"DO YOU RECKON I'M GUNNA GET BAIL?":

THE IMPACT & CONSEQUENCES OF NEW SOUTH WALES BAIL LAWS ON ABORIGINAL JUVENILES

by David Pheeney

INTRODUCTION

The evolution of bail laws in New South Wales ('NSW') has been plagued by ongoing public debate and controversy.[1] Remarks made by Premier Morris Iemma in 2005 after the Cronulla riots clearly illustrate this fact:

> Twenty three rioters charged over Sunday's riots have been granted bail, one of whom had been granted bail days earlier for assault and destroying property. It is unacceptable that such thugs and morons are automatically granted bail, just to be given the chance to wreak further havoc.[2]

The reaction of lobby groups such as the Bail Reform Alliance ('BRA') further highlights the controversial nature of such laws. In 2010, in an appeal to the NSW Attorney-General, the BRA's convenor, Max Taylor, commented that, 'governments of both persuasions [have] undermined the notion of innocent until proven guilty by smashing the presumption in favour of bail for a string of offences'.[3] Taylor further stated that, 'changes over the years [to bail] have often been associated with a particular crime or crisis concerning a particular type of crime and media attention to it'.[4]

Similarly, in 2010, the NSW Director of Public Prosecutions, Nicholas Cowdery AM QC, also entered the debate arguing:

> In recent times, almost by stealth and often in the fashion of politically driven knee-jerk reaction, ad hoc amendment of the legislation has eroded the right to bail and swelled prisoner numbers, some of whom are not later convicted of offences.[5]

The debate surrounding this issue and its polarising effect is best understood as a reaction to the competing interests that bail laws seek to protect, with respect to:[6]

- preserving the presumption of innocence for an individual charged with a criminal offence;
- ensuring an individual charged with a criminal offence appears at court to answer an allegation of wrongdoing;
- protecting victims of crime and the wider community from those charged with a criminal offence committing further criminal offences; and,
- ensuring criminal matters that come before the court are resolved in a timely and efficient manner.

Bail laws seek to fulfil the difficult task of striking an appropriate balance with respect to accommodating these competing legal principles and interests.[7] In their current form, bail laws in NSW fail to preserve these legal principles to the disadvantage and detriment of Aboriginal juveniles who come before the criminal justice system. This has been manifested in alarmingly high incarceration rates for Aboriginal juveniles in NSW and the removal of their right to bail being applied to an increasing range of criminal offences. To understand how this issue developed and continues to perpetuate, a critique of NSW bail laws over the past 34 years is warranted. In doing so, this article will show that during this period of time, an individual's right to bail has been steadily eroded. This paper also argues that urgent reform of NSW bail laws is warranted through the introduction of a separate set of bail criteria for Aboriginal juveniles which applies an 'unacceptable risk' test for bail over the current presumptions for or against bail tests.[8]

HISTORICAL DEVELOPMENT OF BAIL LAWS IN NEW SOUTH WALES

Criticisms made of the *Bail Act 1978* (NSW) ('*Bail Act*') have a historical and political perspective. Since their introduction 34 years ago, NSW bail laws have been subjected to constant amendment by successive Labor and Liberal governments.[9] A chronological summary of the amendments to the *Bail Act* shows this (see over).[10]

The most significant consequence for NSW bail laws during this time has been the steady erosion of an accused person's right to bail after being charged with a criminal offence. This has been brought about through the application of a presumption against bail, or bail only to be granted in exceptional circumstances.[11] Critics of the bail presumption mechanisms, particularly those against the granting of bail, argue that their application to an increasing range of offences has only been used by

1978	Exception to presumption in favour of bail if accused previously failed to comply with a bail condition imposed for the protection of a domestic violence victim.
1993	Exception to presumption in favour of bail for possession or supply of commercial quantity of prohibited drugs. No presumption in favour of bail for – aggravated sexual assault, wound with intent to cause bodily harm or resist arrest, kidnapping, sexual intercourse with child under 10 years, manslaughter.
2001	Exception to presumption in favour of bail for aggravated sexual assault in company. Exception to presumption in favour of bail for persons accused of committing an offence while on bail, parole, subject to a good behaviour bond or serving a non-custodial sentence.
2002	No granting of bail for murder unless exceptional circumstance(s) test satisfied.
2003	No granting of bail for serious personal violence offences unless exceptional circumstance(s) test satisfied where accused previously convicted of serious violence offence. No granting of bail for serious personal violence offences unless exceptional circumstances test satisfied where accused previously convicted of serious violence offence with 10 year custodial sentence.
2005	No presumption in favour of bail for a riot or public disturbance, along with the commission of an offence punishable by a term of imprisonment of two more years connected with a riot or public disturbance.
2006	Exception to presumption in favour of bail for persons on lifetime parole who commit an offence punishable by imprisonment.
2007	Section 22A provisions limits number of bail applications unless accused can show the court that the accused was not represented by a lawyer or that new facts / circumstance(s) exist.

government to portray the image that a 'tough stance' on law and order is being maintained.[12] This was evident in remarks made by Premier Morris Iemma in 2005 at the height of the Cronulla Riots incident when he stated it was 'unacceptable that such thugs and morons are automatically granted bail'.[13]

In terms of how a presumption against bail should be interpreted and applied, in *R v Amane* (2001) NSWSC 7, the Court held as follows:

> An application for bail should normally or ordinarily be refused. A heavy burden rests on the applicant to satisfy the court that bail should be granted. The strength of the Crown case is the prime but not exclusive consideration. Countervailing circumstances common to applications for bail in the generality are to be accorded less weight than in the ordinary case. The application must be somehow special if the Crown case in support of the change is strong.[14]

Other legal authorities, such as the Court of Criminal Appeal in *R v Masters* (1992) 26 NSWLR 450,[15] have also interpreted the presumptions against the granting of bail in terms which 'impose a difficult task upon the person so charged to persuade the court why bail should not be refused'.[16] In this decision the Court also held that a presumption against bail 'expresses a clear legislative intention that persons charged with the serious drug offences specified in should normally—or ordinarily—be refused bail'.[17]

Research assessing the impact of the bail law presumptions by the NSW Bureau of Statistics and Research in 2010 found that for persons charged with an offence which attracts a presumption against bail, the risk of being refused bail was high. For Aboriginal people, the impact of the presumptions against bail was more obvious.[18]

Also of significance has been the introduction of the exceptional circumstances test for bail. The effect of the exceptional circumstances bail test reverses the onus onto an accused person to show why the circumstance(s) justify bail being granted. This exception to bail was originally applied to the offence of murder but has been expanded to capture other offences classified as serious personal violence.[19]

IMPACT OF BAIL LAWS UPON ABORIGINAL JUVENILES – DIMINISHED RIGHTS AND SOARING INCARCERATION RATES

Changes to NSW bail laws that have reduced an individual's entitlement to be granted bail have operated to the detriment and disadvantage of Aboriginal juveniles

who come before the criminal justice system. This is clearly reflected in the soaring number of Aboriginal juveniles held in detention on remand. In the four year period from 2006 to 2010, the percentage of Aboriginal juveniles on remand increased by 48 per cent from 1,639 to 2,445.[20] For the 2010/11 year the average daily intake into detention for all juveniles was 434, of which 204 were Aboriginal.[21] Also of significance is that for most juveniles on remand, the majority do not receive a full time custodial sentence. A 2010 report by Noetic Solutions for the NSW Minister for Juvenile Justice estimated that across all juveniles held on remand, 80 per cent did not receive a custodial sentence.[22]

In light of the changes brought about by the amendments to the bail laws in NSW, this crisis has emerged. In particular, the operation of the section 22A provisions which limit the number of bail applications Aboriginal juveniles can make unless, for example, new facts or circumstances can be relied upon, has been identified as an area of concern by a number of research studies. The research undertaken by the NSW Bureau of Statistics and Research, for instance, acknowledged that the juvenile remand population has increased due to the introduction of the section 22A bail provisions.[23]

The presumptions against bail for certain offences such as repeat property offenders can also be identified as disadvantaging Aboriginal juveniles under the current bail laws. The definition of a serious property offence applies where a person is accused of two or more property offences in the past two years, not arising out of the same circumstances. Under the *Crimes Act 1900* (NSW), offences which attract a 'serious property offence' cover robbery from person, robbery with wounding, break and enter with intent to commit an indictable offence, enter dwelling and stealing motor vehicle.[24]

The problem with the specific identification of offences that attract a presumption against bail is that their application has a more profound impact upon Aboriginal juveniles charged with a serious property offence, as defined under the current bail laws, who subsequently seek bail in remote areas of NSW such as Bourke and Brewarrina. In the data compiled by the NSW Bureau of Crime Statistics and Research for 2011, 59 per cent of all break and enter offences recorded for the Brewarrina local government area were committed by male juveniles in the 10 to 17 year old age group.[25] The figures do not identify Aboriginal from non-Aboriginal offenders; however, noting that the Aboriginal population of Brewarrina is around 90 per cent, the proportion being Aboriginal would be high. Where an Aboriginal juvenile has been charged with two or more offences such as break and enter within the past two years, the impact of the presumption against bail takes full effect.[26] In this way, the presumptions against bail through their application, unfairly target Aboriginal juveniles who come before the criminal justice system seeking bail to be granted when charged with a criminal offence.

THE WAY AHEAD - SEPARATE BAIL CRITERIA FOR JUVENILES WITHIN THE FRAMEWORK OF THE 'UNACCEPTABLE RISK' TEST FOR BAIL

For the reasons outlined above, the present bail laws as they apply to Aboriginal juveniles who come before the criminal justice system warrant a major overhaul. As a starting point, the adoption of a separate set of bail criteria based on the principles espoused by section 6 of the *Children (Criminal Proceedings) Act 1987* (NSW) ('*CCPA*') would guide a judicial officer assessing a bail application for all juveniles, not just those who are Aboriginal, to have regard to the following considerations:

- Children have rights and freedoms before the law equal to those enjoyed by adults, and in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them – section 6(a);
- Children who commit offences bear responsibility for their actions but because of their state of dependency and immaturity, require guidance and assistance – section 6(b);
- It is desirable, wherever possible, to allow the education or employment of a child to proceed uninterrupted – section 6(c);
- It is desirable, wherever possible, to allow a child to reside in his or her own home – section 6(d);
- The penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind – section 6(e); and,
- It is desirable that children who commit offences be assisted with their reintegration into the community so as to sustain family and community ties – section 6(f).

The application of a separate set of bail criteria for juveniles should not be seen as a radical reform measure. In the Australian Capital Territory such an approach has been adopted through the section 94 provisions of the *Children & Young People Act 2008* (ACT).[27] In other jurisdictions such as Queensland, legislation in the form of section 48 of the *Youth Justice Act 1992* (QLD) directs police and judicial officers to take into account certain considerations when making an assessment to grant or deny bail to a juvenile. In 2005, the NSW Law Reform Commission's

study of juvenile offending recognised and endorsed such an amendment to bail laws as they apply to juveniles, indicating as follows:

> The Commission agrees with the submission of the Children's Court and supports the approach taken in other jurisdictions. The special needs of young people would be better addressed if the Bail Act listed separate criteria, consistent with the principles contained in section 6 of the CPPA, to be applied to young people. The application of such criteria would deter unnecessary refusals of bail and the imposition of harsh and inappropriate conditions.[28]

In its current form, the *Bail Act* makes only what would be described as a vague reference to the unique circumstances and background surrounding an Aboriginal juvenile's application for bail.[29] While the section 32 provisions of the *Bail Act* consider the interests of a juvenile when an application for bail is made, such as Aboriginality, ties to the community and background, incorporating the section 6 *CCPA* principles would bring NSW bail laws as they apply to juveniles up-to-date and in line with other jurisdictions.

In addition, there exists a need to amend the *Bail Act* in relation to Aboriginal juveniles to introduce a new test for bail. The current presumptions under the 'for or against' and 'exceptional circumstances' tests have been identified in this paper as operating to the detriment of Aboriginal juveniles. As an alternative, the Victorian 'unacceptable risk' test for bail model has merit.[30] In a review of Victoria's bail laws in 2007 by the Victorian Law Reform Commission ('VLRC'), criticisms surrounding the use of presumptions when determining a bail application were identified. The VLRC noted that in their application and scope, bail determination presumptions should be abolished as 'the current tests are complicated and confusing and there are compelling reasons for their reform'.[31] The exceptional circumstances bail presumption which applies in NSW to offences such as repeat serious personal violence and murder was also criticised by the VLRC as being used to 'give the appearance of being 'tough' on those crimes'. The Commission also noted that such an approach 'obscures the complexity of the bail decision'.[32]

CONCLUSION

This article has highlighted that serious deficiencies exist in regard to NSW bail laws as they apply to Aboriginal juveniles who come before the criminal justice system. The practical implications for Aboriginal juveniles due to the nature in which NSW bails laws have evolved has been identified in this discussion as both eroding their legal rights and contributing to their ever increasing rates of incarceration. To address the disadvantage faced by Aboriginal juveniles in relation to this issue, this discussion has identified that immediate reform of NSW bail laws is required. As a starting point, the introduction of a separate set of bail criteria which are juvenile 'focused' in their operation and that apply an 'unacceptable risk' test for bail is needed. When considering NSW bail laws in their current form and application, the remarks of Geoffrey Leane (1994) clearly bring into focus the unacceptable nature of this legal issue for Aboriginal juveniles: 'law seeks to convince us that 'what is ought to be', yet we are not convinced'.[33]

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1 Andrew Cannell, 'Attorney-General Greg Smith is reviewing bail laws for gays and lesbians', The Telegraph (online), 9 February 2012 <http://www.dailytelegraph.com.au/news/attorney-general-greg-smith-is-reviewing-bail-laws-for-gays-and-lesbians/story-e6freuy9-1226258814866>.

2 NSW, *Parliamentary Debates*, Legislative Assembly, 15 December 2005, 78 (Premier Morris Iemma, in Legislative Assembly).

3 Bail Reform Alliance, 'Letter to the NSW Attorney-General', Hon J Hatzistergos MLC, 4 March 2010.

4 Ibid.

5 Joel Gibson, 'Cowdery backs call to change bail laws', Sydney Morning Herald (online), 9 April 2010 <http://www.smh.com.au/nsw/cowdery-backs-call-to-change-bail-laws-20100408-rv5q.html>.

6 Lenny Roth, 'Bail Law: Debate and Statistics' (Briefing Paper 5/2010, Parliamentary Library Service, Parliament of NSW, 2010) 1; see also *Bail Act 1987* (NSW), s 32(1).

7 Victorian Law Reform Commission, *The Bail Act: 2007*, Final Report (2007), 5.

8 Ibid, 36.

9 Gibson, above n 5.

10 Lucy Snowball, Lenny Roth & Don Weatherburn, 'Bail presumptions and risk of bail refusal: An analysis of the NSW Bail Act', (NSW Bureau of Crime Statistics and Research, Issue Paper No 49, 2010) 8.

11 Geesche Jacobsen, 'Unfair Bail Laws Used As Punishment: Magistrate', The Sydney Morning Herald (online), 26 October 2011 <http://www.smh.com.au/nsw/unfair-bail-laws-used-as-punishment-magistrate-20111025-1mi3q.html>.

12 Gibson, above n 5.

13 Iemma, above n 2.

14 *R v Amane Iskander* (2001) NSWSC 7 at [14].

15 *R v Masters* (1992) 26 NSWLR 450, 473 (Hunt CJ, Allen and Badgery-Parker JJ).

16 Ibid.

17 Ibid.

18 Snowball, Roth, Lenny & Weatherburn, above n 11, 4.

19 *Bail Act 1987* (NSW), s 8D.

20 NSW Department of Juvenile Justice, 2010-11 Annual Report (2011), 151.

21 NSW Department of Juvenile Justice, 2010-11 Annual Report, Summary <http://www.djj.nsw.gov.au/pdf_htm/publications/annualreport/111117%20%20Annual%20report%20Summary%20Brochure%2010%20- 11%20print%20A4%20v2.pdf> 1.

22 Noetic Solutions, 'A Strategic Review of the NSW Juvenile Justice System: A Report for the Minister of Juvenile Justice' (2010) 69.

23 Sumitra Vignaendra, Steve Moffatt, Don Weatherburn, and Eric Heller, 'Recent Trends in Legal Proceedings for Breach of Bail, Juvenile Remand and Crime' (NSW Bureau of Crime Statistics and Research, Contemporary Issues in Crime and Justice Series, No 128, 2009) <http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll. _bocsar.nsf/vwFiles/CJB128 pdf/$file/CJB128.pdf> 3.

24 *Bail Act 1987* (NSW), ss 8C(4)(a)-(c).

25 NSW Bureau of Crime Statistics and Research, 'Brewarrina Local Government Crimes Statistics for 2010', 20 January 2012 <http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/BrewarrinaLGA.xls/$file/BrewarrinaLGA.xls>; see records for number of Break & Enter offences for the 10-17 age group compared to 18-40+ age groups.

26 *Bail Act* 1987 (NSW) s 8C(1)(a)-(c).

27 In s 23(1)(b) of the *Bail Act* 1992 (ACT), a court must consider 'CCPA' principles referred to in the legislation as the principles in the *Children and Young People Act* 2008 (ACT), s 94.

28 NSW Law Reform Commission, *Young Offenders,* Report No 104 (2005) 244.

29 *Bail Act 1987* (NSW) s 32.

30 Victorian Law Reform Commission, above n 7, 69

31 Ibid, 70.

32 Ibid.

33 Geoffrey Leane, 'Testing some theories about law: Can we find substantive justice within law's rules?' (1994) 19(4) Melbourne University Law Review 924, 949.

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