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NSW COUNCIL FOR CIVIL LIBERTIES

SUBMISSION TO THE NEW SOUTH WALES LAW REFORM COMMISSION IN RELATION TO THE REVIEW OF THE LAW OF BAIL

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INTRODUCTION

Attorneys General have repeatedly pointed out that values central to our liberal democracy are to be found in the Bail Act, 1978. Those values are the concept of liberty and the presumption of innocence. It is important to commence this submission with their words so there is no doubt about the fundamental importance of the issue that is being dealt with.

Attorney General Frank Walker in introducing the Act in 1978, stated:

"Although it is perfectly true that the community must be protected against dangerous offenders, one must not lose sight of the circumstances, first that when bail is being considered, one is confronted with an alleged crime and an unconvicted accused person, and second that the liberty of the subject is one of the most fundamental and treasured concepts in our society.[1]

Attorney General, John Dowd, when speaking to an amendment to the Bail Act in 1988 stated:

[1]NSW, *Parliamentary Debates*, Legislative Assembly, 13 December 1978, 2020 (Frank Walker)

"Though the community must be protected against dangerous offenders, it is important to bear in mind that what we are dealing with is an alleged crime by an unconvicted person. The right to liberty is one of the most important and treasured concepts in our society and cannot be dismissed lightly. Under the Bail Act there is a presumption in favour of bail for most offences. This is consistent with the presumption of innocence which is a fundamental of criminal law."[2]

Attorney General, Bob Debus when speaking to an amendment to the Bail Act in 2003, stated:

"The determination of bail is a delicate balancing act between principles that are the foundation of the rule of law in a society such as ours and the protection of the community. The community is right to expect that it will be protected, but that must be done within a framework that continues to observe fundamental principles, such as the presumption of innocence. Several speakers in this debate and in a debate earlier today seem not to understand that there is such a thing as the presumption of innocence, as fundamental as that is to the very essence of our democracy."[3]

NSW Law Reform Commission Document, Bail Questions for Discussion.

All material from this point relates to the questions asked in the LRC document "Bail Questions for Discussion." Headings and numbers refer to the headings and numbers in that document.

[2]New south Wales, (*Parliamentary Debates)* Legislative Assembly, 25 May 1988, 551 (John Dowd)
[3]New South Wales *Parliamentary Debates*, Legislative Assembly, 18 June 2003, 1700 (Bob Debus)

0.6-0.8 Some Concerns.

Complexity, growing remand numbers, risk of re-offending as against the right to liberty, bail as right or privilege.

The human and financial reality concerning bail in 2011 stands in stark contrast to the ideals and beliefs set out in the introduction. The document "Bail Questions for discussion" explains some of the concerns at **0.6** and **0.7**. It is pointed out in that section that the percentage of the prison population on remand has increased from 20.4% to 24.3% in the last 10 years. It should be added that in the same document from which those statistics are taken there is a heading, "Trends in legal status of inmates (including periodic detainees); 1982-2010." It indicates"unconvicted" in 1982 at 12.3%, in 1990 at 13.1% and in 2010 at 22.8% of the total.[4] This huge leap is totally unacceptable in a liberal democracy.

The shameful way this society treats unconvicted juveniles is set out at **0.7**. When half the 12 to 17 year olds in gaol are on remand and the reality is that 80% of such young people will not receive a control order within 12 months, then something has gone radically wrong with the bail system. In should be added that juvenile admissions to remand have increased from 3203 in 2005-2006 to 4439 in 2009-2010. In 2005-2006 only 392 went from remand to control. Out of a total of 5073 admissions to Juvenile Justice Centres in 2009-2010 only 472 went from remand to control.[5]

The financial cost of this failure to find liberal democratic means of dealing with those accused of offences or who remain unsentenced has become a burden to the tax payers of

[4]Simon Corben, 'NSW Inmate Census 2010: Population Trends' (Corrective Services NSW, Statistical Publication, 36, 2010) 71.
[5]Juvenile Justice, 'Young People in Custody' (Juvenile Justice, 2009-2010) 5 and 8.

NSW that cannot be justified. Public schools, public health, public welfare and other public services need extra funds but are being denied them because of the huge amounts of money being poured into placing unjustifiable numbers of adults and juveniles into remand prisons. It costs over $1 billion a year to run correctional services in NSW for adults.[6]The daily cost per juvenile in custody has been estimated at $541 per day.

However, the human cost cannot be measured in statistics. Victims of crime deserve the community's sympathy and support, however it is also important to remember that people on remand also become victims of physical abuse and mental abuse. Adults have been bashed and lost part of the sight of an eye and teeth, people have witnessed heroin being burnt into arms.[7] Some people are in gaol on remand because society is not prepared to provide enough residential accommodation for the homeless.[8] Consideration of this issue is fundamental to any consideration of the Bail Act.

Assaults by juveniles on other juveniles occur in custody. In 2009-2010 the rate of detainee on detainee assaults per 1000 admissions was 68 according to the Department of Human Services.[9] Juveniles involved in assaults include those on remand. The Council for Civil Liberties obtained the figures where at least one of the detainee participants in the incident was on remand through the Freedom of Information Act. The total of assaults of this type was 216 in 2008-2009 of which 10% were sexual assaults. From 1 July 2009

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[6]Corporate Research Evaluation and Statistics, 'Facts and Figures' (Facts and Figures 10th Edtion Corrective Services NSW, May 2010)
[7]Joel Gibson, "No Bail - Go Directly to Jail", *Spectrum The Sydney Morning Herald*, (Sydney), 19 April 2010, 5.
[8]Geoff Turnbull, 'Vanishing Bail Hits Homeless Hard', *Letters The Sydney Morning Herald* (Sydney), 19 April 2010
[9]NSW Human Resources, 'Annual Report 2009-2010.' (NSW Department of Human Resources - Juvenile Justice,) 194.

to 1 June 2010 there were 220 such assaults of which 3% were sexual assaults.[10] Is there any need for statistics to accept that which the international literature makes clear, namely that gaol on remand for juveniles should be the last resort and that some of those incarcerated will increase their likelihood of criminality because of the experience?

As for the "encrusted complexity" and being "not easily comprehensible," referred to in **0.6,** that is a result of endless reactions to individual crimes, types of crime and on some occasions a step too far in an area of public policy development where bail is not the central issue. There was nothing encrusted or non-comprehensible in the Act as originally produced in 1978. It implemented most of the recommendations of the Bail Review Committee Report, 1976.[11]In relation to the matters being considered by the LRC,the Report contains many relevant points and is worthy of being read again. The Bail Act in its original form was a fine achievement. It was written in a readable form, it did not have pages of exceptions and provisos. It was based on the idea that there would be a right to bail for less serious matters and a presumption in favour of bail for other matters with the exception of those covered by s8, aggravated robbery and for failing to appear in court after bail has been granted. It provided for bail to be dispensed with and had three clear grounds for the consideration of bail in s32: the risk of absconding; the interests of the person and the protection and welfare of the community. The sub headings within these three grounds were adequate and usable. The conditions attached to

[10]J Gillam, 'Freedom of Information Act, 1989, s28 (1) &(2), Notice of Determination, Assaults involving detainee-on-detainee' (letter to Council for Civil Liberties, Human Services, Juvenile Justice, 28 July 2010)
[11]Kevin Anderson and Susan Armstrong, 'Report of the Bail Review Committee, ' (Parliament of New South Wales, 1976)

bail moved away from the overreliance on money and rose in a hierarchy from the least onerous to the most onerous.

Several things need to be said about the issue raised in **point 0.8** of a need to balance the risk of re-offending by a person suspected of having committed a serious crime and the right to liberty and the presumption of innocence. They will be considered in the submission response concerning **8**. **Criteria to be considered in bail applications.**

Bail as a right is set out in the quotes from Attorneys General of NSW. A failure in 2011 to restore the Bail Act to its role as a pillar of our liberal democracy will rightly be condemned by history. There can be no excuse this year based on the claim that only the views of those demanding ever more severe 'law and order' solutions to every conceivable issue in criminal justice are raising their voices. In 2010 there were major public debates concerning bail with front page and editorial coverage in the Sydney Morning Herald. Much of that coverage was sympathetic to the view that there is a need for change. The presumption in favour of bail came in for particular attention. Organisations including the Bail Reform Alliance (made up of the NSW Council for Civil Liberties, NSW Law Society, NSW Public Service Association, NSW Teachers Federation, NSW Welfare Rights Centre and NSW Young Lawyers,) and the Youth Justice Coalition raised various concerns over the current state of the Bail Act. Their criticisms, and those of others, were referred to in the Parliamentary Briefing Paper sent to all Parliamentarians in 2010.[12]

[12]Lenny Roth, 'Bail Law: developments, debate and statistics' (Briefing Paper No 5 Parliamentary Library, NSW Parliament, 2010)

SPECIFIC ISSUES

1 Over-arching considerations.

Fundamental principles and concepts. Should there be objectives in the Act?

"Fundamental principles or concepts" referred to in **1.1**must commence with the concept of liberty. The definition of bail in the Bail Act in 1978 and unchanged in 2011 states that, "bail means authorisation to be at liberty under this Act instead of in custody." (s4). That definition is consistent with the opinions expressed by Attorneys General set out above. It is also consistent with the evolution of bail in a period of over 1000 years. There should not be a retreat to earlier parts of that evolution where bail had a more limited meaning. It is worth noting that the English Bill of Rights in 1688 stated that "excessive bail ought not to be required." The Universal Declaration of Human Rights states in Article 9 "No one shall be subjected to arbitrary arrest, detention or exile."[13] At what point do all the additions made to the 1978 Bail Act in its original form, deliberately restricting the discretionary capacity of courts and thus causing a dramatic rise in those not granted bail, become a form of arbitrary detention? Has the limit been reached when a court is told that it is to refuse to entertain an application for bail under certain circumstances as it is in s22A? The obvious needs to be stated – in the overwhelming majority of cases a person seeking bail has either not been found guilty or not sentenced. Article 11 of the Universal Declaration of Human Rights states "Everyone charged with a

[13]Lynn Hunt, *Inventing Human Rights* (W.W Norton and Company, 2007) 225.

penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."[14] Unnecessary restrictions on bail applications that lead to denial of bail hinder the right to be free to prepare for court as set out in s32 of the Bail Act.

In addition to the rights set out above there is need to consider the special rights of children as set out in United Nations Convention on the Rights of the Child. Article 37(b) specifically states, "The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time." The statistics mentioned earlier in relation to the number of juveniles in custody on remand do not sit comfortably with this United Nations provision.

The three traditional tests used for consideration of bail applications should also be considered. They are 1) the probability of whether or not the person will appear in court, 2) the interests of the person and 3) the interests and welfare of the community. The sub parts of each principle will be considered later in relation to s32.

Whether the Act should contain **Objects** requires a cautious answer. In 2010 the then Government released a Public Consultation Draft Bail Bill with proposals to replace the whole of the existing Act. It did contain "Objects of Act." While those Objects included ensuring appearance, preventing offences before finality of the matter, protecting persons against whom the alleged offence was committed, their relatives and any other person requiring protection and preventing interference with witnesses or otherwise interfering

[14] Ibid, 225.

with the course of justice they did not include the rights of the defendant.[15] The risk with Objects is that something as fundamental as this will be left out. On the other hand if those drafting it are confident that all fundamental points will be included then it does provide an overall set of principles to be considered. On balance it is probably better to have fundamental principles set out in Objects but caution is needed to ensure they cover only the fundamental points set out below:

The right to seek bail at all stages of the criminal justice process.

The right to the presumption in favour of bail. A limitation in relation to appeals in the Court of Criminal Appeal will be discussed later.

The probability of whether the person will appear in court.

The interests of the defendant. The additional rights of children should be placed here.

The protection and welfare of the community.

2 Right to release for certain offences.

Should a right to bail be retained, should s8 be changed, should the classes of offences covered by s8 be varied.

Section 8 is fundamental for reasons set out in the Bail Review Committee Report, 1976. Those reasons are as relevant in 2011 as they were in 1976. They included: "There are some offences for which imprisonment pending trial cannot be justified. In broad terms these are offences for which a sentence of imprisonment cannot be imposed except in default of payment of a fine, and offences relating to relatively minor infractions of

[15]Bail Bill 2010 Public consultation draft (NSW) Cl 3.

public order."[16] The Committee recommended a statutory right to bail for such offences including those where imprisonment could not be imposed and "all summary offences against good order such as unseemly words, offensive behavior, public drunkenness, prostitution, vagrancy, and the like."[17] There is at present a statutory right to bail for such offences. That situation should continue. This right should apply to police and court bail. Conditions can be imposed.

It should also be remembered that s 8 was introduced in part because of the use of holding charges such as vagrancy where used to hold a person in detention while more serious charges are investigated.Any change that led to the renewed possibility of bail being used for such a purpose is to be avoided.

Section 8 of the Bail Act in its current form does covera number of offences within the Summary Offences Act, 1988, such as offensive language and offensive conduct in a public place, obscene exposure, certain offences related to prostitution, use of knives, and a number of other offences that can result in a gaol sentence.[18]Some of these were in the original Summary Offences Act in 1988. The issue then and now is that if such offences are not dealt with in accordance with a right to release under s8 then they would be dealt with under the more stringent tests in s9. That would be far too severe an approach given the nature of the offences being considered. Such offences should continue to be dealt with under s8. They are by definition summary offences and in relation to bail should be treated as such.

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[16] Anderson and Armstrong, above, n 11, 19
[17] Anderson and Armstrong, above, n 11, 19
[18] *Summary Offences Act, 1988,* (NSW) s38

There are adequate safeguards in s8 to meet concerns about the ease with which bail is to be provided. The right to bail applies unless: there are breaches of previous bail for the offence, whether there are concerns about the physical condition of the person, whether the person stands convicted and where bail has been dispensed with. Conditions can be attached to bail under s8. These provisions applied in 1978 and do currently.

The physical harm to the person provision raises complex issues. The Committee provided this reservation on the basis that, "Police and courts are often perfectly sincere about the need to provide drunks and vagrants with a "clean up", a bed, and a meal. However, the Committee does not believe that this is a proper function of the criminal justice system and it also believes that this benevolence is widely seen as oppressive by the beneficiaries. If these offences remain on the statute books, persons charged with drunkenness and vagrancy who wish to remain in custody would have the option of declining release by not signing the undertaking to appear. This provision merely ensures that people are not held against their will on trivial charges."[19] In 2011 vagrancy and drunkenness are no longer offences. However, s197-200 of the Law Enforcement (Powers and Responsibilities) Act, 2002 provide power to the police to give directions to people who are intoxicated in public places or who for a variety of other reasons are required to move on. Failure to comply with the direction is an offence that can result in a fine. In an imperfect world it seems better to leave the provision in S8 and s32 and thus allow courts the capacity to deal with a difficult issue in the most humane manner possible.

[19] Anderson and Armstrong, above, n 11, 20

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

The presumption in favour of bail has general significance that goes beyond specific matters. A person walking into a court pleading not guilty should walk in with a presumption of innocence and a presumption that there is a right to bail and thus to liberty. Whether that person is granted bail should then be decided by the court on the basis of the criteria set out in the Bail Act. A liberal democracy should accept no exceptions to this principle. It is also important to note that the 1976 Report stated that "The Poverty Commission's analysis of prison statistics led them to conclude that "the poor, the young and the migrant community are significantly over-represented among Australia's unconvicted prisoners."[20] Aboriginal and Torres Straight Islanders could be added then and now. Thirty five years later those four categories still dominate the numbers of people in gaol either not convicted or not sentenced.

The 1976 Committee Report noted in relation to the presumption that people, through migrant background or ignorance, may not ask for bail. While Legal Aid is far more available than in 1976 the point remains fundamental. The Report indicated that the onus should be on the prosecution to establish grounds for bail refusal. It was noted that "the presumption should be in favour of release on bail rather than limited to the much more illusory right to have bail set."[21]

By contrast, the vast additions made over the following thirty five years have undermined theliberal democratic ideals of the Act, creating clutter and complexity where none is

[20] Anderson and Armstrong, above, n 11, 12.
[21] Anderson and Armstrong, above, n11, 21

needed. The worst example is the inclusion of the exceptions. The accumulation of these exceptions has played a significant part in causing the enormous increase in the number of people on remand in prison and juvenile justice centres. Space does not allow every example of the changes to the presumption to be examined. Some examples set out below make the general point. However, it should be stated that the changes accelerated in the last ten years. The amendments to the Bail Act both in quantity and for particular offences are set out in the paper by Alex Steel.[22] While the material is not restricted to the presumptions it is highly informative about that issue and others. Steel states, "It is clear that NSW has by far a greater involvement by politicians in the setting of the parameters of bail availability. To this extent it would appear that NSW is in an exceptional position in comparison to other Australian states. Interestingly, as suggested earlier in this paper, NSW also began its codification of bail with the most liberal approach to bail with a right to bail for minor offences, and a restriction against bail to only one offence – armed robbery."[23]

The setting up of the 1976 Bail Review Committee and the 1978 Bail Act took place against a background of a series of armed robberies and related violent crime.[24]The new Act provided for no presumption either in favour or against bail for aggravated robbery. It should be noted that this category does not cover all robberies as aggravation requires additional factors such as wounding another person or being armed with an offensive weapon for example.

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[22]Alex Steel, 'Bail in Australia: legislative introduction and amendment since 1970' (Paper presented at the ANZ Critical Criminology Conference Proceedings, Monash Univesity Melbourne, 8-9 July 2009)
[23] Ibid, 234.
[24]J O'Hara, 'Bail System Review Ordered', *Sydney Morning Herald* (Sydney), 3 July 1976, 3 . K Kennedy, 'Helicopter, More Detectives, Parole Review', *Sydney Morning Herald* (Sydney), 29 November, 1978, 1.

Illegal drug supply in the 1980's was the subject of a national program including public appearances by the Prime Minister and Premiers. The presumption in favour of bail for the most serious levels of illegal drug supply ultimately ended up being replaced by a presumption against bail for the most serious supply crimes.

Did changing the presumption improve things for the community or defendants? In 1987 the Bureau of Crime Statistics and Research put out a large report on robbery and opened by stating, "Robbery and armed hold-ups of banks and other premises, along with robberies of persons have been of great concern in New South Wales. In recent years, New South Wales has had the highest rate of such offences per head of population of any Australian State."[25]Rates for robbery with a weapon not a firearm and robbery with a firearm declined in the 1990's, (the first from the late 1990's and the second from the early 1990's.)[26] This probably has much to do with improved security technology and techniques in banks, (bullet proof glass for example) and improved policing. Both were considered and recommended in reports from earlier decades and called for by governments. Changing the presumption concerning bail in relation to aggravated robbery did not lead to a reduction in armed robberies. Indeed, their number remained a serious issue throughout the 1980's. There has been a decline recently, but that decline begins too long after the introduction of the exception for that introduction to explain the decline.

[25]A J Sutton, 'Robbery' (Final Report, NSW Bureau of Crime Statistics and Research, November 1987), vii
[26]Steve Moffatt and Derek Goh, 'An update of long-term trends in property and violent crime in NSW: 1990-2010.' (Crime and Justice Statistics Bureau Brief 58 NSW Bureau of Crime Statistics and Research, April 2011) 3.

There were three Royal Commissions into drug supply in the late 1970's and early 1980's. They disagreed amongst themselves in relation to the presumption in favour of bail for the most serious allegations of drug supply. Part of the problem which they acknowledged was the limited nature of available statistics at that time. His Honour Mr Justice Woodward after considering the range of matters that must be taken into account in s32 of the Bail Act before bail is granted and after also considering absconding rates amongst major drug traffickers whom he concluded were not disproportionately absent, stated, "Nevertheless legislation to diminish or remove this risk represents too high a price."[27] His Honour Mr Justice Williams after considering material on drug offenders and absconding concluded absconding was "becoming a national scandal."[28] He recommended that the presumption for Division 1 drug offences be changed to no presumption for or against bail.[29] His Honour Mr Justice Stewart considered the two different views and concluded it may have come about because of inadequate statistics. He considered material made available from Victoria and also Queensland material that showed a drop in absconding after changes that made bail more difficult to obtain.He recommended that the NSW Bail Act add serious drug trafficking charges to those in which there is no presumption for or against bail.[30]

What was the real position in relation to drug suppliers and absconding? In 1984 the Bureau of Crime Statistics and Research using police records produced a report that

[27]New South Wales, Royal Commission into Drug Trafficking, *Report* (1979) 1830.
[28]Commonwealth, Royal Commission of Inquiry into Drugs, National Report, (1980) F35.
[29] Ibid, F 36.
[30]Commonwealth, Royal Commission of Inquiry into Drug Trafficking, (1983) 550-558 and 843

provided information on levels of absconding for various offences.[31] Weatherburn, Quinn and Rich in their own research considered that Report and combined Table 4 concerning bail determinations for major offence groups with Table 31 concerning warrants issued for failure to appear to create an absconding percentage rate. This was 3.8%. Compared with the other groups it showed that drug offences as a charge group "were among the least likely of defendant groups to abscond."[32]However, it should be noted that the police are less likely to grant bail for serious drug charges and there will be a disproportionate number of less serious drug charges in the figures considered above.

The 1987 paper by Weatherburn, Quinn and Rich, involved their own study of serious drug charges which they defined as any drug charge proceeded with by way of indictment. The sample was restricted to matters in the District Court that were finalised or resulted in a warrant for non-appearance in 1984. Within this group of matters they considered offences that carried life imprisonment (Import) and also supply and cultivate charges which carried a maximum sentence of 10 or 15 years. They concluded that, "bail decisions were found to be strongly related to the nature of the charge. Bail was particularly likely to be refused in relation to import charges. Only 10% of these cases were granted bail by the police. While this figure rose to 38.7% at the first court appearance, rates for other classes of offence in the sample at this stage ranged from 66% to 79.5%."[33]The authors also found "there is no relationship between the seriousness of

[31]J Stubbs, 'Bail Reform in NSW' (NSW Bureau of Crime Statistics and Research, 1984) 14, 61.
[32]Don Weatherburn, Meredith Quinn and Gabrielle Rich, 'Drug Charges, Bail Decisions and Absconding' (June 1987) 20 *Australian and New Zealand Journal of Criminology*, 97.
[33] Ibid, 99, 107.

the charge and the likelihood of absconding."[34] There is also "no evidence of a tendency for absconders to congregate in the higher drug quantity ranges."[35]Perhaps the most sobering statistic is that arising from Table 12 which shows "that in 44.8% (82) cases in which bail was known to have been refused or bail conditions known to have not been met *at some stage or another*, the defendant was ultimately found not guilty or given a non custodial sentence."[36]The period on remand often exceeded six months.[37] The absconding rate for all the offences was 9.8%.[38] Consideration of absconding rates in 2000 by the Bureau of Crimes Statistics and Research showed that in the higher courts when considering the most frequently charged offences, the "persons least likely to be granted bail in 2000 were those charged with import or export of drugs offences." The authors go on to point out in relation to failure to appear at finalization "In 2000, the defendant failed to appear in 5.3 per cent of Higher Court finalisations."[39]

On a number of occasions politicians have been left facing a crisis of public opinion over a particular crime or class of crime with the efforts of those trying to be heard in putting forward the liberal democratic point of view drowned out by media calls for a tougher approach on crime. Politicians have on occasions referred to a particular crime when moving an amendment to the Bail Act. Horrendous murders have, understandably, caused community outrage and been the subject of political discussion, either as part of a wide range of reform, or in their own right. An example will make the point.

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[34] Ibid, 103.
[35] Ibid, 104
[36] Ibid, 106
[37] Ibid, 108
[38] Ibid, 107.
[39]M Chilvers, J Allen and P Doak, 'Absconding on bail' (NSW Bureau of Crime Statistics and Research, May 2002) 7, 8.

The Labor Government of 1976-88 and the Liberal Government of 1988-96 introduced a number of commendable major law reforms that dealt with domestic violence including apprehended violence orders that were gradually expanded to include all persons. A series of Task Forces dealing with issues concerning women and children made a major contribution to the ongoing reforms. The 1991 Report of the NSW Domestic Violence Committee is referred to by the Premier. However, at times this reform program overlapped with the equally important area of bail and human rights to freedom. In 1993 the Premier introduced the Crimes (Domestic Violence) Amendment Bill and the Bail (Domestic Violence) Amendment Bill. The first Bill provided for telephone interim apprehended violence orders, created new offences, extended the coverage of interim orders and increased penalties. Commendably, legal support for women in domestic violence situations was strengthened by this Bill. However, in the second Bill the presumption in favour of bail was lost in a wide range of cases including murder. The Premier made reference to statistics showing that "over 80 per cent of all homicides in New South Wales are committed by a member of the victim's family or by an acquaintance."[40] The Premier concedes that "No legislation, of course, will deter persons who are committed to killing or injuring their partners or family members."[41] The Premier refers to relevant studies showing that the "best indicator of future violence is a past history of violence."[42] In the same speech the Premier referred to "Recent incidents of domestic violence, including the Andrea Patrick case, have raised the question of the capacity of the present criminal law to adequately respond to domestic violence

[40]NSW *Parliamentary Debates*, Legislative Assembly, 1993, 3217, John Fahey.
[41] Ibid, 3218.
[42] Ibid, 3218.

situations.[43] The particular murder had been the subject of wide media coverage. The headline on page one of the Sydney Morning Herald on 25 August 1993 was, “GOVT PLEDGES NEW LAWS TO PROTECT WIVES.” The article went on to state, “The State Government has vowed to pass laws to protect people living under the threat of violence, in the wake of the murder of Miss Andrea Patrick.”[44] On the same page was another article headed, “POLICE SOUGHT BAIL TWO DAYS BEFORE KILLING.” It explained that the alleged perpetrator had been given bail in relation to Ms Patrick, two days earlier, on condition he comply with an AVO condition to stay away from her.[45]

Several points should be made about this change to the presumption in relation to murder. The first three deal with s32 as designed in 1978.

Firstly, the prior criminal record of a person has since 1978 been part of the consideration of whether a person will abscond. It will be a part of considering a “past history of violence.”

Secondly, the protection and welfare of the community has since 1978 included the likelihood of the person interfering with witnesses which would include the victim.

Thirdly, the protection and welfare of the community has since 1978 included the likelihood that the person will or will not commit an offence while at liberty on bail. Part of that criteria specifically refers to being satisfied that the offence “is likely to involve violence or otherwise to be serious by reason of its likely consequences.”

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[43] Ibid, 3217.
[44] E Jurman, 'Government Pledges New Laws to Protect Wives', *Sydney Morning Herald* (Sydney), 25 August 1993, 1.
[45] M Riley, 'Police Sought Bail Two Days Before Killing', *Sydney Morning Herald* (Sydney), 25 August 1993, 1.

Fourthly, since 1978, the "nature and seriousness" of the offence is to be taken into account when considering the risk of absconding. Murder would be regarded as a very serious offence.

Fifthly, the trend in the murder rate per 100,000 persons in NSW has been going down since 1990.[46]

When all these points are considered, what is the justification for removing the presumption in favour of bail for murder in a case where a person is pleading not guilty? Magistrates and judges are quite capable of implementing the law. On occasions tragedies will occur after court decisions. That is no justification for making general changes to the presumption in favour of bail.

Exceptional circumstances is appropriately raised at this point when the charge of murder is being considered. This addition to the Bail Act was introduced in 2003 and relates to the charge of murder and repeat offenders in serious personal violence offences. It should be noted that a repeat offender in this case is defined as a person who has "a previous conviction for a serious personal violence offence (other than the serious personal violence offence in connection with which bail is sought.)" "Serious personal violence offence"covers a vast array of such offences as found in the Crimes Act and applies to interstate offences of a "similar" type. For murder and repeat offenders as defined above "An authorised officer or court is not to grant bail to a person in respect of an offence … unless the authorized officer or court is satisfied that exceptional circumstances justify the grant of bail."

[46] Moffatt and Goh, above, n 25, 2.

A number of things need to be said about the requirement that bail only in exceptional circumstances. It was proposed in the context of a specific crime. Mr Gaudry, in introducing the 2003 Bill in the Legislative Assembly on behalf of the Attorney Generalstated, "These amendments build on those reforms to further protect victims and the community, and particularly women, from serious personal violence offenders. Honourable members will remember the tragic murder of Patricia van Koeverden at Newcastle in April this year by her estranged husband. The community was rightly outraged that Toni Bardakos should have been granted bail and, tragically, the fears of those who knew him were realised. This Bill has been drafted with the input of police and the Attorney General's Department. It will ensure that the court's attention is focused on the elements of serious personal violence in future cases providing greater protection for victims and the community in general."[47] Material was also provided on the extensive nature and seriousness of domestic violence.

There can be no doubt about the distress terrible crimes cause and the concern over the extent of domestic violence. However, creating a general addition to the Bail Act which simply adds complexity resolves nothing.

Firstly, each case should be considered on its merits. Under s32 that will include the criminal record of the defendant as part of the consideration of whether the person will abscond. The "repeat offenders" definition above is therefore unnecessary.

Secondly, the nature and seriousness of the offence will be considered in relation to absconding and in relation to the protection and welfare of the community.

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[47]NSW, *Parliamentary Debates*, Legislative Assembly, 30 May 2003, 1545, Mr Gaudry. On behalf of the Attorney General.

Thirdly, the likelihood of further offences and interference with witness which would include the victim will be considered under protection and welfare of the community. There is no need for an exceptional circumstances provision. In addition, such a provision makes no allowance for differences in cases. It is the named class of crime, (murder, and designated crimes, as defined by relationship with repeat offender) that brings in exceptional circumstances rather than the particular offence. The result is that a woman alleged to have murdered her partner and who has no criminal record and claims to have been battered for ten years starts in exactly the same position as the gangland mastermind with a long record and accused of murdering a gangland associate;that is both are to be granted bail only in exceptional circumstances. To the claim that the woman in the example given may be granted bail because of exceptional circumstances the obvious question arises as to why this additional complexity is needed at all. There is a vast array of offences related to repeat offenders in s9D of the Bail Act. At the commencement of each case the circumstances surrounding an individual human being are being considered and these vary enormously. Why start each case for all men and women with a provision about bail only in exceptional circumstances?The Minister for Justice in the debate introducing the legislation stated, “Exceptional circumstances will be left to the court to decide on an individual, case by case basis. However, as a general guide it might include cases involving a battered wife, or a strong self-defence case or a weak prosecution case. It might also include a case in which the defendant is in urgent need of medical attention or has an intellectual disability, or a case in which the court is satisfied that the offender poses no further threat to the victim or the community.”[48] All of these tests have been in

[48]New South Wales, *Parliamentary Debates*, Legislative Council, 24 June 2003, 1888, J Hatzistergos,

the Bail Act in various parts of s32 (issues of absconding, issues concerning the defendant's rights and wellbeing, issues concerning the protection and welfare of the community) since 1978.Why should courts have to go through all this redundant complexity? Surely the tests in s32 have always been adequate and surely in their simpler form they should continue to be used. Provisions that provide for bail to be provided only in exceptional circumstance should be removed from the Bail Act.

Exceptional circumstances in relation to appeals from conviction or sentence on indictment to the Court of Criminal Appeal raise different issues that do need to be addressed. The Bail Act in its original form made no exceptions in relation to the making of bail applications. In 1987 calls for a review in relation to the Court of Criminal Appeal emerged, including calls from the Court itself. See for example R v Hilton,1987 (7) NSWLR 745. The Government amended the Bail Act to restore it to what was said to be the common law position that there had to be special or exceptional circumstances before bail would be granted in such appeals. The Attorney General explained the issues to be taken into account in balancing rights in this situation. They included changes in the status of the person after conviction, the need for finality related to jury decisions and avoidance of a proliferation of such appeals. They also included the important point that some people will have their appeal upheld and that some terms of imprisonment may be served before the Appeal is heard. The Attorney General stated, "For these reasons, the Government has formed the view that bail should still be available to convicted persons, but that special or exceptional circumstances must first be shown."[49]For the reasons given

[49]NSW, *Parliamentary Debates*, Legislative Assembly, 6 May, 1987, 11248 (Terry Sheahan)

in 1987, this submission does not seek to change the current position in relation to appeals to the Court of Criminal Appeal against conviction or sentence on indictment

The broader picture concerning the presumptions has been considered by the Bureau of Crime Statistics and Research. The results establish the unsatisfactory result of having a range of presumptions and an exceptional circumstances provision. Having concluded that "the presumptions have a significant impact on the probability of imprisonment,"[50] they then consider other characteristics, such as large numbers of prior convictions that have an even greater effect. The Bureau also found 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." Further, "more than 50 per cent of defendants charged with offences where bail can only be granted in exceptional circumstances and more that 79 per cent of defendants facing charges where there is a presumption against bail, were on bail at their final court appearance."[51] Finally, much of what has been said above in this submission is supported by the observation that, "Many defendants facing charges where bail is supposed to be granted only in exceptional circumstances may meet all the other criteria set down in s32 of the Bail Act for bail to be granted. If this is the reason for the higher proportion of defendants granted bail whose charges place them in the presumption against bail or exceptional circumstances

[50]Lucy Snowball, Lenny Roth and Don Weatherburn, 'Bail Presumptions and Risk of Bail Refusal: An Analysis of the NSW Bail Act' (Issue Paper 49, Crime and Justice Statistics, NSW Bureau of Crime Statistics and Research, July 2010) 5.
[51] Ibid, 6.

provision categories, there would seem to be some tension between the presumptions and the criteria set down in section 32."[52]

In relation to bail, concepts we associate with liberal democracy, such as the presumption of innocence and the right to liberty through a presumption in favour of bail, have been eroded over a long period of time. Changes have often been introduced with the best intentions but produced poor outcomes. Different types of presumption – for, neutral, against and denial of bail except in exceptional circumstances – have created unnecessary confusion and difficulty. There should be a presumption in favour of bail for all offences where there is not a right to bail under s8 of the Bail Act.

4. Dispensing with bail.

Section 10 of the Bail Act allows a court to dispense with bail where it has power to grant bail. Before the issues the LRC raises are considered it is important to note that courts are dispensing with bail less and less. BOCSAR found that between 1999 and 2008 for the Local, District and Supreme Court (excluding traffic and breach of bail matters) the percentage of cases where bail was dispensed with fell from 60.3% to 44.9%. Those required to have bail rose from 30.2% to 42.1%.[53] The report concluded that "A more likely explanation for the general decline in unconditional release is that the general toughening of bail laws has reduced the willingness of police and courts to dispense with bail." It goes on to observe "Whatever the reason for reduction in the unconditional release, the present findings provide some explanation for the rise over the last decade in

[52] Ibid, 7.
[53]Clare Ringland and Don Weatherburn, 'The decline in unconditional release before trial' (Crime and Justice Statistics Bureau Brief 55, Bureau of Crime Statistics and Research, December 2010) 2.

the number of cases where bail has been breached."[54] Thirty five years of ever tougher bail laws would appear to have affected the preparedness of courts to dispense with bail. One benefit of a general return to liberal democratic principles in the Bail Act should be an increase in courts dispensing with bail. This will mean fewer people on bail, fewer breaches, and less human and financial cost in relation to those who end up in gaol or a juvenile justice centre for breach of bail.

It is in the context of the factors set out in the paragraph above that a person should be entitled to have the courts determine whether bail should be dispensed with for all matters raised by the Reference. If there is not a need for bail in a court's opinion then that should be the end of the matter without exception. In proposing an offence of failing to appear on bail without reasonable excuse the 1976 Bail Review Committee considered anticipated difficulties. It provided proposals to deal with the difficulties. One of the proposals was to give courts the power to dispense with bail.[55] This recommendation was provided for in 1978 in s10 of the Bail Act as was the recommendation that if a court makes no reference to bail then it is deemed to have been dispensed with.

5. Police bail.

No submission is made.

6. Court bail.

No submission is made.

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[54] Ibid, 6.
[55] Anderson and Armstrong, above, n 11, 17-18.

7. Repeat Bail applications

Section 22A deals with the power of courts to refuse to hear second and further bail applications. It was introduced in 2007 and was a disaster for juveniles from the outset. In its original form and before amendments, it required courts to refuse to hear second and later bail applications unless the person was unrepresented on the previous occasion or the court is satisfied that new facts or circumstances have arisen since the previous application that justify the making of another application.Lawyers were required to satisfy themselves that the person had not been represented on the previous occasion or new facts or circumstances had arisen. In speaking to the Bill the Attorney General stated:

"The Government is pleased to introduce the Bail Amendment Bill 2007. The bill builds on the Government's extensive reforms over the past years to strengthen our bail laws and ensure the community is properly protected while defendants are awaiting trial. New South Wales now has the toughest bail laws in Australia. Over the last few years we have cracked down on repeat offenders – people who habitually come before our courts time and again. Part of those changes includes removing the presumption in favour of bail for a large number of crimes. We have also introduced presumptions against bail for crimes including drug importation, firearm offences, repeat property offences and riots, and an even more demanding exceptional circumstances test for murder and serious personal violence, including sexual assault.

Those type of offenders now have a much tougher time being granted bail under our rigorous system. These extensive changes have delivered results. There is no doubt that the inmate population, particularly those on remand, has risen considerably as a result of the changes. In fact, the number of remand prisoners has increased by 20 per cent in the last three years alone and new jails are being opened to accommodate the increase."[56]

The new law proved to be very tough on juveniles although they were never mentioned in the speech. BOCSAR considered the results when combined with policing of breach of bail. "Between 2007 and 2008, the juvenile remand population in New South Wales (NSW) grew by 32 per cent, from an average of 181 per day to 239 per day."[57]After considering increased proceedings for breaches of bail the BOCSAR report considered the effects of s22A on the length of time spent on remand. "It has been suggested that, following the introduction of s22A, many young people who would have spent just a few days on remand (until mounting a successful bail application) are now staying on remand until the charges against them have been finalized by a court. If this conjecture is true, we should expect to see a growth in the average length of stay on remand following the introduction of s22A. Figure 2 shows exactly this. The discontinuity is so abrupt it would be superfluous to test its statistical significance."[58]After considering the matter the BOCSAR Report also reached the conclusion that, "No significant association was found, however, between the growth in juvenile remand and the fall in property crime."[59]The Reference to the Law Reform Commission, at **0.7,** notes that over the ten years from

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[56]New South Wales, *Parliamentary Debates*, Legislative Council, 17 October 2007, 2669, J Hatzistergos
[57]Sumitra Vignaendra et al, 'Recent Trends in Legal Proceedings for Breach of Bail, Juvenile Remand and Crime' (May 2009) (128) *Crime and Justice Bulletin NSW Bureau of Crime Statistics and Research*, 1.
[58] Ibid, 3.
[59] Ibid, 4.

2000 there has been a 69% increase of adults on remand. The proportion of the prison population on remand rose from 20.4% to 24.3%. The Government of the day saw s22A as part of the overall package that put more and more people into custody on remand. The large numbers of adults and juveniles on remand remains a serious problem in 2011.

Section 22A should never have been introduced and with the exception of the court's powers in relation to frivolous or vexatious applications, should be repealed. Amendments since 2007 have modified the original provisions including easing the restrictions on lawyers. Such amendments have not resolved the original problems. It remains the case that a court is to refuse to entertain a repeat application other than in the circumstances that are set out. That is, the accused wasnot legally represented on the previous occasion, information to be presented that was not presented on the previous occasion, circumstances have changed. The numbers of adults and juveniles on remand remains far too high with associated human and financial cost. S22A is one of the causes of this situation.

As to claims in Parliament that S22A will prevent "forum shopping," that is going from magistrate to magistrate or judge to judge until bail is obtained, no statistics were provided and the extent of such practice was never verified. Some people do not seek bail again while others do seek bail again. That is their right in a society that claims to be a liberal democracy. The eight day limit is there to ensure people who wish to make bail applications have the right to do so within a reasonable time. If that proves to be inconvenient then that is a price worth paying.

It was also argued in Parliament, that the restrictions set out in s22A help to guard against disturbance of victims or inducing worry and anxiety at the prospect of release of the defendant. Once again, if a defendant wishes to come to court then that is their right. Nobody would wish to upset victims but to suggest that such considerations should lead to the denial to a right to come to court is unacceptable. At court a number of provisions that are quite adequate are available. Firstly, a court has since 1978 been able to not entertain an application in relation to bail if it is satisfied that the application is frivolous or vexatious. (Section 22 (4) in the original Act and s22A (2) in the current Act.) Secondly, a court has all the powers set out in s32 in relation to the worth of a bail application and any amendment to bail.

Section 22A should be repealed other than in relation to frivolous or vexatious applications. The repeal should apply to adults and juveniles. The Bail Act will then have provisions which can deal with the merit of applications without undermining a fundamental liberty, the right to seek freedom from incarceration.

8. Criteria to be considered in bail applications.

The Reference begins by pointing out that s32 of the Act currently provides for four criteria. Three of those, the probability of appearance, the interests of the defendant and the protection and welfare of the community have been in the Act for 33 years because they are the obvious tests in a bail application where a person has not been found guilty or not sentenced. It is also true that there are subsidiary criteria in each category. These provisions and their sub parts arose out of the Report of the Bail Review Committee,

1976. The three concepts were also to be found in the common law before the Bail Act, 1978. The Committee noted, however, long lists of criteria used in various places and expressed concern about "a shapeless list of criteria in which first – and second order considerations are jostled erratically together."[60] This view was reinforced by considering a long list provided by the Public Solicitor's Office. The Committee concluded that what was needed was, "PROPOSED CRITERIA – The Committee believes that the length and diversity of this list alone indicates the need for clear and simple guidelines to be laid down governing the factors which should and should not be regarded as relevant to the making of bail decisions. There is no area of law in which it is more important for all parties – lawyers, police and the public- to have a clear understanding of their rights and obligations."[61]This quote provides the clearest answer to one of the questions asked in the Reference. There should be no overarching test or any vague criteria. There should be specific primary criteria with known sub parts. Otherwise the parties involved have no definite criteria to direct their attention to. Even worse would be the perception at the end of the day that some vague concept which could not be prepared for actually decided the bail application. It is important that s32 has always commenced with "and the following matters only:"

The specific criteria should be:

Firstly, the probability of appearance. It has always and should continue to include background, and community ties, previous failures to appear and the seriousness of the charge. The latter has always and should continue to include the circumstances of the

[60] Anderson and Armstrong, above, n11, 21.
[61] Ibid, 22.

offence including its nature and seriousness, strength of the evidence, possible sentence and criminal record. It should also include specific evidence that indicates probability of appearance such as the recent purchase of an air ticket. The sub sections containing references to Aboriginal persons or a Torres Strait Islander should be retained. Secondly, the interests of the accused. It should include the need to be free to prepare a defence, the need to be free for any other lawful purpose, the length of delay and the conditions under which the person will be held. These concepts were part of the common law tests.The references to taking into account the special needs of a person who is under 18 years of age, is an Aboriginal person or a Torres Strait Islander, has an intellectual disability or is mentally ill should be retained and assists in meeting some of the issues raised later in the LRC questions.

It is appropriate at this point to link the changes to the presumption introduced by s9B of the Bail Act. The section was introduced because of concern about repeat offenders. The Attorney General stated, "The Bill removes the presumption in favour of bail for certain repeat offenders, making it more difficult for those offenders to be granted bail and providing a disincentive to offenders to commit further crimes."[62] The section applied to those who at the time of the offence, were on bail, on parole, serving a sentence but not in custody, were subject to a good behavior bond, had previously been convicted for an offence of failure to appear when on bail and to a person accused of an indictable offence if the person has been previously convicted of one or more indictable offences (whether dealt with on indictment or summarily.) It is related to s32 (1) (b) (vi) which was also introduced as an amendment at that time. That section required that if the

[62]New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 March, 2002, 818, R Debus

person was covered by the last of the matters mentioned above (previous conviction etc) then one of the considerations under s32 would be “the nature of the person’s criminal history, having regard to the nature and seriousness of any indictable offences of which the person had previously convicted, the number of any previous such offences and the length of periods between those offences.” The first point to be made is that all of these requirements are available from the person’s criminal record which since 1978 has been part of the consideration of risk of absconding in s32. The second point is that none of this justifies changing the presumption in favour of bail which for reasons set out earlier in this submission should apply to all bail applications where the person is pleading not guilty or has not been sentenced. The courts have ample provisions to deal with a person who is a repeat offender. All the subsections set out in section 9B should be repealed. Section 32 (1) (b) (vi) should also be repealed.

Thirdly, the interests of the community. It has always included possible interference with evidence, witnesses or jurors. It should also include evidence of re-arrest for breach or anticipated breach of a reasonable bail condition that had been provided for the relevant matter. While s32 (b1) overlaps with other provisions, the wide discretion to provide protection to the victim, the relatives of the victim and any other person considered to need protection enhances the courts powers and makes bail more likely via conditions to meet this provision. It should be made part of s32 (c). Much of the material added over the decades by way of amendment to s32 (c) is unnecessary. An example makes the point. The circumstances of the offence including its nature and seriousness must be considered in s32 (1). If it is thought necessary to repeat this in s32 (3) then it doesn’t

need to include specific concepts like “sexual offence” or “possession of or use of an offensive weapon.” That these are serious matters is self evident. They are also referred to unnecessarily in s32(2A)

It is accepted that re-offending is a serious matter. The BOCSAR report on the issue makes that clear.[63] However, that is a complex social issue requiring the time and resources that a society as wealthy as Australia can certainly afford. It certainly shouldn’t rely simply on a Bail Act provision. It is appropriate at this point to deal with section 32 (2) which deals with the likelihood of one or more serious offences while on bail. When the 1976 Bail Review Committee addressed what criteria in bail applications should be included for the protection and welfare of the community it considered the likelihood of further offences being committed. After acknowledging that this concept was widely used in 1976, the Committee pointed out that beyond the criminal record material and other concrete material that would be used in a bail application the rest is speculation. Police opinion on future offences was explicitly rejected. After considering international material on preventative detention, material put before it and the question of gross violation of the presumption of innocence by use of preventative detention, it stated, “The Committee recommends that likelihood of further offences be not regarded as a criterion relevant to bail.”[64] However, the consideration of the likelihood of further offences was considered by courts in 1976, and was with limits placed in the original Bail Act. The key point is that if the Law Reform Commission concludes that it is more appropriate to maintain provisions concerning the risk of re-offending, it should ensure

[63]Jessie Holmes, 'Re-offending in NSW' (Crime and Justice Statistics, Bureau Brief 56, Bureau of Crime Statistics and Research,, February 2011.)
[64] Anderson and Armstrong, above, n 11, 29-32.

that the provisos apparent in 1978 (and without all the additions to be found in 2011,) continue to be in place. That is: the offence is serious, (violent or otherwise serious by reason of likely consequences), the person is likely to commit the offence and that the likelihood together with the likely consequences, outweigh the person's general right to be at liberty. Additional material found in the Bail Act in 2011 about whether the offences is sexual in nature, involves the possession or use of an offensive weapon, the community, victims and the number of future offences is not necessary because these things are either covered by s32 already (victim as witness), likely violence or consequences. The wording in the original Act found at that time in s32 © (iii) and s32 (2) seems preferable to what now appears.

9. Bail conditions.

The nature of bail has changed over time. Originally in medieval times the surety was responsible and at risk of physical punishment if the defendant absconded. Money bail became the replacement and by the 1970's it could be observed that "By retaining almost intact the ancient forms and procedures New South Wales has retained with them their almost exclusive reliance on money bail."[65] The solution was found in a wide range of non financial conditions. Then as now most of the defendants suffered from a range of social disadvantages. Emphasis on money as a bail condition hit and continues to hit such people hard. The new range of conditions was to be put in a priority order because "the most effective means of decreasing reliance on money bail and increasing release on less

[65] Anderson and Armstrong, above, n 11, 14.

onerous conditions which can be met by defendants regardless of means is that proposed in the priority list recommended by the ALRC."[66] The concept of the priority list introduced in 1978 should be retained. It is to be noted that the original first priority in s36 (2) (a) was "(a) that the accused person enter into an agreement to observe specified requirements as to his conduct while at liberty on bail, other than financial requirements (whether for the giving of security, the depositing of money, the forfeiture of money or otherwise)."

Section 36 and s37 have now become s36, s36A, s66B, s36C, s37 and s37A. These provisions run for pages. It is suggested that the Law Reform Commission commence with the wording of the original s36 and s37 and after making allowances for changes thought to be worthwhile, reduce the provisions to a workable size. For example, references to Aboriginal persons and Torres Strait Islanders and those under 18 are worthwhile provisions. However, there is no need for s36 B, introduced in 2001 as part of the "comprehensive anti-gang package, which was announced by the Premier on 4 September."[67]Two thirds of a page of changes to the Bail Act then follow concerning who a person can associate with. There is also no need for s37 (1) dealing with general purposes for imposing bail conditions. These vague concepts do not assist those working with the Act on a daily basis. There is also no need for s37 A about passport forfeiture. The courts have adequate powers to decide if that is necessary. Any residential conditions should emphasise the defendant's needs and the adequacy of available residency for that

[66] Ibid, 14.
[67]NSW, *Parliamentary Debates*, Legislative Council, 14 November, 2001,18551, C Tebbutt

defendant. Setting a condition for residency that cannot be met will simply add to the numbers on remand.

10. Breach of undertakings and conditions.

No submission is made.

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

The time limit of 8 days has been a provision for 150 years in NSW. This long standing practice has the weight of history behind it. This is useful when consideration is given to proposals like that of 2010 where amendment to length of adjournment was proposed to be changed from 8 days to "the Court or a registrar of the Court is not to adjourn the proceedings for a period exceeding 42 clear days, except with the consent of the person,"[68]Eight days currently applies as the maximum to adjournments without consent and for persons remaining in custody after bail has been granted. It should remain the limit. However, a significantly shorter period where bail has been granted and bail conditions cannot be met should be applied to young people for all the reasons set out earlier and later in this submission.

12. Young People.

There have been a number of reports that considered bail in relation to young people. One of those headed A Strategic Review of the NSW Juvenile Justice System is by

[68] Public consultation draft Bail Bill, 2010, above, n14, Cl 40.

Noetic Solutions and was sought by the last Government in 2010.[69]That review found that "changes to the Bail Act have had a range of unintended consequences that have negatively impacted on the juvenile justice system."[70]

The Bail Act does provide for consideration in s32 "If the person is under the age of 18 years, or is an Aboriginal person or a Torres Strait Islander, or has an intellectual disability or is mentally ill, any special needs of the person arising from that fact." However, the Noetic Report supported principles found in the Children's Criminal Proceeding Act. These concern children's rights and freedoms, allowance for the immaturity of children, the desirability of ongoing education and employment, the desirability where possible of residing in their own home (more on this below) and that the penalty should be no greater than that for an adult. It was proposed these take precedence over those found in the Bail Act.

International research noted by Noetic, led to the observation, "Before the impacts of this trend are examined, it is important to highlight some of the findings of *Enclosure 1 – Review of Effective Practice in Juvenile Justice*. It found that time spent in a remand facility is the "most significant factor in increasing the odds of recidivism." It also highlights that remanded detainees often feel isolated and frustrated or as if they have already been found guilty adding stress on family relationships and disruption to education for young people. Excessive use of remand can result in overcrowding of detention centres and unsatisfactory conditions for detainees. International research

[69]Noetic Solutions, 'A Strategic Review of the NSW Juvenile Justice System, Report to the Minister for Juvenile Justice' (Noetic Solutions Pty Ltd, 2010) 66-74.
[70] Ibid, vii.

shows that custodial remand should be used as last resort and bail should be granted to youth wherever possible."[71]

Considering all of the above leads to the conclusions that:

Repeal of s22A as it relates to those pleading not guilty or who have not been sentenced will for the reasons mentioned earlier in this submission assist in easing juvenile numbers on remand. The BOCSAR material mentioned earlier shows the ongoing impact of this section on juvenile numbers on remand.

There is not a need for a separate Bail Act for young people. The existing Act with modifications provides for those things which are of concern in relation to juveniles. The removal of s22A is an example. The restoration of the presumption in favour of bail is another example.

Issues concerning precedent between the Bail Act and the Children (Criminal Proceedings) Act, 1987 will simply create confusion. However, the reference to "any special needs of the person arising from that fact," as currently set out in the Bail Act does not emphasise rights and freedoms and some aspects of the principles set out in the Children (Criminal Proceedings) Act. There has been a dramatic rise in the number of young people on remand. Given that young people are tomorrow's adults and given their importance to our future, those principles should be incorporated in the Bail Act in relation to young people without suggestion that some other Act takes precedent. The

[71] Ibid, 68.

principles will then appear in both Acts. Section 67 concerning the prevailing of the Bail Act over other Acts in relation to matters of bail should continue.

The 8 day limit where bail has been granted and the person remains in custody should be significantly reduced in relation to young people. Given the international material on the destructive effects of incarceration on remand for young people it is unacceptable in a liberal democracy that the legal maximum in such circumstances should be 8 days.

There is a need to recognize that resources and discussions are needed to deal with homelessness and other factors related to bail and young people. Both the Noetic Report and the excellent Youth Justice Coalition document, “Bail Me Out” deal with the difficulties concerning bail conditions for young people.[72] It should be noted that to the extent young people are on remand, whether it be for breach of conditions or because refused bail or because of the effects of s22A, it costs $541 per day to keep them there.[73]Different approaches to residence for young people exist but there is no doubt that the Youth Justice Coalition, Uniting Care Burnside and Noetic all believe there is a need for a significant increase in residential accommodation for young people if bail conditions involving residence are to be provided.[74] The CCL supports that general conclusion. It is appropriate at this point to state that homelessness amongst adults is also a matter of deep concern and needs to be addressed by the Government, generally and in relation to specific matters concerning bail. Courts, reasonably, expect a person given bail

[72]Katrina Wong, Brenda Bailey and Dianna T Kenny, 'Bail Me Out' (Youth Justice Coalition., 2010)
[73] Ibid, 24.
[74] Ibid 25, Noetic, above, n 66, 73.

to be able to provide an address. If homelessness makes that impossible then the situation for the court and the individual before it is unsatisfactory.

Finally, it is requested that the Law Reform Commission read all of the document “Bail Me Out.” In particular, in relation to the point about to be made, there is a need to read pages 16-24. This section shows from the survey undertaken that the fundamental questions of resource and practice concerning young people on remand are only going to be resolved when the issues of resource and practice set out are dealt with. The reality on the ground is what needs to be considered at this point. A court cannot be expected to have no idea where someone on bail will reside. If there is not enough residential care available then a court is placed in an impossible position given that residing at home will not be an option for many young people. It is unrealistic to assume, whatever is said in forums and reports that courts will not have lawful ideas that may meet both bail and welfare concepts in mind when they set conditions. The people in front of the court are 12 to 17 years old and no court is going to ignore that whatever is said or not said in reports. Section 32 already provides for being free for any lawful purpose. That includes going to school which is both a bail condition and a welfare condition. A curfew for someone 12 to 17 is both a reasonable bail and welfare condition. However, as “Bail Me Out” makes clear, many of the breach of bail problems arise from conditions set and the number of conditions set. The examples on page 19 of that document under the heading “Technical breaches,” reinforce this point and also emphasise that conditions leading to breach vary enormously in their importance. The question arises as to whether breaches of all these

types should end up in arrest and court proceedings. A second part of reality on the ground is that the police will carry out their job. A third part of reality is that Legal Aid solicitors and those from the Aboriginal Legal Service will also continue to understandably complain about the difficulties arising from conditions set and arrest for breaches. Clearly the issues arising out of these concerns are practical. No doubt there have been discussions between the groups involved in the past. A fundamental discussion is needed. The Law Reform Commission should recommend that a conference occur. It should be chaired by the Attorney General. It should not be a small meeting consisting of senior people only. It should be open to all magistrates carrying out work in Children's Courts, to police who are in the field making the decisions and to Legal Aid and Aboriginal Legal Service solicitors involved in work in Children's Courts. There is no threat to the independence of judicial officers, police or solicitors in this approach as obviously their independence arises from other laws and they cannot be bound by the decisions of such a conference. This will be costly. However, the cost is minuscule compared with the current human and financial cost of a system where remand rates for young people have risen dramatically. It is a matter for the conference as to how it breaks up into sub groups and continues its work. It should occur on an annual basis and between such conferences its work should be ongoing. Only by interaction of all those involved on a continuous and long term basis will best practice be achieved.

It is also requested that the Noetic Report sought by the last Government also be read. Many of the same issues concerning the lack of resources and other difficulties are discussed. That report caused tension within the Government of the day in 2010. It is

important that the Law Reform Commission remind this Government that if there is no will to provide the resources needed, then many problems relating to young people cannot be resolved.

13. People with cognitive or mental health impairment.

No submission is made.

14. Indigenous people.

The various proposals in this submission when combined with the recognition of Aboriginal and Torres Strait Islander persons currently found in various part of the Bail Act will provide a significant improvement in relation to bail for indigenous people.

15. Duration of Bail.

Section 43 as currently written seems adequate.

16. Review of bail decisions.

No submission is made.

17. Structure of the Bail Act.

The structure of the Bail Act reflects in general terms the structure of the Bail Review Committee Report, 1976. It moves from definitions to what bail is and the parts of the legal process it applies to. This is appropriate. It then correctly moves to the right to bail

for less serious offences. As this covers many offences and in a liberal democracy should be the preferred option wherever possible then this is also appropriate. The Act then deals with the presumption issues and dispensing with bail. Perhaps the dispensing Division could be put before the right to bail and presumption sections but that is hardly critical given its availability is known by those in the court process. The decline in dispensing with bail has more to do with issues mentioned earlier than where it appears in the Act. The Act deals with the power of the police and various courts to deal with bail. Perhaps the Divisions dealing with these issues could be placed after Divisions dealing with criteria to be considered in an application for bail, conditions attached to bail and continuation of bail. That would place it before powers to review bail. Issues to do with non compliance, enforcement and other matters that concern matters arising after the granting of bail could then be in the current order.

None of these suggestions is critical. What is critical is that the major reforms mentioned earlier in this submission occur. The 2010 Public Consultation Draft contained major changes in placement of material. However, the fundamental issues that had caused the public debate over bail remained in the Draft.

18. Plain English.

The only observation that is put forward about plain English is that the Act in its original form was far more readable than the current version. Endless unnecessary amendments have done more than anything else to make the Act not read as plain English. The major

reforms mentioned earlier in this submission will do more than anything else to make the document more likely to pass a plain English test.

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