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

Submission - Review of Bail Law

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

The International Commission of Jurists (ICJ), founded in 1952, has as its mandate the promotion of the rule of law and the legal protection of human rights throughout the world. As a non-governmental organisation it has many national sections and affiliates in all regions of the world, each of whom adhere to the ICJ mandate. The Australian Section of the International Commission of Jurists (the ICJA) is supported by branches in most States and Territories.

The NSW Branch of the ICJA ('ICJA') is pleased to respond to the call by the NSW Law Reform Commission for submissions in relation to the bail laws. The ICJA notes the purpose of the Commission's inquiry is to develop a legislative framework that provides access to bail in appropriate cases having regard to:

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

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;

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

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;

5. The desirability of maintaining s22A;

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;

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;

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 of any reviews of those schemes; and,

9. Any other related matter.

The ICJA draws the Commission's attention to the new NSW government's commitment to end the 'law and order auction' that has for many years driven law reform in this State. The results of this approach for the bail laws are manifest. The presumption in favour of bail has been gradually and unjustifiably eroded over two decades, and an accused's right to the presumption of innocence has been consequently undermined.

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

The ICJA submits that the Bail Act *should* include a clear statement of its objects and purpose. This is also addressed in relation to Question 3 of the submission given the important interconnection of the right to liberty, the presumption in favour of bail for most offences and the fundamental value of the presumption of innocence to Australian criminal law.

The traditional objects and purposes of bail are:

- To ensure that the person concerned will appear in court to answer charges brought against them;
- To protect the community, including preventing any interference with the course of justice; and
- To protect of the interests of the person concerned.

The structure of the proposed Act should clearly set out these objectives at the commencement of the Act. The proposed Act should also include a clear statement of a general entitlement to bail. The objects and purposes should also be adequately dealt with in the substance of the legislation.

Question 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

The ICJA submits that NSW bail legislation should include a clear statement of factors to be taken into account in determining a bail application. Those factors should include all of the factors articulated in section 32 of the *Bail Act 1978*:

(a) the probability of whether or not the person will appear in court respect of the offence for which bail is being considered;
(b) the interests of the person;

(c) the protection of alleged victims of crime, their close relatives or any other person who may be in need of protection because of the circumstances of the case; and
(d) the protection and welfare of the community.

The ICJA submits that these factors should be stated in a more orderly fashion than they are currently.

In addition to the factors already stated in section 32, a set of factors specifically addressing bail in domestic violence matters should be included. The ICJA notes that this suggestion has recently been advocated by the NSW Attorney General's Department, the NSW Police Force and other key stakeholders.[1]

The ICJA further submits that included in the statement of factors should be a reference to vulnerable and disadvantaged accused in order that the legislation is adequately designed to prevent situations where people with special needs face conditions they are unable to meet. We would also direct the Commission to the ICJA's recommendations in Question 7.

Question 3 - What presumptions should apply to bail determinations and how they should apply

The ICJA submits that in determining bail, there should be clear presumptions for granting bail, clear presumptions against granting bail, and no presumption either way in certain circumstances.

The ICJA submits that there should be a general presumption in favour of the granting of bail, except in certain delineated circumstances, when there should either be no presumption either way, or there should be a presumption against bail. This overall presumption is in conformity with articles 9(3) and 14(2) of the *International Covenant on Civil and Political Rights*:

> *Article 9*
>
> 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.
>
> *Article 14*
>
> 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

The statement that everyone is entitled to bail subject to compliance with the Act reflects an acknowledgment that the purpose of bail laws are to balance the right of an accused to be presumed innocent with community protection.[2]

The particular circumstances which will displace the presumption in favour of bail should relate to:

- The nature of the offence concerned.

[1] http://www.lawlink.nsw.gov.au/lawlink/clrd/ll_clrd.nsf/vwFiles/REVIEW_OF_BAIL_IN_NSW_Oct_2010.pdf/$file/REVIEW_OF_BAIL_IN_NSW_Oct_2010.pdf
at p.6
[2] BP 2010 at summary

In relation to a number of serious offences it would be appropriate for the presumption to be displaced and for there to be no presumption either way. The decision-maker would approach the issues with complete neutrality. In relation to certain extremely serious offences, particularly those involving the use of violence, such as murder, it would be appropriate for there to be a presumption against bail.

In this regard, the ICJA submits that there should be no requirement for "exceptional circumstances" to be established as a precondition to the granting of bail, and that sections 9C and 9D of the current Act should be repealed.

- The fact that the person has been convicted and sentenced, and is appealing against conviction and/or sentence.

  In that event, there should be a presumption against the granting of bail.

The ICJA submits that the Act should clearly state that the onus on rebutting the presumption in favour of bail should rest with the prosecution.

Question 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

It is the ICJA's view that section 50 of the existing Act generally gives the courts adequate discretion to deal appropriately with breaches of bail. However, we are concerned about the terms of section 50(3)(b) which give the court the right to refuse to grant bail and commit the person to prison 'notwithstanding anything in this Act'. This is much too far-reaching, and would entitle the court to ignore all the presumptions and criteria set out elsewhere in the Act.

The ICJA submits that a risk-based rather than a technical approach to bail breaches should be used.

Question 5 - The desirability of maintaining section 22A

The ICJA submits that whilst it is clear that section 22A was introduced to address the problem of repeat bail applications where they were wasting resources, the provision has unfortunately had a significant impact upon the number of people detained in custody whilst on remand and in particular, it has had a disproportionate impact on juveniles.

The ICJA thus submits that juveniles should be exempted from section 22A. There is a considerable amount of evidence that confirms that the increase of juveniles on remand is directly related to the amendment to section 22A of the *Bail Act* in 2007.[3] Recent research has also found that 71% of juveniles who had breached their bail conditions without breaking any laws were remanded in custody. The problem is that once they are remanded their ability to re-apply for bail is hindered by section 22A.[4] This situation is clearly undesirable.

It is understood that the government has proposed a new section 24 which will clarify that section 22A does not prevent a person from applying for a new bail hearing in a higher court if they are unhappy with a lower court's bail decision.[5] The ICJA supports the intention of this proposal.

[3] Since the introduction of section 22A of the Bail Act, the number of juveniles placed on remand has increased by over 40%. See NSW Bureau of Crime Statistics and Research 2009, 'Recent trends in legal proceedings for breach of bail, juvenile remand and crime', *Contemporary Issues in Crime and Justice*, Number 128 (May 2009).
[4] Ibid.
[5] www.ipc.nsw.gov.au/lawlink/.../ll...**bail_laws**.pdf/.../131010_**bail_laws**.pdf

However, it is also open for section 22A to be repealed and that the principles it seeks to enforce could be adequately met by an overall power to decline to hear applications which are frivolous or vexatious, a power now contained in section 22A(2) but which was previously in section 22(4) of the Act.

Question 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 must be noted from the outset that the *Bail Act* applies equally to children and adults, prevailing over children's legislation where there is an inconsistency.[6] As the Law Society of NSW has stated, '[d]iscrimination is pronounced in the reluctance of police and courts to release young people on their own undertaking, and the imposition of more onerous bail conditions on young people than adults including place restrictions, non-association orders, residential conditions and curfews. It is accompanied by zero tolerance policing which means that young people are often arrested for minor breaches.'[7] It is well understood that once a young person is involved in the criminal justice system, the probability of him/her revisiting that involvement is high. This is a cost to the community.

The particular and acute vulnerabilities of children and young people, and restrictive amendments to bail legislation over the years, augment the unique barriers to obtaining bail relating to their access to suitable accommodation and support services, a reduced level of community ties, in some cases a history of itinerant accommodation and homelessness, a history of breached bail conditions or failures to appear, and the likelihood of a history of prior convictions and classification as a repeat offender.

The ICJA submits that these unique barriers to obtaining bail demand a unique legislative response. As such, the Act should contain specific provisions that relate solely to children and young people. For instance, the *Bail Act* should contain a provision noting that criminal legislation that specifically applies to children should prevail over the Bail Act to the extent that there is an inconsistency. This is the situation in Victoria.

The rationale behind this proposition is that amendments may be made to the *Bail Act* without proper consideration of the needs of children. If the provision for children's criminal legislation to override the Bail Act was introduced, section 22A would not apply to children. Remand should be a last resort.

The ICJA notes the principles enunciated in the *Children (Criminal Proceedings) Act 1987* which include the following:

- Children who commit offences bear responsibility for their actions, but because of their state of dependency and immaturity, require guidance and assistance;
- It is desirable, wherever possible, to allow the education/employment of a child to proceed without interruption;
- It is desirable, wherever possible, to allow a child to reside in his/her own home.

The ICJA submits that the above principles affirm the suggestion that specific provisions relating to young offenders are necessary. Legislation in Queensland clearly states a presumption in favour of

[6] See, *Bail Act 1978* (NSW), section 5; *Children (Criminal Proceedings) Act 1987*, section 50.
[7] Law Society of NSW, *Young people with cognitive and mental health impairments in the criminal justice system*, Submission to NSW Law Reform Commission, February 2011, 1, available from: http://www.lawsociety.com.au/resources/policypapersandsubmissions/index.htm.

bail for juveniles.[8] The ICJA submits that the *Bail Act* should be drafted in line with the *Children and Young Persons (Care and Protection) Act 1998* so that child-specific factors must be considered in taking any decision relating to bail.

The ICJA further submits that it would be desirable if the *Bail Act* were to include a provision about arranging suitable accommodation for young people when they are given 'reside as directed' bail conditions. The ICJA considers that a lack of accommodation is not a sufficient reason to refuse bail to a child or young person.

Lastly, the ICJA submits that bail conditions, where set, should not be unrealistic. Judicial officers should be satisfied that any conditions imposed are within the capacity for the accused to meet. Nor should conditions be set which could be flouted with little if any chance of a breach being identified.

Question 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 ICJA submits that there should be special provisions that apply to Aboriginal people and Torres Strait Islanders as a separate category, due to their overrepresentation in the prison system including prisoners on remand, and because of their culture-specific history of self-harm in custody.[9]

The problems and concerns that relate to bail for vulnerable and disadvantaged accused are compounded when they apply to children, young people, Aboriginal people and Torres Strait Islanders, or in fact any accused with cognitive and mental health impairments.

In relation to cognitively impaired people and those with a mental illness, the ICJA submits that this group should be subject to different, separate provisions. There are multifaceted reasons for this, one being that people with an intellectual disability often 'do not have good family and community support to enable them to meet bail conditions and, as a consequence, are often unnecessarily held in custody'.[10] There is a direct link between cognitive and mental health impairments, and the capacity of an accused to understand bail conditions.

Accordingly, the ICJA considers that the *Bail Act* should include an express provision requiring the court or police to take account of an accused's cognitive or mental health impairment when deciding whether or not to grant bail.

Certain provisions in the *Bail Act* make it harder for people with a mental illness or cognitive impairment to be granted bail as compared to others, such as the provision that allows bail to be refused in respect of a minor offence if the alleged offender has previously breached a bail condition for that offence. It is easy to imagine situations where a person with a mental illness or cognitive impairment may find it difficult to comply with a bail undertaking without adequate support to explain the conditions of bail and help ensure that they are followed. Thus, that person may easily, and unknowingly, breach bail.[11]

[8] The *Juvenile Justice Amendment Act 2002* (Qld) cl 12 inserted s 37A(4) (renumbered as s 48(4) in reprint No 7 of the principal Act) into the *Juvenile Justice Act 1992* (Qld).
[9] See, for example, 'Aboriginal Deaths in Custody: The Royal Commission and its Records, 1987–1991'.
[10] http://www.ipc.nsw.gov.au/lrc.nsf/pages/DP29CHP8 at 8.12
[11] http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/vwFiles/CP07.pdf/$file/CP07.pdf at 13-14

In terms of defining 'cognitively impaired' people and those with a 'mental illness', the definitions should be determined in accordance with the factors outlined in section 32, as well as police or judicial discretion.

The ICJA submits that there is a powerful argument that section 32, and specifically section 32(1)(b)(v) which refers to 'special needs' groups, should be clarified and enhanced. Firstly, the term 'special needs' should be given more weight and clarified to provide more guidance to decision makers. Secondly, the *Bail Act* should specify that it is a mandatory requirement to consider the 'special needs' of an accused where such needs exist. Thirdly, the bail legislation should include a further factor to be considered under section 32 relating to the cultural norms of members of particular ethnic or religious groups.

Question 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 of any reviews of those schemes

The *European Convention on Human Rights* has had a significant impact on the operation of the United Kingdom bail laws. The English courts have interpreted the presumption against bail in a way that favours the accused's liberty in cases where the court is unsure whether to release the accused on bail, so that although there may be an evidentiary burden on an accused to point to or adduce evidence to show exceptional circumstances, the legal burden of proof remains with the prosecution.

Domestically, Victorian bail laws differ from those of NSW to a significant extent. In Victoria, criminal legislation that specifically applies to children prevails over the Bail Act to the extent that there is an inconsistency. By contrast, the NSW Act contains no such principle.

In terms of reviews of bail schemes, in October 2007 the Victorian Law Reform Commission published a report on bail laws in Victoria. The Commission deemed the Act should be rewritten to make it more comprehensible and the Commission made over 150 recommendations to improve bail laws and practices. Salient recommendations included:

- No presumptions against bail;
- Police guidelines for arrest/summons;
- Review of bail conditions;
- Children: child-specific factors should be taken into consideration in making bail decisions;
- Indigenous persons and other marginalised groups: bail support services should be improved for these groups.

The Victorian Government is currently considering the Commission's recommendations. The ICJA supports the Commission's recommendations.

Question 9 - Any other related matter.

The ICJA submits that a number of changes to the *Bail Act* in addition to what has been discussed above, should be made to ensure bail law and procedures in NSW are improved.

- The structure of the Act should be simplified;

- New ideas should be implemented to assist courts and police in managing defendants on bail, including:

  - Electronic bail; and
  - The development of better information resources to help accused persons better understand their rights and obligations[12];

- Teleconferencing should be more widely used in remote courts;

- Remand prisoners should always be separated from the rest of the prison population;

- Section 17 of the *Bail Act* should be amended so that police can grant bail even on occasions where it is 'practicable' to take an accused before a court;

- The *Bail Act* should be amended to prevent police from being able to decide bail in matters where an accused is charged with a serious indictable offence. This limitation should be restricted to those offences that are currently termed exceptional circumstances offences;

- The *Bail Act* should be amended to allow an accused to be represented at a bail application made shortly after arrest without having to show 'new facts or circumstances' on a subsequent application.

- Bail conditions that are set should not unreasonably interfere with the rights of the individual.

The Hon John Dowd AO QC
President

[12] http://www.lawlink.nsw.gov.au/lawlink/clrd/ll_clrd.nsf/vwFiles/REVIEW_OF_BAIL_IN_NSW_Oct_2010.pdf/$file/REVIEW_OF_BAIL_IN_NSW_Oct_2010.pdf at p.4