THE LAW SOCIETY
OF NEW SOUTH WALES

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15 May 2013

The Hon. Greg Smith SC MP
Attorney General and Minister for Justice
Level 31
Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Attorney General,

Bail Bill 2013

The Law Society's Criminal Law Committee and Juvenile Justice (Committees) have reviewed the *Bail Bill 2013*, which was introduced into Parliament on 1 May 2013.

The Bill is an improvement on the current legislation, which is overly complex and not easily comprehensible. The Committees support the removal of presumptions in relation to the granting of bail. The Committees are particularly pleased that the Bill recognises the fundamental principles of the New South Wales criminal justice system including the presumption of innocence and the general right of an accused to be at liberty before trial and sentence.

The Committees have concerns with some provisions of the Bill, as discussed below.

Clause 17 – Requirement to consider unacceptable risk

Clause 17(3) – 'unacceptable risk'

The Committees note that the type of matters which might bear upon the question of the existence of an unacceptable risk may not be susceptible to exhaustive definition. Circumscribing the matters to which the court can have regard in making a bail determination runs the risk of preventing the court from being able to consider some matters which might be very relevant.

Whilst clause 3(2) requires the bail authority to have regard to the presumption of innocence and the general right to be at liberty (a most welcome provision), it is unclear how this requirement is to be given effect within the structure of clause 17(3). The addition of a catch-all consideration would be one way to cure that problem. Another may be to add a specific sub-section to clause 17(3) in terms similar to clause 3(2).

Clause 17(4) – 'serious offence'

The Government response to the Law Reform Commission Report stated that, for the purpose of assessing unacceptable risk, a serious offence meant 'an offence of a sexual or violent nature or with a weapon, or which the bail authority considers is likely to affect the victim or the community'. This indicated an exhaustive definition.

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'Serious offence' is not defined in clause 17. However, clause 17(4) states the matters to be considered when deciding whether an offence is a serious offence. The Government response is reflected in clause 17(4)(a) and (b) but goes further in that it does not limit the matters that can be considered and adds a third limb clause 17(4)(c), 'the number of offences likely to be committed or for which the person has been granted bail or released on parole'.

'The number of offences likely to be committed', goes to the prospect of future offending (and prevalence of future offending) and does not assist in assessing whether the offence is a serious offence. Likewise, the volume of past offences or alleged offences does not assist that assessment. These concepts confuse the issue.

An exhaustive and objective definition of serious offence for the purpose of clause 17 would be useful.

Clause 21(4) – an offence is not an offence for which there is a right to release if the accused person has previously failed to comply with a bail acknowledgement etc.
This provision flows from the ability to impose conditional bail on an offence for which there is a right to release and means that a decision to refuse bail can be made for an offence which is not punishable by a term of imprisonment.

The Committees submit that bail should be dispensed with altogether for fine-only offences. The legislature has indicated that it is not appropriate to detain a person for an offence not punishable by imprisonment. An accused should not be in custody for any offence that does not carry a penalty of imprisonment.

Clause 30 – Bail conditions include enforcement conditions
The Government response to the Law Reform Commission Report indicated that the impact of the amendments incorporating enforcement conditions into the current Act (*Bail Amendment (Enforcement Conditions) Bill 2012*) would be assessed before the new Act commences. The Committees request to be consulted in relation to this assessment.

Clause 33(2)(b) – Bail acknowledgement requires the accused person to notify the court of any change in the person's residential address
Given that the contravention of a bail acknowledgement can lead to bail being revoked, and the difficulty for those who are homeless to comply with this requirement, the requirement to notify the court of any change in residential address should only apply if residing at a particular address is a condition of bail.

Clause 50 – Prosecution to make detention application
While in practice prosecutors oppose applications for bail, the Bill introduces a new concept of a detention application (an application for the refusal or revocation of bail).

The Bill should indicate the circumstances in which a detention application under clause 50 can be made after bail is granted. For example, as for release applications, there should be limits on the number of applications that can be made unless there is new information of changed circumstances (clause 74).

Clause 51 – Interested person may make variation application
Under clause 51(3) an interested person includes ... (c) the complainant for a domestic violence offence, and (d) the person for whose protection a domestic violence order is or would be made in the case of bail granted on an application for a domestic violence

order. There is no need for the legislation to give standing to third parties to make bail applications. All bail applications should be funnelled through those parties before the court – the prosecutor on behalf of the State and the accused person.

Clause 51(8) provides that a court or authorised justice must not vary a bail decision on application of a person referred to in clause 51(3)(c) or (d) unless the prosecutor has been given a reasonable opportunity to be heard. The accused person should also have been given a reasonable opportunity to be heard.

The Committees acknowledge the need to give the prosecution reasonable notice of a proposed variation. However, the experience of Committee members is that the defendant's ability to obtain a legitimate (and sometimes urgent) variation is often thwarted by bureaucracy and/or by onerous notice/listing requirements ostensibly aimed at according procedural fairness to the prosecution. For some groups of people, especially young people, or those with cognitive and mental health impairments, the barriers to having a bail variation listed can be considerable. The Committees submit that clause 51(7) be amended to permit a bail variation to be listed where the urgency of the application or the interests of justice require it.

Clause 51(7) also provides that reasonable notice much be given of a bail variation application ('subject to the regulations'). The Committees would appreciate the opportunity to be consulted during the drafting of the regulations to ensure that they do not impede accused persons being able to seek appropriate bail variations.

Clause 66(2) – The Supreme Court may hear a detention application if bail for the offence has previously been granted by another court

This provision marks a significant departure from current law and practice. Currently, if bail for an offence has previously been granted by another court, the prosecutor can go to the Supreme Court for a stay and this is limited to very serious offences. The ability of a prosecutor to go to the Supreme Court for a detention application should be limited to very serious offences.

Clause 69(1)(c) – The Local Court may hear a bail application for an offence when a bail decision has been made by the Supreme Court only if it is satisfied that special facts or special circumstances justify the hearing of the bail application

This provision reflects the test for bail applications for appeals from a higher court where a person has been convicted of a very serious offence. It is unnecessarily strict and will be unworkable.

Clause 69(1)(c) does not sit well with clause 57, which reflects current practice and provides that the Local Court must not vary a bail condition imposed by a higher court which the higher court has directed is not to be varied, unless both the accused and prosecutor agree to the variation. There is a significant difference between consent and the test in clause 70(1)(c).

Clause 76(c) – Regulations may make provision for the circumstances in which a bail application may be heard in the absence of the accused person or the accused person's legal representative, as if the person or the representative were present

It is difficult to comment on the effect of this clause without seeing the regulations. However, while the hearing of a bail application in the absence of the accused person may be in circumstances which benefit the accused person, it may also be in circumstances which operate to the detriment of an accused person. A common example is following conviction and sentence in the Local Court, when an accused appeals to the District Court and makes an application for bail. Where the decision is to

the detriment of an accused person these bail applications should be heard in the presence of the parties and not in the Magistrate's chambers.

Where the accused person and/or the accused person's legal representative are present at court, the bail application should not be heard in the absence of the accused person if the resulting bail decision is to the detriment of an accused person.

Clause 77 – Actions that may be taken to enforce bail requirements
While the Committees support clause 77, which provides a range of options for police when dealing with breaches of bail, it would be preferable if the Bill enacted the Law Reform Commission recommendation that arrest is the last resort.

Yours sincerely

John Dobson
President