THE LAW SOCIETY
OF NEW SOUTH WALES

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20 March 2024

Open letter to Members of the Legislative Council
NSW Parliament House
6 Macquarie Street
Sydney NSW 2000

By email

Dear Members of the Legislative Council,

Bail and Crimes Amendment Bill 2024

We refer to the recent introduction of the Bail and Crimes Amendment Bill 2024 (**Bill**), and take the unusual step of addressing correspondence to all Members of the Legislative Council. Our submission is informed by the Law Society's Children's Legal Issues, Criminal Law, Indigenous Issues and Human Rights Committees.

The Law Society's position

The Law Society is cognisant that there are genuine concerns in some regional areas in relation to youth offending behaviours. We support the front-end initiatives announced by the Government in respect of strengthening social and well-being support services, as well as a roll-out of justice reinvestment grants as early as June 2024.[1] However, we are concerned that the nature of the proposed legislative reform will jeopardise any benefit arising from the early intervention approaches.

While the Government recognises that "the best outcome for everyone is avoiding contact with the criminal justice system in the first place,"[2] the proposed bail reforms are likely to achieve the opposite for as long as they are in force. We query the rationale that incarceration is an appropriate "circuit breaker" for children and young people[3] alleged to have committed particular offences, noting its inconsistency with most of the principles set out in s 6 of the *Children (Criminal Proceedings) Act 1987* (NSW), with Closing the Gap targets, and with the *Convention on the Rights of the Child*. Proceeding with the legislative reforms before any of the funding initiatives have had a chance to take effect suggests that Parliament is prepared to, in effect, sacrifice a cohort of children and young people to the long-term criminogenic effects of incarceration. We suggest that a likely unintended consequence of proceeding as proposed will be to further compromise community safety in the medium and long term.

[1] NSW, *Parliamentary Debates,* Legislative Assembly, 12 March 2024, page (Michael Daley, Attorney General) https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1323879322-139003'.
[2] Ibid.
[3] Ibid.

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CONSTITUENT BODY

In our view, the Bill is drafted too widely. In some instances, it will result in a more punitive approach than that taken for adults for equivalent offences,[4] and a number of concepts contained within it are unprecedented. The proposed test for bail is, arguably, more stringent than the "show cause" test applying to adults.

As currently drafted, it will likely result in the incarceration of children and young people who would otherwise not have been incarcerated. It is also likely to result in the incarceration of some children and young people who are unlikely to be found guilty of any offence. We note that, in practice, many charges against children and young people are ultimately withdrawn or dismissed, as they are not adequately supported by evidence. We query the wisdom of increasing the remand population of children in this way, particularly when the child remand population is already high.

In our view, the proposed reforms will also likely have the effect of adversely affecting the rehabilitation prospects for children and young people, including by blocking the ability of First Nations children and young people to access the Youth Koori Court (participants must be on bail to participate fully) or being bailed to attend rehabilitation services.

Further, from a human-rights perspective, we are concerned that restricting the ability of a young person to be granted bail in the manner proposed by the Bill may be inconsistent with Australia's obligations under the *Convention on the Rights of the Child*. Under Article 37(b), 'arrest, detention or imprisonment of a child…shall be used only as a measure of last resort and for the shortest appropriate period of time'. In our view, it is unclear whether the amendments proposed in the Bill meet this threshold. In particular, the limitation in the Bill i.e., the requirement for the bail authority to have a 'high degree of confidence' that the young person will not commit a serious indictable offence, will capture a far greater number of children and young people than those posing 'an immediate danger'.

In our view, a preferable approach would be to amend the legislation to mandate intensive court-ordered bail supervision by Youth Justice for the targeted cohort of children and young people, if they are granted bail.

For the reasons set out above, we oppose the passage of the Bill. However, noting its likely progression, we suggest some amendments for consideration.

Possible bail amendments

Class of offences

We submit that the class of offences to which the amendments apply is disproportionately and unnecessarily wide. In our view, the definition of motor theft offence in clause 22C(5) should be amended to remove reference to section 154A(1)(b) of the *Crimes Act 1900*, which relates to being a passenger in a stolen vehicle.

Further, subclauses 22C(1) and (2) should be amended to remove the references to "serious indictable offences" and replace them with references to "relevant offence".

In our view, the deletion of these references would mitigate the unacceptably broad net cast by clause 22C in respect of the class of offences affected.

[4] Inconsistently with s 6(e), *Children (Criminal Proceedings) Act 1987.*

Proposed test

The proposed “high degree of confidence” test that a child or young person will not commit a serious indictable offence is a new test in the criminal law, and it will be very difficult for bail authorities to engage with it with any certainty. This is likely to result in uneven applications of the test throughout the state. We note that such a test does not exist anywhere in the *Bail Act 2013*, the *Crimes Act 1900*, the *Crimes (Sentencing Procedure) Act 1999*, *Criminal Procedure Act 1986*, *Children (Criminal Proceedings) Act 1987* or the *Young Offenders Act 1997*.

The Government’s view is that this test is not to be a reverse onus test like the “show cause” test in the Bail Act.[5] We note the Government’s amendments, passed by the Legislative Assembly on 19 March, inserting a new clause 22C(2A) to clarify that the onus remains with the prosecution.[6]

It is worth noting that, in practice, the first bail authorities to apply the test will be police officers, who, in some rural and regional areas, are unlikely to be senior officers. In our view, the effect of the new test significantly increases the likelihood that young people will be kept in custody until they face a court, with the "contamination" effect that will result.

Further, in many places the practical result will be a young person being transported great distances, because of limited cell facilities at police stations and courthouses and the distance to the closest Youth Detention Centres. If a child or young person is subsequently granted bail, there is then the challenge of organising suitable transport to return them to their community.

In practice, even taking into account the proposed subclause 22C(2A), the new provision will likely operate more harshly than the “show cause” provisions, which at least allows for a range of factors to be considered, including factors subjective to the accused. In our view, this will have the effect of treating children and young people more punitively than the adult population (albeit in relation to remand), and will, in practice, make it more difficult for impacted children and young people to access bail than for an adult who commits a similar offence. As noted above, this is inconsistent with the established principles in s 6 of the *Children (Criminal Proceedings) Act 1987*.

The inclusion of serious indictable offences within this untested threshold broadens the net of this reform far wider than the stated intention. It would capture too wide a variety of offences, including numerous low level offences, such as shoplifting (s 117 *Crimes Act 1900*), “tap and go” credit card fraud (s 192E *Crimes Act 1900*) and recklessly damaging property (s 195 *Crimes Act 1900*). Among other things, we are concerned that the inclusion of serious indictable offences will have the effect of deepening social disadvantage, for example, if the bail authority has a concern that the child or young person might steal food while on bail, they may feel required to refuse bail.

Our members advise that, in their view, it is likely that this test will result in most, if not all, children and young people affected by new clause 22C being refused bail, including those who may not be found guilty of the alleged offences, and those who will not receive a custodial sentence even if found guilty.

[5] Second Reading speech, Attorney General, 12 March 2024.
[6] Government proposed amendments to the Bail and Crimes Amendment Bill 2024, moved in the Legislative Assembly, c2024-024G, 19 March 2024, online: https://www.parliament.nsw.gov.au/bill/files/18563/GOV%20-%20c2024-024G.pdf.

'Performance crime' offences

The Law Society is not persuaded that the creation of a new offence is necessary, nor that it will effectively address the conduct in question. We do not support creating additional complexity in what is already a complex framework of criminal offences.

The type of conduct to which the proposed offence is aimed would already constitute an aggravating feature in sentencing proceedings for any offence. At a minimum, it would be conduct relevant to a lack of remorse and the need for general and specific deterrence.

We also query the deterrent effect of the proposed new offence. Even if a person knew about the existence of the offence, if the prospect of being detected for the principal offence by advertising their participation in it does not deter an offender, an additional offence is similarly unlikely to.

If the Bill is to proceed, we suggest that the definition of "advertise" in clause 154K(4) be clarified to require an element of boasting or bragging. The proposed definition of "advertise" is currently drafted so broadly that it may catch, for example, posting on social media about conduct for which the child or young person is expressing remorse (or any other instance in which the child or young person is not seeking to glorify the conduct).

We note that this proposed offence is novel in Australian criminal law, and for this reason suggest that it be reviewed in, at most, 12 months. Clause 154L should be amended to reflect this.

Commencement

The Bill provides that, in relation to the proposed amendments to the *Bail Act 2013*, "an amendment made to this Act by the *Bail and Crimes Amendment Act 2024* extends to offences committed or alleged to have been committed, or charged, before the commencement of the amendment."

As a matter of principle and on a rule of law basis, the Law Society opposes retrospective application of legislation. In our view, this provision should be replaced by prospective transitional provisions. If the proposed amendments pass and are to commence, they should not commence until after the other proposed community building and support service initiatives have been progressed, and certainly no earlier than June 2024 (noting the proposed earliest roll out of justice reinvestment funding). We suggest that, in respect of youth offending, the more appropriate and effective circuit breakers have already been demonstrated by the success of initiatives such as the work undertaken by the community as a result of the Maranguka Justice Reinvestment project, and that initiatives such as these should be given time to take effect.

Legislative process

The Law Society takes this opportunity to express its sincere disappointment at the lack of a consultative process leading to the introduction of the Bill. Unfortunately, given the focus on rural locations, and the inevitable impact of new criminal procedural provisions on the disadvantaged, it is likely that First Nations children and young people will be disproportionately affected by the proposed reforms. We therefore query why this process has been conducted so inconsistently with the partnership and co-design requirements of the National Agreement on Closing the Gap, and seemingly without regard for the likely impacts on the Closing the Gap targets. Critically, consultation and co-design with Aboriginal community-controlled organisations (**ACCOs**) should have been an absolute priority in developing this reform.

Issues we have identified in this letter, including in respect of impacts on rehabilitation and restricting access to the Youth Koori Court, could have been identified and addressed if ACCOs had been engaged at an earlier stage.

An earlier and more comprehensive consultation process may have also assisted in the development of more nuanced measures to, for example, effectively engage with those impacted children and young people who are affected by domestic and family violence, or who have learning support needs, or who are in out-of-home care, or who may have significant underlying therapeutic needs, including intellectual or cognitive disabilities.

Opposition amendments

We note the Opposition moved amendments in the Legislative Assembly, although these were not passed.[7] We offer the following comments, in the event the amendments are moved again in the Legislative Council.

We agree with the need to review the impact of the Bill, but suggest that the remit of the Bureau of Crime Statistics and Research is insufficient for a meaningful review. A review of the nature proposed by the Opposition is likely to provide an incomplete picture that has limited utility for future effective policy and legislative decision making.

Review of the impacts should, in the shorter term, take into account the wider impacts on the entire Justice cluster, including the cost of increased levels of remand for children and young people. In the medium to longer term (after the expiry of the 12 month term), the impacts on affected families, communities and individuals of disconnecting incarcerated young people from their families and communities should be reviewed, including the criminogenic consequences of even short periods of remand custody. This should include impacts on Closing the Gap targets, as well as any impacts on the life expectancy gap itself, between First Nations and other Australians in the affected cohort of children and young people.

We oppose the amendments moved in respect of the proposed performance crime offences, aimed that expanding the new offence to serious indictable offences. In our view this is an unnecessary expansion, far beyond what was intended to be a targeted reform exercise, and will dramatically widen the impact of the negative aspects described above.

Thank you for your consideration of these issues. The Law Society reiterates its in-principle position that any proposal to make accessing bail more difficult for children and young people is a retrograde step. We remain ready to assist in respect of improving outcomes both for children and young people, and affected communities.

Yours sincerely,

Brett McGrath
President

[7] Opposition proposed amendments to the Bail and Crimes Amendment Bill 2024, moved in the Legislative Assembly, c2024-028E, 19 March 2024, online: https://www.parliament.nsw.gov.au/bill/files/18563/OPP%20-%20c2024-028E.pdf.