Bail Amendment Bill 2014 (Proof)

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BAIL AMENDMENT BILL 2014

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Second Reading

The Hon. DAVID CLARKE (Parliamentary Secretary) [5.14 p.m.]: I move:

That this bill be now read a second time.

I seek leave to have my second reading speech incorporated in *Hansard*.

Leave granted.

The Government is pleased to introduce the Bail Amendment Bill 2014.

The purpose of this bill is to make amendments to the Bail Act 2013 to give effect to the recommendations made by former Attorney General John Hatzistergos in his review of the Act.

The new Bail Act commenced operation on 20 May 2014. It introduced a new risk-based model for determining bail in New South Wales. There have been a number of bail decisions made under the new Act that have caused concern to the community. These concerns prompted the Government to request the Hatzistergos review.

In conducting the review, Mr Hatzistergos consulted with key stakeholders from across the justice system and carefully considered a number of bail decisions made under the new Act. The review also drew on the work of law reform commissions around Australia in relation to bail. The review made a number of recommendations to strengthen provisions in the Act.

The Government has accepted all of the review's recommendations. These are common sense changes that place the potential risk to the community posed by an accused offender front and centre when bail decisions are made.

The key feature of this bill is the increased stringency it applies to bail decisions for those charged with offences that pose significant risks to the community or the administration of justice. It requires people charged with these offences to "show cause" why their detention is not justified.

The new "show cause" requirement will operate in addition to the existing unacceptable risk test. The unacceptable risk test will also be consolidated from a two-stage test to a simpler one-stage test.

I now turn to the main detail of the bill.

Schedule 1 of the bill contains the substantive amendments to the Bail Act 2013.

Items [1] and [2] will remove the existing reference to the presumption of innocence and the general right to be at liberty from section 3 of the Act, and instead insert a preamble into the Act to clarify the key principles underpinning it. The review noted that the presumption of innocence and general right to liberty are more appropriately reflected as principles in a preamble, rather than as a purpose of the Act. The preamble also includes the need to ensure the safety of victims of crime, individuals and the community and the need to ensure the integrity of the justice system as principles of the Act.

Item [3] will amend section 4 to insert necessary definitions.

Item [5] will amend section 16 to outline two flow charts to guide bail authorities in the decision making process. Flow chart 1 shows the key features of a bail decision for a show cause offence. Flow chart 2 shows the key features of the unacceptable risk test as amended by the bill. The unacceptable risk test must be applied to any consideration of release on bail, including for show cause offences.

Proposed Division 1A of the bill introduces a "show cause" requirement for certain offences. Proposed

section 16A provides that for show cause offences, bail must be refused unless the accused shows cause why his or her detention is not justified. This shift of onus is an important change.

Both Victoria and Queensland have "show cause" requirements in their bail legislation. Courts in those States have noted circumstances which may be relevant to determining show cause include the strength of the prosecution case, preventable delays and urgent personal situations such as a need for medical treatment. Bail authorities in New South Wales will be informed by the approach taken in these other jurisdictions when applying the show cause provisions.

Pursuant to proposed section 16A (3), juveniles will be excluded from the 'show cause' requirement. This reflects the vulnerable position of young people and is consistent with the approach in Queensland. Young people charged with these offences will still however be subject to the unacceptable risk test.

In recommending which offences the show cause requirement should apply to, the review considered the potential consequences for the community and criminal justice system if the risk posed by a person charged with that type of offence were to materialise. The show cause categories therefore apply to those offences which involve a significant risk to the community. These categories are set out in proposed section 16B of the bill and include:

Offences with a maximum penalty of imprisonment for life

· Offences involving sexual intercourse or the infliction of actual bodily harm with intent to have sexual intercourse with a child under the age of 16 years by an adult

· Serious personal violence offences or those involving the infliction of wounding or grievous bodily harm, if the accused has a previous conviction for a serious personal violence offence. Serious personal violence offences are those in Part 3 of the Crimes Act 1900 carrying a maximum penalty of at least 14 years imprisonment

· Certain offences involving the use or possession of a firearm or military-style weapon

· Offences involving a commercial quantity of a prohibited drug or prohibited plant under the Drug Misuse and Trafficking Act 1985 as well as specified drug offences under Part 9.1 of the Commonwealth Criminal Code

· Serious indictable offences committed whilst the accused was on bail or parole and certain offences committed in contravention of a supervision order.

It is important to note that just because an offence falls outside the show cause list, this does not mean a person will automatically get bail. The unacceptable risk test will apply and if the accused poses an unacceptable risk, bail will be refused.

The proposed list of show cause offences serves a different purpose to the old presumptions in relation to bail. Unlike presumptions, determining show cause will not be the end of the matter. If a person shows cause, he or she will still be subject to the unacceptable risk test.

Clause 8 of the bill will remake Division 2 of the Act setting out the provisions that contain the unacceptable risk test. The unacceptable risk test is central to the Bail Act 2013. The provisions in this bill consolidate and simplify the test by making it a one stage test. This is more in line with the Queensland and Victorian bail regimes.

In applying the unacceptable risk test, proposed section 17 stipulates that a bail authority must assess whether there is a bail concern. A bail concern is a concern that the accused will fail to appear in proceedings for the offence, commit a serious offence, endanger the safety of victims, individuals or the community or interfere with witnesses. These are the same concerns targeted by the existing unacceptable risk test so police and courts already have experience in assessing them.

In assessing bail concerns, the bail authority will need to consider the factors set out in proposed section 18 of the Act. These mirror the factors currently set out in section 17 (3) of the Act with some alterations and additions.

The existing factor related to previous compliance with conditional liberty will be amended to require the court to consider the accused's history of compliance or non-compliance rather than a pattern of non-compliance. This will ensure bail authorities can consider serious non-compliance which may not constitute a pattern.

New factors added to section 18 include a requirement to consider whether the accused has any criminal associations. An applicant's links to organised crime networks can have a direct impact on their level of risk. For example, it may give a person access to the means to flee the jurisdiction or the means to continue criminal activity.

Bail authorities will also have to consider the conduct of the accused person towards the victim, or a

family member of the victim, after the offence as this conduct may have a material bearing on their level of risk.

For serious offences, the views of the victim or a family member of a victim will also have to be considered to the extent that they are relevant to assessing the risk of the accused endangering the victim or the community if released. This is not intended to place a burden on victims and subject them to extra questioning. It simply allows police to put forward the information they have available from the victim at that time.

Significantly, the bail authority will now have to consider any conditions that can reasonably be imposed to address bail concerns at the same time it assesses the bail concerns. Previously conditions were considered after the bail authority determined whether or not there was an unacceptable risk. The review noted that a one-stage test, requiring consideration of conditions in assessing unacceptable risk, will allow the bail authority to more directly match a bail concern to a proposed bail condition. I note that the Victorian Bail Act requires that conditions be considered in assessing unacceptable risk.

Proposed section 19 provides that, having assessed bail concerns, a bail authority must refuse bail if satisfied that there is an unacceptable risk that the accused will fail to appear in any proceedings for the offence, commit a serious offence, endanger the safety of victims, individuals or the community or interfere with witnesses or evidence.

Where there are no unacceptable risks, pursuant to proposed section 20, the bail authority must either grant bail, release the accused person without bail or dispense with bail.

Proposed section 20A remakes the existing rules for conditions of bail contained in section 24 of the Act. Subsection (1) provides that bail conditions can only be imposed if there are identified bail concerns. Subsection (2) incorporates the existing restrictions on conditions including that they be reasonable and proportionate to the offence charged and that compliance with the condition be reasonably practicable. The provision will also stipulate that a condition can only be imposed if the bail authority has reasonable grounds to believe that it is likely to be complied with. This will ensure that bail authorities do not impose conditions without considering whether or not the accused will be likely to comply with them.

Division 2A contains a number of consequential and other miscellaneous amendments. Clause [10] will amend section 22 to make clear that if the applicant is required to demonstrate special or exceptional circumstances to get appeal bail under that provision, the show cause requirement does not apply.

The proposed amendments to section 47 at clauses 16 to 18 relate to review of bail decisions by senior police officers. These reforms do not arise from the Hatzistergos review but have been agreed to by the Bail Monitoring Group, which includes representatives from across the justice system.

The requirement for a senior officer to conduct a review of conditional bail was introduced by the new Bail Act. The NSW Police Force has raised concerns that these reviews are creating a significant operational burden for police. Whilst there is utility in allowing a person to seek a review of conditions of bail where they cannot meet the conditions, an accused person who can meet bail can more appropriately seek a review at court after their release. The amendments will therefore restrict the availability of senior officer reviews of conditions to cases where the accused cannot meet a pre-release condition.

Clause 18 will amend section 47 to make clear that where no senior officer is available at the station where the accused is, a senior officer at another station can conduct the review. This will mean reviews can be completed in a more timely fashion, especially in regional areas.

Clauses 20 and 21 of the bill make amendments to section 74 of the Act which restricts multiple bail applications. Section 74 permits a fresh application where there is new information or circumstances relevant to the grant of bail that were not previously presented to the court.

As recommended by the Hatzistergos review, clause 20 will amend this provision to require that new information be 'material', meaning not insignificant. This requirement will apply to both fresh release and detention applications.

There have been reports of some accused people who were refused bail under the Bail Act 1978 arguing that commencement of the new Act is a change in circumstances to justify a fresh release application. The amendments will make clear that the commencement of the Bail Act 2013 does not represent a change in circumstances under section 74.

Clause 23 of the bill contains saving and transitional provisions related to the commencement of the bill. Proposed section 12 of Part 3 will make clear that any amendments made by the bill extend to offences committed, or alleged to have been committed, before its commencement. Proposed section 13 clarifies that the changes made by the bill do not amount to a change in circumstances under section 74.

I would like to take this opportunity to thank Mr Hatzistergos for his excellent work. The changes

proposed in this bill support the risk-based model and put community safety first. The Government has asked Mr Hatzistergos to continue to monitor the operation of the Bail Act 2013 over the next 12 months.

The bill will commence upon proclamation. The Government acknowledges that the NSW Police Force, courts and legal practitioners will need some time to digest these changes. Education and training will be required, along with changes to various information management systems and bail forms. The Government recognises however that the changes proposed in this bill must be implemented swiftly to ensure that the Bail Act is striking the right balance in protecting the community and the integrity of the justice system.

I commend the bill to the House.