

Bail: Firearms and Criminal Associations

150

New South Wales
Law Reform Commission

REPORT

October 2022

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20 October 2022

Hon M Speakman SC MP
Attorney General
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SYDNEY NSW 2001

Dear Attorney

Bail: Firearms and Criminal Associations

We make this report – Report 150: *Bail: Firearms and Criminal Associations* – pursuant to the reference to this Commission received on 16 August 2022.

Yours sincerely



The Hon Tom Bathurst AC KC

Chairperson

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Terms of reference

Pursuant to section 10 of the *Law Reform Commission Act 1967*, the NSW Law Reform Commission is asked to review and report on the following discrete aspects of the *Bail Act 2013* (NSW):

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.

[Received 16 August 2022]

1. Introduction

In Brief

This report recommends that no changes should be made to the *Bail Act 2013* (NSW) in relation to the issues raised by the terms of reference. This chapter describes the scope of the review and our review process. It also includes an overview of our key reasons and outlines the content of the report.

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- 1.1 The NSW Law Reform Commission (the Commission) is an independent statutory body that provides independent, expert law reform advice to the government on matters referred by the Attorney General.
- 1.2 The Attorney General has asked the Commission to review and report on three discrete aspects of the *Bail Act 2013* (NSW) (*Bail Act*), that is whether:
- the list of firearms offences treated as show cause offences should be expanded
 - further legislative guidance should be provided on the meaning of “criminal associations”, and
 - the list of offences relating to criminal associations treated as show cause offences should be expanded.¹
- 1.3 We have concluded that no changes should be made in relation to the issues raised by the terms of reference. We are not persuaded the contemplated changes are necessary or supported by evidence. We are also concerned that they pose a significant risk of unintended, and undesirable, consequences for vulnerable groups and the wider criminal justice system.

Background to the review

- 1.4 This reference emerged out of certain recommendations made by the Bail Act Monitoring Group (BAMG). The Attorney General asked the BAMG to review eight bail

1. The terms of reference are set out in full at viii.

matters and consider if any legislative, operational or procedural reforms may be necessary or appropriate.²

- 1.5 The BAMG reported to the Attorney General on 28 July 2022. It recommended the Attorney General should seek an independent review if minded to consider expanding the list of firearms offences or offences relating to criminal associations treated as show cause offences.³
- 1.6 The BAMG also recommended the Attorney General ask the Department of Communities and Justice to conduct research and consult with stakeholders to determine if further legislative guidance should be provided on the meaning of “criminal associations” under the *Bail Act*.⁴
- 1.7 The Attorney General referred these matters to us on 16 August 2022. Announcing the review, the Attorney General released the executive summary and recommendations of the BAMG report.⁵
- 1.8 However, the full report has not been released and remains confidential. This has meant that some key stakeholders, who were neither members of the BAMG nor recipients of the full report, have been unable to comment on it. We have considered the cases referred to the BAMG, but for reasons of confidentiality do not discuss their detail in our report.

How we conducted this review

- 1.9 The Attorney General expressed the government’s desire to receive our report in time for any legislative response to be enacted in 2022.⁶
- 1.10 Notwithstanding this timeframe, the Commission has thoroughly consulted leading legal stakeholders including senior judicial officers, defence lawyers, prosecutors, police and legal organisations. We also received 15 written submissions.

2. Bail Act Monitoring Group, *Reference to the Bail Act Monitoring Group*, Final Report (2022) 4. All references to the BAMG report are to the extracts released publicly by the Attorney General: M Speakman, “Bail Act Monitoring Group Reports” (Media Statement, 16 August 2022) attachment.

3. Bail Act Monitoring Group, *Reference to the Bail Act Monitoring Group*, Final Report (2022) rec 4, rec 6. The BAMG recommended the Attorney General refer these issues to the Sentencing Council, consistent with the original recommendation of the Hatzistergos review: J Hatzistergos, *Review of the Bail Act 2013*, Report (NSW Department of Justice, 2014) [247]. However, the Attorney General instead referred these matters to the NSW Law Reform Commission.

4. Bail Act Monitoring Group, *Reference to the Bail Act Monitoring Group*, Final Report (2022) rec 5.

5. M Speakman, “Bail Act Monitoring Group Reports” (Media Statement, 16 August 2022).

6. M Speakman, “Bail Act Monitoring Group Reports” (Media Statement, 16 August 2022).

- 1.11 Lists of the consultations conducted, and the submissions received, are available at appendices B and C to this report.
- 1.12 We thank everyone who took the time to meet with us and / or to provide a written submission, particularly given the short response time afforded to them. We also thank the Bureau of Crime Statistics and Research for its expert assistance in compiling statistics for this report.

Overview of key reasons

- 1.13 In its report, the BAMG observed that:

Bail laws exist to keep victims and the community safe until criminal proceedings are finalised, while safeguarding the presumption of innocence and general right to be at liberty until a matter is determined by the courts. Keeping that balance right requires ongoing scrutiny of the operation of the law over time, rather than *ad hoc* law reform in response to individual cases that may not represent broader trends.⁷

- 1.14 We agree. Given their significant potential to limit individual liberty, changes to the *Bail Act* must be justified by a clear and compelling policy rationale. Any such changes must be supported by appropriate evidence.
- 1.15 We have not received any evidence to justify the changes contemplated by the terms of reference. While we are unable to discuss the contents of the cases considered in the BAMG report for confidentiality reasons, we could not identify anything in those cases which demonstrates any need for these changes. Nor did our consultation process reveal any compelling argument in favour of change. Except for the NSW Police Force and (to a limited extent) the Office of the Director of Public Prosecutions, the organisations and individuals consulted agreed the *Bail Act* should not be amended along the lines referred to in the terms of reference.
- 1.16 The consensus among stakeholders, with one exception, was that the present bail framework has not caused any specific problems in respect of firearms offences or offences relating to criminal associations. Risks can be, and are, dealt with adequately under the existing framework, including the unacceptable risk test.⁸
- 1.17 Instead, concerns were expressed that the contemplated changes would likely:
- unnecessarily capture conduct that does not constitute a high degree of criminality

7. Bail Act Monitoring Group, *Reference to the Bail Act Monitoring Group*, Final Report (2022) 5. See also Legal Aid NSW, *Submission BL01*, 2.

8. *Bail Act 2013* (NSW) s 17–20.

- increase the rate of bail refusals, including for people who may not receive a custodial penalty if found guilty
 - lead to further growth in an already significant remand population, which would adversely affect individuals and the community
 - frustrate government initiatives to address the overrepresentation of Aboriginal people in custody
 - add further complexity to an already intricate statutory framework, and
 - increase court workloads and backlogs by adding to the complexity of bail applications.
- 1.18 In summary, the show cause provisions are a serious impingement upon the principle that a person should not be imprisoned except following conviction beyond reasonable doubt. They are said to be justified by the protection of the public. However, the exceptional nature of show cause offences weighs against their extension. The unacceptable risk test is more than adequate to protect the public in most, if not all, situations.

Report outline

- 1.19 In **chapter 2**, we describe the current bail framework and set out key policy factors to guide consideration of any changes to this framework.
- 1.20 In **chapter 3**, we consider whether further firearms offences should be added to the categories of offences treated as show cause offences.
- 1.21 In **chapter 4**, we consider whether further offences relating to criminal associations should be added to the categories of offences treated as show cause offences.
- 1.22 In **chapter 5**, we consider whether further legislative guidance should be provided on the meaning of “criminal associations”.
- 1.23 In **chapter 6**, we discuss two further issues raised with us in consultations and submissions, including:
- a proposal to add firearms prohibition orders and serious crime prevention orders to the list of the orders in s 18(1)(f) of the *Bail Act*, and
 - concerns about the recently enacted s 22B of the *Bail Act*.

2. The bail framework and policy considerations

In Brief

This chapter outlines the show cause requirement and the unacceptable risk test in the *Bail Act 2013* (NSW). It also outlines principles and policy factors to be considered in relation to any proposed change to expand the show cause requirement. These principles and factors provide the context for this review.

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- 2.1 This chapter outlines aspects of the *Bail Act 2013* (NSW) (*Bail Act*) most relevant to this review: the show cause requirement and the unacceptable risk test. It then explains what we consider to be the key principles and factors that must be considered in relation to any proposal to expand the show cause requirement.

Overview of show cause and unacceptable risk

- 2.2 Bail is the “authority to be at liberty for an offence”.¹ It can be granted to an accused person with or without conditions by a “bail authority”, defined as a police officer, an authorised justice or a court.²

1. *Bail Act 2013* (NSW) s 7(1).

2. *Bail Act 2013* (NSW) s 4(1) definition of “bail authority”, definition of “authorised justice”.

2.3 The preamble to the *Bail Act* states that, in enacting the Act, Parliament had regard to the following three fundamental principles:

- (a) the need to ensure the safety of victims of crime, individuals and the community,
- (b) the need to ensure the integrity of the justice system,
- (c) the common law presumption of innocence and the general right to be at liberty.³

2.4 The decision-maker must keep these principles in mind in any bail application.⁴

2.5 Part 3 of the *Bail Act* sets out how a bail authority is to decide whether to grant an accused person bail. Our review is concerned with two specific aspects of the bail framework:

- the show cause requirement, and
- the unacceptable risk test, which is used to assess whether the accused person presents an unacceptable risk in respect of the four “bail concerns” (see below).

For some offences, the accused person needs to show cause

2.6 The show cause requirement was introduced in 2015.⁵ The amendments were made in response to a review of the *Bail Act* conducted by John Hatzistergos.⁶ In the first report of this review (the Hatzistergos report), Hatzistergos concluded that the show cause requirement would “provide a useful level of reassurance for the community in relation to serious offenders whilst also providing greater level of consistency”.⁷

2.7 Where an offence is a “show cause offence”, the accused person needs to show cause why their detention is not justified. The accused person has the onus of proof, on the balance of probabilities, but does not have to show special or exceptional circumstances to discharge this onus.⁸

2.8 The court is not constrained in the factors it can consider when determining the show cause requirement.⁹ It can consider any matters it regards as relevant.¹⁰ Cause can be shown by “a single powerful factor, or a powerful combination of factors”.¹¹

3. *Bail Act 2013* (NSW) preamble.

4. *JM v R* [2015] NSWSC 978 [33].

5. *Bail Amendment Act 2014* (NSW) sch 1 [6].

6. J Hatzistergos, *Review of the Bail Act 2013*, Report (NSW Department of Justice, 2014) rec 5.

7. J Hatzistergos, *Review of the Bail Act 2013*, Report (NSW Department of Justice, 2014) [220].

8. *JM v R* [2015] NSWSC 978 [38]–[39].

9. *DPP (NSW) v Tikomaimaleya* [2015] NSWCA 83 [25].

2.9 If the accused person does not show cause, the bail authority must refuse bail.¹²

Show cause offences

2.10 Section 16B of the *Bail Act* lists categories of offences to which the show cause requirement applies (the full list is extracted in appendix D to this report).

2.11 The Hatzistergos report provided a framework for determining which categories of offences should be subject to the show cause requirement. The report concluded the requirement:

should apply to offenders whose alleged offences are such that in the ordinary course, the consequences of materialisation of the risk to the community and the administration of justice are such that they outweigh the likelihood of it occurring.¹³

2.12 In introducing the amendment, the then Attorney General similarly explained the requirement “applies to bail decisions for those charged with offences that pose significant risks to the community or the administration of justice”.¹⁴

2.13 In 2015, the NSW Sentencing Council observed that the show cause categories fall into two broad groups:

- where the offence charged is itself considered to be very serious, and
- where the person accused of committing an offence has a proven or alleged history of prior offending.¹⁵

2.14 This review is concerned with offences in that first category. For example, s 16B currently includes several categories of serious weapons and firearms offences:

- serious indictable offences under part 3 or 3A of the *Crimes Act 1900* (NSW) (*Crimes Act*) or under the *Firearms Act 1996* (NSW) (*Firearms Act*) that involve the use of a firearm (as defined in the *Firearms Act*)¹⁶
- serious indictable offences under part 3 or 3A of the *Crimes Act* or under the *Weapons Prohibition Act 1998* (NSW) (*Weapons Prohibition Act*) that involve the use of a military-style weapon (as defined in the *Weapons Prohibition Act*)¹⁷

10. *JM v R* [2015] NSWSC 978 [40].

11. *Moukhallaletti v DPP (NSW)* [2016] NSWCCA 314 [54].

12. *Bail Act 2013* (NSW) s 16A(1).

13. J Hatzistergos, *Review of the Bail Act 2013*, Report (NSW Department of Justice, 2014) [227].

14. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 13 August 2014, 30504.

15. NSW Sentencing Council, *Bail: Additional Show Cause Offences* (2015) [2.8].

16. *Bail Act 2013* (NSW) s 16B(1)(d)(i); *Firearms Act 1996* (NSW) s 4(1) definition of “firearm”.

- indictable offences that involve the unlawful possession of a pistol or prohibited firearm (as defined in the *Firearms Act*) in a public place¹⁸
 - indictable offences that involve the unlawful possession of a military-style weapon¹⁹
 - serious indictable offences under the *Firearms Act* that involve acquiring, supplying, manufacturing or giving possession of a pistol, prohibited firearm, or a firearm part that relates solely to a prohibited firearm,²⁰ and
 - serious indictable offences under the *Weapons Prohibition Act* that involve buying, selling or manufacturing a military-style weapon or selling, on three or more occasions, any prohibited weapon.²¹
- 2.15 A “serious indictable offence” is an indictable offence which has a maximum penalty of imprisonment of five years or more, or for life.²² Offences will be indictable unless they either can be or must be dealt with summarily under the *Criminal Procedure Act 1986* (NSW) or any other Act.²³

Bail must be refused if there is an unacceptable risk of a bail concern

- 2.16 If an accused person fulfils the show cause requirement, the bail authority moves to the second step of considering the unacceptable risk test.²⁴ The bail authority will go straight to this test if the offence is not a show cause offence.
- 2.17 In summary, the unacceptable risk test operates as follows:
- Before making a bail decision, a bail authority must assess any relevant “bail concerns”, which are outlined in s 17 of the *Bail Act* (see below).
 - The bail authority must refuse bail if satisfied there is an unacceptable risk in respect of any of the bail concerns.²⁵

17. *Bail Act 2013* (NSW) s 16B(1)(e)(i); *Weapons Prohibition Act 1998* (NSW) s 4(1) definition of “military-style weapon”.

18. *Bail Act 2013* (NSW) s 16B(1)(d)(ii); *Firearms Act 1996* (NSW) s 4(1) definitions of “pistol” and “prohibited firearm”.

19. *Bail Act 2013* (NSW) s 16B(1)(e)(ii).

20. *Bail Act 2013* (NSW) s 16B(1)(d)(iii).

21. *Bail Act 2013* (NSW) s 16B(1)(e)(iii).

22. *Crimes Act 1900* (NSW) s 4(1) definition of “serious indictable offence”.

23. *Criminal Procedure Act 1986* (NSW) s 5–6. The accused person and/or the prosecutor can elect for certain indictable offences to be heard summarily: *Criminal Procedure Act 1986* (NSW) sch 1 table 1 and table 2. Summary offences include most offences where the maximum penalty is less than 2 years’ imprisonment: *Criminal Procedure Act 1986* (NSW) s 6.

24. *Bail Act 2013* (NSW) s 16A(2).

25. *Bail Act 2013* (NSW) s 19(1).

- If there is no unacceptable risk, the bail authority must grant bail (with or without conditions), release the accused without bail or dispense with bail.²⁶
- 2.18 “Bail concerns” are concerns that an accused person, if released from custody, will:
- fail to appear at any proceedings for the offence
 - commit a serious offence
 - endanger the safety of victims, individuals or the community, or
 - interfere with witnesses or evidence.²⁷
- 2.19 When assessing bail concerns, the bail authority must consider the matters outlined in s 18 and cannot consider anything else.²⁸ However, the breadth of the matters outlined in s 18 allows bail authorities to consider a wide range of relevant circumstances and factors.
- 2.20 A full list of those factors is set out in appendix D. Some of those factors are:
- the accused person’s background, including criminal history, circumstances and community ties
 - the nature and seriousness of the offence
 - whether the accused person has a history of violence
 - whether the accused person has a history of compliance or non-compliance with bail acknowledgements and conditions, and certain listed orders
 - whether the accused person has any criminal associations, and
 - the likelihood of a custodial sentence being imposed if the person is convicted.²⁹
- 2.21 In deciding the seriousness of an offence, the bail authority must consider three factors outlined in s 18(2), as well as any other factor it considers relevant. One of these factors is whether the offence involves the possession or use of an offensive weapon or instrument within the meaning of the *Crimes Act*.³⁰

26. *Bail Act 2013* (NSW) s 20(1).

27. *Bail Act 2013* (NSW) s 17(2)(d).

28. *Bail Act 2013* (NSW) s 18(1).

29. *Bail Act 2013* (NSW) s 18(a)–(b), s 18(d), s 18(f)–(g), s 18(i).

30. *Bail Act 2013* (NSW) s 18(2)(a). An “offensive weapon or instrument” is defined as a dangerous weapon, anything made or adapted for offensive purposes, or anything that, in the circumstances, is used, intended for use or threatened to be used for offensive purposes. A “dangerous weapon” is defined as a firearm or imitation firearm as those terms are defined in the *Firearms Act 1996* (NSW), a

Factors to guide review of bail laws

2.22 In the following sections, we outline the key principles and considerations that have informed our deliberations about any potential expansion of the list of offences subject to the show cause requirement.

The general principles of bail should guide reviews of bail laws

2.23 In considering proposals to change the *Bail Act*, it is necessary to keep in mind and to balance the three fundamental principles set out in the preamble (see above).

2.24 The *Bail Act* endeavours to strike a balance between those three principles. While community safety will clearly demand that some accused persons be held on remand, it is important to also give due weight to the second and third principles. In particular, the presumption of innocence and the general right to be at liberty need to be fundamental considerations in a society that adheres to governance by the rule of law.

2.25 A core feature of the presumption of innocence is that accused persons should not be punished before conviction, nor be refused bail as a form punishment.³¹ As Beech-Jones CJ at CL recently stated, “bail cannot be refused as a means to impose interim punishment and bail applications are not forums to adjudge guilt or innocence”.³²

Show cause should be reserved for the most serious and high-risk offences

2.26 Throughout this review, stakeholders identified inherent difficulties with the show cause requirement. This included criticisms that it:

- is unnecessary, as the unacceptable risk test is sufficient to address risks, and
- contributes to the over-incarceration of people who have not been convicted of any crime.³³

2.27 Building on the second point, some described the show cause requirement as akin to a presumption against bail.³⁴ The Aboriginal Legal Service argued that show cause “reverses the onus of proof, encroaches on the presumption of innocence and can lead to detention for allegations of relatively minor offending”.³⁵

2.28 Due to its significant effect on individual liberty, the show cause requirement should be reserved for the most serious offences, for which a custodial sentence is practically

“prohibited weapon” as defined in the *Weapons Prohibition Act 1998* (NSW), or a speargun: *Crimes Act 1900* (NSW) s 4(1) definitions of “offensive weapon or instrument” and “dangerous weapon”.

31. *JM v R* [2015] NSWSC 978 [34].

32. *Edwards v R (No 2)* [2022] NSWSC 1344 [20].

33. NSW, Public Defenders, *Submission BL04*, 2.

34. NSW Council for Civil Liberties, *Submission BL03*, 4.

35. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission BL14*, 2.

inevitable upon conviction, and which are suggestive of a high risk to the public. This is consistent with the rationale for its introduction (see above).

- 2.29 The *Bail Act* provides bail authorities with discretion and flexibility to consider the seriousness of the offence, an accused person’s history and attendant level of risk. It also empowers bail authorities to impose conditions to mitigate that risk. Bail authorities should be afforded sufficient flexibility and discretion to assess risk on the specific facts that come before them.

Changes should not unnecessarily increase the remand population

- 2.30 Extreme care must be taken before introducing any changes that might lead to further growth in the remand population. The remand population in NSW has increased by 27.3% between June 2015 and June 2022.³⁶
- 2.31 The remand population constitutes a significant proportion of the custodial population. As of June 2022, there were 12,336 adults in custody (an increase of 5.2% since June 2015).³⁷ Of these, 4,648 people were on remand, which represents 37.7% of the total adult prison population.³⁸
- 2.32 One of the driving contributors to this increase was the introduction of the show cause requirement in 2015.³⁹ In a 2018 study, the NSW Bureau of Crime Statistics and Research (BOCSAR) found that the introduction of the show cause requirement “increased the probability that the average defendant is refused bail by the courts by about 11 per cent” in the two years following the amendments.⁴⁰ This “represented an additional 1,500 bail refusals” by NSW courts over the same period.⁴¹

36. NSW Bureau of Crime Statistics and Research, “Custody Statistics” (4 August 2022) <www.bocsar.nsw.gov.au/Pages/bocsar_custody_stats/bocsar_custody_stats.aspx> (retrieved 7 October 2022).

37. NSW Bureau of Crime Statistics and Research, “Custody Statistics” (4 August 2022) <www.bocsar.nsw.gov.au/Pages/bocsar_custody_stats/bocsar_custody_stats.aspx> (retrieved 7 October 2022).

38. NSW Bureau of Crime Statistics and Research, “Custody Statistics” (4 August 2022) <www.bocsar.nsw.gov.au/Pages/bocsar_custody_stats/bocsar_custody_stats.aspx> (retrieved 7 October 2022).

39. I Klauzner and S Yeong, *What Factors Influence Police and Court Bail Decisions?*, Crime and Justice Bulletin No 236 (NSW Bureau of Crime Statistics and Research, 2021) 2.

40. S Yeong and S Poynton, *Did the 2013 Bail Act Increase the Risk of Bail Refusal? Evidence from a Quasi-Experience in New South Wales*, Contemporary Issues in Crime and Justice No 212 (NSW Bureau of Crime Statistics and Research, 2018) 1.

41. S Yeong and S Poynton, *Did the 2013 Bail Act Increase the Risk of Bail Refusal? Evidence from a Quasi-Experience in New South Wales*, Contemporary Issues in Crime and Justice No 212 (NSW Bureau of Crime Statistics and Research, 2018) 1.

- 2.33 The show cause requirement does not mean that, as a matter of law, bail will normally be refused for show cause offences.⁴² However, statistics show that bail is more likely to be refused for those offences. Between July 2021 and June 2022, courts refused bail for 60.6% of show cause offences, compared with 37.9% of offences subject only to the unacceptable risk test.⁴³
- 2.34 In consultations and submissions, significant concerns were expressed that any further tightening of bail law (and the show cause requirement specifically) would continue to drive this growth in remand.⁴⁴

The impact of remand on individuals and the community should be considered

- 2.35 We acknowledge that remand has an important role to play in protecting society against the risks presented by a person who poses the recognised bail concerns. As the Productivity Commission observed:

By ensuring that defendants attend trial, that witnesses are protected, and that further offences are not committed, remand is an important element of the legal and policy framework surrounding community safety.⁴⁵

- 2.36 But remand can significantly affect the lives of people subjected to it.⁴⁶ This is particularly the case for vulnerable members of the community who are disproportionately represented in the criminal justice system.⁴⁷ Remand can negatively affect mental health, with higher rates of suicide among the remand population compared with the sentenced prison population. Remandees are not able to access the suite of rehabilitative and therapeutic programs on offer in prisons, and may struggle with the uncertainty of their situation.⁴⁸
- 2.37 The criminogenic impacts of incarceration are well documented. As noted by the NSW Council for Civil Liberties, and also by Corrective Services NSW (CSNSW), even a short time in custody can have a detrimental impact.⁴⁹ It can include loss of employment, loss of accommodation, reduced access to services and breakdown of relationships.⁵⁰ It also

42. *JM v R* [2015] NSWSC 978 [40].

43. NSW Bureau of Crime Statistics and Research, *Bail Decisions Unacceptable Risk and Show Cause* (kf22-21801).

44. See, eg, Legal Aid NSW, *Submission BL01*, 2; NSW Council for Civil Liberties, *Submission BL03*, 4; Australian Lawyers Alliance, *Submission BL12* [7].

45. Australia, Productivity Commission, *Australia's Prison Dilemma*, Paper (2021) 39.

46. For a more detailed review of the consequences of remand, see NSW Law Reform Commission, *Bail*, Report 133 (2012) ch 5.

47. Australian Lawyers Alliance, *Submission BL12* [4].

48. Australia, Productivity Commission, *Australia's Prison Dilemma*, Research Paper (2021) 19, 39.

49. NSW Council for Civil Liberties, *Submission BL03*, 4; Corrective Services NSW, *Submission BL13*, 5.

50. Corrective Services NSW, *Submission BL13*, 5.

increases the likelihood of recidivism.⁵¹ It is particularly concerning if the person being held on remand is not likely to receive a custodial sentence and is therefore being exposed to the prison system only through remand.

- 2.38 As noted by the Bar Association and the Australian Lawyers Alliance, the impacts of prison have ripple effects that are often felt by third parties, such as children and people who are cared for by the detained person.⁵² This is particularly concerning for Aboriginal communities, given the well-documented intergenerational effects of incarceration.⁵³
- 2.39 Remand also has significant financial consequences for the government.⁵⁴ CSNSW advised that the cost to hold someone on remand is \$248.88 per day. Any increase in the remand population would lead to an increased demand on government resources. CSNSW also advised that tightening bail laws would create operational challenges, including by increasing the pressure on bed availability. It could also affect their ability to deliver programs to inmates which aim to reduce reoffending.⁵⁵

Changes should not further contribute to Aboriginal overrepresentation

- 2.40 The Bail Act Monitoring Group observed
- there is a particular risk that amending bail laws may disproportionately increase the Aboriginal remand population, and impact the Government's capacity to reach Closing the Gap targets.⁵⁶
- 2.41 We echo this concern. Any changes to bail laws should be informed by a thorough and evidenced-based analysis of the potential impact on Aboriginal people.⁵⁷ Attempts to tighten bail law, particularly the show cause requirement, should not proceed if it would exacerbate the overrepresentation of Aboriginal people in custody.

51. NSW Council for Civil Liberties, *Submission BL03*, 4.

52. See, eg, NSW Bar Association, *Submission BL15* [35]; Australian Lawyers Alliance, *Submission BL12* [8].

53. See, eg, M Roettger, K Lockwood and S Dennison, *Indigenous People in Australia and New Zealand and the Intergenerational Effects of Incarceration*, Research Brief 26 (Indigenous Justice Clearinghouse, 2019).

54. Australia, Productivity Commission, *Australia's Prison Dilemma*, Research Paper (2021) 47.

55. Corrective Services NSW, *Submission BL13*, 5.

56. Bail Act Monitoring Group, *Reference to the Bail Act Monitoring Group*, Final Report (2022) 5, Executive Summary attached to M Speakman, "Bail Act Monitoring Group Reports" (Media Statement, 16 August 2022).

57. See, eg, Aboriginal Legal Service (NSW/ACT) Ltd, *Submission BL14*, 2; Illawarra Legal Centre Inc, *Submission BL10*, 4.

- 2.42 NSW, along with all other Australian governments, has committed to close the gap in incarceration rates. This includes a commitment to reduce the incarceration rate of Aboriginal adults in NSW by at least 15% by 2031.⁵⁸
- 2.43 Based on current trajectories, this target is currently not on track to be met by 2031.⁵⁹
- 2.44 Aboriginal adults make up 2.7% of the NSW adult population.⁶⁰ However, 29% of the total adult prison population identified as Aboriginal as at June 2022. Aboriginal men represented 28.3% of the total male prison population and Aboriginal women represented 40.1% of the total female prison population.⁶¹
- 2.45 There were 1,451 Aboriginal people on remand as of June 2022. This means that 40.5% of the Aboriginal adults in prison were on remand. In addition, 31.2% of the total remand population were Aboriginal.⁶²
- 2.46 A common concern in consultations and submissions was that actions to tighten bail laws would have a disproportionate impact on Aboriginal people and contradict Closing the Gap commitments.⁶³ Legal Aid NSW, the Australian Lawyers Alliance and the Bar Association submitted that in their experience the show cause test has made it significantly harder for Aboriginal people to get bail and has therefore directly contributed to the high remand rates.⁶⁴ This should be a fundamental consideration in examining any proposal to expand the show cause requirement.

Changes should not further complicate the law or burden the judicial system

- 2.47 Courts already manage a high volume of bail applications. In the Local Court, magistrates made 36,195 bail determinations in the 12 months to March 2022.⁶⁵

58. *National Agreement on Closing the Gap* (July 2020) 32.

59. NSW Bureau of Crime Statistics and Research, "Closing the Gap: Target 10: Adults are not Overrepresented in the Criminal Justice System" <www.bocsar.nsw.gov.au/Pages/bocsar_pages/Closing-the-Gap.aspx> (retrieved 18 October 2022).

60. Australian Bureau of Statistics, *2021 Census of Population and Housing, Indigenous Status by Age, Census TableBuilder* (2022) <www.abs.gov.au/statistics/microdata-tablebuilder/tablebuilder> (retrieved 19 October 2022).

61. NSW Bureau of Crime Statistics and Research, "Custody Statistics" <www.bocsar.nsw.gov.au/Pages/bocsar_custody_stats/bocsar_custody_stats.aspx> (retrieved 9 October 2022).

62. NSW Bureau of Crime Statistics and Research, "Custody Statistics" <www.bocsar.nsw.gov.au/Pages/bocsar_custody_stats/bocsar_custody_stats.aspx> (retrieved 9 October 2022).

63. Legal Aid NSW, *Submission BL01*, 4; Law Society of NSW, *Submission BL02*, 1; Corrective Services NSW, *Submission BL13*, 6; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission BL14*, 2.

64. See, eg, NSW Bar Association, *Submission BL15* [5]; Australian Lawyers Alliance, *Submission BL12* [10]; Legal Aid NSW, *Submission BL01*, 2.

65. Local Court of NSW, *Submission BL05*, 1.

- 2.48 The *Bail Act* is already a complex piece of legislation. In consultations, we were frequently told the Act has been tinkered with enough in recent years. There should not be further changes unless clearly justified.
- 2.49 In particular, any changes which may add complexity to the *Bail Act*, lengthen bail applications or impose an additional burden on courts must be considered carefully and proceed only with compelling justification.
- 2.50 As noted by the Australian Lawyers Alliance, any legislative changes that make bail harder to get and more complex would lead to an increased workload for the courts.⁶⁶ It is widely accepted that the court system is already under immense pressure.
- 2.51 Adding to court workloads would ultimately lead to further delays and result in people spending longer time in custody waiting for hearings. The Australian Lawyers Alliance referred to statistics from the Australian Bureau of Statistics from 2020 which state that NSW has the largest number of unsentenced people spending more than 12 months on remand awaiting hearing.⁶⁷
- 2.52 It also referred to a 2019 BOCSAR study which assessed the number of people sentenced to “time already served” in custody.⁶⁸ Between June 2013 and June 2018, the number of people sentenced to time served increased by 65%.⁶⁹ BOCSAR reported that “[m]ost of the time served increase is due to an increase in the number of people on remand at sentence” since the 2015 bail reforms (including the introduction of the show cause requirement).⁷⁰ Any change which increases court workloads will likely exacerbate these issues.

66. Australian Lawyers Alliance, *Submission BL12* [23].

67. Australian Bureau of Statistics, “Prisoners in Australia” (3 December 2020) <www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/2020#cite-window1> (retrieved 10 October 2022) cited in Australian Lawyers Alliance, *Submission BL12* [9].

68. S Ramsey and J Fitzgerald, *Offenders Sentenced to Time Already Served in Custody*, Bureau Brief No 140 (NSW Bureau of Crime Statistics and Research, 2019). A person is sentenced to time already served if the time spent on remand is equal to or greater than the length of their custodial sentence: 1. See also Australian Lawyers Alliance, *Submission BL12* [9].

69. S Ramsey and J Fitzgerald, *Offenders Sentenced to Time Already Served in Custody*, Bureau Brief No 140 (NSW Bureau of Crime Statistics and Research, 2019) 1.

70. S Ramsey and J Fitzgerald, *Offenders Sentenced to Time Already Served in Custody*, Bureau Brief No 140 (NSW Bureau of Crime Statistics and Research, 2019) 4.

3. Show cause and firearms offences

In Brief

The list of existing firearms offences treated as show cause offences under section 16B of the *Bail Act 2013* (NSW) should not be expanded. The show cause requirement already captures serious offences involving firearms. Any expansion would capture offences that are not sufficiently serious, as well as offenders who may not receive a custodial sentence. The current bail framework is sufficient to address risks arising from the more minor firearms offences. The proposal is not justified by evidence.

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- 3.1 In this chapter, we recommend against any expansion of the categories of firearms offences currently subject to the show cause requirement.
- 3.2 While we accept that a person accused of firearm offences may pose a significant risk to the community in certain situations, this risk can be managed through the existing bail framework. We are also concerned by the breadth of, and potential for unintended consequences from, the changes proposed.
- 3.3 This chapter first outlines the firearms offences currently on the list of show cause offences. It then addresses the general concerns raised by stakeholders about adding

any additional firearms offences to the show cause list. Next, it considers two specific proposals to extend the list of show cause offences to capture the:

- unlawful possession of a pistol or prohibited firearm in a *private* place, and
- possession of a pistol or prohibited firearm in breach of a firearms prohibition order (FPO).

The scope of the current show cause requirement

3.4 The first report of the *Bail Act 2013* (NSW) (*Bail Act*) review undertaken by John Hatzistergos (Hatzistergos report) recommended the inclusion of a “broad firearms category ... intended to capture all offences that are of a serious nature” of show cause offences.¹ It observed the “very nature of a firearm is that it is dangerous” and noted the consequences of an associated risk materialising to the community and the administration of justice.²

3.5 As discussed in chapter 2, s 16B of the *Bail Act* lists certain categories of firearms offences as show cause offences. A range of conduct covered by firearms and weapons offences currently comes within these categories. They include, for example:

- possessing an unregistered pistol or prohibited firearm in a public place without authorisation³
- giving possession of a pistol or prohibited firearm or firearm part that relates solely to a prohibited firearm to an unauthorised person,⁴ and
- possessing or using a military-style weapon.⁵

3.6 “Firearm”, “pistol” and “prohibited firearm” take the same definition as in the *Firearms Act 1996* (NSW) (*Firearms Act*).⁶ The *Firearms Act* defines “firearm” as:

a gun, or other weapon, that is (or at any time was) capable of propelling a projectile by means of an explosive, and includes a blank fire firearm, or an air gun, but does not include a paintball marker within the meaning of

1. J Hatzistergos, *Review of the Bail Act 2013*, Report (2014) [232].

2. J Hatzistergos, *Review of the Bail Act 2013*, Report (2014) [232].

3. *Crimes Act 1900* (NSW) s 93I(2), s 93I(3)(b)–(c).

4. *Firearms Act 1996* (NSW) s 50B.

5. *Weapons Prohibition Act 1998* (NSW) s 7.

6. *Bail Act 2013* (NSW) s 16B(3).

the *Paintball Act 2018* or anything declared by the regulations not to be a firearm.⁷

3.7 With some limited exceptions, the *Firearms Act* applies to an “imitation firearm” in the same way it applies to a firearm.⁸ An “imitation firearm” is defined as:

an object that, regardless of its colour, weight or composition or the presence or absence of any moveable parts, substantially duplicates in appearance a firearm but that is not a firearm.⁹

3.8 A “prohibited firearm” is a firearm described in schedule 1 to the *Firearms Act*.¹⁰ This includes, for example, any machine gun, a firearm that disguises or conceals the fact that it is a firearm and any self-loading rimfire rifle, centre-fire rifle or shotgun.¹¹ A firearm that is an imitation of a prohibited firearm is taken to be a prohibited firearm.¹²

3.9 A “pistol” is defined in the *Firearms Act* as a firearm that “is reasonably capable of being raised and fired by one hand” which does not exceed the size prescribed in the *Firearms Regulation 2017* (NSW).¹³ A firearm that is an imitation of a pistol is taken to be a pistol.¹⁴

General concerns about expanding show cause

Recommendation 3.1: Expanding show cause to include further firearms offences

The list of show cause offences in section 16B of the *Bail Act 2013* (NSW) should not be expanded to include further firearms offences.

3.10 During consultations, and in submissions, there was widespread opposition to expanding the categories of firearms offences subject to the show cause requirement.

Show cause already includes serious firearms offences

3.11 The NSW Police Force (NSWPF) argued that the “inherent risks” associated with firearms offences warrants making further categories of firearms offences subject to the

7. *Firearms Act 1996* (NSW) s 4(1) definition of “firearm”.

8. *Firearms Act 1996* (NSW) s 4D(1).

9. *Firearms Act 1996* (NSW) s 4D(3). Children’s toys are not regarded as imitation firearms: *Firearms Act 1996* (NSW) s 4D(4).

10. *Firearms Act 1996* (NSW) s 4(1) definition of “prohibited firearm”.

11. *Firearms Act 1996* (NSW) sch 1.

12. *Firearms Act 1996* (NSW) s 4D(2)(b). This excludes anything produced and identified as a children’s toy: s 4D(4).

13. *Firearms Act 1996* (NSW) s 4(1) definition of “pistol”.

14. *Firearms Act 1996* (NSW) s 4D(2)(a).

show cause requirement.¹⁵ It considered the existing inclusion of certain firearms offences as show cause offences demonstrated Parliament’s awareness of these risks.¹⁶

3.12 However, by selecting only certain categories of firearms offences for inclusion in s 16B, Parliament signalled it regarded them as more serious and suggestive of risk than other firearms offences. That is, the show cause requirement already covers the firearms offences considered to be the most serious and to involve the greatest degree of risk. As the Bar Association argued, the “gravamen of serious firearms offending is already captured by section 16B(1)(d)”.¹⁷

3.13 This includes all serious indictable offences in parts 3 and 3A of the *Crimes Act 1900* (NSW) (*Crimes Act*), and in the *Firearms Act*, that involve the use of a firearm.¹⁸ As noted by the Bar Association, there are “limited offences” which do not fall into this category “that could be expected to involve the use of a firearm”.¹⁹ Other offences which involve the use of a firearm may also fall within another show cause category.²⁰ For example, offences which attract a maximum penalty of life imprisonment.

Insufficiently serious offences and conduct should not be captured

3.14 We share the concern, expressed in several submissions, that expanding the offences subject to the show cause requirement risks capturing offences that are not sufficiently serious.²¹ The inclusion of any firearms offences that are generally unlikely to result in a sentence of custody would unduly and unjustifiably impinge on the common law right to liberty.

3.15 A number of offences under the *Firearms Act* fall under table 2 of the *Criminal Procedure Act 1986* (NSW), as indictable offences that are to be dealt with summarily unless the prosecutor elects for them to be dealt with on indictment.²² As such, these offences can be and often are dealt with summarily.

3.16 Generally, most adult offenders whose principal offence is under the *Firearms Act* are either on bail or have bail dispensed with at the time their matter is finalised. In 2019–2021, 78.2% of offenders fell into this category.²³ If the show cause categories of

15. NSW Police Force, *Submission BL11*, 2.

16. NSW Police Force, *Submission BL11*, 2.

17. See, eg, NSW Bar Association, *Submission BL15* [14]. See also NSW Council for Civil Liberties, *Submission BL03*, 5.

18. *Bail Act 2013* (NSW) s 16B(1)(d)(i).

19. NSW Bar Association, *Submission BL15* [20].

20. NSW Bar Association, *Submission BL15* [20].

21. See, eg, Legal Aid NSW, *Submission BL01*, 3; NSW Council for Civil Liberties, *Submission BL03*, 4; NSW Bar Association, *Submission BL15* [19].

22. *Criminal Procedure Act 1986* (NSW) table 2 pt 4 cl 7.

23. NSW Bureau of Crime Statistics and Research, *Firearm Offence by Bail and Sentence* (kf22-21875).

firearms offences were expanded, it can be assumed that more of these offenders would be refused bail and kept on remand. Yet many of these offenders may not ultimately receive a custodial sentence.²⁴

- 3.17 Overall, offences under the *Firearms Act* have a low rate of custodial sentences. Between 2019 and 2021, only 20.4% of adult offenders whose principal offence was under the *Firearms Act* received a custodial sentence.²⁵ It is entirely inappropriate that the show cause requirement apply to offences in respect of which there is so significant a prospect that a custodial sentence will not be imposed.

The current framework is sufficient to deal with risks

- 3.18 We agree there are serious risks associated with firearms. However, the unacceptable risk test is sufficient to deal with the risks arising from other firearms offences to which the show cause requirement does not apply.²⁶ Importantly, s 18 directs the court to consider the seriousness of the offence when assessing whether the accused person poses an unacceptable risk, which includes considering whether the offence involved a firearm.²⁷

We received no evidence justifying the inclusion of other firearms offences

- 3.19 Some stakeholders questioned whether there was any evidence to demonstrate a need for expanding the show cause categories to include further firearms offences.²⁸ Certainly we did not receive any evidence, in the form of statistics or caselaw, demonstrating any need for this expansion.
- 3.20 While we have been referred to the cases discussed in the Bail Act Monitoring Group review, we cannot discuss those in this report for confidentiality reasons. However, we have not been able to identify anything in those cases that would justify expanding show cause in this way.

24. Corrective Services NSW, *Submission BL13*, 5.

25. NSW Bureau of Crime Statistics and Research, *Firearm Offence by Bail and Sentence* (kf22-21875). We have not included Intensive Corrections Orders which are served in the community as custodial sentences in this report, consistently with BOCSAR categorisations.

26. See, eg, Law Society of NSW, *Submission BL02*, 2; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission BL12*, 3; NSW Bar Association, *Submission BL15* [21].

27. *Bail Act 2013* (NSW) s 18(1)(b); Legal Aid NSW, *Submission BL01*, 3; NSW Council for Civil Liberties, *Submission BL03*, 6; Law Society of NSW, *Submission BL02*, 2; NSW Bar Association, *Submission BL15* [21].

28. See, eg, NSW Council for Civil Liberties, *Submission BL03*, 6.

Show cause should not extend to private possession

Recommendation 3.2: Unlawful private possession of a pistol or prohibited firearm

Section 16B(1)(d)(ii) of the *Bail Act 2013* (NSW) should not be amended to include the unlawful possession of a pistol or prohibited firearm in a private place as a show cause offence.

- 3.21 As noted above, unlawful possession of a pistol or prohibited firearm in a public place is subject to the show cause requirement. We received a proposal to amend s 16B(1)(d)(ii) to remove the words “in a public place”.²⁹ This would mean all indictable offences involving the unlawful possession of a pistol or prohibited firearm would be show cause offences, whether in a private or a public place.
- 3.22 This proposal was opposed in submissions and consultations.³⁰ We agree that possession in a public place is an appropriate marker of risk to the community, such that the public / private distinction should be maintained. For the following reasons, we do not recommend any change.

The proposal would capture offences and conduct that are insufficiently serious

- 3.23 The NSWPF argued that “the danger posed by firearms is unacceptably high regardless of where they are located”.³¹ In its view:

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.³²

Reference was also made to the fine line that separates private from public space.

- 3.24 However, the consensus in submissions and consultations was that this proposal would capture conduct that is not sufficiently serious to justify the show cause requirement.³³ For example, it would cover situations in which a pistol or prohibited firearm is stored in a private place, maybe even inadvertently, with no intention of it being used. An example commonly raised was a farmer who had not handed in, or obtained a licence for, pistols or prohibited firearms stored in private places. This would not rise to the level of criminality which would justify the application of the show cause requirement.

29. NSW Police Force, *Submission BL11*, 2.

30. See, eg, Legal Aid NSW, *Submission BL01*, 3; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission BL14*, 3; NSW Bar Association, *Submission BL15* [15].

31. NSW Police Force, *Submission BL11*, 2.

32. NSW Police Force, *Submission BL11*, 3.

33. See, eg, Legal Aid NSW, *Submission BL01*, 3; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission BL14*, 3; NSW Bar Association, *Submission BL15* [19].

- 3.25 The broad definition of “firearm” compounds this problem. As noted above, an imitation of a pistol or prohibited firearm is taken to be a pistol or prohibited firearm.³⁴ Concerns were expressed that the proposal would capture people who possess imitations of these firearms in their homes. It was submitted that such conduct is not serious enough to warrant the application of the show cause requirement.³⁵
- 3.26 Legal Aid argued this proposal may affect young people disproportionately.³⁶ This concern was echoed in consultations, where it was raised that young people (including young adults) may “show off” with imitation firearms without any intention of using them. Stakeholders were strongly of the view that it would be disproportionate and inappropriate to subject these young adults to the show cause requirement for possession of imitation firearms in their own homes.
- 3.27 A further, related concern is that the proposal would capture people who purchased pistols or prohibited firearms legally in other states and then stored them in private places. The Law Society provided the example of gel blasters, which are legal in Queensland but could fall within the definition of a prohibited firearm or pistol under the *Firearms Act*.³⁷ A person could thus unknowingly commit a firearms possession offence and then be required to show cause. Their conduct would likely fall on the lower end of objective seriousness and may not attract a custodial sentence.
- 3.28 Concerns were also expressed that the broad definition of “possession” in the *Firearms Act* increases the spectrum of criminality that is caught by relevant possession offences, to include potentially low degrees of criminality.³⁸ A firearm is taken to be in a person’s possession if “it is in or on any premises owned, leased or occupied by, or in the care, control or management of, the person”, unless the court is satisfied to the contrary.³⁹ The Aboriginal Legal Service observed this places the onus on an accused person to disprove that the firearm on their premises is in their possession.⁴⁰
- 3.29 If the show cause requirement applied, then an accused person would be required to show cause for a possession offence in circumstances where the objective seriousness of the alleged offence may be very low – for example, where a prohibited firearm was found on premises where they were a lessee, and there was no evidence of any intention to use it.

34. *Firearms Act 1996* (NSW) s 4D(2).

35. See, eg, Law Society of NSW, *Submission BL02*, 2.

36. Legal Aid NSW, *Submission BL01*, 3.

37. Law Society of NSW, *Submission BL02*, 2; Queensland Police, “Gel Blasters” (15 August 2019) <www.police.qld.gov.au/weapon-licensing/Gel-Blasters> (retrieved 15 October 2022).

38. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission BL 14*, 3.

39. *Firearms Act 1996* (NSW) s 4A.

40. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission BL 14*, 3.

Courts can deal with any ambiguity in the public / private distinction

- 3.30 The NSWPF argued that the reference to “public place” can cause difficulties where it is disputed whether the possession occurred in a public or private place.⁴¹ For instance, difficulties can arise when a firearm is found within a vehicle or on a ledge. In its view, removing “public place” would avoid the need for factual determinations in bail applications to resolve any such ambiguity.⁴²
- 3.31 The NSWPF also submitted that the “public place” requirement is an anomaly because the danger posed by firearms is the same regardless of location. It argued that Parliament recognised and dealt with the same issue by amending the definition of “public place” in s 93F of the *Crimes Act*. This definition applies to the offence of possessing a loaded firearm in a public place,⁴³ and certain other explosives and firearms offences.⁴⁴ The amendments clarified the expression “public place”, for the purpose of those offences, by providing “a person who is in a vehicle or vessel in a public place is taken to be in that place”. The change was made in response to the Court of Criminal Appeal’s decision that the inside of a truck was not a “public place” for the purpose of this offence, even though the truck was on a public road.⁴⁵
- 3.32 However, this amendment did not remove the public / private distinction. Rather, it clarified what a “public place” is for the purpose of the relevant offences. This is different to removing the public / private distinction entirely, which is what the NSWPF proposed be done in s 16B(1)(d)(ii) of the *Bail Act*. This would have far-reaching effects beyond clarifying a definition.
- 3.33 We received no suggestion that the interpretation of the term “public place” is causing any difficulties in the context of s 16B(1)(d)(ii). In our view, courts are capable of dealing with any ambiguities that may arise. As “public place” is not defined in the *Bail Act*, it is open to judicial officers to interpret and apply the term using ordinary principles of statutory interpretation.
- 3.34 Moreover, any such issue would arise only in a small proportion of cases, which does not lend any support to removing the concept from the Act altogether. It would be inappropriate for legislative change to respond to non-systemic issues.

41. NSW Police Force, *Submission BL11*, 3.

42. NSW Police Force, *Submission BL11*, 3.

43. *Crimes Act 1900* (NSW) s 93G.

44. *Crimes Act 1900* (NSW) pt 3A, div 2.

45. NSW Police Force, *Submission BL11*, 2, referring to *Hardman v Minehan* [2003] NSWCA 130; 57 NSWLR 390.

The bail framework is sufficient to deal with risks

- 3.35 We acknowledge there can be risks associated with the possession of pistols or prohibited firearms in a private place, particularly in a domestic violence context.⁴⁶ The consequences of such a risk materialising could be significant and these risks should be taken seriously.
- 3.36 However, these risks can be adequately addressed by the existing bail framework. One of the bail concerns, which must be assessed before any bail decision is made, is whether the person will “endanger the safety of victims, individuals or the community” if released from custody.⁴⁷ Several of the s 18 matters would likely be important in assessing bail concerns in the context of domestic violence offences. For instance, the nature and seriousness of the offence, whether the accused person has a history of violence, the conduct of the accused person to the victim or any of the victim’s family members after the offence, and the views of any victim to the offence.⁴⁸
- 3.37 Notwithstanding that they do not have to “show cause”, accused persons who pose risks which may have serious consequences must, if the risk is judged to be unacceptable, be refused bail, unless the risk can be mitigated by the imposition of bail conditions.
- 3.38 The Bar Association addressed whether removing the public / private distinction could be justified as a means of assisting domestic violence investigations. As it noted, the NSWPF “already have extensive search, entry and seizure powers in relation to firearms located on private premises”.⁴⁹
- 3.39 As the existing legal framework adequately addresses domestic violence risks, it is not necessary to extend the show cause requirement. This is especially the case where the expansion would have implications well beyond domestic violence offences.
- 3.40 The NSWPF also noted that other risks are associated with firearms offences committed in private places. These include the ability to conceal prohibited firearms or pistols from law enforcement, and to enable others to access and use these firearms.⁵⁰ However, these risks could give rise to bail concerns that can be addressed by the unacceptable risk test and the matters listed in s 18. For example, allowing others to access and use firearms could endanger the safety of the community.⁵¹ Similarly, a

46. NSW Police Force, *Submission BL11*, 3.

47. *Bail Act 2013* (NSW) s 17(2)(c).

48. *Bail Act 2013* (NSW) s 18(b), s 18(d), s 18(n), s 18(o).

49. NSW Bar Association, *Submission BL15* [16], referring to *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) pt 6.

50. NSW Police Force, *Submission BL11*, 3.

51. *Bail Act 2013* (NSW) s 19(2)(c).

person's ability to conceal firearms from the police would inform an assessment of their risk of committing a serious offence if released.⁵²

- 3.41 Where the relevant possession offences cover a broad range of conduct varying in risk and seriousness, imposing a blanket show cause requirement in response to risks that can be addressed by the unacceptable risk test is not justified.

The proposal could capture people who receive non-custodial sentences

- 3.42 The NSWPF further submitted this amendment would be consistent with the preamble to the *Bail Act*, as it would further ensure the safety of victims of crime, individuals and the community.⁵³ However, this needs to be balanced against other considerations listed in the preamble, including the common law presumption of innocence and the general right to be at liberty.⁵⁴
- 3.43 These considerations weigh against the extension of the show cause requirement in the form proposed by the NSWPF, especially since the proposal would capture offences and conduct for which a custodial sentence would be far from inevitable.
- 3.44 Conduct covered by offences in the *Firearms Act* that would be affected by this proposal includes:
- possessing a pistol or prohibited firearm without being authorised by licence or permit (maximum penalty of 14 years) – s 7(1)
 - possessing an unregistered pistol or prohibited firearm (maximum penalty of 14 years) – s 36(1), and
 - possessing three or more firearms which are unregistered and the person is not authorised by a licence to possess those firearms, where one or more is a prohibited firearm or pistol (maximum penalty of 20 years) – s 51D(2).
- 3.45 Table 3.1 (below) sets out the sentencing outcomes for adult offenders for whom one of the above offences was their principal offence (ie, the proven charge receiving the most serious penalty). For the first two offences mentioned above, only a minority of offenders received a custodial sentence (34.9% and 18.1% respectively).
- 3.46 A majority of offenders for whom s 51D(2) of the *Firearms Act* was the principal offence received a custodial sentence (69.4%). However, s 51D(2) is a far more serious offence than s 7(1) and s 36(1). The fact that most offenders with s 51D(2) as a principal offence were bail refused or were otherwise in custody at finalisation, and ultimately received custodial sentences, is expected in light of the seriousness of that offence.

52. *Bail Act 2013* (NSW) s 19(2)(b).

53. NSW Police Force, *Submission BL11*, 3.

54. *Bail Act 2013* (NSW) preamble.

Indeed, this shows the current bail framework is responding to the risks associated with conduct covered by s 51D(2).

Table 3.1: Finalised court appearances where the principal offence was select firearms offences, 2019 – 2021

Offence	Total	Bail status at finalisation		Penalty	
		Bail refused or in custody for another offence	Bail granted	Custodial sentence	Non-custodial sentence
<i>Firearms Act, s 7(1)</i>	568	201 (35.4%)	367 (64.6%)	198 (34.9%)	370 (65.1%)
<i>Firearms Act, s 36(1)</i>	138	28 (20.3%)	110 (79.7%)	25 (18.1%)	113 (81.9%)
<i>Firearms Act, s 51D(2)</i>	49	30 (61.2%)	19 (38.8%)	34 (69.4%)	15 (30.6%)

Source: NSW Bureau of Crime Statistics and Research, reference ac22-21766.

This table relates to the following Law Part Codes: 53107, 53108, 27060, 27056, 48374.⁵⁵

- 3.47 In addition, the overwhelming majority of people granted bail for these offences received non-custodial sentences. This was the case for all three offence types (see table 3.2 for all adult offenders on bail at finalisation and table 3.3 showing this information for Aboriginal offenders).

Table 3.2: Finalised court appearances where the principal offence was select firearms offences and defendant was on bail at finalisation, 2019 – 2021

Offence	Total defendants	Defendants on bail at finalisation		
		Custodial sentence	Non-custodial sentence	Total bail granted
<i>Firearms Act, s 7(1)</i>	568	22 (6%)	345 (94%)	367
<i>Firearms Act, s 36(1)</i>	138	1 (0.9%)	109 (99.1%)	110
<i>Firearms Act, s 51D(2)</i>	49	5 (26.3%)	14 (73.7%)	19

Source: NSW Bureau of Crime Statistics and Research, reference ac22-21766.

This table relates to the following Law Part Codes: 53107, 53108, 27060, 27056, 48374.⁵⁶

55. See Judicial Commission of NSW, *Lawcodes* <<https://lawcodes.judcom.nsw.gov.au/>> (retrieved 20 October 2022). In this table, “bail granted” includes defendants who have bail dispensed with. We have not included Intensive Corrections Orders which are served in the community as custodial sentences in this report, consistently with BOCSAR categorisations.

Table 3.3: Finalised court appearances where the principal offence was select firearms offences and defendant was on bail at finalisation – Aboriginal defendants, 2019 – 2021

Offence	Total defendants	Defendants on bail at finalisation		
	Total	Custodial sentence	Non-custodial sentence	Total bail granted
<i>Firearms Act</i> , s 7(1)	126	3 (5.2%)	55 (94.8%)	58
<i>Firearms Act</i> , s 36(1)	21	0 (0%)	10 (100%)	10
<i>Firearms Act</i> , s 51D(2)	8	0 (0%)	0 (0%)	0

Source: NSW Bureau of Crime Statistics and Research, reference ac22-21919.

This table relates to the following Law Part Codes: 53107, 53108, 27060, 27056, 48374.⁵⁷

3.48 It is difficult to estimate the impact the proposal to remove the words “public place” in s 16B(1)(d)(ii) would have on the remand population. This is partly because the statistics do not distinguish between whether the offence occurred in a public or private place, so it is hard to know how many additional people would be subject to the show cause requirement.

3.49 However, this broad change would capture lower-level offences, such as s 7(1) and s 36(1), as show cause offences even where these occur in private places. The statistics in tables 3.1 to 3.3 indicate these possession offences often attract non-custodial sentences. Even for principal offences against s 51D(2), the 30% who did not receive a custodial sentence indicates that a custodial sentence is far from inevitable. This tells against extending the show cause requirement to capture additional firearms offences, in particular private possession.

3.50 It is also revealing that most offenders for whom s 7(1) or s 36(1) of the *Firearms Act* was the principal offence were on bail or had bail dispensed with at the time their matter was finalised, and the overwhelming majority of those offenders did not receive a custodial sentence. This indicates that the current regime is working well in this area. The effect of the proposed change would likely see higher rates of bail refusal for this cohort, which would be a most unfortunate outcome. Overall, these statistics show the potential overreach of this proposal.

56. See Judicial Commission of NSW, *Lawcodes* <<https://lawcodes.judcom.nsw.gov.au/>> (retrieved 20 October 2022).

57. See Judicial Commission of NSW, *Lawcodes* <<https://lawcodes.judcom.nsw.gov.au/>> (retrieved 20 October 2022).

Consistency with military-style weapons is not a reason for change

- 3.51 The NSWPF also argued this proposal would make the treatment of pistols and prohibited firearms consistent with the treatment of military-style weapons in s 16B(1)(e)(ii).⁵⁸ This subjects indictable offences involving the unlawful possession of a military-style weapon to the show cause requirement, regardless of whether it occurs in a private or public place.
- 3.52 The Hatzistergos report applied the public / private distinction to both these categories. The report recommended that offences carrying a term of imprisonment involving the unlawful possession of pistols, prohibited firearms or military-style weapons should be show cause offences only if they occur in a public place.⁵⁹ However, Parliament opted to distinguish between these two categories of offences. The legislative history does not suggest why this course was taken.⁶⁰ However, it can be assumed that Parliament recognised a material difference between these categories which justified the distinction.
- 3.53 This reflects differences between military-style weapons and pistols or prohibited firearms, as defined. A military-style weapon is defined in the *Weapons Prohibition Act 1998* (NSW) (*Weapons Prohibition Act*) as:
- (1) Any bomb, grenade, rocket, missile or mine or other similar device (such as a tear-gas canister) that is in the nature of, or that expels or contains, an explosive, incendiary, irritant, gas or smoke, and whether or not it is live, has been deactivated or is spent.
 - ...
 - (2) Any device intended for use by a military or defence force and that is designed to propel or launch a weapon referred to in subclause (1).
 - (3) A flame thrower that is of military design or any other device that is capable of projecting ignited incendiary fuel.⁶¹
- 3.54 It is characteristic of a military-style weapon that it is capable of occasioning multiple or mass casualties, and there is no reason why an individual would legitimately possess one. These characteristics manifest a much more serious risk profile. This justifies the differential treatment of these categories.

58. NSW Police Force, *Submission BL11*, 3.

59. J Hatzistergos, *Review of the Bail Act 2013*, Report (NSW Department of Justice, 2014) 65.

60. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 13 August 2014, 30504.

61. *Weapons Prohibition Act 1998* (NSW) sch 1 cl 1A definition of "military-style weapons".

Possession in breach of an FPO should not be added

Recommendation 3.3: Possession in breach of a firearms prohibition order

Section 16B of the *Bail Act 2013* (NSW) should not be amended to include the possession of a pistol or prohibited firearm in breach of a firearms prohibition order as a show cause offence.

- 3.55 Another option is to add possession of a pistol or prohibited firearm in breach of an FPO as a category of show cause offences. Currently, any breaches of an FPO that involve the possession of a pistol or prohibited firearm in a public place would be subject to the show cause requirement.⁶² This proposal would subject offences occurring in a *private* place to the show cause requirement.
- 3.56 This could be described as a less far-reaching version of the previous proposal, as it only applies to people who are subject to FPOs. However, for the reasons expressed below, we do not support it.

Overview of FPOs

How FPOs are made

- 3.57 FPOs are not judicial orders. The Commissioner of Police may make an FPO against a person if, in their opinion, that person is not fit, in the public interest, to possess a firearm.⁶³ The Commissioner may delegate the authority to issue FPOs to any police officer of or above the rank of inspector.⁶⁴
- 3.58 When issuing an FPO, the only factor that must be satisfied is that it is not in the public interest for the person to possess a firearm.⁶⁵ The *Firearms Act* does not outline any other prerequisites for making an FPO.
- 3.59 Individuals are often served with FPOs after being charged with offences involving violence, firearms, weapons and / or drugs. Known associates of organised crime networks are also often made subject to FPOs.⁶⁶
- 3.60 An FPO takes effect when a police officer serves a copy of the order personally on the subject.⁶⁷ An FPO is not time limited and there is no periodic review requirement.⁶⁸

62. *Bail Act 2013* (NSW) s 16B(1)(d)(ii).

63. *Firearms Act 1996* (NSW) s 73(1).

64. *Firearms Act 1996* (NSW) s 81(2A).

65. *Firearms Act 1996* (NSW) s 73(1).

66. NSW Ombudsman, *Review of Police Use of Firearms Prohibition Order Search Powers: Section 74A of the Firearms Act 1996*, Final Report (2016) 43.

67. *Firearms Act 1996* (NSW) s 73(2).

3.61 A person served with an FPO has 28 days to request an internal review of the decision.⁶⁹ If the internal review is unsuccessful, an eligible person may apply to the NSW Civil and Administrative Tribunal (NCAT) for a review.⁷⁰ NCAT will only review the decision provided the subject of the order meets certain criteria.⁷¹

The effects of an FPO

3.62 A person subject to an FPO must not:

- acquire, possess or use a firearm
- acquire or possess a firearm part
- acquire or possess ammunition for any firearm
- reside at a premises at which a firearm, firearm part or ammunition for any firearm is kept or found, or
- attend certain premises (including a shooting range) without reasonable excuse.⁷²

3.63 The maximum penalties for these offences range from 5 to 14 years.⁷³

3.64 The person may be subject to police searches under the FPO search powers. When these search powers were introduced in 2013, the then Commissioner of Police described them as “extraordinary”.⁷⁴ These powers may be exercised, without a warrant, “as reasonably required” for the purposes of determining whether the person has committed an offence under s 74(1)–(3) of the *Firearms Act*.⁷⁵

68. A requirement to review an FPO after 10 years was proposed in the Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020 (NSW), however this Bill was not passed. See NSW Legislative Council, *Provisions of the Firearms and Weapons Legislation Amendment (Criminal Use) Bill 2020*, Report 57 (2021) [2.106]. The NSW Ombudsman recommended reviews occur after 5 years: NSW Ombudsman, *Review of Police Use of Firearms Prohibition Order Search Powers: Section 74A of the Firearms Act 1996*, Final Report (2016) 9.

69. *Administrative Decisions Review Act 1997* (NSW) s 53(2)(d).

70. *Firearms Act 1996* (NSW) s 75(1)(f).

71. See *Firearms Regulation 2017* (NSW) cl 5(1)–(2).

72. *Firearms Act 1996* (NSW) s 74.

73. *Firearms Act 1996* (NSW) s 74.

74. NSW Police Commissioner, A Scipione, quoted in NSW Ombudsman, *Review of Police Use of Firearms Prohibition Order Search Powers: Section 74A of the Firearms Act 1996* Final Report, (2016) iii.

75. For criticism of the exercise of these powers, see NSW Ombudsman, *Review of Police Use of Firearms Prohibition Order Search Powers: Section 74A of the Firearms Act 1996*, Final Report, (2016).

Show cause requirement should not extend to possession in breach of an FPO

- 3.65 In one sense, this proposal is less far-reaching than the proposal to extend the show cause requirement to all indictable offences involving the unlawful possession of a pistol or prohibited firearm in a private place (see above). It would only capture instances of possession by a person in breach of an FPO.
- 3.66 However, it would still be a way of removing the public / private distinction. The show cause requirement would apply if a person was in possession in breach of an FPO regardless of where this occurred (in public or in private).
- 3.67 There could be some merit in this approach. To impose an FPO, the Commissioner of Police would have already formed the opinion that the accused person is not fit, in the public interest, to possess a firearm. Breach of an FPO attracts a significant maximum penalty, indicating Parliament's assessment of the potential seriousness of the offence.⁷⁶
- 3.68 However, this more limited proposal is still problematic. Submissions raised several concerns that stem from the nature of FPOs, including that FPOs:
- are made by police, not by a judicial process, and can be based on limited and untested information⁷⁷
 - are not subject to judicial oversight and there are limited review rights,⁷⁸ and
 - can be imposed for life, unless revoked.⁷⁹
- 3.69 We recognise that a person who has a firearm in disobedience of an FPO can manifest a significant risk profile. However, in our view, the current bail framework is sufficient to address risks posed by the breach of FPOs without further amendment. This is suggested by the bail outcomes and sentences received by people charged with, as a principal offence, acquiring, possessing or using firearms, firearm parts or ammunition while subject to an FPO (*Firearms Act*, s 74(1)).
- 3.70 For the purposes of this analysis, we have considered the statistics for adults with a principal offence related to a pistol or a prohibited firearm while subject to an FPO. From 2019–2021, there were 33 adult offenders in this cohort.⁸⁰ Of these, 29 received a custodial sentence. This can be further broken down as follows:

76. *Firearms Act 1996* (NSW) s 74.

77. See, eg, Legal Aid NSW, *Submission BL01*, 3. See also Aboriginal Legal Service (NSW/ACT) Ltd, *Submission BL 14*, 3.

78. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission BL 14*, 3.

79. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission BL 14*, 3.

80. NSW Bureau of Crime Statistics and Research, *Proven Court Appearances: Firearm Related* (ac22-21766).

- 28 people, or 84.8% of all defendants in this cohort, were either refused bail or were already in custody for other offences at finalisation, and all these people received a custodial sentence, and
 - five people were on bail (or had bail dispensed with) at finalisation, four of which received a non-custodial sentence, while one received a short custodial sentence with a non-parole period of 9 months.⁸¹
- 3.71 There were only five adult Aboriginal offenders in this cohort. Of these people, four received a custodial sentence, with an average non-parole period of 6.25 months. All four of those offenders were in custody at finalisation. The offender on bail at finalisation received a non-custodial sentence.⁸²
- 3.72 It is difficult to estimate the impact of including all offences involving the possession of a pistol or prohibited firearm in breach of an FPO as show cause offences. While the statistics distinguish between pistols, prohibited firearms and other firearms, they do not distinguish between acquiring, possessing or using, all of which are covered by s 74(1) of the *Firearms Act*.
- 3.73 However, the statistics show that most offenders who had this offence as their principal offence were bail refused (or in custody for another offence) at finalisation. Importantly, they also show that the small number of offenders who were granted bail generally received non-custodial sentences. This indicates the current regime is appropriately dealing with the risks posed by breach of an FPO, without the need for an expansion of the show cause regime.

81. NSW Bureau of Crime Statistics and Research, *LRC Additional LPC: Firearms and Crim Assoc* (ac22-21919).

82. NSW Bureau of Crime Statistics and Research, *LRC Additional LPC: Firearms and Crim Assoc* (ac22-21919).

4. Show cause and criminal associations offences

In Brief

Further criminal associations offences should not be added to the categories of “show cause” offences under the *Bail Act 2013* (NSW). Serious offences that may relate to criminal associations are already subject to the show cause requirement, and the risks associated with other offences can be addressed through the unacceptable risk test. The proposal risks capturing conduct that is not sufficiently serious, including offenders who may not receive a custodial sentence. The proposal may disproportionately affect Aboriginal people and add time, and complexity, to bail applications.

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The proposal could affect people who might not receive a custodial sentence	38
The proposal could increase the time and complexity of bail applications	39

- 4.1 In this chapter, we recommend against expanding the categories of show cause offences in the *Bail Act 2013* (NSW) (*Bail Act*) to capture further offences relating to criminal associations.

The scope of the current show cause requirement

- 4.2 We have been asked to consider if further “offences relating to criminal associations” should be treated as “show cause” offences. The NSW Police Force (NSWPF) proposed 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.¹

1. NSW Police Force, *Submission BL11*, 4.

- 4.3 Some submissions emphasised that many serious offences related to criminal associations, including those committed in the context of organised criminal activity, are already subject to the show cause requirement. The Aboriginal Legal Service (ALS) observed this includes serious weapon or drug-related offences.² The Bar Association also noted there “are already numerous offences captured by section 16B that would capture offences relating to criminal associations, such as serious terrorism offences”.³
- 4.4 In addition, the NSW Council for Civil Liberties referred us to s 16B(1)(k). This covers the serious indictable offences of “assisting, aiding, abetting, counselling, procuring, soliciting, being an accessory to, encouraging, inciting or conspiring to commit” another show cause offence.⁴ In the Council’s view, this should already cover “the most serious offending ... connected with criminal associations”.⁵
- 4.5 However, as the NSWPF observed, the show cause requirement does not apply “to all of the offences which give rise to the existence of criminal associations”.⁶ For example, the show cause list does not include the offences of:
- participating in a criminal group⁷
 - habitually consorting with convicted offenders,⁸ and
 - associating between members of declared criminal organisations which are subject to interim control orders or control orders.⁹
- 4.6 Other examples include the offences relating to criminal associations and organisations in part 9.9 of the Commonwealth Criminal Code.

The show cause list should not be expanded

Recommendation 4.1: Expanding show cause to further criminal associations offences

The list of show cause offences in section 16B of the *Bail Act 2013* (NSW) should not be expanded to include further offences relating to criminal associations.

-
2. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission BL14*, 4; See, eg, *Bail Act 2013* (NSW) s 16B(1)(d)–(h).
 3. NSW Bar Association, *Submission BL15* [32].
 4. *Bail Act 2013* (NSW) s 16B(1)(k).
 5. NSW Council for Civil Liberties, *Submission BL03*, 6.
 6. NSW Police Force, *Submission BL11*, 4.
 7. *Crimes Act 1900* (NSW) s 93T.
 8. *Crimes Act 1900* (NSW) s 93X.
 9. *Crimes (Criminal Organisations Control) Act 2012* (NSW) s 26.

- 4.7 We have not been provided with any evidence that would justify adding further offences relating to criminal associations to the list of show causes offences. While, for confidentiality reasons, we are unable to discuss the contents of the cases considered by the Bail Act Monitoring Group, we could not identify anything in those cases which demonstrates any need for this change.
- 4.8 Our recommendation also reflects strong opposition in consultations and submissions to this proposal. The key reasons for opposing the proposal are reviewed below.

The current bail framework is sufficient to address risk

- 4.9 The NSWPF submitted that a person's criminal associations pose inherent risks, which are "often exacerbated by access to unexplained wealth and proceeds of crime which is derived from links to organised crime".¹⁰
- 4.10 However, other organisations and individuals consulted during our review considered that the existing *Bail Act* framework can address these risks adequately.¹¹ In particular, the *Bail Act* already directs bail authorities to consider "whether the accused person has any criminal associations" when assessing any bail concerns, which include the safety of the community.¹² Issues about criminal associations can also be addressed through the requirement to consider the seriousness of the offence as part of the unacceptable risk test.¹³
- 4.11 The Public Defenders submitted that risks can be addressed by providing the court with sufficient information about the alleged association and its criminality, along with details of the risk posed and the management of that risk.¹⁴ This will protect relevant risk concerns in individual cases without "changing the legislation with all the potential overreach this entails".¹⁵ We were referred to the decision in *R v Ebrahimi*, in which Beech-Jones J observed "[a]ssertions of criminal associations ... often generate much heat in these applications, but little light".¹⁶

Show cause should not apply to insufficiently serious offences and conduct

- 4.12 Some conduct covered by serious indictable offences which may be indicative of criminal associations would not be serious enough to justify the application of the show cause requirement. For example, offences that relate to criminal associations include

10. NSW Police Force, *Submission BL11*, 4.

11. See, eg, Law Society of NSW, *Submission BL02*, 3; NSW, Public Defenders, *Submission BL04*, 3.

12. *Bail Act 2013* (NSW) s 18(1)(g), s 17(2)(c).

13. See, eg, *Bail Act 2013* (NSW) s 18(1)(b); Law Society of NSW, *Submission BL02*, 3; Illawarra Legal Centre Inc, *Submission BL10*, 14.

14. NSW, Public Defenders, *Submission BL04*, 3.

15. NSW, Public Defenders, *Submission BL04*, 3.

16. *R v Ebrahimi* [2015] NSWSC 335 [43]. See also NSW, Public Defenders, *Submission BL04*, 3.

the offence of participating in a criminal group.¹⁷ This may cover a broad spectrum of criminality, including conduct which is of relatively low objective seriousness (such as, for example, participating in a shoplifting gang).

- 4.13 We agree that the unacceptable risk test provides an adequate mechanism for addressing the varying levels of risk arising from such offences. As the ALS submitted, the “relative seriousness and breadth of criminality covered by offences relating to criminal associations ... is most appropriately accounted for by current bail law”.¹⁸

The proposal could affect Aboriginal people and vulnerable groups

- 4.14 We also are concerned about the effect any extension of the show cause provisions relating to criminal associations offences will have on Aboriginal people. Legal Aid observed that “many young Aboriginal people come from families with a history of crime, and who live with other families that have a similar background”.¹⁹ ALS similarly expressed concern “that such an expansion would impact disproportionately on Aboriginal people”.²⁰
- 4.15 We heard cautionary tales based on experiences with the consorting offence.²¹ The expansion of the show cause requirement to capture this offence, in particular, was strongly opposed.²² Although consorting was intended to capture organised crime groups, the NSW Ombudsman found it disproportionately affected Aboriginal people and young people.²³

The proposal could affect people who might not receive a custodial sentence

- 4.16 The lack of specificity around the proposal makes it impossible to estimate the impact that it would have on the remand population. For instance, would it cover anyone charged with an offence that is typically linked to organised crime? Or would it cover only those people charged with the offence, who have criminal associations?
- 4.17 However, we considered a sample of two offences that the proposals could cover: money laundering²⁴ and dealing with property that is suspected to be the proceeds of

17. *Crimes Act 1900* (NSW) s 93T.

18. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission BL14*, 4.

19. Legal Aid NSW, *Submission BL01*, 4.

20. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission BL14*, 4.

21. *Crimes Act 1900* (NSW) s 93X.

22. See, eg, Law Society of NSW, *Submission BL02*, 2; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission BL14*, 4.

23. Law Society of NSW, *Submission BL02*, 2, citing NSW Ombudsman, *The Consorting Law: Report on the Operation of Part 3A, Division 7 of the Crimes Act 1900* (2016) [8.1.5].

24. *Crimes Act 1900* (NSW) s 193B. This relates to the following Lawpart codes: 58338, 58339, former 58340, 92057, 92058. See <<https://lawcodes.judcom.nsw.gov.au/>>.

crime.²⁵ In 2019–2021, 706 people had a principal offence relating to one of these offences. Of these:

- 558 were on bail at finalisation (79%)
- 153 received a custodial sentence (21.7%), and
- 553 received a non-custodial penalty (78.3%).²⁶

4.18 Of the people on bail at finalisation, 93.2% received a non-custodial sentence.²⁷

4.19 It is unknown how many of these people could be considered to have had criminal associations, particularly associations with organised crime. However, the statistics at least raise the possibility that subjecting these offences to the show cause requirement would lead to an increase in bail refusals and, if they cannot show cause, the incarceration on remand of people who might not otherwise receive a custodial sentence.

The proposal could increase the time and complexity of bail applications

4.20 Another factor weighing against this proposal is its potential to lead to longer and more complex bail applications.²⁸ Where the criminal association is not an element of the offence (for instance, “charges relating to kidnappings relating to organised crime”),²⁹ there would need to be evidence of the alleged criminal association to determine whether the show cause requirement applied. This would place further burdens on courts and parties, in circumstances where courts are already managing a large volume of bail applications.

25. *Crimes Act 1900* (NSW), s 193C. This relates to the following Lawpart codes: 87967, former 58341, 87968. See <<https://lawcodes.judcom.nsw.gov.au/>>.

26. NSW Bureau of Crime Statistics and Research, *Proven Court Appearances: Proceeds of Crime* (ac22-21767).

27. NSW Bureau of Crime Statistics and Research, *Proven Court Appearances: Proceeds of Crime* (ac22-21767).

28. NSW Council for Civil Liberties, *Submission BL03*, 4.

29. NSW Police Force, *Submission BL11*, 4.

5. The meaning of “criminal associations”

In Brief

Further legislative guidance on the meaning of “criminal associations” under the *Bail Act 2013* (NSW) is unnecessary and may have unintended consequences.

The Act does not define “criminal associations” 41

Further legislative guidance should not be provided 42

- 5.1 We recommend against amending the *Bail Act 2013* (NSW) (*Bail Act*) to provide further legislative guidance on the meaning of “criminal associations”.

The Act does not define “criminal associations”

- 5.2 As outlined in chapter 2, bail authorities must assess any bail concerns before making a bail decision. A bail concern is a concern that an accused person will, if released:

- fail to appear at any proceedings for the offence
- commit a serious offence
- endanger the safety of victims, individuals or the community, or
- interfere with witnesses or evidence.¹

- 5.3 One of the matters bail authorities must consider in assessing bail concerns is “whether the accused person has any criminal associations” (s 18(1)(g) of the *Bail Act*). The *Bail Act* does not define the expression “criminal associations”.

- 5.4 This factor was introduced to target associations with organised crime. In the first report from his review of the *Bail Act*, John Hatzistergos concluded:

Given the direct impact that an applicant’s links to organised crime networks can have on their level of risk, there is value in making criminal associations an explicit factor ...²

- 5.5 Similarly, the then Attorney General explained when s 18(1)(g) was introduced:

1. *Bail Act 2013* (NSW) s 17(2).
2. J Hatzistergos, *Review of the Bail Act 2013*, Report (NSW Department of Justice, 2014) [156].

New factors added to section 18 include a requirement to consider whether the accused has any criminal associations. An applicant's links to organised crime networks can have a direct impact on his or her level of risk. For example, it may give a person access to the means to flee the jurisdiction or the means to continue criminal activity.³

5.6 Published bail decisions suggest s 18(1)(g) is often considered in the context of associations with organised crime groups, primarily outlaw motorcycle gangs and other networks.⁴ Notably, the Court of Criminal Appeal found in *Mariam v Director of Public Prosecutions (NSW) (Mariam)* that “[t]he apparent association ... by the applicant with persons considered by police to be involved in organised criminal activity enhances” the bail concern of committing a serious offence.⁵

5.7 Expanding on the decision of the Court of Criminal Appeal in *Mariam*,⁶ the NSW Police Force (NSWPF) proposed that the following definition be included in the *Bail Act*:

Criminal association means an apparent connection between the applicant and another person or persons who are likely to be involved in organised criminal activity.⁷

5.8 The phrase “criminal associations” is capable of a wider meaning. In other published cases, prosecutors have alleged the accused person to have criminal associations where they associate with people engaged in criminal activity unconnected to organised crime networks. For example, in one case associates of the accused person had been “arrested for drug supply and firearms offences” in another state.⁸

Further legislative guidance should not be provided

Recommendation 5.1: Legislative guidance on “criminal associations”

The *Bail Act 2013* (NSW) should not be amended to include further legislative guidance on the meaning of “criminal associations”.

5.9 We are not persuaded that the *Bail Act* should include further guidance on the meaning of “criminal associations”.

3. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 13 August 2014, 30505.
4. See, eg, *R v Schaaf* [2022] NSWDC 116 [30]; *R v Alahmad* [2019] NSWSC 412 [34]; *Tsintzas v DPP (NSW)* [2017] NSWCCA 172 [36], [48]; *R v Russell* [2018] NSWSC 1496 [5]; *Lin v DPP (Cth)* [2017] NSWSC 312 [54].
5. *Mariam v DPP (NSW)* [2015] NSWCCA 216 [34]–[36].
6. *Mariam v DPP (NSW)* [2015] NSWCCA 216 [36].
7. NSW Police Force, *Submission BL11*, 4.
8. *R v Unasa* [2017] NSWDC 291 [46].

- 5.10 In saying this, we recognise that a legislative definition may have certain benefits. In particular, the NSWPF argued that a definition “would help to ensure that the Act is applied predictably and efficiently, particularly in busy Local Courts”.⁹
- 5.11 It could also help ensure the law only covers genuine criminal associations.¹⁰ For instance, Corrective Services NSW recognised that one potential benefit of a specific definition is that it could avoid capturing people who, by virtue of their family or community, associate with people with criminal histories or people who have been involved with the criminal justice system.¹¹
- 5.12 There was also some support for giving specific statutory expression to what appears to have been Parliament’s intention in enacting s 18(1)(g), that is, to target links with organised crime. For instance, the Law Society proposed the term could be amended to read “whether the accused person has any associations with organised crime”.¹² This could assist to ensure s 18(1)(g) is not interpreted more widely than was originally intended.
- 5.13 We acknowledge some merit to these arguments. If anything, the present concept of criminal associations may be too broad. However, there is no need for a definition, unless narrowing the scope to an association with organised crime is necessary to avoid consequences unintended by Parliament. Moreover, there is no particular reason why a criminal association other than with organised crime should not be relevant.
- 5.14 However, consultations did not reveal any widespread problem with the interpretation of s 18(1)(g). Instead, the common view was that courts typically interpret the term to mean a person’s association with organised crime, as was intended by Parliament.¹³
- 5.15 Most submissions did not support further legislative guidance. Some observed that interpretation should be left to the discretion of sufficiently skilled and experienced judicial officers.¹⁴ Another view was that further guidance is unnecessary, as there is no practical difficulty or tension with applying s 18(1)(g).¹⁵
- 5.16 The Bar Association and the NSW Council for Civil Liberties both opposed the introduction of a definition. If any definition was introduced, they insisted it should

9. NSW Police Force, *Submission BL11*, 3.

10. NSW Police Force, *Submission BL11*, 4.

11. Corrective Services NSW, *Submission BL13*, 7.

12. Law Society of NSW, *Submission BL02*, 2.

13. See, eg, Aboriginal Legal Service (NSW/ACT) Ltd, *Submission BL14*, 4.

14. Legal Aid NSW, *Submission BL01*, 3; NSW Council for Civil Liberties, *Submission BL03*, 7; NSW Bar Association, *Submission BL15* [27]; Corrective Services NSW, *Submission BL13*, 6.

15. NSW Bar Association, *Submission BL15* [26]; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission BL14*, 4; Commonwealth Director of Public Prosecutions, *Submission BL07*, 2.

contain safeguards to specify that simply associating with someone who has a criminal history is not sufficient to establish a person has criminal associations.¹⁶

- 5.17 Furthermore, significant concerns were expressed that defining the term may itself have unintended consequences. For instance, care must be taken to avoid a disproportionate impact on Aboriginal people, young people or people with disability who may be required to associate with people with criminal histories due to their family, living or caring arrangements.¹⁷
- 5.18 Conversely, there is always the potential for a statutory definition to narrow the expression, and unduly constrain judicial discretion. The NSWPF recognised it would be “undesirable to be overly prescriptive in the definition” as “the ways in which a person may be criminally associated are many and varied”.¹⁸ A definition that went beyond that provided in *Mariam* would at least arguably do that.
- 5.19 In our view, there is insufficient reason for further legislative guidance on “criminal associations”. In *Mariam*, the Court of Criminal Appeal provided a reasonable and workable statement of the law. It does not need the force of statute. Courts are capable of exercising their discretion to determine whether, on the materials before them, a person’s criminal associations indicate an unacceptable risk.

16. NSW Council for Civil Liberties, *Submission BL03*, 6–7; NSW Bar Association, *Submission BL15* [28], [30].

17. NSW Bar Association, *Submission BL15* [28]–[31]; Youth Justice NSW, *Submission BL08*; Illawarra Legal Centre Inc, *Submission BL10*, 3.

18. NSW Police Force, *Submission BL11*, 3.

6. Other issues raised in this review

In Brief

Firearm prohibition orders and serious crime prevention orders should not be added to the list of orders in s 18(1)(f) of the *Bail Act 2013* (NSW), as these changes are unnecessary. The government may wish to consider referring s 22B of the *Bail Act 2013* (NSW) for review.

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- 6.1 This chapter considers two other matters raised with us during this review:
- whether firearms prohibition orders (FPOs) and serious crime prevention orders (SCPOs) should be added to the list of orders in s 18(1)(f) of the *Bail Act 2013* (NSW) (*Bail Act*), and
 - concerns regarding the recently enacted s 22B of the *Bail Act*.¹

FPOs and SCPOs should not be added to s 18(1)(f)

Recommendation 6.1: Adding other orders to section 18(1)(f) of the *Bail Act 2013* (NSW)

Firearm prohibition orders and serious crime prevention orders should not be added to the list of orders in section 18(1)(f) of the *Bail Act 2013* (NSW).

- 6.2 During this review, we received proposals to add FPOs and SCPOs to s 18(1)(f) of the *Bail Act*. Section 18 of the *Bail Act* sets out the matters a bail authority is to consider in assessing bail concerns. One of the s 18 matters is:
- (f) whether the accused person has a history of compliance or non-compliance with any of the following—
 - (i) bail acknowledgments,

1. *Bail Act 2013* (NSW) s 22B, inserted by *Bail Amendment Act 2022* (NSW) sch 1 [1].

- (ii) bail conditions,
- (iii) apprehended violence orders,
- (iv) parole orders,
- (v) home detention orders, good behaviour bonds or community service orders,
- (vi) intensive correction orders,
- (vii) community correction orders,
- (viii) conditional release orders,
- (ix) non-association and place restriction orders,
- (x) supervision orders

6.3 There could be some sense in adding compliance or non-compliance with an FPO or SCPO to the list of relevant considerations in s 18(1)(f). However, we do not consider the changes to be necessary.

The nature of FPOs and SCPOs

6.4 As explained in chapter 3, FPOs are administrative orders made by the Commissioner of Police. The Commissioner may make an FPO against a person if they consider that person is not fit, in the public interest, to possess a firearm.² (See chapter 3 for further detail on FPOs).

6.5 In contrast, an SCPO is a judicial order made by the District or the Supreme Court following a hearing, on application of the Commissioner of Police, Director of Public Prosecutions or the NSW Crime Commission.³ Before an SCPO is made the court must be satisfied that the person has been:

- convicted of a serious criminal offence, or
- 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).⁴

6.6 The court must also be satisfied that there are reasonable grounds to believe an order would protect the public by preventing, restricting or disrupting involvement by the

2. *Firearms Act 1996* (NSW) s 73(1).

3. *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW) s 5(1), s 3(1) definition of “appropriate court”, definition of “eligible applicant”.

4. *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW) s 5(1)(b).

person in serious crime related activities.⁵ The court must find that there is a real or significant risk, not just a possibility, that a person will be involved in serious crime related activity in the future.⁶

- 6.7 An SCPO may contain such prohibitions, restrictions, requirements and other provisions as the court considers appropriate for the purpose of protecting the public by preventing, restricting or disrupting involvement by the person in serious crime related activities.⁷ These conditions can include restrictions on a person's financial, property or business dealings or holdings, employment, methods of communication, travel, access to premises, and use of certain items.⁸
- 6.8 SCPOs are effective for the period specified in the order, up to a maximum of five years.⁹
- 6.9 A person against whom the order is made has 28 days to apply to the Court of Appeal for a review.¹⁰ Applications for variation or revocation may be made by the person against whom the order was made with leave.¹¹
- 6.10 A natural person who breaches an SCPO faces a maximum penalty of 300 penalty units and / or five years' imprisonment. For a corporation, the maximum penalty is 1,500 penalty units.¹² An eligible applicant may also seek an order requiring the winding up of a corporation that has breached an SCPO.¹³
- 6.11 While SCPOs differ from FPOs, they still have been controversial. The Bar Association has described them as "extraordinary and unprecedented ... with grave implications for the rule of law and individual freedoms".¹⁴ It has submitted that SCPOs set up a rival criminal trial system, where a person's freedoms can be restricted even when they are not found guilty of an offence but the state continues to believe they pose a threat to public safety.¹⁵ The Law Society similarly criticised the Act introducing the SCPO regime

5. *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW) s 5(1)(c).

6. *Vella v Commissioner of Police (NSW)* [2019] HCA 38; 269 CLR 219 [43].

7. *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW) s 6(1).

8. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 22 March 2016, 75.

9. *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW) s 7.

10. *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW) s 11.

11. *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW) s 12(2).

12. *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW) s 8.

13. *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW) s 9.

14. NSW Bar Association, Submission, *Crimes (Serious Crime Prevention Orders) Bill 2016* (13 April 2016) 1.

15. NSW Bar Association, Submission, *Crimes (Serious Crime Prevention Orders) Bill 2016* (13 April 2016) 2.

for eroding “longstanding rights including the presumption of innocence, the right to a fair trial, and the right to be protected against double punishment”.¹⁶

It is unnecessary to add FPOs and SCPOs to s 18(1)(f)

- 6.12 The majority of those we consulted did not believe any amendment was necessary. It was considered that s 18 is sufficiently broad to allow bail authorities to consider whether a person is subject to an FPO or SCPO and the circumstances of any breaches that may occur. Non-compliance with an FPO or SCPO can be considered when assessing:
- the accused person’s background and criminal history, and
 - the nature and seriousness of the offence.¹⁷
- 6.13 There is a view that FPOs and SCPOs should be included in s 18(1)(f) because of the inherent risks that are associated with firearms offences and criminal associations.¹⁸ Offering modest support to the proposal, the Bar Association considered it to be a more appropriate way of addressing concerns about firearms and organised crime than expanding the show cause requirement.¹⁹
- 6.14 However, concerns were expressed about the potential inclusion of FPOs on this list. For instance, the Aboriginal Legal Service pointed out that FPOs are not of the same nature as the other orders listed, are often made based on untested police intelligence, have limited review rights and are not time limited.²⁰ To reiterate, FPOs are non-judicial orders.
- 6.15 There was less concern about adding SCPOs. A common view was that SCPOs fit better within the genus of order already contained in s 18(1)(f). This was largely due to the nature of SCPOs as judicial orders. This means the bail authority can access the reasons for the imposition of an SCPO and the circumstances in which it was made. SCPOs are also time limited and can only be imposed for a maximum of five years.²¹
- 6.16 Overall, neither proposal received resounding support in consultations or submissions. There was no indication that the present omission of FPOs and SCPOs from s 18(1)(f) was causing any practical problems. In the absence of any demonstrable need for the change, we conclude that it should not be made.

16. Law Society of NSW, Submission, *Statutory Review of the Crimes (Serious Crime Prevention Orders) Act 2016* (19 May 2020) 1.

17. *Bail Act 2013* (NSW) s 18(1)(a)–(b). See, eg, Aboriginal Legal Service (NSW/ACT) Ltd, *Submission BL14*, 4; Legal Aid NSW, *Submission BL01*, 3.

18. NSW Police Force, *Submission BL11*, 5.

19. NSW Bar Association, *Submission BL15* [22]–[23], [37].

20. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission BL14*, 3.

21. *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW) s 7(2).

Concerns with section 22B of the *Bail Act*

6.17 In the course of the review, concerns were expressed about the effect of s 22B of the *Bail Act*, which came into effect on 27 June 2022.²² As numerous comments about s 22B have been received, the Attorney General may wish to consider referring the matter to the Commission for review.

Overview of s 22B

6.18 Section 22B provides that any person who has been found guilty or has pleaded guilty to an offence for which they will receive a full-time custodial sentence must not be granted bail unless they can satisfy the court there are special or exceptional circumstances to justify their freedom while they await sentencing.²³

6.19 Section 22B was part of a package of reforms introduced in response to three bail matters that the NSW Government described as being “out of step with community expectations”.²⁴

6.20 The special or exceptional circumstances test poses a “high bar” which overrides other sections of the Act. Special or exceptional circumstances could include that the person is “required to make arrangements before commencing their prison sentence to avoid hardship on third parties, such as a person for whom they are a carer”.²⁵ However, even if this high bar is met, the bail authority is still required to apply the unacceptable risk test in determining whether bail should be granted.²⁶ The addition of s 22B makes getting bail in these circumstances extremely difficult.

Concerns with s 22B

6.21 Although outside the terms of reference, concerns were expressed about the effect of s 22B by a wide range of people consulted.²⁷

6.22 Issues raised included that s 22B will:

- increase the remand population
- contribute to the overrepresentation of Aboriginal people in custody
- increase pressure on the criminal justice system, and

22. *Bail Act 2013* (NSW) s 22B, inserted by *Bail Amendment Act 2022* (NSW) sch1 [1].

23. *Bail Act 2013* (NSW) s 22B(1).

24. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 21 June 2022, 30.

25. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 21 June 2022, 31.

26. *Bail Act 2013* (NSW) s 22B(3); NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 21 June 2022, 31.

27. See, eg, Aboriginal Legal Service (NSW/ACT) Ltd, *Submission BL 14*, 2–3.

- detract from other important initiatives by discouraging guilty pleas. These initiatives include the early appropriate guilty plea scheme and the District Court’s Walama List sentencing procedure for eligible Aboriginal and Torres Strait Islander people.²⁸
- 6.23 We also note concerns that holding a person on remand while they await sentencing significantly reduces their ability to access diversionary, treatment and rehabilitation programs.²⁹ Another problem is how a court on a detention application determines that the offender “will be sentenced to imprisonment to be served by full-time detention”.³⁰
- 6.24 We have not investigated whether these concerns are justified. However, they have been expressed by a broad range of persons involved in the administration of the criminal justice system. This suggests it may be desirable to review and report on the operation of s 22B, particularly in respect of its impact on the early appropriate guilty plea provisions and restorative justice initiatives such as the Drug Court and Walama List.

28. Introduced by *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017* (NSW); District Court of NSW, *Criminal Practice Note 26: Walama List Sentencing Procedure* (22 November 2021).

29. See, eg, Aboriginal Legal Service (NSW/ACT) Ltd, “Aboriginal Legal Service Blindsided by Rushed Bail Amendments that Will Risk Widening the Gap” (Media Release, 22 June 2022); Law Society of NSW, “Bail Amendment: Rushed Reform Can Be Flawed Reform” (Media Release, 26 June 2022).

30. *Bail Act 2013* (NSW) s 22B(1). See, eg, *DPP (NSW) v Day* [2022] NSWCCA 173; *DPP (NSW) v van Gestal* [2022] NSWCCA 171 [16]–[17], [38]–[49].

Appendix A

List of recommendations

3. Show cause and firearms offences

Recommendation 3.1: Expanding show cause to include further firearms offences

The list of show cause offences in section 16B of the *Bail Act 2013* (NSW) should not be expanded to include further firearms offences.

Recommendation 3.2: Unlawful private possession of a pistol or prohibited firearm

Section 16B(1)(d)(ii) of the *Bail Act 2013* (NSW) should not be amended to include the unlawful possession of a pistol or prohibited firearm in a private place as a show cause offence.

Recommendation 3.3: Possession in breach of a firearms prohibition order

Section 16B of the *Bail Act 2013* (NSW) should not be amended to include the possession of a pistol or prohibited firearm in breach of a firearms prohibition order as a show cause offence.

4. Show cause and criminal association offences

Recommendation 4.1: Expanding show cause to further criminal association offences

The list of show cause offences in section 16B of the *Bail Act 2013* (NSW) should not be expanded to include further offences relating to criminal associations.

5. Show cause and criminal association offences

Recommendation 5.1: Legislative guidance on “criminal associations”

The *Bail Act 2013* (NSW) should not be amended to include further legislative guidance on the meaning of “criminal associations”.

6. Other issues raised in this review

Recommendation 6.1: Adding other orders to section 18(1)(f) of the *Bail Act 2013* (NSW)

Firearm prohibition orders and serious crime prevention orders should not be added to the list of orders in section 18(1)(f) of the *Bail Act 2013* (NSW).

Appendix B

Submissions

- BL01** Legal Aid NSW, 23 September 2022
- BL02** Law Society of NSW, 23 September 2022
- BL03** New South Wales Council for Civil Liberties, 23 September 2022
- BL04** NSW, Public Defenders, 23 September 2022
- BL05** Local Court of NSW, 23 September 2022
- BL06** Confidential, 23 September 2022
- BL07** Commonwealth Director of Public Prosecutions, 26 September 2022
- BL08** Youth Justice NSW, 26 September 2022
- BL09** Confidential, 26 September 2022
- BL10** Illawarra Legal Centre Inc, 28 September 2022
- BL11** NSW Police Force, 28 September 2022
- BL12** Australian Lawyers Alliance, 28 September 2022
- BL13** Corrective Services NSW, 28 September 2022
- BL14** Aboriginal Legal Service (NSW/ACT) Ltd, 29 September 2022
- BL15** NSW Bar Association, 30 September 2022

Appendix C

Consultations

Office of the Director of Public Prosecutions (BLC01)

8 September 2022

Sally Dowling SC, Director of Public Prosecutions

James Dorney, Principal Legal Officer

NSW Police Force (BLC02)

8 September 2022

Assistant Commissioner Scott Whyte

A/Superintendent Allan Treadwell

Sergeant Vanessa Robichaux

NSW Bar Association (BLC03)

14 September 2022

Gabrielle Bashir SC, President

Helen Roberts SC, Co-Chair of Criminal Law Committee

Harriet Ketley, Director, Policy and Law Reform

Corrective Services NSW (BLC04)

14 September 2022

Commissioner Kevin Corcoran PSM

Deputy Commissioner Luke Grant

A/Assistant Commissioner Bernhard Ripperger

Commonwealth Director of Public Prosecutions (BLC05)

16 September 2022

Scott Bruckard, A/Director

Eliza Amparo, Assistant Director

Law Society of NSW (BLC06)

19 September 2022

Jane Sanders, Chair of Criminal Law Committee

Michal Mantaj, Deputy Chair of Criminal Law Committee

Legal Aid NSW (BLC07)

20 September 2022

Rob Hoyles, Director, Criminal Law

Melissa Burgess, Deputy Director, Criminal Law

Nicholas Ashby, Solicitor Advocate

Ivan Vizintin, Solicitor

Tijana Jovanovic, A/Manager, Strategic Law Reform Unit

Aboriginal Legal Service (NSW/ACT) Ltd (BLC08)

20 September 2022

Keisha Hopgood, A/Principal Solicitor

Shaun Mortimer, Deputy Principal Solicitor

The Hon Justice Robert Beech-Jones, Chief Judge at Common Law (BLC09)

20 September 2022

The Hon Justice Robert Beech-Jones, Chief Judge at Common Law

Public Defenders (BLC10)

21 September 2022

Belinda Rigg SC, Senior Public Defender

Local Court of NSW (BLC11)

21 September 2022

Judge Peter Johnstone, Chief Magistrate

Deputy Chief Magistrate Sharon Freund

Deputy Chief Magistrate Theo Tsavdaridis

Jonathen Rose, Policy Officer

District Court of NSW (BLC12)

26 September 2022

The Hon Justice Derek Price AO, Chief Judge

Judge Jane Culver

Judge Sarah Huggett

Aboriginal Affairs NSW (BLC13)

27 September 2022

Shane Hamilton, Deputy Secretary

Lisa Madden, Director of Healing and Government Relations

Wesley Green, A/Principal Policy Officer

Ananya Nandakumar, Senior Policy Officer

Children's Court of NSW (BLC14)

28 September 2022

Judge Ellen Skinner, President

Kate Bromley, A/Executive Officer and Senior Children's Registrar

Tatiana Neumann-Murphy, Associate

Appendix D

Bail Act 2013 (NSW) extracts

16A Accused person to show cause for certain serious offences

- (1) A bail authority making a bail decision for a show cause offence must refuse bail unless the accused person shows cause why his or her detention is not justified.
- (2) If the accused person does show cause why his or her detention is not justified, the bail authority must make a bail decision in accordance with Division 2 (Unacceptable risk test—all offences).
- (3) This section does not apply if the accused person was under the age of 18 years at the time of the offence.

16B Offences to which the show cause requirement applies

- (1) For the purposes of this Act, each of the following offences is a ***show cause offence***—
 - (a) an offence that is punishable by imprisonment for life,
 - (b) a serious indictable offence that involves —
 - (i) sexual intercourse with a person under the age of 16 years by a person who is of or above the age of 18 years, or
 - (ii) the infliction of actual bodily harm with intent to have sexual intercourse with a person under the age of 16 years by a person who is of or above the age of 18 years,
 - (c) a serious personal violence offence, or an offence involving wounding or the infliction of grievous bodily harm, if the accused person has previously been convicted of a serious personal violence offence,
 - (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,
 - (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,
 - (f) an offence under the *Drug Misuse and Trafficking Act 1985* that involves the cultivation, supply, possession, manufacture or production of a commercial quantity of a prohibited drug or prohibited plant within the meaning of that Act,
 - (g) an offence under Part 9.1 of the Commonwealth Criminal Code that involves the possession, trafficking, cultivation, sale, manufacture, importation, exportation or supply of a commercial quantity of a serious drug within the meaning of that Code,
 - (h) a serious indictable offence that is committed by an accused person—
 - (i) while on bail (whether granted under this Act or a law of another jurisdiction), or
 - (ii) while on parole (whether granted under a law of this State or another jurisdiction),
 - (i) an indictable offence, or an offence of failing to comply with a supervision order, committed by an accused person while subject to a supervision order,
 - (j) a serious indictable offence of attempting to commit an offence mentioned elsewhere in this section,
 - (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,
 - (l) a serious indictable offence that is committed by an accused person while the person is the subject of a warrant authorising the arrest of the person issued under—
 - (i) this Act, or
 - (ii) Part 7 of the Crimes (Administration of Sentences) Act 1999, or
 - (iii) the Criminal Procedure Act 1986, or
 - (iv) the Crimes (Sentencing Procedure) Act 1999.
- (2) In this section, a reference to the facts or circumstances of an offence includes a reference to the alleged facts or circumstances of an offence.

(3) In this section—

firearm, firearm part, prohibited firearm and **pistol**, and **use, acquire, supply** or **possession** of a firearm or firearm part, have the same meanings as in the *Firearms Act 1996*.

prohibited weapon and **military-style weapon**, and **use, buy, sell, manufacture** or **possession** of a prohibited weapon, have the same meanings as in the *Weapons Prohibition Act 1998*.

serious indictable offence has the same meaning as in the *Crimes Act 1900*.

serious personal violence offence means—

- (a) an offence under Part 3 of the *Crimes Act 1900* that is punishable by imprisonment for a term of 14 years or more, or
- (b) an offence under a law of the Commonwealth, another State or Territory or any other jurisdiction that is similar to an offence under that Part.

17 Assessment of bail concerns

- (1) A bail authority must, before making a bail decision, assess any bail concerns.
- (2) For the purposes of this Act, a **bail concern** is a concern that an accused person, if released from custody, will—
 - (a) fail to appear at any proceedings for the offence, or
 - (b) commit a serious offence, or
 - (c) endanger the safety of victims, individuals or the community, or
 - (d) interfere with witnesses or evidence.
- (3) If the accused person is not in custody, the assessment is to be made as if the person were in custody and could be released as a result of the bail decision.
- (4) This section does not apply if the bail authority refuses bail under Division 1A (Show cause requirement).

18 Matters to be considered as part of assessment

- (1) A bail authority is to consider the following matters, and only the following matters, in an assessment of bail concerns under this Division—
 - (a) the accused person's background, including criminal history, circumstances and community ties,
 - (b) the nature and seriousness of the offence,
 - (c) the strength of the prosecution case,
 - (d) whether the accused person has a history of violence,
 - (e) whether the accused person has previously committed a serious offence while on bail (whether granted under this Act or a law of another jurisdiction),

- (f) whether the accused person has a history of compliance or non-compliance with any of the following—
 - (i) bail acknowledgments,
 - (ii) bail conditions,
 - (iii) apprehended violence orders,
 - (iv) parole orders,
 - (v) home detention orders, good behaviour bonds or community service orders,
 - (vi) intensive correction orders,
 - (vii) community correction orders,
 - (viii) conditional release orders,
 - (ix) non-association and place restriction orders,
 - (x) supervision orders,
- (f1) if the bail authority is making the assessment of bail concerns because the accused person has failed or was about to fail to comply with a bail acknowledgment or a bail condition, any warnings issued to the accused person by police officers or bail authorities regarding non-compliance with bail acknowledgments or bail conditions,
- (g) whether the accused person has any criminal associations,
- (h) the length of time the accused person is likely to spend in custody if bail is refused,
- (i) the likelihood of a custodial sentence being imposed if the accused person is convicted of the offence,
- (i1) if the accused person has been convicted of the offence, but not yet sentenced, the likelihood of a custodial sentence being imposed,
- (j) if the accused person has been convicted of the offence and proceedings on an appeal against conviction or sentence are pending before a court, whether the appeal has a reasonably arguable prospect of success,
- (k) any special vulnerability or needs the accused person has including because of youth, being an Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment,
- (l) the need for the accused person to be free to prepare for his or her appearance in court or to obtain legal advice,
- (m) the need for the accused person to be free for any other lawful reason,
- (n) the conduct of the accused person towards any victim of the offence, or any family member of a victim, after the offence,
- (o) in the case of a serious offence, the views of any victim of the offence or any family member of a victim (if available to the bail authority), to the extent relevant

to a concern that the accused person could, if released from custody, endanger the safety of victims, individuals or the community,

- (p) the bail conditions that could reasonably be imposed to address any bail concerns in accordance with section 20A,
 - (q) whether the accused person has any associations with a terrorist organisation (within the meaning of Division 102 of Part 5.3 of the Commonwealth Criminal Code),
 - (r) whether the accused person has made statements or carried out activities advocating support for terrorist acts or violent extremism,
 - (s) whether the accused person has any associations or affiliation with any persons or groups advocating support for terrorist acts or violent extremism.
- (2) The following matters (to the extent relevant) are to be considered in deciding whether an offence is a serious offence under this Division (or the seriousness of an offence), but do not limit the matters that can be considered—
- (a) whether the offence is of a sexual or violent nature or involves the possession or use of an offensive weapon or instrument within the meaning of the *Crimes Act 1900*,
 - (b) the likely effect of the offence on any victim and on the community generally,
 - (c) the number of offences likely to be committed or for which the person has been granted bail or released on parole.

19 Refusal of bail – unacceptable risk

- (1) A bail authority must refuse bail if the bail authority is satisfied, on the basis of an assessment of bail concerns under this Division, that there is an unacceptable risk.
- (2) For the purposes of this Act, an **unacceptable risk** is an unacceptable risk that the accused person, if released from custody, will—
- (a) fail to appear at any proceedings for the offence, or
 - (b) commit a serious offence, or
 - (c) endanger the safety of victims, individuals or the community, or
 - (d) interfere with witnesses or evidence.
- (3) If the offence is a show cause offence, the fact that the accused person has shown cause that his or her detention is not justified is not relevant to the determination of whether or not there is an unacceptable risk.
- (4) Bail cannot be refused for an offence for which there is a right to release under Division 2A.

20 Accused person to be released if no unacceptable risks

- (1) If there are no unacceptable risks, the bail authority must—
- (a) grant bail (with or without the imposition of bail conditions), or

- (b) release the person without bail, or
- (c) dispense with bail.

(2) This section is subject to Divisions 1A and 2A.

20A Imposition of bail conditions

- (1) Bail conditions are to be imposed only if the bail authority is satisfied, after assessing bail concerns under this Division, that there are identified bail concerns.
- (2) A bail authority may impose a bail condition only if the bail authority is satisfied that—
 - (a) the bail condition is reasonably necessary to address a bail concern, and
 - (b) the bail condition is reasonable and proportionate to the offence for which bail is granted, and
 - (c) the bail condition is appropriate to the bail concern in relation to which it is imposed, and
 - (d) the bail condition is no more onerous than necessary to address the bail concern in relation to which it is imposed, and
 - (e) it is reasonably practicable for the accused person to comply with the bail condition, and
 - (f) there are reasonable grounds to believe that the condition is likely to be complied with by the accused person.
- (3) This section does not limit a power of a court to impose enforcement conditions.

Note—

Enforcement conditions are imposed for the purpose of monitoring or enforcing compliance with other bail conditions. Section 30 provides for this type of bail condition.

22B Limitation regarding bail during period following conviction and before sentencing for certain offences

- (1) During the period following conviction and before sentencing for an offence for which the accused person will be sentenced to imprisonment to be served by full-time detention, a court—
 - (a) on a release application made by the accused person—must not grant bail or dispense with bail, unless it is established that special or exceptional circumstances exist that justify the decision, or
 - (b) on a detention application made in relation to the accused person—must refuse bail, unless it is established that special or exceptional circumstances exist that justify the decision.
- (2) If the offence is a show cause offence, the requirement that the accused person establish that special or exceptional circumstances exist that justify a decision to

grant bail or dispense with bail applies instead of the requirement that the accused person show cause why the accused person's detention is not justified.

- (3) Subject to subsection (1), Division 2 applies to a bail decision made by a court under this section.
- (4) This section applies despite anything to the contrary in this Act.
- (5) In this section—

conviction also includes a plea of guilty.

Note—

Conviction is defined in section 4(1) to include a finding of guilt.

Appendix E

Second reading speech – Bail Amendment Bill 2014 (NSW)

**Extracts from: NSW, *Parliamentary Debates*, Legislative Assembly,
13 August 2014, 30504**

The Government is pleased to introduce the Bail Amendment Bill 2014. The purpose of the bill is to make amendments to the Bail Act 2013 to give effect to the recommendations made by former Attorney General John Hatzistergos in his review of the Act. The new Bail Act commenced operation on 20 May 2014. It introduced a new risk-based model for determining bail in New South Wales. A number of bail decisions made under the new Act have caused concerns in the community. These concerns prompted the Government to request the Hatzistergos review. In conducting the review, Mr Hatzistergos consulted with key stakeholders from across the justice system and carefully considered a number of bail decisions made under the new Act. The review also drew on the work of law reform commissions around Australia in relation to bail.

The review made a number of recommendations to strengthen provisions in the Act. The Government has accepted all the recommendations resulting from the review. These are common-sense changes. 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. It requires people charged with these offences to show cause why their detention is not justified. The new show cause requirement will operate in addition to the existing unacceptable risk test. The unacceptable risk test will also be consolidated from a two-stage test to a simpler one-stage test.

I turn to the main details of the bill. Schedule 1 to the bill contains the substantive amendments to the Bail Act 2013. Items [1] and [2] remove the existing reference to the presumption of innocence and the general right to be at liberty from section 3 of the Act, and insert instead a preamble in the Act to clarify the key principles underpinning it. The review noted that the presumption of innocence and general right to liberty are more appropriately reflected as principles in a preamble rather than as a purpose of the Act. The preamble also includes the need to ensure the safety of victims of crime, individuals and the community, and the need to ensure the integrity of the justice system as principles of the Act.

Item [3] amends section 4 to insert necessary definitions. Item [5] amends section 16 to outline two flowcharts to guide bail authorities in the decision-making process. Flow Chart 1 shows the key features of a bail decision for a show cause offence. Flow Chart 2 shows the key features of the unacceptable risk test as amended by the bill. The

unacceptable risk test must be applied to any consideration of release on bail, including for show cause offences. Division 1A introduces a “show cause” requirement for certain offences. New section 16A provides that for show cause offences bail must be refused unless the accused shows cause where his or her detention is not justified. This shift of onus is an important change.

Victoria and Queensland have show cause requirements in their bail legislation. Courts in those States have noted circumstances that may be relevant to determining “show cause”, including the strength of the prosecution case, preventable delays and urgent personal situations such as the need for medical treatment. Bail authorities in New South Wales will be informed by the approach taken in these other jurisdictions when applying the show cause provisions. Pursuant to new section 16A (3), juveniles will be excluded from the show cause requirement. This reflects the vulnerable position of young people and is consistent with the approach in Queensland. Young people charged with these offences will still, however, be subject to the unacceptable risk test.

In recommending which offences the show cause requirement should apply to, the 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 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.

It is important to note that just because an offence falls outside the show cause list, this does not mean a person will automatically get bail. The unacceptable risk test will apply and if the accused poses an unacceptable risk, bail will be refused. The proposed list of show cause offences serves a different purpose to the old presumptions in relation to bail. Unlike presumptions, determining show cause will not be the end of the matter. If a person shows cause, he or she will still be subject to the unacceptable risk test. Clause 8 of the bill will remake division 2 of the Act setting out the provisions that contain the unacceptable risk test. The unacceptable risk test is central to the Bail Act 2013. The provisions in this bill consolidate and simplify the test by making it a one-stage test. This is more in line with the Queensland and Victorian bail regimes.

In applying the unacceptable risk test, new section 17 stipulates that a bail authority must assess whether there is a bail concern. A bail concern is a concern that the accused will fail to appear in proceedings for the offence, commit a serious offence, endanger the safety of victims, individuals or the community, or interfere with witnesses. These are the same concerns targeted by the existing unacceptable risk test so police and courts already have experience in assessing them. In assessing bail concerns, the bail authority will need to consider the factors set out in new section 18 to the Act.

These mirror the factors currently set out in section 17 (3) of the Act with some alterations and additions. 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. New factors added to section 18 include a requirement to consider whether the accused has any criminal associations. An applicant's links to organised crime networks can have a direct impact on his or her level of risk. For example, it may give a person access to the means to flee the jurisdiction or the means to continue criminal activity. Bail authorities will also have to consider the conduct of the accused person towards the victim, or a family member of the victim, after the offence as this conduct may have a material bearing on his or her level of risk.

For serious offences, the views of the victim, or a family member of a victim, will also have to be considered to the extent that they are relevant to assessing the risk of the accused endangering the victim or the community if released. This is not intended to place a burden on victims and subject them to extra questioning. It simply allows police to put forward the information they have available from the victim at that time. Significantly, the bail authority will now have to consider any conditions that can reasonably be imposed to address bail concerns at the same time it assesses the bail concerns.

Previously conditions were considered after the bail authority determined whether or not there was an unacceptable risk. The review noted that a one-stage test, requiring consideration of conditions in assessing unacceptable risk, will allow the bail authority to more directly match a bail concern to a proposed bail condition. I note that the Victorian Bail Act requires that conditions be considered in assessing unacceptable risk. New section 19 provides that, having assessed bail concerns, a bail authority must refuse bail if satisfied that there is an unacceptable risk that the accused will fail to appear in any proceedings for the offence, commit a serious offence, endanger the safety of victims, individuals or the community, or interfere with witnesses or evidence. Where there are no unacceptable risks, pursuant to proposed section 20, the bail authority must either grant bail, release the accused person without bail or dispense with bail.

... I take this opportunity to thank Mr Hatzistergos for his excellent work. The changes proposed in this bill support the risk-based model and put community safety first. The Government has asked Mr Hatzistergos to continue to monitor the operation of the Bail Act 2013 over the next 12 months.

The bill will commence upon proclamation. The Government acknowledges that the NSW Police Force, courts and legal practitioners will need some time to digest these changes. Education and training will be required, along with changes to various information management systems and bail forms. The Government recognises, however, that the changes proposed in this bill must be implemented swiftly to ensure that the Bail Act is striking the right balance in protecting the community and the integrity of the justice system. I commend the bill to the House.

