

Bail Laws in NSW

The Bail Act 2013 (NSW) “the Bail Act” has been the subject of much debate and significant law reform since it came into force in January 2014.

What is Bail?

Bail is the authority for a person accused of and charged with a crime to be at liberty while awaiting trial.

A bail decision is made by the NSW Police or a judge of the Local, District or Supreme Court in NSW.

A bail decision leads to bail being:

GRANTED

the accused is at **liberty** while they await trial

OR

REFUSED

The accused is held on **remand** while they await trial

How is Bail Decided?

Judges and magistrates in the Local, District and Supreme Courts have the power to make bail decisions (as well as the NSW Police).

The Court of Criminal Appeal may also make bail decisions, but only after it has been considered by a lower court. The Bail Act requires that all courts must hear each bail decision *de novo*. This means that the court which hears a bail application will consider it from the start, and not review the correctness of any subsequent bail decision.

A bail decision originally heard in the Local or District Court can be heard again by the Supreme Court, and the Court of Criminal Appeal could again hear a bail decision heard by any lower court. Both the accused and the prosecution may apply to a higher court to consider a bail decision.

Bail is not punishment

The presumption of innocence ensures that people are not punished without being found guilty of a crime and is an important check on the power of government because it limits the government’s ability to punish and imprison people.

The presumption of innocence is not absolute. The bail process ensures that the presumption of innocence is maintained, but also deals with other important considerations such as the safety of the community and the enforcement of the criminal law.



LEGAL RESPONSE

Bail Act 2013 (NSW)

RECENT BAIL DECISIONS

- *DPP (NSW) v Mawad* [2015] NSWCCA 227
- *Abdulrahman v R* [2015] NSWCCA 238
- *M v R* [2015] NSWSC 138
- *R v Tasker (No 2)* [2015] NSWSC 467
- *R v Toksoz* [2015] NSWSC 1234
- *Kangas v R* [2015] NSWSC 1294
- *R v Boatswain* [2015] NSWSC 1828
- *McAndrew v the Queen* [2016] NSWCCA 58
- *Trinh v R* [2016] NSWCCA 110
- *DPP (NSW) v Zaiter* [2016] NSWCCA 247
- *R v Marcus* [2016] NSWCCA 237
- *R v NK* [2016] NSWSC 498
- *AB v DPP (Cth)* [2016] NSWSC 1042

Bail decisions are available on NSW Caselaw. Search using the court and case number, example: ‘NSWSC 1234’.

Go to: <https://www.caselaw.nsw.gov.au>

This resource has an accompanying website which contains more details and cases about the bail process in NSW:

www.ruleoflaw.org.au/guide/bail/index.html



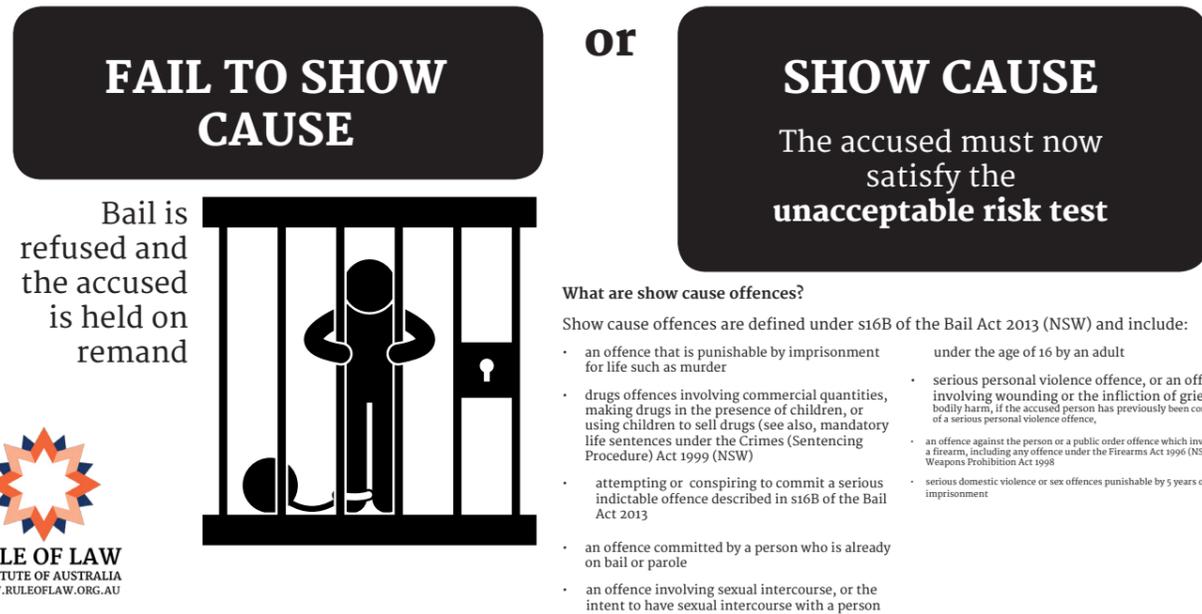
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The Show Cause Test

The Show cause test was added to the Bail Act 2013 in late 2014. An accused is required to show cause only if they are charged with certain serious offences (see back page). No person under the age of 18 is required to show cause.

To show cause, the accused must argue why their detention is not justified. To make a decision about whether the accused has shown cause, the judge may consider (see s31 Bail Act 2013) any evidence or information so long as it is trustworthy and credible. The standard of proof used for making a determination of show cause is on the balance of probabilities (s32).

The accused will either:



The Unacceptable Risk Test

Unacceptable risk requires the judge to assess four bail concerns with reference to a number of specific matters contained in s18 of the Bail Act.

The purpose of bail is to provide a legal process to make a decision about whether a person poses an unacceptable risk in terms of bail concerns. An accused who poses an unacceptable risk in relation to any of the four bail concerns found in the Bail Act will be refused bail.

Bail concerns

Section 17 of the Bail Act 2013 (NSW) defines what is meant by bail concerns. The accused may:



...if they are released on bail.

Overview of the Bail Process

DID THE ACCUSED SHOW CAUSE?

No = **REMAND**

Yes

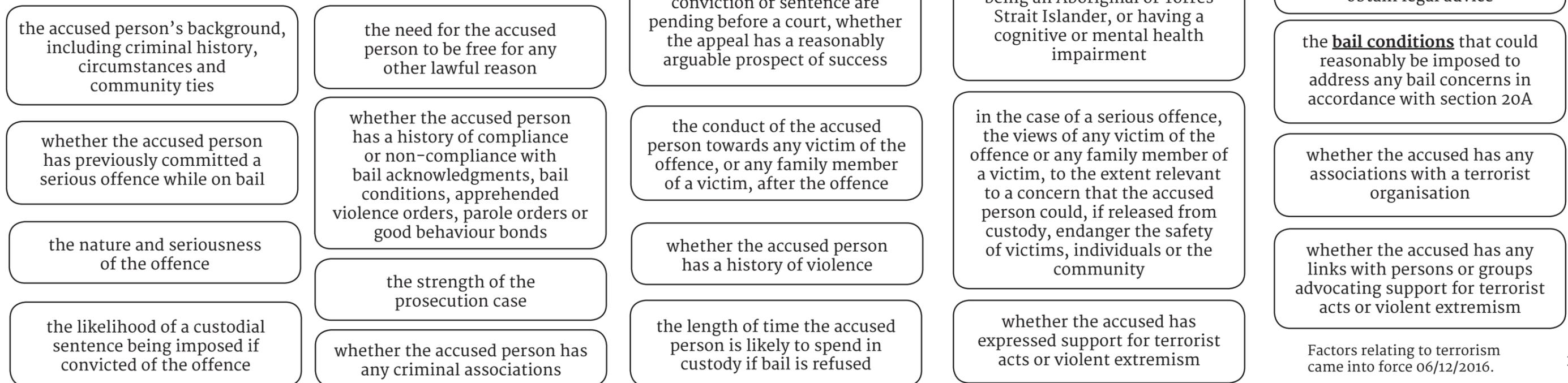
IS THE ACCUSED AN UNACCEPTABLE RISK?

No = **BAIL GRANTED**

Yes = **REMAND**

How do judges make a decision about whether an accused is an unacceptable risk?

A judge considers the four bail concerns in relation to the matters in Section 18 of the Bail Act 2013:



Factors relating to terrorism came into force 06/12/2016.

Bail Conditions

If bail concerns are identified they may be remedied by “bail conditions” (ss23-30):

Conduct requirements – requires the accused to do or not do anything.

Security requirements – providing a sum of money to the bail authority which is forfeit if bail is broken

Character acknowledgements – people who know the accused who provide assurances that the person will comply with their bail conditions

Accommodation requirements – requires the accused to have certain arrangements in place for accommodation before they can be released on bail

Pre-release requirements – the surrendering of the accused’s passport, or other

requirements that must be met before the accused can be released

Enforcement conditions – an example of this would be requiring the person to refrain from consuming alcohol and submitting to drug testing while on bail

The judge will exercise discretion in terms of the bail conditions which are set, and will hear arguments from the accused and prosecution about them.

The accused or their lawyer can offer to follow certain bail conditions and will argue that these address any bail concerns.

The prosecution may argue in response that certain conditions will not address bail concerns.

If bail conditions cannot address bail concerns then the accused is an unacceptable risk and will be refused bail.

Why was there a new Bail Act in 2013?

The following quotes demonstrate some of the reasons the Bail Act 1978 (NSW) was replaced:

“The cumulative effect of thirty years of amendments since the enactment of the reform oriented Bail Act 1978 (NSW) is a level of complexity in the legislation which makes it difficult to comprehend and operate, even for those with legal expertise working with it daily.”

– **NSW Law Reform Commission**, Report 133: Bail (April 2012), p.42 (3.71).

The adding of multiple presumptions against bail led to an increase in the remand population:

“...the number of people in unsentenced detention has increased rapidly in the last 20 years, and is significantly higher than in comparable Australian jurisdictions. In particular, the rates of unsentenced detention for Indigenous people and young people are of concern.

...this increase in remand rates appears to have resulted in a reduction in failure to appear. Such evidence as there is does not suggest an effect in reducing crime.”

– **NSW Law Reform Commission**, Report 133: Bail (April 2012), pp.62-63 (4.44 - 4.46).

To attempt to reduce the cost of holding people on remand (\$276 per day for adults, \$589 for young persons) could be better spent on justice reinvestment:

“CSNSW [Corrective Services NSW] advise that “remand inmates are some of the most resource intensive inmates in the correctional system... because, despite many being in custody for only a few days, remand inmates require screening, intense monitoring, escorts, and security around family and legal visits”.”

– **NSW Law Reform Commission**, Report 133: Bail (April 2012), p.76 (5.52).

Then Attorney-General, Greg Smith SC, stated new Bail Act 2013 would:

“...result in decisions that better achieve the goals of protection of the community while appropriately safeguarding the rights of the accused person”

– **Attorney-General & Minister for Justice**, Greg Smith, Second Reading Speech for Bail Bill 2013, NSW Parliament, 01/05/2013.



What is the Rule of Law?



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The Presumption of Innocence and Bail

Maintaining the presumption of innocence, the **safety of the community** and the **effectiveness of the criminal law** is very important in ensuring fairness, consistency and equality before the law.

The **presumption of innocence** ensures that people are not punished without being found guilty of a crime and is an important **check on the power of government** because it limits the government's ability to punish and imprison people.

The **burden of proof** in the criminal trial process is on the prosecution, which means that a person must be proven guilty, and that they are not required to prove they are innocent.

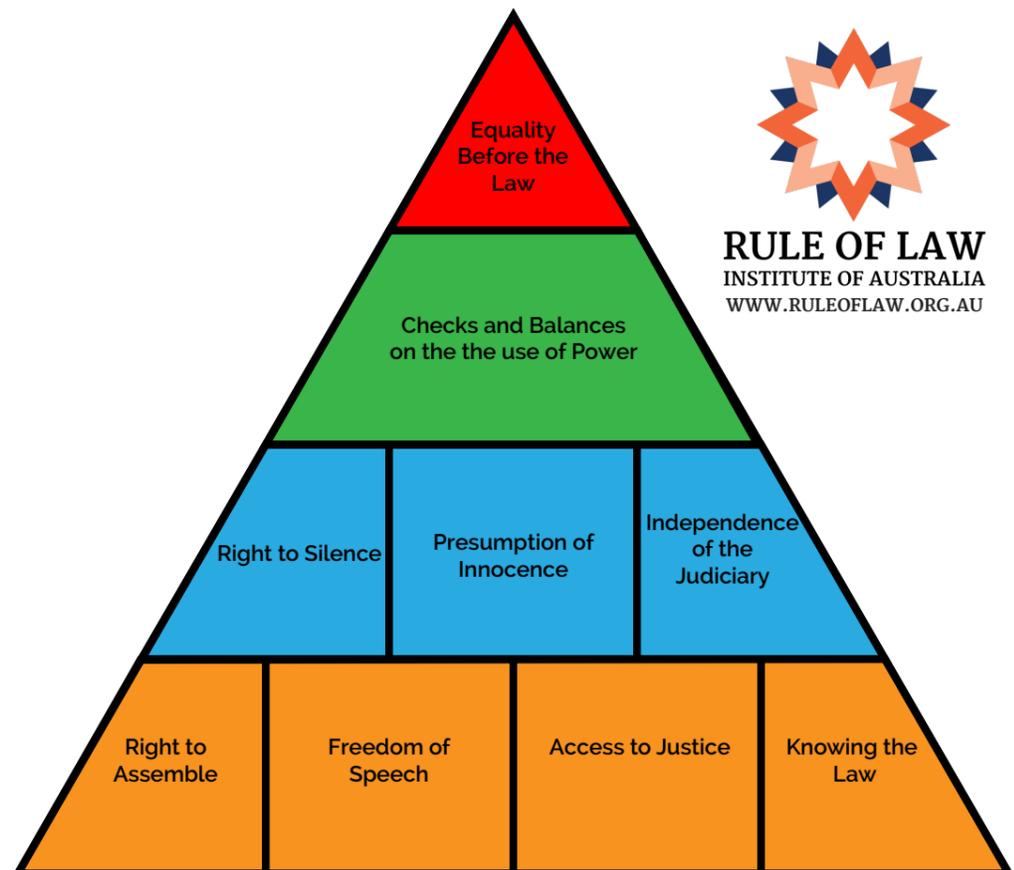
The presumption of innocence is not absolute. The bail process ensures that the presumption of innocence is maintained, but also deals with other considerations such as the safety of the community and the enforcement of the criminal law.

Assuming the Accused is Guilty or Worthy of Punishment

For the criminal justice system to provide equality before the law the judge making a bail decision cannot make the assumption that an accused is guilty or worthy of imprisonment because they have a:

- reputation for being involved with crime,
- have a criminal record; or
- are charged with a serious crime

The idea that a person accused of a crime should be punished because they are charged with a serious crime, or because they have a certain criminal background is in direct opposition to the presumption of innocence and the way in which the criminal law determines guilt.



Law Reform: Why was the Bail Act 2013 changed so quickly?

The Bail Act 2013 (NSW) was passed in 2013 to replace the Bail Act 1978 (NSW). Changes were made to the Bail Act 2013 (NSW) only 4 months after it commenced operation in May 2014 due to concerns about a number of bail decisions.

Bail decisions in the Hawi and other matters were significant in prompting the NSW Government to change the newly introduced Bail Act 2013 (NSW) by **introducing the show cause test**.

Bail Decision: R v Hawi [2014] NSWSC 837

Mahmoud Hawi, formerly President of the Comancheros Motorcycle Club, sought bail after successfully appealing a murder conviction (see the appeal judgment: *Hawi v R* [2014] NSWCCA 83, and the original judgement *R v Hawi* [2012] NSWSC 332).

The Sydney Airport Brawl

The original conviction of Hawi for murder was a high-profile case that received much attention in the media. The crime occurred in a public place, the departures hall at Sydney Airport, and was a brutal crime - the victim, a Hells Angels associate Anthony Zervas, was beaten to death with a metal bollard. This event occurred in March 2009 and came to be known as the Sydney Airport Brawl.

The brawl at the Sydney Airport between the Comancheros and the Hells Angels, had occurred within hours of a drive-by shooting in Western Sydney that had been linked to a feud between the Bandidos and Notorious motorcycle clubs.

The publicity surrounding this crime prompted the NSW Government to introduce legislation to deal with 'outlaw motorcycle clubs', and many of those involved in the Sydney Airport Brawl were charged with murder, manslaughter, riot and affray.

Conviction, Appeal and Bail Application

Hawi was convicted of murder and affray for the Sydney Airport Brawl and sentenced to 28 years and 6 months (non-parole period of 21 years 6 months) in April 2012. Hawi appealed this decision and his conviction was quashed by the Court of Criminal Appeal in May 2014, and a new trial on the murder trial was ordered.

A month later, while waiting for the new trial to commence, Hawi applied for bail. His sentence for affray had ended in November 2012, and since his murder conviction had been quashed, he was, as the bail judge noted, "in custody unrelated to any other offence or sentence".

Since the murder trial was going to be long and complex, it was going to be a long time until there was room in the Court's schedule to hear it. It was not predicted to start until sometime in 2015. That meant that, if Hawi was denied bail this time, he would be in jail for nearly two-and-a-half years before his trial even started, not to mention the further period of many months that he would be in jail during the trial. It could have been over three years that he spent in jail before the end of the trial, and it was possible that he would be acquitted of murder.

Unacceptable Risks

Taking this into account, the bail judge also assessed whether Hawi posed an "unacceptable risk" of failing to appear for his trial, committing a serious offence, endangering the safety of the victims, and interfering with witnesses or evidence. The judge found that Hawi did pose an unacceptable risk of failing to appear. Since the punishment that he would face if he was found guilty would be very serious, he had a high motivation to try and escape trial. Although the chances of this happening were small, the consequences were serious.

Bail Conditions

However, the judge found that this risk could be sufficiently mitigated, or lessened, by imposing bail conditions. Therefore, the judge granted Hawi bail on certain conditions, including that he reside at a particular address, report to the local police station every day, not communicate with certain people or attend certain premises, and not apply for a new passport or go within one kilometre of an airport.

The judge also imposed security conditions, meaning that if Hawi violated his bail, certain family members would have to forfeit money to the government. One family member provided security of \$200,000, and another provided security of \$500,000.

Review of the Bail Act 2013

The Hawi case, and a number of other high profile cases where accused were released on bail led to a review of the Bail Act 2013 by former NSW Attorney General, John Hatzistergos.

The NSW government accepted the Hatzistergos Review's recommendations and amended the Bail Act 2013 in November 2014.

The most significant change to the bail process was the introduction of the **show cause requirement**.

Criticisms from Legal Organisations and Academics

A number of legal organisations and academics highlighted issues with the changes to the Bail Act:

- the changes had come too soon after the introduction of the Bail Act 2013, and that only several months of operation did not allow enough time to demonstrate whether it was effective;
- the bail decisions which prompted change to the law were "edge cases" that were not necessarily representative of the majority of bail decisions in NSW;
- the legal community felt that the government had caved to pressure from the media and made a decision to appease media commentators and appear tough on crime;
- the media portrayal of courts and judges as "soft on crime" and out of touch with community expectations was unfair, given that they were applying the law as it was written by the Parliament;
- the government gave no consideration to the already existing checks and balances, which allow both the defence and prosecution to have bail decisions reviewed by a higher court.

"Since the late 1980s, state governments have used the bail regime for political purposes, specifically to send a "tough on crime" message. Since 1988, more than 20 changes to bail laws created an ever-growing list of offences for which there was a presumption against bail. The list included those accused of murder, armed robbery, certain drug offences, firearms offences, terrorism, repeat property offenders and aggravated sexual assault.

A common thread here is the demonising of particular types of alleged offenders whose crimes evoked popular anxiety and anger.

These changes produced a staggering rise in the prison population. About a quarter of the state's prisoners are on remand - that is, where bail is refused."

- Dr Julia Quilter in 'Not for punishment: we need to understand bail, not review it', The Conversation, 03/07/2014.

Rule of Law Concerns with Changes to the Bail Act

Rule of Law requires the presumption of innocence to be maintained and that bail is not used as punishment.

This shift in the purpose of the Bail Act 2013 raises discussion about the balance struck between the presumption of innocence and the safety of the community.

The removal of the presumption of innocence and general right to liberty from s3 of the Act and putting it in the Preamble where it has no legal force. Protecting the safety of the community is emphasised, more so than the presumption of innocence.

The strike-through text below shows the part removed from the Bail Act 2013:

"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."

Bail Decisions Post 2014 Reform

McAndrew v the Queen [2016] NSWCCA 58

Charges against the accused: Armed robbery (Crimes Act 1900 97)

Was the offence a show cause offence? Yes.

Did the accused show cause? No.

Was bail granted? No.

The Court found that McAndrew had not shown cause as to why he should not be detained. McAndrew stated that the birth of his first child and poor health of his mother as reasons why he should not be held on remand.

Hoeben CJ, Harrison and Schmidt JJ noted that:

"In the present case, Mr McAndrew has not pointed to any factor or combination of factors that satisfy us that he has shown cause why his continued detention is not justified ...It may well be that with the benefit of legal assistance, and a different approach to the circumstances that confront him, Mr McAndrew could...more directly address the burden confronting him."

Kangas v R [2015] NSWSC 1294

Charges against the accused: Drugs offences and possession of weapons

Was the offence a show cause offence? Yes.

Did the accused show cause? Yes.

Were there bail concerns? Yes.

Could bail conditions remedy the bail concerns? Yes.

Was bail granted? Yes.

The Court found that Kangas could be granted bail on the condition that he be placed in residential rehabilitation.

McCallum J also noted that:

"He has now been in custody for almost six months. If a sentence of imprisonment were imposed, there is a prospect that he would receive a sentence with a non-parole period of six months or not much more."

Also, the show cause test places the onus on the accused to show why they should not be detained. This departs from the norm in criminal law where the prosecution carries the burden of proof.

Bail should never be used or seen as a form of preemptive punishment. The reform of the Bail Act 2013 suggests that the NSW Government may be losing sight of the importance of the presumption of innocence, as well as repeating mistakes which led to review of the Bail Act 1978 (NSW).

Potential Issues for an Accused

An accused who is denied bail is still entitled to the presumption of innocence. Issues of unfairness from the perspective of the accused who is held on remand may be:

- they may spend more time on remand than the maximum penalty for the crime they are charged with or the sentence they receive if found guilty;
- they may spend a significant amount of time (months or years) on remand and may be found not guilty;

This resource has an accompanying website which contains more details and cases about the bail process in NSW: www.ruleoflaw.org.au/guide/bail/index.html