THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: CrimJErg:1006610

15 June 2015

His Honour Judge Hatzistergos
Judges' Chambers
District Court of New South Wales
86 Goulburn Street
SYDNEY NSW 2000

Dear Judge,

Review of the *Bail Act 2013*

Thank you for the opportunity to provide a written submission following our meeting on 2 June 2015. In the short time frame available, the Law Society's Juvenile Justice Committee and Criminal Law Committee ("the Committees") make the following brief comments for your consideration.

The Committees consider that the fundamental principles of the New South Wales criminal justice system, including the presumption of innocence and the general right of the accused to be at liberty before trial, should be an important consideration of the review. Bail legislation should emphasise 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.

1. Show cause requirement

The Committees are of the view that the determination of the content of the test for the show cause requirement ought to be left to the common law to develop. The Courts are no stranger to developing a body of jurisprudence in relation to the exact meaning of a particular expression used in legislation. This process tends to yield good law and provides flexibility to meet changing circumstances and community views.

The Committees suggest that you consider recommending the raising of the threshold for section 16B(1)(h) so that it is less likely to inadvertently capture minor offending. Section 16B(1)(h) provides that the show cause requirement applies to a serious indictable offence committed while on bail. The 'serious indictable offence' category includes a broad variety of offences, including relatively minor offences such as larceny and threatening to damage property. The Committee is concerned about the possible injustice faced by people who are already on bail, no matter how minor the charge. Combined with what appears to be a common practice among police to refuse bail to people in "show cause" situations, the section will potentially lead to large numbers of minor offenders being held on remand; these are people who are unlikely to receive a custodial sentence.

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2. Increase in remand figures

The Committees were concerned that the amendments to the *Bail Act 2013* would lead to a greater number of people being refused bail, and a large increase in the remand population. These concerns appear to have come to fruition.

The latest custody statistics by the Bureau of Crime Statistics and Research show that between September 2014 and March 2015, the number of adult prisoners on remand grew by 23.3 per cent. Over the same period, the number of sentenced prisoners rose by just 3.2 per cent.

The number of juveniles in custody also rose substantially between September 2014 and March 2015 (up 23 per cent). The increase was due to a surge in the number of defendants placed on remand. The number of juveniles on remand rose by 72 per cent during this period. Over this same period, the number of juveniles serving a sentence in custody fell slightly (down 5.1 per cent).

The increase in juvenile remand figures is particularly troublesome given that so few juveniles receive custodial sentences even if the young person pleads, or is found, guilty. Juvenile Justice statistics show that 81 per cent of young people on remand did not receive a Control order within twelve months of their remand episode. This is because sentencing law for young people prescribes considering all other options before custody. The bail legislation is inconsistent with that approach. While juveniles are not subject to the show cause provisions, the existence of the show cause provisions appears to have affected other bail decisions as well. Members have reported an increase in the number of conditions attached to juvenile bail, which are disproportionate to the level of offending. The more conditions placed on a young person the higher the likelihood of a breach, which leads to an increase in the number of young people held on remand.

The Committees acknowledge that other factors, such as media pressure and the Martin Place cafe siege, can influence bail determinations. The Committee is also aware that the police have been targeting breaches of bail, which impacts on remand figures.

The Committees are strongly opposed to the creation of an offence of breach of bail. Bail is a risk management tool used to secure a person's attendance at Court and ensure the safety and welfare of the community. An offence of breach of bail would go beyond this purpose.

The increase in remand figures is of great concern to the Committees. The rising numbers has placed significant pressure on Corrective Services NSW and Juvenile Justice to properly accommodate the significant increase in remand inmates.

3. Training for police who are making bail determinations

Committee members have experienced a number of cases where police officers making bail determinations have reportedly demonstrated some lack of understanding of both the tests and powers under the legislation. It is acknowledged that police training of the relevant law has occurred. The Committees have however received reports that some officers are unaware of the change.

The Committees suggest that police, and in particular custody managers, should undergo further training in relation to the amendments to the *Bail Act* 2013 and in relation to their discretion to grant bail.

4. Section 29 Limitation on power to impose pre-release requirements

One specific problem the Committees have encountered is with section 29 "pre-release requirements". Conditions for release of an accused persons to a residential rehabilitation facilities when there is no specified date (i.e. when a bed becomes available) are not uncommon, but are not strictly permitted because the category of pre-release requirements is exhaustive (section 29(1)).

Section 29 (and the Regulations referred to in section 28) could be amended to allow a person to be bailed to a residential rehabilitation facility without providing a specific date.

5. Recommendation 10.6 of the NSW Law Reform Commission Report on Bail

You sought the Committees' view in relation to Recommendation 10.6 of the NSW Law Reform Commission's Report on Bail. The Committee is of the view that the considerations listed in the recommendation are reflected in the current matters in section 18 of the *Bail Act 2013*, so an amendment would be superfluous.

6. Security requirements

You also sought the Committees' view on the use of security requirements.

Section 26(5) provides that a security requirement can only be imposed for the purpose of addressing a bail concern that the accused person will fail to appear at any proceedings for the offence. Further, a bail authority is not to impose a security requirement unless of the opinion that the purpose for which it is imposed is not likely to be achieved by imposing one or more conduct requirements: section 26(6).

The Committee considers that requiring a surety for conduct conditions would work to the detriment of the financially disadvantaged. Granting bail should not be about means and the ability to purchase bail. The Committees prefer the alternative of requiring the provision of a character acknowledgment in compliance with a bail condition pursuant to section 37.

7. Consultation

Given the significant and potentially far reaching implications for any changes to the law of bail, the Committees emphasise the need for thorough consultation with relevant stakeholders, and a considered approach, supported by evidence, prior to any further proposed amendments.

The Committees thank you once again for the opportunity to comment and would welcome the opportunity to be involved in further consultations on this important area of law reform. Any questions can be directed to Rachel Geare, policy lawyer for the Committees at rachel.geare@lawsociety.com.au or (02) 9926 0310.

Yours sincerely,

John F. Eades
President