The Recent Bail Act Changes

Presented by Daniel Covington

Solicitor

Legal Aid NSW

daniel.covington@legalaid.nsw.gov.au

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History of the Bail Act

The Bail Act (1978) began as a "relatively" simple piece of legislation. For nearly all offences there was a presumption in favour of bail. [1]

Over time the Act acquired a large number of amendments involving a rather complicated mixture of presumptions in favour and against bail and an exceptional circumstances test for certain offences. The following table indicates the changes to the presumptions for bail that occurred under the 1978 Act.

Changes to the presumption in favour of bail since 1978

Amending legislation	Commencement	Summary of provision
Bail (Amendment) Act 1986	25/05/1986	Added possession or supply of commercial quantities of prohibited drugs to the exceptions to the presumption in favour of bail.
Bail (Personal and Family Violence) Amendment Act 1987	29/10/1987	Introduced an exception to the presumption in favour of bail in the case of a domestic violence offence, where the accused person has previously failed to comply with any bail condition imposed for the protection and welfare of the victim. This presumption is restored only if the relevant officer or Court is satisfied that those bail conditions will be observed in the future.
Bail (Amendment) Act 1988	21/08/1988	Inserted s.8A, creating a presumption against bail for possession or supply of commercial quantities of prohibited drugs (i.e. the offences covered by the 1986 amendments) and drug importation offences involving commercial quantities. In addition, created an exception to the presumption in favour of bail (but not a presumption against bail) for similar drug offences involving twice the indictable quantity of prohibited drugs, and for drug importation offences involving twice the indictable quantity.
Bail (Domestic Violence) Amendment Act 1993	2/12/1993	Included murder in the s.9 exceptions, and added s.9A, an exception to the presumption of bail for domestic violence offences, where the accused has a history of violence (this extended the exception created in 1987).
Criminal Legislation Amendment Act 1995	1/07/1995	Introduced new exceptions to the presumption in favour of bail for conspiracy, threats and attempts to murder.
Drug Misuse and Trafficking (Ongoing Dealing) Act 1998	7/08/1998	Introduced an exception to the presumption in favour of bail for the new offence of supplying a prohibited drug on an ongoing basis.
Bail (Amendment) Act 1998	11/08/1998	Introduced further exceptions to the presumption in favour of bail, including manslaughter (s.18); wounding etc with intent to do bodily harm or resist arrest (s.33); aggravated sexual assault (s.61J); assault with intent to have sexual intercourse (s.61K); sexual intercourse – child under 10 years (s.78H); and kidnapping (s.90A).
Police Powers (Drug Premises) Act 2001	1/07/2001	Added another exception to the presumption in favour of bail for an offence under the Firearms Act 1996 relating to the unauthorized possession or use of a firearm that is a prohibited firearm or a pistol.

[1] The original 1978 Bail Act under s9 (1) stated that there was presumption in favour of bail for all offences except offences against section 51 (throwing rocks/objects at vehicles) and offences under 95,96,97 and 98 (various robbery offences) of the Crimes Act 1900.

Crimes Amendment (Aggravated Sexual Assault in Company) Act 2001	1/10/2001	Added the new offence of aggravated sexual assault in company (s.61JA Crimes Act) to the list of exceptions to the presumption in favour of bail.
Bail Amendment (Repeat Offenders) Act 2002	1/07/2002	Inserted s.9B into the Act. The section provides for an additional exception to the presumption in favour of bail for three types of defendants: (i) persons accused of an indictable offence who have previously been convicted of an indictable offence; (ii) persons who have been accused of committing an offence while on bail, or on parole, or serving a non-custodial sentence, or subject to a good behaviour bond; and (iii) persons previously convicted of an offence of failing to appear in court pursuant to a bail undertaking.
Bail Amendment Bill 2003	7/07/2003	Inserted ss.9C and 9D, which provided that bail is not to be granted to persons charged with murder, or persons charged with a serious personal violence offence who have previously been convicted of such an offence, unless exceptional circumstances justify the grant of bail. A "serious personal violence offence" includes domestic violence offences, murder, manslaughter, kidnapping, sexual assault and serious assaults.
Bail Amendment (Firearms and Property Offenders) Act 2003	5/12/2003	Inserted s.8B into the Bail Act 1978, which provides for a presumption against the granting of bail for persons accused of certain firearm and weapons offences (including the offence subject to the 2001 changes).
		In addition, inserted s.8C, which provides for a presumption against bail for a 'repeat property offender', which is defined as a person who is accused of two or more serious property offences (not arising out of the same circumstances) and who was convicted of a serious property offence in the past two years. A 'serious property offence' includes several robbery and stealing offences.
Bail Amendment (Terrorism) Bill 2004	4/06/2004	Amended s.8A, to apply a presumption against bail for new terrorism offences
Law Enforcement Legislation Amendment (Public Safety) Act 2005	15/12/2005	Inserted s.8D, which provides for a presumption against bail for riot offences, and for other serious offences committed in the course of a large-scale public disorder.
Bail Amendment (Lifetime Parole) Bill 2006	27/10/2006	Inserted s.8E into the Act, which provides for a presumption against bail for persons on lifetime parole who are accused of offences carrying prison terms.
Crimes and Courts Legislation Amendment Act 2006	29/11/2006	Amended s. 8A, to apply a presumption against bail to certain newly created hydroponic cannabis offences and the offence of manufacturing or producing in the presence of children an amount of a prohibited drug that is not less than the applicable commercial quantity.
Law Enforcement and Other Legislation Amendment Act 2007	21/12/2007	Inserted s.8F into the Act, which provides for a presumption against bail for serious sex offenders accused of breaching a supervision order imposed on them under the Crimes (Serious Sex Offenders) Act 2006.
Bail Amendment Act 2007	14/12/2007	Amended s.8B, to apply a presumption against bail to two additional firearms offences: the offence of prescribed persons being involved in a firearms dealing business, and the offence of shortening a firearm.
Crimes (Criminal Organisations) Control Act 2009	3/04/2009	Amended s.9, to create an exception to the presumption in favour of bail for an offence under new laws targeting criminal organisations: a controlled member of a declared organisation commits an offence if he or she associates with another controlled member of the declared organisation.

Source: Bail Presumptions and Risk of Bail Refusal: Analysis of the NSW Bail Act, Luck Snowball, Lenny Roth and Don Weatherburn, July 2010, Appendix 1

In 2013 a far more streamlined Bail Act commenced. It introduced the concept of an unacceptable risk test. It was a relatively simple Act to understand, in fact it seemed a little too simple. There were no presumptions against bail and no show cause provisions. There was only an exceptional circumstances test for CCA appeals.[2] The Bail Act (2013) Act commenced on 20 May 2014.

A review of the Act was commissioned and in August 2014 the NSW government announced that they would tighten bail laws.

In an article on ABC online titled “Bail laws toughened in NSW to hold defendants deemed 'unacceptable risk”, it was stated:

> *“In the case of serious offences, the onus would shift to the defendant to prove they should be granted bail, NSW Attorney-General Brad Hazzard said.*
> *"If they can't actually show cause, they will stay behind bars," he said. "There is no greater concern for the community than alleged offenders on serious offences still walking free around the community."* [3]

The Bail Amendment Act 2014 commenced on 28 January 2015. It introduced the concept of a show cause test. It also included new factors to be taken into account under Section 18. Section 18 contains the only factors that the court is allowed to take into account in determining if there is an unacceptable risk. From a practical perspective, the show cause test is for all intents and purposes a similar provision to the presumption against bail test that existed under the previous legislation. That is, for certain prescribed offences or scenarios, it is going to be difficult to obtain bail, as it was under the previous Act.

Further changes recommended by the Hatzistergos Review commenced on 6 December 2016. These changes form the basis for this paper.

[2] contained in Section 22 of the Bail Act 2013

[3] http://www.abc.net.au/news/2014-08-05/nsw-government-tightens-bail-laws-for-serious-offences/5649216

The changes can be divided into the following categories:

1. **Pre-release conditions to Rehabilitation Facilities**

BAIL ACT 2013 - SECTION 28

Bail condition can impose accommodation requirements

28 Bail condition can impose accommodation requirements

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

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

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

(a1) for the purpose of enabling the accused person to be admitted to a residential rehabilitation facility for treatment on the person's release on bail, or

(b) in the circumstances authorised by the regulations.

(4) The court responsible for hearing bail proceedings must ensure that, if an accommodation requirement is imposed in respect of a child, the matter is re-listed for further hearing at least every 2 days until the accommodation requirement is complied with.

(5) The court may direct any officer of a Division of the Government Service to provide information about the action being taken to secure suitable arrangements for accommodation of an accused person.

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

The court can also impose the following types of bail condition (conduct requirements):
(a) requiring the accused person to reside at the relevant accommodation while at liberty on bail,

(b) if the accommodation requirement is for the purpose of enabling the accused person to be admitted to a residential rehabilitation facility, requiring the accused person to be accompanied by a person specified by the court to that facility on release on bail.

A bail authority can now impose a 'pre-release' condition under section 28 of the Act. It allows a condition to be imposed so an accused can be released on bail to a rehabilitation facility at a future date. The absence of this condition in the past (or the lack of power) caused numerous difficulties. It was not such a difficulty in the Local Court because matters could be listed at short notice when beds in rehab became available. However it was particularly difficult in the Supreme Court for applicants seeking bail to rehab after their court date. This amendment makes it possible to set a date for release in the future and can name a person who is to accompany the accused on release.

An example of proposed bail conditions to rehab would read:

1. *He is to be of good behaviour.*
2. *On 1 April 2017 the applicant is to travel directly from the correctional centre from which he is to the Calvary Riverina Drug and Alcohol Centre in Wagga Wagga, New South Wales.*
3. *On 1 April 2017 he is to travel from the correctional centre from which he is to be released on bail in the company of xxxxxxx who must be in attendance at the correctional centre before the applicant is to be released.*
4. *The applicant is to remain at that centre until either his completion of an appropriate rehabilitation program, his discharge from the programme or further order of the court.*
5. *He is to undertake a course of rehabilitation at the Calvary Riverina Drug and Alcohol Centre.*
6. *He is to obey any reasonable direction given by any staff member of the Calvary Riverina Drug and Alcohol Centre.*
7. *The applicant is not to take any illegal or prescription drugs except for a drug lawfully prescribed by a medical practitioner.*
8. *He is not to approach or communicate, or attempt to make contact with in any way, any civilian nominated in the briefs of evidence assembled by the Crown as a witness for the Crown.*
9. *Any breach of any condition of this bail is to be regarded as an automatic revocation of it rendering the applicant liable to arrest by any NSW Police Officer.*

2. Changes to the 'show cause' test

BAIL ACT 2013 - SECTION 16B

Offences to which the show cause requirement applies

16B Offences to which the show cause requirement applies

(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 Weapons Prohibition Act 1998 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 Commonwealth Criminal Code 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,

(l) a serious indictable offence that is committed by an accused person while the person is the subject of a warrant authorising the arrest of the person issued under:

(i) this Act, or

(ii) Part 7 of the Crimes (Administration of Sentences) Act 1999 , or

(iii) the Criminal Procedure Act 1986 , or

(iv) the Crimes (Sentencing Procedure) Act 1999 .

(2) In this section, a reference to the facts or circumstances of an offence includes a reference to the alleged facts or circumstances of an offence.

(3)In this section:

***"firearm"** ,*
***"prohibited firearm"** and*
***"pistol"** , and*
***"use"** ,*

"acquire" *,*
"supply" *or*
"possession" *of a firearm, have the same meanings as in the Firearms Act 1996 .*

"prohibited weapon" *and*
"military-style weapon" *, and*
"use" *,*
"buy" *,*
"sell" *,*
"manufacture" *or*
"possession" *of a prohibited weapon, have the same meanings as in the Weapons Prohibition Act 1998 .*

"serious indictable offence" *has the same meaning as in the Crimes Act 1900 .*

"serious personal violence offence" *means:*

(a) an offence under Part 3 of the Crimes Act 1900 that is punishable by imprisonment for a term of 14 years or more, or

(b) an offence under a law of the Commonwealth, another State or Territory or any other jurisdiction that is similar to an offence under that Part.

The show cause test has been extended to include the following circumstances where an accused is:

- Charged with a serious indictable offence committed while being subject to an arrest warrant or revocation of parole warrant (this is consistent with the existing provisions for offences committed on bail or parole).[4]

This amendment closed what had been a loophole in the legislation. Prior to this change, if a person:

- was on bail for an offence
- did not attend court, and a warrant was issued by the court due to non attendance (meaning the person was no longer on bail)
- committed a fresh serious indictable offence,

The person would **not** be subject to the show cause provisions.

Since this amendment a significant issue has arisen. That is, if you don't attend court for an offence (and a warrant is issued) that you were never subject to bail for and you commit a serious

[4] Powers relating arrest warrants in the Criminal Procedure Act are found at Part 4 commencing with Section 235. Further, section 312 of the Criminal Procedure Act deals with the powers of Courts when a person is arrested under bench warrants. Powers relating to warrant being issued under the Crimes Sentencing Procedure Act for breach of bonds is found at Section 98. There is also a reference to warrants in section 96 of the Bail Act. Section 83(3) of the Bail Act also gives the Court power to issue an arrest warrant or summons if an application for discharge of liability is made and the person granted bail is not before the Court. Section 77(1)(f) of the Bail Act gives police the power to apply to an authorised Justice for a warrant to arrest the person. Section 68 (2)(a) gives the Local Court power to hear a release application if a person is arrested under a bench warrant. Section 43(4) states a police officer cannot grant bail or release a person if the person has been arrested under a warrant to bring the person before a court for sentencing.

indictable offence, show cause will apply. This amendment also extends to the call up of bonds where a warrant is issued.

Here is an example of a matter that I had recently:

> A client was arrested for a serious indictable offence that occurred at 4pm. It was show cause because at the time of this fresh offence he was subject to an arrest warrant. The arrest warrant had been issued by the Local Court for a breach of bond at 9am that same day.

It would seem that this amendment was a logical change to close that loop hole. It has however caused an unexpected outcome which although problematic is often easily overcome. The court often finds show cause is overcome by the mere fact that this person was previously not on bail for the original offence. There is a whole separate issue in relation to the unacceptable risk test in this situation however.

A further change to Section 16B is to the definition of a "serious indictable offence". It has been changed to include circumstances where a person:

- Has committed a serious personal violence offence interstate (where the offence is punishable by imprisonment for a term of 14 years or more, regardless of where it was committed)

Previously this definition only included NSW offences and this clarifies the position that interstate offences are included. This is a completely logical amendment.

3. Changes to the unacceptable risk test

BAIL ACT 2013 - SECTION 18

Matters to be considered as part of assessment

18 Matters to be considered as part of assessment

(1) A bail authority is to consider the following matters, and only the following matters, in an assessment of bail concerns under this Division:
(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 any of the following:
(i) bail acknowledgments,

(ii) bail conditions,

(iii) apprehended violence orders,

(iv) parole orders,

(v) good behaviour bonds,

(vi) intensive correction orders,

(vii) home detention orders,

(viii) community service orders,

(ix) non-association and place restriction orders,

(x) supervision orders,

(f1) if the bail authority is making the assessment of bail concerns because the accused person has failed or was about to fail to comply with a bail acknowledgment or a bail condition, any warnings issued to the accused person by police officers or bail authorities regarding non-compliance with bail acknowledgments or bail conditions,

(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,

(i1) if the accused person has been convicted of the offence, but not yet sentenced, the likelihood of a custodial sentence being imposed,

(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,

(q) whether the accused person has any associations with a terrorist organisation (within the meaning of Division 102 of Part 5.3 of the Commonwealth Criminal Code),

(r) whether the accused person has made statements or carried out activities advocating support for terrorist acts or violent extremism,

(s) whether the accused person has any associations or affiliation with any persons or groups advocating support for terrorist acts or violent extremism.

(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.

The amendments now extend the number of factors that the Court is entitled to take into account when assessing bail concerns. The factors now included in the assessment of the bail concerns under section 18 are:

- The accused history of compliance or non-compliance with intensive correctional orders, home detention orders, community service orders, non-association and place restriction orders.
- If there were any previous warnings given to the accused with respect to non-compliance with bail conditions or acknowledgements where the bail authority is making an assessment of bail concerns because the accused person has failed or was about to fail to comply with a bail acknowledgment or condition
- The likelihood of a custodial penalty being imposed if the accused is convicted of the offence but not yet sentenced
- Any associations with terrorist organisations and support for, or associations with others who support, terrorist acts or violent extremism.

In the assessment of bail concerns the court is only entitled to take into factors outlined in section 18. In my opinion, these additional factors have had a negative impact on the prospects of release for many applicants.

The addition of the terrorism considerations is strategic to make bail for those charged with those offences more difficult. I will discuss later in this paper at length the introduction of the exceptional circumstances test for terrorism matters. If an applicant for bail manages to overcome this test and the court turns to the section 18 factors, having specific provisions for terrorism in section 18 will make the application for release more difficult.

4. Bail decisions from a hospital

BAIL ACT 2013 - SECTION 43

Police power to make bail decision

43 Police power to make bail decision

(1) A police officer may make a bail decision for an offence if the person accused of the offence is present at a police station and the officer is:
(a) a police officer of or above the rank of sergeant and present at the police station, or

(b) for the time being in charge of the police station.

(1A) A police officer of or above the rank of sergeant at a hospital may make a bail decision for an offence if:
(a) the person accused of the offence is present at the hospital to receive treatment, and

(b) in the opinion of the police officer, it is not reasonable to take the person to a police station due to the person's incapacity or illness.

(2) The police officer may:
(a) release the person without bail, or

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

(c) refuse bail.

(3) A police officer cannot make a bail decision if:
(a) a bail decision for the offence has been made by a court or authorised justice, or

(b) the accused person has already made a first appearance for the offence and bail has been dispensed with.

(4) A police officer cannot grant bail or release a person without bail if the accused person has been arrested under a warrant to bring the person before a court for sentencing.

(5) Despite subsection (4), a police officer may grant bail to a person arrested as referred to in that subsection if the police officer is satisfied that exceptional circumstances justify the grant of bail.

This amendment to section 43 now allows a police officer of or above the rank of sergeant to make a bail decision at a hospital if it is not reasonable to take the person to a police station due to incapacity or illness. This removes the need to have unnecessary bedside bail hearings when the accused would have been granted bail at the police station had they not been in hospital. Bedside bail hearings are often complicated to facilitate. Anything that can reduce the number of these hearings is of great benefit to all parties involved.

5. Amendment to Section 78

An amendment was made to section 78. Previously this section contained subsection (2) which read:

> *(2) The bail authority may revoke or refuse bail only if satisfied that:*
> *(a) the person has failed or was about to fail to comply with a bail acknowledgment or bail conditions, and*
>
> *(b) having considered all possible alternatives, the decision to refuse bail is justified.*

This section has now been repealed and the amended section states:

BAIL ACT 2013 - SECTION 78

Powers of bail authorities

78 Powers of bail authorities

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

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

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

Note : The power to vary a bail decision includes a power to revoke the bail decision and substitute a new bail decision-section 4 (3) (a).

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

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

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

(6) In this section, a

"relevant bail authority" means:

(a) an authorised justice, or

(b) the Local Court, or

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

The presence of subsection 78(2) in the Act provided some confusion.

It was stated in the Review of the Bail Act[5] that the reason for recommending to delete this section was:

> *"so as to make clear to bail authorities that the show cause requirement and unacceptable risk test need to be reconsidered in a way unencumbered by this consideration once a breach is established."*

By removing this subsection it clarifies the position that the show cause and unacceptable risk test applies where a breach has been established, as it does for any other bail decision. The words "consider all possible alternatives" was not consistent with how bail determinations are to be made under the act.

6. Bail and terrorism suspects

BAIL ACT 2013 - SECTION 22A

Limitation on power to release in relation to terrorism related offences

22A Limitation on power to release in relation to terrorism related offences

(1) Despite anything to the contrary in this Act, a bail authority must, unless it is established that exceptional circumstances exist, refuse bail for:
(a) an offence under section 310J of the Crimes Act 1900 , or

(b) any other offence for which a custodial sentence may be imposed, if the bail authority is satisfied that the accused person:
(i) before being charged with that offence, has been charged with a Commonwealth terrorism offence or an offence under section 310J of the Crimes Act 1900 and the proceedings relating to the offence have not concluded, or

(ii) has previously been convicted of a Commonwealth terrorism offence or an offence under section 310J of the Crimes Act 1900 , or

(iii) is the subject of a control order made under Part 5.3 of the Commonwealth Criminal Code.

(2) If the offence is a show cause offence, the requirement that the accused person establish that exceptional circumstances exist that justify a decision to grant bail or dispense with bail applies instead of the requirement that the accused person show cause why his or her detention is not justified.

(3) Subject to subsection (1), Division 2 (Unacceptable risk test-all offences) applies to a bail decision made by a bail authority under this section.

*(4) In this section, **"Commonwealth terrorism offence"** has the same meaning as **"terrorism offence"** has in the Crimes Act 1914 of the Commonwealth.*

[5] Review of the Bail Act 2013 by John Hatzistergos June 2015- Final Report at 237

CRIMES ACT 1900 - SECTION 310J

Membership of terrorist organisation

310J Membership of terrorist organisation

(1) A person commits an offence if:

(a) the person intentionally is a member of a terrorist organisation, and

(b) the organisation is a terrorist organisation, and

(c) the person knows the organisation is a terrorist organisation.

Maximum penalty: Imprisonment for 10 years.

(2) Subsection (1) does not apply if the person proves that he or she took all reasonable steps to cease to be a member of the organisation as soon as practicable after the person knew that the organisation was a terrorist organisation.

A new section 22A has been inserted into the Bail Act. This section relates to a new exceptional circumstances test for terrorism suspects and offences. It requires that bail be refused unless exceptional circumstances exist.

Under section 22A, an accused will be required to show exceptional circumstances if:

- They are charged with an offence under section 310J of the Crimes Act. This is relatively simple to understand.
- **Or any other offence for which a custodial sentence may be imposed** if the bail authority is satisfied of any of these three factors:
    1. prior to this fresh charge they had been **charged** with a commonwealth terrorism offence or under s310J and the **proceedings have yet to be concluded**, or
    2. have **previously** been **convicted** of a commonwealth terrorism offence or and offence under 310J, or
    3. **subject to a control order** made under 53 of the Commonwealth Criminal Code.

The previous Bail Act (1978) had an exceptional circumstances test under section 9C and 9D.[6] Decisions under these old provisions are still relevant and have been referred to in more recent decisions in this state. The following examples give an outline of what the Courts considered and what parliament expected the court to consider under the 1978 Act:

> *When introducing these reforms, the then Minister for Justice, the Hon. John Hatzistergos MLC, said:*
>
> *Exceptional circumstances will be left to the courts to decide on an individual, case-by-case basis. However, it might include cases involving a battered wife, or a strong self-defence case or a weak prosecution case. It might also include a case in which the defendant is in urgent need of medical attention or has an intellectual disability, or a case*

[6] Sections 9C and 9D related to murder and serious personal violence repeat offenders and these were inserted into the 1978 Act on 7 July 2003

in which the court is satisfied that the offender poses no further threat to the victim or the community.

The 'exceptional circumstances' requirement has been discussed by the Supreme Court. In R v Young [2006] NSWSC 1499, Johnson J stated (at para. 20):

...exceptional circumstances may be found in a case by the coincidence of a number of features. These can include features subjective to the particular applicant, features which bear upon the nature of the alleged offence and features which emphasise that, absent this particular test, the applicant is otherwise a person who will answer bail."[7]

It is also important to consider that for terrorism charges, there has already been an exceptional circumstances test for bail under Section 15AA of the Commonwealth Crimes Act 1914. The new changes to the Bail Act simply add another offence and various scenarios where exceptional circumstances apply to the grant of bail.

It must also be noted that this provision applies to juveniles as does the commonwealth exceptional circumstances test contained in section 15AA.[8]

CRIMES ACT 1914 - SECTION 15AA

Bail not to be granted in certain cases

(1) Despite any other law of the Commonwealth, a bail authority must not grant bail to a person (the ***defendant*** *) charged with, or convicted of, an offence covered by subsection (2) unless the bail authority is satisfied that exceptional circumstances exist to justify bail.*

(2) This subsection covers:

(a) a terrorism offence (other than an offence against section 102.8 of the Criminal Code); and

(b) an offence against a law of the Commonwealth, if:

(i) a physical element of the offence is that the defendant engaged in conduct that caused the death of a person; and

(ii) the fault element for that physical element is that the defendant intentionally engaged in that conduct (whether or not the defendant intended to cause the death, or knew or was reckless as to whether the conduct would result in the death); and

(c) an offence against a provision of Subdivision C of Division 80 or Division 91 of the Criminal Code , or against section 24AA of this Act, if:

(i) the death of a person is alleged to have been caused by conduct that is a physical element of the offence; or

[7] Bail Presumptions and Risk of Bail Refusal: Analysis of the NSW Bail Act, Luck Snowball, Lenny Roth and Don Weatherburn, July 2010, page 3.

[8] Unlike show cause where Section 16A (3) states that show cause does not apply if the person was under 18 years at the time of the offence.

(ii) conduct that is a physical element of the offence carried a substantial risk of causing the death of a person; and

(d) an ancillary offence against a provision of Subdivision C of Division 80 or Division 91 of the Criminal Code , or against section 24AA of this Act, if, had the defendant engaged in conduct that is a physical element of the primary offence to which the ancillary offence relates, there would have been a substantial risk that the conduct would have caused the death of a person.

(3) To avoid doubt, the express reference in paragraph (2)(d) to an ancillary offence does not imply that references in paragraphs (2)(a), (b) or (c) to an offence do not include references to ancillary offences.

(3A) Despite any law of the Commonwealth, the Director of Public Prosecutions or the defendant may appeal against a decision of a bail authority:

(a) to grant bail to a person charged with or convicted of an offence covered by subsection (2) on the basis that the bail authority is satisfied that exceptional circumstances exist; or

(b) to refuse to grant bail to a person charged with or convicted of an offence covered by subsection (2) on the basis that the bail authority is not satisfied that exceptional circumstances exist.

(3B) An appeal under subsection (3A):

(a) may be made to a court that would ordinarily have jurisdiction to hear and determine appeals (however described) from directions, orders or judgments of the bail authority referred to in subsection (3A), whether the jurisdiction is in respect of appeals relating to bail or appeals relating to other matters; and

(b) is to be made in accordance with the rules or procedures (if any) applicable under a law of the Commonwealth, a State or a Territory in relation to the exercise of such jurisdiction.

(3C) If:

(a) a bail authority decides to grant bail to a person charged with or convicted of an offence covered by subsection (2); and

(b) immediately after the decision is made, the Director of Public Prosecutions notifies the bail authority that he or she intends to appeal against the decision under subsection (3A);

the decision to grant bail is stayed with effect from the time of the notification.

(3D) A stay under subsection (3C) ends:

(a) when a decision on the appeal is made; or

(b) when the Director of Public Prosecutions notifies:

(i) the bail authority; or

(ii) if an appeal has already been instituted in a court--the court;

that he or she does not intend to proceed with the appeal; or

(c) 72 hours after the stay comes into effect;

whichever occurs first.

(4) To avoid doubt, except as provided by subsections (1), (3A), (3B), (3C) and (3D), this section does not affect the operation of a law of a State or a Territory.

Note: These provisions indirectly affect laws of the States and Territories because they affect section 68 of the Judiciary Act 1903 .

(5) In this section:

***"ancillary offence** has the meaning given in the Criminal Code" .*

***"primary offence** has the meaning given in the Criminal Code" .*

To better understand what Parliament intended when introducing Section 22A, the second reading speech states:

> *Clause [4] will insert a new test so that bail must be refused unless it is established that exceptional circumstances exist. It will apply when a person is charged with being a member of a terrorist organisation under section 310J of the NSW Crimes Act 1900.*
> *The new test will also apply to an accused person charged with any offence carrying a custodial penalty in three circumstances. The first is if the accused has already been charged with a terrorism offence under Commonwealth law as defined in the Commonwealth Crimes Act 1914, or section 310J of the NSW Crimes Act 1900, and the proceedings relating to that offence have not concluded. The second is if the accused person has a previous conviction for a Commonwealth or New South Wales terrorism offence. The third is if the accused is subject to a control order under the Commonwealth Criminal Code.*
> *The new test provides for a higher threshold than the existing "show cause" test so that bail will only be granted when the circumstances are exceptional.*
> *A similar test applies under section 15AA of the Commonwealth Crimes Act 1914 so that bail must not be granted for a Commonwealth terrorism offence unless exceptional circumstances exist to justify bail. While the new test will be applied on a case-by-case basis, New South Wales courts may find guidance in decisions under the Commonwealth provision.*
> *Clause [4] also clarifies that if the offence is also a "show cause" offence, the requirement that the accused person establish exceptional circumstances will apply instead of the "show cause" test. If the person is able to establish that exceptional circumstances exist, the bail authority must then go on to apply the unacceptable risk test.* [9]

The benefit of this provision already existing in the Commonwealth Act, is we already have a line of authorities. These give us a specific indication of what the courts have found to be exceptional in terrorism matters. There have not been any decisions that I have observed

[9] Terrorism (Police Powers) Amendment Bill 2015 and Bail Amendment Bill 2015, Second Reading Speech, 20 October 2015 at 51

related to the new section 22A provisions. As the test for both the NSW and Commonwealth provisions are identical, the Commonwealth decisions are directly relevant.

I will focus on three 2016 NSW bail decisions.

1. AB v R (2016) NSWCCA 191.
2. R v Naizmand (2016) NSWSC 836
3. R v NK (2016) NSWSC 498

1. AB v R (Cth) (2016) NSWCCA 191

This decision was a CCA release application after a refusal of bail in the Supreme Court by Justice Beech-Jones. The main reason for this case being considered is that it gives a very clear idea that the exceptional circumstances test for terrorism charges is one that is not easily overcome. This case had an extremely compelling set of subjective circumstances combined with a weak crown case. In this case exceptional circumstances were overcome but the application failed at the unacceptable risk test.

Helpfully at 15 in this decision there is a summary of what the courts have previously observed in relation to s15AA:

> 15. *Although "exceptional circumstances" is not defined by the Act, the applicant relied upon the conclusions of Hall J in R v NK [2016] NSWSC 498 at [26] where his Honour summarised the principles derived from relevant case law in relation to s 15AA of the Crimes Act.*
>
> *(i) The section creates a rebuttal presumption against bail being granted but does not prohibit bail.*
>
> *(ii) The presumption is only rebutted if the applicant establishes that exceptional circumstances exist to justify bail.*
>
> *(iii) The word "exceptional" imposes a high test/extremely high hurdle.*
>
> *(iv) The concept of exceptional circumstances is nonetheless flexible and may be constituted by a combination of matters taken together.*
>
> *(v) The combination of features may include features that are subjective to the applicant; features which bear on the nature of the alleged offence and whether the applicant will answer bail.*

Further the Court stated at 16:

> 16. *The applicant also relied upon the observations of Levine J in R v Hantis [2004] NSWSC 153 at [2] where his Honour highlighted the second reading speech of the Bail Amendment legislation in 2003:*
>
> *" Exceptional circumstances will be left to the Court to decide on an individual case by case basis. However, as a general guide it might include cases including a battered wife or a strong self-defence case or a weak*

prosecution case. It might also include a case in which the defendant is in urgent need of medical attention or who has an intellectual disability or a case in which the Court is satisfied that the offender poses no threat to the victim or the community."

When you consider in detail the subjective features of this applicant, in my view, it becomes very clear that there were very compelling subjective circumstances. The court stated what was submitted on exceptional circumstances at 17:

17.AB submitted that the following matters in combination established exceptional circumstances:

(i) A weak prosecution case.

(ii) His age.

(iii) He was born in Australia and has lived here all his life.

(iv) No prior criminal record.

(v) A criminal history limited to a caution under the Young Offenders Act 1997 (NSW) for assault.

(vi) Strong ties with the local community.

(vii) Never been on bail before.

(viii) No history of non-compliance on bail.

(ix) No criminal associations.

(x) No links to any terrorist, political, religious or ideological cause.

(xi) A diagnosis of a mild cognitive disability and a major depressive disorder and Aspergers' Syndrome.

(xii) He has been in custody since 14 June 2016 and will likely spend a lengthy time in custody before trial. (the release application was heard in the CCA on 15 August 2016)

(xiii) The presumption of innocence and the need to be at liberty to prepare his defence.

(xiv) The availability of a substantial surety in the amount of $300,000.

(xv) A willingness to accept strict conditions, including the imposition of an electronic monitoring ankle bracelet.

In terms of the strength of the crown case it was noted:

31. I agree with the applicant's submission that the CDPP case insofar as it relies upon s 101.6(1) and 474.14(2) of the Criminal Code is not strong. It is clear from the wording of the sections that any deficiencies in the evidence supporting the charge under s 101.6(1) affect the charge under s 474.14(2). The highest the

CDPP can put its case is to say that "the ideological or political purpose for the attacks was to raise awareness of mental health and suicide awareness". If that was the intention behind the applicant's conduct, it is doubtful that it would amount to "advancing a political, religious or ideological cause".

32. When one has regard to the relative weakness of the Crown case in relation to those sections, and the other matters relied upon by the applicant to establish exceptional circumstances, I am satisfied that exceptional circumstances exist and that the real issue before the Court is whether the applicant can satisfy the risk assessment process found within Division 2 of Part 3 of the Act. Subsection 19(1) provides that bail must be refused if the court is satisfied "on the basis of an assessment of bail concerns ... that there is an unacceptable risk".

On the question of this applicant overcoming the unacceptable risk test, Justice Beech-Jones in this initial refusal of bail in the Supreme Court clearly outlined his reasons for refusal of bail: (which was ultimately confirmed in the CCA by the refusal of bail in that Court)

AB v DPP (Cth) (2016) NSWSC 1042 at 52- 55

52. *The remaining two suggested bail concerns, namely, committing a serious offence and endangering the safety of the community, can be considered together. There is no doubt the Facebook posts raise this concern but does an assessment of that concern give rise to an unacceptable risk? I have already referred to Dr Dayalan's assessment that it was "unlikely" that AB intended to give effect to his threats. Although the CDPP disputes that assessment I accept it. It accords with the other matters that I have identified in [25]. However an acceptance that it is "unlikely" that AB intended to give effect to his threats must leave allowance for a realistic possibility that AB had that intention.*

53. On any view, over a period of time AB ruminated about an attack on a crowded public area that is hard to secure. This form of attack is one that could potentially be carried out with minimal or no assistance, using an easily available weapon, in a short period of time and which could inflict significant harm on the community. If AB's ruminations are accepted at face value, which I do not but cannot positively exclude, then it follows that he was prepared to carry out such an attack without any intention of surviving. AB has a history of suicidal ideation.

54. The submissions made on AB's behalf contended that the risk that arises from these concerns could be mitigated by the imposition of bail conditions, including conditions equivalent to the imposition of house arrest at his parent's home. I have seriously considered the bail proposal. I have no doubt that AB's parents will do everything they can to monitor their son if he is released. No reasonable person could fail to sympathise with the anguish they must be enduring. However, I am driven to the conclusion that the risk posed by a nihilistic attack on people congregating in a public place cannot

be adequately mitigated, even by a form of strict house arrest. Realistically someone willing to perpetrate that form of attack would be able to leave their house and inflict harm even if the authorities are immediately informed that they have absconded. As AB stated "I can get a real long sharp knife and just cut up and kill as many people that I can under a minute."

55. *One aspect of the application of a test of unacceptable risk is an assessment of the consequences of the relevant risk materialising together with the likelihood of it materialising. The assessment of whether the risk is unacceptable is also informed by the deleterious effect of refusing bail on the accused person, which in this case is significant. The acute difficulty for AB on this application is that, while the likelihood of him giving effect to his threats is relatively low, the consequences if he did so are likely to be horrific. As for the potential mitigating effects of the proposed bails conditions, in the events that transpired, AB identified a form of attack that is not addressed by even the strict bail conditions that are proposed. Even allowing for the effects on him of detention, I am satisfied that there is an unacceptable risk of AB committing a serious offence and endangering the safety of the community. It follows that bail must be refused. I so order.*

This case shows that it is possible to overcome the exceptional circumstances test. However, I could not think of a more powerful subjective case than what was presented in AB. The other point to take away is that overcoming the exceptional circumstances test isn't the end of it. The applicant failed on the unacceptable risk test. Overcoming the Section 17 (2) bail concerns[10] would be exceedingly difficult in these types of matters.

2. R v Naizmand (2016) NSWSC 836

This case involved Section 15AA and the exceptional circumstances test was not overcome.

As with all bail decisions, the facts are an important starting point when considering how the court reached its decision.

This applicant was subject to a control order and a bond as a result of conviction for an offence where he travelled to Dubai on his brother's passport. These control orders are only issued in circumstances where a judicial officer has been satisfied that such an order is necessary to protect the public from a terrorist act. The behaviour amounting to the breach of the control order was:

- Between 11 January 2016 and 24 February 2016 the applicant accessed electronic media depicting or describing propaganda or promotional material for a terrorist organisation, or

[10] In assessing bail concerns the court must consider the four concerns states in Section 17(2) (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.

activities of or associated with Islamic State, or explosives, suicide attacks, bombings or terrorist attacks.

The applicant relied upon a number of factors as to why exceptional circumstances should be overcome:

1. That the charges were not serious
2. Delay- arrested on 29 February 2016- release application on 27 June 2016
3. Custodial Conditions- maximum security at Goulburn due to security classification
4. First time in custody
5. Subjective circumstances- such as married/difficulties with family visiting/applicant being the major source of family's income

The Court gave consideration to the factors submitted on behalf of the accused and observed:

> *"40: The applicant's custodial conditions are therefore not unique. They are on the contrary widespread and commonplace. They are not exceptional. As I have indicated, the question is not whether some members of the community might take exception to the applicant's restricted custodial circumstances. The question is whether or not in the wider population of remand prisoners facing similar charges the applicant's custodial conditions alone or together with other factors amount to exceptional circumstances."*
>
> *41.The delay facing the applicant is also not in my opinion unique. Delays of the order potentially confronting the applicant as he awaits his trial are unfortunately quite common. Whereas a twelve or eighteen month delay on remand might in a different situation support a show cause requirement, it does not amount in my view to an exceptional circumstance of the type that the applicant must demonstrate here.*
>
> *42.Nor is the applicant's subjective case particularly unusual. It is regularly asserted in applications for bail that an applicant's family are suffering hardship because the principal breadwinner is unable to work to support them. So much is understandable and credible. It is not, however, exceptional. It is on the contrary a regular and predictable consequence of an inability to secure release on bail. Neither are deaths in families exceptional. I accept immediately that in the present case the death of the applicant's father-in-law will have placed significant added pressure upon his wife during his enforced absence. But that circumstance is clearly not exceptional.*
>
> *43.I am mindful that the applicant is only 21 years of age and that this is his first time in custody. Those are matters that weigh heavily in this case and serve to place the difficult custodial conditions to which he is exposed into a very particular context. I accept that the combined effect of the applicant's relative youth and relatively unremarkable criminal history are mismatched to incarceration as a suspected terrorism offender. I am once again unable to conclude that these things amount to exceptional circumstances. In the relatively limited experience of terrorism offences with which this country has had to deal, the treatment which the applicant is receiving whilst awaiting trial on remand is not out of the ordinary. The circumstances of his incarceration are not exceptional.*

44.Finally, the Crown case appears to me to be quite strong. In expressing that opinion I should hasten to observe that the evidence before me does not descend into the level of detail that would be necessary to form that opinion as a concluded view. I have assessed the apparent strength of the Crown case by reference to my understanding that the alleged breaches by the applicant will stand or fall upon the evidence derived from a phone or computer in his possession when the offending activities occurred. I accept that there may well be an exculpatory explanation for this electronic footprint, but I have no material touching that possibility and I am required in any event to take the Crown case at its highest. The combination of charges also suggests that the offending conduct was not isolated or accidental.

45.Even taking all of the matters upon which the applicant relies into consideration together, I remain satisfied that they do not amount to exceptional circumstances sufficient to justify a grant of bail."

3. R v NK (2016) NSWSC 498

The final example is where both the exceptional circumstances test and the unacceptable risk test were overcome and bail was granted.

This applicant was charged with intentionally collecting funds for a terrorist organisation. A far different factual scenario to the matter of AB discussed previously. There was a powerful subjective case presented to court, not to dissimilar to decision in AB. The factors relied upon for exceptional circumstances were stated at 16:

"On behalf of the applicant it was additionally submitted:

(1) The age of the applicant is a significant consideration and may be taken into account in combination with other factors.

(2) The applicant has not been charged with any previous offences.

(3) The applicant has been assessed by Mr Borenstein as suffering from a chronic Adjustment Disorder with Mixed Anxiety and Depressed Mood.

(4) An extended period of incarceration of between 18 months to 2 years whilst the applicant awaits the finalisation of the proceedings would, in Mr Borenstein's opinion, impact significantly on her psychological health, possibly leading to a major depressive episode impacting on her ability to instruct legal counsel.

(5) The applicant was born in New South Wales and has lived in this State all her life. She is an Australian citizen. She has always resided with her family which includes her mother and her sister.

(6) The applicant has a significant number of family members in the community.

(7) One of the applicant's aunts is willing to provide surety in the amount of $500,000. This, it was submitted, would provide the Court with confidence that the applicant would comply with any bail conditions.

(8) The applicant is willing to be subjected to strict conditions including the imposition of electronic monitoring bracelet in the form of an ankle bracelet.

(9) It was submitted that there are no unacceptable risks and that bail conditions can mitigate any risks as raised by the Crown.

(10) The imposition of substantial surety would address any concern as to the risk of the applicant absconding.

(11) The applicant does not possess a passport and she would comply with any condition that she is not to apply for any travel documents.

(12) The applicant is prepared to be the subject of a condition that confines her to what was referred to as 'house arrest'. The applicant would be residing with her aunt who would provide full-time supervision.

(13) The fact that the applicant has strong family ties in the community is a disincentive for any motivation of absconding.

(14) The fact that the applicant has an unblemished history with no convictions is a matter that would mitigate any bail concerns."

In relation to youth being a factor relied upon by the applicant, the Crown attempted to make a submission that s15AA does not make a distinction between an adult and a child. The Crown stated that the section commences with the words "Despite any other law of the Commonwealth"

The Court rejected this reasoning and considered that the age of a person when charged is a relevant circumstance to be taken into account for exceptional circumstances. It was this factor alone that amounted to exceptional circumstances in this case, as noted at 49 and 50:

"49.The observations made by Mr Borenstein, including the opinion he has expressed as to the deleterious effects of detention upon the applicant, in my assessment, provides an additional element or factor supportive of a finding, which I make, of exceptional circumstances under s 15AA(1). However, even in the absence of such evidence, for the reasons earlier discussed, I consider that the vulnerability arising from the youth of the applicant did exist in this case and independently provides the basis for the finding I have made as to the existence of exceptional circumstances. Such a finding, in my opinion, is not precluded, upon the facts of this case, by the matters raised in support of the submission as to the strength of the Crown case.

50.I have considered the other matters advanced in support of the application made (including the question of delay and time in custody). However, upon consideration, I do not consider that such matters are such as to (beyond what I have earlier stated as to Mr Borenstein's evidence) assist in the determination of circumstances under s 15AA(1)."

In my view for any matters that involve section 15AA or section 22A there must be a compelling list of subjective circumstances. There also needs to be a strong focus on the strength of the case and delays. All these factors would be clearly relevant to overcome the hurdle of exceptional circumstances. If this exceptional circumstances hurdle is overcome, the other real issue is overcoming the unacceptable risk test. If the allegations include a threat or evidence or

plan to commit a terrorist act, it is going to be an almost insurmountable task to overcome this test. Practitioners will need to focus on the bail proposal and make it as restrictive as possible. For these types of matters electronic monitoring would almost inevitably need to be included or at least considered.

Electronic Monitoring

Electronic monitoring is an alternate condition of bail that is presented in a very limited number of release applications. It is a condition that requires a significant amount of organisation and cost. The costs associated are not covered by the Courts. It is up to the applicant to both organise and fund. The estimated cost is a non-refundable/paid in advance fee of $25,000 to cover the lease of the equipment and monitoring. This fee covers 12 months of monitoring and if arrested and taken back into custody the fee is lost. The company monitoring as well as the OIC is notified of any breaches of the conditions as set up in the parameters by the conditions of bail. The OIC is also provided with a daily report with the movements of the person during that day.

I have included the conditions of bail that where imposed in the matter of *R v Xi (2015) NSWSC 1575* at 51: as an example of conditions involving electronic monitoring.

> *Bail is granted on the following conditions:*
>
> *(1) The applicant is to be of good behaviour.*
>
> *(2) The applicant is to appear at the Central Local Court on 12 November 2015 and on such date thereafter as required.*
>
> *(3) The applicant is to report to the [REDACTED] Police Station daily between the hours of 9am and 5pm.*
>
> *(4) The applicant is to live at [REDACTED] with his parents and son.*
>
> *(5) Curfew: The applicant is not to be absent from [REDACTED] except for the following purposes:*
>
> *(a) To attend medical appointments in relation to himself, his parents or his son and on such occasions he must be in the company of his father or his mother.*
>
> *(b) To report to police.*
>
> *(c) To attend conference with his lawyers.*
>
> *(d) To attend Court.*
>
> *(6) Enforcement of curfew condition (s 30 and on the application of the prosecutor): The applicant is to present himself at the front door of the premises at [REDACTED] to confirm compliance with the curfew condition. Such direction may only be given by a police officer who believes on reasonable grounds that it is necessary to do so, having regard to the rights of other occupants of the premises to peace and privacy.*

*(7) ** The applicant is to surrender his passport to the Central Local Court prior to his release from custody.*

(8) The applicant is not to apply for any new passport or travel document.

(9) The applicant is not to go within 1 km of any international point of departure from the Commonwealth.

(10) The applicant is not to go further than 20 km from [REDACTED] including for the purposes nominated in the curfew condition (condition 5).

*(11) ** The applicant is to enter into an agreement (without security) under which he agrees to forfeit the sum of $15,000 if he fails to appear in accordance with the bail acknowledgment.*

*(12) ** One acceptable person is to deposit the sum of $150,000 and agree to forfeit it if the applicant fails to appear in accordance with the bail acknowledgment.*

(13) Electronic monitoring:(a) Within 6 hours of his release and at his own expense, the applicant is to be fitted with an electronic monitoring system by 3M Electronic Monitoring calibrated to monitor his compliance with the curfew condition (5) and conditions 9 and 10. The applicant is to allow access to the premises at [REDACTED] to technicians of 3M Electronic Monitoring

(b) The applicant is not to remove the electronic monitoring device except by arrangement with 3M Electronic Monitoring.

(c) The applicant is to provide 3M Electronic Monitoring with any mobile telephone numbers or electronic email addresses nominated by the office of the Director of Public Prosecutions which is to be used if it is discovered that the applicant has breached the bail conditions.

(d) Within 24 hours of his release, the applicant is to provide evidence to the Office of the DPP or the Officer in Charge of the [REDACTED] Police Station of compliance with this condition.

(e) Within 24 hours of his release, the applicant is to provide the office of the DPP with a written undertaking by the director or manager of 3M Electronic Monitoring that they will notify the police and/or DPP of any breach of the bail conditions to which the electronic monitoring relates.

*Conditions 7, 11 and 12 (marked** with two asterisks) are pre-release requirements under the terms of s 29 Bail Act.*

Amendments from the Justice Portfolio Legislation (Miscellaneous Amendments) Bill 2016

Bail variations after an appearance in a higher court.

BAIL ACT 2013 - SECT 68

Limited powers when proceedings pending in another court

68 Limited powers when proceedings pending in another court

(1) The Local Court or an authorised justice cannot hear a bail application if:
(a) proceedings for the offence are pending in a court (other than the Local Court) and the accused person has made his or her first appearance before the court in those proceedings, or

(b) summary proceedings for the offence are pending in the Supreme Court, or

(c) the accused person has made his or her first appearance before the Supreme Court after being brought up by a writ of habeas corpus following summary conviction for the offence.

(2) Subsection (1) does not prevent the hearing of a release application in respect of a person if:
(a) the person is arrested under a bench warrant (as referred to in section 312 of the *Criminal Procedure Act 1986*), or

(b) the person's appearance is consequent on the making of an order under section 20 (1) of the *Children (Criminal Proceedings) Act 1987* (a provision that allows a court to remit an offence to the Children's Court for sentencing), or

(c) proceedings for the offence concerned are continued before a magistrate under section 104 of the *Criminal Procedure Act 1986* or section 8A (2) of the *Criminal Appeal Act 1912* .

(2A) Despite subsection (1) (a), the Local Court or an authorised justice may hear a variation application with the consent of the accused person and the prosecutor.

(3) The District Court or the Land and Environment Court cannot hear a bail application if:
(a) proceedings for the offence are pending in the Supreme Court or the Court of Criminal Appeal and the accused person has made his or her first appearance before the court in those proceedings, or

(b) the accused person has made his or her first appearance before the Supreme Court after being brought up by a writ of habeas corpus following summary conviction for the offence.

In late October 2016, prior to these recent amendments, an additional power was added by section 68 (2A) of the Act.[11] This allows the Local Court or an authorised justice to hear a variation application only by consent.

[11] This section was added in large bundle of amendments contained in the Justice Portfolio Legislation (Miscellaneous Amendments) Bill 2016

The second reading speech[12] states:

> "Item [4] of schedule 1.1 will allow the Local Court or authorised justice to hear a variation application to vary conditions of bail imposed by a higher court where the accused and prosecutor consent to the terms of the variation application."

The practical implication is, that bail can be varied in the Local Court after an accused has appeared in a higher court if it is by consent. The practical difficulty that we have found is that the Local Court has been reluctant to do this despite this power. It will be particularly helpful in regional areas as the Local Court is far more accessible than the higher Courts.

Prosecution may apply to the Court for a grant of Bail with conditions

BAIL ACT 2013 - SECTION 50

Prosecutor may make detention application

50 Prosecutor may make detention application

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

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

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

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

(c) refuse bail.

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

(b) vary the bail decision.

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

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

[12] Second reading speech for the Justice Portfolio Legislation (Miscellaneous Amendments) Bill 2016, 19 October 2016. Assented to on 25 October 2016.

Section 50 of the Act was amended[13] to add additional power for the prosecution to apply to the court for the grant of bail with conditions. The second reading speech[14] states the reasons for this:

> "Item [3] of schedule 1.1 will enable a prosecutor to apply for bail conditions to be imposed on a grant of bail to the accused. This amendment will avoid an unintended technicality requiring a prosecutor to first make a detention application before making submissions to the court in relation to bail conditions. The amendment will allow prosecutors to make variation applications where they are seeking conditional bail for people who have no current bail conditions—for example, where the prosecution was commenced by way of a future court attendance notice. This change will make bail proceedings more efficient."

Breaches of District Court and Supreme Court bails

BAIL ACT 2013 - SECT 78

Powers of bail authorities

78 Powers of bail authorities

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

(b) vary the bail decision that applies to the person.
Note : The power to vary a bail decision includes a power to revoke the bail decision and substitute a new bail decision- section 4 (3) (a).

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

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

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

(6) In this section, a
"relevant bail authority" means:
(a) an authorised justice, or

(b) the Local Court, or

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

The Local Court has the power to deal with breaches of bail from matters that are listed in the District or Supreme Court. This is not a recent change, however it is something that often presents itself. The power for the Local Court lies clearly in Section 78(1). This section states

[13] This section was amended by the Justice Portfolio Legislation (Miscellaneous Amendments) Bill 2016

[14] Second reading speech for the Justice Portfolio Legislation (Miscellaneous Amendments) Bill 2016, 19 October 2016. Assented to on 25 October 2016.

that the relevant bail authority (the definition in 78(6) includes the Local Court) can do one of two things:

1. Release the person to their original bail, or
2. Vary the bail decision. Vary includes revoke or substitute a new bail decision.

I have had instances where courts or prosecutors have tried to say that the Local Court has no power to hear the matter. Section 64 and section 68 is often raised and these sections outline the powers specific to the Local Court and the limited powers when proceedings are pending in another court.

The response to this is simply that Section 78 is clear and Section 60 states:

- This Part (part 6) does not limit the power of a court or authorised justice under Part 8 or 9.

Section 64 and 68 are contained in Part 6. Section 78 is contained in Part 8.

Variations of Supreme Court bail decisions

BAIL ACT 2013 - SECT 69

Limited powers when decision made by Supreme Court or Court of Criminal Appeal

69 Limited powers when decision made by Supreme Court or Court of Criminal Appeal

(1) The Local Court, the District Court or the Land and Environment Court (a **"relevant court"**) may hear a bail application for an offence when a bail decision has been made by the Supreme Court (however constituted) or the Court of Criminal Appeal only if:
(a) proceedings for the offence are pending in the relevant court, and

(b) the person appears before the relevant court in those proceedings, and

(c) the relevant court is satisfied that special facts or special circumstances justify the hearing of the bail application.

(2) This section has effect subject to any exceptions or other limitations prescribed by the regulations.

(3) This section does not prevent a court from hearing a detention application under Part 8.
Note : Part 8 permits bail to be revoked because of a failure or threatened failure to comply with a bail acknowledgment or bail conditions.

If your client's matter is still listed in the Local Court and a decision on bail has been made in the Supreme Court, you need to be aware of Section 69 (1). This section states that special facts or circumstances need to exist to justify the hearing of the bail application. Bail application is defined as a release application, detention application or variation application in the section 4 of the Act. However, Section 69(3) stipulates that this does not apply to the court hearing detention applications.

I have not seen any decisions on this particular point, they would generally be decisions of the Local Court. For some guidance you could look at special circumstances in the context of sentencing and this may assist you.

You can also look to Section 74 of the Bail Act and relevant decisions. Noting of course that Section 74 speaks only of "material information" and "circumstances relevant to the grant of bail". Section 69 is clearly a much higher test that what is contained in Section 74.

A recent decision on Section 74 is *R v BNS (2016) NSWSC 350*:

> ***Grounds for a further Bail Application***
>
> 39. *On the issue of whether there were grounds under s 74 of the Bail Act for hearing a further release application, senior counsel for the applicant submitted that the fact that the applicant's mother was willing to provide a surety of $1M as a condition of a grant of bail, compared to IW's offer to provide a surety of $50,000 on the previous application, constituted "material information relevant to the grant of bail … that was not presented to the Court in the previous application".*
>
> 40. *In addition, senior counsel for the applicant said that, in effect, the submissions which he was making were more thorough and covered a greater range of relevant matters:*
>
> > *"…[The] matters I seek to bring to your Honour's attention are … more numerous … and the final concluding remarks I would say more persuasive of the circumstance that both the show cause requirements of the Act and the assessment which inevitably leads to a consideration of risk and whether it is acceptable, has altered and significantly and persuasively."*
>
> 41. *It seems that senior counsel relied upon this submission in support of the proposition that s 74 was satisfied.*
>
> 42. *In my view, the making of submissions by a legal representative which are different in quality or quantity from those made in an earlier application by another legal representative, does not fall within the terms of s 74. Submissions are not information, nor do they constitute a change of circumstances relevant to the grant of bail.*
>
> 43. *The purpose of s 74 of the Bail Act is not to give an applicant the right to a second hearing of a bail application simply because a lawyer thinks that they might put a better or more persuasive argument to the Court than that put on an earlier occasion. On the contrary, s 74 addresses the issue by first requiring a court to refuse to hear a further release application unless particular grounds are established. Relevantly, in this case, those grounds are that material information is available which was not presented earlier, or that circumstances relevant to the grant of bail have changed.*
>
> 44. *I reject the applicant's submission that submissions of senior counsel, which may be considered by the author to be more persuasive, are a reason to permit a second bail application.*
>
> 45. *The change in the identity of a surety and a change in the amount offered by the surety are not always to be regarded as a change of circumstances relevant to the grant of bail, nor are they necessarily always to be regarded as material information relevant to the grant of bail. It is always a question of fact and degree. A court needs to assess, in the context of the seriousness of the charge*

and all of the other circumstances relevant to a bail application, whether a change in the identity of a surety and the sum being offered are "material".

46. In this case, I am satisfied that it is, and the Court accordingly is able to consider this further bail application.

Some General Observations on Bail

Show Cause

The onus is on the accused for show cause offences and the standard is the balance of probabilities.[15]

Show cause can often be an insurmountable hurdle to overcome when you are faced with a strong Crown case and a client with a significant criminal history. It often requires time to mount a decent argument, often the application becomes stronger with the passage of time as opposed to the first appearance. For strictly indictable charges, the service of the brief can usually provide some material so that you can attack the Crown case. From a Supreme Court bail perspective, information relating to the strength of the case is often essential, if the brief has not been served and the charge is serious, often the application should wait.

To be clear, show cause does not require factors that are exceptional.

There is a very simple test that is applied and a clear two-step process.

1. Cause must be shown as to why detention is not justified. The onus is on the accused and this is on the balance of probabilities.
2. If cause is shown, there is an exhaustive list of matters in section 18 that must be considered. If there is an unacceptable risk under any of the four headings, bail is to be refused. If a risk can be ameliorated by conditions then bail can be granted.

The words "exceptional" should never be used by either the Courts or the prosecution to describe show cause. One positive view that can be taken from the most recent amendments to the Bail Act is:

- The legislators have made a clear decision to add a separate and distinct test of exceptional circumstances for a limited number of offences described above. By doing this they have clearly dispelled any myth that show cause amounts to a requirement that there needs to be exceptional circumstances or that anything needs to be exceptional.

Some points to take away:

1. Factors relevant for show cause can also be relevant for the unacceptable risk test.

[15] Section 32 of the Bail Act 2013

2. Importantly there is no exhaustive list of matters that can only be taken into account for show cause (unlike section 18 for the unacceptable risk test). So anything can be taken into account.
3. A helpful summary of the principles of show cause and the application of the test was considered by Justice Harrison in the case of *R v Peter Tsallas (2017) NSWSC 64*:

> *21. It is possible, if not on one view inevitable, that minds may differ in any particular case about how these authorities should play out in the difficult discretionary exercise with which I am presently concerned. It is regrettable that the Parliament did not see its way clear to offering some guidance as to the matters that should be taken into account in assessing the show cause requirement, or better still to circumscribing a test such as a special or exceptional circumstances test, or an inclusive test specifying factors that an applicant would have to satisfy or demonstrate applied in his or her case, in order to show cause as required. (A special or exceptional circumstances test is still to be found in s 22 of the Act but not relevantly for present purposes).*
>
> *22. It is not unusual in a consideration of whether or not an applicant for bail has satisfied the show cause requirement that the decision depends upon a comparison between a strong Crown case on the one hand and the prospect of an unacceptably long period on remand on the other hand. In the present case I consider that the Crown case is strong and that the applicant faces the inevitability of spending a not insubstantial period in custody if convicted. I am however bound by authority to accept that "there is nothing particularly special or unusual in... lack of criminal antecedents, ties to the community and strong family support". It is not difficult to think of any number of factors that might qualify as satisfying the show cause requirement in most cases, such as impending death from disease or injury, illness that could not properly or adequately be treated in gaol, significant mental or physical disability making custody more onerous, threats of assault or established violence that could not be adequately ameliorated by Corrective Services or the need for protective custody coupled with a lengthy period of remand. Those examples are clearly not exhaustive.*
>
> *23. Unfortunately for the present applicant, I am unable to identify anything propounded by the applicant that satisfies me on the balance of probabilities that he has shown cause why his detention is not justified.*

Citation of judgments of the Supreme Court

In my view one of the most interesting and highly relevant decisions of bail was the case of DPP v Zaiter (2016) NSWCCA 247.

This decision was a release application in the CCA. It provided guidance to the lower courts as to what weight they should place on the various bail authorities that are relied upon by both prosecution and defence. Justice R A Hulme made the following observations:

> *30. I pause to observe that in this case, and as seems to often occur, the parties have cited judgments of single judges of the Supreme Court presiding in the Common Law Division Bails List. It is important to recognise that such judgments do not often lay down anything of precedential value for "bail authorities" (as defined in the Bail Act).*
> *31. Many such judgments are delivered ex tempore. Some judges are more inclined as a matter of individual practice to publish judgments on the Caselaw website whereas others are not. Bail decisions involve a discretionary evaluative judgment on a variety of factors about which, and within limits, reasonable minds may differ. It does not follow that simply because a judgment is published it is more authoritative than others that are not.*
> *32. What I am saying should not be taken as any criticism of judges who do publish their judgments in the public domain. But it must be recognised that most of these judgments are very specifically directed to the facts and circumstances of the case at hand. It is useful for "bail authorities" to have examples of how particular factual circumstances have been considered by Supreme Court judges. But every bail application presents its own unique factual matrix.*
> *33. It should be kept very firmly in mind that the doctrine of precedent is concerned with decisions on points of law: see, for example, Fleming v White; Gamble v Hiles [1981] 2 NSWLR 719 at 725-6 (Street CJ); and R v XY [2013] NSWCCA 121; 84 NSWLR 363 at [30] (Basten JA). A decision by a single judge of the Supreme Court regarding, for example, delay as a decisive factor in determining whether cause has been shown under s 16A of the Bail Act is no more than the view taken by that particular judge in the circumstances of the particular case at hand.*

This case is a good reminder that each bail application presents its "own unique factual matrix" and that prior decisions can be used as guidance but are not decisive.

Strength of the Bail Proposal a Factor for Show Cause

A recent unreported bail decision of R v Moran (2017), despite the matter being a refusal of bail, has one point that is particularly useful.

The judgment discusses delay being a factor to overcome show cause. On the second last paragraph Justice Beech-Jones states:

> "That stated, the delay between charge of the applicant and the time for trial is concerning. By itself, I do not consider that would be sufficient to show cause but it might, in combination with other matters, including, for example, **the strength of the bail proposal**, be sufficient in a particular case."

The reasoning that the strength of the bail proposal is a factor that can be considered in a combination of factors for show cause is particularly helpful. Often with show cause, the court stops you or does not want to hear anything about the bail proposal. The court may say that that is relevant for the unacceptable risk test only. This allows you to say that the strength of bail proposal is a factor and you get to air this during your show cause submissions. Often this is the best part of your release application.

It also emphasises the point that Section 18 factors are the only factors that can be taken into account for the unacceptable risk test. However for show cause, there is no such list of factors and anything can be taken into account.

Further I don't think this decision goes against the principles set out in DPP v Zaiter (2016) NSWCCA 247 outlined above, as you are not trying to directly compare the "factual matrix "of a case.

The point being that the strength of the bail proposal is a factor that can be taken into account for show cause. It will then be a matter for the court if they form the view that the applicant overcomes this hurdle in a combination with other factors. You are not saying that the strength of the bail proposal is the sole factor to overcome show cause. You are merely saying it is one of many that the court is entitled consider.

Key Sections of the Bail Act

Section 4	Definitions
Section 7	What is bail
Section 8	Bail Decisions that can be made- release/dispense/grant/refuse
Section 12	Duration of bail
Section 13	Requirement to appear
Section 16	Flow charts containing key features of bail decisions
Section 16A	The accused to show cause to certain offences- if under 18 at time offence not required to show cause
Section 16B	List of offences and circumstances where show cause applies
Section 17	Assessment of bail concerns. 17(2) contains the 4 concerns that the court must consider.
Section 18	Contains the matters that the court is only entitled to take into account when assessing if there are bail concerns
Section 19	Court must refuse bail if after assessing bail concerns there is an unacceptable risk under any of the 4 concerns
Section 20	Accused to be released if no bail concerns
Section 20A	Imposition of bail conditions, stating a court can only impose bail conditions if they are satisfied of certain factors under s17(2)
Section 21	Right to release for certain offences
Section 22	Limitation on courts power to release for CCA appeals- exceptional circumstances test
Section 22A	Limited power to release for terrorism offences- exceptional circumstances test
Section 25	Bail conditions can impose conduct requirements
Section 26	Bail conditions can require security- note security can only be imposed to address a concern of FTA- section 26(5)
Section 27	Bail conditions can require character acknowledgements
Section 28	Bail condition can impose accommodation requirements- note recent variation to allow for rehab
Section 29	Limited power to impose pre-release requirements
Section 30	Bail conditions may include enforcement conditions- note they can only be imposed by a court and at the request of the prosecutor only
Section 31	Rules of evidence do not apply to bail
Section 32	Matters decided on the balance of probabilities
Section 33	Bail acknowledgement to be given on a grant of bail
Section 38	Reason for decisions to be recorded
Section 40	Stay of release if detention sought to SC
Section 41	Limitation on length of adjournment if bail refused
Section 42	Notice required if accused person granted bail remains in custody
Section 43	Police power to make bail decisions
Section 47	Review of police decision by a senior officer
Section 48	Powers of courts and authorised justices to hear bail applications
Section 49	Accused person may make release application
Section 50	Prosecutor may make a detention application
Section 52	Powers of authorised justices to vary court decisions
Section 53	Discretion to make or vary bail without bail application

Section 54	Discretion to refused bail if no application is made
Section 55	Variation of bail decision if accused person remains in custody
Section 56	Discretion to defer decision if accused person is intoxicated
Section 57	Bail decision not to be varied contrary to court direction
Section 58	Authorised justice must not vary/impose enforcement conditions
Section 62	Power to hear bail application if sentence/conviction appealed
Section 63	Power to hear variation application for own decision
Section 64	Powers specific to local court and authorised justices
Section 65	Powers specific to the District court
Section 66	Powers specific to the Supreme Court
Section 67	Powers specific to the CCA
Section 68	Limited powers when proceedings pending in another court
Section 69	Limited powers when decision made by Supreme Court or CCA
Section 73	Discretionary grounds to refuse to hear bail application
Section 74	Multiple release applications at the same court not permitted
Section 77	Actions that may be taken to enforce bail requirements
Section 78	Powers of bail authorities for breach of bail
Section 79	Offence for fail to appear