



Our ref: [REDACTED]

30 September 2022

The Honourable Tom Bathurst AC KC
Chairperson
NSW Law Reform Commission
Selborne Chambers
Level 6, 174 Philip Street
Sydney NSW 2000

By email: nsw-lrc@justice.nsw.gov.au

Dear Mr Bathurst AC KC,

Reference to the NSW Law Reform Commission on discrete aspects of the Bail Act 2013

Introduction

1. The New South Wales Bar Association (**the Association**) thanks the NSW Law Reform Commission for the opportunity to express its opinion in relation to the reference by the NSW Attorney General of three questions arising from the Bail Act Monitoring Group's (**BAMG**) July 2022 report.
2. The Association also commends and supports the public release of the executive summary and recommendations of the BAMG's report by the Attorney-General on 16 August 2022.
3. The terms of reference of the present review require the Commission to review:
 - a. Whether the existing list of firearms offences treated as "show cause" offences under the *Bail Act 2013* (NSW) (**Bail Act**) should be expanded.
 - b. Whether further legislative guidance should be provided on the meaning of "criminal associations" under the Bail Act.
 - c. Whether the list of offences relating to criminal associations that are treated as "show cause" offences under the Bail Act should be expanded.
4. The introduction of the "show cause" regime for certain offences since 2014 has caused a dramatic increase in the numbers of accused persons who are refused bail. A 2018 BOCSAR study found that based on data between 1 January 2012 and 31 January 2017, the Bail Act (as amended) "increased the probability that the average defendant is refused bail by the courts by about 11 per

cent”, an increase that “represents an additional 1,500 bail refusals by NSW courts in the 2-year post reform period”.¹

5. The show cause test has also contributed to the unacceptably high remand rates of First Nations people. We share the concerns of the BAMG that there is a particular risk that further amending bail laws may disproportionately increase the number of First Nations people who are on remand, further exacerbating the overrepresentation of First Nations people in custody in NSW.
6. Against that background, the Association strongly opposes any further expansion of the show cause regime.
7. In summary, the Association’s position with respect to each of the issues under consideration is as follows:
 - a. The existing list of firearms offences which are treated as “show cause” offences should not be expanded;
 - b. Further legislative guidance on the meaning of “criminal associations” is not required. However, the Association would support a clear exception that specifies “criminal associations” does not include associating with a person who has a criminal history as the only factor relied upon to support the existence of a “criminal association”.
The list of offences relating to criminal associations treated as “show cause” offences should not be expanded.
8. Our detailed response to the above issues is set out below.

Whether the existing list of firearms offences treated as “show cause” offences under the Act should be expanded

9. Section 16B(1)(d) of the Act already prescribes an expansive list of firearms offences, including:
 - a. All serious indictable offences that involve the use of a firearm under the *Firearms Act 1996* (NSW) (**Firearms Act**) or Parts 3 or 3A of the *Crimes Act 1900* (NSW) (**Crimes Act**);
 - b. All indictable offences that involve the unlawful possession of a pistol or prohibited firearm in a public place; and
 - c. All serious indictable offences under the *Firearms Act* involving acquiring, supplying, manufacturing, giving possession of a pistol or prohibited firearm (or firearm part).

¹ Yeong, S, and Poynton, S, BOCSAR, Crime and Justice Bulletin N° 212, *Did the 2013 Bail Act increase the risk of bail refusal? Evidence from a Quasi-Experiment in New South Wales*, April 2018, p 1.

10. The show cause provisions also extend to allegations of serious indictable offences of attempting, assisting, aiding, abetting, counselling, procuring, soliciting, being an accessory to, encouraging, inciting or conspiring to commit any of the above offences.²
11. While a number of firearms offences are not captured by section 16B, there are good reasons for excluding such offences. One example is the unauthorised possession of a pistol or prohibited firearm pursuant to section 7(1) of the Firearms Act or unauthorised possession of a firearm generally pursuant to section 7A of the Firearms Act (where that possession is not in a public place in accordance with section 16(1)(d)(ii) and where there is no use of the firearm in accordance with section 16(1)(d)(i)). Offences pursuant to sections 7 and 7A capture a broad range of conduct, including conduct of relatively low objective seriousness. These offences capture possession of items such as imitation firearms (which can, in some cases, involve children's toys if not clearly within the exception contained in section 4D(4) of the Firearms Act), air guns, BB guns and gel blasters. Inclusion of this type of offending within the serious "show cause" provisions would not be appropriate nor reflective of the legislative intent of section 16.
12. A significant majority of prosecutions for unauthorised possession or use of a pistol or prohibited firearm are dealt with summarily. Between July 2021 and June 2022 84% of offences under section 7(1) and 99% of offences under section 7A(1) of the Firearms Act were finalised in the Local Court.³
13. Further, the majority of offenders sentenced for an offence of unauthorised possession or use of a pistol or prohibited firearm are sentenced to penalties other than full-time imprisonment. Statistics from the Judicial Commission's Judicial Information Research System show that of 660 recorded cases dealt with in the Local Court in recent years, 75% received sentences other than full-time imprisonment, with the most popular sentencing option being Community Correction Orders (31.2% of offenders) followed by Intensive Correction Orders (15.5%). Similarly, the vast majority of offenders (91.7% of 557 recorded cases) sentenced in the Local Court for an offence of possession or use of a firearm generally, received sentences other than full time imprisonment, with a significant proportion (28.5%) receiving a Conditional Release Order without conviction. It should be noted that each of these offences include possession *or* use of the firearm, and it is likely that penalties imposed for *possession* of a firearm would be lower than offences involving *use* of a firearm, given the lower objective seriousness of the offending. There are limited cases recorded in the District Court for the same offences. In circumstances where the majority of offenders dealt with in the Local Court receive community-based sentences, it would be disproportionate to the gravity of the offending, and not reflective of the likely penalty, for possession offences to be "show cause" offences.

² Section 16B(1)(j), (k)

³ Data sourced from the NSW Bureau of Crime Statistics and Research (16 September 2022)

14. The gravamen of serious firearms offending is already captured in section 16B(1)(d), particularly as it relates to indictable offences involving the possession of a firearm in a public place as captured in section 16B(1)(d)(ii), or the use of a firearm (whether in public or in private) as captured in section 16B(1)(d)(i). Any offences involving the supply of a firearm, being offences under Part 6 of the Firearms Act, or even the giving of possession of firearm (without supplying it) pursuant to section 50B of the Firearms Act, are also properly captured by section 16B.
15. We consider that expansion of the current show cause offences to indictable offences that involve the unlawful possession of a pistol or prohibited firearm in a private place is unnecessary. Show cause already applies to any serious indictable offence under Part 3 or 3A of the Crimes Act, regardless of location.
16. Further, to the extent that removal of the distinction between possession in a public as opposed to a private place in section 16B(1)(d)(i) could be justified in the context of investigation of domestic violence offences, the Association observes that NSW Police already have extensive search, entry and seizure powers in relation to firearms located on private premises under Part 6 of the *Law Enforcement Powers and Responsibilities Act 2002* (NSW) when investigating domestic violence offences. In particular, police are obliged to seize any firearms when investigating a domestic violence offence under section 85 of that Act. These powers and obligations apply independently of bail processes.
17. Further section 93F(2) of the Crimes Act makes clear that person who is in a vehicle or vessel in a public place is taken to be in that place. This provision was enacted in response to the NSW Court of Appeal decision *Hardman v Director of Public Prosecutions* (NSW)⁴ in which a majority of the NSW Court of Appeal held that possession of a loaded firearm in a vehicle on a public road under s93G of the Crimes Act did *not* constitute possession of a loaded firearm in a public place. Further guidance may be found in the definition of “public place” in section 8 of the Crimes Act.
18. The intention of the legislature in enacting the “show cause” requirement in section 16B of the Bail Act was to place an additional hurdle in the granting of bail, where the alleged conduct is sufficiently serious to warrant it. As the Government emphasised when introducing the show cause test in 2014:

In recommending which offences the show cause requirement should apply to, the [Hatzistergos] review considered the potential consequences for the community and criminal justice system if the risk posed by a person charged with that type of offence were to materialise. The show cause categories therefore apply to those offences that involve a significant risk to the community. These categories are set out in new section 16B of the bill and include offences with a maximum penalty of imprisonment for life, offences involving sexual intercourse or the infliction of actual bodily harm with the intent to have sexual intercourse with a child under the age of 16 years by an adult, serious

⁴ [2003] NSWCA 130

*personal violence offences or those involving the infliction of wounding or grievous bodily harm if the accused has a previous conviction for a serious personal violence offence. Serious personal violence offences are those in part 3 of the Crimes Act 1900, carrying a maximum penalty of at least 14 years imprisonment.*⁵ [emphasis added].

19. As evidenced above, prescribing additional firearm offences in section 16B would capture accused charged with less serious offences involving firearms, or offences where the conduct is low in objective seriousness, meaning that the hurdle to a grant of bail would be disproportionate to the seriousness of the alleged offending. This would represent an unnecessary expansion into offences that are not considered serious enough by the legislature, the courts or the community to warrant a legislated presumption against bail.
20. With respect to firearms offences that exist within the parameters of the Crimes Act, there are limited offences that are outside of Parts 3 and 3A that could be expected to involve the use of a firearm. One exception may relate to robbery offences under Part 4 Division 2. However, if the robbery involves the use of a firearm, or the possession of a pistol or prohibited firearms in a public place, the offence would already be captured by section 16B(1)(d).
21. The current provisions more than adequately capture the range of serious offences involving a firearm that warrant an accused being required to show cause why his or her detention is not justified. The seriousness of any firearm offence is still an important consideration when determining whether there are any bail concerns when applying the unacceptable risk test under section 16A of the Bail Act. If section 16B is to be amended to include further firearms offences, the Association considers that only the most serious of alleged offending conduct should be contemplated for inclusion, and particular care must be taken to exclude offences such as those involving mere possession (including possession of an unregistered firearm where the person is otherwise authorised to possess it) and those dealt with summarily (for example, failing to notify police of a change of address for a licensee or permit-holder).
22. Expanding the list of matters to be considered in the assessment of bail concerns under section 18(1)(f) of the Bail Act for the purpose of assessing unacceptable risk may be a preferable and more proportionate approach to concerns raised by other stakeholders on this issue. The Association acknowledges that an accused's history of compliance or non-compliance with a Firearm Prohibition Order (FPO) issued under Part 7 of the Firearms Act may be relevant to assessment of unacceptable risk under section 16B of the Act where there is an allegation of breach of an FPO by the unlawful possession of a pistol or prohibited firearm.
23. However, the Association would strongly oppose any broader formulation of a bail concern relating to FPOs in section 18(1)(f) given:

⁵ Second Reading Speech to the Bail Amendment Bill, 13 August 2014

- a. the criteria for issuing a FPO does not necessarily rely on a person having a firearm history and can be based on untested police intelligence;
- b. the FPO scheme lacks procedural fairness safeguards, including those recommended by the NSW Ombudsman in 2016⁶; and
- c. unlike other matters prescribed under section 18(1)(f), an FPO is neither a court order nor an order of the State Parole Authority, but an administrative order of the NSW Police.

Whether further legislative guidance should be provided on the meaning of “criminal associations” under the Act

24. The Associations considers further legislative guidance on the meaning of “criminal associations” is not required.
25. The term “criminal associations” in section 18(1)(g) of the Act is not defined, however, the meaning of the term is not confusing and is sufficiently broad to capture a range of relationships and activity which might be relevant in the context of considering bail concerns under section 18 of the Act. We also note the primary dictionary definition of “association” as: “the action of combining together for a common purpose; the condition of such combination; confederation, league”.⁷
26. A review of recent published cases does not appear to demonstrate that there is any tension in the interpretation of this term. Nor do courts appear to be struggling with the consideration of this factor under section 18(1)(g). It appears that most cases involve applicants who do not have criminal associations, and this consideration is therefore not relevant in those cases. In some cases, “criminal associations” has been interpreted to include:
- a. Having associations with outlaw motorcycle gangs;⁸
 - b. Contact with persons who have been involved in “criminal activity” characterised as “significant criminal associations overseas and in this country”;⁹
 - c. Contact with (including living with) persons in Queensland who had been arrested for various offences, including one having been charged with such offences when the applicant was residing with him;¹⁰
 - d. Contact with overseas organisers of an alleged importation;¹¹ and

⁶ NSW Ombudsman, Review of police use of the firearms prohibition order search powers: Section 74A of the Firearms Act 1996, August 2016.

⁷ Oxford English Dictionary: “association, n.”. OED Online. September 2022. Oxford University Press. <https://www.oed.com/view/Entry/11981?redirectedFrom=association> (accessed September 30, 2022).

⁸ *R v Chaaf* [2022] NSWDC 116

⁹ *R v Russell* [2018] NSWSC 1496

¹⁰ *R v Unasa* [2017] NSWDC 291

¹¹ *Lin v Director of Public Prosecutions* (Cth) [2017] NSWSC 312

- e. An inference that a person has criminal associations due to the type of offending (the number and type of weapons found on premises where the applicant was charged with possession of firearms).¹²
27. Further legislative guidance on the meaning of “criminal associations” is not necessary. Judicial officers are sufficiently experienced and capable to interpret the term having regard to the facts and circumstances of each case coming before it.
28. If this position of the Association is not accepted, the Association would encourage consideration of a narrow definition. The Association would be very concerned if “criminal associations” were defined so as to capture people who have criminal convictions. This may well disproportionately affect First Nations people and people from lower socio-economic backgrounds who reside in communities where there are a higher proportion of people with a criminal history due to systemic disadvantage and over-policing.
29. The most recent data published by the NSW Bureau of Crime Statistics and Research indicates that remand rates for adult First Nations people increased by 65% between June 2015 and June 2022 compared to a 27.3% increase in the overall adult remand population over the same period.¹³ Defining “criminal associations” by reference to criminal history may have the unintended consequence of further increasing the overrepresentation of First Nations people in the criminal justice system.
30. For this reason, if it were to be defined, the Association would support a clear exception specifying that “criminal associations” does not include associating with a person who has a criminal history as the only factor relied upon to support the existence of a “criminal association”.
31. Such an exception would also ensure young people who may reside with parents who have criminal records or associate with other young persons (including in schools and programs) who have a criminal history were not unfairly disadvantaged. For example, it would minimise the risk of displacement of young people from their homes, families and communities, and minimise the disproportionate impact of on young peoples in out-of-home care where other residents are likely to have a criminal history.

Whether the list of offences relating to criminal associations that are treated as “show cause offences” under the Act should be expanded

32. The Association does not support any expansion of the list of offences relating to criminal associations that are treated as “show cause offences”. There are already numerous offences captured

¹² *R v Abdulrahman* [2015] NSWSC 2094

¹³ See NSW Bureau of Crime Statistics and Research (June 2022)

by section 16B that would capture offences relating to criminal associations, such as serious terrorism offences.

33. The Association does not support the inclusion of some of the example offences nominated in the Law Reform Commission's Background Note, for the following reasons:

- a. Many of the suggested offences are offences which do not carry high maximum penalties.
- b. Offences involving criminal associations will, by their nature, result in there being a greater chance of the accused being found to be an unacceptable risk of interfering with witnesses or evidence, which lowers the likelihood of a grant of bail.
- c. Offences of participating in a criminal group (section 93T, *Crimes Act 1900 (NSW)*) and directing activities of a criminal organisation (section 390.6, *Criminal Code Act 1995 (Cth)*) are frequently over-charged where a person has played even a minor role in a larger group of offenders, where the complexity of the group and the person's role is not appreciated at the time of charging (for example, a minor offender in a drug syndicate that is largely coordinated by other offenders). Judicial Commission statistics for section 93T offences demonstrate that a number of offenders are ultimately dealt with by way of alternatives to full-time imprisonment.¹⁴ Where the accused is alleged to have engaged in serious offending, the accused is often charged with other offences which already attract the show cause requirement (for example, the supply of a commercial quantity of drug).
- d. The offence of habitually consorting with convicted offenders (section 93X, *Crimes Act*) was amended in 2012 to combat serious and organised crime. However, the offence has applied in practice to a far broader range of offending. A review of the provision by the NSW Ombudsman in 2016 found that consorting laws were disproportionately used in relation to disadvantaged and vulnerable people, including Aboriginal people, people experiencing homelessness, and children and young people.¹⁵ Despite some safeguards being introduced to the provisions in 2019, the Law Enforcement Conduct Commission's recent interim Review of the provisions found that a total of 2361 people were subject to the consorting laws, with 40% of those being Aboriginal or Torres Strait Islander people.¹⁶ Considering the Aboriginal and Torres Strait population of New South Wales is approximately 3.4%, this demonstrates the law's hugely disproportionate impact upon the Aboriginal and Torres Strait Islander population of New South Wales. Expanding show

¹⁴ Of 110 recorded cases dealt with in the Local Court in recent years, 78.2 % received sentences other than full-time imprisonment, with the most popular sentencing option being Community Correction Orders (43.6 of offenders) followed by Intensive Correction Orders (30.9).

¹⁵ NSW Ombudsman *The Consorting Law: Report on the operation of Part 3A, Division 7 of the Crimes Act 1900* (April 2016)

¹⁶ Law Enforcement Conduct Commission *Discussion Paper: Review of the operation of the amendments to the consorting law under Part 3A Division 7 of the Crimes Act 1900* (October 2021)

cause to include section 93X, Crimes Act would have a flow on disproportionate impact on remand rates of First Nations people.

34. Any expansion of section 16B will add unnecessary complexity to the Act, which in turn adds to the costs to the parties and the State in having to deal with more release applications (in circumstances where police bail cannot be granted) and lengthier bail applications (including the likelihood of more Supreme Court release applications).

35. It will also increase short-term remand rates and therefore increase the dislocating effects of imprisonment in these circumstances to individuals and their families. Remand decisions give rise to potentially 'severe social, economic, legal and emotional consequences' for detained persons (and people they care for), not least of all increasing their likelihood of receiving a custodial sentence as compared to people who are on bail at the time of sentencing. In its comprehensive review of the NSW bail regime in 2012, the NSW Law Reform Commission noted:

"It has been said that high rates of imprisonment break down the social and family bonds that guide individuals away from crime, remove adults who would otherwise nurture children, deprive communities of income, reduce future income potential, and engender a deep resentment toward the legal system. As a result, as communities become less capable of maintaining social order through family or social groups, crime rates go up."¹⁷

36. A decision to refuse bail may also prevent that individual from engaging in treatment and rehabilitative programmes prior to trial or sentencing.

37. The Association considers that expanding the list of matters to be considered in the assessment of bail concerns under section 18(1)(f) of the Act to include whether the accused person has a history of compliance or non-compliance with a Serious Crime Prevention Order may be a preferable and more proportionate approach to any identified deficiencies in the current provisions of the Bail Act in relation to "criminal associations". We would oppose any broader expansion of section 18(1)(f) however given the existing offences captured by section 16B that would capture offences relating to criminal associations and the broad range of factors a bail authority is already directed to consider under section 18(1) of the Act.

Conclusion

38. A reform that risks the significant adverse consequences including those referred to in this submission should be approached with caution and on the basis of evidence which explains the need for how non-inclusion of particular firearm offences is systemically endangering the community. No such evidence has been presented. Further restricting bail laws is neither necessary nor justified.

¹⁷ NSWLRC, Bail, Report No 133, 2012 at [5.16].

39. Thank you for the opportunity to respond to the Commission on these issues. If you have any enquiries, please contact [REDACTED]

Yours sincerely,

[REDACTED]

Gabrielle Bashir SC
President