Using the Bail Act 2013

As Amended by the Bail Amendment Act 2014

1. OVERVIEW

The purpose of this paper is to compile a range of relevant information relating to the practical use of the Bail Act 2013 (NSW) (the Act). This paper is written to include amendments contained in the Bail Amendment Act 2014 (the Amending Act) commencing 28 January 2015. It is important to note that the Amending Act changes key sections and section numbers of the old Act.

This paper draws on a number of larger sources that busy practitioners may not have time to investigate individually. The paper offers a summary of the current bail legislation and accompanying regulations with reference to documents relevant to its interpretation, summaries of some relevant authorities, and some ideas in relation possible legal issues which may arise when the Act is applied in practice. It does not purport to be a comprehensive summary of the entire Act.

2. SUMMARY OF AMENDMENTS UNDER THE *BAIL AMENDMENT ACT 2014*

The Amending Act commenced on 28 January 2015 and entails further fundamental changes to the system of bail in NSW. Below is a summary of some key changes.

The Act now contains two new concepts in addition to that of unacceptable risk. The concepts of *bail concern* and *show cause* are introduced.

The Act remains accompanied by a set of regulations – *Bail Regulation 2014* (the Regulations).

Under the Act, a *bail authority* is still a police officer, an authorised justice or a court.

An *authorised justice* is:

(a) a registrar of the Local Court or the Children's Court, or

(b) an officer of the Department of Attorney General and Justice who is declared, by order of the Minister, whether by reference to his or her name or office, to be an authorised justice for the purposes of this Act, or

(c) a person, or member of a class of persons, declared by the regulations to be an authorised justice for the purposes of this Act.

UNACCEPTABLE RISK

Under Division 2 of the Act, in relation to all offences, a bail authority is still required to consider whether there is an unacceptable risk that the accused person 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.

However, the way in which this is considered has changed. Formerly a bail authority was required to consider the question of whether there is any unacceptable risk, and then subsequently consider whether or not conditions could mitigate this risk. If conditions could not mitigate the risk, bail was to be refused. If conditions could mitigate the risk, bail could

be granted with conditions. If there were no unacceptable risks, bail conditions could not be imposed.

Under the Act as amended, a bail authority is now required to consider first, the concept of *bail concerns*, and whether conditions could mitigate such concerns, *before* coming to a conclusion about whether there is an unacceptable risk.

BAIL CONCERNS

Section 17 outlines that a bail authority must as the first step, in a bail determination, consider whether there are any bail concerns. 'Bail concerns', are concerns that the accused person 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.

(You will note that these are the same concerns as those set out under the unacceptable risk provision in section 19).

In considering the issue of bail concerns under section 17, the authority is to consider the following matters and only the following matters under section 18:

(a) the accused person's background, including criminal history, circumstances and community ties,
(b) the nature and seriousness of the offence,
(c) the strength of the prosecution case,
(d) whether the accused person has a history of violence,
(e) whether the accused person has previously committed a serious offence while on bail,
(f) whether the accused person has a history of compliance or non-compliance with bail acknowledgments, bail conditions, apprehended violence orders, parole orders or good behaviour bonds,
(g) whether the accused person has any criminal associations,
(h) the length of time the accused person is likely to spend in custody if bail is refused,
(i) the likelihood of a custodial sentence being imposed if the accused person is convicted of the offence,
(j) if the accused person has been convicted of the offence and proceedings on an appeal against conviction or sentence are pending before a court, whether the appeal has a reasonably arguable prospect of success,
(k) any special vulnerability or needs the accused person has including because of youth, being an Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment,
(l) the need for the accused person to be free to prepare for his or her appearance in court or to obtain legal advice,
(m) the need for the accused person to be free for any other lawful reason,
(n) the conduct of the accused person towards any victim of the offence, or any family member of a victim, after the offence,
(o) in the case of a serious offence, the views of any victim of the offence or any family member of a victim (if available to the bail authority), to the extent relevant to a concern that the accused person could, if released from custody, endanger the safety of victims, individuals or the community,
(p) the bail conditions that could reasonably be imposed to address any bail concerns in accordance with section 20A.

(2) The following matters (to the extent relevant) are to be considered in deciding whether an offence is a serious offence under this Division (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.

Notably, section 18(1)(p) requires the authority to consider whether there are any bail conditions that could reasonably be imposed to address any bail concerns in accordance with section 20A.

Section 20A sets out that bail conditions can be imposed only if a bail authority is satisfied that:

(a) the bail condition is reasonably necessary to address a bail concern, and
(b) the bail condition is reasonable and proportionate to the offence for which bail is granted, and
the bail condition is appropriate to the bail concern in relation to which it is imposed, and
(d) the bail condition is no more onerous than necessary to address the bail concern in relation to which it is imposed, and
it is reasonably practicable for the accused person to comply with the bail condition, and
(f) there are reasonable grounds to believe that the condition is likely to be complied with by the accused person.

Under section 19, there is an unacceptable risk mandating the refusal of bail if:

1. The authority has considered the issue of bail concerns under section 17 (in conjunction with the matters in section 18) and;
2. Determined that under section 18(1)(p) there are no bail conditions that could reasonably be imposed (in accordance with section 20A) to address any of the bail concerns.

Under section 20, there is not an unacceptable risk and an accused person must to be released if:

1. The authority has considered the issue of bail concerns under section 17 (in conjunction with the matters in section 18) and;
2. There are no bail concerns or;
3. There are bail concerns, but under section 18(1)(p) there are bail conditions that could reasonably be imposed (in accordance with section 20A) to address these bail concerns.

If there is no unacceptable risk, an accused person can be released under section 20 with or without bail conditions, without bail, or by the authority dispensing with bail.

Therefore, as of 28 January 2015, a court must first consider the issue of bail concerns, potential bail conditions, and *then* decide whether there is an unacceptable risk. An unacceptable risk will mean bail is refused. No unacceptable risk will mean bail is granted with or without conditions depending on the bail concerns present in each case.

An important change here is that there no longer needs to be an unacceptable risk for bail conditions to be imposed, there merely needs to be a *bail concern*.

SHOW CAUSE OFFENCES

For certain serious offences, section 16A now introduces a requirement for an accused person over 18 years, to *show cause* why his or her detention is not justified. If an accused fails to

show cause, bail must be refused – section 16A(1). See page 18 for a description of the concept of show cause.

If an accused person shows cause, the bail authority must then move on to consider the issue of unacceptable risk (as it would in relation to all other offences) – section 16A(2). Therefore, for such certain serious offences, a bail authority must:

1. Determine whether an accused person has shown cause why his or her detention is not justified;
2. If satisfied the accused has shown cause, consider the issue of whether there are bail concerns;
3. Determine whether or not there is an unacceptable risk taking into account any bail concerns and potential bail conditions.

If an accused person cannot show cause, their application for bail will fail at that point even if there are no unacceptable risks – section 16A(1).

If an accused person can show cause, if there is an unacceptable risk after considering bail concerns, their application will fail at this latter point – sections 16A(2) and 19.

The offences to which show cause applies are numerous. A table of these offences and the categories of offender to which show cause applies, is included in this paper at page 42.

MULTIPLE RELEASE OR DETENTION APPLICATIONS

There now needs to be *material information* that was not presented to the court in a previous application, for there to be a further release or detention application under section 74(3)(b). Formerly this requirement was only for *information*.

Under Schedule 3 of the Act, the amendments commencing on 28 January 2015 do not constitute a change in circumstances for the purposes of section 74(3)(c) or 74(4)(b).

OFFENCES WHERE THERE IS A RIGHT TO RELEASE

The requirement for a bail authority to consider unacceptable risk, even in relation to offences where there is a right to release, has been specifically inserted into the Act with section 21(5). Note that under section 19(4) bail cannot be refused for an offence where there is a right to release (even if an authority were to believe there was an unacceptable risk having regard to bail concerns). This seems to indicate that the provision is there to make clear that a bail authority can consider whether bail conditions are required to address bail concerns, even for offences where there is a right to release, and where there is no unacceptable risk.

THE PRESUMPTION OF INNOCENCE AND THE GENERAL RIGHT TO BE AT LIBERTY

Formerly, under section 3 of the *Bail Act 2013,* 'Purpose of the Act', a bail authority was obliged to have regard to the common law presumption of innocence and the general right to be at liberty, when making any decision about bail under the Act.

Unfortunately the Amending Act has removed this section completely. What is now contained in the act is a Preamble which states that the Parliament of New South Wales, in enacting the Act, has had regard to the following matters:

a) the need to ensure the safety of victims of crime, individuals and the community,
b) the need to ensure the integrity of the justice system,
c) the common law presumption of innocence and the general right to be at liberty.

Given the wealth of common law authority on the presumption of innocence and the general right to be at liberty (see page 26 of this paper), it is doubtful that the Parliament intended to abrogate or curtail such a fundamental right. The Act as amended does not specifically prohibit authorities from having regard to these common law principles. Accordingly, it is suggested that a bail authority ought to ascribe weight to these principles in making any decision under the Act. The removal from the legislation of the requirement for bail authorities to consider these principles however, may in practice place more of an onus on defence advocates to remind bail authorities of them.

3. APPLICATIONS UNDER THE *BAIL ACT 2013*

THREE TYPES OF BAIL APPLICATION:

Section 48 sets out three different types of application, all termed '*bail application*':
a) A release application – which can be made by an accused person (section 49);
b) A detention application – which can be made by a prosecutor (section 50);
c) A variation application – which can be made by any interested person (section 51).

DEFENCE APPLICATION FOR RELEASE

This is simply an application for bail, to which the court or authorised justice can refuse, grant, or dispense with bail under section 49. Regulation 16 sets out this can be made orally or in writing. Applications in writing can be signed by the accused, their lawyer, their de facto, their parent or guardian. Despite there being nothing in the Act or Regulations that stipulates a requirement for the defence to give notice, in practice courts may consider it part of due process, to put a police prosecutor or the Director of Public Prosecutions (DPP) on notice of any intended bail application where possible. In addition, courts may require you to request that the matter is listed for bail formally so that court time can be allocated to it.

PROSECUTION APPLICATION FOR DETENTION

This application can be made by the prosecutor. Under section 50, in response to a prosecutor's application for detention, a court or authorised justice can refuse bail, grant or dispense with bail as in section 49. The added requirement on the prosecutor is to give reasonable notice of the application to the accused person. The application must not be heard unless this is complied with.

An application for detention appears to be differentiated from the practice of 'opposing bail', as prosecutors would have done under the *Bail Act 1978*. Regulation 16 relating to *release* applications by accused persons, sets out that a prosecutor is not required to give notice to the

accused person that they will be opposing their release application (so the practice of opposing bail will continue to exist). However, in contrast, Regulation 17 requires that a prosecutor make a detention application in writing in the approved form. This makes it clear that an application for detention is a discrete application, separate from the practice of the prosecutor opposing bail.

Regulation 18 sets out that notice of the time and place of a detention application must be given by a court or authorised justice to an accused person, if not already satisfied this has been done by police. However, if satisfied that notice has been given, and the accused fails to appear, a decision on the detention application can be made by the court or authorised justice.

VARIATION APPLICATION

The *Bail Act 2013* provides powers for complainants to influence bail determinations. An '*interested person*' can apply to vary an accused person's bail. An interested person includes under section 51:

(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.

Importantly, section 51 sets out that a court *must not* revoke bail on a variation application unless revocation is requested by the prosecutor in the proceedings.

This papers details different types of bail variations at page 30.

MAKING MULTIPLE APPLICATIONS FOR BAIL

Section 74 replaces the former section 22A of the *Bail Act 1978*, and essentially mirrors its terms but importantly adds a provision allowing children to make a second application if their previous application was made on the first court date (even if the second application contains no new information etc.). The section also applies to both a prosecutor making a detention application, as well as an accused person making a release application.

A further release application can be made only if there are grounds for a further application. In the Act these include:

(a) the person was not legally represented when the previous application was dealt with and the person now has legal representation, or
(b) Material information relevant to the grant of bail is to be presented in the application that was not presented to the court in the previous application, or
(c) circumstances relevant to the grant of bail have changed since the previous application was made, or
(d) the person is a child and the previous application was made on a first appearance for the offence.

The *Bail Amendment Act 2014* changed the terminology and threshold regarding new information from the former “information relevant”, to “material information relevant”.

COURT CAN REFUSE TO HEAR BAIL APPLICATIONS

Under section 73 of the Act, a court may refuse to hear a bail application other than a release or variation application by an accused person on the first court appearance, if satisfied that the application is frivolous or vexatious, or the application is without substance or otherwise has no reasonable prospect of success.

4. RULES FOR BAIL IN RELATION TO CERTAIN OFFENCES

RIGHT TO RELEASE FOR CERTAIN OFFENCES

Section 21 of the Act sets out that there is a right to release for:

(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*.

There is an exception to the 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.

The following offences under the *Summary Offences Act 1988* are also excluded:

(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).

A bail authority is required to consider the issue of unacceptable risk (and thus the issue of bail concerns), for offences where there is a right to release - section 21(5). Under section 19(4) bail cannot be refused for such an offence, even if an authority determined there was an unacceptable risk. This seems to indicate that section 21(5) is present to make clear that a bail authority can consider whether bail conditions are required to address bail concerns, even for offences where there is a right to release, and where there is no unacceptable risk.

SHOW CAUSE OFFENCES

For certain serious offences, section 16A requires that an accused person over 18 years, *show cause* as to why his or her detention is not justified. If an accused person fails to show cause, bail must be refused – section 16A(1).

If an accused person shows cause, the bail authority must then move on to consider the issue of unacceptable risk (as it would in relation to all other offences). If a bail authority determines there is an unacceptable risk, bail must be refused at this point – sections 16A(2) and 19.

Therefore, for such certain serious offences, a bail authority must:

1. Determine whether an accused person has shown cause why his or her detention is not justified;
2. If satisfied the accused has shown cause, the authority must then consider the issue of whether or not there is an unacceptable risk taking into account any bail concerns and potential bail conditions.

The offences to which show cause applies are numerous. A table of these offences and the categories of offender to which show cause applies, is included in this paper at page 42.

In relation to the concept of show cause see page 18 of this paper.

BAIL FOR SERIOUS OFFENCES

Section 40 sets out that in relation to a serious offence, where an accused is granted bail or bail is dispensed with, the prosecution can apply to have that decision stayed, preventing the accused from being released on bail.

Serious offences are murder, any offence carrying life imprisonment, or any offence under or mentioned in Part 3 of the *Crimes Act 1990* involving sexual intercourse or attempted sexual intercourse with a person under 16 years old.

Under section 40(1) the decision will be stayed if the police officer or Australian Legal Practitioner appearing on behalf of the Crown:

(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.

Under section 40(5) an authorised officer is 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.

The stay of the decision granting or dispensing with bail 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.

5. HOW THE QUESTION OF BAIL IS TO BE CONSIDERED

DECISIONS AVAILABLE TO A BAIL AUTHORITY

Section 8 sets out four decisions that can be made under the *Bail Act 2013*:

a) A decision to release without bail,
b) A decision to dispense with bail,

c) A decision to grant bail for the offence (with or without bail conditions),
d) A decision to refuse bail.

BAIL CONCERNS

Section 17 outlines that before a bail authority makes any bail decision, it must assess any *bail concerns*.

Bail concerns are a concern that the accused person 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.

(You will note that these are the same concerns as those set out under the unacceptable risk provision in section 19).

In considering the issue of bail concerns under section 17, the authority is to consider the following matters and only the following matters under section 18(1):
(a) the accused person's background, including criminal history, circumstances and community ties,
(b) the nature and seriousness of the offence,
(c) the strength of the prosecution case,
(d) whether the accused person has a history of violence,
(e) whether the accused person has previously committed a serious offence while on bail,
(f) whether the accused person has a history of compliance or non-compliance with bail acknowledgments, bail conditions, apprehended violence orders, parole orders or good behaviour bonds,
(g) whether the accused person has any criminal associations,
(h) the length of time the accused person is likely to spend in custody if bail is refused,
(i) the likelihood of a custodial sentence being imposed if the accused person is convicted of the offence,
(j) if the accused person has been convicted of the offence and proceedings on an appeal against conviction or sentence are pending before a court, whether the appeal has a reasonably arguable prospect of success,
(k) any special vulnerability or needs the accused person has including because of youth, being an Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment,
(l) the need for the accused person to be free to prepare for his or her appearance in court or to obtain legal advice,
(m) the need for the accused person to be free for any other lawful reason,
(n) the conduct of the accused person towards any victim of the offence, or any family member of a victim, after the offence,
(o) in the case of a serious offence, the views of any victim of the offence or any family member of a victim (if available to the bail authority), to the extent relevant to a concern that the accused person could, if released from custody, endanger the safety of victims, individuals or the community,
(p) the bail conditions that could reasonably be imposed to address any bail concerns in accordance with section 20A.
(2) The following matters (to the extent relevant) are to be considered in deciding whether an offence is a serious offence under this Division (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.

Notably, section 18(1)(p) requires the authority to consider whether there are any bail conditions that could reasonably be imposed to address any bail concerns in accordance with section 20A.

Section 20A sets out that bail conditions can be imposed only if a bail authority is satisfied that:

(a) the bail condition is reasonably necessary to address a bail concern, and
(b) the bail condition is reasonable and proportionate to the offence for which bail is granted, and
the bail condition is appropriate to the bail concern in relation to which it is imposed, and
(d) the bail condition is no more onerous than necessary to address the bail concern in relation to which it is imposed, and
it is reasonably practicable for the accused person to comply with the bail condition, and
(f) there are reasonable grounds to believe that the condition is likely to be complied with by the accused person.

UNACCEPTABLE RISK

Under sections 19 and 20 of the Act, in relation to all offences (even those with a right to release), a bail authority is required to consider whether there is an unacceptable risk that the accused person will:

(a) fail to appear at any proceedings for the offence, or
(b) commit a serious offence, or
(c) endanger the safety of victims, individuals or the community, or
(d) interfere with witnesses or evidence.

Section 19 sets out that where there is an unacceptable risk, a bail authority must refuse bail.

Section 20 sets out that where there are no unacceptable risks a bail authority can:

(a) grant bail (with or without the imposition of bail conditions), or
(b) release the person without bail, or
(c) dispense with bail.

SUMMARY OF BAIL PROCESS FOR ALL OFFENCES

1. A bail authority must consider the issue of bail concerns under section 17 (in conjunction with the matters in section 18) – section 17;
2. A bail authority must consider any bail conditions that could reasonably be imposed (in accordance with section 20A) to address any of the bail concerns – section 18(1)(p);
3. A bail authority must determine whether there is an unacceptable risk;
4. If there is an unacceptable risk bail must be refused – section 19;
5. If there is not an unacceptable risk the accused must be released with or without bail conditions, or by dispensing with bail.

Note further steps apply for show cause offences.

SUMMARY OF BAIL PROCESS FOR SHOWCAUSE OFFENCES

1. A bail authority must determine whether an accused person can show cause why his or her detention is not justified – section 16A(1);
2. Only if satisfied that an accused can show cause, does a bail authority move on to consider unacceptable risk – section 16A(2);

3. If satisfied, a bail authority must consider the issue of bail concerns under section 17 (in conjunction with the matters in section 18) – section 17;
4. A bail authority must consider any bail conditions that could reasonably be imposed (in accordance with section 20A) to address any of the bail concerns – section 18(1)(p);
5. A bail authority must determine whether there is an unacceptable risk – section 16A(2), 19;
6. If there is an unacceptable risk bail must be refused – section 19;
7. If there is not an unacceptable risk the accused must be released with or without bail conditions, or by dispensing with bail – section 20.

Section 16 sets out a flow chart for how bail decisions are to be made (other than an offence for which there is a right to release). I note that this flow chart directs a bail authority to consider whether the accused presents an unacceptable risk, before asking the bail authority to consider whether there are any conditions that must be imposed to address bail concerns. I find this unhelpful as the issue of identifying bail concerns under section 17 and possible bail conditions under section 18(1)(p), is required to be undertaken in the assessment of unacceptable risk. Under section 20A bail conditions are only permitted to be imposed if they relate to a specific identified bail concern, so it seems unnecessary to ask a bail authority to consider the issue of conditions *again* after determining bail concerns. The bail authority is not after all, permitted to simply add further conditions at that later step in the process, on top of the previously identified concerns.

Unacceptable Risk Flow Chart, section 16:

In the flow chart:

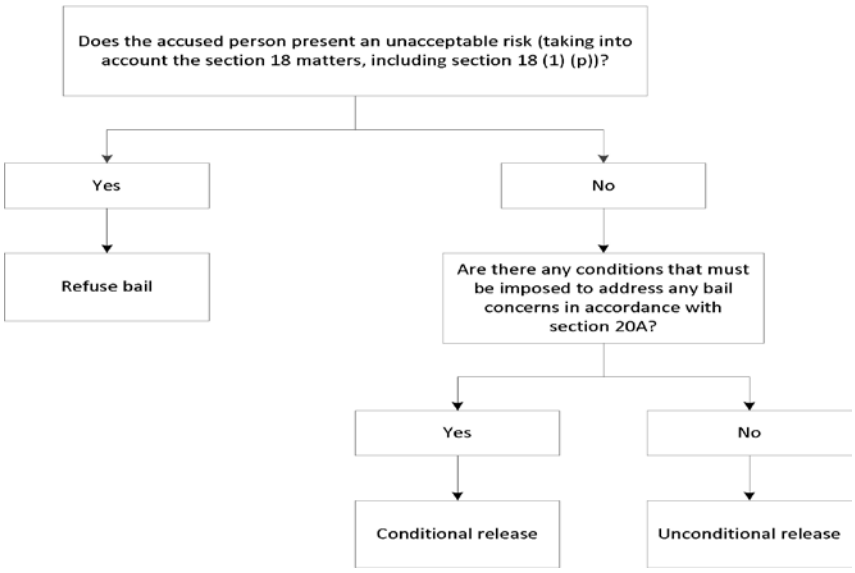
conditional release means a decision to grant bail with the imposition of bail conditions.

unconditional release means a decision:

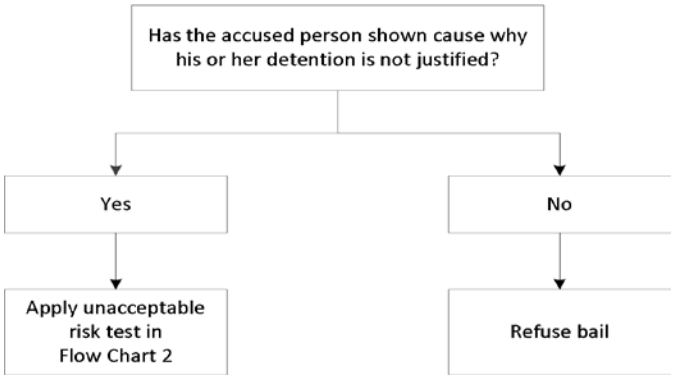
(a) to release a person without bail, or

(b) to dispense with bail, or

(c) to grant bail without the imposition of bail conditions.



Show Cause Offences Flow Chart, section 16:



VULNERABILITY OF ACCUSED PERSON

Section 18(1)(k) requires a bail authority to consider any special vulnerability of the accused person.

The *NSW Government Response to the NSW Law Reform Commission Report on Bail* (November 2012) (Government Response to the NSWLRC Report on Bail) stated at pages 12-13:

> 'The Government acknowledges that some members of particular groups may have special needs and be vulnerable, particularly in the context of the criminal justice system. The new Act will require the bail authority to consider the special vulnerability or needs of the accused when determining bail, including because of youth, ATSI status or cognitive or mental health impairment. This ensures the special vulnerabilities and needs of these groups of people are adequately addressed in the bail decision making process.'

A useful case for Aboriginal accused persons may be ***R v Michael John Brown*** **[2013] NSWCCA 178**. This was a Crown appeal seeking review of a decision of Justice Latham to grant the accused bail. The court considered the issue of bail *de novo* and decided bail should be refused as there were not exceptional circumstances justifying the grant of bail under the old section 9D of the *Bail Act 1978*. In making this decision however, it considered the importance of the accused's Aboriginality in relation to his right to be at liberty.

The court at 34 stated:

> 'In addition, the respondent is a person of Aboriginal background whose extended family and kinship, and other traditional ties, warrant significant consideration in the determination of whether or not to grant bail.
>
> In the cases of Aboriginal accused, particularly where the applicant for bail is young, alternative culturally appropriate supervision, where available, (with an emphasis on cultural awareness and overcoming the renowned antisocial effects of discrimination and/or an abused or disempowered upbringing), should be explored as a preferred option to a remand in gaol. Since the Royal Commission into Aboriginal Deaths in Custody (see particularly Recommendations 8991 and the National Report at 21.4 and following), the incidence of aboriginal incarceration has increased dramatically, overwhelmingly as a result of the increase in the numbers on remand.'

In this case, the court found that suitable culturally appropriate alternatives to jail were *not* available. However, in cases where a defence practitioner can submit there are alternatives, this case could be very persuasive.

POLICE DISCRETION TO GRANT BAIL ON EXECUTION OF WARRANT

Under section 43, police are empowered to release a person without bail, on bail with conditions, or to refuse bail so long as a court or authorised justice has not already made a decision for the offence, or made a first court appearance and had their bail dispensed with.

Under this section, if a warrant has been issued to bring a person before the court, police may *still* grant bail if they are satisfied that exceptional circumstances justify the grant of bail. This section may be of special note to ALS lawyers staffing the Custody Notification Service encountering accused persons arrested upon the execution of a warrant.

6. BAIL CONDITIONS

RULES ABOUT CONDITIONS GENERALLY

Under section 20A bail conditions can only be imposed if a bail authority is satisfied that there are identified bail concerns.

Under section 20A(2) a bail authority may only impose a bail condition if satisfied that:

(a) the bail condition is reasonably necessary to address a bail concern, and
(b) the bail condition is reasonable and proportionate to the offence for which bail is granted, and
(c) the bail condition is appropriate to the bail concern in relation to which it is imposed, and
(d) the bail condition is no more onerous than necessary to address the bail concern in relation to which it is imposed, and
(e) it is reasonably practicable for the accused person to comply with the bail condition, and
(f) there are reasonable grounds to believe that the condition is likely to be complied with by the accused person.

There are six types of bail conditions that can be imposed.

CONDUCT REQUIREMENTS (Section 25)

These are conditions that an accused do or refrain from doing something (but they do not include an accused agreeing to forfeit money with or without security).

SECURITY REQUIREMENTS (Section 26)

These are conditions that an accused person or another person forfeit money if the accused fails to attend court in compliance with bail.

A security requirement can only be imposed for the purpose of addressing a bail concern that the accused person may not attend court.

A security requirement is not to be imposed unless a bail authority is satisfied that the purpose for which the security requirement is imposed is not likely to be achieved by imposing one or more conduct requirements.

Security requirements can include the accused and/or other person/s depositing money with the court (providing security), entering into an agreement to forfeit money without providing security, or providing acceptable security (other than money) for the forfeiture of money under the bail agreement. A bail authority or the officer of the court to whom the bail

acknowledgment is given (if the bail authority has not made a decision), is responsible for deciding what 'acceptable security' is, for the purpose of deciding what items can be used as security instead of cash.

CHARACTER ACKNOWLEDGMENT REQUIREMENTS (Section 27)

A character acknowledgement is an acknowledgement given by an acceptable person, other than the accused, that they are acquainted with the accused and that they regard the accused as a responsible person who is likely to comply with bail.

A character acknowledgement is not to be required unless a bail authority is satisfied that the purpose for which it is required, cannot be achieved by imposing one or more conduct requirements.
A bail authority or an officer of the court to whom the bail acknowledgment is given (if the bail authority has not made a decision) is responsible for deciding who constitutes an acceptable person for the purpose of this section.

ACCOMMODATION REQUIREMENTS (Section 28)

At present this requirement can only be imposed in relation to children.

This type of condition is different to a residential condition (now termed conduct requirement). This is a specific provision created to empower the court or an authorised justice to request that suitable arrangements be made for the accommodation of the accused, before the accused is to be released. (This section does not apply to police officers granting bail).

The Second Reading Speech states that the intent of this section is that once suitable accommodation has been found, the accused can be released to bail without the matter having to be relisted before the court (p. 92). Therefore it follows that the imposition of such a condition means bail has been granted, with a condition imposed, limiting the release of the accused. If a court or authorised justice imposes an accommodation requirement, they must ensure that the matter is re-listed for further hearing at least every 2 days until the accommodation requirement is complied with.

The court or authorised justice is also empowered under this section to direct an officer of a Division of a Government Service to provide information about action being taken to secure suitable arrangements for accommodation of an accused. This is very useful in relation to agencies such as Juvenile Justice or Family and Community Services.

Regulation 31 specifies that this information can be lodged in writing or provided orally in court. The information must identify the address that the accused will reside at if one has been determined.

Importantly, this section states that the Bail Regulation can make further provision for the imposition of accommodation requirements. The Second Reading Speech (p. 92) states that

the intention of this was to potentially expand the application of this section to adults or include situations involving residential rehabilitation. At present the Regulations make no such provision.

PRE-RELEASE REQUIREMENTS (Section 29)

A bail authority can impose *only* the following 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.

The requirement is a *pre-release requirement* if the bail condition specifies that the condition must be complied with before the accused is released on bail. If an accommodation requirement is imposed, this is complied with once the court is informed by an appropriate Government representative in writing or in person that suitable accommodation has been secured for the accused.

In this section, an *appropriate Government representative* means:
(a) the Director-General of the Department of Family and Community Services or a delegate of the Director-General (if the accused person is a child), or
(b) the Director-General of the Department of Attorney General and Justice or a delegate of the Director-General, or
(c) the Commissioner of Corrective Services or a delegate of the Commissioner, or
(d) any other person prescribed by the regulations.

A pre-release requirement (other than an accommodation requirement) is complied with when the requirements specified in the condition are complied with. Once any specified conditions are met, the accused must be released. This section makes it clear that a court can no longer require suitable transportation being arranged as a pre-release requirement for example (which is common when accused persons are applying for bail to go to a residential rehabilitation centre).

ENFORCEMENT CONDITIONS (Section 30)

These can be one or more conditions imposed for the purpose of monitoring or enforcing compliance with another bail condition (the *underlying bail condition*).

Only a court can impose an enforcement condition. A court can only impose such a condition at the request of the prosecutor, and only if it considers that the condition to be reasonable and necessary in the circumstances, having regard to:
(a) the history of the person granted bail (including criminal history and particularly if the person has a criminal history involving serious offences or a large number of offences),
(b) the likelihood or risk of the person committing further offences while at liberty on bail,
(c) the extent to which compliance with a direction of a kind specified in the condition may unreasonably affect persons other than the person granted bail.

An enforcement condition must specify the kind of direction that may be given to the accused while on bail, the circumstances in which that direction can be given (in a manner that ensures that compliance with the condition is not unduly onerous), and the underlying bail condition/s that the direction is being imposed in relation to.

Section 80 sets out that if bail is granted with enforcement conditions, a police officer is empowered to give a direction of the kind specified in the enforcement condition, in the circumstances specified in the condition, or at any other time the police officer has a reasonable suspicion that the accused person has contravened the underlying bail condition in connection with the enforcement condition.

7. UNACCEPTABLE RISK AND SHOW CAUSE

SUMMARY OF CONCEPTS

Bail laws in Australia have followed two types of models – a 'justification' model and an 'unacceptable risk' model (NSWLRC Report on Bail p. 144).

The former NSW *Bail Act 1978* used a justification model. Under the *Bail Act 2013* we now have an unacceptable risk model, with the inclusion of show cause offences. Victoria and Queensland are the two other Australian jurisdictions which appear to have the same model (with slight differences in legislation).

Since the commencement of the *Bail Act 2013* (prior to its amendment by the *Bail Amendment Act 2014*), a wealth of case law on the issue of unacceptable risk has been generated in NSW courts. For a useful summary of many of these cases see: *Bail Act 2013 Decisions in the Supreme Court of NSW* by Rebekah Rodger (July 2014), and *Bail Act 2013 (NSW) Notes - First Online Edition* by Rory Pettit and Jeremy Styles (June 2014) – both available at www.criminalcle.net.au.

With the commencement of the *Bail Amendment Act 2014* it is unclear what the precise interaction between the principles of unacceptable risk and show cause will be, for applications where both principles are applicable. Under the former *Bail Act 1978* there was of course section 8A which required that an accused person in relation to some offences, satisfy the court as to why bail should not be refused. This was a reversal of the onus in relation to bail, and so in a sense was akin to show cause provisions which put the onus on the accused to convince the court that detention is not justified. The Queensland jurisdiction has referred to NSW case law on section 8A in relation to how it interprets its show cause provisions. The Queensland case law therefore adopts the approach that bail should ordinarily be refused, and that something out of the ordinary would need to be present for the accused to satisfy the court that detention is not justified.

In Victoria however, case law seems to have approached the concept of show cause in much the same way as unacceptable risk – suggesting that the factors relevant to unacceptable risk – ie the likelihood of court attendance, reoffending, interference with witnesses or evidence,

should be at the forefront of the consideration in relation to show cause. The Victorian case law does not place as much of an onus on factors that are out of the ordinary and does not reference the NSW approach to section 8A. These factors make the Victorian approach somewhat more advantageous to the accused on my reading of the cases.

Some useful principles which we can draw from these jurisdictions, on the issues of unacceptable risk and show cause are contained in the cases below.

CASELAW

DPP v Harika [2001] VSC 237 (24 July 2001) Gillard J

This was an appeal to the Supreme Court of Victoria by the DPP against an order by a Magistrate granting bail to the accused. The accused was charged with one count of armed robbery. The allegation involved the accused acquiring and administering heroin and methadone, driving with a friend to a milk bar and producing a syringe, stealing approximately $300 in cash. The accused was alleged to have driven away from the crime scene, changed and disposed of his clothes and hidden the vehicle. He was also alleged to have threatened the friend he had with him, to not divulge any information about the robbery.

The Defence submission to the Magistrate was that the accused could be rehabilitated in the community through drug counselling and compulsory treatment meaning he would not be a risk to the community despite his past record: at 59.

The Magistrate granted bail to the accused on the basis that the accused had shown cause due to his young age, the supports that were available to him on bail, and the structure that was available to him on bail at 29. The court noted the vagueness of the Magistrate's record of these reasons at 30.

The court noted the following features in the accused's application for bail:

- A strong case against him with high probability of a conviction: at 50.
- An appalling criminal record showing a failure to answer bail, the commission of offences whilst on bail for other serious offences and the commission of an offence whilst undergoing a suspended sentence: at 51. In addition that this gives rise to a risk of reoffending: at 67.
- A poor employment record: at 57.
- An addiction to heroin whilst being on the methadone program currently: at 58.
- A background which gives rise to a propensity to resort to violence: at 67.

The court held at 61 that to determine show cause requires identifying the factors which led the Legislature to find that bail should be refused. What these factors are will depend on the circumstances of the case.

In this current case the court found at 61 that these relevant factors were:

- The use of a weapon in the offence – showing a propensity by the accused to resort to violence but also the potential for the crime to result in serious physical and mental injury to the victim;
- The high probability of a conviction leading to a substantial term of imprisonment which would encourage the accused not to answer bail;
- The risk of the commission of another similar-type offence.
- The risk that the accused may interfere with prosecution witnesses: at 65.

The court held at 63 that it falls upon the accused to provide cogent evidence to answer these concerns, before it can be found that their detention is not justified. The court held that in this regard the relevant factors in considering this are the background of the accused, his prior convictions, the strength of the case against him and the history of previous grants of bail.

The court held at 64 that the accused's detention would *not* be justified if it was established that:

- The risk of repeat offending was extremely remote;
- The case against him was weak;
- There is a probability that the accused would not be sentenced to a term of imprisonment;
- The use of violence was completely out of character;
- The possibility of re-offending, using a weapon is remote.

The whole of the accused's past should be considered in making this assessment.

The court found at 65 that the Magistrate failed to consider the above identified issues relevant to the exercise of her decision on bail for a show cause offence.

The Supreme Court held that the accused had not shown cause and bail should be refused.

Ref Fred Joseph Asmar [2005] VSC 487 (29 November 2005) Maxwell J

This was an application for bail by the accused to the Supreme Court of Victoria. Asmar was charged with three counts of false imprisonment, three counts of making threats to kill, three counts of making threats to inflict serious injury, two counts of unlawful assault, one count of possession of an unregistered firearm, one count of impersonating a member of the police force and one count of possession of cartridge ammunition whilst unlicensed. All but the last of these charges related to a single incident. In relation to this incident, it was alleged that the victims were in an industrial estate performing "slide outs" in their car, whilst others in their group filmed this on a video camera. The accused approached them at high speed, pulling up in a car. The accused pointed a handgun at the victims, whilst at one point putting the gun to one victim's head threatening to "blow it off". The accused stated that he had footage of the victim's going into his driveway. Once this was denied the accused then allowed the victims to leave, telling them not to come back. The accused was also alleged to have threatened them that if they told anyone about the incident he would kill them or kill their families.

The court noted at 28 that the accused had one prior conviction for intentionally causing injury, had never committed an offence while on bail, and had not previously breached any condition of bail. At 19 the Crown stated that there was a risk of further offending and interference with witnesses.

At 12 the court found that the considerations for whether there was unacceptable risk were at the heart of those the court should consider regarding whether the accused has shown cause. The court went on to state at 13 that there could of course be additional considerations in a particular case which might justify a person's continued detention.

At 15 the court cited the case of *DPP v Ghiller* [2000] VSC 435 with approval – case that at 9 sets out that even for bail applications where an accused must show cause, the primary question relevant to the grant of bail is whether an accused will meet the conditions of bail and attend trial as required. The question of the strength of the case is merely one of the factors to be considered whether it is more or less likely that person will meet the conditions of their bail.

The court also agreed at 25 with the Defence submission that the case of *Ghiller* was relevant in its statement at 43 that 'a bail application is not concerned with determining the issues which the jury must decide, nor is it concerned with punishing a person in advance of that adjudication by a jury'.

It also agreed at 26 that the case of *Burton v R* (1974) 3 ACTR 77 was relevant. That case stated at 78 that:

> 'It is not normally a factor of any great weight adverse to the granting of bail that an accused person may possibly commit a crime while he is on bail. It should not readily be assumed that he might commit an offence, or further offence. If he does, he can be dealt with by the criminal law. There are, however, situations in which the consequences of any crime he commits while on bail may be so serious and have such widespread effect that the possibility that he may commit a crime while on bail is an important consideration.'

The court at 27 noted that it was not in dispute that if refused bail, the accused would be awaiting trial for a time in the range of 14-16 months. The court stated that given this substantial period of pre-trial detention, it would require compelling evidence before deciding to deny the accused bail on the basis of the risk that he may offend while on bail. In this case the court found the risk was small and found there was no unacceptable risk that the accused may offend on bail.

At 32 the court considered the issue of the risk that the accused would interfere with witnesses. The court at 33-35 detailed the fact that police did not arrest the accused until three weeks after the allegation was reported, indicating that they did not have grave concerns for witness safety. The court also found that a condition of bail could be imposed that he not have contact with witnesses and that this would mitigate any such risk to witnesses. In addition, the court was satisfied at 39 in this case that the accused was likely to comply with conditions set.

The court went on to consider at 40-43 that in this case there were clear incentives for the accused to comply with bail conditions. Evidence was given that his business was failing without him whilst he was in custody, and that his wife's father was in palliative care and only had one month to live. In addition, that the accused's mother suffers from a severe mental illness and is dependent on him for psychological and financial support. Whilst the court stated at 44 that show cause was not about the defence stating why an accused should be released, it agreed with the defence submission that these factors were relevant to the assessment of the likelihood that the accused would, if released on bail, comply with stringent conditions.

The court found that the accused had shown cause and bail should be granted.

Re Magee [2009] VSC 384 Forrest J

This was an application for bail by the accused to the Supreme Court of Victoria. Magee was a student of a Bachelor of Arts at the University of Monash, who had been repeatedly convicted of defacing advertisements in public places (damage property) in an attempt to make a public statement about the evils of advertising. He had no other type of offending on his criminal history and was on bail for such an offence at the time he was charged with the offence for which he now sought bail. The most recent offence was defacing an advertisement located in a tram shelter causing damage to the value of $340. At the time of his bail application he had spent 72 days in custody already. He was potentially in breach of a suspended sentence but the suspended part of the sentence was for a period of only 14 days.

The court in this case at 13 held that it agreed with the case with Maxwell J in the case of *Asmir* that even where an accused is required to show cause, the primary question relevant to the grant of bail is whether an accused will meet the conditions of bail and attend trial as required. The question of the strength of the case is merely one of the factors to be considered whether it is more or less likely that person will meet the conditions of their bail.

The court at 18 held that there was a real risk of reoffending. However it stated that this factor must be balanced against the following concerns:

- The type of offending there is a risk of is of a low level criminality;

- Notwithstanding the accused's prior convictions, it is unlikely the accused upon conviction would spend longer in custody than the time he has already been bail refused;
- There is no asserted flight risk;
- The type of offending there is a risk of does not involve the threat of injuryto others;
- The criminal law can deal with any offending that may occur whilst an accused is on bail.

The court found that the accused had shown cause and bail should be granted.

Woods v DPP **[2004] VSC 1 (17 January 2014) Bell J**

This was an application for bail by four co-accused to the accused to the Supreme Court of Victoria.

The court stated at 51, in regard to the show cause requirement that:

- The onus of showing cause is on the applicant.
- The precise nature of that onus has not yet been explored. As with exceptional circumstances, the considerations which may be relevant to showing cause are not specified.
- Each case must be assessed according to its own facts and circumstances. A particular factor or (more usually) a combination of factors may result in an accused showing cause.

At 58 the court stated that:

- The concept of unacceptable risk is very important in relation to whether an accused has shown cause.
- If the prosecution fails to establish unacceptable risk, this will count in the applicant's favour in the show-cause assessment.

<u>Application of co-accused 1: Wayne Woods</u>

The accused was a juvenile charged with attempting to commit burglary and theft of a screwdriver, intentionally causing serious injury recklessly causing serious injury, affray, assaulting and hindering a protective services office and related offences, as well as drug possession. The offences involved allegations of a serious assault on a person in company with a large group of others at a railway station. The main victim was a worker at the railway station and was hospitalised.

The court noted the following features in the accused's application for bail:

- The prosecution case was not weak.
- Juvenile aged 17, 3 months.
- First time in custody.
- Poor record of street and property offences for which he had received non-custodial sentences in the Children's Court.
- Stable family with support available from his parents.
- Evidence was led from his case-manager from Youth Justice which indicated that his offending was due to drug addiction which had escalated over the last two years. Although initially not engaging well with Youth Justice, recently he had remained free of drugs, was clearer in his thinking and had become more motivated to stop his offending.
- Youth Justice were prepared to supervise him on intensive bail program.
- It was submitted that the accused could be bailed on strict conditions to live with his parents and subject to a requirement to report and participate in the Youth Justice bail program. The accused was willing to comply with a curfew and other conditions.
- The accused's behaviour had been erratic due to drug abuse but he had been attempting to rehabilitate.

The defence submitted he was not for these reasons an unacceptable risk. The Prosecution submitted that the accused's behaviour and pattern of offending raise a risk that he will commit further offences.

The court held that:

- As the accused is a child, long term rehabilitation must be a strong consideration: at 95.
- Some negative consequences of detaining young people are: disruption to education, employment, association with other young offenders at a vulnerable time in their lives, isolation from therapeutic programs, and an increased risk of receiving custodial sentences. These consequences are out of proportion with the purpose of ensuring appearance at trial or protecting the community: at 95.

The court found at 97 that the risk posed by the young person could be managed with conditions, that the young person was therefore not an unacceptable risk, and that the young person had shown cause as to his detention not being justified.

Application of co-accused 2: Lirim Salievski

The accused was charged with aggravated burglary, armed robbery, carrying a firearm when a prohibited person, blackmail, theft of a motor vehicle, harassing a witness, theft, extortion with threat to kill, making a threat to kill, false imprisonment, using a firearm in the commission of an offence, possessing amphetamines, possessing cannabis and dealing with property suspected of being proceeds of crime. The charges related to two separate incidents.

The court noted the following features in the accused's application for bail:

Aged 35 and single.

- Extensive criminal record with numerous convictions for burglary, theft and similar offences, recklessly causing injury, recklessly endangering serious injury, firearm offences, and a "shocking" driving record. He has served numerous terms of imprisonment.
- He was arrested whilst reporting on existing bail conditions.
- He had substantial ties to the Dandenong community where he had resided all his life.
- He was not a flight risk.
- Evidence was led from a person who had an offer of employment for him and was prepared to enter a surety.
- Certificates for completed courses were provided that the accused had done in custody.
- Drug test results whilst accused on remand were negative.
- He had been assessed as suitable for drug rehabilitation and if released on bail the accused stated he would undertake it.
- The applicant could be released on bail to reside with his mother and father who were present at court and who could enter a surety.
- The accused was prepared to report on bail daily.

The Defence submitted that the accused was not an unacceptable risk and that he had shown cause because he had a good record of observing bail conditions on previous bails. It also submitted the prosecution case was weak in several aspects. The Prosecution submitted that the accused had not shown cause and presented an unacceptable risk of re-offending and interfering with witnesses. The accused had commenced re-offending whilst on bail for previous offences.

The court found that the accused had not shown cause and presented an unacceptable risk because the charges were very serious and involved violence against the person and property using firearms and standover tactics,

the accused was a mature man who had an extensive criminal history and already served numerous terms of imprisonment, and witnesses are fearful and reluctant to cooperate with police: at 108. Bail was refused.

Application of co-accused 3: Nicholas Kiourellis

The accused was charged with drug trafficking, possession, dealing with property suspected of being the proceeds of crime and possessing a prohibited weapon (a taser) without an exemption or approval.

The court noted the following features in the accused's application for bail:

- Aged 20, 7 months.
- First time in custody.
- No criminal history.
- Evidence was led by the accused's sister stating that since the accused had lost his job his mental health had been in decline and had begun using anti-depressants but had not yet acted upon a referral to see a psychologist. His family were concerned about his involvement in drugs.
- A job was available for the accused if granted bail.

The prosecution stated the accused presented a risk of further offending.

The court found that the accused was not an unacceptable risk and that he had shown cause on account of his young age, lack of prior record, his supportive and loving family, his offending being related to drug addiction related to untreated mental illness of an unknown severity and his commitment to rehabilitation. The court found that the risk he presented of re-offending could be managed by conditions: at 117.

Application of co-accused 4: Deng Mawn

This applicant was not required to show cause.

Van Tongeren v Office of the Director of Public Prosecution (Qld) [2013] QMC 16 Carmody J

This was an application for bail by the accused to the Supreme Court of Queensland. The accused was charged with disorderly conduct and aggravated affray. The alleged disorderly conduct involved a prolonged and apparently unprovoked attack on a hotel patron by the applicant in company. The charge of aggravated affray involved opposing groups fighting and exchanging punches in a hotel car park. While not seen on CCTV to throw any punches the applicant was involved in the fight. The accused was found to be a member of the Bandidos, a declared entity under *Criminal Code (Criminal Organisations) Regulation Act* 2013. Under the *Bail Act* 1980 (Qld) participants in criminal organisations must be refused bail unless they show cause why their continued detention is unjustified: s 16(3A)(a).

In considering the question of whether continuing detention was unjustified the court noted at 111 that the answer to this question will vary from case to case, and it is not possible to state with clarity and precision the complex mix of influential discretionary considerations that may exist in an infinite range of different bail contexts.

However, whilst stating that there is no specific criteria for the determination of the issue, the court set out at 113 that some factors that may be considered include:

- A weak prosecution case;
- Excessive preventable delay;
- Personal factors such as urgent or special medical needs or responsibilities.

The court noted at 122 that the factors relevant to the court's determination of whether there is an unacceptable risk can overlap with the determination of show cause and that some matters will be relevant to both of these issues. The court stated at 125 that in some cases it may be satisfied that detention was unjustified if it concludes that the defendant does not pose an unacceptable degree of risk.'

In discussing how the court should approach show cause applications, it referred to NSW case law such as *R v Iskandar* (2001) NSWSC 7 and *Masters v* DPP (1992) 26 NSWLR 450. These were NSW cases considering section 8A of the *Bail Act 1978*. Section 8A required an applicant to satisfy the court that bail should not be refused, before a court could grant bail. The court referred to lengthy portions of these NSW cases.

In *Masters v DPP* the court at 473 stated:

> 'That section imposes a difficult task upon the person so charged to persuade the court why bail should not be refused. That presumption expresses a clear legislative intention that persons charged with the serious drug offences specified in the section should normally— or ordinarily — be refused bail. That is the effect of a series of decisions by single judges of the Supreme Court, most recently collected and discussed in *R v Kissner* (Hunt CJ at CL, 17 January 1992, unreported). We agree with that interpretation of s 8A.'

In *R v Iskandar* the court said at 14:

> 'In view of the authorities binding on me, I proceed on the basis that where s 8A applies, an application for bail should normally or ordinarily be refused. A heavy burden rests on the applicant to satisfy the court that bail should be granted. The strength of the Crown case is the prime but not the exclusive consideration. Countervailing circumstances common to applications for bail in the generality are to be accorded less weight than in the ordinary case. The application must be somewhat special if the Crown case in support of the charge is strong.'

The court in *R v Iskandar* also referred heavily at 8 to the judgment of Hunt CJ in *R v Kissner* which outlined the following principles in relation to section 8A:

> 'By the presumption against bail enacted by s 8A, the legislature intends the courts to place less weight upon the circumstances which are common to all applicants, and more weight upon the strength of the Crown case against the applicant in the particular case under consideration.
>
> The strength of the Crown case has become the prime consideration where s 8A applies: see for example Toubya (unreported, 15 November 1990); Morton (unreported, 15 May 1990); Franco (unreported, 23 July 1991); Brown (unreported, 25 July 1991), all unreported.
>
> Common to all bail applications are the circumstances that the applicant's continued incarceration will cause a serious deprivation of his general right to be at liberty, together with hardship and distress to himself and his family, and usually with severe effects upon the applicant's business or employment, his finances and his abilities to prepare his defence and to support his family.
>
> Also common to most bail applications by persons charged with the offences to which s 8A applies is the availability of sureties prepared to forfeit (with or without security) large sums of money to ensure that the applicant will answer his bail; an application would otherwise be unlikely to be considered in relation to such serious matter.
> The legislature has, notwithstanding all those particular circumstances, enacted the presumption against bail in these cases, so that such circumstances will not ordinarily be sufficient to overcome the barrier to bail which s 8A has erected.

> […] If the Crown case is a strong one, the applications for bail in which they will be sufficient to do so must necessarily be somewhat special, and the task of the applicant to overcome the presumption that bail is to be refused will ordinarily be a difficult one. On the other hand, if the Crown case is not a strong one, the circumstances to which I have referred in the last paragraph will ordinarily be given greater weight, and the task of the applicant (although still a substantial one) will be correspondingly less difficult.'

The defence submitted at 127 on behalf of the accused that the evidence of the affray was weak and therefore, despite a mandatory minimum of 6 (six) months imprisonment being imposed in Queensland, ongoing incarceration was unwarranted because conditional release is a viable less extreme alternative.

The prosecution submitted at 136 that whilst the offences charged are individually not particularly serious, they involved alcohol fuelled violence committed in a public place where the applicant was the principal aggressor and the evidence in relation to each of the offences was strong. If convicted, the applicant would be sentenced to a term of imprisonment of no less than six (6) months in duration and that therefore the risk of flight was high.

The court noted the following features in the accused's application for bail:

- Aged 46.
- Employed as a truck driver.
- Has two adult daughters living in NSW.
- Has full time care of his 10 year old son – his mother living in the ACT.
- Has a partner employed full time.
- One previous conviction.
- First time in custody.

The court found at 137 that it was open for it to find that there was a risk of reoffending and interference with witnesses by the accused. This it stated was based on the likelihood of a mandatory sentence upon conviction, the applicant's connections with the Bandidos, plus a finding of unacceptable risk of flight. The court found that the accused had not shown cause. Bail was refused.

8. THE PRESUMPTION OF INNOCENCE AND GENERAL RIGHT TO BE AT LIBERTY

REQUIREMENT TO CONSIDER PRINCIPLES

Formerly, under section 3 of the Bail Act 2013, 'Purpose of the Act', a bail authority was obliged to have regard to the common law presumption of innocence and the general right to be at liberty, when making any decision about bail under the Act.

Unfortunately the Amending Act has removed this section completely. What is now contained in the act is a Preamble which states that the Parliament of New South Wales, in enacting the Act, has had regard to the following matters:

a) the need to ensure the safety of victims of crime, individuals and the community,
b) the need to ensure the integrity of the justice system,
c) the common law presumption of innocence and the general right to be at liberty.

Given the wealth of common law authority on the presumption of innocence and the general right to be at liberty it is doubtful that the Parliament intended to abrogate or curtail such a

fundamental right. The Act as amended does not specifically prohibit authorities from having regard to these common law principles. Accordingly, it is suggested that a bail authority ought to ascribe weight to these principles in making any decision under the Act. The removal from the legislation of the requirement for bail authorities to consider these principles however, may in practice place more onus on defence advocates to remind bail authorities of them.

In the NSWLRC Report on Bail, the Commission made several references to the fact that the principles of the presumption of innocence and the right to liberty, should not be seen as being rights that concern only the individual, to be weighed against the interests of the community. For example it stated at page 22-23:

> '[t]he error lies in seeing the interest in liberty, and indeed in the other fundamental principles of the law such as the presumption of innocence and the right to a fair trial, as interests of the individual and in particular the individual defendant. Conceiving them in this way, within the familiar metaphor of balance, renders one far more likely to see them as of less weight than social, community or public interests…[T]he interest in liberty and fundamental principles is correctly seen as a collective, social, *public* interest.'

The Commission's analysis of the importance of thinking about these principles in the above way, could be useful in guiding bail authorities in making bail decisions.

THE PRESUMPTION OF INNOCENCE CASELAW & RESOURCES

The following decisions may also be of assistance:

R v Wakefield **(1969) 89 WN (Pt 1) (NSW) 325**

Justice Cross:

At 326: 'Applications for bail are not to be regarded as the problem of choosing between the rights of the individual on the one hand and the interests of society on the other…Injustice may arise, for example, if one compares the individual's interest in the right of free speech with the public interest in the suppression of blasphemy or sedition. What one must compare – and synthesise – is the public interest in the right of the individual to freedom of speech with the public interest in the freedom of individuals from the offensiveness in one case and the safety of the State in the other.'

R v Michael John Brown **[2013] NSWCCA 178**

Rothman, Fullerton and Beech-Jones JJ:

At 21: 'The refusal of bail is not, and should never be, a form of punishment or a form of duress to force the applicant for bail to do something that is otherwise not required. In *R v Mahoney Smith* [1967] 2 NSWR 154 at 158, O'Brien J said:

> "But it is, I think, important to keep in mind that the grant or refusal of bail is determined fundamentally on the probability or otherwise of the applicant appearing at Court as and when required and not on his supposed guilt or innocence and that the detention of an accused person in lieu of bail cannot be imposed in any way as a retribution for any guilt which might be supposed from the fact of his arrest and charge and committal for trial. Even more so is it important to keep in mind that such detention cannot be imposed as an expression of resentment of his defence or the answer made by him or through his legal representative to the evidence led against him upon the proceedings for his committal for trial." '

***Woods* v DPP [2014] VSC 1**

Justice Bell:

At 4: 'With respect to the importance of the presumption of innocence and the prosecutorial onus of proof, I would refer to this recent statement by Kiefel J in Lee v New South Wales Crimes Commission: (2013) 87 ALJR 1082:

> The golden thread of the system of English criminal law is that it is the duty of the prosecution to prove the prisoner's guilt.[8] This is consistent with the presumption of an accused's innocence. It find expression as a fundamental principle of the common law of Australia.'

The NSWLRC Report on Bail also made reference to several cases and instruments that explore the importance of the presumption of innocence within our criminal justice system (pp. 11-12). These may also be of use to practitioners formulating submissions in under the new Act.

***Chester v The Queen* (1988) 165 CLR 611**

At 618: 'After all it is now firmly established that our common law does not sanction preventative detention.'

The Commission noted that this High Court authority is of particular significance to the denial of bail as a use of preventative detention. Notably, the Commission remarked however, that there will be times when the likelihood of an accused person committing a serious offence while on bail, or threatening the safety of another person, will justice pre-trial detention (p.12).

***Woolmington v DPP* [1935] AC 462**

At 481-482: 'Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt…No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.' (See also *Ex parte Patmoy; Re Jack* (1944) 44 SR (NSW) 351 at 358).

***International Covenant on Civil and Political Rights* (To which Australia is a signatory)**

Article 14(2):

'Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.'

GENERAL RIGHT TO BE AT LIBERTY CASELAW & RESOURCES

***Woods* v DPP [2014] VSC 1**

Justice Bell:

At 5: 'As to personal liberty, it has foundational significance in the scheme of the common law. This was explained by Mason and Brennan JJ in Williams v The Queen [1986] HCA 88; (1986) 161 CLR 278:

> The right to personal liberty is, as Fullagar J described it, 'the most elementary and important of all common law rights': *Trobridge v Hardy* [1955] HCA 68; (1955) 94 CLR 147, 152. Personal liberty was held by Blackstone to be an absolute right vested in the individual by the immutable laws of nature and had never been abridged by the laws of England 'without

> sufficient cause': *Commentaries on the Laws of England* (Oxford 1765), Bk.1, pp.120-121, 130-131.

He warned:

> Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper ... there would soon be an end of all other rights and immunities.

That warning has been recently echoed. In *Cleland v The Queen* [1986] HCA 88; (1986) 161 CLR 278, 292, Deane J said:

> It is of critical importance to the existence and protection of personal liberty under the law that the restraints which the law imposes on police powers of arrest and detention be scrupulously observed. The right to personal liberty cannot be impaired or taken away without lawful authority and then only to the extent and for the time which the law prescribes.

At 6: I pointed out in *Antunovic v Dawson* (2010) 30 VR 355, 359-60**,** a habeas corpus case, that the principle of personal liberty is derived from two related foundational principles of the common law, as explained in Halsbury:

> the subject may say or do what he pleases, provided he does not transgress the substantive law, or infringe the legal rights of others, whereas public authorities (including the Crown) may do nothing but what they are authorised to do by some rule of common law or statute.

I went on draw attention to the equal application of the right of personal liberty to all persons:

> At common law, the right to personal liberty is inherent in every human being. Blackstone said the rights belonged to persons 'merely in a state of nature'. He said these 'rights and liberties [were] our birthright to enjoy entire', unless constrained by law. The courts have long treated the right to liberty and access to habeas corpus as 'inherent' and a human 'birthright'.

At 7: In relation to bail, it is apposite to recollect that the principle of personal liberty is wider than freedom from unlawful detention. It encompasses freedom from unlawful restraint upon movement as well. The law of habeas corpus is based upon the protection of personal liberty in that wider sense: *Antunovic* (2010) 30 VR 355, 359 [6]-[7], 376-80 [99]-[113], as explained by Sharpe et al in their leading text:

> The idea of personal liberty - that is, the physical freedom to come and go as one pleases - is considered to possess special value in the common law tradition. The importance which is attached to habeas corpus parallels this value.'

The NSWLRC Report on Bail made references to several cases and instruments that explore the importance of the general right to liberty in our criminal justice system arguing that because bail decisions take place before any conviction is entered, that the right to personal liberty is of 'particular relevance in framing bail legislation' (pp. 9-10). Defence practitioners may also find these of practical use when thinking about framing submissions under the *Bail Act 2013*. They included:

***Re Bolton; Ex parte Beane* (1987) 162 CLR 514**

Justice Brennan:

At 520-521: 'Many of our fundamental freedoms are guaranteed by ancient principles of the common law or by ancient statutes which are so much part of the accepted constitutional framework that their terms, if not their very existence, may be overlooked until a case arises which evokes their ***contemporary and undiminished force***' (emphasis added).

Justice Deane:
At 528-529: 'The common law of Australia knows no letter de cachet or executive warrant pursuant to which either citizen or alien can be deprived of his freedom by mere administrative decision or action. Any officer of the Commonwealth Executive who, without judicial warrant, purports to authorise or enforce the detention in custody of another person is acting lawfully only to the extent that his conduct is justified by clear statutory mandate…The lawfulness of any administrative direction, or of actions taken pursuant to it, may be challenged in the courts by the person affected: by application for a writ of habeas corpus where it is available or by reliance upon the constitutionally entrenched right to seek in this Court an injunction against an officer of the Commonwealth. ***It cannot be too strongly stressed that these basic matters are not the stuff of empty rhetoric. They are the very fabric of the freedom under the law which is the prima facie right of every citizen and alien in this land. They represent a bulwark against tyranny*** (emphasis added)***.'***

Forester v The Queen (1993) 67 ALJR 550

At 555: '[The right to personal liberty is] 'the most elementary and important of all common law rights.' – Citing *Trobridge v Hardy* (1955) 94 CLR 147 at 152.

Williams v The Queen (1986) 161 CLR 278

Mason and Brennan JJ:
At 292: 'The right to personal liberty cannot be impaired or taken away without lawful authority and then only to the extent and for the time which the law prescribes.'

Wilson and Dawson JJ:
At 306: 'A person is not to be imprisoned otherwise than upon the authority of a justice or a court except to the extent reasonably necessary to bring him before the justice to be dealt with according to law. That, as we conceive it, is one of the foundations of the common law.'

International Covenant on Civil and Political Rights (To which Australia is a signatory)

Article 9:

1) Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

3) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persona awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

9. BAIL VARIATIONS

GENERAL REQUIREMENTS

An '*interested person*' can now apply to vary an accused's bail and includes under section 51:

(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.

Regulation 20 sets out that any interested person making an application to vary bail must do so in writing in the approved form, unless the accused person is before the court in which case the application can be done orally.

Regulation 20(3) however gives courts and authorised justices power to hear an application without it having been made in proper written form.

Upon receiving this application regulation 21 sets out that a court or authorised justice must give notice of the time and place of the hearing to the applicant, the accused person (if not the applicant) and the prosecutor (if not the applicant), unless satisfied that this has already been done by police.

The application can be heard in the accused's absence if the accused fails to attend and the court or authorised justice is satisfied that notice has been given – regulation 21(3).

POWER OF AUTHORISED JUSTICE TO VARY LOCAL COURT BAIL

Section 52 provides that an authorised justice can vary certain bail conditions, but *not* once a determination of summary proceedings or committal proceedings against an accused person has been made.

The following types of conditions *only* can be varied:
(a) a reporting condition, which is a bail condition that requires the person granted bail to report to a police station while at liberty on bail,
(b) a residence condition, which is a bail condition that requires the person granted bail to reside at a specified address,
(c) an association condition, which is a bail condition (however expressed) that requires the person granted bail to refrain from associating with a specified person or class of persons or to refrain from frequenting a specified place or class of places,
(d) a curfew condition, which is a bail condition (however expressed) that imposes a curfew on the person.

Residence, association and curfew conditions can be varied but not deleted by an authorised justice.

POWER OF AUTHORISED JUSTICE TO VARY SUPREME COURT BAIL

Section 52(6) empowers an authorised justice to vary reporting conditions imposed by the Supreme Court only. They are empowered to vary the days on which or the times at which an accused person must report, or to vary the police station which the accused person must report. However, section 57(2) provides that an authorised justice cannot vary a bail condition of a higher court, if the higher court has directed that such a condition not be varied except by the higher court.

VARYING LOCAL COURT BAIL

Any condition of bail imposed by the Local Court, can be varied by a Magistrate on application. Section 51 and regulation 20 set out that an accused person can apply to the court for a variation orally if before the court, or if not before the court, through lodgement of a

written form. The Magistrate can hear the application however, even if written notice has not been given. However, the court must not hear the application if it isn't satisfied that the prosecutor has had reasonable notice.

Under section 53 a court or authorised justice may exercise its discretion to vary bail on its own motion, on the accused's first appearance, and if to the benefit of the accused.

Under section 54 a court or authorised justice may hear a variation application for the purpose of varying the *conditions of bail* (rather than the decision as to whether to grant bail) without receiving an application, if an accused person granted bail, has remained in custody because of non-compliance with a bail condition that has been imposed.

VARYING SUPREME COURT BAIL IN THE LOCAL COURT OR THE DISTRICT COURT

Section 57 provides that if a higher court such as the Supreme Court has imposed bail, and stipulated that certain conditions not be varied except by a Justice of their court, the lower court can vary such conditions *only* if both the accused person and the prosecutor agree to the variation.

If bail has been imposed by a Higher court, sections 64 and 69 empower a lower court to vary bail generally, if the Higher court has not stipulated that the conditions not be varied except in a Higher court, *and* the court is satisfied that special facts or special circumstances justify the hearing of the bail application.

In relation to section 64, it is worth mentioning that the Note attaching to the section states that section 57 of the Act permits the Local Court to vary bail conditions imposed by a higher court only with the consent of the accused person and the prosecutor. This seems to be at odds with the terms of section 57 which set out that such consent is required only when a condition is being varied that a higher court has specifically stated can only be varied by that higher court (not for all types of conditions generally where this is not stated by the higher court).

VARYING BAIL WHERE SURETY (SECURITY REQUIREMENT) OR CHARACTER ACKNOWLEDGMENT REQUIREMENT APPLICABLE

Section 36 requires that a bail authority who varies bail must ensure that a person who has entered into a security agreement be given written notice setting out the terms of the condition as varied.

Section 37 requires that a bail authority who varies bail must ensure that a person who has entered into a character acknowledgement be given written notice setting out the terms of the condition as varied.

10. APPEALS BAIL

BAIL ON APPEAL FROM THE LOCAL COURT TO DISTRICT COURT

Section 62 sets out that a court may hear an application for bail for a person who has been convicted of the offence and has an appeal against a sentence or conviction, so long as they have not made their first appearance in *another* court. I.e. If the person has not yet appeared before the District Court, the Local Court can determine bail.

Section 18(1)(J) sets out that the court when considering bail for a person convicted of an offence, where an appeal has been lodged, must consider whether the appeal has a reasonably arguable prospect of success.

BAIL ON APPEAL FROM THE LOCAL OR DISTRICT COURT TO THE COURT OF CRIMINAL APPEAL OF THE HIGH COURT

Section 22 sets out that if an accused has an appeal against a conviction on indictment, or a sentence imposed on conviction, that they will not be granted bail or have bail dispensed with, unless they establish that there are special or exceptional circumstances that would justify granting or dispensing with bail. For show cause offences this requirement replaces that of the accused to show cause. The bail authority is still however required to consider unacceptable risk, if special or exceptional circumstances have been demonstrated.

11. THE OFFENCE OF FAILING TO APPEAR

THE OFFENCE

Section 79 preserves the offence of failing to appear.

A person fails to appear if they, without reasonable excused, fail to appear before a court in accordance with a bail acknowledgment. The maximum penalty for the fail to appear is the maximum penalty for the offence for which bail was granted, but must not exceed 3 years or if a monetary penalty – 30 penalty units.

It is important to always be mindful when appearing on a sentence, that the sentencing Magistrate does not impose a sentence beyond the maximum penalty for the substantive offence. This commonly occurs when for example, a person is being sentenced for failing to appear for a fine only offence, or for an offence such as goods in custody where the maximum penalty is only 6 months.

Under section 80, proceedings for this offence can be commenced at any time and are to be dealt with summarily.

DEFENDING FAILURES TO APPEAR

Section 94 governs the facilitation of proof for failures to appear. It provides for a system of certificates as prima facie evidence of different facts such as an accused being given a bail acknowledgment, or an accused failing to appear before the court. It is important to consider these when analysing a brief of evidence that includes an offence of failing to appear. In the

author's experience police at times do not properly facilitate proof of the facts needed for failures to appear. These provisions should guide your thinking in terms of the ways in which prosecutors should be leading evidence in such matters or may provide ideas for a hand up brief due to lack of evidence. A brief of evidence with merely a Court Attendance Notice for example will not prove the offence of failing to appear.

In the author's experience, some prosecutors will try and serve a photocopy of a bench sheet displaying the accused's non-appearance on the day of the hearing. If proper proof has not been served in the brief of evidence, and a prosecutor attempts to admit the evidence of the court papers on the day of court, an objection under section 188 and 183 of the *Criminal Procedure Act 1986* should be made by the accused person due to failure to serve key evidence. In addition, a hearsay objection could be made depending on the type of evidence if its maker is not available for cross-examination and it does not fall within the exception of a business record. A bench sheet may be subject to argument from the prosecutor as being a business record, but to the contrary, a defence advocate may wish to argue that it was prepared in contemplation of court proceedings (and during them!) and thus is not an exception to the business record rule, and thus is not admissible due it being hearsay.

Under section 31(2) the rules of evidence apply to such offences.

FORFEITURE OF BAIL SECURITY

Schedule 2, Part 2, empowers a court to make an order for bail security to be forfeited if satisfied that an accused person has failed to appear before a court in accordance with their bail acknowledgement.

12. BREACHES OF BAIL AND THE USE OF ARREST

POLICE ENFORCEMENT OF BAIL REQUIREMENTS

Police have been given clearer options in terms of how they deal with breaches of bail under the new Act. Importantly, the legislature has explicitly set out a number of options *other than arrest* for police to utilise in enforcing bail conditions.

Under section 77, a police officer who believes, on reasonable grounds, that 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.

Police who decide to arrest an accused person are also empowered to *discontinue* the arrest and release the person without or without issuing a warning or notice.

Under section 77(3) in deciding how to exercise their discretion in relation to breaches of bail, the police are to consider (but are not limited to considering):
(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.

IMPROPER/UNLAWFUL USE OF ARREST

There may be a limited number of cases where an improper or unlawful use of arrest on an accused person for a breach of bail, will lead to the police obtaining evidence that is then used against the accused person to prove more serious offences. For example, an accused person may be arrested on a breach of bail and participate in an electronically recorded interview for a serious offence for which police are investigating. Alternatively, an accused person may be arrested on a breach of bail, and during the course of the arrest commit further offences such as resist police, assault police, offensive language, or possess prohibited drug. In such cases, section 77 could be utilised for arguing an exclusion of evidence improperly or unlawfully obtained pursuant to section 138 of the *Evidence Act 1995*.

In relation to section 99(3) of the *Law Enforcement Powers and Responsibilities Act 2002* (*LEPRA*), governing the use of arrest generally, the Parliament, in its Second Reading Speech, made clear reference to the section preserving the common law sentiment, that the the power of arrest is a measure of last resort. (A useful resources on the relationship of the common law to the former provision section 99(3) of *LEPRA* is: Dennis, M. *The Measure of Last Resort: Some Things You Need to Know About the Law of Arrest*' June 2001, available at: http://criminalcle.net.au/attachments/Arrest_paper__The_Measure_of_Last_Resort__June_2011.pdf

Section 99(3) was of course repealed a new provision inserted: section 99(1) of *LEPRA* which commenced on 16 December 2013. Defence practitioners can still argue that the common law on arrest is a measure of last resort however, as nothing in the amended provision seems to suggest that the intention of the new provision was to abrogate the common law principles on the use of arrest. The ambit of section 99(3) was widened in the new section 99(1), however, the wording '[a] police officer may, without a warrant, arrest a person' – codifying a discretionary power, remains.

The Second Reading Speech for the *Bail Act 2013* states in relation to section 77 and the use of arrest for breaches of bail:

> 'The Law Reform Commission recommended that the legislation set out the options open to police when responding to a breach or threatened breach of bail and the matters that should be considered by police when doing so. Proposed section 77(1) therefore stipulates the actions that a police officer may take in relation to a person who the officer reasonably believes has failed, or is about to fail, to comply

> with a bail acknowledgement or bail conditions. In those circumstances the officer amy decide to take no action, issue a warning, issue an application notice or court attendance notice to the person requiring them to attend court, arrest the person or apply for an arrest warrant.'

The NSWLRC in its Report on Bail noted that:

> 'The policy reasons for subsection 99(3) of LEPRA apply with equal force to arrest for failure to observe a conduct requirement imposed under a bail agreement. Indeed, they apply with greater force because, in such a case, the person is not being arrested for a criminal offence. As a consequence it would seem inappropriate for the power of arrest in such a case to be unlimited.'

The second reading speech for the Bail Act can be used to argue that the legislature has given a *clear message* to police that they have options other than arrest, and more explicitly set out what these are, and how they are to be decided between. In addition, section 99(1) of *LEPRA* with its discretionary power to arrest in certain circumstances only, applies equally to breach of bail.

The Government's Response to the NSWLRC Report on Bail states at pages 12-13, that '[t]he Government agrees ***arrest should not be the universal response*** to a breach, however is of the view police should have the discretion to arrest as a response to a breach when appropriate (emphasis added).' This statement is of clear assistance in arguing improper arrest cases.

One practical problem for defence practitioners could be the interplay between section 99(1) of *LEPRA* and section 77 of *The Bail Act 2013*. Many police officers may argue that arrest was necessary for one of the purposes under section 99(1) such as section 99(1)(iv) – to ensure the attendance of the accused at court.

There are two matters that must be closely looked at however in this regard:

1) Notwithstanding the arrest fulfilling one of the purposes of arrest in 99(1), was there an alternative as set out under section 77 of the *Bail Act*? If so, the arrest may still have been improper considering the purpose of section 77, and considering section 99(1) both set up a discretion to arrest rather than a requirement. The common law on the use of arrest as a measure of last resort is here useful. In addition, *DPP v Carr* [2002] NSWSC 194 style cross-examination on what other options police considered before making an arrest, or whether a decision to discontinue and arrest was considered, could be useful.

2) Is the purpose asserted by police under section 99(1) legitimate? For example, if the evidence of a police officer on a voir dire on the issue, is that the arrest was to ensure the attendance of the accused at court, and the accused is a juvenile breaching curfew, the defence may wish to challenge the relationship between a juvenile breaching curfew and any police concern that the child may not attend court. The point here is simply that not every breach of bail is going to justify an

arrest falling within the ambit of section 99(1), and the evidence of police should be scrutinised in this regard.

A useful District Court authority may be ***NT v R* [2010] NSWDC 348**. This was a an ALS conviction appeal to the District Court before Her Honour Judge Tupman and concerned an application under s138 of the *Evidence Act 1995* to exclude evidence obtained during an arrest which was executed for a breach of bail. The court in this case found that the use of arrest in the absence of considering other options such as a summons, was improper and excluded the evidence obtained in consequence of the arrest.

DETERMINING BREACHES OF BAIL AT COURT

Under section 78, if a bail authority is satisfied that an accused person appearing before them has failed or was about to fail to comply with a bail acknowledgment or a bail condition, they may release the person on the person's original bail, or vary the bail decision that applies to the person.

A bail authority cannot revoke or refuse bail unless satisfied that the person has failed or was about to fail to comply with a bail acknowledgment or bail conditions *and* having considered all possible alternatives, the decision to refuse bail is justified.

An offence for which there was a right to release, ceases to be an offence of that kind if bail is to be revoked or refused under section 78. If an authorised justice is re-determining bail to which an enforcement condition applies, they are empowered under section 78 to re-impose the condition, but not to impose new enforcement conditions or vary enforcement conditions.

13. PROCEDURAL MATTERS

APPLICATION OF THE RULES OF EVIDENCE

Section 31 provides that the rules of evidence do not apply on applications under the Bail Act. A bail authority is permitted to take into account any evidence or information that the bail authority considers credible or trustworthy in the circumstances and is not bound by the principles or rules of law regarding the admission of evidence.

These rules of evidence still apply however to proceedings for an offence in relation to bail or proceedings in relation to the forfeiture of security.

Section 32 provides that the standard of proof for matters to be decided by a bail authority is on the balance of probabilities (except in relation to proceedings for an offence in relation to bail).

BAIL ACKNOWLEDGEMENTS TO BE GIVEN

Section 33 sets out that a bail authority that grants bail must, as soon as is practicable, ensure that the accused is given a bail acknowledgement for the decision. This document is a written notice that:

(a) requires the accused person to appear before a court, on such day and at such time and place as are from time to time specified in a notice given or sent to the person as prescribed by the regulations, and
(b) requires 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.

AND

(a) warns the person that committing an offence while on bail could result in a more severe penalty being imposed on conviction for the offence for which bail is granted, and
(b) sets out the bail conditions (if any), and
(c) explains the consequences that may follow if the person fails to comply with his or her bail acknowledgment or bail conditions, and
(d) includes any information regarding the review or variation of the decision the regulations require to be provided when bail is granted.

Regulation 5 prescribes that the following information be given to the accused in the bail acknowledgement:

(a) an explanation of the meaning of "bail decision",
(b) information specifying the courts or persons that may make bail decisions (including the circumstances in which a decision of the Supreme Court may be varied by another court or person),
(c) information specifying the bail applications that may be made and the persons who may make a bail application,
(d) information about the special powers of authorised justices to vary reporting conditions, residence conditions, association conditions and curfew conditions under section 52 of the Act,
(e) information about the special powers of courts and authorised justices to review bail conditions under section 55 of the Act if a person granted bail remains in custody because a bail condition has not been complied with,
(f) details of the way in which an accused person may make a bail application,
(g) information to the effect that a court to which a bail application is made may confirm or vary the decision or give a new decision.

Section 33(5) states that a bail authority is under an obligation to take reasonably practicable steps to ensure that the accused understands the bail acknowledgement.

Section 14 states that an accused must not be released until they have signed this acknowledgment.

POLICE TO GVE BAIL ELIGIBILITY INFORMATION

Under section 44, police must given an accused person bail eligibility information and make a record of giving this to the accused. Regulation 11 sets out that police may keep such a record electronically but the record must set out who gave this information and when.

Regulation 10 sets out that this information must include:

(a) an explanation that the accused person is entitled to be granted bail for the offence, or released without bail, unless there are unacceptable risks,
(b) a list of the 4 types of "unacceptable risk" under the Act,
(c) an explanation of the bail decisions that can be made if there are unacceptable risks,
(d) an explanation of the bail decisions that can be made if the offence is an offence for which there is a right to release.

POWER TO DEFER BAIL DECISIONS FOR INTOXICATED PERSON

Under section 44 police have the power to defer making a bail decision in respect of an intoxicated person so long as it does not delay the person being brought before a court or authorised justice.

Under section 56 a court or authorised justice may defer making a bail decision if an accused person is an intoxicated person, and may adjourn the matter but not for more than 24 hours, and issue a warrant for the committal of the person to a correctional centre until the time of the rehearing of the application.

POLICE TO KEEP RECORDS OF BAIL DECISIONS

Regulation 12 requires police to keep records of decisions in relation to bail.

BAIL AUTHORITIES TO KEEP RECORDS OF BAIL DECISIONS

Section 38 requires a bail authority who imposes bail conditions to immediately make a record specifying the reasons for not granting unconditional bail, and setting out the bail concern or concerns that the conditions relate to. This includes setting out the reason for the imposition of any security requirement or character acknowledgements. If the accused requests certain bail conditions be imposed, and the bail authority imposes different conditions, the reason for this must be recorded.

If bail is refused because of unacceptable risk, the section requires the bail authority to identify the unacceptable risk or risks.

COURT POWER TO VARY BAIL UNABLE TO BE ENTERED INTO

This may occur if an accused cannot be released due to their inability to comply with set bail conditions for example a security requirement.

Section 42 provides that notice must be given to a court that has power to hear a variation application before the expiry of 8 days after the person is received into custody, if the accused remains in the custody of a correctional centre of police station. Only one notice is required to be given.

OBLIGATIONS OF BAIL AUTHORITY UPON REFUSING BAIL

Section 34 states that a court or authorised justice that refuses bail or revokes bail must, as soon as practicable, ensure the accused is given:

(a) a written notice setting out the terms of the decision, and
(b) any information regarding the review or variation of the decision the regulations require to be provided when bail is refused.

Regulation 5 (above) applies to decisions under this section also, thus the accused must be given a copy of the information described in that regulation.

Section 38 sets out that a bail authority that refuses bail must immediately record the reasons for refusing bail, including the unacceptable risk/s identified by the bail authority.

Section 41 sets out that if an accused is refused bail, an authorised justice or the Local Court is not to adjourn the hearing of the matter for a period exceeding 8 clear days, except with the consent of the accused person.

Where the decision to refuse is made by an authorised justice who is not a registrar of the Local Court, the matter is not to be adjourned on the first adjournment for a period exceeding 3 clear days.

Any second or subsequent adjournment of the hearing by an authorised justice who is not a registrar of the Local Court must be for a period not exceeding 48 hours and, be an adjournment to the Local Court with a magistrate sitting, if a magistrate is reasonably available to deal with the case.

These provisions do not apply to an accused who is in custody for other offences, and would be remaining in custody for those offences, and where the authorised justice or court is satisfied that there are reasonable grounds for a longer adjournment.

OBLIGATIONS OF POLICE UPON REFUSING BAIL

Section 45 states that an accused person who is bail refused by police must without reasonable delay be allowed to communicate with an Australian legal practitioner or other person of the person's choice about bail. This is not required if police believe on reasonable grounds that they need to prevent the escape of an accomplice of the accused or the loss, destruction or fabrication of evidence relating to any offence.

Under section 46 police must bring the accused person before a court or authorised justice as soon as practicable. If it is reasonably practicable, and an accused person is not brought before a court or authorised justice within 4 hours after they are brought into custody, police must provide certain facilities.

Regulation 13 provides that police are to provide facilities for an accused to wash, shower or bathe and facilities for an accused person to change clothing. The regulation does not require police to provide clothing but envisages family members bringing clothing to the police station and consenting to be searched upon bringing the clothing.

APPLICATIONS TO DISCHARGE SURETY (SECURITY REQUIREMENT)

A bail guarantor may apply under section 83 to be discharged from the bail security agreement at any time. If this occurs, an authorised justice must issue a summons on the accused person to appear at court, or issue a warrant to apprehend the accused person in order to bring them to court.

Once the accused appears at court, unless the court is satisfied that it would be unjust to do so, the court must direct that the guarantor be discharged from their liability under the security agreement. If this occurs, the court then has the power to vary the bail conditions of the accused person and commit the accused person to a correctional centre until the new condition can be complied with. This might be for example, a variation to delete a surety altogether, or to still impose a surety condition, but allow the accused person to be remanded in custody until a suitable person can be found.

It is worth noting that nothing in this section appears to empower a court to *revoke* bail. It empowers the court to vary bail or remand in custody until conditions can be met. A prosecutor may attempt to argue that the application constitutes a variation application under section 51, and thus the prosecutor can seemingly request that a court revoke bail under section 51(9). A prosecutor upon receiving notice that a bail security wishes to be discharged for example due to bad behavior of the accused, or fear of an imminent breach, may wish to have an accused person's bail revoked. It appears unclear under the legislation whether the proper vehicle to do this would be for the prosecutor to bring their own variation application and request a revocation, or more favourably to the defence – whether it needs to apply in writing, with notice, to put on a detention application due to a change in circumstances under section 50.

SECURITY WHICH CEASES TO BE INTACT

Under section 85, if bail security has been put up and it ceases to be intact due to it ceasing to exist, or due to diminishment of its value, or it ceases to be available for example due to being sold to another owner, bail can be revoked.

PROHIBITION AGAINST ACCUSED PERSONS INDEMNIFYING SURETY

Under section 86, it is an offence for a person to indemnify another person or agree to indemnify another person, against any forfeiture that the other person may incur under a bail security agreement. The penalty is 3 years imprisonment or 30 penalty units or both.

This is an important provision to advise clients about in relation to any agreements they may make to indemnify their family or friends if they agree to put up surety, and it is forfeited.

APPEALS AGAINST FORFEITURE OF BAIL SECURITY

Obviously any defence lawyer thinking about giving advice to a bail security in relation to their rights, needs to carefully consider whether they have a conflict in giving such advice. However, it is useful to know that Part 2, Schedule 2 of the Act provides a bail security with a means to object to the forfeiture of bail security. Defence lawyers could consider referring family members of an accused person to a civil lawyer or community legal centre for assistance in lodging an application against the forfeiture of bail security they have put up. Rights include a right of appeal against an order to forfeit security, to the District Court.

TRANSITIONAL ARRANGEMENTS

Schedule 3 sets out that essentially any bail granted under the *Bail Act 1978* or the *Bail Act 2013* prior to the commencement of the *Bail Amendment Act 2014* continues to bind the accused person and any sureties. If an accused person breaches the conditions of bail under the old legislation, the redetermination of bail, becomes subject to the provisions of the Act as at the date of redetermination. The amendments under the *Bail Amendment Act 2014* do not constitute a change in circumstances for the purposes of section 74(3)(c) or 74(4)(b).

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Show Cause Offences Table

HOW TO USE THIS TABLE

Under section 16B of the *Bail Act* 2013 (the Act), show cause requirements often apply to certain categories of offences only when certain pre-conditions are met. For example, under section 16B(1)(c) an accused person must show cause if charged with a serious personal violence offence, but only if the accused person has previously been convicted of a serious personal violence offence.

For some categories of show cause offence, there were so many possible offences caught, that the table would have been unworkably long if each section was included. Therefore you need to not only consult the table, but check that your matter does not fall within one of the broader categories listed below.

Steps required to determine whether your client must show cause:

1. Check that your client is not caught by one of the three broad categories below that require your client to show cause.

2. See if the offence your client is charged with is located within the table as a possible show cause offence.

3. If you locate your client's charge within the table, look at the specified show cause provision under the *Bail Act 2013* (this is listed next to the offence for you) and check whether or not your client satisfies the preconditions for that category of show cause offence. If you client satisfies the preconditions your client will need to show cause.

Section 16B of the *Bail Act 2013* and relevant definitions have been included at the end of the table for ease of reference.

BROAD CATEGORIES OF OFFENDERS REQUIRED TO SHOW CAUSE

1. ***Was the accused on bail or parole at the time of the offence?***
   If so, if they are charged with a serious indictable offence they need to show cause: section 16B(1)(h) Bail Act 2013. A serious indictable offence is one punishable by imprisonment for life or for a term of 5 years or more: section 4 *Crimes Act 1900*.

2. ***Was the accused subject to a supervision order at the time of the offence?***
   A supervision order is an extended supervision order or an interim supervision order under the Crimes (High Risk Offenders) Act 2006: section 16B(3) *Bail Act 2013*. If the accused was subject to this, they must show cause if charged with any indictable offence, or an offence of failing to comply with a supervision order: section 16B(1)(i) *Bail Act 2013.*

3. Is the accused charged with an attempt, assist, aid, abet, counsel, procure, solicit, being an accessory, inciting, conspiring to commit an offence?

If charged with a serious indictable offence, that is caught by any of the other show cause provisions, then the accused will need to show cause: Sections 16B(1)(j) and (k). Basically, if your substantive offence is listed in the table below, then even if charged as above, the accused will need to show cause.

SHOW CAUSE OFFENCES UNDER THE CRIMES ACT 1900

Section	Offence	Show Cause Provision under the *Bail Act 2013*
18	Murder	16B(1)(a)
18	Murder and Manslaughter	16B(1)(c) 16B(1)(e)(i) 16B(1)(d)(i)
25A	Assault causing death	16B(1)(c)
26	Conspiring to commit murder	16B(1)(c)
27	Acts done to the person with intent to murder	16B(1)(c)
28	Acts done to property with intent to murder	16B(1)(c)
29	Certain other attempts to murder	16B(1)(c)
30	Attempts to murder by other means	16B(1)(c)
32	Impeding endeavours to escape shipwreck	16B(1)(c)
33	Wounding or grievous bodily harm with intent	16B(1)(c)
33A	Discharging firearm with intent	16B(1)(d)(i) 16B(1)(c) 16B(1)(d)(ii)
33B(2)	Use or possession of weapon to resist arrest	16B(1)(d)(i) 16B(1)(c)
35(1)	Reckless grievous bodily harm—in company	16B(1)(c)
37(2)	Choking, suffocation and strangulation	16B(1)(c)
38	Using intoxicating substance to commit an indictable offence	16B(1)(c)
42	Injuries to child at time of birth	16B(1)(c)
45	Prohibition of female genital mutilation	16B(1)(c)
45A	Removing person from State for female genital mutilation	16B(1)(c)
46	Causing bodily injury by gunpowder	16B(1)(c)
47	Using explosive substance or corrosive fluid	16B(1)(e)(i) 16B(1)(c)
48	Causing explosives to be placed in or near building, conveyance or public place	16B(1)(e)(i) 16B(1)(c)
52A(2)	Aggravated dangerous driving occasioning death	16B(1)(c)

52B(2)	Aggravated dangerous navigation occasioning death	16B(1)(c)
55	Possessing or making explosives or other things with intent to injure	16B(1)(e)(ii)
60(3A)	During a public disorder wound or cause GBH to a police officer in execution of his duties and is reckless as to causing ABH to the police officer	16B(1)(c)
61I	Sexual assault	16B(1)(c)
61J	Aggravated sexual assault	16B(1)(b)(i) 16B(1)(c)
61JA	Aggravated sexual assault in company	16B(1)(a) 16B(1)(b)(i) 16B(1)(c)
61K	Assault with intent to have sexual intercourse	16B(1)(b)(ii) 16B(1)(c)
66A(2)	Sexual intercourse—child under 10	16B(1)(a) 16B(1)(c) 16B(1)(b)(i)
66B	Attempting, or assaulting with intent, to have sexual intercourse with child under 10	16B(1)(b)(ii) 16B(1)(c) 16B(1)(b)(i)
66C	Sexual intercourse—child between 10 and 16	16B(1)(b)(i) 16B(1)(c)
66D	Attempting, or assaulting with intent, to have sexual intercourse with child between 10 and 16	16B(1)(b)(ii) 16B(1)(b)(i) 16B(1)(c) (when child under 14)
66EA	Persistent sexual abuse of a child	16B(1)(b)(i) 16B(1)(c)
66EB	Procuring or grooming child under 16 for unlawful sexual activity- where child is under 14	16B(1)(c)
79	Bestiality	16B(1)(c)
80A	Sexual assault by forced self-manipulation	16B(1)(b)(i) 16B(1)(c)
80D	Causing sexual servitude	16B(1)(c) 16B(1)(b)(i)
80E	Conduct of business involving sexual servitude	16B(1)(c)
80G	Incitement to commit sexual offence	16B(1)(b)(i) 16B(1)(c)
86	Kidnapping with intent to commit sexual intercourse	16B(1)(b)(i) 16B(1)(c)
91D	Promoting or engaging in acts of child	16B(1)(c)

	prostitution- Child under 14	
91E	Obtaining benefit from child prostitution- child under 14	16B(1)(c)
93FA	Possession of explosives	16B(1)(e)(ii)
93FB	Possession of dangerous articles other than firearms	16B(1)(e)(ii)
91G(1)	Use of Children for production of child abuse material- Child under 14	16B(1)(c)
93G	Causing danger with firearm or spear gun	16B(1)(d)(i) 16B(1)(d)(ii)
93GA	Firing at dwelling-houses or buildings	16B(1)(d)(i)
93H	Trespassing with or dangerous use of firearm or spear gun	16B(1)(d)(i)
93I	Aggravated possession of unregistered firearm in public place	16B(1)(d)(ii)
97	Armed Robbery	16B(1)(d)(i) 16B(1)(e)(i)

SHOW CAUSE OFFENCES UNDER THE DRUG MISUSE AND TRAFFICKING ACT 1985

Section		Show Cause Provision under the *Bail Act 2013*
Offences under 33(3) and 33AC(4) – offences involving a large commercial quantity of drugs, other than cannabis plant of cannabis leaf		16B(1)(a)
Any offence involving a commercial quantity of drug or plant as set out in Schedule 1 of the *Drug Misuse and Trafficking Act 1985*		16B(1)(f)

SHOW CAUSE OFFENCES UNDER THE CRIMINAL CODE ACT 1995

Division	Offence	Show Cause Provision under the *Bail Act 2013*
72.3	A International terrorist activities using explosive or lethal devices	16B(1)(a)
80.1	Treason	16B(1)(a)
80.1AA	Treason--materially assisting enemies etc.	16B(1)(a)
101.1	Terrorist acts	16B(1)(a)
101.6	Other acts done in preparation for, or planning, terrorist acts	16B(1)(a)
103.1	Financing terrorism	16B(1)(a)
103.2	Financing a terrorist	16B(1)(a)
115.1	Murder of an Australian citizen or a resident of Australia	16B(1)(a)
119.1	Incursions into foreign countries with the intention of engaging in	16B(1)(a)

	hostile activities	
119.4	Preparations for incursions into foreign countries for purpose of engaging in hostile activities	16B(1)(a)
119.5	Allowing use of buildings, vessels and aircraft to commit offences	16B(1)(a)
132.4 (3)(a) and (6)(4)	Burglary	16B(1)(a)
268.3	Genocide by killing	16B(1)(a)
268.4	Genocide by causing serious bodily or mental harm	16B(1)(a)
268.5	Genocide by deliberately inflicting conditions of life calculated to bring about physical destruction	16B(1)(a)
268.6	Genocide by imposing measures intended to prevent births	16B(1)(a)
268.7	Genocide by forcibly transferring children	16B(1)(a)
268.8	Crime against humanity--murder	16B(1)(a)
268.9	Crime against humanity--extermination	16B(1)(a)
268.24	War crime--wilful killing	16B(1)(a)
268.35	War crime--attacking civilians	16B(1)(a)
268.37	War crime--attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission	16B(1)(a)
268.38	War crime--excessive incidental death, injury or damage	16B(1)(a)
268.39	War crime--attacking undefended places	16B(1)(a)
268.40	War crime--killing or injuring a person who is *hors de combat*	16B(1)(a)
268.41	War crime--improper use of a flag of truce	16B(1)(a)
268.42	War crime--improper use of a flag, insignia or uniform of the adverse party	16B(1)(a)
268.43	War crime--improper use of a flag, insignia or uniform of the United Nations	16B(1)(a)
268.44	War crime--improper use of the distinctive emblems of the Geneva Conventions	16B(1)(a)
268.47	War crime--mutilation (international armed conflict)	16B(1)(a)
268.48	War crime--medical or scientific experiments (international armed conflict)	16B(1)(a)
268.49	War crime--treacherously killing or injuring (international armed conflict)	16B(1)(a)
268.50	War crime--denying quarter (international armed conflict)	16B(1)(a)
268.65	War crime--using protected persons as shields	16B(1)(a)
268.66	War crime--attacking persons or objects using the distinctive emblems of the Geneva Conventions	16B(1)(a)
268.70	War crime--murder	16B(1)(a)
268.71	War crime--mutilation (conflict that is not an international armed conflict)	16B(1)(a)
268.76(2)	War crime--sentencing or execution without due process	16B(1)(a)

268.77	War crime--attacking civilians	16B(1)(a)
268.78	War crime--attacking persons or objects using the distinctive emblems of the Geneva Conventions	16B(1)(a)
268.79	War crime--attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission	16B(1)(a)
268.90	War crime--treacherously killing or injuring (conflict that is not an international armed conflict)	16B(1)(a)
268.91	War crime--denying quarter (conflict that is not an international armed conflict)	16B(1)(a)
268.92	War crime--mutilation	16B(1)(a)
268.93	War crime--medical or scientific experiments (conflict that is not an international armed conflict)	16B(1)(a)
268.97	War crime--attack against works or installations containing dangerous forces resulting in excessive loss of life or injury to civilians	16B(1)(a)
268.98	War crime--attacking undefended places or demilitarized zones	16B(1)(a)
302.2	Trafficking commercial quantities of controlled drugs	16B(1)(a) 16B(1)(g)
303.4	Cultivating commercial quantities of controlled plants	16B(1)(a) 16B(1)(g)
304.1	Selling commercial quantities of controlled plants	16B(1)(a) 16B(1)(g)
305.3	Manufacturing commercial quantities of controlled drugs	16B(1)(a) 16B(1)(g)
307.1	Importing and exporting commercial quantities of border controlled drugs or border controlled plants	16B(1)(a) 16B(1)(g)
307.5	Possessing commercial quantities of unlawfully imported border controlled drugs or border controlled plants	16B(1)(a) 16B(1)(g)
307.8	Possessing commercial quantities of unlawfully imported border controlled drugs or border controlled plants reasonably suspected of having been unlawfully imported	16B(1)(a) 16B(1)(g)
309.3	Supplying marketable quantities of controlled drugs to children for trafficking	16B(1)(a)
309.7	Procuring children for trafficking marketable quantities of controlled drugs	16B(1)(a)
309.10	Procuring children for pre-trafficking marketable quantities of controlled precursors	16B(1)(a)
309.12	Procuring Children for importing or exporting marketable quantities of border controlled drugs or border controlled plants	16B(1)(a)
309.14	Procuring children for importing or exporting marketable quantities of border controlled precursors	16B(1)(a)

307.11	Importing and exporting commercial quantities of border controlled precursors	16B(1)(g)
308.3	Possessing plant material, equipment or instructions for commercial cultivation of controlled plants	16B(1)(g)
308.4	Possessing substance, equipment, or instructions for commercial manufacture of controlled drugs	16B(1)(g)

SHOW CAUSE OFFENCES UNDER THE FIREARMS ACT 1996

Section	Offence	Show Cause Provision under the *Bail Act 2013*
7	Offence of unauthorised possession or use of pistols or prohibited firearms	16B(1)(d)(i) 16B(1)(d)(ii)
7A	Offence of unauthorised possession or use of firearms generally	16B(1)(d)(i)
36	Use unregistered firearms	16B(1)(d)(i) 16B(1)(d)(ii) 16B(1)(d)(iii)
43	Unlicensed firearms dealer	16B(1)(d)(iii)
44A	Prescribed persons not to be involved in firearms dealing business	16B(1)(d)(iii)
50	Acquisition of firearms	16B(1)(d)(iii)
50A	Unauthorised manufacture of firearms	16B(1)(d)(iii)
50B	Giving possession of firearms or firearm parts to unauthorised persons	16B(1)(d)(iii)
51	Restrictions on supply of firearms	16B(1)(d)(iii)
51A	Restrictions on acquiring firearms	16B(1)(d)(iii)
51B	Supplying firearms on an ongoing basis	16B(1)(d)(iii)
51D	Unauthorised possession of firearms in aggravated circumstances	16B(1)(d)(ii)
51E	Use of pistol fitted with magazine 10+ capacity	16B(1)(d)(i) 16B(1)(d)(ii)
62	Shortened firearms (possessing)	16B(1)(d)(ii) 16B(1)(d)(iii)
64	Use firearm under influence of alcohol/drugs	16B(1)(d)(i) 16B(1)(d)(ii) 16B(1)(d)(iii)
66(b)	Possession of firearm with altered or defaced identification	16B(1)(d)(ii)
74	Use of firearms in breach of firearms prohibition order	16B(1)(d)(i) 16B(1)(d)(ii) 16B(1)(d)(iii)

SHOW CAUSE OFFENCES UNDER THE WEAPONS PROHIBITION ACT 1998

Section	Offence	Show Cause Provision under the *Bail Act 2013*
20	Weapons dealing, manufacturing without permit (military style weapon is included in the definition of prohibited weapon)	16B(1)(e)(iii)
23A(2)	Breach of restrictions on sale of military style weapons	16B(1)(e)(iii)
23B	Selling prohibited weapons (includes military style weapon) on an ongoing basis	16B(1)(e)(iii)
25A(2)	Unauthorised manufacture of prohibited weapons	16B(1)(e)(iii)
34	Selling in breach of prohibition order	16B(1)(e)(iii)

Section 16B of the *Bail Act 2013*

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

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

(b) a serious indictable offence that involves:

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

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

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

(d) any of the following offences:

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

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

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

(e) any of the following offences:

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

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

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

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

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

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

(i) while on bail, or

(ii) while on parole,

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

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

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

Definitions relevant to section 16B

Firearm means a gun, or other weapon, that is (or at any time was) capable of propelling a projectile by means of an explosive, and includes a blank fire firearm, or an air gun, but does not include anything declared by the regulations not to be a firearm: section 4 *Firearms Act 1996*.

Military-style weapon means (under section 4 *Weapons Prohibition Act 1998*), a prohibited weapon of a kind referred to in clause 1A of Schedule 1:

(1) Any bomb, grenade, rocket, missile or mine or other similar device (such as a tear-gas canister) that is in the nature of, or that expels or contains, an explosive, incendiary, irritant, gas or smoke, and whether or not it is live, has been deactivated or is spent.

For the purposes of this subclause, *bomb* includes a device known as an Improvised Explosive Device (or IED).

(2) Any device intended for use by a military or defence force and that is designed to propel or launch a weapon referred to in subclause (1)

(3) A flame thrower that is of military design or any other device that is capable of projecting ignited incendiary fuel.

Prohibited drug means any substance, other than a prohibited plant, specified in Schedule 1 of the *Drug Misuse and Trafficking Act 1985*: section 3 *Drug Misuse and Trafficking Act 1985.*

Prohibited plant means (section 3 *Drug Misuse and Trafficking Act 1985)*:

(a) a cannabis plant cultivated by enhanced indoor means, or

(a1) a cannabis plant cultivated by any other means, or

(b) any growing plant of the genus Erythroxylon or of the species Papaver Somniferum or Papaver orientale, also known as Papaver bracteatum, or

(c) any growing plant of a description specified in an order in force under subsection (2),

but does not include any growing plant, referred to in paragraph (a), (a1) or (b), of a description prescribed for the purposes of this definition.

Prohibited weapon means anything described in Schedule 1 of the *Weapons Prohibition Act 1998:* section 4 *Weapons Prohibition Act 1998.*

Serious Drug (under Division 300.2 of the *Criminal Code Act 1995*) means:

(a) a controlled drug; (b) a controlled plant; (c) a border controlled drug; (d) a border controlled plant.

Serious indictable offence means an indictable offence that is punishable by imprisonment for life or for a term of 5 years or more: section 4 *Crimes Act 1900*.

Supervision order means an extended supervision order or an interim supervision order under the *Crimes (High Risk Offenders) Act 2006*: section 16B(3) *Bail Act 2013*.

Serious personal violence offence means an offence under Part 3 of the *Crimes Act 1900* that is punishable by imprisonment for a term of 14 years or more: section 16B(3) *Bail Act 2013.*