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Our ref Jane Sanders
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Mr Lloyd Babb
Director
Criminal Law Review Division
Attorney General's Department
GPO Box 6
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Dear Sir

Review of the *Bail Amendment (Repeat Offenders) Act* 2002: Submission by Shopfront Youth Legal Centre

The Shopfront Youth Legal Centre is a free service for homeless and disadvantaged young people aged 25 and under. It is a joint project of Mission Australia, The Salvation Army and the law firm Freehills.

The Shopfront is based in Darlinghurst and serves the inner city area as well as other areas of metropolitan Sydney. The vast majority of our work involves criminal law. We have four solicitors who appear for defendants in Local, Children's and Districts courts on an almost daily basis.

We believe that we are in a good position to comment on the impact of the *Bail Amendment (Repeat Offenders) Act*. Not surprisingly, it has affected a large proportion of our clients. In general, the effect has been negative, with more of our clients being refused bail.

The "repeat offender" provision (*Bail Act* section 9B) is extraordinarily broad. For example, a person who is accused of an indictable offence and "has been previously convicted of one or more indictable offences" would include someone facing a shoplifting charge who has been cautioned by the Children's Court for a similar offence several years ago. Similarly, a person who has been found guilty of fail to appear many years in the past would also lose their presumption in favour of bail.

The Shopfront sees many young people who have become homeless in their teens and who have had some contact with the juvenile justice system during that time. Their juvenile offending may have been relatively trivial, and they may have refrained from re-offending for several years. However, they will lose their presumption in favour of bail if charged with an adult offence, even a relatively

minor one. We suggest that these are not really the types of offenders that the "repeat offender" amendments intended to target.

We note that the research conducted by BOCSAR shows a significant decline in failure to appear, especially in superior courts. At first blush, it would therefore appear that the "repeat offender" amendments are serving their stated purpose. However, we would suggest that this reduction in "absconding" comes at too high a price. The adult remand population has increased significantly, and the increase in Aboriginal and Torres Strait Islander people in custody is a matter of grave concern. If our clients' experiences are anything to go by, we imagine that relatively minor property offenders would account for a large percentage of this increase. In our view it would be helpful to have some further research done about the composition of the remand population, and how many remand prisoners are being held on relatively minor offences. Many of the Shopfront's clients are charged with property offences that do not generally warrant a custodial sentence, but are remanded in custody because of their prior records.

Of course, failure to appear, and re-offending on bail, could be eliminated altogether by refusing bail to all defendants. However, the objective of avoiding failure to appear and other bail breaches must of course be balanced against the fundamental right to liberty and the presumption of evidence. In our view, that the "repeat offenders" amendments have tipped the balance too far in favour of the former.

Incidentally, we take issue with BOCSAR's use of the term "absconding" to refer to a failure to appear on bail. To us, "abscond" implies deliberately avoiding appear in court or fleeing the jurisdiction. Indeed, the Macquarie Dictionary defines "abscond" as "to depart in a sudden and secret manner, especially to avoid legal process".

In our experience, most people who fail to appear do so inadvertently or for reasons not entirely within their control. For example, it is not uncommon for our homeless clients to lose their court papers and to lose track of the court date. People with a mental illness or intellectual disability may have difficulty keeping track of dates and may indeed be prevented from attending because they are acutely ill and/or hospitalised. Indigenous people are often hampered by family commitments, including (sadly) funerals. Practical problems such as lack of transport are also a factor. Some of our clients are unable to attend to court because they are simply unable to afford a train fare and are unable to organised alternative forms of transport. Some people choose not to appear at court on minor summary charges (soliciting, offensive language, etc) because of a perception that they will be convicted and fined in their absence and therefore it does not make any difference whether they attend or not. A small minority fail to appear due to fear of the outcome; however, very few of our clients deliberately avoid appearing in court.

In our experience, homeless or disadvantaged people will usually answer their bail if they have adequate support (eg from a social worker or welfare agency) and can overcome some of the practical hurdles mentioned above. Many of our clients have criminal histories and have failed to appear at court several times in the past, but their compliance with bail has dramatically improved once they are linked with appropriate social services.

We would respond as follows to the specific questions raised by the Attorney-General's Department:

1 Have you observed a change in the operation of bail laws since the amending Act?

It appears to us that more of our clients have been refused bail, at least by the police. There are many magistrates who will still grant bail despite the removal of the presumption in favour; however, some magistrates appear to treat *no presumption* as equivalent to a presumption against bail.

We would also comment that we have observed a significant increase in inappropriate bail conditions, mostly imposed by police, often in relation to trivial summary offences. Although the *Bail Amendment (Repeat Offenders) Act* is not responsible for this, it is reflective of a general climate in which personal liberty is increasingly being viewed as a privilege and not a right.

2 Section 9B(1) removes the presumption in favour of bail for persons subject to any form of conditional liberty. Is there need for distinctions to be drawn between types of conditional liberty?

We oppose the removal of the presumption in favour of bail for people on conditional liberty. However, if this is to be retained, we believe it should only apply to people who are subject to parole or suspended sentences, and perhaps those who are on bail for serious indictable offences.

We believe that people who are on good behaviour bonds or Children's Court probation orders, or who are on bail for less serious offences, should retain a presumption in favour of bail.

Ironically, people on conditional liberty may actually be *more* likely to answer their bail, and to refrain from re-offending, than those who are not, because they are subject to some form of supervision.

3 Has the amended definition of community ties assisted ATSI persons in applications for bail?

Our observation is that it definitely has not assisted. We have seen no discernible improvement in police and court attitudes to indigenous people and their community structures. The statistics speak for themselves in this regard.

In our view, this amendment (along with the ones relating to vulnerable people and bail hostels) is a token gesture which has not been backed up by adequate resources for accommodation, social support, and training of police and magistrates.

4 Has the requirement that the court or authorised officer consider the special needs of vulnerable persons assisted those persons? Your observations in relation to persons with mental illnesses or intellectual disabilities would be particularly useful in due of the lack of statistics for this group.

As with ATSI people, we have noticed no discernible improvement in the way police and courts deal with people with mental illnesses and intellectual disabilities. There is a desperate need for more resources to be devoted to health

and disability services, in order to make it easier for defendants to obtain and comply with bail.

5 In your observation, has the amending Act had any impact on the rate of non-appearance or the level of repeat offending?

Although the statistics show that the rate of non-appearance has declined, we have not noticed any change in the appearance rate for our clients. In our experience, the best way to reduce non-appearance and re-offending rates is to ensure the provision of adequate accommodation, health and support services.

6 There are no bail hostels currently operating in NSW for adults and only one for juveniles. Do you consider there to be a need for bail hostels?

For the reasons discussed above, we believe there is a definite need for bail hostels or some similar form of supported accommodation. The need is particularly acute for indigenous young people. It is disappointing that the *Bail Act* was amended to acknowledge the existence of bail hostels, without any funding being provided to open more hostels.

We would be happy to discuss any maters arising from this submission, including providing client case studies if requested. Please feel free to contact me at jane.sanders@freehills.com or on 9360 1847.

Yours faithfully

Jane Sanders
Solicitor