BAIL 2015 AND BEYOND

LEGAL AID NSW CRIMINAL LAW CONFERENCE 1-3 JULY 2015

OVERVIEW

In following the presentation and paper of Rebekah Rodger, Barrister, of Maurice Byers Chambers, who will cover the amendments which commenced on 28 January 2015 with a particular emphasis on the "show cause" provisions, I have decided to look at a few specific Bail topics. Some of these topics are of general knowledge and application, some more familiar to the Supreme Court Bails (SCB) practice if Inner City Local Courts (ICLC), some are observations and ruminations of my own, and finally, to provide some practical assistance and information to practitioners who are advising and assisting clients in the lodging of SCB Applications.

The areas covered, not necessarily in comprehensive detail, are;

1. Detention Applications.
2. The avenue from the SC to the CCA.
3. S. 40 Stays.
4. Bail to Residential Rehabilitation.
5. Changes to the SC jurisdiction and practice.
6. The "AND BEYOND" bit.
7. Information and Practical Assistance.

1. DETENTION APPLICATIONS

As you will be aware, s. 4 "Definitions" of the Bail Act 2013 (The Act) sets out that there are 3 types of "bail application";

"bail application" means:
(a) a release application, or

(b) a detention application, or

(c) a variation application.

S. 50 of The Act allows the Prosecutor to make detention applications;

50 Prosecutor may make detention application

(1) The prosecutor in proceedings for an offence may apply to a court or authorised justice for the refusal or revocation of bail for an offence.

(2) An application under this section is a "detention application".

(3) A court or authorised justice may, after hearing the detention application:
(a) dispense with bail, or

(b) grant bail (with or without the imposition of bail conditions), or

(c) refuse bail.

(4) If a bail decision has already been made, a court or authorised justice may, after hearing the detention application:

(a) affirm the bail decision, or

(b) vary the bail decision.

(5) A court or authorised justice is not to hear a detention application unless satisfied that the accused person has been given reasonable notice of the application by the prosecutor, subject to the regulations.

(6) To avoid doubt, a prosecutor may oppose a release application made by an accused person to a court or authorised justice without making a detention application.

Regulation 17 (1) requires the prosecutor to make a detention application in writing, although 17 (2) allows the court/ authorised justice to make a decision on a detention application "even if the application does not comply with this clause".

In the Local Court at least, these detention applications are invariably the result of an allegation of a breach of bail conditions. It does not appear that they must necessarily be so, and certainly experience with detention applications in other jurisdictions supports this – they are de novo "bail applications" mostly unaccompanied by allegations of breaches of bail, as will be seen below.

Therefore the "usual" detention application in the local court mounted by the police involve such an allegation of breach of bail.

This area is covered by Part 8 of the Act, "Enforcement of bail requirements". It is noted that the Act provides the police with many other options to deal with this situation than existed under the previous Bail Act, and it does appear that police utilise these other options – warnings etc. Therefore, in my experience at least, the "breach bail" and detention applications that arise are at a more serious and significant level than was previously the case under the old Bail Act, where relatively trivial breaches of bail often clogged up the custody list.

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.

(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.

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

Once the detention application is before the court, and subject to the finding/ admission in relation to the breach, the powers of the bail authority are outlined in s. 78;

78 Powers of bail authorities

(1) A relevant bail authority before which an accused person is brought or appears may, if satisfied that the person has failed or was about to fail to comply with a bail acknowledgment or a bail condition:

(a) release the person on the person's original bail, or

(b) vary the bail decision that applies to the person.

(2) 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 acknowledgment or bail conditions, and

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

(3) Part 3 applies to the exercise by the bail authority of its functions under this section.

(4) However, a bail authority may revoke or refuse bail under this section even if the offence is an offence for which there is a right of release under Part 3. An offence ceases to be an offence for which there is a right to release if bail is revoked or refused under this section.

(5) This section does not give an authorised justice power to vary enforcement conditions or impose new enforcement conditions. However, an enforcement condition imposed by a court may be reimposed by an authorised justice.

(6) In this section, a **"relevant bail authority"** means:

(a) an authorised justice, or

(b) the Local Court, or

(c) a court before which the person is required to appear by his or her bail acknowledgment

As has always been the case, the bail authority may release the person on the original bail, vary the bail, or revoke or refuse bail. If revoking or refusing bail the bail authority must be satisfied that the breach has occurred or is about to occur **and** "having considered all possible alternatives, the decision to refuse bail is justified".

Each case will necessarily be assessed on its own facts; what has been breached, the extent or seriousness of the breach, any explanations given, possible alternate conditions to impose to vary bail, etc, and, because it is a de novo bail application, the usual assessments of bail concerns (s. 17) and s. 18 matters to be considered as part of that assessment (as s. 78 (3) states; Part 3 applies). It may also be the case that "show cause" considerations are enlivened.

Obviously a detention application can be prosecuted at any level of court before which the accused person is appearing, and there is discussion below re the SC and CCA.

Can a court revoke bail absent a detention application being before it?

Under the old Bail Act a court could refuse bail for a person who's matter was before them at any time it was listed, as long as the power to refuse bail was exercised in conformity with the Act. This appears to be different under the new Bail Act.

s. 12 covers how long bail lasts;

12 Duration of bail

(1) Bail ceases to have effect if:
(a) it is revoked, or

(b) substantive proceedings for the offence conclude and, at the conclusion of the proceedings, no further substantive proceedings for the offence are pending before a court.

(2) Bail is not revived if, after the conclusion of substantive proceedings for an offence, further substantive proceedings for the offence are commenced. However, a new bail decision for the offence can be made under this Act.
Note : Proceedings for an offence generally conclude if a person is convicted of and sentenced for the offence. If an appeal against the conviction or sentence is lodged after that conclusion, bail is not revived, but a new bail decision can be made.

(3) If bail is granted by a bail authority for a specified period, bail ceases to have effect at the end of that period, unless sooner revoked.

(4) An authorised justice or a court before which an accused person is required to appear under a bail acknowledgement may continue bail if:
(a) bail would otherwise cease to have effect, and

(b) substantive proceedings for the offence have not concluded

Bail therefore continues until it is revoked or the substantive proceedings are finalised.

A court cannot make a detention application; as seen above, s. 50, this is limited to "the prosecutor in proceedings for an offence". Clearly the court cannot make a "release application" (s. 49 – an accused person). There is a third type of bail application; "a variation application", s. 51;

51 Interested person may make variation application

(1) An interested person may apply to a court or authorised justice for a variation of bail conditions.

(2) An application under this section is a **"variation application"** .

(3) Each of the following persons is an **"interested person"** :

(a) the accused person granted bail,

(b) the prosecutor in proceedings for the offence,

(c) the complainant for a domestic violence offence,

(d) the person for whose protection an order is or would be made, in the case of bail granted on an application for an order under the Crimes (Domestic and Personal Violence) Act 2007,

(e) the Attorney General.

(4) A court or authorised justice may, after hearing the variation application:
(a) refuse the application, or

(b) vary the bail decision the subject of the application.

(5) An authorised justice may vary a bail decision only to the extent permitted by this Division.

(6) A court or authorised justice is not to hear a variation application made by a person other than the accused person unless satisfied that the accused person has been given reasonable notice of the application, subject to the regulations.

(7) A court or authorised justice is not to hear a variation application made by a person other than the prosecutor in the proceedings unless satisfied that the prosecutor has been given reasonable notice of the application, subject to the regulations.

(8) A court or authorised justice must not vary a bail decision on the application of a person referred to in subsection (3) (c) or (d) unless the prosecutor in the proceedings has been given a reasonable opportunity to be heard on the application.

(9) A court must not revoke bail on a variation application unless revocation is requested by the prosecutor in the proceedings.

(10) For the purposes of this section, the Commissioner of Police is, in the case of bail granted on an application for an order under the Crimes (Domestic and Personal Violence) Act 2007, taken to be the prosecutor in the proceedings

As can be seen – additional "interested persons" can make a variation application, but the court is not one of them. Significantly, s. 51 (9) specifically states that "a court must not revoke bail on a variation application unless revocation is requested by the prosecutor in the proceedings".

There are specific limited instances where a court can "of its own motion" (and these words are used) make or vary a bail decision without a bail application, s. 53;

53 Discretion to make or vary bail decision without bail application

(1) A court or authorised justice with power to hear a bail application may, of its own motion, on a first appearance by an accused person for an offence:
(a) grant bail to the person (with or without the imposition of bail conditions), or

(b) vary a previous bail decision made for the offence (but not so as to refuse bail).

(2) A court or authorised justice may exercise a power under this section only to benefit the accused person.

(3) This section does not limit the powers of a court when a bail application is made.

(4) This section does not permit the grant of bail, without a bail application, for a show cause offence.

Significantly again, the court can vary a previous bail decision, but not to refuse bail (s. 53 (1)(b)), and this section can only be used to benefit the accused person (s. 53 (2)).

A court can also, of its own motion, refuse bail if no application is made by an accused person on the first appearance, s. 54;

54 Discretion to refuse bail if no application is made

A court or authorised justice with power to hear a bail application may, of its own motion, refuse bail to an accused person or affirm a decision to refuse bail if:

(a) the accused person is in custody and is brought before the court or authorised justice on a first appearance for an offence, and

(b) a bail decision has not been made, or bail has been refused, and

(c) a bail application is not made.

These specified examples, and the terminology used "of its own motion" suggests that these are intentionally limited. In any event, they are to vary bail (see also s. 55 variation of bail if accused person remains in custody – again it is a power without a specific application being made, and importantly also contains the words "but not revoke or refuse bail" (s. 55 (6)(b)).

What then of the situation where an accused person is on bail and appears before the court in the normal course of their matter?

There does not appear to be any power for the court to revoke bail in these circumstances. Arguably the court may do so in limited circumstances where there is a breach of bail. This argument may arise due to the sections and wording in Part 8 of the Act; "Enforcement of Bail conditions". The relevant sections are copied above – s. 77 (actions of the police to enforce bail requirements) and s. 78 (powers of bail authorities).

s. 77 outlines the various options the police have. The question arises in s. 78, and which of two readings of "before which an accused person is brought or appears" is correct;

1; s. 78 should only be read as identifying the powers that the court has when an accused is "brought or appears" before the court pursuant to police action under s. 77. An accused is "brought" when the police arrest under s. 77 (1)(e), and an accused "appears" when the police decide to take the actions permitted by s. 77 (1) (c) and (d).

2; Alternatively, s. 78 should not be read down in this way, particularly the word "appears", and it means when an accused person appears in the normal course of their matter (as well as "brought" pursuant to police action in s. 77).

Both interpretations are arguable. Significantly, even on the second of the above interpretations, the court's power to revoke or refuse bail is limited to; only if satisfied that the person has failed or was about to fail to comply with a bail acknowledgment or bail condition, and, having considered all possible alternatives, the decision to refuse bail is justified.

Absent a detention application by the prosecutor, or a breach of bail scenario (if that interpretation be correct) the court should not be revoking bail of its own volition. Even in a variation application the court must not revoke bail unless that is requested by the prosecutor.

2. THE AVENUE FROM THE SC TO THE CCA

This "avenue" is covered by s. 67 of the Act;

67 Powers specific to Court of Criminal Appeal

(1) The Court of Criminal Appeal may hear a bail application for an offence if:
(a) the Court has ordered a new trial and the new trial has not commenced, or

(b) the Court has made an order under section 8A (1) of the Criminal Appeal Act 1912 and the person is before the Court, or

(c) the Court has directed a stay of execution of a conviction and the stay is in force, or

(d) an appeal from the Court is pending in the High Court, or

(e) a bail decision has been made by the Land and Environment Court, the Industrial Court or the Supreme Court.

(2) Despite subsection (1) (e), a Judge of the Court of Criminal Appeal sitting alone cannot hear a bail application if a bail decision has been made by the Supreme Court (however constituted) unless the rules made under the Supreme Court Act 1970 permit the Judge to do so.

Only covered here is the situation where a bail decision has been made by the SC.

Until very recently I was not aware of any reported Release (and previously "bail") Application being made in these circumstances.

There have always been Detention Applications (previously – applications for review s. 45 (1)(b) of the old Act) made in these circumstances where the SC J has granted bail and the ODPP/ or at the instigation of the police, seek to have bail revoked. This is now simply a Detention Application lodged in the CCA, heard de novo.

(an example under the old Act is; DPP (NSW) v Leahy [2014] NSWCCA 279, 28 February 2014).

In almost all legally aided matters (and certainly "in house" ones), ICLC's SCB practice will retain carriage. They are a great deal of work in a very short period of time. The SC granting of bail, whilst clearly different to a local court's granting of bail, was still in a busy list with limited evidence on the part of the applicant and rarely with formal written submissions.

The recent example of R v Kugor [2015] NSWCCA 14, illustrates;

- The SC (Davies J) granted bail on 3 February 2015 (a typo results in this being recorded as 2/2/15 in the judgment).
- The DPP lodged a Detention Application in the CCA on 6 February 2015.
- The CCA issued a Notice of Listing on 12 February 2015 setting a Hearing date; at 3 pm on Wednesday 18 February 2015.
- The first we, Campbelltown LA, and Mr Kugor (by then released to bail) were aware of this was 12 February 2015.

- The CCA made the following Directions;
- Crown Submissions by COB Friday 13 February 2015
- Respondent Subs. by COB Monday 16 February 2015

We also, on Tuesday 17 February, prepared and filed 3 Affidavits; from the Respondent Mr Kugor, his father, and from his partner and the mother of his child.

Clearly the material presented was much more comprehensive from both sides, not just the written submissions and Justice Davies judgment. The Crown material was significantly more detailed, with victim and witness statements, DNA evidence, Affidavits annexing prior fact sheets of convicted offences etc.

The CCA refused the detention application on the date of the Hearing, Wednesday 18 February 2015, and the Judgment was delivered on Monday 23 February 2015.

On other occasions (like Leahy) bail is revoked and the client returns to custody, often a matter of days after being released.

Because a "bail application" includes a Release Application, there is nothing to stop a person refused bail by the SC from pursuing a further Release Application in the CCA following the refusal of bail in the SC. Whilst we have contemplated this in the ICLC SCB section, notably a year or so ago when bail was, to us, unjustly refused in the SC, we have not to date taken this step (in the example that springs to mind, the Children's Court granted bail soon after the SC had refused it). Issues such as views with regard to the finality of SC determinations, resources/ capacity, LA Policies and merit tests have all played a part here; but the avenue remains.

A recent case has illustrated this avenue; El-Hilli and Melville v R [2015] NSWCCA 146, and I understand another is in the wings.

If this avenue opens up to a flood of applications one does wonder how long it will last, how LA will respond in terms of policies and the availability of Aid, and already there are considerations of changing this to an error based, rather than de novo, jurisdiction.

2.1 Supreme Court to the Court of Appeal.

For quite some time it has been the "practice" in the SC Bail jurisdiction to refer bail applications from the SC to the Court of Appeal in circumstances where a Judge of either the District Court or Supreme Court has made a bail determination.

This has recently been considered in DPP (NSW) v Tikomaimaleya [2015] NSWCA 83, in which it was stated in para. 5;

"In R v Rowe [1991] NSWCA 300, Hunt AJA described the practice of referral of bail matters from the Supreme Court to this Court as follows;

"…the practice adopted by the Supreme Court (since as long ago as 1979), where an applicant is already the subject of a refusal of bail by a judge of either the District Court or the Supreme Court during a Trial or pending sentence, has been has been for the single judge before whom the application comes to decline to exercise that jurisdiction, but (if there be circumstances shown which may be thought to justify a reconsideration of bail) to remove the application into the Court of Appeal" ".

The Court looked at the history of this practice and the inter-relation with various legislative changes. It found (para. 13); "The practice of referring bail applications from the Supreme Court to

the Court of Appeal should have ceased with the introduction of the 2008 amendments and has no place under the Bail Act 2013".

Whilst these circumstances don't arise very often (and additionally LA merit test considerations are clearly triggered), in the SCB practice of ICLC we have been guilty of giving this (incorrect since 2008) advice as to the procedure. We understood that part of the reason for the practice was the reluctance of a single Judge of the SC to re-determine bail when another Judge, who is part-heard, had already considered and decided the question of bail.

These matters will now remain in the ordinary SC Bail jurisdiction before a single Judge, and if either party is dissatisfied they can use s. 67 and go to the CCA, as outlined above.

3. S. 40 STAYS

In certain (very) serious circumstances one's excellent advocacy in obtaining bail for a client will be (at least temporarily) a pyrrhic victory. This is because s. 40 of the Act allows the prosecutor to immediately lodge a stay with the court, and the client will not be released, even if all bail conditions have been met/ entered into.

This only applies to those offences which are defined in s. 40 as being a "serious offence", and it means murder, or any other offence punishable by imprisonment for life, or an offence under or mentioned in a provision of Part 3 of the Crimes Act 1900 involving sexual intercourse, or an attempt to have sexual intercourse, with a person under the age of 16 years.

I have been told (and I believe it, and probably would even if it isn't true) that the police computer system "spits out" s. 40 stay documentation upon recognising such an offence.

The form is not prescribed, and many may not have seen one. I attach a blank form as Annexure 1.

40 Stay of release decision if detention sought

(1) A decision of a court or authorised justice to grant bail or dispense with bail for a serious offence on a first appearance by an accused person is stayed if a police officer or Australian legal practitioner appearing on behalf of the Crown immediately:
(a) informs the court or authorised justice that a detention application is to be made to the Supreme Court, and

(b) provides the court or authorised justice with a copy of the written approval of an authorised officer or the Director of Public Prosecutions to make a detention application to the Supreme Court if bail is granted or dispensed with.

(2) The stay of the decision has effect until one of the following occurs (whichever happens first):
(a) the Supreme Court affirms or varies the decision, or substitutes another decision for the bail decision, or refuses to hear the detention application,

(b) a police officer or some other person acting on behalf of the Crown files with the Supreme Court, or such other court as may be prescribed by the regulations, notice that the Crown does not intend to proceed with the detention application,

(c) 4pm on the day that is 3 business days after the day on which the decision was made.

(3) A bail decision does not entitle a person to be at liberty while the decision is stayed.

(4) A detention application made to the Supreme Court when a decision is stayed under this section is to be dealt with as expeditiously as possible.

(5) In this section:

"authorised officer" means the Commissioner of Police or a member of the NSW Police Force authorised by the Commissioner of Police to exercise the functions of an authorised officer under this section.

"business day" means a day that is not a Saturday, a Sunday or a public holiday throughout New South Wales.

"serious offence" means:
(a) the offence of murder or any other offence punishable by imprisonment for life, or

(b) an offence under or mentioned in a provision of Part 3 of the Crimes Act 1900 involving sexual intercourse, or an attempt to have sexual intercourse, with a person under the age of 16 years.

As you can see, the stay has effect until one of the following occurs - a detention application is made to the Supreme Court and the Supreme Court makes a decision, notice is given that the detention application is not being pursued, we arrive at 4 pm 3 business days after the day on which the decision is made – which ever happens first.

Therefore, if these are proceeded with you can see that time is very limited. They **will** be listed in the Supreme Court within those 3 days and the detention application heard. At least for most Legally Aided matters, the SCB section of ICLC will assume carriage in most circumstance. There is some capacity for other representation, but this would normally be the case.

Often the detention application is upheld and bail is refused/ revoked – a confronting result for the client who had been granted bail but a few days before.

The SCB case of R v DG, on the 9 and 22 April 2015 is instructive, if only for the way in which Justice Hidden dealt with the 3 day issue (having to make a decision or 4 pm on the third business day would be enlivened, occasioning release to the original bail), whilst having heard enough to want to give the accused the opportunity to provide further evidence as to why bail should be granted. – R v DG is collectively Annexure 2.

4. BAIL TO RESIDENTIAL REHABILITATION

It seems that the Act, and the current drafting of s. 28 (accommodation requirements) and s. 29 (pre-release requirements) has had the unintended consequence of removing a previously available (under the old Bail Act) set of bail conditions which anticipate the availability of a bed/ position in a residential rehabilitation facility on some date in the future, but where, at the time of the decision, that date is not known. This is because the applicant has been assessed as suitable for inclusion into the program, but there is currently no bed available – but one is likely to become available at some stage.

Under the old Bail Act, it was common to see bail conditions along the lines of;

"X is not to be released until a bed at YZ (the rehabilitation facility) is available, and then is to be released only into the custody of AB and is to proceed directly to YZ for admission, and is to participate in the rehabilitation program.."… etc

s. 28 and s. 29, as they currently stand, make this, strictly speaking, impossible (I say "strictly speaking" because I am aware that these conditions are still occasionally made…).

Relevantly;

28 Bail condition can impose accommodation requirements

(1) A bail condition imposed by a court or authorised justice on the grant of bail can require that suitable arrangements be made for the accommodation of the accused person before he or she is released on bail.

(2) A requirement of a kind referred to in this section is an **"accommodation requirement"** .

(3) An accommodation requirement can be imposed only:
(a) if the accused person is a child, or

(b) in the circumstances authorised by the regulations.

(6) The regulations may make further provision for accommodation requirements.

Therefore an accommodation requirement can only be imposed for a child accused, or in the circumstances authorised by the regulations. There are currently no regulations dealing with accommodation requirements.

29 Limitation on power to impose pre-release requirements

(1) The following requirements (and no other requirements) can be imposed by a bail authority as pre-release requirements:
(a) a conduct requirement that requires the accused person to surrender his or her passport,

(b) a security requirement,

(c) a requirement that one or more character acknowledgments be provided,

(d) an accommodation requirement.

(2) A requirement of a bail condition is a **"pre-release requirement"** if the bail condition specifies that the condition must be complied with before the accused person is released on bail.

(3) A pre-release requirement (other than an accommodation requirement) is complied with when the requirements specified in the bail condition that imposes the pre-release requirement, and any requirements specified in the regulations, are complied with.

(4) An accommodation requirement is complied with when the court is informed by an appropriate Government representative, in writing or in person, that suitable accommodation has been secured for the accused person.

(5) If all pre-release requirements are complied with, the accused person is entitled to be released (subject to the other provisions of this Act) without any rehearing of the matter.

At the risk of being repetitive; If there are only a set number of pre-release requirements, and the only one relevant here is an accommodation requirement, and accommodation requirements only apply to children – an adult cannot have a pre-release accommodation requirement.

This issue was identified very early in the life of the Act.

There is no problem if a bed is available on the date of the court appearance (Benzce) – as the court can grant bail to attend the program immediately.

There is also no problem if there is an identified future date when a bed will be available because the court can utilise s. 12(3) and grant bail for a specified period;

12 Duration of bail

(3) If bail is granted by a bail authority for a specified period, bail ceases to have effect at the end of that period, unless sooner revoked.

Thus, in the matter of Barry, where the bail decision was made on 28/5/14, bail was granted from a specified date – 2/6/14 – when the bed was available.

In the matter of Yates, where the bail decision was made on 11/2/15, bail was granted from a specified date – 3/3/15 – when the bed was available.

The judgment of Schmidt J in Barry, 28/5/14, is attached as Annexure 3. The relevant sections of the Act are discussed here.

Benzce and Yates [2015] NSWSC 139, McCallum J, can be found on the LA NSW Internet/ Intranet Bail Act page under "Cases". **Note**; these judgments do not contain the actual conditions. The dates are not as clear as in Barry. Yates was not to be released until 3/3/15, into the custody of his mother, and was to travel directly to the rehabilitation centre. Benzce was to be released into the custody of his mother and to travel to the rehabilitation centre immediately.

Regrettably it is much more common for a residential rehabilitation centre to assess a person as suitable for their program and to state that they can be admitted "when a bed becomes available", without being able to specify a date, or have a bed available coinciding with the date of the appearance/ application.

Submissions, supported/ mirrored by the Law Society Criminal Law Committee and the ODPP, have been made to the Bail Act Monitoring Group and to Judge Hatzistergos for his Review, to amend s. 28 and / or the relevant regulations to remedy this situation.

I do not cover here the interaction between time in residential rehabilitation centres and Sentencing; the case law is extensive and there is clear effect on sentencing principles, not least prospects of rehabilitation and special circumstances. There is also the issue of instructions and advice to clients where a conviction and sentence to full time imprisonment appears inevitable; thus a return to gaol after a period on bail.

Practitioners are often confronted by submissions or questions about the utility of bail to rehabilitation centres in these circumstances. To my mind they are clearly separate considerations and should not overlap. Indeed, the same could be said for the granting of any bail in these circumstances. People are sentenced to full time imprisonment when they have been on bail all the time.

In the SC it is sometimes put that the granting of bail to residential rehabilitation may fetter the sentencing discretion of the lower court judicial officer. This was nicely dealt with by Justice Schmidt in R v Aaron Paul, 28 May 2014;

"In reaching that conclusion, the question is raised by the Crown as to whether such bail conditions might have an impact on the sentencing exercise to be conducted by the Local Court on 16 June. I have expressed my opinion that given the nature of the provisions of the current legislative scheme and its concern with risk assessment and risk mitigation, which I have discussed, I cannot see how conclusions reached in relation to those statutory concerns can have any impact on the sentencing exercise which will have to be undertaken on 16 June. The sentence will have to be determined on the basis of the relevant evidence led in those proceedings.

For all those reasons, I propose to grant bail".

5. CHANGES TO THE SC JURISDICTION AND PRACTICE

- The nature of the application; the calling of evidence
- The application form, issue of having applied for bail below
- The era of "double courts", and recently "quadruple listings"
- Should the avenue from the SC to the CCA be error based?
- "what are you doing here in the Court of Appeal?"

6. THE "AND BEYOND" BIT

Here are a few current and potential future considerations in the Bail area you might like to think about;

- The changes/ pressures in the SCB area, discussed above, will, in my opinion, lead inevitably to considerations of change. Should there be a call over system, should matters (apart from self-represented applications) require some sort of confirmation of readiness to proceed prior to a listing, will the backlog/ waiting time become such that double courts become a permanent fixture (to an extent they already are).

- The NSW Sentencing Council has been asked to consider, and has provided a report to the AG, the issue of expanding the "show cause" offences. Specifically the issue of where an accused person is charged with a serious indictable offence committed ;
  - While subject to a Good Behaviour Bond, an Intervention program, an Intensive Corrections Order, or
  - While serving a sentence in the community, or
  - While in custody.

A report was provided to the AG on the 22 May 2015 but, at the time of writing, was not yet available.

The Sentencing Council has also been asked to undertake an ongoing role in monitoring and reviewing the show cause categories.

- The BAMG – Bail Act Monitoring Group – continues to meet monthly. Issues have been identified which require fixing. Many of these are not controversial, and are to assist in the workings of the area, such as;
  - Police ability to grant bail to persons incapacitated in a hospital without the need for a bedside court sitting
  - Issues of police "senior officer review" of bail decisions and where these can be conducted (eg remote areas with limited numbers of police)
  - The residential rehabilitation issue discussed above, and amendments to the Act or Regulations to better facilitate the granting of bail with conditions to accommodate various permutations of "bed availability" in different residential rehabilitation programs.

Other issues have been identified, primarily by the NSWPF, which would make the area more difficult. A few examples;

- Making the breach of a bail condition a criminal offence
- Creating a specific offence of committing a serious indictable offence whilst on bail for another offence

7. INFORMATION AND PRACTICAL ASSISTANCE

The following points are aimed at assisting practitioners who have a Grant of Legal Aid for a substantive matter, or where the file is at a particular office, and who are considering lodging or advising on a Supreme Court Bail Application.

- Release Applications (Annexure 4) should be completed and faxed to the SC Registry on 92308060 (Ph. 92308680)
- The SC is currently considering amending the Application.
- In the Application question 5; "Do you wish to be represented by…" should be answered by indicating "Legal Aid"- (a)
- If you indicate "Private" (or your client does, eg lodging from the gaol – because they assume they will be "privately represented" because the substantive matter is assigned), the matter will be listed on the private day – Thursdays. This will result in delay or adjournments as Legal Aid does not attend on Thursdays and any application for Legal Aid will be referred in house pursuant to our in house allocation policy.
- If the matter is listed on a Thursday and you apply for a Grant of Legal Aid for the SC Bail Application, you will not necessarily get the Grant. The matter will be referred in house and we will seek instructions to move it to a Legal Aid day (Monday – Wednesdays), which could be some time in the future. We will generally not attend on a Thursday, nor regard this as a sufficient reason to assign the matter.
- You are still able to seek the Grant/ assignment of the SC Bail application even if it listed on Monday – Wednesday. Our Solicitors will consider your request, the complexity and stage of the matter etc in determining whether in house representation should not apply in this particular instance.
- Solicitor **and** Counsel fees will not be paid for SC Bail Applications if the matter is assigned.
- You can apply for a Grant of Aid for the SC Bail application on that particular Grants template. This is not strictly necessary if in house representation is to occur and it is listed on a Monday – Wednesday. This is because the SC Registry sends us ALL the applications where "Legal Aid" has been indicated, and we regard that as sufficient to commence a file, attempt to obtain the papers and conduct an AVL conference with the applicant where we advise and prepare the matter as appropriate. These AVL conferences are generally 1.5 weeks prior to the listing date.
- We will try to contact the practitioner with carriage to obtain a copy of the papers and perhaps discuss the matter. It would be preferable if the papers could be sent to us at the time of lodging the application or at the very latest when we contact.

- Our fax number for the receipt of these SCB papers and any instructions is 92195541, or they can be scanned and emailed to: supreme.court.bails@legalaid.nsw.gov.au
- Our phone number is 92195001 or 92195105. Ask for the SC Bails section.

- We greatly appreciate all the assistance we can get from the substantively instructed practitioner. We also advise of the result of the application.

- Please note; The Inner City Local Court section, which includes SC Bails, does not lodge SC Bail applications for matters we do not substantively appear in at our various court locations. The Grants Division does not lodge SC Bail applications.

Assessment.

- These matters are covered by Legal Aid Means and Merit tests.

4.11.3 Bail applications in the Supreme Court

Legal aid is available for bail applications to the Supreme Court.

For legal aid to be granted in Supreme Court bail applications the following tests must be satisfied:

- the applicant meets the Means Test
- the Unpaid Contributions Test,
- the matter meets Merit Test A, and
- the Availability of Funds Test.

- Means; This occasionally arises. Just because a person is in custody does not necessarily mean that they are eligible for Aid eg even if the income test appears straightforward there may be other sources of income or assets involved. If Aid has been granted in the substantive matter, or the person is represented in-house, the means test is generally easily determined. A question may arise if a person is seeking a Grant of Aid for a SC Bail application but where they are privately funding the substantive matter.

- Merit; Merit Test A

8.2. Merit Test A – State and some Commonwealth matters

Merit Test A is the merit test applied in State matters and in Commonwealth civil and criminal matters. The purpose of Merit Test A is to assess whether it is reasonable in all the circumstances to grant legal aid.

In deciding whether it is reasonable Legal Aid NSW will take into account amongst other issues:

- the nature and extent of
    - any benefit that the applicant might expect to gain by receiving legal aid, or
    - any disadvantage or harm to the applicant that might result from being refused legal aid, **and**
- whether the applicant has reasonable prospects of success.

In the SCB area the primary concern and assessment revolves around “reasonable prospects of success”. Legal Aid has been, and will be in the future, refused because of an assessment that there are not “reasonable prospects of success” in the Release Application.

Paul Johnson
Inner City Local Courts
Legal Aid NSW
June 2015

Post presentation additions, 22 July 2015;

1. As anticipated, the Supreme Court Registry has recently amended the Bail/ Release Application form. There is now a section to complete confirming that bail has been applied for and refused in the Local Court, including the name of the Magistrate and the decision date. If there has been no such application the Supreme Court Release Application will not be listed. Access the form and relevant contact details/ lodgement email address at the link below;

http://www.supremecourt.justice.nsw.gov.au/Pages/SCO2_formsfees/SCO2_forms/SCO2_forms_subject/crime_bail_forms.aspx

2. Annexure 3 "Barry", as well as many other useful cases and training resources, is located on the Legal Aid NSW internet website;

   http://www.legalaid.nsw.gov.au/for-lawyers/resources-and-tools/criminal-law/bail-act