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NSW COUNCIL FOR CIVIL LIBERTIES COMMENTS ON BAIL AMENDMENT BILL 2014

1. UNACCEPTABLE AND POOR POLICY PROCESS

The Government's decision to respond to a narrow section of the media and hastily and prematurely review the new Bail Act is now history. However, the process was so flawed and inappropriate that any consideration of this Bill should explicitly consider the context and timing of the underpinning review.

The Bail Act 2013 was a product of over a year's work by the Law Reform Commission (LRC) working with a team of eminently qualified experts.

The LRC had been tasked in 2011 with improving upon the 1978 Act which had become virtually unworkable through constant piecemeal amendment. The LRC Report was tabled in Parliament in 2012. The Government carefully considered it and in 2013 a new Act was passed which did not merely rubber-stamp the recommendations of the LRC Report.

The Act was passed unanimously – no politician, independent or from any party, in either House, voted against it.

There was then period of about a year while the criminal justice agencies absorbed the changes, trained staff, prepared processes and documentation, adapted IT software, created videos demonstrating the new principles and procedures and otherwise got ready for implementation. A great deal of administrative work was done by Police, Office of the DPP, Legal Aid Commission, Bar Association, Law Society and Courts during that year.

The Act came into force on 20 May 2014, with much fanfare from the then Attorney General Greg Smith QC who stated that it would protect the community.

It very properly provided for review after three years.

Soon after there were three high profile cases of bail being granted (Hawi, Fesus and Ibrahim). Sections of the media agitated against these releases. The DPP appealed the Ibrahim matter and his bail was refused – the system was working as it was intended to. A reading of the judgments in the other two cases has shown that principles were properly applied and the decisions were uncontroversial.

The new Attorney General, Brad Hazzard's initial response to this media furore was a calm and intelligent defence of the Bail Act and the obvious need to monitor it over a reasonably long period before making any useful assessment of its operation. He also noted that a group including the Police and the Attorney Generals Department had been set up to do just that. (DT 19/6/14)

Nonetheless, on 27 June 2014, just over five weeks after the Act came into effect (and well short of the three years thought necessary by Parliament) the Premier Baird announced a review, supposedly because the Act was not protecting the community as much as had been intended.

The review was done in just over four weeks by one person, former Labor Attorney General, John Hatzistergos. His report was published on 5 August 2014. A Bill was already prepared implementing all the report's recommendations. This was introduced to Parliament on 13th August 2014 without any consultation with criminal justice agencies, legal bodies or civil liberties about the report's recommendations or the substance of the Bill.

The Government acted with indecent and unwise haste in the face of widespread professional and expert advice that review of the Bail Act was seriously premature and would have to reach conclusions without access to meaningful operational data.

This unsound process has produced a Bill which should be rejected by Parliament as unwarranted and retrograde draft legislation.

2. NSWCCL OBJECTIONS TO THE BILL

If the amendments to the Act are passed, the effect will be to graft onto a coherent, unified, clearly grounded and eminently workable system under the 2013 Act a number of qualifications of the kind that wrecked the original 1978 Act – and eventually necessitated the LKRC review.

Further, if time is not given for proper adaptation, retraining, preparation, the year's work and spending between 2013 and 2014 will have been largely wasted.

Some proposals may be regarded as "tidying up" – namely the collapsing of the 'unacceptable risk' test from two stages to one and the amendment of a risk factor from a 'pattern' of non-compliance to a "history" of non-compliance.

Some proposals are unnecessary – for example the "belt and braces" approach to specifically including the wishes of victims. They are already considered. Factual circumstances such as connections to organised crime are also already well accommodated in the current Act. .

But the core amendments are harmful of the rights of citizens and should be opposed.

2.1. Relegation of presumption of innocence and general right to liberty to Preamble

The amendment proposes the transfer of the underlying principles that Parliament has regard to in enacting the Act from being specified considerations in the body of the legislation to the Preamble. These include 'the common law presumption of innocence and the general right to be at liberty.'

The presumption of innocence (handed down through common law for centuries and in Article 11 of the UDHR) will be watered down by moving it from a consideration in the granting of bail (as it should be) to a motherhood statement in the Act's Preamble. The right to be presumed innocent should not be relegated in this way.

Whatever the motivations, the decision to relegate this right to the Preamble sends a strong and regrettable signal to police and others. **The presumption of innocence and general right to liberty should remain a specified consideration in the body of the legislation.**

2.2. Division 1A of Part 3 Show cause requirement

NSWCCL strongly opposes the proposed amendments in Division 1A on grounds of important principle and lack of clarity and the strong potential for inappropriate and unjust outcomes .

- The creation of so-called "show cause" offences constitutes a reintroduction of presumptions against bail for prescribed offences by the back door. The presumption scheme was soundly criticised in the revamp of the Bail Act and this grafts presumptions against bail, with all their faults, back onto the scheme of the 2013 Act. It introduces complications for no clearly discernible legitimate benefit. The effect will be to transfer more power to the police, by their selection of charges before the Office of the Director of Public Prosecutions has a chance to exercise independent judgment in charge selection.

- Further – and more seriously – the onus of proof has been reversed in relation to those offences. Article 9 of the ICCPR states (in effect) that remand in custody is not to be the default position for people – any people – charged with offences, yet this creates such a position and imposes upon the accused to prove that it should not apply.

  If one's right to liberty is to be taken away, then the onus has always been on the party that seeks to remove it to establish lawful grounds for doing so. This will no longer be so in respect of these offences. The mischief done by these provisions is tacitly acknowledged by the exemption of juveniles from the scheme.

  The proposed amendments in Division 1A of Part 3 should be withdrawn by the Government -or failing that – should be rejected by the Parliament.

2.3. Lesser Issues re lack of clarity

NSWCCL opposes this Bill on the substantive grounds above. Should it proceed, there are matters which will need clarification. For example:

16A(1) This requires that an accused person '*shows cause why his or her detention is not justified'.*

Apart from the substantive issue of reversal of onus of proof- the expression "shows cause why his detention is not justified" in this context is problematic. What is to be established to show that detention is 'not justified'? Must the applicant exclude all grounds which might (even singly) be said to justify detention? What does "show cause "mean? Does it mean prove? If so, on what onus?

Obviously it means something less than, or different from, the absence of 'unacceptable risk' because, if detention is shown **not** to be justified, the question of 'unacceptable risk' still remains to be resolved.

17(1) specifies that 'A bail authority must, before making a bail decision, assess any bail concerns.' A 'bail concern' is defined as a 'concern' that if released, an accused will: fail to appear, commit a serious offence, endanger the safety of victims, individuals or the community or interfere with witnesses or evidence.

This is subjective. There is no objective standard or test to be satisfied before a 'concern' becomes a 'bail concern'.

18 (1)(g): specifies *'whether the accused person has any criminal associations,'*. This is very open-ended. Having a brother-in-law who has committed an offence would constitute a criminal associate. What is unclear is how often and in what circumstances would the applicant need to be with/telephone/email/write to such a person for him to be an associate?

3. Recommendations

3.1. The Bail Amendment Bill 2014 be withdrawn by the Government or failing that be rejected by the Parliament.

3.2. If the Bill is to proceed it should be referred to a Parliamentary Committee for consideration of its implications in relation to the reversal of the onus of proof and the reintroduction of 'show cause 'offences and to allow proper public consideration of the Bill.

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