The Chief Justice
New South Wales

# Statement on Bail by Chief Justice of New South Wales

Decisions to grant or refuse bail are regularly the subject of media coverage. This Statement is designed to facilitate public understanding of the operation of the bail laws in New South Wales.

In the Supreme Court of New South Wales in 2024, the 21 judges of the Common Law Division dealt with over 3100 bail applications, there having been a sharp increase in bail applications in recent years. Those same judges also hear serious criminal trials, sit on the Court of Criminal Appeal and deal with high risk offender applications. They also hear civil matters such as claims for personal injury, professional negligence, possession of property and compensation for institutional sexual abuse. In the Local Court of New South Wales, the State's 150 magistrates determined almost 40,000 bail applications last year.

Our criminal justice system takes as its starting point the fundamental proposition that an accused person is innocent until proven guilty and, generally speaking, should not be deprived of his or her liberty unless and until found guilty by a judge or a jury. This common law presumption of innocence is a fundamental plank in our system of justice and is referred to in the Preamble to the Bail Act 2013 (NSW) together with the need to ensure the safety of victims of crime, individuals and the community, and the need to ensure the integrity of the justice system. Bail is not the occasion on which the guilt or innocence of an accused person is decided.

As at 30 March 2025, there were 5732 people in New South Wales charged with serious offences being held in prison on remand and awaiting trial because they had been refused bail. This figure has increased from 5452 as at 30 March 2024 and from 4778 five years earlier, that is to say, an increase of approximately 20% over the past five years. If an accused person held on remand is later found to be not guilty of the offence(s) charged, or if the charges are withdrawn, that person will have been deprived of liberty for what will very often be a considerable period of time. Because of finite resources in the criminal justice system, including the number of judges, prosecutors and public defenders as well as the limited number of courtrooms in which jury trials may be held, it is not possible to ensure that an accused person held in prison on remand will receive a quick trial, despite the best efforts of all concerned. A person charged with a serious offence may have to wait up to three years before their trial comes on for hearing. This is required to be taken into account in an assessment of bail concerns under section 18(1)(h) of the Bail Act 2013 (NSW).

Holding a person in prison on remand for several years also carries a significant financial cost to the community (an annual average of over $105,850 per accused person on remand in NSW, according to the Bureau of Crime Statistics and Research), equating to over $600 million per year for prisoners held on remand. It also carries an irremediable cost to the not insignificant number of accused persons held on remand but who are either not subsequently convicted or, if convicted, who are sentenced for a shorter period than they have been held on remand, or those who would have otherwise been given a sentence to be served in the community (a community correction order) as opposed to a sentence of imprisonment.

Before the passage of the Bail Act in 2013, there existed a presumption in favour of bail in most cases. The Bail Act, and recent amendments to it, have significantly restricted the circumstances in which bail may be granted. The Bail Act does not, however, mandate the refusal of bail for any person. Rather, as a primary purpose, it strives to deal with the difficult issue of how to deal with persons who have been charged with

offences but who have not yet been found guilty of any crime. The Act strikes an important balance between ensuring such persons charged are not unnecessarily held in custody on remand for long periods awaiting trial, on the one hand, with the need to ensure that the community is protected from the possibility of serious offences being repeated, on the other hand.

The bail concerns that must be assessed under section 17 of the Bail Act are that an accused person, if released from custody, will (a) fail to appear at any proceedings for the offence, (b) commit a serious offence, (c) endanger the safety of victims, individuals or the community, or (d) interfere with witnesses or evidence. A judge is required by section 18 of the Bail Act to consider 22 specified matters in assessing bail concerns including any conditions that could reasonably be imposed to address any bail concerns.

The decision to grant bail to any person charged with a serious offence is not risk free. The Bail Act does not allow a grant of bail if the risks, as assessed, on the evidence before the judge, are unacceptable. In some circumstances additional tests apply. The Act necessarily accepts that there will be some risk. Over time, having regard to the significant volume of decisions being made, that risk will, on occasion be realised. On the other hand, there is a risk of doing irreparable harm to individuals ultimately found to be not guilty of any crime by imprisoning them for long periods whilst on remand at what is often a formative time in their life. This assists neither the individual nor the protection of the community.

Grants of bail are frequently subject to a series of stringent conditions which impose significant constraints on the accused person's liberty. These may include home detention, daily reporting to police, limitations upon movement and association with alleged victims and witnesses and upon consumption of alcohol and non-prescription drugs. An applicant for bail may also be required to post significant financial security, or to have significant financial security posted on his or her behalf. Such conditions provide a protective regime, formulated by a judge, in order as far as possible to minimise the risk of offending pending trial. The breach of any such condition may lead to the immediate revocation of the grant of bail and return to prison. Forfeiture of security may also be ordered in certain circumstances.

Bail conditions thus play an important role in ameliorating or eliminating what might otherwise be thought to be unacceptable risks. It must be recognised, however, that it is never possible to guarantee that a careful and conscientious risk assessment, made with the benefit of detailed assistance from the prosecution and the alleged offender and on the basis of the evidence before the Court, will always be vindicated. Nor can there ever be an absolute guarantee that the person granted bail will not offend whilst on bail. Where an offence is committed by a person who is on bail, it is both wrong and unfair to attribute blame for that outcome retrospectively to the judicial officer who granted bail. To do so involves a profound misunderstanding of the nature of the difficult and complex risk assessment which judges are required to make when hearing and determining bail applications.

While judges' decisions are not immune from criticism, media reporting of decisions to grant bail is sometimes not informed by a full understanding or proper appreciation of the evidence before the court on any given bail application, the legislative framework and principles that must be applied, or the conditions imposed by the judge and the judge's reasons.

As my predecessor, the Hon. Tom Bathurst AC KC observed in 2012, "*there are few people as much in touch with the realities faced by victims, accused and convicted as are the judges of the criminal courts. They are in the thick of it every single day*". That remains the case today.

**27 May 2025**

**The Hon. Andrew Bell**
**Chief Justice of New South Wales**