



The Hon James Wood AO QC
Chairperson
New South Wales Sentencing Council
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By e-mail: sentencingcouncil@agd.nsw.gov.au

Dear Mr Wood

Submission to NSW Sentencing Council Review of Bail - Additional show cause offences

I am pleased to attach the NSW Police Force submission to the Sentencing Council's review of show cause categories to be included in the Bail Act 2013.

I note that the NSW Police Force supports extension of the show cause requirement to include serious indictable offences committed where a person is subject to conditional liberty.

The NSW Police Force has raised with me a further issue that I would like to bring to your attention.

Police have noted that the reference to serious personal violence offence under the original *Bail Act 1978* captured serious personal violence offences committed in other jurisdictions. Police note that under the new legislation an offender who has previously committed a serious personal violence offence in another jurisdiction will not be required to show cause if they commit a further serious personal violence offence in NSW.

The Police Force has suggested that the Sentencing Council may wish to address this anomaly as part of its review. Your consideration of this matter is appreciated.

Thank you for the opportunity to comment.

If you would like more information, please contact Cheri Boxoen, Senior Policy Analyst ([REDACTED]).

Yours sincerely

A handwritten signature in blue ink, appearing to read 'V. D'Adam', with the date '3.11.14' written next to it.

Vicki D'Adam
Chief Executive Officer
Ministry for Police and Emergency Services

NSW POLICE FORCE SUBMISSION TO SENTENCING COUNCIL REVIEW – ADDITIONAL SHOW CAUSE OFFENCES

The ‘Show Cause’ Requirement was introduced following a recommendation made in Mr John Hatzistergos’ report - *Review of the Bail Act 2013*. It was recommended that it should apply to offenders who commit offences such that in the ordinary course, the consequence of materialisation of the risk to the community and the administration of justice are such that they outweigh the likelihood of it occurring.¹ The show cause requirement was introduced to promote greater consistency and assurance to the community when considering bail for persons accused of serious offences.

Mr Hatzistergos observed that whilst the current *Bail Act 2013* moved from overriding offence based presumptions to a risk based consideration,² Decision Makers, when applying the risk analysis, demonstrated significant variation as to the relative significance they attached to the nature and seriousness of an offence when assessing whether there exists an unacceptable risk.³ This demonstrated the need for an additional requirement when considering bail for persons accused of serious offences.⁴

Amongst other offence categories, Mr Hatzistergos suggested the show cause requirement should apply where a person is charged with a serious indictable offence committed whilst on bail, parole or subject to a supervision order under the *Crimes (High Risk Offenders) Act 2006*.⁵ He suggested that any proposal to supplement the show cause offences should be done so in accordance with the rationale stated in his report, found at paragraph 227.⁶

It is the view of the NSW Police Force that the category of offences for a show cause requirement should be expanded where a person is charged with a serious indictable offence and subject to conditional liberty. The application only to persons on bail, parole or a supervision order under the *Crimes (High Risk Offenders) Act 2006* is too limited. The test should equally apply where a person is subject to other forms of conditional liberty, namely:

- Good Behaviour Bonds subject to supervision or conditions
- Community Service Orders
- Home Detention Orders
- Suspended Sentences
- Intensive Correction Orders

Clearly, under the current amendments, the expectation is that those who commit serious indictable offences whilst subject to bail, parole or supervision orders pose a risk to the community and the administration of justice, the consequence of which outweighs the likelihood that it may occur. This is the basis upon which bail must be refused unless they can show cause why their detention is not justified.

It is the view of the NSW Police Force that those who are the subject of other forms of conditional liberty, as identified above, pose an equal risk and should also be subject to the same ‘Show Cause’ requirement.

¹ John Hatzistergos, ‘Review of the Bail Act 2013’ (July 2014) 59 [227]

² *Ibid* 49 [186-188]

³ *Ibid* 50 [190]

⁴ *Ibid* 50 [191]

⁵ *Ibid* 61 [234]

⁶ *Ibid* 64 [247]

Some examples of real cases demonstrate this point:

R v Loveridge [2014] NSWCCA 120

The defendant was convicted of the Manslaughter of Thomas Kelly on 9 July 2012 at Potts Point. He was also convicted of 3 assaults, related to his ongoing rampage through the area, where he attacked members of the public at random. At the time of his offending, the defendant was subject to an 18 month supervised probation order for a conviction of assault occasioning actual bodily harm.

David Wootton v R [2014] NSWCCA 86

The defendant was convicted of Specially Aggravated Break and Enter and Commit Robbery whilst armed with a pump-action rifle. He was sentenced to 10 years and 9 months imprisonment. At the time of offending, the defendant was subject to a Section 9 Good Behaviour Bond for a period of 10 months, for convictions of assault and threats of serious harm in a domestic context.

R v Tuki (No 4) [2013] NSWSC 1864

The defendant was convicted of participating in a criminal group, Accessory after the fact to Armed Robbery, Armed with a rifle with intent to cause Grievous Bodily Harm, and Possess a Shortened Rifle without licence. At the time of the offences, the defendant was subject to supervised good behaviour bonds for numerous assaults, a breach of an AVO, and possession of an unregistered firearm.

Sean Andrew Duncombe v R [2013] NSWCCA 271

The defendant was convicted of inflicting grievous bodily harm with intent. At the time of the offence he was subject to a nine month suspended sentence for damaging property, and nine months periodic detention for break, enter and steal.

Currie v R [2013] NSWCCA 267

The defendant was convicted for two counts of aggravated sexual intercourse without consent and one count of indecent assault. At the time of offending, the defendant subject to a suspended sentence for driving whilst disqualified.

Arguably, had the current 'Show Cause' requirement applied at the time of each of these matters, and had the defendants committed a serious indictable offence in the period between being placed on a form of conditional liberty and committing the subsequent offences, they would have only been subject to the Risk Assessment which, as outlined in Mr Hatzistergos' report, is vulnerable to significant variation in the way Decision Makers deal with the consideration of the nature and seriousness of an offence.

In light of the risks these offenders posed, which were ultimately and tragically demonstrated by their later actions, clearly the consequences of their risks outweighed any consideration as to the likelihood of them materialising. In such circumstances, they should be subject to the 'Show Cause' requirement, rather than the Risk Analysis alone, where significant variation in Decision Makers' regard to the nature and seriousness of the offence may result in the wrong approach and decision being made.

As demonstrated, the consequence of the risks to the community and the administration of justice materialising for those who commit serious indictable offences whilst subject to conditional liberty is equal regardless of the type of conditional liberty they are subject to.

The fact that a person, who is subject to bail, parole or a supervision order, would commit a serious indictable offence is indicative of their propensity to commit further serious offences and the lack of effectiveness bail conditions, parole conditions or supervision orders have on mitigating the risk, such that they should show cause before bail will be considered.

Equally, a person who is subject to the other forms of conditional liberty identified, and who commits a serious indictable offence, is as much a risk to the community and administration of justice as those that currently fall within the Show Cause categories.

Take the case of *Currie v R* above. If the defendant had been charged with a serious indictable offence whilst on the suspended sentence, it is not sufficient that the risk assessment alone should apply. Why, if he is on a suspended sentence, rather than bail, is he considered any less of a risk? The fact that he has committed a serious offence whilst on a bond that requires him to be of good behaviour, with a threat of imminent imprisonment if he is not, is demonstrative of the significant risk he poses. In such circumstances it is clear any form of conditional liberty is powerless to deter him from continuing to be a significant risk to the community. In circumstances where there is such a risk, the question of whether the consequence of the risk materialising should be allowed by the grant of bail, should not be determined on the basis of a test that allows for significant variation in its application by Decision Makers. Rather, in such circumstances, there is a need for additional requirements (in the form of a show cause requirement) to be in place to promote greater consistency, and assurance to the community, when considering bail for persons accused of serious offences.

Can the risks that persons who commit serious indictable offences whilst subject to conditional liberty pose be sufficiently mitigated without the need for a Show Cause Requirement?

The NSW Police Force argues they cannot. The fact that an accused would commit a further serious offence in circumstances where their current liberty is conditional, is indicative of the lack of effectiveness any bail conditions would have in mitigating the risks.

What impact would there be in expanding the category of offences for a Show Cause Requirement?

Firstly, there would be increased protection for the community. Offenders who demonstrate a lack of compliance with orders and conditions of conditional liberty by the commission of further offences would find it more difficult to secure bail when charged. Additionally, those same offenders would be protected from their own actions. Very often offenders who commit offences, whilst subject to conditional liberty, continue to do so. The impact of this is that whilst awaiting trial or sentence for the original matter, they find themselves adding to the list of matters to be dealt with at court, such that the ultimate sentence at the end is much longer than what it would have been if they were earlier refused bail.

What limitations should apply to the types of offences and categories of conditional liberty that the Show Cause Requirement should apply to?

The NSW Police Force notes that there may be consideration of imposing limitations to the types of offences and categories of conditional liberty the show cause requirements should apply to. It is suggested that the Council balance this against the benefits of creating a clear, simple new category of offence. A complex bail regime may make it harder for bail authorities to administer and lead to less consistency in bail decisions.