Getting Bail:

Working with the *latest* Bail Act

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Introduction

The old *Bail Act 1978* was viewed by practitioners and members of the judiciary as difficult to understand, sometimes confusing and unnecessarily complex. Since 1978 it had been amended by over 80 other Acts. It was an Act centred on a set of offence-based presumptions – presumptions against bail; presumptions in favour of bail; and offences where no presumptions apply.

In 2011 the NSW Government announced a review of the *Bail Act 1978*. This review would be undertaken by the New South Wales Law Reform Commission (NSWLRC).

The NSWLRC received 39 submissions including submissions from the NSW Law Society, the NSW Bar Association and the NSW Police Force. His Honour Judge Henson, Chief Magistrate of the Local Court described the Bail Act as unnecessarily complex. It was his concern that the Act was being used by the police as a form of pre-emptive punishment. [2]

In 2013 the NSWLRC published its final report. One of its recommendations included the removal of the presumptions regarding bail. These would be replaced with a uniform presumption in favour of release in all cases.[3] Rather than relying on offence-based presumptions, the then Attorney General stated that the new legislation would be risk based. If an accused person presents an unacceptable risk, and this risk cannot be mitigated by the imposition of bail conditions, then the accused will be bail refused.[4]

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[2] Judge Graeme Henson, Submission No 2 to the NSW Law Reform Commission, 1 July 2011 <http://www.lawreform.lawlink.nsw.gov.au/lrc/lrc_completed_projects/lrc_bail/lrc_bailsubmissions.html >

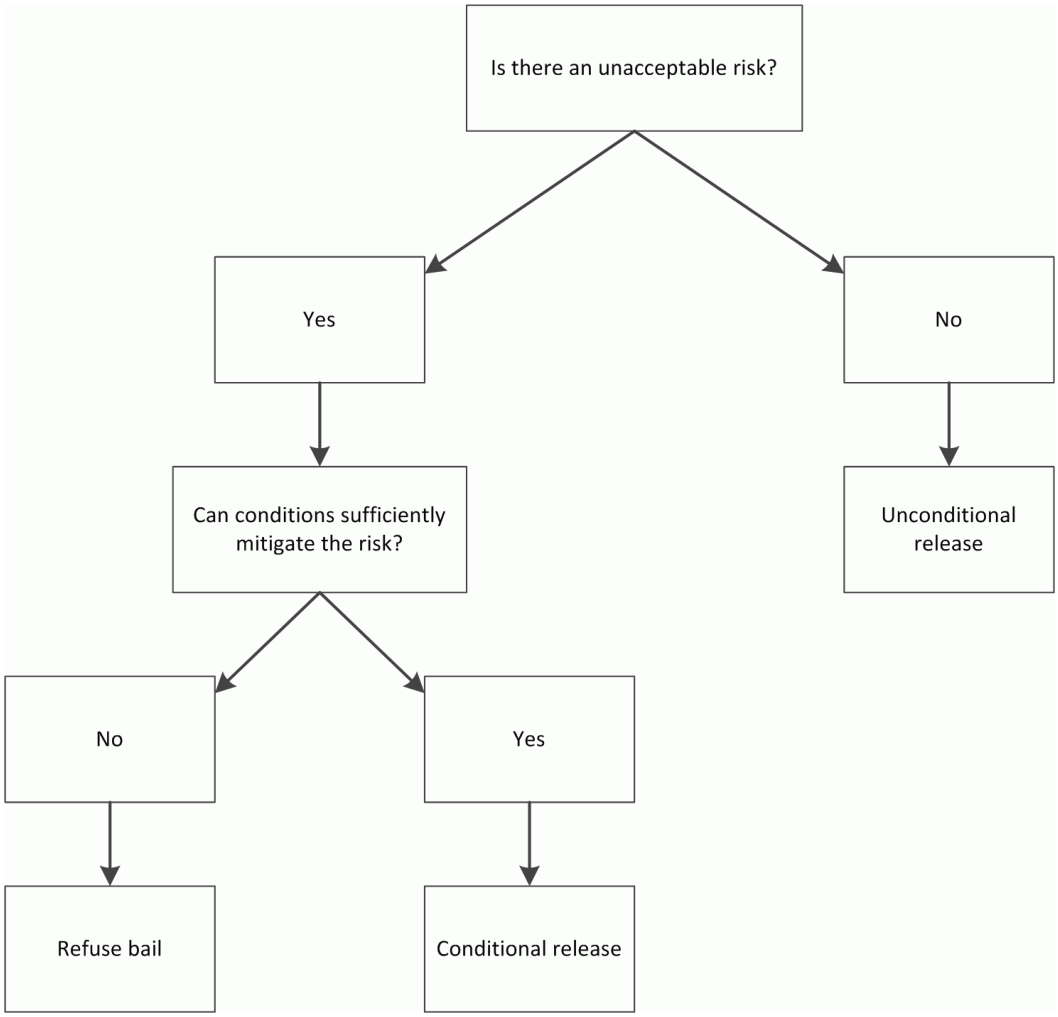
[3] New South Wales Law Reform Commission, *Bail*, Report No 133 (2012) 123 http://www.lawreform.lawlink.nsw.gov.au/lrc/lrc_completed_projects/lrc_bail.html

[4] New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 May 2013, Mr Greg Smith MP 87.

The New *Bail Act 2013*

The *Bail Act 2013* (the Act) was passed on 22 May 2013. It commenced on 20 May 2014. The purpose of the Act is to provide a legislative framework for a decision as to whether a person who is accused of an offence or is otherwise required to appear before a court should be detained or released, with or without conditions. In making a decision under the Act, a bail authority is to have regard to the presumption of innocence and the general right of a person to be at liberty.[5]

Flow Chart Bail Decision[6]



[5] *Bail Act 2013*, s 3.
[6] Ibid, s 16.

The Decision Making Process

This is a two stage process. The decision maker (the bail authority) has to decide whether there are any **unacceptable risks**. If there are unacceptable risks, then the next step is to see if these risks can be **mitigated**.

Unacceptable risk

An unacceptable risk is defined in the Act. A risk is unacceptable where an accused person, if released from custody, will:[7]

- fail to appear at any proceedings for the offence, or
- commit a serious offence, or
- endanger the safety of victims, individuals or the community or,
- interfere with witnesses.

When deciding whether there is an unacceptable risk the decision maker **can only** take the following into account:[8]

- an accused person's background, including criminal history, circumstances and community ties
- the nature and seriousness of the offence
- the strength of the prosecution case
- whether the accused has a history of violence
- whether the accused has previously committed a serious offence while on bail
- whether the accused person has a pattern of non-compliance with bail acknowledgments, bail conditions, apprehended violence orders, parole orders or good behaviour bonds
- the length of time the accused person is likely to spend in custody if bail is refused
- the likelihood of a custodial sentence being imposed if the accused person is convicted of the offence

[7] *Bail Act 2013*, s 17(2).
[8] s 17(3).

- 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
- 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
- the need for the accused person to be free to prepare for their appearance in court or to obtain legal advice, and
- the need for the accused person to be free for any other lawful reason.

Serious offence is not defined in the Act, however section 17 provides guidance as to what could be a serious offence. The matters that are to be considered when deciding if an offence is a serious offence (or the seriousness of the offence) are:[9]

- 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*
- the likely effect of the offence on any victim and on the community generally
- the number of offences likely to be committed or for which the person has been granted bail or released on parole.

It is important to note that these matters are not restrictive. They do not limit the matters that a decision maker can take into account.

Obviously where there is no unacceptable risk, the following bail decisions can be made:[10]

- a decision to release the person without bail
- a decision to dispense with bail
- a decision to grant bail (without the imposition of bail conditions).

[9] s 17(4).
[10] s 18.

Some authorities on section 17 and unacceptable risk

NSW is not the first jurisdiction to implement the unacceptable risk test. Victoria's *Bail Act 1997* uses the same test. In *Haidy v DPP* [2004] VSC 247[11] Redlich J summarised the relevant authorities stating:

- Bail is not risk free[12]
- Because a person's liberty is at stake a tenuous suspicion or fear of the worst possibility if the offender is released is not sufficient[13]
- It is not necessary that the prosecution establish that the occurrence of the event constituting the risk is more probable than not. There are recognised conceptual difficulties associated with applying the civil standard of proof to future events[14]
- To require that the risk be proved to a particular standard would deprive the test of its necessary flexibility. **What must be established is that there is a sufficient likelihood of the occurrence of the risk which, having regard to all relevant circumstances, makes it unacceptable**. Hence the possibility an offender may commit like offences has been viewed as sufficient to satisfy a court that there is an unacceptable risk.[15]

[11] At [14], [15] and [16].
[12] *Williamson v DPP* [1999] QCA 356.
[13] *Dunstan v DPP* (1999) 107 A Crim R 358.
[14] *Davies v Taylor* [1974] AC 207.
[15] *R v Phung* [2001] VSCA 81; *MacBain v DPP* [2002] VSC 321.

Mitigating the risk

Like all good systems of risk assessment, once a risk has been identified it is important to see if that risk can be mitigated. The only way in which a risk can be mitigated in the context of the new *Bail Act* is by the imposition of bail conditions.

If the decision maker finds that there is an unacceptable risk that cannot be sufficiently mitigated by the imposition of bail conditions, then bail may be refused.[16]

It follows that if bail conditions can sufficiently mitigate an unacceptable risk, then bail conditions can be imposed and the person released on bail.

General rules on bail conditions[17]

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

[16] *Bail Act 2013* s 20(1).
[17] s 24.

Types of bail conditions

Bail conditions can:

- Impose conduct requirements (requiring a person to do something or refrain from doing something)[18]
- Require security to be provided[19]
- Require character acknowledgments[20]
- Impose accommodation requirements (generally for children only)[21]
- Impose pre-release requirements (surrender passport, provision of security, character acknowledgment).[22]

Enforcement conditions – an additional bail condition that can be imposed

Under section 30 of the Act, bail conditions can include one or more enforcement conditions. Enforcement conditions are imposed for the purpose of monitoring or enforcing compliance with another bail condition. An enforcement condition requires the person given bail to comply with a specific type of police direction, for example requiring a person to abstain from drugs or alcohol.

These conditions can only be imposed by a court and only at the request of a prosecutor.[23]

Further, an enforcement condition can be imposed only if the court considers it reasonable and necessary in the circumstances, having regard to the following:[24]

- the history of the person granted bail (including criminal history and particularly if the person has a criminal history involving serious offences or a large number of offences)

[18] s 25.
[19] s 26.
[20] s 27.
[21] s 28.
[22] s 29.
[23] s 30(3).
[24] s 30(5).

- the likelihood or risk of the person committing further offences while at liberty on bail
- the extent to which compliance with a direction of a kind specified in the condition may unreasonably affect persons other than the person granted bail.

What type of application is made?

There are three types of applications which can be made. They are self-explanatory.

1. **Release** application which is made by an accused;[25]
2. **Detention** application made by a prosecutor;[26] and
3. **Variation** application which can be made by an interested person.[27] An interested person includes the accused, a prosecutor, a complainant in a domestic violence offence, a PINOP in AVO matters and the Attorney General.

[25] s 49.
[26] s 50.
[27] s 51.

Some NSW authorities

Onus of proof is on the prosecution

R v Lago [2014] NSWSC 660

Lago was charged with aggravated break, enter and steal offence and firearms offences.

In referring to section 20 of the Act and the refusal of bail if bail conditions cannot sufficiently mitigate the unacceptable risk, Hamill J stated that the onus of proof is on the party who opposes bail. The court granted bail with conditions.

Murder – applicant awaiting re-trial

R v Hawi [2014] NSWSC 837

Hawi was charged with murder as a result of a brawl at Sydney Airport. The brawl was between rival outlaw motorcycle gangs. He was convicted but the conviction was set side and the court of criminal appeal ordered a new trial.

The application was heard before Harrison J. His Honour found that there were a number of unacceptable risks including a risk that Hawi would endanger the safety of individuals and the community, and the associated risk of committing a serious offence.

His Honour was ultimately satisfied that these risks could be mitigated by the imposition of the following strict conditions:[28]

1. To be of good behaviour.
2. To live at xxx.

[28] *R v Hawi* [2014] NSWSC 837 at [58].

3. To report daily between the hours of 10.00am and 6.00pm to the officer in charge of the Police Station at Rockdale.
4. To appear at the Supreme Court on 4 July 2014 and thereafter as required.
5. Whilst residing at xxx, not to be absent from that address between the hours of 8.00pm and 6.00am.
6. xxx, being an acceptable person, is to enter into an agreement with security under which xxx agrees to forfeit the sum of $500,000 if Mahmoud Hawi fails to appear before court in accordance with the bail acknowledgment.
7. xxx, being an acceptable person, is to enter into an agreement with security under which xxx agrees to forfeit the sum of $200,000 if Mahmoud Hawi fails to appear before court in accordance with the bail acknowledgment.
8. Not to communicate or associate in any way other than through his legal adviser with any of the persons listed in SCHEDULE 1 to these conditions or to attend any of the premises listed in SCHEDULE 2 to these conditions.
9. Not to communicate, directly or indirectly, with any person whom he has received notice is, or is likely, to be called by the Crown at his trial.
10. Not to apply for a new passport or other travel document.
11. Not to go within one kilometre of any airport or recognised point of departure for overseas.
12. To present himself at the front door of xxx at the direction of any police officer to confirm his compliance with the curfew condition, provided that 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.

The future?

Cases like *Hawi* grabbed the attention of the media and the NSW Police Association. Neither were happy. The NSW government ordered a review of the new *Bail Act 2013* and guess what?

It looks like it is going to be amended.

It is likely that the government proposals will include a special category of bail test for serious offences.[29] The onus for these offences will be on the accused. The accused may soon have to 'show cause' as to why he or she should be released. Let's hope we don't see another 80 amendments over the next 25 years.

[29] NSW Bar Association Media Release, *Bail Changes Threaten Basic Legal Rights*, 5 August 2014.