For too long in NSW commentators and politicians have expressed their outrage regarding isolated bail decisions among the many thousands of sound ones each year. These criticisms are all well and good with the benefit of hindsight but fail to acknowledge that our system of bail provides a balance between the safety of the community and individual liberty.

Of course, the community needs to be protected from dangerous offenders and that is what the current bail system is designed to do.

None of this detracts from fair criticism of bail decisions – there are occasions in a human system where an 'error' is made, yet that does not mean that the system is inadequate. Appeal processes exist to ensure that judicial decisions are subject to proper scrutiny. For instance, police can ask a magistrate that a decision to grant bail be 'stayed' while they initiate an appeal to the Supreme Court. The justice system has its own checks and balances to ensure that justice is done – assuming participants use it.

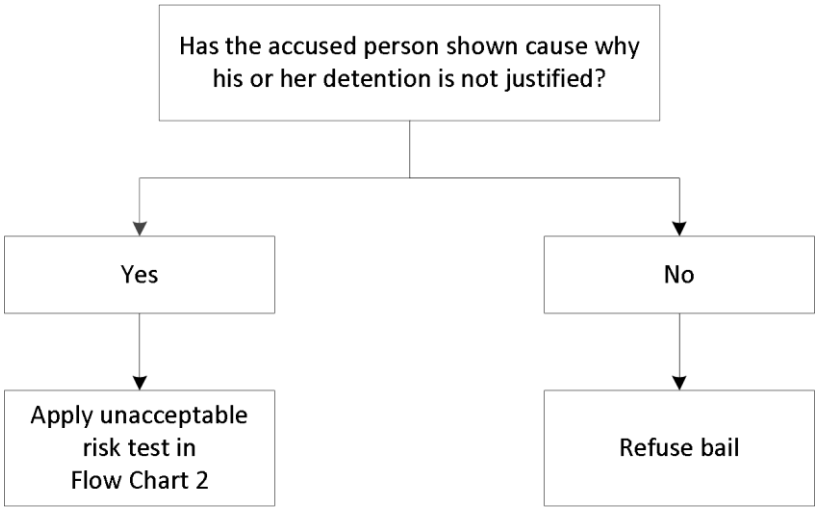
The starting point must be the presumption of innocence. At the time a police officer or court considers whether to grant bail to a person charged with a criminal offence, the person charged has not been convicted. The *Bail Act* sets out a risk-based framework for decisions about whether a person accused of a crime should be detained or released before their guilt or innocence is determined by an independent judge or jury.

Judicial officers can only make bail decisions based on the evidence that is before them at the time. They make over 15,000 bail decisions in NSW every year to manage these risks. Many accused people have their bail refused and are held in prison on remand. The most recent study from the Bureau of Crime Statistics and Research indicates that there are over 4,000 accused on remand at any one time in the NSW Corrections system as they have been determined as posing too great a risk.

And yet it is an everyday occurrence that someone who has spent months, if not years, in gaol on remand is later acquitted by a jury of their peers. Obviously, that must be avoided, as does the case where an accused is granted bail and continues to pose an unacceptable risk of further serious offending or of flight. The *Bail Act* seeks to balance the risk of these two extremes – an innocent accused in gaol awaiting trial and non-deserving accused free in the community.

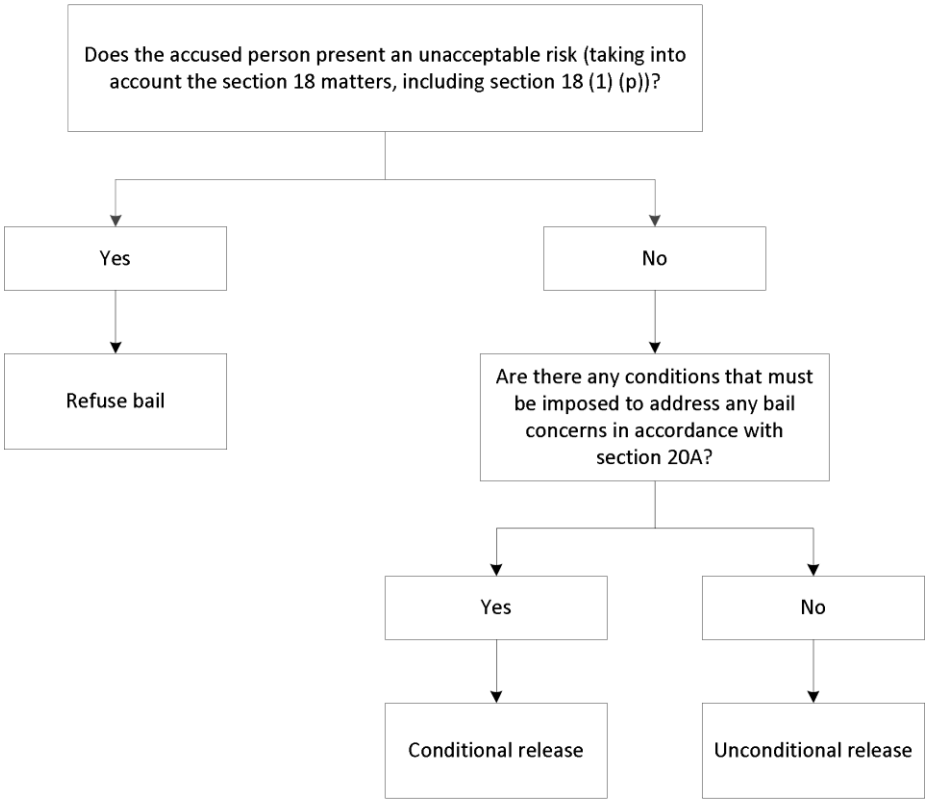
Currently for serious offences (murder, aggravated sexual assault, firearms etc) and those who have already breached bail or parole, the onus is on the alleged offender to show cause why they should get bail – and in many of these serious cases they cannot do so, especially where there is a strong prosecution case against them.

The bail authority for a 'show cause' offence must refuse bail unless the accused person shows cause why his or her detention is not justified. The *Bail Act* has two flow charts in section 16, the first titled 'Show cause requirement':



If they can 'show cause' then they may still not pass the 'unacceptable risk' test in the *Bail Act* and which also otherwise applies for *every* offence. Some of the matters considered under that test include the likelihood that the accused may fail to appear at any proceedings for the offence, may commit a serious offence, may endanger the safety of victims, individuals or the community, or interfere with witnesses or evidence.

An accused who poses an unacceptable risk for any of these 'bail concerns', and considering a range of other matters such as their past record including whether violent, the strength of the prosecution case, compliance with bail etc, must be refused bail – see Flow Chart 2 'Unacceptable risk test':



A judicial officer is required to weigh up these considerations in deciding whether to grant bail, and if they are to grant bail, what conditions should be placed upon the granting of bail to minimise these risks. If conditions are imposed on a grant of bail, they will be tailored to the individual circumstances of the case and may include restrictions on the accused person's behaviour or movements, the imposition of a surety – a sum of money which is forfeited if the bail is breached - or requirements regarding where the accused will stay while released on bail.

There have been recent calls for mandatory bail refusal for certain serious crimes – sex offences, drug dealing etc – but this ignores the fact that the person charged isn't convicted of being a sex offender or drug dealer and takes away the independent decision of a court. The mere charging by police of such an offence would mean bail is refused. However well intentioned, the risk of error or even abuse is clear.

Consider if one of your family or friends were suddenly charged with a serious criminal offence – what kind of system would you want? Would you want a judicial officer to impartially consider the risks they posed, and whether there were conditions that could mitigate those risks, so your parent, sibling or child could retain their employment, live in suitable housing and maintain their connections to the community while preparing their defence and awaiting their day in court? Or would you want a system where, once the police have laid charges for particular crimes, they are automatically put into prison, potentially for years, waiting to have their guilt or innocence determined?

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