

Bail in New Zealand; reviewing aspects of the bail system.

Public Consultation. Ministry of Justice, March, 2011.

Submitted by:

Homeworks Trust
Po Box 20710
Glen Eden
Auckland 0641

Contact:

Debbie Hager
(09) 8169339
(021) 058 8567
debbie.neil@clear.net.nz

Introduction.

Thank you for the opportunity to present a submission on the Bail in New Zealand; reviewing aspects of the bail system discussion document.

We are sending this submission from the perspective of domestic and sexual violence against women and children. Therefore the submission is concerned with the provision of bail to people who have abused their partners, children, family members or others they are in a domestic relationship with.

Homeworks Trust would be happy to speak to this submission if this would be useful to your investigation.

We have consulted with:

- Waitakere Police
- Waitakere Community Law Office
- Deborah McKenzie from Auckland Sexual Abuse Help
- Shine
- Coalition for the Safety of Women and Children, Auckland

Also we have:

- reviewed the various evaluations of the Waitakere Family Violence Court
- accessed other relevant research

Our submission is based on all of the information that we have received. The case studies are from service providers affiliated to the networks we have consulted with.

Domestic/Family Violence.

Domestic or family violence is based on power and control of one person or person's by another.¹ It involves a pattern of behaviours that in isolation may seem trivial, but together create a climate of fear that enables one person to control another.² This is a type of offending that has very specific victims as specified by the Domestic Violence Act 1995.

- “ (1) For the purposes of this Act, a person is in a *domestic relationship* with another person if the person—
 - (a) is a spouse or partner of the other person; or
 - (b) is a family member of the other person; or
 - (c) ordinarily shares a household with the other person; or
 - (d) has a close personal relationship with the other person.

The offending can include physical, emotional, sexual, verbal, financial and mental abuse of another person with the intention of gaining control over that person. The victim can be a partner, child, older parent or a flat mate. Predominantly this is a gendered crime - men abusing their female partners or relatives.

“Male role control works by physically, verbally or emotionally destroying your partner's physical, intellectual and emotional integrity so that she will be afraid to be herself, will control herself, and therefore be available to be controlled by you.”³

The abusive behaviour may or may not be apparent in any other relationships the abuser has with family, friends or colleagues.

Arrest and conviction can increase risk for victims as perpetrators can feel that they have less control over the victim because of the interference of the Court. Therefore all Court procedures need to ensure victim safety.

Our Submission

Currently in the Waitakere Family Violence Court (WFVC) most offenders are granted bail which comes with conditions including:

- to make no contact with the victim for two weeks until the second court appearance when bail conditions are reviewed
- to reside at a specified address away from the victim
- (sometimes) to seek alcohol and drug counselling.

¹ Domestic Abuse Intervention Project, Duluth, Minnesota, accessed April 27th, 2011
<http://www.theduluthmodel.org/>

² McGray S. Talking Responsibility: Discourses of Accountability at the Waitakere Family Violence Court. 2008 Thesis, Massey University p 6

³ Man Alive, Stopping Violence Programme Manual. 1995

When bail is reviewed, contact with the victim is usually by consent of the victim and pertains to domestic matters, care of children etc. "... bail was granted with standard bail conditions which begin with non-association and often changed to association over time"⁴ If the offender is high risk police will oppose bail and this is usually successful. In most cases however, the offender will get bail. In their review of the WFVC Coombes et al. noted that after arrest, in many cases, bail conditions are a critical part of keeping victims safe during the court process.

"...victim protection relies heavily on bail conditions set by the WFVC. Legal protection in the form of custodial remand was ordered in 33 (6%) of arrest cases. 13 (40%) of these custodial remands were made at the defendants first bail hearing and the remaining 20 were made later in the Court process, often because the defendant had been arrested for another occurrence. This suggests that, in the main, custodial remand is instituted rarely and most likely to be used to protect a victim whose safety has been compromised during the Court process."⁵

Existing bail laws

Under the existing legislation, bail must be considered unless there are good reasons to refuse it. One of these reasons is the risk that the defendant will interfere with witnesses or evidence. In cases of family violence there is increased risk of harassment and intimidation of witnesses, as it is just a continuation of the offending that has occurred prior to arrest. As the offending is about power over another person, offenders in family violence cases frequently use this power to threaten and intimidate their partners or family members into withdrawing charges, refusing to give evidence or change their stories. This makes it important to consider this power dynamic when deciding about the granting of bail and types of bail including electronic bail.

Statistics about offending while on bail

Statistics are presented in the discussion paper about offending while on bail and electronically monitored bail. These do not provide information about who the offending is against and, therefore, if it is harassment of the previous victim. (see Appendix One for a list of questions asked.)

We were not able to get answers to our request for more specific information. This makes it difficult to respond based on the information provided. If the offending is towards the original victim then the risk to that person and her family and friends is high and bail should be rescinded.

Being charged with a domestic violence offence can be seen by some defendants as a reason/excuse for further abusing their partners or other victims. If the defendant is

⁴ Coombes L, Morgan M, , McGray S Counting on Protection: a statistical study of the Waitakere Family Violence Court. 2007. Massey university, Viviana, Man Alive p 27

⁵ Coombes L, Morgan M, , McGray S Counting on Protection: a statistical study of the Waitakere Family Violence Court. 2007. Massey university, Viviana, Man Alive p 27

bailed they have time for retribution. This can further endanger the victim, family and friends.

Further information was provided about sexual violence convictions:

The "violent offences" classification in the tables in Appendix 2, include sexual offences involving violence, while the "other offences against the person" includes non-violent sexual offending.

1. In the five year period 2004 – 2008, a sexual offence was the most serious offence committed on bail by a total of 375 defendants. Put another way, a sexual offence was the most serious offence committed by 0.6% of all defendants who committed an offence on bail in 2004 – 2008.
2. Of the 375 defendants, 154 were convicted of non-violent sexual offending (such as unlawful (consensual) sexual connection with a person under 16), while the remaining 221 were convicted of sexual violence (including rape and indecent assault).⁶

Many of these offences will be against people known to the perpetrator. These statistics indicate again the importance of an informed risk assessment as part of the bail decision.

50. Victim's views on bail and protection of witnesses

One of the things we have learnt from experience in the WFVC is the importance of having a community victim advocacy service that provides information to the courts including being able to represent the victims views on bail and bail conditions.

“Advocates play a crucial role in collating and sharing information”⁷

In Waitakere, victim advocates have speaking rights in the court “they provide the court with information on victim safety and take on the role of mediating the relationship between the court and the victim”⁸ This is a different role from the victim advisors, who help victims understand, and keep in touch with, the court processes as they are occurring.

“The victim's views on the defendant's bail conditions are taken into account by presenting them to the Court in a Memorandum or a Victim Impact Statement....Police and CVS (Community Victim Services) are expected to liaise over bail conditions.”⁹

All of these things mean that for family violence cases it is important that:

- information is provided to the Judge from a variety of sources including the victim
- judges have access to prior convictions in order to assess the likelihood of reoffending while on bail

⁶ MOJ, via Deborah McKenzie, Auckland Sexual Abuse Help email, April 23rd, 2011

⁷ McGray S. Talking Responsibility: Discourses of Accountability at the Waitakere Family Violence Court. 2008 Thesis, Massey University p 25

⁸ Ibid.

⁹ Morgan M, Coombes L, McGray S. An Evaluation of the Waitakere Family Violence Court Protocols 2007. Massey University and Waves p 29

- victim's views are presented by an advocate who has specialised family violence knowledge, has developed a relationship with the client and is therefore able to represent the level of risk that is posed to the victim and others associated with her
- bail conditions reflect the level of risk of repeat offending posed by domestic violence cases
- breaches of bail are assiduously policed and prosecuted
- offenders are never bailed to the victims address
- remand in custody should always be considered an option when the victim, her children or related a person's safety is at risk

"I have recently seen a client who has become homeless with her children following her perpetrator being bailed to her address. The client was residing with her uncle and her cousin and her cousin viciously raped her. Her uncle was put in a position of choosing to support his son over his niece. If the perpetrator had been remanded in custody than my client would have had recovery time from her injuries and it would have allowed her time to make alternative arrangements for her and her families accommodation.

"This couple have been in a relationship albeit pretty unstable for 7 years. During a party at their home where a lot of alcohol was consumed, the victim (woman) was stabbed in the neck by her partner. This happened in front of a few people. He was bailed back to the home address where she living with their two children aged 8 yrs and 4 years."

"I've been working with a couple who are in a relationship where a lot of abuse had gone unreported. When she finally made a complaint of being pushed off a deck, (ruptured her spleen) petrol poured over her, and lots of kicking and hitting, this man was bailed back to the home address where she was living with their two children aged 2 and 1 yrs."

These three cases have been in the past 4 months.

In cases of intimate partner violence, and some cases of the abuse of an elderly parent, there is often significant pressure brought to bear on the abused person to ask for the defendant to be bailed back to the victims address. If defendants accused of violent crimes with a family violence component were remanded in custody, it would protect victims from being revictimised and intimidated in this way.

6. Bail for murder and other serious violent and sexual offences

“Defendants charged with serious violent and sexual offences were remanded in custody far more often than defendants charged with less serious offences”¹⁰

When a murder is related to power and control – the murder of an intimate partner or other abused person, there is increased risk to other family and friends if the defendant is bailed. This risk is also high in cases of attempted murder and threats to kill. When a defendant has killed his partner, parent or other family member, others who have threatened his authority may also be at risk.

In these cases we recommend that the defendant be held in remand rather than released on bail, in order to protect all members of the victim’s family.

107. Reverse burden of proof

We support the reverse burden of proof provisions outlined in the discussion document. In addition, we recommend that there should be reverse burden of proof for:

- all sexual crimes against children or young people
- cases of domestic violence where there is potential high risk to the victim or other family members

6.3 Legislation for electronically monitored bail.

Currently, electronically monitored bail is usually only used by the High Court for serious offences including serious violence and sexual offending. A person can only apply for EM bail if they have been remanded in custody and have been bailed for previous offences.

The process of Electronically Monitored Bail (EM bail)

Defence counsel makes the application for EM bail, in a process similar to home detention. The court then gives Police Prosecutions 3 weeks to research the EM bail application and report back before a final decision is made by the Judge.

The Police assign the investigation of the case to assessors who are ex-home detention Supervisors. They interview the officer in charge of the case, the victim and the neighbours and determine the appropriateness of the offender being given EM bail.

Victims definitely have the opportunity to oppose EM bail. It is unlikely that EM bail would be granted if young children lived at the house as police are aware from home detention cases that offenders get very frustrated and angry when confined to a small space and this can place children in greater danger.

¹⁰ Bail In New Zealand: reviewing aspects of the bail system. Public Consultation document. 2011 Ministry of Justice. P 19

The address nominated by the defendant is visited and checked out and occupants of the home are asked if they want the offender to get EM bail at their house. It is not imagined that EM bail would be granted for offenders to their victim's address.

In the chosen house a transmitter is installed that allows the offender about 7 meters range (left, right, up, down) before being activated. The bracelets are monitored by Chubb Security. If the offender leaves the property the alarm is activated and Chubb Security call Northcomms and advise that the offender has absconded. The police will then visit the address. There is a process in place whereby the Northcomms call - taker will contact the victim and let her know the offender has left the property. Offenders can apply to have a transmitter fitted at their place of work. If granted, the alarm is switched off between certain hours to allow the defendant to get to work. This can be up to an hour and a half travel time. The offender is not monitored during this time.

Time on EM bail does not get taken off the final sentence passed, like remands in custody do.¹¹

Concerns about EM bail include that:

EM bail is not appropriate for domestic violence offences – or any offences that include stalking or harassment – because:

- for the safety of the victim, the offender can't be bailed to the victim's address or the address of people who could be influenced to harass or abuse the victim
- the offender can still harass and abuse the victim and her friends and family electronically from another address
- defendants who get remanded in custody are usually the most dangerous offenders who often have no respect for court orders and therefore should be the most monitored
- victims in domestic violence situations are often in a position where they are not able to safely decline an application for EM bail for fear of offender retaliation
- when offenders get 1 - 1.5 hours travel time without their alarm activated, to get to work, victims or friends and family of the victim, would be very susceptible to contact, intimidation or assaults as the offenders are not monitored for these periods
- assessment staff are not trained in the dynamics of family violence or how to assess risk in these circumstances
- if an offender has been held in custody and then granted electronic bail he may be very angry with the victim and she will be more at risk

In these cases, where the offender has motive and means to continue to offend against the victim, it is important for victim safety that the offender remains in custody.

Remand in custody provides services time to work with women in their own homes. For serious offences, if offenders are bailed back to their homes, women and children have to go to refuge to find safety.

¹¹ Deborah McKenzie, Shine, 2006. Personal correspondence, email April 10th, 2011

7. Youth Offenders

At the moment 17, 19 year olds can only be arrested for breach of bail if they are at risk of interfering with evidence, offending or running away. As indicated before, people who offend against family and intimate partners are very likely to continue to offend and interfere with evidence by threatening and intimidating victims and victims friends and family. This also includes young men offending against girl and boy friends, siblings and parents. While we recognise the potential harmful effects of locking young people up with adult offenders, if the offence is domestic or sexual violence then the risk of offending is as great as with adult offenders and therefore the offender should be denied bail.

If bail is granted and there is an offence related to the original domestic or sexual violence charge, then bail should be rescinded.

We also recommend in these instances that there be a specialist branch of CYF to work with these offenders who are not yet adult, but who currently receive no services from CYF.

8. Ensuring Bail is not granted in return for information

We recommend that bail is not granted in return for information. In domestic and sexual violence cases, offenders may appear to be cooperative with authorities to gain concessions. This good, cooperative behaviour is not an indication of good will towards the victim, but an indication of the controlled nature of the abusive behaviour – abuse only happens to the victim and other people that the offender chooses to abuse.

176, 177. Courts proceeding in the absence of the defendant.

We believe that cases can proceed in the absence of the defendant, but only to deal with a Warrant to Arrest and discuss/impose further bail conditions. In this situation it must be mandatory that the victim's views are sought and presented to the court as part of this process.

180. Incentives and sanctions to promote compliance with procedural obligations

As offenders in domestic violence situations frequently use court processes as opportunities to further harass and abuse their partners or other victims, we recommend that this behaviour be taken into consideration as an aggravating factor in sentencing.

181. Police review of warrants to arrest

Police are putting in place processes to prioritise warrants to arrest on the basis of the defendant's risk. We recommend that domestic and sexual violence be included in this process as breaches of bail conditions for victims and families are potentially lethal in these situations.

9.2 Monetary bonds and sureties in the District Court

We feel that the original reasons for not introducing monetary bonds are still valid and would recommend that they are not introduced.

The bonds would privilege those with more money, could place extra financial hardship on abused women and families and could result in offenders buying the right to continue to stalk, intimidate and harass their victims.

General comments about bail related to family and sexual violence

Remanding people in custody when they have committed offences under the Domestic Violence Act means that victims have time to sort themselves out and contact appropriate agencies for support.

Bailing an offender to another address can put extra financial strain on the victim as money must be found for the extra rent and associated costs. Often these come out of the budget that the victim has to manage her household. Holding offenders in custody means that this extra cost is not incurred.

Anecdotal evidence suggests that when offenders are bailed for domestic violence offences, violence frequently occurs and remains unreported, as women are too afraid to call the police again. Also, many women have experience that police don't follow up either breaches of bail or protection orders, if the breach is not considered serious by the police, so they lose faith in the system that is meant to ensure their safety.

All court staff, including judges, lawyers and police require training about the dynamics of domestic/family violence and sexual violence. Staff who make decisions about bail also require training in risk assessment to ensure that risk is fully considered in the bail process.

All staff who make decisions about bail relating to sexual and domestic/family violence require access to victim advocates who can accurately represent the wishes of the victim and the risk to the victim, family and friends.

Thank you.

Who are we?

Homeworks Trust is an Auckland based group of women who are concerned about the lack of specialised housing options and services available for women.

Structure and membership

Homeworks Trust is a voluntary charitable trust. Governance is vested in the Board. There are no paid staff.

Appendix One

Clarification requested.

Further information was requested about Appendix 1 of the discussion document (Bail and remand in custody of defendants charged with serious violent or sexual offences 2004 – 2008) to clarify what proportion of the various offences listed are offences against a partner, other family member or a person in a domestic relationship with the offender and what the gender break down is of the offenders and victims – i.e. is it men harming men or men harming women and children etc.?

In relation to Appendix 2, we asked how many of the offences in the “violent offences” and “other offences against the person” categories are:

- offences against a partner or other family member or a person in a domestic relationship?
- offences against a partner or other family member, or person in a domestic relationship, where the current charge relates to violence against that person – i.e. is a continuation of a pattern of family violence offences for example under the Domestic Violence Act, attempted murder or sexual offending? and how many of these offences are committed by men, how many by women?

We also asked, in relation to offences committed on electronically monitored bail, if it could be identified which of the offenders had offended against the original victim or a member of the immediate or extended family and/or friends of the original victim and what these offences had been. We also requested information about the gender of the offenders and their victims in relation to the first offence and then the subsequent offending on bail.

None of this information was provided.