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**Bail Law and Practice:
Recent Developments**

by

Rowena Johns

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EXECUTIVE SUMMARY

This briefing paper gives a general overview of bail legislation and procedure in New South Wales as a basis for a more detailed discussion of statutory amendments introduced in recent years. The other major area explored is the increasing emphasis on participation in diversionary and rehabilitation programs as a condition of release on bail.

Interpretation of the Bail Act 1978 (pages 4-16)

The operation of bail in New South Wales is governed by the *Bail Act 1978*. Bail becomes an issue when a person is charged by the police with a criminal offence. The accused may be released on bail by an authorised police officer or at a court appearance. The Local, District and Supreme Courts all have the power to grant bail. Under the Act, the availability of bail is divided into categories: a general entitlement to bail for minor offences under section 8(1); a presumption against bail for serious drug offences involving commercial quantities (s 8A); and a presumption in favour of bail for the remainder of crimes, except where the presumption has been specifically removed, such as for murder, manslaughter, serious sexual and drug offences, armed robbery, firearm offences, domestic violence, and for certain categories of repeat offenders (ss 9, 9A, 9B).

In determining whether or not to grant bail for an offence which does not carry an entitlement to bail, four criteria shall be considered by the court or police: the probability of whether the accused will appear in court; the interests of the accused; the protection of victims and relatives; and the protection and welfare of the community: s 32. The conditions that may be imposed on the grant of bail are specified in ss 36-37, including restrictions upon conduct, attendance at a rehabilitation program, or an acceptable person agreeing to forfeit an amount of money if the accused fails to comply with the bail undertaking. The rest of the *Bail Act 1978* deals with the enforcement of bail agreements and the powers for reviewing bail decisions.

Summary of bail developments: 1978-2002 (pages 17-27)

The *Bail Act 1978* introduced a broad presumption in favour of bail, although from the outset it nominated some exceptions such as armed robbery. Over time the exceptions proliferated, removing the presumption in favour of bail for certain domestic violence offenders in 1987, murder in 1993, manslaughter and a range of sexual crimes in 1998, possession of prohibited firearms in 2001, and so on. A presumption against bail was imposed in 1988 upon certain drug offences involving commercial quantities.

There have also been substantial procedural amendments, such as the *Bail (Amendment) Act 1987* which stipulated that the Court of Criminal Appeal shall not grant bail pending an appeal against sentence or conviction passed in the District or Supreme Courts, unless special or exceptional circumstances exist. Recently, bail conditions have become more explicit in identifying the types of restraints that may be imposed on an applicant's conduct. This was the effect of the *Bail Amendment (Confiscation of Passports) Act 2002* and the *Justice Legislation Amendment (Non-association and Place Restriction) Act 2001*.

Some amendments have endeavoured to make the bail process fairer for applicants, victims or other affected parties. For example, the *Bail (Amendment) Act 1988* expanded the criteria under s 32 for determining bail, to require the police or court to take into account the protection of victims and their close relatives. The *Bail (Amendment) Act 1989* provided that a special limited review of bail conditions may be held by a court when a person who has been granted bail remains in custody because they are unable to meet all the conditions of their bail.

Bail amendments in 2002 to target repeat offenders (pages 28-43)

In 2001 the Police Service and the Bureau of Crime Statistics and Research asserted that people who commit minor offences on a regular basis are responsible for a disproportionately large amount of the crime in New South Wales, and have a greater tendency to abscond on bail. The Government responded with the *Bail Amendment (Repeat Offenders) Act 2002*, which excludes from the presumption in favour of bail those defendants who are on bail, parole, or serving a non-custodial sentence at the time of allegedly committing the present offence, and those previously convicted of an indictable offence (if the current charge is also indictable) or failing to appear in court.

Another aspect of the *Bail Amendment (Repeat Offenders) Act 2002* is a recognition that the special needs of Aboriginal people, children, the intellectually disabled, and people with a mental illness should be taken into account when addressing the interests of the accused (under s 32(1)(b)) in the course of determining bail. Amendments in the Legislative Council changed the concept of ‘community ties’ with respect to Aboriginal applicants, to emphasise the importance of extended family, kinship and place when assessing the probability that the accused will attend court (at s 32(1)(a)(ia)).

New bail provisions on intervention programs (pages 44-47)

The *Crimes Legislation Amendment (Criminal Justice Interventions) Act 2002* was assented to on 29 November 2002 but had not commenced at the time of finalising this briefing paper for publication. The Act gives formal, legislative recognition to ‘intervention programs’ and other types of rehabilitation which can be undertaken by accused persons as a condition of bail. Intervention programs will be listed in the regulations to the *Criminal Procedure Act 1986* and are expected to encompass various schemes that encourage offenders to engage in treatment, restitution, or reintegration into the community.

However, the Act removes the presumption in favour of bail if the alleged offence was committed while the accused was participating in an intervention program as a condition of being discharged without conviction for a prior offence.

Magistrates Early Referral Into Treatment program (pages 48-52)

The Magistrates Early Referral Into Treatment (MERIT) Program is a diversion scheme which allows defendants facing drug-related charges in the Local Court to be released on bail, before

they are required to enter a plea to the charge, on the condition that the defendant complies with the treatment regime. A 12 month pilot was conducted at Lismore Local Court from July 2000. MERIT now operates in 24 Local Courts, mainly in regional parts of NSW. Clinical assessment and treatment are administered by the appropriate Area Health Service.

Defendants who are charged with sexual or violent offences or strictly indictable drug offences are not eligible to participate in MERIT. The duration of the program is a minimum of 3 months, and successful completion is taken into account in the defendant's favour at sentence. There were 266 graduates of MERIT by November 2002.

Bail schemes in Cabramatta (pages 53-55)

In March 2001, Premier Carr unveiled a package of initiatives to tackle drug-related crime in the suburb of Cabramatta. Release on conditional bail played a prominent role in the Cabramatta Anti-Drug Strategy, through the Police Drug Bail Scheme and the establishment of a local MERIT program. Cabramatta is the only location in metropolitan Sydney to be included in the MERIT network to date. Liverpool Local Court and the South Western Sydney Area Health Service coordinate the program.

The Police Drug Bail Scheme enables police to refer drug users who are Cabramatta residents to treatment services, or to impose a mandatory bail condition on non-resident drug users, banning them from returning to the Cabramatta area unless they have a legitimate reason for doing so. Between 1 July 2001 and 20 March 2002, police referred 33 people for assessment or treatment, and released 393 minor offenders on bail on the condition that they not return to Cabramatta.

Bail hostels (pages 56-62)

Bail hostels are residential establishments that accommodate people as a condition of their bail, and are endorsed or regulated by the government to some degree. In New South Wales, the only hostel exclusively for persons on bail is operated by the Department of Juvenile Justice for young Aboriginal offenders.

In the United Kingdom there are approximately 100 approved hostels for people on bail, licence, probation, or serving a community sentence. Some hostels are designated 'bail only'. The management, regulation and inspection of the hostels is governed by the *Approved Probation and Bail Hostels Rules 1995* and funding is provided by the Home Office. Some hostels are managed by a local probation service and others by a voluntary management committee. While the guidelines do not exclude particular offences from eligibility, a risk assessment is conducted on applicants and many hostels apply their own admission requirements and house rules.

Bail information schemes (pages 63-66)

Bail information schemes are a means of providing the court with factual, verified details about the

defendant's community ties and other subjective circumstances for the purpose of a bail application. Probation or bail officers interview the defendant, check information with independent sources and produce a written report.

The first bail information scheme commenced in the United States of America in the early 1960s. The concept was attempted in the United Kingdom in the mid-1970s and was revived in the late 1980s. An order issued by Her Majesty's Prison Service in 1999 requires all establishments which hold prisoners on remand to have a bail information scheme in place. Probation officers do not express an opinion or make a recommendation in the bail information report but usually emphasise positive points. The report is supplied to the prosecution and the defence, who then may use it in court.

The bail information schemes in the USA are reputed to be more interventionist. Information that is gathered on community ties is scored on a fixed scale and is presented directly to the court by bail officers who make an explicit recommendation regarding the defendant's suitability for bail.

1. INTRODUCTION

Bail enables a person charged with a criminal offence to be released from custody on the condition that he or she undertakes to attend court and observe such other conditions as are specified. The law of bail was codified in New South Wales by the *Bail Act 1978*, which defines bail as an ‘authorisation to be at liberty under this Act, instead of in custody.’

Since its inception, the role of the *Bail Act 1978* has been regarded by both Labor and Liberal Governments as ‘attempt[ing] to strike the necessarily delicate balance between the right of an unconvicted accused person to be at liberty while awaiting determination of the charge on the one hand, and the protection and welfare of the community on the other.’¹ The majority of the amendments to the Act since 1978 have reflected either of these two principles.

This briefing paper commences with a comprehensive description of the main provisions of the *Bail Act 1978*, including the jurisdiction of the police and the courts to grant bail; the categories of entitlement to bail; the factors that must be considered in deciding whether or not to grant bail; conditions which may be imposed; consequences of breaching bail; and powers to review bail decisions.

Next, the major pieces of amending legislation are summarised, up to the *Bail Amendment (Confiscation of Passports) Act 2002*. During this period, a range of serious offences were named as exceptions to the general presumption in favour of bail, and different types of potential bail conditions were explicitly specified.

Separate chapters are devoted to the most recent legislative reforms affecting bail. The *Bail Amendment (Repeat Offenders) Act 2002* focuses not on serious offences, but on recidivists who commit minor offences. The Act removes the presumption in favour of bail in cases where the defendant is on bail, parole or serving a non-custodial sentence at the time of the alleged offence, or has a previous conviction for failing to appear in court or committing an indictable offence. The potential impact of these amendments for court resources, the size of the remand population, and juvenile and Aboriginal defendants, is examined.

The Crimes Legislation Amendment (Criminal Justice Interventions) Act 2002 gives a formal, legislative basis to ‘intervention programs’ and other strategies for addressing offending behaviour. The Act facilitates release on bail for these purposes, but removes the presumption in

¹ Bail Bill, Second Reading Speech, Hon. Frank Walker MP, Attorney General, *NSWPD*, 14 December 1978, p 2013. These sentiments have been echoed on numerous occasions, for example by: Liberal Premier, Hon. John Fahey MP, Bail (Domestic Violence) Amendment Bill, Second Reading Speech, *NSWPD*, 15 September 1993, p 3218; Labor Minister for Police, Hon. Paul Whelan MP, Criminal Procedure Legislation Amendment (Bail Agreements) Bill and Bail Amendment Bill, Second Reading Speech, *NSWPD*, 14 October 1998, p 8327; and Labor Attorney General, Hon. Bob Debus MP, Bail Amendment (Repeat Offenders) Bill, Second Reading Speech, *NSWPD*, 20 March 2002, p 819.

favour of bail if an alleged offence was committed while the accused was participating in an intervention program as a condition of being discharged without conviction for a prior offence.

The remainder of the briefing paper deals with practical bail initiatives that seek to divert defendants away from custody and into rehabilitation, such as the Magistrates Early Referral Into Treatment program and the Cabramatta Anti-Drug Strategy. Two overseas ventures that are explored as possible future options for New South Wales are bail hostels and bail information schemes.

GLOSSARY OF BAIL TERMS

Acceptable person	A person who is acquainted with the bail applicant and considers them to be a 'responsible person who is likely to comply with his or her bail undertaking'. ² An acceptable person is commonly a relative or friend. The applicant might be bailed to reside with or be supervised by the acceptable person. See also Surety .
Bail agreement or undertaking	The agreement that an accused person signs, pledging to abide by the conditions imposed by the police or the court.
Bail conditions	The standard conditions of a bail undertaking are that the bailed person is to appear at court and be of good behaviour. Additional conditions depend on the circumstances of the case and may include reporting to a police station at specified times, residing with a particular person, obeying a curfew, attending a treatment or training program, and so on.
Bail hostel	A residential establishment which operates to accommodate persons on bail. Usually it is a condition of bail that the defendant reside at the hostel. This may be for a particular reason, for example, to complete a drug or alcohol program.
Bail status	The main terms used in the NSW justice system to describe the bail status of a person are 'bail granted', 'bail refused', 'bail not applied for', and 'bail dispensed with'.
Indictable offence	A serious crime, triable by a jury in the District Court or Supreme Court. However, many indictable offences may be dealt with summarily if permitted by the <i>Criminal Procedure Act 1986</i> . See also Summary offence .
Remand	To be held in custody awaiting a court appearance, such as a trial or sentence proceeding. A person on remand has been refused bail or cannot meet their bail conditions.
Security	An interest in property, temporarily given by way of guarantee that an undertaking will be fulfilled, and liable to be forfeited if it is not. ³
Summary offence	A minor criminal offence, triable before a Magistrate in the Local Court without a jury. See also Indictable offence .
Surety	A person who enters into an undertaking that he or she will forfeit a specified sum of money (or other security) if a defendant fails to comply with his or her bail undertaking. ⁴

² Section 36 of the *Bail Act 1978*.

³ *The CCH Macquarie Concise Dictionary of Modern Law* (1988, Business edition), p 120.

⁴ *Butterworths Concise Australian Legal Dictionary* (1988, Second edition), p 420.

2. INTERPRETATION OF THE BAIL ACT 1978

This section outlines the framework of the *Bail Act 1978* in order to demonstrate the operation of bail procedures in NSW. All amendments to the end of 2002 are incorporated. The most recent additions are also examined in later chapters at '4. BAIL AMENDMENTS IN 2002 TO TARGET REPEAT OFFENDERS' and '5. NEW BAIL PROVISIONS ON INTERVENTION PROGRAMS'.

2.1 Introductory concepts

(i) Definition of bail

Section 4 of the *Bail Act 1978* defines bail as 'authorisation to be at liberty under this Act, instead of in custody'.

(ii) Methods of proceeding against an accused

There are 3 methods of initiating a criminal prosecution against an alleged offender:

- **Charge** – when a person is arrested, they may be formally charged at a police station. The question of bail must be dealt with in this situation.
- **Court attendance notice** – this notice is issued by the police and outlines the alleged offence, and the date and place of the court appearance.⁵ If the person fails to attend, the court can deal with the matter in their absence or issue an arrest warrant.
- **Summons** – a document issued by a court which orders a person to appear in court.

Bail does not arise if the person is served with a summons or court attendance notice. This is because the person's liberty is not in question at that stage.

Bail only becomes an issue if the person is charged by police with an offence. Indeed, police generally only use the charge option 'when it is considered there is a need to invoke the provisions of the Bail Act'.⁶

There has been an increasing use of court attendance notices in recent years to bring defendants

⁵ The Police Handbook advises police not to use court attendance notices if: the alleged offender has to enter conditional bail; the police are concerned about the alleged offender's emotional stability or conduct; or the person is intoxicated or affected by drugs; or a domestic violence offence is alleged: *NSW Police Service Handbook*, January 1999, page C-45.

⁶ Chief Inspector Tony Trichter (Senior Manager, Operational & Special Advice Unit, Court & Legal Services Branch, NSW Police), 'To Bail or Not to Bail?: Recent Developments in Legislation and Policy Concerning the Application of the Bail Act by NSW Police', paper presented at the Institute of Criminology Seminar, 'Crisis in Bail and Remand', University of Sydney Law School, 29 May 2002, p 1.

before the Local Court. In 1995, 52% of the persons whose cases were finalised in the Local Court were proceeded against by charge, requiring a bail determination to be made, whereas this figure had dropped to 36% in 2000.⁷

(iii) Periods when bail can be granted

The periods when bail can be granted are set out at s 6 of the *Bail Act 1978*. These include the passages of time between:

- a person being charged with an offence and their first appearance before a court;
- the committal for trial or sentence and the date of the hearing/sentencing;
- the defendant being referred to the Drug Court and appearing before it;
- the defendant lodging an appeal and the determination of the appeal;
- a successful appeal against conviction, and the commencement of a new trial.

(iv) Police bail: ss 17-21

A police officer may grant bail to an accused person at a police station, if the rank of the officer is sergeant or higher, or if for the time being he or she is in charge of the police station: s 17(1). 'Authorised officer' is the term used throughout the *Bail Act 1978* to refer to such a police officer.

After the accused has been charged, an authorised officer shall 'as soon as reasonably practicable' determine whether or not bail should be granted, or arrange for the person to be brought before a court: s 18(2). When an accused is refused bail by the police, the accused is to be brought to court 'as soon as practicable', for the court to exercise its bail powers or deal with the accused according to law: s 20.

Section 17(2) clarifies that a police officer may not grant bail to an accused person if a determination concerning bail has been made by a court, or the requirement for bail has been dispensed with, in respect of the offence.

(v) Court bail: ss 22-30B

Number of applications:

Generally, there is no limit to the number of bail applications that may be made to a court by an accused person: s 22(1). However, the Supreme Court has a special power under s 22A to refuse to entertain an application in the circumstances outlined below.

Local Court:

⁷ M Chilvers et al, 'Bail in NSW: Characteristics and Compliance', *Crime and Justice Statistics Bureau Brief, Issue Paper No 15* (September 2001), NSW Bureau of Crime Statistics and Research, Table 1 on p 2.

Magistrates may grant bail to a person appearing before them who is accused of an offence, or who is appealing to a higher court: s 23.

Limitations on the capacity of Magistrates to grant bail are outlined in ss 24-25. Generally, a Magistrate has no jurisdiction to grant bail once the accused person has appeared before a superior court in circumstances specified in s 24, including: after committal for trial or sentence; after appealing against conviction or sentence; or on a stated case.⁸

District Court:

The bail jurisdiction of the District Court is outlined in s 26, and enables bail to be granted to persons awaiting trial or sentence in the District Court; persons appealing against a conviction or sentence imposed in the Local Court; and persons awaiting a new trial ordered by the Court of Criminal Appeal following a successful appeal against conviction.

Supreme Court:

The Supreme Court may grant bail to any person accused of an offence, whether or not the person has appeared before the Supreme Court in connection with the offence: s 28. It is commonplace for the Court to receive bail applications from defendants who have been refused bail by a Magistrate or a District Court judge.

However, the Court reserves the discretion to refuse to hear the application when:

- it considers the application to be frivolous or vexatious; or
- a previous application has already been made to the Supreme Court (however constituted) and the Court is not satisfied that special facts or special circumstances exist to justify making another application; or
- the application comprises a bail condition review that could be dealt with under s 48A in the Local Court or District Court: s 22(4), s 22A.

Court of Criminal Appeal:

The Court of Criminal Appeal (CCA) may grant bail in cases where it has allowed an appeal against a conviction and ordered a new trial: s 30. When a person has an appeal against conviction or sentence pending in the CCA or is appealing a decision of the CCA to the High Court, the CCA's bail jurisdiction is subject to the requirement that 'special or exceptional circumstances exist justifying the grant of bail': s 30AA.

High Court:

⁸ A stated case entails the applicant referring a question of law to the Supreme Court for a ruling.

The High Court may grant bail pending the hearing of an application for special leave to appeal,⁹ or when the application is granted, until the actual hearing of the appeal. This jurisdiction is incidental to the power conferred by s 73 of the *Constitution* to hear and determine appeals. The High Court is not specifically referred to in the *Bail Act 1978*.

2.2 Categories of offences

(i) Minor offences – general entitlement to bail: s 8

Section 8(1) of the *Bail Act 1978* creates a general right to be released on bail for certain minor offences:

- offences not punishable by a sentence of imprisonment (except in default of payment of a fine);
- offences under the *Summary Offences Act 1988* that are punishable by a sentence of imprisonment;
- offences punishable summarily that are prescribed by the Bail Regulations – no such regulation has yet been made;¹⁰
- breaching a good behaviour bond or a community service order.

A person accused of one of the abovementioned offences is entitled to be granted unconditional or conditional bail unless one of the situations outlined by s 8(2)(a) applies:

- the accused has previously failed to comply with a bail undertaking or condition; or
- in the opinion of the police officer or court, the accused is incapacitated by intoxication, injury or drug use, or is otherwise in danger of physical injury or in need of physical protection; or
- the accused stands convicted of the offence or the conviction is stayed; or
- a court has already dispensed with bail – this means that the accused is entitled to be at liberty until required to appear in court.

(ii) Serious drug offences – presumption against bail: s 8A

A number of drug offences carry a presumption against granting bail. Those under the *Drug Misuse and Trafficking Act 1985* include: cultivating, supplying or possessing a commercial quantity of a prohibited plant (s 23(2)); manufacturing or supplying a commercial quantity of a prohibited drug (ss 24(2), s 25(2)); and conspiring, aiding, abetting, soliciting, inciting, etc, the commission of the aforementioned offences (ss 26, 27).

⁹ There is no automatic right of appeal to the High Court. Rather, a preliminary hearing is held to determine if there are special reasons for the appeal to be heard. See the *Judiciary Act 1903* (Cth) and the *High Court Rules 1952*.

¹⁰ R Howie and P Johnson (eds), *Criminal Practice and Procedure NSW* (looseleaf service), Butterworths, Vol 2, para [15-150.5].

The presumption against bail also applies to Commonwealth offences of importing narcotics, in contravention of ss 231(1), 233A or 233B of the *Customs Act 1901* (Cth), where the goods concerned are of the same nature and quantity as the NSW offences in the *Drug Misuse and Trafficking Act 1985*.

A person who commits one of the drug offences identified by s 8A of the *Bail Act 1978* will not be granted bail unless they satisfy the court that bail should not be refused. If bail is granted, the police officer or court must record the reasons for doing so: s 38.

The Supreme Court has held that s 8A expresses a legislative intention that persons charged with the drug offences specified in the section should ordinarily be refused bail: *R v Kissner* (unreported, Supreme Court, 17 January 1992), approved by the Court of Criminal Appeal in *R v Masters* (1992) 26 NSWLR 450 at 473.

(iii) Offences which are exceptions to the presumption in favour of bail: ss 9-9B

Section 9 of the *Bail Act 1978* creates a general presumption in favour of bail except for specified offences. The practical effect of naming exceptions to the presumption in favour of bail is that no presumption operates for or against granting bail in relation to these offences.

Serious offences: Section 9 provides that a range of sexual, violent, and drug offences are exceptions to the general presumption in favour of bail. These offences include:

- murder, attempted murder, conspiracy to murder, manslaughter;
- wounding with intent to do bodily harm;
- serious sexual offences such as aggravated sexual assault, assault with intent to have sexual intercourse, homosexual intercourse with a male under 10 years, and sexual intercourse with a child under 10 years (and attempting the same, or assaulting with intent to do same);
- kidnapping;
- aggravated robbery, armed robbery, robbery in company, robbery with wounding;
- certain offences under the *Drug Misuse and Trafficking Act 1985* where the plant or drug concerned is alleged to be of a quantity which is at least twice the indictable quantity¹¹ applicable under the Act, eg. cultivate, supply or possess a prohibited plant; supply or manufacture a prohibited drug; conspire, aid, abet etc to commit such offences;
- supplying drugs on an ongoing basis against s 25A of the *Drug Misuse and Trafficking Act 1985*, or conspiring, aiding, abetting etc to commit such offences;¹²

¹¹ For example, the indictable quantity of heroin, amphetamine, and cocaine is 5 grams: see Schedule 1 of the *Drug Misuse and Trafficking Act 1985*. When a person commits an offence involving the indictable quantity of drug, the offence is strictly indictable. This means the prosecution will normally proceed on indictment in the District Court. If the drug is less than the indictable quantity, the matter may be prosecuted summarily in the Local Court.

¹² Section 25A specifically penalises any person who, on 3 or more separate occasions during any period of 30 consecutive days, supplies a prohibited drug other than cannabis for financial or material reward.

- firearm offences under s 7 of the *Firearms Act 1996*, relating to the unauthorised possession or use of a prohibited firearm or pistol.

Domestic violence: Section 9A also excludes from the presumption in favour of bail:

- domestic violence offences; and
- contravention of an apprehended domestic violence order (ADVO) by an act involving violence, stalking, or intimidation;

WHERE the accused:

- has a history of violence – meaning that the accused has been found guilty in the last 10 years of a personal violence offence (as defined by the *Crimes Act 1900*)¹³ committed against any person, or has contravened an ADVO; or
- has been violent to the alleged victim in the past (a conviction is not necessary); or
- has failed to comply with a bail condition that was imposed for the protection and welfare of the alleged victim.

Repeat offenders: Further exceptions to s 9 were introduced by the *Bail Amendment (Repeat Offenders) Act 2002*, which inserted s 9B to target recidivists who commit minor offences. The presumption in favour of bail at s 9 does not apply if:

- at the time the offence is alleged to have been committed, the person was on bail, on parole, was serving a non-custodial sentence, or was subject to a good behaviour bond, in connection with any other offence;
- the person has been previously convicted of failing to appear at court in accordance with a bail undertaking;
- the person is accused of an indictable offence and has been previously convicted of an indictable offence (whether dealt with on indictment or summarily).

The repeat offender provisions of s 9B will be extended when the *Crimes Legislation Amendment (Criminal Justice Interventions) Act 2002* commences.¹⁴ It removes the presumption in favour of bail when, at the time of committing the alleged offence, the accused was participating in an ‘intervention program’ as a condition of being discharged without a conviction pursuant to s 10 of the *Crimes (Sentencing Procedure) Act 1999*.¹⁵ Intervention programs will

¹³ The definition of ‘personal violence offence’ in s 4 of the *Crimes Act 1900* lists many offences including murder, manslaughter, assault, wounding, indecency, sexual assault, and malicious damage to property.

¹⁴ The Act was passed in the Legislative Assembly on 15 November 2002 and the Legislative Council on 21 November 2002. It received assent on 29 November 2002 but had not commenced at the time of going to print.

¹⁵ Section 10 is commonly used in situations where the offence is of a trivial nature or occurred in extenuating circumstances. The offender is found to be guilty, but the court does not proceed to a conviction. The charge may simply be dismissed, or the offender may be discharged on entering into a good behaviour bond.

be declared by regulation and are expected to include drug treatment, rehabilitation and restorative justice programs that have some degree of government approval. Current examples of programs that would qualify are circle sentencing, community aid panels, and the Traffic Offender Program.¹⁶

The issues surrounding repeat offenders and intervention programs respectively are examined in more detail in later chapters of this paper: '4. BAIL AMENDMENTS IN 2002 TO TARGET REPEAT OFFENDERS' and '5. NEW BAIL PROVISIONS ON INTERVENTION PROGRAMS'.

(iv) Other offences – presumption in favour of bail: s 9

Section 9 provides a presumption in favour of bail for those offences which are not highlighted as exceptions. Although not explicitly stated, the prosecution bears the onus of rebutting the presumption in favour of bail for these offences.

The general entitlement to bail under s 9 applies unless:

- the court or police officer determining bail is satisfied that a refusal of bail is justified pursuant to a consideration of the criteria in s 32; or
- the person stands convicted of the offence, or the conviction has been stayed; or
- bail has already been dispensed with; or
- the person is in custody serving a sentence of imprisonment for another offence, and the duration of the sentence exceeds that for which bail would be granted for the instant offence: s 9(2)-(4).

2.3 Factors in considering whether to grant bail

Section 32 sets out the criteria that must be considered by the court or police officer in deciding whether or not to grant bail. Only the matters outlined may be taken into account.

However, as s 31 makes clear, the s 32 criteria do not apply when an accused person has a right to release on bail for minor offences listed under s 8.

(i) Probability of whether the accused will appear in court – this factor is to be considered having regard only to:

- in the case of a non-Aboriginal accused, their background and community ties as indicated by the history and details of the person's residence, employment and family situation, and prior criminal record (if known);
- in the case of an Aboriginal or Torres Strait Islander accused, their background and community ties as indicated by extended family and kinship, traditional ties to place, and prior

¹⁶ Crimes Legislation Amendment (Criminal Justice Interventions) Bill, Second Reading Speech, Tony Stewart MP, Parliamentary Secretary, *NSWPD(LA)*, 12 November 2002, p 97 (Proof).

criminal record (if known);

- any previous failure by the accused to appear in court pursuant to a bail undertaking;
- the circumstances, nature and seriousness of the offence, the strength of the evidence against the accused, and the severity of the penalty; and
- any specific evidence indicating whether or not it is probable that the accused will appear in court.

(ii) *Interests of the accused* – this factor is to be considered with reference only to:

- the period that the accused may be obliged to spend in custody if bail is refused, and the conditions of that custody;
- the needs of the accused to be free to prepare for court and obtain legal advice, or to be free for any other lawful purpose;
- whether or not the person is, in the opinion of the police officer or court, incapacitated by intoxication, injury or drug use, or is otherwise in danger of physical injury or in need of physical protection;
- special needs of persons under 18 years, Aboriginal persons and Torres Strait Islanders, and persons with an intellectual disability or mental illness;
- if the person is accused of an indictable offence with a previous conviction for an indictable offence (ie. persons denoted by s 9B(3)), the nature of the person's criminal history, having regard to the amount, nature and seriousness of any prior convictions for indictable offences, and the length of time between those offences.

(iii) *Protection of victims and relatives* – in the following categories:

- alleged victims, ie. any person against whom it is alleged that the offence concerned was committed;
- the close relatives¹⁷ of an alleged victim;
- any other person who the court or police considers to be in need of protection because of the circumstances of the case.

(iv) *Protection and welfare of the community* – this issue is to be considered having regard only to:

- the nature and seriousness of the offence, in particular whether the offence is of a sexual or violent nature or involves the possession or use of an offensive weapon or instrument within the meaning of the *Crimes Act 1900*;
- whether or not the person has failed to observe a reasonable bail condition previously imposed in respect of the offence, or has been arrested for an anticipated failure;
- the likelihood of the person interfering with evidence, witnesses or jurors;

¹⁷ Section 4(1) of the *Bail Act 1978* defines a close relative as a mother, father, wife, husband, daughter, son, step-daughter, step-son, sister, brother, half-sister, half-brother, or a partner in a domestic relationship, and the aforementioned relatives of the partner.

- whether or not it is likely that the person will commit any ‘serious offence’ (as defined below) while on bail. But the court or police officer may only consider this factor if satisfied that the person is likely to commit serious offences and that the likelihood, together with the likely consequences, outweighs the person’s general right to be at liberty;
- if the offence for which bail is being considered is a serious offence, whether, at the time the person is alleged to have committed the offence, the person had been granted bail, or released on parole, in connection with any other serious offence;
- if the offence for which bail is being considered is an offence that involves the possession or use of an offensive weapon or instrument within the meaning of the *Crimes Act 1900*, any prior criminal record (if known) of the person in respect of such an offence.

For the purpose of determining whether an offence is a ‘serious offence’, the following matters are to be considered (but are not exclusive):

- whether the offence is of a sexual or violent nature or involves the possession or use of an offensive weapon or instrument within the meaning of the *Crimes Act 1900*;
- the likely effect of the offence on any victim and on the community generally;
- the number of offences likely to be committed or for which the person has been granted bail or released on parole: s 32(2A).

2.4 Bail conditions

Conditional or unconditional bail:

Bail may be granted unconditionally or subject to conditions imposed by instrument in writing: s 36(1). Unconditional bail still requires the accused to appear at court on the date shown on the bail form.

According to s 37, bail shall be granted unconditionally unless the court or police officer determining bail is of the opinion that one or more conditions should be imposed for:

- (a) the promotion of effective law enforcement; or
- (b) the protection and welfare of any specially affected person (the alleged victim, their close relatives, and any other person whose needs warrant special consideration because of the circumstances of the case); or
- (c) the protection and welfare of the community; or
- (d) reducing the likelihood of future offences being committed by promoting the treatment or rehabilitation of an accused person – this last subsection was added by the *Crimes Legislation Amendment (Criminal Justice Interventions) Act 2002*, which had not commenced at the time of writing.

However, unconditional bail is not frequently used these days. According to Chief Inspector Tony Trichter, Senior Manager of the Operational and Special Advice Unit in the Court and Legal Services Branch of NSW Police, unconditional bail is a ‘thing of the past’ and the current focus is

on conditions to ensure that the defendant appears at court.¹⁸

Section 37(2) provides that conditions shall not be imposed that are any more onerous for the accused person than appear to the court or police to be required:

- (a) by the nature of the offence, or
- (b) for the protection and welfare of any specially affected person (as above), or
- (c) by the circumstances of the accused person.

Other technical restrictions on the imposition of bail conditions are outlined in s 37(3)-(4).

General undertaking to appear:

Section 34 provides that a person shall not be released on bail unless the person undertakes in writing to appear before a court, on such a day, time and place as are required.

General conditions under s 36:

Conditions that may be imposed on the grant of bail are stipulated by ss 36-37. Those available under s 36 involve:

- the accused observing specified requirements regarding conduct while on bail;
- the accused residing in accommodation for persons on bail;
- an acceptable person acknowledging that he or she is acquainted with the accused and that the accused is a responsible person who is likely to comply with the bail undertaking;
- the accused or an acceptable person agreeing, with or without the deposit of security (eg. a property), to forfeit a specified amount of money if the accused fails to comply with the bail undertaking;¹⁹
- the accused or an acceptable person depositing with the court or police a specified amount of money in cash and agreeing to forfeit it if the accused fails to comply with the bail undertaking;
- the accused surrendering to the police or court any passport they hold.

Rehabilitation conditions under s 36A:

Section 36A specifically empowers the court or police officer to whom a bail application is made to impose a condition that the accused agree to undergo assessment for an 'intervention program' or other treatment or rehabilitation, and/or that the accused participate in such an activity. An intervention program is a rehabilitation, treatment, or restorative justice program that is described

¹⁸ Comments made at the Institute of Criminology seminar on 'Crisis in Bail and Remand', University of Sydney Law School, 29 May 2002.

¹⁹ A person who enters into an undertaking to forfeit a specific amount of money or other security if a defendant fails to comply with a bail undertaking is known as a 'surety'. Section 42 of the *Bail Act 1978* entitles a surety to make an application to be discharged of his or her liability.

in the regulations to the *Criminal Procedure Act 1986*. It is clear that s 36A allows a bail condition to relate to other forms of treatment or rehabilitation besides approved intervention programs.

This version of s 36A is created by the *Crimes Legislation Amendment (Criminal Justice Interventions) Act 2002*, which received assent on 29 November 2002 but had not commenced at the time of finalising this briefing paper. Previously, s 36A referred more narrowly to ‘assessment, treatment or rehabilitation for drug or alcohol misuse’.

However, the new s 36A does introduce a limitation: subsection (6) precludes the Children’s Court or a police officer from imposing a bail condition requiring a person who was under 18 years at the time of the alleged offence to be assessed for, or participate in, an intervention program.

Non-association conditions under s 36B:

Section 36B provides explicitly for bail conditions which prohibit or restrict the accused from associating with a specified person, and/or visiting or frequenting a particular place or district.

The accused does not contravene this condition if, having associated with the specified person unintentionally, the accused immediately terminates the association. The phrase ‘associate with’ means to be in company with, or to communicate with, by any means including post, facsimile, telephone and email.

Section 36C prohibits the publication or broadcasting of the name of a person (other than the accused) who is specified in a non-association condition, or any information calculated to identify any such person.

For more information about the introduction of non-association restrictions upon the grant of bail, see p 23 of this paper.

Bail conditions for intellectually disabled people:

Section 37(2A) provides that, before imposing a bail condition on an accused person who has an intellectual disability, the court or police officer in question is to be satisfied that the bail condition is appropriate having regard (as far as can reasonably be ascertained) to the capacity of the accused to understand or comply with the bail condition.

The term ‘intellectual disability’ is defined as: ‘a significantly below average intellectual functioning (existing concurrently with two or more deficits in adaptive behaviour) that results in the person requiring supervision or social rehabilitation in connection with daily life activities.’

Condition for surrender of passports:

Bail is not to be granted to a person who is accused of an offence occasioning death without a condition requiring the surrender of any passport held by the person to the court or police: s 37A(2). However, a court may direct that the accused's passport does not have to be surrendered if the accused satisfies the court that such a direction is justified in the circumstances of the case.

Further details about the impetus for this provision are given at p 26.

Recording reasons for conditions imposed:

Section 38(2) provides that where bail is allowed conditionally, the judge or police officer who grants bail shall record the reasons for their decision to not grant bail unconditionally.

They are also required by s 39B to take all reasonable steps to ensure that any person (including the accused) who enters into a bail agreement is made aware of the obligations incurred under that agreement, and the consequences that may follow if the accused fails to comply with the undertaking.

2.5 Breach of bail

Arrest for breach:

If a police officer believes on reasonable grounds that a person who has been released on bail has failed to comply with or is about to contravene the bail undertaking, the person may be arrested and brought before a court: s 50(1). The court may release the person on the original bail conditions, or revoke the original bail if satisfied of failure (or impending failure) to comply: ss 50(2),(3A). Section 50(3) provides that if the original bail is revoked, the court may grant bail on new conditions or refuse bail and commit the person to prison.

Failure to appear:

A person on bail commits an offence if they fail to appear in court without a reasonable excuse: s 51(1). If convicted, the person is liable to the same penalties as are provided for the offence in respect of which they failed to appear, but with a limit of 3 years imprisonment or a fine of 30 penalty units (currently \$3300).

Forfeiture procedures:

If an accused fails to comply with a bail undertaking, the court may make a forfeiture order in relation to bail money: s 53A. Any person affected by the forfeiture may lodge an objection to the order. In the event of an objection, a hearing must be conducted to determine whether to confirm the order, set it aside, or vary it to reduce the amount of bail money to be forfeited: s 53D.

2.6 Review of bail decisions

Part 6 of the *Bail Act 1978* provides for a review of bail conditions. The usual method of review

is to conduct a complete rehearing of the matter: s 48(3). A court can review the bail decision of a court at the same or lower level of jurisdiction, and even a higher court in some circumstances.

A number of avenues of review are available:

- **Senior police officers** may review a refusal to grant bail by a more junior officer: s 43A. Possible grounds for review suggested by s 43A(5) include a ‘significant change in circumstances’ or that the accused is no longer intoxicated or in need of physical protection.
- **Magistrates in the Local Court** may review the decision of a police officer, a justice of the peace, or another Magistrate: s 44(2).
- **District Court judges** may review any bail decision made by the District Court or Local Court.
- **Local and District Courts** also have the capacity to review Supreme Court bail decisions if the Court or Magistrate before whom the applicant is appearing ‘is satisfied that special facts or special circumstances justify the review’: s 44(6).
- **Supreme Court judges** may review any bail decision of an equal or lesser jurisdiction, but a Supreme Court judge sitting alone may generally not review a decision of the Court of Criminal Appeal: s 45.²⁰
- **Court of Criminal Appeal (CCA)** may review its own bail decisions, but a judge of the CCA sitting alone may not review a decision of the CCA constituted by a bench of 3 or more judges: s 46.
- **Limited review if accused is unable to meet a bail condition** – if an accused person remains in custody after being granted bail because they are unable to comply with a bail condition, a limited review in relation to the conditions of bail may be held: s 48A. The Supreme Court may refuse to exercise the general power in s 48 to review a bail decision if it is satisfied that the request entails a bail condition review of the type that can be dealt with under s 48A by a justice of the peace, Magistrate, or the District Court: s 48(7A).
- **Limited review by Attorney-General’s Department** – a justice of the peace (JP) employed in the Attorney General’s Department may review a decision of any court relating to a bail reporting condition or residence condition: s 48B. The JP may vary the arrangements for reporting to a police station, revoke the reporting condition altogether, or may vary the address where the accused must live under a residency condition. Numerous restrictions apply to the use of these powers.

²⁰

Notwithstanding s 45, the Supreme Court may only conduct a review of an accused person’s inability to meet a bail condition when that bail was granted by the Supreme Court: s 48A(5).

3. SUMMARY OF BAIL DEVELOPMENTS: 1978-2002

This section highlights the major amendments that have occurred since the enactment of the *Bail Act 1978*, up to the *Bail Amendment (Confiscation of Passports) Act 2002*. (The latest 2002 amendments are dealt with separately at ‘4. BAIL AMENDMENTS IN 2002 TO TARGET REPEAT OFFENDERS’ and ‘5. NEW BAIL PROVISIONS ON INTERVENTION PROGRAMS’.)

The summary of developments is not exhaustive, and numerous technical amendments have been omitted. Rather, the intention is to demonstrate the volume of changes that have occurred in the last couple of decades, and the trend towards increased specificity and restrictiveness. Labor and Coalition Governments have both contributed to this process.

Bail (Amendment) Act 1986 No 48 P Drug offences

Introduced by the Wran Labor Government, the *Bail (Amendment) Act 1986* commenced on 25 May 1986.²¹ It amended s 9 of the *Bail Act 1978*, which lists the exceptions to the presumption in favour of bail. The offences added were serious drug offences pursuant to the *Drug Misuse and Trafficking Act 1985*, such as supplying or manufacturing a commercial quantity of a prohibited drug, and cultivating, supplying or possessing a commercial quantity of a prohibited plant.

Bail (Amendment) Act 1987 No 43 P Bail pending the hearing of an appeal

The *Bail (Amendment) Act 1987* was introduced by the Unsworth Labor Government and commenced on 23 May 1987.²² It concerned the granting of bail to persons who appeal to the Court of Criminal Appeal or the High Court against sentence or conviction on indictment. The amendments stipulated that bail shall not be granted pending an appeal unless ‘special or exceptional’ circumstances exist.

The then Attorney General, Hon. Terry Sheahan MP, explained the principles at stake:

On the one hand, granting bail in these cases may be thought to whittle away the finality of the jury’s finding, and to treat the verdict merely as a step in the process of appeal...

On the other hand, it can be argued that a person who does not get bail pending appeal and who is later acquitted...may have cause to complain that he or she has been unjustly treated. This would be especially so where the sentence had been substantially served prior to the appeal being heard. Any amendments must,

²¹ *Government Gazette*, No 85 of 23 May 1986, p 2289.

²² *Government Gazette*, No 83 of 22 May 1987, p 2407.

therefore, aim to strike the appropriate balance between these competing views.²³

Bail (Personal and Family Violence) Amendment Act 1987 No 185 P Domestic violence

Introduced by the Unsworth Labor Government, the Act commenced on 21 February 1988.²⁴ It made an exception to the presumption in favour of bail 'in the case of a domestic violence offence, if the accused person has previously failed to comply with any bail conditions imposed for the protection and welfare of the victim. This presumption is restored only if the relevant officer or court is satisfied that those bail conditions will be observed in future.'²⁵

Also, the criteria to be considered under s 32 of the *Bail Act 1978* in determining a bail application were expanded to require that, in the case of a domestic violence offence, the court or police shall have regard to the protection and welfare of the alleged victim, and any previous conduct of the accused which affects the likelihood of the accused committing further domestic violence offences against the alleged victim while on bail.

Bail (Amendment) Act 1988 No 16

The Act was introduced by the Greiner Coalition Government and commenced on 21 August 1988.²⁶

P Drug offences

The offences involving commercial quantities of prohibited drugs and plants that had been identified by the *Bail (Amendment) Act 1986 No 48* as exceptions to the presumption in favour of bail, were shifted by the *Bail (Amendment) Act 1988 No 16* to form a new category of offences which carry a presumption against bail, at Part 2A of the *Bail Act 1978*. Also included in the new category were drug importation offences under the Commonwealth *Customs Act 1901*, amounting to an equivalent commercial quantity of narcotics or plants. Previously the *Bail Act 1978* had not assigned a presumption against bail to any offence. The new provisions placed the onus on the accused to satisfy the court that bail should not be refused.

The then Attorney General, Hon. John Dowd MP, explained the impetus for the change:

This Government is reflecting the community's expectations that a much stronger stand

²³ Bail (Amendment) Bill, Second Reading Speech, Hon. Terry Sheahan MP, Attorney General, *NSWPD*, 6 May 1987, p 11248.

²⁴ *Government Gazette*, No 33 of 19 February 1988, p 930.

²⁵ *Bail (Personal and Family Violence) Amendment Act 1987*, Second Reading Speech, Hon. Barrie Unsworth MP, Premier, *NSWPD*, 29 October 1987, p 15467.

²⁶ *Government Gazette*, No 134 of 19 August 1988, p 4344.

should be taken against commercial drug trafficking... Commercial drug trafficking offences are of a particularly insidious nature, and require special attention. It is almost inevitable that persons who traffic in large quantities of prohibited drugs are members of syndicates fostered by organized crime.²⁷

A second drug amendment was introduced by the *Bail (Amendment) Act 1988*. It removed the presumption in favour of bail for additional offences under the *Drug Misuse and Trafficking Act 1985*, such as cultivate, supply or possess prohibited plant, and manufacture or supply prohibited drug, when the quantity of the prohibited plant or drug exceeded twice the indictable quantity, but was less than the commercial quantity applicable under that Act. Offences under the Commonwealth *Customs Act 1901* which involved an equivalent quantity of narcotic substance were similarly excepted from the presumption in favour of bail.

P Protection of victims

The *Bail (Amendment) Act 1988* also amended the criteria at s 32 for determining bail, stating that the court or police officer considering bail shall take into account the protection of any person against whom it is alleged that the offence was committed, the close relatives of such a person, and any other person in need of protection due to the circumstances of the case.

Bail (Amendment) Act 1989 No 109

The Act was introduced by the Greiner Coalition Government and commenced on 25 March 1990.²⁸

P Inability to meet bail conditions

The *Bail (Amendment) Act 1989* addressed the problem of accused persons who are granted bail but remain in custody because they are unable to meet a condition of the bail. Section 48A was inserted into the *Bail Act 1978* to provide that a special limited review of bail conditions may be held by a court to affirm the conditions, vary them, or grant bail unconditionally. Section 54A was created to require the prison or police station where the person is being held to notify the appropriate court when failure to meet a condition of bail is keeping the person in custody.

The Government anticipated that, 'The effect of this amendment will be to ensure that persons who should be released on bail are able to be so released and, as a consequence, there will be a reduction in the gaol remand population.'²⁹

P Restriction on number of bail applications to Supreme Court

²⁷ Hon. John Dowd MP, Attorney General, *NSWPD*, 25 May 1988, pp 551, 552.

²⁸ *Government Gazette*, No 41 of 23 March 1990, p 2399.

²⁹ *Bail (Amendment) Bill 1989*, Second Reading Speech, Hon. John Dowd MP, Attorney General, *NSWPD*, 3 May 1989, p 7329.

Accused persons can apply to the Supreme Court for bail in relation to any offence, irrespective of whether the person appeared before the Supreme Court in connection with the offence. However, the *Bail (Amendment) Act 1989* inserted s 22A in the *Bail Act 1978* to empower the Supreme Court to refuse to entertain repeated bail applications unless the Court is satisfied that ‘special facts or special circumstances’ justify a further application.

This amendment was intended ‘to assist in the Government’s commitment to reducing court delay [by] relieving the obligation on the Supreme Court to entertain meritless applications.’³⁰

Bail (Domestic Violence) Amendment Act 1993 No 102 P Murder and domestic violence

The Act was introduced by the Fahey Coalition Government and commenced on 19 December 1993.³¹

The exceptions to the presumption in favour of bail, outlined at s 9 of the *Bail Act 1978*, were extended to include:

- murder, and
- domestic violence or contravention of an apprehended domestic violence order (ADVO) where the accused person has a ‘history of violence’ – meaning that the accused has been found guilty within the last 10 years of any personal violence offence, or of contravening an ADVO by any act involving violence.

Criminal Legislation Amendment Act 1995 No 23

The Act was introduced by the Carr Labor Government and commenced on 1 July 1995.³²

P Murder-related offences

The Amending Act removed the presumption in favour of bail for conspiracy to commit murder, wounding with intent to murder, attempted murder, and sending a letter threatening to kill or inflict bodily harm.

P Supreme Court powers

The *Criminal Legislation Amendment Act 1995* authorised the Supreme Court to refuse to entertain an application for a bail review if it involved a review of a person’s inability to meet bail conditions, where such a review could be conducted by the Local Court or District Court under s

³⁰ Ibid, p 7329.

³¹ *Government Gazette*, No 138 of 17 December 1993, p 7273.

³² *Government Gazette*, No 79 of 30 June 1995, p 3433.

48A of the *Bail Act 1978*.

The purpose of this amendment was ‘to ensure that valuable Supreme Court time is not taken up by bail reviews, which are not so much of a review of a decision to grant or not to grant bail, but merely a review of a condition of bail.’³³

Drug Misuse and Trafficking Amendment (Ongoing Dealing) Act 1998 No 73 P Ongoing supply of prohibited drugs

The Act was introduced by the Carr Labor Government and commenced on 7 August 1998.³⁴ It added the offence of supplying prohibited drugs on an ongoing basis, under s 25A of the *Drug Misuse and Trafficking Act 1985*, to the list of exceptions to the presumption in favour of bail. Supply on an ongoing basis is committed when prohibited drugs (other than cannabis) are supplied for financial or material reward on 3 or more separate occasions during a period of 30 consecutive days.

Bail Amendment Act 1998 No 108

The Act was introduced by the Carr Labor Government and commenced on 11 December 1998.³⁵

P Serious offenders

The *Bail Amendment Act 1998* removed the presumption in favour of bail for 8 serious offences of a sexual or violent nature: manslaughter, malicious wounding with intent, aggravated sexual assault, assault with intent to have intercourse, sexual intercourse with a child under 10 years of age, assault with intent to have intercourse with a child under 10, homosexual intercourse with a male under 10, and kidnapping.

An addition was also made to the criteria under s 32 that must be taken into account before granting bail. Subsection 32(1)(c)(v) was inserted to stipulate that if the offence for which bail was being sought was a ‘serious offence’, the court or police shall consider whether at the time the offence was committed the person was already on bail or parole for another serious offence. In this context, the following matters were to be considered (but not to the exclusion of anything else) in determining whether an offence was a serious offence:

- whether the offence was of a violent or sexual nature;
- the likely effect of the offence on any victim and on the community generally; and
- the number of offences ‘likely to be committed’ or for which the person has been granted bail

³³ Criminal Legislation Amendment Bill, Second Reading Speech, Hon Jeff Shaw MLC, Attorney General, *NSWPD*, 1 June 1995, p 541.

³⁴ *Government Gazette*, No 112 of 24 July 1998, p 5603.

³⁵ *Government Gazette*, No 171 of 11 December 1998, p 9457.

or released on parole.

⌘ Intellectually disabled offenders

The *Bail Amendment Act 1998* also inserted s 37(2A) in the *Bail Act 1978* to provide that, before a police officer or court sets bail conditions for a person with an intellectual disability, the officer or court must be satisfied that the conditions are appropriate having regard to the person's capacity to understand and comply with them.

⌘ Arrangements with other States and Territories

Section 39A was inserted into the *Bail Act 1978* to enable a NSW court to make an arrangement with a court in another State or Territory, for that court to enter into an agreement, or accept a deposit of security or an amount of money, that is required by a bail condition imposed by the NSW court.

⌘ Police review of bail

A new power was inserted at s 43A of the *Bail Act 1978* to permit a police officer of more senior rank to review an initial refusal of bail by another police officer. For example, the reviewing officer may grant bail if the accused person is no longer incapacitated by alcohol or drugs, or is no longer in danger of physical injury or in need of physical protection. This provision implemented a recommendation of the Royal Commission into Aboriginal Deaths in Custody, and was aimed at preventing accused persons from being unnecessarily detained pending court appearances.³⁶

⌘ Informing surety of bail variation

Section 54 of the *Bail Act 1978* was amended to require notice to be given to any person who is a surety, when bail conditions are varied. The purpose of the amendment was explained by the then Minister for Police, Hon. Paul Whelan MP:

The amendment provides the existing surety with an opportunity to consider whether or not he or she wishes to remain a surety in light of any new bail conditions imposed by the court. This will reduce the likelihood of sureties unwittingly losing the money which they have put up as bail, and will improve the capacity of the surety to monitor the accused whilst he or she is on bail.³⁷

Criminal Procedure Legislation Amendment (Bail Agreements) Act 1998 No 107 ⌘ Enforcement of bail agreements

³⁶ Criminal Procedure Legislation Amendment (Bail Agreements) Bill, and Bail Amendment Bill, Second Reading Speech, Hon. Paul Whelan MP, Minister for Police, *NSWPD*, 14 October 1998, p 8328.

³⁷ *Ibid*, p 8328.

The Act was introduced by the Carr Labor Government, and the relevant provisions commenced on 1 October 2000.³⁸ It streamlined the procedures for forfeiting amounts of money when bail undertakings are not complied with. Part 7A was inserted into the *Bail Act 1978* to empower the court which granted bail to make a forfeiture order in relation to bail money agreed to be forfeited when an accused fails to appear in court.

Drug Summit Legislative Response Act 1999 No 67 P Drug and alcohol rehabilitation

The Act was introduced by the Carr Labor Government, and the bail amendments commenced on 10 March 2000.³⁹

Section 36A was inserted into the *Bail Act 1978* to provide that a court may impose bail conditions requiring an accused person to undergo drug or alcohol treatment or rehabilitation. This amendment implemented a recommendation of the New South Wales Drug Summit that was held at Parliament House on 17-21 May 1999.

Previously, an offender could be required to engage in a drug or alcohol program as a condition of bail under the general powers of s 36 of the *Bail Act 1978*. But the Second Reading Speech on the Drug Summit Legislative Response Bill confirmed that the Government sought to encourage rehabilitation by introducing a subsection that overtly addressed this issue.⁴⁰

Justice Legislation Amendment (Non-association and Place Restriction) Act 2001 No 100

The Act was introduced by the Carr Labor Government. The amendments relating to bail commenced on 13 May 2002.⁴¹

P Restriction on being at a particular place or with a certain person

The *Justice Legislation Amendment (Non-association and Place Restriction) Act 2001* inserted s 36B into the *Bail Act 1978* to explicitly provide that bail conditions may be imposed to prohibit or restrict an accused person from:

- **associating** with a specified person; or
- **visiting** a specified place or district.

³⁸ *Government Gazette*, No 127 of 29 September 2000, p 10810.

³⁹ *Government Gazette*, No 35 of 10 March 2000, p 1781.

⁴⁰ Drug Summit Legislative Response Bill, Second Reading Speech, Hon. John Della Bosca MLC, Special Minister of State and Assistant Treasurer, *NSWPD*, 21 October 1999, p 1774.

⁴¹ *Government Gazette*, No 85 of 10 May 2002, p 2739.

The concept of 'associate with' is defined to mean being in company with or communicating with by any means including post, fax, telephone and email.

Conditions restricting the movement of persons on bail were often previously imposed under the general powers to make bail conditions. For example, a condition could prohibit an accused from being within a certain radius of an alleged victim's address or workplace, from approaching witnesses, or from visiting a venue where the offence took place. A prominent use of place-restriction bail conditions occurred in Cabramatta during 1 July to 26 September 2001 when the police granted bail to 144 persons on the condition that they not return to Cabramatta.⁴²

The Second Reading Speech on the Bill recognised that such conditions could already be imposed but asserted that:

Express legislative recognition of non-association and place-restriction conditions will require bodies with bail, parole and leave management responsibilities to specifically consider the appropriateness of such orders, thereby promoting their further use.⁴³

Non-association and place restriction orders were also introduced at the same time into the *Crimes (Sentencing Procedure) Act 1999*, as additional measures to impose in conjunction with existing sentencing options.⁴⁴ Guidelines at s 100A of that Act outline the extent of activities that are allowed to be restricted. Significantly, non-association orders cannot be made to preclude an offender from associating with members of their close family, while place-restriction orders cannot be made to prevent the person from attending their place of work, or the home of a close family member. These clarifications were made because 'non-association and place-restriction orders should not be imposed where the burden of such an order would be unreasonable and frustrate the offender's reintegration into the community.'⁴⁵

There are no such overt limitations on the bail provisions. Arguably this is because judges need to be given the scope to restrict people on bail as they see fit while court proceedings are pending. However, the Police Service and the Law Society of NSW have suggested that the non-association and place-restriction orders under s 100A of the *Crimes (Sentencing Procedure) Act 1999* provide guidance for police and courts as to what are reasonable and appropriate

⁴² Justice Legislation Amendment (Non-association and Place Restriction) Bill, Second Reading Speech, Tony Stewart MP, Parliamentary Secretary, *NSWPD*, 26 October 2001, p 18106.

⁴³ *Ibid*, p 18106.

⁴⁴ A court may make such an order when sentencing an offender for an offence that is punishable by imprisonment for 6 months or more. The order prohibiting the offender from associating with a specified person and/or from frequenting a specified place must not exceed 12 months: s 17A.

⁴⁵ Justice Legislation Amendment (Non-association and Place Restriction) Bill, Second Reading Speech, Tony Stewart MP, Parliamentary Secretary, *NSWPD*, 26 October 2001, p 18105.

conditions when imposing the bail restrictions.⁴⁶

The Law Society's Criminal Law Committee and Children's Legal Issues Committee expressed concern that the impact of the legislation would be visited primarily on young people and Aboriginal people. The *Law Society Journal* advised legal practitioners to ensure that non-association and place-restriction conditions imposed on their clients were not unreasonably broad, too onerous, or unworkable in practice, and that there should be strong evidence to support a continuing pattern of criminal behaviour in connection with the person and/or place specified in the conditions.⁴⁷

Protection of identity of persons named in bail conditions

The *Justice Legislation Amendment (Non-association and Place Restriction) Act 2001* also inserted s 36C into the *Bail Act 1978* to prohibit the publication of the identity of persons named in non-association bail conditions, other than the identity of the accused. Formerly there was no such protection under the general bail condition-making powers of the *Bail Act*.

Police Powers (Drug Premises) Act 2001 No 30 Prohibits Firearm offences

The Act was introduced by the Carr Labor Government and commenced on 1 July 2001.⁴⁸ It added offences under s 7 of the *Firearms Act 1996*, relating to unauthorised possession or use of a prohibited firearm within the meaning of the *Firearms Act*, to the list of exceptions to the presumption in favour of bail.

The *Police Powers (Drug Premises) Act 2001* also requires a court determining a bail application to have regard to whether the offence involves the possession or use of an offensive weapon or instrument and any prior record for such offences, in considering the criterion of 'the protection and welfare of the community' at s 32(1)(c).

In introducing the legislation, the Attorney General, Hon. Bob Debus MP, stated that the bail amendments:

⁴⁶ 'Justice Legislation Amendment (Non-Association & Place Restriction) Act 2001', *Policing Issues & Practice Journal*, Vol 10, No 3 (July 2002), p 8 at 10. For example, the article poses a hypothetical case of three male Aboriginal cousins who are charged with assault after fighting in a pub. They have been arrested together in similar situations before. The article suggests (at p 12) that the police officer determining bail should impose a condition that the accused not associate with each other in any licensed premises. A complete prohibition on the accused associating with each other is not recommended because of the close kinship between them. Nor is it necessary to ban them from attending all licensed premises as individuals, because the men only cause problems when they get together. This article was modified by the *Law Society Journal* and appeared in Vol 40, No 7 (August 2002), p 62 at 65.

⁴⁷ *Law Society Journal*, Vol 40, No 7, p 62 at 64.

⁴⁸ *Government Gazette*, No 106 of 29 June 2001, p 5207.

...are aligned with the aim of stopping professional drug dealers, who are serious criminals who often use pistols and prohibited firearms such as sawn-off shotguns to assist in their activities.

...

These amendments are all aimed at protecting the community from persons who are charged with offences that indicate that they are serious and probably professional criminals.⁴⁹

Crimes Amendment (Aggravated Sexual Assault in Company) Act 2001 No 62 P Aggravated sexual assault in company

Introduced by the Carr Labor Government, the *Crimes Amendment (Aggravated Sexual Assault in Company) Act 2001* created a separate offence of aggravated sexual assault in company, inserting s 61JA into the *Crimes Act 1900*. The offence was added to the list of exceptions to the presumption in favour of bail. The provisions commenced on 1 October 2001.⁵⁰

Bail Amendment (Confiscation of Passports) Act 2002 No 4 P Surrender of passports

The *Bail Amendment (Confiscation of Passports) Act 2002* originated as a Private Member's Bill, introduced by the Shadow Minister for Police, Andrew Tink MP, on 10 August 2000. The Act received Government support and commenced on the date of assent, 9 April 2002.

The amendments were prompted by the case of a truck driver, Moslek Hanna Mekhael, who caused a traffic pile-up on the northern beaches on 11 April 2000. An infant passenger in another car died from injuries sustained in the accident. Mekhael was charged with manslaughter and attempting to pervert the course of justice, but conditional bail had not been imposed. Mekhael failed to appear at court and left the country. He was traced to Canada where he was arrested.

The *Bail Amendment (Confiscation of Passports) Act 2002* inserted s 37A into the *Bail Act* to require that a person who is accused of an offence occasioning death and is granted bail must surrender the passports held by them. An exception is provided if the person satisfies the court that, in the circumstances of the case, bail should be granted without such a condition.

The reform was not intended to freeze the passports of all people who commit a crime occasioning death. Mr Tink stated in the Second Reading Speech on the Bill:

That is not to say that all passports will be confiscated: the provision is not mandatory. However, this legislation puts the onus on the accused to demonstrate

⁴⁹ Police Powers (Drug Premises) Bill; Police Powers (Internally Concealed Drugs) Bill, Second Reading Speech, Hon. Bob Debus MP, Attorney General, *NSWPD*, 30 May 2001, p 13997.

⁵⁰ *Government Gazette*, No 146 of 28 September 2001, p 8182.

that he or she is not a flight risk. Many matters, such as a person's reputation here or elsewhere, a person's assets, ties or criminal record both in this country and overseas, must be weighed in the balance.⁵¹

Secondly, the *Bail Amendment (Confiscation of Passports) Act 2002* inserted s 36(2)(i) into the list of potential bail conditions in the *Bail Act 1978*, to specifically enable a police officer or court to order a person accused of any offence to surrender a passport held by them. This type of condition could already be imposed on the accused under s 36(2)(a) as part of 'an agreement to observe specified requirements as to his or her conduct while at liberty on bail', but there was no explicit reference to passports. The Government, in supporting the Bill, noted:

To a certain extent these proposals are a reflection of the current practice. However, the enshrinement of this requirement in legislation will focus the issue of passports in the minds of judicial officers and police officers granting bail. It would seem to be a sensible amendment to the Bail Act to ensure that persons at risk of fleeing the jurisdiction are thwarted in their attempt.⁵²

⁵¹ *Bail Amendment (Confiscation of Passports) Bill*, Second Reading Speech, NSWPD, 10 August 2000, p 8094.

⁵² *Bail Amendment (Confiscation of Passports) Bill*, Second Reading Debate, Tony Stewart MP, Parliamentary Secretary, NSWPD, 14 March 2002, p 499.

4. BAIL AMENDMENTS IN 2002 TO TARGET REPEAT OFFENDERS

In March 2002 a package of bail reforms was introduced, the principle aim of which was to restrict the availability of bail to repeat offenders. Another reform issue was the importance of taking into account the special needs of certain groups, particularly Aboriginal persons, in bail deliberations.

4.1 Development of the Bail Amendment (Repeat Offenders) Bill

4.1.1 Police input

In June 2001 the Police Commissioner, Peter Ryan, called for amendments to the *Bail Act 1978* in relation to repeat offenders. The Commissioner was quoted as stating:

Where the police are getting frustrated is that many of these repeat offenders are being arrested literally almost on a daily, certainly on a weekly basis then being released on bail...So if you could remove the presumption of bail for persistent repeat breaches of bail...it would then give the police a lot more confidence that the courts were supporting them in that particular area.⁵³

In December 2001 the Police Service produced a report which was based on 170 case studies and recommended a number of procedural, operational and legislative changes. The research and anecdotal evidence obtained by the police indicated that there was a problem with bail being granted to offenders who repeatedly committed offences at a relatively low level on the scale of criminality, such as theft, receiving, break and enter, shoplifting, driving offences and minor assaults. These offences had traditionally belonged to the category which attracted a general presumption in favour of bail. The overall seriousness of the behaviour involved was not great, but from the perspective of the police the resources required to pursue the offenders and the cost to the community were significant. The Police Service asserted that there was a gap in the law because the *Bail Act 1978* already adequately addressed the issue of 'serious' repeat offending but did not cover offenders who commit less serious offences on a regular basis.⁵⁴

In January 2002, the Minister for Police, Hon. Michael Costa MLC, announced the impending reforms to bail laws for repeat offenders, hailing them as '...the single most important thing we can

⁵³ R Morris, 'Bail "tripwire" against repeat offenders', *The Daily Telegraph*, 19 June 2001, p 5.

⁵⁴ Information in this paragraph is derived from: 'The Bail Amendment (Repeat Offenders) Bill 2002', a paper presented by Mark Marien, Director of the Criminal Law Review Division of the Attorney General's Department, at an Institute of Criminology seminar on 'Crisis in Bail and Remand', held at the University of Sydney Law School on 29 May 2002, p 2. (The paper is available electronically under the 'reports and papers' heading of the Criminal Law Review Division website at <agd.nsw.gov.au/clrd>)

do to deal with crime in this state.’⁵⁵ The changes were expected to assist police at an operational level: ‘we must get them [repeat offenders] off the streets as soon as possible. Frontline police across the State tell me they are sick of locking up the same people over and over again.’⁵⁶ Mr Costa cited statistics from the police that indicated ‘career criminals commit 80 to 90 per cent of crime in NSW.’⁵⁷ The media also reported that Commissioner Ryan was using similar figures.⁵⁸

The Director of the Bureau of Crime Statistics and Research, Dr Don Weatherburn, confirmed the existence of two of the problems identified by police: ‘The first is that a small proportion of recidivist offenders – that is, the top 10 per cent – account for about 30 to 40 per cent of crime. The second thing is they are notorious for not turning up to court.’⁵⁹

In April 2002, the Attorney General, Hon. Bob Debus MP, distanced himself somewhat from the 80-90% figures favoured by the Police Minister and Police Commissioner:

According to the Bureau of Crime Statistics and Research 14 per cent of persons who have been convicted more than twice account for 40 per cent of all court appearances in the Local Court. That is somewhat less than the 80 per cent figure...promulgated by the Police Service. In turn, it is based on figures from an extensive study in the United Kingdom...I suspect that the amount of crime committed by repeat offenders lies somewhere between the two estimates...⁶⁰

Mr Costa continued to rely on the higher figures and attracted some criticism, including from within his own party.⁶¹

4.1.2 BOCSAR studies

Another major impetus for the repeat offender legislation of 2002 was a report by the Bureau of Crime Statistics and Research (BOCSAR) in 2001 which highlighted the increasing incidence of

⁵⁵ C Wockner, ‘Repeat offenders lose bail’, *The Daily Telegraph*, 14 January 2002, p 6.

⁵⁶ L McIlveen, ‘Hard line on repeat offenders’, *The Australian*, 14 January 2002, p 5.

⁵⁷ R Morris, ‘Bail denied for repeat offenders’, *The Daily Telegraph*, 26 January 2002, p 5.

⁵⁸ For example, Rachel Morris quoted Ryan as saying, ‘Ninety per cent of crime is committed by a very, very small handful of people’: ‘Fighting back against one-man “crime waves”’, *The Daily Telegraph*, 15 January 2002, p 4.

⁵⁹ Quoted in: ‘Repeat offenders’, Editorial, *The Sydney Morning Herald*, 16 January 2002, p 10.

⁶⁰ Bail Amendment (Repeat Offenders) Bill, Second Reading Debate, *NSWPD*, 10 April 2002, p 1340.

⁶¹ One such critic was the Labor Member for Liverpool, Paul Lynch: see R Wainwright, ‘Minister misled on repeat offenders’, *The Sydney Morning Herald*, 29 June 2002, p 3.

persons failing to appear at court in compliance with their bail agreements.⁶²

Some of the findings of the 2001 study were:

- In the year 2000, the persons who were most likely to be on bail before finalisation of their cases in the Local Court were those charged with assault (91.3% of defendants charged with assault were on bail), regulatory driving offences (90.9%) and property damage (89.9%). Least likely to be on bail were those charged with break and enter (68.6% on bail).⁶³
- In the higher courts (District Court and above) in 2000, the persons most likely to be granted bail were those charged with sexual assault (87.6% on bail at time of finalisation) and fraud offences (83.9%). Least likely to be granted bail were those charged with importing or exporting drugs (31.8%).⁶⁴
- In 14.6% of cases finalised in the Local Court in 2000, where the defendant was on bail, the defendant failed to appear and a warrant for arrest was issued by the court.⁶⁵
- Persons charged with theft, receiving, break and enter, or disorderly conduct, were more likely to fail to appear in 2000 in Local Courts. For example, 28.8% of persons on bail for theft offences (excluding motor vehicle theft) failed to appear.⁶⁶
- Failure to appear in the higher courts by persons on bail was much rarer. The highest rate for failing to appear in 2000 was 8.9% of defendants on bail for 'deal or traffic in illicit drugs'.⁶⁷
- Persons with prior convictions were found to be far more likely to have a warrant issued against them for failing to appear while on bail.

The last finding implies that those defendants who fail to appear are committing further offences

⁶² M Chilvers et al, 'Bail in NSW: Characteristics and Compliance', *Crime and Justice Statistics Bureau Brief*, Issue Paper No. 15, September 2001, NSW Bureau of Crime Statistics and Research, Sydney.

⁶³ Ibid, Table 6 on p 6. The BOCSAR bail statistics exclude persons who were brought to Local Courts by summons or court attendance notices, and exclude those for whom a bail determination was not made because their bail had been dispensed with or they were already in custody for a prior offence.

⁶⁴ Ibid, Table 7 on p 8.

⁶⁵ Ibid, p 9. It should be noted that the number of cases do not necessarily represent the same number of individuals. One person may be involved in several cases.

⁶⁶ Ibid, p 12.

⁶⁷ Ibid, Table 13 on p 12. The expression 'deal or traffic in illicit drugs' is a BOCSAR category, not the name of an actual charge.

whilst on bail. Mark Marien, the Director of the Criminal Law Review Division of the Attorney General's Department, notes: 'If this is the case, the type of offences identified by the BOCSAR as having a high rate of failing to appear also supports the assumption that the problem with repeat offenders is centred around offenders who commit offences which have a presumption in favour of bail.'⁶⁸

BOCSAR conducted a further study in 2002 on the subject of absconding on bail.⁶⁹ The study found that 81.4% of people who appeared before the Local Court on a criminal charge and had prior convictions, were on bail at the time of finalisation of their matter in 2000. This may indicate that bail is being granted to people who commit relatively minor offences on multiple occasions.⁷⁰

14.9% of persons who had at least one case finalised in the Local Court in 2000 failed to appear and had a warrant issued against them. Of the persons who failed to appear in 2000, 83.4% had a warrant issued once during the year, while a further 13.2% failed to appear twice, and 3.4% failed to appear 3 or more times during the year.⁷¹

In the Local Court, persons with several outstanding offences are more likely to have a warrant issued against them for non-appearance. For example in 2000, 20% of persons on bail with four or more offences had their cases finalised by the issue of a warrant for non-appearance, compared with approximately 11.9% of persons with a single offence.⁷² In the higher courts, fewer defendants abscond whilst on bail. Warrants were issued for just 5 per cent of finalisations, and there were no *ex parte* convictions.⁷³

The study concluded that: '...in the Local Courts, an association exists between a defendant's likelihood of absconding whilst on bail and their: prior conviction record, number of concurrent offences, and the type of offence charged.'⁷⁴

⁶⁸ M Marien and J Hickey, 'The Bail Amendment (Repeat Offenders) Bill 2002', a paper presented by Mark Marien at the Institute of Criminology Seminar, 'Crisis in Bail and Remand', at the University of Sydney Law School on 29 May 2002, p 3.

⁶⁹ M Chilvers et al, 'Absconding on Bail', *Crime and Justice Bulletin*, No 68, May 2002, NSW Bureau of Crime Statistics and Research. Like the 2001 study, the bail statistics in the article exclude persons who were brought to Local Courts by summons or court attendance notices, and exclude those for whom a bail determination was not made because their bail had been dispensed with or they were already in custody for a prior offence.

⁷⁰ *Ibid*, p 3.

⁷¹ *Ibid*, p 8.

⁷² *Ibid*, p 9.

⁷³ *Ibid*, p 10. An *ex parte* conviction means that the court enters a conviction in the absence of the offender.

⁷⁴ *Ibid*, p 10.

4.1.3 Aboriginal Justice Advisory Council report

A report by the Aboriginal Justice Advisory Council (AJAC) on 'Aboriginal People & Bail Courts in NSW' was released in April 2002. During the second reading debate of the Bail Amendment (Repeat Offenders) Bill in the Legislative Council, the AJAC report was referred to by Hon. Ian Cohen MLC (Greens) and Hon. Richard Jones MLC (Independent).⁷⁵ The Greens successfully moved two amendments dealing with Aboriginal issues: see p 35 of this briefing paper.

The data in the AJAC report was based on a review of 100 bail cases from 5 court locations in NSW. The report found that a disproportionately large number of Aboriginal defendants are refused bail and on remand. Local Court statistics for 1999 showed that 10% of Aboriginal defendants were refused bail compared to 4% of non-Aboriginal people. Of the remand inmates known to be Aboriginal, 45% did not receive a custodial sentence when their matter was finalised.⁷⁶ In other words, there was a disparity between the assessment of these defendants when they were charged and at the time of sentencing:

That courts perceive such a significant proportion of Aboriginal defendants as risks to the community at bail hearings but not at finalisation leads to a serious question about the basis of bail court decisions and the quality of information provided to courts on Aboriginal defendants and their circumstances.⁷⁷

According to the report, the community ties of Aboriginal people were being inadequately evaluated by the Local Court in bail applications:

There appeared to be no real means for magistrates to truly determine the specifically Aboriginal view of community and belonging when dealing with Aboriginal defendants. It appeared that many of the magistrates in the cases examined used very western concepts of community ties when determining bail decisions. If a person did not have a job, their name on a lease or permanently reside in a specific house in the town then they were perceived as having poor community ties regardless of any spiritual or family connection to that place.⁷⁸

There was also some evidence of an inconsistent approach towards bail conditions between different locations. Local Courts 'appeared to impose a particular type of bail condition or group of conditions that seem particular to that court rather than the offence, offender or local

⁷⁵ Hansard references: Cohen on 7 May 2002 at pp 1562-1563 and 9 May 2002 at pp 1908-1909, 1912-1913, 1915; Jones on 9 May 2002 at p 1905-1906.

⁷⁶ *Aboriginal People & Bail Courts in NSW*, Aboriginal Justice Advisory Council, 2002, pp 6, 7.

⁷⁷ *Ibid*, p 16.

⁷⁸ *Ibid*, p 11.

circumstances.⁷⁹ Some courts relied heavily on the use of financial securities or required defendants to leave town until appearing at court. These conditions could be especially difficult for Aboriginal people who were low income earners or had close connections with family. Another obstacle for Aboriginal bail applicants was the lack of local bail accommodation and drug/alcohol treatment facilities in Aboriginal communities.⁸⁰

The report made 14 recommendations, which included the following (only the first point was explicitly reflected in the *Bail Amendment (Repeat Offenders) Act 2002*):

- **Community ties:** Amend s 32(1)(a)(i) of the *Bail Act 1978* to remove the reliance on employment and residence in assessing a person's community ties. Make reference to traditional Aboriginal ties to extended family and place.
- **Sureties and securities:** Amend s 36(2) to make the imposition of a financial surety or security a provision of last resort. Determine the amount of security as a defined proportion of a defendant's income or assets.
- **Minor offences:** Provide an automatic bail entitlement for offensive language and offensive behaviour charges. This recommendation was aimed at removing the potential for over policing and discrimination against Aboriginal people. Another recommendation concerning minor offences suggested excluding summary offences more than 5 years old from the consideration of the applicant's 'prior criminal record' under s 32(1)(a).
- **Aboriginal bail justices:** The Attorney General's Department to employ and train Aboriginal people to act as bail justices, particularly in locations without court houses or full time court staff.
- **Aboriginal 'acceptable persons':** A local list be developed of respected Aboriginal people that can act as 'acceptable persons' in bail hearings.
- **Bail accommodation:** Increase the number and type of accommodation available such as bail hostels, particularly in rural areas.
- **Bail conferencing:** A pilot project be conducted by the Attorney General's Department for 6 months, based on the circle sentencing format whereby Magistrates or bail justices can discuss bail conditions informally with defendants and their families to ensure that the conditions are appropriate.

4.1.4 Royal Commission into Aboriginal Deaths in Custody report

⁷⁹ Ibid.

⁸⁰ Ibid, p 14.

The Royal Commission into Aboriginal Deaths in Custody which commenced from 1987 highlighted reasons why Aboriginal people might experience problems obtaining bail, including: inability to raise bail money, no fixed address, unemployment, physical disability, lack of transport to travel to court, prior failures to appear at court, lack of understanding of the bail process, communication problems, and insufficient awareness of Aboriginal issues on the part of the police and courts.⁸¹

The Royal Commission was acknowledged by the Attorney General, Hon. Bob Debus MP, during the Second Reading Speech on the Bail Amendment (Repeat Offenders) Bill:

The provisions in proposed section 36(2A) simply allow the court to consider the appropriateness of bailing accused persons, particularly those of an Aboriginal or Torres Strait Islander background, to supervised bail accommodation if they are suitable and a place is available. This is in line with the recommendations made by the Royal Commission into Aboriginal Deaths in Custody in relation to gaol as a last resort and the overrepresentation of Aboriginal persons in custody.⁸²

But in the Second Reading debates, other Members claimed that the increased restrictions upon granting bail to repeat offenders went against the spirit of the Royal Commission.⁸³

4.1.5 Working party

The bail provisions relating to repeat offenders were among a range of options for bail reform that were discussed by a working party chaired by the Attorney General's Department. Other organisations represented on the working party are the Legal Aid Commission, the Department of Juvenile Justice, the Probation and Parole Service, the Department of Corrective Services, the Police Service and the Police Ministry.⁸⁴

⁸¹ Royal Commission into Aboriginal Deaths in Custody, *National Report*, Volume 3, 1991, Australian Government Publishing Service, paras 21.4.5; 21.4.15; 21.4.19 to 21.4.22; 21.4.27.

⁸² Bail Amendment (Repeat Offenders) Bill, Second Reading Speech, Attorney General, Hon. Bob Debus MP, *NSWPD*, 20 March 2002, p 820. Imprisonment as a last resort is the subject of Recommendation 92. A number of recommendations touch on the issue of overrepresentation, such as Recommendation 79 (that public drunkenness should be decriminalised) and Recommendation 86 (that offensive language should not normally justify arrest).

⁸³ For example, Hon. Lee Rhiannon MLC, *NSWPD*, 9 May 2002, p 1893.

⁸⁴ M Marien, 'The Bail Amendment (Repeat Offenders) Bill 2002', paper presented at the Institute of Criminology Seminar: 'Crisis in Bail and Remand', held at the University of Sydney Law School on 29 May 2002, p 3; and Attorney General, Hon. Bob Debus MP, second reading debate on the Bail Amendment (Repeat Offenders) Bill, *NSWPD*, 10 April 2002, p 1340.

Some of the broader strategies being considered by the working party are: diversionary alternatives, to enable earlier intervention in the cycle of re-offending; intensive bail supervision for juveniles and certain other defendants; and bail accommodation.⁸⁵ The working party will have an ongoing role in evaluating the repeat offender amendments and suggesting further bail initiatives.

4.2 Provisions of the Bail Amendment (Repeat Offenders) Act 2002

The Bail Amendment (Repeat Offenders) Bill was introduced in the Legislative Assembly by the Attorney General, Hon. Bob Debus MP, on 20 March 2002. It was not opposed by the Coalition, but the following amendments were successfully moved by crossbench Members in the Legislative Council:

- that the background and community ties of Aboriginal applicants for bail be assessed on a different basis to non-Aboriginal persons – amendment moved by the Greens;
- that the special needs of Aboriginal people be taken into account when a court or police officer determines whether to grant bail – the Greens. (The original Bill employed the concept of special needs, but only applied it to children or offenders with an intellectual disability);
- that the special needs of mentally ill persons likewise be taken into account – Hon. Helen Sham-Ho MLC (Independent);
- that the Minister of Corrective Services be required to ensure that ‘adequate and appropriate accommodation’ is available for the purposes of the placement of persons on bail – Hon. Richard Jones MLC (Independent).⁸⁶

The *Bail Amendment (Repeat Offenders) Act 2002* No 34 was assented to on 24 June 2002 and commenced on 1 July 2002.⁸⁷ The main provisions are:

(i) Repeat offenders excepted from presumption in favour of bail:

The Act introduced additional exceptions to the presumption in favour of bail, inserting s 9B in the *Bail Act 1978*. Section 9B states that the presumption in favour of bail does not apply to a person who:

- at the time the offence is alleged to have been committed, was on bail, on parole, was serving a non-custodial sentence, or was subject to a good behaviour bond, for another offence – s 9B(1); or

⁸⁵ M Marien, *ibid*, p 5.

⁸⁶ *NSWPD*, 9 May 2002, pp 1912-1914, 1916-1918.

⁸⁷ *Government Gazette*, No 106 of 28 June 2002, p 4675.

- has been previously convicted of an offence of failure to appear in court in accordance with a bail undertaking, pursuant to s 51 of the *Bail Act 1978* – s 9B(2); or
- is accused of an indictable offence if the person has been previously convicted of an indictable offence (whether dealt with on indictment or summarily) – s 9B(3).

Section 9B(3) must be read in conjunction with the new s 32(1)(b)(vi), which provides that in the case of such persons, the court must also have regard to the nature of their criminal history (the number and severity of indictable offences and periods between them), as part of the criteria to be considered in determining whether to grant bail.

The Attorney General, Hon. Bob Debus MP, explained the impetus for the amendments in the Second Reading Speech on the Bail Amendment (Repeat Offenders) Bill:

There appears, however, to be a growing category of accused persons who commit less serious crimes repeatedly. These offences are generally lower down the scale in criminality in comparison to say, murder, malicious wounding, or drug supply, and fit within the general presumption in favour of bail category. This bill aims to target those offenders who commit less serious offences and are likely to do so again...

It is a common maxim that past behaviour is a good predictor of future behaviour. Criminal justice agencies use the existence of prior offences as part of their criteria in assessing high-risk offenders. Of importance, however, is that the existence of a prior offence is only one factor in making that assessment. This is also true of the courts when making bail determinations. The bill requires the court to also consider the type of offence, the seriousness of that offence, the number of previous offences and the length of time between the offences. For example, an accused person with a single prior offence committed five years ago is likely to be treated in a different manner than an accused with five convictions in the past six months.⁸⁸

(ii) Considerations for people with special needs:

The *Bail Amendment (Repeat Offenders) Act 2002* also inserts specific provisions relating to people with special needs into s 32, which deals with the criteria to be considered in determining bail applications.

The court or authorised police officer dealing with the application shall take into consideration the following additional matters within the category of assessing ‘the probability of whether or not the person will appear in court’ at s 32(1)(a):

- the person’s background and community ties, as indicated in the case of a person **other than** an Aboriginal person or a Torres Strait Islander by the history and details of the person’s

⁸⁸ Bail Amendment (Repeat Offenders) Bill, Second Reading Speech, Hon. Bob Debus MP, Attorney General, *NSWPD*, 20 March 2002, p 819.

residence, employment, family situation, and prior criminal record (if known) – s 32(1)(a)(i);

- the person's background and community ties, as indicated in the case of an **Aboriginal person or a Torres Strait Islander** by their ties to extended family and kinship, other traditional ties to place, and prior criminal record (if known) – s 32(1)(a)(ia).

The creation of separate criteria for assessing the community ties of Aboriginal and non-Aboriginal people is intended to recognise that an indigenous person who does not fulfil the conventional expectations of stability for a bail application, such as employment and a permanent residential address, may still have significant family or spiritual ties to a place.

The interests of the accused is another area to be examined under s 32 in determining bail. The following factors were added to this category:

- any special needs arising from that fact that the person is under 18 years, or is an Aboriginal person or a Torres Strait Islander, or has an intellectual disability or mental illness – s 32(1)(b)(v);
- if the person is charged with an indictable offence and has a prior conviction for an indictable offence, the person's criminal history is to be considered, having regard to the number, nature and seriousness of previous indictable offences, and the length of time between those offences – s 32(1)(b)(vi).

(iii) Accommodation condition:

The conditions of bail available under s 36 were expanded with the insertion of a new condition at s 36(2)(a1): 'that the accused person enter into an agreement to reside, while at liberty on bail, in accommodation for persons on bail'.

In deciding whether to impose such a condition, the court or police officer is to consider whether placement in accommodation is available and suitable for the accused person. Section 36(2A) requires that, when assessing the suitability of placement, the court or police officer is to have regard to the background of the accused, particularly if he or she is an Aboriginal person or a Torres Strait Islander: s 36(2A).

The Minister for Corrective Services is to ensure that adequate and appropriate accommodation is available for the placement of persons on bail: s 36(2B).

The value of bail accommodation was promoted by the Attorney General in the Second Reading Speech on the Bail Amendment (Repeat Offenders) Bill:

Often the lack of employment or appropriate residence will be a debilitating factor in deciding whether to grant bail. The availability of supervised bail accommodation and the suitability of the accused person to be bailed to this type of accommodation allows the court to both strengthen existing requirements of bail and divert offenders

who might otherwise be incarcerated.

This is particularly important for vulnerable accused persons such as juveniles, intellectually or mentally disabled persons, or persons of an Aboriginal or Torres Strait Islander background.⁸⁹

The concept of bail hostels is explored in detail in Chapter 8 of this briefing paper.

(iv) Review of amendments:

The Minister is to review the operation of the *Bail Amendment (Repeat Offenders) Act 2002* as soon as possible after the period of 12 months from the date of commencement (1 July 2002). This includes not only the repeat offender provisions, but the amendments with respect to Aboriginal persons and Torres Strait Islanders, juveniles under the age of 18 years, and people with an intellectual disability or mental illness. A report on the outcome of the review is to be tabled in each House of Parliament within a further 12 month period.

(v) Savings provisions:

The amendments to ss 9, 32 and 36 of the *Bail Act 1978* extend to an offence alleged to have been committed before the commencement of the amendments if a person is charged with the offence on or after the commencement date.

4.3 Impact of the repeat offender amendments on imprisonment rates

When the *Bail Amendment (Repeat Offenders) Act* was passed on 19 June 2002, the Police Minister, Hon. Michael Costa MLC, acknowledged that the new laws were expected to increase the number of offenders in prison. He confirmed that the Government had budgeted more than \$100 million to build additional prisons to cope. Construction is underway on two new prisons at Kempsey and Windsor, while a third prison is planned for the central west.⁹⁰

The Premier, Hon. Bob Carr MP, stated: 'It's forecast these tough new laws could increase the remand population by up to 800 prisoners over the next two years... The Government will provide an extra \$135 million over two years to the prisons budget so its capacity is expanded.'⁹¹

Mark Marien, the Director of the Criminal Law Review Division of the Attorney General's Department, commented in expectation of the commencement of the Act: '...it may seem to some that the development of this legislation is at odds with other Government initiatives in trying to reduce the size of the prison population. Indeed, there is no doubt that the amendments will impact

⁸⁹ Ibid, p 820.

⁹⁰ AAP bulletin, 'Jail population set to rise under new bail laws: Costa', 19 June 2002.

⁹¹ 'Major bail changes introduced', story on 'News' page of the Australian Labor Party's NSW Branch website at <www.nswalp.com>, dated 8 April 2002 (accessed on 23 August 2002).

upon the remand population.⁹²

The increase in the State's prison population has been well documented in recent years. The number of inmates in full-time detention in NSW correctional centres in 1995 was 6407. The figure rose to 7750 in 2001, an increase of 20.9%.⁹³ The Department of Corrective Services predicts that inmate numbers for the financial year 2002-2003 will be 8200.⁹⁴

The remand population – meaning the number of people held in custody awaiting court hearings or sentencing – has also significantly increased. At 30 June 2001, the number of prison inmates on remand was 2188, representing more than a quarter of the prison population. Between 1995 and 2000, the remand population rose by 74.7%.⁹⁵

The New South Wales Legislative Council resolved in 1999 to appoint a Select Committee on the Increase in Prisoner Population.⁹⁶ In its Final Report in November 2001, the Committee found: 'It is clear that the increasing remand population is a major immediate cause of the increase in the prison population.'⁹⁷ The likely reasons identified by the Committee for the growth in the remand population included:⁹⁸

- ***Increased bail refusals in the Local Court and District Court*** – research by the Bureau of Crime Statistics and Research (BOCSAR)⁹⁹ suggests reasons for this trend, such as:
 - growth in the overall number of persons appearing in the Local Court;
 - an increase in the number of persons appearing for some offences with a high rate of bail refusal;
 - indications that police and Magistrates are becoming less willing to grant bail; and
 - court delays in the higher courts.

⁹² M Marien, 'The Bail Amendment (Repeat Offenders) Bill 2002', paper presented at the Institute of Criminology Seminar on 'Crisis in Bail and Remand', held at the University of Sydney Law School on 29 May 2002, p 3.

⁹³ NSW Parliament, Legislative Council, Select Committee on the Increase in Prisoner Population, *Final Report*, November 2001, para 3.8. The statistics reflect the number of inmates as at 30 June each year.

⁹⁴ *Ibid*, para 3.10.

⁹⁵ *Ibid*, page xv & para 5.24.

⁹⁶ Three Labor Government members comprised the minority of the Committee. The Chair was Hon. John Ryan MLC (Liberal Party), and the remaining members were two representatives from the National Party and one from the Greens.

⁹⁷ *Ibid*, para 5.29.

⁹⁸ *Ibid*, paras 5.30-5.55.

⁹⁹ BOCSAR, 'Increases in the NSW Remand Population', *Crime and Justice Statistics Bureau Brief*, November 2000, p 6.

- ***The police practice of ‘over-charging’*** – this practice involves laying the most serious charge which applies to a given fact situation, with a number of lesser alternatives to maximise the likelihood that there is at least one charge that the person will plead guilty to. The impact is accentuated if the person is initially charged with an offence for which there is no presumption in favour of bail.
- ***Changes to the Bail Act 1978*** – statutes such as the *Bail Amendment Act 1998* have removed the presumption in favour of bail for numerous offences.¹⁰⁰
- ***The inability of people to meet bail conditions*** – the Committee heard evidence from various organisations that people of low socio-economic status, particularly Aboriginal people, are unable to meet conditions that require financial outlay or suitable accommodation.

The Select Committee on the Increase in Prisoner Population expressed concern at the number of people who are detained in custody ‘bail refused’ but do not receive a custodial sentence when dealt with by the court. For example, nearly 71% of inmates who are remanded in custody for periods of less than 30 days are discharged without receiving a custodial sentence.¹⁰¹

The Committee’s *Final Report* made three recommendations that focused on bail issues. The Government response to the report was tabled in the Legislative Council on 3 September 2002. The relevant recommendations (retaining the original numbering) and extracts from the accompanying responses were:¹⁰²

- ***Recommendation 2*** – that BOCSAR investigate and report on the reasons for the increase in the rate of bail refusal and its consequent impact upon the increase in the remand population in the NSW prison system.
Government response – BOCSAR has adequately reported on the level of bail refusal in 2000 and 2001.¹⁰³ These reports found indications that police and Magistrates are becoming less willing to grant bail. BOCSAR will continue to monitor the level of the prison population and will investigate the reasons for any increase. The rise in bail refusals has been incremental over many years (less than 1% per year) and accordingly no meaningful study of the reasons for the increase has been undertaken.

¹⁰⁰ Media commentary has also emphasised this point, eg. Editorial, ‘Crime and punishment’, *The Sydney Morning Herald*, 18 June 2001, p 14; and L Doherty, ‘Bail law doubles remand prisoners in crowded jails’, *The Sydney Morning Herald*, 13 June 2001, p 9.

¹⁰¹ *Final Report*, para 5.38.

¹⁰² Recommendations are cited from: *Final Report*, page xviii. Responses are from: *Final Report of the Legislative Council Select Committee Inquiry on the Increase in Prisoner Population: NSW Government Response*, August 2002, pp 3-6.

¹⁰³ *Increases in the NSW Remand Population*, November 2000; and *Bail in NSW: Characteristics and Compliance*, September 2001.

- **Recommendation 3** – that BOCSAR specifically review the impact of the exceptions to the presumption in favour of bail now provided for in s 9 of the *Bail Act*.
Government response – the *Bail Amendment (Repeat Offenders) Act 2002*, which included further restrictions to the presumption in favour of bail, commenced on 1 July 2002 and requires the Attorney General to review the operation of the amendments after 12 months from commencement. The Criminal Law Review Division of the Attorney General’s Department will oversee the review. BOCSAR will continue to monitor the level of the prison population and investigate reasons for any increase.
- **Recommendation 4** – that the *Bail Regulation 1994* be amended to make provision for prompt determinations when offenders face revocation of their periodic detention, home detention or parole order, to minimise the number of offenders remanded into custody and the length of time spent on remand.
Government response – the Government asserted that this recommendation was misconceived because such offenders are not held on remand.¹⁰⁴

4.4 Responses to the reforms

4.4.1 Criticisms and concerns

The Government’s announcement of the repeat offender proposals prompted criticism from lawyers, academics, and community organisations.

The Law Society of New South Wales expressed concern that the legislation would cause more people to be remanded in custody even though they would not ultimately be sentenced to prison. The Law Society lobbied in favour of amendments to the draft Bill to address the special needs of the mentally ill when determining bail.¹⁰⁵

Some of the major problems anticipated by defence lawyers were articulated by Trevor Nyman, an accredited specialist in criminal law and a foundation member of the Law Society’s Criminal Law Committee:¹⁰⁶

¹⁰⁴ An offender who breaches the conditions of a periodic detention order, home detention order, or parole order, may have their order revoked by the Parole Board and be arrested. The offender would then be committed to full-time imprisonment. Alternatively, the Parole Board may decline to issue a warrant for arrest and instead have a revocation notice served on the offender, giving the offender the opportunity to show cause why the revocation should be rescinded. In this scenario, the offender remains at large pending the review hearing.

¹⁰⁵ ‘Bail Amendment (Repeat Offenders) Bill 2002’, entry in ‘Lobbying’ section, *Law Society Journal*, Vol 40, No 5 (June 2002), p 4.

¹⁰⁶ T Nyman, ‘Repeat Offenders’, *Law Society Journal*, Vol 40, No 8 (September 2002), p 50 at 51-52.

- the remand population of gaols in New South Wales will significantly increase;
- there will be a temptation for police officers to select charges that carry a possible prison sentence so that the defendant may be kept in custody;
- the legislation will put ‘immense pressure’ on local courts and Legal Aid duty solicitors as there will be more prisoners in the cells at the beginning of the court day, and each defendant’s prior record will need to be carefully analysed;
- greater demands will be placed on Legal Aid funding because of the need for lawyers to take instructions from clients in custody, and the general entitlement of persons in custody to Legal Aid without a means test;
- defendants who are refused bail by a Magistrate and do not plead guilty will be entitled to a priority hearing, which will cause greater delays for those cases where defendants are on bail or at liberty.

Some law academics also warned that the legislation could have a discriminatory effect on Aboriginal people, juveniles, and certain other groups. According to Associate Professor Chris Cunneen, Director of the Institute of Criminology at the University of Sydney:¹⁰⁷

- the *Bail Amendment (Repeat Offenders) Act 2002* undermines the principles of the *Young Offenders Act 1997*, including the principle that criminal proceedings are not to be instituted against a child if there is an alternative and appropriate means of dealing with the matter; and the principle that the least restrictive form of sanction is to be applied against a child who is alleged to have committed an offence;
- the legislation should have contained a provision excluding children from the amendments, or implementing a presumption in favour of bail for children except when committing serious children’s indictable offences.¹⁰⁸ Rather, there appears to be a trend away from treating young people as a special class of people in the administration of justice;
- more money will have to be allocated by community legal centres and Legal Aid to represent bail applicants in court;
- the repeat offender restrictions signify that the division between repeat and non-repeat offenders is widening, and there is less emphasis on the severity of the actual offence;

¹⁰⁷ These views were expressed by Assoc. Prof. Cunneen in a talk entitled ‘The impact of bail reform on young people’, delivered at the ‘Crisis in Bail & Remand’ seminar, Institute of Criminology, University of Sydney Law School, 29 May 2002.

¹⁰⁸ These include murder and manslaughter, offences punishable by imprisonment for 25 years imprisonment or more, and aggravated sexual assault.

- the focus of bail law is increasingly on the prediction of risk. This can undermine traditional principles such as the presumption of innocence if an accused person belongs to a high risk category.

Welfare and community organisations also questioned the legislation. The Conference of Leaders of Religious Institutes of NSW asserted that:

- the repeat offender provisions effectively imprison people on the basis of past crimes for which they have completed their sentences. This removes a basic tenet of the common law, the right to liberty until conviction and sentence;
- there is little evidence that keeping people on remand after being charged reduces the crime rate. To the contrary, recidivism indicates that a regime of imprisonment does not have a rehabilitative or deterrent effect.¹⁰⁹

4.4.2 Positive reactions

As indicated in the description of the background and history of the legislation, the main proponents of restricting the availability of bail to repeat offenders were the Government, the Coalition, and the police. Many prosecution lawyers and victims were also in favour of this development.

In contrast to the criticisms based on the presumption of innocence, the Attorney General, Hon. Bob Debus MP, advocated that it was legitimate to have regard to a person's criminal history when determining bail:

It is far more sophisticated to assess the question of a person's suitability for bail by taking into account their established patterns of delinquent behaviour rather than just the offence with which they are charged.

This is important since we need to target those committing crimes whilst they are waiting to be processed through the courts on other charges.¹¹⁰

In terms of media reaction, *The Sydney Morning Herald* was one of the most supportive of the proposed reforms, claiming a 'growth of a general leniency by magistrates in granting bail to alleged offenders charged with a range of lesser but significant offences, such as burglary and theft.'¹¹¹

¹⁰⁹ Cited by Hon. Ian Cohen MLC, during the second reading debate of the Bail Amendment (Repeat Offenders) Bill, *NSWPD*, 7 May 2002, p 1563.

¹¹⁰ 'Government targets repeat offenders with new bail Act', *Media release*, Attorney General, Hon. Bob Debus MP, 19 June 2002.

¹¹¹ Editorial, 'Repeat offenders', *The Sydney Morning Herald*, 16 January 2002, p 10.

The Editorial stated:

The changes now proposed make much more sense than the previous piecemeal changes since 1978. Instead of focusing on the offence, they will focus on the offender...It makes little sense to decide whether or not to grant bail according to the seriousness of the crime. In many of the most serious cases of murder, for example, the person accused is most unlikely to repeat the crime, abscond or fail to appear in court...Refusing bail to [recidivist] offenders makes sense and is not unjust. Subject to the exact form of the legislation, the proposed changes should be welcomed.¹¹²

5. NEW BAIL PROVISIONS ON INTERVENTION PROGRAMS

5.1 Introduction to the amendments

The latest piece of legislation to significantly impact upon bail law in NSW is the *Crimes Legislation Amendment (Criminal Justice Interventions) Act 2002* No 100. It was passed unopposed in the Legislative Assembly on 15 November 2002 and in the Legislative Council on 21 November 2002. The Act was assented to on 29 November 2002 but had not commenced at the time of finalising this briefing paper.

The *Crimes Legislation Amendment (Criminal Justice Interventions) Act 2002* No 100 gives statutory recognition to diversionary and rehabilitative programs, and explicitly enables bail to be granted on the condition that an offender agrees to be assessed or to participate in such a program. Numerous criminal statutes are amended, most notably the *Bail Act 1978*, *Criminal Procedure Act 1986*, and *Crimes (Sentencing Procedure) Act 1999*. The emphasis of this summary is on the amendments to the *Bail Act 1978*, but the other key changes will be briefly outlined.

The immediate impetus for the legislation was the decision in July 2002 by the then Chief Magistrate of NSW, Patricia Staunton AM, to dissolve the Community Aid Panels. This scheme has operated since 1987, encouraging first time offenders to make restitution by participating in community projects. Ms Staunton asserted that the scheme lacked sufficient legal foundation and had largely been superseded by the diversionary options of the *Young Offenders Act 1997*.¹¹³ The Attorney General, Hon. Bob Debus MP, stated:

The suspension of the programs by the former Chief Magistrate was accompanied by her request to me that we should overcome the perceived legal hiatus that existed with respect of the programs by the drafting and passage of the bill before us today. The bill establishes a clear framework for courts to refer offenders or accused people

¹¹² Ibid.

¹¹³ S Gibbs, 'Juvenile crime initiative ruled outside the law', *The Sydney Morning Herald*, 26 July 2002, p 3.

to programs declared by the regulations to be intervention programs.¹¹⁴

5.2 Formal recognition of rehabilitation programs

The object of the Bill is to give a formal legislative basis to programs that address the underlying causes of offending behaviour. The Government maintained that:

It is indisputable that there is an enormous benefit to both the offender and the community in attempting to stop a person from offending through addressing these underlying issues, rather than merely delaying their offending through temporary incarceration. This is particularly so when an offender receives a custodial sentence of six months or less...However, it has become apparent that there is a need to provide a formal legislative framework or basis for the operation of such programs; not just government-run programs but community-based programs, such as community aid panels, as well. A framework will promote consistency, accountability and confidence that programs are being conducted appropriately and for the right type of offenders.¹¹⁵

The legislation acknowledges the value of treatment and rehabilitation programs generally, but accords special status to an **intervention program**, meaning 'a program of measures for dealing with offenders or accused persons that is described in the regulations' to the *Criminal Procedure Act 1986*. Regulations may also be made with respect to the conduct and operation of intervention programs. The Attorney General's Department will establish a Criminal Justice Interventions Unit, responsible for co-ordinating the preparation of the regulations.¹¹⁶

A person accused of an offence may be referred to an intervention program at four different points of the criminal justice process:

- as a condition of bail after being charged with the offence; or
- as a condition of bail during an adjournment in court proceedings for the offence (before any finding as to guilt has been made); or
- as a condition of bail after the person has pleaded guilty or been found guilty by the court, but before the person is sentenced for the offence; or
- as a condition of being discharged from the offence or as a condition of a good behaviour bond imposed at sentence.

¹¹⁴ Crimes Legislation Amendment (Criminal Justice Interventions) Bill, Reply to Second Reading Debate, Hon. Bob Debus MP, Attorney General, *NSWPD(LA)*, 15 November 2002, p 29 (Proof).

¹¹⁵ Crimes Legislation Amendment (Criminal Justice Interventions) Bill, Second Reading Speech, Tony Stewart MP, Parliamentary Secretary, *NSWPD(LA)*, 12 November 2002, p 97 (Proof).

¹¹⁶ *Ibid*, p 98 (Proof).

5.3 Basic principles of intervention programs - amendments to the Criminal Procedure Act 1986

A new Part 9, entitled 'Intervention programs' is inserted into the *Criminal Procedure Act 1986*.

The offences in respect of which an intervention program may be conducted are summary offences and indictable offences which can be dealt with summarily.¹¹⁷ Offences which are specifically excluded by s 176(2) and s 177 of the *Criminal Procedure Act 1986* include: malicious wounding, sexual assault, child pornography, stalking, drug supply, any firearm offence, and offences being dealt with in the Children's Court.

The purposes of intervention programs are to promote: treatment and rehabilitation of offenders; respect for law and community safety; remedial actions by offenders towards victims; acceptance by offenders of responsibility for their behaviour; and reintegration of offenders into the community. These principles, outlined at s 175(2), indicate the sort of programs that are likely to qualify in the Regulations. The Government confirmed:

This includes the current programs of circle sentencing, community aid panels and traffic offender programs. It is not intended to extend to those post-sentence programs being conducted by the Department of Corrective Services or those being supervised by the Probation and Parole Service.¹¹⁸

Express provision is made at s 178 for a court, before delivering a finding as to the guilt of an accused, to adjourn proceedings and release the accused on bail for the purpose of assessing their suitability for an intervention program, or to allow them to participate in such a program.

5.4 Amendments to the Crimes (Sentencing Procedure) Act 1999

The *Crimes Legislation Amendment (Criminal Justice Interventions) Act 2002* amends the *Crimes (Sentencing Procedure) Act 1999* in various ways to encourage the use of intervention programs, including:

- **Reasons to be given for decision:** Section 5 of the *Crimes (Sentencing Procedure) Act 1999* is amended to specify that a judge who imposes a sentence of less than 6 months must give reasons for deciding not to make an order allowing the offender to participate in an intervention program or other treatment or rehabilitation program. (This adds to the existing requirement for judges to give reasons why no penalty other than imprisonment is appropriate.)

¹¹⁷ See the Glossary at the front of this briefing paper for definitions of indictable and summary offences.

¹¹⁸ Crimes Legislation Amendment (Criminal Justice Interventions) Bill, Second Reading Speech, Tony Stewart MP, Parliamentary Secretary, *NSWPD(LA)*, 12 November 2002, p 97 (Proof).

- **Conditional discharge of offender:** Formerly, s 10 of the *Crimes (Sentencing Procedure) Act 1999* allowed a judge, without proceeding to a conviction, to dismiss the charge or to discharge the defendant on condition that he or she enter into a good behaviour bond. A third option is added, whereby the person is discharged on condition that he or she undertake to participate in an intervention program. This option is not automatically available for any type of rehabilitation but is limited to programs that are declared to be intervention programs.
- **Suspended sentences:** Section 11 previously enabled a court that found a person guilty of an offence to defer sentence and grant bail for the purpose of enabling the offender to undertake rehabilitation, or for any other purpose that the court considered appropriate in the circumstances. The amending Act clarifies that the court may also suspend the sentence to allow the offender to be assessed for, or participate in, an intervention program.
- **Good behaviour bonds:** Section 95A is inserted to explicitly authorise that attendance at a recognised intervention program can be imposed as a condition of a good behaviour bond, where appropriate. However, this does not limit the power of the court under s 95(c) to make a good behaviour bond conditional upon participation in some other kind of treatment or rehabilitation.

5.5 Amendments to the Bail Act 1978

The amendments to the *Bail Act 1978*, following the pattern of recent years, bring further specificity to the conditions that can be attached to bail, and stipulate another exclusion from the general presumption in favour of bail:

- **Participation in a program as a condition of bail:** Section 36A previously enabled an accused person to be granted bail on the condition that the person agree to participate in, or be assessed for, 'drug or alcohol treatment or rehabilitation'. The amended s 36A widens this condition to apply to an intervention program or any treatment or rehabilitation program. If the accused fails to participate in the program or fails to comply with its requirements, he or she will be regarded as having breached bail and may be arrested and brought before a court.
- **Juveniles:** Section 36A(6) precludes the Children's Court or a police officer from imposing a bail condition requiring a person who was under 18 years at the time of the alleged offence to be assessed for an intervention program.
- **Exception to the presumption in favour of bail:** The list of exceptions to the presumption in favour of bail is extended to create another exception at s 9B(1)(d) when the accused is subject to an 'intervention program order' at the time of the alleged offence. This means that the accused was participating in an intervention program as a condition of being discharged without a conviction, pursuant to s 10 of the *Crimes (Sentencing Procedure) Act 1999*.
- **Purposes of imposing conditions:** Section 37 previously stated that bail is to be granted unconditionally unless conditions should be imposed for the purposes of: promoting effective law enforcement, the protection and welfare of specially affected persons, or the protection

and welfare of the community. The amending Act adds another purpose for which bail conditions may be imposed: 'reducing the likelihood of future offences being committed by promoting the treatment or rehabilitation of an accused person.'

6. MAGISTRATES EARLY REFERRAL INTO TREATMENT PROGRAM

6.1 Introduction

Magistrates Early Referral Into Treatment (MERIT) is a program which allows defendants who are facing drug-related charges in the Local Court to be diverted from the mainstream criminal justice process and released on bail to engage in rehabilitation. Undertaking a drug program could previously be imposed as a condition of bail, but the distinctive feature of MERIT is that it targets defendants at the pre-plea stage. In other words, before the defendant has entered a plea to the charge, the Magistrate allows bail on the condition that the defendant complies with the treatment regime.

MERIT is meant to complement the Drug Court, but for the benefit of less serious offenders. The Drug Court targets drug offences that are highly likely to attract a prison sentence, and defendants are required to enter a plea of guilty to participate. The MERIT program intentionally ‘allows defendants to focus on treating their drug problem in isolation from legal matters. Therefore, the program is designed so that agreement to become involved is not an admission of guilt for the offence(s) charged...’¹¹⁹

The issue of repeat offending is relevant to MERIT because many of the participants in MERIT already have a significant criminal history. By treating the cause of the criminal behaviour, it is hoped to intercept the cycle of recidivism.

Interagency co-operation is crucial to the functioning of MERIT, particularly between the Attorney General’s Department, the Department of Health and the NSW Police. Although MERIT is not authorised by specific legislation, a Local Court Practice Note outlines the guiding principles.¹²⁰

6.2 Regional distribution

A 12 month pilot was conducted at Lismore Local Court from July 2000, in conjunction with the Northern Rivers Area Health Service. Other locations were subsequently added, corresponding to the Area Health Services of: Illawarra, Macquarie (Dubbo), Mid West NSW, Hunter Region, Central Coast, Greater Murray, Mid North Coast, and South West Sydney. As of November 2002, 24 Local Courts were participating in these areas.¹²¹

¹¹⁹ ‘MERIT – Program Description’, document in the MERIT section of the Attorney General’s Department website at <www.lawlink.nsw.gov.au/cpd/merit.nsf/pages/index>, p 2.

¹²⁰ ‘Magistrates Early Referral into Treatment (MERIT) Programme’, *Local Court Practice Note No. 5*, issued on 20 August 2002 by Patricia Staunton AM, Chief Magistrate.

¹²¹ Questions Without Notice, ‘Drug Rehabilitation Beds’, Hon. John Della Bosca MLC, *NSWPD(LC)*, 19 November 2002, p 31 (Proof).

6.3 Eligibility

Participation in MERIT is voluntary. Defendants charged with drug-related offences that can be heard summarily are eligible, excluding cases where the defendant is currently charged with (or has outstanding) matters involving violence or sexual assault.¹²² Because the program operates in the Local Court, it does not apply to strictly indictable drug offences, meaning those which must be prosecuted in the District Court or Supreme Court because of the amount of the prohibited drug.¹²³ The pilot program indicated that heroin was the primary drug used by participants (55%), followed by cannabis (20%).¹²⁴

6.4 Referrals

Referrals can be made by the police at the time of the arrest, by lawyers following arrest, or by the presiding Magistrate at court. The pilot program revealed that police were initially reluctant to refer defendants, accounting for only 15% of referrals compared to 69% referred by the Magistrate or a solicitor on the day of court.¹²⁵ In late 2001, the NSW Legislative Council's Select Committee on the Increase in the Prisoner Population observed: 'To date, the majority of clients have been referred to MERIT at court. It is desirable that referrals be made earlier in the offenders progress through the system to maximise access to treatment.'¹²⁶ However, the Coordinating Magistrate for the Far North Coast, Jeff Linden, was optimistic: 'Notwithstanding slow beginnings, it is anticipated that police referrals are increasing as the police become more aware of the programme and its essential characteristics and objectives.'¹²⁷

6.5 Procedures

¹²² The defendant does not have to be charged with an actual drug offence. The alleged crime could, for example, be a property offence committed to fund a drug habit. The important factor is that the defendant has a drug problem. See the Glossary at the beginning of this briefing paper for definitions of summary and indictable offences.

¹²³ Generally, where the amount of the prohibited drug or plant is not more than the indictable quantity specified in Schedule 1 of the *Drug Misuse and Trafficking Act 1985*, the offence can be dealt with in the Local Court unless the prosecution or the accused elects a trial on indictment. The provisions for cannabis are more lenient, allowing offences to be prosecuted in the Local Court if the amount of cannabis is less than the commercial quantity.

¹²⁴ Magistrate J Linden, 'The MERIT Programme: A Holistic Approach to Drug Offenders', *Judicial Officers' Bulletin*, Vol 13, No 4 (May 2001), p 25 at 26.

¹²⁵ *Ibid*, p 26.

¹²⁶ NSW Legislative Council, Select Committee on the Increase in Prisoner Population, *Final Report*, November 2001, para 7.126.

¹²⁷ Linden, n 124, p 26.

The program lasts for a minimum of 3 months, up to 5 or 6 months. The procedural sequence from the time of appearing in court is:

- The Magistrate adjourns the matter to allow the defendant to be clinically assessed by the MERIT team. The purpose of assessment is to establish whether the defendant has a drug problem and is motivated to undertake treatment. The outcome of the assessment is a written report to the Magistrate, recommending whether the defendant should enter the MERIT program and, if so, an individual treatment plan to be incorporated into the bail conditions.
- If the defendant is considered suitable, the Magistrate will approve placement onto the program. (If the defendant is not suitable, he or she will be asked to enter a plea and the matter will proceed in the usual way.)
- Bail is granted on condition that the defendant comply with the conditions of the program and the directions of the team. Although there is no requirement for defendants to plead guilty, in practical terms this usually happens.
- The defendant is allocated a MERIT case worker and is provided with treatment, support and supervision, but only those bail conditions that are related to drug treatment are monitored. (The monitoring of other conditions continues to be the function of the police, the court, or the Probation and Parole Service, as appropriate.) Participants are required to appear before the Magistrate during the bail period for the purpose of an update on their progress.
- After the program is completed, the case will proceed to hearing or sentence. A plea may be made *ex parte* (in the absence of the defendant) to avoid interrupting rehabilitation.
- At hearing or sentencing, another report from the MERIT team will be supplied to the Magistrate. This report will outline the client's participation in drug treatment and make any further treatment recommendations. Successful completion of the MERIT program is 'a matter of some weight to be taken into account in the defendant's favour' at sentencing.¹²⁸
- An aftercare program may also be formulated by the MERIT team to assist clients to continue their rehabilitation.

The types of treatment options available through MERIT include: hospital detoxification; home-based detoxification with medical support; residing at a rehabilitation establishment; methadone treatment; individual and group counselling; and welfare assistance. Random urinalysis is an integral element of case management.

6.6 Breaches of the MERIT program

If the conditions of treatment are disobeyed, the situation will be assessed firstly by the accused's

¹²⁸ 'Magistrates Early Referral into Treatment (MERIT) Programme', *Local Court Practice Note No. 5*, issued on 20 August 2002 by Patricia Staunton AM, Chief Magistrate.

case worker. The Court will be notified when a participant:

- fails to attend any two consecutive scheduled appointments within a two week period;
- commits further offences;
- does not comply with the bail conditions;
- absconds from a residential treatment service.

Failure to respond to the treatment regime does not attract a separate punishment. If convicted of the offence charged, the penalty will relate to the offence only. However, breaches may result in the Magistrate terminating the defendant's participation in MERIT or withdrawing bail altogether.

6.7 Results

The Attorney General, Hon. Bob Debus MP, stated in March 2002 that 'Early reports on the success of this program are very encouraging.'¹²⁹ The Select Committee on the Increase in the Prisoner Population examined the MERIT program after it had been operating for almost a year. In that period, MERIT had received 126 referrals and 89 people had been assessed as suitable for the program. The Committee was advised that, following completion of the program, almost all of the participants pleaded guilty and were given non-custodial sentences.¹³⁰

By 30 June 2002, there had been a total of 997 referrals to MERIT across the 8 centres operating at that time. Of these, 64% were accepted into the program.¹³¹ Data from Lismore, the first MERIT centre, indicates that participants are experienced in the criminal justice system. Over 90% had prior criminal convictions and around 60% had previously served a prison sentence. In terms of sentencing outcomes, those who successfully completed the program were more likely to receive good behaviour bonds and suspended sentences than those who did not.¹³² Over the first 20 months of the Lismore program, 62% of participants who had completed MERIT had not been charged with a further offence. Many of the new charges were for relatively minor cannabis offences.¹³³

In November 2002, the Special Minister of State, Hon. John Della Bosca MLC, reported to the

¹²⁹ Bail Amendment (Repeat Offenders) Bill, Second Reading Speech, *NSWPD*, 20 March 2002, p 820.

¹³⁰ NSW Legislative Council, Select Committee on the Increase in Prisoner Population, *Final Report*, November 2001, para 7.128.

¹³¹ B Flaherty and J Jousif, 'MERIT', Conference paper presented at the Australian Institute of Criminology National Crime Prevention Conference, Sydney, 12-13 September 2002, p 9. The paper is available on the MERIT page of the Attorney General's Department website at <www.lawlink.nsw.gov.au/cpd/merit.nsf/pages/index>

¹³² *Ibid*, p 9.

¹³³ *Ibid*, p 10.

Legislative Council that MERIT had produced 266 graduates, with another 178 in the participation phase.¹³⁴

A progress report on the Cabramatta MERIT program is included in the next section of this briefing paper, at **7.3**.

¹³⁴ Questions Without Notice, 'Drug Rehabilitation Beds', *NSWPD(LC)*, 19 November 2002, p 32 (Proof).

7. BAIL SCHEMES IN CABRAMATTA

7.1 Development of the Cabramatta Anti-Drug Strategy

The suburb of Cabramatta in Sydney's south-west has a reputation as a centre for the distribution and sale of drugs, especially heroin. On 27 March 2001, Premier Carr announced a four year, \$18.8 million package of initiatives to tackle drug-related crime in Cabramatta.¹³⁵ In addition, \$12.78 million has been earmarked for the construction of a new police station in Cabramatta local area command, due to be completed in mid 2003.

The policies on Cabramatta are collectively referred to as the Cabramatta Anti-Drug Strategy, which is comprised of four main components. The component with the greatest ramifications for bail issues is the compulsory treatment plan for drug users. This involves:

- the Police Drug Bail Scheme – police granting bail for the purpose of the defendant undertaking compulsory drug treatment;
- the Cabramatta MERIT program – Magistrates granting bail to divert offenders from court into drug treatment;
- provision of extra drug treatment places and crisis accommodation places to cater for the diverted defendants.

The Cabramatta Anti-Drug Strategy was implemented on a staged basis from 1 July 2001, and the compulsory treatment initiatives commenced on that date.

Access to drug treatment services in the local area is crucial to the success of the Police Drug Bail Scheme and the Cabramatta MERIT program. To this end, an expanded capacity for up to 100 drug treatment places was made available at Liverpool Hospital.

Outlining the proposed health care arrangements, Premier Carr stated:

A \$4.4 million plan will complement the magistrates early referral into treatment [MERIT] scheme and the police bail scheme with, first, up to 500 extra treatment places, eight transitional rehabilitation beds, three acute-care beds and four mental-health beds; second, 47 extra crisis places through the Department of Housing; third, a three-person team of health professionals working with police and Department of Community Services [DOCS] workers to identify the method of treatment at the first point of contact; and, fourth, Health Department court liaison officers for implementing the MERIT scheme.¹³⁶

¹³⁵ Except where otherwise stated, the information in this section is sourced from: 'Cabramatta Anti-Drug Strategy – the first 12 months', Information Sheet produced by the Community Drug Information Strategy, NSW Premier's Department, May 2002; and *Cabramatta: A Report on Progress*, NSW Office of Drug Policy, April 2002.

¹³⁶ 'Cabramatta Anti-Drug Strategy', Ministerial Statement by the Premier, Hon. Bob Carr MP,

7.2 Police Drug Bail Scheme

Since 1 July 2001, Cabramatta police have been able to use the Police Drug Bail Scheme when they have reasonable grounds to believe that treating an offender's drug problem will stop the person re-offending to finance more drug taking upon their release. Police refer the drug users to health assessment and treatment services as a condition of bail. This scheme is only open to offenders who are Cabramatta residents and who pose no risk to the community.

For non-resident offenders, police can instead impose a mandatory bail condition that the offender is not permitted to return to the Cabramatta area unless they have a legitimate reason for doing so.

Premier Carr explained the reasons for instigating the use of these two options by the police:

Drug users are often homeless, have mental health problems or chronic addictions... In the absence of long-term treatment, many who receive detoxification treatment will simply return to the streets seeking more heroin. One of the solutions has to be compulsory treatment. That is why in Cabramatta police bail will be changed to add two conditions. First, it will be a breach of bail to fail to attend drug treatment and, second, if a person is from outside the area it will be a breach of bail to return to Cabramatta. Breaching bail will mean prison.¹³⁷

Between 1 July 2001 and 20 March 2002, police referred 33 people for assessment or treatment, while 393 offenders who were charged with minor offences were bailed on the condition that they not return to Cabramatta.¹³⁸

7.3 Cabramatta MERIT Program

As explained in Chapter 6 of this paper, the Magistrates Early Referral Into Treatment (MERIT) Program is an initiative which operates through the Local Court to divert drug users into rehabilitation. At an early court appearance, adult defendants with drug problems can be released on bail by a Magistrate on the condition that they undertake assessment and supervised drug treatment.

The Cabramatta branch of MERIT commenced on 2 July 2001. It is administered by Liverpool Local Court, where the majority of drug charges laid in Cabramatta are heard, in conjunction with the South Western Sydney Area Health Service. The operational zone has now been expanded to

NSWPD, 27 March 2001, p 12595.

¹³⁷ 'Cabramatta Anti-Drug Strategy', Ministerial Statement by the Premier, Hon. Bob Carr MP, *NSWPD*, 27 March 2001, p 12595.

¹³⁸ NSW Treasury, *Budget Estimates 2002-2003, Budget Paper No. 3, Volume 2*, Minister for Police, p 15-4.

cover defendants charged in the whole Fairfield Local Government Area.

By 20 March 2002, 70 people had been referred to Cabramatta MERIT and 28 had been accepted into the program. Ten defendants had graduated by 29 March 2002.

8. BAIL HOSTELS

Bail hostels are a long-standing feature of the bail system in the United Kingdom, funded and legislated on a national scale. Some limited types of bail accommodation are available in New South Wales, but the concept of a regulated network of approved bail hostels remains an option for future consideration.

8.1 General principles

Bail hostels are residential establishments that are designated for the purpose of accommodating people as a condition of their bail. The concept allows applicants who do not have access to suitable housing to qualify for release, rather than being refused bail and remaining in custody. In addition, the bail hostel provides a degree of supervision and assessment, assisting residents to comply with other bail conditions such as attending rehabilitation programs.

Some of the potential **benefits** of bail hostels are:

- the prison population may be reduced if bail hostels accommodate some of the people who would otherwise stay on remand;
- people can maintain connections to their community more easily in a bail hostel than in prison. Residents can preserve their jobs, continue their studies, and enjoy a social life to some extent;
- bail hostels may be of particular assistance to Aboriginal people, who are refused bail at a higher rate than non-Aboriginal persons and constitute a disproportionately large number of the prison population. Furthermore, Aboriginal-run hostels would enable Aboriginal people to be supervised in an indigenous context;
- bail hostels can link up with other organisations in the community to facilitate the provision of treatment, counselling, and remedial programs to hostel residents;
- hostel managers may be able to have a stabilising influence on the inhabitants, giving leadership and guidance on a more constant basis than is practical in the prison system.

The perceived **problems** of bail hostels include:

- bail hostels can have a 'net widening effect', meaning that some judges might use residency in a hostel as an added precaution for defendants who would otherwise be released on bail into the community;
- unless bail hostels are geographically widespread, residents may still be a substantial distance from family and other support networks;

- the costs of instigating and running such a system may be difficult to justify if the presence of the hostels has no impact on custodial populations;
- house rules and monitoring need to be sufficiently strict to obtain compliance, but not so restrictive that residents feel that they are in quasi-custody and are prompted to breach their bail.

8.2 Bail accommodation in New South Wales

Although bail hostels for adults do not currently exist in a separate, official sense in New South Wales, there are numerous residential establishments operated by charities, welfare organisations and community groups which accept defendants who are on bail. Conditions of bail may be imposed to require the defendant to reside at such a location, often for a particular purpose. For example, the Salvation Army conducts drug and alcohol programs at the William Booth Institute in Surry Hills, Sydney. Defendants can be bailed to reside at William Booth while undertaking drug or alcohol treatment.

Some facilities cater for a specific type of clientele, such as Aboriginal people, juveniles, or women. Guthrie House, a residential half-way house for women in Enmore, Sydney, provides accommodation, social work services, drug and alcohol assessment, counselling, life skills training, and other types of assistance.¹³⁹ One of the criteria for entry is involvement in the criminal justice system. Residents may be facing criminal charges, be recently released from prison, on parole, bail or a court-imposed bond. Funding is allocated to Guthrie House by the Department of Corrective Services, the Department of Health and the Department of Community Services.

A bail hostel for juvenile Aboriginal offenders is operated by the Department of Juvenile Justice. Ja-Biah Bail Hostel, in the Sydney suburb of Mt Druitt, opened in 1997 with the aim of reducing the number of Aboriginal young people held on remand in juvenile justice centres. The facility is supervised 24 hours and offers clients a range of services, including cultural awareness, personal skills development, access to education, and assistance in addressing their offending behaviour.¹⁴⁰

The NSW Legislative Council's Select Committee on the Increase in Prisoner Population recommended in 2000 that the Government should fund two bail hostels in New South Wales for women, one specifically for indigenous women. The Committee recommended that a maximum of

¹³⁹ Information on Guthrie House was obtained from the website of NADA, the Network of Alcohol and Other Drug Agencies, at <www.nada.org.au>; and NSW Parliament, Legislative Council, Select Committee on the Increase in the Prisoner Population, *Interim Report: Issues Relating to Women*, July 2000, para 6.46.

¹⁴⁰ Assoc. Prof. Chris Cunneen, *The Impact of Crime Prevention on Aboriginal Communities*, 2001, Institute of Criminology, University of Sydney, para 6.5. This report was accessed electronically from the Attorney General's Department website at <www.lawlink.nsw.gov.au/cpd.nsf/pages/alr_index>

10 women, plus their dependent children, be accommodated in each hostel and that the concept be piloted for two years and then evaluated by independent research. The bail hostel format was considered appropriate for women because ‘women offenders are usually the primary carers of children and any period of custody of a mother, and subsequent separation, can have a profoundly negative effect on a child.’¹⁴¹ To avoid the trap of ‘net widening’, the Committee advised that remanding a person to a bail hostel must be a last resort before imprisonment. In other words, bail hostels should be reserved for those who would otherwise be held in custody, not used as an additional restriction upon those who would normally be released on bail into the community.

The Carr Labor Government’s response to the Committee’s proposal of a bail hostel was cautious:

...the evidence obtained to date is not encouraging...Bail hostels present the possible problem of net-widening, whereby offenders who would have ordinarily be granted bail are placed in a bail hostel with its accompanying restrictions on their liberty. Western Australia has closed their bail hostel because they found that the demand was just not there. The UK experience over the last decade has seen unprecedented increases in the prison population in spite of a network of bail hostels and intensive probation hostels.¹⁴²

However by early 2002, there seemed to be a revival of interest in bail hostels. They are among the options that may be considered by the interagency working party into bail reform, chaired by the Attorney-General’s Department. Also, effective from 1 July 2002, the *Bail Amendment (Repeat Offenders) Act 2002* created a specific power to impose a condition ‘that the accused person enter into an agreement to reside, while at liberty on bail, in accommodation for persons on bail’. A related amendment states that the Minister for Corrective Services ‘is to ensure that adequate and appropriate accommodation for persons on bail is available for the purposes of the placement of persons on bail.’ These amendments to s 36 of the *Bail Act 1978* were not part of the Government’s original Bill but were passed in the Upper House.

8.3 Bail hostels in Western Australia¹⁴³

¹⁴¹ NSW Parliament, Legislative Council, Select Committee on the Increase in the Prisoner Population, *Interim Report: Issues Relating to Women*, July 2000, para 6.42.

¹⁴² *Government Response*, 19 February 2001, p 6, quoted in: NSW Legislative Council, Select Committee on the Increase in the Prisoner Population, *Final Report*, November 2001, para 8.5. The Select Committee was comprised of 3 Government members, two from the National Party, one from the Liberal Party (the Chair, Hon. John Ryan MLC), and one from the Greens.

¹⁴³ Information on Western Australia was obtained from: NSW Legislative Council, Select Committee on the Increase in Prisoner Population, *Interim Report: Issues Relating to Women*, July 2000, paras 6.29-6.34; and extracts therein from a report by the Western Australian Ministry for Justice (Offender Management Division), *Bail Hostel: History and Reasons for Closure*, 1999, Perth.

An adult bail hostel operated in Western Australia for 12 years but experienced difficulties and was discontinued.

Stirling House Bail Hostel was established in North Fremantle in 1983, accommodating up to 24 residents (18 males and 6 females). The hostel was intended to cater to itinerant people who did not have a surety; socially disadvantaged persons who lacked a permanent address; defendants accused of domestic violence who could not reside at home and so on. Candidates were referred by the courts or were identified at the point of admission to the remand centre. Stirling House closed in 1995 due to a number of factors such as:

- failure to achieve its occupancy rate;
- legislative changes that made it more likely that ‘marginal’ bail candidates would be released on bail without a hostel residence requirement;
- the commencement of home detention in 1991, including home detention as a condition of bail, which offered courts another alternative to the bail hostel;
- risks to the security of staff at Stirling House and the costs of rectifying this;
- the financial cost of operating a low security institution in the metropolitan area.

But some commentators attributed the demise of the bail hostel to the approach that was taken in Western Australia, rather than regarding the concept itself as unsound. Professor Tony Vinson and Dr Eileen Baldry, of the School of Social Work at the University of New South Wales, have argued that the ‘concerted marketing plan’ to promote the bail hostel to the judiciary in Western Australia needed to be accompanied by recommendations of its use in specific cases. They assert that the hostel option was presented too late, when the defendant had already been referred to a remand centre, instead of at the time when the judge was deliberating:

...the reason why bail hostels enjoy success in the UK is largely the fact that bail officers are in court when the judicial officer is deciding what is to be done. The hearing is frequently adjourned to allow the bail officer to interview the defendant in the cells on the points at issue...Upon resumption of the bail hearing, the judicial officer has a proposal before her or him, which enables the bail hostel option to be adopted. All of this is in total contrast to...Western Australia.¹⁴⁴

8.4 Bail hostels in the United Kingdom¹⁴⁵

Bail hostels are well established in the United Kingdom and could serve as a possible model if the

¹⁴⁴ Submission to the NSW Legislative Council’s Select Committee on the Increase in Prisoner Population, quoted in the *Interim Report: Issues Relating to Women*, July 2000, paras 6.39-6.40.

¹⁴⁵ The information about UK hostels has been combined from two main sources: (1) ‘Hostels for offenders – what they are and what they do’, accessed on the National Probation Service website at <www.homeoffice.gov.uk/cpg/nps> on 30 October 2002; and (2) *Delivering an Enhanced Level of Community Supervision: Report of a Thematic Inspection on the Work of Approved Probation and Bail Hostels*, 1998, Her Majesty’s Inspectorate of Probation, Home Office.

idea is adopted in New South Wales.

(i) Background

In the United Kingdom, the use of hostels to accommodate offenders dates back to the *Criminal Justice Administration Act 1914*, which provided for a residency requirement to be included in a probation order. Defendants were first bailed to hostels in 1971, with the aim of avoiding unnecessarily remanding people in custody. The problem of overcrowding in prisons and police cells prompted an expansion of hostels between 1988 and 1994.

(ii) Distribution

There are currently 100 approved hostels in England and Wales, generating a total of about 2260 beds. Approximately 55% of these beds are for people on bail, including those yet to appear in court and convicted offenders who are awaiting sentence.¹⁴⁶ Some hostels are designated as 'bail only' facilities.

Hostels are created on the basis of local need. When a probation service perceives a demand for accommodation for offenders in the community it submits a request to the Home Office. If this is agreed to, the probation service then has to find a suitable site, taking into account the likely effect of the hostel on the local community.

(iii) Eligibility

Hostels accept residents in the following categories:

- people who have been granted bail by the court and require assessment and supervision;
- inmates released from prison on licence for the last part of their sentence;
- offenders sentenced to a probation order with a condition of residence in a hostel;
- offenders serving community sentences.

Applicants might have committed any offence but strict risk assessment is conducted. When a hostel offers a person a place, the decision has to be agreed to by a court, a prison governor or the Parole Board, depending on the circumstances. Difficult cases are also assessed by a public protection panel, which includes the police. Each potential hostel resident therefore has his or her case examined at least twice before a final decision is made.

(iv) Legislation and funding

Probation and bail hostels were statutorily authorised under ss 7 and 27 of the *Probation Service Act 1993*. Section 27 enabled the creation of the *Approved Probation and Bail Hostels Rules 1995* which govern the management, regulation and inspection of the hostels. The Rules replaced,

¹⁴⁶ 'Hostels for offenders – what they are and what they do', *ibid*, p 3.

with some modifications, a previous version which had operated since 1976. Hostels are also subject to the *National Standards for the Supervision of Offenders in the Community*, first issued by the Home Office in 1992 and revised in 1995.

Funding for building and operation of hostels is provided by the Home Office. Residents are required to pay towards the cost of their stay.

(v) Operations

The hostels are managed by a voluntary management committee or a probation service. Management committees normally approve a policy outlining the categories of resident who may safely and appropriately be admitted to the hostel.

Supervision in hostels can include:

- a night-time curfew;
- 24 hour staff presence, regular monitoring, assessment and support of residents;
- clearly stated house rules which residents are required to obey.

Those residents on bail who break the rules can be returned to court. They may have their bail withdrawn, meaning that they will be remanded in custody. The police are notified immediately if any participant fails to arrive or commits a further offence.

(vi) Review

An evaluation of approved probation and bail hostels was conducted by Her Majesty's Inspectorate of Probation (HMIP) in the summer of 1997-1998. All 99 hostels that were operational at the time provided information and 17 hostels were inspected. Some of the findings of the audit were:

- Only 8 of the 99 hostels were designated as 'bail only', a decline from 31 out of 113 hostels that were operational in 1992. 60 hostels admitted men only, four were for women only, and 35 were unisex.¹⁴⁷
- In January/February 1998, 62% of residents were on bail, 20% on probation, 13% on parole/licence, and 4% were categorised as 'other'.¹⁴⁸
- 88 hostels were managed by a probation service and 13 by voluntary management

¹⁴⁷ *Delivering an Enhanced Level of Community Supervision: Report of a Thematic Inspection on the Work of Approved Probation and Bail Hostels*, 1998, Her Majesty's Inspectorate of Probation, Home Office, paras 3.19-3.20.

¹⁴⁸ *Ibid*, Table 3 in para 4.5.

committees.¹⁴⁹

- There was a wide variation across the hostels regarding the proportion of referrals that were refused and the reasons for refusal. Some hostels refused to admit applicants on the basis of their offence, particularly sex offenders or drug users.¹⁵⁰
- In 1991-1992, 54% of residents successfully completed their period of residence. This figure rose to 64% in 1996-1997 and 67% in 1997-1998.¹⁵¹
- A further examination of 29 hostels was undertaken to assess breaches of orders and reoffending rates. Information provided by the hostels indicated that in 1996-1997, 35% of occupants had committed breaches of the residency order, including failing to arrive at the hostel or absconding, while only 3% of occupants had offended during their period of residency. Police data confirmed that relatively few inhabitants were known to have offended in the course of living in the hostel.¹⁵²
- The estimated cost per resident per night as at March 1998 was less than half the average cost of accommodation in the prison system.¹⁵³

¹⁴⁹ Ibid, Footnote to para 2.2.

¹⁵⁰ Ibid, para 4.28.

¹⁵¹ Ibid, para 4.32.

¹⁵² Ibid, paras 4.36-4.37.

¹⁵³ Ibid, para 12.18. The calculations of the cost of a hostel bed did not take into account the monetary contribution by residents, but did include a contribution from the local government authority which has since been discontinued. All funding is now supplied by the Home Office.

9. BAIL INFORMATION SCHEMES

9.1 General principles

At bail hearings in New South Wales, information about the community ties of the bail applicant can be presented to the court by the defence or the prosecution. Written documentation, such as a statement from an employer, is often tendered or witnesses are called to substantiate the reliability of the applicant if granted bail. But defence lawyers can also make submissions based purely on instructions from their clients and the court accepts the information at face value.

A Bail Information Scheme is a method which provides the court with factual, verified details about the defendant's character, antecedents, community ties, employment record, family responsibilities, access to accommodation, and support services in the community. In the English system, probation officers obtain and check the information and supply a written report to the prosecution and the defence, who then may use it in court. The broad goals of Bail Information Schemes are to assist judges to make better informed bail decisions, and to reduce the remand population.

The first Bail Information Scheme commenced in the United States of America in the early 1960s as part of the Manhattan Bail Project, an initiative of the Vera Institute of Justice, a private, non-profit organisation in New York City. The concept subsequently spread to other parts of America and to England.

9.2 Features of BISs in the United Kingdom¹⁵⁴

Bail Information Schemes (BISs) operated briefly in England in the mid-1970s, and were re-introduced in 1987 in order to overcome the lack of community ties information provided to the courts.

(i) Jurisdictional basis

The Home Office and the Probation Service are responsible for BISs in the English system. There is no statutory requirement for BISs but Prison Service Order 6101, issued by Her Majesty's Prison Service in September 1999, makes it mandatory for all establishments which hold prisoners on remand to have a BIS in place. The compulsory criteria of Order 6101 include:

- bail information, in the form of a report, is to be supplied to the defence and to the court duty officer;

¹⁵⁴ Information on the UK is compiled from: M Dhami, 'Do Bail Information Schemes Really Affect Bail Decisions?', *The Howard Journal*, Vol 41, No 3 (July 2002), p 245; and Her Majesty's Prison Service, Prison Service Order 6101, 'Bail Information Scheme', issued on 2 September 1999.

- information presented to the Crown Prosecution Service¹⁵⁵ should always be verified by at least one other source;
- interviews with defendants are to focus on issues which maximise the defendant's right to apply for bail.

(ii) Type of information

BISs commonly provide information on a defendant's residential status; the availability of a place in a bail hostel if the defendant has no fixed abode; the defendant's participation in employment or education; marital status and number of children; and the availability of a surety who will forfeit money if the defendant absconds.

The bail information report should not comment on the alleged offence, express an opinion, or make a recommendation. However, report writers do exercise discretion in the cases selected, and in the information collected, verified and presented. Initially, the reports emphasised positive points, but the *Probation National Standards* issued by the Home Office in 2000 allow BISs to provide negative information.

(iii) Procedures

There are both court-based and prison-based BISs. The court schemes aim to secure bail at a defendant's first appearance, and are operated by the Probation Service. Prison-based schemes target defendants who have failed to obtain bail at their first court appearance and could benefit from assistance in a subsequent application, particularly in responding to the court's grounds for withholding bail. Schemes in local prisons and remand centres can be operated by either the Prison Service or the Probation Service.

The 7 main stages of the bail information process are:

- targeting and prioritising the defendants to be interviewed;
- interviewing each defendant;
- selecting relevant information arising from the interview;
- confirmation of information from an independent source;
- completing a bail information report, using the national guidelines and forms of presentation;
- relaying the report to the Crown Prosecution Service and defence;
- monitoring and evaluating the work undertaken, to review effectiveness.

(iv) Impact of BISs

¹⁵⁵

The CPS occupies a similar position to the Office of the Director of Public Prosecutions in NSW, except that the CPS prosecutes both summary and indictable offences. The NSW DPP focuses on indictable crime, with most summary matters being handled by Police Prosecutors. See the Glossary at the beginning of this briefing paper for definitions of indictable and summary offences.

Studies of BISs conducted in England in the late 1980s and the 1990s concluded that Magistrates were more likely to grant bail to defendants when provided with bail information. For example, a 1988 study evaluated BIS pilots that ran for a year in 8 English courts, and estimated that 29% of defendants who would otherwise have been remanded in custody were bailed because of BISs.¹⁵⁶ Another general finding of the studies from this period was that when bail information was present, prosecutors were less likely to request a defendant be remanded in custody, and the defence was more likely to apply for bail.¹⁵⁷

However, a recent English study by Mandeep Dhmi, Research Fellow at City University, London, questions the methodological approaches of the previous studies and asserts that information about community ties is not as influential upon Magistrates as other factors such as the nature and severity of the offence, and the defendant's bail record and prior convictions. Dhmi attempted to assess whether the presence of a BIS made any difference to the decisions of Magistrates by constructing hypothetical cases which were identical except for the information on the defendants' community ties. The cases were then randomly assigned to either a group with a BIS or a group without a BIS. Dhmi found that there was no significant difference between the BIS group and no-BIS group in the decisions made, nor in the 'grand mean number' of conditions attached to bail.¹⁵⁸ However, Magistrates in the BIS group were significantly more likely to use sureties and bail hostels as conditions. This could be because the bail report contained information about these options, although Dhmi does not favour this explanation.

Weaknesses of BISs in the United Kingdom have been highlighted by various authors:¹⁵⁹

- the officers who conduct the research and investigations are not necessarily consistent in their treatment of defendants and their collection of data, and may have limited time available to interview defendants;
- prosecutors who are supplied with information sometimes choose not to use it;
- information about community ties can still be conveyed in court in the absence of a BIS;
- the bail legislation does not explicitly require Magistrates to take into account community ties;
- poor communication can occur between the court-based and prison-based schemes (see '(iii) *Procedures*' above for an explanation of the difference between them);
- the Home Office's decision in 2000 to allow negative information to be relayed in BISs may result in fewer defendants consenting to be interviewed.

¹⁵⁶ C Stone, *Bail Information for the Crown Prosecution Service*, 1988, London, Vera Institute of Justice, cited by Dhmi, n 154, p 246.

¹⁵⁷ Various studies cited by Dhmi, n 154, p 247.

¹⁵⁸ Dhmi, n 154, p 252.

¹⁵⁹ Ibid, p 257, and other authors cited therein, eg: M Drakeford et al, *Pre-trial Services and the Future of Probation*, 2002, University of Wales Press, Cardiff; P Morgan and P Henderson, *Remand Decisions and Offending on Bail: Evaluation of the Bail Process Project*, 1998, Home Office, London; A Hucklesby, 'Bail or jail? The practical operation of the Bail Act 1976', *Journal of Law and Society* (1996) Vol 23, p 213.

(v) Application to New South Wales

If an English style Bail Information Scheme was adopted in New South Wales, the role performed by probation officers in researching and writing the bail information reports would not be unprecedented. They already fulfil a comparable function by generating Pre-Sentence Reports, which are presented to the court by the prosecution and considered by the judge in the determination of an appropriate sentence.

However, there would be major resource implications for the Probation and Parole Service. To administer a Bail Information Scheme without an increase in funding would presumably be impractical. It may also be debatable whether such assistance is needed in New South Wales courts because the *Bail Act 1978* is a code that specifies numerous criteria that judges shall take into account, including community ties.

(vi) Comparisons with American BISs

The literature on BISs indicates that the American system differs from the United Kingdom in key respects, and arguably has greater impact on the outcome of bail applications. In America:

- information is gathered on specific aspects of community ties and then scored on an objective, fixed scale;
- an explicit recommendation is made regarding the defendant's suitability for bail;
- information is presented directly to the court by bail officers, not through the prosecution or defence.

Dhami argues that, 'If these differences do result in the desired effect of leading magistrates to remand fewer defendants in custody, then changes must be made to the current operation of BISs in the English system.'¹⁶⁰

¹⁶⁰

Dhami, n 154, p 258.

10. CONCLUSIONS

In its original form, the *Bail Act 1978* was quite broad in its scope to allow accused persons to be released on bail. Increasingly, restrictive amendments have been made to such areas as the presumption in favour of bail; the grant of bail pending an appeal; and making successive applications to the Supreme Court. Yet several amending Acts have assisted disadvantaged applicants, for example, by requiring that conditions for intellectually disabled persons accord with their capacity to comply with them, and by allowing a special review of bail conditions for people who remain in custody because of an inability to meet the terms of their bail. Another development in recent years is the introduction of explicit provisions to direct bail recipients to undertake drug and alcohol rehabilitation, surrender their passport, or refrain from associating with specific persons, rather than relying upon the general capacity to impose conditions relating to conduct.

The most recent amending legislation in 2002 typifies these trends. The *Bail Amendment (Repeat Offenders) Act 2002*, which commenced on 1 July 2002, removed the presumption in favour of bail for certain types of accused persons, including those already on bail, parole, or serving a non-custodial sentence for another offence, and those with a prior conviction for an indictable offence (where the present charge is indictable) or for failing to appear in accordance with a bail undertaking. A new condition is added to the available bail conditions under s 36, requiring an accused 'to enter into an agreement to reside, while at liberty on bail, in accommodation for persons on bail'. The amending legislation also recognises the special needs of some applicants, particularly by differentiating the basis on which the community ties of Aboriginal applicants are assessed compared to non-Aboriginal persons.

The *Crimes Legislation Amendment (Criminal Justice Interventions) Act 2002* was assented to on 29 November 2002 but had not commenced at the time of finalising this briefing paper. The Act gives formal, legislative recognition to 'intervention programs' and other types of rehabilitation which can be undertaken by accused persons as a condition of bail. However, the Act removes the presumption in favour of bail if the alleged offence was committed while the accused was participating in an intervention program as a condition of being discharged without conviction for a prior offence.

Further bail reforms can be expected in the future, with a likely expansion of practical programs to divert offenders from custody. Such developments were foreshadowed by the Attorney General earlier this year:

In addition to procedural changes by police and the courts, joint initiatives are being developed by an interagency working party chaired by my department. Representatives from a number of government agencies have been consulted on these reforms and will continue to meet to develop further programs, including procedural changes to further reduce court waiting times as they affect remand prisoners, and the development of more options for diversion from custodial bail

conditions...¹⁶¹

Mark Marien, the Director of the Criminal Law Review Division of the Attorney General's Department, confirmed that the repeat offender amendments of 2002 were part of a wider strategy of reform:

At present, more intensive supervision for certain defendants; the provision of extra mental health nurses, a focus upon the intellectually disabled accused person, and a program targeting bail supervision for juveniles are all being considered.

In addition, the recommendations of the Select Committee on the Increase in Prisoner Population are currently being considered by the Attorney General's Department, the Department of Corrective Services and NSW Health. This includes investigating a pilot scheme to divert particular categories of offender from imprisonment.

These initiatives are aimed at counteracting the cycle of crime through early intervention and use of rehabilitation programs and intensive supervision. These proposals recognise that the co-operation of all criminal justice agencies and the Department of Health is required in order to develop a co-ordinated and effective response.¹⁶²

Deliberations on the future directions of bail in NSW may also involve investigating the adoption of overseas innovations such as bail hostels.

¹⁶¹ Hon. Bob Debus MP, Attorney General, Second reading debate on the Bail Amendment (Repeat Offenders) Bill, *NSWPD*, 10 April 2002, p 1340.

¹⁶² M Marien, 'The Bail Amendment (Repeat Offenders) Bill 2002', paper presented at the Institute of Criminology Seminar: 'Crisis in Bail and Remand', held at the University of Sydney Law School on 29 May 2002, p 5.