21 July 2011

NSW LAW REFORM COMMISSION REVIEW OF BAIL LAW IN NSW

The Crime and Justice Reform Committee was established to provide information concerning the efficacy and cost effectiveness of current responses to crime, and the potential for alternative approaches. It does so by making experts in criminology available to parliamentarians, political parties, the media and other interested persons and organisations. This continues to be the function of the Committee.

The Crime and Justice Reform Committee makes the following submissions in response to the call for submissions to the NSW Law Reform Commission's reference into the law of bail.

The Committee welcomes the review of the NSW laws regarding bail, noting that the original *Bail Act* 1978 has been amended in a rather piece-meal and ad hoc fashion some 32 times. What is more striking than the number of amendments, however, is the fact that New South Wales has tended to be more punitive in amendments to its bail legislation, as compared to other states across Australia.[1]

These submissions attempt to focus on the basic principles that the Committee believes should guide any bail laws, and notes some of the basic features that Committee believes should be present in any future bail legislation.

Presumption of Innocence and Retention of Liberty.

A fundamental assumption of our legal system is that a person is innocent until proven guilty and, further, that a person cannot be held in prison unless they are being punished for a crime that has been proved to have been committed by them. As such, if a person is charged with a crime then the presumption should be that they remain at liberty until such time as a court determines that they have committed an offence, and have determined that the appropriate punishment in all of the circumstances is imprisonment. Accordingly, the fundamental purpose of any legislation governing bail should, in recognition of these principles, be to permit release from custody of persons arrested and charged with an offence, and to provide justification for holding persons on remand on limited grounds only.

The Committee is concerned that the current bail laws in NSW are not sufficiently protecting this fundamental right. Currently around 30% of NSW prisoners are held on remand[2] - a percentage that has been trending upward for some time, to reach this historic high. The proportion is even higher in juvenile justice centres. In the case of women, the figure currently stands at 32%. It is well recognised that Indigenous people are over-represented in all of these groups.[3] Any changes to bail laws are therefore of great significance to the presumption of innocence, as well as the administration of justice, the community's expectations of the approach of the police and the courts to accused, and the costs to the State's budget.

As such, the Committee submits that, not only should any Bail Act contain a statement of this fundamental principle and a directive that bail authorities are required to have regard to it, but that the Commission's review of bail law should focus on seeking to strengthen protection of the right to liberty before conviction overall.

Bail Decision Criteria.

The Committee submits that it is important that bail legislation contains a list of criteria for bail authorities to consider in deciding whether to grant bail. The current Bail Act does this under s.32. Without a checklist of criteria, bail hearings would likely become overly discretionary and subject to the personal approach of the bail authority. This would make it very difficult for legal practitioners to assist courts to properly consider all relevant criteria, and to indicate when criteria are inappropriate to consider. There would also be significant difficulty for appeal authorities in determining whether the original denial of bail was properly made. It would most likely lead to a period of uncertainty followed by a creation of a common law set of criteria for bail decisions – which may result in a return to the uncertainty of the 1960's.

Further, the Committee considers that the criteria should remain exclusive and mandatory so that there is consistency of treatment by bail authorities.

In addition to, or in variance of, the current conditions under s.32 of the *Bail Act*, the Committee submits that consideration should be given to the following criteria being included in any future legislation:

- The strength of the prosecution's case;
- The seriousness of the alleged behaviour within the range of behaviours prohibited by the offence under which the person has been charged;
- The likely time to be spent on remand and the probable maximum penalty of imprisonment, if any, that the person might face;
- The impact of remand on the person's ability to prepare a defence;
- The impact of remand on the person's personal circumstances, including family and employment impacts; and
- a requirement that the likelihood of reoffending must outweigh the right to liberty.

Whilst these may very well be issues that bail authorities consider pursuant to s.32 at present, the Committee believes that these criteria are vital in any reform of the law as they would serve to focus the determining authority's attention on the basic, process-based question – that is, will the person answer their bail and attend future court dates – as well as balancing the fundamental presumption of innocence and the right to liberty.

Despite the complexity of the current s.32 criteria, it is important to remember the philosophy behind them. The 1978 2nd Reading speech set them out as follows:

> "At present there are no clearly defined criteria for police or courts to follow when faced with a bail decision. The need for clear and easily understood criteria is of vital importance to a smooth functioning and efficient bail system. Relevant criteria can presently only be established by combing through a large number of court decisions. Both courts, and police in particular, are therefore faced with considerable difficulty in determining what evidence they should take into account when setting bail. The bail review committee has rightly observed that it is unfair to expect police, without guidance, to apply fairly the criteria relevant to bail when these cannot even be agreed on by the courts and the legal profession.
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> Clause 32 lists the criteria to be considered under three general headings - the probability of appearance; the interests of the accused person; and the protection and welfare of the community, and particularly in this context, the interest of the community in having accused persons brought to trial. To avoid the introduction of non-relevant or otherwise inappropriate criteria, it is proposed that only these criteria are to be considered. *The basic object of setting bail is to ensure that an unconvicted accused person appears in court in respect of the offence for which bail is being considered. As such, it is the primary and most important factor to be considered in any bail application.* The first indicator of whether a person is likely to abscond is his background and community ties.
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> The committee was of the opinion that courts in New South Wales do not give as much attention to this important indicator as is warranted." *[emphasis added]*

These reasons remain as compelling today as they did in 1978.

Further, the Committee submits that the criteria should also include specific reference to the principles set out in s.6 *Children (Criminal Proceedings) Act* 1987, as previously recommended by the NSW Law Reform Commission, and by the recent review of juvenile justice in NSW.[4] The provision in the existing Act that a bail authority must have regard to special needs arising from the fact that a person is under 18 years is not sufficient since it provides no guidance to bail authorities in applying this provision.

Conditions of Bail.

The Committee considers that any future bail legislation should retain the current Act's requirement that bail on the basis of provision of monetary security be a condition of last resort. It was an important recognition of all bail reform measures in the 1970s and 1980s in Australian jurisdictions that over-reliance on monetary bail both disadvantaged the poor and advantaged the rich. As a result the current Bail Act emphasises community ties and reporting requirements as more appropriate starting point for conditional bail. We consider

it important to continue to provide guidance to bail authorities that non-monetary forms of bail condition are to be preferred.

Such requirement could, however, be amended to separate out proposed conduct, security and character reference requirements and make clear that conditions should be considered in the order of conduct first, character reference second and security last.

Further, the current requirement under s38(2) for reasons to be given in requiring money bail should be included in any future legislation.

The Need to Reassess the Role of the Presumptions.

The Committee notes that the original philosophy of the Bail Act was to require courts to concentrate on the personal characteristics, history and circumstances of the accused. However, the increasing focus on presumptions either for or against bail in the various amendments that have been made over the years risks crushing this philosophy under their weight. It is suggested that the current bail laws are approaching a state whereby the authority is required to first consider the class of offence charged, and the attendant presumption, and thereafter to consider arguments against that prima facie decision by reference to individual characteristics of the accused.

The recent BOCSAR report on presumptions against bail (*Bail presumptions and risk of bail refusal: An analysis of the NSW Bail Act*: July 2010) demonstrates that despite the creation of a multitude of such actuarial considerations, courts continue to emphasise the individual's characteristics, history and circumstances. In light of this, it would be far more realistic for any future legislation to emphasise bail criteria as the primary method of determining bail.

The Committee considers that many of the other removals of the presumption in favour of bail over the years have been motivated by (perceived) community sentiment, political concerns and even one or a series of specific offences reported in the media, as opposed to evidence suggesting that there would be some positive benefit to the community or the functioning of the criminal justice system by removing the presumption in favour of bail.

Children, Young People and Other Vulnerable Persons[5].

The Committee is concerned that the current bail laws seem to impact negatively in a disproportionate way on these groups of people. Whilst many concerns may not be met by a purely legislative response, there are some considerations that can be given to how bail laws might direct attention to certain special needs or considerations.

One of the major obstacles to many young or vulnerable people obtaining bail is lack of accommodation, or suitable accommodation. In the case of children and young people it is often Juvenile Justice or Community Services who have an obligation to secure accommodation on behalf of the accused. The law should include a requirement to notify the relevant government department or agency where a child or young person remains in custody due to a failure to find accommodation.

Further, and more generally, the Commission should consider legislation that would hold a Government department statutorily responsible for providing adequate and appropriate accommodation for accused released under residence conditions (cf s36(2A) and (2B) *Bail Act*). It may be that the Minister for Corrective Services is not the most appropriate Minister to have that responsibility, but without a statutory requirement, there are likely to be budgetary pressures that reduce the availability of such accommodation. The absence of a statutory obligation on Juvenile Justice NSW and Community Services NSW to provide accommodation for children and young people on bail was noted by Wood J in his inquiry into child protection[6]; he emphasised lack of accommodation as a key factor underlying young people being held in custody unnecessarily.

The Committee considers it necessary that any bail law include the provision that the subject person should understand and be able to comply with any bail conditions imposed. This is especially important in relation to persons under 18 years and other vulnerable people. Any such provision should go on to require the bail authority to satisfy themselves that the accused has in fact understood the requirements, or will be made to understand (possibly through an undertaking to the court by the accused's legal representative). Otherwise the law does not ensure that the accused leaves the court understanding the conditions imposed. Failure to do this essentially sets disadvantaged accused up for a breach of bail.

Finally, the Committee believes it is important to consider inclusion of a provision stipulating that any association or other restrictions should not be more onerous that those able to be imposed on a person convicted of an offence, and should be related to the alleged offence or otherwise relevant to the individual circumstances presented in each case. In the case of young and other vulnerable groups, it is considered that there is an increasing tendency to impose conditions or restrictions that are overly punitive and have no justification when the facts of the alleged offence are considered. For example, a curfew imposed on a young person between the hours of 10pm and 6am, when the subject offence was alleged to have occurred in the afternoon, has little justification and is akin to a punishment being imposed. Bail authorities should be directed as to the proper purpose of restrictions and conditions.

As stated at the outset of this section, there are various concerns in relation to bail that may not be tackled by legislation alone. The Committee notes that urgent attention needs to be given to providing suitable accommodation and support within the community to ensure that wherever possible people can be released to bail.

Signed, Chris Geraghty

On behalf of the Crime and Justice Reform Committee.

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[1] Assoc. Professor Alex Steel, 'Bail in Australia: Legislative Introduction and Amendment Since 1970' Proceedings of the 2009 Australian and New Zealand Critical Criminology Conference, 2009,228.

[2] Corrective Services NSW, Offender Population Report, Week Ending 3 July 2011; .

[3] Fitzgerald, J Why are Indigenous imprisonment rates rising? 2009 *Crime and Justice Statistics Bureau Brief Issue Paper* no. 41, BOCSAR, p1-2.

[4] Noetics Solutions (2010) A Strategic *Review of the New South Wales Juvenile Justice System: Report for the Minister for Juvenile Justice* Recs 6 & 7, and p. 70 ; NSW Law Reform Commission, *Report 104: Young Offenders*, 2005 rec. 10.2.

[5] Vulnerable people include groups such as the homeless, poor, Indigenous people, people from non-English speaking backgrounds, people with mental health problems, and disabled people, including those with intellectual disabilities.

[6] Wood, The Hon James. (2008). *Inquiry into Child Protection Services in NSW,* p.559.