

## **BAIL – ADDITIONAL SHOW CAUSE OFFENCES**

**Legal Aid NSW submission**

**to the New South Wales Sentencing Council**

**October 2014**

### **Introduction**

Legal Aid NSW does not support the introduction of additional ‘show cause’ categories. In our view, presumptions against bail or show cause provisions inadequately address the range of matters and circumstances that confront bail authorities on a daily basis. The considerations at play in relation to bail determinations require a more sophisticated response, which allows for a range of factors to be taken into account. The unacceptable risk test is an appropriate mechanism to guide bail authorities in making bail decisions. The effectiveness of this test and the workability of the legislative framework will be undermined if bail legislation is amended to shift the focus of the bail decision from a comprehensive risk analysis in each case to a focus on particular categories of offences, which would require the defendant to show cause why his or her detention is not justified.

We are particularly concerned about the proposal under consideration to expand the scope of s 16B(1)(h) of the *Bail Amendment Bill 2014*. In our view, the existing provision contained in the *Bail Amendment Bill 2014* is already too expansive. We anticipate that the existing s 16B(1)(h) of the *Bail Amendment Bill 2014* will result in a greater number of people being refused bail and a large increase in the remand rate. Broadening this provision as proposed will greatly magnify this effect.

### **The expected impact of expanding show cause requirements to these offences**

We expect that expanding the show cause requirements will limit the number of people who are able to get bail and in turn increase the remand rate. It will also add to the complexity of the *Bail Act 2013* which has already been significantly altered by the *Bail Amendment Bill 2014*. There is no evidence that the decrease in crime rates in New South Wales can be attributed to changes in bail laws.<sup>1</sup> Accordingly, we do not expect that expanding the show cause requirements will impact upon crime rates in NSW.

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<sup>1</sup> NSW Law Reform Commission, *Bail Report 133*, p. 43

Bureau of Crime Statistics and Research (BOCSAR) research examining the effect of bail presumptions found that the risk of bail refusal was 'higher for those charged with offences where there was a presumption against bail or where bail should only be granted in exceptional circumstances.'<sup>2</sup> While this research was conducted in 2010 in relation to the *Bail Act 1978*, it does demonstrate that 'presumptions' or 'show cause' provisions influence bail determinations. Given these findings, and our experience operating under the presumptions contained in the *Bail Act 1978*, we expect that the show cause provisions will lead to more bail refusals and that any expansion of these provisions would increase the risk of bail refusal in a larger number of matters.

Section 16B(1)(h) of the *Bail Amendment Bill 2014* is much more far reaching than the 'repeat property offenders' provision contained in s 8C or s 9C of the *Bail Act 1978* which attracted an 'exceptional circumstances' presumption against bail for repeat serious personal violence offenders. Section 4 of the *Crimes Act 1900* defines a 'serious indictable offence' as 'an indictable offence that is punishable by imprisonment for life or for a term of 5 years or more'. The 'serious indictable offence' category includes a broad variety of offences, ranging from a relatively minor form of larceny<sup>3</sup> to assault occasioning actual bodily harm.<sup>4</sup> 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.

The proposal to expand this provision to include additional categories is concerning. Of particular concern is the proposal to expand the provision to apply to people who appear before a court charged with a serious indictable offence while on a good behaviour bond or intervention program order.

Good 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 Sentencing Council may have access to statistics about the range of offending which can attract a good behaviour bond. In our experience, a great many offences that attract a good behaviour bond could be classified as relatively trivial in the scheme of overall offending. This provision will significantly broaden the scope of the existing provision and impact on a large number of people.

Given that police make the majority of bail decisions in NSW, this provision will also introduce greater complexity for police when making a bail determination in a large number of relatively minor matters. The proposed provision could also lead to police refusing bail in a larger number of matters and result in a larger volume of bail applications needing to be dealt with by the Local Court.

Further, people on intervention program orders are often on this type of order to enable them to demonstrate their prospects of rehabilitation, usually by participating in programs

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<sup>2</sup> L Snowball, L Roth and D Weatherburn, *Bail Presumptions and the Risk of Bail Refusal: an Analysis of the NSW Bail Act*, Issues Paper No. 49 (NSW Bureau of Crime Statistics and Research, 2010) 1

<sup>3</sup> *Crimes Act 1900* (NSW) s 117

<sup>4</sup> *Crimes Act 1900* (NSW) s 59

that address the underlying causes of any offending, such as drug and alcohol treatment. The proposed additions to s 16B(1)(h) of the *Bail Amendment Bill 2014* are likely to undermine the rehabilitative goals of intervention program orders, particularly in cases where the alleged 'serious indictable offending' relates to a relatively minor alleged offence. In any event most people on an intervention program order are usually subject to a range of specific bail conditions and will already fall within the ambit of s 16B(1)(h)(i) of the *Bail Amendment Bill 2014*.

We are also concerned about the impact that the proposed additional show cause offences would have on defendants with special needs and vulnerabilities, particularly those with a mental health or cognitive impairment. The *Bail Amendment Bill 2014* requires the bail authority to first determine whether the defendant has shown cause as to why his or her detention is not justified before considering whether they are an unacceptable risk with reference to the matters in s 18.<sup>5</sup> The insertion of the show cause offences disrupts the original architecture of the *Bail Act 2013* and arguably limits the impact of important considerations in s 18 of the *Bail Amendment Bill 2014* such as '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.'<sup>6</sup> The introduction of additional show cause offences is likely to undermine the government's commitment to increase the use of diversion and increase the capacity of the criminal justice system to respond appropriately to people with cognitive and mental health impairments.

When the previous *Bail Act 1978* was in force, 28 amending Acts made changes to the presumption provisions.<sup>7</sup> The NSW Law Reform Commission observed that '[s]ome of these changes, such as provisions in relation to domestic violence offences, followed research and detailed consideration, consultation and debate'<sup>8</sup> while '[o]thers were made after individual cases attracted media attention without evidence of the incidence of offences of the particular kind.'<sup>9</sup> The NSW Law Reform Commission concluded that '[t]he cumulative effect of thirty years of amendments since the enactment of the reform-oriented *Bail Act 1978* is a level of complexity in the legislation which makes it difficult to comprehend and operate, even for those with legal expertise working with it daily.'<sup>10</sup>

The *Bail Act 2013* in its current form provides a simple and strong framework for bail authorities. Amendments already made to it will introduce considerable complexity for bail authorities and legal practitioners. Introducing the proposed additional show cause offences will add further complexity to the *Bail Act 2013*.

### **The unacceptable risk test and existing provisions contained in the *Bail Act 2013* are sufficient**

The unacceptable risk test already focuses the bail authority's mind on whether an accused person will commit a serious offence, or endanger the safety of victims,

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<sup>5</sup> *Bail Amendment Bill 2014* (NSW) s 18

<sup>6</sup> *Bail Amendment Bill 2014* (NSW) s 18(1)(k)

<sup>7</sup> NSW Law Reform Commission, *Bail Report 133*, p. 30

<sup>8</sup> NSW Law Reform Commission, *Bail Report 133*, p. 30

<sup>9</sup> NSW Law Reform Commission, *Bail Report 133*, p. 30

<sup>10</sup> NSW Law Reform Commission, *Bail Report 133*, p. 42

individuals or the community. It is not necessary or prudent policy to specifically legislate for every conceivable way in which a person before a court can present a risk to the community. It may well be that some people who are on a good behaviour bond or a suspended sentence and are charged with a serious indictable offence do present a significant risk to the community, but it won't always be the case.

The unacceptable risk test provides an appropriate tool to enable bail authorities to make a risk assessment and refuse bail in appropriate matters. More specifically, s 17(3)(h) of the *Bail Act 2013*, which corresponds to s 18(1)(i) of the *Bail Amendment Bill 2014*, already turns the bail authority's mind to 'the likelihood of a custodial sentence being imposed if the accused person is convicted of the offence'. This consideration will have particular weight when defendants come before court charged with a serious indictable offence while serving a sentence in the community or on an Intensive Corrections Order. This will also be a central consideration where an accused person is subject to a good behaviour bond or an intervention program order when they come before the court, albeit to a lesser extent.

BOCSAR research conducted in 2010 found that 'the risk of bail refusal was elevated for those with a larger number of prior convictions and/or concurrent offences.'<sup>11</sup> This research indicates that bail authorities place significant weight on prior convictions even without a presumption or 'show cause' provision requiring them to do so. It is implicit in any risk assessment of the likelihood that a person will 'commit a serious offence' pursuant to s 17(2)(b) of the *Bail Amendment Bill 2014* that the bail authority will have regard to their prior offending and the sentence they were given for the offence. That is, whether they were given a sentence of imprisonment in the community, an intensive corrections order or a good behaviour bond and whether they were able to successfully comply with the order without coming to the attention of the court. In our view, there is no need to introduce the proposed amendment to s 16B(1)(h) of the *Bail Amendment Bill 2014*.

### **No need to create additional show cause categories**

There is no demonstrated need to create a new show cause category. We are not aware of any instances where a gap in the legislation has been identified in particular cases or highlighted by the Supreme Court as in need of reform. As outlined above, we consider that the unacceptable risk test and the considerations contained in section 18 of the *Bail Amendment Bill 2014* are sufficient tools to enable bail authorities to refuse bail in appropriate circumstances without unnecessarily limiting their discretion.

Further amendments should not be made to the *Bail Act 2013* until there is clear evidence that the existing provisions are not operating effectively to meet the overriding purposes of the Act.

Should you require further information, please contact Dara Read on [REDACTED] or at [REDACTED].

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<sup>11</sup> L Snowball, L Roth and D Weatherburn, *Bail Presumptions and the Risk of Bail Refusal: an Analysis of the NSW Bail Act*, Issues Paper No. 49 (NSW Bureau of Crime Statistics and Research, 2010) 1