1. Over-arching considerations

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

The Commission should recognise the fundamental principles of the New South Wales criminal justice system including the presumption of innocence and the general right of the accused to be at liberty before trial and sentence.

The legislation should emphasise balancing a person's right to liberty and the principle of the presumption of innocence, with securing a person's attendance at Court and ensuring the safety and welfare of the community.

The Committees agree with the Commission's observation that the *Bail Act* has become encrusted with complexity and is not easily comprehensible and that the law of bail ought to be as straight forward as possible.

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

Yes. The object of the *Bail Act* should be as follows:

> *The object of the Bail Act is to ensure that a person who is required to appear before a Court in criminal or other proceedings is not deprived of liberty without an appropriate balancing of the interests of the person and the interests of the community having regard to the criteria.*

2. Right to release for certain offences

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

Yes. A right to release on bail for minor offences should be retained.

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

Current section 8 applies to fine-only offences (amongst others). The section 8 entitlement to bail is removed in the circumstances set out in section 8(2)(a) and can in both theory and practice result in people being refused bail for fine-only offences. Subsection 8(1)(a) should be repealed and bail should be automatically dispensed with for fine-only offences. In the event that an offender fails to appear on a fine-only offence the Court has the power to impose a fine in the absence of the accused.

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

Subsection 8(1)(a) should be repealed and bail should be automatically dispensed with for fine-only offences.

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

3.1 How are the existing presumptions applied in practice?

The existing presumptions are highly problematic. The presumptions have evolved on an ad hoc basis through numerous amendments to the *Bail Act* which have restricted the number of offences for which there is a presumption in favour of bail. The amendments have created a complex set of provisions, and the presumptions are difficult to interpret and apply in conjunction with the criteria for bail.

The presumptions relate to the alleged offence rather than to the alleged offender. This has inappropriately increased the significance of the offence type when it is only one of a number of matters to be taken into consideration. The presumptions should be removed from the legislation and the police and Court should look at the circumstances of the alleged offender and the offence under section 32 criteria when making a bail determination.

3.2 What purpose are they intended to serve? What purposes should they serve?

The Committees are of the view that it would be preferable for the presumptions to be removed and replaced with a uniform presumption in favour of bail subject to the section 32 criteria.

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

No.

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

Yes. See 3.1 and 3.2 above.

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

No.

3.6 Should there be:

(a) a uniform presumption against bail;

No.

(b) a uniform presumption in favour of bail;

Yes. There should be a uniform presumption in favour of bail subject to the section 32 criteria.

(c) no express presumption for or against bail; or

No.

(d) an explicit provision that there is, uniformly, no presumption for or against bail?

No.

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

No. See 3.1 and 3.2 above

3.8 Should there be a presumption in favour of bail in some cases only and, if so, in what cases?

No. See 3.1 and 3.2 above

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

No. See 3.1 and 3.2 above.

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

The Committees do not support the retention of a presumption system.

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

The Committees do not support the retention of a presumption system.

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

No. See 3.1 and 3.2 above.

4. Dispensing with bail

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

Yes.

4.2 If so, should such cases include:

(a) offences not punishable by imprisonment ("fine-only" offences) (except for non-payment of a fine);

Yes. Bail should be dispensed with altogether for fine-only offences. The legislature has indicated that it is not appropriate to detain a person for an offence not punishable by imprisonment. An accused should not be in custody for any offence that does not carry a penalty of imprisonment, and it is the Committees' view that this principle should be enshrined in the *Bail Act*.

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

Yes. When police decide that a child is eligible and entitled to be dealt with by way of a caution or to be referred to a youth justice conference under Parts 4 and 5 respectively of the *Young Offenders Act 1997*, bail should not be imposed. It is inconsistent with the intent and purpose of the *Young Offenders Act 1997* for bail to be imposed by police when diverting a child from Court by way of caution or referral to a youth justice conference, or for bail to be continued by a Court which has decided that a child should be cautioned under section 31 of the *Young Offenders Act 1997* or dealt with by way of referral to a youth justice conference under section 33(1)(c1) of the *Children (Criminal Proceedings) Act 1987* or section 40 of the *Young Offenders Act 1997*.

(c) any other class of case?

As a matter of principle bail should be dispensed with altogether for:

- first offences when in all the circumstances it is unlikely that the person will receive a custodial sentence; and
- all persons issued with field Court Attendance Notices (CAN).

The Committees also note that section 8 of the *Children (Criminal Proceedings) Act 1987* needs to be updated to reflect the original intention of the section. The section states that criminal proceedings should not be commenced against a child other than by way of a CAN. Section 8 is referring to a non bail CAN rather than a bail CAN and the section should be amended accordingly.

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

No.

5. Police bail

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

Yes. The *Bail Act* should include definitive criteria for the release of persons on police bail. The *Bail Act* should include criteria that the police must consider and should list certain circumstances in which police must grant bail.

Subsections 17(3) and (4) are problematic and should be repealed. As a result of their operation police almost always refuse bail to people arrested on warrants in circumstances where they would otherwise be suitable for bail.

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

The right to seek an internal review of police refusal to grant bail is not working well in practice. A formal and transparent system of internal review

should be introduced and the provisions should be included in the *Law Enforcement (Powers and Responsibilities) Act 2002*.

6. Court bail

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

Yes.

On a related matter, the Committees are aware of difficulties that arise once a person has been committed to the District Court or Supreme Court and the Local Court has no jurisdiction to deal with breaches of bail or variations to bail conditions once the person has appeared before the higher court. Problems arise in regional and rural NSW when a breach occurs or a variation of conditions is sought and a District Court judge is not available to hear the matter. Magistrates and authorised justices should have the jurisdiction to deal with those matters in circumstances where a District Court judge is not sitting at that location.

The Committees are of the view that section 48B should be amended to give authorised justices the same ability to review bail conditions as Magistrates under section 48A. Alternatively, the power of the authorised justices to vary bail conditions with the consent of the prosecutor and offender should at least be extended to include curfews and non association orders.

The Committees are concerned that in regional and rural NSW a person (adult or child) who has been arrested and refused bail by police is often not brought before a Court where the nearest authorised justice may sit to determine the issue of bail. Instead, the person is transported up to hundreds of kilometres to appear before a Magistrate. The Committees are of the view that the person should appear before the nearest court, whether presided over by a Magistrate or authorised justice, or if neither are available, and Audio Visual Link (AVL) facilities are available, then the person should appear via AVL.

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

The jurisdiction of authorised justices to grant bail in the Local Court is used regularly at weekend bail Courts in rural areas, as well as at bedside Courts conducted in hospitals. It is appropriate for this practice to continue.

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

Yes, there should be a provision requiring the Court to make a fresh determination at the first appearance of the person at Court where bail has been refused by the police or granted by the police subject to conditions.

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

There should be a provision that requires a mandatory review after a specified period of time.

7. Repeat Bail applications

7.1 Should s 22A, *Power to refuse to hear bail application*, which limits repeat bail applications, be repealed or amended in some way?

Section 22A should be repealed.

7.2 If retained, should s 22A apply to juveniles, to juveniles but only in serious cases, or in some other way?

If section 22A is retained it should not apply to juveniles in any circumstances.

It is widely acknowledged that section 22A has contributed to the dramatic increase in the number of children held on remand.[1] The number of children held on remand is contrary to the principles of the Children's Court and the juvenile justice system that gives special recognition and treatment to young people, as required by the International human rights instruments to which Australia is a signatory.

The restriction on the number of bail applications that can be made is particularly inappropriate with regards to children. Experienced practitioners recognise the difficulty of establishing a rapport and taking instructions from young people in the first instance. There is often a mixture of factors preventing the taking of cogent instructions on bail such as a combination of fear, shame, not wishing to tell family or friends, drug effect, lack of sleep, lack of understanding and the pressure of time to take instructions. These barriers are especially compounded when dealing with juveniles through the filter of AVL.

AVL makes communicating with the young person and obtaining proper instructions much more difficult. The impact of section 22A on children is made worse due to the fact that all weekend bail Court is done via AVL. The AVL is from a Juvenile Justice Centre and therefore it is very rare for parents to be able to be physically present at the bail Court, although they can participate in the bail hearing by way of telephone.

In circumstances where the first bail application is made by AVL, with the instructions taken via AVL, and the actual Court appearance via AVL, the bail application opportunity under section 22A is manifestly unfair for young people.

The operation of section 22A, combined with targeted policing activities, has clearly had a detrimental impact on children. BOCSAR data shows that crime is falling or stable in almost all crime categories. The Committees are very concerned that crime rates are falling yet the number of children held on remand is increasing. The seriousness of the situation is highlighted by the fact that approximately 84% of young people remanded in custody do not receive a custodial sentence[2].

---

[1] NSW Bureau of Crime Statistics and Research, '*Recent trends in legal proceedings for breach of bail, juvenile remand and crime*', Crime and Justice Bulletin, Number 128, May 2009.

[2] NSW Law Reform Commission, Young People with Cognitive and Mental Health Impairment in the Criminal Justice System, *Consultation Paper 11* (2010) 30.

7.3 What should be in the legislation to deal with unreasonable repeat applications while, at the same time, preserving a right to make such applications for bail as are reasonably necessary?

Solicitors have an ethical duty to act on the instructions of the client. It is extremely important that the right to make repeat bail applications is preserved.

The legislation should preserve a right to make repeat applications that are reasonably necessary and it should also deal with unreasonable repeat applications. The issues of unreasonable repeat applications could be addressed in section 32 as a criterion to be considered when determining whether or not to grant bail.

8. Criteria to be considered in bail applications

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

Yes, there should be prescribed criteria. The Committees support the retention of the current criteria under section 32. There may be other additional criteria that could be included to the current section 32, for instance if section 22A is repealed an additional criterion could include unreasonable repeat bail applications. The criteria listed in section 32 should be exhaustive.

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

The current section 32 criteria should be retained.

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

- **'unacceptable risk' (as in the Bail Act 1977 (Vic) s 4(2)(d), or Bail Act 1980 (Qld) s 16(1)(a)) or**

No.

- **'reasonable grounds to suspect' (as in the Bail Act 1982 (WA) s 6A(4)) that a particular circumstance will arise?**

No.

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

Additional criteria may need to be added to the current section 32.

8.5 Should prescribed primary criteria be exhaustive?

Yes. This ensures that irrelevant considerations are not considered when the Court or police make a bail determination.

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

Yes. The criteria should be related to the object of the Act and could do so as follows:

> *In making any bail decision in relation to a person, the bail authority is to have regard to the objects of this Act by considering the following criteria:*
>
> *[Insert criteria]*

8.7 Should there be prescribed subsidiary considerations in relation to each primary criterion?

The current subsidiary considerations contained in section 32 are appropriate.

8.8 If so, should the subsidiary considerations currently prescribed in relation to each primary criterion be changed in any way?

The current subsidiary considerations are appropriate.

8.9 Respectively in relation to each primary criterion, should subsidiary considerations be exhaustive?

Yes, see 8.5 above.

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

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

No. However, if section 32(1)(b)(iv) is retained it requires amendment as follows:

Delete the words "or is otherwise" and insert "and as a consequence is..". the section would then read:

> *Whether or not the person is, in the opinion of the authorised Officer or Court, incapacitated by intoxication, injury or use of a drug, and as a consequence is in danger of physical injury or is in need of physical protection.*

The reason why bail has been refused should be noted and recorded.

Where this section is used as a basis for refusing bail there needs to be a requirement that the question of bail be revisited within a reasonable time. The conditions listed are for conditions that apply temporarily, e.g. the person is intoxicated, and do not justify refusal for extended periods of time.

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

If section 32(1)(b)(iv) is retained, the considerations should operate as a reason for granting or refusing bail depending on the circumstances.

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

No.

9. Bail conditions

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

Bail should be granted unconditionally unless the police or Court is of the view that one or more conditions should be imposed having regard to the object of the legislation. Any conditions should be clearly linked to the offence for which bail is being granted and should be no more onerous than necessary.

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

Any conditions imposed should be directly linked to the object of the legislation.

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

Any conditions imposed should be directly linked to the object of the legislation.

The Committees are concerned about onerous bail conditions which are often imposed on young people that are likely to cause them to breach bail. The conditions imposed by the Court and police reflect a welfare approach aimed at altering behaviour and are not related to whether the young person will appear at court or reoffend. Welfare issues should not be taken into account when imposing bail conditions on young people.

The *Bail Act* applies equally to children and adults, prevailing over children's legislation where there is an inconsistency (section 5 *Bail Act* and section 50 *Children (Criminal Proceedings) Act 1987*), and indirectly discriminating against children. Discrimination is pronounced in the reluctance of police and Courts to release juveniles on their own undertaking and the imposition of more onerous bail conditions on children than adults including place restrictions, non-association orders, residential conditions and curfews. It is worsened by zero tolerance policing which means that children are often arrested for minor breaches. Data collected by the NSW Bureau of Crime Statistics and Research in 2007 found that almost one quarter of Aboriginal children and nineteen percent of all children are brought before the Court for breach of bail conditions that are not accompanied by fresh offences.

More frequent arrests of children for breach of bail as a result of more onerous bail conditions and zero tolerance policing necessarily exacerbate the discriminatory effect of the *Bail Act* in its application to children.

9.4 Should the purposes for which such requirements or conditions may be imposed be any wider than the considerations, which apply to the grant

of bail under s 32? If so, what is the rationale for having wider considerations in relation to conduct on bail than the considerations relevant to whether to grant bail at all?

No, the purposes for which conditions may be imposed should not be any wider than the considerations which apply to the grant of bail under section 32.

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

The promotion of effective law enforcement is not a valid purpose for imposing a bail condition and should not be included in the legislation.

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

Yes.

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

The legislation should specify the type of conditions as to conduct that may be imposed.

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

No.

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

The Court and police should be required to provide reasons for the imposition of any conditions.

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

The legislation should contain a requirement that all conditions imposed by the police or the Court must be reasonable.

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

The Committees support bail hostels. The lack of bail accommodation available in NSW needs to be addressed. Bail hostels need to be well resourced and should be available to people who have no alternative accommodation option.

9.12 What should the mechanism be for imposing bail conditions?

Any conditions imposed should be directly linked to the object of the legislation, and should be clearly linked to the offence for which bail is being granted. Written notice of the conditions should be given to the accused.

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

A person is granted bail subject to conditions, there should not be a distinction between the two.

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

No, and it should not be possible to impose any requirement which is not a condition of bail.

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

Yes, as this would make it more likely that the accused would understand those conditions.

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

Yes. The police or the Court should read out the written undertaking and satisfy themselves that the person understands their obligations while on bail.

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

The legislation should require that the police and the Court (whoever is taking the undertaking) to provide a verbal explanation of the bail conditions and satisfy themselves that the accused understands his or her obligations. This would assist and facilitate compliance with conditions under a grant of conditional bail.

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

Section 36(2)(a1) should be amended to include 'reside as directed by an appropriate government agency'.

The Committees would like the review to be aware of the proliferation of unreasonable and unnecessary bail conditions. It is important that any new legislation is drafted in a way that does not permit this to continue.

10. Breach of undertakings and conditions

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

Yes. Section 50 should specify that arrest should only be adopted as a last resort. Police should turn their mind to the nature of the breach, and consider the object of the *Bail Act*. Police should not arrest a person for breaching a condition unless their action accords with the object of the legislation.

The section should contain a specific provision emphasising the options available to police as follows:

1. Release on original bail with warning.
2. Release on varied bail.
3. Issuing a Court Attendance Notice.
4. Arrest with warrant.
5. Arrest without warrant.

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

Yes, see question 10.1 above.

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

Yes, see question 10.1 above.

10.4 Should the section specify criteria for arrest without warrant?

Yes. The primary concern underlying any action taken in response to a breach or likely breach of a bail condition should be the likelihood of the person appearing in Court as required.

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

Yes, the section should provide that the option of arrest should only be adopted as a last resort.

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

The Committees note that although in practice Courts take the view that when a person is brought before the Court for a breach of bail the Court has the power to vary the original bail conditions this should be explicitly provided for in the legislation.

The Committees are also of the view that section 51 should be repealed. If the offence is retained the penalty should be amended to a conviction for failing to appear with no further penalty imposed.

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

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

Yes. The time for notice should be four days for adults and one day for young people.

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

Yes, the *Bail Act* should provide for further notices to be given periodically in the event that a person continues to remain in custody because of non-compliance with a bail condition.

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

Yes, the matter should be listed before a Court.

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

Yes, there should be a mandatory relisting of the matter.

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

Yes, there should be a legislative obligation on the agency to provide a report or information to the court addressing why the bail condition is unable to be met, and the steps being taken to meet it.

12. Young people

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

No.

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

Yes, there should be a separate part of the *Bail Act* relating to juveniles, which would still be subject to the same object and criteria as well as additional considerations relevant to young people.

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

Yes. Section 6 of the *Children (Criminal Proceedings) Act 1987* sets out the principles that a Court exercising criminal jurisdiction with respect to children is to have regard to:

(a) that children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them,
(b) that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance,
(c) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption,
(d) that it is desirable, wherever possible, to allow a child to reside in his or her own home,
(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,
(f) that it is desirable that children who commit offences be assisted with their reintegration into the community so as to sustain family and community ties,
(g) that it is desirable that children who commit offences accept responsibility for their actions and, wherever possible, make reparation for their actions,
(h) that, subject to the other principles described above, consideration should be given to the effect of any crime on the victim.

These principles guide any Court that exercises jurisdiction in relation to children.

It is important for these principles to be specifically mentioned in the *Bail Act* as it will alert police, the Court and legal practitioners to the importance of these principles when dealing with children.

12.4 Should s 6 apply to bail determinations by police?

Yes, section 6 should apply to bail determinations by police.

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

The relevant principles of the Beijing Rules should be applied to bail determinations in relation to young people in addition to the section 6 principles.

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

See the discussion at 9.3 and 14.3 in relation to inappropriate and onerous bail conditions.

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

Yes. There should be additional criteria in section 32 which give the police and the Court the discretion to deal with a young person between the ages of 18 and 21 in accordance with the section 6 principles in making a bail determination.

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

Section 32 requires the bail authority to take into account a person's Indigenous background, community ties and special needs. The Committees are of the view that the police and the Courts need to use these criteria more often.

13. People with a cognitive or mental health impairment

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

Yes. The provisions in the *Bail Act* should be expanded to include a wider range of cognitive and mental health impairments.

The Committees considers that the *Bail Act* should expand 'cognitive impairments' to cover a loss of brain function affecting judgment, resulting in a decreased ability to process, learn and remember information including:

- Developmental disability.
- Acquired brain injury.
- Alzheimer's.
- Dementia.
- Autism and autistic spectrum disorders including Rett's disorder and Asperger's disorder.

'Intellectual disability' is a defined term in the *Bail Act*. For practical purposes, developmental disability and intellectual disability are synonymous, and developmental disability should also be included and defined in the *Bail Act*.

The authors of the *Diagnostic and Statistical Manual of Mental Disorders Fourth Edition* (DSM-IV)[3] candidly acknowledge that no system of categorisation can impose perfect order on the complexity of mental health. Section 32(1) of the *Mental Health (Forensic Provisions) Act 1990* caters for this complexity by using broad categories of mental disorder and simply requiring an *appearance* ("it appears to the Magistrate") of mental disorder. In addition to people suffering from mental illness, the *Bail Act* should include people suffering from a mental condition for which treatment is available.

The DSM-IV contains a definition of "pervasive developmental disorders" as follows: *"... severe and pervasive impairment in several areas of development: reciprocal social interaction skills, communication skills, or the presence of stereotyped behavior, interests and activities.*"

[3] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders Fourth Edition,* Text Revisions, Washington, DC, American Psychiatric Association, 2000

The provisions of the *Bail Act* should also be expanded to cater for people with Attention-Deficit/Hyperactivity Disorder, learning disorders and communication disorders.

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

Yes. The provisions in the *Bail Act* often make it harder for a person with a mental illness or cognitive impairment to be granted bail in comparison to other people. People with cognitive or mental impairments are more prone to breach bail conditions imposed on them than other people, because they are not always adequately supported to ensure that they understand and comply with their bail conditions.

Accordingly, provisions such as s 8(2)(a)(i) adversely affect the chances of offenders with cognitive or mental impairments successfully applying for bail. Section 8(2)(a)(i) provides that bail which may otherwise be granted may be refused if a person has previously failed to comply with a bail undertaking or bail condition imposed in respect of the offence.

Granting bail can be the first step of not only diverting alleged offenders with cognitive or mental impairments away from the criminal process, but can also be the first step in a successful rehabilitation process. Where the applicant for bail has a cognitive or mental impairment, the order is usually subject to a range of conditions which, when tailored carefully to the circumstances, can act as a framework for rehabilitation.

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

It is the Committees' understanding that a person with a mental illness or cognitive impairment will often find it more difficult to obtain a grant of bail compared with other alleged offenders, particularly if the alleged offence is a violent one. Where appropriate accommodation, and provision for treatment and care are unavailable it will be difficult to address the Court's concerns about the protection of the community.

The Court and police should not impose conditions that people who have a cognitive or mental health impairment cannot understand. If a person is suffering from a cognitive or mental health impairment bail conditions imposed should be suitable to the capacity of that person to understand and comply with the conditions. This should be the responsibility of the police or the Court.

14. Indigenous people

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

Yes. Research by the NSW Bureau of Crime Statistics and Research has shown that one quarter of the increase in Aboriginal imprisonment between 2001 and 2008 came from a growth in the number of Aboriginal persons held on remand.[4] The increase in the number of remandees was due to a greater

[4] NSW Bureau of Crime Statistics and Research, '*Why are Indigenous Imprisonment rates rising?*', August 2009.

proportion of Aboriginal defendants being refused bail and an increase in the time spent on remand.

The Committees suggest the following amendments to the provisions of the *Bail Act*:

Less reliance on financial sureties

Sections 36(2) and 37 are directed towards reducing reliance on financial conditions. However, in practice the Courts often impose bail conditions which require financial surety. In some cases, Aboriginal accused cannot meet financial conditions.

Section 36(2) should be amended so that the imposition of the financial surety or security is a provision of last resort and only used where other conditions are inappropriate. Magistrates should be required to record why other conditions are inappropriate.

The amount of any surety required must be reasonable

There is a real need to ensure that those securities, if used, are determined on a fair and sound basis, and the level and amount of security or surety is set equitably.

Section 36(2)(b) should be strengthened

Section 36(2)(b) provides for the use of acceptable persons to certify the defendant's ability to meet his or her bail undertakings. This is a provision that can provide an avenue for respected local Aboriginal community members to come forward and support the Aboriginal defendants. The Court should direct a person as an acceptable person.

The burden upon an accused person of any conditions imposed needs to be appropriately assessed at the time that bail is granted

When a Court considers reporting conditions necessary to meet the objects of the *Bail Act*, then the Court must consider the circumstances of the defendant, and especially any difficulties that he or she might have in reporting to a police station. This would include factors such as distance, access to public transport, access to motor vehicles and a licensed driver. Bail conditions that require people to report regularly or daily to police in locations outside of where they currently reside is often a reason why Aboriginal people breach conditions, because due to a lack of transport they are physically unable to attend a police station.

Curfews that are imposed as part of the bail conditions limit people's ability to perform their cultural responsibilities such as taking care of relatives, attending funerals, family and community functions. When imposing curfew bail conditions, a curfew should only be imposed to meet the objectives of the *Bail Act* and must be directly relevant to the alleged offending behaviour. For example, night time curfews should not be imposed for day time offences and should not be used as a mechanism to try and impose social control.

Police should have the ability to grant on-the-spot bail

Section 17(1) of the *Bail Act* presently states that police can grant bail to "an accused who is present at a police station".

Recommendation 91(c) of the '*Royal Commission into Aboriginal Deaths in Custody*' proposes that police officers be enabled to release a person on bail at or near the place of arrest without necessarily conveying the person to a police station.

The particular difficulty that this recommendation addresses is in relation to accused who are arrested in remote areas.

In making this recommendation, the Committees are mindful that there need to be limits on the conditions imposed, to ensure that unreasonable conditions are not imposed which can then not be reviewed until a first Court appearance. Specifically, financial conditions must not be imposed as part of an on-the-spot bail.

Amend the definition of prior offences in section 32 to exclude offensive language and public order offences

The 1999 Aboriginal Justice Advisory Council NSW report '*Policing Public Order, Offensive Language and Behaviour, the Impact on Aboriginal People*', indicates that on average Aboriginal people are 15 times more likely than the rest of the New South Wales population to be arrested for offensive language and conduct charges.

In addition, on average an Aboriginal defendant is more likely to have been through the bail process before than a non-Aboriginal defendant and to attend a bail proceeding with a criminal record. These and other factors affect Aboriginal defendants being granted bail.

This means that generally when an Aboriginal person appears before a Court, they face significant problems with being granted bail. An amendment to the *Bail Act* to exclude offensive language and public order offences would help to address this problem.

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

The *Bail Act* should provide that the Court must take into account any report tendered on behalf of the defendant from any group providing programs or services to Aboriginal people.

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

Many Aboriginal young people (and non-Aboriginal young people) who come into contact with the criminal justice system are under the care of Minister for Community Services. The *Bail Act* should direct the Department of Community Services (DoCS) to ensure that no young person under their care is in custody for welfare reasons.

The *Bail Act* should state:

> *'A Court which is considering bail for a juvenile who is the responsibility of the Minister and would grant bail except that no accommodation is available, should direct the immediate release of that juvenile into the care of DoCS and require DoCS to find immediate accommodation for that juvenile'.*

DoCS should also assist the young person in complying with any other bail conditions.

15. Duration of bail

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

Yes.

16. Review of bail decisions

16.1 How is s 44 (broadly, allowing review of bail decisions by a Court of the same status) working in practice? Should there be provision for such a review?

Section 44 is not working well in practice. There should be a provision for such a review but the procedures need to be clarified.

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

Yes.

17. Structure of the Bail Act

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

For example:

- ***When can bail be granted?***
- ***When can bail be dispensed with?***
- ***By whom can bail be granted (police powers and Court powers)?***
- ***What criteria apply to bail decisions?***
- ***When can conditions be imposed?***
- ***What conditions?***
- ***Rules relating to bail conditions.***
- ***Duration of bail decisions.***
- ***Effect of a grant of bail.***

Yes, the *Bail Act* should go back to first principles, that is, follow the decision making path involved in determining when and whether bail should be granted, and the drafting should follow a logical pathway.

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

No.

18. Plain English

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

Yes, the *Bail Act* should be drafted in plain English.

18.2 Is any existing model recommended?

No.

18.3 Should the terminology in the Bail Act be changed to reflect the effect of processes under the Act? For example, should the legislation provide for:

- **"pre-trial-release, with or without conditions", rather than "grant of bail"; and**
- **"pre-trial detention", rather than "remand in custody"?**

No, the current terminology should be retained.

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

No.

19. Forms and processes

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

There should be greater flexibility for reviewing bail and minor by consent bail variations; notice should not be required.

Stuart Westgarth
President

18/7/2011