

# NSWPF Submission to Law Reform Commission

## Review of *Bail Act 2013 (NSW)*

### Executive Summary

This submission is limited to the terms of reference which the Attorney General provided to the Law Reform Commission (LRC) on 16 August 2022 in relation to the Bail Act 2013 (NSW) (hereafter referred to as “the Act”) and two additional questions which the LRC subsequently requested the NSWPF address on 14 September 2022.

In brief, the NSWPF advocates that:

1. The list of firearms offences subject to the ‘show cause’ requirement under the Act should be expanded, by removing the words ‘in a public place’ from s 16B(1)(d)(ii), and
2. The meaning of ‘criminal associations’ should be expressly defined under the Act, and
3. Serious indictable offences (punishable by imprisonment for 5 years or more) relating to ‘criminal associations’ should be expressly treated as ‘show cause’ offences under the Act, and
4. Firearm Prevention Orders (FPOs)<sup>1</sup> and Serious Crime Prevention Orders (SCPOs)<sup>2</sup> should both be added to s 18(1)(f) of the Act (unacceptable risk test).

### Firearms Offences Subject to Show Cause Requirement

#### The show cause test

The Act does not specify what will satisfy the “show cause” test. Moreover, consideration of what might have satisfied the show cause test in other cases does not assist future bail determinations. This is because bail decisions are usually not of any precedential value as they are no more than the view of a single judge in the circumstances of a particular case.<sup>3</sup>

Some guidance is provided by the Second Reading speech to the Act which introduced the “show cause” test:

*The potential risk to the community posed by an accused offender is placed front and centre when bail decisions are made. The key feature of the bill is the increased stringency it applies to bail decisions for those charged with offences that pose significant risks to the community or the administration of justice.*

*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.*

Basic principles that apply to a determination of whether an applicant has shown cause that their detention is not justified have since been outlined in *Moukhallaletti v DPP (NSW)*.<sup>4</sup> One of the basic principles is that there will often be a substantial overlap between the factors that may go to whether cause has been shown and the factors that inform whether an unacceptable risk exists. Despite this,

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<sup>1</sup> Made pursuant to Part 7 of the *Firearms Act 1996 (NSW)*.

<sup>2</sup> Made pursuant to Part 2 of the *Crimes (Serious Crime Prevention Orders) Act 2016 (NSW)*.

<sup>3</sup> *DPP v Zaiter* [2016] NSWCCA 247 at [30]-[33].

<sup>4</sup> [2016] NSWCCA 314 at [50]-[56].

it is well established that the unacceptable risk test does not define or confine the extent of the show cause requirement.<sup>5</sup>

### Firearms offences and the show cause test

The firearms offences already subject to the show cause requirement under the Act are prescribed in s 16B(1)(d)-(e). The offences include:

1. 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,
2. an indictable offence that involves the unlawful possession of a pistol or prohibited firearm **in a public place**,
3. 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,
4. 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,
5. an indictable offence that involves the unlawful possession of a military-style weapon,
6. 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.

The fact that some firearms offences are already subject to the "show cause" requirement demonstrates Parliament is aware that there are inherent risks associated with firearms in the context of bail determinations. The NSWPF submits that the inherent risks relevant to a bail determination that are commonly associated with all firearms offences include a greater likelihood an accused may:

1. fail to appear at proceedings for the offence,
2. commit further offences whilst on bail,
3. endanger the safety of the community, and
4. interfere with evidence.

In light of these risks, it is the view of the NSWPF that the show cause requirement should be expanded to apply to all offences involving the unlawful possession of a pistol or prohibited firearm, regardless of where they are located, including on private premises. Primarily, this is because the NSWPF position is of the view that the danger posed by firearms is unacceptably high regardless of where they are located and the inclusion of the words "in a public place" is an anomaly.

Parliament has previously recognised and rectified the same anomaly in reaction to the decision of the Court of Criminal Appeal in *Hardman v Minehan & NSW DPP*.<sup>6</sup> That decision dealt with a professional shooter who had a loaded rifle on the dashboard of his truck as he drove along the highway. The defendant was prosecuted for an offence of, "possession of a loaded firearm in a public place", pursuant s 93G of the *Crimes Act 1900*. The Court of Criminal Appeal held that the inside of the truck was not a "public place" for the purposes of s 93G, even though the truck itself was on a public road and the defendant was acquitted. The situation was remedied by Parliament on 15 December 2003 when amendments were made to s 93F of the *Crimes Act* to, amongst other things, insert s 93F(2) which reads, "For the purpose of this Division, a person who is in a vehicle or vessel in a public place is taken to be in that place".

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<sup>5</sup> *DPP (NSW) v Tikomaimaleya* [2015] NSWCA 83.

<sup>6</sup> 57 NSWLR 390

The proposed amendment for the removal of the words “in a public place” from s 16B(1)(d)(ii) of the Bail Act would promote coherence with Part 3A of the *Crimes Act 1900* by avoiding the need for factual determinations to be resolved by a bail authority in circumstances where it is disputed that the possession of a pistol or prohibited firearm occurred in a public place. The amendment would also be consistent with the preamble of the Act, as it would further ensure the safety of victims of crime, individuals and the community. Moreover, the amendment would bring the treatment of pistols and prohibited firearms into line with military-style weapons under s 16B(1)(e)(ii), promoting consistency throughout the Act in relation to firearms in the context of bail determinations.

In addition to the above, there are some bail risks that are particular to the possession of pistols and prohibited firearms in non-public places which justify the imposition of the show cause requirement. These particular risks include:

1. the ability for individuals to conceal and destroy pistols or prohibited firearms from law enforcement more easily in a non-public setting, and
2. the potential for pistols or prohibited firearms to be used against others in a non-public setting, including those that are prone to domestic violence offences, and
3. the ability for others in the non-public setting to access and use the pistol or prohibited firearm.

It follows that whenever a risk materialises in the context of possessing a pistol or prohibited firearm in a non-public place the results can be catastrophic, which justifies the expansion of the show cause requirement.

## Defining Criminal Associations

When assessing bail concerns, the Act currently states that a bail authority must consider as part of the unacceptable risk test, “whether the accused person has any criminal associations”.<sup>7</sup> However, “criminal associations” is not defined. The NSWPF is of the view that it would be advantageous for the term “criminal associations” to have a statutory definition for the purposes of the Act. In this context, a statutory definition is appropriate because it would help to ensure that the Act is applied predictably and efficiently, particularly in busy Local Courts. With that said, the ways in which a person may be criminally associated are many and varied, and accordingly, it is undesirable to be overly prescriptive in the definition of ‘criminal association’ for the purpose of the Act.

In a joint judgement delivered by Hulme J on behalf of the NSW Criminal Court of Appeal in the decision of *Mariam v Director of Public Prosecutions (NSW)*, his honour stated as follows:

*Counsel for the applicant submitted that his offending in recent years has been minimal and there is no appreciable risk of him committing an offence, let alone a serious offence. The Crown contended that the applicant's preparedness to have a loaded pistol in his possession in the light of his history of involvement in matters of violence supports a submission that there is an unacceptable risk of him committing a serious offence.*

*In my view, that is a real concern but so also are the circumstances in which the applicant is alleged to have possessed the pistol. The various items found by police indicate that the unit was a haven for drug dealing activity of sufficient gravity that urgent attempts were made by the applicant, the only known occupant, to destroy the evidence before an imminent raid by the police.*

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<sup>7</sup> *Bail Act 2013 (NSW)*, s 18(1)(g).

*The apparent association by the applicant with persons considered by police to be involved in organised criminal activity enhances this particular concern.*

In light of *Mariam v Director of Public Prosecutions*, the NSWPF is of the view that the following definition of “criminal associations” would be appropriate:

***Criminal association*** means an apparent connection between the applicant and another person or persons who are likely to be involved in organised criminal activity.

If left undefined, there will also continue to be a risk that the Act may capture relationships other than those that are genuine “criminal associations”.

## **Criminal Associations and the Show Cause Test**

The Second Reading speech to the Act notes that an accused person's links to organised criminal networks can increase their level of risk. Consequently, s 18(1)(g) of the Act currently provides that when applying the unacceptable risk test, bail authorities must consider, "whether the accused person has any criminal associations".

The NSWPF agrees that there are inherent risks which will be of relevance to a bail determination that are caused by an individual having criminal associations. Those risks are similar to those listed above in relation to firearms offences on page 2, and are often exacerbated by access to unexplained wealth and proceeds of crime which is derived from links to organised crime.

Despite these risks, the Act does not provide that the show cause requirement applies to all of the offences which give rise to the existence of criminal associations. Rather, some offences that often relate to criminal associations have been captured inadvertently by virtue of other criteria set out under s 16B. In part, this omission is likely to be caused by the fact that “criminal associations” is currently left undefined for the purposes of the Act.

The NSWPF is of the view that given the significantly greater risks that an individual is likely to present whilst on bail if they have criminal associations, the show cause test ought to apply to serious indictable offences (punishable by imprisonment for 5 years or more) that are indicative of such connections, for example, charges relating to kidnappings relating to organised crime.

With respect to kidnapping, the NSWPF is aware of operational examples whereby violent kidnapping offences have been committed in company and bail was subsequently granted.

## **Firearm Prevention Orders and Serious Crime Prevention Orders**

Section 18(1)(f) of the Act currently provides that a bail authority must consider whether an applicant has a history of compliance or non-compliance with any of the following:

1. bail acknowledgments
2. bail conditions
3. apprehended violence orders
4. parole orders
5. home detention orders, good behaviour bonds or community service orders
6. intensive correction orders
7. community correction orders
8. conditional release orders
9. non-association and place restriction orders
10. supervision orders.

The Second Reading speech provides the following rationale for this provision:

*The existing factor related to previous compliance with conditional liberty will be amended to require the court to consider the accused's history of compliance or non-compliance rather than a pattern of non-compliance. This will ensure bail authorities can consider serious non-compliance which may not constitute a pattern.*

Section 73 of the *Firearms Act 1996* (NSW) states as follows:

1. *The Commissioner may make a firearms prohibition order against a person if, in the opinion of the Commissioner, the person is not fit, in the public interest, to have possession of a firearm.*
2. *A firearms prohibition order takes effect when a police officer serves a copy of the order personally on the person against whom it is made.*
3. *The Commissioner may revoke a firearms prohibition order at any time for any or no stated reason.*

Section 5(1) of the *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW) states as follows:

1. *An appropriate court may, on the application of an eligible applicant, make an order (a serious crime prevention order) against a specified person if:*
  - a) *in the case of a natural person—the person is 18 years old or older, and*
  - b) *the court is satisfied that:*
    - i. *the person has been convicted of a serious criminal offence, or*
    - ii. *the person has been involved in serious crime related activity for which the person has not been convicted of a serious criminal offence (including by reason of being acquitted of, or not being charged with, such an offence), and*
  - c) *the court is satisfied that there are reasonable grounds to believe that the making of the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime related activities.*

In light of the discussion above in relation to the inherent risks that are associated with firearms offences and criminal associations, the NSWPF is of the view that a bail authority should also be required to consider whether an applicant has a history of compliance or non-compliance with Firearm Prohibition Orders (FPOs) and Serious Crime Prevention Orders (SCPOs) pursuant to s 18(f) of the Act.