

Bail Amendment (Stage One) Act 2017 (Vic): a summary of the key changes made to the Bail Act 1977 (Vic)

4 key snapshots of the changes made to the Bail Act 1977 (Vic) (the Bail Act) by the Bail Amendment (Stage One) Act 2017 (Vic) (the Stage One Amendment Act)

- i) **Subsection 4(4) used to contain the “show cause” test. However, the old subsection 4(4) test has been replaced by the “show compelling reason” test as follows:**

“A bail decision maker must refuse bail for a person accused of a Schedule 2 offence unless the accused shows compelling reason why their detention in custody is not justified.”¹

Accordingly, the reverse onus tests under the *Bail Act* are now “exceptional circumstances” and “show compelling reason”. It is more difficult to satisfy the new compelling reason test than the old “show cause” test: “compelling” is a high threshold.

- ii) **The Stage One Amendment Act introduces Schedule 1 offences, which require an accused to show “exceptional circumstances”, and, Schedule 2 offences, which require an accused to “show compelling reason” as to why detention in custody is not justified.**

Instead of inserting these offences into the respective reverse onus subsections, the *Bail Act* now separately lists the offences in separate Schedules: Schedule 1 is for “exceptional circumstances” offences and Schedule 2 is for “show compelling reason” offences.

In separate chapters titled ‘*Schedule 1 – Offences – exceptional circumstances*’ and ‘*Schedule 2- Offences – show compelling reason*’, I have translated the Schedule 1 and 2 offences into English and categorised them under easy to follow headings so that you can easily identify whether your relevant charge is listed under either Schedule.

- iii) **The Stage One Amendment Act does not simply replace the “show cause” test with the “show compelling reason” test. It also introduces new offences into the “show compelling reason” test (without requiring a failure to appear within the last 5 years):**

- Family violence offence: A threat to kill (s 20, *Crimes Act 1958*) that is also a family violence offence is a Schedule 2 offence.²
- Causing serious injury offences (under the Crimes Act 1958): causing serious injury intentionally (s 15A(1)), or, recklessly (s 15B(1)), in circumstances of gross violence; and also, causing serious injury intentionally (s 16).³
- Driving offences (under the Crimes Act 1958): culpable driving causing death (s 319(1)), dangerous driving causing death (s 319(1)) or serious injury (s 319(1A)), and dangerous or negligent driving while pursued by police (s 319AA(1)).⁴

¹ Section 4(4) of the *Bail Act*.

² *Bail Act*, Schedule 2 – offences – show compelling reason, 7.

³ *Bail Act*, Schedule 2 – offences – show compelling reason, 4, 5 and 6.

⁴ *Bail Act*, Schedule 2 – offences – show compelling reason, 22(f)-(h).

iv) There are circumstances where an alleged Schedule 2 offence (a “show compelling reason” offence) becomes a Schedule 1 offence, therefore requiring the accused to establish “exceptional circumstances”.

- A Schedule 2 offence, becomes a Schedule 1 offence requiring ‘exceptional circumstances’, when it is alleged that the Schedule 2 offence was committed by the accused:
 - (a) While on bail for any Schedule 1 offence or Schedule 2 offence; or
 - (b) While subject to a summons to answer to a charge for any Schedule 1 offence or Schedule 2 offence; or
 - (c) While at large awaiting trial for any Schedule 1 offence or Schedule 2 offence; or
 - (d) During the period of a community correction order made in respect of the accused for any Schedule 1 offence or Schedule 2 offence or while otherwise serving a sentence for any such offence; or
 - (e) While released under a parole order made in respect of any Schedule 1 offence or Schedule 2 offence.⁵

The Stage One Amendment Act

The *Stage One Amendment Act* is scheduled to commence before or on 1 July 2018.

The key sections inserted into the *Bail Act* are provided below:

Guiding principles (s 1B)

Section 1B of the *Bail Act* expressly states that it is the intention of the Parliament that the *Bail Act* is to be applied and interpreted having regard to the following⁶:

- “(1) The Parliament recognises the importance of—
- (a) maximising the safety of the community and persons affected by crime to the greatest extent possible; and
 - (b) taking account of the presumption of innocence and the right to liberty; and
 - (c) promoting fairness, transparency and consistency in bail decision making; and
 - (d) promoting public understanding of bail practices and procedures.”⁷

⁵ *Bail Act*, Schedule 1 – Offences – exceptional circumstances, 3.

⁶ Section 1B(2) of the *Bail Act*.

⁷ Section 1B(1) of the *Bail Act*.

Definitions (s 3)

Section 3 defines:

- *'Bail decision maker'* as meaning that any of the following are empowered to grant bail: a court, a bail justice, a police officer and the sheriff or a person authorised under section 84(5) of the *Infringements Act 2006*.
- *'Family violence'* as having the same meaning as in the *Family Violence Protection Act 2008*.
- *'Family violence offence'* as meaning an offence against sections 37(2), 37A(2), 123(2), 123A(2) or 125A(1) of the *Family Violence Protection Act 2008*; or an offence where the conduct of the accused is family violence.
- *'Schedule 1 offence'* means an offence specified in Schedule 1 and, if circumstances are specified in Schedule 1 in relation to that offence, means an offence committed in those circumstances. Please note that Schedule 1 offences are offences which require the accused to show that exceptional circumstances exist which justify the granting of bail.⁸
- *'Schedule 2 offence'* means an offence specified in Schedule 2 and, if circumstances are specified in Schedule 2 in relation to that offence, means an offence committed in those circumstances. Please note that Schedule 2 offences are offences which require an accused to show compelling reason as to why their detention is not justified (this replaces the old "show cause" test).⁹

Replacement of the term 'court' with 'bail decision maker'

The definition of *'court'* which previously existed under s 3 was repealed by the *Stage One Amendment Act*. All references to a court in the *Bail Act* (in the capacity as a decision maker) have been replaced by the term *'bail decision maker'*.

Exceptional circumstances: Schedule 1 offences require exceptional circumstances to exist for bail to be granted (section 4(2)(a))

Subsections 4(2)(a), (aa) and (b) of the *Bail Act* formerly listed the offences¹⁰ which required *'exceptional circumstances'* to be established by an offender for bail to be granted.

These subsections have been repealed and replaced by s 4(2)(a) which states that any Schedule 1 offence requires exceptional circumstances to exist for bail to be granted.

If the court is satisfied that an accused poses an unacceptable risk to commit a family violence offence, bail must be refused (subsection 4(2)(d)(i))

Subsection 4(2)(d)(i) was amended to provide the following example of an unacceptable risk: "Example An unacceptable risk that the accused if released on bail would commit a family violence offence." This shows a clear legislative intention that the commission of family violence offences constitutes an unacceptable risk and there is a legislative emphasis regarding such a risk.

⁸ This test is now reflected in s 4(2)(a) of the *Bail Act*.

⁹ This test is now reflected in s 4(4) of the *Bail Act*.

¹⁰ These included treason, murder and numerous drug trafficking and importation charges.

The “show cause” test has been replaced by the “compelling reason” test (section 4(4))

Subsection 4(4) used to contain the “show cause” test. However, the old subsection 4(4) has been replaced by the “compelling reason” test as follows:

“A bail decision maker must refuse bail for a person accused of a Schedule 2 offence unless the accused shows compelling reason why their detention in custody is not justified.”¹¹

When a court grants bail for a person accused of a Schedule 2 offence, the court must also include in the order a statement of reasons for granting bail.¹²

In any other case, the bail decision maker must provide a statement of reasons as required by the regulations.¹³

My comments regarding the new “compelling reason” test

Schedule 2 offences require the accused to show a compelling reason why their detention in custody is not justified.

The test may be different but prior authorities regarding “show cause” are still relevant in two ways

The compelling reason test replaces the old “show cause” test. Obviously, the “compelling reason” test is a more difficult test to satisfy than the show cause test. The authorities relating to show cause are still relevant because those authorities will provide guidance in two ways. Firstly, where cause was not shown, they will provide authority for circumstances that will not satisfy the “compelling reason” test. Secondly, where cause was shown, those authorities will be examples of bail applications that may be able to satisfy the “compelling reason” test or at least provide some guidance.

The offences which required an accused to “show cause” are still included as Schedule 2 offences, however the *Stage One Amendment Act* introduces more offences into Schedule 2. Therefore, there are more offences subject to the “show compelling reason” test, than there were for offences subject to the old “show cause” test.

More circumstances and offences fall under the “show compelling reason” test than the old “show cause” test

The *Bail Amendment Bill 2015* introduced the definition of ‘serious offence’ into the *Bail Act*. The definition adopted by the *Bail Act* was the definition of ‘serious offence’ under s 3(1) of the *Sentencing Act*. The only qualification was that under the *Bail Act* a serious offence did not include murder.

In regards to ‘serious offences’, the *Bail Amendment Bill 2015* also introduced s 4(4)(ab) which stated that an accused must show cause where he or she has been charged: “with a serious offence and the accused, as an adult, has within the preceding 5 years been convicted or found guilty of an offence against section 30(1)”.

In the subsequent *Stage One Amendment Act* several of these ‘serious offences’ are included as Schedule 2 offences. However, there is no longer a requirement that a person has to also have been found guilty of failing to appear under s 30(1) of the *Bail Act* within the last 5 years of the serious

¹¹ Section 4(4) of the *Bail Act*.

¹² Section 4(4A)(a) of the *Bail Act*.

¹³ Section 4(4A)(b) of the *Bail Act*.

offence. Therefore, an accused can more easily be in a reverse onus, show “compelling reason” position than under the old “show cause” regime.

My view on the show “compelling reason” test

Justice Coghlan in his bail reform recommendations suggested a show “good reason” test. However, the legislators instead inserted a show “compelling reason” test. Justice Coghlan’s suggestion would have been preferable to the show compelling reason test.

After reviewing all of the bail authorities I believe that a single “unacceptable risk” test would have been the best reform. Essentially, my conclusion is that everything comes down to unacceptable risk and that these additional tests only complicate matters.

I do however understand the justification of having an “exceptional circumstances” test for serious offences such as murder and importing, exporting, cultivating, and trafficking commercial or large commercial quantities of drugs. These are amongst the most serious criminal offences and may have increased risks associated with them, for example, the risk of an accused failing to appear at trial due to a strong prosecution case and the resulting likelihood of a lengthy prison sentence.

Applications for bail made by a person accused of an offence of causing injury to another person (section 4(4C)).

If an accused is charged with causing injury to another person, a bail decision maker may refuse bail if at the time of deciding the application it is uncertain whether the person injured will die or recover from the injury.¹⁴

The power to adjourn a bail hearing where the accused appears to be seriously affected by alcohol or drugs (section 4(4D) to 4(4G))

Adjournment of hearing due to alcohol or drugs (subsections 4(4D) and 4(4E))

A bail decision maker may adjourn a bail hearing for up to 4 hours if satisfied that the accused appears to be seriously affected by alcohol or another drug or a combination of drugs.¹⁵ After adjourning the hearing, the bail decision maker may remand the accused in custody until the further hearing of the matter.¹⁶

Further adjournment of hearing due to alcohol or drugs (subsections 4(4F) and 4(4G))

A bail decision maker may adjourn a bail hearing for one further period of up to 4 hours and remand the accused in custody until the next hearing of the matter.¹⁷

The court’s power to do this arises if, at the further hearing of the matter,¹⁸ the bail decision maker is satisfied that the accused still appears to be seriously affected by alcohol or another drug or a combination of drugs.¹⁹

¹⁴ Section 4(4B) and 4(4C) of the *Bail Act*.

¹⁵ Section 4(4D) of the *Bail Act*.

¹⁶ Section 4(4E) of the *Bail Act*.

¹⁷ Section 4(4G) of the *Bail Act*.

¹⁸ Being the further hearing due to the matter having been adjourned under s 4(4D) of the *Bail Act* (due to the accused appearing to be ‘seriously affected’ by drugs and/or alcohol).

¹⁹ Subsections 4(4F) and 4(4G) of the *Bail Act*.

Positive obligation on bail decision maker to make inquiries as to whether there are any family violence intervention orders or safety notices in force against the accused (s 4(4H))

A bail decision maker considering the release of an accused on bail must make inquiries of the informant, prosecutor or person appearing for the Crown as to whether a family violence intervention order or a family violence safety notice has been issued against the accused and is in force.²⁰

A bail decision maker has a positive obligation to consider certain matters when an accused is charged with a family violence offence (s 4(4I))

A bail decision maker considering the release on bail of an accused charged with a family violence offence must consider two matters.

Firstly, whether there would be a risk that the accused would commit family violence if released on bail.²¹

Secondly, whether that risk could be reduced by the imposition of a condition, or the making of a family violence intervention order.²²

‘Conduct conditions’ (s 4(5))

In granting bail, a bail decision maker may impose conduct conditions.²³

The term ‘conditions’ has been replaced with ‘conduct conditions’.

For the purpose of s 4(4), an offence that is both a Schedule 1 and Schedule 2 offence, is taken to be a Schedule 1 offence.

For the purposes of s 4(4) of the *Bail Act*, an offence that is both a Schedule 1 offence and a Schedule 2 offence must be taken to be a Schedule 1 offence.²⁴

Therefore if an offence that is both an “exceptional circumstances” offence and a “show compelling reason” offence, it must be taken to be an “exceptional circumstances” offence.

Undertaking of Bail (s 5)

This section has been amended to reflect the use of the term ‘conduct condition’.

Conduct conditions (s5AAA)

On the issue of conditions, the *Bail Act* essentially remains in similar terms as it was prior to the *Stage One Amendment Act*, however now it expressly addresses the interaction of bail conduct conditions with family violence intervention orders or family violence safety notices.

Conduct conditions and family violence intervention orders or family violence safety notices

Conduct conditions must be consistent with each condition of each family violence intervention order or family violence safety notice to which the accused is subject.²⁵

²⁰ Section 4(4H) of the *Bail Act*.

²¹ Section 4(4I)(a) of the *Bail Act*.

²² Section 4(4I)(b) of the *Bail Act*.

²³ Section 4(5) of the *Bail Act*. Before the *Stage One Amendment Act*, s 4(5) simply used the term ‘conditions’ and not the current term ‘conduct conditions’.

²⁴ Section 4(6) of the *Bail Act*.

²⁵ Section 5AAA(2)(c) of the *Bail Act*. This is subject to s 5AAA(3) of the *Bail Act*.

However, conduct conditions may be inconsistent with family violence intervention orders or safety notices if it will better protect the safety or welfare of an alleged victim of the offence or a protected person.²⁶

Section 5AAA(3) contains the following notation: sections 175AA and 175AB of the *Family Violence Protection Act 2008* provide that if it is not possible to comply with both a bail condition and a family violence safety notice or a family violence intervention order, the safety notice or intervention order prevails to the extent of the inconsistency.

Sureties (s 5AAB)

The main legislation relating to sureties is still contained in s 9 of the *Act*. However, the *Stage One Amendment Act* introduced further provisions relating to sureties contained s 5AAB.

Application for bail – prosecution may submit evidence “to show that there is a risk that the accused may subject another person to family violence” (s 8 (1)(c)(iia))

Subsection 8(1)(c)(iia) was inserted into the *Act* by the *Stage One Amendment Act*.

This subsection allows the informant, prosecutor or person appearing for the Crown to submit evidence, by affidavit or otherwise: “to show that there is a risk that the accused may subject another person to family violence.”²⁷

Power of police officer, sheriff or authorised person to grant or refuse bail (s 10)

Prior to the *Stage One Amendment Act*, section 10 was titled, ‘Where impracticable to bring person arrested before court’.

It is now titled, ‘Power of police officer, sheriff or authorised person to grant or refuse bail’.

Section 10 applies if a person is arrested and it is not practicable to bring the person before a court immediately after the person is taken into custody^{28, 29}

A police officer (of at least the rank of sergeant or at the time being in charge of a police station), the sheriff or a person authorised under section 84(5) of the *Infringements Act 2006* must, without delay, consider whether to grant bail to the person in accordance with the *Bail Act*,³⁰ and may grant or refuse bail.³¹ Note, that if a person is charged with treason only the Supreme Court can grant that person bail; if a person is charged with murder only the Supreme Court or the Magistrates’ Court committing the person for trial for murder can grant bail to that person.³²

If bail is refused, the bail decision maker must do one of two things. The first option is to advise the arrested person that he or she is entitled to apply for bail to a court or, if it is then outside ordinary

²⁶ Section 5AAA(3) of the *Bail Act*.

²⁷ Subsection 8(1)(c)(iia) of the *Bail Act*.

²⁸Or, if questioning or investigation under section 464A(2) of the *Crimes Act 1958* has commenced, immediately on the expiration of the reasonable time referred to in section 464A(1) of that Act.

²⁹ Section 10(1) of the *Bail Act*.

³⁰ Section 10(2) of the *Bail Act*.

³¹ Section 10(5) of the *Bail Act*.

³² Section 13 of the *Bail Act*,

court sitting hours, to a bail justice;³³ the second option, is to instead advise the arrested person of this by giving the person a written statement setting out the provisions of subsection 10(6).³⁴

If the arrested person elects to exercise this right and apply for bail, then he or she must be brought before a court as soon as practicable; if, however, it is outside the ordinary court sitting hours, he or she must be brought before a bail justice.³⁵

Power of bail justice to grant or refuse bail (s 10A)

Section 10A was inserted into the *Bail Act* by the *Stage One Amendment Act* and contains provisions relevant to the power of a bail justice to grant or refuse bail.³⁶

Power of court to grant or refuse bail (s 12)

Section 12 of the *Bail Act* is now titled, "Power of court to grant or refuse bail".

Treason, murder and other Schedule 1 offences (s 13)

Treason and murder

The *Stage One Amendment Act* amended s 13 so that it is more clearly written.

Subsections 13(1) and 13(2) address the circumstances under which a court (as distinct from a bail decision maker) has jurisdiction to hear a bail application for treason or murder respectively:

- i) If a person is charged with treason only the Supreme Court (as distinct from a bail decision maker) can grant that person bail;³⁷ and
- ii) If a person is charged with murder only the Supreme Court or the Magistrates' Court committing the person for trial for murder can grant that person bail.³⁸ The requirement of exceptional circumstances still applies.

Schedule 1 offences other than treason or murder

The *Stage One Amendment Act* also introduced subsection 13(3) which states that treason and murder are Schedule 1 offences and only a court (as distinct from a bail decision maker) may grant bail to a person accused of any other Schedule 1 offence.³⁹ Simply stated, only a court (as distinct from a bail decision maker) may grant bail for any Schedule 1 offence other than murder or treason.^{40, 41}

³³ Section 10(6)(a) of the *Bail Act*.

³⁴ Section 10(6)(b) of the *Bail Act*.

³⁵ Section 10(7) of the *Bail Act*.

³⁶ Note that under s 13 of the *Bail Act*, if a person is charged with treason only the Supreme Court can grant that person bail; if a person is charged with murder only the Supreme Court or the Magistrates' Court committing the person for trial for murder can grant bail to that person.

³⁷ Section 13(1) of the *Bail Act*.

³⁸ Section 13(2) of the *Bail Act*.

³⁹ Subsection 13(3) of the *Bail Act*.

⁴⁰ Note that subsections 13(1) and s 13(2) specifically address the circumstances under which a court can hear bail applications for treason and murder.

⁴¹ Section 13(3) of the *Bail Act*.

Commencement of the *Stage One Amendment Act* (s 34(1))

The *Stage One Amendment Act* is scheduled to commence before or on 1 July 2018.

The amendments apply⁴² from the day of the commencement of an amending provision, regardless of when the offence is alleged to have been committed.⁴³

⁴² To an application made or an appeal commenced under the *Bail Act*.

⁴³ Section 34(18) of the *Bail Act*.

Schedule 1 - Offences – exceptional circumstances

Schedule 1 offences require the accused to establish exceptional circumstances which justify the granting of bail.

The *Stage One Amendment Act* introduced more offences into the exceptional circumstances category.

Only a court (as opposed to a bail decision maker) may grant bail for a Schedule 1 offence

Treason

Only the Supreme Court may grant bail to a person accused of treason.⁴⁴

Murder

If a person is accused of murder, only the Supreme Court or the Magistrates' Court committing a person for trial for murder can grant bail to that person.⁴⁵

Schedule 1 offences other than treason or murder

Only a court (as opposed to a bail decision maker) may grant bail to a person accused of any other Schedule 1 offence.

Treason and murder

Treason and Murder are Schedule 1 offences.⁴⁶

Circumstances where an alleged Schedule 2 offence becomes a Schedule 1 offence requiring 'exceptional circumstances'

A Schedule 2 offence, becomes a Schedule 1 offence requiring 'exceptional circumstances', when it is alleged that the Schedule 2 offence was committed by the accused:

- (a) While on bail for any Schedule 1 offence or Schedule 2 offence; or
- (b) While subject to a summons to answer to a charge for any Schedule 1 offence or Schedule 2 offence; or
- (c) While at large awaiting trial for any Schedule 1 offence or Schedule 2 offence; or
- (d) During the period of a community correction order made in respect of the accused for any Schedule 1 offence or Schedule 2 offence or while otherwise serving a sentence for any such offence; or
- (e) While released under a parole order made in respect of any Schedule 1 offence or Schedule 2 offence.⁴⁷

⁴⁴ Section 13(1) of the *Bail Act*.

⁴⁵ Section 13(2) of the *Bail Act*.

⁴⁶ *Bail Act*, Schedule 1 – Offences – exceptional circumstances, 1 and 2.

⁴⁷ *Bail Act*, Schedule 1 – Offences – exceptional circumstances, 3.

Aggravated home invasion and aggravated carjacking

Aggravated home invasion (section 77B of the *Crimes Act 1958*) and aggravated carjacking (79A of the *Crimes Act 1958*) are Schedule 1 offences.⁴⁸

Trafficking and cultivation offences under the *Drugs, Poisons and Controlled Substances Act 1981* (trafficking in and cultivation of a commercial and large commercial quantity of drugs)

Trafficking in a large commercial quantity (s 71) or commercial quantity (s 71AA) of drugs.⁴⁹

Cultivating a large commercial quantity (s 72) or a commercial quantity of a narcotic plant (s 72A).⁵⁰

A conspiracy to commit any of the above four listed trafficking and cultivation offences contained in the *Bail Act*, Schedule 1 – offences – exceptional circumstances, under 6(a), 6(b), 6(c) and 6(d).⁵¹

Trafficking and cultivation offences under the *Drugs, Poisons and Controlled Substances Act 1981*, (as in force immediately before the commencement of the *Drugs, Poisons and Controlled Substances (Amendment) Act 2001*): trafficking in and cultivation of a commercial and large commercial quantity of drugs.

An offence against any of the below listed provisions of the *Drugs, Poisons and Controlled Substances Act 1981* (as in force immediately before the commencement of the *Drugs, Poisons and Controlled Substances (Amendment) Act 2001*) is a Schedule 1 offence:

- i) Trafficking in a commercial quantity of a drug of dependence (s 71(1)) and cultivation of a commercial quantity of a narcotic plant (s 72(1)).⁵²
- ii) A conspiracy to commit any of the above two offences, namely trafficking in a commercial quantity of a drug of dependence (s 71(1)) or to cultivate a commercial quantity of a narcotic plant (s 72(1)).⁵³

Schedule 1 offences include offences under sections 302.2, 302.3, 303.4, 303.5, 304.1, 304.2, 305.3 or 305.4 of the *Criminal Code of the Commonwealth* which involve a commercial quantity.

Schedule 1 offences include the following offences under the *Criminal Code of the Commonwealth* which involve a commercial quantity (as defined in section 70(1) of the *Drugs, Poisons and Controlled Substances Act 1981*):⁵⁴

- i) Trafficking commercial quantities (302.2) or marketable quantities (302.3) of controlled drugs.
- ii) Cultivating commercial quantities (303.4) or marketable quantities (303.5) of controlled plants.

⁴⁸ *Bail Act*, Schedule 1 – Offences – exceptional circumstances, 4 and 5.

⁴⁹ *Bail Act*, Schedule 1 – Offences – exceptional circumstances, 6(a) and 6(b).

⁵⁰ *Bail Act*, Schedule 1 – Offences – exceptional circumstances, 6(c) and 6(d).

⁵¹ *Bail Act*, Schedule 1 – Offences – exceptional circumstances, 6(f). I note that I believe the *Stage One Amending Act* erroneously lists this Schedule 1 offence under s 6(f), I presume that it should be listed under s 6(e). I base this upon the fact that there is no other offence listed as 6(e), and perhaps it was mistakenly listed as 6(f).

⁵² *Bail Act*, Schedule 1 – Offences – exceptional circumstances, 7(a) and 7(b).

⁵³ *Bail Act*, Schedule 1 – Offences – exceptional circumstances, 7(c).

⁵⁴ *Bail Act*, Schedule 1 – Offences – exceptional circumstances, 8.

- iii) Selling commercial quantities (304.1) or marketable quantities (304.2) of controlled plants.
- iv) Manufacturing commercial quantities (305.3) or marketable quantities (305.4) of controlled drugs.

Schedule 1 offences include offences under sections 307.1, 307.2, 307.5, 307.6, 307.8 or 307.9 of the Criminal Code of the Commonwealth which involve a commercial quantity.

A Schedule 1 offence includes any of the following offences under the *Criminal Code of the Commonwealth*, involving a commercial quantity (as defined in section 70(1) of the *Drugs, Poisons and Controlled Substances Act 1981*) of a drug of dependence:

- i) Importing and exporting commercial quantities (307.1) or marketable quantities (307.2) of border controlled drugs or border controlled plants.⁵⁵
- ii) Possessing commercial quantities (307.5) or marketable quantities (307.6) of unlawfully imported border controlled drugs or border controlled plants.⁵⁶
- iii) Possessing commercial quantities (307.8) or marketable quantities (307.9) of border controlled drugs or border controlled plants reasonably suspected of having been unlawfully imported.⁵⁷

Offences under the *Customs Act 1901* (Cth)

The following offences under the *Customs Act 1901* (Cth) are Schedule 1 offences:

- i) Assembly for unlawful purposes where 2 or more assemble with the intention of importing or smuggling prohibited goods, or assemble to prevent the seizure, or rescuing after seizure, of any prohibited imports or smuggled goods (s 231(1), *Customs Act 1901* (Cth)).
- ii) The master of a ship or the pilot of an aircraft, intentionally using the ship or aircraft to smuggle, import or export any goods in contravention of the *Customs Act* (s 233A, *Customs Act 1901* (Cth)).
- iii) Section 233B(1) of the *Customs Act* as it was in force until 6 December 2005 when the *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act 2005* of the Commonwealth commenced and repealed section 233B.⁵⁸ An offence under s 233B(1) will only be a Schedule 1 offence where the offence is committed in relation to a commercial quantity of narcotic goods. Section 233B used to contain the drug importation and exportation offences of the *Customs Act 1901* (Cth). The offences previously under s 233B of the *Customs Act* are now dealt with in Division 307 of Part 9.1 of the *Criminal Code*.⁵⁹

⁵⁵ *Bail Act*, Schedule 1 – Offences – exceptional circumstances, 9.

⁵⁶ *Bail Act*, Schedule 1 – Offences – exceptional circumstances, 9.

⁵⁷ *Bail Act*, Schedule 1 – Offences – exceptional circumstances, 9.

⁵⁸ See *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act 2005*, s 2.

⁵⁹ *Bail Act*, Schedule 1 – Offences – exceptional circumstances, 10.

Offences under the *Terrorism (Community Protection) Act 2003 (Vic)*.

The following offences under the *Terrorism (Community Protection) Act 2003 (Vic)* (*Terrorism Act*) are Schedule 1 offences:

- i) Providing documents or information facilitating terrorist acts (under s 4B(1)).
- ii) Obstructing or hindering a search or other police powers under s 21W of the *Terrorism Act*: by either obstructing or hindering a police officer in the exercise of a power to enter and search premises or seize and detain a thing; or by failing to comply with a direction given by a police officer in the exercise of a power under the relevant division of the *Terrorism Act*.⁶⁰

An offence of conspiracy, incitement or an attempt to commit an offence listed in Schedule 1 is a Schedule 1 offence

An offence of conspiracy, incitement or an attempt to commit an offence listed in Schedule 1 is a Schedule 1 offence.⁶¹

⁶⁰ *Bail Act*, Schedule 1 – Offences – exceptional circumstances, 11.

⁶¹ *Bail Act*, Schedule 1 – Offences – exceptional circumstances, 12.

Schedule 2 - Offences – show compelling reason

Schedule 2 offences require the accused to show compelling reason as to why detention in custody is not justified.⁶²

The “show compelling reason” test replaces the old “show cause” test. Obviously, the “show compelling reason” test is a more difficult test to satisfy than the “show cause” test.

The authorities relating to show cause are still relevant because those authorities will provide guidance in two ways.

Firstly, where cause was not shown, they will provide authority for circumstances that will not satisfy the “show compelling reason” test.

Secondly, where cause was shown, those authorities will be examples of bail applications that may be able to satisfy the “show compelling reason” test or at least provide some guidance.

The offences which required an accused to “show cause” are still included as Schedule 2 offences, however the *Stage One Amendment Act* introduced more offences into Schedule 2. Therefore, there are more offences subject to the “show compelling reason” test, than there were for offences subject to the old “show cause” test.

Circumstances where the commission of an indictable offence is a Schedule 2 offence

It is a Schedule 2 offence if an accused is charged with committing an indictable offence in the any of the following circumstances:

- (a) While on bail for another indictable offence.
- (b) While subject to a summons to answer a charge for another indictable offence.
- (c) While at large awaiting trial for another indictable offence.
- (d) During the period of a community correction order for another indictable offence.
- (e) While otherwise serving a sentence for another indictable offence.
- (f) While released under a parole order.⁶³

Manslaughter and child homicide

Manslaughter and child homicide are Schedule 2 offences.⁶⁴

⁶² Section 4(4) of the *Bail Act*.

⁶³ *Bail Act*, Schedule 2 – Offences – show compelling reason, 1.

⁶⁴ *Bail Act*, Schedule 2 – Offences – show compelling reason, 2 and 3.

Causing serious injury offences

Causing serious injury intentionally in circumstances of gross violence (s 15A(1), *Crimes Act 1958*) and causing serious injury recklessly in circumstances of gross violence (s 15B(1), *Crimes Act 1958*) are Schedule 2 offences.⁶⁵

Causing serious injury intentionally (s 16, *Crimes Act 1958*) is also a Schedule 2 offence.⁶⁶

Threat to kill that is a family violence offence

A threat to kill (s 20, *Crimes Act 1958*) that is also a family violence offence is a Schedule 2 offence.⁶⁷

This will put many more accused persons in a “show compelling reason” situation due to the prevalence of family violence offences that involve threats to kill.

Stalking offences

An offence of stalking (s 21A(1), *Crimes Act 1958*) is a Schedule 2 offence if either of the following three circumstances apply:

- a) Within the preceding 10 years the accused has been convicted or found guilty of an offence against s 21A(1) in relation to any person.⁶⁸
- b) Within the preceding 10 years the accused has been convicted or found guilty of committing an offence in the course of which the accused used or threatened to use violence against any person.⁶⁹
- c) The bail decision maker is satisfied that the accused on a separate occasion used or threatened to use violence against the person whom the accused is alleged to have stalked, whether or not the accused has been convicted or found guilty of, or charged with, an offence in connection with that use or threatened use of violence.⁷⁰

Sexual offences

The following sexual offences are Schedule 2 offences:

- i) Rape (s 38(1), *Crimes Act 1958*).
- ii) Rape by compelling sexual penetration (s 39(1), *Crimes Act 1958*).
- iii) Assault with intent to commit a sexual offence (s 42(1), *Crimes Act 1958*).
- iv) Abduction or detention for a sexual purpose (s 47(1), *Crimes Act 1958*).⁷¹

⁶⁵ *Bail Act*, Schedule 2 – Offences – show compelling reason, 4 and 5.

⁶⁶ *Bail Act*, Schedule 2 – Offences – show compelling reason, 6.

⁶⁷ *Bail Act*, Schedule 2 – Offences – show compelling reason, 7.

⁶⁸ *Bail Act*, Schedule 2 – Offences – show compelling reason, 8(a).

⁶⁹ *Bail Act*, Schedule 2 – Offences – show compelling reason, 8(a).

⁷⁰ *Bail Act*, Schedule 2 – Offences – show compelling reason, 8(b).

⁷¹ *Bail Act*, Schedule 2 – Offences – show compelling reason, 9, 10, 11 and 12.

Sexual offences involving children

The following sexual offences involving children are Schedule 2 offences:

- i) Sexual penetration of a child under the age of 12 (s 49A(1), *Crimes Act 1958*).
- ii) Sexual penetration of a child under the age of 16, not including circumstances where at the time of the alleged offence the child was at least 12 years of age and the accused was 2 years, or less than 2 years, older than the child. This offence is contained in s 49B(1) of the *Crimes Act 1958*.
- iii) Persistent sexual abuse of a child under the age of 16 (s 49J(1), *Crimes Act 1958*).
- iv) Abduction or detention of a child under the age of 16 for a sexual purpose (s 49P(1), *Crimes Act 1958*).⁷²

Incest

A Schedule 2 offence includes the follow incest offences (excluding circumstances where both people are at least 18 years old)⁷³:

- a) Sexual penetration of a child or lineal descendant (s 50C(1)).
- b) Sexual penetration of a step-child (s 50D(1)).
- c) Sexual penetration of a parent, lineal ancestor or step-parent (s 50E(1)).
- d) Sexual penetration of a sibling or half-sibling (s 50F(1)).⁷⁴

Family violence offences

Any of the following offences, under the *Family Violence Protection Act 2008* (Vic):

- i) Breaching a family violence safety notice under section 37 (contravention of family violence safety notice) or 37A (contravention of notice intending to cause harm or fear for safety); or, an offence for breaching a family violence intervention order under s 123 (contravention of family violence intervention order) or s 123A (contravention of order intending to cause harm or fear for safety)

Where in the commission of that offence, the accused is alleged to have used or threatened to use violence and:

- a) Within the preceding 10 years the accused has been convicted or found guilty of an offence in which the accused used or threatened to use violence against any person;⁷⁵ or
- b) The bail decision maker is satisfied that the accused on a separate occasion used or threatened to use violence against the person who is the subject of the order or notice, whether or not

⁷² *Bail Act*, Schedule 2 – Offences – show compelling reason, 13, 14, 15 and 16.

⁷³ Under Subdivision (8C) of Division 1 of Part I of *the Crimes Act 1958*.

⁷⁴ *Bail Act*, Schedule 2 – Offences – show compelling reason, 17.

⁷⁵ *Bail Act*, Schedule 2 – Offences – show compelling reason, 18(a).

the accused has been charged, convicted or found guilty of an offence in connection with that use or threatened use of violence.⁷⁶

A Schedule 2 offence also includes a persistent contravention of family violence safety notices or family violence intervention orders, under s 125A(1) of the *Family Violence Protection Act 2008* (Vic).⁷⁷

Personal safety offences

A Schedule 2 offence includes an offence of contravening a personal safety order under s 100 of the *Personal Safety Intervention Orders Act 2010*, where in the commission of that offence, the accused is alleged to have used or threatened to use violence and:

- a) Within the preceding 10 years the accused has been convicted or found guilty of an offence in which the accused used or threatened to use violence against any person,⁷⁸ or
- b) The bail decision maker is satisfied that the accused on a separate occasion used or threatened to use violence against the person who is the subject of the order, whether or not the accused has been charged, convicted or found guilty of an offence in connection with that use or threatened use of violence.⁷⁹

Kidnapping

Kidnapping under s 63A of the *Crimes Act 1958* is a Schedule 2 offence.⁸⁰

Armed robbery, aggravated burglary, home invasion and carjacking offences

A Schedule 2 offence includes the following offences under the *Crimes Act 1958*:

- i) Armed robbery (s 75A(1)).
- ii) Aggravated burglary (s 77).
- iii) Home invasion (s 77A).
- iv) Carjacking (s 79).⁸¹

Arson causing death

Arson causing death under s 197A of the *Crimes Act 1958* is a Schedule 2 offence.⁸²

⁷⁶ *Bail Act*, Schedule 2 – Offences – show compelling reason, 18(b).

⁷⁷ *Bail Act*, Schedule 2 – Offences – show compelling reason, 19.

⁷⁸ *Bail Act*, Schedule 2 – Offences – show compelling reason, 20(a).

⁷⁹ *Bail Act*, Schedule 2 – Offences – show compelling reason, 20(b).

⁸⁰ *Bail Act*, Schedule 2 – Offences – show compelling reason, 21.

⁸¹ *Bail Act*, Schedule 2 – Offences – show compelling reason, 22(a)-(d).

⁸² *Bail Act*, Schedule 2 – Offences – show compelling reason, 22(e).

Driving offences

A Schedule 2 offence includes the following offences under the *Crimes Act 1958*:

- i) Culpable driving causing death (s 319(1)).
- ii) Dangerous driving causing death (s 319(1)) or serious injury (s 319(1A)).
- iii) Dangerous or negligent driving while pursued by police (s 319AA(1)).⁸³

Any indictable offence with an alleged use or threatened use of a firearm, offensive weapon, or explosive

A Schedule 2 offence includes any indictable offence in the commission of which, the accused, or any person involved in the commission of the offence, is alleged to have used or threatened to use a firearm, offensive weapon, or explosive^{84, 85}.

Trafficking a drug of dependence and cultivating narcotic plants, including conspiracy to do either.

A Schedule 2 offence includes any of the following offences under the *Drugs, Poisons and Controlled Substances Act 1981*:

- i) Trafficking in a drug or drugs of dependence to a child (s 71AB).
- ii) Trafficking in a drug of dependence (s 71AC).
- iii) Cultivation of narcotic plants (s 72B).
- iv) Conspiracy to commit any of the above offences (s 79(1)).⁸⁶

Trafficking a drug of dependence and cultivating narcotic plants, including conspiracy to do either, under the *Drugs, Poisons and Controlled Substances Act 1918* as it was, prior to the commencement of the amendments under the *Drugs, Poisons and Controlled Substances (Amendment) Act 2001*.

A Schedule 2 offence includes the following offences under the *Drugs, Poisons and Controlled Substances Act 1918* as it was, prior to the commencement of the amendments under the *Drugs, Poisons and Controlled Substances (Amendment) Act 2001*:

- i) Trafficking in a drug of dependence (s 71(1)).
- ii) Cultivation of narcotic plants (s 72(1)).
- iii) Conspiracy to commit any of the above offences (s 79(1)).⁸⁷

⁸³ *Bail Act*, Schedule 2 – Offences – show compelling reason, 22(f)-(h).

⁸⁴ As defined by section 77 of the *Crimes Act 1958*.

⁸⁵ *Bail Act*, Schedule 2 – Offences – show compelling reason, 23.

⁸⁶ *Bail Act*, Schedule 2 – Offences – show compelling reason, 24.

⁸⁷ *Bail Act*, Schedule 2 – Offences – show compelling reason, 25.

Criminal Code of the Commonwealth offences which are Schedule 2 offences

A Schedule 2 offence includes any of the following offences under the *Criminal Code of the Commonwealth*:⁸⁸

Sections 302.2 and 302.3

- i) Trafficking commercial quantities (302.3) or marketable quantities (302.3) of controlled drugs.

Sections 303.4 and 303.5

- ii) Cultivating commercial quantities (303.4) or marketable quantities (303.5) of controlled plants.

Sections 304.1 and 304.2

- iii) Selling commercial quantities (304.1) or marketable quantities (304.2) of controlled plants.

Sections 305.3 and 305.4

- iv) Manufacturing commercial quantities (305.3) or marketable quantities (305.4) of controlled drugs.

Section 306.2

- v) Pre-trafficking commercial quantities of controlled precursors (306.2).

Sections 307.1, 307.2, 307.5, 307.6, 307.8, 307.9 and 307.11

- vi) Importing and exporting commercial quantities (307.1) or marketable quantities (307.2) of border controlled drugs or border controlled plants.
- vii) Possessing commercial quantities (307.5) or marketable quantities (307.6) of unlawfully imported border controlled drugs or border controlled plants.
- viii) Possessing commercial quantities (307.8) or marketable quantities (307.9) of border controlled drugs or border controlled plants reasonably suspected of having been unlawfully imported.

⁸⁸ The below listed *Criminal Code of the Commonwealth* offences are listed as Schedule 2 offences under: *Bail Act*, Schedule 2 – Offences – show compelling reason, 26.

- ix) Importing and exporting commercial quantities of border controlled precursors.

Sections 309.3, 309.4, 309.7, 309.8, 309.10, 309.11, 309.12, 309.13, 309.14 or 309.15

- x) Supplying marketable quantities of controlled drugs to children for trafficking (309.3).
- xi) Supplying controlled drugs to children for trafficking (309.4).
- xii) Procuring children for trafficking marketable quantities of controlled drugs (309.7).
- xiii) Procuring children for trafficking controlled drugs (309.8).
- xiv) Procuring children for pre-trafficking marketable quantities of controlled precursors (309.10).
- xv) Procuring children for pre-trafficking controlled precursors (309.11).
- xvi) Procuring children for importing or exporting marketable quantities of border controlled drugs or border controlled plants (309.12).
- xvii) Procuring children for importing or exporting border controlled drugs or border controlled plants (309.13).
- xviii) Procuring children for importing or exporting marketable quantities of border controlled precursors (309.14).
- xix) Procuring children for importing or exporting border controlled precursors (309.15).

Offences under the *Customs Act 1901* (Cth)

A Schedule 2 offence includes the following offences under the *Customs Act 1901* (Cth) where the offence is committed in relation to a commercial or trafficable quantity of narcotic goods within the meaning of the *Customs Act 1901*:

- i) Assembly for unlawful purposes where 2 or more assemble with the intention of importing or smuggling prohibited goods, or assemble to prevent the seizure, or rescuing after seizure, of any prohibited imports or smuggled goods (s 231(1), *Customs Act 1901* (Cth)).
- ii) The master of a ship or the pilot of an aircraft, intentionally using the ship or aircraft to smuggle, import or export any goods in contravention of the *Customs Act* (s 233A, *Customs Act 1901* (Cth)).
- iii) Section 233B(1) of the *Customs Act* as it was in force until 6 December 2005 when the *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act 2005* of the Commonwealth commenced and repealed section 233B.⁸⁹ An offence under s 233B(1) will only be a Schedule 2 offence where the offence is committed in relation to a

⁸⁹ See *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act 2005*, s 2.

