31 October 2013

Sentencing Council
GPO Box 5199
SYDNEY NSW 2001

Submission to the NSW Sentencing Council
on proposed amendments to the *Bail Act* 2013

This letter is in response to the call for submissions on the proposal to make amendments to the *Bail Act* 2013 following the introduction of the Bail Amendment Bill 2014. Thank you for the opportunity to comment on the proposed introduction of additional show cause offences.

1. Background

We note the competing interests in play with respect to debates about bail and community safety. The reform of bail has historically been subject to complex and competing demands, as evidenced in the sustained media coverage that surrounded the introduction of the *Bail Act* 2013 earlier this year.[1] However, notwithstanding perceived community concerns,[2] reforms to bail have significant implications for accused persons

[1] David Brown, 'Is rational law reform still possible in a shock-jock tabloid world' The Conversation (online), 15 August 2014 < http://theconversation.com/is-rational-law-reform-still-possible-in-a-shock-jock-tabloid-world-30416>; Julia Quilter, 'Not for punishment: we need to understand bail, not review it' The Conversation (online), 3 July 2014, <http://theconversation.com/not-for-punishment-we-need-to-understand-bail-not-review-it-28651>; Joel Gibson, 'Lawyers express their contempt for tough new changes to bail laws', The Sydney Morning Herald (online), 1 November 2010 <http://www.smh.com.au/nsw/lawyers-express-their-contempt-for-tough-new-changes-to-bail-laws-20101031-178xt.html>.

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

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and the community alike, and so it is imperative that law reform proceeds carefully, with an emphasis on research, evidence, review and due process.

2. The Bail Amendment Bill 2014

We note the Sentencing Council has not been asked to generally review the *Bail Act* 2013 or the amendments to the Act pending under the Bail Amendment Bill 2014. However, the concerns raised below concerning expanding the 'show cause' category in s16B can only be fully considered in light of a broader analysis of concerns about the impact of the Bail Amendment Bill 2014. These include, but are not limited to, the removal of the presumption of innocence from section 3, the introduction of the concept of a bail concern and the merging of the consideration of bail conditions into the unacceptable risk test. As Brown and Quilter argue

> While the Government has claimed that the changes are 'common sense', in its determination to look 'tougher' on crime and to give the electorate the impression that more people will be denied bail, they have rashly introduced complicated and unnecessary changes to a regime that had only just begun to become familiar to police, lawyers, magistrates and judges after a twelve-month familiarisation and training period.[3]

3. Additional show cause offences

As enacted, the *Bail Act* 2013 required the court to determine whether an accused person had unacceptable risks, and if so whether such risks could be met by the imposition of bail conditions.[4]

Following the Bail Amendment Bill 2014, for a substantial list of serious offences, the accused must first show cause why bail should not be refused. The current list of show cause offences contained in the proposed s16B includes:

- offences punishable by life imprisonment

[3] Julia Quilter and David Brown 'Speaking too soon: The sabotage of bail reform in New South Wales' (2014) 3 *International Journal for Crime, Justice and Social Democracy* 4, 13.
[4] *Bail Act* 2013 (NSW) ss 17, 25-30.

- child sexual assault offences
- repeat personal violence offences
- drugs offences involving commercial quantities, and
- weapons related offences.[5]

The current review is considering expanding the list to cover applications for bail where the accused is alleged to have committed a serious indictable offence while:

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

This expansion is clearly directed towards alleged repeat offenders.

a. The extent to which concerns raised by these offences can be mitigated by the existing unacceptable risk test and show cause categories in the Bill

Firstly, there is already sufficient provision for alleged repeat offenders in the current show cause category. Section 16B(1)(h) covers accused persons who commit a serious indictable offence while on parole. Section 16(1)(i) covers accused persons charged with both an indictable offence while subject to a supervision order or an offence of failing to comply with a supervision order while subject to a supervision order.

Secondly, whether or not covered by the current show cause category, the proposed additions are covered by the existing unacceptable risk test. As set out in s 18, of the Bail Amendment Bill 2014 the matters to be considered as part of "an assessment of bail" already cover all factual circumstances that it may be desirable to raise on a bail application when dealing with alleged repeat offenders. Specifically, the inclusion of the following sub sections in s 18 mitigate any concerns that may be raised:

[5] Bail Amendment Bill 2014 (NSW) s16B.

(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,

(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*,

(i) the *likelihood* of a custodial sentence being imposed if the accused person is convicted of the offence,[6]

In light of the comprehensive accommodation of factual considerations relevant to persons who commit serious indictable offences while subject to court orders in s18, there is no justification for expanding the show cause category.

b. The expected impact of expanding show cause requirements to these offences

It is challenging to comment on the expected impact of expanding the show cause offence category when the application of show cause hearings for the offences currently outlined in s16B of the Bail Amendment Bill 2014 is yet to commence. Nonetheless, it is difficult to imagine that the introduction, and subsequent expansion, of the show cause category will achieve anything other than expanding the subgroup of accused persons for whom it is more difficult to get bail.[7]

[6] (emphasis added) Bail Amendment Bill 2014 (NSW) s18.

[7] This was the effect under the *Bail Act* 1978 (NSW) for the presumption against and exceptional circumstances category offences. NSW Law Reform Commission, *Bail Report*, Report No 133 (2012) 42; 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.

Providing some evidence in support of this view, in *Spence v Queensland Police Service* [2013] QMC 14, Judge Carmody reflected upon the purpose of introducing a show cause provision:

> Thus the amendments taken as a whole evince unequivocal and unmistakable legislative intention that defendants, caught by the provisions of section 16(3A), should routinely be detained to achieve the underlying public policy objective of community safety and order.[8]

However, in Victoria the Law Reform Commission suggests the operation of reverse onus show cause requirements has had a more ambivalent impact on bail hearings, concluding "bail is often granted for reverse onus offences" because "offence type is only one factor taken into account by the decision maker."[9] In *Woods v DPP* [2014] VSC 1 Justice Bell remarked

> On the proper interpretation of the provisions, the onus is on the applicant with respect to showing cause and on the prosecution with respect to unacceptable risk. I respectfully agree with the conclusion in *Harika* and *Paterson* on the one hand and *Asmar* on the other that unacceptable risk is very important in relation to whether cause has been shown. The applicant for bail and the prosecution contribute to the process of consideration according to the different onuses which they bear. If the prosecution fails to establish unacceptable risk, this will count in the applicant's favour in the show-cause assessment. If the prosecution establishes unacceptable risk, this will count against the applicant in that assessment; in practical terms, it will be dispositive because, under s 4(2)(d)(i), bail must be refused where the prosecution satisfies the court that the applicant represents an unacceptable risk.[10]

The impact of the commitment of the Victorian courts to fundamental common law rights and liberties cannot be underestimated when assessing the development of show cause categories in that jurisdiction. In *Woods* Justice Bell stated:

> The connection between bail and human rights may be illustrated by reference to decisions of the European Court of Human Rights under the Convention for the Protection of Human Rights. Article 5(3) of the Convention provides:

[8] *Spence v Queensland Police Service* [2013] QMC 14 [29].
[9] Victorian Law Reform Commission, *Review of the Bail Act*, Final Report (2007) 37.
[10] *Woods v DPP* [2014] VSC 1[58].

> Everyone arrested or detained [on reasonable suspicion of having committed a criminal offence] shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.[11]

Justice Bell then reflected upon the adverse comments about show cause and reverse onus provisions made by the Victorian courts previously, before quoting from *Rokhlina v Russia* [2005] ECHR 227 wherein the court declared

> Continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty. Any system of mandatory detention on remand is per se incompatible with [art 5(3)] of the Convention, it being incumbent on the domestic authorities to establish and demonstrate the existence of concrete facts outweighing the rule of respect for individual liberty. Shifting the burden of proof to the detained person in such matters is tantamount to overturning the rule of [art 5] of the Convention, a provision which makes detention an exceptional departure from the right to liberty and one that is only permissible in exhaustively-enumerated and strictly defined cases ... Ibid [67] (footnotes omitted);[12]

The apparent acceptance in practice of the primacy of the unacceptable risk test in Victorian bail decision making is such that the Law Reform Commission has recommended removing the show cause category altogether:

> The ultimate issue for a bail decision maker is whether the accused person poses an unacceptable risk. We recommend the removal of reverse onus tests so all bail decisions are made on the basis of unacceptable risk. We do not believe this will alter the outcome of bail decisions because decision makers have told us unacceptable risk is always the ultimate test.[13]

Therefore, the impact of the show cause requirements and any subsequent expansions will depend upon the interpretation by police and courts of the interaction between the requirement to show cause and the unacceptable risk test.

c. Whether there is a need to create a new show cause category for the offences, and appropriate limits in terms of the types of offences it

[11] *Woods v DPP* [2014] VSC 1 [22]
[12] Quoted in *Woods v DPP* [2014] VSC 1 [26]
[13] Victorian Law Reform Commission, *Review of the Bail Act*, Final Report (2007) 37.

applies to and the type of conditional liberty or custody that triggers a show cause requirement

The list of offences in s16B were selected by the NSW Government because those offences are said to "involve a significant risk to the community."[14] However, no evidence is offered indicating that the community is more at risk generally from the offences included in s16B or specifically during the period of an accused person's bail where the accused is charged with s16B offences. In the absence of such evidence, there is no justification for the selection of some offences over others, and subsequently no need to create a new show cause category.

Furthermore, the offences included in s16B appear ad hoc and the additions proposed do not seem to follow any coherent pattern. For example, sexual intercourse without consent is included under s16B(1)(c) as it falls within the definition of a "serious personal violence offence" where the accused has previously committed a serious violence offence. However, aggravated indecent assault carrying a maximum penalty of 7 or 10 years imprisonment does not, unless the assault which is committed in circumstances of aggravation amounts to the infliction of grievous bodily harm or wounding and the accused has previously been convicted of a serious personal violence offence.

While the *Bail Act* 1978 was in force, 28 amendments were directed at the presumption provisions.[15] Thus, the prompt proposal to amend the show cause category, even prior to it commencing, risks harking back to that era of confusion, notwithstanding that this approach was comprehensively criticised for its opaqueness, even for experienced lawyers.[16] It also risks reintroducing all the complexities associated with a presumption based model without the structure provided under the repealed ss 8 – 9D.[17]

[14] New South Wales, *Parliamentary Debates*, Senate, 13 August 2014 (Brad Hazzard, Attorney General)
[15] NSW Law Reform Commission, *Bail Report*, Report No 133 (2012) 30; See generally Alex Steel, 'Bail in Australia: legislative introduction and amendment since 1970' in Marie Segrave (ed) *ANZ Critical Criminology Conference Proceedings* (Monash University, 2009) 228.
[16] NSW Law Reform Commission, *Bail Report*, Report No 133 (2012) 42.
[17] *Bail Act* 1978 (NSW).

A comparison of show cause category offences proposed in NSW, and currently applicable in Queensland and Victoria suggests that there is little consensus amongst states about which offences warrant show cause hearings. In Victoria the application of show cause hearings covers a number of offences,[18] including persons who allegedly commit indictable offences while awaiting trial for an indictable offence.[19] In Queensland the show cause category is limited to accused persons who are alleged to be "or has at any time been, a participant in a criminal organisation,".[20] The Queensland provision is said to be justified on a protection of the community basis:

> Although section 16(3A) admittedly impacts adversely on individual liberty its justification is said to be rooted in the need to deter concerning behaviour and to ensure the maintenance of civil authority and any encroachments on traditional civil rights is justified by the overall greater good and the fact that it is targeted only at individuals who offend, while enjoying the support and encouragement of the criminal group.[21]

However, these objects misinterpret the role of bail in the criminal justice system, placing undue weight on potential perceived risks of harm to the community over the interests of the accused, and the interests of the community represented more broadly in a criminal justice system that adheres to fundamental principles.[22]

Without clear evidence that the risk based approach contained in the *Bail Act* 2013 is failing to achieve the purposes of bail in relation to specific offences there is no justification for encroaching on the accused presumption of innocence and right to be at liberty.[23] At a minimum, such a review could only be conducted after the *Bail Act* 2013 as originally enacted had been in operation for a period of years, not weeks. Any changes are thus premature.

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[18] *Bail Act* 1977 (Vic) s4(4); For example the specified offences include stalking s 4(4)(b), contravening a family violence intervention order s 4(4)(ba) or intervention order ss (4)(4)(bb), aggravated burglary s 4(4)(c) and certain drug offences s 4(4)(ca)-(cc).
[19] *Bail Act* 1977 (Vic) s4(4)(a).
[20] *Bail Act* 1980 (QLD) s16(3A).
[21] *Spence v Queensland Police Service* [2013] QMC 14 [28].
[22] These principles include the right to personal liberty, the presumption of innocence, no detention without legal cause, no punishment without conviction by due process, a fair trial, individualised justice and consistency in decision making, and special provision for young people. NSW Law Reform Commission, *Bail Report*, Report No 133 (2012) 9. See further Chapter 2.
[23] NSW Law Reform Commission, *Bail Report*, Report No 133 (2012) 11-12.

Ultimately, the expansion of the show cause category places overemphasises the type of offending at the expense of an examination of the circumstances of the case and of the accused. More importantly, it ignores the presumption of innocence, and the core object of bail which is to secure the accused person's attendance at court to stand trial.[24]

If the show cause category is extended, then as a minimum requirement the current exemption for juveniles charged with the same offences in s16A(3) must be extended to any new category of show cause offences.

4. Conclusion

Having carefully considered the *Bail Act* 2013, the Bail Amendment Bill 2014 and the Review of the Bail Act 2013, and in the absence of a more broad ranging inquiry into whether original unacceptable risk test is an adequate means of achieving the purpose of bail, we urge the following:

1. No additions to the categories of offences for which the accused must 'show cause' before bail can be considered,
2. If additions are made, the extension of the current exemption for juveniles charged with offences in s16A(3) to the proposed categories of offences,
3. The early referral of the matter to NSWLRC for a holistic review of the selection of show cause category offences, as currently listed in s16B and as proposed in the current review.

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[24] "[t]he object of bail is to ensure and secure the attendance of the accused at his trial and it recognizes that the liberty of the subject should only be restricted in such a way as will achieve this result". *R v Appleby* (1966) 83 WN (Pt 1) (NSW) 300, 301. See NSW Law Reform Commission, *Bail Report*, Report No 133 (2012) 21-29.