Statutory Review

Bail Act 2013

June 2018
Executive Summary

This is a report on the statutory review (the review) of the Bail Act 2013 (the Act). The Act provides a legislative framework for a decision as to whether a person who is accused of an offence or is otherwise required to appear before a court should be detained or released, with or without conditions.

The Act was introduced following a report from the NSW Law Reform Commission which recommended a significant overhaul of NSW bail laws. The Act replaced the complex scheme in the Bail Act 1978 of offence-based presumptions with the “unacceptable risk” test which focuses bail decision-making on the identification and mitigation of risks.

There are a number of factors that must be considered as part of the assessment of unacceptable risk. Conditions can be placed on a person’s bail to mitigate any risk that the person may fail to appear at court, commit a serious offence, endanger the safety of victims, individuals or the community, or interfere with witnesses or evidence.

An accused person charged with a “show cause” offence must justify why they should not be detained prior to the assessment of unacceptable risk. Show cause offences are serious offences including crimes punishable by life imprisonment, crimes involving sexual intercourse with a child, serious firearms and drugs offences, repeat personal violence offences, and any serious indictable offence committed while a person is on bail or parole.

The review was conducted on behalf of the Attorney General by the NSW Department of Justice (the Department), in accordance with s.101 of the Act.

This review follows a series of reviews of the Act, culminating in the Bail Amendment Act 2015 which commenced on 6 December 2016. The Amendment Act implemented the recommendations of the Hatzistergos reviews, the Martin Place Siege Review and a report on bail by the NSW Sentencing Council. Amendments included an extension of the “show cause” test, the introduction of additional factors to be considered as part of the assessment of “unacceptable risk”, and a new limitation on the power to release an accused charged with terrorism-related offences.

More time is required to holistically assess the impact of significant recent amendments introduced by the Bail Amendment Act 2015.

Accordingly, the Department commits to undertake a holistic review of the Act by no later than 6 December 2020, which is four years after the commencement of the Amendment Act.

In the meantime, the operation of the Act will be closely monitored by the Bail Act Monitoring Group, and through the NSW Sentencing Council’s standing reference to monitor show cause offences in the Act.
Recommendation

This report recommends that the Department undertake to conduct a further holistic review of the Act by no later than 6 December 2020 to determine whether the policy objectives remain valid, and whether the terms of the Act remain appropriate for securing those objectives.

Recent reviews of the Act

The Bail Amendment Act 2015 commenced on 6 December 2016 and implemented the recommendations of a number of reviews of the Act, which are outlined below.

Recommendations of the Review of the Bail Act by John Hatzistergos

In 2014, the NSW Government commissioned a review of the Act to consider whether it was appropriately framed to achieve its objectives. Former Attorney General John Hatzistergos undertook the review with advice from the Bail Act Monitoring Group.

The final report of the review was released in June 2015. The NSW Government implemented all of the recommendations of the report, and these recommendations were reflected in the following amendments made to the Act:

- The addition to the “show cause” category of offences any serious indictable offence that is committed by the person while the person is the subject of a warrant authorising their arrest for failure to appear.

- The introduction of additional factors required to be considered as part of assessing “unacceptable risk”:
  - a person’s history of compliance or non-compliance with additional sentencing orders, including intensive correction orders and home detention orders.
  - any warnings for previous breaches of bail conditions when considering whether to revoke bail for a further breach.
  - the likelihood of a custodial sentence being imposed where the bail decision is being made after the person is convicted.

Recommendation of the NSW Sentencing Council

The NSW Sentencing Council has a standing reference to monitor and review the show cause provisions of the Act. In its first report of this reference, the NSW Sentencing Council recommended an expansion of the definition of “serious personal violence offence” under the show cause provisions to include similar convictions from other jurisdictions that are punishable by imprisonment for a term of 14 years or more.

The Act was amended accordingly to expand the circumstances in which a person who is charged with a repeat serious personal violence offence must show cause that their detention is not justified.

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Recommendations of the joint Commonwealth-NSW Martin Place Siege Review

The NSW Government implemented the recommendations of the Martin Place Siege Review\(^3\) to require a bail authority to take into account an accused persons’ links with terrorist organisations and to establish a formal memorandum of understanding between the NSW Police Force (NSWPF) and the Office of the Director of Public Prosecutions (ODPP) to govern the process for seeking review of bail decisions.

The Act was amended to introduce a new test of “exceptional circumstances” which requires bail to be refused for a person accused of being a member of a terrorist organisation, or accused of any other offence for which a custodial penalty may be imposed, where the accused:

- is subject to a terrorism control order under Commonwealth legislation
- has a previous terrorism conviction, or
- has separately been charged with a terrorism offence and the proceedings have not yet concluded.

The Act was also amended to include the following terrorism-related factors to the list of matters which are taken into account when assessing whether there is an “unacceptable risk”:

- links to terrorist organisations
- support for terrorist acts or violent extremism
- associations with others who support terrorist acts or violent extremism.

A memorandum of understanding between the ODPP and the NSWPF setting out the process for seeking reviews of bail decisions, including the process for rapid escalation of contentious bail issues to the Director of Public Prosecutions for a decision was agreed and signed in October 2015.

Other recent reforms

In its role monitoring the operation of the Act and associated Amendment Acts, the Bail Act Monitoring Group proposes amendments to the Act where operational issues arise. The group is made up of representatives from the Department of Justice, NSW Police, Legal Aid, the ODPP and the Department of Premier and Cabinet.

The following four proposals from the Bail Act Monitoring Group to the Attorney General were included in the *Justice Portfolio Legislation (Miscellaneous Amendments) Act 2016*, which took effect from 25 October 2016:

- amend the Act to clarify that the prosecutor can make an application for the imposition of bail conditions when there has been no bail decision (where a Future Court Attendance Notice has been issued) or unconditional bail has been granted
- amend the Act to allow the Local Court to hear a variation application of bail conditions by consent, notwithstanding that the accused person has appeared in another court
- amend the Bail Amendment Act 2015 so that a person will be subject to the show cause test if they commit a serious indictable offence while subject to a bench warrant issued for failing to appear in court proceedings

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\(^3\) Australian Government Department of the Prime Minister and Cabinet and NSW Government Department of Premier and Cabinet, *Martin Place Siege: Joint Commonwealth – New South Wales review*, January 2015.
• amend the Bail Amendment Act 2015 to include extended supervision orders and interim supervision orders under the Crimes (High Risk Offenders) Act 2006 in the list of orders in s.18(1)(f) of the Act.

The following two proposals from the Bail Act Monitoring Group to the Attorney General were included in the Justice Legislation Amendment Act 2017 which commenced in August 2017:
• amend the Mental Health (Forensic Provisions) Act 1990 so that bail is dispensed with when an order for a mental health assessment is made under sections 33(1) or 33(1D) and amend the Act to give police power to make a bail decision following the assessment
• amend section 16B of the Act to prescribe that section 50B of the Firearms Act 1996 is a “show cause” offence for the purposes of bail.

A proposal put forward by the ODPP following the current review is being consulted on as part of the Justice Portfolio Miscellaneous Amendments Bill 2018. The proposal is to amend s.16B of the Act to clarify that the show cause provisions apply to an accused who committed a serious indictable offence while on bail, whether bail was granted in NSW or in another jurisdiction.

Ongoing monitoring of the Act
The Bail Act Monitoring Group, which meets quarterly, will continue to actively monitor and consider the Act and its implementation, and put forward proposals for amendment where issues arise. The Bail Act Monitoring Group continues to collect data and oversee the implementation of the amendments.

The NSW Sentencing Council has a standing reference to review the “show cause” provisions of the Act and will continue to monitor the operation of this part of the Act.

Jurisdictional comparison
NSW bail laws contain four discrete tests which may need to be considered in making a bail decision:
• the unacceptable risk test, applying to all offences
• the show cause test, applying to certain serious offences
• the exceptional circumstances test, which applies where there is an identified terrorist risk
• the special or exceptional circumstances test, applying to offences for which an appeal is pending against a conviction on indictment or sentence imposed on conviction on indictment.

With the introduction of the 2013 Act, NSW moved away from the complex scheme of offence-based presumptions to a risk-based model which requires the bail authority to consider particular risks when determining bail. These risks are:
• that the accused will endanger the safety of individuals or the community;
• interfere with witnesses or evidence;
• fail to attend court; or
• commit a serious offence.

There is an exhaustive list of matters that the bail authority is required to consider when determining unacceptable risk (including personal and criminal background, history of compliance with various orders, the nature of the offence and the conduct of the person following the offence), and conditions can be placed on a person’s bail to mitigate risks.
Victoria and Queensland are the only other jurisdictions with a universal defined unacceptable risk test. Other jurisdictions have a general presumption in favour of bail with carved out exceptions for specified serious offences.

In NSW, if a person is charged with certain serious offences, they must justify why they should not be detained and bail must be refused if the threshold is not met. If cause is shown, the court must then apply the unacceptable risk test. NSW has an extensive category of show cause offences, including crimes punishable by life imprisonment, crimes involving sexual intercourse with a child, serious firearms and drugs offences, repeat personal violence offences and any serious indictable offence committed while a person is on bail or parole.

NSW also has specific provisions limiting a court’s power to release persons charged with terrorism related offences. Section 22A requires a bail authority to refuse bail for anyone charged with being a member of a terrorist organisation, or anyone charged with certain serious offences who was previously convicted of a terrorist offence or was the subject of a control order, unless “exceptional circumstances” exist. This is a higher threshold test than the “show cause” requirement, and was a response to the recommendations of the Martin Place Siege review. The Commonwealth and Victoria are the only other Australian jurisdictions with equivalent provisions. NSW also requires bail authorities to consider a person’s links with terrorist organisations and support for violent extremism when making a bail decision.

NSW Bail laws provide a strong framework for protecting the community from accused individuals who pose an unacceptable risk.

Conclusion

The policy objective of the Act is to ensure a strong and clear regime for bail decision-makers that ensures consistency of decisions and the safety of the community, and reflects the seriousness of alleged offending. This policy objective remains valid.

As previously outlined in this report, NSW bail laws are robust when compared with other Australian jurisdictions. The key tests underpinning bail decisions (unacceptable risk and show cause) place community safety at the forefront of bail decision-making. The matters to be considered as part of the assessment of unacceptable risk under s.18 are exhaustive and require the decision-maker to consider the person’s personal and criminal background. The show cause provisions at ss.16A and 16B place the onus on the person to justify why they should not be detained.

The Act’s risk-management approach focuses bail decision-making on the identification and mitigation of unacceptable risk. The replacement of the regime of offence-based presumptions results in decisions that better reflect the actual seriousness of the offending, thereby ensuring greater consistency of decisions with the law.

Amendments introduced by the Bail Amendment Act 2015 were made in response to a series of reviews of the Act, being the Hatzistergos Review, the Martin Place Siege Review and the NSW Sentencing Council’s 2015 report on bail. The amendments were significant and included the extension of the “show cause” category of offences, the introduction of additional factors to be considered as part of the
assessment of unacceptable risk, and a new limitation on the power to release an accused charged with terrorism-related offences. These amendments were necessary to ensure the terms of the Act were appropriate to secure the policy objective.

These amendments commenced in December 2016 and have not been in force for a sufficient amount of time to allow impacts to be effectively assessed. A holistic review of the Act by the Department by no later than 6 December 2020, as recommended in this report, will ensure proper evaluation of these amendments can be undertaken. Prior to the holistic review, the operation of the Act will continue to be monitored by the Bail Act Monitoring Group and show cause offences will be monitored by the NSW Sentencing Council as part of a standing reference.

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