

DG17203/11

Mr P. McKnight  
New South Wales Law Reform Commission  
GPO Box 5199  
SYDNEY NSW 2001  
AUSTRALIA

Dear Sir,

**Re: Justice Health's Submission to the Law Reform Commission Re Review of Bail Law**

I refer to your email of 9 June 2011 requesting a submission to the Law Reform Commission inquiry into the review of bail law and enclose in this letter the submission by Justice Health.

The submission addresses those questions raised in your reference to this matter that relate to the expertise of Justice Health in this area. Justice Health has experience in the area of bail in relation to three areas of its operation being the Justice Health Statewide Community and Court Liaison Service, the Justice Health Adolescent Children's Court Team and the Justice Health Adolescent Children's Court Team Community Consultation Clinic.

Justice Health's Statewide Community and Court Liaison Service is a court-based diversion program targeting individuals in the criminal justice system with mental health difficulties and it is operating currently in 21 Local Courts. The service is available after the process of prosecution has begun for individuals charged with non-indictable offences appearing in Local Courts. Broadly, the service provides mental health assessments and reports to the court to assist magistrates in making informed decisions about cases involving those with mental health problems.

The Justice Health Adolescent Children's Court Team currently provides a Court Diversion Program to 9 Children's Courts across NSW (Bidura Campbelltown, Woy - Woy, Wyong, and Parramatta, Newcastle, Sutherland, Port - Kembla and Nowra Children's Courts). Recruitment is underway for a further 3 Courts (Dubbo, Bourke, Wagga -Wagga). The aim of the service is to divert young offenders with mental health concerns away from the criminal justice system and into treatment where it is appropriate to do so. The total number of referrals for the calendar year 2010 was 414 with 52% (205) young people diverted into treatment in the community.

The Justice Health Adolescent Children's Court Team Community Consultation Clinic – is a state-wide service provided for young people already involved with other agencies such as the Juvenile Justice NSW, Community Services, and Child and Adolescent Mental Health Services (CAMHS) who due to their behaviour have contact or are at risk of contact with the Criminal Justice System. Young people are referred from other agencies and the Justice Health Adolescent Children's Court Team Community Consultation Clinic. If the

referral is appropriate a Justice Health Adolescent Children's Court Team clinician and a Child and Adolescent Psychiatrist will then conduct a comprehensive forensic mental health and risk assessment of that young person and provide the referring services with recommendations for ongoing treatment and management.

### **General Comments Re Bail for Persons with a Mental Disorder**

As set out in the submission made by Justice Health to the Commission's reference concerning people with cognitive and mental health impairments in the criminal justice system, the provisions in the *Bail Act 1978* (NSW) setting out the conditions for the grant of bail make it harder for a person with a mental illness or cognitive impairment to be granted bail than other alleged offenders. Many clients seen by Justice Health staff are homeless, have no support and have been lost to treatment. Hostel accommodation usually has a limit of a three months stay. The clients may be banned from the hostel due to their poor behaviour or because they owe money. Temporary accommodation or homelessness may lead to mentally ill persons being lost to mental health services and therefore treatment. However for the police/courts to take into account a person's mental illness in deciding to grant bail, this would only work effectively if the police and the courts obtain specialist advice on the person's mental state.

### **Specific comments - Re Questions for Discussion**

#### **Question 1**

Whether the Bail Act should include a statement of its objectives and if so what those objectives should be?

Justice Health has no particular view on this matter, but if objectives are to be included then a reference to the principle contained in Article 13.1 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice should be included. Article 13.1 states that detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time.

#### **Question 2**

Whether the Bail Act should include a statement of the factors to be taken into account in determining a bail application and if so, what those factors should be?

- Justice Health considers that the Bail Act should include a statement of the factors to be taken into account in determining a bail application. The factors should relate to the probability of the person appearing at court and should include factors relating to their risk of non attendance at Court including previous history of non attendance. It should also include factors relating to the severity of the offence the person is charged with and any risk to the victim or witnesses to the alleged offence.
- In the Local Court, where the Magistrate has reasonable grounds for believing that the person is mentally ill or has a mental condition, preference should be given to the use of s32/33 Mental Health (Forensic Provisions) Act 1990 (MHFPA) rather than bail. Where this is not considered to be appropriate then conditions relating to the treatment of the mental illness or condition should be included in the person's bail conditions.
- Where a person before the Local Court is already on a section 32 MHFPA, that factor should be taken into account in setting bail conditions.

### Question 3

What presumptions should apply to bail determinations and how should they apply?

- All minor offences should have a general presumption of bail.
- An exception to the general presumption should only exist for adults with no significant mental health and/or intellectual disability charged with serious indictable offences or where there is sufficient evidence to suggest the person being considered for bail poses a flight or a high risk of non-attendance at Court or of harassing and/or intimidating the victims or witnesses to the alleged offence
- There should be a presumption of bail for all juveniles and all adults and juveniles except for those on serious indictable offences who do not have an Acceptable Person under the Act to supervise them.
- Adults and juveniles with mental health problems or an intellectual disability should, where possible, particularly for non-indictable offences, be diverted away from the criminal justice system into appropriate mental health treatment in accordance with section 32/33 MHFPA.
- Where diversionary options are not preferred, there should be a presumption of bail for all adults and juveniles with significant mental health and /or intellectual disability unless there is sufficient evidence to suggest that the individual being considered for bail poses a genuine risk to their own safety or that of the victim or witnesses of the alleged crime.
- A person appearing to have a mental illness or mental condition should have their risk of deterioration taken into account in any bail conditions if sections 32/33 MHFPA are not to be considered.

### Question 4

The available responses to a breach of bail including the legislative framework for the exercise of police and judicial discretion when responding to a breach

- Police must have reasonable grounds to suspect that a breach of bail has occurred and be able to demonstrate this.
- For a "once only" breach of bail for a non-indictable offence for a juvenile, a Court Attendance Notice should be issued not a Warrant for Arrest.
- For habitual breaches of bail or a single episode of a breach of bail for a serious indictable offence, a Warrant for Arrest should be issued and the Police should actively attempt to action the Warrant.
- If a juvenile is arrested for a breach of bail he/she should be brought before the court within 24 hours and bail conditions reviewed with the options of altering bail conditions to make them more manageable for the juvenile such as residing in a Juvenile Justice Bail House with more Juvenile Justice supervision.
- Justice Health supports the Chief Magistrate's view in his submission on bail to the Law Reform Commission in relation to his recommendation that any decision relating to bail should be excluded from any section 32/33 MHFPA order.

### Question 5

The desirability of maintaining s22A

- Section 22A should not be maintained as it has been shown by some research as reported in the Youth Justice Coalition's report "Bail Me Out: NSW Young People and Bail", (February 2010) as having a larger than expected negative affect on the granting of bail and it derogates generally from the presumption of the granting of bail.
- Section 22A is also difficult to understand and open to different interpretations.

## Question 6

Whether the bail Act should make a distinction between young offenders and adults and if so, what special provisions should apply for young offenders?

- The Bail Act should make a distinction between juvenile and adult offenders.
- Juveniles in the criminal justice system usually range from 10 – 18 years in age and have very different cognitive development and understanding of the consequences of their behaviour than adults.
- Juveniles by nature take more risks and are more impulsive. The Bail Act should focus more on community based options for juveniles such as pro-social behaviour based programs that divert them away from the criminal justice system.
- There should be more mental health and drug and alcohol programs made available by way of diversionary programs.
- Many juveniles involved in the criminal justice system come from extremely disadvantaged backgrounds and families, many are homeless and have suffered significant childhood trauma. Many of these juveniles commit offences to survive and do not have the resources, knowledge or ability to access support services. These issues along with the severity of the alleged offence should be considered when deciding if a juvenile is to be granted bail or detained in custody.
- Many juveniles' breaches of bail are associated with lack of suitable accommodation and association with others. Safe bail houses (suitable accommodation options) should be made more available to juveniles particularly those with mental health issues. Successful purpose run hostels have been working in England for a number of years particularly Elliott House in Birmingham which is an approved bail hostel specialising in providing a place of residence for mentally disordered offenders ([http://books.google.com.au/books?id=tfm62E-rm80C&pg=PA101&lpg=PA101&dq=jeremy+Kenney+herbert&source=bl&ots=OPGkyvXg3l&sig=YHO5rU7aRIGEL8hYlu7UUYLIG6o&hl=en&ei=1yUITuyQGISOmQXeDpCQ&sa=X&oi=book\\_result&ct=result&resnum=9&ved=0CFYQ6AEwCA#v=onepage&q=jeremy%20Kenney%20herbert&f=false](http://books.google.com.au/books?id=tfm62E-rm80C&pg=PA101&lpg=PA101&dq=jeremy+Kenney+herbert&source=bl&ots=OPGkyvXg3l&sig=YHO5rU7aRIGEL8hYlu7UUYLIG6o&hl=en&ei=1yUITuyQGISOmQXeDpCQ&sa=X&oi=book_result&ct=result&resnum=9&ved=0CFYQ6AEwCA#v=onepage&q=jeremy%20Kenney%20herbert&f=false))
- Persons with mental health difficulties are over represented in prisons. There is a clear need for diversion. Many of the underlying causes of the reasons for these people coming into the criminal area relates to what has been referred to a social drift. Social drift relates to persons suffering from no contact or loss of contacts with relatives, friends and support services. They may experience problems with housing and drug and alcohol problems. They can be seen as falling through the cracks in the system. Diversionary systems need to be set up to specifically provide for the special needs of these people. If the person is not diverted directly by the courts to link up with these systems then at least bail conditions can be set to enable contact with these systems.

## Question 7

Whether special provisions should apply to vulnerable people including Aboriginal people and Torres Strait Islanders, cognitively impaired people and those with a mental illness? In considering this question particular attention should be given to how the latter two categories of people should be defined.

- Special consideration should apply to vulnerable people including Aboriginal people and Torres Strait Islanders, cognitively impaired people and those with a mental illness.

- Evidence clearly demonstrates an over representation of these vulnerable people in the prison system when these persons could benefit more in a diversionary system that addresses their particular needs and the underlying causes of their alleged offending behaviour.

#### **Question 8**

The terms of bail schemes operating in other jurisdictions, in particular those with a relatively low and stable remand population, such as the UK and Australian states such as Victoria, and of any reviews of those schemes; and

- No comment.

#### **Question 9**

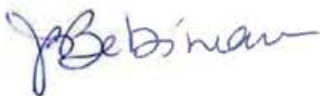
Any other matter

- An issue for the Justice Health Statewide Community and Court Liaison Service is the development of appropriate management plans that meet the court's needs in relation to the granting of bail. The plans need to be easily understood by the defendant and complied with. Keeping the management plan clear and simple without being over inclusive or complex is paramount. Some prosecutors require very detailed undertakings to be included in bail conditions that for the majority of persons with mental health difficulties could lead to failure to comply. A breach can lead to further arrests / court appearances that may interfere with the intent of the management plan.
- Magistrates tend to include management plans presented by health and related agencies and, in addition, other (sometimes more stringent) requirements for community safety in bail conditions. This may produce a more complex set of requirements that cannot be understood or met by the target group. Again this may have the consequence of failure to comply with the conditions leading to possible arrest and further court reviews.

I hope this information is of assistance.

Should you require any further information please do not hesitate to contact Michael Sterry, Forensic Legal Advisor on [REDACTED]

Yours sincerely



Julie Babineau

**Chief Executive**

31 July 2011