Submissions in Response to Discussion Questions on Bail

We refer to the New South Wales Law Reform Commission document *Bail: Questions for Discussion* (the Document).

From the outset we note the most concerning but not surprising trend in the NSW remand population set out at 0.7 of the Document. The statistics in relation to young people are particularly concerning especially in light of the quoted figure that 84% of young people remanded are not given custodial sentences. In light of those trends and the costs to the community associated with housing persons on remand, it's no surprise there is a need to review and amend existing bail laws and their application.

What can be said is that in our opinion, the reason for such high remand rates particularly in the adult population is surely due to the presumptions within the Act, section 22A and the ever increasing prevalence of Apprehended Violence Orders. These issues will be discussed during these submissions however at this point adopting the nomenclature contained within the Document we respond below. Points without comment are indicated by a hyphen.

1. Over-arching Considerations

1.1. Bail is not a privilege it is a right, which should only be fettered in certain, serious enumerated circumstances. Every member of the community charged with an offence is innocent until proven guilty and the burden of that guilt lies with the prosecution. The corollary to the maxim is that every individual charged is entitled to be granted bail. This should be the starting position of every bail application.

Presumptions against bail are contrary to the maxim and if there is one individual who has been remanded on bail and found not guilty, the system has unjustly dealt with that individual. Rather, there should be certain pre and post conditions that should/must be met before bail is granted. We shall elaborate later.

1.2. Yes. The objectives of the Act should be to grant bail to as many individuals as possible whilst maintaining justice and community safety. However to adequately answer this point the question must be asked - What is the purpose of bail? The answer can only be for the protection of the community. Generally speaking the impediments to a grant of bail are a concern that the defendant will:

- Reoffend, be it upon the community at large or more specifically a person within the community or the alleged victim, or
- Engage in conduct that perverts the course of justice for example bribing witnesses, fabricating or destroying evidence or intimidating jurors, or
- Engage in conduct that stifles justice by failing to appear.

These impediments should be set out in the criteria section (section 32) of the legislation which shall be discussed later. However they should also be stated in notional form in the objectives of the legislation thereby making clear the purpose of the statute.

2. Right to Release for Certain Offences

2.1. Yes.

2.2. -

2.3. Some consideration should be given to including traffic offences.

3. Presumptions

3.1. The presumptions are applied in such a manner that the starting position for the granting of bail is that bail is denied. It is then up to the defendant to persuade the Court that bail should be granted. More often than not it's only with exceptional circumstances that the defendant finds success. The structure of the framework should be reversed however pre and post criteria should be used to determine bail.

3.2. Whilst we say that presumptions are contrary to our system of law, the purpose of the presumptions is partly political and partly in the interests of justice. The presumptions are designed to protect the community from certain individuals by making particular assumptions from certain facts. Unfortunately those facts do not always mean the assumptions are correct. For example a person charged with murder is seen as simply too high a risk to be permitted amongst the community, save exceptional circumstances and as such bail is refused. The assumption is that he is probably guilty, or at least for the purposes of bail, we shall assume he is guilty simply because of the objective seriousness of the offence. However the presumption removes any consideration that the defendant may not be guilty and is premised on fear and to a great extent the media and political fallout, rather than legal reasoning.

3.3. It seems that the existing presumptions are designed to keep a greater number of individuals in remand. To that extend they are successful.

3.4. Yes. Presumptions place the burden on the defendant which is not proper. Instead of presumptions we propose certain criteria be addressed which can be a cascading regime in line with the hierarchy of crime.

For example an individual charged with a firearm offence referred to in 8B should not have bail refused simply because of the nature of the charge. Rather, there should be some assessment of whether the person actually is/continues to be dangerous and not simply whether he may have been dangerous at some point in time which is undoubtedly the reason for the provision. As part of that assessment, consideration should be given as to whether the defendant continues to have access to weapons and if the defendant is attempting to conceal that access. For example has the individual's home been searched and did the individual consent to the search. Similarly, there should be some assessment of what came out of the search. The Court should also consider whether the individual is a member of an organised crime group, whether he was on bail, parole or a bond at the time of being charged and his criminal antecedents. These factors ordinarily do and should continue to determine bail not merely the offence itself.

There may also be certain criterion that automatically disqualifies a person from bail save exceptional circumstances which should not include the offence itself. For example a person previously convicted of a violent offence should not be granted bail if charged with a similar offence, in similar circumstances, especially if the same victim is involved. This would be a pre condition to bail. However the exceptional circumstances may be that the offender has no history with anyone else and one of the parties is now living in another part of the state some distance from the other and as such, there is little concern of reoffending.

Naturally the concern that a defendant may fail to appear is legitimate and where a court is satisfied there is a more than even chance of a defendant failing to appear, bail should not be granted. If a person has previously failed to appear on an indictable offence the Court should construe that incident as a more than even chance unless convinced otherwise.

However whilst there may be other means in achieving the same outcome it is the outcome that needs to change and not necessarily the means in which it is achieved.

3.5. -

3.6. As stated above there should be a uniform presumption in favour of bail subject to a variety of pre and post conditions.

3.7. No. The presumption should be replaced with conditions as stated above.

3.8. No

3.9. No

3.10. No

3.11. If presumptions are to remain the burden of persuasion is clearly enough. However they must be narrowed to matters and defendants that involve both actual violence and a history of violence. It seems that an individual convicted of a violent offence a short time prior to being charged for a similar offence, particularly where the same victim is involved, should have bail scrutinised more closely. Whilst the same position may be taken with all offences it is clear that it should hold for the most serious offences at a minimum.

3.12. Yes. No exceptional circumstances should not be further defined it should be left up to the presiding judicial officer.

4. Dispensing with Bail

4.1. Yes

4.2.

(a) Yes

(b) Yes

(c) All offences referred to in section 8 save offences of a violent nature where the offender has a history of those or similar offences. As well as traffic offences involving minors.

4.3. Yes. If Police are not able to determine a person's identity how is bail to be granted? Where the identity of the individual is not known bail should be refused.

5. Police Bail

5.1. Ideally it is best for questions of bail to be determined by a judicial officer however one must accept the mechanics of finding a suitable court to address questions of bail, particularly outside business hours. As such it becomes convenient for Police to determine bail in the interim. Usually it is for a short time until access to a Court can be made. The provisions seem appropriate.

5.2. -

6. Court Bail

6.1. Yes

6.2. The writer has no experience with authorised justices granting bail so we would submit that it does not occur regularly. Once again the writer's preference would be for a judicial officer to determine bail.

6.3. A fresh application should be by way of right but subject to the defendant's wishes in all circumstances. That is if the defendant wishes to amend his bail conditions granted by Police he should have the right to seek a variation. Where bail has been refused by Police a defendant can make an application for bail on the next court appearance, it should not be automatic or mandatory.

6.4. This is as far as the legislation should go. The further question of whether bail should be varied, granted or refused after the matter has already been once determined should be one raised by the defendant and not by the legislation, regardless of the defendant's changed circumstances.

7. Repeat Bail Applications

7.1. The provision should be repealed. It is surely a major reason why remand populations have increased so rapidly over the past three years.

Often, when an advocate meets with a defendant who is bail refused by Police, he will advise the client to remain in custody until a robust application can be made. That is, if there is concern he is a flight risk someone may have to obtain his passport to hand up to the Court. The defendant may require a surety. The acceptable person may require some time to obtain the funds and so on. In such circumstances which are all too common, the defendant will be advised to remain in custody until a solid application can be made. The alternative being that the defendant remains in custody without right to a subsequent application if the original one fails.

An example might be a young male of the age of 20 who has been caught and repeatedly convicted of possession. A magistrate may take the view that he is a repeat offender and may wish to refuse bail unless his parents are prepared to put up a surety. Another magistrate may take the view that reporting conditions will suffice. The advocate may advise the defendant to remain in custody until his parents are available to assist. The outcome is that bail applications take longer to prepare, cost more to run

and defendants are held in remand for a longer period whilst applications are being prepared.

7.2. The section should be repealed but if not, it should not apply to juveniles.

7.3. In the past, once advocates were advised of their client's status they would make hurried bail applications particularly if the application was being made on a Friday to avoid their client spending the week end in custody. This is an important aspect of the process because it provides the opportunity for defendants to be granted bail, it reduces the number of persons in custody and it provides a litmus test for what sort of conditions the Court may be considering and how it intends to deal with them should bail be refused. There is simply no point in having a repeat traffic offender remanded in custody because he was unable to obtain an acceptable person before the close of business. Similarly, that same defendant remanded in custody of some period would have also served no point, when after securing an acceptable person, the Court decides it does not need one.

With section 22A the hurried applications are hazardous. The only subsequent applications that can be made under the current regime are ones that claim a change in circumstances. Even if a defendant is able to secure an acceptable person at a later point in time, this may not be construed as a legitimate change in circumstances especially if the Court believes that the defendant were able to have the acceptable person at the first application, namely by delaying the application. Accordingly the unintended consequence of the provision is that defendants spend longer in remand since it takes time to prepare a strong application. Further, the provision it seems is not about reducing court workload rather an effort to stop what is widely known as "magistrate shopping".

We don't consider repeat applications to be an issue necessarily required to be resolved by legislation rather it can be addressed administratively.

- Each offender may be entitled to a certain number of bail applications whether fresh or under changed circumstances, say three. After that there can be an application fee payable.
- Perhaps the payment of an application fee which is forfeited if the application is unsuccessful will be an adequate measure to stop baseless applications.
- Alternatively a requirement that subsequent bail applications only be made by advocates coupled with a requirement that the advocate declare a reasonable chance of success as in civil matters may be the way forward.

- Perhaps a requirement that bail applications can only be lodged at a certain court for example the court where the CAN was issued. This will no doubt diminish the likelihood of magistrate shopping and baseless applications especially if having to continuously appear before the same judicial officer.

There are a multitude of solutions. Anything in line with the above will be an improvement on s22A.

8. Criteria to be Considered

8.1. Section 32 lists a variety of criteria most of which, where relevant, will be considered in every bail application. The list is prescriptive which is to some extent appropriate but should not be exhaustive. That is, at a minimum the Court must assess the application based on the criteria prescribed but should not be limited to that material only and should be permitted to consider other issues and material where appropriate.

However some of the criteria are inappropriate and should be removed and going through the section 32 criteria we comment as follows:

- (1)(a)(ii) – This criteria is imperative and in our view, where the defendant has previously failed to appear on an indictable matter, the Court should be of the view unless convinced otherwise that the defendant will fail to appear on the next occasion and as such bail should be refused. Similarly consideration should be given to the case where a defendant has previously answered bail.
- (1)(a)(iii) – This criteria is concerning since it draws assumptions from facts that are in dispute or at least not proven. For example the circumstances of the offence are not proven let alone the offence itself yet a decision about bail may be based on the circumstances of the offence. Similarly the nature and seriousness of the offence is not in our view a matter in itself that should be considered to refuse bail. See 3.2 and 3.4 above.

  However the strength of the evidence should certainly be considered as it goes to the likelihood of a conviction. Further, the likelihood of a custodial sentence upon conviction is also a legitimate consideration. However in the absence of a cogent assessment of the strength of evidence probably due to it simply not being available when the application is heard, the severity of the penalty should be considered but only in so far as it goes to the likelihood of the defendant failing to appear.

- (1)(b)(iv) – Let us split this criteria up:
    - If an offender is incapacitated by intoxication, injury or drug use it is appropriate to refuse bail or to defer the matter to a later time with the consideration that the incapacity is likely to be temporary.
    - However where a person is in danger of physical injury or in need of physical protection, holding a person in remand is not a solution and should not be a prescribed consideration.
- (1)(b1) – These criteria are overly basic and need to be expanded. It is not enough to simply require a defendant to be held in remand because of the protection of the alleged victim or his or her friends or relatives.

  In our view the alleged victim or the person for whom there are protection concerns, must fall into a certain category of vulnerable persons and must be shown to fall into that category. Vulnerable persons can be persons with intellectual or physical disorders, minors, or persons who have custody of children.

  Then the Police must demonstrate a genuine fear of certain acts including whether the individual, where appropriate, is indeed fearful of those acts. They should briefly identify those feared acts.

  The final step should be an assessment of whether the defendant is:
    - able and
    - likely on balance

  to carry out those specific acts. There is no point in remand where the circumstances are such that defendant is not able to carry out the feared acts.
- (1)(c)(i) – This criteria being the nature and seriousness of the offence should not alone, be reason for the refusal of bail. If an individual is charged with an offence of a sexual or violent nature, the offence of itself does not require the individual to be held in remand. Rather, an assessment of the other matters which flow from the nature and serious of the offence should be made. Those other matters are set out in the balance of 32(c) and 32(c)(i) must be considered in the light of 32(c)(ii) to (vi). See 3.2 above and comment at (1)(a)(iii) above.
- (1)(2) – This criteria must not only remain but be expanded beyond (1)(c)(iv) such that if there is a likelihood that the defendant will re-offend and the consequences of the re-offending is significant, serious consideration should be given to the refusal of bail.

8.2. –

8.3. Yes. The overarching considerations in relation to the granting of bail must accord with the objectives of the act as set out in 1.1 above. That is the purpose of bail is to ensure that every defendant is granted bail but if so granted, will not:

- Re-offend, or
- Cause harm to the community or to an individual or alleged victim, or
- Attempt to engage in conduct that perverts the course of justice, or
- Stifle justice by failing to appear.

The standard for assessing the likelihood of the occurrence of any of the above matters as set out by the section 32 considerations should be on "*the balance of probabilities*". However, the Court must be satisfied that bail conditions will not alleviate the issue. Accordingly bail should only be refused where the Court is not convinced that bail conditions imposed will reduce the likelihood of the occurrence of the above matters below the requisite standard.

The words "reasonable grounds to suspect" gives rise to a test which in our view is too easy to satisfy. Police have a right to search individuals and motor vehicles in a public place pursuant to reasonable grounds to suspect or upon a reasonable suspicion. Bail should not be determined on such a low threshold.

The phrase "unacceptable risk" is unclear and will only be defined by years of case law. Further, it seems to us that the phrase does not go so far as to say that the defendant is more likely than not to breach bail conditions. Further, the test is subjective. The test refers to a "risk" which in the view of the judicial officer is unacceptable. A Court may form the view that there is an unacceptable risk that a defendant may harm an alleged victim however this is not the same as an assessment that the defendant is on balance, likely to harm an alleged victim. It may be that the Court determines unacceptable risk by the potential outcome of the ham as opposed to the likelihood of the harm being caused.

8.4. See above

8.5. No. An exhaustive list of criteria simply boxes in the judicial officer which can only be contrary to the interests of justice.

8.6. Yes, most certainly. See 8.3 above.

8.7. The manner in which the criteria are currently set out is adequate.

8.8. Some should be changed on the basis of appropriateness as set out above.

8.9. No

8.10. The provision should be retained and is more appropriate for authorised officers than a Court. However in view of the fact that the incapacity due to intoxication drugs or injury is usually short lived, there should be some mechanism for speedy fresh applications. However persons in danger of physical injury or in need of protection should under no circumstances be remanded in custody and this aspect of the provision should be amended. See 8.1 (1)(b)(iv)

8.11. -

9. Bail Conditions

9.1. The scope to impose conditions should be as wide as possible but should exclude conditions that cannot be breached, complied with or where non compliance cannot be known or measured. A condition prohibiting a defendant from using a computer or the internet of its own may be one such example.

As a general rule, bail conditions should not burden defendants in a positive manner. Positive conditions that compel defendants to perform some particular act such as reporting should be the exception to the rule. The majority of bail conditions should be concerned with stopping the defendant from doing particular things such as approaching, threatening or harassing the victim, leaving the jurisdiction, committing subsequent offences whilst on bail, remaining in the company of certain persons, entering certain areas, leaving the home after curfew and so forth.

9.2. Clearly the purpose of imposing bail conditions on defendants is to provide some protection to the community that the issues set out in 8.3, being the likelihood of a defendant to re-offend, interfere with the victim, fail to appear and so on are being addressed. Where those concerns are addressed, bail should be granted.

9.3. Prior to the imposition of bail conditions the court must make an assessment as to whether there exists a real, legitimate or serious concern of a particular event occurring. That assessment is to be made objectively and not simply on an assertion. For example there would probably be little need for a repeat traffic offender to surrender his passport. If the Court is of the view that there exists a real, legitimate or serious concern it should impose whatever conditions it sees necessary to alleviate that concern. If the imposition of those conditions, on balance, reduces the likelihood of the occurrence of a particular event, bail should be granted and the condition should be imposed.

9.4. No

9.5. The imposition of bail conditions should directly address the issues set out at 8.3 above, no more and no less. Bail is a right subject to certain restraints, which arises from concerns about the defendant's future conduct and the impact of that conduct. The promotion of effective law enforcement is not relevant to an assessment of the defendant's future conduct due to its generality and is an irrelevant consideration.

9.6. The assessment of bail should be the first step and separate to some extent from bail conditions. However, if bail is to be granted, conditions should be imposed in line with the real, legitimate or serious concerns held by the Court as set out in 9.3 above.

9.7. No

9.8. Yes, similar to standard and special AVO conditions. In fact it may be appropriate for certain conditions to attach to certain offences as stated at 3.4 above.

9.9. Yes, however briefly. Any condition imposed by a Court should be for a good reason. That reason is not known if it is not stated.

9.10. Yes

9.11. Such a provision may be suitable in the event the defendant is homeless however in the main it appears counterproductive. It is important that the defendant whilst on bail is able to remain in a safe, comfortable and controlled environment so that he is able to comply with bail conditions. Such a situation will reduce the incidents of breaches of bail since one's home will provide the appropriate sanctuary.

9.12. See 9.3

9.13. There seems little difference in the approaches. What is required is a mechanism that binds defendants to their bail conditions. We doubt that the alternative approach will render better results than the current method.

9.14. No.

9.15. Yes. The added step reduces the likelihood of a defendant saying he was not aware of a particular condition.

9.16. No

9.17. -

9.18. -

10. Breach

10.1. No the provision seems appropriate.

10.2. No

10.3. No

10.4. No

10.5. No, the option of arrest should be at the officer's discretion.

10.6. –

11. Remaining in Custody

11.1. Yes. In all cases notice should be no more than 3 days.

11.2. No, too burdensome.

11.3. Yes.

11.4. No, too burdensome.

11.5. No, too burdensome.

12. Young People

12.1. No

12.2. Perhaps some different conditions or different means for determining certain issues in relation to juveniles is appropriate. For example, a juvenile charged with an aggravated assault should not be burdened by his criminal history the same manner as an adult.

12.3. Yes

12.4. Yes

12.5. As a supplement the points under the background note should be included but not the reference to the Beijing Rules.

12.6. No

12.7. No

12.8. No different from young people in general unless there are indigenous specific issues.

12.9. –

13. People with an Impairment

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14. Indigenous People

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15. Duration of Bail

15.1. Yes

16. Review of Bail Decisions

16.1. The fact is that this provision is not working well for a variety of reasons. Firstly many magistrates are not comfortable with the word review since it sounds like an appeal of sorts and a different decision made by the reviewing judicial officer will be seen as a criticism of the original judicial officer. Such criticism from higher courts of lower court decisions is both expected and required. It is also easier for higher courts to dispense that criticism by virtue of the distance. Accordingly it seems to us that a magistrate would probably prefer to adjudicate a fresh application rather than review an application of another magistrate.

There is also the concern that the reviewing magistrate is the original magistrate. When defendants are convicted and given a custodial sentence in the Local Court, it is not uncommon for an appeal to be lodged and bail sought. Often it is the sentencing magistrate that then determines bail which seems somewhat absurd.

16.2. Yes. Where the conditions to put on fresh bail applications are relaxed, the need for review will be diminished however should still remain. Reviews can still be performed instead of running fresh applications where complex and lengthy bail applications took place at first instance. This will save time and costs.

17. Structure of the Bail Act

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18. Plain English

18.1. No

18.2. –

18.3. No

18.4. No

19. Forms and Processes

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20. Other submissions

20.1. Apart from the presumptions within the Act we are of the view that AVO legislation is also a major reason for increased remand population.

It seems to us that the purpose of detaining defendants who are in breach of AVO legislation can only be for the safety of alleged victims. It follows that most defendants

in breach of interim orders are charged with an offence of violence. If we consider those offences it is clear they will cover a spectrum of severity. That is some defendants will take an opportunistic approach to the causing of harm whilst others will take a more planned approach. It seems to us that the majority of defendants who are indeed guilty of this type of offence are more likely to take an opportunistic approach to the causing of harm to an alleged victim. If the victim is easily accessible to the defendant, perhaps by virtue of cohabitation, then the likelihood of further offences increases. However in most cases the defendant need only be denied the opportunity to cause the harm. Very few defendants will travel any significant period of time simply to harass an alleged victim. Accordingly bail conditions introducing distance and/or regular reporting to Police can remove that opportunity.

20.2. **The Typical Family Dispute and its impacts on Remand Population**

In Australia one in every three marriages ends in divorce and the greatest number of divorces granted in Australia is in New South Wales[1]. Whilst the prevalence of joint applications is on the increase the majority of divorce applications are filed by women, which is the first step in the divorce process.

Where the process is acrimonious the next step will be for the wife to obtain an AVO regardless of legitimate fears. It is not uncommon for advocates to advise their female clients to obtain an AVO simply to frustrate the husband or to "soften him up". A female seeking the assistance of Police in obtaining an AVO is almost always met with a positive response. However men are often told to apply through the Courts. This forces the husband out of the house, increases his living expenses and diminishes his access to the children. As a result he usually responds by withholding child & spousal maintenance and perhaps ceases to make mortgage repayments.

The husband who is unable to access his children for months due to the AVO seeks interim access orders. Interim orders are made and the husband again tries to access his children pursuant to same. Often there is little compliance with the orders as the wife raises illegitimate concerns on the day to stifle the husband. He becomes angry at what he sees is noncompliance with the interim orders. However he also realises that breach proceedings against the wife will achieve little except further costs to him.

[1] http://mydivorce.com.au/divorceadvice/divorce-statistics-australia.htm

Accordingly he raises his voice as a last effort to gain access to the children which is usually followed by the wife contacting the Police. He may have used profanity or made crude comment about her sexual promiscuity which may be the reason the marriage broke down. She interprets words like “you’re a fucking slut” as a threat and tells Police as much and that she has fears for her safety. The husband argues the statement is one of fact. The Police reject the argument and charge the husband with breach of interim orders. He then finds himself before a magistrate on a question of bail where there is an unproven threat of violence which appears not to be unprecedented because of the original unproven allegation that gave rise to the interim orders being granted originally. In seeking bail he is forced to accept he is probably not entitled to a presumption for bail due to section 9A. Since the issue of domestic violence is such a hot topic magistrates concerned about criticism take a hard line and as a result, many husbands find themselves in custody.

The above chain of events or one very similar is playing out all over the state and is undoubtedly a major contributor to the remand population. We have acted for many clients who had bail refused in response to charges of assault and breach of interim orders, only to be eventually acquitted of the offence with the AVO application dismissed. On the odd occasion where the offences were proven at first instance but overturned on appeal, the original court did not order a custodial sentence. Notwithstanding the defendant spent a considerable time in custody waiting for trial. This does not attest to our proficiency as advocates. Rather, it shows the relative ease in which a person in similar circumstances is able to find himself in remand for a charge, of which it seems, he is less likely to be convicted.

Frank Mersal
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