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Review of Bail Law in NSW - submission by Shopfront Youth Legal Centre

I write this submission on behalf of the Shopfront Youth Legal Centre, a free legal service for homeless and disadvantaged young people. The centre is located in Darlinghurst and is a joint project of Freehills, Mission Australia and the Salvation Army.

Since 1993 the Shopfront has worked with homeless and marginalised young people between the ages of about 12 and 25. Our primary client base is in the inner city area; however, in recent years we have worked with young people from other areas, particularly South Western Sydney. A substantial proportion of our clients have serious mental health problems, intellectual disabilities and/or substance abuse problems. Most have a history of abuse, neglect and homelessness.

The Shopfront has four solicitors, three of whom have several years' experience in criminal law and children's legal issues. Criminal law comprises about 75% of our practice, and we represent clients in court on a daily basis.

We have read your discussion paper on the Review of Bail Law in NSW and welcome the opportunity to make a submission. We thank you for allowing us an extension of time.

We refer to our submission about the *Bail Amendment (Repeat Offenders) Act*, which was sent to you on 1 October 2004. We enclose a copy. The matters discussed in that submission have direct relevance to the review you are currently undertaking.

We also enclose copies of our preliminary and final submissions to the NSW Ombudsman on the *Justice Legislation Amendment (Non-Association and Place*

Restriction) Act. These submissions discuss the inappropriate imposition of bail conditions for minor offences.

In addition, we set out below our responses to the questions raised in your discussion paper. We have chosen to comment on the issues that are most relevant to young and disadvantaged people.

Question 1: Is there a necessity for separate categories of a presumption against bail and a requirement for an applicant to establish exceptional circumstances?

In our view, such a distinction is neither necessary nor useful. A presumption against bail is already a significant barrier for an applicant to overcome. Such a presumption, together with the factors listed in section 32, provides an adequate safeguard against bail being inappropriately granted in relation to very serious offences.

Question 2: Should factors relating to the criteria in section 32 such as the likelihood of attending court affect the type of presumption that applies?

It would be difficult and inappropriate to attempt to set presumptions according to section 32 factors. Most of the factors enumerated in section 32 are not absolutes but are matters of degree – eg the likelihood of the defendant attending court, the strength of the defendant’s community ties, the need for protection of the community, the interests of the accused person. They are not amenable to being expressed in terms of a presumption.

It is preferable that police and judicial officers retain a broad discretion to apply the factors in section 32 as appropriate in each particular case.

Question 3: Should the provisions in section 32 in relation to the protection and welfare of the community be strengthened?

There is no need for these provisions to be strengthened. In our experience, police and courts already take the protection of victims and the community very seriously when making bail decisions. The availability of non-association, place restriction and AVO-type conditions means that the community, including the alleged victim(s) of the offence, can be afforded a reasonable level of protection even if the defendant is granted bail.

Question 6: Should the right to bail for minor offences be maintained?

In our view, this right should not only be maintained but should be enhanced. Many of our clients lose their entitlement to bail because they are arrested for breaching a bail condition. The breach is often trivial and the condition often unreasonably onerous.

There should be a presumption that proceedings for minor offences are to be commenced by way of no bail, field or future CAN. It would be desirable for the *Bail Act* to reflect the common law position (articulated in cases such as *DPP v Lance Carr*) that arrest should be a last resort, and should not be used for minor

offences where the defendant's name and address are known and there is no significant risk of them absconding.

In circumstances where it is thought appropriate to arrest and bail the defendant, there should be an entitlement to unconditional bail. For fine-only offences, we believe that bail should always be dispensed with. A breach of bail may result in the defendant spending time in custody for an offence that does not carry a custodial penalty. In our view, this should never be permitted to happen.

Question 7: Is there sufficient protection against onerous and unreasonable bail conditions?

In our view, the current provisions in the *Bail Act* are not providing sufficient protection against unreasonable bail conditions. Section 37 ought to provide sufficient protection, but in our experience this section is often ignored or misinterpreted by the police. Police often impose inappropriate bail conditions on the grounds that they are "promoting effective law enforcement". Magistrates are less likely to impose such conditions, but regrettably they often continue inappropriate conditions set by the police.

In this regard we draw your attention to our submission to the NSW Ombudsman Review of the *Justice Legislation Amendment (Non-Association and Place Restriction) Act*, a copy of which is attached.

Question 8: Should there be a category of neither a presumption against nor a presumption in favour of bail?

In our opinion, a neutral presumption is not particularly useful and may be difficult to apply in practice. However, we would certainly prefer a neutral presumption to a presumption against bail.

Ideally, we would support a presumption in favour of bail being restored for those offences where there is currently no presumption.

We continue to be alarmed by the erosion of the presumption in favour of bail that has been taking place over the past few years. The presumption in favour of bail is inextricably linked to the presumption of innocence and should not be removed except in the case of the most serious offences.

Question 9: Should the exceptions to the presumption in favour of bail be based on the type of offence only?

The exceptions to the presumption in favour of bail should be based primarily upon the type of offence and, in our view, should be reserved for only the most serious and/or violent offences.

We acknowledge that it may also be appropriate to base the presumption on the offender's criminal history. However, defendants should not lose their presumption in favour of bail unless they have a serious and recent criminal history and are charged with a serious offence. The current "repeat offender" provision (*Bail Act* section 9B) is unacceptably broad. It removes the presumption in favour of bail even for people with minor criminal records who are charged with trivial offences. We refer you to our submission to the review of the *Bail Amendment (Repeat Offenders) Act 2002*.

Question 10: Are the criteria in section 32 adequate to protect victims, including victims of domestic violence, and the community from repeat offending?

Legislation alone can never protect victims and the community from repeat offending. Adequate access to housing, employment, health services, and other social support is the best form of protection against recidivism in the vast majority of cases.

In so far as legislation is able to protect the community, we believe that the criteria in section 32 are sufficient. In our experience, police and judicial officers take these matters very seriously when making decisions on bail.

Question 11: Should there be distinction as to the type of conditional liberty that a person is subject to?

If people on conditional liberty are to lose their presumption in favour of bail, we believe that it is vital that distinctions be drawn between different types of conditional liberty. As pointed out in your discussion paper, a person on a section 10 bond for a traffic offence will lose their presumption in favour of bail in the same way as a person who is on a bond or parole for a more serious offence. We refer also to our comments made in our submission to your review of the *Bail Amendment (Repeat Offenders) Act 2002*.

Question 12: If the existing presumptions are to be maintained should the offences for each category be set out in a more accessible format?

Although we do not support the retention of the existing presumptions, if they are to be maintained there is a definite need for the offences in each category to be set out with greater clarity. The current Act is difficult to read, a reflection of the fact that it has been amended in a piecemeal fashion over the years.

Question 13: Is there a preferable alternative to the classifications in the NSW *Bail Act*?

The current system of presumptions is unnecessarily complex, and could benefit from simplification. We are unable to offer an opinion as to what would be a preferred model, as this matter needs careful thought and consultation. However, the South Australian bail scheme appears attractive at first draft glance and merits further exploration. South Australia has a relatively high remand rate and it therefore seems that the absence of presumptions against bail or “exceptional circumstances” type provisions have not led to an unacceptably high rate of release on bail.

Question 14: Could initial presumptions be replaced by a revised list of relevant factors in section 32?

We support a general presumption in favour of bail for all offences (or all but the most serious and violent offences). We believe that police and judicial officers should have a broad discretion, taking into account the factors in section 32.

Question 15: Should the presumptions reflect the seriousness of the offence only?

See our response to question 9.

Question 16: Do the criteria in section 32 adequately reflect the matters relevant to the question of bail?

In general, we believe that section 32 provides an adequate list of criteria. However, we support an expanded definition of “community ties”, not only in relation to ATSI people but in relation to any person who is not employed and/or does not live in a “conventional” family environment.

We do not believe that a person’s prior criminal record is necessarily relevant to the strength of the person’s community ties; it would be preferable if the person’s prior criminal record was listed as a separate criterion in section 32(1)(a).

We believe that police and judicial officers need to be better educated as to how to apply the criteria in section 32. For example, the strength of the prosecution case and the likelihood of a custodial sentence are often taken into account, erroneously, as factors in their own right, whereas the correct approach is that they are relevant only in so far as they affect the person’s likelihood of appearance at court. Although the prospect of a custodial sentence may provide an incentive for some defendants to abscond, it cannot be assumed that this is the case with all defendants.

We have also observed that, when considering the protection and welfare of the community under section 32(1)(c), some police and judicial officers fail to adequately distinguish between serious and non-serious offences as required.

Question 17: Should section 32 include a risk assessment checklist?

There is no doubt that risk assessment checklists can be an useful tool in some situations. However, there is a potential that such a checklist could reduce a bail decision to a mathematical formula or a “tick the boxes” exercise, which would not be desirable.

Question 22: Are the provisions of the *Bail Act* sufficient to deal with persons who fail to appear and are arrested on a warrant?

We believe that police should have the discretion to grant bail to people arrested on warrants. Before the recent amendments to the Act, police had this discretion; in our experience it was exercised very rarely and never inappropriately. There were some instances where a person had a good reason for failing to appear at court, but was unable to notify the court in time to avoid a warrant being issued. In these situations, especially if the person hands themselves in on the warrant, it would be appropriate for police to grant bail. This would save time and costs for courts, police and legal representatives. It would also avoid unnecessary hardship to defendants, who may otherwise have to spend a night in custody before being granted bail by the court.

Question 23: Should a failure to comply with bail conditions result in a loss of their entitlement to bail on a minor offence?

In our view, a defendant who has failed to comply with a bail condition on a minor offence should not lose his or her entitlement to bail. As mentioned elsewhere in this submission, police (and occasionally courts) often impose bail conditions which are inappropriate and very difficult to comply with. A defendant should only lose their entitlement to bail on a minor offence if the breach of bail is significant and/or repeated.

Question 24: Should the advice in Court Attendance Notices be clearer?

We would support the provision of clearer information in a Court Attendance Notice. However, we believe this would only provide a partial solution to the problem. Many defendants do not possess adequate literacy to read and understand the information on a Court Attendance Notice. Furthermore, our clients frequently misplace their CANs before they have had the opportunity to read them. Also, defendants are often led to believe (by friends, associates or by their own personal experience) that failure to appear for a relatively minor offence will result in a conviction and fine. Many defendants regard failure to appear as a legitimate option and do not understand that it may be an offence in some circumstances.

Question 25: Are the provisions of the *Bail Act* sufficient to deal with breaches of bail?

We submit that the current provisions are sufficient to deal with breach of bail. We believe police should retain a discretion to warn a person, or re-release them on bail, without the necessity to bring them before the court.

Question 26: Should breach of bail, which does not involve a failure to attend court, be a separate offence?

We would strongly oppose the creation of a separate offence for breach of bail. Bail conditions are a means to an end and not an end in themselves. They are designed to ensure that a person attends court, does not re-offend and does not interfere with victims or witnesses. If a person re-offends while on bail, they will be charged with this offence, and the fact that they are on bail at the time will be taken into account as an aggravating factor. Interference with victims or witnesses may also constitute a separate offence, and of course fail to appear is also a separate offence.

The fact that breach of bail conditions can result in immediate revocation of bail is more than adequate to deal with breaches.

Questions 29: Should the situation with respect to bail pending an appeal to the District Court on either conviction or sentence be maintained?

We support the maintenance of the status quo in relation to bail pending District Court appeals. A District Court appeal is as of right, and (subject to the provisions

about calling fresh evidence on all-grounds appeals) involves a *de novo* consideration of the matter. It is therefore inappropriate to erect further barriers to the granting of appeals bail, particularly where the defendant was on bail immediately before their conviction and/or sentence in the Local Court.

Question 30: Is there sufficient incentive in the *Bail Act* to ensure that sureties will ensure compliance with a bail undertaking?

We believe that the *Bail Act* does contain sufficient provisions to encourage sureties to comply with their undertakings. However, these provisions need to be consistently enforced so that sureties understand that their obligation is a real and not a token one.

Question 31: Should there be a statutory definition of “acceptable person”?

A statutory definition of “acceptable person” is an option which merits further consideration. Alternatively, it may be more appropriate to issue a set of guidelines, possibly in a regulation or practice direction, which set out the relevant criteria for acceptability. It is important that court staff do not impose their own arbitrary and inappropriate concepts of financial acceptability.

Question 32: Are bail forms appropriately used? Do they contain appropriate language?

We believe that bail forms could benefit from some review and simplification so that they are more easily understood. This applies to bail undertakings signed by the defendant and also to undertakings signed by the surety or acceptable person.

Questions 33: Are the conditions specified in s36, s36A and s36B adequate and/or necessary for courts or authorised officers to impose appropriate bail conditions?

In our view, the provision in section 36 for the accused to enter into an agreement to observe requirements as to their conduct is sufficient. Sections 36A and 36B are unnecessary; section 36 has always enabled the making of such conditions.

However, it may be desirable to attempt to set out a list of what sorts of conditions are appropriate (and inappropriate) to attach to bail undertakings. We are not sure whether it is possible or desirable to attempt to list them exhaustively in legislation, but we believe it may be appropriate to issue guidelines to police and judicial officers.

As mentioned elsewhere in this submission, we believe that there is currently inadequate protection against the imposition of inappropriate bail conditions, despite the existence of section 37.

Question 34: Should some conditions be automatic for all matters (other than the surrender of a passport in matters involving the death of a person s37A)?

We do not support the automatic imposition of any type of bail condition, no matter how serious the offence. It is important that police and judicial officers retain a wide discretion to impose conditions appropriate to the alleged offence and offender.

We would support the enactment of a provision prohibiting certain types of bail conditions being imposed for certain offences. For example, offences punishable by way of fine only should have no conditions attached – bail should be unconditional or dispensed with altogether.

Question 35: Is there a need for Bail Hostels in NSW? If so, should Bail Hostels be administered by the Department of Corrective Services? What are the preferred models?

There is a pressing need for more bail hostels or similar accommodation in NSW. We believe that the Department of Corrective Services and the Department of Juvenile Justice would be appropriate organisations to run such hostels, or to fund non-government organisations to run them.

The provision in section 37(2B) is currently not being complied with by the Minister for Corrective Services. It is regrettable that the Department of Corrective Services is being funded to build and staff more correctional centres, but is not adequately resourced to run its community based operations including the Probation and Parole Service.

We do not have strong views on the preferred model for bail hostels. It may be that different models are appropriate for different community groups (eg indigenous people, juveniles, people with mental illness or dual diagnosis) and in different geographical areas. The only bail hostel with which we are familiar (and, until recently, the only bail hostel in NSW) is Ja-Biah in Western Sydney. It would appear that this service provides an appropriate level of supervision and support to indigenous young people who might otherwise be remanded in custody.

Question 36: Could electronic monitoring be used for persons on bail?

This idea merits serious consideration. It would provide a method of supervising compliance with bail conditions, and would reduce the risk of absconding, and may therefore reduce the risk associated with the release of an alleged offender on bail. It is important that electronic monitoring is not used to make bail unreasonably onerous or interfere with the privacy of people who do not warrant such close supervision.

Clearly, electronic monitoring would not be suitable for all persons on bail. However, it could be a valuable tool for managing defendants who are awaiting trial or hearing for serious offences, and who would otherwise spend long periods on remand. Electronic monitoring may also have a role to play in the supervision of section 11 bonds. However, care would have to be taken to ensure that this does not become a net-widening exercise and that a non-custodial sentence effectively becomes a sentence of home detention.

Question 37: Are there practical measures that can reduce failures to appear that arise from disorganisation?

We believe that there are a number of measures that could be taken in this regard. Firstly, there is merit in the procedure adopted by the court in South Australia which takes the defendant's telephone number. We believe that such a system could be adopted in NSW, with the arresting police (or the court that grants bail) taking details of the defendant's telephone number, and/or a telephone number of someone who is in regular contact with the defendant and who is likely to know their whereabouts (eg a relative or social worker). These people should be

contacted in the event of the defendant's non-appearance and, if appropriate, the matter should be adjourned.

We also believe that, as a matter of policy, courts should not finalise matters or issue warrants on the first return date unless the alleged offence is very serious or the defendant's bail conditions very stringent. As a general rule, a defendant who fails to appear on the first occasion should be allowed at least one adjournment to afford them the opportunity to appear.

Of course it may be argued that such measures are likely to be costly and time-consuming. We would respond by suggesting that this would be outweighed by savings in costs associated with warrants, subsequent bail applications, annulment applications and the like.

We would also suggest that the more widespread availability of bail hostels would assist, because bail hostel staff would presumably have a role in ensuring that the defendant attends court on the appropriate date.

Finally, we would point out that a significant number of defendants are unaware of their court date and sometimes also the venue, because they have lost their Court Attendance Notice. A telephone call to the police station is usually fruitless unless the defendant knows the name of the officer in charge of the matter (information that is also contained on the missing court attendance notice). If the defendant contacts the court to attempt to find out the court date, it is likely that the court will be unable to tell them, because the papers do not reach the court until a few days before the first return date. Therefore it is often difficult for the defendant to find out about their court date until after they have missed it. It would be desirable if there were an easier way for defendants to find out their court dates and other relevant details. Clearly though, there would be privacy concerns with making this information readily available over the telephone, especially where Children's Court matters are concerned.

Question: 38: How can the operation of the *Bail Act* be improved in relation to ATSI people?

Some of the suggestions outlined above (which relate to people who are young, homeless or otherwise disadvantaged) also have application to indigenous people. The Shopfront has a significant number of Aboriginal clients and we note that residential, non-association, place restriction and financial conditions are often inappropriate because their domestic and family circumstances do not usually conform to middle class norms. We would also note that indigenous defendants, particularly in rural and regional areas, are especially vulnerable to inappropriate bail conditions for minor street offences.

It is vital that police and judicial officers receive appropriate training on indigenous social and cultural issues, so that they are equipped to make appropriate bail decisions in relation to indigenous people. Further, there is a need for enhanced funding of community based services, including bail hostels and other housing options. Such services must be culturally appropriate for indigenous people and must be located in the areas of greatest need, including rural and regional areas.

Question 39: Should the AJAC recommendations be implemented in whole or in part?

We would support the implementation of the AJAC recommendations. AJAC is a body with significant expertise in indigenous criminal justice issues, and their recommendations have been formulated after extensive consultation with indigenous communities.

Question 40: Should special principles that apply in considering bail in the Children’s Court as set out in the *Children (Criminal Proceedings) Act 1987* and the *Young Offenders Act 1997* be included in the *Bail Act*?

From the discussion paper we believe there is a need for greater harmony between the *Bail Act*, the *Children (Criminal Proceedings) Act* and the *Young Offenders Act*.

In particular, the *Bail Act* should contain an provision equivalent to section 8 of the *Children (Criminal Proceedings) Act*, which creates a presumption that children’s criminal proceedings be commenced by way of attendance notice. Unfortunately this provision has not been amended since the repeal of the *Justices Act* and is somewhat ambiguous; however, the intention of section 8 is that bail shall be dispensed with for children unless the circumstances clearly warrant otherwise.

In fact, we would like to see a presumption that bail be dispensed with enacted in the *Bail Act*, not only for juveniles, but also for adults facing proceedings for summary offences (with the exception of domestic violence and stalking offences).

Question 41: Should there be separate principles applicable to young people on the question of bail?

We believe there should be separate, or at least additional, principles applicable to young people on the question of bail. Firstly, as stated above, there should be a presumption that bail is to be dispensed with for children, except in relation to the most serious violent or persistent offences. The provisions of the *Bail Act* which create a presumption against bail, an exceptional circumstances requirement, or an exception to the presumption in favour of bail, should not apply to children. Children should start with a presumption in favour of bail, or a presumption that bail be dispensed with, in all cases.

The *Bail Act* also needs to reflect the fact that children do not possess the maturity and level of control over their personal affairs that adults can be expected to possess. Conditions with respect to a young person’s conduct while on bail (for example residence, reporting, curfews, place restriction) should be imposed only where absolutely necessary and where the police or court is satisfied that the young person understands them and is capable of fulfilling them. Procedures for variation of bail need to be streamlined and made easier for young people to access.

Question 42: Should bail apply to diversionary measures under the *Young Offenders Act*?

We believe that bail should be dispensed with when a young person is referred for a caution or conference under the *Young Offenders Act*. Although the Act provides for the Children’s Court to administer a caution or refer a child for a conference under the Act, the Act envisages that the majority of young people will be cautioned or conferenced via a police referral, without having to appear in

court at all. In our view it is inconsistent with the diversionary philosophy of the Act to make children subject to bail conditions for *Young Offenders Act* matters. We believe that the *Bail Act* should reflect the Children's Court practice direction, and bail should be dispensed with in *Young Offenders Act* matters (save in exceptional circumstances where there is a real necessity for conditions to be imposed).

Question 43: Should the *Bail Act* also specific reference to ATSI people or ATSI children?

As discussed above, we believe that Aboriginality is a factor that warrants special consideration in bail decisions. This is because indigenous people do not generally conform to traditionally Anglo-Australian ideas about community ties, and also because of the dramatic over-representation of indigenous people in prisons and detention centres.

Question 44: To what extent are special needs taken into account on the question of bail? Does the provision in relation to special needs assist those persons appropriately?

In our experience, Magistrates are generally receptive to submissions about defendants' special needs. However, a lack of appropriate accommodation, mental health or disability services often means that bail is refused. An amendment to the Act would be of limited benefit; what is needed is an on-going commitment by the State and Federal governments to provide adequate services for people with special needs.

Question 45: Is there a need for other special provisions?

See our response to question 44 above.

Question 46: Has the *Bail Act* reduced the reliance on financial security or does it operate unfairly in respect of people with fewer financial resources?

In our experience, it is rare for our clients to be refused bail merely because they or their family lack financial resources. However, there are practical problems associated with the need for an acceptable person or surety to demonstrate their financial acceptability (referred to in your discussion paper and in our response to question 31).

Our clients also experience problems with the requirement for an "acceptable person" to sign an undertaking before bail is granted. In our experience, such conditions are often imposed even where they are unnecessary and/or impossible to meet. Even if there is no financial obligation attached, many of our clients are unable to find an acceptable person because they are homeless and/or estranged from their families. Further if they are indigenous, their family members are more likely to have criminal records and are unlikely to be deemed acceptable by the courts. Many of our clients have strong links with community organisations which provide them with a great deal of support; however, most community and welfare services prohibit their staff from signing clients' bail undertakings.

Question 47: Is there sufficient protection for a person in remand unable to meet their bail?

In our view, there is insufficient protection for people in this situation, even though the Act gives them a right to a bail review. People in custody face practical

difficulties in getting access to legal advice and in applying to the court to have their matters re-listed.

In our view, it is necessary for the courts and the Departments of Corrective Services and Juvenile Justice to improve their procedures, so that a person who is unable to meet their bail is easily and quickly able to obtain a review.

Question 48: Does the review of bail decisions by the Supreme Court for an accused order Crown operate effectively?

Supreme Court bail provides a valuable avenue for reviewing bail decisions of lower courts. Our only criticism of this procedure is that, from a defendant's point of view, the time taken to get a Supreme Court bail application listed is often unreasonably long.

General comments

In our opinion, the *Bail Act* needs to be better integrated with other pieces of legislation such as the *Criminal Procedure Act*, the *Children (Criminal Proceedings) Act* and the *Young Offenders Act*.

We would support the inclusion in the *Bail Act* of a presumption that bail be dispensed with in certain circumstances, particularly for fine-only offences, other summary offences and for juveniles.

We would also like to see the inclusion of a provision that provides for a defendant on bail to be excused from attending court. In our experience, it is common practice for Registrars and Magistrates to excuse defendants from mention dates if they are legally represented. However, we have encountered at least one Local Court Registrar who refuses to excuse defendants, saying that there is nothing in the *Bail Act* that provides for this.

We would be happy to discuss any matters arising from this submission, including providing client case studies if requested. Please feel free to contact me at jane.sanders@freehills.com or on 9360 1847.

Yours faithfully

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