New South Wales
Law Reform Commission

Bail

Questions for discussion

June 2011
www.lawlink.nsw.gov.au/lrc

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Make a submission

We seek your views on the issues raised in this paper and on any other matters you think are relevant to the review.

To tell us your views you can send your submission by:

- Post: GPO Box 5199, Sydney NSW 2001;
- DX: DX 1227 Sydney;
- Email: nsw_lrc@agd.nsw.gov.au.

It would assist us if you could provide an electronic version of your submission.

If you have questions about the process please email or call (02) 8061 9270.

The closing date for submissions is 22 July 2011. The Government has requested a report urgently, so the submission deadline is unlikely to be extended.

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About the NSW Law Reform Commission

The Law Reform Commission is an independent statutory body that provides advice to the Government on law reform in response to terms of reference given to us by the Attorney General. We undertake research, consult broadly, and report to the Attorney General with recommendations.

For more information about us, and our processes, see our website:

www.lawlink.nsw.gov.au/lrc

Background

0.1 On 8 June 2011, the Attorney General asked the NSW Law Reform Commission to undertake a review of the law of bail under the following terms of reference:

> Pursuant to section 10 of the Law Reform Commission Act 1967, the Law Reform Commission is to review bail law in NSW. In undertaking this inquiry the Commission should develop a legislative framework that provides access to bail in appropriate cases having regard to:
>
> 1. whether the Bail Act should include a statement of its objects and if so, what those objects should be;
> 2. whether the Bail Act should include a statement of the factors to be taken into account in determining a bail application and if so, what those factors should be;
> 3. what presumptions should apply to bail determinations and how they should apply;
> 4. the available responses to a breach of bail including the legislative framework for the exercise of police and judicial discretion when responding to a breach;
> 5. the desirability of maintaining s22A;
> 6. whether the Bail Act should make a distinction between young offenders and adults and if so, what special provision should apply to young offenders;
> 7. whether special provisions should apply to vulnerable people including Aboriginal people and Torres Strait Islanders, cognitively impaired people and those with a mental illness. In considering this question particular attention should be give to how the latter two categories of people should be defined;
> 8. the terms of bail schemes operating in other jurisdictions, in particular those with a relatively low and stable remand population, such as the UK and Australian states such as Victoria, and of any reviews of those schemes; and,
> 9. any other related matter.

0.2 The Attorney General has asked the Commission to seek the views of stakeholders and the community and to report by November 2011. We therefore seek submissions by **22 July 2011.**

0.3 A good deal of work has already been undertaken by Government and stakeholders in looking at the laws governing bail and the *Bail Act 1978*. In particular, in 2010, the Department of Attorney General and Justice released a review report and an exposure draft bill, and a roundtable was convened by the Hon Justice Megan Latham to provide advice. The process was somewhat limited in its scope. Our review will, however, take that work into account, ensuring that the progress made is not lost.

0.4 While we seek to draw on the earlier work, we are not constrained by it. Our review will examine the purpose of bail, the considerations that should underlie bail decisions, and the way in which the law is operating from a first principles perspective.

0.5 We will also look at bail in the context of our current reference on people with cognitive and mental health impairment in the criminal justice system, especially in relation to young people. We will use submissions received and consultations conducted by us in the course of that reference.

Some concerns

0.6 One clear criticism of the Bail Act is that is has become encrusted with complexity and is not easily comprehensible. The law of bail ought to be as straight forward as possible and intelligible.

0.7 At a policy level, in giving us this reference, the Government has indicated a concern with the growing remand population. In the latest prison census, as at 30 June 2010, 2504 people were in full time custody on remand awaiting trial or sentence. This is an increase of 69% over the 10 years since 30 June 2000.[1] During the same period, the proportion of the prison population on remand increased from 20.4% to 24.3%. The statistics for young people are even more concerning: 50-60% of young people in detention centres are held on remand, 85% of admissions to detention centres are remand admissions, and approximately 84% of young people remanded in custody do not receive custodial sentences.[2]

0.8 Fundamental questions arise:

- how the risk of re-offending by a person suspected of having committed a serious crime is to be weighed against the right to liberty and the presumption of innocence;
- whether bail should be seen as a right subject to other considerations or a privilege to be revoked for breach of what is considered to be appropriate behaviour while on bail.

These are illustrations of the kind of fundamental questions that arise in this reference.

Our process

0.9 Given the urgency of the issues, and the fact that a large amount of work has been done in this area in recent times, the Commission has decided not to release a

1. Corben, S, *NSW Inmate Census 2010: Summary of Characteristics,* Corrective Services NSW, Statistical Publication No 36 (2010) 23*; Corben, S, NSW Inmate Census 2000: Summary of Characteristics,* NSW Department of Corrective Services Statistical Publication No 22 (2001) 23.
2. NSW Law Reform Commission, *Young People with Cognitive and Mental Health Impairments in the Criminal Justice System,* Consultation Paper 11 (2010) 30.

consultation paper on this issue, as we normally would, to outline the current law and the issues. We do not consider this necessary because the issues are well-known.

0.10 On our website we will provide links to recent and historical materials relevant to the reference: www.lawlink.nsw.gov.au/lrc. Respondents may find this a helpful resource.

0.11 In lieu of a consultation paper, we are releasing this brief introduction to the reference and a series of questions which follow.

0.12 Our questions reflect the scheme of the existing legislation and the order of topics mentioned in the Commission's terms of reference. Respondents should, however, feel free, in addressing those topics, to challenge underlying assumptions and concepts concerning the purpose and function of bail. Submissions are welcome which propose other fundamentally different approaches, whether drawn from other jurisdictions or being original ideas.

0.13 **We seek your views.**

Our Questions

1. Over-arching considerations

1.1 What fundamental principles or concepts should be recognised and implemented by the Commission in reviewing the law of bail and the existing Bail Act?

1.2 Should the Bail Act include objectives and, if so, what should they be?

2. Right to release for certain offences

(Bail Act 1978, Part 2, Div 2)

2.1 Should a right to release on bail when charged with certain offences be retained in principle?

2.2 If so, should s 8, *Right to release on bail for minor offences*, be changed in some way?

2.3 Should the classes of offences covered by s 8 be varied?

3. Presumptions against and in favour of bail and cases in which bail is to be granted in exceptional circumstances only

(Bail Act 1978 Part 2, Div 2A, 3 and 3A)

3.1 How are the existing presumptions applied in practice?

3.2 What purpose are they intended to serve? What purposes should they serve?

3.3 Do the existing presumptions serve their intended or advocated purposes?

3.4 Is there a better way of achieving the purposes of presumptions?

3.5 Is there a legislative framework for presumptions in another jurisdiction that could be used as a model?

3.6 Should there be:

(a) a uniform presumption against bail;

(b) a uniform presumption in favour of bail;

(c) no express presumption for or against bail; or

(d) an explicit provision that there is, uniformly, no presumption for or against bail?

3.7 Should there be a presumption against bail in some cases only and, if so, in what cases?

3.8 Should there be a presumption in favour of bail in some cases only and, if so, in what cases?

3.9 Should there be an explicit provision that there is no presumption against or for bail in some cases? If so, in what cases, and what should a “neutral” presumption mean?

3.10 What principles should guide the classification of cases to which a presumption applies?

3.11 If a presumption against or for bail is to be retained, should the Bail Act specify the meaning and effect of such a presumption? Should such a presumption impute no more than a burden of persuasion or something more? Should the law concerning the meaning of a presumption against bail be changed by statute?

> **Background note:** In *R v Masters*,[1] the Court of Criminal Appeal said of the presumption against bail in s 8A of the Bail Act:
>
> > The presumption against bail … imposed a difficult task upon the person so charged to persuade the court why bail should not be refused. That presumption expresses a clear legislative intention that persons charged with the serious drug offences specified in the section should normally - or ordinarily - be refused bail. That is the effect of a series of decisions by single judges of the Supreme Court, most recently collected and discussed in *R v Kissner* (Hunt CJ at CL, 17 January 1992, unreported). We agree with that interpretation of s 8A.

3.12 Should the concept of ‘exceptional circumstances’ be retained and, if so, should the Bail Act specify the meaning and effect of this category?

4. Dispensing with bail

(Bail Act 1978, Part 2, Div 4)

> **Background note:** Section 10 of the Bail Act empowers a court to dispense with bail altogether whenever it has power to grant bail. The discretion is unqualified.
>
> Section 8 provides for an entitlement to bail in the case of minor offences, as specified for the purpose of that section, but bail so granted may be subject to conditions. Accordingly, there is no provision in the Act providing an entitlement to have bail dispensed with altogether in any circumstances.

4.1 Should a person be entitled to have bail dispensed with altogether in certain cases?

4.2 If so, should such cases include:

(a) offences not punishable by imprisonment (“fine-only” offences) (except for non-payment of a fine);

(b) cases where a juvenile is being dealt with by way of a Youth Justice Conference;

(c) any other class of case?

4.3 Should any such entitlement be qualified by reference to cases where the police are unable to ascertain sufficient information concerning the person’s identity, address and other details to enable a charge to be laid.

1. (1992) 26 NSWLR 450, 473 (Hunt CJ at CL, Allen and Badgery-Parker JJ).

5. Police bail

(Bail Act 1978, Part 3)

5.1 Should any change be made to the ability of Police to grant bail and the procedures that apply?

5.2 How is the right to seek an internal review of Police refusal to grant bail by a more senior officer working in practice? Are any changes required to the provisions governing this review?

6. Court bail

(Bail Act 1978, Part 4, Div 1-7)

6.1 Do the courts have adequate and appropriate jurisdiction to grant bail in relation to proceedings before them?

6.2 Is the jurisdiction of authorised justices to grant bail in the Local Court used regularly in practice? Is it appropriate to continue?

6.3 Should there be a provision that, where bail has been refused by the police or granted by the police subject to conditions, the court is required to make a fresh determination concerning bail at the first appearance of the person at court?

6.4 What provision, if any, should be made for mandatory reconsideration of the question of bail and of any conditions at subsequence appearances?

7. Repeat Bail applications

(Bail Act 1978, Part 4, Div 1)

7.1 Should s 22A, *Power to refuse to hear bail application*, which limits repeat bail applications, be repealed or amended in some way?

7.2 If retained, should s 22A apply to juveniles, to juveniles but only in serious cases, or in some other way?

7.3 What should be in the legislation to deal with unreasonable repeat applications while, at the same time, preserving a right to make such applications for bail as are reasonably necessary?

8. Criteria to be considered in bail applications

(Bail Act 1978, Part 5, Div 1)

Background Note: Currently, s 32(1) of the Bail Act prescribes 4 primary criteria to be considered in bail applications:

- the probability the person will appear in court
- the interests of the person
- the protection of particular people
- the welfare of the community.

Each primary criterion is further confined by reference to subsidiary criteria.

Taken together the primary and subsidiary criteria exclusively set out what the court or police officer may take into account in making a determination as to the grant of bail.

We seek views on what should be taken into account in making bail determinations, including whether criteria should limit the determination, and if so how.

8.1 In relation to s 32, *Criteria to be considered in bail applications*, should there be prescribed criteria? If so, what should those criteria be?

8.2 Is there a set of criteria to be considered in bail applications in another jurisdiction that can be recommended as a model?

8.3 Should an overarching test be applied to the consideration of the criteria such as:

- 'unacceptable risk' (as in the *Bail Act 1977 (Vic)* s 4(2)(d), or *Bail Act 1980 (Qld)* s 16(1)(a)) or
- 'reasonable grounds to suspect' (as in the *Bail Act 1982 (WA)* s 6A(4))

that a particular circumstance will arise?

8.4 Should the currently prescribed primary criteria be amended or supplemented in any way?

8.5 Should prescribed primary criteria be exhaustive?

8.6 If objects are included in the Act, should the primary criteria relate to the objects and if so, how?

8.7 Should there be prescribed subsidiary considerations in relation to each primary criterion?

8.8 If so, should the subsidiary considerations currently prescribed in relation to each primary criterion be changed in any way?

8.9 Respectively in relation to each primary criterion, should subsidiary considerations be exhaustive?

8.10 Section 32(1)(b)(iv) allows the decision-maker to consider whether or not the person is incapacitated by intoxication, injury or use of a drug or is otherwise in danger of physical injury or in need of physical protection as one of the factors relevant to the "interests of the person".

(a) Should s 32(1)(b)(iv) be retained?

(b) Should this consideration operate as a reason for granting bail, or as a reason for refusing bail, or either depending on the circumstances?

8.11 Are any other changes required to the way the criteria operate?

9. Bail conditions

(Bail Act 1978, Part 5, Div 3)

Background Note: Sections 36, 36A and 36B allow bail to be imposed subject to conditions. These include:

- entering into a bail agreement – which can be used to impose a range of restrictions or requirements concerning behaviour (for example: curfews and reporting requirements) and is the principal means by which such conditions are imposed
- residence conditions
- financial forfeiture by the accused or another persons
- attendance at a program (s 36A)
- non-association and place restriction conditions (s 36B)

It is a curiosity that the principal vehicle for imposing bail conditions concerning behaviour is not by specifying conditions upon which bail is granted, but by imposing a condition that the person enter into a bail agreement which specifies the restrictions with which he or she is to comply. That condition is fulfilled when the person enters into the agreement. Enforcement then relates not to breach of a bail condition but on breach of the agreement. Accordingly, s 50 provides that a person in breach of a bail agreement may be brought before a court to be dealt with according to law.

By force of s 37(1), bail must be granted unconditionally unless conditions are required to meet certain specified purposes. These are:

- promoting effective law enforcement
- protection and welfare of any specially affected person
- protection and welfare of the community
- reducing the likelihood of further offending by promoting rehabilitation and treatment.

By force of s 37(2), conditions cannot be any more onerous than are required by the nature of the offence, the protection and welfare of any specially affected person, and the circumstances of the accused person.

9.1 What should be the scope of the court or police power to impose bail conditions?

9.2 What should be the purposes of imposing requirements or conditions concerning conduct while on bail?

9.3 What matters should be considered before such requirements or conditions are imposed, and what limitation should there be on the imposition of such requirements or conditions?

9.4 Should the purposes for which such requirements or conditions may be imposed be any wider than the considerations which apply to the grant of bail under s 32? If so, what is the rationale for having wider considerations in relation to conduct on bail than the considerations relevant to whether to grant bail at all?

9.5 In particular, should the purposes of imposing such requirements or conditions (see s 37) include the promotion of effective law enforcement and protection and welfare of the community without further limitation?

9.6 Should the question of whether to grant bail and the question of what requirements or conditions as to conduct to impose if bail is granted be seen as the one process, with the same considerations being applicable to both aspects of the process?

9.7 Should the legislation specify what requirements or conditions as to conduct may be imposed? Should the list of such requirements or conditions be exhaustive?

9.8 Should there be a set of "standard conditions", supplemented by "special conditions" in some cases?

9.9 If so, should courts be required to provide reasons why conditions in addition to standard conditions are necessary? For example, in the case curfews, the need for and rationale for the timeframe of the curfew, or the need for and amount of money to be forfeited if the person does not comply with their bail undertaking?

9.10 Should there be a requirement that "special" conditions be reasonable in the circumstances?

9.11 Is there any reason for special provision for a condition that the person reside in accommodation for persons on bail (see s 36(2)(a1)) rather than allowing such a requirement to be considered along with other possible requirements as to conduct while on bail?

9.12 What should the mechanism be for imposing bail conditions?

9.13 In particular, should requirements as to the person's conduct while on bail be expressed as conditions on which bail is granted, rather than being the subject of a condition that the person enter into an agreement to observe specified requirements?

9.14 Is there any reason for requirements concerning conduct on bail not being conditions attaching directly to the grant of bail?

9.15 If such requirements were attached directly to the grant of bail as conditions, should the legislation nonetheless provide that a person is not to be released on bail unless the person first provides a written undertaking to comply with those conditions, as in the case of the requirement to appear (under s 34)?

9.16 Should there be any other process, in place of or in addition to such a written undertaking, to ensure that the person knows and understands their obligations while on bail?

9.17 What provision could be made in the legislation to facilitate compliance with conditions or requirements under a grant of conditional bail?

9.18 Should the provisions of the legislation in relation to conditions be changed or supplemented in any other way?

10. Breach of undertakings and conditions

(Bail Act 1978, Part 7)

Background Note: It is an offence to fail to appear at court in breach of a bail undertaking (s 51). By contrast, failing to comply with a bail condition or with an agreement entered into pursuant to a bail condition is not an offence. Instead, where a police officer reasonably believes that a person released on bail has failed to comply with such an undertaking or agreement, or is about to do so, the officer may arrest the person and take the person before a court, or an authorised justice may issue a warrant or a summons (s 50).

10.1 Should s 50 specify the role and powers of a police officer under this section with greater particularity?

10.2 Should the section specify the order in which an officer should consider implementing the available options?

10.3 Should the section specify considerations to be taken into account by a police officer when deciding how to respond under the section?

10.4 Should the section specify criteria for arrest without warrant?

10.5 Should the section provide that the option of arrest should only be adopted as a last resort?

10.6 Should the provisions of Part 7 be changed or supplemented in any other way?

11. Remaining in custody because of non-compliance with a bail condition

(Bail Act 1978, Part 8)

11.1 In relation to s 54A, *Special notice where accused person remains in custody after bail granted*, should the time for notice be less than the 8 days prescribed? Should a shorter time apply only in the case of non-compliance with some particular bail conditions? Should a shorter time apply to young people?

11.2 Should the Bail Act provide for further notices to be given periodically in the event that a person continues to be in custody because of such non-compliance?

11.3 Should the Bail Act specify what steps the court should take on receipt of such notice?

11.4 Should the Bail Act require steps to be taken other than by notice to the court, in the event of a person remaining in custody because of such non-compliance?

11.5 If a particular agency is responsible for the relevant condition should the Act require the agency to provide a report or information to the Court addressing why the bail condition is unable to be met, and the steps being taken to meet it.

12. Young people

12.1 Should there be a separate Bail Act relating to juveniles?

12.2 Alternatively, should there be a separate Part of the *Bail Act 1978* relating to juveniles?

12.3 Should the Bail Act explicitly provide that the principles of s 6 of the *Children (Criminal Proceedings) Act 1987 (NSW)* apply to bail determinations by a court?

12.4 Should s 6 apply to bail determinations by Police?

12.5 As an alternative, or a supplement, should relevant principles of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") be applied to bail determinations in relation to young people?

> **Background note:** Rule 13 of the Beijing Rules provides in part:
>
> **13 . Detention pending trial**
>
> 13.1 Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time.
>
> 13.2 Whenever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home.

12.6 Should the provisions of the Bail Act in relation to juveniles be amended or supplemented in any other way?

12.7 Should the Bail Act make any special provision in relation to young people between the ages of 18 and 21?

12.8 Should the Bail Act make any special provision in relation to Indigenous young people?

12.9 Are any changes to bail law required to facilitate administrative or support arrangements in relation to young people?

13. People with a cognitive or mental health impairment

Background note: The provisions in the legislation which relate to people with intellectual disability or mental illness are

- s32(1)(b)(v), which provides that intellectual disability or mental illness is a consideration in granting or refusing bail; and
- 37(2A) which requires that a bail condition imposed on a person with an intellectual disability must be able to be understood and complied with.

13.1 Should the provisions of the Bail Act in relation to "intellectual disability" (a defined term in the legislation) or mental illness be expanded to include people with a wider range of cognitive and mental health impairments? If so, which types of cognitive and mental health impairments should be included?

13.2 Should any other protections apply in relation to people who have a cognitive or mental health impairment?

13.3 Are any changes to bail law required to facilitate administrative or support arrangements in relation to people cognitive or mental health impairments?

14. Indigenous people

Background note: The provisions in the legislation which relate to Indigenous people are s 32(1)(a)(ia), 32(1)(b)(v) and 36(2A).

14.1 Should the provisions of the Bail Act in relation to Indigenous people be amended or supplemented?

14.2 Should the Bail Act provide that the Court in making a bail decision must take into account a report from a group providing programs or services to Indigenous people? If so, in what circumstances?

14.3 Are any changes to bail law required to facilitate administrative or support arrangements in relation to Indigenous people?

15. Duration of bail

15.1 Should the Bail Act provide explicitly that, subject to any revocation or variation by a subsequent decision, a grant of bail continues, and continues on the same conditions (if any), until the proceedings are finalised.

16. Review of bail decisions

16.1 How is s 44 (broadly, allowing review of bail decisions by a court of the same status) working in practice? Should there be provision for such a review?

16.2 In view of the power of the Supreme Court and the Court of Criminal Appeal to make a fresh determination concerning bail, is there any purpose in preserving a power of review by those courts, as provided by s 45?

17. Structure of the Bail Act

17.1 Subject to the scope of this reference, should the structure of the Bail Act be changed to flow from the general to the particular or in step with the processes involved, so as to incorporate a "logical pathway"?

For example:

- When can bail be granted?
- When can bail be dispensed with?
- By whom can bail be granted (police powers and court powers)?
- What criteria apply to bail decisions?
- When can conditions be imposed?
- What conditions?
- Rules relating to bail conditions.
- Duration of bail decisions.
- Effect of a grant of bail.

17.2 Is there any existing model recommended which could be adopted in restructuring the Act?

18. Plain English

18.1 Should any provisions of the Act covered by this reference be recast in plain English or amended for clarity and intelligibility?

18.2 Is any existing model recommended?

18.3 Should the terminology in the Bail Act be changed to reflect the effect of processes under the Act? For example, should the legislation provide for:

- "pre-trial-release, with or without conditions", rather than "grant of bail"; and
- "pre-trial detention", rather than "remand in custody"?

18.4 Should the name of the Act be changed, such as to the "Pre-Trial Detention Act"?

19. Forms and processes

19.1 In relation to the aspects of the legislation that are the subject of this reference, is there any need for revision of forms and subsidiary processes? Please be specific.

19.2 Are any changes to bail law required to facilitate administrative or support arrangements generally?

20. Other submissions

20.1 Please make any other submissions that are considered to be relevant to the Commission's review.