NSWCCL SUBMISSION

to the NSW Law Reform Commission review of discrete parts of the Bail Act 2013 (NSW)

23 September 2022

Acknowledgment

In the spirit of reconciliation, the NSW Council for Civil Liberties acknowledges the Traditional Custodians of Country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all First Nations peoples across Australia. We recognise that sovereignty was never ceded.

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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The New South Wales Council for Civil Liberties (NSWCCL) welcomes the opportunity to be involved in the review of discrete parts of the *Bail Act 2013* (NSW) (Bail Act) conducted by the NSW Law Reform Commission.

The terms of reference (TOR) for this review are as follows:

1. Whether the existing list of firearms offences treated as 'show cause' offences under the Bail Act 2013 (NSW) should be expanded.
2. Whether further legislative guidance should be provided on the meaning of 'criminal associations' under the Bail Act 2013 (NSW).
3. 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.

Put briefly, we submit that changes are not warranted in respect of each of the TORs. If changes were to be made pursuant to (2) we suggest some modest changes to clarify the extent to which criminal associations can be proved and used in proceedings.

Background

The *Bail Act* identifies certain offences for which persons who are charged must 'show cause' as to why their detention is not justified, in order to be released to bail.[1]

If cause is shown, the decision maker must then consider whether the person poses an unacceptable risk, if not detained.[2] The unacceptable risk test concerns whether there is an:

> *unacceptable risk that the accused person, if released from custody, will—*
>
> *(a) fail to appear at any proceedings for the offence, or*
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> *(b) commit a serious offence, or*
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> *(c) endanger the safety of victims, individuals or the community, or*
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> *(d) interfere with witnesses or evidence.*[3]

Section 18 enumerates a list of matters that the decision maker must consider in the context of determining whether a person poses and unacceptable risk for the purposes of the *Bail Act*. These considerations relevantly include, the seriousness of the offence,[4] whether the person has a history of violence,[5] whether the person has criminal associations,[6] whether the person has associations with individuals or groups connected with terrorism or violent extremism.[7]

If the offence is not one which requires a person to show cause, then the bail application proceeds to consideration of the unacceptable risk test. The unacceptable risk test is a robust safeguard determined by the bail authority irrespective of whether there is a show cause offence or not.

The *Bail Act 2013* was introduced after a lengthy consultation by the NSW Law Reform Commission and achieved widespread support in parliament. The show cause test and substantial revisions to the *Bail Act* occurred following the Hatzistergos Review and were introduced through the *Bail Amendment Act 2014*. NSWCCL opposed this kneejerk reaction to high profile crime reporting and fearmongering at the time.

[1] *Bail Act 2013* (NSW) s 16A(1).
[2] Ibid Div 2.
[3] Ibid s 19(2).
[4] Ibid s 18(1)(b).
[5] Ibid s 18(1)(d).
[6] Ibid s 18(1)(g).
[7] Ibid s 18(1)(s).

We strongly opposed the introduction of the show cause test as one which is effectively akin to a presumption against bail.[8]

Submissions on TORs 1 and 3

General comments

NSWCCL submits that the answer to each of the questions posed in terms of reference 1 and 2 be "no". The reform of the kind contemplated in the terms of reference is:

1) Not justified by sufficient evidence;
2) Will lead to lengthier and more complex bail proceedings;
3) And is likely to result in higher numbers of people being remanded in custody; and
4) Disproportionate to the nature of the risk posed by firearms offences and criminal associations which are subject to the unacceptable risk test, which is an appropriate safeguard.

In the second reading speech introducing the *Bail Act* reforms in 2014 which led to the creation of the show cause test, the Attorney General said:

> ***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 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. [emphasis added].*[9]

Following the introduction of the show cause test the number of people incarcerated due to being remanded in custody significantly increased.[10] BOCSAR has found that the reforms have caused an 11% increase in the probability of a defendant being bail refused.[11] This was certainly the implicit, if not explicit, goal of implementing such reforms. On the basis of this evidence of previous bail reform, we suggest that a further tightening of bail settings (as contemplated by TORs 1 and 3) will further increase the high numbers of individuals who are remanded in custody. It is well known the even one night in custody increases risk of recidivism into the future,[12] and detention in custody should only be a measure of last resort, particularly when charges are not proven.

Section 16B(1) of the *Bail Act* enumerates offences which already attract the show cause test under the *Bail Act*. It relevantly includes any serious indictable offence which:

> *(d) any of the following offences—*
>
> *(i) a serious indictable offence under Part 3 or 3A of the Crimes Act 1900 or under the Firearms Act 1996 that involves the use of a firearm,*
>
> *(ii) an indictable offence that involves the unlawful possession of a pistol or prohibited firearm in a public place,*

[8] Lesley Lynch, 'NSW Council for Civil Liberties comments on Bail Amendment Bill 2014' (2014) NSWCCL_comments_Bail_Bill_2014_fnl.pdf (d3n8a8pro7vhmx.cloudfront.net).

[9] Second Reading Speech by Attorney General Brad Hazzard on the Bail Amendment Bill 2014, 13 August 2014 2R Bail Amendment.pdf (nsw.gov.au).

[10] Steve Yeong and Suzanne Poynton, 'Did the 2013 Bail Act increase the risk of bail refusal? Evidence from a Quasi-Experiment in New South Wales' (2018) 212 *Bureau of Crime Statistics Crime and Justice Bulletin* Did the 2013 Bail Act increase the risk of bail refusal? (nsw.gov.au) 5.

[11] Ibid 1.

[12] Jason Payne, 'Recidivism in Australia: findings and future research' (2007) *Research and public policy series no. 80* (Australian Institute of Criminology, Canberra) https://www.aic.gov.au/publications/rpp/rpp80 54ff.

(iii) a serious indictable offence under the Firearms Act 1996 that involves acquiring, supplying, manufacturing or giving possession of a pistol or prohibited firearm or a firearm part that relates solely to a prohibited firearm,

(e) any of the following offences—

(i) a serious indictable offence under Part 3 or 3A of the Crimes Act 1900 or under the Weapons Prohibition Act 1998 that involves the use of a military-style weapon,

(ii) an indictable offence that involves the unlawful possession of a military-style weapon,

(iii) a serious indictable offence under the Weapons Prohibition Act 1998 that involves buying, selling or manufacturing a military-style weapon or selling, on 3 or more separate occasions, any prohibited weapon,

…

(k) a serious indictable offence (however described) of assisting, aiding, abetting, counselling, procuring, soliciting, being an accessory to, encouraging, inciting or conspiring to commit an offence mentioned elsewhere in this section,

Some examples of firearms offences that do not presently require the show cause test to be satisfied are:

- Unauthorised possession of an unregistered pistol or prohibited firearm in a public place (*Crimes Act 1900* (NSW) s 93I(2)-(3)).
- Giving of possession of a pistol or prohibited firearm (as opposed to other firearms) or part to an unauthorised person (*Firearms Act 1996* (NSW) s 50B).
- Possessing or using a military-style weapon (*Weapons Prohibition Act 1998* (NSW) s 7).
- Selling a military-style weapon without the buyer holding a permit and the seller either seeing that permit or knowing that the buyer is authorised (*Weapons Prohibition Act 1998* (NSW) s 23A(2)).

Section 4 of the *Firearms Act* and schedule 1 of the *Weapons Prohibition Act* respectively define firearms and prohibited weapons in very broad terms. For example, in the case of the *Firearms Act* it can extend to weapons which are inoperable.

It is unclear to NSWCCL what evidence would be relied upon to justify the types of reforms set out by TORs 1 and 3. We are unaware of any evidence which demonstrates that the significant reforms undertaken in 2014 following comprehensive reviews of the *Bail Act* are not working with respect to firearms offences and people who have criminal associations.

Our view in this regard is fortified by judicial criticism of the drafting of the show cause provisions which generally lack clarity. In *R v Tsallas,* Harrison J observed:

> *It is regrettable that the Parliament did not see its way clear to offering some guidance as to the matters that should be taken into account in assessing the show cause requirement, or better still to circumscribing a test such as a special or exceptional circumstances test, or an inclusive test specifying factors that an applicant would have to satisfy or demonstrate applied in his or her case, in order to show cause as required.*[13]

If the show cause provisions are to be reformed at all, consideration could be given to providing greater legislative guidance as to the way in which the test should operate.

<u>Comments specific to firearms offences</u>

As the above account demonstrates, serious firearm offences are already subject to the show cause test. To broaden the scope of offences which are subject to the show cause requirement would encompass offences involving unauthorised possession.

[13] [2017] NSWSC 64 at [21].

NSWCCL does not support the right to own and use firearms and supports the sensible and proportionate regime for gun control in this state and Australia more generally. However, to subject all firearms offences, including those of mere possession to the show cause requirements under the *Bail Act*, would be disproportionate and cannot be substantiated on the available evidence.

Undoubtedly, gun crime does attract significant public outrage and media attention. But its incidence remains low. Kneejerk reactions to any crime fuelled by popular and media fear mongering are dangerous and should be avoided. Significant changes to laws which impact the deprivation of liberty must be carefully considered and evidence based.

96% of offences categorised as "prohibited/regulated weapons and explosives offences" by BOCSAR are dealt with in the Local Court.[14] Only 12.1% of those offences are dealt with by way of custodial sentence, the remainder are dealt with in the community.[15] The jurisdiction in which these matters are dealt with and the way in which proved offences are punished are reflective of the seriousness of these offences for the community. If these matters are almost always dealt with in the Local Court, and mostly attract penalties other than incarceration, the gravity of the offending in these cases cannot be serious. We submit that these statistics tend against further expanding the degree to which firearms offences attract the show case test.

Finally, if there is any doubt as to whether serious offences should be dealt with under the *Bail Act*, s. 18(1)(b) already requires the seriousness of the offence to be considered when the bail authority weighs whether a person meets the unacceptable risk test. We submit that this safeguard already protects against any risk of significant harm that is posed by a person who is alleged to have committed a firearms offence to which the show cause test applies from being released to bail.

Comments specific to criminal associations

Section 16B(1)(k) already covers serious indictable offences which include accessorial liability and conspiracy to commit a serious indictable offence mentioned elsewhere in s16B. We submit that this should already capture the most serious offending with is connected with criminal associations and should not be expanded further.[16]

Moreover, s18(1)(g) already requires that a person's criminal associations be considered in relation to the determination of the unacceptable risk test. and must be considered by police or the court. There is no evidence to suggest that the unacceptable risk test is not working appropriately for the offences under contemplation. As at 20 September 2022, there are seven reported decisions where reliance has been placed on this provision in relation to the unacceptable risk test.[17] This is a not insignificant number of decisions given that most bail determinations are made by bail authorities which are not courts that report their decision, or in the Supreme and District Court with *ex tempore* decisions only.

Reform in the nature contemplated by TOR 3, extends beyond the recommendations made re criminal associations in the Hatzistergos Review of the *Bail Act*. The review simply recommended the implementation of consideration of criminal associations on any determination as to unacceptable risk, which was implemented in 2014.[18]

Submissions on TOR 2

We submit that further legislative guidance as to the proper construction of 'criminal associations' in s. 18(1)(g) of the *Bail Act* is not required. But if any further legislative guidance is given, it should be confined

[14] Using this tool provided by BOCSAR: Sentencing Tool (nsw.gov.au). As at 20 September 2023.

[15] Using this tool provided by BOCSAR: Sentencing Tool (nsw.gov.au). As at 20 September 2023.

[16] See, e.g. *Director of Public Prosecutions (Cth) v Heng* [2015] NSWCCA 333 and *Fantakis v R; Woods v R* [2017] NSWSC 1840 for examples of this provision applying.

[17] *R v Mawad* [2015] NSWSC 1237; *Director of Public Prosecutions (NSW) v GX* [2019] NSWCCA 84; *McGlone v Director of Public Prosecutions (Cth)* [2019] NSWCCA 99; *Mariam v Director of Public Prosecutions (NSW)* [2015] NSWCCA 216; *R v Ebrahimi* [2015] NSWSC 335; *R v Unasa* [2017] NSWDC 291; *Lin v Director of Public Prosecutions (Cth)* [2017] NSWSC 312.

[18] John Hatzistergos, 'Review of the Bail Act 2013' (2014) Review of the Bail Act 2013 (nsw.gov.au) 43.

to only clarifying that criminal association cannot rely on the fact of a criminal history alone and that criminal association cannot be the sole justification for a person not being able to meet the unacceptable risk test.

As with our submissions to TORs 1 and 3, we are concerned that there is an insufficient evidence base to justify the making of any more proscriptive amendments to the way in which 'criminal associations' are construed for the purposes of the *Bail Act*.

It is important for judges and magistrates to retain discretion in the construction of 'criminal associations' and we submit that it is an appropriate phrase to be left to them to consider in the context of the facts of the case that comes before them. Judges are well versed in considering whether criminal associations exist, the deepness of the association, and the extent to which they pose a risk.[19] This question is best left to fall to the courts in a broad way which they can then construe as required using their skill and experience in other areas.

Consideration could be given to clarifying that criminal association cannot rely on the fact of a criminal history alone but must require some additional evidence of association. We submit that reliance on criminal record alone is very likely to have a to disproportionate impact on First Nations people,[20] young people, homeless people, sex workers and groups with criminal histories replete with discrimination and charges for status offences.

The consorting laws contained within Part 3A, Division 7 are a helpful example to illustrate this point. In Professor McMillan stated:

> *To identify consorting, police generally must observe people associating with each other in public areas. The potential for consorting to disproportionately impact on people and groups who occupy public space is therefore significant. A number of organisations expressed concern to us about this issue. For example, Legal Aid NSW observed:*
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> > *Consorting provisions rely on public space surveillance for their application. As a consequence, public space communities will be more frequently targeted by police under these provisions than other parts of our community.*
>
> *Young people and people experiencing homelessness tend to spend time in public spaces and may be readily identified by police as consorting targets. Additionally, people experiencing homelessness rely on community networks for support. Concern was expressed to us about the capacity of the consorting law to dismantle these networks and further marginalise people in these groups.*
>
> *Many of the submissions we received noted that offenders rely on social connections to successfully reintegrate into the community. The consorting law may prevent the formation or continuation of rehabilitative and protective relationships, which in turn may work to further marginalise offenders and inhibit rehabilitation* [references omitted].[21]

Consideration could also be given to clarifying that criminal association alone does not form a proper basis to prove that a person is an unacceptable risk for the purposes of the *Bail Act*. In our submission, if a criminal association rises so high as to pose an unacceptable risk it is probably already criminalised elsewhere, through consorting offences, terror offences, or otherwise inchoate modes of other serious offences.

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[19] It is a common question to be answered under the *Crimes (High Risk Offenders) Act 2006* (NSW) and *Terrorism (High Risk Offenders) Act 2017* (NSW). *State of New South Wales v Elmir (Final)* [2019] NSWSC 1867 is an example of a case concerning complex evidence around criminal associations.

[20] See for more on over-incarceration of First Nations' people: Aboriginal over-representation (nsw.gov.au).

[21] John McMillan 'The consorting law Report on the operation of Part 3A, Division 7 of the Crimes Act 1900' (2016) NSW Ombudsman's Office The-consorting-law-report-on-the-operation-of-Part-3A,-Division-7-of-the-Crimes-Act-1900-April-2016.pdf (nsw.gov.au) 24-25.

Such amendments, if any amendments were proposed at all, would appear to assist the court by ensuring that prosecutors bring appropriate and relevant material on criminal associations before a court when it called upon to make a determination under the *Bail Act*. In *R v Ebrahimi* [2015] NSWSC 335, Beech-Jones J (as his Honour then was) said:

> *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. Beyond stating that, I cannot take this matter any further. It does not play any significant part in my overall decision.*[22]

In explaining the facts that give rise to this comment his Honour said:

> *The Crown facts refer to certain matters which it contends points to a connection between the applicant and the "Hell's Angels Motorcycle Gang". In particular, there are, according to the Crown, various encrypted Blackberry messages which indicate that the applicant was aware that the authorities were looking for members of that gang and was concerned he might be one of the persons being sought.*[23]

Conclusions

The reforms contemplated by TORs 1 to 3 of this review are not evidence based. In light of risks and unintended consequences and disproportionality of their effect the changes should not be made.

This submission was prepared by Josh Pallas on behalf of the New South Wales Council for Civil Liberties. We hope it is of assistance to the NSW Law Reform Commission and would be pleased to assist further, if it would be useful.

Yours sincerely,

[redacted]

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[22] *R v Ebrahimi* [2015] NSWSC 335 [43].
[23] Ibid [42].