The New *Bail Act*

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1 Background

The *Bail Act 2013* was enacted in May 2013 and is expected to commence in May 2014.

As every criminal lawyer knows, the *Bail Act* 1978 is an incoherent mess, largely due to numerous amendments over the years. At the time of enactment, there was a general presumption in favour of bail for all offences except armed robbery; this has gradually been whittled away and replaced with a complex set of offence-based presumptions. The growing number of people (especially children) on remand is a matter of serious concern.

Soon after the Coalition government took office in 2011, the issue of bail was referred to the NSW Law Reform Commission. The NSWLRC's report, released in April 2012[1], made a series of recommendations, including simplifying the Act and doing away with the current system of presumptions. Most, but not all, of the recommendations have found their way into the new Act.

This paper aims to highlight the main features of the new Act, with a particular emphasis on its application to disadvantaged people. It does not claim to be a comprehensive summary of the entire Act.

Practitioners may find it helpful to read the papers presented by Debra Maher (June 2013), Paul Johnson (August 2013), and Lucinda Opper (March 2014)[2], and an article by Christopher White in the February 2014 edition of the Judicial Officers' Bulletin[3]. Lucinda Opper's paper is particularly comprehensive and contains a detailed discussion of case law (mostly from Victoria) about "unacceptable risk", the presumption of innocence and the right to be at liberty.

2 Significant changes introduced by the new Act

While many features of the new Act are familiar, there are some significant changes and new concepts, for example:

2.1 Purpose of Act

Unlike the previous Act, the new Act contains a Statement of Purpose, set out in s3.

Subs(1) essentially states that the purpose of the Act is to provide a legislative framework for decisions as to whether accused persons should be detained or released.

[1] http://www.lawreform.lawlink.nsw.gov.au/lrc/lrc_completed_projects/lrc_bail.html

[2] All three papers are available at http://criminalcle.net.au/main/page_cle_pages_bail.html

[3] For those who have a subscription to JIRS, available at https://sis.judcom.nsw.gov.au/publish/job/vol26/feb/article1.html

More importantly, subs(2) provides:

> "A bail authority that makes a bail decision under this Act is to have regard to the presumption of innocence and the general right to be at liberty."

In *Woods v DPP* [2014] VSC 1, Bell J (citing *Antunovic v Dawson* (2010) 30 VR 355) noted that "the principle of personal liberty is wider than freedom from unlawful detention. It encompasses freedom from unlawful restraint upon movement as well."

2.2 Removal of presumptions

The most significant feature of the new Act is that it does away with the presumptions that exist under the current Act. Under the new Act:

- For some types of offences, there is a right to release, either with or without bail (see section 4 of this paper).
- In an application for bail pending appeal to Court of Criminal Appeal or the High Court, an applicant must demonstrate "special or exceptional circumstances" (see section 7 of this paper).
- In all other cases, there is a requirement to consider "unacceptable risk". In my view, the provisions dealing with unacceptable risk, combined with the requirement to consider the presumption of innocence and the right to be at liberty, effectively create a presumption in favour of bail (see section 5 of this paper).

2.3 Unacceptable risk model

The new Act requires a bail decision-maker to consider whether there are any "unacceptable risks" that the accused will fail to appear, commit a serious offence, endanger the safety of certain others, or interfere with witnesses or evidence.

- If there are no unacceptable risks, bail must be granted unconditionally or dispensed with.
- If any unacceptable risks can be mitigated by the imposition of conditions, conditional bail may be granted.
- Bail may be refused only if there is an unacceptable risk which cannot be mitigated by imposing bail conditions.

This concept will be discussed in more detail in section 5 of this paper.

2.4 Breach of bail

Any criminal lawyer working with young people, Aboriginal people, or clients who are otherwise disadvantaged, will be familiar with the current police practice for dealing with breaches of bail. Although the current Act provides police with a discretion to arrest for breach of bail, and contemplates the issue of a summons as an alternative, most police officers proceed straight to arrest.

While the new Act does not provide explicitly that arrest is a last resort, it sets out a hierarchy of responses to a suspected breach of bail. It also directs police to consider certain matters in deciding which response to take. This will be discussed in further detail in section 10 of this paper.

2.5 22A is here to stay (with some modifications)

To the disappointment of many defence lawyers, s22A of the current Act has been carried over into s74 of the new Act. However, there are some changes, which are discussed in section 9 of this paper:

- a child who has been refused bail on their first appearance has another opportunity to apply for bail before the section takes effect;
- s74 applies to detention applications by the prosecution as well as to release applications by the accused.

3 Framework for making of bail decisions

Part 3 of the Act sets out the matters that a bail authority (defined in s4 as a police officer, court or authorised justice) must take into account when making a bail decision.

Section 15 provides that a bail decision must be made in accordance with Part 3.

Section 16 sets out a flowchart showing the key features of a bail decision for an offence (other than an offence for which there is a right to release under s21).

The framework for making of bail decisions, and the types of decisions that may be made, are discussed in the following sections of this paper.

4 Right to release for certain offences

4.1 Offences for which there is a right to release

Section 21 provides that an accused person has the right to release for the following offences:

- fine-only offences;
- other offences under the *Summary Offences Act*, other than those specifically excluded by subs(3) (these are offences relating to obscene exposure, violent disorder, knives, offensive implements, laser pointers, and loitering by convicted child sex offenders near premises frequented by children; some of these are only "excluded offences" if the accused has prior convictions for similar offences); and
- Children's Court matters that are being referred to a youth justice conference under the *Young Offenders Act*.

4.2 Decisions available if there is a right to release

A person with a right to release must:

- be released without bail (if the bail authority is a police officer); or
- have bail dispensed with (if the bail authority is a court or authorised justice); or
- be released on bail, with or without conditions.

4.3 Loss of automatic right to release

Importantly, subs(4) provides that the automatic right to release is lost if the accused has breached a bail undertaking or condition in respect of the offence.

Unlike s8 of the old Act, this provision does not refer to a “reasonable” condition. It is possible that a police officer, bail justice or magistrate could impose unreasonably onerous conditions for a minor summary offence, and an accused person who breaches such a condition would lose their automatic entitlement to release.

4.4 Relevance of “unacceptable risk”

Where a right to release exists, the “unacceptable risk” test (discussed in the next section of this paper) does not apply in the same way as it does to other bail decisions.

However, the bail authority will need to consider whether there is any unacceptable risk for the purpose of deciding whether it is necessary to impose any bail conditions.

5 The “unacceptable risk” test

5.1 Requirement to consider unacceptable risk

Section 17(1) and (2) provide:

> (1) A bail authority must, before making a bail decision, consider whether there are any unacceptable risks.
>
> (2) For the purposes of this Act, an "unacceptable risk" is an unacceptable risk that an accused person, 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.

Section 17(3) sets out the matters that are to be considered in deciding whether there is an unacceptable risk. These are somewhat similar to the criteria in s32 of the current Act and will be discussed in section 6 of this paper.

As mentioned above, in cases where there is a right to release, the “unacceptable risk” test has work to do only for the purpose of deciding what, if any, conditions should be imposed on bail.

In appeal bail applications where there is a “special or exceptional circumstances” test, it seems that there will still be a requirement to consider unacceptable risk (see section 7 of this paper).

5.2 If there are no unacceptable risks

If there are no unacceptable risks, s18 provides that the only decisions that may be made are:

- a decision to grant unconditional bail; or
- a decision to release the person without bail (if the bail authority is a police officer) or to dispense with bail (if the bail authority is a court or authorised justice).

5.3 If there is an unacceptable risk

If there is an unacceptable risk, s19 provides that bail may be either granted or refused.

However, s20(1) provides that bail may be refused "only if the bail authority is satisfied that there is an unacceptable risk that cannot be sufficiently mitigated by the imposition of bail conditions".

In my view, this effectively amounts to a general presumption in favour of bail.

Section 24(1) provides that a bail condition may be imposed only for the purposes of mitigating an unacceptable risk (see further discussion in section 8 of this paper).

5.4 Interpretation of "unacceptable risk"

The Act does not define "unacceptable risk". However, the concept is based on the Victorian *Bail Act*, and the concept is also used in other jurisdictions including Queensland.

Subsection 4(2)(d) of the Victorian Act provides that "a court shall refuse bail" if satisfied that there is an unacceptable risk that the accused if released on bail would:

- fail to surrender himself [sic] into custody in answer to his [sic] bail;
- commit an offence whilst on bail;
- endanger the safety or welfare of members of the public; or
- interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself [sic] or any other person.

However, it is important to note that the Victorian Act is different from the new NSW Act. The Victorian Act (somewhat like the old NSW Act) was enacted in the 1970s and had a number of amendments since then.

Although there is a general presumption in favour of bail (s4(1)), there are a number of exceptions. For certain offences, an accused person must "show cause" why bail should be granted (equivalent to a presumption against bail) and for some offences (treason, murder and certain drug offences) bail may be granted only in exceptional circumstances.

Therefore, as well as dealing with the issue of unacceptable risk, many Victorian authorities discuss whether the applicant has "shown cause" or whether "exceptional circumstances" exist, and how these tests interact with the "unacceptable risk" test. For the most part, NSW practitioners will not need to trouble themselves with such matters.

The scheme of the Victorian Act and the applicable principles are helpfully summarised in the case of *Asmar* [2005] VSC 487. In that case, the accused was charged with several offences, including a firearms offence, which placed him in a "show cause" position. Maxwell P was satisfied that there was no unacceptable risk that the applicant would commit an offence, or would approach or threaten prosecution witnesses, if released on bail with appropriate conditions.

There are a number of other Victorian authorities which address the concept of "unacceptable risk". What can be distilled from these is that:

(a) Prediction of risk is notoriously difficult and the objective of a bail decision is not to eliminate *all* risk. In *Haidy* [2004] VSC 247, Redlich J, citing *Williams v DPP* (Qld) [1999] QCA 356, said "bail when granted is not risk free".

(b) As the accused's liberty is at stake, "a tenuous suspicion or fear of the worst possibility if the offender is released will not be sufficient" (Redlich J in *Haidy* [2004] VSC 247, citing *Dunstan v DPP* (1999) 107 A Crim R 358 and *Williams v DPP* (Qld) [1999] QCA 356).

(c) To prove that there is an unacceptable risk, it is not necessary that the prosecution establish that the occurrence of the event constituting a risk is more probable than not.

In *Haidy* [2004] VSC 247, Redlich J said:

> "What must be established is that there is a sufficient likelihood of the occurrence of the risk which, having regard to all relevant circumstances, makes it unacceptable. Therefore, courts have been willing to hold that there is an unacceptable risk based on only a possibility (as opposed to probability) of an offence being committed (*R v Phung* [2001] VSCA 81; *MacBain v DPP* [2002] VSC 321)."

(d) A *high* risk of offending while on bail (or failing to answer bail) does not automatically mean an *unacceptable* risk.

In *R v Mitchell* (2013) VSC 59, Forrest J held that there was "a real prospect that the applicant will reoffend whatever conditions are imposed", but that she had already served 7 weeks on remand and was unlikely that she would be sentenced to a longer term of imprisonment for the offences of which she was charged. His Honour also observed that "the type of reoffending that the Crown would contend constitutes the risk does not appear to involve any risk of injury to any other member of the community, and if there is reoffending, as I say, the criminal law will punish the applicant accordingly for that reoffending".

In *R v Hapeta* (2012) VSC 387, the applicant sought bail pending his appeal which was pending in 15 days' time. Although he had a long history of driving offences, and there was a risk that he would commit a similar offence if released on bail, Robson J was not satisfied that the risk was unacceptable. His Honour said, "if the time of the appeal was materially longer, I might find the risk of offending was unacceptable".

In *Re Magee* [2009] VSC 384, the applicant applied for bail on a charge of intentionally damaging property by applying paint to an advertisement in a tram shelter. He had a lengthy record of similar offences which, the court noted, "appear to be part of a continuing protest on the part of the applicant against advertising in the community". Forrest J found that "there appears to be a real risk of reoffending, and by that I mean a risk which is neither far-fetched nor fanciful, whatever conditions are imposed", but that this risk was not unacceptable. His Honour was of the view that:

- "The prospective offence of which there may be a risk is particularly low on the scale of criminal activity."
- Notwithstanding the applicant's prior convictions, it would seem highly unlikely that the term of imprisonment that would be imposed for the current offence would be more than the 10 weeks he had already spent on remand.
- There was no suggestion that the applicant was a flight risk or would interfere with witnesses.
- Any prospective reoffending carried no apparent risk of injury or threat to any member of the public, and that the criminal law process would deal with any such reoffending.

(e) Factors such as delay may also affect whether any risks are "unacceptable".

In *Mokbel v DPP (No 2)* [2002], Kellam J held that, despite a significant delay in bringing the accused to trial, which amounted to an "exceptional circumstance", there was still an "unacceptable risk" and, accordingly, bail was refused.

However, in *Mokbel v DPP (No. 3)* (2002) 133 A Crim R 141; [2002] VSC 393, the prospect of even further delay tipped the balance in favour of granting strict conditional bail. Kellam J said:

> "The issue of detention by reason of unacceptable risk is an issue which must be balanced with the likelihood of the accused man being brought before a court in the near future. The question of unacceptable risk is to be judged according to proper criteria, one of which is the length of delay before trial; that is, although the risk might be objectively the same at different times, the question of unacceptability must be relative to all the circumstances, including the issue of delay."

See also *Hildebrandt v DPP* [2006] VSC 198, in which risks were balanced against delay and bail was granted. The applicant, although charged with apparently serious offences, had a prima facie right to bail (ie. he was not in a "show cause" or "exceptional circumstances" position). King J had previously refused bail, but this time granted strict conditional bail. Her Honour said:

> "The factors that make him an unacceptable risk have to be weighed against the fact that he is a man presumed to be innocent, who has currently spent 2 years on remand and will spend a minimum of at least 2 years 8 months on remand prior to his case being heard. Not only that, the period of time that he has spent on remand has been in onerous conditions as referred to during the last bail application."

and

> "The court is now in a position that it must find ways to manage the risk. To do otherwise would, in light of this particular applicant's circumstances, be an abandonment of the principles that underlie the *Bail Act* and this community's view of what is an unacceptable period of incarceration without trial."

In *Re Kheir* [2008] VSC 492, bail was granted due to delay and a relatively weak prosecution case. Osborne J also took into account the applicant's intellectual disability and the fact that continued detention would mean that a recently-devised case plan would not be implemented.

6 Criteria to be considered in bail decisions

Section 17(3) and (4) provide:

> (3) A bail authority is to consider the following matters, and only the following matters, in deciding whether there is an unacceptable risk:
>
> (a) the accused person's background, including criminal history, circumstances and community ties,
>
> (b) the nature and seriousness of the offence,
>
> (c) the strength of the prosecution case,
>
> (d) whether the accused person has a history of violence,

(e) whether the accused person has previously committed a serious offence while on bail,

(f) whether the accused person has a pattern of non-compliance with bail acknowledgments, bail conditions, apprehended violence orders, parole orders or good behaviour bonds,

(g) the length of time the accused person is likely to spend in custody if bail is refused,

(h) the likelihood of a custodial sentence being imposed if the accused person is convicted of the offence,

(i) if the accused person has been convicted of the offence and proceedings on an appeal against conviction or sentence are pending before a court, whether the appeal has a reasonably arguable prospect of success,

(j) any special vulnerability or needs the accused person has including because of youth, being an Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment,

(k) the need for the accused person to be free to prepare for their appearance in court or to obtain legal advice,

(l) the need for the accused person to be free for any other lawful reason.

(4) The following matters (to the extent relevant) are to be considered in deciding whether an offence is a serious offence (or the seriousness of an offence), but do not limit the matters that can be considered:

(a) whether the offence is of a sexual or violent nature or involves the possession or use of an offensive weapon or instrument within the meaning of the *Crimes Act* 1900,

(b) the likely effect of the offence on any victim and on the community generally,

(c) the number of offences likely to be committed or for which the person has been granted bail or released on parole.

These provisions are broadly similar to the current s32. Like s32, s17(3) sets out an exhaustive list.

Like the current s32, s17(3) requires the bail authority to consider the strength of the prosecution case and the likelihood of a custodial sentence if the accused is convicted. While the current s32 makes it clear that these factors are relevant only insofar as they affect the probability of whether or not the person will appear in court, the new provision contains no such limitation. However, it is important to note that *all bail decisions must be made against the backdrop of s3(2), which requires the bail authority to have regard to the presumption of innocence and the accused's general right to be at liberty*. It is therefore clear that that punishment has no role to play in a bail decision, and that bail may not be refused as some sort of pre-emptive sentencing exercise. A weak prosecution case, a slim prospect of a custodial sentence, or a lengthy delay in finalising the proceedings would all operate in favour of bail being granted.

As with the current s32, s17(3)(g) requires the bail authority to consider the length of time the accused person is likely to spend in custody if bail is refused. Unlike the current s32, though, the new provisions do not refer to the conditions of custody. However, it is possible that the conditions of custody could be taken into account in the context of s17(3)(j), which requires the bail authority to consider any "special vulnerability or needs" of the accused person. Note the use of the word "including", which I interpret to mean that

youth, Aboriginality, and cognitive/mental health impairment are not the only factors that may be taken into account in assessing an accused's special vulnerability or needs.

7 Appeal bail

7.1 Appeal to Court of Criminal Appeal or High Court

Like s30AA of the current Act, a person awaiting appeal to the CCA against a conviction on indictment (or a sentence imposed on such a conviction), or an appeal from the CCA to the High Court, must establish that special or exceptional circumstances exist in order for bail to be granted.

It appears that the court must still consider whether there is an unacceptable risk. However, the Act provides no guidance on how this interacts with the "special or exceptional circumstances" test.

It may be possible to draw some guidance from Victorian authorities in which the "show cause" or "exceptional circumstances" provisions apply.

Maxwell P in *Asmar* [2005] VSC 487 considered that, in the case of a "show cause" offence, the question of bail is a single-step process. In *R v Paterson* [2006] VSC 268, Gillard J disagreed with Maxwell P and preferred a two-step process. Firstly, the onus is on the applicant to show cause and, if cause is shown, the prosecution then bears the onus of establishing that there is an unacceptable risk justifying the refusal of bail.

In cases where the "exceptional circumstances" test applies, the Victorian courts appear to treat the bail decision as a two-stage process. If the applicant manages to demonstrate that exceptional circumstances exist, the court must then consider whether there are any unacceptable risks that would justify refusing bail, with the onus being on the prosecution at this stage. This was the approach taken in cases such as *Mokbel v DPP (No. 3)* (2002) 133 A Crim R 141; [2002] VSC 393.

7.2 Other appeals

Where other appeals are concerned (eg an appeal from the Local or Children's Court to the District Court, or an appeal to the Supreme Court on a point of law) the merit of the appeal is merely one of the criteria that the bail authority must consider (see s17(3)(i)).

It is interesting to note that the NSWLRC initially recommended that appeal bail should only be granted if the bail decision-maker considered that the appeal had reasonable prospects of success. However, there were obvious flaws with this proposal (for appeals to the District Court, bail applications are usually heard by the same magistrate who has just convicted or sentenced the appellant) and thankfully it was not adopted.

8 Bail conditions

8.1 Restrictions on imposing bail conditions

Section 20 provides that:

- Bail conditions may only be imposed if necessary to mitigate an unacceptable risk.
- Conditions must be reasonable, proportionate to the nature of the alleged offence, and appropriate to the unacceptable risk for which they are imposed.

- Conditions must be no more onerous than necessary to deal with the unacceptable risk.

These provisions are not dissimilar to the current s37, which places limits on the imposition of bail conditions. However, in my experience, s37 is not always well understood or applied by police and courts. I hope that, with the benefit of training on the new Act, bail decision-makers will pay more regard to the new s20 than they have done to the old s37.

8.2 Types of conditions that may be imposed

Sections 25-28 set out the types of bail conditions that may be imposed. These include:

- Conduct requirements (s25);
- Security requirements (which may be imposed only for the purpose of mitigating an unacceptable risk that the accused will fail to appear) (s26);
- Character acknowledgments (similar to the current "acceptable person" condition, but without security) (s27); and
- Accommodation requirements (for children only) (s28) – see further discussion below.

Section 29 provides that the only conditions that may be imposed as a precondition to release are a requirement that the accused surrender their passport, a security requirement, a character acknowledgement, or (for a child) an accommodation requirement.

8.3 Accommodation as a precondition to release

If the applicant is a child (or in other circumstances prescribed by the regulations), s28 allows bail to be granted on the condition that the applicant cannot be released until suitable accommodation is available.

To date, the Regulations have not made provision for any other circumstances. However, it is envisaged that a Regulation could be made to apply this provision to people who are seeking treatment in a residential drug rehabilitation facility (or possibly to people with cognitive or mental health impairments).

The new s28 reflects what used to be common practice in the Children's Court. Typically a young person would be granted bail on the condition that they "reside as directed by Juvenile Justice (or Community Services)", and not be released until appropriate accommodation was found or approved by the relevant authority. However, I understand that the Crown Solicitors have since provided an opinion that such a condition does not authorise the continued detention of the young person; he or she must be either released immediately, or refused bail until accommodation is found and the court sees fit to grant bail.

Subs(5) provides that the court may direct "any officer of a Division of the Government Service" to provide information about the action being taken to secure suitable accommodation arrangements. Clause 31 of the Regulations provides that this information may be provided in writing or orally at court, and must identify the address where the accused person will reside (if such an address has been determined). "Government Service" does not appear to be defined in the Act or Regulations, but it presumably includes Juvenile Justice and Community Services.

If an accommodation requirement is imposed, subs(4) requires the court to ensure that the matter is re-listed at least every 2 days until the accommodation requirement is complied with.

8.4 Enforcement conditions

Section 30 essentially re-enacts the current s37AA and allows a court (but not an authorised justice) to impose an enforcement condition at the request of the prosecutor.

Section 81 provides the police with power to give a direction under an enforcement condition.

For discussion of enforcement conditions, Mark Dennis' paper on s37AA[4] is still relevant.

9 Bail applications and decisions

9.1 Types of application

The new Act introduces some new terminology, although the concepts are not entirely new.

"Bail application" in defined in s4 to mean:

- a **release application**, which may be made by the accused (s49);
- a **detention application**, which may be made by the prosecution (s50); or
- a **variation application**, which may be made by any "interested person" (s51).

9.2 Powers and procedures

Parts 5, 6 and 7 of the Act contain provisions about bail applications, and the powers of bail authorities to make bail decisions.

Provisions about bail applications are also set out in Part 3 of the Bail Regulation 2014.

9.3 Police bail

Part 5 Division 1 deals with the power of police to grant bail. These provisions are broadly similar to those in the current Act.

A police officer may (and indeed must) make a decision on bail without any application being made.

The power of a police officer to make a bail decision is in s43. Note that a bail decision may be made if the accused person is "present at a police station". [This implies that the accused does not have to be under arrest; this is perhaps similar to s15 of the current Act, which provides that an accused person may be granted or refused bail even if not in custody. In cases where the legality or appropriateness of an arrest is in issue, it could be argued that it is not necessary to arrest a person in order to impose bail conditions, if the person is willing to attend the police station voluntarily.]

A police officer may release the person without bail (which presumably means issuing a field, future or no-bail CAN), grant bail (with or without conditions) or refuse bail.

If the accused has been arrested on a warrant to bring them to court for sentencing (ie a warrant under s25(2) of the *Crimes (Sentencing Procedure) Act*)), police may not grant bail or release the person without bail unless the police officer is satisfied that exceptional circumstances justify the grant of bail. Note that this provision only applies to sentencing warrants and not to first instance warrants and other types of bench warrants.

[4] http://criminalcle.net.au/attachments/The_New_Section_37AA_of_the_Bail_Act_1978_NSW.pdf

Section 44 requires police to ensure that, as soon as reasonably practicable after a person in police custody is charged with an offence, a bail decision is made or the person is brought before a court or authorised justice. The language “charged with an offence” is somewhat curious, given that the *Criminal Procedure Act* no longer uses this terminology, but instead refers to the commencement of proceedings via Court Attendance Notice.

After bail has either been granted or refused, s45 requires the police to, without unreasonable delay, allow the accused to communicate about bail with a legal practitioner or another person of their choice. However, police may deny this right if the officer believes on reasonable grounds that it is necessary to do so to prevent the escape of an accomplice or the loss, destruction or fabrication of evidence relating to any offence.

If bail is refused, or if bail is granted but the accused is not released, s46 requires the police to ensure that the accused is brought before a court or authorised justice as soon as practicable.

Police must also, if reasonably practicable, ensure that certain facilities prescribed by the Regulations are made available to any accused person who is to be brought, on a first appearance, before a court or authorised justice more than 4 hours after the person came into custody. Clause 13 of the Regulations provides that facilities must be provided for the accused to wash, shower or bath, and to change clothing. Police are not required to provide clothing, but must allow clothing to be brought to the police station by a family member or other person (as long as the person who brings the clothing consents to the clothing being searched).

Police must also provide the person with bail eligibility information (in writing, as prescribed by the Regulations), unless the person is released without bail.

Police may defer making a bail decision while a person is intoxicated, but only if this does not cause delay in bringing the person before a court or authorised justice.

Section 47 allows a police bail decision to be reviewed by a senior police officer, but not if it would delay the person being brought before a court.

9.4 Release applications

Section 49 provides for the accused to make a release application (meaning an application for bail to be granted or dispensed with) to a court or authorised justice.

Clause 16 of the Regulations provides that an accused person is to make a release application orally, if the person is at that time appearing before the court, or otherwise in writing in the approved form. A written release application may be signed by the accused or by their lawyer, spouse, de facto, parent or guardian on their behalf. However, a court or authorised justice may still make a bail decision even if the application does not comply with the formal requirements.

Section 72 provides that *a court or authorised justice must hear any release application or variation application made by an accused person on a first appearance*. Importantly, subs(2) provides that the court or authorised justice must not decline to hear the application because notice has not been given to the prosecutor (but may adjourn the hearing to enable notice to be given, if the court or authorised justice considers it necessary in the interests of justice).

Section 73 allows the court to refuse to hear a bail application if satisfied that it is frivolous or vexatious, without substance or otherwise has no reasonable prospects of success. *However, this does not apply to a release or variation application made by an accused on a first appearance.*

Section 53 provides that a court or authorised justice may, on an accused person’s first appearance, make a bail decision of its own motion, even no application has been made.

The court or authorised justice may grant bail, or it may vary a previous bail decision (but not so as to refuse bail). This power may only be exercised for the benefit of the accused person.

Section 74 essentially replicates the current s22A, imposing limits on further release applications to a court that has previously refused bail. The only significant change is that *children who are refused bail on their first appearance have another chance to apply for bail* before the section kicks in.

9.5 Detention applications

Section 50 provides for the prosecutor to make a detention application, which means an application for bail to be refused or revoked.

In practice, this will most often be an application for bail to be revoked (if a prosecutor wishes bail to be refused, in most cases they will simply oppose the accused's release application; it is not necessary to make a detention application for this purpose).

Clause 17 of the Regulations provides that a prosecutor is to make a detention application in writing and in the approved form. However, a court or authorised justice may still make a decision even if the application does not comply with the formal requirements.

Clause 18 imposes notice requirements.

If bail is granted or dispensed with for a "serious offence" on a first appearance, s40 provides that the decision is stayed if the prosecution immediately informs the court or authorised justice that a detention application is to be made to the Supreme Court, and provides the court or authorised justice with a copy of the written approval of an authorised officer or the DPP to make such a detention application.

"Serious offence" is defined in s40(5) as murder, any other offence punishable by life imprisonment, or an offence under or mentioned in part 3 of the *Crimes Act* involving sexual intercourse (or an attempt to have sexual intercourse) with a person under 16 years of age.

Section 74 (which re-enacts the current section 22A, with some changes) also applies to detention applications, in cases where bail has already been granted or dispensed with. Subs(4) provides that there will be grounds for a further detention application if new information is to be presented, or circumstances relevant to the grant of bail have changed since the previous application was made.

9.6 Variation applications

Section 51 provides for any "interested person" (defined as the accused, the prosecutor, the complainant for a domestic violence offence, the person for whose protection an order is or would be made in the case of bail granted on an AVO application, or the Attorney-General) to make a variation application.

Clause 20 of the Regulations provides that an interested person is to make a variation application in writing and in the approved form. However, an accused person may make a variation application orally if the person is before the court. [Hopefully this will put an end to the practice that has sprung up in some Local Courts, where a magistrate will refuse to hear a variation application unless a written application has been filed with the court.] A court or authorised justice may still make a decision even if the application does not comply with the formal requirements.

Sections 72, 73 and 53 (referred to above in the context of release applications) also apply to variation applications.

Section 74 (which re-enacts the current section 22A) does not apply to variation applications.

While an authorised justice generally does not have the power to review bail decisions made by courts, s52 provides that an authorised justice may vary a reporting condition (it is suggested that this includes a power to delete such a condition), or to vary (but not revoke) a residence, non-association or curfew condition.

10 Breach of bail and failure to appear

10.1 Police response to breach of bail

Most practitioners would be aware of s50 of the current Act, which sets out the actions that may be taken in response to a breach of bail. Although there is provision for an authorised justice to issue a summons or a warrant, this option is rarely used. Instead, it has become the practice of police to arrest without warrant (and indeed, officers are often directed by their superiors to exercise no discretion).

Section 77 of the new Act will hopefully cause the police to change their practice. Although it falls short of providing that arrest for breach of bail is a last resort, it sets out a clear hierarchy of options and matters that the police officer must consider.

Whether an arrest that does not comply with s77 is *unlawful* or merely *improper* will be a matter for the courts to decide. I would suggest that the use of the words “The following factors *are to be* considered” in subs(3) means that a police officer’s failure to consider any of these factors would render an arrest unlawful. An inappropriate exercise of the officer’s discretion (as opposed to a failure to exercise any discretion) would probably render the arrest improper.

Courts have been willing to find that an inappropriate exercise of discretion under s50 of the current Act renders an arrest improper (see, for example, *NT v R* [2010] NSWDC 348). This is discussed in my general paper on Police Powers[5].

Section 77, in full, reads:

> **77 Actions that may be taken to enforce bail requirements**
>
> (1) A police officer who believes, on reasonable grounds, that a person has failed to comply with, or is about to fail to comply with, a bail acknowledgment or a bail condition, may:
>
> (a) decide to take no action in respect of the failure or threatened failure, or
>
> (b) issue a warning to the person, or
>
> (c) issue a notice to the person (an "application notice") that requires the person to appear before a court or authorised justice, or
>
> (d) issue a court attendance notice to the person (if the police officer believes the failure is an offence), or
>
> (e) arrest the person, without warrant, and take the person as soon as practicable before a court or authorised justice, or
>
> (f) apply to an authorised justice for a warrant to arrest the person.

[5] Most recent update January 2013, further update forthcoming in April 2014.

(2) However, if a police officer arrests a person, without warrant, because of a failure or threatened failure to comply with a bail acknowledgment or a bail condition, the police officer may decide to discontinue the arrest and release the person (with or without issuing a warning or notice).

(3) The following matters are to be considered by a police officer in deciding whether to take action, and what action to take (but do not limit the matters that can be considered):

(a) the relative seriousness or triviality of the failure or threatened failure,

(b) whether the person has a reasonable excuse for the failure or threatened failure,

(c) the personal attributes and circumstances of the person, to the extent known to the police officer,

(d) whether an alternative course of action to arrest is appropriate in the circumstances.

(4) An authorised justice may, on application by a police officer under this section, issue a warrant to apprehend a person granted bail and bring the person before a court or authorised justice.

(5) If a warrant for the arrest of a person is issued under this Act or any other Act or law, a police officer must, despite subsection (1), deal with the person in accordance with the warrant.

Note: Section 101 of the *Law Enforcement (Powers and Responsibilities) Act 2002* gives power to a police officer to arrest a person in accordance with a warrant.

(6) The regulations may make further provision for application notices.

10.2 Court orders that may be made following breach of bail

Section 78(1) provides that a relevant bail authority may (if satisfied that the person has failed or was about to fail to comply with a bail acknowledgement or condition):

- release the person on their original bail; or
- vary the bail decision (which may include revoking or refusing bail, as well as varying conditions of bail).

However, subs(2) provides that the bail authority may revoke or refuse bail only if satisfied that:

(a) the person has failed or was about to fail to comply with a bail acknowledgement or bail conditions, and

(b) having considered all possible alternatives, the decision to refuse bail is justified.

Subs(4) clarifies that an offence for which there is a right to release (under s21) ceases to be an offence for which there is a right to release if bail is revoked or refused under this section.

Subs(5) clarifies that this section does not give an authorised justice power to vary or impose enforcement conditions. However, an enforcement condition previously imposed by a court may be re-imposed by an authorised justice.

10.3 Failure to appear

Sections 79 and 80 essentially replicate the old s51, creating the offence of failure to appear and setting out procedural provisions about proceedings for such an offence.

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