Fresh Bail Applications in the District Court following Bail Refusal in the Local Court in Rural and Regional Areas.
Draft Three.

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Introduction

If a magistrate refuses bail to a defendant in criminal proceedings, generally the only method of fresh consideration by a higher court is to the Supreme Court. Even though colloquially these are referred to as an appeal or review, it is strictly a fresh application.

However, this is never to the District Court, even though there is often a District Court sitting in the same building at the same time or in a nearby centre. The District Court only entertains a bail application months later following first committal appearance, or after an appeal on sentence and/or severity.

The current situation represents a significant impediment of access to justice where liberty is at stake.

Even with modern technology, an 'appeal'[1] to the Supreme Court poses significant difficulties for practitioners, particularly in rural and regional New South Wales. In such circumstances, defendants ought to have the right to make a fresh application in a local District Court.

Appeals to the Supreme Court from the Local Court

Almost every appeal from the Local Court is to the District Court. In appeals against conviction, sentence severity or inadequacy, apprehended violence orders (including interim orders), care orders and even civil matters, almost all appeals are to the District Court. And for country people, this makes sense in terms of access to justice. The Supreme Court visits some regional and rural areas, but usually for specific sittings and rarely if ever to deal with appeals from the Local Court. It is true that the ancient and rare remedies of mandamus and the like are dealt with in the Supreme Court. Yet for some obscure historical reasons, an 'appeal' from a bail decision in the Local Court goes to the Supreme Court.

The Importance of Bail

Bail is about interlocutory liberty. Where a defendant is bail refused, this means that punishment is being imposed on presently innocent people. Generally, there are only the police facts before the magistrate and there is little time to put an alternate position before the court. There are a dizzying array of "show cause" charges.

As at December 2020, there were 4205 prisoners on remand in NSW compared to a sentenced prison population of 8561. As at 14 March 2021, there were 4557 prisoners on remand compared to the sentenced prison population of 8553. Figures demonstrate that remandees consistently comprise approximately one third, or more, of those in custody. It is estimated that over 90% of those would be bail refused in the Local Court. A significant proportion of these will be either found not guilty or sentenced in a manner that facilitates their immediate release[2].

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[1] The commonly-used term appeal is used throughout this paper, although technically is a review.

[2] It is recognised that some of these will be sentenced to 'time served'.

Furthermore, it has become increasingly difficult for remandees to be admitted to rehabilitation programs while in custody. Even prior to the Covid pandemic, a number of rehabilitation facilities were requiring that applicants must be on bail prior to being accepted in to programs. Some time ago, MERIT ceased assessing people in custody. It is also now the case that inmates are not able to avail themselves of rehabilitation and support services until sentenced, meaning that for many remandees, their time in custody is unproductive.

It is uncontroversial that the number of people on remand is too high.

Review of a bail decision in the Local Court is limited by s74 Bail Act 2013. Effectively this means that for many who are refused bail there is no opportunity to return to the Local Court.

Current Bail Application Process to Supreme Court

The current process for Supreme Court Bail following refusal in the Local Court is, following procedural changes in 2019, paper heavy and cumbersome. Submissions are to be written, affidavits as to accommodation and surety are pre-prepared and the material must all be filed with the application – See Practice Note 11, Supreme Court.

Experienced practitioners note that the preparation time from bail refusal in the Local Court to filing the application is commonly months rather than weeks. This is further exacerbated in rural areas where, often, the family and community who would the support bail appeal live a considerable distance from the solicitor's office. Another source of delay is the difficulty of obtaining affidavits from clients who are in custody. As an example, staff at Parklea Goal refuse to facilitate the swearing or affirmation of Court documents by inmates.

Once an application has been filed, there is a call-over before the Registrar. At the time of writing, it is then about a five-week delay until the matter is heard.

In summary, it seems that it would be rare to have a bail review/appeal heard in the Supreme Court within three months from the date of refusal in the Local Court.

The current cost for a private practitioner to prepare and appear for an applicant is usually quoted at between eight and ten thousand dollars. This reflects the amount of work and preparation involved.

Since Covid, all Supreme Court bail applications have been by AVL only, even for practitioners in the city. No family or support persons have been allowed in to Court. It would appear likely that this situation may well continue even after the pandemic is over.

The number of applications to the Supreme Court for bail has almost halved from 2016 (3996) to 2020 (2037)[3]

A District Court Alternative

This is how the mooted change could work - a defendant on a serious charge is refused bail in the Local Court at Lismore. There is a District Court sitting in Lismore in the same building.

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[3] https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Provisional%20statistics%20(as%20at%20%2022%20Feb%202021).pdf

An application could be made for that court to hear a fresh bail application within 14 days. It would proceed in a similar fashion to the Local Court – the facts and record are handed up to the District Court Judge, the defendant's legal practitioner and a DPP representative makes submissions. The family are present to lend support, answer any questions, address any concerns and hear the application. Rarely would oral evidence be required. The applications could be time limited to (say) 20 minutes.

The DPP would represent the Crown. This is important for obvious reasons, particularly given that in the vast majority of bail refusal matters in the Local Court the Crown is represented by a non-lawyer police prosecutor.

Such an application would be quicker, cheaper and far more accessible for family of the accused than current Supreme Court applications.

District Court judges are uniquely placed to foreshadow the likely sentence for the allegation even if convicted and the current delays in that court for trials and sentencing matters.

Country Limitations

The current system arguably disadvantages rural applicants for bail. This would be significantly ameliorated by the District Court proposal.

- In Australia today, all the population groups at higher risk of poverty are present in greater proportion in rural and remote parts of the country. People living in rural and remote Australia have lower incomes and net household worth in comparison to those living in metropolitan areas[4].

- The digital divide between rural and metropolitan areas is well documented meaning that there is less access to the internet, it is of poorer quality, and it is more expensive. This means that for the families of defendants and indeed for many rural practitioners participation in online proceedings is impossible or fraught[5].

- The majority of First Nations people live in rural and regional areas and they are grossly overrepresented at all levels of the criminal justice system, particularly incarceration. Access to justice for First Nations people is hindered by processes such as the current bail application procedure to the Supreme Court.

- The reality is that a fresh bail application in the city would rarely be heard by the same magistrate as initial refusal. Typically, bail would be refused by a centralised court such as Central Local Court, before being adjourned to the relevant suburban court. In the country, the reverse is true – most often a fresh application for bail following refusal would be heard before the same magistrate as had initially refused bail. It is not being suggested that magistrates are unreasonably intransigent or do not bring a fresh mind to a fresh application.

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[4] https://www.ruralhealth.org.au/sites/default/files/publications/nrha-factsheet-povertynov2017.pdf

[5] https://www.csi.edu.au/media/2019_ADII_Report.pdf

- There is a clear advantage in having family and support people present in court for a bail application – if for no other reason than to provide comfort for the accused. Principles of open justice require access to the courts, and such access is effectively denied many people by the current procedure for application to the Supreme Court.

Resourcing Implications

There would be resourcing implications as a result of the proposed change.

The Supreme Court bail list would all but disappear, providing significant savings to that court.

There would be significantly less work for lawyers from the Aboriginal Legal Service, Legal Aid and the private profession.

It is our estimation that there would be less people on remand, although the extent of that reduction is harder to predict. Leaving aside the human cost, the financial burden per prisoner on remand is approximately $100,000 per year and remand prisoners are more expensive to house than sentenced prisoners[6]. To put this in perspective, if this reform led to five less prisoners on remand per year, that would represent the cost, including on-costs, of a further Judge of the District Court.

There would be an increased workload for the District Court. However, these matters would take less time than an average sentence appeal from the Local Court, and could in some cases be incorporated into breaks in lengthier proceedings.

Proposed Amendment.

The key amendment would be to s66 of the Bail Act 2013, granting the District Court the power to hear applications once bail has been refused from the Local Court. If an application is lodged for appeal, it would be heard in the District Court within 14 days.

Draft prepared by David Heilpern, Cameron Bell with input from Caitlin Akthar.

[6] https://www.audit.nsw.gov.au/our-work/reports/managing-growth-in-the-nsw-prison-population