



THE LAW SOCIETY
OF NEW SOUTH WALES

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23 September 2022

The Hon Tom Bathurst AC QC
Chair
NSW Law Reform Commission
Locked Bag 5000
Parramatta NSW 2124

By email: nsw-lrc@justice.nsw.gov.au

Dear Mr Bathurst,

Bail: Show cause offences and the unacceptable risk test

Thank you for the opportunity to make a submission to the Law Reform Commission's review of the show cause offences and the unacceptable risk test.

Background

In November 2021, the Attorney General requested the Bail Act Monitoring Group (BAMG) to review eight decisions and to advise on what, if any, reforms to the *Bail Act 2013* might be necessary or appropriate. As advised in his media release, the Attorney received the BAMG's final report on 28 July 2022. The BAMG made six recommendations. Three of the BAMG's recommendations relate to giving further consideration to expanding the list of "show cause" offences concerning firearms and criminal associations.

We note that the Law Reform Commission has been asked to review aspects of the *Bail Act 2013* relating to these recommendations, and, *in* particular, whether the list of firearms and criminal associations offences that are subject to the "show cause" requirement should be expanded, and whether the term "criminal associations" should be defined.

Law Society position

As discussed briefly below, we do not support the expansion of the list of "show cause" offences. The BAMG review and recommendations are based on a small number of identified "contentious" decisions that are not representative, and have resulted in reform options that may have unintended consequences. We would expect that any evidence-based review of bail legislation would involve a substantial sample of decisions taken by the NSW Bureau of Crime Statistics and Research.

As noted in the BAMG report, there is a risk that any amendments to the *Bail Act 2013* may disproportionately increase the Aboriginal remand population, and impact the Government's ability to reach its Closing the Gap targets.

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Law Council
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CONSTITUENT BODY

1. Should the list of firearms offences treated as "show cause" offences under the *Bail Act* be expanded? If so, what offences should be included?

We do not support the expansion of the list of firearms offences that are treated as "show cause" offences. We are unaware of any evidence of systemic issues to justify such an expansion.

In our view, safety concerns relating to firearm offences that are not currently "show cause" offences are already addressed by the existing law. Under the *Bail Act 2013*, the bail authority must refuse bail if there is an unacceptable risk in respect of any of the bail concerns (s19). When assessing the bail concerns, the bail authority must consider the "nature and seriousness of the offence", and, in deciding the seriousness of an offence, the bail authority must consider under s18(2)(a) whether the offence involves the possession or use of an offensive weapon or instrument within the meaning of the *Crimes Act 1900*.

There is a risk that expanding the list will result in capturing minor offenders, and unnecessarily increasing the remand population. For instance, in NSW gel blasters are classified as an air gun, which is defined as a firearm, and the gel ball has been similarly classified as ammunition.¹ Gel blasters that substantially duplicate in appearance a military style firearm are classified as a prohibited firearm.² Many people are unaware of this classification (noting that gel blasters are legal in Queensland), and risk charges such as possession of an unauthorised firearm (s7 and s7A *Firearms Act 1996*), and possession of an unregistered firearm (s36 *Firearms Act 1996*). This demonstrates the caution required if any expansion of the firearms offences is to occur.

2. Should there be further guidance on the meaning of "criminal associations" in s 18(1)(g) of the *Bail Act*? If so, how should it be defined?

Defining "criminal associations" risks unintended consequences. Rather than defining the term, s18(1)(g) could be amended from "whether the accused person has any criminal associations", to "whether the accused person has any associations with organised crime", to better reflect the legislative intent, as detailed in the Second Reading Speech to the *Bail Amendment Bill 2014*.

3. Should the list of offences relating to criminal associations that are treated as "show cause" offences under the *Bail Act* be expanded? If so, what offences should be included?

We do not support the expansion of the list of offences relating to criminal associations that are treated as "show cause" offences.

We would particularly oppose the expansion to the offence of consorting under s93X of the *Crimes Act 1900*, which we consider should be repealed. While the intention of the offence was to curb the activities of "criminal gangs", the NSW Ombudsman's Report³ found that the offence had been used disproportionately and unfairly against Aboriginal people, people experiencing homelessness, and children and young people.⁴

¹ NSW Police Force Firearms Registry, *Gel Blasters – Definition in NSW*, December 2018: https://www.police.nsw.gov.au/_data/assets/pdf_file/0005/613994/Gel_Blasters_December_2018.pdf confirmed in February 2020:

https://www.police.nsw.gov.au/_data/assets/pdf_file/0007/670534/Gel_Blasters_-_Whats_New.pdf

² *Ibid.*

³ NSW Ombudsman, *The consorting law: Report on the operation of Part 3A, Division 7 of the Crimes Act 1900*, April 2016.

⁴ *Ibid.*, piii.

In our view, concerns about criminal associations can be adequately addressed within the existing bail framework, as bail authorities are required to consider the seriousness of the offence when assessing bail concerns.

Questions regarding this submission should be directed to Rachel Geare, Senior Policy Lawyer, who can be reached on (02) 9926 0310 or at rachel.geare@lawsociety.com.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Joanne van der Plaat', written in a cursive style.

Joanne van der Plaat
President