



Presenter Paper

The Bail Amendment Act 2015

The *Bail Amendment Act 2015* ("the Act") was passed on 27 October 2015 but at the time of writing is yet to commence. The Act amends some key sections of the *Bail Act 2013* and also includes amendments to the *Bail Act* which are described as "in response to Martin Place siege review" (this is part of the heading to Schedule 2 of the Act). The amendments clearly expand the scope of the *Bail Act* especially in its consideration of Commonwealth terrorism related offences.

Discussion Includes

- The *Bail Act 2013* (NSW) Schedule 1 amendments
- Show cause requirements
- Assessment of bail concerns
- Accommodation requirements
- Exceptional circumstances test
- Powers of Bail Authorities
- Terrorism offences

THE BAIL AMENDMENT ACT 2015 - by Caroline Dobraszczyk-Barrister-Trust Chambers, Sydney

INTRODUCTION

The *Bail Amendment Act* 2015 ("the Act") was passed on 27 October 2015 but at the time of writing is yet to commence. The Act amends some key sections of the *Bail Act* 2013 and also includes amendments to the *Bail Act* which are described as "in response to Martin Place siege review" (this is part of the heading to Schedule 2 of the Act). The amendments clearly expand the scope of the *Bail Act* especially in its consideration of Commonwealth terrorism related offences.

THE BAIL ACT 2013 - a bit of history

The Bail Act 2013 commenced on 20 May 2014 and contained major changes to the law on bail in NSW. The most important change was the "unacceptable risk test" which applied to all offences and was to replace the previous tests of applying "presumptions", either against bail, in favour of bail or having a bail "neutral" position, depending on what the accused was charged with. There were further important amendments in 2014 (which commenced on 28 January 2015) and which created a different test for certain offences ie "show cause offences", ie these laws require people charged with specified offences to "show cause" why their detention is not justified. We now have the 2015 Amendment Act which makes once again, major important changes as to the determination of bail in NSW.

SCHEDULE 1 AMENDMENTS

This Schedule, which is "in response to Hatzistergos and Sentencing Council Reports" (this is part of the heading to Schedule 1), sets out amendments to:

- expand the types of offences which are subject to the "show cause" requirement
- expand the matters to be considered as part of the assessment of bail concerns
- accommodation requirements as a bail condition
- police powers in relation to bail and
- section 78 –powers of bail authorities.

In June 2014 the NSW government established "the Hatzistergos review" of the Bail Act 2013 to "...ensure the safety of the community, victims and witnesses is at the forefront of all decisions made on bail"-(The Second Reading Speech for the Act, 27 October 2015). Judge Hatzistergos completed his final review of the Bail Act 2013 and the Act implements most of his recommendations. The NSW government also referred some matters to the Sentencing Council and the Sentencing Council made a recommendation as to the definition of "serious personal violence offence" which is implemented in the Act.

The show cause requirements

The first main amendment in this Schedule is in relation to s16B (which sets out the offences to which the show cause requirement applies), and includes a new set of offences, being "a serious indictable offence that is committed by an accused person while the person is the subject of a warrant authorizing the arrest of a person issued under this Act or Part 7 of the *Crimes (Administration of Sentences) Act 1999*-s16B (1)(l)".

Part 7 is headed "Revocation and Reinstatement by Parole Authority of certain Orders" and includes intensive correction orders, home detention orders and parole orders.

There is also to be a new definition of "serious personal violence offence" in s16 B (3) to include not just an offence under Part 3 of the *Crimes Act 1900* which is punishable by imprisonment of 14 years or more, but also "an offence under a law of the Commonwealth, another state or territory or any other jurisdiction that is similar to an offence under that Part." This would include for example, offences of murder/manslaughter/kidnapping offences/ unlawful sexual penetration against UN and associated personnel offences under Chapter 4 Division 71 of the Commonwealth Criminal Code ("the Code"), some of the offences of Harming Australians (eg murder/manslaughter of an Australian citizen or resident outside Australia) in Part 5.4 of the Code, offences in Division 72 Subdivision A which is headed "International terrorist activities using explosives or lethal devices", also slavery offences under Division 270 of the Code.

Assessment of bail concerns

The second set of amendments in Schedule 1 are in relation to section 18, ie the matters to be considered as part of the assessment of bail concerns. This section contains a long list of matters which a bail authority is to consider, and only these matters are to be considered, when making an assessment as to whether there are any "bail concerns." Section 17 sets what is a "bail concern" ie "...a concern that an accused person if released from custody, will- fail to appear at any proceedings for an offence, or commit a serious offence, or endanger the safety of victims, individuals or the community, or interfere with witnesses or evidence."

The current section 18 (1) (f) is to be deleted and replaced with a more extensive set of compliance orders ie the section now reads that a bail authority is to consider "whether the accused person has a history of compliance or non compliance with any of the following:

- (i) bail acknowledgments
- (ii) bail conditions
- (iii) apprehended violence orders
- (iv) parole orders
- (v) good behaviour bonds

- (vi) intensive correction orders
- (vii) home detention orders
- (viii) community service orders
- (ix) non association and place restriction orders.

Further, there is to be a new section 18 (1) (f1) which states that "if the bail authority is making the assessment of bail concerns because the accused person has failed or was about to fail to comply with a bail acknowledgment or a bail condition, [the bail authority is to consider] any warnings issued to the accused person by police officers or bail authorities regarding non-compliance with bail acknowledgments or bail conditions." (Bail acknowledgment is defined in s33 of the Bail Act 2013 as basically a written notice that requires the person to appear at court on a certain day at a certain time as specified in a notice given to them or sent to them).

There will be a new section 18 (1) (i1) which is that a bail authority is to consider "if the accused person has been convicted of the offence, but not yet sentenced, the likelihood of a custodial sentence being imposed".

Accommodation requirements

In relation to accommodation requirements, there is to be a new section 28 (3) (a1) which is that in the case of an accommodation requirement for a child, it is to be imposed "for the purpose of enabling the accused person to be admitted to a residential rehabilitation facility for treatment on the person's release on bail." Further, the note to the section is to be omitted and now reads "The court can also impose the following types of bail condition (conduct requirements):

- (a) requiring the accused person to reside at the relevant accommodation while at liberty on bail, and
- (b) if the accommodation requirement is for the purpose of enabling the accused person to be admitted to a residential rehabilitation facility, requiring the accused person to be accompanied by a person specified by the court to that facility on release on bail."

Police bail

Section 43 is amended to permit a police officer of or above the rank of sergeant, at a hospital, to make a bail decision for an offence if the person is at the hospital receiving treatment and in the opinion of the police officer it is not reasonable to take the person to a police station due to the person's illness. Section 47 is amended to expand the definition of "senior police officer."

Section 78-powers of bail authorities

This section deals with the powers of bail authorities when someone has failed or was about to fail, to comply with a bail acknowledgment or bail condition. Section 78 (1) (b) now includes a note which

is that "The power to vary a bail decision includes a power to revoke the bail decision and substitute a new bail decision..." Section 78 (2), which deals with what a bail authority is to be satisfied of in order to revoke or refuse bail, is to be deleted.

SCHEDULE 2 AMENDMENTS

As stated above, this Schedule has as part of its heading "...in response to Martin Place Siege review." Essentially, "the siege review recommended that bail authorities be required to take into account links with terrorist organisations or violent extremism" (Second Reading Speech to the Act, 27 October 2015).

There are two significant amendments. The first is in relation to section 18. That is there are three new matters to be considered as part of the assessment of bail concerns. They are as follows:

- "(q) whether the accused person has any associations with a terrorist organization (within the meaning of Division 102 of Part 5.3 of the Commonwealth Criminal Code),
- (r) whether the accused person has made statements or carried out activities advocating support for terrorist acts or violent extremism,
- (s) whether the accused person has any associations of affiliation with any persons or groups advocating support for terrorist acts or violent extremism".

"terrorist act" is defined as having the same meaning as it has in part 5.3 of the Commonwealth Criminal Code.

"terrorist act" means an action or threat of action where:

- (a) the action falls within subsection (2) and does not fall within subsection (3); and
- (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
- (c) the action is done or the threat is made with the intention of:
 - (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
 - (ii) intimidating the public or a section of the public.

(2) Action falls within this subsection if it:

- (a) causes serious harm that is physical harm to a person; or
- (b) causes serious damage to property; or
- (c) causes a person's death; or
- (d) endangers a person's life, other than the life of the person taking the action; or
- (e) creates a serious risk to the health or safety of the public or a section of the public; or
- (f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:

- (i) an information system; or
- (ii) a telecommunications system; or
- (iii) a financial system; or
- (iv) a system used for the delivery of essential government services; or
- (v) a system used for, or by, an essential public utility; or
- (vi) a system used for, or by, a transport system.

(3) Action falls within this subsection if it:

(a) is advocacy, protest, dissent or industrial action; and

(b) is not intended:

- (i) to cause serious harm that is physical harm to a person; or
- (ii) to cause a person's death; or
- (iii) to endanger the life of a person, other than the person taking the action; or
- (iv) to create a serious risk to the health or safety of the public or a section of the public.

(4) In this Division:

(a) a reference to any person or property is a reference to any person or property wherever situated, within or outside Australia; and

(b) a reference to the public includes a reference to the public of a country other than Australia."

The second amendment is that we now have a new section –ie s22A. Section 22 is headed "General limitation on court's power to release". Section 22A is headed "Limitation on power to release in relation to terrorism related offences". The section states:

"(1) Despite anything to the contrary in this Act, a bail authority must, unless it is established that exceptional circumstances exist, refuse bail for:

(a) an offence under section 310J of the *Crimes Act 1900*, [Membership of a terrorist organization] or

(b) any offence for which a custodial sentence may be imposed, if the bail authority is satisfied that the accused person:

(i) before being charged with that offence, has been charged with a Commonwealth terrorism offence or an offence under section 310J of the *Crimes Act 1900* and the proceedings relating to the offence have not concluded, or

(ii) has previously been convicted of a Commonwealth terrorism offence or an offence under s 310J..., or

(iii) is the subject of a control order made under Part 5.3 of the Commonwealth Criminal Code.

(2) If the offence is a show cause offence, the requirement that the accused person establish that exceptional circumstances exist that justify a decision to grant bail or

dispense with bail applies instead of the requirement that the accused person show cause why his or her detention is not justified."

(3) Subject to subsection (1), Division 2 (Unacceptable risk test-all offences) applies to a bail decision made by a bail authority under this section."

"Commonwealth terrorism offence" has the same meaning as "terrorism offence" in the *Crimes Act 1914*.

Terrorism offence means:

"(a) an offence against Subdivision A of Division 72 of the *Criminal Code*; or

(aa) an offence against Subdivision B of Division 80 of the *Criminal Code*; or

(b) an offence against Part 5.3 or 5.5 of the *Criminal Code*; or

(c) an offence against either of the following provisions of the *Charter of the United Nations Act 1945*:

(i) Part 4 of that Act;

(ii) Part 5 of that Act, to the extent that it relates to the *Charter of the United Nations (Sanctions—Al-Qaida) Regulations 2008*."

Subdivision A of division 72 is headed "International terrorist activities using explosives or lethal devices." Subdivision B of Division 80 is headed "Treason". Part 5.3 is headed "Terrorism" and includes the offences of providing or receiving training connected with terrorist acts, possessing things connected with terrorist acts, collecting or making documents to facilitate terrorist acts, doing other acts in preparation for, or planning, terrorist acts, membership of a terrorist organization, providing support to a terrorist organization, associating with terrorist organisations, financing terrorism-others. Part 5.5 is headed "Foreign incursions and recruitment".

A "control order" is an order of the Court under Division 104 of the Commonwealth Criminal Code. It can specify places and people that the person cannot go to /see, wear a tracking device, to be photographed, fingerprints to be taken, association orders, restrictions on using technology, restriction on carrying out certain activities.

It is important to remember that section 15AA of the Crimes Act 1914 provides a similar "exceptional circumstances" test for certain specified Commonwealth offences including specified terrorism offences.

The Attorney General stated in the Second reading speech in relation to the new "exceptional circumstances" test that "While the new test will be applied on a case by case basis, New South Wales courts may find guidance in decisions under the Commonwealth provisions." The Second Reading speech also notes that "If the person is able to establish that exceptional circumstances exist, the bail authority must then go on to apply the unacceptable risk test."

R (Commonwealth) v Maywand Osman (2015/00012786, Supreme Court of NSW, Hall J, 12 February 2015) dealt with section 15AA. HH referred to some cases where "exceptional circumstances" had been discussed. In *R v Young* [2006] NSWSC 1499 Johnson J stated that each case "...requires a case by case examination and that there is no definitive definition that would apply to all." There is no doubt that the test is a "... high test or a heavy onus"-at page 6 of Osman. Studdert J stated in *R v Cheikho* (unreported 15 May 2006) that it was "a very heavy onus"-see Osman at page 6-7.

The Attorney General also said in the Second Reading speech that:

"Recent events within Australia have highlighted the need to ensure that New South Wales legislation remains effective in preventing and combating terrorism, while ensuring civil liberties are properly protected and retained.

There is no doubt this is a delicate balancing act, but it is the Government's view that protection of the community must remain the paramount concern.

This is why the New South Wales Government is working closely with the Commonwealth government to ensure that counterterrorism laws and measures are properly directed at combating the threat of terrorism not only to the New South Wales community, but all Australians. The Government will also continue to monitor the operation of the bail laws to ensure they are adequate and working effectively.

The introduction of these bills will ensure the respective laws remain effective and are responsive to the extraordinary harm which can be caused by terrorism."

CONCLUSION

The intention of the amendments is clear, especially the Schedule 2 amendments. Any evidence of terrorism related activities will need to be specifically considered by the bail authority when making a bail decision. Further, there is the new test of "exceptional circumstances" to be met if the accused has been charged with the State offence of "Membership of a terrorist organization" or even if charged with any another offence (for which a custodial sentence may be imposed), and the accused has a criminal history, or has been charged with or is subject to a control order, relating to Commonwealth terrorism offences. These amendments provide a strong set of bail laws to deal with important concerns/safety of people in NSW.

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