

## Case Study: Bail Application

A few days after being arrested, charged and held on remand the accused man appears before a judge in court to see whether they will grant bail. The Department of Public Prosecutions (DPP) appears for the State of NSW and the man is represented by a solicitor.

The solicitor argues that the man can show cause why his detention is not justified as he is in a problem gambler support program run by his local hospital. He is also employed, engaged in his local community and is the sole carer for his young family. The judge has to decide if the man (via his solicitor) is successful in showing cause as to why he should not be held on remand. Rather than the Crown proving why the man should be denied bail, he must show why he should not be imprisoned.

### Should the man be held on remand or granted bail?

After considering the show cause test the Judge considers the unacceptable risk test. The onus of proof is on the Crown, who must prove the bail concerns

The Crown highlights the following **bail concerns**, claiming that the man might:

1. Fail to appear in court because of the strength of the prosecution case and the likelihood of a custodial sentence if convicted.
2. Commit a serious offence because of the nature and seriousness of the offence and his background, criminal history, circumstances and community ties.

The accused's solicitor argues that the bail concerns can be addressed by the following bail conditions:

1. Failure to appear in court: Paying a surety of \$1000 and reporting to police daily
2. Commit a serious offence: Accommodation order that he and his young children will live with his mother while on bail.

### Do the bail conditions address the bail concerns?

#### Would you impose different or other bail conditions to address the bail concerns?

The result:

The judge agrees that the bail conditions will address the bail concerns and the accused is released on bail. The judge tells him that any misbehaviour or breach of his bail conditions will see his bail revoked. A trial date is set for 12 months' time.

OR

The judge does not believe that the bail conditions can address the bail concerns. As a result the accused is an unacceptable risk and cannot be granted bail. The accused is held on remand for 12 months before his trial.

For more information on the man's trial see the Rule of Law Institute's criminal trial process worksheet.



The Rule of Law Institute of Australia is an independent, politically non-partisan, not-for-profit organisation which promotes and protects the rule of law in Australia. The Institute's primary focus is delivering education programs in schools and universities, and making submissions to Government about rule of law issues.



## NSW Bail Laws The Presumption of Innocence

### What are Bail and Remand?

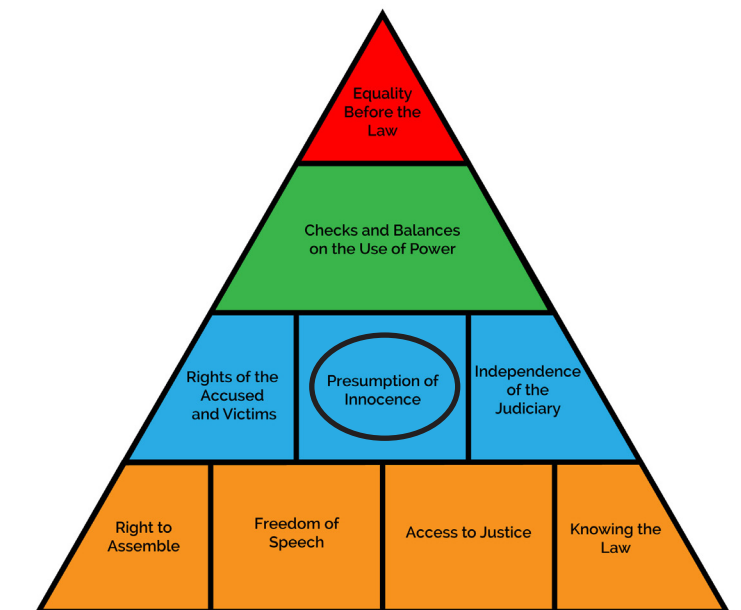
When the police arrest someone they are either released on bail or held on remand. **Bail** is the authority to be at liberty after being charged with an offence. If a person is denied bail they are held on **remand** in a correctional facility until their case is heard in court.

### The Presumption of Innocence and the Safety of the Community

The presumption of innocence is an important check on the power of the government ensuring that people are not punished unless they are found guilty of breaking the law.

However, the law recognises that there are circumstances, such as the safety of the victim, where a person accused of a crime must be held in prison while they await trial. This is called being held on **remand**.

The power to grant bail gives police and judges the opportunity to weigh the concerns about the safety of the community against a person's right to the presumption of innocence.



The September 2014 Bail Act removed the presumption of innocence from the purposes section of the Bail Act 2013. It is now found in the preamble to the Act. This reduces the status of the presumption of innocence in the Bail Act.

## Case Study: Arrest and Charge

The police arrest a 25 year old man for allegedly stealing the handbag of an 80 year old woman on the street after seeing her withdraw money from an ATM.

The woman claims that while grabbing the handbag the man pushed her over and she fell to the ground - breaking her hip.

She was taken to hospital where she had surgery. The doctors advise that she will have many months of rehabilitation before she can walk again. It is likely she will require the assistance of a walking frame for the rest of her life.

Before making the arrest police collected evidence from CCTV cameras and witness statements. They charge the man with '**robbery with wounding**'.

The accused has a previous conviction for robbery when he was 19 years old. He is held in custody until a bail hearing can occur before a judge.

### Should he be granted bail? What factors have you taken into account to make your decisions.

For a definition of Grievous Bodily Harm see Section 4 of the Crimes Act 1900 NSW. Alternatively, see the Rule of Law Institute's booklet on Understanding the Law.

#### Section 96 Same (robbery) with wounding

Whosoever commits any offence under section 95, and thereby wounds or inflicts grievous bodily harm on any person, shall be liable to imprisonment for 25 years.

Rule of Law Institute of Australia

For more information on NSW Bail Laws visit: [www.ruleoflaw.org.au/education](http://www.ruleoflaw.org.au/education)



# Reform of the Bail Act

In 2013 a new Bail Act replaced old and overly complex Bail Act 1978. Since the introduction of the 2013 Bail Act there have been two amendments, substantially altering the tests used to grant bail.

**Bail Act 1978** - The original bail act, viewed as complex and outdated

**Bail Act 2013** - Introduced the **Unacceptable Risk Test** and removed the presumptions for and against bail

**Bail Amendment Bill 2014** - Introduced the **Show Cause Test**

**Bail Amendment Bill 2015** - Introduced presumptions against bail for terrorism offences and expanded the matters to be considered as part of the bail assessment in section 18 of the Act.

## Show Cause Test

The show cause test requires the accused to show why their detention is not justified. **This places the onus of proof on the accused, not the Crown.**

The show cause requirement only applies to serious offences and repeat offenders. If the accused fails the show cause test they are held on remand, regardless of the unacceptable risk test. If the accused satisfies the show cause test they must then satisfy the unacceptable risk test, as shown in the diagram on the opposite.

The term 'show cause' is not defined in the Bail Act. It is a matter of judicial discretion for the judge to decide if the accused has shown cause. As more bail decisions are decided precedent is set about what constitutes showing cause. A judge has the discretion to consider any factor they think is relevant in terms of show cause.

### What can constitute cause?

**Lengthy remand period and separation from 3 month old child perpetuates cycle of disadvantage** - R v Alchin, NSWSC, McCallum J, 16 Feb 2015 - Aggravated enter of a dwelling knowing there was people present

**Residential rehabilitation** - R v Benzce; Yates, NSWSC, McCallum J, 18 Feb 2015 - Domestic Violence and Drug Offences

**Being young and in custody for the first time** - R v Goodwin, NSWSC, Hall J, 11 Mar 2015 - Supply of prohibited firearm

**Weakness in prosecution case and the length of remand** - R v Toksoz [2015] NSWSC 1234 - offences of shooting with intent to murder (two counts)

**Being the best person to care for his severely disabled son** - R v Xi [2015] NSWSC 1575 - large commercial supply of methamphetamine



# Unacceptable Risk Test

The unacceptable risk test is used if a person satisfies the show cause requirement, or if they are charged with an offence not requiring them to show cause. In order to decide whether someone is an unacceptable risk the judge must consider the **bail concerns**. If the concerns that exist cannot be addressed by **bail conditions**, the concerns are deemed to be an **unacceptable risk**, and bail cannot be granted.

### Bail Concerns

A bail concern is a concern that if an accused is released on bail he or she will:

- a) fail to appear at trial
- b) commit another serious offence
- c) endanger victims, individuals, or the community
- d) interfere with evidence or witnesses.

These concerns are outlined in section 17 of the Bail Act. Bail concerns must be assessed using only the matters listed in section 18 of the Bail Act.

Matters to be considered as part of the bail assessment include -

- (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, ...
- (h) the length of time the accused person is likely to spend in custody if bail is refused,
- (i) the likelihood of a custodial sentence being imposed if the accused person is convicted of the offence, ...
- (k) 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,
- (l) the need for the accused person to be free to prepare for his or her appearance in court or to obtain legal advice, ...

### Bail Conditions

Bail conditions are required to address bail concerns. They can include:

**Conduct requirements** (s25) - that the accused person do or refrain from doing anything. e.g: surrendering their passport and not contacting specified people.

**Security to be provided** (s26) - providing a specified amount of money that can be forfeited if the accused does not turn up to trial.

**Character acknowledgments** (s27) - an acknowledgment from an acquaintance of the accused that they are a responsible person who will comply with the bail conditions

**Accommodation requirements** (s28)- suitable accommodation requirements to be made before the granting of bail. Suitable accommodation requirements could include living with a relative, or living a certain distance from the victim.

