



**Justice**  
Sentencing Council

# Bail – Additional show cause offences

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May 2015



### NSW Sentencing Council

May 2015

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ISBN 978-1-922254-03-0

ISSN 1835-5234

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### Acknowledgements

We acknowledge with gratitude the assistance of all those who made submissions, as well as the NSW Bureau of Crime Statistics and Research.

## Bail – Additional show cause offences

## Executive Summary

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- 0.1 This is the first report of the NSW Sentencing Council's ongoing reference to monitor and review the show cause provisions in the *Bail Act 2013* (NSW).
- 0.2 The reference began as a stand-alone reference to consider a proposal to extend the show cause requirement to 'on sentence' offences, that is, serious indictable offences committed while:
- subject to a good behaviour bond, intervention program order, intensive correction order, or
  - serving a sentence in the community, or
  - in custody.
- 0.3 The reference was subsequently expanded to include an ongoing role in monitoring and reviewing the show cause categories. That extension also included reviewing the definition of serious personal violence offences and the existing category of committing a serious indictable offence while on bail.
- 0.4 As the show cause provisions themselves commenced on 28 January 2015, there is very limited data regarding the operation of the existing provisions. There has also been some uncertainty regarding the operation of the show cause test itself. In these circumstances, the recommendations in this report are made on an interim basis.
- 0.5 The report considers the threshold test for including offences in the show cause categories, and notes stakeholder views on the inclusion of 'on sentence' offences and its potential impact.
- 0.6 We concluded that, as stated in the initial reference, the proposed 'on sentence' category was too broad, and risked capturing those convicted of minor offences who do not pose a significant risk to the community.
- 0.7 After considering possible alternatives, we recommend that, if introduced, any 'on sentence' show cause category in the *Bail Act 2013* should apply to strictly indictable offences committed by a person while serving a 'custodial sentence'. Custodial sentences should be defined for this purpose as meaning full time imprisonment, home detention orders, intensive correction orders or suspended sentences (Recommendation 3.1).
- 0.8 We have a number of concerns about the breadth of the existing 'on bail' show cause category, as it raises similar concerns to those applying to the proposed 'on sentence' category. However, given the limited operation of the existing provisions, we recommend that the existing provision remain in place until we have had further opportunity to consider its impact and report to the Attorney General (Recommendation 4.1).
- 0.9 Given the uncontroversial nature of the equivalent provision in the *Bail Act 1978* (NSW), we recommend that the *Bail Act 2013* be amended to expand the definition of serious personal violence offence to include offences under the law of the

## Bail – Additional show cause offences

Commonwealth, another State or Territory or of another country that are similar to the defined serious personal violence offences in NSW (Recommendation 5.1).

- 0.10 We also note our intention to continue to monitor the operation of the *Bail Act 2013* with specific regard to bail determinations after a conviction, and whether the fact that a person has been convicted should be explicitly listed as a factor to be taken into account as part of the unacceptable risk test.



## Recommendations

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3. Applying the test		page
3.1	If introduced, any 'on sentence' show cause category in the <i>Bail Act 2013</i> should only apply to strictly indictable offences committed by an accused person while serving a 'custodial sentence'.  'Custodial sentences' should be defined as meaning full time imprisonment, a home detention order, intensive correction order or suspended sentence.	35
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5. Repeat serious personal violence offences		
5.1	The legislature should amend the <i>Bail Act 2013</i> (NSW) to expand the definition of serious personal violence offence in s 16B(3) to include offences under the law of the Commonwealth, another State or a Territory or of another country that are similar to the offences under Part 3 of the <i>Crimes Act 1900</i> (NSW) that are punishable by imprisonment for a term of 14 years or more.	40

## Bail – Additional show cause offences

# 1. Introduction

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## In brief

This chapter provides an overview of recent developments in bail law in NSW; outlines the terms of reference for our consideration of the proposed ‘on sentence’ show cause category and ongoing review of the show cause categories; and identifies the challenges we faced in reporting on provisions that have had a limited period of operation.

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- 1.1 This chapter places the reference in context. It presents recent key events in bail law in NSW, overviews the current operation of the *Bail Act 2013* (NSW), and outlines the features of the Act that we have been asked to review. We also acknowledge the interim nature of our recommendations. The short-term application of the Act, and a corresponding paucity of data, means that we have decided to make interim recommendations in this report, with a subsequent report to present final recommendations based on more complete evidence.

## Recent events in bail law in NSW

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- 1.2 Bail law in NSW has undergone numerous government reviews and statutory amendments since the commencement of the *Bail Act 1978* (NSW). Key recent events include the commencement of the *Bail Act 2013* (NSW), and the 2014 amendment, which introduced the show cause test for certain categories of offending. The amendment commenced on 28 January 2015.
- 1.3 Below we present a time line of recent events, and highlight the key points relevant to our review of the show cause category.

## Bail – Additional show cause offences

Table 1.1: Timeline of events in bail NSW from 2012 - 2015

Date	Bail event	Key points
April 2012	NSW Law Reform Commission (NSWLRC) releases Report 135, <i>Bail</i> .	The NSWLRC recommend replacing the existing complex scheme of offence-based presumptions and exceptions with a justification approach to bail.
May 2013	The <i>Bail Act 2013</i> (NSW) is passed by Parliament.	The <i>Bail Act 2013</i> does not take up the key recommendation of the NSWLRC and is instead drafted using a risk-based assessment model. The two-step process asks the bail decision maker to assess whether there is an unacceptable risk of the accused person: <ul style="list-style-type: none"> <li>failing to appear before the court</li> <li>committing a serious offence</li> <li>endangering community safety, or</li> <li>interfering with the judicial process.</li> </ul> If so, an assessment is made as to whether there are any conditions that can mitigate the risk.
May 2014	The <i>Bail Act 2013</i> (NSW) comes into force	
June 2014	The NSW Government announces a review of the Act by former Attorney General John Hatzistergos	The review's terms of reference included consideration of whether the risk-based approach adequately balanced community protection with the integrity of the justice system.
July 2014	The <i>Review of the Bail Act 2013</i> report is published.	Among other things, the review recommends: <ul style="list-style-type: none"> <li>replacing the two-step unacceptable risk test with a one-step test, and</li> <li>incorporating a show cause test into the <i>Bail Act 2013</i> to apply to certain serious offences.</li> </ul> The review proposes that any expansion to the show cause categories be referred to the NSW Sentencing Council.
September 2014	The <i>Bail Amendment Act 2014</i> (NSW) adopts all of the recommendations of the review, to be proclaimed on 28 January 2015.	

Date	Bail event	Key points
September 2014	The former Attorney General refers to the NSW Sentencing Council a suggestion by the Police Association of NSW that a new show cause category include people charged with a serious indictable offence while 'on sentence'.	'On sentence' to include people charged with a serious indictable offence while: subject to a good behaviour bond, intervention program order, intensive correction order; or while serving a sentence but not in custody; or while in custody.  The NSW Sentencing Council is to report to the Government by 31 May 2015.
January 2015	The former Attorney General refers to the NSW Sentencing Council concerns raised by stakeholders that the show cause requirement for people charged with a serious indictable offence while on bail may be too broad. The former Attorney asks the Council to report on bail and whether to expand the trigger for show cause where there has been a repeat serious violence offence to offences committed in another jurisdiction.  The former Attorney General gives the NSW Sentencing Council a standing reference to review the show cause categories in the <i>Bail Act 2013</i> as they arise.	
January 2015	The <i>Bail Amendment Act 2014</i> comes into force	

## Unacceptable risk and show cause

- 1.4 Following the commencement of the *Bail Amendment Act 2014*, there are now two tests for determining bail in NSW.
- 1.5 For certain specified offences, the accused must show cause why his or her detention is not justified.<sup>1</sup> The offences for which this show cause requirement is applicable are listed in s 16B of the *Bail Act 2013*, and include offences punishable by imprisonment for life, repeat serious personal violence offences, certain serious firearms and drug offences and serious indictable offences committed while on bail or parole.
- 1.6 If an accused person is able to show cause why their detention is not justified, the bail authority must then make a bail determination using the unacceptable risk test.<sup>2</sup>
- 1.7 For all other offences, bail is determined using the unacceptable risk test.

1. *Bail Act 2013* (NSW) s 16A (1).

2. *Bail Act 2013* (NSW) s 16A (2).

## Bail – Additional show cause offences

1.8 Section 17 of the *Bail Act 2013* outlines the “bail concerns” that bail decision makers must turn their mind to when making a bail assessment. These are:

... (2) For the purposes of this Act, a bail concern is a concern that an accused person, if released from custody, will:

- (a) fail to appear at any proceedings for the offence, or
- (b) commit a serious offence, or
- (c) endanger the safety of victims, individuals or the community, or
- (d) interfere with witnesses or evidence.

(3) If the accused person is not in custody, the assessment is to be made as if the person were in custody and could be released as a result of the bail decision.

1.9 A bail authority must refuse bail if satisfied that there is an unacceptable risk that the accused person will fail to appear at proceedings for the offence, commit a serious offence, endanger the safety of victims, individuals or the community, or interfere with witnesses or evidence.<sup>3</sup>

1.10 Otherwise, the bail authority may release the person if there are no unacceptable risks, or release the person subject to any conditions that are reasonably necessary to address a bail concern.<sup>4</sup>

1.11 When assessing a bail concern, the bail authority is to have regard to only the following matters:

(1) A bail authority is to consider the following matters, and only the following matters, in an assessment of bail concerns under this Division:

- (a) the accused person’s background, including criminal history, circumstances and community ties,
- (b) the nature and seriousness of the offence,
- (c) the strength of the prosecution case,
- (d) whether the accused person has a history of violence,
- (e) whether the accused person has previously committed a serious offence while on bail,
- (f) whether the accused person has a history of compliance or non-compliance with bail acknowledgments, bail conditions, apprehended violence orders, parole orders or good behaviour bonds,
- (g) whether the accused person has any criminal associations,
- (h) the length of time the accused person is likely to spend in custody if bail is refused,

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3. *Bail Act 2013* (NSW) s 19.

4. *Bail Act 2013* (NSW) s 20, s 20A.

- (i) the likelihood of a custodial sentence being imposed if the accused person is convicted of the offence,
  - (j) if the accused person has been convicted of the offence and proceedings on an appeal against conviction or sentence are pending before a court, whether the appeal has a reasonably arguable prospect of success,
  - (k) any special vulnerability or needs the accused person has including because of youth, being an Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment,
  - (l) the need for the accused person to be free to prepare for his or her appearance in court or to obtain legal advice,
  - (m) the need for the accused person to be free for any other lawful reason,
  - (n) the conduct of the accused person towards any victim of the offence, or any family member of a victim, after the offence,
  - (o) in the case of a serious offence, the views of any victim of the offence or any family member of a victim (if available to the bail authority), to the extent relevant to a concern that the accused person could, if released from custody, endanger the safety of victims, individuals or the community,
  - (p) the bail conditions that could reasonably be imposed to address any bail concerns in accordance with section 20A.
- (2) The following matters (to the extent relevant) are to be considered in deciding whether an offence is a serious offence under this Division (or the seriousness of an offence), but do not limit the matters that can be considered:
- (a) whether the offence is of a sexual or violent nature or involves the possession or use of an offensive weapon or instrument within the meaning of the Crimes Act 1900,
  - (b) the likely effect of the offence on any victim and on the community generally,
  - (c) the number of offences likely to be committed or for which the person has been granted bail or released on parole.<sup>5</sup>

## Terms of reference

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- 1.12 This report deals with two referrals from the former Attorney General. The first was received in September 2014 and referred to a proposal put forward by the Police Association of NSW (PANSW). The former Attorney General requested the NSW Sentencing Council to review the possibility of extending the current show cause categories to include people who are charged with an offence while ‘on sentence’.

A proposal has been put forward ... to amend the show cause provisions to include circumstances where an accused person is charged with a serious indictable offence committed:

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5. *Bail Act 2013* (NSW) s 18.

## Bail – Additional show cause offences

- a) while subject to a good behavior bond, intervention program order, intensive correction order; or
- b) while serving a sentence in the community; or
- c) while in custody.

I would like the SC to consider the ... proposal to extend a show cause requirement to the circumstances referred to above ('on sentence offences').

As part of this review the SC should consider and advise on:

- (1) the extent to which concerns raised by 'on sentence offences' can be mitigated by the existing unacceptable risk test and show cause categories in the Bill
- (2) the expected impact of expanding show cause requirements to 'on sentence offences'
- (3) taking into account the above, whether there is a need to create a new show cause category for 'on sentence offences'; and if so what the appropriate limitations on this category should be in terms of:
  - a) the type of offences it applies to; and
  - b) the type of conditional liberty (or custody) that should trigger the show cause requirement, if an offence is committed.

- 1.13 The second was received in January 2015. The former Attorney General confirmed the ongoing role of the Sentencing Council in reviewing the show cause categories and asked the Council to extend our inquiry into the existing 'on bail' category. It also asked us to review the show cause category of repeat serious personal violence offences.

In addition to considering the NSWPA proposal, I ask that the SC undertake an ongoing role in monitoring and reviewing the show cause categories. I will also refer specific issues to the SC for consideration as they arise.

Two issues have already arisen that I ask you to consider. The Office of the Director of Public Prosecutions have raised another possible expansion, suggesting that the show cause category for repeat serious violent offenders should be more closely aligned with the similar category of offences which had a presumption against bail under the *Bail Act 1978*. There has also been significant stakeholder concern expressed about the breadth of the show cause requirement applying to all serious indictable offences committed while on bail.

- 1.14 We are to provide an interim report on the matters raised in the second letter, and a final report on the matters raised in the first, to the Attorney General by 31 May 2015.
- 1.15 The relevant provisions from the *Bail Act 2013* (NSW) are at Appendix A.

### Uncertainty around the operation of the show cause test

- 1.16 As part of our reference, we conducted an analysis of the existing case law regarding the operation of the show cause test in Victoria and Queensland.



- 1.17 The legislative wording of the show cause tests is similar across NSW, Queensland and Victoria.<sup>6</sup> In all three jurisdictions the bail authority must refuse bail unless the accused person shows cause why his or her detention is not justified.
- 1.18 Each jurisdiction also has, as the basis of its bail regime, an ‘unacceptable risk’ test. This test provides that a bail authority must refuse to grant bail to an accused if the bail authority is satisfied that if the accused is released on bail there is an unacceptable risk that he or she will commit an offence, endanger a person’s safety, interfere with witnesses, or fail to surrender themselves into custody in answer to his or her bail.<sup>7</sup> In order to make this determination, the bail authority must consider a number of matters that are outlined in the respective legislation.<sup>8</sup>
- 1.19 One of the key issues that has arisen in Queensland and Victoria is how the show cause and unacceptable risk tests operate concurrently with each other. On one view, there are two steps involved. Firstly, the accused must show cause why their detention is not justified. If they are successful, the onus shifts to the prosecution to establish that there is an unacceptable risk that, if released, the person will fail to appear, commit a serious offence, endanger the safety of the community or interfere with witnesses or evidence (the bail concerns).
- 1.20 However, a number of cases have acknowledged that even where there is distinct consideration of the two tests, the matters to be considered will overlap, as there is inevitably some consideration of the factors that establish unacceptable risk when considering whether an accused has shown cause.<sup>9</sup>
- 1.21 An alternative approach is to consider the two tests together. In the case of *Re Asmar*, it was held that answering the question of whether an accused has shown cause effectively removed the need for any consideration of unacceptable risk.
- I do not see how the Court could be satisfied ... that the accused person’s detention in custody was not justified, unless the Court was satisfied that there was no unacceptable risk on any of the four grounds.<sup>10</sup>
- 1.22 Using a one-step approach, the four primary bail concerns are at the heart of any consideration of whether the accused has shown cause, and, as such, there is no need for a two-step test.
- 1.23 In the early operation of the show cause test in NSW, this uncertainty as to whether a one- or two-step approach should be used has become evident.
- 1.24 The NSW Act explicitly states that where an accused has shown cause that their detention is not justified, a bail authority must then still undertake the unacceptable risk test – a two-step approach.<sup>11</sup>

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6. *Bail Act 2013* (NSW) s16A(1); *Bail Act 1980* (Qld) s 16(3); *Bail Act 1977* (Vic) s 4(4).

7. *Bail Act 2013* (NSW) s 19(1); *Bail Act 1980* (Qld) s 16(2); *Bail Act 1977* (Vic) s 4(3).

8. *Bail Act 2013* (NSW) s 18(1); *Bail Act 1980* (Qld) s 16(1)(a); *Bail Act 1977* (Vic) s 4(2)(d)(i).

9. *Director of Public Prosecutions v Harika* [2001] VSC 237 [46] (Gillard J).

10. *Re Asmar* [2005] VSC 487 [13] (Maxwell P).

11. *Bail Act 2013* (NSW) s 16A(2).

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- 1.25 However, the observations of Justice McCallum in *M v R*, decided shortly after the commencement of the show cause provisions, cast doubt on the correctness of a two-step approach.

... I have reached the conclusion that the apparent simplicity of a two-stage approach is illusory ... Having regard to the content of [the show cause] requirement, it is difficult to conceive how an applicant could show cause without addressing any relevant bail concerns. The issue whether an applicant has shown cause in my view must inevitably be informed by the outcome of the risk assessment... Conversely, it is difficult to conceive of a finding that an applicant had failed to show cause in circumstances where there was no unacceptable risk.<sup>12</sup>

- 1.26 A few weeks after *M v R*, however, the Court of Appeal re-emphasised the importance of the two-step approach in *DPP v Tikomaimaleya*.<sup>13</sup> The Court accepted that:

... in many cases it may well be that matters that are relevant to the unacceptable risk test will also be relevant to the show cause test and that, if there is nothing else that appears to the bail authority to be relevant to either test, the consideration of the show cause requirement will, if resolved in favour of the accused person, necessarily resolve the unacceptable risk test in his or her favour as well.<sup>14</sup>

- 1.27 However, the Court emphasised the difference between the tests, in that the show cause test is to be determined by a consideration of all the credible evidence, and not just the matters exhaustively listed in s 18, as in the unacceptable risk test.<sup>15</sup>

- 1.28 Indeed, the Court noted that the fact that the offender had been convicted was a matter that was relevant to the show cause test, but was not available to be considered in relation to the unacceptable risk test, as it is not listed in s 18.<sup>16</sup>

- 1.29 The Court did not give any further guidance as to the content of the show cause test, leaving these matters for further argument in future matters before the Court of Criminal Appeal.

- 1.30 We do not express a view as to whether a one- or two-step approach is preferable. However, we note that the ongoing uncertainty over the correct interpretation of the test, and its content, has made it very difficult for us to make an informed assessment of the potential impact of introducing a new show cause category for those charged with a serious indictable offence while ‘on sentence’.

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12. *M v R* [2015] NSWSC 138 [8] (McCallum J).

13. *DPP v Tikomaimaleya* [2015] NSWCA 83.

14. *DPP v Tikomaimaleya* [2015] NSWCA 83 [24].

15. *DPP v Tikomaimaleya* [2015] NSWCA 83 [25].

16. *DPP v Tikomaimaleya* [2015] NSWCA 83 [26]. This raises other issues in relation to the impact of a guilty verdict on the consideration of bail. We address these in Chapter 6.

## Paucity of data

- 1.31 A further difficulty in the preparation of this report has been the lack of relevant data. We have sought data relating to the potential cohort of those committing offences while serving sentence in NSW, as well as on those committing offences while on bail.
- 1.32 While figures relating to the total number of people serving sentences at any given time in NSW are available, we were not able to obtain comprehensive data relating to reoffending while serving a sentence, which would assist in assessing the likely number of people affected by the proposed 'on sentence' category.
- 1.33 The data that was available in relation to those convicted of a fresh offence while serving a sentence could not be broken down to determine the nature of the fresh offence, and hence whether or not it was a serious indictable offence. Further, as the data only captured those convicted of a further offence, it did not include those who were charged with an offence during their sentence, who either had the charges dropped, or were not convicted during their sentence. Both cohorts would be affected by the proposed 'on sentence' show cause category.
- 1.34 We were also unable to obtain data regarding re-offending rates on bail in NSW. We understand that this data is now starting to be captured, but it was not available in time for the preparation of this report.
- 1.35 Predicting the likely number of all those affected by the existing and proposed show cause provisions is very difficult in any case. Firstly, many of the categories have dependencies – that is, whether the offence falls into the show cause category or not will depend on the facts of the case, rather than simply the offence charged. Secondly, there is no systematic recording of offending on bail or parole that would allow such offenders to be identified by whether they were convicted, let alone accused, of a serious indictable offence.
- 1.36 In terms of the actual operation of the show cause provisions after their commencement on 28 January 2015, at the time of writing, no publishable data was available. Even if it had been available, it would only have represented the initial operation of the provisions, which was subject to some volatility as the criminal justice system became familiar with the show cause test.
- 1.37 Given these gaps, we have taken a cautious approach in making the recommendations in this Report. Given our ongoing reference to monitor and review the show cause categories, we intend to continue to monitor the 'on bail' category, and the 'on sentence' category, if introduced, and make further recommendations to government once a clearer picture of the operation of the show cause provisions is available.

## Other ongoing reviews

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- 1.38 When the *Bail Act 2013* commenced, the Government established the Bail Monitoring Group to actively monitor and consider the *Bail Act 2013* and its implementation. In order to inform our report, the Secretariat of the Council has attended a number of Bail Monitoring Group meetings to discuss data collection for the show cause amendments.
- 1.39 The Bail Monitoring Group continues to collect data and oversee the implementation of the amendments. The Group's work will also assist in supporting the preparation of a further report on the *Bail Act 2013* to be conducted by Judge Hatzistergos, which is due to be completed in June 2015.

## 2. Defining the threshold test to determine show cause offences and the proposed ‘on sentence’ category

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### In brief

The threshold test for which offence types or circumstances could attract a show cause requirement was set by the Hatzistergos Review. Under this test, show cause can be triggered where the person poses a significant risk to the community and release is not in the public interest. We examine the sentence types that would be caught by the proposed ‘on sentence’ category, and available breach statistics.

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- 2.1 This chapter presents the threshold test for inclusion in the show cause category – understood as an offence type that manifests a significant risk to the community. It then provides an overview of the sentence types that would be caught by the ‘on sentence’ category.

### The test for identifying new show cause categories

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- 2.2 It is anticipated that the show cause categories in s 16B of the *Bail Act 2013* (NSW) are not to be fixed, and will be expanded or decreased as required. This was implicitly recognised by the *Review of the Bail Act 2013* (the Hatzistergos Review) when it stated:

Any proposal to supplement the list of show cause offences (in accordance with the rationale earlier described) should be a matter reserved for the NSW Sentencing Council under a reference by the Attorney General.<sup>1</sup>

- 2.3 Implicit in that statement is that any proposed new expansion of the show cause category must first meet the qualifying rationale as set out in the Hatzistergos Review, which was variously stated as:

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1. John Hatzistergos, *Review of the Bail Act 2013* (2014) [25].

## Bail – Additional show cause offences

“...in cases where the likelihood of the risk eventuating is outweighed by the consequences should the risk materialise”.<sup>2</sup>

“This test should apply to offenders whose alleged offences are such that in the ordinary course, the consequences of materialisation of the risk to the community and the administration of justice are such that they outweigh the likelihood of it occurring”.<sup>3</sup>

“the gravity of these offences and the public interest is of such significance that it is recommended the alleged offender must show cause”.<sup>4</sup>

“That is, the offence by its nature and circumstances is so serious that the onus shifts to the accused to establish why bail should be granted as detention in custody is not justified”.<sup>5</sup>

2.4 In the Second Reading speech for the *Bail Amendment Bill 2014* (NSW), the test was framed as:

“In recommending which offences the show cause requirement should apply to, the review considered the potential consequences for the community and criminal justice system if the risk posed by a person charged with that type of offence were to materialise. *The show cause categories therefore apply to those offences that involve a significant risk to the community.*”<sup>6</sup>

2.5 Accordingly, a show cause provision can be justified where the consequences of something occurring on release (“the materialisation of the risk”) are so dire that - even if the risk of that occurring is low (“likelihood of it occurring”) - release may run contrary to the public interest.

2.6 Implicit in the test is the assumption that anyone accused of an offence serious enough to be in the show cause category is an inherent risk of causing some harm to the community, purely by virtue of having been charged with that offence. Neither the Hatzistergos Review nor the Second Reading speech specified what the ‘something’ that might occur might be (for example, it could be any of the primary bail concerns – reoffending, failing to appear, causing harm to the community or interfering with a witness).

2.7 We have taken the view that it is the consequences of the accused person re-offending or causing some other harm to the community that outweigh considerations of their likelihood. Presumably, those who are accused of serious offences or repeat offences are more likely to represent a serious danger to the community in this regard.

2.8 The existing show cause categories fall broadly into two groups.<sup>7</sup> The first is where the charged offence is itself considered to be very serious, for example offences

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2. John Hatzistergos, *Review of the Bail Act 2013* (2014) [18].

3. John Hatzistergos, *Review of the Bail Act 2013* (2014) [277].

4. John Hatzistergos, *Review of the Bail Act 2013* (2014) [231] – when referring to why child sexual assault offences are in the show cause category. Note – the author means to refer to [227].

5. John Hatzistergos, *Review of the Bail Act 2013* (2014) [242].

6. NSW, *Parliamentary Debates*, Legislative Assembly, 13 August 2014, 30504, (B Hazzard, Attorney General) [emphasis added].

7. See Appendix A, s16B.

punishable by life imprisonment, child sex offences, firearm offences and serious drug offences. The second is where the person is accused of committing an offence where there is a proven or alleged history of prior offending, for example, a repeat serious personal violence offence, a serious indictable offence committed while on bail or parole, and an indictable offence committed while subject to a high risk offender supervision order. In this latter group, it would appear that the *likelihood* of a risk materialising is a relevant consideration in placing the offence in the show cause category, not merely the *consequences* of the risk materialising.

- 2.9 Our reference to examine circumstances where an accused is charged with committing a serious indictable offence whilst subject to an existing sentence or bail falls into the second group.

### What does the 'on sentence' category entail?

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- 2.10 Our reference requires us to assess whether the show cause provision in s 16B should be expanded to include matters where an accused person is charged with a serious indictable offence committed whilst subject to a:

- good behaviour bond, intervention program order, intensive correction order (ICO), or
- while serving a sentence in the community, or
- while in custody.

### What is a serious indictable offence?

- 2.11 Under the proposal outlined in the terms of reference, a person must commit a serious indictable offence while 'on sentence' to trigger the show cause requirement. A serious indictable offence is defined in the *Crimes Act 1900* (NSW) as an indictable offence that is punishable by imprisonment for life or for a term of 5 years or more.<sup>8</sup> The significant majority of offences in the *Crimes Act 1900* fall under this definition. This includes:

- **offences against the person**, encompassing homicide offences;<sup>9</sup> acts that cause danger or bodily harm;<sup>10</sup> most assaults;<sup>11</sup> most sexual assaults;<sup>12</sup> abortion offences;<sup>13</sup> bigamy;<sup>14</sup> abduction;<sup>15</sup> prostitution offences;<sup>16</sup> child abuse material;<sup>17</sup> and aggravated voyeurism offences.<sup>18</sup>

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8. *Crimes Act 1900* (NSW) s 4.

9. *Crimes Act 1900* (NSW) pt 3, div 1-4.

10. *Crimes Act 1900* (NSW) pt 3, div 6, excluding s 38A (spiking a drink), s 51B (first offence police pursuit), s 53 (injuries by furious driving) and s 54 (causing grievous bodily harm).

11. *Crimes Act 1900* (NSW) pt 3, divs 8, 8A, 8B and 9, excluding s 57 (obstructing the clergy) and s 61 (common assault).

12. *Crimes Act 1900* (NSW) pt 3, div 10 and 10A, excluding s 61N, s 61O (some acts of indecency), s 73(2) and s 78B (attempted incest).

13. *Crimes Act 1900* (NSW) pt 3, div 12.

14. *Crimes Act 1900* (NSW) pt 3, div 16.

## Bail – Additional show cause offences

- **Public order offences**<sup>19</sup> including riot and affray;<sup>20</sup> most explosive and fire arm offences.<sup>21</sup>
- **Stealing offences** including robbery;<sup>22</sup> embezzlement;<sup>23</sup> housebreaking;<sup>24</sup> larceny;<sup>25</sup> stealing a car;<sup>26</sup> and receiving stolen property.<sup>27</sup>
- Fraud, identity and money laundering offences.<sup>28</sup>
- Cheating at gambling offences.<sup>29</sup>
- Criminal destruction and damage.<sup>30</sup>
- Offences relating to transport services.<sup>31</sup>
- Corruption offences.<sup>32</sup>
- Blackmail.<sup>33</sup>
- Forgery.<sup>34</sup>
- Some computer offences.<sup>35</sup>
- Escaping from custody.<sup>36</sup>
- Membership of a terrorist organisation.<sup>37</sup>
- Public justice offences, including perjury.<sup>38</sup>

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15. *Crimes Act 1900* (NSW) pt 3, div 14.

16. *Crimes Act 1900* (NSW) pt 3, div 14A and 15.

17. *Crimes Act 1900* (NSW) pt 3, div 15A.

18. *Crimes Act 1900* (NSW) pt 3, div 15B.

19. *Crimes Act 1900* (NSW) pt 3A, excluding Division 7 (consorting).

20. *Crimes Act 1900* (NSW) pt 3A, div 1.

21. *Crimes Act 1900* (NSW) pt 3A, div 2.

22. *Crimes Act 1900* (NSW) pt 4, div 2.

23. *Crimes Act 1900* (NSW) pt 4, div 6

24. *Crimes Act 1900* (NSW) pt 4, div 4.

25. *Crimes Act 1900* (NSW) s 117.

26. *Crimes Act 1900* (NSW) pt 4, div 5A

27. *Crimes Act 1900* (NSW) pt 4, div 16, excluding s 189 (principle offence minor indictable offence); s192 (receiving material or tools entrusted for manufacture).

28. *Crimes Act 1900* (NSW) pts 4AA, 4AB and 4AC, excluding s 192L (possession of certain equipment) and s 193C (dealing with property suspected of being proceeds of a crime).

29. *Crimes Act 1900* (NSW) pt 4ACA, excluding s 193Q(2).

30. *Crimes Act 1900* (NSW) pt 4AD.

31. *Crimes Act 1900* (NSW) pt 4AE, excluding s 209 and s 212.

32. *Crimes Act 1900* (NSW) pt 4A.

33. *Crimes Act 1900* (NSW) pt 4B.

34. *Crimes Act 1900* (NSW) pt 5, excluding s 256 (2) and (3).

35. *Crimes Act 1900* (NSW) s 308D and s 308E.

36. *Crimes Act 1900* (NSW) pt 6A (not all).

37. *Crimes Act 1900* (NSW) s 310J.

38. *Crimes Act 1900* (NSW) pt 7, div 4.



- Abettors and accessories.<sup>39</sup>
- 2.12 There are over 1500 current serious indictable offences in NSW. Serious indictable offences can also be found in workplace, weapons, environmental and drug legislation.

### What does it mean to be 'on sentence'?

- 2.13 Our terms of reference ask us to consider whether to extend the show cause requirement to instances where an offender is charged with a serious indictable offence while 'on sentence'. We have taken this to include custodial sentences, such as imprisonment, compulsory drug treatment orders (CDTOs), home detention, and ICOs,<sup>40</sup> and non-custodial alternatives, such as community service orders (CSOs), good behaviour bonds (supervised and unsupervised), intervention program orders and suspended sentences.<sup>41</sup>
- 2.14 We review each sentence type below.

#### *In custody: a correctional facility*

- 2.15 This category includes all offenders who are charged with reoffending while subject to a sentence of imprisonment. Where an offender commits the offence in prison and is charged while the offender is in prison, the question of bail does not arise. It would only be where an offender commits an offence in prison and is charged post release (and while not on parole) that he or she would be captured by the proposed extension of show cause. We do not have any statistics for this particular cohort.

#### *In custody: compulsory drug treatment*

- 2.16 The Drug Court and CDTOs have been created to deal with specific, drug dependant offending.<sup>42</sup> CDTOs include a staged program, which has internal disciplinary measures that apply when people breach the conditions of the program.
- 2.17 CDTOs allow offenders to serve sentences of imprisonment with a non-parole period of at least 18 months and a head sentence of not more than six years at the Compulsory Drug Treatment Correctional Centre (CDTCC) where they undertake the compulsory drug treatment program. The compulsory drug treatment program is conducted in five stages:

- (1) closed detention in the CDTCC
- (2) a combination of detention in the CDTCC and access to community based programs
- (3) residing under supervision in the community

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39. *Crimes Act 1900 (NSW)* pt 9.

40. *Crimes (Sentencing Procedure) Act 1999 (NSW)* pt 2, div 2, s 5-7.

41. *Crimes (Sentencing Procedure) Act 1999 (NSW)* pt 2, div 3, s 8-12.

42. *Drug Court Act 1998 (NSW)* s 5A.

## Bail – Additional show cause offences

(4) parole, and

(5) voluntary community based case management.<sup>43</sup>

2.18 If the Drug Court revokes a CDTO, it must commit the offender to a correctional centre to serve the remainder of his or her sentence.<sup>44</sup> The responsibility for making a parole order reverts to the State Parole Authority (SPA). CDTOs can be revoked for a variety of reasons, including many that do not involve reoffending, and we were advised that rates of reoffending while serving a CDTO have historically been low.<sup>45</sup>

### *Home detention*

2.19 A court that imposes a term of imprisonment of up to 18 months can order that it be served by way of home detention.<sup>46</sup> The orders are supervised by Corrective Services NSW and breaches are referred to the SPA.<sup>47</sup> If SPA satisfied that a breach has occurred, it may revoke the order<sup>48</sup> or place further conditions on the order.<sup>49</sup> If SPA revokes the order, the offender must serve three months in custody before the order can be reinstated.<sup>50</sup>

2.20 Home detention involves the offender being detained in his or her home, instead of a correctional facility. A court cannot make a home detention order unless it is satisfied that:

- the offender is a suitable person
- home detention is appropriate, and
- the offender and other inhabitants of the house have consented (and the offender consents to the conditions attached to the order).<sup>51</sup>

2.21 Standard conditions include that the home detainee must:

- be of good behaviour and not commit an offence
- remain in the approved residence
- obey all reasonable directions of a supervisor
- not consume alcohol or drugs
- submit to monitoring

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43. Corrective Services NSW, *Review of the Compulsory Drug Treatment Program and the Compulsory Drug Treatment Correctional Centre pursuant to the Crimes (Administration of Sentences) Act 1999* (2013) 7-8.

44. *Crimes (Administration of Sentences) Act 1999* (NSW) s 106R, 106S.

45. Informal communication with the Drug Court, 29 April 2015.

46. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 6.

47. *Crimes (Administration of Sentences) Act 1999* (NSW) s 166.

48. *Crimes (Administration of Sentences) Act 1999* (NSW) s 167(1).

49. *Crimes (Administration of Sentences) Act 1999* (NSW) s 167(4).

50. *Crimes (Administration of Sentences) Act 1999* (NSW) s 168(A)(1).

51. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 78.

- engage in treatment plans, and
  - undertake community work.<sup>52</sup>
- 2.22 Home detention is limited to offences where the prison term is less than 18 months. It is not available for serious offences such as homicide, sexual assaults, child sex offences, firearm offences, serious assaults, domestic violence, and some drug offences.<sup>53</sup> It is also not available to a person who has any previous conviction for homicide offences, serious sexual assault, stalking or intimidation; recent domestic violence offences or under AVOs.<sup>54</sup>
- 2.23 In 2012, 161 home detention sentences were imposed as a principal penalty in the Local Court and higher courts, of which:
- 41% (67) were for traffic and regulatory offences
  - 23% (38) were for offences against justice procedures (this includes breach of a suspended sentence, revocation of community service order or good behaviour bond), and
  - 12% were for fraud offences.<sup>55</sup>
- 2.24 In 2013, 134 home detention sentences were imposed as a principle penalty in the Local Court (130) and the higher courts (4).
- 2.25 In 2011/12, 90.5% of home detainees completed (without breach) an order for home detention. This decreased slightly to 88.5% in 2012/13.<sup>56</sup>

### *Intensive correction order*

- 2.26 A court that imposes a term of imprisonment of up to two years can order that it be served by way of ICO,<sup>57</sup> which generally comprises community service work, supervision and one or more rehabilitative programs. The court must find an ICO to be an appropriate sentence, and the person must consent in writing to the conditions of the order.<sup>58</sup> Standard conditions include: to be of good behaviour and not commit an offence; reside at an approved residence, be supervised, submit to searches and testing; monitoring; curfew; community service; medical examination.<sup>59</sup>

52. *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 190.

53. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 76.

54. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 77.

55. For further details see NSW Law Reform Commission, *Sentencing – Patterns and Statistics*, Report 139A (2013), Figure 4.1.

56. Productivity Commission, *Report on Government Services* (2014) Table 8A.31.

57. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7. Note: ICO's cannot be imposed for certain sexual assault offences.

58. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 67.

59. *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 186.

## Bail – Additional show cause offences

- 2.27 Breach of the ICO conditions can result in SPA making an order for home detention for up to seven days<sup>60</sup> or revoking the ICO.<sup>61</sup> If the ICO is revoked, the offender must serve one month in full-time detention before SPA can reinstate the ICO.<sup>62</sup>
- 2.28 In 2012, 0.92% of all NSW offenders (898) were sentenced to an ICO, of which:
- 26% (230) were for traffic and regulatory offences
  - 26% (230) were for offences against justice procedures
  - 15% (135) were for acts intended to cause injury
  - 8% (71) were for drug offences
  - 6% (53) were for fraud
  - 5% (43) were for break and enter, and
  - 1% (12) were for sexual assault.<sup>63</sup>
- 2.29 In 2013, 880 ICOs were imposed by the Local Court. This equated to 10% of all “custodial” sentences, 1.5% of all sentences (excluding fines); and 0.95% of all penalties. 152 offenders were sentenced to an ICO in the higher courts, which equates to 5% of all people sentenced in the higher courts.
- 2.30 Of the 1057 ICOs that were discharged in 2013, 783 (74%) were discharged as the result of the offender successfully completing the ICO, and 274 (26%) were revoked.<sup>64</sup>
- 2.31 22% of revocations (60) were caused by the offender reoffending/breaching the good behaviour condition.<sup>65</sup>

### *Suspended sentences*

- 2.32 The court may impose a term of imprisonment of two years or less and suspend the execution of the sentence on the condition that the offender enters into a good behaviour bond.<sup>66</sup> The bond may include supervision conditions, in which case the offender is managed by Corrective Services NSW for the duration of those conditions. If the court revokes the bond due to a breach (including any reoffending) the offender serves the remainder of the sentence in custody.<sup>67</sup>

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60. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 90(1)(b).

61. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 90(1)(c), s 163.

62. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 165(2)(a).

63. NSW Law Reform Commission, *Sentencing – Patterns and Statistics*, Report 139A (2013), Figure 4.5

64. NSW Sentencing Council, *Annual Report* (2013) 30.

65. NSW Sentencing Council, *Annual Report* (2013) 32.

66. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 9, s 12. See [2.41] below.

67. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 99(1)(c).

- 2.33 In 2013, 57% (2675) of suspended sentences imposed by the Local Court were supervised.<sup>68</sup> In the higher courts, 67% (373) of suspended sentences were supervised.<sup>69</sup>
- 2.34 The majority of offenders convicted in the Local Court are serving a suspended sentence for traffic offences (24% - 1110) followed by assault (24% - 1105) and offences against justice procedures (19% - 873), of which 570 had breached a previous condition of sentence.<sup>70</sup>
- 2.35 In the higher courts 33% (185) of suspended sentences were imposed for illicit drug offences; 17% (93) for unlawful entry with intent/burglary, break and enter; and 11% (62) for sexual assault.
- 2.36 In our 2011 background report on suspended sentences, we reported that approximately 25% of offenders who received a suspended sentence in the Local Court in 2008 committed a further offence during the period of their suspended sentence.<sup>71</sup> This accords with more recent data provided by the Bureau of Crime Statistics and Research (BOCSAR) which also showed that 25% of those sentenced to suspended sentences in 2011/12 were convicted of a subsequent offence during the period of their suspended sentence.<sup>72</sup>

### *Community service orders*

- 2.37 Courts may make a CSO directing an offender to perform community service work for up to 500 hours.<sup>73</sup> In 2013, the average amount of time imposed under a CSO in the Local Court was 137 hours,<sup>74</sup> and 208 hours in the higher courts.<sup>75</sup>
- 2.38 In the Local Court in 2013, 3643 offenders were sentenced to a CSO. Of these, the majority (37% - 1350) had committed a traffic offence, followed by assault and acts intended to cause injury (21% - 764) and offences against justice procedures (11% - 403) of which 207 had breached a previous community based order.<sup>76</sup>
- 2.39 Only 25 CSO's were imposed as a principle penalty in the higher courts. Eight for illicit drug offences; 6 for unlawful entry with intent/burglary, break and enter.

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68. NSW Bureau of Crime Statistics and Research, *Criminal Courts Statistics 2013*, (2014) Table 1.7.

69. NSW Bureau of Crime Statistics and Research, *Criminal Courts Statistics 2013*, (2014) Table 3.8.

70. NSW Bureau of Crime Statistics and Research, *Criminal Courts Statistics 2013*, (2014) Table 1.7.

71. NSW Sentencing Council, *Suspended Sentences: A Background Report by the NSW Sentencing Council* (2011) 23.

72. NSW Bureau of Crime Statistics and Research (unpublished data, ref: 12735).

73. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 8.

74. NSW Bureau of Crime Statistics and Research, *Criminal Courts Statistics 2013*, (2014) Table 1.10.

75. NSW Bureau of Crime Statistics and Research, *Criminal Courts Statistics 2013*, (2014) Table 3.11.

76. NSW Bureau of Crime Statistics and Research, *Criminal Courts Statistics 2013*, (2014) Table 1.7.

## Bail – Additional show cause offences

2.40 CSO's do not include a standard condition that the offender be of good behaviour (not reoffend) during the order. It is possible for a NSW offender subject to a CSO to successfully complete his or her CSO even if they reoffend while the order is in force. This makes it impossible to determine how many breaches were for reoffending. That said, in 2011/12 the completion rate of CSO's was 83%.<sup>77</sup>

### *Good behaviour bonds*

2.41 Following a conviction, the court may direct an offender to enter into a bond to be of good behaviour for a specified period of up to five years, and the court can choose to make the bond subject to supervision by Corrective Services NSW.<sup>78</sup> Good behaviour bonds can be ordered directly, or as a part of a suspended sentence (see above) or dismissal of charges.<sup>79</sup>

2.42 In 2013, the Local Court ordered that 20 030 people be subjected to a good behaviour bond. Of these:

- 6603 (33%) were convicted of acts intended to cause injury
- 3614 (18%) for traffic offences, and
- 3065 (15%) for offences against justice, of which 1233 (40%) were for breach of a previous sentence order.<sup>80</sup>

2.43 The average length of time a person was subjected to a good behaviour bond in 2013 was 18 months in the Local Court,<sup>81</sup> and 21 months in the higher courts.<sup>82</sup>

2.44 In 2012, 2807 people were dealt with by the courts for breach of a good behaviour bond. This equates to around 14% of all people subject to a good behaviour bond at that time.<sup>83</sup>

### *Intervention programs*

2.45 Intervention programs are defined by the *Criminal Procedure Regulation 2010* (NSW), and include pre-sentence and alternative sentencing programs, composed of the circle sentencing intervention program;<sup>84</sup> forum sentencing;<sup>85</sup> and the traffic offender intervention program.<sup>86</sup>

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77. NSW Law Reform Commission, *Sentencing – Patterns and Statistics*, Report 139A (2013), [5.19].

78. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 9.

79. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10.

80. NSW Bureau of Crime Statistics and Research, *Criminal Courts Statistics 2013*, (2014) Table 1.7.

81. NSW Bureau of Crime Statistics and Research, *Criminal Courts Statistics 2013*, (2014) Table 1.10.

82. NSW Bureau of Crime Statistics and Research, *Criminal Courts Statistics 2013*, (2014) Table 3.11.

83. NSW Law Reform Commission, *Sentencing – Patterns and Statistics*, Report 139A (2013), [5.37].

84. *Criminal Procedure Regulation 2010* (NSW) pt 6.

85. *Criminal Procedure Regulation 2010* (NSW) pt 7.

86. *Criminal Procedure Regulation 2010* (NSW) pt 8.

2.46 **Forum sentencing:** under this program, offenders (usually young adults) charged with an eligible offence<sup>87</sup> can take part in a forum with the victim and others affected by the offence, support people and police. Here the participants discuss the offender's conduct and agree to an intervention plan with the objective of repairing the harm of the offence. The court approves the plan and offenders undertake the actions required in the plan before or during the sentence.

2.47 In 2013, 516 forums took place.<sup>88</sup> In 2013, BOCSAR conducted a study regarding forum sentencing, and in the control group of 575 people referred to forum sentencing, found that:

At their index court appearance, most Forum Sentencing offenders had been granted bail, were legally represented and had pleaded guilty to their principal offence. The most frequent principal offence for which offenders were referred to Forum Sentencing was violent offences (23.1%), followed by theft (21.4%), driving (12.7%) and fraud (11.7%) offences. Over half of all offenders referred to Forum Sentencing had more than one offence finalised at their index court appearance. Most offenders in the Forum Sentencing group also had extensive prior offending histories. Forty per cent of all offenders referred to Forum Sentencing had three or more convictions in the five years prior to the index court appearance; 44 per cent had previously received a s9 good behaviour bond and 17 per cent had previously been sentenced to full-time imprisonment.<sup>89</sup>

2.48 **Circle sentencing:** Circle sentencing is a similar program to forum sentencing, involving Aboriginal and Torres Strait Islander offenders. In 2013, 61 circle sentences were finalised.<sup>90</sup>

2.49 **Traffic offender intervention programs (TOIP):** A magistrate is able to refer a defendant who has entered a guilty plea to a traffic offence to an approved traffic course. A referral is made prior to sentencing, with the proceedings adjourned to allow sufficient time for the nominated course to be completed.

2.50 In 2013:

- 11,795 individuals participated in and 9,898 individuals completed a TOIP (83.9%).
- Driving with a prescribed concentration of alcohol (ie drink driving) represented the most frequent offence type (60% of offences).
- Other categories included speeding (23%) and licence infringement offences (17%).
- The majority of participants (79%) were male, with the most frequent age group being those aged 20-24 years (41%).<sup>91</sup>

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87. This excludes indictable only offences, such as murder, manslaughter and serious violent and sexual offences, as well as some other non-indictable offences of serious violence, sexual offences, offences of stalking and intimidation, drug supply, cultivation and manufacture, serious firearms offences). See *Criminal Procedure Regulation 2010* (NSW) pt 7.

88. NSW Local Court, *Annual Review 2013* (2014) 23.

89. NSW Bureau of Crime Statistics and Research, *Rates of recidivism of offenders referred to forum sentencing* (2013) 5.

90. NSW Local Court, *Annual Review 2013* (2014) 22.

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- 2.51 The *Criminal Procedure Act 1986* (NSW) permits the court to adjourn proceedings to assess an offender's capacity for participation in an intervention program and to allow the offender to participate.<sup>92</sup> Proceedings must not be adjourned unless the court grants bail for the offence or dispenses with bail under the *Bail Act 2013*.<sup>93</sup> The court will sentence the offender at a later, specified, date.
- 2.52 If a defendant is granted bail, s 16B(h) of the *Bail Act 2013* will be triggered – so that if that person is then charged with a serious indictable offence, the 'show cause' provisions will apply in any following bail application. This means that only people who have bail dispensed with while being assessed or participating in an intervention program would be captured by the proposed inclusion of 'intervention program orders' in the 'on sentence' category.

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91. NSW Local Court, *Annual Review 2013* (2014) 24.

92. *Criminal Procedure Act 1986* (NSW) s 350.

93. *Criminal Procedure Act 1986* (NSW) s 350(1A); *Criminal Procedure Regulation 2010* (NSW) cl 29.



### 3. Applying the test – Should there be an ‘on sentence’ show cause category?

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#### **In brief**

We outline the views of stakeholders who made a submission regarding the proposed ‘on sentence’ category. Blanket application of the show cause requirement to all people charged with a fresh serious indictable offence while ‘on sentence’ may capture many offenders who do not pose a serious risk to the community. We propose that the show cause test should only apply to those subject to certain custodial sentence types and charged with a strictly indictable offence. This is an interim recommendation based on limited data, and should be considered in light of emerging data about the show cause test.

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- 3.1 The previous chapter looked at the threshold test for including offences in the show cause category and the range of sentences that the ‘on sentence’ category would apply to. In this chapter, we outline stakeholder views on whether people charged while ‘on sentence’ meet the threshold test and the possible impact of the category on the criminal justice system and particular offenders. We look at alternative approaches to the proposed category, and recommend restricting the proposed ‘on sentence’ criteria.

#### **Stakeholder views - application of the test to ‘on sentence’ offences**

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- 3.2 The majority of stakeholders who made submissions to us expressed doubt as to whether all serious indictable offences committed whilst ‘on sentence’ came within the threshold test set by the Hatzistergos Review, and many did not support the

introduction of an on sentence category at all. Only law enforcement considered the proposed category of ‘on sentence’ offences to be appropriate for a show cause requirement. The two views are outlined below.

### People charged while on conditional liberty evince behaviour that generates a serious risk to the community

- 3.3 It is the view of the Police Association of NSW (PANSW) that a person who is charged with a serious indictable offence while subject to conditional liberty “demonstrates a disregard for the trust that the courts placed in them when they were first sentenced to some form of conditional liberty; and they should not be given that trust again lightly”.<sup>1</sup> This disregard is evident in ‘on sentence’ offenders who accordingly pose a “significant risk to the community”.<sup>2</sup>
- 3.4 The PANSW refer to a 2002 Bureau of Criminal Statistics and Research (BOCSAR) study which showed a large drop in the number of people absconding and failing to appear after on-liberty offenders were identified as an exception to the presumption in favour of bail to support their position.<sup>3</sup> Accordingly, “[S]ection 16B(1)(h) has been included in the Bill because those who offend while on bail or parole pose a significant risk to the community and should not be trusted with conditional liberty again. The same applies to other forms of conditional liberty”.<sup>4</sup>
- 3.5 The NSW Police Force (NSWPF) agree and note:
- Clearly, under the current amendments, the expectation is that those who commit serious indictable offences whilst subject to bail, parole or supervision orders pose a risk to the community and the administration of justice, the consequence of which outweighs the likelihood that it may occur. This is the basis upon which bail must be refused unless they can show cause why their detention is not justified. It is the view of the NSW Police Force that those who are the subject of other forms of conditional liberty... pose an equal risk and should also be subject to the same ‘show cause’ requirement.<sup>5</sup>
- 3.6 For the NSWPF, people accused of a serious indictable offence while ‘on sentence’ have indicated “their propensity to commit further serious offences and the lack of effectiveness bail conditions, parole conditions or supervision orders have on mitigating the risk mean that they should be required to show cause before bail will be considered”.<sup>6</sup> The NSWPF further posit:

Why, if he is on a suspended sentence, rather than bail, is he considered any less of a risk? The fact that he has committed a serious offence whilst on a bond that requires him to be of good behaviour, with a threat of imminent imprisonment if he is not, is demonstrative of the significant risk he poses. In

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1. NSW Police Association, *Submission BASCO05*, 2.  
2. Second reading speech, *Bail Amendment Bill 2014*, 13 August 2014 (Hazzard), cited NSW Police Association, *Submission BASCO05*, 4.  
3. NSW Police Association, *Submission BASCO05*, 3.  
4. NSW Police Association, *Submission BASCO05*, 4.  
5. NSW Ministry for Police and Emergency Services, *Submission BASCO12*, 2.  
6. NSW Ministry for Police and Emergency Services, *Submission BASCO12*, 3.

such circumstances it is clear any form of conditional liberty is powerless to deter him from continuing to be a significant risk to the community.<sup>7</sup>

### People charged while on conditional liberty may not pose any risk to the community

- 3.7 The NSW Bar Association does not agree that ‘on sentence’ offences necessarily equate to the accused posing a greater risk to the community. The Bar Association point out that an accused person in the ‘on sentence’ category may be arrested for a “serious indictable offence that is much less serious than the offences contained in the new s 16B”, including “larceny, steal from person, and receiving stolen property, damaging property, making a false document, and perjury”.<sup>8</sup> The Bar Association infer that these offence types do not necessarily involve a significant risk to the community and state that the “proposed new categories represent a significant, and unnecessary, expansion of the categories of conduct that would trigger the ‘show cause’ requirement”.<sup>9</sup>
- 3.8 Similarly, Legal Aid note that, under s 16B(h), a person who is on bail for an allegation of offensive behaviour who comes before the court charged with larceny will have to ‘show cause’ under the *Bail Act 2013*.<sup>10</sup> Under the proposed amendments this would also apply to people who are charged with a serious indictable offence while on a good behaviour bond or intervention program order. Legal Aid observes that “[G]ood behaviour bonds are one of the lowest penalties on the sentencing hierarchy. People receive good behaviour bonds for varying lengths of time and often for very minor offending ... The provision will significantly broaden the scope of the existing provision and impact on a large number of people”.<sup>11</sup>
- 3.9 The Office of the Director of Public Prosecutions (ODPP) makes the observation that not all categories of ‘on sentence’ outlined in the terms of reference equate to conditional liberty including:
- s 10 bonds, which are an alternative to a fine<sup>12</sup>
  - s 9 bonds, which are a deferral of sentence and the lowest available penalty, and
  - intervention programs such as circle sentencing and traffic offenders programs, which may not involve a serious offence, and are designed to facilitate the rehabilitation of the offender.
- 3.10 It is the view of the ODPP that these categories don’t hold the same concerns as outlined in the police submissions, and should not necessarily attract a show cause requirement.<sup>13</sup>

7. NSW Ministry for Police and Emergency Services, *Submission BASCO12*, 4.

8. NSW Bar Association, *Submission BASCO02*, 4 (references omitted).

9. NSW Bar Association, *Submission BASCO02*, 3.

10. Legal Aid NSW, *Submission BASCO04*, 2

11. Legal Aid NSW, *Submission BASCO04*, 2.

12. Also see the Law Society of NSW, *Submission BASCO11*, 1.

13. NSW Office of the Director of Public Prosecutions, *Submission BASCO14*, 3.

## Bail – Additional show cause offences

- 3.11 The ODPD makes a distinction between the above and orders that are considered to be custodial such as intensive correction orders (ICOs), s 12 bonds (suspended sentences) and home detention. The ODPD considers that people that commit strictly indictable offences while subject to one these custodial orders should be included in the show cause category. However, it does not follow, according to the ODPD, that offences alleged to have occurred in custody (while imprisoned) would generate a risk to the community generally. Serious or strictly indictable offences alleged to occur in custody, it is suggested, should not be included in the show cause category.<sup>14</sup>
- 3.12 In regards to alleged offences committed in the course of a non-custodial sentence attracting a show case requirement, the Public Interest Advocacy Centre (PIAC) assert that:

Imposing a higher threshold, which increases the likelihood of bail refusal, on a small range offender will risk imprisoning individuals who pose no risk to the community with all the detriment this entails. It will also encompass risk that does not involve the serious consequences that the Hatzistergos Review intended to address in recommending the show cause test. Requiring an individual, for example, who has been placed on a good behaviour bond for driving while suspended who then gets involved in a pub fight to show cause is a disproportionate response to the legitimate aim of protecting public safety.<sup>15</sup>

## The potential impact of an ‘on sentence’ show cause category on the criminal justice system

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- 3.13 Stakeholders have also expressed concern regarding the potential scope of the proposed ‘on sentence’ category and universally agree that the natural consequence of expanding the show cause category to offences charged while ‘on sentence’ will be to increase the remand population.<sup>16</sup> This in turn may:
- undermine the rehabilitative goals of intervention program orders<sup>17</sup>
  - increase the number of people exposed to the criminogenic effect of remand<sup>18</sup>
  - detrimentally impact on defendants with special needs and vulnerabilities, especially mental health or cognitive impairment, and disproportionately impact on indigenous people, young people and women<sup>19</sup>
  - institutionalise people who would not be considered a risk under the old regime<sup>20</sup>

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14. NSW Office of the Director of Public Prosecutions, *Submission BASCO14*, 3.

15. NSW Public Interest Advocacy Centre, *Submission BASCO07*, 7.

16. See, for example, NSW Office of the Director of Public Prosecutions, *Submission BASO14*, 2; Chief Magistrate of the Local Court, *Submission BASCO03*, 2; Corrective Services NSW, *Submission BASCO15*, 5.

17. Legal Aid NSW, *Submission BASCO04*, 3.

18. Corrective Services NSW, *Submission BASCO15*, 3.

19. Public Interest Advocacy Centre, *Submission BASCO07*; Legal Aid NSW, *Submission BASCO04*, 3; Public Defenders, *Submission BASCO08*, 2.

20. Law Society of NSW, *Submission BASCO11*, 4.

- unnecessarily cause people to lose employment and housing,<sup>21</sup> and
  - require a significant increase in government resourcing.<sup>22</sup>
- 3.14 The NSWPF viewed expansion of the remand population to be a positive outcome. The key justifications being that the community will be safer, and the offender will be “protected from their own actions such that they won’t be at risk of prolonging their sentence”.<sup>23</sup>
- 3.15 As indicated in Chapter 1, it is too early to state with conviction whether the introduction of the show cause test has had an impact on the remand population. Custody figures published by BOCSAR indicate that the adult remand population increased to 3535 in February 2015. However, the increase from January to February 2015 was less than increases in the preceding months, and the remand population decreased in March 2015.<sup>24</sup> We will continue to monitor these trends.
- 3.16 Victims Services comment that the proposed expansion would be in the interests of victims of crime because it focuses on crimes that inherently impact on the safety and welfare of victims, witnesses and the community.<sup>25</sup>

### The impact on particular defendants

- 3.17 Stakeholders have expressed concern that expanding the show cause test to people charged with a fresh serious indictable offence while ‘on sentence’ (or bail) may disproportionately affect certain defendants.

### Unrepresented defendants

- 3.18 In their submission to us, the ODPP noted that the proposed amendments may lead to greater difficulties for unrepresented defendants.

It may be that the relative seriousness of the bail offence and the new offence will be readily addressed by the court in determining that the offender has discharged the onus, however it remains to be seen how effective an unrepresented offender at a police station will be in addressing the ‘show cause’ issue. There is a distinct possibility that this cohort of offenders will not get police bail and it will be the role of the court to determine bail. Some offenders in this group may not be facing a custodial sentence for either of the offences. This will have an adverse impact on court, correctional, prosecution and legal aid resources.<sup>26</sup>

- 3.19 The Law Society of NSW shared this concern.<sup>27</sup>

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21. Corrective Services NSW, *Submission BASCO15*, 3.

22. NSW Young Lawyers Criminal Law Committee, *Submission BASCO06*, 4; Corrective Services NSW, *Submission BASCO15*, 5.

23. NSW Ministry for Police and Emergency Services, *Submission BASCO12*, 4.

24. Bureau of Crime Statistics and Research, *NSW Custody Statistics, Quarterly Update March 2015*, 27.

25. NSW Department of Justice, Victims Services, *Submission BASCO13*, 2.

26. NSW Office of the Director of Public Prosecutions, *Submission BASO14*, 1.

27. Law Society of NSW, *Submission BASCO11*, 4.

## Bail – Additional show cause offences

### *Indigenous and vulnerable defendants*

- 3.20 A number of submissions were concerned that the proposed amendments would have a detrimental impact on Indigenous people and other vulnerable groups.<sup>28</sup>
- 3.21 The Public Defenders “hold serious concerns about the disproportionate impact that these expansions will have on Indigenous people, particularly young people and women”.<sup>29</sup>
- 3.22 Legal Aid NSW highlighted the impact that the proposed show cause categories could have on defendants with a mental health or cognitive impairment, and argued that the proposed amendments could limit the impact of considering a defendant’s vulnerability and other important factors under s 18 of the *Bail Act 2013*. It could also undermine the Government’s objective of making the criminal justice system more appropriately responsive to people with cognitive and mental health impairments.<sup>30</sup>
- 3.23 PIAC, which operates the Homeless Persons’ Legal Service, focused on the impact of the proposed amendments on homeless people.

Homeless people will be particularly affected by the imposition of a show cause test. Requiring a homeless person charged with a serious indictable offence to show cause as to why they should be released on bail places an additional pressure for that person to establish that they are able to reside at a particular address.<sup>31</sup>

- 3.24 PIAC contend that expansion of the show cause category to include serious indictable offences committed while the person is subject to a good behaviour bond or intervention program order will perpetuate disadvantage.<sup>32</sup> Good behaviour bonds allow the court to set conditions that support an offender’s rehabilitation, health and housing, which are of particular importance to homeless people. The flexibility of good behaviour bonds also allows for magistrates to impose conditions that are beneficial to the individual defendant – an approach that will be unavailable where a person has failed to show cause.<sup>33</sup>

## Alternative approaches

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- 3.25 The NSWPF and Victims Services support the PANSW proposal to expand the show cause test to all people charged while ‘on sentence’. Almost all other stakeholders that provided submissions to us - including the ODPP - expressed some doubt as to the appropriateness of such a broad category.

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28. The Public Defenders, *Submission BASCO08*; Legal Aid NSW, *Submission BASCO04*; Public Interest Advocacy Centre, *Submission BASCO07*.

29. The Public Defenders, *Submission BASCO08*, 2.

30. Legal Aid NSW, *Submission BASCO04*, 3.

31. Public Interest Advocacy Centre, *Submission BASCO07*, 5.

32. Public Interest Advocacy Centre, *Submission BASCO07*, 8.

33. Public Interest Advocacy Centre, *Submission BASCO07*, 12.

- 3.26 Although we did not seek submissions specifically on the issue, many stakeholders raised the same concerns with respect to the existing ‘on bail’ show cause provision in their submission regarding the proposed ‘on sentence’ category.
- 3.27 Below we canvas some alternative options to the PANSW proposal. These options attempt to balance the requirement to mitigate risks to the community with the need to ensure that only suitable offenders charged with an offence while on conditional liberty are subject to the show cause test.

### Raise the seriousness of offence types

- 3.28 As noted above, the breadth of the PANSW proposal, and its potential to affect those convicted of minor offences, has concerned stakeholders, particularly defence advocates. NSW Young Lawyers highlighted that a “person on bail for shoplifting who is accused of threatening minor damage to an item of insignificant value (s 199) must show cause why they should not be remanded in custody.”<sup>34</sup> The NSW Bar Association noted:

If an accused person is subject to the proposed new category of offences and is arrested for a serious indictable offence that is much less serious than the offences contained in the new s 16B, that person would still be subject to show cause requirements. Examples of the types of serious indictable offences that are much less serious than the offence contained in the new s 16 B are larceny (s 117 *Crimes Act*); steal from the person (s 94 *Crimes Act*); receiving stolen property (s 188 *Crimes Act*); damaging property (s 195 *Crimes Act*); making a false document (s 253 *Crimes Act*) and perjury (s 327 *Crimes Act*).<sup>35</sup>

- 3.29 Public Defenders note that “[E]xpanding the show cause category to people who commit serious indictable offences while subject to these orders, especially orders arising from indictable or summary offences and to serious indictable offences, will have a net widening effect. More people will be refused bail, increasing the remand population. Bail should not be punitive”.<sup>36</sup>
- 3.30 One way to prevent the proposal from inappropriately capturing those convicted of minor offences is by raising the seriousness of the offences that bring accused within the category. Various stakeholders made suggestions regarding how this might be done, including limiting the offence for which the person is serving a sentence, limiting the type of fresh offence that the person is charged with, or both.
- 3.31 Legal Aid NSW does not support any expansion of the show cause provisions, and therefore did not suggest an alternative for the proposed ‘on sentence’ category. However, it suggests that the existing ‘on bail’ provision be amended to only apply where a person is charged for a *strictly* indictable offence<sup>37</sup> against an accused person while on bail for a *serious* indictable offence.<sup>38</sup>

34. NSW Young Lawyers Criminal Law Committee, *Submission BASCO06*, 4.

35. NSW Bar Association, *Submission BASCO02*, 4.

36. The Public Defenders, *Submission BASCO08*, 3.

37. A strictly indictable offence is one which must be prosecuted in the District Court. Other indictable offences are prosecuted in the Local Court unless either the prosecution or the accused person elects to have the matter dealt with in the District Court. Matters in Table 1 of Schedule 1 of the *Criminal Procedure Act 1986* (NSW) are dealt with in the Local Court unless

## Bail – Additional show cause offences

3.32 In their submission, they state:

The ‘serious indictable offence’ category includes a broad range of offences, ranging from a relatively minor form of larceny to assault occasioning actual bodily harm. As a result, this provision will capture a person on bail for an allegation of offensive behaviour who then comes before the court charged with larceny. Were the existing provision amended to apply to *strictly* indictable offences committed by an accused person while on bail *for a serious indictable* offence or while on parole, the provision would be less likely to inadvertently capture minor offending.<sup>39</sup>

3.33 Such a proposal could equally apply to a new ‘on sentence’ category, limiting the category to those serving a sentence for a serious indictable offence.

### *Limit the index offence*

3.34 Under the PANSW proposal, the type of index offence for which the person is serving a sentence is not taken into consideration when deciding whether the matter should be a show cause offence. This means that people convicted of minor offending who are serving a sentence of some kind and are then charged with a serious indictable offence will fall under the proposed show cause provisions.

3.35 Limiting the index offence to serious indictable offences would prevent those serving sentences for minor offences being required to show cause where charged with a serious indictable offence, thus reducing the likelihood that those convicted of minor offences might be inadvertently caught by the provisions. An offender would need to have been convicted of a serious indictable offence and charged with a fresh serious indictable offence to be brought into the regime.

3.36 While stakeholders raised examples of minor offending that could still fall into the serious indictable offence category, requiring the person to have been convicted of such an offence and accused of another such offence at least ensures that both offences need to be above a certain threshold.

3.37 One downside of such a proposal would be that a bail authority would need to know the offence for which the person was serving a sentence, and whether it was a serious indictable offence or not, before knowing whether the show cause category would apply, thus adding complexity to the process.

### *Limit the fresh offence*

3.38 The ODPP suggests that only a person serving a sentence who is charged with a strictly indictable offence should be required to show cause, explaining that:

Arguably, the definition of a ‘serious indictable offence’ is out of step with how this phrase might ordinarily be interpreted. But in our view the fact that the offence carries a maximum penalty of 5 years or more captures

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either the prosecution or the accused person elects otherwise. For matters in Table 2 of Schedule 1, only the prosecution has the right to elect to have the matter dealt with in the District Court.

38. Legal Aid NSW, *Submission BASCO04*, 2.

39. Legal Aid NSW, *Submission BASCO04*, 2



many offences that may not ultimately attract a custodial sentence. The same cannot be said for 'strictly indictable offence', moreover legal practitioners and police officers are familiar with the offences that fall within the strictly indictable category.<sup>40</sup>

- 3.39 Strictly indictable offences encompass the more serious offences in NSW, including murder, manslaughter, wounding with intent to cause grievous bodily harm, dangerous driving occasioning death, aggravated sexual assault and armed robbery. There are over 600 strictly indictable offences in NSW.

### Narrow the category of sentence to 'custodial' sentences

- 3.40 A further option for limiting the breadth of the proposed 'on sentence' category is by limiting the type of sentences to which the proposal applies.

- 3.41 Under this option, only people charged with an offence while subject to full time imprisonment, home detention, a suspended sentence or an intensive correction order would be included in the 'on sentence' show cause category.

- 3.42 NSW Young Lawyers observe that "most people in breach of s 9 bonds are not resentenced to a term of imprisonment, yet under the proposed amendments they would need to 'show cause' why they should not be remanded in custody".<sup>41</sup> PIAC expressed concern that "extending the show cause category will perpetuate disadvantage by undermining key developments in the NSW criminal justice system used to divert vulnerable offenders".<sup>42</sup>

- 3.43 The ODPP also noted:

Care needs to be taken to identify what forms of sentence order are in fact conditional liberty. For instance a section 10 bond is an alternate to a fine and imposed in circumstances where a court has determined there should be no penalty. A section 9 bond is a deferral of sentence and the lowest penalty available, so it cannot be construed as conditional liberty. Prescribed Intervention Programs include Forum Sentencing, Circle Sentencing and the Traffic Offenders Program, these Programs may not involve a serious offence (or factual circumstance) and the offender will usually be on bail pending the final sentence, so therefore already caught by cl16 (1) (h).<sup>43</sup>

- 3.44 Omitting non-custodial sentences from the proposed 'on sentence' category most directly addresses the concern that those convicted of minor offences on conditional liberty may incidentally be captured by the proposed provisions, and refocuses on the more serious offenders. Under this option, people attending a traffic offender intervention program (if they are not on bail), on a good behaviour bond or completing community service will be excluded from the show cause requirement. Forum and circle sentencing participants not on bail would also be excluded. These offenders would instead be dealt with under the "unacceptable risk" test.

40. Office of the Director of Public Prosecutions, *Submission BASO14*, 2-3.

41. NSW Young Lawyers Criminal Law Committee, *Submission BASCO06*, 4.

42. Public Interest Advocacy Centre, *Submission BASCO07*, 8.

43. Office of the Director of Public Prosecutions, *Submission BASO14*, 3.

## Bail – Additional show cause offences

- 3.45 Although a suspended sentence is not strictly a custodial sentence, they are nevertheless a serious sanction where the primary alternative in the event of breach is for the offender to serve their sentence in custody. As such, we have chosen to include it in the category of custodial sentences for the purpose of this proposal.

### Our view

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- 3.46 The threshold test set out in the Hatzistergos Review requires that the show cause category apply only in circumstances where the accused poses an inherent risk to the community. This is the justification for placing the onus on the accused person to demonstrate why they should not be detained.
- 3.47 The PANSW proposed the ‘on sentence’ category on the basis that a person accused of committing a serious indictable offence while subject to conditional liberty has demonstrated a disregard for the trust that the courts had placed in them when first sentenced to conditional liberty, and that trust should not be given again lightly. The PANSW also noted that those on conditional liberty could be seen as being in a similar position to those on bail or parole, and should be treated accordingly when accused of a serious indictable offence.
- 3.48 Stakeholders were concerned with the breadth of this proposal, and raised numerous examples of minor offending which would not pose a significant risk to the community but could fall into the proposed show cause category. Some stakeholders also suggested that the existing unacceptable risk test was a satisfactory way of considering bail for those accused of serious indictable offences while serving sentences.
- 3.49 We share many of the concerns raised by stakeholders, and believe that the proposal, as broadly stated in our terms of reference, does not meet the threshold test articulated in the Hatzistergos Review, and would risk exposing a number of individuals to detention on remand unnecessarily if implemented.
- 3.50 We are particularly concerned that the proposal may disproportionately impact vulnerable members of the community and Indigenous defendants. In the context of a continuing rise in the remand population, we do not believe that a significant expansion of the show cause category is warranted at this time.
- 3.51 In light of the former Attorney General’s request that we consider appropriate limitations on the category, we have considered alternatives to the proposal that might meet the threshold test but not capture minor offending which does not pose a serious risk to the community.
- 3.52 We consider that any show cause category directed at those currently serving a sentence be limited in two ways. Firstly, it should only apply where the person is alleged to have committed the offence while serving a custodial sentence, that is, a sentence of full time imprisonment, home detention, intensive correction order or suspended sentence. Secondly, the category should be limited to those charged with a strictly indictable offence.
- 3.53 We believe this combination of limitations passes the threshold test of identifying those persons who, by virtue of the seriousness of the offence with which they have

been charged, and their status as serving a serious sentence, should be required to justify why they should not be remanded in custody. Defining the category in this way should avoid the problems of inadvertently capturing minor offending, as the original proposal might have.

- 3.54 A restriction regarding the type of sentence the person is serving means the category would use a more accurate and individualised assessment of the person's prior offending. Only those whose offending was sufficiently serious that a court imposed a custodial sentence are brought within the category.
- 3.55 In choosing the strictly indictable offence threshold for the fresh charge, we have tried to identify those offences that are sufficiently serious to warrant a trial on indictment. We believe this threshold is more appropriate given that the default consequence for such an accused person is that they will be detained upon charge, unless they are able to justify why they shouldn't be.
- 3.56 We note that the NSW Police Force suggest that any calls for limiting the expansion of the show cause category be balanced "against the benefits of creating a clear, simple new category of offence. A complex bail regime may make it harder for bail authorities to administer and lead to less consistency in bail decisions".<sup>44</sup>
- 3.57 We are of the view that a strictly indictable offence threshold is of a similar complexity to a serious indictable offence threshold. However, limiting the offence types to strictly indictable offences significantly reduces the risk of capturing minor offending which does not pose the kind of risk to the community that the show cause provisions are designed to address.

### Unacceptable risk test will still apply to those outside the category

- 3.58 In recommending this formulation, we note that people who are charged with serious indictable offences while serving non-custodial sentences will still face the unacceptable risk test before being granted bail.
- 3.59 In particular, the bail authority will be required to consider a number of factors directly relevant to their status as having been charged with a serious offence while serving a sentence, including:
- (a) the accused person's background, including criminal history, circumstances and community ties,
  - (b) the nature and seriousness of the offence,
  - ...
  - (d) whether the accused person has a history of violence,
  - (e) whether the accused person has previously committed a serious offence while on bail,

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44. NSW Ministry for Police and Emergency Services, *Submission BASCO12*, 3

## Bail – Additional show cause offences

(f) whether the accused person has a history of compliance or non-compliance with bail acknowledgements, bail conditions, apprehended violence orders, parole orders or good behaviour bonds,

...

(i) the likelihood of a custodial sentence being imposed if the accused person is convicted of the offence.<sup>45</sup>

### Accused may also be subject to consequences for breach of their sentence

3.60 Depending on the nature of the incident or behaviour that led to the serious indictable offence charge, those we have recommended be excluded from the show cause category may also face consequences in relation to the sentence they are serving.

3.61 For example, a good behaviour bond must contain a condition to the effect that the person under bond will be of good behaviour during its term.<sup>46</sup>

3.62 If an offender is suspected of breaching the good behaviour bond or failing to comply with any of the conditions the court may call the offender to appear before it.<sup>47</sup> If satisfied that the offender before it has breached the bond, the court may vary the conditions of the bond, impose more conditions or revoke the bond.<sup>48</sup>

3.63 If a court revokes a good behaviour bond:

- For s 9 bonds – the court may re-sentence for the offence to which the bond relates
- For s 10 bonds – the court may convict the person and sentence them for offence to which the bond relates.<sup>49</sup>

3.64 Similarly for participants in intervention programs, if a court is satisfied they have failed to comply with the order, the court may revoke the order and convict and sentence the offender.<sup>50</sup>

3.65 For community service orders, if the offender's assigned Corrective Service officer may apply to a court to revoke the order on the grounds that the offender has failed, without reasonable excuse, to comply with the terms of the order. If the court is so satisfied, it may re-sentence the offender.<sup>51</sup>

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45. *Bail Act 2013* (NSW), s 18

46. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 95(b).

47. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 98(1).

48. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 98(2).

49. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 99(1).

50. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100R and s100S.

51. *Crimes (Administration of Sentences) Act 1999* (NSW) s 115.

- 3.66 We believe that these alternative sanctions, and the operation of the unacceptable risk test, will ensure that those alleged offenders falling outside our recommended 'on sentence' category are dealt with appropriately.

### Interim nature of recommendation

- 3.67 Given the limitations outlined in Chapter 1, we put forward this recommendation on an interim basis. We were asked to provide a final report by 31 May, and have put forward our recommendation for the 'on sentence' category accordingly.
- 3.68 However, we reiterate our view that it may be premature to amend the show cause provisions before a sound understanding of their operation in practice is apparent. We intend to report further on the 'on bail' category once further information has become available later in 2015. Should the government refrain from implementing a new 'on sentence' category in the short term, we would also like the opportunity to make a more firm recommendation once further data is available.

#### Recommendation 3.1

If introduced, any 'on sentence' show cause category in the *Bail Act 2013* should only apply to strictly indictable offences committed by an accused person while serving a 'custodial sentence'.

'Custodial sentences' should be defined as meaning full time imprisonment, a home detention order, intensive correction order or suspended sentence.

### The Drug Court program

- 3.69 As outlined in Chapter 2, the Drug Court and compulsory drug treatment orders (CDTOs) have been created to deal with specific, drug dependant offending.<sup>52</sup> CDTOs include a staged program, which has internal disciplinary measures applicable when people breach the conditions of the program.
- 3.70 Given the rehabilitative nature of the program, we specifically considered the applicability of the show cause provisions to CDTOs. It is our view that the appropriate orders for CDTO participants accused of further offending is best placed with the Drug Court, which has been developed to provide drug dependent offenders with an avenue for rehabilitation and reintegration, where possible. We note that serious offending while on the program will likely lead to full time custody.
- 3.71 In our view, no differential treatment of participants in the Drug Court program is warranted when considering the 'on sentence' show cause category.

52. *Drug Court Act 1998* (NSW) s 5A.



## 4. The 'on bail' category

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- 4.1 As noted above, when we sought comment on the proposed 'on sentence' show cause category, several stakeholders raised concerns with the breadth of the 'on bail' show cause category found in s 16B(1)(h)(i) of the *Bail Act 2013*. The former Attorney General subsequently wrote to the Chair of the Council asking us to specifically consider those concerns and present an interim report by 31 May 2015.
- 4.2 We share the concerns raised by stakeholders, in particular those concerns which relate to the potential for those charged with minor offences, who do not pose a significant danger to the community, being required to justify why they should not be detained. Many of the arguments raised above that support our recommended limitations on the 'on sentence' category could be applied to the 'on bail' category.
- 4.3 However, given the current, and likely temporary, lack of clarity on the interpretation of what is required to 'show cause', and the lack of available data regarding the number of people who are being caught by the show cause test, and the offences with which they have been charged, we believe that it is premature to make a formal recommendation to restrict the 'on bail' category at the present time.
- 4.4 As we now have a standing reference to monitor and review the show cause categories, we intend to keep this particular category under review, and report to the Government as soon as a body of reliable data has been collected about the operation of the show cause test so far. We hope to be in a position to report further on this issue by the end of 2015.

### **Recommendation 4.1**

The *Bail Act 2013* s 16B(h)(i) should be in operation for a period of at least six months prior to any firm recommendations being made about its breadth of operation.





## 5. Repeat serious personal violence offences

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### In brief

A person who has a previous conviction for a serious personal violence offence who is charged with another serious personal violence offence is required by the *Bail Act 2013* (NSW) to show cause as to why detention is not justified. The show cause test is not triggered where the previous conviction occurred in another jurisdiction. We recommend amending the *Bail Act 2013* so that previous convictions for relevant offences from other jurisdictions are captured by the serious personal violence show cause provision.

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- 5.1 The *Bail Act 2013* (NSW) requires a person charged with a serious personal violence offence or an offence involving wounding or the infliction of grievous bodily harm to show cause as to why detention is not justified, where that person has previously been convicted of a serious personal violence offence.<sup>1</sup> Serious personal violence offences are defined as offences under Part 3 of the *Crimes Act 1900* (NSW) that attract a prison term of 14 years or more.<sup>2</sup> A person who attempts to commit, or assists, a serious personal violence offence is also captured by the Act.<sup>3</sup>
- 5.2 This show cause requirement reproduces, to some extent, the repeat serious personal violence offence exception to the presumption in favour of bail from the repealed *Bail Act 1978* (NSW).<sup>4</sup> The 1978 Act required an alleged repeat serious violence offender to establish “exceptional circumstances” to be granted bail.<sup>5</sup> Section 9D also captured a person charged with attempting to commit a serious personal violence offence,<sup>6</sup> and where a similar offence has occurred in another jurisdiction.<sup>7</sup> The provision was abolished with the repeal of the 1978 Act.<sup>8</sup>

### Extra-jurisdictional convictions are not covered by the *Bail Act 2013*

- 5.3 The Director of Public Prosecutions (DPP) has identified a gap in the 2014 amendment. This gap means that the requirement to show cause for an alleged serious personal violence offence will not be triggered by similar offences outside NSW. We were asked by the former Attorney General to review whether “the show

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1. *Bail Act 2013* (NSW) s 16B(1)(c).
  2. *Bail Act 2013* (NSW) s 16B(3).
  3. *Bail Act 2013* (NSW) s 16B(j), s 16B(k).
  4. *Bail Act 1978* (NSW) s 9D.
  5. *Bail Act 1978* (NSW) Division 3A.
  6. *Bail Act 1978* (NSW) s 9D(4)(c).
  7. *Bail Act 1978* (NSW) s 9D(4)(d).
  8. *Bail Act 2013* (NSW) s 100.

cause category for repeat serious violent offenders should be more closely aligned with the similar category of offences which had a presumption against bail under the *Bail Act 1978*.<sup>9</sup> We have taken this to mean that we are to review whether the definition of serious personal violence offences should be expanded to include similar offences committed outside NSW. The DPP has confirmed this interpretation.<sup>10</sup>

### The inclusion of extra-jurisdictional convictions in the 1978 Act was unproblematic

5.4 The relevant repeat serious personal violence provision in the 1978 Act stated:

(4) in the section:

**serious personal violence** offence means:

...

(d) an offence under the law of the Commonwealth, another State or Territory or of another country that is similar to an offence referred to in paragraph (a), (b) or (c).<sup>11</sup>

5.5 This provision was introduced in 2003,<sup>12</sup> and does not appear to have generated any controversy or legal commentary. Denial of bail due to a “similar” prior serious personal violence offence in another jurisdiction has not been examined on appeal. Stakeholders did not raise the inclusion of extra-jurisdictional convictions as an issue in the NSW Law Reform Commission’s review of bail.

### There is support for reintroducing extra-jurisdictional convictions

5.6 The NSW Police Force raised the omission of extra-jurisdictional convictions in the serious personal violence provision as part of their submission to us, and suggested that the “Sentencing Council may wish to address this anomaly as part of its review”.<sup>13</sup> The DPP raised the issue in discussions with the Bail Monitoring Group. We agree that it makes sense for the repeat serious violence provision to capture prior convictions that occurred in other jurisdictions. We note that the previous inclusion of extra-jurisdictional convictions was without controversy.

#### Recommendation 5.1

The legislature should amend the *Bail Act 2013* (NSW) to expand the definition of serious personal violence offence in s 16B(3) to include offences under the law of the Commonwealth, another State or a Territory or of another country that are similar to the offences under Part

9. Correspondence, 14 January 2015.

10. Correspondence, 30 January 2015.

11. *Bail Act 1978* (NSW) s 9D(4)(d).

12. *Bail Amendment Act 2003* (NSW) Schedule 1 [2].

13. NSW Ministry for Police and Emergency Services, *Submission BASCO12*, Letter

3 of the *Crimes Act 1900* (NSW) that are punishable by imprisonment for a term of 14 years or more.

## 6. Consideration of bail after a guilty verdict

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### In brief

A person who has been convicted of an offence may have their bail status considered, either prior to sentencing, or pending an appeal. We considered whether the show test should apply to people in these circumstances. We recommend that it be made clear that the fact that a person has been convicted of an offence should be taken into account when considering bail.

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- 6.1 The former Attorney General's letter of 14 January 2015 asked the Council to undertake an ongoing monitoring and review role for the show cause categories in the *Bail Act 2013* (NSW), and requested that any matters brought to the Council's attention be noted and, if possible, responded to in our 31 May 2015 report.
- 6.2 An issue was raised for the Council's consideration, relating to the bail consideration that should apply once a person has been found guilty, particularly prior to sentencing.

### Position under the *Bail Act 1978*

- 6.3 Section 8 of the *Bail Act 1978* (NSW) provided a right to release on bail for a person accused of certain minor offences, including offences not punishable by a sentence of imprisonment and offences under the *Summary Offences Act 1988* (NSW) punishable by imprisonment.
- 6.4 However, s 8(2)(a)(iii) stated that such a person was not entitled to bail if the person had been convicted of the offence or the person's conviction for the offence is stayed. Such a situation might occur if the person had been convicted, but the matter had been adjourned for sentencing submissions, or is subject to appeal. Bail could still be considered for the person, but they were not automatically entitled to it.
- 6.5 The 1978 Act also provided that where an appeal was pending in the Court of Criminal Appeal or the High Court, bail would not be granted unless exceptional circumstances could be shown.<sup>1</sup>

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1. *Bail Act 1978* (NSW), s 30AA.

### Position under the *Bail Act 2013*

- 6.6 Section 21 of the *Bail Act 2013* provides a right to release for minor offences similar to that which existed under s 8 of the 1978 Act, although there are fewer minor offences specified. However, there is no exception relating to people who have been convicted of the offence.
- 6.7 Section 22 effectively replicates the old s 30AA, requiring exceptional circumstances to be shown to justify bail if there is an appeal pending in the Court of Criminal Appeal or High Court.
- 6.8 Section 18 sets out the matters that must be considered when assessing bail concerns under the unacceptable risk test. Section 18(1)(i) provides that the likelihood of a custodial sentence being imposed if an accused person is convicted must be considered in an assessment of bail. Section 18(1)(j) provides that if an accused person has been convicted of an offence and proceedings on an appeal against conviction or sentence are pending, whether the appeal has a reasonably arguable prospect of success is a matter that must be considered in an assessment of bail.

### Law Reform Commission consideration

- 6.9 In its 2012 report on bail, the NSW Law Reform Commission considered the issues of exceptions to a right to release on bail following conviction and bail pending appeal.
- 6.10 The Commission recommended that an exception to a right to release on bail for minor offences be retained, provided that the exception does not apply unless a custodial sentence is likely.<sup>2</sup> Thus, in circumstances where a person had been convicted, but a custodial sentence was unlikely, that person would retain their right to release on bail pending appeal or sentencing.
- 6.11 In relation to appeals, the Commission recommended that, in general, applications for release on bail pending an appeal should be governed by the same considerations as applied before the appeal, subject to the proviso that the person should only be released where the appeal has a reasonably arguable prospect of success.<sup>3</sup>

### Our view

- 6.12 Notwithstanding the ability to appeal, it is important that the finality of a conviction for a criminal offence is respected. As noted by the Law Reform Commission, a conviction should not merely be a temporary status pending confirmation by a higher court.<sup>4</sup> From this perspective, it is reasonable to expect that where a person has been convicted, that person should have to justify their release on bail pending an appeal, or a sentence being delivered. The fact that a court had found a person

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2. NSW Law Reform Commission, *Bail*, Report 133 (2012) [7.42].

3. NSW Law Reform Commission, *Bail*, Report 133 (2012) Recommendation 9.2

4. NSW Law Reform Commission, *Bail*, Report 133 (2012) [9.55].

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did not pose an unacceptable risk and released that person on bail prior to conviction does not automatically imply that that person should be released on bail after they have been convicted.

- 6.13 However, in circumstances where the matter has been adjourned for sentence, it would be inappropriate to place the onus on the convicted person to justify their release in circumstances where a custodial sentence is unlikely in any case.
- 6.14 In our view, the fact that a person has been convicted should be treated as a changed circumstance when considering bail, if the matter is adjourned for sentencing, with a guiding factor being the likelihood of a full time custodial sentence.
- 6.15 However, as noted in Chapter 1, the case of *DPP v Tikomaimaleya* has cast some doubt on the extent to which a finding of guilt can be considered in an unacceptable risk test. The Court of Appeal noted “that a jury’s verdict of guilty is not within any of the matters listed in s18”.<sup>5</sup>
- 6.16 In that particular case, the fact that the offender had been convicted could be taken into account in the context of a show cause test, and for that, and other reasons, bail was refused.
- 6.17 Whether a conviction may affect the consideration of other factors in s 18, for example s 18(1)(c) – the strength of the prosecution case, remains to be seen.
- 6.18 Where a person is appealing against a non-custodial sentence, the issue of bail does not arise. Under the current provisions of the *Bail Act 2013*, for an appeal against a custodial sentence, the unacceptable risk test would apply to an application for bail, including the requirement to consider whether the appeal has a reasonably arguable prospect of success.
- 6.19 We intend to monitor the operation of the current provisions of the *Bail Act 2013* in this regard. Should it be necessary, we will consider recommending that an amendment be made to s 18 to make it explicit that where bail is being considered after conviction but prior to sentencing, the fact that the person has been convicted is to be taken into account.

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5. *DPP v Tikomaimaleya* [2015] NSWCA 83 [26].



## Appendix A: *Bail Act 2013* (NSW) excerpts

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### Division 1A Show cause requirement

#### 16A Accused person to show cause for certain serious offences

- (1) A bail authority making a bail decision for a show cause offence must refuse bail unless the accused person shows cause why his or her detention is not justified.
- (2) If the accused person does show cause why his or her detention is not justified, the bail authority must make a bail decision in accordance with Division 2 (Unacceptable risk test—all offences).
- (3) This section does not apply if the accused person was under the age of 18 years at the time of the offence.

#### 16B Offences to which the show cause requirement applies

- (1) For the purposes of this Act, each of the following offences is a **show cause offence**:
  - (a) an offence that is punishable by imprisonment for life,
  - (b) a serious indictable offence that involves:
    - (i) sexual intercourse with a person under the age of 16 years by a person who is of or above the age of 18 years, or
    - (ii) the infliction of actual bodily harm with intent to have sexual intercourse with a person under the age of 16 years by a person who is of or above the age of 18 years,
  - (c) a serious personal violence offence, or an offence involving wounding or the infliction of grievous bodily harm, if the accused person has previously been convicted of a serious personal violence offence,
  - (d) any of the following offences:
    - (i) a serious indictable offence under Part 3 or 3A of the *Crimes Act 1900* or under the *Firearms Act 1996* that involves the use of a firearm,
    - (ii) an indictable offence that involves the unlawful possession of a pistol or prohibited firearm in a public place,
    - (iii) a serious indictable offence under the *Firearms Act 1996* that involves acquiring, supplying or manufacturing a pistol or prohibited firearm,
  - (e) any of the following offences:



- (i) a serious indictable offence under Part 3 or 3A of the *Crimes Act 1900* or under the *Weapons Prohibition Act 1998* that involves the use of a military-style weapon,
  - (ii) an indictable offence that involves the unlawful possession of a military-style weapon,
  - (iii) a serious indictable offence under the *Weapons Prohibition Act 1998* that involves buying, selling or manufacturing a military-style weapon or selling, on 3 or more separate occasions, any prohibited weapon,
  - (f) an offence under the *Drug Misuse and Trafficking Act 1985* that involves the cultivation, supply, possession, manufacture or production of a commercial quantity of a prohibited drug or prohibited plant within the meaning of that Act,
  - (g) an offence under Part 9.1 of the *Criminal Code* set out in the Schedule to the *Criminal Code Act 1995* of the Commonwealth that involves the possession, trafficking, cultivation, sale, manufacture, importation, exportation or supply of a commercial quantity of a serious drug within the meaning of that Code,
  - (h) a serious indictable offence that is committed by an accused person:
    - (i) while on bail, or
    - (ii) while on parole,
  - (i) an indictable offence, or an offence of failing to comply with a supervision order, committed by an accused person while subject to a supervision order,
  - (j) a serious indictable offence of attempting to commit an offence mentioned elsewhere in this section,
  - (k) a serious indictable offence (however described) of assisting, aiding, abetting, counselling, procuring, soliciting, being an accessory to, encouraging, inciting or conspiring to commit an offence mentioned elsewhere in this section.
- (2) In this section, a reference to the facts or circumstances of an offence includes a reference to the alleged facts or circumstances of an offence.

(3) In this section:

**firearm, prohibited firearm** and **pistol**, and **use, acquire, supply** or **possession** of a firearm, have the same meanings as in the *Firearms Act 1996*.

**prohibited weapon** and **military-style weapon**, and **use, buy, sell, manufacture** or **possession** of a prohibited weapon, have the same meanings as in the *Weapons Prohibition Act 1998*.

**serious indictable offence** has the same meaning as in the *Crimes Act 1900*.

**serious personal violence offence** means an offence under Part 3 of the *Crimes Act 1900* that is punishable by imprisonment for a term of 14 years or more.

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**supervision order** means an extended supervision order or an interim supervision order under the *Crimes (High Risk Offenders) Act 2006*.

### Division 2 Unacceptable risk test—all offences

#### 17 Assessment of bail concerns

- (1) A bail authority must, before making a bail decision, assess any bail concerns.
- (2) For the purposes of this Act, a **bail concern** is a concern that an accused person, if released from custody, will:
  - (a) fail to appear at any proceedings for the offence, or
  - (b) commit a serious offence, or
  - (c) endanger the safety of victims, individuals or the community, or
  - (d) interfere with witnesses or evidence.
- (3) If the accused person is not in custody, the assessment is to be made as if the person were in custody and could be released as a result of the bail decision.
- (4) This section does not apply if the bail authority refuses bail under Division 1A (Show cause requirement).

#### 18 Matters to be considered as part of assessment

- (1) A bail authority is to consider the following matters, and only the following matters, in an assessment of bail concerns under this Division:
  - (a) the accused person's background, including criminal history, circumstances and community ties,
  - (b) the nature and seriousness of the offence,
  - (c) the strength of the prosecution case,
  - (d) whether the accused person has a history of violence,
  - (e) whether the accused person has previously committed a serious offence while on bail,
  - (f) whether the accused person has a history of compliance or non-compliance with bail acknowledgments, bail conditions, apprehended violence orders, parole orders or good behaviour bonds,
  - (g) whether the accused person has any criminal associations,
  - (h) the length of time the accused person is likely to spend in custody if bail is refused,

- (i) the likelihood of a custodial sentence being imposed if the accused person is convicted of the offence,
  - (j) if the accused person has been convicted of the offence and proceedings on an appeal against conviction or sentence are pending before a court, whether the appeal has a reasonably arguable prospect of success,
  - (k) any special vulnerability or needs the accused person has including because of youth, being an Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment,
  - (l) the need for the accused person to be free to prepare for his or her appearance in court or to obtain legal advice,
  - (m) the need for the accused person to be free for any other lawful reason,
  - (n) the conduct of the accused person towards any victim of the offence, or any family member of a victim, after the offence,
  - (o) in the case of a serious offence, the views of any victim of the offence or any family member of a victim (if available to the bail authority), to the extent relevant to a concern that the accused person could, if released from custody, endanger the safety of victims, individuals or the community,
  - (p) the bail conditions that could reasonably be imposed to address any bail concerns in accordance with section 20A.
- (2) The following matters (to the extent relevant) are to be considered in deciding whether an offence is a serious offence under this Division (or the seriousness of an offence), but do not limit the matters that can be considered:
- (a) whether the offence is of a sexual or violent nature or involves the possession or use of an offensive weapon or instrument within the meaning of the *Crimes Act 1900*,
  - (b) the likely effect of the offence on any victim and on the community generally,
  - (c) the number of offences likely to be committed or for which the person has been granted bail or released on parole.

## 19 Refusal of bail—unacceptable risk

- (1) A bail authority must refuse bail if the bail authority is satisfied, on the basis of an assessment of bail concerns under this Division, that there is an unacceptable risk.
- (2) For the purposes of this Act, an **unacceptable risk** is an unacceptable risk that the accused person, if released from custody, will:
  - (a) fail to appear at any proceedings for the offence, or
  - (b) commit a serious offence, or
  - (c) endanger the safety of victims, individuals or the community, or

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- (d) interfere with witnesses or evidence.
- (3) If the offence is a show cause offence, the fact that the accused person has shown cause that his or her detention is not justified is not relevant to the determination of whether or not there is an unacceptable risk.
- (4) Bail cannot be refused for an offence for which there is a right to release under Division 2A.

### 20 Accused person to be released if no unacceptable risks

- (1) If there are no unacceptable risks, the bail authority must:
  - (a) grant bail (with or without the imposition of bail conditions), or
  - (b) release the person without bail, or
  - (c) dispense with bail.
- (2) This section is subject to Divisions 1A and 2A.

### 20A Imposition of bail conditions

- (1) Bail conditions are to be imposed only if the bail authority is satisfied, after assessing bail concerns under this Division, that there are identified bail concerns.
- (2) A bail authority may impose a bail condition only if the bail authority is satisfied that:
  - (a) the bail condition is reasonably necessary to address a bail concern, and
  - (b) the bail condition is reasonable and proportionate to the offence for which bail is granted, and
  - (c) the bail condition is appropriate to the bail concern in relation to which it is imposed, and
  - (d) the bail condition is no more onerous than necessary to address the bail concern in relation to which it is imposed, and
  - (e) it is reasonably practicable for the accused person to comply with the bail condition, and
  - (f) there are reasonable grounds to believe that the condition is likely to be complied with by the accused person.
- (3) This section does not limit a power of a court to impose enforcement conditions.

**Note.** Enforcement conditions are imposed for the purpose of monitoring or enforcing compliance with other bail conditions. Section 30 provides for this type of bail condition.