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Bail Act 2013 (NSW) post 2015 amendments

Step 1: Show Cause Requirement

- i) Determine whether A has been charged with a “show cause” offence as per **s 16B**:
 - Serious indictable offence (+ 5 years) that involves sexual intercourse with a person under 16, firearms, while on bail or parole, attempting to commit an offence in the section
 - Cultivation, supply, possession, manufacture or production of commercial quantity of prohibited drug (DTMA) or serious drug (CCA Cth)
 - Failing to comply with a supervision order
 - ii) If not, proceed to Step 2
 - iii) If so, A must show cause as to why his or her detention is not justified **s 16A**
 - Use all relevant evidence/facts for justification: ***DPP (NSW) v Tikomaimaleya***
 “The justification or otherwise of detention is a matter to be determined by a consideration of all of the evidence of information the bail authority considers credible or trustworthy in the circumstances (**s 31(1)**) and not just by consideration of those matters exhaustively listed in s 18 required to be considered for the unacceptable risk assessment” (*DPP (NSW) v Tikomaimaleya* [2015] NSWCA 83 (26 March 2015))
 E.g: jury’s guilty verdict, circumstances of the event, time remaining before sentencing
 - Burden of proof is on the accused on the balance of probabilities **s 32**
- If A has not shown cause, bail is to be refused: **s 16A(1)**
- If A succeeds in showing cause (i.e. detention not justified), proceed to Step 2. → note: in exam, always move on to Step 2 just in case.

Step 2: Unacceptable Risk Test

- i) **S 17** → Assess whether there exists a bail concern that A, if released from custody, will:
 - Fail to appear
 - Commit a serious offence
 - Endanger the safety of victims, individuals or the community
 - Interfere with witnesses
- ii) In the assessment of bail concerns only **s 18(1)** matters to be considered:
 - a. Background, including criminal history, circumstances and community ties
 - b. Nature and seriousness of the offence (seriousness = must consider (but not limited to) s18(2) matters → sexual/violent/involves weapon, effect of offence on victim/community, no. offences)
 - c. Strength of the prosecution case
 - d. History of violence
 - e. Previously committed a serious offence while on bail
 - f. History of compliance/non-compliance with bail, AVOs, parole orders or good behaviour bonds
 - g. Criminal associations
 - h. Length of time likely to spend in custody if bail refused
 - i. Likelihood of a custodial sentence if convicted
 - j. If an appeal, whether the appeal has a reasonable prospect of success
 - k. Any special vulnerability or needs because of youth, being ATSI, having mental health impairment
 - l. Need to be free to prepare for court appearance or seek legal advice
 - m. Need to be free for any other lawful reason
 - n. Conduct towards any victim or family member of the victim after the offence
 - o. In a serious offence, the views of victim/family members of whether accused could endanger them or the community
 - p. See below

- Including whether any bail conditions can reasonably be imposed in accordance with **s 20A** (reasonable, practical, proportionate) to address any bail concerns (**s 18(1)(p)**)
 - Conduct s 25 → do or refrain from doing anything (e.g. give passport)
 - Enforcement: s 30 → condition imposed in order to monitor or enforce compliance with bail condition e.g. drug testing if bail condition is not to take drugs
 - Security: s 26 → money deposit forfeited if fails to appear
 - Character acknowledgment s 27 → from an acceptable person that accused will comply
 - Accommodations if A < 18 years: s 28 → require suitable accom before release
- iii) Determine whether there is an “unacceptable risk” that A will fail to appear, commit a serious offence, endanger safety of victims, individuals or community, or interfere with witnesses **s 19(2)**
 - Note: If A proves detention is not justified under step 1, this is irrelevant to unacceptable risk assessment: s 19(3)
- If yes, refuse bail: **s 19(1)**
- If no, A must be released: **s 20**
 - Conditional release if conditions required to address bail concerns
 - Unconditional release if no conditions required

Monitored by LEPR

- Pt 4: search and seizure (w/o warrant)
- Pt 9: Investigating and questioning
- Pt 8: Arrest
- Pt 14: Powers to give directions
- Pt 15: Safeguards relating to powers

Note: police discretionary power is non-justiciable (Wright v McQualter)

CONSEQUENCES FOR POLICE FAILING TO COMPLY:

→ May trigger S 138 of the *Evidence Act 1995* (NSW)

<p>S 138 of the Evidence Act 1995 (NSW)</p>	<p>Exclusion of improperly or illegally obtained evidence</p> <p>(1) Evidence obtained improperly or in contravention of an Australian law, or as a consequences of this, is not admitted unless → desirability of admitting evidence > undesirability of admitting evidence → Judges must balance both things and make decision</p> <p>(2) Provisions relating to the evidence obtained through questioning</p> <p>(3) Court must take into account factors including:</p> <ul style="list-style-type: none"> (a) the probative value of the evidence, and (b) the importance of the evidence in the proceeding, and (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding, and (d) the gravity of the impropriety or contravention, and (e) whether the impropriety or contravention was deliberate or reckless, and (f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the <i>International Covenant on Civil and Political Rights</i> , and (g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention, and (h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.
<p>Case law</p>	<p><i>R v Ali Alkan</i></p> <p>Evidence excluded on the basis of illegal and improper police conduct:</p> <ul style="list-style-type: none"> • Breaches of law and impropriety are <i>grave and unnecessary</i> • <u>Consequence</u>: Person was wounded and hospitalized as a result → suffered extreme punishment and harm for a minor offence • Action was <u>deliberate by police officer</u> • Evidence could have easily been obtained without illegal or improper action • <u>Factors of the defendant</u>: Breaches more serious given the he may have been mentally ill • Officer was senior ranked

MOVE-ON POWERS

LEPRA

POWERS

S 197 – police <u>may</u> give reasonable directions to persons in public places	<p>(4) Police have the power to direct a person to move-on from a public place if the officer believes on reasonable grounds that the person is:</p> <ul style="list-style-type: none"> (a) Obstructing persons or traffic (b) Harassing or intimidating (c) Causing or likely to cause fear in a person of ‘reasonable firmness’ → note they do not actually have to be present or likely to be present s 197(4). This is <u>very broad</u> (d) Waiting to supply or solicit another to supply prohibited drugs (e) Waiting to obtain, procure or purchase prohibited drugs <p>(5) Direction must be reasonable to reduce the above (a) – (c) or stop (d) or (e)</p> <p>(6) Person only needs to be near a a public place, not required to actually be in it.</p>
S 198 – to intoxicated people	<p>(1) Additional grounds on which a person may give a direction to a person they believe is intoxicated and is (a) likely to injure someone (note: only need to be near a public place – (4), damage property or poses a risk to public safety or (b) is disorderly.</p> <p>(2) Must be reasonable to prevent (a) or (b)</p> <p>(3) Can only exclude a person from a public place for 6 hours maximum</p>
S 198A – to a group	Police officer may give a direction to a group of persons – no need to repeat directions, info or warning to every person. However no presumption that each person has received warning.

FAILURE TO COMPLY

S 199	Refusal or failure to comply constitutes a criminal offence Penalty = 2 penalty units (currently 1 unit = \$110)
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LIMITS

S 200	<p>Police cannot give move-on directions for industrial disputes, ‘apparently genuine demonstration or protest’, a procession or an organized assembly</p> <p><i>Note: Inclosed Lands Act allows police to move-on the protests, demonstrations and assembly on additional grounds.</i></p>
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SAFEGUARDS

S 202	Before giving a move-on direction the officer must identify themselves as a police officer and provide reasons
S 203	Officer must warn the person that he/she is required by law to comply with the direction
S 204B	A person has not committed a “failure to comply” offence unless such a warning has been given

CROWD CONTROL AND PUBLIC DISORDER

RIOT – Table 1 Offence = dealt with summarily unless prosecution/defendant elects to be indictable

<p>S 93B <i>Crimes Act</i></p> <p>S 93D(1)</p>	<p>Offence:</p> <ul style="list-style-type: none"> • 12 or more people • Use or threaten unlawful violence for a common purpose (does not matter whether this occurs simultaneously) <ul style="list-style-type: none"> ◦ Violence = violent conduct towards property or persons, does not need to cause injury or damage e.g. throwing a rock towards a person that misses s 93A • Their conduct <i>would</i> cause a person of reasonable firmness to fear for their personal safety • Private or public place <p>Mens Rea:</p> <ul style="list-style-type: none"> • Intends to use violence, OR • Aware that conduct may be violent (recklessness) <p>Penalty: liable to imprisonment 15 years (s 93B)</p>
<p>R v Parhizkar [2014]</p>	<p>Participants in a riot do not have to be in close proximity to each other, as long as they are in the area for a common purpose.</p> <ul style="list-style-type: none"> • Protestors at Villawood Detention Centre on the roof & on the ground. Convicted of riot.

AFFRAY – Table 1 Offence

<p>S 93C <i>Crimes Act</i></p> <p>S 93 D(2)</p>	<p>Offence:</p> <ul style="list-style-type: none"> • A person who uses or threaten unlawful violence towards a person (need not cause injury or damage s 93A) <ul style="list-style-type: none"> ◦ Threat cannot be words alone • Conduct <i>would</i> cause a person of reasonable firmness to fear for their personal safety • If 2 or more persons, conduct taken together • Private or public place <p>Mens rea:</p> <ul style="list-style-type: none"> • Intends to use violence, OR • Aware that conduct may be violent or threaten violence (recklessness) <p>Penalty: liable to imprisonment 10 years (s 93C)</p>
<p>R v Parhizkar [2014]</p>	<p>Prosecution does not need to prove each individual act (elements) of each person → they just need to be present and involved in some way.</p> <ul style="list-style-type: none"> • Three men involved in a fight with security at Star City Casino • Assault charges dismissed but found guilty of affray • Easier to charge than assault - don't need to prove the elements

VIOLENT DISORDER – Overlap with the above offences.

<p>S 11A – SOA</p>	<p>Offence:</p> <ul style="list-style-type: none"> • 3 or more persons use or threaten unlawful violence (does not have to be simultaneous) to person or property (does not actually have to cause or intend to cause injury or damage) • Conduct taken together would cause a persons of reasonable firmness to fear for his or her personal safety (does not actually have to be or likely to be present) • Public or private • Mens Rea → intends or is aware that conduct may be violent or threaten violence <p>Penalty: 10 units or 6 months imprisonment</p>
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