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1. Bail

Wednesday, 10 August 2016 9:56 AM

History

- **Stubbs**
 - **Juveniles** treated as adults under s 22A(1) (no second bail applications)
 - Blurring **purpose**: punitive, pretrial punishment
 - Onerous or **innappropriate** bail conditions
 - Tighter enforcement, performance measure
- **Brown**
 - **Harsher conditions** and aggressive **monitoring** has led to more bail revocations (Key Performance Indicator)
 - **No evidence** higher remand rates leads to safer communities
- **Intervention programs**
 - Crimes Legislation Amendment (Criminal Justice Interventions) Act 2002 introduced intervention programs
 - **Freiberg and Morgan**
 - Promote consistency, accountability and confidence in the programs
 - Condition of **bail**, **dismissal** of charge without conviction, **deferral** of sentencing or **GBB**

Reforming the Act

- **NSWLRC (2012)**
 - Too **complex** and doesn't allow for consideration of all relevant **factors**
 - Should be entitled to release "unless detention is **justified**"
 - **Government** opted against "justification" model, but court must "consider particular risks..."
- **Bail Act 2013**
 - Presumption of innocence (s 3(1)(2)) = in favour of bail? replaced by **preamble** in 2014
 - **S 74** retained most of restrictions on repeated application (slight exemption for children)
 - **"Unacceptable Risk"** (s 18)
 - See **principles** from Victoria on granting bail (p 321-2)
 - **Lago [2014]**: removed complicated presumption for on **unacceptable risk** and "**protection** of the community, the Court's process and alleged victims and witnesses"
 - **Williamson v DPP [2001]**: "No grant of bail is **risk free**"
 - **Hawi [2014]**: balancing factors (likelihood of materialisation, serious/significance if does), attempts to balance need to protect and right to be at liberty
 - **"Show cause"** why detention is unjustified for certain serious offences (s 16A(1))
 - **Brown and Quilter**
 - Media deemed Bail Act 2013 was "soft on crime"
 - **Hatzistergo**: 3 or 12 recommendations:
 - **Presumption of innocence**: preamble
 - **Unacceptable risk test too complex?**: changing 2-step process to 1 step
 - **Show cause**: pretrial detention viewed by public as part of punishment, presumption against bail

Steps in Applying for Bail

Show cause

1. Is it a show cause **offence**? (see s16A, s16B)
 - **No** = unacceptable risk test (1A)
 - **Yes** = has the person shown cause why his or her detention is not justifiable? (1B)
 - i. **Has not** shown cause = bail refused
 - ii. **Has** shown cause = go to unacceptable risk test

Unacceptable risk

1. Unacceptable risk test (s 19, 20)
 - 2A. Are there any **bail concerns**? (s 17) Consider each in turn:
 - i. Consider each of the **matters** in s 18 as relevant to case and see if impact on the bail concern
 - ii. Consider any **bail conditions** (s 23-30) which could reasonably be imposed to address the bail concern (s18(p) being considered in accordance with s 20A), for each bail condition consider:
 - 1) Relevant **section** and any **restrictions** (e.g. security only for fail to appear)
 - 2) Each of the **matters** in s 20A

Note: bail conditions are not at large, they must relate to a bail concern
 - iii. Come to a conclusion as to whether there is a bail concern and the bail condition which could reasonably be imposed to address the bail concerns in accordance with s 20A
 - 2B. In light of the bail concerns, is there an **unacceptable risk**?
 - **Yes** = bail refused
 - **No** = go to s 20 and decide on which one is relevant