Submission to the NSW Sentencing Council on the proposal for additional show cause offences in the *Bail Act 2013* (NSW)

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1. Introduction

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC has long called for the reform of New South Wales bail laws, sharing the concern of the NSW Government about the growing remand population in NSW prisons and juvenile detention centres. Accordingly, PIAC welcomed the NSW Law Reform Commission's comprehensive report on bail and the subsequent enactment of the *Bail Act 2013* (NSW) (the **2013 Act**).

Through its legal casework, PIAC is acutely aware of the detrimental impact of custody and detention on the most marginalised and vulnerable groups in our society. In this submission, PIAC draws its conclusions on the basis of our work with Indigenous people, those with cognitive disability and other vulnerable members of the community, including people experiencing and at risk of homelessness.

The proposal to expand the "show cause" category in the 2013 Act (as soon to be amended) will capture a wide range of accused. PIAC believes, for its vulnerable clients in particular, bearing the onus of showing cause will often present an insurmountable obstacle. With bail being harder to obtain, there is a higher probability that an individual will be imprisoned to await trial where they may not, in all circumstances of the case, pose a risk to the community. This increased exposure to the criminal justice system will serve to perpetuate disadvantage without any proportionate benefit to community safety. On this basis, PIAC opposes any further extension of the show cause category in the NSW bail regime.

1.1 The Public Interest Advocacy Centre

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from NSW Trade and Investment for its work on energy and water, and from Allens for its Indigenous Justice Program. PIAC also generates income from

project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

1.2 PIAC's policy work on bail and non-custodial sentencing

PIAC has for many years strongly advocated reform of NSW bail laws, most recently providing a detailed submission to the NSW Law Reform Commission bail inquiry in 2011.[1] Prior to this, PIAC made submissions to a number of inquiries recommending changes to bail in NSW, aiming to identify solutions to reduce the remand population and provide greater community-based support to those vulnerable and disadvantaged members of the community who become entangled in the criminal justice system.[2] PIAC has also drawn on its legal casework to respond to consultations and inquiries reviewing the operation of non-custodial[3] and custodial sentencing.[4]

1.3 PIAC's work in the criminal justice system

PIAC has significant experience with the criminal justice system through its Homeless Persons' Legal Service (HPLS). The HPLS Solicitor Advocate provides representation for people who are homeless and charged with minor criminal offences. The role was established in 2008 to overcome some of the barriers homeless people face accessing legal services, including: a lack of knowledge of how to navigate the legal system; the need for longer appointment times to obtain instructions; and the need for greater capacity to address multiple and complex interrelated legal and non-legal problems.

Since commencing in 2008, the HPLS Solicitor Advocate has provided court representation to 467 individual clients in 669 matters. From January 2010 to December 2013, the HPLS Solicitor Advocate provided court representation to 324 individual clients facing criminal charges. Of these:

- 51 per cent disclosed that they had a mental illness;
- 56 per cent disclosed that they had drug or alcohol dependency;
- 36 per cent disclosed that they had both a mental illness and drug/alcohol dependency;
- 58 per cent had either a mental illness or drug/alcohol dependency;
- 31 per cent disclosed that they have previously been in prison.

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1 Bailey, B et al *Review of the Law of Bail in NSW: Submission to the New South Wales Law Reform Commission* Public Interest Advocacy Centre, 26 July 2011.

2 These submissions include, for example, Bailey, B and Dodd, P *Treatment and care over punishment and detention – even more critical for young people,* Submission on the NSW Law Reform Commission's Consultation Paper on Young people with cognitive mental health impairments in the criminal justice system, Public Interest Advocacy Centre, 17 March 2011; Brown, L *Updating Bail,* Submission on the draft NSW Bail Bill 2010, Public Interest Advocacy Centre, October 2010; Brown, L and Zulumovski, K *A better future for Australia's Indigenous Young,* Submission to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs' Inquiry into the high involvement of Indigenous juveniles and young adults in the criminal justice system, Pulbic Interest Advocacy Centre, 22 December 2009; and Bailey, B *Special Commission of Inquiry into Child Protection Services in NSW*, Public Interest Advocacy Centre, 11 February 2008.

3 See, for example, Hourigan Ruse, J *Considering non-custodial sentencing options*, Response to the NSW Sentencing Council's review of the use of non-conviction orders and good behavior bonds, Public Interest Advocacy Centre, 27 August 2009.

4 See, for example, Moor D and Schetzer, L *NSW Law Reform Commission – Sentencing Question Papers 5-7*, Public Interest Advocacy Centre, 28 August 2012.

2. Changes to NSW bail laws

PIAC was optimistic that the introduction of the *Bail Act 2013*, based on the considered and extensive work of the NSW Law Reform Commission and broad stakeholder and community consultation, would address the systemic problems embedded in the existing bail regime. Given the detrimental impact of early exposure to the criminal justice system,[5] particularly for young people and vulnerable adults, any decrease in the number of individuals being placed on remand to await trial must be viewed as a positive for long-term public safety. Accordingly, PIAC cautiously welcomed initial statistical evidence indicating a drop in remand receptions during the second quarter of 2014.[6] While recognising there is as yet insufficient data to definitively determine the reasons for this fall in the NSW prison population, PIAC is hopeful that this downward trend continues.

PIAC is concerned that changes to the new bail regime as set out in the 2013 Act will now be made by the *Bail Amendment Act 2014* (the **2014 Act**). Along with others in the NSW legal community,[7] PIAC was disappointed to see moves to substantially reform the 2013 Act before it had been objectively determined that change was required by evidence that the new bail regime was failing to protect the community. The reform contained in the 2014 Act, introducing a category of 'show cause' offences, is a significant change to the 2013 Act. It reverses a fundamental principle of our criminal justice system that an accused be considered innocent until proven guilty and will present a particularly heavy evidentiary burden for disadvantaged people such as PIAC's vulnerable clients.

Accordingly, PIAC urges the NSW Sentencing Council to reject any further expansion of the show cause category in Part 3, Division 1A of the 2014 Act. For the reasons detailed below, PIAC does not believe the extension of the category is necessary or desirable.

At a minimum, PIAC urges that no further reform be undertaken until the new bail regime has been in place for at least a 12-month period to enable an evidence-based assessment of whether further change is warranted.

Recommendation 1

There should be no expansion of the category of "show cause" offences in new s 16B of the Bail Act 2013 *(as amended by the* Bail Amendment Act 2014*).*

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5 See, for example, the damaging consequences of remand as outlined by the NSW Law Reform Commission, "Consequences of remand" (Chapter 5) *Report 133, Bail*, ibid, at p 65.

6 NSW Bureau of Crime Statistics and Research, *NSW Custody Statistics, Quarterly Update*, June 2014, <http://www.bocsar.nsw.gov.au/agdbasev7wr/_assets/bocsar/m716854l11/nswcustodystatisticsjun2014.pdf;http://www.smh.com.au/nsw/number-of-prisoners-falls-as-nsw-considers-changes-to-bail-laws-20140728-zxjbz.html>.

7 See, for example, the comments of the NSW Bar Association, *Media Release: Bail changes threaten basic legal rights*, 5 August 2014, <http://www.nswbar.asn.au/docs/mediareleasedocs/MR_05082014.pdf>; see also the comments of the former Director of Public Prosecutions, Nicholas Cowdery, outlined in Whitbourn, M "Former DPP boss Nicholas Cowdery slams Baird government over Bail Act review" *Sydney Morning Herald online*, 30 June 2014 <http://www.smh.com.au/nsw/former-dpp-boss-nicholas-cowdery-slams-baird-government-over-bail-act-review-20140630-zsr2n.html>.

Recommendation 2

If it is considered there are arguments that may justify the expansion of the 'show cause' offences in new s 16B of the 2013 Act (as amended), it is recommended that no reform be undertaken for at least a 12-month period during which time an evidence-based analysis should be undertaken.

2.1 A new show cause category for bail

In recommending reform of the 2013 Act, the Hatzistergos Review stated the new show cause test should be applied

> to offenders whose alleged offences are such that in the ordinary course, the consequences of materialisation of the risk to the community and the administration of justice are such that they outweigh the likelihood of it occurring. …Broad categories should more accurately reflect groups or types of offences that have such significant consequences to the community.[8]

When introducing the reform to Parliament, the Hon Brad Hazzard MP, Attorney General, confirmed this justification, stating the show cause requirement will 'apply to those offences that involve a significant risk to the community'.[9] Accordingly, the application of the show cause threshold in the new s 16B captures those more serious offences involving personal and social safety.

2.1.1 Subverting the presumption of innocence

PIAC considers the show cause test to be a departure from long-standing common law principles that are also fundamental objectives of the 2013 Act. A bail regime should strike an appropriate balance between, on one hand, the right to liberty and the presumption of innocence, and on the other, the protection of the community and the risk of re-offending. The clear and primary function of a bail regime is to ensure attendance at court of a person charged with a criminal offence. Consideration of bail does not assess guilt and it is not a punitive measure; a person not yet convicted of an offence should not be imprisoned unless there is a compelling reason to do so. In PIAC's view, it is fundamental that every bail decision should depart no more than is absolutely necessary from the right to liberty of a person presumed to be innocent.

The show cause test sidesteps this important balancing exercise by placing as the starting point not the presumption of innocence but an assumption of risk and, consequently, a need for the accused to be held on remand. The impact of reversing the usual onus is compounded by the removal in the 2014 Act of the requirement for a bail authority to have regard to the presumption of innocence and general right to be at liberty.[10]

2.1.2 Relevant factors in a show cause assessment

The factors a bail authority will have to take into account in a show cause assessment are not specified in the 2014 Act. In his Second Reading speech for the 2014 Act, the Attorney General stated that it is expected that NSW bail authorities will refer to the precedents established in

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8 At paragraphs 227 to 228, Hatzistergos, J *Review of the Bail Act 2013,* July 2014, https://www.nsw.gov.au/sites/default/files/news/review_of_the_bail_act_2013_-_final_report.pdf .

10 Item 1, Schedule 1 of the *Bail Amendment Act 2014* removes this requirement in s 3(2) of the *Bail Act 2013*, and inserts a new Preamble, of which the common law presumption of innocence and the general right to be at liberty form part of a general purposes statement.

Victoria and Queensland, which both have show cause requirements in their bail regimes.[11] Based on the factors taken into account in those states, PIAC is confident that it will be extremely difficult for a vulnerable accused to show cause why they should be released on bail. This is due both to the difficult task, often without representation, of discharging the presumption, and due to the facts that will have to be established in order to do so.

In both Victoria and Queensland, there is also no direction in legislation as to the factors an accused can argue in order to show cause why they should not be detained; rather each case is assessed according to the individual's specific circumstances. An accused in those jurisdictions has been able to show cause relying on a single factor or combination of factors,[12] such as permanent employment and stable accommodation, delay in allocating a trial date, ill health (either of the accused or a family member), a weak prosecution case and the accused's criminal history.[13] In Victoria, similarly to the 2014 Act in NSW, if the show cause test is satisfied by the accused, bail will only be granted if the second stage unacceptable risk test is also satisfied.

2.1.3 The impact of show cause requirements on homeless people

Homeless people will be particularly affected by the imposition of a show cause test. Requiring a homeless person charged with a serious indictable offence to show cause as to why they should be released on bail places an additional pressure for that person to establish that they are able to reside at a particular address.

If a person is experiencing homelessness, it is unreasonable and impracticable to expect the person to reside at a particular address if there is no suitable accommodation available, or the accommodation available is not safe and secure. If a person is unable to find safe, secure and affordable housing for the duration of the bail period, it will be extremely difficult for the person to comply with this condition. It is particularly inappropriate for a court to order a person to reside in unsafe, unaffordable, or inadequate housing as a condition of their bail given the detriment this can cause to an already vulnerable person's health and well-being and due to the risk of re-offending this instability creates. On the other hand, there is concern that a person's lack of a stable residential address may be used as a basis for considering that there is a risk that she/he will not subsequently attend court.

For homeless people, such a requirement for residence can result in a person being refused bail. As Case study 1 from PIAC's HPLS practice illustrates, the NSW Supreme Court has stated that being homeless, of itself, should not be a reason for refusing bail, particularly for non-serious offences.

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[11] See the Second Reading Speech for the *Bail Amendment Bill 2014*, NSW, *Parliamentary Debates*, Legislative Assembly, 13 August 2014, *Hansard*, 30504 (Brad Hazzard).

[12] Bell J in *Woods v DPP* [2014] VSC 1 (17 January 2014) at [51] adopting the reasoning of Gillard J in *DPP v Harika* [2001] VSC 237 (24 July 2001) at [41].

[13] Victorian Law Reform Commission, *Review of the Bail Act*, Consultation Paper, October 2005 <http://www.lawreform.vic.gov.au/sites/default/files/Bail_Consultation_Paper_Final.pdf>. For Queensland jurisprudence see, for example, the relevance of delay discussed in *Lacey v DPP* (Qld)*; Lacey v DPP* [2007] QCA 413 (23 November 2007); in *Neale, Re an Application for Bail* [2013] QSC 310 (7 November 2013) North J considered the strength of the prosecution case, the accused's unblemished criminal record, employment record and apparent co-operation with the police; in *Carew v DPP* [2014] QSC 001 (14 January 2014) Byrne J released the accused on bail taking into account such factors as the accused's ties with the community, business connections in the local area, previous record of attending court hearings and the accused's anxiety not to return to solitary confinement (considered to be a disincentive to reoffending while on bail).

HPLS Case study 1

JD has a long history of anti-social and public disorder offences, as well as breaching bail conditions. He was charged with assaulting his former partner with a knife, and was bailed. He was subsequently breached on his bail on charges of offensive conduct. Police opposed bail, and bail was refused by the Local Court Magistrate on the basis that JD was homeless.

On an application for bail in the Supreme Court, the Court held that the fact that he did not have an address should not be a reason for refusing bail, especially for non-serious charges such as offensive conduct.

In PIAC's view, allowing a person to remain in the community pending the resolution of their criminal case promotes and enables effective participation in society and fulfils some fundamental objectives of the justice system. A person remanded in custody on the other hand, is effectively prevented from participating in society in a meaningful way, which can have detrimental effects. For example, in PIAC's experience representing people at risk of homelessness, the impact of being refused bail can lead to a person losing their housing, which can in turn have devastating consequences when the person is released from custody into homelessness.[14]

3. Proposed expansion of the show cause category

The proposal that the NSW Sentencing Council has been asked to consider is whether to expand the new show cause category to include where an individual has allegedly committed a 'serious indictable offence'[15] when already subject to a non-custodial sentence (a good behaviour bond, intervention order or community sentence) or custodial sentence served outside a prison (an Intensive Correction Order) or while in custody.[16] This will involve a shift from the 2014 Act's trigger, which focuses solely on the severity of the alleged offence and therefore the assumption of heightened risk to the community, to a consideration of previous criminal history.

PIAC submits that this proposal should be rejected. It is unnecessary for public protection and will subvert the important overarching principles set out in the Preamble to the 2013 Act[17] to ensure, in addition to public safety, the integrity of the justice system, the common law presumption of innocence and the general right to be at liberty.

3.1 Can the existing unacceptable risk test mitigate the concerns raised by these offences?

PIAC acknowledges that the fact an offence was allegedly committed when an accused was already subject to a specified custodial or non-custodial sentence will raise risk concerns. PIAC believes the unacceptable risk test will be able to most satisfactorily address these concerns in accordance with the purposes of the Act.

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14 See Schetzer, L and StreetCare, *Beyond the Prison Gates – The experience of people recently released from prison into homelessness and housing crisis* Public Interest Advocacy Centre, 31 July 2013 available at http://www.piac.asn.au/publication/2013/08/beyond-prison-gates.

15 As defined in s 4 of the *Crimes Act 1900* (NSW) to mean an offence punishable by imprisonment for life or a term of five years.

16 As outlined in the terms of reference, accessed 15 October 2014 at http://www.sentencingcouncil.justice.nsw.gov.au/sentencing/sent_council_current_projects/bail_show_cause_project.html.

17 As amended by Item 1, Schedule 1 of the *Bail Amendment Act 2014 (*NSW).

The proposed additional show cause categories will capture a wide range of alleged criminal behaviour and offenders. A serious indictable offence[18] spans multiple criminal acts, from predatory driving to assault. Non-custodial sentences, such as bonds, are typically imposed for less serious offences, from knowingly breaching an AVO to driving while suspended. Imposing a higher threshold, which increases the likelihood of bail refusal, on a small range offender will risk imprisoning individuals who pose no risk to the community with all the detriment this entails. It will also encompass risk that does not involve the serious consequences that the Hatzistergos Review intended to address in recommending the show cause test.[19] Requiring an individual, for example, who has been placed on a good behaviour bond for driving while suspended who then gets involved in a pub fight to show cause is a disproportionate response to the legitimate aim of protecting public safety. PIAC believes that this risk is most appropriately addressed in the context of an unacceptable risk assessment. A determination of whether a bail concern[20] can be nullified will allow a bail authority to weigh up the multiple factors relevant to the circumstances of the alleged offence, including, for example, a history of non-compliance with good behaviour bonds.[21]

The experience in Victoria lends support to this view. It is evident that, in practice, the application of the show cause and unacceptable risk tests under the *Bail Act 1977* (Vic) has caused confusion. In its review, the Victorian Law Reform Commission found that the considerable overlap between the tests made the division between them somewhat artificial.[22] Two approaches have emerged in Victorian jurisprudence.[23] On one hand, the show cause test has been conflated with the unacceptable risk test, given many of the factors to be considered in the latter second stage have been found to be relevant to the primary show cause consideration.[24] On the other hand, it has been asserted that approaching the show cause offence bail consideration as a one-stage test is incorrect and there is indeed a two-stage process.[25] Either way, Bell J in *Woods v DPP*[26] concluded that

> …unacceptable risk is very important in relation to whether cause has been shown. …If the prosecution fails to establish unacceptable risk, this will count in the applicant's favour in the show-cause assessment. If the prosecution establishes unacceptable risk, this will count against the applicant in that assessment…[27]

The difficulties in the application of the bail regime led the Victorian Law Reform Commission to conclude that there should be one unacceptable risk test, noting:

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18 As defined in s 4, *Crimes Act 1900* (NSW) to mean an indictable offence that is punishable by imprisonment for life or for a term of 5 years or more.

19 See above, note 8.

20 As defined in s 17 of the 2014 Act, a "bail concern" is one that an accused, if released from custody, will '(a) fail to appear at any proceedings for the offence, or (b) commit a serious offence, or (c) endanger the safety of victims, individuals or the community, or (d) interfere with witnesses or evidence.

21 New s 18, Matters to be considered as part of assessment.

22 Victorian Law Reform Commission, *Review of the Bail Act, Final Report*, August 2007, at page 37.

23 The Court of Appeal has yet to resolve which of the two is the correct: per Bell J in *Woods v DPP* [2014] VSC 1 (17 January 2014) at [55].

24 See the approach of President Maxwell in *Re Fred Joseph Asmar* [2005] VSC 487 (Unreported, Supreme Court of Victoria, Maxwell P, 29 November 2005).

25 See the approach of Justice Gillard in *DPP v Harika* [2001] VSC 237 (Unreported, Gillard J, 24 July 2001).

26 [2014] VSC 1 (17 January 2014).

27 Ibid at para 58.

> Compartmentalising a bail decision so there is a two-step process with individual factors being considered and addressed as different stages is illogical. …[S]atisfying one stage of the process will likely satisfy the other.[28]

Given the Victorian experience, PIAC considers there is a likelihood that the main impact of incorporating an expanded show cause test will only be to cause confusion and inappropriately place the bail burden on a greater number of alleged offenders. The flexibility of the unacceptable risk test is likely to be the more effective and efficient approach, particularly when taking account of the breadth of the proposed show cause offences now being considered by the Sentencing Council.

3.2 Expected impact of expanding the show cause category

3.2.1 Increase in number of offenders having to show cause

The expansion of the show cause category will result in a larger pool of alleged offenders who will have to prove why their detention is not justified. It is difficult to predict precisely how great the impact will be in terms of time and cost; however it is inevitable that there will be an increased number of show cause hearings. Good behaviour bonds, for example, are an increasingly used non-custodial sentence imposed in NSW;[29] in 2010, of the 103,584 offenders sentenced in the NSW Local Court, just over 20,500 were placed on a good behaviour bond. Just over 4000 offenders were made subject to a community sentence order.[30] Recent analysis of recidivism rates of those placed on good behaviour bonds in 2011 across Australia show a tendency to reoffend; 47.8% of all offenders placed on a bond for up to two years reoffended within 36 months.[31]

3.2.2 Broader implications: homeless people, mental illness and the criminal justice system

PIAC is concerned that extending the show cause category will perpetuate disadvantage by undermining key developments in the NSW criminal justice system used to divert vulnerable offenders. In particular, the use of good behaviour bonds and various intervention program orders are important sentencing options which have significant capacity to respond to the needs of homeless people with mental illness who disproportionately have contact with the criminal justice system.

Previous research has consistently identified a strong relationship between homelessness and mental illness. In their study of 4,291 homeless people in Melbourne, released in 2011, Johnson and Chamberlain found that 31 per cent of their sample had a mental illness (not including any form of alcohol or drug disorder).[32] Current research exploring the pathways of people with

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28 Victorian Law Reform Commission, *Review of the Bail Act*, Final Report, August 2007, at http://www.lawreform.vic.gov.au/projects/bail/bail-act-final-report.

29 See NSW Law Reform Commission, *Sentencing – Patterns and Statistics, Companion Report 139-A*, July 2013, . 67 <http://www.lawreform.justice.nsw.gov.au/agdbasev7wr/_assets/lrc/m731654l10/report%20139-a.pdf>.

30 Brignell, G et al, *Sentencing Trends & Issues, Common Offences in the NSW Local Court: 2010, Number 12,* Judicial Commission of New South Wales, May 2012 <http://www.judcom.nsw.gov.au/publications/st/sentencing-trends-issues-no-40/ST40.pdf>.

31 Poynton, S and Weatherburn, D *Bonds, suspended sentences and reoffending: Does the length of the order matter?,* Australian Institute of Criminology, July 2013<http://www.aic.gov.au/publications/current%20series/tandi/461-480/tandi461.html>.

32 Johnson, G. and Chamberlain, C. (2011), 'Are the Homeless Mentally Ill?', *Australian Journal of Social Issues*, Autumn 2011, 35.

mental and cognitive impairment into prison indicates that those people with disability, in particular those with complex needs, are significantly more likely to have experienced homelessness than those without disability.[33]

In 2004, Teesson et al conducted interviews with 210 homeless people in Sydney, comprising 160 men and 50 women.[34] The study found that 73 per cent of men and 81 per cent of women met the criteria for at least one mental disorder in the year preceding the survey and that 40 per cent of men and 50 per cent of women surveyed had two or more disorders. Of particular interest was their comparison of the rate of mental illness in the homeless population to that of the general population, which found that the prevalence of mental disorders among homeless people in Sydney is approximately four times that of Australia in general.

A 2003 study involving 403 homeless young people in Melbourne aged 12-20 found that 26 per cent of those surveyed reported a level of psychological distress indicative of a psychiatric disorder.[35] In its 2003 study into the legal needs of homeless people in NSW, the Law and Justice Foundation of NSW reported that mental health, alcohol and drug issues, dual diagnosis and other complex needs are prevalent among the homeless population, particularly those who are entrenched in homelessness.[36]

Several studies in Australia over the last ten years have found a strong correlation between homelessness, criminal offending, and experience of imprisonment. A 2003 study of people released from prison found that being homeless and not having effective accommodation support were strongly linked to returning to prison. Sixty one per cent of those homeless on release returned to prison, compared to 35 per cent of those with accommodation.[37]

According to the Australian Institute of Health and Welfare, in 2005/06, 12 per cent of clients of specialist homelessness services reported that they had spent time in the criminal justice system, and 11 per cent reported they had more than one experience of being incarcerated in a correctional facility.[38]

In 2008, the Australian Institute of Criminology reported on a 7 year survey of 24,936 police detainees, which found that 7 per cent of detainees reported primary homelessness or living in crisis accommodation at the time of arrest.[39] Most recently, a 2009 NSW Inmate Health Survey reported that 11 per cent of survey participants were homeless prior to their current incarceration,

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33 Baldry, Eileen, Dowse, Leanne and Clarence, Melissa (2012), *People with mental and cognitive disabilities: pathways into prison*, Background Paper for Outlaws to Inclusion Conference, February 2012, available online at <http://www.mhdcd.unsw.edu.au/publications.html>

34 Teesson, M., Hodder, T. and Buhrich, N. (2004), "Psychiatric Disorders in Homeless Men and Women in Inner Sydney" (2004) 38(162) *Aust NZ J Psychiatry*.

35 Rossiter, B, Mallett, S, Myers, P and Rosenthal, D (2003) *Living Well? Homeless Young People in Melbourne*, Melbourne, Australian Research Centre in Sex, Health and Society, 17.

36 Forell, Suzie, McCarron, Emily and Schetzer, Louis (2005), *No Home, No Justice? The Legal Needs of Homeless People in NSW*, Law and Justice Foundation of NSW, Sydney, 124.

37 Baldry, E, McDonnell, D, Maplestone, P, Peeters, M (2003), *Ex-prisoners and accommodation: what bearing do different forms of housing have on social reintegration?* Australian Housing and Urban Research Institute (AHURI), as quoted in Australian Housing and Urban Research Institute (AHURI) 2004, 'The role of housing in preventing and re-offending' *Research and Policy Bulletin*, Issue 36.

38 Australian Institute of Health and Welfare (AIHW) (2007), *Homeless people in SAAP*, SAAP National Data Collection Annual Report 2005-06, Canberra.

39 Australian Institute of Criminology (AIC) (2008), 'Homelessness, Drug Use and Offending', *Crime Facts Info*. No 168, 15 April 2008.

and of those who had previous experience of prison, 30 per cent reported that they had experienced difficulties accessing stable accommodation within six months of their last release into the community.[40]

That people with a mental illness are over-represented in the criminal justice system is generally accepted as fact, and confirmed by a number of studies:

- A 2001 Australian Institute of Criminology study found that of the approximately 15,000 people in Australian institutions for a major mental illness, one-third were in prisons.[41]
- According to NSW Correctional Health Services, in 2003, 74 per cent of NSW inmates had at least one psychiatric disorder[42] compared to the 22 per cent in the general population.[43]
- In 2003, in the 12 months prior to being arrested, 1 in 20 NSW prisoners will have attempted suicide,[44] and every day, approximately 4 people with schizophrenia are received into NSW prisons.[45]
- In 2008, following a study of 2700 people in the Australian prison system, it was found that 28 per cent of the prisoners experienced a mental health disorder in the preceding 12 months, 34 per cent had a cognitive impairment and 38 per cent had a borderline cognitive impairment.[46]
- A 2011 report found that 87 per cent of young people in custody in NSW had a psychological disorder, with over 20 per cent of Indigenous young people and 7 per cent of non-Indigenous young people in custody being assessed as having a possible intellectual disability.[47]

According to the Australian Institute of Criminology, there are several factors that may explain why the number of people in NSW with mental illnesses who engage with the criminal justice system is disproportionately high. Some are social: the prevalence of homelessness and economic desperation among people with mental illness; the deinstitutionalisation and isolation of people with mental illness; and increased use of drugs and alcohol among the general population and among people with mental illness.[48] Others point to the paucity of services available to people with a mental illness: the inadequate rehabilitation of patients in mental health facilities, and the disconnection between mental health services and the courts.[49]

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[40] Corben, S and Eyalnd, S (2011), *NSW Inmate Census 2011*, Corrective Services NSW.

[41] Australian Institute of Criminology (2009), 'Mental disorders and incarceration history', No 184, January 2009, Canberra. <http://www.aic.gov.au/publications/current%20series/cfi/181-200/cfi184.aspx>.

[42] "Psychiatric disorder" has been given the broad definition of "any psychosis, anxiety disorder, affective disorder, substance use disorder, personality disorder or neurasthenia" – Tony Butler & Stephen Alnutt (2003), 'Mental Illness Among New South Wales Prisoners', NSW Corrections Health Service, (2003), 15.

[43] Tony Butler & Stephen Alnutt (2003), 'Mental Illness Among New South Wales Prisoners', NSW Corrections Health Service, 2.

[44] Ibid, 3.

[45] Ibid, 21.

[46] Baldry, Eileen (2008), *A critical perspective on Mental Health Disorders and Cognitive Disability in the Criminal Justice System*, (2008).

[47] Indig, Devon, Vecchiato Claudia, Haysom Leigh (2009), *2009 NSW Young People in Custody Health Survey: Full report,* Justice Health and Juvenile Justice, (2011).

[48] James RP Ogloff, Michael R Davis, George Rivers and Stuart Ross (2007), Australian Institute of Criminology, 'The identification of mental disorders in the criminal justice system', No 334, March 2007, Canberra. Available at <http://www.aic.gov.au/publications/current%20series/tandi/321-340/tandi334.html> (8 March 2013).

[49] Tony Butler & Stephen Alnutt (2003), 'Mental Illness Among New South Wales Prisoners', NSW Corrections Health Service, (2003), 15, 49.

3.2.3 Additions to the categories of show cause offences: good behavior bonds and intervention program orders

Good behaviour bonds and several intervention order programs have been categorised under the broader rubric of 'problem-solving justice initiatives', which have had significant positive effects on the vulnerable and disadvantaged groups in the communities in which they have been implemented. Problem-solving justice initiatives can have significant value in responding to criminal offending for people experiencing homelessness and people with mental illness. The strategies can make a significant contribution to making our communities safer, and encouraging people who would be otherwise at high risk of reoffending, to become positive actors in the social and economic life of our society.

By making the recipients of such sentencing options subject to show cause requirements in order to be released on bail should they re-offend, the benefit of such problem-solving justice initiatives is undermined, given the higher likelihood of that person being incarcerated pending their hearing.

In terms of the HPLS criminal law casework, three sentencing options that are affected by the proposals and which are often sought due to their problem-solving justice features are:

- Good behaviour bonds under s 9 of the *Crimes (Sentencing Procedure) Act 1999*;
- Deferral of sentencing for rehabilitation, participation in an intervention program under s 11 of the *Crimes (Sentencing Procedure) Act 1999*;
- Orders made pursuant to the Court Referral of Eligible Defendants into Treatment (CREDIT) program.

3.2.3.1 Section 9 good behaviour bonds

Good behaviour bonds under s 9 of the *Crimes (Sentencing Procedure) Act 1999* (**Sentencing Procedure Act**) work particularly well for clients who are homeless and in need of support to meet the underlying needs that give rise to their offending. In 2013 to 2014, for example, close to 11% of all cases where PIAC's HPLS Solicitor Advocate provided representation finalised to date, resulted in the imposition of a s 9 bond.[50]

The NSW Law Reform Commission has noted the high percentage of bonds imposed in the Local Court.[51] This may simply reflect the characteristics of offenders who appear in the Local Court on charges largely due to their homelessness, mental health and substance dependency. The following case study from PIAC's HPLS legal practice demonstrates how a bond can support the path to recovery and safety for people with complex needs.

> **HPLS Case study 2**
> SP was homeless and slept in a city doorway where there was a CCTV camera in the hope that it would give him some protection from violent attacks. SP was addressing his substance dependency problems and had no record of violence. Another homeless man set up a fruit

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50 At the time of writing, of a total of 231 closed case files, 24 offenders were placed on section 9 good behavior bonds.

51 NSW Law Reform Commission, *Sentencing Question Paper 7, Non-custodial sentencing options*, June 2012, at para 7.27, <http://www.lawreform.justice.nsw.gov.au/agdbasev7wr/lrc/documents/pdf/cref130qp07.pdf>.

stall near SP selling fruit late at night and early in the morning. When SP asked him to move, the fruit vendor became abusive, at which point SP punched him a number of times.

While the court noted the seriousness of the offence, it applied a s 9 bond for 12 months, taking into account the provocation and SP's progress in rehabilitation.

Good behaviour bonds allow the court to set conditions that support an offender's rehabilitation, health and housing. This aspect of good behaviour bonds is particularly important for HPLS clients. A primary benefit of good behaviour bonds is the flexible response magistrates can deliver for offenders with complex needs with consistent but minor offences. Moreover, if such a person were to be denied bail as a result of failing to 'show cause' after being charged with a subsequent offence, she/he would not be able to continue in any rehabilitation, health or housing program that is part of the s 9 Bond, that could further stabilise the individual's living situation.

This is illustrated in the HPLS case study below:

HPLS Case Study 3
WJ pleaded guilty to a charge of voyeurism in August 2014. On sentence he was convicted and placed on a three-year good behaviour bond, pursuant to section 9 *Crimes (Sentencing Procedure) Act* already detailed above.

In later September, WJ was arrested following execution of a search warrant. As well as numerous items of property being seized, WJ was found in possession of three bags of "Ice", amounting to 11.2 grams. The quantity is in the strictly indictable category.

At his bail hearing, the Magistrate took the view that WJ should not be precluded from bail just because he was on a good behaviour bond, and that to deny bail would prevent WJ from continuing his treatment pursuant to the s 9 Bond.

3.2.3.2 Section 11 treatment bonds

HPLS clients have benefitted from receiving s 11 Treatment Bonds. Under s 11 of the Sentencing Procedure Act, where a court finds a person guilty of an offence, it may adjourn the matter:

- for the purpose of assessing the offender's capacity and prospects for rehabilitation; or
- for the purpose of allowing the offender to demonstrate that rehabilitation has taken place; or
- for the purpose of assessing the offender's capacity and prospects for participation in an intervention program; or
- for the purpose of allowing the offender to participate in an intervention program; or
- for any other purpose the court considers appropriate in the circumstances.

Several HPLS clients have successfully completed their treatment bonds, and subsequently become eligible for more remedial and therapeutic sentencing outcomes when their charges returned to court. Such bonds result in more flexible and therapeutic sentencing options for offenders with a history of alcohol or drug dependency.

The following HPLS case studies illustrate how the successful completion of a s 11 treatment bond can widen the available options for appropriate remedial sentencing. In particular, s 11 bonds are an important mechanism for homeless clients with lengthy records, who cannot access non- custodial options.

HPLS Case study 4
GC was charged with a number of theft offences. He was initially placed on a s 11 treatment bond and the matter was adjourned for a period of six months to allow for a subsequent assessment as to how the treatment progressed. In the interim the client committed further offences of stealing. When the matter returned to Court for sentence, the probation and parole report again stated that he was not suitable for a community service order, due to drug use.

The Magistrate placed him on further s 9 good behaviour bonds, for two reasons:

- Despite further offending, the client had gone reasonably well on his drug treatment program.
- The Magistrate was of the view that placing the client on a s 12 suspended sentence was setting him up to fail. That is, given his history, there was a good chance he would offend again and would be in breach of a s 12 bond which would result in an automatic term of imprisonment.

The Court would have imposed a community service order if it could, but could not due to the report from probation and parole. The Court was of the view that a s 12 bond for stealing offences was harsh, thus it took a more meaningful and remedial option.

HPLS Case study 5
DF was charged with supply of a prohibited drug, theft and a further possess prohibited drug charge. DF was homeless and had a history of drug use. He was thus ineligible for a community service order.

The Magistrate was loath to impose a suspended sentence because he considered it was setting DF up for failure. He was placed on a s 11 treatment bond. When the matter returns to Court and if DF has no further offending, there is a reasonable prospect that a s9 good behaviour bond may be imposed.

HPLS Case study 6
TA has a history of psychosis and depression, substance dependency and trauma caused by childhood sexual assault from the age of 4 to 16. She had a history of violent offending and the latest charge was for common assault. A custodial sentence was likely.

The magistrate took into account the personal circumstances of TA and considered a suspended sentence. Because of TA's history of offending and her underlying health issues, however, a suspended sentence was likely to fail unless it was combined with treatment. TA entered a drug treatment program, which led the court to agree to a section 11 bond and to adjourn the matter for three months. If TA has remained engaged with the program and made progress, it is possible that when TA appears before the court in three months, a section 9 good behaviour bond will be applied.

3.2.3.3 CREDIT program

Court Referral of Eligible Defendants into Treatment (CREDIT) is a court-based intervention program involving either voluntary or court-ordered participation by NSW adult defendants. The program was designed to contribute to the NSW Government's target of reducing 'the proportion

of offenders who re-offend within 24 months of being convicted by a court ... by 10 per cent by 2016'.[52]

In order to meet its overall aim of reducing re-offending, CREDIT seeks to encourage and assist defendants appearing in local courts to engage in education, treatment or rehabilitation programs.

An evaluation of the pilot program by BOCSAR has shown a high degree of satisfaction among both stakeholders and participants.[53]

CREDIT links the defendant to a range of services (including accommodation, financial counselling, mental health support, domestic violence support, education, training, drug treatment, etc), thereby creating the capacity to address a broad range of issues that could be impacting on offending and re-offending. The program is also sufficiently flexible to vary the intensity of the services response in relation to the defendant's needs and risk of re-offending.

The following HPLS case studies illustrate the effectiveness of the CREDIT Program.

> **HPLS Case study 7**
> DTX was referred to HPLS by Newtown Mission in May 2011, charged with assault.
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> When DTX was waiting at an ATM, an older man in front of him was taking an inordinately long time to obtain money. DTX was in a hurry and therefore told the man to hurry up. The man responded in a verbally aggressive manner. DTX realised that the man was simply playing with the keys on the ATM and again asked him to hurry up. When the man responded in an aggressive tone, DTX grabbed him and pushed him over.
>
> DTX was charged with common assault. He had no criminal record; however, the assault was not minor. DTX disclosed that he had alcohol, mental illness and anger management problems. Due to the nature of the assault, the Magistrate required DTX to demonstrate to the Court that he was obtaining assistance to resolve his alcohol and anger management issues. He was referred to the CREDIT program and in four months successfully completed the program.
>
> On sentence, a s 10 bond was imposed, largely because the client had undertaken counselling and courses provided by CREDIT.
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> **HPLS Case study 8**
> KM was charged with theft and use of credit cards. She had a lengthy history of drug abuse, mental illness and a lengthy criminal record for theft and fraud, and had previously served terms of imprisonment.
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> Subsequent to the offence, KM had commenced a stable relationship and had made serious attempts to get off drugs. At the time of pleading guilty, it was clear that KM faced the real prospect of a further term of imprisonment. Given the change in her circumstances and her

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[52] NSW Government, *A New Direction for NSW: State Plan*, 2006.

[53] Trimboli, L, NSW Court Referral of Eligible Defendants into Treatment (CREDIT) pilot program: An Evaluation *Crime and Justice Bulletin, Contemporary Issues in Crime and Justice, No. 159, February 2012*, NSW Bureau of Crime Statistics and Research, <http://www.bocsar.nsw.gov.au/agdbasev7wr/bocsar/documents/pdf/cjb159.pdf>.

attitude, KM was referred to the CREDIT program. A program was developed for KM to obtain financial and drug counselling together with referral to self-development programs.

If KM successfully completes the program it is likely that an alternative to full-time custody may be imposed.

3.3 Is there a need for a new show cause category?

As outlined in this submission, PIAC does not consider that there is any need for additions to the show cause category. The objectives of the 2013 Bail Act to ensure public safety, ensure the integrity of the justice system, and have regard to the common law presumption of innocence and the general right to be at liberty are most effectively addressed by the imposition of an unacceptable risk test. The bail authority's task to take into account all relevant circumstances of the alleged offence and weigh in the balance the various factors that may raise or mitigate risk is best served by a test that is flexible and fair. PIAC does not consider that further expanding the use of a reverse onus test will provide this measure of flexibility and fairness.

Finally, given the criminogenic effect of exposure to the criminal justice system is well established, any move to increase the likelihood of that exposure, which costs both individuals and the whole community, should be avoided. PIAC submits that expanding the show cause category along the lines proposed will increase that likelihood, and accordingly urges the Sentencing Council to recommend that no further amendment to the 2013 Act be undertaken.