

10861NAT Diploma of Aboriginal and Torres Strait Islander Legal Advocacy

Making a Bail Application

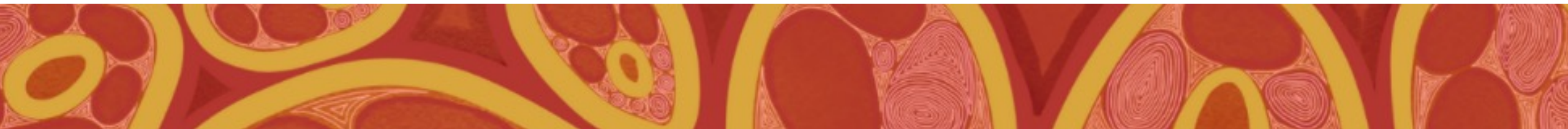


Acknowledgement of Country

We acknowledge the traditional owners of the land on which Tranby stands, the Gadigal people of the Eora nation. We pay our respects to their Elders both past and present, who remain the traditional knowledge holders of this land.



We proudly extend this respect to all current and emerging leaders around Australia, for they hold the memories, the traditions, the culture and the future of their people.



Bail Legislation

- *Bail Act 2013* (NSW)
- *Bail Act 2018* (Vic)
- *Bail Act 1985* (SA)
- *Bail Act 1982* (WA)
- *Bail Act 1980* (Qld)
- *Bail Act 1994* (Tas)
- *Bail Act 1982* (NT)
- *Bail Act 1992* (ACT)



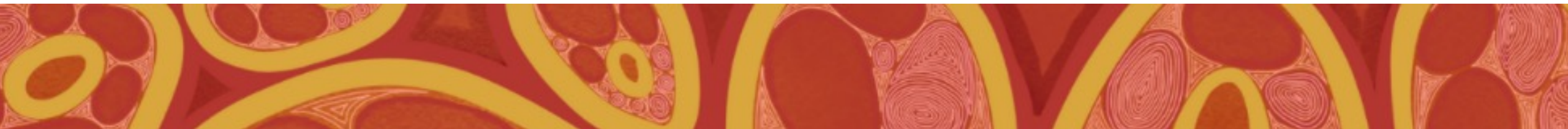
How Does Bail Work?

- Once police arrest and charge you for a criminal offence, you'll be considered an accused person.
- The accused person will then be taken to the police station where the bail sergeant police officer will decide on whether or not to grant bail to the accused person.
- If bail is granted at the police station, the accused person will be released with or without bail conditions and will be required to appear in court on the scheduled court date in relation to the criminal charge(s).



When Can Police Grant Bail?

- The law in NSW allows certain police officers to be able to make a decision to grant or refuse bail (with or without bail conditions) at the police station, immediately after the accused person is arrested and charged– this is the first opportunity for bail to be granted.
- *Section 43 Bail Act 2013* (NSW) says that a police officer can grant or refuse an accused person bail at the police station, if the police officer is:
 - At least the rank of sergeant and present at the police station; or
 - In charge of the police station for the time being.
- A police officer is not allowed to make a bail decision (grant or refuse) if:



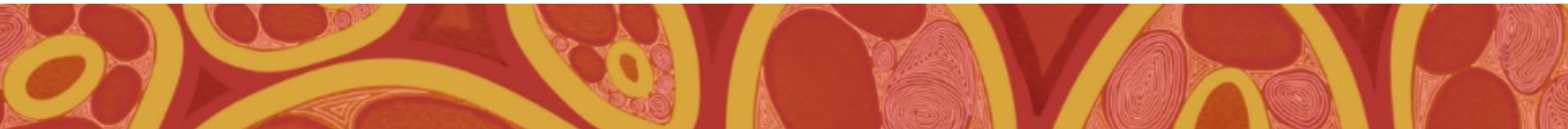
When Can't Police Grant Bail?

- A court has already made a decision on bail for the accused person; or
- Bail has been dispensed with after already appearing in court; or
- If the accused person's been arrested under a warrant to bring the person before a court for sentencing(unless the officer considers there are exceptional circumstances to justify granting bail).
- **Note:**
- If the accused person is under the influence of alcohol or drugs at the time of arrest, the police may defer making a decision on bail, but can't then cause a delay in bringing the person before a court where a Magistrate or Judge can then decide on bail.



How Does Bail Work?

- If bail is refused at the police station, the accused person will be taken to the nearest local court as soon as possible to make a bail application for a Judge or Magistrate to determine bail.
- This will either be on the same day, or the next morning, depending on whether the court is still open by that stage.
- (A Court with a Presiding Judge or Magistrate usually sits from 9:30am to 4:30pm. There is usually a morning tea break from 11:30am-12pm, and a lunch break from 1-2pm. Some courts may decide to sit longer on certain days, depending on the work load).



How Does Bail Work?

- If police end up refusing bail at the police station, and if by that time, court has finished for the day, the accused person will likely be required to stay overnight in custody, and then brought before the court the following day.
- It's always a good idea to be prepared for an urgent bail application before attending the police station, wherever there is an opportunity to do this.
- The court process can take months to years- all the more reason why one would want to be granted bail.



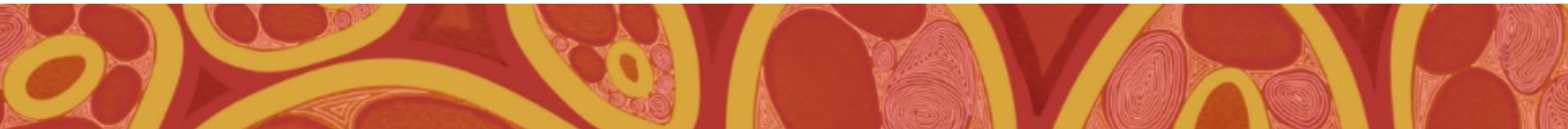
Bail Conditions

- Conditions normally do get imposed if bail is granted- This includes conditions to appear next time in court and not to commit an offence while on bail.
- If the police, or court grants bail, the accused person will receive a bail acknowledgement and then released from custody.
- A bail acknowledgement is a document which provides the details of the Court date in relation to the charge, bail conditions (if any), and explains the consequences of failing to comply with bail.
- The police are required to explain the bail conditions and ensure that the accused person understand them if bail is granted by police at the police station.
- If bail conditions are breached, the accused person can be arrested and taken to court where the court will re-determined bail. The court can then either grant or refuse bail.



Bail Conditions

- The Judge or Magistrate can grant bail either with or without bail conditions.
- The bail conditions are there to allow a court to more safely grant bail if appropriate.
- If bail is granted, the accused person will be released on bail immediately.
- The bail conditions will continue until the case is determined or if the conditions get varied in court.
- There are various types of bail conditions in NSW that a court can impose, including the following:



Bail Conditions

- Reporting condition: To report to the nearest police station on certain days and times of the week.
- Residential condition: To reside at a specified address. Which can be either a home or a residential rehabilitation facility for drugs and alcohol or other.
- Curfew condition: To be inside the specified residence during a specified time frame. i.e. 8pm-8am.
- To surrender passport to police or court.
- Security condition (Bail bond): For an 'acceptable person' (surety) to deposit a certain sum of money or other form of security with the court.



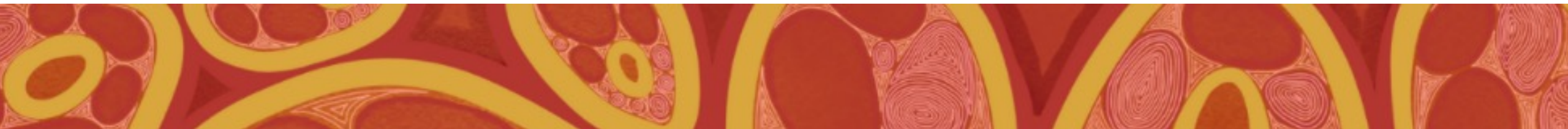
Bail Conditions

- Prohibition with associating with certain specified people.
 - Subject to drug and alcohol tests.
 - Prohibition from going within a specified geographical area.
 - No to approach any point of international departure i.e. airport.
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- Once bail is granted, the accused person will be released from custody after he/she signs the bail undertaking to comply with the bail conditions.



Bail Conditions

- The court can only impose bail conditions that the court considers are safe enough to adequately address the bail concerns.
- The bail conditions the court imposes must be:
 - Reasonable and proportionate to the offence
 - Appropriate to the bail concerns
 - No more onerous than necessary
 - Reasonably practicable for the accused person to comply with
 - There must be reasonable grounds to believe that the conditions are likely to be complied with (these are considered *section 20A factors of the Bail Act 2013 (NSW)*).



How to Get Bail?

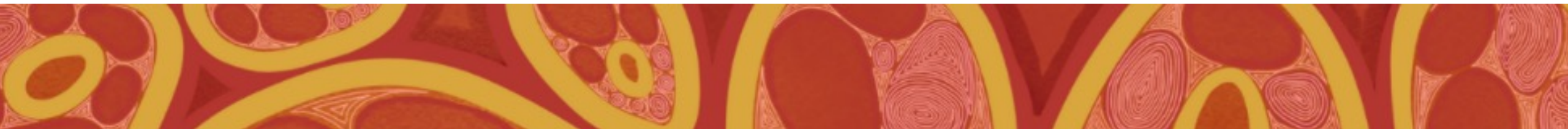
➤ Bail will be granted by a Court if you can satisfy the following two tests in court (NSW):

1. Show Cause Test (only applies if it's a 'show cause' offence)

2. Unacceptable Risk Test

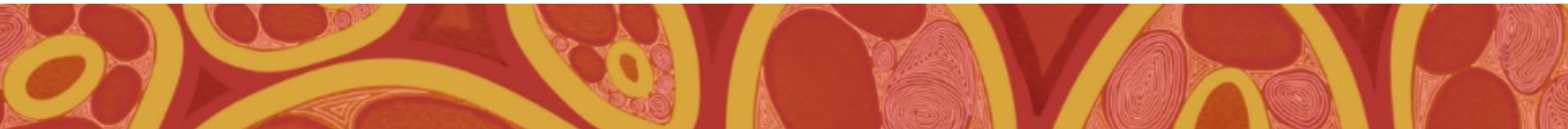
- **How to Pass the Show Cause Test**

- To be granted bail, the 'show cause' test is the first test the court must be satisfied with before moving to the next step (being the unacceptable risk test) in order to be able to grant bail to an accused person.
- The court is only required to be satisfied as to the 'show cause' test if the charge is a 'show cause offence' outlined in *section 16B Bail Act 2013* (NSW).
- The show cause test requires the accused person to 'show cause' or give sufficient reasons to the court as to why it would be unjustified to keep the accused person on remand in jail (without bail) during the court case proceedings.



What is a 'show cause' offence?

- A charge that is punishable by life imprisonment; or
- Certain serious charges (such as a charge of a sexual nature with a minor, or one that involves firearms or weapons); or
- A serious personal violence offence, where you have been convicted previously of the same; or
- Certain drug charges; or
- A charge that is punishable of a term of imprisonment of 5 or more years, and at time of this charge you were on bail or on parole.



What is a 'show cause' offence?

- You committed an offence while on bail (not including simple offences, for example offences punishable by fines only).
- You committed an offence against the Bail Act (most commonly failing to appear in accordance with a bail undertaking or breaching a bail condition in another way).
- You committed an offence while armed with a weapon (including a firearm or explosive).
- You committed certain offences relating to organised crime.
- You committed an offence punishable by mandatory life imprisonment.
- You might also find yourself in a show cause situation if you are charged as being a member of a prescribed organisation, for example an outlaw motorcycle gang.



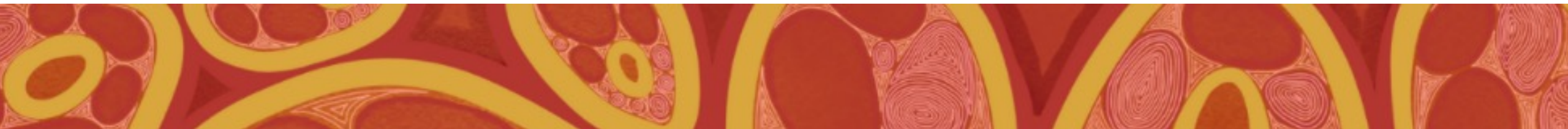
How to Pass the Unacceptable Risk Test (NSW)

- To be granted bail, the unacceptable risk test is considered the second test for the court to be satisfied with in order to grant bail to an accused person who makes a bail application.
- If the charge is a 'show cause offence', then the court will only consider the unacceptable risk test if the first test ('show cause' test) is satisfied first.
- If the charge is not a 'show cause offence' then the court will skip straight to considering the unacceptable risk test, to determine bail.



How to Pass the Unacceptable Risk Test (NSW)

- The unacceptable risk test requires the accused person to convince the court to accept that there are no unacceptable risks associated with granted bail to the accused person.
- How is this done? An experienced bail lawyer or criminal lawyer will need to convince the Judge or Magistrate that the bail concerns can be sufficiently reduced or mitigated after considering the following factors of the accused person's case:
- Current or upcoming job; close relationship with family or partner; criminal history, background
- Strength or weakness of police case



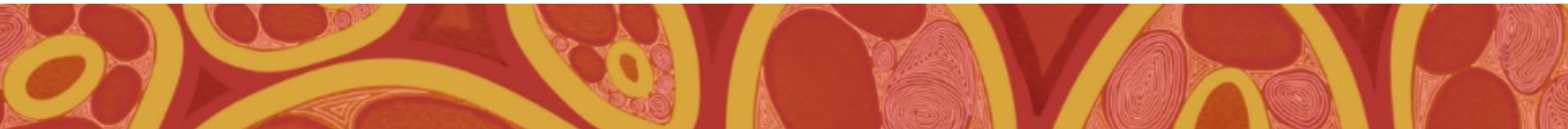
How to Pass the Unacceptable Risk Test (NSW)

- Seriousness and nature of offence
- History of violence
- Whether he/she previously committed a serious offence while on bail
- Whether he/she has previously breached any past bail conditions, AVO's, parole or good behaviour bonds
- If there is an “unacceptable risk”, the court will refuse bail.



Sufficient Reasons

- The bail application should be prepared in a way that best outlines the main reasons why continued detention of the accused person would be unjustified
- Some of the reasons may include outlining:
 - Weaknesses of the police evidence.
 - How long you would end up remaining in jail if refused bail by the time the case finalises.
 - Your special needs, medical or otherwise, that won't be available in jail.
 - Any strong reasons why you need to remain in the community, including to prepare your case, attend a rehabilitation program (in-patient or out-patient basis).



Section 18 factors (NSW)

- In convincing the court why your continued detention is not justified, you should be prepared to address the court on the following main points referred to as section 18 factors:
 - Your criminal history, your background, community ties
 - The weakness or strength of the police case so far
 - The seriousness of the alleged offence
 - Whether you have a history of violence and whether you have previously committed offences while on bail, or any history of not complying with court orders
 - Whether you have any criminal associations
 - Likely period you will end up spending in prison if refused bail pending your court case
 - Likelihood of you getting a prison sentence if found guilty and sentenced in court later
 - Any vulnerability or needs you have i.e. being aboriginal, your youth, mental health issues or other health problems
 - Need to be free for other reasons, including prepare your case with your lawyer



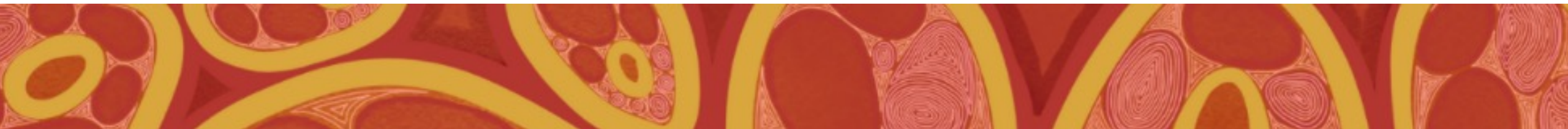
‘Right to Release Offence’?

- For certain offences, the court is not allowed to refuse bail. If an accused person is faced with an charge considered to a “right to release offence”, bail must be granted.
- A ‘right to release offence’ means, the court must grant bail if an accused person is charged with this type of offence in NSW.
- The court *must* grant bail if the accused person is charged with any one of the following right to release offences:
- A fine only offence- These are offences that do not carry a jail sentence.
- A summary offence- An offence under the *Summary Offences Act 1988* (NSW), other than an *excluded offence*.



An excluded offence includes:

- Offence of obscene exposure if you have previously been convicted for that offence.
- An offence of violent disorder if you have previously been convicted for that offence or of a personal violence offence
- An offence relating to knives and offensive implements if you have previously been convicted for those offences or of a personal violence offence.
- An offence of custody or use of laser pointer in public place.
- An offence of loitering if you are a convicted child sexual offender near premises frequented by children.
- An offence being dealt with by conference under part 5 of the *Young Offenders Act 1997* (NSW)
- If charged with a *right to release offence*, the court can refuse bail if the accused person has previously failed to comply with a bail condition/bail acknowledgement for a right to release offence.



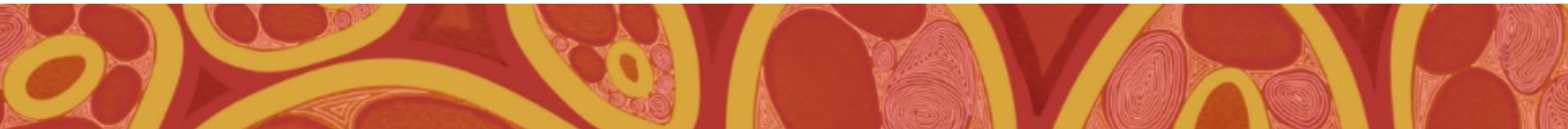
Breach of Bail

- A failure to attend court when required to under a bail condition, without reasonable excuse carries a maximum penalty of 3-years jail and/or \$3,300 fine.
- The maximum penalties are rarely imposed by courts, especially for first-time offenders
- If an accused person simply forgot to or was too sick to report at the police station, strict action by police can be avoided simply by calling and letting the police station know as soon as possible afterwards.
- If unable to report due to medical condition, the accused person can provide police with a medical certificate to avoid further action being taken.



Breach of Bail

- If bail conditions are breached, police can do any one of the following:
- Take no action
- Issue a warning
- Issue a notice requiring the accused person to attend court
- Issue a court attendance notice –if he/she failed to appear in court
- Arrest the accused person (without a warrant), and then take him/her to court as soon as possible
- Seek an arrest warrant and arrest the accused person before taking him/her to court as soon as possible.



Breach of Bail

- Which one of those 6 options police take in the event of a breach of a bail condition will depend on:
- The seriousness of the breach
- Whether there was a reasonable excuse for the breach
- Personal circumstances of the accused person; and
- Whether the police officer can take another option other than arrest.



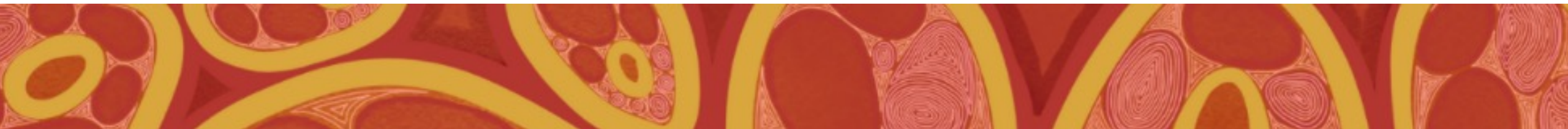
Breach of Bail

- If police decide to arrest the accused person following a breach of bail, the accused person will be taken to court as soon as possible where the Judge or Magistrate can re-determine bail.
- At court, he/she can provide the court with an explanation on why bail was breached in order to persuade the Judge/Magistrate to grant bail again either with the same or amended bail conditions.
- If bail is refused, the accused person will remain in custody for the entire court case unless another bail application is made and granted later.
- Any security bond or bail bond money that was deposited by a surety can then be forfeited to the court.



How to Change Bail Conditions

- Sometimes it is far too difficult, impossible or simply unnecessary to continue complying with certain bail conditions. This might be as a result of a change of circumstances i.e. new job or change of residence or health factors.
- An accused person who is out on bail can change or delete the bail conditions, but it must and can only be done by going to court for an order with sufficient grounds.
- To vary or change bail conditions, the following steps must be taken first:



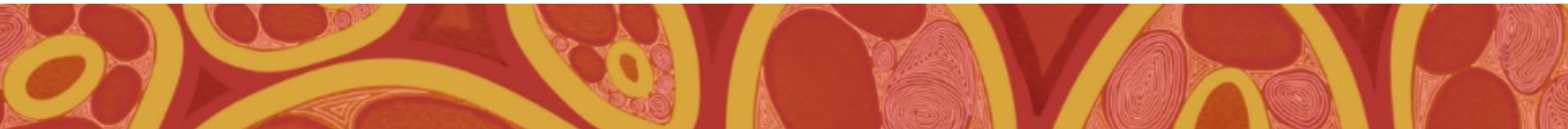
How to Change Bail Conditions

- Complete and lodge a variation of bail form with the Local Court. This will outline the bail conditions sought to be changed.
- Serve a copy of that form to the other side (prosecution/Office in Charge)
- The court will then list the bail variation hearing in court.
- The accused person is required to attend court where the Magistrate or Judge will hear the application. The prosecution may consent or oppose the variation.
- Court will decide whether or not to vary the bail conditions.
- Bail conditions should be practical and appropriate for the situation.
- *Section 51 Bail Act 2013* allows the court to vary, change or delete bail conditions



How is a Bail Application Made in Court

- At the hearing of a bail application, the police prosecutor will hand a police facts sheet and a copy of the accused persons' criminal record to the Court at the beginning of the bail application.
- The police facts sheet will provide reasons as to why the police have charged the accused person and the circumstances of the alleged offence. it's important to remember that these are allegations, and are not proven.
- Documents may also be handed up to the court on behalf of the accused person in support of the bail application to be granted.



How is a Bail Application Made in Court

- After reading both sides of the material/evidence, the court will hear from the prosecutor who will either oppose or consent to bail.
- If the police prosecutor is of the view that the accused person should remain in custody, he/she will make submissions to the court outlining the reasons why bail should be refused.
- Sometimes the prosecutor will consent to granting bail. The court will still make the ultimate decision as to whether or not to grant bail.
- If the prosecutor consents to granting bail, it generally increases the chances of the court granting bail too.



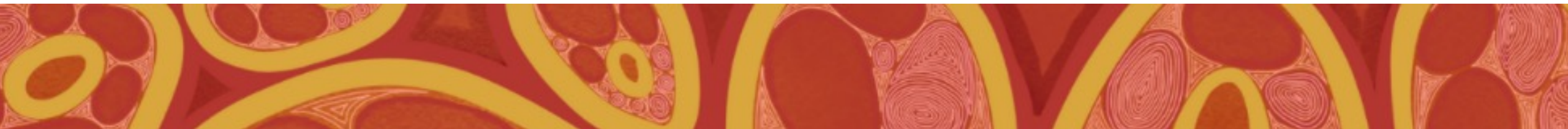
How is a Bail Application Made in Court

- The accused person's lawyer will then give submissions to the court as to why bail should be granted.
- Here, the aim is to outline to the court why bail should be granted with evidence to back up everything that is said by the lawyer for the accused person.
- Each of the court's bail concerns should be addressed by the accused persons' lawyer to the court so that the court can have enough confidence in granting bail.
- Once all of the submissions and material have been considered, the court will make a bail determination to either grant or refuse bail.
- If enough evidence can be produced to show why there is no unacceptable risk in releasing the accused person on sensible bail conditions, then bail is more likely to be granted by a court



Second Bail Application

- Can an accused person do if initially refused bail? Can a second bail application be made?
- Yes. *Section 74 Bail Act 2013* allows for a second or subsequent bail application if:
- There is a change of circumstances since the last bail application; or
- The accused person didn't have a lawyer during the last bail application, and now does; or
- New material or evidence has come to light since the last bail application.
- If refused bail in the Local Court, in some cases there will be higher chance of getting bail on the second go in the Supreme Court.



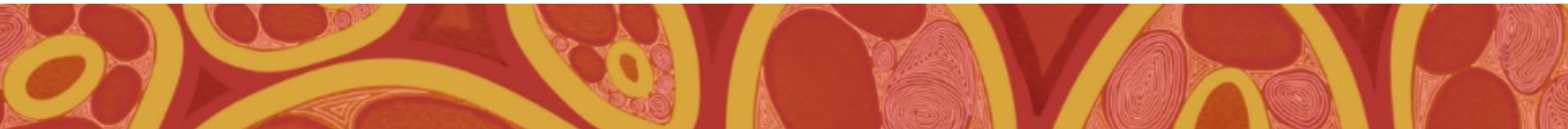
Supreme Court and Bail

- Supreme Court bail is usually the last attempt and final try at making a bail application after having failed to get bail in the Local Court.
- A Supreme Court bail application can only be made after you've first tried and failed to get bail in the local court.
- The Supreme Court is the highest court in NSW, and the second highest court in Australia, sitting below the High Court of Australia (the highest court).
- A very experienced Justice/Supreme Court Judge sits in a Supreme Court bail application who will carefully read through the bail application before making a final decision about bail for an accused person.



Supreme Court and Bail

- In a Supreme Court bail application, the accused person will normally appear in court via an Audio-Visual Link(AVL) where he/she will be able to talk, hear and see everything during the bail application.
- The good news is, that a different Judge will hear the Supreme Court bail application, who will look at the application afresh. This can increase the chances of getting bail if new material is produced.
- You only get one shot at applying for a Supreme Court bail application unless you can show there are further grounds for a second application in the way outlined earlier under section 74.



Supreme Court and Bail

- It's important to be aware of the Supreme Court procedures for filing a Supreme Court bail application.
- When filing for a Supreme Court bail application at the Sydney Supreme Court, you're required to first complete and submit the following documents with the Court (which can be done online via email):
 - Supreme Court Bail Application Form
 - Proposed bail conditions
 - Written submissions/arguments
 - Any affidavit evidence in support
 - Any report in support
 - Any character references in support
 - If a bail bond is offered for bail (also known as a security from a surety), then a consent letter from the surety should also be attached.
 - If this is the second Supreme Court bail application, written submissions outlining the basis for the court to hear the application a second time should be attached.



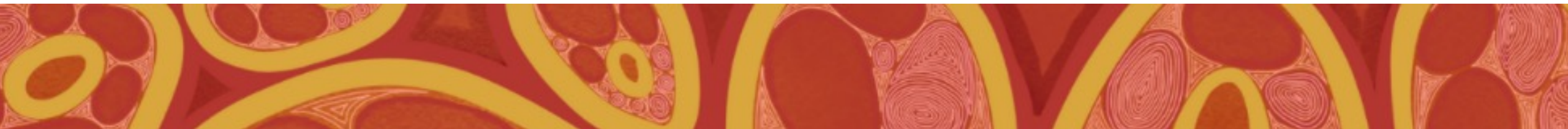
Supreme Court and Bail

- In addition to the above, a copy of the above documents must also be served to the Director of Public Prosecutions, surety and anyone whom has agreed to allow the accused person to reside with him/her if bail gets granted.
- Once the above is done, the Supreme Court will then give you a court date called a call-over when the case will be first listed to determine how long the bail application will take and to ensure all parties are ready.
- If all parties are ready, the Court will then list the Supreme Court bail application for hearing on another day.
- On the day of the hearing, the Judge/Justice will preside in the Court to hear the bail application.
- After hearing both sides of the evidence and arguments, the Court will end up deciding whether or not to grant bail after going through the 'show cause' test (if applicable) and the 'unacceptable risk' test.



Case Study

- The case of *R v Melmeth [2015] NSWSC 1762* is an example of a Bail Act 2013 Show Cause Offence situation whereby cause was shown, and bail granted.
- The case involved a 30-year-old female, Ms Melmeth, who was charged with Intent to Cause Grievous Bodily Harm and Detain in Company. She had been held in custody 6 months prior to making a Bail Application.
- Due to the nature of the offence, Ms Melmeth was required to show cause as to why being held in custody was not justified.



Case Study

- **Evidence of her serious ill health:** Ms Melmeth has Type 1 Diabetes and during the course of 6 months in custody, there were no attempts made to treat her condition.
- Dr's letters were relied upon to show the seriousness of her illness, however she provided evidence that she experienced blurred vision, slurred speech, dizziness and serious physical symptoms on a daily basis.
- The argument was that the treatment she required could not be adequately addressed in prison and was causing a serious decline in her health.



Case Study

- **Stringent bail conditions:** Strict bail conditions were proposed to be placed upon her.
- Some of those included, daily reporting, to live with her father, a strict curfew, not to drink or take drugs, be subject to regular drug and alcohol testing and not to associate with the co-accused or victim.

