NEW SOUTH WALES

The Chief Magistrate of the Local Court

1 July 2011

Mr P McKnight
Executive Director
NSW Law Reform Commission
GPO Box 5199
SYDNEY NSW 2001

Dear Mr McKnight

Submission - Review of Bail Law

I write in response to your letter of 9 June 2011 inviting my submission in respect of the NSW Law Reform Commission's review of the law of bail.

At this stage of the review, I do not propose to answer each of the questions posed in the Questions Paper. Since its introduction, the *Bail Act* 1978 has become increasingly difficult to apply, to the extent that in the Court's view, it should be redrafted to return to a simpler process that focuses on the fundamental purposes of bail. I have thus limited myself in this submission to setting out the Court's overarching views on bail and providing some observations about the operation of bail law relative to the extensive experience of the Local Court, having regard to the review's terms of reference. I would be pleased to discuss the review with the Commission further in due course at out meeting on 29 July 2011.

1. <u>The object of bail</u>

The Court's experience in applying the current *Bail Act* 1978 is that it has become unnecessarily complex. For whatever reason, the simplicity of the 1978 Act appears to have been forgotten. The traditionally primary objects of a bail determination – ensuring the appearance of the accused person before the court and the protection of the community whilst also having regard to an accused person's interests in being at liberty – have been intermittently truncated or affected in response to artificially created political reaction to publicised concerns that have had more to do with media campaigning than the product of empirical evidence.

I believe I speak on behalf of the judicial members of this Court when I state that it is of rising concern that prosecution agencies appear to view bail from a perspective alien to the original, and in my view enduring, philosophy of the *Bail Act*. Concerns articulated before the Court and elsewhere that bail is being used as a form of pre-emptive punishment are in my view grounded in legitimacy. One only has to have regard to the agreement of prosecuting agencies to the reduction of draconian and ultimately pointless conditions at bail reviews to look for confirmation of this assessment. The fact that a level of the judiciary bound by its oath of office has been forced into a semblance of complicity in executing non-bail related agendas remains troubling.

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Further, there appears to be a culture that court bail should be opposed amongst prosecuting agencies. Opposition to bail is frequently encountered in circumstances where, having regard to the considerations set out in section 32, there is little or no material before the court to indicate that bail should be refused or where it appears adequate conditions are available to address any concerns at a grant of bail.

Overly complex or onerous reporting requirements that go beyond those reasonably necessary to secure an accused person's attendance at court are commonly seen in conditions of police bail or are being sought in applications for bail before the court, notwithstanding the requirement of section 37(2) that the conditions imposed on a grant of bail are to be no more onerous than appear to be required. The Court is exposed to constant applications for review of bail conditions and observes that in the majority of cases such applications are wholly or partially successful, in most cases with the consent of the prosecuting agency.

A measure to address this may be to introduce a provision placing the onus on the party seeking the imposition of a condition to satisfy the court that the condition is reasonably necessary, having regard to the list of considerations for determining bail and to call evidence under oath to support the imposition of a condition.

2. Determination of a bail application

One area of unnecessary complexity in the *Bail Act* is the proliferation of required considerations in the determination of a bail application. In its present form, section 32 is both overly prescriptive as to the matters to be taken into account when considering each primary criterion, and restrictive insofar as the section requires that *only* those matters can be taken into account.

A simplified list of considerations that enables judicial officers to consider such information as is relevant to each criterion, such as the following, would be desirable:

- The probability of whether or not the person will appear in court in respect of the offence for which bail is being considered
- The interests of the person in being at liberty
- The protection and welfare of the community or any particular person/s
- The strength of the case against the person
- The age of the person and the principles set out in section 6 of the *Children (Criminal Proceedings) Act* 1987, where the person is a child
- The mental health of the person and, having regard to the protection and welfare of the community, whether a less restrictive environment than that created by a refusal of bail is available and appropriate

3. Presumptions applying to bail applications

Current categories of presumptions for and against a grant of bail or where no presumption applies, set out in sections 8A to 9D, are illogical and difficult to apply. In the Court's experience, it is not easy to perceive what purpose the presumptions are intended to serve in circumstances where the extensive list of considerations set out in section 32 must also be applied. The grouping of offences into the categories of presumptions has little relationship, if any, to consideration of the discrete circumstances of each accused person and the purpose of determining how to best ensure his or her future attendance at court.

In place of the current presumptions, a more straightforward approach such as the following may assist:

- No bail consideration should be required in respect of offences that are not punishable by a sentence of imprisonment.

- An absolute right to bail should apply in respect of strictly summary offences in which a penalty of imprisonment exists.

- For all strictly indictable and Table 1 offences, no presumption based upon the offence charged should apply. It is often the case that the ultimate charge determined is not the more serious charge originally preferred. Further, to arm a prosecuting authority with the ability to restrict considerations of bail simply by charging an offence falling within a particular category is to create an environment that may be subject to potential abuse; hence also the suggestion of the criterion of the strength of the prosecution case. Consideration of bail should occur simply on the basis of brief criteria such as those suggested above.

4. Repeat bail applications - section 22A

The impact of amendments to section 22A limiting repeat bail applications is difficult to conclusively assess, as to my knowledge data on the number and type of bail applications being made in the Local Court is not recorded. Anecdotally, it appears that numbers have declined since the commencement the section 22A amendments.

In principle, subject to the existence of a more transparent and workable Bail Act, the Court is not opposed to the current limitations in section 22A on repeat bail applications. An oft-cited concern with section 22A is that an accused person is only entitled to "one shot" at bail, although it appears clear from the section that it is intended to prevent an unsuccessful applicant from making another application for bail without grounds for the fresh application, such as a change in circumstances. As in any situation where the court has determined an application, it would be contrary to the efficient administration of justice for a party to be able to repeatedly make the same application in the hope it will eventually succeed.

However, it also appears that section 22A has had a disproportionate impact on defendants in positions of social disadvantage, such as the homeless. A difficulty with section 22A as it presently stands is that the grounds for making a fresh application in subsection (1A) are prescriptive and are limited to the three grounds set out therein.

In practice, an accused person will often be able to make a fresh bail application on the basis of the last mentioned ground, that is, a change in circumstances. It is the Court's understanding that a "change in circumstances" is to be construed broadly when applying section 22A.[1] Thus, the Court is aware of unreported bail decisions holding that the following situations did or potentially may amount to grounds for a fresh bail application:

- Time spent on remand, due to delays in obtaining DNA and/or ballistics evidence;
- New evidence lessening the strength of the Crown case is available;
- New medical evidence relating to treatment options for the accused is available;
- A formerly unwilling accused becomes willing to participate in a rehabilitation or intervention program;
- Failure on the part of the prosecution to serve a brief in line with Court orders.

While the current grounds in subsection (1A) should ordinarily be sufficient to enable the making of a fresh bail application where reasonably necessary, if it is thought desirable to ameliorate the perceived severity of section 22A an option may be to add a discretionary,

[1] The Hon. J Hatzistergos MLC, Attorney General, Second Reading Speech – *Courts and Crimes Legislation Further Amendment Bill* 2008, 27 November 2008 (Legislative Council)

catch-all ground to subsection (1A) such as "any other matter that, in the court's opinion, justifies the making of a further application for bail".

5. Possible distinction between young people and adults

As noted above, the primary objects of a bail determination are to ensure the appearance of the accused person before the court and the protection of the community whilst also having regard to an accused person's interests in being at liberty. Those objects remain the same whether the person is an adult or a child. However, the policy objectives set out in section 6 of the *Children (Criminal Proceedings) Act* 1987 should not be ignored. This can be addressed in the list of bail considerations as I have suggested above.

Provided that sufficient allowance is made for considerations affecting young people, such as in the manner proposed above, it does not seem necessary for there to be a separate Act relating to young people. However, if the legislation remains in its current, cumbersome form, it would be preferable for the presumptions not to apply to children.

6. Further issues

There are two further bail issues that I wish to bring to the Commission's attention:

a. *Relationship between bail and mental health diversion*

The issue of the role of bail at the time of the diversion of a mentally ill defendant in the Local Court for assessment at a mental health facility has also been raised in respect of the Commission's enquiry into people with cognitive and mental health impairments in the criminal justice system.

Section 33 of the *Mental Health (Forensic Provisions) Act* 1990 provides that a magistrate has power to make such an order "without derogating from any other order the Magistrate may make in relation to the defendant", including "the granting of bail in accordance with the *Bail Act* 1978".

Although the preferred practice of the Court is not to make a bail determination following an order under section 33, some magistrates take a differing view that consideration of bail is required at that stage. However, a bail determination often subverts the purpose of the section by causing difficulties in the admission of the defendant to a mental health facility if he or she is found to be mentally ill, as follows:

- If bail is refused at the time of making an order under section 33, the defendant is effectively 'in custody' and should be guarded by the police or Corrective Services for the period of time he or she is at the mental health facility (if admitted). The practical effect in such instances is for the accused to be refused admission to the facility, as police/hospital protocols do not allow admission if bail is refused.
- If bail is granted, the defendant becomes subject to attend court at a future date as required. Again, the practical effect is that hospitals are relcutant to admit the person.

To avoid those consequences, it would be desirable for section 33 to be amended to delete any reference to bail and provide that bail is not to be considered in respect of diversion under the section.

b. *Pre-charge bail*

In 2010, I wrote to the former Attorney General to propose that New South Wales trial a pre-charge bail system, based upon the model presently used in England and Wales.

Pre-charge bail enables the police to release a person on bail whilst the decision to charge is referred to the Crown or Police prosecutor. Such a system has the potential to streamline the court process and consequential costs to the administration of justice, and address a number of difficulties that presently create delays in the Local Court.

Under the current *Bail Act*, the police are only empowered to grant or refuse bail once a person has been charged with an offence, and also rightly have limits placed upon the period of time for which they may hold an individual without charge. This gives rise to the situation where police may charge early or 'overcharge'.

Once a charge decision is made and a court attendance notice is issued and filed, a case is commenced in the Court. In many instances an amendment to the charges on the indictment will be made after a first or subsequent appearance. Aside from the concern raised above as to cases where bail is refused due to the operation of current bail presumptions but the more serious charge is ultimately abandoned and a lesser charge is determined, the amendment of indictments also has the effect that cases are frequently adjourned on numerous occasions whilst a brief of evidence is compiled and served. This often causes the Court to experience unnecessary delays. At the Downing Centre, where case conferencing is being trialled, this in turn delays the holding of conferences.

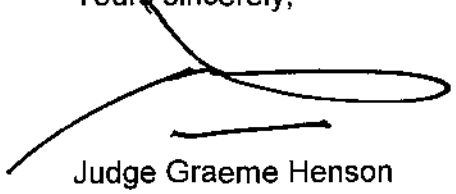
By providing police with a mechanism to release suspects on bail prior to charge, there may be a number of benefits to the administration of criminal cases in the Court, including:

- A more thorough investigation and evidence-gathering process can be undertaken prior to charge, enabling the appropriate charges to be laid to begin with and reducing the frequency of the amendment of charges mid-proceeding;
- If appropriate having regard to the evidence, in some situations fewer, lesser or no charges may be laid, reducing the number of weak cases coming before the court; and
- Briefs of evidence can be substantially prepared prior to the first court appearance, reducing the number of adjournments due to the non-service of briefs of evidence.

It is recognised that any pre-charge bail system generates issues such as the minimum grounds needed to trigger a decision to release a person on pre-charge bail rather than an unconditional release, and the need to develop safeguards to ensure that a person's liberty is not unreasonably impinged, so that pre-charge bail cannot be used as an instrument of oppression. Issues such as these will require careful consideration and discussion.

Thank you for the opportunity to make a submission to this review. I would welcome the opportunity to discuss the above comments or any other issue relating to the review with the Commission further, should you wish.

Yours sincerely,



Judge Graeme Henson
Chief Magistrate