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Not for punishment: we need to understand bail, not review it

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Not for punishment: we need to understand bail, not review it

Abstract

Courts make hundreds of bail decisions every week but we rarely hear about them. In the past month in New South Wales, however, we have heard much about three high-profile decisions granting bail to: Steven Fesus, accused of murdering his wife 17 years ago; Hassan “Sam” Ibrahim, charged with selling illegal firearms across western Sydney (bail was revoked on appeal); and Mahmoud Hawi, charged with the murder of Peter Zervas during a brawl at Sydney Airport in 2009.

Each was granted bail under the Bail Act 2013, which came into force on May 20 this year. The allegations these men face are serious but at this stage they are precisely that: allegations. Media coverage of these cases has conflated the role of bail with that of guilt and a desire to condemn and punish. It is suggested the new laws are “soft on crime”.

The cases demonstrate no such thing. Yet rather than defend the Bail Act, the government has yielded to the media outrage and announced a review after only a month’s operation. This vote of “no confidence” in the laws is premature and unfortunate.

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Being arrested does not make a person guilty and deserving of punishment; that's what a trial determines. AAP/NSW Police

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The cases demonstrate no such thing. Yet rather than defend the Bail Act, the government has [yielded to the media outrage](#) and [announced a review](#) after only a month's operation. This vote of "no confidence" in the laws [is premature](#) and unfortunate.

What is bail?

The term comes from the French “bailler”, which means to take charge of, guard, control and ultimately to hand over and deliver. Originally, an accused was released into the custody of persons known as “sureties”, typically on the payment of a monetary sum. This was forfeited if the accused did not turn up at court.

Today, when a person is accused of a crime, he or she must be brought before a judge as soon as practicable after arrest. An application for bail may then be made, which can either be granted (with or without conditions) or denied. The critical point is that, at this stage, the person is only accused of a crime.

A cornerstone of our criminal justice system is that a person is presumed innocent until tried and convicted according to law. It is fundamental that a person should not be denied his or her liberty. Simply put, wherever possible people should be kept out of jail until they have been convicted – only then should punishment begin.

Two big problems converge when we move away from these principles. It is unfair and it is expensive.

Historically, using “cash bail” had a significant discriminatory effect on marginalised groups – the unemployed, young people and Indigenous people – leading to lengthy periods of imprisonment before their trial. In 1978, a [new Bail Act](#) was introduced in NSW. At its heart was a presumption in favour of bail and a move away from “cash bail”.

Politicising proper process

Since the late 1980s, state governments have used the bail regime for political purposes, specifically to send a “tough on crime” message. Since 1988, more than 20 changes to bail laws created an ever-growing list of offences for which there was a presumption against bail. The list included those accused of murder, armed robbery, certain drug offences, firearms offences, terrorism, repeat property offenders and aggravated sexual assault.

A common thread here is the demonising of particular types of alleged offenders whose crimes evoked popular anxiety and anger.

These changes produced a staggering [rise in the prison population](#). About a quarter of the state’s prisoners are on remand - that is, where bail is refused. The estimated cost of a remand inmate is up to [A\\$330.80 per day](#), costing more than sentenced inmates.

When the Coalition came to power in NSW in 2011, then attorney-general Greg Smith SC took the laudable step of reforming bail laws. The Bail Act 2013 was the product of a rigorous and well-considered process. All stakeholders – including lawyers, civil liberties groups and victims’ rights groups – participated. It included a lengthy and considered [report from the NSW Law Reform Commission](#).

Restoring the legal principles

The new law is not a radical shift but rather a return to the traditional concept of bail, doing away with the complexity of the presumptions against bail.

Under the Bail Act, a bail decision-maker is required to consider whether there are any “unacceptable risks” that the accused will: fail to appear at any proceedings for the offence; commit a serious offence; endanger the safety of victims, individuals or the community; or interfere with witnesses or evidence. If no such “unacceptable risks” exist, bail must be granted.

If there are risks, but these can be mitigated by imposing conditions (such as daily reporting to police), bail is granted. If not, bail will be refused. Such decisions balance the presumption of innocence and an accused’s general right to liberty against the community’s interests in safety and confidence in the justice system.

Bail is not about whether or not an accused person is guilty of an offence. And that’s where the problem lies. In recent media coverage, bail has come to symbolise “judgment” and serve as a proxy for guilt and punishment.



The reason Steven Fesus ‘walks free’ on bail is that his guilt or innocence is yet to be decided. AAP

Denying bail – putting a person in jail *before* trial – has become a way of expressing condemnation of the behaviour in which a person is *alleged* to have engaged. For example, [commenting on the decision](#) to grant bail to Fesus, Gay Williams, the mother of Jodie Fesus, said:

...for almost two decades her family had kept out of the media. Now we’ve said, damn this, 16 years it’s taken us to get him into that jail and one year (later) he walks free.

In our system, condemnation and punishment should only ever happen after someone has been found guilty of an offence. Bail [should not be used to punish](#) a person who is yet to be prosecuted for a crime.

The new Bail Act is designed to return bail to its proper place in the criminal justice system: to ensure that an accused person turns up to face charges against him or her and to ensure the protection of the community and witnesses. Bail decisions need to be made dispassionately – and the government’s response does nothing to promote this. If we want the debate to rise

above emotional populism, we need to be talking about what is actually happening in the courts each day, not just focusing on isolated examples.

The NSW Chief Justice [recently endorsed](#) government moves to introduce filming of judgments in accordance with principles of “open justice” and community education. It remains rare, however, for bail decisions to be made available to the public in an accessible form. If courts at all levels were more pro-active in explaining their bail decisions the public debate might be better informed and more constructive.