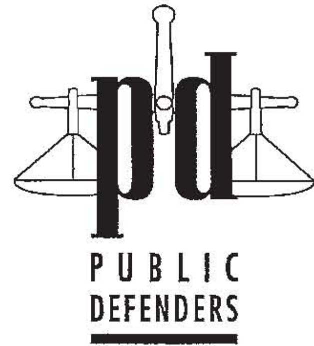

23 July 2011

Paul McKnight,
The Executive Director,
NSW Law Reform Commission,
DX 1227,
SYDNEY NSW 2000

By email

Dear Mr McKnight,

Re: Review of the Bail Act

Thank you for your invitation to submit a response to the LRC Bail discussion paper. I respond to the questions posed as follows:

1. Over-arching considerations

1.1 Where the accused/defendant has not entered a plea of guilty, there is one fundamental principle: the presumption of innocence and concomitant right to liberty. There are secondary principles, namely, whether there is a significant risk of the defendant not attending court, and the protection of the community, including any alleged victim.

1.2 Yes. The stated objectives should refer to the need to minimally disrupt the defendant's life, subject to the two secondary principles referred to above.

2. Right to release for certain offences

2.1 Yes.
2.2 the classes of offences (subsection 1), and circumstances of the offender in which there is a right to bail pursuant to section 8 should not be reduced. If it is possible to re-order the section to give at least the same effect, in a less complex fashion, that would be desirable.
2.3 They should only be expanded upon, not reduced.

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

3.1 It is very difficult for an accused to obtain bail where there is a presumption against bail. There is authority that the circumstances must be "somewhat special",[1] but in practice, it might be reasonably thought that they must be quite exceptional and rare.

3.2 A presumption in favour of bail should ordinarily be the case. In my view there should not be a presumption against bail for any offences. The offences that are identified in section 8A are, by definition, serious offences attracting lengthy maximum gaol penalties. Many typically involve access by such offenders to significant material means of avoiding apprehension and departing the jurisdiction, and so on. These are all matters that mitigate against a grant of bail whether there is a statutory presumption against bail or not, and which a judicial officer would be expected to give considerable weight.

The section was introduced in response to a perceived laxity of judicial officers to the granting of bail to serious offenders. A better approach is to consider appeal provisions where the DPP wishes to appeal a grant of bail by a lower court, and to accordingly permit appellate courts to develop a more flexible regime of the circumstances in which bail should be refused, rather than a starting point-presumption against bail for certain offences, regardless of the idiosyncratic circumstances, filtered through a test of it being "somewhat special".

3.3 See 3.2 above.

3.4 See 3.2 above.

3.5 I am unaware of what legislative frameworks apply elsewhere, but think that such an examination would be an interesting exercise, particularly in relation to Victoria.

3.6 -3.12 See 3.2 above.

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[1] *"Common to all bail applications are the circumstances that the applicant's continued incarceration will cause a serious deprivation of his general right to be at liberty, together with hardship and distress to himself and to his family, and usually with severe effects upon the applicant's business or employment, his finances and his abilities to prepare his defence and to support his family. Also common to most bail applications by persons charged with the offences to which s8A applies is the availability of sureties prepared to forfeit (with or without security) large sums of money to ensure that the applicant will answer his bail; an application would otherwise be unlikely to be considered in relation to such serious matters.*
The Legislature has, notwithstanding all of those particular circumstances, enacted the presumption against bail in these cases, so that such circumstances will not ordinarily be sufficient to overcome the barrier to bail which s8A has erected. As Badgery-Parker J said: if the Crown case is a strong one, the applications for bail in which they will be sufficient to do so must necessarily be somewhat special, and the task of the applicant to overcome the presumption that bail is to be refused will ordinarily be a difficult one." (my underlining)
per *Hunt CJ at CL referring to section 8A of the Bail Act in Kissner (NSWSC 17.1.92 unreported) at page 6, approved by the Court of Appeal in DPP (Cth) v Spadina 6.2.09 at para 5.*

4. Dispensing with bail

4.1 Yes.

4.2 (a) yes (b) yes (c) no.

4.3 yes, with a mechanism for bail conditions to be revoked when such information is provided.

5. Police Bail

5.1-5.2 The Public Defenders are not normally involved in the consideration of bail by police, and therefore I offer no opinion on these questions.

6. Court Bail

6.1 Yes.

6.2 No opinion is expressed, since we so rarely are involved in these procedures.

6.3 Yes.

6.4 None, other than an obligation on the part of the prosecutor (police or DPP) to draw to the attention of the magistrate that a reconsideration is required.

7. Repeat Bail Applications

7.1 Section 22A caused considerable confusion with the use of the expression 'a Court'. Some practitioners and judges took view that once bail had been refused in any court (including the Local Court), a further application could not be made in another court (such as the District Court or the Supreme Court) unless the criteria in s. 22A were met.

Although there is a view that the current form of the Act has cleared up this confusion, and that the section does not need further amendment in this regard, in my view there is still some ambiguity in the provision and the section should be further amended to make abundantly clear that s. 22A applies only to second and further applications for bail in the same jurisdiction, not different jurisdictions.

7.2 I am content for section 22A to apply to juveniles, provided that liberal interpretations are applied to "information" and "circumstances" [22A(1A)(b) and (c)]. For example, with a juvenile offender, on a subsequent bail application it may be that an adult family member who was unavailable previously (for example, an uncle or aunt) can give some evidence relevant to future attendance or a curfew condition. There must be sufficient flexibility for such additional material to be presented and considered.

7.3 The matters stipulated in 22A(1A), together with 22A(2), should be sufficient to ensure this.

8. Criteria to be considered in bail applications

8.1 My preference is that a simple objects clause supplant a criteria clause.

8.2 I am unaware of any, but think that an examination of interstate and New Zealand legislation would be beneficial.

8.3 I think that such a provision could be helpful, and could be equally incorporated into an objects clause, rather than a criteria clause.

8.4 If parts of s. 32 are retained, they could benefit from redrafting, and it clearly suffers from having been subjected to piecemeal amendment over the years. For example s. 32 (a) commences this way:

> *(a) the probability of whether or not the person will appear in court in respect of the offence for which bail is being considered, having regard only to:*
>
> > *(i) the person's background and community ties, as indicated (in the case of a person other than an Aboriginal person or a Torres Strait Islander) by the history and details of the person's residence, employment and family situations and the person's prior criminal record (if known), and*
> >
> > *(ia) the person's background and community ties, as indicated (in the case of an Aboriginal person or a Torres Strait Islander) by the person's ties to extended family and kinship and other traditional ties to place and the person's prior criminal record (if known)*

This provision could be redrafted in the following terms:

> *(a) the probability of whether or not the person will appear in court in respect of the offence for which bail is being considered, having regard only to:*
>
> > *(i) the person's background and community ties as indicated by their residence, employment and family situations, the person's prior criminal record (if known), and additionally (in the case of an Aboriginal person or a Torres Strait Islander) by their extended family, kinship and other traditional ties to place.*

Similarly, s. 32 (b1) requires the decision maker to take into account the protection of alleged victims and their families, while s. 32 (c) requires the decision maker to take into the account the protection and welfare of the community as a whole. These considerations could be merged into one provision.

8.5 No.

8.6 Yes. There should be a provision that the criteria is subject to the objects of the Act; that it must be interpreted in a manner that is consistent with the objects clause. A difficulty of course is that some of the objects would tend towards contradictory outcomes, since they are in effect competing principles, such as a presumption of innocence, which bespeaks a right to liberty, versus the protection of the community.

Nevertheless it should be possible to develop a provision that requires any criteria clause to be subject to a proper consideration of overriding objects, as articulated in the legislation.

8.7 No; too complicated.

8.10 Yes, because it is appropriate for the State to assume some responsibility for a person before the court in a state of incapacity. However, detention by means of a refusal of bail is inappropriate. It is a misuse of the purpose of bail, and an overstatement of the factor of the interests of the person. It is more appropriate to develop a separate legislative basis of imposing either conditions of release or temporary detention, die to temporary incapacity. Such a category could be included in the Bail Act as a matter of convenience.

8.11 If it is to be retained, no.

9. Bail conditions

9.1 Not sure what this means. Essentially police power need not be extensive as court-imposed conditions.

9.2-9.4 The difficulty is that, whereas the ostensible purpose of bail conditions should be to tend towards the overriding objects mentioned above at 1.1, as a matter of common sense there are sometimes defendants (eg drug users) who clearly have an immediate issue that could be sensibly assisted by appropriately fashioned bail conditions, even though they are more rehabilitative and long-term than the interests of bail strictly require.

Even so, it is important that the Court retains the power to impose such conditions.

9.5 It is unclear to me what is meant by "the promotion of effective law enforcement".

9.6 See 9.2-9.4 above.

9.7 No. Rather, a statement of principles such as that the conditions imposed be "reasonable".

9.8 I would not object to such a set.

9.9 Yes.

9.10 Yes; see 9.7 above.

9.11 No.

9.12 No special mechanism.

9.13 – 9.15 I have no particular view on this issue. The observations in the "Background Note" to this section explain the difference, and the current basis. I am unclear as to whether there is any need to change it, other than the conceptual oddity.

9.16 – 9.18 I have no particular views on these issues.

10. Breach of undertakings and conditions

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

The work of the Public Defenders has minimal involvement with failures to comply, and therefore I do not offer any opinions or views on the questions under these two headings.

12. Young People

12.1 – 12.2 There should be separate legislative considerations for young people. As to whether these should be in a separate Act or a separate part of the Bail act, encouragement of a quite different judicial and police approach would be emphasised by the existence of a separate Act. However, ultimately it would be merely symbolic, and would entail practical difficulties for legal practitioners, such as the need to have access to separate acts when appearing on a list day.

12.3 Some parts have little or no application to a determination of bail; eg, 6(e). Therefore I think not. However, it would be an ideal starting point for the development of principles ("object") to apply to a separate Bail Act, or part of the Bail Act, to apply to young people.

12.4 A revised section in line with my suggestion at 12.3, yes.

12.5 No. I think that this is a guideline for legislators in fashioning relevant principles, rather than being of any practical assistance to police or judicial officers considering a grant of bail for a young person.

12.6 – 12.9 I would like more time to consider these issues, which are perhaps some if the most significant issues in a Bail review, having regard to rates of refusal of bail for juveniles, particularly indigenous juveniles.

13. People with a cognitive or mental health impairment

13.1 Yes. For example, persons (particularly juveniles) on the autism spectrum.

13.2 a range of measures, including that they be kept under close observation and separate from other detainees, given their vulnerability to exploitation.

13.3 A continuing problem in this area is an absence of awareness by the relevant police officer who considers bail that an offender has an intellectual or other mental disability. However, this is a policy rather than a legislative issue.

14. Indigenous people

14.1 – 14.3 Given the high rates of incarceration (and presumably refusal of bail) of indigenous defendants, it may be that further conditional release options need to be developed. While this is a policy rather than legislative issue, it may be that they could be developed in tandem. Clearly this would not be a short-term goal.

15. Duration of bail

15.1 On balance, I think not. A beneficial aspect is a minimal imposition on court time, but detrimental aspects to the proposal is that conditions, particularly onerous conditions, may last longer than is really required if there is a presumption that they last until proceedings are finalised.

16. Review of bail decisions

16.1 see my comments above generally, in relation to bail reviews.

16.2 I am not aware of any disadvantage in the present system that would warrant a change.

17. Structure of the Bail Act

17.1 Yes, this would be a logical way of re-shaping the Bail Act.

17.2 I am unaware of any existing model.

18. Plain English

18.1 – 18.3 Yes to all of these questions.

18.4 No. That title has no advantage over the "Bail" Act.

19. Forms and processes

No comment.

Thank you again for this opportunity. I apologise for the brevity of some of the comments. I would be happy to assist further if I can be of assistance.

Yours faithfully,

Mark Ierace SC
Senior Public Defender