

23 September 2022

The Honourable Tom Bathurst AC QC
Chairperson
NSW Law Reform Commission
By email: nsw-lrc@justice.nsw.gov.au.

Dear Mr Bathurst,

Bail: show cause – firearms offences and criminal associations

Thank you for the opportunity to provide feedback to the Commission's review of the *Bail Act 2013* (NSW). (**Bail Act**)

Legal Aid NSW does not support the expansion of show cause offences to other firearms offences and offences concerning criminal associations. Our casework experience does not suggest that the present laws are inadequate and that systemic issues exist justifying such reforms. We also do not consider there to be the need to define the term 'criminal associations'. In our experience, the term is used appropriately by courts to capture all different manner of circumstances.

Preliminary observations

Legal Aid NSW notes the risks of law reform that is reactive to particular cases, rather than targeted to addressing systemic issues. There is a danger that such reform is not properly considered and leads to wider unintended adverse consequences.

Legal Aid NSW is concerned that consideration of the current reforms in isolation will make it harder for defendants to get bail and could further drive the overrepresentation of Aboriginal and Torres Strait Islander people in custody. This is especially the case given that the NSW Bureau of Crime Statistics and Research (**BOCSAR**) has found that the most significant factor influencing both police and court decisions to refuse bail is the fact that a defendant has been charged with a

show cause offence.¹ Expanding the categories of show cause offences is therefore likely to result in even more bail refusals.

Any proposals which lead to bail becoming more difficult need to be considered in the following wider context:

- An increasing remand population. According to BOCSAR, the adult remand population was 27 per cent larger in June 2022 than in June 2015.²
- The impact of COVID 19 has led to overcrowding in custodial centres, onerous conditions in custody, lack of access to justice and significant delays in the criminal justice system. Any further increases in the remand population will exacerbate these problems.
- The urgent need to address the overrepresentation of Aboriginal and Torres Strait Islander adults in custody, and the NSW Government's commitments under the Closing the Gap agreement. Recent BOCSAR custody statistics show an almost 65 per cent increase in the number of Aboriginal adult offenders held on remand.³

Legal Aid NSW supports a comprehensive review of the Bail Act to ensure that reforms strike an appropriate balance between the need to ensure the safety of victims of crime, individuals and the community, whilst safeguarding the presumption of innocence and the general right to be at liberty. In 2020 Legal Aid NSW provided a comprehensive submission to the NSW Department of Communities and Justice in response to the statutory review of the Bail Act, a copy of which is attached. Our submission contains 40 recommendations which are informed by our casework experience. In particular, we draw attention to recommendations 1 to 10, which strive to make bail decisions and bail conditions fairer and more culturally appropriate for Aboriginal and Torres Strait Islander people. Whilst the outcome of that review is outstanding, we invite the Commission to consider those recommendations in light of the current proposals and their potential impact on vulnerable individuals, including Aboriginal and Torres Strait Islander defendants.

Should the list of firearms offences treated as "show cause" offences under the Bail Act be expanded? If so, what offences should be included?

¹ Klauzner, I., and Yeong, S. (2021). *What factors influence police and court bail decisions?* (Crime and Justice Bulletin No. 236), 11. Sydney: NSW Bureau of Crime Statistics and Research.

² See NSW Bureau of Crime Statistics and Research, Custody Statistics: https://www.bocsar.nsw.gov.au/Pages/bocsar_custody_stats/bocsar_custody_stats.aspx as at 13 September 2022.

³ Ibid.

Legal Aid NSW does not support the expansion of firearms offences to which the show cause requirement applies. There is sufficient scope within existing legislation for courts to consider the use of a weapon in determining whether an offence is a serious offence for the purpose of assessing unacceptable risk.⁴ We therefore submit that it is appropriate to restrict show cause offences to more serious offences that pose a danger to the community.

Legal Aid NSW does not consider that possession of a firearm or ammunition in a private place is sufficiently serious to warrant it being a show cause offence. We are also concerned that extending the show cause requirement to possession of firearms in a private place may impact disproportionately on young people who possess imitation firearms (such as gel blasters) in their home, as well as farmers and others living in rural or regional areas.

Legal Aid NSW also does not support a breach of a firearms prohibition order⁵ being treated as a show cause offence. We note that these orders are the result of an administrative rather than judicial process and can be based on limited and untested information. We are concerned that should a breach of a firearms prohibition order become a 'show cause offence' there might be an increase in these orders and subsequent targeting of individuals subject to the order. This could particularly be the case in circumstances where possession of a firearm in a private place is not a show cause offence, but possession of a firearm in breach of a firearms possession order is. Having regard to the wide range of factors which the courts can take into account under section 18 of the Bail Act in assessing bail concerns, we see no need to add firearms prohibition order to the list of factors already listed.

Should there be further guidance on the meaning of "criminal associations" in s 18(1)(g) of the Bail Act? If so, how should it be defined?

We acknowledge that there is currently no guidance around the meaning of "criminal associations" under section 18(1)(g) of the Bail Act and as such the term is not limited to organised crime networks but is capable of capturing people living in families and communities with high incidences of criminal offending and engagement with the criminal justice system.

However, on the balance, we consider it appropriate to leave the interpretation of this term to judicial discretion. We are concerned that historically many reforms originally targeted at serious and organised crime have in practice applied to a far broader range of citizens, and there is a risk that the creation of a definition of "criminal

⁴ *Bail Act 2013* (NSW) section 18(2)(a)

⁵ *Firearms Act 1996* (NSW) Part 7.

associations” would do the same. For example, the NSW Ombudsman conducted a review of NSW Police use of consorting laws which had sought to criminalise associations with convicted criminals, including organised crime networks. However, the Ombudsman’s report noted with concern the “use of the consorting law in relation to disadvantaged and vulnerable people, including Aboriginal people, people experiencing homelessness, and children and young people”.⁶ The Report further noted that the consorting law may “continue to be used to address policing issues not connected to serious and organised crime and criminal gangs and in a manner that may impact unfairly on disadvantaged and vulnerable people in our community”.⁷

Should the list of offences relating to criminal associations that are treated as "show cause" offences under the Bail Act be expanded? If so, what offences should be included?

Legal Aid NSW submits that existing show cause offences sufficiently target those involved in organised crime whose criminal associations are of concern. Legal Aid NSW is concerned that tightening bail laws in relation to criminal associations could undermine efforts under the Closing the Gap agreement. We note that many young Aboriginal people come from families with a history of crime, and who live with other families that have a similar background. Particular care needs to be taken to ensure that consideration of an Aboriginal person’s associations and any condition imposing non association is culturally appropriate.

If amendments to bail laws were progressed to make it more difficult for people with alleged gang affiliations to be granted bail, then the following safeguards should be imposed:

- a different threshold of proof applied for those associations so that the prosecution is not able to assert, without evidence, that an accused has organised criminal associations, but instead is required to provide particularised evidence to establish those facts
- the prosecution should be required to provide details of the associate’s convictions, including whether they are minor offences or serious offences, as well as details of the association, such as its frequency and the nature of the relationship.

It should not be sufficient for police to allege that a defendant associates with a person or people merely suspected of criminal activity, or charged but not convicted

⁶ NSW Ombudsman, *The Consorting Law: Report on the operation of Pt 3A, Division 7 of the Crimes Act 1900*, April 2016, p iii.

⁷ Ibid.

of a crime. We note these comments are consistent with the following observations of Beech-Jones CJ at CL in *R v Ebrahimi* [2015] NSWSC 335 at [43].⁸

Thank you again for the opportunity to provide feedback to the review. If you have any questions or would like to discuss this matter further, please contact [REDACTED], [REDACTED], [REDACTED], at [REDACTED] or on [REDACTED].

Yours sincerely



Jane Cipants
A/Chief Executive Officer

Enclosure:

Legal Aid NSW submission to the NSW Department of Communities and Justice,
Review of the *Bail Act 2013* (NSW), (17 August 2020)

⁸ “Assertions of criminal associations of this kind often generate much heat in these applications, but little light. To truly assist in assessing bail concerns the Court needs to know much more about the nature of the association, the nature of the alleged criminality that the alleged criminal associations have engaged in in the past and the material that provides a basis of believing the applicant has contacts with persons who could provide him some assistance if he wished to abscond”.