Bail in the Time of COVID-19

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One of the numerous and unexpected ways that the COVID-19 pandemic has affected Australian law and judicial practice, has been the impact on bail applications. In a very short space of time, a new body of jurisprudence has emerged in which the COVID virus has become a relevant factor in the determination of bail. This article considers the extent to which COVID has influenced bail decisions in New South Wales and Victoria, by analysing how COVID-19 has changed bail applications, and the impact this has on bail jurisprudence. In conclusion, we suggest that while COVID has been integrated into Australian law rapidly, it has done so with respect to existing categories including concerns centred around trial delay, potential exposure to the virus while incarcerated, increased health risks due to a compromised immune system, hardship on remand, and limits on access to legal representatives. While COVID has affected decision-making, it is one of many factors considered.

Introduction

One of the practical ways in which the presumption of innocence is given effect is for an accused person to be granted conditional liberty in the period before trial. Bail, as it is known, is not always granted. Much depends on the circumstances. Apart from the important symbolic effect, bail allows the accused time to adequately prepare their defence. This is particularly important where the accused is facing a trial for a serious offence that may result in a substantial prison term. Accordingly, bail is an essential component of the trial process. But what happens when the trial process is disrupted by an extraordinary event, such as a pandemic? This article examines the question of bail in the context of the COVID-19 (COVID) pandemic by investigating the way in which COVID has changed bail jurisprudence in New South Wales (NSW)and Victoria. In the first part of this article we present an outline of bail law in those jurisdictions. In Part II we set out the statutory changes introduced in those jurisdictions in response to COVID affecting trial process generally, and bail specifically. We then turn to case examples in Part III, discussing the principles that have rapidly emerged, at least in Victoria. In Part IV we then discuss the comparative differences. Here we identify two divergent approaches to the grant of bail, as well as observe the main finding – which is that COVID, while quickly identified as a matter important to the grant of bail, has just as quickly settled into existing categories. This has enabled judicial officers to immediately adapt to an apparent crisis with relative ease. In concluding, we celebrate the genius of the adaptation available in these systems of law and we raise additional questions for discussion.

I. Comparative Bail

As is well known, bail is the right of a person to be at liberty following a charge of an alleged offence.[1] The term "*bail*" is derived from the French word *baillier* (*deliver*). It is based on the idea that the person will either deliver or return goods in exchange for a surety (as in a bailment), or surrender themselves to a court to answer a charge against them.[2] It is a manifestation of the high regard attached to personal

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[1] Bail is defined in the *Bail Act 2013* (NSW) s 7(1) as "authority to be at liberty for an offence".

[2] Classically, see William Blackstone, *Commentaries on the Laws of England* (University of Chicago Press, 1979) Vol III, 287–292; Vol IV, 294–295.

liberty in the western legal tradition,[3] and has come to be reflected in statutes that give effect to a complex array of competing principles. It is premised on an old and eminently sensible policy that a person is entitled to the presumption of innocence, with the very real need to prepare for trial in the period leading up to the trial. This is especially so in serious cases where conviction may result in a significant prison term. This right to liberty is necessarily balanced against the equally important right of the victim and the public to be protected from the kind of offending the accused is charged with. This is combined with the need to ensure the accused will appear to answer the allegations. Liberty is balanced in combination with the risk of offending, perverting the course of justice, and absconding. In this respect there is a very real balancing of significant competing interests. That balancing is exercised fundamentally at two key entry points in the criminal justice system, both concerned with the decision to grant bail: by a senior police officer, or by a magistrate upon first appearance in court. These decisions are, of course, subject to appeal in the superior courts. Such appeals are rarely successful unless there has been some demonstrable error in the decision. Where bail is refused, the accused is "remanded in custody"; that is, they are kept in custody pending trial, with any time served deemed as pre-sentence detention and counted as time served ultimately factored into any sentence.

Despite the emphasis given to liberty, there is no common law right to bail.[4] At common law, the relevant remedy was found in habeas corpus, or in statute.[5] In all jurisdictions in Australia bail is governed by legislation,[6] presenting, in effect, a code that effectively excludes other forms of court-ordered liberty, such as habeas corpus. The Supreme Courts in each Australian jurisdiction (including the High Court), have powers to make orders compelling the attendance of the accused before the court, which can have the effect of taking the person out of custody.[7] Bail is something quite different and has formed a distinct body of law grounded in statute. Although bail is uniformly available, and generally operates according to a set of recognised principles across jurisdictions, there are nuances.

Bail in New South Wales

Bail in New South Wales is governed by the *Bail Act 2013* (*NSW*), which came into effect in 2014. It introduced significant change to bail law in the state. Previously, the *Bail Act 1978* (*NSW*) was structured around the existence of a system of statutory presumptions for[8] or against the grant of bail,[9] with obligations on one or other party to displace the presumption unless some exception existed.[10]

[3] In *Foster v The Queen* (1993) 67 ALJR 550; 66 A Crim R 112 a majority of the High Court held at 555: "The courts of this country have been at pains to stress that the right to personal liberty under the law is, in the words of Fullagar J (*Trobridge v. Hardy* (1955) 94 CLR 147, at p 152.), 'the most elementary and important of all common law rights'." It is a right recognised in international instruments, such as *International Covenant on Civil and Political Rights* Art 9.

[4] *Ngoc Tri Chau v DPP* (1995) 37 NSWLR 639; 82 A Crim R 339; *R v Light* [1954] VLR 152.

[5] Example *Habeus Corpus Act 1640* (UK) 16 Car 1 c 10.

[6] *Bail Act 1992* (ACT); *Bail Act 2013* (NSW); *Bail Act 1982* (NT); *Bail Act 1980* (Qld); *Bail Act* 1985 (SA); *Bail Act 1994* (Tas); *Bail Act 1977* (Vic); *Bail Act 1982* (WA). Commonwealth bail is governed by the *Crimes Act 1914* (Cth), but is limited in scope. Bail for offences not otherwise covered by that Act is delegated to the States pursuant to *Judiciary Act 1903* (Cth) s 68.

[7] It is worth noting that statutory bail operates concurrently with the power of the Supreme Courts to make orders in the nature of *habeus corpus*. That is, an order to have a person released from custody and brought before the court to have whatever matter heard according to law. Ordinarily, bail is a creature of statute, being codified in legislation and as such courts has generally avoided or refused habeus corpus as a means of review of decisions otherwise made under bail legislation. See *Eaves v James* (1988) 33 A Crim R 369; *R v Hilton* (1987) 7 NSWLR 745; 27 A Crim R 59.

[8] *Bail Act 1978* (NSW) s 9 (Presumption in favour of bail for certain offences).

[9] *Bail Act 1978* (NSW) ss 8A (Presumption against bail for certain offences); 8B (Presumption against bail for serious firearms and weapons offences).

[10] Example *Bail Act 1978* (NSW) s 9(2) A person accused of an offence to which this section applies is entitled to be granted bail in accordance with this Act unless: (1) the authorised officer or court is satisfied that the officer or the court is, pursuant to a consideration of the matters referred to in s 32, justified in refusing bail, (2) the person stands convicted of the offence or the person's conviction for the offence is stayed, or (3) the requirement for bail is dispensed with, as referred to in s 10.

In other cases, there was a right to bail for certain offences,[11] while offences that were otherwise not identified as having positive or negative presumptions were carried a "neutral" presumption and heavily shaped by further submissions from both parties. That all changed in 2013 when the NSW Parliament repealed the entire Act and replaced the essential mechanism for bail decision-making with a risk-assessment in the form of the *Bail Act 2013* (*NSW*).[12] That assessment hinges on the existence of certain offences being identified as "show cause offences",[13] which require the offender to show cause why their detention is not justified. In this context the "show cause" threshold is an evidence-based examination on the balance of probabilities.[14] If the accused does demonstrate their detention is not justified, the decision-maker must then consider whether there is an "unacceptable risk". This includes whether the accused will fail to appear, commit further offending while on bail, endanger the safety of others, or interfere with evidence or prosecution witnesses.[15] If the accused has *not* been charged with a show-cause offence, the decision must still apply the "unacceptable risk" test, unless it is an offence for which there is a presumption in favour of bail and a right to release applies.[16] The "unacceptable risk" test is governed by a set of "bail concerns" that are indicators the person presents as an "unacceptable risk".[17]

Broadly, where a person is charged with a show-cause offence and fails to show cause, bail will be refused. Where they do show cause, but present an unacceptable risk, bail will be refused. Where a person has not been charged with a show cause offence but presents an unacceptable risk, bail will be refused. One aspect of this evaluation is whether any conditions can be, or must be, imposed by the decision-maker in order to mitigate any bail concerns.[18] In this respect bail concerns that may constitute an "unacceptable risk" of one or more of the issues identified above can be addressed through the imposition of bail conditions, which typically may involve a set of orders that a financial security be paid, the person resides at a certain address, be of good behaviour, and refrain from certain conduct, places or contacting named people.[19]

[11] *Bail Act 1978* (NSW) s 8 (Right to release on bail for minor offences).

[12] For authoritative commentary and analysis on the *Bail Act 2013* (NSW) and its evolution, see David Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 6th ed, 2015) 311–333. See also New South Wales Law Reform Commission, *Bail*, Report No 133(2012).

[13] *Bail Act 2013* (NSW) ss 16A, 16B.

[14] *Bail Act 2013* (NSW) s 32.

[15] *Bail Act 2013* (NSW) s 19.

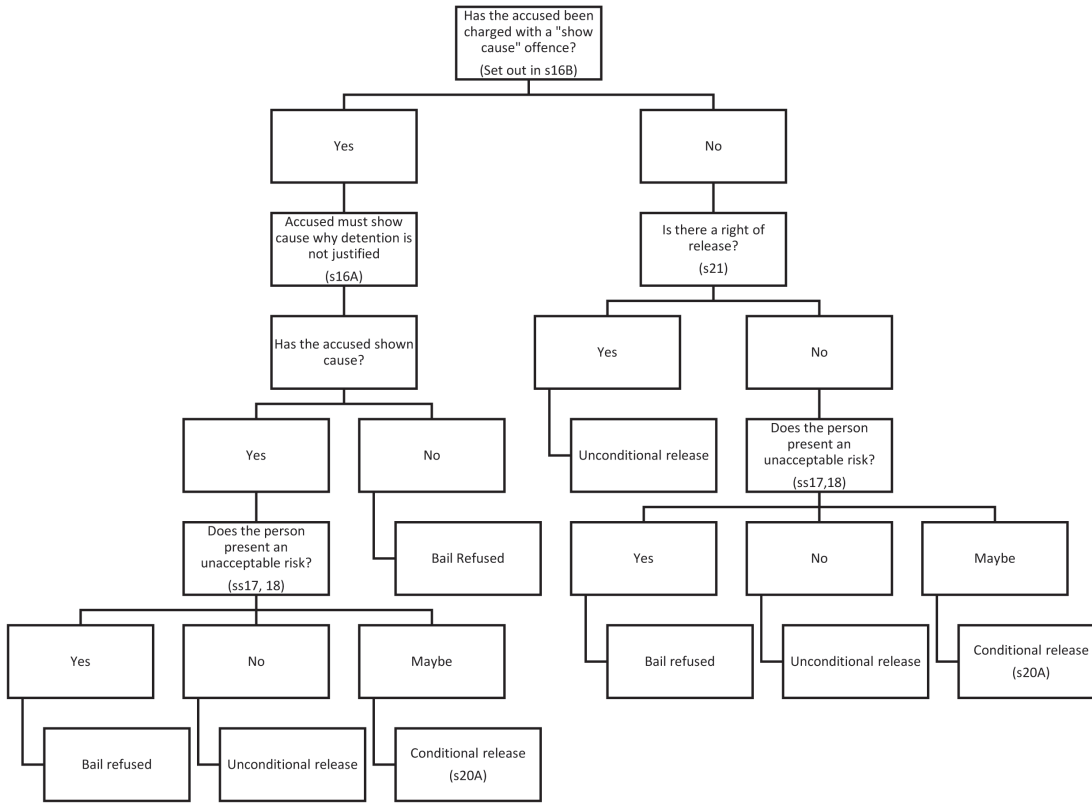
[16] *Bail Act 2013* (NSW) s 16(3).

[17] *Bail Act 2013* (NSW) ss 17, 18.

[18] *Bail Act 2013* (NSW) s 20A.

[19] *Bail Act 2013* (NSW) ss 25–30.

This process can be represented in the following chart:



Bail decisions are effectively a question of fact and degree, determined on a case-by-case basis. Each case must be determined in accordance with its own constituent elements and facts.[20] A great deal depends on the reasoning behind why the bail application is opposed and how concerns surrounding bail can be ameliorated through the imposition of conditions. In this respect, bail applications are often contested. Such decisions necessarily involve a consideration of the evidence available to the court, noting that the rules of evidence do not apply. Here the decision-maker determines their assessment based on any material considered "credible or trustworthy".[21] As is often the case with legal reasoning, the exercise is not a mathematical one. Not only is it impossible to completely exclude every risk the accused will breach their conditions, but the reasoning involved is not as mechanical as the flow chart in the act would suggest. It has been held, for example, that "bail concerns" set out in s 17 may be relevant to show cause in s 16A.[22] There is a necessary synthesis of a range of factors, requiring the decision-maker to move intellectually as the facts and law require. In this environment a combination, or a single significant factor, may be relevant. As will be discussed in more detail below, pandemics present a cluster of factors that are relevant to that determination.

[20] *DPP v Harika* [2001] VSC 237; *Woods v DPP* (2014) 238 A Crim R 84; [2014] VSC 1.

[21] *Bail Act 2013* (NSW) s 31.

[22] *R v Tikomaimaleya* [2015] NSWCA 83, [24]; *DPP (Cth) v Heng* [2015] NSWCCA 333, [18]. It is important not to conflate the two tests, however.

Bail in Victoria

Bail in Victoria is governed by the *Bail Act 1977* (Vic). This legislation commenced in 1977 and has been subject to numerous amendments thereafter. There are three bail tests depending on the seriousness of the alleged offending.

The "exceptional circumstances" test applies to the most serious types of alleged offences. Schedule 1 includes offences such as murder and treason or a Sch 2 offence that is alleged to have been committed by the accused while on bail for any Sch 1 or 2 offence. The "exceptional circumstances" test is a high hurdle, but not set so that it is impossible for an accused person to achieve.[23] "Exceptional circumstances" may include the combination of the strength of the prosecution case, an applicant's personal circumstances, and an absence of factors demonstrating that the applicant poses an "unacceptable risk".[24]

For Sch 2 offences, the "compelling reason" test applies. Schedule 2 includes offences such as rape, abduction, armed robbery, aggravated burglary, home invasion, threats to kill and stalking. The "compelling reason" test is a synthesis or balancing of all relevant matters which compel the conclusion that the accused's detention in custody is not justified. The reason may be forceful or convincing, but it need not be irresistible or exceptional.[25]

All other offences not listed in Sch 1 or 2 fall under the "prima facie" entitlement to bail. However, once the appropriate bail test has been applied, regardless of the test, the bail decision-maker must assess whether the accused presents an unacceptable risk while at liberty.[26] This relates to risk that the accused, would if released on bail, endanger the safety or welfare of any person, commit an offence while on bail, interfere with witnesses, obstruct the course of justice or fail to surrender into custody in accordance with bail conditions. While a risk may be identified, the onus is on the prosecution to prove that the risk cannot be ameliorated.

In addition, the bail decision-maker must have regard to the surrounding circumstances.[27] This term is defined in the act[28] and contains a non-exhaustive set of factors. Some, all or none of them may be a relevant consideration. A bail decision-maker considering the grant of bail, must impose any condition[29] that will reduce the likelihood that the accused may engage in conduct amounting to an unacceptable risk. Conduct conditions include but are not limited to, reporting to a police station, residing at a particular address, surrender of passport or any other condition deemed appropriate.

The bail process is outlined in the following four flow charts.

[23] *Re Ceylan* [2018] VSC 361; *Re CT* [2018] VSC 559.

[24] *Re Gloury-Hyde* [2018] VSC 393.

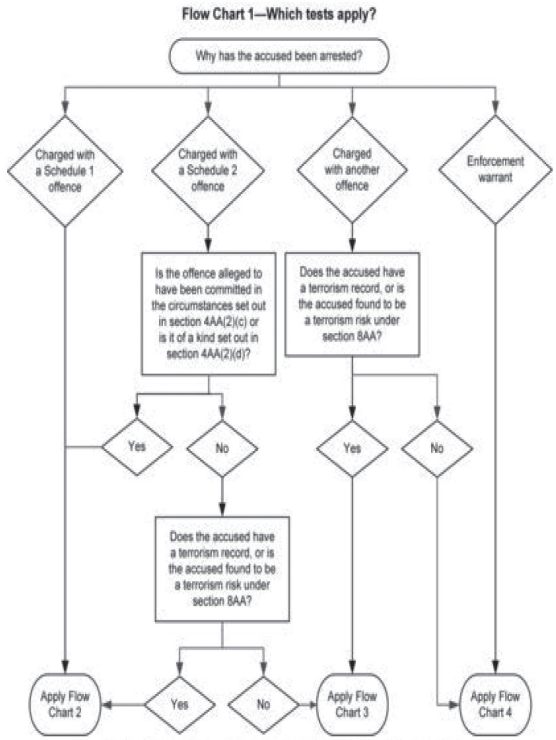
[25] *Re Ceylan* [2018] VSC 361.

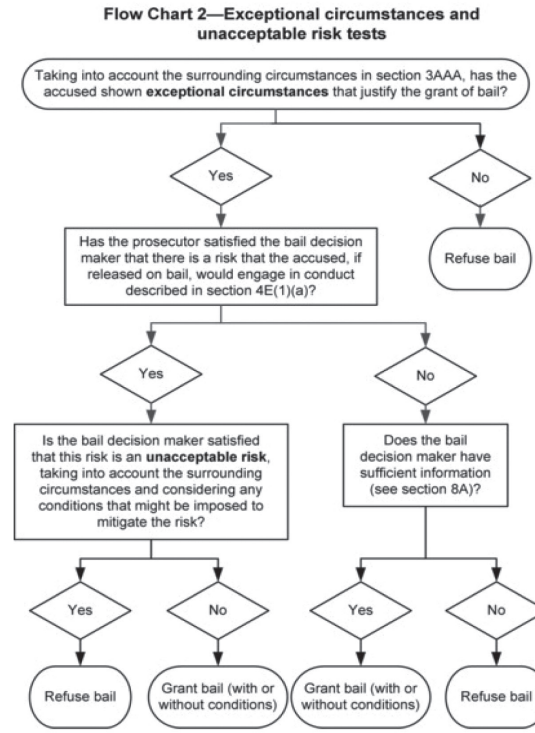
[26] *Bail Act 1977* (Vic) s 4E(1)(a).

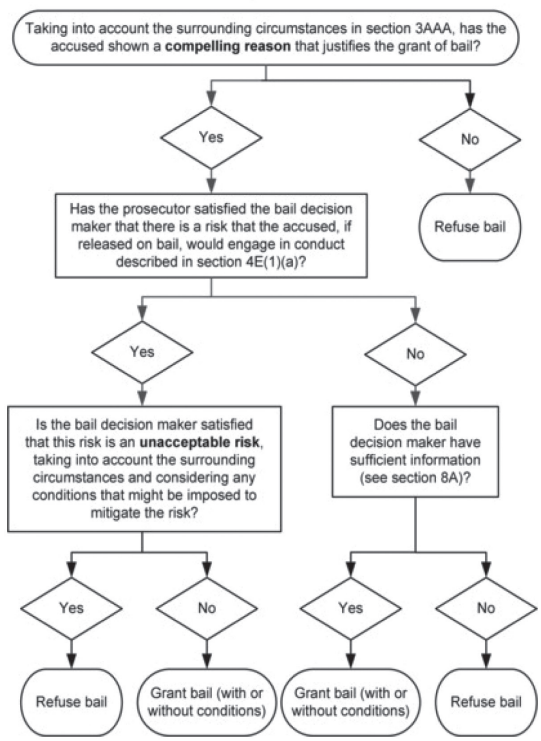
[27] *Bail Act 1977* (Vic) s 3AAA.

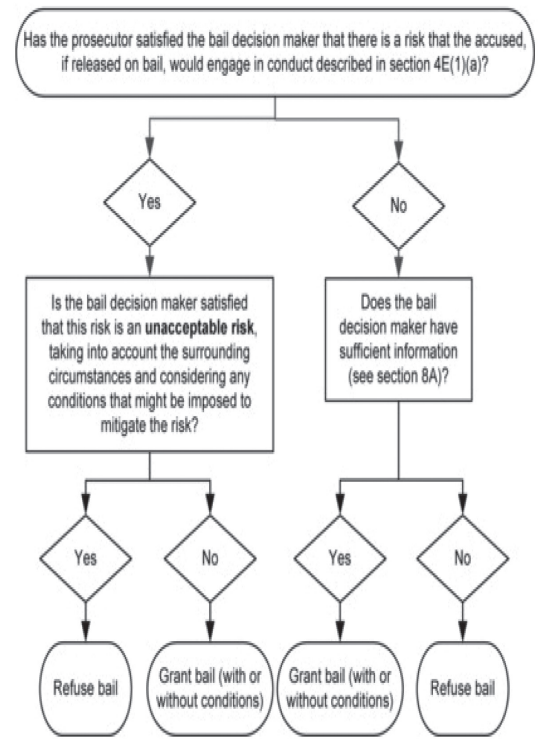
[28] Section 3AAA includes factors such as the nature and seriousness of the alleged offending; the strength of the prosecution case; the accused's criminal history; the extent to which the accused complied with the conditions of any earlier grant of bail (if applicable); whether at the time of the alleged offending the accused was on bail, subject to a summons; awaiting trial for another offence; was released on parole or subject to a community corrections order; whether the accused has any special vulnerability (eg: child, an Aboriginal person, experiencing ill health, cognitive impairment, intellectual disability or mental illness), and whether the accused has expressed support for any terrorist act or organisation.

[29] *Bail Act 1977* (Vic) s 5AAA.









Source: Bail Act 1977 (Vic) s 3D.

Points of Merger and Distinction

Bail laws in New South Wales and Victoria are broadly similar. Both Acts provide for conditional liberty pending trial, subject to an assessment of the alleged charge(s), risk of absconding, re-offending, interfering with prosecution witnesses or evidence, as well as providing a framework for reasoning and the associated orders. In this respect there is considerable overlap between the schemes. There are, of course, some nuanced differences between the Acts, notably the requirement for "show cause offences" as opposed to "exceptional circumstances" and "compelling reasons". These are, however, largely semantic differences. Both Acts emphasise the importance of a risk assessment as a key feature of bail decisions, which necessarily requires an appraisal of the factual matrix, the type of crime charged, and the criminal history of the offender.

Neither of the Acts makes explicit reference to COVID. There is, however, little doubt that prisons are environments in which the risk of pandemic is significant. Prisoners live in close proximity, with visitation from the outside world. In addition, the prison guards and administration also converge at the same sites. Because COVID, like all viruses, is communicable, the combination of a confined population exposed to contact from a substantial number of contacts with the outside world creates an environment where lockdown is a necessary, if not essential response to reduce the risk of outbreak and contain it if it does break out. Prisons can easily become incubators for viruses, creating an additional infection threat to the community. As discussed below, there has been a range of amendments that have passed through Parliament that are all aimed at responding to pandemics.

II. Statutory Bail Reforms in New South Wales and Victoria Linked to COVID-19

The COVID pandemic required an unprecedented lockdown of social life across Australia and around the world. With remarkable agility, both New South Wales and Victoria quickly introduced a host of laws that effectively restructured social life generally. One aspect of those changes included omnibus amendments to criminal justice, aimed at ensuring, on the one hand, a significant reduction in personal interaction in courts, while also attempting to ensure that the business of the courts could continue.

In New South Wales, this took the form of the *COVID-19 Legislation Amendment (Emergency Measures) Act 2020 No 1* (NSW).[30] The Act received Royal Assent on 25 March 2020. The Act contained amendments to 21 Acts. For present purposes, the most important of these were changes in the *Criminal Procedure Act 1986* (NSW), relating to the expansion of giving evidence via video link and judge-alone trials. Importantly, the Act also conferred delegated authority to make regulations for the administration of the courts. These provisions contained a sunset clause, with automatic repeal after six months, with provision for up to 12 months by extension.[31] Acts concerned with the administration of detention facilities were authorised to take any steps considered reasonably necessary to protect detainees, which for the most part included powers to restrict personal visits.[32] A discretionary power was also conferred to the Commissioner for Corrective Services to grant parole during the pandemic.[33] Enforcement powers for public health orders were enhanced through the introduction of an arresting power in the *Public*

[30] There were seven omnibus Acts introduced in New South Wales, but only the first is of present relevance.

[31] *COVID-19 Legislation Amendment (Emergency Measures) Act 2020 No 1* (NSW) Sch 1.

[32] *COVID-19 Legislation Amendment (Emergency Measures) Act 2020 No 1* (NSW) Sch 2.2 (*Children (Detention Centres) Act 1987* (NSW)); Sch 2.5 (*Crimes (Administration of Sentences) Act 1999* (NSW).

[33] *COVID-19 Legislation Amendment (Emergency Measures) Act 2020 No 1* (NSW) Sch 2.5 inserted s 276 into the *Crimes (Administration of Sentences) Act 1999* (NSW). Section 276(1) provides: "Despite any other provision of this Act or the regulations or any other Act or law, the Commissioner may, during the prescribed period, make an order (a Commissioner's order) releasing an inmate on parole if – (a) the inmate belongs to a class of inmates prescribed by the regulations, and (b) the Commissioner is satisfied that releasing the inmate on parole is reasonably necessary because of the risk to public health or to the good order and security of correctional premises arising from the COVID-19 pandemic."

Health Act 2010 (NSW).[34] What is noteworthy is that apart from extending the power to hear evidence relating to bail applications by video link,[35] the Act contained no changes to bail. Bail decisions were otherwise to be based on the normal factual matrix and associated judicial authorities.

Bail reforms did, however, take place at the local level as an aspect of the courts asserting control over their own processes and the administration of justice. Here the main approach was achieved through Practice Notes operating in the courts. The Practice Notes of most importance related to matters in the Local Court and the Supreme Court. What is significant is that the notes are primarily concerned with facilitating hearing such matters by audio-visual link. There is no indication that bail applications are to be dealt with on anything other than their merits. However, where a custodial sentence is likely to be handed down, the practice in this jurisdiction has been the grant of an eight-week adjournment on the *sentence*.[36]

The Victorian Parliament introduced a similar body of the legislation in the form of the *COVID-19 Omnibus (Emergency Measures) Act*. This Act commenced on 25 April 2020, having been introduced to Parliament on the 23rd. The Act itself is 299 pages in length, comprising six chapters. Fundamentally, the Act introduces provisions the delegate powers across the apparatus of government to enable flexible administration, in addition to retail and residential leases. Like the NSW Act, it is intended to apply for six months, with an in-built sunset clause. Chapter 3 introduces a range of amendments across the justice sector as temporary measures. Here Pt 6 was inserted into the *Bail Act 1977* (Vic). These provisions are not controversial. Fundamentally they explain the purpose of the changes is to respond to a pandemic,[37] to apply regardless of the provisions of any other Act (subject to the Charter and the Constitution),[38] and the appearance of the person before a court being satisfied either in person, through the person's representative, or through audio-visual link.[39] Otherwise the Act has no particular impact on bail decisions. It appears that the decision-making itself would otherwise be in accordance with usual practice involving reference to the legislation and relevant case authorities. In a related amendment, changes to the *Corrections Act 1986* involved the insertion of a new Pt 10B. These provisions include significant powers relating to the management of prisons, essentially enabling a comprehensive lockdown of prisons. While not directly linked to bail, these provisions confirm that those on remand are subject to a substantially more onerous period of incarceration limiting contact with those in custody and the outside world in a manner that would not usually apply. One of the more controversial aspects of the Victorian reforms has been the introduction of judge-only trials. These were introduced through amendments to the *Criminal Procedure Act*. Here a *new* Ch 9 was inserted that enables a judge to hear a criminal trial alone without the need for a jury. Again, this aspect of amendment is not directly linked with bail, but it enlivens two issues of note. First, the capacity of a court to hear a case without a jury may actually make the trial process more efficient, and expedite a trial that might otherwise have been delayed on account of an inability of the court to empanel a jury due to social distancing requirements. Second, the introduction of a judge-alone trial for the first time in this jurisdiction has been somewhat controversial because it is seen on the one hand as an erosion of a person's right to trial by jury, however on the other hand, speeding up access to justice and a hearing. The legalities and politics involved in this are beyond the scope of this article, but it is worth observing that judge-alone trials have been a feature

[34] *COVID-19 Legislation Amendment (Emergency Measures) Act 2020 No 1* (NSW) Sch 2.16 inserted s 71A into the *Public Health Act 2010* (NSW).

[35] *COVID-19 Legislation Amendment (Emergency Measures) Act 2020 No 1* (NSW) Sch 2.9 inserted s 22C into the *Evidence (Audio and Audio-Visual Links) Act 1998* (NSW). Section 22C(2) provides: "The appearance of an accused person in any proceedings relating to bail is to take place by way of audio visual link unless the court otherwise directs."

[36] Table of arrangements for fresh custodies and bail review applications under the Chief Magistrate's Memorandum issued 24 March 2020 (arrangements commenced on 30 March 2020) <http://www.localcourt.justice.nsw.gov.au/Documents/COVID19/arrangements-for-new-custodies-and-bail-review-applications-in-the-local-court.pdf>; Chief Magistrate's Memorandum (No 12) – COVID-19 arrangements for re-listing of non-custody defended hearings <http://www.localcourt.justice.nsw.gov.au/Documents/COVID19/chief-magistrate-s-memorandum-12-covid-19-arrangements-for-re-listing-of-non-custody-defended-hearings.pdf>.

[37] *Bail Act 1977* (Vic) s 34A.

[38] *Bail Act 1977* (Vic) s 34A.

[39] *Bail Act 1977* (Vic) s 34C.

of criminal justice in New South Wales for indictable matters since 1990[40] and in South Australia since 1984.[41] It is possible these reforms will remain post-COVID, although that is yet to be determined.[42]

As can be seen, the legislative changes have been relatively administrative in their focus. While the most significant change, at least for Victoria, has been the enablement of judge-only trials; a development that has long been a feature of criminal proceedings in New South Wales – and very likely to remain in Victoria after COVID. Otherwise there is little change to the statutory framework with respect to bail. While at the time of writing this article (in the midst of the pandemic), neither the *Bail Act 1977* (Vic) or the *Bail Act 2013* (NSW) makes mention of situations giving rise to a pandemic or COVID-19, it is clearly evident that the courts in Victoria and New South Wales have taken it into account when determining bail applications. This is likely to become of greater importance now there is evidence that COVID-19 has been found in Victorian prisons.[43]

III. Judicial Consideration

The main area, it seems, where there has been the greatest activity has been judicial consideration of COVID – which is not surprising, given this is where bail is ordinarily determined. An accurate report on the number of cases in which COVID has been raised in the context of bail is exceedingly difficult to determine, given the fact that bail is determined at multiple stages in the pre-trial process, including police bail, Local Court in New South Wales and Magistrate Court in Victoria, determinations. We are still awaiting data on bail determinations for the first half of this year. But even then, we will not be able to determine the extent to which COVID was raised as a bail concern at first instance.

We can, however, examine those cases before superior courts to consider the extent to which COVID has been considered by a court. As a number of those cases have been determined at the level of the Supreme Court, a number of these cases have quickly become precedent authorities on the question of COVID.

At the time of writing, we know there have been at least 1,485 cases that have appeared in Australian courts and Tribunals where COVID has been raised as an issue.[44] Such matters cover a wide array of proceedings. Of present relevance, we have identified 268 cases in which "bail" and "COVID" have been considered to a greater or lesser extent. Of these, 44 cases have been considered by the Supreme Court in New South Wales and Victoria. From these, we selected cases that have emerged as both exemplars and apparent precedent authorities for the approach of courts in these jurisdictions to the question of bail during the COVID pandemic. As is expected in common law jurisdictions, there is a remarkable degree of cross-referencing and citation of cases. The cases we have selected appear to have emerged as the central authorities.

Victorian Authorities

Re Broes

The decision in *Re Broes* was one of the first times that COVID was raised as an explicit bail concern in an Australian Supreme Court. As this case has been discussed at length elsewhere,[45] we provide only

[40] *Criminal Procedure Act 1986* (NSW) s 132.

[41] *Juries Act 1977* (SA) s 7.

[42] Anecdotally, there appears to be a good deal of resistance to the normalisation of judge-alone trials in Victoria, with the Office of Public Prosecutions reluctant to bring matters to trial in the absence of juries in indictable cases.

[43] Elias Visontay, "Six Victorian Prisons in COVID-19 Lockdown as Lawyers Call for Low-risk Inmates to Be Released", *The Guardian*, 21 July 2020 <https://www.theguardian.com/australia-news/2020/jul/21/six-victorian-prisons-in-covid-19-lockdown-as-lawyers-call-for-low-risk-inmates-to-be-released>; Jessica Longbottom, "Pressure Mounts for Release of Low-risk Inmates due to Coronavirus in Victorian Prisons", *ABC Online*, 25 July 2020 <https://www.abc.net.au/news/2020-07-24/coronavirus-push-to-release-low-risk-victorian-prisoners/12489722>; Tammy Mills, "Six Prisons in Lockdown after Guard Tests Positive", *The Age*, 21 July 2020 <https://www.theage.com.au/national/victoria/six-prisons-in-lockdown-after-guard-tests-positive-20200721-p55e70.html>.

[44] The numbers vary depending on the search engine used. A Boolean search using multiple legal search engines indicated the following: JADE (1,485) <https://jade.io/t/home>; AUSTLII (1,520) <http://www.austlii.edu.au/>; LEXIS ADVANCE (873).

[45] Brendon Murphy, "Case and Comment: Re Broes [2020] VSC 128" (2020) 44 Crim LJ 189.

an outline here. Broadly, Samantha Broes was arrested and charged with drug trafficking in November 2019. Bail was refused at first instance, which is not surprising given the quantity of drugs found during the police search of her home.[46] In addition, Ms Broes had been arrested and charged with a number of drug-related offences earlier in June and was on bail at the time of the arrest in November. A subsequent bail application in February 2020 was also refused. Thereafter the matter was heard before the Victorian Supreme Court in March 2020, where Ms Broes was granted bail.

A range of matters were presented to the Court, including Ms Broes exemplary behaviour, genuine attempts to turn her life around, the availability of a part-time job and stable accommodation. Although not pressed as a reason for release, Ms Broes also had shared custody of three children. Lasry J concluded that because Ms Broes had been charged with Sch 2 offences, he was required to find exceptional circumstances that would justify a grant of bail. These circumstances were not regarded as exceptional. What was regarded as exceptional was the case being brought in the context of a pandemic. That factor was conceded by the prosecution. Accordingly, Lasry J considered the question of the effect of a pandemic on bail in the following terms:

> Since the filing of this application and the affidavit material, the entire community has been overtaken by the eventuality of COVID-19, which the World Health Organisation has declared a pandemic.[47]
>
> Dramatic steps have been taken by both the state and federal governments to endeavour to, as they say, "flatten the curve" in relation to the spread of this virus. On Sunday, 22 March 2020, federal and state governments announced further measures restricting people's activities with a promise that additional measures will be introduced in the near future. It seems clear that there will be significant delays occasioned within the courts as a result of this virus, which may result in lengthy periods of remand.[48]
>
> [A]s Mr McGrath submitted, on behalf of the applicant, in addition to issues of delay, there can be no question that once the virus is discovered in any of the Victorian prisons, there will have to be a significant lockdown for a number of reasons. The transmission between prisoners will be significant and likely to occur at a much greater rate than the transmission that is occurring in the community at present. That will result in a large number of prisoners becoming quite seriously ill, depending on their age and underlying conditions. I appreciate these are matters of speculation to a degree, but the situation is sufficiently urgent to require them to be taken into account. Further bearing in mind that the entire situation may have changed again within one or two weeks.[49]
>
> Given the extraordinary circumstances in which we now find ourselves, I have come to the conclusion that an already significant delay will be likely exacerbated by the consequences of COVID-19, and I am therefore satisfied that exceptional circumstances have been established. As to the acceptability of release the applicant on bail, I am also satisfied that the imposition of conditions will ameliorate any risk that is involved in her being released.[50]

As can be seen, the focus in this decision was not so much concerned with the question of the health risks posed by COVID. The focus here was on the consequences of the pandemic on the administration of justice, in particular on the likely delays caused in bringing the case before the courts, and the reality that the likely sentence of the accused in this case was likely to be less than time served on remand pending trial. *Broes* can therefore be seen as a case that is more focused on the systemic effect of COVID on the criminal justice as a whole, rather than any particular health risk as the central basis for the bail decision in this case. Hardship in prison and delay are key factors in the bail decision, but these are necessarily located in the individual circumstances relevant to each accused.

[46] *Re Broes* [2020] VSC 128, [12]: "326g of cannabis, 30g of cocaine, 20g of MDMA, 21 ecstasy capsules, sour strap and gummy bear lollies believed to be laced with drugs of dependence, $570 in cash, a large number of resealable bags, two small scales, two Tasers, an extendable baton, a hatchet and a flick knife."

[47] *Re Broes* [2020] VSC 128, [35].

[48] *Re Broes* [2020] VSC 128, [36].

[49] *Re Broes* [2020] VSC 128, [39].

[50] *Re Broes* [2020] VSC 128, [46]–[47].

Re Mc Cann

Adam McCann faced multiple drug trafficking offences, including four counts of drug trafficking, and two counts of trafficking in a commercial quantity of methamphetamine, and possessing a firearm as a prohibited person.[51] At the date of the bail application before the Supreme Court, the accused had been in custody for a total of 787 days. The matter was originally set down for trial in April 2019 but resolved by way of a plea resolution. By May 2019, the matter was to proceed by way of trial, set down for 4 May 2020. However, due to the unprecedented effect of COVID, all jury trials were suspended. This increased the time an accused would spend in custody awaiting trial. The accused had previously been denied bail on two occasions at the County Court. Lasry J stated:

> [T]here is no prospect of a trial in May of this year as a result of the pandemic and, in all likelihood, little prospect of a trial this year at all. Should the applicant's trial begin in February 2021, it would result in a period of pre-trial custody of more than three years. Consistently with my first ruling in relation to COVID-19 in Broes, this is a delay that well and truly establishes the existence of exceptional circumstances.[52]

Ultimately, Lasry J granted bail with conditions.

Re Tong

Thi Hong Tham Tong faced charges pertaining to trafficking in a drug of dependence (cannabis), possessing a drug of dependence (cannabis), dealing with proceeds of crime, committing an indictable offence while on bail and contravening a conduct condition of bail.[53] The exceptional circumstances test applied, which provided that the applicant must satisfy the Court that exceptional circumstances justified the granting of bail. In determining the bail application, Tinney J took into account the "COVID-19 pandemic sweeping Australia and the world and the drastic measures taken to slow its spread" and "have the potential to cause significant delays in the criminal justice system".[54] Tinney J had regard to the decision in *Re Broes*, however noted that decision related to a case in the summary stream unlike the current case which is.[55] Like the decision in *Re McCann*, the key aspect of the decision to grant bail was linked to the issue of delay in the current case, noting that it was likely that any term of imprisonment would not exceed the time spent in custody.[56]

Re Diab

Fadi Diab was charged with multiple offences after being arrested in Melbourne following a shooting incident involving the Federal Police.[57] Among the numerous charges, one included two counts of

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[51] Adam McCann was charged in January 2019 with trafficking a drug of dependence; trafficking in methylamphetamine (two counts); trafficking in 3,4-methylenedioxy-methamphetamine (MDMA) (two counts); trafficking in a commercial quantity of methamphetamine (two counts); possessing 3,4-Methylenedioxy-amphetamine (MDA); possessing psilocin and/or psilocybin; and possessing a firearm as a prohibited person.

[52] *Re Mc Cann* [2020] VSC 138, [39].

[53] *Re Tong* [2020] VSC 141, [1].

[54] *Re Tong* [2020] VSC 141, [31].

[55] *Re Tong* [2020] VSC 141, [33]: "It should not be thought that the current health crisis facing our community will in every case be a matter which will lead to satisfaction in the mind of a judge or magistrate of the existence of exceptional circumstances, less still that it will necessarily lead to a grant of bail. These matters, whilst themselves unheard of in our community in living experience, are simply part of the surrounding circumstances required to be taken into account in a consideration of both steps in the 2 step bail process currently undertaken."

[56] *Re Tong* [2020] VSC 141, [35]: "In this case, the applicant has already been in custody since 14 August 2019, a period of 7 months and 12 days. Add to that the period of 18 months or so which may be the shortest realistic period within which a trial may be reached, and there is the prospect of her spending over two years on remand before trial. That would mean that there is the real prospect that the period of time the applicant spends on remand may substantially exceed any sentence she would receive."

[57] The offences included two counts of attempted murder (*Crimes Act 1958* (Vic) s 321M(*CA*); two counts of discharging a firearm being reckless as to the safety of a police officer (*CA* s 31C(1); two counts of common assault of a police officer on duty while having a firearm readily available (*CA* s 320A(2)); being a non-prohibited person in possession of a general category handgun (*Firearms Act 1996* (NSW) s 7(1)); two counts of theft of a motor vehicle (*CA* s 74); going equipped to steal/cheat (*CA* s 91(1)); failing to store cartridge ammunition for a category A or B longarm in the manner required by the provisions of the *Firearms Act* (s 121(1A)); and· handling stolen goods (*CA* s 88).

attempted murder of police officers. Attempted murder is a Sch 1 offence, and as such bail required exceptional circumstances to be granted. Not surprisingly, bail was refused at first instance by police, and again in the Magistrates' Court. Fadi then appealed to the Supreme Court. Among the submissions presented to Beach JA was the effect of COVID on both delay and the conditions in custody.[58] On this aspect of bail, his Honour drew, inter alia, on the above authorities, and presented a synthesis of principles as follows:

> The way in which COVID-19 may be relevant in the establishment of exceptional circumstances has been discussed in a number of recent decisions of this Court. More generally, the way in which the current health crisis may be relevant in a bail application has also been discussed. The following propositions have emerged:
>
> (1) Delay in trials due to COVID-19 may establish exceptional circumstances, particularly (but not limited to) where the delay is likely to lead to an accused spending more time on remand than the likely sentence.
> (2) The existence of the current COVID-19 health crisis will not, however, give rise to exceptional circumstances in all cases. The crisis is simply one of the surrounding circumstances that a bail decision maker must take into account in considering an application for bail.
> (3) The relevance of the COVID-19 crisis is that it may make time in custody very difficult and/or significantly more difficult than usual. Moreover, to the extent that correctional facilities are not permitting visitors, there may be greater isolation for those on remand. Additionally, the extent to which the crisis may impede education and/or rehabilitation opportunities is a matter capable of being relevant and, to that extent, would need to be taken into account.
> (4) In any individual bail application, in the absence of agreement between the parties, much will depend upon the evidence of the effect of the crisis so far as it concerns the circumstances of the applicant for bail.[59]

In Diab's case Beach JA refused bail. The question of COVID was factored into the reasoning, but what was more important was the prospect of a lengthy prison term if convicted. This factor was also considered in the context of the very serious nature of the offending, prior convictions, and the escalation in offending. The result was a failure on the part of Diab to demonstrate exceptional circumstances.[60]

Decisions in New South Wales

In contrast to the numerous authorities that have emerged in Victoria, there are comparatively fewer cases in New South Wales. This may well be the result of the substantial drop in prisoners on remand in prisons in New South Wales,[61] indicating that bail is being granted at the level of the Local Courts and at first instance more often in this jurisdiction. Conversely, where matters involve bail refusals it is likely that those who remain on remand are charged with more serious offences that would be equally unlikely lead to success on appeal. Nevertheless, there are cases in this jurisdiction that have considered COVID.

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[58] *Re Diab* [2020] VSC 196, [22]: "The committal hearing on 29 April 2020 was vacated as a result of the outbreak of COVID-19. At this stage, it is unknown when the applicant's committal hearing will be relisted 'coupled with a further delay before the applicant is presented for trial at the Supreme Court'. The conditions of the applicant's confinement have now become more onerous because of COVID-19. All visits have been cancelled and the applicant is subject to periodical lockdown to minimise interaction with other prisoners."

[59] *Re Diab* [2020] VSC 196, [38] (Footnotes omitted).

[60] *Re Diab* [2020] VSC 196, [40] (Footnotes omitted): "when one considers the length of time the applicant is likely to spend in custody if bail is refused and the likely sentence to be imposed should the applicant be found guilty of the offences with which he is charged (even assuming he is acquitted on the attempted murder charges), it cannot be concluded that the delays the applicant is likely to experience (as matters stand presently) is likely to lead to him spending more time on remand than the likely sentence that may be imposed. In that regard, it is to be observed that there are significant maximum terms of imprisonment applicable to a number of charges the applicant is facing."

[61] Nicholas Chan, "The Impact of COVID-19 Measures on the Size of the NSW Adult Prison Population" (2020) 149 *Crime and Justice Statistics Bureau Brief* <https://www.bocsar.nsw.gov.au/Publications/BB/BB149-The-impact-of-COVID-19-measures-on-the-NSW-adult-prison-population.pdf>.

Rakielbakhour v DPP (NSW)

This case came before Hamill J on 30 March 2020, which situates the case after *Broes*, *McCann* and *Tong*, but before *Diab*.[62] Abdul Rakielbakhour was charged with common assault and assault occasioning actual bodily harm in a domestic violence incident in Sydney. Bail had been refused as first instance, and later came before the Supreme Court for review. Counsel for Rakielbakhour relied heavily on COVID-19. Consequently, a good deal of official and public evidence was presented to the court. Hamill J commenced his consideration by stating:

> The existence of the COVID-19 pandemic creates a challenge for the criminal justice and penal systems of a kind not experienced in recent decades, if ever, in Australian law. While New South Wales moves steadily toward a complete "lock-down" the rule of law, and the courts and lawyers who administer it, are considered to be an essential service. Mr Rakielbakhour's release application was conducted with neither the lawyers, nor the applicant or his supporters, present in court. All participants were engaged in a "virtual court room" by means of video link.[63]

His Honour then concluded that no less than 11 factors were relevant in the context of a pandemic: (1) prisons were highly susceptible to viral transmission; (2) evidence of COVID in the prison system (none at that stage); (3) inmates are subjected to harsher conditions during lockdown than normal; (4) Delay in matters being determined; (5) an eight-week adjournment was mandatory and the minimum delay; (6) longer delays are likely; (7) lockdown during pandemics increases anxiety in prisoners; (8) official information linked to the number and increase in COVID cases nationally; (9) official information linked to the number and increase in COVID cases in New South Wales; (10) legislative responses to COVID have included options to Corrective Services to release eligible prisoners earlier to reduce prison populations; (11) legislation has been introduced to enable the courts to continue operating.[64] It is worth noting that not only does lockdown increase anxiety for prisoners, it also means their period incarcerated is effectively one of confinement, with no opportunity for physical visits from friends and loved ones, and routine disconnect from legal advisors. While prisons have attempted to increase prisoner access to telecommunications technology. It is well recognised that the absence of human contact makes the experience of incarceration an isolating one.

Further, pandemics are relevant to the statutory factors contained in ss 16A–16B and 18 of the *Bail Act 2013* (NSW). Here Hamill J stated:

> In some cases, and depending on the circumstances and evidence in a particular case, the issues that the COVID-19 pandemic throw up will be relevant to the question of whether an applicant has shown cause why their detention is not justified … In other cases, and this is one of them, the factual issues arising out of the COVID-19 pandemic will be relevant to various factors under s 18.[65]

Sections 16A and B require the offender to show cause why their detention is not justified, while s 18 contains an exhaustive list of factors that must be considered in assessing bail concerns.[66] Here Hamill J considered that the pandemic was relevant to (1) the need for an accused person to be free for any lawful reason (including the health of the accused and any family member);[67] (2) the length of time a person will be in custody, in the context of needing to keep that person safe;[68] (3) the need to be free to prepare a proper defence;[69] and (4) any special vulnerability of the accused.[70]

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[62] These cases were decided on 19 March (*Re Broes* [2020] VSC 128), 25 March (*Re McCann* [2020] VSC 138), 26 March (*Re Tong* [2020] VSC 141) and 21 April (*Re Diab* [2020] VSC 196). Rakielbakhour was decided on the 31st of March.

[63] *Rakielbakhour v DPP (NSW)* [2020] NSWSC 323, [13].

[64] *Rakielbakhour v DPP (NSW)* [2020] NSWSC 323, [14].

[65] *Rakielbakhour v DPP (NSW)* [2020] NSWSC 323, [19].

[66] *Bail Act 2013* (NSW) s 18(1): "A bail authority is to consider the following matters, and only the following matters, in an assessment of bail concerns under this Division.".

[67] *Bail Act 2013* (NSW) s 18(1)(m).

[68] *Bail Act 2013* (NSW) s 18(1)(h).

[69] *Bail Act 2013* (NSW) s 18(1)(l).

[70] *Bail Act 2013* (NSW) s 18(1)(k).

Hamill J allowed bail, subject to strict conditions, which effectively included being confined to a residential address, and not to have contact with the victim. In reaching that conclusion, Hamill J applied the reasoning of Lasry J in *Broes* and cited *Tong*, essentially finding that the COVID pandemic and its impact was relevant to matters addressing bail concerns. But, like the Victorian cases, this was not the deciding factor. It formed part of the factual and legal matrix for a determination under the *Bail Act*.

In contrast to decisions like *Broes*, which has already been cited 33 times,[71] decisions like *Rakielbakhour v DPP (NSW)* have been far less influential.[72] As indicated, this may be, in part, the result of bail determinations in New South Wales being dealt with at first instance, with resulting matters that have been refused considered without merit; or it may be due to the fact that the key issues relating to COVID and bail have already been well established and do not require further consideration.

Established Principles

Based on the cases outlined above, and their associated consideration in other cases, it is clear that the judiciary does consider COVID a relevant factor in the determination of bail. However, it is equally clear that judges do not consider the mere fact of the risk to health as a matter justifying conditional release. Indeed, much of the attention has been the institutional effects of disruption on the ordinary business of the courts in the administration of criminal justice. It is the combination of multiple issues that point towards exceptional circumstances, with particular emphasis on delay in bringing the matter to trial, hardship experienced by prisoners while in custody, access of legal representation and ability to properly prepare for trial, as well as the associated health to the accused, their family, and the community, that are the key components of reasoning. Like the gordian knot, judicial officers are presented with a complex array of interwoven threads of information, rather than a discrete element to consider. In effect the issues presented by COVID have been rapidly integrated into existing principles in the determination of bail.

IV. Discussion

Law is often criticised for its tendency to evolve very slowly, particularly where case authority is concerned. The analogy is one of the barnacles that grow on the hull of legislation. In this case, however, the exact opposite has occurred. The combination of legislative change and case authority has grown rather like the virus the law here intended to respond to. This is especially the case in Victoria, where multiple cases have been brought before the Supreme Court. Because of the position of the Supreme Court in the judicial hierarchy, a body of precedent has rapidly developed in that State and beyond. COVID was interwoven into bail application submissions swiftly and responded to in judicial decisions.

Precedent Authority?

The question arises, however, as to whether these cases can truly be considered "precedent authority". We suggest at least caution on that conclusion, for three reasons. First, the only real unifying theme in the cases is their timing during a pandemic. There is remarkable diversity in the reasons for bail being refused or granted. Often, bail has been refused. Second, the reasoning in the cases indicates strongly that such matters are determined on a case-by-case basis. While there is a tendency for cases such as

[71] *DPP v Kent* [2020] VCC 991; *DPP v Lang* [2020] VCC 759; *DPP v Singh* [2020] VCC 719; *DPP v Baird* [2020] VCC 692; *Re Richardson* [2020] VSC 289; *Re Hu* [2020] VSC 285; *DPP v Crockett* [2020] VCC 647; *DPP v Zampatti* [2020] VCC 628; *Re Barker* [2020] VSC 321; *DPP v Nguyen* [2020] VCC 584; *DPP v Calgaret* [2020] VCC 673; *DPP v Nixon* [2020] VCC 553; *R v BD (No 1)* [2020] NSWDC 150; *R v Londono-Gomez* [2020] SADC 48; Bail application by *Re Ashton* [2020] VSC 231; *DPP v Smith* [2020] VCC 480; *Thomas v Kitching* [2020] VSC 206; *DPP v Schmidt* [2020] VCC 479; *Re Diab* [2020] VSC 196; *Re JB* [2020] VSC 184; *Re JMT* [2020] QSC 72; *Lynch v DPP (Qld) (No 2)* [2020] QSC 64; *DPP v Walker (a pseudonym)* [2020] VCC 447; *Re AFR* [2020] QSC 118; *DPP v De Ocampo* [2020] VCC 366; *DPP v Kilpatrick* [2020] VCC 379; *Re JK* [2020] VSC 160; *Rakielbakhour v DPP (NSW)* [2020] NSWSC 323; *DPP v Chen* [2020] VCC 385; *Re Taylor* [2020] VSC 146; *Re Tong* [2020] VSC 141; *DPP (Vic) v Morey* [2020] VCC 320; *Re McCann* [2020] VSC 138.

[72] *R v Farah* [2020] NSWDC 192; *Walders v McAuliffe* [2020] FCCA 1541; *R v BD (No 1)* [2020] NSWDC 150; *R v Mostafa Dib* [2020] NSWDC 145; *R v Londono-Gomez* [2020] SADC 48; *Re Diab* [2020] VSC 196; *R v Fiordelli* [2020] NSWDC 154; *Borg v The Queen* [2020] NSWCCA 67; *R v Hughes* [2020] NSWDC 98; *R v Manojlovic* [2020] NSWDC 221; *Re JMT* [2020] QSC 72; *Lynch v DPP (No 2)* [2020] QSC 64; *DPP v Walker (a pseudonym)* [2020] VCC 447.

Broes and *Diab* to be referred to, there is no guarantee that just because there is a COVID risk this will translate to a more lenient approach to bail. As might be expected, it seems that there is more of a concern with the type of crime, the strength of the prosecution case, and the likely sentence if convicted. The third factor is very clear incorporation of existing principles into the reasoning synthesis. COVID is essentially an environmental factor that enlivens four components that are pre-existing matters in sentencing decisions, namely; the hardship of time served if the accused is ultimately found not guilty, the effect of the delay in the trial being heard, prison and general population, and access to counsel and resources necessary for the preparation of trial. The significance of decisions such as *Broes*, *Diab* and *Rakielbakhour* is not so much the establishment of a new principle, but more the consolidation of existing principles in the time of pandemic.

Disproportionate Cases in Victoria

Another aspect of the emergence of this consolidation is the question of jurisdiction. Why have these cases appeared so quickly in Victoria, as opposed to New South Wales? At the risk of speculating, there are any number of possibilities. One may be linked to the different manifestation of the COVID infection in each State. Another may be linked to the substantial restrictions in escalating bail applications to the Supreme Court in New South Wales. Indeed, as discussed above, one of the problems in doing comparisons between these jurisdictions is the fact that the great majority of matters in New South Wales linked to bail are in the Local and District Courts. There is limited access to District Court matters, and almost no access to Local Court bail data. A third possibility may be the human factor: the networks of legal practitioners willing and able to rapidly share knowledge, experience and information on success and failure in the courts. In this respect part of the rise of COVID as a matter of concern in bail applications may well be the combination of collective panic and opportunism, combined with networks of barristers in chambers in Melbourne. This is not to suggest any impropriety. Far from it, counsel is required to present a case in its strongest terms, which includes raising matters before the court relevant to the decision without fear or favour. Certainly, issues linked to health risk, delay, and the humane treatment of those in custody are matters of necessary importance.

COVID and the Charter of Human Rights and Responsibilities

As observed elsewhere,[73] one of the remarkable aspects of "COVID bail jurisprudence" is the extent to which human rights principles have been articulated. Basically, in the context of bail, they have not. New South Wales does not have a statutory human rights framework, in contrast to Victoria which has a Charter.[74] In Victoria the question of the relationship between COVID and the Charter has not been a feature of bail considerations. That may well be the fact that prison and remand are always matters that are potentially Charter considerations, but at the same time is not unusual in that respect. Here the Charter has not been raised as a matter in bail determinations because of COVID. However, COVID and its links with the Charter *has* been considered in other cases. In *Rowson v Department of Justice and Community Safety*,[75] Ginnane J was called on to consider whether the Charter had been breached because of the risk of COVID infection as a prisoner in Port Phillip Prison. Broadly, it was submitted that because Mr Rowson had several health conditions, including a tendency to develop lung infections,[76] that increased his risk of death if he contracted COVID while in prison. Here Mr Rowson relied on the recitals to changes made to the *Corrections Regulation 2019* (Vic), that stated there was an increased risk of infection of COVID. Although there was a finding that at that point in time, there was no actual evidence of any infection inside Victorian prisons. Although this would occur later. Mr Rowson argued that there had been breaches of the protocol to protect prisoners by prison services, effectively placing

[73] Murphy, n 45.

[74] *Charter of Human Rights and Responsibilities Act 2006* (Vic).

[75] *Rowson v Department of Justice and Community Safety* [2020] VSC 236.

[76] *Rowson v Department of Justice and Community Safety* [2020] VSC 236, [2]: "[Mr Rowson] is 52 years old and suffers from heart disease including chronic atrial fibrillation, angina, asthma, poor blood pressure and decreased renal function. He has also been prone to lung infections and pneumonia throughout his life."

him (and others) at greater risk. On that basis, Mr Rowson was seeking a "corrections administration permit", that effectively enabled him to serve his sentence in the community.[77] Ginnane J found there was prima facie evidence that Victorian authorities had breached a duty of care owed to prisoners by the various breaches of access protocols but concluded there was not sufficient evidence to justify release from prison. Any risk should be the subject of risk assessment and appropriate mitigation.[78] Ginnane J ultimately gave orders that a risk assessment in the prison be undertaken and any recommendations implemented and adjourned the matter until its completion.[79]

Of note in this case were the submissions made with respect to the Charter. Counsel for Mr Rowson[80] argued that COVID enlivened three Charter rights: the right to recognition and equality before the law;[81] the right to life;[82] and the right to human treatment in prison.[83] The gist of the argument was the "failure to release Mr Rowson from prison was an unreasonable limitation of his human rights contrary to s 7(2) of the Charter."[84] Importantly, the purpose of the reliance on the Charter was not to argue a case for damages, but rather as justification for community release. On this point the Solicitor-General for Victoria (Ms Walker QC), contended there was no "unlawfulness" within the meaning the Charter that would otherwise support a finding of a Charter breach.[85] In concluding, Ginnane J did not determine the case based on the Charter. His Honour invoked the inherent jurisdiction of the court to make orders that both required Corrective Services to undertake and implement a risk assessment, but also to "ensure the subject matter of the litigation is preserved".[86] In other words, there was no finding of a Charter breach, or a consideration the Charter beyond the submissions of the parties. However, the requirement to undertake a risk assessment and implement it, and an adjournment of the proceedings, kept the door open to reconsider the matter *and* effectively paved the way for the matter to be considered through tort should Mr Rowson go on to acquire COVID while in prison.

Apart from this case, there does not appear to be any detailed consideration of the Charter, apart from the general right of a person to have their matter determined without unreasonable delay.[87] But even here there is little examination of this issue. And to a large extent, this may well be because the risk of COVID in prisons in Australia has been effectively controlled, notwithstanding the very serious potential consequence that may arise. But this is also located in the important context of those under arrest, or under sentence, for serious offences. As observed by Ginnane J in *Rowson*:

> I note that Nettle JA stated in *Anderson v Pavic* [2005] VSCA 244: [P]rison legislation should ordinarily be interpreted so as to give full scope to the power of correctional authorities to carry out tasks of prison administration and management without undue influence of courts.[88]

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[77] A CAP is available pursuant to the *Corrections Act 1986* (Vic) ss 57, 57A.

[78] *Rowson v Department of Justice and Community Safety* [2020] VSC 236, [10]–[14].

[79] *Rowson v Department of Justice and Community Safety* [2020] VSC 236, [102].

[80] Mr Nekvapil and Ms Kretzenbacher of the Fitzroy Legal Service.

[81] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8.

[82] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 9.

[83] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 22.

[84] *Rowson v Department of Justice and Community Safety* [2020] VSC 236, [80]. *Charter* s 7(2) provides: "A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including – (a) the nature of the right; and (b) the importance of the purpose of the limitation; and (c) the nature and extent of the limitation; and (d) the relationship between the limitation and its purpose; and (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve."

[85] *Rowson v Department of Justice and Community Safety* [2020] VSC 236, [82]. *Charter* 38(1) provides: "Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right."

[86] *Rowson v Department of Justice and Community Safety* [2020] VSC 236, [102].

[87] Example *DPP v Truong & Bui* [2020] VCC 806; *Taylor v DPP (Vic)* [2020] VSCA 142; *Re IH* [2020] VSC 325.

[88] *Rowson v Department of Justice and Community Safety* [2020] VSC 236, [85].

Fundamentally, one of the prospective issues for judicial officers considering the impact of COVID on detention and remand is the potential for a form of collateral attack on proceedings. It does not, however, appear that Charter questions have formed a substantial part of "COVID jurisprudence, and certainly not in the context of bail.

COVID Safe Plan in Prisons, and the Reduction of the Prison Population

Prisons in Victoria are required to ensure that they are compliant with directions under the *Public Health and Wellbeing Act 2008* (Vic) and the *Occupational Health and Safety Act 2004* (Vic). Prisons must demonstrate they have taken all reasonable steps to ensure a safe environment for employees and prisoners alike. As of 30 June 2020, there were 7,171[89] prisoners housed in Victorian prisons. As of 10 August 2020, there were seven active cases of COVID-19 involving prisoners. The prisons have taken extensive proactive measures to restrict the spread of COVID-19 within their prisons.

Since the onset of COVID, there has been a notable reduction in the prison population in New South Wales and Victoria. In New South Wales, the prison population decreased by 10.7% from 15 March to 10 May 2020.[90] This represents a reduction of 1,508 prisoners. This reduction is primarily due to three factors, including less charges laid by police, increased success with bail applications and increased release of accused on remand while awaiting the hearing of their case. Similarly, the Victoria prison population decreased by approximately 11.6% from 29 February to 30 June 2020. This represents a reduction of 1,408 prisoners.[91]

The longer-term implications of this are worth considering. If it is acceptable to release this number of prisoners during a pandemic, will this continue once the pandemic subsides? It's a question of public policy, of course, but it raises significant questions around the concept of decarceration, public costs, humane treatment of those in custody, risk to victims and the community, and whether remand is restricted to offenders likely to serve custodial sentences longer than any period on remand.

Conclusion

The changes that have taken place in Australia, especially in New South Wales and Victoria, in response to COVID have far-reaching implications socially and legally. In many ways our lawmakers and institutions of government, especially the courts, have done an amazing job in rapidly introducing changes that have undoubtedly saved lives. The use of technology, in particular, was extended in a matter of weeks to enable social distancing and maintain, so far as reasonably possible, the administration of justice. It is very likely that a number of those changes will continue beyond the pandemic, notably the use of judge-only trials and a more permissive approach to bail through the use of conditions to ameliorate risk.

Bail, in the time of COVID, has seen the very rapid consolidation of precedent after equally rapid legislative changes. This has happened not only because of applications being made for bail, but also through the communication networks within the legal profession that have shared authorities and principles. Technology has enabled that knowledge to be disseminated almost immediately as decisions were handed down. One might be forgiven for suggesting that COVID has been used in an opportunistic way to push forward bail applications that would otherwise not succeed under the legislative framework. That may be so in some instances, however, the 75 cases that we examined do not indicate that the judiciary have been permissive in that regard. On the contrary, as would be expected, cases are carefully considered. And while COVID is a matter relevant to the decision, it has become immediately integrated into the legal and factual matrix of each case. For every case where bail has been granted, another will be refused.

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[89] *Our Response to Coronavirus (COVID-19)* (10 August 2020) <http://www.corrections.vic.gov.au>.

[90] *NSW Custody Statistics: Quarterly Update June 2020: The Impact of COVID-19 Measures on the NSW Adult Prison Population* (10 August 2020) <http://www.bocsar.nsw.gov.au>.

[91] *Monthly Time Series Prisoner and Offender Data* (10 August 2020) <http://www.corrections.vic.gov.au>.