Redfern Legal Centre

SUBMISSION:

NSWLRC BAIL: QUESTIONS FOR DISCUSSION

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DATE: 22 JULY 2011

Redfern Legal Centre

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i. Introduction: Redfern Legal Centre

Redfern Legal Centre (RLC) is an independent, non-profit, community-based legal organisation with a prominent profile in the Redfern area.

RLC has a particular focus on human rights and social justice. Our specialist areas of work are domestic violence, tenancy, credit and debt, employment, discrimination and complaints about police and other governmental agencies. By working collaboratively with key partners, RLC specialist lawyers and advocates provide free advice, conduct case work, deliver community legal education and write publications and submissions. RLC works towards reforming our legal system for the benefit of the community.

ii. RLC's work in bail

In general, Redfern Legal Centre does not represent people in court who have been charged with criminal matters. However, we have regular contact with people who are subject to bail conditions and are experiencing other consequences as a result of these conditions.

Redfern Legal Centre has a Police Powers practice and receives regular complaints about the exercise of powers in relation to bail by Police. We regularly advise on Police failures to exercise lawful authority.

Redfern Legal Centre also operates the Women's Domestic Violence Court Assistance Scheme at the Balmain, Newtown, Waverly and Downing Centre Local Courts.

Response to Questions for Discussion Paper

1. Over-arching considerations

1.1 What fundamental principles or concepts should be recognised and implemented by the Commission in reviewing the law of bail and the existing Bail Act?

The presumption of innocence is the foundation of our criminal justice system. The prima facie right to liberty is an essential characteristic of a civil society. Bail can only be permitted to limit the liberty and presumed innocence of the accused to the extent necessary to protect against foreseeable risks to the administration of justice and the safety of the community.

Bail is more than simply what is in the Bail Act. Bail has timeless, essential features that, if ignored, render bail punitive and subvert the fairness of the judicial system.

As the law stands, a person found not guilty but accused and prosecuted without malice and in the absence of unlawful actions by the Police, bears the costs, losses and damages of defending themselves and complying with bail conditions or time spent on remand. In an environment where bail is not presumed to be and in fact not granted, the amount of collateral damage the individual is asked to bear for the wellbeing of the justice system is

increased and in practice falls disproportionately on the disadvantaged members of the community.

The Commission should recognise and realise these imperatives in reviewing the law of bail and the existing Act.

1.2 Should the Bail Act include objectives and, if so, what should they be?

a. To maintain the presumption of innocence and prima facie right to liberty of defendants within the criminal justice system;
b. To facilitate the administration of justice; and
c. To restrain the liberty of accused people only to the extent necessary to protect the community from foreseeable risks.

2. Right to release for certain offences
(Bail Act 1978, Part 2, Div 2)

2.1 Should a right to release on bail when charged with certain offences be retained in principle?

Yes. Redfern Legal Centre supports the offence categories used in the current s.8. The current classes are justified by the rarity of custodial sentences for these offences, and the lack of obvious risk to the community. The classes of offences are those:
a. Not punishable by imprisonment;
b. Under the *Summary Offences Act 1988*;
c. Under a class or description prescribed by the Regulations.

We note that there do not appear to be any offences currently prescribed under the Regulations. This power should nonetheless be preserved as it is an additional method by which the Government may articulate its priorities regarding bail and remand.

2.2 If so, should s 8, *Right to release on bail for minor offences*, be changed in some way?

The entitlement to bail should be modified. Failure to comply with bail conditions for a minor offence should not raise the possibility of remand. The loss of entitlement to bail because of failure to comply with undertakings or conditions (s.8(2)(a)(i)) should be amended to be an entitlement to conditional bail.

3. Presumptions against and in favour of bail and cases in which bail is to be granted in exceptional circumstances only
(Bail Act 1978 Part 2, Div 2A, 3 and 3A)

3.2 What purpose are they intended to serve? What purposes should they serve?

The presumptions in the present legislation do not accord with the broader, essential purpose of bail. The legislative history of ss.8A-9D is a classic illustration of the proverbial

'slippery slope'. One reversed presumption was followed by another, until we reached the current situation where determining the presumption in relation to bail is now more an exercise of procedure than principle. Presumptions in bail should only reflect the presumption of innocence. All other considerations should be based on information available to the authorised officer making the bail decision.

3.3 Do the existing presumptions serve their intended or advocated purposes?

The existing presumptions do serve their intended and advocated purposes, however those purposes do not give due weight to the presumption of innocence and the prosecutorial burden of proof. The current presumptions in ss.8A-9D reverse the onus of proof in seeking bail. Moreover, they do so by reference to the charge rather than the evidence in the matter. It is clear that the existing presumptions fulfil the intended purpose, but that purpose is not a proper one.

3.4 Is there a better way of achieving the purposes of presumptions?

Yes. Where a presumption is a valid one, its purpose should be achieved by reference to the evidence supporting the charge, rather than the selected charge itself. Police officers make the decision to charge based on different criteria to a judicial decision to grant bail.

3.6 Should there be:
(a) a uniform presumption against bail;
(b) a uniform presumption in favour of bail;
(c) no express presumption for or against bail; or
(d) an explicit provision that there is, uniformly, no presumption for or against bail?

There should be a uniform presumption in favour of bail.

The guiding approach should be that both refusal of bail and grant of conditional bail, be based on evidence. It should not be based on a statutory regime that approximates charges with evidence.

A uniform presumption against bail is contrary to the purpose of bail, and is arguably in breach of Article 9.3 of the International Covenant on Civil and Political Rights, that "*It shall not be the general rule that persons awaiting trial shall be detained in custody*". Further, a uniform presumption against bail will not assist in reducing the remand population, and will indeed exacerbate the problem.

The absence of a presumption for or against, explicit or not, fails to give proper recognition to the purpose of bail. There is a presumption of innocence and it should be given its due.

The Centre is anecdotally aware of instances where an accused, having been on remand for many months, has sought advice from their practitioner about changing plea and the likely sentences. Having received the advice, the accused has concluded that they are likely to get time served if they now change their plea to guilty. The accused at this stage makes the decision to plead guilty, not based on tested legal consideration of guilt or innocence but just to get it over with. Remand is having not only a punitive effect, but a

coercive one.

It is concerning that the accused who take this option are generally from a disadvantaged background. The cumulative effect is that if that the Police and the Courts will take notice of the conviction and custodial sentence in future dealings with the accused to his detriment.

The presumption of innocence should be properly reflected at all stages of the criminal justice system. This means a uniform presumption in favour of bail for all offences. The evidence gathered against the accused as part of the charge process provides the relevant information to partially or fully rebut the presumption in favour of bail.

4. Dispensing with bail

(Bail Act 1978, Part 2, Div 4)

4.1 Should a person be entitled to have bail dispensed with altogether in certain cases?

A more pressing reform issue is not dispensing with bail, but granting unconditional bail at the police station. Dispensing with bail can only occur by order of the court. The offences that are likely candidates for dispensation of bail are the same minor offences where LEPRA powers of arrest are not always justified, but have in any case already been exercised. Pursuant to s.10, Police cannot dispense with bail - the closest option available to a police officer is unconditional bail.

We recommend that greater focus be given to the presumption in favour of bail, and clear directions as to the limited conditions that can be placed on bail.

5. Police bail

(Bail Act 1978, Part 3)

5.1 Should any change be made to the ability of Police to grant bail and the procedures that apply?

The primary issue with Police bail is the use of onerous and unrealistic bail conditions. Onerous conditions, such as daily reporting for an alleged verbal breach of an APVO, impair the liberty of the accused to a punitive degree. Unrealistic conditions, such as a non-association condition on a young Aboriginal accused towards his cousin, fail to consider the accused as people who have lives within the community. The procedures by which police impose bail conditions do not seem to accord with the restraints in s.37 of the Act.

The stated importance of bail checks to current NSW Police Force crime prevention methodologies raises the serious question of whether bail conditions are being set at a level that increases the likelihood of breaches of a bail agreement. It is always difficult to argue against a negative like crime prevention, but it is clear from the Commission's own concerns that there is a serious problem of remand being used in cases that do not result in a custodial sentence. The Police Force emphasis on bail compliance as an operational strategy is producing unjust results.

5.2 How is the right to seek an internal review of Police refusal to grant bail by a more senior officer working in practice? Are any changes required to the provisions governing this review?

The power under s.43A is a sensible inclusion in the Act, though it is rightly overshadowed by the imperative that Police procedure should not delay the accused being brought before the courts. The usefulness of s.43A is also impaired by apprehension of bias. Some accused are not interested in the prospect of asking one police officer to review the decision of a fellow officer.

s.43A should be amended to draw further attention to the circumstances in which an internal review can take place. An additional subsection should be inserted between (1) and (2) stating: "Where an accused person is refused bail, an authorised officer may review the decision under this section, without a request from the accused person." Though not a common scenario, such voluntary reviews may help reduce the amount of time spent in custody or the severity of bail conditions for at least some accused.

Where Police refuse to grant bail, the courts will always hear the accused on bail. The more concerning in practice, is the large number of cases where bail is granted subject to conditions that may be disproportionate or of debatable relevance to the criteria in the Act.

6. Court bail

(Bail Act 1978, Part 4, Div 1-7)

6.3 Should there be a provision that, where bail has been refused by the police or granted by the police subject to conditions, the court is required to make a fresh determination concerning bail at the first appearance of the person at court?

Yes. Some of the many issues with police bail conditions are discussed above, and it is of utmost importance to vulnerable people to be able to put information afresh. Within the Commission's own reviews into the young and the intellectually disabled in the criminal justice system, there is a wealth of evidence regarding the often dismissive attitude of Police to the relevance of the accused's personal circumstances.

In addition, the accused is often not well placed to organise support documentation or even their thoughts at the point of arrest and charge. This is particularly so for the more disadvantaged persons in the community. The system currently works to favour the experienced and well resourced.

6.4 What provision, if any, should be made for mandatory reconsideration of the question of bail and of any conditions at subsequence appearances?

Subsequent bail issues would only be on the basis of change of circumstances and the parties can reasonably be expected to raise the issue. Length of period of the remand can itself represent a change in circumstances. Mandatory reconsideration by the court should be provided for in the legislation where the accused is self-represented.

7. Repeat Bail applications

(Bail Act 1978, Part 4, Div 1)

7.1 Should s 22A, *Power to refuse to hear bail application*, which limits repeat bail applications, be repealed or amended in some way?

The implicit premise of s.22A is that a court should operate from a default of not considering a bail application. This is inimical to the prima facie right to liberty, the purpose of bail and the administration of justice. Subsections (1) and (1A) should be removed. These two subsections have fuelled much of the increase in remand populations.

The courts need only be protected from frivolous or vexatious bail applications, on the same basis as the courts should be protected from any application amounting to an abuse of process. Subsection (2) is satisfactory protection for the courts from these problems.

7.2 If retained, should s 22A apply to juveniles, to juveniles but only in serious cases, or in some other way?

The Redfern Legal Centre supports the assessment of the Youth Justice Coalition in their *Bail Me Out* report, that s.22A has disproportionate impact on juveniles, over and above the section's wider capacity for injustice. Juveniles should be exempted from s.22A as it stands.

7.3 What should be in the legislation to deal with unreasonable repeat applications while, at the same time, preserving a right to make such applications for bail as are reasonably necessary?

Until such time as prosecution briefs are served without delay, an accused person should be able to continue to make bail applications. We argue that failure to serve a brief amounts to a change of circumstances, and one particularly relevant to the administration of justice. Despite this arguably surmounting the test of s.22A, the prima facie right to liberty does not support the continued existence of s.22A.

8. Criteria to be considered in bail applications

(Bail Act 1978, Part 5, Div 1)

8.1 In relation to s 32, *Criteria to be considered in bail applications*, should there be prescribed criteria? If so, what should those criteria be?

Any criteria should reflect the objectives of the legislation and protect the prima facie right to liberty. Primary criteria to grant bail should seek to balance the risk to the community (including victims) with the principle of the presumption of innocence.

a. Probability of the person appearing in court: this consideration goes directly to the purpose of bail. In considering this probability, the Court should have regard not only to previous failures to attend, but also any reasonable excuses for those failures and any instances of the accused voluntarily reporting to a police station or court to deal with warrants.

b. Interests of the person: this consideration goes to the presumption of innocence of the accused and their prima facie right to liberty. The person's interests should be viewed within the context of the administration of justice. Despite an accused's vulnerability, whether by reason of homelessness or other factor, remand should not be viewed as better or safer living conditions than those the accused would experience if at liberty. Further, it is unlikely that a successful defence will ever give rise to a form of compensation for time spent on remand, despite the loss suffered by the accused. It is therefore appropriate that the irremediable nature of the harm caused by remand be considered relevant to the interests of the person.

We submit that the current s.32(b1) should be subsumed within s.32(c). Despite the validity of the factors, the protection of the victim and their relatives is closely aligned with the concept of interference with witnesses. Indeed, the NSW Ombudsman has repeatedly expressed the concern that victim protection bail conditions are set by Police in lieu of making an AVO application. There are separate, robust legislative provisions for the protection of individuals and they should be more fully utilised in the course of prosecutions.

c. Welfare of the community: this consideration goes to risk of the accused offending while on bail, not to the strength of the prosecution case on the current charge. It should also incorporate a recognition that accused people can be valued members of families and communities. Community activities, employment, family welfare and education can all be seriously harmed by a refusal of bail based on the prescribed view of what the "protection and welfare of the community" means.

8.3 Should an overarching test be applied to the consideration of the criteria such as: 'unacceptable risk' (as in the *Bail Act 1977 (Vic)* s 4(2)(d), or *Bail Act 1980 (Qld)* s 16(1)(a)) or 'reasonable grounds to suspect' (as in the *Bail Act 1982 (WA)* s 6A(4)) that a particular circumstance will arise?

We do not support either of the suggested overarching tests. 'Unacceptable risk' may compel more caution in the authorised officer than is appropriate given the prima facie right to liberty. 'Reasonable grounds to suspect' is, in light of the current case law on a 'reasonable suspicion', too low a standard when considering remand. 'More than a mere possibility' is arguably a lower standard than the balance of probabilities.

8.4 Should the currently prescribed primary criteria be amended or supplemented in any way?

With the exception of the current separate ground for victim protection, the primary criteria are logically justified. The factors considered reflect the balance between the accused's right to liberty, ensuring their attendance at court and the protection of the community.

8.5 Should prescribed primary criteria be exhaustive?

Yes. This further encourages consistency of decisions across the Police Force and the courts. It also protects against a growing list reasons to not grant bail. This is a real fear

and one that has been borne out over the past 20 years by the incremental introduction of presumptions against bail, and even presumptions against bail applications.

8.6 If objects are included in the Act, should the primary criteria relate to the objects and if so, how?

So long as the primary criteria do not markedly change, they will reflect the proposed objects:

a. To maintain the presumption of innocence and prima facie right to liberty of defendants within the criminal justice system;
b. To facilitate the administration of justice; and
c. To restrain the liberty of accused people to the extent necessary to protect the community from foreseeable risks.

8.10 Section 32(1)(b)(iv) allows the decision-maker to consider whether or not the person is incapacitated by intoxication, injury or use of a drug or is otherwise in danger of physical injury or in need of physical protection as one of the factors relevant to the "interests of the person".

(a) Should s 32(1)(b)(iv) be retained?

The subsection should not be retained. Despite its good intentions, it is an irrelevant consideration to granting bail. That is not to say that the effects of intoxication, injury or drugs are irrelevant considerations to the interests of the person at the time when they are taken into custody. They are only temporary affectations and are not justifiable to the purposes of bail.

The continuing obligations of Police to people in custody should not inform a bail decision. We recognise the effects of intoxication, injury or drugs as impairing the capacity of the accused to understand bail conditions. This operates to defer granting bail, rather than being a basis to refuse bail.

(b) Should this consideration operate as a reason for granting bail, or as a reason for refusing bail, or either depending on the circumstances?

Our preference is that this section be removed. Intoxication, injury and drug use are primarily health issues and remand is not an appropriate way to deal with those issues. Further, if an accused is in need of physical protection, remand is an even less appropriate way of respecting their right to be free from harm.

8.11 Are any other changes required to the way the criteria operate?

We are concerned at the operation of s.32(3) in relation to Police bail. We are aware of several cases in which Police have imposed inappropriate and onerous bail conditions on accused, including exclusion zones and residency requirements that prevent the accused from residing at their true residential address. Police have elected to prefer the particulars recorded on the COPS database as credible and trustworthy, despite the age of those COPS entries and the accused and relatives informing Police of the accused's current

residential address and place of employment. These scenarios result in court time being wasted on bail variations.

We do not, however, propose amending s.32(3). Our concern is that the operation of the criteria is hampered by unreasonable scepticism by Police when deciding which evidence to apply towards the criteria.

9. Bail conditions

(Bail Act 1978, Part 5, Div 3)

9.2 What should be the purposes of imposing requirements or conditions concerning conduct while on bail?

Broadly speaking, the purpose of conditions remains the same as the purpose of the Act: to maintain the presumption of innocence and the prima facie right to liberty, limited to the extent necessary by the administration of justice and the protection of the community. The conditions on a person entering a plea of not guilty should reflect the fact they have not admitted to criminal behaviour and are entitled to a presumption of innocence.

9.3 What matters should be considered before such requirements or conditions are imposed, and what limitation should there be on the imposition of such requirements or conditions?

Bail conditions should be referable to the objects of the Act. Conditions must also have regard to the personal circumstances of the accused and the prosecution case. For example, individual police stations may be in the habit of using a standard exclusion zone. In some cases, this exclusion zone has simply been a photocopied page of a street directory, with a circle drawn around the exclusion zone. The condition was included seemingly without reference to the fact the zone included a major highway, an intercity train line, a hospital, the charging police station and the courthouse where the matter was listed for its first mention. Further, none of the charges were for offences against the general public and it is arguable that the safety of the community was not served by the exclusion zone.

9.4 Should the purposes for which such requirements or conditions may be imposed be any wider than the considerations which apply to the grant of bail under s 32? If so, what is the rationale for having wider considerations in relation to conduct on bail than the considerations relevant to whether to grant bail at all?

No.

9.5 In particular, should the purposes of imposing such requirements or conditions (see s 37) include the promotion of effective law enforcement and protection and welfare of the community without further limitation?

One of the major factors in the increasing remand population is that the Police Force considers proactive policing of bail conditions to be ‘effective law enforcement’. This should not be a purpose of conditional bail. Bail is intended to ensure a return to court, not

a return to the cells. Those purposes should only be the objects of the Act: the presumption of innocence and the prima facie right to liberty, limited only to the extent necessary by the administration of justice and the protection of the community.

9.6 Should the question of whether to grant bail and the question of what requirements or conditions as to conduct to impose if bail is granted be seen as the one process, with the same considerations being applicable to both aspects of the process?

Yes, and those considerations should be the objects of the Act.

9.8 Should there be a set of “standard conditions”, supplemented by “special conditions” in some cases?

We strongly oppose the introduction of standard conditions into the Bail Act. The over-reliance on standard bail conditions by Police is indifferent to the presumption of innocence and the administration of justice. It discourages investigation into the circumstances of the accused and expends valuable resources for all parties on applications for variation of bail conditions, conditions that arguably should never have been imposed.

9.10 Should there be a requirement that “special” conditions be reasonable in the circumstances?

All conditions should be reasonable.

9.12 What should the mechanism be for imposing bail conditions?

Conditional bail should be a unilateral decision because of the nature and purposes of bail. Currently, there is the appearance of consent and input by the accused because it is labelled an ‘agreement’. This appearance should be dispensed with. Rather than the accused agreeing to bail conditions, they should be asked to sign an acknowledgement of the conditions imposed by the authorised officer.

Additionally, the s.37(2A) requirement should be expanded to all accused. Accordingly, it is incumbent on the authorised officer to take the necessary steps to organise sufficient assistance in order to allow comprehension by the accused (eg. provision of a support person, translator and plain English explanations).

9.13 In particular, should requirements as to the person’s conduct while on bail be expressed as conditions on which bail is granted, rather than being the subject of a condition that the person enter into an agreement to observe specified requirements?

See 9.12.

10. Breach of undertakings and conditions
(Bail Act 1978, Part 7)

10.1 Should s 50 specify the role and powers of a police officer under this section with

greater particularity?

Any action taken by Police should be with reference to the objects of the Act, and the core principles of the presumption of innocence, the administration of justice and the safety of the community. Conditional bail is not simply an extended opportunity to discredit the accused by accumulating reports of apparent non-compliance with bail agreements to foster a perception of criminality.

10.2 Should the section specify the order in which an officer should consider implementing the available options?

The primary concern is that arrest be used as a power of last resort. The upward trend in remand populations raises serious questions about the use of arrest for breach of bail conditions. Bail conditions and their breaches may have no indication of future criminal behaviour. Accordingly, arrest should only be used as a power of last resort where it is justified in relation to the breach of the bail condition and the offence that the bail relates to.

10.3 Should the section specify considerations to be taken into account by a police officer when deciding how to respond under the section?

Yes. Police should consider all relevant information, including:

a. Would the alleged breach constitute an offence justifying arrest if the accused were not on conditional bail?
b. Is the accused now materially less likely to appear before the court on the next occasion?
c. Is the community now at a materially greater risk from the accused?

The likely reason for a breach is a particularly relevant factor in a police officer deciding how to respond. Many breaches are unintentional, despite best endeavours or, at the very least, forgivable. We have had a client who reported for bail but was not believed by the police officer because of differences between married name and birth name. The most problematic aspect was the refusal by the officer in question to record any attendance by someone purporting to be the accused. The client was therefore left open to arrest for breach because of an overly narrow response by the police officer.

Police should not consider temporary targeting strategies, such as the accused's status as an Active Suspect Targeting Management Plan ("STMP") Target. That is an operational program with a stated aim of proactive detection of bail breaches in order to place targeted individuals before the courts. s.50 arrests have accordingly been seen as a simple method to pursue this program.

10.4 Should the section specify criteria for arrest without warrant?
10.5 Should the section provide that the option of arrest should only be adopted as a last resort?

Yes to both questions. s.99(3) of the *Law Enforcement (Powers and Responsibilities) Act 2002* ("LEPRA") provides clarity to police officers and other professionals in the criminal

justice system. Inserting a similar subsection into s.50 of the *Bail Act* would add to the fairness and consistency of Police powers of arrest. This is especially important in circumstances where an accused is brought before the courts for a minor breach of bail, such as a minor breach of curfew hours. This behaviour would not ordinarily justify an arrest, and the Bail Act should explicitly adopt a consistent position.

The proposed criteria for a s.50 arrest broadly reflect s.99(3) of LEPRA, but with two removals from the grounds listed there. Firstly, it is not appropriate to be able to arrest an accused person solely to prevent a repetition or continuation of the bail breach or the commission of another bail breach. For example, failure to observe a curfew does not inherently jeopardise the resolution of the criminal proceedings, nor does it necessarily place the community at risk. Secondly, a power to arrest to preserve the safety or welfare of the accused does not have a place in a Bail Act. The remaining arrest considerations (appearance before the courts, witness harassment and evidence tampering) are necessary and their inclusion would benefit the criminal justice system.

A list of relevant considerations and a legislative statement that arrest is a power of last resort for bail breaches would be positive amendments to the Bail Act. They would each act as a check on the use of arrest and help reduce remand populations.

11. Remaining in custody because of non-compliance with a bail condition
(Bail Act 1978, Part 8)

11.1 In relation to s 54A, *Special notice where accused person remains in custody after bail granted*, should the time for notice be less than the 8 days prescribed? Should a shorter time apply only in the case of non-compliance with some particular bail conditions? Should a shorter time apply to young people?

72 hours is the maximum period that we suggest. If an accused cannot meet conditions within 72 hours, they may not be able to meet the conditions for some time. This is particularly so in the case of young people who, even when independent, are usually of limited means.

11.2 Should the Bail Act provide for further notices to be given periodically in the event that a person continues to be in custody because of such non-compliance?

Yes. Further notice should be provided on a weekly basis. Inability to meet a bail condition is compelling evidence that the Court has not realistically considered the circumstances of the accused. A statutory mechanism should be implemented to maintain awareness of accused in this situation, lest the detention later be seen as divorced from the relevant information, or arbitrary.

11.5 If a particular agency is responsible for the relevant condition should the Act require the agency to provide a report or information to the Court addressing why the bail condition is unable to be met, and the steps being taken to meet it.

Yes.

12. Young people

12.1 Should there be a separate Bail Act relating to juveniles?

No. It is likely that the 'main' Bail Act would not sufficiently refer to the juvenile Bail Act. Fragmentation of legislation is a live issue for authorised bail officers who may not frequently deal with juveniles. A separate Juvenile Bail Act may do little to increase awareness.

12.2 Alternatively, should there be a separate Part of the *Bail Act 1978* relating to juveniles?

Separate considerations for juveniles should be provided. This is consistent with the current approach to provide other specific provisions in the criminal justice system dealing with juveniles. The question of whether to provide these considerations at the level of subsections, sections, divisions or parts depends on the nature and extent of the different considerations that will be applied in relation to juveniles.

12.3 Should the Bail Act explicitly provide that the principles of s 6 of the *Children (Criminal Proceedings) Act 1987 (NSW)* apply to bail determinations by a court?

Direct importation of s.6 is inappropriate because several principles relate to offences committed by the child. Only the s.6 principles of equality before the law, continuity of education or employment and the desirability of stable accommodation should be included. These are eminently sensible principles, and the grossly disproportionate rate of juvenile remand supports their explicit inclusion in the Act.

12.4 Should s 6 apply to bail determinations by Police?

Yes, subject to the same qualifications in 12.3.

12.5 As an alternative, or a supplement, should relevant principles of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") be applied to bail determinations in relation to young people?

The Beijing Rules provide additional detail to the requirements set out in Articles 9, 10 and 14 of the International Covenant on Civil and Political Rights.

13. People with a cognitive or mental health impairment

13.1 Should the provisions of the Bail Act in relation to "intellectual disability" (a defined term in the legislation) or mental illness be expanded to include people with a wider range of cognitive and mental health impairments? If so, which types of cognitive and mental health impairments should be included?

The aim of the current provisions in ss.32 and 37 of the is to ensure that the special needs of the accused are taken into account in their treatment during the bail process and in any conditions that may be imposed on bail. The provisions fail to take account of those

outside the current definition of 'intellectual disability' who nevertheless have need special accommodations to understand the bail process. The narrowness of the current terminology and definitions creates injustice by omission. The Bail Act should be expanded to account for a wider range of cognitive impairments and mental health issues. A wider definition is already present in the *Law Enforcement (Powers and Responsibilities) Act 2005* (and *Regulations*) in the definition of "vulnerable person" in cl 23(1). There is no reason to not to take into account the special needs of an accused person, especially where ignoring those needs leads to unnecessary time in custody, trauma, inadvertent breaches of bail conditions and further expense to the already under-funded justice, disability and mental health sectors.

13.2 Should any other protections apply in relation to people who have a cognitive or mental health impairment?

The current s.37(2A) is critical to the proper functioning of bail. People with an impaired ability to comprehend bail conditions need additional protection from indifference to their special needs. Where a vulnerable person is arrested for breach of bail conditions, the authorised officer should be required to consider whether s.37(2A) was complied with in setting the conditions. If it was not, the conditions should be varied accordingly.

13.3 Are any changes to bail law required to facilitate administrative or support arrangements in relation to people cognitive or mental health impairments?

Given that the shortcomings are in relation to administrative and support arrangements, legislative amendments will only be of limited value. What would cause the most tangible improvement in bail processing would be increased awareness by the individual Police officers of the needs of vulnerable people. Failure to take these needs into account leads to tangible injustice and reduces the effectiveness of the officers involved.

14. Indigenous people

14.1 Should the provisions of the Bail Act in relation to Indigenous people be amended or supplemented?

The upward trend in Indigenous remand rates has not abated since the introduction of the abovementioned legislation in 2002. Though the Centre does not operate a criminal defence practice, it appears to be a situation where, even if an Indigenous accused's circumstances are heard, the authorised officer does not recognise why these circumstances matter. Anecdotally, our clients have spoken about being refused a variation of bail conditions to visit sick family members or to attend funerals. We cannot determine whether this was because the authorised officer did not believe the accused or whether they did not understand the cultural significance of the accused's attendance at the event.

Secondly, the good intentions of the provisions have little practical effect due to the creeping effects of Div 2A of the Act providing circumstances where there is a presumption against bail. Under s.9B of the Act, a person loses a presumption in favour of bail under s.9, simply for reasons being that they were at liberty on bail, on parole or subject to a

good behaviour bond. Combined with long-standing issues of overpolicing and recidivism in Indigenous communities, the low bar operating in s.9B of the Act counters the positives of the s.32 considerations and this is reflected in the escalating remand rates.

14.2 Should the Bail Act provide that the Court in making a bail decision must take into account a report from a group providing programs or services to Indigenous people? If so, in what circumstances?

If such a report is provided, yes. The Court should not be prevented from making a decision to grant bail because of the unavailability of a requested report.

14.3 Are any changes to bail law required to facilitate administrative or support arrangements in relation to Indigenous people?

It is difficult to separate the adequacy of some aspects of bail law from the problems caused by presumptions against bail and 'proactive' policing of conditional bail. A broader reorganisation of the Bail Act to reassert the importance of the presumption of innocence and the prima facie right to liberty would unfetter the current provisions specifically relating to Indigenous accused.

18. Plain English

18.3 Should the terminology in the Bail Act be changed to reflect the effect of processes under the Act? For example, should the legislation provide for: "pre-trial-release, with or without conditions", rather than "grant of bail"; and "pre-trial detention", rather than "remand in custody"?

18.4 Should the name of the Act be changed, such as to the "Pre-Trial Detention Act"?

Accuracy of language does not equal an improved chance of understanding. When we speak to clients about bail and remand, they know what we are talking about. Given that the clients are the people with the bail conditions or on remand, we oppose a change of terminology on the basis it will confuse the people who already feel the criminal justice system speaks about them, but not to them.