



# **ALS Submission to the Bail Act Review: Show cause – Firearms Offences and Criminal Associations**

29 September 2022

## Introduction

Thank you for the opportunity to provide feedback to the Commission's review of the Bail Act 2013 (NSW) (Bail Act) following our discussion on 20 September 2022. The ALS does not support the expansion of show cause offences to other firearms offences and offences concerning criminal associations. Any expansion of show cause offences on the grounds of community safety must clearly evidence a need for this. In our submission, drawing from our vast experience representing Aboriginal and Torres Strait Islander people across the State, there is no need for the proposed expansion as existing bail law appropriately addresses community safety for these offence categories. This context compounds our significant concern that an expansion of show cause to these offence categories will result in an increase in the incarceration of Aboriginal and Torres Strait Islander people. The ALS also does not consider that further legislative guidance on the meaning of 'criminal associations' is needed.

## The overrepresentation of Aboriginal people in custody

Concerningly the numbers of Aboriginal people in custody and the overrepresentation of Aboriginal people in custody is growing. While there are less people in prison than before the pandemic, the number of Aboriginal people in prison is higher.<sup>1</sup> Aboriginal men now comprise 28% of the male prison population and Aboriginal women comprise 40% of the female prison population.<sup>2</sup> The most significant driver of these rates is the number of persons on remand.<sup>3</sup>

The ALS is concerned that increasing the categories of offences subject to the show cause provision will have a disproportionate impact on Aboriginal people and lead to more Aboriginal people in prison, in direct contradiction to the NSW Government's commitment to Closing the Gap. A recent study by the NSW Bureau of Crime Statistics and Research (BOCSAR) found that defendants accused of a show cause offence are far more likely to be bail refused than other defendants and further that Aboriginal people were 20.4% more likely to be bail refused by police than non-Aboriginal people.<sup>4</sup>

## Show cause and section 22B

The ALS does not support the show cause provision generally, and particularly with respect to section 16B(h) of the Bail Act.<sup>5</sup> Bail laws must operate to provide community safety while safeguarding the presumption of innocence and general right to be at liberty. The show cause provision does not achieve this balance. It reverses the onus of proof, encroaches on the presumption of innocence and can lead to detention for allegations of relatively minor offending.<sup>6</sup>

In this context we note the introduction in June 2022 of section 22B to the Bail Act, which applies to convicted<sup>7</sup> persons who will be sentenced to full time detention and replaces the show cause test in these circumstances<sup>8</sup>. It follows that the show causes provision will only apply to persons who have

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<sup>1</sup> See NSW Bureau of Crime Statistics and Research, Custody Statistics: June 2022  
[https://www.bocsar.nsw.gov.au/Pages/bocsar\\_custody\\_stats/bocsar\\_custody\\_stats.aspx](https://www.bocsar.nsw.gov.au/Pages/bocsar_custody_stats/bocsar_custody_stats.aspx)

<sup>2</sup> Ibid

<sup>3</sup> Ibid

<sup>4</sup> 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.

<sup>5</sup> See Aboriginal Legal Service, *Submission to the Administrative Review of the Bail Act 2013 (NSW)*, 12 August 2020

<sup>6</sup> Ibid at 14

<sup>7</sup> Conviction in this section includes a plea of guilty and a finding of guilt. See section 22B(5) of the Bail Act 2013.

<sup>8</sup> Section 22B(2) of the Bail Act 2013

not been convicted or who have been convicted but section 22B does not apply as the possibility of a penalty other than full time custody is accepted. In these circumstances there is a clear risk that remand may operate punitively and that the show cause provision unjustifiably sanctions preventative detention. We submit that any purported expansion of show causes offences must consider the operation of section 22B, the impact of which is still to be realised.

**Whether the list of firearms offences treated as ‘show cause’ offences under the *Bail Act 2013 (NSW)* should be expanded.**

The ALS does not support the expansion of the list of firearms offences treated as show cause offences. In addition to the concerns already raised regarding the show cause provision generally, we submit that existing bail law, which mandates consideration of the possession or use of a weapon in determining the seriousness of an offence<sup>9</sup>, appropriately accounts for the relative seriousness of other firearm offences and for community safety.

The relative seriousness of the various firearm offences is currently distinguished by factors including the type of firearm, the use, supply or manufacture of firearms as distinct from possession, and the possession of a firearm in public as distinct from in a private place. These are valid distinctions. The ALS does not support the extension of the show cause requirement to possession of a firearm or prohibited firearm in a private place. The policy underpinning firearm legislation is to control the possession of firearms in the community “by honest citizens and not simply to disarm the criminally minded.”<sup>10</sup> Further, we note the Firearms Act 1996 (NSW) provides a definition of firearm and prohibited firearm that includes imitations as well as firearm parts<sup>11</sup> and also presumes a person’s possession (reversing the onus of proof) where the firearm is on “any premises owned, leased or occupied” by the person.<sup>12</sup> As such there is a broad spectrum of criminality that could constitute an offence of possessing a firearm (or prohibited firearm) in a private place. In these circumstances the unacceptable risk test provided by the Bail Act is the appropriate means of addressing community safety.<sup>13</sup>

The ALS does not support a breach of a firearms prohibition order (FPO) being treated as a show cause offence. We note that the making of an FPO follows an administrative rather than judicial process, is often based on untested information and there are limited review rights. We note our concerns raised above regarding the expansion of the show cause requirement to the possession of prohibited firearms in a private place, in particular the reverse onus, broad definition of ‘possession’ for the purposes of the Firearms Act. Further we note that an FPO takes effect when a police officer serves a copy of the order personally on the person against whom it is made and the presence of a firearm on a person’s premises straight after service would constitute a breach of the FPO. Finally, an FPO is an order that is for life unless revoked and as such the circumstances that informed the making of the order may be far removed from the circumstances of the person at the time of an alleged breach. Again there is a broad spectrum of criminality that may constitute possession of a prohibited firearm in breach of an FPO and this is most appropriately accounted for under existing bail law.

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<sup>9</sup> Section 18(2) of the Bail Act

<sup>10</sup> See *R v Tolley [2004] NSWCCA 165 at [53]*

<sup>11</sup> Section 4 and 4D of the Firearms Act 1996.

<sup>12</sup> Section 4A of the Firearms Act 1996

<sup>13</sup> See the discussion of Armed Robbery and Robbery in Company in Hatzigeros, J. (2014) *Review of the Bail Act 2013*, report prepared for the Department of Justice, Sydney, NSW Government at 62

The ALS is also concerned that the expansion of a show cause requirement to a breach of an FPO offence will likely see an increase in the number of FPOs made. We note the inclusion of FPOs and bail conditions as ‘tools’ in the ‘disruption’ policing approach regarding persons subject to suspect target management plans.<sup>14</sup>

The ALS does not support the inclusion of FPOs in the list of orders in section 18(1)(f) of the Bail Act. A FPO is not of the same nature as the other orders listed. In addition to the concerns outlined above, in particular regarding the administrative nature of the order and its duration, we submit that the court may consider compliance or non-compliance with an FPO, where relevant, pursuant to s18(1)(a) or 18(1)(b) of the Bail Act.

**Whether further legislative guidance should be provided on the meaning of ‘criminal associations’ under the *Bail Act 2013* (NSW).**

The ALS recognises that the lack of legislative guidance on the meaning of ‘criminal associations’ under the Bail Act potentially risks inadvertently capturing Aboriginal defendants who may “associate” with others in their communities who have criminal records. However, our experience is that the phrase is interpreted as referable to organised crime, as intended. We are concerned that further legislative guidance may lead to an unintended broadening in application and in these circumstances we suggest further guidance is unnecessary.

**Whether the list of offences relating to criminal associations that are treated as ‘show cause’ offences under the *Bail Act 2013* (NSW) should be expanded.**

The ALS does not support the expansion of the list of offences relating to criminal associations that are subject to the show cause requirement. The ALS is concerned that such an expansion would impact disproportionately on Aboriginal people. We note the introduction of consorting legislation in 2012<sup>15</sup>, ostensibly to support the NSW Police Force (NSWPF) to deal with organised crime<sup>16</sup>, but which was used to target minor suspected criminal activity and disproportionately targeted Aboriginal people.<sup>17</sup>

The ALS submits that the most serious offences that may involve organised crime are already subject to a show cause requirement, for example, those relating to weapons or drug related offences. Further, the relative seriousness and breadth of criminality covered by offences relating to criminal associations, for example sections 93X, 93T and 193C of the Crimes Act 1900 (NSW), is most appropriately accounted for by current bail law. We again note the requirement that any expansion of the show cause provision must clearly evidence the need in order to justify the onus reversal, encroachment on the presumption of innocence and likely resulting increase in the numbers of Aboriginal people imprisoned.

**Conclusion**

Bail must appropriately balance community protection with safeguarding the general right to be at liberty and the presumption of evidence. A purported expansion of the reverse onus show cause provision must ask more than whether an offence is ‘serious’ or not. Evidence must exist that clearly justifies the extension of the provision, namely evidence that clearly illustrates a significant risk to

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<sup>14</sup> State Intelligence Command, *NSW Police Force, STMP III Toolkits*, 5 November 2021

<sup>15</sup> Crimes Amendment (Consorting and Organised Crime) Act 2012

<sup>16</sup> New South Wales, Parliamentary Debates, Legislative Assembly, 7 March 2021, 65 (David Clark, Parliamentary Secretary)

<sup>17</sup> Professor John McMillan, *The consorting law: Report on the operation of Part 3A, Division 7 of the Crimes Act 1900*. (Report, NSW Ombudsman, April 2016) 1.

community safety, including relative to other offences, as well as evidence of the systemic failure of current bail law to address this risk. We are concerned that instead of evidence driving bail reform, calls for the expansion of show cause follow “select cases” and results in the use of bail as a political tool.

In such circumstances a resulting increase in the number of Aboriginal people in custody, and in contradiction to the NSW Government’s commitment to Closing the Gap, would be particularly concerning.

Sincerely,



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