ALS

Aboriginal Legal Service (NSW/ACT) Limited

BAIL

QUESTIONS FOR DISCUSSION

A SUBMISSION BY
THE *ABORIGINAL LEGAL SERVICE (NSW/ACT) LTD*
TO THE *NEW SOUTH WALES LAW REFORM COMMISSION*

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Question 1

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?

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

The ALS supports the inclusion in the Act of a set of objectives.

Section 3 of the Crimes (Sentencing Procedure) Act is a useful model for such a provision.

The ALS believes the fundamental principles which should be recognised are:

- The presumption of innocence
- Bail is not a method of punishment
- Imprisonment is a measure of last resort both pre and post a finding of guilt
- A presumption in favour of bail for all accused persons
- The need to ensure the attendance of accused persons at Court
- The need to protect the administration of justice, including preserving evidence and protecting witnesses (including the alleged victim) from interference

The Bail Act was described in the 2010 Government Discussion Paper as:

"..At its heart a complex risk assessment scheme balancing three broad principles

1. *The presumption of innocence: bail is not intended to be a form of punishment, nor is a bail determination a judgment of guilty or innocence.*
2. *Flights risks and Court attendance: in order for the criminal justice system to function effectively, accused people must turn up to court on set dates and an assessment must be made of the likelihood that a person will flee.*
3. *Protection of the community: an assessment must be made as to whether the accused may commit more offences or interfere with the criminal justice process, for example by interfering with*

witnesses or evidence, or be a danger to someone else or to him or herself".

The law has long recognised that bail is not properly refused as a measure of punishment. Mann CJ in *R v Greenham*[1] stated, ".the discretion in certain circumstances to refuse bail can never be used by way of punishment". O'Brien J in *R v Mahoney-Smith*[2] stated "..the detention of an accused person in lieu of bail cannot be imposed in any way as a retribution for any guilt which might be supposed from the fact of his arrest and charge and committal for trial".

As is made clear in the third paragraph of the above quotation the current Bail Act allows courts to refuse bail on the basis that a person is a risk of committing further offences, even if those offences are unrelated to the matter the subject of the charges before the Court.

The ALS believes that the protection of the community from further offending, as a principle, does not sit comfortably within the bail scheme and if it is to be retained as an objective of the Act then its role must be carefully delineated and given less importance than the other principles listed above.

As a question of principle free and democratic societies do not generally countenance preventive detention of persons with a view to ensuring they do not commit criminal offences or otherwise adversely harm others. (There are of course well recognised exceptions to this including civil commitment of the mentally ill and detention of persons on public health grounds).

Failure to subordinate the importance of the 'protection of the community from general offending' principle in the reformed legislation will mean that the Bail Act will continue to inappropriately sanction preventive detention.

In this context a distinction can often properly be drawn between protection of prosecution witnesses (including the alleged victim) and protection of the community generally. In appropriate situations, the need to protect complainants and witnesses from undue interference or harm is an important consideration relating to bail. The refusal of bail or the imposition of bail conditions can, in appropriate circumstances, be justified by the need to insulate the administration of justice from interference. However, such considerations are distinct from generalised notions of community protection, and should be clearly delineated

The 1978 Act as passed was predominantly concerned with ensuring attendance at court and upholding the general right to liberty for unconvicted persons. Successive legislative changes have however fundamentally changed the balance of the scheme to the extent that it can now be fairly said that the Act places equal weight, if not greater weight, on protection of the

[1] [1940] VLR 236
[2] [1967] 2 NSWR 154

community from further offending by accused persons. This amounts to the explicit sanctioning of preventive detention.

This can be seen in the variety of provisions throughout the Act that qualify or abrogate the presumption in favour of bail and allow the Court to take into account a general risk of re-offending.

The many and varied exceptions to the presumption in favour of bail have the practical effect that many persons are remanded in custody prior to trial for the 'protection of the community' from further offending.

The experience of ALS lawyers appearing for accused persons in thousands of bail applications a year across the state is that a person with a substantial criminal record often has little chance of obtaining bail regardless of whether there is evidence to suggest they will fail to appear or that they will interfere in the administration of justice.

A real question to be grappled with in the formulation of the policy behind the reformed Bail Act is how this can be justified as a question of policy and principle.

One view is that the detention of those who pose an unacceptable risk of re-offending is justified on the basis of the duty of care that the state owes to the community. On this view it would be wholly unsatisfactory to simply allow a detained person to be released notwithstanding the existence of evidence that they are likely to soon after re-offend whether against the same or different alleged victims. The state, on this view, becomes a positive actor in the situation and has a duty to put in place mechanisms to protect the community from the person who the state holds in custody at that point in time.

Many in the community however, would take the view that such reasoning is anathema to the presumption of innocence, inconsistent with the importance our law attaches to individual liberty and has no role to play in the determination of bail. On this view bail should be solely a question of ensuring that the accused person attends their trial and does not act to frustrate the administration of justice. Protection of the community on this view is properly viewed as a matter to be considered by the sentencing court not the bail decision maker.

The ALS opposes on principle the inclusion in the Bail Act of criteria that could lead to the refusal of bail on the basis of a general risk of further offending. If, however, the principle is to be retained, the ALS believes that the objectives of the Act should explicitly provide that the protection of the community from general further offending should be a secondary consideration that cannot alone justify the refusal of bail.

In extreme cases persons who pose a very high risk of offending can properly be made the subject of NSW Police suspect management plans and monitoring and other law enforcement mechanisms applied. However, bail should not be used as a law enforcement mechanism.

Question 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?

The ALS supports the retention of a right to bail for certain offences.

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

The ALS supports the extension of the right to bail to all offences not carrying a term of imprisonment of more than six months.

While imprisonment is sometimes imposed for such offences the comparatively minor nature of the conduct involved means that pre-trial detention is unjustifiable even in circumstances where the person poses some bail risk.

Section 8 of the Australian Capital Territory states:

> *8 Entitlement to bail—certain minor offences etc*
> *(1) This section applies to—*
> *(a) a person charged with an offence not punishable by imprisonment (except in default of payment of a fine); and*
> *(b) a person charged with an offence punishable by imprisonment for not longer than 6 months; and*
> *(c) a person arrested for a breach of the peace or apprehended breach of the peace; and*
> *(d) a person arrested under a warrant because of failure to comply with a summons or subpoena; and*
> *(e) a person brought up to attend a trial or hearing following the issue of a habeas corpus order.*
> *(2) The person is entitled—*
> *(a) to be granted bail; and*
> *(b) if the person is in custody—to be released from*

The ALS further supports an extension of the right to bail to all first offenders charged with offences carrying no more than 12 months imprisonment.

Under the current Act, a person who is entitled to be released on bail under section 8 may still be subjected to onerous bail conditions, including curfews, place and association restrictions and daily reporting to police stations. Such conditions can inhibit a person's participation in employment or education and may impact on other aspects of their life. If the conditions are not complied with, the person is at risk of not only having their bail revoked, but of losing their entitlement to be released on a further grant of bail in respect of that offence.

This is of particular concern in relation to juveniles, and particularly juveniles residing in remote or regional areas, who may be subject to strict bail conditions that are rigidly enforced by police. For example, a young person who is entitled to bail in respect of an offence which does not attract a term of imprisonment may nonetheless find themselves on remand if, for example, they fail to return home in time for a curfew check. As a result of breaching their bail, such a person would then lose their entitlement to any further grant of bail under s 8(2)(a)(ii) of the Act. In these circumstances, a person will be under significant pressure to plead guilty to the offence on the basis that their continuing detention will clearly exceed any likely penalty they may receive in severity. This is a manifestly unjust outcome.

The ALS suggests that section 8(2)(a)(ii) not apply to juveniles and that a provision also be inserted to mitigate the risk of overly onerous bail conditions being imposed in cases to which the section applies.

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

As discussed above the ALS supports the extension of the right to bail to those offences identified above.

Question 3 - Presumptions and Exceptional Circumstances

Introduction

The historic presumption in favour of bail entrenched in the common law has long been viewed as a consequence and manifestation of the presumption of innocence. It is this principle that speaks against punishment other than as a consequence of a finding of guilt.

The ALS supports this fundamental principle and suggests that it should be granted central place in the Bail Act. As such the ALS strongly supports a return to a uniform presumption in favour of bail for all criminal offences.

A uniform presumption in favour of bail of course does not mean bail can never be refused. Considerations such as the seriousness of the offence, the strength of the prosecution case, a prior record of similar offending or of failing to appear before the Courts are all factors which may lead to a refusal of bail, even where there exists a presumption in favour of bail.

Indeed, the current section 32 factors overlap considerably with factors resulting in a presumption against bail or the loss of a presumption in favour of bail. For example, s32(1)(a)(ii) and s9B(2); s32(1)(b) and s9A(1A)(b). In this regard, the current presumptions allow for a “double-counting” of factors adverse to bail.

The current scheme fetters the discretion of bail decision makers and imposes rules that often operate in an arbitrary and unfair way to deny bail to persons yet to be convicted of a criminal offence.

3.1 - How are the existing presumptions applied in practice?

In the experience of the ALS the varying presumptions scheme has produced widely divergent practises depending on the judicial officer and location involved.

The reality of the ALS legal practice provides a useful insight into the practical operation of the Bail Act. ALS duty solicitors make bail applications at Local Courts throughout NSW on a daily basis. Often, a single solicitor will make bail applications for 5 or more clients in a day. These solicitors are under considerable time constraints because of the number of clients they are representing and the time made available by the court for taking instructions and presenting applications. There is limited time available to give consideration to the applicable presumption and the case law that may apply to it. Experience suggests that the provisions are overly complex and that solicitors appearing in busy court lists would be greatly assisted if the presumptions were simplified and clarified, or removed altogether.

In some courts the existing presumptions are rarely applied in practice except perhaps as a reason for the defence to have to collate and present a stronger case for bail than might otherwise be done. In these circumstances the persons who broadly speaking are considered appropriate candidates for bail are granted bail and those who are not are bail refused. The prescriptive legislative provisions appear to have little role to play and only lip service is given to presumptions by the courts and authorised justices. Often the presumptions are not mentioned or seemingly ignored when raised or, alternatively, there is confusion as to exactly which presumption applies and why a particular presumption applies. This is fairly commonly the experience in the Local Court.

ALS lawyers in other locations however report that it can be all but impossible for an applicant to be granted bail for a matter involving a presumption against bail unless a particularly compelling and exceptional case can be mounted.

However where the charge is a more serious one, or where the Director of Public Prosecutions appears, greater consideration is generally given by both parties to where the presumption lies, and how it is to be applied. Bail applications in these types of matters are usually researched and prepared in advance and greater time and resources tend to be allocated.

One broad concern identified by ALS solicitors is that by creating a scheme that provides for numerous circumstances under which the presumption in favour of bail is abrogated, the Act has provoked a trend (among some judicial officers) towards courts refusing bail unless an accused person is able to identify circumstances that justify a grant of bail. One possible explanation for this is that a judicial culture has been fostered that views the liberty of an

accused person not as a right but as a privilege which must be justified by the circumstances of the particular case.

Another concern is that the current Act, by creating such broad categories of offences in which the presumption in favour of bail is abrogated, has the practical effect of reversing the principle that imprisonment is a measure of last resort[3] and ensuring that many accused people have served time in jail unnecessarily before guilt or innocence is determined. This can only be seen as a practical effect of the current draconian system of presumptions.

The procedure and test to be applied in a case involving a 'neutral presumption' is unclear and productive of inconsistent application. The ALS is of the view that the neutral presumption concept is of little assistance to judicial officers in balancing the competing factors which must be addressed when considering bail. In some cases it is misapplied and leads in effect to a presumption against bail.

Section 9A of the Bail Act provides that section 9 of the Act does not apply to certain domestic violence related offences, thus creating a neutral presumption. The primary purpose of this section appears to be protection of the alleged victim. One problem identified with removing the presumption in favour of bail in relation to domestic violence offences is that the prosecution of these matters regularly fails at hearing, because the alleged victim does not attend or the matter cannot be proved beyond reasonable doubt. The effect of section 9A of the Bail Act is that a number of ALS clients are bail refused and spend extended periods of time in custody solely in relation to offences that are not later proved at hearing. Court lists are growing, and it is often up to 6 months before a hearing date can be allocated at a particular court. Remand should not be used as a way of punishing suspected domestic violence perpetrators for offences that may not be proved.

The ALS recognises that the issue of domestic violence complainants generally is a difficult one and while largely beyond the scope of the reference it looms large in the bail context. While courts are properly concerned to ensure that victims are not put at further risk by perpetrators of domestic violence, this needs to be balanced against the risk of an accused spending extended time on remand for charges that will ultimately be dismissed. One avenue of addressing this may be to insert a requirement into the Bail Act requiring the prosecutor to provide evidence to the court as to the willingness of the alleged victim to attend the hearing of the matter and as to what version will be given in evidence. Such evidence could also extend to material relating to whether the alleged victim has attended such hearings in the past.

The existing presumptions are overly cumbersome and difficult to apply in practice. For example, the distinction between a presumption against bail and a requirement to show exceptional circumstances is elusive and judicial interpretation has further confused the distinction.

[3] *Crimes (Sentencing Procedure) Act* 1999, 5(1).

It is undesirable in the extreme that erroneous trends, judicial idiosyncrasies, confusion or lack of clarity should infect statutory provisions pursuant to which the question of liberty is determined. The existing act, complicated as it is by the many and various different tests applicable depending on the charge and the history of the applicant, is overly complex and liable to be misread. The opportunity for error to go unnoticed, particularly in the Local Court, is unacceptably high.

In the interests of fairness and clarity the ALS favours a return to the historic position of a uniform presumption in favour of bail for all offences balanced against statutory criteria by reference to which bail can be refused if the presumption in favour is overcome. As discussed below section 10 of the South Australian Bail Act provides a concise and useful starting point.

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

The presumption in favour of bail, insofar as it survives in the current Bail Act, is intended to implement on a practical level the presumption of innocence and to ensure that people are not remanded before trial unless justified on clear and cogent evidence.

The purpose behind the other presumptions is to redefine the balance that must be struck in assessing risk under the Act, according to the seriousness of the offence charged and the background of the accused. The presumptions create varying thresholds that must be met before bail is to be granted, depending on the classification of the case.

Under the existing presumptions, great weight is placed on the nature of the charge in determining where the presumption falls. Where the charge is a serious one, there is no presumption in favour of bail or there is a presumption against bail. This is problematic not least because it duplicates the criteria for a grant of bail provided for in section 32 of the Bail Act. The court is already required to take into consideration the nature of the charge as per sections 32(1)(a)(iii), 32(1)(b)(vi), 32(1)(c)(i), 32(1)(c)(v) and 32(1)(c)(vi) of the Bail Act. This is another instance of ‘double-counting’ of factors adverse to bail as identified above.

The ALS believes that the provisions abrogating the presumption in favour of bail serve an illegitimate purpose and that the Bail Act should be drafted to provide that a person should only be deprived of their liberty following a reasoned determination that this is necessary to ensure attendance at trial or protection of the justice system. In the event that protection of the community from a general risk of further offending is to be retained as a purpose of the Act the ALS believes it should be subordinate to the other two purposes.

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

The existing presumptions suffer from various defects, both in form and application, which mean that to a very significant degree they are not functioning as intended.

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

As stated above the ALS favours a uniform presumption in favour of bail.

However, if the presumptions are to be retained the ALS favours significant amendments to the list of offences falling within the exceptions to the presumption in favour of bail and significant simplification of the presumptions.

The process of classification should be informed by the fundamental principle that no person should be subject to detention unless proven guilty of an offence, except where extenuating circumstances dictate otherwise.

In accordance with this principle, any categories of cases which cause the presumption in favour of bail to be abrogated should be restricted to those in which it could reasonably be considered sound and compelling reasons so require. The ALS suggests this could reasonably only consist of a very small category of offences.

If a presumption against bail is to be retained, it is further desirable that the meaning and effect of the provision be clearly defined. The passage from *R v Masters* (1992) 26 NSWLR 450 at 473 quoted in the Questions Discussion Paper, which currently represents the state of the law, clearly states that for all cases falling into this category, bail should "normally – or ordinarily – be refused". Given the breadth of this category and the rate at which it has expanded since its inception, this is a worrying proposition.

If the presumption against bail is to be retained it should be tailored to make it clear that this is not the intended effect of the provision. The provision should be amended to provide that the presumption indicates no more than a reversal of the burden of persuasion. This could provide meaningful guidance to the courts and clearly differentiate that category from the exceptional circumstances one.

The ALS suggests that the exceptional circumstances provisions are of no utility and should not be retained. In practice, the provisions are not applied in any materially different manner to the presumption against category. Given the decision in *R v Masters* both categories appear to require the identification by an accused person of circumstances which differentiate their case from other, ordinary cases. In this respect, the words "exceptional circumstances" are arguably nugatory.

The ALS further supports the abolition of the provisions that operate to deny a presumption in favour of bail based on a person's criminal history. These provisions operate arbitrarily and can deny bail in the absence of clear and cogent evidence to suggest bail needs to be refused.

The ALS is concerned that s9A (which provides another exception to the presumption in favour of bail) defines an accused person as having a "history of violence" even if they have only one prior personal violence offence or offence of contravening an apprehended violence order in the previous decade.

Assuming the provisions are retained the ALS also suggests the following particular amendments in relation to the definition of personal violence offences:

- The definition of "personal violence offence" as adopted from the *Crimes (Domestic and Personal Violence) Act* in s9A(3) should not include the offence of damage to property under s195 *Crimes Act.*
- The definition of "serious personal violence offence" within s9D should not include the offence of damage to property by fire under s195(1)(b) or (2)(b) *Crimes Act*.

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

All jurisdictions in Australia (with the exception of Tasmania) currently provide for some system of classifying cases for the purpose of applying different presumptions in respect of bail. Few jurisdictions, however, have adopted such onerous provisions as New South Wales. It is likely that this distinction has had a significant impact on the statistically high remand population in New South Wales compared to other Australian jurisdictions.

The most appropriate outcome would be a set of provisions that allows the presumption of innocence to be balanced against other factors relevant to the analysis of risk required under the Act. In that respect, section 10 of the South Australian *Bail Act* provides a useful framework (thought the ALS does not necessarily endorse all of the criteria deemed to be relevant by the section).

Section 10 of that Act creates a presumption (subject to s 10A of that Act) that a person who is accused of an offence but not yet convicted of that offence should be released on bail unless the relevant authority considers that it is not appropriate to do so, having regard to specific factors identified in the provision. Such factors include the seriousness of the offence, the likelihood of the accused absconding, re-offending or interfering with witnesses, any medical needs the accused may have, previous occasions on which the accused has failed to comply with bail, or any other relevant factor. This provision retains the presumption of innocence, whilst providing adequate discretion for a court to remand an accused person to custody if there exist legitimate reasons for doing so. It acknowledges that not all offences that fall within a pre-defined and over-simplified category will necessary be of the same nature or seriousness.

It is notable that section 10A of the South Australian Act provides for a presumption against bail in respect of certain offences, thus excluding them from the operation of section 10. The exclusions are however very limited when compared to those in New South Wales.

3.6 Should there be:

(a) a uniform presumption against bail;

(b) a uniform presumption in favour of bail;

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

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

As discussed above the ALS supports a uniform presumption in favour of bail.

The ALS suggests that this position is the only way of ensuring the compatibility of our Bail Act with international human rights standards.

Australia is a signatory to the International Covenant on Civil and Political Rights which in Article 9 states:

> *"1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*
>
> *2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.*
>
> *3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.*
>
> *4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.*
>
> *5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation".*

In *WBE v The Netherlands* (Communication No. 432/1990, HRC 1990) the United Nations Human Rights Committee stated:

> *"..Article 9, paragraph 3, allows pre-trial detention as an exception; pre-trial detention may be necessary, for example, to ensure the presence of the accused at the trial, avert interference with witnesses and other evidence, or the commission of other offences".*

This ICCPR provision is in very similar terms to Article 5(3) of the European Convention on Human Rights and guidance is found in case law of the European Court of Human Rights on the meaning of the provision. Article 5(3) of the Convention states:

> *"..Everyone arrested or detained… shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial".*

The European Court of Human Rights has consistently held that bail must be granted unless the state shows clear and convincing reasons why the presumption in favour of bail should not be applied.

In *Iljkov v Bulgaria* [2001] ECHR, (Application 33977-96), the European Court of Human Rights held that a provision in the Bulgarian Penal Code to the effect that there was a presumption against bail applicable to persons charged with serious offences was in violation of Article 5(3) of the European Convention on Human Rights. The Court stated:

> *"..Continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty.*
>
> *Where the law provides for a presumption in respect of factors relevant to the grounds for continued detention the existence of the concrete facts outweighing the rule of respect for individual liberty must be nevertheless convincingly demonstrated.*
>
> *Moreover, the court considers that it was incumbent on the authorities to establish those relevant facts. Shifting the burden of proof to the detained person in such matters is tantamount to overturning the rule of article 5 of the Convention, a provision which makes detention an exceptional departure from the right to liberty and one that is only permissible in exhaustively enumerated and strictly defined cases".*

The Courts of the United Kingdom have also considered provisions that create presumptions against bail for certain offences. They have found such provisions violate human rights now recognised in law in that jurisdiction.

In *O v Crown Court at Harrow* [2006] UKHL 42, the House of Lords considered section 25 of the *Criminal Justice and Public Order Act 1994* (UK) which creates an 'exceptional circumstances' test for bail for certain serious offences.

The House of Lords unanimously ruled that to apply the ordinary meaning of section 25 would breach article 5(3) of the European Charter. The Court therefore used the interpretative provision in section 3 of the *Human Rights Act 1998* (UK) to reinterpret the provision such as to denude the test of its onerous nature.

In the absence of clear legislative recognition of human rights through a bill of rights or other statutory human rights framework the ALS is of the view it is incumbent upon government to ensure that New South Wales does not fall behind comparable jurisdictions in advancing and respecting fundamental human rights.

The ALS recommends that the Law Reform Commission closely consider the content of international human rights law (and the case law coming from Victoria and the Australian Capital Territory which both have statutory bills of rights in operation) before recommending the re-enacting of bail provisions such as the current presumption against bail/exceptional circumstances laws.

These provisions violate international human rights law to which Australia is a signatory and are not necessary to achieve an appropriate bail scheme.

In relation to juveniles the ALS suggests that any legislative scheme should be guided by the principle that the court should always take the least restrictive approach when dealing with children, and adopt the approach which is likely to cause the least disruption to their development needs. Where possible, bail should be dispensed with for children, and, failing that, there should always be an entitlement or a presumption in favour of bail. The criteria to be considered in respect of children should also contain specific provisions to ensure that the proper factors are considered in relation to children.

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

The ALS supports a uniform presumption in favour of bail.

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

The ALS supports a uniform presumption in favour of bail.

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?

The ALS supports a uniform presumption in favour of bail and has significant concerns about the operation of the current 'neutral' presumption.

In the event this is not the course adopted the ALS is of the view that a 'neutral' presumption is certainly preferable to a presumption against.

In the event 'neutral' presumptions are retained the ALS is unsure how further legislative guidance could be given to ensure their consistent and fair operation. The ALS would however support any legislative measure that had the practical effect of lessening the presumption's capacity to operate to remand people in custody in circumstances where this is not truly necessary.

Any such proposals should be subjected to a consultation process.

The neutral presumption has been held to mean that the applicant must make a good case justifying the exercise in his or her favour of the statutory discretion to grant bail. In *R v Hilton* (1987) 7 NSWLR 745 the court stated:

> *"..In this sense he bears an onus of putting forward material sufficient to satisfy the Court that bail should be granted to him. The Court must be satisfied of any relevant matter on the balance of probabilities."*

This onus on the applicant of fails to reflect in law the presumption of innocence and a person's prima facie right to be at liberty whilst their matter is finalised. If neutral presumptions are to be retained the ALS suggests the Act explicitly require the court to take into account the presumption of innocence when applying any neutral presumption in respect of bail.

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

As discussed above the ALS favours a uniform presumption in favour of bail.

In the event that a system of classifications is to be retained the process of classification should be informed by the fundamental principle that no person should be subject to detention unless proven guilty of an offence, except where extenuating circumstances dictate otherwise.

In accordance with this principle, any category of offences which do not attract the presumption in favour of bail should be restricted to those in which sound and compelling reasons arguably so require. This could only be a small category of offences.

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 ALS believes the concept of a presumption for or against bail is fairly well understood among lawyers and judicial officers (even if it is unclear which presumption actually applies in a given case). It is somewhat unclear how the concepts could be helpfully further defined.

One possibility discussed above is to ensure that the concept of a presumption against bail places no more than a burden of persuasion on the applicant. Another also discussed above is to require the Court to explicitly consider the presumption of innocence even when dealing with an application involving a presumption other than in favour.

In the event an adverse presumption is retained the ALS would support any legislative measure that had the practical effect of lessening its capacity to operate to remand people in custody in circumstances where this is not truly necessary to achieve the person's attendance, the protection of the justice system and the protection of the community.

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?

The ALS supports the abolition of the exceptional circumstances requirement.

In the event an exceptional circumstances test is to be retained the ALS is unsure how further legislative guidance could be given to ensure consistent and fair operation.

However in the event it is to be retained the ALS would support any legislative measure that had the practical effect of lessening its capacity to operate to remand people in custody in circumstances where this is not truly necessary to achieve the person's attendance, the protection of the justice system and the protection of the community.

Question 4 Dispensing With Bail

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

4.2 If so, should such cases include:

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

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

(c) any other class of case?

The ALS supports a right to have bail dispensed with for offences carrying fine only punishment and for matters being dealt with by way of youth justice conferencing.

An entitlement to have bail dispensed with in certain cases reflects the principle that bail is not to be used as a means of preventative detention nor punishment.

The imposition of arduous bail conditions (eg curfew and /or strict reporting) can often be more onerous then the ultimate punishment for the offence. This is particularly the case in offences that do not carry a sentence of imprisonment as a maximum penalty.

A concern in this area raised by ALS solicitors is that, where bail is not dispensed with in relation to minor offences, there is often significant pressure on accused persons, particularly children, to plead guilty. Where strict bail conditions are imposed, or where bail is subsequently revoked due to a breach of the conditions, a person may choose to plead guilty to an offence which they have not committed in order to have the matter finalised. It is often preferable to receive a small fine for an offence you have not committed, than to spend months in custody or on strict conditions awaiting an acquittal.

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.

Arguably an entitlement to bail should be qualified only to the extent that reporting conditions can be imposed to allow Police time for personal particulars to be ascertained. Once this has been achieved, reporting should be automatically terminated for the offences discussed above. A time limit for the Police to gain the information should be imposed with extension

applications required to be placed before the court by Police for determination prior to automatic expiry. If the application for extension is not made in the time set, the reporting conditions should lapse.

Question 5 Police Bail

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

The ALS is concerned at the regular imposition by New South Wales Police of overly draconian bail conditions on persons which in effect "set them up to fail".

One example is the trend in Sydney of police subjecting children to unrealistic curfews. An example provided by one of our solicitors involved a fourteen year old child with no prior record who was charged with breaking into a car at lunch time. The child received police bail with a curfew between seven pm and seven am.

Another example involved a case where four co-accused children were charged with entering enclosed lands and put on bail to not associate with each other and to obey a strict curfew. Three of the children were cousins and two lived in the same house. Three were subsequently arrested for breaching their bail less than seven days after police bail was granted. Two out of the four were first time offenders.

A further example involved a case where police charged a person suffering from alcoholism with offensive language and imposed a bail condition not to consume alcohol. The person was arrested days later for breaching the condition. (The issue of bail conditions involving alcohol and drug prohibitions is discussed further below).

The ultimate effect of unreasonable bail conditions is that the defendant often breaches the conditions before they attend court for the first mention. Some solicitors are concerned that the imposition of such conditions by police may be a deliberate attempt to set juveniles up for failure, amounting to a cynical attempt to circumvent the operation of certain favourable provisions of the Act.

This problem is often aggravated by the approach taken by judicial officers and authorised justices when dealing with breaches of police bail. Not wishing to be seen as reducing the strictness of bail conditions that have already been breached, the court or officer will often impose stricter conditions than those imposed by police. The problem of inappropriate bail conditions is thereby compounded.

The ALS is unsure how this problem can be addressed, given that it arises from the unreasonable exercise of a reasonable discretion, but would welcome the opportunity to comment on draft provisions intended to address the practice. It may be that a limit of some sort should apply to conditions imposed by police depending on the seriousness of the charge.

One possible method of addressing the problem could be to create a mechanism where defendants are given the opportunity to obtain legal advice specifically in relation to bail conditions before they sign the bail agreement. Another method could be the creation of a system where an on call Magistrate could review police bail conditions if defendants sought such a review. This review system could deter police from imposing such harsh conditions.

The unfortunate reality of the current scheme is that police are at liberty to impose any bail conditions they see fit, regardless of whether they are necessary or appropriate. Defendants who do not agree to the conditions remain in custody, resulting in overwhelming pressure to agree to unreasonable conditions.

The ALS also suggests that the Act be amended to allow an authorised justice to review bail conditions imposed by police. Currently s 48B allows an authorised justice to review bail conditions imposed by a court. There is no power for an authorised justice to review the conditions imposed by police. This may have been an oversight when the provision was drafted. An amendment is necessary both because of the significant time delay between the granting of police bail and a person's first court appearance and the often inappropriate bail conditions imposed by police.

It may also be appropriate to include a right of appeal to the Local Court/Children's Court from the refusal of a police officer to vary bail.

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

The ALS suggests that the Act be amended to allow an internal police review of bail conditions imposed by police. Currently the Act only allows an internal police review once bail is refused. This addition to the Act would add flexibility to the system and keep many basic bail review matters out of the court lists.

One concern raised by ALS solicitors with experience working on the ALS 'Custody Notification Scheme' is a practise whereby the right to an internal review of a bail decision may be precluded by the absence of any more senior officers on duty at the time of the adverse decision. This may occur when a Senior Constable or Sergeant acts as the Custody Manager, and no LAC Superintendents are on shift. This practice is particularly prevalent in regional and remote police stations. It may be that some amendment is necessary to ensure this situation does not occur.

Question 6 Court Bail

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

Subject to certain restrictions, courts have a wide jurisdiction under which to grant bail. The principal cause of concern in this respect is s 22A of the Act. This provision is discussed in more detail below. The unduly restrictive nature of the provision creates unfairness and it should be removed from the Bail Act.

It is suggested that the Bail Act should be amended to clarify provisions allowing courts of inferior jurisdiction to vary or dispense with Bail in appropriate circumstances. In cases where a superior court has granted bail an inferior court should have a broader power to review conditions on subsequent grants of bail. Section 44 as it currently stands is complicated and confusing.

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 a useful and appropriate power which should be retained. The provision is of particular utility in country courts, where a magistrate may not be available for a number of days or longer to hear a bail application. In the experience of the ALS the jurisdiction is utilised frequently and generally appropriately. Where an authorised justice refuses bail, an accused person will not be prevented from making a further application to the Local Court by virtue of s 22A of the Act. This is an important safeguard on the proper exercise of the jurisdiction.

It is suggested that consideration be given to expanding the role of the authorised Justices. Such an expansion has the potential to expedite the processing of people in custody on busy court days. It may also further ameliorate the effects of the section 22A provisions (in the event they are retained) as a refusal by the justice would not prevent an application before a Magistrate.

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?

The ALS supports a provision that ensures that conditions imposed by police are automatically reviewed at the first court mention. Such a provision is necessary due to the often onerous and unnecessary bail conditions imposed by police decision makers.

The ALS does not support a general requirement to review all bail decisions made by police if this would potentially put in jeopardy grants of bail made by

police. Currently, where police have granted bail, the court can only revoke bail if the client or Police “open bail” by making an application to review/vary the bail.

On one view there does not appear to be any utility to adding a provision in these terms to the Act. Where bail has been refused by police, an accused person will be free to make a fresh bail application when brought before a court. Where bail has been granted by police, and the informant subsequently forms a view that bail should not have been granted, section 48 of the Act provides for a review of the decision. Similarly, where bail has been granted by police subject to conditions, section 48 of the Act will allow an accused person to seek a review of those conditions by a court.

The proposed provision may however assist unrepresented persons appearing in court for the first time following a refusal of bail by police or the imposition of onerous conditions.

The ALS is however concerned that a provision in the proposed terms will generally serve little utility except to reduce certainty in respect of a person’s liberty where police have granted or refused bail.

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If a provision is implemented mandating a fresh determination at first appearance, amendment of the Act should expressly provide that a court should only have power to grant bail, dispense with bail or revoke or confirm the existing conditions imposed by Police similar to the current section 48A.

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

An accused person who has been refused bail should be entitled to mandatory periodic reconsideration of bail and bail conditions. There should be a statutory limit on the period of time a person may be held on remand prior to a hearing of the charges, the expiry of which will create an automatic right to a review of the bail decision regardless of whether circumstances have changed or otherwise remained static. It is proposed that an appropriate time limit would be 28 days.

This should be provided for in addition to the current section 25 which bestows on accused persons an important right to regular court appearances.

This suggestion is consistent with international human rights standards whereas the current Bail Act is inconsistent with those standards.

In *Bezicheri v Italy* (1990) 12 E.H.R.R 210 the European Court of Human Rights considered article 5(4) of the European Charter of Human Rights and ruled to the effect that a defendant remanded in custody must have the opportunity to challenge the detention at reasonable interviews. Article 5(4) is basically identical to article 9(4) of the ICCPR to which Australia is a signatory.

The British Law Commission, in an inquiry into the United Kingdom Bail Act looked into the compatibility of Article 5(4) and provisions of the Bail Act. In its consultation paper the Commission stated:

> *"..where, after remand in custody for 28 days, the defendant makes an application for bail and the court refuses to hear arguments that were put forward at the previous hearing, the Strasbourg Court may well find an infringement of the defendant's rights under Article 5(4). It follows in these circumstances that a magistrates' court should be willing to hear such arguments again".*

The ALS suggests that persons remanded in custody should have the right to a review of the determination on a regular basis and that this right should not be conditioned on a need to show a change in circumstances.

In the event a mandatory periodic reconsideration of bail is not to be adopted it may be appropriate to consider special measures in relation to strictly indictable matters that are being dealt with "pre-committal" to enable mandatory reconsideration of bail. There are often long delays in serving forensic evidence (eg DNA and toxicology evidence) in such matters which are due in no part to the conduct of an accused person.

In such cases a timetable could be set that is in line with standard brief service orders. If an accused person is refused bail in the matter and the evidence fails to be served within the required period, then the Court should be obligated to re-consider bail based on the material served to date.

Not only would such a provision work towards reducing unnecessary remand times, but it would protect against unreasonable delay in the prosecution of matters once a charge is laid.

Question 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?

As discussed above the ALS supports a right to periodic review of the question of bail. This should, within the period of time stated, not be dependent upon a change of circumstances. The insertion of such a right is necessary to ensure fairness to remanded persons and compliance with international human rights standards.

Within the relevant time period (of for example 28 days) it is accepted that some limitation on repeated applications is warranted. It is suggested however that even within the fixed period at least one review of an adverse bail decision should be allowed.

In the Local Court this should allow a person who is refused bail the option of one fresh opportunity to apply for bail without there being a requirement to show a change in circumstances. This re-hearing should occur before a different Magistrate. The second Magistrate should be randomly selected from an AVL roster outside the area of the first instance Magistrate.

This process would eliminate the perception of bias experienced by clients who are known to the Magistrate of first instance. The extensive AVL facilities available should make this reasonably practical. The increase in workload created in the Local Court by this process has potential to reduce the bail workload of the Supreme Court that currently hears second or subsequent applications.

The 'review by peer' process also has potential to provide a measure of accountability to Magistrates, level out judicial standards on grants of bail, and reduce the perception of local bias. The same provisions should also apply to appeals bail. That is, a same level peer review at the request of the bail refused person. A strict time provision should apply and 'within 3 business days' is suggested.

In the event it is decided to retain a provision in the nature of section 22A the section as currently worded is problematic in a number of additional respects.

The requirement of a change in circumstances contained in section 22A(1A)(c) lacks clarity and risks being applied unevenly. At a minimum section 22A should be amended to provide wider grounds for further applications, such as where the interests of justice so require. This would acknowledge that there are many reasons why a person should be afforded a further opportunity to apply for bail and allow a court ample discretion to deal with repeat applications fairly.

A further difficulty with section 22A is that where a matter suffers from delay, a person on remand will often be unable to identify any specific change in circumstances that would justify a further application for bail. There is no obligation on the prosecution to disclose matters relevant to bail, and it is frequently a material change in the prosecution case that can justify a further application for bail. As discussed below the ALS supports a provision in the Bail Act imposing on the Crown a continuing obligation to disclose matters relevant to any diminishing in the strength of the prosecution case during the period of remand.

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

All accused persons detained in custody, including juveniles, should have the right to regular reviews of the appropriateness of their ongoing detention. The period within which review is possible should be shorter for cases involving juveniles. The ALS suggests 14 days as the maximum time which a juvenile should be remanded in custody without the opportunity to review the decision.

The *Children (Criminal Proceedings) Act 1987* contains principles that require juvenile offenders to be dealt with differently to adult offenders when being sentenced for criminal offences. The Act has a general focus on promoting the rehabilitation of children and ensuring that where possible they remain at home with their families and continue with education.[4] A critical issue to be examined pursuant to this reference is why if juveniles are dealt with in a different manner in relation to sentence proceedings, are they treated in the same manner in bail proceedings.

In the event section 22A is to be retained in its current form it should not apply to juveniles. The current number of juveniles on remand in New South Wales is unacceptably high. The substantial proportion of juveniles on remand who do not ultimately receive a custodial sentence makes these figures particularly alarming. The growing numbers of aboriginal children in detention is truly shocking.

Given that any action taken by the court in respect of juveniles should be of the least restrictive nature that is appropriate in the circumstances, it is not appropriate to retain a provision that allows for ongoing detention of juveniles without the opportunity for a periodic review on the merits of the particular case.

As discussed above there should be a right to a second determination of bail within the time period applicable to a bail determination. This scheme should vary in relation to juveniles in that on a requested first instance review, juveniles should appear before a specialist Children's Court Magistrate. In cases of juveniles, an automatic review may be appropriate rather than optional as with adults. As above, this provision should apply also to children's appeals bail.

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?

Some limitation on the right to repeated applications inside the 28 or 14 day period is appropriate.

Question 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?

The ALS supports legislative prescription of the criteria to be considered in a bail application. There should however be provision for the court to consider 'other relevant factors'.

[4] *Children (Criminal Proceedings) Act 1987* (NSW); section 6.

The criteria should focus on the following:

- Factors relevant to the likelihood of the accused appearing
- Factors relevant to the likelihood of the accused interfering with the administration of justice.
- Factors relevant to the likelihood of the accused committing further offences against the alleged victim and thus interfering with the alleged victim's participation in the trial process.

As discussed above the ALS opposes on principle the criteria including factors relevant to the likelihood of the accused committing further offences if bailed (other than against the alleged victim or against the administration of justice).

If such a factor is to be retained the ALS supports the legislation making it clear that in light of the presumption of innocence and the general right to liberty such factors should generally be given lesser weight on a bail application than those relevant to the capacity of the offence to be tried.

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 ALS does not propose a model from another jurisdiction.

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

The ALS suggests that the Bail Act require that bail be granted unless one of the risk factors is proven on the balance of probabilities and the decision maker is of the view bail should properly be refused having regard to the seriousness of the offence, the likelihood of a custodial sentence, the strength of the evidence and the presumption of innocence.

No less a requirement should exist than that the prosecution be required to prove that the person is likely to abscond or interfere with the administration of justice. A person should not be refused bail on the basis of mere possibilities, conjecture or suspicion.

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

The criteria should address more prescriptively how a court should deal with the offence as outlined in the prosecution evidence. Often an accused, through their lawyer, will submit that an alternative factual scenario different to the one contained in the police facts should be accepted by the court, at least on the question of bail. There is no guidance for a court in section 32 about

how the court should assess the seriousness of the offence or concerns for victim and/or community protection in circumstances where the accused submits that the police facts are disputed. Section 32 should make it clear that, unless the offence has been proved or a plea of guilty has been entered, the document provided to the court outlining the circumstances of the offence (usually the police fact sheet) is only a set of allegations against the accused. Those allegations should be capable of being tested on a bail application if the accused wishes, and the court should be empowered to make its own determination about the reliability of the version put forward by the prosecution in light of the accused's submissions.

The notion, prevalent among some judicial officers, that the prosecution case should be taken "at its highest" on a bail application should be legislatively vanquished.

Section 32 should also specifically contemplate the accused's willingness to enter into strict bail conditions or their ability to put forward surety undertakings. For example, it may be that the court's concern for the protection of the community is paramount, but such concern is substantially mitigated if the accused is willing to be subject to curfew or "house arrest" style conditions which restrict the movements of the accused during high risk times of the day.

Section 32 should specifically allow for the accused's willingness to enter into strict bail conditions as a matter that the court can take into account when determining the issue of bail.

As discussed below ALS suggests that bail conditions be used only where they are considered by the court to be a materially relevant factor in the actual grant of bail.

8.5 Should prescribed primary criteria be exhaustive?

There appears to be limited justification for section 32 to list exhaustive criteria. It may be that there are matters not referred to in the criteria that will from time to time be relevant to the question of bail, both in terms of a decision to grant or refuse bail. The court should be entitled to take these additional matters into account as and when they arise. Section 32 should be amended to allow the court to have regard to any other relevant matter so long as consideration of that matter is consistent with the objectives of the Act, in this respect the Bail Act of the Australian Capital Territory is a model.

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

The criteria are the central feature of the Bail Act and its most commonly referred to and used provisions. The criteria should be consistent with the objectives of the Act and entirely referable to those objectives.

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

So long as the subsidiary considerations are consistent with the primary criterion and consistent with the objectives of the Act.

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

Section 32(1)(a)(ia) would appear, in relation to an Aboriginal or Torres Strait Islander, to preclude consideration of the person's residence, employment and family considerations. This provision is discriminatory and should be re-drafted to ensure that the law is consistent in this respect.

The provision should ensure that the same criteria in relation to the likelihood of court attendance are considered for all applicants, with Aboriginal and Torres Strait Islanders being entitled to additional consideration of "ties to extended family and kinship and other traditional ties to place".

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

No, the criteria should allow the consideration of additional factors as long as the consideration is consistent with the objectives of the Act.

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?

The law allows broadly speaking for the taking into custody of intoxicated persons and the specific appropriate legislation should be used in such circumstances. Other laws allow for the detention of the mentally ill for assessment and treatment. Legislative schemes exist for the granting of protection orders and other such protections. Police broadly speaking can often assist people in danger from other persons.

Requirement for treatment in relation to injury, drug or alcohol use should be a factor that weighs in favour of bail being granted.

If a detained person is incapacitated by intoxication, injury or drug use, this implies that there is a health issue that needs to be addressed along side the considerations that are relevant to all bail applications. Such an implication should not lead to this factor weighing against bail being granted.

In the experience of the ALS, Corrective Services has limited resources to address health issues related to injury, drugs or alcohol use. Our clients tend to receive better treatment for these issues in the community by Aboriginal

specific services. The equivalent services in a custodial setting are not generally Aboriginal specific, and have lengthy waiting lists.

The Bail Act should not be the vehicle for this type of detention.

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

As discussed above.

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

A number of the criteria listed in section 32(1)(c) appear to be inconsistent with the presumption of innocence. As discussed above the ALS opposes consideration in a bail application of the prospects of a person committing general unrelated criminal offences.

Question 9 Bail Conditions

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

The Act currently allows the decision maker to impose bail conditions to achieve any of the purposes contained in section 37. It does not require the decision maker to form the conclusion that the imposition of the condition is a pre-condition to arriving properly at the decision to grant bail.

This means that the imposition of conditions can become a way of the decision maker achieving outcomes unrelated to the actual decision as to whether bail is appropriate.

Police sometimes use such conditions to achieve wider law enforcement objectives in aboriginal communities.

The ALS opposes unnecessary and often onerous bail conditions which are imposed routinely and sometimes without due consideration. As such the ALS supports a provision in the Act designed to ensure that conditions are only imposed where the decision maker is satisfied they are of significance and where in the absence of such conditions it may not be appropriate to grant bail.

An example of this issue is discussed below. Courts sometimes impose conditions on aboriginal people not to consume alcohol because presumably they are of the view this will somehow mitigate the risk of re-offending. In circumstances where bail will in any case be granted it is arguably no role of the bail court to impose conditions aimed at reducing the risk of re-offending.

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

As discussed above the purpose of imposing conditions should be integrally linked to the decision to grant bail. Conditions not strictly necessary to the grant of bail should not be imposed.

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?

The Bail Act should require that a decision maker only impose a condition where the condition is necessary to satisfy the Court it is appropriate to grant bail.

Alcohol and Drugs

The ALS is concerned by the imposition of conditions that "set our clients up to fail" and that arguably exceed the proper ambit of the Bail Act.

This includes the regular imposition by Courts of conditions that persons suffering from alcoholism not consume alcohol and submit to breath analysis as requested by police.

Such conditions provide the police with an effective 'license' to ensure the return of the person to custody at the police officer's whim. They also exceed the lawful scope of the power to impose conditions on bail contained within section 36 of the Act (not least because of the specific content of section 36A).

Experience suggests such bail conditions are of little effect on chronic alcoholics. Such conditions are also unfortunately reminiscent of the past in New South Wales when aboriginal people's access to alcohol was regulated in a racially discriminatory way by police and other authorities.

Such conditions are more likely to impact adversely on aboriginal people and may be imposed in circumstances where bail, in the absence of such a condition, may have in fact been granted.

The ALS would support an amendment similar to section 37(2A) of the current Act which requires a decision maker before imposing such a condition to consider whether the condition is essential to the grant of bail and whether it is reasonable, having regard to any history of alcoholism or drug dependence, to impose the condition.

Acceptable Persons

The experience of the ALS is that varied standards are imposed by Court staff on occasion as to whether a proposed surety or other guarantor is an acceptable person. Such variation can adversely impact on aboriginal people.

The ALS supports a regulation being made that contains criteria designed to ensure consistency of decision making and to ensure that people are not refused status as acceptable persons due to criminal records or financial status in circumstances where such refusal is not strictly necessary.

Consultation on the content of the regulation will be necessary.

The ALS further supports a provision making it clear that a Court can always deem a person an acceptable person.

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?

As discussed above the ALS does not support a wider basis for the imposition of bail conditions.

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?

No. Reliance on generalised notions of community protection and law enforcement to restrict individual liberty is inconsistent with the presumption of innocence and the right to liberty of unconvicted persons.

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. The decision to grant bail must be informed by the availability of any specific conditions which may be imposed and the extent to they could ameliorate the court's concerns regarding the person.

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?

There should be an exhaustive list of standard conditions, supplemented by the possibility of imposing 'special conditions' where necessary. There should not be an exhaustive list of special conditions.

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

Yes.

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?

Yes. Courts should be required to give reasons for decision in respect of the imposition of bail conditions. This will act as a significant deterrent to the imposition of unnecessary and unjustifiable conditions.

The power to impose a surety should be a special condition requiring a degree of justification and reasons.

<u>Sureties</u>

Aboriginal people suffer from comparative economic deprivation. As such decision makers should tailor bail conditions involving sureties and other financial guarantees to the realities of the individual and/or family concerned.

The ALS supports an amendment requiring decision makers to take into account in determining such conditions information such as it is known regarding the means of the person/family concerned and the comparative value of the money involved to them.

This could be achieved through measures such as:

- Amending section 36(2) to make surety conditions a condition of last resort and to require decision makers to give reasons as to why other conditions are insufficient in the circumstances.

- Amending section 36(2) to require that sureties not generally exceed a certain proportion of a defendant's (or their families) income or assets

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

Yes. Any conditions imposed should be reasonable, and this applies with particular force to "special" conditions.

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?

Yes.

9.12 What should the mechanism be for imposing bail conditions?

Accused persons should have bail conditions explained to them in open Court and then be required to have the conditions explained a second time by court staff before a signed agreement is made.

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?

Either mechanism could be appropriate. Any proposed mechanism should be subject to a consultation process.

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

Not necessarily, but any proposed mechanism should be subject to a consultation process.

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)?

The ALS supports written bail agreements so long as the Act requires that conditions are also explained twice, first in Court or by police and a second time by Court staff in the case of court bail.

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?

As discussed above Courts and police should be required to clearly explain bail conditions and a further requirement should be placed on court staff to explain conditions a second time.

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

The ALS supports the introduction of adult bail hostels and the widening of the existing juvenile scheme. The ALS supports specific tailored hostels for aboriginal people.

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

No submission.

Question 10 Breaches of Bail

Introduction

The ALS is concerned that police are not properly exercising their discretion when it comes to the arrest of persons for alleged breaches of bail.

It is suggested, in addition to the suggestions below, that the Act be amended to require police to submit to the Court which granted the bail a short justification in the documents to be tendered as to why they considered it necessary to arrest.

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

Yes. Under section 50, police officers retain discretion not to arrest a person who has failed to comply with their bail conditions. Police will usually be in a better position than the court to investigate an accused's explanation for a breach of bail. However, the experience of ALS clients generally is that the police discretion under section 50 is rarely exercised. Little to no investigation usually takes place as to the circumstances of the breach. Even where the breach of bail alleged against an accused is explained by a misunderstanding, illness or misadventure, police will almost always arrest the person and take them before a court.

Through our provision of the Custody Notification Service the ALS is in the position of experiencing the practical approach that NSW Police take to what might be described as minor alleged breaches of bail. ALS solicitors encounter on a daily basis aboriginal people being refused bail from the police for very minor indiscretions which constitute a breach of their bail conditions.

ALS clients have been brought before a court for a breach of bail in the following circumstances:

- Where a client was ten minutes late returning home after curfew;
- Where a client was out after curfew at their next door neighbour's house borrowing some bread for dinner;
- Where a client failed to report to police on a particular day because they were not able to get a lift in the car to the station, but reported to the station on the following day;
- Where a client failed to be of good behaviour because they travelled on a train without a valid ticket.
- Where a 12 year old boy who attended Court in compliance with bail was arrested in the Court's precincts for a breach of curfew alleged to have occurred the previous night. This matter should

simply have been brought to the Court's attention rather than the young person being arrested at Court, removed to the Watch house and held in custody for some hours while he was processed before being returned to court and bailed.

- Where a child was arrested for breaching a bail condition that he "reside" at a certain premises after spending one night away from the residence.

In these circumstances the client's bail would usually be continued by the court without opposition. However, the client may have spent the night in custody and significant resources will have been dedicated to the client's detention and appearance before the court.

These situations may be avoided if section 50 was amended to make it clearer that police officers have discretion where a person appears to have breached their bail and by placing further limitations on the exercise of the power.

Such further limitations could be modelled on the arrest provisions in the *Law Enforcement (Powers and Responsibilities) Act* 2002. The Act should specify other options available to police other than taking the person to court. These could include issuing a warning or taking no further action.

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

Yes. Section 50 should make clear that arrest without warrant should be a measure of last resort.

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. It is more appropriate for an officer to arrest a person for breaching their bail where there is a direct correlation between the breach and the charge matter. For example, where the breach relates to contact with a victim or witness or co-accused; or where the accused is out in breach of their curfew and intoxicated, where the charge involves conduct alleged to have occurred at night under the influence of alcohol.

It is also more appropriate for an officer to exercise their power of arrest where the breach may affect an assessment of the likelihood of the person to attend court in the future. For example, if the person has failed to report to the police for an extended period of time, or has approached a point of departure.

However, where the breach arises from an accused's misadventure or oversight, the legislation should encourage police to exercise their discretion to deal with the matter otherwise than by arresting the person. Perhaps prescribing arrest for breach of bail only as a last resort would have this effect.

10.4 Should the section specify criteria for arrest without warrant?

Yes. Such criteria could be modelled on s 99 of the *Law Enforcement (Powers and Responsibilities) Act* 2002. In particular, the overarching principle that arrest should be a measure of last resort should apply equally to cases that involve an alleged breach of bail. A breach of bail should not automatically result in an arrest.

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

Yes.

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

Juveniles and Section 50

Section 50 of the Bail Act should be amended to limit police power to arrest juveniles for minor breaches of bail including curfew and non-association conditions. Clear guidelines should be introduced to prevent repeated bail checks between the hours of 11pm and 6am.

Basis for Belief that Bail Has Been Breached

The ALS is concerned that people can be arrested for breaches of bail on the basis that a police officer has made an entry on a police database indicating the person is in breach of bail or on the basis of an erroneous entry on a database as to the continued existence of bail or a bail condition.

Making arrest for breach of bail a last resort would to some degree address the recurring issue of accused persons being brought before courts for breaching bail that has been dispensed with or varied to remove the condition that the person is said to have breached.

Aboriginal people are regularly accused of breaching bail that doesn't exist and then arrested and brought before the courts. ALS clients have been kept in custody overnight for breaching bail where the court ultimately confirms that the bail has been dispensed with. When our clients are arrested in these circumstances they will often protest to the police that the bail is not as it is recorded on the police system, but they will rarely be believed unless they can provide paperwork to prove what is being said.

If the police power to arrest for breach of bail is one of last resort, it is likely that more regard would be had to accused person's protests in these circumstances, and more investigation might be conducted by an officer before they arrest.

The ALS suggests than an arrest based on a marking on a computer system where the officer does not have personal knowledge of the facts of the alleged breach may be unlawful. The lawfulness of the arrest will turn on the nature and quality of the information contained in the database and whether the officer properly considered the information. Also relevant is whether or not the officer was aware that the information on the system is often incorrect and generally needs to be verified.

In *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] AC 286, the House of Lords examined the 'reasonable suspicion' requirement in the *Prevention of Terrorism (Temporary Provisions) Act 1984* (UK).

Steyn LJ stated:

> "..The information which causes the constable to be suspicious of the individual must be in existence to the knowledge of the police officer at the time he makes the arrest. ..... The executive 'discretion' to arrest or not, as Lord Diplock described it in *Mohammed-Holgate v Duke* [1984] A.C. 437, 446, vests in the constable, who is engaged on the decision to arrest or not, and not in his superior officers."

Diplock LJ stated:

> "..The statutory power does not require that the constable who exercises the power must be in possession of all the information which has led to a decision, perhaps taken by others, that the time has come for it to be exercised. What it does require is that the constable who exercises the power must first have equipped himself with sufficient information so that he has reasonable cause to suspect before the power is exercised".

Steyn LJ also held:

> "..Given the independent responsibility and accountability of a constable under a provision such as section 12(1) of the Act of 1984 it seems to follow that the mere fact that an arresting officer has been instructed by a superior officer to effect the arrest is not capable of amounting to reasonable grounds for the necessary suspicion within the meaning of section 12(1). It is accepted, and rightly accepted, that a mere request to arrest without any further information by an equal ranking officer, or a junior officer, is incapable of amounting to reasonable grounds for the necessary suspicion. …Such an order to arrest cannot without some further information being given to the constable be sufficient to afford the constable reasonable grounds for the necessary suspicion".

O'Hara has been endorsed by the New South Wales Court of Criminal Appeal, see *R v Rondo* [2001] NSWCCA 540.

The ALS suggests that the Bail Act be amended in a way designed to ensure that arresting officers personally have a belief to the requisite standard.

Historical Breaches of Bail

The recording on a person's 'bail report' of the times that they have been arrested for an actual or alleged breach of bail over their entire criminal history can be problematic.

The criminal history notes every time a person has been before the court for a breach of bail, whether the breach was proved or not, and whether the breach was serious or not.

Courts are often reluctant to grant bail to a person who has a number of breaches of bail on the basis that the person is not likely to comply with any conditions imposed. This is despite there almost always being no supporting evidence before the Court in relation to the alleged or actual breach.

The prosecution is able to rely on the fact of the matters being listed on the record and it then falls to the accused to explain the circumstances of the breaches or to raise the fact that they were not proved. This practice unfairly prejudices the accused. Where an accused has a number of breaches or breaches dating back a number of years, it is difficult to recall the circumstances of each allegation. As the person is in custody, they will not have access to any documents that would prove the matters one way or the other. The legal representative may not have time to go through each breach with the accused to determine if they were proved or admitted or not.

The content of bail histories is something that needs to be considered. It may be that each entry should indicate whether the breach was admitted or not.

Question 11 Persons Remaining in Custody Where Bail Granted

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?

Section 54A often applies to ALS clients in two circumstances:

- Where their family has been unable to meet an acceptable person or surety condition on their bail; or

- Where they are required to live as directed by Community Services and no placement is available.

Where a person is unable to meet their bail in either of these circumstances it appears that 8 days is an excessive period of time to remain in custody before the court is notified about the failure to meet the bail conditions and then is able to determine the course of action.

The effect of the prescribed time period is that a person may be in custody for up to two weeks before a bail review is heard. A shorter period of time is appropriate, particularly where the accused is a juvenile.

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.

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

Yes. The section as currently drafted has limited practical effect. For example, one ALS client was recently granted bail but could not meet it because his family was unable to meet the surety condition on the bail. It is not clear whether a notice was given by the governor of the prison under section 54A. It was only after the client called the ALS from custody some 14 days after being granted bail that the ALS made arrangements for the matter to be re-listed in court.

The steps should include:

- Notifying the accused's legal representative (where they are on the record);
- Listing the matter in court for a review;
- Maximum times periods in which the accused's legal representative is to be notified and the matter is to be listed for hearing; and
- Guidance on how the court should approach its review of the matter where the decision has already been made that the person should have their liberty, albeit subject to certain conditions that cannot be met.

Surety conditions are often challenging for ALS clients to meet. They can be imposed even where the accused does not suggest to the court that a surety (without or without security and with or without deposit) is available. This practise is a fundamental breach of natural justice and the Act should be amended to require a court to allow the parties to be heard before such requirements are imposed.

If the effect of a surety condition is that the person remains in custody despite bail having been granted, the court's decision that the person be at liberty should be the paramount consideration when the court reviews the bail

decision under section 54A. Allowance should be made under the legislation for accused persons who have very limited means, especially where the accused has not suggested to the court that a surety of any form was available on bail. Poverty should not be the reason that a person remains in custody.

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, particularly for Aboriginal clients given the history of Aboriginal deaths in custody. The ALS should be notified of a person remaining in custody at the time the court is notified.

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. Often our juvenile clients are not granted bail or released from custody because Community Services says that no placement can be found for them. This situation (referred to in Police v Raymond [5](26 April 2007, CCM Flood)) is regularly encountered in the Children's Court on bail applications for juveniles who cannot return home or who are under the parental responsibility of the Minister.

This issue is discussed further at question 12. The ALS suggests the Bail Act should be amended to reflect that a child should not remain in custody simply because they are homeless.

Question 12 - Young people

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

Yes. The current legislative scheme does not appropriately reflect the fundamentally different considerations applicable to children.

These include:

- Children have less control over their lives.
- Children rarely have a say about where they live.
- Children often need assistance to comply with bail conditions and to attend court.

[5] Published on LawLink.

- The different legal principles applicable to sentencing children, which should be reflected in the bail legislation.

- Things often change very quickly for children. For example, welfare services are more easily available to children, the way they occupy their days can be simply altered by enrolling them in schooling, a change in attitude might be the difference in whether they are likely to comply with bail conditions or simply disregard them.

The ALS suggests it is preferable to legislate in this regard in a separate act.

The experience of ALS solicitors is that in some bail matters the decision maker fails to apply different parts of the Act and proceeds to determine matters unaware of them. Providing for a separate act for children would reduce their likelihood that the special provisions applicable to them will simply be overlooked.

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

This would be preferable to the current situation.

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, this should be clarified. It should be noted that in practice section 6 is often applied by the Children's Court on bail applications. .

A separate Bail Act for children should include these principles.

In the event the general Bail Act continues to apply to children the principles contained in section 6 of the Children's Criminal Proceedings Act should also be enshrined in Bail Act principles/objects.

12.4 Should s 6 apply to bail determinations by Police?

Yes. It is worth noting that the Police already have to consider section 8 of the *Children (Criminal Proceedings) Act 1987* in relation to bail for juveniles. This section provides commendable guidance for the police in their bail determinations for juveniles, but it does not mandate how the police should approach bail determinations in respect of juveniles. Also, it is often the case that it is not followed.

Replicating section 8 in any bail laws relating to juveniles would have the effect of adding further weight to the matters referred to in this section. Consideration should also be given to making this section mandatory. That is, criminal proceedings must not be commenced against a child otherwise than

by way of court attendance notice, except in the circumstances listed in subsection 8(2).

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?

International standards should be reflected and upheld in the separate Bail Act dealing with children.

International standards should be recognized as a minimum level of protection and New South Wales should where appropriate go further than the international minimum standards.

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

The provisions of the Bail Act applicable to juveniles should be drafted to take into account a number of issues that tend to arise more often in the Children's Court than in the adult jurisdiction.

Bail conditions imposed on juveniles by the Police and the courts often reflect welfare considerations rather than the principle of ensuring the attendance of the young person at court. Curfews are overused by the Children's Court and by police. They are imposed on juveniles where there is no correlation between the person being out at night and their offending. They are often imposed by Police at the request of parents and used as a parenting technique rather than because it is appropriate to impose such a condition in accordance with section 36 of the Bail Act.

Juveniles tend to breach their bail more often than adults. One reason for this is that juveniles have less control over their own personal circumstances than adults. It is not unusual for a child to leave their home at night because it is not safe for them to remain there. It is not unusual for a child to fail to report to the police because their parents have run out of money and can't drive them to the station or can't provide them with the money for public transport.

Police therefore should be given greater discretion in the way they deal with children who breach their bail. Often it will not be appropriate to bring a child back to court to have their bail re-determined, particularly where there is a good reason for the breach. It may be appropriate to simply warn the child instead, or indeed to take no action at all.

There is a general concern that children's bail conditions are being over-policed. Over-policing of curfews is a regularly raised concern of the parents of Aboriginal children. Curfew checks are conducted very late at night and very early in the morning. It is a frightening experience for a family when the

police knock on the door in the middle of the night. It can also be a continued annoyance for family members and neighbours when police are conducting curfew checks as regularly as once or twice a night. This issue could be addressed by legislating for police to only have the power to conduct curfew checks where they have a reasonable suspicion that the young person is not at home. Alternatively or additionally, it might be appropriate to reflect the additional burden of the curfew by amending the Bail Act to say that a curfew should only be imposed as a last resort, and the court should consider the removal of such a condition where it can be shown that it is being over-policed.

Reporting conditions are imposed on juveniles even where there is no reason for concern about attendance at court or flight from the jurisdiction. Where a child breaches their bail (usually the curfew condition), the court often deals with the breach by re-granting bail on stricter conditions by imposing a reporting condition. Often it appears the court is simply punishing the young person for failing to comply with his or her previous bail conditions. Proper consideration is often not given to the appropriateness of the conditions in accordance with section 36 of the Bail Act. This has the effect of exposing the child to police on a regular basis and normalising for the child the experience of attending a police station, This in turn may lead to the child being stopped by police in the community more often than would otherwise be the case, and potentially leads to poor relationships between the child and the local police force.

Conditions relating to behaviour, such as to attend school, or to obey directions of parents or carers, are often imposed as a way of controlling a young person's behaviour whilst on bail, even where this is not justified on the basis of the bail criteria. This in turn can lead to the child being unnecessarily remanded in custody because they refuse to attend school or obey their parents or carers. This can place parents, carers and educators in a position of conflict between their duties to the child and their duties to the court. This in turn has the potential to undermine their relationship with the child. Such relationships may be particularly important for the child's rehabilitation. The ALS accepts these are complex issues that arise in an essentially discretionary context. The ALS raises them for the consideration of the Law Reform Commission as they may inform the development of tailored proposals to address these problems.

Many juvenile ALS juvenile clients are under the care of the Minister for Community Services and are sometimes remanded in custody because DOCS have not been able to find them a placement. The Act should specify that no such child is remanded in custody for welfare reasons. There is a provision to this effect in the Victorian legislation.

The Act could state to the effect:

> *"..A Court who 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 D.O.C.S. and to require D.O.C.S. to find immediate accommodation for that juvenile. D.O.C.S. should also assist the young person in complying with any other bail conditions".

If there is some compelling reason why a juvenile should be remanded in custody whilst a placement is found, the matter should be reviewed under section 54A on a daily basis to avoid detention centres becoming refuges for homeless youth. In these cases, Community Services should provide evidence in affidavit form about what has occurred to obtain a placement for the young person, and a worker from Community Service should be made available to the court and the young person's representative for cross examination on the evidence of their efforts.

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

Yes.

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

Yes. The substantial over representation of indigenous young people in custody is an issue that requires a committed and long term approach by government. In the most recent Australian Institute of Criminology figures released in May 2011, 54 percent of juveniles in detention identified as Indigenous[6]. This alarming statistic illustrates the extreme nature of the problem.

The recent report "*Doing Time – Time for Doing*" prepared by the Commonwealth House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs released on 20 June 2011 examines the experience of Aboriginal youth with the criminal justice system. Paragraphs 7.99 to 7.132 examine some of the issues faced by Aboriginal juveniles in the context of applying for bail. The Bail Act should consider including provisions that address these issues with an overall goal of reducing the over-representation of Aboriginal juveniles on remand.

The ALS would welcome the opportunity to comment on any draft legislative proposals specifically designed to achieve this aim.

The ALS suggests that many of the general reforms suggested in this paper will have an immediate beneficial effect on the numbers of young aboriginal people on remand. While tailored proposals are reforms are also needed it is these general reforms to the Bail Act that will perhaps have the greatest effect.

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

[6] See: http://www.aic.gov.au/publications/current%20series/facts/1-20/2010/6_corrections.aspx

The Bail Act should expressly recognise, and Magistrates/Justices should have to take into account when determining bail, that custody for children removes them from family and support, encourages feelings of a 'rite of passage' and facilitates differential association and exposes them to negative influences.

Aboriginal Juveniles who are detained away from cultural centres experience isolation from community and are often, due to distance and financial difficulties, very restricted in their ability to have visitation contact with family. The Bail Act should contain provision whereby Detention Centres are required, or the courts have power to order, that juvenile remand detainees be located as close as possible to cultural areas and family/kinship ties.

Question 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?

The wording of the relevant provisions should be amended to include all individuals who suffer from a mental illness or cognitive impairment of any type.

Section 37(2A) currently applies only to people suffering from an intellectual disability, defined in s 37(5). This term does not appear anywhere in the mental health legislation. It is suggested that the definition is unduly restrictive and should be amended to include persons who suffer from any condition that substantially impedes their cognitive functioning. This would remove uncertainty in the application of the provision. For example, it would ensure that the definition could not be read down to apply only to persons who suffer from a genetic or congenital disorder, thereby excluding individuals whose cognitive functioning may be impaired as a result of an acquired brain injury, the effects of medication or neurodegenerative diseases.

Further, the provision should be amended to include persons suffering from a mental illness where that illness substantially affects their capacity to understand the conditions of their bail.

Both of these amendments are necessary to ensure that the provisions satisfies the object of ensuring that people subject to bail conditions are capable of understanding their obligations under bail, notwithstanding any cognitive impairment or mental illness they may suffer. Given this object, there is no rational basis for restricting the category of people to which it applies in the current form.

Section 32(1)(b)(v) should be similarly amended to apply to all persons who suffer a mental illness or who have any other condition that that substantially impedes their cognitive functioning. For the same reasons discussed above, there is no rational basis for restricting the category of people to which section 32(1)(b)(v) applies to those currently described in s 37(5).

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

People suffering mental health or cognitive impairments face significant difficulties in obtaining bail. Many of the reasons for this are beyond the scope of this review, such as the lack of adequate mental health facilities and support services in regional areas. These problems can only be addressed by increased government funding allocation. However, it is appropriate for the Act to be amended in other respects to ensure that mental health and cognitive impairment is properly considered in determining bail.

There is authority for the proposition that a sentence of imprisonment may weigh more heavily on persons who suffer from mental illness.[7] The ALS suggests this principle should be recognised in the Bail Act and decision makers required to consider the effects of custody on the mentally unwell.

Decision makers should also be required to make the relevant notations upon prison warrants so as to trigger access to prison welfare and medical assistance during the period of remand.

The Act should provide further guidance on how courts are to apply the concept of "special needs" in s 32(1)(b)(v). People with mental health of cognitive impairments are acutely vulnerable to psychological and psychiatric harm in custody and in some cases the consequence of having bail refused may be that a person's mental health condition is significantly exacerbated.[8]

The ability of a person with a mental health or cognitive impairment to properly prepare their case may be hindered by the refusal of bail in ways that would not apply to other accused persons. For example, the ability to engage with support services which may assist with a person's post-release rehabilitation will be diminished, as will the ability of the person to properly communicate with their legal representatives.

The meaning of "special needs" should therefore be defined in its application to people with mental health or cognitive impairments to include the specific areas of disadvantage that may result in the refusal of bail, including the need to properly engage with appropriate support services and to properly prepare their case.

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[7] *Regina v Hemsley* [2004] CCA 228.

[8] D Howard, B Westmore, *Crime and Mental Health law in New South Wales* (LexisNexis Butterworths, 2nd ed, 2010) 569.

The ALS suggests that it should be mandatory that reasons for refusal of bail of mentally ill or cognitively impaired persons address the issue of the particular impairment and that reasons should be given as to why bail is refused notwithstanding the issue.

Section 37 of the Act should be amended to impose a positive duty on a court that is imposing bail conditions on a person who suffers from a mental health or cognitive impairment to ensure the person understands the conditions and is able to comply with conditions, before imposing those conditions. This would provide an additional safeguard against conditions being imposed which "set a person up to fail" by imposing conditions which they either do not understand or are unable to comply with.

The bearing of relevant developmental delay or mental illness and other impairments on previous breaches or failures to appear should be taken into account by the decision maker.

Letters and/or evidence from support workers and carers of persons with difficulties noted above should also be taken into account on bail applications.

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

The provision of hostel and other community based specialist accommodation suitable for the mentally and cognitively impaired is economically challenging but essential. The Bail Act should contain provisions enabling Magistrates to consider alternative bail options for this group of individuals

Problems often arise where a person with a mental health or cognitive impairment is granted bail and released from a correctional centre or police station in the absence of adequate support arrangements that will allow that person to return to their place of residence or to a residential facility to which they have been bailed. The Act should impose a duty on the General Manager of a correctional centre or on a police officer with responsibilities over people in police custody to ensure that a person with a mental health or cognitive impairment who is granted bail is provided adequate means of returning to their place of residence, including a duty to ensure that adequate means of transport and funds are available to that person.

Question 14 - Indigenous people

14.1 Should the provisions of the Bail Act in relation to indigenous persons be amended or supplemented?

Having regard to Recommendation 168 of the Royal Commission into Aboriginal Deaths in Custody, the ALS considers that the Bail Act should

specifically take account of the hardship resulting from indigenous inmates and young people being detained a long way from their families and support networks.

The Recommendation provides:

> *"..That Corrective Services [and Juvenile Justice] effect the placement and transfer of Aboriginal prisoners according to the principle that, where possible, an Aboriginal prisoner should be placed in an institution as close as possible to the place of residence of his or her family. Where an Aboriginal prisoner is subject to a transfer to an institution further away from his or her family the prisoner should be given the right to appeal that decision".*

A significant proportion of the state's indigenous population live in remote and regional areas. In circumstances where the most western detention centre for young people is in Wagga Wagga and four of the eight detention centres are located in the Sydney metropolitan area, the ALS suggests that the Law Reform Commission consider this issue particularly in relation to young indigenous people.

This specific consideration could to be incorporated into either s32(b)(i) or s32(b)(v).

Statistics continue to demonstrate that Aboriginal people are significantly overrepresented in the NSW prison remand population. These statistics reflect the numerous impediments faced by Aboriginal people seeking bail that do not affect other accused persons. The Act should be amended in several respects to ensure that the impediments to bail faced by Aboriginal people do not give rise to unfairness and promote the continuing cycle of social disadvantage and imprisonment.

Aboriginal people are often subject to inappropriate bail conditions which they are either unable to meet, or which create inappropriately onerous restrictions on their behaviour. For example as discussed above it is common for Aboriginal youths to be subject to strict curfews, place restriction orders and non-association orders. Sometimes these conditions will prevent an Aboriginal person from engaging with their community or fulfilling cultural obligations or familial duties. These conditions reflect a lack of understanding by the court of Aboriginal communities and extended kinship groups, particularly those in remote areas which are unlikely to be familiar to the bench. When these conditions are breached, even in the absence of any further offences, the consequences will often include the revocation of bail and the loss of any presumption that may exist in favour of bail. It is therefore proposed that a provision be inserted into s 37 of the Act that requires that a court, before imposing a condition of bail in respect of a person who is an Aboriginal person or Torres Strait Islander, consider how it would impact on that person's proper and lawful participation in any cultural family or community obligations, having regard to the location and make-up of the relevant community.

A further defect in the Act as it applies to Aboriginal people is the failure to provide any guidance to the courts on what is meant by the phrase “special needs” in s 32(1)(b)(v). The problem is similar to that discussed above regarding people with mental health or cognitive impairments. In particular, the Act should be amended to make clear that the phrase “special needs” as it applies to Aboriginal people or Torres Strait Islanders includes any family or cultural obligations that the person may be subject to, the difficulties that the person may face in communicating relevant cultural information to the court and the difficulties that the person may face in preparing their case while on remand due to linguistic, cultural and communication barriers between that may exist between that person and their legal representative.

The provisions should be strengthened by including express recognition of the over representation of indigenous persons in custody and requiring Magistrates and Justices to give reasons for refusing bail that expressly addresses each of the existing provisions.

It is well recognised that Aboriginal people tend to have greater levels of poor education, unemployment, inadequate housing and entrenched poverty than non-Aboriginal people. This needs to better reflected in the Bail Act to encourage courts to come up with increasingly innovative ways to allow Aboriginal people bail.

Often Aboriginal people will not be in a position to offer any surety as security for their future attendance at court. Any available sureties may face challenges obtaining the relevant documents to prove they have money available to forfeit, such as illiteracy, access to financial institutions or lack of financial sophistication. Some Aboriginal people may have difficulties finding an acceptable person to sign their bail because of the greater rates of contact Aboriginal people experience with the criminal justice system. Aboriginal people will sometimes live between two or three different residences, and offering to live in a single place whilst their matter is finalised at court may be difficult for their family to accommodate. Aboriginal people often live a distance from their local police station and don’t have regular access to private transport so reporting to police is a greater burden and greater cost.

The Bail Act should include a provision to the effect that an Aboriginal person should not be prejudiced on the question of bail simply because of their socio-economic disadvantage.

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?

Such provisions must be carefully drafted. Aboriginal people could be disadvantaged if courts are mandated to take into account a range of information on their bail applications that is not put into evidence on applications by non aboriginal people. Such reports and information can of course be prejudicial and adverse to the granting of bail.

The ALS suggests such a provision be framed in mandatory terms only if the report is tendered by the applicant for bail.

Any such provision should be carefully drafted so as to not act as an unintended impediment to a bail application being heard quickly and should not be able to be used in circumstances where the applicant has a legitimate objection to the report.

The ALS suggests that this issue could also be facilitated by requiring Magistrates, Registrars and other Judicial Officers working in communities with a significant indigenous population to participate in regular inter-agency meetings so that they are aware of the programs and services provided in each community.

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

Aboriginal people who are granted bail, either from police custody or the custody of corrective services, will often find themselves in a location some distance from their place of residence. On occasions, these people are released without adequate means to return home or without a proper understanding of the travel arrangements put in place. The Act should impose a duty on the General Manager of a correctional centre or on a police officer with responsibility over people in custody to ensure that an Aboriginal person who is granted bail is provided with adequate means of returning to their place of residence or to any residential facility to which they may have been bailed, including a duty to ensure that adequate means of transport and funds are available to that person.

It is not uncommon for police to transport accused persons hundreds of kilometres from the place of arrest in a remote location to the nearest Magistrate or Registrar for a bail application, only for the person to be bailed back to their own community. The burden is then on the accused person to find their way back home often in circumstances of limited public transport and limited access to money, particularly on weekends. The ALS has concerns about the over-use of audio-visual link facilities; however, this is an area in which the Bail Act could avoid unnecessary transport of persons in police custody from remote locations.

Juvenile Justice should provide assessments and reports on bail. Those reports should be taken into account and, if bail is refused, the Magistrate/Justice should be required to give reasons why recommendations in favour of bail contained in the report were not followed and why they were not followed.

The expression of this reasoning, (preferably written), should then allow those reasons for refusal to be addressed by the client or Juvenile Justice prior to making a further bail application.

Question 15

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.

The continuation of bail after each time in court when a person's matter is adjourned places an administrative burden on the court's time and staff. However, it also serves to remind accused persons of their bail obligations, and provides them with documentary proof of their attendance at court on a particular day.

The Act should deem bail to have continued in the absence of further orders but still require it to have been explicitly continued.

Question 16 – Review of the Bail Act

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 of the Act generally provides an important means by which a person subject to conditional bail may periodically seek to have the conditions of their bail varied where appropriate. Such will often be the case where proceedings are delayed and it is appropriate to reduce the strictness of, for example, reporting conditions, or where existing conditions are restricting a person's access to employment or education opportunities. Section 44 protects an important legal right which, subject to what is said below, should be retained.

One difficulty that arises in respect of section 44 is that, when an accused person seeks a review of their bail conditions, a power exists under s 48(5) for bail to be revoked altogether and for the person to be committed to prison. In some courts, it is the practice of prosecutors to seek this course of action, even where there has been no material change of circumstances justifying such a revocation. On other occasions, accused persons have been reminded in open court by a Magistrate of the Local Court that their application for review of bail conditions will have the consequence of "opening the door" to a full review of bail, which may result in its revocation. In such cases, the individuals concerned have understandably sought to withdraw their applications. Such a situation is an untenable infringement on an accused person's right to have the conditions of their bail reviewed on regular intervals.

Where a condition is no longer necessary, an accused person should be free to seek a variation to their bail without exposing themselves to the revocation of their liberty. Therefore, it is proposed that a provision should be inserted into s 48 of the Act to provide that, on the hearing of application to review bail, bail may only be revoked where there has been a relevant change in circumstances that justifies the revocation.

Furthermore, the experience of ALS solicitors is that the section is generally is working inconsistently in practice. Some Magistrates are willing to review conditions while others routinely refuse to hear the applications, seeing them as a method of circumventing s 22A on the basis that they do not know what was put on bail before the original Magistrate.

There is also a practise among some Magistrates of marking court papers to the effect that "no other Magistrate" should be able to review the bail that has been granted. This practise seems to be unsupported by the legislation and amount to an unlawful fetter on the power granted by section 44. It is suggested that this practise may need to be proscribed by legislation.

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?

Section 45 of the Act reflects the state of the common law. The Supreme Court has an inherent power to grant bail, or to review the conditions of bail.[9] Section 45 is a useful codification of the common law principles in this area and should be retained.

However, it is suggested that the power in 45 expressly provide that the review is limited to bail conditions including surety and not the power to revoke bail. This could be similar to section 48A but obviously without the need for a person to be in custody unable to meet a condition. However, it is also suggested that section 44 be amended to allow Local/District courts to review Supreme Court bail conditions without the need for the person to be "appearing before the court or Magistrate in proceedings for an offence". This provision would reduce the requirement for Supreme Court review. The retention of the limited section 45 review suggested above would provide an unsuccessful applicant in the local or children's court to have the Supreme Court consider the application. The applicant should at no time be in peril of having Bail revoked under these provisions.

[9] *Harrod, In the Application of* [1978] 1 NSWLR 331.

Question 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.**

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

The ALS supports the restructuring of the Bail Act to increase the accessibility and comprehensibility of the Bail Act. As noted in the 2010 discussion paper the Act has been amended multiple times since 1978 and is in parts confusing and somewhat inaccessible.

This could be achieve through structuring the Bail Act in a "logical pathway" style where the structure of the Act reflects roughly the way in which a bail matter might be dealt with.

If the revamped act is to retain presumptions in favour, presumptions against and neutral presumptions then the structure of the Act should reflect that clearly and it should be accessible in the body of the Act which offences fall within the different categories. As discussed above the current Act contains neutral presumptions but that is not clear on the face of the Act.

The special provisions applicable to Aboriginal people should be contained within a separate part of the Act appropriately titled so as to ensure their visibility and prominence in a similar way to the structure of the *Law Enforcement (Powers and Responsibilities) Act* 2002.

Question 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?

The Bail Act is one of the most significant and commonly utilised pieces of criminal legislation in New South Wales. It is employed by courts at all levels throughout the State on a daily basis. It is vital that a piece of legislation of this significance should be clear in its intention, accessible in its drafting and straight forward in its application. For this reason, it is proposed that the entire Act should be reviewed with the intention of recasting its terms in plain English and restructuring the Act in a logical and coherent format.

The objects and Principles contained in the Act as guidance for interpretation of sections should be clear and easily understood by judicial officers, legal representatives and, most importantly, accused persons.

The current structure of the Act is excessively complex, being the result of numerous ad hoc amendments and alterations introduced without due regard for the impact on the overall structure and operation of the Act. The result is manifest difficulty in understanding and applying the Act, both on the part of legal practitioners and judicial officers. This situation risks that the purposes of the Act may be overridden by particular practices of individual courts, or that specific provisions of the Act may be ignored altogether in practice. These dangers will, in most cases, serve to disadvantage accused persons by making it more difficult to obtain bail. This is particularly so in respect of the somewhat complex exercise that must be undertaken to identify what presumption exists in respect of bail. As discussed above in practice, the detailed presumptions are often ignored, sometimes resulting in accused persons bearing the onus of persuading a court that bail should be granted.

18.2 Is any existing model recommended?

Without endorsing any particular interstate model the Victorian *Bail Act* 1977 is commendable in its brevity and the logical clarity of its structure. The Victorian Act is clearly divided into five parts, dealing respectively with the question of when bail should and should not be granted, further applications and applications for review, appeals by the DPP, and statutory miscellanea. This stands in stark contrast to the current format of the NSW Act, the structure of which is both clumsy and cumbersome. The Victorian provisions regarding the presumptions, whilst not endorsed, are significantly clearer than the NSW provisions and consequently provide for more accurate and accessible application.

Similarly, the South Australian *Bail Act* 1985 ably addresses all necessary aspects of bail law without becoming excessively complex or opaque. This enables courts to deal with bail applications with more consistency and more fairness than is currently the situation in NSW. The SA provisions dealing with the presumptions (subject to what is said above at par 3.5) are clear and straight forward, and are unlikely to cause undue confusion or unnecessarily waste court time and resources in their application.

Any redrafting of the New South Wales Act could be informed by the logical structure and clarity which the South Australian and Victorian Acts embody.

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"?

The ALS can understand the reasoning behind the suggestions and agrees that there is some merit in the terminology used speaking clearly of the 'pre-trial' nature of the custody. However on balance we consider that "bail" and "remand in custody" are widely known and well understood terms and should be retained.

It is noted that simplification does not always require reconstruction or reinterpretation of all understood terms. The Family Law Act is an example of how the desire to 'simplify' language has resulted in convoluted and tortuous terms where the widely understood term of 'custody' became 'parent who the child lives with" and "access" became "person who the child spends time with".

The words "bail" and "remand" are familiar words commonly understand amongst people versed in the law as well as those who are not. They are words with historical meaning in the English language, and that meaning remains accurate and relevant in their modern application.

The terms "pre-trial release" and "pre-trial detention" arguably have a bureaucratic tone which is likely to inhibit, rather than promote, the public's understanding of the Act. This is of particular concern for practitioners who deal with any class of clients who may suffer from communication or comprehension difficulties, as significant time will inevitably be spent explaining that the new nomenclature is in no way different to the previous, familiar wording of the Act.

On balance, the terms "grant of bail" and "remand in custody" should therefore be retained.

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

For the above reasons, the proposal to change the name of the Act to the "Pre-Trial Detention Act" is not supported.

Question 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.

19.2 Are any changes to bail law required to facilitate administrative or support arrangements generally?

All forms used pursuant to the Act should be re-considered closely with a view to ensuring they are as comprehensible as possible, particularly in relation to conditions.

Question 20 - Other submissions

20.1 Please make any other submissions that are considered to be relevant to the Commission's review.

Disclosure

An issue that needs to be considered closely in the context of bail is disclosure by the prosecution. Currently in New South Wales applications for bail are generally dealt with on the basis of the tender of a facts sheet and a criminal history. A person can be remanded continuously with no further disclosure for a significant period with often only a plea of not guilty triggering a disclosure process.

There is considerable international human rights jurisprudence on what degree of disclosure must occur in order for a bail application to be considered compliant with international standards[10]. Effectively a detained person must be given access to all information necessary to adequately challenge their detention. Current New South Wales disclosure provisions apply to strictly indictable matters and contested summary matters and fall far short of international standards. in *R v Lee* [1999] 2 All E.R., the English Court of Appeal Court ruled the Crown must disclose any information or material relevant to a bail application or of assistance to the applicant.

The procedure adopted in bail applications in New South Wales also

[10] *Garcia Alva v Germany* (2003) 37 E.H.R.R. 335

aggravates this problem. Police officers with intimate knowledge of a case are rarely made available for cross-examination unlike in some other jurisdictions.

The ALS suggests the Bail Act should provide for a procedure that satisfies basic fairness and a disclosure obligation that ensures the prosecution make timely and appropriate disclosure of all material relevant to the application and which could be of assistance to the defence, this would include material that shows a weakening of the Crown case.

Statute of Limitations for Failure to Appear

The offence of failing to appear pursuant to a bail undertaking should have a three month statute of limitation to ensure that people are not prosecuted for the offence long after they have failed to appear. The act of appearing, or not appearing, before a court is a routine event in the lives of many people. It will generally be all but impossible for such persons to recall the events that occurred around their court date many months after the event.