The Public Defenders

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NSW Law Reform Commission

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Dear Commissioners,

Response to call for submissions on 'Bail: Show cause offences & the unacceptable risk test'

Thank you for the opportunity to make submissions to the NSW Law Reform Commission on this topic. It was beneficial to meet on Wednesday September 21 with the Chairperson, the Hon. Tom Bathurst AC KC, and a number of officers of the Commission. This meeting allowed for explanation to me of some particular suggestions which have been put forward to achieve the amendments proposed in the terms of reference. As discussed at that time, the Public Defenders oppose the suggested amendments to the Act. This submission in writing is a brief confirmation of that stated position and the reasons for it.

As you are aware the current *Bail Act* was introduced in 2013, commencing in May 2014, in circumstances where the prior legislation was in a hopeless state of complexity. The new Act promised a great deal of simplicity of application, capable of addressing simultaneously the vitally important issues of community safety, the integrity of the criminal justice system, and the undesirability of interfering with the lives of those charged, and presumed to be innocent, to any extent greater than necessary to protect these other considerations.

The Public Defenders were extensively involved in the early months of implementation of the Act in the Supreme Court, and perceived an initial problem in the Act's lack of

connection between consideration of relevant bail concerns, risk, and bail conditions. This problem was remedied by amending legislation implementing a number of recommendations made by the 2014 *Hatzistergos Review.* These amendments commenced on 28 January 2015. The amendment of the legislation to provide for a one stage test for assessing unacceptable risk, in which the capacity to address risk by imposition of bail conditions is considered in determining whether a concern amounts to a risk that is unacceptable, was recommended to the Review, and drafted, by the Public Defenders.

Also introduced at that time, but opposed by the Public Defenders, was the system of 'Show cause' offences. The Public Defenders were and remain opposed to this system as being unnecessary, and potentially causing the over-incarceration of people who are not convicted of any crime. The opportunity for determining bail is crucial in its connection with important social issues such as the over-representation of First Nations people in custody. Detention of those who may never be convicted causes grave disruption of the lives of individuals, families and communities. Our view is that the unacceptable risk test, adjusted as described above, is perfectly calibrated to result in judicially determined outcomes which protect and balance as far as possible all relevant vital interests.

In introducing the show cause system in specific respects, and in previous considerations of extending it (such as NSW Sentencing Council '*Bail – Additional show cause offences*' May 2015) the requirement for demonstration of necessity before interfering with the Act has been thought important. We regard this as crucial to avoid a return to the complexity of the 1978 legislation.

We are aware that the impetus for the current reference to the Law Reform Commission on discrete aspects of the *Bail Act* 2013 was a report to the Attorney-General from the Bail Act Monitoring Group. The Executive Summary of that report which was annexed to the Attorney-General's media release has been reviewed, but the report itself has not been made available to me, despite the nature of my statutory office as Senior Public Defender which includes an obligation to advise the Attorney-General in relation to matters of criminal law reform.

I am not aware from the Executive Summary alone of that report, the Public Defenders' experience in cases before the courts, nor any information provided to me, of any proof of need for the proposed amendments. The perceived problems in individual cases, as I

understand them, are all ones capable of being addressed within the current legislative framework.

The issue of alleged criminal associations is one which is highly dependent on adequate information being placed before the court determining bail. As was said by his Honour Beech-Jones J (as his Honour then was) in refusing bail in *R v Ebrahimi* [2015] NSWSC 335 at [43], assertions of criminal associations of this kind often generate much heat in bail applications, but little light. It is contended on behalf of the Public Defenders that it is through placing appropriate information before the courts as to the detail of alleged association, the criminality of the association, and details of risk and potential management of it, that relevant risk concerns will be protected in individual cases– not by changing the legislation with all the potential for over-reach this entails.

The number of cases where cause is found to be shown for offences listed within s 16A of the Act, but bail is nonetheless refused because there is found to be an unacceptable risk of a bail concern eventuating despite the conditions contemplated, confirms the very hardy role of the existing unacceptable risk test in ensuring community safety and the integrity of the criminal justice system.

Yours sincerely,

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Senior Public Defender