

The Public Defenders

30 October 2014

The Hon James Wood AO, QC.
New South Wales Sentencing Council
GPO Box 5199
Sydney NSW 2001

By Email

Dear Chair,

Bail – Additional show cause offences

I write in response to the Sentencing Council's request for submissions regarding additions to the categories of offences for which the accused must 'show cause' before bail can be granted.

Please find attached submissions addressing the Terms of Reference for the Council's consideration.

Yours sincerely



Craig Smith SC
Deputy Senior Public Defender

Introduction

The NSW Parliament recently passed the Bail Amendment Bill 2014, which introduced categories of offences for which bail must be refused unless an accused can 'show cause' why his or her detention is not justified. The Attorney General has requested the Sentencing Council to consider the following additions to the categories of offences:

Where an accused person is charged with a serious indictable offence committed:

- *While subject to a good behaviour bond, intervention program order, intensive correction order; or*
- *While serving a sentence in the community; or*
- *While in custody.*

Our submission is that the proposed amendment should not be made. We are concerned that the suggested changes will result in significant flow-on effects for the administration of justice in NSW and, in particular, a significant increase in the remand population. This is particularly so where there is no evidence of the risk, or the extent of any risk, posed to the community by those people that may be caught by the suggested addition to the 'show cause' categories of offences.

Unacceptable Risk Test

The Public Defenders believe that the proposed amendment is already appropriately dealt by the existing unacceptable risk test, and the show cause categories in the Bill.

In relation to a person being subject to a good behaviour bond, intervention program order, intensive correction order, the serving of a sentence in the community, or alleged to have committed a serious indictable offence in custody:

- s18(a) allows for consideration of an accused person's background, including their criminal history.
- s18(f) allows for consideration of a history of non-compliance of orders such as good behaviour bonds.
- s18(g) permits consideration of whether the accused persons has any criminal associations.
- s18(o) allows for the consideration, in the case of a serious offence, of the views of any victim of the offence or any family member of a victim, 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.

All of these matters encompass the concerns implicit in the suggested additions to the 'show cause' category.

The negative impact of expanding show cause requirements

The Public Defenders oppose the expansion on the basis that it may result in significant increases in remand rates in NSW, which trend analysis indicates is already increasing. The NSW Bureau of Crime Statistics and Research (BOCSAR) found that the proportion of defendants who were remanded in custody at their final court appearance doubled between 1993 and 2007¹. A growing remand population creates a great amount of pressure on the NSW Corrections System, resulting in concerns such as over-crowding².

Furthermore, the Public Defenders hold serious concerns about the disproportionate impact that these expansions will have on Indigenous people, particularly young people and women. The over-representation of Indigenous people in NSW prisons remains of grave concern. Rates of Indigenous imprisonment continue to rise, with one quarter of the increase coming from remandees³.

It is well established that the increasing numbers of Indigenous people on remand is due to a greater proportion of Indigenous offenders being refused bail⁴. Sentencing options such as good behaviour bonds, intervention program orders, and intensive correction orders are widely used by lower courts to reduce incarceration rates. Expanding the 'show cause' category to people who commit serious indictable offences while subject to these orders, especially orders arising from indictable or summary offences and not serious indictable offences, will have a net widening effect. More people will be refused bail, increasing the remand population. Bail should not be punitive.

It is largely accepted that the size of the remand population is strongly influenced by the way that police and courts exercise their discretion in relation to bail, but also the influence of policy makers and their response to changes in crime⁵. The Public Defenders emphasise the importance of considering such influences when determining whether to expand show cause requirements.

Conclusion.

Taking into account the above, the Public Defenders maintain that there is no need to create a new category and oppose the addition of the suggested categories to the show cause offences.



Craig Smith SC

Deputy Senior Public Defender

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¹ Lulham, R & Fitzgerald, J. (2008). *Trends in bail and sentencing outcomes in NSW Criminal Courts: 1993-2007*. Crime and Justice Bulletin (No. 124). NSW Bureau of Crime Statistics and Research, available:

http://www.lawlink.gov.au/bocsar/bocsar_topics

² Fitzgerald, J. (2000). *Increases in the remand population*. Crime and Justice Statistics Brief (Issues paper no. 9). NSW Bureau of Crime Statistics and Research, available: http://www.lawlink.gov.au/bocsar/bocsar_topics

³ Fitzgerald, J. (2009). *Why are Indigenous imprisonment rates rising?* Crime and Justice Statistics Brief (Issues paper no. 41). NSW Bureau of Crime Statistics and Research, available: http://www.lawlink.gov.au/bocsar/bocsar_topics

⁴ Ibid.

⁵ Wan, W-Y., Moffat, S., Xie, Z., et al. (2014). *Forecasting prison populations using sentencing and arrest data*. Crime and Justice Bulletin (No. 174). NSW Bureau of Crime Statistics and Research, available:

http://www.lawlink.gov.au/bocsar/bocsar_topics