Tabled by Mr Martin
22/6/22

BAIL AMENDMENT BILL 2022

STATEMENT OF PUBLIC INTEREST

Need: Why is the policy needed based on factual evidence and stakeholder input?

This Bill strengthens the *Bail Act 2013* by:

1.1. In a national first, inserting a provision to require that any electronic monitoring imposed as a bail condition must meet any minimum standard prescribed in the regulations; and

1.2. inserting a requirement that bail must be refused following conviction and prior to sentencing where the offender will be sentenced to full-time detention, unless special or exceptional circumstances can be established, in response to three recent bail matters that were widely regarded as out of step with community and NSW Government expectations.

Bail is authority for a person to be at liberty for an alleged offence or offence. The *Bail Act 2013* sets out the circumstances under which bail can be granted and bail conditions imposed.

As its Preamble states, the *Bail Act 2013* balances the need to ensure the safety of victims of crime, individuals and the community, the need to ensure the integrity of the justice system, and the common law presumption of innocence and the general right to be at liberty.

Maintaining the right balance is a delicate balancing exercise and where there are opportunities for improvement, the NSW Government is committed to acting swiftly and decisively realise these, to protect our community and support our frontline services in keeping our community safe, as has been done this week in developing and proposing these important amendments to Parliament.

Electronic monitoring amendment

Schedule 1[2] to the Bill introduces a new section 30A of the *Bail Act 2013* to provide that, if bail conditions impose a requirement for an accused person to be subject to electronic monitoring, the electronic monitoring must be of a standard that at least meets any minimum standards prescribed in the regulations.

The bail condition must also require the electronic monitoring to be of a standard that meets any standards prescribed in the regulations. The standards themselves will be contained in subordinate legislation, so they can be updated as electronic monitoring technology improves and in line with industry best practice.

NSW courts have imposed electronic monitoring as a bail condition since at least 2010. The *Bail Act 2013*, rather than narrowly prescribing what conditions courts may impose, provides courts with discretion to impose conditions that are tailored to the circumstances of particular cases, ensuring that courts are able to address the particular bail concerns posed by individuals accused person.

Currently, there are no jurisdictions in Australia that have legislated prescribed minimum standards for use of electronic monitoring as a bail condition for an accused person.

In NSW there are no minimum standards, in legislation or elsewhere, for the use of electronic monitoring as a condition of bail.

Currently in NSW, any electronic monitoring imposed as a bail condition is directly arranged with a private electronic monitoring provider, funded by the accused. This is different to the use of electronic monitoring as a condition of parole or sentence, which is arranged and supervised by Corrective Services NSW.

Currently, courts must assess the suitability of an electronic monitoring condition based on the evidence put before them. That ordinarily includes evidence from the electronic monitoring provider explaining its equipment and monitoring services. Courts assess the reliability and quality of the services (but without reference to any standards).

An accused proposing a bail condition of electronic monitoring must convince the decision maker, often over the prosecutor's opposition, that such an arrangement mitigates the risks.

Electronic monitoring can be a useful tool to ensure that a person complies with their bail conditions or other court orders. These amendments will ensure it is subject to important safeguards.

The Bill will introduce, in a national first, minimum legislated standards for electronic monitoring imposed as a bail condition.

Bail refused where offender will be sentenced to full-time detention amendment

Schedule 1[1] to the Bill introduces a new section 22B of the *Bail Act 2013*. It will provide that a court is not to grant bail or dispense with bail, including in the course of considering a detention application, during the period following conviction and before sentencing for an offence for which an offender will be sentenced to full-time detention, unless it is established that special or exceptional circumstances exist that justify that bail decision. For the purposes of the provision, conviction is defined in subsection 5 to include a plea of guilty.

Bail exists to keep victims and our community safe before and during a trial, and to protect every person's right to the presumption of innocence and the general right to be at liberty until they can have their day in court and their matter determined.

Bail is not intended to be a pre-judgement of someone's guilt, or punishment before conviction. However, this does not mean that criminals who have been convicted or pled guilty and the Court considers will be sentenced to imprisonment by full-time detention, should be permitted to walk free in our community while they are waiting to be sentenced.

The presumption of innocence does not apply post-conviction or guilty plea.

Currently when an accused person is found guilty of an offence and the matter is adjourned for sentencing to a later date, a bail decision maker must, under section 18(1)(i1) of *the Bail Act 2013*, already have regard to "the likelihood of a custodial sentence being imposed".

This new provision will go one step further to provide that serious offenders who will be sentenced to imprisonment to be served by full-time detention, generally must not be granted bail post conviction prior to sentencing.

Offenders will not be taken into remand under the provision in circumstances where it is possible that they will later be sentenced to a lesser penalty and released, or are being considered for an Intensive Corrections Order, for example, as by very definition, these are not circumstances where the offender "will be sentenced" to full-time detention.

In relation to the amendment's interaction with section 11 of the Crimes (Sentencing Procedure) Act 1999, it is relatively unusual for an offender to seek deferred sentencing under that section where they are facing full-time custody. Should a section 11 deferral be put to a court as an option for an offender prior to sentencing, the relevant judicial officer may determine whether or not that justifies special or exceptional circumstances for the purposes of section 22B, allowing a grant of bail to be made on that basis.

The provision acknowledges that special or exceptional circumstances may arise from time to time that justify a granting of bail even in these circumstances, consistent with the approach taken in the existing section 22 of the *Bail Act 2013*.

Section 22 overrides other sections of the *Bail Act 2013* by providing that in certain situations bail cannot be granted, except in special or exceptional circumstances. Section 22 appears to be working satisfactorily.

The Courts have declined to set out an exhaustive list of factors that may constitute 'special or exceptional'. For example in *El-Hilli and Melville v R* [2015] NSWCCA 146 at [29], Hamill J said (Simpson and Davies JJ agreeing) that:

> "Special or exceptional circumstances" may exist in the combination of factors or in "the coincidence of a number of features... It is not possible to determine or predict in advance what those features may be."

What is clear is that it is a high bar to be met, and similarly will be a high bar under the new proposed section 22B.

There could, for example, be circumstances where a person argues that special or exceptional circumstances exist as they are required to make arrangements before commencing their prison sentence to avoid hardship on third parties, such as a person for whom they are a carer. It would be for the Court to determine in the circumstances of the case whether the test was satisfied.

Even in the event that special or exceptional circumstances were able to be proven in a case, subsection (3) of the new provision provides that "Subject to subsection (1), Division 2 applies to a bail decision made by a court under this section".

This means that the other stringent existing tests in the *Bail Act 2013* would also need to be applied in determining whether bail should be granted, and what bail conditions may be required.

Objectives: What is the policy's objective couched in terms of the public interest?

Bail reflects an important tenet of our justice system.

Electronic monitoring amendment

Under this amendment, NSW will become the first jurisdiction in Australia to identify minimum standards for electronic monitoring as a bail condition. Establishing minimum standards will make it clear to electronic monitoring providers, the courts and the community the quality of electronic monitoring and service delivery that the Parliament expects if electronic monitoring is imposed as a bail condition.

Implementing minimum standards will also contribute to improved public confidence in electronic monitoring conditions by supporting improved accountability, transparency and consistency in the quality of services.

The police or the courts, as bail authorities, would still be required to consider the evidence of the electronic monitoring provider in each bail application and make an assessment as to whether that evidence meets the specified statutory standards.

Bail refused where offender will be sentenced to full-time detention amendment

This amendment is not intended to be a pseudo or abridged sentencing hearing, just as currently having regard to the terms of section 18(1)(i1) of the *Bail Act 2013* does not require a pseudo or abridged sentencing hearing.

A full sentencing hearing will still occur before a judge as per the usual processes at a later date determined by the Court, with the usual opportunities for parties to make submissions.

The defence will still have the opportunity to put forward evidence and arguments about what the precise sentence should be. New section 22B would not be enlivened where there is doubt whether the offender will be sentenced to imprisonment by full-time detention.

This reform will ensure, however, that for those offenders who will be receiving full-time detention, they are not granted bail to be released back into the community in the interim before that sentencing hearing can occur, unless it is proven that there are special or exceptional circumstances.

Options: What alternative policies and mechanisms were considered in advance of the bill?

Reform of the *Bail Act 2013* can only be achieved through legislative amendment.

Analysis: What were the pros/cons and benefits/costs of each option considered?

Electronic monitoring amendment

No regulatory scheme can remove entirely the possibility of an accused trying to remove or interfere with their electronic monitoring device. However, minimum standards will ensure an appropriate standard of service delivery, notification and prompt response expected of providers if an accused does so.

Bail refused where offender will be sentenced to full-time detention amendment

This amendment is not about increasing the number of people going to prison – it is about ensuring that offenders who have already been found guilty beyond a reasonable doubt, or pled guilty, and are already heading to prison, get there quicker, and are not out in the community while awaiting sentence.

The NSW Government will carefully monitor the impact of this reform in practice, to ensure it does not adversely impact on the government's Early Appropriate Guilty Plea reforms, although it is difficult to envisage how this could occur.

If a person pleads guilty under the Early Appropriate Guilty Plea scheme, they will already have a very good idea of the type of sentence they can expect to receive. If that sentence will be imprisonment by way of full-time detention, it should come as no surprise if the new section 22B is enlivened in the course of a bail decision ahead of sentencing.

Pathway: What are the timetable and steps for the policy's rollout and who will administer it?

The Bill, and both amendments, commence on the date of assent.

Minimum standards for electronic monitoring prescribed in any regulations will reflect Corrective Services NSW's requirements to ensure robust and consistent standards.

Consultation: Were the views of affected stakeholders sought and considered in making the policy?

Yes, in drafting both amendments, the NSW Government has consulted on an urgent basis, with stakeholders including Corrective Services NSW, the NSW Police Force, the Law Society of NSW, New South Wales Bar Association, Legal Aid NSW, Director of Public Prosecutions and the heads of jurisdiction in the Supreme Court, District Court and Local Court. We thank these stakeholders for rapidly contributing to this important and urgent work.