

## **More new Bail law-The Bail Amendment Act 2014**

### **By Caroline Dobraszczyk**

The Bail Amendment Act 2014 sets out further changes to the law in relation to bail in NSW. It was assented to on 25 September 2014 and is expected to commence on about 28 January 2015. I say “further changes” because of course substantial changes were made this year, ie commencing from 20 May 2014, which in essence provided for completely new criteria to be satisfied before bail would be granted. The new amendments contain changes which, to some extent, are similar to the law pre 20 May 2014 and hence, make it more difficult for some accused persons to obtain bail.

The most significant proposed 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 deleted. Instead, there is a Preamble that states, inter alia, that the Parliament of NSW has had regard to the common law presumption of innocence and the general right to be at liberty, in enacting the Act.
- There will now be two flow charts (which set out how to make bail determinations) -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.
- NB-section 15AA of the *Crimes Act* 1914-bail not to be granted in certain Commonwealth offences unless the bail authority is satisfied that exceptional circumstances exist to justify bail.
- The second flow chart relates to all other offences, and still must be applied if detention is not ordered for a show cause offence. The second flow chart does not apply to offences for which there is a right of release. A new unacceptable risk test is to apply.
- 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 in the proposed laws 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, 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 maybe 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. 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.." -see eg *Application for Bail-Abdou* [2014] VSC 406; *Bail Application, Asmar* [2005] VSC 487; *Re an Application for Bail* [2013] QSC 310.

- However, there have been some NSW Supreme court decisions which set the scene for us-eg *M v R* [2015] NSWSC 138; *R v Kugor* [2015] NSWCCA 14; *R v Kirby* unreported 2 February 2015; *R v Mariam* unreported 12 February 2015; *R v Osman* unreported 12 February 2015; *R v Benzce; Yates* [2015]NSWSC 139; *DPP v Tikomaimaleya* [2015] NSWSC 83.
- Then, if it is decided that detention is not justified, the bail authority must make a bail decision in accordance with Division 2, ie 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 new unacceptable risk test is as follows-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 ie the issues are ----- the 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 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 when deciding the seriousness of an offence, section 18(2) provides guidance by specifying certain matters to be taken into account when deciding this issue- ie 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 19(2) sets out what is an unacceptable risk ie an “unacceptable risk” is an unacceptable risk that the accused person, if released from custody, will:
  - 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.
- 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 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.
- Any amendments made to the Bail Act 2013 by the Amendment Act is not a change of circumstances for the purposes of the section 74(3) (c) or (4) (b).

So the major changes are that there is a removal of the consideration of the presumption of innocence by a bail authority, certain serious offences 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 and 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. We shall see how they work.

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Caroline Dobraszcyk  
Trust Chambers  
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