



Mr Paul McKnight
Executive Director
NSW Law Reform Commission
nsw_lrc@agd.nsw.gov.au

Dear Mr McKnight

I am pleased to make a submission to the NSW Law Reform Commission's 2011 review of the law of bail.

Under s 11(d) of the *Commission for Children and Young People Act 1998*, one of the Commission's principal functions is to make recommendations to government and non-government agencies on legislation, policies, practices and services affecting children. Consistent with the Commission's role as an advocate for children and young people, this submission focuses on the issues concerning children and young people in the context of NSW bail laws.

The Commission welcomes the current review of bail laws and considers it a timely opportunity to reflect on the issues raised in the following recent reports:

- *Strategic Review of the NSW Juvenile Justice System*, Noetic Solutions Pty Limited, 2010;
- *Bail Me Out: NSW Young Offenders and Bail*, NSW Youth Justice Coalition, 2009; and
- *Recent trends in legal proceedings for breach of bail, juvenile remand and crime*, NSW Bureau of Crime Statistics and Research, 2009.

These three reports document the negative impact that NSW bail laws are having on the wellbeing of children and young people. In particular, these reports demonstrate how the application of section 22A of the *Bail Act 1978 (NSW)* has contributed to an increase in the number of children and young people on remand in the NSW juvenile justice system.

This increase has a negative impact on children and young people, their families and the broader community. Time spent on remand can isolate children and young people from their families, disrupt their education, increase their likelihood of recidivism and non pro-social pathways.¹ The high numbers of children and young people on remand has also led to overcrowding in juvenile justice centres, placing their safety and wellbeing at risk. It also increases costs to government associated with the juvenile justice system.

The Commission has made submissions to the NSW Attorney General's previous reviews of bail laws in 2005 and 2010. These submissions broadly proposed that in

¹ Justice Policy Institute, 2006, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, http://www.justicepolicy.org/images/upload/06-11_REP_DangersOfDetention_JJ.pdf accessed 7 July 2011.

its current form the *Bail Act 1978 (NSW)* should not apply to children and young people under the age of 18 years, as it fails to properly take account of their particular needs, which differ from those of adults, and is detrimental to their wellbeing. The Commission continues to support this position.

Children, young people and bail

Children and young people have unique needs and vulnerabilities that require special consideration. In creating laws that impact on children and young people, it is important to recognise that the approaches developed for adults may not necessarily be in the interests of children and young people. The majority of children and young people who have contact with, or enter, the criminal justice system demonstrate a range of risk factors, such as family breakdown, mental health issues, disengagement from education and substance abuse. It appears that children and young people are often unable to comply with the *Bail Act 1978 (NSW)* because of their individual circumstances and are refused bail, for example where they have a lack of stable accommodation and/or other supports in the community. As a result, a range of bail conditions of a welfare nature, such as requiring a child or young person to reside with a specific person, adhering to curfews and not associating with particular individuals, are imposed. Such conditions are often more onerous than the bail conditions imposed on adults and fail to recognise the capacity of children and young people, in the context of their families and communities, to meet such requirements. As a consequence, children and young people are 'breached' for failing to meet bail conditions and further punished for these breaches of conditions, rather than for committing any new criminal offences.

The way that NSW bail laws are currently applied to children and young people is also inconsistent with the principles underlying the NSW criminal justice system, where a separate juvenile justice system has been established in recognition of the different needs of children and young people.

The Commission's view is that, consistent with the approach taken in the *Children (Criminal Proceedings) Act 1987* and the *Young Offenders Act 1997*, the *Bail Act 1978* should be amended to contain appropriate, and separate, principles governing the application of bail laws to children and young people. These principles and criteria should reflect the United Nations Convention on the Rights of the Child, including Article 37 which states that detention of a child should be used only as a last resort and for the shortest appropriate period of time. In addition, they should reflect the articles of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, Article 13.1 of which states that detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time.

Bail applications and conditions

One of the key functions of the Commission is to promote the participation of children and young people in decision-making affecting their lives and encouraging government and non-government agencies to seek the participation of children and young people appropriate to their age and maturity. Section 12 of the *Children*

(Criminal Proceedings) Act 1987 states that criminal proceedings must be explained to those children and young people involved. The Commission considers that consistent with this, the *Bail Act 1978* should be amended so that the criteria for bail in relation to children and young people is made clearer. The *Bail Act 1978* should contain a provision requiring that children and young people understand the process and effectively participate in it.

In 2009, the NSW Bureau of Crime Statistics and Research (BOCSAR) reported that the majority of children and young people proceeded against in court for breach of bail had not committed a further offence while on bail.² Some examples given by BOCSAR of the kinds of conditions that children and young people were alleged to have breached included, did not follow directions of parent/guardian, found at banned location, was not in company of parent/guardian and did not comply with curfew. The Commission considers that it would be in the best interests of children and young people if bail conditions were used as a last resort. Further, as noted in the Commission's earlier submissions on this issue, children and young people on conditional bail who breach a condition should not lose the presumption in favour of bail as they currently do under s. 22A of the *Bail Act 1978 (NSW)*. Children and young people may fail to comply with bail conditions for reasons associated with their particular vulnerability, their lack of experience or awareness of what they are required to do, rather than an intention to commit an offence. There is no evidence to demonstrate that monitoring, arresting and detaining children and young people for breaches of their bail conditions reduces re-offending.

Diversionsary strategies, bail accommodation and interagency co-operation

The Commission strongly advocates the use of strategies that provide the least restrictive form of sanction and aim to divert children and young people from the criminal justice system. To this end, we encourage the use of cautions, warnings and conferences under the *Young Offenders Act 1997* rather than having children or young people appear before the courts. In particular, the Commission encourages the use of the *Young Offenders Act 1997* by police for breaches of bail conditions, rather than the breach being referred to court as a separate offence.

As children and young people may be refused bail because of a lack of stable accommodation or other supports under the *Bail Act 1978*, the Commission strongly supports the need for bail accommodation and community based alternatives, such as bail supervision programs, that seek to support children and young people on bail.

In addition, the Commission is a member of the Attorney-General's Remand Working Group. We consider that this group is an effective means of improving interagency cooperation and the sharing of information on issues concerning children, young people and remand.

² NSW Bureau of Crime Statistics and Research, *Recent trends in legal proceedings for breach of bail, juvenile remand and crime*, 2009.



Conclusion

The Commission considers this review to be an ideal opportunity to make legislative change to improve the situation for children and young people in NSW who are subject to bail laws. In particular, it presents an opportunity to develop special principles and criteria applying to bail for children and young people so that their detention is a last resort, consistent with their best interests, the objectives of the NSW juvenile justice system and international conventions of law.

Thank you for the opportunity to comment.

If you have any further queries, please contact Ms Vanessa Ford, Senior Policy Officer, on 9286 7208 or by email at vanessa.ford@kids.nsw.gov.au.

Yours sincerely

Megan Mitchell
Commissioner
13 July 2011