THE LAW SOCIETY
OF NEW SOUTH WALES

31 July 2012

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,

New South Wales Law Reform Commission Report on Bail

The Law Society's Juvenile Justice Committee and Criminal Law Committee (Committees) have asked that I write to you in relation to the New South Wales Law Reform Commission's comprehensive report on the law of bail.

The Committees are very supportive of the majority of the recommendations made in the report and its overall direction. The Committees particularly support the recommendations for a uniform presumption in favour of bail and arrest as a last resort for breach of bail.

The Committees are of the view that the approach taken to the reform of the law of bail is appropriate and should be pursued by the NSW Government when drafting the new *Bail Act*.

There are some recommendations that the Committees do not support, as discussed below.

Recommendation 6.1 and 6.2: the language and structure of the Bail Act

Recommendation 6.1(2) provides that:

> The terminology used in the new Bail Act should be changed:
> - "release pending proceedings" should replace "bail" and "grant bail"
> - "detain pending proceedings" should replace "refuse bail".

The Committees support the retention of the current terminology used in the *Bail Act*. The terms "grant bail" and "refuse bail" are entrenched in the community, and there is no need to change them.

The Committees do not support Recommendation 6.2 that the bail undertaking should be replaced with a notice of listing. There are administrative issues that are overcome by people signing an acknowledgement, such as providing confirmation that the person has received a copy of the undertaking.

Recommendation 9.2: Appeals to Courts other than Court of Criminal Appeal

The Committees' main concern is with Recommendation 9.2. The recommendation provides that in the case of an appeal other than to the Court of Criminal Appeal, the authority, in determining whether to release or detain a person pending the appeal, must not release the person unless it is satisfied that the appeal has a reasonably arguable basis for success.

The Committees do not support the introduction of a test based on whether the appeal has "a reasonably arguable basis for success". This requirement is problematic as the majority of bail applications will be heard by the same magistrate who has entered the judgment against which the appeal is being lodged.

The Committees submit that the test should be one which takes into account the same considerations as were, or would have been, relevant prior to determination by the magistrate, and in addition, if relevant, the finding of the magistrate. For example, the fact that a person stands convicted and sentenced for the offence may be relevant insofar as it gives the person a further incentive to abscond.

The Committees note that an appeal to the District Court is an appeal on the merits, which does not require the appellant to demonstrate legal error. The question for the District Court Judge hearing the appeal is "is the evidence sufficient to prove the offence beyond reasonable doubt?" Therefore, there is still a presumption of innocence for an appellant who appeals to the District Court against a finding of guilt made by the Local Court.

If a test is to be introduced, the Committee would prefer that it is framed as follows:

> "*...in the case of an appeal other than to the Court of Criminal Appeal, the authority, in determining whether to release or detain a person pending the appeal, must release the person unless it is satisfied that the appeal has no reasonably arguable basis for success.*"

Recommendation 11.1: Children and young people

The Committees submit that Recommendation 11.1 should include a presumption that bail be dispensed with for children, consistent with section 8 of the *Children (Criminal Proceedings) Act 1987*.

Section 8 of the *Children (Criminal Proceedings) Act 1987* provides that proceedings against children should generally be commenced via court attendance notice. Unfortunately the section has not been amended to take account of the fact that all proceedings are now commenced by court attendance notice and the procedure that used to be known as "charge" is now a "bail CAN". While the language of the section is now out-dated, it is clear that the intention is to create a presumption that bail should be dispensed with for children, subject to a few specific exceptions.

Recommendation 13.7: Third party assurance of reliability

The Committees do not support the recommendation to remove section 36(2)(b). The Committees consider that it is a useful option to permit an acceptable person to provide an assurance that the accused person is a responsible person who is likely to comply with his or her bail undertaking.

The removal of a simple acceptable person condition will have a significant impact on indigent people and Aboriginal and Torres Strait Islander community members. The acceptable person is often unable to provide sureties, and yet can provide assistance and guidance to people subject of bail in ensuring they attend upon their court obligations.

The removal of this discretion could contribute to a more onerous obligation, as the next condition in the hierarchy is an agreement to forfeit a sum of money.

Recommendation 16.1: Enforcement conduct directions

The Committees are strongly of the view that *Lawson v Dunlevy* [2012] NSWCA 48 is good law, and enforcement conduct directions should be prohibited.

The only situation where enforcement conduct directions may be necessary would be if e-bail is introduced, in order to allow monitoring and ensure compliance with requirements that currently attach to home detention orders. Enforcement conduct directions should be outside the ambit of ordinary bail.

If enforcement conduct directions are to be introduced, their use must be restricted and targeted to risk, and constrained by safeguards. They should not be issued as a matter of course.

The suggested threshold requirements in 16.1(2) provide as follows:

> (2) An authority may impose an enforcement conduct direction if the authority considers that:
>
> > (a) without such a direction, police would not have adequate opportunity to detect and act on noncompliance with the underlying conduct direction, and
> >
> > (b) the imposition of the enforcement conduct direction is reasonable in the circumstances, having regard to the history of the released person and the likelihood or risk of that person breaching the underlying conduct direction.

The threshold requirements should also include a requirement that before an enforcement conduct direction can be placed on a bail condition "exceptional circumstances" must be shown to exist.

The suggested requirements for precision and specificity when imposing enforcement conduct directions in 16.1(3) provides as follows:

> (3) The conduct enforcement direction must:
>
> > (a) state with precision what is required (for example, it must identify with precision, the form of the testing that may be employed); and
> >
> > (b) specify such limits on the frequency with which the power can be exercised or the places or times at which it can be exercised, to ensure that it is not unduly onerous in all the circumstances.

In addition, the exercise of enforcement powers should not be arbitrary, but subject to a reasonable suspicion test. The police must have a reasonable suspicion that the person

is breaching the relevant conduct requirement. If a reasonable suspicion test is not included it would allow the exercise of a power that would not otherwise be available, and is not subject to the safeguards that otherwise attach to the exercise of regular law enforcement powers.

The Committees agree with the Law Reform Commission's suggestion that if enforcement conduct directions are introduced, their application by police should be monitored by the Ombudsman.

Recommendation 18.6: Redetermination on first appearance at court

The Committees have concerns about the sometimes inflexible approach of the Local Court and the Children's Court to bail variations.

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 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.

Recommendation 18.6 only applies to the first appearance. Measures need to be taken to ensure that a defendant is able to make a variation application at every reasonable opportunity.

The Law Society would appreciate the opportunity to be consulted during the drafting of a new legislative framework for bail law in New South Wales.

Yours sincerely,

Justin Dowd
President