An introduction to the Bail Act 2013

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This article outlines the significant changes the Bail Act 2013 will make to the bail regime including the process for determining bail pursuant to the new unacceptable risk test.

The Bail Act 2013 ("the Act") was assented to on 27 May 2013 and the Government expects that it will commence operation in May 2014.

A significant feature of the Act is that it operates without the complex scheme of offence-based presumptions contained in the existing Bail Act 1978 ("the existing Act") and instead implements a simple unacceptable risk test for making bail decisions.¹

In addition to implementing a risk-management model, the Act overhauls the procedural framework of the bail regime, notably the way in which bail applications are made and bail is reconsidered following an initial bail decision.

The process for determining bail under the Act

Part 2 of the Act set out the type of bail decisions that can be made and which bail authorities can make them. Section 4 of the Act defines a bail authority as a police officer, an authorised justice or a court. For authorised justices and courts, the available bail decisions are essentially the same as those under the existing Act being a decision to grant, refuse or dispense with bail.²

When making a bail determination, the bail authority must consider the presumption of innocence and the general right to be at liberty as set out in s 3 of the Act. In the Second Reading Speech, the Attorney General noted the appropriateness of considering these important legal principles in making a bail decision.³

Part 3, Div 1 of the Act contains a flowchart setting out the key steps in making a bail decision including the unacceptable risk test.⁴ Part 3, Div 2 contains provisions which reflect the process in the flowchart. The flowchart describes the key features of a bail decision for those matters where there is not a right to release on bail.

Section 17 of the Act provides that when determining bail, a bail authority must first consider whether or not there is an unacceptable risk that the accused will: fail to appear at any proceedings for the offence; commit a serious offence; endanger the safety of victims, individuals or the community; or, interfere with witnesses or evidence. In making this determination, the bail authority must consider the factors set out in s 17(3) which include the accused person's background including criminal history, history of violence, any special vulnerability or needs, whether the accused person has previously committed a serious offence while on bail, as well as matters relevant to the alleged offence including its nature and seriousness and the strength of the prosecution case.

If the bail authority determines that there is no unacceptable risk then, pursuant to s 18, the permissible bail decisions are those involving unconditional release, being release without bail (if the bail authority is a police officer⁵), dispensing with bail or unconditional bail.

¹ NSW, Legislative Assembly, Parliamentary Debates, 1 May 2013, p 19,839.
² Bail Act 2013 ss 10, 11.
³ ibid s 9.
⁴ Bail Act 2013 s 16.
However, if the bail authority determines that there is an unacceptable risk, the permissible bail decisions are either to grant or refuse bail. The question which must be considered is whether or not the identified unacceptable risk can be sufficiently mitigated by the imposition of conditions on bail. If the bail authority determines that the risk can be so mitigated, then bail will be granted with conditions. If not, then pursuant to s 20 of the Act, bail will be refused.

**Right to release for certain offences**

A right to release applies to fine-only offences, offences under the Summary Offences Act 1988 other than certain excluded offences, and matters being dealt with by conference under the Young Offenders Act 1997. However, these offences do not attract a right to release if the accused person has previously failed to comply with a bail acknowledgment, or bail condition, in relation to the offence.

Bail cannot be refused for offences with a right to release and Pt 3 Div 2 applies when determining whether conditional bail should be imposed. This process is similar to that described in the flowchart. The bail authority must consider whether or not there is an unacceptable risk present. If such a risk is identified, bail conditions can be imposed to mitigate that risk.

**Appeal bail**

Section 22 of the Act limits a court’s power to grant bail when there is an appeal against conviction or sentence to the Court of Criminal Appeal (CCA), or on appeal from the CCA to the High Court. The section provides that bail is not to be granted for these matters unless it is established that special or exceptional circumstances justify such a decision. The same test applies under the existing Act and the NSW Law Reform Commission (NSWLRC) supported its retention. In determining bail for these matters, the accused will need to establish that special or exceptional circumstances exist to justify a decision not to refuse bail, and should that occur, the court will also be required to apply the unacceptable risk test before making the bail decision.

**Onus and standard of proof**

Consistent with the existing Act, s 32 of the new Act provides that any decision made under the new Act is to be made on the balance of probabilities.

In relation to establishing unacceptable risk, if the prosecution asserts that such a risk exists, it will fall to the prosecution to establish its existence on the balance of probabilities.

**Imposing bail conditions**

Section 24 of the Act provides significant guidance regarding the permissible purposes for imposing bail conditions and the restrictions that apply to them. Notably, it provides that conditions can only be imposed for the purpose of mitigating an unacceptable risk. They must be reasonable, proportionate to the alleged offence and appropriate to address the unacceptable risk in relation to which they are imposed. Further, any conditions imposed must not be more onerous than is necessary to mitigate the identified risk and compliance with the conditions must be reasonably practicable.

The Attorney General outlined the rationale for providing this guidance when introducing the legislation:

“The Law Reform Commission noted in its report concerns expressed by many stakeholders about the increasing use of bail conditions to address issues related to the welfare of the accused rather than achieving the traditional aims of bail, such as ensuring the accused’s attendance at court. The Government agrees that there needs to be appropriate guidance in the legislation regarding the permissible purposes for bail conditions and the restrictions which apply to them so that unnecessary conditions are not imposed.”

Sections 25 to 28 of the Act set out the types of requirements that can be imposed under a condition of bail, including requirements as to conduct, accommodation, the provision of security and the provision of character acknowledgments. These broadly replicate the types of bail conditions that can be imposed under s 36 of the existing Act.

The Act stipulates that the only requirements that can be imposed as “pre-release requirements” are those relating to the surrender of passports, provision of security and character acknowledgments and accommodation.

The accommodation requirement, provided for in s 28 of the Act, is a new type of bail condition stipulating that suitable accommodation is to be arranged for a person before they are released to bail. An accommodation requirement is complied with when the court is informed that suitable accommodation has been secured for the accused person. The NSWLRC recommended that the new Act make conditions of this nature available for juvenile accused persons in response to concerns expressed by the Children’s Court about dealing with children who are suitable for bail but who do not have accommodation available. Under the existing Act, the court’s only option in those circumstances is to refuse...
bail and then reconsider it when accommodation is organised. Under the new provisions, the court will be able to impose bail including an accommodation requirement, and once suitable accommodation is found, the accused can be released to bail without the matter being relisted.

A continuous bail regime
The NSWLRC recommended implementation of a system of continuous bail so that once a decision is made to grant bail, that bail remains in place for the duration of the proceedings unless the court revokes or varies it. The Act implements this recommendation.

Section 12(1) provides that, once granted, bail only ceases to have effect if it is revoked, or if substantive proceedings for the offence for which it was granted conclude.

The Act broadly defines “proceedings for an offence” to capture all criminal proceedings and clarifies that all such proceedings are “substantive” unless they relate solely to bail or an appeal against an interlocutory judgment or order.

Section 6 of the Act stipulates that proceedings for an offence conclude at the point at which the court finally disposes of them. It also clarifies that proceedings do not conclude when an accused person is committed for trial or sentence, nor do they conclude upon conviction but before sentence, or if there is a stay pending an appeal.

While a grant of bail is continuous, ss 13 and 14 of the Act make clear that the accused person must appear before the court as and when required by their bail acknowledgment, and that the grant of bail does not entitle them to be at liberty at these times.

The operation of these provisions removes the need to formally continue bail every time an accused person appears before the court as, in the absence of any order being made or the proceedings being concluded, bail will simply continue as previously set. It is expected that this will reduce the burden on practitioners and courts in having to seek and make these formal orders.

The process for making a bail application and seeking redetermination of a bail decision
The Act implements significant changes to the process for making bail applications and seeking review of a bail decision. The NSWLRC noted that the review regime in the existing Act is potentially confusing and recommended that it be replaced by a simplified bail application regime whereby three forms of application can be made depending on what outcome is sought.

Three types of “bail application”
Sections 49 to 51 of the Act implement the NSWLRC’s recommendation by providing for three types of “bail application” as follows:

- a release application made by the accused to have bail granted or dispensed with;
- a detention application by the prosecution to have the accused’s bail refused or revoked. A detention application cannot be heard unless the accused person has been provided with reasonable notice, subject to the regulations;
- a variation application for variation of bail conditions. A variation application can only be made by one of the interested persons identified in the Act and, if made by someone other than the accused, the application cannot be heard unless the accused person has been provided with reasonable notice, subject to the regulations.

The Bail (Consequential Amendments) Bill 2013, which was introduced to Parliament on 20 November 2013, contains an amendment to s 50 of the Act clarifying that where a release application is made by the accused person, the prosecution can oppose that application without having to make a separate detention application. This amendment does not alter the operation of the provisions but simply makes clear that a cross-application is not necessary to oppose a release application, consistent with the goal of simplifying the legislation. Similarly, where the prosecution makes a detention application, that application can be opposed without the accused person having to make a release application.

Section 61 of the Act makes clear that each jurisdiction has power to hear a bail application for an offence if proceedings for the offence are pending before that jurisdiction. Further, s 62 provides each jurisdiction with power to hear a bail application in relation to an appeal against a conviction or sentence imposed in that jurisdiction, up until when the appellant first appears in the appellate court. Section 63 makes clear that each jurisdiction has power to hear a variation application in relation to a bail decision of that jurisdiction.

17 NSWLRC, above n 11, pp 88-89, rec 6.3.
18 Bail Act 2013 s 5, “Substantive proceedings” include, for example, committal proceedings, proceedings relating to sentence and proceedings on an appeal against conviction or sentence.
19 ibid ss 13, 14(2).
20 NSWLRC, above n 11, pp 263–267, rec 18.2.
21 Bail Act 2013 s 49 and Reg 16 of the Bail Regulation 2014.
22 Bail Act 2013 s 50 and Reg 18.
23 Bail Act 2013 s 51. “Interested persons” include the complainant where the accused is charged with a domestic violence offence or, where bail is granted on an application for an apprehended violence order under the Crimes (Domestic and Personal Violence) Act 2007, the person for whose protection the order would be made.
24 Bail Act 2013 s 51(6) and Reg 21.
25 Bail (Consequential Amendments) Bill 2013 (NSW) Sch 1 cl [4].
26 Bail Act 2013 s 63(2) provides that an authorised justice can vary a bail decision of an authorised justice.
Making a further bail application following a bail decision

There will no longer be a concept of review of a bail decision under the Act. Instead, if a previous decision has been made to refuse bail, a release application can be made. Alternatively, if a previous decision has been made to grant bail, a variation application can be made to alter the bail conditions, or a detention application can be made by the prosecution. These reforms are intended to do two things: firstly, to streamline and simplify the process for making applications, and secondly; to clarify the nature of the bail application being made and what is being sought.

While it does not incorporate a concept of review, the new Act has been drafted so as not to diminish the accused person or prosecution’s capacity to seek a re-determination of bail. The Act therefore provides courts with broadly equivalent powers to reconsider a bail decision made by another court, or an authorised justice, as provided in the existing Act. Part 6, Div 3 of the Act contains the relevant provisions and refers to the type of application that can be made in each court following a decision in another jurisdiction.

Section 66, for example, provides the Supreme Court with power to hear a release application if a decision to refuse bail has been made by another court, authorised justice or by police. It can also hear a variation application or detention application where a decision to grant bail has been made by the District or Local Courts, an authorised justice or police.

Multiple bail applications

Sections 73 and 74 of the Act include similar provisions to those contained in s 22A of the existing Act. Section 73(1) provides courts with discretion to refuse to hear a bail application if satisfied that it is frivolous or vexatious, is without substance or otherwise has no reasonable prospect of success. It further provides discretion for a court, other than the Local Court, to refuse to hear a bail application if satisfied that it could be dealt with as a variation application by the Local Court or an authorised justice.27

Section 74 precludes the court from hearing a second or subsequent release application unless there are grounds for a further application. It also applies the same restriction to second or subsequent detention applications to reflect the new application structure contained in the Act.

The grounds for a second or subsequent release application replicate the grounds required for such an application under s 22A of the existing Act. However, they include an additional ground for a further application, where the accused person is a child and the previous application was made on a first appearance for the offence.28

The grounds for a second or subsequent detention application are similar to those for a release application ie, new information relevant to the grant of bail is to be presented, or relevant circumstances have changed since the previous application was made.29

Other provisions applicable to first appearance in proceedings

The NSWLRC recommended that the Act include a number of safeguards applicable to an accused person’s first appearance in proceedings for an offence.30 These recommendations have been incorporated in the Act as follows:

- Section 53 provides that a court or authorised justice may, of its own motion, grant bail or vary a previous bail decision on first appearance. Such a decision may only be made to benefit the accused person.
- Section 72 provides that a court or authorised justice must hear a release application or variation application made by the accused person on first appearance. However, the proceedings may be adjourned to enable notice of the application to be given to the prosecution, if it is in the interests of justice to do so.31

Intoxicated persons

Section 56 of the Act provides courts with the power to defer a bail decision and adjourn the proceedings where an accused person is intoxicated, but not for more than 24 hours.32

Section 44 contains a complementary power for a police officer to defer making a decision in circumstances where the accused person is intoxicated, however the deferral must not cause delay in bringing the accused person before a court or authorised justice.33

Enforcement of bail requirements

Part 8 of the Act deals with enforcement of bail requirements. Section 78 sets out the powers of bail authorities when dealing with a breach. Bail may only be revoked or refused where the authority is satisfied that the person has failed or was about to fail to comply with their bail and, having considered all possible alternatives, the decision to refuse bail is justified.34 The court is to apply the unacceptable risk test set out in Pt 3 of the Act when making a determination under these provisions.

Review of the Act

As noted in the Second Reading Speech, the Act is intended to simplify bail laws, promote bail decisions that are consistent with the law and better achieve the goals of protection of the community while appropriately safeguarding the rights of the accused person.35 The Act will be reviewed after three years in operation to assess whether it is meeting these policy objectives.36

27 Bail Act 2013 s 73(2). Section 52 of the Act provides authorised justices with power to vary certain bail conditions imposed by courts. Section 64(4) also provides the Local Court with power to hear a variation application in relation to a bail decision of a higher court. These powers are subject to the restrictions contained in Pt 5, Div 4 of the Act.
28 Ibid s 74(3)(d).
29 Ibid s 74(4).
30 NSWLRC, above n 11, pp 273–275, rec 18.6.
31 Bail Act 2013 s 72(2).
32 Section 4 of the Act defines “intoxicated person” to mean a person who appears to be seriously affected by alcohol or another drug or a combination of drugs.
33 Bail Act 2013 s 44(4).
34 Ibid s 78(2).
35 NSW, Legislative Assembly, above n 1, pp 19,838–19,839.
36 Bail Act 2013 s 101.