1 May 2020

The Hon Vickie Chapman MP
Attorney-General
GPO Box 464
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By email: AttorneyGeneral@sa.gov.au

Dear Ms Attorney

COVID-19 Emergency Response (Bail) Amendment Bill 2020


2. The Bill seeks to expand upon the classes of offences where a presumption against bail exists under section 10A of the Bail Act 1985 (“the Bail Act”). The new offences include:

   2.1 Serious criminal trespass in residential and non-residential premises and criminal trespass in a place of residence (sections 169, 170 and 170A of the Criminal Law Consolidation Act 1935 (“the CLCA”).

   2.2 Any offence against the person that is aggravated due to the victim falling into the category of a person who was acting in the course of a prescribed occupation (on a paid or voluntary basis) for the purposes of section SAA(1)(ka) of the CLCA as set out in regulation 3A of the Criminal Law Consolidation (General) Regulations 2006 and the offender knew that the victim was acting in the course of their duties. This includes:

      2.2.1 emergency workers, those employed to perform duties in a hospital and those employed in retrieval medicine (medical practitioners, nurses, midwives, security officers or otherwise);

      2.2.2 medical or other health practitioners attending out of hours or unscheduled callout, or assessing, stabilising or treating a person at the scene of an accident or other emergency, in a rural area;

      2.2.3 passenger transport workers;

      2.2.4 police support workers; court security officers;

      2.2.5 bailiffs under the South Australian Civil and Administrative Tribunal Act 2013; and

      2.2.6 protective security officers and inspectors under the Animal Welfare Act 1985.
2.3 An offence against either section 20AA or 20AB of the CLCA which provides for causing harm to, or assaulting, certain emergency workers and the further offence involving use of human biological material.

3. Your letter of 24 April 2020 does not provide a basis for which the amendments were sought. However, in subsequent correspondence from your Advisor, Madeleine Church, to the Society’s Policy Lawyer, Anna Finizio of 27 April 2020, it is noted that the changes were sought by the State Coordinator in light of the work being done by frontline emergency service workers during the pandemic. In addition, it was advised that SAPOL have indicated that there has been an increase in non-residential break ins, compared to the same period last year. This is presumed to be due to a number of businesses having to shut down due to the COVID-19 restrictions imposed.

4. The Society does not condone offences against persons acting in the course of their employment duties and understands that there are number of occupations who may be at a heightened risk during the COVID-19 pandemic. However, it questions what, if any, impact the Bill will have in preventing such offences. The Society does not support the Bill and sets out its concerns with respect to the extension of section 10A of the Bail Act below.

Unlikely to be effective in deterring offences

5. As noted above, while the Society considers offences against emergency workers and those acting in the course of their employment duties to be unacceptable, reversing the presumption of bail for these offences is unlikely to act as a deterrent.

6. In many cases, offences against hospital staff and emergency workers are committed by people with various mental health or other health issues (i.e. drugs and alcohol), who are unlikely to turn their mind to the reversal of the presumption in favour of bail at the time of committing the offence, if at all. In addition, such people are unlikely to receive the appropriate treatment they require in custody, as opposed to in hospital or the community. Similarly, the prospect of the presumption against bail is unlikely to deter a person contemplating an offence of trespass during the pandemic.

7. The Society does not consider that the Bill will be an effective deterrent and therefore questions its necessity. It should also be noted, as some of these offences are categorised as aggravated offences under the CLCA, they are already subject to greater penalties. As such, following trial (and determination of guilt) an appropriate penalty can be applied.

Erosion of discretion

8. Section 10 of the Bail Act sets out the relevant considerations a bail authority must have regard to when considering an application for bail. These include:

8.1 The gravity of the alleged offence;

8.2 Whether the applicant may abscond, offend again, interfere with evidence, hinder police inquiries or bribe a witness to commit perjury;

8.3 The likelihood of the applicant committing a breach of an intervention order;

8.4 If necessary, the protection of the applicant for bail;
8.5 Any medical or other care that the applicant may require;

8.6 Any previous occasion(s) where the applicant has contravened or failed to comply with a term or condition of a bail agreement; or

8.7 Any other relevant matter, such as the strength of the evidence, any prior conditions the applicant may have, and any other special need for the applicant to have bail.

9. The criteria set out in section 10 of the Bail Act seek to strike a balance between the presumption that a person is innocent until proven otherwise, on the one hand, and the right of complainants, witnesses and the community more generally to be protected from persons, and the desirability to ensure that persons charged with offences are brought to trial, on the other.¹

10. However, section 10A of the Bail Act reverses the presumption in favour of bail for “certain categories of alleged offenders whose release on bail can reasonably be regarded as creating a relatively greater risk than many other alleged offenders.”² It has not been established what greater risk such persons identified in the Bill pose to the community in this regard.

11. The Society is concerned that the Bill seeks to further erode judicial discretion. The Society considers that judges are best placed to consider the appropriateness of a bail application based on the facts of each individual application brought before them. If police are opposed to bail, they are able to put their concerns before the court.

12. Section 10 of the Bail Act provides an appropriate and balanced framework to determine whether an application for bail should be granted. It does not appear that the Bill seeks to address bail applicants that might present a higher risk, but rather punish these classes of alleged offenders. This is very much at odds with the presumption of innocence, as well as Australia’s obligations under international law.³

Extended periods in custody

13. As a result of COVID-19, the courts have had to make a number of arrangements to comply with social distancing requirements. These arrangements have impacted upon the flow of matters in the courts, and have/will continue to cause significant delays in the criminal justice system. This means if bail is denied, people are likely to remain in custody for substantial periods of time without trial (i.e. possibly 12-18 months). The Society considers that to implement such measures during the pandemic, where such delays are inevitable due to public health precautions, is inappropriate and may lead to serious injustice for those caught under the amendments.

Bill likely to increase risk of COVID-19 outbreak in correctional facilities

14. Not only is reversing the presumption of bail going to be ineffective in deterring the commission of these offences, but is likely to exacerbate the risk of a COVID-19 outbreak in a South Australian correctional facility. As a result of persons being refused bail (the effect of the proposed legislation) the prison population in South Australia is likely to increase. The is particularly undesirable during a pandemic.

¹ R v Mehr [2016] SASC 174, [64].
² R v Lombardi [2013] SASC 61, [24].
³ See Article 9(3) of the International Covenant on Civil and Political Rights
15. Correctional facilities, as you would appreciate, provide the perfect conditions for the spread of infectious diseases. This is further compounded by the overcrowding of prisoners. An outbreak in a correctional facility may have fatal consequences given the large number of inmates with chronic health conditions, with a disproportionate impact on over-represented groups in prisons, such as Indigenous Australians. The Society wrote to you noting its concerns regarding COVID-19 and correctional facilities on 3 April 2020. Measures which result in an increase in the prison population during the COVID-19 pandemic, particularly of unsentenced persons, are not supported by the Society.

General comments

16. The Society is aware that the Bill has passed the House of Assembly and is likely to pass the Legislative Council. If it is the will of the Parliament to pass this legislation, the amendments to the Bail Act should be strictly confined to the COVID-19 emergency. It is indicated in your letter that the Bill will only operate while the COVID-19 Emergency Response Act 2020 operates. The COVID-19 Emergency Response Act will cease to operate either on the day on which all relevant declarations relating to the outbreak of COVID-19 within South Australia have ceased, or 6 months from the commencement of the Act, whichever is the earlier. The Society will be incredibly disappointed and concerned if such measures are adopted on a permanent basis.

17. The Society considers the Bill is not only likely to be ineffective in deterring the commission of offences, but will have a number of unintended and negative consequences. The COVID-19 Emergency Response Act (and the Emergency Management Act 2004 (SA) generally) provides the State Coordinator with extremely broad and coercive powers to deal with matters arising as result of COVID-19. The use of emergency powers to interfere with bail laws as proposed by the Bill, in the Society’s view, is an inappropriate use of these powers.

Yours sincerely

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