. Within the guidelines, a **first time offender** is a person who does not have a conviction which, by virtue of section 143(2) of the Criminal Justice Act 2003, must be treated as an aggravating factor.
 - b) As an aid to consistency of approach, a guideline will describe a number of types of activity which would fall within the broad definition of the offence. These will be set out in a column generally headed “type/nature of activity”.
 - c) The expected approach is for a court to identify the description that most nearly matches the particular facts of the offence for which sentence is being imposed. This will identify a **starting point** from which the sentencer can depart to reflect aggravating or mitigating factors affecting the seriousness of the *offence* (beyond those contained within the column describing the type or nature of offence activity) to reach a **provisional sentence**.
 - d) The range is the bracket into which the **provisional sentence** will normally fall after having regard to factors which aggravate or mitigate the seriousness of the offence. The particular circumstances may, however, make it appropriate that the provisional sentence falls outside the range.
2. Where the offender has previous convictions which aggravate the seriousness of the current offence, that may take the **provisional sentence** beyond the **range** given particularly where there are significant other aggravating factors present.

Personal Mitigation

3. Once the **provisional sentence** has been identified by reference to those factors affecting the seriousness of the offence, the court will take into account any relevant factors of personal mitigation.

Reduction for guilty plea

4. Where there has been a guilty plea, any reduction attributable to that plea will be applied to the sentence at this stage. This reduction may take the sentence below the **range** provided.

SUMMARY OF RECOMMENDATIONS

Recommendation 1

The approach to sentencing for a Bail Act offence should generally be the same whether the offence was committed under section 6(1) or 6(2) of the Bail Act 1976 and whether the defendant failed to surrender to a police station or to a court. It will be influenced more by factors relating to harm and culpability than by the sub-section under which the offence arises or whether the bail was granted by the police or by a court.

Recommendation 2

The fact that an offender has a disorganised or chaotic lifestyle should not normally be treated as mitigation.

Recommendation 3

A court should normally determine guilt on the first appearance after arrest or surrender. Sentence for a Bail Act offence should be delayed only in exceptional circumstances, for example when sentencing for the original offence is imminent or where the court would be better placed to assess the harm caused by the Bail Act offence during the substantive proceedings for the original offence. In all other circumstances, Bail Act offences should be charged, tried and sentenced as soon as is practicable.

Recommendation 4

Acquittal of the original offence does not mitigate the offence of failure to surrender to custody.

Recommendation 5

Whilst the seriousness of the original offence does not of itself aggravate or mitigate the seriousness of the offence of failing to surrender to custody, the nature of the original offence may be relevant to assessing the likelihood of harm caused by the failure to surrender.

Recommendation 6

Where determinate custodial sentences are being imposed for a Bail Act offence and the original offence at the same time, the normal approach should be for the sentences to be consecutive. However, a court must always be mindful of the totality principle and may impose sentences concurrently where to do otherwise would result in an overall sentence wholly disproportionate to the combined seriousness of the offences.

Recommendation 7

Where it has proved possible to conclude proceedings in the absence of the defendant, this should have no bearing on the assessment of culpability of the offender.

THE CONSULTATION

In accordance with the duty imposed by 171(3) of the Criminal Justice Act 2003, the Panel issued a consultation paper on 27 January 2006. The Panel's provisional views on sentencing guidelines for Bail Act offences were set out.

Copies of the consultation paper were sent to 138 individuals and organisations including the Panel's 33 regular consultees and Resident Judges at each Crown Court Centre in England and Wales. It was also published on the Panel's website and in the Justice of the Peace journal.

Responses were received from the following:

Centre for Crime and Justice Studies

Council of District Judges (Magistrates' Courts)

Criminal Sub-Committee, Council of Her Majesty's Circuit Judges

Criminal Bar Association

Crown Prosecution Service

Justices' Clerks' Society

Law Society

Magistrates' Association

National Offender Management Service jointly with the Office for Criminal Justice Reform

Police Federation of England and Wales

Prison Reform Trust

Youth Justice Board

Responses were also received from:

Gordon Allen, JP

HH Judge Michael Baker, QC

HH Judge J Bevan

John Clucas, private individual

Neil Corre and David Wolchover, Barristers

HH Judge Cowling

Criminal Law Solicitors' Association

CPS, West Midlands

Anthony Edwards, Solicitor and member of Sentencing Guidelines Council

Peter Howsam, JP

Nigel Orton, JP, Deputy Chairman on behalf of Harrow Gore Magistrates

Inner Manchester Branch, Magistrates' Association

Susan Kearle, JP

Law Reform Committee

London Criminal Courts Solicitors' Association

The Magistrates' Association, Northamptonshire Branch

David Milner-Scudder, JP

HH Judge Ronald Moss

Chief Inspector Curtis Parkyn, MPS Operation Emerald, officer in charge,
Warrants Management

Robert Scrase, JP

South East London Branch of the Magistrates' Association

Bill Taylor, Senior Crown Prosecutor

HH Judge Tonking

George Tranter, Solicitor and former Justices' Clerk

Ann A West MBE, JP

West Hertfordshire Magistrates' Bench