

BAIL

22 July 2011

**Submission on behalf of Legal Aid NSW
to the New South Wales Law Reform Commission**

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 36 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 bail decision is one of the most crucial decisions made in the criminal process, with the potential to have a significant impact on how a person progresses in the criminal justice system. A person remanded in custody has fewer resources available to them to prepare a defence. The impression they make in court is less favourable. Bail status can even have an impact on the severity of the sentence ultimately handed down. All this is to say nothing of the destabilising effect of remand on a person's family life, education and employment.

It is therefore with concern that Legal Aid NSW notes the steady rise in the remand population in this State over the last ten years, and the imposition of onerous bail conditions on defendants that in combination with police compliance checking practices have increased the number of bail breaches being dealt with by the courts. In relation to juveniles in particular, onerous bail conditions have had the effect of escalating defendants' involvement in the criminal justice system at an early and unnecessary stage.

Changes to the *Bail Act 1978* since its introduction in part hold the key to these trends. When introducing the original Bail Bill to Parliament in 1978 the Hon. Frank Walker said: "One must not lose sight of the circumstances, first, that when bail is being considered, one is confronted with an alleged crime and an unconvicted accused person, and second, that the liberty of the subject is one of the most fundamental and treasured concepts in our society."

A series of ad hoc amendments to the legislation have, however, infringed upon both the right to liberty and the presumption of innocence, decreasing over time the number of offences to which a presumption in favour of bail applies, and resulting in a confusing set of

provisions that artificially inflate the significance of the type of alleged offence to a bail decision. Amendments to s 22A have made it harder for people to make additional bail applications and have put upward pressure on the juvenile remand population.

Police decision making in relation to bail is another significant factor. Police are the gatekeepers of the bail system and the decisions they make about bail – when to refuse it, how to ensure bail compliance, and when to arrest someone for a breach – are critical to the ultimate outcomes for a defendant. Despite this fact, the *Bail Act* provides little guidance for police in the exercise of their discretion and little is known about police internal policies and practices in relation to bail.

Finally, a lack of bail support services – bail accommodation in particular – means that people who would otherwise be granted bail are being remanded in custody because they have nowhere else to go.

Legal Aid NSW makes the following priority recommendations in relation to bail reform:

Recommendation 1: Repeal the presumptions system, which artificially inflates the significance of alleged offence type to a bail decision and adds an unnecessary layer of complexity to the legislation.

Recommendation 2: Repeal s 22A, which limits the rights of a defendant to make bail applications and has placed upward pressure on remand rates.

Recommendation 3: Provide further legislative guidance for police about their bail decision-making powers and encourage the development of transparent police policies and procedures in relation to bail.

Recommendation 4: Provide further legislative guidance for police and courts on setting bail conditions, to prevent the imposition of unnecessarily onerous conditions.

Recommendation 5: Train police and court officers about their bail decision-making powers and the objectives of the *Bail Act*.

In making these recommendations, we note that the effectiveness of any bail regime is dependent on an adequate range of support services, such as:

- bail officers in juvenile detention centres to assist young people on remand to prepare for a bail review and help find services and accommodation;
- bail accommodation to limit the number of people being remanded in custody due to lack of alternative accommodation options;
- a bail support program modelled on Victoria's CREDIT / Bail Support Program; and
- rehabilitation programs, especially programs that are rural-based and culturally relevant to defendants, to provide accommodation and treatment options for people on bail.

These and other recommendations are included and elaborated upon in our responses to the discussion questions, which are attached.

This submission contains a number of real case examples. The names of our clients have been changed in these examples.

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.

Response to Questions for Discussion

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*?

We would suggest that the following principles are fundamental to this review:

- *A person is presumed innocent until proven guilty.* Therefore a bail authority must not use its bail-making powers to impose punishment on an unconvicted defendant: *R v Roberts and Lardner* (1997) 97 A Crim R 456.
- *The right to liberty*, as set out in Article 9 of the UN International Covenant on Civil and Political Rights. Flowing from this, detention should be an option of last resort. A bail authority should not detain a defendant unless satisfied, having considered all possible alternatives, that no other option is appropriate. This is also consistent with NSW sentencing principles: see s 5 of the *Crimes (Sentencing Procedure) Act 1999*. In all cases the Crown should bear the onus of proof as to why bail should not be granted (as in New Zealand and Canada, for example). Once a person is detained, that person should have a broad entitlement to apply for bail, so that the bail authority may decide without delay on the lawfulness of the person's detention and order the person's release if not lawful.
- *A person should not be detained in custody prior to being sentenced as a substitute for social measures* such as child protection, the provision of accommodation or mental health treatment.

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

Yes. The objectives of the Act should be to ensure that:

- a person who is required to appear before a court is not deprived of liberty unless the court is satisfied in accordance with the provisions of the Act that there are good reasons to refuse bail; and
- bail decisions are made in a fair, open, accountable and efficient manner.

2. Right to release for certain offences

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

Yes.

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

All defendants should have a right to unconditional release unless it can be shown that detention in custody or attaching conditions to that person's release is justified. This right should be stated in the Act.

Section 8 could then provide for situations where a defendant has a right to *automatic* release on bail because of the offence charged.

Section 8 would also be clearer if, rather than referring to other sections or regulations, the offences in relation to which there is a right to automatic release on bail are named within the section.

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

Fine-only offences should be omitted from s 8. Instead, bail should be dispensed with altogether for such offences and only come to court by way of a non-bail court attendance notice (see discussion below at 4.2(a)). A broader range of summary offences could also be considered for inclusion in the section; for example, all offences with a maximum penalty of 12 months or less. A comparable approach is taken by New Zealand in its *Bail Act 2000*, which provides that an accused has a right to bail if charged with an offence that carries a maximum penalty of less than three years' imprisonment, with only a handful of named exceptions.

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

3.1 How are the existing presumptions applied in practice?

Both lawyers and bail authorities have difficulty interpreting and applying the current presumptions in conjunction with the criteria for bail. As noted in our introduction, part of the reason for this is that the presumptions appear to inflate the significance of the type of offence alleged when in fact the offence type is only one factor that is required to be taken into account in accordance with the principles that underlie the Act.

Another reason for confusion is the lack of uniform reasoning for the placement of offences in particular presumption categories – a result of the ad hoc introduction of presumptions through a series of amendments to the Act since its inception.

The existing presumptions also cause problems because the Act lists section numbers rather than naming the offences, making it difficult to identify what offences fall within each category.

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

Presumably the purpose of the existing presumptions is to increase the significance of the offence type in the making of a bail decision. We would argue that the offence type is only one of a number of factors relevant to a bail decision and that in our experience the existence of presumptions shifts the focus away from the other factors bail authorities should consider when making a bail decision.

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

No. The NSW Bureau of Crime Statistics and Research (BOCSAR) report of July 2010, *Bail presumptions and risk of bail refusal: An analysis of the NSW Bail Act*, showed that individual factors such as prior criminal record, number of concurrent offences and delay in finalising a case exert a much stronger influence on the risk of bail refusal than the presumptions surrounding bail.

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

Yes. The application of presumptions for and against bail based upon types of offences is a conceptual weakness in the *Bail Act*. Not only does it inflate the significance of type of offence alleged to have been committed in the making of a bail decision, but it treats people who have allegedly committed an offence of the same type in the same way, regardless of the objective seriousness of the alleged offence. A single offence type can cover a broad range of circumstances. For example, two children breaking into a school tuckshop at the weekend to steal ice cream on the one hand, and an armed home invasion by an adult

offender on the other, are both aggravated break and enter offences. This identical treatment of very different circumstances 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.

The presumptions against bail that apply to "repeat offenders" and people who are on parole or serving a sentence are particularly problematic. Presumptions based on earlier convictions blur the purposes of bail with sentencing objectives by shifting the focus from the matter at hand. The fact that someone has previous convictions should not reduce their right to be considered innocent until proven guilty of the offence charged. The appropriateness of refusing bail to a person with a prior record should be determined by the bail authority on a case-by-case basis, having regard to a number of factors, including the strength of the Crown case, the range of facts and circumstances that make up the individual's criminal record and the likely penalties that will flow from those circumstances should the person be convicted. Such presumptions have led to people being refused bail in circumstances where a custodial penalty is unlikely.

One of the recommendations the Victorian Law Reform Commission made in its 2007 review of Victoria's *Bail Act 1977*, was to abolish its presumption system altogether. The Commission recommended 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 will:

- 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.

New South Wales should consider adopting a similar approach. For example, rather than employing presumptions, the *Bail Act* could provide that the seriousness of the alleged offence(s) and the seriousness and length of the applicant's criminal record are relevant to the criteria to be considered in a bail application (currently set out in s 32).

Such an amendment 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. It would also prevent future ad hoc amendments to the list of offences that carry presumptions for and against bail.

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

The framework recommended by the Victorian Law Reform Commission in 2007, although not currently in force, 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?**

If the presumption system is retained (and we argue it should not be), our preference is for a uniform presumption in favour of bail to reflect the principles that a person is innocent until proven guilty and has a right to liberty. This is the approach currently taken in Victoria, where there is a general presumption in favour of bail except in relation to a handful of offences.

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

We would not advocate for a presumption against bail in any particular cases; rather, decisions with the capacity to infringe upon a person's presumption of innocence and right to liberty should be made taking the individual circumstances into account.

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

As already stated, if the presumption system is retained, there should be a uniform presumption in favour of bail. If exceptions are made to this presumption in favour, there should nevertheless be a presumption in favour of granting bail for young offenders and people with a mental health and cognitive impairment, regardless of any of the other sections of the Act.

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?

No. The concept of a "neutral" presumption has proven to be confusing and is unnecessary.

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

As we do not support the conceptual basis of a presumption system, we cannot recommend appropriate principles to 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?

If the presumption system is to be retained, the meaning and effect of such a presumption should be much clearer in the *Bail Act* than it currently is. A presumption should impute no more than a burden of persuasion. If retained, the law concerning the meaning of a presumption should be contained within the legislation.

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?

No. The concept of 'exceptional circumstances' should not be retained. There is no justification for such a category. If the presumptions system inflates the significance of offence type to a bail decision to an inappropriate degree as argued above, an 'exceptional circumstances' category does so exponentially.

Case example

A Legal Aid client recently pleaded not guilty to a charge of wounding with intent for stabbing her ex-partner. Because she had been convicted of a relevant break and enter offence nine years previously, the *Bail Act* required that bail was to be granted in exceptional circumstances only. The client had a history of mental illness. The magistrate determining her bail application refused bail. In making this decision, the magistrate stated that he considered it appropriate to grant her bail to receive treatment; however, because of the requirement to show exceptional circumstances, he felt compelled to refuse her bail.

4. Dispensing with bail

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

Yes.

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?

(a) Yes. 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 an offensive language offence. Our Children’s Legal Service (CLS) solicitors regularly see young clients who have breached a curfew condition 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.

(b) Yes, because the intention of dealing with a young offender under the *Young Offender’s Act* is to divert them from the criminal justice system altogether. Our solicitors report that in dedicated Children’s Courts the practice of dispensing with bail in line with the original practice note regarding youth justice conferences (no longer in force) is generally followed. In regional and rural areas, however, this practice is not followed, leading to unfair outcomes across the State that affect Aboriginal young people in particular. It is therefore important to include the requirement to dispense with bail in such circumstances in the Act.

(c) The court should have a general discretion to dispense with bail whenever it considers it appropriate. This is currently set out at s 10(1) and should remain in the Act. In its equivalent section, the Australian Capital Territory’s *Bail Act 1992* also states: "In deciding whether to release an accused person from custody without requiring bail, a court may have regard to any information that appears to the court to be relevant and reliable": s 10(2). This would be a useful provision. The section should also provide that bail should be dispensed with for young people unless the circumstances clearly warrant otherwise.

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.

It would be appropriate to qualify the entitlement by stating that bail is to be dispensed with provided the person gives sufficient identification to commence proceedings.

5. Police bail

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

Yes, as outlined below.

- *Define the role of a bail authority.* For police, the distinction between their role as bail decision-makers and their role as crime preventers and investigators can be unclear. In our experience, bail powers are sometimes used to achieve other police goals. It would therefore be useful to include in the *Bail Act* some clear definitions about the role of a bail authority and its limitations.
- *List options available to police with respect to bail.* The options available to police with respect to bail should be clearly listed.
- *State that bail refusal is a last resort.* The Act should state that the power to refuse bail should be used as a last resort and should provide clear and exhaustive grounds that need to be met before someone can be remanded in custody. Additionally, police should be required to record detailed reasons for any such decision. This would reduce the likelihood of remand being used to achieve inappropriate objectives such as information gathering. Legal Aid NSW would also support the introduction of a process like the one in place in Victoria whereby a police officer refusing bail is required to give sworn evidence at any court bail application justifying the decision if bail is contested.
- *Outline criteria to be taken into account.* The Act should outline criteria that police must take into account when exercising their discretion in relation to bail.
- *Require police to inform accused of right to apply for bail.* A situation that Legal Aid solicitors often encounter is one where the reason given by police for refusing bail is that the defendant "did not apply for bail" in circumstances where the defendant was unaware of their right to apply for bail. It would be useful if the *Bail Act* or the *Law Enforcement (Powers and Responsibilities) Act 2002* ("LEPRA") required police to inform a defendant of their right to apply for bail.
- *Provide that a defendant has a right to communicate with a lawyer prior to a bail decision.* The Act should also provide the defendant with the right to communicate with a lawyer before a bail decision is made by police, as opposed to afterwards (the current situation under s 19). Legal Aid lawyers often see clients who have agreed to particularly onerous conditions in order to fast-track their release; conditions which increase the likelihood of a bail breach down the track. Ensuring defendants have a right to speak to a lawyer prior to a bail decision being made would prevent this occurring as regularly as it currently does.

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?

In our experience internal reviews are rare. Legal Aid would support amendments to the *Bail Act* or to LEPRA that establish a more accountable and transparent system of internal review.

6. Court bail

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

On the whole, yes.

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

This jurisdiction is used regularly in regional courts on the days the courts are not sitting, at weekend courts on public holidays and also in bedside courts at hospitals. It is appropriate and important that this jurisdiction is retained.

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?

Yes. It is our experience that the bail conditions imposed at first instance often do not take into account the realities of the life of the defendant. Particularly for juveniles, who often do not have the capacity to provide information relevant to a bail decision (for example, accommodation options) to police at first instance, the period of time between the initial bail decision and the first court appearance is necessary for gathering information relevant to bail. Moreover, at court, unlike when bail is initially imposed, both Legal Aid and Juvenile Justice are available to assist.

A related difficulty is that, contrary to the rule in s 37(2) of the Act, bail conditions imposed at first instance are often more onerous than what is required to ensure the person's attendance at Court and to protect alleged victims and the community from further offending. As referred to in our response to 5.1, there is a high proportion of offenders who have been refused bail as a result of breaching unrealistic and often onerous bail conditions set by police.

Legal Aid solicitors report the tendency of some magistrates to review bail conditions on the first mention only if the Crown has been given notice of the bail variation application. Giving notice is generally impossible, since the defence will only receive its instructions on the day of the first appearance just before the hearing. This approach is nevertheless often justified by courts on the grounds of procedural fairness to the Crown. It does not, however, take into account the lack of procedural fairness to the defendant at the point of arrest, where legal advice is rarely available.

Given these considerations, and the principle that detention should be an option of last resort, it is worth introducing such a provision. The provision should, however, be limited to allowing the court to reconsider the bail conditions or dispense with bail altogether. We would not support a provision that enabled the court to refuse bail to a person previously granted bail at the first mention without notice.

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

Reconsideration of the question of bail and of any conditions should be mandatory if bail has been granted and the defendant has been unable to fulfil one or more conditions.

7. Repeat Bail applications

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

Section 22A should be repealed as it infringes upon the rights of a defendant to challenge the lawfulness of his or her detention (Article 9(4) of the *International Covenant on Civil and Political Rights*). While the 2009 amendments to the section clarified the scope of the section to make plain that a defendant can make a fresh application for bail if they have any relevant facts or circumstances that have previously not been brought to the attention of the court, our lawyers report that this threshold is often hard to meet. For example, even in circumstances where the receipt of the brief of evidence sheds fresh light upon the strength or otherwise of the Crown case, judges and magistrates are often reluctant to accept that the s 22A threshold has been met.

Particularly in the context of indictable matters, court delay is a significant factor that, in conjunction with s 22A, impinges upon the procedural fairness afforded to the accused. The criminal case conferencing process dictates that a matter is adjourned for eight weeks for the brief and reply. Often, however, the full brief is not served in that period, and there are further adjournments. Despite the impact such delay has on the amount of time a defendant is remanded in custody or must comply with bail conditions, it is rarely recognised as being enough to satisfy the new information requirements of s 22A.

Case example

In February 2011, a Legal Aid client was granted bail to report three times a week, with the anticipation that his court matter would be finalised within weeks. The matter was, however, adjourned until August. The defence argued that this delay constituted a change of circumstances under s 22A. The Crown submitted that it did not. The judge accepted the Crown's submission and refused to entertain a bail variation application on the basis of s 22A.

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

If s 22A is retained, juveniles should be exempt from its operation altogether. As BOSCAR reported in its bulletin *Recent Trends in legal proceedings for breach of bail, juvenile remand and crime* in May 2009, the introduction of s 22A has put upward pressure on the juvenile remand population. This is particularly concerning 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 underlying 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.

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?

On the rare occasions that an accused person makes unreasonable repeat applications, the Act could provide a means of dealing with vexatious applications similar to that currently provided for in s 22A(2), and also in s 53(4)(a) of the *Crimes (Domestic and Personal Violence) Act 2007* in relation to apprehended violence orders. Section 54(4)(a) provides that "an authorised officer or a Registrar may refuse to issue process if satisfied that the application is frivolous, vexatious, without substance or has no reasonable prospect of success."

8. Criteria to be considered in bail applications

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?

Yes. Section 32 should include prescribed criteria. The current criteria are appropriate.

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

The current s 32 criteria are appropriate.

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?

Yes. An 'unacceptable risk' test is appropriate. One of the dangers of a number of the current s 32 criteria is that they invite the bail authority to speculate upon an unknown future outcome; for example, whether it is likely that the person will commit a serious offence if granted bail. Applying an 'unacceptable risk' test would provide further guidance during this process to ensure that a high level of risk exists before a bail authority is able to infringe upon a person's right to liberty.

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

Yes. The currently prescribed primary criteria should require the bail authority to consider in its decision whether to grant bail the fact that it is unlikely a person will receive a custodial sentence, when applicable.

8.5 Should prescribed primary criteria be exhaustive?

Yes. This ensures that irrelevant considerations are not taken into account when bail decisions are made. It also means that, from a practical point of view, all the considerations that can be taken into account can be found in the one place within the legislation.

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

Yes. Section 32 (or its redrafted equivalent) could provide that in making a decision in relation to bail, the bail authority is required to take into account the listed criteria to ensure the objectives of the Act are fulfilled.

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

Yes. Section 32 as currently drafted provides a useful checklist of the considerations that may be taken into account in a bail decision.

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

No, the current subsidiary considerations are appropriate.

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

Yes, for the reasons outlined in answer to 8.5 above.

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?

- (a) It is appropriate that s 32(1)(b)(iv) be retained. The Act should, however, also provide that these factors cease to be a valid consideration as soon as the person ceases to be incapacitated, in danger or in need of physical protection.
- (b) This consideration should operate as a reason for granting or refusing bail, depending on the circumstances. If used as a basis for refusing bail, police should be required to record that this was the basis for the bail decision. The legislation should further provide that the question of bail must be revisited within a reasonable time to ensure the person is not kept in custody despite the s 32(1)(b)(iv) factors no longer applying.

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

Section 32 should state at the outset that a bail authority must not use its bail-making powers to impose punishment on an unconvicted defendant.

9. Bail conditions

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

Bail should be granted unconditionally unless conditions are necessary to prevent an unacceptable risk that an accused may:

- 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.

These are considerations similar to those contained in s 5(3) of Victoria's *Bail Act 1977*.

In addition, the Act should provide that bail conditions should not be more onerous than necessary to achieve these objectives, and that any other considerations, such as those motivated by welfare concerns, are unlawful. This last restriction should preferably apply to bail conditions imposed upon anyone, but certainly to conditions imposed upon children. (See further our responses to 9.3 and 12.6 below).

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

In line with our answer to 9.1, the purposes of imposing conduct requirements or conditions while on bail should be to prevent an unacceptable risk of the accused:

- failing to attend court as required;
- committing a serious offence while on bail;
- endangering the safety or welfare of the public; or
- interfering with witnesses or otherwise obstruct the course of justice.

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?

Conditions should be reasonable having regard to the nature of the alleged offence and the circumstances of the defendant

In early 2011, Victoria introduced a requirement in its Act that all bail conditions must be reasonable having regard to the nature of the alleged offence and the circumstances of the defendant. Legal Aid would welcome this kind of limitation on the power to impose conditions.

Such a requirement would require the bail authority, for example, to show a nexus between the time of offence and the imposition of a curfew. If the offence occurred during the day, there would be no justification to impose a curfew that a defendant is home by 6.00pm each night.

It would also prevent the imposition of unjustified reporting conditions. Such conditions can be very burdensome, for example where a person is required to report to police every day. Reporting conditions are often imposed even though a person is not at risk of flight, has not failed to appear at court and has strong community ties.

Relevant circumstances of the defendant would include:

- A defendant's capacity to understand a condition.

A bail condition should not be imposed unless the bail-making authority is satisfied it is appropriate having regard to the capacity of the person to understand and comply with that condition. Indeed, the legislation should go so far as to require the bail authority to satisfy itself that the accused has in fact understood the requirements, or that somebody else understands the requirements and undertakes to do their best to ensure that the person complies; for example a parent, guardian or member of the person's community. This is particularly important in the case of young people, Aboriginal people, people of a non-English speaking background, and people with a mental illness, cognitive impairment or physical disability.

Highlighting the need for such a requirement is the 2009 Juvenile Justice and Justice Health survey of young people in custody. The survey found that of those in sampled, 14% had a possible intellectual disability (IQ 69 and under), 32% scored in the borderline intellectual disability range (IQ 70 to 79) and 18% had a mild to moderate hearing loss. The percentages in each three categories were higher still when the sample was limited to Aboriginal youth. Such mental and physical factors can have a significant impact on the capacity of a defendant to understand bail conditions.

- The places a defendant is required to visit.

Too often bail is made subject to unrealistic association or place restrictions. A bail condition should not prevent a person from associating with any member of the person's close family or from visiting any place where they live, work, go to school, or receive a health, welfare or legal service. Courts should not impose place restrictions that encompass central business districts which also operate as travel interchanges (for example, Central or Town Hall stations) without consideration of the effect this will have on the defendant.

Case example

A Legal Aid Children's Legal Service client was charged with committing affray. In the experience of Legal Aid solicitors it is standard practice at Bidura Court for magistrates in such cases to impose a place restriction encompassing a 2km radius from Sydney Town Hall. The magistrate accordingly imposed this condition, giving no consideration to the fact that the defendant would breach the condition every time she travelled to school,

visited the Department of Juvenile Justice in accordance with another bail condition, or visited her sister, who lived in Redfern.

- Accommodation circumstances of the defendant.

Often the accommodation circumstances of a defendant – commonly a young defendant – will make a condition such as a curfew condition or a requirement that the person remain in the company of a parent inappropriate and unachievable. Many young defendants come from unstable family backgrounds. Their living circumstances can change from day to day. The movements of other family members can be unpredictable. It should be a requirement that a curfew can only be imposed once the court has information about the person's accommodation circumstances that suggests such a condition is appropriate and workable.

Bail conditions should not be used to punish an unconvicted defendant

As with the decision whether to grant bail, the Act should also state that conditions should not be imposed to punish an unconvicted defendant.

Monetary security should be a condition of last resort

It is important to preserve the current legislative requirement that bail on the basis of monetary security is a condition of last resort. It should not be easier for those with financial resources to be granted bail than those without.

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?

No. There is no rationale for wider considerations.

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?

The promotion of effective law enforcement

The promotion of effective law enforcement is not a legitimate reason for imposing a bail condition and should not be included.

A particular difficulty experienced by Legal Aid clients with curfew conditions attached to their bail is onerous bail compliance checks, often during the middle of the night and multiple times a week, which police undertake as a crime prevention strategy. Rigorous curfew checking can further disrupt a family situation already under stress. Legal Aid knows of cases where young people have been made homeless as a result of onerous curfew checking by police. For adults too, curfew checking can affect relations with neighbours and landlords.

In our experience, police use curfew checking to target people on bail indiscriminately, irrespective of whether they are high-risk offenders, and without evidence that this practice reduces re-offending.

Case example

A 16 year-old Legal Aid client named Kristy was charged with aggravated robbery and assault occasioning actual bodily harm for an incident where it was alleged that she and a friend robbed the victim of a mobile phone. Prior to these charges, Kristy had had no dealings with police. One of the bail conditions set for her was that she be home between 7pm and 7am. Kristy lived with her father and her 9 year-old sister.

Police conducted bail compliance checks on Kristy over a three month period on average five nights a week. This was despite the fact that during this time Kristy attended all of her court appearances and did not commit any offences. The times the checks were carried out varied: for example, 8.45pm, 3.10am and 6.50am. The bail compliance checks were noticed by other residents of the unit block in which Kristy's family lived and caused significant embarrassment to the family.

Kristy applied to the Supreme Court for a bail variation. The Court removed the curfew condition.

Bail compliance checks have become so entrenched in police policy and practice that police prosecutors have been known to insist on tailoring bail conditions to facilitate compliance checking irrespective of the circumstances of the defendant.

Case example

A 14 year-old Legal Aid client named Ned applied for bail in the Children's Court. A curfew was one of the conditions. Ned's parents were both in attendance at court, and had agreed between them that it would be best for Ned if he lived with his mother most of the time but was able to go to his father's house on occasions when he and his mother were not getting on. This was a proven technique of managing Ned's behavioural difficulties. The police prosecutor opposed the arrangement on the basis that police would not know where to conduct their bail compliance check.

If it is not considered appropriate to address the issue of bail compliance checks by way of legislative amendment, Legal Aid recommends that police be encouraged to develop transparent policies and guidelines that govern bail compliance-checking practices to ensure that checks are undertaken appropriately, are targeted to high risk offenders, and are grounded in an evidence-based assessment of risk.

The protection and welfare of the community

While the protection and welfare of the community is an appropriate consideration, it is often used to justify the imposition of inappropriately onerous conditions. The situations in which conditions can be imposed should therefore be limited to where there is an unacceptable risk that the safety or welfare of the public would be endangered, as stated in response to 9.1.

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?

This should be a two-step process, with the considerations then weighed up together to make a decision about whether a person should be granted bail.

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?

The legislation should specify the categories of conditions that may be imposed without providing an exhaustive list of conditions per se. This allows for flexibility to suit the circumstances of the individual defendant.

We can see value though, in excluding certain conditions from being imposed. The commonly-used condition to "be of good behaviour" is so broad as to be potentially onerous. It is also misused on a regular basis. For example, when a police officer charges a person for committing a fresh offence, that officer will often also determine on the spot that the person has breached the condition of their existing bail to be of good behaviour, even though the offence has not yet been proven.

The legislation should also prohibit the making of a condition to "attend school" or equivalent condition. There are existing processes in place to ensure school attendance, including the compulsory schooling orders regime under the *Education Act 1990*. The criminal justice system should not be used as a tool to achieve this end. See further our discussion at 12.6.

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

No. Such an approach assumes that there are certain conditions that are appropriate for all defendants, which is not the case.

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?

Courts and police should be required to provide and record reasons why any conditions are necessary. As mentioned in our introduction, onerous bail conditions increase the likelihood of a breach and can escalate a person's involvement in the criminal justice system at an early and unnecessary stage. The likelihood of onerous bail conditions can also motivate people to plead guilty despite the fact they have not committed the offence.

Curfew conditions are a good example of conditions that are often unnecessarily onerous. As discussed above at 9.3, the bail authority should have to show a nexus between the time of offence and the imposition of a curfew, as well as why any reporting conditions are necessary.

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

All conditions, not just "special" conditions, should 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?

Legal Aid supports having this condition as a separate provision as it draws the court's attention to the possibility of directing a person to reside in bail accommodation. Unfortunately at present s 36(2)(1a) does not in most cases provide the court with an option for granting bail due to the lack of bail accommodation available.

We nevertheless support the retention of the provision in the hope that it will focus attention on the adequacy of funding for bail accommodation options. The provision of adequate bail accommodation not only limits the number of people being remanded due to lack of alternative accommodation options; it also provides an accused with some stability that can reduce the likelihood that they breach other bail conditions, such as requirements to appear at court.

9.12 What should the mechanism be for imposing bail conditions?

Written notice of the conditions should be given to the defendant.

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?

Requirements as to the person's conduct while on bail should remain the subject of a condition that the person enters 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?

The danger with expressing conduct requirements as "conditions on which bail is granted" is that it suggests that a breach of a condition is enough to justify revoking a person's bail, when in fact this is just one of a number of possible responses to a breach 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)?

Yes.

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?

As mentioned at 9.3, it is important that the court has satisfied itself that a defendant understands and can comply with the conditions. This will in some cases involve the magistrate or judge explaining the conditions to the accused. It is already the practice of many court staff to explain conditions line by line to a defendant and the "acceptable person". This could be enshrined in the legislation.

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

See 9.16.

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

No.

10. Breach of undertakings and conditions

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

Yes. Currently s 50 gives a police officer a broad discretion to arrest an accused if the officer believes on reasonable grounds that a person has failed to comply with a bail condition. It does not state what other actions in response to a breach can be taken. Possibly as a result of the way the section is drafted, police have adopted a "no tolerance" approach to bail breaches. The number of arguably minor, even trivial breaches that now come before the courts occupy a significant proportion of Legal Aid resources and court time.

Case example

A Legal Aid client who was a young single mother was alleged to have committed a minor offence unlikely to attract a custodial sentence. As a condition of her bail she was required to report daily to the police. On one particular day her one-year-old child was very sick, vomiting so much as to suffer dehydration. As a result, she was unable to report that day. She reported the next day and told police what had happened. Police arrested her and kept her in custody for most of the day until she was granted bail, despite the fact that they did not dispute her explanation or the fact that the charges were minor and unlikely to attract a custodial sentence.

There is no evidence that arresting people for minor bail breaches reduces re-offending. To prevent such arrests, the limitations of a police officer's role and powers under s 50 should be made explicit, and alternative options in response to a breach other than arrest should be outlined. These options should include the power to issue a court attendance notice in respect of a person's failure to comply with a bail agreement.

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

Yes. The order of available options should be:

1. Release on original bail
2. Release on varied bail
3. Issuing a court attendance notice
4. Arrest with warrant
5. Arrest without warrant

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

Yes. One consideration could be the number of times police have used their discretion to release a person after that person has committed a breach.

10.4 Should the section specify criteria for arrest without warrant?

Yes.

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

Yes. As mentioned above at 1.1, this is consistent with NSW sentencing principles: see s 5 of the *Crimes (Sentencing Procedure) Act 1999*. See also s 105(b) of LEPRA.

The section could provide that a police officer must not arrest a person for breach of bail without a warrant unless:

- the police officer suspects on reasonable grounds that it is necessary to arrest the person to ensure their appearance before a court or to prevent contravention of bail; and
- the matter could not reasonably be dealt with by the issue of a court attendance notice or by obtaining a warrant for the person's arrest.

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

The Act should explicitly empower 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.

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

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?

Yes, the time for notice should be three days, to prevent a defendant spending unnecessary time in custody. This shorter time should apply to everyone, including children, and not just in the case of non-compliance with some particular bail conditions.

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?

Yes.

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

Yes. The Act should require that the court relist the matter so that the relevant bail conditions can be reviewed.

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?

Yes. The person's legal representative should be notified.

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.

Legal Aid strongly supports this suggestion. To give an example of the kind of provisions that would be suitable, consider the situation where a person is remanded in custody because they have nowhere to live.

In relation to a person who is under the care of the Minister, Community Services should have a legislated responsibility to provide accommodation in a timely manner. There would then be no justification for such a person to be remanded in custody. This would prevent that person spending time in remand simply because they have nowhere else to go. In most cases, it would also be more cost effective for the Government.

In the case of a young person who is not under the care of the Minister, but nevertheless has no accommodation options because of their family situation, the Act should enable the court to declare such a young person "homeless". Once such a declaration is made, Community Services should have the same obligation to find accommodation as it would in relation to people under the care of the Minister.

In addition, the Juvenile Justice should have a legislative obligation to review the situation of every child or young person remanded in custody due to lack of accommodation options every 48 hours.

Case example

Derek is a 17 year-old Legal Aid client who is a regular user of the Children's Legal Service. He is from an unstable family background. Derek has some mental health problems but is not sick enough to be scheduled. Many of his past offences have been dealt with by way of s 32 of the *Mental Health (Forensic Provisions) Act 1990*.

Recently Derek breached his bail conditions and was remanded in custody. His mother refused to let him return home. Because of his mental health problems he is unable to be placed in youth refuge accommodation. For this reason, even though he is likely to receive a s 32 order in relation to the offence, the court refused bail due to a lack of accommodation options.

12. Young people

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

No.

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

Yes. A separate section is a good approach because while many of the general principles of bail will apply to juveniles, it is important that juvenile-specific provisions are enacted to ensure the proper treatment of young people in relation to bail.

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?

Yes. 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.

12.4 Should s 6 apply to bail determinations by Police?

Yes.

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?

Yes. "The Beijing Rules" should supplement the s 6 principles. As the Child Rights Taskforce observed in its May 2011 report *Listen to Children*: "The number of children on remand is

one indication that the principle of detention of children as a last resort is not being observed in practice."

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

Yes.

Provision that prevents inappropriate use of welfare considerations in bail decision-making

While the *Bail Act 1978* applies equally to adults and children, it is the experience of Legal Aid NSW that bail laws are used differently in relation to children, often resulting in the harsher treatment of children. A paternalistic, welfare-based approach by the police and courts means, for example, that it is more common for children to be released on bail subject to onerous conditions such as curfews, requirements to be in the company of a parent, requirements to follow the directions of a parent, and place restrictions.

As already mentioned, because of the stringency of such conditions, the likelihood they will be breached is increased. There also appears to be an increased amount of attention given by police to bail compliance checking in relation to young people. As a result, in the last ten years, our Children's Legal Service has witnessed a dramatic increase in the number of bail breach matters coming before the Children's Court.

One potential consequence of a young person breaching bail is that he or she will end up on remand. Another consequence is that, if the young person comes into contact with the adult criminal justice system at a later stage having breached bail multiple times as a juvenile, that person is treated by the courts as a person with a lengthy criminal history, which, among other things, decreases the chances of that person being granted bail in the future. This is even though often the bail breach is a result of engaging in behaviour that is not in itself criminal.

For example, as mentioned at 9.7, there is a growing trend among police and the courts to include school attendance as a bail condition, especially in relation to Aboriginal young people in regional areas. This represents an attempt to inappropriately use the criminal justice system to tackle broader social problems in a way that entrenches those problems further. Imagine that two high school students decide to truant for a day. One of them is on conditional bail that requires him to attend school; the other is not. For the same act of truancy, the consequence for the student not on bail is most likely a warning from the school, or a suspension at most. For the other student the consequences could include detention and a mark on his criminal record.

In this way the criminalisation of children's problematic behaviour in adolescence has consequences for them as adults. This is contrary to the philosophy of the *Children (Criminal Proceedings) Act 1987*.

Our Children's Legal Service has found the problem of welfare-based bail conditions to be particularly acute for children who are in out-of-home care. In this context, the police and the justice system are increasingly being relied upon in lieu of adequate behavioural management, especially in relation to children with complex needs. For example, a common bail condition imposed on children in out-of-home care is the condition to "obey the directions of carer". As a result, the CLS regularly sees children who are reported to the police for breaching bail by carers and being subsequently arrested for demonstrating the type of behaviour that, if they were living in a functioning family environment, one might expect would be dealt with without police intervention.

This is particularly concerning if we consider that the number of children in care is increasing. A *Child Protection* report published by the Australian Institute of Health and Welfare in January 2011 reported that between 2005 and 2010, the number of children in out-of-home care Australia-wide rose by 51% (from 23,695 to 35,895).

Case example

Carl is twelve years old and has a cognitive impairment that means he often misbehaves and is difficult to control. As a result he lives in supported housing, where those caring for him find him hard to discipline. Carl was arrested for assault and at the request of his carer, one of the conditions attached to his bail was that he eats his dinner every night. If Carl fails to do so, he breaches his bail and could be placed on remand.

Case example

Amir is a fourteen year-old with a mental health impairment living in supported housing. Eighteen months ago he had a clean criminal record; he now has a ten-page record. All of the offences on his record stem from carer-related incidents, or for breach of subsequent bail conditions. For example, Amir has been charged with assaulting his carer on a number of occasions. All matters Amir has been charged with have been dealt with by the court under s 32.

Recently Amir was wrongfully arrested by police for breaching his bail. He was in fact not on bail at the time. Because he was aware he was not on bail he resisted the arrest and expressed anger towards police at the station.

When coming to pick him up his carer, who was also under the mistaken belief that Amir was on bail, requested that the police charge him. Amir was subsequently charged with "assault police" and "intimidate police".

We recommend that a provision is inserted that restricts the inappropriate consideration of welfare concerns in making a bail decision. For example, s 29 of Canada's *Youth Criminal Justice Act* provides, under the heading, "Detention as social measure prohibited" that a court "shall not detain a young person in custody prior to being sentenced as a substitute for appropriate child protection, mental health or other social measures." Such a section would, for example, prevent a court from remanding a person in custody in order to ensure they can see a psychologist. We would support a similar section that also prohibited bail conditions as a social measure; for example, a condition to attend school.

Dispense with bail for young people

As mentioned at 4.2, the *Bail Act* should be amended to explicitly provide that bail is to be dispensed with for young people unless the circumstances clearly warrant otherwise (as per the intention of s 8 of the *Children (Criminal Proceedings) Act*).

No remand if custodial sentence not a possibility

It would also be useful to have a provision similar to that in s 29(2) of Canada's *Youth Criminal Justice Act*, which directs the court to presume that pre-trial detention of a juvenile is not necessary if the young person could not, on being found guilty, be committed to custody.

Assistance for children in out-of-home care

To assist children in out-of-home care, we endorse recommendation 43 of the Noetic Group's *Strategic Review of the Criminal Justice System*, that the Act require a Community Services representative to attend court to support a young person who is called to appear and is under the Minister's Parental Responsibility.

The use of remand in lieu of appropriate accommodation

In CLS experience, it is common for homeless children, children with a dysfunctional home life or children with complex needs who are ineligible for a large proportion of out-of-home care facilities to be refused bail simply because accommodation services are not available. The result is that young people are often remanded in custody for no other reason than they have nowhere else to go.

This demonstrates the pressing need for accommodation alternatives for young people on bail in New South Wales. Better cooperation between juvenile justice authorities, community services departments and public housing authorities to find young people accommodation at the earliest opportunity is also required.

To reduce the number of young people without alternative accommodation options in custody, the Act could impose a statutory obligation on:

- Juvenile Justice NSW and Community Services NSW to provide accommodation for children and young people on bail in a timely manner (as mentioned at 11.5); and
- The court to inquire about appropriate accommodation if a young person would be detained in custody in the absence of appropriate accommodation: see s 31(2) of Canada's *Youth Criminal Justice Act*.

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

We do not support the drawing of an arbitrary line between young people of different ages. Rather the maturity and capacity of the defendant should be a factor that is taken into account in the making of bail decisions in relation to young people. For example, the fact that a 21 year-old with an intellectual disability has a functioning age of less than 18 should be able to be taken into account.

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

Yes. The Act could provide that, if practicable and appropriate, bail decisions about an Aboriginal and Torres Strait Islander young person should be made in a way that involves their community: see s 94(1)(d) of the *Children and Young People Act 2008* (ACT).

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

"Reside as directed" condition

Until recently it was court practice for dealing with a young person unable to provide an appropriate address for residence but otherwise suitable for bail, to impose a condition that the young person reside as approved by the Department of Juvenile Justice.

This type of condition was useful in two main situations. Firstly, if there was a possibility that the young person could stay with extended family members but the options still needed to be investigated, a "reside as directed" condition would give Juvenile Justice the power to negotiate with family to organise accommodation for the young person. If an accommodation

arrangement broke down while the young person was still on bail, Juvenile Justice could renegotiate another accommodation option with other family members without the young person having to go back to detention.

Secondly, the "reside as directed" condition was useful when Juvenile Justice was required to consult with Community Services to secure accommodation for a young person under 16. After consultation, the agencies jointly placed the young person in accommodation.

Earlier this year, Juvenile Justice obtained advice from the Crown Solicitor that cast doubt on the validity of a condition that meant a young person remained in custody until directed by Juvenile Justice to reside elsewhere.

Because of this uncertainty, the Children's Court has indefinitely suspended its use of "reside as directed" bail conditions. The unfortunate consequence of this is that rather than being granted conditional bail, young people without accommodation options are being refused bail altogether.

While we understand the concern expressed by some juvenile advocates that a "reside as directed" condition can mean that a young person remains in custody for longer than anticipated by the court because of the difficulty of finding them alternative accommodation, in our experience Juvenile Justice was generally well placed to make a direction as to residence and for the most part did so in a timely and efficient manner.

Without the option of a "reside as directed" condition, there is no way for a young person to be granted bail in a situation where it could take a few days for appropriate accommodation to be arranged. In the case of refuges and youth hostels, as soon as accommodation becomes available, the young person must accept the offer immediately. This leaves no time for a bail application if the young person is on remand, which means that the place is inevitably offered to the next in line.

We suggest that the Law Reform Commission consider the advice of the Crown Solicitor on this issue and recommend an appropriate amendment to the legislation to allow "reside as directed" conditions to be made. In order to avoid unnecessary delay by the Juvenile Justice and Community Services, such an amendment could include imposing upon those departments a legislative obligation to make the placement, to review the situation of every young person remanded in custody for this reason every 48 hours, and to provide regular progress reports to the court until accommodation is found.

13. People with a cognitive or mental health impairment

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?

Yes, the definition of "intellectual disability" should include acquired brain injury.

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

Yes. People with cognitive and mental health impairments are more likely to have difficulty understanding bail conditions, and are therefore more likely to breach conditions inadvertently. As with young people, it is also common for the interests of carers to be inappropriately reflected in bail conditions (and sometimes charge decisions as well) with the hope of controlling difficult behaviour.

If the presumption system is to continue, the fact that an accused person has a mental illness or cognitive impairment should be a factor that is capable of rebutting a presumption against bail. Often the defence are in possession of documents and information that can confirm that impairment and would be able to present that information to the court.

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

Ideally the court should obtain a report on a person's cognitive or mental health condition prior to making a decision in relation to bail. Such a report should, however, only be obtained with the consent of the client and the absence of such a report should not be a basis for refusing bail.

14. Indigenous people

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

Yes. In its August 2009 report *Why are Indigenous Imprisonment Rates Rising?*, BOCSAR found that one quarter of the increase in the Indigenous imprisonment rate in New South Wales between 2001 and 2008 was the result of a greater proportion of indigenous offenders being refused bail and an increase in the time spent on remand.

Stringent bail conditions are also having a big impact on Aboriginal people because there is inadequate consideration by the bail authority of community ties and kinship systems. Non-association orders can be especially problematic for Aboriginal people. Welfare-related conditions imposed upon Aboriginal young people such as "attend school" conditions also regularly lead to breaches that escalate a person's involvement in the criminal justice system.

The lack of appropriate accommodation available for Aboriginal young people when awaiting sentencing is a particular problem in rural and remote areas where there are fewer accommodation options and treatment services.

Legal Aid NSW recommends that the NSW Act include provisions in relation to Aboriginal people similar to those that commenced in Victoria on 1 January 2011. The new section 3A in the Victorian *Bail Act* imposes a specific requirement on decision makers in relation to Aboriginal Australians. Section 3A requires a decision maker to take into account (in addition to any other requirements of the *Bail Act*) any issues that arise due to a person's Aboriginality when making a determination under the *Bail Act*, including the person's cultural background (including the person's ties to extended family or place) and any other relevant cultural issue or obligation.

The requirement in section 3A applies to all determinations made under the *Bail Act*. For example, when deciding:

- whether or not to grant an accused bail;
- any bail conditions to impose on an accused;
- whether to extend bail in an accused's absence;
- an application for variation of bail conditions; and
- whether or not an accused has reasonable cause for failing to answer bail.

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?

It is appropriate that such a report is taken into account, however it is also important to ensure that if such a report is not available, this is not a basis for refusing bail.

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

No.

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.

Yes, until proceedings are finalised or bail is dispensed with.

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?

Section 44 is currently not working very well in practice as a result of the s 22A provisions. The procedure should be clarified and a distinction made in the Act between variation of bail and review of bail. See also our recommendation at 6.3 that bail conditions are reviewed at the first court mention.

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?

Yes. Section 45 is particularly important in the case of defendants who have failed to meet bail conditions imposed by the Local Court. Seeking a review of unrealistic or onerous conditions in the Supreme Court is more efficient than making a fresh application to the Supreme Court concerning bail.

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.

Yes. A restructure in the form of the given example would be clearer. A bail variation and bail review section should also be included.

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

The Victorian and Australian Capital Territory Bail Acts both have good elements.

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?

Yes. The entire Act would benefit from being redrafted in plain English. This would make it easier for those using the Act – the community, the police, lawyers and the court – to understand how and why bail decisions are made. This is particularly important given the number of people with intellectual disabilities, poor literacy or poor understanding of English to whom the Act applies. 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.

Care should be taken, however, in relation to words and phrases that carry a particular legal meaning – especially those that have been interpreted in case law – to ensure that that meaning is not unintentionally lost in the redrafting process.

18.2 Is any existing model recommended?

No, but Chapter 2 of the Victoria Law Reform Commission's 2007 review of the *Bail Act* makes some useful recommendations.

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”?

No. “Grant of bail” and “remand in custody” should be retained. “Bail” is a concept that is commonly understood.

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

No. This places emphasis on the “detention” option at the expense of the option to release a person on bail. As we have stated as one of our recommended objectives, the Act should ensure a person who is required to appear before a court is not deprived of liberty unless the court is satisfied that there are good reasons to refuse bail.

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.

Registry requirement to show proof of money before release from custody

Legal Aid has noticed a practice recently of some court registries to require proof of money in the bank account of an acceptable person, regardless of whether the bail has been

entered with a security condition attached. This creates additional arbitrary hurdles for defendants to whom the court has already granted bail, and creates unfair outcomes for the most socially disadvantaged. Statutory clarification of acceptable registry practices in relation to sureties could assist.

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

CREDIT / Bail Support Program

The CREDIT / Bail Support Program in Victoria has been devised to facilitate access to accommodation, welfare, legal and other supports, all of which assist the defendant in meeting bail conditions. While in New South Wales the MERIT program provides the opportunity for adult accused with drug and alcohol problems to work, on a voluntary basis, towards rehabilitation as part of the bail process, an expansion to bring the program in line with Victoria's CREDIT program could offer increased assistance on bail to a broader range of people. Legal Aid recommends that NSW consider establishing such a program, based on Victoria's model.

Implementation of Electronic Bail

Legal Aid supports the implementation of electronic bail (E-bail) for defendants who would otherwise be remanded in custody. E-Bail is less expensive than remand, and ensures a more appropriate balance between the rights of the defendant and maintaining public safety than remand. We are aware that it is used in other jurisdictions such as Western Australia, South Australia, New Zealand, and England. A recent review conducted of the E-Bail system in New Zealand, which has been in place since 2006, found that the rate of offending of people on E-Bail was relatively low.

We recommend that the framework of an E-Bail system be set out in either statute or regulation, to ensure consistency and transparency of operation, and to ensure it is only used in appropriate circumstances. Because E-bail is far more restrictive than regular bail, it would be important to ensure, for example, that it is only used in cases where standard bail is not sufficient. Only defendants who have already been remanded in custody should be able to apply. The regulation could also set out the conditions that could be applied.

It should be the government, not the individual accused, who pays for the provision of E-Bail equipment. This would ensure that E-Bail is available for all accused, and not just those who can afford it. Given the cost is relatively low in comparison to the cost of remand, we think this is a reasonable proposal.

Use of audio visual links in bail hearings

The *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) requires a defendant detainee to appear by audio visual link on his or her second or any subsequent appearance in relation to an alleged offence unless the court directs otherwise.

While Legal Aid appreciates the benefits of AVL, including the reduction in the need for accused detainees to be transported in the caged environment of a prison van, sometimes over vast distances, for brief court appearances, there are circumstances where these benefits are outweighed by the disadvantages of not physically appearing in court.

Using AVL can be very challenging for defendants. They can feel disconnected from the legal process and can find it harder to follow. The limitations of the technology mean that it is not always possible for defendants to see or hear everything that is going on in court. Some

magistrates also have a concerning tendency to start discussing the matter before the defendant is on the screen. From a lawyer's perspective, obtaining instructions via AVL (and often, over the phone) from a client's one has never previously met can be a challenging task. This physical barrier is particularly difficult when obtaining instructions from young people, people with a cognitive and mental impairment, and Aboriginal people.

While the court can make a direction that the defendant appear physically before the court if it is satisfied that it is in the interests of the administration of justice, such directions are in our experience uncommon. Legal Aid would support an amendment to the *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) that gives members of these vulnerable groups the option to appear physically if they would prefer to do so.

20. Other submissions

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

Police fact sheets

To a large extent, a grant of bail is based on untested police facts. This is partly because of the emphasis the presumptions system places upon the alleged offence committed. Too often, however, the police facts sheet contains allegations that are ultimately unsubstantiated. The system creates an incentive for police to present the facts in strong terms if they want to see a defendant remanded in custody.

Case example

A Legal Aid client was recently charged with an armed robbery offence. The "antecedents" section of the police fact sheet stated that the accused had been convicted of five violent offences in Victoria. The Legal Aid solicitor spoke to Victoria Police, who provided documentation that the accused had in fact been charged with only two offences in that State, and had not yet been convicted of either offence.

Legal Aid recommends that a regulation is drafted that sets out what can and cannot be included in a police facts sheet. Such a regulation could follow similar principles to those set out in case law in relation to pre-sentence reports by probation and parole officers: see for example *R v Gilder Rose* [1978] QD R61. Facts sheets should not include information such as unconvicted criminal conduct, the police officer's opinion about the seriousness of the offence, derogatory remarks or emotive language. The term "police facts" could also be replaced with the term "police allegations" as is used in other jurisdictions.

Appeal bail

Legal Aid practitioners have reported a concerning trend in some Local Courts for decisions in relation to appeal bail to be made in chambers without the magistrate hearing submissions from any of the parties. The Act should provide that the person in relation to whom the bail decision applies has a right to be present when the bail decision is made and an opportunity to make submissions in relation to that decision.