



THE LAW SOCIETY  
OF NEW SOUTH WALES

Our Ref: RBG

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The Hon. John Hatzistergos MLC  
Attorney General for NSW  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

Dear Attorney General,

### **Draft Bail Bill 2010**

The Law Society's Criminal Law Committee and Juvenile Justice Committee (Committees) have reviewed the draft *Bail Bill 2010* and the Criminal Law Review Division's Review Document and bring the following comments to your attention.

### **Primary position**

The Committees' primary position is that the draft Bill should not be introduced into Parliament. The review of the current Bail Act should be referred to a Parliamentary Committee or to the NSW Law Reform Commission to allow sufficient time to develop an improved and workable new Bail Act. The two week consultation period is completely inadequate for proper consideration of such an important piece of legislation.

The Committees have always supported a thorough review and re-write of the Bail Act to simplify it and make it more workable. The Criminal Law Review Division recommended in its Review Document that "a new Act be drafted in plain English, with material presented and structured in a logical manner that is accessible to the reader and that is easy to apply and navigate". Unfortunately the draft Bill does not achieve this goal. The provisions are poorly drafted, the operation of the Bill is complicated, and the new levels of offences are unnecessarily complicated.

The removal of the current s 32 criteria from the Bill and an inadequate objects section provides little guidance for decision makers, and will likely result in an increase in the number of people who are refused bail.

### **Objects and Criteria to be considered in bail applications**

If the Bill is to proceed, it is essential that the objects and eligibility for bail clauses (clauses 3, 48 and 49) are amended.

Section 32 of the current Act provides detailed criteria to be considered when a decision maker is making a determination as to the grant. Section 32 provides a fair balancing

act between the interests of the accused and the protection of the community and victims. Section 32 is the cornerstone of the current Act and its omission from the Bill is of great concern to the Committees.

Clause 48(1) provides that in determining a bail application a bail authority is to have regard to the objects of the Act. The Review Document specifically recognises the presumption of innocence as one of the three broad principles to be considered in making a complex risk assessment scheme under the Act. However, clause 3 only lists four objects and makes no reference to the interests of the accused to be at liberty.

The current objects in clause 3 are insufficient, and much harsher and more restrictive than the criteria in the current Act. For example, one of the objects in clause 3 is (b) "to prevent the commission of *any* offences by a person required to appear in proceedings until the proceedings have been finally determined". This is in stark contrast to the current Act which requires consideration of the probability that the accused will commit a *serious* offence.

The objects do not promote a balancing act but rather an absolute e.g. "to ensure" that a person appears rather than taking into consideration the probability that a person will appear. Clearly the way to "ensure" that a person appears is to refuse bail.

The Review Document states that "one of the major challenges for those applying the Act is balancing a person's right to liberty and the principle of the presumption of innocence, with securing a person's attendance at Court and ensuring the safety and welfare of the community". Clauses 3 and 48 do not provide proper guidance to decision makers and almost eliminate the balancing act between competing considerations. A literal interpretation of the objects provides little scope to justify the grant of bail.

The Committees' proposed amendments are as follows:

#### Objects of the Act

- Clause 3 should be redrafted as follows:

The object of this Act is to ensure that there is an appropriate balance between the need to ensure that a person required to appear before a court in criminal or other proceedings appears as and when required by the court and the need to uphold the presumption of innocence.

#### Criteria to be considered in bail applications

- Clause 48 'Eligibility for bail' should be renamed 'Criteria to be considered in bail applications'.
- Clause 48 should be redrafted as follows:

In making any bail decision in relation to a person, a bail authority is to have regard to the objects of this Act by considering the following criteria:

(a) the probability of whether or not the person will appear in court in respect of the offence for which bail is being considered, having regard only to:

- (i) the person's background and community ties, as indicated (in the case of a person other than an Aboriginal person or a Torres Strait Islander) by the history and details of the person's residence, employment and family situations and the person's prior criminal record (if known), and
  - (ia) the person's background and community ties, as indicated (in the case of an Aboriginal person or a Torres Strait Islander) by the person's ties to extended family and kinship and other traditional ties to place and the person's prior criminal record (if known),
  - (ii) any previous failure to appear in court pursuant to a bail undertaking or pursuant to a recognizance of bail entered into before the commencement of this section, and
  - (iii) the circumstances of the offence (including its nature and seriousness), the strength of the evidence against the person and the severity of the penalty or probable penalty, and
  - (iv) any specific evidence indicating whether or not it is probable that the person will appear in court, and
- (b) the interests of the person, having regard only to:
- (i) the period that the person may be obliged to spend in custody if bail is refused and the conditions under which the person would be held in custody, and
  - (ii) the needs of the person to be free to prepare for the person's appearance in court or to obtain legal advice or both, and
  - (iii) the needs of the person to be free for any lawful purpose not mentioned in subparagraph (ii), and
  - (iv) whether or not the person is, in the opinion of the authorised officer or court, incapacitated by intoxication, injury or use of a drug or is otherwise in danger of physical injury or in need of physical protection,
  - (v) if the person is under the age of 18 years, or is an Aboriginal person or a Torres Strait Islander, or has an intellectual disability or is mentally ill, any special needs of the person arising from that fact, and
  - (vi) if the person is a person referred to in section 9B (3), the nature of the person's criminal history, having regard to the nature and seriousness of any indictable offences of which the person has been previously convicted, the number of any previous such offences and the length of periods between those offences, and
- (b1) the protection of:
- (i) any person against whom it is alleged that the offence concerned was committed, and
  - (ii) the close relatives of any such person, and
  - (iii) any other person the authorised officer or court considers to be in need of protection because of the circumstances of the case,
- (c) the protection and welfare of the community, having regard only to:
- (i) the nature and seriousness of the offence, in particular whether the offence is of a sexual or violent nature or involves the possession or use of an offensive weapon or instrument within the meaning of the *Crimes Act 1900*, and
  - (ii) whether or not the person has failed, or has been arrested for an anticipated failure, to observe a reasonable bail condition previously imposed in respect of the offence, and
  - (iii) the likelihood of the person interfering with evidence, witnesses or jurors, and

(iv) whether or not it is likely that the person will commit any serious offence while at liberty on bail, but the authorised officer or court may have regard to this likelihood only if permitted to do so under subsection (2), and

(v) if the offence for which bail is being considered is a serious offence, whether, at the time the person is alleged to have committed the offence, the person had been granted bail, or released on parole, in connection with any other serious offence, and

(vi) if the offence for which bail is being considered is an offence that involves the possession or use of an offensive weapon or instrument within the meaning of the *Crimes Act 1900*, any prior criminal record (if known) of the person in respect of such an offence.

- Clause 48(2) to be omitted.
- Clause 49(1) should be amended as follows:

The question of whether bail should be granted, refused or revoked in a particular case is to be decided by reference to the classification applicable to the offence in respect of which the bail decision is to be made and the criteria to be considered in bail applications in s 48.

Detailed comments on the remaining provisions of the Bill are contained in the attached Annexure.

Yours sincerely,



Mary Macken  
President

## Annexure 1

### Detailed comments on the provisions of the Bill

The Committees note that there has been a great deal of discussion recently about the problems with the operation of the Bail Act and its impact on young people. These problems are identified and reported by the Bureau of Crime Statistics and Research, 'Recent trends in legal proceedings for breach of bail, juvenile remand and crime', May 2009, the Noetic Solutions Report 'A Strategic Review of the New South Wales Juvenile Justice System: Report for the Minister of Juvenile Justice', April 2010 and by the Youth Justice Coalition, 'Bail Me Out: NSW Young People and Bail', February 2010. The Committees are very disappointed that neither the Review Document nor the Bill even attempt to respond to or to rectify the issues and recommendations that are raised in these reports.

#### **Clause 3**

To be amended as outlined above under 'Objects and Criteria to be considered in bail applications'.

#### **Clause 8**

The wording in clause 8(1) "Bail confers an entitlement on a person to be at liberty, instead of in custody...", suggests that an accused is not entitled to be at liberty. This statement further, and unnecessarily, erodes the presumption of innocence.

The Committees understand the issue clause 8(4) section is trying to address, however the clause requires a tighter definition of "surrendered to the custody of the court".

#### **Grant of bail when not in custody**

The Bill does not make provision for granting bail when the accused is not in custody e.g. when an accused presents himself/herself to the police station, they could be given a bail CAN or conditional bail without having to be entered into custody. The Committees would like section 15 of the current Act replicated in the Bill.

#### **Clause 12**

Clause 12(b) provides that bail ceases to have effect if the person granted bail is convicted of the offence in respect of which bail was granted. While this reflects the procedure in the Superior Courts, it is a departure from practice in the Local Court and Children's Court where bail normally continues until a court finally disposes of a matter.

#### **Clause 15**

Grant of bail to "non-offenders" should be amended to "persons other than the accused".

#### **Clause 18**

The language "A police officer who charges a person..." in clause 18(1) is antiquated and may cause confusion, as criminal proceedings are now commenced by the issuing of a range of court attendance notices.

#### **Clause 19**

Clause 19 requires amendment to allow a person to communicate with a legal practitioner *before* a bail decision is made.

#### **Clause 28**

The Committees seek input into the drafting of the regulations relating to bail applications.

**Clause 36**

The Committees are disappointed that clause 36 replicates s22A of the current Act without amendment.

It is widely acknowledged that s 22A has contributed to the dramatic increase in the number of children held on remand. The number of children held on remand is contrary to the principles of the Children's Court and the juvenile justice system that gives special recognition and treatment to young people, as required by the International human rights instruments to which Australia is a signatory. While the 2009 amendments to s 22A were a step in the right direction, the Committees maintain the position that clause 36 is too restrictive and should not apply to children.

**Clause 40**

Under the current Act where an accused person is refused bail an adjournment of the hearing cannot exceed 8 days except with the consent of the person. Clause 41(1)(a) has extended the length of adjournment to 42 days. The Committees are completely opposed to this amendment. The current 8 day period should be retained.

**Clause 41**

Under clause 41(3)(a), if a person has been granted bail but remains in custody because of a failure to meet a residential requirement, notice must be given to an appropriate court within 2 days after the person is received into custody. The Committees support this provision.

The Committees suggest the inclusion of an additional sub-clause between clause 41(4) and (5) requiring that the matter must be relisted and reviewed as soon as possible.

**Clause 45**

Clause 45(1) provides that the requirement for bail is to be dispensed with in respect of any offence for which a youth justice conference is convened or proposed to be convened. This is appropriate as a referral to a youth justice conference will always result in a non custodial outcome. The qualification in clause 45(2) is undesirable and should be deleted.

**New Clause**

Part 5 should contain a new clause "Bail to be dispensed with for certain offences" and this section should provide that bail must be dispensed with for all fine only offences.

An accused should not be in custody while awaiting trial for an offence that does not carry a penalty of imprisonment. It is the Committees' view that this principle should be enshrined in the Bail Act.

**Clause 48**

To be amended as discussed above under 'under 'Objects and Criteria to be considered in bail applications'.

**Clause 49**

To be amended as discussed above under 'Objects and Criteria to be considered in bail applications'.

**Clause 51**

Clause 51 does not provide a comprehensive definition of a "minor offence". The use of levels in the Bill is unnecessarily complicated and the presumptions in the current Act are easier to understand. A minor offence should always be a level 1 offence.

Clause 51(2)(a) should be deleted as bail should be dispensed with for fine only offences under Part 5 as suggested above.

The Committees' position is that a minor offence should always be a level 1 offence and therefore clause 51(3) and (4) should be deleted. If this amendment is not adopted then clause 51(4) should be amended so that the failure to appear relates to the current offence.

**Clause 56**

Clause 56 provides that an offence is a level 3 offence if it is a level 3 offence under Schedule 1.

Clause 17 of Schedule 1 should be amended to read as follows:

"An offence (other than a minor offence) is a level 3 offence if the offence is an indictable offence and the person who committed or is alleged to have committed the offence has previously been convicted *for any offence on indictment.*"

**Clause 58**

Clause 58 provides that an offence is a level 4 offence if it is a level 4 offence under Schedule 2. Given the extremely short consultation period it is not possible to comment on the appropriateness of the offences categorised as level 4 offences in Schedule 2.

Clause 5(2) of Schedule 2 defines a repeat offender in relation to serious property offences. The clause should include a requirement that the person is over 18.

**Clause 59**

Offences for which bail is to be granted in exceptional circumstances only, as set out in Part 3 of Schedule 2, should be in a new separate level 5.

**Clause 60**

The Committees support clause 60(4) which expands the list of persons currently contained in s 37(2A) in relation to the imposition of bail conditions and considerations of capacity.

**Clause 61**

Clause 61(2) should include a requirement that the bail conditions are not unduly onerous to comply with, and that any conditions attached to a grant of bail should be internally consistent.

**Clause 65**

Clause 65(2) should be amended to be consistent with, or subject to, s 100A of the *Crimes Sentencing Procedure Act 1999* which provides that non-association and place restriction orders are not to restrict certain associations or activities except in exceptional circumstances.

**Division 3 of Part 7**

Division 3 of Part 7 relates to variations of bail conditions and would make more sense to be included in Part 4.

**Clause 83**

Clause 83 should require that copies of agreements and bail conditions should be written in plain English, and provided in the language of the accused person.

**Clause 84**

The court may deem it appropriate that the consent of the bail guarantor is not required for minor variations of bail conditions. This discretion should be provided for in the Bill.

**Clause 93**

Clause 93(1) provides that a police officer may arrest a person who has been released on bail if the police officer believes on reasonable grounds that the person has failed to comply with, or is about to fail to comply with, the person's bail agreement.

Clause 93(2) requires a description of the police discretion to release a person on the person's existing bail.

Clause 93(2) should read:

A police officer who arrests a person under this section may:

- (a) release the person on the person's existing bail; or
- (b) take the person before a court to be dealt with according to law.

**Clause 94**

Clause 94 provides that a police officer may issue a court attendance notice in relation to a person's failure to comply with a bail agreement.

Clause 94 should be amended to provide that police must consider alternatives before arresting a person for breach of bail. The drafting could be similar to s 99(3) of the *Law Enforcement (Powers and Responsibilities) Act 2002* which highlights that the power of arrest should only be exercised as a last resort where alternatives are impractical.

**Clause 96**

The maximum penalty for an offence under clause 96(1) of failing to appear before a court in accordance with the person's bail agreement is 30 penalty units, or 3 years imprisonment, or both.

The Committees submit that clause 96(1) should adopt the wording used in current s 51(2) of the Act:

"A person convicted of an offence against this section is liable to the same penalties as are by law provided for the offence in respect of which the person failed to appear, but no sentence of imprisonment imposed pursuant to this section shall exceed 3 years and no fine so imposed shall exceed 30 penalty units."