New South Wales Law Reform Commission 25 July 2011
By email: nsw_lrc@agd.nsw.gov.au

# Bail: submission from the Shopfront Youth Legal Centre

The Shopfront Youth Legal Centre welcomes the opportunity to make a submission to The New South Wales Law Reform Commission's current reference on bail.

## About the Shopfront Youth Legal Centre

The Shopfront Youth Legal Centre is a free legal service for homeless and disadvantaged young people aged 25 and under.

Established in 1993 and based in Darlinghurst in inner-city Sydney, the Shopfront is a joint project of Mission Australia, the Salvation Army and the law firm Freehills.

The Shopfront employs 4 solicitors (3.1 full-time equivalent), 2 legal assistants, a paralegal (0.4 full-time equivalent) and a social worker. We are also assisted by a number of volunteers. Two of our solicitors are accredited specialists in criminal law; one is also a specialist accredited in children's law.

The Shopfront represents young people in criminal matters, mainly in the Local, Children's and District Courts. We prioritise those young people who are the most vulnerable, including those in need of more intensive support and continuity of representation than the Legal Aid system can provide.

The Shopfront also assists clients to pursue victims' compensation claims and deal with unpaid fines. We also provide advice and referrals on range of legal issues including family law, child welfare, administrative and civil matters.

The Shopfront's clients come from a range of cultural backgrounds, including a sizeable number of indigenous young people. Common to most of our clients is the experience of homelessness: most have been forced to leave home due to abuse, neglect, domestic violence or extreme family dysfunction. Moreover, most of our clients have limited formal education and therefore lack adequate literacy, numeracy and vocational skills. A substantial proportion also have a serious mental health problem or an intellectual disability, often co-existing with a substance abuse problem.

## Scope of this submission

Given our considerable experience in the criminal justice system, and the vulnerability of our clients, we believe we are in a good position to comment on bail law reform, especially where children and young people are concerned.

The Shopfront's clients are particularly affected by:

- The inappropriate use of arrest and bail, instead of proceedings being commenced by Field, Future or No-bail CAN;
- The absence of a presumption in favour of bail for "repeat offenders";
- Refusal of bail due to homelessness, mental illness or perceived lack of "community ties";
- Onerous and often inappropriate bail conditions;

- Procedural barriers to obtaining variations of bail conditions;
- The police practice of visiting young people's homes at night to conduct "bail compliance checks";
- The use of arrest (as a first response and not a last resort) for breach of bail.

We also attach copies of our submissions previously made to the Criminal Law Review Division of the Department of Justice and Attorney-General in October 2010, January 2005 and October 2004.

Time does not permit us to address the individual questions set out in your discussion paper. Instead we will comment more generally on the terms of reference.

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

We support the inclusion of a statement of objects in the *Bail Act*.

As discussed in our 2010 submission (see "Objects of act and criteria to be considered in bail decisions" on pages 2 and 3), the objects in the Bail Bill 2010 were inappropriate, as they did not take into account the important balancing exercise between a suspect's fundamental right to be at liberty and the competing considerations such as protection of the community and ensuring the defendant attends court. The work of the Bail Roundtable in late 2010 arrived at a revised set of objects which, in our view, are more appropriate.

It is of course a fundamental principle of our criminal justice system that an accused person is innocent until proven guilty, and should not be imprisoned before trial and sentence unless the circumstances clearly warrant it. In a democratic society, liberty is a right and not a privilege. In our view, the objects of the Act should reflect these principles and provide that *an accused person should only be deprived of their liberty after a careful balancing exercise*.

Traditionally, the main countervailing factors to be balanced against an accused person's right to liberty were ensuring that the accused appeared at court and did not interfere with the course of justice in the interim.

In recent years, the focus has shifted markedly towards the protection of the community, in the sense of attempting to ensure that an accused person does not commit any further offences while on bail.

While protecting the community and preventing re-offending is a laudable aim, we are of the view that this aim is often pursued at the expense of an unconvicted person's right to be at liberty. Further, it is questionable whether preventing re-offending in a general sense is an appropriate aim for a bail scheme. In this regard we note the comments made in the 1976 *Report of the Bail Review Committee*, which preceded the enactment of the *Bail Act* 1978. The committee was of the view that the likelihood of further offending on bail was not a proper criterion for bail refusal, as this amounted to preventative detention and was a gross violation of the presumption of innocence[1].

We also note and endorse the Chief Magistrate's concerns about the erosion of the philosophy of the Act and the use of bail as a form of pre-emptive punishment[2].

[1] Anderson & Armstrong, Parliament of New South Wales, *Report of the Bail Review Committee*, 31 August 1976, pp 28-32.

[2] The Chief Magistrate of the Local Court (NSW), *Submission - Review of Bail Law,* 1 July 2011, p1

The Chief Magistrate also comments:

> "The fact that a level of the judiciary bound by its oath of office has been forced into a semblance of complicity in executing non-bail related agendas remains troubling."[3]

We submit that the objects of the Act must place community protection in its appropriate context and not elevate it above other considerations.

It may also be appropriate to include in the objects of the Act a specific provision concerning children. Such a provision would incorporate the principles of the UN Convention on the Rights of the Child (CROC) and related instruments such as the Beijing Rules, which provide that detention for children should be a last resort and should be for the shortest period possible.

## 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

We believe the Act should include a statement of factors to be taken into account in determining a bail application. The list should be exhaustive to guard against irrelevant or improper considerations being taken into account.

In our view the current section 32 provides a very good starting point. The section would benefit from some redrafting but is fundamentally sound and provides helpful guidance for bail decision-makers.

As we will discuss further on in this submission, the complicated set of presumptions that currently exists is unhelpful and unnecessary. The criteria in s32 provide adequate guidance.

In our view, there are some amendments required to ensure that s32 serves its intended purpose of striking an appropriate balance between a defendant's right to be at liberty and the relevant countervailing factors.

Firstly, we support a strong statement (in s32 or elsewhere) to the effect that where the bail decision-maker is of the view that a conviction and/or a custodial sentence is unlikely, bail should be refused in exceptional circumstances only.

However, where the converse applies and a conviction and/or custodial sentence *is* likely, this should not of itself be a ground for refusing bail. As s32(1)(a)(iii) provides, this is relevant only insofar as it provides an incentive to abscond.

We also support an amendment to safeguard against the unwarranted elevation of "community protection" above other considerations. We acknowledge that there are currently some provisions aimed at limiting the consideration that may be given to the risk of a defendant re-offending while on bail (s32(1)(c), (2) and (2A)). These provisions attempt to restrict the bail decision-maker to a consideration of whether the defendant is reasonably likely to commit *serious* offences while on bail, and whether that likelihood outweighs the defendant's right to be at liberty. However, these provisions are not drafted as clearly as they could be, and the definition of "serious" offence is unhelpful. It is relatively easy for a police officer or magistrate to justify refusing bail on the grounds that the defendant is likely to commit a series of trivial offences.

In our experience, many of our clients are granted bail but are loaded up with onerous conditions ostensibly aimed at protecting the community by preventing the commission of *any* offence. In our view, there is currently inadequate protection against the imposition of unreasonable conditions aimed at community protection.

[3] Ibid, p1

**Case study - Troy**

Troy is a young man who has been involved with the juvenile justice system since the age of 13. He is not homeless but has grown up in a dysfunctional household with inconsistent parenting, family conflict and, at times, physical violence.

Over the years Troy has been charged with numerous offences such as shoplifting, breaking into cars, common assault and minor property damage. These offences were relatively minor and, for a juvenile, would rarely attract a custodial sentence. After a while, police stopped considering diverting Troy under the *Young Offenders Act*, as he has "used up all his cautions" and was thought to have too long a criminal history for youth justice conferencing to be appropriate.

For most of Troy's charges, he was released on police bail with a residential condition (to reside with his mother and stepfather), a curfew (not to be away from home at night without a parent) and a reporting condition. The Children's Court would rarely accede to requests to relax these conditions, saying they were necessary for her protection of the community, even though there was no evidence that Troy was likely to commit *serious* offences while on bail.

For Troy, home is not always a pleasant or safe place, and so he would often take off. Sometimes we went to say with his dad, sometimes with friends, occasionally in a refuge and sometimes on the street.

Having breached his residential and curfew conditions, Troy knew it was only a matter of time before he got arrested, so he stopped reporting, stopped attending school and went "on the run". With no income, and afraid to go back home in case the police came for him, he turned to stealing as a way of supporting himself.

Troy has been through this cycle several times. Typically it ends with him being arrested for breach of bail and refused bail for a few days or weeks. He is then released either on a non-custodial sentence or a short custodial sentence back-dated to take into account the time he has spent on remand. This constant "churning" in and out of custody has contributed to his disengagement from education and has made it difficult for him to do anything productive, either in custody or in the community.

More recently, Troy was charged with stealing from the person and was bailed with a night-time curfew, even though the alleged offence was committed in the middle of the day. Troy's solicitor applied to have the curfew deleted but the magistrate refused. However, a few weeks later another magistrate willingly deleted the curfew and he was left with minimal bail conditions. Although it may seem counter-intuitive, relaxing Troy's bail conditions really worked; his attitude and behaviour improved significantly and he did not re-offend or come to police notice for several months.

## 3 What presumptions should apply to bail determinations and how they should apply

The current set of presumptions is confusing, illogical, and often unfair. This is not surprising given that most of these presumptions were not part of the original *Bail Act* but were added on an ad-hoc basis over the years, often in response to a catastrophic event or a dramatic media story.

We also submit that a complex system of presumptions is unnecessary, as s32 provides bail decision-makers with adequate guidance.

- We support a general presumption in favour of bail.
- We do not support a presumption against bail (except perhaps in limited circumstances, such as were a person is on appeal following the imposition of a custodial sentence by a superior court), nor do we support an "exceptional circumstances" provision.

- We support a presumption that bail should be dispensed with for fine-only offences, for some other summary offences (eg those with a maximum penalty of six months' imprisonment or less), and for most matters involving juveniles.

We share the concerns of the Chief Magistrate about offence-based presumptions:

> "It is often the case that the ultimate charge determined is not the more serious charge originally preferred [sic]. … [T]o arm a prosecuting authority with the ability to restrict considerations of bail simply by charging an offence falling within a particular category is to create an environment that may be subject to potential abuse.'[4]

**Case study – Gemma**

Gemma, 24, was the victim of two serious sexual assaults during her teenage years. Following this she has struggled with mental illness and drug abuse for several years.

About two years ago, Gemma was charged with assault with intent to rob in company after she tried to snatch $20 from a woman who had just withdrawn money from an ATM. At the time she was in company with a friend who tried to help her get away with the money.

Gemma pleaded guilty to assault with intent to rob in company. The sentencing judge accepted that the criminality was relatively low for this type of offence and released her on a section 11 bond, followed by a suspended sentence. During this period Gemma successfully completed a residential program aimed at diverting "dual diagnosis" women from the prison system.

After completing the program, Gemma moved into community housing, but unfortunately she became homeless when her lease expired. Gemma and her boyfriend went to stay with a friend for a while, but were not able to stay there for long.

Shortly after moving out, Gemma and her boyfriend returned to their friend's place to pick up their belongings. A fight broke out and Gemma ended up being charged with "aggravated enter dwelling with intent to commit serious indictable offence (assault)".

This charge brought her within s9D of the *Bail Act*, as it is defined as a "serious personal violence offence" and she already had another "serious personal violence offence" on her record. This meant she had to demonstrate exceptional circumstances for bail to be granted.

The magistrate hearing Gemma's bail application accepted that Gemma and her boyfriend had entered the premises for a legitimate purpose and would probably not be convicted of aggravated enter dwelling with intent. She also accepted that, although she had recently been homeless, Gemma had been complying with the conditions of her suspended sentence and did not appear to present a risk to the community. However, Her Honour was unable to find that the "exceptional circumstances" test in s9D had been met, and therefore refused bail.

## Impact of the presumptions on disadvantaged young people

We refer to our 2010 submission (at pages 3 and 4 and pages 5 and 6) where we discuss these presumptions and also the desirability of dispensing with bail.

We also refer to our 2004 submission on the "repeat offender" provisions and the impact of removing the presumption in favour of bail for people in this category. We also refer to our 2005 submission, in particular our answers to questions 5 and 14.

**Case study – Jason**

Jason, 19, is a young man who grew up in foster care. He had a very limited criminal history, apart from a serious assault for which he received a suspended sentence.

[4] Ibid, p1

While on the suspended sentence, Jason was charged with goods in custody after police found him in possession of several pairs of expensive-looking running shoes. These shoes were not in fact stolen, as the police suspected, but were cheap imitations of designer brand shoes which Jason was selling on behalf of his employer.

Jason was refused bail by both the police and the Local Court. Although the alleged offence was trivial, there was no presumption in favour of bail because he was on a suspended sentence. In our experience, many police officers making bail decisions seem to treat a neutral presumption as if it were a presumption against bail, and are more inclined to refuse bail to "repeat offenders".

The decision to refuse bail seemed to be largely based on the fact that Jason was on a suspended sentence and, if convicted of the fresh offence, would be facing breach proceedings and a consequent custodial sentence. There was no evidence that Jason was likely to abscond, interfere with the course of justice or to re-offend if released on bail. He had a stable residence and a good employment record.

Although s32(1)(a)(iii) of the *Bail Act* states that the likelihood of a custodial sentence is only relevant insofar as it affects the likelihood of the accused failing to appear at court, both the police and the court appear to have gone beyond this and taken the view that "it looks like you're going to jail anyway, so you might as well stay there". In our view this was tantamount to Jason being prematurely tried and sentenced.

A few weeks later, Jason was granted bail by the Supreme Court.

Jason ultimately pleaded guilty to the goods in custody charge on the basis that the goods were unlawfully obtained in breach of the *Copyright Act* (which makes it an offence to obtain copyright-infringing goods for the purpose of sale). He was also dealt with for the breach of his suspended sentence. He received a short custodial sentence, back-dated to cover the period he had spent on remand. Had he not been initially refused bail, we think he probably would not have received a full-time custodial sentence at all.

## Commencement of proceedings and dispensing with bail

Before any decision about bail falls to be made, the prosecuting authority (usually the police) must decide how to commence proceedings.

Under the *Criminal Procedure Act*, police may commence proceedings via a "field", "future", "no bail" or "bail" court attendance notice. The first three options effectively mean that bail is dispensed with, unless a judicial officer decides to set bail when the defendant appears at court. It is only with a "bail CAN" that police decide whether to grant or refuse bail.

Part 8 of the *Law Enforcement (Powers and Responsibilities) Act* (LEPRA), and in particular s99(3), provides that arrest for the purpose of commencing proceedings should be a last resort[5]. It follows that, where possible, proceedings should be commenced via court attendance notice without the need to set bail.

Further, s8 of the *Children (Criminal Proceedings) Act* provides that proceedings against children should generally be commenced via court attendance notice. Unfortunately (through what be believe to be an oversight) the section has not been amended to take account of the fact that all proceedings are now commenced by CAN and the procedure that used to be known as "charge" is now a "bail CAN". While the language of the section is now outdated, it is clear that the intention is to create a presumption that bail should be dispensed with for children, subject to a few specific exceptions.

In our experience, the principle of arrest as a last resort is inadequately observed by police, although we hope this might change as police officers continue to be educated about LEPRA. Similarly (especially where young people are concerned) we are of the view that field, future and no-bail CANs are under-utilised.

[5] For a discussion of LEPRA and the principle of arrest as a last resort, see Sanders, J, *Police Powers Update 2011*, at http://www.theshopfront.org/documents/Police_powers_upate_2011.pdf

In our opinion, some thought should be given to better integrating the provisions of LEPRA, the *Criminal Procedure Act,* the *Children (Criminal Proceedings) Act,* the *Young Offenders Act* and the *Bail Act.* This may better serve to reinforce the message that arrest should be a last resort and that the issue of bail should only come into play when dispensing with bail is clearly inadequate.

**Case study – Luat**

In the late 1990s and early 2000s, Luat, 21, and many of his friends were the target of a police campaign to move drug users out of Cabramatta. If the police suspected that a person was in Cabramatta to purchase or use drugs, they would issue a move-on direction under s28F of the *Summary Offences Act* (now Part 14 of LEPRA*).*

The direction given to Luat was almost identical with the directions given to everyone else – that he not come within a 2km radius of Cabramatta Railway Station for seven days.

Luat, who had many legitimate reasons to be in Cabramatta including visiting his aunt and seeking treatment for his drug problems, returned to Cabramatta within the week and was arrested and charged with failing to comply with a police direction.

Although this is a fine-only offence (attracting a maximum penalty of $220) and could be dealt with by penalty notice, the police adopted a blanket policy of arresting, charging and bailing people on the condition that they not come within a certain radius of Cabramatta Railway Station.

While these police practices were in force, many people were arrested for breach of bail and placed before the court. The Local Court magistrate was usually prepared to re-release them on bail but was unwilling to delete the place restriction condition. However, the magistrate would tell people that if they pleaded guilty, they would be released immediately with a fine and no further conditions. Not surprisingly, most people pleaded guilty, even though in our view they had a good defence to the charge.

We advised Luat that he should plead not guilty to the charge because the direction originally given by the police was not reasonable in the circumstances, that Luat had a reasonable excuse for breaching the direction, and that he did not continue to engage in any "relevant conduct" after the direction was given. We had previously successfully defended similar charges for other clients; in the first of these matters, the Magistrate ruled that the seven-day, two-kilometre direction was arbitrary and unreasonable.

Luat took our advice and pleaded not guilty. Pending the hearing date we applied for a bail variation, which the Local Court magistrate refused. We applied to the Supreme Court; the judge was of the view that the bail condition was unreasonable and granted the variation[6]. Luat was ultimately found not guilty of the offence.

Soon after this, police modified their practices and started issuing 24-hour directions instead of seven-day ones. However, even 24-hour directions are problematic if they are issued in an arbitrary way, and if an alleged breach is dealt with by way of arrest, charge and bail.

Police have also adopted similar practices in different areas. For example, police will often charge street sex workers with soliciting (a summary offence which carries a term of imprisonment but usually, if proved, results in a fine only) and bail them on condition that they stay out of the area.

This illustrates the need for a presumption that bail should be dispensed with (or at least a presumption of unconditional bail) for fine-only offences and for minor summary offences in general.

[6] see *R v Truong*, NSWSC, unreported, Greg James J, 13 November 2002

## 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

### Arrest as a last resort

We refer to our 2010 submission, in particular the discussion on "Breach of bail" (see page 5).

We also refer to our 2005 submission. In our answer to question 25, we suggested that the existing provisions in the *Bail Act* were sufficient to deal with breach of bail. Please note that we have since changed our view.

At the time of writing our 2005 submission, police officers would generally exercise discretion when dealing with a breach of bail. People who missed one or two days of reporting to the police station, or who were found in a public place a short time after their curfew, were generally given a warning. However, the police approach has shifted significantly in recent years, as will be further discussed below.

Even though the current *Bail Act* provides police with discretion, clearly this is not enough. In our view, there needs to be a provision to the effect that arrest for breach of bail is a last resort.

As discussed above, s99(3) of LEPRA provides that arrest for the purpose of commencing proceedings is a last resort. In our view a similar principle should apply to arrests under s50 of the *Bail Act.* We suggest that the work of the Bail Roundtable may provide guidance in drafting such a provision.

### The impact of current police practices

In recent years, as has been documented, the NSW police have moved to a position that could be described as "zero tolerance". Instead of exercising appropriate discretion, police now deal with most breaches of bail by arresting the person and placing them before the court.

We are often told by police officers that, if a person has breached a bail condition set by a court, "We have no discretion. We have to arrest them. This is what the court expects". It is a matter of serious concern that this appears to be a widely-held view among police officers (and, indeed, a policy of the NSW Police Force). In our experience, many judicial officers have expressed the view that a night in custody is a disproportionate response to a minor bail breach, and that a warning – or bringing the alleged breach to the notice of the court without arresting the defendant - would have been more appropriate.

For accused persons (usually juveniles) who are subject to curfew conditions, many police local area commands have also embraced the practice of visiting people's homes in the middle of the night to conduct "bail compliance checks". The legality of this practice is dubious and it is a significant intrusion on the life of an accused person and members of their household.

While the NSW Police Force claims that their assertive monitoring and enforcement of bail compliance is consistent with the NSW State Plan priority of "keeping people safe" and its strategy of "[e]xtended community monitoring of those at high risk of re-offending"[7], we disagree. As pointed out in the Youth Justice Coalition's *Bail Me Out* report, published in 2010, the State Plan recognises that schools, health, justice agencies, police, family services and community groups have to work together to reduce the risk factors associated with juvenile offending[8].

[7] NSW Premier's Department, *State Plan: A New Direction for NSW* (Sydney Crown Copyright, 2006) 30, cited in Katrina Wong, Brenda Bailey and Dianna T Kenny, 'Bail Me Out: NSW Young People and Bail' (2010) *Youth Justice Coalition* 3.

[8] *Youth Justice Coalition* Katrina Wong, Brenda Bailey and Dianna T Kenny, '*Bail Me Out: NSW Young People and Bail*' (February 2010) 3

In our view, rigid enforcement of bail conditions does not necessarily reduce re-offending but engenders hostility towards the police and inappropriately exposes more people – especially juveniles – to a custodial environment which, in turn, is likely to *increase* the prospect of re-offending.

BOCSAR's 2009 study in this area[9] shows a close correlation between police enforcement of bail conditions and the number of juveniles in custody. Statistics show that the number of juveniles on remand between 1 January 1998 and 1 December 2008 corresponded closely with the number proceeded against in court for breach of bail. BOCSAR's analysis of a random sample of 102 juveniles who had contact with police for breach of bail found that 75% were remanded in custody within 3 days of the alleged breach. Of those remanded in custody, only 34% had committed a further offence while on bail. The most common bail conditions attracting breach action were not complying with a curfew and not being in the company of a parent.

Importantly, BOCSAR found that there was no significant association between the increased number of young people on remand and the fall in property crime[10]. This suggests that refusing bail to young people does not necessarily fulfil the aim of crime prevention or "community protection". While incapacitation (taking offenders out of the community and locking them up) can reduce re-offending rates in the short term, it is a very crude crime prevention measure and can be counter-productive in the long term. Not only that, but it often comes at an unacceptable cost to personal liberty.

The Youth Justice Coalition's *Bail Me Out* report, published in 2010, supports BOCSAR's findings. It provides evidence that police are failing to consider other options in their practice of arresting young people for breach of bail. In 60% of cases surveyed by the Youth Justice Coalition, the nature of the breach was not serious enough to warrant the young person remaining in custody and they were re-released by the court.[11]

**Case study – Moussa**

Moussa, 18, is from a Sudanese refugee background. As a juvenile he was charged with an offence and released on bail conditions which required him to report to his local police station three times a week. He pleaded not guilty and the matter took several months to come up for hearing.

While this matter was still pending at the Children's Court, Moussa turned 18 and was charged with a relatively minor adult offence, and was bailed to report at a different police station on different days of the week. Moussa dutifully reported to both police stations as required. Unfortunately, no doubt because he was appearing in different courts with different sets of legal representatives, no-one suggested to Moussa that he could get his bail conditions varied to bring them into line.

Moussa's Children's Court matter was finalised when he was found not guilty. He knew that he no longer had to report on bail for this charge, although he had to keep reporting on his adult bail undertaking. Unfortunately but understandably, Moussa got the police stations and the days mixed up. One Saturday afternoon, he reported to police as he thought he was required to do, to be told that he was actually supposed to report to a different police station on the previous day. The police arrested him for breach of bail and held him in custody overnight.

While Moussa was in police custody, his solicitor spoke on the phone to the Custody Manager and asked him to consider discontinuing the arrest and releasing Moussa. The Custody Manager accepted that Moussa had made a genuine mistake and was not blatantly disregarding his bail conditions. However, he told Moussa's solicitor that the

[9] Sumitra Vignaendra, Steve Moffatt, Don Weatherburn, and Eric Heller, 'Recent trends in legal proceedings for breach of bail, juvenile remand and crime' (2009) 128 *Crime and Justice Bulletin*.

[10] Ibid, pp3-4.

[11] Katrina Wong, Brenda Bailey and Dianna T Kenny, 'Bail Me Out: NSW Young People and Bail' (2010) Youth Justice Coalition 17.

police had no discretion. When Moussa's solicitor challenged him on this, he admitted that he did have discretion but did not propose to exercise it in this case, saying "he's 18 now, he should know what his bail conditions are." The Custody Manager went on to say something along the lines of, "it's no big drama. He'll get bail at court in the morning anyway."

In our view, for the police to refuse bail, knowing that there is a good excuse for the breach and that the court will almost certainly grant bail, is a form of arbitrary extra-curial punishment.

**Case study – Ben**

Ben, 15, has been in care since the age of 18 months, and has lived with the same foster family since then.

He has no criminal history, but is alleged to have been involved in the lighting of a small bonfire in parkland near his home, which unfortunately burnt out about 660 square metres of Crown land and had to be extinguished by the Fire Brigade. The evidence is that clear attempts were made to put out the bonfire (with dirt) by the four young accused people before they left the area.

Despite Ben's lack of criminal record or prior contact with police, he was placed on onerous bail conditions including non-association with 8 of his friends, and a curfew from 8pm to 6am.

Not only was the curfew unwarranted in the circumstances (the alleged offence was committed in the afternoon), it had a particularly harsh impact because of the police practice of "bail compliance checks".

For several weeks, police turned up almost every night (some time between 11.30pm and 3am) at Ben's house to check that he was abiding by his curfew. This caused Ben and his foster family much distress. There is a 4-year-old child in the family home who was awoken each night and who had trouble getting back to sleep. The neighbours were also becoming upset with the voices and police car lights interrupting their sleep almost every night.

The conduct by police is concerning for a number of reasons. This includes the fact that Ben has a right to confidentiality in relation to his being charged with criminal offences as a child. The arrival by police every night was, in effect, a publication to his neighbourhood community of his alleged involvement in a criminal matter. The stigma for Ben and his foster family was, and continues to be, significant.

Further, Ben is a young man without any criminal history. His alleged involvement in the offence can only be described in terms of behaviour reflective of youth and immaturity. The police brief suggests a group of young people were not careful, and mistakenly thought they had extinguished embers from their fire. Although this unfortunately had significant consequences, it is our view that Ben's alleged involvement is not reflective of high objective criminality.

The problem was only resolved when we explained the circumstances to the Children's Court magistrate and had the curfew condition deleted. [As an aside, we would add that some other magistrates in other cases have been unmoved by such explanations and have continued curfew conditions despite the hardship occasioned to the young person and their family by police curfew checks.]

### Arrest due to administrative error

Not only do police often arrest young people for minor breaches where a warning would be more appropriate, it has been widely documented that many young people have been arrested for alleged breaches of bail conditions that no longer exist, due to out-of-date information on the COPS system.

According to the *Bail Me Out* report, 3% of the young people surveyed had been arrested due to administrative error[12]. In our view, this rate is unacceptably high.

In our experience, even when young people are adamant that they have been arrested in error, the police rarely give them the benefit of the doubt. Young people do not always carry around their bail notices with them and, because most of these arrests happen after hours, police are not able to contact the court to verify the correct bail conditions. It is not until the next day, when the young person appears at court, that the error is acknowledged and the young person is released.

Despite publicity surrounding this issue, and repeated efforts to get the police to improve their communication and information systems, the problem continues. Recently a class action was commenced on behalf of young people affected by this problem[13].

**Case study – Billy**

Billy, 19, had a childhood was characterised by serious abuse, neglect and a lack of stability. His father was frequently in prison and, when he was in Billy's life, exposed him to domestic violence and drug and alcohol abuse. Billy reports drinking from age 12 and using illicit drugs including ice from age 13.

Having been known to the Department of Community Services since age 1, he was placed in care at age 10. Since then he was moved around various foster care placements until adulthood. In one year alone he had 23 placements.

At age 18, Fred was charged with assault following an incident that occurred when he was experiencing severe paranoia as a result of mental illness and intoxication. He was placed on strict bail conditions that were quite onerous and difficult to keep, especially for a young person of his background. One of the bail conditions was not to drink alcohol – although well-intentioned, this was a very problematic condition for someone with a chronic alcohol problem. After a few weeks Billy's bail conditions were relaxed by the court and he felt quite relieved.

A month after the conditions had been changed, Billy was on the way to visit a friend, but did not have any money so he jumped the ticket barrier at the train station. He was stopped by police who smelt alcohol on his breath.

When the police did a radio check it came back saying that he still had a bail condition not to consume alcohol. He was taken back to the police station in handcuffs and released and hour later when police realised the error.

A few days later he was again stopped by police and again arrested based on incorrect information on the police system. This time he was held in custody overnight before being re-released on bail at court the following day.

This was the first time Billy had been in adult custody. He said, "It did my head in" and, "My life was a mess and that didn't help".

Billy was upset that the police didn't listen to him when he explained on both occasions that the bail condition had been changed. It fuelled in Billy anger towards the police and society in general. He commented, "If they are going to treat me like a criminal I may as well be one..."

## A more appropriate response

It must be remembered at all times that bail conditions are a means to an end and not an end in themselves. Bail conditions are directed at ensuring an accused person appears at court when required, does not interfere with the course of justice, and does not commit serious offences while on bail.

[12] Ibid, "Key findings" at p. v and "Administrative error" at p. 20.

[13] See http://www.piac.asn.au/project/cidnap-unlawful-detention-young-people

Breach of bail is not an offence and nor should it be. While we are not suggesting that police and courts should turn a blind eye to breaches of bail conditions, the response to an alleged breach should be appropriate, having regard to the nature of the breach and the circumstances of the accused person.

As discussed in our 2010 submission to the NSW Law Reform Commission on People with Cognitive and Mental Health Impairments in the Criminal Justice System[14]:

> "Section 50 of the *Bail Act* provides police with a discretion whether to arrest for breach of bail conditions. In the past, many police officers exercised this discretion appropriately and did not take action on minor and one-off breaches. However, in most Local Area Commands there now seems to be a "zero discretion" policy on breaches of bail, which leads to many inappropriate arrests, especially of children.
>
> We find that sometimes young people who attend police stations to explain the reason why they missed reporting are arrested, taken into police custody and then put before the court (often after an overnight stay in custody). What seemed a reasonable excuse in the mind of the young person is often not tolerated by police, particularly in those cases where young people lack adult support.
>
> In our view, a police officer who reasonably believes a person had breached (or is about to breach) bail should have the discretion to:
>
> - take no action;
> - issue an informal warning;
> - issue a Court Attendance Notice without arresting the person; or
> - (only in the most serious cases where there is a risk of flight or a significant and continuing breach of bail) arrest the person and immediately place them before the court.
>
> It is important that, if a person is arrested for breach of bail, police have an express power to discontinue the arrest (for example, if the person provides a reasonable excuse for having breached bail, or if the police made the arrest based on incorrect information about the bail conditions)."

## 5 The desirability of maintaining s22A

We refer to our 2010 submission (see "Limits on repeat bail applications" on page 4).

We are of the view that s22A ought to be repealed (except subs(2), which provides that a court may refuse to entertain a frivolous or vexatious bail application). If s22A is to be retained, we submit that juveniles should be exempted from its operation.

The purported aim of s22A was to restrict unnecessary and repeated bail applications, particularly in relation to more serious offences. One of the stated aims was to spare victims the trauma of the possibility that an accused person could be granted bail at any time. It was said by the Attorney-General at the time, "The changes are necessary to guard against unnecessary, repeated bail applications that serve only to inflict further anguish upon victims".[15]

As far as we are aware, there no evidence to support the contention that, prior to 2007, there was widespread abuse of the bail system (including magistrate-shopping) by defendants. In other words, there is no compelling evidence of the need for s22A.

---

[14] The Shopfront Youth Legal Centre, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Submission to NSW Law Reform Commission*, June 2010, p4.

[15] New South Wales Legislative Assembly, *Parliamentary Debates (Hansard) Bail Amendment Bill 2007*, 6 November 2007 at 3570.

Any potential abuse can be adequately addressed by a provision along the lines of s22A(2), which empowers the court to refuse to entertain a bail application if it is frivolous or vexatious.

Nor is there evidence that a lot of court time was being wasted on repeated and meritless bail applications. In our view, far more court time has been wasted on breach proceedings and bail variation applications following the imposition of overly onerous conditions.

Even if there was a demonstrated need for s22A, its widespread application has had unintended consequences. In particular, it has adversely affected large numbers of young people, including those charged with less serious (and often victimless) offences.

It is well-established that, following the introduction of s 22A, there was an abrupt increase in the number of juveniles on remand. The available evidence suggests that s22A has been a significant (albeit not the only) contributing factor.

The BOCSAR study referred to above[16] cited statistics showing a significant growth in the average length of stay in remand for young people following the introduction of 22A. This supports the contention that young people who would otherwise have made a successful bail application are precluded from doing so by s22A and are therefore staying on remand.

Although a defendant can of course apply to the Supreme Court for bail, it takes several weeks to have a bail application listed in the Supreme Court and it is not desirable for the Supreme Court's resources to be consumed by applications that could more appropriately be dealt with in the Local or Children's Court.

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

Firstly, we take issue with the use of the term "young offenders" in this context. A person affected by the *Bail Act* is not necessarily an offender, as they are innocent until proven guilty and may ultimately be acquitted of the charge.

We are pleased to note that, in your discussion paper, you instead refer to "young people" and "juveniles".

### Distinction between adults and juveniles

We refer to our 2010 submission (especially pages 5 and 6) and to our 2005 submission (particularly the answers to questions 40-42).

We strongly support a distinction between young people and adults in the *Bail Act*. For very good reasons, young people are treated differently to adults when it comes to sentencing and to various aspects of criminal procedure, including police interviews and the protection of the privacy of children who appear before the court. There is a wealth of credible literature on why children and adults should be treated differently; for a brief but helpful discussion, see the Noetic Group's report of the Strategic Review of the NSW Juvenile Justice System[17].

The special needs of children are reflected in the statement of principles in s6 of the *Children (Criminal Proceedings) Act*, and also in sentencing law. Detention as a last resort for children is enshrined in Article 37(b) of the UN Convention on the Rights of the Child (CROC) and in the Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules).

---

[16] Sumitra Vignaendra, Steve Moffatt, Don Weatherburn, and Eric Heller, 'Recent trends in legal proceedings for breach of bail, juvenile remand and crime' (2009) 128 *Crime and Justice Bulletin*.

[17] Strategic Review of the NSW Juvenile Justice System, conducted by the Noetic Group in 2009/2010, see final report at http://www.djj.nsw.gov.au/strategic_review.htm, pp2-5.

## The need for special provisions for children

While we do not see the need for a separate *Bail Act* for children, we strongly support legislative reform to ensure that children's needs are met and their rights are protected.

One suggestion that has been put forward is including a children's bail regime in the *Children (Criminal Proceedings) Act* rather than in the *Bail Act.* We are attracted to this idea, as it would provide a "red flag" to police and judicial officers that children must be treated differently to adults.

Alternatively, we suggest that children would continue to be covered by the *Bail Act,* but:

- it would contain special provisions relating to children;
- it would clearly be subject to the *Children (Criminal Proceedings) Act*;
- it would also direct the police or court to consider the *Young Offenders Act* in appropriate cases; and
- s6 of the *Children (Criminal Proceedings) Act* would be amended to ensure the principles of the Act are appropriately applied to bail decisions.

The current *Bail Act* gives a nod to the special needs of children and young people (see, for example, s32(1)(b)(v)), but only in a limited way.

While the principles of s6 of the *Children (Criminal Proceedings) Act* apply to any "person or body that has functions under this Act", including a court making a decision in relation to bail, this has proved inadequate to protect the interests of juveniles in the context of bail.

We would support the amendment of s6 to provide additional guidance to courts (and other bodies including police) making bail decisions in relation to children.

While paragraph (a), which provides that "children have rights and freedoms before the law equal to those enjoyed by adults …", ought to provide a safeguard against inappropriate bail refusal or unreasonably onerous bail conditions, our experience shows that it is insufficient.

Paragraph (b), "that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance" is sound in principle but there is a danger of it being misapplied in relation to bail. We have observed that some magistrates in the Children's Court seem to interpret "guidance and assistance" as allowing them to impose onerous bail conditions that are largely based on welfare considerations. Such conditions are often tenuously linked with the alleged offence and are usually more onerous than conditions imposed on adults in similar circumstances.

Paragraph (e) "that the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind", provides important guidance on sentencing but does not apply directly to bail. It is well-known that children are often refused bail for offences that do not warrant a custodial sentence; in practice this operates as a punishment and arguably offends this important principle.

It would be desirable for s6 to include an additional principle to the effect that:

- a child should be detained as a last resort and for the shortest appropriate period of time; and
- a child should not be deprived of their liberty, or have their liberty restricted, in circumstances where an adult would not be subject to such restrictions.

An additional problem lies in s27 of the *Children (Criminal Proceedings) Act,* which provides that, in Children's Court proceedings, the *Children (Criminal Proceedings) Act* prevails over other procedural legislation – *except* the *Bail Act* - in the event of any inconsistency. We see no good reason why the *Children (Criminal Proceedings) Act*

should not prevail over the *Bail Act*, and submit that the legislation should be amended accordingly[18].

### Inappropriate considerations and unreasonable bail conditions applying to children

In our view there is a growing problem with the imposition of onerous and inappropriate bail conditions. While this is not confined to the Children's Court, it is mainly juveniles who bear the brunt. The impact is especially harsh when combined with current police monitoring and enforcement practices.

We endorse the comments of the Chief Magistrate:

> "Overly complex or onerous reporting requirements that go beyond those reasonably necessary to secure an accused person's attendance at court are commonly seen in conditions of police bail or are being sought in applications for bail before the court, notwithstanding the requirement of section 37(2) that the conditions imposed on a grant of bail are to be no more onerous than appear to be required. The Court is exposed to constant applications for review of bail conditions and observes that in the majority of cases such applications are wholly or partially successful, in most cases with the consent of the prosecuting agency.
>
> A measure to address this may be to introduce a provision placing the onus on the party seeking the imposition of a condition to satisfy the court that the condition is reasonably necessary, having regard to the list of considerations for determining bail and to call evidence under oath to support the imposition of a condition."[19]

Regrettably, some judicial officers (especially in the Children's Court) appear to have become infected with this police penchant for unnecessarily onerous bail conditions.

We refer to our 2005 submission, especially our answer to question 7, and suggest that s37 in its current form is not strong enough to safeguard against inappropriately onerous bail conditions. The inclusion of "promoting effective law enforcement" is problematic as it is capable of being interpreted to justify onerous bail conditions which are disproportionate to the alleged offence.

We also refer to our discussion on "Practical measures to reduce failure to appear through disorganisation" in our response to question 37 in our 2005 submission. Measures such as SMS messaging to remind accused people of court dates are probably cheaper and more effective – not to mention less onerous on the defendant - than reporting and residential conditions.

We support the Chief Magistrate's suggestion of a provision placing the onus on the party seeking the imposition of a bail condition to satisfy the court that the condition is reasonably necessary. We also see merit in the Youth Justice Coalition's recommendation that police bail should only continue until the first return date, whereupon the court should be required to make a fresh bail determination.

As discussed in our 2011 submission to the NSW Law Reform Commission on Young People with Cognitive and Mental Health Impairments in the Criminal Justice System:

> "We also suggest there may be a need for closer court scrutiny of bail conditions, and a greater readiness to review bail conditions. Currently, most Local and Children's Courts will only vary bail conditions upon application of the defendant (and often this requires a application to be filed and the prosecution put on notice). For young people, especially those with cognitive and mental

[18] We note that this was one of the recommendations of the Strategic Review of the NSW Juvenile Justice System, conducted by the Noetic Group in 2009/2010, see final report at http://www.djj.nsw.gov.au/strategic_review.htm.

[19] The Chief Magistrate of the Local Court (NSW), *Submission - Review of Bail Law,* 1 July 2011, p2

> health impairments, the barriers to having a bail variation listed are considerable.
>
> Further, in practice there is usually an onus on the defendant to satisfy the court as to why the bail condition is onerous or unreasonable. For example, we have encountered numerous situations where a curfew condition has been imposed in relation to a relatively minor offence alleged to have taken place in the middle of the day. Rather than considering whether a curfew is necessary and appropriate in the circumstances, many children's magistrates will approach the matter by asking the defendant "why do you need to be out in the middle of the night?".
>
> Additionally, there appears to be a widely-held attitude among magistrates that young people should not be "rewarded" for breaching their bail conditions. There is thus a propensity to continue (or even toughen) onerous bail conditions rather than make a realistic assessment of the appropriateness of the condition and the young person's ability to comply.
>
> There are, of course, magistrates who take a different approach, often reviewing bail conditions of their own motion and being prepared to vary or delete inappropriate conditions. We would like to see this approach adopted across the board, although we are unsure how this could be achieved by legislation. The *Bail Act* already provides that bail conditions are not to be more onerous than necessary, having regard to certain objectives, but in our view this section is not as rigorously applied in the Children's Court as it should be."[20]

We also commented on the problems facing young people who remain in custody because they are unable to meet bail conditions (usually homeless young people who are subject to a "reside as directed" condition). While our primary position is that bail should be dispensed with wherever possible, if such conditions are to be imposed we are of the view that:

> "Appropriate procedural measures include regular reviews by the court where a young person remains in custody because of inability to find appropriate accommodation. Currently s54A of the *Bail Act* provides for the matter to be re-listed after 8 days; however, in our view, such a review needs to happen more promptly (we suggest 2-3 days) and may need to happen more than once if the young person remains in custody. If the court has imposed a residential condition such as "reside as directed by Community Services", the court should have power to order an Community Services staff member to attend and explain why the condition has not been met."[21]

Where the court is of the view that a residential condition is necessary, we support "reside as directed" or "reside as approved " conditions in preference to being bailed to reside at a specified address. This provides the flexibility for a young person to change address without constantly having to apply to the court for a bail variation.

We are of the view that no child should be refused bail due to homelessness, nor should children on "reside as directed " conditions be held on remand pending the arrangement of accommodation. We suggest there may need to be a stronger statement in the *Bail Act* that homelessness or welfare concerns are not, in themselves, proper reasons for refusing or delaying the grant of bail.

---

[20] The Shopfront Youth Legal Centre, *Young People with Cognitive and Mental Health Impairments in the Criminal Justice System: Submission to NSW Law Reform Commission*, March 2011, response to Question 11.9, at p 6.

[21] Ibid, response to Question 11.10, at p 6.

**Case study - Tayla**

Tayla, 17, is Aboriginal and lives with her family. She has a limited criminal history involving relatively minor offences.

Tayla was charged with shoplifting and released by police on strict bail conditions including a night-time curfew and a prohibition on associating with her co-accused Leanne. Leanne is a close family friend who Tayla's family had taken under their wing following the death of Leanne's mother.

The Children's Court agreed to delete the curfew, which had been imposed by police despite the fact that the alleged offence had been committed in the day-time. However, the non-association condition remained.

A few weeks later, Tayla was arrested for breaching the non-association condition when she was found in the company of Leanne. Neither of them were suspected of committing any further offences.

When dealing with the breach of bail, the Magistrate agreed to release Tayla on bail and to delete the non-association condition, but only on condition that the curfew was re-imposed. The magistrate appeared to take the view that Tayla must suffer some consequences for breaching her bail, even though the non-association condition was obviously unreasonable and the curfew clearly unnecessary.

Tayla's solicitor commented that if Tayla was an adult she probably would have received a field court attendance notice and the issue of bail would not have arisen at all. The magistrate replied that, while in most respects children are dealt with more leniently than adults, children needed stricter bail conditions than adults to ensure that they were adequately supervised and did not re-offend. We respectfully disagree with this view, which we believe to be contrary to well-established principles of juvenile justice. and are deeply concerned that it seems to have gained some currency in the Children's Court.

**Case study – Yun Jia**

Yun Jia, 16, was born in Hong Kong and had been in Australia for only 1½ years. She struggled with expressing herself in the English language. She had experienced family violence (at the hands of her mother's new husband, her stepfather) and subsequent homelessness.

Yun Jia was referred to the Shopfront by a counsellor at a Mission Australia service. She did not have any prior criminal history and was charged for the first time for offences of dishonesty. At the time she was homeless and had no income, and her offences could be described as survival crimes. Yun Jia had a twin sister, who was not in trouble with the law, but who also was homeless and fleeing domestic violence.

Yun Jia was granted police bail on the condition that she report to police three times per week. This condition was imposed despite the fact that she was only 16 years of age and had never been before the courts in Australia or Hong Kong. The difficulty for this young woman was that she was experiencing sudden homelessness and was moving between friends' houses. This made reporting to the police station particularly onerous. This problem was exacerbated by her lack of income. She simply had no access to money which meant she was struggling with the basic necessities of life and had difficulty paying for public transport. Yun Jia finally found emergency refuge accommodation, and with our assistance was granted special benefit by Centrelink, despite her uncertain immigration status.

During the adjournment period she was breached twice by police for failing to report to the police station and she subsequently spent time in custody. On two occasions we were required to attend the Children's Court and argue that bail be reinstated. On both these occasions Yun Jia was extremely distressed. In relation to the second alleged breach, Yun Jia had contacted the police station by telephone on the day of the breach, and explained that she could not attend for reporting because she had to travel out to western

Sydney to support her twin sister who was very ill that day. Yun Jia then attended the police station the next day and she was promptly arrested, taken into custody and some hours later appeared at the Children's Court.

Yun Jia was deprived of her liberty on two occasions, despite the fact that the Children's Court would never have considered a custodial sentence an appropriate or proportionate penalty for the crimes committed.

This matter is an example of how the current *Bail Act*, and the way in which is it applied, can draw young people into the criminal justice system and deal with them in a disproportionately harsh way, in contradiction to the principles of rehabilitation, diversion and prevention that underpin sentencing in the Children's Court jurisdiction.

### Ineffectiveness of current practices in relation to bail

Traditionally, the main aim of a bail scheme is to minimise the risk of an accused person failing to appear at court. In fact, the risk of young people "absconding" while on bail is very low. For instance, in relation to the period of 2006-2007 the Youth Justice Coalition reported that of the 87% of young people either granted bail or where bail was dispensed with, fewer than 2% failed to appear at court or had arrest warrants issued in the same year.[22]

Some might say that this proves the effectiveness of the current regime – under which young people are often subject to tough bail conditions - in ensuring young people attend court. We beg to differ: our experience shows that supportive rather than coercive and punitive measures are much more likely to ensure a young person attends court.

Of the relatively small number of young people who fail to appear at court, our experience suggests that most do not deliberately "abscond". Their non-appearance is usually due to factors such as mental illness, homelessness, a chaotic lifestyle, lack of transport, and the like. Some young people do not appear due to a sense of fear or hopelessness. Appropriate support services would go a long way to addressing these problems.

We have already discussed the role of s22A and police enforcement practices in driving up the number of young people remanded in custody. We also discussed BOCSAR's findings that suggest that these increased numbers have not led to a fall in property crime.

It is now common knowledge that many young people are held on remand for offences that do not warrant a custodial sentence. Although not necessarily refused bail at the outset, many young people are remanded in custody due to breaches of bail conditions that are overly onerous and difficult to comply with.

It is also well-established that – all other things being equal – a period in custody is unlikely to reduce a young person's risk of re-offending, but is more likely to have the opposite effect. As the Youth Justice Coalition points out, there is a lack of evidence demonstrating that monitoring, arresting and detaining young people for breach of bail conditions reduces re-offending among juveniles. Conversely, there is a demonstrated link between "intervening early with diversionary options to adequately support young people" and reduced re-offending[23].

While there will always be some juveniles for whom remand in custody is necessary, there are undoubtedly many young people in custody who should not be there. These are among the most marginalised people in our community.

The 2009 Young People in Custody Health Survey (YPICHS) assessed the health of juvenile detainees in NSW and found that young people in custody experience mental and physical health problems and disabilities at a rate which is disparate when compared

[22] Department of Justice and Attorney General, New South Wales Criminal Courts Statistics 2008 (Sydney: NSWBCSR, 2009), cited in Youth Justice Coalition, '*Bail Me Out: NSW Young People and Bail*' (2010) at p 2.

[23] Youth Justice Coalition, '*Bail Me Out: NSW Young People and Bail*' (2010) at p 3.

to their counterparts in the community.[24] Under-reporting is a significant obstacle to reporting the health conditions suffered by young people in custody because so few are in regular contact with a health professional.[25]

In relation to mental health, 87% were found to have a psychological disorder, with conduct disorder (59%), substance use (49%), alcohol abuse (44%) or ADHD (30%) being the most common.[26] Nearly three quarters of young people (73%) were found to have two or more psychological disorders.[27] This is unsurprising considering 60% of young people had a history of child abuse or trauma.[28]

14% of young people in custody were thought to have an intellectual disability and a further 32% were assessed to be functioning in the borderline intellectual disability range.

The high numbers of young people who had been in care, homeless, and/or not attending school immediately before being taken into custody is also a cause for concern.

All of this evidence points towards a need for supportive measures, rather than onerous bail conditions, to keep young people out of custody while minimising the risk of non-appearance and re-offending pending their appearance at court.

### More appropriate alternatives for young people

As discussed in our 2011 submission to the NSW Law Reform Commission on Young People with Cognitive and Mental Health Impairments in the Criminal Justice System:

> "While there may be some young people for whom custodial remand is the only appropriate option, we suggest that these represent a tiny minority.
>
> In most cases, we believe that concerns about attendance at court, community protection and the like can be addressed by the provision of appropriate support services in the community, without the need for remand or for onerous bail conditions. Without these support services, sadly, juvenile detention becomes the inappropriate alternative to Children's Courts.
>
> It is supportive rather than punitive measures that are most likely to ensure a child attends court when required and does not offend in the interim. It is a well-established principle of children's sentencing that rehabilitation should generally prevail over punishment and deterrence. This is a sound principle based on an understanding of young people's development and what works best to prevent young people re-offending. Further, section 6 of the *Children (Criminal Proceedings) Act* sets out a number of important principles that courts must observe when dealing with criminal matters (including bail applications) involving children. Regrettably, these principles often seem to be forgotten when it comes to imposing and enforcing bail conditions.
>
> *Ideally, we would like to see a presumption that bail be dispensed with for children.* Section 8 of the *Children (Criminal Proceedings) Act*, while quite outdated in its terminology, effectively creates a presumption that bail should be dispensed with for children. It provides that, unless there are real concerns about violence, re-offending or non-attendance at court, children should generally be dealt with by court attendance notice rather than being arrested

[24] Indig, D., Vecchiato, C., Haysom, L., Beilby, R., Carter, J., Champion, U., Gaskin, C., Heller, E., Kumar, S.,Mamone, N., Muir, P., van den Dolder, P. & Whitton, G. (2011) *2009 NSW Young People in Custody Health Survey: Full Report.* Justice Health and Juvenile Justice. Sydney, p 164.

[25] Ibid, at p 80.

[26] 2009 *Young People in Custody Health Survey Fact Sheet: Key Findings for All Young People.*

[27] Indig, D., Vecchiato, C., Haysom, L., Beilby, R., Carter, J., Champion, U., Gaskin, C., Heller, E., Kumar, S.,Mamone, N., Muir, P., van den Dolder, P. & Whitton, G. (2011) *2009 NSW Young People in Custody Health Survey: Full Report.* Justice Health and Juvenile Justice. Sydney, p 162.

[28] Ibid.

and put through the charge process. We are of the view that section 8 needs to be updated and strengthened.

We note that, where a child is referred by a court to a Youth Justice Conference, or placed on a Youth Conduct Order, bail is generally dispensed with.

More specialised mental health and disability services for young people are part of the solution. These would include adolescent psychiatric facilities, early intervention teams based at community mental health centres, and targeted programs within ADHC.

It would be helpful if the police or Children's Court were able to refer a young person directly to a community-based service and (if necessary) impose a bail condition that the young person participate in assessment, treatment or case management with that service.

We are very concerned about the use of coercive sanctions on children in the early stages of a matter (when they are still presumed to be innocent or, even if they have admitted guilt, have yet to be sentenced). However, bail conditions requiring a young person to engage with services are preferable to the kind of bail conditions that are currently routinely imposed upon our most vulnerable children.

We also support the increased use of interlocutory orders under s32 (we note that, currently, magistrates are often reluctant to make interlocutory orders under s32, unless the matter has been formally listed for a lengthy s32 application). If a young person is thought to have a mental illness or cognitive impairment, they could be referred for assessment (or, if already assessed, for treatment or case management) on an interlocutory basis under s32 and bail dispensed with. A young person who fails to engage with the service offered would not be breaching bail (with all the consequences that may entail, including arrest and detention on remand) but would still be subject to court scrutiny the next time the matter is listed.

We also suggest that the development of a MERIT or CREDIT type program for juveniles, including those with cognitive and mental health impairments, would help address the need for appropriate support services.

When referred to these programs, the monitoring of compliance is conducted flexibly by people with specialist skills, as opposed to the narrow approach generally adopted by police when enforcing bail conditions."[29]

With the exception of the comment about s32 (of the *Mental Health (Forensic Provisions) Act*), the above comments do not apply only to young people with cognitive and mental health impairments. It is our view that young people generally - by virtue of their youth, immaturity and relative lack of agency over their lives - need supportive rather than punitive measures to ensure their appearance at court and to minimise the risk of re-offending.

We strongly support a MERIT or CREDIT type program for juveniles, available at the pre-plea stage, which could alleviate the (actual or perceived) need for many of the bail conditions that are currently imposed on young people.

Our submission on Young People with Cognitive and Mental Health Impairments in the Criminal Justice System outlines how such a scheme could operate for young people with cognitive impairments and mental health problems.[30]

---

[29] The Shopfront Youth Legal Centre, *Young People with Cognitive and Mental Health Impairments in the Criminal Justice System: Submission to NSW Law Reform Commission*, March 2011, response to Question 11.1, at p 3.

[30] Ibid, response to Question 11.21, at pp 13-14.

Such a scheme could be readily adapted to the needs of young people more generally. It could incorporate some elements of the current Youth Conduct Order (YCO) scheme which, for all its flaws, has some commendable aspects. A YCO generally involves dispensing with bail and instead providing a network of support services. Such a scheme could deal with some of the court's concerns about the welfare of the child and the protection of the community, without the need to impose bail conditions which effectively criminalise children for welfare problems which are beyond their control.

It is important that such a program would be voluntary, and failure to complete it would not attract punishment. While reservations are sometimes expressed about young people being encouraged to participate in such programs when they are pleading not guilty and may ultimately be acquitted, in our view this is preferable to being bail refused or subject to onerous bail conditions.

## 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

### Capacity to understand and comply with bail conditions

We support the inclusion of a provision that requires a bail authority to satisfy itself that a vulnerable person is capable of understanding and complying with any proposed bail condition.

Such a provision should apply to the categories of vulnerable people as currently set out in Part 9 of LEPRA and the related regulations, ie:

- Children;
- Aboriginal and Torres Strait Islander people ;
- People of non-English speaking background;
- People with a disability (whether physical, intellectual or otherwise).

### Aboriginal people and Torres Strait Islanders

Our comments in relation to young people apply all the more to young people of Aboriginal and Torres Strait Islander background.

The recent Young People in Custody Health Survey reported that in 2009 Aboriginal young people were disproportionately represented among young people in juvenile detention, comprising approximately 50% of detainees, despite making up approximately 4% of the general adolescent community in NSW.[31]

This is consistent with numerous previous studies that demonstrate the over-representation of indigenous people in custody, and in the criminal justice system more generally. Clearly there is a need for legislative and policy change to reduce this over-representation in all aspects of the criminal justice system, of which bail is but one component.

We understand that the Aboriginal Legal Service is preparing a submission to this reference. We defer to their expertise when it comes to making specific recommendations in relation to indigenous people and bail.

### People with cognitive and mental health impairments

As discussed in our 2010 submission to the NSW Law Reform Commission on People with Cognitive and Mental Health Impairments in the Criminal Justice System:

[31] Indig, D., Vecchiato, C., Haysom, L., Beilby, R., Carter, J., Champion, U., Gaskin, C., Heller, E., Kumar, S.,Mamone, N., Muir, P., van den Dolder, P. & Whitton, G. (2011) *2009 NSW Young People in Custody Health Survey: Full Report.* Justice Health and Juvenile Justice. Sydney, p 12.

> "In our experience, a person with a mental illness or cognitive impairment often finds it more difficult to get bail than other alleged offenders, particularly if the alleged offence is a violent one. Lack of appropriate accommodation, treatment and care may make it difficult to address the court's concerns about the protection of the community."[32]

We also refer to this comment from our 2011 submission on Young People with Cognitive and Mental Health Impairments in the Criminal Justice System:

> "Attempts to exhaustively define terms in legislation may lead to a more restrictive interpretation that would otherwise be the case. If "special needs" is to be defined, it is important that the definition be non-exhaustive. Examples of some factors that could be taken into account include:
>
> - The fact that people with cognitive impairments and mental health problems are more vulnerable in custody;
> - The lack of specialist mental health and disability services within the custodial environment (this is not to say that they do not exist, but they are less readily available in custody than in the community);
> - The fact that disruption to a person's routine occasioned by a period on remand is likely to have a more significant impact on a young person with a measure of cognitive impairment, not only because it is likely to be distressing but because it disrupts established treatment and support networks.
>
> Special needs are also relevant to any conditions imposed on bail, in particular the person's ability to understand and comply with conditions."[33]

In both submissions we advocate for the increased use of interlocutory orders under s32 of the *Mental Health (Forensic Provisions) Act,* and the adoption of a MERIT/CREDIT type program for people with cognitive and mental health impairments, in preference to conditional bail[34].

In relation to how the categories of people with "cognitive impairment" and "mental illness" should be defined, we refer to our submission on People with Cognitive and Mental Health Impairments in the Criminal Justice System.[35]

**Case study – Simon**

Simon (19) has a moderate intellectual disability and functions at a level equivalent to a child of about 11. His parents had very high expectations of him and refused to accept that he had a disability. This eventually led to a breakdown in their relationship and Simon went to a refuge when he was about 16.

Since then, Simon has come to the attention of the police a few times, mainly for being involved in minor fights, once for being a passenger in a stolen car, and once for being part of a group who barged into a person's home (who Simon did not know) to "speak to him" about a debt. On most of these occasions he was clearly led astray by older and more sophisticated "friends".

---

[32] The Shopfront Youth Legal Centre, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Submission to NSW Law Reform Commission*, June 2010, response to Issue 7.6 at p4.

[33] The Shopfront Youth Legal Centre, *Young People with Cognitive and Mental Health Impairments in the Criminal Justice System: Submission to NSW Law Reform Commission*, March 2011, response to Question 11.4 at p4.

[34] The Shopfront Youth Legal Centre, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Submission to NSW Law Reform Commission*, June 2010, response to Issues 7.21 and 7.22 at p9 and response to Issue 7.35 at pp 12-13; *Young People with Cognitive and Mental Health Impairments in the Criminal Justice System: Submission to NSW Law Reform Commission*, March 2011, response to Questions 11.3 and 11.4 at p4 and response to Question 11.21 at pp 13-14.

[35] The Shopfront Youth Legal Centre, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Submission to NSW Law Reform Commission*, June 2010, response to Issues 7.9 to 7.16 at pp 5-6.

On one occasion, Simon was found by police in a park with a samurai sword. He had been attacked a few weeks previously and thought he needed to carry something with him to feel safe. He was unable to explain this to the police and, although he was not wielding the sword or threatening harm to anyone, he was charged with possessing an offensive weapon with intent to commit an indictable offence.

Simon was bail refused by the police and by the Local Court. The court was very concerned about the seriousness of the alleged offence and the protection of the community. Despite Simon's intellectual disability and the fact that he had accommodation and support services in place, it took a few weeks to get him out on bail. Simon's charge was subsequently dismissed under s32 of the *Mental Health (Forensic Provisions) Act*.

Simon was subsequently charged with another offence which also was ultimately dealt with under s32. While the matter was pending, he was on strict bail conditions including a 9pm curfew. One night he was out with a group of other young people and a youth worker as part of an organised sporting activity; they stopped on the way home to have something to eat and were still out after 9pm. He was arrested by police for breaching his curfew and was held overnight in custody. Although the youth worker should have been more careful to ensure that Simon was home by 9pm, this was not Simon's fault and it is somewhat unfair that he should bear the consequences.

Since being released on his last s32 order a couple of years ago, Simon has done extremely well and has not offended. We believe this is largely because he has a network of support services and realistic conditions that he is capable of understanding and complying with.

## 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

Unfortunately time does not permit us to adequately research and comment on bail schemes in other jurisdictions.

## 9 Any other related matter

### The drafting of the Bail Act

We do not see the need for a wholesale re-writing of the *Bail Act*.

The *Bail Act* 1978 – if it is "stripped back to basics" by repealing most of the ill-conceived and ad-hoc amendments that have been made in recent years - is fundamentally a sound piece of legislation. We agree with the Chief Magistrate that "it should be redrafted to return to a simpler process that focuses on the fundamental purposes of bail."[36]

The Bail Bill 2010 demonstrably failed in its attempt to simplify the Act and re-draft it in plain English. In our view, it is not a model that should be followed.

### Pre-charge bail

We note the Chief Magistrate's proposals in relation to pre-charge bail[37]. We have grave concerns about restrictions being placed on a suspect's liberty when there is insufficient evidence to charge him or her with a criminal offence. Although we understand the reasoning behind this proposal, we are not confident it will have the intended outcomes.

[36] The Chief Magistrate of the Local Court (NSW), *Submission - Review of Bail Law,* 1 July 2011, p1

[37] Ibid, p5

## Conclusion

We would be happy to be involved in further discussions or consultations on this issue. In this regard please do not hesitate to contact me.

Yours sincerely

**Jane Sanders**
Principal Solicitor
Shopfront Youth Legal Centre