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Bail in New South Wales

by

Rachel Simpson

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EXECUTIVE SUMMARY

Bail in one form or another has been a part of the common law since Anglo-Saxon times. The modern system of bail developed as a result of provisions in the *Statute of Westminster I*, in 1275, which prescribed for the first time a number of categories of persons who were not to be bailed, and another list of persons who were not to be refused bail. This system is not so different from the scheme contained within the *Bail Act 1978* (NSW) which commenced operation on 20 March 1980. A more thorough history of bail is contained in Part 2, and a history of the NSW *Bail Act* can be found in part 4.2.

New South Wales has the largest remand population in Australia - there were a total of 941 remand prisoners in NSW facilities on 1 May 1997. This represented 15.1% of the full time population in NSW prisons. In terms of numbers per 100,000 adult population the Northern Territory had the highest rate - 77.6 per 100,000 adult population, and Tasmania had the lowest rate - 9.0 per 100,000 adult population.

Bail is the granting of temporary liberty to a person charged with a criminal offence. It may be granted by the police or by a court. The rules applying to police and court bail are essentially the same. The operation of the *Bail Act* is examined in Part 4. The *Bail Act* implements a four-tiered regime of eligibility for bail. For those offences categorised as minor (generally, an offence that is not punishable by imprisonment) there is a right to release on bail, except in a number of exceptional circumstances. If the offence is categorised as non-violent, there is a presumption in favour of bail for the accused. The presumption may be rebutted if the prosecution can demonstrate that bail should not be granted. Certain offences which could be classified as violent do not enjoy the presumption in favour of bail. These offences include murder, aggravated robbery and domestic violence offences. In these cases the accused must prove to the court why bail should be granted. The final category relates to certain serious drug offences. In these cases, there is a presumption against bail being granted. Again, if the accused can prove to the court why bail should be granted, the presumption does not preclude the granting of bail. The *Bail Act* establishes very clearly the criteria which must be considered in any bail application. The criteria fall into four main categories: the likelihood of the accused appearing in court if bail is granted; the interest of the accused; the protection of the alleged victim, and the protection and welfare of the community. Only those considerations laid down in the Act can be considered in a bail application.

Bail may have conditions attached to it, or may be unconditional. Unless necessary to promote law enforcement or protect the victim or community generally, bail is to be unconditional. If bail conditions are necessary, no more stringent conditions are to be imposed than the offence and the circumstances of the accused warrant. Financial conditions are to be imposed only if no other condition is appropriate. Conditions may be imposed on the accused personally, or may involve a third person or persons, known traditionally as a surety, but termed an acceptable person in the *Bail Act*. If a person fails to comply with a bail condition, or fails to appear in accordance with bail undertakings, he or she may have committed an offence against the *Bail Act*. These offences are outlined in Part 4.4. Reasons for imposing conditions are to be written down in accordance with the Bail Regulations, and

may be the subject of an appeal, as may the bail decision itself. The review mechanisms are examined in Part 4.5.

When examining a system of bail, there are a number of important considerations to bear in mind. Foremost among these is the preservation of the presumption of innocence, which is a fundamental premise upon which our legal system rests. However, the interests of the victims of violent personal crime and those of the community in bringing the accused to trial are also important and must not be overlooked. The size of the remand population and conditions on remand are also relevant, particularly in light of the lengthy delays in hearing cases that some accused may face. Tables 5(a) and 5(b) illustrate the possible delays. The average length of time from arrest to determination in the Local Court in 1996 was 126 days for those on bail and 72 days for those on remand. In the higher courts, the time was even longer: 505 days from arrest to sentence for those on bail and 301 days was the average time for those on remand. It is also important to give special consideration to the interests of juveniles, who are particularly affected by being on remand. These considerations are canvassed briefly in Part 5.

1.0 INTRODUCTION

The *Bail Act 1978* (the 'Bail Act') commenced on 17 March 1980. The Act codified the law relating to bail, which previously had been contained in various statutes and common law rules. The original Act introduced a three-tiered system of eligibility for bail: those minor offences for which there was an entitlement to bail; those offences for which was a presumption in favour of bail, and a small group of offences for which there was neither an assumption for or against bail. The Act was later amended to include a fourth tier; offences for which there was an assumption against bail. The *Bail Act* greatly simplified the bail process, laying down clear criteria for determining bail in all circumstances. No additional considerations are to be taken into account when determining a bail application. In addition, the Act established clear guidelines for imposing bail conditions, and reduced the emphasis on money bail that previously operated. Under the new regime, a number of non-financial conditions must be considered before financial conditions are able to be imposed.

Since its commencement, the Act has been amended considerably, primarily in order to restrict the number of offences for which there is a right to or presumption in favour of bail. In 1987 and 1993 this category was changed to include domestic violence offences and murder. Then in 1988, the fourth tier mentioned above was introduced. There is, however, continuing debate as to whether these amendments go far enough in restricting the eligibility for bail in cases where the accused might present a threat to the safety of the community.

This paper begins by looking at the origins of the bail system, and tracing the development of the modern understanding of bail. It continues by examining bail generally, and then the nature and operation of bail specifically under the New South Wales *Bail Act*. Statistics relating to bail and remand in New South Wales are included so that the results of the bail system in terms of the remand population can be understood and compared to other Australian states. Finally, some issues which must be given consideration in any discussion on bail reform are canvassed.

Unless specifically stated, any reference to a section of an act refers to a section of the *Bail Act 1978* (NSW).

2.0 HISTORY OF BAIL

The origins of bail are not certain, but have been accorded to three theories:

1. the necessity of an alternative to holding an accused in custody where there were extensive delays and the gaols were disease-ridden;
2. the Anglo-Saxon practice of hostageship, and
3. the ancient practice of weregeld, whereby a third person would guarantee to a creditor that the debt would be paid.¹

¹ B Donovan, *The Law of Bail: Practice, Procedure and Principles*, Sydney, 1981, p. 23.

Originally it was the sheriff, as the representative of the Crown and administrator of criminal justice who determined whether or not an accused would be granted bail. This inevitably led to abuses, which were addressed by the *Statute of Westminster I* (1275). Based on three considerations: the seriousness of the offence, the “outlawed” status of the accused and the likelihood of conviction of the accused, the Statute provided a number of categories of persons not to be bailed, and another list of those to whom bail should be granted. In determining an accused’s “outlawed” status, factors such as the accused’s marital status, how long he had resided at his present address and so on were taken into consideration.² These provisions of the *Statute* have been called the “main foundations for the modern law”³, and are not so different from the framework contained within the New South Wales *Bail Act*.

Between 1275 and 1444 a large proportion of the sheriff’s powers were transferred to Justices of the Peace, including the power to grant bail. The granting of bail was to become gradually more and more regulated, in order to stop the collusion which had developed between justices and prisoners. A further development in 1444 saw certain cases, including misdemeanours, in which bail could not be refused, and other cases (most notably treason) in which bail could not be granted except by order of the Secretary of State or by the High Court.⁴ During the reign of Queen Victoria an even more modern bail system was introduced. The justice was empowered to grant bail or refuse it to a person accused of any felony or misdemeanour except libel, conspiracies, unlawful assembly, night poaching and seditious offences.

In 1826 a new *Bail Act* was passed in the United Kingdom. However, this statute was not adopted in New South Wales: indeed none of the English Acts concerned with bail were included in those adopted by the *Imperial Acts Adoption Act 1969*.⁵ Section 62 of the *Bail Act* expressly abolishes the common law powers to grant bail and section 14 of the Act states that the power to refuse bail can only be exercised in accordance with the Act. Consequently, the *Bail Act* is the sole source of the power to grant or refuse bail in New South Wales, apart from any special provisions in any other Acts.

For a more detailed history of the *Bail Act*, see Part 4.2 below.

3.0 NATURE OF BAIL

² Ibid, p. 24.

³ W Holdsworth, *A History of English Law*, Vol IV, pp. 525-8, extracted in Donovan, n 1, p. 26.

⁴ Ibid, pp. 24-25.

⁵ Ibid, p. 28. This Act sets out those Imperial Acts which are to be applicable in New South Wales.

Bail is defined in the *Butterworths Concise Australian Legal Dictionary* as:

The right to be released from custody granted to a person charged with an offence, on the condition that he or she undertakes to return to the court at some time specified, and any other conditions that the court may impose.⁶

Bail has also been defined as:

conditional liberty ... [that which is] granted to an innocent person conditional upon him or her appearing at a later time before the court to answer bail and upon his or her giving a guarantee that he or she will so appear. It can be self bail, ie a self guarantee or surety bail, ie guarantee by a third person.⁷

The emphasis of modern bail lies in the notions of release and liberty, based on the fundamental concept of the presumption of innocence.⁸ This emphasis is also inherent in the *Bail Act*, a discussion of which can be found at Part 4.3 below. Bail did not always involve the concept of conditional liberty: originally bail was in fact based the idea of the accused being placed in custody of his surety. The surety, who enters into an agreement to forfeit a sum of money if the accused breaks a bail undertaking, was totally responsible for the accused while on bail. Thus, in theory, the accused was still in custody while awaiting trial, such custody merely being that of his surety rather than prison or the police station. If at any time the surety wished to discharge himself, he could do so simply by seizing the accused and presenting him into custody, where the accused would remain unless he could obtain fresh sureties.⁹

Bail is only relevant in criminal proceedings, and is not a consideration in civil cases. Bail may be granted at a number of stages throughout criminal proceedings:

- after charge and before the first appearance at court;
- during any adjournments before or after the start of the hearing of the case;

⁶ P. Nygh (ed) *Butterworths Concise Australian Legal Dictionary*, Sydney, 1997, p. 41.

⁷ Donovan, n 1, p. 19.

⁸ The emphasis is referred to by Jacobs J in *Griffiths v the Queen* (1977) 137 CLR 293, where his Honor indicated that there was essentially no difference between the common law recognizance to be of good behaviour and the recognizance entered into by an accused to be of good behaviour and reappear in front of the court, in the particular case in 12 months' time for sentencing: see Donovan, n 1, p. 19. Since the commencement of the *Bail Act 1978*, the emphasis on monetary recognizance has been removed and the court may now impose any reasonable condition on bail. See Part 4.3.3 for a discussion of the conditions which may be imposed under the *Bail Act 1978*.

⁹ Donovan, n 1, p. 21.

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- between committal for trial or sentence, and appearance in the District or Supreme Court;
 - between date of conviction and date of sentence;
 - during any period of the stay of execution of a judgement or sentence, and
 - while waiting for the hearing of an appeal.¹⁰

Bail may be granted by either the police or the court. A police officer of the rank of sergeant or above, or the officer who is in charge of the police station, is authorised to grant bail as long as a court has not already decided that bail is to be refused, or the requirement for bail has already been dispensed with (section 17). A police officer is required to inform the accused of his or her eligibility for bail as soon as is practicable after he or she has been charged, and enable the accused to communicate with a lawyer or any other person in connection with bail, making the necessary facilities available for the accused to do this. Where the accused is refused bail by an authorised officer, or is not released on bail as granted by the authorised officer, the accused must be brought before a court in order for the court to determine bail as soon as is practicable (section 20).

It is not essential that the question of bail be decided at all: bail may in fact be dispensed with altogether by a court. If this is the case, the accused is at liberty until the next court appearance. Bail may also be continuing, in which case the court does not need to redetermine bail at each stage of the proceedings. The least restrictive form of bail is on an undertaking in writing by the accused that he or she will appear at the next court appearance. In other cases, conditions may be attached to the bail. The conditions present a limitation on the grant of bail, and are not restricted to money. Any breach of these conditions can lead to arrest and forfeiture of any money involved. It may in fact constitute a criminal offence to abscond. For detail on the relevant provisions of the *Bail Act 1978*, see Parts 4.3 to 4.5, below.

Such conditions may be either placed on the accused him or herself, or may require a surety. Self bail occurs where the accused enters into an agreement to observe specific conditions while on bail, or gives a security which will be forfeited if he or she fails the bail requirements. Alternatively, a surety may be required. A surety has been defined in the *Butterworths Concise Australian Legal Dictionary* generally as “a person who makes himself or herself answerable for another’s actions”, and in relation to the criminal law as “a person who enters into a (usually written) 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.”¹¹ The surety acts as a watchdog over the accused as his or her own finances are at stake if the person fails to comply with bail conditions. Bail conditions in New South

¹⁰ Redfern Legal Centre Publishing, *The Law Handbook*, Sydney, 1997, p. 92; *Bail Act*, section 6.

¹¹ Nygh, n 6, p. 384.

Wales are examined in further detail in Part 4.3.3 below.

4.0 BAIL IN NEW SOUTH WALES

New South Wales has the largest population of remand prisoners in Australia (see Part 4.1, below and Table 2 in the Appendix). The issues of bail, therefore, are particularly relevant in this state. Prior to the commencement of the *Bail Act*, bail in New South Wales was governed by a confusing combination of common law rules and legislative provisions. The *Bail Act* codified the law regarding bail into one piece of legislation. The Act as originally enacted has been amended several times since March 1980 when it commenced operation, mainly to restrict the classes of offences for which a presumption in favour of bail operates, and to alter the considerations which must be taken into account when determining a bail application. Some statistics regarding the remand population in New South Wales and other Australian jurisdictions, a brief history of the development of the *Bail Act* since its enactment and a detailed examination of the operation of the Act follow.

4.1 Bail and remand statistics in NSW

On Sunday 16 November 1997, there were 919 male and 77 female remand prisoners awaiting trial in New South Wales, a total of 996 remand inmates. This represents 15.86% of the 6,279 full-time inmates, and 12.72% of total inmates, taking into account the 1549 additional periodic detention inmates in New South Wales.¹² The Department of Corrective Services distinguishes between unconvicted inmates awaiting trial and convicted inmates awaiting sentence. For the purposes of the above statistics, only those awaiting trial are included as "on remand".¹³ The rate of remand prisoners, as a percentage of full-time inmates, has fluctuated at around 11-12% since 1992, and has remained fairly static in terms of number of inmates until 1996, when it reached 800 for the first time since 1991, as Table 1 in the Appendix below illustrates.¹⁴ It is not possible to compare the averaged 1996 rate with the 16 November 1997 rate, since the annual rate includes the "down-time" during Summer when the courts are not sitting.

New South Wales also has the highest remand population of any Australian state, although states with smaller populations have a higher rate per 100,000 adult population. The Northern Territory, for example, had a rate of 77.6 remand inmates per 100,000 population at May 1997. Tasmania had the lowest rate - 9.0 per 100,000 adult population at that date. Table 2 in the Appendix compares the percentage of remand prisoners within state and territory prison populations. For the purposes of that table, remand prisoners are those persons who have been placed in custody while awaiting the outcome of their court

¹² Information supplied by Department of Corrective Services Research and Statistics unit, 24 November 1997.

¹³ For more detail, refer to the annual *NSW Inmate Census* published by the NSW Department of Corrective Services. The 1997 census is due to be published early 1998.

¹⁴ Figures taken from the Summaries of the *Inmate Census* published by the NSW Department of Corrective Services, 1988-1996.

hearing.¹⁵ The information is current at 1 May 1997. More recent figures will be published by the Australian Bureau of Statistics national Corrective Services Statistics Unit early in 1998.

When examining the policy and practice of bail, it is useful to know what proportion of accused receive bail, and what conditions if any are attached. The NSW Bureau of Crime Statistics and Research compiles such figures, which are reproduced in the Appendix as Tables 3 and 4. Perhaps the most significant fact to emerge from those tables, in the context of a discussion of bail laws, is the number of people who were refused bail and who were then acquitted of all charges. In the higher courts, this represented 10.63% of those acquitted of all charges and 11.66% of those cases in which no charges were proceeded with. In the Local Court it represented 4.7% of those cases in which all charges were dismissed and 9.85% of those either dismissed without hearing or otherwise disposed of without conviction. Bearing in mind the presumption of innocence which is fundamental to the rule of law in New South Wales, these figures could be cause for concern. It is also interesting to note the corollary - that bail was refused in only 22.86% of cases where the accused was found guilty of or pleaded guilty to at least one charge in the higher courts. The other 77.14% of accused were released on bail and later convicted. In the Local Court the figure is even more stark: only 5.78% of those accused later convicted of at least one offence were refused bail. An additional 1.2% of those accused were in custody for a prior offence. It must be borne in mind that the nature of the offences being tried in the Local Court could result in a higher incidence of bail being granted.

4.2 History of the *Bail Act 1978*

The *Bail Act* totally re-wrote the laws relating to bail in New South Wales. The Act was enacted following recommendations of the Bail Review Committee, established in 1976. The Committee was established by the then Attorney-General to examine and report on the system of bail in New South Wales as it was then operating. Specifically, the Committee was asked to report on the following:

- what matters should be considered in determining whether to grant bail;
- what alternatives to the existing system of bail were available, and which if any of these were appropriate to the NSW criminal justice system;
- whether there was a need to amend certain bail provisions of the *Justices Act 1902*;

¹⁵ Corrective Services Ministers' Council by the National Corrective Services Statistics Unit, Australian Bureau of Statistics, *National Correctional Statistics: Prisons, June Quarter 1997*, October 1997, p. 17. It is noted in this report that care must also be taken when making comparisons as there may be differences across the states and territories as to what is counted. For example, NSW and South Australia both include prisoners on work release in the count of prisoners; South Australia excludes the number of home detainees from the count, and Queensland does not include persons held in Work Outreach Camps or Community Corrections Centres in the count of prisoners.

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- whether, in respect of petty offences, it was desirable to eliminate the need to bail altogether or eliminate the requirement for sureties, and if so, in respect of what types of offences, and on what conditions, if any, and
 - whether or not the practice of justices of the peace to require affidavits of justification, or to require the deposit of cash or title deeds by a surety or sureties, as security, should be continued and if not, what alternatives if any should be adopted.¹⁶

Prior to the report of the Committee, the Australian Law Reform Commission had concluded that “the law in regard to bail ... is badly in need of overhaul”¹⁷. Similarly, the Law and Poverty Commission produced a report in 1977 titled *Essays on Law and Poverty: Bail and Social Security* in which it emphasised “the urgency of a thorough review of bail system in Australia”¹⁸. Before the commencement of the *Bail Act*, bail provisions were scattered throughout the common law and various statutory provisions, for example, the criteria for determining bail which was ambiguous and confusing.¹⁹ The *Bail Act* codified all legislation regarding bail in one Act.

The major aim of the original *Bail Act* was to balance the concerns of the accused with community concern for safety. This reflected the concern of the Bail Review Committee, which wrote in its report:

It is difficult to overstate the importance of bail. At every stage of the often slow progress from arrest to trial and defence, someone must decide whether the accused will be allowed to continue his normal life while awaiting the next step, or whether he must be held in custody. Every decision involves balancing the right to liberty of someone who is legally presumed to be innocent, against the need of society to ensure that accused people are brought to trial.²⁰

The problem has since shifted somewhat from an emphasis on bringing the accused to trial to an emphasis on protecting the community from possible violent acts while the accused is on bail. This is discussed further in Part 5.1.

This concern was echoed by the then Attorney-General, Hon Frank Walker, MP on 14

¹⁶ NSW Bail Review Committee, *Report*, 1976, p. 10.

¹⁷ Australian Law Reform Commission, *Criminal Investigation*, Report No. 2, 1975, para 165.

¹⁸ S Armstrong, ‘Unconvicted prisoners: the problems of bail’, Law and Poverty Commission Australia, *Essays on law and Poverty; Bail and Social Security*, 1977, p. 203.

¹⁹ Criminal Law Review Division, NSW Attorney-General’s Department, *Review of the Bail Act Issues Paper*, June 1992, p. 1.

²⁰ *Ibid*, p. 11.

December 1978 in his second reading speech:

Although it is perfectly true that the community must be protected against dangerous offenders, one must not lose sight of the circumstances, first, that when bail is being considered, one is confronted with an alleged crime and an unconvicted accused person, and second, that the liberty of the subject is one of the most fundamental and treasured concepts in our society.²¹

Prior to the commencement of the *Bail Act*, the granting of bail in New South Wales was almost entirely based on money, either in the form of lodgement of money by the accused or a surety, or an agreement to forfeit such money if the accused failed to appear at his or her trial. This clearly discriminated against those who could not afford sometimes large sums of money for bail. There was no clear authority to release an accused on any conditions except financial ones.²² The Bail Review Committee borrowed some of the features of the successful Manhattan Bail Project which had been operating in the United States for over two decades. This project, established in 1961, operated on the philosophy that for a person with substantial background and community ties a financial bond may be unnecessary. The scheme proposed that as much information as possible about the accused be presented to the court to assist in a rational decision being made. Independent studies have proven the philosophy of the Project to be correct: the provision of verified information about the accused was associated with both a higher rate of pre-trial release and a lower incidence of failing to appear in court.²³ Prior to the commencement of the *Bail Act*, the average duration of a bail hearing was less than two minutes. In most cases no information about the accused was presented to the court, and no attempt was made to assess any special circumstances of the accused to the ability of the accused to meet bail.²⁴ Under the new Act community ties is one of a number of factors which are taken into consideration in a bail determination. The operation of the *Bail Act* is examined in more detail in Part 4.3 below.

A number of major amendments have been made to the *Bail Act* since it commenced in 1980. These are:

- *Bail (Amendment) Act 1986*, by which the original Act was amended to deny the presumption *in favour* of the grant of bail in certain drug offences.²⁵

²¹ NSWPD, 14 December 1978, p. 2020.

²² B Smith, 'Assisting the court: bail assessments and developments', in D Challinger (ed) *Bail or Remand?*, *Conference Proceedings No. 6*, Australian Institute of Criminology, November-December 1988, p. 91.

²³ Bureau of Crime Statistics and Research, *Bail Reform in NSW*, 1984, p. 48.

²⁴ *Ibid*, pp. 4-5.

²⁵ This amendment seems to have been enacted in response to a particular case in which a person charged with drug offences was granted bail and then absconded, on the basis that the "Mr Bigs of the drug world" pose a serious threat to the safety of the community: "Although loath to interfere with the normal right of any person to bail before conviction, the Government believes that the community expects that serious drug traffickers should be one

- *Bail (Amendment) Act 1987*, by which bail shall not be granted by the Court of Criminal Appeal where there is an appeal against a conviction or sentence on an indictable matter ‘unless it is established that special or exceptional circumstances exist justifying the grant of bail’ (section 3).
- *Bail (Personal and Family Violence) Amendment Act 1987*, in which an exception to the presumption in favour of bail was made “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.”²⁶ This Act also amended the criteria to be considered in bail applications in relation to domestic violence offences (section 32).
- *Bail (Amendment) Act 1988*, by which a presumption *against* bail for certain drug offences was created (Part 2A). This was the first time the *Bail Act 1978* contained a presumption *against* bail for any offence.²⁷ This Act further amended the criteria for determining bail in relation to the protection of victims of crime.
- *Bail (Domestic Violence) Amendment Act 1993*, by which the exceptions to the presumption in favour of bail were extended to include domestic violence offences where there has been a history of violence (section 9A).²⁸

The *Victims Rights Act 1996* also impacts on the operation of the *Bail Act*, although it does not amend the *Bail Act* specifically. The *Victims’ Rights Act 1996* includes the Victims’ Charter, of which three statements are directly relevant to bail:

6.11 Protection from accused

A victim’s need or perceived need for protection should be put before a bail

of the exceptions to that right. The *Bail Act* already excepts people charged with armed robbery from the presumption of bail. Nobody would argue that the Mr Bigs of the drug world pose any less of a threat to the community and therefore should not be treated in exactly the same way”. Hon T Sheahan, MP, Attorney-General, NSWPD, 23 April 1986, p. 2578. For more detail on the operation of the *Bail Act 1978*, see Part 4.3, below.

²⁶ J Dowd, MP, NSWPD, 29 October 1987, p. 15467.

²⁷ While the Government acknowledged the presumption of innocence as “one of the most fundamental and treasured concepts in our society”, and that bail could only be denied in the most compelling of circumstances, it also believes that “... the community has an overriding interest in arresting the supply of prohibited drugs”, and that the Government was “reflecting the community’s expectations that a much stronger stand should be taken against commercial drug trafficking”. Hon J Dowd, MP, Attorney-General, NSWPD, 25 May, 1988, p. 551.

²⁸ For more detailed commentary on the *Bail (Domestic Violence) Amendment Bill 1993*, see NSW Parliamentary Library Research Service, *Bills Digest* No 026/93.

authority by the prosecutor in any bail application by the accused.

6.12 Information about special bail conditions

A victim should be informed about any special bail conditions imposed on the accused that are designed to protect the victim or the victim's family.

6.13 Information about outcome of bail application

A victim should be informed of the outcome of a bail application if the accused has been charged with sexual assault or other serious person violence.

While these statements are not legally binding, section 7 of the *Victims' Rights Act 1996* states that the Charter is, as far as practicable and appropriate, to govern the treatment of victims in the administration of the affairs of the State. "Affairs of the State" includes the administration of justice, the provision of police services and the administration of any Government department.

4.3 Operation of the *Bail Act 1978*

The *Bail Act* commenced on 17 March 1980. The scheme established by the Act applies to any offence heard in NSW, whether it be against a Commonwealth or NSW criminal law. Bail is defined in section 4 as "authorisation to be at liberty under this Act, instead of in custody". At the core of this definition is the notion of release and liberty, emphasising the accused's appearance in court.²⁹ This sees a departure from the earlier notion of bail as being placed in the custody of the surety (the person who acts as guarantee that the accused will appear before the court at a later time), the effect of which was to keep the person in custody, simply replacing prison or police custody with custody of the surety.³⁰

The *Bail Act* establishes a regime under which there are four tiers of eligibility for bail. Under the original Act, there were only three tiers, the fourth relating to a presumption against bail for certain drug offences being introduced in 1988. The Act also clearly sets out the criteria to be used in determining bail, and affords juveniles the same rights to bail as adults.³¹ There is no limit to the number of applications a person may make for bail (section 22). Each time an accused appears before court a fresh decision on bail can be made. A Local Court magistrate, however, has no power to grant bail to an accused who has appeared in a higher court in connection with the same offence (section 24).

4.3.1 Eligibility for bail

Bail may be dispensed with under section 10 of the *Bail Act*. If no specific determination is

²⁹ B Schurr, *Criminal Procedure (NSW)*, Sydney 1996, p. 851.

³⁰ Donovan, n 1, p. 19.

³¹ This, in fact, can create problems for juveniles, and is discussed in more detail in Part 5.4.

made with regards to bail, the court is deemed to have dispensed with the requirement for bail. This does not apply where the accused is subject to continuing bail, in which case bail is deemed to have been continued unchanged from a previous determination. If bail is dispensed with, the accused is entitled to remain at liberty until he or she is required to appear before a court in respect of the offence. Naturally, if the accused is in custody in respect of some other offence, he or she must remain in custody despite bail having been dispensed with in relation to a different or subsequent offence.

The four tiers of eligibility for bail depend on the seriousness of the offence charged, and are as follows:

1. *Right to release on bail for minor offences (section 8)*

A minor offence is one which is not punishable by imprisonment (the exception being imprisonment for non-payment of a fine) or is an offence under the *Summary Offences Act 1988* that is punishable by a sentence of imprisonment (section 8(1)). An example is offensive behaviour. A person charged with a minor offence is to be granted bail and released as soon as possible except in the following situations:

- the person has previously breached bail conditions in respect of the same charge;
- the person is incapacitated as a result of intoxication, injury or drug use;
- the person is in physical danger or in need of physical protection;
- the person has already been convicted and is waiting to be sentenced, or
- bail has been dispensed with under section 10.

The person is entitled under section 8 to be granted bail in respect of a relevant offence despite being in custody for some other offence for which the person is not entitled to bail. However, if the person is already serving a sentence of imprisonment for another offence and the court is satisfied that the person would be likely to remain in custody for a longer period than the period for which bail would be granted, the person is not entitled to bail under section 8.

Bail may be unconditional or may be subject to conditions. See part 4.3.3 for a more detailed discussion of bail conditions.

2. *Presumption in favour of bail for certain non-violent offences (section 9)*

If the offence is not minor, but does not involve violence or robbery, there is a presumption that bail should be granted. The presumption applies to all offences not specifically listed in section 9: those for which there is an entitlement to bail; and

serious robbery, murder, domestic violence and some drug offences (see '3' below). The presumption also applies where the offence is one of failing to comply with bail conditions, or where the person has previously failed to comply with a bail undertaking. The onus is on the prosecution to demonstrate why bail should not be granted. The presumption may be rebutted, and bail may be refused, or bail may be granted unconditionally or with conditions attached (see Part 4.3.3 for more detail).

3. *No presumption either in favour or against bail being granted (section 9, 9A)*

No presumption applies to those offences not specifically listed in section 9, including: murder, attempted murder or conspiracy to commit murder; aggravated robbery; armed robbery; certain drug offences (see '4', below), or domestic violence offences. The *Bail Act* was amended in 1987 and again in 1993 with the result that the presumption in favour of bail does not apply in domestic violence cases where the person has previously failed to comply with a bail condition in favour of the offence, being a bail condition imposed for the protection and welfare of the alleged victim (section 9(5)), or in cases where the accused has been convicted of a personal violence offence within the past 10 years or where the accused has a history of domestic violence against the alleged victim (section 9A(1)).

In cases where there is no presumption in favour of bail, it does not mean the person becomes ineligible for bail and bail can not be granted (section 13). It simply means that the accused must prove to the court why bail should be granted. The onus transfers to the accused to demonstrate why bail should be granted. See Part 4.3.2 below for a discussion of the criteria to be considered in bail applications. It does mean, however, that bail must be decided: the requirement for bail can not be dispensed with in these cases.

4. *Presumption against bail for certain drug offences (section 8A)*

In 1986, the *Bail Act* was amended to introduce a presumption against bail for people charged with committing serious drug offences against the *Drug Misuse and Trafficking Act 1985* (NSW) (the DMTA). These offences include: cultivating, possessing or supplying a commercial quantity of a prohibited plant (section 23(2) of the DMTA); manufacturing or possessing a commercial quantity of a prohibited drug (section 24(2) of the DMTA); supplying a prohibited drug (other than cannabis) to a person under 16 years (section 25(2) of the DMTA), or conspiring, aiding or abetting such offences (sections 26-28 of the DMTA). Again it must be noted that even though the presumption exists, people charged with such offences are not precluded from being granted bail, if they can show that they should be granted bail. The criteria used to determine bail applications is discussed in Part 4.3.2, below.

4.3.2 **Criteria to be considered in bail applications**

The criteria to be used when determining a bail application are contained in section 32 of the

Bail Act. As is the case with the eligibility for bail, these criteria have been amended since the commencement of the Act in 1980, most notably in relation to the protection of alleged victims. The amendments have been necessary because only those criteria listed in section 32 are able to be taken into consideration. No other considerations are deemed relevant. The purpose of this limitation is to “avoid the introduction of non-relevant or otherwise inappropriate criteria”.³² The criteria were originally grouped into three broad categories, however, in 1987 a fourth category - protection of the alleged victim, was added. If a bail application is refused in accordance with the criteria below, the reasons for that refusal are required to be recorded (section 38(1))³³. The categories of criteria are as follows:

1. *The likelihood of the accused appearing on court if granted bail (section 32(1)(a))*

In his second reading speech, Frank Walker stated that “the basic object of setting bail is to ensure that an unconvicted accused person appears in court in respect of the offence for which bail is being considered. As such, it is the primary and most important factor to be considered in any bail application.”³⁴ When determining the likelihood of the accused appearing in court, four factors may be taken into account:

- The accused’s background and community ties as indicated by residence, employment, family history and prior criminal record;
- any previous failure to appear to answer bail;
- the circumstances, nature and seriousness of the offence, the strength of evidence and the severity of the probable penalty if found guilty, and
- specific indications as to the accused’s likely appearance, including whether the accused came voluntarily to the police, whether the accused was arrested when about to fly overseas etc.³⁵

The importance given to the accused’s background and family ties in determining his or her likelihood to appear in court reflects the Bail Review Committee’s opinion that not enough weight was previously given to this indicator, and the recommendation that the principles of the Manhattan Bail Project be adopted (see

³² Hon F Walker, MP, NSWPD, 14 December 1978, p. 2016.

³³ If the decision is to be reviewed, section 48(3) states that the review shall be by the way of rehearing the application, not a review of the merits of the decision of the original officer or court. However, the reasons for the previous decision will be taken into consideration. In relation to police bail the Hon F Walker, MP stated in his second reading speech to the Bail Bills that the requirement that police give written reasons for their decision partly ‘to ensure that in any fresh application or review all relevant criteria including any such reasons will be before the court’: NSWPD 14 December 1978, p. 2018-19.

³⁴ Hon F Walker, MP, NSWPD, 14 December 1978, p. 2018.

³⁵ F Devine, ‘Bail in Australia’, in D Challinger, n 22, p. 26.

Part 4.2 above).

2. *Interests of the accused (section 32(1)(b))*

The interests of the defendant must not be ignored when considering bail, bearing in mind the presumption of innocence and the impact that denying bail can have on the accused and any dependants: loss of income and possibly employment, removal from supportive friends and family and the difficulty in obtaining legal advice are examples. It may also have a detrimental effect at the time of sentencing if the offence is proven, since one of the factors taken into account when sentencing is the employment and stability of the offender. The greater an offender's individual and community responsibilities, it is argued, the greater the pressure not to impose a custodial sentence. Where the offender has been on remand, these ties may have been broken or weakened.³⁶ These effects can have a particularly heavy impact on young accused or accused from strong ethnic or indigenous communities.³⁷ The effect on the accused is an increasingly relevant consideration, bearing in mind the length of the delays in the justice process. See Part 5.2 for further discussion. When considering the interests of the accused, the following factors only are regarded as relevant:

- the likely length of time the accused will remain in custody before the case is heard at trial and the conditions while in custody;
- the need to obtain legal advice and prepare for the appearance in court;
- the need to be at liberty for other lawful purposes, such as employment, education, care of dependents, and
- whether the defendant is incapacitated by intoxication, injury, use of drugs, or is otherwise in danger of physical injury or in need of physical protection.³⁸

3. *The protection of the alleged victim (section 32(1)(2A))*

The purpose of this section is to enable bail legislation to be used effectively “to protect victims of sexual assault and domestic violence”.³⁹ This section ensures that

³⁶ Queensland Law Reform Commission, *The Bail Act 1980*, Report No. 43, June 1993, p. 4.

³⁷ It is, in fact, these groups who have been found to be over-represented in unconvicted prison populations. See NSW Bureau of Crime Statistics and Research, n 23, p. 4.

³⁸ The Law Handbook, n 10, p. 94.

³⁹ Hon B Unsworth, MP, second reading speech, Bail (Personal and Family Violence) Amendment Bill (Cognate), NSWPD, 29 October 1987, p. 15467.

the police of court ‘direct their attention to the well-being of the victim’⁴⁰ in a decision about bail in any case of sexual assault or domestic violence. When determining a bail application, the protection of:

- any person against whom it is alleged that the offence concerned was committed;
- the close relatives of the alleged victim, and
- any other person in need of protection because of the circumstances of the case

must be taken into consideration.

4. *The protection and welfare of the community (section 32(1)(c))*

In order for this fourth criterion to apply, the likelihood, plus the violence or other serious consequence of any offence the accused may commit must outweigh the accused’s general right to liberty.⁴¹ When assessing the need for protection and welfare of the community, the following facts only may be given regard to:

- the nature and seriousness of the offence, in particular whether the offence is of a sexual or violent nature;
- whether or not the person has failed to observe a condition of bail in relation to that offence;
- the accused’s likelihood to interfere with evidence, witnesses or jurors, and
- the likelihood that the person will commit an offence while on bail.⁴²

Irrelevant considerations

Some factors that may have been relied upon by police are in fact irrelevant in determining a bail application, as they are not specified as relevant criteria in section 32. These factors are:

- that further charges will be brought;

⁴⁰ J Face, MP, NSWPD, 17 November 1987, p. 16152.

⁴¹ F Devine, n 35, p. 27. In determining this, consideration must be given to whether the offences are likely to involve sexual assault or violence, the number of offences likely to be committed, and the effect on the victim(s) or the community generally: *Bail Act*, section 31(2), (2A).

⁴² This last criteria is only relevant if the court or authorised officer is satisfied that the accused is likely to commit an offence while on bail and that that offence is likely to be of a violent or otherwise serious nature (section 32(1)(iv), (2)).

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- that the defendant is wanted for questioning by other police or in another state, and
 - that police need further time to investigate the offence, and interrogate the accused while in custody.⁴³

4.3.3 Bail conditions

Bail may be granted either unconditionally or subject to conditions. Bail is to be unconditional unless conditions are considered necessary to promote law enforcement purposes and for the protection and welfare of a specially effected person or the community generally.⁴⁴ Even if bail is granted unconditionally, the accused must undertake in writing to appear before such court on such day and at such time and place as determined according to the Bail Regulations (section 34(1)). The undertaking may include an undertaking that the accused appear at every time and place at which the proceedings are continued, whether upon adjournment, committal or otherwise (section 43). This is known as continuing bail, and saves the court having to make a fresh bail determination after each adjournment, for example. This does not restrict the court from altering the conditions at subsequent appearances, which may occur if it becomes apparent that the accused is likely to abscond because the case is going badly, for example, or where it becomes apparent that there is a real danger that the accused may interfere with witnesses or jurors.⁴⁵

If bail conditions are imposed, no more stringent conditions are to be imposed than the nature of the offence and the circumstances of the accused warrant. Onerous conditions, particularly financial conditions, are only to be applied when it is believed that less onerous conditions are unlikely to ensure the accused's appearance in court.⁴⁶ If bail is subject to conditions, these conditions must be imposed in writing, with reasons for imposing those conditions also in writing. Forms are provided for this purpose in the Bail Regulations

⁴³ The Law Handbook, n 10, p. 95.

⁴⁴ *Bail Act*, section 37(1). See also Devine, n 35, p. 30. The consideration of the interests of a "specially effected person" was part of the reforms made to the *Bail Act* to increase the protection of victims. "Specially effected person" includes the alleged victim, the close relatives of the alleged victim and any other person in need of protection. Originally this section only covered to victims of domestic violence, however the Act was later amended to include all alleged victims, if appropriate.

⁴⁵ S Mitchell & P J Richardson (eds), *Archbold Criminal Pleading, Evidence & Practice*, forty-third edition, 1988, vol 1, para 3-27.

⁴⁶ The police have found this to be very advantageous in assisting the efficient processing of people charged, particularly with minor offences. It reduces the number of accused who are placed in cells while waiting for the arrival of a surety with the bail money, and all the administrative tasks associated with being detained, such as the time taken to write dockets for the accused's property, put that property in a safe and then return it to the accused when the bail money arrives. See further NSW Bureau of Crime Statistics and Research, n 23, pp. 32-33.

(forms 7 and 8). The possible conditions that may be imposed are set out very clearly in section 36(2), in order of least to most onerous. A single condition may be imposed, or a combination of conditions may be imposed. However, no other condition or combination of conditions than those contained in section 36(2) may be imposed. The possible conditions are:

- That the accused enter into an agreement to observe specified requirements as to his or her conduct while at liberty. This does not include a financial requirement of any kind, and may include conditions such as surrendering a passport, reporting to a police station daily and so forth.
- That one or more acceptable person acknowledge that he or she is acquainted with the accused and that he or she regards the accused to be a responsible person likely to comply with his or her bail undertaking. The determination as to which person or persons, or class of person is an ‘acceptable person’ is to be made by the officer or court imposing the condition (regulation 13). There is no criteria set out in the Act for determining who is an ‘acceptable person’, although Form 6 (the acknowledgement) provides some guidance. The name, address and occupation of the person must be stated, as well as the length and nature of the person’s acquaintance with the accused (employer, business partner, mother, father, spouse or friend are given as examples). The Bail Regulations stipulate that nothing shall limit this authority to determine who is to be an acceptable person.
- That the accused enter into an agreement (without security) to forfeit a specified amount of money if he or she fails to comply with the bail undertaking.
- That one or more acceptable person (see above), enter into an agreement, without security, to forfeit a specified amount of money if the accused fails to comply with his or her bail undertaking.
- That the accused enter into an agreement, and deposits acceptable security, to forfeit a specified amount of money if he or she fails to comply with the bail undertaking. The officer or court imposing the condition must determine whether or not the security is sufficient, although there are no guidelines as to what constitutes sufficient security. It has been argued that the requirement of deposit of a security is in fact a financial bail condition, which can be disadvantageous to some accused.⁴⁷ In interviews conducted by the NSW Bureau of Crime Statistics and Research, police in particular were found to be concerned with the difficulty in assessing the value of and storing the security, and stated that they were less likely to impose such a

⁴⁷ J Miles, ‘Bail Legislation: Objectives and Achievements’, in Challinger, n 22, p. 43.

condition for this reason.⁴⁸ Where a person deposits a bank, building society or credit union passbook as security, he or she is entitled to exchange that for the equivalent amount in cash at a later time (section 41).

- That one or more acceptable person (see above) enter into an agreement, and deposit acceptable security (see above), to forfeit a specified amount of money if the accused fails to comply with the bail undertaking.
- That the accused person deposits a specified amount of money in cash and enters into an agreement to forfeit that amount if he or she fails to comply with the bail undertaking.
- That one or more acceptable persons (see above) deposits a specified amount of money in cash and enter into an agreement to forfeit that money if the accused fails to comply with the bail undertaking.

If a bail undertaking includes an undertaking to appear at any time and place as required to continue the proceedings, a court may continue bail already granted, whether or not the accused appears in person. Where the bail is continued, the bail undertaking and conditions continue to apply. However, conditions may be altered if the court so orders. Where the accused appears before the court on continuing bail and no direction is made by the court in respect of bail, bail is taken to be continued (section 43). If the original order is for continuing bail, bail may be continued automatically. However, a written notice stating the new date and place of appearance must be given to the accused (section 54(4)).

4.4 Offences against the *Bail Act 1978*

There are three main offences against the *Bail Act*. These are:

- ***Section 50 - Failing to comply with bail conditions or undertakings*** (other than the condition to appear in court). This makes a person liable to arrest by or without a warrant. Additionally, the court may issue a summons for the person's appearance in court. It is not a separate offence to breach conditions, and does not carry a separate penalty.⁴⁹ However it may result in the person's original bail being revoked, and either bail being refused or granted with a different set of conditions being imposed (section 50(2), (3)).

There have been 2 convictions under section 50 in the Local Court between August 1992 and July 1997. There has been one conviction under that section in the Higher

⁴⁸ NSW Bureau of Crime Statistics and Research, n 23, p. 34. It is important to note that this report was published in 1984, only 4 years after the Act commenced, so a level of unfamiliarity with the operation of the Act could in part account for this response.

⁴⁹ *Bowen*, unreported, CCA, 22 July 194, in *Schurr*, n 29, p. 991.

Courts between January 1990 and July 1997.⁵⁰

- ***Section 51 - Failing to appear in accordance with bail undertakings.*** This offence is a summary offence and carries a maximum penalty of three years' imprisonment and/or 30 penalty units, or the maximum penalty for the offence for which the person failed to appear, as long as it does not exceed three years (section 51(2)). Proceedings for the offence are dealt with by the court before which the person failed to appear, whether that be the Local Court, the District Court, the Supreme Court or the Court of Criminal Appeal (section 51(3), (5)). There is no statute of limitations applying to this offence, and a failure to appear does not preclude the person from obtaining bail in subsequent applications. The creation of an offence of absconding is partly a result of the diminished reliance on financial bail conditions, to help ensure the accused's appearance in court.⁵¹ It is believed by some that the prospect of being charged with a second offence is a greater incentive to appear in court than the deposit of a sum of money.⁵² For the purposes of appeal to the Court of Criminal Appeal, a conviction under section 51, although summary, is deemed to be indictable (section 51(7)).

Between August 1992 and July 1997 there have been 2,495 convictions under section 51 in the Local Court. There have been two convictions under the same section in the Higher Courts between January 1990 and July 1997⁵³.

- ***Section 56(1) - Making a false acknowledgement under section 36.*** As a condition of bail, one or more acceptable persons must acknowledge that he or she is acquainted with the accused and regards the accused as a responsible person who is likely to comply with his or her bail undertaking. Before the acceptable person signs the acknowledgment he or she must be warned of the offence and the possible penalty. Making a false acknowledgment is a summary offence heard in the Local Court and carries a maximum penalty of two years imprisonment and/or a fine of 20 penalty units (section 56(2)).

There have been 4 convictions under section 56 in the Local Court between August 1992 and July 1997. There were no convictions under this section during the period in the higher courts.

4.5 Review of bail decisions

A review of a bail decision may be brought about at the request of the accused, a police officer, the Attorney-General or the Director of Public Prosecutions. In domestic violence

⁵⁰ Information taken from the NSW Judicial Commission sentencing database.

⁵¹ Devine, n 35, p. 31.

⁵² NSW Bureau of Crime Statistics and Research, n 23, p. 33.

⁵³ Information taken from the NSW Judicial Commission sentencing database.

cases, the complainant (not necessarily the police) may also make the request. Any request for review must be made on the form prescribed in the regulations (Form 11). In a review of a bail decision, the decision is reconsidered from the beginning. A review may be of the decision in its entirety, or may be limited to a review of that part of the bail decision that relates to bail conditions in the situation where an accused person has remained in custody after being granted bail because a bail condition has not been complied with. A bail condition review may be requested by the accused, a police officer or may be made as a result of the court's own motion. At a bail condition review, the reviewer may either: affirm the decision regarding bail conditions; vary the decision by removing or imposing conditions, or grant bail unconditionally (section 48A). There is an additional power to review bail decisions contained in section 48B where they relate to reporting conditions (requiring the accused to report to a police station while on bail). A justice employed by the Department of Courts Administration may review any reporting condition, and may vary the police station to which an accused may report or the days or times on which the accused must report. The total number of days that the accused must report can not be varied.⁵⁴

Different bodies have the power to review different bail decisions:

- a justice of the peace may review a bail decision made by him or herself (section 44(1));
- a magistrate may review a bail decision made by him or herself, an authorised police officer, a justice of the peace or another magistrate (section 44(2));

⁵⁴ In addition to the review mechanisms, a person may apply to have a bail condition amended. Section 48B is the relevant section of the *Bail Act*. The Courts Legislation Further Amendment Bill 1997 was passed by both Houses on December 2, 1997. The Bill, in part, repeals and replaces section 48B with the following effect:

- a justice may review a bail reporting condition or a bail residence condition. A bail residence condition is a condition requiring the accused to reside at a specified address;
- on such review, the justice may vary the days on which, times at which at police station to which an accused person must report under a bail reporting condition. The justice may also vary the number of days which an accused must report to a police station, revoke a bail reporting condition or vary the address at which the accused must reside pursuant to a bail residence condition.

Any review of this type can not take place if the informant or complainant has not been notified or if an objection to the proposed action has been made by any person appearing at the review on behalf of the informant or complainant. This effectively gives the police and victim the power to veto a change in bail reporting or residence conditions. No review may be undertaken against a determination of the Supreme Court, or at any time after the determination of summary or committal proceedings against the accused. A justice can not limit or revoke either type of condition if the court imposing the condition specified that the condition not be varied or revoked.

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- a judge of the District Court may review a bail decision made by him or herself, or any bail decision made in the District Court, no matter how it is constituted (section 44(3));
 - the Land and Environment Court may review any bail decision made by that court, however constituted (section 44(4));
 - the Industrial Court may review any bail decision made by that court, however constituted (section 44(5));
 - the Land and Environment Court, the Industrial Court, the District Court or a magistrate can review any decision of the Supreme Court in relation to bail where the accused is appearing before that court in proceedings for an offence, and special circumstances justify the review (section 44(6));
 - the Supreme Court can review a bail decision made by an authorised police officer, a justice of the peace, a magistrate, the District, Land and Environment, Industrial or Supreme Courts in relation to bail. The Supreme Court may review a bail decision regardless of whether or not the decision has been reviewed previously by the same court pursuant to section 44. A judge of the Supreme Court sitting alone can not generally review a bail decision of the Court of Criminal Appeal, except in accordance with the *Supreme Court Rules*. (section 45);
 - the Court of Criminal Appeal may review a bail decision of that Court (however constituted). However, a judge sitting alone may not review a bail decision made by a bench of three judges of the Court of Criminal Appeal, unless the *Supreme Court Rules* specifically provide for it (section 46).

There is no limit to the number of bail applications an accused may make (section 22(1)). However, the Supreme Court has the power to refuse to entertain a bail application if an application has already been dealt with by the Supreme Court, where there are no special facts or circumstances that justify the accused making the additional application (section 22A). Further, the Supreme Court may refuse to entertain a bail application if the application comprises a bail condition review and may be dealt with by a magistrate or the District Court. If a bail decision is varied as a result of a review, the court must give reasons for its decision (sections 38, 48(4)).

5.0 ISSUES TO BE CONSIDERED

In any review of the operation of the *Bail Act*, a number of issues must be considered. The presumption of innocence, the effect of granting bail on victims and the community, the size of the remand population, the effect of certain bail conditions and the impact on the administration of juvenile justice must all be examined before any proposals for reform are entertained.

5.1 Presumption of innocence and protection of the community

Presumption of innocence

Throughout the web of the ... criminal law one golden thread is always to be seen - that it is the duty of the prosecution to prove the prisoner's guilt subject to ... the defence of insanity and subject also to any statutory exception.⁵⁵

This "golden thread" ensures the presumption of innocence remains fundamental in the criminal process. Not only must a court judge an accused to be guilty of a particular crime, but it must also determine that imprisonment is suitable punishment for that crime before incarceration of any kind can be appropriate.⁵⁶ Apart from a philosophical concern about bail and the presumption of innocence, it is also particularly important practically speaking to bear this presumption in mind when considering the possible effect of refusing bail on an accused. Remand has been described as having a 'moral sapping, debilitating effect' on the prisoner.⁵⁷ Loss of income or employment opportunity, the effect on a person's reputation and disruption to family life, as well as the impact that being held in remand has been shown to have on an accused's likelihood of being convicted, are practical examples of the effects of remand⁵⁸ (despite the fact that over 10% of those refused bail are later acquitted, it is argued that being held on remand has a detrimental effect on an accused's ability to prepare for trial). It has also been suggested that because of such detrimental effects 'a defendant whose incarceration before trial is likely to be lengthy may be induced to plead guilty simply to get an earlier hearing date.'⁵⁹ The importance of the presumption of innocence was highlighted in the NSW Bail Review Committee's 1978 report (see Part 4.2) and reaffirmed by the Attorney-General, the Hon F Walker, MP in his second reading speech to the original Bail Bill:

... when bail is considered, one is confronted with an *alleged* crime and an

⁵⁵ Lord Sankey, *Wollmington v DPP* [1935] AC 462 (HL).

⁵⁶ Queensland Law Reform Commission, n 36, p. 3.

⁵⁷ *Ibid*, p. 4.

⁵⁸ Australian Institute of Criminology, *The Issues of Bail*, Administrative Report, July 1976, p. 3.

⁵⁹ Queensland Law Reform Commission, n 36, p. 3.

unconvicted accused person, and ... that the liberty of the subject is one of the most fundamental and treasured concepts in our society. [emphasis added]⁶⁰

When speaking to the 1988 amendments to the *Bail Act*, the then Attorney-General, the Hon J Dowd, also affirmed the importance of the presumption of innocence:

It is important to bear in mind that what we are dealing with is an alleged crime by and unconvicted person. The right to liberty is one of the most fundamental and treasured concepts in our society and cannot be dismissed lightly. Under the *Bail Act* there is a presumption in favour of bail for most offences. This is consistent with the presumption of innocence, which is a fundamental principle of criminal law.⁶¹

The right to be presumed innocent until proven guilty is also enshrined in the United Nations *Universal Declaration of Human Rights*, by Article 11 which reads ‘Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence’.

Community protection

The Attorney-General also alluded in his 1978 second reading speech that ‘the community must be protected against dangerous offenders’.⁶² A balance must be reached between respecting the right to liberty of an unconvicted accused, and protecting the community generally and the alleged victims in particular, from violent acts while the accused is on bail. The victim of a violent act, in particular, may suffer fear and other psychological harm knowing that their alleged attacker has been released prior to trial.⁶³

The fundamental problem is determining, or predicting, which accused will commit violent acts while released on bail.⁶⁴ In its 1976 report the NSW Bail Review Committee wrote that refusal of bail, which the Committee termed “preventive detention”, ‘rests upon an unproven factual assumption: that it is possible for courts to identify with some degree of accuracy people likely to commit crimes if released’.⁶⁵ There are also ethical problems in detaining

⁶⁰ NSWPD, 14 December 1978, p. 2020.

⁶¹ NSWPD, 25 May 1988, p. 551.

⁶² Hon F Walker, MP, NSWPD, 14 December 1978, p. 2020.

⁶³ Queensland Law Reform Commission, n 36, p. 3.

⁶⁴ A more thorough discussion of the problems of predicting future behaviour can be found in Briefing Paper No 14/97, *Dangerous Offenders Legislation: An Overview*, by Honor Figgis and Rachel Simpson. The focus of that paper is on predicting future dangerousness, however the discussion is also relevant to the current debate concerning predicting behaviour of accused released on bail.

⁶⁵ NSW Bail Review Committee, *Report*, 30 September 1976, p. 30.

accused for what they *might* do in the future, rather than for offences which have been proven. The *Bail Act* addresses this dilemma by providing a presumption in favour of bail for a majority of offences, including, however, factors such as the protection of the alleged victim and the protection and welfare of the community as factors which must be considered when determining a bail application. The problem was further addressed when the *Bail Act* was amended to include in the category of offences where there was no presumption in favour of bail domestic violence offences where the accused had breached a bail condition imposed for the protection of the alleged victim or where the accused had been convicted of a personal violence offence within the past 10 years. It is questionable whether these amendments were imposed because it was believed these accused posed a greater risk of violence while on bail, or for the benefit of the alleged victim's peace of mind.

Whether or not a person should enjoy the presumption in favour of bail for each case where he or she is before the court on a number of unrelated charges is another issue which must be considered. A different approach is to disallow the presumption where the accused is charged with a large number of different offences, although questions about the presumption of innocence become relevant here, where the accused must be presumed innocent of *each* charge independently of any other unrelated charge.⁶⁶

5.2 Size of remand populations

As the lists of persons waiting for trial on criminal charges lengthens, the potential time spent on remand becomes increasingly relevant in any decision about bail. There are two reasons for this. Firstly, the number of people at liberty within the community who might be guilty of a criminal offence may increase, as might the time for which they remain at liberty; and secondly, the number of legally innocent people incarcerated without being convicted of an offence may also increase. The average number of days from arrest to determination for those who proceeded to a defended hearing in the local court was 126 for those accused on bail and 72 days for those on remand. In the higher courts, where it is normal for proceedings to last longer, the average number of days from arrest to sentence for those who proceeded to trial is 505 days for those on bail, and 301 days for those on remand. These figures are taken from tables produced by the NSW Bureau of Crime Statistics and Research illustrating the duration of proceedings in NSW courts, which are reproduced in the Appendix.

As well considering the numbers of remand prisoners, and the length of this imprisonment, the conditions of remand prisoners must also be considered. Apart from the detrimental effect being imprisoned on remand has on the accused's ability to prepare a defence, it has been argued that 'in some prisons, remand conditions are worse than those of sentenced prisoners'.⁶⁷ These considerations become even more significant in relation to those accused who were in fact granted bail but were unable to meet the conditions (11.8% of those

⁶⁶ This issue was raised by the Hon J Hannaford, MLC during the debate on the Courts Legislation Further Amendment Bill: NSWPD, 2/12/97, p. 2945.

⁶⁷ D Brown, et al, *Criminal Laws* (2nd ed), Sydney, 1996, p. 176.

acquitted of all charges in higher courts in 1996), since their incarceration has nothing to do with any belief that they pose a threat to individuals or the community, or that they might abscond. If remand and sentenced prisoners are to remain segregated, as specified in Article 10(2)(a) of the United Nations *International Covenant on Civil and Political Rights*, which reads; ‘accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons’, then the resources required to properly care for a large remand population is also a matter which must be taken into consideration.

5.3 Special considerations for juvenile offenders

Between one-third and one-quarter of all juveniles in detention centres are on remand, either because bail has been refused, or because bail conditions are unable to be met.⁶⁸ This proportion is much higher than for the adult prison population, and makes the interests of juvenile justice important in any consideration of bail. Article 10(2)(b) of the *International Convention on Civil and Political Rights* concerns juvenile remand prisoners, and states: ‘accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication’. It is also a fundamental premise of the international human rights instruments that juveniles be treated appropriately ‘according to their age and legal status’.⁶⁹ Despite this, under section 5 of the *Bail Act*, juveniles are subject to the same rules governing the award of bail as adults. This means that the same criteria are applied to juveniles as to adults when determining a bail application. Two criteria in particular have been identified as being potentially adverse to the interest of a juvenile:

- the probability that the person will appear in court taking into consideration the person’s background and community ties, as indicated by the history and details of the person’s residence, employment and family situation (section 32(1)(a)(i)), and
- whether or not the person is, in the opinion of the bail decision maker, in need of physical protection (section 32(1)(b)(iv)).⁷⁰

This can result in an unusually high representation of females on remand: 9%, compared to 5% of convicted female juveniles in 1992, and an equally disproportionate number of young juveniles (aged 12-15 years): 26.2%, which was almost twice the number of convicted inmates in the same age group (14%). One reason given for these anomalies in the report *Juveniles in Detention: A Model for Diversion*, prepared by the NSW Office of Juvenile Justice, is that ‘remand centres may be being used to meet the welfare needs of certain groups of socially disadvantaged young persons’. It was further commented in that report that ‘placing a young offender on remand for welfare reasons is not necessarily in the best

⁶⁸ B Schurr, n 29, p. 4673.

⁶⁹ See, for example, Article 10(3) ICCPR and Articles 4 and 37 of the *Convention on the Rights of the Child*.

⁷⁰ Schurr, n 29, p. 4672.

interests of the child considering the dangers of exposure to experienced criminals.⁷¹ The study also found that Aborigines were over-represented in the remand population, comprising 20% while constituting only 1.2% of the general population.

The same rules for imposing bail conditions are also applied to juveniles as to adults. It has been found that in some cases excessively onerous conditions such as curfews, a requirement that a juvenile reside with a particular relative or monetary conditions which the juvenile can not meet were imposed. The NSW Legislative Council Standing Committee on Social Issues, in preparing its May 1992 report *Juvenile Justice in NSW* concluded that:

Evidence relating to conditions imposed by police and courts, particularly in country areas, suggested that they were 'frequently elaborate, unenforceable, unreasonable and impossible to comply with' ... It was suggested that magistrates took on the role of parent at times to restrict the movement and modify the behaviour of young people. The Committee recognised such an approach inhibited the young person and their family taking responsibility and undermined family discipline.⁷²

6.0 CONCLUSION

Bail is the granting of temporary liberty to a person accused of committing a criminal offence. It has a very long history in common law legal systems, and was codified in New South Wales by the *Bail Act 1978*. That act sought to simplify the bail process and to clarify the criteria for granting bail and the conditions which could be attached to bail. The Act also removed the reliance on money as a condition for bail.

Since its commencement in March 1980 the Act has been amended many times, resulting in a much restricted right to bail, and an increase in the number of offences for which there is no presumption in favour of bail. Additionally, a new category was introduced by which people accused of certain drug offences are subject to a presumption against bail. The reason for tightening the rules of bail is the increased awareness of the need to protect the community at large and alleged victims in particular from any further violence that might be committed while the accused is at liberty on bail. This raises the difficult question of where to draw the line between the fundamental right to a presumption of innocence until proven guilty of a crime, and the responsibility to protect members of the public from avoidable

⁷¹ M Cain, NSW Office of Juvenile Justice, *Juveniles in Detention: A Model for Diversion*, Information and Evaluation Series No 2, 1993, pp. 33-34. The 'best interests of the child' is to be 'a primary consideration' in any action concerning children, according to Article 3 of the United Nations' *Convention on the Rights of the Child*. This is particularly so in relation to juveniles over 16 who may be transferred to an adult prison after bail has been refused. The juvenile must have been charged with an indictable offence, and the court must be satisfied that he or she is unsuitable for detention in a detention centre: *Children (Detention Centres) Act 1987* (NSW), sections 28A(2)(c), 28E.

⁷² NSW Legislative Council Standing Committee on Social Issues, *Juvenile Justice in NSW*, May 1992, p. 75.

harm, a dilemma which has been acknowledged from the time the *Bail Act* was introduced into Parliament. The question is further complicated by practical considerations such as the size of the remand population, conditions at remand centres, the effect of being on remand on an accused and the difficulty in applying adult rules to juveniles. In the end, as in all questions of this kind, it rests upon individuals to weigh the conflicting arguments themselves and to try and strike the appropriate balance.

APPENDIX

Bail and remand statistics: NSW

Table 1: Remand population, NSW 1988-1996

Year	Total full-time inmates	Total remand inmates	Percentage
1988	4269	726	17.01%
1989	4736	715	15.10%
1990	5338	790	14.80%
1991	5660	808	14.28%
1992	6228	720	11.56%
1993	6392	750	11.73%
1994	6420	724	11.28%
1995	6384	711	11.14%
1996	6267	800	12.77%

Table 2: Remand population, Australian states May 1997

State	Average Daily Prisoner Population	Remand Prisoner Population	Percentage Total Prison Population	Rate per 100,000 adult population
New South Wales	6357	941	15.1%	19.8
Victoria	2545	376	15.3%	10.7
Queensland	3739	530	14.3%	20.9
South Australia	1493	272	18.1%	23.9
Western Australia	2260	348	15.6%	26.0
Tasmania	258	32	12.5%	9.0
Northern Territory	575	101	17.5%	77.6
ACT*	167	49	28.0%	21.1

Note:

* Prisoners sentenced to full-time custody in the ACT are held in NSW prisons. This figure, therefore, includes 120 sentenced prisoners in NSW goals. Additionally, ACT and NSW periodic detainees are not included in these figures.

Table 3(a): Bail status Higher Courts - Proceeded to trial

	Outcome of charge					
	Acquitted of all charges		Found guilty of at least one charge		Acquitted of at least one charge/guilty plea to at least one other	
Bail Status:	No	%	No	%	No	%
Bail dispensed with	30	6.14	15	3.67	-	
In gaol bail refused	52	10.63	93	22.74	6	25
In gaol bail not met	4	0.82	2	0.49	1	4.17
On bail unconditional	65	13.29	39	9.53	3	12.5
On bail conditional	325	66.47	253	61.86	14	58.33
Shelter	1	0.20	2	0.49	-	
Unknown	12	2.45	5	1.22	-	
Totals	489	100%	409	100%	24	100%

Table 3(b): Bail status Higher Courts - Other outcome

	Outcome of charge					
	Proceed to sentence only		No charges proceeded with		All charges otherwise disposed of	
Bail Status:	No	%	No	%	No	%
Bail dispensed with	94	4.07	20	5.83	4	1.85
In gaol bail refused	863	37.36	40	11.66	21	9.68
In gaol bail not met	21	0.91	3	0.86	3	1.38
On bail unconditional	218	9.44	37	10.79	26	11.98
On bail conditional	1090	47.18	238	69.38	149	68.66
Shelter	1	0.04	-	-	-	-
Unknown	23	1	5	1.48	14	6.45
Totals	2310	100%	343	100%	217	100%

Table 4(a): Bail status Local Court - Proceeded to defended hearing

	Outcome of charge					
	All charges dismissed		Found guilty of at least one charge		At least one charge dismissed/guilty plea to at least one other	
Bail Status:	No	%	No	%	No	%
Summons case or bail dispensed with	2281	41.84	4312	46.61	282	28.03
On bail	2785	51.08	4089	44.20	644	64.02
Bail refused	214	3.92	538	5.81	55	5.47
In custody, prior offence	55	1.01	111	1.20	13	1.29
Unknown	117	2.15	202	2.18	12	1.19
Totals	5452	100%	9252	100%	1006	100%

Table 4(b): Bail status Local Court - Other outcome

	Outcome of charge							
	Convicted ex parte		Dismissed without hearing		Sentenced after guilty plea		All charges otherwise disposed of	
Bail Status:	No	%	No	%	No	%	No	%
Summons case or bail dispensed with	9647	72.91	3238	50.97	41110	56.70	1491	45.91
On bail	3254	24.59	2683	42.23	26481	36.52	1526	46.98
Bail refused	72	0.55	238	3.75	3266	4.51	198	6.10
In custody, prior offence	7	0.05	53	0.83	829	1.14	30	0.92
Unknown	251	1.90	141	2.22	817	1.13	3	0.09
Totals	13231	100%	6353	100%	72503	100%	3248	100%

Table 5(a): Duration of proceedings - Local Court

	Median duration (days): offence to determination*	
	ON BAIL	IN GAOL/SHELTER
Proceeded to defended hearing:		
a) all charges dismissed	126	54.5
b) guilty of at least one offence	126.5	89.5
Convicted ex parte	50	59
All charges dismissed - no hearing	133	64
Sentenced after guilty plea	26**	29
All charges otherwise disposed of	48	44

* This figure includes the number of days from offence to first appearance, and the number of days from first appearance to determination.

** Those on bail before hearing are remanded in custody between conviction and sentence, therefore the number of days is only the time between offence and first appearance.

Table 5(b): Duration of proceedings - higher courts

	Median duration (days): arrest to sentence*					
	ON BAIL			IN GAOL/SHELTER		
	A	B	C	A	B	C
Proceeded to trial						
c) acquitted of all charges	132	349.5	-	75	196	-
d) guilty-at least one charge	147	363.5	35.5	93.5	218	29
e) acquitted at least one/ guilty at least one charge	171	309	9	60	229	2
Proceeded to sentence only	97	171.5	1	46	91	-
No charges proceeded with	129	265	-	77	170	-
All charges otherwise disposed of	84	145	-	50.5	135	-

* this figure includes:

- A. the number of days from arrest to committal;
- B. the number of days from committal to outcome, and
- C. the number of days from outcome to sentence.