NEW SOUTH WALES COUNCIL FOR CIVIL LIBERTIES

Suite 43, 203 Castlereagh Street, Sydney, NSW 2000
T: 61 2 9286 3767 | F: 61 2 9286 3544 | Website: http://www.nswccl.org.au

# Response by the NSW Council for Civil Liberties to the Review of the Bail Act, 1978.

**Prepared by Max Taylor**

**Date submitted:** 27 Oct 2010

**INTRODUCTION**

The NSW Council for Civil Liberties believes that the best way of simplifying the Bail Act, 1978 is to restore the general concepts set out in the Report of the Bail Review Committee, 1976. That document, based on liberal democratic ideas provided the basis for the Act of 1978. The Report provided for a presumption in favour of bail for all crimes where there was not a right to bail. It did not propose a limitation on bail based on "exceptional circumstances" and it did not limit repeat applications for bail in the manner currently provided by section 22A. It proposed a Section 32 in relation to what should be taken into account that was not cluttered with unnecessary detail. 1. It is a matter of concern that 34 years after a Report referring to the correct tests for bail, (probability of appearance, interests of the accused and protection of the community) that a debate about these fundamental principles still needs to take place. That Report also pointed out the need for alternates to gaol for those not granted bail. What was simple has been made complex by three decades of political point scoring and law and order campaigns. The total effect of all the changes has been ever increasing numbers on remand and enormous cost in money, time and human injustice.

The Review points out at page 17 that the remand population has been rising for many years and that time on remand as at 30 June, 2009 was a mean time of 5.9 months and a median time of 3.4 months. Those on remand make up nearly a quarter of those in adult prisons. The Juvenile Justice Annual Report, 2008-9, indicates that on any day 50% of those aged 12 to 17 in such centres will be on remand. It also indicates that 78.3% of those with a remand episode will not receive a control order within 12 months. The Noetic Report, requested and obtained by the Government and not dealt with in the Review, concludes that a summary of international research showed that time spent on remand is the "most significant factor in increasing the odds of recidivism." 2. The Review on pages 79 confirms much of the factual base for the crisis concerning the number of juveniles on remand. The Review confirms that aboriginal people make up a disproportionate number of those on remand. It points out that between 2001-2 and 2005-6 there was a 25% increase in the number of Aboriginal and Torres Straight Islander young people being remanded to NSW juvenile detention centres. (See page 74). The

Review on pages 18 and 19 indicates the significant number of people in Local and Higher Courts who are refused bail and then have all charges dismissed.

It should also be noted that limited education resources in Corrective Services have to be allocated according to most effective use. A leading TAFE educator has noted, “The fact remains that unless offenders released into the community have the skills needed to obtain and keep a job, they may well find themselves back in the same circumstance that produced their criminal behaviour in the first place. Research supports the premise that imprisoned individuals are disproportionately and increasingly under educated, with low skills in the basics of reading, writing, maths and oral communication.” The author goes on to point out that “Remandees, unless they self refer will generally be excluded from educational contact.” 3. That persons on remand represent a significant part of the gaol population raises serious questions given the limited nature of educational resources. The 1976 Report makes many references to the poor, (see for example page 10). 34 years on the poor continue to be a fundamental concern when considering reform of Bail laws. Colleagues in the welfare area point out that many leave gaol with debts to Centrelink because suspension of payments which occurs on incarceration will not be the subject of instant reporting. The Review acknowledges the hardship for those on remand in relation to family and employment. (See page 21). Any doubt about the significance of poverty in Australia is quickly dispelled by the release of the Salvation Army Report, Perception of Poverty, released on 18 October, 2010. “The report – ‘Perceptions of Poverty’ – shows 2 million Australians now live in poverty – 1 in 10 of us.” 4. A Bail Act should never lose sight of who the majority of those seeking bail are.

The financial cost of keeping huge numbers on remand in NSW is a drain on money that could otherwise be used for health, education and welfare both within gaols and Juvenile Justice Centres and in our schools and TAFE colleges. The Review points out that it costs $187.14 for open custody and $216.85 for secure custody for adults. In juvenile custody the figure is $543. (See page 21). As the Chief Judge of the District Court pointed out in his recent address to the Legal Aid Conference:

"The economic impact of this imprisonment rate in New South Wales for the 2008-2009 financial year is shown in the budget for Corrective Services that year. It was $1.090.7 million = $1,090,700,000. In its Annual Report the Department estimated that it cost $205.94 per day to house a prisoner or $75,190 a year.

The question then to be considered is why in New South Wales we are spending 500 million dollars a year more than we would if we applied the same principles and practices as are applied in Victoria.

I do not believe the reason for the difference lies in the nature of the prison populations. It is reported in New South Wales that 22.2% of prisoners are from an aboriginal background and 21.8% are born outside Australia. I would not expect the Victorian experience to be greatly different.

However, in New South Wales 25% of the prison population is unsentenced. In Victoria the equivalent figure is 18%. That in spite of the fact there are significant delays in getting accused persons to trial in Victoria whereas in New South Wales the time from committal to trial is the shortest in Australia. The reason for the difference is clearly changes to the Bail Act in New South Wales creating presumptions against bail for many offences and removing the presumption in favour of bail for others. Changes to bail laws in this State have significantly been driven by particular incidents. The Bail act was passed in response to the number of prisoners on remand in the gaols." 5.
The Review confirms the marked difference between Victoria and NSW concerning persons on remand when it considers remand population in Australia on page 20. It states that the persons unsentenced and in full time custody in NSW as at June 2010, is 2778. The figure for Victoria is 861.

The Review notes that in 2008 "around 5.5% of accused persons in the Local Court failed to appear and warrants were issued for their arrest. In Higher Courts, the rate was around 0.2%." It then concedes "While these are significant reductions from 2001, where the rates were around 10.5% and 3% respectively, there is concern that some of these

accused persons continue to commit offences while on bail." (See page 22). The decline in failure to appear is set out in yearly figures from 2001 in the the NSW Parliamentary Library Briefing Paper, May, 2010. The percentage has declined in every year since 2001. 6.

Crime rates in NSW for many types of crime have been in decline for many years. The Bureau of Crime Statistics and Research has considered long term trends in property and violent crime. Crimes such as murder, individual examples of which have on a number of occasions led to changes in the Bail Act, have been in decline as a rate per 100,000, population, for two decades. Such crimes are terrible events. They do not justify savage changes of a general nature to the Bail Act. Robbery with a firearm has also been in decline for two decades. 7.

**Specific Issues.**

The specific recommendations are considered in the context of all the points set out in the introduction.

In relation to recommendation 1 on page 30, dealing with a new Act in plain English, this is desirable. However, it will not be possible until all the clutter and poor principles surrounding the presumption in favour of bail and the tests for bail, is removed.
In relation to recommendation 2 on page 32, dealing with additional information from the Bureau of Crime Statistics and Research, this is supported so long as BOCSAR is provided with adequate resources to undertake the task.

In relation to recommendation 3 on page 35, dealing with a schedule of classifications, a number of things need to be said. A schedule at the back of the Act may provide some convenience but it is a minor matter compared with the real issues. The presumption in favour of bail is a fundamental part of the presumption of innocence and the concept of liberty in our society. It was recommended in 1976 without modification where there was not a right to bail. It has been modified over the decades, on many occasions because of individual crimes or types of crimes such as bank robbery or particular murders. The politics of law and order have played an important part in the modification. None of this crime has justified the erosion of the presumption in favour of bail. A presumption in

favour of bail does not guarantee bail. The tests for whether bail will be provided are to be found in Section 32 not Section 9. It is inexcusable in a Western Liberal Democracy that a person should walk into a court with a presumption against bail or no presumption in favour of bail.

The Review makes reference to a recent Bureau of Crime Statistics and Research paper on bail presumptions and risk of bail refusal. That paper noted the following:
"The unadjusted risks of bail refusal for each of the bail provisions… were 48.6 per cent (exceptional circumstance), 20.9 per cent (presumption against) 29.0 per cent (presumption neutral) and 15.1 per cent (presumption in favour)." Having then introduced other controlling factors it noted, "The results in Table 2 show, as expected, that bail is less likely to be granted when the defendant:
Is male, has a larger number of concurrent offences, has a longer prior criminal record, is older, is in a case that is finalized relatively quickly, **has committed an offence where bail can only be granted in exceptional circumstance or where there is a presumption against bail.**" (Our emphasis). The paper goes on to note that "defendants whose offences fall into the 'bail neutral' category are more likely to be refused bail than defendants whose offences invoke a presumption against bail." The paper also notes that "…**while the presumptions have a significant impact on the probability of imprisonment, they do not have as large an effect as other defendant characteristics, such as large numbers of prior convictions and/or three or more concurrent offences. A short time period between initial court appearance and finalization also exerts a larger marginal effect than each of the three presumptions."**

The points found to have an even larger effect than the "significant impact" of the presumptions have all been in Section 32 of the Bail Act since 1978. In the original Act the time the person may spend in custody is found in Section 32 (b) (i) under the heading "the interests of the person…" The prior criminal record is found in Section 32 (1) (a) (i) under the heading "the probability of whether the person will appear…" The likelihood that the person will or will not commit an offence is found in Section 32 (c) (iii) under the heading "the protection and welfare of the community…" These and other traditional

criteria have always been significant. Comparing them with the presumptions which are also noted to be significant does not detract from the overall point. Moving away from the presumption in favour of bail has been significant and unnecessary. It has diminished us as a Liberal Democratic society. It has also caused anomalous results as the paper goes on to suggest. It notes that "defendants whose offences fall into the 'bail neutral' category are more likely to be refused bail than defendants whose offences invoke a presumption against bail." A suggestion put forward in the paper is the number of violent offences in the bail neutral category and the presumption against bail category being dominated numerically by repeat property offences. 8.

The presumption in favour of bail should be restored for all offences for which there is not a right to bail. Recommendation 4 on page 46 does not resolve this fundamental issue.

In relation to recommendation 5, found on page 48, dealing with Section 8, the deletion of the words "bail condition imposed" is supported.

In relation to recommendation 6, found on page 50, dealing with Section 32 and criteria to be considered when deciding if bail should be granted it is noted that the Review states, "The criteria to be considered in bail applications in s 32 were developed when there was a general presumption in favour of bail with a few exceptions. In determining bail, consideration must first be given to what, if any, presumption applies and then to turn to the separate consideration under s 32. There is now considerable overlap with the matters to be considered in s 32 and matters that affect the initial presumption."
Section 32 always dealt with three issues. Firstly, the probability of whether the person will appear. This included background, community ties, employment, criminal record, previous failures to appear, circumstances of the offence, nature and seriousness, strength of case, severity of penalty, specific evidence on probable appearance and a rating (later abandoned). Secondly, the interests of the person. This included the period spent in custody and the conditions under which it would be spent, need to be free to prepare the

case, free for other lawful purposes, personal danger, intoxication, drugs or injury. Thirdly, the protection of the community. This included failure to observe a reasonable bail condition, interference with evidence, witnesses or jurors, likelihood of offences on bail.

Given the extensive criteria, two questions arise. Firstly, why over the following 32 years was the presumption in favour of bail endlessly eroded? This has been dealt with above. Secondly, why so much duplication by way of clutter has been added to Section 32? The references to Aboriginal and Torres Straight Islanders in the section dealing with probability of appearance and interests of the person is appropriate. So are the references to age, intellectual disability or mental illness. However, why should there be a special reference under interests of the person back to Section 9B(3) which provides for an exception to the presumption in favour of bail? That section deals with previous conviction for indictable offences. This would be obvious from the criminal record which has always been required to be dealt with. Under the protection of the community why is there a need for a special reference to offences of a “sexual or violent nature” or possession of offensive weapons? The nature and seriousness of the offence is surely clear enough. It has also already been referred to in relation to probability of appearance. In relation to the likelihood of the person committing a serious offence there is reference to the need to consider whether the person has been granted bail, is on parole, has a previous record for offensive weapon offences if that is the type of charge being considered, faces a charge of a sexual or violent nature or involving an offensive weapon, the likely effect of the offence on any victim “and on the community generally” and the number of offences likely to be committed or for which the person has been granted bail or released on parole. Surely, all of these matters are covered by reference to criminal record and other information that would be provided to the court. Finally, because of the presumption sections dealing with presumption against bail and exceptional circumstances exist there is a need to explain how those sections interrelate to this section.

If the intention is to simplify the Act and put it into plain English then the restoration of the presumption in favour of bail combined with a common sense revision of Section 32 would go a long way to achieving this aim. The proposed checklist will simply add more detail of an obvious type to a Section already containing too much detail.

In relation to Recommendation 7, on page 51 dealing with clear objects it is suggested that clear objects are not the problem. The problem is the current state of the presumptions, the complexity of Section 32 and the effects of Section 22A discussed below. Any change that does not deal with those three issues will not achieve results desired.

Section 22A is referred to at pages 55 and 56 of the Review. It deals with second and further applications for bail. No changes are proposed. This is disappointing. In 2006 section 22A applied to the discretion of the Supreme Court to refuse to hear bail applications. In 2007 the power was extended to all courts and made mandatory in subsequent applications unless the person was not legally represented or new facts or circumstances had arisen.

Adult numbers on remand continue to rise but the result of Section 22A was most spectacular for juveniles. Firstly it should be noted that the Noetic Report requested by the Government found “no evidence that children and young people were making unnecessary bail application.” 9. The average length of juvenile incarceration per month while on remand jumped from 10 days to 33 days in 14 months. The Bureau of Crime Statistics and Research stated, “The discontinuity is so abrupt it would be superfluous to test its statistical significance.” 10. The Bulletin explains that there was an increase in the length of time juveniles remained on remand and this played a significant part in increasing the average length of stay per month.

The Bulletin also discussed police enforcement activity in relation to juveniles and breach of bail. The Report indicates “It is of course entirely appropriate that police enforce the law.” (Page 82). Noetic found that “A recent review of remand cases over a 3 month

period undertaken by Juvenile Justice found that 90% of children and young people on remand were unable to meet bail conditions in the first instance." 11. It then goes on to list what is being done to assist young people to comply with their bail conditions. Much of the crisis in the number of young people on remand and consideration of what is being done about it can be found in the Noetic Report. The Review discusses a number of initiatives taken to assist young people on page 82. Noetic also considered many of these issues including finding accommodation for young people with nowhere else to live and support services. It concluded, "Overall accommodation options for the placement of children and young people are limited and virtually non existent in rural NSW." 12. It supports an increase in funding to existing accommodation providers. The initiatives mentioned in the Review are simply not adequate and yet Section 22A continues to apply to young people. Noetic concludes that "The Government's current response of increasing juvenile justice centre capacity to deal with this trend is resulting in a more expensive system that produces poorer outcomes (e.g increasing the risk of re-offending." 13. The important point is that if there is not enough resource to deal with young people's inability to meet bail conditions why would society add to their problems by applying Section 22A to them. The original Act allowed a bail application at a maximum of every eight days. Being 12 to 17 years old should be enough to justify such applications. It does not guarantee bail. Additional burdens to have the matter reconsidered are not acceptable in a liberal democracy.

The Review indicates that the Government amended Section 22A. It states that there is now no need to change Section 22A because now it refers to non legal representation, new circumstances and new information. This still leaves hurdles for a 12 to 17 year olds to go through beyond being of the age they are. Adults should also be entitled to apply for bail on more than one occasion without being restricted by the provisions of Section 22A.

It is noted that Clause 40 of the Public Consultation Draft indicates that the period of adjournment where bail is refused and where there is no consent is to be increased from 8 to 42 days. This is an unacceptable change. It is reasonable to expect it will increase remand numbers for adults and juveniles. It will increase costs.

Recommendation 9 on page 59 concerning an information resource for those on remand is supported.

In relation to Recommendation 10, P 61, a pilot of electronic monitoring of accused persons who would otherwise be remanded in custody, the following provides a balanced response.

The Australian Institute of Criminology paper on electronic monitoring makes some important points in relation to surveillance and bail. Some of the points below are based on consideration of that material.

Bail is not a form of punishment. It is not to be more onerous than is necessary to ensure that the defendant appears for trial and does not commit further offences. See for example S 32 (1) (b) of the Bail Act referring to "…the conditions under which the person would be held in custody" and S 37 (2) referring to "Conditions shall not be imposed that are any more onerous for the accused person than appear…"

The reforms restoring the presumption in favour of bail, eliminating "exceptional circumstances", eliminating much of S 22A and reducing repetition in S 32 should all take place before any electronic monitoring is considered. This will lead to a considerable reduction in the number of adults and juveniles on remand. Otherwise, there is the risk of failing to restore a liberal democratic Bail Act and of increasing the use of remand via electronic surveillance as an alternative.
Electronic surveillance is invasive and raises serious issues concerning civil liberties. If there is to be electronic surveillance then at the pre trial stage "Electronic monitoring should, therefore, be confined to surveillance unless restrictions and detention are absolutely essential." 14.

A decision to provide for electronic monitoring should only be made by a judge or a magistrate after forming the view that bail is not otherwise going to be provided. Electronic monitoring should only be provided for with the consent of the accused.

If all of the above conditions and considerations are taken into account then the proposed pilot system of electronic monitoring of accused persons who would otherwise be remanded in full custody is not opposed.

Recommendations 11 and 12 on page 62 concerning greater clarity in forms are supported.

In relation to recommendations dealing with working groups to assist accused persons comply with bail conditions and also to consider the use of hostels and community based alternatives, it is fundamental that the issue of funding be resolved. Otherwise there simply will not be the resources to deal with constructive proposals. The Noetic Report informed the Government on pages 71 – 74 of the need for additional resources for various initiatives including accommodation in order to ensure that bail conditions are complied with. The pages include a discussion of the relative merits of bail houses and alternate accommodation. The Review notes that Juvenile Justice after the closure of bail hostels has used community based alternatives and that "The DJJ believes the program is successful and would like to expand the program." (See page 71). The Review also notes that "A major problem with the introduction of S 36 (2) (a1) is that there are no adult bail hostels and currently no more juvenile hostels in operation in NSW. (See page 69). Noetic suggested new direction for $348.14 million that will on current projections be used "over the next six years to meet forecast juvenile justice centre capacity." The money would be used for "evidence based prevention and early intervention programs and services for local communities." 15. It has already been pointed out earlier in this submission that hundreds of millions of dollars could be saved by reintroducing a liberal democratic Bail Act. Lower remand numbers in Victoria, the cost of keeping people in gaols and juvenile justice centres on remand and more productive use of money are all fundamental issues needing consideration.

If working groups are going to be set up then Legal Aid solicitors should also be invited to be part of the membership. They represent daily, young people and adults seeking bail.

In relation to the recommendations concerning bail and Aboriginal and Torres Strait Islander people the first thing to be noted is the Review itself confirms the overrepresentation of adults and juveniles on remand. It also sets out reasons why this is so. They include the range of difficulties that arise from poverty, lack of accommodation, repeat offender provisions and cultural issues. (See pages 73-78). Surely the first step in dealing with these issues as far as they relate to bail is to restore rights to the presumption in favour of bail, remove exceptional circumstances provisions, amend S 22A and remove repetition from S 32. The resultant fall in numbers on remand will assist Aboriginal and Torres Strait Islander people who currently are a disproportionate part of the total. Surely the second step is to provide the funds to deal with issues such as accommodation. Aboriginal Justice Advisory Council Recommendations 7 and 10 deal with accommodation and support program issues.

The recommendations are supported.

**Conclusion**

The Council for Civil Liberties believes the consultation draft of the Bail Bill, 2010 should not be put before the Parliament. The fundamental flaws in the Bill are set out in the Council's response to the Review of the Bail Act, 1978. The Council sees no point in responding to individual clauses in the Bill when the fundamentals need to be reconsidered. The Council's primary position is that fundamental changes such as the restoration of the presumption in favour of bail, removal of the exceptional circumstances provision for certain crimes, modification of S 22A so that it only applies as a discretion in the Supreme Court, restoration of the eight day limit for adjournments where there is no consent and removal of clutter from S 32 need to occur immediately. If that is not to occur then the Council calls for a public inquiry into the Bail Act, independently chaired and with public recommendations before any Bill is put before the Parliament.

1. Anderson and Armstrong, Report of the Bail Review Committee, (Vol 1, Joint Volume of Papers, Parliament of NSW, 1976-8) P 20 and 7.
2. A Strategic Review of the NSW Juvenile Justice System, April 2010, (Noetic Solutions, Pty Ltd, 2010) P 68-9.
3. Usher, S, Education Behind Bars, (Australian TAFE TEACHER, Vol 44/2, Winter 2010) P 16-17.
4. Media Release, Salvation Army Perceptions of Poverty Report, 18 October, 2010.
5. The Hon Justice R O Blanch, Chief Judge District Court of NSW, Address to Legal Aid Conference, 2.6.2010.
6. Roth, L, Briefing Paper, Bail Law, developments, debate and statistics, (Briefing Paper 5/2010, NSW Parliamentary Library Research Service, June, 2010) P 21.
7. Moffatt, S and Goh, D, An Update of Long-Term Trends in Property and Violent Crime in NSW: 1999-2009, (Crime and Justice Statistics, Bureau of Crime Statistics and Research, Issue Paper, 45, April, 2010) P 1-3.
8. Quotes from Snowball, L, Roth, L and Weatherburn, D, Bail Presumptions and Risk of Bail Refusal: An Analysis of the NSW Bail Act (Crime and Justice Statistics, NSW Bureau of Crime Statistics and Research, Issue Paper 49, July 2010)
9. A Strategic Review of the NSW Juvenile Justice System, P 70.
10. Vignaendra, S, Moffatt, S, Weatherburn, D, Heller, E, Recent Trends in Legal Proceedings for Breach of Bail, Juvenile Remand and Crime, (Crime and Justice Bulletin, Number 128, NSW Bureau of Crime Statistics and Research, May, 2009) P 3.
11. A Strategic Review of the NSW Juvenile Justice System, P 71.
12. A Strategic Review of the NSW Juvenile Justice System, P 72.
13. A Strategic Review of the NSW Juvenile Justice System, P 74.
14. Black M and Smith, R, Electronic Monitoring in the Criminal Justice System, (Trends and Issues, Australian Institute of Criminology, May, 2003) P 2.
15. A Strategic Review of the NSW Juvenile Justice System, P ix.