

BAIL BILL 2010 - EXPOSURE DRAFT

27 October 2010

**Submission on behalf of Legal Aid NSW
to the Department of Justice and Attorney General**

About Legal Aid NSW

The Legal Aid Commission of New South Wales ("Legal Aid NSW") is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged. Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 35 community legal centres. Our criminal law practice spans all criminal jurisdictions, and our solicitors represent clients in bail applications in all courts in which an application can be made, including the Children's Court and the Supreme Court.

General Comments

The redrafting of the *Bail Act 1978* (NSW) has the potential to significantly affect the rights of our criminal law clients and Legal Aid NSW is grateful for the opportunity to comment on the proposed reforms. The deadline for submissions means that our comments are limited to the issues we have been able to identify within the short timeframe provided. For this reason we welcome the opportunity to comment further at the roundtable or as part of other discussions.

The *Bail Bill 2010* ("the Bill") improves upon the *Bail Act 1978* ("the Act") in many ways. By and large it is more logically structured and uses clearer language than the Act. We particularly welcome the following reforms:

- The new requirement in cl 41 of the Bill that where a person has not been released because of a failure to meet a bail condition that requires the person to make specified residential arrangements beforehand, notice must be given to an appropriate court.
- The new requirement in cl 45 that bail is to be dispensed with in respect of any offence for which a youth justice conference is convened.
- The additional provision in cl 52(2) that bail must be granted in respect of a level 1 offence if the person ceases to be incapacitated, in danger or in need of physical protection.
- The new requirement in cl 60(5) that in relation to an Aboriginal person or Torres Strait Islander, the court must take into account any representations made by or on behalf of a group that provides criminal justice programs to Aboriginal persons or Torres Strait Islanders, or that is comprised of elders or other respected members of the person's community.

- The additional provision in cl 94 that makes it clear that a police officer can issue a court attendance notice in respect of a person's failure to comply with a bail agreement.
- The additional provision in cl 95(1)(b) that empowers the court before which a person who has breached bail conditions appears, to vary the original bail conditions, as well as revoke bail or release the person on the original bail conditions.

Some opportunities for further improvements to bail law have been missed in the Bill.

Firstly, while the language of the Bill is clearer in many ways, it could be clearer still. Some of the clauses import wordy language from the Act that does little to achieve the stated aim of "simplifying the concepts involved in determining bail so that they are more easily understood and applied". To give just a few examples, the use of phrases such as "bail confers an entitlement" and "surrender to the custody of the court" would benefit from further simplification.

Another opportunity for clarification lies in Schedule 1 of the Bill. While the inclusion of a schedule outlining what bail classification each offence falls within, and the creation of headings that describe groups of offences, are positive steps towards providing greater clarity about the presumptions, the schedule would be improved if all the offences were named. It is true that this would increase the length of the schedule; however it would have the benefit that users of the Bill would not have to refer to other legislation to understand its application.

Secondly, further reform is needed if the operational issues of concern, such as the impact of bail laws and processes on young people, are to be effectively addressed.

Set out below are some concerns we have in relation to a number of the amendments that the Bill introduces, including some possibly unintended consequences of the redrafting. These are followed by some suggestions for further reform that we believe would help address the operational issues outlined in the Review.

Bail Bill 2010: some areas of concern

Clause 3: Objects of Act – considerations are weighted against the accused

Clause 3 sets out four objects of the Act; namely:

- (a) to ensure that a person required to appear before a court in criminal or other proceedings appears as and when required by the court, and
- (b) to prevent the commission of any offences by a person required to appear in proceedings until the proceedings have been finally determined, and
- (c) to protect any person against whom it is alleged that an offence was committed, the close relatives of any such person and any other persons who may require protection in the case, and
- (d) to prevent a person required to appear in proceedings from interfering with witnesses or otherwise interfering with the course of justice.

Section 48(1) provides that "in making any bail decision in relation to a person, a bail authority is to have regard to the objects of this Act."

In the Review the Criminal Law Review Division states that these objects are intended to replace the criteria for bail currently set out in s 32 of the Act, and that this amendment has been made "to ensure decision-makers are provided with clear guidance as to the sorts of matters that are to be paramount considerations in the making of bail decisions".

The new objects and the old s 32 criteria differ in a number of significant ways. Firstly, s 32 requires the authorised officer or court, in making a bail decision, to weigh up numerous factors - some that favour the accused and some that do not - in order to assess certain potential risks: the risk that the accused will not attend the next court appearance, for example, or the risk that the accused will interfere with evidence. As the Review acknowledges, “the Act is a complex risk assessment scheme balancing three broad principles”. These broad principles are the presumption of innocence; flight risks and court attendance; and protection of the community.

This risk assessment approach is absent from the Bill. For example, under s 32(1)(a) of the Act, an authorised officer or court must consider “the probability of whether or not the person will appear in court” among a number of other factors that include the interests of the accused. Compare this to its equivalent in cl 3(a) of the Bill, where the object is to “ensure” that the person appears in court. There is no room here for the balancing of different considerations. Worded like this, the scales are weighted against the accused. The only way to “ensure” that a person appears in court, after all, is to refuse bail.

The potential ramifications of this approach can be seen again in how the Bill deals with the possibility that a person will commit a further offence if released on bail. Section 32(1)(c)(iv) of the Act requires the authorised officer or court to consider “whether or not it is likely that the person will commit any serious offence while at liberty on bail”. In cl 3(b), it is an object of the Act to “prevent the commission of any offences by a person...until the proceedings have been finally determined.” There is no requirement that the likelihood of reoffending outweigh the accused’s “general right to be at liberty”, as in s 32(2)(b) of the Act. Once again, this objective gives few grounds to justify bail.

It is also of concern that cl 3(b) creates a more stringent test than s 32(1)(c)(iv): the object at cl 3(b) is to prevent the commission of “any” offences, whereas s 32(1)(c)(iv) refers to “any serious offence”. This means that a child who has previously committed an offensive language or trespass offence, for example, is more likely to be refused bail under the Bill than under the Act, because such offences will be relevant under the Bill, whereas under the Act they are not considered to be “serious offences”.

Another aspect of s 32 of the current Act that is lost in the Bill is the way that it limits the types of considerations that can be taken into account in the making of a bail decision by providing a finite list. This has always ensured that irrelevant considerations are not taken into account when bail decisions are made. It has also meant that, from a practical point of view, all the considerations that can be taken into account in a bail application can be found in the one place within the legislation.

The language of cl 48 of the Bill does not impose an equivalent limitation, which means that under the Bill an authorised officer or court will be able to take into account considerations that the Act previously prohibited. The structure of the Bill also means that the considerations to be taken into account in bail applications are scattered throughout the Bill; in clauses 52 and 60, for example, as well as in clause 3. This complicates the bail application process for practitioners, who will no longer have a “one-stop shop” section like s 32 to refer to.

Clause 7: When can bail be granted – question of period between initial and final sentences in Drug Court

Under the *Drug Court Act 1998*, once a person is convicted of an offence, the Drug Court has the power to hand down an “initial sentence” to an offender. The offender is then given

the opportunity to undertake a rehabilitation program, after which time the Court hands down a “final sentence”.

It is not clear that cl 7 of the Bill empowers a court to grant bail in the period after the rehabilitation program has come to an end but before the final sentence has been handed down, a period that is currently covered by s 6(c)(ii) of the Act. Clause 7 should be amended to specifically provide that bail can be granted to offenders during this period.

Part 4: Court powers with respect to bail – the right to bail review restricted

Currently, Part 6 Division 2 of the Act empowers a person who is refused bail to seek a review of the decision at any time. The power to seek a bail review is in addition to a person’s right to apply for bail. Neither a first application for bail nor any application for a bail review has a threshold requirement attached. Section 22A, which gives a court the power to refuse to hear a further bail application unless certain requirements are satisfied, does not limit the power to seek a bail review; this is explicitly stated in s 22A(4).

However, under the Bill the power of a person who has been refused bail to make an application to revisit the question of bail is curbed by the requirements set out in cl 36. In this way, and despite the Review’s stated intention not to make any substantive change to the bail review provisions, the Bill effectively abolishes such a person’s right to seek to have the question of bail re-examined if they are unable to meet the threshold requirements of cl 36. This is perhaps an unintended effect of the reforms that should be corrected.

Clause 25: Who can make bail application – meaning of “complainant” unclear

In clause 25(2) it is unclear whether the reference to “complainant” is intended to include persons who are not a police officer. It is our view that complainants who are not police officers should *not* have the right to apply for a bail variation, and that this should be clarified in the legislation.

Clause 37: Further applications made following decision by court of superior jurisdiction – the unintended introduction of a threshold for bail applications made in any court once a Supreme Court bail application has been refused

Currently an applicant for bail has the right to lodge his or her first bail application in the Supreme Court. The decision to do so will be based on practical or tactical considerations.

The same right exists under the Bill. The effect of cl 37, however, is that any person who first applies for bail to the Supreme Court and is refused, is prevented from making a first application at any other court unless the threshold set out in cl 37 is overcome.

Section 22A of the Act applies where a person has been refused bail in one jurisdiction and then makes a further application in that same jurisdiction; it does not apply in circumstances where an appellant appears before a different court seeking bail once bail has been refused. Under the Bill however, not only is a person who has lodged his or her first bail application in the Supreme Court prevented from making a first application at any other court, but cl 37 also limits the ability of a person who has been granted bail by the Supreme Court to apply to that Court for a bail variation. It is submitted that cl 37 should be amended to clarify that the threshold it establishes must be met only in relation to subsequent applications for bail at the same court of superior jurisdiction.

Clause 40: Limitation on length of adjournments if bail refused by court or authorised justice – amendment from eight to 42 days will increase time spent in custody

Clause 40 of the Bill provides that the allowable length of adjournment in Local Court matters is 42 days, unless the person consents to a longer adjournment. The Act currently restricts the length of adjournment in such a situation to eight days. The change to 42 days is an inappropriate amendment that has the potential to substantially increase the amount of time that people spend in custody without conviction, especially in the case of vulnerable people such as young people.

Currently, Part 6 Division 2 of the Act empowers a person who is refused bail to seek a review of the decision at any time. In practice, however, persons in custody are not able to readily access advice about their rights to lodge a bail review, or receive advice about their prospects of making a further bail application, unless they are brought back to Court and have the opportunity to speak to a duty solicitor. The delays in accessing a visiting solicitor service in a Correctional Centre may be substantial. Even if access is granted, the visiting solicitor will not have carriage of the inmate's file and so is unlikely to be able to give advice about the prospects of the inmate successfully re-listing the matter for a bail application.

The existing rule that requires people who have been refused bail to be returned to court within eight days unless they consent to longer, gives the bail refused defendant a reasonably expeditious means of accessing advice about their options under the *Bail Act*, and if appropriate the opportunity to make either a further application for bail or to lodge an application for review of bail.

It is the experience of Legal Aid NSW solicitors that a significant proportion of the people who come before the court after an eight-day adjournment are granted bail at the end of the eight days. This can be because appropriate accommodation has become available, or some other factor relevant to the grant of bail has changed, or because in the view of the Court the law favours conditional bail being granted. People who are remanded in custody for 42 days almost invariably return to court 42 days later without having seen a lawyer or having had the opportunity to make any application to the Court in the interim. The practical result of the proposed change is therefore likely to be an increase in the prison population and an increase in the proportion of the prison population on remand.

Clause 41: Court to be notified if person remains in custody after grant of bail – court obligations should be specified

Clause 41 provides that the court is to be notified if a person remains in custody after a grant of bail. The clause would be more effective if it also specified the court's obligation once notified - namely, to relist the matter as soon as possible and review the original bail decision on that date.

Clause 55: Level 3 offences – unclear what presumption applies

Clause 55 of the Bill creates a category of offences entitled "Level 3 offences – no presumption." Despite its heading, it appears from the substance of the section that in relation to level 3 offences, the presumption is not neutral but rather a rebuttable presumption in favour of bail. The only distinction between this section's requirements and the requirements of cl 53, which relates to level 2 offences, is that it is the prosecutor who must convince the bail authority that bail should not be granted where the offence is a level 2 offence, whereas in relation to level 3 offences, the bail authority must satisfy itself of this.

Legal Aid NSW supports a rebuttable presumption in favour of bail applying to level 3 offences because it is in keeping with the presumption of innocence, and submits that, in order to avoid confusion, the heading should be amended to reflect the substance of the section.

Part 9: Enforcement of bail agreements – power to issue a warning should be specified

As mentioned above, the inclusion of cl 94, which specifies that a police officer may issue a court attendance notice in respect of a person's failure to comply with a bail agreement, is a valuable amendment. It would also be valuable to set out in a similarly drafted clause that a police officer may issue a warning in such circumstances.

Opportunities for further reform

Modify the rule in relation to "past offenders"

Clause 17 of Schedule 1 imports into the Bill the rule set out in s 9B(3) of the Act that affects the applicable presumption in relation to bail if a person alleged to have committed an indictable offence has previously been convicted of an indictable offence. This rule negatively impacts upon the bail rights of a disproportionate number of people. For example, a person charged with shoplifting who committed an assault as a juvenile twenty years previously will have the shoplifting offence treated as a level 3 offence, even if the assault matter was dismissed after a finding of guilt. The reach of this provision is too broad and should be modified.

Dispense with bail for "fine only" offences

Just as the current Act does, the Bill categorises "fine only" offences as minor offences in relation to which bail must be granted unconditionally or subject to minimal conditions (cl 61).

Despite this requirement, Legal Aid NSW solicitors regularly represent clients who have been refused bail for a fine only offence such as a failure to comply with a move-on direction or offensive language offence. Our Children's Legal Service solicitors also report regularly seeing clients who have breached a curfew condition that has been imposed in relation to a fine only offence and who are refused bail as a result.

The fact that in such cases a person can end up spending time in custody for an offence that does not carry a custodial sentence is inappropriate. Therefore, rather than being in a category of offence to which bail can be granted, "fine only" offences should be a category of offence in relation to which bail is automatically dispensed with.

Exempt juveniles from the operation of clause 36 of the Bill

The New South Wales Bureau of Crime Statistics and Research last year reported on the increase in the juvenile remand population since 2007, following amendments to s 22A of the Act.

As the Review states, recent amendments to s 22A have clarified the scope of the section to make clear that an accused person can make a fresh application for bail if they have new information to present to the court.

Even with these clarifications, it is our view that juveniles should be exempted from the operation of the section (reformulated in the Bill as cl 36). There should be no restrictions on a juvenile's right to apply for bail, particularly when one considers the low proportion of juveniles on remand that ultimately receive a custodial sentence. Restricting a juvenile's

rights to apply for bail is also inconsistent with the principles that underlie the *Children (Criminal Proceedings) Act 1987*.

Exempting juveniles from the application of certain criminal provisions is not unprecedented. For example, the Standard Non-Parole Period scheme in the *Crimes (Sentencing Procedure) Act 1999* that was introduced in 2002 does not apply to juveniles. Clause 36 of the Bill should likewise exempt juveniles from its operation.

Import into the Bill the considerations set out in s 6 of the *Children (Criminal Proceedings) Act 1987*

Another way of improving the bail laws as they relate to juveniles would be to import into the Bill some of the considerations set out in Section 6 of the *Children (Criminal Proceedings) Act 1987*. Sections 6(b)-(d) provide:

- A person or body that has functions under this Act is to exercise those functions having regard to the following principles: [...]
- (b) that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance,
 - (c) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption,
 - (d) that it is desirable, wherever possible, to allow a child to reside in his or her own home [...]

The NSW Law Reform Commission has previously recommended that the *Bail Act 1978* should be amended to provide that conditions attaching to the grant of bail in the case of a young person must be reasonable having regard to these principles. This recommendation was supported in a recent independent review of the NSW juvenile justice system in NSW commissioned by the Minister for Juvenile Justice.

Legal Aid NSW also supports this recommendation. The requirement at cl 48 of the Bill that any “special needs” arising from the fact that a person is a juvenile, is not specific enough a requirement, and while it can be argued that the principles in s 6 of the *Children (Criminal Proceedings) Act* already apply except to the extent of any inconsistency with the *Bail Act*, importing the principles into the bail laws would draw them to the attention of the court and help to ensure that they are taken into account when a bail decision is made.

Provide for the expiry of bail conditions on the first mention date

A significant pattern in the juvenile remand population in particular is the high proportion of offenders who have been refused bail as a result of breaching bail conditions. It is our experience that the bail conditions imposed upon juveniles at first instance often do not take into account the realities of the young person’s life. Moreover, contrary to the rule in s 37(2) of the Act, they are often more onerous than what is required to ensure the young person’s attendance at Court and to protect alleged victims and the community from further offending.

While one way of addressing this issue is to prohibit police from imposing certain conditions, there is a risk that this approach will result in more bail refusals by police. A better solution would be to provide in the legislation that any police bail conditions, other than residence and reporting conditions, automatically expire on the first mention date. The court would then have to specifically remake those conditions for them to continue to apply.

Abolish the current 'presumption' approach

A conceptual weakness of the *Bail Act 1978* is its application of presumptions for and against bail based upon types of offences. One of the reasons that this approach has caused so much confusion is that it appears to inflate the significance of the offence type in the making of a bail decision, when in reality the offence type is only one factor that is taken into account by the decision maker in accordance with the principles that underlie the Act.

As the Victorian Law Reform Commission states in its 2007 review of Victoria's *Bail Act 1977*, "the ultimate issue for a bail decision maker is whether the accused person poses an unacceptable risk." The type of offence that the person has allegedly committed is only one consideration when deciding this issue.

Another difficulty with the current 'presumption' approach is that it treats all persons who have committed an offence of the same type in the same way, regardless of the alleged objective seriousness of the offence. This can sometimes mean, for example, that a person likely to receive a good behaviour bond has the same presumption in relation to bail as a person likely to receive fifteen years imprisonment.

One of the recommendations the Victorian Law Reform Commission makes in its Report is that Victoria abolish its presumption system altogether. It recommends that the basis for a bail refusal should be if the decision maker is satisfied on the balance of probabilities that there is an unacceptable risk the accused would:

- fail to attend court as required
- commit an offence while on bail
- endanger the safety or welfare of the public; or
- interfere with witnesses or otherwise obstruct the course of justice in any matter before a court.

NSW should consider adopting this approach: it would simplify the bail process to the benefit of police, the courts, practitioners and bail applicants alike, while maintaining the principles upon which bail in New South Wales has always been granted.

Conclusion

Thank you for the opportunity to provide these comments. Should you have any queries in relation to any aspect of this submission, please contact Erin Gough, Senior Solicitor, Legal Policy Branch at Erin.Gough@legalaid.nsw.gov.au or by telephone on (02) 9219 5859.