

NSW Sentencing Council

Bail – Additional show cause offences

Submission of the Office of the Director of Public Prosecutions (ODPP)

Introduction

The *Bail Act 2013* (the Act) has been in force since 21 May 2014. The *Bail Amendment Act 2014* (the Amending Act) has not commenced at the time of preparing this submission. Commenting on possible expansion of the provisions of the Act and amending Act is made more challenging by the fact that to date there has been little opportunity for the operation of the Act to be evaluated and in the case of the amending Act it is difficult to say how the “show cause” amendments will be implemented in practice.

Clause 16 (1) (h) of the Amending Act in providing that an accused who commits a serious indictable offence while on bail or parole appears to create a significant cohort of offenders who will need to “show cause” under this Act. Alleged offenders in this category may be on bail for a relatively minor offence and the new offence may also be a matter that would be appropriately disposed of in the summary jurisdiction. It may be that the relative seriousness of the bail offence and the new offence will be readily addressed by the court in determining that the offender has discharged the onus, however it remains to be seen how effective an unrepresented offender at a police station will be in addressing the “show cause” issue. There is a distinct possibility that this cohort of offenders will not get police bail and it will be the role of the court to determine bail. Some offenders in this group may not be facing a custodial sentence for either of the offences. This will have an adverse impact on court, correctional, prosecution and legal aid resources. We suggest that the scope of clause 16 (1) (h) is reassessed and consideration is given to raising the bar on the type of secondary offending, to for instance strictly indictable offences, to limit this impact.

Extent to which concerns raised by these offences can be mitigated by the existing unacceptable risk test and show cause categories in the Bill

In our view there is adequate provision within the Act to address the concerns about offending while on conditional liberty. This is by reason of clause 16 (1) (h) being distinguishable in its character from the other show cause factors. The fact that the offender has committed an offence while on conditional liberty is a behavioural factor. It is indicative of a pattern of behaviour which at common law and under the 1978 Act was a highly probative indicator of future behaviour and hence a matter to which the court gives significant weight to in balancing of the various interests necessary to determine the risk. It is a

consideration peculiar to the accused and his or her criminal history/behaviour. In our submission the bail authority has adequate scope to assess the accused's criminal history in applying the unacceptable risk test, which avers specifically to the concern that the accused will commit further offences if released on bail. The requirement to show cause for this behaviour is therefore circular and repetitive within the terms of the Act.

In contrast the other categories for showing cause attach to offences that warrant special consideration, reflecting community concern about that type of offending, that is those clauses are enacting overarching policy considerations. A distinction can thus be made between identifying a particular type of offence as a show cause criteria and it is not circular or duplicitous to the next step of applying the unacceptable risk test, because the seriousness of the offence within that category of offending is a further and distinguishable factor to be taken into account in clause 18 (1) (b).

The expected impact of expanding show cause requirements to these offences

In our view expanding the category of show cause requirements will inevitably lead to more offenders being remanded in custody. In our submission the Act needs to strike a balance to ensure that the mistakes of the 1978 Act are not repeated where the overly prescriptive requirements attaching to the offences charged caused the remand population to swell with offenders who ultimately did not get sentenced to imprisonment. It is important to preserve the holistic approach of the Act so that all the facts, circumstances and characteristics of the offender are weighed to produce a just result as soon as possible after charging, otherwise nothing will have been achieved by the new enactment.

It is important not to lose sight of the fact that the bail laws are not meant to be punitive, but are about ensuring that offenders attend court and where required the community is protected from further offending.

Taking into account the above whether there is a need to create a new show cause category for the offences; and if so what the appropriate limitations on this category should be in terms of:

- 1. The type of offence it applies to; and**
- 2. The type of conditional liberty (or custody) that should trigger the show cause requirement, if an offence is committed.**

As noted above in our submission the provision should be limited to the commission of a further very serious offence. We appreciate because of the way the *Crimes Act* has evolved that there are difficulties in determining an appropriate definition of what a serious offence is. Arguably, the definition of a "serious indictable offence" is out of step with how this phrase might ordinarily be interpreted. But in our view the fact that the offence carries a maximum

penalty of 5 years or more captures many offences that may not ultimately attract a custodial sentence. The same cannot be said for “strictly indictable offences”, moreover legal practitioners and police officers are familiar with the offences that fall within the strictly indictable category.

Breaching certain types of conditional liberty brings its own consequences, which range from return to custody, an extension of the order, a substituted order or no further action. For the reasons stated above our view is that the clause should only be enlivened by the alleged commission of a strictly indictable offence as the fresh offence. This would appropriately narrow the scope and allow for rest of the Bail Act to do the work it is meant to do.

Care needs to be taken to identify what forms of sentence order are in fact conditional liberty. For instance a section 10 bond is an alternate to a fine and imposed in circumstances where a court has determined there should be no penalty. A section 9 bond is a deferral of sentence and the lowest penalty available, so it cannot be construed as conditional liberty. Prescribed Intervention Programs include Forum Sentencing, Circle Sentencing and the Traffic Offenders Program, these Programs may not involve a serious offence (or factual circumstance) and the offender will usually be on bail pending the final sentence, so therefore already caught by cl 16 (1) (h) . Moreover there is a practical problem in that the fact that the offender is participating in an intervention program may not ordinarily be apparent from the criminal record (bail report) or in the COPs system.

In respect of ICO’s, section 12 bonds and Home Detention, the considerations are different as these are all orders considered to be custodial sentences. For reasons of consistency as these are forms of conditional liberty, consideration should be given to including them in the show cause provisions.

The concept of offences committed while in “custody” needs clarification. If the offence is committed in a correctional centre, the question of bail may be academic. The environment of a correctional facility is distinguishable on many levels to conditions in the community and offences may be committed or detected that would not arise in the community. In the case of the offence of escaping from a correctional centre, the question of bail would not arise because the offender would automatically be taken back to complete their sentence. Secondly, “custody” could mean police custody (e.g. resist arrest) or the custody of the court (e.g. contempt). Again it is an environment where offending behaviour is more likely to be detected and acted upon, but it does not necessarily follow that the behaviour would be replicated in the community generally. We would suggest that it should not be necessary to include offences committed in custody in the show cause category.

**Office of the Director of Public Prosecutions
6 November 2014**