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Report of the

ATTORNEY-GENERAL

on the Crimes (Bail Reform) Bill

Presented to the House of Representatives pursuant to Section 7 of the New Zealand Bill of Rights Act 1990 and Standing Order 260 (2) of the Standing Orders of the House of Representatives

I have considered the Crimes (Bail Reform) Bill (the bill), a member's bill in the name of the Hon. Phil Goff, for consistency with the New Zealand Bill of Rights Act 1990 (BORA). I have concluded that proposed new sections 319AA, 319AB and 319AC appear to be inconsistent with section 24(b) of BORA. I set out the reasons for my conclusion below.

The bill

The bill amends the Crimes Act 1961 to provide restrictions on the availability of bail. The explanatory note explains that the purpose of the bill is to help ensure that alleged offenders who constitute a threat to public safety are less likely to be released on bail.

Proposed section 319AA would apply to a person in custody who applies for bail, and who has 10 previous convictions for imprisonable offences, and where either at least one of those convictions arises from an offence committed while previously on bail, or he or she has contravened bail conditions on a previous occasion. Such a person is presumed to be a danger to the public and ineligible for bail unless he or she establishes on a balance of probabilities that, in addition to satisfying general criteria for bail, he or she will not commit an imprisonable offence while on bail.

Proposed section 319AB would apply to all bail applications currently required by law where the applicant has 10 or more convictions for imprisonable offences. It would oblige a judge to refuse bail to such a person where the judge is not satisfied that the person will not commit an offence while on bail or breach bail conditions.

Proposed section 319C imposes a mandatory 3 day notice period on all bail applications made in the High Court by persons remanded in custody to whom sections 318 and 319(5) of the Crimes Act applies.

Section 24(b) of BORA

Section 24(b) provides that

> "Everyone who is charged with an offence shall be released on reasonable terms and conditions unless there is just cause for continued detention."

Key to an assessment of the consistency of proposed sections 319AA, 319AB and 319AC of the bill with the BORA are the words "just cause" in section 24(b).

The appropriate test for assessing whether a provision that restricts the availability of bail amounts to "just cause" is the *Oakes* test [1] as modified by our Court of Appeal in *MOT v Noort* [1992] 3 NZLR 260. In other words, the enquiry should be, in essence, does the measure

[1] Formulated by the Supreme Court of Canada in *R v Oakes (1986)* 26 DLR (4th) 200

serve an important societal goal and is there a rational and proportionate connection between the goal and its means.

Proposed sections 319AA and 319AB

These proposed sections can be considered together. While they differ in significant details they share the following important features. Both apply to accused who have 10 or more previous convictions for offences punishable by imprisonment. Both provide that a judge must decline bail where he or she is not satisfied that an accused, if released on bail, would not commit an offence.

I note that one of the significant differences between sections 319AA and 319AB is that the former imposes upon the accused a burden of proof. This raises a prima facie issue under section 25(c) of the BORA, which affirms the right to be presumed innocent until proved guilty according to law. For reasons that will become obvious below it is unnecessary to pursue the point here. However, I note for the record my view that, if the provision for declining bail under section 319AA was based on "just cause", the reversal of onus would not be objectionable. Canadian authorities show that a reverse onus is capable of being consistent with a guarantee of "release unless there is just cause for continued detention" where the reverse onus provision is narrowly tailored and consistent with the purposes of bail. [2]

The assumption that appears inherent in sections 319AA and 319AB is that persons with 10 or more previous convictions for offences punishable by imprisonment are likely to offend while on bail. This assumption is born out by research done by the Ministry of Justice that indicates 65% of persons who offended on bail in 1994 had 10 or more previous convictions. [3] The other assumption is that persons who offend while on bail constitute a threat to public safety. The basis for this assumption is less obvious. However, while it is unlikely that every offence committed on bail will literally endanger public safety it is, I think, fair to say that offending *per se* is a danger to public safety in a more general sense.

One of the factors that Courts may currently take into account in considering applications for bail is the risk that an accused may offend while on bail (*Hubbard v Police* [1986] 2 NZLR 738). It is a legitimate aim of the bail system to prevent offending by persons on bail. This is supported by the Canadian courts in applying section 11(e) of the Canadian Charter of Rights, which equates with section 24(b), and in the United States: see *R v Pearson* [1992] 3 SCR 665 and *R v Morales* [1992] 3 SCR 711 for Canadian authorities and *Schall*

[2] *R v Morales* [1992] 3 SCR 711
[3] *Those on bail in New Zealand in 1994 and their offending*, Barb Lash, Ministry of Justice, January 1998

v Martin 467 US 253 (1984) and *United States v Salerno* 481 US 739 (1987) for US authorities. [4]

In *Morales*, Lamer CJC, at p 738 in a statement accepted by all judges sitting, said:

> "In my view the bail system does not function properly if individuals commit crimes while on bail. One objective of the entire system of criminal justice is to stop criminal behaviour. The bail system releases individuals who have been accused but not convicted of criminal behaviour, such release must be on condition that the accused will not engage in criminal activity pending trial . . . . [If] there is a substantial likelihood that the accused will engage in criminal activity pending trial, it furthers the objectives of the bail system to deny bail."

To sum up thus far, therefore, it is a legitimate aim of the bail system to prevent offending while on bail and it is rational to assume that there is a substantial likelihood that an accused who has 10 or more previous convictions for imprisonable offences will offend while released on bail. However, the next question is whether it is proportionate (or just) in every case for such an accused to be declined bail, as a mandatory requirement, unless the judge is satisfied the offender will not offend while on bail. I conclude that it is not.

Research by the Ministry of Justice indicates that 80% of accused to which sections 319AA and 319AB would apply do not receive a sentence of imprisonment upon conviction. Given the known propensity for this group to offend while on bail, it is likely that judges would not be easily satisfied that such an accused would not offend if released on bail. Where a judge is not so satisfied sections 319AA and 319AB require the judge to decline bail. This would be so even where the judge considered it unlikely that the offence for which the accused was bailed or any offence the accused might commit on bail would result in a sentence of imprisonment if convicted. The effect of sections 319AA and 319AB, therefore, would be to require judges to remand in custody accused persons who are ultimately unlikely to receive a custodial sentence for the offence for which bail is declined. I do not think this result is justifiable in terms of the BORA. My concern is succinctly put by Hammond J in *R v Gillbanks* [1994] NZLR 61 thus:

> "The outcome [of bail applications] to be avoided is that a person can serve more actual time on remand in custody than the "true" sentence passed. Such results are a straight out miscarriage of justice."

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[4] While I prefer the conclusion of the NZ, Canadian and US authorities, I note for completeness that there is also high judicial authority for the proposition that the prevention of offending while on bail is not a legitimate aim of a bail regime: see *Ryan v Director of Public Prosecutions* [1989] IR 399, a decision of the Irish Supreme Court, and Butler, *The Law of Bail* (1994) NZ Recent Law Rev 314.

The key to designing a bail regime that achieves both the goals of this bill and consistency with section 24(b) of the BORA is to define a class of accused persons to which the regime applies that, if found guilty, are more likely than not to be sentenced to imprisonment. Sections 319AA and 319AB do not achieve this.

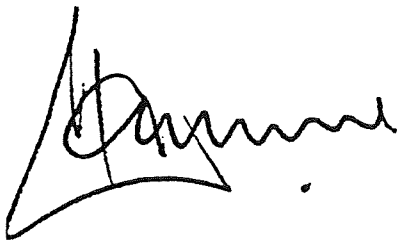
Proposed section 319AC

Section 319AC would apply to any application of bail to which sections 318 or 319(5) of the principal Act apply. It would introduce a mandatory notice requirement whereby the High Court could not consider an application for bail until 3 days after a notice of application is given. This requirement would apply whatever the circumstances of a particular case. The provision is clearly inconsistent with the requirement in section 24(b) that a person be released on bail unless there is "just cause" for continued detention.

A Court should be able to, and currently can, order that an accused be remanded in custody pending a consideration of his or her bail application where this is reasonably necessary to enable the merits of his or her bail application to be properly considered. Such a detention constitutes "just cause" for the purposes of section 24(b). However, a blanket notice period of 3 days does not allow the Court any discretion to take account of the particular circumstances of each case. It would inevitably result in some accused persons being detained longer than the circumstances of their cases would justly require.

Conclusion

I conclude that proposed new sections 319AA, 319AB and 319AC of the Crimes (Bail Reform) Bill, a member's bill in the name of the Hon. Phil Goff, appear to be inconsistent with section 24(b) of the New Zealand Bill of Rights Act 1990.



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