

03 Bail

Bail Act ('BA') 2013 s 7: Bail is the authority to be at liberty for an offence.

- BA 2013 provides the statutory framework in NSW, underpinned by the presumption of innocence – the removal of the objects section (s3(2)) of the Act – which referred to the presumption of innocence and the right of an accused to be at liberty – does not derogate from these fundamental common law principles (*M v Queen*).
- Roles – (1) preservation of the presumption of **innocence** and right to general **liberty**, (2) protection of the **community** by preventing further serious offending, and (3) protecting the **integrity** of the trial process (*Hawi*).
- Police have the frontline responsibility of dealing with bail; as soon as the accused is charged with an offence (s 44). s 42 stipulates actions police officers may take regarding granting/refusing bail.

1. Is there a right to release?

- s 21(2): There is a right to release for (a) fine-only offences, (b) offences under the *Summary Offences Act 1988* (NSW) (other than excluded offences listed in s 21(3)), and (c) offences dealt with under Part 5 of the *Young Offenders Act 1997* (NSW).
 - s 21(3) An “excluded offence” includes offences under: (a) s 5 (obscene exposure) if the person has previously been convicted of that offence, (b) s 11A (violent disorder) if the person has previously been convicted of that offence, (c) s 11B, 11C or 11E (offences relating to knives and offensive implements) if the person has previously been convicted of that offence, (d) s 11FA (custody or use of laser pointer in public place), (e) s 11G (loitering by convicted child sexual offenders near premises frequented by children).
- s 21(4) No right to release of the accused has **previously failed to comply** with a bail acknowledgement, bail condition or bail decision for the offence.
 - a. Yes – s 21(1) A bail authority can only make a decision to (a) release without bail (b) dispense with bail or (c) grant conditional/unconditional bail.
 - b. No → 2.

2. Is it a show cause offence?

- The accused bears the onus to establish that their detention is not justified: s 16A(1) – does not apply if the accused was under 18yo at the time of the offence: s 16A(3).
- **Show cause test** – s 16B show cause offences:
 - a. Offence punishable by life imprisonment,
 - b. Serious indictable offence involving: sexual intercourse with someone under 16yo by someone who is/above 18yo, or infliction of actual bodily harm with the intent of that sexual intercourse,
 - c. Serious personal violence offence/offence involving wounding/grievous bodily harm (GBH) where the accused was previously convicted of such an offence,
 - d. Any of the following (i) serious indictable offence under Part 3/3A of the Crimes Act 1900 or the Firearms Act 1996 that involves the use of a firearm, (ii) indictable offence involving the unlawful possession of a pistol/prohibited firearm in public, or (iii) serious indictable offence under the Firearms Act 1996 that involves acquiring, supplying, manufacturing or giving possession of a pistol or prohibited firearm/firearm part that relates solely to a prohibited firearm,
 - i. Crimes Act s 4: **Serious indictable offence** means an indictable offence that is punishable by imprisonment for life or for a term of 5 years or more.
 - e. Any of the following: (i) serious indictable offence under Part 3/3A of the Crimes Act 1900 or under the Weapons Prohibition Act 1998 that involves the use of a military-style weapon, (ii) indictable offence that involves the unlawful possession of a military-style weapon, (iii) serious indictable offence under the Weapons Prohibition Act 1998 that involves buying, selling or manufacturing a military-style weapon or selling, on 3 or more separate occasions, any prohibited weapon,
 - f. Offence under the **Drug Misuse and Trafficking Act 1985** that involves the cultivation, supply, possession, manufacture or production of a commercial quantity of a prohibited drug or prohibited plant,
 - g. Offence under **Part 9.1 of the Commonwealth Criminal Code** that involves the possession, trafficking, cultivation, sale, manufacture, importation, exportation or supply of a commercial quantity of a serious drug,
 - h. Serious indictable offence that is committed by an accused (i) while on bail (whether granted under this Act/another jurisdiction), or (ii) while on parole (whether granted under a law of this State/another jurisdiction),
 - i. Indictable offence or an offence of failing to comply with a supervision order, committed by an accused person while subject to a supervision order,
 - j. Serious indictable offence of attempting to commit an offence mentioned elsewhere in this section,
 - k. Serious indictable offence (however described) of assisting, aiding, abetting, counselling, procuring, soliciting, being an accessory to, encouraging, inciting/conspiring to commit an offence mentioned elsewhere in this section,
 - l. Serious indictable offence that is committed by an accused person while the person is the subject of a warrant authorising the arrest of the person issued under: (i) this Act, (ii) Part 7 of the Crimes (Administration of Sentences) Act 1999, (iii) the Criminal Procedure Act 1986 or (iv) the Crimes (Sentencing Procedure) Act 1999.

- Judicial guidance to 'show cause requirements':
 - **Primary consideration:** strength of prosecution case (*Lacey v DPP*) – but is not limited to this.
 - 'Each case must be assessed according to its own facts and circumstances. A particular factor or combination of factors may result in an accused showing cause' (*Woods v DPP*).
 - Cause does not require something 'special and exceptional' (*DPP v Tony*).
 - Whether accused will attend court and comply with bail conditions (*Re Asmar*).
 - Effect of a **plea** of guilty on a bail application (*R v Tasker*).
 - Effect of a **verdict** of guilty – whether cause can be shown that his continuing detention is unjustified (*DPP v Tikomaimaleya*).
 - What matters may be sufficient to show cause?
 - Strength of the **prosecution's case** – weak case would show cause (even when the risk of reoffending is high) (*R v Awad*).
 - Strong case would not show cause.
 - **Aboriginality:** where refusing bail would perpetuate the cycle of disadvantage, but conditions may be imposed that are calculated to break that cycle (*R v Alchin*).
 - Where **residential rehabilitation** is available, bail conditions can be imposed to undertake the proposed rehabilitation (*R v Benzce*).
 - Where appropriate **medical treatment** is not available in custody (*R v Najem*).
 - Where the accused is **terminally ill** (*DPP v Boatswain*).
 - Where the **adjournment period** is **long** and will cause a lengthy delay (*R v Kirby*) OR where it is **short** thus difficult to show cause (*R v Anderson*).
 - **Youth:** being young and in custody for the first time (*R v Goodwin*).
 - **Mental illness** and brain damage can constitute cause (*R v Burke*).
 - a. Yes: cause is shown as to why his/her detention is not justified, bail authority must make bail decision in accordance with Division 2 (unacceptable risks test): s 16A(2) → 3.
 - b. No → refuse bail.
3. **Does the accused present an unacceptable risk?** If the accused shows cause, the onus shifts to the prosecution to establish that there is an unacceptable risk of a bail concern ie. **unacceptable risk test:** s 16. Standard of proof is on the **balance of probabilities** ie. proof beyond reasonable doubt of the accused person's guilt: s 32.
- The court must assess whether an applicant poses bail concerns (s 17) – is there a risk that the accused will:
 - s 17(2) a 'bail concern' is a concern that an 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 witness or evidence**.
 - In assessing bail concerns, the court must have regard to **ONLY** those considerations set out in s 18 (including a consideration of the proposed conditions – s 18(1)(p)). This is an **exhaustive** list: s 18(1) A bail authority is to consider the following matters, and only the following matters, in an assessment of bail:
 - Accused's background – including criminal history, circumstances and community ties;
 - Nature and seriousness of offence;
 - Strength of prosecution case;
 - Whether the accused has a history of violence; d1: behaviour engaged in by the accused that may, under the Crimes (Domestic and Personal Violence) Act 2007, section 6A(2), constitute domestic abuse eg. behaviour that is physically abusive or violent, including strangulation and sexual assault, animal abuse and stalking;
 - Whether the accused has previously committed a serious offence while on bail;
 - Whether the accused has a history of compliance or non-compliance with – (i) bail acknowledgments, (ii) bail conditions, (iii) apprehended violence orders, (iv) parole orders, (v) home detention orders, good behaviour bonds or community service orders, (vi) intensive correction orders, (vii) community correction orders, (viii) conditional release orders, (ix) non-association and place restriction orders, (x) supervision orders;
 - Accused's criminal associations;
 - Length of time the accused will spend in custody (delay – *R v Kugor*);
 - Likelihood of a custodial sentence being imposed if the accused is convicted; i1: if the accused has been convicted but not yet sentenced, the likelihood of a custodial sentence being imposed;
 - If an appeal is pending post-conviction, the reasonable prospects of success of the appeal;
 - Any special vulnerability/needs of the accused person eg. youth, being an Aboriginal or Torres Strait Islander (*R v Wright*), or having a cognitive or mental health impairment;
 - Need for accused to be free to prepare for court appearance or obtain legal advice;
 - Need for accused to be free for any other lawful reason;
 - Conduct of the accused towards victim(s) or victim's family member post-offence;
 - For serious/DV offences, the views of any victim or victim's family member, on whether there is a concern that the accused could, if released from custody, endanger the safety of victims, individuals or the community;
 - Bail conditions which could reasonably be imposed to address any bail concerns per s 20A;
 - Whether accused is associated with terrorist organisations;
 - Whether the accused has made statements/carried out activities advocating for support for terrorist acts/violent extremism;