THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

Criminal Law Committee

Submission to the Sentencing Council of NSW

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The Sentencing Council
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Sydney
NSW 2001
By email: sentencingcouncil@agd.nsw.gov.au

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1. Preface

New South Wales Young Lawyers is a division of the Law Society of New South Wales. Members include legal practitioners in their first 5 years of practice and/or under the age of 36 and law students. There are currently over 15,000 members.

The NSW Young Lawyers Criminal Committee (the Committee) is responsible for development and support of members of NSW Young Lawyers who practice in or are interested in the Criminal Law. The Committee takes a keen interest in providing comment and feedback on the criminal law and the structures that support it, and consider the provision of submissions to be an important contribution to the community. The committee is drawn from prosecution, defence (both private and public), police, the courts and other areas of practice that intersect with the criminal law.

The Committee is grateful for the opportunity to make this submission.

2. Initial Comments

The Committee submits that the *Bail Act 2013* (the Act) has been in operation for such a short time that any assessment of its strengths and weaknesses is premature. No meaningful data is yet available regarding the Act's impact on bail decisions, rates of offending while on bail, remand populations, or any other metric.

The Act represented a substantial departure from the previous regime. It was drafted following an extensive consultation and review process, and passed unanimously by both houses of Parliament. No amendments should be made without a considered, careful assessment based on meaningful data.

One of the most significant flaws of the *Bail Act 1978* (the old Act) was that constant amendment created an overly complex system for regulating the granting of bail. Consideration of the grant of bail had become overly complex, bureaucratic and, in many ways, divorced from consideration of the individual characteristics of the defendant.

The Committee is of the view that the proposed amendment of the Act risks creating a system very similar to that which was done away.

3. The extent to which concerns can be mitigated by the existing unacceptable risk test and show cause categories in the Bill

The Committee is of the view that considerations said to be addressed by recent 'show cause' provisions are already built into the comprehensive unacceptable risk model introduced in the Act. Concerns about the seriousness of the offence, a person's criminal history, and whether they are on bail are already factors that are given careful consideration in the Bail Act.

The introduction of 'show cause' provisions appears to suggest that without them, a bail decision-maker may not assess the potential risk presented by a person accused of murder differently to one accused of shoplifting. The Committee is of the view that this is an unhelpful approach in that the nature and seriousness of the offence is already an essential consideration in a bail decision under section 17(3)(b) of the Act.

Similarly, the fact of an accused person being on conditional liberty at the time of the alleged offence is an essential consideration under sections 17(3)(e) and (f) (whether the accused has previously committed an offence on bail, or has a pattern of non-compliance with any form of conditional liberty) and 17(3)(a) ('criminal history').

Requiring persons who have not been proven guilty of an offence to persuade a bail decision-maker why they should not be deprived of their liberty is a significant change that in the Committee's view is unlikely to lead to an improvement in community safety.

More significantly, the change is not simply a shift in onus. Rather, it is a marked increase in burden compared with the burden the defence must discharge under the unacceptable risk model; the legislation requires that a court must refuse bail if an accused person does not show that their detention is not justified. The Committee

does not accept the asserted benefit to public safety said to flow from this change and does not support the introduction of, or any expansion to, this model.

4. The expected impact of expanding show cause requirements to these offences

The Committee is of the view that the impact of the introduction and any expansion of show cause requirements will be an increase in the prison population. That increase will be attributable to a significant number of people being refused bail based on assumed, rather than demonstrated, risk.

As an example, the effect of section 16B(1)(h) in the first amendment to the Act is that a person on bail for shoplifting who is accused of threatening minor damage to an item of insignificant value (s199 of the Crimes Act, deemed a 'serious indictable offence'), must show cause why they should not be remanded in custody.

Absent any criminal history, it is highly unlikely such a person, even if convicted, would be sentenced to gaol, yet under the amendments to the Act they may be exposed to the prison environment and potentially lose employment, housing, or access to their children while waiting for their matter to be finalised. Applying the risk model of the Act, a court could determine that any potential risk the person posed could be mitigated and release the person on bail. With the introduction of show cause requirements, it appears that circumstances referred to in the second reading speech such as strength of the prosecution case, preventable delays or urgent personal situations such as the need for medical treatment would need to be demonstrated.

Similar concerns would arise where a person was charged with a fresh 'serious indictable offence' while subject to a bond under s9 of the Crimes (Sentencing Procedure) Act 1999 (NSW). Most people in breach of s9 bonds are not resentenced to a term of imprisonment, yet under the proposed amendments they would need to 'show cause' why they should not be remanded in custody.

The Committee is of the view that this expected increase in the prison population will not lead to a corresponding improvement in public safety. The Committee is not aware of any evidence which demonstrates a relationship between the refusal of bail and a reduction in crime. Indeed it appears that the opposite may well be true; the destructive effects of imprisonment, particularly on indigenous people, are well understood.

In addition, an increase in the remand population will impose a further financial burden on NSW taxpayers. It is fair to say that the community can ill-afford to unnecessarily imprison more individuals.

Of course the consequences are more than just financial. There is a wealth of research on the devastating impact of remand on prisoners, such as that presented in the 2002 study by the Judicial Commission of New South Wales entitled "Bail: An Examination of Contemporary issues ". This study revealed that "figures show that remand prisoner suicides are disproportionately high, accounting for 36% of suicides among the entire prison population".

More recently, of the 159 deaths in custody over the reporting period, 108 (68%) were of sentenced prisoners and 51 (32%) were of unsentenced prisoners. In each year of the reporting period, the rate of death for sentenced prisoners was lower than for unsentenced. It is highly likely that an increase in the remand prison population would result in an increase in prisoner deaths.

5. **Whether there is a need to create a new show cause category for the offences**

6. **If so what the appropriate limitations on this category should be in terms of:**

    the type of offences it applies to; and

    the type of conditional liberty (or custody) that should trigger the show cause requirement, if an offence is committed.

In light of the above comments, the Committee does not argue that any new show cause category is called for.

7. Conclusion

The Committee thanks the Council for the opportunity to comment on this important issue.

Any request for further comment should be made to:

Thomas Spohr (President, NSW Young Lawyers)
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or

Andrew Tiedt (Chair, NSW Young Lawyers Criminal Law Committee)
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