

COMMUNITY LEGAL CENTRES TASMANIA

9 February 2018

Department of Justice
Office of Strategic Legislation and Policy
GPO Box 825
Hobart TAS 7001
attn: Principal Policy Officer

via email: legislation.development@justice.tas.gov.au

To Emma Gunn,

Re: Response to the *Reforms to the Tasmanian Bail System – Position Paper*

Community Legal Centres Tasmania (CLC Tas) welcomes the opportunity to provide comment on the *Reforms to the Tasmanian Bail System – Position Paper*.¹

CLC Tas is the peak body representing the interests of nine community legal centres (CLCs) located throughout Tasmania. We are a member-based, independent, not-for-profit and incorporated organisation that advocates for law reform on a range of public interest matters aimed at improving access to justice, reducing discrimination and protecting and promoting human rights.

We strongly support many of the reforms proposed in the position paper, particularly those reforms that seek to clarify and simplify the law. However, we do not support the proposal to reverse the onus of proof by introducing either the 'exceptional circumstances' or 'show good reason' test primarily because of the likely increase on an already overstretched prison system.

- Simplifying and clarifying Bail Law

The failure of our legislators to clearly articulate the purpose and objectives of bail contributes to the lack of understanding and uncertainty in the wider community. This confusion is compounded by the competing considerations that the judiciary must weigh up in their decision to grant bail. We therefore strongly support the adoption of a clear statement that sets out the purpose and objectives of bail as well as articulating the principles that underpin the grant of bail.

¹ CLC Tas would like to acknowledge Jessanna Gent who assisted in the preparation of this response.

We believe that the proposed objects clause should articulate the presumption of innocence and the prima facie right to liberty, limited only to the extent necessary by the administration of justice and the protection of the community.

Issue 1: Should the Tasmanian Bail Act include an “unacceptable risk test” which contains a list of relevant circumstances to take into account when assessing if the accused is of an unacceptable risk that differs from the outlined considerations in R v Fisher?

It is a long established principle of both Australian and international law that a person is innocent until proven guilty² and that a person should only be deprived of their liberty where there are appropriate grounds for doing so. In Tasmania, the seminal case is *R v Fisher*³ in which Crawford J affirms the fundamental presumption “... that *prima facie* every accused is entitled to his freedom until he stands trial”¹ except in cases where an accused is charged with murder. Crawford J then sets out a non-exhaustive list of factors that should be considered in determining the grant of bail.⁴

More recently, Victoria, New South Wales and Queensland have sought to emphasize the safety and welfare of the community by introducing an ‘unacceptable risk’ test. This test requires a court to refuse a bail application if satisfied that there is an unacceptable risk that the accused if released on bail would:

- fail to surrender himself or herself into custody in answer to his bail;
- commit an offence whilst on bail;
- endanger the safety or welfare of members of the public; or
- interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or herself or any other person.

Whilst all of these factors are broadly recognized in the Tasmanian decision of *R v Fisher*, it is acknowledged that as the law currently stands, the primary consideration is whether the accused will answer bail. While the inclusion of an ‘unacceptable risk’ test in Tasmanian law would elevate the public interest above many other factors that are currently considered, the adoption of the test in legislation is supported on the basis that it will provide a clear reference point for both the legal profession and the wider community.

In adopting an ‘unacceptable risk’ It is important that the list of relevant considerations is non-exhaustive and expressly includes factors that may have an impact on the accused including:⁵

- the need for the accused to be free for any other lawful reason;⁶ and

² Article 14(2) of the *International Covenant on Civil and Political Rights*.

³ (1964) 14 Tas R 12.

⁴ (1964) 14 Tas R 12 at paras. 8-19 per Crawford J.

⁵ Section 18 of the *Bail Act 2013* (NSW).

- the length of time the accused is likely to spend in custody if bail is refused; and
- any special vulnerability or needs the accused has including because of youth, being an Aboriginal or Torres Strait Islander, of a non-English speaking background or having a cognitive or mental health impairment.

Issue 2: Should the Tasmanian Bail Act include a reversal of onus with an exceptional circumstances test for a limited number of offences?

Issue 2A: Should a “show good reason test be included in Tasmanian bail law?

We do not believe that either the ‘exceptional circumstances’ or the ‘show good reason’ tests should be adopted in Tasmania. The proposed tests reverse the onus of proof, requiring the accused to demonstrate that bail should be granted and are a significant encroachment on the accused’s right to the presumption of innocence and the *prima facie* right to liberty. The adoption of one or both tests is also likely to be in breach of article 9(3) of the International Covenant on Civil and Political Rights which provides that “It shall not be the general rule that persons awaiting trial shall be detained in custody”.

We strongly believe that an accused is entitled to the presumption of innocence and the right to liberty unless the State can satisfy the court that the grant of bail should not be made. As Justice Estcourt has previously noted “the rule of law is threatened by any unjustified weakening of the presumption of innocence and the presumption of an accused’s *prima facie* entitlement to bail pending trial”.⁷

Finally, we are concerned that the reversal of the onus of proof is likely to result in an increase in prisoners on remand. In a 2002 Tasmania Law Reform Institute report it was observed that the proportion of prisoners on remand in Tasmania had increased over the previous decade from 12.3 per cent to 20.8 per cent.⁸ More recently, in December 2017 the Department of Justice provided data noting that 28 per cent of prisoners were on remand.⁹ With almost one-third of Tasmanian prisoners on remand, any weakening of the presumption of innocence and their liberty is likely to place a significant strain on an already over-stretched prison system.

⁶ In our opinion, ‘lawful purpose’ should be defined broadly to include an accused’s right to work, obtain an education, participate in family life, access health services and maintain housing.

⁷ Stephen Estcourt, *Bail – Some People Don’t Get it*, article published in *Counsel: The Journal of the Tasmanian Bar* (2016) 1(1) Counsel 10. As found at http://www.supremecourt.tas.gov.au/publications/speeches/estcourt_j (Accessed 7th February 2018).


⁸ Tasmania Law Reform Institute, *Offending while on Bail Research Paper*, No 1 May 2004 at 6.

⁹ Response received from David Sealy, Statutory Appointments, Policy and Projects Officer with the Department of Justice on 8th December 2017.

As well, a number of our centres have reported instances where an accused having been on remand for many months has sought legal advice about changing their plea and the likely sentences. Having received the advice, the accused has concluded that they are likely to get time served and have changed their plea to guilty. In other words, the accused has made the decision to plead guilty, not based on their guilt or innocence but for finalisation.

If you have any queries or we can be of any further assistance, please do not hesitate to contact us.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Benedict Bartl', with a long, sweeping flourish extending to the right.

Benedict Bartl
Policy Officer

Community Legal Centres Tasmania
