BAIL LAW IN NSW

22 AUGUST 2014

INTRODUCTION

1. The *Bail Act* 2013 ("the 2013 Act") commenced on 20 May 2014, repealing the *Bail Act* 1978 ("the 1978 Act"). The introduction of the 2013 Act was prompted by a general examination of bail law conducted by the NSW Law Reform Commission in 2012. Most recommendations by the Commission have been adopted in the 2013 Act.

2. The 2013 Act represents a significant departure from the scheme in the 1978 Act, which had been amended on numerous occasions since its assent. The fundamental change in the legislative regime was explicated by the Attorney General in the second reading speech introducing the *Bail Bill* 2013:

> "*Rather than rely on presumptions, the bill requires that the bail authority consider particular risks when determining bail, namely, the risk that the accused will fail to appear, commit a serious offence, endanger the safety of individuals or the community, or interfere with witnesses. The bill incorporates a number of key considerations that need to be taken into account in deciding whether there are any risks of this nature and whether they are unacceptable. These considerations incorporate matters relevant to the protection of the community and the criminal justice system as well as the rights of the accused person. If the bail authority is satisfied that the accused person presents an unacceptable risk, it will have to assess whether that risk can be sufficiently mitigated by the imposition of bail conditions. If satisfied that the risk can be sufficiently mitigated, the person will be released to conditional bail. If the risk cannot be so mitigated, bail will be refused".*

3. This paper sets out some key provisions in the 2013 Act and briefly examines how these provisions have been interpreted by the Supreme Court of NSW. The paper also examines some of the provisions and difficulties in the *Bail Amendment Bill* 2014

("the Amendment Bill"), which was introduced in the Legislative Assembly on 13 August 2014 but as at the date of this paper is yet to be debated in parliament.

4. This paper is not intended to be an exhaustive analysis of the 2013 Act and the various papers on the Legal Aid and Judicial Commission websites are commended to the reader.

SOME KEY PROVISIONS

Purpose

5. The purpose of the 2013 Act is "*to provide a legislative framework for a decision as to whether a person who is accused of an offence or is otherwise required to appear before a court should be detained or released, with or without conditions*" (sub-section 3(1)). Importantly sub-section 3(2) provides that in making a bail decision the bail authority "*is to have regard to the presumption of innocence and the general right to be at liberty*". Neither of these provisions existed in the 1978 Act.

Unacceptable risk

6. Section 17 is the key provision in the 2013 Act and provides that prior to making a bail decision, a bail authority must consider whether there are any unacceptable risks that an accused person will, if released from custody, fail to appear at any proceedings for the offence; commit a serious offence; endanger the safety of victims, individuals or the community; or interfere with witnesses or evidence (sub-sections 17(1) and (2)).

7. In deciding whether there is an unacceptable risk a bail authority must only consider the matters set out in sub-section 17(3) (which are not dissimilar to the criteria in section 32 of the 1978 Act) including: the accused person's background including criminal history, circumstances and community ties; the nature and seriousness of the offence; the strength of the prosecution case; whether the accused person has a

history of violence; whether the accused person has previously committed a serious offence while on bail; whether the accused person has a pattern of non-compliance with bail acknowledgments, bail conditions, apprehended violence orders, parole orders or good behaviour bonds; the length of time the accused person is likely to spend in custody if bail refused; the likelihood of a custodial sentence being imposed if the accused person is convicted of the offence; if the accused person has been convicted of the offence and proceedings on an appeal against conviction or sentencing are pending before a court, whether the appeal has a reasonably arguable prospect of success; any special vulnerability or needs the accused person has including because of youth, being Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment; the need for the accused person to be free to prepare for their appearance in court or to obtain legal advice; the need for the accused person to be free for any other lawful reason.

8. If the bail authority is not satisfied that there exist any unacceptable risks, section 18 provides that a decision can be made to release the person without bail, dispense with bail or grant bail (without the imposition of conditions).

9. If the bail authority is satisfied that there exist any unacceptable risks, section 19 provides that a decision can be made to grant bail or refuse bail. The latter decision is qualified by sub-section 20(1) which 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*".

Bail conditions

10. Section 24 provides that bail conditions may only be imposed if necessary to mitigate an unacceptable risk; that the conditions must be reasonable, proportionate to the offence for which bail is granted and appropriate to the unacceptable risk for which they are imposed; and that the conditions must not be unnecessarily onerous. This provision is not dissimilar to section 37 of the 1978 Act.

11. Sections 25 to 28 describe the types of bail conditions that may be imposed including conduct requirements (section 25), security requirements which can only be imposed "*for the purpose of mitigating an unacceptable risk that the accused person will fail to appear at any proceedings for the offence*" (sub-section 26(5)), character acknowledgments which can only be imposed if the bail authority is "*of the opinion that the purpose for which the acknowledgment is required is not likely to be achieved by imposing one or more conduct requirements*" (sub-section 27(4)) and accommodation requirements, which can only be imposed if the accused person is a child or in circumstances authorised by the regulations (sub-section 28(3)).

Other key provisions

12. Section 21 provides that an accused person has a right to release for a fine only offence, an offence under the *Summary Offences Act* 1988 (other than an excluded offence) and an offence dealt with by conference under Part 5 of the *Young Offenders Act 1997*.

13. Section 22 replicates section 30AA of the 1978 Act by requiring a person awaiting appeal to the CCA against a conviction on indictment or sentence imposed on a conviction, or an appeal from the CCA to the High Court, to establish that special or exceptional circumstances exist that justify the grant of bail. It would appear that if this has been established the person would still be required to satisfy the unacceptable risk test.

14. Section 74 essentially repeats section 22A of the 1978 Act providing that repeat applications for release or detention can only be made if there are grounds for such applications, defined at sub-sections 74(3) and 74(4).

DECISIONS CONCERNING THE 2013 ACT

15. The 2013 Act has been subject to recent judicial comment. In relation to the concept of "*unacceptable risk*" Harrison J in *R v Hawi* [2014] NSWSC 837 at [15] stated:

> *"15 The concept of unacceptable risk finds expression in other jurisdictions. Section 4(2)(d) of the Bail Act 1977 (Vic) was considered by Bell J in Woods v DPP [2014] VSC 1 at [47] as follows:*
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> *"[47] The test in s 4(2)(d)(i) is expressed in terms of 'unacceptable' risk not in terms of the magnitude or degree of the risk. Moreover, not all of the circumstances specified in s 4(3) relate to the degree of the risk. It follows, as Redlich J pointed out in Haidy, that '[t]he degree of likelihood of the occurrence of the event may be only one factor which bears upon whether the risk is unacceptable': [2004] VSC 247 at [18]. Consistently with the presumption of innocence and the prosecutorial onus of proof, it is the overall effect of the multiplicity of considerations in the individual facts and circumstances of the case which must be considered. In consequence, bail may be granted though a risk of offending or not answering bail is relatively high when other circumstances, such as inordinate delay between arrest of the accused and trial or a weak prosecution case, lead to the conclusion that the risk is not unacceptable, having regard to the presumed innocence, right to liberty and other human rights of the accused and relevant public interest considerations. Conversely, a relatively low risk of re-offending may be overwhelmed by considerations on the opposite side, such as a high risk of not answering bail, which establish that the risk is unacceptable.""*

16. In an early decision after the enactment of the 2013 Act, Hamill J in *R v Lago* [2014] NSWSC 660 provided commentary on some of the key provisions. At [7]-[13] his Honour stated:

> *"7 Section 20 is a critical provision and it provides that bail can only be refused where the Court is satisfied that any unacceptable risk "cannot be sufficiently mitigated by the imposition of bail conditions". It can be seen that this provision casts the onus on the party who is opposed to the grant of bail. Again, the standard is on the balance of probabilities.*
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> *8 The concept of assessing risk of this kind has been considered in a number of cases in the context of legislation relating to bail in other states, in sentencing cases and also in applications for detention under various statutory schemes: see for example Williamson v DPP (2001) 1 Qd R 99; Dale v DPP [2009] VSCA 212; Woods v DPP [2014] VSC 1: Fardon v Attorney-General (Qld) (2004) 223 CLR 575 per Gleeson CJ at [22], McHugh J at [34], Gummow J at [60] and Callinan and Heydon JJ at [225]; M v M (1998) 166 CLR 69; Beldon v R [2012] NSWCCA 194 at [53].*

9 The cases on bail recognise that "no grant of bail is risk free": see Williamson (supra) at [22]; Dale (supra) at [58]. In the Application of Haidy [2004] VSC 247, a decision under the Victorian bail legislation, Redlich J said:

> *"Bail when granted is not risk free. Williamson v DPP (Qld).As the offender's liberty is at stake, a tenuous suspicion or fear of the worst possibility if the offender is released will not be sufficient. Dunstan v DPP; Williamson v DPP (Qld)."*

10 In Fardon v Attorney General (Qld) the High Court was concerned with the validity of Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld). Gleeson CJ said (at [22]):

> *"It was argued that the test, posed by s 13(2), of "an unacceptable risk that the prisoner will commit a serious sexual offence" is devoid of practical content. On the contrary, the standard of "unacceptable risk" was referred to by this Court in M v M in the context of the magnitude of a risk that will justify a court in denying a parent access to a child. The Court warned against "striving for a greater degree of definition than the subject is capable of yielding". The phrase is used in the Bail Act 1980 (Q), which provides that courts may deny bail where there is an unacceptable risk that an offender will fail to appear (s 16). It is not devoid of content, and its use does not warrant a conclusion that the decision-making process is a meaningless charade."*

11 Callinan and Heydon JJ said (at [225]):

> *"The yardstick to which the Court is to have regard, of an unacceptable risk to the community, relevantly a risk established according to a high degree of probability, that the prisoner will commit another sexual offence if released, established on and by acceptable and cogent evidence, adduced according to the rules of evidence, is one which courts historically have had regard to in many areas of the law. The process of reaching a predictive conclusion about risk is not a novel one. The Family Court undertakes a similar process on a daily basis and this Court (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ) said this in M v M of the appropriate approach by the Family Court to the evaluation of a risk to a child:*
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> > *'Efforts to define with greater precision the magnitude of the risk which will justify a court in denying a parent access to a child have resulted in a variety of*

formulations. The degree of risk has been described as a 'risk of serious harm', 'an element of risk' or 'an appreciable risk', a 'real possibility', a 'real risk', and an 'unacceptable risk'. This imposing array indicates that the courts are striving for a greater degree of definition than the subject is capable of yielding. In devising these tests the courts have endeavoured, in their efforts to protect the child's paramount interests, to achieve a balance between the risk of detriment to the child from sexual abuse and the possibility of benefit to the child from parental access. To achieve a proper balance, the test is best expressed by saying that a court will not grant custody or access to a parent if that custody or access would expose the child to an unacceptable risk of sexual abuse.'"

12 *These comments provide some guidance as to the evaluative task involved in assessing whether there is an unacceptable risk although they must be considered in the context of other relevant provisions of the Act including:*

The absence of the rules of evidence and the requirement that the task is to be undertaken by reference to 'any evidence or information that the bail authority considers credible or trustworthy in the circumstances' (s. 31)

The standard of proof is on the balance of probabilities (s. 32)

The only matters that can be taken into account in making the assessment are those mentioned in s. 17(3).

13 *While the Act has changed in a significant way the focus of the Court from a series of complicated presumptions to an assessment of risk, certain fundamental concepts and protections that lie at the heart of our criminal justice system remain important. For example, the Act does no violence to the presumption of innocence or to the ultimate requirement of proof beyond reasonable doubt before the State can punish one of its citizens. Further, the length of time that a person is required to remain in custody is specifically required to be taken into account in assessing whether there are or are not unacceptable risks: s. 17(3)(g). The following words of Sperling J in Cain (No 1) (2001) 121 A Crim R 365 at 367 continue to resonate when a bail authority is dealing with a release application where there is expected to be a lengthy delay:*

> *"As to the interests of the applicant, he has a legitimate claim to be at liberty to go about a lawful life and to be with his family pending trial. He has been in custody for over a year. I am told by the Crown that the present charges might not come to trial for a further year. The prospect that a private citizen who has not been convicted of any offence might be imprisoned for as long as two years pending trial is, absent exceptional circumstances, not consistent with modern concepts of civil rights."*

17. In terms of how the above principles have been applied in various applications for bail, Ms Rebekah Rodger of the Legal Aid Commission has prepared useful case summaries available on the Legal Aid website. It is not proposed to extract those summaries here.

THE AMENDMENT BILL

18. In response to the public backlash concerning the decisions to release on bail accused murderers Steven Fesus and former Comanchero bikie boss Mick Hawi, the Government introduced the Amendment Bill. This Bill not only strips away many of the changes made to the 2013 Act but appears to re-introduce the scheme of offence based presumptions, albeit under a different name.

19. The Bill introduces the following significant amendments:

    (i) The deletion of sub-section 3(2) of the 2013 Act which mandates a bail authority to "*have regard to the presumption of innocence and the general right to be at liberty*".

    (ii) The deletion of the flow chart in section 16 of the 2013 Act and replacement with a new flow chart illustrating the key features of the amendments including "*show cause offences*".

(iii) Section 16A has been introduced and sub-section 16A(1) requires a bail authority making a decision for a show cause offence to refuse bail unless the accused person shows cause why his or her detention is not justified. 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.

(iv) Section 16B defines a "*show cause offence*" which is, broadly stated, an offence under the 1978 Act which attracted a presumption against bail.

(v) Division 2 is titled "*Unacceptable risk test – all offences*" and sub-section 17(1) requires a bail authority, before making a bail decision, to assess any bail concerns, which are defined in sub-section 17(2).

(vi) In the assessment of the bail concerns, a bail authority is to consider the matters set out in sub-section 18(1) including sub-section 18(1)(g), "*whether the accused person has any criminal associations*" and sub-section 18(1)(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*".

(vii) Sub-section 19(1) requires a bail authority to refuse bail if satisfied, on the basis of an assessment of bail concerns, that there is an unacceptable risk.

(viii) If there are no unacceptable risks the bail authority must grant bail, release the person without bail or dispense with bail (sub-section 20(1).

(ix) If the offence is a show cause offence, the fact that the accused person has shown cause that his or her detention is not justified is not relevant

to the determination of whether or not there is an unacceptable risk (sub-section 19(3)).

(x) Bail conditions are to be imposed only if the bail authority is satisfied, after assessing bail concerns, that there are identifiable bail concerns (sub-section 20A(1)).

(xi) Section 22 of the 2013 Act, which applies to the question of bail where a person is appealing to the CCA or High Court, has been amended to include in sub-section 22(2) that "*if the offence is a show cause offence, the requirement that the accused person establish that special or exceptional circumstances exist that justify a decision to grant bail or dispense with bail applies instead of the requirement that the accused person show cause why his or her detention is not justified*".

20. The Explanatory note to the Bill provides further background to the Bill. The note states that the show cause requirement "*requires a bail authority making a bail decision for a show cause offence to refuse bail unless the accused person shows cause why his or her detention is not justified. Bail must be refused on this basis whether or not there is an unacceptable risk. If the bail authority decides not to refuse bail on this basis, the unacceptable risk test still applies*."

21. The Explanatory note also states that the new unacceptable risk test "*replaces the existing 2-step unacceptable risk assessment process that must be carried out by a bail authority before making a bail decision with a one-step assessment*." Further, it reads, "*The amendments will require the bail authority to assess any bail concerns before making a bail decision. The bail authority will be required, as part of its assessment, to consider the bail conditions that could reasonably be imposed to address those concerns*."

22. The proposed amendments represent an extraordinary and unashamedly politically motivated transformation to the 2013 Act. The deletion of the provision requiring a bail authority to "*have regard to the presumption of innocence and the general right*

to be at liberty" would be amusing were not so telling. Most notably, the "*show cause offences*" appear to place the onus on an accused person to show why his or her detention is not justified. This is a presumption against bail, in all but name. The requirement that a bail authority consider whether an accused person has any "*criminal associations*" is patently directed at Mr Hawi and others who belong to any outlaw motorcycle gangs. The requirement that a bail authority have regard to the views of "*any family member of a victim*" is baffling.

23. The full extent of the mechanics and operation of the amendments is unclear and difficulties emerge from a cursory examination of the Bill. For example, the precise interaction between the "*show cause requirement*" and the "*unacceptable risk test*" is vexed. As repeated above, sub-section 19(3) states that "*if the offence is a show cause offence, the fact that the accused person has shown cause that his or her detention is not justified is not relevant to the determination of whether or not there is an unacceptable risk*" which would appear to suggest that for a show cause offence there are (at least) 2 hurdles to overcome. However, if a bail authority is indeed satisfied that an accused person shows cause why his or her detention is not justified, that must surely satisfy the bail authority that the person is not an unacceptable risk. The latter conclusion inevitably follows from the former. Put another way, if someone's detention is not justified that must mean they are not an unacceptable risk. Yet, in its current form, the Bill expressly requires 2 hurdles to be overcome (without reference to each other) for a show cause offence to attract bail. It may be the case that the difference works no practical disadvantage to an accused person however that remains to be seen.

CONCLUSION

24. The 2013 Act was introduced after significant consultation and deliberation about the problems concerning the 1978 Act. The 2013 Act moves away from the scheme of offence-based presumptions contained in the 1978 Act. It also introduces a 2 step

method of determining bail by which a bail authority considers whether a person is an unacceptable risk and if so, whether that risk can be mitigated. The proposed amendments to the 2013 Act constitute a retrograde step to the development of bail law in the State and possess difficulties yet to be resolved.

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