Community Justice Coalition
Submission to the
New South Wales Law Reform Commission
Review of the Bail Act 1978

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Community Justice Coalition
P.O. BOX 345 BROADWAY NSW 2007
info@communityjusticecoalition.org
www.communityjusticecoalition.org

About the Community Justice Coalition

The Community Justice Coalition (CJC) was formed in 2009 following decades of media driven "law and order" campaigns, resulting in a huge growth in the prison population, the many new prisons, privatisation of prisons, the over representation of indigenous, illiterate and mentally ill people in prison, the inadequate rehabilitation services and the huge increases in expenditure on incarceration without an equal growth in the crime rate and a growing lack of transparency in the governance of prisons.

CJC strives for an educative and restorative, as well as punitive prison system. CJC also aims to ensure better results for financial investment, community safety and fairness in a public prison system.

CJC works in collaboration with other interested bodies such as those involved in crime and justice reform and bail reform, which are often constituted by expert academics, lawyers and retired Judges with long-serving experience in the criminal justice system.

CJC plays lobbyist to government for inquiries into prisons by the State and Federal Law Reform Commissions with the aim to ensure compliance with United Nations protocols and reports on prisons, with a special emphasis on indigenous prisoners. Prisons need to be effective in rehabilitating prisoners and outlaid costs need to produce effective achievement of professed goals in this area. There is also a need for independent inspection procedures for prisons to ensure adequate provision of personal necessities to protect basic human rights. CJC strongly encourages government to take up issues for reform arising from these inquiries in parliamentary question and debate sessions as a necessary part of addressing the criminal justice system.

CJC also is a monitor of independent reports and recommendations and subsequent government responses affecting prisoners. CJC is a strong supporter of legislated mandatory responses of government on recommendations on the health of prisoners generally and on people with cognitive and mental health impairments in the criminal justice system. CJC also strongly endorses recommendations for reform to the juvenile justice system, juveniles being greatly overrepresented in detention. Such inquiry and study reports including recommendations for reform are open to broader public comment, which is an important part of the reform process. CJC also monitors international reports involving promotion and protection of human rights, civil, political, economic and cultural rights, including the right to development and the right to education of persons in detention and these are incorporated into government submissions.

Introduction and Overview

The CJC welcomes the opportunity to participate in the NSW Law Reform Commission's review of the bail system in NSW, and to comment on the questions raised in the Discussion Paper.

Support has decreased for changes introduced in the 1990s around diversion and detention as a last resort, with an increased focus on "law and order" and "getting tough on crime".[i] This growth in "getting tough on crime" rhetoric from politicians in NSW in the last decade also lead to changes to the *Bail Act 1978* over that time, with 18 amendments being made since 2000.[ii] However a causal relationship between higher incarceration levels and reduced crime has not been convincingly evidenced. Instead the causes of crime need to be considered in law and order campaigns. Pure reliance on the prison system as a consequence of crime and the sole mechanism for justice and reduction in crime does not solve the social and economic determinants of crime.

The proportion of prisoners in custody has nearly doubled in the decade 1997-2007 and is approaching one in every four prisoners.[iii] In NSW the increasing proportion of prisoners in custody stems from an ever expanding list of exceptions to the presumption in favour of bail created in the Bail Act. In particular, 2002 amendments targeting repeat property offenders have made bail much harder to obtain, especially for juveniles, as has a recent change which restricts bail applications to one.

The granting of bail during the pre-trial period when appropriate is an opportunity for the State to reinvest incarceration funds into diversionary programs with the aim of achieving restorative justice. The CJC particularly supports such reinvestment and diversion away from custody for young people who would otherwise benefit from directed services.

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

1.1 The CJC supports the inclusion of a statement of purpose and objectives in the Bail Act. We consider that such a statement would emphasise the expectation on the part of the legislature that bail conditions be used sparingly and the power to place accused in custody be used only as a last resort.

1.2 Similarly, we believe that there is a need to repeat within the objects or purpose clause of the Act the position that bail powers are not to be used punitively or otherwise than in accordance with the presumption of innocence. This would aid statutory interpretation and add greater force to these principles, which are sometimes lost in the complex drafting style of the Act in its present form. We consider that a statement of objectives and purposes would also assist in ensuring that decision makers properly take them into account when determining questions of bail.

- Any stated objectives of the Bail Act should emphasise the general entitlement to bail and the legitimate bases for refusing bail or imposing bail conditions.

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.***

2.1 The Bail Act should contain a list of broad matters that decision makers should have regard to in deciding whether there are exceptional circumstances or whether cause has been shown.

2.2 The CJC considers that the exceptional circumstances and show cause provisions should be used with caution as they have little relevance to the matters which ought to properly be considered during any decision making process in relation to bail. Namely, the question of whether an accused presents an 'unacceptable risk'. If reverse onus offences are retained, improved provisions should be included to prevent discrimination against vulnerable and disadvantaged accused by the imposition of conditions which are unable to be met. For example, relevant considerations in favour of a grant of bail adopted by courts include long-term employment, stable accommodation, strong family support and so on. These are the very factors that are likely to exclude a large number of accused from obtaining bail and unfairly and unjustly compound their particular vulnerability and disadvantage.

- Instead, if reverse onus offences are retained, additional factors should be included in the Act which may clarify the question of unacceptable risk and which do not operate in a discriminatory manner. Then Bail may be refused in conformity with the Act (s 14) and the only matters which may be considered are those set out in s 32.

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

3.1 The CJC is sceptical of reverse onus provisions such as 'exceptional circumstances' and 'show cause' provisions. These provisions are fundamentally inconsistent with the presumption of innocence. It is unjust that a person should effectively lose their liberty merely by being charged with a particular offence.

- We support a universal presumption in favour of bail with the onus on the prosecution to rebut that presumption based on a modified set of risk criteria.

- Any criteria adopted in relation to risk (ie non-attendance) should not discriminate against accused for reasons of disadvantage such as mental impairment, cultural or linguistic difference, disability, illiteracy, homelessness or substance dependence.

3.2 The Act should place an immediate obligation on the Court and potentially others to provide access to appropriate supports to deal with these factors as they affect risk assessment. This is particularly so in circumstances where an accused is charged with offences for which even on conviction a custodial sentence is unlikely to eventuate.

- There should be implementation of a presumption in favour of bail for all young people charged with offences.

- There should be a statutory requirement that children be granted bail unless there are exceptional reasons for holding them in custody.

- There should be implementation of a presumption in favour of bail for young people, save where there is a presumption against bail.

- The general presumption for bail in conjunction with an assessment of modified unacceptable risk criteria should be maintained for all offences alike.

- As reversing the onus of proof at bail stage undermines the presumption of innocence, the burden of proof should remain with the prosecution throughout the criminal proceedings.

- The listing of reverse onus offences is somewhat ad hoc and not reflective of those matters with which the granting or refusal of bail should ultimately be concerned.

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.***

4.1 The CJC does not consider that breaching a condition of bail should be a criminal offence. If an accused has breached conditions of bail, the prosecution may apply to vary or revoke bail. This is an appropriate mechanism to allow the prosecution to return the accused to court and put bail in issue. Further, the charge of failure to appear rarely results in significant punishment and is usually dealt with in

conjunction with a range of other offences committed in breach of bail. Moreover, the charge of failure to appear is often difficult to defend. The onus of proof in relation to the lawful excuse operates unfairly. This is because the reasons for the failure may have been legitimate and justified, but the proof of this lies upon the accused who is rarely in a position to obtain this proof well after the event and is often more concerned to dispose of all outstanding charges when returned to court as a result of a breach of bail.

5. *The desirability of maintaining s22A.*

5.1 Formerly, there was no limit to the number of bail applications which could be made by a person in custody. Section 22A now strictly limits the circumstances in which an earlier decision to refuse bail can be reviewed. Power to review or vary bail where a person has an earlier grant of bail would appear to be unaffected by the introduction of the 2007 amendments to ss 22A and 48, however s 22A limits applications for bail by persons who are in custody bail refused.

5.2 The court is to refuse to entertain an application for bail if an application has already been made by the accused and dealt with by the court unless there are grounds for a further application.

Section 22A and Juveniles

5.3 Of particular concern to the CJC are the conditions placed on young people who are granted bail. Often circumstances affecting young people can change and there is limited flexibility to accommodate the changes. This issue has been exacerbated by s 22A of the Bail Act. Young people who break their bail conditions without committing a crime are likely to be placed in custody until their court date.

5.4 The CJC has been active in advocating for a number of reforms to address the growing number of children and young people particularly in custody. The CJC has advocated for the exemption of children and young people from s 22A of the Bail Act. Section 22A has restricted access to bail for both adults and juveniles, and consequently led to a large increase in the numbers of children and young people who cannot access bail and/or were placed in custody after breaching restrictive bail conditions. Evidence from a number of sources, including the Bureau of Crime Statistics and Research (BOCSAR), confirms that the increase of the child and juvenile custody population is directly linked to the s 22A amendment of the Bail Act in 2007.[iv] Since the introduction of s 22A of the Bail Act, the number of juveniles placed in custody has increased by over 40%.

5.5 Section 22A has had the unintended consequence of increasing the numbers of often disadvantaged or vulnerable children and young people who are being put into custody unnecessarily, with a high likelihood that they will not be given a control order following their court appearance. Furthermore, evidence on recidivism suggests the legislation may be directly contributing to increasing the risk of reoffending.

5.6 Recent research by BOCSAR found that 71% of young people who breached their bail conditions without breaking any laws were put into custody.[v] Once put in custody, their ability to re-apply for bail has been hindered by s 22A in the Bail Act. This has led to a sharp increase in the custody population and in the length of time spent in custody by children and young people. In extreme cases, we have received reports from case workers of young people removing themselves from dangerous or abusive situations, only to be arrested for breaching their bail condition to reside as directed. This has been highlighted in the Noetic Review of the NSW Juvenile Justice system.[vi]

5.7 It has been argued that the increased custody population for juveniles stems not from s.22A, but from a misunderstanding by courts of the section, resulting in courts refusing bail applications where facts or circumstances had in fact changed. The Attorney General amended the bill in 2009 to clarify what were grounds for additional applications for bail; however attempts by government to clarify s 22A have not translated into court practice. This suggests that misunderstanding of s.22A is not the reason for the increase in children and young people in custody.

5.8 During court, children and young people have access to the Children's Legal Service when attending court. Unfortunately, these services are often stretched to capacity and place children and young people at risk of receiving insufficient legal support. The current bail laws, which govern bail applications from both children and young people and adults, exacerbate this situation.

- There is a need to introduce a support system to ensure children and young people have support before and during court and should have immediate, mandated support to help them successfully navigate the legal system. Many children and young people who are involved with the juvenile justice system do not have strong family support.

5.9 Mandated support would assist with finding appropriate accommodation options and remain present during the court process. This could result in a reduction of the number of children and young people in custody and an increase in the numbers of those who can successfully understand the court process and gain realistic bail conditions.

- Establishment of a Bail Working Group and an Aboriginal and Bail Working Group to examine a number of areas of concern in regards to bail in NSW is recommended. These working groups would be strengthened by representation from the non-government as the community sector has a strong role in supporting children and young people.

5.10 In each working group this would build on partnerships between the Department of Juvenile Justice and the non-government sector on the Bail Assistance Line and accommodation pilots, as well as the work of the non-government sector in the implementation of the Keep Them Safe reforms.

Section 22A generally

5.11 The disadvantages experienced by those in custody compared to their counterparts at liberty have been well documented.[vii] Not only do those in custody have fewer resources to prepare their defence, they may make a less favourable impression when they appear in court (they will probably be less well dressed and have experienced a loss of morale). They also miss the opportunity to impress the court by showing that they have met their bail conditions and appeared in court. The accused in custody will have limited opportunities for rehabilitation, will endure upset to their family life, and will suffer stigmatisation and possible contamination by contact with criminals. Furthermore, judicial officers may feel obliged to justify pre-trial custody by guiding the outcome of the trial towards a guilty verdict.[viii] Aboriginal offenders are also less likely to have their bail dispensed with, and more likely to have their bail refused.[ix]

- Unless a hearing is set within months of bail being refused, this bail review should cover circumstances where bail has been set and not met or where an accused is bail refused.
    - There needs to be provision for a prison official visitor with a duty to examine the papers of anyone bail refused or bail allowed with conditions not met.

- There should also be a right to apply to the Supreme Court for a rehearing before a bail judge to review bail conditions. The setting of unreasonable bail conditions should be appealable.

5.12 It has been suggested that the increasing number of people refused bail may be a result of a general increase in the number of persons appearing in NSW courts, the fact that persons are appearing in greater numbers for offences with high bail refusal rates, such as robbery and break and enter, and the fact that magistrates themselves are less willing to grant bail.[x]

- There needs to be amendment to the Bail Act to reduce the number of provisions enacted which prevent the presumption in favour of bail.

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.*

6.1 Since the introduction of the *Young Offenders Act* in 1997 there has been a significant increase in the numbers of children and young people under control orders, a large growth in the numbers held in custody, a continued overrepresentation of Indigenous young people in the NSW juvenile justice system, and while a steady decline in the re-offending rate has occurred, it remains at approximately 57.3% overall (and at 65.6% for those in custody).[xi] In considering the *Children (Criminal Proceedings) Act* and the *Bail Act*, changes to the Bail Act are considered to have had a range of unintended consequences that have negatively impacted on the juvenile justice system.[xii] Children and young people who enter the juvenile justice system will do so with well known risk factors. including family dysfunction, intellectual disability, poor mental health, dislocation from education, and homelessness. Another issue is that a

quarter of those detained in the NSW juvenile justice system could have intellectual disabilities. This is considered a complex health-related question which will require careful consideration by Government.[xiii]

6.2 Bail outcome of itself may have a punitive quality, and have the effect of an "interim sentence". A young person who is refused bail, or who has been granted bail but cannot meet bail conditions, is put in custody in a juvenile detention centre. On average, on any given day, there are 125 young people in custody awaiting court appearances, which represents approximately 44% of all young people in custody.[xiv] Particularly in circumstances where the young person is charged with a minor offence, a young person's experience of being held in custody, or subject to harsh bail conditions, may effectively be the main component of "punishment".[xv] This is fundamentally contrary to the purpose of bail, which is simply to ensure a young person's appearance in court, and to protect the community from further offending.

6.3 Currently, the Bail Act is generally applicable to anyone charged with an offence, regardless of whether they are an adult or a child.[xvi] The sole section which provides some mitigation for this general application is s 32(1)(b)(v), which requires that, in making a bail determination, a court must take into consideration any "special needs" which may arise from the fact that a person is under the age of 18. The connection between the granting of bail and the common law presumption of innocence of an accused is reflected by a general presumption in favour of granting bail in the Bail Act.[xvii] However, amendments to the Bail Act have eroded the applicability of the overarching presumption in favour of bail.[xviii]

6.4 The Bail Act currently has no specific presumption in favour of granting bail to young people who have been arrested. It should be noted that Queensland's *Juvenile Justice Act 1992* (Qld) contains a presumption in favour of bail for children.[xix] Under this Act, in deciding whether to keep a child in custody, the court or officer must decide to release the child, unless, according to the criteria under the Act, the child poses an unacceptable risk.[xx] The explanatory notes to the Bill that introduced these amendments observed that these provisions are consistent with the implementation of the juvenile justice principle that for a child, detention is the option of last resort.[xxi]

6.5 It is also questionable whether the police are using their powers of arrest of children appropriately. It is evident that children charged with minor offences are imposed with unnecessarily harsh curfews and exclusion conditions. Moreover, children are often proceeded against by way of charge and bail even in the case of minor offences.

6.6 Adult custody facilities are completely inappropriate for young people and have been shown to be very dangerous places for them. International human rights law and conventions on the rights of the child to which Australia is a signatory also require this. These conventions also place an obligation on government to provide sufficient places in youth training centres to ensure the availability of places is never a factor for consideration for a decision maker in relation to young people and bail.

- Given the inappropriateness of adult custody facilities, a young person (18-21) should always be in custody in a youth training centre rather than an adult custody facility if, as a last resort, they are assessed as suitable and this is appropriate. The fundamental issue here is in what circumstances one would deem appropriate.

- Not only should the decision-maker be required to provide adequate reasons but guidelines should exist assisting the decision maker in relation to the question of suitability for custody in a youth training centre in making an informed decision. An accused should be entitled to challenge an assessment of unsuitability.

- A bipartisan approach to juvenile justice should be taken based on a recognition that children and young people are both important and different, that rehabilitation and diversion underpin the State's approach to juvenile justice.

- Arrest, detention and imprisonment of children should only be imposed as a last resort and for the shortest appropriate length of time.

- 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 when making the bail decision.

- Unintended consequences on children and young people as a result of changes to the Bail Act can be overcome by having the *Children (Criminal Proceedings) Act* take precedence over the *Bail Act*.

- A provision should be incorporated into the Bail Act which provides that children are to be proceeded against by summons unless there are exceptional circumstances. Police should be retrained in the application of these principles in dealing with children and young people.

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.***

7.1 The CJC supports the funding of culturally and linguistically specific bail support programs and practitioners. We submit that a failure to provide such services is discriminatory and inequitable in the outcomes produced. We further submit that where such accused have dependent children the importance of providing appropriate services is greater.

- There should be obligations on the court to ensure adequate translation facilities before bail is determined.

7.2 The lack of availability, accessibility and affordability of drug treatment services, particularly for people in custody and people experiencing financial or social disadvantage is a significant problem.

- Additional resources should be provided to ensure that a range of community-based programs are available to accused who require additional support in relation to drug issues.

7.3 We are concerned about homeless and young people from dysfunctional families who lack accommodation options and other basic supports.

- There is a need for appropriate centres and supported accommodation that the courts can explore in such circumstances.

7.4 Practical difficulties in the form of time and resource constraints, or limitations on access, are also often experienced in obtaining assessments of accused by external support services. Due to their own resource constraints, many community-based services struggle to attend courts, training centres, prisons and custody facilities.

- Practical measures to facilitate access to external agencies for accused persons in custody should be considered by courts and custodial services providers.

7.5 Contemporary research and evidence recognises the significant associations between disadvantage, poverty and drug use.

- These associations require that, to be effective, drug treatment strategies must be long-term, holistic and integrated with programs targeting areas of disadvantage such as poverty, poor housing, ill health and social exclusion.

7.6 Specialised support should be available to an accused with cognitive impairment at bail hearings, both court hearings and after-hours hearings. Such accused are severely and unfairly disadvantaged compared with other accused when applying for bail.

- We consider that legal practitioners assisted by specialised support would be appropriate to protect the rights and interests of cognitively impaired accused. The involvement of these professionals at bail hearings should not limit future applications by the accused as to 'new facts and circumstances.'

- Police should be given specific training to assist them to identify a person with a mental illness or intellectual disability. They should be given guidance on how to interview a person with an intellectual disability or mental illness.

- The Act itself should specifically deal with this issue with provisions to address and remedy any disadvantage suffered by such accused in relation to bail and to promote human rights and dignity.

- The involvement in bail decisions of an appropriately qualified person with specialist training to advocate for the rights of accused may be a necessary

part of measures designed to address and counter the specific vulnerabilities of such accused.

7.7 The special vulnerabilities of accused with mental illness or intellectual disability do not merely necessitate improvement measures directed to preventing potential abuses of power or disadvantage in relation to bail and deprivation of liberty.

- Such special vulnerabilities demand the implementation by the Act of positive statements and practical measures which further the protection and promotion of these very basic human rights as a matter of course.

8. Any other related matter.

a. There should be educational and other facilities available to ensure maximum diversion away from the custody system.

8.1 There is a need for better education or creation of information facilities where inquiries can be made by or on behalf of an accused before making a bail application to facilitate diversion from the custody system.

- Such facilities would necessarily highlight juvenile bail accommodation and the availability of NGO accommodation groups.

- There needs to be an examination of the system of accommodation available to an accused where they may be separated from convicted offenders.

- An examination should be made to ensure that people are aware of what legal advice is available to accused.

- There needs to be a thorough examination of computer technologies to ensure that at every stage of the process there is readily accessible counsel available to provide information at an elementary level as to NGO and legal information.

    - For example, such facility and assistance is blatantly lacking and in need in the Goulburn Street Cells (Sydney) where there is a significant number of police cells without any assistance.

- There should be an independent Commission report as to the assistance available and if necessary with further reference sought from the Attorney-General.

b. The Bail Act should be rewritten to simplify its language and format and improve its accessibility.

8.2 The CJC supports the redrafting of the Bail Act in simplified language and format on the basis that policy and other lay decision makers are likely to remain the core decision makers regarding the grant or refusal of bail.

8.3 We consider that an increased understanding of the proper objectives of the Act, promoted by simpler and more accessible language, is likely to result in more appropriate use of powers under the Act. It is also likely to facilitate more consistent and appropriate decision making, and improve the accountability of decision makers upon review.

8.4 Another important reason to more clearly draft the Act would be to ensure that accused persons are able to determine the conditions under which they may be granted or refused bail, and any avenues of appeal they may have available to them in relation to decisions which result in the deprivation of their liberty.

- Any redrafting of the Act should ensure that the key principles underpinning bail law are not diminished, including the presumption of innocence, the right to liberty, the presumption in favour of bail, and other important rights of accused persons such as the right against self-incrimination.

c. *Processes involved in arrest and bail or issuing summons may affect the decision about which course to adopt.*

8.5 The CJC is concerned about the influence of and reliance upon administrative convenience or efficient use of resources by police in determining whether to use arrest or summons procedures.

8.6 Vulnerable and disadvantaged accused are more likely to be processed by way of arrest and bail/custody than summons on the basis of factors unrelated to the seriousness of offence or accurate assessments of community risk. This unfairly and inappropriately places their liberty in issue.

8.7 The decision whether to proceed by way of summons or arrest should be made in accordance only with the appropriate principles: whether there is a risk that the accused will not appear in Court, whether there is a risk that they will interfere with prosecution witnesses or commit further offences.

- The CJC supports the introduction of NSW Police guidelines or station checklists regarding the use of arrest subject to the qualification that such guidelines or checklists reflect accurately the appropriate principles to be applied.

- Changes to police standing orders or procedures could also include referral procedures to relevant networks to assist accused who are vulnerable or disadvantaged to access support, particularly in relation to accommodation. Lack of funding or availability of such services should not form the basis for unequal treatment of an accused by police in making the summons versus arrest decision, particularly where the offence is unlikely to attract a custodial sentence.

d. 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.

8.8 The CJC considers that the police practice of processing bail applications where bail is not opposed should be legislatively recognised as being consistent with the right of the accused to be bailed as soon as possible even where it is 'practicable' to take an accused before the court.

8.9 We also consider however, that where conditions have been attached to a bail undertaking, the accused must be fully advised by police of the right to attend court to have those conditions varied.

8.10 Where bail is refused or opposed by police, we support the retention of the police practice of allowing the court to make or review the decision as soon as practicable.We consider such an approach strikes an appropriate balance between convenience, resources and legitimacy.

e. 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.

8.11 In our view, the ultimate risk to deprivation of liberty is greater when an accused is charged with a serious indictable offence. Therefore, the risk arising from the waiver by many accused of their right against self-incrimination during police questioning on the basis that this will improve their prospects of being granted bail or speed up the process is serious.

f. There is a potential problem with police using a promise of the grant of bail inappropriately.

8.12 There are reports of misuse of the promise of bail or threats of refusal of bail to elicit admissions or obtain information by investigating police. In the absence of legal advice, such pressure may be very effective in eliciting admissions. It is usually difficult to establish this when the voluntariness of such admissions is in issue. Also reported is a belief of an accused, even in the absence of explicit representations or conduct by police, that their cooperation or making of admissions will bear substantially on the question of bail.

- The CJC considers that the standard provision of basic legal advice relating to bail rights at the point of arrest may assist in alleviating the pressure placed on an accused to make admissions while in custody. A greater emphasis on legal education for the community, together with a dedicated, properly resourced telephone legal advice service for accused in custody, and a requirement on police to ensure an accused has access to that advice before they are interviewed would address this problem.

8.13 In relation to those cases where women accused are primary carers, the pressure to make admissions in order to obtain bail may be significantly stronger than for others. For such accused, the immediate concern is the safety and wellbeing of children under their care.

- Any NSW Police guidelines should favour prompt grants of bail in such cases so that family trauma is minimised, and so that appropriate and adequate arrangements regarding the care of dependents can be made by the primary carer at the earliest opportunity. Those risks on which a decision to oppose bail are presently based are also likely to diminish in such cases. Police guidelines in favour of prompt decision-making in relation to bail, if adopted, should be strictly adhered to, and should also be considered when the decision whether to proceed by arrest or summons is contemplated.

g. It would be beneficial for further guidance to be provided to police officers about making bail decisions. For example, it is desirable to have a clear, plain English guide that sets out the powers police have under the Bail Act and the appropriate procedures to be adopted in a bail application. Police would benefit from guidelines detailing what sort of matters are relevant to the bail decision.

8.14 The CJC considers that such a proposal is an essential step towards improving the quality, transparency and accountability of police bail decision-making.

- The key principles underpinning bail law should be strongly asserted, including the presumption of innocence, the right to liberty, the presumption in favour of bail, and other important rights of accused persons such as the right against self-incrimination in any such document.

Bail and court

h. 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.

8.15 Bail applications made shortly after arrest are very difficult to prepare and present and often have limited prospects of succeeding. An accused recently placed in custody however, usually has a strong desire to bring on an urgent application. This may be due to factors such as a fear of incarceration, concerns about family or other commitments, or symptoms of impending substance withdrawal. It is very difficult for those acting for an application to properly explain their disinclination to assist in making a premature application in their client's interests.

8.16 Concerns about the difficulty of bringing a fresh application if the premature application is refused may result in many accused being held in custody longer than necessary due to over caution on the part of their legal representatives.

8.17 Moreover, an immediate represented bail application may result in important indications being given by the decision maker hearing the application as to matters which would enable them to grant bail. Comments of this nature by

decision makers are rarely of use to an accused whose self-represented application has been refused. The efficient use of this information would result in higher numbers of applications being granted at an earlier stage, would reduce the cost to the justice system of subsequent applications in terms of lower expenditure on court cost and the expense of holding accused in custody.

- Accordingly, if bail is refused, representation immediately after arrest should not prejudice an accused by denying them another opportunity to apply for bail once their legal representatives have been able to collect further information to appropriately present all relevant factors to the court.

- We consider a compromise position to be that the 'new facts or circumstances' rule is retained, but amended so that it does not apply in cases where the original bail application was made within a short period of arrest. Any resource-related considerations raised by this change are clearly outweighed by the importance of ensuring an accused the fundamental right to liberty.

Endnotes

[i] Noetic Solutions Pty Limited, *A Strategic Review of the New South Wales Juvenile Justice System*, Report for the Minister for Juvenile Justice (2010).
[ii] Ibid.
[iii] Australian Institute of Criminology, *Australian crime: facts and figures 2007* (2008), available online at http://www.alc.gov.au/publications /fact/2007/.
[iv] 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).
[v] Ibid.
[vi] Noetic Solutions Pty Limited, above n 1, 65.
[vii] For example Quebec Court of Appeal in *Pearson* (1990) 79 CR (3d) 90.
[viii] *Pearson* (1990) 79 CR (3d) 90, cited in S Zindel, 'A principled approach to bail' (1993) *New Zealand Law Journal* 49, 51.
[ix] Aboriginal Justice Advisory Council, *Aboriginal People and Bail Courts in NSW* (2002) Sydney.
[x] J Fitzgerald, 'Increases in the NSW remand population' (2000) *Crime and Justice Statistics*, Bureau Brief.
[xi] Noetic Solutions Pty Limited, above n1.
[xii] Ibid.
[xiii] Ibid.
[xiv] New South Wales, Department of Juvenile Justice, *Annual Report 2004-05* at 35.
[xv] Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process* (ALRC Final Report 84, 1997) at para 18.170.
[xvi] Section 5 of the *Bail Act 1978* (NSW) states that "the Act applies to a person whether or not the person has attained the age of 18 years".
[xvii] *Bail Act 1978* (NSW) s 9.
[xviii] *Bail Amendment (Repeat Offenders) Act 2002* (NSW); *Bail Amendment Act 2003* (NSW); *Bail Amendment (Firearms and Property Offences) Act 2003* (NSW); *Bail Amendment (Terrorism) Act 2004* (NSW). See G Brignell, Bail: An Examination of Contemporary Issues at1.
[xix] 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).
[xx] *Juvenile Justice Act 1992* (Qld) s 48(5).
[xxi] "Clause 12 inserts new section 37A and introduces the bail regime to be considered when dealing with a child. Because of the amendment made by clause 128 to section 16 of the *Bail Act 1980*, the 'show cause' provisions in that Act no longer apply to children. This is consistent with the juvenile justice principle that for a child, detention is the option of last resort. The provisions in section 37A provide that a court or a police officer must consider a broad range of matters when deciding the issue of bail and that the child must be granted bail unless there is an unacceptable risk posed by the child against listed criteria. The child must not be released if release would threaten the child's safety (examples are provided of when a child's safety might be threatened by release on bail) and there is no other reasonably practicable way of ensuring the child's safety.": *Juvenile Justice Amendment Bill 2002* (Qld) Explanatory Notes at 13.