Bail: Show cause offences & the unacceptable risk test

Submission to the New South Wales Law Reform Commission

28 September 2022

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | **ABN** 96 086 880 499
T +61 2 (02) 9258 7700 | **F** +61 2 9258 7777 | **E** enquiries@lawyersalliance.com.au | **W** www.lawyersalliance.com.au
Protecting and promoting justice, freedom and the rights of the individual.

Contents

Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

The ALA office is located on the land of the Gadigal of the Eora Nation.

[1] www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input into the New South Wales Law Reform Commission's review into a number of discrete aspects of the *Bail Act 2013* (NSW) ('the Act'); namely, whether the existing list of firearm offences treated as "show cause" offences under the Act need be expanded, whether further legislative guidance on the meaning of "criminal associations" under the Act is necessary, and whether the list of "show cause" offences relating to criminal associations should be expanded.

2. The ALA is opposed to expanding the list of show cause provisions for criminal association and firearm offences under section B of the Act as proposed by the Bail Act Monitoring Group. This legislative change will see prison numbers continue to rise and an increase in the work of the courts in hearing bail applications. Similar reforms introduced in Victoria have seen prison populations rise exponentially.[2]

3. The ALA submits that existing show cause provisions and the proposed expansion of such offences are in direct contravention of the premise that liberty of the subject, a fundamental human right, and the presumption of innocence which entails that a person ought not be detained except by exception, rank behind "community safety". Show cause provisions and statutory injunctions against bail such as the "unacceptable risk" test, are incompatible with those human rights. Justice Bell in the Supreme Court of Victoria stated:

> [T]he presumptive entitlement to bail, which reflects the importance of the presumption of innocence and the prosecutorial onus of proof as well as the right of all persons to liberty and freedom of movement, was displaced by the show cause provisions in the Victorian Bail Act.[3]

4. The impact of an ever-increasing remand population on the community cannot be ignored, particularly when new legislative amendments are being sought and current conditions mean an increasingly devastating impact on the most vulnerable members of society. There are of course many other vulnerable members of our community who are significantly disproportionately represented in our prisons such those who are homeless and First Nations peoples. The evidence shows that, of those entering prison, one in three are homeless during the four weeks before prison and more than half (54%) report being unemployed in the 30

[2] Justice Reform Initiative, Submission No 103 to the Legal Council, Legal and Social Issues Committee, *Inquiry into Victoria's Criminal Justice System* (1 September 2021).

[3] *Woods v Director of Public Prosecutions* (2014) 238 A Crim R 84.

days before entering prison. Of those exiting prison, over half expect to be homeless on discharge and less than one quarter had employment organised on release.[4] The risk of associated with communities who have experienced long-term intergenerational poverty, coming into contact with the criminal justice system and the significant statistical likelihood of this is well known.

5. The ALA believes the time has come to see long-term intergovernmental coordination and substantial investment in these communities, to break the cycle of poverty and disadvantage. This goal is worthy of the support of all political parties, as are the ideas of justice reinvestment. The issues also overlap with the Closing the Gap commitments of all our governments to Aboriginal people and communities. It was indeed these underlying issues which the Royal Commission into Aboriginal Deaths in Custody recognised as giving rise to the disproportionate rate of Aboriginal peoples in incarceration.

6. The ALA is not convinced that show cause provisions are useful or necessary and rather, are unnecessarily complex, redundant and have the great potential to hold accused persons in custody for longer than they would have otherwise been sentenced for. Jurisdictions such as Victoria have proven to be a disaster for show cause offences and the NSW Government would be wise not to proceed with the proposed amendments in light of the current incarceration crisis facing New South Wales (NSW) and Australia broadly.

Bail and the incarceration crisis

7. The increasing number of persons detained in prisons in NSW is a matter of concern for the ALA. The ever-increasing growth of the prisoner population is due in large part to the number of persons who are denied bail and detained in prison ('remanded into custody'). The 'incarceration crisis' in NSW is intimately related to changes in bail laws and associated practices. The NSW prison population has risen by over 38 per cent in the past decade, from 9,710 to 13,430 people.[5] Interestingly over this same period, violent offences and property offences have been declining.[6] While economic and social determinants of crime influence these statistics, and must be separately addressed to resolve inflated incarceration statistics

[4] AIHW (2019). The Health of Australia's Prisoners, 2018.

[5] NSW Recorded Crime Statistics, Quarterly Update, June 2021, NSW Bureau of Crime Statistics, <https://www.bocsar.nsw.gov.au/Publications/RCS-Quarterly/NSW_Recorded_Crime_June_2021.pdf>.

[6] Ibid.

long-term, the ALA emphasises the point that growth in the prison population is in large part associated with the increased use of remand.[7]

8. About one-third (32.6 per cent) of all people in NSW prisons are imprisoned without a sentence (almost 10 per cent higher than a decade ago), and remand numbers have increased by over 1650 people during that period. Currently, 4,788 of the 12,453 people in prison in NSW are unsentenced.[8] This growing reliance on remand has a severe impact on an individual's work, housing, and family relationships and a ripple effect in the community. For example, remand increases the likelihood of children being placed into out-of-home care,[9] severely disrupting a child's development and relationships.

9. Oftentimes, individuals serve more time on remand than they would have spent in custody were they to be sentenced, especially with increasingly congested courts. Over a five-year period, the number of people sentenced to 'time already served' (i.e. people held on remand were immediately released upon receiving their sentence as they had spent more, or the equivalent, time of the penalty imposed) increased by 65 per cent.[10] NSW leads the way in keeping more unsentenced people in prison for more than a year than any other state or territory.[11] In NSW alone, the prison population has grown by 38 per cent in the past decade; more than three in ten are unsentenced and 15% are held in remand for longer than a year.[12]

10. The ALA is concerned with the overuse of remand which has undoubtedly serious consequences for individuals and their families. It is deeply concerning when remand is over-used among children and young people. In September 2021, 107 children and young people were in prison without having been sentenced, with 68 children and young people detained

[7] Justice Reform Initiative, 'State of Incarceration: Insights into Imprisonment in NSW', (December 2021), 6.

[8] Australian Bureau of Statistics, *Corrective Services Australia, June Quarter 2022,* <https://www.abs.gov.au/statistics/people/crime-and-justice/corrective-services-australia/latest-release>.

[9] Legal and Constitutional Affairs Senate Committee, Value of a justice reinvestment approach to criminal justice in Australia, Chapter 3, <https://www.aph.gov.au/Parliamentary_Business/>.

[10] Ramsey, S and Fitzgerald, J Offenders sentenced to time already served in custody, 2019, NSW Bureau of Crime Statistics and Research, <https://www.bocsar.nsw.gov.au/Publications/BB/2019-Report-Offenders-sentenced-to-time-already-served-in-custody-BB140.pdf>.

[11] Australian Bureau of Statistics (ABS), Prisoners in Australia 2020, Table 32.

[12] Bob Debus and Greg Smith, 'Jailing is failing and NSW is a world beating failure', *Sydney Morning Herald* (News article, December 10, 2021) <https://www.smh.com.au/national/nsw/jailing-is-failing-and-nsw-is-a-world-beating-failure-20211209-p59g49.html>.

under sentence. In the June quarter 2021, the number of people held in prison without being sentenced was more than double the number detained under sentence.[13]

Complexity in the 'two-step process'

11. In section 3(2) of the *Bail Act 2013* (NSW) contains a presumption in favour of bail. Accused people must be granted bail unless there is an unacceptable risk they will not return to court, will commit offences or interfere with witnesses. However, for certain offences there is a presumption against bail unless the accused person can 'show cause' or 'exceptional circumstances' why bail should be granted. This system of 'reverse onuses' adds to the complexity of the Bail Act because two tests have to be applied to the decision—the unacceptable risk test and the show cause, otherwise known as the reverse onus test.

    In line with broader approaches to criminal justice, politics and the preference for a 'tougher' approach on crime, bail has become a site of increased political attention; adopting restrictive, risk-oriented practices. This retributive approach to justice is clearly evident in the evolution and amendment of bail law in NSW and Victoria particularly. In the 1977 Bail Act of Victoria, bail could be denied if the person presented an unacceptable risk of offending if granted bail, policy-makers citing community protection to ensure they committed no further offences and appeared for trial.

12. Concern about the dangers presented by some bail applicants (particularly those charged with aggravated burglary, use of a weapon or committing certain offences while on bail), led to the introduction of legislation that reversed the onus provision and those who applied for bail to show cause as to why bail should be granted. For example, section 4(4) of the *Bail Act 1977* (Victoria) was introduced in the context of concerns about recidivist armed robbers targeting banks. This section effectively removed the presumption of bail and placed the onus on the applicant to satisfy the bail decision maker as to why they should be released on bail. Similarly, when the Bail Review Committee in NSW developed the first Bail Act, much of the discussion was influenced by the fatal shooting of a bank manager during a robbery committed by a person who was already on bail for armed robbery.[14] Since that time, amendments and

[13] New South Wales Custody Statistics, Quarterly Update (September 2021), <https://www.bocsar.nsw.gov.au/Publications/custody/NSW_Custody_Statistics_Sept2021.pdf>.

[14] J. Miles (1991) 'Bail Legislation: Objectives and Achievements', paper presented to the Australian Institute of Criminology Conference, Canberra, 29 Nov–1 Dec 1988, p. 37.

additions to risk mechanisms in both jurisdictions continue to be grounded in fears about community protection.

13. The ALA strongly believes that existing tests for show cause offences and the unacceptable risk test are both complex and confusing, there is a clear need for reform. Firstly, show cause provisions are ambiguous and there is no exhaustive definition of a show cause offence. In its review of the Bail Act, the Victorian Law Reform Commission noted the following:

> A commonly expressed concern was raised about the ambiguity or uncertainty surrounding the term 'show cause'. We were told that the phrase lacks meaning. Defence practitioners in particular said that it is difficult to explain to clients and, given its subjectivity, becomes a 'hit-and-miss' process—some decision makers will find that cause has been shown while others, in an almost identical factual scenario, will not.[15]

Secondly, the ALA points out the inconsistencies in the rationale for expanding some show cause offences and not others as articulated by the Law Reform Commission of Victoria:

> Treason and murder are very serious offences, it is true. But many murders are committed in the heat of the moment and in special circumstances by people who have no history of violent crime and who are unlikely to re-offend, or to fail to attend for trial. The crimes associated with the use of weapons … and the drug offences …are serious, but not nearly as serious as attempted murder (with its obvious risk of reoffending) or rape [neither of which attract a reverse onus].[16]

14. The fact that there is no single definition of what constitutes a show cause offence makes the inclusion of additional offences under this category of reverse onus offences rather ad hoc and adding show cause provisions to select categories of offences is unjustifiable. This is evident when one considers that most serious violent offences are not included as show cause offences, such as attempted murder, rape or serious assault. The only decision for the decision-maker is whether the accused

[15] Law Reform Commission of Victoria, Review of the Bail Act 1977, Final Report (2007) 40.

[16] Law Reform Commission of Victoria, Review of the Bail Act 1977, Discussion Paper No 25 (1991) 13–14.

person poses an unacceptable risk. The Victorian Law Reform Commission recommends this simplified approach and doing away with arbitrary tests.[17]

Redundancy of 'show cause' offences

15. The ALA is of the view that that reverse onus offences are ad hoc and anomalous. They tend largely to be a mixture of new additions, many responding to the fears of society at any given time. Fitzroy Legal Service noted:

> … it is apparent from Parliamentary debates surrounding the enactment of some of these provisions and other extrinsic material that offences are given reverse onus status in order to reflect politically expedient views about particular offences, rather than because accused charged with these offences pose an objectively greater risk of breaching bail.[18]

16. There is no clear rationale explaining why certain offences attract a reverse onus and others do not, particularly when seriousness or prevalence are not the only criteria used. In this case, the proposal to expand the list of show cause offences to include more "criminal association" related and firearm offences lacks sufficient justification when comparing other serious offences that do not fall under show cause provisions. Such serious offences include attempted murder, manslaughter, rape, aggravated rape, and culpable driving causing death which do not attract a reverse onus.[19] The ALA maintains that a piecemeal approach to reform hinders the development of an Act principled on fairness, consistency, uniformity and predictability.

17. The ALA also points out the impact of reverse onus provisions on the perception of police officers enforcing the law in applications for bail; namely, the perception that serious offences that do not fall within the exceptions are not treated with the same degree of gravity as the offences that do. For example, the Victorian Law Reform Commission heard that the more junior police officers used reverse onus provisions as a flag in order not to grant bail and leave

[17] Victorian Law Reform Commission, *Review of the Bail Act* (Final Report, September 2007), 7.

[18] Fitzroy Legal Service, Submission No. 32 to the Victorian Law Reform Commission on the Review of the Bail Act (21 February 2006).

[19] Victorian Law Reform Commission, *Review of the Bail Act* (Final Report, September 2007), 7.

the matter to the courts; this leaves a disproportionate number of low-level offenders on remand.[20]

Failure to appear data

18. In 2004 the NSW Bureau of Crime Statistics and Research conducted a study of the impact of amendments such as restricting the availability of bail for those charged with an indictable offence who have an earlier conviction of an indictable offence.[21] It found that bail refusal rates rose by more than 15% in this category of offences.[22] This had a significant effect on the state's remand population, which jumped from a monthly average of 1654 prisoners before the tougher bail laws, to a monthly average of 1756 prisoners after the new laws.[23]

19. These methods involve considerable financial and social cost as a result of retaining a higher number of people on remand and in addition, have a disproportionate impact on Indigenous peoples.

Indigenous defendants: High remand rates

20. The remand rate for Indigenous Australians was already significantly higher than that of non-Indigenous adults—17.3% compared to 6.5%. After the Bail Act amendment, the rate of remand for Indigenous Australians increased by 14.4% and for non-Indigenous adults by only 7%.[24] The issue of attaining bail is compounded by a lack of access to appropriate housing for Indigenous defendants (those without a fixed residential address are unlikely to be granted bail) and other social disadvantages faced by Indigenous communities.
21. These statistics occurred despite provisions in the *Bail Act 2013* (NSW) that allowed the court to consider kinship and community ties when assessing the probability that Indigenous Australians would appear in court, and to consider their 'special needs'.[25]

[20] Victorian Law Reform Commission, *Review of the Bail Act* (Final Report, September 2007), 41.

[21] Bail Amendment (Repeat Offenders) Act 2002 s 3 and schedule 1, now in Bail Act 1978 (NSW) s 9B.

[22] NSW Bureau of Crime Statistics and Research, The Impact of the Bail Amendment (Repeat Offenders) Act 2002, Crime and Justice Bulletin No 83 (2004).

[23] Ibid 6.

[24] Ibid 5.

[25] Victorian Law Reform Commission, *Review of the Bail Act* (Final Report, September 2007), 45.

Conclusion

22. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the NSW Law Reform Commission's review of aspects of the *Bail Act 2013* (NSW). The ALA gravely concerned with the prison population statistics in NSW and the implications of further amendments to increase the number of show cause provisions under the Act. Specifically, the ALA believes that such amendments can only lead to a greater number of people being refused bail, and a large increase in the remand population. These concerns are clearly demonstrated by inflated statistics above.

23. If enacted, these amendments will predictably have consequences that include higher numbers of individuals in prison who have not yet been convicted of a crime (which has serious implications for both those individuals and their families, an increase in the work of courts in hearing bail applications, and a financial burden on the NSW Government and taxpayers.

24. The ALA is available to provide further assistance to the Commission on the issues raised in this submission.

Greg Barns SC

Spokesperson on Criminal Justice

Australian Lawyers Alliance