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New South Wales
Law Reform Commission

Report
133

Bail

April 2012
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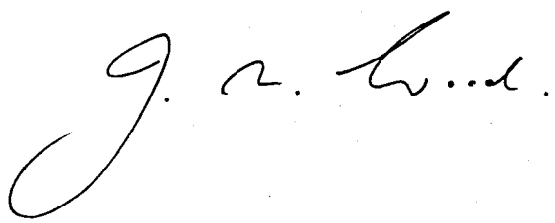
Law Reform Commission
Attorney General & Justice

The Hon G Smith SC MP
Attorney General for New South Wales
Level 31, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Attorney

Bail

We make this report pursuant to the reference to this Commission received 8 June 2011.



The Hon James Wood AO QC
Chairperson
April 2012

Table of contents

Table of contents ..... **v**

Participants ..... **xiii**

Terms of reference ..... **xv**

Executive Summary ..... **xvii**

Recommendations ..... **xxxi**

1. Introduction to the bail review **1**
- **Previous reviews** **2**
- **Our review** **2**
- **Our process** **3**
- **The scope of our report** **5**

2. Bail and the criminal justice system **7**
- **The structure and purposes of the criminal justice system** **7**
  - The purposes of an effective criminal justice system 8
- **Principles that protect liberty and fairness in the criminal justice system** **9**
  - Personal freedom and liberty: "the most elementary and important of all common law rights" 10
  - The presumption of innocence 11
  - No detention without legal cause 11
  - No punishment without conviction by due process, and limitations on preventative detention 12
  - The right to a fair trial 12
  - Individualised justice and consistency 13
  - Special provision for young people 14
- **Framing bail legislation in response to the objectives and principles of the criminal justice system** **15**

3. The history of bail law in New South Wales **19**
- **The early history of bail in England** **19**
- **Pre *Bail Act* common law in NSW** **21**
  - Pressure for reform: the remand and poverty connection 24
- **Codification and reform: the *Bail Act 1978* (NSW)** **25**
  - The Report of the Bail Review Committee (1976) 25
  - The Bail Act 1978 28
  - Frequent amendments, 1978-2011 29
- **Amendments relating to presumptions** **30**
  - The original 1978 Act: the starting point 30
  - 1986 to 2001: a period of incremental change 31
  - 2002 to 2004: a period of significant change 35
  - 2004 to date: further presumptions against bail 38
  - The cumulative effect of the amendments relating to presumptions 40
- **Conclusion** **42**

4. Trends in remand ... 45
Introduction ... 45
Adults: Increasing remand numbers and rates ... 46
Comparison with other jurisdictions ... 49
The drivers of increasing remand rates ... 50
Bail refused ... 50
Time spent on remand ... 51
Bail conditions: arrest and revocation ... 54
The special situation of young people ... 55
Increased numbers and rates of young people in remand ... 55
Young people and the risk of reoffending ... 58
Bail conditions ... 59
Indigenous defendants ... 59
High remand rates ... 59
Bail refusal ... 60
Time on remand ... 62
Young people ... 62
A disproportionate impact ... 62
Conclusion ... 62

5. Consequences of remand ... 65
Introduction ... 65
The hardship of imprisonment ... 66
Physical and psychological hardship ... 66
Assaults and deaths in custody ... 66
Financial implications for the person and the person's family ... 66
Effect on others generally ... 67
Special effect on children ... 67
Effect on community ... 68
The criminogenic effect of imprisonment ... 69
Remandees not found guilty or who do not receive a custodial sentence ... 70
Remanded and found not guilty ... 71
Remanded and no custodial sentence ... 71
Most young people do not receive a control order ... 72
Effects of imprisonment which are particular to remandees ... 73
No opportunity to prepare for prison ... 73
Higher rate of assaults ... 73
Effects on a fair trial ... 73
Effects on guilty pleas, conviction and sentences ... 74
The criminogenic effect of mixing with sentenced prisoners and high risk remandees ... 75
Unavailability of rehabilitation programs ... 75
Financial cost to the community ... 76
Justice reinvestment ... 76
Conclusion ... 77

6. Language and structure ... 79
The language of the Act ... 79
Plain English ... 79
The terms "bail" and "grant bail" ... 80
Submissions ... 82
Reasons for change ... 82
Conclusion concerning the language of the Act ... 83
Consequential amendments ... 83

The structure of the Act **84**
Structure generally 84
Reform to the nature and structure of bail 84
Proposed simplifications 85
Notice of listing 85
Conduct direction 86
Submissions 86
Discussion 87
Continuation of bail **88**

7. Entitlement and discretion to release **91**
Introduction **91**
The entitlement to bail for minor offences **92**
The current provision 92
Other jurisdictions 94
Offences covered 95
Young people referred to Youth Justice Conference 96
Imposition of conditions 97
Exceptions 98
The discretion to release **103**
The current provision 103
Other jurisdictions 103
Submissions 104
Conclusion 104

8. Presumptions **107**
Introduction **107**
The current provisions **107**
Presumption against bail 108
Presumption in favour of bail 109
Neutral presumption 109
Exceptional circumstances required 110
Complexity 111
The history of the amendments **111**
Effect of the amendments on detention rates **112**
Other jurisdictions **113**
Other reports **114**
Submissions and consultations **115**
Criticisms of the scheme as a whole 115
Substantial support for a uniform presumption in favour of bail 116
The law enforcement view 118
Evaluation of the arguments **120**
Conclusion **123**

9. Release pending appeal **125**
Rights of appeal **125**
Matters prosecuted in the Local Court 126
Matters prosecuted in the District Court or the Supreme Court 127
Review of conviction and retrials 128
Complexity of the appellate framework 128
Procedures applicable to bail pending appeal **129**
Limitations on bail pending appeal **130**
Appeal from convictions and sentences on indictment 130

Is reform needed? **133**
Section 30AA threshold **134**
Bail in respect of appeals from the Local Court **135**
Perfecting sentences after appeals **138**
Applications to the Supreme Court for judicial review 138
Appeals to the Court of Criminal Appeal and High Court 139
Appeals from the Local Court to the District Court and Supreme Court 140
Local Court review of Local Court decisions 141
Conclusion 142

10. Considerations **143**
The current provision **143**
Other Australian jurisdictions **144**
Structuring considerations **144**
Existing models 144
The choice of a model 145
Whether considerations should be exhaustive 146
Submissions and consultations 146
The public interest in freedom and securing justice according to law **148**
An objects clause? 148
The integrity of the criminal justice system **150**
The likelihood of the person failing to appear at court 150
The likelihood of interference with the course of justice 153
That the person has offended while on conditional liberty 153
Protecting the community and particular people **154**
Preventive detention 154
The likelihood of causing or threatening harm to a particular person or persons 155
The likelihood of committing a serious offence or offences 156
The interests of the person **156**
Incapacitation by intoxication etc 158
The relevance of particular matters **159**
The nature and seriousness of the offence charged 159
The strength of the prosecution case 160
Prior offences 160
Previous failure to comply with a conduct direction 160
Rules relating to decisions **161**
The specific provisions of s 32 ..... **162**
Recommendations **162**

11. Special needs and vulnerabilities **167**
Introduction **167**
Young people **169**
The special characteristics of young people 169
Different capacities acknowledged in other laws 170
The impact of remand on young people 171
A separate Bail Act for young people? 172
Conclusion and recommendation 173
Mental illness and cognitive impairment **175**
Definition 175
Over-representation 178
The impact of remand 178
Difficulty complying with conditions 179
A history of offending 179

Rights under international law 179
Conclusion and recommendation 180
Aboriginal people and Torres Strait Islanders....181
Current provisions 181
Needs and cultural practices 181
The Royal Commission into Aboriginal Deaths in Custody....183
Report from a group providing services to Aboriginal people and Torres Strait Islanders .184
The Victorian approach 184
Conclusion and recommendation 185
Other special needs and vulnerabilities....186
Susceptibility to physical hardship and vulnerability to assault....186
Community and extended family ties....187
Cultural, linguistic and religious minorities....187
How should this consideration be expressed?....188

12. Conditions and conduct requirements: Background 191
Introduction 191
Language: Use of the term "conditions"....192
Extent of the imposition of conditions and conduct requirements 192
General submissions 192
Young people 193
People with cognitive and mental health impairments 197
The law enforcement view....199
Views concerning compliance monitoring 200
Stakeholder concerns....200
The law enforcement view....201
Evidence concerning the benefits and costs of monitoring 204
Deterrence....206
Economic model studies: the value of apprehension....206
The effect of monitoring of conduct requirements....207
The Commission's views 211

13. What conditions and conduct directions should be allowed....213
The current provisions of the *Bail Act* 213
Permitted conditions and conduct requirements....214
Bail accommodation 214
Assurance conditions....215
Third party assurance of reliability....215
Financial conditions 216
Surrender of passport 216
Treatment and rehabilitation....216
The scope of the current provision 216
Is an express therapeutic provision required? 217
Should consent be required?....218
Non-association and place restrictions 218
Homeless young people....219
Recommendations....220

14. How conditions and conduct directions should be decided....223
Presumption against imposing conditions and conduct requirements....223
Considerations to be taken into account....223
Proposed rules....226
Conditions and conduct directions to be imposed only to avoid detention....226

Family, community and other support to be taken into account ... 227
Conditions and conduct directions not to be more onerous than required ... 227
Conditions and conduct directions to be reasonably practicable ... 227
Financial conditions to be reasonable ... 228
Limitations on financial conditions in relation to young people ... 228
The welfare of the person ... 231
Cognitive and mental health impairment ... 232

15. Failure to comply with a condition or to observe a conduct direction ... 235
Failure to satisfy a condition of release ... 235
Review where conditions unsatisfied ... 236
People on remand for more than three months ... 238
The response to failure to observe a conduct requirement ... 240
The current legislation ... 240
The new scheme ... 240
Power to arrest ... 241
Contempt ... 244

16. Implications of *Lawson v Dunlevy* ... 245
The decision in *Lawson v Dunlevy* ... 245
The implications arising from *Lawson v Dunlevy* ... 247
Stakeholders' views ... 248
Arguments for and against enforcement conduct directions ... 248
Conclusion and recommendation ... 250

17. The offence of failing to appear ... 253
Retention of the offence ... 253
Scope of the offence ... 254
Time limitation ... 255
Penalty ... 255

18. Applications for release, detention and variation ... 257
Police bail ... 257
Police power to grant bail ... 257
Review by police ... 258
Issues arising ... 258
Court review ... 260
Review powers ... 260
Making an application ... 260
Special limited review powers ... 261
Stays ... 262
Issues arising ... 263
Powers to release or vary conditions on first appearance at court ... 269
Requirement to bring a detained person before a court ... 270
Submissions and consultations ... 271
Discussion ... 272

19. Refusal to hear applications ... 277
Legislative history ... 278
The original provision ... 278
The 2007 amendment ... 279
The 2009 amendment ... 279
The effect of the 2007 amendments ... 280

Other jurisdictions **281**
Submissions and consultations **282**
Discussion **285**
The discretion to refuse to entertain 285
The requirement to refuse to entertain 286
Variation 288
The role of the lawyer 289
Recommendation **290**

20. Electronic monitoring **291**
Background **291**
Technology options 292
NSW experience with electronic monitoring: the home detention scheme 293
Schemes in other jurisdictions **293**
New Zealand 293
England 295
Scotland 296
United States 296
Western Australia 296
Submissions **297**
Discussion **298**
Cost and net-widening 298
New Zealand model favoured 299
Eligibility for release with electronic monitoring 299
Time spent on e-release to be taken into account. 300
Should the scheme have a legislative basis? 300
Recommendation **301**

21. Monitoring and review of a new Bail Act **303**
Review **303**
Data collection **303**
Data gaps identified during this inquiry 305

22. Outstanding issues **307**
Important issues of detail that will need to be addressed in drafting a new *Bail Act* **307**
Jurisdiction of courts 307
Authorised justices 307
Enforcement of forfeiture orders 308
Procedure for police bail 308
Issues with practical ramifications **308**
Pre-charge bail 308
Bail support and accommodation 309
Criminal records 309
Charter of Victims Rights 309

Appendix A Review of s 32 of the Bail Act **311**

Appendix B Submissions **317**

Appendix C Consultations **319**

Appendix D Court visits **325**

Appendix E Presumptions **327**

Appendix F Data **337**

Table of cases **347**

Table of legislation **351**

Bibliography **357**

Participants

Commissioners

The Hon Hal Sperling QC (Lead Commissioner)

Professor Hilary Astor

Professor David Brown

Deputy Chief Magistrate Jane Mottley

The Hon James Wood AO QC (Chairperson)

Officers of the Commission

Executive Director	Mr Paul McKnight
Project manager	Ms Dara Read (until 30 November 2011) Mr Joseph Waugh PSM (from 1 December 2011)
Research and writing	Mr Edward Elliott Ms Robyn Gilbert Ms Jessica Ji Ms Kirri Piper
Librarian	Ms Anna Williams
Administrative assistance	Ms Maree Marsden Ms Suzanna Mishhawi

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Terms of reference

Pursuant to section 10 of the *Law Reform Commission Act 1967*, the Law Reform Commission is to review bail law in NSW. In undertaking this inquiry the Commission should develop a legislative framework that provides access to bail in appropriate cases having regard to:

1. whether the *Bail Act* should include a statement of its objects and if so, what those objects should be;

2. whether the *Bail Act* should include a statement of the factors to be taken into account in determining a bail application and if so, what those factors should be;

3. what presumptions should apply to bail determinations and how they should apply;

4. the available responses to a breach of bail including the legislative framework for the exercise of police and judicial discretion when responding to a breach;

5. the desirability of maintaining s22A;

6. whether the *Bail Act* should make a distinction between young offenders and adults and if so, what special provision should apply to young offenders;

7. whether special provisions should apply to vulnerable people including Aboriginal people and Torres Strait Islanders, cognitively impaired people and those with a mental illness. In considering this question particular attention should be given to how the latter two categories of people should be defined;

8. the terms of bail schemes operating in other jurisdictions, in particular those with a relatively low and stable remand population, such as the UK and Australian states such as Victoria, and of any reviews of those schemes; and,

9. any other related matter.

[Reference received 8 June 2011]

Executive Summary

0.1 The Attorney General referred the law of bail to the Law Reform Commission on 8 June 2011. The Terms of Reference require the Commission to undertake a fundamental review of the Act. We consulted widely, receiving 40 submissions and holding 19 consultation meetings in the course of the reference. This report reflects our findings and recommendations following a nine month process of research and consultation. We find that a new, simplified *Bail Act* is required.

0.2 The report includes specific recommendations concerning how a new *Bail Act* should be framed. A complete list of the recommendations appears immediately following this Executive Summary.

Background and principles (Chapter 2)

0.3 Bail law is part of the criminal justice system. It provides the framework for decisions by the police and the courts concerning the detention or release of a person while proceedings are pending.

0.4 Bail law has a role in implementing three of the purposes of the criminal justice system: the protection and welfare of the community by preventing further serious offending; the protection of particular individuals who might be at risk; and protecting the integrity of the trial process, by ensuring that the accused person appears at court to be dealt with according to law and by avoiding interference with the course of justice. Our recommendations are directed to the promotion of these purposes.

0.5 Other functions of the criminal justice system are not the province of bail law. Such functions include the denunciation of offending behaviour, the punishment of offenders, and deterring others from offending.

0.6 The criminal justice system has embedded within it the value of personal liberty and a suite of cautionary concepts and principles which recognise and protect the value of liberty. These include the presumption of innocence, no detention without legal cause, no punishment without conviction by due process, a fair trial, individualised justice and consistency in decision making, and the special consideration required in relation to young people.

0.7 The community has high expectations of the criminal justice system. Bail legislation cannot reflect all the ways in which the criminal justice system aims to protect the community. Because bail is part of the criminal justice system, it should be subject to the constraints embedded in the criminal justice system as a whole. In setting the scope of bail legislation, it is necessary to find a balance between achieving the purposes of bail law and recognising the constraining principles and concepts to which the criminal justice system as a whole is subject.

The history of bail law in New South Wales (Chapter 3)

0.8 Prior to the enactment of the *Bail Act 1978* (NSW), bail law in NSW was a mixture of common law principles and piecemeal legislative provisions. The 1978 Act codified the law relating to bail in a single, comprehensive statute. It continues in force to this date but with extensive amendments made over the years.

0.9 The cumulative effect of these amendments has been a level of complexity in the legislation which makes it difficult to comprehend and operate, even for those with legal expertise.

0.10 The most significant of the amendments have removed the presumption in favour of bail in relation to certain offences and certain defendants, have introduced a presumption against bail in other instances, and have required that bail should only be granted in exceptional circumstances in other cases. In the result, NSW now has one of the most convoluted and restrictive bail statutes in Australia.

0.11 The evidence shows that these amendments have, as intended, restricted access to bail. There is also evidence that they have reduced the failure to appear rate, though at significant cost in terms of increasing remand numbers. There is no evidence that the amendments have led to a reduction in crime generally or in offending while on bail.

Trends in remand (Chapter 4)

0.12 The number of people in unsentenced detention has increased rapidly in the last 20 years, and is significantly higher than in comparable Australian jurisdictions. Over the last 15 years the number of remand prisoners has more than trebled and the rate of remand prisoners per 100,000 of the population has more than doubled. The evidence is clear that policy shifts have made a significant contribution to the increased remand population.

0.13 In particular, the rates of unsentenced detention for young people and Indigenous people are of concern. The number of young people on remand on an average day has increased from approximately 225 in 2000 to over 400 in 2010. About half of the young people in juvenile detention are unsentenced. Between 2001 and 2008, the number of Indigenous adults on remand rose 72%.

Consequences of remand (Chapter 5)

0.14 Having been charged with a criminal offence but without the proceedings being finalised by due process, a person refused bail is denied liberty, removed from an ordinary life in society and subjected to the hardships of prison life. These consequences are often damaging to the individuals involved, to their families and to children in particular, and costly to the state. Some of these consequences are common to all prisoners, and include loss of employment, loss of housing and debt. Of significant concern is the potential for detention to be criminogenic – that is, a cause of further offending. Some of the consequences are particular to remand prisoners, such as difficulties preparing for and participating in the trial.

0.15 A substantial number of people remanded are not later convicted or sentenced to imprisonment. It is a matter of concern that many people who are not found guilty of any offence, or whose offending is not found to warrant a sentence of imprisonment, are imprisoned for even a short period of time pending proceedings. While this is an inevitable feature of any system of pre-trial detention, in individual cases it is hard to see it as anything other than unjust. While the criminal justice system must recognise situations where pre-trial detention is justified, it is also important to minimise the incidence of detention of people in these circumstances.

0.16 The potential for cost saving in reducing remand populations appears to be significant. With the time available we have not undertaken cost benefit modelling. However, this may be a valuable exercise to undertake and one we would support.

0.17 There are clearly cases where detention while proceedings are pending is justified. But detention comes at a financial and social cost to the individual and to the community. Our recommendations recognise the consequences and cost of detention while seeking to ensure the integrity of the criminal justice process and to promote the safety of the community.

Language and Structure (Chapter 6)

0.18 The complexity of the current Act and its language means that it is unintelligible not only to ordinary citizens, but also to legal practitioners. The legislation should be simplified and its language modernised. We recommend that a new *Bail Act* should be drafted in plain English with a clear and logical structure.

0.19 We recommend updating to terminology that clearly states the effect of a decision: “grant bail” should be replaced with “release pending proceedings” and “refuse bail” with “detain pending proceedings”. (Recommendation 6.1)

0.20 The current legislation requires a person to sign a bail undertaking, which is an undertaking to appear as required. This should be replaced with a simple notice of listing. (Recommendation 6.1) (See Chapter 17 for the offence of failing to appear.)

0.21 Currently, conduct requirements to be observed while a person is on bail are imposed by making it a condition of release that the person enter into an agreement to observe such conduct requirements. We are recommending that this cumbersome and fictitious process be replaced with a straightforward conduct direction. (Recommendation 6.1)

0.22 We use the term “authority” to mean the police officer, court officer (authorised justice), or judicial officer who makes a decision about release or detention under the Act.

Entitlement and discretion to release (Chapter 7)

0.23 The current law includes a right to bail for certain minor offences and a broad discretion to dispense with bail.

0.24 We recommend that the right to bail should be replaced by an entitlement to unconditional release for defendants charged with fine only offences, certain

offences under the *Summary Offences Act 1988* (NSW), and defendants referred to a Youth Justice Conference. Such an entitlement would avoid detention pending proceedings or the imposition of conditions or conduct requirements for offences where a penalty of imprisonment is either not available or very unlikely. The entitlement would not apply to offences involving a risk of harm (such as carrying a knife or a sex offender loitering near a school) which we would exempt from the reference to offences under the *Summary Offences Act.* A review should be conducted of all strictly summary offences to determine whether they should be included within the scope of the entitlement to release. (Recommendation 7.1)

0.25 We also recommend that the broad discretion to dispense with bail should remain as an unqualified discretion to release without a condition or a conduct direction. The discretion provides a convenient and efficient method of dealing with a case that is obviously one for unconditional release. (Recommendation 7.2)

Presumptions (Chapter 8)

0.26 The current scheme of presumptions, exceptions and exceptional circumstances is unduly complex and restrictive. It is an unwarranted imposition on the discretion of police and the courts. It throws the emphasis onto the offence with which the person is charged or onto prescribed elements in the person's criminal history, instead of allowing a balanced assessment of all the considerations which bear rationally on the question of detention or release. It is voluminous, unwieldy, hugely complex and involves too blunt an approach. The results are frequently anomalous and unjust. The present scheme has contributed to the large increase in the number of people detained pending proceedings. The overwhelming majority of submissions advocated the removal of the existing scheme of presumptions, exceptions and special circumstances, and its replacement with a uniform presumption in favour of release.

0.27 We strongly recommend a uniform presumption in favour of release, except in relation to appeal. (Recommendation 8.1)

0.28 In making this recommendation, we do not envisage that people who present a serious risk of absconding, committing serious crime, or threatening another's safety should be released. Our proposed regime meets these concerns directly and simply.

Release pending appeal (Chapter 9)

0.29 The question of release pending appeal requires special consideration, and requires weight to be given to the conviction entered and the sentence passed. We recommend retention of the requirement for exceptional circumstance to be shown in cases of appeal to the Court of Criminal Appeal or the High Court. We recommend a new provision in other appeal cases, where there is currently no specific legislative guidance, that a person should not be released unless the appeal has a reasonably arguable prospect of success. (Recommendations 9.1, 9.2 and 9.3)

Considerations (Chapter 10)

0.30 Having recommended that there should be a presumption in favour of release for all offences, we discuss the considerations that should be taken into account when deciding whether a person should be released or detained.

0.31 Section 32 of the *Bail Act* provides such a list. It has, however, become complex, cumbersome, and, in some respects, unclear due to amendments made over the years.

Structuring considerations

0.32 We consider two models for structuring the decision to release or detain: the "unacceptable risk" model (used for example in the Victorian *Bail Act*) and the 'justification" model. In our view the current Act's requirement that detention be "justified" by reference to specified considerations should be retained. It better incorporates the interests of the person and basic legal principles, while allowing the authority to consider the risk of non-appearance, the risk of interfering with the course of justice, the risk of committing other offences, and the risk of harm to particular people.

0.33 We therefore recommend that a person should be entitled to be released unless detention is justified having regard to the specified considerations. (Recommendation 10.1)

The primary considerations

0.34 We recommend a simplified list incorporating five primary considerations. They should be exhaustive as well as mandatory in order to ensure that irrelevant considerations are not taken into account and to maintain a consistent approach. The list should be:

(i) the public interest in freedom and securing justice according to law,

(ii) the integrity of the criminal justice system,

(iii) the likelihood of harm or threat of harm to any other person in a domestic relationship,

(iv) the protection and welfare of the community having regard to the likelihood that the person will commit a serious offence if released, and

(v) the interests of the person and of the person's family and other associates.

(Recommendation 10.2)

0.35 Matters relevant to these primary considerations are specified in Recommendations 10.3-10.8.

The public interest in freedom and securing justice according to law

0.36 The public interest in freedom and securing justice according to law is not mentioned in the current legislation. The consideration explicitly recognises the

principles of the criminal justice system discussed in Chapter 2. Further elaboration of this consideration is set out in Recommendation 10.3.

The integrity of the criminal justice system

0.37 The integrity of the criminal justice system covers four important matters.

0.38 The first two concern the likelihood that the person will abscond (that is, deliberately attempt to avoid justice by fleeing the jurisdiction or by going into hiding) and any persistent history of failure to attend (which might be due to forgetfulness or confusion). We make this distinction because the response to absconding and persistent non-appearance should be different, particularly in light of the high incidence of cognitive and mental health impairment in people who come into contact with the criminal justice system. (Recommendation 10.2(2)(b)(i) and (ii))

0.39 We recognise that legislation is not a good solution for inadvertent failure to attend court, and we recommend that consideration be given to issuing reminder notices under a pilot program. (Recommendation 10.5)

0.40 The third is the likelihood that the person will interfere with evidence, witnesses or jurors. (Recommendation 10.2(2)(b)(iii)) We have expanded the reference in the current legislation to include the risk of *any* interference with the course of justice.

0.41 The fourth recognises community concerns in relation to people who offend while released pending proceedings, or while on parole, or while subject to other forms of conditional liberty, and who come before the courts again, charged with a further offence committed in similar circumstances.

Protecting the community and particular people

0.42 We recommend retention of the likelihood of harm to any particular person as a primary consideration. (Recommendation 10(2)(c)) We recognise the special need to protect people under threat of harm from a partner or family member. The current legislation deals with this topic in a cumbersome way by removing the presumption in favour of bail in relation to some domestic violence offences and by requiring exceptional circumstances to be established in the case of repeated serious personal violence offences. We recommend a clearer and more direct approach in two ways. First, we make specific reference to the likelihood that the accused person will harm or threaten a person with whom the accused person is in a domestic relationship. (Recommendation 10(2)(c)) Secondly, we recommend an additional provision, based on the current s 9A, specifying matters to be taken into account when a threat of domestic violence is involved, including any history of violence and any failure to comply with a prior conduct direction of relevance. (Recommendation 10.6)

0.43 We recognise the community expectation that the likelihood of a person committing a serious offence should be a relevant consideration in deciding whether to detain the person while the proceedings are pending. This should also be a primary consideration. The current Act includes a series of complex and intricate provisions regarding the likelihood of committing a serious offence if released. A simpler approach is required that focuses on serious harmful offending. We recommend that the authority must consider the protection and welfare of the community having

regard to the likelihood that the person will commit an offence causing death or injury, a sex offence, or an offence involving serious loss of or damage to property, or an offence or a series of offences which give rise to a substantial risk of causing death or injury or serious loss of or damage to property. The list includes a persistent, potentially harmful course of conduct which might otherwise not qualify as a serious offence. (Recommendation 10.2(2)(d))

The interests of the person

0.44 The current legislation includes the interests of the person as an explicit consideration. We recommend that a new *Bail Act* should also make specific reference to the hardship of imprisonment, the potential consequences of imprisonment in the person's private life or employment, the consequences for the person's family and the person's associates (such as an employer, landlord or a creditor). It should also refer to the effects of imprisonment which fall specifically on a person detained pending proceedings, such as difficulty in preparing for and participating in a trial. (Recommendations 10.2(2)(e) and 10.7)

The relevance of particular matters

0.45 A number of matters may be, and often are, relevant to a decision whether to release a person pending proceedings but, for reasons of principle, are not in themselves mandatory considerations. These are: the nature and seriousness of the offence charged; the strength of the prosecution case; the person's history of offending; the person's past failure to comply with bail conduct requirements. We recommend that these matters must be taken into account if the authority considers they are relevant to the mandatory considerations specified but not otherwise. (Recommendation 10.8)

Rules relating to decisions

0.46 We recommend the inclusion of a set of over-arching rules designed to avoid detention which proves to have been unwarranted and which, in effect, amounts to unjust punishment (Recommendation 10.9). The proposed rules are that

- detention is a measure of last resort,
- a person must be released if a reason for detention is sufficiently satisfied by setting conditions of release or by giving a conduct direction,
- a person must not be detained unless a custodial sentence is likely, and
- a decision must not be made to detain a person for longer than the likely duration of a custodial sentence.

People requiring special consideration (Chapter 11)

0.47 Some members of particular groups may be prone to vulnerability in a special way or may experience special needs. Our recommendations in this regard relate to young people, (Recommendation 11.1) people with cognitive or mental health impairments, (Recommendation 11.2) Aboriginal people and Torres Strait Islanders. (Recommendation 11.3) There was considerable support in submissions for

consideration to be given to the special vulnerabilities and needs of this kind. There are also individuals with special vulnerabilities and needs that may be relevant to a decision to detain a person pending proceedings or a decision to the impose conditions or a conduct direction. We recommend a requirement that the authority take all such vulnerabilities and needs into account. (Recommendation 11.4)

Conditions and conduct requirement: Background (Chapter 12)

0.48 Many submissions to this inquiry raised serious concerns about onerous conditions and conduct requirements. Chapters 13, 14 and 15 cover proposed reforms concerning the types of conditions and conduct requirement that may be imposed, the considerations and rules that should guide decision making about the impositions of conditions and conduct requirements, and the enforcement of conduct requirements.

0.49 The extent of the imposition of conditions and conduct requirements, and their monitoring by police, especially in relation to young people, is an area of contention among the stakeholders. The Chief Magistrate of the Local Court, the President of the Children's Court and others have supported the view that unduly numerous, complex and onerous conduct requirements are frequently imposed, some as a matter of routine. Reporting, curfew and non-association requirements in relation to young people were of particular concern. Some submissions also argue that the monitoring of conduct requirements by police and their response to breach is excessive, again particularly in relation to young people. The NSW Police Force, on the other hand, strongly supports the role of conduct requirements. The Police Force says that the imposition of such requirements and effective monitoring for breach builds rapport between police and young people and their families, and prevents crime.

0.50 It is, however, clear from the submissions and the data that there is a significant problem in this area. Conduct requirements appear to be imposed routinely and unnecessarily without tailoring to the situation of the individual. Monitoring for compliance by police has become more active and intense over recent times. Arrest for failure to comply has been increasing. We have no evidence of a statistically significant reduction in crime as a result.

0.51 The consequence has been a substantial increase in the number of people in detention pending trial and an increase in the court time required to deal with unnecessary arrests for breach of unnecessary conduct requirements.

0.52 In these circumstances, there is a strong case for looking closely at the justification for imposing conditions and conduct requirements. There are cases where the imposition of stringent conditions and conduct requirements are necessary. In such cases, proper and diligent enforcement is required. But intensive enforcement of routinely imposed conditions is creating unnecessary public costs and unnecessary hardship, particularly for young people, without apparent benefit to the community.

What conditions and conduct directions should be allowed (Chapter 13)

0.53 The current Act specifies that only certain kinds of conditions can be imposed. This provision helps to prevent inconsistent and idiosyncratic outcomes, and we propose

retaining such a limitation. The current provision does not, however, limit the conduct requirements that can be imposed within the specified categories. We agree with that approach, except in relation to conduct requirements directed solely to the welfare of the person.

0.54 We recommend retention of the current provisions allowing financial conditions, and surrender of passport (with some modification). (Recommendation 13.2)

0.55 We recommend against retention of the condition in the current legislation that an "acceptable person" acknowledge that the defendant is a responsible person and is likely to attend court. (Recommendation 13.7) In our view, little weight can be attached to the assurance made and the condition has no useful purpose. The requirement of acceptability is vague and release can be delayed while an acceptable person is found.

0.56 We recommend retention of the provision which allows conditions and conduct directions to be imposed in order to facilitate assessment and participation in a treatment, intervention or rehabilitation program, based on s 36A of the *Bail Act*. We understand that this provision is used regularly. It allows, for example, the successful MERIT drug and alcohol treatment scheme to operate.

0.57 A special problem has arisen in relation to young people who should, all other things considered, be released pending proceedings but who are homeless or have no suitable place to live. The Children's Court is understandably reluctant to release a young person from custody in these circumstances. The best solution is to ensure that suitable accommodation is arranged quickly. The current legislation does not deal with this situation. We therefore recommend a scheme to allow the Court to order detention until suitable accommodation is found, but with safeguards to ensure that suitable accommodation is found as soon as possible. (Recommendation 13.5)

How conditions and conduct directions should be decided (Chapter 14)

0.58 As in the case of detention pending proceedings, a condition or conduct direction should be imposed only if justified. (Recommendation 14.1)

0.59 The current legislation allows a condition, including a condition embodying conduct requirements, to be imposed for purposes which are much wider than the considerations applicable to a decision whether to detain or release a person. In our view, bail legislation should be a coherent code and serve one set of policy objectives. The same considerations should apply to decisions concerning conditions and conduct requirements as apply to decisions whether to release or detain. (Recommendation 14.2)

0.60 A number of submissions were concerned about the proliferation of conditions and conduct requirements, and their imposition in circumstances where they are not necessary. In our view, the imposition of a condition or a conduct requirement is a serious and significant burden on the individual. The purpose of their imposition should be to avoid the need to detain the person pending proceedings by limiting the person's freedom, but in ways that are justified by the relevant considerations.

0.61 For these reasons, we propose rules to ensure that any conditions and conduct directions are reasonable, necessary and practical to comply with. We recommend that a condition or conduct direction must not be imposed unless the authority is satisfied that the person should otherwise be detained; a condition or conduct direction must not be more onerous than is necessary; and compliance must be reasonably practicable. We recommend a financial condition must not be imposed in relation to a young person (except in the case of a serious indictable offence) or in relation to an adult unless there would otherwise be a likelihood of failure to appear and the sum is likely to be within the means of whoever may be liable to pay. We also recommend that a condition or conduct direction must not be imposed for the purpose of promoting the welfare of the person unless it is otherwise justified having regard to the listed considerations.

Failure to comply with a condition or to observe a conduct requirement (Chapter 15)

0.62 The current legislation contains provisions for review of a decision to impose a condition where the person remains in custody because the condition has not been met. The provisions are disjointed and cumbersome. We recommend a streamlined process. (Recommendation 15.1)

0.63 The current legislation gives a police officer power to arrest a person for breach of a conduct requirement and bring the person before a court to be dealt with. The court may then re-assess the question of release and what conditions or conduct requirements should be imposed. The power of arrest for breach of a conduct requirement is not regulated by the current legislation. In contrast, police powers of arrest for a criminal offence are regulated by the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (LEPRA) which provides constraints and requires the police officer to consider alternatives to arrest. We recommend that the legislation should specify that the police officer may take action other than arrest (which we specify); and that the police officer must consider a range of factors, including that arrest should be a last resort; the relative seriousness or triviality of the breach; whether the person has a reasonable excuse; and any apparent cognitive or mental health impairment on the part of the person. (Recommendation 15.2)

Implications of Lawson v Dunlevy (Chapter 16)

0.64 The decision of *Lawson v Dunlevy* was handed down while the Commission was finalising this report. In that case, the Court found that a condition requiring a person to enter into an agreement to submit to a breath test when requested by a police officer was unlawful. This decision casts doubt on the lawfulness of a range of conduct requirements designed to aid in the enforcement of other requirements ("enforcement conduct requirements"). It has not been possible for us to consult and fully consider the implications of this decision. We recommend that the government consult on the need to provide a framework for enforcement conduct requirements. We propose for consideration a scheme that would allow reasonable enforcement conduct directions to be made in certain circumstances. (Recommendation 16)

Offence of failing to appear (Chapter 17)

0.65 We consider that, because a failure to appear may result in serious consequences concerning the administration of justice and public cost, the offence of failing to appear without reasonable excuse is warranted as a deterrent. Currently, those "on bail" are subject to the offence. In our proposed scheme, those released with a condition or conduct direction would be subject to the offence. This group is broadly equivalent to the group currently covered. We also recommend extending the offence to cover all cases of failing to appear on sentence, which we regard as a particularly serious situation. We recommend a maximum penalty of 2 years. (Recommendation 17.1)

Applications for release, revocation and variation (Chapter 18)

Police decisions and review power

0.66 Our proposals envisage police retaining their role in relation to bail. The current legislation authorises a more senior police officer to review a decision to detain made by a more junior officer, but only on request by the person and in limited circumstances. This provision should be clarified and expanded, removing the current limitations, and making conditions and conduct requirements open to such review. (Recommendation 18.1(1)) We also recommend that a person arrested for an offence should be provided with information concerning the right to review. (Recommendation 18.1(2))

Court decisions

0.67 The current legislation includes a multiplicity of provisions relating to the grant of bail and review of decisions concerning the grant and revocation of bail and of decisions concerning conditions. We have devised a simplified scheme, classifying court proceedings according to the kind of application being made (Recommendation 18.2):

- a **release application,** being an application for release made by a person, where a decision has been made to detain the person;
- a **revocation application** made by the prosecutor where a person has been released; and
- a **variation application** made by the accused person, the informant, the complainant (where the person has been released in respect of a domestic violence offence), the prosecutor or the Attorney General, to modify a condition or conduct requirement.

0.68 We deal with the distribution of jurisdiction to entertain such applications as between the three tiers of State's court system. (Recommendation 18.3)

Review on first appearance

0.69 Many submissions supported mandatory consideration of the question of release and of any conditions at first appearance in court. This is the point at which judicial proceedings commence and the court, rather than police, becomes the authority for

detaining a person or subjecting the person to conduct requirements. We recommend that, at first appearance, the court should be required to entertain an application for release or variation of conditions, and should have the power to act of its own motion. We recognise that this will require police to be prepared for such an application. We would accordingly preserve the court's power to adjourn if necessary in the interests of justice. (Recommendation 18.7)

Refusal to hear applications (Chapter 19)

0.70 There must be strong reasons to impede access to the courts for an order for release. On the other hand, concerns have been raised about the public cost of unnecessary and wasteful applications, the potential for "magistrate shopping", and the stress caused to victims by repeat applications for release.

0.71 Section 22A was introduced with a view to limiting the incidence of meritless repeat applications. An amendment in 2007, extending and strengthening the provision, had the effect of increasing the number of people on remand substantially, particularly young people. A further amendment in 2009 moderated the terms of the section. In our view further modification is required. (Recommendation 19.1)

0.72 We recommend that the prohibition against further applications should not apply to a person who is under 18 at the time of the offence and who is under 21 at the time of the application. In the case of adults, two applications to the court should be allowed before the prohibition applies. Any matter which, in the opinion of the court, is relevant should be a ground for a further application. The provision relating to the role of lawyers should not be retained.

0.73 We recommend that the provision allowing a court to refuse to hear an application if it is frivolous or vexatious should be clarified and strengthened by adding the words "without substance or has no reasonable prospect of success". We also recommend that this provision should be extended to apply to an application for variation of a condition or conduct direction that is the same or substantially the same as the one previously sought.

Electronic monitoring (Chapter 20)

0.74 Electronic monitoring while released pending proceedings has been implemented or is being trialled in a number of overseas jurisdictions, and has been ordered, at private cost, in at least two cases in New South Wales. It is more expensive than conventional release pending proceedings, and more restrictive of liberty. It is, however, much cheaper than detention. We recommend that consideration be given to establishing a pilot scheme limited to people who have already been detained and who are likely to spend a substantial amount of time in detention. Corrective Services NSW should carry out the monitoring. A court should be able to take time under electronic monitoring into account on sentence. (Recommendation 20.1)

Monitoring and review of a new Bail Act (Chapter 21)

0.75 In NSW, new legislation generally includes a review clause requiring review to be commenced after five years from assent. Because of the potential for bail law to

impact on people's lives and liberty and the safety and wellbeing of the wider community, we recommend that the effects of a new Bail Act be assessed after three years. (Recommendation 21.1)

0.76 Our review has identified some gaps in data regarding police and court bail decisions, offences committed while on bail, breaches of conduct directions, the police response to breaches, the cost of detaining a person pending proceedings and other matters. Improvements in data collection and reporting would improve the quality of the statutory review, and would also be of use to independent researchers. We recommend that the government establish a process to improve the collection and reporting of data. (Recommendation 21.2)

Other issues (Chapter 22)

0.77 We have listed issues that we have been unable to consider, that are outside our brief, or that are more appropriately considered while drafting a new Act.

Recommendations

Note: No recommendations are made in Chapters 1 – 5, 12 and 22.

	Chapter 6 – Language and structure	page
6.1	(1) A new Bail Act should be drafted in plain English language, so as to be readily understandable, and with a clear and logical structure. (2) The terminology used in the new *Bail Act* should be changed: - "release pending proceedings" should replace "bail" and "grant bail" - "detain pending proceedings" should replace "refuse bail". (3) *Proceedings* should be defined to include trial, and a sentencing hearing or an appeal.	83
6.2	(1) The bail undertaking should be replaced with a notice of a listing. (2) The notice should include: (a) a statement explaining the circumstances in which failure to appear will constitute an offence; (b) a warning that committing an offence while released pending proceedings could result in a more severe sentence for the offence. (3) The condition that the person enter into an agreement to observe specified conduct requirements should be replaced by a conduct direction. (4) Notice of a condition or conduct direction should be given to the person in writing and in plain English. (5) The person should be required to acknowledge in writing receipt of the notice of listing and the notice of any condition or conduct direction imposed. (6) The authority* should take all reasonable steps to ensure that the person has understood any condition or conduct direction imposed. (7) The court officer or police officer giving the defendant a notice of listing or a notice of a condition or conduct direction should be required to take all reasonable steps to ensure the defendant understands the content and implications of the documents. * *Authority* in these recommendations means a person or court having authority to release a person at any stage before completion of the proceedings, including authorised police officers and authorised justices (who are court staff).	87
6.3	A new *Bail Act* should provide that any decision as to release, with or without a condition or a conduct direction, should remain in force unless varied or unless detention is ordered, with no need to continue the order expressly.	89

	Chapter 7 – Entitlement and discretion to release	page
7.1	(1) A new *Bail Act* should provide that entitlement to release means release without any condition or conduct direction. (2) Subject to paragraph (3), entitlement to release should apply in relation to all fine-only offences and the public order offences in the *Summary Offences Act* (offensive conduct s 4, obscene exposure s 5, and the prostitution offences s 15-20). (3) Entitlement to release should not apply to the following offences under the *Summary Offences Act*: offences relating to knives (s 11B, 11C, 11E), offensive implements (s 11B), violent disorder (s 11A), custody or use of a laser pointer in a public place (s 11FA) and child sex offenders (s 11G). (4) Subject to paragraph (3), a review should be conducted of all strictly summary offences to determine whether they should be included within the scope of the entitlement to release. (5) Entitlement to release should apply to a young person referred to a Youth Justice Conference irrespective of the offence.	102

(6) The current exception to an entitlement to release when a person has previously failed to comply with a bail undertaking or a bail condition in relation to the offence, should not be retained.

(7) The current exception to entitlement to release relating to a person who is incapacitated by intoxication, injury or use of a drug or is otherwise in danger of physical injury or in need of physical protection, should not be retained.

(8) New legislation should make clear that an entitlement to release in the case of a specified minor offence should not preclude the commission of that offence being taken into account as relevant in some other proceeding (such proceedings for a breach of a conduct direction, or sentencing proceedings).

7.2 A new *Bail Act* should provide that in all cases other than those covered by an entitlement to release, an authority has absolute discretion to release without a condition or a conduct direction. 105

Chapter 8 – Presumptions page

8.1 In a new *Bail Act*, the scheme of presumptions, exceptions and exceptional circumstances in the current legislation should be replaced with a uniform presumption in favour of release applicable to all cases except those covered by an entitlement to release and appeal cases. 123

Chapter 9 – Release pending appeal page

9.1 A new *Bail Act* should continue to provide that a court should not release a person pending an appeal to the Court of Criminal Appeal or to the High Court unless exceptional circumstances are established. 135

9.2 A new *Bail Act* should provide that, in the case of an appeal other than to the Court of Criminal Appeal, the authority, in determining whether to release or detain a person pending the appeal, must not release the person unless it is satisfied that the appeal has a reasonably arguable prospect of success. 138

9.3 (1) Consideration should be given to amalgamation of the *Criminal Appeal Act 1912* (NSW) and the *Crimes (Appeal and Review) Act 2001* (NSW) into a single statute. 142

(2) Consideration should also be given to clarifying the relevant appeal provisions to ensure that, where the offender has been released pending the appeal, the court determining the appeal has sufficient power to order the commencement or recommencement of the original sentence, so as to give effect to the decision of that court.

Chapter 10 – Considerations page

10.1 The justification model for a presumption in favour of release, as incorporated in the current *Bail Act 1978*, should be retained in a new *Bail Act*, as follows: 162

A person is entitled to be released unless detention is justified having regard to the considerations set out in the following recommendations.

10.2 (1) A new *Bail Act* should provide that, in deciding whether to release a person and whether to impose a condition or give a conduct direction, the authority must take the considerations specified in paragraph (2), and only these considerations, into account. The considerations are not listed in any hierarchy, and the weight given to each consideration should be considered in the circumstances of the particular case. 162

(2) The considerations should be:

(a) The public interest in freedom and securing justice according to law.

(b) The integrity of the criminal justice system having regard to, and only to:

(i) the likelihood that, if released, the person will abscond (as defined in Recommendation 10.4);

(ii) the fact that the person has a history of persistent failure to attend court for whatever reason and the authority is satisfied that the person is unlikely to attend court on a future occasion as required if released;

(iii) the likelihood that, if released, the person will interfere with the course of justice, such as by interfering with evidence, witnesses or jurors;

(iv) the fact that the person, being charged with an indictable offence committed while subject to conditional liberty and:

(A) has one or more pending charges for an indictable offence committed while subject

to conditional liberty; or

(B) has been convicted on one or more prior occasions of an indictable offence committed while subject to conditional liberty.

"Subject to conditional liberty" means being released pending proceedings, or being on parole, or serving a sentence of imprisonment by way of home detention or an intensive corrections order, or being subject to a suspended sentence or a good behaviour bond.

(c) The likelihood that, if released, the person will harm or threaten harm to any particular person or people including, in particular, anyone with whom the person is in a domestic relationship as defined in the *Crimes (Domestic and Personal Violence) Act 2007 (NSW)*.

(d) The protection and welfare of the community having regard to and only to the likelihood that, if released, the person will commit:

(i) an offence causing death or injury, or

(ii) a sex offence, or

(iii) an offence involving serious loss of or damage to property, or

(iv) an offence or series of offences which give rise to a substantial risk of causing death or injury or serious loss of or damage to property.

(e) The interests of the person and of the person's family and associates.

(3) The provision should state that it does not apply to cases where there is an entitlement to release without conditions or conduct directions or where the authority exercises its absolute discretion to release on this basis.

10.3 A new *Bail Act* should provide that, in relation to the public interest in freedom and securing justice according to law, the authority must consider: 163

(a) The entitlement of every person in a free society to liberty, freedom of action and freedom from unnecessary constraint in daily life.

(b) The presumption of innocence whenever a person is charged with an offence.

(c) There should be no detention by the state without just cause.

(d) There should be no punishment by the state without conviction according to law.

(e) The public interest in a fair trial for both the state and the person charged with an offence.

10.4 (1) A new *Bail Act* should provide that "abscond" should be defined to mean wilful failure to appear in order to avoid being dealt with by the court, as distinct from non-appearance merely out of forgetfulness or confusion. 164

(2) In considering the likelihood of absconding or whether the authority is satisfied that the person is unlikely to appear on a future occasion, the authority must consider:

(a) the strength or otherwise of the person's family and community ties, including employment, business and other associations, extended family and kinship ties and the traditional ties of Aboriginal people and Torres Strait Islanders,

(b) the likelihood of conviction for the offence charged and, if convicted, the likelihood of a custodial sentence and the likely duration of any such sentence,

(c) whether the person has a history of absconding or otherwise failing to appear or of attending court as required (including the circumstances of any prior failure to appear),

(d) any specific evidence indicating whether or not the person is likely to abscond or fail to appear (as the case may be).

10.5 Consideration should be given to implementing a pilot program of reminder notices being sent to people released pending trial in order to evaluate the potential cost savings of such a program if implemented on a wider basis. 164

10.6 A new *Bail Act* should provide that, in assessing the likelihood that, if released, the person will harm or threaten harm to any particular person in a domestic relationship as defined in the *Crimes (Domestic and Personal Violence) Act 2007 (NSW)*, an authority must consider whether: 164

(a) the person has a history of violence,

(b) the person has been violent to the other person in the past (whether or not the accused person has been convicted of an offence in respect of the violence),

(c) the person has failed to comply with a conduct direction in respect of the offence to which this section applies that was imposed for the protection and welfare of the other person,

(d) in the opinion of the bail authority, the accused person will comply with any such requirement in the future.

10.7 A new *Bail Act* should provide that, in considering the interests of the person and of the person's family and associates, the authority must consider: 165

(a) the person's interest in liberty, freedom of action and freedom from unnecessary constraint in daily life,

(b) the period that the person may be obliged to spend in custody if detained and the conditions under which the person would be detained,

(c) the prospect that the person will not be able to prepare optimally for trial and participate optimally in the trial,

(d) the physical and psychological hardship of imprisonment,

(e) the consequential hardship for the individual, such as the effect on housing, not being employed, not being able to service financial commitments, and the stigma of having been to prison,

(f) hardship for the person's family, such as loss of financial support, loss of housing and the impact on children from loss of parental care,

(g) hardship for the person's associates, such as an employer, a business partner or a creditor, and

(h) any special vulnerability or need of any child or young person, of a person with a cognitive or mental health impairment, or an Aboriginal person or Torres Strait Islander, or of any other person.

10.8 A new *Bail Act* should provide that the following matters must be taken into account if the authority considers such a matter is relevant in relation to one or more of the mandatory considerations mentioned in Recommendation 10.2, but do not comprise mandatory considerations in themselves: 165

(a) the nature and seriousness of the offence charged including whether the offence charged involves firearms, explosives, prohibited weapons or terrorism

(b) the strength or otherwise of the prosecution case

(c) a history of prior offences

(d) previous failure to comply with a conduct direction or a conduct requirement imposed as part of a bail agreement under the *Bail Act 1978*.

10.9 A new *Bail Act* should provide that the following rules apply to all decisions whether to release a person, irrespective of any other consideration: 165

(1) Detention is a measure of last resort and a person must be released if a reason for detention is sufficiently satisfied by setting conditions of release or by giving a conduct direction.

(2) A person must not be detained unless a custodial sentence is likely.

(3) An authority must not order a person to be detained for longer than the likely duration of a custodial sentence. A court or authorised justice may disregard this rule, provided that the matter is listed for reconsideration at a sufficiently early time to ensure that the person is not detained for longer than the likely duration of a sentence for the offence with which the person is charged.

(4) In assessing the matters referred to in (2) and (3) above the authority is to make its best estimate having regard to the experience and information of the person constituting the authority on the particular occasion.

Chapter 11 – Special needs and vulnerabilities page

11.1 A new *Bail Act* should provide that, in making a decision in relation to a young person under the age of 18 years regarding release or a condition or conduct direction, the authority must take into account (in addition to any other requirements) any matters relating to the person's age, including: 175

(a) that young people have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard and a right to participate in the processes that lead to decisions that affect them,

(b) that it is desirable, wherever possible, to allow the education or employment of a young person to proceed without interruption,

(c) that it is desirable for a young person to reside in safe, secure and stable accommodation, and,

where possible, in his or her own home,

(d) that the detention or imprisonment of a young person is to be used only as a measure of last resort and for the shortest appropriate period of time,

(e) the young person's ability to understand and to comply with conditions or conduct directions, and

(f) that young people have undeveloped capacity for complex decision-making, planning and the inhibition of impulsive behaviours.

11.2 A new *Bail Act* should provide that, in making a decision in relation to a person with a cognitive or mental health impairment regarding release or a condition or conduct direction, the authority must take into account (in addition to any other requirements): 180

(a) the person's ability to understand and comply with conditions or conduct directions,

(b) the person's need to access treatment or support in the community,

(c) the person's need to undergo assessment to determine eligibility for treatment or support,

(d) any additional impact of imprisonment on the person as a result of their cognitive or mental health impairment,

(e) any report tendered on behalf of a defendant in relation to the person's cognitive or mental health impairment,

(f) that the absence of such a report does not raise an inference adverse to the person or a ground for adjourning the proceedings unless on the application of or with the consent of the person.

11.3 A new *Bail Act* should provide that, in making a decision in relation to an Aboriginal person or Torres Strait Islander regarding release or a condition or conduct direction, the authority must take into account (in addition to any other requirements): 185

(a) any matter relating to the person's Aboriginal or Torres Strait Islander identity, culture and heritage, which may include:

(i) connections with and obligations to extended family

(ii) traditional ties to place

(iii) mobile and flexible living arrangements

(iv) any other relevant cultural issue or obligation.

(b) any report tendered on behalf of a defendant from groups providing services to Indigenous people.

(c) that the absence of such a report does not raise an inference adverse to the person, or a ground for adjourning the proceedings unless on the application of or with the consent of the person.

11.4 A new *Bail Act* should provide that, in making a decision regarding release or a condition or conduct direction, the authority must take into account (in addition to any other requirements) any special vulnerability or need of the person. 189

	Chapter 13 – What conditions and conduct directions should be allowed	page
13.1	A new *Bail Act* should: (1) specify that the only permitted conditions are those referred to in the recommendations below; (2) not limit the kind of conduct direction that may be imposed, subject to any limitations (including limitations as to purpose) recommended in this report.	220
13.2	A new *Bail Act* should continue to provide that financial and security conditions may be imposed, based on the current provisions of the *Bail Act 1978* (NSW).	220
13.3	(1) A new *Bail Act* should continue to provide that surrender of a passport may be a condition of release, based on s 36(2)(i) of the *Bail Act 1978* (NSW), subject to being satisfied that a passport or passports exist. (2) A new *Bail Act* should not retain the provision requiring that any passport be surrendered in the case of an offence causing death (s 37A of the *Bail Act 1978* (NSW)).	220
13.4	(1) A new *Bail Act* should allow the imposition of conditions and conduct directions to facilitate assessment and participation in a treatment, intervention or rehabilitation program, based on s 36A of the *Bail Act 1978* (NSW).	220

(2) A new *Bail Act* should provide:

(a) that a condition may be imposed concerning the release into the care of a person or agency (including a rehabilitation facility).

(b) that a conduct direction may be imposed to facilitate assessment, or treatment, intervention or rehabilitation program.

(c) that a condition or a conduct direction given for this purpose may only be imposed with the consent of the person (including a young person), a guardian, or a person with parental responsibility for a young person under 18 years.

13.5 A new *Bail Act* should provide that, in cases where a young person would be released except for the fact that there is no accommodation or no suitable accommodation available, the Act should provide that: 221

(a) the Children's Court may impose a condition that the young person is not to be released until the court is informed by the Department of Family and Community Services or Juvenile Justice NSW that suitable accommodation is available,

(b) the Court may also impose a conduct direction that, upon release, the young person is to reside at such accommodation as may be directed by the relevant agency,

(c) information that suitable accommodation is available may be lodged with the court in writing, specifying the address of such accommodation,

(d) upon provision of such information and subject to compliance with any other condition the young person must be released without any requirement that the matter be re-listed before the court,

(e) upon imposing a condition pursuant to this provision, the Court must re-list the matter for further hearing every 2 days until the Court is notified in writing that suitable accommodation has become available and its address,

(f) at any stage in this process, the court may direct any relevant department to provide up to date information concerning action being taken to provide suitable accommodation.

13.6 The provisions in the current Act relating to bail accommodation provided by Corrective Services NSW (s 36(2)(a1), s 36(2A) and s 36(2B)) should not be retained. 221

13.7 A new *Bail Act* should not retain provision for a third party assurance of reliability (s 36(2)(b) of the *Bail Act 1978* (NSW)). 221

Chapter 14 – How conditions and conduct directions should be decided page

14.1 A new *Bail Act* should provide that neither a condition nor a conduct direction should be imposed unless it is justified. 223

14.2 The considerations to be taken into account in deciding whether to impose a condition or a conduct direction should be the same as apply to a decision whether to release or detain a person. 226

14.3 (1) A new *Bail Act* should provide that an authority must: 233

(a) not impose a condition or conduct direction unless the authority is of the opinion that, without such a condition or conduct direction, the person should be detained pending proceedings having regard to the considerations and rules applicable to a decision whether to release or detain;

(b) consider whether the person has family, community or other support available to assist the person in complying with a condition and conduct direction;

(c) not impose a condition or conduct direction that is more onerous or more restrictive of the person's daily life than is necessary having regard to the considerations and rules applicable to a decision whether to release or detain;

(d) not impose a condition or conduct direction unless the authority is satisfied that compliance is reasonably practicable;

(e) not impose a financial condition concerning the forfeiture of an amount of money, with or without security, in relation to a young person under 18 years, except if charged with a serious indictable offence (as defined in s 4 of the *Crimes Act*);

(f) not impose a financial condition concerning the forfeiture of an amount of money, with or without security, in relation to an adult unless the bail authority is satisfied that:

(i) there would otherwise be a likelihood of the person absconding or being unlikely to appear

on a future occasion having regard to the considerations mentioned in Recommendation 10.5(2), and

(ii) payment of the sum involved is or is likely to be within the means of the person or people who may be liable to pay that sum;

(g) not impose a condition or conduct direction for the purpose of promoting the welfare of the person unless it is otherwise justified having regard to the considerations set out in the Act.

(2) In this recommendation *financial condition* means a condition requiring a person (who may be the accused person) to enter into an agreement to forfeit a sum of money if the accused person fails to attend court as required.

	Chapter 15 – Failure to comply with a condition or to observe a conduct direction	page
15.1	(1) A new *Bail Act* should provide that if a person remains in custody because a condition of release has not been met: (a) a court of competent jurisdiction (to be defined for the purpose of the provision) must be notified to that effect by the government agency holding the person in custody, within eight days from the date on which the decision was made to impose the condition, (b) such a notice must continue to be given, periodically, each 14 days after the expiration of the initial period of eight days, if the person continues to be in custody, subject to a decision by the court or by the person that such periodic notice is not required, (c) if the person is a young person under 18, notice must be given within two days, and every two days thereafter. (d) upon receiving any such initial or periodic notice, the court must list the matter at the earliest possible time, at which time the court may, pursuant to an application by the person or by any other person competent to make an application or of its own motion, decide afresh whether the person should be released or detained and what conditions or conduct direction (if any) should be imposed, (e) notice of such listing must be given to such legal representatives as are on the record; if the person has been unrepresented and is an Aboriginal person or Torres Strait Islander, then to the Aboriginal Legal Service; and, if a young person, then to Juvenile Justice or to the Department of Family and Community Services if the young person is in care of the Department, (f) at any stage in the process, the court may direct any government agency with responsibility for the welfare of the person to explain to the court why the condition has not been complied with and what steps are being taken to comply with the condition, and (g) these provisions do not apply where a court decides that a young person not be released unless the court is notified that suitable accommodation is available. (2) Consideration should be given to whether it would be practicable to specify a shorter period for giving the initial notice. (3) Section 258 of the *Crimes (Administration of Sentences) Act 1999* (NSW) should be repealed.	239
15.2	(1) A new *Bail Act* should provide: (a) that if a police officer believes, on reasonable grounds, that a person is failing, has failed or is about to fail to comply with a conduct direction, the police officer may: (i) take no action, (ii) issue a warning, (iii) require the person to attend court by notice without arresting the person, or (iv) arrest the person and take them as soon as practicable before a court. (b) that, in considering what course of to take, the police officer must have regard to: (i) the relative seriousness or triviality of the suspected failure (including threatened failure), (ii) whether the person has reasonable excuse for the failure, (iii) that arrest is a last resort, (iv) insofar as they are apparent to or known by the officer, the person's age and any cognitive or mental health impairment.	243

(c) that, if the person is arrested, the officer may afterwards discontinue the arrest.

(d) that, upon being satisfied that the person has failed, or was about to fail, to comply with a conduct direction, a court may redetermine whether to release or detain the person and whether to impose a condition or a conduct direction.

(2) In relation to the power in (1)(d), the provisions as to jurisdiction of the various courts should be those set out in Recommendation 17.3.

15.3	A new *Bail Act* should provide that failure to comply with a conduct direction does not constitute contempt of court.	244
	Chapter 16 – Implications of *Lawson v Dunlevy*	page
16.1	The government should consult, in the course of considering this Report and of drafting a new *Bail Act*, on the need to provide for a mechanism for imposing enforcement conduct directions. The following framework could be used as a basis for consultation:	252
	(1) An enforcement conduct direction should be defined as a direction that requires a released person to submit to any form of testing, or to comply with a police instruction, that is imposed in support of monitoring that person's compliance with another conduct direction (the underlying conduct direction).	
	(2) An authority may impose an enforcement conduct direction if the authority considers that:	
	(a) without such a direction, police would not have adequate opportunity to detect and act on non-compliance with the underlying conduct direction, and	
	(b) the imposition of the enforcement conduct direction is reasonable in the circumstances, having regard to the history of the released person and the likelihood or risk of that person breaching the underlying conduct direction.	
	(3) The conduct enforcement direction must:	
	(a) state with precision what is required (for example, it must identify with precision, the form of the testing that may be employed); and	
	(b) specify such limits on the frequency with which the power can be exercised or the places or times at which it can be exercised, to ensure that it is not unduly onerous in all the circumstances.	
	(4) The NSW Police Force should develop standard operating procedures for monitoring release compliance and enforcement that would recognise the foregoing requirements.	
	(5) In the event of alcohol or drug testing being accepted as suitable enforcement conduct directions then it would be convenient for the new *Bail Act* to include a set of provisions akin to the existing Acts and Regulations that variously permit and regulate alcohol and drug testing and analysis and the use of the results of any such exercise of power.	
	Chapter 17 – The offence of failing to appear	page
17.1	(1) A new *Bail Act* should retain the offence of failing to appear but only in relation to a person	256
	(a) who has been released with a condition or a conduct direction being imposed, or	
	(b) who fails to appear on sentence.	
	(2) The maximum penalty for the offence should be two years imprisonment.	
	(3) A new *Bail Act* should reflect the general law of accumulation of sentences, and not retain the current provisions which exempt this offence from the usual principles relating to accumulation of sentences.	
	Chapter 18 – Applications for release, detention and variation	page
18.1	A new *Bail Act* should provide that:	259
	(1) Where an authorised officer has refused to release a person from custody or has imposed conditions or conduct directions:	
	(a) a more senior police officer of or above the rank of sergeant:	
	(i) may review the decision of the authorised officer (without a request from the person), and	
	(ii) must review the decision of the authorised officer if the person requests it,	
	unless such a review would cause any delay in bringing the matter before an authorised justice,	

a magistrate or a court;

(b) the review may be of:

(i) the refusal to release the person from custody; or

(ii) any conditions or conduct direction imposed by the authorised officer making the original decision.

(2) The requirement that police provide an accused person with information about his or her entitlement to, or eligibility for, release, should include a requirement that the person be advised of his or her entitlement to seek review by a more senior authorised officer.

18.2 (1) The system of court review under Part 6 of the *Bail Act 1978 (NSW)* should be simplified and included in a regime that allows for three forms of application, namely: 267

(a) If a person is subject to a decision to detain the person, the person may apply for an order that the person be released. On such an application, the court may affirm the prior decision to detain the person or may release the person with or without a condition or a conduct direction.

(b) If a person is subject to a decision to release the person with or without a condition or conduct direction, a prosecutor may apply for an order that the person be detained. On such an application, the court may affirm the prior decision to release the person with any condition or conduct direction that was imposed, may vary a condition or a conduct direction, impose a new condition or conduct direction, or order that the person be detained.

(c) An application for the variation of a condition and/or conduct direction may be made by:

(i) a person subject to the release order;

(ii) the informant (being a police officer) or complainant in the case of bail granted in respect of a domestic violence offence or an application for an order under the *Crimes (Domestic and Personal Violence) Act 2007* (NSW);

(iii) the prosecutor; and

(iv) the Attorney General.

(d) Upon such an application, the court may affirm the prior decision, revoke or vary any existing condition or conduct direction, or impose any condition or conduct direction.

(2) In the case of an application for variation, the court should be confined to considering conditions or conduct directions and should not make an order for detention unless the prosecution has also applied for an order for detention.

(3) Applications should be dealt with by way of rehearing, and evidence or information may be given in addition to, or in substitution for, the evidence or information given on the making of the original decision.

(4) Subject to Recommendation 18.6, reasonable notice must be given of the bringing of an application for detention following a decision to release or for the variation of conditions or conduct directions. In the case of a detention application such notice must be given to the accused. In the case of a variation application, the notice must be given to:

(a) the prosecution, if the accused seeks a variation; and

(b) the accused, if the prosecution seeks the variation.

18.3 A new *Bail Act* should specify in which court or courts applications may be made for release, for detention and for variation of conditions or conduct directions, and in what circumstances. Subject to further consultation with the courts concerned, the following broad considerations should be taken into account in drafting such a provision. 268

(1) The Supreme Court's jurisdiction to entertain an application for release following a decision by a lower court to detain a person should be preserved, the following paragraphs being subject to that jurisdiction.

(2) Where proceedings for an offence are pending in the Supreme Court or in the District Court, that court should have exclusive jurisdiction to entertain an application for release or an application for detention.

(3) Except where proceedings are pending in Supreme Court or in the District Court, the Local Court should have jurisdiction to entertain an application for release or an application for detention.

(4) The Supreme Court, the District Court and the Local Court should have jurisdiction to entertain an application for variation of a condition or conduct direction imposed by the respective court.

(5) The Local Court should have a concurrent jurisdiction to entertain an application for variation of a

condition or conduct direction imposed by that court or by the Supreme Court or by the District Court, subject to paragraph (6).

(6) If the Supreme Court or the District Court has ordered that any application be made only to that court to vary any condition or conduct direction imposed by that court, the Local Court should have no jurisdiction to deal with such an application unless the parties consent to the variation proposed.

(7) The Supreme Court and the District Court should have power to decline to hear an application for variation of a condition or conduct direction.

(8) An application for detention may be made:

(a) where an application has been made for variation of a condition or a conduct direction, to the court considering the variation application, or

(b) where the prosecutor is dissatisfied with a decision to release, to the Supreme Court.

18.4 The forms currently in use in relation to bail reviews should be replaced with a single form in plain English that accords with the current law, including the relevant Regulations. 269

18.5 A new *Bail Act* should retain the provision in s 48B of the *Bail Act 1978* (NSW) allowing authorised justices to hear variation applications, subject to limitations, in relation to reporting or residence conduct directions. The provision should be extended to include the variation, but not the removal, of curfew and non-association or place restriction directions. 269

18.6 A new *Bail Act* should provide that, on first appearance by a person before a court in relation to proceedings: 275

(a) the court must hear any application for an order to release the person or to remove or vary any condition or conduct direction, without requiring that notice of the application be given to the prosecutor, but may adjourn the hearing if necessary in the interests of justice;

(b) the court may, of its own motion, make an order to release the person or to remove or vary any condition or conduct direction, provided that any such order is for the benefit of the person.

Chapter 19 – Refusal to hear applications page

19.1 A new *Bail Act* should retain a provision based on s 22A of the *Bail Act 1978* (NSW) with the following changes: 290

(1) The provision (currently s 22A(2)) that a court may refuse to entertain an application for release if satisfied that the application is frivolous or vexatious should include the additional grounds that the application is "without substance or has no reasonable prospect of success".

(2) The provision (currently s 22A(3)) allowing the Supreme Court to refuse to entertain an application if it comprises a bail condition review (a variation application under our recommendations) which could be dealt with in the Local Court or in the District Court should be retained.

(3) The provision (currently s 22A(1) and (1A)) proscribing repeat applications unless there are grounds for further application should be retained, but should not apply to:

(a) a person who was under 18 years at the time of the offence and is under 21 years at the time of the application, or

(b) to an adult unless the person has already made two applications to the court.

(4) An additional ground for further application should be provided: any other matter which, in the opinion of the court, is a relevant consideration.

(5) The provision for refusal to hear a release application should be extended to apply to an application for variation of a condition or conduct direction that is the same or substantially the same as previously sought.

(6) The provision (currently s 22A(5)) allowing a lawyer to refuse to make a further application should not be retained.

Chapter 20 – Electronic monitoring page

20.1 (1) Consideration should be given to the establishing a pilot scheme of release subject to electronic monitoring, with the following features: 301

(a) the scheme should be limited to people who have already been detained and who are likely to spend a substantial amount of time in detention;

(b) monitoring of compliance should be carried out by the Community Compliance and Monitoring

Group of Corrective Services NSW;

(c) it should be possible for time spent on release with electronic monitoring to be taken into account on sentence.

(2) In developing the scheme, further consideration be given to:

(a) whether a scheme is best achieved administratively or by statute; and

(b) the procedure for applying for release with electronic monitoring.

	Chapter 21 – Monitoring and review of a new Bail Act	page
21.1	(1) A new *Bail Act* should contain a provision requiring the Minister to conduct a review of the Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives. (2) The review should be undertaken as soon as possible after the period of three years from the date of assent to the Act. A report on the outcome of the review should be tabled in each House of Parliament within 12 months after the end of the period of three years	303
21.2	The government should, as soon as practicable, establish a process to improve the collection and reporting of data required for an effective review of a new *Bail Act*.	306

1. Introduction to the bail review

Previous reviews 2
Our review 2
Our process 3
The scope of our report 5

1.1 On 8 June 2011, the Attorney General asked the NSW Law Reform Commission to undertake a review of the law of bail under the following terms of reference:

> Pursuant to section 10 of the Law Reform Commission Act 1967, the Law Reform Commission is to review bail law in NSW. In undertaking this inquiry the Commission should develop a legislative framework that provides access to bail in appropriate cases having regard to:
>
> 1. whether the Bail Act should include a statement of its objects and if so, what those objects should be;
> 2. whether the Bail Act should include a statement of the factors to be taken into account in determining a bail application and if so, what those factors should be;
> 3. what presumptions should apply to bail determinations and how they should apply;
> 4. the available responses to a breach of bail including the legislative framework for the exercise of police and judicial discretion when responding to a breach;
> 5. the desirability of maintaining s 22A;
> 6. whether the Bail Act should make a distinction between young offenders and adults and if so, what special provision should apply to young offenders;
> 7. whether special provisions should apply to vulnerable people including Aboriginal people and Torres Strait Islanders, cognitively impaired people and those with a mental illness. In considering this question particular attention should be give to how the latter two categories of people should be defined;
> 8. the terms of bail schemes operating in other jurisdictions, in particular those with a relatively low and stable remand population, such as the UK and Australian states such as Victoria, and of any reviews of those schemes; and,
> 9. any other related matter.

1.2 The Attorney General asked the Commission to seek the views of stakeholders and the community and to report to him. This is our report.

Previous reviews

1.3 The *Bail Act 1978* (NSW) was originally enacted following a review conducted by a committee of K S Anderson and S Armstrong.[1] The committee's report recommended a comprehensive statute to consolidate and reform the mix of common law and statute that existed at the time. In 2011, the underlying structure of the Act remains largely the same, but frequent amendments, particularly in more recent times, have resulted in an Act which is widely regarded as complex and difficult to understand.

1.4 The first recommendation of the Bail Review Committee was:

> All laws governing Bail should be stated in precise but simple words which can readily be understood by the layman.[2]

1.5 The *Bail Act* in 2011 no longer conforms with this recommendation. It never did by modern day standards, though it represented a ground-breaking reform at the time. The large number of subsequent amendments has been mostly *ad hoc*. A major theme of these amendments has been to make it harder for a large proportion of defendants to get bail. The history of the *Bail Act* is set out in Chapter 3.

1.6 In very recent times, government agencies and stakeholders have undertaken a good deal of work in looking at the laws governing bail and the *Bail Act*. In 2010, the Department of Justice and Attorney General released a review report and an exposure draft bill, and received 28 submissions.[3] Following that process a roundtable chaired by the Hon Justice Megan Latham was convened to provide advice to the government. While no report of that process was released, the roundtable did valuable work on some key areas of the *Bail Act* within its specified parameters.

1.7 The Attorney General initiated this more fundamental review in 2011. We have drawn on the material and deliberations of the previous departmental review as well as the 1976 report of the Bail Review Committee.

Our review

1.8 Our approach has been more fundamental than the recent departmental review.

1.9 While the *Bail Act* has been amended often, those amendments have not addressed the basic principles that apply to bail, or the evidence about how the law is working. We have gone back to basic principles and asked: what purpose does bail law serve in the context of the criminal justice system and how should that purpose be reflected in legislation? We have reviewed the evidence about the working of bail law, and the effect it is having on the number of people in prison on remand. We have asked stakeholders for their views.

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1. New South Wales, *Report of the Bail Review Committee,* Parl Paper No 46 (1976).
2. New South Wales, *Report of the Bail Review Committee,* Parl Paper No 46 (1976) 5.
3. NSW, Department of Justice and Attorney General, Criminal Law Review, *Review of Bail Act 1978 (NSW)* (2010).

1.10 Those stakeholders have clearly and unanimously stated that a principled evidence-based review is required. A new simplified *Bail Act* which adheres to the fundamental principles of bail is needed.

Our process

1.11 We were asked to report within a short timeframe, initially by November 2011. At that stage the Attorney asked us to conduct some further consultation and report in March 2012. Recognising the urgency of this issue, the recent scrutiny of the *Bail Act* by other agencies and the widespread interest of stakeholders, we adopted a streamlined but thorough consultation process.

1.12 We have researched widely. The wide-ranging academic, law reform and other literature on the law of bail has formed the background to, and foundation of, our review. We have taken a pragmatic approach.

1.13 We did not release a detailed consultation paper in this reference. There was already considerable work in the public domain, including the recent departmental review,[4] to provide a background to bail law. Instead, we released a very short paper outlining the context to our review, and posing a list of questions that we saw as being important.

1.14 We received 40 submissions (listed in Appendix B) which were comprehensive and of high quality.

1.15 We conducted 19 consultation meetings with stakeholders including two roundtables focussed on young people and adults (listed in Appendix C). We consulted with the judiciary, legal practitioners (defence and prosecution), community organisations, special interest groups, representatives of victims' groups, as well as the NSW Police Force and relevant government departments and agencies. These consultations proved invaluable in focusing us on the key issues in the law and in adding depth and detail to the written submissions. We also observed relevant proceedings in a Local Court, Children's Court and Weekend Bail Court (listed in Appendix D).

1.16 At the Attorney's request we conducted a number of targeted consultations on our draft proposals between November 2011 and February 2012. This process enabled us the refine the recommendations in the report and ensure their practicality.

1.17 As we were finalising this Report, the Supreme Court released an important decision in the case of *Lawson v Dunlevy*.[5] We propose a way of dealing with the implications of this important case in Chapter 16. However, because the case came late in the process, we have been unable to consult on the approach, and further consideration will be necessary.

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4. NSW, Department of Justice and Attorney General, Criminal Law Review, *Review of Bail Act 1978 (NSW)* (2010).

5. *Lawson v Dunlevy* [2012] NSWSC 48.

1.18 Bail laws are put into practice in courts across NSW on a daily basis. Given this, the practical experience of those working in and around the criminal justice system is given major emphasis in this report.

1.19 We are grateful for the time and energy of all those who made submissions and came to consultation meetings, and to the court staff and magistrates who contributed their time and assistance.

1.20 This is a complex area of law involving consideration of a number of often fundamental and competing principles. Unanimity did not emerge on all points and in all details. There were divergent views about the appropriate way forward in some important areas. Nonetheless, there was a remarkable level of agreement among stakeholders over the key themes and problems with the current law:

- There was overwhelming concern about the growth in the remand population, especially in relation to young people.
- There was unanimity that the *Bail Act* is overly complex and too hard to understand.
- There was broad agreement that the present complex structure of presumptions was undesirable and should go. Defence and prosecution lawyers, and community groups all agreed on this proposition. The Police Association opposed any change to the existing presumptions. The NSW Police Force submission proposed reform, but not abolition, of the presumptions.
- There was broad agreement that the considerations applying to the bail decisions required review. A difference emerged about the level of detail that should be provided, which we have sought to balance in our recommendations.
- There was a considerable level of agreement on aligning the considerations applicable to the imposition of conditions with those applying to decisions whether to release at all.
- There was broad, though not universal, agreement that the extent of bail conditions being imposed and the monitoring of compliance with them was a major issue. There were submissions from NSW Police Force concerning the need and legitimate role of bail conditions and the need to monitor compliance. However, many other stakeholders considered overuse of conditions and overly intensive monitoring was contributing to unnecessary remands. This was a particular area of concern for those who deal with people under 18 years of age (“young people”).
- There was widespread concern about the effect of changes which limit the repeat bail applications that can be made, although there was a divergence of views about how best to proceed and the level of reform required.

The scope of our report

1.21 Given the limited time available for this review, we have focused on the fundamental issues presented by the law of bail, and on the main issues that are causing difficulty. In this regard we have made major recommendations on:

- Modernising the language to reflect reality, by replacing the terms "grant bail" and "remand" with the terms "release pending proceedings" and "detain pending proceedings".
- The replacement of the complex structure of presumptions with a single presumption in favour of bail (except in appeal cases).
- A new and simplified structure for the considerations that a court should take into account in making bail decisions:
  - the public interest in freedom and in securing justice according to law;
  - the interests of the person and of the person's family and associates;
  - the risk of the person failing to appear at court;
  - the risk of the person interfering with the course of justice;
  - the risk of the person committing a seriously harmful offence;
  - a history of offending while on bail or parole; and
  - the risk of the person harming, or causing harm to, another person.
- A new vehicle for the conduct requirements which may be imposed when a person is released, replacing the condition that the person enter into a "bail agreement" with a simple conduct direction.
- The reform of conditions and conduct requirements to ensure only those conditions and conduct requirements that are actually required are placed on a person, and that those conditions can then be properly monitored.
- Reform of the procedure for repeat bail applications to ensure that court time is not wasted, but that bail applications which should be brought are not unnecessarily stifled.

1.22 In the time available we have not been able to address all the detailed legislative changes necessary for such reforms. There are also numerous other instances where changes are necessary to simplify and clarify the current legislation. A new *Bail Act* should be drafted which deals with these matters comprehensively.

1.23 Our concurrent reference on people with cognitive and mental health impairments in the criminal justice system also has a bail component. We have drawn on work done in that reference. We will have more to say about the law of bail as it applies to people with cognitive and mental health impairments in our report on that reference, but the main recommendations required in relation to the *Bail Act* are contained in this Report.

2. Bail and the criminal justice system

The structure and purposes of the criminal justice system.....7
The purposes of an effective criminal justice system.....8
Principles that protect liberty and fairness in the criminal justice system.....9
Personal freedom and liberty:
"the most elementary and important of all common law rights".....10
The presumption of innocence 11
No detention without legal cause.....11
No punishment without
conviction by due process, and limitations on preventative detention.....12
The right to a fair trial.....12
Individualised justice and consistency.....13
Special provision for young people.....14
Framing bail legislation in response to
the objectives and principles of the criminal justice system 15

2.1 Bail law is part of the criminal justice system. In this chapter, we discuss the fundamental purposes of the criminal justice system and the need for its effective functioning. We discuss some fundamental and long-standing principles that underpin its fair operation. We conclude by providing our view concerning the role of bail legislation in the criminal justice system as a whole and the need for a balance to be achieved between the function of bail law and the principles and values of the criminal justice system itself.

The structure and purposes of the criminal justice system

2.2 The criminal justice system is made up of a number of linked institutions, governed by law:

- The legislature makes laws that define certain acts as criminal. These are acts that breach the standards of conduct the community requires of its members and which are sufficiently serious to warrant attention by the state.
- Police have responsibility for preventing and detecting crime and for bringing suspected offenders before the courts.
- The courts, with the assistance of prosecutors and defence lawyers, determine whether the person is guilty, and impose an appropriate sentence if the person is convicted.
- The corrective services agencies manage prisons and supervise sentences served in the community. A specialist agency has this role in relation to young people.

2.3 When a person is apprehended by police for a criminal offence, the person may be arrested and brought before a court or the person may be required to attend court by notice without arrest. Once arrested by police and once before a court with or without arrest, the *Bail Act* provides the framework for decisions to be made

concerning the release or detention of the person pending determination of the proceedings.

The purposes of an effective criminal justice system

2.4 The purposes of an effective criminal justice system are reflected in s 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) which provides that the purposes of sentencing are as follows:

(a) to ensure that the offender is adequately punished for the offence,

(b) to prevent crime by deterring the offender and other persons from committing similar offences,

(c) to protect the community from the offender,

(d) to promote the rehabilitation of the offender,

(e) to make the offender accountable for his or her actions,

(f) to denounce the conduct of the offender,

(g) to recognise the harm done to the victim of the crime and the community.

2.5 Some of these purposes can be described as "backward looking" – making the offender accountable for the conduct, punishing the offender, denouncing the conduct, and recognising harm to victims and the community. These purposes recognise that, where it is proved that a person has committed a crime, that conduct should be denounced and punished.

2.6 Importantly, the interests of the victim of crime are recognised in this way. The victim has suffered harm. Victims have an interest in ensuring that an offender is held accountable for the crime against them. Those interests relate to both the outcome of a criminal proceeding, and the process by which it is undertaken. Key rights are recognised in the *Victims Rights Act 1996* (NSW).

2.7 Other purposes can be described as utilitarian, or "forward looking" – they aim to achieve a future end, such as deterring the offender and others and promoting rehabilitation of the offender. The community expects that an effective criminal justice system will result in a safer society by deterring crime, incapacitating by imprisoning those who commit serious crimes, controlling the behaviour of offenders serving sentences in the community, and rehabilitating offenders.

2.8 There are functions of the criminal justice system that are not encompassed by s 3A. Reparation and restorative justice are not included in the above list, although reparation is mentioned in the legislation for young people, discussed below.[1] Activities directed at reparation, mediation and restorative justice are seen in many NSW programs including Youth Justice Conferencing, Circle Sentencing, Forum Sentencing, victims compensation and reparation orders. These matters are of

1. See para 2.34.

limited relevance to our discussion of bail, and we will explore them further in our current reference on sentencing.

Principles that protect liberty and fairness in the criminal justice system

2.9 Consistent with the expectation of the community, wide powers are assigned by the Parliament and the law to the police, the judiciary, and the corrective services agencies in order to ensure the effective functioning of the criminal justice system. However, since ancient times, the law has constrained these powers to prevent excessive intrusions into the liberty of the citizen. Criminal law and procedure has long recognised constraining principles of this kind. As Justice Brennan put it:

> Many of our fundamental freedoms are guaranteed by ancient principles of the common law or by ancient statues which are so much part of the accepted constitutional framework that their terms, if not their very existence, may be overlooked until a case arises which evokes their contemporary and undiminished force.[2]

2.10 These principles, which may also be described as rights, include:

- the right to personal liberty
- the presumption of innocence
- no detention without legal cause
- no punishment without conviction by due process
- a fair trial
- individualised justice and consistency in decision making, and
- special provision for young people.

We discuss each of these further below, with particular reference to their relevance to bail law.

2.11 Bail legislation, being part of the criminal justice system, should be constrained by the same principles. The legislation operates at every stage of the criminal justice system including appeal against conviction or sentence. However, most of its work is done before conviction, there being an appeal in only a minority of cases. In consequence, the majority of bail decisions are made before any conviction is entered. The right to personal liberty and its ancillary principles – "the presumption of innocence" and "no punishment without conviction by due process" - are therefore of particular relevance in framing bail legislation.

2. *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 520-521.

Personal freedom and liberty: "the most elementary and important of all common law rights"

2.12 The High Court of Australia has described the right to personal liberty as "the most elementary and important of all common law rights".[3] It has said:

> The right to personal liberty cannot be impaired or taken away without lawful authority and then only to the extent and for the time which the law prescribes.[4]
>
> A person is not to be imprisoned otherwise than upon the authority of a justice or a court except to the extent reasonably necessary to bring him before the justice to be dealt with according to law. That, as we conceive it, is one of the foundations of the common law.[5]

2.13 The right to liberty was seen as fundamental in many of the submissions to the Commission. The NSW Council for Civil Liberties noted that the "fundamental principles or concepts … must commence with the concept of liberty".[6] The NSW Bar Association stated that "the *Bail Act* should give particular emphasis to a person's right to liberty, even when charged with a criminal offence, unless there are substantial and unacceptable risks that the person may abscond or that they may jeopardise the safety and welfare of the community".[7] The Crime and Justice Reform Committee said:

> the fundamental purpose of any legislation governing bail should, in recognition of these principles, be to permit release from custody of persons arrested and charged with an offence, and to provide justification for holding persons on remand on limited grounds only.[8]

2.14 This right is recognised in the *International Covenant on Civil and Political Rights* (ICCPR), to which Australia is a signatory, and which recognises explicitly that pre-trial detention is not to be the norm:

> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
>
> 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.[9]

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3. *Foster v The Queen* (1993) 67 ALJR 550, 555, citing *Trobridge v Hardy* (1955) 94 CLR 147, 152.
4. *Williams v The Queen* (1986) 161 CLR 278, 292 (Mason and Brennan JJ).
5. *Williams v The Queen* (1986) 161 CLR 278, 306 (Wilson and Dawson JJ).
6. NSW Council for Civil Liberties, *Submission BA3*, 8.
7. NSW Bar Association, *Submission BA27*, 1.
8. Crime and Justice Reform Committee, *Submission BA9*, 1.
9. *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 99 UNTS 171 (entered into force 23 March 1976) art 9 (1), (3).

The presumption of innocence

2.15 The classic statement comes from *Woolmington v DPP*:

> Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt … No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.[10]

2.16 The presumption of innocence is recognised in a wide range of international and constitutional instruments.[11] Most importantly, article 14(2) of the ICCPR states:

> Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.[12]

2.17 The fundamental importance of the presumption of innocence to the criminal justice system in general and the law of bail in particular was emphasised in many submissions.[13] For example the Senior Public Defender stated that "where the accused/defendant has not entered a plea of guilty, there is one fundamental principle: the presumption of innocence and concomitant right to liberty".[14]

No detention without legal cause

2.18 A corollary of the right to liberty and the presumption of innocence is that every detention must have a legal cause, and a clear basis in law that is amenable to review by a court. As Justice Deane said:

> The common law of Australia knows no lettre de cachet or executive warrant pursuant to which either citizen or alien can be deprived of his freedom by mere administrative decision or action. Any officer of the Commonwealth Executive who, without judicial warrant, purports to authorise or enforce the detention in custody of another person is acting lawfully only to the extent that his conduct is justified by clear statutory mandate .... The lawfulness of any administrative direction, or of actions taken pursuant to it, may be challenged in the courts by the person affected: by application for a writ of habeas corpus where it is available or by reliance upon the constitutionally entrenched right to seek in this Court an injunction against an officer of the Commonwealth. It cannot be too strongly stressed that these basic matters are not the stuff of empty rhetoric. They are the very fabric of the freedom under the law which is the prima facie

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10. *Woolmington v DPP* [1935] AC 462, 481-482. See also *Ex parte Patmoy; Re Jack* (1944) 44 SR (NSW) 351, 358.
11. *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, CETS 005 (entered into force 3 September 1953) art 6(2); *Standard Minimum Rules for the Treatment of Prisoners*, ESC Res 663 C (XXIV) (13 July 1957) and 2076 (LXII) (13 May 1977) art 84.2; *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 40(2); *Human Rights Act 1998* (UK) sch 1 art 6(2); *Canada Act 1982* (UK) c 11, sch B pt 1 ('*Canadian Charter of Rights and Freedoms*') s 11(d).
12. *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 99 UNTS 171 (entered into force 23 March 1976) art 14(2).
13. NSW Young Lawyers, *Submission BA11*, 2; Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 2; NSW, Office of the Director of Public Prosecutions, *Submission BA21*, 1; Legal Aid NSW, *Submission BA17*, 3; D Shoebridge, *Submission BA19*, 3; Jumbunna Indigenous House of Learning, *Submission BA37*, 13.
14. M Ierace, *Submission BA16,* 1.

> right of every citizen and alien in this land. They represent a bulwark against tyranny.[15]

No punishment without conviction by due process, and limitations on preventative detention

2.19 In *Chu Kheng Lim v The Minister for Immigration, Local Government and Ethnic Affairs*, Justices Brennan, Dean and Dawson, quoting Dicey, stated: "Every citizen is 'ruled by the law, and by the law alone' and 'may with us be punished for a breach of law, but he can be punished for nothing else'".[16]

2.20 The courts have been emphatic that denial of bail is not to be used as a form of pre-trial punishment; this would infringe both the presumption of innocence and the principle that punishment cannot be imposed except after conviction by due process.[17] Pre-trial detention should only be entertained if clearly justified on other grounds.

2.21 The principle of no punishment without conviction by due process is related to the common law's position against preventive detention.[18] In *Chester v R*, the High Court said "[a]fter all it is now firmly established that our common law does not sanction preventive detention."[19] Preventive detention is the detention of someone in custody, not for the past commission of a crime but on the prospect that he or she may commit a crime in the future. While there are situations in the law of NSW where this is legally authorised, those situations are rare and require strong justification.[20] In this Report, while we recognise the long-standing concern about preventive detention, we acknowledge that there are circumstances where pre-trial detention is justified because of the likelihood the person may commit a serious offence while on bail, or threaten the safety of a particular person.[21]

The right to a fair trial

2.22 The right to a fair trial has been described as "engrained"[22] in the Australian legal system. From a defendant's perspective, this principle has many components, but for the purposes of this review the most important is that defendants have an adequate opportunity to instruct counsel, and to prepare for and participate in their defence.

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15. *Re Bolton: Ex parte Beane* (1987) 162 CLR 514, 528-529.
16. *Chu Kheng Lim v The Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27-8, quoting A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959) 202.
17. *R v Roberts* (1997) 97 A Crim R 456, 459, applying *R v Greenham* [1940] VLR 236, 239 and *R v Mahoney-Smith* (1967) 87 WN (Pt 1) (NSW) 249, 254. No punishment without law appears in a range of human rights conventions and legislation, eg, *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, CETS 005 (entered into force 3 September 1953) art 7(1); *Human Rights Act 1998* (UK) sch 1 art 7(1); *Canadian Charter of Rights and Freedoms* s 10.
18. See *Chester v The Queen* (1988) 165 CLR 611, 618.
19. *Chester v The Queen* (1988) 165 CLR 611, 618.
20. See *Crimes (Serious Sex Offenders) Act 2006* (NSW).
21. See para 10.63-10.71.
22. *Dietrich v The Queen* (1992) 177 CLR 292, 353 (Toohey J).

2.23 In *Dietrich* Chief Justice Mason and Justice McHugh, in an analysis of the right to a fair trial, said:

> [A]rticle 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms …enshrines such basic minimum rights of an accused as the right to have adequate time and facilities for the preparation of his or her defence.[23]

2.24 We will discuss in Chapter 5 the effect of pre-trial detention on the ability of defendants to instruct counsel and participate in their trials.

2.25 The interest in ensuring a fair trial is also important to the victim and community as a whole. From this perspective, it is important for the law to ensure that the defendant attends the trial, and that the procedure promotes a reliable verdict and a fair sentence.

Individualised justice and consistency

2.26 The criminal justice system attempts to reconcile two important but sometimes conflicting principles – individualised justice and consistency.

2.27 Individualised justice is a principle most often raised in the context of sentencing, but similar reasoning applies in relation to bail. The following passage is extracted from the ALRC report on sentencing federal offenders:

> The principle of individualised justice requires the court to impose a sentence that is just and appropriate in all the circumstances of the particular case. Courts have consistently recognised the importance of this sentencing principle. For example, in *Kable v Director of Public Prosecutions*, Mahoney ACJ stated that "if justice is not individual, it is nothing" (*Kable v Director of Public Prosecutions* (1995) 36 NSWLR 374, 394). Individualised justice can be attained only if a judicial officer possesses a broad sentencing discretion that enables him or her to consider and balance multiple facts and circumstances when sentencing an offender.[24]

2.28 Similarly, a court considering pre-trial release must make a decision that is appropriate in all the circumstances of the particular case. To achieve this, the decision-maker must exercise a broad discretion. An overly prescriptive approach to bail creates complexity and inflexibility for decision-makers.

2.29 On the other hand, it is a principle of justice that like cases must be treated alike. Consistency and predictability in decision making contributes to public confidence in the justice system. The more prescriptive the rules governing the process the more consistency and predictability.

2.30 While it may not be possible to completely reconcile these two principles, both can best be accommodated by a simple, clear and principled approach. Submissions

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23. *Dietrich v The Queen* (1992) 177 CLR 292, 300, citing *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) art 6(3)(b).

24. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006) 5.21.

from both the Chief Magistrate[25] and the President of the Children's Court[26] called for such an approach in relation to bail.

2.31 In the same vein, the Victorian Law Reform Commission said, in its 2007 report:

> Good policy should be informed by the broad range of cases that come before our justice system, not one particular case or type of case. An effective Bail Act must be able to respond to the diverse circumstances of accused people so decision makers can determine whether they present an unacceptable risk if released. It should therefore provide an effective response to everyone from the intellectually disabled young person to high profile organised crime figures.
>
> Some people who participated in this review suggested a prescriptive approach to bail. This would focus on the alleged offence and rely on complex formulas to determine risk. The commission believes a prescriptive approach would not achieve the breadth of response needed for the Bail Act to work effectively and that it is inappropriate when an accused is yet to be convicted. Prescriptive legislation is inevitably complex, which is undesirable for legislation that is predominantly applied by people without legal training. Instead, we have focused on simplifying the Act to make it more accessible for the lay decision makers who are its main users, police and bail justices, and easier to understand for those affected by it.[27]

2.32 The Commission agrees that a simpler *Bail Act* based on fundamental principles would best accommodate the important values of individualised justice and consistent decision making.

Special provision for young people

2.33 The law has long recognised that it should treat young people differently, reflecting their lesser maturity and capacity to make considered decisions. Specialist courts, different procedures and separate legislation have been developed, and there is often a particular emphasis on mediation, reparation, restorative justice and rehabilitation.

2.34 The *Children (Criminal Proceedings) Act 1987* (NSW), for example, sets out certain principles to guide the exercise of criminal jurisdiction in relation to children:

> (a) that children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them,
>
> (b) that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance,
>
> (c) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption,
>
> (d) that it is desirable, wherever possible, to allow a child to reside in his or her own home,

25. G Henson, *Submission BA2*, 2.
26. Children's Court of NSW, *Submission BA33*, 6.
27. Victorian Law Reform Commission, *Review of the Bail Act,* Final Report (2007) 21.

(e) that the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind,

(f) that it is desirable that children who commit offences be assisted with their reintegration into the community so as to sustain family and community ties,

(g) that it is desirable that children who commit offences accept responsibility for their actions and, wherever possible, make reparation for their actions,

(h) that, subject to the other principles described above, consideration should be given to the effect of any crime on the victim.[28]

2.35 These principles are consistent with the international instruments to which Australia is a party.[29] In Chapter 11, we discuss the need for special consideration of young people and other people with special vulnerability or special needs.

Framing bail legislation in response to the objectives and principles of the criminal justice system

2.36 As we have said, bail legislation should be seen as part of the criminal justice system and as being subject to the concepts and principles which apply to that system as a whole. There has been strong community support for this approach in the submissions we have received. For example, the Law Society of NSW said:

> The Commission should recognise the fundamental principles of the New South Wales criminal justice system including the presumption of innocence and the general right of the accused to be at liberty before trial and sentence.
>
> The legislation should emphasise balancing a person's right to liberty and the principle of the presumption of innocence, with securing a person's attendance at Court and ensuring the safety and welfare of the community.[30]

The Redfern Legal Centre stated:

> The presumption of innocence is the foundation of our criminal justice system. The prima facie right to liberty is an essential characteristic of a civil society. Bail can only be permitted to limit the liberty and presumed innocence of the accused to the extent necessary to protect against foreseeable risks to the administration of justice and the safety of the community. Bail is more than simply what is in the Bail Act. Bail has timeless, essential features that, if ignored, render bail punitive and subvert the fairness of the judicial system.[31]

2.37 However, as we have recognised, these principles are not absolute. They operate as constraints on the exercise of the power of the state and as such, limit the way legislation such as bail law should be permitted to impinge on the liberty of the

28. *Children (Criminal Proceedings) Act 1987* (NSW) s 6.

29. *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 99 UNTS 171 (entered into force 23 March 1976) art 14(4); *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, GA Res 40/33, 96th mtg, UN Doc A/RES/40/33 (29 November 1985) Rule 13; *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 37, 40.

30. Law Society of NSW, *Submission BA5*, 2.

31. Redfern Legal Centre, *Submission BA18*, 1.

citizen. As a former Chief Justice said: "To refuse release without the most anxious consideration is to stand with John against Magna Carta and with the Stuarts against the commonweal".[32]

2.38 There are three respects in which bail law has a role in implementing the purposes of the criminal justice system as a whole. These are:

- the protection and welfare of the community from further serious offending,
- the protection of particular individuals who might be at risk, and
- protecting the integrity of the trial process, by ensuring that the accused person appears at court to be dealt with according to law and by protecting against interference with the course of justice.

As we will show in Chapter 3 of this Report, these purposes, with the exception of protection of particular individuals, were settled by the common law as legitimate purposes of bail law.[33] They have been carried into the 1978 *Bail Act* and into the codification statutes of other states and territories of Australia. They have stood the test of time. Protection of particular individuals was introduced as a consideration by amendment to the *Bail Act* in 1988.[34] It is in the same vein as protection of the community from further serious offences and can be seen as an extension of that consideration.

2.39 In these respects, bail law answers to the purposes of the criminal justice system. On the other hand, some purposes of the criminal justice system have no place in bail law because the person has not been convicted.[35] These are: preventing crime by deterring others from offending and by deterring the person from reoffending; punishing and denouncing unlawful conduct; and recognising the harm done to victims and the community.

2.40 How far bail law should go in protecting the community against the risk of other offences, in protecting a particular individual from harm and in protecting the integrity of the trial process is a matter for judgment, taking into account the constraining principles embedded in the criminal justice system to which we have referred. The proper balance is the subject of our deliberations and recommendations in Chapter 10 of this report.

2.41 The community has high expectations of the criminal justice system. However, for the reasons we have given, bail legislation cannot reflect all the ways in which the criminal justice system aims to protect the community. Insofar as bail legislation does incorporate the objectives of the criminal justice system, it should be subject to the constraints embedded in the criminal justice system as a whole. A balance is

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32. F T Giles, *The Magistrates' Courts: What They Do How They Do It and Why* (Penguin Books, 1949) 168 quoted in L Herron, "Opening Address" (delivered at the Proceedings on Bail, Institute of Criminology, Sydney, 14 November 1969) 15.
33. See particularly *R v Wakefield* (1969) 89 WN (Pt 1) (NSW) 325, reviewed in detail in Chapter 3.
34. *Bail (Amendment) Act 1988* (NSW) sch 2[2].
35. Or convicted with finality in the case of appeal, though in appeal cases a more restrictive approach to release should be taken, if the person has been convicted and sentenced to imprisonment, as set out in Ch 9.

required in setting the scope of bail legislation in recognition of these limitations and in recognition of the constraining principles and concepts we have discussed.

3. The history of bail law in New South Wales

The early history of bail in England **19**
Pre *Bail Act* common law in NSW **21**
Pressure for reform: the remand and poverty connection 24
Codification and reform: the *Bail Act 1978* (NSW) **25**
The Report of the Bail Review Committee (1976) 25
The *Bail Act 1978* 28
Frequent amendments, 1978-2011 29
Amendments relating to presumptions **30**
The original 1978 Act: the starting point 30
1986 to 2001: a period of incremental change 31
2002 to 2004: a period of significant change 35
Bail Amendment (Repeat Offenders) Act 2002 (NSW): prior offences *35*
Bail Amendment Act 2003 (NSW): Murder and serious personal violence *36*
Bail Amendment (Firearms and Property Offenders) Act 2003 (NSW) *37*
Other developments *38*
2004 to date: further presumptions against bail 38
The cumulative effect of the amendments relating to presumptions 40
Conclusion **42**

3.1 This chapter will provide a very brief overview of the early origins of bail law, followed by a brief overview of the development of the common law. It will then outline the background to the reform-oriented *Bail Act 1978* (NSW). Finally, it will discuss the substantial amendments to that Act.

The early history of bail in England

3.2 The origins of bail lie in the common law of medieval England.[1] It emerged from earlier Anglo-Saxon practices of *bohr* or blood price, *hostageship*, and the ancient practice of *weregeld*, whereby a third person would guarantee to a creditor that a debt would be paid.[2] Extensive delays and disease ridden gaols created a need for an alternative to holding an accused in custody. Those who offered themselves as security for the appearance of an accused were made personally responsible for the appearance of the accused, and were required to surrender themselves to custody should the accused escape.[3] In turn the sureties had custody of the accused, and could at any time seize the accused and present the person to the authorities.

3.3 In the thirteenth century sureties became liable for a court-imposed fine should the accused fail to appear. Later still, it became usual that a surety promise to pay a

1. R P Roulston, "Principles of Bail" (Paper presented at the Seminar on Bail, Sydney Institute of Criminology, 14 November 1969) 2.
2. B Donovan, *The Law of Bail: Practice, Procedure and Principles* (Legal Books, 1981) 23.
3. R P Roulston, "Principles of Bail" (Paper presented at the Seminar on Bail, Sydney Institute of Criminology, 14 November 1969) 2.

predetermined sum in the event of non-appearance. The surety might also be expected to take custody of the accused.[4]

3.4 Sheriffs were invested with a wide discretion in the matter of bail. The breadth of the discretion put too much power into the hands of sheriffs and created a risk of corruption. This concern led to the first statutory regulation of the granting of bail in England by way of the *Statute of Westminster I 1275*.[5] The Statute specified which offences were bailable and which were not, with the three considerations being:

(1) the seriousness of the offence;

(2) the likelihood of the accused's guilt; and

(3) the 'outlawed' status of the offender, which included considerations such as the accused's background, marital status, the length of time the accused had resided at their current residence, and other related matters.[6]

It appears that at this point in history, the key consideration underlying whether or not to grant bail was the likelihood that the accused would appear for trial.[7]

3.5 In 1444, the Statute was amended to provide certain offences for which bail could not be refused, and others for which bail could only be granted with an order from a higher authority, thus further reducing the discretion of the sheriffs.[8] Power to bail began to pass from sheriffs to the justices of the peace, in an effort to prevent collusion between authorities and accused individuals, and to maintain stricter control over the exercise of this power. Further to this aim, legislative change in 1487 required that two justices were required in order to exercise the power to grant bail, and later amendments imposed a fine on the justices for breach of the legislation.[9]

3.6 It was not until the 17th century struggles between the barons of Parliament and the King that the concept of bail as a right emerged. This was furthered by the acceptance of the *Petition of Right* in 1627, which introduced a requirement that cause be shown before a person could be jailed.[10] The *Habeas Corpus Act 1679*[11] created a right to bail under certain circumstances, and the *Bill of Rights 1688*[12] outlawed excessive bail. Notwithstanding the adoption of these instruments, the number of crimes for which bail was denied continued to grow, and the denial of bail

4. W Holdsworth, *A History of English Law* (3rd ed, Sweet and Maxwell, 1945) vol 4, 525-526.
5. W Holdsworth, *A History of English Law* (3rd ed, Sweet and Maxwell, 1945) vol 4, 526.
6. B Donovan, *The Law of Bail: Practice, Procedure and Principles* (Legal Books, 1981) 24.
7. R P Roulston, "Principles of Bail" (Paper presented at the Seminar on Bail, Sydney Institute of Criminology, 14 November 1969) 1.
8. R Simpson, *Bail in New South Wales,* NSW Parliamentary Library Research Service, Briefing Paper No 25/97 (1997) 2.
9. W Holdsworth, *A History of English Law* (3rd ed, Sweet and Maxwell, 1945) vol 4, 527.
10. *Petition of Right 1627* (3 Car I, c 1(a)).
11. *Habeas Corpus Act 1679* (31 Car II, c 2).
12. *Bill of Rights 1688* (1 Wm & M sess 2, c 2).

was increasingly seen as a tool to address increasing crime.[13] For the most part, the *Statute of Westminster I 1275* remained the authority as to which offences were bailable, and no basic changes were made in that regard for some five centuries until the enactment of the *Bail Act 1826* (UK).[14]

3.7 The *Bail Act 1826* (UK) represented a shift in the focus of bail determinations. Under the *Statute of Westminster I* the appearance of the accused was the key determinant. This gave way in the *Bail Act 1826* to the likelihood of conviction as the main factor to be considered. However, further reform in 1835 explicitly authorised bail for any offence, including in circumstances where conviction appeared likely, provided that the granting of bail did not jeopardize the appearance of the accused at trial. This marked a return to the focus on whether the accused would appear at trial as the key determinant in granting bail.[15] In 1854 in *Re Robinson*,[16] Justice Coleridge stated that the test was "whether it is probable that the party will appear to take his trial". The answer to this question was governed by the answers to three general questions: the seriousness of the offence, the probability of conviction, and the probable punishment in the event of conviction.[17]

3.8 These considerations closely mirror the approach under the *Statute of Westminster I*, and remained influential, with one commentator describing them as "the text-book test for bail determinations until the 1976 bail reform".[18] However the same commentator notes that cases such as *R v Phillips*,[19] where a repeat burglar deemed likely to commit future offences on bail was denied bail, indicated that preventive detention was increasingly invoked.

Pre *Bail Act* common law in NSW

3.9 Until 1978, New South Wales bail law was a mixture of common law principles and *ad hoc* legislative provisions. The *Imperial Acts Application Act 1969* (NSW) commenced in 1971, and served to repeal, modify or adopt British laws that until this time had applied to New South Wales. The statutory laws relating to bail were not adopted by New South Wales in this Act. This left bail to the common law and an increasing number of piecemeal legislative provisions.[20]

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13. K X Metzmeier, "Preventive Detention: A Comparison of Bail Refusal Practices in the United States, England, Canada and Other Common Law Nations" (1996) 8 *Pace International Law Review* 399, 402-403.
14. R P Roulston, "Principles of Bail" (Paper presented at the Seminar on Bail, Sydney Institute of Criminology, 14 November 1969) 2.
15. K X Metzmeier, "Preventive Detention: A Comparison of Bail Refusal Practices in the United States, England, Canada and Other Common Law Nations" (1996) 8 *Pace International Law Review* 399, 413.
16. *Re Robinson* (1854) 23 LJQB 286.
17. *Re Robinson* (1854) 23 LJQB 286, 287. See also Coleridge J in *R v Scaife* (1841) 10 LJ MC 144.
18. K X Metzmeier, "Preventive Detention: A Comparison of Bail Refusal Practices in the United States, England, Canada and Other Common Law Nations" (1996) 8 *Pace International Law Review* 399, 414.
19. *R v Phillips* (1947) 32 Cr App R 47.
20. R Simpson, *Bail in New South Wales,* NSW Parliamentary Library Research Service, Briefing Paper No 25/97 (1997) 5.

3.10 The first case in NSW to set out the grounds upon which bail should be decided was that of *R v Campbell*, in 1850.[21] In this case, the court adopted an approach similar to that expounded by Justice Coleridge in *Robinson*[22] four years later. The likelihood of the accused's appearance at trial should be the main determinant in bail applications.[23] This fundamental consideration was emphasised in subsequent cases such as *R v Appleby*[24] and *R v Mahoney-Smith*.[25] In *Appleby*, Justice Isaacs said that "[t]he object of bail is to ensure and secure the attendance of the accused at his trial and it recognizes that the liberty of the subject should only be restricted in such a way as will achieve this result".[26] However he also noted other considerations such as the potential commission of other offences while on bail, saying "[t]he public interest requires and demands adequate protection against these depredations …".[27]

3.11 In *R v Wakefield*[28] in 1969, Judge Cross (Chairman of Quarter Sessions, later Justice Cross) embarked on an expansive review of the common law of bail in NSW. He began with an insightful analysis of the correct starting point:

> Applications for bail are not to be regarded as the problem of choosing between the rights of the individual on the one hand and the interests of society on the other. For, as has been pointed out…when one is balancing competing considerations it is illogical and erroneous to frame those considerations as one of the interests of the individual on the one hand and the interests of the community on the other. Such an approach will almost inevitably lead to error. Injustice may arise, for example, if one compares the individual's interest in the right of free speech with the public interest in the suppression of blasphemy or sedition. What one must compare – and synthetize – is the public interest in the right of the individual to freedom of speech with the public interest in the freedom of individuals from offensiveness in one case and the safety of the State in the other.[29]

3.12 In this passage, Judge Cross identified a mistake which often surfaces in discussions of bail. The error lies in seeing the interest in liberty, and indeed in the other fundamental principles of the law such as the presumption of innocence and the right to a fair trial, as interests of the individual and in particular the individual

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21. *R v Campbell* (*Sydney Morning Herald,* 29 April 1850; W H Wilkinson, *The Australian Magistrate* (Government Printer, 3rd ed, 1876) 249); and *R v Fraser* (1892) 13 NSWLR 150, both cited in K X Metzmeier, "Preventive Detention: A Comparison of Bail Refusal Practices in the United States, England, Canada and Other Common Law Nations" (1996) 8 *Pace International Law Review* 399, 424.
22. *Re Robinson* (1854) 23 LJQB 286.
23. K X Metzmeier, "Preventive Detention: A Comparison of Bail Refusal Practices in the United States, England, Canada and Other Common Law Nations" (1996) 8 *Pace International Law Review* 399, 424. In *R v Campbell*, Stephen CJ said that "the point *mainly* to be regarded was the probability of the prisoner's appearing to take his trial; and that in determining the question, the probability of a *conviction* for the crime charged was the safest test" (W H Wilkinson, *The Australian Magistrate* (Government Printer, 3rd ed, 1876) 249).
24. *R v Appleby* (1966) 83 WN (Pt 1) (NSW) 300.
25. *R v Mahoney-Smith* (1967) 87 WN (Pt 1) (NSW) 249, 254 (O'Brien J): "But it is, I think, important to keep in mind that the grant or refusal of bail is determined fundamentally on the probability or otherwise of the applicant appearing at court as and when required and not on his supposed guilt or innocence ...".
26. *R v Appleby* (1966) 83 WN (Pt 1) (NSW) 300, 301.
27. *R v Appleby* (1966) 83 WN (Pt 1) (NSW) 300, 301.
28. *R v Wakefield* (1969) 89 WN (Pt 1) (NSW) 325.
29. *R v Wakefield* (1969) 89 WN (Pt 1) (NSW) 325, 326.

defendant. Conceiving them in this way, within the familiar metaphor of balance, renders one far more likely to see them as of less weight than social, community or public interests. As we have said in the previous chapter, the interest in liberty and fundamental principles is correctly seen as a collective, social, *public* interest. The issue is then one of reconciling or evaluating the strength of competing public interests. Put in this way, as Judge Cross argues it must be, the societal or public interest in the liberty of the individual is less easily outweighed by other public interests. We will return to this point in Chapter 10.

3.13 Judge Cross then sets out a number of relevant considerations. The first and "the most important consideration is the public interest in the right of any person to have his case presented in the fairest possible circumstances." He notes that "[p]rima facie it is desirable that the preparation of the defence be allowed to take place in circumstances of approximate parity with those in which the prosecution is prepared."[30] This includes ready access of the legal advisor to the accused:

> So that prima facie a person accused of a crime should be allowed his liberty before the hearing in order that the preparation of his case be as full and thorough and unfettered as possible. This applies not only where an accused has been committed for trial but also where the accused has been committed for sentence only or has otherwise indicated his intention of pleading guilty….In my view this first consideration, ie the desirability of the accused being allowed his freedom so that his case may be prepared in the best possible circumstances, is the most important consideration on bail applications.[31]

3.14 Judge Cross lists a number of other considerations, which include:

- The public interest in the accused answering his or her bail; that the trial not be delayed by non-appearance; and that time and money not be wasted on apprehending offenders who fail to answer bail.[32]
- Subjective elements of the accused's "character and personality", for example previous conduct in answering or failing to answer to bail; previous convictions and antecedents; his or her "reliability or unreliability"; present circumstances, such as family ties; and those matters which "may strongly tempt an accused person to flee."[33]
- The gravity of the offence, and the maximum penalty it carries.[34]
- The probability or improbability of conviction; a plea of guilty; and the strength of the Crown case.[35]
- The "undesirability of interference with the course of justice."[36]
- Trial delay through no fault of the accused or his or her legal advisor.[37]

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30. *R v Wakefield* (1969) 89 WN (Pt 1) (NSW) 325, 326.
31. *R v Wakefield* (1969) 89 WN (Pt 1) (NSW) 325, 327.
32. *R v Wakefield* (1969) 89 WN (Pt 1) (NSW) 325, 327.
33. *R v Wakefield* (1969) 89 WN (Pt 1) (NSW) 325, 328-329.
34. *R v Wakefield* (1969) 89 WN (Pt 1) (NSW) 325, 329.
35. *R v Wakefield* (1969) 89 WN (Pt 1) (NSW) 325, 329-331.
36. *R v Wakefield* (1969) 89 WN (Pt 1) (NSW) 325, 331.
37. *R v Wakefield* (1969) 89 WN (Pt 1) (NSW) 325, 331.

- The prospect of the commission of further criminal offences while on bail.[38]

Pressure for reform: the remand and poverty connection

3.15 In the 1960s and 1970s a critique of bail law emerged across a number of jurisdictions.[39] Susan Armstrong's 1975 report, *Unconvicted prisoners: the problems of bail,* highlighted many of the problems in an Australian context.[40]

3.16 This Report demonstrated that the problems with bail were intimately linked with poverty. Of particular concern was the inability of the poor to satisfy the financial conditions being imposed. The Report opens with a quote from President Lyndon Johnson, on signing into law the US *Bail Reform Act of 1966*:[41]

> He does not stay in jail because he is guilty. He does not stay in jail because any sentence has been passed. He does not stay in jail because he is more likely to flee before trial. He stays in jail for one reason only – because he is poor.[42]

Armstrong said:

> The problem of bail is a problem of poverty. Many unconvicted prisoners are gaoled not because they are likely to abscond but merely because they cannot afford the price which a court has placed upon their freedom. The poor, the young, and the migrant community are significantly over-represented among Australia's unconvicted prisoners. Many of them are held for long periods and often for offences which are unlikely to result in a prison sentence.[43]

3.17 The Report noted that statistical records were so poor that it was "impossible to even estimate how *many* such people [remandees] are imprisoned in Australia each year, or to guess for how long they may be held" as no separate statistics were compiled:

> At any particular moment the prisoners in Australia's gaols and lock-ups who have *not* been convicted of an offence probably outnumber those serving

38. *R v Wakefield* (1969) 89 WN (Pt 1) (NSW) 325, 332.
39. See, eg, Institute of Criminology, Sydney University, *Proceedings of the Seminar on Bail (No 3)* (1969); M King, *Bail or Custody* (Cobden Trust, 1971); M Zander, "Bail: A Re-Appraisal" [1967] *Criminal Law Review* 25, 100, 128; A K Bottomley, *Prison Before Trial: A Study of Remand Decisions in Magistrates' Courts* (Social Administration Research Trust, 1970); UK, Home Office Working Party, *Bail Procedures in Magistrates' Courts* (1974); M Friedland, *Detention Before Trial: a Study of Criminal Cases Tried in the Toronto Magistrates' Courts* (University of Toronto Press, 1965); United States, Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice, *Report* (1963); Vera Institute of Justice, *Programmes in Criminal Justice Reform: Ten-Year Report 1961-1971* (1972); NSW, *Report of the Bail Review Committee*, Parl Paper No 46 (1976) 29-32.
40. S Armstrong, "Unconvicted prisoners: the problems of bail" in S Armstrong, R Sackville and M J Mossman (ed), *Essays on Law and poverty: Bail and Social Security* (Australian Government Publishing Service, 1977); NSW, *Report of the Bail Review Committee*, Parl Paper No 46 (1976).
41. *Bail Reform Act of 1966*, Pub L No 89-465, 80 Stat 214.
42. S Armstrong, "Unconvicted prisoners: the problems of bail" in S Armstrong, R Sackville and M J Mossman (ed), *Essays on Law and poverty: Bail and Social Security* (Australian Government Publishing Service, 1977) 1.
43. S Armstrong, "Unconvicted prisoners: the problems of bail" in S Armstrong, R Sackville and M J Mossman (ed), *Essays on Law and poverty: Bail and Social Security* (Australian Government Publishing Service, 1977) 1.

> sentences. Most are simply being held overnight or for a few hours before they appear in court to face charges, but many face weeks or months in custody before their trial is held and sentence passed.[44]

3.18 The Report made a range of recommendations, including:

- the expansion of duty solicitor schemes;
- the backdating of all sentences to take account of time spent on remand;
- improved remand conditions and the removal of all restrictions on communications between prisoners and their legal advisors;
- the establishment of minimum security bail hostels;
- the codification of the common law criteria governing bail under three heads: the probability of appearance, the interests of the accused, and the protection of the community;
- a general presumption in favour of bail;
- maximum use of summons procedures;
- clarification and regulation of the powers of police and courts in relation to bail;
- adoption of the Manhattan bail test which provided greater information on the defendant's background and community ties;
- the abolition of sureties; and
- improved avenues of appeal against bail refusal.[45]

Codification and reform: the *Bail Act 1978* (NSW)

The Report of the Bail Review Committee (1976)

3.19 On 14 July 1976 the NSW Attorney General, the Hon Frank Walker, established a Bail Review Committee headed by Stipendiary Magistrate Kevin Anderson and Susan Armstrong to "examine and report on the system of bail in New South Wales and to propose any necessary changes".[46] The Review Committee reported on 31 August 1976. The Report built on the work of the Commission of Inquiry into Poverty and the Australian Law Reform Commission's Second Report, *Criminal Investigation* (1975).[47] From these various reports and the Committee's own investigations, a "widespread consensus on many reforms" was identified, namely:

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44. S Armstrong, "Unconvicted prisoners: the problems of bail" in S Armstrong, R Sackville and M J Mossman (ed), *Essays on Law and poverty: Bail and Social Security* (Australian Government Publishing Service, 1977) 1.
45. S Armstrong, "Unconvicted prisoners: the problems of bail" in S Armstrong, R Sackville and M J Mossman (ed), *Essays on Law and poverty: Bail and Social Security* (Australian Government Publishing Service, 1977), see summary of recommendations, 52-54.
46. NSW, *Report of the Bail Review Committee*, Parl Paper No 46 (1976) 10.
47. Australian Law Reform Commission, *Criminal Investigation*, Report No 2 (1975).

> [T]he need to make bail hearings more systematic and comprehensive; to reduce the emphasis on money bail; to codify the relevant criteria; and to eliminate anomalies in the powers of police and courts.[48]

3.20 The primary consideration was seen as "balancing the right to liberty of someone who is legally presumed to be innocent, against the need of society to ensure that accused people are brought to trial",[49] "the whole object of bail" being "to ensure attendance at trial".[50]

3.21 The lack of available data was a major problem for the Committee. A bail census was carried out by the NSW Bureau of Crime Statistics and Research (BOCSAR), which revealed that bail was refused in 15.3% of cases and of those refused bail and finally dealt with in the (then) magistrates courts, 57.3% did not receive any kind of custodial sentence.[51] Research by Professor Ward, based on a 1969 census carried out at Long Bay Gaol, indicated that "unsentenced prisoners are not people selected rationally because they are likely to abscond".[52]

3.22 These results and the Committee's own inquiries led it to conclude that:

> The importance of bail is not always recognized by the courts and the police of New South Wales. Many decisions are made in the briefest of court hearings on the basis of sketchy and sometimes inaccurate information. Excessive reliance on the setting of money bail has largely replaced a proper consideration of whether or not the defendant should be released. The poor are often held unnecessarily in prison, while those with ready money, perhaps the proceeds of the crime with which they are charged, are sometimes unjustifiably released.[53]

3.23 The Committee recommended:

- new terminology, and new legislation to codify the law relating to bail in NSW;[54]
- the abolition of the surety system;[55]
- a separate offence of failure to appear on bail without reasonable excuse;[56]
- an absolute right to release for minor offences;[57]
- a presumption in favour of bail at all stages of the criminal process,[58] including appeal[59] (but no general right to bail);[60]
- police should have no power to hold people in custody for their own good;

48. NSW, *Report of the Bail Review Committee*, Parl Paper No 46 (1976) 10.
49. NSW, *Report of the Bail Review Committee*, Parl Paper No 46 (1976) 11.
50. NSW, *Report of the Bail Review Committee*, Parl Paper No 46 (1976) 23.
51. NSW, *Report of the Bail Review Committee*, Parl Paper No 46 (1976) 12.
52. NSW, *Report of the Bail Review Committee*, Parl Paper No 46 (1976) 12.
53. NSW, *Report of the Bail Review Committee*, Parl Paper No 46 (1976) 13.
54. NSW, *Report of the Bail Review Committee*, Parl Paper No 46 (1976) 13.
55. NSW, *Report of the Bail Review Committee*, Parl Paper No 46 (1976) 16.
56. NSW, *Report of the Bail Review Committee*, Parl Paper No 46 (1976) 17.
57. NSW, *Report of the Bail Review Committee*, Parl Paper No 46 (1976) 19.
58. NSW, *Report of the Bail Review Committee*, Parl Paper No 46 (1976) 20.
59. NSW, *Report of the Bail Review Committee*, Parl Paper No 46 (1976) 41.
60. NSW, *Report of the Bail Review Committee*, Parl Paper No 46 (1976) 19.

- no preventive detention except where there was need to prevent the continuation of an offence;
- the criteria relevant to release on bail should be listed under three headings: the probability of appearance, the interests of the accused and the interests of the community;[61]
- given that most bail hearings in magistrates courts took less than two minutes, background and community ties information should be prepared and presented to the courts in the manner of the Manhattan Bail Project;[62]
- police use of summons or 'citations' should be expanded;[63]
- no special provision for appeal was necessary as every application for bail was a hearing *de novo*;[64]
- procedural reforms;
- delays should be minimised and time spent in custody limited;
- ample access to lawyers and witnesses for remand prisoners;[65]
- that all sentences and all non-parole periods should be backdated to the date on which the defendant was taken into custody.[66]

3.24 The Committee recommended that the likelihood of further offences being committed should not be regarded as a criterion relevant to bail.[67] The Committee noted that "[t]he place of this criterion in the common law is obscure: it does not appear in the classical statements, but in practice this newer ground for refusing bail has become one of the most important considerations".[68] On the other hand, as the Committee noted, the likelihood of further offences had become entrenched as a consideration in English and New South Wales law.[69] The committee made the following observation concerning that development:

> There is no doubt that by permitting courts to refuse bail on the ground that the accused may commit further offences, Australia has established a system of preventive detention … [which] rests upon an unproven factual assumption: that it is possible for courts to identify with some degree of accuracy people likely to commit crimes if released.[70]

3.25 The Committee also noted that the evidence for the existence of widespread offending while on bail was weak. Professor Ward's study of 400 cases appearing before the New South Wales higher courts in 1968 found evidence of offending

61. NSW, *Report of the Bail Review Committee*, Parl Paper No 46 (1976) 21-22.
62. NSW, *Report of the Bail Review Committee*, Parl Paper No 46 (1976) 23-27.
63. NSW, *Report of the Bail Review Committee*, Parl Paper No 46 (1976) 32-37.
64. NSW, *Report of the Bail Review Committee*, Parl Paper No 46 (1976) 41.
65. NSW, *Report of the Bail Review Committee*, Parl Paper No 46 (1976) 49.
66. NSW, *Report of the Bail Review Committee*, Parl Paper No 46 (1976) 52.
67. NSW, *Report of the Bail Review Committee*, Parl Paper No 46 (1976) 32.
68. NSW, *Report of the Bail Review Committee*, Parl Paper No 46 (1976) 29.
69. NSW, *Report of the Bail Review Committee*, Parl Paper No 46 (1976) 29.
70. NSW, *Report of the Bail Review Committee*, Parl Paper No 46 (1976) 30.

while on bail in only two cases.[71] In the United States, the Harvard study[72] found that bail crime accounted for less than one percent of arrests for violent or dangerous crimes, and that most offences committed while on bail were not serious.[73]

3.26 The Committee also examined the evidence as to whether judicial officers can accurately predict which defendants will offend while on bail. No Australian research was available on the issue, but two United States studies found that it was not possible to accurately predict recidivism. A third study of a high risk group of prisoners using sophisticated assessment techniques found that it was possible to identify those who were at a higher risk of re-offending. However, even using these techniques, of every three prisoners assessed as dangerous and released, only one actually committed a serious assault.[74] The Committee quoted the famous jurist, Norval Morris who said:

> … we possess an extremely convenient mechanism by which to conceal from ourselves our critical incapacity as predictors – the mask of overprediction… What is wonderfully convenient about this overprediction of risk is that the predictor does not know who in particular, as a person, as eyes to be met, he is unnecessarily holding. Further he is most unlikely to precipitate any political or administrative trouble as a result of ordering imprisonment or prolonging its duration … Hence, the path of administrative and political safety is the path of the overpredicted risk.[75]

3.27 The Committee concluded that the evidence did not justify "so gross a violation of the presumption of innocence as preventive detention by refusal of bail on the grounds of likelihood to commit further offences".[76]

The Bail Act 1978

3.28 Following the recommendations of the Bail Review Committee, the law relating to bail in New South Wales was consolidated and codified into the *Bail Act 1978* (NSW).

3.29 The original Act introduced a three-tiered system of eligibility for bail, consisting of those minor offences for which bail was considered an entitlement, offences for which there was a presumption in favour of bail, and offences for which there was neither a presumption for or against bail. The Act also included clear criteria for determining bail in all cases, and guidelines for imposing bail conditions.[77]

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71. NSW, *Report of the Bail Review Committee*, Parl Paper No 46 (1976) 30.
72. A Angel, and others, "Preventive Detention: An Empirical Analysis" (1971) 6 *Harvard Civil Rights – Civil Liberties Law Review* 300.
73. NSW, *Report of the Bail Review Committee*, Parl Paper No 46 (1976) 30.
74. NSW, *Report of the Bail Review Committee*, Parl Paper No 46 (1976) 31-32.
75. NSW, *Report of the Bail Review Committee*, Parl Paper No 46 (1976) 31.
76. NSW, *Report of the Bail Review Committee*, Parl Paper No 46 (1976) 32.
77. R Simpson, *Bail in New South Wales,* NSW Parliamentary Library Research Service, Briefing Paper No 25/97 (1997) 1.

3.30 On the whole, the *Bail Act 1978*:

- represented a reform-oriented, simplified system of bail determination;
- reduced the emphasis on money-based bail by giving clear authority for non-financial bail conditions; and
- enhanced the focus on the accused's individual circumstances in making bail determinations.[78]

3.31 The definition contained in the *Bail Act* conceptualised bail as being at liberty from custody, on the condition that certain undertakings are complied with.[79]

3.32 The Act included, as a consideration relevant to the bail decision, the likelihood that the person will or will not commit an offence while at liberty on bail. The Act provided that this matter could be taken into account only if the bail authority was satisfied that the person was likely to commit an offence involving violence or having serious likely consequences, and if it was satisfied that the likelihood of committing the offence outweighed the person's general right to be at liberty.[80] The provision has since been amended but the substance of it has been preserved.[81]

Frequent amendments, 1978-2011

3.33 The *Bail Act* has been amended frequently. Since 1979 when the *Bail Act* came into force (a 32 year period) there have been 85 amending Acts, some of which contain multiple amendments.

3.34 We can categorise these amendments as being of four types.

3.35 **Terminological or technical changes** occurred in 41 of these amending Acts. They include updating references to offences, and amendments to reflect changes in criminal procedure.

3.36 **Machinery or procedural changes**. There were 19 significant changes of this nature. For example, these amendments:

- created limits on bail in appeal cases;[82]
- allowed lower courts to review Supreme Court bail following changes of circumstances; and[83]
- allowed an authorised justice to alter certain conditions imposed by a court.[84]

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78. R Simpson, *Bail in New South Wales,* NSW Parliamentary Library Research Service, Briefing Paper No 25/97 (1997) 1, 8.
79. *Bail Act 1978* (NSW) s 4, 7.
80. *Bail Act 1978* (NSW) (as enacted) s 32(1)(c)(iii), (2).
81. *Bail Act 1978* (NSW) s 32(1)(c)(iv), (2).
82. *Bail (Amendment) Act 1987* (NSW).
83. *Bail (Amendment) Act 1992* (NSW).
84. *Courts Legislation Further Amendment Act 1997* (NSW).

3.37 The most significant and contentious of these amendments concerned the introduction of provisions allowing courts to refuse repeated bail applications. These provisions were first introduced as an efficiency measure in Supreme Court applications, and later extended to lower courts. The history of these amendments is canvassed in Chapter 19.

3.38 **Therapeutic concerns**. There were three amendments using bail as a framework for therapeutic programs (including MERIT) and other programs. These were introduced following the *NSW Drug Summit 1999*[85] and were initially confined to drug and alcohol programs. They were later extended to other programs in 2003. These amendments are canvassed in Chapter 13.

3.39 **Amendments to the presumptions and considerations**. One amendment changed the consideration regarding "the circumstances of the offence (including its nature and seriousness)"[86] to specify "in particular whether of a sexual or violent nature".[87] There are amendments in 28 separate Acts which deal with presumptions. These excluded certain offences from the presumption in favour of bail, introduced presumptions against bail, or allowed bail to be granted only "in exceptional circumstances". Some of these changes, such as provisions in relation to domestic violence offences, followed research and detailed consideration, consultation and debate. Others were made after individual cases attracted media attention without evidence of the incidence of offences of the particular kind.[88]

3.40 We examine the presumption amendments in more detail below.

Amendments relating to presumptions

The original 1978 Act: the starting point

3.41 In the 1976 Report of the Bail Review Committee, it was recommended that where there was no right to bail, there should be a uniform presumption in favour of bail.[89] This recommendation was not adopted entirely, a statutory exception in relation to robbery offences being included in the Bill as introduced.[90] In addressing this provision, the then Attorney General, said that the government:

> is well aware of the widespread feeling in the community of a need to take a firm and exemplary stand in relation to serious and violent crime, particularly the offences of armed and otherwise violent robbery.[91]

85. NSW Drug Summit, "Government Plan of Action" (1999) 103 (Recommendation 9.12); *Drug Summit Legislative Response Act 1999* (NSW).
86. *Bail Act 1978* (NSW) s 32(1)(a)(iii).
87. *Bail (Amendment) Act 1990* (NSW).
88. D Brown and others, *Criminal Laws* (The Federation Press, 5th ed, 2011) 177-191; T Booth and L Townsley, "The Process is the Punishment: The Case of Bail in New South Wales" (2009) 21 *Current Issues in Criminal Justice* 41; J Stubbs, "Re-examining Bail and Remand for Young People in NSW" (2010) 43 *Australian and New Zealand Journal of Criminology* 485.
89. NSW, *Report of the Bail Review Committee*, Parl Paper No 46 (1976) 6.
90. *Bail Act 1978* (NSW) (as enacted) s 9(1)(c).
91. NSW, *Parliamentary Debates*, Legislative Assembly, 14 December 1978, 2015.

3.42 Later commentators have noted that this provision was prompted by a highly publicised case in which a bank manager was shot during the course of a robbery performed by an offender already on bail, who was in turn pursued and shot by police. Commentators criticised the provision. The following observation is an example:

> Persons charged with armed or violent robbery are not known to be more likely to abscond or commit further offences while on bail than persons charged with other offences.[92]

Some commentators suggested that this exception, made in response to a high profile and worrying case, may have opened the possibility of further exceptions.[93] This proved to be the case.

1986 to 2001: a period of incremental change

3.43 In this period 11 amendments were made relating to presumptions. Of these:

- nine removed the presumption in favour of bail for certain offences and categories of offence;
- one created a presumption against bail for commercial quantity drug offences; and
- one confirmed a presumption in favour of bail for people facing charges of failing to appear in relation to fine-only offences.

3.44 This was a period of incremental change that slowly reduced the scope of the presumption in favour of bail. As Table 3.1 shows, some of these changes were responses to particular cases (in one case at least, a particularly horrific crime). In other cases, the bail amendments followed reviews or were part of packages of amendments relating to particular issues such as drug crime, or gang-related crime.

3.45 While the policy rationale for the changes was often attributed to community concern about crime, there was mostly no objective evidence of community concern or of a need to change bail law or its likely effect. An early amendment to remove the presumption in favour of bail in serious drugs cases, which had been proposed by a Royal Commission, was explicitly criticised for lacking an empirical basis.[94]

3.46 The following table sets out the major changes and the policy rationale, generally taken from second reading speeches. It includes reference to critical commentary where appropriate.

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92. D Weatherburn, M Quinn and G Rich, "Drug Charges, Bail Decisions and Absconding" (1987) 20(2) *Australian and New Zealand Journal of Criminology* 95.
93. D Weatherburn, M Quinn and G Rich, "Drug Charges, Bail Decisions and Absconding" (1987) 20(2) *Australian and New Zealand Journal of Criminology* 95.
94. D Weatherburn, M Quinn and G Rich, "Drug Charges, Bail Decisions and Absconding" (1987) 20(2) Australian and New Zealand Journal of Criminology 95, 107-108.

Table 3.1: Presumptions-related amendments until 2001

Amending Act and effect	Rationale and background
Bail (Amendment) Act 1986 (NSW) Created an exception to presumption in favour of bail for supply of commercial quantities of prohibited drugs	The second reading speech to the amending Act[95] indicates that the legislation gives effect to recommendations of the 1980 Australian Royal Commission of Inquiry into Drugs (Williams Commission) that the *Bail Act* of each State "should specifically provide that in the case of a Division I offence there shall be no presumption in favour of bail."[96] This amending Act was criticised on the basis that there was no empirical evidence for a higher risk of absconding by commercial drug dealers. That criticism argued the Act was a response to a particular case involving a single alleged drug dealer who failed to answer bail.[97]
Bail (Personal and Family Violence) Amendment Act 1987 (NSW) Exception to presumption in favour of bail created for domestic violence offences where accused has previously breached bail conditions imposed for the victim's welfare.	These amendments were based[98] on an extensive inquiry by the NSW Violence Against Woman and Children Law Reform Task force that had consulted widely, engaged in research and published an extensive Report, recommending that the *Bail Act* should be amended to provide that the presumption in favour of bail should not apply where a person is arrested on a breach of a bail condition imposed to protect the victim-complainant in domestic violence matters.[99]
Bail (Amendment) Act 1988 (NSW) Created presumption against bail for drug offences involving commercial quantities (and analogous Commonwealth importation offences) Removed the presumption in favour of bail for offences of supply, manufacture and cultivation in cases involving larger quantities.	The bill was said to make it more difficult for people charged with serious drug offences to obtain bail[100] and to reflect the community's expectations that a much stronger stand should be taken against commercial drug trafficking. This was the first presumption against bail, no further presumptions against bail were inserted until 2003.
Bail (Further Amendment) Act 1988 (NSW) Created presumption in favour of bail for ▪ People charged with offences covered by the right to bail in s 8, but disentitled because of a previous failure to appear or fail to comply with bail undertaking. ▪ People charged with s 51 (fail to appear) in relation to a s 8 offence.	The trend of amendments making it more difficult to obtain bail was departed from in this amendment in 1988 which was made to ensure people retain a presumption in favour of bail when charged with failure to appear in relation minor offences.

95. NSW, *Parliamentary Debates*, Legislative Assembly, 23 April 1986, 2575.
96. Australia, *Australian Royal Commission of Inquiry into Drugs*, Parl Paper No 226 (1980) F36.
97. D Weatherburn, M Quinn and G Rich, "Drug charges, bail decisions and absconding" (1987) 20(2) *Australian and New Zealand Journal of Criminology* 96.
98. NSW, *Parliamentary Debates*, Legislative Assembly, 29 October 1987, 15463-4, 15467 (B Unsworth, Premier).
99. NSW, Violence Against Women and Children Law Reform Task Force, *Report to the Premier on Personal and Family Violence Legislative Reforms* (1987) 33.
100. NSW, *Parliamentary Debates*, Legislative Assembly, 25 May 1988, 551.

Amending Act and effect	Rationale and background
Bail (Domestic Violence) Amendment Act 1993 (NSW) Created exceptions to presumption in favour of bail for ▪ Murder ▪ Breach of an apprehended domestic violence order where there is a history of violence.	Amendments followed a government review of the *Bail Act* which showed "significant shortcomings in its protection of victims".[101] The circumstances of the domestic homicide of Andrea Patrick[102] were specifically mentioned. Ms Patrick's partner had a history of domestic violence for which he had served a term of eight month's imprisonment in Victoria. A further assault led to the granting of an Apprehended Violence Order against the offender, and he was granted bail in relation to the assault. Two days after the offender was granted bail, Ms Patrick was stabbed some twenty times by the offender, and died.
Criminal Legislation Amendment Act 1995 (NSW) Conspiracy, threats and attempts to murder added to exceptions to presumption in favour of bail.[103]	Aimed to better ensure the safety of victims of alleged crimes while the accused awaits trial.[104]
Drug Misuse and Trafficking (Ongoing Dealing) Act 1998 (NSW) Supply of prohibited drugs on an on-going basis in amounts between traffickable and commercial quantity added to exceptions to presumption in favour of bail.	Updated the *Bail Act* for the new offence of ongoing commercial drug dealing.[105]
Bail Amendment Act 1998 (NSW) Created exceptions to presumption in favour of bail for: manslaughter, wounding with intent, kidnapping, aggravated sexual assault, sexual intercourse with a child under 10, and assault with intent to commit sexual intercourse with a child under 10. The Act also clarified and extended the domestic violence exception, to cover all domestic violence offences, and breach of an AVO involving violence only. Inserted a new consideration into s 32 concerning previous offending on bail or parole.	The Bill was said to be the result of a comprehensive review of the *Bail Act* recently undertaken by the government, "because the issue of bail remains a matter of ongoing community concern. The proper balance between protection of the community and the rights of the accused is an important matter which warrants regular monitoring".[106] This amendment was explicitly linked to a well publicised incident, relating to the abduction, rape and murder of two schoolgirls from the NSW country town of Bega. The girls, aged 14 and 16, had been subject to multiple sexual assaults during their 12 hour abduction during which they were driven into the State of Victoria before being stabbed and killed. A police investigation identified two offenders who were ultimately prosecuted for the offences. One was on bail at the time of the offence, due to an aborted trial.[107] The offenders were tried in Victoria. Neither were released on bail. Both offenders were convicted and received a sentence of life imprisonment.[108]

101. NSW, *Parliamentary Debates*, Legislative Assembly, 15 September 1993, 3218 (J Fahey, Premier).
102. NSW, *Parliamentary Debates*, Legislative Assembly, 15 September 1993, 3217; W Owens, "Beaten, stalked, and then murdered", *Sunday Telegraph* (12 March 1995) 4.
103. This amendment also amended *Bail Act 1978* (NSW) s 22A.
104. NSW, *Parliamentary Debates*, Legislative Council, 1 June 1995, 542 (J Shaw, Attorney General).
105. NSW, *Parliamentary Debates*, Legislative Assembly, 7 May 1998, 4690 (E Page, Minister for Local Government).
106. NSW, *Parliamentary Debates*, Legislative Assembly, 14 October 1998, 8327 (P Whelan, Minister for Police).
107. NSW, *Parliamentary Debates*, Legislative Assembly, 14 October 1998, 8327 (P Whelan, Minister for Police); A Clennell, "Lawyers back call for overhaul of jury pay, exemptions", *Sydney Morning Herald* (9 January 2008).
108. *R v Camilleri* [1999] VSC 184, with an appeal dismissed in *R v Camilleri* [2001] VSCA 14, 119 A Crim R 106 and no leave to appeal granted by the High Court (*Camilleri v The Queen* [2002] HCATrans 214); *R v Beckett* [1998] VSC 219.

Amending Act and effect	Rationale and background
Police Powers (Drug Premises) Act 2001 (NSW) Unauthorised possession or use of a prohibited firearm added to exceptions to presumption in favour of bail.	This Act removed the presumption in favour of bail for the offence of unauthorised use or possession of a firearm and amended the *Bail Act* "in certain ways that are aligned with the aim of stopping professional drug dealers, who are serious criminals who often use pistols and prohibited firearms such as sawn-off shotguns to assist in their activities".[109] The Attorney General stated that all the amendments in the bill were "aimed at protecting the community from persons who are charged with offences that indicate that they are serious and probably professional criminals".[110]
Crimes Amendment (Aggravated Sexual Assault in Company) Act 2001 (NSW) Offence of aggravated sexual assault in company added to exceptions to the presumption in favour of bail.	This amendment was part of the Bill that created the new offence of aggravated sexual assault in company, to "better protect the citizens of this State from abuse perpetrated by sexual predators who hunt in packs".[111] It followed certain high profile gang rape incidents.[112] The treatment of this offence under bail law aligns with aggravated sexual assault.
Crimes Amendment (Gang and Vehicle Related Offences) Act 2001 (NSW) New offence of kidnapping added to exceptions to presumption in favour of bail.	The Bill updated the offence of kidnapping in the *Crimes Act 1900* (NSW) (replacing s 90A with 85A), and exempted it from the presumption in favour of bail (as the previous form of the offence had been).

3.47 By the end of this 15-year period, there was one presumption against bail, namely, in commercial quantity drug cases, and there was a set of provisions that removed the presumption in favour of bail for:

- a range of domestic violence offences;
- murder and manslaughter;
- the most serious sexual and violent offences;
- kidnapping;
- serious drug offences; and
- serious firearms offences.

3.48 It should also be noted that the Drug Summit provisions relating to drug and alcohol programs were instituted in this period, to support diversionary programs.[113]

109. NSW, *Parliamentary Debates*, Legislative Assembly, 30 May 2001, 13997 (R J Debus, Attorney General).
110. NSW, *Parliamentary Debates*, Legislative Assembly, 30 May 2001, 13997.
111. NSW, *Parliamentary Debates*, Legislative Assembly, 4 September 2001, 16319 (R J Debus, Attorney General).
112. G Coss, "The politics of reaction" (2008) 32 *Criminal Law Journal* 329, 333.
113. *Crimes Legislation Amendment (Criminal Justice Interventions) Act 2002* (NSW). See NSW, *Parliamentary Debates*, Legislative Assembly, 12 November 2002, 6555 (T Stewart, Parliamentary Secretary). For a critique of tying therapeutic concerns to bail see A Freiberg and N Morgan, "Between bail and sentence: the conflation of dispositional options" (2004) 15 *Current Issues in Criminal Justice* 220, 234. See also para 13.24-13.34.

2002 to 2004: a period of significant change

3.49 Three major Acts were passed in this period that covered a significant number of defendants.

Bail Amendment (Repeat Offenders) Act 2002 (NSW): prior offences

3.50 This Act created three exceptions to the presumption in favour of bail:

- anyone accused of an offence while on bail, parole or some other conditional liberty;
- anyone who has been convicted of failure to appear in accordance with a bail undertaking; and
- anyone accused of an indictable offence if the person has previously been convicted of one or more indictable offences.

3.51 In the second reading speech for the bill, the Attorney General made it clear that the amendment was targeted towards "a growing category of accused persons who commit less serious crimes repeatedly".[114] The stated intention of these amendments was to reduce the rate of failing to appear by denying bail to the repeat offenders. This amendment was based on evidence. Research by BOCSAR had shown that in 2000 14.6% of Local Court defendants on bail failed to appear and an arrest warrant was issued. The failure to appear rates were highest among people with prior convictions and multiple concurrent offences.[115]

3.52 The amending Act also sought to improve access to bail by members of groups with special needs, requiring the court to consider any special needs arising from a defendant's age, if under 18 years, or any intellectual disability, or arising from the person's status as an Aboriginal person or Torres Strait Islander.

3.53 Subsequent evaluation of these changes by BOCSAR noted:

> [T]he bail refusal rate for defendants appearing in New South Wales criminal courts has increased by 7 per cent. The increase is greatest among defendants targeted by the amendments, including those with prior convictions (up 10.3%), those appearing for an indictable offence with an indictable prior conviction (up 7.3%) and defendants who have previously failed to appear (up 15.5%). There has been no change in the bail refusal rate for defendants without a prior conviction or for juvenile defendants. The bail refusal rate for Indigenous adults increased 14.4 per cent, which is greater than the increase for non-Indigenous adults (up 7.0%). This may be due to the high proportion of Indigenous defendants who have a prior conviction. [116]

The proportion of people failing to appear in the Local Court fell from 11.6% in the 18 months prior to the bail amendments, to 9.4% in the 18 months after the

114. NSW, *Parliamentary Debates*, Legislative Assembly, 20 March 2002, 818-819.

115. M Chilvers, J Allen and P Doak, *Absconding on Bail*, Crime and Justice Bulletin No 68 (NSW Bureau of Crime Statistics and Research, 2002).

116. J Fitzgerald and D Weatherburn, *The impact of the Bail Amendment (Repeat Offenders) Act 2002*, Crime and Justice Bulletin No 83 (NSW Bureau of Crime Statistics and Research, 2004) 1.

amendments. In the higher courts, the rate fell from 3.6% to 1.9%.[117] This reduction was at the cost of about 100 additional defendants in remand per month: the monthly adult remand population increased from an average of 1654 per month before the amendments, to 1756 per month after the amendments.[118]

3.54 In short, bail refusals had increased and the failure to appear rate had been cut, but access to bail by groups with special needs had not improved and bail refusals had increased significantly for Indigenous people.

3.55 It is noted that data on the level of offending while on bail is not systematically collected, and this was not measured, either before or after the passage of the Act.[119]

Bail Amendment Act 2003 (NSW): Murder and serious personal violence

3.56 This Act inserted two sections into the *Bail Act* which provided for bail to be granted only in "exceptional circumstances" in cases where the accused faced charges of:

- murder;[120] or
- a "serious personal violence offence" where the person charged has a previous conviction for a serious personal violence offence.[121]

"Serious personal violence offence" was defined by reference to sections of the *Crimes Act 1900* (NSW) to include murder and manslaughter, serious sexual and violent offences, and some property offences that involve threats of violence or risk to safety (for example, arson offences).[122]

3.57 The Act also created a procedure for prosecutors to seek a stay of a Local Court decision to grant bail pending a Supreme Court review of the Local Court decision, in cases of murder, offences punishable by imprisonment for life, and sex offences against a person under 16.[123]

3.58 The second reading speech explained the rationale:

> This bill continues our ongoing reform of bail law, which began last July with the introduction of the *Bail (Repeat Offenders) Act*. These amendments build on those reforms to further protect victims and the community, and particularly women, from serious personal violence offenders.[124]

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117. J Fitzgerald and D Weatherburn, *The impact of the Bail Amendment (Repeat Offenders) Act 2002*, Crime and Justice Bulletin No 83 (NSW Bureau of Crime Statistics and Research, 2004) 6.
118. J Fitzgerald and D Weatherburn, *The impact of the Bail Amendment (Repeat Offenders) Act 2002*, Crime and Justice Bulletin No 83 (NSW Bureau of Crime Statistics and Research, 2004) 6.
119. Limitations on data collection were explained in an email from Director, BOCSAR to Executive Director Law Reform Commission, 6 January 2012.
120. *Bail Act 1978* (NSW) s 9C.
121. *Bail Act 1978* (NSW) s 9D.
122. *Bail Act 1978* (NSW) s 9D(4).
123. *Bail Act 1978* (NSW) s 25A.
124. NSW, *Parliamentary Debates*, Legislative Assembly, 30 May 2003, 1545.

3.59 The speech referred to the troubling case of the murder of Patricia van Koeverden in April 2003. Ms van Koeverden was shot by her estranged husband who was on bail for charges that he had abducted and raped her.[125] The case was advanced as motivation for accelerating the government's bail reform program.[126]

Bail Amendment (Firearms and Property Offenders) Act 2003 (NSW)

3.60 The last major amendment to the *Bail Act* in this period extended the presumption against bail to include firearms related offences,[127] and people charged with two or more serious property offences who have previously been convicted of one or more serious property offences within the previous two years.[128]

3.61 The second reading speech to the Bill outlined its background and purpose:

> The bill amends the *Bail Act* 1978 to strengthen the provisions in relation to property offenders and in relation to serious firearm offences. … these amendments form stage two of bail amendments this year. They build upon previous amendments in relation to serious personal violence offenders and address certain community concerns in relation to recent firearms offences. The amendments were substantially adopted from a report produced by an internal working party.…
>
> A repeat property offender is defined as a person who has one or more convictions in the past two years, at least one of which is robbery or burglary related, and who has two or more outstanding charges which are robbery or burglary related. These provisions specifically target persons who commit more offences while on bail. The proposal is based on the strategy that by identifying certain categories of offences charged in combination with the criminal history of the person charged, high-risk persons may be identified and incapacitated, thereby preventing them from offending in the future. Criminology research has repeatedly shown that a small percentage of offenders are responsible for a large percentage of crime. This is especially the case in relation to property offences.…
>
> Incapacitation of repeat property offenders through remand in custody has the benefit to the community for the period that the offender is in custody. However, the Government also recognises that more long-term benefit can be gained if efforts are directed towards rehabilitating offenders once they have been identified.[129]

3.62 By the end of 2003 there were a significant number of instances where the presumption in favour of bail was displaced, creating a neutral presumption or where there was a presumption against bail or an "exceptional circumstances" requirement.

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125. "Shot woman lived in fear of her husband" *Sydney Morning Herald* (1 May 2003) 5.
126. NSW, *Parliamentary Debates*, Legislative Assembly, 30 May 2003, 1545.
127. *Bail Act 1978* (NSW) s 8B.
128. *Bail Act 1978* (NSW) s 8C. The definition of serious property offence includes offences of robbery, breaking and entering with intent, car-jacking, and stealing motor vehicles.
129. NSW, *Parliamentary Debates*, Legislative Council, 19 November 2003, 5195-5196.

Other developments

3.63 This period saw the extension of the provision facilitating drug and alcohol programs, to other assessment, therapeutic, rehabilitative and intervention programs.[130] On the other hand, the presumption in favour of bail was removed for offences committed while subject to an intervention program order.[131]

3.64 There were also minor amendments to achieve consistency in the treatment of Commonwealth offences.[132]

2004 to date: further presumptions against bail

3.65 Since 2004, 13 amendments have further limited the scope of the presumption in favour of bail. In this period the displacement most commonly took the form of a presumption against bail.

3.66 Most of these changes have been incremental, relate to low volume offences or rare circumstances, or can be regarded as extensions of existing policy. Many of the changes also came about as a result of changes to offence structures, or the introduction of new offences (for example, in relation to motor vehicle theft and stalking), where the new offence was analogous to existing or replaced offences. However, in other situations, notably the response to the "Cronulla riots", and the arrest of a person who had been released on lifetime parole, the changes were a response to a particular situation giving rise to a community law and order concern.

3.67 Table 3.2 summarises the changes in this period.

Table 3.2: Amendments since 2004

Amending Act and Effect	Rationale and background
Bail Amendment (Terrorism) Act 2004 (NSW) Commonwealth terrorism-related offences included in list of presumptions against bail.	Part of the legislative response to the threat of terrorism, following the referral of legislative powers to the Commonwealth to create terrorism offences.[133] The opposition in the Parliamentary Debates attributes the bill to the publicised granting of bail to a particular accused charged with terrorism offences.[134]
Crimes and Courts Legislation Amendment Act 2005 (NSW) Updated presumptions to reflect transfer of Commonwealth drug offences to the *Criminal Code* (Cth).	This Act followed the creation of new Commonwealth drug-related offences, and applied the presumptions concerning existing State offences, to the analogous Commonwealth offences.

130. *Crimes Legislation Amendment (Criminal Justice Interventions) Act 2002* (NSW).
131. *Bail Act 1978* (NSW) s 9B(1)(d).
132. *Crimes Legislation Amendment Act 2002* (NSW).
133. NSW, *Parliamentary Debates*, Legislative Assembly, 3 June 2004, 9599 (R J Debus, Attorney General).
134. NSW, *Parliamentary Debates*, Legislative Assembly, 3 June 2004, 9600.

Amending Act and Effect	Rationale and background
Law Enforcement Legislation Amendment (Public Safety) Act 2005 (NSW) Inserted a presumption against bail for offences committed in the course of riots or other civil disturbances in certain circumstances.	Introduced as part of a parcel of legislation to address a large-scale public disturbance in Cronulla (the "Cronulla Riots"). The government expressed concern that people charged with offences during the disturbance were being released "automatically" "to be given the chance to wreak further havoc".[135]
Crimes Amendment (Organised Car and Boat Theft) Act 2006 (NSW) Inserted a presumption against bail for people repeatedly committing theft of motor vehicle offences.	Updated the Act to cover new offences introduced as part of the government's anti-gang strategy and to improve police activities against car "rebirthing" operations.[136]
Bail Amendment (Lifetime Parole) Act 2006 (NSW) Inserted s 8E creating a presumption against bail for people accused of committing offences which carry sentences of imprisonment allegedly committed while on lifetime parole.	A response to a perception of community expectations regarding the behaviour of lifetime parolees.[137] Apparently triggered by a particular case involving the arrest of a life-time parolee for offensive behaviour.[138]
Crimes Amendment (Apprehended Violence) Act 2006 (NSW) Created an exception to the presumption in favour of bail for people accused of stalking offences.	The Act was introduced to indicate the government's low tolerance of offences that fall under it. There is no recorded discussion specifically regarding this bail amendment.[139]
Crimes and Courts Legislation Amendment Act 2006 (NSW) Extended the presumption against bail to new drug offences relating to the indoor cultivation of prohibited plants as well as offences in the presence of children.	Extended the presumption against bail for serious drug offences to analogous new offences related to hydroponically grown cannabis.
Bail Amendment Act 2007 (NSW) Extended the presumption against bail to licensed firearm dealers who permit "prescribed persons" to be involved in their business activities, and people who shorten a firearm. Updated s 9D to include property damage offences involving fire or explosives (including those committed during public disorder) as serious personal violence offences allowing bail for repeat offenders only in exceptional circumstances. Amended s 22A to limit repeat bail applications.	Updated reference to *Crimes Act 1900* (NSW) offences, and extends the presumptions against bail to two serious firearms offences.

135. NSW, *Parliamentary Debates*, Legislative Assembly, 15 December 2005, 20622 (M Iemma, Premier).
136. NSW, *Parliamentary Debates*, Legislative Assembly, 28 March 2006, 21578 (A Megarrity, Parliamentary Secretary).
137. NSW, *Parliamentary Debates*, Legislative Assembly, 19 September 2006, 1856 (R J Debus, Attorney General).
138. See E Murray, "Child killer in court over indecency charge", *Sydney Morning Herald* (online), 12 October 2006.
139. NSW, *Parliamentary Debates*, Legislative Assembly, 6 September 2006, 1591 (N Newell, Parliamentary Secretary).

Amending Act and Effect	Rationale and background
Crimes (Domestic and Personal Violence) Act 2007 (NSW) Updated s 9A(1) (removing the presumption in favour of bail) to reflect the new offence of stalking.	Updates the *Bail Act* to reflect the new offence of stalking introduced as part of the reforms to domestic violence law contained in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).
Law Enforcement and Other Legislation Amendment Act 2007 (NSW) Removed sunset clause on the presumption against bail for riots and civil disturbances. Introduced presumption against bail for alleged breaches of Sex Offender Supervision Orders as well as prohibiting dispensing with bail for such offences. Extended presumption against bail to repeat offenders who allegedly attempt or do assault children for the purpose of intercourse.	The Act was said to be part of the government's "ongoing commitment" to protect the community against recidivist sex offenders.[140]
Crimes (Criminal Organisations Control) Act 2009 (NSW) *Crimes (Criminal Organisations Control) Act 2012* (NSW) Created an exception to the presumption in favour of bail for offences relating to the association of people subject to control orders under this Act.	Part of the legislative changes intended to criminalise association between members of proscribed criminal gangs The High Court has declared that the 2009 *Act* invalid.[141] The amendments to the *Bail Act* were re-enacted in the 2012 *Act*.
Weapons and Firearms Legislation Amendment Act 2010 (NSW) Updated the presumption against bail for certain offences relating to military-style weapons.	Amendments introduced to address the risk to public safety posed by military-style weapons. The bill was said to formalise recommendations made in a 2009 report of a review of the *Weapons Prohibition Act 1998* (NSW).[142] That report[143] did not make any recommendations regarding bail.

The cumulative effect of the amendments relating to presumptions

3.68 In the 2007 debate on the Bail Amendment Bill, the then Attorney General stated that the cumulative effect of amendments to that time was that New South Wales "now has the toughest bail laws in Australia". He summarised the effect of the amendments over the previous 30 years in these terms:

140. NSW, *Parliamentary Debates*, Legislative Council, 28 November 2007, 4506 (J Hatzistergos, Attorney General).

141. *Wainohu v NSW* (2011) 243 CLR 181; see also A Lynch, "Terrorists and Bikies: The Constitutional Licence for Laws of Control" (2009) 34 *Alternative Law Journal* 237, 239; N Cowdery, "A Threat to the Rule of Law: The New South Wales Crimes (Criminal Organisations Control) Act 2009" (2009) 21 *Current Issues in Criminal Justice* 321; A Loughnan, "The Legislation We Had to Have? The Crimes (Criminal Organisations Control) Act 2009 (NSW)" (2009) 20 *Current Issues in Criminal Justice* 457.

142. NSW, *Parliamentary Debates*, Legislative Council, 2 June 2010, 23522 (P Sharpe, Parliamentary Secretary).

143. NSW, Ministry for Police, *Report on the Review of the Weapons Prohibition Act 1998 and Weapons Prohibition Regulation 1999,* Statutory review (2009).

> The Government is pleased to introduce the Bail Amendment Bill 2007. The bill builds on the Government's extensive reforms over the past years to strengthen our bail laws and ensure the community is properly protected while defendants are awaiting trial. New South Wales now has the toughest bail laws in Australia. Over the last few years we have cracked down on repeat offenders—people who habitually come before our courts time and again. Part of those changes includes removing the presumption in favour of bail for a large number of crimes. We have also introduced presumptions against bail for crimes including drug importation, firearm offences, repeat property offences and riots, and an even more demanding exceptional circumstances test for murder and serious personal violence, including sexual assault.
>
> Those types of offenders now have a much tougher time being granted bail under our rigorous system. These extensive changes have delivered results. There is no doubt that the inmate population, particularly those on remand, has risen considerably as a result of the changes. In fact, the number of remand prisoners has increased by 20 per cent in the last three years alone and new jails are being opened to accommodate the increase. The latest figures from the New South Wales re-offending database on bail decisions have shown that from 1995 to 2005 bail refusals in the District Court and Supreme Court have almost doubled, with an increase from 25.8 per cent to 46.4 per cent.[144]

3.69 The statement that by the end of this period NSW had the "toughest bail laws in Australia" has academic support. Steel notes that NSW is "in an exceptional position in comparison to other Australian states"[145] in the "involvement by politicians in the setting of the parameters of bail availability."[146] This is despite NSW beginning its codification in 1978 "with the most liberal approach to bail with a right to bail for minor offences, and a restriction against bail to only one offence - armed robbery".[147] Steel compiled a table comparing the number of "punitive changes" in the different Australian jurisdictions.[148]

144. NSW, *Parliamentary Debates*, Legislative Council, 17 October 2007, 2670.

145. A Steel, "Bail in Australia: Legislative Introduction and Amendment Since 1970" (Paper presented at the ANZ Critical Criminology Conference Proceedings, Monash University, 8 and 9 July 2009) 228, 234.

146. A Steel, "Bail in Australia: Legislative Introduction and Amendment Since 1970" (Paper presented at the ANZ Critical Criminology Conference Proceedings, Monash University, 8 and 9 July 2009) 228, 234.

147. A Steel, "Bail in Australia: Legislative Introduction and Amendment Since 1970" (Paper presented at the ANZ Critical Criminology Conference Proceedings, Monash University, 8 and 9 July 2009) 228, 234.

148. Punitive changes are those that change presumptions or restrict bail for certain classes of offences or offenders, or change the considerations for determining bail applications. The total number of "punitive" changes for NSW from 1979, when the Act came into force, and 2011 is 28 Acts.

Table 3.3: Number of "punitive" changes to bail legislation, 1992-2008

Tasmania	1
Queensland	3
South Australia	4
Victoria	6
Western Australia	7
Northern Territory	7
ACT	9
NSW	23

Source: A Steel, "Bail in Australia: legislative introduction and amendment since 1970" ANZ Critical Criminology Proceedings 2009, 233-234.

3.70 In 2010, the Bureau of Crime Statistics and Research published a report examining how the presumptions in the *Bail Act* influence the likelihood of bail refusal. BOCSAR found that, after controlling for legally relevant factors, defendants are less likely to be granted bail when there is a presumption against bail, or when bail can only be granted in exceptional circumstances. [149]

Conclusion

3.71 The cumulative effect of thirty years of amendments since the enactment of the reform oriented *Bail Act 1978* (NSW) is a level of complexity in the legislation which makes it difficult to comprehend and operate, even for those with legal expertise working with it daily.

3.72 Many of the amendments were intended to restrict access to bail. The evidence presented in this chapter and the next indicates that this has been achieved.

3.73 Some of the amendments were intended to reduce the rate of fail to appear. Again, there is evidence that this goal was achieved, although at a significant cost in terms of increased rates of bail refusal.

3.74 As the *Bail Act* has developed, one area of particular concern is the need to ensure the safety of women and children from domestic violence. The risk is real. There have been cases of perpetrators of domestic violence committing murder while on bail. This concern has led to limitations on the presumption in favour of bail as a means of addressing this risk. While we do not consider that that this is the best means of addressing the problem, we agree that the problem must be front and

149. L Snowball, L Roth and D Weatherburn, *Bail Presumptions and Risk of Bail Refusal: An Analysis of the NSW Bail Act*, Crime and Justice Statistics Issue Paper No 49 (NSW Bureau of Crime Statistics and Research, 2010).

central to our considerations, and we make recommendations to address this risk.[150]

3.75 More broadly, the amendments were intended to contribute to safety in the community. The amendments often targeted people charged with serious offences or who were repeat offenders charged with a new offence. Such changes reflect the concern of legislators about the risk these groups pose to the community by reoffending while on bail. However, there is a paucity of analysis of the effects of such changes on offending. The only available study is by BOCSAR in 2009 which found that changes to the *Bail Act* and police enforcement of bail laws were associated with an increased number of juveniles in remand, but did not have a significant impact on property crime.[151] There is no information available about the rate of offending while on bail.

3.76 Crime rates in NSW have generally declined since 2000 across most violent and property crimes. (The exception is sexual assault, which is showing an upward trend, and assault which shows a fairly stable pattern.[152]) There is no evidence to connect these trends with changes in bail laws. We note that in the last decade, crime rates have decreased across Australia.[153] This suggests that the decline in NSW is part of a wider trend, rather than a consequence of changes in bail law and practice specific to NSW.

150. See Ch 10.

151. S Vignaendra, S Moffatt, D Weatherburn and E Heller, *Recent Trends in Legal Proceedings for Breach of Bail, Juvenile Remand and Crime*, Crime and Justice Bulletin No 128 (NSW Bureau of Crime Statistics and Research, 2009). After considering revised data from Juvenile Justice NSW, BOCSAR found that remand had a "weakly deterrent effect" on crime – that is, it was not statistically significant but close to being so. This study is discussed in more detail at para 12.53.

152. S Moffatt and D Goh, *An Update of Long-term Trends in Property and Violent Crime in New South Wales: 1990-2010*, Bureau Brief No 58 (NSW Bureau of Crime Statistics and Research, 2011).

153. The Australian Bureau of Statistics found that recorded crime rates decreased between 1998 and 2007 in all categories (homicide, kidnapping/abduction, robbery, unlawful entry with intent, motor vehicle theft and other theft) except blackmail/extortion: *Recorded Crime – Victims, 4510.0* (Australian Bureau of Statistics, 2007) table 1. The decreases were consistent across jurisdictions for most offences. Assault was not included in the national statistics but was included in separate jurisdictions. Rates of assault increased in all jurisdictions except Queensland, but this was at least in part due to changes in recording practices and to police initiatives encouraging reporting of domestic violence: 28-36.

4. Trends in remand

Introduction **45**
Adults: Increasing remand numbers and rates **46**
Comparison with other jurisdictions 49
The drivers of increasing remand rates **50**
Bail refused 50
Time spent on remand 51
A high proportion of short term remands *51*
Many short term remandees are subsequently released to bail *52*
Changes over time *53*
Bail conditions: arrest and revocation 54
The special situation of young people **55**
Increased numbers and rates of young people in remand 55
Short stays *57*
Young people and the risk of reoffending 58
Bail conditions 59
Breach of bail conditions *59*
Inability to comply with bail conditions *59*
Indigenous defendants **59**
High remand rates 59
Bail refusal 60
Time on remand 62
Young people 62
A disproportionate impact 62
Conclusion **62**

Introduction

4.1 This chapter will report on the current situation in NSW in relation to bail and remand and identify some of the problems that this review was set up to address. It will show the following:

Total population

- The number of unsentenced prisoners has more than trebled in 15 years, from just over 700 in 1995 to over 2500 unsentenced prisoners in 2010.
- The rate of unsentenced prisoners per head of population has more than doubled, from 18 per 100,000 in 1994-95 to 45 per 100,00 in 2010-11.
- The proportion of the prison population made up of those on remand has more than doubled, from approximately 12% in 1994 to approximately 26% in 2011.
- The NSW rate of unsentenced prisoners per head of population is two and a half times that of Victoria.
- The rate of bail refusal for Local Court matters (excluding traffic offences and people under 18 years) increased from 5% in 1995 to 8% in 2010.

- The average time spent on remand is 6 months, which is longer than all Australian jurisdictions except Queensland.
- Many people spend a short time on remand and are then released to bail, or are released having been sentenced to a non-custodial sentence.

Young people

- The number of young people on remand on an average day has increased from approximately 225 in 2000 to over 400 in 2010. About half of the young people in juvenile detention are unsentenced.
- The average length of stay for a young person is ten days, and most do not receive a control order.
- Many young people are detained for less than 24 hours for breach of a bail condition.

Indigenous people

- The rate of remand for Indigenous people per head of population is over 11 times the rate for the total population: 583 per 100 000 compared with 49 per 100 000.
- Between 2001 and 2008, the number of Indigenous adults on remand rose 72%.
- Indigenous defendants are three times more likely to be bail refused in the Local Court, largely because of legally relevant factors such as criminal history.
- Indigenous young people are heavily over-represented in juvenile remand, making up 38% of those in Juvenile Justice remand.

Adults: Increasing remand numbers and rates

4.2 The number of unsentenced prisoners in New South Wales has been growing steadily for at least twenty years. Table 4.1 sets out the prison population and the numbers of those “not under sentence” or “unsentenced” at five year intervals from 1970-2010. It is taken from Corrective Services NSW prison census data which has gaps in collection and involves some changes in definition.[1] It indicates a growing trend in the total prison population and in the percentage of prisoners that are unsentenced on remand. The growth is marked since the 1990s.

1. The data had some definition changes between “unsentenced” and “not under sentence”. Between 1970 and 1982 statistics were kept for people “not under sentence” which included people on remand awaiting trial, awaiting sentencing, prisoners awaiting deportation and extradition, and those awaiting outcomes of appeals; from 1982-1995, the appeal category was excluded; from 1995-2006 those awaiting sentencing and deportation were excluded; from 2007 those awaiting sentencing were re-included.

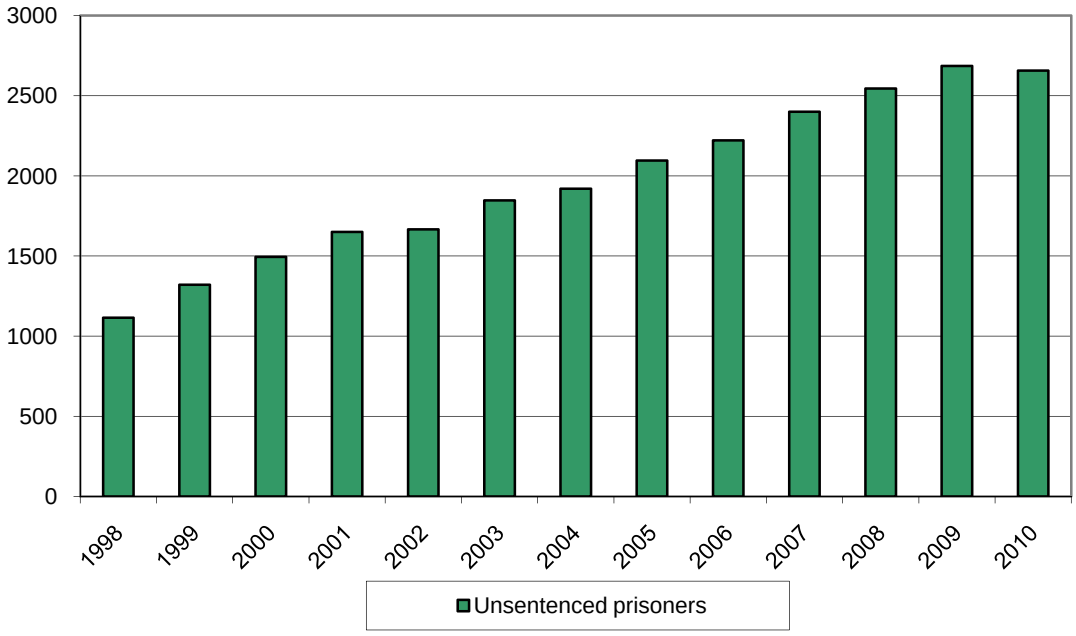
Table 4.1: Long term trends in prison population NSW

Year	1970	1975	1980	1985	1990	1995	2000	2005	2010
NSW Prison Population	3875	3385	3767	4115	No data	7749	8532	9803	10984
Sentenced	3429	3009	3299	3483		7038	7099	7833	8482
Unsentenced	446	376	468	632		711	1433	1970	2502
Unsentenced as a percentage of the prison population	11.5	11.1	12.4	14.3		9.1	16.7	20.1	22.7

Source: Department of Corrective Services, Inmate Census reports 1970-2010, data analysed and collated by the LRC.

4.3 More detailed information regarding the number of unsentenced prisoners in NSW is available for the last 13 years. Figure 4.1 shows a steady increase from just over 1000 unsentenced prisoners in 1998 to over 2500 unsentenced prisoners in 2010.

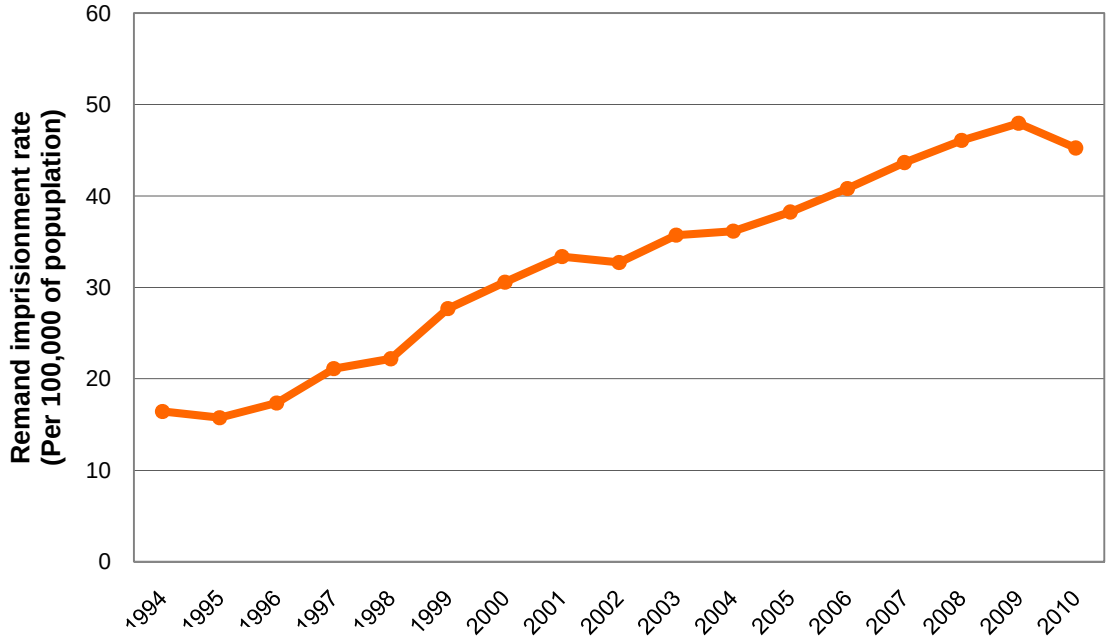
Figure 4.1: Number of unsentenced prisoners (NSW)



Source: Corrective Services, Australia 4512.0 (Australian Bureau of Statistics, 2011).

4.4 The rate of people on remand, relative to the general adult population, has increased. Figure 4.2 below shows that this relationship went from 18 per 100,000 in 1994-95 to 45 per 100,00 in 2010-11, a 250% increase.

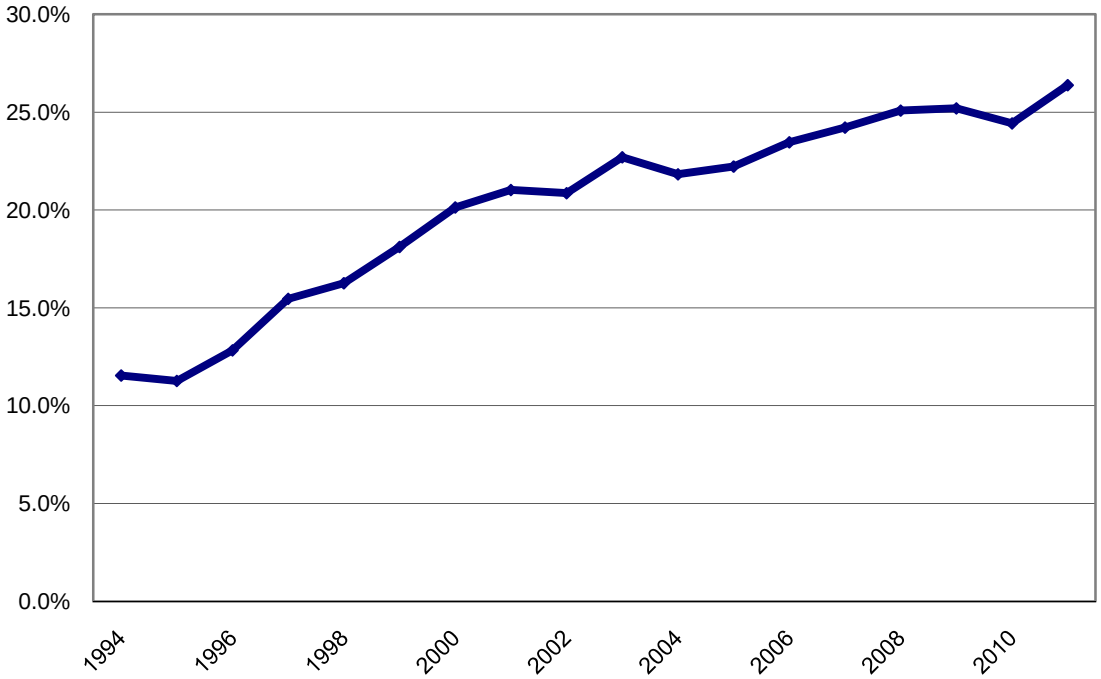
Figure 4.2: Remand imprisonment rate (NSW)



Source: Corrective Services NSW.

4.5 The remand population has increased more rapidly than the sentenced prison population. As shown by Table 4.1, between 1995 and 2010, the sentenced prison population went from 7,038 to 8,482, an increase of approximately 20%; in the same period, the remand prison population went from 711 to 2502, an increase of approximately 250%. As a result, as Figure 4.3 shows, the proportion of the prison population constituted by those on remand has increased markedly, from approximately 12% in 1994 to approximately 26% in 2011.

Figure 4.3: Remand population as percentage of all inmates (NSW)

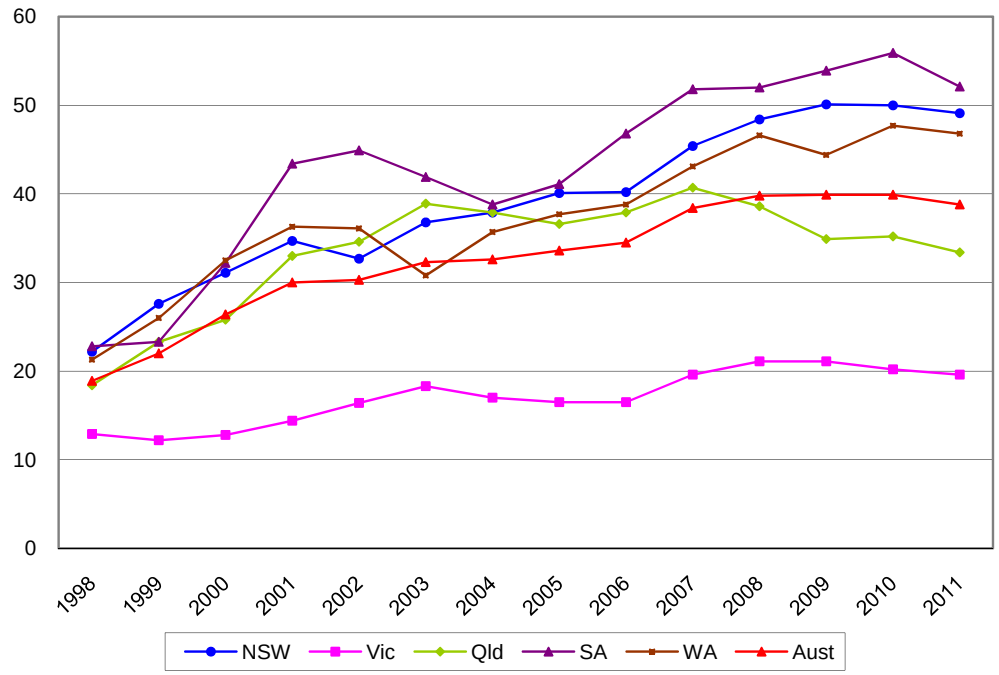


Source: Corrective Services NSW.

4.6 Because these statistics look at the prison population for one day only in each year, they capture only some of those on remand and on short term sentences[2] who tend to cycle through prison for shorter periods in large numbers.[3] Remand prisoners make up a high proportion of prison receptions over a year. In 2010, 10,342 of 14,288 prison receptions, or 72.4%, were remand prisoners.[4]

Comparison with other jurisdictions

Figure 4.4: Rates of unsentenced prisoners per 100,000 population



Source: Corrective Services, Australia 4512.0 (Australian Bureau of Statistics, 2011). (See Appendix F to this Report, Table F.2.)

4.7 The NSW rate of unsentenced prisoners per 100,000 population has been consistently above the Australian national average over the period 1998-2011. Figure 4.4 shows that the NSW rate is higher than all other States except South Australia.[5] The comparison with Victoria is instructive, with NSW (47.3 per 100,000

2. See, eg: NSW Parliament, Legislative Council, *Select Committee on the Increase in Prisoner Population,* Final Report, Parl Paper 924 (2001); B Lind and S Eyland, *The Impact of Abolishing Short Prison Sentences*, Crime and Justice Bulletin No 73 (NSW Bureau of Crime Statistics and Research, 2002).

3. For a discussion of the importance of this notion of 'flow' or 'flow through' in relation to prison populations see: E Baldry, "Women in Transition: From Prison to …" (2010) 22 *Current Issues in Criminal Justice* 253, 255-6.

4. Information supplied by Corrective Services NSW, 6 October 2011.

5. Figure 4.4 excludes the ACT and the NT. Over most of this period, ACT prisoners were detained in NSW. The NT imprisonment rate is far higher than the States and can be treated as an outlier. For Australian imprisonment rates and patterns see: *Prisoners in Australia*, *4517.0* (Australian Bureau of Statistics, 2010) 26; S Indyk and H Donnelly, *Full-time Imprisonment in New South Wales and Other Jurisdictions: A National and International Comparison*, Research Monograph 29 (Judicial Commission of NSW, 2007).

population) having close to two and a half times as many unsentenced prisoners as a rate per 100,000 population as Victoria (19.3 per 100,000 population).[6]

The drivers of increasing remand rates

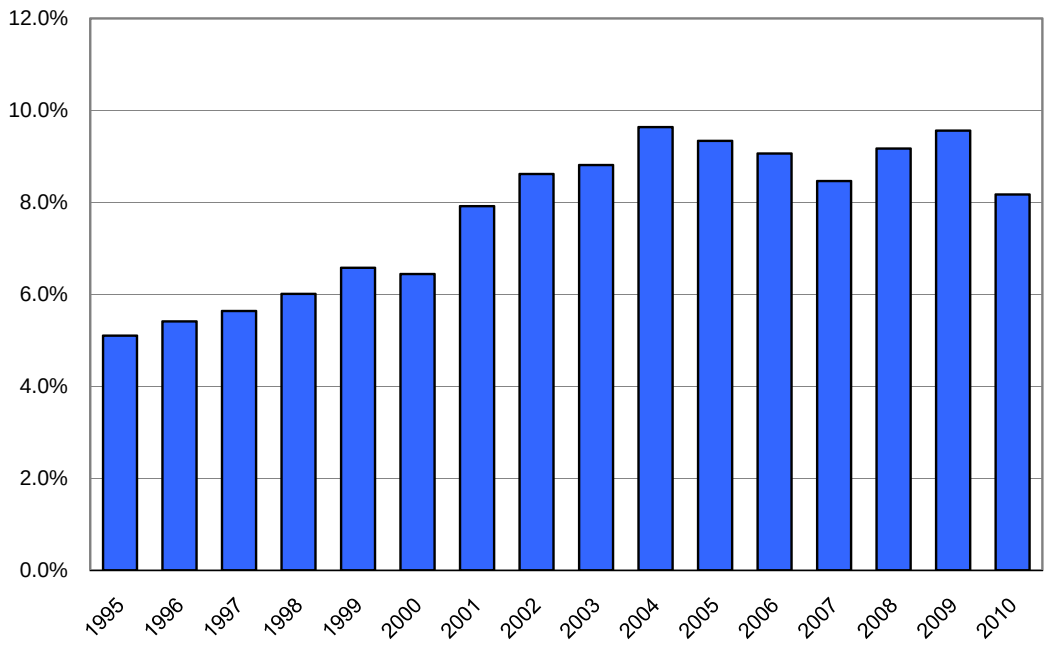
4.8 Remand rates are affected by the rates of bail refusal, the amount of time spent on remand, and the frequency of bail revocation. This section of our report will consider these three factors.

Bail refused

4.9 Data is collected for bail status at the finalisation of charges but not for bail decisions made by police or courts at the initial or intermediate stages of criminal proceedings. Accordingly, we do not know, for example, to what extent police bail decisions are reversed or modified by the courts, or the extent to which people spend a period in detention but not the whole of the time they are awaiting trial.

4.10 As Figure 4.5 shows, at the Local Court level the rate of bail refusal (excluding traffic offences and people under 18 years and measured at the time of finalisation of the charge) nearly doubled between 1995 and 2004 and has fluctuated in a relatively narrow range since then. Taking a broad view, the rate of bail refusal in the Local Court has been substantially higher during the last 5 years (in the order of 8 to 10%) than it was 10 to 15 years ago (in the order of 5 to 6%).

Figure 4.5: Local Court rate of bail refusal at the time of finalisation



Source: NSW Bureau of Crime Statistics and Research (kg11-10034).

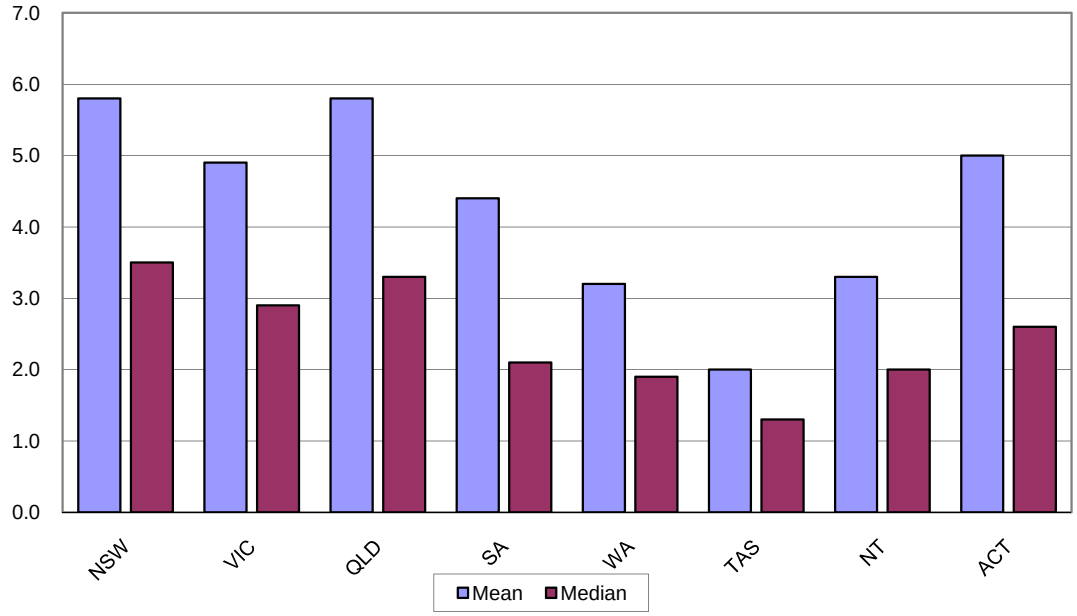
6. The factors underlying this are discussed in D Weatherburn, K Grech and J Holmes, *Why does NSW Have a Higher Imprisonment Rate than Victoria?* Crime and Justice Bulletin No 145 (NSW Bureau of Crime Statistics and Research, 2010) 4, fig 3.

4.11 In the higher courts, bail refusal increased from 24.5% in 1994 to 34.7% in 1999.[7] In 2009, 33.2% of defendants were bail refused at finalisation, and 33.4% in 2010.[8] Data between 1999 and 2009 does not distinguish between bail refusal and being in custody for another reason (for example serving a sentence for another offence).

Time spent on remand

4.12 The average (mean) length of stay in NSW on remand has been increasing. In 1982, only 93 out of 459 or 20% of prisoners on remand in NSW had a length of stay exceeding five months.[9] By 2001, the average length of stay was just below five months.[10] By 2010 it was just below six months.[11] Figure 4.6 shows that, among Australian jurisdictions, only Queensland has a longer mean and median remand time.

Figure 4.6: Median and mean time on remand (at 30 June 2011)



Source: Prisoners in Australia 4517.0 (Australian Bureau of Statistics, 2011).

A high proportion of short term remands

4.13 Of the 10,342 people on remand in 2010 in NSW, 5,218 or 55% were released as 'unconvicted' or not subject to further custodial sentence, that is, they were either

7. J Fitzgerald, *Increases in the NSW Remand Population*, Bureau Brief No 9 (NSW Bureau of Crime Statistics and Research, 2000) 2, Table 1.
8. Data supplied by the NSW Bureau of Crime Statistics and Research.
9. S Eyland, *NSW Prisoners: 30 June 1982*, Statistical Publication No 1 (NSW Corrective Services Commission, 1984) 24-25.
10. *Prisoners in Australia, 4517.0* (Australian Bureau of Statistics, 2001).
11. *Prisoners in Australia, 4517.0* (Australian Bureau of Statistics. 2010).

released to bail, received a non-custodial sentence, had already served their full sentence while on remand, had all charges dismissed or were acquitted.[12]

4.14 Of the 5,218 people on remand released from custody as unconvicted in 2010:

- 3,299 (63%) spent 0-1 month in custody on remand (26% less than a week);
- 1600 (31%) spent 1-4 months in custody on remand;
- 319 (6%) spent more than 4 months in custody on remand.[13]

4.15 The large number of remand prisoners having to be processed for very short stays, is time consuming and costly.[14]

Many short term remandees are subsequently released to bail

4.16 Table 4.2 shows the reasons for the unsentenced discharge of inmates remanded for less than 30 days. People remanded for less than 30 days are most likely to be released on bail (69%) or released having been sentenced to a non-custodial sentence such as a community service order or bond (13%).

Table 4.2: Reason for unsentenced discharge of short term remandees

Discharge reason category	Less than 30 days	Percent
Bail	2267	69%
Bond/CSO	415	13%
Other	214	6%
Drug Court	186	6%
Mental Health	72	2%
Acquit/Quash	24	1%
Immigration/Extradition	39	1%
Fine	40	1%
Periodic detention	27	1%
Juvenile	7	0%
Appeal Bail	7	0%
Home Detention	1	0%
TOTAL	3299	100%

Source: Corrective Services NSW.

12. Corrective Services NSW, *Submission BA29*, 1.
13. Corrective Services NSW, *Submission BA29*, 1-2.
14. Corrective Services NSW, *Submission BA29*, 2.

4.17 As Table 4.3 shows, the majority of these releases take place in the first seven days of custody.

Table 4.3: Release to bail in less than 30 days

Release type	1 day	2-7 days	8-29 days	Total
Bail	668	914	685	2267
Percent	29.5%	40.3%	30.2%	100%

Source: Corrective Services NSW.

4.18 Current data are not available to show how many of these short term remand releases subsequently receive a custodial or non-custodial sentence for the offences for which they were remanded.[15]

Changes over time

4.19 Table 4.4 shows that between 1995/96 and 2009/10, the number of unsentenced prisoners on remand less than 30 days has remained stable, while the number of unsentenced prisoners on remand for more than 30 days has increased both in number and proportion from 1,996 (26.4% of unsentenced prisoners) in 1995/96 to 10,639 (50.7% of unsentenced prisoners) in 2009/10.

Table 4.4: Proportion and number of short stays and long stays

Financial year	Unsentenced (Number)			Unsentenced (Percent)	
	On remand less than 30 days	On remand 30 days or more	Total unsentenced	% on remand less than 30 days	% on remand 30 days or more
1995/96	5552	1996	7548	73.6%	26.4%
1996/97	5539	2275	7814	70.9%	29.1%
1997/98	5756	2383	8139	70.7%	29.3%
1998/99	6639	3012	9651	68.8%	31.2%
1999/00	7031	3563	10594	66.4%	33.6%
2000/01	6988	3796	10784	64.8%	35.2%
2001/02	6414	4131	10545	60.8%	39.2%
2002/03	5827	4596	10423	55.9%	44.1%
2003/04	5451	4536	9987	54.6%	45.4%
2004/05	5424	4731	10155	53.4%	46.6%

15. However a Corrective Services NSW research study in 2001 found that 85% of those remand cases finalised in the month of March 1999 received a custodial sentence: B Thompson, *Remand Inmates in NSW – Some Statistics*, Research Bulletin No 20 (Corrective Services NSW, 2001).

Financial year	Unsentenced (Number)			Unsentenced (Percent)	
	On remand less than 30 days	On remand 30 days or more	Total unsentenced	% on remand less than 30 days	% on remand 30 days or more
2005/06	5602	4886	10488	53.4%	46.6%
2007/08	5343	5638	10981	48.7%	51.3%
2008/09	4894	5825	10719	45.7%	54.3%
2009/10	5249	5390	10639	49.3%	50.7%

Source: Corrective Services NSW.

4.20 It is difficult to interpret the trends in length of time on remand. However, it may reasonably be concluded that:

- The group of longer-term remandees is increasing in size and appears to be contributing to a larger remand population.
- Short-term remandees appear to be stable in number and are mostly released to bail, though some are sentenced to non-custodial sentences or referred to programs such as the Drug Court. This group would include those who are refused bail by police and are granted bail by the courts, perhaps after a period, to organise a proper application or to make arrangements to satisfy imposed or potential conditions.

Bail conditions: arrest and revocation

4.21 It might be expected that an increase in the imposition of bail conditions, combined with an increase in the intensity of policing, would result in increased rates of arrest, short term periods in custody and bail revocation for breach of conditions. Bail conditions and conduct requirements are discussed in detail in Chapter 12.

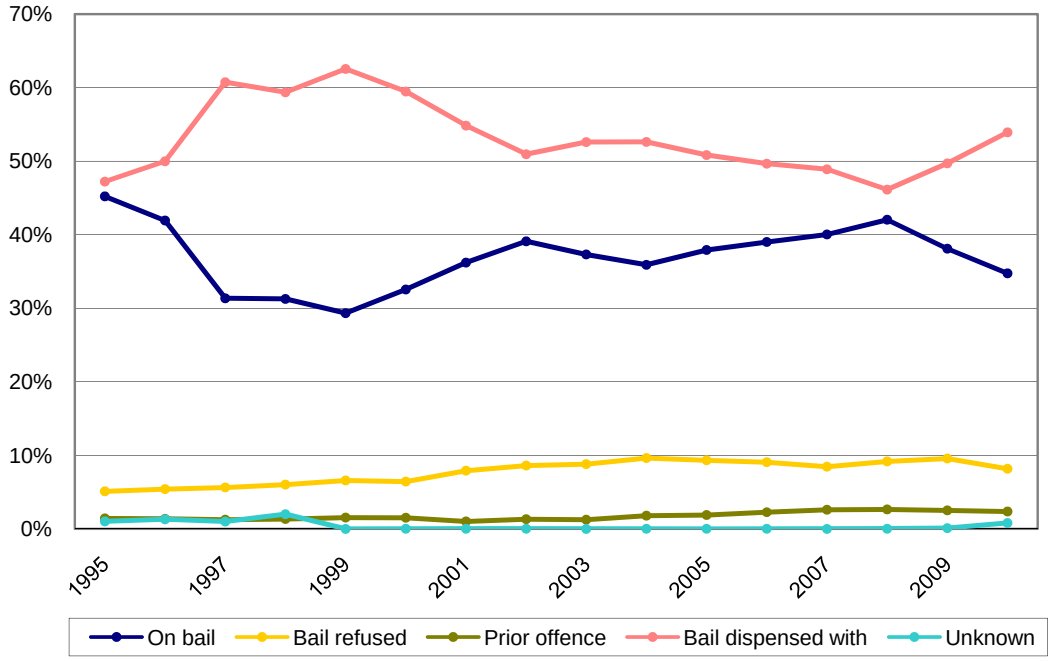
4.22 In relation to adults there is no direct evidence of such a relationship. However, a nexus is established in the case of young people.[16]

4.23 A decrease in the extent to which bail is "dispensed with" (that is, where no conditions are imposed) could also contribute to an increase in rates of arrest and bail revocation for breach of conditions. In a December 2010 publication, the Bureau of Crime Statistics and Research (BOCSAR) noted a decline over the previous 10 years in the rate of dispensing with bail, from 62% in 1999 to 46% in 2008 (see Figure 4.7).[17] The research showed that bail was both refused and granted more often, and that dispensing with bail was less prevalent. More recent figures obtained from BOCSAR over a slightly longer period show a recent rebound in dispensation rates, to 54% in 2010.[18]

16. See para 12.59-12.66.
17. C Ringland and D Weatherburn, *The Decline of Unconditional Release Before Trial*, Bureau Brief No 55 (NSW Bureau of Crime Statistics and Research, 2010).
18. These figures cover all Local Court finalisations excluding traffic offences, breach of bail proceedings and people under 18.

4.24 It is likely that the reduction in bail dispensation rates during the last 10 years has resulted in more people being subject to bail conditions and to the possibility of arrest and bail revocation for breach of bail condition.

Figure 4.7: Bail status of people having finalised court appearances in NSW Local Courts



Source: NSW Bureau of Crime Statistics and Research (kg11-10034).

The special situation of young people

4.25 In many ways the situation of young people mirrors that of adults, but some features are exaggerated. Key concerns are

- the increased numbers and rates of young people in detention,
- a high proportion of short term remands,
- the impact of bail conditions and breaches, and
- the over-representation of Indigenous young people.

4.26 In relation to young people, there is also some concern about the restriction on repeat bail applications made in s 22A of the *Bail Act*. This topic is examined in Chapter 19.

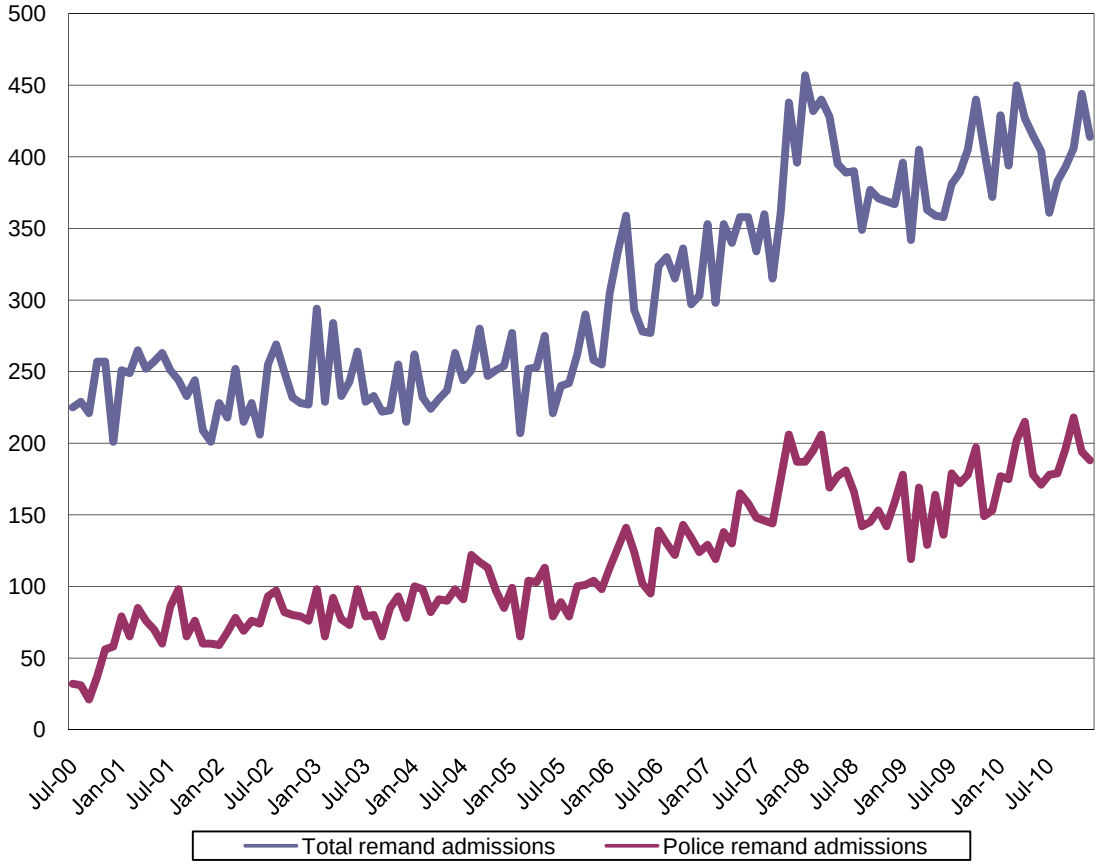
Increased numbers and rates of young people in remand

4.27 As Figure 4.8 indicates, the number of young people on remand in NSW has gradually increased between 2004 and 2010**,** including an increase of 25% between

2006-7 and 2009-10.[19] Also, between 2006-7 and 2009-10, the number of young people in unsentenced detention in Australia increased by 17%.[20]

4.28 In 2009-10, the rate of detention of young people in New South Wales was 0.5 per 1000, and half of these young people were unsentenced.[21] Victoria has the lowest rate of detention of young people, at 0.2 per 1000,[22] and only 29% of these young people were unsentenced.[23]

Figure 4.8: Number of young people remanded



Source: L Snowball, Police Bail and Risk of Re-offending, Issue Paper No 57 (NSW Bureau of Crime Statistics and Research, 2011) 1.

4.29 At any one time, about half of the Juvenile Justice Centre population is on remand in NSW.

19. Australian Institute of Health and Welfare, *Juvenile Justice in Australia 2009-2010*, Juvenile Justice Series No 8 (2011) 143.
20. Australian Institute of Health and Welfare, *Juvenile Justice in Australia 2009-2010*, Juvenile Justice Series No 8 (2011) 143.
21. Australian Institute of Health and Welfare, *Juvenile Justice in Australia 2009-2010*, Juvenile Justice Series No 8 (2011) 109.
22. Australian Institute of Health and Welfare, *Juvenile Justice in Australia 2009-2010*, Juvenile Justice Series No 8 (2011) 115.
23. Australian Institute of Health and Welfare, *Juvenile Justice in Australia 2009-2010*, Juvenile Justice Series No 8 (2011) 138.

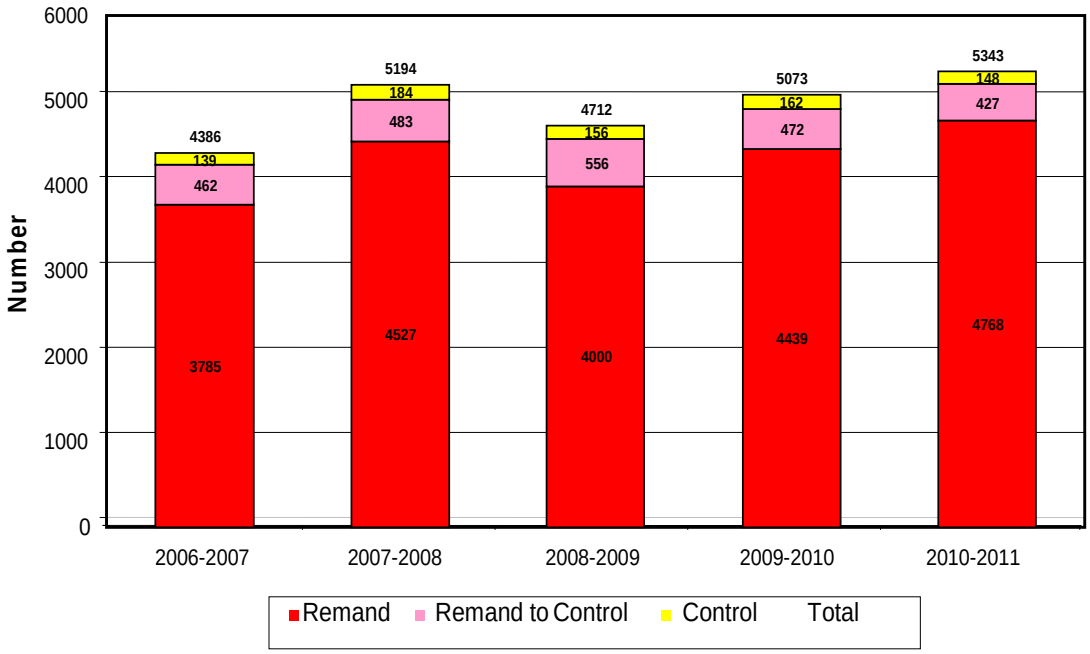
Table 4.5: Key Service Measures for 2010-11 – Custody

Average daily number of young people in custody	391
Average daily number of young women in custody	30
Average daily number of young people of Aboriginal and/or Torres Strait Islander background	184
Average daily number of young people serving custodial sentences	198
Average daily number of young people remanded in custody awaiting the finalisation of court proceedings	193

Source: DAGJ/JJ Strategic Information System (SIS). Effective date 16 July 2010.

4.30 Figure 4.9 shows that remand admissions comprise the overwhelming majority of all admissions into Juvenile Justice Centres, and most do not result in control orders

Figure 4.9: Admissions to Juvenile Justice Centres



Source: DAG/JJ Strategic Information System (SIS). Effective date 16 July 2011.

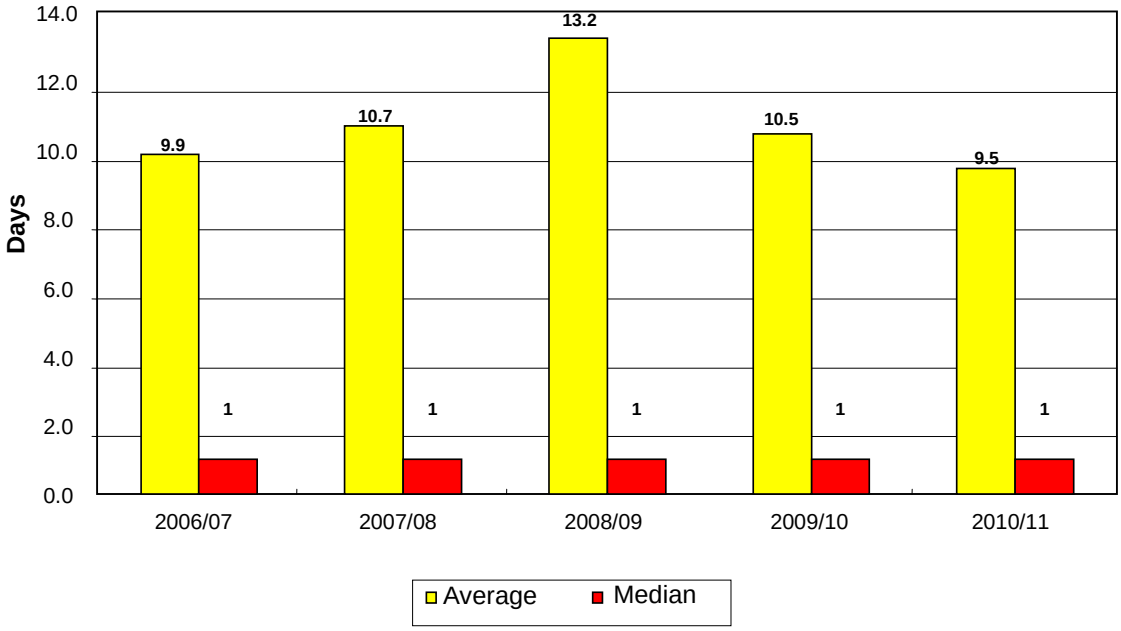
[Remand to Control are admissions on remand which become control orders during a continuous period of custody.]

Short stays

4.31 The length of stay for young people is typically short. Juvenile Justice statistics (Figure 4.10) show a fairly short average remand, and a very short (1 day) median remand length. This suggests that a large number of young people are admitted to detention centres and almost immediately released. This 'churn' through detention centres, while involving only one night of accommodation costs, has significant transport and admission costs. The low average remand length suggests that, at least in some cases, the young person may be on remand awaiting fulfilment of

conditions. In advice provided to the 2008 Special Commission of Inquiry into Child Protection Services in NSW, the Department of Juvenile Justice stated that during a three month review in 2006/07, "90 per cent of [remand cases] did not meet bail conditions at the first instance".[24]

Figure 4.10: Length of stay for young people in custody on remand



Source: DAG/JJ Strategic Information System (SIS). Effective date 16 July 2011.

Young people and the risk of reoffending

4.32 Concerns about the steady increase in the number of young people refused bail by police led BOCSAR to examine whether police were refusing bail to low risk young people and/or granting bail to high risk young people. The authors of this study used BOCSAR's Reoffending Database to develop a model that predicts a young person's likelihood of reoffending based on age, gender, Indigenous status, current offences charged, prior offences and prior control orders. The study found that:

> [w]hen it comes to judging risk of re-offending, police do not appear to adopt an overly restrictive approach. Few of those they refuse bail to are at low risk of re-offending. Indeed, some of those they grant bail to are at fairly high risk of re-offending.[25]

24. J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008) vol 2, 558.
25. L Snowball, *Police bail and risk of re-offending*, Bureau Brief Issue Paper No 57 (NSW Bureau of Crime Statistics and Research, 2011) 3.

Bail conditions

Breach of bail conditions

4.33 Revocation of bail for breach of conditions is contributing significantly to the rise in remand rates in relation to young people. This topic is covered in detail in Chapter 12. Briefly, the number of young people remanded for breach of bail conditions only has increased from 193 in 2000-01 to 1142 in 2010-2011.[26] The average length of stay for a young person who is bail refused for breach of bail conditions is 14 hours 46 minutes.[27]

Inability to comply with bail conditions

4.34 Young people may also be held in custody because they cannot meet the imposed conditions. Juvenile Justice NSW reported that the number of young people held in custody who were granted bail, but could not meet the conditions, increased by 80% between 2004-05 and 2008-09.[28] The average number of days young people remained in custody in 2008-09 after being granted conditional bail but were unable to meet conditions was 9 days.[29]

Indigenous defendants

High remand rates

4.35 The over-representation of Aboriginal people and Torres Strait Islanders in the criminal justice system is extreme and increasing. In New South Wales in 2011, Aboriginal people and Torres Strait Islanders were held on remand at a rate of 583 per 100,000 population, compared with the overall NSW rate of 49 per 100,000.[30] Between 2001 and 2008, the number of Indigenous adults on remand rose 72%.[31] Table 4.6 shows that the proportion of the remand population that is Indigenous has more than doubled over the last 17 years.

26. Data supplied by Juvenile Justice NSW from DAG/RPE Live.
27. Data supplied by Juvenile Justice NSW.
28. Juvenile Justice NSW, NSW Department of Human Services, *Annual Report 2008-2009*, 54.
29. Juvenile Justice NSW, NSW Department of Human Services, *Annual Report 2008-2009*, 54.
30. *Corrective Services, Australia 4512.0* (Australian Bureau of Statistics, December 2011) table 9 and 16. The disparity between Indigenous and non-Indigenous remand rates is even greater as the overall remand rate includes Indigenous people.
31. J Fitzgerald, *Why are Indigenous Imprisonment Rates Rising?* Bureau Brief No 41 (NSW Bureau of Crime Statistics and Research, 2009).

Table 4.6: NSW remand inmate population by Indigenous status

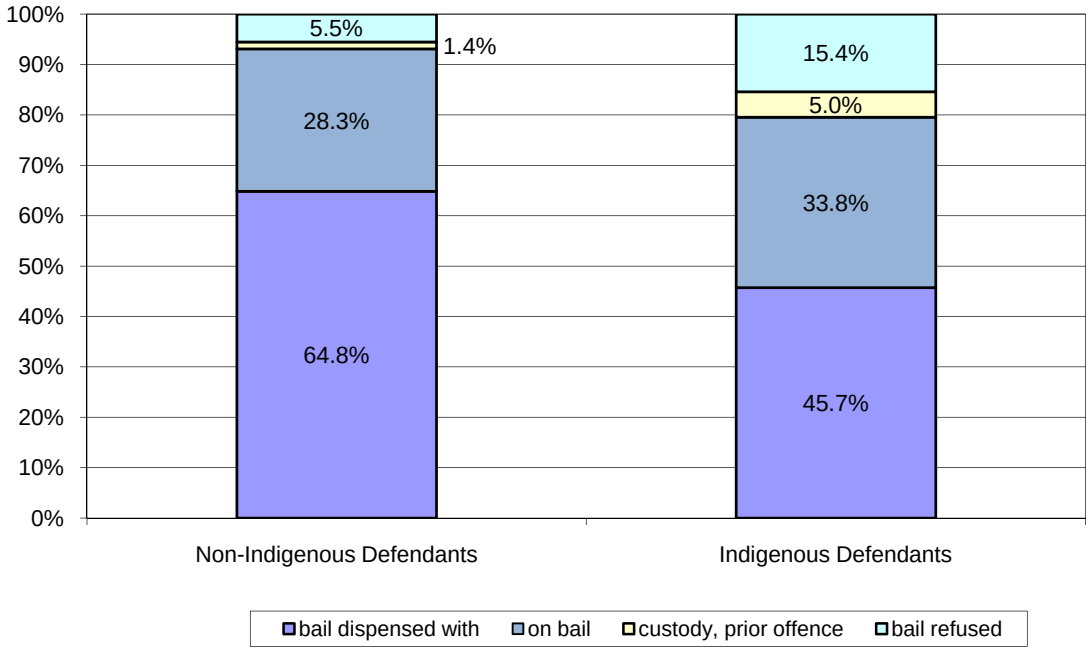
Census year	Indigenous	Non-Indigenous	Unknown	Total	Percentage
1994	92	647	2	741	*11.5%*
1995	89	624	6	719	*11.3%*
1996	121	672	11	804	*12.8%*
1997	134	813	44	991	*15.5%*
1998	174	865	16	1055	*16.3%*
1999	198	1111	12	1321	*18.1%*
2000	203	1261	15	1479	*20.1%*
2001	265	1342	33	1640	*21.0%*
2002	288	1307	48	1643	*20.9%*
2003	348	1405	84	1837	*22.7%*
2004	325	1467	82	1874	*21.8%*
2005	380	1438	183	2001	*22.2%*
2006	430	1558	154	2142	*23.5%*
2007	460	1694	160	2314	*24.2%*
2008	460	1827	186	2473	*25.1%*
2009	534	1822	256	2612	*25.2%*
2010	504	1856	154	2514	*24.4%*
2011[1]	570	2051	3	2624	*26.4%*

Source: Corrective Services NSW.

Bail refusal

4.36 Bail refusal rates are higher for Indigenous people. As Figure 4.11 shows, in the New South Wales Local Courts in 2010, 15.4% of Indigenous people were bail refused on finalisation of their matter, nearly three times higher than the proportion of non-Indigenous people (5.5%).

Figure 4.11: Bail status at finalisation, Local Court, 2010



Source: NSW Bureau of Crime Statistics and Research (jh11-9943).

4.37 As noted in Chapter 3, the *Bail Amendment (Repeat Offenders) Act 2002* (NSW) had a disproportionate effect on remand rates for Indigenous defendants. Before the 2002 amendment, 17% of Indigenous adults were in custody at finalisation. After the amendment, nearly 20% were in custody. This compared with 6.5% of non-Indigenous adults before the amendment, and 6.9% afterwards.[32] BOCSAR suggested that "this may be due to the high proportion of Indigenous defendants who have a prior conviction".[33]

4.38 A 2009 BOCSAR study investigated the reasons for the increase in Indigenous adults on remand between 2001 and 2008. It found that the number of Indigenous people brought before court decreased during that period, but a higher proportion were refused bail, and the average time spent on remand increased.[34] This indicates that detected offending did not increase, but release on bail became more difficult to obtain.

4.39 We do not suggest that Indigenous people are being refused bail more often because of their Indigenous status. A recent study by Weatherburn and Snowball found that, "there is little evidence of racial bias in the granting and refusal of bail by the New South Wales Local Court".[35] The study found that Indigenous defendants

32. J Fitzgerald and D Weatherburn, *The Impact of the Bail Amendment (Repeat Offenders) Act 2002*, Crime and Justice Bulletin No 83 (NSW Bureau of Crime Statistics and Research, 2004) 4, 5.

33. J Fitzgerald and D Weatherburn, *The Impact of the Bail Amendment (Repeat Offenders) Act 2002*, Crime and Justice Bulletin No 83 (NSW Bureau of Crime Statistics and Research, 2004) 1, 7.

34. J Fitzgerald, *Why are Indigenous Imprisonment Rates Rising?* Bureau Brief No 41 (NSW Bureau of Crime Statistics and Research, 2009) 3, 4.

35. D Weatherburn and L Snowball, "The effect of Indigenous status on the risk of bail refusal" (2012) 36 *Criminal Law Journal* 50, 57.

are more than twice as likely to have previously breached a bail conduct requirement and that they also have much longer criminal records. These factors, they concluded, "account for the higher risk of bail refusal among Indigenous defendants".[36]

Time on remand

4.40 The length of time Indigenous people spend on remand has also increased. In NSW in 2001, Indigenous remandees spent, on average, 3.3 months in prison. In 2008, the average time had increased to 4.2 months.[37]

Young people

4.41 Indigenous young people are heavily over-represented on remand, with 38.5% of those admitted to Juvenile Justice remand in 2010/11 being Aboriginal and Torres Strait Islander young people.[38]

4.42 Relying on unpublished data from BOCSAR, Bargen noted that in 2006-07 almost one quarter of all Aboriginal children appearing in court in NSW were there for "breach of bail conditions".[39]

A disproportionate impact

4.43 The Director of BOCSAR, Dr Don Weatherburn, gave evidence to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs on the disproportionate numbers of Indigenous people involved in the criminal justice system, during which he said:

> Whenever the justice system gets tougher, as it has in New South Wales and other states, it always has a bigger impact on Aboriginal people than it does on non-Aboriginal people.[40]

Conclusion

4.44 The data presented in this Chapter demonstrates that the number of people in unsentenced detention has increased rapidly in the last 20 years, and is significantly higher than in comparable Australian jurisdictions. In particular, the rates of unsentenced detention for Indigenous people and young people are of concern.

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36. D Weatherburn and L Snowball, "The effect of Indigenous status on the risk of bail refusal" (2012) 36 *Criminal Law Journal* 50, 56.
37. J Fitzgerald, *Why are Indigenous Imprisonment Rates Rising?* Bureau Brief No 41 (NSW Bureau of Crime Statistics and Research, 2009) 4.
38. Juvenile Justice NSW, NSW Department of Human Services, *Annual Report 2010-2011*, 151.
39. J Bargen, "Juvenile justice: responding to Australia's children and young people in trouble with the law" (2008) 92 *Reform* 28, 31.
40. Parliament of Australia, House of Representatives Standing Committee of Aboriginal and Torres Strait Islander Affairs, *Official Committee Hansard*, House of Representatives, 4 March 2010.

4.45 Chapter 3 outlined the changes to the *Bail Act* that have had a significant impact on the remand rates. BOCSAR has shown that the *Bail Amendment (Repeat Offenders) Act 2002* (NSW), in particular, had a significant impact on rates of bail refusal and remand rates.[41] BOCSAR has also shown that bail presumptions exert a significant influence on bail refusal.[42] The evidence is clear that policy shifts have contributed to a significant increase in the remand population.

4.46 As outlined in Chapter 3, this increase in remand rates appears to have resulted in a reduction in failure to appear. Such evidence as there is does not suggest an effect in reducing crime.[43]

41. J Fitzgerald and D Weatherburn, *The Impact of the Bail Amendment (Repeat Offenders) Act 2002*, Crime and Justice Bulletin No 83 (NSW Bureau of Crime Statistics and Research, 2004).

42. L Snowball, L Roth and D Weatherburn, *Bail Presumptions and Risk of Bail Refusal: An Analysis of the NSW Bail Act*, Issue Paper No 49 (NSW Bureau of Crime Statistics and Research, 2010).

43. See para 3.75-3.76.

5. Consequences of remand

Introduction **65**
The hardship of imprisonment **66**
Physical and psychological hardship 66
Assaults and deaths in custody 66
Financial implications for the person and the person's family 66
Effect on others generally 67
Special effect on children 67
Effect on community 68
The criminogenic effect of imprisonment 69
Remandees not found guilty or who do not receive a custodial sentence **70**
Remanded and found not guilty 71
Remanded and no custodial sentence 71
Most young people do not receive a control order 72
Effects of imprisonment which are particular to remandees **73**
No opportunity to prepare for prison 73
Higher rate of assaults 73
Effects on a fair trial 73
Effects on guilty pleas, conviction and sentences 74
The criminogenic effect of mixing with sentenced prisoners and high risk remandees 75
Unavailability of rehabilitation programs 75
Financial cost to the community **76**
Justice reinvestment 76
Conclusion **77**

Introduction

5.1 Bail law is part of the criminal justice system. Its function is to set the framework for decisions concerning the release or detention of defendants while proceedings are pending. As discussed in Chapter 2, the value of liberty in a free society gives rise to a set of principles embedded in our criminal justice system, including the presumption of innocence and the principle of no punishment without conviction for a criminal offence by due process of law. These principles are not absolute. In bail law, they yield to public interests such as the preservation of the integrity of the criminal justice system, the protection of the community and the protection of individuals whose safety is threatened. But, because of the pre-eminent value of liberty, they should yield only so far as is reasonably necessary after "the most anxious consideration".[1] The limits of reasonable necessity and the consequent boundaries of bail law are a matter for policy judgment. That is the subject of this report.

5.2 We recognise in this connection that, although detention while proceedings are pending is not intended as punishment, it is imprisonment nonetheless. Having been charged with a criminal offence but without the proceedings being finalised by

1. See para 2.37.

due process, the person is denied liberty, removed from an ordinary life in society and subjected to the hardships of prison life.

5.3 We will consider two aspects of the issue. First, we will consider the hardship of imprisonment generally. Our main concern is with those who are detained pre-trial but are either not convicted of any crime, or who are not sentenced to imprisonment. For these defendants, the hardship of pre-trial detention is particularly heavy.

5.4 The hardship of pre-trial imprisonment is of less concern in relation to those defendants who are subsequently sentenced to imprisonment. Their pre-trial imprisonment will be taken into account on sentence. However, a significant proportion of persons detained while the proceedings are pending are not convicted or do not receive a custodial sentence. (We will review the incidence of such cases in some detail.)

5.5 Furthermore, at the time the decision regarding pre-trial detention is made, whether the defendant will be found guilty or subject to a custodial penalty is unknown. That is of importance in striking a balance between the value of liberty and reasonable necessity when it comes to framing bail law.

5.6 Secondly, we will consider the additional impacts of imprisonment that are particular to remandees, such as a lack of the opportunity to prepare for imprisonment afforded to a person released while the proceedings are pending, and difficulty in preparing for and participating in a trial.

The hardship of imprisonment

Physical and psychological hardship

5.7 To state the obvious, prison life is harsh, physically and psychologically. It is also a deprivation of ordinary life in society in all its aspects concerning family, employment, leisure and the enjoyment of life. Less obvious implications are mentioned below.

Assaults and deaths in custody

5.8 In NSW, in 2010-11 prisoner on prisoner assaults occur at a rate of 13 per 100 prisoners.[2] In 2010-11 there were 16 deaths in custody nationally from apparent unnatural causes, 10 of which occurred in NSW.[3]

Financial implications for the person and the person's family

5.9 Employment may be lost as a consequence of imprisonment, and not regained on release. The person acquires the stigma of having been to prison which may

2. Australia, *Report on Government Services* (Productivity Commission, 2012) ch 8 table 8A.14.
3. Australia, *Report on Government Services* (Productivity Commission, 2012) ch 8 table 8.1, 8.16.

compromise re-employment. Cessation of income may mean foreclosure on a mortgage or the loss of a tenancy with implications not only for the person but for the person's family including children. In the worst cases, the family may become destitute and homeless. Goods under finance, such as a car or household furniture, may be repossessed.

Effect on others generally

5.10 In *Edwards*, Chief Justice Gleeson spoke of the effect of a custodial sentence on family and others. The passage has equal application to detention pending proceedings:

> [S]entencing judges and magistrates are routinely obliged, in the course of their duties, to sentence offenders who may be bread-winners of families, carers, paid or unpaid, of the disabled, parents of children, protectors of persons who are weak or vulnerable, employers upon whom workers depend for their livelihood, and many others, in a variety of circumstances bound to result in hardship to third parties if such an offender is sentenced to a term of full-time imprisonment.[4]

5.11 In order to maintain face-to-face contact, family and friends are required to find the time, juggle childcare and other responsibilities and travel often long distances to meet restricted visiting times under stressful visiting conditions.[5] Family and friends also assist in securing and liaising with legal representatives, supply clothing and pay money into prison accounts to buy food, cigarettes and toiletries. A range of other responsibilities such as contacting employers, social security, medical and welfare authorities, service providers, creditors and others, falls on family and friends.

Special effect on children

5.12 The 2009 NSW Inmate Health Survey revealed that 49% of female inmates and 43% of male inmates were the parent of at least one child under the age of 16, including foster children and step-children. Not all of these children were dependent on the prisoner. Thirty percent of female inmates reported having a child under 16 dependent on them immediately before being incarcerated, as did 26% of male inmates.[6]

5.13 If the accused person is a parent then the burden of childcare falls upon the partner, mainly women. Where the accused person in custody is a single mother or woman

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4. *Edwards v The Queen* (1996) 90 A Crim R 510, 515 (James and Ireland JJ concurring).
5. F Begg, *Serving Time on the Outside: A Survey of Visitors to Correctional Centres in the Wacol Region, Queensland* (Australian Community Safety and Research Organisation, 2002); J McHutchison, *Visiting the inside: A survey of visitors to NSW Correctional Centres*, Research Publication No 43 (NSW Department of Corrective Services, 2000).
6. D Indig and others, *2009 Inmate Health Survey: Key Findings Report* (NSW Justice Health, 2010) 38.

with an unsupportive, incapable or working partner, children are often transferred to relatives, parents or grandparents, or in some cases taken into state care.[7]

5.14 Dennison, Foley and Stewart (2005) reviewed the literature regarding the impact of parental incarceration on children, and found that reactions include bedwetting, anxiety, violence, distrust of legal authorities and abuse from peers. The trauma of separation can damage parent-child bonds and contribute to maladaptive behaviour patterns.[8] Children of prisoners are more likely to offend themselves, but these children have usually been exposed to multiple risk factors.[9]

5.15 While these effects are obviously more potent in the case of a lengthy prison sentence, they are nonetheless relevant in relation to pre-trial custody awaiting trial, which can lengthy.

Effect on community

5.16 The incarceration of accused people has the potential to affect the wider community, particularly if that community is affected by high imprisonment rates and other forms of dysfunction and disadvantage. Leading US researchers Rose and Clear found that there may be a 'tipping point' in certain communities so that crime increases once incarceration reaches a certain level. It has been said that high rates of imprisonment break down the social and family bonds that guide individuals away from crime, remove adults who would otherwise nurture children, deprive communities of income, reduce future income potential, and engender a deep resentment toward the legal system. As a result, as communities become less capable of maintaining social order through family or social groups, crime rates go up.[10]

5.17 Given that Indigenous Australians comprise 25% of the Australian prison population, some commentators argue that in certain Aboriginal communities "we may have already reached that 'tipping point' where excessive imprisonment rates are actually causing crime".[11] In these circumstances, imprisonment becomes normalised and loses any potential deterrent effect. This is a further reason for caution in setting a framework for bail decisions which may result in imprisonment while proceedings are pending.

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7. On the link between the welfare and juvenile justice systems with particular reference to young women see K McFarlane, "From Care to Custody: Young Women in Out-of-Home Care in the Criminal Justice System" (2010) 22(2) *Current Issues in Criminal Justice* 345; K Carrington, *Offending Girls: Sex Youth and Justice* (Allen and Unwin, 1993); K Carrington, *Offending Youth: Sex Crime and Justice* (Federation Press, 2009).
8. S Dennison and others, *Understanding Experiences and Needs of Families of Prisoners* (Griffith University, 2005) 10-13.
9. S Dennison and others, *Understanding Experiences and Needs of Families of Prisoners* (Griffith University, 2005) 13-14.
10. D Stemen, *Reconsidering Incarceration: New Directions for Reducing Crime* (Vera Institute of Justice, 2007) 6 referring to D Rose and T R Clear, "Incarceration, Social Capital and Crime: Implications for Social Disorganization Theory" (1998) 36 *Criminology* 441, 457.
11. D Brown, "The Limited Benefit of Prison in Controlling Crime" (2010) 22(1) *Current Issues in Criminal Justice* 137, 141.

The criminogenic effect of imprisonment

5.18 Where a person has been charged with a criminal offence, particularly a serious offence, the common response can be that the person should be kept in custody until they have been dealt with by the courts. In this Report, we recognise that there may be reasons in the particular case justifying such detention. However, it should also be recognised that imprisonment will not necessarily prevent more crime than it causes. The capacity of imprisonment to cause crime is known as its *criminogenic* effect.

5.19 Researchers and corrections authorities recognise that imprisonment may increase the likelihood of subsequent offending. The potentially criminogenic effects of incarceration fall into three categories:

- *the effects of incarceration itself*, including "prisons as 'schools of crime' effects; the fracturing of family and community ties; hardening and brutalisation; and the deleterious effects of imprisonment on mental health";
- *post-incarceration crime-producing effects*, including "labelling; deskilling; reliance on criminal networks built up in prison; reduced employment opportunities; and reduced access to benefits and social programs";
- *third-party effects*, including "crime-producing effects on the families of offenders and their communities".[12]

5.20 In response to a request from this Commission, Corrective Services NSW (CSNSW) provided a summary of research on the impact of incarceration on re-offending.[13] Three studies were cited which indicated the potential for incarceration to increase offending:

- A major meta-study compared 23 studies in the literature containing 27 comparisons between custodial and non-custodial sanctions. It found in 11 comparisons the re-offending rate was lower after non-custodial sanctions; in 14 comparisons there was no difference; and in two, custodial sanctions produced lower rates of re-offending.[14]
- A Canadian study involving large numbers of offenders (68,248) showed an increase of re-offending of 3% for those incarcerated over those in non-custodial settings. There was "some tendency" for offenders with a lower risk of reoffending to be "more negatively affected by the prison experience" in that

12. D Brown, "The Limited Benefit of Prison in Controlling Crime" (2010) 22(1) *Current Issues in Criminal Justice* 137, 141. See generally M H Pritikin, "Is Prison Increasing Crime?" (2008) 6 *Wisconsin Law Review* 1049; C Daoust, *The Paradox in Incarceration and Crime*, Directed Research (Justice Action, 2008); T V Kovandzic and L M Vieraitis, "The Criminogenic Effects of Imprisonment: Evidence from State Panel Data, 1974-2002" (2007) 6(3) *Criminology and Public Policy* 589.
13. Corrective Services NSW, Advice, Partnerships and Community Engagement, Offender Services and Programs, *Issue: Law Reform Commission Enquiry in Relation to Bail Legislation Review – Impact of Incarceration on Re-Offending* (Trim D2011/426586, 15 September 2011).
14. P Villettaz, M Killias, and I Zoder, *The Effects of Custodial vs. Non-custodial Sentences on Re-Offending: A Systematic Review of the State of Knowledge*, Campbell Systematic Reviews 13 (The Campbell Collaboration, 2006).

those who spent longer in custody had a higher rate of re-offending (4%) than those who spent less time in custody.[15]

- A NSW Bureau of Crime Statistics and Research study matched pairs of convicted burglars and offenders convicted of non-aggravated assault and compared those who received a prison sentence with those sentenced to a non-custodial sentence. It found that "offenders who received a custodial term were slightly more likely to re-offend than those who received a non-custodial penalty". The effect as measured was statistically significant for the non-aggravated assault offenders although not for the burglars.[16]

5.21 CSNSW, however, added an important caveat to the consideration of the studies reviewed:

> none of the research exploring incarceration and future re-offending has been conducted on remand populations. Therefore, in order to consider the impact incarceration may have, it is valuable to consider the characteristics of both remand and remandees, and the exact mechanisms by which incarceration may impact upon rates of re-offending.[17]

5.22 CSNSW drew the following conclusion from the research it reviewed:

> Attempts to reduce rates of remand should target those who pose a lower risk of further offending since the community can anticipate the least harm from these individuals while at liberty.[18]

Remandees not found guilty or who do not receive a custodial sentence

5.23 A significant proportion of adults who are remanded in custody at some stage of the proceedings have all charges dismissed or, having been convicted, do not receive a custodial sentence. A large majority of young people who are remanded in custody at some stage in the proceedings are not convicted or, having been convicted, do not receive a control order.[19] This situation has implications for the individuals concerned and for the state in terms of cost.

15. P Gendreau and C Goggin, *The Effects of Prison Sentences on Recidivism*, User Report 3 (Solicitor General, Canada, 1999).
16. Corrective Services NSW, Advice, Partnerships and Community Engagement, Offender Services and Programs, *Issue: Law Reform Commission Enquiry in Relation to Bail Legislation Review – Impact of Incarceration on Re-Offending* (Trim D2011/426586, 15 September 2011) citing D Weatherburn, *The Effect of Prison on Adult Re-Offending,* Crime and Justice Bulletin No 143 (NSW Bureau of Crime Statistics and Research, 2010).
17. Corrective Services NSW, Advice, Partnerships and Community Engagement, Offender Services and Programs, *Issue: Law Reform Commission Enquiry in Relation to Bail Legislation Review – Impact of Incarceration on Re-Offending* (Trim D2011/426586, 15 September 2011) 4.
18. Corrective Services NSW, Advice, Partnerships and Community Engagement, Offender Services and Programs, *Issue: Law Reform Commission Enquiry in Relation to Bail Legislation Review – Impact of Incarceration on Re-Offending* (Trim D2011/426586, 15 September 2011) 6.
19. A control order is equivalent to a custodial sentence for adults.

Remanded and found not guilty

5.24 In 2010, 8.2% of those on remand when Local Court proceedings were finalised had all charges dismissed or "otherwise disposed of",[20] 8.7% in Children's Court proceedings, and 8.1% in higher courts proceedings (Tables F.3, F.4, F.5 in Appendix F). In that year, more than 500 adults and almost 100 young people, who were on remand when the proceedings were finalised, were not found to be guilty of any offence.

5.25 These figures underestimate the problem. They do not include people remanded in custody at an earlier stage in the proceedings and granted bail before the proceedings are finalised. That would include cases where conditions of release on bail (for example, financial security) have not been satisfied promptly, cases where bail was refused by police and granted by the Local Court or the Children's Court, cases where bail was refused by the Local Court or the Children's Court and granted by a higher court, and cases where a person has been held in custody temporarily following arrest for failure to comply with a conduct requirement. No statistics are available showing the number of such cases in which there is subsequently no finding of guilt. But given the high number of short term remands,[21] the incidence would be considerable.

5.26 It is a matter of concern that many people who are not found guilty of any offence are imprisoned for even a short period of time, let alone until the proceedings are finalised. While this is undoubtedly an inevitable feature of even the most fair and reasonable system of pre-trial detention, in individual cases it is hard to see it as anything other than unjust. While the criminal justice system must recognise situations where pre-trial detention is justified, it is also important to minimise the incidence of detention of people who are ultimately not found to be guilty.

Remanded and no custodial sentence

5.27 Another area of concern exists in relation to those who are in custody on remand for a time before the proceedings are finalised and who do not receive a custodial sentence.

5.28 In 2010, 34% of those found guilty in the Local Court and on remand when the proceedings were finalised did not receive a custodial sentence, 26% in the Children's Court and 2% in the higher courts (Tables F.6, F.7 and F.8 in Appendix F). In that year, more than 2000 adults and almost 200 young people who were found guilty and were on remand when the proceedings were finalised did not receive a custodial sentence or order.

5.29 In one respect, these figures are likely to understate the effect. As in the case of those who are on remand and who are not found guilty of an offence, these figures take no account of cases where bail was initially refused by police or a court and subsequently granted before the proceedings were finalised. Again, the number of additional cases would be substantial.

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20. This is primarily where the prosecution decides not to proceed.

21. See para 4.13-4.18.

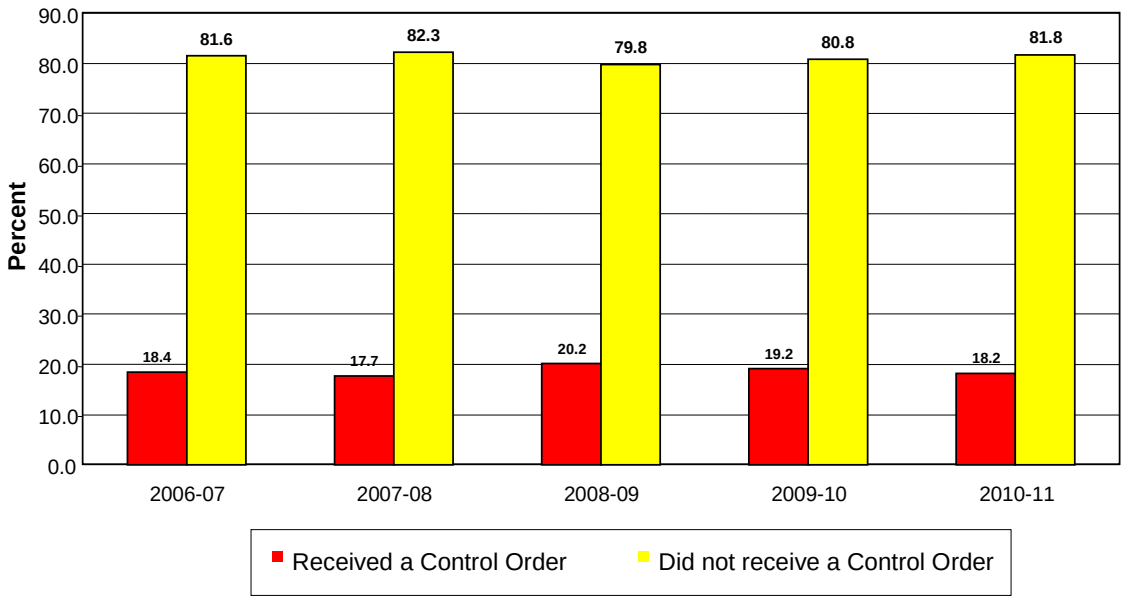
5.30 In another respect, the statistics overstate the situation. That is because there may be cases where the court believes a short custodial sentence is appropriate but does not impose such a sentence because of the time spent in custody on remand. In such a case, the court might consider imposing a bond instead. Such cases would then be included in the statistics for no custodial sentence, notwithstanding that the court was of the opinion that a custodial sentence was warranted and had, in effect, been served. However, this is not likely to be a substantial compounding factor because good sentencing practice is to the contrary. What should be done in such a case is to backdate an appropriate custodial sentence to take into account the time in custody on remand. It is reasonable to assume that this happens in most cases.

5.31 These cases of time in custody on remand which are found not to warrant a custodial sentence, when the court considers all the circumstances, are again a matter of concern and, from the individual's perspective, an occasion of injustice. Again, we conclude that, while the criminal justice system must recognise situations where pre-trial detention is justified, it is also important to minimise the detention of people whose offending is ultimately found not to warrant imprisonment as a sanction.

Most young people do not receive a control order

5.32 Statistics from a different source confirm the extent of the problem in relation to young people. These statistics are for young people who have been on remand at any stage in the proceedings as distinct from being on remand when the proceedings are finalised. They show that approximately 80% of them do not receive a control order. That has consistently been the situation for the last five years. This is shown in Figure 5.1.

Figure 5.1: Young people who are remanded and receive a control order



Source: DAG/JJ Strategic Information System (SIS). Effective date 16 July 2011.

5.33 Again, there is the possibility that a control order has not been imposed in some of these cases because of the time spent in custody while the proceedings were pending. However, for the reasons given above regarding good sentencing practice and given the extent of the disparity, that is not likely to be a substantial qualifying factor.

5.34 Such a large figure for young people who spend time in custody on remand and do not receive a control order is a matter of concern. It highlights the need to consider closely and carefully the situation of young people.

Effects of imprisonment which are particular to remandees

5.35 In this section we consider those effects of imprisonment that are particular to remandees.

No opportunity to prepare for prison

5.36 Typically, when a person is refused bail, the period of detention commences immediately on arrest by police and continues uninterrupted until the proceedings are finalised unless a court grants bail in the meantime. The abrupt commencement of imprisonment means that the defendant is unable to make arrangements regarding family responsibilities, employment, accommodation, storing property or financial arrangements. The *Taking Justice into Custody* report referred to the disadvantage of an unprepared admission to prison in terms of having "little or no opportunity to close the business, 'tie up loose ends' or complete projects".[22]

Higher rate of assaults

5.37 The CSNSW submission stated that "owing to the nature of the operations, and the high rates of movement of inmates between facilities, many remand and reception centres experience higher rates of assault".[23] The CSNSW submission noted, for example, that the assault rate in 2009-10 at the Metropolitan Reception and Remand Centre (MRRC) was 18.7% compared with 8.2% at Lithgow Correctional Centre which is a maximum security prison for sentenced prisoners.[24]

Effects on a fair trial

5.38 The disadvantages of being in detention pending trial have long been recognised. Judge Cross mentioned them in *Wakefield* in 1969. He said:

22. A Grunseit, S Forell and E McCarron, *Taking Justice into Custody: The Legal Needs of Prisoners* (Law and Justice Foundation of NSW, 2008) 66.
23. Corrective Services NSW, *Response to NSWLRC Questions for discussion*, 15.
24. Corrective Services NSW, *Response to NSWLRC Questions for discussion*, 15.

> Prima facie it is desirable that the preparation of the defence be allowed to take place in circumstances of approximate parity with those in which the prosecution is prepared.[25]

5.39 The 2008 *Taking Justice into Custody* report identified several respects in which a person on remand may be at a disadvantage in preparation for trial compared with a person on bail. It mentioned difficulties in obtaining legal representation, difficulties in communicating with legal representatives, and communication being compromised by the person's emotional state.[26] The extent of such difficulties should not be over-stated but it cannot be doubted that the flexibility and effectiveness of communication with legal representatives is compromised to some extent by the person being in custody.

5.40 Defendants who are on remand rather than on bail are also at a disadvantage during a trial. The *Taking Justice into Custody* report noted that tiredness was frequently reported among prisoners who had been woken at 4.30am, strip-searched, and put on a truck which frequently travelled to a number of court houses, before being placed in court cells, prior to being brought into court.[27]

5.41 Members of this Commission have noted the problem of fatigue from their own observations in court.

Effects on guilty pleas, conviction and sentences

5.42 Defendants who are in custody on remand plead guilty at a greater rate than those who are on bail. In the Local Court, 52.9% of those on remand plead guilty, compared with 49.2% of those on bail (Table F.3). In the Children's Court, 49.8% of those on remand plead guilty, compared with 44.4% of those on bail (Table F.4). In the higher courts: 83.1% plead guilty, compared with 67.5% of those who are on bail (Table F.5).

5.43 It is possible that this disparity is because bail is more likely to be refused when the case against the person is strong. It may also be, however, that the disparity is at least partly due to people having been refused bail. It is reasonable to assume that there are cases, particularly cases where a short sentence is likely, where a person on remand might plead guilty in the hope of bringing an end to the detention earlier than might otherwise be the case.

5.44 The *Taking Justice into Custody Report* cited instances of "inmates who pleaded guilty to avoid having to travel back and forth to court for a trial", given the early start and unpleasant travelling and holding conditions.[28]

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25. *R v Wakefield* (1969) 89 WN (Pt 1) (NSW) 325, 326.
26. A Grunseit, S Forell and E McCarron, *Taking Justice into custody: The Legal Needs of Prisoners*, (Law and Justice Foundation of NSW, 2008) xvii-xix.
27. A Grunseit, S Forell and E McCarron, *Taking Justice into custody: The Legal Needs of Prisoners*, (Law and Justice Foundation of NSW, 2008) 187.
28. A Grunseit, S Forell and E McCarron, *Taking Justice into custody: The Legal Needs of Prisoners*, (Law and Justice Foundation of NSW, 2008) 188.

The criminogenic effect of mixing with sentenced prisoners and high risk remandees

5.45 CSNSW has advised that "an important rule of correctional practice" is that "lower risk offenders should not be mixed with higher risk offenders".[29] This advice is based on research indicating that mixing offenders in this way can results in increased reoffending risks among the lower risk offenders.

5.46 CSNSW informed us that there are dedicated remand centres in Sydney for adult prisoners and dedicated remand wings of prisons in major regional centres; that CSNSW has a policy of keeping remand prisoners separate from sentenced prisoners in such facilities, but that this is not always practicable.[30]

5.47 Even where separation from the general prison population is achieved, CSNSW has advised that it is not possible to separate remandees with a high risk of re-offending from remandees with a low risk of re-offending as there is currently no attempt to complete assessments of the risk of re-offending for unsentenced inmates.[31] Accordingly, "those at lower risk of further offending are likely to associate with those at higher risk of offending".[32] It is, therefore, likely that imprisonment on remand, for at least some defendants, has a criminogenic effect, that is, "the incarceration experience may increase the risk of further offending".[33]

Unavailability of rehabilitation programs

5.48 As mentioned in Chapter 2, one of the ways in which the criminal justice system aims to prevent crime is by rehabilitating the offender, but "remanded inmates have limited access to the programs offered at correctional centres."[34]

5.49 This comes about because it is inappropriate to place unsentenced prisoners in offence-focused programs and because their custody period is uncertain. In the result, there is no access to anger management and sex offending programs which necessitate admission and acceptance of offending behaviour; and other programs requiring a set participation period are not available because of the uncertainty as to how long the person will be in prison.[35]

5.50 If the person is convicted and sentenced to a custodial offence, the sentence is backdated to take account of the time on remand. The person will then serve less time after sentence – and possibly no time, in the case of a short sentence – than

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29. Corrective Services NSW, Advice, Partnerships and Community Engagement, Offender Services and Programs, *Issue: Law Reform Commission Enquiry in Relation to Bail Legislation Review – Impact of Incarceration on Re-Offending* (Trim D2011/426586, 15 September 2011) 2.
30. Telephone interview with Assistant Commissioner Mr L Grant on 5 March 2012.
31. Corrective Services NSW, *Response to NSWLRC Questions for discussion*, 21.
32. Corrective Services NSW, Advice, Partnerships and Community Engagement, Offender Services and Programs, *Issue: Law Reform Commission Enquiry in Relation to Bail Legislation Review – Impact of Incarceration on Re-Offending* (Trim D2011/426586, 15 September 2011) 4-5.
33. Corrective Services NSW, Advice, Partnerships and Community Engagement, Offender Services and Programs, *Issue: Law Reform Commission Enquiry in Relation to Bail Legislation Review – Impact of Incarceration on Re-Offending* (Trim D2011/426586, 15 September 2011) 2.
34. Corrective Services NSW, *Response to NSWLRC Questions for discussion*, 10.
35. Telephone interview with Assistant Commissioner Mr L Grant on 5 March 2012.

would have been served if the person had been released pending the proceedings. The person may then miss out, either totally or in part, on an appropriate rehabilitation program where the program is not available to remandees.

Financial cost to the community

5.51 The cost of keeping a person in prison in NSW is, on average, $276 per day including net operating expenditure and capital cost.[36] A Juvenile Justice NSW submission cited a figure of $589 per day to keep a young person in detention.[37]

5.52 CSNSW advise that "remand inmates are some of the most resource intensive inmates in the correctional system…because, despite many being in custody for only a few days, remand inmates require screening, intense monitoring, escorts, and security around family and legal visits".[38]

5.53 The potential for savings arises in the following ways.

- Reducing the number of people who are remanded in custody and ultimately not found guilty of an offence, or who are ultimately not given a custodial sentence, or not given a custodial sentence as long as the time on remand. As we have observed, the number of adults in this category is likely to be significant. In the case of young people, the number is demonstrably large.
- Reducing the number of people who are remanded in custody and *are* both convicted and sentenced to imprisonment as a penalty for the offence. In such cases, time on remand counts towards sentence but is more costly, because of the issues mentioned in paragraph 5.52, than time served on sentence.
- Reducing the number of people remanded in custody for short periods, and thereby reducing the high cost of transporting and processing short stay remandees, of whom there are many. This is particularly so in relation to young people, where the typical duration of a remand admission is very short, and who must always be transported to a juvenile detention centre.

5.54 The smaller the number of people who are remanded in custody, the lower the expected cases in all the above categories. An overall reduction in the number of people on remand can be expected to result from the recommendations made in this Report, by better targeting detention to those who must be detained to prevent failure to appear, to protect the integrity of the justice system, and to protect the safety of the community and particular individuals.

Justice reinvestment

5.55 The CSNSW submission noted that "the daily cost of incarceration for many people on remand is not cost effective, and that this expenditure could be utilised in another way to reduce re-offending/recidivism".[39] This observation is consistent with

36. Australia, *Report on Government Services* (Productivity Commission, 2012) ch 8 table 8A.7.
37. Juvenile Justice NSW, *Submission BA35*, 16.
38. Corrective Services NSW, *Submission BA29,* 2.
39. Corrective Services NSW, *Submission BA29,* 2.

an approach known as "justice reinvestment". Justice reinvestment involves moving funds away from more expensive, often end-of-process, crime control options that have been shown to be less effective (for example incarceration) and supporting more effective programs that target the factors that cause offenders to commit crime.[40] The approach aims, at the least, to be cost neutral once the effects flow through, with less crime and consequently fewer custodial sentences generating the savings in prison costs to fund better ways of controlling crime.

5.56 A number of agencies and reports have called for the adoption of justice reinvestment policies in Australia, including the current and immediate past Aboriginal and Torres Strait Islander Social Justice Commissioners, beginning with the 2009 *Social Justice* Report;[41] the Legal and Constitutional Affairs Committee;[42] the Noetic Report (a review of the NSW Juvenile Justice system);[43] and most recently, the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs in its report on the over-incarceration of Indigenous young people, *Doing Time – Time for Doing*.[44] Support for a reduction in prison numbers is coming from non-traditional sources such as business leaders. A Pew report, *Right Sizing Prisons: Business leaders make the case for corrections reform*, refers to US business leaders across various states "adding their voices to calls for more cost-effective ways to protect public safety and hold offenders accountable".[45]

Conclusion

5.57 This chapter has reviewed some of the research evidence concerning the social, legal and financial consequences of being held in custody on remand. These consequences are often damaging to the individuals involved, to their families and to children in particular, and costly to the State. Some of these damaging consequences go to the nature and effects of incarceration in common to all prisoners, whether on remand or sentenced. Some of the consequences, such as those concerning preparation for trial and participation in the trial process itself, are particular to remand prisoners.

5.58 The potential for cost saving in this area appears to be significant. With the time available we have not undertaken cost benefit modelling. However, this may be a

40. T Lanning, I Loader and R Muir, *Redesigning Justice: Reducing Crime Through Justice Reinvestment* (2nd ed, Institute for Public Policy Research, 2011) 4.
41. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2009* (2010).
42. Parliament of Australia, Senate Legal and Constitutional Affairs References Committee, *Access to Justice* (2009) Recommendation 21.
43. Noetic Solutions, *A Strategic Review of the New South Wales Juvenile Justice System*, Report for the Minister for Juvenile Justice (2010).
44. Parliament of Australia, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time - Time For Doing: Indigenous Youth in the Criminal Justice System* (2011).
45. Pew Center on the States, *Right Sizing Prisons: Business Leaders Make the Case for Corrections Reform,* Public Safety Performance Project, Reform Issue Brief (2010) 1. See also: M Steketee, "Smith Takes Electoral Sting Out of Crime" *The Australian* (29 May 2010); D Stemen, *Reconsidering Incarceration: New Directions for Reducing Crime* (Vera Institute of Justice, 2007); A Travis and A Hirsch, "Kenneth Clarke Pledges to Cut Daily Prison Population" *Guardian (*20 October 2010).

valuable exercise to undertake and one we would support. Of significant concern is the potential for detention and its effects to be criminogenic – that is, a cause of further offending. There are clearly cases where detention while proceedings are pending is justified. But detention comes at a financial and social cost, to the individual and the community. Our recommendations recognise the consequences and cost of detention while preserving the function of bail law in protecting the integrity of the criminal justice process and promoting the safety of the community.

6. Language and structure

The language of the Act **79**
Plain English 79
The terms "bail" and "grant bail" 80
Submissions 82
Reasons for change 82
Conclusion concerning the language of the Act 83
Consequential amendments 83
The structure of the Act **84**
Structure generally 84
Reform to the nature and structure of bail 84
The bail undertaking *84*
Conditional bail and conduct requirements *84*
Proposed simplifications 85
Notice of listing 85
Conduct direction 86
Submissions 86
Discussion 87
Continuation of bail **88**

The language of the Act

Plain English

6.1 As a matter of principle the law and the processes of the law should be intelligible to the ordinary citizen. This principle has been recognised repeatedly in relation to bail legislation. In 1976, in the report which led to the enactment of the *Bail Act,* the Bail Review Committee said:

> The vocabulary of the nineteenth century is inappropriate to bail in 1976. All laws governing bail should be stated in precise but simple words which can readily be understood by the layman. No system of criminal justice can operate and be seen to operate fairly if the people whom it regulates cannot establish easily their rights and obligations under it.[1]

6.2 In its 2007 report reviewing the *Bail Act 1977* (Vic) the Victorian Law Reform Commission said:

> Bail has a profound impact on the tens of thousands of people who are arrested every year and the many victims of crime affected by their actions. Despite this, it appears little regard was given to the needs of the Act's audience when it was drafted…Legislation should be drafted so that people who are affected by it can understand it. This is especially so in the case of bail because the legislation includes many important legal rights and responsibilities.[2]

1. NSW, *Report of the Bail Review Committee*, Parl Paper No 46 (1976) 13.
2. Victorian Law Reform Commission, *Review of the Bail Act,* Final Report (2007) 24.

6.3 In its 2010 report *Review of Bail Act 1978*, the NSW Department of Justice and Attorney General, Criminal Law Review said:

> The current Act is complex and difficult to understand. Courts and legal practitioners are often confused by the application of the Act and accused people placed in a disadvantaged position by the complexity.
>
> The drafting and style of the Act have remained much the same as they were in 1978. The Act has not been comprehensively updated or modernised since it was enacted.[3]

6.4 The review said that the *Bail Act* should be redrafted in simpler language.[4]

The terms "bail" and "grant bail"

6.5 The major issue concerning the language of the current legislation is the use of the term "bail" and the expression to "grant bail". This was the language of the common law.[5]

6.6 In its 1976 report, the Bail Review Committee[6] recommended retention of the common law terminology, to "grant bail". In the result, s 6 of the *Bail Act*, as introduced and as it continues, provides that "[b]ail may be granted in accordance with this Act".[7] The term "to grant bail" is used throughout the Act.[8]

6.7 The Bail Review Committee gave thought to abandoning the term 'bail' but opted to retain it. The Committee gave its reasons for retaining the term:

> The term "bail" itself is technically inappropriate to describe the system of pre-trial release. Historically, "bail" applied only to release on financial recognizances, yet money bail is only one of a number of conditional and unconditional forms of release appropriate to the period before trial. Already courts in New South Wales commonly impose a variety of non-financial conditions such as requirements of reporting, or else allow defendants to go at large without any conditions at all. The Committee recommends later that much more emphasis should be placed on these non-financial forms of release.
>
> Despite this, the Committee does not propose that the word "bail" be replaced with a more general term such as "release". "Release" is itself objectionable in situations where people are not already in custody, as where they are appearing from bail or in answer to a summons. The more precise term "pre-trial release" is even more objectionable, implying as it does that the bail decision is only relevant before trial has begun. Moreover, most people understand "bail" as meaning all forms of pre-trial release, not merely financial ones. It seems more sensible therefore, to retain the widely accepted word, emphasizing in

3. NSW, Department of Justice and Attorney General, Criminal Law Review, *Review of Bail Act 1978 (NSW)* (2010) 29.
4. NSW, Department of Justice and Attorney General, Criminal Law Review, *Review of Bail Act 1978 (NSW)* (2010) 29.
5. See Ch 3.
6. NSW, *Report of the Bail Review Committee*, Parl Paper No 46 (1976).
7. *Bail Act 1978* (NSW) s 6.
8. See for example *Bail Act 1978* (NSW) s 8A-9D, 17, 23, 26-30B.

> legislation that "bail" is intended to cover all forms of release, with or without conditions and whether on financial or non-financial terms.[9]

6.8 It is questionable whether most people would understand "bail" as meaning "any form of pre-trial release, not merely financial ones".[10] Recourse to *The Shorter Oxford English Dictionary*[11] suggests otherwise. It defines the word "bail" as follows (omitting from the passage two obsolete usages).

> 3. Temporary delivery or release of a prisoner who provides security to appear for trial.
>
> 4. Security given for the release of a prisoner awaiting trial.[12]

6.9 It is clear though that the main reason for retaining the term "bail", despite the Committee's obvious misgivings about its use, was the difficulty it had in finding a satisfactory alternative. Such a concern is now dispelled by the bail legislation, at a federal level, of the United States and of Canada.[13] The United States Code is titled "Release and detention pending judicial proceedings".[14] The Canadian Code is titled "Interim Judicial Release".[15] Both codes consistently use the word "release" rather than "bail" or "grant bail".

6.10 The Committee also saw a difficulty in using the term "release" to cover situations where the person is not in custody.[16] We do not share that concern. Where a person is before a court that has the power to detain, it is appropriate that a decision not to do so is expressed as one to release.

6.11 This is borne out by closer examination of the current provision and of the alternative. Section 15 provides that a person "may be granted or refused bail in accordance with this Act, notwithstanding that the person is not in custody".[17] The word "bail" is defined in the statute as meaning "authorisation to be at liberty under this Act, instead of in custody".[18] So, a person who is not in custody may be "granted authorisation to be at liberty, instead of custody". In terms of the language and logic of the current Act, granting "authorised liberty", instead of custody, to a person who is not in custody makes sense because the court has the power to detain. In the same way, in terms of our language, a decision to "release" a person who is not in custody makes sense because the court has power to detain. For these reasons we find no difficulty with the use of the term "release" in this context.

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9. NSW, *Report of the Bail Review Committee*, Parl Paper No 46 (1976) 13.
10. NSW, *Report of the Bail Review Committee*, Parl Paper No 46 (1976) 13.
11. *Shorter Oxford English Dictionary* (6th ed, Oxford University Press, 2007).
12. *Shorter Oxford English Dictionary* (6th ed, Oxford University Press, 2007).
13. *United States Code* 18 USC § 3142-3144; *Criminal Code,* RSC 1985, c C-46 s 515.
14. *United States Code* 18 USC ch 207.
15. *Criminal Code,* RSC 1985, c C-46 s 515.
16. NSW, *Report of the Bail Review Committee*, Parl Paper No 46 (1976) 13.
17. *Bail Act 1978* (NSW) s 15.
18. *Bail Act 1978* (NSW) s 4.

Submissions

6.12 In questions we posed for comment at the outset of this reference, we included a question as to whether the terminology of the *Bail Act* should be changed.[19] We gave, as an example of possible revision, the possibility of replacing the expression 'grant of bail' with the expression 'pre-trial release'. Most respondents did not address this question in their submissions. The Public Defenders answered "Yes" to the proposal.[20] All others who responded to the question were either opposed to the proposal or did not see any advantage in making a change of the kind proposed.[21]

Reasons for change

6.13 We advance three reasons for change in the terminology of "bail" and "grant bail". First, the language of the *Bail Act* in this regard is not plain English, and processes expressed in such terms are not conducted in plain English. The terms "bail" and "grant bail," as used in the *Bail Act,* are capable of being understood with accuracy and confidence only by people who are familiar with the processes under the legislation. From these processes they derive a common understanding of what is meant by the expressions. The law and the processes under the law should be readily understandable by anyone.

6.14 Our report draws attention to the complexity and convolutions of the present legislation and recommends changes to simplify the code. If our recommendations are substantially accepted, it will be necessary to redraft the legislation. That would be an opportunity, not only to restructure the Act to provide a logical sequence of processes, but also an opportunity to express bail law in plain terms that are readily understandable to the lay person.[22] The opportunity should not be lost.

6.15 A second reason for change is that the terminology of "bail" carries an unfortunate connotation. The word implies that liberty is something to be bestowed by agencies of the state rather than a human right that is curtailed in certain defined circumstance for compelling reasons. This is apparent from the definition of "bail" in the legislation, as "authorised to be at liberty under this Act, instead of in custody". Speaking of bail as being something to be "granted" fortifies this connotation. The Act should be concerned with justifying detention, rather than authorising liberty.

6.16 That the implication is unstated makes it the more dangerous, because it is subliminal. The danger is that the terminology contributes to a mindset that a person accused of criminal conduct should not be accorded the privilege of bail. While there may be good reasons for detaining a person before trial, this mindset runs

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19. NSW Law Reform Commission, *Bail*, Questions for Discussion (2011) 18.3.
20. M Ierace, *Submission BA16*, 7.
21. Law Society of NSW, *Submission BA5,* 21; R Moloney, *Submission BA6,* 2; F Mersal, *Submission BA10,* 13; NSW Young Lawyers, *Submission BA11,* 14; Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 54; Legal Aid NSW, *Submission BA17,* 27*;* Redfern Legal Centre, *Submission BA18,* 15; D Shoebridge, *Submission BA19,* 13; NSW, Office of the Director of Public Prosecutions, *Submission BA21,* 18*;* NSW, Department of Family and Community Services, *Submission BA24*, 18; Children's Court of NSW, *Submission BA33*, 8; NSW Police Force, *Submission BA39,* 42-3.
22. NSW, Department of Justice and Attorney General, Criminal Law Review, *Review of Bail Act 1978* (NSW) (2010).

counter to fundamental principles of our criminal justice system, such as the presumption of innocence. Clear language such as the term "release", which carries no such implication, is preferable to "bail".

Conclusion concerning the language of the Act

6.17 We recommend a change in the language of the legislation:

- "grant bail" should become "release pending proceedings"; and
- "refuse bail" should become "detain pending proceedings".

The word *proceedings* should be defined to include trial, a sentencing hearing or an appeal.

6.18 We recommend use of the word 'authority' as a general term to include police officers, authorised justices (who are court staff) and courts having authority to release a person at any stage before completion of the proceedings. The term is taken from the Draft *Bail Bill* produced as part of the 2010 departmental review.[23] The term "authority" is convenient for use in provisions that relate to processes common to all decision-makers. Where a provision relates only to one type (for example police, or courts), it could be worded in that way.

Consequential amendments

6.19 Consequential amendments would be required to statutes referring to "bail" or "granting bail" to accord with the language of a new *Bail Act*. For example, s 11 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) provides that a court that finds a person guilty of an offence may make an order adjourning the proceedings "and granting bail to the offender in accordance with the *Bail Act 1978*", for certain purposes.

Recommendation 6.1: The language of the Bail Act

(1) A new *Bail Act* should be drafted in plain English language, so as to be readily understandable, and with a clear and logical structure.

(2) The terminology used in the new *Bail Act* should be changed:

- "release pending proceedings" should replace "bail" and "grant bail"
- "detain pending proceedings" should replace "refuse bail".

(3) ***Proceedings*** should be defined to include trial, and a sentencing hearing or an appeal.

23. NSW, Department of Justice and Attorney General, Criminal Law Review, *Draft Bail Bill 2010,* 3.

The structure of the Act

Structure generally

6.20 The basic structure of the *Bail Act* has remained the same since its inception. The numerous amendments made since then have, however, added layers of complexity to the point where the Act is difficult to read and apply.

6.21 The first of the recommendations in the 2010 departmental review of the Act was:

> A new Act be drafted in plain English, with material presented and structured in a logical manner that is accessible to the reader and that is easy to apply and navigate.[24]

We agree with this recommendation.

Reform to the nature and structure of bail

6.22 We have given special attention to two aspects of the current Act: the provisions dealing with the bail undertaking and the provisions dealing with conduct requirements.

The bail undertaking

6.23 The *Bail Act* provides that a person is entitled to be released and remain at liberty when bail has been granted and the person has entered into the bail undertaking.[25] The bail undertaking is a written undertaking to appear as specified in a notice given or sent to the person.[26] It is an offence to fail to appear in accordance with the bail undertaking.[27] A person who does fail to appear may be arrested and brought before a court or brought before a court by summons.[28]

Conditional bail and conduct requirements

6.24 Bail may be granted unconditionally or subject to conditions.[29] The Act provides that bail conditions must be "entered into" before the person can be released.[30] This language is unsuitable. The conditions specified in the Act require action of some kind, such as the deposit of money or security, or that the person enter into an agreement to observe specified conduct requirements, or surrender their passport. In none of these instances does the person "enter into" the condition. Conduct requirements commonly include residence requirements, reporting requirements, and non-association or place restriction requirements. They are not conditions

24. NSW, Department of Justice and Attorney General, Criminal Law Review, *Review of Bail Act 1978 (NSW)* (2010) 5.
25. *Bail Act 1978* (NSW) s 7.
26. *Bail Act 1978* (NSW) s 34. See also *Bail Regulation 2008* (NSW) regarding the form of the notice.
27. *Bail Act 1978* (NSW) s 51.
28. *Bail Act 1978* (NSW) s 50(1)(b)(i)-(ii).
29. *Bail Act 1978* (NSW) s 36(1).
30. *Bail Act 1978* (NSW) s 7(c).

under the legislation (although they are commonly referred to as such). The condition is the requirement to enter into the agreement. This is an indirect way of controlling or limiting the person's behaviour while on bail.

6.25 A person who fails to comply with "an agreement entered into by the person pursuant to a bail condition" may be arrested or summonsed and brought before a court to redetermine the person's status under the Act, as in the case of failure to comply with a bail undertaking.[31] Breach of a bail agreement is not an offence.

Proposed simplifications

6.26 We consider that the bail undertaking and the agreement to observe conduct requirements are unnecessarily complex processes. A simpler alternative is to

- Replace the bail undertaking with a notice of listing.[32]
- Replace the condition that the person enter into an agreement to observe specified conduct requirements with a conduct direction given by the authority.

Notice of listing

6.27 We recommend that defendants who are released pending a proceeding would be given or sent a notice of listing that specified when they were next required to attend. The *Bail Act* or the Regulation should provide that the person is required to acknowledge receipt of the notice, where the person is at court.

6.28 The notice should contain warnings concerning the penalty for non-appearance and the liability to arrest and re-assessment of the person's status under the Act. The notice should also include a warning about the consequences of committing an offence while released pending proceedings – in particular, that committing an offence while "on bail" is a factor in aggravation of sentence.[33]

6.29 The consequences of failure to appear at court as required would be preserved, in relation to the police power of arrest and the court's power to re-assess the person's status under the Act.[34] The changes we recommend later in this report in relation to the police power to arrest for failure to appear would apply as readily.

6.30 There would continue to be a separate offence of failure to appear as required.[35]

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31. *Bail Act 1978* (NSW) s 50.
32. There is currently provision for such a notice in *Bail Act 1978* (NSW) s 34 and *Bail Regulation* 2008 (NSW) cl 11 to be issued in conjunction with or on the same forms as the undertaking. When bail is continued under s 54 a new notice is given of the adjourned date and time.
33. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(j); *R v Richards* [1981] 2 NSWLR 464; *R v Cicekdag* (2004) 150 A Crim R 299.
34. See Ch 15.
35. See Ch 17.

Conduct direction

6.31 Instead of requiring a bail agreement, the bail authority would issue a conduct direction in conjunction with the decision to release. It would specify conduct requirements in a straightforward way. Conduct directions should be given to a person in writing, and explained to the person.

6.32 The consequences of failure to comply with specified conduct requirements would be unaffected. The police power to arrest and the court's opportunity to re-assess the person's status under the Act could readily be preserved. The changes we recommend later in this report in relation to the police power of arrest would apply as readily to conduct requirements imposed under this simplified process.

6.33 An authority would still be able to impose true conditions, to be fulfilled prior to release (for example, that the defendant surrender a passport, or that money be deposited or that security be provided, or that the defendant or a third party enter into an agreement to forfeit money or provide security). Chapter 13 contains further discussion of the conditions that should be allowed.

Submissions

6.34 Submissions in relation to such changes varied greatly. The Redfern Legal Centre was critical of the present scheme of the Act. It said:

> Conditional bail should be a unilateral decision because of the nature and purposes of bail. Currently, there is the appearance of consent and input by the accused because it is labelled an 'agreement'. This appearance should be dispensed with. Rather than the accused agreeing to bail conditions,[36] they should be asked to sign an acknowledgement of the conditions imposed by the authorised officer.[37]

6.35 At a consultation, the President of the Children's Court, Judge Marien, said that children mostly do not understand what a bail undertaking is, and that simplification in relation to the imposition of conduct requirements is needed.[38]

6.36 In contrast, Legal Aid NSW supported the present scheme.[39] The Law Society of NSW also said it should not be possible to impose any requirement "which is not a condition of bail".[40]

6.37 Others were ambivalent. The Senior Public Defender said he was "unclear as to whether there was any need to change it [the current scheme], other than the

36. In Ch 12, we refer to the common use of the term "conditions", to mean conduct requirements which are the subject of a condition that the person enter into an agreement to observe such requirements. The Redfern Legal Centre is using the term "conditions" in that way in its submission.
37. Redfern Legal Centre, *Submission BA18*, 10.
38. Children's Court of NSW, *Consultation BAC7*.
39. Legal Aid NSW, *Submission BA17*, 17.
40. Law Society of NSW, *Submission BA5*, 12.

conceptual oddity".[41] Similarly, the Aboriginal Legal Service said that either the scheme of the Act or the suggested alternative "could be appropriate".[42]

Discussion

6.38 As noted above, the same consequences could flow from a failure to attend court as required in a notice, as flow from a failure to do so in compliance with an undertaking. The courts could retain the power to re-assess the person's status under the Act. The offence of failure to attend could stand unaffected.

6.39 Similarly, if a straightforward conduct direction were substituted for the condition that the person enter into an agreement to observe such conduct requirements, the consequences of non-compliance with the conduct direction could be the same as the consequences of non-compliance with the agreement to observe such requirements.

6.40 While the present arrangements are called "undertakings" and "agreements", these are not obligations assumed voluntarily. They must be signed in order to obtain release, and are therefore coerced. There is no moral force of the kind which attaches to an obligation freely assumed.

6.41 We consider that bail legislation should abandon the pretence of a voluntary assumption of an obligation. If agencies of the state are to impose obligations and restrictions on the daily lives of people, the state should take responsibility for such requirements. It should not shelter behind a fiction that the person is taking the obligation on themselves. There is good reason for such agencies to keep in mind that these are curtailments of liberty, imposed by the state on people otherwise entitled to go about their lives freely.

6.42 In relation to young people in particular, there may be a better prospect for compliance with a conduct direction given directly by a police officer or court, than with a conduct requirement specified in a coerced "agreement".

Recommendation 6.2: The structure of the Bail Act

(1) The bail undertaking should be replaced with a notice of a listing.

(2) The notice should include:

  (a) a statement explaining the circumstances in which failure to appear will constitute an offence;

  (b) a warning that committing an offence while released pending proceedings could result in a more severe sentence for the offence.

(3) The condition that the person enter into an agreement to observe specified conduct requirements should be replaced by a conduct direction.

41. M Ierace, *Submission BA16*, 6.

42. Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 32.

(4) Notice of a condition or conduct direction should be given to the person in writing and in plain English.

(5) The person should be required to acknowledge in writing receipt of the notice of listing and the notice of any condition or conduct direction imposed.

(6) The authority* should take all reasonable steps to ensure that the person has understood any condition or conduct direction imposed.

(7) The court officer or police officer giving the defendant a notice of listing or a notice of a condition or conduct direction should be required to take all reasonable steps to ensure the defendant understands the content and implications of the documents.

* ***Authority*** in these recommendations means a person or court having authority to release a person at any stage before completion of the proceedings, including authorised police officers and authorised justices (who are court staff).

Continuation of bail

6.43 A problem relating to the operation of s 43 of the Act has been drawn to our attention. The section provides as follows:

> (1) If a bail undertaking includes an undertaking to appear at any time and place at which proceedings in respect of the offence may be continued, whether upon an adjournment, committal or otherwise, a court may accordingly continue bail already granted in respect of the offence, whether or not the accused person then appears in person.
>
> (2) Where bail is continued, the bail undertaking and the bail conditions continue to apply, except to the extent that a condition or agreement thereunder otherwise provides or the court otherwise orders.
>
> (3) If the accused person appears before a court in accordance with a bail undertaking referred to in subsection (1) but no specific direction is made by the court in respect of bail, the court is taken to have continued bail.

6.44 Subsection 43(3) was not in the original Act. It was added in 1993.[43] The purpose appears to have been to avoid the court and the court registry having to deal with a person's status under the Act each time the proceedings come before the court. Prior to the introduction of this subsection, if no change was to be made concerning release and any conditions of release, including conduct requirements, it appears it was necessary for the court to give a direction that bail was continued. Under s 43(3), the prior arrangements were apparently intended to continue if the court made no specific direction. The second reading speech introducing s 43(3) outlines the rationale behind the provision:

> The bill ensures that bail is not dispensed with where a court later omits or fails to make a bail determination. Bail will be deemed to be continued on the same

43. By the *Bail (Domestic Violence) Amendment Act 1993* (NSW).

> conditions as previously ordered. This procedural reform will ensure important continuity of protection, particularly in domestic violence cases.[44]

6.45 We understand that, in practice, orders to continue bail are routinely made in the Local Court. This comes to our attention from the submission of the Office of the Director of Public Prosecutions. In its submission, it points to s 10(2) which provides that if no order is made bail is deemed dispensed with.[45] The Office says:

> The present Act s 10(2) deems that bail is dispensed with where the Court makes no specific direction or order. The provision is unnecessary.
>
> It means that on every appearance before a Court, and whether raised by the parties or not, the court is compelled to turn its attention to the bail issue. In literally 1000's of cases around the State every day, Courts are making the order, "bail to continue". It is a burden on busy courts and on the odd occasion a court overlooks making the order, there is confusion as to the accused's bail status. This Office is aware of a prosecution for "failure to appear" where the accused was acquitted because the remanding Magistrate neglected to tick the "bail to continue" box on the bench papers.[46]

6.46 It would appear to be clear that s 43(3) is intended to apply to the situation where a bail order has been made and there is no change needed to its terms. There is no reason to disturb the underlying order in such cases. We are told that practice does not accord with this position. Whether that is because of a perceived lack of clarity in s 43(3) or of potential inconsistency between s 43(3) and s 10(2) (as suggested by the submission of the Office of the Director of Public Prosecutions), or whether it is simply a matter of established court and registry practice is unclear.

6.47 In the new Act, we recommend that any order as to release, with or without conditions or conduct directions, should remain in force unless varied or unless detention is ordered, with no need to continue the order expressly. We recommend simplified procedures for seeking release, variation and detention orders in Chapter 18. Registry practices, including any computerised processes, should reflect this approach. We recommend elsewhere[47] that a provision similar to s 10(2) should be retained. That recommendation makes clear that such a provision should operate only where there has been no prior decision of a court to detain the person, or to release the person subject to a condition or with a conduct direction.

Recommendation 6.3: Continuation of orders

A new *Bail Act* should provide that any decision as to release, with or without a condition or a conduct direction, should remain in force unless varied or unless detention is ordered, with no need to continue the order expressly.

44. NSW, *Parliamentary Debates,* Legislative Assembly, 15 September 1993, 3219 (J Fahey, Premier).
45. *Bail Act 1978* (NSW) s 10(2).
46. NSW, Office of the Director of Public Prosecutions, *Submission BA21*, 16.
47. Recommendation 7.2.

7. Entitlement and discretion to release

Introduction **91**
The entitlement to bail for minor offences **92**
The current provision 92
Other jurisdictions 94
Australian Capital Territory *94*
New Zealand *94*
Offences covered 95
Possible expansion of offences covered *95*
Possible contraction of offences covered *95*
Young people referred to Youth Justice Conference 96
Imposition of conditions 97
Exceptions 98
Previous failure to appear or to comply with a condition in respect of the offence *98*
Incapacitation by intoxication *100*
The person has been convicted or a conviction is stayed *101*
Where bail is dispensed with *101*
Protesters *101*
The discretion to release **103**
The current provision 103
Other jurisdictions 103
Submissions 104
Conclusion 104

Introduction

7.1 Under the *Bail Act* there are presently three ways a person arrested and charged by police may be released pending proceedings:

- by way of a discretionary decision by police or a court to grant bail.[1] In this case, bail can be subject to conditions;[2]
- by way of a statutory entitlement to bail, described as "a right to release on bail".[3] Again, bail can be granted subject to conditions;[4]
- by way of a discretionary decision by the court to dispense with bail.[5] No conditions may be imposed in this case.

A fourth way of avoiding detention pending proceedings, not encompassed by the *Bail Act*, is for police not to arrest or to discontinue the arrest and to serve a Court

1. *Bail Act 1978* (NSW) s 9(2), 13.
2. *Bail Act 1978* (NSW) s 36.
3. *Bail Act 1978* (NSW) s 8.
4. *Bail Act 1978* (NSW) s 8(2).
5. *Bail Act 1978* (NSW) s 10.

Attendance Notice on the person.[6] This is the equivalent of the court's power to dispense with bail.

7.2 In this chapter we will explore the entitlement to release on bail (s 8), which is available for minor offences, and the discretion to dispense with bail (s 10), which is available for most offences. We will report on concerns that have arisen regarding the qualifications to the entitlement in s 8, the use of conditional bail for fine-only and minor offences, as well as concerns about an entitlement to bail for offences that carry a real risk of harm.

7.3 We will recommend that s 8 should be replaced by an unqualified entitlement to unconditional release for defendants charged with fine-only offences, certain offences under the *Summary Offences Act 1988* (NSW), and defendants referred to a Youth Justice Conference. Such an entitlement would avoid detention pending proceedings or the imposition of conditions or conduct requirements for offences where a penalty of imprisonment is either not available or very unlikely. The entitlement would not apply to offences involving a risk of harm (such as carrying a knife or sex offender loitering near school) which we would exempt from the reference to offences under the *Summary Offences Act*.

7.4 We will also recommend that the broad discretion in s 10 to dispense with bail should remain, to be known as "the unqualified discretion to release". Under the scheme we recommend for a new *Bail Act* that would be an accurate description of the power, expressed in plain English.

The entitlement to bail for minor offences

The current provision

7.5 Section 8(1) of the *Bail Act* provides that a person accused of certain offences is *entitled* to be granted bail. Those offences are as follows -

> (a) all offences not punishable by a sentence of imprisonment (except in default of payment of a fine,
>
> (a1) offences under the *Summary Offences Act 1988* that are punishable by a sentence of imprisonment, and
>
> (b) all offences punishable summarily that are of a class or description prescribed by the regulations for the purposes of this section, and
>
> (c) all offences (whether or not of a kind referred to in paragraph (a) or (b)) in respect of which a person is an accused person by virtue of section 4(2)(e) or (f).
>
> except offences against section 51.[7]

6. There is an express power for police officers to discontinue an arrest at any time: *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 105.

7. *Bail Act 1978* (NSW) s 8(1).

7.6 Section 4(2)(e) refers to a person appearing in court because of a breach of a good behaviour bond[8] and proceedings for extension or revocation of a community service order.[9] Section 4(2)(f) refers to sections of the *Children (Community Service Orders) Act 1987* (NSW) which no longer exist,[10] but were to do with proceedings for revocation of children's community service orders.

7.7 The excepted offence, referred to in the section as an offence against s 51, is the offence of failing to appear. [11]

7.8 The entitlement is not available to a person who has previously failed to comply with a bail undertaking or bail condition in respect of the offence, or who is incapacitated by intoxication, injury, or use of a drug, or who is otherwise in danger of physical injury or in need of physical protection.[12]

7.9 A person accused of an offence specified in s 8 is entitled to be granted bail either conditionally or unconditionally. In deciding whether or not to impose conditions, the authority would be subject to s 37(1), which provides that bail shall be granted unconditionally unless the officer or court considers that conditions should be imposed for the purposes specified in the subsection.

7.10 The class of offences for which bail is an entitlement include some which may attract a sentence of imprisonment, being those under the *Summary Offences Act*. However, statistics collated by the Judicial Commission show that, for those offences, only a small proportion of people convicted are imprisoned. Of the five offences under the *Summary Offences Act* with more than 100 records on the Judicial Information Research System, the highest imprisonment rate was only 7% of the 521 people sentenced for the offence of obscene exposure, against s 5.[13]

7.11 It would appear then that the vast majority of cases entitled to bail under the current s 8 are those that do not attract imprisonment, either because they are prescribed as fine-only offences, or because according to sentencing statistics, only the most serious cases go on to receive a sentence of imprisonment. The questions which then arise relate to the ambit of an entitlement to release pending proceedings and whether conditions or conduct directions should be permitted in connection with such entitlement.

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8. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 98.
9. *Crimes (Administration of Sentences) Act 1999* (NSW) s 116.
10. *Children (Community Service Orders) Act 1987* (NSW) s 21(1)(d), 26(1)(c).
11. *Bail Act 1978* (NSW) s 51.
12. *Bail Act 1978* (NSW) s 8(2)(a)(i), (ii).
13. The five offences with the highest number of convictions were s 4 offensive conduct 1% of 5330 people, s 11B custody of offensive implement 5% of 642 people, s 5 obscene exposure 7% of 521 people, s 11A violent disorder 5% of 422 people, s 11C custody of knife first offence 2% of 252 people: Judicial Information Research System (accessed on 11 October 2011).

Other jurisdictions

Australian Capital Territory

7.12 In Australia, only the ACT has an equivalent provision regarding the entitlement to bail for minor offences. The ACT provision is similar to the NSW provision, but covers a broader range of offences. A person charged with one of the offences in s 8 of the *Bail Act 1992* (ACT) is entitled to be granted bail and to be released from custody after giving an undertaking to appear. If no further appearance is required for a person arrested for a breach of the peace or apprehended breach of the peace, then no undertaking is required. The offences covered by s 8 of the ACT legislation are:

- an offence not punishable by imprisonment;
- an offence punishable by imprisonment for less than 6 months;
- a person arrested for a breach of the peace or apprehended breach of the peace;
- a person arrested under a warrant because of failure to comply with a summons or subpoena; and
- a person brought up to attend a trial or hearing following the issue of a *habeas corpus* order.

7.13 The ACT legislation includes substantially the same exceptions as the NSW legislation regarding a person who has previously failed to comply with undertakings or bail conditions, or who is incapacitated by intoxication, injury or drugs or is in danger of physical injury or in need of protection.[14] However in one respect the ACT legislation is more restrictive of liberty: while in NSW a person loses their entitlement to bail if the person has previously failed to comply with a bail undertaking or condition in respect of *the offence*, in the ACT the entitlement is lost for failure to comply with an undertaking or condition in respect of *the same or similar offence*.[15]

New Zealand

7.14 The *Bail Act 2000* (NZ) provides that a defendant is "bailable as of right who is charged with an offence that is not punishable by imprisonment".[16] Also, a defendant is bailable as of right who is charged with an offence for which the maximum punishment is less than three years imprisonment (with two exceptions, both regarding domestic violence offences).[17] The Act also includes a list of *Crimes Act 1961* (NZ) offences for which a defendant is bailable as of right.[18] In these cases, judges are not able to refuse bail, but "reasonable terms and conditions" may

14. *Bail Act 1992* (ACT) s 9.
15. *Bail Act 1992* (ACT) s 9(1)(a).
16. *Bail Act 2000* (NZ) s 7(1).
17. *Bail Act 2000* (NZ) s 7(2).
18. *Bail Act 2000* (NZ) s 7(3).

be imposed.[19] The right is lost if the defendant has been previously convicted of an offence punishable by imprisonment.[20] Special provision is made in relation to young persons in the *Children, Young Persons and their Families Act 1989* (NZ) and the *Bail Act 2000* (NZ).

Offences covered

Possible expansion of offences covered

7.15 Of the submissions seeking an expansion of offences covered,[21] there was support for including all offences with a maximum penalty of up to six months[22] or up to 12 months.[23] It was noted that in New Zealand there is a right to bail for offences with a maximum penalty of less than three years.[24] There was also support for a right to bail for all strictly summary offences.[25] However in this case some exceptions would be required. For example, the offence of breach AVO is a strictly summary offence with a maximum penalty of two years imprisonment. In light of the risk of reoffending and the risk to the victim, it would not be appropriate to attach an entitlement to release to this offence.

7.16 Consideration should be given to including strictly summary offences (offences that must be heard in the Local Court) within this provision. We are not in a position to conduct such a time consuming review in the context of this reference. There are approximately 61,000 strictly summary offences, relating to traffic, aviation, firearms, environmental protection, occupational health and safety, food safety, civil aviation, child protection and many other matters. It would be appropriate for there to be a further review[26] to determine which, if any, of such offences should be included within the ambit of a provision such as s 8. We suggest that the criteria for inclusion should be whether the offence involves a significant risk of harm or a likelihood of incurring a prison sentence.

Possible contraction of offences covered

7.17 Two submissions raised concerns about certain of the offences presently included under s 8, for which, if convicted, the accused person is likely to receive a sentence of imprisonment.[27] The NSW Police Force raised particular concerns about "convicted child sexual offender loiter near school",[28] "convicted child sexual

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19. *White v Police* (Unreported, NZ High Court, William Young J, 10 September 2003).
20. *Bail Act 2000* (NZ) s 7(4).
21. Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 5; M Ierace, *Submission BA16*, 1; Legal Aid NSW, *Submission BA17*, 4.
22. Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 5.
23. Legal Aid NSW, *Submission BA17*, 4.
24. Legal Aid NSW, *Submission BA17*, 4.
25. G Henson, *Submission BA2*, *3*; Children's Court of NSW, *Submission BA33*, 3. In consultations, the Law Society, Bar Association and the Office of the Director of Public Prosecutions expressed qualified support for this approach.
26. Government departments and agencies responsible for detecting and prosecuting offences of this kind should be involved in the review.
27. NSW Police Force, *Submission BA39*, 5-6; Police Association of NSW, *Submission BA38*, 1-2.
28. *Summary Offences Act 1988* (NSW) s 11G(1)(a).

offender loiter near public place",[29] "possess offensive weapon/implement in place of detention",[30] "inmate use or possess mobile phone",[31] and "violent disorder".[32]

7.18 The Police Association also argued that there are offences within the *Summary Offences Act* for which there should be no automatic right to release, including the "convicted child sexual offender loiter", "custody or use of laser pointer", violent disorder and wielding of knives in a public place or school.[33]

7.19 We agree that the entitlement to release should not apply to offences carrying a real risk of harm to others. The provisions regarding child sex offenders are a useful example. While convictions for these offences are rare,[34] more than half of those convicted are imprisoned.[35] We recommend that the offences in the *Summary Offences Act* relating to knives,[36] offensive implements,[37] violent disorder,[38] custody or use of a laser pointer in a public place[39] and child sex offenders[40] should be exempted from a provision such as s 8.

Young people referred to Youth Justice Conference

7.20 The *Young Offenders Act 1997* (NSW) includes four options for dealing with young people who are alleged to have broken the law: warning, caution, Youth Justice Conference, and court. A young person who has admitted to the offence and agreed to participate may be referred to a Youth Justice Conference for summary offences and indictable offences that may be dealt with summarily.[41] The purpose of the conference is for the young person, his or her family and the victim and/or his or her representative to agree on a suitable outcome, which may include an apology, reparation, and steps to reduce the risk of reoffending.

7.21 Our Questions for Discussion asked whether a young person being dealt with by way of a Youth Justice Conference should be entitled to have bail dispensed with altogether, that is, entitled to unconditional release.[42] Many submissions agreed that bail should be dispensed with in this case,[43] while the submission of the NSW

29. *Summary Offences Act 1988* (NSW) s 11G(1)(b).
30. *Summary Offences Act 1988* (NSW) s 27D(1).
31. *Summary Offences Act 1988* (NSW) s 27DA(1).
32. *Summary Offences Act 1988* (NSW) s 11A(1).
33. Police Association of NSW, *Submission BA38*, 1-2.
34. *Summary Offences Act 1988* (NSW) s 11G(1) was inserted in 2002. Between July 2007 and June 2011, only 22 convictions have been recorded in the Lower Courts: Judicial Information Research System (accessed 28 November 2011).
35. Judicial Information Research System (accessed 28 November 2011).
36. *Summary Offences Act 1988* (NSW) s 11B, 11C, 11E.
37. *Summary Offences Act 1988* (NSW) s 11B.
38. *Summary Offences Act 1988* (NSW) s 11A.
39. *Summary Offences Act 1988* (NSW) s 11FA.
40. *Summary Offences Act 1988* (NSW) s 11G.
41. With some exceptions, see *Young Offenders Act 1997* (NSW) s 8.
42. NSW Law Reform Commission, *Bail*, Questions for Discussion (2011) 7 (question 4.2(b)).
43. Law Society of NSW, *Submission BA5*, 4; Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 17; M Ierace, *Submission BA16*, 3; Legal Aid NSW, *Submission BA17*, 7; D Shoebridge, *Submission BA19*, 5; NSW, Office of the Director of Public Prosecutions, *Submission BA21*, 6; Children's Court of NSW, *Submission BA33*, 4; NSW, Juvenile Justice, *Submission BA35*, 10.

Police Force opposed such an entitlement.[44] A requirement that bail be dispensed with in this instance would go further than s 8, which allows for conditional or unconditional release.

7.22 We agree that a young person referred to a Youth Justice Conference should not be subject to any conditions or conduct directions. A Youth Justice Conference is a diversionary option. Young people are diverted from the criminal justice system in order to avoid the damaging effects of that system, which include stigmatisation and labelling, increased antagonism to authority, and increased reoffending.[45] Conditions and conduct directions, with the attendant monitoring and risk of breach, arrest, detention and court appearance, entrench young people in the criminal justice system and are counter to the purposes of diversion. They are also counter to the spirit of the conference, which is based on the consent of both victim and offender, and is intended to encourage the young person to take responsibility for his or her actions. Bail conditions, particularly reporting requirements, place restrictions and curfews, imply external control and surveillance rather than responsibility and restoration.

7.23 We consider that a young person referred to a Youth Justice Conference should have an entitlement to release without conditions or conduct directions.

Imposition of conditions

7.24 Bail granted under s 8 is to be granted either unconditionally or conditionally.[46]

7.25 Where, under the current legislation, conditions are imposed on a person with an entitlement to bail this may have an effect on the liberty or livelihood of a defendant beyond that which can be imposed upon sentence. For example, in a fine-only offence, no restriction of liberty may be imposed by the Court by way of sentence. This is because the legislature has deemed the offences sufficiently minor.

7.26 The Bail Review Committee recommended that an entitlement to bail should be unconditional or subject only to such conditions as could be met before appearance in court and in the period pending trial.[47] It is clear that the Bail Review Committee did not envisage the imposition of highly restrictive conditions for minor offences such as non-association conditions, curfews and place restriction conditions with a significant radius.

7.27 The submission from Legal Aid noted:

> Legal Aid NSW solicitors regularly represent clients who have been refused bail for a fine-only offence such as a failure to comply with a move-on direction or an offensive language offence. Our Children's Legal Service solicitors regularly see young clients who have breached a curfew condition imposed in relation to a fine-only offence and who are refused bail as a result. The fact that in such

44. NSW Police Force, *Submission BA39*, 17.
45. D Cressy, "Epidemiology and Individual Conduct: A Case from Criminology" (1960) 3(2) *Pacific Sociological Review* 47; D Lipton, R Martinson and J Wilks, *The Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies* (Praeger, 1975).
46. See para 7.9.
47. NSW, *Report of the Bail Review Committee,* Parl Paper No 46 (1976) 20.

> cases a person can end up spending time in custody for an offence that does not carry a custodial sentence is inappropriate.[48]

7.28 Where imprisonment is not a possible penalty for the offence, it is unjust for a person to be at risk of detention – even briefly – for breach of a conduct requirement. We are recommending[49] that conditions or conduct directions should only be imposed when necessary to avoid detention. It follows that where there is a right to release, no conditions or conduct requirements should be imposed.

7.29 There may be two concerns regarding a prohibition on conditions and conduct directions in conjunction with an entitlement to release. First, that a risk of reoffending cannot be managed. This concern is answered by the selective exclusion of offences from the right to release category, as now occurs. Secondly, there may be a perceived need to impose conditions to address a concern that the person may abscond. We answer this concern in Chapter 9[50] on the basis that cases which cannot or are unlikely to attract a term of imprisonment may be dealt with by the Local Court in the defendant's absence.

7.30 We accordingly recommend that the entitlement to release should be an unqualified entitlement, and conditions and conduct directions should not be permitted.

Exceptions

7.31 The current legislation makes four exceptions to the entitlement to bail, where:[51]

- The person has previously failed to comply with a bail undertaking given or bail condition imposed in respect of the offence;
- the person is, in the opinion of the authorised officer or court, incapacitated by intoxication, injury or use of a drug or is otherwise in danger of physical injury or in need of physical protection;
- the person stands convicted of the offence or the person's conviction for the offence is stayed; or
- the requirement for bail is dispensed with as referred to in s 10.

Previous failure to appear or to comply with a condition in respect of the offence

7.32 Under the current exceptions, a person has no entitlement to bail if he or she has breached a bail undertaking (that is, has failed to appear) or has breached a condition imposed in respect of the offence. Since very few people charged with s 8 offences will receive a penalty of imprisonment, the potential for people to be remanded in custody is of concern. The recent departmental review of the *Bail Act* expressed the concern as follows:

48. Legal Aid NSW, *Submission BA17*, 7.
49. See para 14.18-14.19.
50. See para 9.79.
51. *Bail Act 1978* (NSW) s 8(2)(a)(i).

> If an accused person breaches any bail condition he or she loses his or her entitlement to bail. People placed on bail for minor offences can be placed on conditional bail, which may significantly restrict their liberty. If bail is refused due to a breach of a bail, an accused, who claims their innocence, may elect not to defend the matter given that the period spent in custody is likely to exceed the penalty for the offence. Even a single night in the Police cell can be greater punishment than is available to the sentencing Court.
>
> Section 37 of the Act creates a presumption in favour of unconditional bail for all offences where bail is granted unless conditions should be imposed for the purpose outlined in s.37 of the Act.
>
> There have been concerns that bail conditions may be used to unreasonably restrict the liberty of an accused person. For example, by restricting them from attending an area that might include essential services, their families or potential or actual employers. Some have argued that the need to promote effective law enforcement and protect the community can sometimes unfairly outweigh the interests of a person on bail for a minor offence.
>
> There is a strong argument that a failure to comply with bail conditions should not result in an automatic loss of entitlement to bail on a minor offence. In line with this view, an accused should not be in custody for an offence which does not carry a penalty of imprisonment, or where the possibility of such a sentence is remote. Many matters involve minor breaches of bail such as failing to notify the Court or Police of a change of address. [52]

7.33 The Review recommended that a person who has failed to comply with a bail condition should not lose the entitlement to bail for minor offences.

7.34 Many submissions to this reference raised concerns about unduly restrictive conditions placed on bail, and how difficult they are to comply with, especially for young people, homeless or transient people and people with cognitive or mental health impairment or poor organisational skills.[53] Submissions also noted that many instances of failing to appear are inadvertent rather than real attempts to abscond.[54] This creates a real risk that a person may be refused bail for a minor or fine-only offence. The following case study was reported by the Aboriginal Justice Advisory Council.

> A 24 year old Aboriginal woman was charged with offensive behaviour. The magistrate refused her bail and she was remanded. The reasons stated for refusing bail was one previous charge for failing to appear and poor community ties.[55]

7.35 The recent departmental review of the *Bail Act*,[56] and some submissions[57] suggested that a breach of a condition should not result in a loss of entitlement to bail under s 8. Others argued that fine-only offences should be removed from s 8 and that there should be an entitlement to have bail dispensed with for these

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52. NSW, Department of Justice and Attorney General, Criminal Law Review, *Review of Bail Act 1978 (NSW)* (2010) 47.
53. See para 12.26-12.29.
54. See para 10.39.
55. Aboriginal Justice Advisory Council, *Aboriginal people and bail courts in NSW* (2000) 11.
56. NSW, Department of Justice and Attorney General, Criminal Law Review, *Review of Bail Act 1978 (NSW)* (2010).
57. For example, Redfern Legal Centre, *Submission BA18*, 2.

offences.[58] That would avoid the risk of pre-trial custody for breach of condition in the case of fine-only offences.

7.36 We agree that pre-eminence should be given to avoiding detention in relation to offences where a custodial sentence is not available or is extremely rare. We note that, in light of our recommendation that an entitlement to release under s 8 should not be subject to any condition or conduct direction,[59] the question does not arise of having an exception that applies in circumstances where a person has breached such a condition or conduct direction. Accordingly, this exception should not be retained in a new *Bail Act*.

7.37 In making this recommendation, we wish to emphasise that it does not preclude the commission of an offence to which an entitlement to release applies from being taken into account as relevant in some other proceeding (such as proceedings for a breach of a conduct direction, or sentencing proceedings). A new *Bail Act* should make this clear.

Incapacitation by intoxication

7.38 The entitlement to bail under s 8 is not available to a person who is incapacitated by intoxication, injury or use of a drug or is otherwise in danger of physical injury or in need of physical protection.[60] The Bail Review Committee recommended this provision.[61]

7.39 In relation to cases that do not attract an entitlement to release, the *Bail Act* currently also includes, as one of the considerations that should be taken into account when deciding whether to release or detain a person, "whether or not the person is incapacitated by intoxication, injury or the use of a drug or is otherwise in danger of physical injury or in need of physical protection".[62] In Chapter 10 we recommend that this consideration not be adopted and suggest, as a more appropriate solution, the possibility of expanding police powers to detain an intoxicated person under s 206 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).[63]

7.40 It would be inconsistent to remove a consideration that applies in cases that do not attract an entitlement to release but to retain it as an exception in cases where there is an entitlement to release. Accordingly, we recommend that intoxication should not be an exception to an entitlement to release.

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58. Law Society of NSW, *Submission BA05*, 2; Legal Aid NSW, *Submission BA17*, 4; NSW Bar Association, *Submission BA27*, 2; Children's Court of NSW, *Submission BA33*, 3; NSW, Office of the Director of Public Prosecutions, *Submission BA21*, 2.
59. Recommendation 7.1(1).
60. *Bail Act 1978* (NSW) s 8(2)(a)(ii).
61. NSW, *Report of the Bail Review Committee*, Parl Paper No 46 (1976) 28.
62. *Bail Act 1978* (NSW) s 32(1)(b)(iv).
63. See para 10.79-10.86.

The person has been convicted or a conviction is stayed

7.41 This exception would apply pending a sentencing hearing or pending an appeal against conviction or sentence.

7.42 We are recommending in Chapter 9 that special grounds should be required for release pending an appeal where a custodial sentence has been imposed. This recognises the status that should be afforded to a court determination. The same reasoning applies where a person has been convicted and not yet sentenced provided that a custodial sentence is likely. Accordingly, a provision along the lines of the exception in the present legislation should be maintained but with the proviso that the exception does not apply unless the authority is satisfied that a custodial sentence is the likely outcome of the proceedings.

Where bail is dispensed with

7.43 Section 8 provides as an exception to the entitlement to bail that "the requirement is dispensed with, as referred to in section 10". The purpose of this exception is to preserve the power under s 10 to dispense with bail altogether in circumstances where there is a concurrent right to release under s 8 (which does require a bail undertaking to attend court and may be subject to conditions). The need for any such exception is removed if the entitlement to release becomes an entitlement to release without any conditions or conduct direction.

Protesters

7.44 A particular issue has been raised in relation to protesters. The NSW Police Force submits that the power to impose bail conditions on those charged with fine-only offences is important for dealing with protesters.[64] It argues that "the ability to impose bail conditions may provide additional deterrence where the maximum penalty for the offence, the process of arrest and/or the commencement of proceedings fails to do this".[65] The submission notes that if protesters charged with unlawful entry on inclosed lands are released without conditions, "there would be nothing further to deter protesters from continuing to commit fine-only offences".

7.45 Protesters who commit minor offences pose a particular challenge for law enforcement. Some organised groups use non-violent direct action, such as demonstrations, sit-ins and blockades. In the course of these activities, they may breach laws including obstructing traffic,[66] enter or remain on inclosed lands[67] or failure to comply with a notice.[68] While the offences may be minor, the organised and persistent nature of the offences has potential to cause considerable inconvenience, economic damage, and damage to public spaces and amenity. However, the Commission's view is that deterrence is a matter for the imposition of penalties, rather than for bail law. A further objection to such an approach is that any attempt to deal with this problem by imposing conditions on bail for minor and

64. NSW Police Force, *Submission BA39*, 17.
65. NSW Police Force, *Submission BA39*, 17.
66. *Summary Offences Act 1988* (NSW) s 6.
67. *Inclosed Lands Protection Act 1901* (NSW) s 4.
68. *Local Government Act 1993* (NSW) s 632.

fine-only offences and then detaining for breach of those conditions amounts to preventive detention. We have recorded our view that preventive detention under bail law is only justified when there is a likelihood that the person will commit an offence which causes or risks causing death, injury, or serious loss of or damage to property, or which causes or threatens harm to a particular person or persons.[69]

7.46 In our view, a case is not made out for the imposition of conditions in this class of case. If there is an outstanding issue about management of protesters, it can be dealt with under special legislation addressing that issue rather than by framing bail law to accommodate a special case.

Recommendation 7.1: Entitlement to release

(1) A new *Bail Act* should provide that entitlement to release means release without any condition or conduct direction.

(2) Subject to paragraph (3), entitlement to release should apply in relation to all fine-only offences and the public order offences in the *Summary Offences Act* (offensive conduct s 4, obscene exposure s 5, and the prostitution offences s 15-20).

(3) Entitlement to release should not apply to the following offences under the *Summary Offences Act*: offences relating to knives (s 11B, 11C, 11E), offensive implements (s 11B), violent disorder (s 11A), custody or use of a laser pointer in a public place (s 11FA) and child sex offenders (s 11G).

(4) Subject to paragraph (3), a review should be conducted of all strictly summary offences to determine whether they should be included within the scope of the entitlement to release.

(5) Entitlement to release should apply to a young person referred to a Youth Justice Conference irrespective of the offence.

(6) The current exception to an entitlement to release when a person has previously failed to comply with a bail undertaking or a bail condition in relation to the offence, should not be retained.

(7) The current exception to entitlement to release relating to a person who is incapacitated by intoxication, injury or use of a drug or is otherwise in danger of physical injury or in need of physical protection, should not be retained.

(8) New legislation should make clear that an entitlement to release in the case of a specified minor offence should not preclude the commission of that offence being taken into account as relevant in some other proceeding (such proceedings for a breach of a conduct direction, or sentencing proceedings).

69. See para 10.61-10.62.

The discretion to release

The current provision

7.47 Section 10(1) of the *Bail Act* provides that "[a] court that may grant bail to an accused person may instead dispense with the requirement for bail". Section 11 provides that the effect of dispensing with bail is that the person is entitled to remain at liberty until required to appear before a court in respect of the offence. The section applies to all offences except those where there is a presumption against bail.[70]

7.48 A consequence of dispensing with bail is that the person is not required to provide an undertaking to appear,[71] and is therefore not liable for the offence of fail to appear in accordance with a bail undertaking.[72]

7.49 Bail is deemed to have been dispensed with if no specific order or direction is made by the court in respect of bail.[73] However if bail has been granted at a previous appearance, bail is continued by the operation of s 43(3), and the deeming provision does not apply.[74]

7.50 In 2008, 63% of people facing criminal charges in the Local Court had their status recorded as "bail dispensed with".[75] That would include occasions where no specific order was made and bail was accordingly deemed to have been dispensed with. It may be assumed this would include numerous cases where people attended court pursuant to a Court Attendance Notice rather than being brought before the court in custody following an arrest.

Other jurisdictions

7.51 In Queensland, Western Australia, the Australian Capital Territory and the Northern Territory, the bail statutes explicitly authorise the courts to dispense with bail.

7.52 In Queensland, the Magistrate may, in relation to certain offences, "permit the defendant to go at large without bail on the condition that the defendant will surrender into custody".[76] If a person appears to have an impairment of mind and does not appear to understand the nature and effect of entering into a bail undertaking, the person may be released without bail, either by releasing them into the care of another person, or by permitting them to go at large.[77] In Western

70. *Bail Act 1978* (NSW) s 8A(3), 8B(3), 8C(3), 8D(4), 8E(3), 8F(2).
71. *Bail Act 1978* (NSW) s 34.
72. *Bail Act 1978* (NSW) s 51.
73. *Bail Act 1978* (NSW) s 10(2).
74. *Bail Act 1978* (NSW) s 10(3). We recommend the retention of a provision that an order for release should remain in force until varied or revoked, with no need to continue the order expressly: see Recommendation 6.3.
75. C Ringland and D Weatherburn, *The decline in unconditional release before trial,* Bureau Brief No 55 (NSW Bureau of Crime Statistics and Research, 2010).
76. *Bail Act 1980* (Qld) s 14A(1)(b).
77. *Bail Act 1980* (Qld) s 11A.

Australia, a judicial officer may dispense with bail if it appears that bail would be granted but that the completion of bail papers is an unnecessary imposition.[78] In the Australian Capital Territory, the court may dispense with bail, but bail must not be dispensed with if the person is accused of a serious offence while a charge for another serious offence is outstanding, or if the person is sentenced to imprisonment, except in exceptional circumstances.[79] In the Northern Territory, the court has an unrestricted power to dispense with bail.[80]

7.53 In Victoria, Tasmania and South Australia, the bail legislation does not include a power to dispense with bail.

Submissions

7.54 A number of stakeholders called for the *Bail Act* to require bail to be automatically dispensed with for fine-only offences,[81] for young people referred to Youth Justice Conferences,[82] or for people charged with offensive conduct.[83] Some submissions supported a presumption in favour of dispensing with bail for all young people[84] or for most matters involving young people.[85] The NSW Police Force submission opposed automatic dispensing with bail for fine-only offences and matters dealt with by Youth Justice Conference.[86]

7.55 With regard to submissions calling for unconditional release for those charged with fine-only offences, those charged with offensive conduct and young people referred to a Youth Justice Conference, the Commission has addressed these concerns by way of our recommendations regarding the entitlement to release.[87]

Conclusion

7.56 A provision such as s 10 has scope for operation in all cases where there is not an entitlement to bail and where the court, accordingly, has a discretion whether to release, unconditionally or conditionally, or to detain. The provision provides a convenient and efficient method of dealing with a case that is obviously one for unconditional release.

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78. *Bail Act 1982* (WA) s 7A, s 13A.
79. *Bail Act 1992* (ACT) s 10.
80. *Bail Act* (NT) s 9.
81. Law Society of NSW, *Submission BA5*, 1; F Mersal, *Submission BA10*, 4; M Ierace, *Submission BA16*, 3; Legal Aid NSW, *Submission BA17*, 4; D Shoebridge, *Submission BA19*, 5; NSW, Office of the Director of Public Prosecutions, *Submission BA21*, 2; Shopfront Youth Legal Centre, *Submission BA23*, 5; NSW Bar Association, *Submission BA27*, 2; Children's Court of NSW, *Submission BA33*, 3.
82. Law Society of NSW, *Submission BA5*, 5; F Mersal, *Submission BA10*, 4; M Ierace, *Submission BA16*, 3; Legal Aid NSW, *Submission BA17*, 7; D Shoebridge, *Submission BA19*, 5; NSW, Office of the Director of Public Prosecutions, *Submission BA21*, 6; Children's Court of NSW, *Submission BA33*, 4; NSW, Juvenile Justice, *Submission BA35*, 10; NSW Police Force, *Submission BA39*, 17.
83. Aboriginal Legal Service, *Consultation BAC6*.
84. Public Interest Law Clearing House, *Submission BA12*, 9.
85. Shopfront Youth Legal Centre, *Submission BA23*, 5.
86. NSW Police Force, *Submission BA39*, 17.
87. See Recommendation 7.1(5).

7.57 A current function of dispensing with bail is to avoid the requirement that the person enter into the bail undertaking. We have recommended that the bail undertaking be abolished in favour of reliance on the notice of a future listing.[88] Accordingly, under the scheme which we propose there is no need for a provision such as s 10 in relation to further attendance at court. However, a provision such as s 10 would continue to provide an effective way of disposing of cases which clearly warrant unconditional release. We recommend that a provision to the effect of s 10 should be retained.

7.58 Section 10 includes a provision that, if nothing is said, a court is deemed to have dispensed with bail.[89] The provision should be retained; in our terms, a person would be deemed released without condition or conduct direction. However where a prior decision has been made to detain a person, or to release the person subject to a condition or with a conduct direction, that decision should continue to operate.

Recommendation 7.2: Discretion to release
A new *Bail Act* should provide that in all cases other than those covered by an entitlement to release, an authority has absolute discretion to release without a condition or a conduct direction.

88. See paras 6.27-6.30.

89. *Bail Act 1978* (NSW) s 10(2).

8. Presumptions

Introduction **107**
The current provisions **107**
Presumption against bail 108
Presumption in favour of bail 109
Neutral presumption 109
Exceptional circumstances required 110
Complexity 111
The history of the amendments **111**
Effect of the amendments on detention rates **112**
Other jurisdictions **113**
Other reports **114**
Submissions and consultations **115**
Criticisms of the scheme as a whole 115
Substantial support for a uniform presumption in favour of bail 116
The law enforcement view 118
Risk management approach *119*
Retain and modify existing scheme of presumptions *119*
Evaluation of the arguments **120**
Conclusion **123**

Introduction

8.1 This chapter discusses the role of presumptions in bail law. This is one of the most important issues that we have considered in this review, and it is an area where those we have consulted have had a considerable amount to say, most of it critical of the current law. As such we have given the issue close consideration.

The current provisions

8.2 The *Bail Act* includes presumptions which operate whenever a decision whether to release or detain is to be made. In chapter 3 we have set out the history of presumptions in the *Bail Act* in some detail.

8.3 The Act as originally passed set a presumption in favour of bail for all offences except armed robbery and the offence of failure to appear in answer to bail, where a neutral presumption applied.

8.4 Under the *Bail Act* as it now stands, there is provision for:

- a presumption against bail;
- a presumption in favour of bail;
- exceptions to the presumption in favour of bail (a neutral presumption); and
- exceptional circumstances as a pre-requisite for granting bail.

8.5 In other criminal law contexts, when the law speaks of a presumption, it is usually in relation to an issue of fact. A presumption may shift the burden of proof from the prosecutor to the defendant. For example, s 52AA of the *Crimes Act 1900* (NSW) provides that:

> The concentration of alcohol in the accused's blood is presumed to be that registered by a blood test taken within two hours of the accident, unless the accused proves otherwise.[1]

8.6 The *Bail Act* presumptions do not concern proof of facts, but decision-making and the burden of persuasion. The decision to release or detain is to be as stated by the presumption unless the authority is persuaded to the contrary. The presumptions indicate who has the burden of persuading the authority (the burden of persuasion).

8.7 The role of the presumption is to set a starting point for consideration of the issue of bail. The presumption does not, however, determine the outcome. Bail must still be determined considering the relevant factors (those set out in s 32 of the *Bail Act*). The person may be released because release is justified, notwithstanding a presumption against bail. A person may be detained because detention is justified notwithstanding a presumption in favour of bail.

8.8 In this section, we deal with each presumption in the order it appears in the *Bail Act*.

Presumption against bail

8.9 There is a presumption against bail for certain serious drug offences involving commercial quantities or commercial purpose;[2] terrorism offences;[3] riot and serious offences committed during large scale public disorders[4] and serious firearms and weapons offences.[5] There is also a presumption against bail for people who are charged with two or more separate serious property offences,[6] and who have been convicted of one or more serious property offence within the past two years.[7] People who are accused of committing an offence attracting a term of imprisonment while on lifetime parole[8] or breaching an extended supervision order or interim supervision order pursuant to s 12 of the *Crimes (Serious Sex Offenders) Act 2006* (NSW)[9] also fall into this category.

8.10 In each of the above cases, the Act provides that a person is not to be granted bail unless the person satisfies the authority that bail should not be refused.[10]

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1. *Crimes Act 1900* (NSW) s 52AA(3).
2. *Bail Act 1978* (NSW) s 8A(1)(a), s 8A(1)(b), s 8A(b1).
3. *Bail Act 1978* (NSW) s 8A(1)(c).
4. *Bail Act 1978* (NSW) s 8D.
5. *Bail Act 1978* (NSW) s 8B.
6. Not being offences arising out of the same circumstances: *Bail Act 1978* (NSW) s 8C(1)(a).
7. *Bail Act 1978* (NSW) s 8C(1)(c).
8. *Bail Act 1978* (NSW) s 8E(1).
9. *Bail Act 1978* (NSW) s 8F(1).
10. *Bail Act 1978* (NSW) s 9, exceptions set out in s 8A(2), s 8B(2), s 8C(2), s 8D(3), s 8E(2), s 8F(1).

8.11 Speaking of s 8A, but with equal application to other sections in the Division,[11] the Court of Criminal Appeal said in *R v Masters*:

> The presumption against bail expressed in that section imposes a difficult task upon the person so charged to persuade the court why bail should not be refused. The presumption expresses a clear legislative intention that persons charged with the serious drug offences specified in the section should normally or ordinarily be refused bail. That is the effect of a series of decisions by single judges of the Supreme Court, most recently collected and discussed in *R v Kissner* (Hunt CJ at CL, 17 January 1992). We agree with that interpretation of s 8A.[12]

8.12 The NSW Court of Appeal endorsed this approach in *R v Brown*,[13] and in *R v Budiman*.[14] It remains the law in this State.[15] The effect of this line of authority is that, in addition to the burden of persuasion being cast on the applicant, the standard of persuasion required is elevated to the point where the person will normally or ordinarily be refused bail.

Presumption in favour of bail

8.13 The default position in the *Bail Act* is the presumption in favour of bail, which applies to all offences except those specifically excluded.[16] The list of exceptions is extensive. It includes the offences and circumstances that are subject to the presumption against bail and the offences for which exceptional circumstances are required. However, the exceptions also include numerous other offences and circumstances which are dealt with next under the heading "neutral presumption".

8.14 Where there is a presumption in favour of bail, the person is entitled to be granted bail unless the authority is satisfied, after considering the matters referred to in s 32,[17] that it is justified in refusing bail. The presumption is also displaced when the person has been convicted of the offence and awaits sentence or appeal.[18]

Neutral presumption

8.15 Offences and circumstances excluded from the presumption in favour of bail and not covered by other provisions of the *Bail Act* constitute a class of their own. The *Bail Act* makes no provision concerning who has the burden of persuasion in these cases, and to what standard. The presumption has come to be called "neutral", there being no presumption either way.

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11. *Bail Act 1978* (NSW) pt 2 div 2A.
12. *R v Masters* (1992) 26 NSWLR 450, 473.
13. *R v Brown* (Unreported, NSW Court of Appeal, 15 March 1994) (Kirby P).
14. *R v Budiman* (1997) 97 A Crim R 548, 550.
15. See, eg, *R v Jomaa* [2011] NSWSC 342.
16. *Bail Act 1978* (NSW) pt 2 div 3.
17. *Bail Act 1978* (NSW) s 32: This section specifies the considerations to be taken into account in deciding whether to grant or refuse bail.
18. *Bail Act 1978* (NSW) s 9(2).

8.16 This category has become more extensive over time. The neutral presumption now covers people charged with serious drug offences;[19] violent and armed robbery offences;[20] domestic violence offences in some circumstances;[21] manslaughter;[22] wounding or grievous bodily harm with intent; kidnapping; and a number of serious sexual offences.[23] The class includes an applicant who committed the offence charged while on bail, or on parole or on a bond or subject to an intervention program.[24] It also includes an applicant who has previously been convicted of failing to appear.[25] Importantly, the neutral presumption covers people charged with an indictable offence, who have previously been convicted of an indictable offence.[26]

Exceptional circumstances required

8.17 There is a fourth category of cases where the authority is not to grant bail unless it is satisfied that exceptional circumstances justify the grant of bail.[27] These cases are people charged with murder, and people charged with serious personal violence offences, as defined in the legislation, who have been previously convicted of a serious personal violence offence.[28]

8.18 There is no reference to s 32 in this provision (unlike the provision regarding the presumption in favour of bail) because the provision involves a determination anterior to any decision whether to release or detain. If the threshold of exceptional circumstances is satisfied, the decision then to be made concerning release or detention is governed by the considerations in s 32.

8.19 The intended effect of this category is stated in the second reading speech:

> Exceptional circumstances will be left to the court to decide on an individual, case-by-case basis. However … it might include cases involving a battered wife, or a strong self-defence case or a weak prosecution case. It might also include a case in which the defendant is in urgent need of medical attention or has an intellectual disability, or a case in which the court is satisfied that the offender poses no further threat to the victim or the community.[29]

8.20 On one view, the situations listed in the speech might not be so unusual as to be described as "exceptional". A stricter construction was taken in *R v Wright* in which Justice Rothman said the word "exceptional" in this provision means "out of the ordinary or unusual".[30] That would appear to accord more closely with common usage.

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19. *Bail Act 1978* (NSW) s 9(1)(d), s 9(1)(d1), s 9(1)(e).
20. *Bail Act 1978* (NSW) s 9(1)(c).
21. *Bail Act 1978* (NSW) s 9A.
22. *Bail Act 1978* (NSW) s 9(1)(f).
23. *Bail Act 1978* (NSW) s 9(1)(c).
24. *Bail Act 1978* (NSW) s 9B(1).
25. *Bail Act 1978* (NSW) s 9B(2).
26. *Bail Act 1978* (NSW) s 9B(3).
27. *Bail Act 1978* (NSW) s 9C, s 9D(1).
28. *Bail Act 1978* (NSW) s 9D(1).
29. NSW, *Parliamentary Debates,* Legislative Council, 24 June 2003, 1888.
30. *R v Wright* (Unreported, Supreme Court of NSW, Rothman J, 7 June 2005) [25].

Complexity

8.21 This summary does not convey the length, detail and intricacy of these provisions. The provisions consist of eleven separate sections and occupy nine pages of the *Bail Act*. They refer to approximately 150 separate offences by statute and section. That does not include generic circumstances, specified in some of the provisions, which do not relate to a single, specific offence. Only a reading of the provisions can convey the web of complexity in this part of the legislation. A summary of the provisions is provided in Appendix E.

The history of the amendments

8.22 Before the enactment of this legislation, there was a presumption in favour of bail at common law. In *R v Wakefield*, Judge Cross (sitting as Chairman of Quarter Sessions, later Justice Cross) provided a comprehensive account of the common law in relation to bail as it then stood.[31] The following passage related to the risk of non-appearance but it has a wider implication:

> …whether the Crown has shown such a degree of risk of the accused failing to answer his bail that the general desirability of granting accused persons bail is outweighed, ie such a degree of risk as displaces the presumption in favour of bail.[32]

8.23 Early judgments in the Supreme Court of Victoria and of the Australian Capital Territory are to the same effect.[33]

8.24 The 1976 Report of the Bail Committee took the same approach:

> Every defendant should have a right to release on bail unless it appears that such release is undesirable. The onus should be on the prosecution to establish grounds for bail refusal.[34]

8.25 The report included the following recommendation:

> The presumption in favour of bail should apply at all stages of criminal proceedings, whether before trial, during trial, before sentence or pending appeal.[35]

8.26 However, the Bill introduced into Parliament included an exception to the presumption in favour of bail for armed robbery offences and certain other robbery offences,[36] and an exception in the case of the offence of failure to appear.[37] As we

31. *R v Wakefield* (1969) 89 WN (Pt 1) NSW 325, 331.
32. *R v Wakefield* (1969) 89 WN (Pt 1) NSW 325, 331.
33. *R v Light* [1954] VLR 152, 157 (Sholl J) and *Burton v The Queen* (1974) 3 ACTR 77, 78 (Fox J).
34. NSW, *Report of the Bail Review Committee,* Parl Paper No 46 (1976) 20.
35. NSW, *Report of the Bail Review Committee,* Parl Paper No 46 (1976) 7 (Recommendation 28).
36. *Bail Act 1978* (NSW) (as enacted) s 9(1)(c) referring to *Crimes Act 1900* (NSW) s 95 (aggravated robbery), s 96 (aggravated robbery with wounding), s 97 (armed robbery or robbery in company), s 98 (armed robbery with arms etc and wounding).
37. *Bail Act 1978* (NSW) (as enacted) s 9(1)(b) referring to the offence created by s 51.

have remarked, this followed two highly publicised bank robberies in 1978.[38] In the second reading speech introducing the legislation, the Attorney General explained why the exception had been introduced. It bears repeating:

> This Government is well aware of the widespread feeling in the community of a need to take a firm and exemplary stand in relation to serious and violent crime, particularly the offences of armed and otherwise violent robbery.[39]

8.27 This statement typifies the motivation behind many of the amendments concerning presumptions. The *Bail Act* has served as a vehicle for denouncing and for providing a response to such behaviour.

8.28 As we have said earlier in this report, denouncing crime is one of the roles of the broader criminal justice system.[40] It is not the proper role of bail legislation.[41] It is this use of the *Bail Act*, without due regard to the principles which underlie the criminal justice system, which has led to the proliferation of amendments of this kind.

Effect of the amendments on detention rates

8.29 There is evidence that the amendments we have reviewed have contributed to the huge increase in the number of people in custody pending trial over the same period.[42] We refer to two recent studies.

8.30 In 2004, the NSW Bureau of Crime Statistics and Research (BOCSAR) published a report on the effect of the *Bail Amendment (Repeat Offenders) Act 2002* (NSW).[43] That amendment removed the presumption in favour of bail for people who had committed certain prior offences.[44] In particular, the amendment removed the presumption in favour of bail where a person is charged with an indictable offence and has previously been convicted of one or more indictable offences.[45] In that event, the person's criminal history was also made a relevant consideration when a decision was made whether to grant bail.[46]

8.31 It was found that, in the 18 months following the amendment, there was no significant change in the bail refusal rate for defendants without prior convictions. By contrast, the bail refusal rate for people charged with an indictable offence who had a previous indictable conviction increased by 7.3%[47] and the bail refusal rate for

38. D Weatherburn, M Quinn and G Rich, "Drug Charges, Bail Decisions and Absconding" (1987) 20(2) *Australian and New Zealand Journal of Criminology* 95.
39. NSW, *Parliamentary Debates,* Legislative Assembly, 14 December 1978, 2015.
40. See para 2.4-2.8.
41. See para 2.39.
42. See Ch 4.
43. J Fitzgerald and D Weatherburn, *The Impact of the Bail Amendment (Repeat Offenders) Act 2002,* Crime and Justice Bulletin No 83 (NSW Bureau of Crime Statistics and Research, 2004).
44. *Bail Act 1978* (NSW) s 9B.
45. *Bail Act 1978* (NSW) s 9B(3).
46. *Bail Act 1978* (NSW) s 32(1)(b)(vi); and see para 10.93.
47. J Fitzgerald and D Weatherburn, *The Impact of the Bail Amendment (Repeat Offenders) Act 2002,* Crime and Justice Bulletin No 83 (NSW Bureau of Crime Statistics and Research, 2004) 2.

defendants charged with any offence who had any prior conviction increased by 10.3%.[48] These findings indicate that there was a significant increase in the bail refusal rate for those defendants specifically targeted by the amendment.

8.32 The second study was in 2010, again by BOCSAR.[49] The aim of the study was to consider the effect of the presumptions on the likelihood of bail refusal. It examined 6,103 defendants whose matters were finalised before the Local Court in 2008 and who were refused bail. It found that the risk of bail refusal was 48.6% for defendants subject to an "exceptional circumstances" presumption, 20.9% for defendants subject to a presumption against bail, 29.0% where the presumption was neutral, and 15.1% where there was a presumption in favour.

8.33 The authors then used a logistic regression model to control for a range of matters, including the age, gender and Indigenous status of the defendant, concurrent offences, criminal history, and plea. Once the effect of these matters was removed, it was clear that the presumptions had "a significant impact on the probability of imprisonment".[50] In the "base case" involving a first offender facing a single charge where there is a presumption in favour of bail, the accused had a 2.1% risk of being refused bail. Changing the charge to one involving a neutral presumption (but holding all other factors constant) had the effect of increasing the risk to 5.1%. For charges where there was a presumption against bail the risk was 3.0%, and in "exceptional circumstances" cases, 5.3%.[51]

8.34 There is strong evidence that erosion of the presumption in favour of bail has contributed significantly to the increase in the number of defendants detained before trial.

Other jurisdictions

8.35 The bail legislation of all other Australian States and Territories includes a presumption in favour of release, with a presumption against release in relation to specified cases or a requirement for exceptional circumstances in specified cases or both. However, the offences and the number of offences assigned to one category or another vary considerably from jurisdiction to jurisdiction. When dealing with any one offence, there are considerable differences concerning the burden and standard of persuasion. Demonstrably, there is no universally agreed principle

48. J Fitzgerald and D Weatherburn, *The Impact of the Bail Amendment (Repeat Offenders) Act 2002,* Crime and Justice Bulletin No 83 (NSW Bureau of Crime Statistics and Research, 2004) 3.

49. L Snowball, L Roth and D Weatherburn, *Bail Presumptions and Risk of Bail Refusal: An Analysis of the NSW Bail Act*, Issue Paper No 49 (NSW Bureau of Crime Statistics and Research, 2010).

50. L Snowball, L Roth and D Weatherburn, *Bail Presumptions and Risk of Bail Refusal: An Analysis of the NSW Bail Act*, Issue Paper No 49 (NSW Bureau of Crime Statistics and Research, 2010) 5.

51. L Snowball, L Roth and D Weatherburn, *Bail Presumptions and Risk of Bail Refusal: An Analysis of the NSW Bail Act*, Issue Paper No 49 (NSW Bureau of Crime Statistics and Research, 2010) 6 (table 3). The fact that 'neutral presumption' cases are more likely to result in bail refusal than 'presumption against' cases is notable. It is explained partly by the fact that the neutral presumption cases (including serious sexual offences, cases of serious violence, and domestic violence cases) may involve the risks to particular people or the community in the particular case. The bulk of the 'presumption against' cases are repeat property offences, where the court might assess the risks posed to the community by release as lesser.

behind the assignment of a presumption for or against release or a requirement of exceptional circumstances to any particular offence.

8.36 In Chapter 3 we have discussed Alex Steel's research which examines the many "punitive amendments" to the NSW legislation and compares NSW to other jurisdictions in this regard. The changes to presumptions have resulted in NSW having one of the most restrictive approaches to bail in Australia.[52]

Other reports

8.37 As mentioned above, the Bail Review Committee recommended in 1976 that there should be a presumption in favour of bail in all cases where there was not an automatic right to bail.[53]

8.38 Since then, Australian law reform agencies have consistently supported a presumption in favour of bail when reviewing bail law in their respective jurisdictions. A uniform presumption in favour of bail, except after conviction, has been recommended by the Western Australian Law Reform Commission,[54] the Queensland Law Reform Commission,[55] the Tasmanian Law Reform Institute,[56] and the Victorian Law Reform Commission.[57]

8.39 Law reform agencies charged with reviewing other aspects of the law have recommended a presumption in favour of bail in relation to offences within the ambit of their enquiry. In 2005, this Commission, in a reference relating to young offenders, recommended that s 9B of the *Bail Act* should not apply to young people.[58] In 1997, the Australian Law Reform Commission reviewed the situation of children in relation to legal proceedings. It recommended a presumption in favour of bail for all young people.[59] In 2010, the New South Wales and Australian Law Reform Commissions reported on family violence. They recommended that there should be no presumption against bail on the ground that an alleged crime had occurred in a family violence context.[60]

52. A Steel, "Bail in Australia: legislative introduction and amendment since 1970" (Paper presented at the ANZ Critical Criminology Conference Proceedings, Monash University, 8 and 9 July 2009); see para 3.69.
53. NSW, *Report of the Bail Review Committee*, Parl Paper No 46 (1976).
54. Law Reform Commission of Western Australia, *Bail*, Report No 64 (1979) 89.
55. Queensland Law Reform Commission, *The Bail Act 1980*, Report No 43 (1993) 46.
56. Tasmanian Law Reform Institute, *Offending While on Bail*, Research Paper No 1 (2004) 16.
57. Victorian Law Reform Commission, *Review of the Bail Act*, Final Report (2007) 9.
58. New South Wales Law Reform Commission, *Young Offenders*, Report No 104 (2005) 260 (Recommendation 10.9); Section 9B of the *Bail Act 1978* (NSW) makes an exception to the presumption in favour of bail in certain cases; see para 8.16 of this Report.
59. Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) [18.159]-[18.168], Recommendation 228.
60. Australian Law Reform Commission, *Family Violence – A National Legal Response*, Report No 114 (2010) 420 (Recommendation 10-1).

Submissions and consultations

Criticisms of the scheme as a whole

8.40 In submissions and consultations, the scheme of presumptions, exceptions and exceptional circumstances was described as "ad hoc", "illogical", "convoluted", "complex", "cumbersome" and "difficult to interpret and apply in practice".[61]

8.41 The Chief Magistrate observed that "the grouping of offences into the categories of presumptions has little relationship, if any, to consideration of the discrete circumstances of each accused person and the purpose of determining how to best ensure his or her future attendance at court".[62]

8.42 This view was repeated in a number of other submissions. Legal Aid stated that presumptions "inflate the significance of the type of offence alleged"[63] and the NSW Police Force commented that they "can create artificial distinctions and thereby produce anomalies in their operation".[64] The outcome of applying the existing presumptions to bail decisions was described in one submission as "often unfair" and, in another, "unjust".[65]

8.43 The following examples are taken from submissions.

Example 8.1

Jason, 19, is a young man who grew up in foster care. He had a very limited criminal history, apart from a serious assault for which he received a suspended sentence. While on the suspended sentence, Jason was charged with goods in custody after police found him in possession of several pairs of expensive-looking running shoes. These shoes were not in fact stolen, as the police suspected, but were cheap imitations of designer brand shoes which Jason was selling on behalf of his employer. Jason was refused bail by both the police and the Local Court. Although the alleged offence was trivial, there was no presumption in favour of bail because he was on a suspended sentence.[66]

61. Children's Court of NSW, *Submission BA33*, 3; NSW Police Force, *Submission BA39*, 6; Law Society of NSW, *Submission BA5*, 3; Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 8; G Henson, *Submission BA2*, 2; Legal Aid NSW, *Submission BA17*, 4; NSW, Office of the Director of Public Prosecutions, *Submission BA21*, 3; Jumbunna Indigenous House of Learning, *Submission BA37*, 15.
62. G Henson, *Submission BA2*, 2.
63. Legal Aid NSW, *Submission BA17*, 4.
64. NSW Police Force, *Submission BA39*, 13.
65. Shopfront Youth Legal Centre, *Submission* BA23, 4; Community Justice Coalition, *Submission BA31*, 5.
66. Shopfront Youth Legal Centre, *Submission* BA23, 5. The Shopfront notes in relation to this case study that: "[a]lthough s 32(1)(a)(iii) of the *Bail Act* states that the likelihood of a custodial sentence is only relevant insofar as it affects the likelihood of the accused failing to appear at court, both the police and the court appear to have gone beyond this and taken the view that 'it looks like you're going to jail anyway, so you might as well stay there'". The case study goes on to note Jason was convicted of copyright related charges and the Shopfront conclude the case

Example 8.2

A client named Sarah recently pleaded not guilty to a charge of wounding with intent for stabbing her ex-partner… The client had a history of mental illness. The magistrate determining her bail application refused bail. In making this decision, the magistrate stated that he considered it appropriate to grant her bail to receive treatment; however, because of the requirement to show exceptional circumstances [she had a previous conviction for a serious personal violence offence], he felt compelled to refuse her bail.[67]

8.44 The Office of the Director of Public Prosecutions (ODPP) highlighted problems arising from the operation of s 9B(3) which removes the presumption in favour of bail where the person is charged with an indictable offence and has previously been convicted of one or more indictable offences:[68]

> The impact of section 9B(3) in particular is such that any person convicted at any time of an indictable offence of whatever severity, who is charged with an indictable offence of whatever severity, loses their entitlement to bail. This has achieved the absurd result, that a person for example charged with shoplifting who decades earlier as a first offender was convicted at the Children's Court for passing a bad cheque is in no different a position as far as the presumption is concerned, to that of a person charged with bank robbery and who has spent their lifetime committing crime.[69]

8.45 Two submissions specifically attributed the high remand rate to the presumptions.[70] The NSW Bar Association submitted that the large number of offences that attract a presumption against bail are "probably the single biggest reason why there are so many people in remand custody".[71]

Substantial support for a uniform presumption in favour of bail

8.46 The overwhelming majority of submissions advocated the removal of the existing scheme of presumptions, exceptions and special circumstances, and its replacement with a uniform presumption in favour of release in some form.

8.47 Other submissions supported a risk management model. The Community Justice Coalition supported "a universal presumption in favour of bail with the onus on the prosecution to rebut that presumption based on a modified set of risk criteria".[72] The ODPP proposed that:

> bail should be granted in all other cases [that is, in all cases other than 'right to bail'], unless the prosecution case on bail is such that the risk of flight or the risk to the community (including any particular person or persons) of further

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study by commenting, "[h]ad he not been initially refused bail, we think he probably would not have received a full-time custodial sentence at all".

67. Legal Aid NSW, *Submission BA17*, 6.
68. Discussed in para 8.16.
69. NSW, Office of the Director of Public Prosecutions, *Submission BA21*, 2.
70. D Shoebridge, *Submission BA19*, 4; NSW Bar Association, *Submission BA27*, 2.
71. NSW Bar Association, *Submission BA27*, 2.
72. Community Justice Coalition, *Submission BA31*, 5.

> offending either taken together or alone are such as to outweigh the accused's general right to liberty.[73]

8.48 Legal Aid supported an "unacceptable risk test" modelled on that proposed by the Victorian Law Reform Commission.[74] The Children's Court also supported[75] the 'unacceptable risk test' contained in the *Bail Act 1977* (Vic).[76] The Bar Association called for "a general presumption in favour of granting bail, unless the statutory considerations tip the balance in favour of refusing bail because of unacceptable risks of non-attendance and/or unacceptable risks to the community's safety and welfare".[77]

8.49 Other submissions supported a uniform presumption in favour of release which did not specify "unacceptable risk" as the basis for displacing the presumption. These included submissions by the NSW Law Society, Frank Mersal and the Intellectual Disability Rights Service. These respondents directed attention to considerations such as appear in s 32 for the basis on which the presumption could be displaced.[78]

8.50 We will discuss the choice between a Victorian style risk management model and a justification model (where detention must be justified having regard to specified considerations) in Chapter 10. Both models include a presumption in favour of release.

8.51 Juvenile Justice NSW recommended that "the *Bail Act* should have a presumption in favour of bail for all children and young people, with the possible exception of children and young people accused of serious children's indictable offences [which, in their view,] should incur a 'neutral' presumption".[79] However, Juvenile Justice NSW also stated that the *Bail Act* should recognise the *UN Convention on the Rights of the Child*,[80] including that the "arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time".[81] Detention as a last resort should be seen as a presumption in favour of bail, as it requires the person to be released unless there are strong reasons to the contrary.

8.52 The Public Interest Law Clearing House recommended that young people charged with summary offences should have a right to bail.[82] That went further than a presumption in favour of bail for young people in that class of case.[83]

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73. NSW, Office of the Director of Public Prosecutions, *Submission BA21*, 4.
74. Legal Aid NSW, *Submission BA17*, 11.
75. Children's Court of NSW, *Submission BA33*, 4.
76. *Bail Act 1977* (Vic) s 4(2)(d)(i).
77. NSW Bar Association, *Submission BA27*, 2.
78. Law Society of NSW, *Submission BA5*, 2; F Mersal, *Submission BA10*, 4; Intellectual Disability Rights Service, *Submission BA30*, 2.
79. NSW, Juvenile Justice, *Submission BA35*, 9.
80. *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
81. NSW, Juvenile Justice, *Submission BA35*, 7.
82. Public Interest Law Clearing House, *Submission BA12*, 7.
83. It may be noted that we have recommended an entitlement to bail without conditions in relation to both adults and children where the person is charged with a minor offence. See Rec 7.1.

8.53 The Department of Family and Community Services was particularly concerned with family violence offences against women and children. For this reason, the Department supported the retention of domestic violence offences as an exception to the presumption in favour of bail, and the retention of the requirement for exceptional circumstances in the case of serious personal violence offences allegedly committed by a repeat offender.[84] We agree that the protection of women and children from domestic violence is an important issue, and relevant to bail decision-making. We return to the issue of protection for victims of domestic violence in our discussion of the criteria to apply in bail decision-making.[85] We believe our proposed solution meets the concern raised.

8.54 The International Commission of Jurists canvassed various options, in its submission concerning presumptions for and against release[86] but it supported the recommendation of the Victorian Law Reform Commission that there should be no presumption against bail for any offence.[87] In consultation, it was confirmed that this organisation supported a uniform presumption in favour of bail.

The law enforcement view

8.55 The NSW Police Association advocated retention of the presumptions against bail in the current legislation.[88]

8.56 The NSW Police Force presented a detailed submission concerning the scheme of the present legislation. There were three major elements in the submission:

- The current provisions are convoluted.
- They should be replaced with a risk management approach.
- If this approach is not taken, the existing scheme of presumptions should be retained and modified.

8.57 The submission from NSW Police Force put forward two options for reform: a risk management approach without presumptions of any kind, and retention of the existing presumptions with modifications. In subsequent correspondence, the NSW Police Force affirmed support for the retention of presumptions.[89] It is useful, however, to set out the detail of the two options proposed in the NSW Police Force submission.

84. *Bail Act 1978* (NSW) s 9D; NSW, Department of Family and Community Services, *Submission BA24*, 6.
85. See para 10.63-67.
86. International Commission of Jurists Australia, *Submission BA22*, 3.
87. International Commission of Jurists Australia, *Submission BA22*, 7; Victorian Law Reform Commission, *Review of the Bail Act,* Final Report (2007) 9 (Recommendation 12).
88. Police Association of NSW, *Submission BA38*, 2.
89. Letter from Assistant Commissioner Mennilli to Chairperson, Law Reform Commission, 29 February 2012.

Risk management approach

8.58 The first option discussed in the NSW Police Force submission is a risk management approach, which would replace the current right to bail and presumptions with a framework for assessing the risk presented by a person charged with an offence. The following formulation of the approach was proposed:[90]

> 1. **Object**.
>
> The object of this Act is to provide for a pre-trial process when there is question as to the control or deprivation of the accused person's liberty where the interests of the accused person are appropriately weighed against the interests of the community consistently in light of the strength of the prosecution case and likelihood of a custodial sentence.[91]
>
> [Proposed subsidiary considerations relating to the interests of the person and the interests of the community are listed.]
>
> 2. **Inclusive indicia** of the Interests of the Accused Person and Interests of the Community.
>
> 3. **Risk Assessment Process** - looks at the likelihood and consequence of something relevant to the subsidiary considerations happening and weighs these against the strength of the prosecution case and likelihood of a custodial sentence.
>
> 4. **Risk Management Process** - looks to control or eliminate the risk by:
>
> - Bail refusal - high risk & medium risk where conditions cannot control or eliminate the risk
> - Conditional Bail - medium risk & low risk where unconditional bail cannot control or eliminate the risk
> - Unconditional Bail - low risk
> - Bail dispensed with - no risk.

8.59 In later correspondence the NSW Police Force proposed that presumptions should apply to risk categories.[92] This appears broadly consistent with point 4 above which assigns certain bail outcome to certain risk categories, unless other factors apply.

Retain and modify existing scheme of presumptions

8.60 As a second option, the NSW Police Force advanced reasons for retaining the existing scheme of presumptions. The reasons were, first, to advance consistency in decision making and, secondly, to enhance the efficiency of decision making. Consistency was advanced on the basis of doing justice as between one case

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90. NSW Police Force, *Submission BA39*, Appendix, p 1 The risk management approach advocated by the Police Force in place of the current provisions is to be distinguished from the Victorian-style "unacceptable risk" model, discussed elsewhere in this report (para 10.7), which incorporates a scheme of presumptions and which also imports a range of normative considerations under the rubric of "unacceptable".
91. NSW Police Force, *Submission BA3*, 4.
92. Letter from Assistant Commissioner Mennilli to Chairperson, Law Reform Commission, 24 February 2012.

relative to another. Efficiency in the decision making process, it was said, was advanced by a saving in time.

8.61 The retention of the present scheme of presumptions was supported on the basis that it was appropriate to assign particular offences to a particular kind of presumption having regard to the nature of the offence.

8.62 Modifications were proposed to the present scheme of right to bail and presumptions. The proposed modified scheme was as follows:[93]

> **Right to Bail**
> All fine only offences unless the same offence is alleged to have been committed whilst on bail, subject to the imposition of conditions that the accused person can meet in line with the stated Objective and the provision of identification suitable to identify the accused person to the court.
>
> **Presumption in favour of bail**
> All offences where, notwithstanding the maximum penalty available is imprisonment, sentencing statistics show that a sentence of imprisonment is not likely;
>
> All fine only offences alleged to have been committed when the accused person is at liberty on bail for the same fine-only offence.
>
> **Neutral Presumption**
> All offences
>
> (i) likely to attract a sentence of imprisonment on conviction according to the sentencing statistics;
>
> (ii) that carry a standard non-parole period or
>
> (iii) where legislation or guideline judgement provide for imprisonment to be considered divergent to s 5(1) of the *Crimes (Sentencing Procedure) Act 1999;*
>
> (iv) that carry a term of imprisonment as a maximum sentence, alleged to have been committed whilst the accused person was at liberty on bail, on parole, subject to a bond, subject to an intervention program order, serving a sentence but not in custody, or allegedly committed in custody.
>
> **Presumption against bail**
> Current categories remain.
>
> **Bail not to be granted unless exceptional circumstances justify the grant of bail**
> Current categories remain.

Evaluation of the arguments

8.63 We have given close consideration to the arguments put forward in submissions on these issues. There is a strong, close to consensus view, that the introduction of the current scheme of presumptions into the *Bail Act* has created a complex regime that

93. NSW Police Force, *Submission BA39,* 14-15.

is difficult to apply and which fails to take account of the individual circumstances of the cases coming before the courts. The argument from principle is that such a scheme of presumptions - with its exceptions to the presumption in favour of bail, its presumption against bail and the requirement of special circumstances – is in conflict with the presumption of innocence and the other principles set out in chapter 2 of this report.

8.64 The evidence clearly shows that the current scheme has resulted in additional people being detained pending trial. There is evidence to suggest this effect has reduced absconding rates. There is no similar evidence, one way or the other, in relation to the prevention of crime. The overall cost in financial terms and in terms of the personal effect on people imprisoned while proceedings are pending has not been assessed against any possible benefits in terms of community safety.

8.65 The NSW Police Force supports the retention of presumptions. The submission argues that presumptions promote consistency.[94] Obviously enough, the current presumptions promote consistency to some extent, creating greater predictability of outcome in relation to particular offences and defendants with a particular kind of criminal record. However, the effect of a presumption should not be overrated. It sets the starting point for the decision making process but, under the current legislation and under any new *Bail Act*, the authority is and would be required to have regard to a range of mandatory considerations relating to the circumstances of the case in making its decision.

8.66 Consistency is not an overriding consideration. In our view, justice in the circumstances of the case – individualised justice – is more important than consistency based on any particular criterion. The assignment of a presumption to a category of offence offends against the notion of individualised justice. It constitutes an approach that is too blunt as it overlooks the fact that the circumstances that constitute an offence that is the subject of the initial charge can vary substantially in their objective seriousness. Moreover it is often the case that the offence which the offender faces at trial differs from the initial charge and may well be one for which there is a lesser presumption.

8.67 The NSW Police Force submission advances a second argument, that a scheme of presumptions promotes efficiency by saving court time. The example given is that where there is a presumption against bail, the judicial officer may indicate to the prosecutor that no verbal submissions are required.[95] However, most submissions made to us advanced the contrary argument, that decision-making efficiency is undermined by a complex scheme of presumptions of the kind that exists in the current legislation.

8.68 Having considered these competing views, we cannot support retention of the current scheme of presumptions, irrespective of whether it is modified in the way proposed.

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94. NSW Police Force, *Submission BA39*, 6-7.

95. NSW Police Force, *Submission BA39*, 7.

8.69 As we have recorded, the NSW Police Force also put forward the option of a risk management approach.[96]

8.70 A risk management approach has the advantage of requiring a clear and individualised assessment of the risks presented by releasing a person against the consideration of justice and the interests of the individual. However, there is a level of complexity in the risk management model that is proposed in the Police Force submission, and it is not clear to us how the interests of the person (which form part of the proposed scheme) are to be brought to account in the decision-making process. We are not convinced that applying presumptions to a risk category, and then considering other factors, is a process that would be practical or straightforward for a court to undertake.

8.71 More particularly, the assessment of risk by reference to likelihood and consequence is already a feature of the current legislation and of the scheme that we propose. The matters to be taken into consideration in deciding whether to grant bail include:

- the probability that the person will not appear in court;
- the protection of any particular person in need of protection;
- the likelihood of the person interfering with evidence, witnesses or jurors; and
- whether it is likely that the person will commit any serious offence.

The weight to be given to each of these matters necessarily involves both the degree of probability that the event will occur and the degree of seriousness of the consequences if the event occurs. As will appear, our recommendations do not depart radically from this aspect of the current legislation. In the result, we consider that our approach is consistent with the police risk management approach, but simpler and more practical for the courts to apply.

8.72 The removal of any presumption in favour of bail would be a significant departure from the common law, which embodied a uniform presumption in favour of bail, and from the current legislation which, despite the amendments made over the years, retains a presumption in favour of bail as the default position. It would also be at odds with the basic tenets of the criminal justice system as a whole discussed earlier in this report, including the primacy afforded to the value of personal freedom and principles such as the presumption of innocence.

8.73 We understand the NSW Police Force to be concerned that a uniform presumption in favour of bail would overwhelm all other factors and result in people who should be detained being released. We do not think this would be the case. It would do no more than require the authority to be satisfied that detention or the imposition of a condition or a conduct requirement was justified, having regard to the considerations specified in the statute.

96. NSW Police Force, *Submission BA39*, appendix A.

Conclusion

8.74 The scheme of presumptions, exceptions and exceptional circumstances in the current legislation should be abolished. It is an unwarranted imposition on the discretion of police and the courts. It throws the emphasis onto the category of the offence with which the person is charged or onto other prescribed elements in the person's criminal history, instead of a balanced assessment of all the considerations which bear rationally on the question of detention or release. It is voluminous, unwieldy, hugely complex and involves too blunt an approach. The results are frequently anomalous and unjust.

8.75 We strongly recommend a uniform presumption in favour of bail (with the sole exception of bail pending appeal against conviction or sentence[97]). That would accord with basic legal principles and concepts enshrined in the criminal justice system, particularly the value of personal liberty and its corollary, the presumption of innocence. The submissions we have received provide overwhelming support for that approach.

8.76 In recommending a presumption in favour of bail, we do not envisage that people who present a serious risk of absconding, committing serious crime, or threatening another's safety should be released. In Chapter 10, we outline the issues that a bail authority must consider and propose a regime which we consider meets such concerns directly and simply.

Recommendation 8.1: Uniform presumption in favour of release

In a new *Bail Act*, the scheme of presumptions, exceptions and exceptional circumstances in the current legislation should be replaced with a uniform presumption in favour of release applicable to all cases except those covered by an entitlement to release and appeal cases.

97. See Ch 9.

9. Release pending appeal

Rights of appeal **125**
Matters prosecuted in the Local Court 126
Matters prosecuted in the District Court or the Supreme Court 127
Review of conviction and retrials 128
Complexity of the appellate framework 128
Procedures applicable to bail pending appeal **129**
Limitations on bail pending appeal **130**
Appeal from convictions and sentences on indictment 130
Is reform needed? **133**
Section 30AA threshold **134**
Bail in respect of appeals from the Local Court **135**
Perfecting sentences after appeals **138**
Applications to the Supreme Court for judicial review 138
Appeals to the Court of Criminal Appeal and High Court 139
Appeals from the Local Court to the District Court and Supreme Court 140
Local Court review of Local Court decisions 141
Conclusion 142

9.1 In this chapter we consider the circumstances in which a decision to release or detain a defendant may arise for consideration, where an appeal has been lodged by a defendant or by a prosecutor.

9.2 The question of bail may arise at the instance of a person who has been committed into custody after trial, and who seeks release on bail pending an appeal; or at the instance of a prosecuting authority which seeks to have that person placed into custody until the outcome of its appeal against a non-custodial sentence or, less frequently, against an acquittal. In some instances the lodging of an appeal will operate as a stay of execution of the sentence, although in relation to people in custody this will depend upon them being given bail.[1]

Rights of appeal

9.3 The circumstances in which an appeal lies against conviction or sentence differ according to the court in which the case was first determined. In this section we are only concerned with matters brought in the Local Court, District Court and Supreme Court, since they constitute the principal criminal trial and appellate courts.

9.4 It is against the complex background outlined in this section, and in the light of the current authorities and reforms elsewhere, that we give consideration, later in this chapter, to the issues that arise in relation to release pending an appeal.

1. *Crimes (Appeal and Review) Act 2001* (NSW) s 63(2)(c).

Matters prosecuted in the Local Court

9.5 Where the case is prosecuted in the Local Court, appeal lies as follows:

- to the **Local Court** by way of an application for annulment of a conviction or sentence by the prosecutor or by the defendant (but only where the defendant did not appear when the conviction was made or the sentence imposed);[2]
- to the **District Court** by the defendant:
  - as of right, against conviction or sentence or both, or against the refusal of an application to annul a conviction or sentence;[3] or
  - by leave of the District Court, against a conviction made in the defendant's absence or following a plea of guilty;[4]
- to the **District Court** by the Director of Public Prosecutions (DPP), as of right, against a sentence imposed in proceedings for:
  - an indictable offence that has been dealt with summarily,
  - a prescribed summary offence, or
  - a summary offence that has been prosecuted by or on behalf of the DPP;[5]
- to the **Supreme Court** by the defendant:
  - as of right, from a conviction or sentence, only on a ground that involves a question of law,[6] or
  - by leave of the Supreme Court, where the ground involves a question of fact or mixed fact and law;[7]
- to the **Supreme Court** by the prosecutor, as of right, against:
  - a sentence imposed by the Local Court in summary proceedings, or
  - a stay by the Local Court of summary proceedings, or
  - an order of the Local Court dismissing summary proceedings,

  but only on a ground that involves a question of law.[8]

9.6 In some circumstances a judge of the District Court can submit, to the Court of Criminal Appeal, for determination any question of law arising in an appeal to the District Court in its criminal jurisdiction, either before or after disposition of the

2. *Crimes (Appeal and Review) Act 2001* (NSW) s 4(1).
3. *Crimes (Appeal and Review) Act 2001* (NSW) s 11, s 11A.
4. *Crimes (Appeal and Review) Act 2001* (NSW) s 12(1).
5. *Crimes (Appeal and Review) Act 2001* (NSW) s 23(1).
6. *Crimes (Appeal and Review) Act 2001* (NSW) s 52(1).
7. *Crimes (Appeal and Review) Act 2001* (NSW) s 53(1).
8. *Crimes (Appeal and Review) Act 2001* (NSW) s 56(1).

appeal in that Court.[9] The decisions in relation to a stated case can be subject to appeal to the High Court.[10]

9.7 A Supreme Court judge can review decisions of the District Court in relation to appeals brought from the Local Court as part of the Supreme Court's supervisory jurisdiction,[11] but the review is limited to questions of whether the District Court has committed a jurisdictional error in dealing with the Local Court appeal.[12] Appeal then lies from the single judge of the Supreme Court to the Court of Appeal.[13]

9.8 Decisions of the Supreme Court on appeals from the Local Court can be reviewed by the Court of Appeal, subject to a grant of leave.[14]

Matters prosecuted in the District Court or the Supreme Court

9.9 Where the case is prosecuted in the District Court or Supreme Court, then appeal lies to the **Court of Criminal Appeal** as follows:

- by a person convicted on indictment:
  - against the conviction, as of right, on a ground that involves a question of law alone, or otherwise with the leave of the court, or upon the certificate of the trial judge, and
  - against the sentence that was passed, by leave;[15]
- by a person:
  - convicted by the Supreme Court in its summary jurisdiction, or
  - convicted of a related summary offence in a criminal case dealt with by the Supreme Court or District Court,

  as of right, against the conviction (and any sentence imposed);[16]
- by the Attorney General or the DPP, as of right, against:
  - any sentence imposed in either of those trial courts,[17] or
  - against any sentence imposed in either of those courts in respect of related summary offences;[18]

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9. *Criminal Appeal Act 1912* (NSW) s 5B(1).
10. *Judiciary Act 1903* (Cth) s 35. See, eg, *Taikato v The Queen* (1996) 186 CLR 454.
11. *Supreme Court Act 1970* (NSW) s 69.
12. While the supervisory jurisdiction may generally include errors of law appearing on the face of the record, *District Court Act 1973* (NSW) s 176 has been taken as limiting the power of the Supreme Court to intervening in cases of jurisdictional error: *McKellar v Director of Public Prosecutions (NSW)* [2011] NSWCA 91 [10].
13. As was the case in *McKellar v Director of Public Prosecutions (NSW)* [2011] NSWCA 91.
14. *Supreme Court Act 1970* (NSW) s 101(2)(h). See, eg, *Eades v Director of Public Prosecutions (NSW)* [2010] NSWCA 241.
15. *Criminal Appeal Act 1912* (NSW) s 5(1).
16. *Criminal Appeal Act 1912* (NSW) s 5AA(1), s 5AD(1).
17. *Criminal Appeal Act 1912* (NSW) s 5D(1), s 5DA(1).

- by the Attorney General or the DPP, as of right, against an acquittal:
  - by a jury at the direction of the trial judge, or
  - by a judge of the Supreme Court or District Court in proceedings for an indictable offence tried without a jury, or
  - by the Supreme Court in its summary jurisdiction in any proceedings in which the Crown was a party,

  in each case on a ground that involves a question of law alone.[19]

9.10 In some circumstances, after trial and conviction on indictment, the trial judge can state a question of law, that arises in respect of the trial or conviction, to the Court of Criminal Appeal, which will deal with it as if it were an appeal.[20]

9.11 Additionally there will be cases where either the defendant or prosecutor will seek special leave to bring an appeal from the Court of Criminal Appeal to the High Court of Australia.[21]

Review of conviction and retrials

9.12 Exceptional cases might also arise where it is necessary to consider the release of a person serving a sentence pending a review of a conviction under Part 7 of the *Crimes (Appeal and Review) Act 2001* (NSW).

9.13 Finally, the question of granting or refusing bail may arise where the Court of Criminal Appeal orders a retrial of a person who:

- was previously acquitted of a life sentence offence, and there is fresh and compelling evidence;[22] or
- was previously acquitted of a 15 years or more sentence offence, and the acquittal was tainted.[23]

Complexity of the appellate framework

9.14 It can be seen that there are several potential avenues for appeal in relation to proceedings heard in the Local Court, District Court and Supreme Court, and in relation to appeals from decisions of the Court of Criminal Appeal. The complexity of this appellate framework is not assisted by the fact that it is governed by two separate Acts, namely the *Crimes (Appeal and Review) Act 2001* (NSW) and the *Criminal Appeal Act 1912* (NSW), and that some appeals lie as of right, and others by leave or upon the issue of a certificate by the trial judge that the case is one that

18. *Criminal Appeal Act 1912* (NSW) s 5DB(1).
19. *Crimes (Appeal and Review) Act 2001* (NSW) s 107(2).
20. *Criminal Appeal Act 1912* (NSW) s 5A.
21. *Judiciary Act 1903* (Cth) s 35.
22. *Crimes (Appeal and Review) Act 2001* (NSW) s 100(1).
23. *Crimes (Appeal and Review) Act 2001* (NSW) s 101(1).

is fit for an appeal against conviction. Nor is it assisted by the various further avenues of appeal outlined above.

9.15 Added to the complexity is the circumstance that while the convicted and sentenced person can appeal against both conviction and sentence, and while for the most part, the right of the prosecution is confined to an appeal against the leniency of the sentence, there are some circumstances where the prosecution can also appeal against an acquittal, or a stay of proceedings, or the quashing of an indictment.

9.16 Moreover separate provisions apply to appeals in respect of convictions or sentences imposed by the Drug Court, the Land and Environment Court, and the Industrial Court, as well as in relation to pronouncements and sentences under the habitual criminal provisions.[24]

Procedures applicable to bail pending appeal

9.17 The *Crimes (Appeal and Review) Act 2001* (NSW) and the *Criminal Appeal Act 1912* (NSW) each specifically provide that the *Bail Act* prevails to the extent of any inconsistency between it and those statutes.[25]

9.18 As a matter of practice, bail applications following conviction and sentence in the Local Court, pending an appeal from that court, can be dealt with by a magistrate after an oral application where the appellant is present before or at the court of conviction; or if the appeal is lodged after the date of conviction by a magistrate after a bail application in writing. If the applicant is refused bail or cannot meet the conditions of any appeal bail, a bail review application can be made and determined in the Local Court at any time prior to, but not after, appearance in the District Court, or in the Supreme Court,[26] whichever is the court to which the appeal lies. After appearance, a bail application can be heard in the District Court[27] or in the Supreme Court.[28]

9.19 Where the appeal is brought from the District Court or Supreme Court to the Court of Criminal Appeal, then appeal bail can be granted by the Supreme Court,[29] or by the Court of Criminal Appeal.[30] The Court of Criminal Appeal can also grant bail where an appeal from that Court is pending in the High Court.[31] This does not exclude or limit the power of the High Court itself to grant bail.

24. See, eg, *Criminal Appeal Act 1912* (NSW) s 5AB,s 5AF,s 5AG,s 5BA,s 5DC,s 5E.
25. *Crimes (Appeal and Review) Act 2001* (NSW) s 117; *Criminal Appeal Act 1912* (NSW) s 29.
26. *Bail Act 1978* (NSW) s 24(1)(b).
27. *Bail Act 1978* (NSW) s 26(1)(c).
28. *Bail Act 1978* (NSW) s 28.
29. *Bail Act 1978* (NSW) s 28.
30. *Bail Act 1978* (NSW) s 30.
31. *Bail Act 1978* (NSW) s 30(e).

Limitations on bail pending appeal

Appeal from convictions and sentences on indictment

9.20 Bail, in the case of an appeal to the Court of Criminal Appeal from a conviction on indictment or sentence imposed in the District Court or Supreme Court, is subject to the limitation imposed by s 30AA of the *Bail Act*. It provides that bail is not to be granted "unless it is established that special or exceptional circumstances exist justifying [its grant]". An application for bail in such a case can be heard by the Court of Criminal Appeal,[32] or by a single judge of the Supreme Court.[33]

9.21 Where bail has been refused in the Supreme Court, then a fresh application can be made to the Court of Criminal Appeal. It will similarly be subject to the s 30AA limitation, and is dealt with as a fresh application and not as "a kind of indirect appeal".[34]

9.22 Where an appeal, or application for leave to appeal, is pending in the High Court, then, as was observed in *Chamberlain v The Queen (No 1)*,[35] the High Court can grant bail in its inherent jurisdiction "in order to preserve from futility the exercise of the Court's jurisdiction to grant special leave to appeal and to allow an appeal thereafter".[36]

9.23 The High Court has itself adopted the common law test that has been given statutory force in s 30AA of the *Bail Act* requiring the demonstration of exceptional circumstances.[37]

9.24 The High Court has however applied a test of greater stringency when the bail application is made before special leave is granted. Although bail is rarely granted at the leave stage there have been occasions where that has occurred.[38]

9.25 Section 30AA was added to the *Bail Act* in 1987 in response to concerns expressed by the Court of Criminal Appeal and otherwise arising from the decision of the Court in *R v Hilton*.[39] It was there held, in substance, that the *Bail Act* constituted an exclusive codification of the law;[40] and that the Act did not "expressly import into the

32. Pursuant to *Bail Act 1978* (NSW) s 30.
33. *Bail Act 1978* (NSW) s 28 and see *DPP (Cth) v Cassaniti* [2006] NSWCCA 335 [13], [17]-[18]; *Potier v The Queen* [2011] NSWCCA 204.
34. *R v Hardy* (Unreported, NSWCCA, 17 June 1996).
35. *Chamberlain v The Queen (No 1)* (1983) 153 CLR 514.
36. More recently, it has been held that the power to grant bail should be understood as involving an "incidental power" to the inherent jurisdiction which the Court has to stay proceedings to protect its appellate function, rather than as an exercise of its inherent power – *United Mexican States v Cabal* (2001) 209 CLR 165, 180-181.
37. *R v Velevski* (2000) 117 A Crim R 30 [21]; *Marotta v The Queen* (1999) 73 ALJR 265 [15].
38. *Sinanovic v The Queen (No 1)* (2001) 122 A Crim R 524 [11].
39. *R v Hilton* (1987) 7 NSWLR 745.
40. *R v Hilton* (1987) 7 NSWLR 745 (Street CJ) and 751 (Hunt J); and see *R v Velevski* (2000) 117 A Crim R 445 [9].

grant of bail to appellants the common law requirement of establishing the presence of special or exceptional circumstances".[41]

9.26 As the Court observed in *R v Hilton* the common law requirement that an appellant applying for bail establish the presence of special or exceptional circumstances, was a long-standing principle. In *Chamberlain v The Queen (No 1)*, Justice Brennan explained:

> To suspend or defer the sentence before an appeal is heard in such a case is to invest the verdict of the jury with a provisional quality, as though it should take effect only after the channels of appeal have been exhausted. But the jury is the tribunal constituted to determine whether an accused should be convicted or acquitted, and its verdict takes effect immediately. In a serious case, where the prisoner's custodial sentence depends upon a jury's verdict (as it does when there is a conviction for murder and there is no discretion as to sentence) an application for bail before the verdict is set aside is in substance an application to suspend the effect of the verdict. To grant bail in such a case is to whittle away the finality of the jury's finding and to treat the verdict merely as a step in the process of appeal. The central feature in the administration of criminal justice is the jury, and it is a mistake to regard the effect of its verdict as contingent upon confirmation by an appellate court.[42]

9.27 Additional reasons for the common law approach have been identified by the authorities, including:

- The invidious position in which a court can be placed where it considers it necessary to dismiss an appeal having the effect of returning to prison a person whose circumstances may have changed during the period of liberty on bail.
- The risk of the availability of bail leading to a proliferation of unmeritorious appeals.[43]
- The public interest in having a convicted person serve his or her sentence as soon as practicable.
- The risk of respect for the judicial system being undermined where a recently sentenced person is seen to be walking free.[44]

9.28 Similar requirements for the demonstration of special or exceptional circumstances, in support of an application for release pending an appeal, exist in other Australian States or Territories, either by statutory force or by judicial decisions.[45]

9.29 There has been a degree of consistency in relation to the matters to be taken into account in determining whether special or exceptional circumstances exist, either standing alone or in conjunction with other matters. The primary factors potentially requiring consideration include whether or not:

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41. *R v Hilton* (1987) 7 NSWLR 745, 748 (Street CJ).
42. *Chamberlain v The Queen (No 1)* (1983) 153 CLR 514, 519-520.
43. *R v Giordano* (1982) 31 SASR 241, 242 cited in *R v Hilton* (1987) 7 NSWLR 745.
44. *Ex parte Maher* [1986] 1 QdR 303, 310 (Thomas J), cited with approval by the High Court in *United Mexican States v Cabal* (2001) 209 CLR 165, 181.
45. *Bail Act* (NT) 23A; *Bail Act 1992* (ACT) s 9E; *Bail Act 1982* (WA) sch 1 pt C cl 4A; *Re Clarkson* [1986] VR 583; *R v Collins* (1986) 41 SASR 208; *Ex Parte Maher* [1986] 1 QdR 303.

- the sentence will have been wholly or substantially served pending any application for leave or special leave to appeal, the listing of the appeal for hearing, or its determination; and
- the application or appeal has sufficiently strong prospects of success.

9.30 Some differences have emerged, for example in relation to whether the relevant portion of the sentence that is to be taken into account is the non-parole period[46] or the full term of the sentence.[47]

9.31 Similarly the prospects of success that need to be demonstrated in relation to the applicant/appellant's case have been expressed in various ways, including for example that it is one which amounts to a "very strong case"; or, particularly where this is the only basis for bail, that the appeal is "most likely to succeed",[48] or is one that has "extraordinarily high prospects of success" or "can be seen without detailed argument to be certain to succeed".[49]

9.32 In general it has been accepted that more than an "arguable" or "fairly arguable" case is required.[50]

9.33 Similarly it is established that the fact that special leave to appeal to the High Court has been granted, is not of itself, sufficient to establish special or exceptional circumstances,[51] although it can be weighed in the balance.[52]

9.34 The authorities have accepted that matters other than the prospects of success, or the time served before the appeal is heard, can be taken into account since the expression "special or exceptional circumstances" is not circumscribed by reference to those matters alone.[53]

9.35 While it is only likely to be a rare case that personal or family hardships will justify a grant of bail, they may tip the balance, if that hardship is particularly unusual,[54] or if there are other compelling circumstances present. It has been held that a relevant circumstance includes administrative delay in providing the record of proceedings that is required for the appeal.[55]

9.36 The demonstration of special or exceptional circumstances will not of itself suffice. The applicant will still need to make out a case by reference to the s 32 considerations.

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46. *United Mexican States v Cabal* (2001) 209 CLR 165; *Marotta v The Queen* (1999) 73 ALJR 265 [18]; *R v Antoun* [2005] NSWCCA 270 [10]; *R v Zoudi* (2006) 14 VR 580; *R v Velevski* (2000) 117 A Crim R 30 [33].
47. *Chew v The Queen* (1991) 66 ALJR 209, 210 and *Chew v The Queen (No 2)* (1991) 66 ALJR 221, 222.
48. *R v Wilson* (1994) 34 NSWLR 1, 6 (Kirby P).
49. *R v Wilson* (1994) 34 NSWLR 1, 7 (Hunt CJ at CL).
50. *R v Clarkson* [1986] VR 583, 586; *R v Wilson* (1994) 34 NSWLR 1, 6.
51. *R v Velevski* (2000) 117 A Crim R 30 [22].
52. *Parsons v The Queen* (1998) 72 ALJR 1325 [3]; *Marotta v The Queen* (1999) 73 ALJR 265 [12] and *Potier v The Queen* [2011] NSWCCA 204 [25]-[27].
53. *R v Antoun* [2005] NSWCCA 270 [14]-[15].
54. See, eg, *R v Southgate* (1960) 78 WN (NSW) 44.
55. *R v Greenham* (1998) 103 A Crim R 185.

9.37 Notwithstanding the potential hardship and injustice that may be occasioned in a case where an appeal against conviction or sentence succeeds, and the appellant is belatedly released from a custodial sentence, the balance currently rests heavily against the grant of appeal bail in respect of convictions and sentences on indictment. That is the case even though it will not be possible to restore to a successful appellant any time that he or she has spent in unwarranted custody.

Is reform needed?

9.38 Suggestions have been made, from time to time, for the introduction of a less restrictive approach to allowing release pending an appeal than that which is currently permitted.[56]

9.39 Although Australian jurisdictions have uniformly adopted the "special or exceptional circumstances" test, often expressed simply as an "exceptional circumstances" test, other models can be seen in New Zealand and Canada.

9.40 The *Bail Act 2000* (NZ) provides:

> **14. Exercise of discretion when considering bail pending appeal**
>
> (1) If a person is in custody under a conviction and is appealing the conviction or sentence, or both, the court must not grant bail unless it is satisfied on the balance of probabilities that it would be in the interests of justice in the particular case to do so.
>
> (2) The onus is on the appellant to show cause why bail should be granted.
>
> (3) When considering the interests of justice under subsection (1) the court may, instead of the considerations in section 8, take into account the following considerations:
>
> (a) the apparent strength of the grounds of appeal:
>
> (b) the length of the sentence that has been imposed on the appellant:
>
> (c) the likely length of time that will pass before the appeal is heard:
>
> (d) the personal circumstances of the appellant and the appellant's immediate family:
>
> (e) any other consideration that the court considers relevant.[57]

9.41 The s 8 considerations mentioned are those which a court is required to take into account when considering, in accordance with the Act, whether there is just cause for the continued detention of a defendant.

9.42 The Canadian *Criminal Code* permits a judge of the Court of Appeal to release an appellant from custody pending the determination of an appeal, both against

56. For example, J Willis, "Bail Pending Appeal after Conviction and Sentence on Indictment" (2005) 29 *Criminal Law Journal* 296, 312-314.

57. *Bail Act 2000* (NZ) s 14.

conviction and sentence,[58] or against sentence alone.[59] It provides that an order may be made in the case of a conviction appeal if the appellant establishes that:

(a) the appeal or application for leave to appeal is not frivolous;

(b) he will surrender himself into custody in accordance with the terms of the order; and

(c) his detention is not necessary in the public interest.[60]

9.43 In the case of an appeal against sentence, such an order can be made if the appellant establishes that:

(a) the appeal has sufficient merit that, in the circumstances, it would cause unnecessary hardship if he were detained in custody;

(b) he will surrender himself into custody in accordance with the terms of the order; and

(c) his detention is not necessary in the public interest.[61]

9.44 The determination of the public interest involves the consideration, among other things, of the type of crime of which the appellant has been convicted, the confidence of the public in the administration of the criminal justice system, the protection of the community and the personal circumstances of the appellant, as well as the interests of enforceability (that sentences imposed are carried into effect) and of reviewability (that judgments resulting in imprisonment are seen to be correct).[62]

Section 30AA threshold

9.45 We were not informed, in the course of the submissions or consultations, of any concerns in relation to the application of the s 30AA *Bail Act* threshold for the grant of bail, where an appeal has been lodged to the Court of Criminal Appeal in respect of a conviction or sentence on indictment.[63] The "special or exceptional circumstances" test has a lengthy history in the common law and otherwise, and is applied by the High Court, such that good reason would need to be demonstrated for its replacement or amendment. No such reason has been identified

9.46 We are satisfied that the application of s 30AA has not been confined to a sole question dependent on the demonstration of very strong prospects of success. Clearly the Court can take into account a range of considerations, including:

58. *Criminal Code*, RSC 1985, c C-46 s 679(1)(a).
59. *Criminal Code*, RSC 1985, c C-46 s 679(1)(b).
60. *Criminal Code*, RSC 1985, c C-46 s 679(3).
61. *Criminal Code*, RSC 1985, c C-46 s 679(4).
62. *R v Pabani* (1991) 10 CR (4th) 381; *R v Ali* (2008) 77 BCLR (4th) 289; *R v Dang* 2004 ABCA 266.
63. The Office of the Director of Public Prosecutions supported the retention of the concept of exceptional circumstances in respect of matters to which s 30AA applies: NSW, Office of the Director of Public Prosecutions, *Submission BA21*, 5.

- the fact that, after conviction, the presumption of innocence no longer applies;
- the need to maintain a balance between the interest of enforceability of the judgment appealed from and its reviewability; and
- the fact that a refusal of bail can nullify the value of a successful appeal in the case of a short custodial sentence, particularly where it relates to an offence that is not particularly serious, and lead to harm to an appellant and family that cannot be rectified.

9.47 We consider that the current approach to s 30AA of the *Bail Act* does not require reform, although we consider that in any redraft of the Act it would be convenient to confine the test to one that requires the identification of "exceptional circumstances". The word "special" does not seem to have added anything to the test in practical terms.[64]

Recommendation 9.1: Release pending appeal in relation to the Court of Criminal Appeal

A new *Bail Act* should continue to provide that a court should not release a person pending an appeal to the Court of Criminal Appeal or to the High Court unless exceptional circumstances are established.

Bail in respect of appeals from the Local Court

9.48 The position is less clear in relation to the grant of bail pending an appeal from the Local Court to the District Court, or in less common circumstances to the Supreme Court. This issue was addressed in some of the submissions and consultations.

9.49 As has been noted earlier, the Local Court can grant bail in such a case until the appellant appears in the District or Supreme Court. After appearance, the District Court, or the Supreme Court can grant it.

9.50 Section 30AA of the *Bail Act* does not apply to appeals from the Local Court since it does not, in its terms, mention such appeals. It would similarly appear that the pre-existing common law test[65] does not apply since the *Bail Act* constitutes a comprehensive codification of the circumstances in which bail can be granted.[66]

9.51 There is no specific legislative guidance given in relation to the test to be applied, save to the extent that it can be assumed that at least some of the provisions applicable to bail pre-trial will continue to be relevant.

9.52 It is not entirely clear whether the presumptions that currently arise under the *Bail Act* continue to apply, after conviction in the Local Court when an appeal is brought. On one view s 9(2)(b) of the *Bail Act* may mean that, at least in some cases, the

64. See *R v Jacobs* [2008] NSWSC 417 [9].
65. Assuming that it ever applied in the context of bail pending an appeal from the Local Court.
66. *R v Hilton* (1987) 7 NSWLR 745, 749.

fact of conviction would result in the removal of any pre-existing presumption in favour of bail.[67]

9.53 The Office of the Director of Public Prosecutions suggested that consideration should be given to the introduction of a test based on whether or not there was a "likelihood that a pending appeal to the District Court would succeed".[68] It is assumed that a test framed in these terms would not set the bar as high as that required by s 30AA of the *Bail Act*, and would require at least the demonstration of a reasonably arguable case.

9.54 Some other concerns were identified in relation to the practice in the Local Court. For example Legal Aid NSW advised:

> Legal Aid practitioners have reported a concerning trend in some Local Courts for decisions in relation to appeal bail to be made in chambers without the magistrate hearing submissions from any of the parties. The Act should provide that the person in relation to whom the bail decision applies has a right to be present when the bail decision is made and an opportunity to make submissions in relation to that decision. [69]

9.55 We are of the view that it would be desirable to give some further statutory direction in any redrafted *Bail Act*, in relation to release pending an appeal in this context. We acknowledge that proper respect needs to be afforded to decisions of magistrates in criminal cases, and that such decisions should not be regarded as provisional determinations pending confirmation or otherwise on appeal.

9.56 The Local Court is the court in which the vast majority of criminal cases in NSW are determined. Its jurisdiction extends to a wide range of cases including Table 1 and Table 2 indictable offences that are dealt with summarily, many of which attract a maximum penalty of imprisonment in that court of two years. The court is comprised of experienced, professionally qualified judicial officers. Moreover appeals to the District Court against conviction or sentence are determined by way of a rehearing of the evidence given in the original Local Court proceedings,[70] and do not constitute a hearing *de novo*. Appeals to the Supreme Court based on questions of law alone are similarly decided on the record below. Where successful, the case is commonly referred by the Supreme Court back to the Local Court for redetermination in accordance with the directions of the court.

9.57 Consistently with the approach which we have taken in this Report, we consider that applications for release pending appeals from the Local Court to the District Court, or Supreme Court, should be governed by the same considerations that apply to applications for release pre-trial, where they are relevant.

9.58 In order to give effect to the changed status of the convicted person, and the presumption of regularity that should apply in relation to the Local Court determination, we are however of the view that an additional consideration should

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67. A possible construction of the Act that was noted by Sully J in *R v Tyler* (1995) 80 A Crim R 371.
68. NSW, Office of the Director of Public Prosecutions, *Submission BA21*, 19.
69. Legal Aid NSW, *Submission BA17*, 29.
70. *Crimes (Appeal and Review) Act 2001* (NSW) s 17-18, s 26.

apply, namely that the application is shown to have a reasonably arguable prospect of success.

9.59 Framed in this way, the court would be in a position to balance the interests of enforceability and reviewability. It could take into account the public interest in allowing the review by way of appeal of a conviction or sentence, where there is a reasonable basis for review, and where there is a risk that refusal of bail might frustrate or nullify the value of an effective appeal. Similarly to applications for release pre-trial, this would permit consideration to be given to the length of the custodial portion of the sentence and the time required for a hearing and disposition of the appeal. It would also allow the court to consider the other factors that are to be taken into account in relation to applications for release generally, including for example the risks of the appellant absconding, or of causing harm to others, or of interfering with the judicial process.

9.60 Some considerations that are not relevant in the context of an appeal, because of the fact of conviction, would include some of the particular principles concerning the public interest in freedom and securing justice according to law, namely:

- The presumption of innocence whenever a person is charged with an offence.
- There should be no detention by the state without just cause.
- There should be no punishment by the state without conviction according to law.

The rules relating to not detaining a person unless a custodial sentence is likely and detention being a measure of last resort would also not be relevant.

9.61 It is recognised that where, in accordance with this recommendation, the determination falls to be made in the Local Court, magistrates would need to give some consideration to the correctness of their own decisions. Some stakeholders raised this as an issue and did not support our approach on this basis.[71] However, we do not consider that in practice it should present an insurmountable problem. Framed in terms of the availability of a reasonably arguable prospect of success, the test falls well below the s 30AA threshold, or of any assessment that the original decision was wrong. With the benefit of the submissions received prior to conviction and with any further submission made at the application hearing (particularly where new evidence has emerged), a magistrate should be able to identify whether or not a reasonably arguable prospect for appellate review remains open without conceding original error.

9.62 In any event, consistently with the recommendations that we have made in relation to the existing procedure under s 22A of the *Bail Act*, it will be possible for the District Court, or Supreme Court, to revisit any refusal of appeal bail in the Local Court, if a fresh application is made.

9.63 We do not consider it appropriate to impose a similar test in relation to release sought pending an application in the Local Court for the annulment of a conviction and/or sentence imposed in the absence of the applicant. The general pre-trial

71. Letters from the Law Society of NSW (24 January 2012) and Legal Aid NSW (27 January 2012).

regime proposed in this Report should continue to apply. In some cases there may be circumstances where an applicant's absence arose as a deliberate choice, amounting to absconding. Such matters should be weighed in the balance if the applicant seeks release.

Recommendation 9.2: Appeals to courts other than the Court of Criminal Appeal

A new *Bail Act* should provide that, in the case of an appeal other than to the Court of Criminal Appeal, the authority, in determining whether to release or detain a person pending the appeal, must not release the person unless it is satisfied that the appeal has a reasonably arguable prospect of success.

Perfecting sentences after appeals

9.64 If an offender is granted bail pending an appeal and the conviction and/or sentence is confirmed, then it is necessary to ensure that the sentence imposed by the lower court is given its full effect and that, where necessary, the appeal court has the power to adjust or restart that sentence.

9.65 This can arise in the context of appeals to the High Court (from decisions of the Court of Criminal Appeal), to the Court of Criminal Appeal (from decisions of the Supreme Court and District Court), to the Supreme Court and Court of Appeal (by way of judicial review of appeals from the Local Court to the District Court), to the District Court (from decisions of the Local Court), and to the Local Court (for annulment of convictions made or sentences imposed by the Local Court).

9.66 Although the issue considered in this section of the chapter is primarily concerned with appellate procedure it does have a peripheral relevance, since the issues that arise do so as a consequence of an appellant being at liberty pending an appeal or review of a custodial sentence.

Applications to the Supreme Court for judicial review

9.67 The relevant question arose initially in the context of an application to the Court of Appeal for judicial review of a decision made following appeal from the Court of Petty Sessions (the predecessor to the Local Court) to the District Court.

9.68 The High Court, in *Whan v McConaghy*, held that the Court of Appeal lacked jurisdiction to make an order that would allow a term of imprisonment, that had been imposed at first instance, to commence on some future date to take into account the period spent on bail. In substance it was held that:

- in the absence of a stay of execution, the bail order did not have the effect of suspending or postponing the operation of the sentence;
- the sentence continued to run notwithstanding that the applicant did not commence to serve the term of imprisonment that had been imposed; and
- the Court of Appeal:

- had no inherent jurisdiction to substitute a fresh order of commitment for a sentence which had expired, and

- had no statutory power, similar to that possessed by the Court of Criminal Appeal, to vary the sentence so as to take account of the period spent on bail.[72]

As a consequence the offender effectively escaped serving the sentence which had expired while he was at liberty on bail.

9.69 The statutory power of the Court of Criminal Appeal referred to was that contained in the since repealed s 18(3) of the *Criminal Appeal Act 1912* (NSW). It provided, first, that any time during which the appellant was at liberty on bail did "not count as part of any term of imprisonment or penal servitude under his sentence". Secondly, it provided:

> Any imprisonment or penal servitude under such sentence, whether it is the sentence passed by the court of trial or the sentence passed by the court shall, subject to any directions which the court may give as aforesaid, be deemed to be resumed or to begin to run, as the case requires, if the appellant is in custody, as from the day on which the appeal is determined, and if he is not in custody as from the day on which he is received into prison, under the sentence.[73]

9.70 In order to avoid the consequences that arose in *Whan v McConaghy*, a practice arose, in circumstances where judicial review was sought of an appeal to the District Court, of judges staying the operation of an appellant's sentence pending determination.[74]

9.71 The need to follow this practice was dispensed with in 1996, when s 69A was inserted in the *Supreme Court Act 1970* (NSW) to allow the Supreme Court to vary the commencement date of a sentence in relation to applications for judicial review:

> (3) The time during which a claimant is at liberty on bail (pending the determination of the proceedings for review) does not count as part of any term of imprisonment under the claimant's sentence. ...
>
> (5) In determining proceedings for judicial review, the Court may order that the imprisonment under the original sentence of imprisonment is to commence or recommence on a day specified by the Court.

Appeals to the Court of Criminal Appeal and High Court

9.72 In 1995, the situation that formerly applied in relation to appeals to the Court of Criminal Appeal changed. Subsection 18(3) of the *Criminal Appeal Act 1912* (NSW) was repealed and replaced by an amended s 18(2) which provided for, in effect, only the first limb of s 18(3):

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72. *Whan v McConaghy* (1984) 153 CLR 631; a similar outcome occurred in *R v Nunan* (1999) 108 A Crim R 1.
73. *Criminal Appeal Act 1912* (NSW) s 18(3).
74. *Palmer v DPP* (1992) 28 NSWLR 282, 289.

> The time during which an appellant is at liberty on bail (pending the determination of his or her appeal) does not count as part of any term of imprisonment under the appellant's sentence.

9.73 The Court of Criminal Appeal, in 2004, observed, in *R v Hall*, that the new s 18(2) did not:

- re-enact the second limb, which the majority in *Whan v McConaghy* had said conferred a statutory power in the Court of Criminal Appeal "to substitute a fresh order of commitment to prison for one the term of which had expired"; or
- include any provision corresponding to s 69A(5) of the *Supreme Court Act 1970* (NSW),

and concluded that "this Court has no power to adjust and re-start the appellant's sentence".[75] In the particular case, the periodic detention order had not yet expired and remained in force for the remainder of the term. Nevertheless the effect of the decision was that part of the sentence was taken to have been served while the appellant was on bail, even though his appeal was unsuccessful.

9.74 Section 25A of the *Criminal Appeal Act 1912* (NSW) similarly provides, in relation to appeals from the Court of Criminal Appeal to the High Court:

> (1) Any time during which a person is at liberty on bail pending the determination of the person's appeal to the High Court from an order or determination of the Court of Criminal Appeal does not count as part of any term of imprisonment or penal servitude under the person's sentence.[76]

9.75 Although neither s 18 or s 25A made provision for the stay of a sentence pending appeal when the applicant was released on bail, it would appear that the problem that arose in the cases cited is cured by s 28A which was inserted into the *Criminal Appeal Act 1912* (NSW) in 2004:

> (1) This section applies if, under section 18 or 25A, any period does not count as part of any term of imprisonment under an appellant's sentence.
>
> (2) The court may make any order that it thinks fit to give effect to section 18 or 25A (including an order specifying the date of the commencement or re-commencement of the sentence).
>
> (3) If the court does not make such an order, the sentence commences or re-commences on the appropriate date required for the operation of section 18 or 25A.[77]

Appeals from the Local Court to the District Court and Supreme Court

9.76 In relation to appeals from the Local Court to the District Court and Supreme Court, s 63 of the *Crimes (Appeal and Review) Act 2001* (NSW) expressly provides for a stay of execution of any sentence pending appeal:

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75. *R v Hall* [2004] NSWCCA 127 [40]-[41], [47].
76. *Criminal Appeal Act 1912* (NSW) s 25A(1).
77. *Criminal Appeal Act 1912* (NSW) s 28A.

> (1) The execution of any such sentence ... is stayed:
>
> (a) except as provided by paragraphs (b) and (c), when notice of appeal is duly lodged, or
>
> (b) in the case of an appellant whose appeal is the subject of an application for leave, when leave to appeal is granted, or
>
> (c) in the case of an appellant who is in custody when the appeal is made or leave to appeal is granted, when the appellant enters into a bail undertaking, or when bail is dispensed with, under the Bail Act 1978.
>
> ...
>
> (3) Subject to any order of the appeal court, a stay of execution continues in force until the appeal is finally determined.[78]

9.77 In addition, it is noted that s 68 of the *Crimes (Appeal and Review) Act 2001* (NSW) could be called in aid, if any question arose in relation to the power of the Supreme Court or District Court to make an order in the event of an unsuccessful appeal, to ensure that the original sentence was given its intended effect. In this respect s 68 provides:

> (1) An appeal court may order that a conviction or sentence confirmed or varied by it on appeal, or any part of it:
>
> (a) is to take effect (as confirmed or varied) on and from a day specified in the order, or
>
> (b) in the case of a sentence that has been served in part, is to recommence (as confirmed or varied) on and from a day specified in the order,
>
> being the day on which the order is made or an earlier day.[79]

9.78 For the purposes of this provision "appeal court" is defined as being:

> the court to which an appeal or application for leave to appeal may be made under Part 3, 4 or 5.[80]

Part 3 relates to appeals from the Local Court to the District Court, Part 4 relates to appeals from the Local Court to the Land and Environment Court and Part 5 relates to appeals from the Local Court to the Supreme Court. This would not seem to encompass appeals to the Court of Criminal Appeal or the High Court.

Local Court review of Local Court decisions

9.79 The problems noted above will not arise in relation to review or annulment proceedings in the Local Court.[81] Where an accused person has been convicted in his or her absence, then unless the matter has been dealt with by a fine, sentencing

78. *Crimes (Appeal and Review) Act 2001* (NSW) s 63.
79. *Crimes (Appeal and Review) Act 2001* (NSW) s 68.
80. *Crimes (Appeal and Review) Act 2001* (NSW) s 3(1).
81. Under *Crimes (Appeal and Review) Act 2001* (NSW) pt 2.

will be deferred until the convicted person is brought before the court pursuant to a warrant to be sentenced.[82] Section 25 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) precludes the imposition, in the absence of the convicted person, of orders imposing a sentence of imprisonment, or of orders providing for intensive correction, home detention, community service, a good behaviour bond, or a non-association or place restriction order, or an intervention program order.

9.80 Whether or not an annulment application is then brought, and whether or not it is successful and results in a rehearing, the imposition of any sentence of imprisonment will commence on the date that is set by the court where the matter is finally determined in the presence of the accused person.

9.81 In such a case, any period that is spent in custody following execution of the warrant will be taken into account. Otherwise, there is no risk of any sentence of imprisonment being taken to have been served while the accused person was at large.

Conclusion

9.82 The solution to the problems that arise in this context is somewhat complex and, so far as it requires a court to make a specific order resetting the commencement date of a sentence, risks being overlooked. In the event of the two criminal appeal statutes being amalgamated at a future date - an outcome that we consider desirable in light of the complexity that the two statutes add to the appellate framework outlined earlier in this chapter - it would be helpful to address this issue in a simpler and clearer manner. This might also include a provision that would eliminate any need for the High Court to remit the matter to the Court of Criminal Appeal for an appropriate order, for example, by deeming a sentence to commence or recommence on the day on which the offender enters custody following the determination of the appeal; and by clarifying the powers of the Local Court in relation to the annulment procedures arising under Part 2 of the *Crimes (Appeal and Review) Act 2001* (NSW).

Recommendation 9.3: Procedural reforms

(1) Consideration should be given to amalgamation of the *Criminal Appeal Act 1912* (NSW) and the *Crimes (Appeal and Review) Act 2001* (NSW) into a single statute.

(2) Consideration should also be given to clarifying the relevant appeal provisions to ensure that, where the offender has been released pending the appeal, the court determining the appeal has sufficient power to order the commencement or recommencement of the original sentence, so as to give effect to the decision of that court.

82. *Criminal Procedure Act 1986* (NSW) s 202(3). See also *Crimes (Sentencing Procedure) Act 1999* (NSW) s 25(2).

10. Considerations

The current provision **143**
Other Australian jurisdictions **144**
Structuring considerations **144**
Existing models 144
The choice of a model 145
Whether considerations should be exhaustive 146
Submissions and consultations 146
The public interest in freedom and securing justice according to law **148**
An objects clause? 148
The integrity of the criminal justice system **150**
The likelihood of the person failing to appear at court 150
The likelihood of interference with the course of justice 153
That the person has offended while on conditional liberty 153
Protecting the community and particular people **154**
Preventive detention 154
The likelihood of causing or threatening harm to a particular person or persons 155
The likelihood of committing a serious offence or offences 156
The interests of the person **156**
Incapacitation by intoxication etc 158
The relevance of particular matters **159**
The nature and seriousness of the offence charged 159
The strength of the prosecution case 160
Prior offences 160
Previous failure to comply with a conduct direction 160
Rules relating to decisions **161**
The specific provisions of s 32 ..... **162**
Recommendations **162**

10.1 In Chapter 8 of this report, we recommend that there should be a presumption in favour of release for all offences. In this Chapter, we discuss the considerations that should be taken into account when deciding whether a person should be released or detained.

The current provision

10.2 The *Bail Act* substantially incorporated the common law in relation to the considerations to be taken into account when a decision is made to release or detain a person pending trial.[1]

10.3 Section 32(1) of the *Bail Act* sets out the considerations. The skeleton of the section is as follows (omitting the elaboration of specified considerations):

1. *R v Wakefield* (1969) 89 WN (Pt 1) (NSW) 325.

> (1) In making a determination as to the grant of bail to an accused person, an authorised officer or court shall take into consideration the following matters (so far as they can reasonably be ascertained), and the following matters only:
>
> (a) the probability of whether or not the person will appear in court in respect of the offence for which bail is being considered…
>
> (b) the interests of the person…
>
> (b1) the protection of … any … person the authorised officer or court considers to be in need of protection.
>
> (c) the protection and welfare of the community, having regard … to …
>
> (iii) the likelihood of the person interfering with evidence, witnesses or jurors. and
>
> (iv) whether … it is likely that the person will commit any serious offence while at liberty on bail …[2]

Each of (a), (b) and (c), but not (b1), is followed by a list of matters to which the court must have regard. The full text of the subsection is reproduced in Appendix A to this report.

10.4 The *Bail Act* refers to the above matters as "criteria", but we prefer the term "considerations" and will use that term in our report.

Other Australian jurisdictions

10.5 There is considerable agreement between the States and Territories concerning the considerations to be taken into account when making a decision about release or detention.[3] However there is some variation as to which of the traditional considerations are explicitly mentioned and which are left to implication, whether a list of considerations is exhaustive, and the extent to which explicit considerations are further elaborated.

Structuring considerations

Existing models

10.6 In Australia, two models have emerged for incorporating the considerations to be taken into account when deciding whether a person is to be released or detained. They are the "unacceptable risk model" and the "justification model".

10.7 The Victorian *Bail Act* includes an example of the unacceptable risk model. It provides that a person is generally to be granted bail, but is to be refused bail if the

2. *Bail Act 1978* (NSW) s 32(1).
3. See particularly the following legislation: *Bail Act 1977* (Vic) s 4(3); *Bail Act 1980* (Qld) s 16(2); *Bail Act 1982* (WA) s 6A(4); *Bail Act 1985* (SA) s 10; *Bail Act 1992* (ACT) s 22; *Bail Act* (NT) s 24.

court is satisfied that there is an unacceptable risk that the accused, if released, would

- fail to appear,
- commit an offence,
- endanger the public,
- interfere with witnesses or
- obstruct the course of justice.[4]

10.8 The NSW *Bail Act* includes an example of the justification model. It provides that a person is entitled to be granted bail unless the bail authority is satisfied, after considering the matters in s 32, that refusal is justified. [5]

The choice of a model

10.9 Some submissions we have received favour the unacceptable risk model.[6] A similar but distinct "risk management" option is raised by the NSW Police Force, and considered in Chapter 8.[7] Other submissions favour retention of the justification model.[8]

10.10 The "unacceptable risk" and "justification" models are very similar, in that they both include reference to certain risks, namely: the risk of non-appearance, the risk of interfering with the course of justice, the risk of committing other offences, and the risk of harm to particular persons.[9]

10.11 However it is more difficult to include explicit reference to the interests of the person within the unacceptable risk model. Of the two Australian jurisdictions that use this model, neither mentions the interests of the person.[10] Of course, these interests are necessarily taken into account in deciding whether a risk is unacceptable, but they are not explicit in the statutes.

10.12 The justification model can more easily incorporate reference to the interests of the person, as is done in New South Wales, the Australian Capital Territory, and the Northern Territory.[11] It can also more easily incorporate reference to basic legal principles. Finally, it has the advantage of being familiar to authorities and practitioners in this state. Therefore, we recommend retaining the justification model in NSW bail legislation.

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4. *Bail Act 1977* (Vic) s 4.
5. *Bail Act 1978* (NSW) s 9(2).
6. For example, Legal Aid NSW, *Submission BA17*, 5; Youth Justice Coalition, *Submission BA20*, 11; NSW Bar Association, *Submission BA27*, 2; Children's Court of NSW, *Submission BA33*, 4.
7. See para 8.58-8.59.
8 For example, G Henson, *Submission BA2*, 2; Law Society of NSW, *Submission BA5*, 8; Redfern Legal Centre, *Submission BA18*, 7.
9. Comprehended by "endanger the safety or welfare of members of the public" in the Victorian model: *Bail Act 1977* (Vic) s 4(2)(d)(i).
10. *Bail Act 1977* (Vic); *Bail Act 1980* (Qld).
11. *Bail Act 1978* (NSW) s 32(1)(b); *Bail Act 1992* (ACT) s 22(1)(c); *Bail Act* (NT) s 24(1)(b).

Whether considerations should be exhaustive

10.13 The considerations specified in s 32(1) are both mandatory and exhaustive. That is to say, they must be taken into account and they are the only considerations which may be taken into account.

10.14 The majority of submissions supported an exhaustive list of considerations.[12] Ensuring irrelevant considerations are not taken into account and maintaining a consistent approach were highlighted as reasons to support an exhaustive list. On the other hand, the Aboriginal Legal Service NSW/ACT and Jumbunna Indigenous House of Learning recommend specified criteria with an additional provision enabling the court to take into account any other matter that is consistent with the objectives of the *Bail Act*.[13] Two submissions considered that the criteria should be inclusive to facilitate judicial discretion.[14] The NSW Bar Association prefers the list to be inclusive to allow for relevant considerations that may arise in a particular case.[15] The NSW Police Force submits that "the decision maker should be able to take into account any matter relevant to the fundamental principles".[16]

10.15 We recommend that a new *Bail Act* should require the authority to take into account five primary considerations. We consider that this list of primary considerations should be both mandatory and exhaustive. Otherwise, there is the risk of matters being taken into account which should be regarded as extraneous. One such matter would be a poor criminal record which might be factually relevant to legitimate primary considerations but should not be regarded as a relevant matter in itself. We discuss that point below.[17] We also recommend that a new *Bail Act* should specify more particular matters that must be taken into account when considering some of these primary considerations. In the current legislation, such further matters are specified, and are made both mandatory and exhaustive. We consider that the more particular matters specified in a new *Bail Act* should be mandatory but not exhaustive.

Submissions and consultations

10.16 There has been considerable support for the retention of the primary considerations referred to in s 32,[18] although a number of submissions raised concerns about retaining the likelihood of committing further offences as a consideration. The

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12. NSW Council for Civil Liberties, *Submission BA3*, 32; Law Society of NSW, *Submission BA5*, 8; Crime and Justice Reform Committee, *Submission BA9*, 2; F Mersal, *Submission BA10*, 9; Legal Aid NSW, *Submission BA17*, 11; Redfern Legal Centre, *Submission BA18*, 7; NSW, Office of the Director of Public Prosecutions, *Submission BA21*, 8; Intellectual Disability Rights Service, *Submission BA30*, 2.
13. Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 26; Jumbunna Indigenous House of Learning, *Submission BA37*, 18.
14. D Shoebridge, *Submission BA19*, 7; NSW Bar Association, *Submission BA27*, 3.
15. NSW Bar Association, *Submission BA27*, 3.
16. NSW Police Force, *Submission BA39*, 25.
17. See para 10.93.
18. G Henson, *Submission BA2*, 2; Law Society of NSW, *Submission BA5*, 8; Crime and Justice Reform Committee *Submission*, *BA9*, 2; Legal Aid NSW, *Submission BA17*, 10, Police Association of NSW, *Submission BA38*, 3; NSW Police Force, *Submission BA39*, 25.

Senior Public Defender took a different approach, calling for a simple objects clause rather than a list of considerations.[19]

10.17 There was, however, considerable criticism of the unnecessary complexity and detail of s 32. In the result, some respondents argued for a shorter list of considerations,[20] others for maintaining a longer one,[21] but it was evident that there was substantial support for the basic elements of the section. Submissions were directed substantially to matters of detail.

10.18 The Chief Magistrate supported moving from the current s 32 considerations to a simpler list.[22] The Department of Juvenile Justice also put forward a simplified list in its submission.[23]

10.19 Legal Aid NSW, the Law Society of NSW, the Department of Family and Community Services and Jumbunna submitted that the current considerations should largely be retained with some minor amendments.[24] In response to questions posed by the Commission during consultation, Legal Aid NSW suggested that the considerations could benefit from including "the fact that it is unlikely that a person will receive a custodial sentence" and "any need the defendant has to be free for medical treatment".[25] During that consultation, Legal Aid NSW noted that practitioners find the 'checklist' of considerations in the current s 32 useful.[26] Jumbunna expressed the view that "it is imperative that s 32 requires a decision maker under the Act to consider the issues which, uniquely, impact particularly on Indigenous people."[27] The Shopfront Youth Legal Centre stated that the current s 32 provides a "good starting point"; and recommends adding a provision that "where the bail decision-maker is of the view that a conviction and/or custodial sentence is unlikely, bail should be refused in exceptional circumstances only" and that "a likely conviction and/or custodial sentence should not of itself be a ground for refusing bail".[28] The Office of the Director of Public Prosecutions endorsed a restructuring of s 32 which effectively retains the elements of the existing provision.[29]

10.20 The Senior Public Defender, Mark Ierace SC, suggested replacing s 32 with an objects clause. However, if retained, Mr Ierace considered that s 32 would benefit

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19. M Ierace, *Submission BA16*, 4.
20. For example, G Henson, *Submission BA2*, 2.
21. For example, Law Society of NSW, *Submission BA5*, 8; Crime and Justice Reform Committee, *Submission BA9*, 2.
22. The considerations proposed by the Chief Magistrate are: the probability of whether or not the person will appear in court in respect of the offence for which bail is being considered; the interests of the person in being at liberty; the protection and welfare of the community or any particular person/s; the strength of the case against the person; the age of the person and the principles set out in *Children (Criminal Proceedings) Act 1987* (NSW) s 6, where the person is a child; and the mental health of the person.
23. NSW, Juvenile Justice, *Submission BA35*, 12.
24. Law Society of NSW, *Submission BA5*, 8; Legal Aid NSW, *Submission BA17*, 10; NSW, Department of Family and Community Services, *Submission BA24*, 7; Jumbunna Indigenous House of Learning, *Submission BA37*, 17.
25. Legal Aid NSW, *Response to questions asked by the Commission*.
26. Legal Aid NSW, *Consultation BAC6*.
27. Jumbunna Indigenous House of Learning, *Submission BA37*, 18.
28. Shopfront Youth Legal Centre, *Submission BA23*, 3.
29. NSW, Office of the Director of Public Prosecutions, *Submission BA21*, 8.

from re-drafting to cure the effects of numerous "piecemeal amendments over the years".[30]

10.21 The Crime and Justice Reform Committee suggested that consideration should be given to including the following considerations: the seriousness of the alleged behaviour within the range of behaviours prohibited by the offence; the likely time to be spent on remand and the probable maximum penalty of imprisonment that the person might face; the impact of remand on the person's personal circumstances, including family and employment impacts; and a requirement that the likelihood of re-offending must outweigh the right to liberty.[31]

10.22 Redfern Legal Centre emphasised that criteria should protect the *prima facie* right to liberty[32] and the Aboriginal Legal Service stated that the criteria should focus on the likelihood of appearing, interfering with the administration of justice and committing further offences against the alleged victim.[33]

The public interest in freedom and securing justice according to law

10.23 The first consideration to be listed in a revised provision should invoke the basic principles and concepts inherent in the criminal justice system to which we have referred in Chapter 2. These principles should be recognised in the legislation and, for the reasons given earlier, should be incorporated as a consideration to be taken into account when a decision is made whether to release or detain.

10.24 As we have mentioned earlier, the core processes of the criminal justice system are the creation of offences, apprehending suspected offenders, deciding their guilt or innocence and punishing those found to have offended. Bail legislation, being part of the criminal justice system, should be subject to the same constraints. Basic principles concerning the public interest in freedom of the individual and securing justice according to law are as much applicable to bail law as they are to rest of the criminal justice system.

An objects clause?

10.25 Submissions expressed widespread support for basic legal principles such as the presumption of innocence and the prohibition of punishment except after conviction by due process of law. These sentiments led, in turn, to considerable support for the introduction of an objects clause in bail legislation which would recognise such principles.

10.26 The difficulty with that approach is not its motivation but its implications. Ordinarily, an objects clause has effect only to resolve any inadvertent ambiguity or lack of

30. M Ierace, *Submission BA16*, 4.
31. Crime and Justice Reform Committee, *Submission BA9*, 2.
32. Redfern Legal Centre, *Submission BA18*, 7.
33. Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 25.

clarity in the substantive provisions of the statute.[34] With competent drafting, an objects clause would have very little work to do.

10.27 If the legislation specified that substantive provisions were to be read subject to an objects clause, every substantive provision would have to be reviewed when applying the Act and, if necessary, its ordinary meaning changed in order to accommodate the objectives in the objects clause. Uncertainty about the meaning of substantive provisions in the legislation would abound.

10.28 A different style of objects clause appears in the draft consultation bill released by the Criminal Law Review Division of the Attorney-General's Department in 2010:

> The object of this Act is to ensure that a person who is required to appear before a court in criminal or other proceedings is not deprived of liberty without an appropriate balancing of the interests of the person and the interests of the community.[35]

10.29 There was considerable support for such a clause in the submissions we received. There is, however, a fundamental problem with such a formulation, apart from the limited effect it would have on decisions made under the Act. In our view, it is not correct to treat a decision whether to release a person as involving a balancing of the interests of the person and the interests of the community. Such an approach wrongly opposes the interest of the person charged and the community as a whole. This opposition fails to recognise that there is a public interest in the freedom of the individual and the basic legal principles - such as the presumption of innocence – which support the institutional integrity of the criminal justice system and ultimately form part of the community's interests.

10.30 The task is to incorporate basic legal principles in a way that has an impact on decision making but does not create uncertainty. That can be achieved by introducing a new provision which requires that such basic legal principles be taken into account whenever an authority decides whether to release a person.

10.31 We recommend that a new consideration – the public interest in freedom and securing justice according to law – should stand first in the list of considerations that the authority is required to take into account. (Recommendation 10.2(a)) That would give the consideration the prominence it deserves and would ensure that it comes to attention whenever the prescribed considerations are examined.

10.32 This consideration should require the authority to consider the following basic principles of justice:

- the entitlement of every person in a free society to liberty, freedom of action and freedom from unnecessary constraint in daily life;
- the presumption of innocence whenever a person is charged with an offence;
- that there should be no detention by the state without just cause;

34. D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (7th ed, LexisNexis, 2011) 156-158.
35. NSW, Department of Justice and Attorney General, Criminal Law Review, *Bail Bill 2010* (Revised public consultation draft) cl 3.

- that there should be no punishment by the state without conviction according to law;
- the public interest in a fair trial for both the state and the person charged with an offence. (Recommendation 10.3)

The integrity of the criminal justice system

10.33 We have said that the *Bail Act* should be seen as part of the wider criminal justice system, serving its purposes and being subject to its principles and constraints. There are three considerations consistent with that approach.

10.34 Two were recognised by the common law and have been included in bail statutes across the jurisdictions, including our own. These are the likelihood of the person failing to appear at court and the likelihood of interference with the course of justice. The third is a new proposal. We recommend the inclusion of a further consideration; namely, a history of offending while released pending proceedings on earlier occasions. Recommendation 10.2(2) covers these issues.

The likelihood of the person failing to appear at court

10.35 Failure to appear may have adverse consequences in two respects. First, a person charged with a criminal offence may avoid answering to the law.

10.36 Secondly, when proceedings are listed and have to be adjourned, there is the waste of public resources, impact on victims, and the inconvenience to witnesses, sometimes amounting to serious hardship. This is particularly so in relation to trials on indictment where substantial cost in wasted resources may be incurred, witnesses may have to attend afresh and a jury panel constituted afresh. The power to determine guilt in the absence of the defendant is limited to proceedings in the Local Court.[36] The power to sentence in the defendant's absence is also limited to proceedings in the Local Court and is confined, in effect, to the imposition of a fine.[37]

10.37 Obviously enough, the prospect that the person may not answer to the law is the more serious of these consequences. Where that is a real prospect, it should obviously be a consideration to be taken into account in deciding whether to detain the person or whether to release the person subject to a condition or a conduct requirement.

10.38 A distinction is accordingly to be made between the prospect of absconding and the prospect that the person will fail to attend inadvertently due to forgetfulness or confusion.

36. *Criminal Procedure Act 1986* (NSW) s 199, s 200.
37. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 25.

10.39 Stakeholders with first-hand experience informed us that failure to attend is commonly caused by inattention and confusion.[38] A United States report indicated that "[i]llness, ignorance of legal processes, family emergencies, and confusion about when and in what court to appear have accounted for almost all non-appearances of Project parolees".[39] The high incidence of cognitive and mental health impairment and of drug and alcohol addiction in persons who become involved in the criminal justice system[40] no doubt contributes to this situation.

10.40 It is also relevant that a person who fails to appear for any reason is amenable to be arrested on warrant and to answer to a charge of failing to appear. It is likely that, in most cases of inadvertent failure to appear, this sanction will be sufficient to ensure attendance on the next occasion**.**

10.41 There is also an injustice in the notion of detaining a person in custody on the ground that he or she is likely to fail to attend court inadvertently. It is difficult to envisage how any reasonable condition or conduct requirement would be effective to overcome the problem. We have heard it said that reporting requirements, for example, serve to remind a person of their obligation to attend court as required. We do not see why that would be so.

10.42 The reality is that bail law does not provide an appropriate response to the problem of inadvertent non-appearance in the ordinary case. There may be other ways of dealing with this situation. A report associated with the Manhattan Bail Project in the United States recommended a program of computerised reminder notifications to released defendants.[41] The success of the program in New York and other cities is reported in the literature.[42] More recently, an article evaluating a pilot of reminder telephone calls to defendants in Jefferson County, Colorado in the United States described the scheme as a "valuable and sustainable program that solves a real-world justice system issue", having found that it significantly improved court appearance rates.[43] The UK Youth Justice Board suggests that reminders are an important part of best practice systems of bail support for young people.[44] It is reported that the Aboriginal Client Service Specialist in Moree is sending text message reminders to clients to remind them of court dates.[45]

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38. Shopfront Youth Legal Centre, *Submission BA23*, 18. See also Shopfront Youth Legal Centre, Submission to the Criminal Law Review Division, *Review of the Bail Act 1978*, 31 January 2005, 9.
39. C Ares, A Rankin and H Sturz, "The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole" (1963) 38 *New York University Law Review* 67, 86; using the term "parolee" in so far as it means "release on one's own recognizance or pre-trial parole as it is called in New York" (at 68).
40. See para 11.40.
41. S A Schaffer, *Bail and Parole Jumping in Manhattan in 1967* (Vera Institute of Justice, 1970) 5.
42. E Harsworth, "Bail and Detention: An Assessment and Critique of the Federal and Massachusetts Systems" (1996) 22(2) *New England Journal on Criminal and Civil Confinement* 213, 222-223.
43. T Schnacke, M Jones and D Wilderman, *Increasing Court Appearance Rates and Other Benefits of Live-Caller Telephone Court Date Reminders: The Jefferson County, Colorado, FTA Pilot Project and Court Date Notification Program* (2011), article submitted to *Court Review,* available from <http://pretrial.org>.
44. S Thomas, N Cymru and A Hucklesby, *Remand Management* (Youth Justice Board, 2003) 43.
45. G Denning-Cotter, *Bail Support in Australia*, Brief No 2 (Indigenous Justice Clearinghouse, 2008) 3.

10.43 That said, provision should be made for what would be a small proportion of cases where it appears that the person will persistently fail to appear, notwithstanding that there is no intent to evade justice. In particular, if the charge is a serious one, action to ensure attendance in such a case may be unavoidable and appropriate.

10.44 In these circumstances, we recommend that the authority should be required to take into account as a consideration the likelihood that, if released, the person will fail to attend court as required, provided that:

- there is a likelihood that the person will abscond, or
- the fact that the person has a history of persistent failure to attend court for whatever reason and the authority is satisfied that the person is unlikely to attend court on a future occasion as required if released. (Recommendation 10.2(2)(b)(i) and (ii))

10.45 We also recommend that consideration be given to implementing a court date reminder service as a pilot program. (Recommendation 10.3.) It should be set up in a way that enables evaluation of its effectiveness in reducing non-attendance and cost saving.

10.46 The legislation should specify four matters to be taken into account in relation to the likelihood of failure to appear. There is no need to make these matters exhaustive.

10.47 First, the person's family and community ties should be considered. This is already a consideration under the current *Bail Act* and should continue to be so. However, the provision requires modification. The consideration should be stated more broadly in order to allow the authority to consider any kind of family or community ties, including: nuclear and extended family and kinship connections, ties to friends, employment, residence, the traditional ties of Indigenous people and other community connections.

10.48 Second, it is necessary to specify what may motivate a person to avoid the court process. The likelihood of conviction and, if convicted, the likelihood of a custodial sentence and the likely duration of any such a sentence are relevant matters. In this respect, it is the likely outcome of the proceedings which is relevant, rather than the bare fact of the kind of offence with which the person is charged.

10.49 Third, any history of absconding or failing to appear or of appearing at court as required should be considered, including the circumstances of any prior failure to appear.

10.50 We note that there are cases which may involve a failure to appear due to other court process or action by a government agency. Special consideration would need to be given to such cases in the course of drafting to ensure they are accommodated satisfactorily. They would include cases where the person is held in custody in relation to another offence or is subject to a requirement to appear in another court on the same day, cases involving witness protection, where a person assisting police with their inquiries may be concealed overseas or interstate, and cases where the defendant is in immigration detention, or where a person faces extradition.

10.51 Finally, the current provision[46] allowing the authority to take account of specific evidence that a person may abscond or fail to appear should be retained. This would, for example, take account of preparations to leave the jurisdiction.

10.52 In the current legislation, a person's criminal record, the strength of the evidence against the person and the severity of the penalty or probable penalty are mentioned as relevant to the risk that the person will not appear in court.[47] These provisions are, in some respects, too narrow and, in some respects, too wide. What is relevant to the risk of non-appearance in these respects is the probability of conviction and the probable severity of the sentence if the person is convicted. We have framed our recommendations along those lines. The matters mentioned in the current legislation may be of evidentiary relevance, but do not comprehend all the matters which go to assessing the likely outcome of the proceedings for the offence, including matters relevant to sentencing. At the same time, one at least of the matters mentioned is not a relevant consideration, namely, the maximum available penalty for the offence as distinct from the likely penalty for that offence in the particular circumstances of the case.

The likelihood of interference with the course of justice

10.53 The second necessary consideration in support of the broader criminal justice system is any likelihood that the person will interfere with the course of justice. The present provision specifies the likelihood of the person interfering with evidence, witnesses or jurors.[48] That provision should be retained and extended to allow the consideration of any risk of interference with the course of justice.

That the person has offended while on conditional liberty

10.54 There is considerable community concern about offenders who continue to offend while on bail or parole.

10.55 The submission of the NSW Police Force argues for adequate provision to protect the community from repeat offending. There is no data available about the frequency of offending while on bail or parole. However the experience of members of this Commission confirms that there are some individuals who do continue to offend while released on bail or on parole, regardless of the imposition of conduct requirements and supervision, and regardless of the additional penalties they may incur for offences committed in such circumstances.

10.56 There is understandable frustration on the part of police and the judiciary in these cases, and understandable anger in the community when such individuals are charged with a further offence and have the question of their release pending a further trial determined without such a course of conduct being taken into account.

10.57 Currently, if the authority is considering release or detention for a person charged with a serious offence, the *Bail Act* requires the authority to take into account

46. *Bail Act 1978* (NSW) s 32(1)(a)(iv).
47. *Bail Act 1978* (NSW) s 32(1)(a)(i), (ia), (iii).
48. *Bail Act 1978* (NSW) s 32(1)(c)(iii).

whether the person was on bail or parole at the time the offence was alleged to have been committed.[49]

10.58 In our view, there is a need to address the issue in a new Act. In our view, the focus should, however, be on offenders with a history of repeat offending in such circumstances. We recommend that an authority should be required to take into account the fact that a person charged with an indictable offence committed while released pending proceedings or on parole has, on one or more previous occasions been convicted of an indictable offence committed while so released or on parole, or has one or more pending charges committed while so released or on parole.

10.59 We further recommend that such a provision should extend to offences committed while the person is under a sentence that involves conditional liberty, including home detention, an intensive corrections order, a suspended sentence or a good behaviour bond.

10.60 This consideration is not the only way previous offending may become relevant to the release or detention decision. As discussed below, it may be relevant to the question of failure to appear or threats to safety of the community or an individual.[50]

Protecting the community and particular people

Preventive detention

10.61 As we noted in Chapter 2preventive detention is not part of the common law,[51] and it conflicts with the rule of law which prohibits punishment other than for a breach of the law.[52] There are statutory provisions that authorise preventive detention in certain circumstances, but they are the exception rather than the rule. The use of bail law to prevent a potential future crime - preventive detention - has always been problematic. In 1975 the Australian Law Reform Commission rejected such a provision,[53] as did the Bail Review Committee in 1976.[54]

10.62 The current *Bail Act* requires the authority to consider the likelihood that the person will commit a serious offence while on bail, but only if the likelihood, together with the likely consequences, outweighs the person's general right to be at liberty. It does not allow the authority to consider the likelihood that the defendant will commit <u>any</u> further offence, and we do not recommend such a broad proposition. This formulation is too wide and constitutes too extensive a breach of the rule of law. However, there are two circumstances in which it is necessary to consider that possibility in the context of preventive detention: where there is a likelihood that the person will commit a serious crime or crimes if released and, secondly, where there

49. *Bail Act 1978* (NSW) s 32(1)(c)(v).
50 . See para 10.93.
51. See also *Chester v The Queen* (1988) 165 CLR 611, 618.
52. *Chu Kheng Lim v The Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27-8.
53. Australian Law Reform Commission, *Criminal Investigation*, Report No 2 (1975) 84-85.
54. New South Wales, *Report of the Bail Review Committee*, Parl Paper No 46 (1976).

is a likelihood that the person will, if released, cause harm or threaten harm to some particular person or persons.

The likelihood of causing or threatening harm to a particular person or persons

10.63 This consideration has broad application but often arises in cases of domestic or family violence. Where a person has been arrested for a domestic or family violence offence or for breach of a domestic violence order, it may be the culmination of a course of events giving rise to a significant risk to the safety of a family member. In cases such as this, there can be a reasonable expectation that the same kind of behaviour will continue if the person is released. There is a special need for protection in those circumstances.

10.64 We recommend that this should be a consideration to be taken into account.

10.65 The Department of Family and Community Services did not support a presumption in favour of release in matters involving family violence.[55] The Department suggested that if such a presumption was to apply, the considerations should include the risk of harm to other individuals with particular reference to family violence against women and children,[56] and with reference to the factors in the current s 9A and s 9D.[57] Section 9A removes the presumption in favour of bail for a person accused of a domestic violence offence against another person where the person has a history of violence (that is, has been found guilty of a personal violence offence or a violent contravention of an apprehended violence order), the person has been violent to the other person in the past, or the person has failed to comply with a bail condition in respect of the offence that was imposed for the protection or welfare of the other person.[58]

10.66 We agree that the risk of harm to a person in a domestic relationship with the accused person should be a mandatory consideration, and make that recommendation. (Recommendation 10.2(2)(c)) We also recommend that the circumstances listed in s 9A should be taken into account when considering the risk of harm to a person in a domestic relationship. (Recommendation 10.6)

10.67 Section 9D requires a court to be satisfied that there are exceptional circumstances before granting bail to a person charged with a serious personal violence offence if that person has already been convicted of a serious personal violence offence.[59] We have not reproduced this approach, but have addressed concerns about the likelihood of offences causing death or injury in Recommendation 10.2(2)(d).

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55. NSW, Department of Family and Community Services, *Submission BA24*, 6.
56. NSW, Department of Family and Community Services, *Consultation BAC13*.
57. Letter from Jim Moore, Director General, Family and Community Services, to Paul McKnight, Executive Director, Law Reform Commission, 27 January 2012.
58. *Bail Act 1978* (NSW) s 9A.
59. *Bail Act 1978* (NSW) s 9D.

The likelihood of committing a serious offence or offences

10.68 An extreme case illustrates the necessity of preventive detention in certain circumstances. If a person has been arrested for a series of random murders, and the evidence is compelling, it would be reasonable to conclude there is a serious risk that the person will continue to kill if released. How could police or a court conscientiously release a person in such circumstances? If release is simply intolerable because the defendant is likely to commit such an offence, there has to be a provision allowing the person to be detained.

10.69 The *Bail Act* includes a series of complex and intricate provisions regarding the likelihood of committing a serious offence if released on bail.[60] A simpler approach is required. One option we have considered is to require the authority to consider whether the person is likely to commit one of a list of specified offences. However, this approach fails to take account of the wide range of criminality covered by a particular offence. A generic formula is preferable, leaving it to police and the courts to exercise their discretion sensibly. The formula we recommend is the likelihood that the person will commit an offence causing death or injury, a sex offence, or an offence involving serious loss of or damage to property, or an offence or a series of offences which give rise to a substantial risk of causing death or injury or serious loss of or damage to property. (Recommendation 10.2(2)(d))

10.70 Stealing a motor vehicle and driving at high speed through a built up area, while it might not necessarily cause injury or damage to property, would be an illustration of an offence involving a substantial risk of injury or serious damage to property. Arson would be an illustration of an offence involving a substantial risk of serious loss of or damage to property.

10.71 There is an argument that a generic formula of this kind is too inexact and is likely to lead to inconsistent results. On balance, we do not take that view. These kinds of questions arise frequently in the criminal law. Take, for example, the offence of assault occasioning grievous bodily harm. Police and prosecutors make decisions about the appropriate charge to lay, and judges and juries manage the normative judgments involved in determining whether injury is “grievous” without apparent difficulty or serious problems about consistency of results.

The interests of the person

10.72 The current legislation includes the interests of the person as an explicit consideration.[61] It requires the authority to take into account:

(i) the period that may be spent in custody and the conditions under which the person would be held in custody

(ii) the person’s need to obtain legal advice and prepare for trial

(iii) the person’s need to be free for any lawful reason

60. *Bail Act 1978* (NSW) s 32(1)(c)(iv), s 32(2), s 32(2A).
61. *Bail Act 1978* (NSW) s 32(1)(b).

(iv) whether the person is incapacitated by intoxication

(v) any special needs arising from being under 18 years old, being an Aboriginal or Torres Strait Islander, or having an intellectual disability or being mentally ill

(vi) in certain circumstances, the nature of the person's criminal history.

10.73 The present provision fails to take full account of the hardship of imprisonment or of the potential consequences of imprisonment for the individual in the person's private life or of loss of employment.[62] It also fails to take into account the consequences for the person's family and, of less importance, the person's associates, such as an employer, landlord or a creditor. Immediate detention means that the person has no opportunity to make other arrangements about employment obligations, housing and family responsibilities.

10.74 The present provision takes account of the prejudice a person suffers in preparing for a trial but it fails to take account of the prejudice suffered by a person in custody during the trial itself. During trial, it is not unusual for a defendant to be woken early to be processed out of prison, transported to court, sometimes significant distances, and then taken back to prison and processed for re-admission. This process during a trial results in fatigue, often results in the missing of meals, and impedes ready access to legal representatives and day-to-day consultation with them. The result is prejudice in effective participation in the trial process and unnecessary personal hardship.[63]

10.75 Our Recommendations 10.2(2)(e) and 10.7 deal more adequately with the interests of the person and the interests of the person's family and associates.

10.76 A person's interest in liberty is not confined to the need to be free to prepare for trial, to obtain legal advice, or for any other lawful purpose, as specified in the current legislation. Most obviously, a person's interest in liberty includes not being incarcerated. It also includes freedom of action and freedom from unnecessary constraint in daily life. Later in this report, we recommend that the same considerations should apply to the imposition of conditions and conduct requirements as apply to a decision whether to release or detain. We have incorporated this more complete reference to the freedom of the individual with an eye to that recommendation. (Recommendation 10.7(1)(a))

10.77 Some people legitimately require special consideration because of their personal or cultural characteristics. They include young people, people with cognitive and mental health impairments and Aboriginal people and Torres Strait Islanders. They also include a wide range of other people such as people who are physically ill or physically disabled and people who are old and frail. Decision-makers need to be alive, not just to the potential harm or prejudice suffered by vulnerable people in detention, but also to the personal characteristics of the accused person, and the special needs that the person may have for support or in connection with their family or community situation.

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62. See Ch 5.

63. *R v Benbrika (Ruling No 20)* [2008] VSC 80 is an example where the Court noted significant problems with trial participation due to transport.

10.78 Accordingly, we recommend that consideration should be given to any special vulnerability or need of any child or young person, of a person with a cognitive or mental health impairment, or of an Aboriginal person or Torres Strait Islander, or of any other person. In Chapter 11 we will deal with the matters that should be considered with regard to these groups.

Incapacitation by intoxication etc

10.79 The *Bail Act* currently requires the authority to take into account "whether or not the person is … incapacitated by intoxication, injury or use of a drug or is otherwise in danger of physical injury or in need of physical protection".[64] About half of the submissions on this topic supported removing this provision[65] and half of the submissions did not.[66] Some argued that while it may be well intentioned, bail refusal on the grounds of intoxication alone is inappropriate; they suggested that social services, rather than police or the courts are best placed to respond to health considerations such as this.[67]

10.80 On the other hand, the NSW Police Force stressed the duty of care that police have to protect people from injury or death. Reference was made to s 6 of the *Police Act 1990* (NSW) which provides that the functions of the NSW Police Force include "the protection of persons from injury or death … whether arising from criminal acts or in any other way".[68] The NSW Police Association also expressed these concerns.[69]

10.81 The Public Defender submits that the state should "assume responsibility for a person before the court in a state of incapacity" but suggests developing "a separate legislative basis of imposing either conditions of release or temporary detention due to temporary incapacity".[70]

10.82 The current provision is well intentioned but it is a good intention misplaced. Detention in a police cell should not be the way such cases are dealt with.

10.83 We note s 206 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ("LEPRA") which provides that a police officer "may detain an intoxicated person found in a public place who is … in need of physical protection because the person is intoxicated".[71] The section goes on to provide that an intoxicated person so detained may be held in detention if it is necessary to do so temporarily for the purpose of finding a responsible person willing to undertake the care of the intoxicated person. There are more detailed provisions dealing with the possibility

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64. *Bail Act 1978* (NSW) s 32(1)(b)(iv).
65. Law Society of NSW, *Submission BA5*, 9; Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 28; Redfern Legal Centre, *Submission BA18*, 8; D Shoebridge, *Submission BA19*, 7; NSW, Office of the Director of Public Prosecutions, *Submission BA21*, 9.
66. F Mersal, *Submission BA10*, 10; M Ierace, *Submission BA16*, 5; Legal Aid NSW, *Submission BA17*, 12; NSW Police Force, *Submission BA39*, 28; Jumbunna Indigenous House of Learning, *Submission BA37*, 20; Police Association of NSW, *Submission BA38*, 3.
67. Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 27-28.
68. *Police Act 1990* (NSW) s 6(3)(b).
69. Police Association of NSW, *Submission BA38*, 3.
70. M Ierace, *Submission BA16*, 5.
71. *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 206.

that the intoxicated person is behaving so violently that a responsible person would not be capable of taking care of and controlling the intoxicated person.

10.84 It seems to us that the intent of the item in the current legislation would be sufficiently met by expanding s 206 of LEPRA to include the case of an intoxicated person in custody who would otherwise be released under the *Bail Act*. This would be a more appropriate way of managing the problem of intoxication.

10.85 If the person is so incapacitated by injury, as distinct from intoxication, as to be in need of protection, it is difficult to imagine that the person would not be a hospital case.

10.86 We have accordingly not adopted s 32(1)(b)(iv).

The relevance of particular matters

10.87 In this section, we deal with a number of matters that may be, and often are, relevant to the bail decision but for reasons of principle are not in themselves mandatory considerations. These are:

- the nature and seriousness of the offence charged;
- the strength of the prosecution case;
- the person's history of offending; and
- the person's past failure to comply with bail conduct requirements.

10.88 We recommend that these matters must be taken into account if the authority considers they are relevant to the mandatory considerations but not otherwise. (Recommendation 10.8)

The nature and seriousness of the offence charged

10.89 The *Bail Act* currently requires the authority to take into account the seriousness of the offence charged when considering "the protection and welfare of the community".[72] This provision appears to invite an authority to refuse release purely because the offence charged is a serious one. Pre-trial detention purely because the offence is a serious one amounts to punishment without proof of guilt. It runs counter to the presumption of innocence and the requirement of due process.

10.90 However, there are many situations in which the nature and seriousness of the charge and its circumstances (such as whether the offence charged involves firearms, explosives, prohibited weapons or terrorism) will be directly relevant to one or more of the primary considerations. For example, the more serious the charge and the objective circumstances of the alleged offending, the more likely a lengthy prison sentence and, accordingly, the greater the likelihood of absconding (subject, of course, to countervailing considerations). The seriousness of the offence and the

72. *Bail Act 1978* (NSW) s 32(1)(c)(i).

circumstance involved, such as the use of firearms, may also be relevant to the risk of other offences being committed or the threat of harm to a particular individual. For example, a person charged with a terrorism related offence, in circumstances involving the threatened use of explosives and where there is a support network alleged, may present both a high risk of absconding and a high risk of serious offending if released.

The strength of the prosecution case

10.91 The *Bail Act* requires the authority to take into account the strength of the evidence against the person when considering the probability of whether or not the person will appear in court in respect of the offence.[73]

10.92 The strength of the prosecution case is not relevant in itself and, accordingly, should not be a consideration in itself. As recognised in the current act, it may be relevant to the risk of the person not appearing, and the nature and strength of the case may be relevant to the likelihood of committing further serious offences, or of threatening the safety of a particular person.

Prior offences

10.93 The *Bail Act* currently requires the authority to take into account criminal record in relation to the person's probability of appearing in court, and the nature of the person's criminal history in somewhat limited circumstances, when considering the interests of the person. [74] How such a history could be in the interests of the person is not presently material. The point is that the person's criminal history should not be taken into account as a relevant matter in itself although it may be relevant to a mandatory consideration. For example, criminal history may go to the likelihood of a custodial sentence and its duration, and hence to a likelihood of failure to appear. Criminal history may also be relevant to whether the person is likely to commit further serious offences, such as in the case of a serial killer or serial sex offender, or a person with a history of gang related offending. It may be relevant to the risk of harm to a particular individual, as in some instances of serious repeat family violence.

Previous failure to comply with a conduct direction

10.94 The *Bail Act* requires the authority, when considering "the protection and welfare of the community", to take into account whether the person has failed to observe a reasonable bail condition (or in our terms a conduct direction) previously imposed in respect of the offence.[75]

10.95 Refusal to release because of prior non-compliance with a conduct requirement would, in effect, be punishment for such non-compliance even though such non-

73. *Bail Act 1978* (NSW) s 32(1)(a)(iii).
74. *Bail Act 1978* (NSW) s 32(1)(b)(vi).
75. *Bail Act 1978* (NSW) s 32(1)(c)(ii).

compliance does not constitute a criminal offence and carries its own potential consequences including possible revocation of a prior order for release.

10.96 However, previous failure to comply with a conduct requirement of a particular kind might, depending on the circumstances of the case, be relevant to a mandatory consideration such as the likelihood that the person will interfere with the course of justice or commit a serious offence.

Rules relating to decisions

10.97 This chapter is concerned with how decisions are made concerning whether to detain a person while proceedings are pending or whether to release the person, either unconditionally or with a condition or a conduct direction.

10.98 As a matter of principle, detention should be a measure of last resort and should be for no longer than any likely custodial sentence. Such constraints should be recognised in the legislation as over-arching principles. We recommend that this be done by incorporating three rules which give pre-eminence to those constraints.

10.99 The first rule is that detention is a measure of last resort. As a corollary, the rule should then provide that a person must be released if a reason for detention is sufficiently satisfied by setting conditions of release or by giving a conduct direction. (Recommendation 10.9(1)) This rule is intended to ensure that the least possible restriction is imposed, with due regard to the considerations to be taken into account. The proposed rule recognises a principle of fundamental fairness. It also recognises that detention is costly and should be reserved for those situations where it is required.

10.100 The second and third rules are that a person must not be detained unless a custodial sentence is likely and must not be detained for longer than the likely duration of any such a sentence. These rules recognise the principle that pre-trial detention should not operate as a punishment. (Recommendation 10.9(2) and (3))

10.101 We have recognised that it may be difficult for the authority to predict the likely duration of a sentence on available information. Further, if a person is to be detained pending trial, adjournments and other delays in the trial may result in detention for longer than initially expected. To overcome these practical difficulties, we recommend that the authority may, in effect, detain the person provisionally, listing the matter for reconsideration at a future time so that the question of detention can then be re-assessed in the light of better information. (Recommendation 10.9(3))

10.102 In further recognition that it may be difficult in some cases for the authority – particularly police officers making bail decisions – to assess the likelihood of a custodial sentence or to assess the likely duration of any such custodial sentence, we have included in our recommendations that the authority is to make its best estimate of those matters having regard to the experience and information of the person constituting the authority on the particular occasion. (Recommendation 10.9(4))

The specific provisions of s 32

10.103 In Appendix A to this report, we include the full text of s 32 and a table outlining the approach we have taken in relation to specific provisions of s 32(1), (2) and (2A) of the current legislation.

Recommendations

10.104 The following recommendations are made having regard to the foregoing discussion.

10.105 We have also taken into account the recommendation in Chapter 14 that the same considerations should apply to conditions and conduct requirements as those which apply to a decision whether to release or detain. When it comes then to formulating the considerations applicable to decisions whether to release or detain, it has been necessary, in some respects, to word the recommendations in a way that will also accommodate decisions concerning the imposition of conditions and conduct requirements.

Recommendation 10.1: Retain justification model

The justification model for a presumption in favour of release, as incorporated in the current *Bail Act 1978*, should be retained in a new *Bail Act*, as follows:

> A person is entitled to be released unless detention is justified having regard to the considerations set out in the following recommendations.

Recommendation 10.2: Considerations to be taken into account

(1) A new *Bail Act* should provide that, in deciding whether to release a person and whether to impose a condition or give a conduct direction, the authority must take the considerations specified in paragraph (2), and only these considerations, into account. The considerations are not listed in any hierarchy, and the weight given to each consideration should be considered in the circumstances of the particular case.

(2) The considerations should be:

(a) The public interest in freedom and securing justice according to law.

(b) The integrity of the criminal justice system having regard to, and only to:

(i) the likelihood that, if released, the person will abscond (as defined in Recommendation 10.4);

(ii) the fact that the person has a history of persistent failure to attend court for whatever reason and the authority is satisfied that the person is unlikely to attend court on a future occasion as required if released;

(iii) the likelihood that, if released, the person will interfere with the course of justice, such as by interfering with evidence, witnesses or jurors;

(iv) the fact that the person is charged with an indictable offence committed while subject to conditional liberty and:

(A) has one or more pending charges for an indictable offence committed while subject to conditional liberty; or

(B) has been convicted on one or more prior occasions of an indictable offence committed while subject to conditional liberty.

"Subject to conditional liberty" means being released pending proceedings, or being on parole, or serving a sentence of imprisonment by way of home detention or an intensive corrections order, or being subject to a suspended sentence or a good behaviour bond.

(c) The likelihood that, if released, the person will harm or threaten harm to any particular person or people including, in particular, anyone with whom the person is in a domestic relationship as defined in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

(d) The protection and welfare of the community having regard to and only to the likelihood that, if released, the person will commit:

(i) an offence causing death or injury, or

(ii) a sex offence, or

(iii) an offence involving serious loss of or damage to property, or

(iv) an offence or series of offences which give rise to a substantial risk of causing death or injury or serious loss of or damage to property.

(e) The interests of the person and of the person's family and associates.

(3) The provision should state that it does not apply to cases where there is an entitlement to release without conditions or conduct directions or where the authority exercises its absolute discretion to release on this basis.

Recommendation 10.3: Particular principles concerning the public interest in freedom and securing justice according to law

A new *Bail Act* should provide that, in relation to the public interest in freedom and securing justice according to law, the authority must consider:

(a) The entitlement of every person in a free society to liberty, freedom of action and freedom from unnecessary constraint in daily life.

(b) The presumption of innocence whenever a person is charged with an offence.

(c) There should be no detention by the state without just cause.

(d) There should be no punishment by the state without conviction according to law.

(e) The public interest in a fair trial for both the state and the person charged with an offence.

Recommendation 10.4: Matters particular to the likelihood that the person will abscond or is otherwise unlikely to attend court

(1) A new *Bail Act* should provide that "abscond" should be defined to mean wilful failure to appear in order to avoid being dealt with by the court, as distinct from non-appearance merely out of forgetfulness or confusion.

(2) In considering the likelihood of absconding or whether the authority is satisfied that the person is unlikely to appear on a future occasion, the authority must consider:

(a) the strength or otherwise of the person's family and community ties, including employment, business and other associations, extended family and kinship ties and the traditional ties of Aboriginal people and Torres Strait Islanders,

(b) the likelihood of conviction for the offence charged and, if convicted, the likelihood of a custodial sentence and the likely duration of any such sentence,

(c) whether the person has a history of absconding or otherwise failing to appear or of attending court as required (including the circumstances of any prior failure to appear),

(d) any specific evidence indicating whether or not the person is likely to abscond or fail to appear (as the case may be).

Recommendation 10.5: Reminder notices

Consideration should be given to implementing a pilot program of reminder notices being sent to people released pending trial in order to evaluate the potential cost savings of such a program if implemented on a wider basis.

Recommendation 10.6: Matters particular to the likelihood that the person will harm or threaten harm to any particular person in a domestic relationship

A new *Bail Act* should provide that, in assessing the likelihood that, if released, the person will harm or threaten harm to any particular person in a domestic relationship as defined in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW), an authority must consider whether:

(a) the person has a history of violence,

(b) the person has been violent to the other person in the past (whether or not the accused person has been convicted of an offence in respect of the violence),

(c) the person has failed to comply with a conduct direction in respect of the offence to which this section applies that was imposed for the protection and welfare of the other person,

(d) in the opinion of the bail authority, the accused person will comply with any such requirement in the future.

Recommendation 10.7: Matters particular to the interests of the person and of the person's family and associates

A new *Bail Act* should provide that, in considering the interests of the person and of the person's family and associates, the authority must consider:

(a) the person's interest in liberty, freedom of action and freedom from unnecessary constraint in daily life,

(b) the period that the person may be obliged to spend in custody if detained and the conditions under which the person would be detained,

(c) the prospect that the person will not be able to prepare optimally for trial and participate optimally in the trial,

(d) the physical and psychological hardship of imprisonment,

(e) the consequential hardship for the individual, such as the effect on housing, not being employed, not being able to service financial commitments, and the stigma of having been to prison,

(f) hardship for the person's family, such as loss of financial support, loss of housing and the impact on children from loss of parental care,

(g) hardship for the person's associates, such as an employer, a business partner or a creditor, and

(h) any special vulnerability or need of any child or young person, of a person with a cognitive or mental health impairment, or an Aboriginal person or Torres Strait Islander, or of any other person.

Recommendation 10.8: The relevance of particular matters

A new *Bail Act* should provide that the following matters must be taken into account if the authority considers such a matter is relevant in relation to one or more of the mandatory considerations mentioned in Recommendation 10.2, but do not comprise mandatory considerations in themselves:

(a) the nature and seriousness of the offence charged including whether the offence charged involves firearms, explosives, prohibited weapons or terrorism,

(b) the strength or otherwise of the prosecution case,

(c) a history of prior offences,

(d) previous failure to comply with a conduct direction or a conduct requirement imposed as part of a bail agreement under the *Bail Act 1978*.

Recommendation 10.9: Rules applying irrespective of any other consideration

A new *Bail Act* should provide that the following rules apply to all decisions whether to release a person, irrespective of any other consideration:

(1) Detention is a measure of last resort and a person must be released if a reason for detention is sufficiently satisfied by setting conditions of release or by giving a conduct direction.

(2) A person must not be detained unless a custodial sentence is likely.

(3) An authority must not order a person to be detained for longer than the likely duration of a custodial sentence. A court or authorised justice may disregard this rule, provided that the matter is listed for reconsideration at a sufficiently early time to ensure that the person is not detained for longer than the likely duration of a sentence for the offence with which the person is charged.

(4) In assessing the matters referred to in (2) and (3) above the authority is to make its best estimate having regard to the experience and information of the person constituting the authority on the particular occasion.

11. Special needs and vulnerabilities

Introduction **167**
Young people **169**
The special characteristics of young people 169
Lack of knowledge and experience *169*
Dependence *169*
Impulsivity and lack of foresight *169*
Difficult life circumstances *170*
Different capacities acknowledged in other laws 170
The impact of remand on young people 171
A separate Bail Act for young people? 172
Conclusion and recommendation 173
Mental illness and cognitive impairment **175**
Definition 175
Submissions regarding the definition *176*
The Commission's view *176*
Over-representation 178
The impact of remand 178
Difficulty complying with conditions 179
A history of offending 179
Rights under international law 179
Conclusion and recommendation 180
Aboriginal people and Torres Strait Islanders **181**
Current provisions 181
Needs and cultural practices 181
Socio-economic disadvantage *181*
Family structure *182*
Mobility and links to place *183*
The Royal Commission into Aboriginal Deaths in Custody 183
Report from a group providing services 184
The Victorian approach 184
Conclusion and recommendation 185
Other special needs and vulnerabilities **186**
Susceptibility to physical hardship and vulnerability to assault 186
Community and extended family ties 187
Cultural, linguistic and religious minorities 187
How should this consideration be expressed? 188

Introduction

11.1 Bail authorities are called upon to make decisions about individual defendants, in light of their particular circumstances and the circumstances of the matters alleged against them. Decisions must be made on the basis that all people "are equal

before the law and are entitled without any discrimination to the equal protection of the law".[1]

11.2 Discrimination can be direct, when a person is treated less favourably because of their age, sex, race or other irrelevant ground. Indirect discrimination occurs where a requirement that appears to be neutral and fair, in fact impacts disproportionately on people in particular groups and the requirement or condition is not reasonable in the circumstances.[2] The disproportionate impact can occur because the people in a certain group have particular needs or vulnerabilities, or because the apparently neutral requirement conflicts with lifestyles or cultural practices that are outside the mainstream or unfamiliar to bail authorities.

11.3 The potential for indirect discrimination in bail decisions is currently acknowledged in the *Bail Act*. Section 32 requires a decision maker to consider the interests of the person when making a determination regarding bail. If the person is under the age of 18 years, or has an intellectual disability or is mentally ill, or is an Aboriginal person or a Torres Strait Islander, the court must consider any special needs of the person arising from that fact.[3]

11.4 Submissions and other evidence before this review indicate that, despite s 32, decision makers do not always appropriately take into account the particular circumstances of these defendants. The Commission will therefore recommend that bail legislation include more specific provisions regarding the particular circumstances of defendants in these and other categories.

11.5 In Chapter 10 we have recommended that a new *Bail Act* should contain an exhaustive list of considerations that are relevant to decisions to release or detain and to decisions to impose conditions or make conduct directions. As is the case at present, these considerations should include "the interests of the person". The list of considerations should specify that the interests of the person include any special vulnerability or need of any young person, a person with a cognitive or mental health impairment or an Aboriginal person or Torres Strait Islander.

11.6 In this Chapter, we will recommend provisions that further define the considerations that are relevant for young people, people with a cognitive or mental health impairment, and Aboriginal people and Torres Strait Islanders.

11.7 There are other individuals with special needs and vulnerabilities that may be relevant to a bail decision and the Commission recommends that the *Bail Act* include a requirement that the authority take those needs and vulnerabilities into account.

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1. *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 99 UNTS 171 (entered into force 23 March 1976) art 26.
2. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report No 92 (1999) [3.4].
3. *Bail Act 1978* (NSW) s 32(1)(b)(v).

Young people

The special characteristics of young people

Lack of knowledge and experience

11.8 The *Declaration of the Rights of the Child* states that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection".[4] Because of their age, young people have not yet acquired knowledge and experience of legal matters and court processes. They often do not have the skills and confidence to express their needs or explain their circumstances to adult strangers. It may be difficult for them to instruct a solicitor and participate in court processes.

Dependence

11.9 Young people's dependence poses a special challenge for the legal system. Young people's access to housing, transport and money is largely controlled by adults. This affects their ability to comply with bail conditions. For example, a young person subject to a curfew is dependent upon an adult to provide a safe home, and a young person subject to reporting requirements may need assistance with transport to the police station. The Aboriginal Legal Service submission indicates that it is not unusual for a young person to leave home at night because it is unsafe to remain, or to fail to report because of a lack of money for public transport.[5]

11.10 Young people's dependence is directly related to the problem of homelessness among young people. When young people are unable to live with their families, their lack of income means they have few alternatives. Many submissions identified the significant difficulties that homeless young people face in obtaining bail.[6] The Children's Court submission also noted the "serious lack of bail accommodation and support services for high risk juveniles".[7]

Impulsivity and lack of foresight

11.11 There is a common understanding that the immaturity of young people means that they cannot be held strictly responsible for their action. This common understanding has been confirmed by recent scientific discoveries regarding brain development and cognitive function. Professor Ian Hickie, the Executive Director of the Brain and Mind Research Institute, Sydney University, has said:

> New research in neuro-science tells us that the brain continues to develop right through until the late teenage and early adult period. In fact, particularly in young men, it may not reach adult maturity till the mid-20s.

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4. *Declaration of the Rights of the Child*, GA Res 1386(XIC) (20 November 1959).
5. Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 41.
6. Shopfront Youth Legal Centre, *Submission BA23*, 16; UnitingCare Children, Young People and Families, *Submission BA13*, 12; NSW Council for Civil Liberties, *Submission BA3*, 40; Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 43; Legal Aid NSW, *Submission BA17*, 19-20; Youth Justice Coalition, *Submission BA20*, 19.
7. Children's Court of NSW, *Submission BA33*, 8.

> It is the frontal part of the brain that regulates complex decision making, forward planning and inhibition of impulsive behaviours that is undergoing final development at this age.[8]

11.12 Impulsivity and lack of judgement, planning and foresight may lead a young person into offending. This may explain why offending rates peak in late adolescence (at age 18 or 19) and decline in early adulthood.[9] The same characteristics also make it difficult for a young person to comply with bail conditions, particularly if multiple and complex bail conditions are imposed.[10]

Difficult life circumstances

11.13 Young people who have contact with the criminal justice system are likely to have experienced many disadvantages. A survey of 361 young people in custody in 2009 found:

- About a quarter had experienced out-of-home care (by someone other than their parents);
- Only 38% were attending school prior to custody, and only 26% were working;
- 45% had had a parent in prison;
- 37% were taking medication, most commonly for mental illness;
- 87% were found to have at least one psychological disorder;[11]
- 60% report a history of child abuse or neglect, and 23% had experienced severe child abuse or neglect; and[12]
- 14% scored in the extremely low range of intellectual ability (under 70 IQ), and 32% were in the borderline range (70 – 79).[13]

Different capacities acknowledged in other laws

11.14 Until the age of 10, a child is conclusively presumed to be incapable of committing a criminal act,[14] and between the ages of 10 and 14, there is a rebuttable presumption that the child is incapable of committing an offence.[15] Other areas of NSW legislation differentiate between the treatment of young people and adults. The

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8. I Hickie, "We must raise the legal age of drinking to 19" *The Sydney Morning Herald* (19 November 2009). See also S Blakemore, S Choudhury, "Development of the adolescent brain: implications for executive function and social cognition" (2006) 47(3) *Journal of Child Psychology and Psychiatry* 296.
9. K Richards, *What makes juvenile offenders different from adult offenders?* Trends and Issues in Crime and Criminal Justice No 409 (Australian Institute of Criminology, 2011) 2.
10. See para 12.12-12.25.
11. D Indig and others, *2009 NSW Young People in Custody Health Survey: Full Report* (Justice Health and Juvenile Justice, 2011) 13-15.
12. D Indig and others, *2009 NSW Young People in Custody Health Survey: Full Report* (Justice Health and Juvenile Justice, 2011) 158.
13. D Indig and others, *2009 NSW Young People in Custody Health Survey: Full Report* (Justice Health and Juvenile Justice, 2011) 156.
14. *Children (Criminal Proceedings) Act 1987* (NSW) s 5.
15. *R v CRH* (Unreported, NSW Court of Criminal Appeal, 18 December 1996).

Young Offenders Act 1997 (NSW) provides that criminal proceedings are not to be instituted against a child if alternative and appropriate means of dealing with the matter are available.[16] The Act also makes provision for warnings, cautions and conferences to be used instead of traditional criminal justice processes. The *Children (Criminal Proceedings) Act 1987* (NSW) contains a separate sentencing scheme for young people. These statutes acknowledge that, because young people do not have the same cognitive capacity and life experience as adults, they should be treated differently within the criminal justice system.

The impact of remand on young people

11.15 There are far-reaching consequences associated with holding young people in custody, both for the individual being held in remand, and for the community more broadly. A period spent in remand adversely affects the ability of young people to maintain community and family ties, and disrupts education.[17] The impacts are worse for young people who are sent to a detention centre a long way from their family. Research from the United States indicates that juvenile detention makes mental illness worse, and for some, the onset of depression occurs after incarceration.[18]

11.16 As in the case of adults, being held on remand may affect a young person's sentence through limitations on the ability to prepare his or her defence, and on the ability to make a positive impression upon the court.[19] It is also likely that as a result of the remand period, the young person will have fewer community ties, less opportunity for family support during the process, and fewer prospects of employment due to interruption of education or training. The reduced employment prospects may also increase the risk of reoffending.[20]

11.17 There is evidence from a study of British juveniles that "even a relatively short term in custody on remand was found to significantly increase subsequent offending (64.3 per cent) compared to being placed on remand at home (36.6 per cent)".[21] Similarly, a study of Canadian boys, relying on self-reported offending, found that intervention by juvenile justice authority was associated with a significant increase in the likelihood of offending as an adult. Juvenile detention had the most negative impact.[22] A review of studies in the United States also found that detention is a

16. *Young Offenders Act 1997* (NSW) s 7.
17. Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) [18.170].
18. B Holman, J Ziedenberg, *The Dangers of Detention: the impact of incarcerating youth in detention and other secure facilities* (Justice Policy Institute, 2007) 8.
19. G Brignell, *Bail: An Examination of Contemporary Issues*, Sentencing Trends and Issues No 24 (Judicial Commission of NSW, 2002) 3. See Ch 5.
20. D Weatherburn, S Vignaendra and A McGrath, *The Specific Deterrent Effect of Custodial Penalties on Juvenile Re-offendiing,* Crime and Justice Bulletin No 132 (NSW Bureau of Crime Statistics and Research, 2009) 5.
21. Kraus J, Smith J, "Remand in Custody as a deterrent in juvenile jurisdiction" (1978) 18(3) *British Journal of Criminology* 285 cited in M Lynch, J Buckman and L Krenske *Youth Justice: criminal trajectories*, Trends & Issues in Crime and Criminal Justice (Australian Institute of Criminology, 2003).
22. U Gatti, R E Tremblay and F Vitaro, "Iatrogenic effect of juvenile justice" (2009) 50(8) *Journal of Child Psychology and Psychiatry* 991.

significant risk factor for reoffending, and that detention may interrupt the normal pattern of growing out of crime, as it disrupts links with family, school and work.[23]

11.18 This effect has not been demonstrated in Australia. A study of 395 young offenders (152 sentenced to detention, 243 received non-custodial penalties) found no difference in the likelihood of reconviction, after controlling for other relevant factors.[24]

11.19 The Children's Court submission to this review indicated that detention can be criminogenic because offenders learn better offending strategies and create and maintain criminal networks.[25] Reducing this impact requires separating high risk offenders from low risk offenders. However young people on remand in New South Wales are not separated from young people serving a custodial sentence.[26]

11.20 The commentary to the UN Standard Minimum Rules for the Administration of Juvenile Justice ("the Beijing Rules") observed:

> The many adverse influences on an individual that seem unavoidable within any institutional setting evidently cannot be outbalanced by treatment efforts. This is especially the case for juveniles, who are vulnerable to negative influences. Moreover, the negative effects, not only of loss of liberty but also of separation from the usual social environment, are certainly more acute for juveniles than for adults because of their early stage of development.[27]

11.21 We have referred to the situation of young people, including increases in the remand population in Chapter 4, and the international law regarding young people, including the *Convention on the Rights of the Child*, in Chapter 2.

A separate Bail Act for young people?

11.22 In our Questions for Discussion, we asked if there should be a separate *Bail Act* relating to young people. Most of the submissions that addressed this issue argued that a separate *Bail Act* is unnecessary, and that the interests of young people can be appropriately safeguarded within the main bail legislation.[28] Others considered that it would be useful to have a separate bail statute for young people,[29] or to have

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23. B Holman, J Ziedenberg, *The Dangers of Detention: the impact of incarcerating youth in detention and other secure facilities* (Justice Policy Institute, 2007) 4-7.
24. D Weatherburn, S Vignaendra and A McGrath, *The Specific Deterrent Effect of Custodial Penalties on Juvenile Re-offending*, Crime and Justice Bulletin No 132 (NSW Bureau of Crime Statistics and Research, 2009). The authors noted that "Our results are inconsistent with the two previous Australian studies of specific deterrence, both of which found evidence that juveniles given custodial penalties are more likely to re-offend" (at 5).
25. Children's Court of NSW, *Followup Submission*, 2-3.
26. Children's Court of NSW, *Followup Submission*, 3.
27. *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* Rule 13, GA Res 40/33, 96th mtg, UN Doc A/RES/40/33 (29 November 1985) commentary to art 4.1.
28. G Henson, *Submission BA2*, 4; NSW Council for Civil Liberties, *Submission BA3*, 39; Law Society of NSW, *Submission BA5*, 13; F Mersal, *Submission BA10*, 12; Legal Aid NSW, *Submission BA17*, 20; NSW Young Lawyers, *Submission BA11*, 5; Redfern Legal Centre, *Submission BA18*, 16; NSW, Office of the Director of Public Prosecutions, *Submission BA21*, 14; Children's Court of NSW, *Submission BA33*, 2; NSW Police Force, *Submission BA39*, 40.
29. Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 39-40; M Ierace, *Submission BA16*, 6; D Shoebridge, *Submission BA19*, 9; Public Interest Advocacy Centre, *Submission BA26*, 16.

provisions for young people within a separate Part of the *Bail Act*,[30] or within the *Children (Criminal Proceedings) Act 1997*.[31] For example, the Youth Justice Coalition noted that in other areas of the criminal justice system, the vulnerability of children and young people is acknowledged through the enactment of specific legislation.[32]

11.23 We consider that it is most convenient and appropriate to deal with the pre-trial detention and release of young people within the *Bail Act*. The reforms we have recommended – regarding fine-only offences, presumptions, conditions and conduct directions, considerations, and the response to breach of a conduct direction – are all of benefit to young people and adults alike. It is unnecessary to duplicate these provisions in a separate Act, and convenient to have all of the provisions that are relevant to young people's bail in one place.

11.24 This is not to say, however, that young people should be treated in the same way as adults. We have made two recommendations that apply to young people alone, regarding repeat applications[33] and financial conditions.[34] We also recommend further provisions regarding considerations relevant to young people in particular.

Conclusion and recommendation

11.25 We consider that, in light of the special circumstances of young people and the serious impact that remand can have on young people further provision should be made regarding young people in the *Bail Act*.

11.26 Section 6 of the *Children (Criminal Proceedings) Act 1987* (NSW) currently sets out a number of principles to be applied by people or bodies exercising functions under that Act as follows:

> (a) that children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them,
>
> (b) that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance,
>
> (c) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption,
>
> (d) that it is desirable, wherever possible, to allow a child to reside in his or her own home,

30. Public Interest Advocacy Centre, *Submission BA26*, 16; Law Society of NSW, *Submission BA5*, 13; Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 39-40; Youth Justice Coalition, *Submission BA20*, 7.
31. Public Interest Law Clearing House, *Submission BA12*, 13; UnitingCare Children, Young People and Families, *Submission BA13*, 7; Youth Justice Coalition, *Submission BA20*, 7; Shopfront Youth Legal Centre, *Submission BA23*, 14.
32. Youth Justice Coalition, *Submission BA20*, 6.
33. See para 19.56-19.57.
34. See para 14.39.

(e) that the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind,

(f) that it is desirable that children who commit offences be assisted with their reintegration into the community so as to sustain family and community ties,

(g) that it is desirable that children who commit offences accept responsibility for their actions and, wherever possible, make reparation for their actions,

(h) that, subject to the other principles described above, consideration should be given to the effect of any crime on the victim.

11.27 Nearly all submissions supported the inclusion in the *Bail Act* of these principles, either in their current form, amended to remove those provisions that deal with young people once guilt has been determined, or by incorporating the principles in another way. We agree with those submissions which suggested that if the principles are imported, those provisions dealing with children as offenders should be omitted as they are inappropriate at the pre-trial stage when the presumption of innocence still applies.[35] Accordingly, we recommend that the provisions regarding the right to be heard and participate (s 6(a)), the desirability of maintaining the employment and education of a young person (s 6(c)), and the desirability, wherever possible, of a young person living at home (s 6(d)) should be incorporated into the *Bail Act*. (Recommendation 11.1(a)-(c))

11.28 Submissions also supported the incorporation of relevant principles of the Beijing Rules.[36] For the purpose of bail proceedings, the most important of these is article 13, which requires that detention pending trial shall be used only as a measure of last resort and for the shortest appropriate period of time. We recommend that this principle be taken into account when making a determination in relation to a young person. (Recommendation 11.1(d))

11.29 In light of the submissions regarding the complex and onerous nature of bail conditions imposed on young people,[37] we recommend that bail authorities be required to take into account the young person's ability to understand and to comply with conditions or conduct directions. (Recommendation 11.1(e)) Young people's undeveloped capacity for complex decision-making, planning and inhibiting compulsive behaviours[38] are also relevant to a young person's capacity to comply with conditions or conduct directions, particularly if multiple and complex bail conditions are imposed.

35. NSW Young Lawyers, *Submission BA11*, 6; M Ierace, *Submission BA16*, 6; Redfern Legal Centre, *Submission BA18*, 16.

36. NSW, Commission for Children and Young People, *Submission BA4*, 2; Law Society of NSW, *Submission BA5*, 14; NSW Young Lawyers, *Submission BA11*, 6; Legal Aid NSW, *Submission BA17*, 20; Redfern Legal Centre, *Submission BA18*, 16; NSW, Office of the Director of Public Prosecutions, *Submission BA21*, 14; Children's Court of NSW, *Submission BA33*, 2; NSW, Juvenile Justice, *Submission BA35*, 16.

37. See para 12.12-12.25.

38. See para 11.8-11.2.

Recommendation 11.1: Matters to be taken into account when making a determination in relation to a young person

A new *Bail Act* should provide that, in making a decision in relation to a young person under the age of 18 years regarding release or a condition or conduct direction, the authority must take into account (in addition to any other requirements) any matters relating to the person's age, including:

(a) that young people have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard and a right to participate in the processes that lead to decisions that affect them,

(b) that it is desirable, wherever possible, to allow the education or employment of a young person to proceed without interruption,

(c) that it is desirable for a young person to reside in safe, secure and stable accommodation, and, where possible, in his or her own home,

(d) that the detention or imprisonment of a young person is to be used only as a measure of last resort and for the shortest appropriate period of time,

(e) the young person's ability to understand and to comply with conditions or conduct directions, and

(f) that young people have undeveloped capacity for complex decision-making, planning and the inhibition of impulsive behaviours.

Mental illness and cognitive impairment

Definition

11.30 The *Bail Act* presently requires a decision maker to take into consideration the special needs of a person who is mentally ill or has an intellectual disability. "Mentally ill" is not defined. Intellectual disability is defined as meaning:

> a significantly below average intellectual functioning (existing concurrently with two or more deficits in adaptive behaviour) that results in the person requiring supervision or social rehabilitation in connection with daily life activities.[39]

11.31 Within NSW, "mental illness" is defined narrowly in the *Mental Health Act 2007* (NSW)[40] and the *Mental Health (Forensic Provisions) Act 1990* (NSW).[41] These statutes define circumstances in which a person can be detained or treated involuntarily. There are also definitions of cognitive impairment in the *Criminal Procedure Act 1986* (NSW)[42] (regarding giving of evidence by a vulnerable person) and the *Crimes Act 1900* (NSW)[43] (regarding victims of sexual assault).

39. *Bail Act 1978* (NSW) s 37(5).
40. *Mental Health Act 2007* (NSW) s 4(1).
41. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 3(1).
42. *Criminal Procedure Act 1986* (NSW) s 306M.
43. *Crimes Act 1900* (NSW) s 61H(1A).

Submissions regarding the definition

11.32 Submissions to this reference have called for a definition that includes a wider range of conditions that impede functioning and the ability to understand bail conditions,[44] and in particular, that includes brain injury,[45] cognitive impairment[46] and mental illness.[47] Other submissions[48] suggested using the definition of "vulnerable person" in the regulations to the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW). This regulation creates an entitlement to a support person for "vulnerable people", including "persons who have impaired intellectual functioning".[49] "Impaired intellectual functioning" is defined as:

> (a) a total or partial loss of the person's mental functions, or
>
> (b) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction, or
>
> (c) a disorder, illness or disease that affects the person's thought processes, perceptions of reality, emotions or judgement, or that results in disturbed behaviour.[50]

11.33 Other submissions proposed adopting the definitions in the *Mental Health Act 2007* (NSW),[51] the *Criminal Procedure Act 1986* (NSW)[52] or the *Crimes Act 1900* (NSW).[53]

The Commission's view

11.34 The Commission is presently undertaking a review of criminal law and procedure applying to people with cognitive and mental health impairments. We have explored the various definitions of these terms and found that there is no consistency of approach to the terms among experts in the medical, social and behavioral sciences. There is also no consistency between definitions used in statutes in New South Wales. In part, this is because each statute has a different purpose. The definition that is appropriate to determine whether a person should be admitted to a mental health facility, whether he or she agrees or not, is different to the definition of mental illness appropriate when deciding whether or not to detain a person in a prison or release them, or to attach a particular condition to release.

11.35 Further, developments in our understanding of some disabilities have overtaken the criminal law. For example, improved understandings of disabilities such as Acquired

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44. Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 44; D Shoebridge, *Submission BA19*, 10.
45. Legal Aid NSW, *Submission BA17*, 24; Public Interest Advocacy Centre, *Submission BA26*, 18-19; Brian Injury Association of NSW and Blake Dawson Pro Bono Team, *Submission BA32*, 3.
46. Public Interest Advocacy Centre, *Submission BA26*, 18-19.
47. Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 44; Public Interest Advocacy Centre, *Submission BA26*, 18-19.
48. NSW Young Lawyers, *Submission BA11*, 8; Redfern Legal Centre, *Submission BA18*, 14.
49. *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) cl 24.
50. *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) cl 23.
51. Public Interest Law Clearing House, *Submission BA12*, 15.
52. NSW, Office of the Director of Public Prosecutions, *Submission BA21*, 15.
53. Intellectual Disability Rights Service, *Submission BA30*, 3.

Brain Injury and dementias mean that it is now desirable to include them in a definition of cognitive impairment.

11.36 The Commission has provisionally adopted the following definitions applying to people with cognitive and mental health impairments for decisions about bail, diversion and sentencing:

> "Cognitive impairment" means an ongoing impairment in comprehension, reason, adaptive functioning, judgement, learning or memory that is the result of any damage to, dysfunction, developmental delay, or deterioration of the brain or mind.
>
> Such cognitive impairment may arise from, but is not limited to, the following:
>
> - Intellectual disability
> - Borderline intellectual functioning
> - Dementias
> - Acquired brain injury
> - Drug or alcohol related brain damage
> - Autism spectrum disorders.
>
> "Mental health impairment" means a temporary or continuing disturbance of thought, mood, volition, perception, or memory that impairs emotional wellbeing, judgment or behaviour, so as to affect functioning in daily life to a material extent.
>
> Such mental health impairment may arise from, but is not limited to, the following:
>
> - Anxiety disorders
> - Affective disorders
> - Psychoses
> - Severe personality disorders
> - Substance induced mental disorders.

The term 'substance induced mental disorders' is intended to include ongoing mental impairments caused by consumption of drugs, alcohol or other substances (such as drug induced psychoses). It is intended to exclude people with substance abuse disorders (addiction to substances) or people who act when under the temporary effects of such substances.

11.37 To be relevant to a decision about bail, a personality disorder must be severe. The diagnosis of personality disorder is not without controversy in this context, for the most part because some personality disorders are diagnosed by reference to criminal behaviour. Used in the context of the criminal justice system, there is the potential for such a diagnosis to be circular (the person is criminal because he or she has a personality disorder, and has a personality disorder because of his or her criminal behaviour.) Nevertheless, a severe personality disorder may, for example,

cause self-harming behaviours that need treatment and thus be relevant to a decision about detention or release, and to the conditions of release. In this context, therefore, we have included severe personality disorders in the definition of mental health impairment.

11.38 This definition is broad, and encompasses the conditions and disorders mentioned in submissions. It also includes the conditions and disorders currently encompassed by the LEPRA Regulation, the *Mental Health Act 2007* (NSW), the *Criminal Procedure Act 1986* (NSW) and the *Crimes Act 1900* (NSW). It is intended to be suitable for a range of uses where special consideration is to be given to people with mental health or cognitive impairments, including diversion, bail and sentencing. However there are purposes for which it would not be suitable, such as for statutes dealing with involuntary detention, or when considering whether a person has the state of mind to have committed an offence.

11.39 The proposed definitions are provisional, and will be settled in Part 1 of the final report of the review of criminal law and procedure applying to people with cognitive and mental health impairments, which will be delivered in 2012. That report will include detailed discussion of the reasoning that led to the above definitions. The Commission recommends that the same definitions be used for the purpose of the *Bail Act*.

Over-representation

11.40 It is difficult to obtain accurate figures about the number of people with cognitive and mental health impairments who have contact with the justice system. A comprehensive analysis of the available data will be included in our forthcoming review of criminal law and procedure applying to people with cognitive and mental health impairments. For the purposes of this review of bail law, it is sufficient to note that there is evidence that there is significant over-representation of people with mental health[54] and cognitive impairments[55] within prison, court and juvenile justice[56] populations.

The impact of remand

11.41 The courts have acknowledged that a custodial sentence may weigh more heavily on a person with mental illness,[57] and this is also the case for a person with mental illness on remand. Submissions indicate that it is difficult for a person on remand to

54. T Butler and S Allnutt, *Mental Illness Among New South Wales Prisoners* (Corrections Health Service, 2003).

55. NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report No 80 (1996) [2.7]; K A Vanny, M H Levy, S C Hayes and D M Greenberg, "Mental Illness and Intellectual Disability in Magistrates Courts in NSW South Wales, Australia" [2009] *Journal of Intellectual Disability Research* 53, 289;E Baldry and L Dowse, *People with Mental Health Disorders and Cognitive Disabilities in the Criminal Justice System in NSW – Policy and Legislative Impacts* (NSW Department of Human Services, 2010) 3.

56. D Indig and others, *2009 NSW Young People in Custody Health Survey: Full Report* (Justice Health and Juvenile Justice, 2011).

57. *R v Tsiaras* [1996] 1 VR 398, 400; *R v Jiminez* [1999] NSWCCA 7 [25], *R v Hemsley* [2004] NSWCCA 228 [35].

engage with support services,[58] and that people with cognitive impairments are more vulnerable to violence and abuse when in custody.[59] Those with mental illnesses may find their illness exacerbated by imprisonment:

> Some patients are more vulnerable from a psychological, psychiatric and physical perspective in prison compared with other patients. The stress of incarceration can precipitate acute psychological decompensation and, in some cases, psychotic illness. Some prisoners are emotionally immature and may be adversely influenced by the hard-core prison population, and this may have a detrimental affect on their personality and subsequently their risk of re-offending.[60]

Difficulty complying with conditions

11.42 The difficulties that people with cognitive or mental health impairments have in complying with conditions are discussed later in this Report.[61] Several submissions pointed to the critical importance of s 37(2A) in the *Bail Act*.[62] This section requires an authorised officer or court, before imposing a condition on an accused person who has an intellectual disability, "to be satisfied that the bail condition is appropriate having regard (as far as can reasonably be ascertained) to the capacity of the accused person to understand or comply with the bail condition".

A history of offending

11.43 Similarly, submissions reported that people with cognitive or mental health impairments often have a history of offences relating to their disability.[63] The presumptions against bail for repeat offenders in s 8C and 9D therefore disproportionately affect those defendants, and our recommendations regarding presumptions are particularly relevant.[64]

Rights under international law

11.44 Australia has ratified the *Convention on the Rights of Persons with Disabilities*, which requires parties to ensure that people with disabilities enjoy, on an equal basis with others, the right to liberty and security of person, and are not deprived of their liberty unlawfully or arbitrarily.[65]

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58. Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 45; Shopfront Youth Legal Centre, *Submission BA23*, 22.
59. Shopfront Youth Legal Centre, *Submission BA23*, 22.
60. D Howard and B Westmore, *Crime and Mental Health Law in New South Wales* (2nd ed, LexisNexis Butterworths, 2010) 569. See also Public Interest Advocacy Centre, *Submission BA26*, 22.
61. See para 12.26-12.29.
62. Redfern Legal Centre, *Submission BA18*, 17; Public Interest Advocacy Centre, *Submission BA26*, 21.
63. Law Society of NSW, *Submission BA5*, 17; International Commission of Jurists, *Submission BA22*, 6; NSW, Office of the Director of Public Prosecutions, *Submission BA21*, 15.
64. See para 8.74-8.76.
65. *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 14.

Conclusion and recommendation

11.45 For people with cognitive or mental health impairments, as for young people, Aboriginal people and Torres Strait Islanders, and in fact all defendants, our general recommendations regarding presumptions, considerations, conditions, and the entitlement to release will be most important. For example, Recommendation 7.1 means that previous failure to comply with bail conditions, which is often associated with mental illness or cognitive impairment, will not disqualify a person from the entitlement to release for minor offences.

11.46 In addition, in light of the *Convention on the Rights of Persons with Disabilities* and to avoid direct or indirect discrimination against people with cognitive or mental health impairments, we recommend that decision makers be required to take certain matters into account. These matters include a person's ability to understand and comply with conditions, the person's need to access treatment or support in the community, the person's need to undergo assessment, and any additional impact of imprisonment as a result of the cognitive or mental health impairment. The matters listed in Recommendation 11.2(a)-(d) may be the subject of a report tendered on behalf of the person. In requiring the authority to have regard to any such report, we do not intend that the authority have regard solely to such a report and the absence of a report should not raise an inference adverse to the person or provide a ground for adjourning proceedings unless the person has applied for such an adjournment.

Recommendation 11.2: Matters to be taken into account when making a determination regarding a person with a cognitive or mental health impairment

A new *Bail Act* should provide that, in making a decision in relation to a person with a cognitive or mental health impairment regarding release or a condition or conduct direction, the authority must take into account (in addition to any other requirements):

(a) the person's ability to understand and comply with conditions or conduct directions,

(b) the person's need to access treatment or support in the community,

(c) the person's need to undergo assessment to determine eligibility for treatment or support,

(d) any additional impact of imprisonment on the person as a result of their cognitive or mental health impairment,

(e) any report tendered on behalf of a defendant in relation to the person's cognitive or mental health impairment,

(f) that the absence of such a report does not raise an inference adverse to the person or a ground for adjourning the proceedings unless on the application of or with the consent of the person.

Aboriginal people and Torres Strait Islanders

11.47 The over-representation of Aboriginal people and Torres Strait Islanders in the criminal justice system has been discussed earlier.[66] Because of this over-representation, we consider that particular attention should be paid to the circumstances of Aboriginal people and Torres Strait Islanders when making decisions regarding bail.

Current provisions

11.48 The *Bail Act* requires a bail authority to consider the special needs arising from being an Aboriginal person or Torres Strait Islander.[67] It also requires the bail authority, when considering the likelihood of the person appearing in court, to take into account:

> the person's background and community ties, as indicated (in the case of an Aboriginal person or a Torres Strait Islander) by the person's ties to extended family and kinship and other traditional ties to place and the person's prior criminal record …[68]

11.49 When considering whether a condition requiring a person to reside in a bail hostel is suitable, a bail authority must consider the background of the person, particularly if the person is an Aboriginal person or Torres Strait Islander.[69] However, possibly as a result of a drafting error, s 32(4) does not apply to Aboriginal or Torres Strait Islander young people. Section 32(4) provides that a court shall ignore the fact that a person under the age of 18 years does not reside with a parent or guardian.[70]

Needs and cultural practices

11.50 The Commission considers that bail authorities should take into account not only the special needs that may arise from being an Aboriginal or Torres Strait Islander, but also matters relating to Aboriginal or Torres Strait Islander identity, culture and heritage. Aboriginal people have the right to practise their cultural traditions and customs[71] and bail authorities should avoid bail decisions that unnecessarily interfere with those practices. Cultural practices concerning family structure, mobility and links to place are particularly relevant to bail law, and we have discussed these briefly below.

Socio-economic disadvantage

11.51 Many Aboriginal people and Torres Strait Islanders are successful in education and employment and live in safe and healthy families and communities. However,

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66. See para 4.35.
67. *Bail Act 1978* (NSW) s 32(1)(b)(v).
68. *Bail Act 1978* (NSW) s 32(1)(a)(i).
69. *Bail Act 1978* (NSW) s 36(2A). See also para 13.9-13.11.
70. See Appendix A.
71. *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) art 11.

statistically members of these communities are also much more likely to experience disadvantage, including chronic disease and disability, early school leaving, unemployment, and poverty.[72]

11.52 When poverty is concentrated within a particular group, the use of an apparently non-discriminatory condition such as a financial surety can create a disproportionate impact on that group. In other words, if financial sureties are used without close attention to the economic circumstances of an accused person, indirect discrimination is likely to occur. In 2001, the Aboriginal Justice Advisory Council reported that the use of financial sureties posed significant difficulties for Aboriginal defendants.[73] The submission of the Aboriginal Legal Service indicates that the imposition of financial securities on poor defendants is still a significant barrier to release for Aboriginal people.[74]

11.53 Economic disadvantage combined with a lack of public transport can also make it difficult to comply with bail conditions. The Law Society reports that Aboriginal people often breach reporting conditions because they do not have access to public transport, a motor vehicle or a licensed driver.[75]

Family structure

11.54 The importance of extended family in Aboriginal culture has been noted in reports, submissions to this reference, and is acknowledged in legislation.[76] A number of submissions pointed out that bail conditions such as curfews, exclusion zones and non-association orders restrict contact with family networks and prevent Aboriginal people from maintaining relationships, performing responsibilities such as taking care of elderly relatives or attending funerals.[77] Bail conditions that conflict with cultural obligations are often breached, leading to enforcement proceedings and bail refusal.[78] The Aboriginal Legal Service suggests that when a court imposes conditions, a relevant consideration should be

> how it would impact on that person's proper and lawful participation in any cultural family or community obligations, having regard to the location and make-up of the relevant community.[79]

11.55 The importance of extended family means that Aboriginal people, especially young people, experience particular hardship when detained away from their family. The Aboriginal Legal Service notes that many Indigenous people live in remote and

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72. Australia, Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage Key Indicators 2009* (Productivity Commission, 2009) [4.5], [4.6], [4.8], [4.9].
73. Aboriginal Justice Advisory Council, *Aboriginal people and bail courts in NSW* (2000) 14.
74. Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 48.
75. Law Society of NSW, *Submission BA5*, 18.
76. See, eg, the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 5(h).
77. NSW, Department of Family and Community Services, *Submission BA24*, 24; NSW Young Lawyers, *Submission BA11*, 7; Law Society of NSW, *Submission BA5*, 18; Legal Aid NSW, *Submission BA17*, 25; Council of Social Service of NSW, *Submission BA7*, 10. See also para 11.33.
78. NSW Young Lawyers, *Submission BA11*, 7; Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 47.
79. Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 47.

regional areas, while the most western detention centre for young people is in Wagga Wagga.[80]

Mobility and links to place

11.56 For many Aboriginal people, frequent short-term mobility is a normal part of life. People may travel for a few days or a few months, usually to visit family, but also to attend funerals, cultural or sporting festivals or to access health services. Short-term travel is most common among young adults, with older people more firmly associated with a homeland and serving as a focus or base for others, particularly children.[81] Bail processes requiring a fixed address and frequent reporting to a particular police station may conflict with these cultural practices.[82]

11.57 At the same time, "Aboriginal people have strong cultural and historical ties with particular locations, [and] the nature of extended Aboriginal families further create strong senses of belonging to a specific place and community".[83] This is recognised in s 32(1)(a)(ia) of the *Bail Act* which requires an authorised officer or court (when considering the probability of a person appearing in court) to take into account "the person's background and community ties, as indicated (in the case of an Aboriginal person or a Torres Strait Islander) by the person's ties to extended family and kinship and other traditional ties to place". Bail conditions that exclude an Aboriginal person from a town or area where the person has traditional ties can have a serious impact on the person.

The Royal Commission into Aboriginal Deaths in Custody

11.58 The Commission is concerned to find that the problems raised in submissions regarding Aboriginal people and bail are very similar to those raised at the Royal Commission into Aboriginal Deaths in Custody 20 years ago. The Report noted

> in New South Wales, where monetary bail is usually not set for most minor offences, concern has been expressed at the police practice of imposing bail conditions which are most unlikely to be kept. Examples were given to the Commission of conditions such as prohibition on entering the home town of the arrested person; daily reporting for summary offences; and prohibition on the consumption of alcohol and being within a designated distance of licensed premises. When such conditions are breached, the likelihood of the person returning to custody is increased. Even if such a result is not immediate, a progression to more stringent conditions for future release on bail becomes inevitable, with the ultimate conclusion being refusal of bail on the basis of prior failure to abide by conditions of release.[84]

11.59 The Report also found that:

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80. Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 47.
81. S Prout, *On the move? Indigenous temporary mobility practices in Australia* Working Paper No 48/2008 (Centre for Aboriginal Economic Policy Research, 2008) 5-14.
82. See also Jumbunna Indigenous House of Learning, *Submission BA37*, 9-10.
83. Aboriginal Justice Advisory Council, *Aboriginal people and bail courts in NSW* (2000) 11.
84. Australia, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 3, [21.4.10].

> Many of the restrictions on access to police bail of Aboriginal detainees have to do with their failure to meet the criteria for release. Prior failures to appear at court, lack of a fixed residential address, lack of employment and other such indicators of possible non-attendance at court have been regarded as contributing significantly to Aboriginal disadvantage in the bail process.[85]

11.60 The *Bail Act* contains provisions which are intended to address the issues raised by the Royal Commission. However, the Jumbunna Indigenous House of Learning has suggested that these provisions have not had the intended effect:

> Twenty years after the handing down of the RCIADIC recommendations and both Police and the Courts are still imposing residential, curfew and financial surety conditions that take no heed of the way in which Indigenous families operate, and the culture of Indigenous people. To fail to rectify this approach is not only to disregard the reality of Indigenous culture, but to criminalise it.[86]

Report from a group providing services to Aboriginal people and Torres Strait Islanders

11.61 Our Questions for Discussion asked if the *Bail Act* should provide that a bail authority must take into account a report from a group providing programs or services to Indigenous people. The purpose of this provision would be to improve bail decision making by allowing Aboriginal and Torres Strait Islander community members to contribute their knowledge about the defendant, available services and other relevant matters.

11.62 Submissions generally supported this proposal,[87] but some submissions cautioned that the absence of such a report should not be a reason to refuse bail[88] or delay the bail decision.[89] The Aboriginal Legal Service suggested that the bail authority should only be required to take such a report into account if tendered by the applicant for bail, and it should not be able to be used if the applicant has a legitimate objection to the report.[90]

The Victorian approach

11.63 Several submissions[91] called for a provision similar to s 3A of the *Bail Act 1977* (Vic):

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85. Australia, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 3, [21.4.15].
86. Jumbunna Indigenous House of Learning, *Submission BA37*, 13.
87. Law Society of NSW, *Submission BA5*, 19; Legal Aid NSW, *Submission BA17*, 26; NSW, Department of Family and Community Services, *Submission BA24*, 3; NSW Police Force, *Submission BA39*, 42; Jumbunna Indigenous House of Learning, *Submission BA37*, 25; Youth Justice Coalition, *Submission BA20*, 21; Redfern Legal Centre, *Submission BA18*, 15.
88. Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 48-49; Legal Aid NSW, *Submission BA17*, 26; Redfern Legal Centre, *Submission BA18*, 15.
89. NSW, Office of the Director of Public Prosecutions, *Submission BA21*, 16; NSW Police Force, *Submission BA39*, 42; Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 48-49.
90. Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 48-49.
91. Youth Justice Coalition, *Submission BA20*, 5; Children's Court of NSW, *Submission BA33*, 2; Legal Aid NSW, *Submission BA17*, 25.

Determination in relation to an Aboriginal person
In making a determination under this Act in relation to an Aboriginal person, a court must take into account (in addition to any other requirements of this Act) any issues that arise due to the person's Aboriginality, including—

(a) the person's cultural background, including the person's ties to extended family or place; and

(b) any other relevant cultural issue or obligation.

Conclusion and recommendation

11.64 The Commission agrees with the Aboriginal Legal Service submission that general reforms to the *Bail Act* are of great importance to Aboriginal defendants.[92] Creating a uniform presumption in favour of release and limiting conditions to those that are necessary to avoid detention are important steps towards reducing the numbers of Aboriginal people on remand and subject to onerous bail conditions.

11.65 However we also recommend that the *Bail Act* include further provisions regarding Aboriginal people. Our recommendation is very similar to the Victorian provision, in that it calls for consideration of any matter associated with Aboriginal or Torres Strait Islander identity, culture and heritage, including connections with extended family and traditional ties to place. However we also recommend that the provision specify that the bail authority take into account mobile and flexible living arrangements, as these are an important part of Aboriginal culture and are particularly relevant to the setting of bail conditions. Finally, we recommend that, if a report from a group providing services to Aboriginal people is tendered on behalf of a defendant, that report should be taken into account.

11.66 This provision would also allow a bail authority to take into account special needs and vulnerabilities that are associated with Aboriginal or Torres Strait Islander identity, which might include poverty or other forms of disadvantage.

Recommendation 11.3: Matters to be taken into account when making a determination regarding an Aboriginal person or Torres Strait Islander

A new *Bail Act* should provide that, in making a decision in relation to an Aboriginal person or Torres Strait Islander regarding release or a condition or conduct direction, the authority must take into account (in addition to any other requirements):

(a) any matter relating to the person's Aboriginal or Torres Strait Islander identity, culture and heritage, which may include:

(i) connections with and obligations to extended family

(ii) traditional ties to place

(iii) mobile and flexible living arrangements

(iv) any other relevant cultural issue or obligation.

92. Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 43.

(b) any report tendered on behalf of a defendant from groups providing services to Indigenous people.

(c) that the absence of such a report does not raise an inference adverse to the person, or a ground for adjourning the proceedings unless on the application of or with the consent of the person.

Other special needs and vulnerabilities

11.67 There are other people who may experience more acute hardship or who may be especially vulnerable if detained or made subject to conditions or conduct requirements. Such people include:

- people with special susceptibility to the hardship of prison or to assault in custody;
- people who have community and extended family ties different from those of the majority of the populations; and
- people from cultural, linguistic or religious minorities.

Susceptibility to physical hardship and vulnerability to assault

11.68 For some the prison environment is particularly harsh, because of physical vulnerability. Those who have a physical disability or a serious illness, older people, especially the frail, and pregnant women may all experience prison more acutely than others. This may be because of the demands of prison life, or because support or specialist medical services may be harder to access in the particular case.

11.69 For some people, the risk of assault – which is high in remand populations - may be higher. For example, people who are gay, lesbian, bisexual, transgender or intersex can be subject to prejudice and hate-related violence.[93] The following example was included in the Australian Institute of Criminology paper *Transgender Inmates.* It is a stark example of a woman who died in custody following a series of sexual assaults in December 1997:

> After an appearance in a Local Court, bail was refused and Ms M was remanded in custody. Late on 22 December she was transported to a remand and reception centre where she underwent induction assessment. She was identified as transgender by the welfare officer and it was determined she should go into a "protection" wing. Having spent December 24 in court Ms M spent December 25 and 26 in "strict protection". During this time she was brutally raped at least twice during daylight hours. The attacks were so vicious that two other prisoners took the unusual step of reporting the incidents and

93. U K Young, '*You shouldn't have to hide to be safe', A report on Homophobic Hostilities and Violence against Gay Men and Lesbians in New South Wales* (Attorney General's Department of NSW, 2003). The research was conducted across NSW between March and June 2003 with 600 respondents, of which 50% were gay men, 42% were lesbians and 6% were bisexual.

> giving sworn evidence. On December 27 Ms M was found dead in her cell hanging by a shoelace.[94]

Corrective Services NSW now has a specific policy regarding the management of transgender people in custody. The policy specifies that "until a decision has been made regarding ongoing placement and management, the transgender inmate is to be kept separate from other inmates; accommodated in a single cell; provided access to separate ablutions; and is not to be transported with any other inmate in the same compartment of a transport vehicle.[95] The case illustrates how individuals can be especially at risk of assault, and how protection arrangements may unavoidably involve the additional hardship of isolation.

Community and extended family ties

11.70 In the previous chapter we recommend that the strength or otherwise of the person's family and community ties, including employment, business and other associations, extended family and kinship ties and the traditional ties of Aboriginal people and Torres Strait Islanders should be taken into account when assessing the likelihood of absconding.[96]

11.71 Many people have extended family, community ties or support networks that are important and should be taken into account in relation to their individual needs when the question of release arises for consideration. These ties may be particularly relevant to the way a conduct direction is formulated.

Cultural, linguistic and religious minorities

11.72 Similarly, people from a non-English speaking background or refugees who have recently settled in Australia may have no, or limited close family connections living in the country. They may however, have strong connections with a broader community or cultural group in Australia. Considerations such as this may be relevant to determination of an appropriate financial condition or residential requirement. Considerations such as this may be relevant, for example, in the case of a young Sudanese man who has settled in Australia after being separated from his family during the Sudanese Civil War.

11.73 People from a religious minority may also have particular needs. For example, the need to access a particular place of worship may need to be taken into account if the authority is considering a place restriction condition. This may be relevant for people of strong religious views from mainstream religions as well as to adherents of minority religions. Religious practices, traditions or obligations which may be associated with significant cultural or religious events can be a relevant

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94. J Blight, *Transgender Inmates*, Trends and Issues in Crime and Criminal Justice No 168 (Australian Institute of Criminology, 2000) 6, citing: Coroner J Abernethy, Inquiry into a death, 21 July 1999. Red: W308 201/99 JI-DI.

95. Corrective Services NSW, *Operations Procedures Manual*, section 7.23 (Management of Transgender Inmates).

96. See para 10.47.

consideration in relation to "the person's interest in liberty, freedom of action and freedom from unnecessary constraint in daily life".[97]

How should this consideration be expressed?

11.74 We have made recommendations in relation to people belonging to particular groups: young people, people with a cognitive or mental health impairment, and Aboriginal people and Torres Strait Islanders. There then remains a wider, more diffuse group of people who have special need or vulnerabilities.

11.75 We considered recommending a provision that would include a short list of qualifying characteristics that could, in a particular case, indicate a special need or vulnerability. This might include: having a disability, illness, or being old and frail; being from a cultural or religious minority; having a non-English speaking background; or being a person who is gay, lesbian, bisexual, transgender or intersex.

11.76 The value of such a list is that it highlights the need to consider whether people with a particular characteristic have a special need or vulnerability which should be taken into account. However, this approach has difficulties. First, it tends to make membership of the group the relevant factor rather than the special vulnerability or need of an individual. Secondly, many members of the particular group may not be vulnerable at all. For example, a person from a cultural or religious minority may be a particularly robust individual with no special needs or vulnerability.

11.77 On the other hand, if the source of a special need or vulnerability is not specified, there is the risk that it may be overlooked, or even that the authority might be reluctant to take the matter into account because the legislature has not thought it important enough to specify.

11.78 On balance, we have formed the view that, it is better to focus the authority on the particular needs and vulnerabilities of the individual. This does not preclude the person raising a vulnerability or need related, for example, to membership of an ethnic or cultural group, but it does require the person to explain how a special vulnerability arises in his or her case. A general provision of this nature would allow any person who can show a special vulnerability or need, however arising, to raise the issue with the bail authority.

11.79 We would emphasise that the requirement to consider special needs or vulnerabilities is only one of many factors the authority is to consider. It should not be an automatic reason for releasing a person or for reducing conditions or conduct requirements. In some cases, detention will still be required notwithstanding a special need or vulnerability. For example, detention will normally be required in the case of a foreign national who has entered Australia for the sole purpose of committing a serious crime, such as drug importation or a terrorist offence, notwithstanding the fact that the person does not speak English. In other cases, a strict regime of conditions or conduct requirements may be required notwithstanding the special need or vulnerability of the person.

97. See Recommendation 10.7.

11.80 Where an especially vulnerable person has to be detained while proceedings are pending, the risks to the person's health or safety may then have to be managed by prison authorities by means of protective procedures and protocols (for example, segregation).

Recommendation 11.4: Matters to be taken into account when making a determination regarding a person requiring special consideration.

A new *Bail Act* should provide that, in making a decision regarding release or a condition or conduct direction, the authority must take into account (in addition to any other requirements) any special vulnerability or need of the person.

12. Conditions and conduct requirements: Background

Introduction **191**
Language: Use of the term "conditions" 192
Extent of the imposition of conditions and conduct requirements **192**
General submissions 192
Young people 193
People with cognitive and mental health impairments 197
The law enforcement view 199
Views concerning compliance monitoring **200**
Stakeholder concerns 200
The law enforcement view 201
Evidence concerning the benefits and costs of monitoring **204**
Deterrence 206
Economic model studies: the value of apprehension 206
The effect of monitoring of conduct requirements 207
Young people *207*
Adults *210*
The Commission's views **211**

Introduction

12.1 The *Bail Act* makes provision for the imposition of conditions on bail. Many submissions to this inquiry raised serious concerns about bail conditions and their imposition and monitoring. In this Chapter, we review the issues raised by stakeholders, and the available empirical evidence, in relation to the imposition of bail conditions and conduct requirements.

12.2 The following three chapters cover our proposed reforms including our recommendations concerning:

- the types of conditions and conduct requirement that may be imposed;
- the considerations and rules that should guide the decision making about the impositions of conditions and conduct requirements; and
- the enforcement of conduct requirements.

12.3 This topic is further considered in Chapter 16 concerning the very recent case of *Lawson v Dunlevy*,[1] which was decided while this report was being finalised. Chapter 16 gives our views on the way forward following that decision.

1. *Lawson v Dunlevy* [2012] NSWSC 48.

Language: Use of the term "conditions"

12.4 Under the current law, conduct requirements are imposed by means of a bail agreement, which must be entered into as a pre-condition of release.[2] In consequence, it is common to refer to conduct requirements as "conditions". Many submissions used the term "conditions" in that sense. Unless directly quoting a submission which uses the word "conditions" in that way, we will use the term "condition" to mean a condition in the strict sense, that is, a requirement which has to be met before a person can be released (such as a condition that money be deposited or security provided as a condition of release).

12.5 We will use the term "conduct requirement" when we speak about conduct requirements embodied in a bail agreement under the current legislation or when speaking about bail law generally. In Chapter 6 we recommend abolishing the bail agreement and replacing it with a court ordered conduct direction. When speaking specifically about our proposals for a new *Bail Act*, we will use the new term "conduct direction".

Extent of the imposition of conditions and conduct requirements

12.6 Many submissions raised concerns about the extent of the imposition of conditions and conduct requirements. In the view of a large number of stakeholders, too many conditions are imposed (whether by police or courts) and this is having the effect of creating an onerous burden on those on bail. Particular concerns are raised in relation to young people and people with mental health or cognitive impairments.

General submissions

12.7 The submission received from the Chief Magistrate of the Local Court included the following passage:

> Overly complex or onerous reporting requirements that go beyond those reasonably necessary to secure an accused person's attendance at court are commonly seen in conditions of police bail or are being sought in applications for bail before the court, notwithstanding the requirement of section 37(2) that the conditions imposed on a grant of bail are to be no more onerous than appear to be required. The Court is exposed to constant applications for review of bail conditions and observes that in the majority of cases such applications are wholly or partially successful, in most cases with the consent of the prosecuting agency.[3]

12.8 A number of other submissions support the above observations. The following extracts are provided from submissions by Legal Aid NSW and the Aboriginal Legal Service:

> It is therefore with concern that Legal Aid NSW notes the steady rise in the remand population in this State over the last ten years, and the imposition of onerous bail conditions on defendants that in combination with police compliance checking practices have increased the number of bail breaches

2. *Bail Act 1978* (NSW) s 7.
3. G Henson, *Submission BA2*, 2.

> being dealt with by the courts. In relation to juveniles in particular, onerous bail conditions have had the effect of escalating defendants' involvement in the criminal justice system at an early and unnecessary stage.[4]
>
> The ALS opposes unnecessary and often onerous bail conditions which are imposed routinely and sometimes without due consideration. As such the ALS supports a provision in the Act designed to ensure that conditions are only imposed where the decision maker is satisfied they are of significance and where in the absence of such conditions it may not be appropriate to grant bail.[5]

12.9 The Public Interest Advocacy Centre provided the following case study:

Example 12.1:

LA was charged with resist police and possession of an illicit substance. She was apprehended in Kings Cross. Police released her on bail, with one of her conditions being that she was restricted from going within 1000 metres of Kings Cross railway station.

She was subsequently arrested in Kings Cross again sharing needles, and was taken into custody. An application for bail was made before the court, and bail was granted with the same conditions, namely that she not go within 1000 metres of Kings Cross railway station.

The bail condition presented considerable difficulties for LA as she needed to enter the Kings Cross area to access her doctor and her methadone clinic.

An application for variation of the bail conditions was made, with the conditions being varied.[6]

12.10 In this case study, a condition was imposed for a good reason – namely to prevent the person accessing drug suppliers – but it had unintended consequences that ultimately undermined the objective. Similarly, some submissions highlighted problems associated with imposing "no alcohol" conditions on people who are known to be addicted to alcohol.[7] While this is no doubt well intentioned, in practice, it can set a defendant up to fail.

12.11 The submissions that were critical of the current extent of imposition of conduct requirements identified two groups of people who they say are particularly affected by the current regime – young people and people with cognitive and mental health impairments.

Young people

12.12 Many submissions emphasised the particular impact of the problem on young people. The following extract from the Youth Justice Coalition submission is an illustration:

4. Legal Aid NSW, *Submission BA17*, 1.
5. Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 28.
6. Public Interest Advocacy Centre, *Submission BA26*, 10.
7. Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 29; Aboriginal Justice Advisory Council, *Aboriginal People and Bail Courts in NSW* (2000) 15.

> Bail conditions are often far more onerous than what is required to meet the overall objectives of bail - that is, to ensure the young person's attendance at court and to protect alleged victims and the community from further offending. Conditions such as curfews have a punitive function of limiting movement and freedom, often to a greater extent than required by the offence.
>
> Further, bail conditions imposed on juveniles at first instance often do not take into account the realities of the young person's life or their ability to comply. Conditions are often imposed without consultation with the young person and their family as to their appropriateness. Young people in contact with the juvenile justice system have a greater likelihood of poor cognitive functioning, unstable family arrangements, and experience out of home care placements - all factors which make it more difficult to comply with bail conditions imposed on them.[8]

12.13 In the same vein, the submission from the President of the Children's Court included the following passage:

> It is the experience of the Children's Court that children and young people are often granted police bail subject to conditions that are more onerous than necessary and do not relate to the nature of the offence. Such conditions include strict reporting requirements, curfew conditions, and non-association and place restriction conditions. It is well recognised that more onerous bail conditions are regularly imposed on juveniles than are imposed on adults. Reporting conditions require the young person to attend a police station and as a consequence, they will be likely to come into contact with both adult and juvenile offenders. There is a serious risk of contamination in these instances. There are also many cases that come before the Court where the individual has been granted bail subject to curfew conditions where there is no correlation between the condition and the offence. Reporting, curfew conditions and non-association and place restriction conditions are the most common conditions that are breached by young people.[9]

12.14 These issues are not new, particularly in relation to young people. In our 2005 report on *Young Offenders*[10] we made the following observations:

> The practice of imposing harsh and inappropriate bail conditions on young people has been the subject of repeated concern over the last decade or more. The Children's Court has noted that onerous bail conditions have been criticised in a number of key reports. In its 1992 report, *Juvenile Justice in New South Wales*, the Legislative Council Standing Committee on Social Issues reported that "magistrates take on the role of parent at times to restrict the movement and modify the behaviour of young people", so that conditions imposed by police and courts were frequently "elaborate, unenforceable, unreasonable and impossible to comply with". Bail conditions were sometimes more onerous than those placed on adults, and unrelated to the circumstances of the actual offence, or the young person's likelihood of reoffending.
>
> In 1993, the Juvenile Justice Advisory Council emphasised that bail conditions need to be proportionate to the nature of the offence and relevant to the situation of the young person. It recommended that a Code of Practice be developed, identifying what are suitable and reasonable bail conditions to impose on young people. The [Australian Law Reform Commission] and [Human Rights and Equal Opportunity Commission] argued that police should not deal with anti-social behaviour by imposing restrictive bail conditions on

8. Youth Justice Coalition, *Submission BA20*, 18-19.
9. Children's Court of NSW *Submission BA33*, 6.
10. NSW Law Reform Commission, *Young Offenders*, Report No 104 (2005).

> young people, stating that "bail conditions should not criminalise a young person's non-offending behaviour".[11]

12.15 We made the following recommendations in that report:

- The *Bail Act 1978* (NSW) should be amended to provide that conditions attaching to the grant of bail in the case of a young person must be reasonable having regard to the principles in s 6(b)-(d) of the *Children (Criminal Proceedings) Act 1987* (NSW), and are not excessive or unrealistic.
- The *Bail Act 1978* (NSW) should be amended to provide that information on the young person's accommodation circumstances must be provided to the court (although not necessarily in a formal report) before a curfew condition may be imposed.[12]

12.16 Government has not adopted these recommendations.

12.17 A study of young people appearing in the Children's Court at Parramatta in the custody list found that:

- 67% of young people received three or more bail conditions;[13]
- The three most common conditions imposed were curfew (68%), reside as directed (58%) and obey reasonable direction (58%);[14]
- Almost 10 percent of young people surveyed were granted bail but remained in custody because they could not meet the conditions of their bail.[15]

12.18 Again, these particular aspects of the problem are not new. With regard to curfew restrictions, for example, we said in our 2005 report on *Young Offenders*:

> Curfews may also exacerbate existing problems in the home environment by forcing constant and/or inappropriate contact with families or imposing policing roles on carers. A curfew is inappropriate where a young person is safer on the street than at home, for example where alcohol or drug abuse or domestic violence is a problem in the home.[16]

12.19 Speaking of bail conditions commonly imposed on young people such as curfews and "reside as directed" conditions, Professor Julie Stubbs has observed that "[s]uch conditions may result in young people being held in custody because they cannot meet bail, and or may set them up to fail when they breach inappropriate conditions".[17]

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11. NSW Law Reform Commission, *Young Offenders*, Report No 104 (2005) [10.54]-[10.55] (references omitted).
12. NSW Law Reform Commission, *Young Offenders*, Report No 104 (2005) 256 (recommendations 10.6, 10.7).
13. Youth Justice Coalition, *Bail ME Out: NSW Young Offenders and Bail* (2009) 14.
14. Youth Justice Coalition, *Bail ME Out: NSW Young Offenders and Bail* (2009) 14.
15. Youth Justice Coalition, *Bail ME Out: NSW Young Offenders and Bail* (2009) v.
16. NSW Law Reform Commission, *Young Offenders*, Report No 104 (2005) [10.61] (footnotes omitted).
17. J Stubbs, "Re-examining Bail and Remand for Young People in NSW" (2010) 43 *Australian and New Zealand Journal of Criminology* 485, 496.

12.20 The Legal Aid NSW submission contained a number of case studies which highlight some of the problems that can arise when onerous, ill considered, or routine conditions are imposed on young people. This is one such case study:

Example 12.2

A Legal Aid Children's Legal Service client was charged with committing affray. In the experience of Legal Aid solicitors it is standard practice at Bidura Court for magistrates in such cases to impose a place restriction encompassing a 2 km radius from Sydney Town Hall. The magistrate accordingly imposed this condition, giving no consideration to the fact that the defendant would breach the condition every time she travelled to school, visited the Department of Juvenile Justice in accordance with another bail condition, or visited her sister, who lived in Redfern.[18]

12.21 The Aboriginal Legal Service submission also raised concerns with the imposition of onerous, unrealistic and unrelated bail conditions on young people, particularly in relation to curfew and non-association conditions:

> An example provided by one of our solicitors involved a fourteen year old child with no prior record who was charged with breaking into a car at lunch time. The child received police bail with a curfew between seven pm and seven am.
>
> Another example involved a case where four co-accused children were charged with entering enclosed lands and put on bail to not associate with each other and to obey a strict curfew. Three of the children were cousins and two lived in the same house. Three were subsequently arrested for breaching their bail less than seven days after police bail was granted. Two out of the four were first time offenders.[19]

12.22 The Shopfront Youth Legal Centre submission comments that, in their view, "there is a growing problem with the imposition of onerous and inappropriate bail conditions".[20] The submission also contains the following case study:

Example 12.3

Ben, 15, has been in care since the age of 18 months, and has lived with the same foster family since then.

He has no criminal history, but is alleged to have been involved in the lighting of a small bonfire in parkland near his home, which unfortunately burnt out about 660 square meters of Crown land and had to be extinguished by the Fire Brigade. The evidence is that clear attempts were made to put out the bonfire (with dirt) by the four young accused people before they left the area.

Despite Ben's lack of criminal record or prior contact with police, he was placed on onerous bail conditions including non-association with 8 of his friends, and a curfew from 8pm to 6am.

18. Legal Aid NSW, *Submission BA17*, 13-14.
19. Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 18.
20. Shopfront Youth Legal Centre, *Submission BA23*, 15.

> Not only was the curfew unwarranted in the circumstances (the alleged offence was committed in the afternoon), it had a particularly harsh impact because of the police practice of "bail compliance checks".
>
> For several weeks, police turned up almost every night (sometime between 11.30pm and 3am) at Ben's house to check that he was abiding by his curfew. This caused Ben and his foster family much distress. There is a 4-year-old child in the family home who was awoken each night and who had trouble getting back to sleep. The neighbours were also becoming upset with the voices and police car lights interrupting their sleep almost every night.[21]

12.23 At the Young People Roundtable,[22] the majority of participating organisations told us about what they perceived to be the excessive imposition of bail conditions in the case of young people. They said that the sheer volume of bail conditions imposed on young people was often quite confusing and that bail conditions imposed often aimed to address perceived welfare and behavioural issues rather than the likelihood of attending court.

12.24 Concern was also expressed about the impact of non-association orders on young people living in regional areas, particularly Aboriginal young people. It was submitted that their inappropriate use can have a detrimental impact on family relationships and result in people being denied access to already limited amenities and services in small towns.

12.25 These issues were highlighted in relation to both police bail and court bail conditions. The view was expressed during the Young People roundtable that police often place onerous bail conditions on young people that are difficult to have removed unless one can put forward a "good reason" for doing so.[23]

People with cognitive and mental health impairments

12.26 Other submissions emphasised the impact on people with cognitive impairments. The Intellectual Disability Rights Service said this:

> It is the experience of the [Intellectual Disability Rights Service] and the [Criminal Justice Support Network] that bail conditions imposed by police on persons with intellectual disability are often numerous and onerous and beyond what could be regarded as necessary to reduce the risk of serious re-offending. The imposition of such conditions all too often sets up subsequent breach. We believe there is insufficient protection in the Bail Act 1978 against unreasonable conditions.[24]

12.27 People with cognitive and mental health impairments face additional challenges when onerous bail conditions are imposed. The Brain Injury Association of NSW submits that, as well as problems understanding bail conditions, other factors make compliance with onerous bail conditions harder, such as people's cognitive capacity

21. Shopfront Youth Legal Centre, *Submission BA23*, 10.
22. Young People roundtable, *Consultation BAC1*.
23. Young People roundtable, *Consultation BAC1*.
24. Intellectual Disability Rights Service, *Submission BA30*, 2-3.

to organise themselves and to motivate themselves to comply with bail conditions, and the lack of resources needed to comply with bail conditions.[25]

12.28 The challenges that young people face are exacerbated for young people with a cognitive impairment. In its submission to the Consultation Paper on *Young People with Cognitive and Mental Health Impairments in the Criminal Justice System*, the Shopfront Youth Legal Centre observed that:

> If bail is granted, a young person with a cognitive impairment or mental health problem is likely to find it even more difficult to understand and comply with bail conditions, or to seek a variation of unsuitable conditions. In turn, they are more likely to be arrested for breach of bail.[26]

12.29 The Legal Aid NSW submission in response to the same Consultation Paper contained two case studies that highlight some of the difficulties faced by young people with a cognitive or mental health impairment who are subjected to inappropriate, welfare-oriented or overly onerous bail conditions:

Example 12.4

Carl is twelve years old and has a cognitive impairment that means he often misbehaves and is difficult to control. As a result he lives in supported housing, where those caring for him find him hard to discipline. Carl was arrested for assault and, at the request of his carer, one of the conditions of his bail was that he eat his dinner every night. If Carl fails to do so, he breaches his bail and could be placed on remand.[27]

Example 12.5

Jenna is fourteen years old and has been diagnosed with having a developmental delay. She has been assessed as having a mental age of eight. Jenna also has a mental illness. On New Year's Eve she was at her Aunt's house with a number of other children. During this time she was on conditional bail. The conditions of her bail included that she remain with her grandmother or her aunt at all times. While at her aunt's house Jenna called an ambulance for herself because she felt that she was having a breakdown. Her aunt could not accompany her to hospital because of the other children in her care. The hospital would not admit Jenna because it was not able to identify her medical problem. As a result, Jenna started running amok in the hospital waiting room. Police, who had brought in an unrelated person for treatment, arrested Jenna for breach of bail (for not being in the company of her grandmother or aunt) and offensive behaviour. She spent a night in custody before being released from court the next morning on the same bail conditions.[28]

25. Brian Injury Association of NSW and Blake Dawson Pro Bono Team, *Submission BA32*, 14-15.
26. Shopfront Youth Legal Centre, *Submission MH41*, 2.
27. Legal Aid NSW, *Submission MH38*, 4 (also produced in Legal Aid NSW, *Submission BA17*, *22*).
28. Legal Aid NSW, *Submission MH38*, 3.

The law enforcement view

12.30 NSW Police Force submissions have strongly supported the role of bail conditions and conduct requirements in addressing the need to protect the community from the risks of absconding, commission of further crime, and interference with the justice system. [29]

12.31 The NSW Police Force did not, however, advocate unlimited discretion to impose whatever conduct requirements the police officer or the court consider would be useful. The NSW Police Force advocated a restriction of conduct requirements to requirements that can be enforced and breach of which is intended to result in revocation of bail. It said:

> Bail legislation that specifically allows for the promotion of effective law enforcement through the imposition of bail conditions that can be effectively policed is vital. The imposition of bail conditions that can be enforced is an important mechanism for reducing the level of crime, anti-social behaviour and re-offending by persons on bail. [30]

12.32 It also said:

> With specific emphasis on the requirement that the promotion of law enforcement be "effective" then,… bail conditions should only be put in place or continued if the judicial officer is of the view that breach of the condition or conditions imposed should result in a revocation of bail. To do otherwise suggests that the condition/s are more onerous than necessary and do not reflect the immediate threat the accused person poses.
>
> Accepting the fundamental principles pertinent to the accused person, to arrest a person for breach of bail, hold them in a police cell overnight, then transport them to a Department of Corrective Services or Juvenile Justice facility costs the NSW Police Force a lot of time, resources and money. To have these persons routinely granted bail following a breach does not constitute effective law enforcement.[31]

12.33 In information provided to us, the NSW Police Force cites an internal survey of 61 Local Area Commands (LACs) concerning bail conditions and young people. The survey finds that, in the view of the LACs:

- Curfews and place restrictions remove juveniles from environments where offending is likely. They also restrict the criminal behaviour, capability and intent of active offenders.
- Non-association restrictions disrupt groups of juveniles who might otherwise commit offences together.[32]

29. NSW Police Force, *Submission BA39*, 27.
30. NSW Police Force, *Submission BA39*, 29.
31. NSW Police Force, *Submission BA39*, 29.
32. NSW Police Force, *Bail Act Review: Juvenile Statistical Data, Case Study and Reference Material* (2012) 35.

Views concerning compliance monitoring

12.34 One of the areas where there was a significant divergence of opinion in our consultations was the topic of monitoring of compliance with bail conditions and conduct requirements. At consultation meetings, agencies and organisations repeatedly raised the extent of police monitoring of bail conditions and the frequent use of arrest. This was particularly the case at the consultation with representatives of organisations working with young people.[33] In contrast, the NSW Police Force submission presented the view that compliance monitoring is an important component of policing and is not excessive.

Stakeholder concerns

12.35 Shopfront Youth Legal Centre stated:

> In recent years, as has been documented, the NSW police have moved to a position that could be described as "zero tolerance". Instead of exercising appropriate discretion, police now deal with most breaches of bail by arresting the person and placing them before the court.
>
> We are often told by police officers that, if a person has breached a bail condition set by a court, "We have no discretion. We have to arrest them. This is what the court expects". It is a matter of serious concern that this appears to be a widely-held view among police officers (and, indeed, a policy of the NSW Police Force). In our experience, many judicial officers have expressed the view that a night in custody is a disproportionate response to a minor bail breach, and that a warning – or bringing the alleged breach to the notice of the court without arresting the defendant - would have been more appropriate.
>
> For accused persons (usually juveniles) who are subject to curfew conditions, many police local area commands have also embraced the practice of visiting people's homes in the middle of the night to conduct "bail compliance checks"… [T]his practice…is a significant intrusion on the life of an accused person and members of their household.[34]

12.36 Legal Aid NSW provided a case study on this topic:

Example 12.6

A 16-year-old Legal Aid client named Kristy was charged with aggravated robbery and assault occasioning actual bodily harm for an incident where it was alleged that she and a friend robbed the victim of a mobile phone. Prior to these charges, Kristy had had no dealings with police. One of the bail conditions set for her was that she be home between 7pm and 7am. Kristy lived with her father and her 9-year-old sister.

Police conducted bail compliance checks on Kristy over a three month period on average five nights a week. This was despite the fact that during this time Kristy attended all of her court appearances and did not commit any offences. The times the checks were carried out varied: for

33. Young People roundtable, *Consultation BAC1*.
34. Shopfront Youth Legal Centre, *Submission BA23*, 8.

example, 8.45pm, 3.10am and 6.50am. The bail compliance checks were noticed by other residents of the unit block in which Kristy's family lived and caused significant embarrassment to the family.

Kristy applied to the Supreme Court for a bail variation. The Court removed the curfew condition.[35]

12.37 Example 12.3 above is also related to frequent bail checks.

12.38 Some stakeholders have suggested that police treat arrests as a measure of performance, and this appears to have encouraged police to intensify compliance monitoring. The point is made by Professor Julie Stubbs:

> Breach of bail is not an offence. Rather, s 50 of the *Bail Act* provides for the person to be brought before the court to reconsider bail. However, there is evidence of police targeting of bail compliance and using this as a performance measure. For instance, police annual reports highlight specific operations to target breach of bail and the use by some commands of 'nightly bail compliance checks, particularly on juveniles' (NSW Police Force, 2008, p 15). Data indicate a 250% increase in arrests for outstanding warrants and/or breach of bail from 2003–04 to 2007–08, but the statistics reported do not differentiate between young people and adults. A media release from the NSW Police Minister in November 2009 confirms that proactive policing using bail compliance checks continues to be endorsed and used as a measure of police performance.[36]

12.39 There were also concerns raised about the ways in which arrest may be used without adequate consideration of use of discretion not to arrest. Legal Aid NSW provided the following case study:

Example 12.7

A Legal Aid client who was a young single mother was alleged to have committed a minor offence unlikely to attract a custodial sentence. As a condition of her bail she was required to report daily to the police. On one particular day her one-year-old child was very sick, vomiting so much as to suffer dehydration. As a result, she was unable to report that day. She reported the next day and told police what had happened. Police arrested her and kept her in custody for most of the day until she was granted bail, despite the fact that they did not dispute her explanation or the fact that the charges were minor and unlikely to attract a custodial sentence.[37]

The law enforcement view

12.40 The NSW Police Force regards it as its responsibility to ensure that conduct requirements imposed by police themselves or by the courts are observed. The NSW Police Force says:

> There is an expectation from the Courts, the community, police and victims that person with conditional bail will comply with the specific conditions imposed. …

35. Legal Aid NSW, *Submission BA17*, 15.
36. J Stubbs, "Re-examining Bail and Remand for Young People in NSW" (2010) 43 *Australian and New Zealand Journal of Criminology* 485, 496-497.
37. Legal Aid NSW, *Submission BA17*, 18.

> The [NSW Police Force] employs various strategies to ensure compliance including bail compliance checks.[38]

12.41 In additional material provided to us, the NSW Police Force outlined its views on the value of bail compliance checks in the context of young people. In the NSW Police Force view bail compliance checks:

- deter young people from offending and being incarcerated
- build rapport with young people and their families
- reinforce community expectation (of bail compliance)
- prevent young people from becoming victims or from victimising other young people (noting that young offenders often have a history of victimisation).[39]

12.42 The NSW Police Force says:

> Commands also viewed bail compliance checks as an investigative tool. Juveniles on conditional bail known for offences with a similar modus operandi had curfew checks conducted on them as soon as the incident was reported to rule them out as possible suspects.
>
> Targeting is risk based. It considers the juvenile's profile as well as the crime environment in the local area.
>
> Most Commands cited Break, Enter and Steal; Robbery; Steal from Motor Vehicles and Malicious Damage as the key juvenile criminal activities. Most gave examples of the effectiveness of bail compliance strategies in reducing these offence types.[40]

12.43 NSW Police Force submissions show that police have been increasing their use of bail compliance monitoring. It states that the number of bail compliance checks conducted per month on young people has increased approximately 400% from January 2007 to September 2010.[41] (In the 2007/08 financial year, there were 25,712 bail compliance checks on young people recorded in the police computer system. In the 2009/10 financial year, there were 40,799 such checks.)

12.44 The NSW Police Force states that the selection of young people who receive compliance checks is "in line with [NSW Police Force] strategies of predominantly targeting high-risk (being recidivist, serious and violent) offenders".[42] The Police figures indicate that checks are conducted on only 41% of young people on bail, so that 59% of young people on bail do not receive bail compliance checks.[43] The

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38. NSW Police Force, *Bail Act Review: Juvenile Statistical Data, Case Study and Reference Material* (2012) 18.
39. NSW Police Force, *Bail Act Review: Juvenile Statistical Data, Case Study and Reference Material* (2012) 18-19.
40. NSW Police Force, *Bail Act Review: Juvenile Statistical Data, Case Study and Reference Material* (2012) 35.
41. NSW Police Force, *Submission BA39*, 35.
42. NSW Police Force, *Bail Act Review: Juvenile Statistical Data, Case Study and Reference Material* (2012) 4.
43. NSW Police Force, *Bail Act Review: Juvenile Statistical Data, Case Study and Reference Material* (2012) 4.

NSW Police Force has provided, in Table 12.1, data concerning the frequency of bail checks in relation to young people.

Table 12.1 Frequency of bail checks for young people in 2008-09 financial year

Number of checks	Number of young people receiving a bail check	Percentage of total number of checks
200+	10	0.4%
150 - 199	7	0.3%
100 - 149	17	1%
50 - 59	120	5%
40 - 49	75	3%
30 - 39	120	5%
20 - 29	188	8%
10 - 19	378	17%
2 - 9	891	40%
1 only	418	20%
Total	2224	100%

Source: NSW Police Force

12.45 The NSW Police Force submission has provided a number of case studies to illustrate the deterrent effect of bail compliance monitoring from the police perspective. We provide two below:

Example 12.8

During May 2010 D3, a juvenile offender, was on bail for 3 sets of charges. Amongst other matters, the bail conditions imposed a curfew and stipulated that D3 reside at a specified address. Police conducted regular bail compliance checks on the juvenile. These were at varying hours, predominantly late night or early morning.

On the evening of 26 May 2010, a group of males met at the juvenile's residence. During this meeting the males agreed to commit a home invasion. The address of the home invasion was approximately 400-500 metres from the juvenile's residence. A group of seven males armed themselves with weapons including a rifle and committed the home invasion. Police responded to the incident and arrested the offenders.

Follow up inquiries reveal that D3 was offered the opportunity to participate in this home invasion, but he declined because he was fearful of police attending his home on a bail compliance check whilst he was absent. It is of significance that it was not the seriousness of the offence that deterred him, but rather the fear or apprehension of police targeting

> him through a bail compliance check and being arrested for failing to comply with bail conditions that prevented him from re-offending.[44]

Example 12.9

> One example of the success of bail compliance in this LAC includes a large Affray at Nowra Stockland Mall on 26/01/2010 involving 10 juveniles… Subsequently all juveniles were arrested and charged with strict conditional bail imposed. Information was received that there may be a repeat of an affray at the Nowra Show on 12 -13 February 2010 involving the same juveniles. Bail compliance checks increased on these juveniles leading up to and during the Nowra show, and as a result no further incidents occurred. Only one of these 10 juveniles has been charged with breach of bail since; and it appears that the strict conditional bail is deterring any similar offences by those involved.[45]

12.46 In support of its submission that compliance checks build a rapport with young people and their families, the NSW Police Force says there is evidence of parents contacting the police and requesting bail compliance checks on their children and that "[b]ail compliance checks can assist in empowering parents of juvenile offenders to prevent them from becoming involved in further criminal activity".[46] In response to an internal survey of LACs, one Command stated:

> the parents of juvenile offenders often state their appreciation of curfew bail to assist them in controlling their children. In these instances they encourage police attendance to check on their children, even at very late hours.[47]

Other LACs reported similar observations.

12.47 These Police views contrast with the views of other stakeholders reported above of problems being caused within some families related to compliance checks, especially late at night. These contrasting perceptions are not necessarily inconsistent. Those families who appreciate bail compliance checks are likely to express their gratitude to police, while those who are distressed by bail compliance checks are more likely to report their concerns to legal advisors.

Evidence concerning the benefits and costs of monitoring

12.48 In this section, we examine the evidence concerning the effects and costs of compliance checking. Mostly, the material in this area relates to young people. There is very limited evidence in relation to adults.

12.49 A reasonably high number of young people who breach conduct requirements are also charged with further criminal offences.

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44. NSW Police Force, *Submission BA39*, 33-34 (original emphasis).
45. NSW Police Force, *Bail Act Review: Juvenile Statistical Data, Case Study and Reference Material* (2012) 37.
46. NSW Police Force, *Bail Act Review: Juvenile Statistical Data, Case Study and Reference Material* (2012) 19.
47. NSW Police Force, *Bail Act Review: Juvenile Statistical Data, Case Study and Reference Material* (2012) 42.

12.50 A 2009 Bureau of Crime Statistics and Research (BOCSAR) study examined a random sample of 102 police narratives relating to young people brought before the court for breach of bail.[48] In this sample, 26 were alleged to have committed further offences.

12.51 Statistics provided by the NSW Police Force of its own survey of all juvenile files in the financial year 2008-09 indicated that of the 1789 juveniles brought before the court for breach of bail in the period, 771 (43.1%) were also charged with another offence.[49] The most common offences were theft and related offences (18%), acts intended to cause injury (17%) and public order offences (14%) (see Table 12.2). The statistics do not state whether the offences were detected as a result of bail compliance activity, or whether the breaches of bail conditions were detected in the course of the investigation of an offence.

Table 12.2: Number of offences committed by juveniles concurrent with breach bail

Offence type	Number	Percentage of offences
Theft and related offences	355	18%
Acts intended to cause injury	320	17%
Public order offences	275	14%
Offences against justice procedures	250	13%
Property damage and environmental pollution	214	11%
Road traffic and motor vehicle regulatory offences	182	9%
Unlawful entry with intent/burglary, break and enter	151	8%
Robbery, extortion and related offences	43	2%
Illicit drug offences	36	2%
Dangerous or negligent acts endangering persons	35	2%
Abduction, harassment and other offences against the person	24	1%
Miscellaneous offences	16	1%
Deception and related offences	11	1%
Weapons and explosives offences	7	0.4%
Homicide and related offences	2	0.1%
Sexual assault and related offences	2	0.1%

Source: NSW Police Force

48. S Vignaendra, S Moffatt, D Weatherburn and E Heller, *Recent Trends in Legal proceedings for Breach of Bail, Juvenile Remand and Crime*, Crime and Justice Bulletin No 128 (NSW Bureau of Crime Statistics and Research, 2009).

49. NSW Police Force, *Bail Act Review: Juvenile Statistical Data, Case Study and Reference Material* (2012) 30.

12.52 This information shows that a substantial proportion of young people released pending proceedings and who breach their conduct requirements also continue to offend while released.

Deterrence

12.53 We have not seen statistically significant evidence of a direct link between bail compliance checks and offending. A 2009 BOCSAR study examined the impact of police enforcement of conduct requirements on the juvenile remand population and the relationship between the growing juvenile remand population and the falling property crime rate. The published study found that while increased enforcement of conduct requirements led to an increased juvenile remand population, there was no significant association between the increased remand population and a decrease in property crime.[50] Since publication, Juvenile Justice has supplied BOCSAR with revised data. BOCSAR advised us that its revised conclusion, based on the new data, is:

> We now find a weakly significant deterrent effect for remand…The phrase 'weakly significant' in this context should be read as indicating that [the] relationship observed between remand and crime is not statistically significant but is close to being significant. In such circumstances, we cannot rule out the possibility the observed relationship is an artifact of chance.[51]

Economic model studies: the value of apprehension

12.54 The NSW Police Force cites the research of Dr V Sarafidis, which applied an economic modelling technique to the commission of crime. He concludes, consistent with longstanding American literature, that targeting the risk of apprehension and conviction for a criminal offence is a more effective strategy for increasing deterrence than increasing the severity of the punishment. According to his research, a one percent increase in the likelihood of arrest[52] could be expected to reduce total crime by 0.87 percent in the short term and 1.3 percent in the long term.[53] That was then compared with the crime prevention estimated to result from imprisonment.

12.55 A recent BOCSAR study, building on the work of Sarafidis, found a lesser effect resulting from the prospect of apprehension. BOCSAR concluded that a "one per cent increase in the risk of arrest in the long run produces a 0.135 per cent

50. S Vignaendra, S Moffatt, D Weatherburn and E Heller, *Recent Trends in Legal proceedings for Breach of Bail, Juvenile Remand and Crime*, Crime and Justice Bulletin No 128 (NSW Bureau of Crime Statistics and Research, 2009) 4.

51. Email correspondence from the Director of the Bureau of Crime Statistics and Research, Dr Don Weatherburn, to the Executive Director of the NSW Law Reform Commission (15 November 2011).

52. We note that the Sarafidis model does not appear to draw a distinction between arrest and other forms of police action (eg, issuing a CAN). In this model "arrest" can be taken to mean lodging criminal charges in general.

53. NSW Police Force, *Submission BA39*, 33.

reduction in property crime, a one percent increase in the risk of arrest for violent crime produces a 0.297 per cent reduction in violent crime".[54]

12.56 The NSW Police Force submission suggested that "these findings [the Sarafidis study] must call into question policy that arrest should be a last resort",[55] particularly when dealing with people suspected of breaching bail conditions. We do not agree with this conclusion. Both the Sarafidis and the BOCSAR study looked at the chance of being apprehended for a crime - not whether the method of apprehension was by way of arrest or Court Attendance Notice.

12.57 The work of Dr Sarafidis and BOCSAR does suggest that measures to increase the risk of apprehension are likely to contribute to a reduction in overall offending. We therefore consider that bail compliance checks might form part of a strategy to increase the risk of apprehension and therefore reduce offending while on bail. We do not yet have any statistical evidence for this conclusion, as the BOCSAR 2009 study was equivocal, and it considered the relationship between remand population and offending rather than between bail compliance checks and offending. However, where bail conditions are specifically directed at reducing the risks of offending, it is reasonable to conclude that monitoring compliance, deterring breaches and increasing the risk of apprehension for breach will contribute to reduced offending.

The effect of monitoring of conduct requirements

Young people

12.58 Earlier in this report, we discussed the significant increase in the number of people, particularly young people, detained pending trial.[56] There is evidence that the imposition of conduct requirements and the police monitoring of those requirements has contributed significantly to that increase.

12.59 The 2009 report by BOCSAR[57] studied the effect on young people of police activity in relation to breach of bail and of the introduction of s 22A in the *Bail Act 1978*.[58] It concluded as follows:

> Police activity in relation to breach of bail and the introduction of s.22A are both putting upward pressure on the juvenile remand population…The initial increase in remand (from 2006) was probably a result of increased enforcement activity.

54. W Wan, S Moffatt, C Jones and D Weatherburn, *The Effect of Arrest and Imprisonment on Crime*, Crime and Justice Bulletin No 158 (NSW Bureau of Crime Statistics and Research, 2012) 16.
55. NSW Police Force, *Submission BA39*, 33.
56. See para 4.25-4.30.
57. S Vignaendra, S Moffatt, D Weatherburn and E Heller, *Recent Trends in Legal Proceedings for Breach of Bail, Juvenile Remand and Crime*, Crime and Justice Bulletin No 128 (NSW Bureau of Crime Statistics and Research, 2009).
58. See also Chapter 19 where this report is discussed in more detail in relation to the impact of s 22A of the *Bail Act 1978* (NSW).

> The acceleration in remand after 2008 was probably due to the combined effects of enforcement and the introduction of s.22A.[59]

12.60 The revised data produced by Juvenile Justice, to which we have referred above, has also been considered by BOCSAR in this respect. BOCSAR advises that the revised data "suggests that much more of the growth in juvenile remand is attributable to bail enforcement activity by police than we thought at the time [the 2009 report] was published".[60] Accordingly, the revised data has strengthened the conclusion that the intensity of police monitoring activity has contributed to the increase in remand numbers.

12.61 Data produced by BOCSAR and collated by Legal Aid NSW corroborates this conclusion. The data in respect of young people are reproduced in the following table:

Table 12.3 – Young people proceeded against in court for breaching bail conditions

Year	Number of young people proceeded against to court for breaching bail conditions	Total number of young people proceeded against to court	Percentage of young people proceeded against to court for breaching bail conditions
Jun 06 – Jun 07	2324	14023	16.57%
Jul 07 - Jun 08	2891	15283	18.92%
Jul 08 – Jun 09	2699	14703	18.36%
Jul 09 – Jun 10	2869	14583	19.67%
Jul 10 – Jun 11	3126	13708	22.80%

Source: NSW Bureau of Crime Statistics and Research, NSW Recorded Crime Statistics July 2006-June 2011, reference DG11/9956.

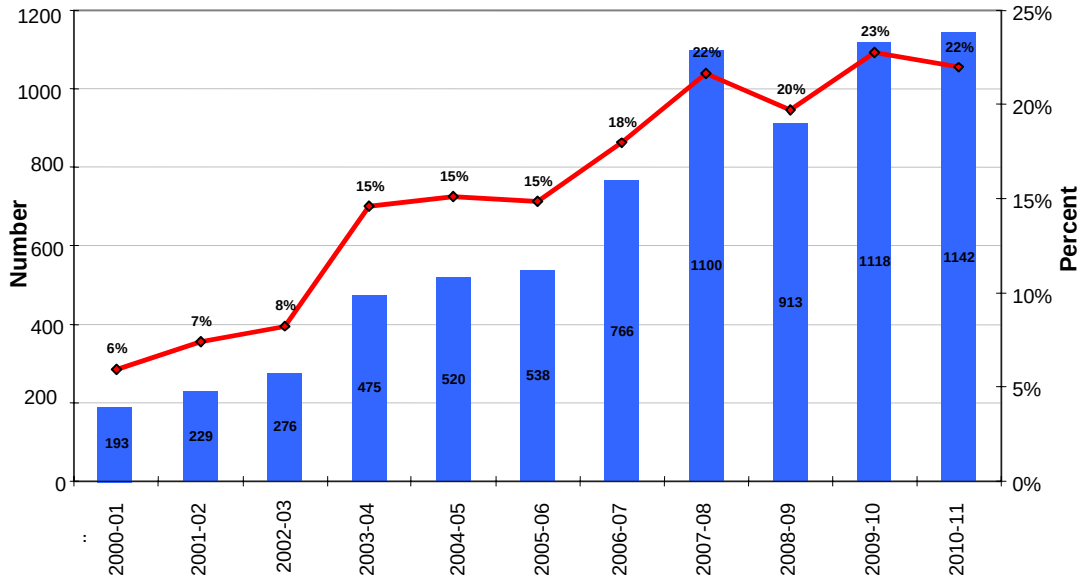
12.62 This data shows a substantial increase in the number of court proceedings for non-observance of conduct requirements over the last five years, while the total number of proceedings against young people has remained stable

12.63 Data from Juvenile Justice indicates that over the last 10 years there has been a significant increase in the number of young people detained for breach of conduct requirements only. There has also been a significant increase in the percentage of young people detained for breach relative to the total number of detentions pending completion of proceedings: from 6% of such total detentions in 2001 to between 20 and 23% during the last three years. Juvenile Justice provided the following table:

59. S Vignaendra, S Moffatt, D Weatherburn and E Heller, *Recent Trends in Legal proceedings for Breach of Bail, Juvenile Remand and Crime*, Crime and Justice Bulletin No 128 (NSW Bureau of Crime Statistics and Research, 2009) 4.

60. Email correspondence from the Director of the Bureau of Crime Statistics and Research, Dr Don Weatherburn, to the Executive Director of the NSW Law Reform Commission (15 November 2011).

Figure 12.1 Number and percentage of remand admissions for breach of bail conditions only



Source: DAGJ/JJ RPELive. As this is taken from a live database, figures are subject to change.

This counts remand admissions for Police Charge - Bail Refused with Most Serious Offence category of Justice Offences and text search including "breach" and "bail" in the free-text offence description.

12.64 A small scale study by Juvenile Justice provides some evidence of the main conditions breached.[61] In 2008, Juvenile Justice NSW examined a random sample of 85 young people who had been detained following breach of conduct requirements. The files were reviewed to identify what bail conditions were breached. The most frequent breaches were curfew (46.5%), fail to reside as directed (12.2%), fail to report to police (12.1%) and non-association conditions (11.1%). The study excluded from the initial data set those cases where there was concurrent offending, consequently only 4% of the breaches related to the commission of an offence.

12.65 It is apparent that the problem identified in our 2005 report[62] persists and has become more acute. Many of the admissions to detention are for very short periods, up to 24 hours, before the Court releases the young person again.[63] This would create administrative cost, and disruption to the young person, with no demonstrated benefit of any significance in terms of crime prevention.

12.66 We note for completeness that the NSW Police Force submitted to us that the 400% increase in compliance checks[64] had not contributed to an increase in remand numbers which in their view had remained stable over the period between 2007 and

61. NSW, Juvenile Justice, *Key trends in Juvenile Justice Custody* (Presentation to the NSW Law Reform Commission, 2011).
62. NSW Law Reform Commission, *Young Offenders*, Report No 104 (2005) [10.55].
63. See para 4.31.
64. See para 12.43; NSW Police Force, *Submission BA39*, 35.

2012. This submission was not based on statistical analysis and does not accord with the BOCSAR finding. It is also at variance with the remand numbers over the period which have not remained stable: the average remand number in January 2012 is 17% higher than in 2007.

Table 12.4 - Average daily remand number for January

Year	2007	2008	2009	2010	2011	2012
Average remand population for January	160.19	214.06	206.94	210.74	206.58	187.52

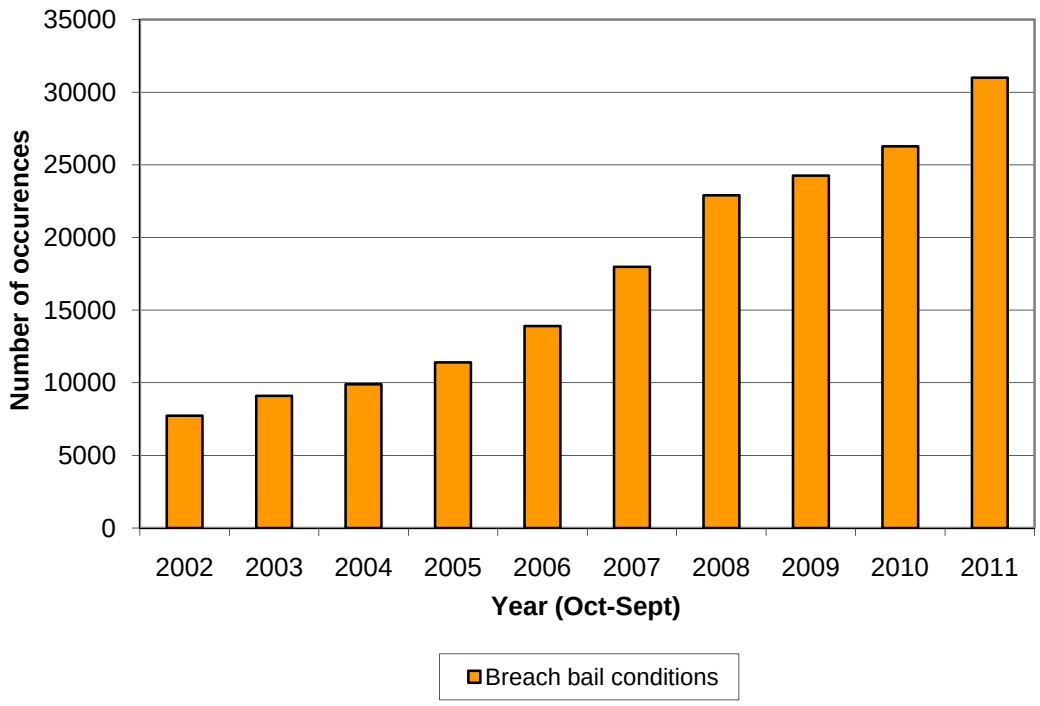
Source: Juvenile Justice NSW.

Adults

12.67 The debate, and most empirical evidence, has mainly been focused on young people.

12.68 However, it also appears to be the case that enforcement activity is increasing for adults. Figure 12.2 shows the upward trend in the number of recorded incidents of "breach bail conditions" over the last 10 years. Between October 2001 and September 2011 there was an average annual percentage change of 16.7%.[65]

Figure 12.2 Recorded incidents of breach bail conditions in NSW, Oct 2001- Sept 2011



Source: NSW Recorded Crime Statistics, NSW Bureau of Crime Statistics and Research.

65. NSW Bureau of Crime Statistics and Research, *Crime Trends Tool* (ref number 2012-409037) <http://bocd.lawlink.nsw.gov.au/bocd/cmd/crimetrends/Init>.

12.69 Courts data supplied by BOCSAR shows a substantial increase in the number of proceedings arising from breach by adults, while the total number of proceedings against adults has remained stable.

Table 12.5: Adults proceeded against in court for breaching bail conditions

Year	Number of adults proceeded against to court for breaching bail conditions	Total number of adults proceeded against to court	Percentage of adults proceeded against to court for breaching bail conditions
Jun 06 – Jun 07	4097	131019	3.13%
Jul 07 – Jun 08	4767	133276	3.58%
Jul 08 – Jun 09	4849	135178	3.59%
Jul 09 – Jun 10	5092	130432	3.90%
Jul 10 – Jun 11	5505	121779	4.52%

Source: NSW Bureau of Crime Statistics and Research, NSW Recorded Crime Statistics July 2006-June 2011, reference DG11/10094.

12.70 We should note here that the figures are confined to breach of conduct requirements. Such breaches are not criminal offences (notwithstanding that "breach bail" is sometimes reported as an "offence type", and has been interpreted as an offence in the media from time to time).[66] Moreover, it should not be assumed that increases in the number of "breaches of bail" which proceed to court reflect an increase in the occurrence of breaches. The increases are more likely to be indicative of increased enforcement action, which is consistent with the NSW Police Force strategy and data as reported to us. That is how we interpret the figures in this report.

The Commission's views

12.71 The extent of the imposition of conditions and conduct requirements, and their monitoring by police, especially in relation to young people, is an area of contention among the stakeholders.

12.72 In our view, the use of conditions and conduct requirements has a clear and legitimate purpose in ensuring that a person appears in court, does not commit

66. *The Sunday Telegraph* 15 January 2012 included an article with the headline "Crime rate on bail is soaring in NSW according to new data". The article included the following passage: "Bureau of Crime Statistics and Research figures show breach of bail offences have surged by 18 percent over two years, with 31,002 charges laid against offenders who committed further crimes while on bail in the past 12 months to September 2011. The number was up from the same period, when 26,278 charges were laid for a variety of breaches of bail offences."

The article contains two errors. First it assumes that breach of bail indicates offending while on bail. It does not. Breach of bail conditions is not of itself an offence. There is no recorded data about offending while on bail. Secondly, it assumes that recorded incidents of breach of bail indicates that breaches are increasing. Instead, this increase is more likely to be associated with increasing monitoring and enforcement.

serious crime while released, and does not threaten the safety of particular people or the integrity of the court processes. Appropriately tailored conditions and conduct requirements should be diligently enforced.

12.73 However, it is clear from the submissions and the data that there is a significant problem in this area at the present time. Conduct requirements appear to be imposed routinely and unnecessarily without tailoring to the situation of the individual. Monitoring for compliance by police has become more active and intense in recent times. Arrest for failure to comply has been increasing. We have no statistically significant evidence of a reduction in crime as a result.

12.74 The consequence has been a substantial increase in the number of people in detention pending trial and an increase in the court time required to deal with unnecessary arrests for breach of unnecessary conduct requirements. This is at a public cost which includes the cost of processing detainees for short periods in custody following arrest before the person is released again because detention is unwarranted. Young people appear to be especially affected by this situation, as overall remand numbers and short-term churn through juvenile detention centres have increased.

12.75 In these circumstances, there is a strong case for looking closely at the justification for imposing conditions and conduct requirements. There are cases where the imposition of stringent conditions and conduct requirements are necessary. In such cases, proper enforcement is required. But intensive enforcement of routinely imposed conditions is creating unnecessary public costs and unnecessary hardship, particularly for young people, without apparent benefit to the community. In the following chapters we address the reforms required.

13. What conditions and conduct directions should be allowed

The current provisions of the *Bail Act* **213**
Permitted conditions and conduct requirements **214**
Bail accommodation **214**
Assurance conditions **215**
Third party assurance of reliability 215
Financial conditions 216
Surrender of passport **216**
Treatment and rehabilitation **216**
The scope of the current provision 216
Is an express therapeutic provision required? 217
Should consent be required? 218
Non-association and place restrictions **218**
Homeless young people **219**
Recommendations **220**

13.1 In this and the following chapters we deal with the imposition of conditions, which have to be met before the person can be released, and with the imposition (by way of conduct directions) of requirements concerning the person's conduct which must be observed if the person is released while proceedings are pending. In this chapter, we deal with what types of conditions and conduct directions should be allowed.

The current provisions of the *Bail Act*

13.2 The only conditions that may be imposed on bail are those specified in s 36(2), s 36A and s 36B of the *Bail Act*.[1]

13.3 The conditions specified in s 36(2) are:

- "that the accused person enter into an agreement to observe specified requirements as to his or her conduct while at liberty on bail";[2]
- that the person "enter into an agreement to reside…in accommodation for persons on bail";[3] and
- that the "person surrender…any passport held by the person".[4]

1. *Bail Act 1978* (NSW) s 36.
2. *Bail Act 1978* (NSW) s 36(2)(a).
3. *Bail Act 1978* (NSW) s 36(2)(a1).
4. *Bail Act 1978* (NSW) s 36(2)(i).

Subsection 36(2) also lists a series of permitted conditions (mostly financial conditions) designed to ensure the person's attendance at court, which we will refer to as "assurance conditions".[5]

13.4 Section 36A allows conditions relating to assessment, treatment or rehabilitation, and to participation in an intervention program.

13.5 Section 36B allows conditions relating to non-association and place restrictions.

Permitted conditions and conduct requirements

13.6 We recommend that the bail legislation should continue to provide that the conditions specified in the legislation are the only conditions that can be imposed. This provision helps to prevent inconsistent and idiosyncratic outcomes. (Recommendation 13.1(1))

13.7 Section 36(2)(a) allows the bail authority to impose a condition that the person enter into an agreement to observe specified conduct requirements. As we recommended in Chapter 6, this condition should be removed from the list of permitted conditions and, instead, the legislation should provide that a bail authority may impose conduct directions.

13.8 The current provision does not limit the conduct requirements that can be imposed. We agree with that approach, subject to an exception relating to conduct requirements directed solely to the welfare of the person. We deal with that exception later in Chapter 13.[6] (Recommendation 13.1(2))

Bail accommodation

13.9 The current legislation envisages Corrective Services NSW providing accommodation for people on bail. It allows the imposition of a condition that the person enter into an agreement to reside in such accommodation, and requires the authority to consider whether such accommodation is available and suitable.[7] It requires the Minister for Corrective Services to ensure that adequate and appropriate accommodation for a person on bail is available.[8] These provisions were inserted by a private member's bill introduced in the Legislative Council in 2002.[9]

13.10 We are informed by Corrective Services NSW that no such dedicated bail accommodation exists, and that funding has never been allocated for this purpose. There would, therefore, appear to be no point in these provisions. We recommend that they should not be retained.

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5. *Bail Act 1978* (NSW) s 36(2)(b)-(h).
6. See para 14.40-14.47.
7. *Bail Act 1978* (NSW) s 36(2)(a1), s 36(2A).
8. *Bail Act 1978* (NSW) s 36(2B).
9. NSW, *Parliamentary Debates*, Legislative Council, 9 May 2002,1916 (R Jones).

13.11 The issue of bail accommodation and bail support more generally is, however, an important one. As we note later in this chapter in relation to homeless young people, the best and obvious solution where young people lack a safe home is to ensure that suitable accommodation is available in the community. We make specific recommendations in this regard.

13.12 The provision of bail support to assist adults to meet residence requirements or other conduct requirements may be an effective means of avoiding costly and unnecessary detention. This is an area where involvement of the non-government sector could be valuable. It is not appropriate for the legislation to stipulate how or by whom accommodation and other bail support needs are to be met but we do consider further investigation of bail support services would be useful. (Recommendation 13.6)

Assurance conditions

13.13 A series of conditions may be imposed under s 36(2)(b)-(h). They include: a third party acknowledgment of the person's reliability, and agreements to forfeit money, to deposit money and to provide security, all as an assurance of the person's attendance at court.

13.14 No submission has raised significant issues with the content of these provisions.

Third party assurance of reliability

13.15 We consider that s 36(2)(b) should not be retained. The wording of the paragraph is as follows:

> (b) that one or more than one acceptable person (other than the accused person) acknowledge that he or she is acquainted with the accused person and that he or she regards the accused person as a responsible person who is likely to comply with his or her bail undertaking.

13.16 In the experience of members of this Commission, the provision serves no useful purpose. It is somewhat vague as to the criteria by which a person is to be regarded as an "acceptable person". It is not difficult to imagine that a variety of people will readily be prepared to provide such an assurance if that is necessary to obtain the release of the person charged. Little, if any, weight can therefore be attached to such an assurance. Nor will the person charged be motivated to attend court because of such an assurance, there being no sanction against the person giving the assurance in the event of non-appearance by the person charged.

13.17 Yet, despite the absence of discernible benefit, such an assurance comes at a cost. One or more people are required to attend court and court staff are required to assess them for acceptability. More importantly, the release of a person, otherwise entitled to be released, can be delayed while one or more suitable people are found, brought to court and processed for acceptability. If a person presented is not acceptable, a substitute has to be found causing further delay.

13.18 We recommend that this provision should not be retained. (Recommendation 13.7)

Financial conditions

13.19 The conditions permitted under s 36(2)(c)-(h) provide for the forfeiture of money in the event of the person failing to attend court as required. The conditions are listed from the least burdensome to the most burdensome, and the legislation requires the authority to impose the least burdensome condition likely to secure the purposes specified in s 37(1).[10] Section 37(4) provides that an authority may impose a more burdensome condition at the person's request. We recommend that these provisions be retained, but note that s 37(4) could be more clearly drafted. (Recommendation 13.2)

Surrender of passport

13.20 Subsection 36(2)(i) allows the court to require surrender of a passport as a condition for release.[11] We recommend the retention of that provision. In a case involving a serious risk of absconding, the authority should have the option of imposing such a condition.

13.21 It would also be open to the authority to impose a conduct direction that the person not apply for an initial passport, or for a replacement passport or other form of travel document if surrender of an existing passport is made a condition of release.

13.22 Section 37A makes surrender of any passport a mandatory condition in the case of an offence causing death, unless the authority is satisfied that dispensing with the requirement is justified. The burden is on the person to show that retention of the passport is justified.

13.23 We see no rational basis for this provision. There may be a very low risk of absconding in the case of an offence causing a non-intentional death, for example, where it is a driving related offence. Conversely, there may be a very high risk of absconding in cases where the offence has not caused death, for example a strong case of commercial drug dealing by a person with no family ties in this country. We consider that s 37A should not be retained. (Recommendation 13.3)

Treatment and rehabilitation

The scope of the current provision

13.24 Section 36A allows a bail authority to impose a condition that the person agree to undergo assessment of suitability for treatment or rehabilitation, or agree to participate in treatment or rehabilitation. An authority may only do so if the authority believes that the person will benefit from assessment or participation.

13.25 When introduced in 1999, the section was limited to treatment or rehabilitation for drug or alcohol misuse, but in 2002, the scope of the section was widened to

10. *Bail Act 1978* (NSW) s 37(3).
11. *Bail Act 1978* (NSW) s 36(2)(i).

include "an intervention program and any other program for treatment and rehabilitation". The terms *intervention program* and *intervention plan* in the section take their meaning from s 346 and s 347 of the *Criminal Procedure Act 1986* (NSW). Under s 347, a program may be declared to be an intervention program by regulation. Such declared intervention programs include Forum Sentencing, Circle Sentencing, and the Traffic Offender Intervention Program.[12] An *intervention plan* is defined as a "plan, agreement or arrangement arising out of the participation of an offender or an accused person in an invention program".[13]

13.26 We understand that this provision is used regularly. It allows, for example, the successful MERIT drug and alcohol treatment scheme to operate. The court has the option of having an accused person undertake such a program before the court deals with the case. The person's participation and any relevant results can then be taken into account, typically as a matter mitigating the sentence. The procedure has broad support.

Is an express therapeutic provision required?

13.27 The courts should have the capacity to facilitate participation in treatment and rehabilitation programs, whenever it appears to the court that this would be of benefit for the charged person or the broader community. This capacity may exist by implication but we consider that the matter should be put beyond doubt by an explicit provision.

13.28 We recommend that the *Bail Act* should allow the authority to make a conduct direction requiring the person to undergo assessment or to participate in a program. If the person did not comply, that would constitute breach of the conduct direction and the person could be brought back to court. The court would then have the option of making a different decision concerning release or concerning conditions or conduct directions.

13.29 Where a person is released on the basis that he or she is to undergo a treatment program, it is sometimes necessary for the person to be released only into the care of a particular person or agency, including a rehabilitation facility. We therefore recommend that, in such a case, the court should be able to impose a condition (in the strict sense) that the person is to be released only into the care of a particular person or agency. We accordingly recommend that, subject to these details and to the identification of any requirements concerning the time and manner in which the person is to be received into the relevant program or facility, or subjected to a pre-admission assessment of suitability, a provision along the lines of s 36A should be retained. (Recommendation 13.4(1), 13.4(2)(a) and (b))

12. *Criminal Procedure Regulation 2010* (NSW).
13. *Criminal Procedure Act 1986* (NSW) s 346.

Should consent be required?

13.30 A question arises as to whether an authority should be permitted to direct a person to undergo assessment or to participate in a treatment or rehabilitation program without the person's consent.

13.31 The issue does not arise under the current provision because it involves the person entering into an agreement, which the person may decline to do, with the consequence that he or she will not satisfy a condition for release.

13.32 An assessment or a treatment or rehabilitation program is unlikely to be of much benefit without the person's co-operation. Accordingly, a court is unlikely to make such a direction without an appropriate consent, and a person is unlikely to be accepted for assessment or for such a program without the person's consent. In most cases, consent would be given due to the benefits at the sentencing stage of successful participation in the program. The issue of consent may therefore be more theoretical than real.

13.33 Although refusal of consent is unlikely to arise, we recommend that an authority should not be permitted to direct a person (whether a young person or an adult) to participate in assessment or treatment without consent, or where the person is under 18, the consent of their parent or guardian. Where a person has not been convicted of an offence, he or she should not be required to participate unwillingly, under threat of detention pending trial if the person fails to comply. Even pending sentence or appeal, it seems to us that such a direction would be inappropriate without consent. In some cases, for example the Youth Drug and Alcohol Court Program, the consent required will be to an entire program, rather than to individual requirements of the program.

13.34 We recognise that release under a bond or on parole can be conditional upon participation in a treatment or rehabilitation program, including pre-admission assessment of suitability, but, in those cases, the person has been convicted and the condition is incidental to a sentence for the offence. (Recommendation 13.4(2)(c))

Non-association and place restrictions

13.35 Section 36B provides that a condition may be imposed requiring the person to enter into an agreement not to associate with a specified person, or an agreement not to frequent or visit a specified place or district. These conduct requirements could now be imposed under s 36(2)(a) of the Act, and could equally be imposed under our recommended provision for a conduct direction. The section is an unnecessary duplication. We see no merit in preserving the provision. It gives unwarranted prominence to such conduct requirements.

13.36 However, the provision does put qualifications on non-association and place restrictions. Section 36C prohibits publication of the identity of a person named in a non-association condition. Such detail could be preserved by enacting special provisions in relation to a conduct requirement of this kind. That should be considered in the course of redrafting the legislation.

Homeless young people

13.37 A problem arises where a young person should be released but there is no suitable residential accommodation available for that person. This can happen in the case of homeless young people, including young people without a reasonably stable or safe home in which to reside, children whose family is not willing or able to accommodate them and young people in the care of the Department of Family and Community Services with no residential placement available to them. There is a lack of public facilities for the accommodation of homeless adults and young people who have nowhere to live and who should be released on all other grounds. The lack of such facilities has been pointed out in several reports.[14]

13.38 The Children's Court is of the view, correctly in our opinion, that it should not release a young person in those circumstances until such time as appropriate accommodation is found. We are told that suitable accommodation is almost always found within a relatively short space of time but the intervening period is nonetheless one of concern.

13.39 It was, for a time, the practice to release young people in such cases on the condition that they "reside as directed". Such a condition was thought to allow the child to be detained until suitable accommodation could be arranged. Legal advice was then received that, where such a condition was imposed, the young person had to be released immediately.[15] In consequence, the practice of imposing such a condition has been discontinued. In some cases this is likely to result in bail being refused at least in the short term.

13.40 The best and obvious solution is to ensure that suitable accommodation is arranged quickly for young people in this situation. That said, it must be acknowledged that such a solution involves allocation of resources and the interaction of government agencies. We note the recently announced expansion of the Juvenile Justice Court Intake Service which may assist the court to speed up bail hearings and help young people to meet their bail conditions.[16] This service may contribute to the resolution of the problem.

13.41 Meanwhile, it is necessary for the *Bail Act* to address the situation. We recommend the following scheme:

- The Children's Court may impose a condition that the young person is not to be released until the court is informed by the Department of Family and Community Services or Juvenile Justice NSW that suitable accommodation is available.
- The young person must be released upon the provision of such information without any requirement that the matter be re-listed before the court.

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14. NSW Law Reform Commission, *Young Offenders*, Report No 104 (2005) 260-263; J Wood, *Report on the Special Commission of Inquiry into Child Protection Services in NSW* (2008) vol 2, 558-562; Noetic Solutions, *A Strategic Review of the New South Wales Juvenile Justice System*, Report for the Minister for Juvenile Justice (2010) 71-72; Parliament of Australia, House of Representatives Standing Committee of Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing: Indigenous Youth in the Criminal Justice System* (2011) 222.
15. NSW, Juvenile Justice, *Submission BA35*, 13.
16. NSW, *Budget, Budget Paper No 3*, Budget 2011-2012 (2011) 2-5.

- The Court may also impose a conduct direction that, upon release, the young person is to reside at such accommodation as may be directed by the relevant department.
- The Court should re-list the matter for further hearing every 2 days until the Court is notified in writing that suitable accommodation has become available and its address.
- At any stage in this process, the Court may direct any relevant department to provide up to date information concerning action being taken to provide suitable accommodation.

13.42 The *Bail Act* should make provision for the condition and conduct direction referred to above. The administrative aspects of this scheme should be given a legislative basis, possibly by regulation.

Recommendations

Recommendation 13.1: Permitted types of conditions and conduct directions

A new *Bail Act* should:

(1) specify that the only permitted conditions are those referred to in the recommendations below;

(2) not limit the kind of conduct direction that may be imposed, subject to any limitations (including limitations as to purpose) recommended in this report.

Recommendation 13.2: Financial and security

A new *Bail Act* should continue to provide that financial and security conditions may be imposed, based on the current provisions of the *Bail Act 1978* (NSW).

Recommendation 13.3: Surrender of passport

(1) A new *Bail Act* should continue to provide that surrender of a passport may be a condition of release, based on s 36(2)(i) of the *Bail Act 1978* (NSW), subject to being satisfied that a passport or passports exist.

(2) A new *Bail Act* should not retain the provision requiring that any passport be surrendered in the case of an offence causing death (s 37A of the *Bail Act 1978* (NSW)).

Recommendation 13.4: Therapeutic conditions and conduct directions

(1) A new *Bail Act* should allow the imposition of conditions and conduct directions to facilitate assessment and participation in a treatment, intervention or rehabilitation program, based on s 36A of the *Bail Act 1978* (NSW).

(2) A new *Bail Act* should provide:

(a) that a condition may be imposed concerning the release into the care of a person or agency (including a rehabilitation facility).

(b) that a conduct direction may be imposed to facilitate assessment, or treatment, intervention or rehabilitation program.

(c) that a condition or a conduct direction given for this purpose may only be imposed with the consent of the person (including a young person), a guardian, or a person with parental responsibility for a young person under 18 years.

Recommendation 13.5: Homeless young people

A new *Bail Act* should provide that, in cases where a young person would be released except for the fact that there is no accommodation or no suitable accommodation available, the Act should provide that:

(a) the Children's Court may impose a condition that the young person is not to be released until the court is informed by the Department of Family and Community Services or Juvenile Justice NSW that suitable accommodation is available,

(b) the Court may also impose a conduct direction that, upon release, the young person is to reside at such accommodation as may be directed by the relevant agency,

(c) information that suitable accommodation is available may be lodged with the court in writing, specifying the address of such accommodation,

(d) upon provision of such information and subject to compliance with any other condition the young person must be released without any requirement that the matter be re-listed before the court,

(e) upon imposing a condition pursuant to this provision, the Court must re-list the matter for further hearing every 2 days until the Court is notified in writing that suitable accommodation has become available and its address,

(f) at any stage in this process, the court may direct any relevant department to provide up to date information concerning action being taken to provide suitable accommodation.

Recommendation 13.6: Compulsory residence in bail accommodation

The provisions in the current Act relating to bail accommodation provided by Corrective Services NSW (s 36(2)(a1), s 36(2A) and s 36(2B)) should not be retained.

Recommendation 13.7: Third party assurance of reliability

A new *Bail Act* should not retain provision for a third party assurance of reliability (s 36(2)(b) of the *Bail Act 1978* (NSW)).

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14. How conditions and conduct directions should be decided

Presumption against imposing conditions and conduct requirements **223**
Considerations to be taken into account **223**
Proposed rules **226**
Conditions and conduct directions to be imposed only to avoid detention 226
Family, community and other support to be taken into account 227
Conditions and conduct directions not to be more onerous than required 227
Conditions and conduct directions to be reasonably practicable 227
Financial conditions to be reasonable 228
Limitations on financial conditions in relation to young people 228
The welfare of the person 231
Cognitive and mental health impairment 232

14.1 This chapter will discuss the considerations that should be taken into account in deciding whether to impose a condition or a conduct direction. We will recommend that the considerations should be the same as those that apply to a decision whether to detain or release the person. We will also recommend rules intended to eliminate unnecessary conditions and conduct directions, and ensure that conditions and conduct directions are reasonable and practicable.

Presumption against imposing conditions and conduct requirements

14.2 Section 37(1) of the current legislation provides that bail is to be granted unconditionally unless the authority is of the opinion that one or more conditions should be imposed for the purposes specified in the legislation.

14.3 This provision requires the authority to be persuaded that a condition is warranted. In other words, there is a presumption against the imposition of conditions. We recommend that this feature of the current legislation should be preserved but using the same terminology – "unless justified" – as in the case of a decision whether to release or detain.

Recommendation 14.1: Presumption applicable to the imposition of a condition or a conduct direction

A new *Bail Act* should provide that neither a condition nor a conduct direction should be imposed unless it is justified.

Considerations to be taken into account

14.4 By specifying the purposes for which conditions may be imposed, s 37(1) of the *Bail Act* effectively sets the considerations and the only considerations, which are to be taken into account in that regard.

14.5 Under the original legislation, the specified purposes were:

- promoting effective law enforcement; and
- the protection and welfare of the community.

Since then, the following purposes have been added:

- the protection and welfare of any specially affected person (that is, any person against whom it is alleged the offence was committed, a close relative of any such person, and any person warranting special consideration) and
- reducing the likelihood of future offences by promoting the treatment or rehabilitation of an accused person.

14.6 The considerations in s 37(1) are extremely wide. They go well beyond the considerations which would justify the detention of a person under the current legislation or under our proposed reforms.

14.7 The phrase "promoting effective law enforcement" would appear to cover every aspect of police activity from apprehending people reasonably suspected of committing an offence to anything done with a view to preventing crime. Justice Garling has said:

> I accept that the purpose of "promoting effective law enforcement" is a concept that is rather more elastic than concise, rather more ambulatory than fixed and generally protean like. In addition to the well known concept of preventing the commission of crime and the arrest of offenders, or else those suspected of committing crimes, it would also include ensuring that a person attends court when required and preventing the person from fleeing the jurisdiction, thereby attempting to avoid prosecution and sentence. It may also include conditions of bail, such as designated residence and compliance with supervision by a nominated person, because such conditions are designed to achieve these ends, and these ends promote law enforcement.[1]

14.8 The phrase "protection and welfare of the community" is even wider. The same phrase appears in s 32(1) as a primary consideration to be taken into account when a decision is made whether to release a person. However in that section, the breadth of the phrase is significantly limited by the definitional provision which follows. In s 37(1), the phrase is unqualified, and can be read to include the protection of the community, not only from crime but from any form of troublesome behaviour.

14.9 These provisions allow a decision to be made to release a person because there is no sufficient reason for detention, and for the authority then to impose conditions, including conduct requirements, for other and different reasons. The current provisions also fail to recognise the interests of the person and of the person's family when such conditions are set, and they fail to recognise the fundamental concepts and principles which underlie the criminal justice system discussed in Chapter 2.

1. *Lawson v Dunlevy* [2012] NSWSC 48 [36].

14.10 Bail legislation should be a coherent code and serve one set of policy objectives. Conditions and conduct directions should reflect the role of bail legislation within the broader criminal justice system, no less than a decision whether to release a person. The same considerations should therefore apply to decisions concerning conditions and conduct requirements as apply to decisions whether to release or detain. A condition or conduct direction would then only be imposed where that was necessary to manage the same range of risks as are relevant to a decision whether to detain a person, considered in conjunction with the public interest in freedom and justice and the interests of the individual and the individual's family. This approach conforms with the first rule proposed in Recommendation 10.9, namely that detention is a measure of last resort and a person must be released if a reason for detention is sufficiently satisfied by setting conditions of release or by giving a conduct direction.

14.11 There is ample precedent for aligning the considerations applicable to conditions (including conduct requirements) with those applicable to a decision whether to release a person. In the bail legislation of the Australian Capital Territory,[2] Victoria,[3] Queensland,[4] Western Australia[5] and New Zealand[6] the same considerations are applicable, either in identical terms or in terms that are essentially the same.

14.12 A number of submissions supported this outcome. For example, the Aboriginal Legal Service said that "conditions not strictly necessary to the grant of bail should not be imposed".[7]

14.13 Others supported this outcome indirectly. For example, Legal Aid submitted that:

> bail should be granted unconditionally unless conditions are necessary to prevent an unacceptable risk that an accused may: fail to attend court as required; commit an offence while on bail; endanger the safety or welfare of the public or interfere with witnesses or otherwise obstruct the course of justice.[8]

These 'risks' are substantially the same as those we have recognised as material to a decision whether to release a person.

14.14 Another way in which this outcome was supported was in submissions regarding an objects clause. A number of the submissions arguing for inclusion of an objects clause went on to say that conditions should be subject to the same objects.[9]

14.15 While the NSW Police Force and the Police Association supported the existing purpose of "promoting effective law enforcement",[10] a large number of other submissions did not.[11]

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2. *Bail Act 1992* (ACT) s 22(1), s 25(6)(a).
3. *Bail Act 1977* (Vic) s 4(2)(d), s 5(3).
4. *Bail Act 1980* (Qld) s 11, s 16(1).
5. *Bail Act 1982* (WA) s 6(4), sch 1 pt D cl 2(2).
6. *Bail Act 2000* (NZ) s 8(1), s 31(3).
7. Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 29.
8. Legal Aid NSW, *Submission BA17*, 12.
9. Law Society of NSW, *Submission BA5*, 2; NSW, Office of the Director of Public Prosecutions, *Submission BA21*, 1; Redfern Legal Centre, *Submission BA18*, 2; M Ierace, *Submission BA16*, 1.

14.16 We note that the NSW Police Force say in their submission that a condition should not be imposed unless the authority is of the view that a breach of condition should result in revocation of bail.[12] This suggests that the NSW Police Force recognises the desirability of having the considerations applicable to conduct requirements in line with the considerations applicable to decisions as to whether to detain.

Recommendation 14.2: Considerations regarding the imposition of a condition or conduct direction

The considerations to be taken into account in deciding whether to impose a condition or a conduct direction should be the same as apply to a decision whether to release or detain a person.

Proposed rules

14.17 We propose a set of rules relating to the imposition of conditions and conduct directions.

Conditions and conduct directions to be imposed only to avoid detention

14.18 A number of submissions were concerned about the proliferation of conditions and conduct requirements, and their imposition in circumstances where they are not necessary.[13] One view canvassed in consultations, and receiving support, was that conditions and conduct requirements should only be imposed if necessary to avoid detention.[14] The Aboriginal Legal Service submission put it in terms that conditions should only be "imposed where the decision maker is satisfied they are of significance and where in the absence of such conditions it may not be appropriate to grant bail".[15] This approach would also be consistent with the Police Force view noted above that a condition should not be imposed unless the authority is of the view that a breach of condition should result in revocation of bail.[16]

14.19 The imposition of conditions or conduct direction is a serious and significant burden on the individual. The purpose of their imposition should be to avoid the need to

10. NSW Police Force, *Submission BA39*, 29; Police Association of NSW, *Submission BA38,* 4.
11. Law Society of NSW, *Submission BA5*, 11; Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 30; M Ierace, *Submission BA16*, 5; Legal Aid NSW, *Submission BA17*, 14; Redfern Legal Centre, *Submission BA18*, 9-10; Shopfront Youth Legal Centre, *Submission BA23*, 3; Jumbunna Indigenous House of Learning, *Submission BA37,* 21.
12. NSW Police Force, *Submission BA39*, 29.
13. G Henson, *Submission BA2*, 2; NSW Council for Civil Liberties, *Submission BA3*, 42; Law Society of NSW, *Submission BA5*, 10; UnitingCare Children, Young People and Families, *Submission BA13*, 12; Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 29; Legal Aid NSW, *Submission BA17*, 14; Redfern Legal Centre, *Submission BA18*, 9; Youth Justice Coalition, *Submission BA20*, 18; Shopfront Youth Legal Centre, *Submission BA23*, 15; Public Interest Advocacy Centre, *Submission BA26*, 8; Intellectual Disability Rights Service, *Submission BA30*, 2-3; Children's Court of NSW, *Submission BA33*, 6.
14. NSW Bar Association and Law Society of NSW, *Consultation BAC5*, Defence Representatives, *Consultation BAC6*, Community roundtable, *Consultation BA14*, Legal practitioners, *Consultation BAC16*.
15. Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 28.
16. NSW Police Force, *Submission BA39*, 29.

detain the person pending proceedings, by limiting the person's freedom in ways that are justified by the relevant considerations. A condition or conduct direction should accordingly be imposed only if its imposition is necessary to avoid detention.

Family, community and other support to be taken into account

14.20 In assessing whether a person should be released subject to a condition or conduct direction the authority should have regard to whether the person has family, community or other support available to assist the person in complying with a proposed condition or conduct direction.

Conditions and conduct directions not to be more onerous than required

14.21 Section 37(2) provides that conditions are not to be imposed that are more onerous than appear to be required by the nature of the offence, for the protection of any specially affected person, or by the circumstances of the accused person. This provision prescribes considerations for a "not more onerous" rule that are different from the purposes - that is, the considerations - which apply to the imposition of the condition in question.

14.22 We recommend that a "not more onerous" test should be retained, for both conditions and conduct directions, but that the applicable considerations should be the same as the statutory considerations and rules that are applicable to a decision whether to release or detain.

14.23 A condition or conduct direction should be treated as "onerous" if it includes an unnecessary or unreasonable incursion or restriction in relation to the person's daily life. A reporting requirement, for example, can be onerous if it requires daily reporting to a police station some distance from the person's home. If reporting is more intrusive or restrictive in relation to the person's daily life than is necessary to avoid the risk of absconding, it should not be imposed.

14.24 In the course of this reference, we were informed that some conduct requirements, such as reporting requirements, were frequently imposed as routine practice and without sufficient consideration of individual circumstances. This accorded with the experience of members of the Commission. Another illustration is the requirement that the person be of good behaviour, which appears to be automatically included as a conduct requirement in the standard release documentation generated by the JusticeLink computer system and cannot be removed. While a conduct requirement to be of good behaviour may be appropriate and required in some cases, it should not be an automatic inclusion.

14.25 It is intended that this rule would curb the routine imposition of conduct requirements.

Conditions and conduct directions to be reasonably practicable

14.26 There is little sense in imposing a condition that cannot be satisfied or a conduct requirement that will inevitably be breached. We recommend a rule that conditions and conduct requirements must be reasonably practicable.

14.27 Conduct requirements which would prevent a person from visiting close relatives, accessing methadone treatment, reporting to a Juvenile Justice or Corrective Services case worker, as illustrated in the case studies to which we have referred, are unreasonable and impractical.[17]

Financial conditions to be reasonable

14.28 Financial conditions may be required where there is a serious risk of the person absconding and the person has financial resources. On the other hand, conditions requiring the deposit of even small amounts of money can cause unnecessary hardship for people with limited means charged with minor offences or for their families and would have little or no effect on the risk of absconding where that is a real risk. In extreme cases they may encourage friends or relatives to commit a crime in order to raise the amount required.

14.29 The Aboriginal Legal Service made the following submission.

> Aboriginal people suffer from comparative economic deprivation. As such decision makers should tailor bail conditions involving sureties and other financial guarantees to the realities of the individual and/or family concerned.
>
> The ALS supports an amendment requiring decision makers to take into account in determining such conditions information such as it is known regarding the means of the person/family concerned and the comparative value of the money involved to them.[18]

14.30 The Aboriginal Legal Service submitted that imposing a financial condition should require "a degree of justification and reasons".[19] Jumbunna Indigenous House of Learning submitted that "decision makers should not impose financial surety conditions without first being satisfied that the person is able to provide such surety".[20]

14.31 We recommend that the authority must not impose a financial consideration unless it is satisfied there would otherwise be a likelihood of the person absconding or being unlikely to appear on a future occasion.

14.32 We also recommend a rule that financial conditions should only be imposed if the authority is satisfied that the sum involved is, or is likely to be, within the means of the person concerned or the person's family.

Limitations on financial conditions in relation to young people

14.33 Juvenile Justice NSW submitted that the *Bail Act* should not allow financial surety conditions to be imposed on young people, pointing to their financial dependence upon adults and their limited income or government benefits.[21]

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17. See para 12.9,12.20.
18. Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 31.
19. Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 31.
20. Jumbunna Indigenous House of Learning, *Submission BA37*, 21.
21. NSW, Juvenile Justice, *Submission BA35*, 15.

14.34 The *Noetic Strategic Review of the New South Wales Juvenile Justice System*[22] contains the following observation:

> Children and young people who enter the juvenile justice system will do so with well known risk factors. These factors emerge early in a child's life and are linked to a range of risk factors, including family dysfunction, intellectual disability, poor mental health, dislocation from education, and homelessness.[23]

14.35 The *2009 NSW Young People in Custody Health Survey* (YPICHS) paints a comprehensive picture of the demographics of young people in custody. The report found that:

> [y]oung people in custody come from very disadvantaged backgrounds compared with young people in the community. This is demonstrated by disproportionately high numbers of Aboriginal young people in custody, low participation in education and employment and high rates of out of home care and homelessness.[24]

In particular, the YPICHS found that:[25]

- Nearly half (45%) of the sample received allowances or benefit payments in the six months prior to their admission to custody. The majority (59%) of those young people receiving an allowance or benefit received Youth Allowance. 14% of the Aboriginal survey participants received Abstudy.
- Over one-quarter of the sample had experienced out-of-home care placements before 16 years of age. Aboriginal young people were twice as likely as non-Aboriginal young people to be placed in out-of-home care.
- 45% of the sample reported one or both of their parents having been incarcerated. Aboriginal participants were far more likely to report that their parents had been in prison (61% vs 30%).
- 3.5% of the sample reported that they had no fixed place of abode.
- 27% of the sample had moved two or more times in the six months prior to custody.
- 26% of the sample reported working in the six months prior to their admission to custody. Non-Aboriginal young people were more likely to be working than Aboriginal young people (34% vs 17%).

14.36 As a result of this pronounced social disadvantage, young people in contact with the criminal justice system and their families or carers are likely to have very limited financial means. Young people in out-of-home care are also unlikely to have their own money or access to people who are in a position to assist them to meet a financial condition.

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22. Noetic Solutions, *A Strategic Review of the New South Wales Juvenile Justice System*, Report for the Minister for Juvenile Justice (2010).
23. Noetic Solutions, *A Strategic Review of the New South Wales Juvenile Justice System*, Report for the Minister for Juvenile Justice (2010) vii.
24. D Indig and others, *2009 NSW Young People in Custody Health Survey: Full Report* (Justice Health and Juvenile Justice, 2011) 51.
25. D Indig and others, *2009 NSW Young People in Custody Health Survey: Full Report* (Justice Health and Juvenile Justice, 2011) 31-44.

14.37 Juvenile Justice provided us with a number of case studies involving the consequence of inappropriate financial conditions being imposed in relation to young people.

Example 14.1:

A 15 year old Aboriginal Male … was granted conditional Bail with $200 surety. This young person lives with his grandmother who relies solely on welfare payments to provide care and support for him and his younger siblings. This client remained in custody [for] 8 days despite conditional bail being granted as he was unable to meet the surety condition until his grandmother received a fortnightly payment from Centrelink.[26]

Example 14.2:

An 18 year old Aboriginal young person was a first offender. His charges were aggravated break and enter (five counts), take and drive conveyance without consent of owner (two counts), dishonestly obtain property by deception, damage property by fire, be carried in conveyance taken without consent of owner (two counts).

The young person was a co-offender with 5 other people, who were all adults. The young person voluntarily supplied Police with information that greatly assisted their investigation. He was granted Police bail at the time. When he returned to Court for mention in January, the Magistrate advised the young person he was tightening his already strict bail conditions to: House arrest except for medical or legal appointments, and to forfeit an amount of $8,000. This was despite the young person abiding by all Police bail conditions. The mother of the young person was very distressed and ended up putting the family vehicle up as collateral, which the Magistrate only accepted in the end, at a value of $3,000.[27]

Example 14.3:

A young person required $500 secured surety. Her father receives a disability pension and was unable to obtain money on short notice. This placed significant financial stress upon the father as he had only just received his fortnightly pension and had to contribute the last $350 of his payment to make up the $500 with support of his own sister. This created a number of associated living/welfare issues. The father was without enough money for the duration of the fortnight in order to properly support himself and the young person who was several months pregnant at the time. The young person was given a reporting condition that she report to police daily whilst she was heavily pregnant and living 5 km from the Police Station with limited transport options.[28]

14.38 These examples highlight the financial hardship that young persons and their families can face if the young person is subject to a financial condition.

26. NSW, Juvenile Justice, *Case Studies – Review of Bail Law in NSW 2011*, case study 2.
27. NSW, Juvenile Justice, *Case Studies – Review of Bail Law in NSW 2011*, case study 8.
28. NSW, Juvenile Justice, *Case Studies – Review of Bail Law in NSW 2011*, case study 12.

14.39 On the other hand, some young people do commit serious offences and it is in the interests of justice to ensure that they appear to answer the charge in such cases. There may accordingly be justification for imposing a financial condition in such a case. We recommend a rule that financial conditions cannot be imposed on or in relation to young people except if the young person is charged with a serious indictable offence (as defined in s 4 of the *Crimes Act 1900* (NSW)).

The welfare of the person

14.40 There is a temptation to see the imposition of conduct requirements as an opportunity to foster the welfare of the person in ways that go beyond the role of bail legislation as part of the criminal justice system. This is particularly so in relation to children and young people. In an effort to encourage a better and more orderly life, a proliferation of conduct requirements may be imposed, involving a regime of reporting, non-association and place restrictions, curfews, requirements to attend school, submission to testing for substance abuse, or obedience to the instructions of parents, carers or others.

14.41 The question, then, is whether there should be an explicit prohibition against imposing a conduct requirement for the purpose of the welfare of the person. Such a prohibition would not, of course, prevent the imposition of conduct requirements that have the incidental effect of contributing to the welfare of the person.

14.42 The question involves the liberty of the individual, the role of the courts and the expertise to manage social and family problems.

14.43 There was considerable support for introducing a prohibition against welfare conduct requirements. At the Community Roundtable, convened in the course of our consultation process, there was general support for the proposition that detention pending trial should not be used to provide for the welfare of the person.[29] Views on this point were asserted even more strongly in relation to young people. At the Young People Roundtable, strong views were expressed against imposing conduct requirements for welfare reasons.[30]

14.44 Submissions also supported this approach. The Law Society, for example, said that welfare issues should not be taken into account when imposing bail conditions on young people.[31] Legal Aid said that the legislation should prohibit, for example, a condition that the child should attend school.[32] This organisation was particularly concerned about conduct requirements imposed on children in out-of-home care, where a condition to "obey the directions of a carer" was common. As a result, according to Legal Aid, children are reported to police by carers and are arrested for demonstrating the type of behaviour which would be managed without police intervention under normal circumstances.[33]

29. Community Roundtable, *Consultation BAC14*.
30. Young People roundtable, *Consultation BAC1*.
31. Law Society of NSW, *Submission BA5*, 10.
32. Legal Aid NSW, *Submission BA17*, 16, 21.
33. Legal Aid NSW, *Submission BA17*, 21.

14.45 Many of those we consulted were concerned that welfare oriented conduct requirements set young people up for failure.[34] Conduct requirements, imposed with good intentions, but unlikely to be met, result in almost inevitable breach, arrest and an overnight, or longer, stay in a detention centre. A school attendance requirement imposed on a habitual truant is an example.

14.46 It is undoubtedly the case that many young people coming into contact with the criminal justice system have complex welfare needs and require intervention. However, we agree with the weight of submissions on this topic, that welfare-oriented conduct requirements are ill suited to meeting those needs.

14.47 We recommend a rule that a conduct requirement should not be imposed for the welfare of the person unless it is otherwise justified having regard to the statutory considerations which apply to a decision whether to impose a condition or conduct requirement. (Recommendation 14.3(1)(g))

Cognitive and mental health impairment

14.48 Subsection 37(2A) of the current legislation requires that, in the case of a person with an intellectual disability, the authority must be satisfied that a condition is appropriate, having regard to the capacity of the person, as far as can reasonably be ascertained, to understand or comply with the condition.

14.49 The phrase "intellectual disability" is defined as meaning:

> a significantly below average intellectual functioning (existing concurrently with two or more deficits in adaptive behaviour) that results in the person requiring supervision or social rehabilitation in connection with daily life activities.[35]

14.50 Our recommended considerations regarding release, conditions and conduct directions include special consideration for people with mental health impairment as well as people with cognitive impairment.[36] When a decision is made regarding release, conditions, or conduct directions, we have recommended that capacity to understand should be recognised as a relevant aspect of the special consideration to be given to such people. We have advanced definitions of "mental health impairment" and of "cognitive impairment", the latter definition being substantially wider than the definition of "intellectual disability" in s 37(5).[37]

14.51 The function of s 37(2A) would, therefore, appear to be covered by the provisions that we recommend at a broader level. However, in any reform of the legislation, care should be taken to ensure that the effect of s 37(2A) is retained, and expanded to include mental health impairments and a wider range of cognitive impairments. In these circumstances, we see no need for a special rule in this regard.

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34. Young People roundtable, *Consultation BAC1*.
35. *Bail Act 1978* (NSW) s 37(5).
36. See para 10.77-10.78.
37. See para 11.36.

Recommendation 14.3: Rules in relation to conditions and conduct directions

(1) A new *Bail Act* should provide that an authority must:

(a) not impose a condition or conduct direction unless the authority is of the opinion that, without such a condition or conduct direction, the person should be detained pending proceedings having regard to the considerations and rules applicable to a decision whether to release or detain;

(b) consider whether the person has family, community or other support available to assist the person in complying with a condition and conduct direction;

(c) not impose a condition or conduct direction that is more onerous or more restrictive of the person's daily life than is necessary having regard to the considerations and rules applicable to a decision whether to release or detain;

(d) not impose a condition or conduct direction unless the authority is satisfied that compliance is reasonably practicable;

(e) not impose a financial condition concerning the forfeiture of an amount of money, with or without security, in relation to a young person under 18 years, except if charged with a serious indictable offence (as defined in s 4 of the *Crimes Act*);

(f) not impose a financial condition concerning the forfeiture of an amount of money, with or without security, in relation to an adult unless the bail authority is satisfied that:

(i) there would otherwise be a likelihood of the person absconding or being unlikely to appear on a future occasion having regard to the considerations mentioned in Recommendation 10.5(2), and

(ii) payment of the sum involved is or is likely to be within the means of the person or people who may be liable to pay that sum;

(g) not impose a condition or conduct direction for the purpose of promoting the welfare of the person unless it is otherwise justified having regard to the considerations set out in the Act.

(2) In this recommendation ***financial condition*** means a condition requiring a person (who may be the accused person) to enter into an agreement to forfeit a sum of money if the accused person fails to attend court as required.

15. Failure to comply with a condition or to observe a conduct direction

Failure to satisfy a condition of release **235**
Review where conditions unsatisfied 236
Submissions and consultations *236*
Comment and conclusions *238*
People on remand for more than three months 238
The response to failure to observe a conduct requirement **240**
The current legislation 240
The new scheme **240**
Power to arrest 241
Contempt 244

15.1 In this Chapter we deal, first, with issues relating to the failure to comply with a condition. We then deal with the response to failure to observe a conduct requirement. That will include review of those aspects of the current legislation which relate to monitoring for such failure, the police response to such failure or perceived failure, and the consequences which may follow.

Failure to satisfy a condition of release

15.2 Where a person is unable to satisfy a condition of release, the person remains in custody. In some cases, that may be a satisfactory outcome. In other cases, however, it may be necessary for a court to consider whether some other condition would suffice, or whether the condition should be removed.

15.3 Implementation of our other recommendations may reduce the extent of this problem by eliminating unnecessary and impractical conditions. However, cases will no doubt continue to occur.

15.4 There is existing legislation directed to minimising the problem. In respect of police bail, if a person is refused or not released on bail granted by a police officer, that person must be brought before a court as soon as possible under s 20 of the *Bail Act*.

15.5 In relation to court bail, there are two relevant legislative responses allowing or requiring review:

- where conditions are unsatisfied: s 48A and s 54A of the *Bail Act*, and
- where people have remained on remand for more than three months: s 258 of the *Crimes (Administration of Sentences) Act 1999* (NSW).

Review where conditions unsatisfied

15.6 Section 48A of the *Bail Act* provides that, if a person has remained in custody after being granted bail because a condition has not been complied with, the court may review the decision in relation to bail, at the request of the person, at the request of a police officer, or of the court's own motion. The section provides that the court may affirm the previous decision as to the conditions of bail, vary the decision by removing or imposing bail conditions, or grant bail unconditionally.

15.7 Section 54A provides for the agency holding the person to give notice to an appropriate court (defined as a court authorised to conduct a bail condition).[1] The notice is to be given before the expiration of eight days after the person was received into custody.

15.8 In Chapter 15 we recommend replacement of the review process with a new scheme of applications for release, revocation or variation of conditions or conduct directions. A s 48A review would be a "variation application".

Submissions and consultations

15.9 The majority of submissions support reducing the time for notice concerning both adults and young people.[2] The suggested time frames varied from one to three days for young people and from two to four days for adults.[3] A number of other submissions focused their attention on young people in particular submitting, most commonly, that two days was an appropriate notice period for young people.[4] The NSW Council for Civil Liberties and the Office of the Director of Public Prosecutions (ODPP) considered that the current time frame was appropriate for adults, but not for children.[5]

15.10 The Intellectual Disability Rights Service and Jumbunna Indigenous House of Learning (Jumbunna) submitted that a shorter notice period should be specified for people with a cognitive impairment and Indigenous people respectively, due to their particular vulnerability in a custodial setting.[6]

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1. *Bail Act 1978* (NSW) s 54A(3).
2. Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 38; Legal Aid NSW, *Submission BA17*, 19; Redfern Legal Centre, *Submission BA18*, 12; D Shoebridge, *Submission BA19*, 8; Public Interest Advocacy Centre, *Submission BA26*, 3, 12; Jumbunna Indigenous House of Learning, *Submission BA37*, 24.
3. Law Society of NSW, *Submission BA5*, 14; Legal Aid NSW, *Submission BA17*, 19; Redfern Legal Centre, *Submission BA18*, 12; D Shoebridge, *Submission BA19*, 8; Public Interest Advocacy Centre, *Submission BA26*, 3, 12.
4. NSW Council for Civil Liberties, *Submission BA3*, 40; Youth Justice Coalition, *Submission BA20*, 19; NSW, Office of the Director of Public Prosecutions, *Submission BA21*, 13; Shopfront Youth Legal Centre, *Submission BA23*, 16; Children's Court of NSW, *Submission BA33*, 7; NSW, Juvenile Justice, *Submission BA35*, 16; NSW, Department of Family and Community Services, *Submission BA24*, 8.
5. NSW Council for Civil Liberties, *Submission BA3*, 40; NSW, Office of the Director of Public Prosecutions, *Submission BA21*, 13.
6. Intellectual Disability Rights Service, *Submission BA30*, 4; Jumbunna Indigenous House of Learning, *Submission BA37*, 24.

15.11 The NSW Police Force was the only submission that explicitly supported the *status quo*.[7]

15.12 Juvenile Justice has advised that it could give notice to the court that a residence condition had not been met within two days after the decision to release and within eight days in the case of other conditions. Corrective Services NSW said that it required the eight days presently prescribed.

15.13 The ODPP submitted that if s 54A of the *Bail Act* is retained, the *Bail Act* should not be amended to specify further the steps that should be taken following receipt of such a notice.[8] In their view, "the inclusion of mandatory requirements in the *Bail Act* adds to the Act's complexity".[9] The ODPP considers that the review provisions in the Act are sufficient for the purpose.[10] All other submissions received on this issue considered that the *Bail Act* should specify that the matter should be relisted on receipt of the notice.[11]

15.14 The bulk of the submissions received on this point considered that further notices should be given periodically in the event that a person continues to be in custody because a condition remains unsatisfied.[12]

15.15 The Aboriginal Legal Service submitted that the *Bail Act* should specify that the relevant steps should include:

- notifying the accused's legal representative (where they are on the record);
- listing the matter in court for a review;
- fixing maximum time periods in which the accused's legal representative is to be notified and the matter is to be listed for hearing; and
- providing guidance concerning how the court should approach its review of the matter where the decision has already been made that the person should be released, albeit subject to certain conditions that cannot be met.[13]

15.16 There was considerable support for a provision enabling the court to require any government agency responsible for compliance with the relevant condition to provide a report to the court, explaining why the bail condition could not be met and the steps being taken to meet it. The Law Society, the Aboriginal Legal Service, Redfern Legal Centre, Legal Aid NSW, Shopfront Youth Legal Centre, PIAC and Jumbunna all consider that the court should be able to require a report from the

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7. NSW Police Force, *Submission BA39*, 37.
8. NSW, Office of the Director of Public Prosecutions, *Submission BA21*, 7, 13.
9. NSW, Office of the Director of Public Prosecutions, *Submission BA21*, 7.
10. NSW, Office of the Director of Public Prosecutions, *Submission BA21*, 7, 13.
11. Law Society of NSW, *Submission BA5*, 14; Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 38; Legal Aid NSW, *Submission BA17*, 19; D Shoebridge, *Submission BA19*, 8; Public Interest Advocacy Centre, *Submission BA26*, 3, 12; Jumbunna Indigenous House of Learning, *Submission BA37*, 24.
12. Law Society of NSW, *Submission BA5*, 14; Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 38; Redfern Legal Centre, *Submission BA18*, 12; D Shoebridge, *Submission BA19*, 8; NSW, Office of the Director of Public Prosecutions, *Submission BA21*, 13; Jumbunna Indigenous House of Learning, *Submission BA37*, 24.
13. Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 38.

relevant agency, either in writing or in person.[14] The ODPP, however, considers that the *Bail Act* "should not impose obligations on third parties".[15]

Comment and conclusions

15.17 We recommend that a provision to the effect of s 48A and 54A of the *Bail Act* should be retained, but with modifications concerning periodic review, notice of listing and a power to require any relevant government agency to report concerning the situation. The proposed modifications are detailed in Recommendation 15.1. Since a notification period shorter than the 8 days currently specified involves matters of administration, we have gone only so far as to recommend that consideration be given to the practicability of shortening that period, except in the case of a young person, where we recommend that notice be given within 2 days and every 2 days thereafter.

People on remand for more than three months

15.18 Section 258 of the *Crimes (Administration of Sentences) Act 1999* (NSW) states that the Commissioner of Corrective Services must, every three months, give to the Supreme Court "a list of all persons on remand who … have been in custody in a correctional centre for more than 3 months".[16] On each occasion, the Court is required to review the list in open court so as:

> (a) to ascertain whether there has been any undue delay in the prosecution or conduct of proceedings … and
>
> (b) if there has been any such delay, to take such action as the Supreme Court considers appropriate to expedite those proceedings.

15.19 The stated object of the procedure is to remedy any unnecessary delay in bringing proceedings to trial in cases where the person charged is in custody. That would include people in respect of whom a decision has been made for release subject to a condition where the condition has not been satisfied. It has its origins in the "gaol delivery" jurisdiction of the Supreme Court,[17] having been given a statutory basis originally in 1912.[18] The provision was necessary to ensure that returns were sent from all gaols across the State to the Supreme Court in Sydney, following the abolition of the circuit courts which previously operated as courts of gaol delivery. The provision was intended to "prevent any person being unlawfully detained in gaol or being detained there an unreasonable time whilst awaiting trial".[19]

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14. Law Society of NSW, *Submission BA5*, 14; Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 39; Redfern Legal Centre, *Submission BA18*, 12; Legal Aid NSW, *Submission BA17*, 19; Public Interest Advocacy Centre, *Submission BA26*, 3, 12; Jumbunna Indigenous House of Learning, *Submission BA37*, 24.
15. NSW, Office of the Director of Public Prosecutions, *Submission BA21*, 14.
16. *Crimes (Administration of Sentences) Act 1999* (NSW) s 258.
17. See, eg, *Gaol Delivery* [1842] NSWSupC 14.
18. *Supreme Court and Circuit Courts (Amendment) Act 1912* (NSW) s 8, relocated to *Supreme Court and Circuit Courts Act 1900* (NSW) s 33A by *Supreme Court Procedure Act 1957* (NSW) s 13 sch 1, then relocated to *Prisons Act 1952* (NSW) s 40A by *Supreme Court Act 1970* (NSW).
19. NSW, *Parliamentary Debates*, Legislative Council, 6 March 1912, 3484 (F Flowers).

15.20 We are advised that, in accordance with this provision, the Department of Corrective Services generates reports that are circulated to the relevant registries of the Local Court, District Court and Supreme Court. The registries check these lists for people who are in custody but without a date having been fixed for their trial. However, the process of review of a complete list of such cases by the Supreme Court, sitting in open court each three months, as envisaged by the statute, has apparently long since fallen into disuse.

15.21 Developments since 1912 obviate the need for the process of review by a judge of the Supreme Court. Courts now take a pro-active role in case management and in bringing cases on for trial. There are publicly funded and pro-active legal aid agencies available. Where there is delay in bringing a matter on for trial, whether necessary or avoidable, and release pending proceedings has been refused or conditions have not been met, a further application for release or an application to remove or vary a condition can be made readily under the *Bail Act*, with legal representation. Our recommendations simplify and clarify such processes.

15.22 It appears that the statutory provision is no longer required and we are recommending its repeal. There is no reason, however, why the process that is presently undertaken – as distinct from the process envisaged by the statute - should not continue at an administrative level if it is thought that it serves a useful purpose.

Recommendation 15.1: People in custody because a condition of release has not been met

(1) A new *Bail Act* should provide that if a person remains in custody because a condition of release has not been met:

(a) a court of competent jurisdiction (to be defined for the purpose of the provision) must be notified to that effect by the government agency holding the person in custody, within eight days from the date on which the decision was made to impose the condition,

(b) such a notice must continue to be given, periodically, each 14 days after the expiration of the initial period of eight days, if the person continues to be in custody, subject to a decision by the court or by the person that such periodic notice is not required,

(c) if the person is a young person under 18, notice must be given within two days, and every two days thereafter.

(d) upon receiving any such initial or periodic notice, the court must list the matter at the earliest possible time, at which time the court may, pursuant to an application by the person or by any other person competent to make an application or of its own motion, decide afresh whether the person should be released or detained and what conditions or conduct direction (if any) should be imposed,

(e) notice of such listing must be given to such legal representatives as are on the record; if the person has been unrepresented and is an Aboriginal person or Torres Strait Islander, then to the Aboriginal Legal Service; and, if a young person, then to Juvenile Justice or to the Department of Family and Community Services if the young person is in care of the Department,

(f) at any stage in the process, the court may direct any government agency with responsibility for the welfare of the person to explain to the court why the condition has not been complied with and what steps are being taken to comply with the condition, and

(g) these provisions do not apply where a court decides that a young person not be released unless the court is notified that suitable accommodation is available.

(2) Consideration should be given to whether it would be practicable to specify a shorter period for giving the initial notice.

(3) Section 258 of the *Crimes (Administration of Sentences) Act 1999* (NSW) should be repealed.

The response to failure to observe a conduct requirement

The current legislation

15.23 Section 50(1) provides that a police officer may arrest a person without warrant and take the person as soon as practicable before a court:

> [w]here [the] police officer believes on reasonable grounds that a person has… failed to comply with, or is…about to fail to comply with the person's bail undertaking or an agreement entered into by the person pursuant to a bail condition.

Alternatively, a warrant or a summons may be issued by an authorised justice.[20]

15.24 The "bail undertaking" referred to in s 50(1) is the written undertaking to attend court required by s 34 of the Act as a pre-condition for release whenever a court grants bail. An "agreement entered into by the person pursuant to a bail condition" includes an agreement to observe conduct requirements entered into pursuant to a condition that the person enter into such an agreement. Breach of such a conduct requirement then constitutes a failure to comply with the agreement.

15.25 When a person has been brought before a court following failure to comply with a bail undertaking or with such an agreement, the question of the person's release may be re-assessed and a different decision may be made concerning release or conditions including a condition embodying conduct requirements.[21]

The new scheme

15.26 The basic elements of s 50 should be retained in a new *Bail Act.* The power of the police to arrest for breach of a conduct requirement should be preserved, as should the power of a court to reconsider the person's status in relation to release conditions and conduct requirements. However, we consider that the power to arrest requires clarification.

20. *Bail Act 1978* (NSW) s 50(1).
21. *Bail Act 1978* (NSW) s 50(2)-(3A).

Power to arrest

15.27 Arrest for breach of a conduct requirement is not mandatory under the current legislation. Subsection 50(1) says only that a police officer "may" arrest a person, and the alternative of a summons for appearance is specifically mentioned. The extent to which the power of arrest is exercised is dealt with in Chapter 12.

15.28 The *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (LEPRA) provides:

> A police officer must not arrest a person for the purpose of taking proceedings for an offence against the person unless the police officer suspects on reasonable grounds that it is necessary to achieve one or more of the following purposes:
>
> (a) to ensure the appearance of the person before a court in respect of the offence, [or]
>
> (b) to prevent a repetition or continuation of the offence or the commission of another offence". [22]

15.29 The following is an extract from the second reading speech introducing the LEPRA:

> Part 8 of the Bill substantially re-enacts arrest provisions of the *Crimes Act 1900* and codifies the common law. The provisions of Part 8 reflect that arrest is a measure that it is to be exercised only when necessary. An arrest should only be used as a last resort as it is the strongest measure that may be taken to secure an accused person's attendance at court. Clause 99, for example, clarifies that a police officer should not make an arrest unless it achieves the specified purposes, such as preventing the continuance of the offence.[23]

15.30 The policy reasons for subsection 99(3) of LEPRA apply with equal force to arrest for failure to observe a conduct requirement imposed under a bail agreement. Indeed, they apply with greater force because, in such a case, the person is not being arrested for a criminal offence. As a consequence it would seem inappropriate for the power of arrest in such a case to be unlimited.

15.31 The Office of the Director of Public Prosecutions (ODPP), the NSW Police Force and the Police Association of NSW do not support this approach to arrest for breach of a conduct requirement.[24] These commentators are concerned about creating technical and potentially onerous obligations on front line police. The NSW Police Force also expressed apprehension that such an approach, requiring an exercise of discretion as to whether to exercise an arrest power or to take some other course in bringing the person before the court, would expose it to the prospect of an action for wrongful arrest, based on a failure to consider such options or failure to have regard to such considerations.[25]

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22. *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 99(3). Further purposes mentioned in LEPRA s 99(3) are not material.
23. NSW, *Parliamentary Debates*, Legislative Assembly, 17 September 2002, 4848-4849 (B Debus, Attorney-General).
24. NSW, Office of the Director of Public Prosecutions, *Submission BA21*, 12-13; NSW Police Force, *Submission BA39*, 32; Police Association of NSW, *Submission BA38*, 4.
25. NSW Police Force, *Submission BA39*, 32.

15.32 A further objection lies behind the police opposition to such a change in the law. The NSW Police Force takes the view that, if a court has imposed a conduct requirement and the statute provides a court with an opportunity for re-assessment, it is the role of police to bring the person before a court for this purpose.[26] However, the Act gives police a discretionary power to arrest and bring the person before a court; it does not require police to do so. A statutory framework of options and considerations would make this clear.

15.33 Other submissions have raised concerns about technical and minor breaches sometimes leading to arrest (for example, not meeting a reporting deadline by less than an hour). Arrest should be reserved for those situations that are serious enough to warrant arrest in order to prevent continuation or repetition of the breach and to facilitate immediate re-assessment of the person's status.

15.34 We consider it anomalous that the LEPRA constraints apply to an arrest for a criminal offence but not to arrest for a breach of a bail condition or conduct direction. Legislation should make clear that police have options other than arrest in such circumstances, what those options are, and, to some extent, what police should take into account. Some of the constraints on arrest prescribed by s 99(3) of LEPRA are not applicable to arrest for failure to comply with a conduct requirement under bail legislation. Otherwise, we consider that those constraints should apply.

15.35 In the case of breach or anticipated breach of a conduct requirement, where the arrest is not also for the commission of a criminal offence, the legislation should provide explicitly that the following options are available to police:

- take no action;
- issue a warning;
- require the person to attend court by notice without arresting the person; and
- arrest the person and take them as soon as practicable before a court.

Arrest should be specified as an option of last resort.

15.36 The police power to take action should arise only where the police officer believes, on reasonable grounds, that a failure or anticipated failure to comply with a conduct direction has or will occur without reasonable excuse. We make a corresponding recommendation in relation to the powers of a court when dealing with a case of failure to comply with a conduct direction.

15.37 In considering what course is to be taken in response to failure to comply with a conduct direction, the officer should be required to have regard to the relative seriousness or triviality of the perceived breach. The officer should also be required to have regard to the person's age and any mental health or cognitive impairment that is apparent or known to the officer. We make those recommendations.

15.38 There are three options in relation to the process by which a person may be required to attend court without arrest:

26. NSW Police Force, *Submission BA39*, 32.

- Use of the existing form of Court Attendance Notice, which is the common form in which criminal proceedings are commenced and is, as we understand, a method by which police do sometimes bring a person to court, under the current legislation, for breach of a conduct requirement bail.
- A new form of Court Attendance Notice, designed for the specific purpose under the bail legislation.
- Use of s 45 of the *Local Court Act 2007* (NSW) which applies to the Local Court's "special jurisdiction" (used, for example, for applications for apprehended violence orders).

15.39 We are attracted to the second or third options, which are consistent with the fact that breach of a conduct requirement is not a criminal offence. This accords with the view that bail hearings "are not so much proceedings *inter partes* as administrative inquiries presided over by a judicial officer (who must act judicially…)".[27]

15.40 A number of submissions supported a provision requiring police to have regard to the options in order of severity.[28] The ODPP, NSW Police Force and the Police Association oppose it.[29] We do not consider that such a hierarchy is necessary. It is sufficient to require police to have regard to the options available, to make arrest a last resort and to require consideration of the seriousness of the breach, whether the person has reasonable excuse for the failure, and the capacity of the person.

Recommendation 15.2: Response to failure to comply with a conduct direction

(1) A new *Bail Act* should provide:

(a) that if a police officer believes, on reasonable grounds, that a person is failing, has failed or is about to fail to comply with a conduct direction, the police officer may:

(i) take no action,

(ii) issue a warning,

(iii) require the person to attend court by notice without arresting the person, or

(iv) arrest the person and take them as soon as practicable before a court.

(b) that, in considering what course of to take, the police officer must have regard to:

(i) the relative seriousness or triviality of the suspected failure (including threatened failure),

(ii) whether the person has reasonable excuse for the failure,

(iii) that arrest is a last resort,

27. *R v Wakefield* (1969) WN (Pt 1) (NSW) 325, 328.

28. Law Society of NSW, *Submission BA5*, 4; Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 34; Legal Aid NSW, *Submission BA17*, 18; NSW, Juvenile Justice, *Submission BA35*, 4, 14; Jumbunna Indigenous House of Learning, *Submission BA37*, 22.

29. NSW, Office of the Director of Public Prosecutions, *Submission BA21*, 13; NSW Police Force, *Submission BA39*, 32; Police Association of NSW, *Submission BA38*, 4.

(iv) insofar as they are apparent to or known by the officer, the person's age and any cognitive or mental health impairment.

(c) that, if the person is arrested, the officer may afterwards discontinue the arrest.

(d) that, upon being satisfied that the person has failed, or was about to fail, to comply with a conduct direction, a court may redetermine whether to release or detain the person and whether to impose a condition or a conduct direction.

(2) In relation to the power in (1)(d), the provisions as to jurisdiction of the various courts should be those set out in Recommendation 17.3.

Contempt

15.41 Under our recommendations, conduct requirements would be embodied in a conduct direction rather than in a condition that the person enter into an agreement to observe specified conduct requirements. A conduct requirement imposed by a court, as distinct from police, would, in effect, be an order of the court.

15.42 It would accordingly be necessary to make clear in any new legislation that breach of a conduct direction did not constitute a contempt of court. We have included that recommendation.

Recommendation 15.3: Breach of a conduct direction not contempt

A new *Bail Act* should provide that failure to comply with a conduct direction does not constitute contempt of court.

16. Implications of *Lawson v Dunlevy*

The decision in *Lawson v Dunlevy* **245**
The implications arising from *Lawson v Dunlevy* **247**
Stakeholders' views **248**
Arguments for and against enforcement conduct directions **248**
Conclusion and recommendation **250**

16.1 As the Commission was finalising its report on Bail, the Supreme Court delivered a decision that is relevant to the bail conduct requirements that can be validly imposed under the current *Bail Act*. This decision is recent enough for its implications in practice to be unclear.

The decision in *Lawson v Dunlevy*

16.2 In *Lawson v Dunlevy*,[1] a person was charged with an assault (of his domestic partner) occasioning actual bodily harm. He was granted bail subject to a condition that he enter into an agreement to observe a number of requirements while at liberty on bail, one of which was "not to consume alcohol for any reason". As a way of enforcing this requirement, the person was also required to "submit to a breath test when requested by a police officer". As noted in the judgment, requirements of this kind involving the two elements have been imposed regularly in some western districts of the State, as a matter of routine and in a standard form. They have been referred to as "alcohol bail".[2]

16.3 At issue in the case was the validity of the breath testing requirement. Justice Garling noted that the parties accepted that it was a valid condition of a bail agreement to restrict a person from consuming any alcohol. He found that the imposition of such a ban can be said to fulfil the purpose of the protection of and/or welfare of either the specially affected person or the community as the consumption of alcohol has been directly connected with the commission of the offence with which the person was charged.[3] However, Justice Garling held that, for a number of reasons, the impugned breath test requirement could not lawfully be imposed under the *Bail Act*.

16.4 We use the expression "enforcement conduct directions" to refer to requirements that a person on bail submit to a test, or comply with a direction of police that is designed to deter or to detect breach of a bail agreement.

16.5 The impugned requirement was held to be unlawful, first, because it was inconsistent with the purposes for which conditions can be imposed in accordance

1. *Lawson v Dunlevy* [2012] NSWSC 48.
2. *Lawson v Dunlevy* [2012] NSWSC 48 [14].
3. *Lawson v Dunlevy* [2012] NSWSC 48 [32].

with s 37 of the Act. It could not be imposed for the purpose of "promoting effective law enforcement",[4] because:

> the [bail] agreement does not create any obligation which is enforced by the criminal law. A breach of it is addressed by a revocation of bail, or else a continuation of bail. No question arises, at least directly, as to the enforcement of any specific law or the law generally.[5]

As His Honour also observed:

> A condition which is designed to enable a more ready proof of a breach of the agreement, or else to deter a breach of this agreement does not either directly or indirectly address any issue of law enforcement.[6]

16.6 It could not be imposed for the "protection and welfare of either a specially affected person or of the community generally",[7] because, as His Honour observed:

> It seems to me that the concept of protection as it is used in s 37, is protection from the conduct which involves the commission of further offences, or else which may involve a threat, a potential threat to the physical and mental well-being of an identified individual, but which may fall short of the commission of an offence.
>
> The impugned condition cannot fulfil these objectives. Nor could a condition such as an obligation to wear a specified type or colour of clothing that would enable ready detection of, or deterrence from breach of bail conditions fall within such a purpose.
>
> Likewise, the impugned condition, the purpose of which is to deter a breach of a condition of bail, or else to make the detection of a breach more readily established, does not fall within either of those purposes.[8]

16.7 Section 37(1)(d) includes a fourth purpose for which conditions can be imposed: reducing the likelihood of future offences being committed by promoting the treatment or rehabilitation of an accused person.[9] For completeness, we note that no question arose in this case as to whether the alcohol testing requirement could have been validly imposed by reference to this purpose.

16.8 The breath test requirement was held to be unlawful for three additional reasons. His Honour observed that enforcement conduct directions are inconsistent with the provisions contained in Part 7 of the Act. These provisions allow a person who fails to comply with a bail agreement or any condition of it to be brought before the Court so the Court may reconsider the question of bail and any relevant conditions. Since the Act does not contemplate the imposition of any other deterrent upon the person subject to the bail undertaking or agreement:

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4. *Bail Act 1978* (NSW) s 37(1)(a).
5. *Lawson v Dunlevy* [2012] NSWSC 48 [39].
6. *Lawson v Dunlevy* [2012] NSWSC 48 [40].
7. *Bail Act 1978* (NSW) s 37(1)(b), (c).
8. *Lawson v Dunlevy* [2012] NSWSC 48 [45]-[47].
9. *Bail Act 1978* (NSW) s 37(1)(d).

> It is not for the Courts to fill a void left by the legislation and to impose a condition that deters a person from breaching their bail agreement.[10]

16.9 Second, the breath test requirement was "vague and in a legal sense meaningless", and hence incapable of enforcement,[11] because:

> The term "breath test" was not defined by the impugned requirement or by reference to any piece of legislation. Its generality and lack of specificity as to the device to be used, and the procedures to be followed, was compared with the specific definition and directions for testing that are given in other Acts and Regulations which permit breath testing, including for example the *Road Transport (Safety and Traffic Management) Act 1999* (NSW); the *Rail Safety (Drug and Alcohol Testing) Regulation 2008* (NSW); the *Marine Safety Act 1998* (NSW) and so on.[12]

16.10 Finally, the breath test requirement was "more onerous than required for the plaintiff and thereby contrary to s 37(2) of the *Bail Act*".[13] In particular, it did not require police to have a reasonable suspicion that the person had consumed alcohol; specify a location for or method of testing; specify the number of times the person could be requested to undergo a breath test; or specify a connection between the result of the test and proof of the consumption by the person of alcohol.[14]

16.11 In summary it is clear that under the *Bail Act*, the law as laid down in *Lawson v Dunlevy* means that enforcement conduct directions are prohibited or are to be closely constrained.

The implications arising from *Lawson v Dunlevy*

16.12 The decision in *Lawson v Dunlevy* has a relevance in relation to the commonly imposed requirement, in support of residence or curfew requirements, that the bailed person present himself or herself to police, at the door of his or her place of residence, when requested to do so. Such a requirement assumes compliance with a police instruction for the purpose of monitoring and/or encouraging compliance with the curfew or residence requirement. As currently imposed, requirements of this kind have not been expressed to be subject to limitations as to the frequency with which police may visit, or as to the times at which a person can be required to present.

16.13 The decision in *Lawson v Dunlevy* does throw into question the validity of this form of requirement, and of any similar requirement intended to serve as a deterrent to breach, or to aid the proof of a breach. There is also doubt as to the validity of any requirement that a bailed person, who was subject to a prohibition on the use of drugs, submit to drug testing upon request by police.

16.14 The decision has relevance for the introduction of e-release, since a requirement or direction as to the wearing of an electronic bracelet, or any associated direction requiring the bailed person to present himself or herself to a police officer, or to

10. *Lawson v Dunlevy* [2012] NSWSC 48 [52]-[54].
11. *Lawson v Dunlevy* [2012] NSWSC 48 [55].
12. *Lawson v Dunlevy* [2012] NSWSC 48 [57]-[62].
13. *Lawson v Dunlevy* [2012] NSWSC 48 [63]; see also [69].
14. *Lawson v Dunlevy* [2012] NSWSC 48 [64].

respond to a telephone call, in accordance with the requirements that currently attach to home detention orders, could potentially cross over into deterrence and breach detection.

16.15 The question then arises, whether a new *Bail Act* should make specific provision for enforcement conduct directions that are designed to facilitate the detection of breaches, to encourage compliance or to act as a deterrent to breach.

Stakeholders' views

16.16 *Lawson v Dunlevy* was decided too recently for the Commission to have undertaken specific consultation on the issues that it raises. However, our general consultations did reveal some stakeholder views.

16.17 On the one hand, there was considerable concern raised by the legal community about police exercising powers, under requirements or directions of the kind mentioned, in ways that were considered unreasonable. In particular, concerns were expressed in relation to requirements that allowed police to check for curfew or residence breaches by requiring people to come to the door of their house frequently and/or in the early hours of the morning.[15]

16.18 On the other hand, police reported success in deterring crime by closely monitoring curfew and residence requirements by the means of house visits. They considered that they exercised their power reasonably, and strongly supported the practice as a law enforcement measure. The NSW Police Force proposed that bail legislation should specifically allow for "the promotion of effective law enforcement through the imposition of bail conditions that can be effectively policed".[16]

Arguments for and against enforcement conduct directions

16.19 The enforcement conduct directions that are being imposed give police powers in aid of law enforcement that otherwise they would not have, or that would, if permitted be constrained by safeguards. For example, some powers can only be exercised upon reasonable suspicion or belief as to the commission or likely commission of an offence. Without attempting any exhaustive review in relation to those powers, or the applicable legislation, we draw attention to the following:

- Random breath and oral fluid testing of motorists for the presence of alcohol or prescribed illicit drugs is available in relation to those who police have "reasonable cause to believe" were driving a motor vehicle, or were occupying the driving seat, or being the holder of a licence were occupying the seat next to a learner driver. Each method of testing is subject to a number of additional safeguards or procedures that are designed to ensure the ultimate accuracy of any positive analysis and its use as evidence.[17]

- Similar provisions exist in relation to

15. See para 12.35-12.36.

16. NSW Police Force, *Bail Act Review: Juvenile Statistical Data, Case Study and Reference Material* (2012) 17.

17. *Road Transport (Safety and Traffic Management) Act 1999* (NSW) pt 2 div 3-3A.

- random alcohol and drug testing and analysis of persons who a relevant officer has "reasonable cause to believe is or was operating a vessel";[18]
- random and targeted alcohol and drug testing of rail safety workers;[19]
- random and targeted testing of police on duty for alcohol, prohibited drugs or steroids;[20] and
- alcohol and drug testing of transport safety employees.[21]

▪ The police powers under the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) are not exercisable at large. Each is dependent, in effect, on the existence of reasonable grounds or cause for suspecting the commission of some offence or some other event which justifies their use. These powers include:

- to require a person to disclose his or her identity or to take other steps for identification purposes;[22]
- to stop and search people, vehicles, vessels and aircraft, without a warrant;[23]
- to exercise search, entry and seizure powers relating to domestic violence offences without a warrant upon invitation;[24] and
- to exercise the several emergency powers in relation to situations of public disorder including stop, search and seizure powers.[25]

▪ The use of surveillance devices and telecommunications and similar forms of interception depend on the obtaining of a warrant, following disclosure to an authorised justice of proper cause for its issue, and then only subject to compliance with a number of procedural safeguards and monitoring by the Ombudsman.[26]

▪ The powers to carry out forensic procedures on a suspect, particularly without the suspect's consent, are subject to detailed regulation and safeguards as provided in the *Crimes (Forensic Procedures) Act 2000* (NSW) and *Crimes (Forensic Procedures) Regulation 2008* (NSW).

16.20 It follows from the foregoing analysis that police do not normally have an unlimited power, under the common law or statute, to compel a person to disclose his or her identity or whereabouts, or to provide information; or to enter on enclosed lands to

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18. *Marine Safety Act 1998* (NSW) s 28C, sch 1.
19. *Rail Safety Act 2008* (NSW) s 19, sch 1; *Rail Safety (Drug and Alcohol Testing) Regulation 2008* (NSW) pt 4.
20. *Police Act 1990* (NSW) s 211A, 211AA; *Police Regulation 2008* (NSW) pt 5 div 4-7.
21. *Passenger Transport Act 1990* (NSW) s 9C, sch 5; *Passenger Transport (Drug and Alcohol Testing) Regulation 2010* (NSW).
22. *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) pt 3.
23. *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) pt 4.
24. *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) pt 6.
25. *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) pt 6A.
26. *Surveillance Devices Act 2007* (NSW) pt 3, 4, 5; *Telecommunications (Interception and Access) (New South Wales) Act 1987* (NSW).

check whether a person is present; or to require a person to submit to random or targeted alcohol or drug testing or to provide a forensic sample unless specifically authorised by legislation. When such a power exists, it is limited, regulated and subject to procedural and other safeguards.

16.21 Unless reasonable grounds exist, a warrant to enter and search a person's home cannot be executed between 9.00 pm on any day and 6.00 am on the following day,[27] yet the standard bail curfew compliance/enforcement condition is not subject to any such restriction. If a residence/curfew conduct direction is accompanied by a requirement for the bailed person to present himself or herself at their place of residence to police on request, there is a question as to whether an implied licence for police to enter on those lands (if they are enclosed lands) arises. If so, there is a further question as to whether the owner or occupier of those premises could revoke such licence, and with what consequences for the bailed person.

16.22 The exercise by police of a power to subject a bailed people to random or targeted alcohol or drug testing, or to enter onto the lands where they reside to confirm their presence, or to detect their absence, whenever they choose to do so, is not conditioned on the presence of any reasonable suspicion or belief that a person is breaching the relevant conduct requirement, or that he or she has committed or is preparing to commit some fresh offence. It represents the exercise of a power that would not otherwise be available, and it is not subject to the safeguards that otherwise attach to the exercise of regular law enforcement powers.

16.23 The question that arises, particularly in the light of the decision of Justice Garling, which, at the time of writing this Report, is taken to reflect the current law, is whether the new *Bail Act* should expressly permit the imposition of enforcement conduct directions of the kind outlined. If the answer is in the affirmative, it is important to provide a clear legislative solution that would preclude the unreasonable imposition, or exercise, of any such direction.

Conclusion and recommendation

16.24 Because the judgment in *Lawson v Dunlevy* was delivered at a very late stage of this Reference, what follows represents our provisional views. We hope this might form the basis for further consultations with stakeholders and, if necessary, the issue of a supplementary reference, in which any outstanding practical or technical issues could be identified and resolved by a report.

16.25 We recognise that conduct requirements or directions of the kind discussed above have been imposed by courts, or if imposed by police, have been subject to court review and revocation. This provides a potential safeguard on their imposition, though it would appear that too often such requirements have been imposed as a matter of routine rather than as a result of a close consideration of their need in the individual case, and that there have been occasions where curfew monitoring in particular has been excessive or unreasonable.

27. *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 72.

16.26 Elsewhere in this Report we recommend the tightening of considerations that bail authorities may have regard to in deciding to impose conduct directions. We expect that this will result in such directions being tailored to the individual and that the routine imposition of "alcohol bail" requirements or of "curfew reporting" directions, will be curtailed.

16.27 We also expect that the requirement to impose conduct directions that are capable of compliance, and that are the least intrusive to suit the needs of the individual case, would have a similar effect. For example, we would expect that fewer curfew directions would be imposed and that in appropriate cases the relevant restrictions would be directed to the released person not being in or approaching a specific public place, or not associating with defined people. Police would still be able to monitor compliance with such conditions, and to arrest a person observed to be in breach. The release decision could then be revoked or different conduct directions imposed.

16.28 If conduct directions are limited and properly targeted to risk, then there is a stronger case for ensuring that police have adequate powers to monitor and enforce their compliance. We recognise that enforcement conduct directions requiring submission to alcohol or drug analysis, or demonstrated presence at a particular residence, or during a curfew period, may need to be imposed by a bail authority (whether police or a court) in cases where the released person is assessed, by reference to their history or the special needs of the case, as presenting a significant risk of non-compliance, or where police would otherwise be unable to detect a breach, or where monitoring by other means would be unnecessarily costly or ineffective. In any such case, it should be necessary for police to justify the imposition of any such enforcement conduct direction to the Court on review of police bail, or on any other application to the court.

16.29 We consider that there is also a role for safeguards to be built into the use of enforcement conduct directions. Adequate specification of the circumstances in which the power can be exercised would be desirable, including the imposition, in suitable cases, of some reasonable limits on the frequency, location or time of any compliance check, or alcohol or drug test to ensure that the direction is not overly onerous. Possibly it should also depend on the presence of a reasonable suspicion that the released person is failing to comply with the relevant direction.

16.30 It is also our provisional view that police standard operating procedures should be developed that would give police proper guidance as to the reasonable limits on the imposition of this condition as police bail and subsequently on compliance monitoring and enforcement.

16.31 We recognise that there is likely to be a significant divergence of opinion in the community about the ramifications of *Lawson v Dunlevy*.

16.32 In these circumstances we consider that the approach identified above, and set out in more detail below, could be a balanced way forward, subject to further consultation during the course of consideration of this Report and the drafting of a new *Bail Act*.

Recommendation 16.1 Enforcement conduct directions

The government should consult, in the course of considering this Report and of drafting a new *Bail Act*, on the need to provide for a mechanism for imposing enforcement conduct directions. The following framework could be used as a basis for consultation:

(1) An enforcement conduct direction should be defined as a direction that requires a released person to submit to any form of testing, or to comply with a police instruction, that is imposed in support of monitoring that person's compliance with another conduct direction (the underlying conduct direction).

(2) An authority may impose an enforcement conduct direction if the authority considers that:

(a) without such a direction, police would not have adequate opportunity to detect and act on non-compliance with the underlying conduct direction, and

(b) the imposition of the enforcement conduct direction is reasonable in the circumstances, having regard to the history of the released person and the likelihood or risk of that person breaching the underlying conduct direction.

(3) The conduct enforcement direction must:

(a) state with precision what is required (for example, it must identify with precision, the form of the testing that may be employed); and

(b) specify such limits on the frequency with which the power can be exercised or the places or times at which it can be exercised, to ensure that it is not unduly onerous in all the circumstances.

(4) The NSW Police Force should develop standard operating procedures for monitoring release compliance and enforcement that would recognise the foregoing requirements.

(5) In the event of alcohol or drug testing being accepted as suitable enforcement conduct directions then it would be convenient for the new *Bail Act* to include a set of provisions akin to the existing Acts and Regulations that variously permit and regulate alcohol and drug testing and analysis and the use of the results of any such exercise of power.

16.33 Finally, having regard to the concerns arising out of the consultations and submissions outlined above, in relation to curfew monitoring, and the consequences of the decision in *Lawson v Dunlevy*, we consider it desirable that the Ombudsman give particular attention to the manner in which enforcement conduct directions are applied in practice. In this respect we consider it appropriate that the Ombudsman be consulted in relation to the way in which this aspect of policing should best be monitored within the proper authority and responsibilities of that office. Elsewhere in this Report we have made recommendations in relation to the collection and availability of information in relation to the operation of the proposed new *Bail Act* generally that would include information in relation to police monitoring and compliance checks, the existence of which would be relevant to this purpose.

17. The offence of failing to appear

Retention of the offence **253**
Scope of the offence **254**
Time limitation **255**
Penalty **255**

Retention of the offence

17.1 Section 51 of the *Bail Act* creates an offence of failing to appear in accordance with a bail undertaking without reasonable excuse. There are analogous provisions in the bail legislation of other States and Territories.[1]

17.2 We did not raise any specific question concerning this offence in the *Questions for Discussion* published at the commencement of this reference.[2] The only submission which directly addresses the abolition or retention of this offence is that of the Law Society of NSW which submits, without reasons, that s 51 should be repealed and that, if retained, the penalty should be the recording of a conviction with no further penalty imposed.[3]

17.3 The Victorian Law Reform Commission, in its Draft Recommendation Paper regarding *Failure to Appear in Court in Response to Bail*,[4] examined the consequences of failure to appear. The Commission listed the following actual and potential implications:

- the waste of court and police resources;
- the loss of evidence due to lapse of time; and
- the additional anxiety caused to witnesses and victims resulting from postponement of proceedings.[5]

17.4 We consider that, because a failure to appear may result in serious consequences concerning the administration of justice and public cost, the offence of failing to appear without reasonable excuse is warranted as a deterrent. We recommend that the offence should be preserved.

1. See, eg, *Bail Act 1980* (Qld) s 33; *Bail Act 1977* (Vic) s 30; and *Bail Act 1992* (ACT) s 49.
2. NSW Law Reform Commission, *Bail*, Questions for Discussion (2011).
3. Law Society of NSW, *Submission BA5*, 13.
4. Victorian Law Reform Commission, *Failure to Appear in Court in Response to Bail*, Draft Recommendation Paper (2001).
5. Victorian Law Reform Commission, *Failure to Appear in Court in Response to Bail*, Draft Recommendation Paper (2001) 4.

Scope of the offence

17.5 Currently, the offence of failure to appear is committed by failing to comply with "the bail undertaking", that is, the undertaking to attend court as required. The undertaking has to be provided as a pre-condition for release following a grant of bail. An offence is not committed if the person fails to appear after bail is dispensed with or after the issue of a Court Attendance Notice (CAN) with no requirement for bail.

17.6 Under our proposals, the bail undertaking would be abolished and replaced by a notice of listing, which would be given to all defendants. However, not all defendants should be liable for the offence of failure to appear. A different way of prescribing the scope of the offence has therefore to be devised.

17.7 Under the scheme we propose in this Report, "the right to bail" in the current legislation in the case of minor offences has been substantially preserved as an "entitlement to release", but we have recommended an entitlement to release without conditions or conduct requirements. The range of offences recommended to define that entitlement is similar to the existing criteria for the right to bail. We have also preserved the discretion to dispense with bail, which exists under the current legislation, in the form of an unqualified discretion to release without conditions or conduct requirements.

17.8 The imposition of a condition or a conduct direction is a convenient line for marking out the scope of the offence of failure to appear. Those released with a condition or conduct direction would be liable for the offence of failure to appear. Under our recommendations, conditions or conduct directions are imposed in cases where otherwise the authority would detain the person. Such serious cases justify a penalty on failure to attend.

17.9 Those charged with fine-only offences and offences where there is no serious prospect of a custodial sentence would not be liable. That is appropriate; a person should not be penalised for failing to appear in such cases.

17.10 The scope of the offence would be similar to the scope of the offence which is currently set by reference to the bail undertaking. It would continue to exclude the large volume of cases in which people are dealt with by the issue of a CAN without bail. It would also exclude the large volume of cases which are currently dealt with by a court dispensing with bail. Accordingly, we recommend that the offence should relate to people who have been released with a condition or conduct direction.

17.11 We also recommend that the offence should apply to people who have failed to appear on sentence. We consider it is a serious matter that a person released after a determination of guilt should fail to appear for sentencing regardless of whether he or she has been released with a condition or conduct direction. It is appropriate that a failure to appear in such circumstances should be the subject of criminal sanction.

Time limitation

17.12 The Aboriginal Legal Service submits that there should be a three month limitation period for instituting proceedings for the offence.[6] The submission is made on the basis that, since the offence is qualified by the exception of reasonable excuse,[7] it can be difficult to recollect or to piece together what one was doing on a particular date in the past, a difficulty which would increase with the passage of time.[8]

17.13 We do not recommend a limitation period. The Community Justice Coalition points out that prosecutions under s 51 are rare and, when raised, are usually dealt with in conjunction with other offences.[9] We are concerned that, if the prosecuting authority is required to decide whether to prosecute the offence in so short a time, the effect may be to precipitate prosecutions which would not have been initiated if further time was available for consideration.

Penalty

17.14 Subsection 51(2) of the *Bail Act* provides that the maximum penalty for failing to appear is the same as for the offence for which the person failed to appear, with the proviso that "no sentence of imprisonment imposed pursuant to this section shall exceed 3 years".

17.15 Subsection 51(8) provides:

> Notwithstanding anything in Division 2 of Part 4 of the *Crimes (Sentencing Procedure) Act 1999*, the court imposing a sentence of imprisonment pursuant to this section may direct that the sentence and any other specified sentence or sentences of imprisonment then imposed on the person convicted or then being served by the person be served consecutively, in which case the firstmentioned sentence shall commence at the expiration of the other sentence or sentences.[10]

17.16 The relevant provisions of the *Crimes (Sentencing Procedure) Act 1999* (NSW) relate to accumulation of sentences[11] and a limitation concerning the jurisdiction of the Local Court in relation to consecutive sentences.[12]

17.17 The maximum penalty for this offence in the legislation of other States and Territories varies widely, for example, a maximum penalty of 12 months in the case of Victoria and Tasmania,[13] two years in the case of the Australian Capital Territory[14] and three years in the case of Western Australia.[15]

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6. Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 56.
7. *Bail Act 1978* (NSW) s 51(1).
8. Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 56.
9. Community Justice Coalition, *Submission BA31*, 5-6.
10. *Bail Act 1978* (NSW) s 51(8).
11. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 55.
12. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 58.
13. *Bail Act 1977* (Vic) s 30; *Bail Act 1994* (Tas) s 9.
14. *Bail Act 1992* (ACT) s 49.

17.18 Against this background, we recommend that the maximum penalty for this offence should be imprisonment for two years.

17.19 We also recommend that the current provisions of the legislation, which exclude the usual principles relating to accumulation of sentences, should not be retained. We see no justification for singling out this offence for special treatment.

17.20 Section 51 of the *Bail Act* includes detailed provisions concerning the disposition of proceedings for the offence, having regard to the statutory framework of the Local Court, the District Court and the Court of Criminal Appeal.[16] We see no reasons to disturb those provisions.

Recommendation 17.1: Offence of failing to appear

(1) A new *Bail Act* should retain the offence of failing to appear but only in relation to a person

(a) who has been released with a condition or a conduct direction being imposed, or

(b) who fails to appear on sentence.

(2) The maximum penalty for the offence should be two years imprisonment.

(3) A new *Bail Act* should reflect the general law of accumulation of sentences, and not retain the current provisions which exempt this offence from the usual principles relating to accumulation of sentences.

15. *Bail Act 1982* (WA) s 51.

16. *Bail Act 1978* (NSW) s 51(5).

18. Applications for release, detention and variation

Police bail **257**
Police power to grant bail 257
Review by police 258
Issues arising 258
Court review **260**
Review powers 260
Making an application 260
Special limited review powers 261
Stays 262
Issues arising 263
Interaction between applications and reviews *263*
Appropriate court to deal with applications *268*
Application of s 22A of the Bail Act *268*
Forms *269*
Variation of reporting and residence requirements – s 48B of the Bail Act *269*
Powers to release or vary conditions on first appearance at court **269**
Requirement to bring a detained person before a court 270
Submissions and consultations 271
Discussion 272
First appearance when the person is in custody *272*
First appearance following release with a Bail Court Attendance Notice *273*
Limitation on the court's "own motion" powers *274*
Repeat applications *274*

18.1 In this chapter we consider a number of procedural issues relating to bail decision-making including: the role of police, the provisions of Part 6 of the *Bail Act* which deal with the review of bail decisions, the kinds of application that should be made for various orders, and the jurisdiction of the various courts. We also consider the issue of mandatory review of conditions and conduct requirements on first appearance.

Police bail

Police power to grant bail

18.2 A police officer of or above the rank of sergeant who is present at a police station, or an officer in charge of the station, is authorised under Part 3 of the *Bail Act* to grant bail to an accused person who has been charged and is present at that station, pending appearance in a court.[1] If the accused person is refused bail, or is not released on bail granted by an authorised officer, then that person is to be brought before a court, as soon as practicable, for the purpose of having the court

1. *Bail Act 1978* (NSW) s 17, 18.

exercise its powers in relation to bail or of otherwise dealing with the case according to law.[2]

Review by police

18.3 An accused person who is refused bail by an authorised officer may request a review of the decision.[3] That review is to be carried out by an authorised officer who is more senior than the officer who made the original decision.[4] The authorised officer may affirm the original decision or grant bail unconditionally or on conditions.[5] The grounds on which the senior officer may review include but are not limited to:

(a) the accused person is no longer incapacitated by intoxication, injury or use of a drug or is no longer in danger of physical injury or in need of physical protection, or

(b) there has been a significant change in circumstances since the decision was made, or

(c) exceptional circumstances exist that justify a grant of bail.[6]

18.4 Section 43A of the *Bail Act* further provides that the authorised officer may not:

- conduct the review if it would cause any delay in bringing a person, who has not been released on bail, before a court in accordance with s 20 of the *Bail Act*;[7] and
- exercise the power to review if an authorised justice, magistrate or court has exercised, or sought to exercise, any power to review the decision in accordance with Division 2 of Part 6 of the *Bail Act*.[8]

Issues arising

18.5 There is some uncertainty as to whether the Act requires a more senior authorised officer to conduct a review if a request is made, or whether the obligations of police under the Act would be satisfied by bringing the accused person before a court irrespective of the request for a review.

18.6 The submissions received suggest that the police review process is not commonly used.[9] Although one submission drew attention to the possibility of apprehended

2. *Bail Act 1978* (NSW) s 20.
3. *Bail Act 1978* (NSW) s 43A(1).
4. *Bail Act 1978* (NSW) s 43A(3).
5. *Bail Act 1978* (NSW) s 43A(4).
6. *Bail Act 1978* (NSW) s 43A(5).
7. *Bail Act 1978* (NSW) s 43A(2).
8. *Bail Act 1978* (NSW) s 43A(6).
9. Legal Aid NSW, *Submission BA17*, 8; Police Association of NSW, *Submission BA38*, 3.

bias being inherent to the process,[10] there appears to be general support for its retention.[11]

18.7 Submissions raised two issues which warrant attention.

18.8 First, it would seem desirable to ensure that a more senior authorised officer has the authority to exercise the review power, even though the accused person has not requested it.[12] Such a review may, in some cases, avoid the detention of an accused person until the person could be taken to an authorised justice or magistrate. It could also address some of the concerns identified in the submissions about the imposition of unduly onerous or unrealistic conditions by police officers.

18.9 Secondly, submissions raised an issue as to whether the existing review power should be confined to cases where release has been refused, or should include a power to review the conditions that were set by the authorised officer making the original decision.[13] In our view it would be appropriate to make it clear that the review power should include a review of any condition or conduct direction imposed.

18.10 We note additionally that the information that police are required to provide to an accused person about his or her entitlement to, or eligibility for, bail[14] does not include information about an entitlement to seek a review by a more senior authorised officer. It would be useful to include such information to deal particularly with situations where an accused person is not immediately taken before a court.

Recommendation 18.1: Review by senior police officer

A new *Bail Act* should provide that:

(1) Where an authorised officer has refused to release a person from custody or has imposed conditions or conduct directions:

(a) a more senior police officer of or above the rank of sergeant:

(i) may review the decision of the authorised officer (without a request from the person), and

(ii) must review the decision of the authorised officer if the person requests it,

unless such a review would cause any delay in bringing the matter before an authorised justice, a magistrate or a court;

(b) the review may be of:

(i) the refusal to release the person from custody; or

10. NSW Young Lawyers, *Submission BA11*, 3.

11. Law Society of NSW, *Submission BA5*, 5-6; NSW Young Lawyers, *Submission BA11*, 3; Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 19; Legal Aid NSW, *Submission BA17*, 8; Redfern Legal Centre, *Submission BA18*, 5; D Shoebridge, *Submission BA19*, 5; NSW Police Force, *Submission BA39*, 18-9; Police Association of NSW, *Submission BA38*, 3.

12. As was suggested in the submission of the Redfern Legal Centre, *Submission BA18*, 5.

13. As was suggested in the submission of the Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 19, and NSW Police Force, *Submission BA39*, 18-19.

14. *Bail Act 1978* (NSW) s 18; *Bail Regulation 2008* (NSW) cl 5.

(ii) any conditions or conduct direction imposed by the authorised officer making the original decision.

(2) The requirement that police provide an accused person with information about his or her entitlement to, or eligibility for, release, should include a requirement that the person be advised of his or her entitlement to seek review by a more senior authorised officer.

Court review

Review powers

18.11 Part 6 Division 2 of the *Bail Act* confers powers of review upon a range of judicial and non-judicial officers. In substance, it confers the power on:

- an authorised justice to review decisions made by that authorised justice;[15]
- the Land and Environment Court, the Industrial Court, and the District Court to review decisions made within the same court;[16]
- magistrates to review decisions of authorised officers and authorised justices;[17]
- the Land and Environment Court, the Industrial Court, the District Court or a magistrate to review a decision of the Supreme Court in relation to bail, if a person is appearing before the relevant court in proceedings for an offence and special facts or special circumstances are present.[18]

18.12 Section 45 of the *Bail Act* confirms the authority of the Supreme Court to review any decision in relation to bail made by an authorised officer, magistrate or authorised justice,[19] as well as conferring upon the Court of Criminal Appeal a right to review any decision made by the District Court, Land and Environment Court, Industrial Court or Supreme Court (however constituted).[20]

Making an application

18.13 The power to review a decision pursuant to Part 6 Division 2 may only be exercised at the request of one or other of the following people:[21]

- the accused person;
- the informant police officer;

15. *Bail Act 1978* (NSW) s 44(1).
16. *Bail Act 1978* (NSW) s 44(3), (4), (5).
17. *Bail Act 1978* (NSW) s 44(2).
18. *Bail Act 1978* (NSW) s 44(6).
19. *Bail Act 1978* (NSW) s 45(1)(a).
20. *Bail Act 1978* (NSW) s 45(1)(b).
21. *Bail Act 1978* (NSW) s 48(1)(a).

- the informant or complainant in the case of bail granted in respect of a domestic violence offence or an application for an order under the *Crimes (Domestic and Personal Violence) Act 2007* (NSW);
- the Attorney General; or
- the Director of Public Prosecutions.[22]

18.14 The review is by way of a rehearing. The review can occur in the absence of fresh evidence,[23] although evidence or information can be received in addition to, or in substitution for, the evidence or information given or obtained on the making of the original decision.[24]

18.15 The applicant does not need to identify an error of reasoning on the part of the original decision maker.[25] The review may result in the affirmation or variation of the decision or the substitution of another decision.

18.16 The Act permits a court to refuse to entertain a request to review a decision pursuant to Part 6 Division 2 if it is satisfied that the request is frivolous or vexatious.[26]

18.17 The Supreme Court may also refuse to entertain a request if it is satisfied that the request comprises a special limited review of bail conditions under s 48A that could be dealt with by a magistrate, authorised justice or the District Court.[27]

Special limited review powers

18.18 The *Bail Act* also makes provision for two special limited forms of review.

18.19 First, if an accused person has remained in custody after being granted bail because any condition of the bail has not been complied with, the bail decision may be reviewed, at the request of the accused person, or at the request of a police officer, or of the Court's own motion.[28] The review is confined to the conditions of bail,[29] and the power conferred extends to affirming the decision as to the conditions of bail, to varying the decision by removing or imposing conditions, or granting bail unconditionally.[30]

18.20 We deal with this provision in Chapter 15 and Recommendation 15.1.

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22. This has been confirmed to include the Commonwealth Director of Public Prosecutions: *Commonwealth DPP v Germakian* [2006] NSWCCA 275.
23. *R v Hamill* (1986) 25 A Crim R 316.
24. *Bail Act 1978* (NSW) s 48(3); *R v Hamill* (1986) 25 A Crim R 316.
25. *R v Pakis* (1981) 3 A Crim R 132, 136.
26. *Bail Act 1978* (NSW) s 48(7).
27. *Bail Act 1978* (NSW) s 48(7A).
28. *Bail Act 1978* (NSW) s 48A(1).
29. *Bail Act 1978* (NSW) s 48A(2).
30. *Bail Act 1978* (NSW) s 48A(4).

18.21 Secondly, an authorised justice is given power to review a decision of any court relating to a bail reporting condition or a bail residence condition.[31] Section 48B provides:

> (3) On any such review, the authorised justice may do any one or more of the following:
>
> (a) the authorised justice may vary the days on which, or the times at which, the accused person must report to a police station under a bail reporting condition,
>
> (b) the authorised justice may vary the police station to which the accused person must report under a bail reporting condition,
>
> (c) the authorised justice may reduce the number of days on which the accused person must report to a police station under a bail reporting condition,
>
> (d) the authorised justice may revoke a bail reporting condition,
>
> (c) the authorised justice may vary the address at which the accused person must reside under a bail residence condition.
>
> . . .
>
> (6) The authorised justice may not, on any such review, vary or revoke a bail reporting condition, or vary a bail residence condition, if the court imposing the condition has directed that the condition must not be varied or revoked under this section.[32]

Below, we recommend an extension of this provision.[33]

Stays

18.22 Where a magistrate or justice grants release to a person accused of a serious offence,[34] that decision will be stayed if the prosecution informs the court that a request for a review is to be made to the Supreme Court.[35]

18.23 Justice Howie has said that prosecutors should only exercise this power "where an urgent resolution of bail is truly required, not simply because they do not agree with the result", adding that:

> The power should, in my opinion, be seen as a very exceptional one and used only where the circumstances call for an urgent review of the magistrate's

31. *Bail Act 1978* (NSW) s 48B(2).
32. *Bail Act 1978* (NSW) s 48B.
33. See para 18.51-18.52.
34. "Serious offence" is defined for the purposes of the provision to mean murder or any other offence punishable by imprisonment for life as well as certain offences involving sexual intercourse or attempted sexual intercourse with a person aged under 16 years: *Bail Act 1978* (NSW) s 25A(6).
35. *Bail Act 1978* (NSW) s 25A.

> decision because of the risks posed to the community if the applicant were to be released.[36]

18.24 Although we agree that the stay provision should only be invoked in such circumstances, we see value in its retention, and do not recommend its repeal. There may be cases involving serious offences where an interim stay is justified for the protection of the community. However, in such a case it should be expected that the prosecution would lodge an immediate detention application in the Supreme Court, and cause it to be served on the accused person.

Issues arising

18.25 Several questions emerged in the submissions and consultations in relation to court reviews under Part 6 of the *Bail Act*. There was a general recognition of the need for a power to review bail conditions, and of a power to revoke bail on the application of the prosecution. Nevertheless, there were suggestions to the effect that Part 6 of the *Bail Act* was not working well in practice and that there was need for clarification.

Interaction between applications and reviews

18.26 The existence of separate procedures for making a fresh application for bail, where a bail determination has previously been made, and for seeking a review of that determination, is potentially confusing. In practice, an accused person has normally made a fresh application where bail has previously been refused. The prosecution has sought a review where bail has been granted. The accused person and the prosecution have also used the review procedures where a variation of conditions has been sought.

18.27 Legal Aid NSW, in its submission, supported retention of the review procedure on the basis that it is more efficient than the bringing of a fresh application.[37] Presumably this is because the court can take into account evidence already received, even though the review takes the form of a hearing *de novo*, whereas, on a fresh application, the accused person must present supporting evidence again.

18.28 The current law is uncertain as to whether, upon an application for a review of bail conditions, sought either by the accused person or by the prosecution, the court is able to revoke the previous bail determination and refuse bail.[38]

18.29 The Aboriginal Legal Service (ALS) expressed concern about this issue. It advised that, in some courts, prosecutors have a practice of seeking revocation of bail in response to a review application brought by an accused person, even though there had been no material change that would justify revocation.[39] It also made reference to the fact that, on occasions, applicants seeking a review of bail conditions were cautioned that their application had the effect of "opening the door" to a full review

36. *R v Blissett* [2006] NSWSC 1383 [8].
37. Legal Aid NSW, *Submission BA17*, 26.
38. Pursuant to the *Bail Act 1978* (NSW) s 48(5).
39. Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 50.

of bail, which might result in revocation. The result, it indicated, was to encourage the withdrawal of the application for review.

18.30 ALS submitted that a provision should be inserted into the Act to provide that, on a review application, bail should only be revoked where there has been a relevant change in circumstances justifying revocation.[40]

18.31 ALS also drew attention to a practice that, it asserted, had emerged in some Local Courts whereby magistrates had marked court papers to the effect that "no other magistrate" should review the bail determination currently in place.[41] We do not consider this practice to be desirable since it appears to impose a fetter on the power that currently exists under the Act. Unless such an annotation is a shorthand reference to the kind of order which is authorised under s 48B(6) of the *Bail Act* (in relation to special limited review of reporting and residence requirements), we consider that it should not be employed.

18.32 Although it is obvious that it is necessary to allow a court to review release conditions (or conduct requirements in accordance with the recommendations in this Report) or to revoke a release order, a question does arise whether there is any purpose to be served by providing a review regime in addition to an application regime.

18.33 In our view, the current procedure for court review under Part 6 should be replaced by a system which would allow courts to deal with applications for release, detention, and the variation of conditions or conduct directions. These applications would be subject to the considerations that would otherwise apply to applications for release, as recommended in this Report.

18.34 Under this system the court powers with respect to release or detention pending proceedings would encompass three kinds of application:

(a) if a person is subject to a decision to detain, an application by the person for an order that the person be released;

(b) if a person is subject to a decision to release, an application by a prosecutor for detention; and

(c) a variation application, that is, an application that one or more conditions or conduct directions imposed in respect of an order for release be varied, (including the imposition of a new condition or conduct direction, or the revocation of an existing condition or conduct requirement).

18.35 In recommending a simple application process and the removal of the distinction between applications and reviews we have had regard to the 1976 Bail Review Committee report:

> A prisoner has the right each time he comes before the trial court in the ordinary course of proceedings, and more often if he makes specific application, to apply for bail. In addition he may apply to the Supreme Court for bail…. Every application for bail is a hearing de novo and is not merely an appeal from or

40. Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 51.

41. Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 51.

> review of a prior decision. This is because of the very nature of imprisonment before trial or sentence. It is such an inroad upon personal freedom that it is fitting that the reasons for it be capable of being tested in the light of changing circumstances so long as it continues.[42]

18.36 The Act should make similar provision to that currently existing in relation to accused people who may apply for release, or prosecutors who may apply for detention. Similarly, a variation application should be available to the same people who may presently seek a review:

- the accused person;
- the informant police officer;
- the informant or complainant in the case of bail granted in respect of a domestic violence offence or an application for an order under the *Crimes (Domestic and Personal Violence) Act 2007* (NSW)
- the prosecutor; and
- the Attorney General

18.37 We have considered whether the provision empowering non-police informants or complainants should be retained. We understand that complainants in respect of domestic violence offences do not, in practice, make such applications. This may be because they (or their legal representatives) are unaware of the power. In consultations with the Apprehended Violence Legal Issues Coordinating Committee, committee members indicated that they could foresee situations where the power would be of benefit to a victim of domestic violence. For example, Apprehended Domestic Violence Orders (ADVOs) are commonly made in the same terms as bail conduct requirements. Where police apply for an ADVO on behalf of a complainant, but the police and the complainant have a different view as to the appropriate orders, the complainant can make an application for a variation. For the variation to be effective, the complainant would also need to apply for a review of the conditions or conduct requirements.

18.38 We consider that it is appropriate for the bail legislation and the ADVO legislation to be consistent in this regard, and we recommend that non-police informants or complainants should retain the power to seek a variation.

18.39 The amended scheme should then empower the court:

(a) **on an application for release**, to make an order for the release of the accused person, either unconditionally or subject to such conditions and/or conduct requirements, as the court considers appropriate, or otherwise to make a detention order;

(b) **on an application for detention**, to detain or to continue the release subject to the same or varied conditions and conduct requirements; and

42. NSW, *Report of the Bail Review Committee,* Parl Paper No 46 (1976) 41.

(c) **on a variation application**, to affirm the existing order, or to revoke or vary one or more conditions or conduct requirements or to impose one or more new conditions or conduct directions, as the court considers appropriate.

18.40 In relation to a variation application, the power of the Court should, in our view, be confined to a consideration of the conditions or the conduct requirements that are the subject of the existing release order, but should not extend to an order to detain. If the prosecution wishes to seek detention, then it should be required to bring an appropriate application or cross-application which, if necessary, could be heard at the same time as the variation application.

18.41 The Act should provide that an application for detention or variation must be dealt with by way of rehearing. It should also provide that evidence or information may be given or obtained in addition to, or in substitution for, the evidence or information given or obtained on the making of the original decision.

18.42 The Act should require a party seeking a variation or detention order to give reasonable notice. In the case of a detention application such notice should be given to the accused person. In the case of a variation application the notice should be given to the prosecution if the accused seeks the variation, and to the accused if the prosecutor seeks the variation.

18.43 Similar provisions should apply in relation to a fresh application for release in those cases where the accused person was previously refused release and remains in detention.

18.44 These recommendations are intended to replace potentially overlapping forms of application and sources of power, arising under Parts 4 and 6 of the Act, with a single applications procedure. The procedure would encompass release, detention and variation. An accused person would be able to apply for variation of bail conditions without the risk of being detained as a result of that application.

18.45 While some concerns arise as to whether a single application procedure would result in variation applications becoming more complex or formal, we do not see why that should be so. If the issue is confined to a reconsideration of the conditions or conduct requirements, then it should be possible for the court to tailor its procedures, so as to deal with that issue expeditiously and effectively. In fact we would expect variation applications to be less complex if the risk of detention is removed.

18.46 We do not consider that it would be appropriate to introduce a provision that would expressly require a court to dismiss a detention application, unless there had been a relevant or material change in the circumstances of the case. The existence of any such change or absence of change might remain a material consideration, but it should not be the sole consideration. It is necessary for the prosecution to have the capacity to apply to the Supreme Court for detention, in those cases where the release order should not have been made on the material that was available at the time of the initial determination.

Recommendation 18.2: Applications for release, detention or variation

(1) The system of court review under Part 6 of the *Bail Act 1978 (NSW)* should be simplified and included in a regime that allows for three forms of application, namely:

(a) If a person is subject to a decision to detain the person, the person may apply for an order that the person be released. On such an application, the court may affirm the prior decision to detain the person or may release the person with or without a condition or a conduct direction.

(b) If a person is subject to a decision to release the person with or without a condition or conduct direction, a prosecutor may apply for an order that the person be detained. On such an application, the court may affirm the prior decision to release the person with any condition or conduct direction that was imposed, may vary a condition or a conduct direction, impose a new condition or conduct direction, or order that the person be detained.

(c) An application for the variation of a condition and/or conduct direction may be made by:

(i) a person subject to the release order;

(ii) the informant (being a police officer) or complainant in the case of bail granted in respect of a domestic violence offence or an application for an order under the *Crimes (Domestic and Personal Violence) Act 2007* (NSW);

(iii) the prosecutor; and

(iv) the Attorney General.

(d) Upon such an application, the court may affirm the prior decision, revoke or vary any existing condition or conduct direction, or impose any condition or conduct direction.

(2) In the case of an application for variation, the court should be confined to considering conditions or conduct directions and should not make an order for detention unless the prosecution has also applied for an order for detention.

(3) Applications should be dealt with by way of rehearing, and evidence or information may be given in addition to, or in substitution for, the evidence or information given on the making of the original decision.

(4) Subject to Recommendation 18.6, reasonable notice must be given of the bringing of an application for detention following a decision to release or for the variation of conditions or conduct directions. In the case of a detention application such notice must be given to the accused. In the case of a variation application, the notice must be given to:

(a) the prosecution, if the accused seeks a variation; and

(b) the accused, if the prosecution seeks the variation.

Appropriate court to deal with applications

18.47 We recommend that the Act should specify which of the courts has jurisdiction to entertain applications of a particular kind and in what circumstances. Our proposal includes broad considerations that should be taken into account in drafting such a provision. In this instance, our recommendation must be subject to further consultation with the courts concerned.

Recommendation 18.3: Jurisdiction to entertain applications

A new Bail Act should specify in which court or courts applications may be made for release, for detention and for variation of conditions or conduct directions, and in what circumstances. Subject to further consultation with the courts concerned, the following broad considerations should be taken into account in drafting such a provision.

(1) The Supreme Court's jurisdiction to entertain an application for release following a decision by a lower court to detain a person should be preserved, the following paragraphs being subject to that jurisdiction.

(2) Where proceedings for an offence are pending in the Supreme Court or in the District Court, that court should have exclusive jurisdiction to entertain an application for release or an application for detention.

(3) Except where proceedings are pending in Supreme Court or in the District Court, the Local Court should have jurisdiction to entertain an application for release or an application for detention.

(4) The Supreme Court, the District Court and the Local Court should have jurisdiction to entertain an application for variation of a condition or conduct direction imposed by the respective court.

(5) The Local Court should have a concurrent jurisdiction to entertain an application for variation of a condition or conduct direction imposed by that court or by the Supreme Court or by the District Court, subject to paragraph (6).

(6) If the Supreme Court or the District Court has ordered that any application be made only to that court to vary any condition or conduct direction imposed by that court, the Local Court should have no jurisdiction to deal with such an application unless the parties consent to the variation proposed.

(7) The Supreme Court and the District Court should have power to decline to hear an application for variation of a condition or conduct direction.

(8) An application for detention may be made:

(a) where an application has been made for variation of a condition or a conduct direction, to the court considering the variation application, or

(b) where the prosecutor is dissatisfied with a decision to release, to the Supreme Court.

Application of s 22A of the Bail Act

18.48 The recommendations made in this chapter are subject to the recommendations in Chapter 18 concerning s 22A of the *Bail Act*, which deals with refusal to hear an

application for bail if an application has already been dealt with by the court. In Chapter 18, we recommend that the section continue to apply subject to some important amendments.

Forms

18.49 It is noted that the forms currently in use in relation to bail reviews that are located on the Local Court and Supreme Court websites respectively, differ in their terms. Additionally each form makes reference to the *Bail Regulation 1999* (NSW), which has been repealed and replaced by the *Bail Regulation 2008* (NSW).

18.50 It would seem desirable to replace the current forms with a single form in plain English that accords with the current law including the relevant Regulations, and also with the recommendations made in this Report.

Recommendation 18.4: Forms

The forms currently in use in relation to bail reviews should be replaced with a single form in plain English that accords with the current law, including the relevant Regulations.

Variation of reporting and residence requirements – s 48B of the Bail Act

18.51 We support retention and extension of s 48B of the *Bail Act.* The provision currently allows authorised justices to hear variation applications in relation to a reporting or residence requirement, if the prosecution is notified and does not object and subject to some other limitations. Any such intervention should be treated as a variation application, subject to the same restrictions as are currently provided by s 48B(4)-(6).

18.52 We consider that the power should extend to the variation, but not the revocation, of curfew and non-association or place restriction directions,[43] again subject to the prosecution being notified and given an opportunity to object to any such variation.

Recommendation 18.5: Non-contentious variations

A new Bail Act should retain the provision in s 48B of the *Bail Act 1978* (NSW) allowing authorised justices to hear variation applications, subject to limitations, in relation to reporting or residence conduct directions. The provision should be extended to include the variation, but not the removal, of curfew and non-association or place restriction directions.

Powers to release or vary conditions on first appearance at court

18.53 In our Questions for Discussion we asked:

> Should there be a provision that, where bail has been refused by the police or granted by the police subject to conditions, the court is required to make a fresh determination concerning bail at the first appearance of the person at court?

43. As was proposed by the Law Society of NSW, *Submission BA5*, 6.

Requirement to bring a detained person before a court

18.54 Following arrest, police may release a person, unconditionally or conditionally. Section 20 of the *Bail Act* provides:

> Where an accused person is refused bail by [the police] or is not released on bail granted by [the police] … the police officer ….shall, as soon as practicable, bring the person … before a court for the purpose of having the court exercise its powers in relation to bail or for the purpose of the person being dealt with otherwise according to law.

This provision operates irrespective of the reason the person has not been released. That may be because police have refused bail altogether. It may be because a condition (typically, a financial condition) has not been met.

18.55 There is a corresponding provision in virtually identical terms in the *Law Enforcement (Powers and Responsibilities) Act*[44] which regulates the exercise of police powers of arrest.[45]

18.56 The purpose of bringing the person before a court "as soon as practicable" where the person remains in custody is to provide the earliest practicable opportunity for a court to deal with any issue relating to the detention of the person. That might be a question relating to the lawfulness of the arrest or it may be a question of whether bail should be granted, unconditionally or conditionally, or whether an unsatisfied condition should be removed or varied.

18.57 There is historic and fundamental significance in the requirement that a person who has not been released following arrest be brought before a court or other authorised person expeditiously. In *Williams v the Queen*, Justices Mason and Brennan said of a similar obligation under Tasmanian legislation:

> Plainly it prescribes the procedure to be followed to allow a person who has been taken into custody for an offence the earliest practicable opportunity to seek a judicial order for his release – either absolutely or on bail. It is concerned with personal liberty, not with the exigencies of police investigation.[46]

18.58 In the same case, Justices Wilson and Dawson said:

> The point at which an arrested person is brought before a justice upon a charge is the point at which the machinery of the law leading to trial is put into operation. It is the point from which the judicial process commences and purely ministerial functions cease.[47]

18.59 Making a decision as to whether to release or detain a person at the commencement of the judicial process and at the cessation of "purely ministerial

44. *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 99(4).
45. The minor differences between these provisions should be synthesised.
46. *Williams v The Queen* (1986) 161 CLR 278, 289.
47. *Williams v The Queen* (1986) 161 CLR 278, 306.

functions",[48] is significant. The court's role at that point in the legal process was described by Lord Denman in *Linford v Fitzroy* as a judicial duty.[49]

18.60 The significance of this transition from the executive realm to the judicial realm carries with it all the features of the judicial process including judicial independence and procedural fairness. The point was well made in an article by a United States judge:

> In every criminal justice system, the first major decision by a judicial officer is whether the arrestee should be released pending trial. In many instances, it may be the most important decision for the players as well as for society.[50]

18.61 The entitlement to a prompt judicial determination concerning release before trial is recognised in the international conventions[51] including Article 9 of the *International Convention on Civil and Political Rights*, which provides that:

> Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power…[52]

Submissions and consultations

18.62 Many submissions supported mandatory consideration of the question of release and of any conditions[53] at first appearance in court. These included the Law Society of NSW, the Senior Public Defender, the NSW Police Force, the Jumbunna House of Learning, the Aboriginal Legal Service and Legal Aid.[54]

18.63 The Children's Court of NSW stated:

> [The Court] supports the position that a court should be required by the Bail Act at the first appearance of a person before the court to turn its mind to the question of whether bail conditions imposed by the police are appropriate. It would be time consuming and impractical however if a Court was required to hear bail applications de novo at first appearance. A statutory requirement in the Bail Act that the court must at the first appearance consider the appropriateness of bail conditions imposed by the police would be sufficient.[55]

18.64 The Youth Justice Coalition (supported by Shopfront Youth Legal Centre) proposed that "bail legislation should provide that any police-imposed bail conditions on children and young people should automatically expire on the first mention date and

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48. *Williams v The Queen* (1986) 161 CLR 278, 306.
49. *Linford v Fitzroy* (1849) 13 QB 239, 255, 257.
50. T E Scott, "Pretrial Detention Under the Bail Reform Act of 1984: An Empirical Analysis" (1989) 27(1) *American Criminal Law Review* 1, 50.
51. See Ch 2.
52. *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 99 UNTS 171 (entered into force 23 March 1976) art 9.
53. Some submissions used the term "conditions" to refer to conduct requirements imposed by way of a condition that a person enter into an agreement to observe conduct requirements.
54. Law Society of NSW, *Submission BA5*, 6; M Ierace, *Submission BA16*, 3; NSW Police Force, *Submission BA39*, 20; Jumbunna House of Learning, *Submission BA37*, 16; Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 20; Legal Aid NSW, *Submission BA17*, 9.
55. Children's Court of NSW, *Submission BA33*, 5.

that this would require the Children's Court to consider the appropriateness of imposing any bail conditions.[56]

18.65 Some limitations were suggested. Legal Aid NSW said that any such provision should not allow the court "to refuse bail to a person previously granted bail".[57] The Aboriginal Legal Service also expressed reservations that "a general requirement to review all bail decisions made by police…would potentially put in jeopardy grants of bail made by police".[58]

18.66 The Office of the Director of Public Prosecutions (ODPP) opposed the proposal, stating that a mandatory requirement would add to the complexity of the legislation.[59] The ODPP also raised the concern that redetermination by the court might result in a refusal of release in a case where police had released the person. The NSW Bar Association also saw no need for a redetermination to be mandatory and thought it could be left to the person's lawyer to make an application if appropriate. The Association was also concerned about the interaction of such a provision with the provisions of s 22A concerning the court's obligation to refuse to hear an application if a prior determination has been made.[60]

Discussion

18.67 As the authorities stress, the first appearance of a person before a court is the commencement of the judicial process. At that point, the court becomes the authority for detaining or restricting the conduct of an accused person pending trial.

First appearance when the person is in custody

18.68 A person may be in custody because the person has been refused release, or because the person has been unable to meet a condition of release. In such a case, there is no question of *notice to the police* being required. Police will be aware that the person may apply for release, or for a variation or removal of the unsatisfied condition. They will be ready to deal with it on the day without notice.

18.69 In this class of case there is, however, the question as to whether the court should be required, or permitted, to decide *of its own motion* whether the person should be released or whether any unsatisfied condition should be removed or varied.

18.70 We are informed that in some regional areas, when a person who remains in custody following arrest is brought before a magistrate or an authorised justice, publicly-funded legal representation is not always available on the weekend.[61] The person may be unrepresented and unaware of the right to apply for bail or to apply

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56. Youth Justice Coalition, *Submission BA20*, 14; Shopfront Youth Legal Centre, *Submission BA23*, 15.
57. Legal Aid NSW, *Submission BA17*, 9.
58. Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 21.
59. NSW, Office of the Director of Public Prosecutions, *Submission BA21*, 7.
60. NSW Bar Association, *Consultation BAC5*.
61. Information supplied by A Lumsden, Executive Director Strategic Policy, Planning and Management Reporting, Legal Aid NSW to the Hon H Sperling QC, Commissioner, NSW Law Reform Commission (by telephone, 2 December 2011).

for removal or variation of an unsatisfied condition. An unrepresented person may also be reluctant to make an application personally, even if the presiding officer informs the person of that right and invites an application.

18.71 Even if the person is legally represented on such a first appearance, the person's right to a judicial determination might require attention by the court. It may appear to the court that a person's rights are not being adequately pursued. Such a situation may arise, for example, due to the pressure of a busy list on the lawyers involved who may have to deal with cases in rapid succession. The need to protect the person's interests might also arise where it appears that a lawyer has received irrational instructions not to make an application or is unable to obtain positive instructions to do so. This may occur due to a cognitive or mental health impairment on the part of the client or due to the emotion of the situation.

18.72 We conclude that, in the case of a person in custody, a court should have power to determine, of its own motion, on first appearance of the person at court, whether a person should be released, unconditionally or conditionally, or whether an unsatisfied condition imposed by police should be removed or varied on such a first appearance.

18.73 We do not recommend *requiring* the court to act of its own motion. It would be a serious matter to impose an obligation on the courts to act without a party having initiated the process. We consider that sufficient protection of the right to a judicial determination is afforded if the power is discretionary.

18.74 We do not recommend extending the same discretionary power to subsequent appearances. The special reasons for such a provision at the commencement of the judicial process do not apply in relation to later appearances.

First appearance following release with a Bail Court Attendance Notice

18.75 In this case, the person is not in custody. The person has been granted bail by police and any conditions imposed have been satisfied, including the signing of any required agreement to observe specified conduct requirements. The person has been issued with a Bail Court Attendance Notice (CAN) to attend court on an appointed date.

18.76 Conduct requirements imposed by police might be unduly onerous or unsuitable. In such a case, there is not the same need for prompt attention as in the case of a person who has not been released. The first appearance in court is nonetheless significant. Conduct requirements are a curtailment of liberty. The first appearance marks the commencement of the judicial process and provides the first opportunity for a judicial determination of such restrictions on freedom of action.

18.77 The question arises of *notice to the prosecutor* of any application to be made for removal or variation of a conduct requirement. We understand, from the submissions we have received and from our consultations, that some magistrates require that notice of any such application be given to the police or to the Director of Public Prosecutions. This may result in the hearing of the application being postponed. The delay might only be for a short time but that may be of serious importance to the person concerned.

18.78 On the other hand, advance notice might not be practicable. Legal representatives might meet the accused person for the first time on the day of first appearance, or receive instructions to make such an application on the day. They may have the relevant supporters and family there to provide the necessary information to make a variation application. Gathering the necessary people again in a few days time to allow notice to be given might be a significant difficulty.

18.79 The countervailing consideration is that, without notice, the prosecutor would have to be ready to meet an application to vary a conduct requirement in every case.

18.80 We conclude that, in this class of case, the courts should be required to entertain any application to vary a condition or conduct direction on the person's first appearance, irrespective of notice to the police or the prosecuting authority. Should the court be satisfied that the prosecutor is not reasonably able to deal with the matter on the day, the court's power of adjournment would be available.

18.81 We also recommend that the court should be permitted to redetermine a condition or conduct direction *of its own motion*. There is not the same prospect that the person may be unrepresented, as in the case of first appearance by a person in custody. However, this is the point of transition to the judicial domain and the curtailment of freedom of action is involved. There is the possibility that rights might not be pursued due to the pressure of a busy court list, and that legal representatives might not receive rational instructions from clients with mental health or cognitive impairments or due to the emotion of the occasion. We note that the submission by the NSW Police Force supports mandatory consideration on first appearance at court, not only of any question of release but also of any conditions of release.[62]

18.82 For the same reasons as apply in the case of first appearance by a person in custody, we do not recommend that the court should be obliged to redetermine conditions and conduct directions of its own motion, or that the discretion should extend to later applications.

Limitation on the court's "own motion" powers

18.83 We recognise the apprehension expressed in some submissions that the court's "own motion" powers could create a risk of a person being detained who had been released by the police or otherwise being disadvantaged by the redetermination of a condition imposed by the police. We recommend that the power of the court to redetermine of its own motion should be available subject to a qualification that such a redetermination should only be made for the purpose of benefiting the person.[63]

Repeat applications

18.84 In Chapter 19, we recommend the retention of restrictions on repeat bail applications by adults (but not young people), and modifications to the grounds for exemption. We recommend that a first or second application for release would be

62. NSW Police Force, *Submission BA39*, 29.

63. *Bail Act 1978* (NSW) s 48A contains a similar restriction on some police applications.

exempt from the operation of the section. This provision would operate satisfactorily in relation to decisions made on first appearance at court. An application made by or on behalf of the person on first appearance at court would count as one of the first and second applications allowed before a provision corresponding with s 22A of the *Bail Act* came into operation. On the other hand, a decision made by the court of its own motion would not count because it would not involve an "application" by the person. That would be an appropriate consequence.

Recommendation 18.6: Redetermination on first appearance at court

A new *Bail Act* should provide that, on first appearance by a person before a court in relation to proceedings:

(a) the court must hear any application for an order to release the person or to remove or vary any condition or conduct direction, without requiring that notice of the application be given to the prosecutor, but may adjourn the hearing if necessary in the interests of justice;

(b) the court may, of its own motion, make an order to release the person or to remove or vary any condition or conduct direction, provided that any such order is for the benefit of the person.

19. Refusal to hear applications

Legislative history **278**
The original provision 278
The 2007 amendment 279
The 2009 amendment 279
The effect of the 2007 amendments **280**
Other jurisdictions **281**
Submissions and consultations **282**
Discussion **285**
The discretion to refuse to entertain 285
The requirement to refuse to entertain 286
Young people *286*
Adults *288*
Variation 288
The role of the lawyer 289
Recommendation **290**

19.1 Section 22A of the *Bail Act* provides:

> (1) A court is to refuse to entertain an application for bail by a person accused of an offence if an application by the person in relation to that bail has already been made and dealt with by the court, unless there are grounds for a further application for bail.
>
> (1A) For the purposes of this section, the grounds for a further application for bail are:
>
> (a) the person was not legally represented when the previous application was dealt with and the person now has legal representation, or
>
> (b) information relevant to the grant of bail is to be presented in the application that was not presented to the court in the previous application, or
>
> (c) circumstances relevant to the grant of bail have changed since the previous application was made.
>
> (2) A court may refuse to entertain an application in relation to bail if it is satisfied that the application is frivolous or vexatious.
>
> (3) The Supreme Court may refuse to entertain an application in relation to bail if the bail application comprises a bail condition review that could be dealt with under section 48A by a magistrate or authorised justice or the District Court.
>
> ...
>
> (5) If a court has previously dealt with an application for bail for a person accused of an offence, a lawyer may refuse to make a further application to the court on behalf of that person if there are no grounds for a further application for bail.

(6) In this section, a reference to a court does not include a reference to an authorised justice exercising the functions of a court.

19.2 The section specifies three distinct circumstances in which a court may refuse to hear an application for release:

- Where a prior application has been dealt with by a court,[1] it must refuse to entertain a subsequent application, unless one of the specified grounds is made out. In this regard, a determination by an authorised justice does not preclude a further application being made, by operation of s 22A(6). And a determination in one court does not preclude a further application being made in another court, because the first application will not have been dealt with by "the court".[2]
- Where a court is satisfied that the application is "frivolous or vexatious", it may, in its discretion, refuse to entertain the matter.[3]
- Where the application is a review of bail conditions which could be dealt with by the Local Court or by the District Court, the Supreme Court may, in its discretion, refuse to hear the matter.[4] This aspect of s 22A applies only to the Supreme Court and has not given rise to any difficulty as far as we are aware.

Legislative history

19.3 Section 22A has undergone several amendments since it was first introduced in 1989.[5] The relevant amendments are outlined here.

The original provision

19.4 In its original form, the section applied only to repeat applications in the Supreme Court. It provided that the Court "may refuse to entertain the application" if the Court was not satisfied that there were "special facts or special circumstances that justify the making of the application".[6]

19.5 The Attorney General said that the purpose of the provision was "to assist in the Government's commitment to reducing court delay [by] relieving the obligation on the Supreme Court to entertain meritless applications".[7] The underlying assumption was that an application, which had failed on a previous occasion after consideration by a Supreme Court judge, was likely to be without merit, absent special facts or circumstances. The provision was also designed to discourage judge shopping, although that may have had the indirect consequence of applications being withdrawn or adjourned.

1. *Bail Act 1978* (NSW) s 22A(1).
2. *R v Petrovski* [2008] NSWDC 110 [11] (Berman DCJ).
3. *Bail Act 1978* (NSW) s 22A(2).
4. *Bail Act 1978* (NSW) s 22A(3).
5. *Bail (Amendment) Act 1989* (NSW).
6. *Bail (Amendment) Act 1989* (NSW) sch 1[2].
7. NSW, *Parliamentary Debates*, Legislative Assembly, 3 May 1989, 7329 (J Dowd, Attorney General).

The 2007 amendment

19.6 The most significant amendment to s 22A occurred in 2007.[8]

19.7 The amendment substituted a new s22A that applied to all courts, not only to the Supreme Court. A court was now *required* to refuse to entertain a repeat application (unless a ground for further application was established), rather than having a discretion.

19.8 An additional ground for further application was introduced, namely, that the person was not legally represented previously and was now legally represented. However, the existing ground regarding "special facts or special circumstances" was restricted to "new facts or circumstances".[9]

19.9 The new section provided that a lawyer may not make a further application unless satisfied that a specified ground for further application was made out.[10] It also allowed a court to refuse to entertain an application in relation to bail if it is satisfied that the application is "frivolous or vexatious". This applied to all applications, not only to a repeat application.[11]

19.10 The Attorney General said that the purpose of the amendment was to protect victims of crime from worry and anxiety at the prospect of the defendant's release, and to prevent 'magistrate shopping', described as "the process of going from magistrate to magistrate, or judge to judge, with the hope of obtaining a different outcome".[12]

The 2009 amendment

19.11 In 2009, the last of the amendments was made.[13]

19.12 The Attorney General indicated that the policy goals of the 2007 amendments remained valid but that there had been "significant misapplication of the section, which had coincided with an increase in the number of people being remanded in custody".[14]

19.13 The ground for further application relating to "new facts" was repealed. It was replaced with s 22A(1A)(b), which expanded the ground to include any relevant information not before the court on the previous occasion, whether available at that time or not. An additional ground was also introduced, namely, any "change of circumstances".[15]

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8. *Bail Amendment Act 2007* (NSW).
9. *Bail Act 1978* (NSW) s 22A(1).
10. *Bail Act 1978* (NSW) s 22A(5).
11. *Bail Act 1978* (NSW) s 22A(2).
12. NSW, *Parliamentary Debates*, Legislative Council, 17 October 2007, 2670 (J Hatzistergos, Attorney General).
13. *Courts and Crimes Legislation Amendment Act 2009* (NSW).
14. NSW, *Parliamentary Debates*, Legislative Council, 29 October 2009, 18984 (J Hatzistergos, Attorney General).
15. *Bail Act 1978* (NSW) s 22A(1A)(c).

19.14 The intention to provide a wide ambit to the first of these grounds was apparent from the second reading speech. It was said that "[a]ny relevant facts and circumstances that have previously not been brought to the attention of the court are grounds for further applications for bail".[16]

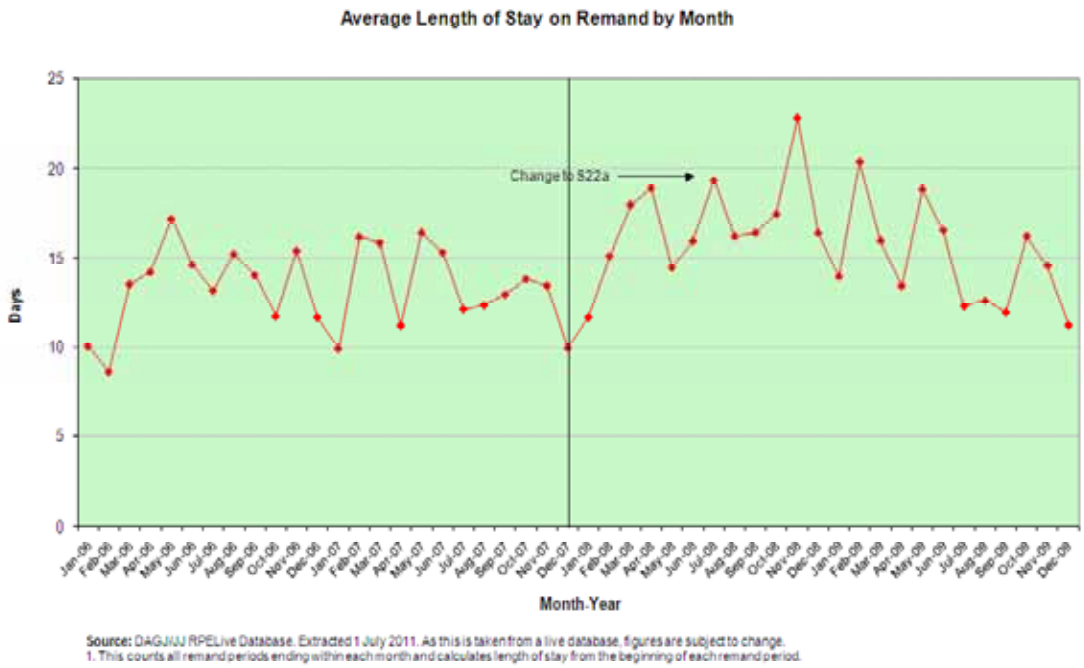
19.15 Subsection 22A(5) was also relaxed. Whereas it previously provided that a lawyer "may not" make a further application for bail unless satisfied of the grounds for such an application, it now provided that a lawyer "may refuse" to make a further application if there are no grounds for a further application.[17]

19.16 The "frivolous or vexatious" provision, s 22A(2), was unaffected.

The effect of the 2007 amendments

19.17 So far as we are aware, there are no statistics available concerning the effect of the 2007 amendments on the pre-trial detention of adults. However, information is available in relation to young people.

Figure 19.1: Average length of stay by young people on remand by month



Source: DAGJ/JJ RPELive Database. Extracted 1 July 2011. As this is taken from a live database, figures are subject to change.
This counts all remand periods ending within each month and calculates length of stay from the beginning of each remand period.

19.18 The 2007 amendments came into effect in November 2007. The Bureau of Crime Statistics and Research (BOCSAR) has supplied a graph (Figure 19.1) based on

16. NSW, *Parliamentary Debates*, Legislative Council, 29 October 2009, 18984 (J Hatzistergos, Attorney General).

17. *Bail Act 1978* (NSW) s 22A(5).

Juvenile Justice NSW data.[18] It shows a substantial increase in the time young people spent 'on remand' immediately following the 2007 amendments.[19]

19.19 The effect of the remand increase was commented on at the time. Judge Haesler in his former capacity as Deputy Senior Public Defender in 2008 stated:

> The newly amended s 22A of the *Bail Act* 1978 has had an immediate and dramatic effect on the number of prisoners and child detainees on remand. Baxter Juvenile Detention Centre is full. Kids [are] doubling up in cells meant for one and are sleeping in the spare visitors rooms.[20]

19.20 The BOCSAR report on *Recent Trends in Legal Proceedings for Breach of Bail, Juvenile Remand and Crime*[21] includes observations concerning the growth in the average length of stay on remand following the introduction of the 2007 amendment to s 22A. BOCSAR has since obtained revised data (Figure 19.1). This data shows a statistically significant increase in the average length of stay on remand following the 2007 amendment of s 22A. BOCSAR suggests this indicates that the amendment contributed to an increase in the juvenile remand population. However, this effect begins to fade from 2009 onwards, indicating, BOCSAR advises, that its contribution was significant but temporary.[22]

19.21 Juvenile Justice NSW suggests it is difficult to identify what caused the reduction of the average length of stay on remand from 2009 onwards. It may be a result of the further amendment to s 22A in 2009, the increasing familiarity of magistrates and lawyers with the provision or the bail support services provided by Juvenile Justice NSW.[23]

19.22 The statistical effect of these changes is, however, not the only matter relevant to bail applications by young people, as we discuss below.

Other jurisdictions

19.23 Victoria and Western Australia have provisions similar to s 22A(1) and (1A) of the NSW legislation.[24] In Victoria, however, an unrepresented person is not affected by the provision. According to the Victorian Law Reform Commission, this had led lawyers to advise clients who insist on an early application for release to make the application without legal representation. In order to stem applications without legal

18. Email from Don Weatherburn to Executive Director, NSW Law Reform Commission, 15 November 2011.
19. Note that the Graph cannot be compared with the Department of Attorney General and Justice, Juvenile Justice Annual Report 2011 data due to counting differences.
20. A Haesler, "New Bail Laws 2008 – s 22A Bail Act 1978" (Paper presented at the NSW Criminal Defence Lawyer's Association, 16 April 2008).
21. S Vignaendra, S Moffatt, D Weatherburn and E Heller, *Recent Trends in Legal Proceedings for Breach of Bail, Juvenile Remand and Crime,* Crime and Justice Bulletin No 128 (NSW Bureau of Crime Statistics and Research, 2009).
22. Email from Don Weatherburn to Executive Director, NSW Law Reform Commission, 15 November 2011.
23. Email from Executive Director, Office of the Chief Executive, Juvenile Justice NSW to Executive Director, NSW Law Reform Commission, 25 November 2011.
24. *Bail Act 1977* (Vic) s 18AA; *Bail Act 1982* (WA) sch 1 pt B cl 4.

representation, the Victorian Law Reform Commission has recommended that the provision should be amended to allow a second application with representation, if made within two days of an earlier application.[25] This recommendation has not been implemented.

19.24 A firm distinction needs to be made between, on the one hand, a discretionary power to refuse to entertain an application on the ground that it is frivolous or vexatious and, on the other hand, a requirement that the court must refuse to entertain a repeat application (albeit subject to exceptions). There is no provision of the latter kind in the bail legislation of South Australia,[26] Tasmania,[27] the Northern Territory,[28] the United Kingdom[29] or New Zealand.[30] In Queensland, there is a restriction on further applications made while awaiting sentencing.[31] The Canadian Criminal Code allows applications for review to be made to the trial judge and thereafter at 30-day intervals, but leave can be granted to make an earlier application.[32]

19.25 In the Australian Capital Territory, a person may make two applications in the Magistrates Court without restriction.[33] Thereafter, a change of circumstances or fresh evidence is required.[34] Similar provisions apply in the Supreme Court.[35] There is also provision to prevent an application which is "frivolous or vexatious" from proceeding.[36]

Submissions and consultations

19.26 Respondents generally accepted that the provision relating to frivolous and vexatious applications should be retained.[37]

19.27 A number of submissions were opposed to any change relating to repeat applications. These were the Office of the Director of Public Prosecutions, the NSW Police Force, and the Police Association of NSW.[38] The NSW Children's Court was initially opposed to any amendment to the current provision but the President of the

25. Victorian Law Reform Commission, *Review of the Bail Act*, Final Report (2007) 108-109.
26. *Bail Act 1985* (SA) s 12(2).
27. *Justices Act 1959* (Tas) s 125C.
28. *Bail Act* (NT) s 19(4).
29. *Bail Act 1976* (UK) sch 1 pt 2A(1).
30. *Bail Act 2000* (NZ) s 40, 41.
31. *Bail Act 1980* (Qld) s 19. This provision has been interpreted in conjunction with s 10(3) so as to preclude further applications while awaiting sentencing: *R v Wren* [2000] 1 Qd R 577.
32. *Criminal Code*, RSC 1985, c C-46, s 520(1), s 520(8), s 521(1).
33. *Bail Act 1992* (ACT) s 20A.
34. *Bail Act 1992* (ACT) s 20A(2).
35. *Bail Act 1992* (ACT) s 20C.
36. *Bail Act 1992* (ACT) s 19(5), 39(4), 45(7).
37. M Ierace, *Submission BA16*, 3; Legal Aid NSW, *Submission BA17*, 10; NSW Council for Civil Liberties, *Submission BA3*, 29; Redfern Legal Centre, *Submission BA18*, 6; International Commission of Jurists, *Submission BA22*, 5; Shopfront Youth Legal Centre, *Submission BA23*, 12; Jumbunna Indigenous House of Learning, *Submission BA37*, 17.
38. NSW, Office of the Director of Public Prosecutions, *Submission BA21*, 7; NSW Police Force, *Submission BA39*, 20; Police Association of NSW, *Submission BA38*, 3.

Children's Court has since advised that he would not object to exempting young people from the restriction on repeat applications provided that s 22A(2) was amended to make it clear that the subsection applied to cases which, in the opinion of the court, were without substance or had no reasonable prospect of success.[39]

19.28 The Chief Magistrate expressed the view that:

> while the current grounds in subsection (1A) should ordinarily be sufficient to enable the making of a fresh bail application where reasonably necessary, if it is thought desirable to ameliorate the perceived severity of section 22A, an option may be to add a discretionary catch-all ground to subsection (1A) such as "any other matter that, in the court's opinion, justifies the making of a further application for bail".[40]

19.29 Other respondents advocated a total repeal of s 22A insofar as it relates to repeat applications. These were Legal Aid NSW, NSW Council for Civil Liberties, the Shopfront Youth Legal Centre and the Redfern Legal Centre.[41] The International Commission of Jurists Australia submits that "it is ... open for section 22A to be repealed" as its purposes can be met by a power to refuse to hear frivolous and vexatious applications.[42]

19.30 The Aboriginal Legal Service proposed a modification to the provision to allow periodic review of determinations.[43]

19.31 In our *Questions for Discussion* we asked whether s 22A, if retained, should apply to young people.[44] The vast majority of respondents who answered this question advocated that young people should be exempt from the provision.[45] However, in responding to this question, a number of submissions stated that their primary view was that the provision should be repealed.[46]

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39. Email from Judge Marien SC, President of the Children's Court, to the Hon Harold Sperling QC, NSW Law Reform Commission, 23 November 2011.
40. G Henson, *Submission BA2*, 3-4.
41. Legal Aid NSW, *Submission BA17*, 9; NSW Council for Civil Liberties, *Submission BA3*, 31; Shopfront Youth Legal Centre, *Submission BA23*, 12; Redfern Legal Centre, *Submission BA18*, 6.
42. International Commission of Jurists, *Submission BA22*, 5.
43. Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 22-23.
44. NSW Law Reform Commission, *Bail*, Questions for Discussion (2011) 8, question 7.2.
45. Law Society of NSW, *Submission BA5*, 7; F Mersal, *Submission BA10*, 6; Public Interest Law Clearing House Ltd, *Submission BA12*, 13; UnitingCare Children, Young People and Families, *Submission BA13*, 16; Aboriginal Legal Service NSW/ACT Ltd, *Submission BA14*, 24; Legal Aid NSW, *Submission BA17*, 10; Redfern Legal Centre, *Submission BA18*, 6; Youth Justice Coalition, *Submission BA20*, 17; International Commission of Jurists, *Submission BA22*, 4; Shopfront Youth Legal Centre, *Submission BA23*, 12; NSW, Department of Family and Community Services, *Submission BA24*, 6; Public Interest Advocacy Centre, *Submission BA26*, 6; Community Justice Coalition, *Submission BA31*, 6; NSW, Juvenile Justice, *Submission BA35*, 12; Jumbunna Indigenous House of Learning, *Submission BA37*, 17.
46. Law Society of NSW, *Submission BA5*, 7; F Mersal, *Submission BA10*, 6; Public Interest Law Clearing House Ltd, *Submission BA12*, 13; Shopfront Youth Legal Centre, *Submission BA23*, 12; NSW, Juvenile Justice, *Submission BA35*, 12; Jumbunna Indigenous House of Learning, *Submission BA37*, 17.

19.32 A number of submissions articulated some of the practical reasons why they considered s 22A was particularly problematic in relation to young people. The Law Society of NSW commented that:

> Experienced practitioners recognise the difficulty of establishing a rapport and taking instructions from young people in the first instance. There is often a mixture of factors preventing the taking of cogent instructions on bail such as a combination of fear, shame, not wishing to tell family or friends, drug effect, lack of sleep, lack of understanding and the pressure of time to take instructions. These barriers are especially compounded when dealing with juveniles though the filter of AVL (Audio Visual Link).[47]

19.33 The Council of Social Service of NSW mentioned difficulties it considers young people face at their first and subsequent appearances:

> The ability of a child, particularly one who is unfamiliar with the legal system, to adequately cope with the court system is often compromised by their youth and inexperience, and if the young person has spent their first night in a juvenile detention facility, the associated trauma of this experience may hinder their ability to effectively communicate their needs.[48]

19.34 During consultations, representatives of the Victims of Crime Assistance League, the Homicide Victims Support Group and Enough is Enough Anti-Violence Movement, told us that victims took an interest in ensuring that the police put an adequate case against release and that having to confront the alleged perpetrator repeatedly when they attended court for this purpose and the repeated prospect of the defendant being released was stressful for them. We were also told that there were instances of defendants making unnecessary applications for the very reason of intimidating victims.[49] This is a perspective to be taken into account.

19.35 These victims groups expressed a range of views on the question of whether s 22A should apply to young people. Some had greater reservations than others about introducing some flexibility into s 22A in relation to young people. Suggestions included the exclusion of particular categories of offences, such as summary offences, from the operation of the section; the application of the section only to young people charged with serious offences of violence; or the amendment of the section to require, in relation to young people, consideration of the seriousness of the alleged offence and whether the alleged offence involved harm or violence.[50]

19.36 In consultation meetings with representatives of Legal Aid NSW, the Aboriginal Legal Service and the NSW Law Society, we were informed of more particular concerns in relation to the operation of s 22A than had been raised in submission documents.[51] We were told that, despite the liberalising amendment in 2009, practitioners were still cautious in relation to a first application. Practitioners could not be sure that an exempting ground would be made out if a subsequent application proved to be necessary. Practitioners had to advise clients concerning

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47. Law Society of NSW, *Submission BA5,* 7.
48. Council of Social Service of NSW, *Submission BA7,* 8.
49. Victims' groups, *Consultation BAC11*.
50. Victims' groups, *Consultation BAC11*.
51. Defence representatives, *Consultation BAC6*; Bar Association and Law Society, *Consultation BAC5*.

the section and prepare applications in the context of a busy court list. In such circumstances, caution frequently led to postponing an application in order to ensure that everything possible by way of evidence and argument was available to be put before the court on a subsequent occasion. A typical example would be whether one needed to have a family member present at court to support the application. The absence of a comprehensive record of a prior application could make it difficult to show that an item of evidence was not before the court on the prior occasion.

19.37 Representatives at the consultation said that the consequence was the postponement of applications which would otherwise have been made and which might have been successful, and additional cost in preparing for every eventuality when the application was ultimately made. A further consequence of the provision was that practitioners did not obtain the court's guidance about what might be lacking in an application that was rejected and, hence, did not have the opportunity of curing the deficiency on a subsequent application without unnecessary preparation in other respects.

19.38 Some legal practitioners have had their clients make the first application without legal representation in order to avoid the risk of a subsequent application being barred under the section. We note, as mentioned above, that this practice has motivated the Victorian Law Reform Commission to recommend amendment of the corresponding provision in Victoria.[52]

19.39 There is no statistical evidence in relation to adults that repeat bail applications were causing problems prior to the 2007 amendment, or that the amendments are currently causing problems. However, the complaints of problems resulting from the amendment of s 22A are substantial. We also observe that these complaints relate to aspects of the situation that would not necessarily be apparent to magistrates and judges, as they relate to delayed applications.

Discussion

19.40 Where a person who has not been convicted of a crime is detained pending resolution of a charge, access to the courts to challenge that detention is imperative. The provisions of s 22A impede such access. Strong reasons are required to justify such an impediment.

The discretion to refuse to entertain

19.41 There appears to be no reason to disturb the capacity of a court to refuse to entertain an application which is frivolous or vexatious. An application is not dismissed on this account unless the court is satisfied that it is, in effect, without merit. Judicial discretion is not abrogated.

19.42 We recommend a minor change. The suggestion was made in discussion with the President of the Children's Court that the provision would be clearer to the general

52. Victorian Law Reform Commission, *Review of the Bail Act*, Final Report (2007) 108, 109.

public if the plain words "without substance or has no reasonable prospect of success" were added so that the provision was in terms that the court could refuse to entertain the application if it was "frivolous, vexatious or without substance or has no reasonable prospect of success". This is in the same terms as s 53(4)(a) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).[53] We make that recommendation. The phrase "frivolous or vexatious" is familiar to lawyers and can be retained. The additional words would enable a court to state the grounds for refusing to entertain an application in terms familiar to the court and, additionally, in terms that are intelligible to the general public.

The requirement to refuse to entertain

19.43 The current provision requires a court to refuse to entertain an application where one has already been made and dealt with by the court, unless there are grounds for a further application.[54] The permitted grounds are that the person was not legally represented on the previous application, that relevant information was not presented in the previous application, or that circumstances have changed.[55]

19.44 The reasons which have been advanced in justification of the repeat application provisions of s 22A are the protection of the criminal justice system from wasteful and unnecessary applications, forum shopping and the protection of victims from unnecessary stress. Countervailing considerations have been mentioned in our review of submissions and consultations.

19.45 It is by no means clear that the courts are in need of protection from what would otherwise be a burden of wasteful repeat applications. No such provision was seen to be required when bail law was codified in NSW in 1978 or for some ten years thereafter. Some jurisdictions, including jurisdictions within Australia, have not seen the need for such a provision to this day.

19.46 We do not doubt the accounts given to us of distress caused to victims of violent behaviour when unnecessary repeat applications are made. It does not follow however that such cases are so numerous as to warrant a blanket approach in relation to repeat applications.

Young people

19.47 The aspect of s 22A which stands out as requiring attention is its impact on young people. We have, earlier in this report, drawn attention to the special characteristics of young people and the need for special consideration in their case.[56] A number of submissions outlined above also highlight the distinctions between young defendants and adult defendants.[57] A recent review of Juvenile Justice in NSW

53. A provision similar to s 53(4)(a) was recommended by Legal Aid: Legal Aid NSW, *Submission BA17*, 10.
54. *Bail Act 1978* (NSW) s 22A(1).
55. *Bail Act 1978* (NSW) s 22A(1A).
56. See para 11.8-11.29.
57. See para 11.22.

found no evidence that children and young people were making unnecessary bail applications.[58]

19.48 With regard to the goal of protecting victims from anxiety at the prospect of the defendant's release, Booth and Townsley observe that the majority of crimes committed by young people can be characterised as minor or property offences, and that victims of such offences tend not to want to become involved in the criminal justice system and are, therefore, not particularly invested in the custodial status of the defendant.[59]

19.49 It is evident from first hand experiences conveyed to us in submissions and consultations that a young person's inexperience of life and intellectual immaturity can impact upon the ability to comprehend fully his or her situation and the workings of the criminal justice system. It may also take time for the young person to develop trust and confidence in his or her lawyer.

19.50 This may compromise the young person's ability to provide cogent instructions and to participate in the court process in an effective way. These factors may diminish over time, but would not necessarily resolve completely after one or two applications for release.

19.51 Apart from these practical considerations, the concern of the state for the welfare of young people is fundamental. A heavy burden accordingly rests on those who argue for a statutory provision which might prevent a case for release being put on behalf of a young person, especially in circumstances where the young person is entitled to the presumption of innocence.

19.52 We conclude that young people under the age of 18 years should be exempted from the repeat provisions aspect of s 22A.

19.53 We have considered whether such an exemption should be qualified by reference to the nature of the offence charged, for example, by specifying that the exemption did not apply if the maximum penalty for the offence charged was imprisonment for 5 years or more, or cases involving very serious personal violence.

19.54 We have decided against such a qualification because it is not a rational line to draw. There may be extenuating circumstances, so that an offence with a long custodial sentence as the maximum penalty might not, in the circumstances of the case, be in a high order of seriousness. Such an arbitrary line would inevitably give rise to inconsistent results, with some cases falling on one side of the line and cases of comparable seriousness falling on the other. But, quite apart from those considerations, it is unjust for rights, even procedural rights, to be determined by an arbitrary classification which precludes consideration of the circumstances of the case.

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58. Noetic Solutions, *A Strategic Review of the New South Wales Juvenile Justice System*, Report for the Minister for Juvenile Justice (2010) 70 [233].

59. T Booth and L Townsley, "The Process is the Punishment: The Case of Bail in New South Wales" (2009) 21 *Current Issues in Criminal Justice* 54.

19.55 Furthermore, such a distinction would be irrelevant to the purpose of s 22A as stated in the second reading speech when the provision was introduced in 1989, namely, relieving the court of meritless applications.[60] There is no evidence that meritless applications are more likely to be made by those charged with more serious offences.

19.56 For these reasons, we do not recommend a qualification to the exemption which should apply in the case of young people. We define a young person for these purposes in a way similar to the jurisdiction of the Children's Court in s 5 of the *Children (Criminal Proceedings) Act 1987* (NSW). That is, it is a person who was under 18 at the time of committing the alleged offence and is under 21 at the time of making the application for release.

19.57 Accordingly, we recommend that young people be exempted from the repeat applications aspect of the section.

Adults

19.58 As for adults, conflicting considerations arise. On the one hand, there is a public interest in protecting the criminal justice system from unnecessary and wasteful repeat applications and in protecting the interests of victims of crime. On the other hand, there is the public interest and the interest of the particular person in access to the courts which should be curtailed only for strong reasons. That is especially so where liberty and freedom of action in daily life are at stake. A balance between these conflicting considerations is required.

19.59 We consider that the ACT provision, which applies only to an accused person who has made two applications in the Magistrates Court, strikes the correct balance. Two applications should be sufficient to place all relevant matters before the court. After that, the applicant should be required to establish one of the specified grounds for further application. We therefore recommend that a provision equivalent to s 22A should be retained. It should only apply to a person who has already made two applications. The existing grounds (regarding legal representation, information that has not been presented to the court and changed circumstances) should continue to be available. As a further safeguard, there should be an additional ground for a further application: any other matter that, in the opinion of the court, is a relevant consideration.

19.60 Currently, s 22A does not restrict a further application where the prior determination was made by an authorised justice, rather than a court.[61] We recommend that this provision should be retained.

Variation

19.61 In Chapter 18, we recommend a new procedure to apply for variation of release conditions or conduct directions. Consistent with our approach in this chapter to

60. NSW, *Parliamentary Debates*, Legislative Assembly, 3 May 1989, 7329 (J Dowd, Attorney General).

61. *Bail Act 1978* (NSW) s 22A(6).

applications for release, we recommend that variation applications also be subject to a power to refuse to hear the application, in the same way as applications for release, if the variation application is the same or substantially the same as pervious applications.

The role of the lawyer

19.62 Subsection 22A(5) is directed to lawyers rather than to the courts. As enacted in 2007, it forbad a lawyer from making a further application unless the lawyer was satisfied of one or other of the two matters which then constituted grounds for further application (that the person was not legally represented on the previous occasion or that new facts or circumstances had arisen). The intent was obviously to provide a filter for further applications. If the lawyer was not satisfied there were grounds, that would forestall a further application and the court would not have to consider whether there were such grounds.

19.63 Under the 2009 amendments,[62] the provision was liberalised. It now provides that a lawyer "may refuse" to make such an application "if there are no grounds for a further application".[63] Accordingly, the prohibition has been removed and, in its place, the lawyer is given permission to refuse to make a further application, subject to the qualification that there are no grounds for such a further application.

19.64 The meaning of the provision is clear enough, to a point. The lawyer is relieved of what might otherwise be a professional duty to put the client's case to the court if there are no grounds for the further application. The phrase "if there are no grounds for a further application" is, however, ambiguous. It could mean "if there are no grounds for a further application on its merits". Alternatively, it could mean "if there are no grounds of exemption as specified in the section". In view of the history of the provision, it is likely that the latter construction was intended.

19.65 Another unclear aspect of the subsection is that, read literally, the clause "if there are no grounds for a further application" raises a question of objective fact. It can be inferred, however, that these words were intended to mean "*if the lawyer is satisfied* that there are no grounds for a further application".

19.66 If a lawyer declines to make a further application in reliance on this provision, the person can, in theory, retain another lawyer. However, that overlooks the reality that most legal representation of this kind is through duty lawyers. If a lawyer employed by Legal Aid or Aboriginal Legal Service, or a duty solicitor retained by Legal Aid declines to make a further application in reliance on this provision, the person is very likely to be unrepresented.

19.67 Publicly funded agencies may decline to represent a person if the case is without arguable merit but this provision goes further. It permits such agencies to refuse to represent the person in a difficult case on the ground that, in the lawyer's opinion, a ground for application is not made out. That should be for the court to decide, not for the lawyer.

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62. *Courts and Crimes Legislation Amendment Act 2009* (NSW).
63. *Bail Act 1978* (NSW) s 22A(5).

19.68 There is an apposite passage in the English Court of Appeal judgment *Ridenhalgh v Horsefield*:

> Legal representatives will, of course, whether barristers or solicitors, advise clients of the perceived weakness of their case and of the risk of failure. But clients are free to reject advice and insist that cases be litigated. … They [lawyers] are there to present the case; it is (as Samuel Johnson unforgettably pointed out) for the judge and not the lawyers to judge it.[64]

19.69 The provision continues to provide a potential barrier between the citizen and the courts, unnecessarily and inappropriately. We recommend that this provision should not be retained.

Recommendation

Recommendation 19.1: Refusal to hear applications

A new *Bail Act* should retain a provision based on s 22A of the *Bail Act 1978* (NSW) with the following changes:

(1) The provision (currently s 22A(2)) that a court may refuse to entertain an application for release if satisfied that the application is frivolous or vexatious should include the additional grounds that the application is "without substance or has no reasonable prospect of success".

(2) The provision (currently s 22A(3)) allowing the Supreme Court to refuse to entertain an application if it comprises a bail condition review (a variation application under our recommendations) which could be dealt with in the Local Court or in the District Court should be retained.

(3) The provision (currently s 22A(1) and (1A)) proscribing repeat applications unless there are grounds for further application should be retained, but should not apply to:

   (a) a person who was under 18 years at the time of the offence and is under 21 years at the time of the application, or

   (b) to an adult unless the person has already made two applications to the court.

(4) An additional ground for further application should be provided: any other matter which, in the opinion of the court, is a relevant consideration.

(5) The provision for refusal to hear a release application should be extended to apply to an application for variation of a condition or conduct direction that is the same or substantially the same as previously sought.

(6) The provision (currently s 22A(5)) allowing a lawyer to refuse to make a further application should not be retained.

64. *Ridehalgh v Horsefield* [1994] Ch 205, 234.

20. Electronic monitoring

Background **291**
Technology options 292
NSW experience with electronic monitoring: the home detention scheme 293
Schemes in other jurisdictions **293**
New Zealand 293
England 295
Scotland 296
United States 296
Western Australia 296
Submissions **297**
Discussion **298**
Cost and net-widening 298
New Zealand model favoured 299
Eligibility for release with electronic monitoring 299
Time spent on e-release to be taken into account. 300
Should the scheme have a legislative basis? 300
Recommendation **301**

Background

20.1 Electronic monitoring schemes can operate at a number of stages in the criminal justice system:

- pre-trial as a bail condition or in support of a bail condition;
- as an adjunct to a sentence such as home detention or an intensive corrections order; or
- as a mechanism attached to parole.

Here we are considering only the question of a pilot e-release scheme in the context of a decision whether to release or detain someone pending proceedings.

20.2 The use of electronic monitoring in support of bail conditions in NSW is not new. It has been ordered by the Supreme Court in *R v Medich*[1] and *R v RS*.[2] Those cases required the defendants to submit to and fund their own monitoring by a private company, Abakus ElmoTech Pty Ltd. In this chapter, we are considering a government-operated scheme.

1. *R v Medich* [2010] NSWSC 1488.
2. *R v RS* [2011] NSWSC 103.

Technology options

20.3 A number of different technological systems for release with electronic monitoring are available. They each have advantages and disadvantages in terms of cost, maintenance requirements, accuracy and reliability. Each also has differing privacy implications.

20.4 Black and Smith have identified the following types of technology:

> **Passive Systems**
> In these systems, wearers are periodically contacted by telephone to ensure that they are where they are supposed to be. The individual's identity may be verified by such means as a password, a device that the subject wears or a biometric such as a fingerprint or retinal scan. Passive systems are only effective for detention purposes.
>
> **Active Systems**
> These systems utilise a device worn by the individual that continuously emits a signal. A corresponding device in the person's home relays the signal to a monitoring station. If the wearer strays too far from home or breaks the device, the authorities are alerted.
>
> A variation of this system utilises mobile equipment that can detect the presence of the individual's device. A corrections officer can drive past a designated place to ensure that the wearer is there. Active systems primarily seek to enforce detention, although they may be extended to achieve some restriction and surveillance as well.
>
> **Global Positional Systems**
> Detention with GPS is achieved in the same way as with an active system. The person is monitored to ensure curfew hours are kept. Place-restriction is enforced through an alert that is triggered if the person goes into prohibited areas….
>
> Surveillance is achieved by continuously monitoring the person's location.[3]

20.5 We make no suggestion as to what type of technology is preferable. We are advised that the home detention scheme currently operated by Corrective Services NSW (CSNSW) is an active system.[4] Detainees wear an electronic anklet; a data collection unit is connected to the detainee's home phone and transmitted to a central monitoring base.[5] Compliance monitoring officers can also use a mobile scanning unit when a monitored person is outside their home. We assume that there would be efficiencies in using the same technology for a trial of an e-release scheme, and we anticipate that our recommendations could be implemented using this technology.

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3. M Black and R Smith, "Electronic Monitoring in the Criminal Justice System" (2003) 254 *Trends and Issues in Crime and Criminal Justice* 1, 2 (citations omitted).
4. Advice provided by CSNSW to the NSW Law Reform Commission, emailed 14 February 2012.
5. P Achterstraat, *Home Detention: Corrective Services NSW*, Auditor General's Report: Performance Audit (2010).

NSW experience with electronic monitoring: the home detention scheme

20.6 If a court sentences a convicted person to a term of imprisonment of less than 18 months, it may make an order that the term is to be served by way of home detention.[6] Home detention is not available for certain offences, such as serious offences against the person,[7] or to offenders with a history of certain serious offences.[8] Before making a home detention order, the court must consider whether such an order is suitable and appropriate, and is to have regard to an assessment report prepared by the Probation and Parole Service.[9]

20.7 A court may impose certain conditions on any home detention order.[10] There are also standard conditions that apply to any order, including, to "submit to electronic monitoring of his or her compliance with the home detention order".[11]

20.8 When offenders are sentenced to home detention, the administration of electronic monitoring is conducted by a division of Corrective Services NSW, called the Community Compliance and Monitoring Group (CCMG). The CCMG deals with minor breaches through warnings or giving further directions, or refer serious and continued breaches to the State Parole Authority.[12]

Schemes in other jurisdictions

New Zealand

20.9 New Zealand has had an electronic monitoring scheme, known as 'EM Bail', in operation since September 2006.[13] It uses an ankle bracelet that communicates to a monitoring unit at their home, similar to the NSW home detention scheme. The current system allows for EM Bail as a condition requiring a person to stay at a particular residence at all times (except for an approved purpose such as work). As it is meant to be an alternative to remand it is restricted to people denied bail on relatively serious charges who are likely to spend a long time on remand awaiting trial. They make a fresh application to the court for release with electronic monitoring.

20.10 After application is made, a police unit checks whether the device will work at the proposed address. Standard conditions include consent by other people at that address.

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6. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 6.
7. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 76.
8. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 77.
9. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 75, s 78, s 81.
10. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 82.
11. *Crimes (Administration of Sentences) Regulation 2008* (NSW) cl 200(h).
12. P Achterstraat, *Home Detention: Corrective Services NSW*, Auditor General's Report: Performance Audit (2010) 18.
13. New Zealand Police, *Frequently asked questions about EM-Bail* <http://www.police.govt.nz/service/embail/faq.html>.

20.11 The scheme has no legislative basis and is dealt with under bail conditions. A 2011 review of bail conducted by the New Zealand Ministry of Justice noted that the government is considering (and inclined towards) putting the scheme on a legislative basis so that regional differences do not emerge.[14] It is also considering whether defendants charged with serious violent and sexual offences and serious methamphetamine offences should be excluded from the scheme. The current thinking is that because of the low rate of offending on EM Bail such defendants should not be excluded.[15]

20.12 The New Zealand Ministry of Justice report notes that EM Bail:

> can be a very restrictive condition. It is significantly more expensive to run than standard bail, but less expensive than remand in custody.[16]

20.13 While, in most cases in New Zealand, the courts do not take time spent on EM Bail into account in sentencing, they do in some cases because it is felt that EM Bail is particularly restrictive and more akin to home detention. The review report noted that, since November 2008, the UK has had a legislative regime for crediting time spent on EM Bail against a prison sentence by way of a half day credit for every day in which the defendant was required to be home for at least nine hours.[17] The report's preliminary view was that some legislative guidance by way of setting out relevant factors that the court should take into account would be preferable to a set formula. The suggested factors are:

- the length of time the defendant spent on EM Bail;
- the relative severity of the conditions imposed; and
- the defendant's compliance with the conditions.[18]

20.14 Police classify breaches of EM Bail as either major or minor breaches. Major breaches are likely to lead to the defendant being remanded in custody, and include absconding, attempted interference with witnesses or evidence, or alleged offending. Minor breaches (for example, consumption of alcohol) will lead to a warning. New Zealand Police suggests that approximately 75% of all defendants on EM Bail "complied fully with their bail conditions", and 45% of the breaches that did occur were minor. New Zealand Police suggests that the breach rate is lower than in other jurisdictions, such as the Scottish pilot, due to the "rigor of the EM bail assessment process in New Zealand".[19]

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14. NZ, Ministry of Justice, *Bail in New Zealand: Reviewing Aspects of the Bail System,* Public Consultation Document (2011) 58 [211].
15. NZ, Ministry of Justice, *Bail in New Zealand: Reviewing Aspects of the Bail System,* Public Consultation Document (2011) [104].
16. NZ, Ministry of Justice, *Bail in New Zealand: Reviewing Aspects of the Bail System,* Public Consultation Document (2011) [201].
17. NZ, Ministry of Justice, *Bail in New Zealand: Reviewing Aspects of the Bail System,* Public Consultation Document (2011) [226].
18. NZ, Ministry of Justice, *Bail in New Zealand: Reviewing Aspects of the Bail System*, Public Consultation Document (2011) [227].
19. New Zealand Police, *Frequently asked questions about EM-Bail* <http://www.police.govt.nz/service/embail/faq.html>.

20.15 Between September 2006 and 31 December 2010, the courts heard 2,254 applications for EM Bail and granted 1,135 (50%). The re-offending rate while on EM Bail was 7%, which is significantly lower than the general bail re-offending rate in New Zealand of 17%. Of the 75 defendants convicted of offending while on EM Bail over this period 70% were sentenced to imprisonment.[20]

England

20.16 The use of electronic monitoring in bail cases began in England in 1989. It was introduced on a trial basis to monitor curfew conditions in Nottingham, North Tyneside and Tower Bridge in London in 1989 and 1990. The results were positive but there was resistance to uptake and problems with the technical equipment.[21]

20.17 A second pilot was undertaken in Manchester and Norwich between April 1998 and August 1999.[22] An evaluation found that "[b]ail curfew worked as an alternative to custodial remand"[23] but also identified areas for improvement.

20.18 Since those trials, electronic monitoring of bailed persons has become commonplace in England. In the case of adults, monitoring is available under s 6(3) of the *Bail Act 1976* (UK). There is a prohibition against electronic monitoring of minors unless the young person has attained the age of twelve years, and is charged with an imprisonable offence.[24] A key feature of the English scheme is the use of private contractors to install electronic monitoring equipment and monitor compliance. For example, company G4S says it monitors around 12,000 people in the UK, and 40,000 across the world.[25]

20.19 Recent reports of electronic monitoring in England have been positive. A 2006 audit by the UK Comptroller and Auditor General which reviewed the use of electronic monitoring in sentence (but not bail) found that electronic monitoring provides value for money and was cheaper than custody.[26] A Home Office review of electronic monitoring of juveniles on bail found indications that electronic monitoring improved compliance, especially when it is part of a support package.[27]

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20. NZ, Ministry of Justice, *Bail in New Zealand: Reviewing Aspects of the Bail System*, Public Consultation Document (2011) [203]-[204].
21. Reported by G Mair and C Nee, *Electronic Monitoring: the Trials and their Results*, Home Office Research Study 120 (Home Office (UK), 1990).
22. J Airs, R Elliott and E Conrad, *Electronically Monitored Curfew as a Condition of Bail – Report of the Pilot* (Home Office (UK), 2000).
23. J Airs, R Elliott and E Conrad, *Electronically Monitored Curfew as a Condition of Bail – Report of the Pilot* (Home Office (UK), 2000) vii.
24. *Bail Act 1976* (UK) s 3AA; as inserted by *Criminal Justice and Police Act 2001* (UK) s 131.
25. G4S <http://www.g4s.com>.
26. United Kingdom, Comptroller and Auditor General, *The Electronic Monitoring of Adult Offenders* (National Audit Office (UK), 2006).
27. D Cassidy, G Harper and S Brown, *Understanding Electronic Monitoring of Juveniles on Bail or Remand to Local Authority Accommodation*, Home Office Online Report 21/05 (2005).

Scotland

20.20 In April 2005, electronic monitoring as a condition of bail was introduced as a pilot program at four courts. The *Criminal Procedure (Amendment) (Scotland) Act 2004* (Scot) provided for monitoring as a condition of bail in cases where an accused had been refused standard bail, and in cases where bail had been granted to murder or rape defendants.

20.21 In 2007 an extensive evaluation reported on the first 16 months of the two-year pilot.[28] The evaluation showed:

- a low rate of successful applications for monitoring as a condition of bail (38%);
- a low usage rate of the scheme generally (63 completions in 16 months);
- a relatively high rate of breaches (44 out of 63); and
- the cost of monitoring as a condition of bail was greater than that of remand.

20.22 The evaluation report concluded that:

> Although the process of EM bail is relatively efficient, the outcomes are less promising. …This evaluation suggests that the pilots have not fulfilled their aims of either increasing perceptions of public safety or reducing the custodial remand population in any significant way.[29]

United States

20.23 Electronic monitoring is used in a number of US States and also in some federal judicial districts as a condition of pre-trial release.[30]

20.24 There are problems in relying on evaluations of US schemes:[31] many of the schemes use GPS tracking systems; evaluation studies note that e-release is used for a higher risk group of defendants than non-e-released defendants; and in some jurisdictions, e-release was used in conjunction with a court reminder call.

Western Australia

20.25 Western Australia has a scheme in place which allows the imposition of a bail condition requiring "home detention" subject to electronic monitoring.[32] The provision was introduced by the *Community Corrections Legislation Amendment Act 1990* (WA).

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28. Scottish Executive Social Research, *An Evaluation of the Use of Electronic Monitoring as a Condition of Bail in Scotland* (2007).
29. Scottish Executive Social Research, *An Evaluation of the Use of Electronic Monitoring as a Condition of Bail in Scotland* (2007) Executive Summary vi.
30. See M VanNostrand, K Rose and K Weibrecht, "State of the Science of Pretrial Release Recommendations and Supervision" (Bureau of Justice Assistance, US Department of Justice, 2011) 24-27.
31. Such as M VanNostrand, K Rose and K Weibrecht, "State of the Science of Pretrial Release Recommendations and Supervision" (Bureau of Justice Assistance, US Department of Justice, 2011).
32. *Bail Act 1982* (WA) s 28(2)(d), sch 1 pt D s 3.

20.26 The second reading speech indicates that the "home detention regime will be similar in most respects for defendants remanded on bail and prisoners released on a home detention order". [33] A major difference is that unlike a convicted person, the bailed person does not have to participate in a community corrections centre program.[34]

20.27 We understand an evaluation of this scheme has yet to be released.

Submissions

20.28 The 2010 NSW departmental review of the *Bail Act* raised the issue of release with electronic monitoring as a specific question.[35] We did not explicitly raise the issue of a scheme of release with electronic monitoring in our Questions for Discussion. However a number of submissions did briefly mention the possibility.

20.29 All the agencies which raised the issue in the course of either the CLR review or this review supported some sort of a scheme of release with electronic monitoring. There were, however, differences of approach concerning the eligibility criteria and scope for the scheme.

20.30 CSNSW supported a pilot scheme which applied only to "offenders who are remanded in custody" and accepted as eligible after a "suitability assessment" which would include having "suitable residential accommodation in an approved residence".[36] In its submission to the departmental review, CSNSW noted that "the costs of electronic bail (which include the costs of electronic monitoring devices) would result in CSNSW needing to impose a cap (ceiling) on the number of remandees released to electronic bail at any one time".[37]

20.31 The NSW Police Force favoured release with electronic monitoring being considered as an option "for offences where bail might otherwise be refused", particularly for young offenders.[38] The Public Interest Law Clearing House took a similar position.[39] The Women's Advisory Council urged that "preference be given to women, especially Aboriginal women who are the sole carers of dependent children".[40]

20.32 The Shopfront Youth Legal Centre warned of the dangers of net-widening noting that "care would have to be taken to ensure that this does not become a net-

33. Western Australia, *Parliamentary Debates*, Legislative Assembly, 20 November 1990, 7351 (D Smith, Minister for Community Services).
34. Western Australia, *Parliamentary Debates*, Legislative Assembly, 20 November 1990, 7351 (D Smith, Minister for Community Services).
35. NSW, Department of Justice and Attorney General, Criminal Law Review, *Review of Bail Act 1978 (NSW)* (2010) 60-1.
36. Corrective Services NSW, *Submission BA29*, 5-6.
37. Corrective Services NSW, Submission to the Criminal Law Review Division, *Review of the Bail Act 1978*, 27 October 2010, 4.
38. NSW Police Force, *Submission BA39*, 40.
39. Public Interest Law Clearing House, Submission to the Criminal Law Review Division, *Review of the Bail Act 1978*, 1 November 2010, 2.
40. Women's Advisory Council, *comments re the Bail Act Exposure Bill*, 2.

widening exercise".[41] The NSW Council for Civil Liberties was similarly concerned about net-widening, arguing that a decision on release with electronic monitoring should "only be made by a judge or magistrate after forming the view that bail is not otherwise going to be provided" and then only with the consent of the accused.[42]

20.33 Legal Aid supported the introduction of release with electronic monitoring "for defendants who would otherwise be remanded in custody". It suggested that the framework should be set out in "either statute or regulation" and:

> …because E-Bail is far more restrictive than regular bail, it would be important to ensure, for example, that it is only used in cases where standard bail is not sufficient. Only defendants who have already been remanded in custody should be able to apply.[43]

Discussion

Cost and net-widening

20.34 Electronic monitoring is a relatively expensive option compared with normal bail with conduct requirements but it is much less expensive than imprisonment. The costs of electronic monitoring include assessment of suitability, provision of the equipment and monitoring. CSNSW in its submission noted that "Home Detention with electronic monitoring costs only $47 per day per offender",[44] compared with $276 per day for those on remand.[45]

20.35 We accept that electronic monitoring constitutes a very substantial restriction on liberty, similar to a post-conviction sentence of home detention. As such it should be reserved for people who are already in detention and who have no realistic prospects of release other than with electronic monitoring. As Ross Lay has noted:

> The specific intention of such a program is to divert appropriate defendants from a bail refused situation to a supervisory regime where they are partially rather than totally incapacitated; where there is no radical overtaking of their liberty; where there can be the maintenance of such things as accommodation, family ties, and employment.
>
> …If net-widening in such a program is to be avoided, two factors assume significance. Firstly, the identification and assessment of appropriate defendants for such a program is critical…Secondly, maybe only those defendants who have been refused bail at some stage should be entitled to assessment for intensive supervision bail.[46]

41. Shopfront Youth Legal Centre, Submission to the Criminal Law Review Division, *Review of the Bail Act 1978*, 31 January 2005, 8.
42. NSW Council for Civil Liberties, Submission to the Criminal Law Review Division, *Review of the Bail Act 1978*, 27 October 2010, 10.
43. Legal Aid NSW, *Submission BA17*, 28.
44. Corrective Services NSW, *Response to NSWLRC Questions for discussion*, 16 [1.15].
45. See para 5.51-5.52.
46. R Lay, "Intensive Supervision and Electronic Surveillance as Alternatives to Remand in Custody" (Paper presented at Bail or remand?, Canberra: Australia Institute of Criminology, 29 November-1 December 1988) 132.

New Zealand model favoured

20.36 There are problems in drawing clear lessons from the evaluations of schemes in other jurisdictions, as they have involved the use of different technology, have different target groups and different criteria.

20.37 Of the various models, we have a preference for the New Zealand approach which operates following a decision to remand and is targeted at people who may spend a substantial amount of time on remand. The English scheme has broader application, including as a supplement to bail curfew conditions. It is a high cost option and involves a significant element of net-widening. We do not support this approach.

Eligibility for release with electronic monitoring

20.38 In our view, any scheme should be highly targeted and limited to people who are already in custody, and who are unlikely to be released otherwise. The target group for a pilot scheme might be those who are in custody and are likely to spend 1 to 6 months in detention, a group which in 2010 comprised 1,919 people.[47]

20.39 The cost-benefit for the large population of short-term 'churn' prisoners who spend less than 30 days in detention is likely to be much less since in most cases they are currently released to bail without the need for electronic monitoring.[48]

20.40 The 2010 departmental review recommended that "the Government develop and pilot a system of electronic monitoring of accused persons who would otherwise be remanded in full custody."[49] In the Commission's view, this recommendation casts the category of eligibility too widely. In our view the scheme should be restricted, not merely to those "who would otherwise be remanded in full custody" but to those who *have been* remanded in custody as in the New Zealand scheme.

20.41 It follows that release with electronic monitoring should not be available on an initial release application. A further limitation might be provided by requiring a waiting period during which assessments and application to the court are made.

20.42 In our view, release with electronic monitoring should be considered having regard to the same considerations and rules as would apply to any other decision to release with conduct requirements. It is a corollary of this view that a court must form the view that, unless electronic monitoring is imposed, detention would otherwise need to continue. In other words, no less onerous conduct requirement would be enough to allow release.

20.43 The equipment for electronic monitoring would also need to be available in the individual case. Since this would involve cost to CSNSW, we envisage that CSNSW would need to advise the court that the person is suitable for electronic monitoring and the resources are available to provide electronic monitoring to the person. In a

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47. See para 4.14.
48. See Corrective Services NSW, *Submission BA29*, 1-2; see para 4.16-4.18.
49. NSW, Department of Justice and Attorney General, Criminal Law Review, *Review of Bail Act 1978 (NSW)* (2010) 60-1 Recommendation 10.

pilot period, the scheme might also need to be restricted geographically or in terms of numbers of people.

20.44 While we envisage the scheme operating broadly as we describe above, further consideration would need to be given to the procedure and eligibility criteria in the course of designing a pilot scheme. We are not in a position to make definitive recommendations at this stage.

Time spent on e-release to be taken into account.

20.45 Whether under an administrative scheme or by way of legislation, the time spent on release with electronic monitoring should be able to be taken into account on sentence if the person is convicted, in appropriate cases, by the sentencing court in the event of the person subsequently being convicted and being called up for sentence. This is because the e-release scheme can be similar to the sentence of home detention.

Should the scheme have a legislative basis?

20.46 There is a question concerning whether it is necessary or desirable to provide for the electronic monitoring scheme through legislation. As noted above, other jurisdictions have implemented such schemes without explicit statutory authorisation, using the power to impose bail conduct requirements. The Supreme Court of NSW has imposed electronic monitoring as a condition of bail under the *Bail Act*.[50] The South Australian Supreme Court has taken a similar position.[51] This has the advantage of flexibility.

20.47 However, the recent case of *Lawson v Dunlevy* suggests that there are limitations on the use of conduct enforcement mechanisms, whether as conditions of release or as conduct enforcement directions, and that, as a result of that decision, it may be necessary to implement a scheme of release with electronic monitoring by legislation.[52] Such an approach has the advantage of transparency and clear rules. A legislative scheme is also less likely to produce significant regional variation in access to the scheme, than an administrative scheme.

20.48 Further consideration would need to be given to this issue.

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50. *R v RS* [2011] NSWSC 103; *R v Medich* [2010] NSWSC 1488.
51. *R v Blayney* [2002] SASC 184.
52. See Chapter 16 for a discussion of the *Lawson v Dunlevy* [2012] NSWSC 48.

Recommendation

Recommendation 20.1: A Pilot electronic monitoring scheme

(1) Consideration should be given to the establishing a pilot scheme of release subject to electronic monitoring, with the following features:

(a) the scheme should be limited to people who have already been detained and who are likely to spend a substantial amount of time in detention;

(b) monitoring of compliance should be carried out by the Community Compliance and Monitoring Group of Corrective Services NSW;

(c) it should be possible for time spent on release with electronic monitoring to be taken into account on sentence.

(2) In developing the scheme, further consideration be given to:

(a) whether a scheme is best achieved administratively or by statute; and

(b) the procedure for applying for release with electronic monitoring.

21. Monitoring and review of a new Bail Act

Review **303**
Data collection **303**
Data gaps identified during this inquiry 305

Review

21.1 In NSW, a review clause is included in many substantial pieces of legislation. The clause usually requires the Minister to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives. The clause can require the review to be undertaken by this Commission or by the Sentencing Council or by a parliamentary committee. It is usually the case that the review must be commenced after five years from assent with a report to be tabled in both Houses of Parliament within 12 months.

21.2 Our report has recommended a new *Bail Act* that will differ in significant ways from the current *Bail Act*. We therefore recommend that a new *Bail Act* include a provision requiring a review that engages with and reports on the experience of key stakeholders, and analyses statistical information.

21.3 Bail law has the potential for immediate impact on people's lives and liberty and the safety and wellbeing of the wider community. Because of this, we consider that the usual five year review period is too long. We recommend that the effects of the new Act should be assessed after three years.

Recommendation 21.1: Statutory review

(1) A new Bail Act should contain a provision requiring the Minister to conduct a review of the Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

(2) The review should be undertaken as soon as possible after the period of three years from the date of assent to the Act. A report on the outcome of the review should be tabled in each House of Parliament within 12 months after the end of the period of three years

Data collection

21.4 In the course of preparing this report, we have drawn extensively on the statistical data that is kept by various agencies, in order to understand the effect of the current *Bail Act* and to identify areas in need of reform. Some of this data was publicly available and some of it was provided to us on request or in confidence. Unfortunately, in some important areas, data was simply not available, usually because it was not collected. In other areas, there were significant complexities

involved in identifying the agency that held the required information and reducing it to a suitable dataset.

21.5 Further, we discovered differences in how the same or similar statistics are kept or reported. For example, Corrective Services NSW (CS NSW) and the Australian Bureau of Statistics (ABS) employ different definitions of a person who is in prison but who has not been sentenced. These definitions change across their own reports, over time and between report series. This makes it difficult to compare data and to establish reliable trends.

21.6 Addressing some of these shortcomings in data would facilitate the three year review of a new *Bail Act*. To address these shortcomings, a process should be established that:

- identifies what data is required for an effective review of the *Bail Act*;
- identifies whether the data is currently collected and who holds it;
- ensures that data collection is consistent and comparable across agencies;
- ensures that necessary data is collected and reported in a way that sheds light on whether the *Bail Act* is achieving its objectives.

21.7 The time frame of our review has not permitted us to consult the relevant agencies about the detail of such a process, or how it should be managed. We therefore make no specific recommendations in this regard. The relevant agencies which collect, use or analyse data relevant to this review include the NSW Police Force, CSNSW, Juvenile Justice, the Department of Attorney General and Justice (DAGJ), the Australian Bureau of Statistics (ABS) and the NSW Bureau of Crime Statistics and Research (BOCSAR). In order to plan and implement an improved data collecting and reporting regime, a lead agency should be commissioned to take charge of the process and collaborative arrangements should be established.

21.8 As part of the process, non-government agencies and people with expertise in the collection, use and interpretation of data should be consulted for advice. These would include researchers from universities, the Sydney Institute of Criminology, the Australian Institute of Criminology and other similar bodies. A draft process for the collecting and reporting of the necessary data could be circulated for comment.

21.9 Improvements in data collection and reporting would also contribute more generally to our understanding of the criminal justice system. Some important questions about pre-trial detention remain unanswered. For example, does pre-trial detention have an impact on conviction rates and sentence outcomes?[1] Is the "school of crime" theory relevant to remand populations?[2]

21.10 Agencies such as BOCSAR have provided invaluable contributions and assistance in preparing this report. BOCSAR largely relies on data collected by other agencies, including the DAGJ's Justice Link, the NSW Police Force's COPS database, and JJ's RPELive. Enhancement and improvement of the databases would enhance the

1. See para 5.42-5.44.
2. See para 5.18-5.22.

analyses made by BOCSAR. Regular reporting and publication of the data would provide reliable data for university based and independent researchers when identifying trends and analysing the impact of legislation and policing practices.

Data gaps identified during this inquiry

21.11 The following gaps in data were identified during our inquiry, and we suggest that making this data available would be a priority for an effective review of a new Bail Act:

- Information about the outcomes of police bail decisions, the nature of any conduct directions imposed, demographic information concerning the accused and particulars of the offence or breach of a conduct direction for which release is being decided. We understand that some data relating to police bail decisions has been made available to BOCSAR, which is currently evaluating the possibility of using this data to supplement data from the courts. We support such an exercise.
- The extent to which police bail decisions are affirmed, reversed or varied by the courts.
- Information about the frequency and outcome of senior officers' reviews of police bail decisions.
- Details of monitoring of conduct directions and use of enforcement conduct directions.
- Information about the police response to suspected breach of conduct directions other than arrest, such as warnings.
- When a person is brought before the court for breaching a conduct direction, it would be useful to know what type of direction was breached, and the court's determination.
- Information about how many defendants experience <u>any</u> pre-trial detention (at present information is only available about bail status at finalisation of proceedings). Similarly, it would be useful to know how many defendants are bail refused at first mention, or after conviction but before sentence.
- The number of people who commit offences while released pending trial, and the types of offences.
- The number of people with cognitive and mental health impairments who are detained pre-trial.
- The incidence and length of detention of people who are not released because of failure to meet conditions.
- The number and rate of people in unsentenced detention who are assaulted or die in custody.
- The variable cost of detaining a person pending proceedings – that is, the extra costs that are incurred for each additional person on remand (food, clothing, bedding) rather than the largely fixed costs of employing personnel, security and building expenses. The cost per prisoner per day figure available at present

incorporates all the costs of the correctional system, and does not allow consideration of the cost of each extra person on remand.

- Whether and how pre-sentence custody is taken into account at sentence.

Recommendation 21.2: Data collection
The government should, as soon as practicable, establish a process to improve the collection and reporting of data required for an effective review of a new *Bail Act.*

22. Outstanding issues

Important issues of detail that will need to be addressed in drafting a new *Bail Act*...307
Jurisdiction of courts....307
Authorised justices....307
Enforcement of forfeiture orders....308
Procedure for police bail....308
Issues with practical ramifications....308
Pre-charge bail....308
Bail support and accommodation....309
Criminal records....309
Charter of Victims Rights....309

22.1 This review has focussed on the major issues of bail law. We have not conducted a detailed and comprehensive review of each provision of the current Act. If our recommendations are accepted, that work remains to be done in the course of drafting a new Act. We have also not investigated a number of issues with operational implications in the time available.

Important issues of detail that will need to be addressed in drafting a new *Bail Act*

22.2 Some issues of detail are best worked through in the context of redrafting a simplified new Act. They will require the close involvement of the affected courts and other agencies.

Jurisdiction of courts

22.3 We have made tentative recommendations concerning the jurisdiction of the courts to entertain applications for release, detention and variation in Chapter 15. This is a complex area. Further consultation is required concerning the scheme we propose, particularly with the Courts.

22.4 We have not dealt with jurisdictional issues concerning the Children's Court, the Land and Environment Court, the Industrial Court or the Court of Criminal Appeal.

Authorised justices

22.5 In our consultation process, we asked questions about whether authorised justices (that is registrars and other court staff) should continue to be able to make decisions about release or detention. Submissions overwhelmingly indicated that they should, that these powers are required for practical reasons and are currently working well. We are aware that under the current law the authorisation for court staff is very broad and would include some junior and inexperienced staff. There may be value in considering the scope of the role of an authorised justice in the course of drafting.

22.6 We note here that there are inconsistencies between the *Bail Act* and the *Law Enforcement (Powers and Responsibilities) Act* (LEPRA) as to who is an authorised justice or authorised officer for the purposes of each Act. While each piece of legislation allows the Minister to appoint, by gazette notice, a class of persons that are to be authorised justices or authorised officers respectively, the gazette notice for the *Bail Act* appoints as authorised justices "[a]ll officers employed within Attorney General's Department holding a position of clerical officer or clerk within a registry".[1] The respective notice for LEPRA appoints only those employees within a court registry who are graded "Clerk Grade 5/6 and above".[2]

22.7 In drafting a new *Bail Act*, regard should be had to ensuring consistency both in terminology and substance between statutes in this regard.

Enforcement of forfeiture orders

22.8 We have not reviewed the regime for enforcing forfeiture orders under the Act. The Director of Courts Services, Department of Attorney General and Justice, has raised with us the need to modernise processes for transmitting orders between the courts and the State Debt Recovery Office, and allowing the introduction of efficient technology. We agree that such modernisation is warranted as long as adequate safeguards are in place to ensure accuracy. This, however, is a matter of operations and drafting detail.

Procedure for police bail

22.9 Decisions about release and detention made by police should be covered by the same principles and rules that govern decisions by the courts. Sections 17-21 of the current Act cover police procedures. We have made some recommendations in relation to review of police bail in Chapter 15, but we have not undertaken a comprehensive review of these procedural provisions. This is a matter that would need to be dealt with in the course of drafting a new *Bail Act*.

Issues with practical ramifications

22.10 A number of issues have been raised which are operational in nature, or in the case of pre-charge bail, a legal issue with significant operational implications. In some instances, the issues have been raised in submissions. In others, they have been identified through our own research.

Pre-charge bail

22.11 A submission from the Chief Magistrate raised the desirability of a scheme of pre-charge bail, to assist in ensuring that the police lay proper charges in the first instance.[3] A scheme such as this currently operates in the UK, but we have not had

1. New South Wales, *Government Gazette*, No 109, 4 July 2003, 6918.
2. New South Wales, *Government Gazette*, No 137, 4 November 2005, 9324.
3. G Henson, *Submission BA2*, 5.

the opportunity to examine its operation there. This is a complex issue with both legal and operational ramifications. The issue has been further complicated by a decision of the High Court of England and Wales, *R v Hookway*,[4] handed down during the early course of this reference, which challenged the conventional interpretation of the *Police and Criminal Evidence Act 1984* (UK) as it relates to questioning suspects released on pre-charge bail. In response to this decision, the *Police (Detention and Bail) Act 2011* (UK) was passed. We have not investigated this proposal in our report.

Bail support and accommodation

22.12 We have referred at various points in this draft report to the issue of support services, including suitable accommodation for people released pending proceedings. There is considerable support from stakeholders for improving services in this area. However, it is primarily an operational matter rather than a legislative matter, and we have not investigated the issue.

Criminal records

22.13 Some concerns have been raised about the accuracy of records of alleged and proven breach of conduct requirements and of failures to appear. Clearly, accurate records are a pre-requisite for fair court procedures. We have not been able to investigate the nature and extent of this concern in the time available.

Charter of Victims Rights

22.14 Victims groups have raised the issue of responsibility under the Charter of Victims Rights for informing victims of crime of protective bail conditions and outcomes of bail hearings. We understand that in some cases this notification may not occur. There may be scope to confirm which agency has responsibility for undertaking this role and for improving its processes.

4. *R v Hookway* [2011] EWHC 1578.

Appendix A
Review of s 32 of the Bail Act

Section 32 of the *Bail Act* is reproduced below for ease of reference.

32 Criteria to be considered in bail applications

(1) In making a determination as to the grant of bail to an accused person, an authorised officer or court shall take into consideration the following matters (so far as they can reasonably be ascertained), and the following matters only:

(a) the probability of whether or not the person will appear in court in respect of the offence for which bail is being considered, having regard only to:

(i) the person's background and community ties, as indicated (in the case of a person other than an Aboriginal person or a Torres Strait Islander) by the history and details of the person's residence, employment and family situations and the person's prior criminal record (if known), and

(ia) the person's background and community ties, as indicated (in the case of an Aboriginal person or a Torres Strait Islander) by the person's ties to extended family and kinship and other traditional ties to place and the person's prior criminal record (if known),

(ii) any previous failure to appear in court pursuant to a bail undertaking or pursuant to a recognizance of bail entered into before the commencement of this section, and

(iii) the circumstances of the offence (including its nature and seriousness), the strength of the evidence against the person and the severity of the penalty or probable penalty, and

(iv) any specific evidence indicating whether or not it is probable that the person will appear in court, and

(v) (Repealed)

(b) the interests of the person, having regard only to:

(i) the period that the person may be obliged to spend in custody if bail is refused and the conditions under which the person would be held in custody, and

(ii) the needs of the person to be free to prepare for the person's appearance in court or to obtain legal advice or both, and

(iii) the needs of the person to be free for any lawful purpose not mentioned in subparagraph (ii), and

(iv) whether or not the person is, in the opinion of the authorised officer or court, incapacitated by intoxication, injury or use of a drug or is otherwise in danger of physical injury or in need of physical protection,

(v) if the person is under the age of 18 years, or is an Aboriginal person or a Torres Strait Islander, or has an intellectual disability or is mentally ill, any special needs of the person arising from that fact, and

(vi) if the person is a person referred to in section 9B(3), the nature of the person's criminal history, having regard to the nature and seriousness of any indictable offences of which the person has been previously convicted, the number of any previous such offences and the length of periods between those offences, and

(b1) the protection of:

(i) any person against whom it is alleged that the offence concerned was committed, and

(ii) the close relatives of any such person, and

(iii) any other person the authorised officer or court considers to be in need of protection because of the circumstances of the case,

(c) the protection and welfare of the community, having regard only to:

(i) the nature and seriousness of the offence, in particular whether the offence is of a sexual or violent nature or involves the possession or use of an offensive weapon or instrument within the meaning of the Crimes Act 1900 , and

(ii) whether or not the person has failed, or has been arrested for an anticipated failure, to observe a reasonable bail condition previously imposed in respect of the offence, and

(iii) the likelihood of the person interfering with evidence, witnesses or jurors, and

(iv) whether or not it is likely that the person will commit any serious offence while at liberty on bail, but the authorised officer or court may have regard to this likelihood only if permitted to do so under subsection (2), and

(v) if the offence for which bail is being considered is a serious offence, whether, at the time the person is alleged to have committed the offence, the person had been granted bail, or released on parole, in connection with any other serious offence, and

(vi) if the offence for which bail is being considered is an offence that involves the possession or use of an offensive weapon or instrument within the meaning of the Crimes Act 1900 , any prior criminal record (if known) of the person in respect of such an offence.

(2) The authorised officer or court may, for the purposes of subsection (1) (c) (iv), have regard to whether or not it is likely that the person will commit one or more serious offences while at liberty on bail if the officer or court is satisfied that:

(a) the person is likely to commit the offences, and

(b) that likelihood, together with the likely consequences, outweighs the person's general right to be at liberty.

(2A) The following matters are to be considered in determining for the purposes of subsection (1)(c) or (2) whether an offence is a serious offence (but do not limit the matters that can be considered):

(a) whether the offence is of a sexual or violent nature or involves the possession or use of an offensive weapon or instrument within the meaning of the Crimes Act 1900,

(b) the likely effect of the offence on any victim and on the community generally,

(c) the number of offences likely to be committed or for which the person has been granted bail or released on parole.

(3) For the purposes of this section, the authorised officer or court may take into account any evidence or information which the officer or court considers credible or trustworthy in the circumstances and, in that regard, is not bound by the principles or rules of law governing the admission of evidence.

(4) In having regard to the details of residence, as referred to in subsection (1)(a)(i), of an accused person who is under the age of 18 years, the fact that the person does not reside with a parent or guardian of the person shall be ignored.

(5) The reference in subsection (1)(a)(i) to an accused person's residence includes a reference to the residential address at which the person may generally be found.

(6) This section applies to an offence to which section 8A, 8B or 8F applies, and a grant of bail to which section 8C or 8E applies, but does not prevent consideration of any matter accepted by the authorised officer or court as relevant to the question of whether bail should not be refused.

(7) This section applies to a grant of bail to which section 9C or 9D applies, but does not prevent consideration of any matter accepted by the authorised officer or court as relevant to the question of whether bail should be granted under that section.

Current provision	Recommendation	Discussion and Recommendation
32(1)(a) Likelihood of appearing	Include as a consideration relevant to the integrity of the criminal justice system. Modify to draw a distinction between absconding and a history of persistent failure to appear	[10.35]-[10.52] Rec 10.2(b),10.4,10.5
32(1)(a)(i), (ia) Background and community ties	Retain and modify to recognise all relevant aspects. Recognise criminal history where relevant to a mandatory consideration.	[10.47], [10.52], [10.93] Rec 10.4(2)(a), 10.8(c)
32(1)(a)(ii) Previous failures to appear	Replace with whether the person has a history of absconding or otherwise failing to appear or of attending court as required (including the circumstances of any prior failure to appear).	[10.49] Rec 10.4(2)(c)
32(1)(a)(iii) the circumstances of the offence (including its nature and seriousness), the strength of the evidence against the person and the severity of the penalty or probable penalty	Replace with "likelihood of conviction, likelihood of custodial sentence, likely duration of such sentence". Recognise nature and seriousness of the offence where relevant to a mandatory consideration.	[10.48], [10.89]-[10.90] Recs 10.4(2)(b); 10.8(a)
32(1)(a)(iv) specific evidence	Retain.	10.51 Rec 10.4(2)(d)
32(1)(b) interests of the person	Retain as a primary consideration, extend to include the interests of the person's family and associates.	[10.72]-[10.86] Rec 10.7
32(1)(b)(i) period spent in custody, conditions of custody	Retain and also refer to the physical and psychological hardship of imprisonment, and the impact of imprisonment on the person and the person's family and associates.	[10.73]-[10.75] Recs 10.7(1)(b), (d), (e), (f), (g)
32(1)(b)(ii) need to prepare / obtain legal advice	Retain and also include ability to participate in the trial.	[10.74] Rec 10.7(1)(c)
32(1)(b)(iii) need to be free for any lawful purpose	Retain and reformulate to refer to person's interest in liberty generally.	[10.76] Recs 10.7(1)(a), (e)
32(1)(b)(iv) incapacitated by intoxication etc	Not retained, alternative approach proposed.	[10.79]-[10.86]
32(1)(b)(v) special needs	Retain, and reformulate to cover any special vulnerability or need of any child or young person, of a person with a cognitive or mental health impairment, or an Aboriginal person or Torres Strait Islander, or of any other person.	[10.77] Rec 10.7(1)(h)
32(1)(b)(vi) criminal record of certain persons where there is a neutral presumption	Not retained in this form, no longer needed as a factor relevant to the interests of the person.	
32(1)(b1) protection of alleged victim, victim's family, other person	Retain and reformulate to cover harm or threatened harm against any person. Specifically recognise harm against a person in a domestic relationship, and include factors related to domestic violence currently in s 9A(1A).	[10.63]-[10.67] Rec 10.2(2)(c),10.6
32(1)(c) protection and welfare of the community	Retain as a primary mandatory consideration.	[10.68]-[10.71] Rec 10.2(d)

Current provision	Recommendation	Discussion and Recommendation
32(1)(c)(i) nature and seriousness of the offence	Not retained as a consideration in itself. Recognise nature and seriousness of the offence charged where relevant to a mandatory consideration.	[10.89]-[10.90] Rec 10.8(a)
32(1)(c)(ii) prior breach of bail condition	Not retained as a consideration in itself. Recognise nature and seriousness of the offence charged where relevant to a mandatory consideration.	[10.94]-[10.96] Rec 10.8(d)
32(1)(c)(iii) likelihood of interfering with evidence, witnesses, jurors	Retain as a matter going to the integrity of the criminal justice system.	[10.53] Rec 10.2(2)(b)(iii)
32(1)(c)(iv) likely to commit any serious offence	Modify to require the authority to consider the likelihood that a person will commit offence causing death or injury, a sex offence, an offence involving serious loss of or damage to property or an offence or series of offences giving rise to a substantial risk of injury death, or series loss or damage to property.	[10.68]-[10.71] Rec 10.2(2)(d)
32(1)(c)(v) where alleged offence is serious, whether on bail/parole	Replaced with a new mandatory consideration going to the integrity of the criminal justice system: That a person, charged with an offence committed while on conditional liberty, has previously been convicted of, or has charges pending for, an offence committed while on conditional liberty. Conditional liberty is expanded to encompass release pending proceedings, release on parole, or serving a sentence involving conditional liberty.	[10.54]-[10.60] Rec 10.2(2)(iv)
32(1)(c)(vi) where alleged offence involved possession offensive weapon	Recognise use of an offensive weapon where relevant to a mandatory consideration.	[10.90] Rec 10.8(a)
32(2), (2A) relate to s 32 (1)(c)(iv)	See above re s 32(1)(c)(iv).	

Appendix B
Submissions

BA1 Ms Kay Valder OAM, Official Visitor, Parklea Correctional Centre, 23 June 2011

BA2 His Honour Judge Graeme Henson, Chief Magistrate of the Local Court, 4 July 2011

BA3 NSW Council for Civil Liberties, 7 July 2011

BA4 NSW, Commission for Children and Young People, 14 July 2011

BA5 Law Society of NSW, 20 July 2011

BA6 Mr Richard Moloney, Solicitor, 20 July 2011

BA7 Council of Social Service of NSW, 20 July 2011

BA8 Mr Geoff Turnbull, Official Visitor, Parklea Correctional Centre, 21 July 2011

BA9 Crime and Justice Reform Committee, 21 July 2011

BA10 Mr Frank Mersal, Solicitor, 21 July 2011

BA11 NSW Young Lawyers, 21 July 2011

BA12 Public Interest Law Clearing House, 22 July 2011

BA13 UnitingCare Children, Young People and Families, 22 July 2011

BA14 Aboriginal Legal Service NSW/ACT Ltd, 22 July 2011

BA15 Australian Prisons Project, 23 July 2011

BA16 Public Defenders (NSW), 24 July 2011

BA17 Legal Aid NSW, 24 July 2011

BA18 Redfern Legal Centre, 24 July 2011

BA19 Mr David Shoebridge, MLC, 24 July 2011

BA20 Youth Justice Coalition, 24 July 2011

BA21 NSW, Office of the Director of Public Prosecutions, 24 July 2011

BA22 International Commission of Jurists Australia - NSW Branch, 25 July 2011

BA23 Shopfront Youth Legal Centre, 25 July 2011

BA24 NSW, Department of Family and Community Services, 25 July 2011

BA25 Crime and Justice Reform Committee – Research Team, 26 July 2011

BA26 Public Interest Advocacy Centre Ltd, 26 July 2011

BA27 New South Wales Bar Association, 27 July 2011

CBA28 Confidential submission, 28 July 2011

BA29 Corrective Services NSW, 29 July 2011

BA30 Intellectual Disability Rights Service, 1 August 2011

BA31 Community Justice Coalition, 1 August 2011

BA32 Brian Injury Association of NSW and Blake Dawson Pro Bono Team, 1 August 2011

BA33 Children's Court of NSW, 1 August 2011
CBA34 Confidential submission, 4 August 2011
BA35 NSW, Juvenile Justice, 4 August 2011
BA36 NSW, Justice Health, 4 August 2011
BA37 Jumbunna Indigenous House of Learning, 8 August 2011
BA38 Police Association of NSW, 18 August 2011
BA39 NSW Police Force, 27 October 2011
BA40 Public Service Association of New South Wales, 16 March 2012

Appendix C
Consultations

Young people roundtable – *BAC 1*

27 July 2011, 2:00pm

Ms Sophie Anderson, Law Society of NSW
Ms Amy Baker, Youth Justice Coalition
Ms Jenny Bargen, Youth Justice Coalition
Ms Rosemary Davidson, Executive Officer, Children's Court of NSW
Ms Kay Elphick, Juvenile Justice
Ms Roz Everett, Chair Juvenile Justice Committee, Law Society of NSW
Mr Kevin Harris, Juvenile Justice
Mr Eric Heller, Juvenile Justice
Ms Jane Irwin, Shopfront Youth Legal Centre
Ms Debra Maher, Children's Legal Service
Ms Anne Meagher, Juvenile Justice
Ms Emily Muir, Youth Justice Coalition
Mr Stephen Lawrence, Aboriginal Legal Service NSW/ACT Ltd
Ms Jane Sanders, Shopfront Youth Legal Centre

Supreme Court of NSW – *BAC 2*

27 July 2011, 4:30pm

The Hon Justice Peter McClellan, Chief Judge at Common Law
The Hon Justice Megan Latham
Mr Michael Crompton, Registrar, Court of Criminal Appeal and Supreme Court

Chief Magistrate and Deputy Chief Magistrates – *BAC 3*

29 July 2011, 9.30am

His Honour Judge Graeme Henson, Chief Magistrate, Local Court of NSW
Her Honour Deputy Chief Magistrate Jane Mottley, Local Court of NSW
Her Honour Deputy Chief Magistrate Jane Culver, Local Court of NSW

Office of the Director of Public Prosecutions – *BAC 4*

1 August 2011, 2:00pm

Mr Lloyd Babb SC, Director of Public Prosecutions
Mr Michael Day, Managing Lawyer
Mr Mark Finlay, Managing Lawyer
Mr Daniel Noll, Senior Solicitor
Ms Johanna Pheils, Assistant Solicitor for Public Prosecutions

Bar Association and Law Society – *BAC 5*

1 August 2011, 4:30pm

Mr Phillip Boulten SC, NSW Bar Association
Mr David Giddy, Law Society of NSW
Mr Ian McClintock SC, NSW Bar Association
Mr Alastair McConnachie, NSW Bar Association
Mr Brett Thomas, Law Society of NSW
Ms Pauline Wright, Law Society of NSW

Defence Representatives – *BAC 6*

2 August 2011, 4:30pm

Mr Richard Button SC, Deputy Senior Public Defender, Public Defenders Office
Ms Georgina Darcy, Legal Aid Commission NSW
Ms Erin Gough, Legal Aid Commission NSW
Mr Alan Kirkland, Chief Executive Officer, Legal Aid Commission NSW
Ms Annmarie Lumsden, Legal Aid Commission NSW
Mr John McKenzie, Chief Legal Officer, Aboriginal Legal Service NSW/ACT Ltd
Ms Rebekah Rodger, Legal Aid Commission NSW
Mr Brian Sandland, Legal Aid Commission NSW

President of the Children's Court of NSW – *BAC 7*

3 August 2011, 8.30am

His Honour Judge Marien SC, President, Children’s Court of NSW

Police Portfolio – *BAC 8*

5 August, 2011, 10:00am

Assistant Commissioner Frank Mennilli, Corporate Spokesperson, Custody and Corrections, NSW Police Force

Inspector Michael Moroney, NSW Police Force

Inspector Brendan Searson, NSW Police Force

Ms Christabelle Sheehan, Ministry for Police and Emergency Services

Chief Superintendent Tony Trichter, Commander, Police Prosecutions, NSW Police Force

Ms Laura Tskalous, Ministry for Police and Emergency Services

Juvenile Justice NSW – *BAC 9*

8 August 2011, 2:00pm

Ms Kay Elphick

Ms Eric Heller

Mr Bernie Logo

Mr Steve Miller

Mr Julian O'Connell

Ms Valda Rusis, Deputy Chief Executive (Operations)

Ms Megan Wilson, Executive Director, Office of the Chief Executive

Chief Judge of the District Court of NSW – *BAC 10*

12 August 2011, 11.30am

The Hon Justice R O Blanch AM, Chief Judge, District Court of NSW

Victims' groups – *BAC 11*

17 August 2011, 1:00pm

Mr Howard Brown, Victims of Crime Assistance League

Ms Martha Jabour, Homicide Victims Support Group

Mr Ken Marslew AM, Enough is Enough Anti-Violence Movement

Corrective Services NSW – *BAC 12*

17 August 2011, 2.30pm

Ms Rosemary Caruana, Assistant Commissioner, Community Corrections

Mr Leigh Costa, Legislation and Policy Officer, Corporate Legislation and Parliamentary Support

Mr Simon Eyland, Director Corporate Research and Evaluation and Statistics

Mr Luke Grant Assistant Commissioner, Offender Services and Programs

Ms Jo McAlpin

Mr Phillip Snoyman

Ms Nicci Wilson, Director Partnerships and Community Engagement

Department of Family and Community Services – *BAC 13*

19 August 2011, 2.45pm

Mr John Gaudin, Solicitor, Ageing, Disability and Home Care

Ms Rebecca Macken, Office for Women's Policy

Mr Peter Muir, Assistant Director General, Service Delivery Improvement

Ms Stacey Romeo, Legislative Review Unit

Ms Kelly Schwalger, Central office project manager

Community roundtable – *BAC 14*

26 August 2011, 2:30pm

Ms Brenda Bailey, Council of Social Service of NSW

Professor Eileen Baldry, Crime and Justice Reform Committee

Mr David Bitel, Community Justice Coalition

Ms Janene Cootes, Intellectual Disability Rights Service

Ms Anne Cregan, Blake Dawson pro-bono team

The Hon John Dowd QC, International Commission of Jurists Australia

Mr Sam Indyk, Blake Dawson pro-bono team

Ms Maree Jennings, Aboriginal Programs Unit, NSW Department of Attorney General and Justice

Mr Craig Longman, Jumbunna Indigenous House of Learning

Ms Vavau Mawuli, Public Interest Advocacy Centre Ltd

Ms Jocelyn McGirr, Community Justice Coalition

Ms Rachel Merton, Brain Injury Association of NSW

Mr David Porter, Redfern Legal Centre

Ms Yvette Theodorou, Crime and Justice Reform Committee

Police Portfolio– *BAC 15*

13 December 2011, 3:00pm

Ms Fiona Manning, Office of the Commissioner, NSW Police Force

Assistant Commissioner Frank Mennilli, Corporate Spokesperson, Custody and Corrections, NSW Police Force

Inspector Brendan Searson

Ms Christabelle Sheehan, Ministry for Police and Emergency Services

Chief Superintendent Tony Trichter, Commander, Police Prosecutions, NSW Police Force

Legal practitioners – *BAC 16*

14 December 2011, 10:00am

Mr Phillip Boulten SC, NSW Bar Association

Mr Richard Button SC, Deputy Senior Public Defender

Ms Georgina Darcy, Legal Aid Commission NSW

Mr Mark Finlay, Office of the Director of Public Prosecutions

Ms Rachel Geare, Law Society of NSW

Mr David Giddy, Law Society of NSW

Ms Sarah Huggett, NSW Bar Association

Mr Mark Ierace SC, Senior Public Defender

Ms Annemarie Lumsden, Legal Aid Commission NSW

Mr John McKenzie, Chief Legal Officer, Aboriginal Legal Service NSW/ACT Ltd

Ms Johanna Phiels, Office of the Director of Public Prosecutions

Ms Jane Sanders, Law Society of NSW

Government Agencies – *BAC 17*

18 January 2012, 10:00am

Ms Rosemary Caruana, Assistant Commissioner, Community Corrections

Mr Leigh Costa, Corrective Services NSW

Mr John Gaudin, Ageing, Disability and Home Care, Department of Family and Community Services

Ms Ingrid Giles, Office for Women's Policy, Department of Family and Community Services

Mr Colin Leslie, Department of Family and Community Services

Ms Rebecca Macken, Office for Women's Policy, Department of Family and Community Services

Mr Peter Muir, Department of Family and Community Services

Ms Valda Rusis, Deputy Chief Executive (Operations), Juvenile Justice NSW

Ms Jane Selwood, Community Services NSW, Department of Family and Community Services

Ms Megan Wilson, Executive Director, Office of the Chief Executive, Juvenile Justice NSW

Ms Rani Young, Corrective Services NSW

Police Portfolio – *BAC 18*

3 February 2012, 10:00am

Assistant Commissioner Frank Mennilli, Corporate Spokesperson, Custody and Corrections, NSW Police Force

Inspector Michael Moroney, NSW Police Force

Ms Gayle Robson, Ministry for Police and Emergency Services

Inspector Brendan Searson, NSW Police Force

Ms Christabelle Sheehan, Ministry for Police and Emergency Services

AVLICC – *BAC 19*

7 February 2012, 2:30pm

Mr Nathan Corbett, NSW Police Force

Ms Christine Hall, Children's Legal Service (Legal Aid) NSW

Ms Angela Jones, Legal Aid Commission of NSW

Ms Janet Loughman, Women's Legal Service NSW

Ms Rachael Martin, Wirringa Baiya

Ms Gwen Middleton, NSW Health

Ms Alison Passe-de Silva, Chief Magistrate's Office

Ms Audrey Pereira, Department of Family and Community Services

Ms Steph Phan, Immigrant Women's Speakout Association of NSW

Ms Trina Robinson, LawAccess NSW

Ms Julie Hourigan Rose, WDVCAS Network

Ms Christabel Sheehan, Ministry for Police and Emergency Services

Ms Susan Smith, Sydney WDVCAS Network

Ms Sally Steele, NSW Women's Refuge Movement

Mr Wayne Thurlow, NSW Police Force

Ms Vanessa Viaggio, Crime Prevention Division

Mr Amy Watts, Office of the Director of Public Prosecutions

Ms Helen Wodak, Criminal Law Review

Appendix D
Court visits

NSW Children's Court

2 September 2011

His Honour Magistrate Paul Mulroney, Children's Court Magistrate

Central Local Court

9 September 2011

His Honour Magistrate John Favretto, Local Court Magistrate
Mr Tim Henderson, Registrar

Parramatta Weekend Bail Court

24 September 2011

His Honour Acting Magistrate Kevin Flack
His Honour Acting Magistrate Paul Lyon

Appendix E
Presumptions

Presumption in favour of bail 327
Neutral presumption as to bail.....327
Presumptions against bail 330
Bail granted only in exceptional circumstances 334

Presumption in favour of bail

Bail Act 1978 (NSW)	Applies to:			Relevant circumstances
	Legislation	Section	Type of offence or accused person	
9			There is a presumption in favour of bail for all offences, unless otherwise specified in the Act	
9(1)(b), 9(1A)			Minor offences (fine-only and *Summary Offences Act 1988* (NSW)) referred to in s8, and fail to appear (s 51)	If a person accused of a s 8 offence loses the entitlement to bail because of a previous failure to comply with a bail undertaking or bail condition, there is a presumption in favour of bail.

Neutral presumption as to bail

Bail Act 1978 (NSW)	Applies to:			Relevant circumstances
	Legislation	Section	Type of offence or accused person	
9(1)(c)	*Crimes Act 1900* (NSW)	26	Conspiring to commit murder	
		27	Acts done to the person with intent to murder	
		28	Acts done to property with intent to murder	
		29, 30	Other attempts to murder	
		31	Documents containing threats	
		33	Wounding etc with intent to do bodily harm or resist arrest	
		61J	Aggravated sexual assault	

		61JA	Aggravated sexual assault in company	
		61K	Assault with intent to have sexual intercourse	
		66A	Sexual intercourse—child under 10	
		66B	Attempting, or assaulting with intent, to have sexual intercourse with child under 10	
		86	Kidnapping	
		95	Robbery – aggravated	
		96	Robbery with wounding	
		97	Robbery etc or stopping a mail, being armed or in company	
		98	Robbery with arms etc and wounding	
9(1)(d)	*Drug Misuse and Trafficking Act 1985* (NSW)	23(1)	Offences with respect to prohibited plants	The neutral presumption is only applicable for these offences if the plant or drug concerned is alleged to be of a quantity which is at least twice the indictable quantity applicable under *Drug Misuse and Trafficking Act 1985* (NSW).
		24(1)	Manufacture and production of prohibited drugs	
		25(1)	Supply of prohibited drugs	
		26	Conspiring	
		27	Aiding, abetting etc commission of offence in NSW	
		28	Conspiring to commit and aiding etc commission of offence outside NSW	
9(1)(d1)	*Drug Misuse and Trafficking Act 1985* (NSW)	25A	Supply on an ongoing basis	The neutral presumption is applicable to these offences regardless of the quantity alleged.
		26	Conspiring to supply on an ongoing basis	
		27	Aiding, abetting etc supply on an ongoing basis in NSW	
		28	Conspiring, aiding, abetting etc supply on an ongoing basis outside NSW	
9(1)(e)	*Criminal Code* (Cth)	302.3, 302.4	Trafficking controlled drugs	These offences attract a neutral presumption only if the goods or substances concerned are alleged to be of a nature and quantity required to meet the criteria of the above offences under the *Drug Misuse and Trafficking Act 1985* (NSW), i.e., at least twice the indictable quantity applicable under that Act.
		303.5, 303.6	Commercial cultivation of controlled plants	
		304.2, 304.3	Selling controlled plants	
		305.4, 305.5	Commercial manufacture of controlled drugs	
		306.2, 306.3, 306.4	Pre-trafficking controlled precursors	

		307.2, 307.3, 307.6, 307.9, 307.11, 307.12, 307.13	Import-export drug offences	
		309.2, 309.3, 309.4, 309.7, 309.8, 309.10, 309.11, 309.12, 309.13, 309.14, 309.15	Drug offences involving children	
		Part 2.4 Div 11	Attempt, complicity and common purpose, joint commission, commission by proxy, incitement or conspiracy in relation to any of the above offences under the *Criminal Code* (Cth) as listed under s 9(1)(e) of the *Bail Act*.	The presumption applies only if the goods or substances concerned are alleged to be of a nature and quantity required for an offence referred to above in relation to the *Drug Misuse and Trafficking Act 1985* (NSW).
9(1)(e1)	*Crimes (Criminal Organisations Control) Act 2009* (NSW)	26	Association between members of declared organisations subject to interim control order or control order	This legislation has been declared invalid by the High Court.
9A(1)			A domestic violence offence, or an offence of contravening an apprehended violence order, if by: ▪ an act involving violence, or ▪ by an act that would constitute an offence under s 13 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW), ie, stalking or intimidation with intent to cause fear of physical or mental harm.	The neutral presumption only applies if the accused: ▪ has a history of violence, as defined in s 9A(2) of the *Bail Act*, or ▪ has been violent to the other person in the past (whether or not the accused person has been convicted of an offence in respect of the violence), or ▪ has failed to comply with a bail condition in respect of the offence to which this section applies that was imposed for the protection and welfare of the other person (unless the authorised officer or court is satisfied that the accused person will comply with any

				such bail condition in the future).
9B(1)			There is a neutral presumption if, at the time the offence is alleged to have been committed, the person, in connection with any other offence: ▪ was at liberty on bail, or ▪ was on parole, or ▪ was serving a sentence but was not in custody, or ▪ was subject to a good behaviour bond or an intervention program order, or ▪ was in custody.	
9B(2)	*Bail Act 1978* (NSW)	51	If the person has a previous conviction under s 51 of the *Bail Act*, i.e., a failure to appear before the court	
9B(3)			A person who is accused of an indictable offence if the person has been previously convicted of one or more indictable offences (whether dealt with on indictment or summarily)	

Presumptions against bail

Bail Act 1978 (NSW)	Applies to:			Relevant circumstances
	Legislation	Section	Type of offence or accused person	
8A(1)(a)	*Drug Misuse and Trafficking Act 1985* (NSW)	23A(1A), 23(2), 23A(2), 23A(3)	Offences with respect to prohibited plants	
		24(2), 24(2A)	Manufacture of commercial quantity of a prohibited drug, expose child to that manufacture	
		25(2)	Supply of a commercial quantity of a prohibited drug	
		26, 27	Conspiring to commit, or aiding, abetting, counselling, procuring, soliciting or inciting the commission of the above offences under the *Drug Misuse and Trafficking Act 1985* (NSW)	
		28	Conspiring, aiding, abetting, counselling, procuring, soliciting or inciting the commission of offences outside of NSW which correspond to the above offences under the *Drug Misuse and Trafficking Act 1985* (NSW)	
8A(1)(b)	*Criminal Code* (Cth)	302.2	Trafficking commercial quantities of prohibited drugs	
		303.4	Cultivating commercial quantities of controlled plants	

		304.1	Selling commercial quantities of controlled plants	
		305.3	Manufacturing commercial quantities of controlled drugs	
		307.1	Importing and exporting commercial quantities of border controlled drugs or border controlled plants	
		307.5	Possessing commercial quantities of unlawfully imported border controlled drugs or border controlled plants	
		307.8	Possessing commercial quantities of border controlled drugs or border controlled plants reasonably suspected of having been unlawfully imported	
		Part 2.4 Div 11	Attempt, complicity and common purpose, joint commission, commission by proxy, incitement, or conspiracy in relation to any of the above offences from the *Criminal Code* (Cth), as listed in s 8A(1)(b) of the *Bail Act*	
8A(1)(b1)	*Criminal Code* (Cth)	302.3, 302.4	Trafficking marketable quantities of controlled drugs	These offences only attract a presumption against bail if the goods or substances concerned are alleged to be of a nature and quantity required for an offence referred to under s 8A(1)(a).
		303.5, 303.6	Commercial cultivation of controlled plants	
		304.2, 304.3	Selling controlled plants	
		305.4, 305.5	Commercial manufacture of controlled drugs	
		306.2, 306.3, 306.4	Pre-trafficking controlled precursors	
		307.2, 307.3, 307.6, 307.9, 307.11, 307.12, 307.13	Import-export drug offences	
		309.2, 309.3, 309.4, 309.7, 309.8, 309.10, 309.11, 309.12, 309.13, 309.14, 309.15	Drug offences involving children	

		Part 2.4 Div 11	Attempt, complicity and common purpose, joint commission, commission by proxy, incitement or conspiracy in relation to any of the above offences under the *Criminal Code* (Cth) as listed under 8A(1)(b1) of the *Bail Act*	These offences also attract a presumption against bail only if the goods or substances concerned are alleged to be of a nature and quantity required for an offence referred to above in relation to the *Drug Misuse and Trafficking Act 1985*, ie, s 23A(1A), 23(2), 23A(2), 23A(3), 24(2), 24(2A), or 25(2).
8A(1)(c)	*Criminal Code* (Cth)	Part 5.3 Div 101, 102 and 103	Various offences relating to terrorism, terrorist organisations, and financing terrorist activity	
8B(1)(a)	*Crimes Act 1900* (NSW)	93G	Causing danger with firearm or spear gun	
		93GA	Firing at dwelling-houses or buildings	
		93H	Trespassing with or dangerous use of firearm or spear gun	
		93I	Possession of unregistered firearm in public place	
		154D	Stealing firearms	
8B(1)(b)	*Firearms Act 1996* (NSW)	7	Offence of unauthorised possession or use of prohibited firearms or pistols	Applies only to offences that relate to a prohibited firearm or pistol.
		36	Unregistered firearms	
		50	Purchase of firearms	
		50A(2)	Unauthorised manufacture of firearms	
		51(1A), 51(2A)	Restrictions on sale of firearms	
		51A	Restrictions on purchase of firearms	
		51D(2)	Unauthorised possession of firearms in aggravated circumstances	
8B(1)(c)	*Firearms Act 1996* (NSW)	44A	Prescribed persons not to be involved in firearms dealing business	
		51B	Selling firearms on an ongoing basis	
		51BB	Selling firearm parts on an ongoing basis	
		62	Shortening firearms	
8B(1)(d)	*Weapons Prohibition Act 1998* (NSW)	7	Offence of unauthorised possession or use of prohibited weapon	If the offence relates to a military-style weapon.
8B(1)(e)	*Weapons*	23A(2)	Sale of military-style weapons	

	Prohibition Act 1998 (NSW)	23B	Selling prohibited weapons on an ongoing basis	
		25A(2)	Manufacture of military-style weapons	
8C	*Crimes Act 1900* (NSW)	94	Robbery or stealing from the person	This applies if the person is accused of 2 or more of the listed property offences, provided that those were not offences arising out of the same circumstances, that bail is being sought in respect of one or more of those offences, and that the person has been convicted of one of more of the listed property offences within the last 2 years.
		95	Robbery in circumstances of aggravation	
		96	Robbery with wounding	
		97	Robbery etc or stopping a mail, being armed or in company	
		98	Robbery with arms etc and wounding	
		99	Demanding property with intent to steal	
		109	Breaking out of dwelling-house after committing, or entering with intent to commit, indictable offence	
		110	Breaking, entering and assaulting with intent to murder etc	
		111	Entering dwelling-house	
		112	Breaking etc into any house etc and committing serious indictable offence	
		113	Breaking etc into any house etc with intent to commit a serious indictable offence	
		149	Stealing property in a dwelling house with menaces	
		154C	Taking motor vehicle or vessel with assault or with occupant on board	
		154F	Stealing motor vehicle or vessel	
			Attempt to commit any of the offences from the *Crimes Act 1900* (NSW) listed above.	
			An offence under the law of the Commonwealth, another State or Territory or of another country that is similar to an offence from the *Crimes Act 1900* (NSW) listed above, or attempt of the same.	
8D(1)(a)	*Crimes Act 1900* (NSW)	93B	Riot	
8D(1)(b)			Any offence that is punishable by imprisonment for 2 years or more and that is alleged to have been committed in the course of participating in a large-scale public disorder, or in connection with the exercise of police powers to prevent or control such a disorder or the threat of such a disorder	
8E			An offence for which a penalty of imprisonment may be imposed, if the person is serving a sentence of imprisonment for life and is on	This does not apply where the offence is murder. Instead s 9C of the *Bail Act* applies,

			parole.	such that bail is not to be granted except for in exceptional circumstances.
8F	*Crimes (Serious Sex Offenders) Act 2006* (NSW)	12	Breach of supervision order	

Bail granted only in exceptional circumstances

Bail Act 1978 (NSW)	Applies to:			Relevant circumstances
	Legislation	Section	Type of offence or accused person	
9C			Murder	
9D	*Crimes Act 1900* (NSW)	19A	Murder	These offences only qualify for the 'exceptional circumstances' category if the accused is a repeat offender i.e. he or she has a previous conviction for a serious personal violence offence.
		24	Manslaughter	
		26	Conspiring to commit murder	
		27	Acts done to the person with intent to murder	
		28	Acts done to property with intent to murder	
		29	Certain other attempts to murder	
		30	Attempts to murder by other means	
		33	Wounding etc with intent to do bodily harm or resist arrest	
		33A	Discharging firearm with intent to cause grievous bodily harm, or to resist arrest	
		35(1) or (3)	Reckless grievous bodily harm or wounding, in company	
		37	Attempts to choke or suffocate	
		38	Using an intoxicating substance to commit an indictable offence	
		39	Using poison etc so as to endanger life or inflict grievous bodily harm	
		46	Causing bodily injury by gunpowder etc	
		47	Using etc explosive substance or corrosive fluid etc	
		48	Causing explosives to be placed in or near building, conveyance or public place	
		61I	Sexual assault	
		61J	Aggravated sexual assault	

		61JA	Aggravated sexual assault in company	
		61K	Assault with intent to have sexual intercourse	
		61M	Aggravated indecent assault	
		66A	Sexual intercourse—child under 10	
		66B	Attempting, or assaulting with intent, to have sexual intercourse with child under 10	
		66C	Sexual intercourse—child between 10 and 16	
		66D	Attempting, or assaulting with intent, to have sexual intercourse with child between 10 and 16	
		66EA	Persistent sexual abuse of a child	
		66F	Sexual offences—cognitive impairment	
		73	Sexual intercourse with child between 16 and 18 under special care	
		80A	Sexual assault by forced self-manipulation	
		86	Kidnapping	
		87	Child abduction	
		95	Robbery in circumstances of aggravation	
		96	Robbery with wounding	
		97	Robbery etc or stopping a mail, being armed or in company	
		98	Robbery with arms etc and wounding	
		110	Breaking, entering and assaulting with intent to murder etc	
		195(1)(b) or (2)(b)	Destroying or damaging property by fire or explosives, including during a public disorder	
		196 (1)(b) or (2)(b)	Destroying or damaging property with intent to injure a person, including during a public disorder	
		198	Destroying or damaging property with intention of endangering life	
9D(4)(b)	*Crimes Act 1900* (NSW)	79	Bestiality	These offences only qualify for the 'exceptional circumstances' category if the accused is a repeat offender, ie, he or she has a previous conviction for a serious personal violence offence. These offences also
		109	Breaking out of dwelling-house after committing, or entering with intent to commit, indictable offence	
		111	Entering a dwelling-house with intent to commit a serious indictable offence therein	
		112	Breaking etc into any house etc and committing serious indictable offence	

		113	Breaking etc into any house etc with intent to commit serious indictable offence	only qualify for the 'exceptional circumstances' category if the circumstances of the offence involve an act of actual or threatened violence against a person.
9D(4)(c)			Attempt to commit an offence from the *Crimes Act 1900* (NSW) specified in s 9D of the *Bail Act 1978* (NSW) as referred to above	These offences only qualify for the 'exceptional circumstances' category if the accused is a repeat offender, ie, he or she has a previous conviction for a serious personal violence offence.
9D(4)(d)			An offence under the law of the Commonwealth, another State or a Territory or of another country that is similar to an offence from the *Crimes Act 1900* (NSW) specified in s 9D of the *Bail Act 1978* (NSW) as referred to above, and including attempt of these offences	These offences only qualify for the 'exceptional circumstances' category if the accused is a repeat offender, ie, he or she has a previous conviction for a serious personal violence offence.

Appendix F
Data

Chapter 4 data

Table F.1: Rate of imprisonment per 100,000 of the population (Figure 4.4)

	NSW	VIC	QLD	SA	WA	TAS	NT	AUST
1997	135.7	72	159.3	133.3	170.5	72.9	436.7	126.3
1998	135.4	78.6	189.1	123.9	171.5	79.9	451.6	133
1999	148.5	80.3	195	120.7	216.2	95.4	475.5	143.6
2000	151	85.4	182.2	114.9	218.1	120.4	459.3	143.9
2001	156.8	90.7	174.5	120.1	222	97.9	510.6	146.5
2002	153	93.7	176	127.1	196.3	117.1	473.1	144.5
2003	154.9	97.2	182.8	124.8	198.2	121.9	548.5	149
2004	163.2	92.9	179.5	122.1	211.3	128.8	513.1	151.1
2005	171.4	92.3	177.9	124.5	234.3	148.2	579.6	156.9
2006	172.3	95.4	180.9	130.6	225.4	135.3	555.1	158.0
2007	181.8	103.8	178.9	144.4	238.1	141.7	593.8	165.5
2008	182.3	103.4	170.5	153.3	230.3	139.4	590.4	163.9
2009	191.9	104.2	171.1	154.8	252.1	139.2	676.7	170.5
2010	187.5	106.5	165.7	153.5	278.3	123.0	672.9	171.1
2011	178.5	104.5	155.8	154.7	262.4	116.6	718.8	164.5

Source: ABS Corrective Services in Australia 4512.0

Table F.2 : Rates of unsentenced prisoners per 100,000 of the population (Figure 4.5)

	NSW	VIC	QLD	SA	WA	TAS	NT	AUST
1998	22.2	12.9	18.4	22.8	21.3	8.8	59.5	18.9
1999	27.6	12.2	23.3	23.3	26	12.4	63	22
2000	31.1	12.8	25.8	32.2	32.5	26	129.5	26.4
2001	34.7	14.4	33	43.4	36.3	17.1	87.9	30
2002	32.7	16.4	34.6	44.9	36.1	25.3	79.4	30.3
2003	36.8	18.3	38.9	41.9	30.8	21.9	100.1	32.3
2004	37.9	17	37.9	38.8	35.7	25	101.1	32.6
2005	40.1	16.5	36.6	41.1	37.7	33.1	105.8	33.6
2006	40.2	16.5	37.9	46.8	38.8	32.7	105.5	34.5
2007	45.4	19.6	40.7	51.8	43.1	32.7	124.6	38.4
2008	48.4	21.1	38.6	52.0	46.6	30.9	127.0	39.8
2009	50.1	21.1	34.9	53.9	44.4	32.2	170.2	39.9
2010	50.0	20.2	35.2	55.9	47.7	25.5	144.6	39.9
2011	49.1	19.6	33.4	52.1	46.8	21.5	169.0	38.8

Source: ABS Corrective Service in Australia 4512.0

Chapter 5 data

Outcomes of finalised appearances

Table F.3: Local Court 2010

	Bail not required or dispensed with		On bail		Bail refused	
Outcome of appearance	No.	%	No.	%	No.	%
Proceeded to defended hearing						
All charges dismissed	2,457	3.0	3,146	11.0	266	3.8
Guilty of at least one charge	4,641	5.8	4,478	15.7	1,375	19.6
Other[1]	364	0.5	642	2.3	176	2.5
Proven outcome not further described[2]	10,107	12.5	2,079	7.3	1,181	16.8
Sentenced after guilty plea	50,319	62.4	14,041	49.2	3,706	52.9
Convicted ex parte	9,469	11.7	916	3.2	-	-
All charges dismissed without hearing	3,135	3.9	3,156	11.1	172	2.5
All charges otherwise disposed of[3]	125	0.2	54	0.2	136	1.9
Total	80,617	100.0	28,512	100.0	7,012	100.0

Source: NSW Bureau of Crime Statistics and Research, NSW Criminal Court Statistics 2010 (2011) 27, Table 1.6.

1. The 'other' category includes defendants who had one or more charges dismissed at a defended hearing but plead guilty to other charges or were convicted *ex parte*.
2. This category includes people who were sentenced but the data was inconclusive as to whether they pleaded guilty or were found so after a hearing.
3. This includes cases where the court dismissed charges but there was no hearing, ie, where the prosecution does not offer any evidence or where the defendant dies prior to finalisation.

Table F.4: Children's Court 2010

	Bail not required or dispensed with		On bail		Bail refused	
Outcome of appearance	No.	%	No.	%	No.	%
Proceeded to defended hearing						
All charges dismissed	146	4.7	382	9.4	41	3.6
Guilty of at least one charge	179	5.7	471	11.6	162	14.3
Other	24	0.8	151	3.7	47	4.1
Proven outcome not further described	975	31.2	799	19.8	261	23.0
Sentenced after guilty plea	1,544	49.4	1,797	44.4	565	49.8
Convicted ex parte	94	3.0	47	1.2	-	-
All charges dismissed without hearing	135	4.3	371	9.2	16	1.4
All charges otherwise disposed of	31	1.0	25	0.6	42	3.7
Total	3,128	100.0	4,043	100.0	1,134	100.0

Source: NSW Bureau of Crime Statistics and Research, NSW Criminal Court Statistics 2010 (2011) 67, Table 2.4.

Table F.5: Higher Courts 2010

	Bail not required or dispensed with		On bail		Bail refused	
Outcome of appearance	No.	%	No.	%	No.	%
Proceeded to defended hearing						
All charges dismissed	3	11.1	214	11.5	67	5.8
Guilty of at least one charge	*3*	*11.1*	*182*	*9.7*	*89*	*7.7*
Other	-	-	17	0.9	9	0.8
Proven outcome not further described	-	-	3	0.2	4	0.3
Sentenced after guilty plea	*7*	*25.9*	*1,260*	*67.5*	*963*	*83.1*
All charges dismissed without hearing	2	7.4	167	8.9	16	1.4
All charges otherwise disposed of	12	44.4	24	1.3	11	0.9
Total	27	100.0	1,867	100.0	1,159	100.0

Source: NSW Bureau of Crime Statistics and Research, NSW Criminal Court Statistics 2010 (2011) 119, Table 3.12.

Sentencing outcomes

Table F.6: Principal penalty by bail status in Local Courts (2010)

	On bail	In custody – bail refused	In custody – prior offence	Bail not required or bail dispensed with	Unknown	Total
Imprisonment	1320	3924	1543	912	1	7700
Home detention	105	11	1	77	0	194
Periodic detention	274	38	2	200	0	514
Intensive correction order	47	3	0	16	0	66
Suspended sentence with supervision	1711	263	39	830	2	2845
Suspended sentence without supervision	1143	178	30	1082	0	2433
Community service order	1861	85	43	2205	1	4195
Bond with supervision	3495	377	135	2941	0	6948
Bond without supervision	5297	445	208	8137	3	14090
Fine	3975	482	372	39387	1279	45495
Nominal sentence	17	14	8	27	0	66
Conviction without penalty	329	115	99	1246	27	1816
Bond without conviction	2094	33	98	11056	10	13291
No conviction recorded	469	27	32	5723	229	6480
Other proven outcomes	7	1	0	15	0	23

Source: NSW Bureau of Crime Statistics and Research (jh12-10314)

Table F.7: Principal penalty by bail status in Children's Court (2010)

	On bail	In custody – bail refused	In custody – prior offence	Bail not required or bail dispensed with	Total
Control order	97	492	197	41	827
Suspended sentence with supervision	208	49	4	19	280
Suspended sentence without supervision	70	9	0	21	100
Community service order	219	38	3	48	308
Bond with supervision	507	61	12	287	867
Bond without supervision	601	44	30	542	1217
Fine	155	12	13	389	569
Nominal sentence	2	0	1	2	5
Conviction without penalty	0	1	1	4	6
Bond without conviction	0	0	0	6	6
Dismissed with caution	220	26	17	460	723
No conviction recorded	79	13	5	153	250
Other proven outcomes	164	2	14	560	740

Source: NSW Bureau of Crime Statistics and Research (jh12-10314)

Table F.8: Principal penalty by bail status in Higher Courts (2010)

	On bail	In custody – bail refused	In custody – prior offence	Bail not required or bail dispensed with	Total
Imprisonment	624	1023	391	7	2045
Control order	1	2	0	0	3
Home detention	9	0	0	1	10
Periodic detention	70	0	0	0	70
Intensive correction order	6	0	0	0	6
Suspended sentence with supervision	314	14	2	1	331
Suspended sentence without supervision	167	1	0	2	170
Community service order	40	0	0	0	40
Bond with supervision	98	7	1	1	107
Bond without supervision	90	1	0	0	91
Fine	2	0	0	0	2
Nominal sentence	0	0	0	0	0
Conviction without penalty	2	1	0	0	3
Bond without conviction	13	0	0	0	13
No conviction recorded	5	0	0	0	5
Other proven outcomes	6	0	0	0	6

Source: NSW Bureau of Crime Statistics and Research (jh12-10314)

Table F.9: Breakdown of penalty category (Tables F.6-F.8)

Penalty category	Penalty sub-category
Imprisonment	Imprisonment
Control Order	Control Order
Home detention	Home detention
Periodic detention	Periodic detention
Intensive correction order	Intensive correction order
Suspended sentence with supervision	s 12 Suspended sentence with supervision
	Commonwealth s 20(1)(b) recognizance with supervision
	Juvenile Suspended sentence with supervision
Suspended sentence without supervision	s 12 Suspended sentence
	Commonwealth s 20(1)(b) Suspended Sentence
	Juvenile Suspended sentence
Community service order	Community Service Orders
	Children's Community Service Order – s 33(1)(f)
Probation Order	Probation Order
Bond with Supervision	Bond with supervision
	s 20(1)(a) Commonwealth recognizance with supervision
	s 33(1)(b) Bond with supervision
	s 33(1)(a)(ii) (Children's Court) Bond with supervision
	Juvenile – recognizance (with or without supervision)
Bond without supervision	Bond without supervision
	s 9 Good behaviour bond
	Recognizance other (eg s 20 (Commonwealth))
Fine	Fine
Nominal sentence	Nominal sentence
Conviction without penalty	Conviction without penalty
Bond without conviction	Offence proved, discharged to intervention program, s 10(1)(c)
	Offence proved, discharged with recognizance, s 10(1)(b)
	s 19B Commonwealth recognizance
	s 10 non-conviction bond

	s 10 non-conviction bond with supervision
Dismissed with Caution	Dismissed with Caution s 33(1)(a) Children (Criminal Proceeding) Act
	Dismissed with Caution s 31(1) Young Offenders Act
No conviction recorded	Offence proved, dismissed, s 10(1)(a)
	s 19B Commonwealth Dismissal
	Offence proved no conviction – charge dismissed, S556A
Other proven Outcomes	Driver's license disqualification/suspension – s 33(5)(c)
	Dismissed after Youth Justice Conference – s 33(1)(c1)
	Pre Trial diversion undertaking
	Unknown

Source: NSW Bureau of Crime Statistics and Research (jh12-10314)

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Bolton, Re; Ex parte Beane (1987) 162 CLR 514 ..... 2.18

Burton v The Queen (1974) 3 ACTR 77 ..... 8.23

Camilleri v The Queen [2002] HCATrans 214 ..... 3.46

Chamberlain v The Queen (No 1) (1983) 153 CLR 514 ..... 9.22,9.26

Chester v The Queen (1988) 165 CLR 611 ..... 2.21,10.61

Chew v The Queen (1991) 66 ALJR 209 ..... 9.30

Chew v The Queen (No 2) (1991) 66 ALJR 221 ..... 9.30

Chu Kheng Lim v The Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1 ..... 2.19,10.61

Clarkson, Re [1986] VR 583 ..... 9.28

Dietrich v The Queen (1992) 177 CLR 292 ..... 2.22,2.23

DPP (Cth) v Cassaniti [2006] NSWCCA 335 ..... 9.20

DPP (Cth) v Germakian [2006] NSWCCA 275 ..... 18.13

Eades v Director of Public Prosecutions (NSW) [2010] NSWCA 241 ..... 9.8

Edwards v The Queen (1996) 90 A Crim R 510 ..... 5.10

Foster v The Queen (1993) 113 ALR 1 ..... 2.12

Gaol Delivery [1842] NSWSupC 14 ..... 15.19

Jack, Re; Ex parte Patmoy; (1944) 44 SR (NSW) 351 ..... 2.15

Kable v Director of Public Prosecution (1995) 36 NSWLR 374 ..... 2.27

Lawson v Dunlevy [2012] NSWSC 48 ..... 1.17,12.3,14.7,16.1-16.33,20.47

Linford v Fitzroy (1849) 13 QB 239 ..... 18.59

Maher, Ex parte [1986] 1 QdR 303 ..... 9.27,9.28

Marotta v The Queen (1999) 73 ALJR 265 ..... 9.30,9.33

McKellar v Director of Public Prosecutions (NSW) [2011] NSWCA 91 ..... 9.7

Palmer v DPP (1992) 28 NSWLR 282 ..... 9.70

Parsons v The Queen (1998) 72 ALJR 1325 ..... 9.33

Potier v The Queen [2011] NSWCCA 204 ..... 9.20,9.33

R v Ali (2008) 77 BCLR (4th) 289 ..... 9.44

R v Antoun [2005] NSWCCA 270 ..... 9.30,9.34

R v Appleby (1966) 83 WN (Pt 1) (NSW) 300 ..... 3.10

R v Beckett [1988] VSC 219 ..... 3.46

R v Benbrika (Ruling No 20) [2008] VSC 80 ..... 10.74

R v Blayney [2002] SASC 184 ..... 20.46

R v Blissett [2006] NSWSC 1383 ..... 18.23

R v Brown (Unreported, NSW Court of Appeal, 15 March 1994) 8.12

R v Budiman (1997) 97 A Crim R 548 ..... 8.12
R v Camilleri [1999] VSC 184 ..... 3.46
R v Camilleri [2001] VSCA 14 ..... 3.46
R v Campbell (Sydney Morning Herald, 29 April 1850; W H Wilkinson, *The Australian Magistrate* (Government Printer, 3rd ed, 1876) 249) 3.10
R v Cicekdag (2004) 150 A Crim R 299 ..... 6.28
R v Clarkson [1986] VR 583 ..... 9.32
R v Collins (1986) 41 SASR 208 ..... 9.28
R v CRH (Unreported, NSW Court of Criminal Appeal, 18 December 1996) 11.14
R v Dang 2004 ABCA 266 ..... 9.44
R v Fraser (1892) 13 NSWLR 150 ..... 3.10
R v Giordano (1982) 31 SASR 241 ..... 9.27
R v Greenham (1998) 103 A Crim R 185 ..... 9.35
R v Greenham [1940] VLR 236 ..... 2.20
R v Hall [2004] NSWCCA 127 ..... 9.73
R v Hamill (1986) 25 A Crim R 316 ..... 18.14
R v Hardy (Unreported, NSWCCA, 17 June 1996) 9.21
R v Hemsley [2004] NSWCCA 228 ..... 11.41
R v Hilton (1987) 7 NSWLR 745 ..... 9.25-9.27,9.50
R v Hookway [2011] EWHC 1578 ..... 22.11
R v Jacobs [2008] NSWSC 417 ..... 9.47
R v Jiminez [1999] NSWCCA 7 ..... 11.41
R v Jomaa [2011] NSWSC 342 ..... 8.12
R v Kissner (Unreported, NSW Supreme Court, Hunt CJ at CL, 17 January 1992) 8.11
R v Light [1954] VLR 152 ..... 8.23
R v Mahoney-Smith (1967) 87 WN (Pt 1) (NSW) 249 ..... 2.20,3.10
R v Masters (1992) 26 NSWLR 450 ..... 8.11
R v Medich [2010] NSWSC 1488 ..... 20.2,20.46
R v Nunan (1999) 108 A Crim R 1 ..... 9.68
R v Pabani (1991) 10 CR (4th) 381 ..... 9.44
R v Pakis (1981) 3 A Crim R 132 ..... 18.14
R v Petrovski [2008] NSWDC 110 ..... 19.2
R v Phillips (1947) 32 Cr App R 47 ..... 3.8
R v Richards [1981] 2 NSWLR 464 ..... 6.28
R v Roberts (1997) 97 A Crim R 456 ..... 2.20
R v RS [2011] NSWSC 103 ..... 20.2,20.46
R v Scaife (1841) 10 LJ MC 144 ..... 3.7
R v Southgate (1960) 78 WN (NSW) 44 ..... 9.35

R v Tsiaras [1996] 1 VR 398 ..... 11.41
R v Tyler (1995) 80 A Crim R 371 ..... 9.52
R v Velevski (2000) 117 A Crim R 30 ..... 9.23,9.25,9.30,9.33
R v Wakefield (1969) 89 WN (Pt 1) (NSW) 325 . 2.38,3.11-3.14,5.38,8.22,10.2,15.39
R v Wilson (1994) 34 NSWLR 1 ..... 9.31
R v Wren [2000] 1 Qd R 577 ..... 19.24
R v Wright (Unreported, Supreme Court of NSW, Rothman J, 7 June 2005) 8.20
R v Zoudi (2006) 14 VR 580 ..... 9.30
Ridehalgh v Horsefield [1994] Ch 205 ..... 19.68
Robinson, Re (1854) 23 LJQB 286 ..... 3.7,3.10
Sinanovic v The Queen (No 1) (2001) 122 A Crim R 524 ..... 9.24
Taikato v The Queen (1996) 186 CLR 454 ..... 9.6
Trobridge v Hardy (1955) 94 CLR 147 ..... 2.12
United Mexican States v Cabal (2001) 209 CLR 165 ..... 9.22,9.27,9.30
Wainohu v NSW (2011) 243 CLR 181 ..... 3.67
Whan v McConaghy (1984) 153 CLR 631 ..... 9.68,9.70
White v Police (Unreported, NZ High Court,
William Young J, 10 September 2003) 7.14
Williams v The Queen (1986) 161 CLR 278 ..... 18.57-18.59
Woolmington v DPP [1935] AC 462 ..... 2.15

.

Table of legislation

Commonwealth of Australia

Criminal Code 3.67
Judiciary Act 1903
s 35 ..... 9.6,9.11

Australian Capital Territory

Bail Act 1992
s 8 ..... 7.12
s 9 ..... 7.13
s 9E 9.28
s 10 ..... 7.52
s 19(5) 19.25
s 20A 19.25
s 20C 19.25
s 22 ..... 10.5
s 22(1) 14.11
s 22(1)(c) 10.12
s 25(6)(a) 14.11
s 39(4) 19.25
s 45(7) 19.25
s 49 ..... 17.1,17.17

New South Wales

Bail (Amendment) Act 1986 ..... 3.46
Bail (Amendment) Act 1987 ..... 3.36
Bail (Amendment) Act 1988
sch 2[2] 2.38,3.46
Bail (Amendment) Act 1989 ..... 19.3
sch 1[2] 19.4
Bail (Amendment) Act 1990 ..... 3.39
Bail (Amendment) Act 1992 ..... 3.36
Bail (Domestic Violence) Amendment Act 1993 .. 3.46
Bail (Further Amendment) Act 1988 ..... 3.46
Bail (Personal and Family Violence) Amendment Act 1987 ..... 3.46
Bail Act 1978 ..... 1.3, 3.30, 3.71
pt 2 div 2A 8.11
pt 2 div 3 ..... 8.13
pt 6 ..... 18.1,18.25,**R18.2**
s 4 ..... 3.31,6.11
s 4(2)(e) 7.6
s 4(2)(f) 7.6
s 6 ..... 6.6
s 7 ..... 3.31, 6.23,12.4
s 7(c) 6.24
s 8 ..... 7.1-7.3,7.5-7.11,7.43
s 8(2)(a)(i) 7.8,7.31
s 8(2)(a)(ii) 7.8,7.38
s 8A 8.11
s 8A – 9D 6.6
s 8A(1) 8.9
s 8A(2) 8.10
s 8A(3) 7.47
s 8B 3.60,8.9
s 8B(2) 8.10
s 8B(3) 7.47
s 8C 3.60,11.43
s 8C(1)(a) 8.9
s 8C(1)(c) 8.9
s 8C(2) 8.10
s 8C(3) 7.47
s 8D 8.9
s 8D(3) 8.10
s 8D(4) 7.47
s 8E(1) 8.9
s 8E(2) 8.10
s 8E(3) 7.47
s 8F(1) 8.10
s 8F(2) 7.47
s 9 ..... 8.10
s 9(1)(b) (as originally enacted) 8.26
s 9(1)(c) (as originally enacted) 3.41,8.26
s 9(1)(c) 8.16
s 9(1)(d) 8.16
s 9(1)(d1) 8.16
s 9(1)(e) 8.16
s 9(1)(f) 8.16
s 9(2) 7.1,8.14,10.8
s 9(2)(b) 9.52
s 9A 10.65
s 9B 8.30,8.40
s 9B(1) 8.16
s 9B(1)(d) 3.63
s 9B(2) 8.16
s 9B(3) 8.16,8.30,8.45
s 9C 3.56,8.17
s 9D 3.56,8.53,10.67,11.43
s 9D(1) 8.17
s 9D(4) 3.56
s 10 ..... 7.1,7.2
s 10(1) 7.47
s 10(2) 6.45,6.46,7.49,7.58
s 10(3) 7.49
s 15 ..... 6.11
s 17 ..... 6.6,18.2
s 17-21 ..... 22.9
s 18 ..... 18.2,18.10
s 20 ..... 15.5,18.2,18.54
s 22A 3.46,12.59,18.48,19.1

s 22A(1) 19.2,19.8,19.23,19.43,**R19.1**
s 22A(1A) 19.23,19.43,**R19.1**
s 22A(1A)(c).....19.13
s 22A(2) 19.2,19.9,**R19.1**
s 22A(3) 19.2,**R19.1**
s 22A(5) 19.9,19.15,19.62,19.63,**R19.1**
s 22A(6) 19.2
s 23 .....6.6
s 24(1)(b) 9.18
s 25A.....3.56
s 25A(6) 18.22
s 26(1)(c) 9.18
s 26-30B 6.6
s 28 .....9.18-9.20
s 30 .....9.19,9.20
s 30(e).....9.19
s 30AA 9.20,9.47,9.50,9.53,9.61
s 32 .....8.14,10.17-10.20
s 32(1).....10.3,10.103,14.8
s 32(1)(a)(i) 10.52,11.48
s 32(1)(a)(ia) 10.52,11.57
s 32(1)(a)(iii).....3.39,10.52,10.91
s 32(1)(a)(iv) 10.51
s 32(1)(b) 10.12,10.72
s 32(1)(b)(iv) 7.39,10.79,10.86
s 32(1)(b)(v) 11.3,11.48
s 32(1)(b)(vi) 8.30,10.93
s 32(1)(c)(i) 10.89
s 32(1)(c)(ii).....10.94
s 32(1)(c)(iii) (as originally enacted).....3.32
s 32(1)(c)(iii).....10.53
s 32(1)(c)(iv).....3.32,10.69
s 32(1)(c)(v) 10.57
s 32(2).....3.32,10.69,10.103
s 32(2A) 10.69,10.103
s 32(4).....11.49
s 34 .....6.23,6.26.7.48
s 36 .....7.1,13.2
s 36(1).....6.24
s 36(2).....13.2,13.3
s 36(2)(a) 13.3,13.35
s 36(2)(a1) 13.3,13.9,**R13.6**
s 36(2)(b) 13.15,**R13.7**
s 36(2)(b)–(h).....13.3,13.13
s 36(2)(c)–(h) 13.19
s 36(2)(i) 13.3,13.20,**R13.3**
s 36(2A) 11.49,13.9,**R13.6**
s 36(2B) 13.9,**R13.6**
s 36A..... 13.2,13.4,13.29,**R13.4**
s 36B.....13.2,13.5,13.35
s 36C 13.36
s 37 .....7.32,16.5
s 37(1).....7.9,13.19,14.2,14.4,14.6
s 37(1)(a) 16.5
s 37(1)(b) 16.6
s 37(1)(c) 16.6
s 37(1)(d) 16.7
s 37(2) 14.21,16.10
s 37(2A) 11.42,14.48,14.51
s 37(3) 13.19
s 37(4) 13.19
s 37(5) 11.31,14.49,14.50
s 37A 13.22,13.23,**R13.3**
s 43..... 6.43
s 43(3) 6.44,6.46,7.49
s 43A(1) 18.3
s 43A(2) 18.4
s 43A(3) 18.3
s 43A(4) 18.3
s 43A(5) 18.3
s 43A(6) 18.4
s 44..... 18.11
s 45(1)(a) 18.12,18.13
s 45(1)(b) 18.12
s 48(3) 18.14
s 48(5) 18.28
s 48(7) 18.16
s 48(7A) 18.17
s 48A 15.5,15.6,15.8,15.17,18.83
s 48A(1) 18.19
s 48A(2) 18.19
s 48A(4) 18.19
s 48B 18.21,18.51
s 48B(2) 18.21
s 48B(4)-(6) 18.51
s 48B(6) 18.31
s 50..... 6.25,15.26
s 50(1) 15.23,15.24,15.27
s 50(1)(b)(i)-(ii)..... 6.23
s 50(2)-(3A) 15.25
s 51..... 6.23,7.7,7.48,17.1,17.20
s 51(1) 17.12
s 51(2) 17.14
s 51(5) 17.20
s 51(8) 17.15
s 54A 15.5,15.7,15.17
s 54A(3) 15.7
Bail Amendment (Firearms and Property Offenders) Act 2003 ..... 3.60-3.62
Bail Amendment (Lifetime Parole) Act 2006 ..... 3.67
Bail Amendment (Repeat Offenders) Act 2002 .... 3.50-3.55,4.45,8.30
Bail Amendment (Terrorism) Act 2004 ..... 3.67
Bail Amendment Act 1998..... 3.46
Bail Amendment Act 2003..... 3.56-3.59
Bail Amendment Act 2007..... 3.67,19.6

Bail Regulation 1999 ..... 18.49
Bail Regulation 2008 ..... 6.23,18.49
cl 5 ..... 18.10
cl 11 ..... 6.26
Children (Community Service Orders) Act 1987
s 21(1)(d) 7.6
s 26(1)(c) 7.6
Children (Criminal Proceedings) Act 1987 .....
..... 11.14,11.22
s 5 ..... 19.56
s 6 ..... 2.34,11.26
s 6(a) 11.27
s 6(b) 12.15
s 6(c) 11.27,12.15
s 6(d) 11.27,12.15
Courts and Crimes Legislation Amendment Act 2009 ..... 19.11,19.63
Courts Legislation Further Amendment Act 1997.....
..... 3.36
Crimes (Administration of Sentences) Act 1999
s 116 ..... 7.6
s 258 .....15.5,15.18,**R15.1**
Crimes (Administration of Sentences) Regulation 2008
cl 200(h) 20.7
Crimes (Appeal and Review) Act 2001..... 9.14,**R9.3**
pt 2 ..... 9.79,9.82
s 3(1) 9.78
s 4(1) 9.5
s 11 ..... 9.5
s 11A 9.5
s 12(1) 9.5
s 17 ..... 9.56
s 18 ..... 9.56
s 23(1) 9.5
s 26 ..... 9.56
s 52(1) 9.5
s 53(1) 9.5
s 56(1) 9.5
s 63 ..... 9.76
s 63(2)(c) 9.2
s 68 ..... 9.77
s 100(1) 9.13
s 101(1) 9.13
s 107(2) 9.9
s 117 ..... 9.17
Crimes (Criminal Organisations Control) Act 2009 ..... 3.67
Crimes (Criminal Organisations Control) Act 2012 (NSW) 3.67
Crimes (Domestic and Personal Violence) Act 2007.....3.67,**R10.2**,**R10.6**,18.36,**R18.2**
s 5(h) 11.54
s 53(4)(a) 19.42
Crimes (Forensic Procedures) Act 2000 ..... 11.54
Crimes (Forensic Procedures) Regulation 2008 16.19
Crimes (Sentencing Procedure) Act 1999
s 3A 2.4,2.8
s 6 ..... 20.6
s 11 ..... 6.19
s 21A(2)(j) 6.28
s 25 ..... 9.79,10.36
s 25(2) 9.79
s 55 ..... 17.16
s 58 ..... 17.16
s 75 ..... 20.6
s 76 ..... 20.6
s 77 ..... 20.6
s 78 ..... 20.6
s 81 ..... 20.6
s 82 ..... 20.7
s 98 ..... 7.6
Crimes (Serious Sex Offenders) Act 2006 ..... 2.21
s 12 ..... 8.9
Crimes Act 1900 ..... 11.33
s 4 ..... 14.41
s 52AA(3) 8.5
s 61H(1A) 11.31
s 85A 3.46
s 95 ..... 8.26
s 96 ..... 8.26
s 97 ..... 8.26
s 98 ..... 8.26
Crimes Amendment (Aggravated Sexual Assault in Company) Act 2001 ..... 3.46
Crimes Amendment (Apprehended Violence) Act 2006 ..... 3.67
Crimes Amendment (Gang and Vehicle Related Offences) Act 2001 ..... 3.46
Crimes Amendment (Organised Car and Boat Theft) Act 2006 ..... 3.67
Crimes and Courts Legislation Amendment Act 2005 ..... 3.67
Crimes and Courts Legislation Amendment Act 2006 ..... 3.67
Crimes Legislation Amendment (Criminal Justice Interventions) Act 2002 ..... 3.63
Crimes Legislation Amendment Act 2002 ..... 3.64
Criminal Appeal Act 1912.....9.14,**R9.3**
s 5(1) 9.9
s 5A 9.10
s 5AA(1) 9.9
s 5AB 9.16
s 5AD(1) 9.9
s 5AF 9.16
s 5AG 9.16
s 5B(1) 9.6
s 5BA 9.16
s 5D(1) 9.9

s 5DA(1) 9.9
s 5DB(1) 9.9
s 5DC 9.16
s 5E 9.16
s 18(2) 9.72,9.73
s 18(3) 9.69,9.72
s 25A(1) 9.74
s 28A 9.75
s 29 ..... 9.17
Criminal Legislation Amendment Act 1995 ..... 3.46
Criminal Procedure Act 1986 ..... 11.33
s 199 ..... 10.36
s 200 ..... 10.36
s 202(3) 9.79
s 306M 11.31
s 346 ..... 13.25
s 347 ..... 13.25
Criminal Procedure Regulation 2010 ..... 13.25
District Court Act 1973
s 176 ..... 9.7
Drug Misuse and Trafficking (Ongoing Dealing) Act 1998 ..... 3.46
Drug Summit Legislative Response Act 1999 ..... 3.38
Imperial Acts Application Act 1969 ..... 3.9
Inclosed Lands Protection Act 1901
s 4 ..... 7.45
Law Enforcement (Powers and Responsibilities) Act 2002
pt 3 ..... 16.19
pt 4 ..... 16.19
pt 6 ..... 16.19
pt 6A 16.19
s 72 ..... 16.21
s 99(3) 15.28,15.30,15.34
s 99(4) 18.55
s 105 ..... 7.1
s 206 ..... 7.39,10.83,10.84
Law Enforcement (Powers and Responsibilities) Regulation 2005 ..... 22.6
cl 23 ..... 11.32
cl 24 ..... 11.32
Law Enforcement and Other Legislation Amendment Act 2007 ..... 3.67
Law Enforcement Legislation Amendment (Public Safety) Act 2005 ..... 3.67
Local Court Act 2007
s 45 ..... 15.38
Local Government Act 1993
s 632 ..... 7.45
Marine Safety Act 1998
s 28C 16.19
sch 1 ..... 16.19
Mental Health (Forensic Provisions) Act 1990
s 3(1) 11.31
Mental Health Act 2007 ..... 11.33
s 4(1) 11.31
Passenger Transport (Drug and Alcohol Testing) Regulation 2010 ..... 16.19
Passenger Transport Act 1990
s 9C 16.19
sch 5 ..... 16.19
Police Act 1990
s 6(3)(b) 10.80
s 211A 16.19
s 211AA 16.19
Police Powers (Drug Premises) Act 2001 ..... 3.46
Police Regulation 2008
pt 5 div 4-7 ..... 16.19
Prisons Act 1952
s 40A 15.19
Rail Safety (Drug and Alcohol Testing) Regulation 2008
pt 4 ..... 16.19
Rail Safety Act 2008
s 19 ..... 16.19
sch 1 ..... 16.19
Road Transport (Safety and Traffic Management) Act 1999
pt 2 div 3-3A 16.19
Summary Offences Act 1988 ..... 7.3
s 4 ..... 7.10,**R7.1**
s 5 ..... 7.10,**R7.1**
s 6 ..... 7.45
s 11A 7.10,**R7.1**
s 11A(1) 7.17
s 11B 7.10,7.19,**R7.1**
s 11C 7.10,7.19,**R7.1**
s 11E 7.19,**R7.1**
s 11FA 7.19,**R7.1**
s 11G 7.19,**R7.1**
s 11G(1) 7.19
s 11G(1)(a) 7.17
s 11G(1)(b) 7.17
s 15-20 ..... **R7.1**
s 27D(1) 7.17
s 27DA(1) 7.17
Supreme Court Act 1970 ..... 15.19
s 69 ..... 9.7
s 69A 9.71
s 101(2)(h) 9.8
Supreme Court and Circuit Courts (Amendment) Act 1912
s 8 ..... 15.19
Supreme Court and Circuit Courts Act 1900
s 33A 15.19
Supreme Court Procedure Act 1957
s 13 sch 1 ..... 15.19

Surveillance Devices Act 2007
pt 3 ... 16.19
pt 4 ... 16.19
pt 5 ... 16.19
Telecommunications (Interception and Access) (New South Wales) Act 1987 ... 16.19
Victims Rights Act 1996 ... 2.6
Weapons and Firearms Legislation Amendment Act 2010 ... 3.67
Weapons Prohibition Act 1998 ... 3.67
Young Offenders Act 1997
s 7 ... 11.14
s 8 ... 7.20

Northern Territory

Bail Act
s 9 ... 7.52
s 19(4) ... 19.24
s 23A ... 9.28
s 24 ... 10.5
s 24(1)(b) ... 10.12

Queensland

Bail Act 1980 ... 10.11
S 10(3) ... 19.24
s 11 ... 14.11
s 11A ... 7.52
s 14A(1)(b) ... 7.52
s 16(1) ... 14.11
s 16(2) ... 10.5
s 19 ... 19.24
s 33 ... 17.1

South Australia

Bail Act 1985
s 10 ... 10.5
s 12(2) ... 19.24

Tasmania

Bail Act 1994
s 9 ... 17.17
Justices Act 1959
s 125C ... 19.24

Victoria

Bail Act 1977 ... 6.2,8.48,10.11
s 3A ... 11.63
s 4 ... 10.7
s 4(2)(d) ... 14.11
s 4(2)(d)(i) ... 8.48,10.10
s 4(3) ... 10.5
s 5(3) ... 14.11
s 18AA ... 19.23
s 30 ... 17.1,17.17

Western Australia

Bail Act 1982
s 6(4) ... 14.11
s 6A(4) ... 10.5
s 7A ... 7.52
s 13A ... 7.52
s 28(2)(d) ... 20.25
s 51 ... 17.20
sch 1 pt B cl 4 ... 19.23
sch 1 pt C cl 4A ... 9.28
sch 1 pt D cl 2(2) ... 14.11
sch 1 pt D s 3 ... 20.25
Community Corrections Legislation Amendment Act 1990 ... 20.25

Canada

Canadian Charter of Rights and Freedoms
s 10 ... 2.20
s 11(d) ... 2.16
Criminal Code, RSC 1985, c C-46
s 515 ... 6.9
s 520(1) ... 19.24
s 520(8) ... 19.24
s 521(1) ... 19.24
s 679(1)(a) ... 9.42
s 679(1)(b) ... 9.42
s 679(3) ... 9.42
s 679(4) ... 9.43

New Zealand

Bail Act 2000
s 7(1) ... 7.14
s 7(2) ... 7.14
s 7(3) ... 7.14
s 7(4) ... 7.14
s 8(1) ... 14.11
s 14 ... 9.40
s 31(3) ... 14.11
s 40 ... 19.24
s 41 ... 19.24
Children, Young Persons and their Families Act 1989 ... 7.14
Crimes Act 1961 ... 7.14

United Kingdom

Bail Act 1826 ... 3.6,3.7
Bail Act 1976
s 3AA ... 20.18
s 6(3) ... 20.18
sch 1 pt 2A(1) ... 19.24
Bill of Rights 1688 (1 Wm & M sess 2, c 2) ... 3.6
Criminal Justice and Police Act 2001
s 131 ... 20.18

Habeas Corpus Act 1679 (31 Car II, c 2) 3.6
Human Rights Act 1998
sch 1 art 6(2) 2.16
sch 1 art 7(1) 2.20
Petition of Right 1627 (3 Car I, c 1(a)) 3.6
Police (Detention and Bail) Act 2011 ..... 22.11
Police and Criminal Evidence Act 1984 ..... 22.11
Statute of Westminster I 1275 ..... 3.4,3.6,3.7,3.8

United States of America

Bail Reform Act of 1966, Pub L No 89-465, 80 Stat 214 ..... 3.16
United States Code 18 USC
§ 3142-3144 ..... 6.9
ch 207 ..... 6.9

Treaties

Convention for the Protection of Human Rights and Fundamental Freedoms
art 6(2) 2.16
art 7(1) 2.20
Convention on the Rights of Persons with Disabilities 11.44,11.46
Convention on the Rights of the Child 8.51
art 37 ..... 2.35
art 40 ..... 2.35
art 40(2) 2.16
European Convention for the Protection of Human Rights and Fundamental Freedoms
art 6(3) 2.23
International Covenant on Civil and Political Rights
art 1 ..... 2.14
art 3 ..... 2.14
art 9 ..... 18.61
art 14(2) 2.16
art 14(4) 2.35
art 26 ..... 11.1

UN Materials

Declaration of the Rights of the Child 11.8
Declaration on the Rights of Indigenous Peoples
art 11 ..... 11.50
Standard Minimum Rules for the Administration of Juvenile Justice 2.35,11.28
Rule 13 ..... 11.28
Standard Minimum Rules for the Treatment of Prisoners
art 84.2 ..... 2.16

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NSW Law Reform Commission
Level 13 Swire House
10 Spring Street
Sydney NSW 2000 Australia

GPO Box 5199
Sydney NSW 2001 Australia
DX 1227 Sydney

Phone: 02 8061 9270
Fax: 02 8061 9376
Email: nsw_lrc@agd.nsw.gov.au
Internet: www.lawlink.nsw.gov.au/lrc

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