New South Wales Law Reform Commission
Bail

Submission of the Office of the Director of Public Prosecutions (ODPP)

1. Over-arching considerations

1.1 What fundamental principles or concepts should be recognised and implemented by the Commission in reviewing the law of bail and the existing Bail Act?

The principles that should be recognised in reviewing the law of bail are essentially a reflection of the fundamental principles of criminal justice, including the presumption of innocence, a general right to be at liberty before trial and sentence, balanced against ensuring that the accused attends court and the community is protected from further offending by the accused. The essential concept in the Act should be that determining bail is a risk assessment exercise balancing the right of the accused to liberty and the interests of the community.

The current Bail Act, with its scheme of presumptions has become overly focused on the offence charged. This is probably a significant contributing factor to the number of persons who are bail refused who ultimately are acquitted or dealt with for lesser offences for which they may have been granted bail. The offences charged initially are often not the offences the accused is ultimately dealt with and it is the facts, the strength of the case and the circumstances of the offender that are more relevant to the risk assessment exercise.

Bail is not about punishment it is about risk and specifically risk in respect of 2 issues,

- Whether the accused will attend court?
- The protection of the community (at large and specific individuals) from the accused's further offending

1.2 Should the Bail Act include objectives and, if so, what should they be?

We agree with the objects proposed by the Bail Roundtable – namely

"The object of this Act is to ensure that a person who is required to appear before a court in criminal or other proceedings is not deprived of liberty without an appropriate balancing of the interests of the person and the interests of the community."

2. Right to release for certain offences

2.1 Should a right to release on bail when charged with certain offences be retained in principle?

If the Bail Act is simplified and addresses the risk assessment exercise adequately, in theory it would not be necessary to state a right to release for minor offences, and particularly those that do not carry a custodial penalty. Nevertheless we have no objection to the right to release on minor offences being expressly stated within the Act for abundant caution.

2.2 If so, should s 8, Right to release on bail for minor offences, be changed in some way?

No.

2.3 Should the classes of offences covered by s 8 be varied?

No.

3. Presumptions against and in favour of bail and cases in which bail is to be granted in exceptional circumstances only

3.1 How are the existing presumptions applied in practice?

When section 9 of the Bail Act was first enacted it provided that except in relation to a number of specified serious crimes (murder, manslaughter, serious drug offences and serious robberies) accused persons enjoyed a presumption in favour of bail.

A series of amendments to the Act, notably, to section 9, and the inclusions of ss9A and 9B operated to render the presumption in favour of bail an almost meaningless phrase. The impact of section 9B(3) in particular is such that any person convicted at any time of an indictable offence of whatever severity, who is charged with an indictable offence of whatever severity, loses their entitlement to bail. This has achieved the absurd result, that a person for example charged with shoplifting who decades earlier as a first offender was convicted at the Children's Court for passing a bad cheque is in no different a position as far as the presumption is concerned, to that of a person charged with bank robbery and who has spent their lifetime committing crime.

We are unaware of any instances in recent times where a person has been refused bail on a charge in respect of which they enjoy a presumption in favour. That is because the combined effect of sections 9, 9A and 9B means it is a rare case where an accused person would enjoy a presumption in favour of bail. In practice today the loss of the entitlement to bail applies to so many of the cases before the Courts that it has little effective impact.

By contrast the presumption against bail [sections 8A, 8B, 8C, 8D] is a provision about which there is little confusion. The law in respect of the application of those sections is reasonably well-settled.

In Regina v Mitchell John Newby[1] his Honour as he then was, Mr Justice Sully relevantly made the following observations,

> *"Parliament has enacted over time a series of provisions in ss 8A, 8B and 8C, as well as in s 8D, which define in the aggregate, groups of offences which are seen by Parliament as being so serious as to justify, not the peremptory and unwavering denial of bail, but the abrogation of the normal presumption in favour of bail and its replacement by a presumption against bail, that presumption being rebuttable by an applicant for bail who can bring his case within the words, of, relevantly to this application, subs (3) of s 8D."*

His Honour then discussed the construction of s 8D(3) and concluded by observing,[2]

> *"Language such as that employed by the Parliament in subs (3) of s 8D has in fact been the subject of a not inconsiderable body of judicial construction. The authorities are collected, helpfully, in a decision of Sperling J of this Court in an application by one Iskander[3]. I am content to proceed upon the basis that the following statement quoted from the decision of the Court of Appeal in the Matter of Brown[4] sufficiently expresses the current state of curial opinion on the point:*
>
> *"The foregoing decisions make it plain as indeed the section itself does that it is the will of Parliament that persons charged with offences of this variety should ordinarily be refused bail. In determining whether the very high onus imposed by law has been discharged less weight is placed upon the circumstances common to all applicants for bail, more weight is placed upon the strength of the Crown case against the person seeking bail."*

3.2 What purposes are they intended to serve? What purposes do they serve?

We note that the word "presumption" only appears in the heading, and is not used in the operative part of sections in Division 2A. The exceptions to section 9 serve the purpose of changing the onus on the party, making it easier for the prosecution to argue against the grant of bail and harder for the applicant to satisfy the court bail should be granted.

The introduction of s8A (and subsequently 8B, 8C, 8D) were ad hoc legislative responses in a get tough on law and order climate. The effect of those provisions is seen in the above extract from Newby. Ignoring the presumption of innocence and the accused person's right to liberty, parliament introduced a scheme where in certain identified categories of offences, the onus was reversed.

Ultimately the scheme "presumptions" serves the purpose of unnecessarily complicating the task of assessing whether or not bail should be granted.

3.3 Do the existing presumptions serve their intended or advocated purpose?

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[1] Unreported, Supreme Court, NSW, 27/1/2006, p 9
[2] Ibid, p 11
[3] *(2001) 120 ACR 302, see in particular at 304 and following*
[4] *U*nreported, Court of Appeal, 15 March 1994

For the reasons outlined it is our view the presumptions do not serve the purpose for which they were intended.

3.4 Is there a better way of achieving the purpose of presumptions?

The word *presumption* in so far as it applies to bail laws in NSW has lost meaning. We do not support the retention of the present presumption for, presumption neutral, presumption against approach to bail decision making. It is time to clean the slate in terms of the use of that word.

3.5 Is there a legislative framework for presumptions in other jurisdictions that could be used as a model?

We are not aware of any.

3.6 What should there be?

We support a model based on the following [and which represents a return to the theme of the original Act],

i. A right to release on bail for minor offences

ii. Bail to be granted (with reasonable conditions if they are necessary) in all other cases, unless the prosecution case on bail is such that the risk of flight or the risk to the community (including any particular person or persons) of further offending either taken together or alone are such as to outweigh the accused's general right to liberty

iii. If it is considered necessary for exceptions in particular classes of matters, there be a provision that bail not be granted in respect of those matters unless there are exceptional circumstances (examples of such provisions in the present Bail Act include ss 9C, 9D and 30AA).

3.7 Should there be a presumption against bail in some cases only and if so, in what cases?

No. See above.

3.8 Should there be a presumption in favour of bail in some cases only?

Yes. See above.

3.9 Should there be an explicit provision that there is no presumption against or for bail in some cases? If so, in what cases, and what should a "neutral" presumption mean?

No. See above.

3.10 What principles should guide the classification of cases to which a presumption applies?

See 3.6

3.11 If presumption retained should the Bail Act specify the meaning and effect of such a presumption? Should such a presumption impute no more than a burden of persuasion or something more? Should the law concerning the meaning of a presumption against bail be changed by statute?

The Office of the Director of Public Prosecutions does not support the concept of "presumptions" being maintained.

3.12 Should the concept of "exceptional circumstances" be retained and if so, should the Bail Act specify the meaning and effect of this category?

The Office of the Director of Public Prosecutions supports the concept of exceptional circumstances being retained in respect of matters to which s30AA applies.

In Daron John Wright [2005] NSWSC 588, his Honour, Justice Rothman was discussing s 9D, Bail Act. Relevantly, he said,

> *"The use of the term "exceptional circumstances" means that the circumstances need to be exceptional but not necessarily special. "Special" is defined by the Macquarie Dictionary as "relating or peculiar to a particular person, thing, instance; having a particular function, purpose, of a distinct or particular character; being a particular one; extraordinary or exceptional". Thus the distinction between "special and extraordinary" and "extraordinary" may be more illusory than substantial.*
>
> *The Macquarie Dictionary defines the word "exceptional" as:*
>
> *"1. forming an exception or unusual instance; unusual; extraordinary.*
>
> *2. exceptionally good, as of a performance or product.*
>
> *3. exceptionally skilled, talented or clever."*
>
> *The Oxford English Dictionary defines the word "exceptional" as:*
>
> *"Of the nature of or forming an exception; out of the ordinary course; unusual, special."*
>
> *Thus it would seem that if a Court or authorised officer is satisfied that one or more factors either singularly or combined produced a circumstance or situation out of the ordinary or unusual the mandatory requirement otherwise contained within sub-section 9D(1) of the Act will no longer apply. "Special" on the other hand, seems to imply a unique situation or one which pertains only to that individual.*
>
> *Once one is satisfied of the "exceptional circumstances" one is drawn to the presumptions otherwise contained in the Act and the provisions of s.32 on the question of the grant of bail."*

"Exceptional circumstances" is the setting of a higher barrier for an accused person to get bail in a relevant case, than the various sections in the Bail Act for which there is a presumption against bail. In Regina v Grant Kelly Connelly[5] his Honour, Justice Hoeben was considering s 8C. His Honour commented,

> *"It was submitted by the Crown (correctly in my opinion) that exceptional circumstances require a higher onus than situations where there is a presumption against bail. The extent to which that is so, however, must obviously be a matter of fact and degree upon the particular circumstances of each case. As a general statement of principle, however it seems to be correct."*

[5] Unreported, Supreme Court, NSW, 16/2/2006, p 2

4. Dispensing with bail

4.1 Should a person be entitled to have bail dispensed with altogether in certain cases?

Yes.

4.2 If so, should such cases include:
(a) offences not punishable by imprisonment ("fine-only" offences) (except for non-payment of a fine);

Yes. Bail should be dispensed with for fine only offences, an accused person should not be detained for any offence that does not carry a custodial penalty.

(b) cases where a juvenile is being dealt with by way of a Youth Justice Conference;

Yes. If police decide that a child is eligible and entitled to be dealt with by way of a caution or to be referred to a youth justice conference under the *Young Offenders Act* 1997, bail should not be imposed. It is inconsistent with the purpose of the *Young Offenders Act* 1997 for bail to be imposed by police when diverting a child from court by way of caution or referral to a youth justice conference. Similarly in respect of a youth justice conference under s 33(1)(c1) of the *Children (Criminal Proceedings) Act* 1987.

(c) any other class of case?

No.

4.3 Should any such entitlement be qualified by reference to cases where the police are unable to ascertain sufficient information concerning the person's identity, address and other details to enable a charge to be laid?

No, refusing Bail should not be utilised by Police in this manner to lay a charge. This issue can be otherwise addressed by Police powers.

5. Police bail

5.1 *Should any change be made to the ability of police to grant bail and the procedures that apply?*

Office of the Director of Public Prosecutions is not in a position to comment.

5.2 How is the right to seek an internal review of Police refusal to grant bail by a more senior officer working in practice? Are any changes required to the provisions?

Office of the Director of Public Prosecutions is not in a position to comment.

6. Court bail

6.1 Do the courts have adequate and appropriate jurisdiction to grant bail in relation to proceedings before them?

Yes.

6.2 Is the jurisdiction of authorised justices to grant bail in the Local Court used regularly in practice? Is it appropriate to continue?

We understand it is still regularly used in country areas. We have no objection to it continuing. However in such cases where bail is refused or granted and not met, the matter should be brought before the Local Court as soon as practicable.

6.3 Should there be a provision that, where bail has been refused by the police or granted by the police subject to conditions, the court is required to make a fresh determination concerning bail at the first appearance of the person at court?

The inclusion of mandatory requirements in the Bail Act adds to the Act's complexity. Our preferred position is that this provision be removed and the accused's rights to seek review are retained. We note that there is nothing to prevent a Court inviting the accused to apply for bail if the Court on its own motion considers that bail should be amended or granted.

6.4 What provision, if any, should be made for mandatory reconsideration of the question of bail and of any conditions at subsequent appearances?

A mandatory provision of this nature is not required.

7. Repeat Bail applications

7.1 Should s22A be repealed or amended in some way?

No. Sensibly it provides that a Court has power to decline to hear an application where it has heard and considered a previous application in the same case by the same accused unless there are new grounds.

The provision does not specify what "grounds" means; therefore leaving the accused with widest possible options should a change of circumstances occur.

8. Criteria to be considered in bail applications

8.1 In relation to s 32, Criteria to be considered in bail applications, should there be prescribed criteria? If so, what should those criteria be?

Yes, there should be prescribed criteria. We endorse the work done by the Bail roundtable on the criteria as drafted in Part 6 Division 1 of the revised public consultation draft of the Bail Bill 2010.

8.2 Is there a set of criteria to be considered in bail applications in another jurisdiction that can be recommended as a model?

Not that we are aware of.

8.3 Should an overarching test be applied to the consideration of the criteria such as:

- *'unacceptable risk' (as in the Bail Act 1977 (Vic) s 4(2)(d), or Bail Act 1980 (Qld) s 16(1)(a)) or*
- *'reasonable grounds to suspect' (as in the Bail Act 1982 (WA) s 6A(4)) that a particular circumstance will arise?*

We support an overarching test to the criteria of "reasonable grounds to suspect" that a particular circumstance will arise.

8.4 Should the currently prescribed primary criteria be amended or supplemented in any way?

Depending on the ultimate course taken by this review it may be necessary to supplement the criteria in response to compensate for other provisions that may be removed or amended in the current Bail Act.

8.5 Should prescribed primary criteria be exhaustive?

Yes.

8.6 If objects are included in the Act, should the primary criteria relate to the objects and if so, how?

Principles of statutory interpretation should be relied on, the objects are over arching and recourse may be made to them to assist in interpretation. Otherwise the criteria should clearly reflect the risk assessment / balancing exercise required to make the determination about bail.

8.10 Section 32(1)(b)(iv) allows the decision-maker to consider whether or not the person is incapacitated by intoxication, injury or use of a drug or is otherwise in danger of physical injury or in need of physical protection as one of the factors relevant to the "interests of the person".

(a) Should s 32(1)(b)(iv) be retained?

We do not support the retention of s32(1) (b) (iv). The incapacitation referred to in this sub section is of a temporal nature, as the effects of intoxication or the use of a drug will subside after a period. As such it should have no bearing on the decision of whether or not to grant bail to someone. If an accused's incapacitation means if bail is granted they may not have adequate capacity to enter bail or understand consequences, then there are (or should be) adequate powers for the Police to delay the person entering bail until such time as they are fit to do so.

Similarly the need for physical protection should not be a consideration relevant to bail, this is an issue that should otherwise be addressed by LEPRA or witness protection.

(b) Should this consideration operate as a reason for granting bail, or as a reason for refusing bail, or either depending on the circumstances?

Not applicable

8.11 Are any other changes required to the way the criteria operate?

No.

9. Bail Conditions

9.1 What should be the scope of the court or police power to impose bail conditions?

Bail conditions should generally only be imposed when it is reasonably necessary to meet one of the objectives of the Act.

At the lowest end is unconditional bail.

It would be difficult, however, to draft a definite upper limit, so a requirement that a condition be reasonable in the circumstances is probably the most appropriate test.

9.2 What should be the purposes of imposing requirements or conditions concerning conduct while on bail?

Conditions should only be imposed when they go to meet one of the objectives of the Act, namely to ensure that that a person attends court or for the protection of the community.

9.3 What matters should be considered before such requirements or conditions are imposed, and what limitation should there be on the imposition of such requirements or conditions?

First, there obviously has to be a consideration of the subjective circumstances of the accused person.

If conditions are too onerous, it may be merely setting a person up to fail. This is undesirable as breaches of bail have a continuing effect on a person's future bail prospects.

On the other hand reasonable conditions must be considered as one way to allow the release of a person, who otherwise would have remained in custody.

9.4 Should the purposes for which such requirements or conditions may be imposed be any wider than the considerations, which apply to the grant of bail under s.32? If so, what is the rationale for having wider considerations in relation to conduct on bail than the considerations relevant to whether to grant bail at all?

No, there should be consistency between s.32 and any considerations that go to imposing bail conditions.

9.5 In particular, should the purposes of imposing such requirements or conditions (see s.37) include the promotion of effective law enforcement and protection and welfare of the community without further limitation?

Yes.

9.6 Should the question of whether to grant bail and the question of what requirements or conditions as to conduct to impose if bail is granted be seen as the one process, with the same considerations being applicable to both aspects of the process?

Yes.

Although it would be possible to break the process down if necessary, to stages such as (1) can the person be granted unconditional bail (2) if not can the person be granted conditional bail (3) if not then the person must be Bail refused.

9.7 Should the legislation specify what requirements or conditions as to conduct may be imposed? Should the list of such requirements or conditions be exhaustive?

Sections 36, 36A and s.36B provide an exhaustive list of the type of conditions that can be imposed.

In our view the list of conditions should not be exhaustive. Unique situations arise that will require unusual conditions. As long as the conditions are in furtherance of the purposes of the Act and are reasonable the Court should have some flexibility in this regard.

9.8 Should there be a set of "standard conditions", supplemented by "special conditions" in some cases?

No.

9.9 If so, should courts be required to provide reasons why conditions in addition to standard conditions are necessary? For example, in the case curfews, the need for and rationale for the timeframe of the curfew, or the need for and amount of money to be forfeited if the person does not comply with their bail undertaking?

The court and police are already required to provide reasons for granting bail, but in practice these reasons, if they are ever set down, are usually short.

9.10 Should there be a requirement that "special" conditions be reasonable in the circumstances?

No. Conditions should simply be reasonable in the circumstances.

9.11 Is there any reason for special provision for a condition that the person reside in accommodation for persons on bail (see s 36(2)(a1)) rather than allowing such a requirement to be considered along with other possible requirements as to conduct while on bail?

Section 36(2)(a1) was inserted into the Act at a time when it was hoped that Government agencies could provide Bail Hostel services, and at a time when the legislation provided that Corrective Services should make this type of accommodation available.

For a number of reasons development of this type of service has never been pursued, despite the fact that Bail Hostels have the potential to reduce the remand population and be much cheaper to run than full time remand.

9.12 What should the mechanism be for imposing bail conditions?

Bail should be granted with conditions as to conduct. This makes it clear to the person that if they fall below these conditions, then bail may be revoked.

Bail conditions should be provided to a person in writing and explained verbally where appropriate.

9.13 In particular, should requirements as to the person's conduct while on bail be expressed as conditions on which bail is granted, rather than being the subject of a condition that the person enter into an agreement to observe specified requirements?

Yes.

9.14 Is there any reason for requirements concerning conduct on bail not being conditions attaching directly to the grant of bail?

No, this may add a layer of complexity that is undesirable.

It is also difficult to conceive of conduct that could fall into that category.

9.15 If such requirements were attached directly to the grant of bail as conditions, should the legislation nonetheless provide that a person is not to be released on bail unless the person first provides a written undertaking to comply with those conditions, as in the case of the requirement to appear (under s 34)?

Yes**.**

9.16 Should there be any other process, in place of or in addition to such a written undertaking, to ensure that the person knows and understands their obligations while on bail?

Yes. In practice this already occurs. The Courts and police must be satisfied that the person understands the conditions. This may involve verbally explaining the conditions or directing the person to other services, such as translation services.

9.17 What provision could be made in the legislation to facilitate compliance with conditions or requirements under a grant of conditional bail?

The primary mechanism for compliance is the threat that bail will be revoked.

There are other practical ways that could be used to ensure compliance with bail such as:

(1) ensuring people understand the conditions in the first place.
(2) use of new technologies to remind people of court dates and or conditions – for instance text messaging/email reminders.

9.18 Should the provisions of the legislation in relation to conditions be changed or supplemented in any other way?

Not as far as we are aware at this time.

10. Breach of undertakings and conditions

10.1 Should s 50 specify the role and powers of a police officer under this section with greater particularity?

No.

10.2 Should the section specify the order in which an officer should consider implementing the available options?

No.

10.3 Should the section specify considerations to be taken into account by a police officer when deciding how to respond under the section?

No.

10.4 Should the section specify criteria for arrest without warrant?

No.

10.5 Should the section provide that the option of arrest should only be adopted as a last resort?

No.

10.6 Should the provisions of Part 7 be changed or supplemented in any other way?

No.

11. Remaining in custody because of non-compliance with a bail condition

11.1 In relation to s 54A, Special notice where accused person remains in custody after bail granted, should the time for notice be less than the 8 days prescribed? Should a shorter time apply only in the case of non-compliance with some particular bail conditions? Should a shorter time apply to young people?

See our earlier comments at 6.3. If s54A is retained we support a shorter time period for young people but 8 days is appropriate for adults.

11.2 Should the Bail Act provide for further notices to be given periodically in the event that a person continues to be in custody because of such non-compliance?

Yes, the Act should provide for further notices to be given periodically in the event that a person is unable to meet their bail conditions.

11.3 Should the Bail Act specify what steps the court should take on receipt of such notice?

No, there are adequate powers in the act for the Accused to seek a review of bail.

11.4 Should the Bail Act require steps to be taken other than by notice to the court, in the event of a person remaining in custody because of such non-compliance?

No.

11.5 If a particular agency is responsible for the relevant condition should the Act require the agency to provide a report or information to the Court addressing why the bail condition is unable to be met, and the steps being taken to meet it?

No, the Bail Act should not impose obligations on third parties.

12. Young people

12.1 Should there be a separate Bail Act relating to juveniles?

No, the interests of young people may be appropriately considered if the risk assessment criteria in the Act are correctly drawn.

12.2 Alternatively, should there be a separate Part of the Bail Act 1978 relating to juveniles?

No, the considerations in relation to juveniles may be stated as principles at the beginning of the Act. The criteria already include age of the accused.

12.3 Should the Bail Act explicitly provide that the principles of s 6 of the Children(Criminal Proceedings) Act 1987 (NSW) apply to bail determinations by a court?

Yes .

12.4 Should s 6 apply to bail determinations by Police?

Yes.

12.5 As an alternative, or a supplement, should relevant principles of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") be applied to bail determinations in relation to young people?

Yes, in accordance with revised draft of Bail Bill 2010.

12.6 Should the provisions of the Bail Act in relation to juveniles be amended or supplemented in any other way?

No.

12.7 Should the Bail Act make any special provision in relation to young people between the ages of 18 and 21?

No.

12.8 Should the Bail Act make any special provision in relation to Indigenous young people?

No.

12.9 Are any changes to bail law required to facilitate administrative or support arrangements in relation to young people?

Not that we are aware of.

13. People with a cognitive or mental health impairment

13.1 Should the provisions of the Bail Act in relation to "intellectual disability" (a defined term in the legislation) or mental illness be expanded to include people with a wider range of cognitive and mental health impairments? If so, which types of cognitive and mental health impairments should be included?

The Definition should be expanded and updated to be consistent with the definition for cognitive impairment in section 306M of the *Criminal Procedure Act.*

13.2 Should any other protections apply in relation to people who have a cognitive or mental health impairment?

The Bail Act should have a mechanism that allows the court to take into account the fact that people with a cognitive impairment may have difficulty in finding suitable accommodation, complying with bail conditions, and may have a criminal history consistent with their impairment. This particularly applies in consideration of breach of bail and any repeat offending provisions in the Act.

13.3 Are any changes to bail law required to facilitate administrative or support arrangements in relation to people cognitive or mental health impairments?

The bail law needs to have adequate flexibility to take into account the disadvantages faced by people with a cognitive impairment. Administrative and support arrangements seem to be more a question of adequate resources being available to agencies, and would be difficult to incorporate into the bail law.

14. INDIGENOUS PEOPLE

14.1 Should the provisions of the Bail Act in relation to Indigenous people be amended or supplemented?

The Bail Act should recognise and compensate for the disadvantages suffered by Indigenous people namely:

- Financial – less money to put up, fewer people who would be accepted as suitable sureties.
- Criminal record – generally more extensive.

14.2 Should the Bail Act provide that the Court in making a bail decision must take into account a report from a group providing programs or services to Indigenous people? If so, in what circumstances?

No, such a requirement would be superfluous and may be the cause of delay.

If such a report is available, then a court will take it into account.

If there is a requirement to take such a report into account and it is not available, then the matter will be adjourned.

14.3 Are any changes to bail law required to facilitate administrative or support arrangements in relation to Indigenous people?

Not as far as we are aware.

15. Duration of bail

15.1 Should the Bail Act provide explicitly that, subject to any revocation or variation by a subsequent decision, a grant of bail continues, and continues on the same conditions (if any), until the proceedings are finalised.

Yes, it is better for the Act to provide that orders continue in the absence of a specific order rather than the orders lapsing.

15.2 Should the Bail Act provide explicitly that subject to any revocation or variation by subsequent decision, a grant of bail continues and continues on the same conditions until proceedings are finalised?

Yes. The present Act s10(2) deems that bail is dispensed with where the Court makes no specific direction or order. The provision is unnecessary.

It means that on every appearance before a Court, and whether raised by the parties or not, the court is compelled to turn its attention to the bail issue. In literally 1000's of cases around the State every day, Courts are making the order, "bail to continue". It is a burden on busy courts and on the odd occasion a court overlooks making the order, there is confusion as to the accused's bail status. This Office is aware of a prosecution for "failure to appear" where the accused was acquitted because the remanding Magistrate neglected to tick the "bail to continue" box on the bench papers.

16. Review of bail decisions

16.1 How is s 44 (broadly, allowing review of bail decisions by a court of the same status) working in practice? Should there be provision for such a review?
We have no issue with the operation of s44.

16.2 In view of the power of the Supreme Court and the Court of Criminal Appeal to make a fresh determination concerning bail, is there any purpose in preserving a power of review by those courts, as provided by s 45?

Yes. The review provisions of the Bail Act give to the accused and the Crown the right to apply for review and the proceedings are to be conducted in the nature of a reconsideration, de-novo of the bail issues in respect of the accused (R v Hamill [1986] 25 A Crim R 316 at p321).

But the interaction of ss22, 22A on the one hand and ss44 45 and 48 on the other is a bit unclear. In practice it seems to be that if an accused is bail refused an "application" for bail is made under ss22 and 22A. But if the prosecution wishes to challenge a grant of bail then a "review" is made under s48. In our view these provisions could be clarified and streamlined.

A further aspect of the Act that could be improved is in applications under s45 and s48A where variation is sought to existing bail orders in the Supreme Court. These matters in our view should not be heard in the Supreme Court at first instance. There should be a requirement that such applications, generally from people at liberty on bail seeking minor variations to conditions, should initially be addressed to the court with carriage of the substantive proceedings. It is only when such an application is rejected in the lower court that access to the Supreme Court ought to be available. It is our submission that a provision along these lines would go some way towards alleviating the present listing pressure on the Supreme Court.

17. STRUCTURE OF THE BAIL ACT

17.1 Subject to the scope of this reference, should the structure of the Bail Act be changed to flow from the general to the particular or in step with the processes involved, so as to incorporate a "logical pathway"?

For example:

- *When can bail be granted?*
- *When can bail be dispensed with?*
- *By whom can bail be granted (police powers and court powers)?*
- *What criteria apply to bail decisions?*

- *When can conditions be imposed?*
- *What conditions?*
- *Rules relating to bail conditions.*
- *Duration of bail decisions.*
- *Effect of a grant of bail.*

Yes, the *Bail Act* should go back to first principles and the drafting should follow a logical pathway.

17.2 Is there any existing model recommended which could be adopted in restructuring the Act?

The original Bail Act as enacted in 1978 was much simpler. It is only after years of piecemeal and *ad hoc* amendment that we are left with the current dysfunctional Act.

One option would be to use the 1978 Act as a platform to rewrite the Act.

South Australia has a refreshingly short and simple Bail Act.

18. Plain English

18.1 Should any provisions of the Act covered by this reference be recast in plain English or amended for clarity and intelligibility?

Generally we support the use of plain English, and particularly as the Bail Act needs to be applied by non lawyers (e.g. Police) clarity and intelligibility are highly desirable.

18.2 Is any existing model recommended?

Not as far as we are aware.

18.3 Should the terminology in the Bail Act be changed to reflect the effect of processes under the Act? For example, should the legislation provide for:
- *"pre-trial-release, with or without conditions", rather than "grant of bail"; and*
- *"pre-trial detention", rather than "remand in custody"?*

The term "bail" is widely understood. We do not think that there is anything to be gained by a change in terminology.

18.4 Should the name of the Act be changed, such as to the "Pre-Trial Detention Act"?

No.

19. Forms and processes

19.1 In relation to the aspects of the legislation that are the subject of this reference, is there any need for revision of forms and subsidiary processes? Please be specific.

Not as far as we are aware.

19.2 Are any changes to bail law required to facilitate administrative or support arrangements generally?

Not as far as we are aware.

20. Other submissions

20.1 Please make any other submissions that are considered to be relevant to the Commission's review.

Local Court Bail after Sentence

When a person before the Local Court is convicted and sentenced to full time custody it is unclear what test or criteria is to apply when making a bail application. In the decision of *R v Lapa NSWSC 19/11/1997* Sully J indicated that it was unclear whether the Local Court or the Supreme Court should apply the current section 30AA or whether the Court should have recourse to the criteria pursuant to section 32 of the *Bail Act*.

Currently it is unclear what is the appropriate approach to be taken by the Court when determining bail. The DPP would suggest that once a notice of appeal has been lodged with the Court, an appropriate test would be to consider whether or not there was a likelihood that the pending appeal to the District Court would succeed.

Whether or not this test is appropriate, the DPP would suggest that a provision needs to be made in relation to this particular area.

Bail Variations

The current *Bail Act* makes no provision for a party to approach the Court to have bail varied. A practice has developed over the years between the Courts and the parties whereby bail can be varied by agreement of the parties.

In the past, the Supreme Court has taken the view that as there is no provision for bail variation, any Applicant seeking to have their bail varied has to make a fresh application before the Court and runs the risk that bail may well be refused.

Office of the Director of Public Prosecutions
22 July 2011