

Our ref: LOR/TL

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Dear Ms Craven

Bail Bill 2021

Thank you for your letter of 3 February 2021 attaching a draft copy of the Bail Bill 2021 (**the Bill**).

I acknowledge the briefing the Department provided to the Law Society's Criminal Law Committee.

Law Society's Opposition to the Bill

The Bill was considered by the Council of the Law Society on 22 March 2021. Council resolved to oppose the Bill in its current form. In summary:

1. there is no compelling reason for a change in the current law regarding bail.
2. the downstream problems that will result from the introduction of the proposed changes particularly those flowing from the reduction of the police power to grant bail in the first instance and more bail applications having to go before a justice/magistrate; and
3. the potential for the accused right to be granted bail being substantially eroded by the introduction of the concept of exceptional circumstances in a broader category of offending and substantial risk in all other cases.

It is the view of the Society that over the years the Courts have set an appropriate balance between the right of an individual to be at liberty until convicted and protecting the community interest whilst such people are on bail.

Having said the above, the Society does support the concept of one act encompassing **all** the law on bail in Tasmania and articulating what matters are to be taken into account in determining whether to grant bail or not.

Discussion

Current position regarding bail

To appreciate the significance of the proposed changes that are sought to be introduced an understanding of the current position regarding bail in Tasmania is necessary.

Primarily we are dealing with people who have been arrested and taken into custody usually in respect of more serious indictable crimes that will ultimately end up in the Supreme Court.

Generally, there is a presumption that every accused person is entitled to bail. and the onus is on the prosecution to make a clear case for the refusal of bail except in very limited and very serious crimes which used to be capital offence such as murder in which case the accused must prove there are '*exceptional circumstances*' before being released on bail.

The police are the gate keeper who currently have the power to release a detainee on police bail.¹

The only situations where the police will not or are prohibited from granting a detainee bail are:

1. they are not satisfied that it is desirable in the interests of justice to do so;
2. the detainee is in custody because they have been arrested on warrant for having breached bail; or
3. the detainee has been arrested and charged in respect of a Family Violence matter or breaching a FVO/PFVO

If a detainee is not granted police bail which is usually the case where that detainee has been charged with serious crimes, the police are to bring the person before a justice/magistrate as soon as '*reasonably practicable*' so they may apply for bail.

Whether the detainee will be admitted to bail will depend on the judicial officer being satisfied:

1. It is more probable than not they will appear to answer their bail; and
2. The public will not be at risk whilst they are on bail.

Different factors are considered in resolving these two issues.

If a detainee is not granted bail by a justice/magistrate then they can appeal to the Supreme Court or later apply for bail when they appear after being committed to stand trial.

Whether they are successful in the Supreme Court will depend on a judge being satisfied about the same two matters outlined above.

Position if the provisions of the Bail Bill are introduced

The first and most obvious change is in respect of the police power to release a detainee on bail. Police will no longer be able to release detainees on bail in respect of a matter outlined in section 8 (1)(a) to (d) (see s.11(2) (d)) which covers:

- Crimes relating to murder or treason
- Serious indictable matters (See S.5 plus Schedule 1) with the attributes of the matters in S.8(1)(b) (i) to (iii);
- An indictable offence with the attributes of the matters in S.8(1)(c)(i) to (iii);
- A terrorism linked person.

¹ s4 of the *Criminal Law (Detention and Interrogation) Act 1994*.

The predictable result will be a likely substantial increase in the work of the Magistrates Court along with all the relevant parties involved in the criminal justice process. This is unnecessary when the police are often in a much better position to know who they are dealing with and to exercise the discretion to admit someone to bail or not.

In respect of those matters where the police will retain the power to release someone on bail, they must release a person on bail unless amongst other things they are satisfied on reasonable grounds that the person poses an *'unacceptable risk'* which is a concept addressed later in these submissions. This is a new requirement in addition to the old *'desirable in the interest of justice'* element. (s.11(2)(b)).

Next, after carving out the crimes and attributes set out in section 8 where the police will no longer have the power to release a detainee on bail, the detainee will now have to apply to the relevant court for bail which is as follows:

- The Supreme Court for crimes relating to murder or treason; and
- A magistrate or judge in respect of
 - Serious indictable matters with the attributes of the matters in s.8(1)(b)(i) to (iii);
 - An indictable offence with the attributes of the matters in s.8(1)(c)(i) to (iii); and
 - A terrorism linked person.

In all of the above situations the onus will now be on the accused to prove there are *'exceptional circumstances'* in respect of the person or offence in order to be granted bail. This is perhaps understandable when dealing with murder and treason but there is no apparent or justifiable reason for shifting the onus to the accused in respect of the others.

Next, a Courts general power to release a person on bail will now reside in section 12(3)(a) which also prohibits a Court from granting bail if the Court believes on reasonable grounds that the person applying for bail poses an *'unacceptable risk'*.

It is the notion of *'unacceptable risk'* that has ultimately led the Law Society to adopt a position of opposition to the Bill.

What amounts to an unacceptable risk is set out in section 6 and the Law Society raises the following concerns:

- The section conflates matters that are usually taken into account in determining whether the accused will appear to answer their bail with matters taken into account in determining if the public will be at risk whilst the accused is on bail. This will result in unnecessary confusion.
- Currently the Court would look at all the relevant matters in determining these two issues and whilst some matters are given more weight than others, none are usually in themselves enough to deny a person bail. The Bill proposes that any *'one or more'* of the criteria in section 6 will be enough.
- If this is not a sufficient concern one of the criteria is *'a person is at risk of not attending the court in respect of the offence, as required'* which has the potential to erode the current test of whether it is more *probable* than not that the accused will attend or there is a *real and substantial reason* to fear the accused will not attend. *'Risk'* covers a spectrum from little or negligible risk to substantial risk whereas *'probable'* means the accused failing to attend court is likely to happen.
- The same applies to the second criteria that the accused is *'likely'* to commit an offence whilst released on bail. The current test is there is a *real and substantial*

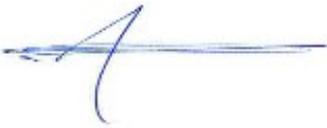
reason to fear the accused would be likely to commit offences during the period of bail or there are **substantial prospects** they will.

Conclusion

The Bill, if enacted will substantially erode the fundamental right of an accused person to freedom in the absence of a finding of guilt. If enacted the Bill is likely to place substantial strain on a criminal justice system that is under considerable and increasing pressure. It should not be progressed in its current form.

It should be noted that the Law Society's concerns regarding the Bill are considerably more extensive than has been outlined. Those concerns have not been raised at this time, given the nature of the Law Society's fundamental opposition to the Bill.

Yours faithfully



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