THE *BAIL ACT 2013* - AN OVERVIEW AND SOME ISSUES AFFECTING THE SUPREME COURT

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1 The *Bail Act 2013* is expected to commence on 20 May 2014. The commencement of the 2013 Act will see the repeal of the *Bail Act 1978*: s.100, 2013 Act.

2 The 2013 Act was amended, prior to its commencement, by the *Bail (Consequential Amendments) Act 2014*. The *Bail Regulation 2014* is also expected to commence on 20 May 2014.

Background to the 2013 Act

3 The 2013 Act has come about following a general examination of bail laws in this State by the New South Wales Law Reform Commission in Report 133 *Bail* (April 2012). A history of bail laws in New South Wales, including the 1978 Act and the many amendments to that Act thereafter, may be found in the NSWLRC Report (Chapter 3).

4 The Government adopted many, but not all, of the recommendations contained in the NSWLRC Report. In the second reading speech introducing the *Bail Bill 2013*, the Attorney General said (Hansard, Legislative Assembly, 1 May 2013):

> *"The Government agreed to adopt a large number of the recommendations made by the review. However, rather than implement a justification approach to bail, as favoured by the Law Reform Commission, the Government decided to adopt a risk-management approach to bail decision-making. The bill has been*

> *drafted in accordance with the Government response and its key feature is a simple unacceptable risk test for bail decisions. 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."*

5 The 2013 Act moves away from the scheme of offence-based presumptions contained presently in the 1978 Act. The structure and operation of the 1978 Act had been altered by a variety of amendments introducing, with respect to different classes of offences, presumptions against bail or statutory restrictions on the grant of bail which did not appear in the original 1978 Act. The offence-based presumptions or statutory restrictions under the 1978 Act now include the following:

(a) the presumption against bail for certain serious drug supply and importation offences: s.8A; *Director of Public Prosecutions (Cth) v Germakian* [2006] NSWCA 275; 166 A Crim R 201; *R v Jomaa* [2011] NSWSC 342 at [4]-[9];

(b) the presumption against bail for serious firearms and weapons offences: s.8B; *R v Karnib* [2012] NSWSC 391 at [2]-[6];

(c) the presumption against bail for certain repeat property offenders: s.8C;

(d) the presumption against bail for offences committed in the course of riots or other civil disturbances: s.8D; *R v Hawi (No. 33)* [2011] NSWSC 1679 at [2]-[3];

(e) the presumption against bail for persons on lifetime parole who commit offences carrying prisons terms: s.8E;

(f) the presumption against bail for breach of extended supervision orders or interim supervision orders under the *Crimes (High Risk Offenders) Act 2006*: s.8F;

(g) the exception from the presumption in favour of bail concerning certain domestic violence offences and offences of contravening apprehended domestic violence orders: s.9A;

(h) further exceptions from the presumption in favour of bail under s.9 - where the alleged offence is said to have been committed whilst at liberty on bail or parole or while serving a sentence (but not in custody), or when subject to a good behaviour bond or an intervention program order or whilst being in custody: s.9B;

(i) the need to demonstrate exceptional circumstances before a grant of bail to a person charged with murder: s.9C; *R v Young* [2006] NSWSC 1499 at [15]-[24]; *R v Jacobs* [2008] NSWSC 417 at [3]-[10]; *R v Medich* [2010] NSWSC 1488 at [4]-[7];

(j) the need to demonstrate exceptional circumstances before bail is granted to a repeat offender with a history of serious personal violence offences: s.9D; *R v Magrin* [2004] NSWCA 354 at [6]ff; *R v Brown* [2013] NSWCCA 178 at [10]-[31].

6 This complex set of provisions will pass into history with the repeal of the 1978 Act. The Attorney General explained the fundamental change in the bail legislative scheme in the second reading speech:

> *"Rather than rely on presumptions, the bill requires that the bail authority consider particular risks when determining bail, namely, the risk that the accused will fail to appear, commit a serious offence, endanger the safety of individuals or the community, or interfere with witnesses. The bill incorporates a number of key considerations that need to be taken into account in deciding whether there are any risks of this nature and whether they are unacceptable. These considerations incorporate matters relevant to the protection of the community and the criminal justice system as well as the rights of the accused person. If the bail authority is satisfied that the accused person presents an unacceptable risk, it will have to assess whether that risk can be sufficiently mitigated by the imposition of bail conditions. If satisfied that the risk can be*

sufficiently mitigated, the person will be released to conditional bail. If the risk cannot be so mitigated, bail will be refused."

The 2013 Act - A Code Concerning Bail

7 The 1978 Act was held to be a comprehensive and exhaustive code with respect to bail which operated to the exclusion of the common law: ss.62, 67, 1978 Act; *R v Hilton* (1986) 7 NSWLR 745 at 751A-B.

8 Like the 1978 Act, the 2013 Act appears to constitute a comprehensive and exhaustive statutory scheme for bail: s.3(1), 2013 Act. Sections 62 and 67 of the 1978 Act made clear that the common law power to grant bail was abolished. Clause 11 of Schedule 3 of the 2013 Act provides that the *"repeal of the 1978 Act does not revive any power or duty that would exist, apart from statute, to grant bail"*.

Some Key Features of the 2013 Act

9 The purpose of the 2013 Act is described in s.3:

> *"3 Purpose of Act*
>
> *(1) The purpose of this Act is to provide 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.*
>
> *(2) A bail authority that makes a bail decision under this Act is to have regard to the presumption of innocence and the general right to be at liberty."*

10 In the second reading speech, the Attorney General observed that it was *"appropriate that these important legal principles* [in s.3] *be considered as part of the bail decision-making process"*.

11 Section 12(1) provides that, once granted, bail only ceases to have effect if it is revoked, or if substantive proceedings for the offence for which it was granted conclude. Section 6 provides:

> *"6 Conclusion of proceedings*
>
> *(1) Proceedings for an offence conclude when a court finally disposes of the proceedings concerned.*
>
> *(2) If a court convicts an accused person of an offence, and a sentence is to be imposed, proceedings for the offence do not conclude until the sentence has been imposed.*
>
> *(3) The committal of a person for trial or sentence is not a conclusion of proceedings for an offence.*
>
> *(4) If a person's conviction or sentence for an offence is stayed on or before the conclusion of proceedings for an offence, the proceedings do not conclude while the stay is in force.*
>
> *(5) The regulations may make further provision for the time at which proceedings for an offence are to be regarded as concluded and this section has effect subject to the regulations."*

12 In the second reading speech, the Attorney General said with respect to s.12:

> *"This means that if bail is granted to an accused, that bail and any conditions attaching to it continue to apply until the matter is finalised, unless varied or revoked sooner. The Law Reform Commission recommended implementation of a system of continuous bail to remove the need to formally continue bail every time the accused appears before the court, thereby streamlining court bail procedures."*

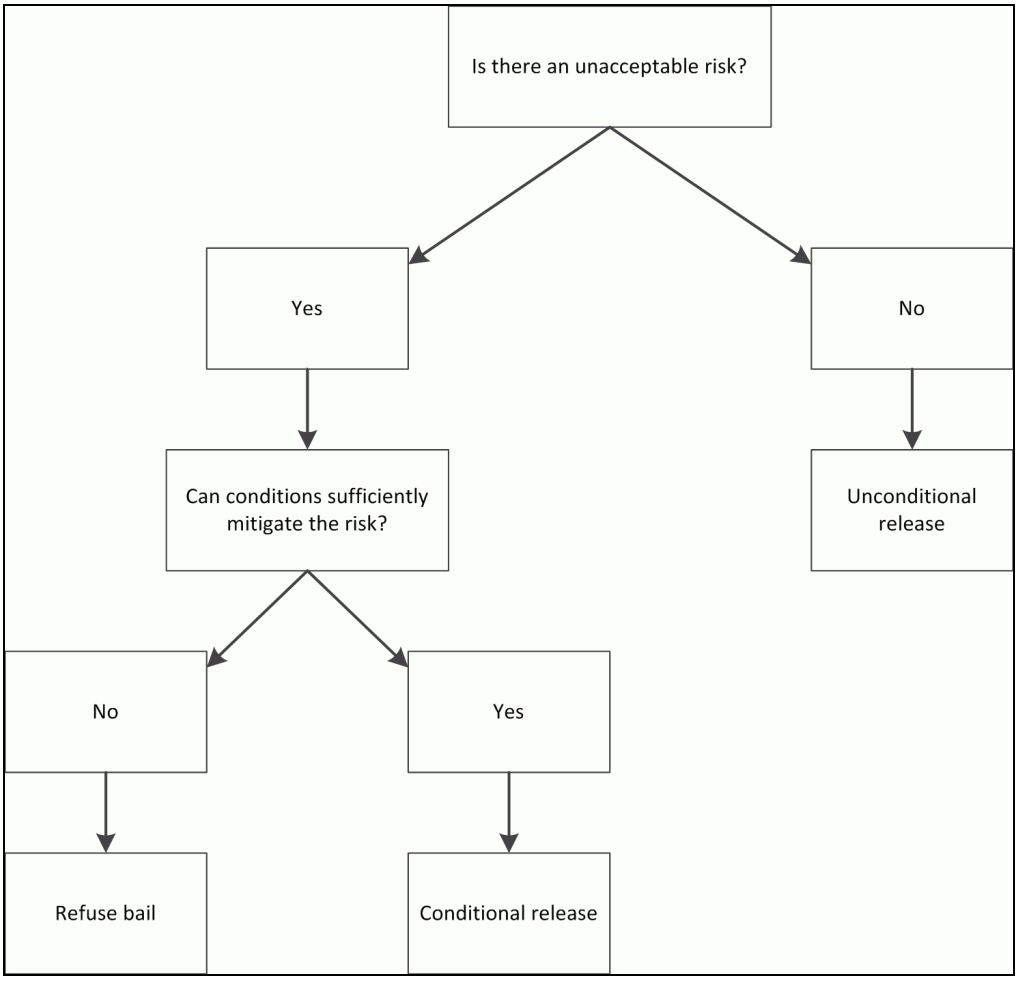
13 The 2013 Act contains in s.16 a flow chart showing the key features of a bail decision for an offence (other than an offence for which there is a right to release as listed in s.21).

14 Section 21 creates a special rule for offences for which there is a right of release:

> *"21 <u>Special rule for offences for which there is a right to release</u>*
>
> *(1) The following decisions are the only bail decisions that can be made for an offence for which there is a right to release:*
>
> *(a) a decision to release the person without bail,*
>
> *(b) a decision to dispense with bail,*
>
> *(c) a decision to grant bail to the person (with or without the imposition of bail conditions).*
>
> *(2) There is a right to release for the following offences:*
>
> *(a) a fine-only offence,*
>
> *(b) an offence under the Summary Offences Act 1988, other than an excluded offence,*
>
> *(c) an offence that is being dealt with by conference under Part 5 of the Young Offenders Act 1997.*
>
> *(3) Each of the following offences under the Summary Offences Act 1988 is an excluded offence:*
>
> *(a) an offence under section 5 (obscene exposure) if the person has previously been convicted of an offence under that section,*
>
> *(b) an offence under section 11A (violent disorder) if the person has previously been convicted of an offence under that section or of a personal violence offence,*
>
> *(c) an offence under section 11B, 11C or 11E (offences relating to knives and offensive implements) if the person has previously been convicted of an offence under any of those sections or of a personal violence offence,*
>
> *(d) an offence under section 11FA (custody or use of laser pointer in public place),*
>
> *(e) an offence under section 11G (loitering by convicted child sexual offenders near premises frequented by children).*

(4) An offence is not an offence for which there is a right to release if the accused person has previously failed to comply with a bail acknowledgment, or a bail condition, of a bail decision for the offence."

15 The statutory flow chart in s.16 takes the following form:



16 Section 17 is a key provision of the 2013 Act:

"17 <u>Requirement to consider unacceptable risk</u>

(1) A bail authority must, before making a bail decision, consider whether there are any unacceptable risks.

(2) For the purposes of this Act, an unacceptable risk is an unacceptable risk 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 witnesses or evidence.

(3) A bail authority is to consider the following matters, and only the following matters, in deciding whether there is an unacceptable risk:

(a) the accused person's background, including criminal history, circumstances and community ties,

(b) the nature and seriousness of the offence,

(c) the strength of the prosecution case,

(d) whether the accused person has a history of violence,

(e) whether the accused person has previously committed a serious offence while on bail,

(f) whether the accused person has a pattern of non-compliance with bail acknowledgments, bail conditions, apprehended violence orders, parole orders or good behaviour bonds,

(g) the length of time the accused person is likely to spend in custody if bail is refused,

(h) the likelihood of a custodial sentence being imposed if the accused person is convicted of the offence,

(i) if the accused person has been convicted of the offence and proceedings on an appeal against conviction or sentence are pending before a court, whether the appeal has a reasonably arguable prospect of success,

(j) any special vulnerability or needs the accused person has including because of youth, being an Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment,

> *(k) the need for the accused person to be free to prepare for their appearance in court or to obtain legal advice,*
>
> *(l) the need for the accused person to be free for any other lawful reason.*
>
> *(4) The following matters (to the extent relevant) are to be considered in deciding whether an offence is a serious offence (or the seriousness of an offence), but do not limit the matters that can be considered:*
>
> *(a) whether the offence is of a sexual or violent nature or involves the possession or use of an offensive weapon or instrument within the meaning of the Crimes Act 1900,*
>
> *(b) the likely effect of the offence on any victim and on the community generally,*
>
> *(c) the number of offences likely to be committed or for which the person has been granted bail or released on parole.*
>
> *(5) If the person is not in custody, the question of whether there are any unacceptable risks is to be decided as if the person were in custody and could be released as a result of the bail decision."*

17 In the second reading speech, the Attorney General observed that s.17(3) sets out *"an exhaustive list of matters"* to be considered when determining whether there is an unacceptable risk as defined in s.17(2).

18 The term *"serious offence"* is used in ss.17(2)(b) and 17(3)(e) and s.17(3)(b) refers to the *"seriousness of the offence"*. Section 17(4) (which is based on s.32(2A) of the 1978 Act) provides a formula for determining the *"seriousness"* of an offence and what a *"serious offence"* is. A more flexible (and case specific) definition is used than the penalty-based term *"serious indictable offence"*, being an indictable offence punishable by imprisonment for life or for a term of five years or more: s.4(1) *Crimes Act 1900*. The 2013 Act also avoids the use of terms in the 1978 Act, such as *"serious firearms and weapons offences"* (s.8B), *"serious property offences"* (s.8C) and *"serious personal violence offences"* (s.9D).

19 Section 18 provides that the following bail decisions can be made if there are no unacceptable risks:

(a) a decision to release the person without bail;

(b) a decision to dispense with bail;

(c) a decision to grant bail (without the imposition of bail conditions).

20 Section 19 provides that, if there is an unacceptable risk, a decision may be made to grant bail or to refuse bail.

21 Section 20 provides:

> *"20 When can bail be refused*
>
> *(1) A bail authority may refuse bail for an offence only if the bail authority is satisfied that there is an unacceptable risk that cannot be sufficiently mitigated by the imposition of bail conditions.*
>
> *(2) Bail cannot be refused for an offence for which there is a right to release under this Part."*

The Concept of *"Unacceptable Risk"*

22 The term *"unacceptable risk"* is defined or explained only in terms of s.17 (see the definition of *"unacceptable risk"* in s.4(1)). The words should be given their ordinary meaning, viewed in their statutory context.

23 The term *"unacceptable risk"* has been considered in different contexts, including child access and custody (*M v M* [1988] HCA 68; 166 CLR 69) and serious sex offender legislation (*Fardon v Attorney-General (Qld)* [2004] HCA 46; 223 CLR 575). It is used, as well, in the *Bail Act 1980 (Qld)* and the *Bail Act 1977 (Vic)* (to which further reference will be made at [32]-[36] below).

24 In *Fardon v Attorney-General (Qld)*, Gleeson CJ said at 593 [22]:

> *"It was argued that the test, posed by s 13(2), of 'an unacceptable risk that the prisoner will commit a serious sexual offence' is devoid of practical content. On the contrary, the standard of 'unacceptable risk' was referred to by this Court in M v M* [(1988) 166 CLR 69 at 78] *in the context of the magnitude of a risk that will justify a court in denying a parent access to a child. The Court warned against 'striving for a greater degree of definition than the subject is capable of yielding'. The phrase is used in the Bail Act 1980 (Q), which provides that courts may deny bail where there is an unacceptable risk that an offender will fail to appear (s 16). It is not devoid of content, and its use does not warrant a conclusion that the decision-making process is a meaningless charade."*

25 Later in Fardon v Attorney-General (Qld), McHugh J observed at 597 [34] that the statutory requirement that the Court "determine whether there is an unacceptable risk that the prisoner will commit a serious sexual offence" was "a standard sufficiently precise to engage the exercise of State judicial power".

26 Gummow J, at 606 [60], referred to *M v M* at 78, where Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ said (footnotes excluded):

> *"Efforts to define with greater precision the magnitude of the risk which will justify a court in denying a parent access to a child have resulted in a variety of formulations. The degree of risk has been described as a 'risk of serious harm', 'an element of risk' or 'an appreciable risk', 'a real possibility', a 'real risk', and an 'unacceptable risk'. This imposing array indicates that the courts are striving for a greater degree of definition than the subject is capable of yielding. In devising these tests the courts have endeavoured, in their efforts to protect the child's paramount interests, to achieve a balance between the risk of detriment to the child from sexual abuse and the possibility of benefit to the child from parental access. To achieve a proper balance, the test is best expressed by saying that a court will not grant custody or access to a parent if that custody or access would expose the child to an unacceptable risk of sexual abuse."*

27 Callinan and Heydon JJ, at 657 [225], observed that *"the process of reaching a predictive conclusion about risk is not a novel one"*, referring to the passage from *M v M* cited in the preceding paragraph.

28 The term *"unacceptable risk"* is used in s.5B *Crimes (High Risk Offenders) Act 2006*, and similar legislation in other jurisdictions in Australia (as considered in *Fardon v Attorney-General (Qld)*). Although the context is different (as is the standard of proof), what has been said may assist in consideration of the meaning of the term in the bail context.

29 In *Director of Public Prosecutions (WA) v Williams* [2007] WASC 206; 176 A Crim R 110 Wheeler JA (with whom Le Miere AJA agreed) said at 124 [63]:

> *"In my view, an 'unacceptable risk' in the context of s 7(1) is a risk which is unacceptable having regard to a variety of considerations which may include the likelihood of the person offending, the type of sexual offence which the person is likely to commit (if that can be predicted) and the consequences of making a finding that an unacceptable risk exists. That is, the judge is required to consider whether, having regard to the likelihood of the person offending and the offence likely to be committed, the risk of that offending is so unacceptable that, notwithstanding that the person has already been punished for whatever offence they may have actually committed, it is necessary in the interests of the community to ensure that the person is subject to further control or detention."*

30 In *Director of Public Prosecutions (WA) v GTR* [2008] WASCA 187; 198 A Crim R 149 Steytler P and Buss JA said at 159 [27]:

> *"The word 'unacceptable' necessarily connotes a balancing exercise, requiring the court to have regard, amongst other things, for the nature of the risk (the commission of a serious sexual offence, with serious consequences for the victim) and the likelihood of the risk coming to fruition, on the one hand, and the serious consequences for the offender, on the other, if an order is made (either detention, without having committed an unpunished offence, or being required to undergo what might be an onerous supervision order). As John Fogarty points out, albeit in a rather different context (Unacceptable risk - A return to basics (2006) 20 AJFL 249, 252), the advantage of the phrase 'unacceptable risk' is that 'it is calibrated to the nature and degree of the risk, so that it can be adapted to the particular case ... '."*

31 In *State of New South Wales v Richardson (No. 2)* [2011] NSWSC 276; 210 A Crim R 220, Davies J referred to *Fardon v Attorney-General (Qld)*,

M v M and the Western Australian cases at 228-229 [27]-[29]. Davies J said at 241 [90]:

> *"Two things seem to me significant when assessing the evidence and the likelihood of re-offending. The first is the higher standard of proof imposed by the words 'a high degree of probability'. The second is the notion that 'unacceptable risk' involves a balancing exercise between the commission of a serious sexual offence and the likelihood of that risk coming to fruition on the one hand, and the serious consequences for the Defendant either because he will be detained beyond the period of his sentence although he has not committed any further offence or he will be subject to an onerous supervision order, on the other hand. It is because of that balancing exercise that it is open to the Court to be satisfied to a high degree of probability that there is an unacceptable risk but that the result of that finding (either a continuing detention order or a supervision order) may vary in a given situation. ..."*

32 The concept of *"unacceptable risk"* is used in bail legislation in Queensland (s.16 *Bail Act 1980*) and Victoria (s.4(2)(d) *Bail Act 1977*). There are, of course, differences in the relevant statutory schemes as between the States, with some presumptions against bail or other statutory restrictions operating elsewhere. However, general statements in interstate cases concerning the concept of *"unacceptable risk"* may be useful.

33 In *Williamson v Director of Public Prosecutions* [1999] QCA 356; [2001] 1 Qd R 99, Thomas JA (McPherson JA agreeing) said at 103 [22]:

> *"No grant of bail is risk-free. The grant of bail, however, is an important process in civilised societies which reject any general right of the executive to imprison a citizen upon mere allegation or without trial. It is a necessary part of such a system that some risks have to be taken in order to protect citizens in those respects. This does not depend on the so-called presumption of innocence which has little relevance in an exercise which includes forming provisional assessments upon very limited material of the strength of the Crown case and of the defendant's character. Recognising that there is always some risk of misconduct when an accused person or for that matter any person, is free in society, one moves to consideration of the concept of unacceptable risk."*

34 In *Application of Haidy* [2004] VSC 247, Redlich J said at [14]-[16]:

> *"[14] Bail when granted is not risk free. Williamson v DPP (Q'ld)* [(1999) QCA 356]*.*
>
> *[15] As the offender's liberty is at stake, a tenuous suspicion or fear of the worst possibility if the offender is released will not be sufficient. Dunstan v DPP* [(1999) 107 A Crim R 358; [1999] FCA 921 per Gyles J at [56]]*; Williamson v DPP (Q'ld)* [at [21]].
>
> *[16] It is not necessary that the prosecution establish that the occurrence of the event constituting the risk is more probable than not. There are recognised conceptual difficulties associated with applying the civil standard of proof to future events. Davies v Taylor* [[1974] AC 207 at 212]*; Patterson v BTR Engineering (Aust) Ltd* [(1989) 18 NSWLR 319 at 325 per Gleeson CJ]*. To require that the risk be proved to a particular standard would deprive the test of its necessary flexibility. What must be established is that there is a sufficient likelihood of the occurrence of the risk which, having regard to all relevant circumstances, makes it unacceptable. Hence the possibility an offender may commit like offences has been viewed as sufficient to satisfy a court that there is an unacceptable risk. R v Phung* [[2001] VSCA 81]*; MacBain v Director of Public Prosecutions* [[2002] VSC 321 per Nettle J]*."*

35 In *Dale v Director of Public Prosecutions* [2009] VSCA 212, Maxwell P, Nettle JA and Lasry AJA said at [57]-[58]:

> *"57 Axiomatically, whether risk is unacceptable depends on all the circumstances of the case. Risks which would otherwise be unacceptable may be reduced, by the imposition of appropriate bail conditions, to a level which would be regarded as acceptable in all the circumstances* [MacBain v DPP (2002) VSC 321, [17] (Nettle J)]
>
> *58 Since no release on bail is without risk, however stringent the conditions, the question in the end is whether such risk as remains should be tolerated. In this case, given the long delay and severe consequences of incarceration for the appellant, that depended in part on whether there would be a greater risk if the appellant were released on bail than there was while he remained in gaol."*

36 Section 4(2)(d) of the Victorian Act was considered recently by Bell J in *Woods v Director of Public Prosecutions* [2014] VSC 1 at [43]-[47]:

> *"[43] Section 4(2)(d)(i) operates to require bail to be refused despite the presumptive entitlement to bail. It applies only where 'the court is satisfied' that there is an unacceptable risk. Therefore the onus is on the prosecution to persuade the court that the applicant does not* [sic] *represent an unacceptable risk* [Dale [2009] VSCA 212 (21 September 2009) [28] (Maxwell P, Nettle JA and Lasry AJA)].
>
> *[44] As the court has repeatedly emphasised, the question is not whether there is no risk, for there is always some risk if the accused is released on bail, but whether the risk is unacceptable* [Paterson (2006) 163 A Crim R 122 at 129 [36] (Gillard J); Haidy v DPP [2004] VSC 247 (22 April 2004) [14] (Redlich J) (Haidy); Scott [2011] VSC 674 (14 November 2011) [23] (T Forrest J)]. *On the other hand, it was held by Redlich J in Haidy v DPP* [[2004] VSC 247 (22 April 2004) [16]] *that a risk may be unacceptable even though the prosecution has not established that the occurrence of the event is more probable than not. According to his Honour, the prosecution had to establish that 'there is a sufficient likelihood of the occurrence of the risk which, having regard to all relevant circumstances, makes it unacceptable'.*
>
> *[45] In determining whether the circumstances constitute an unacceptable risk as specified in s 4(2)(d)(i), the court is required by s 4(3) to have regard to all relevant matters, including (but not limited to):*
>
> *(a) the nature and seriousness of the offence;*
>
> *(b) the character, antecedents, associations, home environment and background of the accused;*
>
> *(c) the history of any previous grants of bail to the accused;*
>
> *(d) the strength of the evidence against the accused;*
>
> *(e) the attitude, if expressed to the court, of the alleged victim of the offence to the grant of bail;*
>
> *(f) any conditions that may be imposed to address the circumstances which may constitute an unacceptable risk.*
>
> *[46] This provision was in substantially the same form when the legislation was originally enacted. One important amendment was made by the Bail Amendment Act 2010 which introduced para (f) into s 4(3). For the first time, an*

express link was thereby made between the imposition of conditions and the administration of the unacceptable risk test. Previously there was authority for the proposition that it was implicitly permissible to take the imposition of conditions into account when determining whether an accused represented an unacceptable risk. For example, in MacBain v DPP [[2002] VSC 321 (9 August 2002)]*, Nettle J formed the view that, if conditions of a particular kind were imposed, 'the risk that the applicant would not appear and the risk that she would re-offend whilst on bail may be reduced to a level which should be regarded as acceptable in all the circumstances'* [Ibid [17]]*. The amendment of s 4(3) to include para (f) makes clear that this is the correct approach and also underlines the significance of conditions under the modernised statutory regime.*

[47] The test in s 4(2)(d)(i) is expressed in terms of 'unacceptable' risk not in terms of the magnitude or degree of the risk. Moreover, not all of the circumstances specified in s 4(3) relate to the degree of the risk. It follows, as Redlich J pointed out in Haidy*, that '*[t]*he degree of likelihood of the occurrence of the event may be only one factor which bears upon whether the risk is unacceptable'* [[2004] VSC 247 (22 April 2004) [18]. *Consistently with the presumption of innocence and the prosecutorial onus of proof, it is the overall effect of the multiplicity of considerations in the individual facts and circumstances of the case which must be considered. In consequence, bail may be granted though a risk of offending or not answering bail is relatively high when other circumstances, such as inordinate delay between arrest of the accused and trial or a weak prosecution case, lead to the conclusion that the risk is not unacceptable, having regard to the presumed innocence, right to liberty and other human rights of the accused and relevant public interest considerations. Conversely, a relatively low risk of reoffending may be overwhelmed by considerations on the opposite side, such as a high risk of not answering bail, which establish that the risk is unacceptable* [See Mokbel v DPP (No 3) [2002] VSC 393 (4 September 2002) [10] (Kellam J) (approved in Barbaro [2009] VSCA 26 (3 March 2009) [41] (Maxwell P, Vincent and Kellam JJA); Haidy [2004] VSC 247 (22 April 2004) [18]–[19] (Redlich J); R v Wakefield (1969) 89 WN (Pt 1) (NSW) 325 at 327 (Cross Ch QS)]*."*

37 The concept of risk assessment in the criminal law is not confined to bail applications. An assessment of a person's risk of reoffending forms part of the sentencing process. In *Beldon v R* [2012] NSWCCA 194 at [53], the Court said:

> *"The courts have recognised the imprecise nature of the process which involves an assessment of an offender's risk of reoffending, in particular where a lengthy sentence is to be imposed so that there is no prospect of the offender being released into the community at an early time. It has been emphasised that it is the risk of reoffending which is under consideration: R v SLD [2003] NSWCCA 310; 58 NSWLR 589 (special leave to appeal refused: SLD v The Queen [2004] HCA Trans 501); R v Johnson [2005] NSWCCA 186 at [13]; Knight v R [2006] NSWCCA 292; 164 A Crim R 126 at 141 [30]; Adanguidi v R [2006] NSWCCA 404; 167 A Crim R 295 at 309 [55]; R v Willmott [2012] NSWSC 824 at [30]."*

Bail Conditions

38 Bail can be granted subject to conditions or unconditionally: s.23(1). Section 24 creates a general rule concerning imposition of bail conditions:

> *"24 General rules for bail conditions*
>
> *(1) A bail condition can be imposed only for the purpose of mitigating an unacceptable risk.*
>
> *(2) Bail conditions must be reasonable, proportionate to the offence for which bail is granted, and appropriate to the unacceptable risk in relation to which they are imposed.*
>
> *(3) A bail condition is not to be more onerous than necessary to mitigate the unacceptable risk in relation to which the condition is imposed.*
>
> *(4) Compliance with a bail condition must be reasonably practicable.*
>
> *(5) This section does not apply to enforcement conditions."*

39 Bail conditions can impose or require:

(a) a conduct requirement that the accused person do or refrain from doing something: s.25;

(b) a security requirement: s.26;

(c) a character acknowledgement, given by an acceptable person to the effect that he or she is acquainted with the accused person and regards the accused person as a responsible person who is likely to comply with his or her bail acknowledgment: s.27;

(d) accommodation requirements: s.28.

40 The accommodation requirement provision in s.28 is new. It provides:

> *"28 <u>Bail condition can impose accommodation requirements</u>*
>
> *(1) A bail condition imposed by a court or authorised justice on the grant of bail can require that suitable arrangements be made for the accommodation of the accused person before he or she is released on bail.*
>
> *(2) A requirement of a kind referred to in this section is an accommodation requirement.*
>
> *(3) An accommodation requirement can be imposed only:*
>
> *(a) if the accused person is a child, or*
>
> *(b) in the circumstances authorised by the regulations.*
>
> *(4) The court responsible for hearing bail proceedings must ensure that, if an accommodation requirement is imposed in respect of a child, the matter is re-listed for further hearing at least every 2 days until the accommodation requirement is complied with.*
>
> *(5) The court may direct any officer of a Division of the Government Service to provide information about the action being taken to secure suitable*

arrangements for accommodation of an accused person.

(6) The regulations may make further provision for accommodation requirements.

Note. The court can also impose a bail condition requiring the accused person to reside at the relevant accommodation while at liberty on bail (a conduct requirement).”

41 Clause 31 of the *Bail Regulation 2014* makes further provision concerning accommodation requirements:

“31 Information about action taken to secure accommodation for accused person

(1) The information that the court may direct any officer of a Division of the Government Service to provide under section 28 (5) of the Act may be lodged in writing or can be provided orally in court.

(2) The information must identify the address at which the accused person will reside while on bail, if such an address has been determined.”

42 The Attorney General explained s.28 in the following way in the second reading speech:

“The Law Reform Commission recommended that the new Act should provide for a condition of this nature in relation to children, and proposed section 28 implements this recommendation. The Children's Court has faced a recurring difficulty when dealing with children whom it wishes to release to bail but who do not have suitable accommodation available. Under the existing Act the court's only option in those circumstances is to refuse bail to the young person and then reconsider it when accommodation is organised.

However, proposed section 28 allows the court to impose bail, including the accommodation requirement, and, once suitable accommodation has been found, the accused can be released to bail without the matter having to be relisted before the court. The bill incorporates safeguards recommended by the Law Reform Commission including a requirement that the court relist the matter at least every two days for further hearing until the condition is met, to ensure that the person is not detained for an unduly lengthy period beyond the grant of bail. Whilst the provision is presently targeted at children, it includes a regulation-making power to allow for the extension of these requirements to adults,

for example, to facilitate the imposition of a residential rehabilitation condition."

43 The only provision in the 2014 Regulation concerning accommodation requirements is Clause 31 (set out at [41] above).

Some Procedural Issues - Evidentiary Rules, Standard of Proof, Reasons and Stay Pending Crown Supreme Court Detention Application

44 A bail decision maker may take into account any evidence or information considered credible or trustworthy in the circumstances and is not bound by the principles or rules of law regarding the admission of evidence: s.31. Section 32(3) of the 1978 Act is in similar terms to s.31 of the 2013 Act.

45 Any matter that must be decided by a bail authority in exercising a function in relation to bail is to be decided on the balance of probabilities (with the exception of proceedings for an offence in relation to bail): s.32. Section 59 of the 1978 Act is in similar terms.

46 There is a requirement to give reasons for a decision to refuse bail or to impose conditions. Section 38 provides:

> *"38 <u>Reasons for decision to be recorded</u>*
>
> *(1) A bail authority that refuses bail must immediately record the reasons for refusing bail, including the unacceptable risk or risks identified by the bail authority.*
>
> *(2) A bail authority that imposes bail conditions must immediately make a record that:*
>
> *(a) specifies the reasons for not granting bail unconditionally, and*
>
> *(b) sets out the unacceptable risk or risks identified by the bail authority.*
>
> *(3) The record must include the bail authority's reasons for imposing any security requirement or requiring any character acknowledgments.*

> *(4) If an accused person requests that certain bail conditions be imposed, and other bail conditions are imposed, the bail authority must record reasons for imposing the other conditions.*
>
> *(5) The regulations may make provision for the making of records under this section and the manner of retaining and otherwise dealing with those records."*

47 Clause 12 of the 2014 Regulation provides for reasons of a deciding police officer. The 2014 Regulation makes no provision for reasons of a court. Section 38 of the 1978 Act requires reasons to be given for a bail decision.

48 Section 40 provides for a stay of a release decision if a police officer or Crown legal representative informs the Court that a detention application is to be made to the Supreme Court with that stay extending for up to three business days. A detention application made to the Supreme Court when a decision is stayed under s.40 is to be dealt with as expeditiously as possible: s.40(4).

49 Special provision is made for deferral of the making of a bail decision if the accused person is intoxicated: s.44.

Charges of Murder

50 Prior to 1978, a common law principle restricted the grant of bail in murder cases to those involving special or exceptional circumstances: *R v Cable* (1947) 63 WN 267; *R v Watson* (1948) 64 WN 100; *R v Zvonaric* (1967) 1 Petty Sessions Review 77 (Moffitt J, 3 November 1967); *R v Anderson* [1978] VR 332.

51 That principle was not imported into the 1978 Act: Donovan, *"The Law of Bail: Practice, Procedure and Principles"*, 1981, Legal Books Pty Limited, paragraphs 9.4, 32.3.

52 However, in 2003, s.9C was inserted, thereby creating an exceptional circumstances test for bail in murder cases: *R v Young* [2006] NSWSC 1499 at [15].

53 With the commencement of the 2013 Act, there will once again be no special bail test applicable to murder cases. The general *"unacceptable risk"* test will apply.

Bail Pending Appeal to Court of Criminal Appeal or High Court of Australia

54 Prior to 1978, the common law required that a person seeking bail pending appeal against conviction or sentence on indictment must establish special or exceptional circumstances: *R v Hilton* at 746-747, 752.

55 The 1978 Act removed the requirement for special or exceptional circumstances: *R v Hilton*.

56 In 1987, s.30AA was inserted in the Act, restoring the special or exceptional circumstances test for appellants to the Court of Criminal Appeal or the High Court of Australia.

57 The NSWLRC Report recommended retention of the special or exceptional circumstances test, and the Attorney General observed in the second reading speech that this recommendation had been adopted.

58 Section 22 of the 2013 Act maintains the special or exceptional circumstances test where a person appeals to the Court of Criminal Appeal or to the High Court of Australia with respect to conviction or sentence on indictment.

59 Application of the special or exceptional circumstances test on a bail application in advance of a conviction appeal may be seen in cases such as *R v Wilson* (1994) 34 NSWLR 1; *R v Velevski* [2000] NSWCCA 445 at

[8]ff; *Petroulias v R* [2010] NSWCCA 95 at [11]-[13] and *Lane v R* [2013] NSWSC 146 at [7]-[10].

60 For application of the special or exceptional circumstances test where bail is sought pending a sentence appeal, see *Director of Public Prosecutions (Cth) v Cassaniti* [2006] NSWSC 1103; *Lee v R* [2012] NSWSC 1168; 224 A Crim R 278 at 288-290 [60]-[71] and *R v Khoo* [2013] NSWSC 1518; 97 ACSR 1 at 3-4 [10]-[21].

Bail Review

61 The provisions for bail review by courts in the 1978 Act (ss.43A-49) are not included in the 2013 Act. In the second reading speech, the Attorney General explained why this part of the 1978 Act was not to be imported into the 2013 Act:

> *"The Law Reform Commission noted that the existing scheme for review by a court of a previous bail decision can be confusing, as it may be unclear whether a new application is being made or a review of the previous decision is being sought.*
>
> *The commission therefore recommended that the review system be scrapped and that a simplified application regime be implemented whereby three forms of bail application can be made, depending on what outcome is sought. The bill implements this recommendation. Proposed section 49 provides for the accused to make a release application, being an application to have bail granted or dispensed with. Proposed section 50 provides for the prosecution to make a detention application, being an application to have the accused's bail refused or revoked. In relation to both of these types of application, the relevant bail authority may, after hearing the application, dispense with bail, grant bail or refuse bail and may vary or affirm a previous bail decision made. A detention application cannot be heard unless the accused has been provided with reasonable notice, subject to the regulations.*
>
> *Proposed section 51 provides for the third type of application recommended by the Law Reform Commission, being an application for variation of bail conditions."*

Other Provisions Relating to the Court of Criminal Appeal or Supreme Court

62 Section 66 refers specifically to the Supreme Court:

> *"66 Powers specific to Supreme Court*
>
> *(1) The Supreme Court may hear a release application for an offence if bail for the offence has been refused by another court, an authorised justice or a police officer.*
>
> *(2) 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 authorised justice or a police officer."*

63 In the second reading speech, the Attorney General said concerning s.66:

> *"Division 3 sets out the powers of particular courts to hear bail applications. I will not set out these provisions in detail. However, I note that proposed section 66 allows the Supreme Court to hear a variation application or detention application where a bail decision has already been made by the District Court. This differs from the existing Act whereby decisions of the District Court can be reviewed only by the Court of Criminal Appeal."*

64 Where a release application, detention application or variation application is made to the Supreme Court under s.66 following a bail decision by the District Court during or after trial, a question may arise as to whether the application should be referred to the Court of Appeal in accordance with the practice in *R v Roberts and Lardner* (1997) 97 A Crim R 456 at 457, applied in cases such as *Director of Public Prosecutions v SKA* [2009] NSWCA 51 at [8].

65 Section 67 relates to the Court of Criminal Appeal:

> *"67 Powers specific to Court of Criminal Appeal*
>
> *(1) The Court of Criminal Appeal may hear a bail application for an offence if:*
>
> *(a) the Court has ordered a new trial and the new trial has not commenced, or*
>
> *(b) the Court has made an order under section 8A (1) of the Criminal Appeal Act 1912 and the person is before the Court, or*
>
> *(c) the Court has directed a stay of execution of a conviction and the stay is in force, or*
>
> *(d) an appeal from the Court is pending in the High Court, or*
>
> *(e) a bail decision has been made by the Land and Environment Court, the Industrial Court or the Supreme Court.*
>
> *(2) Despite subsection (1) (e), a Judge of the Court of Criminal Appeal sitting alone cannot hear a bail application if a bail decision has been made by the Supreme Court (however constituted) unless the rules made under the Supreme Court Act 1970 permit the Judge to do so."*

66 Section 69 provides for limited powers for other courts to make a bail decision, when a decision has already been made by the Supreme Court or the Court of Criminal Appeal. Section 69 provides:

> *"69 Limited powers when decision made by Supreme Court or Court of Criminal Appeal*
>
> *(1) The Local Court, the District Court, the Land and Environment Court or the Industrial Court (a relevant court) may hear a bail application for an offence when a bail decision has been made by the Supreme Court (however constituted) or the Court of Criminal Appeal only if:*
>
> *(a) proceedings for the offence are pending in the relevant court, and*
>
> *(b) the person appears before the relevant court in those proceedings, and*

(c) the relevant court is satisfied that special facts or special circumstances justify the hearing of the bail application.

(2) This section has effect subject to any exceptions or other limitations prescribed by the regulations.

(3) This section does not prevent a court from hearing a detention application under Part 8.

Note. Part 8 permits bail to be revoked because of a failure or threatened failure to comply with a bail acknowledgment or bail conditions."

67 Schedule 2 to the 2013 Act relates to forfeiture of security. Clause 18 of Schedule 2 provides as follows:

"18 Court of Criminal Appeal may authorise other courts to take action

If a person granted bail is under a duty to appear before the Court of Criminal Appeal in connection with an appeal:

(a) the Court of Criminal Appeal may instead authorise the court from which the appeal arose to take any action under this Schedule that the Court of Criminal Appeal is authorised to take, and

(b) in that event, the court from which the appeal arose may take such action."

68 Section 99 provides as follows:

"99 Court rules

(1) Rules (being rules not inconsistent with this Act) may be made under the Supreme Court Act 1970 with respect to the powers, authorities, duties or functions of the Supreme Court and the Court of Criminal Appeal in respect of bail.

(2) Those rules may prescribe forms to be used in connection with those powers, authorities, duties or functions. If such forms are prescribed, they may be used instead of forms prescribed by regulations made under this Act."

69 Part 75 *Supreme Court Rules 1970* relates to criminal proceedings. Rules 3E-3FB of Part 75 relate to aspects of the 1978 Act and will require amendment.

Restriction on Multiple Applications

70 Section 74 restricts the making of multiple release or detention applications to the same court. Section 74 provides:

> *"74 <u>Multiple release or detention applications to same court not permitted</u>*
>
> *(1) A court that refuses bail for an offence, or that affirms a decision to refuse bail for an offence, after hearing a release application is to refuse to hear another release application made by the accused person for the same offence, unless there are grounds for a further release application.*
>
> *(2) A court that grants or dispenses with bail for an offence, or that affirms a decision to grant or dispense with bail for an offence, after hearing a detention application is to refuse to hear another detention application made by the prosecution for the same offence, unless there are grounds for a further detention application.*
>
> *(3) For the purposes of this section, the grounds for a further release application are:*
>
> *(a) the person was not legally represented when the previous application was dealt with and the person now has legal representation, or*
>
> *(b) information relevant to the grant of bail is to be presented in the application that was not presented to the court in the previous application, or*
>
> *(c) circumstances relevant to the grant of bail have changed since the previous application was made, or*
>
> *(d) the person is a child and the previous application was made on a first appearance for the offence.*

(4) For the purposes of this section, the grounds for a further detention application are:

(a) information relevant to the grant of bail is to be presented in the application that was not presented to the court in the previous application, or

(b) circumstances relevant to the grant of bail have changed since the previous application was made.

(5) In this section, court does not include an authorised justice."

71 In the second reading speech, the Attorney General said with respect to s.74:

"Proposed section 74 largely remakes provisions in existing section 22A of the Bail Act 1978 restricting second or subsequent release applications made to the same court. This has been the most controversial provision, particularly in relation to juveniles. The proposed section also extends these restrictions to second or subsequent detention applications made by the prosecution. It stipulates that a court is to refuse to hear a second or subsequent release or detention application unless there are grounds for a further application. In relation to release applications, proposed section 74 (3) sets out the grounds for a further application, including where there is relevant information that was not presented on the previous application and where relevant circumstances have changed since the last application.

However, this provision includes an additional ground for a further application, not contained in the existing section 22A, which applies where the accused person is a child and the previous application was made on their first appearance for the offence. The Law Reform Commission's review noted the particular difficulties that can be faced by legal practitioners when taking instructions from juveniles at the early stages of proceedings. This additional ground for a further application has been included in recognition of that difficulty. The grounds for a further detention application in proposed section 74 (4) also include a change in circumstances and where there is new information relevant to the grant of bail. An example of circumstances that may qualify as grounds for a further detention application is where the accused enters a plea of guilty or is convicted of the offence following a hearing.

Detention applications have been included in this provision because they are a new form of application, not provided for in the existing Act, and it is appropriate that a second or subsequent application to the same court not be heard unless grounds for the

application are demonstrated. This will not prevent the prosecution from making a detention application in another jurisdiction with power to hear such an application. For example, where a detention application is refused in the Local Court the prosecution can make a further application in the Supreme Court without having to demonstrate grounds for the application."

Transitional Provisions

72 Schedule 3 of the 2013 Act includes transitional provisions.

73 A 1978 Act bail application pending as at 20 May 2014 is taken to be a release application under the 2013 Act: cl.8(1), Schedule 3.

74 A 1978 Act review application pending as at 20 May 2014 is taken to be a detention or variation application under the 2013 Act: cl.8(2), Schedule 3.

75 Bail granted under the 1978 Act is taken to have been granted under the 2013 Act, and continues in force until it would have ceased to have effect under the 1978 Act unless sooner revoked under the 2013 Act: cl.3(2), Schedule 3.

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