NSW Police Force response to the NSW Law Reform Commission paper
Bail – Questions for Discussion

Introduction

The questions set out in the New South Wales Law Reform Commission (NSWLRC) paper are organised in accordance with the structure and content of the current *Bail Act*. The NSW Police Force is of the view that this review presents an opportunity to consider a new paradigm for achieving the fundamental objectives of the bail legislation.

Due to the numerous amendments made to it over time, in its current form the *Bail Act* is not well written and is difficult to apply.

By revisiting the fundamental objectives of the bail legislation it may be possible to achieve the desired outcomes by reconsidering the prescriptive formula approach represented by presumptions and instead adopt an approach based on risk assessment and management. An outline of the application of a risk assessment and management approach to bail is considered at Appendix A.

Question 1 - Over-arching considerations

The Bail legislation should clearly state its underpinning principles.

The legislation should make explicit that bail involves a balancing of conflicting considerations. Not one of these fundamental but conflicting considerations should carry more weight than any other. The weight attributed to each fundamental principle or consideration should depend on the circumstances of and information produced during any individual bail application, particularly information concerning the strength of the prosecution case and likelihood of a custodial sentence.

The Object of the revised public consultation draft Bail Bill 2011 gives primacy to the right to be at liberty and creates a universal presumption in favour of bail. Whilst acknowledging that extraneous materials may be considered for the purposes of interpretation of an Act,[1] if this Object is enacted and there is ever any question on the interpretation of any other section in the Act, section 33 of the *Interpretation Act 1987* would require the section in question be construed so as to promote the Object of the Act. This could have significant ramifications for any subsequent Act that includes sections that provide for a neutral presumption. However, it is noted that this issue may be sought to be dealt with at Q3.9.

Whilst acknowledging that the interests of the accused are also collectively the interests of the community, the conflicting considerations, or conflicting fundamental principles, can be viewed as those for the accused person and those for the community:

[1] Lucy J, 'Statutory Interpretation – extrinsic materials and context', Crown Solicitors Office Client Seminar 19 November 2008.

Accused	Community
Right to be at liberty	Provision of an effective and efficient Judicial System (Risk of Absconding/Risk of prejudicing the administration of justice)
Presumption of Innocence	Preservation of the course or administration of justice (Risk of interference with witnesses/ Risk of prejudicing the administration of justice/Risk of Absconding)
	Protection of the Community (Risk of interference with witnesses including victims/Risk of committing further offences whilst on bail)
	Promotion of effective law enforcement
	Consistency in approach to bail.

Numerous statutes recognise that the right to liberty is overborne by competing public policy considerations. If bail law is enacted which requires the decision maker to take into account the strength of the prosecution case, the nature and seriousness of the offence plus the likelihood of a custodial sentence, then it would be incongruous to require the decision maker to give greater weight to the right to be at liberty than other fundamental principles/considerations.

Given that in NSW there is a proven prosecution rate of about 82%,[2] the presumption of innocence should likewise not be given greater weight than any other fundamental principle or consideration.

The risk of an accused person committing further offences, particularly serious offences, should *not* be removed from any revised bail law. This has been a consideration of bail since at least 1954.[3]

[2] 139,970 separate criminal proceedings were commenced in NSW from 1 May 2010 to 30 April 2011.[2] About 90% of the 133,553 criminal proceedings conducted by police prosecutors were proven.[2] The remaining 6417 proceedings were prosecuted by the ODPP.[2] Whilst the ODPP prosecuted 452 criminal proceedings in the Local Court in 2009/2010, the writer is not aware how many of these matters were proven. Disregarding this small number of summary prosecutions, if one sought to work out the ODPP's rate of proven prosecutions, one would have to look at the percentage of matters committed for trial that resulted in a finding of guilt and add the number of matters committed for sentence. For 2009/2010 the percentage of matters committed for trial resulting in a finding of guilt was 47%.[2] Applying this percentage to the 1616[2] matters committed for trial in 2009/2010 and adding the 1688[2] matters committed for sentence the proven prosecution rate would be **41%** (1688 + (1616*0.47)/5965) or 2447.5 proceedings. Without taking into account appeals, the overall proven prosecution rate, not taking into account the outcome of appeals is approximately **88%.** IN 2009/2010 the DPP completed 7982 appeals, whether they be conviction or severity appeals in the District and Supreme Courts.[2] If all these appeals were successful, this still leaves a proven prosecution rate of about 82%. As such, notwithstanding the presumption of innocence, if criminal proceedings are commenced against a person in NSW it is likely that the matter will be proven.

[3] *R v Light* [1954]VLR 1527

The likelihood that the accused will commit further offences whilst on bail was labelled a public interest consideration in *R v Wakefield.*[4] In *R v Walters*[5] Cross J stated:

> Nowadays charges of armed robbery, **because of its repetitiveness by individual offenders**, and drug courier or importation charges, for obvious reasons, may well render bail more difficult to obtain than a charge of murder. I would not want what I am saying to be misunderstood. I can imagine that, in many charges of murder, bail would be refused. It is unnecessary, I think, to go into the reasons why. They involve (only shortly), apart from the inducement to flee which the heavy sentence carries with it, the consideration that much time and effort and cost is involved in the preparation of a Crown case on an important charge such as murder, and it would be undesirable if, when the matter is to proceed, the jury summoned and judge, counsel and all the attachés of the court present, all that time and cost should be thrown away by a person not responding to his bail. But, on the facts of this particular case, of an elderly man with a stable background and **no previous convictions**, I am of the opinion that bail should be granted.

The mention of the issue of repetitiveness is one akin to or provides a direct link to the likelihood of committing further similar offences.

Research consistently demonstrates that a relatively small number of offenders commit a disproportionately larger number of crimes.[6] It was this consideration that section 9B of the *Bail Act* was intended to deal with. Removing the risk of an accused person committing other offences, or limiting that risk to serious offences or offences causing serious harm appears to be inconsistent with the reasoning behind the introduction of Section 9B of the *Bail Act.*

The risk of an accused person committing further offences, particularly serious offences, is a fundamental principle to be taken into account on the question of bail and should not be removed from any future bail law.

Bail legislation that specifically allows for the promotion of effective law enforcement through the imposition of bail conditions that can be effectively policed is vital. A decision maker on bail should be able to impose a bail condition for the purpose of enabling enforcement of a bail condition.

It is agreed that the use of the term "ensuring" should not be used in the Object of the Act.[7]

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[4] (1969) 89 WN (Pt 1) (NSW) 325 at 328-32 per Cross J

[5] [1979] 2 NSWLR 284

[6] The *Bail Amendment (Repeat Offenders) Bill* followed a report of Dr Don Weatherburn. This report was referred to in the parliamentary debate on this Bill, during the course of which it stated on more than one occasion that 80% of crimes at the lower end of the criminal scale were being committed by few persons (see for example, Mr Kevin Green and Mr Alan Ashton, Legislative Assembly, *Hansard and Papers*, 10 April 2002 at 1334). Anecdotally, police at any local area command find that when certain well known recidivist offenders are sentenced to imprisonment or are placed on remand, the local crime pertinent to property crime goes down.

[7] As per letter from Commissioner Sperling to the Director of the Criminal Law Review Division of the then Department of Justice and Attorney General dated 29 November 2010 in relation to the Bail Act/Bill round table.

If the reformed Act is to include an Object, then in order to give adequate emphasis to the range of relevant factors, a suggestion for the wording of the Object of the legislation is as follows:

The object of this Act is to provide for a pre-trial process when there is question as to the control or deprivation of the accused person's liberty where the interests of the accused person are appropriately weighed against the interests of the community consistently in light of the strength of the prosecution case and likelihood of a custodial sentence.

Question 2 - Right to release for certain offences

2.1: A right to release on bail when charged with certain offences should be retained in principle.

2.2: The current section 8 is by and large satisfactory.

However, as drafted, there is some confusion in the interpretation and application of Divisions 2 and 3 of Part 2 of the *Bail Act*.

For example, sections 9(1)(b) and 9(1A) of Division 3 operate to either:

(i) confirm the right in section 8 in Division 2; or

(ii) provide for a presumption in favour of bail where a person accused of an offence against section 8 has either
(a) previously failed to comply with a bail undertaking in respect of the offence, or
(b) failed to appear in respect of an offence not punishable by imprisonment.

The operation of the law between these two divisions, then sections is convoluted.

In other respects, Divisions 2 and 3 operate differently. The intermingling of the two divisions serves to confuse. Some advocates attempt erroneously to apply section 9B of Division 3 in circumstances where section 8 of Division 2 applies to its exclusion.

2.3: There should be a right to bail in respect of certain classes of offences.

However, the current categories of offence in section 8 allow for a right to bail to persons accused of serious offences for which a full time custodial sentence is likely (including persons with a lengthy criminal history for committing serious offences).

For example, each of the offences in the following table currently fall within section 8. The table shows the applicable JIRS statistics on the percentage of sentences of imprisonment from Jan 2006 to Dec 2009.[8] None of the offences in the table below are minor.

[8] https://jirs.judcom.nsw.gov.au (27/10/10)

Offence falling within ambit of s.8 of Bail Act	% of Prison Sentences
Convicted child sexual offender loiter near school - *Summary Offences Act 1988* s.11G(1)	56%
Convicted child sexual offender loiter near public place – *Summary Offences Act 1988* s.11G(1)	69%
Possess offensive weapon/implement in place of detention – *Summary Offences Act 1988* s. 27D(1)	26%
Inmate use or possess mobile phone/SIM card/charger/etc – *Summary Offences Act 1988* s.27DA(1)	76%
Violent disorder – *Summary Offences Act 1988* s.11A(1)	5%

Case studies

The following are real persons. Their CNI and personal details have not been reproduced but are available if lawfully requested.

- D1 who had previously served time for indecent assault of a child under ten was charged under section 11G of the *Summary Offences Act* in 2005. He was refused bail by the police, but later granted conditional bail by the Court. D1's matter was adjourned for three months during which period police intelligence reports document D1's attempts to groom a family for the purpose of developing an association with more children. D1 was ultimately sentenced to seven months imprisonment. In 2009, D1 was charged with a further offence under s.11G and was granted conditional bail by the police in compliance with section 8(1)(a1) of the *Bail Act 1978.* Three months later D1 was sentenced to nine months imprisonment. In this three month period, D1 was seen loitering near a Catholic Primary School, in breach of bail, and later charged with further offences including one under s.11G. D1 remained in custody until being sentenced just over a month later on a different sentence date to the matter D1 was on bail for. Surprisingly,D1 was sentenced to a shorter period of imprisonment for the s.11G offence committed whilst on bail, backdated so that the sentence would be served concurrently.

- D2 was first convicted of indecent assault in 1978. D2 had previous convictions for indecent and aggravated indecent assault and had been charged with, and committed to trial for, many and various indecent and sex related crimes that were either ultimately not proceeded with by the DPP or where he was found not guilty by verdict.

  D2 was convicted of aggravated indecent assault in 1994 on a male born in 1979, receiving a sentence of 19 months imprisonment. In the early 2000s he was again charged with and committed for trial for many and various indecent and sex related crimes. At trial he was found guilty of most and sentenced to lengthy periods of

imprisonment. However, on appeal some matters were ordered to be returned for a new trial and ultimately the DPP decided not to further proceed. In the remaining matters a verdict of acquittal was directed. In February 2008 he was charged with an offence under s.11G and granted conditional bail by police in compliance with section 8(1)(a1) of the *Bail Act 1978*. The offence date for this matter was in September 2007. In March 2008 he was charged with child pornography offences emanating from offences in October 2007. He was refused bail by police and the Court until these matters were finalised in March 2009. He received a head sentence of 22 months and was released in May 2009. In May 2010 he was charged with various indecent and sex related crimes allegedly occurring in the same and preceding month on a person under the age of 16 years. The majority of these matters have been committed for trial and D2 is currently on remand.

Section 8F of the *Bail Act 1978* currently provides for a presumption against bail for breach of a supervision order under s.12 of the *Crimes (Serious Sex Offenders) Act 2006*. Breaching a supervision order carries the same maximum penalty of two years as an offence under s.11G(1) of the *Summary Offences Act 1988*. The *Crimes (Serious Sex Offenders) Act 2006* limits the period of any one supervision order to five years. However, the operation of s.11G is not limited by time. Further, the scope of offences and risk of further commission of offences intended to be included within or dealt with by s.11G is wider than that applicable to a supervision order under the *Crimes (Serious Sex Offenders) Act 2006*. Still, both fall within the principle of protection of the community, specifically children who are vulnerable to predatory sexual acts. The wide disparity in approach to these two types of offences provided for in the *Bail Act 1978* appears incongruous.

Where the legislature has seen fit to attach a maximum penalty of imprisonment to an offence, the right to bail should not apply, irrespective of what Act establishes the offence. At the very least, for offences of the nature listed in the table above, the right to bail should be removed and replaced by a neutral presumption. The fundamental principle of protection of the community is not otherwise met.

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

Subject to any consideration of a risk management approach to bail, the inclusion of presumptions is supported by the NSW Police Force. That having been said, the structure of the current Divisions 2, 2A, 3 and 3A of Part 2 of the *Bail Act 1978* are convoluted and should be simplified.

3.2: Presumptions have two main purposes:

(i) To provide consistency in decision making in relation to bail.
Presumptions provide clear guidelines and promote a consistent approach amongst operational police, legal practitioners on both sides of the bar table and the judiciary to bail applications.

The community expects that accused persons charged with similar offences, with similar subjective features including criminal antecedents and current bail status will be treated consistently on the question of bail. Presumptions regarding bail provide

for such consistency. An inconsistent application of bail law by the police or judiciary will result in a loss of confidence in these institutions by the community.

It is submitted that presumptions do, with few exceptions, provide for consistency in decision making in relation to bail.

(ii) To enhance efficiency of the bail application process, and the judicial system generally

From the perspective of legal practitioners, a presumption provides guidance so that they may assist the court and their client without wasting the court or their client's time. If a legal practitioner is aware that their client is facing a presumption against bail or where bail is only to be granted in exceptional circumstances, they will be cognisant, by virtue of the hurdle they face, of the amount and type of information they must seek and obtain to make a successful or well-founded bail application and in order to make a decision on whether bail should be applied for. If such information is not forthcoming, they will be in a better position to explain to their client the prospects of bail in any given situation.

Presumptions in favour of bail can free up court time by enabling police officers to grant bail at a police station. For example, where an accused person has a criminal record that suggests that he/she will not commit further offences if granted bail and the substantive offence carries a presumption in favour of bail, it is likely that that the accused person will be granted bail at a police station, rather than add to a court's list of matters.

Presumptions against bail can similarly prevent bail applications becoming inefficiently long. For example, where the substantive offence perhaps combined with the accused person's criminal antecedents and current bail status provides for a presumption against bail, then the judicial officer may indicate to the prosecutor that no verbal submissions will be required from him or her. This provides for less time being spent on any one bail application in court.

In each of these cases, presumptions operate to provide for an effective and efficient judicial system.

3.3: The following table illustrates some of the various insertions and/or amendments to the *Bail Act 1978* relevant to presumptions on bail. It also indicates the purpose the amendments intended to serve, as disclosed by comments made during the parliamentary debate relevant to the original insertion or amendment:

Inserted or amended section of the *Bail Act 1978*	**Amending Act**	**Purpose**
9A(1A)	*Bail Amendment Act 1998*	To extend the application of a neutral presumption to victims of breaches of apprehended domestic violence orders where the breach involves an act of

		violence or intimidation.[9]
9	*Bail Amendment (Repeat Offenders) Bill* – 2002	To combat the growing category of accused persons who commit less serious crimes repeatedly[10]
9C & 9D	*Bail Amendment Act 2003*	To prevent a person who is accused of (i) a serious personal violence offence and who has previously been convicted of a serious personal violence offence or (ii) murder from being granted bail other than in exceptional circumstances. To further protect victims and the community, and particularly women, from serious personal violence offenders.[11]
8A	*Bail (Amendment) Act 1988*	To recognise the community's expectations that a much stronger stand should be taken against commercial drug trafficking.[12] To make it more difficult for serious drug offenders to obtain bail and thereby re-offend whilst on bail.[13]
8B & 8C	*Bail Amendment (Firearms and Property Offences) Act 2003*	To send a clear message that the possession of prohibited firearms and pistols is an extremely serious matter. To identify high risk persons and incapacitate them, thereby preventing them from re-offending in the future. To reduce property and theft-related offences.[14]
8D	*Law Enforcement Legislation Amendment (Public Safety) Act 2005*	Following the Cronulla riots: to prevent a large scale public disorder. "Twenty-three rioters charged over Sunday's riots have been granted bail, one of whom had been granted bail days earlier for assault and destroying property. It is

[9] Mr Paul Whelan, NSW, Legislative Assembly, *Hansard and Papers*, 14 Oct 1998, at 8328
[10] Mr Bob Debus, NSW Legislative Assembly, *Hansard and Papers*, 20 March 2002, at 818.
[11] Mr Bryce Gaudry, NSW, Legislative Assembly, *Hansard and Papers,* 30 May 2003, at 1544
[12] The Hon John Dowd, NSW, Legislative Assembly, *Hansard and Papers,* 25 May 1988 at 551
[13] The Hon E.P. Pickering, NSW, Legislative Council, *Hansard and Papers,* 1 June 1988, at 988
[14] The Hon. John Hatzistergos, NSW, Legislative Council, *Hansard and Papers*, 19 November 2003 at 5195

		unacceptable that such thugs and morons are automatically granted bail, just to be given the chance to wreak further havoc. This bill will help shut that revolving door by creating a presumption against bail for riot and for any other offence that is punishable by imprisonment for two years or more, where that offence is committed in the course of the person participating in a large-scale public disorder, or in connection with the exercise of police powers to prevent or control such a disorder or the threat of such a disorder. That way the police can do their jobs knowing that they will be backed up."[15]
8E	*Bail Amendment (Lifetime Parole) Act 2006*	To ensure that if life parolees come before the courts again they will bear the burden of convincing the court that bail should be granted.[16]
8F	*Law Enforcement and Other Legislation Amendment Act 2007*	To protect the community from serious recidivist sex offenders.[17]

Sections 9B, 9C/9D, 8B/8C & 8E seek to reduce recidivism. These provisions commenced in July 2002, August 2003, July 2004 and October 2006 respectively.

The 'less serious' offences that ordinarily carry a presumption in favour of bail but for the application of section 9B (and 9A) to repeat offenders are offences in the BOCSAR categories of:

1. Robbery without a weapon	2. Break and enter non-dwelling
3. Break and enter dwelling	4. Motor vehicle theft
5. Steal from motor vehicle	6. Steal from Retail Store
7. Steal from dwelling	8. Malicious Damage to property
9. Assault (Went from overall assaults to non-domestic related in reporting period)	10. Steal from person
11. Fraud	12. Assault – Domestic Violence Related (Section 9A)

[15] Mr Morris Iemma, NSW, Legislative Assembly, *Hansard and Papers,* 15 December 2005 at 20620
[16] Mr Bob Debus, Legislative Assembly, *Hansard and Papers,* 19 September 2006 at 1856; this legislation came into force after the publication at Note 30.
[17] The Hon. John Hatzistergos, NSW, Legislative Council, *Hansard and Papers,* 28 November 2007 at 4505

The more serious offences contemplated by sections 9C/9D and 8B/8C include some of the above offences as well as offences in the BOCSAR categories of:

13. Murder	14. Sexual Assault
15. Robbery with a weapon not a firearm	16. Robbery with a firearm

The following table illustrates the yearly trends as reported by BOCSAR since December 2002 for each of the above crime categories:[18]

Key: SDT = Significant downward trend
NUD = No upward or downward trend
SUT = Significant upward trend
(Number) = Offence Category above.

Off	'02	'03	'04	'05	'06	'07	'08	'09	'10
1	SDT 17.9%	SDT 4.6%	SDT 21.5%	NUD	NUD	NUD	SDT 6.0%	SDT 15.7%	SDT 6.9%
2	SDT 20.9%	SDT 12.8%	SDT 18.4%	SDT 7.8%	SDT 2.4%	SDT 10.4%	SDT 6.2%	SDT 16.3%	SDT 11.4%
3	SDT 12.9%	SDT 11.4%	SDT 10.5%	SDT 11%	SDT 4.1%	NUD	SDT 5.9%	SDT 6.4%	NUD
4	SDT 22.2%	SDT 17.3%	SDT 5%	SDT 12.4%	SDT 3.0%	SDT 5.5%	SDT 8.9%	SDT 8.5%	SDT 9%
5	SDT 15.7%	SDT 14.7%	SDT 8.8%	SDT 9%	NUD	SUT 6.6%	SDT 7.0%	SDT 18.8%	SDT 4.8%
6	SUT 7.5%	NUD	SDT 16.8%	NUD	NUD	NUD	SUT 7.8%	NUD	NUD
7	NUD	NUD	SDT 10.4%	SDT 5.4%	NUD	NUD	NUD	NUD	NUD
8	NUD	NUD	NUD	SUT 8.1%	SUT 4.3%	NUD	NUD	NUD	SDT 10.1%
9	NUD	NUD	NUD	NUD	NUD	NUD	NUD	NUD	NUD
10	NUD	SDT 6.8%	SDT 23.9%	SDT 12.5%	SDT 6.8%	NUD	SDT 12.2%	SDT 4%	SDT 10.6%
11	NUD	SDT 15.2%	NUD	NUD	NUD	NUD	SUT 15.7%	SDT 10.7%	NUD
12			NUD	NUD	NUD	NUD	NUD	NUD	NUD
13	NUD	NUD	NUD	NUD	NUD	NUD	NUD	NUD	NUD
14	NUD	NUD	NUD	NUD	NUD	NUD	NUD	NUD	NUD
15	SDT 36.5%	SDT 19.3%	SDT 12.6%	NUD	NUD	SDT 7%	SDT 19.1%	SDT 10.6%	SDT 11.0%
16	NUD	NUD	NUD	SDT 26.7%	NUD	NUD	SDT 31%	NUD	NUD

[18] Reports available at http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/pages/bocsar_crime_stats_archived (5.7.11) - Please Note the 2003 BOCSAR report gives statistics relevant to 2002 etc.

The amount of green in the above table and the downward trends in the following graphs[19] are an indication that since the introduction of presumptions that combat recidivist offenders, the crime rate has dropped in both property crime and violent crime, more prominently in the former. Whilst the crime rate is influenced by a number of factors, the above figures certainly support the notion that the existing presumptions serve at least one of their intended purposes, that is, the protection of the community through reduced rates of recidivism.

However, the statistics arguably do not support a finding that the existing presumptions serve to reduce the rate of recidivism in relation to the offences of murder, sexual assault, assault (including domestic assault), steal from retail store and, until 2010, malicious damage.

[19] 2011 report at http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/pages/bocsar_crime_stats_archived (5.7.11) - Please note the NSWPF has inputted the relevant sections of the *Bail Act 1978*.

FIGURE 1.1: NSW LONG-TERM TREND IN VIOLENT CRIME*

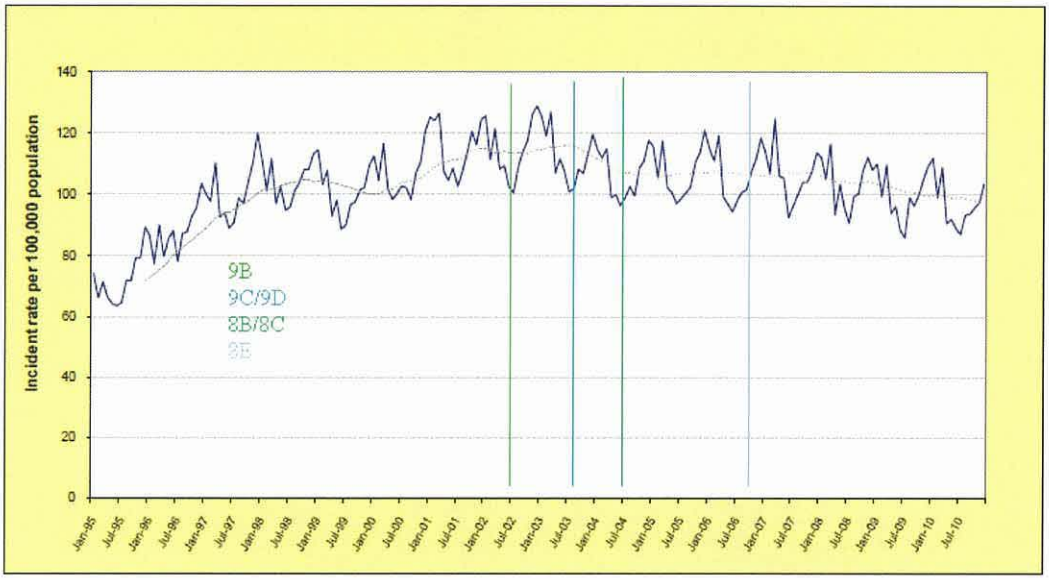
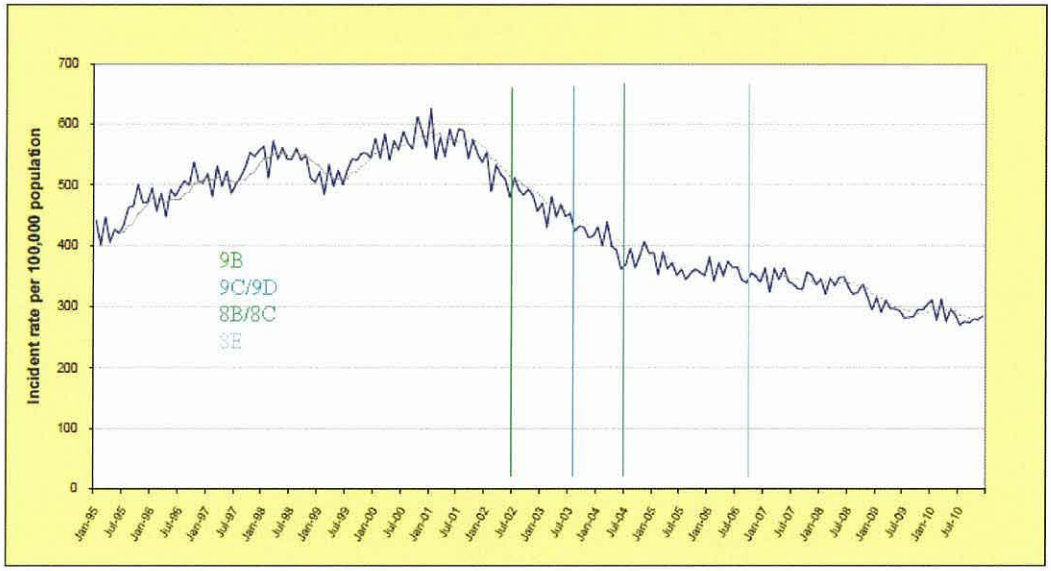


FIGURE 1.2: NSW LONG-TERM TREND IN PROPERTY CRIME**



* ***Violent offences*** *include: murder, assault - domestic violence related, assault - non-domestic violence related, assault police, robbery without a weapon, robbery with a firearm, robbery with a weapon not a firearm, sexual assault and indecent assault / act of indecency / other sexual offences.*

** ***Property offences*** *include: break and enter dwelling, break and enter non-dwelling, motor vehicle theft, steal from motor vehicle, steal from retail store, steal from dwelling, steal from person, stock theft, other theft and fraud.*

As noted in the table, section 8D was introduced following the Cronulla riots for the purpose of preventing persons who commit an offence in the course of a large scale public disorder, or in connection with the exercise of police powers to prevent or control such a disorder or the threat of same, from committing further similar offences. To this end, apart from the example below, there is no evidence of this purpose *not* being met.

Specific examples where presumptions do not serve to provide consistency and/or promote an effective and efficient judicial system

1. Pursuant to the presumption *against* bail under section 8D, a young man involved in the Cronulla riots was refused bail, notwithstanding that he had nil or minimal antecedents and arguably posed neither an extreme nor high risk.

2. *In confidence* (Matter currently before the Court)

3. The presumption in favour of bail in respect of the offences of break, enter and steal and robbery arguably do not reflect the seriousness of such offences (assessed in terms of their consequences) or the likelihood that those alleged to have committed them will commit further similar offences.[20] Given the impact of these crimes on the victim, these offences are serious.

These deficiencies would be overcome through the application of a risk management approach to the determination of bail.

3.4: The existence of presumptions is arguably over-prescriptive. Presumptions can create artificial distinctions and thereby produce anomalies in their operation (such as that discussed in response to Q2.3).

At essence the legislation ought to reflect the fundamental reality that decisions about bail are based on a risk assessment.

Approaching the issue of bail from this perspective, then as a general matter, bail would be granted subject to assessment of the risk the accused person poses to the fundamental principles pertinent to the community identified at Q1.

If the risk is extreme then there is no release on bail. If the risk is medium or high on one or more of these categories the question is whether this risk can be managed by imposing conditions. See further Appendix A.

The answers to the remaining questions is subject to consideration of this risk management model.

3.5: Nil response.

3.6: (a) No
(b) No
(c) No
(d) No

3.7: Yes, there ought to be a presumption against bail in some cases. The current categories of case are suitable, however the drafting of the legislation is convoluted.

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[20] See for example *Table 15: Risk of re-offending by index offence* in *Don Weatherburn, Rachel Cush and Paula Saunders,* Screening juvenile offenders for further assessment and intervention, *CRIME AND JUSTICE Bulletin,* NSW Bureau of Crime Statistics and Research, No. 109 August 2007 at 7

3.8: Yes, there should be a presumption in favour of bail in some cases. Subject to the offences identified in relation to Q2.3 above, the current categories should remain. Further, all offences which carry a maximum penalty of imprisonment excluding those that currently carry no presumption in favour of bail, a presumption against bail or where bail is only to be granted where the court or authorised officer is satisfied that exceptional circumstances justify the grant of bail, ought be included in the list of offences for which there is a presumption in favour of bail as opposed to carrying a right to bail. The same reasoning which underpins the argument that fine-only offences should carry either a right to bail or be subject to a requirement that bail be dispensed with may be employed for this purpose. If, as a matter of policy, the bail legislation should not curtail the right to be at liberty in cases where the substantive offence does not carry a term of imprisonment as a maximum penalty then conversely where the substantive offence does carry a term of imprisonment as a maximum penalty, then curtailment of that right ought reasonably be open for consideration.

Further, the procedure concerning indictable offences triable summarily, and by virtue of a current abundance of indictable offences that may be dealt with summarily, the very nature of what may ordinarily be considered and dealt with as a summary offence has changed dramatically since 1988 when section 8(1)(a1) into the *Bail Act 1978* was inserted by the *Summary Offences Act 1988.*

3.9: Yes. Current categories are suitable, but should include the offences listed at 2.3.

3.10: Attaching a presumption in favour of bail is unsuitable where:
(i) sentencing statistics indicate that imprisonment is likely on conviction for specific offences;
(ii) a standard non-parole period applies; and/or
(iii) a guideline judgement or legislative instrument provides for imprisonment to be considered in contradiction to section 5(1) of the *Crimes (Sentencing Procedure) Act 1999.*

In such circumstances at least a neutral presumption should apply. This notion fits within the premise that where the decision maker finds there is a strong prosecution case, a likelihood of a custodial sentence and the subjective features or interests of the accused person do not tip the balance, bail should be refused. Where the prosecution case is not strong, the balance would shift to the accused person and bail would be granted.

Acknowledging the difficulty of simplifying categories given the range of variables, the following hierarchy of presumptions are appropriate:

Right to Bail
All fine only offences unless the same offence is alleged to have been committed whilst on bail, subject to the imposition of conditions that the accused person can meet in line with the stated Objective and the provision of identification suitable to identify the accused person to the court.

Presumption in favour of bail

- All offences where, notwithstanding the maximum penalty available is imprisonment, sentencing statistics show that a sentence of imprisonment is not likely;
- All fine only offences alleged to have been committed when the accused person is at liberty on bail for the same fine-only offence.

Neutral Presumption
All offences

(i) likely to attract a sentence of imprisonment on conviction according to the sentencing statistics;
(ii) that carry a standard non-parole period or
(iii) where legislation or guideline judgement provide for imprisonment to be considered divergent to s.5(1) of the *Crimes (Sentencing Procedure) Act 1999;*
(iv) that carry a term of imprisonment as a maximum sentence, alleged to have been committed whilst the accused person was at liberty on bail, on parole, subject to a bond, subject to an intervention program order, serving a sentence but not in custody, or allegedly committed in custody.

Presumption against bail
Current categories remain.

Bail not to be granted unless exceptional circumstances justify the grant of bail
Current categories remain.

3.11: Future bail law may need to explain the meaning of a presumption in favour, a neutral presumption or a presumption against bail.

The question though suggests that Hunt CJ at CL, Allen and Badgery-Parker JJ in saying, "...persuade the court why bail should not be refused. That presumption expresses a clear legislative intention that persons charged...should normally – or ordinarily – be refused bail"[21] added something more than a burden of persuasion to the presumption against bail. They didn't. The intention of parliament was to make it more difficult for serious drug offenders to obtain bail and thereby re-offend whilst on bail.[22] Hunt CJ at CL, Allen and Badgery-Parker JJ explained the practical effect of the intention of parliament. Where such presumption exists, the accused has the burden of persuading the court that bail not be refused. If an accused person doesn't meet this burden, the practical effect is that bail is refused. The practical effect of the presumption is not an addition to the presumption, but a flow-on effect.

A judicial officer or police officer's decision on bail should not be reliant upon the persuasion skills of another police officer, the accused person, or a legal representative. The decision maker should be able to make a decision on bail independent of whether they are persuaded by the submissions of a police officer, accused person or a legal practitioner. The decision maker should be able to make a decision on all the information before them, taking into account, but not restricted by, the views or submissions of a party with standing.

[21] *R v Masters* (1992) 25NSWLR 450, 473
[22] Note 13

For example, take the situation of a Legal Aid Commission legal practitioner taking instructions from many accused persons and having to read many fact sheets during a busy Bail Court held on a weekend or public holiday. If that legal practitioner omits to draw attention to a weakness in the prosecution case that the judicial officer is aware of, and the offence is one in respect of which there is a presumption against bail, then the NSW Police Force submits that the judicial officer should not be prevented from granting bail to that accused person by reason of this oversight and the failure of the legal practitioner to persuade him or her.

Conversely, where there is a presumption in favour of bail and the crown or police prosecutor fails to address the court on a point that would justify an order that bail be refused, then the NSW Police Force similarly submits that a judicial officer, him or herself aware of the omitted point, should not be prevented from refusing bail to the accused person if justified.

A presumption should not impute a burden of persuasion on either party. A presumption should provide the decision maker with a starting point, a basis or footing and guidance to provide for consistency and reflect the intention of parliament pertinent to a specific type or category of offence. Upon this, the process of answering the question of the appropriateness of controlling or depriving an accused person of their liberty may begin.

On this foundation the following meanings for each of the presumptions are appropriate:

Right to Bail
The accused person is to be granted unconditional bail unless the decision maker (police/registrar/court) considers that granting conditional bail is justified.

Presumption in favour of bail
The accused person is to be granted bail unless the decision maker (police officer/registrar/court) considers that refusing bail is justified.

Neutral Presumption
The accused person may be granted or refused bail as the decision maker (police officer/registrar/court) considers justified.

Presumption against bail
The accused person is to be refused bail unless the decision maker (police officer/registrar/court) considers that granting bail is justified.

Bail only to be granted in exceptional-circumstances
The accused person is to be refused bail unless the decision maker (police officer/registrar/court) is satisfied that exceptional circumstances justify the grant of bail.

3.12: The concept of "exceptional circumstances" should be retained.

With regard to murder (s.9C), considering this offence is at the pinnacle of criminal behaviour, the community would expect this current provision to remain.

With regard repeat serious personal violence offences (s.9D), persons with the propensity for violence contemplated pose such a risk to the community to justify the retention of this provision.

With regard to whether the *Bail Act* should specify the meaning and effect of this category, see final heading under 3.11.

Question 4 – Dispensing with bail

4.1: The main distinction between "bail dispensed with" and "unconditional bail" is that a person who is unconditionally bailed is liable for the offence of fail to appear; a person who has had bail dispensed with is not. This will carry repercussions for the person if they are subsequently charged with another offence that would ordinarily carry a presumption of bail.[23]

4.2(a): The NSW Police Force opposes automatically dispensing with bail for fine only offences. There will be circumstances where imposing bail conditions on fine only offences will be appropriate and the *Bail Act* should be flexible enough to deal with all circumstances, however uncommon or unexpected.

In particular, the ability to impose bail conditions may provide additional deterrence where the maximum penalty for the offence, the process of arrest and/or the commencement of proceedings fails to do this. Take for example the *Camp for Climate Action* protests outside Bayswater Power Station and its surrounds in the Hunter Valley on the 5 December 2010. On their website, the organisers promote "*Non-Violent Direct Action*" and under this heading state, "If the laws are killing the planet, people of conscience have a responsibility to take action – even if this means breaking the law."[24] The organisers' website boasts, "73 people fined in largest court appearance for a climate protest."[25]

If bail was dispensed with for fine only offences then protesters would be continually released and there would be nothing further to deter protesters from continuing to commit fine-only offences of Enter or Remain on Inclosed Lands and offences against the Rail Safety Regulation.

4.2(b): In cases where a juvenile is being dealt with by way of Youth Justice Conference, having bail dispensed with should not be an entitlement, but should be an option available to the Court.

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[23] For example, if John Smith is issued with a Court Attendance Notice for Offensive Language under s.4 of the *Summary Offences Act 1988* and placed on unconditional bail, if he doesn't attend court, is convicted of Fail to Appear and is later issued with a Court Attendance Notice for an offence that would normally carry:

- a presumption in favour of bail, then s.9B would operate to remove the presumption;
- a right to bail, then s.8(2)(a)(i) would operate to remove the right.

[24] http://www.climatecamp.org.au/node/9 (14.2.11)

[25] http://www.climatecamp.org.au/category/category/media-releases (14.2.11)

If it becomes an entitlement, it should only be exercisable after the Court approves the outcome plan under section 54 of the *Young Offenders Act 1997*. If the court does not approve the plan, it may continue the proceedings. If it was appropriate to continue bail up until Youth Justice Conference referral, where the court does not approve the plan and is of the view that bail should continue, the *Bail Act* should not automatically inhibit the courts power in this regard.

4.2(c): There should not be an entitlement to have bail dispensed with in any other class of case.

4.3: Yes, any such entitlement should be qualified by reference to cases where the police are unable to ascertain sufficient information to identify the person to the court.

In situations where police intend on commencing proceedings and the identity of a person cannot be confirmed, police are then not in a position to identify an accused person to the Court (this is a different situation than that dealt with under ss.114 and 115 of the *Evidence Act 1995*). The administration of justice fails in circumstances where the court cannot be satisfied that the person whose name appears on the court attendance notice is the person who was served with the court attendance notice.

The current practice where a person does not provide police with identification sufficient to identify them to the Court is to refuse bail to ensure they appear before court. Following this, the Court usually places them on conditional bail to provide sufficient identification to the police, usually in the form of fingerprints.

Automatically dispensing with bail without qualification in such circumstance would not allow this practice to occur. In essence, police could then not commence proceedings. This will allow for accused persons who are not previously known, do not carry identification and refuse to provide sufficient identification to commit fine only offences without consequence.

Question 5 – Police bail

There should be no change to the ability of police to grant bail. However, some amendment to the procedures for review of bail decisions may be warranted.

Currently the power of a police officer to review the bail decision of another police officer is confined to where the original decision was to refuse bail, the reviewing officer is 'more senior' and, arguably, where the accused person makes a request for a review.

Under the current legislation, there is no avenue for internal review available to an accused person unable to meet the conditional bail granted by police. For example, if the original bail decision by a police officer is that an acceptable person lodge $500 in cash to guarantee the accused person's appearance at court, then there is no procedure for internal police review in the event that an acceptable person is only able to lodge an amount less than $500.

By contrast, if the original bail decision by police is to refuse bail and an acceptable person proposes to lodge a financial surety to guarantee the accused person's attendance at court, then the accused person is able to request a review of that original bail decision.

It appears incongruous that a person who has been refused bail may be granted bail they can meet after review, but a person granted conditional bail that they cannot meet, must be put before the next available court (which may mean an overnight stay) even though a more senior police officer would grant them conditional bail they could meet.

The term 'more senior' may be interpreted by police to mean either more senior in rank or more senior within rank. The former would pose more restriction on review than the latter. For example, a sergeant of police who has been a sergeant for ten years is more senior within rank than a sergeant of three years standing. An inspector of police is more senior in rank than a sergeant of police.

To overcome the said restrictions and possible ambiguity surrounding not only the meaning of 'more senior' but whether a review may be conducted independent of a request by the accused person an amendment along the following lines may be appropriate:

"A person who is being held in custody at a police station after having been refused bail or having been granted conditional bail they cannot meet by a police officer may have the decision on bail reviewed whether or not they request such review.

A review may be conducted by a more senior police officer of or above the rank of sergeant.

The more senior police officer who conducts the review may:

(a) affirm the decision to refuse bail, or
(b) grant bail, or
(c) affirm the conditions of bail, or
(d) vary the conditions of bail"

Question 6 – Court bail

6.1: Nil response

6.2: The use of authorised justices to grant bail in the Local Court is used frequently in country areas. All regional weekend and public holiday bail courts are conducted by a Registrar. Whilst having a judicial officer decide every bail application is ideal, from a practical point of view the NSW Police Force has no objection to the current practice continuing.

It is understood that audio visual links may soon be trialled in some regional areas, linking them to the Parramatta weekend and public holiday Bail Court. Considering the usually small number of persons remanded in custody who appear in regional bail

courts and the cost of having to staff them with at least a police prosecutor, the NSW Police Force supports the trial.

6.3: Yes. The conditions of bail in place should reflect the immediate risk the accused person will not attend court plus the immediate risk she/he poses to the victim, their relatives, any other person in need of protection and the community. When making these decisions the court will have time to calmly reflect on them. Such a process may reduce the amount of persons arrested and brought before the court for breach of bail to simply have their bail continued because it will result in less persons inappropriately being on bail conditions. It will appropriately place more responsibility on the court to ensure that bail conditions are not more onerous than necessary taking into account the risk the accused person poses at that particular time and into the immediate future. This also implies that bail conditions should only be in place in circumstances where the court is likely to refuse bail upon breach. This is in stark contrast to the present situation, particularly with juveniles (see further the response to Q10).

6.4: Where an accused person has been granted conditional bail, a provision that requires the court to consider at each subsequent appearance whether the conditions in place reflect the immediate risk the accused person:

- will not attend court
- will inappropriately interfere with the victim, any of the victim's relatives, witnesses or other persons in need of protection
- will commit further offences whilst on bail
- will interfere with evidence

should form part of any future bail legislation.

If, at the time of re-consideration, the judicial officer is not of the view a breach of a condition or conditions imposed should result in a revocation of bail, the condition should not be put in place or continued. To do so would be more onerous than necessary and not reflect the immediate threat the accused person poses.

Such mandatory reconsideration would reinforce the responsibility of the judicial officer putting in place or continuing the bail condition/s.

Question 7 – Repeat bail applications

7.1: Section 22A of the *Bail Act* is appropriate and should not be repealed. The key objectives of the provision still apply, namely:

- to guard against unnecessary, repeated bail applications that serve only to inflict further anguish on victims, and
- to prevent magistrate shopping.

It is appropriate to require new facts or circumstances to support a further bail application.

7.2: Section 22A should continue to apply to juveniles. During the parliamentary debate on the *Courts and Crimes Legislation and Amendment Bill* 2009, Mr Barry

Collier (then Parliamentary Secretary assisting the Attorney General and Minister for Corrective Services) argued that:[26]

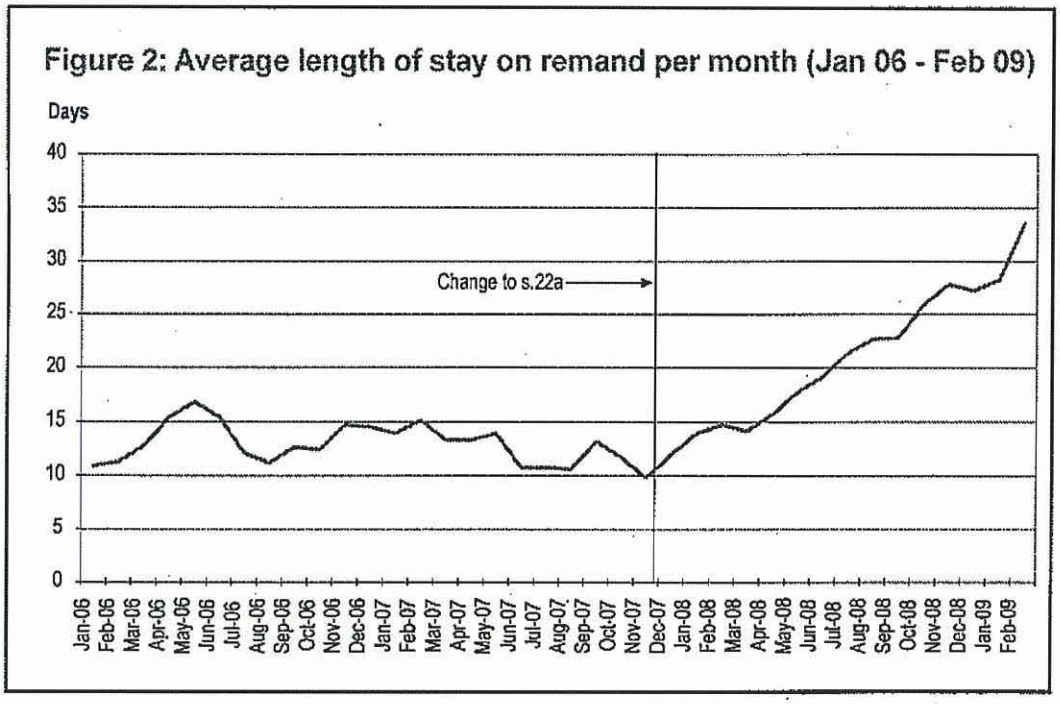
> ...excluding young people undermines the policy of protecting victims from the stresses of repeat, unnecessary bail applications. Nobody would suggest that a young person should, merely because of his or her age, be allowed to make applications that are a waste of time and place stress on victims.
> ...
> ...excluding young people undermines the policy of preventing judge "shopping". Again, an alleged criminal's age does not justify him or her manipulating the administration of justice.

Under section 22A(1A), a juvenile is able to make a further bail application if, for example, he or she was unable to put adequate instructions to their lawyer on the first occasion they appear, where further information comes to light, or where circumstances have changed since the first or previous bail application (such as the provision of a juvenile justice report). Anecdotal evidence from police prosecutors suggests that prior to the 2009 amendments to s.22A, it was being applied liberally in Children's Courts to allow for further bail applications.

Calls to exempt juveniles appear to be based on a misconception that the legislation only permits one application for bail[27] and on the premise that this provision has contributed to a rise in the number of juveniles on remand.

The basis of this latter conclusion is the finding in the May 2009 BOCSAR report *Recent Trends in Legal Proceedings for Breach of Bail, Juvenile Remand and Crime* that section 22A of the *Bail Act* was an important factor putting upward pressure on the juvenile remand rate. This Report, which relied on statistics from the Department of Juvenile Justice, produced the following graph depicting the effect that section 22A had on the average length of stay for juveniles in remand:

[26] Mr Barry Collier, NSW, Legislative Assembly, *Hansard and Papers,* 29 October 2009 at 18999
[27] For example, Mr Greg Smith SC MP (shadow Attorney General) in the course of the parliamentary debate in the Legislative Assembly *Hansard and Papers* 9/6/2010 at 24096.



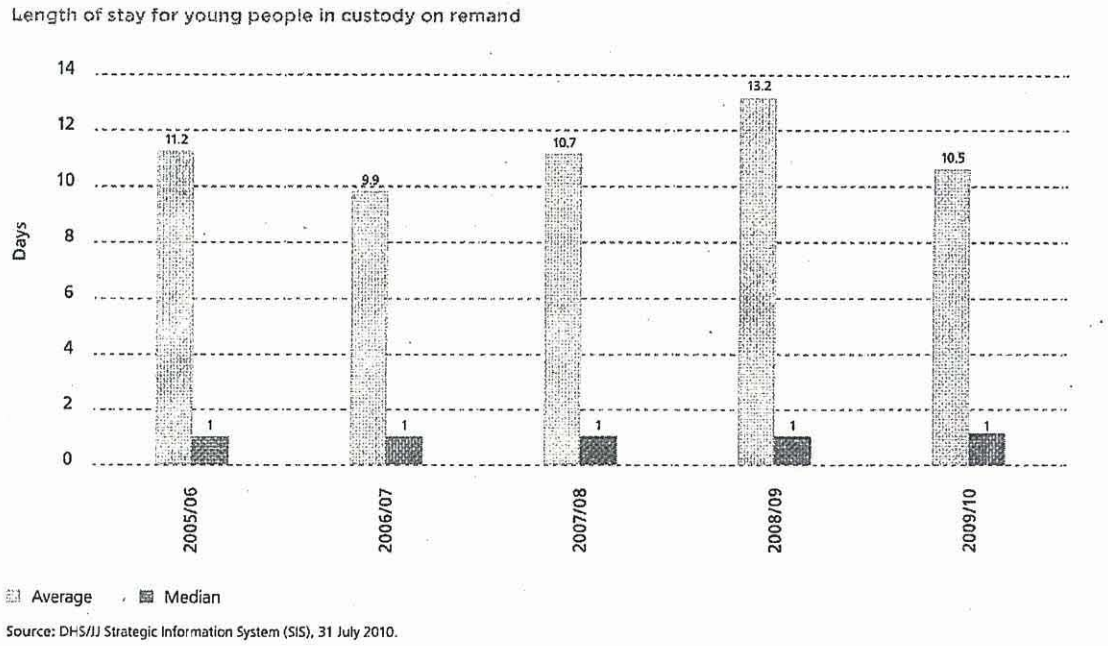
Source: DJJ RPELive Database. Extracted 4 March 2009. As this is taken from a live database, figures are subject to change.

1. *This graph counts remand periods active within each month and calculates length of stay from the beginning of each remand period. If the remand period ends within the month, the discharge date is used. If the remand period continues beyond the end of the month, the last day of the month is used.*
2. *Control order periods are excluded.*

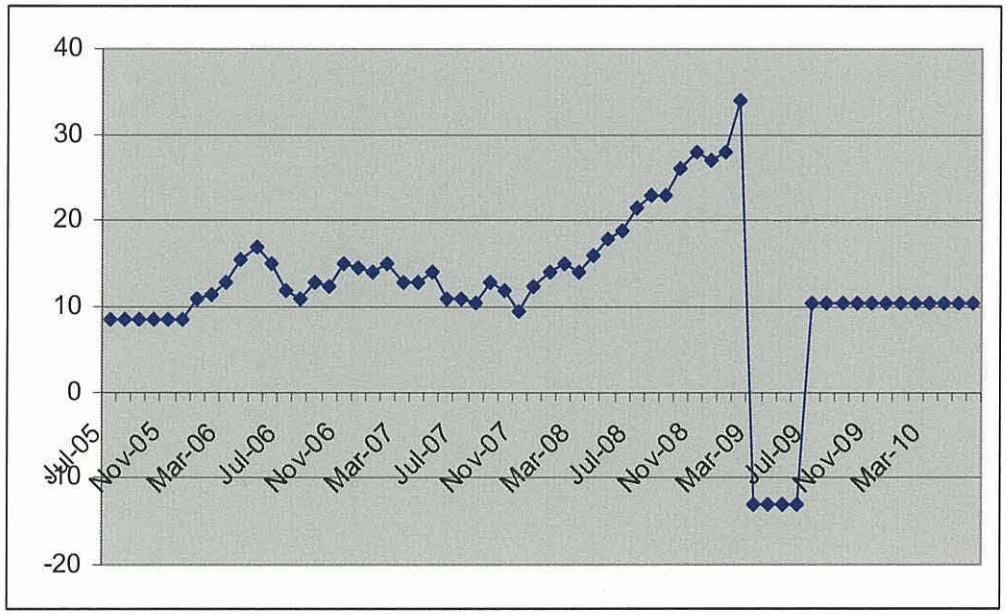
The graph shows that for the nine months from July 2008 to March 2009, the average length of stay on remand for juveniles was 26.3 days.

However, the NSW Police Force has identified discrepancies between the Department of Juvenile Justice statistics and statistics reported in the *Department of Human Services Annual Report 2009/10*. The Juvenile Justice portion of this latter report provided the following 5 year breakdown of the length of stay for young people in custody on remand:[28]

[28] http://www.humanservices.nsw.gov.au/__data/assets/pdf_file/0005/233429/8._Juvenile_Justice.pdf (25.11.11) at p. 196; http://www.djj.nsw.gov.au/pdf_htm/publications/annualreport/Key%20Statistics%20from%202009-10%20Annual%20Report%20FINAL.pdf (21 .6.11) at p. 11.



Keeping the Jan '06 to Feb '09 statistics provided by DJJ for BOCSAR's May 2009 report and inputting the remaining available yearly averages for the years 2005/2006 to 2009/2010, 'figure 2' above would look like this:



The 2009/2010 yearly average causes the monthly average for March to June 2009 to fall into the negative. It is self evident that juveniles cannot spend a negative amount of time on remand. This graph highlights the discrepancy between the statistics provided by the Department of Juvenile Justice to BOSCAR as reported in its May 2009 report and the November 2010 *Department of Human Services Annual Report 2009/10*. The discrepancy is between a yearly average of 13.2 as compared to a 9-month average of 26.3 (plotted from 'figure 2'). The discrepancy cannot be said to be of a minor nature.

Further, if one plots the yearly averages for 2006/2007 and 2007/2008 from 'figure 2' above, they average about 13.2 and 13.7 respectively. This is inconsistent with the figures in the Human Services 2009/2010 annual report: 9.9 and 10.7 respectively.

On 22 June 2011 Chief Superintendent Tony Trichter, Commander, Police Prosecutions wrote to both Dr Weatherburn of BOCSAR and Mr John Hubby of the Department of Juvenile Justice seeking clarification on the above discrepancies between the statistics provided by the Department of Juvenile Justice to BOSCAR as reported in its May 2009 report and the November 2010 *Department of Human Services Annual Report 2009/10.*

Dr Weatherburn has informed Police Prosecutions:

> If I have understood the problem correctly, the data in Figure 2 of our report are incorrect. I would like to correct the figure but to do that, I need DJJ to give me data on remand stay periods for all juveniles leaving remand, regardless of whether this is because the charges against them have been dismissed, because they have been sentenced to a custodial order or because they have been sentenced to a non-custodial order. I do not know whether DJJ can do this but when I receive advice I will contact you again. In the meantime, I have copied the Executive Director of the NSW Law Reform Commission into this email so that they can set aside any consideration of Figure 2 in when conducting their review of the NSW Bail Act.

The Acting Chief Executive of Juvenile Justice NSW has written to Police Prosecutions acknowledging that the numbers in Figure 2 of the May 2009 BOCSAR report are in error and that monthly figures cannot be compared to annual figures due to differences in how remand periods that are converted to sentenced custody are represented.

Accordingly, the NSW Police Force submits that any conclusion regarding the impact of section 22A drawn from those figures is unreliable.

Even if s.22A caused a rise in the length of time spent on remand soon after its introduction, the above 5 year breakdown of the length of stay for young people in custody on remand shows that in the next reporting period after that (depicted in Figure 2 above) that the length of stay on remand reduced to levels below that in place prior to the introduction of s.22A. Anecdotal evidence suggests that legal practitioners were not making applications at the first instance in apprehension of being denied a further application. Such apprehension appears to have dissipated, perhaps by virtue of the 2009 amendments to s.22A.[29]

7.3: It is submitted that amendment should be made to section 22A(5). Legal practitioners should not make further applications for bail unless the application meets the requirements of section 22A(1A). It is inappropriate to legislate for legal practitioners to have discretion in this respect. Their duty to the court is paramount.[30] The legislation should reinforce the responsibility of legal practitioners to, 'ensure the

[29] *Courts and Crimes Legislation Amendment Act 2009* Sch.2
[30] *Giannarelli v Wraith* (1988) 165 CLR 543

proper and efficient administration of justice.'[31] Prior to the introduction of section 22A magistrate shopping for bail applications was a genuine issue.[32]

Accordingly, section 22A(5) should be amended as follows:

> *If a court has previously dealt with an application for bail for a person accused of an offence, a lawyer* ***must*** *refuse to make a further application to the court on behalf of that person if there are no grounds for a further application for bail.*

Preserving a right to make applications for bail in the circumstances as contained within section 22A(1A) is distinct from making such applications as are *reasonably necessary*. The latter is so general and ambiguous that it will do little to impose restriction on further bail applications to promote the objective of preventing unnecessary bail applications and magistrate shopping.

Question 8 – Criteria to be considered in bail applications

8.1: Not unlike the original *Bail Bill 2010* public consultation draft,[33] the NSW Police Force favours bail legislation that does not set specific criteria to be considered in bail applications. Bail legislation that sets an objective,[34] supplements this objective with an indication of what the fundamental principles of bail are (as discussed at Q.1), provides for the power to grant bail,[35] allows the decision maker (police/registrar/court) to set bail conditions[36] then make a bail decision in line with the Object/s of the Act[37] and presumptions on bail,[38] provides for a simple straight forward process, unencumbered by convoluted issues of exclusivity of bail criteria, primary plus secondary criteria and subsidiary considerations. The latter issues appear to be inconsistent with providing a 'plain English' model not encrusted with complexity.

If criteria are to remain, those currently within s.32 appear appropriate.

8.2: Nil response

8.3: No. If current criteria remain, the present test to be applied is that the decision maker takes into account certain matters so far as they can be reasonably ascertained based on evidence or information that they consider credible or trustworthy.[39] To introduce overarching tests that appear to provide for an onus on either party to prove

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[31] Law Society of NSW, Statement of Ethics, 28 May 2009 at http://www.lawsociety.com.au/ForSolictors/professionalstandards/Ethics/statement_of_ethics/index.htm (8.7.11)

[32] For a practitioner's perspective, refer to the contribution to the parliamentary debate by Mr Frank Terenzini, NSW Legislative Assembly *Hansard and papers* 29 October 2009 at 18999.

[33] b2008-092-40.d14

[34] *Bail Bill 2010* public consultation draft - b2008-092-40.d14 – cl.3

[35] *Bail Bill 2010* public consultation draft - b2008-092-40.d14 – cl.6

[36] *Bail Bill 2010* public consultation draft - b2008-092-40.d14 – cl.10

[37] *Bail Bill 2010* public consultation draft - b2008-092-40.d14 – cl.48

[38] *Bail Bill 2010* public consultation draft - b2008-092-40.d14 – Part 6 Div 2-5

[39] Bail Act 1978 ss.32(1) & (3)

'unacceptable risk' or 'reasonable grounds to suspect' does not give credence to the fact that a bail application is, after all, an interlocutory proceeding. Section.32(3) of the *Bail Act 1978* gives the decision maker appropriate leeway to give what weight they see fit to evidence or information provided when considering the criteria to be considered. Also see answer to Q3.11.

8.4: Assuming that the primary criteria are *Probability of Appearance*, *Interests of the Accused Person* and *Protection and Welfare of the Community,* if criteria to be considered on bail are to remain but be amended, then the fundamental principles as discussed at Q.1 should be the primary criteria to be considered on bail.

For example, the likelihood of the accused person interfering with evidence or jurors fits more neatly into the fundamental principle of *Preservation of the course or administration of justice* than it does the *Protection and Welfare of the Community.*

8.5: No. The decision maker should be able to take into account any matter relevant to the fundamental principles so far as it can be reasonably ascertained based on evidence or information that they consider credible or trustworthy.

8.6: Yes. Perhaps the legislation could provide for an Object akin to that proposed at Q.1, then detail immediately after, inclusively as opposed to exhaustively, categories that fall within each fundamental principle. For example:

> ***The object of this Act is to provide for a pre-trial process when there is question as to the control or deprivation of the accused person's liberty where the interests of the accused person are appropriately weighed against the interests of the community consistently in light of the strength of the prosecution case and likelihood of a custodial sentence.***
>
> *The interests of the accused person include:*
>
> > *(a) The Right to be at Liberty and*
> > *(b) The Presumption of Innocence*
>
> *The interests of the community include:*
>
> > *(a) Provision of an effective and efficient Judicial System,*
> > *(b) Preservation of the course & administration of justice,*
> > *(c) Protection of the Community,*
> > *(d) Promotion of effective law enforcement and*
> > *(e) Consistency in approach to bail.*

8.7: Yes.

8.8: If the suggested fundamental principles are employed, with regard to those pertinent to the community the following list of subsidiary considerations is not exhaustive:

Provision of an effective and efficient Judicial System	Risk of Absconding.
Preservation of the course & administration of justice	Risk of interference with jurors and/or evidence. Risk of Absconding. Risk of prejudicing the administration of justice.
Protection of the Community	Risk of interference with witnesses including victims. Risk of committing further offences whilst on bail.
Promotion of effective law enforcement	Providing for bail conditions that allow police officers to check compliance with other bail conditions. Providing for bail conditions that are not more onerous than necessary and only seek to eliminate or control the immediate risk posed by the accused person.
Consistency in approach to bail	

Otherwise, if the current primary considerations remain, the current subsidiary considerations appear appropriate subject to the discussion in Q.8.9.

8.9: No, in relation to each primary criterion - see answer to Q8.1

It is noted that the decision of the Bail Bill round-table was to restrict the primary consideration of Protection and Welfare of Community by making the subsidiary considerations exhaustive and not including 'any other relevant matter' as a subsidiary consideration. The basis for this argument was an apprehension that the bail authority may take into account the risk the accused person will commit further offences whilst on bail as opposed to further *serious* offences.

The NSW Parliament has previously demonstrated an intention to combat the growing category of accused persons who commit less serious crimes repeatedly and, by mechanism of law which creates a neutral presumption for offences that would ordinarily carry a presumption in favour of bail, compel the court to take into account the risk of commission of any further offence on bail.

Moreover, in circumstances where the *Crime (Sentencing Procedure) Act 1999* provides commission of an offence on conditional liberty as an aggravating feature,[40] the risk that a person will commit an offence on bail can be viewed as a factor in determining the likelihood of a custodial sentence attached to any future offence.

The risk indicia for a person committing further offences on bail include their criminal antecedents. Section 32 of the *Bail Act 1978* and the subsidiary considerations under the primary consideration of Protection and Welfare of the

[40] s.21A

Community within the *Bail Bill 2010* public consultation draft[41] to varying extents and in varying circumstances require the decision maker on bail to take into account the accused person's prior criminal record. BOCSAR have published research papers that indicate that a prior conviction is a predictor for whether or not a person will re-offend.[42]

In circumstances where one of the fundamental principles of bail is the Protection of the Community and accused persons who commit less serious crimes repeatedly infringe this fundamental principle, whilst not making it a singularly determining factor, providing for a mechanism whereby the decision maker on bail can consider the risk the accused person will commit any offence on bail after examining at least their criminal record is appropriate.

8.10(a): Yes. Otherwise police may be exposed to an expectation to release a person on bail in circumstances where such release would infringe their legislated duty to protect persons from injury or death.[43]

8.10(b): It should operate as a reason to refuse bail as an accused person in such a state is not in a position to understand and therefore comply with the requirements of any bail condition put in place to mitigate the risk they pose to the fundamental principles of bail pertinent to the community.

8.11 Nil response.

Question 9 – Bail conditions

9.1: The scope of the power to impose bail conditions must be wide enough to deal with any situation that threatens any of the fundamental principles outlined in the answer to Q1. Police and courts need flexibility to impose conditions that suit the individual case.

9.2: An appropriate purpose of bail conditions is to control, eliminate or mitigate the immediate risk (as determined on each occasion the accused appears at court) that the

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[41] B2008-092-40.d17 10 November 2010

[42] *Overall, it is clear that the majority of those who are convicted in the NSW criminal courts are eventually reconvicted of a further offence, and this is especially so for juveniles* - Jessie Holmes, Re-offending in NSW – *Crime and Justice Statistics Bureau Brief, BOCSAR, No 56 Feb 2011 at 5* http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/bb56.pdf/$file/bb56.pdf (20.7.11); *Juvenile offenders placed on supervised orders were more likely tore-offend if they are 14 years of age or younger, were not at school at the time of their index offence, if they had been suspended or expelled from school or if they had a number of previous contacts with the criminal justice system.*

A large number of routinely recorded factors were found to be associated with the risk of further offending. These included... having been convicted of a theft offence and having had several prior contacts with the justice system -
Don Weatherburn, Rachel Cush and Paula Saunders, 'Screening juvenile offenders for further assessment and intervention' - *Crime and Justice Bulletin,* BOCSAR, No. 109 August 2007 at 8, 9 http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/cjb109.pdf/$file/cjb109.pdf (20.7.11)

[43] *Police Act 1990* s.6

accused person poses to the fundamental principles pertinent to the community identified at Q1.

9.3: The only limitation should be that bail conditions not be more onerous than necessary to:

- meet the Object proposed at Q.1.2, or
- preserve the fundamental principles pertinent to the community outlined in the answer to Q.1 based on the risk posed.

9.4: Yes. See answer to Q.9.2.

9.5: Yes it should. See further the response to Q10.

With specific emphasis on the requirement that the promotion of law enforcement be "effective" then, as noted in response to Q6 and Q10, bail conditions should only be put in place or continued if the judicial officer is of the view that breach of the condition or conditions imposed should result in a revocation of bail. To do otherwise suggests that the condition/s are more onerous than necessary and do not reflect the immediate threat the accused person poses.

Accepting the fundamental principles pertinent to the accused person, to arrest a person for breach of bail, hold them in a police cell overnight, then transport them to a Department of Corrective Services or Juvenile Justice facility costs the NSW Police Force a lot of time, resources and money. To have these persons routinely granted bail following a breach does not constitute effective law enforcement.

Whilst the NSW Police Force objects to any restrictions to the power of arrest for breach of bail and therefore the creation of a new category of false imprisonment (as per our response to Q10), any attempt to do so must be with the intent of providing for more effective law enforcement. If legislative guidance as opposed to legislative restriction is provided for as suggested at the answer to Q.10.6, this also must be with the intent of providing for more effective law enforcement.

Bail legislation that specifically allows for the promotion of effective law enforcement through the imposition of bail conditions that can be effectively policed is vital. The imposition of bail conditions that can be enforced is an important mechanism for reducing the level of crime, anti-social behaviour and re-offending by persons on bail.

For example, the condition giving foundation to bail compliance checks that an accused person or juvenile present themselves at the front door of the premises they are bound to be residing at in line with a corresponding curfew condition. Currently s.37(1) of the *Bail Act 1978* allows for the imposition of such conditions.

9.6: Provided that promotion of effective law enforcement is accepted as a fundamental principle pertinent to the community, then yes, the question of whether to grant bail and the question of what conditions to impose should be seen as the one process, with the same considerations being applicable to both aspects of the process.

Still, further considerations should be those within the answers to questions 9.1, 9.2 and 9.3, particularly with reference to ensuring that conditions are not more onerous than necessary and to control, eliminate or mitigate the immediate risk that the accused person poses to the fundamental principles pertinent to the community.

9.7: No and No. The power needs to be wide enough to deal with any situation that threatens one of the fundamental principles outlined in the answer to Q.1. Police and courts need flexibility to impose conditions that suit the individual case.

9.8: There is not a 'standard' set of circumstances for each bail application therefore there should not be a set of standard conditions. Provided that they are consistent with the purposes of imposing conditions, the decision maker should be able to put in place bail conditions that meet any set of circumstances.

9.9: No. This requirement would not be in the interests of an efficient and effective criminal justice system. Such a requirement, especially on weekend and public bail court days, will serve to lengthen court sitting times that already cause significant cost to various government departments, most notably the Department of Corrective Services, and therefore the community.

The way to ensure that curfews, financial forfeiture and such like conditions are appropriately imposed is through eduction rather than legislation.

9.10: If the decision maker meets his or her obligation to ensure that any condition is not more onerous than necessary to either meet the Object proposed at Q.1.2 or preserve the fundamental principles pertinent to the community outlined in the answer to Q.1 based on the risk posed, then there is no need for a further requirement that a 'special' condition be reasonable in the circumstances.

Adding another layer of consideration for the decision maker will also serve to further complicate the bail legislation. This appears to be contrary to this review's aim of simplifying the legislation (as per point 0.6 of the Paper).

9.11: Conditions allowed for by virtue of section 36(2)(a1) are not required to be put in place and s.36(2) specifically provides for such a requirement to be considered along with other possible requirements as to conduct on bail. Section 36(2) reads:

> *Subject to sections 36A and 36B, one or more of the following conditions only may be imposed on the grant of bail...*

This is the current list contemplated by questions 9.7 and 9.8. It is exhaustive, but by virtue of the imputation of the word 'may' does not impose an obligation to place any particular one condition on the accused person.

9.12: Whatever the mechanism for imposing bail conditions, there should be some written acknowledgement by the accused person that they know and understand the conditions imposed. In the absence of this, accused persons will routinely argue ignorance of bail conditions in the course of any application to review bail.

9.13: The former. Requirements as to the person's conduct while on bail should be expressed as conditions on which bail is granted.

9.14: No. Requirements concerning the conduct of an accused person on bail should directly attach to the grant of bail. Bail conditions should only meet the immediate risk and not be more onerous than necessary.

However, arguably there are some bail conditions that don't attach directly to the grant of bail, for example, MERIT assessment conditions.

9.15: See response to Q9.12 and Q9.14.

9.16: See response to Q9.12.

9.17: A continuing power of arrest for breach exercisable in circumstances where the risk arising from the breach of condition justifies arrest and refusal of bail. Further, the accused person could acknowledge in writing that if they breach a condition of bail that they will be arrested and brought back to court to have their bail re-determined. Finally, consideration could be given to introducing a requirement for accused persons to self report any breach to the court. Compliance with such an obligation would obviate the need for arrest for breach.

9.18: Nil response.

Question 10 – Breach of undertakings and conditions

General preliminary observations:
The conditions of bail in place immediately prior to any breach should reflect the immediate risk the accused person will not attend court plus the immediate risk she/he poses to the victim, their relatives, any other person in need of protection and the community.

If, at the time of determination, the judicial officer is not of the view a breach of a condition or conditions imposed should result in a revocation of bail, the condition should not be put in place or continued. To do so would be more onerous than necessary and not reflect the immediate threat the accused person poses.

If bail conditions are not more onerous than necessary and reflect the immediate threat the accused person poses, one would expect a higher percentage of accused persons being refused bail after being arrested for a breach plus less accused persons being arrested for a breach. This expectation is not borne out in practice, particularly with juveniles.

It is difficult to obtain long term statistics electronically concerning applications to re-determine bail following an arrest for breach. However, on a random dip sample of three recent weekend children's bail courts the following emerged:

Date	No. of applications to re-determine bail	Initial Court determination = Bail Refused after application	Initial Court determination = Bail to Continue (no change)	Initial Court determination = Bail varied with more onerous conditions	Initial Court determination = Bail varied with less onerous conditions.
25/06/11	6	1	3		2
17/4/11	7*	3	3		
22/1/11	12*	1	9		1

* NB: the outcome of one application on each of these days was not able to be determined reliably after comparing COPS with Justicelink. What could be ascertained is that the application relevant to the 17/4/11 did not result in the accused person being bail refused.

Whilst accepting that this survey sample is not statistically representative, it does provide a snap-shot. Overwhelmingly, juveniles arrested for breaching their bail and brought to court to re-determine bail were released. Anecdotally, this is consistent with the experience of NSW Police Prosecutors.

It is worth considering whether the message communicated to accused persons, particularly juveniles, through this action is an appropriate one.

10.1: The power of arrest without warrant should remain under the *Bail Act*. Section 50 needs to be kept simple. There is no need to specify the role and powers of a police officer under this section with greater particularity.

10.2: The section should not specify the order in which an officer should consider implementing the available options as this would affect the power of discretion. The NSW Police Force opposes the creation of a further category of false imprisonment based on restrictions imposed on the power of arrest for breaching bail conditions.

10.3: Section 50 may specify considerations to be taken into account by a police officer when deciding how to respond under the section. They should be in the form of considerations, not restrictions.

10.4: No criteria for arrest without warrant should be specified. The NSW Police Force objects to "criteria" if by that term it means that restrictions are placed upon arrest for breaching bail akin to section 99(3) of LEPRA, resulting in the creation of a further category of false imprisonment.

10.5: No.

10.6: No.

The NSW Police Force does not advocate that police officers should arrest all accused persons found to have breached their bail on each and every occasion. However, there should be a clear distinction between the decision to arrest in the first instance and the decision to arrest once a person is on bail conditions and subsequently breaches them. This is the current position when one combines section 5 with sch.1 of the *Law Enforcement (Powers and Responsibilities) Act 2002.*

Dr Vasilis Sarafidis in his seminar, "The impact of the NSW criminal justice system on crime" (part of BOCSAR's 2011 seminar series) stated:[44]

> *Our findings suggest that the criminal justice system can potentially exert much greater influence on crime than past estimates suggest.*
>
> *From a policy perspective, it appears that* ***targeting the risk of apprehension*** *and conviction are more effective strategies than increasing the severity of punishment.*
>
> ...
>
> and
>
> *... a 1 per cent* ***increase in the likelihood of arrests, is expected to reduce total crime*** *by 0.87 per cent in the short term and 1.3 per cent in the long-term*

These findings must call into question policy that arrest should be a last resort, particularly when one considers that the class of persons dealt with under section 50 of the *Bail Act* are less numerous but pose a greater risk than those persons dealt with by section 99(3) of the *Law Enforcement (Powers and Responsibilities) Act 2002.*

These findings by Dr Sarafidis are supportive of the case studies within the February 2011 'Bail Compliance Review' conducted by the NSW Police Force Corporate Spokesperson, Custody and Corrections.[45] The monitoring of recidivist offenders through bail compliance targeting has been a successful crime reduction strategy utilised by the NSW Police Force for a number of years. Bail compliance checks increase an accused person's apprehension of arrest for failing to comply with bail conditions which are put in place to provide for an effective and efficient judicial system, preserve the course or administration of justice and protect the community.

Case study

During May 2010 D3, a juvenile offender, was on bail for 3 sets of charges. Amongst other matters, the bail conditions imposed a curfew and stipulated that D3 reside at a specified address. Police conducted regular bail compliance checks on the juvenile. These were at varying hours, predominantly late night or early morning.

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[44] http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/pages/bocsar_seminar_series (8.7.11)

[45] South West Metropolitan Region Intelligence Unit, *New South Wales Police Force Bail Compliance Review – Draft* (NSW Police Force, 2010).

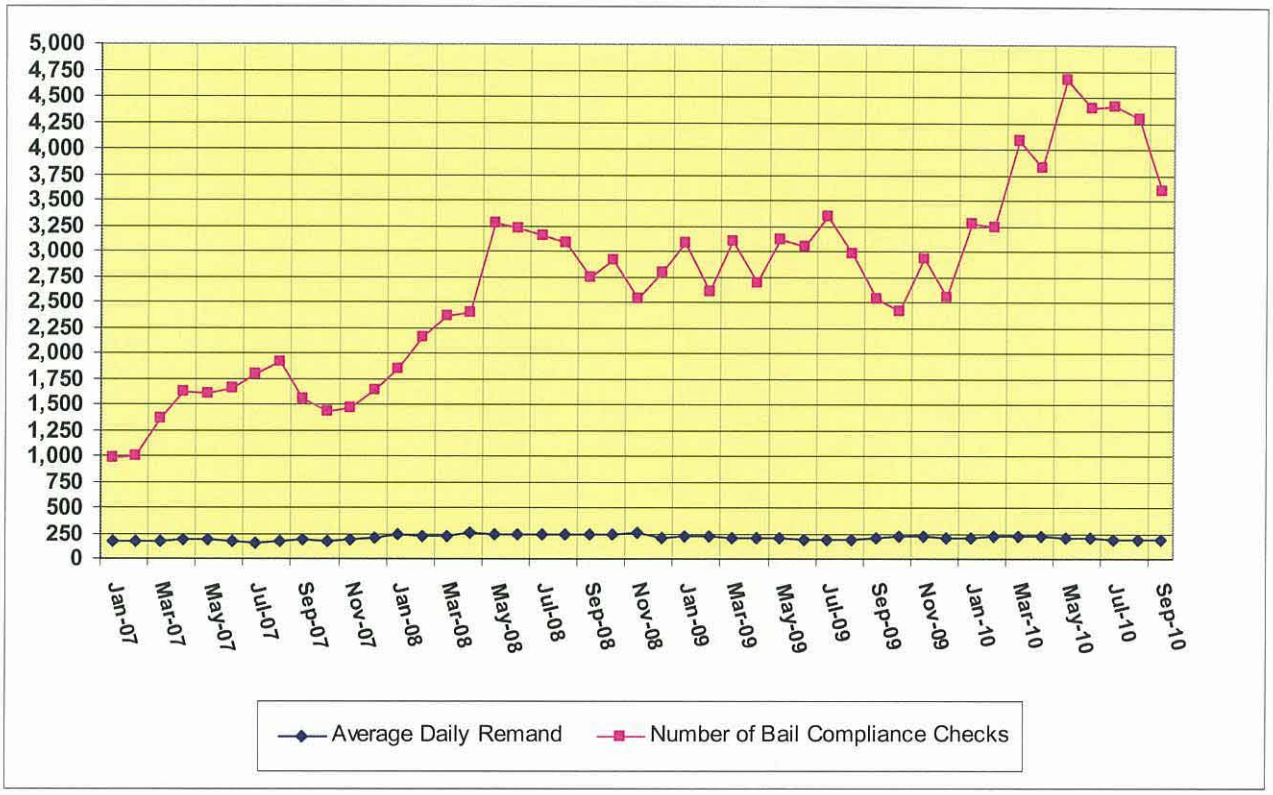
On the evening of 26 May 2010, a group of males met at the juvenile's residence. During this meeting the males agreed to commit a home invasion. The address of the home invasion was approximately 400-500 metres from the juvenile's residence. A group of seven males armed themselves with weapons including a rifle and committed the home invasion. Police responded to the incident and arrested the offenders.

Follow up inquiries reveal that D3 was offered the opportunity to participate in this home invasion, but he declined because he was fearful of police attending his home on a bail compliance check whilst he was absent. It is of significance that it was not the seriousness of the offence that deterred him, but rather **the fear or apprehension of police targeting him through a bail compliance check and being arrested for failing to comply with bail conditions that prevented him from re-offending.**

A number of people and forums have suggested that the NSW Police Force practice of conducting bail compliance checks on juvenile offenders, and the subsequent arresting and charging of juveniles who are breaching their bail, was a major contributor to the increase in the juvenile remand rate from 2006 to 2008.[46]

The following chart demonstrates that the average daily remand rate has remained reasonably steady since January 2007, hitting a peak average of 252.83 in November 2008 dropping to 192.03 in September 2010.

[46] This suggestion has been raised on a number of occasions, including Vignaendra, S., Moffat, S., Weatherburn, D., and Heller, E., BOCSAR Crime and Justice Bulletin No 128, *Recent Trends in Legal Proceedings for Breach of Bail, Juvenile Remand and Crime,* May 2009, p.4; by several members of the Criminal Justice CEO's Juvenile Remand Working Group; and reiterated repeatedly within independent non-Governmental organisation's reports, such as the UnitedCare Burnside report, *Releasing the pressure on remand: Bail solutions for children and young people in NSW,* July 2009 pp.1-16; the Youth Justice Coalition's *Bail Me Out: NSW Young People and Bail,* February 2010, pp.1-48; and the Noetic Solutions Pty Ltd, *A Strategic Review of the New South Wales Juvenile Justice System – Report for the Minister of Juvenile Justice,* April 2010, p.70.



Note: Average Daily Remand data above provided by Juvenile Justice. Number of Bail Compliance Checks conducted extracted from NSWPF EDW system.

Significantly, between January 2007 to September 2010, there has been approximately a **400% increase** in the recorded number of bail compliance checks conducted by police as per the NSW State Plan requirements; and yet the **juvenile remand rate has dropped and remained steady**, and at the end of the reporting period was at its lowest rate since 2007.

Whilst we do not currently have statistics with regard to adults, 43.1% of the 1789 juveniles charged with Breach of Bail in the 2008-2009 financial year were also charged with another offence in conjunction with the breach of bail. This figure does not take into account those offences which were committed whilst on bail but not detected until after the breach of bail or those offences which occurred and were not detected at all. Allowing for the likelihood that an unknown portion of recidivist offenders are continuing to commit crime whilst on bail, it is probable that at least 50% of juveniles charged with breaching bail are committing additional offences whilst on bail.

As noted earlier, it should be the responsibility of the courts to impose or continue bail conditions that are no more onerous then necessary and which reflect the immediate risk posed by the accused person. It is not, and should not be, an operational police officer's role to second guess, at the time of detected breach, the appropriateness of a bail condition put in place by a member of the judiciary or a more senior police officer. Any bail law that places restrictions on the power of police to arrest for breach of bail creates a new category of false imprisonment, invites errors to be made by operational police and increases the complexity of policing.

On police issued bail conditions, the current *Bail Act* does not allow police officers of lesser rank to review a decision to refuse bail. The draft *Bail Bill 2010* did not allow police officers of lesser rank than the Sergeant, or officer for the time being in charge of a police station, setting the bail conditions to review them. It is incongruous that the *Bail Act* would prohibit such review in one section and allow for it in another through the operation of restrictions that ultimately require a more junior operational police officer to assess the same risk the more senior police officer assessed, but in extraneous circumstances.

S.105 (2) of the *Law Enforcement (Powers and Responsibilities) Act 2002* states:

> ... a police officer may discontinue an arrest in any of the following circumstances:
>
> (a) if the arrested person is no longer a suspect or the reason for the arrest no longer exists for any other reason,
>
> (b) if it is more appropriate to deal with the matter in some other manner, including, for example, by issuing a warning or caution or a penalty notice or court attendance notice...

A clause similar in wording, but of different effect, to section 105(2) of the *Law Enforcement (Powers and Responsibilities) Act 2002* will give some guidance to operational police on how to exercise their discretion to arrest a person for breaching bail. This combined with education to operational police on how to use their discretion to arrest appropriately is a better approach than placing a restriction on the power of arrest for breach of bail.

In early 2011, Assistant Commissioner Mennilli, the NSW Police Force Corporate Spokesperson for Custody and Corrections, prepared an article for the purposes of educating operational police on the appropriate use of police discretion when making a decision whether or not to arrest a person for breaching their bail. This article included the following advice:

> There are instances in which police may determine it is appropriate not to arrest an individual for breach bail, for example, pregnancy or illness; or for very minor technical breaches that occur independently of the commission of other offences (such as minor lateness in reporting or curfews resulting from legitimate excuses).

The article also listed, in the following order, options for police to consider upon detecting a breach:

1. No Action – issuing a warning.
2. Making an application to the court to have bail re-determined under s.50(b) of the *Bail Act 1978.*
3. Arrest

Whilst the NSW Police Force's primary position is that the power of arrest for breach of bail remain untouched, if there were to be any criteria concerning such power, the relevant legislation perhaps could read:

> *(1) A police officer may, without a warrant, arrest a person who has been released on bail if the police officer believes on reasonable grounds that*

the person has failed to comply with, or is about to fail to comply with, the person's bail agreement.

(2) Without limiting the circumstances in which a police officer may choose not to exercise the power contained in subsection (1), a police officer ***may*** *choose not to exercise the power of arrest in subsection (1) or discontinue the arrest in any of the following circumstances:*

(a) if the police officer no longer believes on reasonable grounds that the person has failed to comply with, or was about to fail to comply with, the person's bail agreement;
(b) if it is more appropriate to deal with the breach in some other manner, including, for example, by issuing a warning or caution.

(3) When considering whether it is more appropriate to deal with the breach in some other manner, a police officer ***may*** *take into account the following matters:*

(a) whether the breach is only technical in nature;
(b) if the breach is against a bail condition that the person report to a police station between certain times, whether the time of reporting is not unreasonably outside of these times;
(c) if the breach is against a curfew condition, whether the breach is not unreasonably outside the times set by the curfew and/or whether the location the person is detected committing the breach is not an unreasonable distance from the residence subject of the curfew; or
(d) whether the breach is reasonably explained by the person's pregnancy or illness.

(4) A police officer who arrests a person under this section must, as soon as is reasonably practicable, release the person on the person's original bail or take the person before a court to be dealt with according to law.

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

No change is considered necessary. In relation to 11.5 (whether an agency responsible for a relevant bail condition should provide a report or information to the Court addressing why the bail condition is unable to be met), this already occurs in practice.

Question 12 – Young people

The statistics regarding the rate of young persons on remand and the rate of young persons who later receive custodial sentences or control orders is concerning. It is also recognised that there are specific considerations pertaining to youth. From an operational policing perspective, the inability of the police or judiciary to appropriately control a young person in the home environment who may also be

considered a child at risk due to circumstances in that young person's home life is a contributing factor.

It should be noted that whilst the paper states (on page 4) that 84% of young people remanded in custody do not receive a custodial sentence, it is important that this figure, which derives from a submission by the Department of Juvenile Justice to the 2007 *Special Commission of Inquiry into Child Protection Services in New South Wales*,[47] be considered in context.

First, this statistic does not take into account that on many occasions time in remand is taken into account as time served upon sentencing and therefore no further custodial sentence is added. This is particularly pertinent to juveniles as their sentences tend to be shorter.

Moreover, the same submission reported:[48]

* 90% of juveniles were on remand because they were unable to meet conditions of their bail, spending an average of eight days in custody on 'remand'.

* 95% of those 'remanded' had court imposed bail conditions to reside as directed.

These figures suggest that it took an average of eight (8) days for the Department of Juvenile Justice to find a place for the juvenile to reside at other than a detention centre. It would appear, therefore, that the key factor accounting for the juvenile remaining in custody was the lack of available community based residence options available to the Department of Juvenile Justice and the young person rather than any operation of the *Bail Act 1978.*

Looking only at juveniles initially bail refused and remaining bail refused until finalisation, it is evident from the figures set out below that the majority of young persons remanded in custody in these circumstances receive a custodial sentence.

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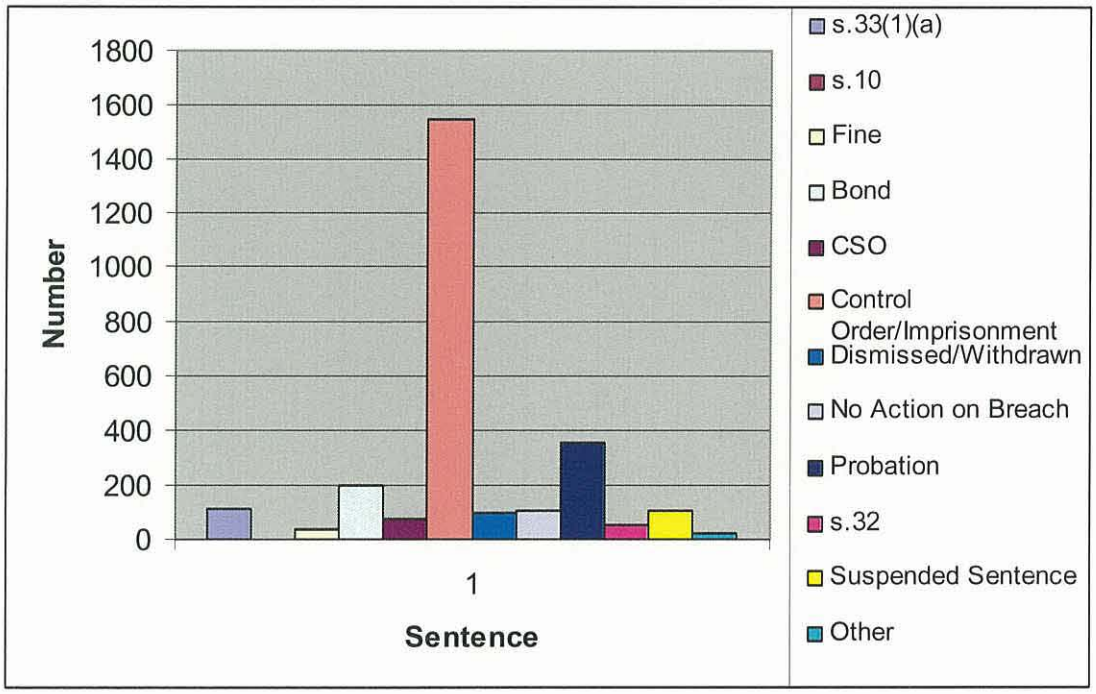
[47] Submission by Juvenile Justice to Wood J, *Special Commission of Inquiry into Child Protection Services in NSW* (2008) vol 2, [15.12] in NSW Law Reform Commission, *Young People with Cognitive and Mental Impairments in the Criminal justice System*, Consultation Paper 11 (2010) 28 at http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_cps (25.10.11)

[48] Submission by Juvenile Justice to Wood J, *Special Commission of Inquiry into Child Protection Services in NSW* (2008) vol 2, [15.12] at http://www.acwa.asn.au/kts/wood.html (25.10.11)

Total head sentences - June 2008 – May 2011 - for juveniles who were initially bail refused and remained bail refused until finalisation.

Size of sample: 2712

Sentence	Number	%
s.33(1)(a) *Children (Criminal Proceedings) Act 1987*	110	4
s.10 *Crimes (Sentencing Procedure) Act 1999*	1	
Fine	40	1
Bond	200	7
CSO	77	3
Control Order/Imprisonment	1551	57
Dismissed/Withdrawn	96	3.5
No Action on Breach	102	4
Probation	357	13
s.32 *Mental Health (Forensic Provisions) Act 1990*	51	2
Suspended Sentence	104	4
Other	23	1
Total	2712	



A large proportion of the matters dealt with under section 33(1)(a) of the *Children (Criminal Proceedings) Act 1987* were where the juvenile was initially refused bail by the police as the subsequent offence was committed whilst the juvenile was on bail for another offence.

Young people are responsible for a significant portion of high volume crime and there needs to be sufficient tools to deal with each individual case on its merits.

The NSW Police Force does not support a separate *Bail Act* relating to juveniles. The *Children (Criminal Proceedings) Act 1987* already provides guidelines as to how children are dealt with by courts, and applies to bail applications.

There are currently a number of trials in place to meet the needs of young offenders and aimed at diverting young offenders from custody. Examples include trial programs of Youth Conduct orders, Supporting Children and Supporting Families initiatives and the Bail Assistance Line (where alternate housing or guardianship can be arranged to allow a young person to be granted bail). The current Act has the flexibility to accommodate these initiatives.

If any changes in relation to juveniles are effected, the NSW Police Force submits that there should be provision to exempt particular categories of repeat juvenile offenders.

Should electronic monitoring be considered as an option for offences where bail might otherwise be refused, the number of juveniles on remand could be significantly reduced. Electronic monitoring would provide the police and the community with an alternative to detaining juveniles in remand centres and would be an efficient law enforcement aid.

12.8: There should be no special provision in relation to indigenous young people under the *Bail Act* over and above that which already exists (e.g. consideration of family ties). The needs of Aboriginal youth are taken into account in relation to their legal representation and custody arrangements in police stations in line with LEPRA. The *Bail Act* provides sufficient flexibility to police and courts to impose bail conditions that consider any special issues presented by the young person's aboriginality.

Question 13 – People with a cognitive or mental health impairment

The difficulty with expanding the range of people to which section 32(1)(b)(v) applies is the ability of the custody manager or other relevant police officer to identify these people accurately to apply the provision. Police are not medical practitioners and the verification process would be impractical. The ability to verify mental health impairment should remain with the judiciary who can have a person assessed.

The response to the following questions is subject to this caveat.

13.1: 'Intellectual disability' refers to one particular kind of cognitive impairment. There are a range of other cognitive impairments that could affect a person's understanding of and ability to comply with bail conditions, such as dementia, acquired brain injury or autism spectrum disorders.

The term 'intellectual disability' is inconsistent with the definitions used in LEPRA of 'impaired intellectual functioning'. The term 'impaired intellectual functioning' is

more inclusive, and refers to the effects of a person's disability or disorder on their understanding of the interview process.

If there is to be a change to the definition of 'intellectual disability', it should be consistent with the LEPRA definition to ensure consistency across police practice when dealing with offenders with impaired intellectual functioning. Accordingly, the NSW Police Force recommends the use of the term 'impaired intellectual functioning'.

13.2: LEPRA and NSW Police Force custody practice already outline that where police suspect that a person may have impaired intellectual functioning or be mentally ill or mentally disordered persons, the Custody Officer/s will arrange to contact a 'support person'; ensure that bail conditions are suitable; and that the accused person can understand them.

These protections are suitable at the level of police bail. These protections allow for the accused person to be supported through the interview process. The support person should assist the accused person to understand the nature of the bail conditions. The use of support person provides a comprehensive set of protections for persons with a cognitive impairment, and/or mental illness or mental disorder to assist in understanding and complying with their bail conditions.

13.3: Whilst the onus is still on Police to clearly explain bail and or conditions imposed to all accused persons in custody, that responsibility is shared with the support person (if nominated) in the case of intellectually impaired and/or mentally ill/disordered persons.

It would greatly assist police if people with impaired intellectual functioning engaged with a support person and/or support services, so that they can fully understand their bail conditions, and receive support to comply with them. However, it is noted that a person with a mental condition may choose to decline to nominate a support person.

There is no need to amend bail law to arrange this. This can be ameliorated via policy, education and training.

Question 14 – Indigenous people

The key issue is that bail conditions should be reasonable and achievable, i.e., a reasonable expectation that they can be complied with, if not immediately then in a certain timeframe.

One of the most significant disadvantages confronted by Aboriginal people with regard to the *Bail Act* is access to funds to meet a monetary bail condition. In addition, over recent times there has been reliance by some courts when determining bail to set conditions excluding an individual from their community. Whilst this may pose some inconvenience for those residing in metropolitan or regional cities the impact upon those residing in remote rural communities poses a significant challenge in finding accommodation and surviving day to day at another location.

Still, the protection and welfare of the aboriginal community in which the accused person may reside should be the primary consideration. Restricting the ability to place conditions on accused persons that exclude them from a residence or prohibit them from approaching a family member or person within their community in appropriate circumstances relegates the principle of the protection and welfare of the community.

14.1: No

14.2: Yes, but only if the report is available and provision will not jeopardise the efficiency of the judicial system. Whilst a report from a group providing programs or services to indigenous people may be a useful tool for a court in making a bail determination, this should be an option rather than a mandatory requirement.

14.3: Nil response

Question 15 – Duration of bail

15.1: The NSW Police Force supports the inclusion of an explicit provision 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.

Question 16 – Review of bail decisions

16.1: Yes, there should be provision for such a review, but only after service of application to review on all interested parties a reasonable time before the application is heard. Time and time again, police prosecutors are served with applications to vary bail in court minutes before the application is heard. This is simply unfair and places the police prosecutor in an invidious position.

16.2: Nil response

Question 17 – Structure of the Bail Act

The NSW Police Force supports streamlining the structure of the Act, though the detail of this is subject to discussion on risk management model at meeting of 5 August 2011.

Question 18 – Plain English

The NSW Police Force does not support a change to the name of the Act. The use of simple language that avoids misinterpretation and aids understanding is supported, however, any changes should be clear and unambiguous and not alter the intent of any specific section.

18.1: Refer to comments on interplay of Divisions 2 and 3 of Part 2 in Q2.2

18.2: No

18.3: No

18.4: No

Question 19 – Forms and processes

19.1: Refer to comments on review of/applications to very bail application in Q16.

19.2: No

Question 20 – Other submissions

1. The wording of the current Section 9A of the *Bail Act 1978* and the proposed wording of Schedule 1, Part 3, section 14 in the public consultation draft of the *Bail Bill 2010* both relate to domestic violence offences and both contain the same anomaly as reproduced below:

> **9A Exception from presumption in favour of bail—certain domestic violence offences and offences of contravening apprehended domestic violence orders**
>
> (1) This section applies to the following:
>
> (a) any **domestic violence offence**,
> (b) any offence of contravening an apprehended domestic violence order by an act:
> (i) involving violence, or
> (ii) that would constitute an offence against section 13 of the *Crimes (Domestic and Personal Violence) Act 2007* or section 545AB or 562AB of the *Crimes Act 1900*.

> **14 Domestic violence offences**
>
> (1) The following offences are level 3 offences if the bail authority is satisfied that the person who committed or is alleged to have committed the offence is a risk to others:
>
> (a) a **domestic violence offence**,
> (b) an offence of contravening an apprehended domestic violence order by an act that involves violence or conduct referred to in section 13 of the *Crimes (Domestic and Personal Violence) Act 2007* or section 545B of the *Crimes Act 1900*.

"Domestic violence offence" is defined by section 11 of the *Crimes (Domestic and Personal Violence) Act 2007* as a personal violence offence (defined in section 4 of the same Act) committed within the auspices of a domestic relationship (defined in section 5 of the same Act). The offence of breach AVO (section 14 of the Act) is a personal violence offence

The anomaly in both the current and proposed new legislation is that each subsection (b) relates to an offence of breach ADVO involving violence, stalking or intimidation whereas each subsection (a) includes the offence of breach ADVO by virtue of it being a domestic violence offence. Therefore (a) not only encompasses (b) but expands upon it to include breaches of ADVOs that do not involve violence, intimidation or stalking.

This review provides an opportunity to overcome this anomaly and ensure the law of bail is straight forward as per the terms of reference of the review

2. A thorough examination of the success of otherwise of electronic monitoring devices is recommended both as part of bail conditions and in sentencing in other jurisdictions such as the UK, Toronto and WA. This initiative has the potential to impact positively on reducing the number of people on remand and in custody, whilst still promoting effective law enforcement and protecting victims, witnesses and the greater community.

APPENDIX A

A Risk Management approach to decisions on bail

At the outset, the NSW Police Force does not endorse the risk management approach within the *Bail Act 1977* (VIC). If a risk management approach is adopted, the preferred approach is that each determination on bail be supported by a simple straightforward process, unencumbered by presumptions.

The Object at Q8.6 and, if subsidiary considerations are to be employed, those at 8.8 could be employed to form a structure of the Act, i.e.:

1. **Object**

2. **Inclusive indicia** of the *Interests of the Accused Person* and *Interests of the Community*.

3. **Risk Assessment Process** - looks at the likelihood and consequence of something relevant to the subsidiary considerations happening and weighs these against the strength of the prosecution case and likelihood of a custodial sentence.

4. **Risk Management Process** - looks to control or eliminate the risk by:

- Bail refusal - high risk & medium risk where conditions cannot control or eliminate the risk
- Conditional Bail - medium risk & low risk where unconditional bail cannot control or eliminate the risk
- Unconditional Bail - low risk
- Bail dispensed with - no risk

Risk Assessment

A 'right' decision on bail cannot be made without first conducting a risk assessment. This risk assessment process should be enshrined in legislation. Todinov states, "The purpose of risk analysis is to provide support in making correct management decisions."[1] Whilst Todinov applies risk assessment to engineering scenarios, his approach can be applied to decisions on bail.

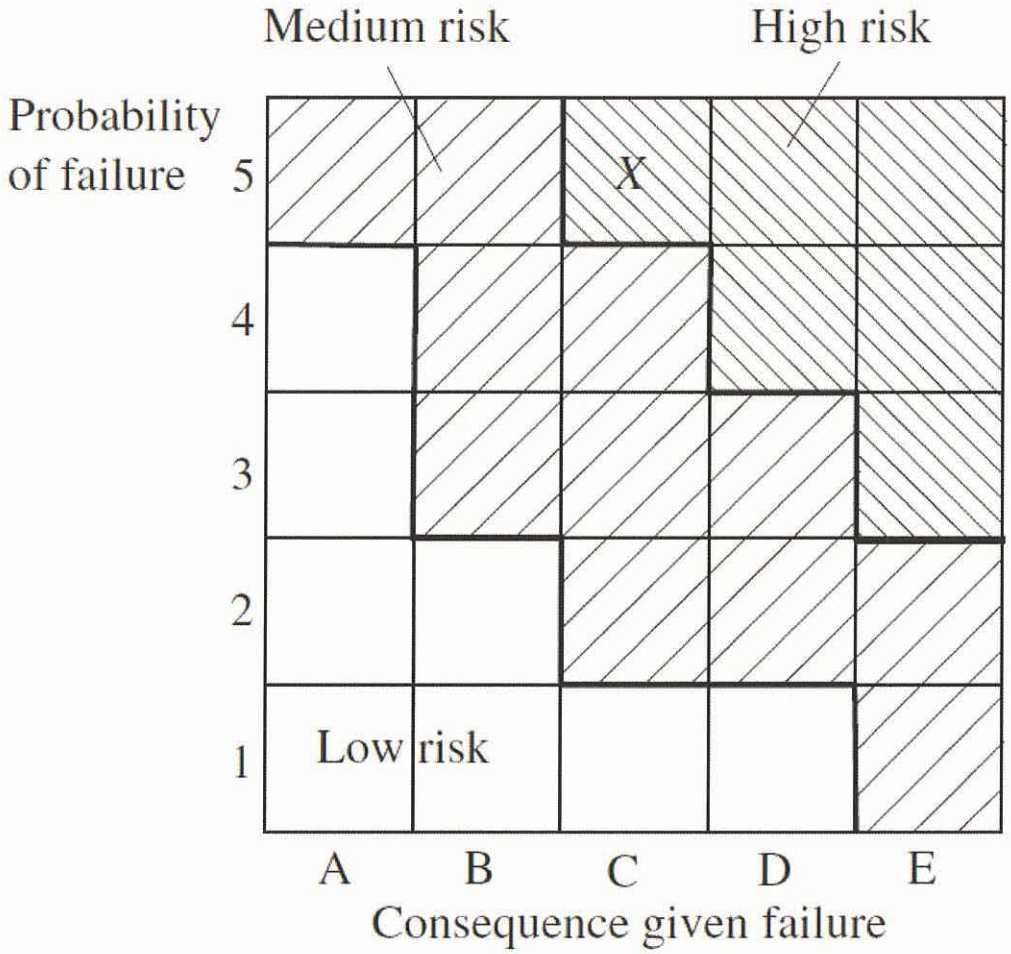
Decisions by magistrates and police officers on bail are qualitative and somewhat subjective. Whilst we can produce quantitative statistics on the percentage of accused persons who, for example, commit further offences whilst on bail and who ultimately receive a sentence of imprisonment, it would be inappropriate to attach these statistics to each individual person who applies for bail. Each application for bail should be decided on a case by case basis. Todinov labels a qualitative approach to risk

[1] Todinov M T, *Risk-Based Reliability Analysis and Generic Principles for Risk Reduction,* Elsevier, Amsterdam, 2007 at 59.

management as, "less precise"[2] compared to other quantitative approaches. A purely subjective qualitative approach to decisions on bail may not only produce errors but inconsistency. Considering that the use of presumptions on bail may be dispensed with, if magistrates and police officers are simply given a carte-blanche discretion on bail based on a set of considerations, errors and inconsistency may result.

To overcome errors and inconsistency attached to a purely qualitative/subjective approach to decisions on bail, one may employ Tove's *semi-quantitative risk analysis:*[3]

FIG A



A set of scores p1, . . . , p5 are assigned to the ranked probabilities of failure and another set of scores cA, . . . , cE to the ranked consequences given failure. The product of the scores expressing the likelihood of failure and the consequence from failure gives the risk score. The risk scores measure the risk magnitude and can be used to rank risks associated with identified failure scenarios. Subsequently, the risks are segregated according to their magnitude. Suppose that the scores measuring the likelihood of failure are p1 = 1, . . . , p5

[2] Note 47 at 62.
[3] In note 47 at 63, 64

= 5 and the scores measuring the consequences given failure are cA = 1, . . . , cE = 5. In Fig. A, squares with scores greater than 14 define the high-risk region, squares with scores smaller than 5 define the low-risk region while squares with scores between 5 and 14 define the medium-risk region. For a single failure scenario, the risk-assessment procedure works as follows. The **likelihood** and the **consequences** associated with the failure scenario are ranked by using scores and the product of these scores gives the risk score. If the risk score defines a square in the low-risk region, the risk is so low that it is considered negligible and no response is required. If the square representing the risk is in the high-risk region, the risk is considered intolerable. For example, a failure scenario with likelihood score 5 and consequence score 3 produces a risk score of 15 and defines a square marked by 'x' in the high-risk region (Fig. 4.4). Risk reduction measures are required to exit this region.

Risk represented by a square in the intermediate region, requires risk reduction measures to reduce it to a level which is as low as reasonably practicable (ALARP).'

In the context of bail, a *failure scenario* is where something relevant to a subsidiary consideration happens, for example, the accused person fails to attend court or commits a further offence whilst on bail. In the context of the latter, the consequence score will vary depending on the seriousness of the projected offence; the likelihood on the accused person's criminal record. In the context of the former, the consequence score will depend on whether the offence may be dealt with in the absence of the accused person (perhaps by fine) or whether a warrant would ultimately be issued, negatively effecting the efficiency of the administration of justice. Risk reduction measures can be correlated with bail conditions.

However, as Todinov explains, "In the very common case where the system can fail due to multiple failure scenarios", the above approach reveals a major weakness:[4]

'Often, each individual risk corresponding to the separate failure scenarios is in the low-risk region (therefore acceptable) which creates a dangerous perception of safety. In many cases, however, the aggregated risk from all failure scenarios cannot be tolerated. Despite that all individual risks may have low scores and for none of them a response plan is required, the total aggregated risk may not be acceptable.

...

...reducing each individual risk below the maximum tolerable level does not necessarily reduce the aggregated risk. A large aggregated risk from multiple failure scenarios, each characterised by risk below the tolerable level can be just as damaging as a large risk resulting from a single failure scenario.'

Applying this to bail, an accused person may not only pose a risk of committing further offences, but interfering with witnesses as well as being a flight risk. Whilst

[4] Note 47 at 64

bail conditions may be put in place to mitigate the risk of each individual subsidiary consideration, the remaining total aggregated risk may be too high to grant bail.

To overcome the said weakness, Todinov outlines the following steps in assessing the total aggregated risk of multiple mutually exclusive failure scenarios:[5]

1. Identifying all potential hazards and failure scenarios.
2. Estimating the probability of occurrence of each failure scenario.
3. Estimating the consequences (losses) from each failure scenario given its occurrence.
4. Estimating the risk associated with each failure scenario.
5. Estimating the total risk by accumulating the risks associated with the separate failure scenarios.
6. Comparing the estimated total risk with risk acceptability criteria.

The risk acceptability criteria relevant to a bail decision are the subsidiary considerations pertinent to the fundamental principles relevant to the accused person - strength of the prosecution case and likelihood of a custodial sentence. If the total aggregated risk is quite high, but the strength of the prosecution case or likelihood of a custodial sentence low, the risk acceptability criteria may be higher, resulting in bail being granted.

Risk Management

Todinov explains:[6]

> 'A basic step of the risk management is the identification of as many as possible failure scenarios, assessing their likelihood and impacts. After the total risk associated with the identified failure scenarios has been estimated, the focus is on making a decision. If the risk is low, the risk is accepted and no further action is taken. Otherwise, the risk must be transferred, spread or reduced.'

In the context of bail, risk management is performed by the operations of refusing bail, granting conditional bail, granting unconditional bail or dispensing with bail.

Not only may conditions on bail, or their projection, act to reduce risk at the assessment phase, but ultimately manage it.

[5] Note 47 at 65
[6] Note 47 at 81, 82