THE LAW SOCIETY
OF NEW SOUTH WALES

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Mr Andreas Heger
Acting Executive Director
Policy, Reform and Legislation Branch
Department of Communities and Justice
GPO Box 31
Sydney NSW 2001

By email: charlotte.davidson@justice.nsw.gov.au

Dear Mr Heger,

Administrative review of the *Bail Act 2013*

The Law Society welcomes the opportunity to make a submission to the review of the *Bail Act 2013*.

We note the then Department of Justice's recommendation in the '*Statutory Review of the Bail Act 2013*', was that "the Government undertake to conduct a further holistic review of the Act by no later than 6 December 2020 to determine whether the policy objectives remain valid, and whether the terms of the Act remain appropriate for securing those objectives".[1]

Community safety is the ultimate objective for bail, and in the long term this requires effective alternatives to remand that address underlying issues.

We note that since the last substantive review of bail legislation, the Australian Law Reform Commission (ALRC) has released its *Pathways*[2] report on incarceration rates of Aboriginal and Torres Strait Islander peoples, and changes in the justice system have occurred in response to COVID-19.

We remain concerned about the high remand population in NSW, and note that the proportion of prisoners on remand grew from approximately 25% of the total inmate population in 2012 to 33% in 2018.[3] There is significant work to be done to reduce the remand population through both legislative and non-legislative reform. Such work has become more of an imperative as a result of the COVID-19 pandemic, which has highlighted the potential impacts to both individuals and the broader community of prison overcrowding. The pandemic is both a catalyst and an opportunity for wholesale change to the criminal justice system, including bail processes as the entry point to that system.

[1] Department of Justice, *Statutory review of the Bail Act 2013*, June 2018, p4.
[2] Australian Law Reform Commission, *Pathways to Justice - Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, ALRC Report 133, 2017.
[3] NSW Audit Office, *Managing growth in the NSW prison population*, 2019.

We support substantial investment in community-based programs, such as those suggested in the *Pathways* report,[4] as they can make a positive contribution across the justice continuum and would positively impact on bail by reducing bail risks, the risk of reoffending and consequently remand and incarceration rates.

Priority areas for legislative reform

Section 74

We submit that s74 should be amended to allow the Local Court to hear two bail applications before the prohibition applies.

The prohibition on repeat applications for bail under s74 has resulted in bail applications becoming longer and more complex because lawyers are aware that this may be their client's only opportunity to seek bail in the Local Court. We understand that arguments regarding whether the defendant has demonstrated that there are grounds for a further release application under s74(3) can be just as time consuming as the bail application itself. The first application may also be deferred leading to an unnecessary number of inmates being on remand for a short initial period before release. The barrier to making a second or further bail application can result in an extended period of remand for a person who may be unlikely to receive a custodial penalty or any period exceeding the remand period.

Allowing a second application in the Local Court could reduce remand rates. We are aware that lawyers sometimes advise their clients to delay making a bail application until every bail consideration can be addressed, because of the 'one chance' nature of s74. Allowing two applications could also save court time, as lawyers would not feel obliged to address every bail consideration in such detail. If the first application fails, the lawyer would have the opportunity to address the concerns identified by the court in a second application. The amendment would also reduce pressure on Supreme Court bail lists.

We would be happy to discuss with the Department possible restrictions to avoid repeat frivolous release applications.

Section 77

Section 77(1)(a)-(f) lists the actions police can take when dealing with a breach, or imminent breach, of a bail condition, with increasingly severe consequences for the person subject to bail. It provides a number of alternative actions besides arrest to respond to an alleged breach or imminent breach of bail. It also confirms that an arrest can be discontinued, and an alternative action pursued instead.

However, Law Society members advise that s77 has not afforded the intended flexibility in policing failures to comply with bail conditions. Anecdotally, it appears that many police believe that if somebody breaches bail, they are required to bring them before a court, and the court frequently decides to continue or vary bail.

We submit that to provide clarity, s77 should be amended to explicitly state that police must take the least restrictive option appropriate. This amendment would provide consistent legislative guidance to police. We further submit that a new sub-section should be inserted which provides that police should not arrest for a breach unless there is a necessity to do so.

Further police training and internal guidance recommendations may also assist in this regard.

[4] Australian Law Reform Commission, *Pathways to Justice - Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, ALRC Report 133, 2017, 13-15.

We suggest that s77 should contain a provision that requires oversight by the custody manager of an arresting officer's decision to take arrest action and require both the arresting officer and the custody manager to consider additional matters when using their discretion under s77. These considerations would include whether releasing the person on existing bail conditions poses an unacceptable risk (as defined in s19 of the *Bail Act 2013*), and that the unacceptable risk cannot be mitigated by issuing a notice to the person under s77(1)(c) or (d). In our view, it is incongruous that at present neither police nor the court can refuse someone bail unless there is an unacceptable risk of a bail concern being met, but the police (unlike the court) can deny someone liberty on bail because they breached their bail, including by a non-criminal act such as not going to school or being out after curfew.

We further suggest that s77 be amended to require an arresting officer to record reasons for why they arrested a person, without warrant, because of a failure or threatened failure to comply with a bail acknowledgment or a bail condition, and for the custody manager to provide reasons why the arrest was not discontinued. This would align with s38, which requires a bail authority to immediately record reasons for refusing bail.

Bail review without notice on first appearance

We suggest an amendment to provide that, on the first appearance by a person before a court in relation to proceedings, the court must hear any application for an order to release the person or to remove or vary any condition or conduct requirement, without requiring notice of the application to the prosecutor.

The NSW Law Reform Commission recommended such an amendment on that basis that 'the first appearance marks the commencement of the judicial process and provides the first opportunity for a judicial determination of such restriction on freedom of action'.[5]

Police bail frequently includes conditions that are beyond what are necessary to address the risk of a particular bail concern. Research published by the Bureau of Crime Statistics and Research (BOCSAR) in 2018 into the nature of bail breaches in NSW revealed that for 35% of orders, defendants had only breached their bail conditions through technical breaches rather than through reoffending.[6] BOCSAR further reported that the predominant court response to defendants who breached their bail orders was to continue bail (61.3%).[7]

It is therefore important that the court review police bail conditions and ensure that they are reasonable. Onerous and unnecessary conditions in police bail are of particular concern for children and people with mental illness and cognitive impairments. These conditions may be inadvertently breached, exposing the person to breach proceedings and the risk of detention even where the alleged offence is minor and does not warrant a custodial penalty. A history of non-compliance with bail conditions is also a consideration under s18.

Police should appropriately tailor bail conditions to the bail concern. The legislation is clear, and the issue is unlikely to be resolved by legislative reform alone and may require cultural change, and targeted programs involving the police and the community. For instance, in Dubbo, police are trialling more flexible bail conditions for Aboriginal defendants, who are able to register up to three bail addresses to combat the ongoing problem of bail breaches. We would welcome publication of resulting data from this trial.

[5] NSW Law Reform Commission, *Report 133: Bail*, 2012, p273.
[6] NSW Bureau of Crime Statistics and Research, Donnelly, N. & Trimboli, L., *The Nature of Bail Breaches in NSW*, 2018, p9.
[7] Ibid., p5.

Section 51

We submit that s51(7) should be amended so that applications for variation should be able to be made by the accused person at any subsequent appearance, without notice, while also providing the court with a discretion to adjourn the matter where the variation is substantial, or the lack of notice is procedurally unfair to the prosecution.

We note that clause 20(2) of the *Bail Regulation 2014* provides that the accused can make a variation application orally if the person is before the court. However, very few Magistrates allow this to occur, hence the need to amend the section.

The requirement to give notice often results in the defendant, their lawyer and the prosecution having to make a further court appearance, which is inefficient and costly.

Show cause

We submit that s16B(1)(h) should be amended to raise the threshold 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 Law Society 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, we remain concerned with the potential for the section to lead to minor offenders being held on remand, who are unlikely to receive a custodial sentence.

In our view, s16B(1)(h) should be amended to refer to a person charged with a strictly indictable offence, rather than a serious indictable offence, so that the provision is less likely to inadvertently capture minor offending.

We suggest a further amendment so that the relevance of a warrant is considered as part of s18 rather than as part of the show cause test. The show cause requirement under s16B applies when a person is charged with a serious indictable offence committed while being subject to an arrest warrant (s16B(1)(l)).

We note that s16B(1)(i) (inserted in December 2016), has had the unexpected consequence of extending the show cause test to a person who fails to attend court for an underlying offence for which they are not subject to bail. There may be a variety of sound reasons why an arrest warrant may be issued which do not give rise to any increased bail risk (such as where a defendant is too unwell to attend court).

We also reiterate our strong opposition to any proposal to expand "show cause" offences to juveniles, or to the creation of additional "show cause" offences.

Aboriginality

We support the adoption of a standalone provision to require bail authorities to consider any issues that arise due to a person's Aboriginality, including cultural background, ties to family and place, and cultural obligations, as recommended by the ALRC.[8]

[8] Australian Law Reform Commission, *Pathways to Justice - Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, ALRC Report 133, 2017, Rec 5.1.

Under s32(1)(1a) of the *Bail Act 1978*, bail authorities had to consider an accused Aboriginal or Torres Strait Islander person's background and community ties, as indicated by the person's ties to extended family and kinship and other traditional ties to place.

Section 18(1)(k) of the *Bail Act 2013* requires bail authorities to consider 'any special vulnerability or needs' of an accused person that arise from their being an Aboriginal or Torres Strait Islander person, which has, in effect, reduced the factors of Aboriginality that must be considered by a bail authority.

A standalone provision would give the section more prominence and ensure that a person's cultural background, ties to family and place, and cultural obligations are taken into account when bail is determined, and help facilitate the imposition of appropriate bail conditions.

Legislative reform relating to children

A new division relating to children

Due to the heightened vulnerability of children, and the importance of rehabilitation, the Law Society suggests it would be appropriate to amend the *Bail Act 2013* to include a division specifically related to bail and children.

Including a separate division of the *Bail Act 2013* related to children would emphasise the unique vulnerabilities children face, and the difficulties that often arise when children are required to comply with bail conditions. We note that complying with conditional bail requires a person to be able to think through the consequences of their actions; specifically, to think about the consequences of failing to comply with bail conditions.[9] Because of the still developing frontal lobe of a child's brain, which houses executive function, children have a lesser capacity for consequential thinking when compared with adults, and their ability to comply with bail conditions over a long period is consequently more limited than an adult's. The current President of the NSW Children's Court has written about the emerging body of knowledge regarding the brain development of children and its consequences on the ability of children to comply with conditions.[10]

Despite what is known about children's under-developed capacity for consequential thinking,[11] children are subject to largely the same bail laws as adults.[12] The effect of the way the *Bail Act 2013* is applied in its present form is that children are routinely detained for failures to comply with bail, rather than because of the risk they pose to the safety of the community, or because the court has considered that gaol is the appropriate punishment for their proven offences. In most quarterly periods, the majority of children in custody in NSW are being held on remand, and have not been found guilty of the offence they are in custody for. Most children who spend time in custody do not ultimately receive a gaol sentence for the offences they were in custody

[9] Although s77 provides for a number of different potential consequences for bail breaches, the choice of which consequence lies entirely in the hands of police: *Director of Public Prosecutions (NSW) v GW* [2018] NSWSC 50, citing *N T v R* [2010] NSWDC 348.

[10] Judge Peter Johnstone, *'Updates in the Children's Court Jurisdiction'* (2018), at [29]. Available from: https://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0020/28541/CLS-conference-Judge-Johnstone-presentation-2018.pdf.

[11] Judge Peter Johnstone, *'Updates in the Children's Court Jurisdiction'* (2018), at [20] – [42], 'The continuing relevance of brain science'. Available from: https://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0020/28541/CLS-conference-Judge-Johnstone-presentation-2018.pdf.

[12] Two exceptions are that the 'show-cause' requirement does not apply to children: s16A(3), and that children are allowed one additional application for bail than adults, before restrictions on further applications apply s74(3)(d).

for.[13] Rather, they are remanded without bail, awaiting the outcome of their matter; often for issues related to their safety and care, as opposed to the protection of the community.

We consider it important to limit the imposition of bail conditions on children. In this regard, we note that while the *Bail Act 2013* is clear in its requirements for only imposing bail conditions where necessary,[14] the prevalence of onerous bail conditions continues to concern many Law Society members who practice in the Children's Court jurisdiction. This issue was a concern prior to the *Bail Act 2013* being enacted. In its 2012 review of bail law, the NSW Law Reform Commission highlighted concerns about young people being remanded for failing to comply with bail conditions, and because they are unable to meet bail conditions.[15] The report emphasised a "need to consider closely and carefully the situation of young people".[16]

Our members advise that bail conditions can have a disproportionate impact on already vulnerable children. Standard bail conditions requiring school attendance or residential conditions can be harder to satisfy for some Indigenous children, as these children are overrepresented in out of home care, and in those falling away from education. Applying standard bail conditions to children with cognitive deficits and learning difficulties can also lead to negative impacts, and an increased likelihood that these children will have continued contact with the criminal justice system.

We note that onerous bail conditions placed on children can have a long-term negative impact. Children are not subject to the show cause provisions in the *Bail Act 2013* when they are appearing in the Children's Court. However, if these children transition to the adult courts on turning 18, the show cause provisions apply and any allegation of a re-offence whilst on bail would place this person in a show cause position requiring her or him to justify why detention is not necessary. The Court will take into account, to the detriment of the young adult, a history of non-compliance in the Children's Court. In this way, a history of non-compliance with onerous bail conditions imposed by the Children's Court can have significant ramifications for a young person later in life.

We support limiting the imposition of curfew or 'condition to obey' conditions on children. This would assist in clarifying the application of s20A in the *Bail Act 2013* in relation to bail conditions commonly imposed on children for minor offending. In relation to curfew conditions, it is our view that imposing a condition on a child not to leave their residence between the onset of evening and early morning is unlikely to be warranted for minor offending. In addition, it puts a child at risk of arrest and detention for staying out too late; behaviour which, whilst arguably undesirable, is not criminal.

Inclusion of principles relevant to children

The NSW Law Reform Commission's 2012 recommendation for bail reform for young people was that explicit principles be applicable to bail authorities making decisions about children.[17] The principles suggested by the NSW Law Reform Commission are substantially similar to those applicable to sentencing young people in s6 of the *Children (Criminal Proceedings) Act* (CCPA).[18] This recommendation was not reflected in the *Bail Act 2013* and we submit that the principles should be included in the legislation.

[13] NSW Law Reform Commission, *Report 133: Bail*, 2012, pp56-59.
[14] Section 20A of the *Bail Act* 2013.
[15] NSW Law Reform Commission, *Report 133: Bail*, 2012, pp56-59.
[16] Ibid., p73.
[17] Ibid., p175 (Recommendation 11).
[18] Ibid.,p173.

The legislation should also be amended to recognise that children, by virtue of their unique vulnerability, are entitled to special protections under international law requiring that detention of children be used only as a last resort and for the shortest appropriate period of time,[19] and be limited to exceptional cases.[20]

Section 28

We submit that s28 of the *Bail Act 2013* should be amended to empower a court to make an order regarding placement of children under 16 in supported accommodation without parental consent in appropriate cases.

There may be a practical problem with s28 if the Department of Communities and Justice is not able to place children under 16 years in supported accommodation unless it is with parental consent. This will adversely impact those young people who have experienced a breakdown in family relations and may mean that they are unnecessarily kept in custody.

Removing children from the scope of the Bail Act

An alternative to the suggestions outlined above would be to amend the *Bail Act 2013* so it does not apply to children, or to adults who were children at the time of an alleged offence, and instead include provision for bail within a new section of the CCPA.

As referred to above, the application of the *Bail Act 2013* in children's matters can result in problematic outcomes, despite the protections in the legislation, and this has a disproportionate impact on Indigenous children and children with disabilities. The Law Society has previously noted[21] that while children are not subject to the show cause provisions, the existence of these provisions appears to have affected other bail decisions as well. Law Society members have reported an increase in the number of conditions attached to children's bail which are disproportionate to the level of offending. The more conditions placed on a child's bail, the higher the likelihood of a breach, which leads to an increase in the number of children and young people held on remand.

In NSW there is already separate legislation, processes and principles for children and young people in many other aspects of the criminal justice system, as outlined in the CCPA, the *Young Offenders Act 1997* (NSW), and the *Children (Detention Centres) Act 1987* (NSW) (CDCA). The CDCA covers the parole of children and young people (another form of conditional liberty) and at s38 notes that "the purpose of parole for children is to promote community safety, recognising that the rehabilitation and re-integration of children into the community may be highly relevant to that purpose".

Section 40(1)

Section 40(1) provides that where a Local Court Magistrate grants bail to an accused person at their first appearance for a serious offence, that decision will be stayed for up to three days, pending determining by the Supreme Court, if:

- the police officer or legal practitioner appearing on behalf of the Crown immediately informs the court that a detention application is to be made to the Supreme Court; and

[19] See article 37(b), CRC; Children's Legal Centre and UNICEF, 'Administrative detention of children: A global report', February 2011, p23. The UN Standard Minimum Rules for the Administration of Juvenile Justice (para 19), UN Rules for the Protection of Juveniles Deprived of their Liberty ("Havana Rules") (para 2) and UN Guidelines for the Prevention of Juvenile Delinquency (para 46) state that institutionalisation of a child should be a measure of last resort and for the "minimum necessary period".
[20] Para 2, Havana Rules.
[21] Law Society submission to the Bail Act review, 2015.

- the applicant provides a copy of the written approval of an authorised officer or the Director of Public Prosecutions to make a detention application in the Supreme Court.

The power to stay a release decision was considered in the judgment of Howie J in *Regina v Blissett* [2006] NSWSC 1383. At [8], his Honour stated that the power for the Director of Public Prosecutions to stay the granting of bail, pending review by the Supreme Court, should only be exercised "where an urgent resolution of the question of bail is truly required, not simply because they [the prosecutor] do not agree with the result". His Honour further stated that:

> The power should, in my opinion, be seen as a very exceptional one and used only where the circumstances call for an urgent review of the magistrate's decision because of the risks posed to the community if the applicant were to be released.

Law Society members have advised of instances where, in their opinion, the powers under s40(1) have been utilised in relation to a young person in circumstances that were not 'exceptional'. Members have also noted that in their experience, a stay under s40(1) is sometimes sought by the prosecutor, but the application is not progressed to the Supreme Court. As a result of the exercise of this power, young people can spend up to three days in detention, despite a Local Court Magistrate deciding that bail should be granted or dispensed with. This can have negative consequences for the young person and their family, particularly if it is their first time in detention.

We submit that s40(1) should be amended so it cannot be applied in relation to children. In the alternative, s40(1) should be amended to incorporate the guidance of Howie J in *Regina v Blissett*, namely: that it is an exceptional power, and should only be used because of risks posed to the community if the applicant were to be released.

Non-legislative considerations

Bail support to help defendants comply with bail obligations

The Law Society strongly supports the investment in, and implementation of, practical measures to provide support for defendants in the community and to assist with compliance with bail conditions and reduce the number of technical breaches.

We refer to the Court Integrated Services Program (CISP) in Victoria, a state-wide, court-based approach to the assessment and treatment of defendants at the pre-trial or bail stage, with the aim of reducing the likelihood of reoffending and bail breach rates. It provides case management support and links defendants to support services such as drug and alcohol treatment, crisis accommodation, disability services and mental health services and Koori specific services. The program decreased reoffending by 30% and resulted in significant cost savings.[22]

We consider that it would be worthwhile for the NSW Government to consider a similar service model for NSW, consistent with the recommendations of the ALRC in relation to Indigenous defendants.[23] To be effective, it is essential that adequately resourced treatment and service providers are available to provide a series of appropriate wraparound services.

Indigenous incarceration rates

[22] Department of Justice Victoria, *Court Integrated Services Program: Tackling the Causes of Crime, Executive Summary Evaluation Report*, 2010, p10-11.
[23] Australian Law Reform Commission, *Pathways to Justice - Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, ALRC Report 133, 2017, Rec 5.2.

We support Indigenous led, culturally appropriate and safe healing/treatment services, such as Weave's *Creating Futures Justice Program*, which is an intensive support service for young people aged 18-30 years leaving custody or otherwise involved in the criminal justice system. It provides wraparound casework tailored to the needs and goals of each client, as well as court support and advocacy. A recent evaluation of the service reported, inter alia, decreased recidivism rates and improved bail outcomes.[24]

We also note the successes of the Maranguka Justice Reinvestment Project in Bourke NSW. The impact assessment report prepared by KPMG[25] details both the significant qualitative and quantitative benefits accrued through this community led initiative, including a reduction in both adult and juvenile bail breaches.

It is essential for Indigenous and non-Indigenous people on remand that meaningful alternatives to prison are available in the community particularly to support people with mental health issues and drug and alcohol dependence. There is a distinct lack of residential and other drug and alcohol services in New South Wales. This is particularly so for regional and remote areas of New South Wales.[26] Such services are less expensive than prison, provide targeted therapy for vulnerable people who may be at risk of offending and enhance the safety of our community.

Members of the Criminal Law and Children's Legal Issues Committees have extensive experience with bail, both from a defence and prosecution perspective, and would welcome the opportunity to speak about their practical experiences with bail to the Department officers undertaking the review.

The Law Society contact for this matter is Rachel Geare, Senior Policy Lawyer, who can be reached on (02) 9926 0310 or at rachel.geare@lawsociety.com.au.

Yours sincerely,

Richard Harvey
President

[24] Schwartz and Terare, *Creating Futures: Weave's intensive support service for young people leaving custody or involved in the criminal justice system*, Evaluation Report, 2020, p7.
[25] *KPMG, Maranguka Justice Reinvestment Project: Impact Assessment*, 2018, p22.
[26] NSW Legislative Council, Portfolio Committee No. 2 - Health and Community Services *Provision of drug rehabilitation services in regional, rural and remote New South Wales*, Report 49, 2018, Rec 2; Professor Dan Howard SC, *Special Commission of Inquiry into the crystal methamphetamine and other amphetamine-type stimulants*, 2020, Rec 31.