1. The Commission for Children and Young People

1.1 The NSW Commission for Children and Young People (‘the Commission’) promotes the safety, welfare and well-being of children and young people in NSW.

1.2 The Commission was established by the Commission for Children and Young People Act 1998 (NSW) (‘the Commission’s Act’). Section 10 of the Commission’s Act lays down three statutory principles which govern the work of the Commission:

(a) the safety, welfare and well-being of children are the paramount considerations;
(b) the views of children are to be given serious consideration and taken into account; and
(c) a co-operative relationship between children and their families and community is important to the safety, welfare and well-being of children.

1.3 Section 12 of the Commission’s Act requires the Commission to give priority to the interests and needs of vulnerable children. Children are defined in the Act as all people under the age of 18 years.

1.4 Section 11(d) of the Act provides that one of the principal functions of the Commission is to make recommendations to government and non-government agencies on legislation, policies, practices and services affecting children.

2. General Comments

2.1 The Commission is pleased to make a submission to the Criminal Law Review Division of the Attorney-General’s Department on the review of the Bail Act 1978 (NSW).

2.2 The Commission’s submission focuses on issues impacting on children and young people under the age of 18 years. Children and young people who come into contact with the criminal justice and juvenile justice system are vulnerable in a variety of ways. Accordingly, the Commission is concerned that their situation receive particular attention in this review.
2.3 The Commission welcomes the review of the *Bail Act* as an opportunity for clarification of the Act and its policy objectives. The Commission’s particular concern is that, consistent with the approach taken in *Children (Criminal Proceedings) Act 1987* and the *Young Offenders Act 1997*, appropriate principles govern the application of the criteria for bail for young people. These principles and criteria should reflect the relevant provisions of the Convention on the Rights of the Child (‘the Convention’) including Article 37 which states that detention of a child should be used only as a last resort, and for the shortest appropriate period of time. They should also take account of the special difficulties that can face young people in the criminal justice system and be clear and capable of being understood by young people.

3. **Application of the Bail Act to Children and Young People**

3.1 *The Bail Act* applies to both adults and children. Section 32 of the Act limits the criteria to be applied in determining bail to the matters mentioned in that section. Apart from s32(1)(b)(v) there are no special criteria applying to bail applications by young people. Section 32(1)(b) simply states that the interests of the person to be considered include ‘any’ special needs relating to the fact that the person is under the age of 18 years. It does not state that the fact that a person is under the age of 18 years is a special factor in itself. There is no reference in the Act to the principle in the Convention that detention of a child should be a last resort.

**Separate Principles applying to bail for children and young people:**

response to questions 2 and 39 to 44 of Discussion Paper

3.2 There should be separate principles applying to the consideration of bail for children such as there are in the *Children (Criminal Proceedings) Act* and the *Young Offenders Act 1997*. While the Commission endorses those statements of principles, in relation to bail there should also be a specific principle stating that the detention of children should be a last resort. This principle would reflect the principle set out in section 7(a) of the *Young Offenders Act* in relation to sanctions for offences, that the least restrictive form of sanction should be applied against a child. It would also reflect the fundamental presumption of innocence until proven otherwise. In accordance with that principle bail should be either dispensed with for children, or there should be a presumption in favour of bail for children. These special criteria applying to bail for children should be included in the *Children (Criminal Proceedings) Act* rather than the *Bail Act*. This would provide greater clarity by bringing together the principles that apply to children at different stages of the criminal proceedings.

In that respect, the Commission notes that the intention of s8 of the *Children (Criminal Proceedings) Act* is that bail should be dispensed with unless the circumstances clearly indicate otherwise. However the terms of section 8 need to be up-dated to reflect the fact that all criminal proceedings now commence with a court attendance notice. Consistent with the original intention of s8, the Commission’s view is that the separate
criteria that should apply to bail for children should clearly provide for bail to be dispensed with for children, unless there are strong reasons to the contrary.

3.3 Consistent with the Commission’s reasoning set out above, and the diversionary philosophy of the Young Offenders Act, bail should be dispensed with in relation to diversionary measures under that Act.

3.4 The statistics set out in the Discussion Paper in relation to the disproportionate over-representation of Indigenous children who are refused bail are very troubling. Indigenous children caught up in the criminal justice system are especially vulnerable. The Commission believes there is merit in the recommendations made by the Aboriginal Justice Advisory Committee set out on page 28 of the Discussion Paper. Article 30 of the Convention states that indigenous children should not be denied the right to enjoy their own culture in community with other members of their group. The Commission supports specific reference in the criteria applying to bail for children to the need for Indigenous children to maintain a relationship with their community.

3.5 Children with a disability are also particularly vulnerable. Article 23 of the Convention acknowledges the need for disabled children to receive special support and consideration. The Commission supports specific reference to their needs in the criteria applying to bail for children.

3.6 The Commission’s responses to questions 2 and 39 to 44 above, answer a number of the other questions asked in the Discussion Paper. However, for the sake of completeness the Commission’s response to other questions relevant to the Commission’s role are set out below.

Dispensing with bail or presumption in favour of bail for children: response to questions 6, 8, 9, 11, 13 to 16, 23 and 26 of Discussion Paper

3.7 Bail should be dispensed with for children for minor offences unless special reasons are shown that indicate bail is required. In that event there should be presumption of a right to unconditional bail for minor offences. In general there should be a presumption in favour of bail for children, not a ‘neutral presumption’.

3.8 In the case of children, the nature of the offence should not displace the presumption in favour of bail but should be a factor that can be taken into account in refusing bail. A revised list of factors, similar to the South Australian scheme, could be developed that takes account of the seriousness of the offence.

3.9 Children on conditional liberty who breach a condition should not lose the presumption in favour of bail. That fact can be considered along with other relevant factors in determining bail rather than displacing the presumption.
3.10 Failure by a child to comply with bail conditions should not result in a loss of their entitlement to bail, although it may be a relevant factor to be considered in reviewing bail. Children may fail to comply with bail conditions for reasons associated with their particular vulnerability and lack of experience or awareness of what they are required to do.

3.11 The same special criteria should apply to bail to prosecute an appeal as apply to bail for children generally.

**Accessibility of information about bail and court attendance requirements: response to questions 2, 12, 15, 24 and 32 of Discussion Paper**

3.12 As the Discussion Paper points out, there are now five categories of presumptions and considerable overlap between those presumptions and the general criteria applying to bail, and a lack of clarity about the relationship between the two. Section 12 of the *Children (Criminal Proceedings) Act* states that criminal proceedings must be explained to children. One of the functions of the Commission is to promote the participation of children in decision-making affecting their lives and encouraging government and non-government agencies to seek the participation of children appropriate to their age and maturity. The criteria for bail in relation to children must be made simpler and clearer, so children can understand the process and effectively participate in it.

3.13 In relation to the accessibility of the criteria for bail, the Commission refers to its response at paragraph 3.12 above. The seriousness of the offence should not affect the presumption in favour of bail. It can be a factor in considering whether the presumption should be displaced.

3.14 Court Attendance Notices should be designed in a way so they are readily understandable by children. Care should be taken to explain the requirements of the Notice in a way that children can understand.

3.15 The Commission is not aware of the current format of bail forms. However, as indicated in paragraph 3.12 above and in light of the right of children to be informed and participate in matters affecting them, bail forms relating to children must be designed in an appropriate way so they are easily understood.
Bail hostels and practical measures: response to questions 35 and 36 of Discussion Paper

3.16 The Commission is very concerned that there is only one bail hostel for children in New South Wales. Children in the juvenile justice system often lack accessible or stable accommodation which may disadvantage their bail situation. In accordance with the principle that detention should be a last resort, there is an urgent need for bail hostels or similar arrangements in accessible locations to prevent children otherwise being refused bail.

3.17 The Commission supports further consideration of practical measures, such as making telephone contact, to reduce failures to appear on account of disorganisation. Vulnerable children often lack life and organisational skills. They should be not disadvantaged in relation to bail because of that.

Breaches of bail: response to question 25 of Discussion Paper

3.18 The application of the provisions of the Young Offenders Act to children who breach bail is sufficient, as that Act provides that the least restrictive form of sanction is to be applied to children alleged to have committed an offence.

3.19 A breach of bail should not be separate offence. As ss7(c) of the Young Offenders Act states, criminal proceedings should not be instituted against a child if there is an alternative and appropriate means of dealing with the matter. The breach of a condition can be taken into account in relation to reviewing the child’s bail situation.

Protection of children in relation to adult bail: response to question 10 of Discussion Paper

3.20 Children need to be protected from domestic violence. The criteria in section 32 appear to be sufficient.

4 CONCLUSION

4.1 The current Bail Act should not apply to children. It fails to properly take account of their interests and is unnecessarily complex and confusing. The review of the Bail Act provides the opportunity to develop special principles and criteria applying to bail for children so that detention of children should be a last resort and are consistent with the Children (Criminal Proceedings) Act and the Young Offenders Act. These principles and criteria should be included in the Children (Criminal Proceedings) Act rather than the Bail Act.

4.2 Concern may be raised that children who are alleged to have committed very serious crimes should be refused bail. However, the best interests of children seeking bail generally should not be prejudiced by the alleged actions of a few. A bail scheme that dispenses with bail in most cases or
applies a presumption in favour of bail in relation to more serious offences
could still make provision for exceptional cases in which bail could be
refused by setting out a list of relevant factors that could be taken into
account in certain situations.

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