

The new Bail Act

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A completely new Bail Act will commence, very likely sometime in May 2014. This of course is very important legislation for any criminal law practitioner so at some stage before its commencement, a detailed consideration of it will be required by all, as there are fundamental changes to this area of law.

The first main issue is that the *Bail Act 1978* will be repealed and we will have the new *Bail Act 2013*, to commence approximately 12 months after the date of assent. The date of assent was 27 May 2013. The time period has been set to allow for the training of police and judicial officers and for appropriate changes to be made to court technology.

The second issue is that the key principle to granting bail will be the consideration of the unacceptable risk test, and not offence based presumptions as appear in the current Act. The attorney general said in the second reading speech that 'This test will focus bail decision making on the identification and mitigation of unacceptable risk, which should result in decisions that better achieve the goals of protection of the community while appropriately safeguarding the rights of the accused person.'

Part 1 deals with preliminary issues such as the purpose of the Act, definitions and having regard to the presumption of innocence and the general right of liberty, when making a bail decision. Part 2 sets out the general provisions governing bail and includes the types of bail decisions that can be made, restrictions on who can make particular bail decisions and that bail ceases to have effect only if it is revoked or substantive proceedings for the offence conclude. This should streamline court bail procedures by having a system of continuous bail and remove the need for an accused to formally continue bail every time the accused person appears before the court. An accused person who is granted bail is still required to attend court as and when ordered.

Part 3 is the main part of the legislation and is entitled 'Making and variation of bail decisions'. Section 16 sets out a flow chart which sets out the decision making process that a bail authority (defined as a police officer, an authorized justice or a court), is required to undertake when applying the unacceptable risk test. (As in Chapter 3 of the Evidence Act, this is a very welcome addition).

Section 17 sets out that the first step that a bail authority is required to take is to decide whether there are any unacceptable risks. In particular, whether the accused, if released, will fail to appear in any proceedings for the offence; commit a serious offence; endanger the safety of victims, individuals or the community; or interfere with witnesses or evidence: s 17(2). Section 17(3) then sets out an exhaustive list of matters that the bail authority will be required to consider when determining whether there are any unacceptable risks. None of these are unusual or unfamiliar:

- the 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 person has a history of violence;
- whether the accused person 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 behavior 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 has been convicted of the offence and proceedings on an appeal against conviction or sentence are pending, whether the appeal has a reasonably arguable prospect of success;
- any special vulnerability or needs the accused person has including youth, being an Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment;
- the need to be free to prepare for their appearance in court or to obtain legal advice;
- the need for the accused person to be free for any other lawful reason.

It is interesting to note that some of these factors do

not go directly to the s 17(2) issues, except perhaps the failure to appear consideration, nevertheless they are relevant to the issue of determining unacceptable risk which a bail authority must consider.

Sections 18, 19 and 20 then set out what bail decisions are possible when there are no unacceptable risks and where there is an unacceptable risk, which includes a decision to grant bail with conditions. Section 21 provides for specific decisions for offences for which there is a right to release. Those offences are set out in s 21 (2), (3) and (4) and include a fine only offence and certain offences under the *Summary Offences Act 1988* and the *Young Offenders Act 1997*. Section 22 provides that court is not to grant or dispense with bail on an appeal against conviction or sentence to the CCA, or an appeal from that court to the High Court, unless it is established that special or exceptional circumstances justify the decision. This is the same test that applies currently.

Division 3 of part 3 is entitled 'Bail conditions'. In the second reading speech the attorney general stated that the Law Reform Commission 'noted concerns expressed by many stakeholders about the increasing use of bail conditions to address issues related to the welfare of the accused rather than achieving the traditional aims of bail, such as ensuring the accused's attendance at court. The government agrees that there needs to be appropriate guidance in the legislation regarding the permissible purposes for bail conditions and the restrictions that apply to them so that unnecessary conditions are not imposed...Consistent with the government's risk based approach to bail, [section 24] provides that bail conditions can be imposed only for the purpose of mitigating an unacceptable risk. Conditions must be reasonable, proportionate to the alleged offence and appropriate to address the unacceptable risk in relation to which they are imposed.' However section 25 sets out that bail conditions can impose conduct requirement (i.e. a requirement that the accused person do or refrain from doing anything) and section 26 states that bail conditions can require security to be provided. Sections 27-30 provide for character acknowledgments, accommodation requirements, pre release requirements (e.g. surrender of passport) and enforcement conditions (e.g. to undergo testing

for drugs or alcohol) as the type of conditions that can be imposed when granting bail.

Section 31 confirms the current position as to evidential requirements in any bail hearing and states that a bail authority may take into account any evidence or information that the bail authority considers credible or trustworthy and is not bound by the principles or rules of law regarding the admission of evidence.

Part 4 is headed 'Procedures after decision is made or varied'. Essentially, if an accused is granted bail he/she will be given a 'bail acknowledgment' which is a written notice setting out when an accused person is to appear before a court and specifying that an accused is to notify the court of any change in the residential address. This notice must be signed by the accused person before they will be released on bail. The notice also sets out the conditions of bail and includes information about any bail variations. Division 1 then sets out other notices and information to be given to the accused person. Division 2 provides for the prosecution to seek a stay of a decision to grant or dispense with bail in relation to a serious offence where such a decision is made on the first appearance by the accused so that a detention application can be made to the Supreme Court. There is also a restriction on the maximum period for which certain officers and courts can adjourn a matter if bail is refused. There are also notice requirements where bail is granted but the accused person is not released.

Part 5 sets out the powers to make and vary bail decisions. Division 1 deals with all issues surrounding bail decisions by police officers and Division 2 deals with courts and 'authorized justices' defined as including a registrar of the Local Court or the Children's Court. The new Act provides for three forms of bail applications: a release application (by an accused); a detention application (by the prosecutor); and an application for variation of bail conditions (can be made by any interested person).

Part 6 then sets out the powers of courts and authorized justices to hear bail applications and sets out a new regime for the rehearing of bail decisions. Division 2 deals with general powers, which includes

the power to hear bail applications if proceedings are pending in the court or if a sentence or conviction is appealed. Further that a court may hear a variation application for a bail decision made by the court however constituted. Division 3 provides for additional powers specific to the Local Court, the District Court, the Supreme Court and the CCA. Importantly, the Supreme Court may hear a release application if bail has been refused by another court, authorised justice or a police officer. Also, the Supreme Court may hear a detention application or variation application for an offence if a bail decision has been made by the District Court, the Local Court, an authorized justice or a police officer. Division 4 then sets out restrictions on powers e.g. when proceedings are pending in another court or when a decision has been made by the Supreme Court.

Part 7 is headed 'General provisions about bail applications' i.e. to be dealt with expeditiously, at the first appearance but a court may refuse to hear a bail application on discretionary grounds- ie the application is frivolous or without substance. Section 74 is equivalent to the existing s 22A restricting second or subsequent release applications made to the same court. The new section also extends these restrictions to second or subsequent detention applications by the prosecutions. There must be grounds for a further application. Section 74(3) sets out the grounds for a further release application, which include no legal representation when the previous application was made, relevant information not presented at the previous hearing, circumstances have changed, the person is a child, and the previous application was made on a first appearance.

This last issue is a new and takes into account a recommendation by the Law Reform Commission, noting that there are particular difficulties when taking instructions from children at the early stages of proceedings. Section 74(4) specifies what are the grounds for a further detention application, ie new information to be presented or circumstances have changed. An example in the second reading speech of such a change is where an accused enters a plea of guilty or is convicted of the offence following a hearing.

Part 8 deals with the enforcement of bail requirements. The second reading speech notes that the Law Reform Commission recommended that the new bail legislation set out the options open to police when responding to a breach or threatened breach of bail and the matters that should be considered by them. Sections 76 and 77 deal with this issue. Section 78 sets out the powers of bail authorities (defined as an authorized justice the Local Court or other relevant court that the person is to appear in by his or her bail acknowledgment), when someone has failed or was about to fail to comply with a bail acknowledgment or bail condition.

Sections 79 and 80 deal with the offence of failing to appear. Part 9 provides for bail security requirements and Part 10 deals with miscellaneous issues including the restriction on publication of certain information regarding association conditions, the facilitation of proof of bail acknowledgments, decisions and failure to appear, and the repeal of the Bail Act 1978. The new Bail Act is to be reviewed after 3 years in operation. The schedules contain usual features including savings and transitional provisions.