Recommendations

Recommendation 1: That the Bail Act be redrafted using plain language and a logical structure.

Recommendation 2: That the Bail Act include a statement of objectives that the purpose of bail is to: (1) maintain the presumption of innocence; (2) ensure a person returns to court; and (3) protection of the community.

Recommendation 3: That the Bail Act's statement of objectives makes clear that detention should be used only as a last resort, especially in respect of children and young people.

Recommendation 4: That the Bail Act incorporate the principles in section 6 of the *Children (Criminal Proceedings) Act 1987*.

Recommendation 5: That the Bail Act include a statement of factors specifically relating to children and young people to be taken into account in determining a bail application.

Recommendation 6: That the situation of a young person remanded in custody due to lack of accommodation be reviewed every 48 hours.

Recommendation 7: That the NSW Government fund a residential bail support program to accommodate young people who would otherwise be remanded in custody.

Recommendation 8: That there be a presumption that bail is dispensed with for all young people.

Recommendation 9: That young people charged with summary offences have a *right* to bail.

Recommendation 10: That arrest is *not* an option available to police in the event of a technical breach of bail conditions.

Recommendation 11: That police officers be given a range of options to deal with breach of bail by a young person; including diversionary options available under the Young Offenders Act 1987 (NSW).

Recommendation 12: That police only be permitted to actively monitor young people on bail if they have a reasonable suspicion that the young person has breached or will breach their bail.

Recommendation 13: That police make all reasonable enquiries into the circumstances of a breach of bail by a young person before choosing the most suitable course of action.

Recommendation 14: That s22A of the Bail Act be repealed in its entirety. If this recommendation is not adopted, that young people be exempted from its operation.

Recommendation 15: That specific bail legislation relating to young people be drafted and separated from adult bail provisions, preferably within the Children (Criminal Proceedings) Act 1997 (NSW).

Recommendation 16: That special provisions applying to vulnerable young people be included in the legislation so that specific consideration is given to their vulnerability when making determinations regarding bail.

Recommendation 17: That the definitions of 'mental illness' and 'cognitive impairment' for the purposes of bail legislation be taken from existing legislation.

Recommendation 18: That consideration be given to the policy and funding changes that would be required in addition to amending or re-drafting bail legislation.

Submission of the New South Wales Public Interest Law Clearing House (PILCH)

It is widely acknowledged that the current bail legislation in New South Wales is in need of reform. Since 2000 the *Bail Act 1978* (NSW) (**the Bail Act**) has been amended eighteen times[1], making it what the Hon Greg Smith, Attorney General, has described as a "patchwork quilt that is difficult to read and understand."[2]

Where the liberty of children is at stake it is crucial that New South Wales has a clear and comprehensible Act to work from. For this reason, PILCH recommends that the Act be redrafted in plain language and structured in a logical way, enabling practitioners, decision makers and members of the public to apply and understand the Act.

Recommendation 1: That the Bail Act be redrafted using plain language and a logical structure.

[1] Peter Murphy & Anthony McGinness, *Strategic Review of the New South Wales Government into the Juvenile Justice System: Report for the Minister of Juvenile Justice*, Noetic Solutions Ltd, April 2010, pg vi (hereafter 'Noetic Review')

[2] Anna Patty, 'Premier acts on promise to review juvenile detention', *Sydney Morning Herald*, 10 June 2011.

1. Whether the Bail Act should include a statement of its objects and if so, what those objects should be;

PILCH believes it is important for the Act to include a statement of objectives in light of the changes that have taken place to the Bail Act over recent years. It is crucial to remember that it is not the purpose of bail to punish an individual, as they have not yet been found guilty of an offence. It is a fundamental principle of our criminal justice system that an accused is innocent until proven guilty. However, the Bail Act as it currently stands places very little emphasis on the rights of defendants and instead is a product of the law and order platforms that have been prevalent amongst State governments to date. This approach is inconsistent with both the notion that an individual is innocent until proven guilty and more importantly with the juvenile justice principles set out in both domestic and international legislation.

By inserting a statement of objectives into the Act, both police and magistrates who are applying the legislation can be reminded of the purpose of bail and make decisions consistent with that purpose. Although bail is a 'complex risk assessment'[3] the NSW Department of Justice and Attorney General has stated that three broad principles at its core are:

- The presumption of innocence;
- Flight risk and court attendance; and
- Protection of the community.

PILCH agrees with these general principles and believes that they should be set out at the start of the Act.

Enumerating these principles would have important implications for children and young people. If it is agreed that one of the primary goals of bail is to ensure attendance at court and such an objective were included in the Act, then most young people should not require bail at all. Statistics showing the outcomes of appearances at the Children's Court by bail status provide strong evidence that the risk of a young person absconding whilst on bail is very low. Of those granted bail or where bail was dispensed with, fewer than 2 percent of young people failed to appear at court.[4] Thus imposition of bail on a young person to ensure they return to court is unwarranted.

Furthermore, young people are often placed on bail for summary offences. These cases can be heard without the requirement of the young person's presence in court. Thus placing the young person on bail so they return to court on the relevant date is

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[3] Department of Justice and Attorney General Review, October 2012, at 12.

[4] Department of Justice and Attorney General, *New South Wales Criminal Court Statistics 2008* (NSWBCSR, Sydney 2009).

incongruous. PILCH believes that if a statement of objectives were included in the Act, practices such as these could be decreased or prevented entirely.

In light of the disproportionate numbers of young people being held on remand, PILCH also believes that such a statement of objectives should emphasise that detention should only be used as a last resort. Reference could be made to the international instruments to which Australia is a party. Under Article 37(b) of the *Convention on the Rights of the Child 1989*, the arrest and detention of a child "...shall be used only as a measure of last resort..." and Rule 19.1 of the Beijing Rules[5] states that "the placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period."

Notwithstanding these international obligations, over 80% of the young people currently held on remand will not go on to receive a custodial sentence.[6] Clearly, the principle of detention as a last resort is not being applied in the New South Wales Childrens' Courts so the Bail Act must be amended to ensure our compliance with this fundamental principle.

Recommendation 2: That the Bail Act include a statement of objectives that the purpose of bail is to: (1) maintain the presumption of innocence; (2) ensure a person returns to court; and (3) protection of the community.

Recommendation 3: That the Bail Act's statement of objectives makes clear that detention should be used only as a last resort, especially in respect of children and young people.

[5] The United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985.

[6] NSW Law reform Commission, *Young People with Cognitive and Mental Health Impairments in the Criminal Justice System,* Consultation Paper 11 (2010) at 30.

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

Currently, section 32 of the Bail Act outlines the factors that should be taken into account when a court or authorised officer is determining whether or not to grant bail. Such a section is important to provide relevant factors to consider for both the decision maker (magistrate or authorised officer) and the person making the bail application.

However, PILCH believes that the section should be more detailed in respect of children and young people. In its current form, section 32 comprises a number of broad based considerations and only requires a decision maker to explicitly consider an applicant's youth in subsection 32(1)(b)(v): "*if the person is under the age of 18 years...any special needs of the person arising from that fact.*"

It is well recognised both within Australia and internationally that young people, by virtue of their age and lack of emotional and developmental maturity, should have special protections in dealing with the criminal justice system. The Act in its current form treats juveniles and adults equally. The idea that young people should not be treated the same as adults currently underpins much of the juvenile justice system in New South Wales and were outlined in the Green Paper in 1993.[7] In light of this acknowledgement, it is important that bail legislation include a specific or separate list of factors to be taken into account when granting bail for a young person.

It is also worth noting that both Queensland and the ACT have provisions applicable to young people when making a bail determination. Queensland's *Juvenile Justice Act 1992* (QLD) includes separate criteria to be considered for young people and adults whilst the ACT Act refers the court or authorised officer to the *Youth Justice principles* contained in section 94 of the *Children and Young People Act 1999* (ACT) to determine the best interests of the young person.

The New South Wales Law Reform Commission's *Report 104 Young Offenders (2005)* (**NSWLRC Report**) endorsed this approach and stated[8]:

> *"The special needs of young people would be better addressed if the Bail Act listed separate criteria, consistent with the principles contained in s6 of the CCPA to be applied to young people. The application of such criteria would deter unnecessary refusals of bail and the imposition of harsh and inappropriate conditions."*

PILCH also endorses this approach and recommends that the criteria to determine bail for young people should be developed primarily by reference to the principles in the

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[7] Juvenile Justice Advisory Council of New South Wales, *Future Directions for Juvenile Justice in NSW*, 1993.
[8] NSWLRC, Report 104: Young Offenders, 2005 at 243.

Children (Criminal Proceedings) Act 1987.Section 6 of that Act requires that a decision maker have regard to the following principles:

- That children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard and a right to participate in the processes that lead to decisions that affect them;
- That children who commit offences bear responsibility for their actions, but because of their state of dependence and maturity, require guidance and assistance;
- That it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption;
- That it is desirable, wherever possible, to allow the child to reside in his or her own home;
- That the penalty imposed in a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind;
- That is it desirable that children who commit offences be assisted with their reintegration into the community so as to stain family and community ties;
- That it is desirable that children who commit offences accept responsibility for their actions and, wherever possible, make reparation for their actions;
- That, subject to the other principles described above, consideration should be given to the effect of any crime on the victim.

It is important that these principles be taken into consideration when determining whether a young person should be granted bail. Against the backdrop of these broader juvenile justice principles, there should also be consideration of the effect of bail in particular on the young person. These could include considerations such as:

- the young person's capacity to understand and comply with their bail and any attached conditions;
- whether bail is appropriate for the offence with which the young person has been charged;
- the circumstances of the young person;
- the detrimental effect of bail and remand on a young person.
- the appropriateness of bail in relation to the young person's culture; and
- any other orders that the young person may be on, such as Community Service Orders and Mental Health Orders and whether there is a potential for them to become confused by the many conditions.

Additionally, in view of the evidence that many young people are spending time on remand because accommodation cannot be found for them, there should also be a specific consideration of a young person's homelessness in the Act. This should make clear that a young person's homelessness should *not* in and of itself preclude the

granting of bail. Where a young person must be remanded in custody because there is no accommodation available to them, the Act should require a review of their situation every 48 hours, as recommended in the Noetic review[9] so they are not left in remand for indefinite periods of time. PILCH also recommends that a residential bail support program be funded to provide accommodation to those young people who are granted bail but have nowhere to go and would otherwise be remanded in custody.

Recommendation 4: That the Bail Act incorporate the principles in section 6 of the *Children (Criminal Proceedings) Act 1987*.

Recommendation 5: That the Bail Act include a statement of factors specifically relating to children and young people to take into account in determining a bail application.

Recommendation 6: That the situation of a young person remanded in custody due to lack of accommodation be reviewed every 48 hours.

Recommendation 7: That the NSW Government fund a residential bail support program to accommodate young people who would otherwise be remanded in custody.

[9] Noetic Report, Recommendation 21.

3. What presumptions should apply to bail determinations and how they should apply;

The Bail Act's current provisions relating to presumptions and bail are incredibly confusing for legal practitioners and decision makers. For various offences there are currently presumptions for or against bail, as well as neutral presumptions, a right to bail for some offences and provisions for exceptional circumstances. A priority in drafting new bail legislation should be clarifying the presumptions for and against bail and setting them out in such a way that a lay person would be able to understand the provisions.

PILCH believes that, with limited exceptions, bail should be dispensed with for all young people. No young person should be remanded in custody other than in exceptional circumstances. It is crucial for the development of children and young people that they are permitted to remain the community and have minimal disruption in their lives. Such an approach would also accord with the statement of objectives proposed earlier in this submission and the principle of detention as a last resort.

In the case of young people charged with summary offences, PILCH is of the opinion that young people should have a **right** to bail. Such a right would likely assist in decreasing the numbers of young people who spend time on remand for offences for which they do not go on to receive a custodial sentence. This would likely also go a long way to decreasing the rate of recidivism, as spending time on remand is the single most significant factor in determining the likelihood of a young person reoffending.[10]

Recommendation 8: That there be a presumption that bail is dispensed with for *all* young people.

Recommendation 9: That young people charged with summary offences have a *right* to bail.

[10] Justice Policy Institute, *The Dangers of Detention: The impact of incarcerating Youth in Detention and Other Secure Facilities,* http://www.justicepolicy.org/images/upload/06-11_REP_DangersOfDetention_JJ.pdf

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

In light of the wealth of evidence pointing to increased numbers of young people being held on remand and over-policing of young people on bail[11], changing the available responses to a breach of bail should be a high priority in any reform of the bail legislation.

Under the current Bail Act, section 50 provides that: "*where a police officer believes on reasonable grounds that a person who has been released on bail has, while at liberty on bail, failed to comply with, or is, while at liberty on bail, about to fail to comply with, the person's bail undertaking or an agreement entered into by the person pursuant to a bail condition; a police officer may arrest the person without warrant and take the person as soon as practicable before a court.*" Whilst this provision does not *require* a police officer to arrest someone for a breach of bail, it does not provide officers with any alternatives.

Alternatives to Arrest

In the event of a breach of bail conditions, a young person should only be arrested as a last resort. There should also be a number of safeguards in place to ensure that such an arrest is not the primary response to a breach. It is useful at this point to define two separate types of breaches that can occur when someone is released on bail. The first is what can be called a 'technical breach'. Such breaches normally involve breaching of bail conditions such as a curfew, but do not amount to a separate offence and do not cause harm to the young person or community.[12] The other type of breach is where a new offence has been committed whilst someone is at liberty on bail. It is particularly in the cases of these 'technical breaches' that the safeguards should be in place to protect children and young people as they are caught out most often by these. The Youth Justice Coalition (YJC) found in their 2010 report 'Bail Me Out: NSW Young People and Bail' that over half of those brought before the court for breaches of bail were for technical breaches rather than new substantive offences.[13]

In the event of a technical breach, arrest should not be an option for police. A new offence has not been committed and to detain a child under such circumstances is clearly contrary to the policy of detention as a last resort. In the event of a technical breach, the options available to police under the *Young Offenders Act 1997*, such as warnings and cautions, could be available instead. Alternatively, police could be

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[11] Sumitra Vignaendra, Steve Moffatt, Don Weatherburn & Eric Heller, ' Recent Trends in Legal Proceedings for Breach of Bail, Juvenile Remand and Crime', *Crime and Justice Bulletin No 128,* NSW Bureau of Crime Statistics and Research, May 2009.

[12] The Youth Justice Coalition, *Bail Me Out: NSW Young People and Bail,* (2010)(hereafter "Bail Me Out") at 17.

[13] Bail Me Out at 12.

empowered to issue a Court Attendance Notice in the event of a breach. This would encourage compliance with bail conditions where possible for young people but also keep them out of juvenile detention while awaiting their court date. The legislation should be drafted in such a way that these alternative options to detention *must* be considered before arrest so that police officers are compelled to try to divert the young person. Such an amendment would bring bail legislation in line with section 7(a) of the *Young Offenders Act 1997* which states that the least restrictive sanction should be used for a young person, and section 8(1) of the *Children (Criminal Proceedings) Act 1987* which makes clear that criminal proceedings should not be commenced against a young person other than by way of Court Attendance Notice.

Policing of Bail Compliance

One of the reasons that so many young people are being arrested for breaching technical bail conditions is that they are being constantly monitored by police. It is well known that under the previous State Plan, reducing recidivism was a key goal and the means of achieving and measuring this was targeting those who breach bail. As children and young people have more numerous conditions placed upon them, they are easier to target. There have been countless stories of children and young people who have been arrested for breaching a curfew condition by a mere few minutes or inadvertently entering an area from which they are banned and consequently being arrested[14]. Police officers are also known to knock on the doors of homes where children on bail are living in the early hours of the morning to ensure that the young person is at home. This wakes the entire family and identifies the young person as someone on bail to those in the community around them. There should therefore be provisions limiting the powers of police to monitor the children and young people who are placed on bail conditions. They should not be permitted to monitor any children and young people for breach, unless they have a reasonable suspicion that the child or young person has been breaching their conditions. Such a provision could be included as part of the Bail Act or the *Law Enforcement (Powers and Responsibilities) Act 2005* (NSW).

In the event that police believe that a young person should be arrested for breaching their bail, there should also be a legislative requirement that police make all reasonable enquiries into the circumstances of that young person's breach. A focus of PILCH's work in the CIDnAP project is those young people who are mistakenly arrested on the basis of varied or out of date bail conditions due to errors in the COPS system. We are repeatedly told by the young people that they (and often also their parents) tried to tell police that they were no longer required to comply with the bail condition they are charged with breaching. The police rarely listen and the young person subsequently spends time in detention before they can be brought before the court. In such

[14] Bail Me Out – case studies.

circumstances the police should be required to contact the court registry (if it is open) or wait for the young person's family to provide documentation supporting their assertions. Such enquiries should also include questioning why the young person breached their bail. If for example, they are found to have breached their curfew, the police should enquire whether there are any domestic issues at home that the young person may have perhaps tried to escape. This has been the circumstance for a number of young people whom PILCH has encountered in the course of our project.

The most important element in any legislative reforms is that the police are given flexibility in dealing with young people who breach bail conditions. They currently have little to no flexibility which is likely a significant cause of the large numbers of young people on remand in New South Wales.

Recommendation 10: That arrest is *not* an option available to police in the event of a technical breach of bail conditions.

Recommendation 11: That police officers be given a range of options to deal with breach of bail by a young person; including diversionary options available under the Young Offenders Act 1987 (NSW).

Recommendation 12: That police only be permitted to actively monitor young people on bail if they have a reasonable suspicion that the young person has breached or will breach their bail.

Recommendation 13: That police make all reasonable enquiries into the circumstances of a breach of bail by a young person before choosing the most suitable course of action.

5. The desirability of maintaining s22A;

There is no doubt now that the introduction of section 22A to the current Bail Act by the *Bail Amendment Act 2007* has largely been responsible for the dramatic increase in numbers of young people on remand. This section must be repealed, if not in its entirety then at least in respect of children and young people. Bail should be available to young people at every opportunity and a Supreme Court application is not a reasonable alternative to the Children's Court for making such an application.

The rationales relied upon by the (then) Attorney General for introducing the section[15] have no relevance for children and young people. Due to the structure of the Children's Courts it is very difficult to 'magistrate shop' and the Noetic Review found no evidence of unnecessary and vexatious applications or of victims being harmed by repeated bail applications.[16]

Notwithstanding the irrelevance of the rationale for section 22A to young people, its imposition has caused a staggering increase in the number of young people on remand yet it has not caused a correlative increase in the adult remand population[17]. This demonstrates the disproportionate effect of the section on young people.

In light of such clear evidence, PILCH strongly advocates for the removal of the section from the Act.

Recommendation 14: That s22A of the Bail Act be repealed in its entirety. If this recommendation is not adopted, that young people be exempted from its operation.

[15] New South Wales Legislative Council, *Second Reading Speech, Bail Amendment Bill 2007,* 17 October 2007 at 2669.
[16] Noetic Review, at 70.
[17] NSW Department of Corrective Services, *Facts and Figures* (9th ed) (2009).

6. Whether the Bail Act should make a distinction between young offenders and adults and if so, what special provision should apply to young offenders;

It has already been acknowledged in this submission that children and young people are different from adults and should be treated as such. This has also been recognised by the myriad other legislative instruments that deal exclusively with young people, including the *Young Offenders Act 1997* and the *Children (Criminal Proceedings) Act 1987*.

As children and young people should be treated differently in respect of bail, it follows that any legislation applying should ideally be separated. One option is to place separate provisions within the Bail Act itself under a new Part. However, PILCH is of the view that bail provisions relating to young people would fit better within the *Children (Criminal Proceedings) Act 1987* (NSW). This Act currently applies to children at all other stages of the criminal process and it would make sense for the bail provisions to lie within this Act, rather than in the broader Bail Act that also applies to adults.

Recommendation 15: That specific bail legislation relating to young people be drafted and separated from adult bail provisions, preferably within the *Children (Criminal Proceedings) Act 1997*.

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

The rationale for drafting particular provisions in respect of young people is to ensure that their particular vulnerabilities are taken into account. Those children and young people who have cognitive or mental health impairments or identify as Aboriginal or Torres Strait Islander are even more vulnerable and should therefore have this status specified as an additional consideration. Particular consideration should be given to how this young person's status will affect their ability to comply with any bail conditions. For instance, will they be able to understand and comply with multiple bail conditions if they have a cognitive or mental health issue? Will an Aboriginal young person understand a bail condition requiring them to be in the company of a parent when their culture has more fluid concepts of family than we are used to?

The definitions of those with a cognitive impairment and mental illness could be taken from existing legislation.

The *Mental Health Act 2007* (NSW) defines a mental illness in section 4 as: "*a condition that seriously impairs, either temporarily or permanently, the mental functioning of a person and is characterised by the presence in the person of any one or more of the following symptoms:*

(a) Delusions
(b) Hallucinations
(c) Serious disorder of thought form;
(d) A severe disturbance of mood;
(e) A sustained or repeated irrational behaviour indicating the presence of any one or more of the symptoms referred to in paragraphs (a)-(d)."

A cognitive impairment is described in the Work and Development Order Guidelines, drafted by the Department of Justice and Attorney General, as: "*a wider range of disabilities than intellectual disability and includes a disability which:*

(a) Is attributable to impaired brain functioning that can be associated with many diagnoses that are present at birth or acquired throughout a person's life span; and
(b) Is permanent or likely to be permanent; and
(c) Results in a significantly reduced capacity in one or more major life activities, such as communication, learning, mobility, decision-making, or self-care.

The guidelines go on to provide the following examples: "*a developmental disorder (including an autistic spectrum disorder or cerebral palsy), neurological disorder, dementia, brain injury (including from trauma or as a result of substance abuse)*".

Recommendation 16: That special provisions applying to vulnerable young people be included in the legislation so that specific consideration is given to their vulnerability when making determinations regarding bail.

Recommendation 17: That the definitions of 'mental illness' and 'cognitive impairment' for the purposes of bail legislation be taken from existing legislation.

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

In drafting new bail legislation or amending the current Act, regard should be had to the regulations in Victoria where the remand population is both stable and low for young people.

In Queensland, since 2001 the Youth Bail Accommodation Support Service (YBASS) has operated alongside the bail legislation. YBASS is available to those young people who are at risk of remaining on remand due to lack of accommodation. YBASS is essentially an agency service that provides a youth worker to the young person to assist in finding accommodation that the young person would otherwise not have located themselves.

The considerations relating specifically to young people in Queensland and the ACT have already been addressed in this submission.

9. Any other related matter.

It is important to recognise that whilst amending or re-drafting the Bail Act is important and well overdue, it cannot take place in a vacuum. The issues that frequently arise surrounding bail are caused not only by the legislation itself but also as a result of police practice, political pressures and availability of resources.

For example, section 22A alone would not have caused the increase in the numbers of young people on remand to be as significant, had it not been coupled with increased police monitoring of young people on bail. It is this over-policing, in conjunction with the ineligibility of a young person to apply for bail again under s22A that together have caused the increase in numbers on remand. Thus, repealing s22A alone will not reduce the numbers of young people on remand enough unless the associated police practices are changed.

Similarly, the numbers of young people being held on remand due to lack of available accommodation will not decrease unless alternative accommodation is provided, whether it be in the form of bail hostels or otherwise. Although the previous New South Wales government tendered for these bail hostels, the tender was abandoned and no additional accommodation has since been provided to alleviate the problem. Whilst the Bail Hotline has been a positive step forward, its efficacy is limited by the number of beds available to homeless young people on a given night. A residential bail support program such as that mentioned in recommendation 7 would go some way to improving the outcomes for homeless young people who are granted bail subject to a 'reside as directed' condition.

Recommendation 18: That consideration be given to the policy and funding changes that would be required in addition to amending or re-drafting bail legislation.