

31 October 2014

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

By email: sentencingcouncil@agd.nsw.gov.au

To the Chair

Re: Bail - Additional show cause offences

We refer to the Attorney General's request for the Sentencing Council to consider a proposal to make amendments to the *Bail Act 2013* (NSW) ('the 2013 Act') and specifically the Terms of Reference regarding the addition to the categories of offences for which the accused must 'show cause' before bail may be granted. The specific addition under consideration is with respect to an accused charged with a serious indictable offence committed:

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

We make the following five submissions.

First, we are opposed to the *Bail Amendment Act 2014* (NSW) ('Amendment Act') in its entirety for the reasons set out in the attached article: David Brown and Julia Quilter, 'Speaking Too Soon: The Sabotage of Bail Reform in New South Wales' (2014) 3(3) *International Journal for Crime, Justice and Social Democracy* 4-28 ('the article'). In summary, the Amendment Act was the product of a Review by John Hatzistergos that was premature and responded to three high profile and unpopular decisions to grant bail under the 2013 Act - two of which were later demonstrated to be well-founded and the final one was overturned on appeal (see the article pp.7 & 10). The Hatzistergos, *Review of the Bail Act 2013* (August 2014) ('Review Report') upon which the Amendment Act is based, ultimately made recommendations that disrupt the integrity of the 2013 Act and return us to the complexity of the old *Bail Act 1978* (NSW) ('1978 Act'). This was the very reason the NSW Law Reform Commission was in 2011 requested to review bail law. The Review Report provides no evidence to support the amendments (see the article at pp.7-10) and, therefore, any further extension of such recommendations should be strongly resisted.

Secondly, we are particularly opposed to the introduction of the new 'show cause' offences in the Amendment Act, s 16B. In reality such a provision is indistinguishable from the old presumptions and exceptions against bail in the 1978 Act (discussed in the article at pp.12-13). Not only does such a provision damage the integrity of the 2013 Act and add unnecessary complexity to it, but it is also not

clear as a matter of construction how such provisions operate if 'cause' is shown with regard to the assessment of 'unacceptable risk' in s 19(3) and how this interacts with the factors in s 18 of the Act (see attached article at pp.12-13). In short, the 'show cause' provision is unnecessary and creates undue complexity.

Thirdly, the current formulation of 'show cause' offences in s 16B is already overly-long and the offences included are not so included on the basis of any evidence as to the need or otherwise in regard to the important risks that ought to be relevant: failing to appear at any proceedings for the offence; committing a serious offence whilst on bail; endangering the safety of victims/community; or interfering with witnesses or evidence. The inclusion of these categories of offences as 'show cause' offences tells us nothing about such risks (see the article at p.12). The ad hoc inclusion of these offences, lacking any evidentiary basis vis-à-vis the relevant risks, follows a similar pattern to the development of presumptions and exceptions against bail under the 1978 Act – the latter were usually added in the context of specific cases that triggered popular anxiety or law and order debates (these developments were discussed at length in NSW Law Reform Commission, *Bail*, Report No 133 (2012), ch 3; see also the article at pp.12-13). The s 16B list already contains numerous 'serious indictable offences' (eg ss 16B(1)(b); (d)(i), (iii); (e)(i), (iii); (h); (j); and (k)) and it is unclear how the proposed further category of serious indictable offence will operate in conjunction with those already included and what, if any further need is alleged for its inclusion.

Fourthly, we submit that the matters that must be assessed regarding 'bail concerns' in s 18 arguably deal with any risks associated with the area of the reference. In particular, s 18(1)(a) (the accused person's background, including criminal history, circumstances and community ties), s 18(1)(b) (the nature and seriousness of the offence), s 18(1)(d) (whether the accused person has a history of violence), and more importantly, s 18(1)(f) (whether the accused person has a history of compliance or non-compliance with bail acknowledgments, bail conditions, apprehended violence orders, parole orders or good behaviour bonds), make the proposed inclusion redundant.

Finally, we submit that the whole process of Review, amending legislation and this reference, demonstrates that we are back in the previous destructive dynamic of the 1978 Act whereby every time there is a media outcry over a particular case yet another offence will be added to the 'show cause' list; the law will become progressively more complex and difficult to understand; and the ability of police and judicial officers to do justice in the individual case through the exercise of their discretions will be increasingly circumscribed. In short, we are back where we started: the incoherence that led to the NSW Law Reform Commission being asked to report on bail reform in 2011.

Yours sincerely



 Emerita Professor David Brown, Faculty of Law, UNSW

Dr Julia Quilter, Senior Lecturer, School of Law, University of Wollongong