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NSW Law Reform Commission
(via email)

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Bail Question for Discussion

Intellectual Disability Rights Service

About IDRS

The Intellectual Disability Rights Service ('IDRS') is a community legal centre and disability advocacy service that provides legal and other services for people with intellectual disability throughout New South Wales. IDRS's services include the provision of legal advice and legal representation in select matters, including criminal matters. IDRS advocates for policy and law reform to advance the rights and welfare of people with intellectual disability. IDRS welcomes the review of the Bail Act 1978 (the Act).

IDRS also operates the Criminal Justice Support Network ('CJSN') which provides support persons for with intellectual disability when they come into contact with the criminal justice system, particularly at the police station and at court. IDRS provides after hours legal advice to people with intellectual disability who are in police custody through a roster of volunteer solicitors.

In 2008, IDRS published "Enabling Justice", a report on problems and solutions in relation to diversion of alleged offenders with intellectual disability from the NSW local court system.

It is the experience of IDRS that people with an intellectual disability face particular difficulty in obtaining bail. Such difficulties may flow from lack of support services and suitable accommodation options together with reduced community ties. They may also be more likely to have a history of previous offences and/or previous failures to appear.

Objects of the Act

We consider that bail legislation should include a statement of its objects. Of paramount importance is the right to liberty of the accused pending trial. This is to be balanced with the interests in the community in ensuring appearance before the court; preventing commission of further serious offences; protecting the interests of individuals and of the course of justice.

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Bail Decision Criteria

We consider there is utility in providing a list of criteria for bail. In the absence of such criteria case law will need to be developed to fill the gap. There will be resultant uncertainty and lack of clarity as that process evolves. An exclusive and mandatory set of criteria would provide a checklist for bail authorities and for practitioners and promote more consistent application of the Objects of the Act.

Factors to be Taken into Account and Presumptions

The concept of presumptions against bail ought be reviewed. It is an unduly complex system that restricts the bail authority from exercising a discretion in favour of bail. The application of the presumption scheme under the current Act has a disproportionate effect on people with intellectual disability. This is demonstrated by their disproportionate rate of incarceration.

In particular, we consider categorisation of offences on the basis of failures to appear and the commission of previous offences problematic. People with intellectual disability will all too frequently have some history of failures to appear and previous convictions.

They may inadvertently fail to appear at court due to their lack of understanding and their difficulty with planning ahead and managing their commitments without assistance. Many failures to appear in court by people with intellectual disability are a direct result of the effect of the person's disability, lack of support and the failure of the justice system to adjust its processes to accommodate people with intellectual disability.

The Criminal Justice Support Network provides trained volunteer support persons who attend court with defendants with intellectual disability. This service routinely contacts the person a day or two before the court date to make sure the person realises and remembers they need to attend court; knows how to get there and assists them to work out a plan to get to court. In our experience with this practical support it is quite rare that the person with intellectual disability fails to attend at court. It is also our belief that many people with intellectual disability find the court situation so difficult and confusing that without support they may attend but leave the court without appearing. Many people with intellectual disability now and in the past have not had the support required and are quite likely to have a history of failures to appear at court directly due to their disability.

In our experience supportive rather than coercive measures and conditions are more likely to result in a person with intellectual disability's attendance at court.

It is suggested that the focus on presumptions be abandoned in favour of a system that requires consideration of our proposed objects of the Act together with a list of criteria such as the present section 32.

Purpose and Appropriateness of Bail Conditions

The purpose of imposing bail conditions should be directly linked to the reduction of the risk of serious reoffending rather than gratuitous punishment. It is the experience of IDRS and CJSN that bail conditions imposed by police on persons with intellectual disability are often numerous and onerous and beyond what could be regarded as necessary to reduce the risk of serious re-offending. The imposition of such conditions all too often sets up subsequent breach. We believe there insufficient protection in the Bail Act 1978 against unreasonable bail conditions.

We consider a requirement that a bail authority not impose a bail condition on a person who has an intellectual disability unless satisfied that the bail condition is appropriate, should also require that the person is able to “understand and comply” so far as possible, the person granted bail should leave the police station or the court understanding and able to comply with conditions imposed.

The availability of appropriately trained support persons, such as the volunteers provided by the Criminal Justice support Network, is an important practical resource in assisting persons with intellectual disability in relation to bail. Two important roles of the support person are to explain the bail conditions and to assist the defendant to understand the implications of the condition. The support person can also raise any anticipated problems with the bail conditions with the police and negotiate for conditions that the person is able to comply with. Unfortunately, in the experience of IDRS, many people with intellectual disability are not given access to a support person when in police custody as required by LEPRa.

It is also essential that police and other bail authorities actively take into account a person’s intellectual disability; the person’s circumstances and the specific nature of the breach in responding to a breach of bail. We too often see a police response that fails to consider these factors.

Given the inappropriateness of bail conditions often imposed on people with intellectual disability, it is important that the review of the Bail Act provides for readily accessible opportunities to have bail conditions reviewed.

People with Cognitive or Mental Health Impairment

We are of the view that the provisions of the Bail Act in relation to “intellectual disability” should be expanded. We note the Draft Bail Bill 2010 proposed to increase the range of disabilities to be taken into account including intellectual disability.

It is suggested that the term “cognitive impairment” is a more useful overarching term than intellectual disability. We suggest the list under section 61H(1A) of the *Crimes Act* 1900, while not ideal, is a useful starting point for defining the conditions amounting to cognitive impairment.

“(1A) For the purposes of this Division, a [person](#) has a “cognitive impairment” if the [person](#) has:

- (a) an intellectual disability, or
- (b) a developmental disorder (including an autistic spectrum disorder), or

- (c) a neurological disorder, or
- (d) dementia, or
- (e) a severe mental illness, or
- (f) a brain injury,

that results in the [person](#) requiring supervision or social habilitation in connection with daily life activities.”

However, we would advocate for a non-exhaustive list and a definition that does not necessarily require a definitive diagnosis. We also consider the rider that the disability “results in requiring supervision of social habilitation in connection with daily life activities” is not necessary or appropriate in relation to bail decisions. These words can be variously interpreted, are subjective and not well defined in the literature. These words are capable of being interpreted as requiring a higher level of disability and dependence to fall into the category of “special needs”.

Further Comments

- **Information About Bail Rights**

IDRS stresses the importance of information about bail rights being available in formats that are easily understood by people with intellectual and other disabilities.

- **Obligations under Agreements to be Explained**

IDRS submits that the requirement to take reasonable steps to ensure that the person who is the subject of bail decisions “is made aware of” their obligations and the consequences of failing to comply should be strengthened by substituting a word such as “understands”. Simply making a person with intellectual disability aware of this important information is unlikely to be sufficient to assist them to comply with their bail agreement and disadvantages them.

- **Notice Requirements Where the Accused Remains in Custody after Bail Granted**

We consider it inappropriate that a person with cognitive impairment, including intellectual disability, remain in custody for eight days in circumstances where they are unable to meet their bail conditions. We consider that a shorter notice period be applicable in light of heightened vulnerability in the custodial setting.

- **Denial of bail leads to long periods on remand for people with intellectual disability**

People with intellectual disability are particularly vulnerable to remaining on remand for long periods of time when denied bail. This is often due to the difficulty and time lag in securing any assistance from disability services for the person. Hence many people with intellectual disability for whom diversionary orders under s32 of the Mental Health (Forensic Provisions) Act are eventually made have spent months in custody due to the slow response of the service system.

In IDRS experience, which includes providing support persons for people with intellectual disability who are in police custody through the Criminal Justice Support Network, people with intellectual disability who find themselves in police custody are usually not in need of detention but are in need of support and services.

IDRS believes there is a desperate need for emergency community based accommodation options to be available for adults with intellectual disability who may require short term accommodation support in order to provide an alternative to denial of bail and time spent on remand.

- **Support Persons**

Further, it is relevant to add that it is the experience of Criminal Justice Support Network that a support person can play a vital role at the police station in explaining and helping a person with intellectual disability to realize and plan for the practical implications of their bail conditions. Unfortunately, it is our experience that most people with intellectual disability who are arrested do not have access to a support person while in police custody, although it is required under LEPRa so this opportunity to assist with understanding bail conditions is missed.

- **Potential Revocation of Bail**

It is submitted that it is equally important to consider a person's intellectual or other disability in decisions about potential **revocation** of bail as it is in consideration of eligibility for bail or imposition of bail conditions. IDRS submits that consideration of a person's special) and capacity to understand and comply with bail conditions should be taken into account in any consideration of whether or not to revoke bail.

Conclusion

IDRS advocates that it is appropriate that a person's cognitive impairment or mental illness be taken into account at five stages of the bail process. That is,

1. In a consideration of eligibility for bail;
2. At the time of determining appropriateness of bail conditions;
3. In the categorisation of the offences which effects the presumption of bail;
4. In decisions concerning the appropriateness of dispensing with bail; and
5. In any decision making process about the potential revocation of bail.

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