



The New South Wales Bar Association

11/175

27 July 2011

The Hon H D Sperling QC
New South Wales Law Reform Commission
GPO Box 5199
SYDNEY NSW 2001

Dear Judge Sperling

Review of the Law in Relation to Bail

The New South Wales Bar Association welcomes the New South Wales Law Reform Commission's review of the *Bail Act 1978 (Bail Act)*. The Association regards the review as an important opportunity to reshape the *Bail Act* to more appropriately meet community expectations about the balancing of a person's right to liberty pending trial, securing a person's attendance at court and the welfare of the community.

The Association views both the current remand population and its trend upwards over the last 10 years as disturbing. The current adult remand population of more than 2600 is disproportionately high. The rise in juvenile remand admissions from 3260 in 2004 to 4263 in 2007 is a particular matter of concern.

The Association supports a significant shift in emphasis in the *Bail Act*. There are good public policy reasons for a set of legislative amendments, the effect of which is to reduce the numbers of people being held in custody on remand.

The Commission's review is the first major review of the bail laws for three decades. The Association wishes to engage positively in the review process. Unfortunately, there has been insufficient time for the Association to widely consult its membership about all of the Commission's 'questions for discussion'. However, the Association has a clear view about the value of redrafting the *Bail Act* in order to ensure that only those who pose an unacceptable risk be incarcerated prior to trial.

We will be pleased to participate in the Commission's consultation process and to provide comment on proposals as they become clearer.

Over-arching considerations

The *Bail Act* should give particular emphasis to a person's right to liberty, even when charged with a criminal offence, unless there are substantial and unacceptable risks that the person may abscond or that they may jeopardise the safety and welfare of the community.

The *Bail Act* should give clear guidance to the courts about this emphasis in clear and straight forward language.

The Association supports the insertion of an objects clause. We suggested this form of words to last year's *Bail Act* Review conducted by the Criminal Law Review Division:

The object of this Act is to ensure that a person required to appear before a court in a criminal or other proceeding shall not be deprived of liberty without an appropriate balancing of the interests of the person and the interests of the community.

The 'interests of the person and the interests of the community' should be identified in the *Bail Act* in the form of statutory considerations that must be taken into account in the making of any decision about bail – both concerning whether to grant bail and, if so, what, if any, conditions should be imposed.

Right to release for certain offences

There should still be a right to release for certain minor offences. This should be the case for all offences for which the maximum penalty is a fine only.

Presumptions

There should be a major change in policy regarding the presumptions. The Association regards the plethora of offences which carry a presumption against bail as being problematic. It is probably the single biggest reason why there are so many people in remand custody.

The Association calls for a general presumption in favour of granting bail, unless the statutory considerations tip the balance in favour of refusing bail because of unacceptable risks of non-attendance and/or unacceptable risks to the community's safety and welfare.

Dispensing with bail

There is often good reason for the court to dispense with bail. Many people appear at court without the need for any form of bail. This option should remain. There is no need for bail when a person is charged with an offence that does not carry a term of imprisonment as a penalty.

Police bail

Police officers have a special role to play in the administration of bail. There should be clear guidance in the *Bail Act* for police decision makers.

Criteria to be considered in bail applications

There should be a set of statutory criteria that must be taken into account on every bail application, one of which should be that, in making any bail decision, the court or bail authority must have regard to the object of the *Bail Act*.

The other criteria should state as exhaustively as possible all of the relevant criteria touching upon the balancing of the interests of the person and the interests of the community. But, the

Association recognises that there may be relevant considerations in a particular case that cannot be identified in advance. Therefore, the Association prefers that the list of statutory considerations should be inclusive.

There are good reasons to consider the Victorian and Queensland concept of 'unacceptable risk' as a form of overarching test. Anecdotal evidence from those states suggests that this criterion is well understood and operates well.

Otherwise, the Association welcomes the opportunity for the Commission to explore the adequacy of the existing criteria in section 32 of the *Bail Act*.

Bail conditions

The parameters for considering appropriate bail conditions should be the same as those that apply to the decision about whether or not bail should be granted. The two issues are inextricably intertwined. Often, a decision to grant bail will be exercised in the context of a forecast about whether bail conditions could achieve the appropriate balance between the interest of the person seeking bail and the interests of the community.

Young people

The Association supports the insertion of a provision similar to section 6 of the *Children (Criminal Proceedings) Act 1987* emphasising the special and different nature of children and young persons in the criminal justice system. The Association supported this proposal in the round table process that was initiated by the Criminal Law Review Division in last year's review.

There is merit in considering whether there are additional criteria that apply to bail applications made by young people.

Conclusion

The Association approves of any attempt to simplify and clarify the *Bail Act*. The Association is keen to participate in any form of consultation that the Commission intends to undertake. Thank you for the opportunity to comment on the Commission's review of the *Bail Act*.

Should you or your officers require any further information, please do not hesitate to contact the Association's Executive Director, Mr Philip Selth, on 9232 4055 or at pselth@nswbar.asn.au.

Yours sincerely



Alastair McConnachie
Deputy Executive Director