**Outline of suggested structure of submissions for bail in NSW**

|  |
| --- |
| **Is the offence one that requires the applicant to show cause?** |

Yes – why?

No (or were they a child at the time of the offence?) then skip to unacceptable risk test.

|  |
| --- |
| **Key authorities on show cause** |

**Moukhallaletti v Director of Public Prosecutions (NSW) [2016] NSWCCA 314**

**(Button J, Gleeson JA and Rothman J) at 50**

1. *Firstly the question is separate from the question of whether there would be unacceptable risks of certain things occurring if the applicant were granted bail: see Director of Public Prosecutions (NSW) v Tikomaimaleya [2015] NSWCA 83 at [25].*
2. *Secondly, as was remarked upon in that judgment of this Court, Parliament has not enumerated the facts that may show cause, in contrast to the enumeration by Parliament of the factors relevant to the assessment of unacceptable risks: see ss 16A and 18 of the Bail Act.*
3. *Thirdly, there will nevertheless often be a substantial overlap between the factors that may go to whether cause has been shown and the factors that inform whether an unacceptable risk exists: see Director of Public Prosecutions (NSW) v Tikomaimaleya at [24], R v Marcus [2016] NSWCCA 237 at [31] and [35], and McAndrew v R [2016] NSWCCA 58 at [9].*
4. *Fourthly, cause may be shown by a single powerful factor, or a powerful combination of factors: see R v S [2016] NSWCCA 189 at [63].*
5. *Fifthly, one should refrain from placing a gloss on the words of the Bail Act: see the judgment of Beech-Jones J (Gleeson JA and Adams J agreeing) in Director of Public Prosecutions (NSW) v Mawad [2015] NSWCCA 227 at [42]. In particular, it is not incumbent upon an applicant to show special or exceptional circumstances in order to show cause; Parliament has reserved that different requirement to different circumstances: see s 22 of the Bail Act.*
6. *Sixthly, one can find countless examples whereby a single judge of the Supreme Court has found that an applicant has shown cause, or failed to do so. However, as RA Hulme J (Hoeben CJ at CL and Wilson J agreeing) explained recently in Director of Public Prosecutions (NSW) v Zaiter [2016] NSWCCA 247 at [30] to [33], unless they contain a discussion of legal principles, those decisions have little or no precedential value. That is because many bail decisions are evaluative judgments about the interplay of a multitude of factors, not determinations of legal questions.*

|  |
| --- |
| **Examples of cases where cause has been found to be shown** |

(beware any authority below is in most instances persuasive only – see *Moukhalletti* at 55 and show cause is by no means limited to the below circumstances):

Where sentence unlikely to attract a custodial penalty R v Grooms [2019] NSWSC 359

Time spent in custody pending trial may be a relevant factor in considering whether an applicant has shown cause why his or her detention is not justified: R v BNS [2016] NSWSC 350 per Garling J at [62]; A1 v R, A2 v R [2016] NSWSC 1288 per Garling J at [102]. Significant delay is relevant to show cause R v Gountounas [2018] NSWCCA 40 Simpson JA at [1]; Fullerton J at [5] (in dissent on this point); McCallum J at [48] however other authorities suggest on its own it is not enough: Director of Public Prosecutions v Hourigan [2017] NSWCCA 170

Issues with prosecution case/weak prosecution case R v Davis [2018] NSWSC 1831 & R v Gao [2018] NSWSC 1011, R v David Ewen [2017] NSWSC 1328

Risk of reoffending tempered by experience in custody prior to bail *(R v Kugor* [2015] NSWCCA 14).

Young and first time in custody: *R v Goodwin*, NSWSC, Hall J, 11 March 2015.

Residential rehabilitation not available in custody: *Yates,* NSWSC, McCallum J, 18 February, *R v Stanley*, SCNSW, Hall J, 11 February 2015.

Lack of appropriate medical treatment in custody: *R v Najem*, SCNSW, Wilson J, 18 February 2015, *R v Melmeth* [2015] NSWSC 1762

Mental illness: *R v Bourke*, NSWSC, McCallum J, 16 February 2015.

Risk of offending high but relatively minor offences can show cause: *R v Awad,* NSWSC, Davies J, 3 February 2015.

Aboriginality and *Bugmy/Fernando* type deprivation; *R v Alchin*, NSWSC, McCallum J, 16 February 2015, *R v Wright*, NSWSC, Rothman J, 7 April 2015.

|  |
| --- |
| **Why does the applicant show cause why their detention is not justified?** |

*(i.e combination of factors: weak prosecution case, time in custody will be longer than any sentence awaiting trial and needs medical treatment)*

|  |
| --- |
| **Unacceptable risk test** |

Below are the matters to be considered as part of assessment of bail concerns if the applicant has shown cause or does not have to show cause.

The below sets out factors identified in s18 of the *Bail Act* that are suggested by the author to be relevant for each of the identified concerns in the *Bail Act,* this is of course a suggestion only. Included below the identified sections at points below are again suggestions only for submissions relevant to those factors. Please also note this template does not address the specific considerations for persons accused of terrorist offences or for appeals bail.

|  |
| --- |
| **Preliminary factors** |

These are all relevant to the common law right to be at liberty and are all important considerations but do not, it is suggested, specifically relate to any particular concern.

* s18(1)(h) the length of time the accused person is likely to spend in custody if bail is refused
* s18(1)(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
* s18(1)(l) the need for the accused person to be free to prepare for his or her appearance in court or to obtain legal advice
* s18(1)(m) the need for the accused person to be free for any other lawful reason (i.e work, childcare or carer responsibilities)

|  |
| --- |
| **Relevant matters in assessing the s17(2)(a) concern that the accused person will fail to appear** |

* s18(1)(a) the accused person's background, including criminal history, circumstances and community ties

(*Consider family ties, dependents, employment, continuing medical or mental health treatment, assets, housing, how long lived in the area)*

* s18(1)(f) whether the accused person has a history of compliance or non-compliance with bail acknowledgments, bail conditions, apprehended violence orders, parole orders or good behavior bonds

(*look particularly for attendance at court on prior occasions, explain any non-attendance, if accused usually attends court less likely they will fail to appear in the future, also look for successful annulment applications*)

* s18(1)(c) the strength of the prosecution case

(*the weaker the case arguably more likely to attend court, consider also compliance with other court conditions bonds etc*.)

* s18(1)(i) the likelihood of a custodial sentence being imposed if the accused person is convicted of the offence

(*If not likely to receive full-time custodial sentence then more likely to attend court*)

|  |
| --- |
| **s18(1)(p) Suggested bail conditions which address concern that the accused person will fail to appear (see s20A for limits on imposing bail conditions)** |

1. **Conduct**
2. i Reporting
3. Surrender passport/limit travel
4. **Surety/character acknowledgement:**
5. Self-deposit or agree to forfeit
6. Other deposit or agree to forfeit
7. Character acknowledgement

|  |
| --- |
| **Relevant matters in assessing the s17(2)(b) & (c) concerns that the accused person will commit a serious offence, and/or that the accused person will endanger the safety of victims, individuals or the community** |

(NB note that the Act specifies bail should only be refused where there is a risk the applicant will commit a ‘serious**’** offence)

* s18(1)(f) the strength of the prosecution case

*(The weaker the case the less likely they committed this offence therefore less likely to commit a further offence)*

* s18(1)(b) the nature and seriousness of the offence

*(In assessing the seriousness consider the below pursuant to s18(2))*

*Sexual nature?*

*Violent nature?*

*Does it involve the use of an offensive weapon or instrument?*

*Likely effect of the offence on any victim and on the community generally*

*Number of offences likely to be committed or for which the person has been granted bail or released on parole*

* s18(1)(d) whether the accused person has a history of violence
* s18(1)(e) whether the accused person has previously committed a serious offence while on bail

*(NB this includes interstate or overseas)*

* s18(1)(g) Whether the accused person has any criminal associations
* s18(1)(n) The conduct of the accused person towards any victim of the offence, or any family member of a victim, after the offence

*(NB also consider prior breaches of AVO’s)*

* s18(1)(o) in the case of a serious offence, the views of any victim of the offence or any family member of a victim (if available to the bail authority), to the extent relevant to a concern that the accused person could, if released from custody, endanger the safety of victims, individuals or the community

*(NB this does not include the opinions of police see Director of Public Prosecutions (NSW) v Mawad [2015] NSWCCA 227 at 31)*

|  |
| --- |
| **s18(1)(p) Suggested bail conditions which address concern that the accused person will commit a serious offence or endanger the safety of victims, individuals or the community (see s20A for limits on imposing bail conditions)** |

1. **Conduct requirements**
2. Residence condition
3. Comply with any AVO
4. Curfew
5. Alcohol/drugs abstention condition
6. Non-association
7. Place restriction
8. **Enforcement conditions** (NB must be requested by prosecution)
9. Curfew check
10. Alcohol/drug test

|  |
| --- |
| **Relevant matters in assessing the s17(2)(d) concern that the accused person will interfere with witnesses or evidence** |

* s18(1)(n) The conduct of the accused person towards any victim of the offence, or any family member of a victim, after the offence (also consider prior offences of this type, this is a rare concern)

|  |
| --- |
| **s18(1)(p) Suggested bail conditions which address concern that the accused person will interfere with witnesses or evidence** |

**Conduct conditions**

1. Comply with any AVO
2. Contact prohibition
3. Non-contact with any prosecution witness