

# Bail Laws in NSW - 2018

## Why do we have Bail?

Bail is part of the criminal trial process.

The presumption of innocence and the right to liberty are two important principles of our common law (judge made law). They help ensure that our criminal justice system is fair and that everyone is equal before the law. According to these two principles, when an accused person is charged with an offence, they have a right to apply to remain in the community to await their trial. This is called bail. The law for bail in NSW is set out in the *Bail Act 2013* (the Act).

Under the Act, a bail authority must decide whether the accused person should be held in gaol (called on remand) before their hearing or whether they should be released, with or without conditions, into the community. When the accused person applies for bail they are called the bail applicant.

The bail process is not meant to punish an accused person. When considering their application the bail authority weighs up their right to liberty against other considerations, such as the safety of the community and the need for the accused person to appear at court as part of the trial process. It can take months or even years before a matter comes to trial.

Bail is therefore made available to allow the accused (but not convicted) person to remain out of gaol until their trial, often with bail conditions.

## Bail Authorities

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

If unhappy with a bail decision, the prosecution or the accused person can ask for the bail decision originally heard in the Local or District Court to be heard again by the Supreme Court. The Court of Criminal Appeal can also re-hear a bail decision heard by any lower court. The 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 previous bail decision.

## When is bail granted?

Whether bail can be granted is determined by one or more of the following tests:

- the automatic right to release
- the show cause test
- the unacceptable risk test

Which one or more tests applies depends on the offence that has been allegedly committed. For some offences bail is automatic. For other offences the bail authority has to weigh up factors prescribed by the Act, before it decides whether bail should be granted. If an accused person is refused bail, they are kept on remand in gaol.

## What is Remand?

Remand is when the accused person remains in gaol until their trial.

An accused person can be on remand for three main reasons:

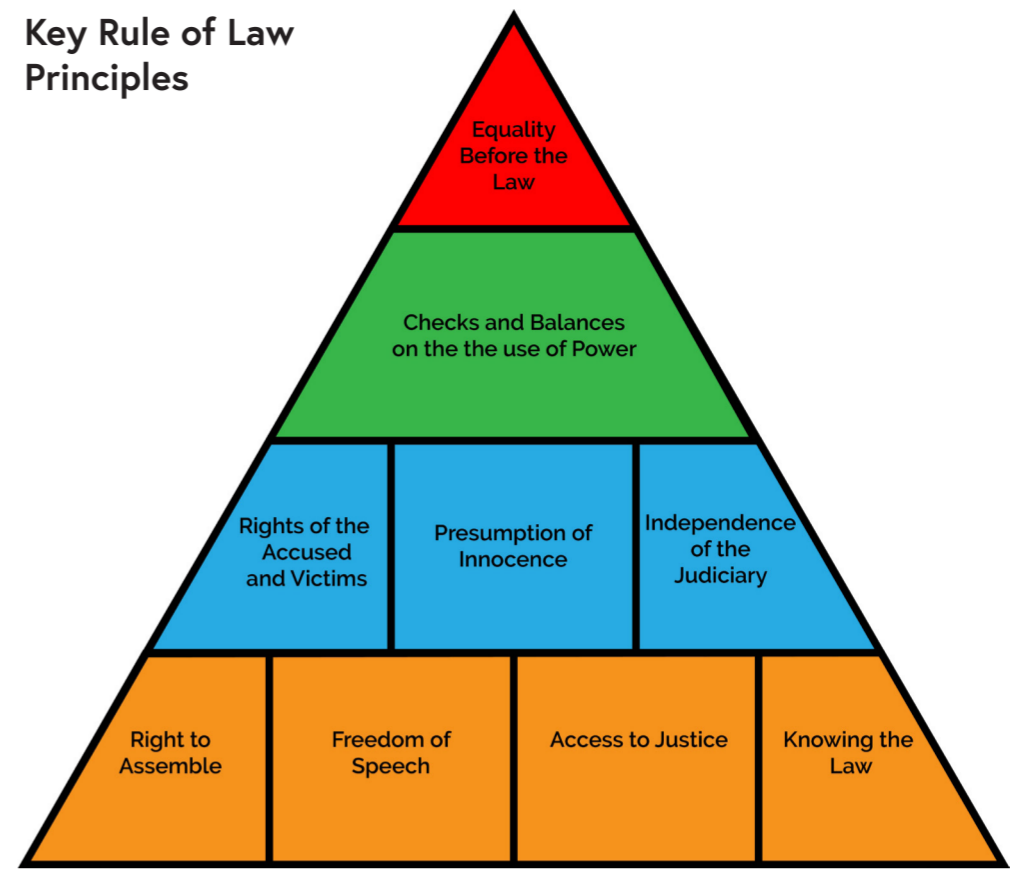
- they have been charged with an offence and they are refused bail
- they cannot meet bail conditions as set by the bail authority
- they were previously released on bail and breached their bail condition(s)

## Law Reform

The *Bail Act 2013* was amended in 2015 and introduced a 'show cause' test for a number of serious offences. Under the show cause test an accused person is required to provide reasons to the court as to why they should not be detained without bail. Offences to which this applies include murder, serious drug and sexual offences and serious offences committed whilst the accused was already on bail. Additional changes were made to the Act in 2017 and 2018 to include special provisions for terrorism and weapons offences.



## Key Rule of Law Principles



## The First Test: Automatic Right to Release

In minor offences there is a right to release for the alleged offender. In these cases, under section 21 of the Act, bail does not have to be considered.

There is a right to release for the following offences:

- a fine-only offence,
- an offence under the *Summary Offences Act 1988*, other than knife offences and those including violence.
- an offence that is being dealt with by conference under Part 5 of the *Young Offenders Act 1997*.

Under the Act the Bail Authority must:

- release the person without bail,
- dispense with bail,
- grant bail to the person (with or without bail conditions).

## The Second Test: The Show Cause Test

Section 16A of the Act requires that a person charged with a section 16B offence must 'show cause' why their detention is not justified. A person under the age of 18 years is not required to show cause. The offences in Section 16B may include:

- offences that are punishable by imprisonment for life;
- particular sexual offences;
- serious personal violence offences;
- certain firearms offences;
- certain drug offences; and
- a serious indictable offence that is committed while the accused is on bail.

To show cause the accused person must provide evidence to the bail authority as to why they should not be held on remand. The Act does not limit the factors that a court may consider relevant, when deciding if an accused has shown cause.

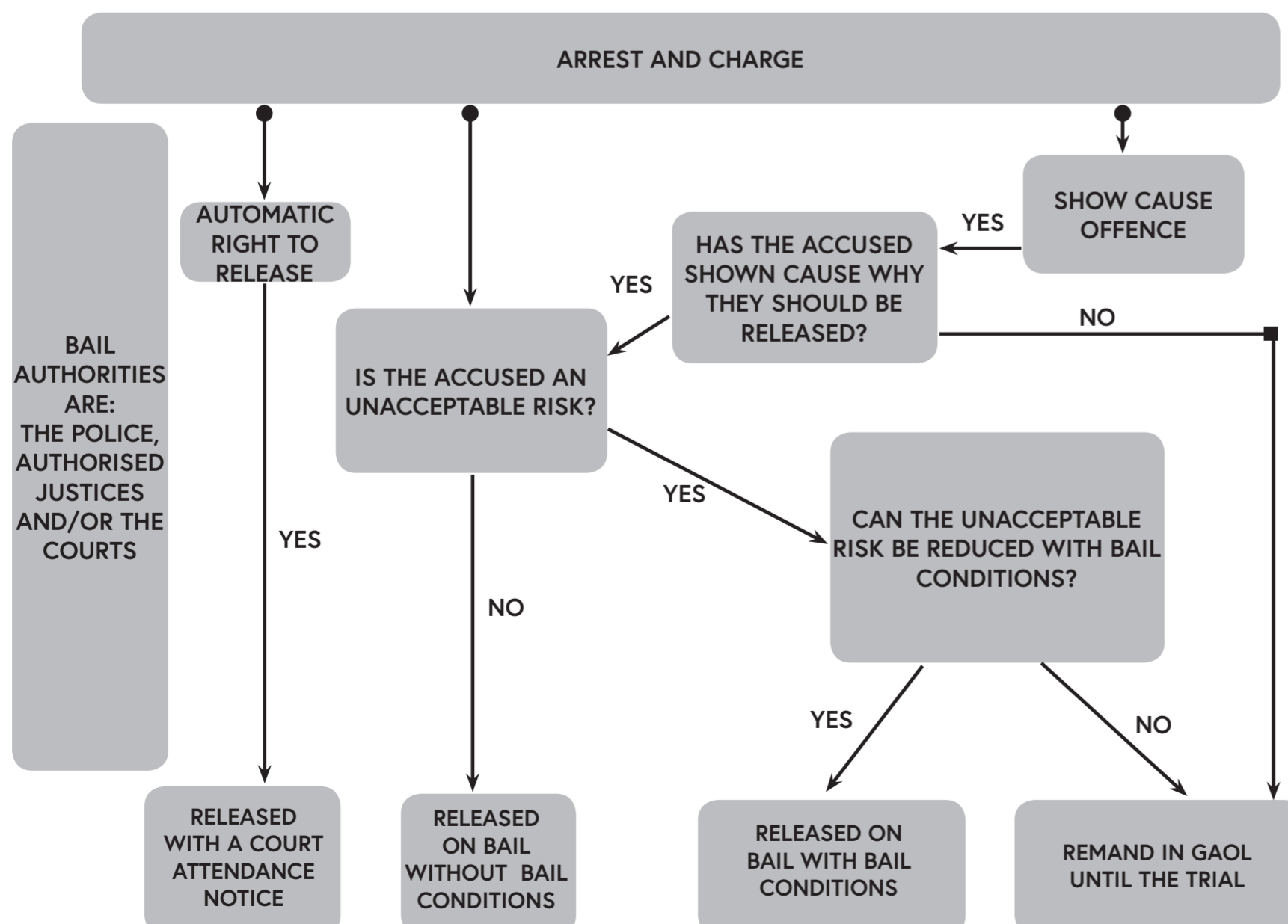
The standard of proof required to be met by the accused person for show cause is 'on the balance of probabilities'. If a person fails to show cause then bail must be refused and the person is then held on remand.

## SHOW CAUSE

The accused person must now satisfy the unacceptable risk test

If the accused person is able to show cause, the authorised officer must then consider the bail concerns under sections 17 and 18. If the bail concerns mean that the person poses an 'unacceptable risk' bail can be denied, even if the person has shown cause.

## The Bail Process in NSW-2018



## The Third Test: The Unacceptable Risk Test

The unacceptable risk test has two stages.

### Stage One

s 17 - The bail authority assesses the four bail concerns. An accused person who poses an unacceptable risk in relation to any of the four bail concerns found in the Act will be refused bail.

### Bail Concerns



...if they are released on bail.

### Stage Two

- s 18 - the bail authority has to consider a number of matters when assessing the bail concerns.
- These can include: the criminal history of the person, the nature and seriousness of the offence, the strength of the prosecution case, bail compliance in the past, history of violence, community ties, Indigenous status, likelihood of re-offending.

If an accused person is found not to be an unacceptable risk they are released on bail. If they are found to be an unacceptable risk, bail conditions can be put in place to reduce that risk and the person can be released into the community.

## Glossary of Key Terms

**Acceptable Person** - person who the bail authority considers appropriate to give a character reference, and/or enters into a bail security agreement and/or provides accommodation for the accused person. The acceptable person is usually a family member or close friend.

**AVO** - An **Apprehended Violence Order** is an order made by the court against a person who makes another person fear for their safety. The AVO is to protect a person from further violence, intimidation or harassment. All AVO orders made by the court prohibit the person who is causing these fears from assaulting, harassing, threatening, stalking or intimidating another person. Other orders can be included.

**Bail applicant** - person charged with an offence who is applying for bail

**Bail application** - application to be at liberty in the community until a trial starts.

**Breach of bail conditions** - when a person who has been granted bail with conditions by the bail authority does not follow one or more of the conditions. Example: Moving house without notifying the court of the new address can be a breach of bail conditions.

**Charged** - when police formally arrest a person and allege they have committed an offence under the law. People can be charged with multiple offences - these are called sequences.

**Commercial Quantity of a Drug** - the weight or strength of the drug as deemed by law that is greater than the amount a person would have for their own use. Commercial supply has a maximum penalty of 25 years in gaol.

**Comply with Conditions** - sometimes when an accused person is granted bail they have to agree to follow or comply with bail conditions such as report to police or stay at a certain address.

**Conditional Bail** - when bail is granted the accused person has to comply with certain special conditions to remain in the community until the court hearing, such as report to police and/or surrender their passport. Sometimes an accused person may be granted unconditional bail. This means there are no special conditions to be followed when they are awaiting their trial.

**Show Cause** - is related to s16 of the *Bail Act 2013* and requires the applicant to show why for certain very serious offences they should not remain in gaol until the trial. Offences include: any offence punishable by life imprisonment, some sexual and violent offences.

**Unacceptable Risk** - is related to Div 2 of the *Bail Act 2013* and requires the prosecution to show why an applicant for bail may be a risk if at liberty in the community.

**Juveniles and Bail** - Accused persons under the age of 18 are treated differently in bail applications due to their vulnerability.



## Bail Conditions

If bail concerns are identified they may be remedied by 'conditions' (ss 23-30 of the Act).

The bail authority will hear arguments from either side as to whether bail should be granted and any bail conditions that should be required.

Sometimes the prosecution will argue that no bail conditions are suitable to address bail concerns and that bail should be denied. In that case the accused or their lawyers might argue that certain bail conditions are appropriate to answer bail concerns. On other occasions the accused's lawyers will agree to bail conditions sought by the prosecution, to avoid the risk that bail might not be granted.

Some examples of bail conditions are as follows:

- Conduct requirements: requires the accused person to do or not do something, eg report to police
- Security requirements: the accused person must provide a sum of money called a surety to the bail authority, which is kept by the authority if they breach any of their bail conditions
- Character acknowledgments: An acknowledgement given by an acceptable person, other than the accused, that they know the accused and that they regard the accused as a responsible person who is likely to comply with bail and any bail conditions imposed by the bail authority. They may be a family member or friend.
- Accommodation requirements: the accused person will need to have suitable accommodation if they are released on bail, eg that they will live with their parents or a responsible friend
- Pre-release requirements: the accused person will surrender their passport or make arrangements to

seek certain treatment before they are allowed to be released on bail

- Enforcement conditions: that the accused person should not do certain things whilst on bail, such as drink alcohol or take drugs. They may be required to undergo regular testing.

If the bail authority decides that any suggested bail conditions are not appropriate to address the bail concerns, they must refuse bail. This is done on the basis that there is an unacceptable risk that the accused person, if released from custody, will:

- Fail to appear at court
- Commit a serious offence
- Endanger the safety of victims, individuals or the community
- Interfere with witnesses or evidence

## Bail Case Studies

### Court of Criminal Appeal 23/02/18 R v Goutounas [2108] NSWCCA 40 Show Cause

#### Background Facts

In early 2017, as part of an undercover operation spanning more than one year the NSW Police and the Australian Intelligence Commission gathered substantial evidence regarding the bail applicant, Mr Goutounas. The evidence showed that he was involved in a conspiracy to import drugs, provide money to finance drug importation and that he possessed a commercial quantity of drugs for sale.

On 2/11/17 Mr Goutounas was arrested in South Australia and charged with 2 counts of organizing to import a commercial quantity of drugs – being methamphetamine from Mexico and cocaine from Columbia.

On 9/11/17 similar charges were laid in NSW. Mr Goutounas was extradited to NSW and the Commonwealth DPP withdrew the SA charges. Mr Goutounas was refused bail on the NSW charges.

On 1/12/17 Mr Goutounas made an application for a bail review in the Local Court. As the alleged crimes might potentially result in a life sentence, he was not able to convince the Magistrate that under s17 & 18 of the Bail Act he was not an unacceptable risk nor could he 'show cause' why he should not remain in custody. His bail review failed.

Mr Goutounas appealed to the Supreme Court for a bail review of the Local Court decision and was granted strict conditional bail by Justice Hamill. He was unable to meet one of the bail conditions requiring surety of \$1.5M (combined monies from Mr Goutounas and his family). He therefore remained on remand in gaol.

The prosecution made an application to the CCA for a fresh bail determination (de novo) to revoke the Supreme Court bail and keep Mr Goutounas in gaol. New evidence was brought forward by his lawyers to meet surety. The matter came before Judges Simpson, Fullerton and McCallum of the Court of Criminal Appeal (CCA).

The CCA said that the obligation to 'show cause' was determined by the following principles:

- the question of 'show cause' is separate from the question of unacceptable risk
- the *Bail Act* does not provide guidance on how to assess 'show cause'
- there may be a substantial overlap between the factors that 'show cause' and the factors for 'unacceptable risk'
- 'show cause' may be one powerful factor or a combination of factors
- there is no requirement to show exceptional or special circumstances in order to 'show cause'
- although there are many 'show cause' bail decisions in the Supreme Court, most bail decisions are about evaluating individual case facts and not determining legal principles. There are, therefore, few legal precedents the courts can refer to.

The CCA considered the following evidence in evaluating the prosecution's request for bail to be refused:

For Grant of Bail	Against Grant of Bail
Unacceptable delay - estimating the case could start in 2019 which meant that Mr Goutounas would be waiting 2 years in gaol.	Considerable if not overwhelming strength of Crown Case meaning there was Likelihood of conviction coupled with the likelihood of a long incarceration period. The accused person might try to flee the country before the trial. Prior offending for similar matters
Separation from family including his wife and child.	Although an important factor, in this case there was a lack of evidence that separation would be a burden to the family.
Difficulty in preparing case.	Although a significant factor there was lack of evidence that: the case would not proceed if the accused person could not see his lawyer in person or that he needed intensive dialogue with his lawyers or that his lawyers needed or wanted to travel to NSW from South Australia
Preparedness of relatives and family members to offer substantial monetary surety (\$1.5 million).	Some "skepticism" that surety (\$1.5 million) would reduce the risk of the accused person fleeing the country.
<b>Judge's Decision: Bail application refused.</b>	

## Supreme Court of New South Wales - 21/12/17 - R v JW [2017] NSWSC 1843 - Unacceptable Risk

Catchwords - 15 year old Aboriginal child applies for bail - criminal and custodial history - little family support - bail granted with stringent conditions

#### Background Facts

On 18/10/17 a 15 year old Aboriginal child (the accused person), and her co-accused had on several occasions, whilst under the influence of alcohol, forced their way into the victims' property. They threatened the victims and damaged property. The applicant was charged with stalking and intimidation.

The accused person was initially granted bail in the Children's Court because of her age. The accused person did not comply with bail conditions and on 4/11/17 was refused bail. The accused person sought a new bail hearing in the Supreme Court.

Justice Hamill weighed up the following points for and against in his decision whether to grant or refuse bail according to s17 and s18 of the Act.

For Grant of Bail	Against Grant of Bail
There is a presumption in favour of bail for children in accordance with s6 of the <i>Children's Criminal Procedure Act</i> as well as international instruments concerning the rights of the child. Multiple breaches of bail and non-attendance at court resulted in convictions in her absence, possibly for offences she had not committed.	An apparent disregard for the law evidenced by lengthy criminal and custodial history encompassing assault as well as stalking, intimidation and contravention of an AVO. Multiple breaches of bail and non-attendance at court including fail to appear at any proceedings for the current offence.
The accused person's co-accused were dealt with by the Children's Court and released on a bond. The date of hearing meant the applicant would be in custody for 2 -3 months.	Applicant was probably the instigator of the current and more serious offences Little family support. Probable psychological problems.
Department of Juvenile Justice organised and approved of accommodation, support and counselling services available for reporting purposes. The accused person acknowledged a significant drinking problem which triggered criminal conduct. Being pregnant, she knew drinking would be detrimental to the unborn child. The accused person wrote a letter to the Judge suggesting she would like to study at TAFE, demonstrating efforts towards personal responsibility and a positive future.	
<b>Judge's Decision: Bail granted with strict conditions.</b>	