



THE LAW SOCIETY  
OF NEW SOUTH WALES

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31 October 2014

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

By email: [sentencingcouncil@agd.nsw.gov.au](mailto:sentencingcouncil@agd.nsw.gov.au)

Dear Mr Wood,

### **Bail – Additional Show Cause Offences**

I write to you on behalf of the Criminal Law and Juvenile Justice Committees of the Law Society of NSW ("the Committees") in relation to the above consultation regarding additional "show cause" offences for bail. The Law Society does not support the new test which was introduced prematurely and puts the onus on the defendant to "show cause" or establish why his or her detention is not justified.

The Committees' view is that the existing provision in the *Bail Amendment Act 2014* ("Amendment Act") is already too broad, and the Committees are opposed to the proposal to expand the scope of s 16B(1)(h) to include additional "show cause" offences. Decisions on bail require a consideration of a range of matters and circumstances, and the Committees are concerned that the proposed approach may be too blunt to produce appropriate outcomes, and may result in an increase in the remand population.

The Committees note that the then Attorney General stated on the introduction of the *Bail Act 2013* ("Act") that:

A significant feature of the bill is that it operates without the complex scheme of offence-based presumptions contained in the existing Act. Under current bail laws, some offences carry a presumption in favour of bail, others carry a presumption against and there are offences where no presumptions apply. This has added a layer of significant complexity to bail decision-making which the bill's unacceptable risk test is intended to avoid. Bail presumptions generally apply based on the particular section under which the accused is charged. This means that they may not reflect the actual seriousness of the alleged offending or the risk the accused poses to the community<sup>1</sup>.

The Committees understand that the Act was intended to address (among other things) this issue, as it resulted in undue complexity and unjust outcomes. The Committees consider that the show cause offences effectively reintroduce in part the

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<sup>1</sup> Hansard 1/5/2013 page 19838

regime of bail presumptions. Given that the Act, which was the result of a lengthy review process, is still in its infancy, the Committees query the rationale of this approach.

The Committees appreciate the opportunity to comment and provide in the attachment their concerns in more detail. Questions may be directed to Vicky Kuek, policy lawyer for the Committees, or [REDACTED] or [REDACTED].

Yours sincerely,



Michael Tidball  
**Chief Executive Officer**



## **Bail – Additional Show Cause Offences**

### **Introduction**

The Criminal Law and Juvenile Justice Committees of the Law Society of NSW (“the Committees”) do not support the introduction of additional “show cause” offences into the *Bail Act 2013* (“Act”). The Committees’ view is that “show cause” provisions will not adequately address the range of issues a court is required to consider when making a decision on bail.

### **Requirement to show cause when an accused person on bail is charged with a serious indictable offence**

The Committees are particularly concerned with the proposal to expand the scope of s 16B(1)(h) of the Act (as enacted by the *Bail Amendment Act 2014*). The Committees’ view is that this provision, as it currently exists, is already too broad. The Committees submit that any expansion of this existing provision will result in considerably more people being refused bail with the flow-on effect being an increase in the remand rate.

The Committees are concerned that a serious indictable offence includes a very broad range of offences, including the lowest forms of larceny. Section 16B(1)(h) will capture, for example, a person on bail for an allegation of offensive behaviour who then appears before the court charged with larceny.

While the Committees do not support s 16B(1)(h), if it is to remain, the Committees’ view is that this provision should be amended to apply only to serious indictable offences.

### **Additional categories of show cause offences where an accused person is charged with a serious indictable offence 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**

The Committees’ view is that adequate provisions already exist in the Act for the above issues to be properly addressed when making a bail determination.

The Committees are most concerned with the proposal to expand the provision to apply to people who have been charged with a serious indictable offence while on a good behaviour bond or intervention program order. Bonds, especially those imposed under section 9 and 10 of the *Crimes (Sentencing Procedure) Act 1999* are at the lower end of the sentencing hierarchy. It is the Committees’ view that many people receive such a penalty because of the relatively trivial nature of the offence.

The Committees are particularly concerned about persons charged with a serious indictable offence while subject to a bond pursuant to section 10 of the *Crimes (Sentencing Procedure) Act 1999* or its Commonwealth equivalent of s 19B of the *Crimes Act 1914*. The Committees’ view is that this should not be included as an additional category of show cause offences. A bond under section 10 is usually imposed as an alternative to a fine, and indeed is frequently imposed for fine-only offences. It is therefore not “conditional liberty” in the strict sense.



The Committees' further view is that s 16B(1)(h) may impact heavily and unnecessarily on people participating in intervention programs. The Committees note intervention programs include Forum Sentencing, Traffic Offender Programs and Circle Sentencing. Offenders often participate in such intervention programs (particularly traffic offender programs) in circumstances where bail is dispensed with. The Committees' view is that an intervention program, in and of itself, should not be regarded as a form of conditional liberty. If a person who has been ordered to attend and participate in an intervention program is charged with a further offence, the unacceptable risk factors are still required to be addressed.

The Committees' view is that if s 16B(1)(h) is to be expanded then Home Detention, Intensive Correction Orders and suspended sentences pursuant to s 12 of the *Crimes (Sentencing Procedures) Act 1999*, could more appropriately be considered for additional categories.

Where a serious indictable offence is committed by a person while they are in custody, the Committees' view is that this should not be included, as being in custody is not a form of conditional liberty. While an offence committed in custody may attract a more severe (and often cumulative) sentence following conviction, this is something that may be taken into account under the current "unacceptable risk" test.

#### **Expected impact of expanding show cause requirements to these offences**

The Committees' view is that expanding the show cause requirements will result in an increase in the number of people who are refused bail, especially those who are initially refused bail by the police. This will lead to an increase in the remand rate and additional work for courts. The Committees' further view is that unrepresented defendants may find it difficult to satisfy the "show cause" test under these new provisions and that this will reintroduce additional strain on the system. This strain will also be on the police who make the majority of bail decisions in NSW. The Committees are concerned that the new arrangements would institutionalise people who would not be considered a risk under the old regime.

As mentioned above, the Committees remain concerned that a serious indictable offence includes a very broad range of offences, including some that would be generally regarded as trivial.

#### **No need to create additional show cause offences**

The Committees do not see any need to create new show cause categories. The current legislation already enables courts and police to refuse bail in appropriate circumstances without unnecessarily limiting their discretion.

The Committees' further view is that the recent amendments to the Act, which introduced the show cause provisions, have been enacted without allowing the opportunity for the Act to be given time to work, or to properly evaluate the impact of the legislation on the workloads of the courts, Corrective Services and Juvenile Justice. The addition of any further show cause offences would be premature.