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Our ref: Criminal Law and Family Law Committees

Dear Research Director

***Bail (Domestic Violence) and another Act Amendment Bill 2017***

Thank you for the opportunity to provide a submission on the amendments to the *Bail (Domestic Violence) and another Act Amendment Bill 2017* (the Bill).

As there has been only a very brief opportunity to review the amendment to the Bill, an in-depth analysis has not been conducted. It is possible that there are issues relating to fundamental legislative principles or unintended drafting consequences which we have not identified. We request that the government extend the period by which to provide feedback and also extend the reporting date of the Committee, so that the Committee has a reasonable opportunity to consider the draft legislation and provide more useful and in-depth feedback which will hopefully assist in improving the quality of the legislation being passed. The members of the Society are in a unique position to provide informed feedback based on their extensive experience in practice.

With respect to the proposed amendments, we make the following comments on specific clauses in the Bill.

**1. Clause 4 - Amendment of s 11 (Conditions of release on bail)**

This provision seeks to establish a special bail condition for a tracking device (or GPS tracker) to be imposed by a court or a police officer authorised to grant bail, against a person charged with a relevant domestic violence offence. The provision states:

A court or a police officer authorised by this Act to grant bail for the release of a person who is charged with a relevant domestic violence offence must also consider the imposition of a special condition under subsection (2) that requires the person to wear a tracking device while the person is released on bail.

The Society is supportive of this clause. However, the Society notes that proper resourcing and funding is required for this provision to be effective in achieving the policy objectives of the Bill. For example, the use of tracking devices must also be met with a commensurate increase in personnel and resources to monitor these tracking devices.

We note that the Bill proposes that proposed section 11(4B) mandates that a:

court or a police officer authorised by this Act to grant bail for the release of a person who is charged with a relevant domestic violence offence must consider the imposition of a special condition under subsection (2) that prohibits the person from approaching within a stated distance of a stated place regularly frequented by the complainant for the offence.

Examples of a place regularly frequented by a complainant for an offence—

- the complainant's usual place of residence
- the complainant's workplace

However, the Society notes that this might be difficult to impose if the victim has an undisclosed personal or work addresses. This also raises the issue of how the location of the victim might be tracked in relation to the location of the alleged offender. In this regard, we are concerned that the GPS tracking device might create a false sense of security for victims. In addition, the Society is concerned about response times.

## **2. Clause 5 - Insertion of new ss 11C and 11D**

Proposed sections 11C and 11D seek to introduce a new system to alert the victim of a relevant domestic violence offence when the defendant applies for bail, is released on bail or receives a variation to a bail condition. The Society supports this provision and considers that these requirements also be replicated in the Queensland Police Service's Operational Procedures Manual and Office of the Director of Public Prosecutions' Director's Guidelines.

## **3. Clause 6 – Amendment of s 16 (Refusal of Bail)**

Clause 6 seeks to reverse the presumption of bail for an alleged offender charged with a relevant domestic violence offence. The Society does not support this provision.

Our members have reported that their recent experience is that Magistrates are applying a much more conservative approach to domestic violence. In fact, anecdotal reports suggest that bail in domestic violence cases is never a "routine process" and that there is a significant amount of scrutiny in domestic violence cases.

The Society notes the tragic deaths associated with domestic violence. However, we do not consider that a reversal of the onus of proof in all bail matters will have a positive impact on this tragic statistic.

In our view, reversal of bail should only ever occur in cases as already outlined in section 16 of the *Bail Act 1980*. Changing the legislation to reverse the onus does not allow for the wide scope of breach matters, which come before the Court to be carefully considered.

Some examples where technical breaches are charged but appear to be unfortunate include the following examples:

- a) The Aggrieved attended Southport Police station to report the breach stating that the defendant had attended her address on 13 December 2015. On 30 December 2015 the defendant voluntarily attended Southport Police station in regard to matter. The

defendant was arrested for the breach of domestic violence order. The defendant declined to participate in an Electronic Record of Interview. The defendant did state however that on the 13 December 2015, he attended to visit the Aggrieved's mother, having been notified by the Aggrieved that her father had passed away two days earlier. The Respondent brought with him a bunch of flowers and a sum of money to assist the family with funeral costs. The Respondent gave the flowers and money to the Aggrieved's mother, had no conversation with the Aggrieved, and left a short time later. The respondent stated that he is of Samoan heritage and it is his culture to pay his respects the deceased family and his extended family had collected money to give the Aggrieved's mother. He was aware that he should not have been at the address but believed that he was not breaching the order if he attended just for this matter, as he had spoken with the Aggrieved by telephone about her father's death. The defendant was then transported to the Southport Watch house where he was given bail to appear at the Southport Magistrates Court in relation to this matter at a later date.

- b) The Aggrieved arrived at the Respondent's caravan (contrary to a no contact condition), with their children in tow. The Aggrieved demanded that he look after them while she went out on the town or else. The Aggrieved came back intoxicated and committed an 'assault-occasioning-bodily-harmed against the Respondent. A couple of months later Queensland police travelled to Sydney to charge the Respondent with breaching the order by having her at his caravan. The Defendant asked the police how he was in breach because the Aggrieved attended his address and she assaulted him. The Queensland police advised that they did not care in the circumstances. Queensland Police flew down to Sydney to charge and extradite him and he quit his job to move back to Queensland to deal with the charges.
- c) The client was charged with breaching a protection order. Dual orders were in place that permitted contact to arrange care for two children. Contact was permitted by text and email on Mondays and Thursdays between 9 am and 8 pm, for the purposes of arranging contact with the children. The registering of consent orders by the Family Court has been continually frustrated by the Aggrieved in this matter. Correspondence on the file generally supported this contention. Some text messages and one email were sent to the Aggrieved on Friday, 4 December. The contact was all in relation to the care of the children. It continued the discussions between the two parties about their children which were permissible on the previous day. One factor further necessitating contact on the Friday was that one of the children had to stay home from school due to illness. It was accepted that this was a technical breach of the terms of the protection order, however, it was hard to imagine a more benign breach. The defence argued that it was not in the public interest to pursue this matter and that it was an abuse of the purposes of the *Domestic and Family Violence Protection Act 2012*, and the types of protections sought to be provided by a protection order for vulnerable persons. Further to this, documentation provided by the defence proved that the Aggrieved had sought to use this charge as a bargaining tool in the current proceedings for consent orders. An offer to the Defendant's solicitor was made to "forego the breaches if.... we can agree about the above mentioned children's change over conditions." This lent support to the Defendant's instructions that the Aggrieved was seeking to manipulate the terms of the protection order in order to gain leverage in the parallel family law proceedings. The Defendant is female and works as an insurance broker, and has been with the same company for 18 years. She had one previous conviction for similar conduct, but otherwise no criminal history and is in the process of seeking a variation of the protection order to allow contact by email and text relating to children on all days.

- d) The Defendant and victim have been in a relationship for about five years and share three children together, the youngest being 10 weeks old. The Defendant also has another child from a different relationship that resides at the Defendant's address. The victim now resides in Sydney and travels to the Gold Coast once a week to pick up the children and take them back to Sydney then returns back to the Gold Coast a week later. There is a current Domestic Violence Order in place naming the Aggrieved and the Respondent. The Defendant and victim became involved in an argument over property within the home. The Defendant stated, she had become very angry with the victim as he was taunting her over her not working and that he had paid for all the furniture. The Defendant stated he could have the furniture back and placed chairs from the dining room setting outside. When the Defendant returned inside the house the victim assaulted her. More specifically, the victim punched and pushed the Defendant around the house. The Defendant moved upstairs to go the toilet and see her children and the victim followed her upstairs where the arguing continued. The Defendant asked the victim to leave her home. The victim refused stating he wanted to stay with the children. The Defendant and victim were standing in the bedroom of the oldest child, the Defendant became very animated with the victim and attempted to push him out of the bedroom as she did not want the child being part of the argument. The victim then pushed the Defendant to the ground. The defendant lashed out at the victim and hit him in the torso. The victim has then punched the Defendant in the face causing her tooth to chip and her lip to bleed. At some stage during the argument, QAS were called for the welfare of the children. QAS arrived and then called police. Police arrived and heard the Defendant was screaming at the victim to give back her baby. Police entered the home where the Defendant turned on police threatening to hurt them. The Defendant was very abusive towards the victim shouting at him when Police advised she was under arrest for breaching the domestic violence order where she is to be of good behaviour towards the victim. The Defendant was placed in the rear of the police vehicle and transported to the Southport watch house where she was charged with the matter now before the court.

The above examples demonstrate that creating a mandatory legislative position removes discretion and creates unreasonable situations. Reversing the onus of proof for bail in domestic violence matters, therefore, does not take into account the complex and challenging social relationships that society is attempting to "manage" through the justice system.

Therefore, in the absence of strong, independent, cogent evidence based data to the contrary, the Society does not consider that adequate reason has been provided to depart from the fundamental legislative principles as detailed in section 4 of the *Legislative Standards Act 1992*.

#### **4. Clause 7 - Insertion of new s 19CA**

The clause proposes the insertion of new section 19CA (stay of release decision relating to relevant domestic violence offence). This provision seeks to introduce a provision to allow for an urgent review of a bail decision in a higher court. The original bail decision would be stayed for up to three business days and the alleged offender would not be released during that period.

The Society has serious concerns about the proposed section.

First, the imposition of a temporary stay may, in some cases, only serve to inflame an already strained relationship without providing any other assistance to resolve the underlying issues between the parties.

Secondly, we note that a framework for review already exists in the *Bail Act 1980*. It is the Society's view that the policy intentions behind the Bill might be better achieved if:

1. the existing framework in the *Bail Act 1980* were utilised more effectively; and
2. rather than implementing additional custody arrangements, an independent mental health professional was available to assist the court in any case where there is a concern around the mental health of the defendant and in which there exists the potential that a person will reoffend upon release. This approach is not dissimilar to the process under the *Dangerous Prisoners (Sexual Offenders) Act 2003*, which provides for scenarios, which are in some ways analogous to this issue.

Thirdly, the Society notes that there is a lack of clarity around where alleged offenders would be detained during a stay of his or her bail decision. We note that watch houses are not designed to detain persons for up to three days. As such, we would not be supportive of a proposal that would, in practice, result in the use of watch houses as defacto detention facilities. In this regard, the Society notes its concern around the potential impact of this proposal on Indigenous Deaths in Custody. The Society also notes that Queensland correctional facilities are currently overcrowded.

Fourthly, the Society considers that the detention of these alleged offenders during a stay of the original bail decision does not accord with our international human rights obligations under the International Covenant on Civil and Political Rights, to which Australia is a party. Article 9 of the Covenant mandates that no one shall be subjected to arbitrary arrest or detention. In our view, the detention of persons without conviction or charge has the potential to be detention of an arbitrary nature.

We look forward to our continued involvement in the policy and legislative process.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Senior Policy Solicitor, Ms Binari De Saram on [b.desaram@qls.com.au](mailto:b.desaram@qls.com.au) or 3842 5889.

Yours faithfully



Christine Smyth  
**President**