



New South Wales

Bail Amendment Bill 2014

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the *Bail Act 2013* (the *principal Act*) as follows:

- (a) to provide for a preamble to the principal Act,
- (b) to require bail for certain serious offences to be refused unless the accused person shows cause why his or her detention is not justified,
- (c) to convert the current 2-step unacceptable risk assessment process that applies to all bail decisions into a one-step risk assessment, so that:
 - (i) the bail conditions that could reasonably be imposed to address bail concerns are considered as part of an unacceptable risk assessment, and
 - (ii) bail must be refused if there are any unacceptable risks,
- (d) to require additional matters to be considered by a bail authority in applying the unacceptable risk test,
- (e) to make other miscellaneous changes.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Schedule 1 Amendment of Bail Act 2013 No 26

Preamble

Schedule 1 [1] inserts a preamble into the principal Act that sets out the underlying principles that the Parliament has regard to in enacting the Act. Those principles are:

- (a) the need to ensure the safety of victims of crime, individuals and the community, and
- (b) the need to ensure the integrity of the justice system, and
- (c) the common law presumption of innocence and the general right to be at liberty.

Show cause requirement

Schedule 1 [6] requires a bail authority making a bail decision for a show cause offence to refuse bail unless the accused person shows cause why his or her detention is not justified.

Bail must be refused on this basis whether or not there is an unacceptable risk. If the bail authority decides not to refuse bail on this basis, the unacceptable risk test still applies.

Show cause offences are certain serious offences set out in proposed section 16B. The offences include offences punishable by imprisonment for life, child sex offences, serious personal violence offences, certain offences involving drugs, firearms or prohibited weapons, and serious offences committed by an accused person while on bail, on parole or subject to a supervision order.

Schedule 1 [5] inserts a new flow chart that sets out how the show cause requirement applies to show cause offences.

Schedule 1 [10] provides that the show cause requirement is displaced if the offence is one for which the accused person must establish special and exceptional circumstances for a decision to grant bail or dispense with bail. This special requirement applies if the accused person has been convicted on indictment and an appeal in relation to the conviction or sentence is pending. The unacceptable risk test will continue to apply to such an offence.

Schedule 1 [19] makes it clear that the power of a court to grant bail of its own motion does not apply if the offence is a show cause offence.

Unacceptable risk test—all offences

Schedule 1 [8] replaces the existing 2-step unacceptable risk assessment process that must be carried out by a bail authority before making a bail decision with a one-step assessment.

Currently, the principal Act requires the bail authority to identify whether there is any unacceptable risk that the accused person, if released from custody, will:

- (a) fail to appear at any proceedings for the offence, or
- (b) commit a serious offence, or
- (c) endanger the safety of victims, individuals or the community, or
- (d) interfere with witnesses or evidence.

If there is an unacceptable risk, the bail authority must then consider whether bail conditions can be imposed to sufficiently mitigate that risk. If not, bail can be refused.

The amendments will require the bail authority to assess any bail concerns before making a bail decision. The bail authority will be required, as part of its assessment, to consider the bail conditions that could reasonably be imposed to address those concerns.

If the bail authority is satisfied, after making that assessment, that there is an unacceptable risk, the bail authority must refuse bail.

If there is no unacceptable risk, a release decision must be made (and bail conditions may be imposed to address bail concerns).

Accordingly, an unacceptable risk will always require bail to be refused.

In addition, the bail authority may impose bail conditions as a way of addressing bail concerns only if there are reasonable grounds to believe that those bail conditions will be complied with by the accused person.

Schedule 1 [5] inserts a flow chart that sets out the new unacceptable risk test.

Schedule 1 [11] and [12] repeal matters that are now provided for by Schedule 1 [8].

Schedule 1 [4], [7], [13]–[15] and [21] are consequential amendments.

Schedule 1 [9] makes it clear that the unacceptable risk test also applies to bail decisions for offences for which there is a right to release. However, it will continue to be the case that bail cannot be refused for right to release offences.

Additional matters to be considered in risk assessment

Schedule 1 [8] (proposed section 18) sets out the matters to be considered by a bail authority in assessing bail concerns. Those matters replicate existing section 17 (3) of the principal Act, with the following changes and additions:

- (a) the bail authority must consider whether the accused person has a history of compliance or non-compliance with bail acknowledgments, bail conditions, apprehended violence orders, parole orders or good behaviour bonds (not a pattern of non-compliance),
- (b) the bail authority must consider whether the accused person has any criminal associations,
- (c) the bail authority must consider the conduct of the accused person towards the victim of the offence, or any family member of the victim, after the offence,
- (d) if the offence is a serious offence, the bail authority must consider the views of the victim of the offence, or any family member of the victim, if available, to the extent relevant to a concern about the safety of the victim, individuals or the community,
- (e) as mentioned above, the bail authority must consider the conditions that could reasonably be imposed to address bail concerns.

Miscellaneous amendments

Schedule 1 [2] removes a requirement that the bail authority have regard to the presumption of innocence and the general right to be at liberty when making bail decisions.

Schedule 1 [16] limits the circumstances in which a senior police officer is required, at the request of an accused person, to review a bail decision of another police officer. The review will now be required only if the accused person was refused bail or bail was granted subject to a pre-release requirement and the accused person is unable to comply with the pre-release requirement. A pre-release requirement is a requirement of a bail condition that must be complied with before a person is released on bail, such as a requirement to provide security or a character acknowledgment. **Schedule 1 [17]** is a consequential amendment.

Schedule 1 [18] permits a review by a senior police officer of a decision by another police officer to refuse bail or to grant bail subject to conditions to be carried out by a senior police officer who is not present at the police station if no senior police officer is available at the police station to carry out the review.

Schedule 1 [20] limits the grounds on which a further release application or detention application can be made to a court that has already heard an application. The amendment will permit a further application to be made when new information relevant to the grant of bail is available only if that information is *material* information.

Schedule 1 [22] provides that the enactment of the principal Act is not a change in circumstances for the purposes of a release application or a detention application. This means that the enactment of the principal Act does not provide grounds for the making of a further bail application to a court if an application has already been heard by the relevant court.

Schedule 1 [23] provides for savings and transitional matters.

Schedule 1 [3] defines expressions used in the proposed amendments.



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No. , 2014

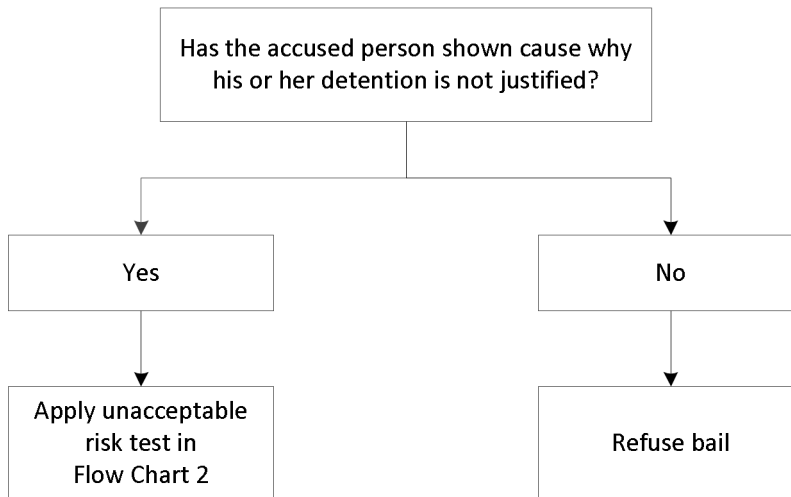
A Bill for

An Act to amend the *Bail Act 2013* to make further provision for bail decisions.

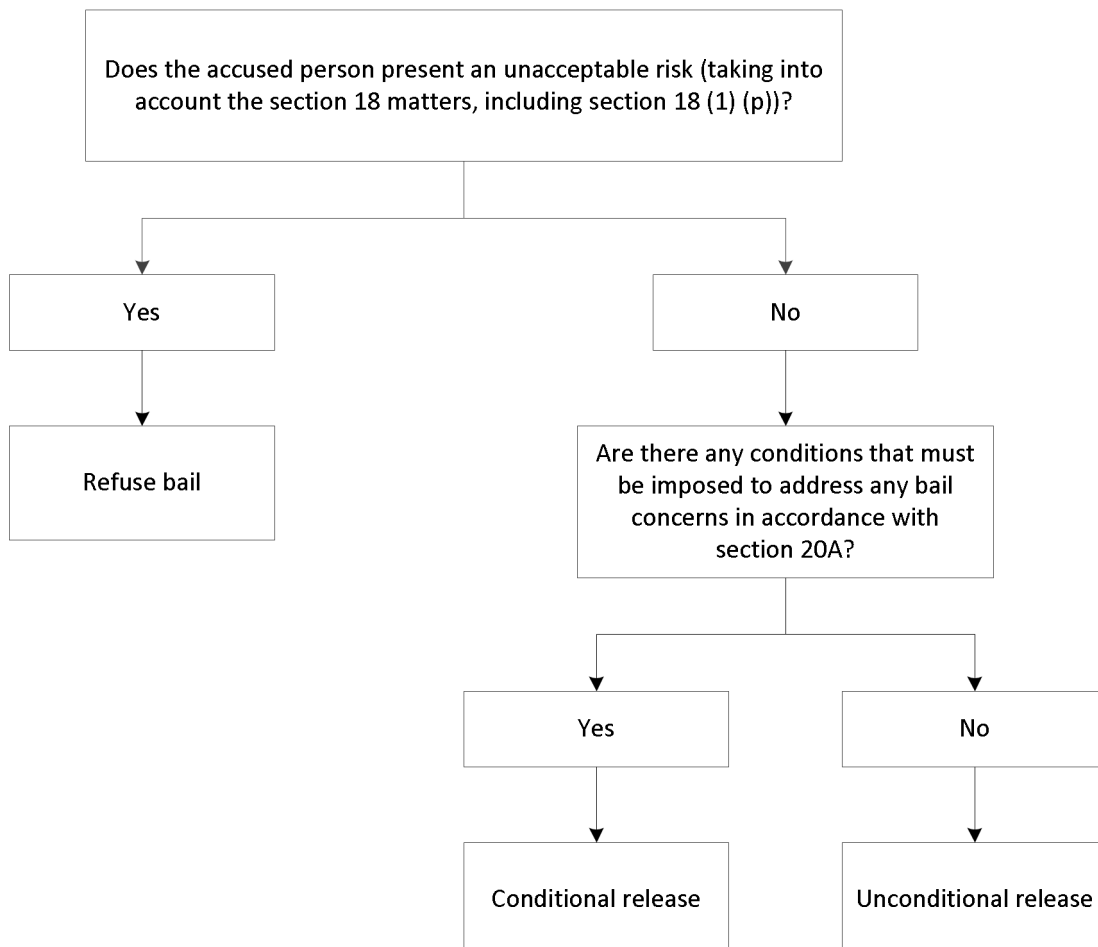
The Legislature of New South Wales enacts:	1
1 Name of Act	2
This Act is the <i>Bail Amendment Act 2014</i> .	3
2 Commencement	4
This Act commences on a day or days to be appointed by proclamation.	5

Schedule 1	Amendment of Bail Act 2013 No 26	1
[1] Preamble		2
Insert after the long title:		3
Preamble		4
The Parliament of New South Wales, in enacting this Act, has regard to the following:		5
(a) the need to ensure the safety of victims of crime, individuals and the community,		6
(b) the need to ensure the integrity of the justice system,		7
(c) the common law presumption of innocence and the general right to be at liberty.		8
[2] Section 3 Purpose of Act		9
Omit section 3 (2).		10
[3] Section 4 Definitions		11
Insert in alphabetical order in section 4 (1):		12
<i>bail concern</i> —see section 17.		13
<i>show cause offence</i> —see section 16B.		14
<i>victim</i> of an offence includes an alleged victim of an offence.		15
[4] Section 4 (1), definition of “unacceptable risk”		16
Omit “section 17”. Insert instead “section 19”.		17
[5] Section 16		18
Omit the section. Insert instead:		19
16 Flow charts—key features of bail decisions		20
(1) The flow charts illustrate the key features of bail decisions under this Act.		21
(2) Flow Chart 1 illustrates the show cause requirement (set out in Division 1A), which applies only to show cause offences.		22
(3) Flow Chart 2 illustrates the unacceptable risk test (set out in Division 2) as it applies to all offences, other than offences for which there is a right to release.		23
(4) In the flow charts:		24
<i>conditional release</i> means a decision to grant bail with the imposition of bail conditions.		25
<i>unconditional release</i> means a decision:		26
(a) to release a person without bail, or		27
(b) to dispense with bail, or		28
(c) to grant bail without the imposition of bail conditions.		29

Flow Chart 1 Show cause requirement



Flow Chart 2 Unacceptable risk test



[6] Part 3, Division 1A	1
Insert after Division 1:	2
Division 1A Show cause requirement	3
16A Accused person to show cause for certain serious offences	4
(1) A bail authority making a bail decision for a show cause offence must refuse bail unless the accused person shows cause why his or her detention is not justified.	5 6 7
(2) If the accused person does show cause why his or her detention is not justified, the bail authority must make a bail decision in accordance with Division 2 (Unacceptable risk test—all offences).	8 9 10
(3) This section does not apply if the accused person was under the age of 18 years at the time of the offence.	11 12
16B Offences to which the show cause requirement applies	13
(1) For the purposes of this Act, each of the following offences is a <i>show cause offence</i> :	14 15
(a) an offence that is punishable by imprisonment for life,	16
(b) a serious indictable offence that involves:	17
(i) sexual intercourse with a person under the age of 16 years by a person who is of or above the age of 18 years, or	18 19
(ii) the infliction of actual bodily harm with intent to have sexual intercourse with a person under the age of 16 years by a person who is of or above the age of 18 years,	20 21 22
(c) a serious personal violence offence, or an offence involving wounding or the infliction of grievous bodily harm, if the accused person has previously been convicted of a serious personal violence offence,	23 24 25
(d) any of the following offences:	26
(i) a serious indictable offence under Part 3 or 3A of the <i>Crimes Act 1900</i> or under the <i>Firearms Act 1996</i> that involves the use of a firearm,	27 28 29
(ii) an indictable offence that involves the unlawful possession of a pistol or prohibited firearm in a public place,	30 31
(iii) a serious indictable offence under the <i>Firearms Act 1996</i> that involves acquiring, supplying or manufacturing a pistol or prohibited firearm,	32 33 34
(e) any of the following offences:	35
(i) a serious indictable offence under Part 3 or 3A of the <i>Crimes Act 1900</i> or under the <i>Firearms Act 1996</i> that involves the use of a military-style weapon,	36 37 38
(ii) an indictable offence that involves the unlawful possession of a military-style weapon,	39 40
(iii) a serious indictable offence under the <i>Weapons Prohibition Act 1998</i> that involves buying, selling or manufacturing a military-style weapon or selling, on 3 or more separate occasions, any prohibited weapon,	41 42 43 44
(f) an offence under the <i>Drug Misuse and Trafficking Act 1985</i> that involves the cultivation, supply, possession, manufacture or production	45 46

	of a commercial quantity of a prohibited drug or prohibited plant within the meaning of that Act,	1 2
(g)	an offence under Part 9.1 of the <i>Criminal Code</i> set out in the Schedule to the <i>Criminal Code Act 1995</i> of the Commonwealth that involves the possession, trafficking, cultivation, sale, manufacture, importation, exportation or supply of a commercial quantity of a serious drug within the meaning of that Code,	3 4 5 6 7
(h)	a serious indictable offence that is committed by an accused person:	8
	(i) while on bail, or	9
	(ii) while on parole,	10
(i)	an indictable offence, or an offence of failing to comply with a supervision order, committed by an accused person while subject to a supervision order,	11 12 13
(j)	a serious indictable offence of attempting to commit an offence mentioned elsewhere in this section,	14 15
(k)	a serious indictable offence (however described) of assisting, aiding, abetting, counselling, procuring, soliciting, being an accessory to, encouraging, inciting or conspiring to commit an offence mentioned elsewhere in this section.	16 17 18 19
(2)	In this section, a reference to the facts or circumstances of an offence includes a reference to the alleged facts or circumstances of an offence.	20 21
(3)	In this section:	22
	<i>firearm, prohibited firearm</i> and <i>pistol</i> , and <i>use, acquire, supply</i> or <i>possession</i> of a firearm, have the same meanings as in the <i>Firearms Act 1996</i> .	23 24
	<i>prohibited weapon</i> and <i>military-style weapon</i> , and <i>use, buy, sell, manufacture</i> or <i>possession</i> of a prohibited weapon, have the same meanings as in the <i>Weapons Prohibition Act 1998</i> .	25 26 27
	<i>serious indictable offence</i> has the same meaning as in the <i>Crimes Act 1900</i> .	28
	<i>serious personal violence offence</i> means an offence under Part 3 of the <i>Crimes Act 1900</i> that is punishable by imprisonment for a term of 14 years or more.	29 30 31
	<i>supervision order</i> means an extended supervision order or an interim supervision order under the <i>Crimes (High Risk Offenders) Act 2006</i> .	32 33
[7]	Part 3, Division 2, heading	34
	Omit the heading. Insert instead:	35
	Division 2 Unacceptable risk test—all offences	36
[8]	Sections 17–20A	37
	Omit sections 17–20. Insert instead:	38
	17 Assessment of bail concerns	39
(1)	A bail authority must, before making a bail decision, assess any bail concerns.	40
(2)	For the purposes of this Act, a <i>bail concern</i> is a concern that an accused person, if released from custody, will:	41 42
	(a) fail to appear at any proceedings for the offence, or	43
	(b) commit a serious offence, or	44

(c)	endanger the safety of victims, individuals or the community, or	1
(d)	interfere with witnesses or evidence.	2
(3)	If the accused person is not in custody, the assessment is to be made as if the person were in custody and could be released as a result of the bail decision.	3 4
(4)	This section does not apply if the bail authority refuses bail under Division 1A (Show cause requirement).	5 6
18	Matters to be considered as part of assessment	7
(1)	A bail authority is to consider the following matters, and only the following matters, in an assessment of bail concerns under this Division:	8 9
(a)	the accused person's background, including criminal history, circumstances and community ties,	10 11
(b)	the nature and seriousness of the offence,	12
(c)	the strength of the prosecution case,	13
(d)	whether the accused person has a history of violence,	14
(e)	whether the accused person has previously committed a serious offence while on bail,	15 16
(f)	whether the accused person has a history of compliance or non-compliance with bail acknowledgments, bail conditions, apprehended violence orders, parole orders or good behaviour bonds,	17 18 19
(g)	whether the accused person has any criminal associations,	20
(h)	the length of time the accused person is likely to spend in custody if bail is refused,	21 22
(i)	the likelihood of a custodial sentence being imposed if the accused person is convicted of the offence,	23 24
(j)	if the accused person has been convicted of the offence and proceedings on an appeal against conviction or sentence are pending before a court, whether the appeal has a reasonably arguable prospect of success,	25 26 27
(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,	28 29 30
(l)	the need for the accused person to be free to prepare for his or her appearance in court or to obtain legal advice,	31 32
(m)	the need for the accused person to be free for any other lawful reason,	33
(n)	the conduct of the accused person towards any victim of the offence, or any family member of a victim, after the offence,	34 35
(o)	in the case of a serious offence, the views of any victim of the offence or any family member of a victim (if available to the bail authority), to the extent relevant to a concern that the accused person could, if released from custody, endanger the safety of victims, individuals or the community,	36 37 38 39 40
(p)	the bail conditions that could reasonably be imposed to address any bail concerns in accordance with section 20A.	41 42

(2)	The following matters (to the extent relevant) are to be considered in deciding whether an offence is a serious offence under this Division (or the seriousness of an offence), but do not limit the matters that can be considered:	1
		2
		3
(a)	whether the offence is of a sexual or violent nature or involves the possession or use of an offensive weapon or instrument within the meaning of the <i>Crimes Act 1900</i> ,	4
		5
		6
(b)	the likely effect of the offence on any victim and on the community generally,	7
		8
(c)	the number of offences likely to be committed or for which the person has been granted bail or released on parole.	9
		10
19	Refusal of bail—unacceptable risk	11
(1)	A bail authority must refuse bail if the bail authority is satisfied, on the basis of an assessment of bail concerns under this Division, that there is an unacceptable risk.	12
		13
		14
(2)	For the purposes of this Act, an <i>unacceptable risk</i> is an unacceptable risk that the accused person, if released from custody, will:	15
		16
(a)	fail to appear at any proceedings for the offence, or	17
(b)	commit a serious offence, or	18
(c)	endanger the safety of victims, individuals or the community, or	19
(d)	interfere with witnesses or evidence.	20
(3)	If the offence is a show cause offence, the fact that the accused person has shown cause that his or her detention is not justified is not relevant to the determination of whether or not there is an unacceptable risk.	21
		22
		23
(4)	Bail cannot be refused for an offence for which there is a right to release under Division 2A.	24
		25
20	Accused person to be released if no unacceptable risks	26
(1)	If there are no unacceptable risks, the bail authority must:	27
(a)	grant bail (with or without the imposition of bail conditions), or	28
(b)	release the person without bail, or	29
(c)	dispense with bail.	30
(2)	This section is subject to Divisions 1A and 2A.	31
20A	Imposition of bail conditions	32
(1)	Bail conditions are to be imposed only if the bail authority is satisfied, after assessing bail concerns under this Division, that there are identified bail concerns.	33
		34
		35
(2)	A bail authority may impose a bail condition only if the bail authority is satisfied that:	36
		37
(a)	the bail condition is reasonably necessary to address a bail concern, and	38
(b)	the bail condition is reasonable and proportionate to the offence for which bail is granted, and	39
		40
(c)	the bail condition is appropriate to the bail concern in relation to which it is imposed, and	41
		42
(d)	the bail condition is no more onerous than necessary to address the bail concern in relation to which it is imposed, and	43
		44

(e)	it is reasonably practicable for the accused person to comply with the bail condition, and	1 2
(f)	there are reasonable grounds to believe that the condition is likely to be complied with by the accused person.	3 4
(3)	This section does not limit a power of a court to impose enforcement conditions.	5 6
	Note. Enforcement conditions are imposed for the purpose of monitoring or enforcing compliance with other bail conditions. Section 30 provides for this type of bail condition.	7 8
	Division 2A Special rules for certain offences	9
[9]	Section 21 Special rule for offences for which there is a right to release	10
	Insert after section 21 (4):	11
(5)	Subject to subsection (1), Division 2 (Unacceptable risk test—all offences) applies to a bail decision for an offence for which there is a right to release.	12 13
[10]	Section 22 General limitation on court’s power to release	14
	Insert at the end of the section:	15
(2)	If the offence is a show cause offence, the requirement that the accused person establish that special or 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.	16 17 18 19
(3)	Subject to subsection (1), Division 2 (Unacceptable risk test—all offences) applies to a bail decision made by a court under this section.	20 21
[11]	Section 23 When bail conditions can be imposed	22
	Omit section 23 (1).	23
[12]	Section 24 General rules for bail conditions	24
	Omit the section.	25
[13]	Section 26 Bail conditions can require security to be provided	26
	Omit “mitigating an unacceptable risk” from section 26 (5).	27
	Insert instead “addressing a bail concern”.	28
[14]	Section 38 Reasons for decision to be recorded	29
	Omit “including the unacceptable risk or risks identified” from section 38 (1).	30
	Insert instead “including (if bail was refused because of an unacceptable risk) the unacceptable risk or risks identified”.	31 32
[15]	Section 38 (2) (b)	33
	Omit “unacceptable risk or risks”. Insert instead “bail concern or concerns”.	34
[16]	Section 47 Review of police decision by senior police officer	35
	Omit section 47 (2). Insert instead:	36
(2)	A senior police officer must carry out a review, at the request of the accused person, if:	37
(a)	bail was refused, or	38 39

	(b) bail was granted subject to a pre-release requirement and the accused person cannot comply with the pre-release requirement.	1 2
[17]	Section 47 (5)	3
	Omit “person the subject of the bail decision”. Insert instead “accused person”.	4
[18]	Section 47 (8)	5
	Insert after section 47 (7):	6
	(8) If there is no senior police officer available at a police station to carry out a review under this section, the review may be carried out by any other police officer who would be a senior police officer if he or she were present at the police station.	7 8 9 10
[19]	Section 53 Discretion to make or vary bail decision without bail application	11
	Insert after section 53 (3):	12
	(4) This section does not permit the grant of bail, without a bail application, for a show cause offence.	13 14
[20]	Section 74 Multiple release or detention applications to same court not permitted	15
	Insert “material” before “information” wherever occurring in section 74 (3) (b) and (4) (a).	16
[21]	Schedule 3 Savings, transitional and other provisions	17
	Insert “, 18” after “17” in clause 7.	18
[22]	Schedule 3, clause 9	19
	Insert at the end of the clause:	20
	(2) The enactment of this Act is not a change in circumstances for the purposes of section 74 (3) (c) or (4) (b).	21 22
[23]	Schedule 3, Part 3	23
	Insert after Part 2:	24
	Part 3 Provisions consequent on enactment of Bail Amendment Act 2014	25 26
	12 Application of amendments	27
	An amendment made to this Act by the <i>Bail Amendment Act 2014</i> extends to offences committed or alleged to have been committed, or charged, before the commencement of the amendment.	28 29 30
	13 Amendments do not constitute change in circumstances	31
	An amendment made to this Act by the <i>Bail Amendment Act 2014</i> is not a change in circumstances for the purposes of section 74 (3) (c) or (4) (b).	32 33