

### More new bail law

By Caroline Dobraszczyk

The *Bail Amendment Act 2014* (the amendment Act) makes further changes to the law in relation to bail in NSW. It was assented to on 25 September 2014, *but has yet to be proclaimed*. I say 'further changes' because of course substantial changes were made this year, i.e. commencing from 20 May 2014, which in essence provided for completely new criteria to be satisfied before bail would be granted. The amendment Act makes changes which, to some extent, are similar to the law pre-20 May 2014 and also seem to make it more difficult for an accused person to obtain bail. The most significant changes are as follows.

Currently, section 3(2) states that when making a bail decision the bail authority is to have regard to the presumption of innocence and the general right to be at liberty. This is to be deleted. Instead, there is to be a preamble that states, inter alia, that the New South Wales Parliament has had regard to the common law presumption of innocence and the general right to be at liberty, in enacting the Act. An interesting deletion.

Two flow charts (which set out how to make bail determinations), are now proposed: the first one applies to 'show cause offences', which are defined as offences that are punishable by imprisonment for life, certain specified sexual offences, certain serious violence offences, certain offences under the *Firearms Act 1996* and the *Weapons Prohibition Act 1998*, offences of cultivation, supply, possession, manufacture or production of a commercial quantity of a prohibited drug or plant under the *Drug Misuse and Trafficking Act 1985*, Commonwealth offences under Part 9.1 of the Criminal Code that involve possession, trafficking, cultivation, sale, manufacture, importation, exportation or supply of a commercial quantity of a serious drug, a serious indictable offence that is committed by an accused person while on bail or on parole, 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, a serious indictable offence of attempting to commit an offence as stated in the section and a serious indictable offence involving accessorial liability of an offence as stated in the section.

The second flow chart relates to all offences, other than offences for which there is a right of release, and sets out a new unacceptable risk test.

Division 1A is entitled 'Show cause requirement' and provides a new section which states that when making a bail decision for a show cause offence, the bail authority must refuse bail unless the accused person shows cause why his or her detention is not justified. There is no guidance as to what is to be considered when determining whether detention is not justified. If one

considers the fundamental principles of bail, issues such as risk of flight, strength of the prosecution case, risks to the community, and risks of any interference in the accused's case, and any special need to not be in custody in order to prepare for the criminal proceedings, would be important issues as well as may be any health issues which cannot be met in custody. There may of course be other particular issues which are unique to an accused's case. However these are issues to be considered when addressing the new section 17 i.e. bail concerns. Is it proposed that these issues are to be considered twice if the accused is charged with a show cause offence? The attorney general stated in the second reading speech that 'Victoria and Queensland have show cause requirements in their bail legislation. Courts in those states have noted circumstances that may be relevant to determining 'show cause', including the strength of the prosecution case, preventable delays and urgent personal situations such as the need for medical treatment. Bail authorities in New South Wales will be informed by the approach taken in these other jurisdictions when applying the show cause provisions.' Then, if it is decided that detention is not justified, the bail authority must make a bail decision in accordance with Division 2, i.e. the unacceptable risk test (which, as stated above, applies to all offences except right to release offences). The show cause requirement does not apply if the accused person is under 18 years of age at the time of the offence.

#### The proposed unacceptable risk test

The bail authority must, before making a bail decision, assess any bail concerns. A bail concern is defined as a concern that the accused person will fail to appear at any proceedings for the offence, or commit a serious offence or endanger the safety of victims or members of the community or interfere with witnesses or evidence. Section 18 then sets out the matters to be considered as part of the assessment, which is an exhaustive list. The list includes some familiar issues but also issues which have not been part of the law before, i.e., the issues are: background of the accused, criminal history, community ties, the nature and seriousness of the offence, strength of the prosecution case, any history of violence, any history of committing a serious offence while on bail, compliance with bail conditions, whether the accused person has any criminal associations, length of time in custody if bail is refused, likelihood of a custodial sentence, if convicted the arguable prospect of success on appeal, any special vulnerability or needs including youth and health, the need for the accused person to be free to prepare for court or for any other lawful reason, the conduct of the accused person towards the victim of the offence or any family member of a victim

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after the offence, and in the case of a serious offence, the views of the victim of the offence or any family member of a victim to the extent this is relevant to the issue of safety of the victim or the community. The bail authority is also to consider under the new section 18 the bail conditions that could reasonably be imposed to address any bail concerns.

For the purpose of deciding whether an offence is a serious offence or where deciding the seriousness of an offence, section 18(2) provides guidance by specifying certain matters to be taken into account when deciding this issue: i.e. whether the offence is of a sexual or violent nature or involves possession or use of an offensive weapon, the likely effect of the offence on any victim and on the community generally, and the number of offences.

Section 19 now states that a bail authority must refuse bail if the bail authority is satisfied, on the basis of an assessment of bail concerns, that there is an unacceptable risk. Section 20A states that bail conditions are to be imposed only if the bail authority identifies bail concerns. Then, a bail authority may impose a bail condition only if satisfied that the bail condition is reasonably necessary to address a bail concern, the bail condition is reasonable and proportionate to the offence, the bail condition is appropriate to the bail concern, it is no more onerous than necessary to address the bail concern, it is reasonably practicable for the accused person to comply with

the bail condition and there are reasonable grounds to believe that the condition is likely to be complied with.

The current section 74, which is headed 'Multiple release or detention applications to same court not permitted' is to be amended to require that 'material' information was not presented to the court in the first bail application, before the same court hears a second release or detention application.

It is proposed that any amendments made to the Bail Act by the amendment act is not a change of circumstances for the purposes of the section 74(3) (c) or (4) (b).

So what is proposed is, in essence, to remove the consideration of the presumption of innocence by a bail authority. Certain serious offences are to be bail refused, unless it is shown that the detention is not justified. The current, simple, two-step process in determining unacceptable risk is to be converted into a one step process where bail concerns and bail conditions are to be considered as part of determining unacceptable risk. The additional factors of criminal associations, the conduct of the accused after the offence and the views of the victims, may be part of a bail determination. It is perhaps regrettable that after major amendments to the law of bail earlier this year, with a completely new Act, drafted in clear and precise language, the amendments seem to be a little more convoluted and potentially difficult to apply. We shall see.

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