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Thank you for the opportunity to make a submission on behalf of the Greens NSW on the review of the Bail Act. The Greens NSW welcome this review and commend the Attorney General in moving to instigate the review so promptly following the March election.

Bail in NSW is currently governed by laws that are overly-complex and a process that is poorly understood by the litigants. It urgently needs to be reformed. A less complex and more principled Bail Act in plain English would be a step in the right direction.

Consideration of granting or not granting bail should not be punitive but should uphold the presumption of innocence at the heart of our legal system.

A. The Need for Reform

Despite having similar socio-demographic profiles, Victoria has half as many prisoners as NSW. Victoria imprisons its citizens at the rate of 103.6 per 100,000 compared to the NSW rate of 184.8. The result is NSW runs 57 gaols to Victoria's 14. This comes at a significant cost to taxpayers, with NSW paying to run four times as many gaols as Victoria. A significant and growing proportion of NSW prisoners are held on remand due to having bail refused.

This situation has come about through repeated law and order auctions by the major parties that have seen the NSW prison population swell by one third since truth in sentencing changes in 1999. This has been compounded by changes to the Bail Act, especially the now notorious s22A, that limits most accused people to a single bail application.

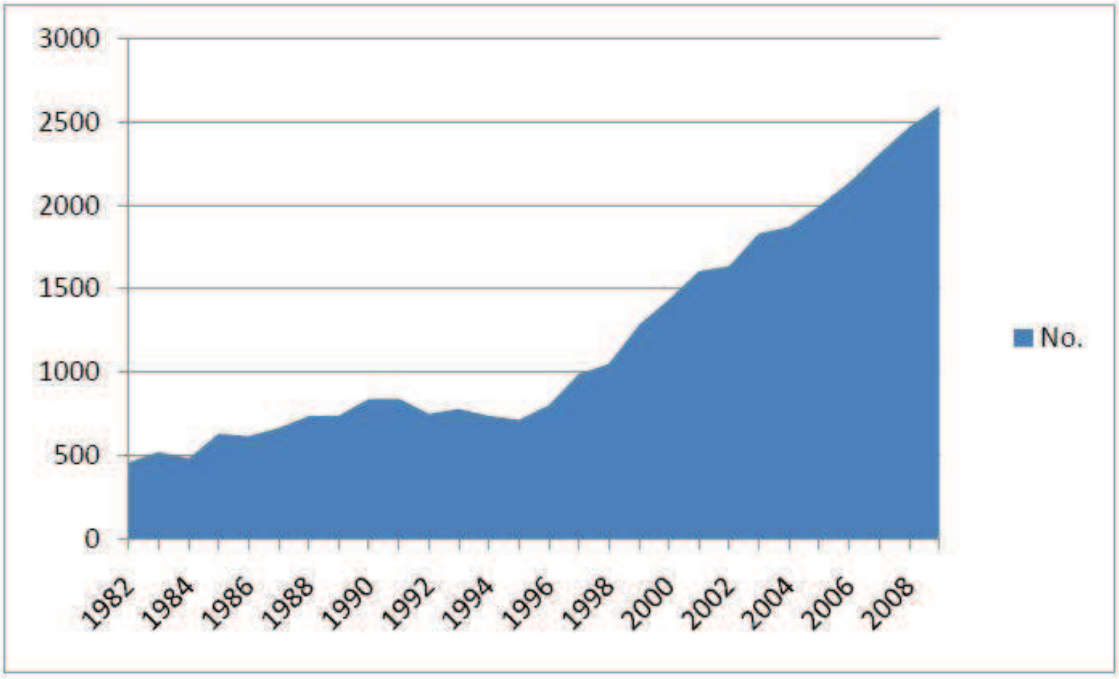
The situation is even more dramatic in the juvenile justice system where the average number of young people in detention increased by more than 60% from 2003-04 to 2009-10. In 2009-10 there were on average, 431 young people in NSW gaols on any given night. This means we detain children in NSW at more than 4 times the rate they do in Victoria.

Aboriginal citizens are bearing the brunt of this law and order auction. More than 20% of all adult NSW prisoners are Aboriginal, with adult Aboriginals being more than 10 times as

likely to be in gaol as adult non Aboriginals. The outcomes for young Aboriginal people are even more telling, with half of all the young people in NSW gaols being Aboriginal. Representing only 2.5% of the population in NSW, this means Aboriginal young people are more than 20 times as likely to be gaoled as non Aboriginal young people

The cost of a growing prison population, both juvenile and adult, is an unacceptable financial burden on the State. In the 20010-11 financial year expenditure on adult correctional services in NSW is budgeted to be $1.06 billion. A further $333 million is being spent to punish and gaol young people in the state's juvenile justice budget. Altogether the total annual state expenditure on correctional services is a staggering $1.4 billion. To this must be added the cost of policing and the Court system.

The following graph of inmate numbers illustrates the current trend upwards in prisoner numbers in NSW.



Source: NSW Inmate Census 2009: Summary of Characteristics, Statistical Publication No. 34 March 2010, Corrective Services NSW[iii1]

Studies consistently show that over a quarter of people who are refused bail in NSW are ultimately acquitted. This is strong evidence of substantial injustices occurring through the current Bail Act and its implementation.

The Greens seek a return of the presumption in favour of bail for all offences in NSW, together with the repeal of s22A of the Bail Act that effectively limits an accused to one bail application. This will restore balance in our justice system and will allow Courts to consider each bail application on its merits.

The Bail Act must also be simplified by directing the Court to focus on the individual circumstances of the accused rather than the complex set of statutory criteria presently

included. This will still allow Courts to refuse bail where the prosecution can prove this is appropriate, including where an accused is a flight risk and where it is necessary to protect the public or specific individuals before trial.

Restoring the balance on bail laws will help to turn around the exponential increase in the number of prisoners held on remand in NSW.

It is expected that with the reforms proposed in this submission the number of prisoners held on remand would reduce over the next 12 months to 2000 levels, being a 40% reduction. This would reduce the prison population by 10% per annum. This would not only restore balance in the justice system, it will also amount to a budget saving of $85 million per annum or $340 million over the first four years of implementation.[1]

B. Response to Questions for Discussion

This submission will address, so far as possible, the substance of the questions for discussion by reference to the topic headings.

1. Overarching considerations

The fundamental principles that should be recognised in any bail law are:

(a) Those charged with a criminal offence retain a presumption of innocence and bail laws must recognise this as the primary consideration.

(b) The refusal of bail must not be used as a form of punishment but limited to those cases where to grant bail would pose a serious risk of flight or a serious risk of substantial harm to the community or an individual.

(c) The refusal of bail must be subject to a right to appeal and to review.

(d) That the best interests of young people are ordinarily served by their not being held in detention and these interests are to be paramount in considering whether or not they will be granted bail.

Given the gross over-representation of Aboriginal citizens in NSW gaols, an additional specific object should be to reduce the level of imprisonment of Aboriginal citizens in this State.

[1] Community based correctional services are delivered at less than 10% the cost of incarceration. Assuming a 10% reduction in prisoner numbers and associated costs from the $1,065 million correctional services budget, even with community based correctional services costs being incurred in their place, produces conservative annual savings of $85 million per annum.

Objectives should be included in the Bail Act to guide the application of the Act and also to serve as an important explanatory tool of the Parliament's intention. The objects should mirror the overarching considerations above.

2. Right to release for certain offences

There should be a right to be released on bail when charged with any offence that carries only a non-custodial sentence and for other minor offences.

The current section 8 is essentially sound in principle, save that the classes of additional summary offences subject of the section should be expressed in the Act and not only in the regulations. Such a change would give more clarity and accountability to those making these laws.

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

Existing presumptions have been applied in a way that has dramatically increased the size of the remand population and have undermined the presumption of innocence that lies at the heart of our criminal law.

Holding those who have not been found guilty of an offence in correctional facilities should only be considered as a last resort. A person's right to free movement and the presumption of innocence is superior to all other but the most serious concerns about individual and community safety.

A person who is held on remand suffers in a number of ways – they are deprived of their liberty and freedom of movement, they may lose employment, relationships may be severely affected and they will likely suffer substantial damage to their reputation. This should only be done in the most compelling pre-trial circumstances.

The existing presumptions have failed to strike an appropriate balance. The increasing use of remand in NSW has not led to any significant reduction in reported crime.

The Greens NSW believe there should be a uniform presumption in favour of bail.

If, contrary to this submission, there is to be a class of offences where the presumption is not in favour of bail it should be reserved for the most serious allegations of crimes of violence. If some offences were to be excluded from the universal presumption in favour of bail then the preferred method would be the use of a neutral presumption instead of a presumption against bail

The effect of a presumption in favour of bail should be expressed such that:

"*Bail is to be granted unless there are good reasons for it being refused*."

Equally if, contrary to this submission, a position is taken that there should be a presumption against bail for certain offences, the same test should apply, namely:

"Bail is not to be granted unless there are good reasons for it being granted."

The concept of "exceptional circumstances" has no rational place in bail determinations.

4. Dispensing with bail

Courts should have a discretion to dispense with bail in any case. In some instances the imposition of bail may be disproportionate to the offence that has been charged. To impose bail in these cases would mean acting outside of the stated purpose of the bail system.

Dispensing with bail entirely should be allowed, indeed encouraged, in the case of offences not punishable by imprisonment and cases where offenders are dealt with through court diversion programs including juveniles dealt with by Youth Justice Conferences.

No explicit qualifications are required on such an entitlement – judicial discretion will be sufficient to take into account relevant circumstances.

5. Police bail

The current ability for Police to grant bail is appropriate and should be maintained or potentially expanded. It is possible that a greater emphasis on Police granting bail would save time and court costs.

A more formal internal review process, able to be exercised summarily at the time of any initial refusal of bail, may be appropriate.

6. Court bail

Courts currently have adequate jurisdiction in granting bail.

The use of authorised justices gives greater flexibility for considering bail applications in as speedy a manner as possible and is supported.

Any refusal of bail, including by an authorised justice, must not establish either a status quo or be otherwise used against the interests of an accused in any later bail application.

In the instances where bail is explicitly refused by police, or has been granted subject to conditions that are challenged by the accused, then the courts must be required to undertake an *ab initio* review of the matter as soon as is reasonably practicable.

Given that breaches of overly onerous bail conditions are often the cause of incarceration for many people, particularly young people, the review of bail conditions imposed is an essential safeguard to ensure that people are not being penalised for reasons such as being homeless or otherwise socially disadvantaged.

7. Repeat Bail applications

Section 22A should be repealed as soon as possible. Its continued operation is inappropriate and penalises people who may not have had legal representation, or had poor advice when making a bail application.

Given the presumption of innocence, justice is better served by allowing an accused to make multiple bail applications rather than in seeking to make efficiency gains by limiting an accused's right to seek bail.

Section 22A should not be retained for any person. Its application to juveniles is particularly invidious.

Apart from one or two highly publicised instances, there is no empirical evidence to suggest that repeat bail applications were a significant issue in the justice system prior to the introduction of s22A.

To the extent that repealing s22A may allow a limited number of frivolous bail applications to be made, this is a modest price to pay for allowing those not found guilty of an offence to seek to have their liberty restored.

8. Criteria to be considered in bail applications

The criteria for consideration of bail should be simple, clear and sufficiently general to allow for the proper exercise of judicial discretion. The current criteria are overly technical and overly prescriptive.

The primary criteria should not be exhaustive and any secondary criteria must not be prescriptive. The primary criteria should reflect the objects of the Act as directly as possible.

In making a determination as to the grant of bail to an accused person, an authorised officer or court should be required to take into consideration the objects of the Act and more specifically:

(a) The fact that an accused person is presumed to be innocent and ordinarily entitled to his or her liberty;

(b) The probability of whether or not the person will appear in court on the next occasion; and

(c) Whether or not there is a substantial risk of serious harm to either the community, or an individual, if the accused is released on bail.

These criteria should not be exhaustive and a broad discretion to grant bail should be retained which allows a Court to consider any other relevant factor in its determination to grant bail. Employment and/or educational factors may, for example, be compelling in certain circumstances.

The current section 32(1)(b)(iv) should be repealed. Considerations of whether the person is a danger to themselves by reason of intoxication or drug use should not operate as a reason for not granting bail. These concerns should be dealt with by giving Courts the ability to refer these cases to adequately resourced social services.

9. Bail conditions

The current law on bail conditions is overly technical and inappropriately limits judicial discretion. The law should say in plain terms:

(a) Bail may be imposed subject to conditions; and

(b) Conditions imposed must not be any more onerous than are reasonably required by the circumstances of the case.

There may well be a case for the regulations to stipulate standard conditions that may be imposed by the Courts. These should not be mandatory.

Conditions should be imposed directly by the Court and not pursuant to an "agreement" with the accused. Imposing the fiction of an "agreement" in these circumstances does not advance the interests of justice.

If conditions are imposed then there must be a mechanism to explain these conditions to the accused in such a way that they comprehend fully the nature of the conditions imposed.

If the accused determines they would be unable or unwilling to comply with the conditions then, to avoid further criminalising the individual by breach, they must be a position to reject the conditions and therefore be held on remand until they are able, at the next practical occasion, to seek a review of the bail conditions.

10. Breaches of undertakings and conditions

Section 50 should be repealed and breach of bail conditions dealt with in a fundamentally different manner.

Given the currently high number of people sanctioned for breaching their bail conditions, but found not guilty of any other offence, change in this area is substantially overdue.

This submission urges the Commission to consider:

(a) That the power to arrest be subject to the officer considering the breach to be either a substantial breach or a repeated breach of a bail condition,

(b) That there be a further option for an officer to issue an accused found in breach with a penalty notice to be considered by the Court at the next return date, and

(c) That arrest for breach is to be considered only where other options to enforce the conditions are not reasonably available.

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

Section 54A should be substantially reformed.

Where a condition of bail has not been met then this should, initially, cause a notice to be sent to the Court that imposed the condition within 48 hours of the failure to meet the condition.

On receipt of the notice a Court should be required to list the matter for review as soon as practical.

On review by the Court, the authority that has detained the accused should provide to the Court a report detailing the circumstances relevant to the issue before the Court. There must also be scope for the accused to present further evidence. The Court then must review the condition.

Any continued failure of an accused to comply with such a condition following an initial review should be subject of further periodic review. It may be reasonable in these circumstances to cause the matter to be further reviewed every 14 days or such lesser period as the Court orders.

It may be appropriate in limited circumstances for a Court to refuse bail on a further review rather than continue to impose a condition that the accused is either unwilling or unable to meet. Equally it may be appropriate for the condition to be removed or revised to allow for bail to occur in practice.

12. Young people

A separate Bail Act for young people is required. This recognises our society's primary duty to protect and nurture young people, our international obligations and the specific needs of young people.

Whatever legislation covers bail for young people it should incorporate the principles set out in section 6 of the *Children (Criminal Proceedings) Act 1987* namely:

(a) that children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them,

(b) That children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance,

(c) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption,

(d) that it is desirable, wherever possible, to allow a child to reside in his or her own home,

(e) that the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind,

(f) that it is desirable that children who commit offences be assisted with their reintegration into the community so as to sustain family and community ties,

(g) that it is desirable that children who commit offences accept responsibility for their actions and, wherever possible, make reparation for their actions,

(h) that, subject to the other principles described above, consideration should be given to the effect of any crime on the victim.

Such legislation should also incorporate the principles from the *Children and Young Persons (Care and Protection) Act* 1998, namely:

(1) This Act is to be administered under the principle that, in any action or decision concerning a particular child or young person, the safety, welfare and well-being of the child or young person are paramount.

The Beijing Rules also provide useful guidance and should be referenced in the objects of any Act dealing with the detention of young people.

The rules relating to bail for young people should be amended significantly, most notably to create a universal presumption in favour of bail, include a right to appeal a bail decision, and include the guiding principles outlined above.

Any Bail Act must make special provision in relation to Aboriginal young people. The current numbers of indigenous young people held on remand are unacceptable and an overhaul of the bail system should be expected to go some of the way to addressing this. Incorporating input from Aboriginal elders, community justice programs and other community-specific non-custodial measures to address the special circumstances of Aboriginal youth must be a part of any new Act.

Additional care must be taken with young people to ensure that they are properly informed of their rights and able to exercise them. This should include provisions for contacting their family or legal representative.

Care should also be taken to ensure that bail conditions are appropriate for young people's situations. For instance ownership of property is understandably rare among young people so using it as a major criteria for assessing the availability of bail can essentially punish young people for being young.

Given the often fluid nature of accommodation for troubled young people there needs to be serious consideration on applying flexible bail conditions that recognise this fact.

Conditions on non-association must also take into account the specific needs of young people (for example often an accused and an alleged victim can attend the same school) and the particular circumstances of young people in the regions where social and recreational options are minimal.

13. People with a cognitive or mental health impairment

Consideration should be given to including a wider range of cognitive and mental health impairment in the Bail Act. This is particularly the case with young people where an overwhelming proportion of young people in our gaols suffer from one or more mental illnesses or impairments.

14. Indigenous people

Consideration must be given to amending the Bail Act in relation to Aboriginal people. As is noted above there is a gross over-representation of Aboriginal people in NSW gaols.

A recent study of bail diversion programs prepared for the Victorian Department of Justice titled *Bail Diversion: Program Options for Indigenous Offenders in Victoria* including the following findings:

Any bail support or diversion program for Indigenous people must incorporate a focus upon alcohol misuse - including through eligibility criteria - given the prevalence of alcohol as a substance misuse issue within Indigenous communities However, the focus upon alcohol use ought not to exclude treatment and support for other substances that might be of relevance to particular communities (including inhalants or cannabis).

And

The ability to deal with a dual diagnosis of mental health and substance abuse issues is an essential component of any bail diversion program seeking to ensure maximum engagement with Indigenous offenders, given the frequent correlation of these issues within Indigenous communities.

And

Program elements which may be beneficial in increasing engagement of Indigenous offenders include:

- *employment of an Aboriginal caseworker and other staff;*
- *liaising more closely with Aboriginal agencies and communities and working within existing networks (including staff of the Koori Court or other Indigenous persons working with in courts, as well as Elders within Indigenous communities);*
- *development of culturally appropriate resources;*
- *improving staff skills and knowledge relevant to service delivery to Indigenous people;*
- *developing appropriate promotional material; and*
- *attempting to overcome barriers to participation, including in relation to transport difficulties by providing outreach or transport to Indigenous offenders.*

The latter cross over into elements common to bail support programs. Providing bail support (as defined) may be appropriate as a component of bail diversion.

And

A bail diversion or support program should be able to provide a range of intervention options to Indigenous participants (residential rehabilitation or rehabilitation at home; different service providers, for instance), rather than a single, standardised intervention option for all Indigenous participants. However, all intervention options should be culturally appropriate for Indigenous offenders. Residential rehabilitation, for example, where imposed as a strict condition of bail diversion may not be appropriate for Indigenous offenders.

The Greens NSW endorse a similar approach for NSW.

As is noted above in relation to Aboriginal young people, incorporating input at the time of a bail hearing from Aboriginal elders should be seriously considered as should consideration of Aboriginal specific community justice programs and other community-specific non-custodial measures when determining bail for Aboriginal accused.

15. Duration of Bail

The Act should explicitly provide that any grant of bail continues until either revoked or varied until the proceedings are finalised.

16. Review of Bail decisions

Section 44 should be largely retained in any review of the Act. However consideration should be given to removing the regulation making power in the section.

There is nothing offensive in retaining the express power to review bail as contained in s45 of the Act.

17. Structure of the Bail Act

Save for urging simplicity, the Greens NSW do not seek to be heard on this matter.

18. Plain English

While there is scope for recasting much of the Act into plain English, the Greens NSW do not accept the 2010 draft Act as an acceptable starting point.

Where existing terminology is both well understood by the Courts and producing just outcomes then the Greens NSW do not view plain English drafting as an end in itself.

19. Forms and processes

Again, save for urging simplicity, the Greens NSW do not seek to be heard on this matter.

20. Other submissions

There are no further submissions that the Greens NSW wish to make at this stage.

Thank you again for your consideration of this matter. I look forward to publication of your review which will hopefully lead to a significant advance in this area of the law.

Yours sincerely,

David Shoebridge, Greens MLC