



NEW SOUTH WALES
BAR ASSOCIATION

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Servants of All Yet of None

Selborne Chambers
B/174 Phillip Street
Sydney NSW 2000

DX 1204 Sydney
T +61 2 9232 4055
E enquiries@nswbar.asn.au

ABN 18 526 414 014
ACN 000 033 652

nswbar.asn.au

Mark Johnstone
NSW Sentencing Council
Department of Justice
Level 13, 10 Spring St
Sydney NSW 2000

Dear Mr Johnstone

Proposed new show cause offences

The New South Wales Bar Association is grateful for the opportunity to express its opinion in relation to the Sentencing Council's consideration of a proposal to make further amendments to the *Bail Act 2013*.

The specific proposal is one which would add to the categories of offences for which an accused person must 'show cause' before bail can be granted. Proposed additional 'show cause' offences (the **proposed new category of offences**) are where an accused person is charged with a serious indictable offence committed:

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

The Association's position is that:

1. There does not need to be any further addition to the number of 'show cause' offences, as that will lead to the same complexity and unwieldiness that was found in the *Bail Act 1978*.
2. The proposed new category of offences represents a significant, and unnecessary, expansion of the categories of conduct that would trigger the 'show cause' requirement.

3. The proposed new category of offences can currently be adequately considered by a bail authority in relation to whether an accused person poses an unacceptable risk, and accordingly whether bail conditions can be imposed which would mitigate against that risk.

1. Adding to the list of 'show cause' offences will cause further unnecessary complexity in applying the Bail Act 2013

In the Second Reading Speech of the *Bail Bill 2013* (Legislative Assembly, 1 May 2013) the then Attorney General explained why the system of presumptions against bail in the *Bail Act 1978* was to be abandoned:

Under current bail laws, some offences carry a presumption in favour of bail, others carry a presumption against and there are offences where no presumptions apply. This has added a layer of significant complexity to bail decision-making, which the Bill's unacceptable-risk test is intended to avoid. Bail presumptions generally apply based on the particular section under which the accused is charged. This means that they may not reflect the actual seriousness of the alleged offending or the risk the accused poses to the community.

The amendments to the *Bail Act 2013* moved away from offence-based tests under the previous *Bail Act*. The then Attorney General stated in the Second Reading Speech that:

Simplifying the decision-making process and focusing on risk rather than offence-based presumptions should also achieve the goal of ensuring that bail decisions are more consistent with the terms of the law. This is an outcome not always evident in decisions under the existing Act. For example, an analysis by the Bureau of Crime Statistics and Research has shown that those who are charged with an offence carrying no presumption in relation to bail face a greater risk of being remanded in custody than those charged with an offence carrying a presumption against bail.

The system of bail presumptions under the *Bail Act 1978* was unnecessarily complex. The amendments that will insert 'show cause' offences into the *Bail Act 2013* have already added a layer of significant complexity to bail decision-making, which the *Bail Act 2013* actively avoided.

The Association does not support a move towards even further 'show cause' offences, which will add to the complexity in the *Bail Act*.

2. The proposed new categories represent a significant, and unnecessary, expansion of the categories of conduct that would trigger the 'show cause' requirements

The categories of conduct which trigger the 'show cause' requirements should not be expanded.

The list of 'show cause' offences contained in the amended s 16B of the *Bail Act 2013* includes:

- (a) Offences punishable by imprisonment for life;
- (b) Serious indictable offences that involve sexual intercourse or 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) Serious personal violence offences involving wounding or the infliction of grievous bodily harm, if the accused person has previously been convicted of a serious personal violence offence;
- (d) Serious indictable offences under Part 3 or 3A of the *Crimes Act 1900* or under the *Firearms Act 1996* that involves the use of a firearm;
- (e) An indictable offence that involves the unlawful possession of a pistol or prohibited firearm in a public place;
- (f) A serious indictable offence under the *Firearms Act 1996* that involves acquiring, supplying or manufacturing a pistol or prohibited firearm;
- (g) A serious indictable offence under Part 3 or 3A of the *Crimes Act* under the *Firearms Act 1996* that involves the use of a military-style weapon;
- (h) An indictable offence that involves the unlawful possession of a military-style weapon;
- (i) 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;
- (j) 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;
- (k) A serious indictable offence that is committed by an accused person while on bail or on parole.

The list of offences which s 16B will cover will be very large.

A 'serious indictable offence' is any indictable offence that is punishable by imprisonment for life or for a term of 5 years or more (s 4 *Crimes Act*). 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 the 'show cause' requirements. Examples of the types of serious indictable offences that are much less serious than the offences contained in the new s 16B are larceny (s 117 *Crimes Act*), steal from the person (s 94 *Crimes Act*) and 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*).

The result would be a significant expansion of the type of offences that would have been contemplated in the development of the Bail Amendment Bill 2014. When the list of 'show cause' categories was proposed in the Bill they were meant to relate only to the following (Second Reading Speech, Legislative Assembly, 13 August 2014):

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. These categories are set out in new s 16B of the bill and include offences with a maximum penalty of imprisonment for life, offences involving sexual intercourse or the infliction of actual bodily harm with the intent to have sexual intercourse with a child under the age of 16 years by an adult, serious personal violence offences or those involving the infliction of wounding or grievous bodily harm if the accused has a previous conviction for a serious personal violence offence. Serious personal violence offences are those in part 3 of the Crimes Act 1900, carrying a maximum penalty of at least 14 years imprisonment.

3. Each of the proposed new categories can be adequately considered in an assessment of unacceptable risk

In the Second Reading Speech of the Bail Bill 2013 (Legislative Assembly, 1 May 2013) the then Attorney General explained the introduction of the 'unacceptable risk' test as follows:

[T]he government decided to adopt a risk-management approach to bail decision-making. The bill has been drafted in accordance with the Government response and its key feature is a simple unacceptable-risk test for bail decisions. This test will focus bail decision-making on the identification and mitigation of unacceptable risk, which should result in decisions that better achieve the goals of protection of the community while appropriately safeguarding the rights of the accused person.

What is an 'unacceptable risk' has been discussed in a number of Supreme Court judgments. In *R v Lago* [2014] NSWSC 660 Hamill J explained the concept of 'unacceptable risk' at [15] as follows:

The Act makes it clear that the seriousness of the allegation is a matter that might give rise to an unacceptable risk even though that allegation has not been proved beyond reasonable doubt. It is the very nature of the allegation that may cause the Court to conclude that there are unacceptable risks. Where the allegations include offences of extreme violence such as murder, the Court may conclude on that basis alone that there are unacceptable risks involved in the release of the alleged offender. However, the Act has abolished the requirement that an applicant charged with murder must establish 'exceptional circumstances' justifying the grant of bail: s 9C *Bail Act 1978*. The proposition that the seriousness of the offence itself may give rise to unacceptable risk might also apply to offences such as the one that I am dealing with on this application. It will all depend on a consideration of the relevant factors referred to in s 17.

If an accused person is charged with offences that fall within the proposed new category, that can already be considered by the bail authority in relation to whether there is an unacceptable risk. There is no gap in the law that the proposed new category meets. All that will be achieved is that it will be harder to be granted bail, as an accused person charged with offences that fall within the proposed new category will have to prove that his or her detention is not justified. The Association does not support the creation of a new show cause category.

Should you or your officers have any questions in relation to this submission, please do not hesitate to contact the Association's Executive Director, Philip Selth, on [REDACTED] or at [REDACTED].

Kind regards



Jane Needham SC
President