



16 May 2011

Bail Review
Ministry of Justice
DX SX10088
WELLINGTON

By email: bailreview@justice.govt.nz

Bail in New Zealand – Reviewing aspects of the bail system

The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Ministry of Justice's Public Consultation Document on *Bail in New Zealand – Reviewing aspects of the bail system*. The Law Society's comments have been prepared with the assistance of its Criminal Law and Youth Justice Committees.

Bail for defendants charged with serious class A drug offences

Q1 - What is your view on whether there should be a reverse burden of proof for defendants charged with serious class A drug offences (i.e. should they have to prove that they should be granted bail instead of the prosecution having to prove that they should not)?

There should not be a reverse burden of proof for defendants charged with serious class A drug offences. New Zealand's criminal justice system is based on the principle that a person is innocent until proven guilty. The presumption of innocence means that a defendant should not be deprived of liberty, nor required to prove a right to liberty, simply because of an allegation of offending or of a particular form of offending. There must be an adequate justification for depriving a person presumed to be innocent of liberty before his or her guilt has been determined.

Q2 - What is your view on whether electronically monitored bail should continue to be an option for defendants charged with serious methamphetamine offences?

Electronically monitored bail should continue to be an option for defendants charged with serious methamphetamine offences. Government data does not suggest that defendants charged with serious methamphetamine offences have a significantly higher rate of breach of bail conditions than do other defendants.

Bail for defendants charged with serious violent and sexual offences

Q3 - What is your view on whether the Courts should be able to release defendants charged with murder on bail?

Courts should be able to release defendants charged with murder on bail, for two reasons. First, as a matter of principle, the presumption of innocence must mean that it is not proper to deprive a person of liberty solely on the basis of an allegation that the person is guilty of a criminal offence. Secondly,

as a matter of practicality, there is no empirical data to suggest that persons accused of murder who are granted bail, breach the conditions of bail at a rate which gives grounds for concern.

Q4 - What is your view on whether there should be a reverse burden of proof for defendants charged with murder (i.e. should they have to prove that they should be granted bail instead of the prosecution having to prove that they should not)?

There should not be a reverse burden of proof for defendants charged with murder. Bail applications should be considered on merit, irrespective of the nature of the charge. Again as a matter of principle, the presumption of innocence means that an allegation of offending is not sufficient in itself to justify depriving a person of liberty. Nor is it justifiable to reverse the onus and make the person prove he or she should receive bail simply because a particular offence has been alleged.

Q5 - What is your view on whether new offences should be added to the list of specified offences that qualify for a reverse burden of proof (if the defendant has a previous conviction for one of those offences)? What criteria should be used to assess which offences to add to the list of specified offences?

No comment.

Q6 - What is your view on whether electronically monitored bail should continue to be an option for defendants charged with serious violent and sexual offences?

Electronically monitored bail should continue to be an option for defendants charged with serious violent and sexual offences. As noted earlier, the presumption of innocence means that the fact of a charge being made does not in itself justify depriving a person of liberty. If electronically monitored bail provides a sufficient assurance that the risks enumerated in s8 of the Bail Act 2000 can be managed, bail should be granted. There is no empirical data to indicate that persons with no prior criminal record or a limited criminal record who are charged with serious violent or sexual offences have posed a particular threat to the public or have failed to abide by bail conditions if released on electronic bail.

Bail for young defendants under 20 years of age

Q7 - What is your view on whether the presumption in favour of bail for 17 to 19 year olds should apply to defendants who have previously served a prison sentence?

There should be a presumption of bail in favour of 17 to 19 year old defendants who have previously served a prison sentence. The status quo (s15 of the Bail Act 2000 – granting of bail to defendant under 20 years of age) should remain.

Q8 - What is your view on whether breach of any condition of bail should be a ground for arresting a defendant under 17 years of age without a warrant?

The status quo (s214 of the Children Young Persons and Their Families Act 1989 (arrest of a child or young person without warrant)) should remain as no case for change has been shown.

Ensuring bail is not granted in return for information

Q9 - Do you think that any further requirements or safeguards are needed to prevent bail being granted inappropriately in return for information? If so, do you agree with the Government's proposal to insert a legislative provision into the Bail Act 2000 and are any other requirements or safeguards needed?

The Law Society supports the proposal to insert a legislative provision in the Bail Act 2000, to ensure bail is not granted in return for information.

Failure to answer bail

Q10 - Are there any other non-legislative measures that could be used to reduce the number of defendants that fail to answer bail?

An automatic reminder could be sent (for example by text) to defendants before they are due in Court.

Q11 - What is your view on whether the maximum penalty for failure to answer Court bail should be increased? If you think it should be increased, what should it be increased to?

The Law Society believes the current maximum penalty for failure to answer Court bail is adequate. It is highly likely that persons released on Court bail will be aware of the seriousness of breaching that bail and will be reminded of it by their legal advisers and family as well as the Police.

Q12 - What is your view on whether the maximum penalty for failure to answer Police bail should be increased? If you think it should be increased, what should it be increased to?

The proposal that failure to answer Police bail should be punishable by up to three months' imprisonment, as an alternative to the existing \$1,000 maximum fine, is supported. A higher penalty may have some deterrent effect that will encourage compliance with Police bail.

Q13 - What is your view on whether monetary bonds and sureties should be reintroduced in the District Court?

Monetary bonds and sureties should be reintroduced in the District Court. There have been a number of cases where bail has been granted in the High Court solely because a defendant can be required to provide a bail bond or to obtain suitable sureties. There is no good reason why the imposition of that condition could not be done in the District Court. This would make the process both quicker and less costly in terms of resources.

Q14 - What is your view on whether monetary bonds and sureties should be abolished for Police bail?

It would be appropriate for Police to be able to require monetary bonds and sureties. However, the Law Society understands that monetary bonds and sureties are seldom, if ever, imposed for Police bail. Perhaps inquiries could be made why they are almost never imposed.

Legislation for electronically monitored bail

Q15 - What is your view on whether the EM bail regime should be set out in legislation?

The EM bail regime should not be set out in legislation. Electronically monitored bail is simply a version of bail and there is already legislation governing the grant of bail. No separate legislative regime is necessary.

Q16 - What is your view on whether breach of EM bail should be an offence in addition to being a ground for arrest and reconsideration of bail?

Breach of EM bail should not be an offence. EM bail is a condition of bail, and it would be unfair to punish a person for breach of a bail condition, when they have not been found guilty of the original charge for which they were on bail.

Q17 - What is your view on whether time spent on EM bail should be taken into account in sentencing?

Time spent on EM bail should be taken into account in sentencing. In some cases defendants spend a long period under restrictive conditions while on EM bail. It should be open to the sentencing judge to take into account the length of time on EM bail and the degree of restriction on the defendant that has been imposed by the EM bail conditions.

Q18 - If time spent on EM bail is taken into account in sentencing, should there be some legislative guidance to assist the Courts in determining the appropriate discount (e.g. a set formula or guidelines specifying the types of factors relevant to deciding how time spent on EM bail should be taken into account)?

Some guidance to assist the Court in exercising its discretion to decide the amount of the discount for time spent on EM bail would be appropriate. However, a set formula would be likely to be problematic because the range of EM bail conditions will mean a variation in the degree to which they impose significant restrictions on, and hardship to, a defendant.

As a general concluding comment, the Law Society believes there is often an unwillingness on the part of the Police and the Courts to prosecute for breaches of bail. This means repeat offenders appear having breached their bail, sometimes numerous times, and the presiding Court often doesn't know.

The Law Society hopes that the above comments are of assistance to the Ministry of Justice. If you wish to discuss any matters raised in this letter please contact the Criminal Law Committee convener, Jonathan Krebs, through the Criminal Law Committee secretary, Rhyn Visser by phone (04) 463 2962 or email rhyn.visser@lawsociety.org.nz.

Yours sincerely



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President