The New South Wales Bar Association

11/175

22 April 2013

Mr Chris White
Policy Manager
Department of Attorney General and Justice
DX 1227 SYDNEY

Dear Mr White

Draft Bail Bill 2013

The New South Wales Bar Association is grateful for the opportunity to comment in relation to the draft Bail Bill 2013.

The draft Bill represents a major improvement on the *Bail Act* 1978. The Association strongly supports the policy underlying the draft Bill and notes that the Bill has clearly been influenced by the New South Wales Law Reform Commission's recent recommendations in relation to bail.

The Association is particularly happy with the removal of presumptions in relation to the granting of bail and with the language in the draft Bill, which is clear and will assist with sequential decision making.

The Association has some concerns in relation to the manner in which particular sections of the draft Bill may operate in practice, which are outlined below.

'Unacceptable Risk' in sections 17 and 18

The concept of 'unacceptable risk' is somewhat confused. As drafted, the matters listed in section 18 (1) of the Bill are only applicable insofar as they are relevant to the four categories listed in section 17.

It seems that the better approach is to draft the provision in such a way that it is clear that the court is:

- First, identifying whether there is a real risk that one of the four things listed in section 17 (2) will take place, and
- Second, determining whether it is acceptable to take that risk in light of the factors set out in section 18(1).

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It is also important that this section indicates the extent to which a decision under these sections requires the risks to be balanced against the presumption of innocence and potential infringement of the accused's liberty.

Accordingly, section 17 should be amended as follows:

Requirement to consider unacceptable risk

1. A bail authority must, before making a bail decision, consider whether there are any risks of future criminal behaviour that are unacceptable risks.
2. For the purposes of this Act, a risk of future criminal behaviour is a real risk that an accused person, if released from custody, will:
    a) fail to appear at any proceedings for the offence, or
    b) commit a serious offence, or
    c) endanger the safety of victims, individuals or the community, or
    d) interfere with witnesses or evidence.
3. For the purposes of this Act, an unacceptable risk is a risk of future criminal behaviour that is sufficiently great to override the general right to be at liberty.
4. If the person is not in custody, the question of whether there are any unacceptable risks is to be decided as if the person were in custody and could be released as a result of the bail decision.

Section 18 (2)(b)

The Association does not consider 'the likely effect of the offence on any victim and on the community generally' to be relevant to a determination as to whether an offence is a 'serious offence' for the purposes of section 18.

By way of example it may be that a break, enter and steal offence could severely affect the victim and the community generally, but this does not make the offence comparable to a more serious offence like murder.

The considerations listed in subsections (a) and (c) of this section are sufficient to determine whether the offence is a 'serious offence'.

Meanwhile, section 18 (1)(b) refers to the 'seriousness of the offence', while section 18 (2) refers to a 'serious offence'. It would be ideal if these references were uniform and that these sections all referred to 'seriousness', as defined.

Section 30

This provision should be amended in such a way as to allow the court to make orders that are contingent upon particular events taking place. By way of example, to give the court the power to make an order that the accused be released to a residential rehabilitation facility when a place in the facility becomes available.

The amendment of this provision to accommodate the making of such orders would save court time and resources by ensuring that the accused is not required to make a subsequent application seeking release to a residential rehabilitation facility upon a place in the facility becoming available for the accused.

Section 34 (5)

It would be ideal if the regulations enacted in relation to this section of the draft Bill made particular provision for addressing issues related to the understanding of bail conditions amongst members of vulnerable groups.

Sections 35 and 36

The requirement to provide information under these sections should also include a provision similar to that contained in section 34 (5), requiring the taking of practicable steps to ensure that the person understands the information that they have been given.

Section 39 (1)

This provision should be amended to read:

> A bail authority that refuses bail must immediately record the reasons for refusing bail and identify the unacceptable risks that justified the refusal to grant bail, and the matters in section 18 (1) that were taken into consideration in the decision.

Section 46

There does not appear to be any reason why the accused's communication with a legal practitioner should not take place prior to the police officer making a decision in relation to bail. This provision should be amended accordingly.

Section 52 (7)

The wording of this provision in its current form is unduly strict. There may well be extenuating circumstances in which it is not feasible to give the prosecutor due notice in accordance with this subsection.

The provision should be amended as follows:

> A court or authorised justice is not to hear a variation application made by a person other than the prosecutor in the proceedings unless satisfied that the prosecutor has been given reasonable notice of the application, except with the consent of the prosecutor or where the urgency of the application or the interests of justice require it.

Section 75

This provision should be drafted in such a way as to clarify that the refusal of bail in the Local or District Court does not trigger the requirement to demonstrate a change of circumstances before the Supreme Court can reconsider the bail application.

Section 82 (b)

This provision should be limited to those circumstances where the police officer also has a reasonable suspicion of imminent danger to a person and is an appropriate response to that

contravention. Amendment of the provision in this way would ensure that it does not defeat the operation of any enforcement checking orders made by the court.

Section 86 (2)(b)

This provision is unduly strict in circumstances where the value of the bail may be diminished for reasons beyond the accused's control, but may still be adequate. The provision should be amended as follows:

> Bail security ceases to be intact if its value is significantly below the amount of money required to be forfeited.

Section 90 (1)

A maximum penalty of 10 penalty units may not be a sufficient disincentive for media outlets to comply with this provision of the draft Bill. The Association recommends increasing the maximum penalty units for this offence.

Should you or your officers require any further information, please do not hesitate to contact me on 9232 4055 or at pselth@nswbar.asn.au.

Yours sincerely

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