

# The Bail Act (cont)

# The test for the bail decision maker, relevant to the circumstances of the particular case

- There is a prima facie entitlement to bail under s 4, unless another test applies
- See s 3D of the Bail Act and the key features of the decision making process
- Flow chart 1 – which test applies
- If exceptional circumstances – move to flow chart 2
- If compelling reasons – move to flow chart 3
- If unacceptable risk only – move to flow chart 4

# Examples where the exceptional circumstances test will apply

- S 4AA(1): Schedule 1 offences: Murder, aggravated home invasion, aggravated carjacking, trafficking, cultivation in a large commercial quantity or commercial quantity
- S 4AA(2): The exceptional circumstances test also applies where a sch 2 offence said to have been committed where the person has a terrorism record or there is risk of a terrorism offence, or the offence is alleged to have been committed whilst the accused is on bail or summons or is awaiting trial for a Sch 1 or Sch 2 offence, or during a sentence, parole order, or community corrections order for a Sch 1 or Sch 2 offence

# Re Gloury-Hyde [2018] VSC 393

- The concept of ‘exceptional circumstances’ is elusive, but in an appropriate case it may be a combination of the strength of the prosecution’s case, an applicant’s personal circumstances, and an absence of factors showing that the applicant poses an ‘unacceptable risk.’ [30]
- The right to liberty is particularly important when the applicant is young and has physical, psychological and cognitive problems. The nature and extent of those problems and their impact on the applicant’s functioning, when considered with other factors – such as the availability of treatment – may ‘establish exceptional circumstances justifying a grant of bail.’ [35]

# Re CT [2018] VSC 559

- Having to show ‘exceptional circumstances’ takes a case out of the normal and is a high hurdle for a bail applicant; however, it is not an impossible standard. [64]
- ‘Exceptional circumstances’ may be established by a combination of factors involving the nature of the Crown’s case – including its strength, undue delay in bringing the matter to trial, or unusual features of the offending or investigation – and the applicant’s personal circumstances. [65]

# If the exceptional circumstances test applies

- The accused bears the onus of demonstrating exceptional circumstances (s 4A(2)), having regard to the surrounding circumstances (s 4A(3))
- Even if those exceptional circumstances are made out, the prosecution may then allege there is an unacceptable risk (referred to as a two stage test under the Act)
- if so the prosecution bears the onus of demonstrating that the risk is unacceptable in the surrounding circumstances, including having regard to the extent to which any risk may be mitigated by suitable conditions of bail
- Consider delay as well as those other relevant surrounding circumstances

# Examples where the compelling reasons test will apply

- S 4AA(3): Examples of schedule 2 offences:
  - An indictable offence alleged to have been committed whilst the accused is on bail or summons or awaiting trial for another indictable offence, or during a community corrections order or parole order
  - Manslaughter, child homicide, homicide by firearm
  - ICSI, RCSI in circumstances of gross violence
  - Rape, sexual penetration of a child and other sexual offences
  - Contravening a family violence intervention order in some circumstances
  - Etc

# If the compelling reasons test applies

- The accused bears the onus of demonstrating a compelling reason (s 4C(2)), having regard to the surrounding circumstances (s 4C(3))
- Even if those compelling reasons are made out, the prosecution may then allege there is an unacceptable risk (referred to as a two stage test under the Act)
- if so the prosecution bears the onus of demonstrating that the risk is unacceptable in the surrounding circumstances, including having regard to the extent to which any risk may be mitigated by suitable conditions of bail
- Consider delay as well as those other relevant surrounding circumstances



# Re Ceylan [2018] VSC 361 and compelling reasons

- In applying its terms, the Act requires a court to consider two considerations that may factor against each other when it comes to determining if bail should be granted. They are the safety of the community as well as the presumption of innocence and right to liberty.
- The 'exceptional circumstances' test in the Act is plainly intended to be more difficult to satisfy than the 'compelling reason' test. [45] • Whether an accused shows a 'compelling reason' involves considering all relevant circumstances including the strength of the prosecution case, the accused's personal circumstances, and criminal history. A synthesis of all the factors must compel the conclusion that detention is not justified. [46]. • This will likely be shown if there is a 'forceful, and therefore convincing, reason showing, that in all the circumstances, the continued detention of the applicant was not justified.' [47]

# If the unacceptable risk test applies

- This can therefore be the second stage of a two stage test, if exceptional circumstances or compelling reasons applies, or it could arise separately
- The prosecutor bears the onus of demonstrating an unacceptable risk (s 4D(2)), having regard to the surrounding circumstances (s 4D(3)) and the extent to which any risk may be mitigated by suitable conditions of bail

# S 4E – what are the relevant risks?

- (1) A bail decision maker must refuse bail for a person accused of any offence if the bail decision maker is satisfied that—
  - (a) there is a risk that the accused would, if released on bail—
    - (i) endanger the safety or welfare of any person; or
    - (ii) commit an offence while on bail; or
    - (iii) interfere with a witness or otherwise obstruct the course of justice in any matter; or
    - (iv) fail to surrender into custody in accordance with the conditions of bail; and
  - (b) the risk is an unacceptable risk.
- (2) The prosecutor bears the burden of satisfying the bail decision maker—
  - (a) as to the existence of a risk of a kind mentioned in subsection (1)(a); and
  - (b) that the risk is an unacceptable risk.
- (3) In considering whether a risk mentioned in subsection (1)(a) is an unacceptable risk, the bail decision maker must—
  - (a) take into account the surrounding circumstances; and
  - (b) consider whether there are any conditions of bail that may be imposed to mitigate the risk so that it is not an unacceptable risk.

# What conduct conditions may be imposed on a grant of bail

- S 5AAA(2): Conduct conditions must be no more onerous than is required to reduce the likelihood that the accused may do a thing mentioned in the previous slide, and must be reasonable, having regard to the nature of the alleged offence and the circumstances of the accused
- S 5AAA(4): Could be all or any of the following:
  - (a) reporting to a police station;
  - (b) residing at a particular address;
  - (c) subject to subsection (5), a curfew imposing times at which the accused must be at their place of residence;
  - (d) that the accused is not to contact specified persons or classes of person;
  - (e) surrender of the accused's passport;
  - (f) geographical exclusion zones, being places or areas the accused must not visit or may only visit at specified times;
  - (g) attendance and participation in a bail support service;
  - (h) that the accused not drive a motor vehicle or carry passengers when driving a motor vehicle;
  - (i) that the accused not consume alcohol or use a drug of dependence;
  - (j) that the accused comply with any existing intervention orders;
  - (k) any other condition that the bail decision maker considers appropriate to impose in relation to the conduct of the accused.

# Surety

- S 5(2)(c) – this is a specified amount or a deposit of money of a specified account
- Separate to conduct conditions
- See also s 5AAB – court must have regard to means of accused
- S 9 – who can act as surety
- If accused fails to comply with undertaking, surety can be forfeited

# Applications for bail: s 8

- Bail decision maker may make such inquiries on oath as considered desirable
- Accused shall not be examined or cross examined as to the offence charged
- Prosecutor may submit evidence to show risk
- Bail decision maker may receive and take into account any evidence which they consider credible or trustworthy

# Practicalities of answering bail question

- Start with relevant test
- Apply to facts in stages, noting surrounding circumstances (circumstances of the offence, circumstances of the offender)
- Draw conclusions as you go
- Integrate available conditions into your evaluation of risk

# The Jury Directions Act 2015



# Part 1: Preliminary

- S 1 – Purposes
- The purposes of this Act are—
  - (a) to reduce the complexity of jury directions in criminal trials; and
  - (b) to simplify and clarify the issues that juries must determine in criminal trials; and
  - (c) to simplify and clarify the duties of the trial judge in giving jury directions in criminal trials; and
  - (d) to clarify that it is one of the duties of legal practitioners appearing in criminal trials to assist the trial judge in deciding which jury directions should be given; and
  - (e) to assist the trial judge to give jury directions in a manner that is as clear, brief, simple and comprehensible as possible; and
  - (f) to provide for simplified jury directions in relation to specific issues

## Part 2 - General

- S 5 outlines the guiding principles of the Act, including that in recent decades, the common law of jury directions in criminal trials has become increasingly complex, which may in turn make it increasingly difficult for jurors to understand and apply jury directions.
- it is the responsibility of the trial judge to determine the matters in issue in the trial, the directions that the trial judge should give to the jury, and the content of those directions. It is one of the duties of legal practitioners appearing in a criminal trial to assist the trial judge in his or her determination of those matters.
- It is the intention of the Parliament that a trial judge, in giving directions to a jury in a criminal trial, should give directions on only so much of the law as the jury needs to know to determine the issues in the trial, avoid using technical legal language wherever possible, and be as clear, brief, simple and comprehensible as possible.

# Part 3 – Request for directions

- See s 9: purposes of this Part are to assist the judge in the exercise of the discharge of their duty, but also to ensure that legal practitioners appearing in a criminal trial discharge their duty to assist the trial judge
- S 10: the following provisions do not apply to general directions and other directions that the judge is obliged to give; further the part does not preclude the giving of a direction, s consistent with this Act, that the trial judge considers necessary at any time before the close of all evidence, after considering any submissions

# S 11: Counsel to assist in identification of matters in issue

- After the close of all evidence and before the closing address of the prosecution—
- (a) the prosecution must inform the trial judge whether it considers that the following matters are open on the evidence and, if so, whether it relies on them—
- (i) any alternative offence, including an element of any alternative offence;
- (ii) any alternative basis of complicity in the commission of the [offence charged](#) and any alternative offence; and
- (b) defence counsel must then inform the trial judge whether he or she considers that the following matters are or are not in issue—
- (i) each element of the [offence charged](#);
- (ii) any defence;
- (iii) any alternative offence, including an element of any alternative offence;
- (iv) any alternative basis of complicity in the commission of the [offence charged](#) and any alternative offence.

# S 12 - Legal practitioners must request that particular directions be given or not given

- After the matters in issue have been identified in accordance with section 11, the prosecution and defence counsel must each request that the trial judge give, or not give, to the jury particular directions in respect of—
  - (a) the matters in issue; and
  - (b) the evidence in the trial relevant to the matters in issue.

# s 14 Trial judge must give requested directions

- Note there is a reference to the Evidence Act in the recorded discussion, this obviously should be to the Jury Directions Act
- (1) The trial judge must give the jury a requested direction unless there are good reasons for not doing so.
- (2) In determining whether there are good reasons for not giving a requested direction to the jury, the trial judge must have regard to—
  - (a) the evidence in the trial; and
  - (b) the manner in which the prosecution and the accused have conducted their cases, including—
    - (i) whether the direction concerns a matter not raised or relied on by the accused; and
    - (ii) whether the direction would involve the jury considering the issues in the trial in a manner that is different from the way in which the accused has presented his or her case.
- And note s 15: the trial judge must not give a direction that has not been requested

# S 16: When trial judge must give direction regardless of parties' views

- (1) The trial judge must give the jury a direction if the trial judge considers that there are substantial and compelling reasons for doing so even though the direction has not been requested under section 12.
- (2) Before giving a direction under this section, the trial judge must—
  - (a) inform the prosecution and defence counsel (or, if the accused is unrepresented, the accused) that the trial judge is considering giving the direction; and
  - (b) invite submissions from the prosecution and defence counsel (or the accused, as the case may be) about the direction and whether there are substantial and compelling reasons for giving the direction.

# No slides for next session

- In our next discussion, we will simply discuss ss 18-44 and 61-67 of the Jury Directions Act