SUPREME COURT OF QUEENSLAND

CITATION:	*Re HSJ* [2020] QSC 241
PARTIES:	**HSJ** (applicant) **v** **DIRECTOR OF PUBLIC PROSECUTIONS (CTH)** (first respondent) **DIRECTOR OF PUBLIC PROSECUTIONS (QLD)** (second respondent)
FILE NO/S:	BS No 7724 of 2020 BS No 7988 of 2020
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	7 August 2020
DELIVERED AT:	Brisbane
HEARING DATE:	4 August 2020
JUDGE:	Bradley J
ORDER:	**I will hear from the parties as to the form of the orders that should be made.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – BAIL – BEFORE TRIAL – GENERALLY – where the applicant is charged with one count of breaching a restraining order and eight counts of using a carriage service to menace, harass or cause offence, as well as summary offences – where the applicant submits that, having been held on remand for 341 days, he is at risk of spending too much time in custody if he is not granted bail – where the respondents submit there is a significant risk that the applicant will fail to appear if granted bail, because of his prior convictions for breaches of bail conditions, absconsion from the jurisdiction while on parole and subject to a notice to appear, limited ties to the jurisdiction and contemptuous view of the judicial process – whether the risks the respondents identified are capable of amelioration such that the applicant's continued detention is not justified *Bail Act* 1980 (Qld), s 11, s16 *Carew v Director of Public Prosecutions* [2014] QSC 1, cited *El Nasher v Director of Public Prosecutions (Vic)* [2020] VSCA 144, cited

R v Hampson [2011] QCA 132, distinguished

COUNSEL: The applicant appeared on his own behalf
D Whitmore for the Director of Public Prosecutions (Cth)
R Guppy-Coles for the Director of Public Prosecutions (Qld)

[1] The applicant seeks bail in respect of a number of alleged offences. The Commonwealth Director of Public Prosecutions (**CDPP**) has presented two indictments in the District Court at Brisbane, containing a total of eight counts, each alleging a breach of s 474.17(1) of the *Criminal Code* (Cth). He is also charged with committing 11 contraventions of the *Civil Aviation Safety Regulations* 1998 (Cth). These summary charges are pending in the Brisbane Magistrates Court. Finally, he faces one summary charge of breach of a restraining order contrary to s 359F(8) of the *Criminal Code* (Qld) (the **State offence**), also pending in the Brisbane Magistrates Court.

Background

[2] On 25 January 2018, the applicant was convicted in the Richlands Magistrates Court on a charge of unlawful stalking and some other summary offences. The stalking charge complainant was an investigator with the Office of Fair Trading (the **OFT officer**). The applicant was sentenced to six months' imprisonment, suspended from the date of sentencing for a period of five years. The applicant had served seven days in pre-sentence custody.[1] The Court also made a restraining order. It imposed a number of conditions on the applicant, including that he not post anything on the internet or in a public place about the OFT officer. The restraining order also required the applicant to remove any content on the internet or in a public place relating to the OFT officer. The restraining order has effect until 24 January 2023.

[3] On 18 January 2019, police executed a search warrant at the applicant's home seeking evidence the applicant possessed weapons and dangerous drugs.

[4] On 1 April 2019, police executed another search warrant at the applicant's home. The warrant arose from "an unrelated matter" according to the proposed statement of facts prepared by the CDPP. During the search, police seized mobile telephones, CCTV systems and computers. That day the applicant was arrested and charged with breach of the restraining order. It was alleged that he posted content about the OFT officer on his website and on YouTube. He was remanded in custody.

[5] On 12 June 2019, the applicant pleaded guilty to that charge in the Richlands Magistrates Court. He was sentenced to four months' imprisonment and, having served 79 days in pre-sentence custody, he was granted immediate parole.[2] The content about the OFT officer was removed from the applicant's website.

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1 It appears the applicant was received into custody on 19 January 2018. On a summary charge for having barbed wire along the top of his brick fence, he was convicted and sentenced to three months' imprisonment, also suspended for five years. He was convicted of some summary drug-related charges, for which he was not further punished.

2 He was also sentenced for nine months imprisonment for unlawful possession of a weapon (found in the 18 January 2019 search) and released on immediate parole. This parole period would have continued until about 24 October 2019. There were lesser two month and one month sentences for

[6] On 26 June 2019, the applicant was served with two complaints and summonses, issued by the Brisbane Magistrates Court, alleging a total of seven Commonwealth offences against s 474.17(1) and issued with notices to appear at the Brisbane Magistrates Court on 29 July 2019. Five are allegations that, on 31 March 2019, the applicant used the secure messaging application "Signal" on a mobile telephone to send file sharing links to five other Signal users.[3] The messages instructed the recipients not to share the link by text, but to use variously Signal, Wickr or "secret text" only. Two of the messages suggested the recipients "Check it out", one suggested the recipient "Try to get people to share it around", and another that they "Try to get it out". It is alleged the linked file is an edited video of the shooting at a Christchurch mosque, which had occurred on 15 March 2019, a little over two weeks before. The alleged content of the video is quite distasteful, apparently rendering the shooting as a video game with points scored for persons killed by the shooter, with a soundtrack as well as voice-overs, including statements about the decline of Europeans and the potential for a reaction to threats to Europeans.

[7] By the separate summons two further breaches of s 474.17(1) are alleged to have been committed on 31 March 2019. .

[8] On 5 July 2019, in breach of his parole granted on 12 June 2019, the applicant left Queensland for Kingscliffe, New South Wales. He stayed there until 27 or 28 August 2019. His parole was suspended on 5 July 2019 and cancelled on 9 July 2019. A return to prison warrant was issued for the arrest of the applicant.

[9] On 29 July 2019, the applicant, being outside of the State, failed to appear in accordance with the notices given to him on 26 June 2019. 16 August 2019 was set as the date for a further appearance. On that occasion, the applicant again failed to appear and a warrant was issued for his arrest.

[10] On 28 August 2019, the applicant was arrested by NSW police at Tweed Heads and extradited to Queensland, where he was charged with the State offence. This charge alleges that the applicant posted content about the OFT officer online between 5 July 2019 and the date of his arrest. The applicant was remanded in custody in respect of the State offence.

[11] On 18 September 2019, the applicant sought bail in respect of the State offence in the Brisbane Magistrates Court. It was refused.

[12] On 19 September 2019, the applicant was committed to prison for contempt, following a hearing in this Court before Douglas J. The contempt related to the posting of statements about the Queensland Magistracy on two websites and on a Google drive electronic storage system. According to his Honour's reasons, the application particularised the public contemptuous statements as carrying "the implication that identified Magistrates – the Magistracy generally and female Magistrates – as not conducting proceedings in accordance with the law, as being

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drug-related and ammunition-related offences. All sentences were to be served concurrently.

[3] According to the police deponent, these messages were discovered during a forensic examination of a mobile telephone seized on 1 April 2019 during the execution of the search warrant at the applicant's home. The date of the forensic examination is not disclosed.

incapable of properly performing their judicial functions impartially, as being dishonest and not worthy of respect, as improperly exercising judicial power, as being involved in a criminal conspiracy with Auscript and other government agencies to pervert the course of justice, as conducting secret trials, as being corrupt and as being deceitful". Douglas J sentenced the applicant to imprisonment for nine months and ordered the applicant, after his release from custody, to immediately and permanently remove all contemptuous statements from the websites identified in the application and the Google drive electronic storage system.

[13] On 22 October 2019, the applicant again sought bail in respect of the State offence in the Brisbane Magistrates Court. As he was then serving his custodial sentence for contempt, the second bail application seems to have been somewhat quixotic. It was refused.

[14] A pre-sentence custody certificate exhibited to an affidavit filed and read by the Office of the Director of Public Prosecutions (**ODPP**) records that the applicant was sentenced on 9 December 2019 to six months' imprisonment "for Revocation of Recognisance Order", as a Commonwealth offence.

[15] On 12 May 2020, the applicant, still in custody, was served with a complaint and summons for the final set of Commonwealth offences, which had been filed in and issued by the Brisbane Magistrates Court. The eleven charges each relate to the operation of a model aircraft. It is alleged these offences were committed between 27 December 2017 and 14 July 2018, so that they predate all of the other pending counts and charges. No submission was put to the effect that the applicant ought to be detained in custody in respect of these offences. They are summary offences for each of which the maximum penalty is 50 penalty units. Given their nature, there are of no practical significance for a decision on whether to grant the applicant bail.

[16] On 14 July 2020, the CDPP presented a two-count and a six-count indictment in respect of contraventions of s 474.17(1) of the *Criminal Code* (Cth). Save for one, all counts had previously been the subject of the two complaints and summonses in the Brisbane Magistrates Court in June 2019.[4]

[17] One count on the longer indictment is different. The presentation of the indictment appears to have been the first time the CDPP alleged this offence. According to the police deponent, on 13 and 19 July 2019 and again on 3 August 2019, police reviewed a website allegedly owned or controlled by the applicant. On each occasion, police located on the website a copy of a manifesto by the Christchurch shooter. The count alleges the offence was committed between 12 July and 4 August 2019. No explanation was offered for the delay in charging the applicant with this offence.

[18] On 17 July 2020, the applicant completed serving his custodial sentences. Since 18 July 2020, he has been held only on remand in respect of the State offence and does not have bail for the Commonwealth offences the subject of the two District Court indictments.

Present bail application(s)

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[4] As noted above, at that time the applicant had been given notices to appear. He had not been arrested or detained in respect of those alleged offences.

[19] On 17 July 2020, the applicant filed an application for bail. The application was dated 30 June 2020. On 24 July 2020, the applicant filed a further application for bail dated 12 July 2020. This duplication may have been either inadvertent or the result of some doubt about the efficacy of the first application or about it reaching the Court registry.

[20] Both applications were dealt with at an oral hearing on 4 August 2020. The applicant appeared in person by video link. Mr Whitmore of counsel appeared for the CDPP and Ms Guppy-Coles appeared for the ODPP.

[21] The indictments and the summary charges are not pending in this Court. However, pursuant to s 10(1) of the *Bail Act* 1980 (Qld), the Court may grant bail to a person held in custody on a charge of an offence or in connection with a criminal proceeding pending in other courts.

[22] The CDPP opposed a grant of bail on the ground that there was an unacceptable risk that, if bail were granted, the applicant would fail to appear and surrender into custody, would endanger the safety or welfare of another person, or would commit further offences. The ODPP opposed bail on the same grounds.

[23] If satisfied the ground is established, the Court would refuse to grant bail pursuant to s 16(1)(a) of the *Bail Act*, which relevantly provides:

> "**16 Refusal of bail generally**
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> (1) Notwithstanding this Act, a court or police officer authorised by this Act to grant bail shall refuse to grant bail to a defendant if the court or police officer is satisfied—
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> (a) that there is an unacceptable risk that the defendant if released on bail—
>
> (i) would fail to appear and surrender into custody; or
>
> (ii) would while released on bail—
>
> (A) commit an offence; or
>
> (B) endanger the safety or welfare of a person who is claimed to be a victim of the offence with which the defendant is charged or anyone else's safety or welfare;"

[24] Also relevant to the application is s 16(3), which provides:

> "(3) Where the defendant is charged—
>
> (a) with an indictable offence that is alleged to have been committed while the defendant was at large with or without bail between the date of the defendant's apprehension and the date of the defendant's committal for trial or while awaiting trial for another indictable offence; …

> the court … shall refuse to grant bail unless the defendant shows cause why the defendant's detention in custody is not justified and, if bail is granted …, must include in the order a statement of the reasons for granting bail or releasing the defendant."

[25] The applicant is in a "show cause" situation because on 14 July 2020 he was charged with the sixth count on the longer District Court indictment, which he is alleged to have committed between 12 July 2019 and 4 August 2019. Between those dates, he was at large without bail in respect of the other counts on the indictments, the subject of complaints and summons served on 26 June 2019. He must show why his continued detention is not justified.

[26] It follows that, although not necessarily sufficient to obtain bail, in the language of s 16(1)(a), the applicant must show that there is not an "unacceptable risk" that he would fail to appear at trial or that in the meantime he would commit an offence or endanger the safety or welfare of a person.[5] The *Bail Act*, by s 16(2), further assists in directing the Court's consideration in respect of unacceptable risk:

> "(2) In assessing whether there is an unacceptable risk with respect to any event specified in subsection (1)(a) the court … shall have regard to all matters appearing to be relevant and in particular, without in any way limiting the generality of this provision, to such of the following considerations as appear to be relevant—
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> (a) the nature and seriousness of the offence;
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> (b) the character, antecedents, associations, home environment, employment and background of the defendant;
>
> (c) the history of any previous grants of bail to the defendant;
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> (d) the strength of the evidence against the defendant;"

[27] Whether there is an acceptable or an unacceptable risk is a matter of fact and degree. All the relevant matters, including those in ss 16(2)(a) to (d), must be considered and accorded appropriate weight. As the Victorian Court of Appeal noted recently, "[t]he end result will be a product of an informed, intuitive evaluation, and reasonable minds may well differ on that result".[6]

[28] The imposition of conditions for the release of a person on bail can operate to make an otherwise unacceptable risk an acceptable one. Of course, where it is appropriate to fix such conditions, the Court is not to make the conditions more onerous for the person than those that in the opinion of the Court are necessary, having regard to the nature of the offences, the circumstances of the defendant and the public interest.[7]

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5 *Carew v Director of Public Prosecutions* [2014] QSC 1 at [5] (Byrne SJA).

6 *El Nasher v Director of Public Prosecutions (Vic)* [2020] VSCA 144 at [51] (Priest, T Forrest and Weinberg JJA).

7 *Bail Act*, s 11(1).

[29] With particular relevance to the risks identified by the CDPP and the ODPP, the Court may impose appropriate special conditions for release on bail where the Court considers them necessary to secure that the person appears and surrenders into custody in accordance with the bail, and, while on bail, does not commit an offence, or endanger the safety or welfare of members of the public.[8]

The applicant's submissions

[30] The dominant theme of the applicant's submissions was that the maximum penalty for each of the Commonwealth offences alleged in the two indictments was three years' imprisonment, and the maximum penalty for the State offence of breaching a restraining order was one year imprisonment. Given these relatively modest maximum penalties, the applicant contended that, if convicted of each offence, the sentencing Courts would take into consideration the fact that he has been held on remand for a total of 341 days. The applicant submitted that there was a real risk that, if not granted bail, he would spend more time in custody on remand than he was liable to serve for sentences that might be imposed for his alleged offending. These are relevant considerations arising from the nature and seriousness of the offences with which the applicant is charged.

[31] There is considerable force to this submission.

[32] According to the pre-sentence custody certificate, of the 341 days the applicant has spent on remand only 17 days are declarable as pre-sentence custody pursuant to s 159A of the *Penalties and Sentences Act* 1992 (Qld). This may be due to the suspension and cancellation of his parole and the period he served for contempt. These aspects of his time on remand might be considered in light of the practical reality that they are related in time and substance. The applicant's very foolish decision to leave the State in breach of his parole conditions appears to have been triggered by the charging of the applicant with seven of the Commonwealth offences by two separate summonses on 26 June 2019. His contempt predated those charges. It seems to have concerned his experience in the Magistrates Court with respect to the stalking charge and restraining order. With the benefit of hindsight, it might be considered that the applicant lost his sense of propriety, judgment and even his connection to reality in the course of reacting to the investigation by the OFT officer and all that followed that process, including multiple police searches of his home and multiple charges being preferred over the ensuing time periods.

[33] The applicant's lack of perspective about his offensive behaviour and his unbalanced judgment may be evidenced in a lengthy handwritten letter to his brother, sent shortly after he was sentenced for contempt. In that letter, he sought to enlist his brother in a process of attracting further attention to online posts which had been the reason for that sentence. He expressed his annoyance and frustration that an earlier letter, in which he had apparently offered to remove the contemptuous material from the internet, had not been passed on by the prison authorities until after he had been sentenced. The applicant concluded his letter in these terms:

> "I made some tactical errors this year but I have a clear concience [sic]. I am not a crook and I am doing the right thing. If I could take it back I would but I'm here now and I must move forward and deal

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8 *Bail Act*, s 11(2).

> with it. Pls help me get this shit fixed and I'm leaving the game after this. I need a break and so do you. Thanks for what you've done and all you will do. I'll make it up to ya one day. Worst case scenario I'll serve the time and like Earl Turner: it will only harden my resolve."

[34] The applicant's demeanour at the hearing and the measured and logical presentation of his submissions indicates that he may have avoided the "Worst case scenario". He has served his sentence for contempt and the balance of his sentence for breach of the restraining order, but he appears to have reformed (rather than hardened) his attitude to the Court and to his past offending conduct.

[35] He wishes to put to the District Court his arguments about the material the subject of the two indictments. He wishes the court to consider whether the private secure communication of information and opinions that might (objectively) be offensive is within the scope of s 474.17(1) of the *Criminal Code* (Cth) or whether it is protected by a right to freedom of expression or private communication. He submitted that no person complained that they had been menaced, harassed or offended by any of his relevant conduct. The Commonwealth did not contest this submission. Mr Whitmore explained to the Court that the relevant offences turned upon whether the applicant's use of the carriage service was objectively offensive, so that an actual complainant was unnecessary. For the purposes of this application, I do not cavil with Mr Whitmore's submission. However, I take the absence of a complaint into consideration for the purposes of assessing whether the risk of the applicant re-offending in this way is or is not unacceptable. In recent times, there has been an increasing trend for persons to take offence at online conduct. This makes the absence of any complaint more significant in the assessment of this risk.

[36] The applicant disavowed any intention to commit any further breach of the restraining order. He said the re-posting of content about the OFT officer occurred because he asked his website hosting service to assist with problems he was experiencing with the website, while he was "on the lamb" in NSW. The hosting service was unwilling to provide any substantial assistance, because the applicant was not paying for a higher level of service. However, the hosting service did seek to assist the applicant by reloading the website from a back-up. In this way, according to the applicant, the material he had previously removed from the website came to be posted again, including that about the OFT officer. This explanation may or may not be accepted when the State offence is determined by the Magistrates Court. For present purposes, it has relevance as part of the applicant's explanation for why he is unlikely to re-offend, now that the website has been taken down and the contract with the hosting services has ended.

[37] He submitted that he surrendered to NSW police on 28 August 2019, after seven and a half weeks in Kingscliffe with his family. He was arrested, extradited and has remained in custody since that time. He urged the Court to accept that he had learned his lesson about such foolish and unlawful conduct. The applicant explained that his leaving the State on 5 July 2019 was the result of a serious lapse of judgment, triggered by being charged with the Commonwealth offences on 26 June 2019.

[38] The applicant submitted he had no intention of re-offending. He explained that the sentence of nine months' imprisonment for contempt had made clear to him the

significant consequences that may follow breaches of the law in the online realm. The applicant's submissions in this respect appeared to be genuine. The applicant's submissions accord, in part, with the purpose of sentencing in this State, namely to deter offenders from repeating their unlawful conduct.

[39] At the present time, the opportunities for the applicant to abscond inter-State or overseas are much more constrained than they were in mid-2019.

[40] The applicant was content to undertake to comply with a range of bail conditions that would ameliorate the risk of him failing to appear. He was also willing to accept other stringent conditions directed to the risk he might reoffend or affect the safety or welfare of the OFT officer or the investigating police officers, who were the only persons identified as being at any possible such risk.

Respondents' submissions

[41] Mr Whitmore for the CDPP submitted that, given the applicant's criminal history, it is likely that the applicant would receive a sentence involving a period of actual imprisonment if he were convicted of any of the Commonwealth offences. As well, Mr Whitmore indicated possible aggravating circumstances of the alleged offending. Seven of the counts on the District Court indictments are alleged to have been committed during the operational period of a suspended sentence and during the good behaviour period of a Commonwealth recognizance release order. Mr Whitmore contended that the remaining count is alleged to have been committed while the applicant was on parole.[9]

[42] When pressed by the Court, Mr Whitmore offered as a "yardstick" the suggestion that, if convicted of the counts on the District Court indictments, the applicant might be sentenced to two years' imprisonment with parole or a suspension of sentence after serving eight months in custody. The only decision identified in submissions was *R v Hampson*.[10]

[43] According to Mr Whitmore, the matters relevant to a risk that the applicant might fail to appear may be summarised as follows:

(a) the applicant has three previous convictions for breach of bail conditions, requiring him to report;

(b) within a short period of time after his release from custody on 12 June 2019, and while on parole and having been served with a notice to appear, the applicant absconded to New South Wales on 5 July 2019, remaining there until he was arrested and extradited on 28 August 2019;

(c) while in New South Wales, the applicant wrote to the Brisbane Magistrates Court advising he was refusing to attend the court because Queensland Courts were, in his view, corrupt and he would not receive a fair hearing;

(d) the applicant has, in the past, been found in possession of multiple false identity documents in the form of drivers licences in other names;

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9 I am not certain this is correct. The applicant's parole appears to have been suspended on 5 July 2019 and cancelled on 9 July 2019. He is not alleged to have committed this offence until 12 July 2019. Of course, the true position is not better for the applicant.

10 [2011] QCA 132 (***Hampson***).

(e) the applicant has limited ties to the jurisdiction, as his wife left Australia in September 2019;[11] and

(f) in his bail application material, the applicant stated that he did not hold a current passport, but enquiries with the Australian Passports Office confirmed that he does hold a current Australian passport.

[44] In respect to the risk to the safety or welfare of another person, Mr Whitmore identified that in a video the applicant posted to the internet, images of the police officers carrying out a search of his home were annotated with "rope nooses" around their heads. He submitted this was a "veiled threat" to harm the police officers.

[45] Mr Whitmore identified that the stalking conduct towards the OFT officer had involved persistent telephone calls, text messages, emails, online blog posts seeking personal information about the OFT officer (including her whereabouts) and the placing of "Wanted" posters with an image of the OFT officer online and in public places. He said the applicant had a conviction in 2009 for discharging an air rifle on his property into the wall of a neighbouring shed.

[46] The CDPP's six-count indictment has not been listed for trial. It is listed for mention in the District Court on 7 August 2020. The two-count indictment is listed as the second matter for trial in the week commencing 30 November 2020.

[47] Ms Guppy-Coles for the ODPP adopted the submissions put by Mr Whitmore for the CDPP. Her submissions drew attention again to the police officers as persons whose safety and welfare might be endangered by the release of the applicant on bail. At the Court's request, Ms Guppy-Coles produced a draft of conditions that might attach to a grant of bail to the applicant.

The applicant's reply

[48] The applicant explained that he is no longer "online". His domain registrations and websites have expired. The persistent stalking conduct towards the OFT officer was now somewhat dated.

[49] The applicant acknowledged his past breaches of bail in respect of reporting. These, he said, were minor.

[50] He explained that he now proposed a residential address with a former employer at Rochedale South. He could also work from that address as an electrician. He would rather work on his own account in that trade. The applicant is an electrician, who earned his income in his own electrical business. If released on bail, the applicant intends to resume that trade.

[51] The applicant submitted he was not aware that the Christchurch shooter's manifesto (which he described as a "rant") was on his website until he was charged. He contended that another person must have posted it. No firm view may be reached on that question in this application.

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[11] In a letter to his brother written in about September 2019, the applicant refers to his wife having returned to Russia. For the purpose of this application, I have assumed that the applicant's four year old child is with her mother, wherever she may be, outside of Australia. Aside from his brother, there is no evidence that the applicant has any other personal ties to the State.

[52] He explained that he had been a licensed weapon owner for more than ten years, without serious breaches. I note that no conviction was recorded for any offence of discharging a weapon.

[53] The applicant submitted that his alleged offences were of a lesser gravity than those in *Hampson*. He had not made any threats to any person.

[54] The applicant also submitted that the delays in bringing the charges and in progressing them to a hearing were unreasonable and unexplained.

[55] He indicated he was willing to accept a range of bail conditions, set out in the draft produced by Ms Guppy-Coles. Some of the draft conditions, he contended, were not appropriate, but the vast majority were acceptable.

Consideration

[56] The applicant's past conduct flags him as a possible flight risk. So does the absence of his immediate family from the country. However, the available and appropriate bail conditions are sufficient to ameliorate the risk that the applicant might fail to appear when required in respect of his outstanding counts and charges.

[57] Aside from the stalking conduct the subject of the January 2018 conviction, the evidence before the Court is that the applicant's past conduct, while objectively foolish, offensive, derogatory and unbalanced, has not amounted to conduct that could be said, of itself, to have endangered the safety or welfare of any person. The egregious stalking conduct is now somewhat dated. The applicant's resolve not to reoffend, in that and other respects, appears genuine.

[58] Further bail conditions might appropriately ameliorate any risk on that account.

[59] In *Hampson*, the appellant posted a number of offensive pictures and comments of an explicit sexual and macabre nature on Facebook tribute pages for two dead children. On appeal, the conduct was found to be extremely serious, but not within the worst category of cases for which the three year imprisonment penalty is provided. Muir JA, with whom White JA agreed, accepted as correct the submission that past s 474.17(1) cases "revealed, at least as a general proposition, that custodial terms of imprisonment were imposed only on offenders whose conduct was threatening or which caused genuine fear".[12] His Honour observed that in a case involving direct threats of harm by messages on the complainant's Facebook profile, a sentence of six months' imprisonment was described as "severe and at the upper end of an acceptable range".[13] The longest sentence identified by Muir JA was 12 months' imprisonment for conducting involving 42 lengthy calls to each of two women, causing considerable distress to the victims who suffered severe stress and deteriorating health.[14] The Court of Appeal set aside the sentence of three years' imprisonment for the s 474.17(1) counts and imposed a sentence of two years with an immediate release upon entering into a recognizance in the sum of $1000 to be of good behaviour. The appellant had served 220 days in pre-sentence custody. Muir JA explained that release after eight months in custody would have been appropriate.[15]

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12 *Hampson* at [37].
13 *Hampson* at [37]-[38], referring to *Agostino v Cleaves* [2010] ACTSC 19.
14 *Hampson* at [38].
15 *Hampson* at [45].

[60] I accept, on what is before the Court, that the applicant's alleged offences appear less serious than those in *Hampson*. This raised the real prospect that, if not granted bail, the applicant might serve more time in pre-sentence custody than he might be sentenced to serve by the District Court if found guilty of the pending counts.

[61] As is commonly observed, no grant of bail is risk free. The question for the Court is whether the applicant has shown cause why his continued detention is not justified by reference to whether the identified risks are acceptable, given the ameliorating effect of appropriate bail conditions. I am satisfied that the applicant has done so.

Disposition

[62] The Court should grant the applicant bail on the conditions generally as set out in the draft proffered by the ODPP. I will hear any particular submissions that the applicant or the respondents might wish to make about those conditions.