

Bail Bill 2010

Submission to Criminal Law Review Division, DJAG

About the Shopfront Youth Legal Centre

The Shopfront Youth Legal Centre is a free legal service for homeless and disadvantaged young people aged 25 and under.

Established in 1993 and based in Darlinghurst in inner-city Sydney, the Shopfront is a joint project of Mission Australia, the Salvation Army and the law firm Freehills.

The Shopfront employs 4 solicitors (3.1 full-time equivalent), 3 legal assistants (2.4 full-time equivalent), a paralegal (0.4 full-time equivalent) and a social worker (on secondment from the Public Interest Advocacy Centre Mental Health Legal Services Project). We are also assisted by a number of volunteers.

The Shopfront represents young people in criminal matters, mainly in the Local, Children's and District Courts. We prioritise those young people who are the most vulnerable, including those in need of more intensive support and continuity of representation than the Legal Aid system can provide.

The Shopfront also assists clients to pursue victims' compensation claims and deal with unpaid fines. We also provide advice and referrals on range of legal issues including family law, child welfare, administrative and civil matters.

The Shopfront's clients come from a range of cultural backgrounds, including a sizeable number of indigenous young people. Common to most of our clients is the experience of homelessness: most have been forced to leave home due to abuse, neglect, domestic violence or extreme family dysfunction. Moreover, most of our clients have limited formal education and therefore lack adequate literacy, numeracy and vocational skills. A substantial proportion also have a serious mental health problem or an intellectual disability, often co-existing with a substance abuse problem.

Scope of this submission

As you are aware, this draft bill was released for public consultation on 13 October 2010, together with a review of the current *Bail Act* undertaken by the Criminal Law Review Division (CLRD) of the NSW Department of Justice and Attorney General (DJAG).

Although we regard bail as a vitally important issue, time does not permit us to make an extensive submission. In this submission we will make some general comments, as well as focusing on selected aspects of the draft bill.

There are other issues with the draft bill that are not addressed in this submission. We understand that the NSW Law Society is making a submission commenting on a number of issues including significant drafting problems; we endorse these comments.

We also ask you to have regard to the Shopfront Youth Legal Centre's previous submissions to the CLRD about bail, dated 1 October 2004 and 31 January 2005.

General comments on bill

The CLRD review recommended "redrafting the Act in plain English, re-working the structure of the Act and simplifying the concepts involved in determining bail so that they are more easily understood and applied".

In our view the new bill fails to meet these objectives. It has not simplified the language of the concepts in the current *Bail Act*, nor has it improved the structure of the Act. In fact, it has arguably made it more complex, logically inconsistent and difficult to understand.

The new bill has also demonstrably failed to tackle some of the more fundamental issues about the *Bail Act*, arising from the fact that the current Act has been amended in a piecemeal way over the years. Many of these amendments have eroded the presumption in favour of bail, and have been made hastily without a sound basis in evidence or policy.

This review presented an opportunity to go "back to basics", re-think bail policy and come up with a coherent piece of legislation. Regrettably, this opportunity has not been taken up.

Our primary recommendation is that the bill *not* be passed (in its current form, or with amendments) in the near future. Instead, the time for public consultation on this important and complex issue should be extended, and the matter should be referred to a parliamentary committee or independent inquiry.

Objects of Act and criteria to be considered in bail decisions

One of the most concerning features of the new bill is that section 32 of the current Act, which sets out the criteria that must be considered by a court or authorised officer when making a bail decision, has been done away with.

It has been replaced with a new clause 3, which sets out the objects of the new Act, and clause 48.

The objects in clause 3 include ensuring the accused appears at court, preventing the commission of any offences while proceedings are pending, and the protection of victims and witnesses.

Clause 48(1) provides "In making any bail decision in relation to a person, a bail authority is to have regard to the objects of this Act". Clause 48(2) requires a bail authority to also have regard to certain special needs of certain categories of people.

The combined effect of clauses 3 and 48, read literally, would mean that bail would be rarely (if ever) granted.

In its review report, the CLRD refers to a recent study by the Bureau of Crime Statistics and Research (BOCSAR) which "highlighted some confusion surrounding the interaction of the criteria in section 32 and the presumption surrounding bail" (see section 11.2 on page 50 of review report). The CLRD review report goes on to say:

"To address these concerns, it is proposed that in re-drafting the *Bail Act* and re-organising it with a clearer and more logical structure, the section 32 criteria be replaced with clear objects at the front of the Act that will ensure decision makers are provided with clear guidance as to the sorts of matters that are to be paramount considerations in the making of bail decisions".

The deletion of section 32 and its replacement with a set of four objects demonstrably fails to achieve this purpose. In fact, the new provisions provide far *less* guidance for bail decision-makers than did section 32. The new provisions are problematic for a number of reasons, including:

Failure to take into account fundamental principles

The objects in clause 3 fail to take into account the fundamental principles of our criminal justice system: the presumption of innocence and the general right of the accused to be at liberty before trial and sentence.

This is despite the recognition by the CLRD that “at its heart, the Act is a complex risk assessment scheme” and that the presumption of innocence is one of the factors that must be weighed up (see section 3.1 on page 12 of review report).

The CLRD report also states “the major aim of the original Act was to balance the right to liberty and secure the person’s attendance at court”. The report recognises that, since the current Act was drafted, “there has been a tremendous shift away from the original emphasis of bringing the accused to trial, to an emphasis to protecting the community from possible violent acts while the accused is on bail”. Whether or not this shift in emphasis is a desirable thing, the nature of the balancing act required should be reflected in the objects of the Act.

No guidance for decision-makers

There is nothing in the new bill to indicate which, if any, of the objects should be paramount, and how competing considerations are to be balanced. The current section 32 provides significant guidance about balancing competing considerations such as the protection of the community versus the defendant’s right to be at liberty. The new objects in proposed clause 3 do not provide any practical guidance to the decision-maker.

Departure from principles of current Act

The objects represent a significant departure from the criteria in the current section 32 and, in our view, tips the balance too far in favour of the protection of the community at the expense of the defendant’s liberty.

For example, one of the stated objects of the new bill is “(b) to prevent the commission of *any* (our italics) offences by a person required to appear in proceedings until the proceedings have been finally determined”. Compare this with section 32 of the current Act, which requires the decision-maker to consider the probability of the defendant committing *serious* offences while on bail, and to weigh this up against the person’s general right to be at liberty.

Bail presumptions

Most of the bail presumptions in the current Act have been transferred over to the new bill, apparently without serious thought as to whether these presumptions are appropriate.

Minor offences

One redeeming feature of the new bill is that it enhances a defendant’s entitlement to bail for minor offences (referred to in the new bill as “level 1 offences”). It is pleasing to see that, under the new bill, people accused of minor offences will not have their entitlement to bail removed by virtue of being a “repeat offender”, as is the case with the current Act.

However, clause 51(4) is problematic. It provides that a person charged with a minor offence loses their automatic entitlement to bail if the person “has previously failed to appear before a court in accordance with a bail agreement”. This applies to a person who has *ever* failed to appear on bail for *any* matter, even if this was several years ago. Compare this to section 8 of the current Act, where a person loses their automatic entitlement to bail if the person “has previously failed to comply with a bail undertaking given or bail condition imposed in respect of *the offence* (our italics)”.

Classification of offences and presumptions

The attempt to classify offences into level 1, level 2, level 3 and level 4 offences has complicated rather than simplified the legislation. Some offences are level 1, 2, 3 or 4 offences only in certain circumstances. A whole schedule is needed to define level 3 offences and another schedule to define level 4. The current sections 8-8E and 9-9D, problematic as they are, are easier to understand than the new provisions.

Presumptions applicable to children

It is also disappointing that children are subject to the same presumptions as adults. For reasons which are further discussed later in this submission, we are of the view that, where possible, bail should be dispensed with for children, and, failing that, there should be an entitlement or a presumption in favour of bail. Only in exceptional circumstances should there be no presumption, or a presumption against bail, for children. The requirements in clauses 48 and 60 that the decision-maker must consider the needs of children and other vulnerable groups do not provide sufficient protection to children (or, indeed, to other vulnerable people such as Aboriginal people or those with a disability).

Limits on repeat bail applications

The current section 22A has been replicated in the new bill (clause 36). Also, the old sections 44-49 allowing for bail review do not appear to have been replicated in the new bill, although there is still a limited review (similar to the current section 48A) provided for in clause 73.

In our view, clause 36 is unduly restrictive and has tipped the balance too far away from a defendant's general right to be at liberty. To give practical effect to this right, it is necessary that a defendant be able to apply for bail (at least in the Local Court) at any reasonable opportunity.

The court already has the power to refuse to hear frivolous and vexatious applications (clause 38). This is sufficient to deal with repeated bail applications that have no merit.

Although a defendant can of course apply to the Supreme Court for bail, it takes several weeks to have a bail application listed in the Supreme Court and it is not desirable for the Supreme Court resources to be consumed by applications that could more appropriately be dealt with in the Local Court.

It is widely recognised that section 22A has contributed to a dramatic rise in the number of children on remand. The impact of this was somewhat ameliorated by amendments in 2009 which allowed the court to consider new information even if there had not been a change in circumstances. However, the amendments have not solved the problem and we still maintain that the section is too restrictive.

Bail conditions

We are pleased to see that section 37 of the current Act, which sets some limits on the imposition of bail conditions, has been substantially replicated in the new Act.

We especially welcome the insertion of a requirement that a bail condition must not be imposed on a child, an Aboriginal or Torres Strait Islander person, a person of non-English speaking background, or a person with a mental illness or other disability unless the bail authority is satisfied that the condition is appropriate having regard to the capacity of the person to understand or comply with the condition.

Clause 65 sets out the power to impose non-association and place restriction conditions. Vulnerable people (including children and Aboriginal people) are especially likely to be impacted by such conditions. If a non-association or place restriction order is made when sentencing a person

for an offence (under the *Crimes (Sentencing Procedure) Act* or the *Children (Criminal Proceedings) Act*) the legislation provides that a person may not be prohibited from associating with close family or from frequenting their usual residence, work place, etc. We believe it is important for a similar provision to be included in the *Bail Act*.

Breach of bail

Section 50 of the current Act, which empowers police to arrest a person upon a reasonable belief of breach of bail, has been replicated in the new bill (clause 93). There is also a section which clarifies that police may issue a court attendance notice for a breach of bail (clause 94).

We would like to see a provision to the effect that police must consider alternatives before arresting a person for breach of bail. Such a provision could be similar to section 99(3) of the *Law Enforcement (Powers and Responsibilities) Act*, which effectively provides that arrest for the purpose of commencing proceedings for an offence should be a last resort.

Although police have discretion whether or not to arrest a person for breach of bail, they seldom exercise it. There has been a marked change in police practices in recent years. Previously, it was relatively common for police to warn a defendant about a minor breach of bail (eg forgetting to report on one or two occasions, being out 10 minutes after curfew) rather than arresting and bringing them before the court. It now appears that all NSW police are operating under a directive to exercise a zero tolerance/zero discretion policy.

In many cases, arrest for breach of bail is an unjust and disproportionate response. It causes unwarranted hardship to the defendant, not to mention the significant diversion of police, court and Legal Aid resources.

We would like to see a provision confirming that police have the power to discontinue an arrest and re-release the person at any time (similar to section 105 of LEPR). For example, police may arrest a person based on a genuine, but mistaken, belief that the person has breached a bail condition. After making further inquiries, police may discover there has been no breach. In some situations, police might arrest a person and then decide that there is a reasonable excuse for the breach and/or that a warning would be appropriate. Clause 93, in its current form, requires police to bring an arrested person before a court as soon as reasonably practicable. This could be easily amended by the insertion of another sub-section.

It must be remembered that bail conditions are a means to an end and not an end in themselves. If a person has committed a minor or one-off breach of bail, but has not reoffended or failed to appear at court, the utility of arresting them and putting them before the court is questionable.

Application to children and young people

There are several aspects of the new bill which are particularly applicable to children and young people:

Special needs of children

While we are pleased that the bill includes a requirement for the bail decision-maker to consider any special needs arising from the fact that the defendant is under 18, this is not a new provision.

We welcome the new provision (clause 60(4)) requiring that the decision-maker consider a young person's capacity to understand and comply with bail conditions.

However, we are of the view that these protections do not go far enough.

Children are different to adults in many ways and should be treated accordingly. This is reflected in the statement of principles in section 6 of the *Children (Criminal Proceedings) Act*, and also in sentencing law.

To continue applying bail law to children as if they were adults is misguided and also, we suggest, ineffective. The impact on children of onerous bail conditions, and police action for breach of bail, is also now well recognised. Along with section 22A, it is considered to be responsible for the increase in the number of children on remand (see BOCSAR report dated May 2009).

Dispensing with bail

There is a new provision to the effect that bail must be dispensed with for children referred to a youth justice conference (except in exceptional circumstances). This provision is commendable and reflects current practice as set out in a Children's Court practice direction.

It is regrettable that the new bill does not go further and provide a general presumption that bail should be dispensed with (or at least a presumption in favour of bail) for children.

Section 8 of the *Children (Criminal Proceedings) Act* provides that police should proceed against children by way of court attendance notice rather than charge. Although the terminology is outdated, this effectively amounts to a presumption that police should use a field, future or no bail court attendance notice, which means there is no requirement for bail. It would be consistent with this Act to include in the *Bail Act* a presumption that bail should be dispensed with for children, except in certain specified circumstances.

Notification to court if child unable to enter bail

We welcome new clause 41, which requires a court to be notified within 2 days if a child is unable to enter bail due to failure to meet a residential condition.

Although clause 73 enables the court to conduct a bail review of its own motion in such circumstances, we note with concern that there appears to be nothing to mandate the court to conduct such a review, and no mechanism for the defendant to seek such a review.

Limits on repeat bail applications

See our comments above in relation to clause 36 (current section 22A).

Breach of bail

Research by BOCSAR and the Youth Justice Coalition (*Bail Me Out!* report, released in late 2009) confirms that children are frequently arrested and brought before the court for breach of bail conditions. See our comments on breach of bail above.

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