



Children's Court of New South Wales

1 August 2011

Mr Paul McKnight,
Executive Director
NSW Law Reform Commission
GPO Box 5199 SYDNEY NSW 2001

Dear Mr McKnight

RE: Review of the Bail Act 1978 (NSW)

Thank you for the opportunity to make a submission to the Review of the *Bail Act 1978* (NSW) (the Bail Act) being conducted by the NSW Law Reform Commission. The Court notes that there were a number of very constructive proposals put forward during the Bail Exposure Bill Review Roundtable chaired by Justice Latham and I trust that those proposals will be considered in the Commission's final report.

The Children's Court agrees with the criticism of the Chief Magistrate in the Local Court submission to the Commission dated 1 July 2011 concerning the complexity of the Bail Act. In general terms the Children's Court supports the position of the Local Court but wishes to make further submissions with respect to children and young people concerning bail and simplifying the test that should be applied to a bail determination.

The submission below does not answer each specific question in the Question Paper but covers the broad range of concerns.

1 Objects and Principles of the Act

The Court strongly supports inclusion in the Bail Act of a clear statement of its objectives and principles. The primary consideration of the Bail Act should be to ensure that a person who is required to appear in Court is not deprived of their

liberty unless necessary, having regard to the interests of the person and the community. The Bail Act should also contain a clear re-statement of the principle that all persons charged with a criminal offence is presumed innocent until proven guilty.

Whilst the Children's Court agrees with the submission of the Local Court that there is no need for a separate Bail Act relating to children and young people, it is recommended that the Bail Act should expressly recognise and apply to children and young people in a manner that reflects their unique needs and interests as well as their vulnerability. The Bail Act should therefore reflect the relevant principles as contained in Section 6 of the *Children (Criminal Proceedings) Act 1987* including the following:

- it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption; and
- it is desirable, wherever possible, to allow a child to reside in his or her own home.

The objects and principles of the Bail Act should also reflect the United Nations Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), specifically the following principles:

- detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time, and
- whenever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or educational setting or home.

Regard should also be had to the relevant provisions of the United Nations Conventions of the Rights of the Child including Articles 3, 5; 9, 18, 37 (b) and 40.

It is also submitted that the Bail Act should also express in general terms additional principles to be applied in determining bail in relation to an Aboriginal and Torres Strait Islander person. This should include similar considerations as those found in the corresponding Victorian legislation including (but not limited to) the following:

- the person's cultural background;
- the person's ties to extended family or place; and
- any cultural issue or obligation.

2 Definitions

The Children's Court is of the view that the Bail Act does not adequately define the terms 'bail application', 'bail determination' and 'bail review' and that there has been some blurring of these terms over time, particularly since the introduction of s22A of the Bail Act. The Court recommends that there should be rationalisation and clarification of these terms to support consistent interpretation and practice.

The Court is also concerned that the definition of 'authorised justice' does not clearly distinguish between the role of a person who has authority to determine a bail application and the role of a person who has authority to enter a person into bail. At present this is a very complicated process, with multiple sections of the Bail Act and Regulations to consider in determining whether a person has authority with respect to bail and the extent of that authority. Definitions should be contained in the Act clearly distinguishing the differing roles.

3 Right to Release for Certain Offences

The Children's Court is of the view that a person should be entitled to be released without bail with respect to fine only offences or, in the alternative, that a child or young person is entitled to be released without bail with respect to a fine only offence.

The Court agrees with the submission of the Local Court that there should be an absolute right to bail with respect to strictly summary offences in which a penalty of imprisonment exists except in circumstances where a court has issued a warrant for the arrest of the person.

4 Eligibility for Bail and Presumptions

It is the experience of the Court that the presumptions are, in general, ad hoc and inconsistent. Many offences were added to the presumption tests as a response to a particular event or political climate. Further, this form of categorisation fails to take into consideration significant variations within offences as to the objective

seriousness of the particular offence. The current presumptions place a focus on the offence rather than the individual circumstances of the alleged offence and the individual.

As stated in the Local Court submission, to arm the police with the ability to restrict considerations of bail by charging for an offence within a particular category is to create an environment that may be subject to potential abuse as very often a more serious charge (attracting a presumption against bail) is later withdrawn by police to be replaced by a less serious charge which does not attract a presumption against bail.

Further, the Bail Act is unclear as to the interrelationship between the presumption tests and the 'exceptional circumstances' test. It is the view of the Children's Court that there should be a general presumption in favour of bail and that all other presumptions should be removed from the Bail Act. The Court recommends that all bail determinations should be made on the basis of the 'unacceptable risk' test as currently applies in the *Bail Act 1977* (Vic). Adopting such a test would simplify the Act and make bail decisions easier to understand.

5 Dispensing with Bail

It is the view of the Children's Court that the police and courts should retain a general power to dispense with the requirement for bail. There should also be additional cases where the Bail Act should require that bail be dispensed with, for example, any offence for which a youth justice conference is convened or proposed to be convened under the *Young Offenders Act 1997*.

6 Police Bail

The Court has concerns regarding draft clause 17 of the Bail Exposure Bill brought forward by the former Attorney General. That clause, as drafted, does not make it sufficiently clear whether police may grant bail to a person who has been arrested pursuant to a warrant under sections 54(3A) or 181(3A) of the *Criminal Procedure Act 1986*. The Children's Court supports the granting of authority to police to determine bail in such circumstances.

The Court also has concerns with respect to young persons gaining access to legal advice before bail is determined. It is noted that under the *Law Enforcement*

(Powers and Responsibilities) Act 2002 a child or young person is entitled to a support person and to communicate with a legal practitioner during the pre-charge detention investigative process and under s19 of the current Bail Act a person is entitled to communicate with a legal practitioner or other person following the determination as to bail. The Children's Court submits that a child or young person should also be entitled to a support person and to communicate with a legal practitioner following the decision to "charge" and before the determination with respect to bail is made and that a legal practitioner or support person is entitled to provide police with information relevant to the determination as to bail on behalf of the child or young person.

7 Court Bail

The Children's Court supports the position that a court should be required by the Bail Act at the first appearance of a person before the court to turn its mind to the question of whether bail conditions imposed by police are appropriate. It would be time consuming and impractical however if a Court was required to hear bail applications de novo at the first appearance. A statutory requirement in the Bail Act that the court must at the first appearance consider the appropriateness of bail conditions imposed by police would be sufficient.

8 Repeat Bail Applications

The Court adopts the submission of the Local Court with respect to section 22A and repeat bail applications. It is further recommended that the Bail Act should make it clear that s22A does not apply to the first bail application before the court made following a bail determination made by a registrar or other authorised justice.

9 Criteria to be used in Bail Applications

The Bail Act outlines in section 32 exhaustive criteria to be considered whether or not to grant bail but does not stipulate the weight to be given to the criteria or how these factors are to be interpreted. As stated earlier, the Children's Court recommends that an unacceptable risk of harm test be introduced into the Bail Act whereby specified criteria are considered in the context of an overarching test which balances the risk of harm to the defendant remaining in custody with the risk of harm to the community or an individual and/or the risk of harm that the person will not attend court on the next occasion.

The Children's Court supports the simplified list of considerations as proposed by the Local Court.

10 Bail Conditions

It is the experience of the Children's Court that children and young people are often granted police bail subject to conditions that are more onerous than necessary and do not relate to the nature of the offence. Such conditions include strict reporting requirements, curfew conditions, and non-association and place restriction conditions. It is well recognised that more onerous bail conditions are regularly imposed on juveniles than are imposed on adults. Reporting conditions require the young person to attend a police station and as a consequence, they will be likely to come into contact with both adult and juvenile offenders. There is a serious risk of contamination in these instances. There are also many cases that come before the Court where the individual has been granted bail subject to curfew conditions where there is no correlation between the condition and the offence. Reporting, curfew conditions and non-association and place restriction conditions are the most common conditions that are breached by young people.

It is recommended that there be specific training for authorised police officers as to appropriate bail conditions that should be imposed, particularly on juveniles. The Court strongly recommends that there be specified criteria in the Bail Act to be considered before imposing a reporting, curfew or non-association or place restriction condition. Whilst it could be said that such a requirement is covered by the current s37 (2)(a) of the Bail Act, a list of non-exhaustive considerations would assist police officers and courts in imposing bail conditions that are appropriate to the person and the charged offence.

11 Breach of Undertaking and Conditions

The Children's Court recommends that the Bail Act should be restructured to make it clear that police officers have multiple options available to them in response to a failure to comply with a bail condition. The Bail Act should clearly give police authority:

- to not take action;
- to give a caution;

- to grant fresh bail with the same or varying conditions (any such varied condition to not be more onerous than the original condition or conditions imposed); and
- to arrest and bring a person to court but only where the nature of the breach indicates that there is an unacceptable risk of harm to the community or an individual if the person was to be released having regard to the considerations that would ordinarily apply to a determination to grant bail.

The availability of these alternatives would be more in line with the objectives of the Bail Act and could provide for a mechanism for police to bring more ‘technical’ breaches to the attention of the court on the next adjourned date.

12 Remaining in Custody because of a non-compliance with a bail condition

With regard to children and young persons, notice of remaining in custody after grant of conditional bail should be given within two (2) working days of the conditions being imposed.

It is the understanding of the Court that Juvenile Detention Centres do not have an automatic re-submit system ensuring that those juveniles to whom a notice requirement relates have been identified and notice is given to the Court. As a result, young persons may spend more time in custody than is warranted.

13 People with Cognitive and Mental Health Impairment

The Children’s Court made responses with regard to this issue to the Law Reform Commission’s reference on “*Young People with Cognitive and Mental Health Impairments in the Criminal Justice System*” on 31 March 2011. Those submissions are adopted for the purposes of this submission.

The Children’s Court also adopts the submission made by the Chief Magistrate regarding the relationship between bail and mental health diversion.

14 Duration of Bail

The Court agrees with the proposal in the Question Paper that the Bail Act should explicitly state that bail should continue on the same conditions imposed (if any) until such time as the offences for which bail has been granted have been

finalised unless there has been any revocation or variation by an authorised person or the court.

15 Plain Language

It is recommended that the Bail Act should be recast in plain English to make it more understandable for authorised officers, the courts and the public.

The Court does not support a proposal that the Bail Act be re-named. The term 'bail' is well understood in the community and there is no need to change the name of the Act.

16 Forms and Processes

With respect to bail applications made under s22A, it is recommended that the forms include a section that would require inclusion of the grounds for the application (the new circumstances etc) and the type of bail being sought (for example, no conditions, alternate conditions etc). This would assist the court in determining what the issues are and would give notice to the prosecutor.

17 Children's Impact Statement

The Children's Court is concerned that many pieces of legislation, including the Bail Act, is intended to extend to children and young people but there is no consideration in the legislation as to the unique circumstances and needs of young people. It is therefore recommended that there be a requirement that the Attorney-General include a Children's Impact Statement with respect to any new criminal legislation which impacts on children and young people (including Bail legislation). This would require Parliament to consider the effects of proposed criminal legislation on children and young people and make sure any concerns are dealt with appropriately.

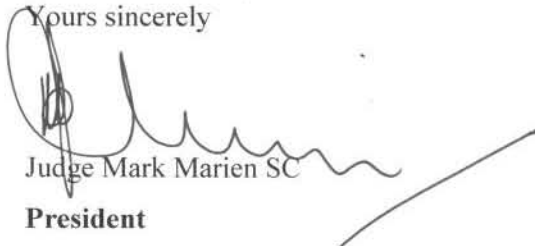
In conclusion, the Children's Court wishes to raise its concern that due to lack of sufficient resources (such as appropriate bail accommodation and support services for high needs children and young people who are at risk) the Court is often called upon to make bail determinations on welfare rather than strictly criminal justice concerns. The serious lack of appropriate bail accommodation and support services for high risk juveniles in NSW has been highlighted in a number of recent reports and inquiries: see for example, *The Report of the Special Commission of Inquiry into Child Protection*

Services in NSW, (November 2008) (the Wood Report) at [15.8] – [15.24] and *A Strategic Review of the NSW Juvenile Justice System – Report for the NSW Minister for Juvenile Justice* (April 2010) at [233] – [242].

The Strategic Review found that a recent review of the juvenile remand population in NSW found 90% of juveniles on remand were not able to meet bail conditions in the first instance and that 95% of these cases had court imposed ‘reside as directed’ bail conditions. The Strategic Review also noted that only 18.3% of juvenile remandees will go on to receive a custodial penalty at sentencing. The Review concluded that ‘*a substantial number of children and young people (in NSW) are spending time in juvenile justice centres unnecessarily*’.

The Children’s Court strongly urges government to urgently respond to the concerns raised by both the Wood Report and the Strategic Review Report by the urgent implementation of a collaborative approach between Juvenile Justice, Community Services and other relevant government agencies to provide an intensive bail support program in NSW for high needs children and young people who are at risk.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Mark Marien', with a long horizontal flourish extending to the right.

Judge Mark Marien SC

President