Bail – recent developments

Jane Sanders, Principal Solicitor, The Shopfront Youth Legal Centre, April 2015

1 Introduction

The *Bail Act 2013* commenced on 20 May 2014, and was amended with effect from 28 January 2015.

This paper is an update on developments since my March 2014 paper[1], particularly the legislative amendments and the interpretation of key concepts such as "show cause".

I also wish to acknowledge (and commend to you) the work of others who have written about recent developments in relation to bail[2].

2 Background to the 2014 amendments

A few weeks after the *Bail Act* 2013 commenced, a couple of high-profile bail decisions attracted adverse media comment, chiefly from "shock jocks". As a consequence, the Government commissioned a former Labor Attorney-General, (now Judge) John Hatzistergos, to conduct an urgent review of the Act.

There is already provision for a statutory review[3], and this is ongoing, but Hatzistergos was asked to provide an interim report, which was published in July 2014[4].

Many of Hatzistergos' recommendations found their way into the *Bail Amendment Act* 2014, which was passed by Parliament on 17 September 2014 and commenced on 28 January 2015.

For an interesting discussion of the amendment Act and the process leading up to it, see the article by David Brown and Julia Quilter[5].

The main amendments are:

(a) Section 3(2), which required the court to consider the presumption of innocence and the right to be at liberty, has been replaced with a preamble.

(b) The two-stage "unacceptable risk" test has been conflated into one (see ss17-20 and the new flowcharts at s16).

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[1] http://criminalcle.net.au/attachments/The_New_Bail_Act_March_2014_Jane_Sanders.pdf

[2] See, for example, *Using the Bail Act 2013* by Lucinda Opper, *Speaking Too Soon: The Sabotage of Bail Reform In New South Wales* by David Brown and Julia Quilter (both at http://criminalcle.net.au/main/page_cle_pages_bail.html) and *Recent changes to bail law in NSW* by Mark Ierace SC (http://www.publicdefenders.nsw.gov.au/Documents/Bail%20Law%20-%20recent%20changes%20in%20-%20FINAL%20amended%20document.pdf). Legal Aid also has a very helpful collection of resources, including links to key cases, at http://www.legalaid.nsw.gov.au/for-lawyers/resources-and-tools/criminal-law/bail-act.

[3] s101 requires a review to be "undertaken as soon as possible after the period of 3 years from the repeal of the *Bail Act* 1978".

[4] https://www.nsw.gov.au/sites/default/files/news/review_of_the_bail_act_2013_-_final_report.pdf

[5] See footnote 2 above.

(c) Before the amendments, bail conditions could only be imposed for the purpose of mitigating an unacceptable risk. The amendments have watered this down by introducing the concept of a "bail concern" and providing that conditions may be imposed to mitigate a "concern" that the accused may fail to appear, commit a serious offence, etc (see new s17).

(d) The matters to be considered by the bail authority have been shifted from s17 to s18, and some extra matters have been added.

(e) The concept of "show cause" has been introduced into the Act. For certain offences, before the "unacceptable risk" test comes into play, the accused must first "show cause why his or her detention is not justified" (ss16A, 16B).

(f) In relation to multiple bail applications, the hurdle in s74(3)(b) has been made a little higher, in that it now requires "material" new information relevant to the grant of bail[6].

3 The new preamble and the presumption of innocence

Unlike the old *Bail Act* 1978, the 2013 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.

Until the recent amendments, there was also a subs(2), which provided:

> "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."

This has been replaced with a preamble which states:

> "The Parliament of New South Wales, in enacting this Act, has regard to the following:
>
> (a) the need to ensure the safety of victims of crime, individuals and the community,
>
> (b) the need to ensure the integrity of the justice system,
>
> (c) the common law presumption of innocence and the general right to be at liberty."[7]

The effect of this is discussed by Mark Ierace SC, who in turn refers to Lucinda Opper's paper[8]. Both papers are worth reading on this point. Although a preamble does not have the same status as a section of the Act, Ierace and Opper both hold the view that the presumption of innocence remains relevant and must be considered by any bail authority.

[6] This will not be discussed further in this paper. Ierace (see footnote 2) is of the view that this has *not* made it significantly more difficult to overcome s74.

[7] I could not find the preamble in the Austlii version of the Act but it can be found at http://www.legislation.nsw.gov.au/maintop/view/inforce/act+26+2013+cd+0+N

[8] See footnote 2 above.

4 Unacceptable risk

4.1 Changes to the unacceptable risk test

The two-stage "unacceptable risk" test has been merged into one (see ss17-20 and the new flowcharts at s16).

This was aimed at overcoming the public perception that a person who was said to be an "unacceptable risk" (under the first limb of the old test) could nevertheless be granted bail.

Under the new test, "unacceptable risk" will essentially mean an unacceptable risk that cannot be mitigated by conditions. The test that was set out in s17 has now been moved to s18. In assessing whether there is an unacceptable risk, s18(1)(p) directs the bail authority to consider the bail conditions that could reasonably be imposed to address any "bail concerns".

Although the reasoning behind the amendment is understandable, it does represent a departure from the Act's original intention. The original two-stage test was the product of a great deal of deliberation on the part of the NSW Law Reform Commission. It was aimed at ensuring that accused persons were not routinely loaded up with unnecessary bail conditions. If there were no unacceptable risks, then that was the end of the matter and the accused had to be released unconditionally. The conflation of two steps into one, and the introduction of the concept of "bail concerns" (see part 6 of this paper) has, in my view, weakened the protection against unnecessary and unreasonable conditions.

4.2 Case law on unacceptable risk

The unacceptable risk test was considered by the Supreme Court on a number of occasions in the first few months of the new *Bail Act.*

The Legal Aid website provides links to these cases, and brief summaries of the decisions. There are also links to more detailed case summaries prepared in June 2014 by Rory Pettit and Jeremy Styles from the ALS, and by Rebekah Rodger (then at Legal Aid, now at the bar)[9].

These authorities remain relevant, although the reasoning process and the language has changed somewhat, and for some offences there will also be a need to "show cause".

5 Matters to be considered by bail authority

The matters to be considered by the bail authority, which were set out in subss17(3) and (4), have been moved to subss18(1) and (2).

Section 18(2), which provides guidance as to the meaning of "serious offence", is identical to the former s17(4).

[9] http://www.legalaid.nsw.gov.au/for-lawyers/resources-and-tools/criminal-law/bail-act/key-cases

However, s18(1) contains some further matters that the bail authority must consider. It is set out here in full, with the new content in bold and italics:

> (1) A bail authority is to consider the following matters, and only the following matters, in an assessment of bail concerns under this Division:
>
> (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 history of compliance or non-compliance with bail acknowledgments, bail conditions, apprehended violence orders, parole orders or good behaviour bonds,
>
> (g) ***whether the accused person has any criminal associations***,
>
> (h) the length of time the accused person is likely to spend in custody if bail is refused,
>
> (i) the likelihood of a custodial sentence being imposed if the accused person is convicted of the offence,
>
> (j) 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,
>
> (k) 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,
>
> (l) the need for the accused person to be free to prepare for his or her appearance in court or to obtain legal advice,
>
> (m) the need for the accused person to be free for any other lawful reason,
>
> (n) ***the conduct of the accused person towards any victim of the offence, or any family member of a victim, after the offence***,
>
> (o) ***in the case of a serious offence, the views of any victim of the offence or any family member of a victim (if available to the bail authority), to the extent relevant to a concern that the accused person could, if released from custody, endanger the safety of victims, individuals or the community***,
>
> (p) ***the bail conditions that could reasonably be imposed to address any bail concerns in accordance with section 20A***.

Mark Ierace, in his recent paper[10], discusses the likely effect of some of these additions.

[10] See footnote 2 above.

6 “Bail concerns” and bail conditions

As already mentioned, the change to the unacceptable risk test has brought with it the concept of a “bail concern”. This is defined in s17(2) as follows:

> (2) For the purposes of this Act, a "bail concern" is a concern 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.

There is still a requirement that bail conditions must be reasonably necessary and proportionate (see new s20A), but I suggest that the “bail concern” concept may lead to conditions being more onerous than they really need to be. There was a similar restriction on overly onerous conditions in the 1978 Act (s36), and experience shows that this was inadequate to safeguard against unnecessary and inappropriate conditions.

For an example of a recent case dealing with the new “unacceptable risk” test and “bail concerns”, see *R v Kugor* [2015] NSWCCA 14.

7 The new “show cause” provisions

7.1 The concept of “show cause”

The most worrying aspect of the amendment Act is the introduction of “show cause” offences. A person caught by these provisions will first be required to show cause why their detention is not justified; if they succeed in this, the bail authority must then consider whether there are any unacceptable risks.

“Show cause” is not defined in the Act, and nor do the second reading speech or the review report shed much light on its meaning. The review report refers to some interstate authorities which suggest that relevant factors may include urgent medical needs, unreasonable delays, etc. There has been some recent case law from the NSW Supreme Court and the Court of Appeal. The interpretation of “show cause” will be further discussed below.

Section 16A provides:

> **16A Accused person to show cause for certain serious offences**
>
> (1) A bail authority making a bail decision for a show cause offence must refuse bail unless the accused person shows cause why his or her detention is not justified.
>
> (2) If the accused person does show cause why his or her detention is not justified, the bail authority must make a bail decision in accordance with Division 2 (Unacceptable risk test—all offences).
>
> (3) This section does not apply if the accused person was under the age of 18 years at the time of the offence.

7.2 Show cause offences

16B Offences to which the show cause requirement applies

(1) For the purposes of this Act, each of the following offences is a show cause offence:

(a) an offence that is punishable by imprisonment for life,

(b) a serious indictable offence that involves:

(i) sexual intercourse with a person under the age of 16 years by a person who is of or above the age of 18 years, or

(ii) the infliction of actual bodily harm with intent to have sexual intercourse with a person under the age of 16 years by a person who is of or above the age of 18 years,

(c) a serious personal violence offence, or an offence involving wounding or the infliction of grievous bodily harm, if the accused person has previously been convicted of a serious personal violence offence,

(d) any of the following offences:

(i) a serious indictable offence under Part 3 or 3A of the *Crimes Act* 1900 or under the *Firearms Act* 1996 that involves the use of a firearm,

(ii) an indictable offence that involves the unlawful possession of a pistol or prohibited firearm in a public place,

(iii) a serious indictable offence under the *Firearms Act* 1996 that involves acquiring, supplying or manufacturing a pistol or prohibited firearm,

(e) any of the following offences:

(i) a serious indictable offence under Part 3 or 3A of the *Crimes Act* 1900 or under the *Weapons Prohibition Act* 1998 that involves the use of a military-style weapon,

(ii) an indictable offence that involves the unlawful possession of a military-style weapon,

(iii) a serious indictable offence under the *Weapons Prohibition Act* 1998 that involves buying, selling or manufacturing a military-style weapon or selling, on 3 or more separate occasions, any prohibited weapon,

(f) an offence under the *Drug Misuse and Trafficking Act* 1985 that involves the cultivation, supply, possession, manufacture or production of a commercial quantity of a prohibited drug or prohibited plant within the meaning of that Act,

(g) an offence under Part 9.1 of the *Criminal Code* set out in the Schedule to the *Criminal Code Act* 1995 of the Commonwealth that involves the possession, trafficking, cultivation, sale, manufacture, importation, exportation or supply of a commercial quantity of a serious drug within the meaning of that Code,

(h) a serious indictable offence that is committed by an accused person:

(i) while on bail, or

(ii) while on parole,

(i) an indictable offence, or an offence of failing to comply with a supervision order, committed by an accused person while subject to a supervision order,

(j) a serious indictable offence of attempting to commit an offence mentioned elsewhere in this section,

(k) a serious indictable offence (however described) of assisting, aiding, abetting, counselling, procuring, soliciting, being an accessory to, encouraging, inciting or conspiring to commit an offence mentioned elsewhere in this section.

(2) In this section, a reference to the facts or circumstances of an offence includes a reference to the alleged facts or circumstances of an offence.

(3) In this section:

firearm, ***prohibited firearm*** and ***pistol***, and ***use***, ***acquire***, ***supply*** or ***possession*** of a firearm, have the same meanings as in the *Firearms Act* 1996.

prohibited weapon and ***military-style weapon***, and ***use***, ***buy***, ***sell***, ***manufacture*** or ***possession*** of a prohibited weapon, have the same meanings as in the *Weapons Prohibition Act* 1998.

serious indictable offence has the same meaning as in the *Crimes Act* 1900.

serious personal violence offence means an offence under Part 3 of the *Crimes Act* 1900 that is punishable by imprisonment for a term of 14 years or more.

supervision order means an extended supervision order or an interim supervision order under the *Crimes (High Risk Offenders) Act* 2006.

At the end of Lucinda Opper's paper[11] is a useful list (by Act and section) of show cause offences. However, please note that some of the listed offences are not *always* show cause offences. For example, armed robbery is only a show cause offence if:

- it involves wounding or GBH and the accused has previously been convicted of a "serious personal violence offence" (s16B(1)(c));
- it involves a firearm or military-style weapon (s16B(1)(d) or (e)); or
- at the time of the alleged offence, the accused was on bail or parole, or subject to a supervision order under the *Crimes (High Risk Offenders) Act*) (s16B(1)(h) or (i)).

Many of our clients will be caught by s16B(1)(h), which applies to a serious indictable offence (ie any offence with a maximum penalty of 5 years' imprisonment or more) committed by an accused person while on bail or parole. An accused could be on bail for offensive language and be charged with shoplifting, and be required to show cause.

It is worth pointing out that the prosecution bears the onus of proving that the offence is a show cause offence. If there is doubt about your client's criminal history, or whether they were on bail at a particular time, put the prosecution to proof on this.

For clients charged with minor offences, where the police have released the accused on bail instead of pursuing the more appropriate option of a field or future CAN, I suggest

[11] See footnote 2 above.

that practitioners should consider making a variation application and asking the court to dispense with bail at the earliest opportunity.

The Sentencing Council has been asked to review whether any other offences should be added to the list of show cause offences, including whether (h) should be expended to include other forms of conditional liberty.

7.3 Interpretation of "show cause" provisions - background

The Hatzistergos review report[12] recommended a "show cause" provision for bail applications but did not define "show cause". At paras 209-226, the report discusses some of the interstate legislation and authorities, and goes on to recommend that the question of what constitutes just cause "will be informed by similar considerations to those developed interstate" (at para 253).

The Second Reading Speech to the Bail Amendment Bill 2014[13] does not define "show cause" but explains that New South Wales will be informed by the approach taken in other jurisdictions, specifically Victoria and Queensland:

> "Victoria and Queensland have show cause requirements in their bail legislation. Courts in those States have noted circumstances that may be relevant to determining "show cause", including the strength of the prosecution case, preventable delays and urgent personal situations such as the need for medical treatment."

Opper's paper contains a discussion of the interstate authorities and some commentary on the somewhat different approaches taken by the Queensland and Victorian courts[14].

7.4 Queensland cases

Section 16(3A) of the *Bail Act* 1980 (Qld) contains a show cause provision. As in NSW, "show cause" is undefined. However, cases have noted relevant factors in determining what constitutes 'show cause', such as:

- Strength of the prosecution case: *Lacey & Lacey v DPP [2007] QSC 291*; *Spence v Queensland Police Service* [2013] QMC 14; *Neale, Re an Application for Bail* [2013] QSC 310
- Time between the application for bail and trial: *Neale, Re an Application for Bail* [2013] QSC 310; *Carew v DPP* [2014] QSC 001
- Anxiety of returning to solitary confinement: *Carew v DPP* [2014] QSC 001; *Re Halilovic* [2014] QSC 5, *Re Alajbegovic* [2014] QSC 6
- Risk of failing to appear or reoffending: *Van Tongeren v DPP* [2013] QMC 016; *Lansdowne v DPP* [2013] QMC 19; *Lansdowne v DPP* [2014] QSC 002

7.5 Victorian cases

Section 4(4) of the *Bail Act 1977* (Vic) is a "show cause" provision.

Some cases have held that even in determining what constitutes 'show cause', the primary question relevant to a grant of bail is whether a person will meet the conditions of bail and attend at the trial: *Re Asmar* [2005] VSC 487; *Re Metekingi* [2012] VSC 366;

[12] See footnote 4 above.

[13] http://www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/0/d6ec77aa7a3bb8feca257d4e001e3f12/$FILE/2R%20Bail%20Amendment.pdf

[14] See footnote 2 above.

However, other authorities have held that, as with exceptional circumstances, the question of unacceptable risk is an additional matter that needs to be determined if the accused successfully shows cause: *DPP v Harika* [2001] VSC 237; *R v Paterson (2006) 163 A Crim R 122; Woods v DPP* [2014] VSC 1. This is similar to the two-stage test that now applies in NSW.

In any case, there is considerable overlap between the factors which are said to show cause and the issue of unacceptable risk: *DPP v Harika.*

In *Re Clegg* [2012] VSC 317, cause was shown by the following factors:

- doubt about the strength of the prosecution case
- the defendant's intellectual disability
- the defendant's personal circumstances
- a stable address
- proposed support
- acceptable risk of re-offending and breaching bail

In *R v El-Azar & Anor* [2007] VSC 487, cause was shown by the following factors:

- no relevant prior convictions
- defendant's need to work to fund his defence
- acceptable risk of re-offending and breaching bail

In *Re Odlum* [2008] VSC 319, cause was shown by the following factors:

- the defendant was 21 years old
- no prior convictions
- realistic prospect of full-time employment
- stable address
- family support
- delay

7.6 NSW cases

The interpretation of "show cause" in NSW is evolving, with new authorities emerging from the Supreme Court and Court of Appeal.

I have done my best to ensure that this paper reflects the current case law, but I would advise practitioners to check for new cases which may alter or at least clarify the legal position. I will not discuss all the cases here, but instead I commend to you the "key cases" page on the Legal Aid website[15].

In *R v Stephen Anthony Kirby* (NSWSC, Garling J, 2 February 2015), Garling J set out what "show cause" does *not* mean. Specifically, it does not require "special or exceptional" circumstances (cf. s22 of the Act). His Honour found that cause had been shown in this case by a number of factors including:

- matters detailed in a psychological report;
- the fact that most of the accused's prior offending took place when he was addicted to drugs ("which it appears he no longer is");

[15] See http://www.legalaid.nsw.gov.au/for-lawyers/resources-and-tools/criminal-law/bail-act/key-cases

- the fact that he had already been in custody for a long period; and
- that “the charges, if proved, would merit only a sentence at the very lowest end of the range”.

An interesting and relevant example of the factors that may contribute to “showing cause” is *R v Alchin* (NSWSC, McCallum J, 16 February 2015)[16]. In dealing with an Aboriginal person from a disadvantaged background, who would be facing a long period on remand, McCallum J stated:

> "That is a factor which seems to me to be likely to perpetuate the cycle of disadvantage and deprivation notoriously faced in indigenous communities and, as a matter of evidence in the material before me, specifically faced in the family of this applicant. If the Court can reasonably impose conditions which are calculated to break that cycle, in my view it should. That is a strong factor in my finding cause shown."

Until recently, the most helpful “show cause” case (for the defence at least!) was *M v R* [2015] NSWSC 138, a decision of McCallum J handed down on 18 February 2015.

Her Honour rejected the Crown submission that bail would "normally or ordinarily be refused" for a show cause offence. Rather, the court is "to approach each case on its merits with no presumption as to the likely or proper outcome of the release application".

Her Honour expressed the view that “show cause” and “unacceptable risk” cannot be considered in isolation from each other. She said (at [7]-[8]) that the "apparent simplicity of a two-stage approach is illusory" and that "it is difficult to conceive how an applicant could show cause without addressing any relevant bail concerns".

Her Honour went on to say (at [8]):

> "The issue whether an applicant has shown cause in my view must inevitably be informed by the outcome of the risk assessment, since the Act contemplates that the detention of a person who poses an unacceptable risk of the kind identified is justified. Conversely, it is difficult to conceive of a finding that an applicant had failed to show cause in circumstances where there was no unacceptable risk. The absence of any unacceptable risk would, I think, inevitably point to the conclusion that the detention was not justified, bearing in mind the common law principles to which I have referred."

McCallum J acknowledged that s 16A must be construed as having some work to do:

> “[13] … In my view, the section should be understood to have the object of instructing the bail authority that, in the case of a show cause requirement, the circumstance that triggered the requirement is likely to inform the assessment of any bail concerns and the evaluative judgment as to the acceptability of any risk established. In some instances, the circumstance giving rise to the show cause requirement is in itself likely to reveal a bail concern. For example, s16B(1)(d) specifies, as show cause offences, a series of offences relating to firearms, pistols, prohibited weapons and the like. Similarly, s16B(1)(f) specifies as show cause offences offences under the *Drug Misuse and Trafficking Act 1985* (NSW) involving the cultivation, supply, possession, manufacture or production of a commercial quantity of a prohibited drug.
>
> [14] The Act guides the court that it must have regard to the common or notorious features of such offences. For example, a strong Crown case as

[16] This case does not appear to be on the Caselaw NSW website, and the link to the case at the Legal Aid website currently seems to be broken. However, I can provide a copy on request.

> to the commission of an indictable offence involving the unlawful possession of a pistol in a public place would guide the Court in the assessment of a bail concern as to the safety of the community. Similarly, a strong Crown case alleging an offence under the *Drug Misuse and Trafficking Act* of the kind to which I have referred would guide the Court as to the likelihood of an applicant re-offending, the insidiousness of an addiction to some prohibited drugs, such as Ice, being a matter of notoriety.
>
> [15] Importantly, I would construe s 16A as imposing on an applicant the task of persuading the Court that any such obvious bail concern did not give rise to an unacceptable risk of the kind specified in the Act. In saying so, I do not mean to suggest that the Act imposes any formal onus of proof in the traditional sense. The Act makes it clear in s 32 that any matter that must be decided by the bail authority in exercising a function in relation to bail is to be decided on the balance of probabilities, but the rules of evidence do not apply in that task. Rather, the bail authority may take into account any evidence or information it considers credible or trustworthy in the circumstances: see s 31 of the Act.
>
> [16] But the Court should not approach the show cause requirement, in my view, on the ground that an applicant must go further in order to show cause why his or her detention is not justified or bears any higher onus than to persuade the Court that there is no unacceptable risk having regard to the bail conditions that could reasonably be imposed to address any bail concerns in accordance with s 20A."

However, in *Director of Public Prosecutions (NSW) v Tikomaimaleya* [2015] NSWCA 83, the Court of Appeal (Beazley P, R A Hulme J and Adamson J) disagreed with the view expressed by McCallum J in *M v R*.

The Court held that a two-stage test applies and that the steps should not be merged, but conceded that factors relevant to unacceptable risk will still be relevant to the "show cause" decision.

The accused had been convicted by a jury of an offence contrary to s66A(1) of the *Crimes Act* (sexual intercourse with a person under 10 years of age). His Honour Judge King in the District Court granted bail pending sentence, essentially so that the accused could "get his affairs in order". His Honour made it clear that a sentence of full-time imprisonment would ultimately be imposed.

The DPP made a detention application, which came before Button J in the Supreme Court but was then referred to the Court of Appeal in accordance with a practice that had arisen while the now repealed 1978 Act was in force[17].

After discussing *M v R*, the Court said:

> "[24] We accept that in many cases it may well be that matters that are relevant to the unacceptable risk test will also be relevant to the show cause test and that, if there is nothing else that appears to the bail authority to be relevant to either test, the consideration of the show cause requirement will, if resolved in favour of the accused person, necessarily resolve the unacceptable risk test in his or her favour as well.
>
> [25] It is important, however, that the two tests not be conflated. Determination of the unacceptable risk test is not determinative of the show cause test. The show cause test by its terms requires an accused person to demonstrate why, on the balance of probabilities (s 32), his or her detention is not justified. The justification or otherwise of detention is a matter to be determined by a

[17] Incidentally, the Court of Appeal opined (at [5] – [13]) that this practice is no longer appropriate under the 2013 Act, but nevertheless went on to deal with the application on its merits.

> consideration of all of the evidence or information the bail authority considers credible or trustworthy in the circumstances (s31(1)) and not just by a consideration of those matters exhaustively listed in s18 required to be considered for the unacceptable risk assessment.
>
> [26] The present case provides an example of why it is important to bear in mind the two-stage approach Parliament has prescribed in relation to bail applications concerned with offences of the type listed in s16B in that here there is a matter that is relevant to the show cause test that is not available to be considered in relation to the unacceptable risk test. The jury's verdict of guilty is not within any of the matters listed in s18; yet it is plainly germane to the question whether cause can be shown that his continuing detention is unjustified, since the presumption of innocence, which operated in his favour before the jury returned its verdict, has been rebutted by that verdict.
>
> [27] The Director also made relatively brief submissions as to the content of the show cause test in Div 1A. He cited a single authority, a decision of a magistrate in Queensland: *Landsowne v Director of Public Prosecutions (Qld)* [2013] QMC 19. A number of other interstate authorities are available in which there is discussion of a show cause test in bail legislation in those jurisdictions. However, in the absence of full argument on the issue it would be appropriate to defer more detailed analysis which is now more likely to occur in the Court of Criminal Appeal.”

The Court granted the detention application and revoked the accused’s bail. The Court’s reasons for holding that the accused had not shown cause (at [28]-[36]) included:

- he had been found guilty of a very serious offence carrying a maximum penalty of imprisonment for 25 years and a standard non-parole period of 15 years;
- the reasons advanced on behalf of the accused (eg the need to continue working for as long as possible so as to provide for his wife, the need to attend to matters relating to his superannuation, a scheduled medical appointment in relation to his kidneys, and the fact that there was only about 2 weeks remaining until sentence) were insufficient to show cause;
- “The matters relied upon are not out of the ordinary for a person found guilty at trial and facing inevitable incarceration upon sentence.” (at [35])

It is clear that the case law in this area is evolving. The courts have certainly not set out an exhaustive list of factors that are relevant to the show cause test, or resolved the question of whether show cause is similar to a presumption against bail. Despite the somewhat restrictive approach in *Tikomaimaleya,* I suggest that there is still considerable scope for us to demonstrate that our clients have “shown cause”.

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