At Legal Aid NSW's Criminal Law Conference of 2013 we have the following presenting on, or discussing the new Bail Act 2013;

- The Hon. Greg Smith, SC, MP, Attorney General and Minister of Justice (NSW)
- Maureen Tangney and Chris White, DAGJ (NSW)
- Saul Holt, SC, Victoria Legal Aid

In contributing to this session at the Conference, I have not prepared a comprehensive paper on the new Bail Act but have highlighted some significant, and some not so significant, changes (beyond the obvious) that we need to consider. The new Bail Act will not commence until at least May 2014, as the AG said in the second reading speech, "to mount an education and training campaign for police, legal practitioners and courts regarding the new legislation".

As the AG said in the second reading speech, the Bail Act 1978 has been amended by more than 80 other Acts since its introduction.

In 1978, when the then Attorney General Frank Walker introduced the Bail Act, only aggravated robbery was denied the presumption in favour of bail. I understand the intention was for all matters to have the presumption of bail. Despite there being few robbers on bail at the time, two fatal armed bank hold-ups tipped the balance and so those charged with such offences were denied the presumption of bail. This was an early sign of things to come, with further horrific crimes and media outrage demanding a response from the Government.

The result, as we all know, was a succession of further amendments removing the presumption in favour of bail for one type of charge after another. There were many articles/ comments that the Bail Act became so complicated that even legal practitioners had trouble understanding it.

There is no complex scheme of offence based presumptions in the Bail Act 2013, but rather a requirement that the bail authority consider particular risks when considering bail.

As the AG said in the media release of 22 May 2013 announcing that the Bail Act had passed Parliament;

"The new Bail Act is all about putting the safety of the community, victims and witnesses first".

From a defence Solicitor's perspective, the interests of the Accused get a mention early in the new Bail Act;

Purpose of Act, s. 3 (Bail Act 2013);

"3 Purpose of Act
(1) The purpose of this 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.

(2) 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."

The underlined portion above is new to the Bail Act, and its inclusion in s.3, "Purpose of Act", gives legislative recognition to fundamental principles of our criminal justice system.

Less clear is how this requirement to have regard to these principles will be given effect within the structure of assessing unacceptable risk.

SOME NEW CONCEPTS TO GRAPPLE WITH;

There are 3 types of Bail Applications (noted in s.4 definitions; "a bail application means", and s. 48);

a. A release application (made by an accused person)
b. A detention application (made by the Prosecutor)
c. A variation application (made by any interested person)

a. A release application made by an accused is easily understood as a traditional Bail application.

b. A detention application (an application for the refusal or revocation of Bail) is a new concept. This detention application is mentioned in at least the following;

- **S. 40 (stay of release decision if detention sought)** - A decision of a court or an authorised justice to grant or dispense with bail for a serious offence ... is stayed if informed that a detention application is to be made to the Supreme Court. It appears the stay only lasts until 4 pm on the day that is 3 business days after the day on which the decision was made (s. 40(2)(c)), unless what is contemplated in s.40(2)(a) and (b) occurs – that is, the Supreme Court considers it or it is in effect withdrawn/ discontinued.

- **S.48 – Powers of courts and authorised justices to hear bail applications, 48(1)** Note There are three types of bail applications ... (b) a detention application (which can be made by a prosecutor)

- **S.50 - Prosecution to make detention application**

- **S.66(2) – The Supreme Court may hear a detention application (or variation application) if bail for the offence has previously been granted by another court.**

While in current practice prosecutors oppose applications for bail, the concept of a detention application not only introduces new terminology but in fact introduces a new form of bail application.

In s.50(1) a prosecutor may apply for the refusal or revocation of bail. This is a "detention application". This may contemplate the possibility of the prosecutor pre-empting the Accused with a detention application before the accused person can make a release application. This appears to be quite different to a prosecutor opposing an accused person's bail application as is currently the case.

Part 7 of the Bail Act 2013 introduces limits to multiple release or detention applications to the same Court after a determination has been made – a court is to refuse to hear another release or detention application.....unless there are grounds for a further release/ detention application (s. 74(1) and (2), the grounds for these further applications being identified at ss(3) and (4) – essentially the current s.22A). However, note an additional chance if the person is a child and the previous application was made on a first appearance for the offence.

The s.40 stay and s.66(2) power of the Supreme Court to hear a detention application is a big change from current law and practice. S.25(A) of the Bail Act 1978 currently covers stays and reviews by the Supreme Court – they are limited to "serious offences", which are defined in s.25(A)(6) – a limited number of very serious offences. This is duplicated in the new Bail Act in terms of stays for serious offences, BUT s. 66(2) allows the Supreme Court to hear a detention application (or variation application) for any offence. Thus, whilst the prosecution can only get a stay for those "serious offences" in s.40, there appears to be nothing to stop detention applications being made to the Supreme Court for all matters.

The Supreme Court Registry and our SC Bails practice better get ready if the prosecution choose to vigorously make use of their ability to apply to the Supreme Court for detention applications.

It will be interesting to know what the procedure will be for these applications, for example, how they will be listed, in what order they are to be heard, etc.

c. A variation application.

I copy s.51 here because it appears to contain a new dynamic;

s. 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.

An "interested person" being an accused or prosecutor is easily understood.

However, you will have noted;

- 51(3)(c) An interested person includes ... the complainant in the case of bail granted for a domestic violence offence, and (d) the person for whose protection a domestic or personal violence order is or would be made,
  (and (e) – the Attorney General).

  It is noteworthy that the Act gives standing to third parties to make bail variation applications. To my mind, there are two parties before the court – the prosecutor on behalf of the State and the accused person, and all bail applications should be funnelled through those parties.

  How is the complainant or PINOP (eg in a private application for an order, though note ss.10) to make these variation applications? Who will give them legal advice?

  If the variation application is to be made by someone other than the accused or the prosecutor, they need to be given reasonable notice (ss. (6) and (7)).

  ss.(8) above requires a prosecutor to be heard before any variation is made pursuant to an application by a complainant in a DV charge, or PINOP. No such requirement exists for the accused/ defendant. This is curious – is what is being contemplated here a variation that is beneficial to the accused/ defendant?

  Any practitioner, particularly duty solicitors, working in a busy local court domestic violence list may view this with some trepidation, from practical, procedural and ethical considerations.

  (Note s.52 relates to powers of authorised justices to vary court decisions)

Unacceptable Risk

This is a concept already contained in Bail legislation elsewhere, including;

- s.4(2)(d) of the Bail Act 1977 (Vic)
- s. 16(1)(a) of the Bail Act 1980 (Qld)

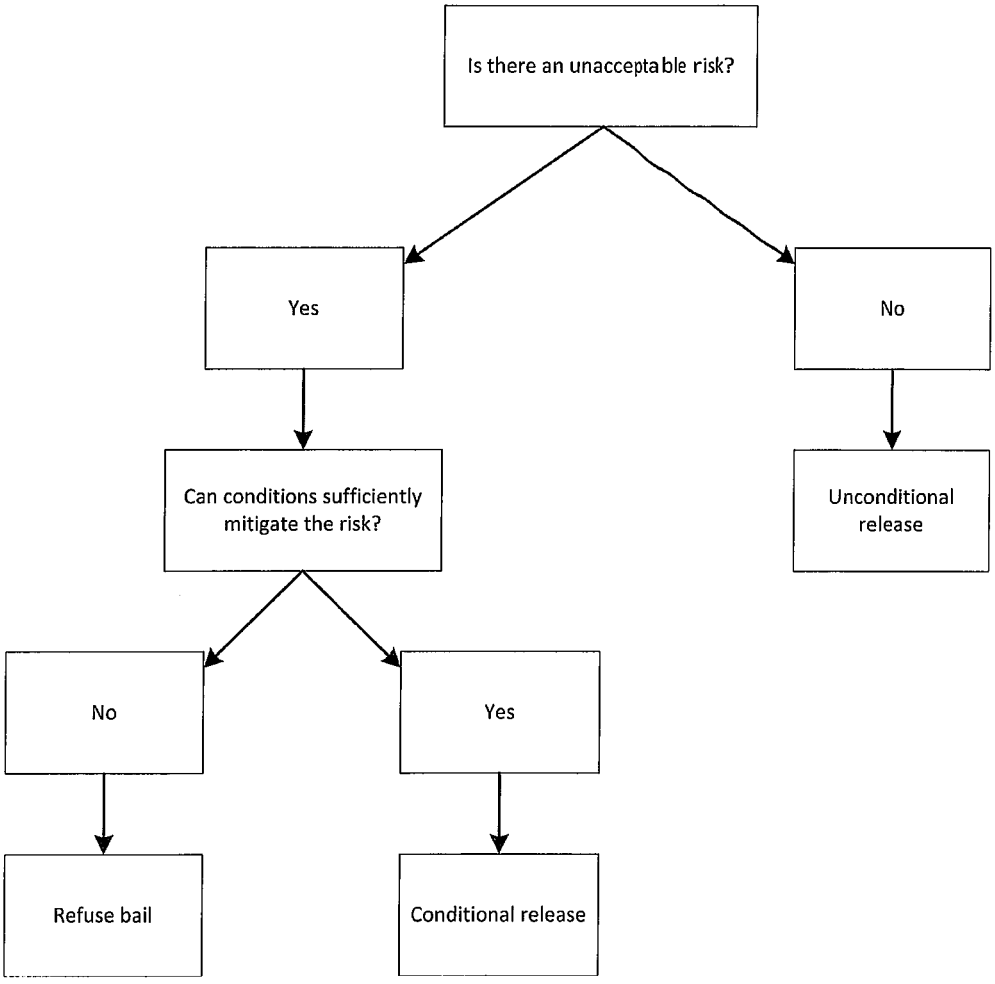
s. 16 Flow Chart – key features of bail decision;

As the AG said in the second reading speech;

"...the provisions governing the unacceptable-risk test in Part 3 of the bill have been distilled into a flow chart which should greatly assist police, legal practitioners and courts when applying the legislation"

And later;

"Courts and police have been consulted in the relation to the bill and feedback provided confirms that the flowchart is a welcome addition to the legislation"



17 Requirement to consider unacceptable risk

(1) A bail authority must, before making a bail decision, consider whether there are any unacceptable risks.

(2) For the purposes of this Act, an **unacceptable risk** is an unacceptable risk that an accused person, if released from custody, will:
(a) fail to appear at any proceedings for the offence, or
(b) commit a serious offence, or
(c) endanger the safety of victims, individuals or the community, or
(d) interfere with witnesses or evidence.

(3) A bail authority is to consider the following matters, and only the following matters, in deciding whether there is an unacceptable risk:
(a) the accused person's background, including criminal history, circumstances and community ties,
(b) the nature and seriousness of the offence,
(c) the strength of the prosecution case,
(d) whether the accused person has a history of violence,
(e) whether the accused person has previously committed a serious offence while on bail,
(f) whether the accused person has a pattern of non-compliance with bail acknowledgments, bail conditions, apprehended violence orders, parole orders or good behavior bonds,
(g) the length of time the accused person is likely to spend in custody if bail is refused,
(h) the likelihood of a custodial sentence being imposed if the accused person is convicted of the offence,
(i) if the accused person has been convicted of the offence and proceedings on an appeal against conviction or sentence are pending before a court, whether the appeal has a reasonably arguable prospect of success,
(j) any special vulnerability or needs the accused person has including because of youth, being an Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment,
(k) the need for the accused person to be free to prepare for their appearance in court or to obtain legal advice,
(l) the need for the accused person to be free for any other lawful reason.

(4) The following matters (to the extent relevant) are to be considered in deciding whether an offence is a serious offence (or the seriousness of an offence), but do not limit the matters that can be considered:
(a) whether the offence is of a sexual or violent nature or involves the possession or use of an offensive weapon or instrument within the meaning of the *Crimes Act 1900*,
(b) the likely effect of the offence on any victim and on the community generally,
(c) the number of offences likely to be committed or for which the person has been granted bail or released on parole.

(5) If the person is not in custody, the question of whether there are any unacceptable risks is to be decided as if the person were in custody and could be released as a result of the bail decision.

18 Bail decisions possible when there are no unacceptable risks
The following bail decisions can be made if there are no unacceptable risks:
(a) a decision to release the person without bail,
(b) a decision to dispense with bail,
(c) a decision to grant bail (without the imposition of bail conditions).

19 Bail decisions possible when there is an unacceptable risk
The following bail decisions can be made if there is an unacceptable risk:
(a) a decision to grant bail,
(b) a decision to refuse bail.

20 When can bail be refused
(1) A bail authority may refuse bail for an offence only if the bail authority is satisfied that there is an unacceptable risk that cannot be sufficiently mitigated by the imposition of bail conditions.
(2) Bail cannot be refused for an offence for which there is a right to release under this Part.

General rules for bail conditions

When thinking about Bail conditions it may be useful to have regard to the general rules for bail conditions in s.24 – especially if you are faced with, or arguing about, proposed conditions that do not appear to be related to the alleged factual circumstances of the offence/s charged, or appear too onerous or impracticable, or don't appear to be related to one of the unacceptable risks.

24 General rules for bail conditions
(1) A bail condition can be imposed only for the purpose of mitigating an unacceptable risk.
(2) Bail conditions must be reasonable, proportionate to the offence for which bail is granted, and appropriate to the unacceptable risk in relation to which they are imposed.
(3) A bail condition is not to be more onerous than necessary to mitigate the unacceptable risk in relation to which the condition is imposed.
(4) Compliance with a bail condition must be reasonably practicable.
(5) This section does not apply to enforcement conditions.

BAIL ON APPEAL

1. INDICTABLE APPEALS – CCA.

BAIL ACT 1978

30AA Limitation on power to grant bail

Notwithstanding anything in this Act, if:

(a) an appeal is pending in the Court of Criminal Appeal against:
(i) a conviction on indictment, or
(ii) a sentence passed on conviction on indictment, or

(b) an appeal from the Court of Criminal Appeal is pending in the High Court in relation to an appeal referred to in paragraph (a), bail shall not be granted by the Court of Criminal Appeal or any other court unless it is established that special or exceptional circumstances exist justifying the grant of bail.

BAIL ACT 2013

22 General limitation on court's power to release
Despite anything to the contrary in this Act, a court is not to grant bail or dispense with bail for any of the following offences, unless it is established that special or exceptional circumstances exist that justify that bail decision:
(a) an offence for which an appeal is pending in the Court of Criminal Appeal against:
(i) a conviction on indictment, or
(ii) a sentence imposed on conviction on indictment,
(b) an offence for which an appeal from the Court of Criminal Appeal is pending in the High Court in relation to an appeal referred to in paragraph (a).

There is clearly no change in the significant hurdle to be overcome in securing a grant of Bail in these circumstances - unless it is established that special or exceptional circumstances exist justifying the grant of bail.

In our Supreme Court Bail's Practice we have seen applications for Supreme Court Bail in these circumstances reasonably often over the years. Unless your sentence will expire before the Appeal is heard (or a significant part of the sentence will be served), or unless there will be almost inevitable success in your CCA Appeal (and this is argued in the Bail Application), there is rarely good news for Applicants, and Legal Aid's merit test for Supreme Court Bails (essentially reasonable prospects of success) will invariably not be overcome.

Some useful cases on the operation of s. 30 AA (and thus the new s. 22) include;

- R v Wilson (1994) 34 NSWLR 1
- R v Velevski [2000] NSWCCA 445; 117 A Crim R 34
- R v Waters (1990) 9 PSR 4016
- And various unreported SC decisions in the SC Bails jurisdiction, including; R v Lawson (Sup Ct NSW Levine J, unreported 28 June 1995), R v Willard (Sup Ct NSW Grove J, unreported 2 February 2000), R v Campbell (Sup Ct NSW Sperling J, unreported 24 August 1998)

2. DISTRICT COURT APPEALS

The identical position for CCA Appeals in the new Bail Act can be contrasted with the new position that will exist for District Court Appeals.

BAIL ACT 1978

- Refer to s. 32 considerations.

There are NO separate considerations in the Bail Act 1978 governing Appeals to the District Court (although refer to s.8(2)(iii) and s. 9(2)(b) regarding presumptions, and then see s. 13).

Clearly a conviction and sentence in the Local Court adds some weight to some of the considerations within s. 32 of the Bail Act 1978, "criteria to be considered in bail applications", including;

- Strength of the evidence and severity of the penalty
- Perhaps probability of appearing in court when faced with a custodial sentence - that you have appealed
- Perhaps protection of victim and witnesses – now that a conviction has been secured
- And so on

Nevertheless, these Appeals are governed by the Bail Act 1978 generally, the presumptions that apply and the criteria to be considered in s. 32.

Whilst this has occasionally caused gnashing of teeth, and incredulity, from Judicial Officers, especially Magistrates, it has always been so.

This situation caused His Honour Sully J to have "affronted common sense" in the case of R v Moya Lapa (Sup Ct NSW Unreported, 19 November 1997). This is attached in full (Attachment 1) because it is a great read and because it identifies in His Honour's view (in 1997) "a serious defect in the Bail Act as it stands at the moment".

I understand the reasoning behind the comments of Sully J in Moya Lapa, but I have seen too many occasions such as the situation outlined in the case of R v Reece Darren Crowe (Sup Ct NSW Howie J, unreported 7 July 2008) (Attachment 2), to be so affronted.

BAIL ACT 2013

The situation in 2014 will be very different.

Within s. 17 **"Requirement to consider unacceptable risk" is s. 17 (3)(i);**

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

I query how a merit determination of reasonably arguable prospect of success on an appeal plays a significant part in determining unacceptable risk as outlined in s. 17(2), other than adding to the risk of failing to appear (although arguably, one might suggest a greater reason to appear to argue the appeal, rather than not appear and have the original sentence confirmed).

This new consideration adds some practical difficulties for those regularly appearing in Local Courts, particularly remote and/or smaller locations.

Part 8 – Enforcement of bail requirements

There appear to be more options for police officers to consider when they believe, 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.

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

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

After considering the matters in ss.3 (and other matters), a police officer will be able to; take no action, issue a warning, issue an **application notice** requiring a person to appear at court (? – for the purported breach?), issue a CAN (for an offence), arrest for the breach and put the person before a court, or apply for a warrant to arrest the person.

ss.2 allows the police, after an arrest without warrant for a failure or threatened failure to comply, to discontinue the arrest and release the person.

These options give the police a welcome variety of enforcement choices. Time will tell whether a hard-line approach to breaches of bail will continue.

Residential address

s. 33(2)(b) requires, as part of a bail acknowledgment, the accused person to notify the court before which the accused person is required to appear of any change in the person's residential address – whether or not it is a condition of bail.

Contravention of a bail acknowledgment can lead to bail being revoked.

This may cause some difficulty for generally disorganised accused persons who are residentially mobile, or homeless, or periodically homeless.

<u>You can be refused bail under the new Bail Act for an offence that is not punishable by a term of imprisonment.</u>

This scenario results from the ability to impose conditional bail on an offence for which there is a right to release, combined with the effect of s.21(4).

s.21 Special rule for offences for which there is a right to release
(1) The following decisions are the only bail decisions that can be made for an offence for which there is a right to release:
(a) a decision to release the person without bail,
(b) a decision to dispense with bail,
(c) a decision to grant bail to the person (with or without the imposition of bail conditions).

(2) There is a right to release for the following offences:
(a) a fine-only offence,
(b) an offence under the *Summary Offences Act 1988*, other than an excluded offence,

(c) an offence that is being dealt with by conference under Part 5 of the *Young Offenders Act 1997*.

(3) Each of the following offences under the *Summary Offences Act 1988* is an **excluded offence**:
(a) an offence under section 5 (obscene exposure) if the person has previously been convicted of an offence under that section,
(b) an offence under section 11A (violent disorder) if the person has previously been convicted of an offence under that section or of a personal violence offence,
(c) an offence under section 11B, 11C or 11E (offences relating to knives and offensive implements) if the person has previously been convicted of an offence under any of those sections or of a personal violence offence,
(d) an offence under section 11FA (custody or use of laser pointer in public place),
(e) an offence under section 11G (loitering by convicted child sexual offenders near premises frequented by children).

(4) An offence is not an offence for which there is a right to release if the accused person has previously failed to comply with a bail acknowledgment, or a bail condition, of a bail decision for the offence.

On the first determination bail cannot be refused; one of the decisions in ss.(1) must be made. However, conditional bail can be imposed. If conditional bail is imposed, eg for a fine only offence, and it is not complied with (or a bail acknowledgment is not complied with), ss.(4) takes that offence away from those offences where there is a right to release. If it is no longer an offence for which there is a right to release, one of the bail decisions that can be made is the refusal of bail.

Whilst in practice this may occur rarely, and the decision maker would also have to be of the opinion that there is an unacceptable risk that cannot be sufficiently mitigated by the imposition of bail conditions (s.20), it is curious that it is possible to be essentially imprisoned for an offence for which, even if you were guilty, you could only receive a fine.

Bail conditions can require "character acknowledgments"

s. 27 of the Bail Act 2013 states that bail conditions can require character acknowledgments, which are defined in ss. 2.

This is very similar to the current s. 36(2)(b);

s. 36(2)(b) that one or more than one acceptable person (other than the accused person) acknowledge that he or she is acquainted with the accused person and that he or she regards the accused person as a responsible person who is likely to comply with his or her bail undertaking

27 Bail conditions can require character acknowledgments
(1) Bail conditions can require one or more character acknowledgments to be provided.

(2) A **character acknowledgment** is an acknowledgment, given by an acceptable person, other than the accused person, to the effect that he or she is acquainted with the accused person and that he or she regards the accused person as a responsible person who is likely to comply with his or her bail acknowledgment.

(3) A decision as to which person or persons, or class or description of persons, is an acceptable person for a character acknowledgment is to be made by:
(a) the bail authority imposing the bail condition, or
(b) the officer or court to whom the bail acknowledgment is given (if no decision has been made under paragraph (a)).

(4) A bail authority is not to require a character acknowledgment unless 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.

(5) The regulations may make further provision for character acknowledgments and requirements to provide character acknowledgments.

What we have presently known as a condition of bail along the lines of – there is an acceptable person who can acknowledge....etc is now to be known as a "character acknowledgment".

Given ss.4 of the new Act above, the ability to impose conduct requirements (s. 25), and the usual "security requirements" for the accused and other persons (s. 26), one wonders when this character acknowledgment would be used. However, as with the current potential condition that "an acceptable person acknowledge.....", which is occasionally used, it is a potential bail condition which we should be aware of.

A few other points to consider

s.30 – Enforcement conditions – to monitor or enforce compliance with an underlying bail condition – ie. to comply with specified kinds of police directions. Note – these can only be imposed by a court (not via police bail), and only at the request of the prosecutor (not of the Judicial Officer's own volition). The Court must consider them reasonable and necessary in the circumstances, and should have regard to how compliance with a direction "may unreasonably affect persons other than the person granted bail" (s.30 (5)).

Police powers upon the arrest of a person under a warrant for sentencing.

S.43 (4) states that a police officer cannot bail someone in these circumstances – but, despite ss.(4), ss.(5) allows the police officer to grant bail in these circumstances "if...satisfied that exceptional circumstances justify the grant of bail".

Intoxicated persons in the cells

s. 56 gives the court discretion to defer making a bail decision if an accused person is an intoxicated person. The hearing of the matter can be adjourned, but not for more than 24 hours.

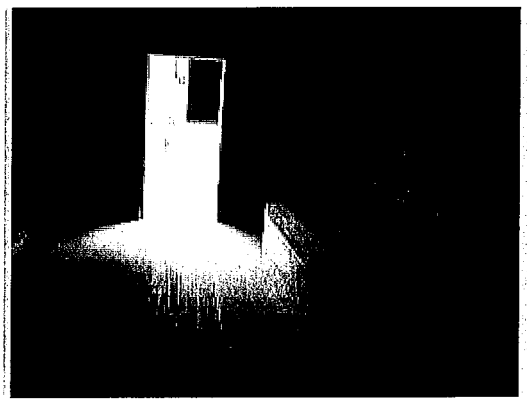
Bail under the Bail Act 1978 when the new Bail Act commences – refer to Schedule 3 – bail is taken to have been granted under the new Act and will continue in force, bail obligations continue, existing security agreements continue, pending bail applications are taken to be "release applications", and so on.

As stated by the AG in a media release – "The Bail Act will come into operation in a year's time, to allow time to train police and judicial officers who will be applying it".

Legal Aid NSW applied for funding for our own training purposes with regard to the commencement of the new Bail Act. I understand this has been successful and we can expect training and information on the topic to be forthcoming.

REVIEW OF ACT
101 Review of Act
(1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
(2) The review is to be undertaken as soon as possible after the period of 3 years from the repeal of the *Bail Act 1978*.
(3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 3 years.

Paul Johnson
Legal Aid NSW
July 2013



Attachment 1.

SCB245 SLB-J1

SUPREME COURT OF NEW SOUTH WALES

FILE COPY OF JUDGMENT

TO REMAIN ON COURT FILE

THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

SULLY J

WEDNESDAY 19 NOVEMBER 1997

073187/97 - REGINA v MOYA LAPA

JUDGMENT - On application for bail

HIS HONOUR: This is an application for bail by Miss Moya Lapa, whose relevant history is as follows;

Miss Lapa was arrested on 27 April 1997 and charged with stealing property from a dwelling house. She was bailed to appear on 18 September 1997. She did not in fact appear on that occasion. She was dealt with accordingly, and pursuant to s 80AA of the **Justices Act**, and a conviction was recorded against her in her absence.

On 30 May 1997, that is to say while at liberty on the bail that had been granted to her on 27 April, Miss Lapa was again arrested and charged with breaking and entering a building with intent to commit a felony in it. Yet again she was bailed, and, yet again, to the 18th September 1997. Once again she did not appear at Court as she was required to do; and once again she was dealt with in her absence and pursuant to s 80AA of the **Justices Act**.

On 17 September 1997, that is to say one bare day before she was due to appear in Court upon two distinct grants of bail, she was arrested in relation to her participation in the supply of a prohibited drug, and was bailed to attend Court on 28 October 1997. In the events

that happened she was never put to the test of answering to that bail, for the reason that on 24 October 1997 she was arrested in execution of the two outstanding s 80AA warrants earlier mentioned. She has remained in custody since that time.

On 28 October 1997, Miss Lapa duly appeared in the relevant Local Court. She pleaded guilty to the charge of having taken part in the supply of a prohibited drug; and she was dealt with on that account, and as well in respect of the two s 80AA convictions. In respect of each matter, she was sentenced to a term of imprisonment of nine months to date from 24 October 1997, with an additional term of three months, each of the three sentences to be served concurrently.

The applicant lodged an appeal to the District Court. It is an appeal against severity only. It is to be dealt with at the Campbelltown District Court on 16 December 1997. The material before the Court suggests that bail has been refused, although, as is usual in my experience of matters of the present kind, the evidence is anything but clear as to what exactly happened in the immediate aftermath of the lodging of the notice of appeal to the District Court.

The law applicable to such a case as the one I have briefly outlined, is in my view not without real practical difficulties. The **Justices Act** itself makes provision in Pt 5, Div 4, respecting appeals to the District Court. A particular notice of appeal is required to be given within a particular time. Thereupon, and in accordance with s

122(5), notice is to be given to the relevant magistrate, and there is to be determined by that magistrate, an amount which the appellant is to deposit in respect of the costs of the appeal; and the amount of a surety which he or she is to lodge as an earnest of the due and diligent prosecution of the appeal.

Section 123 of the **Justices Act**, proceeds from that point to a consideration of conditions upon which the execution of a conviction may be stayed. s 123 is a fairly long and convoluted section, and it is not expedient to take the time now to set it out in its fine detail. It is sufficient to understand that it contemplates a number of alternative procedures by the use of any one of which a person in the position of the present applicant for bail can be released by a magistrate, the convictions against which she has appealed, or the sentences against which she has appealed, having been stayed.

One of those alternative methods is that provided by s 123(3): that is to say, that the intending appellant may make an application for bail pursuant to the **Bail Act.** In such a case bail may not be granted, - or, at least, the applicant for bail may not be released on bail, - unless the bail undertaking embodies certain prescribed conditions. As I have earlier remarked: in my own experience at any event, every case of the present kind that comes to this Court is lacking in any precise evidence as to whether or not the relevant magistrate has been asked to fix a recognizance for the prosecution of the appeal, or otherwise to consider the

matters to which s 122(5) refers.

On the assumption that the applicant is entitled to come to this Court seeking a grant of bail, it becomes a question of how to define the criteria by reference to which that application for bail is to be determined. I, myself, considered that matter in the case of **Geoffrey Tyler**, 80 ACrimR 371. I there expressed the view that before this Court grants bail in anticipation of a District Court severity appeal, the Court should be satisfied at least of either of the following things:

(a) That if bail is not granted, there is a real likelihood, given the listing situation, that the applicant will be required to serve the whole, or all but the whole, of the sentence of imprisonment, before its merits can be tested in the District Court.

(b) There is an overwhelming likelihood that the pending appeal to the District Court will succeed.

Tyler was decided in May 1995. In August 1995, Allen J of this Court came to consider the same question in the matter of **Geoffrey Donald Denman**. His Honour expressed the view that in the case of an application for bail by an intending appellant against severity to the District Court, s 32 of the **Bail Act**, provided the only criteria by reference to which the bail application fell to be considered. His Honour referred to my earlier judgment in **Taylor**, and made these observations,

> "I do not share his Honour's doubts as to the construction of the Act. Such doubts to my mind

arise because of affronted commonsense. That is not a criterion for declining to give effect to the clear commands of the statute".

The circumstances of the present case do not cause me to have any less "affronted commonsense" than I was seen by Allen J as having had in the case of **Tyler**. I adhere to the view that I expressed in **Tyler** to the effect that if something is not done to bring a little more discipline and order into the law relating to cases such as the present one, then whatever might be the elegant theory to the contrary, the practical effect in the hard cold world is going to be that a large number of people regularly sentenced in the Local Court to comparatively short sentences of imprisonment, will file appeals against severity to the District Court; and then, as it were, seek to put off the evil day by making an application for bail to this Court, it being a premise of that application for bail that the Court is constrained, as in a straight jacket, by the requirements of s 32 of the **Bail Act**; and is prevented thereby from giving any, let alone any sensible, weight to the plain law that a sentence regularly imposed in the Local Court is not simply a provisional and formal procedure which nobody ought to take seriously unless and until it has been dealt with on appeal to the District Court.

It is in my respectful view a serious defect in the **Bail Act** as it stands at the moment, that appeals from a decision of the Local Court to the District Court are not subjected to some such proper filtering as is provided by s

30AA of the **Bail Act** in respect of appeals against conviction and/or sentence from the District Court to the Court of Criminal Appeal. The provisions of s 30AA, requiring as they do "special and exceptional circumstances" before appeal bail will be granted in respect of an outstanding appeal to the Court of Criminal Appeal, have served in my respectful view as a just, practical, sensible and useful filter for ensuring that speculative applications for bail, premised upon speculative appeals to the Court of Criminal Appeal, do not succeed. In my respectful view it is time that the Legislature was invited to consider extending some such provision as that made in s 30AA to the, as yet uncovered, situation of appeals from decisions of Local Court magistrates to the District Court.

I turn then to consider the particular present application upon the basis of the provisions of s 32 of the **Bail Act**. I wish to make it perfectly clear that if I felt that I were legally entitled to travel beyond a s 32 of the **Bail Act**, and in particular if I felt that I were lawfully entitled to take into account the likelihood of the prospects of success in the present appeal, and those other matters of which I spoke in **Tyler**, I would unhesitatingly have refused the present application. It is because I am not prepared to say dogmatically that I think Allen J was wrong in his perception of the Act, that I propose to take the alternative course, but only as a matter of comity, of adopting the view of his Honour, and of applying s 32 and no other provision of the **Bail Act**, and no other consideration

outside the **Bail Act**, to the present application.

Section 32, subs (1) of the **Bail Act** provides, as is of course well known, four particular criteria according to which bail is to be granted or refused. Each of those criteria is hedged about with statutory qualifications of one kind or another. With regard to the criterion established by s 32(1)(c) of the Act, it has been thought expedient by the Legislature, to enact no fewer than two separate additional subsections, that is to say subs (2) and(2A), fettering the discretion initially conferred by s 32(1)(c)(iv). So far as concerns the criterion established by s 32(1)(a), there is an abundance of evidence in the present case to suggest a possibility that the applicant if granted bail will not answer to it. But that is not what the Act requires. If effect is to be given to the literal words of the Act, what has to be established is "a probability", that she will not appear. A possibility is not enough. A risk greater than a possibility but less than a probability, is not enough. I have some doubts about the applicant in relation to this question of appearing on 16 December, but I am not prepared to say on the basis of the evidence, such as it is, before me on this application, that there is a "probability" that if granted bail she will not appear on the 16 December.

I do not see the criteria established by s 32(1)(b) and (b1) of the Act as having any practical application to the given facts of the present case.

The criterion established by s 32(1)(c) of the Act

certainly has application to the circumstances of the present case. Once again, it is necessary to pick one's way through the thicket of particular statutory provisions that surround that criterion. Those provisions that appear in paragraphs (iii) and, to a lesser extent as I think in (i), do not seem to me to be particularly relevant for present purposes. There is an abundance of evidence to establish that the applicant falls squarely within the contemplation of the provisions made in para (c)(ii). As to the provisions established by para.(c)(iv), as read in the light of the further provisions in subs (2) and (2A), I return to the problem of which I spoke earlier, of the requirement that there be a "likelihood" that she will commit further serious offences of such a kind as to outweigh her entitlement otherwise to be at liberty on bail. It seems to me that anybody who has a level headed regard to the history of this matter as I have earlier set it out, could not gainsay that there is at least a risk of further offences; but, once again, if one is to ask literally whether the evidence establishes affirmatively a "likelihood", I would have to say that I am not persuaded on the evidence, such as it is, that that affirmative proposition has been established.

It will be apparent from what I have said, that I have come to the conclusion that bail on some appropriate conditions ought to be granted in the present case. I will not disguise, or attempt to disguise, the reluctance with which I come to that conclusion. It seems to me to be fundamentally wrong, that a person who has been apparently

regularly dealt with by a Local Court magistrate, - a fortiori in such a case as the present one, where there has been a distinct plea of guilty as to one matter, and a failure to appear at all in relation to two other matters, - that the Court is closed off by the law as it stands from giving a proper practical weight to the fact of the plea of guilty; to the facts of the convictions; to the apparent regularity of the sentence imposed in the Local Court; and to the total absence of any evidence, or indeed any attempt to put any evidence, before the Court, that the prospects of success in the District Court are of such a kind that, to quote from s 30AA in its admittedly different context, the case is one where there might reasonably be supposed to be "special and exceptional circumstances", warranting the grant of bail pending appeal.

I will ensure that this judgment is taken out as soon as the Court Reporting Branch can arrange for that to be done. I indicate that it is my proposal to refer it to the Chief Justice's relevant law reform liaison, to the end, that something will be done by Parliament about this situation. I express again my own conviction that if something is not done, and done promptly about it, then what is to be expected is a serious unravelling of the regular conduct of affairs in Local Courts in this State.

HIS HONOUR: Where is the nearest police station?

JONES: Campbelltown, your Honour.

HIS HONOUR: Who is going to make the cash deposit?

JONES: Maurice Candelori.

HIS HONOUR: Did you say Maurice?

JONES: Maurice yes.

HIS HONOUR: Spell it again please. Cand--

JONES: --elori.

HIS HONOUR: From.

JONES: 4 Kiev Street, Merrylands.

HIS HONOUR: You have spoken to him Miss Jones?

JONES: I have.

HIS HONOUR: And he has no relevant criminal antecedents.

JONES: He advised me that he had a conviction for goods in custody about ten years ago, and advised me that that is the only matter on his record.

HIS HONOUR: Thank you. Does your client have a passport?

JONES: No.

HIS HONOUR: Bail will be granted in respect of all matters that are the subject of the applicant's pending severity appeal to the District Court. Bail will be granted upon the following conditions to be incorporated into the printed form in normal use in this court.

1A. That the applicant appear at the Campbelltown District Court on 16 December 1997.

1B. That she report to the officer-in-charge of the Police Station at Campbelltown, twice daily, once between the hours of 8am and 12 noon, and once between the hours of 4pm and 6pm, the first such reporting to occur on the day on which she is released to the bail now granted.

1C. That she reside at 15 Norris Place, Narellan Vale with her sister, Mrs Rosa Lambton.

1D. That one acceptable person enter into an agreement to forfeit the sum of $1000 if she fails to comply with her bail undertaking. Such agreement is to be secured by cash deposit. Mr Maurice Candelori, of 4 Kiev Street, Merrylands is such an acceptable person.

1E. The printed conditions as to remaining away from points of arrival or departure.

1F. Not applying for a new passport or travel documents.

1G. That the applicant give in such form as may be required by the Justice before whom bail is entered, the undertakings required by s 123(3) of the **Justices Act** 1902 (NSW).

1H. The printed condition as to being of good behaviour and the printed conditions 2 and 3 will apply.

HIS HONOUR: Mr Crown, do you wish to be heard?

LAFFAN: Your Honour, section 1, 2, 3, that entails that the applicant abide by the judgment of the District Court and pay such court costs as may be awarded by the District Court.

HIS HONOUR: She has to appear at the District Court and prosecute the appeal, to notify the Registrar for the proclaimed place at which the appeal is to be heard of any change in the appellant's address, to abide the judgment of the District Court on the appeal, and to pay such costs as may be awarded by the District Court.

LAFFAN: Thank you your Honour.

HIS HONOUR: Do you wish to be heard Ms Jones?

JONES: No your Honour.

HIS HONOUR: You will be admitted to bail accordingly. Before you go I would like to say two things to you. First you will be given in due course a document that sets out the

conditions of bail as you have heard me announce, you should take the time and the trouble to read it carefully so that you know what the conditions of your bail are. If you breach any of them at any time in any way, you will be liable to be re-arrested and brought back into your present custody, do you understand that?

APPLICANT: I understand.

HIS HONOUR: You will see that one of the conditions of your bail, is that while at liberty on bail you are to be of good behaviour. That means that you are not to break the law in any way, great or small. If you do that will be a breach of your bail and once again you will be liable to be re-arrested and brought back into your present custody. Do you understand that?

APPLICANT: I understand.

HIS HONOUR: You will be admitted to bail accordingly. Go with the officer please.

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Attachment 2.

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THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

HOWIE J

MONDAY 7 JULY 2008

883700*/08 Regina v Reece Darren CROWE

JUDGMENT - Application for bail

VIDEO LINK TO JUNE CORRECTIONAL CENTRE

HIS HONOUR: This is a matter where the applicant is to appear in the Griffith District Court on 21 July 2008 in respect of appeals against the severity of sentences imposed upon him in the Leeton Local Court. The applicant was sentenced on two matters of affray, both of them on their face serious, one particularly serious although I note his father was involved.

The applicant is 18 years of age. He has almost no criminal record, apart from a driving matter for which he was fined. The Magistrate concerned decided that sentences of one month for one of the offences and three months for the other were appropriate. It is a matter for the magistrate although, with great respect to him or her, I am not so sure I could be so positive that short sentences like that were more appropriate for an 18-year-old young man than some other alternative, particularly where that person had not been to jail and had no offence of any significance on his record.

More alarming, however, to me, is that having imposed sentences totalling a period of three months the Magistrate refused bail when the applicant appealed against the severity of the sentences. With respect that is not a decision that I can understand. The Magistrate must have known that by taking that course a young man of 18 years was going to end up in custody for

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some period and that, to me, is a course that I find difficult to justify.

I understand the offences were bad. I understand there was probably a community attitude in respect of them. However I simply do not understand how the Magistrate could refuse bail on an appeal when the applicant was on bail before he was sentenced and there was no suggestion that he breached those bail conditions.

The result is that the applicant has actually served one of the sentences, which was bound to happen, by the Magistrate refusing bail.

In those circumstances bail should have been granted in the Local Court and should be now granted to him.

Bail is granted subject to the following conditions: that the applicant enters into an agreement to observe the following requirements whilst at liberty on bail. He is to appear at the Griffith District Court on 21 July next. He is to reside at 48 Wirilda Street, Leeton and nowhere else. He is to report to the officer in charge of the police station at Leeton once every Monday, Wednesday and Friday between the hours of 6 a.m. and 6 p.m. He is to enter into an agreement without security to forfeit the sum of $1,000 if he fails to comply with his bail undertaking.

The applicant is to prosecute his appeal with due diligence. He is to be of good behaviour in all respects throughout the period of his liberty on bail. He is not to leave the town of Leeton during the course of his bail. He is to report to the Probation and Parole Service within 24 hours of his release from custody in order for an up-date of his pre-sentence report can be prepared if necessary.

Bail is automatically to be revoked in the event of any breach of one

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these conditions and the applicant may thereupon be arrested by any police officer. Bail may be entered into before any person authorised under the Bail Act 1978.

There is one further condition, the applicant is not to enter any licensed premises. He is not to leave Leeton except to attend the District Court in Griffith.

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