



Review of the Bail Act 2013

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1. Terms of Reference

NSW Premier Mike Baird and Attorney General Brad Hazzard have established a review of the new bail laws to ensure the safety of the community, victims and witnesses is at the forefront of all decisions made on bail.

The new laws were introduced following concerns the old system was overly complicated, full of anomalies and did not produce consistent outcomes. The new Bail Act replaces the complex set of presumptions with a risk-based model that prioritises public safety above all else. The new focus on individual risk reflects that widely varying circumstances can result in the commission of the same type of offence, and the offence with which a person is charged may not be a good indicator of the risk they pose to the community.

However, concerns have been expressed by the community and victims about the new bail regime. To ensure victim and community confidence in NSW's bail laws and that community safety is paramount, the Review is to consider:

- Whether the Bail Act 2013 is appropriately framed to achieve its objectives including:
- The protection of the community
- Consistency of decision-making
- The need for laws to be easily understood and applied.

In considering the need to protect the community, the review will consider:

- Whether the risk-based approach sufficiently reduces the risk that the accused may endanger the safety of victims, individuals or the community; commit a serious offence while on bail; interfere with a witness or evidence; or fail to attend court
- Whether the Act strikes the right balance in protecting the community and the integrity of the justice system
- Recent judgments and the implications of the new Act.

Former Attorney General John Hatzistergos will be supported by the Department of Premier and Cabinet and will have the advice of the Bail Monitoring Group which has representatives

from the NSW Police Force, Department of Justice, BOCSAR, Ministry of Police and Emergency Services, the Director of Public Prosecutions and Legal Aid.

An interim report is to be provided to the Premier and Attorney General by the end of July 2014, with any potential immediate changes in time for the next sitting of Parliament.

2. Executive Summary

1. The new *Bail Act 2013* came into force on 20 May 2014. It is based on an “unacceptable risk” model which replaces the complex set of presumptions that existed under the previous legislation. This was a significant change, which gives a higher degree of discretion to bail authorities by focusing on individual risk.
2. The key feature of the model is that it requires the bail authority to determine whether the accused would pose an unacceptable risk if released from custody. This is an unacceptable risk of:
 - failing to appear at any proceedings for the offence, or
 - committing a serious offence, or
 - endangering the safety of victims, individuals or the community, or
 - interfering with witnesses or evidence.¹
3. If the bail authority is satisfied the accused presents an unacceptable risk, they must then consider whether this risk can be mitigated by bail conditions. If so, conditional bail will be granted. If the risk cannot be sufficiently mitigated, bail will be refused.
4. This model followed a review of bail laws by the NSW Law Reform Commission. The Commission reported in April 2012, recommending a justification model with a universal presumption in favour of bail. After an extended period of consultation and deliberation, the Government decided the risk management model would better protect community safety than the model recommended by the NSW Law Reform Commission.
5. Hundreds of bail decisions are made in NSW every day by police and judicial officers. It is essential the Act is based on sound principles and is easy to use. A select number of bail decisions have caused concern for police, victims and the community. This concern has prompted the Premier and the Attorney General to commission an independent review of the Act to ensure it is framed to achieve its objectives.

¹¹ Section 17(2) of the *Bail Act 2013*

6. The review has focused on underlying policy issues. Given its targeted focus, the review has not been hampered by the lack of data.
7. The methodology involved consultation with key stakeholders and a review of bail decisions that were raised in public commentary or referred to by stakeholders. The review has also drawn significantly on the work of law reform commissions around Australia.
8. The review has focused on the immediate changes that are required. A number of stakeholders have put forward proposals that are better dealt with by the inter-agency Bail Monitoring Group. I will liaise with this group over the next 12 months and will monitor these proposals.

2.1 Purpose of the Bail Act (Chapter 5)

9. The purpose of the *Bail Act 2013* is contained in section 3 of the legislation. It requires a bail authority to have regard to the presumption of innocence and the general right to be at liberty.
10. This is not a new consideration, with the presumption of innocence operating at common law. Despite this, the provision has caused confusion, particularly in its interaction with the list of risk factors a bail authority is to consider, as set out in section 17(3). The presumption of innocence is not a purpose of the Act, and should not operate as a stand-alone consideration aside from the other objects such as the protection of the community and preserving the integrity of the justice system.
11. Consideration should therefore be given to either moving the provision into a broader principles clause or preamble. Any such reference should also note the importance of bail decisions to community safety and preserving the integrity of the justice system
(Recommendation 1).

2.2 Unacceptable risk test (Chapter 6)

12. The unacceptable risk test, as described above, is the central provision of the *Bail Act 2013*. It involves a two-stage test. The bail authority must firstly decide whether the accused presents an unacceptable risk and secondly, whether that risk can be mitigated by bail

conditions.

13. Whilst intended to be a simpler test, its application has proved less so. The reasoning process of judicial officers when applying the test is difficult to see in a number of cases. There have however been a number of Supreme Court decisions that demonstrate how the test is to be applied appropriately.
14. There are conceptual difficulties with the language of “unacceptable risk”. It is difficult for the community to appreciate how an accused who was found to present an “unacceptable risk” can be safely released, even with strict bail conditions. The review recommends a shift to a one-stage test. This will involve the bail authority considering any conditions that can be imposed in the context of the other risk factors in section 17(3) and which the bail authority believes on reasonable grounds can be complied with (**Recommendation 2**). The effect of this is that an “unacceptable risk” will only ever refer to a risk that cannot be sufficiently addressed so as to grant bail.
15. There are also additional risk factors that should be included. These are an accused’s criminal associations; the views of the victim and the victim’s family (for serious offences) where available; and the conduct of the accused towards the victim or the victim’s family after the offence (**Recommendation 3**). The need for a “pattern of non-compliance” with bail acknowledgments, bail conditions, apprehended violence orders, parole orders or good behaviour bonds should be replaced with a “history of compliance” (**Recommendation 4**). This is in recognition of the fact that non-compliance may be a significant indicator of an accused’s level of risk, without it amounting to a “pattern”.

2.3 Serious offenders (Chapter 7)

16. Under the current *Bail Act 2013*, a bail authority must apply the same unacceptable risk test to serious offenders. The nature and seriousness of the offence is one of the risk factors the bail authority must consider. There is limited guidance in the Act on what constitutes a serious offence. These same guiding provisions existed in the previous Act, however were largely dormant because of the overriding offence-based presumptions. These provisions have now been given increased prominence.

17. A number of Supreme Court decisions have assisted with the interpretation of these provisions. Given however that the majority of bail decisions are made by police, registrars and magistrates in high volume situations, there is benefit in additional requirements when dealing with specified classes of serious offenders.
18. Reassurance would be particularly enhanced in cases where the likelihood of the risk eventuating is outweighed by the consequences should the risk materialise. This also recognises the practicalities of having a large number of decision makers at different levels dealing with all categories of offenders and legislative criteria imposing significant evaluative discretion.
19. Bail legislation can only legislate for a structure, not judgment. Judgment can only be sensible and rational based on all available information at the time it is made.
20. With this in mind, the preferred option is to introduce a “show cause” provision. In this model, where an accused is charged with a show cause offence, the bail authority must refuse to grant bail unless the accused shows cause why their detention in custody is not justified (**Recommendation 5**). If satisfied the bail authority will then move on to considering the risk test. Both Victoria and Queensland have analogous versions of this model. In *Lacey & Lacey v DPP [2007] QSC 291; [2007] QCA 413* it was held that where a show cause situation does exist, courts will place considerable reliance on the strength of the Crown case.
21. A proposed list of show cause serious offence categories is provided (**Recommendation 6**). Juveniles will be excluded from the show cause test but will remain subject to the unacceptable risk test (**Recommendation 7**).
22. The provisions contained in this category based list are those serious offences where in the ordinary course the consequences of materialisation of the risk to the community and the administration of justice are such that they outweigh the likelihood of it occurring.
23. Juveniles will be excluded from the show cause provisions consistent with the approach taken in Queensland.

24. The risk test remains a robust and appropriate vehicle for assessing risk for many offenders. Its rigour should not be diluted by the absence of the show cause requirement in other cases. Indeed the additional factors proposed for inclusion in section 17(3) should enhance its effectiveness and give further community reassurance.
25. Any proposal to supplement the list of show cause offences (in accordance with the rationale earlier described) should be a matter reserved for the NSW Sentencing Council under a reference by the Attorney General. Other matters may also be referred as necessary.

2.4 Multiple bail applications (Chapter 8)

26. The savings and transitional provisions in the *Bail Act 2013* intend that the commencement of the new Act will not be classified as a change in circumstance for the purpose of making a fresh bail application under section 74(3)(c) or section 74(4)(b). This should be clarified in the legislation (**Recommendation 8**).
27. An amendment should also be made to section 74(3)(b) and section 74(4)(a) to require material information relevant to the grant of bail as a ground for a further release or detention application (**Recommendation 9**).

2.5 Bail offence (Chapter 9)

28. The NSW Police Force proposed offences for breaching conduct requirements; and committing an indictable offence whilst on bail. Both of these provisions are based on Victorian bail legislation.
29. It is however too early to draw conclusions from available data about the circumstances of breaches and their outcomes. This can be better considered once robust data under the 2013 Act is available.
30. There are existing mechanisms to deal with breaching conduct requirements or committing an indictable offence whilst on bail in the *Bail Act 2013* and the *Crimes (Sentencing Procedure) Act 1999*. There are also specific offences relating to failing to appear and interfering with the justice system. The review also recommends that committing a serious

indictable offence whilst on bail should be a show cause offence.

31. Otherwise, these proposals are therefore better dealt with by the Bail Monitoring Group, once more data is available. This will allow better consideration of whether applying additional penalties will provide a useful deterrent to breaching conduct requirements or committing an indictable offence whilst on bail, over and above the current arrangements.

2.6 Developing a culture around the new Bail Act (Chapter 10)

32. The culture around the new Act is still developing. There are a number of non-legislative initiatives that can be put in place to improve the current system.

33. These include:

- increased training to private legal practitioners on the new Act and advocacy skills in general (**Recommendation 10**)
- increased training for magistrates, registrars and deputy registrars, particularly regarding serious offences (**Recommendation 11**)
- publication of Supreme Court bail decisions wherever practicable (**Recommendation 12**).

3. Recommendations

Recommendation 1

That section 3(2) be deleted and consideration given to acknowledging the common law presumption as part of a new principles clause or deleting section 3(2) and inserting reference to it in a preamble to the *Bail Act 2013*. Any such reference should also note the importance of bail decisions to community safety and preserving the integrity of the justice system.

Recommendation 2

Replace the current two-stage unacceptable risk test with a one-stage test, whereby any conditions that may be imposed and the reasonable likelihood of them being complied with are considerations as to unacceptable risk.

If an unacceptable risk is found, then bail is refused consistent with the approach taken in Victoria and Queensland.

If no unacceptable risk is found, then bail conditions can be imposed that are consistent with section 24 of the *Bail Act 2013*.

If there is no bail concern, then unconditional bail is to be granted.

Recommendation 3

Include in section 17(3) (in addition to that proposed in Recommendation 2) the following additional considerations to be taken into account:

- a. An accused's criminal associations
- b. The views of the victim and the victim's family (for serious offences) relevant to s17(2)(c) where available
- c. Conduct of the accused towards the victim or the victim's family after offence.

Recommendation 4

Remove the need for a "pattern of non-compliance" with bail acknowledgments, bail conditions, apprehended violence orders, parole orders or good behaviour bonds from section 17(3)(i) and insert instead a "history of compliance".

Recommendation 5

Insert a provision that provides if the defendant is charged with a show cause offence, the bail authority must refuse to grant bail unless the defendant shows cause why the defendant's detention in custody is not justified.

The question of what constitutes just cause will be informed by similar considerations to those developed interstate.

Recommendation 6

The show cause requirement would apply to the following categories of serious offences where:

- The alleged offence involved the use of a firearm, or the unauthorised possession (in a public place where the alleged offence carries a penalty of imprisonment) acquisition, supply, or manufacture of a prohibited firearm or pistol (as defined in the *Firearms Act 1996*) or a weapon that is a military-style weapon (as defined in the *Weapons Prohibition Act 1998*).
- The alleged offence involved the sexual assault of a child under the age of 16 years and the accused is an adult.
- The alleged offence is a serious indictable offence committed whilst on bail or parole or subject to a supervision order made under the *Crimes (High Risk Offenders) Act 2006*. A serious indictable offence is any offence carrying a maximum penalty of five years imprisonment or more.
- The alleged offence is one carrying a maximum penalty of imprisonment for life.
- The alleged offence involves the supply, manufacture, cultivation, importation or exportation of not less than the commercial quantity of a prohibited substance. Prohibited substance will need to be defined as a prohibited drug, prohibited plant (DMTA) and a controlled drug or a controlled plant in the Criminal Code.
- The alleged offence is a serious personal violence offence or any offence that involves the infliction of wounding or grievous bodily harm, and the accused has a previous conviction for a serious personal violence offence. 'Serious personal violence offence' is to be defined as offences against the person in Part 3 of the Crimes Act that carry a maximum penalty of 14 years imprisonment or more.

Recommendation 7

Children should be exempt from the "show cause" provisions but remain subject to the "unacceptable risk" test.

Recommendation 8

Clarify in the legislation that the existence of the new *Bail Act 2013* (NSW) does not warrant a change in circumstance for the purposes of section 74(3)(c) or section 74(4)(b).

Recommendation 9

Amend section 74(3)(b) and section 74(4)(a) to require material information relevant to the grant of bail not presented on a previous application as ground for a further release or detention application.

Recommendation 10

That the Law Society provide increased training to its members (particularly private practitioners) on the new *Bail Act 2013* (NSW) and advocacy skills in general.

Recommendation 11

That the Local Court and/or Judicial Commission provide increased training to magistrates, registrars and deputy registrars dealing with bail applications where a serious offence is involved.

Recommendation 12

Wherever practicable, arrangements should be made to publish Supreme Court judgments regarding bail on an appropriate basis.

4. Introduction

34. The *Bail Act 2013* came into force on 20 May 2014.
35. The Act was developed after a long and involved process of deliberation including an initial consultation and roundtable discussion followed by a NSW Law Reform Commission review, reporting in April 2012.²
36. The *Bail Act 2013* did not however implement a justification approach to bail, as favoured by the NSW Law Reform Commission. Such an approach formed the basis of the *Bail Act 1978*. Instead the *Bail Act 2013* adopted a risk management approach. This is a new approach for NSW, and the knowledge and culture surrounding the Act is still developing.
37. Hundreds of bail decisions are being made across the state every day: by police, registrars, magistrates and judges. The overwhelming number have attracted no controversy. A relatively small proportion have caused concern for police, victims and the community.
38. This and other stakeholder concerns have prompted a review of the Act to ensure it is appropriately framed to achieve its objectives including:
- the protection of the community
 - consistency of decision-making
 - the need for laws to be easily understood and applied.

4.1 Methodology

39. The methodology for the review was cognisant of the following:
- the Bail Act is still very new, and adequate data is not yet available
 - the interim review period was short and its focus had to be targeted
 - significant research had already been conducted on bail, not only in NSW but across Australia.

² New South Wales Law Reform Commission (April 2012) *Bail*, Report 133.

40. The Department of Premier and Cabinet has provided the support services to enable the completion of this report. I would particularly like to thank Shenuka Wraight and Lauren Judge for their assistance.
41. The review was also greatly assisted by having access to persons and information that could provide information as to many of the concerns raised. A list of the stakeholders consulted throughout the course of the review is at Attachment A. The Attorney General facilitated unrestricted access to persons and materials to assist the review process. NSW Police and other stakeholders were also cooperative. Nevertheless some prioritisation was necessary. The review proceeded to consider a number of bail decisions raised in public commentary or referred to by stakeholders. Nearly all of these cases involved serious or repeat offenders. This provided some overview of how the implementation of the Act was progressing and assisted in identifying priorities for consultation with stakeholders.
42. In view of the fact that many of the cases are still before courts, cases will not be referenced by name except where necessary and decisions are published. The Attorney General will have access to material examined including transcripts, file information, police records and commentary. Where appropriate, issues raised in this material were drawn to the attention of stakeholders during consultation in order to invite responses and progress the review. The recommendations made in this review are informed by this material and stakeholder views.
43. This review has also drawn significantly on the work of law reform commissions around Australia, particularly the Victorian Law Reform Commission Review of the Bail Act which considers a risk based model.
44. There has been some concern expressed that the review is premature and is being undertaken in the absence of comprehensive data on how the new Act is operating. It is acknowledged that there is no data yet to assess some of the objectives of the Act such as:
- ensuring that bailees attend court
 - the risk of offences being committed on bail is minimised
 - defendants being unnecessarily remanded in custody is also kept to a minimum.

45. The most recent Quarterly Report from the Bureau of Crime Statistics and Research found:

Adult remand receptions fell by 27 per cent between April and June this year....As with adult custody numbers, the fall in juvenile custody numbers is mainly attributable to a drop in the number of defendants being remanded in custody by police.

Between February and June this year, the number of remand receptions arising from police bail refusal fell by 58 per cent. Over the same time period the number of remand receptions arising from court bail refusal fell by 40 per cent.

According to the Director of the Bureau, the fall in remand numbers coincides with the introduction of the new Bail Act but the precise reason for the fall is not yet clear.

There are three possibilities. The first is that courts are granting bail to a higher proportion of defendants.

The second is that the arrest rate for serious offences is falling.

The third is that police are more often dispensing with any requirement for bail.

We will have a clearer picture of which of these is true by September.³

46. The review has not been hampered by this lack of data, as it focuses on the underlying policy of the Act. This was necessitated by the terms of reference.

47. The review has however drawn from such data as was available under the *Bail Act 1978*. The NSW Law Reform Commission report highlighted a number of gaps including information about the outcomes of police bail decisions, the extent to which police bail decisions were affirmed, reversed or varied by the courts and information about people's bail status throughout the course of a court matter. The NSW Law Reform Commission recommended that data collection be improved⁴ and much of this data is now being collected. It is vital that this is done to inform the longer term review of the Act and its operation.

³NSW Bureau of Crime Statistics and Research Media Release *New South Wales Custody Statistics Quarterly Update June 2014*, available at http://www.bocsar.nsw.gov.au/bocsar/mr_nswcustodystatsjun2014.html (accessed July 2014).

⁴ Recommendation 21.2, New South Wales Law Reform Commission (April 2012) *Bail*, Report 133.

48. The terms of reference were to review the Act which Parliament established. The reforms enacted by the 2013 Act are significant. As with any intensively utilised legislation it is inevitable that issues will arise perhaps sooner rather than later; a factor recognised in the establishment of the Bail Monitoring Group, discussed later.
49. The process adopted has sought to provide an overview thus far.
50. Although the three areas specified in the terms or reference do not include reference to the rights of individual accused persons, there is an obvious interaction which cannot be ignored when considering issues of protecting the community, consistency and need for the laws to be easily understood and applied.
51. In making recommendations, the review has been mindful that the Act:
- is largely applied by decision-makers who do not have formal legal qualifications
 - is often applied in circumstances of significant work pressure
 - needs to have a level of flexibility to apply to a variety of circumstances
 - requires decisions often to be made in administrative settings with limited information
 - is still developing a culture and precedent setting (research shows that practices and procedures that influence the bail decision develop separately from the legislation)⁵
 - establishes a model which whilst it does not coincide with the NSW Law Reform Commission's recommendations, nevertheless follows a lengthy consultation and implementation program.

4.2 The Bail Monitoring Group

52. The Government established a Bail Monitoring Group to actively monitor and consider the Bail Act. Its Terms of Reference are at Attachment B. The Bail Monitoring Group meets monthly, and is made up of representatives from:
- the Department of Justice
 - the Ministry of Police and Emergency Services
 - the NSW Police Force
 - the Office of the Director of Public Prosecutions

⁵ King, Bamford and Sarre (2005) *Factors that Influence Remand in Custody* - Final Report to the Criminology Research Council.

- Legal Aid
- the Bureau of Crime Statistics and Research
- the Department of Premier and Cabinet.

53. The Bail Monitoring Group will continue to oversee the Act's implementation, and will consider any further issues that arise as our decision-makers become more familiar with the Act and as data becomes available. The review has examined progress thus far and will follow the progress of the Group as required over the next 12 months. The Group will provide a platform to consider any more detailed reforms that may be required. This is inevitable with any bail laws, and particularly newly implemented ones.

54. A number of issues have been raised in consultations, particularly by the NSW Police Force. This includes creating a new offence for breaching bail. This issue, along with others, are already being examined through other processes, although some discussion is to be found in this report. In compiling this interim report the focus has been on priorities under the terms of reference. The Bail Monitoring Group will continue to progress other matters.

4.3 The Bail Act 1978 - presumptions

55. When the Bail Act came into force in 1978 it created a presumption in favour of bail for all offences except violent offences and armed robbery. Since that time until when the new Bail Act came into effect there were 85 amending Acts.⁶

56. Before the old Bail Act was replaced with the new Act, courts had to distinguish between four categories of cases when considering whether or not to grant or refuse bail:

- cases where there is a presumption in favour of bail
- cases where there is no presumption in favour or against bail
 - a number of drug offences – mainly offences involving twice the indictable quantity;
 - violent or armed robbery;
 - domestic violence offences, where there is a history of violence;
 - attempt to murder, and conspiracy to commit murder;

⁶ New South Wales Law Reform Commission (April 2012) *Bail*, Report 133, at [3.33].

- manslaughter;
- wounding or grievous bodily harm with intent;
- kidnapping;
- aggravated sexual assault with intent to have sexual intercourse; sexual intercourse with a child who is under the age of 10;
- repeat offenders; and
- breach of control order by a controlled member of a declared criminal organisation.
- cases where there is a presumption against bail
 - a number of drug offences – mainly offences involving a commercial quantity;
 - a number of firearms and weapons offences;
 - terrorism offences;
 - riot offences, and serious offences in the course of riot;
 - repeat property offenders;
 - persons on lifetime parole – offences punishable by sentence of imprisonment; and
 - serious sex offenders – breach of supervision order.
- cases where bail can only be granted in exceptional circumstances
 - murder; or
 - a “serious personal violence offence” where the person charged has a previous conviction for a serious personal violence offence.⁷

57. However, this model did not only consider presumptions, it also considered: the probability of whether the accused will appear in court in respect of the offence; the interests of the accused person; the protection of alleged victims and their close relatives; and the protection and welfare of the community. For each of these criteria, the Act listed factors that could be considered. Interestingly, it was found that it was these personal circumstances that seemed to have the strongest impact on a bail decision. In its 2010 review, the NSW Bureau for Crime Statistics and Research found:

“Firstly, nearly half of those falling into the ‘exceptional circumstance’ category were on bail at their final court appearance. Secondly, factors such as prior criminal record,

⁷ Please note the summary of presumptions is drawn from Lucy Snowball, Lenny Roth, & Don Weatherburn (2010) *Bail Presumptions and risk of bail refusal: an analysis of the NSW Bail Act*, NSW Bureau of Crime Statistics and Research.

number of concurrent offences and delay in finalising a case, exert a much stronger influence on the risk of bail refusal than the presumptions surrounding bail. Thirdly, the bail refusal risk was higher for those charged with offences where there was no presumption for or against bail than for those charged with offences involving a presumption against bail.”⁸ (emphasis added)

58. The NSW Law Reform Commission considered the above report and focused on the finding that:

“After adjusting for the effects of other factors, the risk of bail refusal was found to be higher for those charged with offences where there was a presumption against bail or where bail should only be granted in ‘exceptional circumstances’. The risk of bail was also elevated for those with a larger number of prior convictions and/or concurrent offences.”⁹

59. The NSW Law Reform Commission concluded that:

“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.”¹⁰

4.4 The NSW Law Reform Commission Report

60. In its report, the Law Reform Commission noted that there were two models of bail in Australia - the “unacceptable risk” model and the “justification” model. The Commission

⁸ Ibid.

⁹ Ibid.

¹⁰ New South Wales Law Reform Commission (April 2012) *Bail*, Report 133, page xx.

noted that both models had support amongst the submissions it received.

61. The NSW Law Reform Commission recommended:

“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.”¹¹

“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.”¹²*

62. While the NSW Law Reform Commission drew parallels between the justification model and the risk management model, they ultimately recommended the justification model because they were of the view:

- the justification model can more easily incorporate reference to the interests of the person
- it can more easily incorporate reference to basic legal principles
- it has the advantage of being familiar to authorities and practitioners in this state.¹³

63. The Commission noted 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. Of course, these interests are necessarily taken into account in deciding whether a risk is unacceptable, but they are not explicit in the statutes.”¹⁴

64. In their original submission to the Commission, the NSW Police Force supported a risk management approach to bail, without the retention of presumptions. Its submission stated with reference to presumptions:

¹¹ Recommendation 8.1 of New South Wales Law Reform Commission (April 2012) *Bail*, Report 133.

¹² Recommendation 10.1 of New South Wales Law Reform Commission (April 2012) *Bail*, Report 133.

¹³ New South Wales Law Reform Commission (April 2012) *Bail*, Report 133 at [10.12].

¹⁴ New South Wales Law Reform Commission (April 2012) *Bail*, Report 133 at [10.11].

“The NSW Police Force does not endorse the risk management approach within the Bail Act 1977 (VIC). If a risk management approach is adopted, the preferred approach is that each determination on bail be supported by a simple straightforward process, unencumbered by presumptions.”¹⁵

65. In subsequent correspondence to the Chairperson of the NSW Law Reform Commission, the NSW Police Force affirmed support for the retention of presumptions.¹⁶

66. The NSW Police Force saw presumptions as having two main purposes:

- To provide consistency in decision-making in relation to bail, by providing clear guidelines to bail authorities and legal practitioners
- To enhance efficiency of the bail application process, and the judicial system generally through guidance to police and legal practitioners.¹⁷

67. The presumptions supported by the NSW Police Force in their revised submission were those in the 1978 Act. As those presumptions included decision presumptions against bail they are difficult to reconcile with a risk based model.

68. The NSW Law Reform Commission rejected the risk based model, largely on the basis that they considered consistency was not an overriding consideration. Instead, they favoured “individualised justice”¹⁸ based on the circumstances of the case. The NSW Law Reform Commission also rejected the argument that presumptions enhance the efficiency of the bail application process, citing the majority view of stakeholders that efficiency is undermined by the complex set of presumptions.¹⁹

¹⁵ NSW Police Force submission to NSW Law Reform Commission review of bail laws Appendix A (Submission BA39), 27 October 2011.

¹⁶ New South Wales Law Reform Commission (April 2012) *Bail*, Report 133 at [8.57].

¹⁷ NSW Police Force submission to NSW Law Reform Commission review of bail laws Appendix A (Submission BA39), 27 October 2011, pages 6-7.

¹⁸ New South Wales Law Reform Commission (April 2012) *Bail*, Report 133 at [8.66].

¹⁹ New South Wales Law Reform Commission (April 2012) *Bail*, Report 133 at [8.67].

69. Ultimately, the Commission recommended maintaining the “justification” model whereby there was a uniform presumption in favour of release applicable to all cases except those covered by an entitlement to release and appeal cases.²⁰

70. In these circumstances, the NSW Law Reform Commission did not go into detail about the risk-based model. The review has therefore drawn to some extent on the Victorian Law Reform Commission report on bail,²¹ which does consider the risk based model in greater detail.

4.5 The current risk based model

71. The NSW Government Response did not adopt the NSW Law Reform Commission recommended model, but instead adopted the risk based model. This model was developed after a robust process involving a working group including the NSW Police Force, the Department of Premier and Cabinet, the Department of Justice, the Ministry for Police and Emergency Services and Treasury. The working group considered the Law Reform Commission Report in detail and consulted with members of the police force and judiciary. The new model was consequently developed collaboratively. It was then tested with police and magistrates.

72. The key features of the NSW *Bail Act 2013* risk based model are:

- It operates without a system of offence-based presumptions. Instead it requires the decision-maker to assess the risk posed by an accused person when deciding whether to release or remand them
- If the decision-maker is satisfied that the accused does not present an unacceptable risk, the accused person will be released on unconditional bail
- If the decision-maker is satisfied an accused presents an unacceptable risk, the bail authority will assess whether the risk can be mitigated by the imposition of conditions
- If the decision-maker is satisfied that the risk cannot be mitigated, the accused will be remanded in custody until trial.

²⁰ Recommendation 8.1 of New South Wales Law Reform Commission (April 2012) *Bail*, Report 133.

²¹ Victorian Law Reform Commission (October 2007) *Review of the Bail Act: Final Report*.

73. The Act merges consideration of risks and personal considerations (not directly associated with risk) in section 17(3). As the then Attorney explained in his Second Reading speech:

“Proposed section 17 (3) sets out an exhaustive list of matters that the bail authority will be required to consider when determining whether or not there is an unacceptable risk. They include matters such as the accused's background and criminal history, the nature and seriousness of the offence, the strength of the prosecution case and any special vulnerability or needs the accused has because of youth, because they are an Aboriginal or Torres Strait Islander, or because they have a cognitive or mental health impairment. Whilst some of the considerations do not go directly to the existence of one of the risks identified in proposed section 17(2), they will be relevant to the question of whether or not any such risk is unacceptable, which is part of the determination the bail authority must make.”

74. There have now been some Supreme Court decisions addressing issues under the *Bail Act 2013*. These are discussed in greater detail in Chapter Six on the unacceptable risk model.

75. The risk based model should not be seen as necessarily more or less punitive than the 1978 presumption based model. Punishment is not an object of bail. It is however a significantly different model, with greater emphasis on the individual rather than the offence. However, it does provide decision-makers with more flexibility in their decision-making. Depending on the circumstances, the risk based model can be more onerous than the presumption based model if there are risk factors that cannot be overcome, particularly for offences where there was previously a presumption in favour of bail.

76. One of the features of the risk based model without presumptions was that in theory it should enable a person to be granted bail earlier in the process. The NSW Law Reform Commission found that under the 1978 presumption approach *“Many people spend a short time on remand and are then released to bail.”*²² The old presumption based model was in some ways a vehicle to get to the end, whereas the revised model aims to be the end itself. This should assist in reducing the dislocating effects of unnecessary imprisonment. The NSW Law Reform Commission said:

²² New South Wales Law Reform Commission (April 2012) *Bail*, Report 133 at [4.1].

*“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.”*²³

77. In 2013 in NSW, the median time spent on remand was 3.3 months.²⁴ A process whereby an accused who is ultimately granted bail is sitting in prison is very costly for the tax payer.

78. The Law Reform Commission report noted particular concern for people on remand who are later sentenced with no custodial sentence:

*“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...In that year, more than 2000 adults and almost 200 young people who were found guilty and were on remand when the proceedings were did not receive a custodial sentence or order.”*²⁵

79. Whilst assented to on 27 May 2013, the 2013 Act did not become operational until 20 May 2014. During that period it was necessary for lawyers, the judiciary and other stakeholders to implement revised procedures and training to familiarise themselves with the new approach. In the time available to the review, the examination of matters made clear that many of the concerns raised in public commentary were more appropriately directed to implementation processes.

80. The review does however propose some legislative and non-legislative action whilst still working within the risk based model. It is envisaged that this will enhance the Act’s ability to reduce the risk to the community by enhancing processes around bail determinations, providing greater consistency in determinations and maintaining ease of understanding.

²³ New South Wales Law Reform Commission (April 2012) *Bail*, Report 133 at [5.16].

²⁴ Australian Bureau of Statistics, *Prisoners in Australia 2013*, available at <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4517.0main+features392013> (accessed July 2014).

²⁵ New South Wales Law Reform Commission (April 2012) *Bail*, Report 133 at [5.28].

4.6 The scope of this report

81. In considering the underlying policy of the Bail Act, the review focuses on:

- the purpose clause in section 3(2) of the Act
- the ‘unacceptable risk test’
- a show cause requirement for serious offenders
- reinforcing the requirement that the new Bail Act itself is not used as the basis of a new bail application
- revising and supplementing some of the considerations relevant to risk in section 17(3), and
- proposing enhancement around the administration of the Act.

5. Purpose of the Bail Act

82. Section three of the Act states:

(1) The purpose of this Act is to provide a legislative framework for a decision as to whether a person who is accused of an offence or is otherwise required to appear before a court should be detained or released, with or without conditions.

(2) A bail authority that makes a bail decision under this Act is to have regard to the presumption of innocence and the general right to be at liberty.

83. The then Attorney General in his Second Reaching Speech to Parliament stated that:

“Proposed section 3 sets out the purpose of the Act which, at its essence, is to provide a legislative framework for bail decisions. This provision also requires a bail authority making a bail decision under the Act to have regard to the presumption of innocence and the general right to be at liberty. It is appropriate that these important legal principles be considered as part of the bail decision-making process.”

5.1 The reason for a purpose clause

84. It is important to remember that whilst acknowledging the strong support for an objects clause, the NSW Law Reform Commission did not recommend one, stating at [10.25-10.26]:

“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.

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 clarity in the substantive provisions of the statute. With competent drafting, an objects clause would have very little work to do.”

85. At [10.30] the NSW Law Reform Commission stated:

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.

86. Instead, the NSW Law Reform Commission recommended that there should be a new consideration of the public interest in freedom and securing justice according to law. In relation to this the Commission stated:

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.²⁶*

87. This recommendation was coupled with a recommendation for a presumption in favour of bail for all offences.²⁷

88. These recommendations were proposed in the context of the justification model advanced by the NSW Law Reform Commission.

89. The Government response to the NSW Law Reform Commission Report stated:

“The new Act will also have regard to the core principles underpinning our criminal justice system including the presumption of innocence and the general entitlement to be at liberty.”

90. In his Second Reading Speech, the then Attorney General made it clear the intention is that there be no presumptions operating either way stating:

²⁶ Recommendation 10.3 of New South Wales Law Reform Commission (April 2012) *Bail*, Report 133.

²⁷ Recommendation 8.1 of New South Wales Law Reform Commission (April 2012) *Bail*, Report 133.

“Rather than rely on presumptions, the bill requires that the bail authority consider particular risks when determining bail, namely, the risk that the accused will fail to appear, commit a serious offence, endanger the safety of individuals or the community, or interfere with witnesses.”

5.2 Interpretation of section 3

91. Inquiries of officials involved in advocating for the inclusion of section 3(2) in the 2013 Act have ascertained that it was aimed at reminding lay decision-makers of important legal principles. The view that there is nothing new in the provision has been endorsed in two cases.

92. In *R v Fesus* Adams J stated:

*“it is not correct to suggest that the presumption of innocence and the general right to be at liberty are new considerations”*²⁸

93. This was reiterated by Hamill J in *R v Lago*²⁹

“While the Act has changed in a significant way the focus of the Court from a series of complicated presumptions to an assessment of risk, certain fundamental concepts and protections that lie at the heart of our criminal justice system remain important. For example the Act does no violence to the presumption of innocence or to the ultimate requirement of proof beyond reasonable doubt before the State can punish one of its citizens.”

94. The real issue however is what role is to be played by the presumption of innocence in a bail determination.

95. Referring to the role of the presumption in the context of a risk based model, Thomas JA in *Williamson v The Director of Public Prosecution*, (McPherson JA agreeing) stated at [21] in the context of the Queensland legislation:

“No grant of bail is risk free. The grant of bail, however is an important process in civilised societies which reject any general right of the executive to imprison a citizen

²⁸ *R v Fesus* [2014] NSWSC 770 at [8].

²⁹ *R v Lago* [2014] NSWSC 660 at [13].

upon mere allegation or without trial. It is a necessary part of such a system that some risks have to be taken in order to protect citizens in those respects. This does not depend on the so called presumption of innocence which has little relevance in an exercise which includes forming provisional assessments upon very limited material of the strength of the Crown case and of the Defendant's character. Recognising that there is always some risk of misconduct when an accused person or for that matter any person, is free in society, one moves to consideration of the concept of unacceptable risk."

96. In the course of this review it is apparent that the role played by section 3(2) has been problematic or at least confusing, particularly in its interaction with section 17(3).

97. Indeed in *R v Chamseddine*³⁰ the Court appeared to have taken section 3 into account as a controlling factor in the decision without any evaluation of the section 17(3) task. A similar approach to section 3(2) has been taken in some Local Court determinations.

98. On the other hand in *R v Rokhzayi*³¹ Beech Jones J stated:

"An assessment of the strength of the prosecution case is a very difficult task for a bail court. Bail courts cannot and do not conduct a mini trial. Bail courts are only provided with a limited set of materials.The process envisaged by the Act is one of "risk assessment". Such an assessment is taken in the context where a person seeking bail is entitled to the presumption of innocence. Nevertheless, the Court is required to consider the strength of the prosecution case. This assessment informs the Court's assessment of the risk posed by the release of the person seeking bail. Of course the Court does not make any definite finding as to whether the accused person committed the offences in question. Instead it must have regard to the apparent strength of the evidence supporting the allegations in assessing the risk posed by their release."

99. In the case of section 3(2), that confusion appears confounded by placing the provision as a purpose of the legislation.

³⁰ Unreported 12 June 2014, Supreme Court of NSW, 12 June 2014.

³¹ *R v Rokhzayi* [2014] NSWSC 958 at [28]-[29].

100. To some extent, the confusion regarding a purpose clause was forecast when the NSW Law Reform Commission rejected the concept, stating:

*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 clarity in the substantive provisions of the statute.*³²

101. This is supported by section 33 of the *Interpretation Act 1987* which states

In the interpretation of a provision of an Act or statutory rule, a construction that would promote the purpose or object underlying the Act or statutory rule (whether or not that purpose or object is expressly stated in the Act or statutory rule or, in the case of a statutory rule, in the Act under which the rule was made) shall be preferred to a construction that would not promote that purpose or object.

102. There is a distinction to be drawn between the purposes of the Bail Act and bail.

103. On no basis could the presumption of innocence as referenced in section 3(2) be regarded as a purpose of the Act. In any event, it is difficult to understand why it should stand alone as a purpose aside from other objects such as the protection of the community and preserving the integrity of the justice system.

104. Section 3(1) is clearly a purpose of the Act. A more elaborate example of a purpose clause relevant to the Act is found in the Victorian Law Reform Commission Review of the Bail Act. The Commission recommended at Recommendation 9 a purpose for a proposed Bail Act as follows:

- Have within one Act all general provisions dealing with bail
- Establish processes to ensure the prompt resolution of bail after arrest
- Ensure bail hearings are conducted in a fair, open and accountable manner
- Ensure bail is not used to punish accused people
- Limit or prevent offending by accused people while on bail by providing for the imposition of conditions of bail commensurate with any such risk
- Promote transparency in decision making

³² New South Wales Law Reform Commission (April 2012) *Bail*, Report 133 at [10.26].

- Ensure the safety of the community, including alleged victims and witnesses
- Ensure the bail system does not perpetuate the historical disadvantage faced by Indigenous Australians in their contact with the criminal justice system
- Promote public understanding of bail practices and procedures
- Reform the bail laws

105. Victoria's human rights legislation separately provides for the presumption of innocence according to law.³³

106. Suggestions made in the course of the review to await appellate consideration of section 3(2) overlook the fact that the jurisdiction of the Supreme Court and the Court of Criminal Appeal in bail is primarily by review,³⁴ not error. Accordingly there is no certainty if and when it can be addressed. In any event this would not necessarily resolve the issue.

5.3 Relocate section 3(2)

107. An option canvased by some stakeholders is to remove section 3(2) from the objects clause and place it in section 17(3), so that it is one of a number of the matters a bail authority considers when determining whether there is an unacceptable risk.

108. This approach would add a further non risk factor into a risk assessment. A more fundamental problem however is that, it could confuse the general presumption that applies to all accused facing trial, with the specific task required by section 17(3) undertaken pursuant to sections 31 and 32 of the *Bail Act 2013* (without the rules of evidence applying and on the balance of probabilities). A bail application is not a mini trial where the presumption of innocence is to be engaged in an adversarial setting.

109. Section 17(3) also operates in a context where bail is being considered following the lodgement of an appeal to the District Court after conviction and sentence in the Local Court. It also operates where a plea of guilty is entered. In these circumstances, the bail authority should be entitled and is required to take into account these circumstances.

³³ Section 25(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

³⁴ Sections 66 and 67 *Bail Act 2013* (NSW).

110. Further, section 7(3) and Schedule 1 of the *Bail Act 2013* applies the bail provisions in settings involving proceedings for the administration of sentences. Clearly the presumption of innocence should have no role in these circumstances, and regulations would be required pursuant to Schedule 1 Clause 1 (3) to overcome any impact.

111. Finally, there may be other circumstances where decisions under the Act are being made where the presumption of innocence may have a role to play so as to make confining the application of the presumption to section 17(3) confusing.

112. For these reasons this proposal is not recommended.

5.4 Remove section 3(2)

113. Another option would be to remove section 3(2) and allow the common law to inform bail decisions as it did under the 1978 Act. This course was discussed with Legal Aid NSW who in their submission supported retention of the section but advocated as an alternative the insertion of a principles clause. The submission stated:

To remove the provision at this stage may be incorrectly interpreted as a definitive statement from parliament that a substantial change to the common law was intended by the amendment, that is, that the principles of the presumption of innocence and the right to liberty are no longer relevant to a release application.

The movement of the provision from a purpose to a principle may overcome the perceived concerns that the purpose is overriding other considerations under the Act, such as the section 17(3) considerations, rather than a guiding principle to be considered by all bail authorities exercising functions under the Act.

114. Advice on the interaction between section 3(2) and 17(3) was also requested from the Director of Public Prosecutions (DPP). The DPP has expressed the view that the placement of section 3(2) in the purpose clause may be unnecessary because the presumption of innocence underpins the criminal law.

115. The proposal for a principles clause advocated by Legal Aid NSW may have some merit. It mirrors the approach in other criminal legislation.³⁵ There are other matters which would need to be included in such a clause, such as the safety of the community and the integrity of the justice system.³⁶ Conscious of the need to ensure the legislation is easily understood and applied, there may be issues concerning the drafting and application of such a statement bearing in mind it is to be applied by lay decision-makers.

116. A further alternative is deleting section 3(2) together with an appropriate acknowledgment in the Second Reading Speech, explanatory note and/or preamble to the Act relating to the common law presumption of innocence before trial. The text would also need to acknowledge the public interest in bail more broadly, as previously discussed.

Recommendation 1

That section 3(2) be deleted and consideration given to acknowledging the common law presumption as part of a new principles clause or deleting section 3(2) and inserting reference to it in a preamble to the *Bail Act 2013*. Any such reference should also note the importance of bail decisions to community safety and preserving the integrity of the justice system.

³⁵ Section 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and section 6 of the *Children (Criminal Proceedings) Act 1987* (NSW).

³⁶ See also [10.32] of New South Wales Law Reform Commission (April 2012) *Bail*, Report 133.

6. Unacceptable Risk Test

6.1 Current unacceptable risk test

117. The central provision of the *Bail Act 2013* is section 17. Section 17 requires a bail authority to consider whether there are any unacceptable risks in releasing the accused from custody and provides an exhaustive list of the factors the bail authority is to consider in assessing risk.

118. It is framed in the following terms:

17 Requirement to consider unacceptable risk

- (1) A bail authority must, before making a bail decision, consider whether there are any unacceptable risks.
- (2) For the purposes of this Act, an **unacceptable risk** is an unacceptable risk that an accused person, if released from custody, will:
 - (a) fail to appear at any proceedings for the offence, or
 - (b) commit a serious offence, or
 - (c) endanger the safety of victims, individuals or the community, or
 - (d) interfere with witnesses or evidence.
- (3) A bail authority is to consider the following matters, and only the following matters, in deciding whether there is an unacceptable risk:
 - (a) the accused person's background, including criminal history, circumstances and community ties,
 - (b) the nature and seriousness of the offence,
 - (c) the strength of the prosecution case,
 - (d) whether the accused person has a history of violence,
 - (e) whether the accused person has previously committed a serious offence while on bail,

- (f) whether the accused person has a pattern of non-compliance with bail acknowledgments, bail conditions, apprehended violence orders, parole orders or good behaviour bonds,
 - (g) the length of time the accused person is likely to spend in custody if bail is refused,
 - (h) the likelihood of a custodial sentence being imposed if the accused person is convicted of the offence,
 - (i) if the accused person has been convicted of the offence and proceedings on an appeal against conviction or sentence are pending before a court, whether the appeal has a reasonably arguable prospect of success,
 - (j) any special vulnerability or needs the accused person has including because of youth, being an Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment,
 - (k) the need for the accused person to be free to prepare for their appearance in court or to obtain legal advice,
 - (l) the need for the accused person to be free for any other lawful reason.
- (4) The following matters (to the extent relevant) are to be considered in deciding whether an offence is a serious offence (or the seriousness of an 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.
- (5) If the person is not in custody, the question of whether there are any unacceptable risks is to be decided as if the person were in custody and could be released as a result of the bail decision.

119. This process is a two-stage test. The bail authority must consider whether:
- the accused poses an unacceptable risk as per s17(2)
 - the risk cannot be sufficiently mitigated by the imposition of bail conditions.
120. Sections 18 to 20 set out the four decisions that a bail authority can make after undertaking this test:
- To release the person without bail
 - To dispense with bail
 - To grant bail (with or without the imposition of bail conditions)
 - To refuse bail.
121. Bail can only be refused where there is an unacceptable risk that cannot be sufficiently mitigated by bail conditions.

6.2 Rationale for the current unacceptable risk test

122. The Government's intent in adopting this risk-based framework is clear in the then Attorney General's Second Reading Speech of the Bail Bill 2013:
- "[The Bill's] key feature is a simple unacceptable-risk test for bail decisions. This test will focus bail decision-making on the identification and mitigation of unacceptable risk, which should result in decisions that better achieve the goals of protection of the community while appropriately safeguarding the rights of the accused person...*
- The Government considers that applying its unacceptable-risk test is a much simpler and more responsive way to make bail decisions than applying the complex scheme of presumptions in the existing Bail Act. Simplifying bail laws so that they are easier to understand and apply is one of the key goals of this bill."*

6.3 Application of the current unacceptable risk test

123. Whilst the risk test may be viewed as a relatively simple one in statute, its application has in some cases proved less so. Indeed some of the cases, the evaluative exercise required by section 17(3) does not appear to have been carried out or if it has, the process has not been transparently exposed. It is not asserted the ultimate determination made in these cases was necessarily wrong.

124. It is accepted that many persons administering the legislation have significant experience with alleged offenders and bail assessments generally. It is also accepted that many decision-makers are under significant pressures. Further, with time, many of the provisions and the obligations required will become more familiar.
125. Instinct, intuition, emotion and even a concession from the parties as to unacceptable risk are not substitutes for the task required by the legislature.
126. Those requirements involve a structured method of evaluation and imposition of conditions.
127. If there were any doubts as to the approach required, the Supreme Court has recently provided useful guidance that demonstrates the nature of the evaluative exercise. In particular, the judgments emphasise the need to have regard to the full list of factors in section 17(3) and in particular, the nature and seriousness of the offence as required in section 17(3)(b).
128. In *R v Hawi* [2014] NSWSC 837 Harrison J went through each of the considerations in section 17(3) in determining whether or not it was established that the accused posed an unacceptable risk.
129. After conducting the first stage of this test, Harrison J went on to consider whether there is an unacceptable risk of the accused committing one of the four acts in section 17(2) and any bail conditions that can be imposed to mitigate this risk.
130. At [41] His Honour stated:
- It is clear that the scheme of the Act proceeds upon the basis that the grant of bail is never altogether free of risk. It would be surprising, given the complete unpredictability of individual behaviour, if any other view could be supported. The Act requires that the Court must accept that at least some risk will always be present and that it must make an evaluation as to whether or not the risk is unacceptable.*

131. In *R v Sarkhel Rokhzayi* [2014] NSWSC 958 Beech-Jones J considered the list of factors in section 17(3) in conducting the evaluative exercise. At [49] he stated:

“[Section] 20(1) requires the Court to be positively satisfied that the relevant unacceptable risk cannot be sufficiently mitigated by those bail conditions. If the Court was left in a state of uncertainty, the conditional bail would have to be granted.”

132. The nature and seriousness of the offence is dealt with in Chapter 7 of this report.

133. There are two options that could go some way towards addressing the conceptual challenges referred to. The first option involves retaining the two-stage test but changing the language of “unacceptable risk”. The second option involves creating a one-stage test in considering risk.

6.4 Retaining the two-stage test but changing the language of “unacceptable risk”

134. Applied correctly, the two-stage risk process has the primary benefit of encouraging a comprehensive risk assessment of the applicant before imposing any bail conditions.

135. The Government’s intention to ensure bail conditions that were targeted at managing risk and risk alone are clear in the then Attorney General’s Second Reading Speech:

“The Government agrees that there needs to be appropriate guidance in the legislation regarding the permissible purposes for bail conditions and the restrictions which apply to them so that unnecessary conditions are not imposed...Consistent with the Government's risk-based approach to bail, it provides that bail conditions can be imposed only for the purpose of mitigating an unacceptable risk. Conditions must be reasonable, proportionate to the alleged offence and appropriate to address the unacceptable risk in relation to which they are imposed. Further, they must not be more onerous than is necessary to mitigate that risk. The court will also need to ensure that compliance with the bail conditions is reasonably practicable.”

136. If the applicant is found to *not* pose an unacceptable risk in the first stage of the decision-making process, then no bail conditions are necessary.

137. This is a significant factor in deciding whether to keep the two-stage risk assessment process.
138. The language of “unacceptable risk” however does have a conceptual difficulty as the assessment could be formed on non-risk factors. This is a difficulty not only for lay decision-makers but also for the community to appreciate how a person who was found to present an “unacceptable risk” can be safely released, even with strict bail conditions.
139. The relevant risk could alternatively be phrased as a “bail concern”. The first stage of the test would therefore involve a bail authority determining whether an applicant presents a bail concern. If so, they would then go on to the second stage of the stage, and determine whether the bail concern can be satisfactorily addressed by bail conditions that the authority has reasonable grounds for believing the bailee will comply with.
140. If the bail concern cannot be satisfactorily addressed, it would then be classed as an unacceptable risk, in which case the accused must be denied bail.
141. If the identified bail concern could be managed by conditions, then they should be put in place.

6.5 Creating a one-stage test in considering unacceptable risk

142. The Victorian and Queensland bail regimes include consideration of unacceptable risk. In Victoria, bail must be refused if the Court is satisfied there is an unacceptable risk the accused person, if released on bail, would:
- fail to surrender himself or herself into custody in answer to his or her bail
 - commit an offence whilst on bail
 - endanger the safety or welfare of members of the public or
 - interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or herself or any other person.³⁷
143. The provisions in Queensland are comparable.³⁸

³⁷ Section 4(2)(d) *Bail Act 1977* (Vic).

³⁸ Section 16(1)(a) *Bail Act 1980* (Qld).

144. Unlike NSW, Queensland and Victorian bail schemes involve a one-stage test in determining whether the accused would pose an unacceptable risk if released from custody. This involves the bail authority considering any bail conditions that could be imposed in determining whether the accused would pose an unacceptable risk.
145. As noted earlier, it is difficult to conceptualise and communicate how a risk that has been assessed as “unacceptable” can become acceptable, even with strict bail conditions.
146. Creating a one-stage test would involve the bail authority considering any conditions that may be imposed in the context of other section 17(3) factors and which the bail authority believes on reasonable grounds would be complied with and otherwise in accordance with section 24.
147. The effect of this will be:
- An “unacceptable risk” will only ever refer to a concern that cannot be sufficiently addressed so as to grant bail
 - It will allow the bail authority to directly match a bail concern to a proposed bail condition or conditions and consider compliance
 - The test better lends itself to considering the s 17(3) factors that are related to risk and those that are related to the interests of the person (such as the length of time the accused is likely to spend in custody if bail is refused (s 17(3)(g)).

6.6 Stakeholder views

148. The proposal for a one stage test had support from NSW Public Defenders. The NSW Bar Association indicated that although it opposed the review it would not oppose adding in section 17(3) “any bail condition that might be imposed” with consequential changes to sections 18-20. The Local Court supported the two stage test expressing any change might remove the structured imposition of bail conditions targeted to risk factors. Retaining the current system but changing the language was favoured by Legal Aid NSW.
149. Overall, the one stage test as in Victoria and Queensland for unacceptable risk is favoured.

150. The NSW Public Defenders usefully proposed a model which provides a basis for the continuing limits on the imposition of conditions to address bail concern.
151. In considering any conditions it imposes the Court should also be required to consider the likelihood of compliance on reasonable grounds.

Recommendation 2

Replace the current two-stage unacceptable risk test with a one-stage test, whereby any conditions that may be imposed and the reasonable likelihood of them being complied with are considerations as to unacceptable risk.

If an unacceptable risk is found, then bail is refused consistent with the approach taken in Victoria and Queensland.

If no unacceptable risk is found, then bail conditions can be imposed that are consistent with section 24 of the *Bail Act 2013*.

If there is no bail concern, then unconditional bail is to be granted.

6.7 Additional considerations in assessing risk

152. As a result of the examination of key bail decisions and the consultation process, a number of additional considerations are proposed to be added to the list of factors in s 17(3).

1. An applicant's criminal associations

153. In both *R v Hawi* [2014] NSWSC 837 and *R v Sarkhel Rokhzayi* [2014] NSWSC 958 the Supreme Court took into account the links to organised crime networks. This was primarily in the context of assessing the likelihood of the applicant fleeing the jurisdiction or committing a serious offence.
154. This is not however an explicit factor in the list of considerations at section 17(3).
155. Queensland includes direct consideration of the accused's links to organised crime networks, with section 16(2)(b) of the *Bail Act 1980* requiring the court or police to have

regard to the accused's "associations" in determining whether they present an unacceptable risk. Victoria also includes reference to the accused's "associations".³⁹

156. Given the direct impact that an applicant's links to organised crime networks can have on their level of risk, there is value in making criminal associations an explicit factor in section 17(3).

II. Previous non-compliance with acknowledgments, conditions, orders or bonds

157. Section 17(3)(f) requires a bail authority to take into account whether the accused has a pattern of non-compliance with bail acknowledgments, bail conditions, apprehended violence orders, parole orders or good behaviour bonds.

158. There may well be instances where an accused's previous non-compliance with bail or another type of order or bond may be very relevant to the consideration of unacceptable risk, although they may not be part of a pattern. Also relevant may be other instances where the accused has complied. The provision as drafted and interpreted is limited to the frequency of the non-compliance not its circumstances or its gravity. This amendment would more directly empower the bail authority to consider the broader history of compliance.

159. It is therefore appropriate that the word "pattern of non-compliance" be removed from section 17(3)(f) and instead insert "history of compliance".

III. The views of the victim and the victim's family

160. Victims are currently taken into account in bail decisions in the following ways in NSW:
- in determining whether an accused poses an unacceptable risk, the bail authority must consider the likelihood that they will endanger the safety of victims, individuals or the community (section 17(2)(c))
 - in determining whether an offence is a serious offence or the seriousness of the offence for the purposes of section 17(4).

³⁹ Section 4(3)(b) *Bail Act 1977* (Vic).

161. A bail authority does not however consider the views of the victim and their family in whether bail should be granted.

162. The views of the victim are taken into account in bail decisions in Victoria and New Zealand. This is limited to certain serious offences only in New Zealand. This same limitation does not apply in Victoria.

163. In assessing whether the accused presents an unacceptable risk, section 3(e) of the *Bail Act 1977* (Vic) states that a court should take into account:

the attitude, if expressed to the court, of the alleged victim of the offence to the grant of bail.

164. This provision was inserted in 1997.

165. This is reflected in section 10(2) of the *Victims Charter 2006* (Vic):

“In having regard to the safety or welfare of members of the public in accordance with the Bail Act 1977, the safety or welfare of the victim or family members of the victim and the attitude of a victim towards the granting of bail may be taken into account by a court in determining whether to grant bail to a person accused of a criminal offence.”

166. In 2010, Victoria introduced a further provision whereby the views of the victim are taken into account when a bail authority is determining whether to vary bail:

“the attitude, if known, of the alleged victim of the offence to the proposed variation of the amount of bail or the conditions of bail.”⁴⁰

167. Although section 3(e) of the *Bail Act 1977* (Vic) is phrased broadly, the views of the victim are only relevant to consideration of whether the accused poses an unacceptable risk if released. In its review of bail laws, the Victorian Law Reform Commission noted that some stakeholders expressed concern about the relevance of the victim’s attitude to the bail decision.⁴¹

⁴⁰ Section 18AD(e) *Bail Act 1977* (Vic).

⁴¹ Victorian Law Reform Commission (October 2007) *Review of the Bail Act: Final Report* page 73.

168. The Victorian Law Reform Commission had concerns about the wording of the Victorian provision, and noted that:

*“Bail is not about the determination of guilt, nor is it concerned with punishment. The accused is presumed to be innocent. The commission believes the current provision is potentially misleading to victims and decision makers. The reference to the victim’s attitude may falsely raise victims’ expectations that they will have a say in whether or not the accused is released on bail. This is not the case, and the current provision may lead to disappointment and frustration with the system. The important and relevant issue is the safety of the victim. Focusing on the safety and welfare of victims, and any other person affected by the grant of bail, reflects current practice and accords with our proposed purposes statement.”*⁴²

169. To remedy this, the Commission recommended that rather than having regard to the victim’s attitude to the grant of bail, the Act should require regard to ‘the safety and welfare of the alleged victim or any other person affected by the grant of bail’ when assessing whether the accused poses an unacceptable risk.⁴³ This recommendation was intended to clarify how victims’ concerns are relevant to the bail decision.

170. The Victorian Law Reform Commission also recommended that the reference to the ‘family members of the victim’ in section 10(2) of the *Victims Charter 2006* (Vic) should be replaced with ‘any other person affected by the grant of bail’.⁴⁴

171. It should be noted however that the Victorian Government did not progress either of these recommendations.

172. Bail decisions in New Zealand also take into account victims’ views, although this is limited to more serious offences.

173. Section 8(4) of New Zealand’s *Bail Act 2000* states that:

⁴² Ibid.

⁴³ Recommendation 13 of Victorian Law Reform Commission (October 2007) *Review of the Bail Act: Final Report*.

⁴⁴ Recommendation 38 of Victorian Law Reform Commission (October 2007) *Review of the Bail Act: Final Report*.

When considering an application for bail, the court must take into account any views of a victim of an offence of a kind referred to in section 29 of the Victims' Rights Act 2002, or of a parent or legal guardian of a victim of that kind, conveyed in accordance with section 30 of that Act.

174. Section 29 of the *Victims' Rights Act 2002* relates to serious offences, including:

- *one of sexual violation or other serious assault; or*
- *one that resulted in serious injury to a person, in the death of a person, or in a person being incapable; or*
- *one of another kind, and that has led to the victim having ongoing fears on reasonable grounds—*
 - (i) *for his or her physical safety or security; or*
 - (ii) *for the physical safety or security of 1 or more members of his or her immediate family.*

175. Section 30 of the *Victims' Rights Act 2002* relates to victim's views about release on bail of accused or offender, and specifies that:

If a person accused of the offence or, as the case requires, the offender, applies to a court for release on bail, the prosecutor must determine whether or not this section applies to a victim in accordance with section 29 and, if it does,—

(a) must make all reasonable efforts to ensure that any views the victim has about the release on bail of the person accused of the offence or, as the case requires, the offender, are ascertained; and

(b) must inform the court of any views ascertained under paragraph (a).

176. NSW's section 17(2)(c) is somewhat similar to what was recommended by the Victorian Law Reform Commission, although s17(3) does not extend to consider the views of the victim.

177. In South Australia section 10(4) of the *Bail Act 1985* states:

Despite the other provisions of this section, where there is a victim of the offence, the bail authority must, in determining whether the applicant should be released on bail, give primary consideration to the need that the victim may have, or perceive, for physical protection from the applicant.

178. The South Australian provision is the only one that extends to the victim's perception. In consultations, both Legal Aid NSW and Public Defenders opposed provision for victims' views in section 17(3).

179. The voices of victims and their families are important and can well inform a bail decision, particularly where a serious offence is involved.

180. Victims' views will not always be available to the bail authority when making a bail decision. This is particularly the case with bail decisions made by police. This is a matter that can be accommodated in drafting so that the views can be taken into account to the extent relevant to the section 17(2)(c) enquiry where available.

181. Due to the high volume of bail decisions, it should be limited to serious offences only, so as not to impose any unreasonable resource demands.

IV. Conduct of the accused towards the victim or the victim's family after offence

182. In the course of consultations, the DPP raised the issue of adding the conduct of the accused towards the victim or the victim's family after the offence but prior to charging in section 17(3). This was discussed with victim group representatives and other stakeholders and has broad support.

183. The conduct of the accused in this respect may have a material bearing on the applicant's level of risk, and should be included. This should be expanded to include the conduct of the accused towards the victim or their family after the offence more broadly.

Recommendation 3

Include in section 17(3) (in addition to that proposed in Recommendation 2) the following additional considerations to be taken into account:

1. An accused's criminal associations
2. The views of the victim and the victim's family (for serious offences) relevant to section 17(2)(c) where available
3. Conduct of the accused towards the victim or the victim's family after the offence.

Recommendation 4

Remove the need for a "pattern of non-compliance" with bail acknowledgments, bail conditions, apprehended violence orders, parole orders or good behaviour bonds from section 17(3)(i) and insert instead a "history of compliance".

7. Serious Offenders

184. Other Australian, New Zealand and United Kingdom jurisdictions were surveyed for comparison. To varying degrees in all jurisdictions, persons accused of serious offences (as variously defined) are assessed differently to other offenders either by reference to a different bail authority hierarchy or a different bail threshold.
185. A feature of the 2013 test is that there is no limitation on bail decisions that can be made by reference to offences by different bail authorities and there is no additional threshold for more serious offences beyond the general test in section 17(3). This is not a feature in particular of risk based models in Victoria and Queensland.

7.1 The current model

186. The current risk based model requires consideration of whether a person is an “unacceptable risk” and if that risk can be “sufficiently mitigated”. This is discussed in detail in the chapter on “unacceptable risk”.
187. In determining if a person is an “unacceptable risk” consideration is given as to the nature and seriousness of the offence under section 17(3)(b). Section 17(4) lists the matters that are to be considered in deciding whether an offence is a serious offence (or the seriousness of the offence):
- (a) whether the offence is of a sexual or violent nature or involves an offensive weapon or instrument,
 - (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.
188. Although these provisions were in the 1978 Bail Act they were to some extent made dormant by the overriding offence based presumptions. The removal of the presumptions in the 2013 Act revived their significance. Referring to the provisions in section 17(3) and comparing it to section 32 of the 1978 Act Adams J in *R v Fesus [2014] NSWSC 770* stated at [8]:

*“In particular it is not correct to suggest that The nature and seriousness of the offence is now not to be considered; par17(3)(b) expressly requires this matter to be considered. Of particular relevance in the present application is the strength of the prosecution case: These matters have always been important. **However, where an applicant was charged with murder, their relative significance to the ultimate issue of whether bail should or should not be granted was different.**”*

189. The Supreme Court has now handed down a number of decisions that assist with the interpretation of section 17 of the Act. In *R v Rokhzayi* [2014] NSWSC 958 Beech Jones J held at [30]

“the assessment that is undertaken is not one that just considers the seriousness of the alleged offences and the evidence that supports them, but the “nature” of the offences. Thus, a person may be charged with a very serious offence and the evidence against them may be strong. However, the “nature” of the offence might be such that, even if it was established, it does not mean that there is a greater risk that they will commit a serious offence if they are released on bail. That is so because the circumstances of the alleged offence may, for example, suggest that it arose in a relatively unique set of circumstances that will not be replicated.”

190. The review of the material referred to demonstrates significant variation between various decision makers as to the relative significance attached to the matters in sections 17(3)(b) and (c) and further variation as to when conditions can be imposed.

191. Given the majority of decisions are made by police, registrars and magistrates in high volume situations, there is a question as to whether additional requirements should be in place when considering bail for persons accused of serious offences to promote greater consistency.

192. The Law Reform Commission referred to the risks flowing from the nature and seriousness of the offence charged at 10.90 of its report in the following terms:

“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 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.

193. Referring then to the modified Police submission relating to retaining presumptions the Law Reform Commission stated at 8.65 to 8.66:

“The NSW Police Force supports the retention of presumptions. The submission argues that presumptions promote consistency. 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.

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.”

194. These two paragraphs contend that the role of presumptions are overrated but then that consistency is not an overriding consideration. The impact of presumptions has been previously referred to in the introduction to this report, as it appears on the basis of the research.⁴⁵

195. Although the 2013 Act departs from the NSW Law Reform Commission's recommendations in the model adopted, it followed it by not retaining the 1978 Act presumptions. A number of those presumptions had a history in adverse circumstances. The NSW Law Reform Commission recommended a more comprehensive range of considerations referred to in Chapter 10 of its report. These were not adopted.

196. Considering the circumstances of unacceptable risk Harrison J in *R v Hawi* at [45]:

"The question of whether or not a risk is unacceptable must be a function of a number of factors, including the likelihood of the risk materialising on the one hand, and the seriousness or significance of the consequences if it does on the other hand. Whereas in the present case it may be thought that the likelihood of materialisation is small, the significance for the community and the administration of justice if it were to materialise is not."

197. The current risk based model may be seen as challenged in these circumstances.

198. The question posed is what variations would assist to provide greater reassurance to the community, bearing in mind the practicalities of having a large number of decision makers at different levels dealing with all categories of offenders and legislative criteria imposing significant evaluative discretion.

7.2 Grave consequences approach

199. Section 10(1)(a) of the South Australian *Bail Act 1985* specifically requires the bail authority to have regard to "*the gravity of the offence in respect of which the applicant has been taken into custody*". This places a similar emphasis on the gravity of the offence as was done in the cases of *R v Hawi* [2014] NSWSC 837 and *R v Rokhzayi* [2014] NSWSC 958.

⁴⁵ See [57] of this report for further detail.

200. While there is some attraction to this approach as it merges well with a risk based model and maintains current judicial findings, it would be ultimately difficult to apply in practice.

7.3 Specific types of offences can be granted only by the Supreme Court

201. Queensland has dealt with their most serious offenders by only allowing the Supreme Court to grant them bail. Section 13 of the Queensland *Bail Act 1980* only allows the Supreme Court to make certain bail decisions:

Only the Supreme Court or a judge of the Supreme Court may grant bail to a person charged with an offence under the Criminal Code if, on conviction, the sentencing court will have to decide which of the following sentences to impose on the person—

(a) imprisonment for life, which cannot be mitigated or varied under the Criminal Code or any other law;

(b) an indefinite sentence under the Penalties and Sentences Act 1992, part 10.

202. Section 13(2) of the Victorian *Bail Act 1977* also only allows the Supreme Court to grant bail for murder and treason in exceptional circumstances.

203. The prospect of introducing such requirements in NSW for the most serious offences was considered. At present NSW has provision for a stay to be granted under section 40 from a Local Court decision involving a serious offender as defined under section 40. This provision was little used under the 1978 however it has been used in a number of applications under the 2013 Act only for the stay to be withdrawn if a review to the Supreme Court is not to be pursued.

204. Whilst having applications for serious offenders dealt with by a Court higher in the judicial hierarchy may provide some benefits there would be resource and efficiency implications.

205. The use of section 40 where appropriate by the DPP appears to adequately address the safeguarding of the public interest.

7.4 Exceptional circumstances

206. Section 4(2) of the Victorian *Bail Act 1977* includes an “exceptional circumstances” test, as did the 1978 *Bail Act*. This test has been advocated by the NSW Police Force for inclusion in the new *Bail Act*.

207. The term has a history of application in the *Bail Act 1978* whilst the *Bail Act 2013* retains an “exceptional circumstances” testing. Section 22 which provides:

Despite anything to the contrary in this Act, a court is not to grant bail or dispense with bail for any of the following offences, unless it is established that special or exceptional circumstances exist that justify that bail decision:

(a) an offence for which an appeal is pending in the Court of Criminal Appeal against:

(i) a conviction on indictment, or

(ii) a sentence imposed on conviction on indictment,

(b) an offence for which an appeal from the Court of Criminal Appeal is pending in the High Court in relation to an appeal referred to in paragraph (a).

208. In the case of *R v Daron John Wright* (Supreme Court of New South Wales, 7 June 2005, unreported) Rothman J states at [22]:

"The use of the term 'special and exceptional circumstances' would require that the circumstances be both special and exceptional. The use of the term 'exceptional circumstances' means that the circumstances need to be exceptional but not necessarily special. 'Special' is defined by the Macquarie Dictionary as 'relating or peculiar to a particular person, thing, instance; having a particular function, purpose, of a distinct or particular character; being a particular one; extraordinary or exceptional'. Thus the distinction between 'special and extraordinary' and 'extraordinary' may be more illusory than substantial."

7.5 Show cause requirement

209. An alternative option for dealing with community concern regarding serious offenders is to adopt a “show cause” provision for serious offenders. In a “show cause” model the decision maker must refuse to grant bail unless the defendant shows cause why the

defendant's detention in custody is not justified. Both Victoria and Queensland have adopted different versions of this model.

210. In the Queensland *Bail Act 1980* section 16(3) contains a "show cause" model. The show cause offences have existed in the Queensland Bail Act since it commenced. The list of show cause offences has expanded over time to include life sentence offences (murder and serious drug offences) and participation in criminal organisations.

211. In *Lacey & Lacey v DPP [2007] QSC 291; [2007] QCA 413* it was held that where a show cause situation does exist, courts will place considerable reliance on the strength of the Crown case. If the Crown has a strong case, and the time to be spent in custody on remand is not likely to exceed any custodial sentence which might be imposed after conviction, the defendant will have difficulty in having his application for bail approved.⁴⁶

212. Section 16(3A) was introduced into the *Bail Act 1980* on 17 October 2013 to specifically create a "show cause" test for those involved in criminal organisation.

(3A) If the defendant is charged with an offence and it is alleged the defendant is, or has at any time been, a participant in a criminal organisation, the court or police officer must—

(a) refuse to grant bail unless the defendant shows cause why the defendant's detention in custody is not justified; and

(b) if bail is granted or the defendant is released under section 11A—

(i) require the defendant to surrender the defendant's current passport; and

(ii) include in the order a statement of the reasons for granting bail or releasing the defendant.

213. In relation to the requirement to "show cause" in s16(3A) of the *Bail Act 1980* the case of *Van Tongeren v Office of the Director of Public Prosecution (Qld) [2013] QMC 16 (14 November 2013)* made the following statements at [110]-[116] on how to interpret the legislative requirement that a decision maker must refuse to grant bail unless the defendant shows cause why the defendant's detention in custody is not justified:

⁴⁶ Legal Aid Queensland (2012) *Criminal Law Duty Lawyer Handbook*, available at <http://www.legalaid.qld.gov.au/publications/Practitioners-service-providers/Documents/duty-lawyer-handbook/chapter-2-bail.pdf> (accessed July 2014).

“Once the prosecution satisfies the court that the person charged with any offence is a participant in a criminal organisation as it has here, the evidentiary and persuasive onus shifts to the defendant, to show cause why ongoing detention in custody is unwarranted.

Is continuing detention unjustified?

There is, of course, no single or simple answer to this question. It will vary case by case. The Act does not explain when pre-trial detention is unjustified, and it would be almost impossible to state with clarity and precision all the complex mix of influential discretionary considerations that may be in an infinite range of different bail contexts.

No specific criteria for deciding when detention is not justified is stated in the Act.

However, preventable delays or circumstances that might make incarceration unjustified include a weak prosecution case or excessive preventable delay and, personal factors such as urgent or special medical needs or responsibilities.

This suggests that from now on it will be incumbent on a participant in a criminal organisation to identify some special as distinct from exceptional reason why he or she should not be refused bail in Queensland.”

214. Whilst the case refers to section 16(3A) of the Queensland Act, the case law would still seem to be relevant.

215. The Victorian *Bail Act 1977* also has a “show cause” provision in section 4(4). That Act also lists specific offences that the defendant must show cause for.

216. The Victorian Law Reform Commission in their Report on Bail considered if a reverse onus test should be maintained for certain offences, ultimately they rejected it:

“The commission notes the strong support for removing the presumption against bail and agrees with many of the criticisms of reverse onus tests: the inclusion of offences is ad hoc, the tests are complex, and the reasoning process behind them is artificial. We believe the reverse onus tests:

- create confusion*
- obscure risk as the key issue of a bail application*
- erode the presumption of innocence*
- are unfair and unnecessary.*

The commission has not heard any sufficiently compelling arguments in favour of their retention. There is no evidence to suggest the tests reduce absconding or offending on bail. It is imperative that the Bail Act be an accessible, simple and readily understood piece of legislation. The current Act fails on all counts. The commission believes removing the reverse onus provisions so that bail decisions are made solely on the basis of unacceptable risk will result in simpler and more readily understood bail laws.⁴⁷”

217. A BOCSAR study has however highlighted the problem of accused persons failing to appear before NSW courts, particularly repeat offenders.⁴⁸ The study found that in 14.6 per cent of Local Court finalisations in 2000 for persons on bail, the defendant failed to appear and a warrant was issued by the court. The study also found that failure to appear rates were highest among persons with prior convictions and multiple concurrent offences:

“Persons with prior convictions are far more likely to have a warrant issued against them for failing to appear while on bail and, in the Local Courts, persons with multiple concurrent offences are more likely to have a warrant issued against them for non-appearance. Persons charged with theft offences, receiving, break and enter, and disorderly conduct offences in the Local Courts are more likely to fail to appear while on bail. In the Higher Courts, the highest probability of failing to appear occurs for persons charged with serious drug offences or burglary (although the numbers are very small in each category).”

218. As a result of this, Parliament passed amendments in 2002 to reduce the availability of bail for some categories of repeat offender by removing the presumption of bail for:

- persons accused of an offence who are on bail, on parole, subject to a bond or serving another sentence at the time of the alleged offence;
- persons accused of an offence who have a previous conviction for failing to appear before a court in accordance with the person’s bail undertaking; and
- Persons accused of an indictable offence who have a previous conviction for an indictable offence.

⁴⁷ Victorian Law Reform Commission (October 2007) *Review of the Bail Act: Final Report* page 52.

⁴⁸ Chilvers, Allen & Doak (2002) *Absconding on Bail*, Bulletin – Contemporary Issues in Crime and Justice No. 68, NSW Bureau of Crime Statistics and Research.

219. A further 2004 BOCSAR study on the impact of these changes found that:

*“Since then the bail refusal rate for defendants appearing in New South Wales criminal courts has increased by seven 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. **Since the bail amendments the rate of absconding has fallen by 18.4 per cent in the Local Courts and by 46.4 per cent in the Higher Courts.**”⁴⁹ (emphasis added).”*

220. On balance the show cause test in conjunction with the risk based assessment would provide a useful level of reassurance for the community in relation to serious offenders whilst also providing greater level of consistency. It parallels provisions in similar risk models in Queensland and Victoria.

221. For reasons that will be explained later however it does not need to operate across the range of offences where there were previously presumptions against under the 1978 Act

7.6 The “show cause” requirement and the “unacceptable risk” model

222. The show cause test is different to the previous offence-based presumptions in the 1978 Act. Offence-based presumptions indicate the bail outcome that an accused is expected to receive. Where an accused cannot rebut the presumption, the presumption has operative force. This does not work within an unacceptable risk model. The show cause requirement is part of a *process* to reach the end decision which includes the risk assessment.

223. In Victoria there is a divergence of authority on whether the question of unjustifiable risk falls to be determined as part of showing cause or whether, it is an additional matter that needs to be determined if the accused successfully shows cause.⁵⁰ However, the most

⁴⁹ Fitzgerald and Weatherburn (2004) *The impact of the Bail Amendment (Repeat Offenders) Act 2002*, Bulletin – Contemporary Issues in Crime and Justice No. 83, Bureau of Crime Statistics and Research.

⁵⁰ Fitzroy Legal Services, *The Law Handbook*, available at <http://www.lawhandbook.org.au/handbook/ch03s03s06.php> (accessed July 2014).

recent case *Woods v DPP [2014] VSC 1* followed the approach developed in *R v Paterson (2006) 163 A Crim R 122*; *Director of Public Prosecutions v Harika* that the defendant must first discharge the onus of showing cause and then the prosecution must establish unacceptable risk.

224. Where an accused has demonstrated why their continuing detention is not justified, the bail authority must then assess whether the accused would present an unacceptable risk if released from custody.
225. The question of what constitutes just cause will be informed by the interpretations of similar provisions in interstate case law.
226. It is important that the risk assessment process should not be diluted by this approach as it will continue to operate across a broad range of offending and in some circumstances in conjunction with the show cause test.

7.7 What offences do you reverse the onus for?

227. Once deciding that a “show cause” reverse onus requirement should be adopted into the new Bail Act, the question turns to what offences it should apply to. This test should apply to offenders whose alleged offences are such that in the ordinary course, the consequences of materialisation of the risk to the community and the administration of justice are such that they outweigh the likelihood of it occurring.
228. Consequently, it is important that categories and types of offences are considered rather than specific lists of offences. The disadvantage of specific lists is significant, as it may easily miss an offence that does carry grave risks, and it is difficult for it to adapt and grow with community expectations. Broad categories should more accurately reflect groups or types of offences that have such significant consequences to the community.
229. Keeping this at the forefront, the offences in the *Crimes Act 1900*, other relevant offences, court judgments, stakeholder views, and general public debate, the categories developed for the “show cause” requirement to apply to are as follows:
1. The alleged offence involved the sexual assault of a child under the age of 16 years by an adult.

2. The alleged offence involved the use of a firearm, or the unauthorised possession (in a public place where the alleged offence carries a penalty of imprisonment) acquisition, supply, or manufacture of a prohibited firearm or pistol (as defined in the *Firearms Act 1996*) or a weapon that is a military-style weapon (as defined in the *Weapons Prohibition Act 1998*).
3. The alleged offence involves the supply, manufacture, cultivation, importation or exportation of not less than the commercial quantity of a prohibited substance.
4. The alleged offence is a serious indictable offence committed whilst on bail or parole or subject to a supervision order made under the *Crimes (High Risk Offenders) Act 2006*.
5. The alleged offence is one carrying a maximum penalty of imprisonment for life.
6. The alleged offence is a serious personal violence offence or any offence that involves the infliction of wounding or grievous bodily harm, and the accused has a previous conviction for a serious personal violence offence. Serious personal violence offence is to be defined as an offence against the person in Part 3 of the Crimes Act that carries a maximum penalty of 14 years or more imprisonment.

230. Comparisons with the 1978 Act presumptions are problematic. This is because the proposed list serves a different purpose in the risk model. Some presumption offences in the 1978 Act are appropriately addressed through the risk model. Other former presumption offences are now appropriate show cause offences.

231. Under these proposals a person charged with offences involving the sexual assault of a child under the age of 16 years by an adult, will be required to justify why they can be released on bail. Using the same criteria referred to in [229] above, the gravity of these offences and the public interest is of such significance that it is recommended the alleged offender must show cause.

232. The broad firearms category is intended to capture all firearms offences that are of a serious nature. Under s8B of the 1978 Bail Act, many of the firearms offences had to be linked to a prohibited firearm or pistol, this is no longer the case. The very nature of a firearm is that it is dangerous, and fits within the threshold applied to determining if an offence should be included in this category – that in the ordinary course, the consequences

of materialisation of the risk to the community and the administration of justice are such that they outweigh the likelihood of it occurring.

233. The inclusion of the broad drug offence category in the “show cause” category for alleged offences involving the supply, manufacture, cultivation, importation or exportation of not less than the commercial quantity of a prohibited substance will capture the drug provisions that were included in s8A of the 1978 Bail Act. Prohibited substance will need to be defined as a prohibited drug, prohibited plant (DMTA) and a controlled drug or a controlled plant in the Criminal Code.
234. I have also included the situation of when an alleged offence is a serious indictable offence committed whilst on bail or parole or subject to a supervision order made under the *Crimes (High Risk Offenders) Act 2006*. A serious indictable offence is any offence carrying a maximum penalty of five years imprisonment or more. I note that a breach under the *Crimes (High Risk Offenders) Act 2006* need not be a serious indictable offence, and this should be taken into consideration in drafting.
235. The next criterion is if the alleged offence is one carrying a maximum penalty of imprisonment for life. If the legislature is of the view that an offence should carry a life sentence it may be deemed inherently grave. This will capture murder matters, offences involving large commercial quantities of prohibited drugs and aggravated sexual assault offences committed in company or where the victim is under the age of 10 years.
236. The final category that should be included is when the alleged offence is a serious personal violence offence or any offence that involves the infliction of wounding or grievous bodily harm, and the accused has a previous conviction for a serious personal violence offence. Serious personal violence offence should be defined as an offence against the person in Part 3 of the *Crimes Act 1900* that carries a maximum penalty of 14 years or more imprisonment. This broad based category of personal violence offences attracting a penalty of 14 years or more relies on the determination that an offence is serious enough to carry a penalty of 14 years or more. This means that there are a range of offences that are now included in the “show cause” requirement such as female genital mutilation, that were not captured in the 1978 Bail Act definition of “serious personal violence”. There are some offences that were captured under the definition of “serious personal violence offence” in

the 1978 Bail Act that are not captured in this definition including: s37, 39, 61M(1), s66F(3), s73, 95, 97, 110, 195 of the *Crimes Act 1900*.

237. In addition, the categories of offences that have been proposed do not include the below presumptions against bail that were included in the 1978 Act:

- presumption against bail for certain repeat property offenders, and
- presumption against bail for offences committed in the course of riots or other civil disturbances.

This is because the features of these offences are considered to be adequately dealt with through the “unacceptable risk” model. An example best demonstrates this based on section 97 *Crimes Act 1900* - Robbery armed or in company.

238. The offence of Robbery armed with a weapon or in company under section 97 of the *Crimes Act 1900* covers a broad range of criminal offending behaviour.

239. The provision captures the following factual scenarios:

- a) A robbery committed by two young adult males in company stealing a mobile telephone from a passenger on a train
- b) A robbery committed by a 30 year old drug addict armed with a knife stealing grocery items from a convenience store attendant
- c) A pre-planned bank robbery involving a number of disguised offenders armed with offensive weapons and firearms

240. Although all of the above are serious criminal offences, the level of criminality is different for each offence and would be assessed by reference to factors including the type of weapon used. The range of criminal offending captured by this provision is reflected by the fact that although the maximum penalty is 20 or 25 years imprisonment (depending on the type of the weapon used), the sentences imposed by the courts range from suspended sentences to full time imprisonment for a number of years.

241. Some robbery offences that fall under this provision are more serious than others, both by virtue of the facts of the offence and the individual circumstances of the accused. For

example, in the following circumstances an accused should have to “show cause” as to why bail should be granted:

- A firearm is used during the commission of the robbery (as in the scenario (c) above)
- A victim is injured and this injury amounts to wounding or grievous bodily harm, and the accused has a previous conviction for a serious personal violence offence,
- The accused was on bail or parole at the time of the commission of the alleged offence

242. In these circumstances, the offence is deemed more serious and becomes a “show cause offence”. That is, the offence by its nature and circumstances is so serious that the onus shifts to the accused to establish why bail should be granted as detention in custody is not justified.

243. In other robbery offences involving weapons (such as a screwdriver) that do not become “show cause offences”, the court will still need to consider the unacceptable risk test in determining bail. This does not mean that the accused will automatically be granted bail, rather the nature of the weapon (amongst other things) will determine the severity of the risk posed by a particular accused.

244. This allows consideration of relevant factors and the level to risk to be assessed in determining a bail application and provides a mechanism for focus on serious offenders.

245. In addition, being an accessory, aiding, abetting or attempt of these offences should also be included in the “show cause” category of offences.

246. Some Commonwealth offences are covered by s15AA of the *Crimes Act 1914*, which specifies that bail is not to be granted in certain cases. Four of the other Australian jurisdictions are silent on Commonwealth offences. It is not proposed that any specific inclusion of Commonwealth offences be included in the NSW Bail Act. If the Commonwealth would like specific offences to have a show cause requirement, they are able to legislate for it under the *Crimes Act 1914* or for the issue to be referred to the Sentencing Council. There is no impediment however to the Commonwealth utilising the

State's show cause categories including those relating to life imprisonment and prohibited substances.

247. Any proposals to supplement the list of show cause offences (in accordance with the rationale earlier described) should be a matter reserved for the NSW Sentencing Council under a reference by the Attorney General. Other matters may also be referred as necessary.

7.8 Exemption for children

248. There should be an exemption from the "show cause" requirement for children. The NSW Law Reform Commission Report on Bail stated:

*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". 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.*⁵¹

249. A child is defined in section 4 of the *Bail Act 2013* as a person under the age of 18 years.
250. The Australian Institute of Criminology has considered bail schemes for children around Australia.⁵²
251. Queensland's bail provisions for children are contained in the separate *Youth Justice Act 1992*.⁵³ The show cause test relating to certain serious offences does not apply to young people.
252. In Victoria, young people are subject to the same considerations and conditions as adults, however the *Children, Youth and Families Act 2005* contains a number of protective mechanisms relating specifically for children.⁵⁴ Although the show cause test in Victoria

⁵¹ New South Wales Law Reform Commission (April 2012) *Bail*, Report 133 at [11.8].

⁵² Australian Institute of Criminology (2013) *Bail and remand for young people in Australia: a national research project*, Research and Public Policy Series no.125.

⁵³ Part 5 of the *Youth Justice Act 1992* (Qld).

⁵⁴ Part 5.2 Division 1 of the *Children Youth and Families Act 2005* (Vic).

does apply to children, a child can only be remanded up to a maximum of 21 days⁵⁵ although in practice children are sometimes remanded for multiple consecutive 21 day periods.⁵⁶

253. Given the inexperience and vulnerable position of children, it is considered that as in Queensland, the “show cause” provisions should not extend to them.

Recommendation 5

Insert a provision that provides if the defendant is charged with a show cause offence, the bail authority must refuse to grant bail unless the defendant shows cause why the defendant’s detention in custody is not justified.

The question of what constitutes just cause will be informed by similar considerations to those developed interstate.

Recommendation 6

The show cause requirement would apply to the following categories of serious offences where:

- The alleged offence involved the use of a firearm, or the unauthorised possession (in a public place where the alleged offence carries a penalty of imprisonment) acquisition, supply, or manufacture of a prohibited firearm or pistol (as defined in the *Firearms Act 1996*) or a weapon that is a military-style weapon (as defined in the *Weapons Prohibition Act 1998*).
- The alleged offence involved the sexual assault of a child under the age of 16 years and the accused is an adult.
- The alleged offence is a serious indictable offence committed whilst on bail or parole or subject to a supervision order made under the *Crimes (High Risk Offenders) Act 2006*. A serious indictable offence is any offence carrying a maximum penalty of five years imprisonment or more.
- The alleged offence is one carrying a maximum penalty of imprisonment for life.
- The alleged offence involves the supply, manufacture, cultivation, importation or exportation of not less than the commercial quantity of a prohibited substance. Prohibited substance will need to be defined as a prohibited drug, prohibited plant

⁵⁵ Section 346(3)(b) *Children Youth and Families Act 2005* (Vic).

⁵⁶ Australian Institute of Criminology (2013) *Bail and remand for young people in Australia: a national research project*, Research and Public Policy Series no.125 page 41.

(DMTA) and a controlled drug or a controlled plant in the Criminal Code.

- The alleged offence is a serious personal violence offence or any offence that involves the infliction of wounding or grievous bodily harm, and the accused has a previous conviction for a serious personal violence offence. Serious personal violence offence is to be defined as an offence against the person in Part 3 of the Crimes Act that carries a maximum penalty of 14 years or more imprisonment.

Recommendation 7

Children should be exempt from the “show cause” provisions but remain subject to the “unacceptable risk” test.

8. Multiple bail applications

254. There are a number of considerations in determining whether a fresh application for bail should be granted. On the one hand, being remanded is a serious imposition on a person's liberty and should only be done with due regard to procedural fairness. On the other, it is important for victims, the community and court resources that an accused person cannot make multiple release applications unless justified.

255. There are two points of clarification that I believe are required to section 74.

8.1 The existence of the new Act does not warrant a change in circumstance

256. The savings and transitional provisions in the new Act intend that the commencement of the new Act will not be classified as a change in circumstance for the purposes of section 74(3)(c).

257. I am advised however that there have been a number of instances where this argument has been raised. Although clause 9 of the *Bail Regulation 2013* addresses this issue, legislative clarification is appropriate.

258. Further, in light of the observations by Adams J in *R v Fesus* [2014] NSWSC 770 at [11]-[12], an amendment should be made to section 74(3)(b) to require *material* information relevant to a grant of bail as a ground for a further release or detention application.

Recommendation 8

Clarify in the legislation that the existence of the new *Bail Act 2013* (NSW) does not warrant a change in circumstance for the purpose of section 74(3)(c) and section 74(4)(b).

Recommendation 9

Amend section 74(3)(b) and section 74(4)(a) to require material information relevant to the grant of bail not presented on a previous application as a ground for a further release or detention application.

9. Bail Offence

259. The NSW Police Force proposed offences for:

1. breaching conduct requirements
2. committing an indictable offence while on bail

260. The reason Police seem to be suggesting this reform is to deter people from continually breaching bail. They are particularly concerned that an accused person arrested for breach of bail may be released again into the community, with the same or lesser conditions.

9.1 Conduct requirement offence

261. The Police Force suggested the implementation of a specific offence for breaching conduct requirements similar to section 30A of the Victorian *Bail Act 1977*:

(1) Subject to subsection (2), an accused on bail in respect of whom any conduct condition is imposed must not, without reasonable excuse, contravene any conduct condition imposed on him or her.

Penalty: 30 penalty units or 3 months

Imprisonment [note the penalty for fail to answer bail is 12 months].

(2) Subsection (1) does not apply to contravention of a conduct condition requiring the accused to attend and participate in bail support services.

262. A 'conduct condition' includes:

- reporting to a police station
- reside at a particular address
- observe curfew times
- desist from contacting certain people
- surrender passport
- not go to a particular place
- not drive vehicle or carry passengers
- not consume alcohol or use a drug.

263. The offence in Victoria was introduced in 2013 to strengthen bail laws by:

- providing a penalty for contravention of bail conditions (beyond being at risk of having bail revoked) to send a clear message to offenders that bail conditions should not be contravened; and
- ensuring that contraventions of bail conditions appear on criminal records to inform any later bail decisions (the previous arrangements were deficient).

264. The changes were said to be in response to the high numbers of breaches of bail conduct requirements, however no data in support was provided.⁵⁷

265. Under the offence in Victoria:

- Persons are not guilty if they have a reasonable excuse for the breach and cannot be charged for breaches of drug or alcohol treatment orders
- The penalty is 30 penalty units or three months imprisonment and must be served cumulatively with any other sentence of imprisonment, unless the court directs otherwise. Police can also issue infringement notices.
- There is flexibility in relation to children aged under 18:
 - Police guidelines require Police to consider the child's age and maturity when deciding whether to charge as well as cautioning and diversionary options.
 - Those convicted will be sentenced under the specialised sentencing options of the *Children, Youth and Families Act 2005* and a presumption of concurrency of sentences applies.

266. Section 29 of the Queensland *Bail Act 1980*, section 51 of the Western Australia *Bail Act 1982*, section 17 of the South Australian *Bail Act 1985*, section 9 of the Tasmanian *Bail Act 1994*, and section 37B of the Northern Territory *Bail Act* also have equivalent offences for breaching bail.

⁵⁷ Second Reading Speech of the *Bail Amendment Bill 2013* (Vic), available at <http://www.parliament.vic.gov.au/publications/research-papers/bills-backgrounders/8566-bail-amendment-bill-2013> (accessed July 2014).

9.2 Indictable offence while on bail

267. The NSW Police Force also suggested the implementation of a specific offence for committing an indictable offence while on bail similar to section 30B of the Victorian *Bail Act 1977*:

An accused on bail must not commit an indictable offence whilst on bail.

Penalty: 30 penalty units or 3 months imprisonment.

268. The offence in Victoria was introduced in 2013 to strengthen bail laws by:

- Providing a clear penalty for committing a serious offences while on bail (beyond being at risk of having bail revoked or having the conduct considered when the severity of the sentence is considered)
- Ensuring that offences committed while on bail appear on criminal records to inform any later bail decisions.

269. Again, the changes were said to be in response to the high numbers of breaches of bail conduct requirements, however no data in support was provided.⁵⁸

9.2 Analysis

270. It is too early for conclusive data about the number of breach of bail orders. In its bail review, the NSW Law Reform Commission noted stakeholder concerns (including the President of the Children's Court, Legal Aid and Aboriginal Legal Service) that many previous conditions were onerous and difficult to comply with.⁵⁹ It is too early to say whether similar views exist under the new Act.

271. The question that needs to be addressed is whether applying additional penalties such as penalty notices or imprisonment through a specific bail offence would provide a useful additional deterrent to breaching conduct requirements over and above the current arrangements.

⁵⁸ Second Reading Speech of the *Bail Amendment Bill 2013* (Vic), available at <http://www.parliament.vic.gov.au/publications/research-papers/bills-backgrounders/8566-bail-amendment-bill-2013> (accessed July 2014).

⁵⁹New South Wales Law Reform Commission (April 2012) *Bail*, Report 133, at [12.6].

272. This was not an issue canvassed in either the NSW Police submission to the Law Reform Commission or in the Commission's report. The Victorian Law Reform Commission opposed the offence of breach of conditions⁶⁰
273. While clearly NSW does not have a specific offence for breaching bail, the *Bail Act 2013* does have some useful provisions for addressing breach of bail.
274. Section 77 of the *Bail Act 2013* provides for a number of actions that can be applied when a police officer believes, on reasonable grounds, that a person has failed to comply with, or is about to fail to comply with bail, including arresting the person without a warrant and taking them before the court.
275. Section 78 of the *Bail Act 2013* then allows *a relevant bail authority before which an accused person is brought or appears may, if satisfied that the person has failed or was about to fail to comply with a bail acknowledgment or a bail condition:*
- (a) release the person on the person's original bail, or*
 - (b) vary the bail decision that applies to the person.*
- (2) The bail authority may revoke or refuse bail only if satisfied that:*
- (a) the person has failed or was about to fail to comply with a bail acknowledgment or bail conditions, and*
 - (b) having considered all possible alternatives, the decision to refuse bail is justified.*
276. It should also be noted that section 79 of the *Bail Act 2013* includes an offence of failing to appear:
- (1) A person who, without reasonable excuse, fails to appear before a court in accordance with a bail acknowledgment is guilty of an offence.*
 - (2) The onus is on the person granted bail to prove reasonable excuse.*
 - (3) The maximum penalty for an offence against this section (a fail to appear offence) is the maximum penalty for the offence for which bail was granted, subject to this section.*

⁶⁰ Victorian Law Reform Commission (October 2007) *Review of the Bail Act: Final Report* page 128.

(4) A penalty of imprisonment for a fail to appear offence is not to exceed 3 years and a monetary penalty for an offence against this section is not to exceed 30 penalty units

277. In addition, any breach of bail conditions in relation to conduct requirements may potentially be dealt with as public justice offences under Part 7, Division 3 of the Crimes Act 1900. A number of these offences are aimed at capturing conduct that threatens or intimidates victims and witnesses, or where a person tried to influence a witness or give false evidence, withhold evidence, or not attend court at all. These offences may be available where an accused communicates with or approaches a victim or witness in the proceedings, if that approach or communication amounts to conduct that is prohibited.

278. Under section 21A(2)(j) of the *Crimes (Sentencing Procedure) Act 1999* committing an offence while a person is on conditional liberty, including on bail, is an aggravating circumstance in sentencing. The role of section 21A of the *Crimes Act 1900* was considered in the context of the NSW Law Reform Commission inquiry into sentencing. It seems preferable to await the Government response to this report.

279. A stronger deterrent than a bail offence may be through addressing breach of bail through an enhanced ability to revoke bail.

280. Serious consideration would need to be given as to whether the aggravating factor would need to be removed if the bail offence was implemented.

9.3 Recommendation

281. Given the significant consequences of the introduction of the bail offences that have been requested by the NSW Police Force, coupled with the existing legislative framework that provides options for addressing police concerns, namely:

- revocation of bail, and
- offences committed while a person is on bail being an aggravating factor in sentencing
- the existing offences for failing to appear and interference with the justice system

I recommend that this issue be referred to the Bail Monitoring Group and considered once further data is available.

10. Developing a culture around the new Bail Act

282. The *Bail Act 2013* involves a significant shift for decision makers.
283. Bail authorities can no longer rely on the presumptions of the past. They are instead required to undertake a comprehensive risk analysis of the accused. They must then carefully consider whether that risk can be mitigated by any conditions.
284. This task requires a great deal for those involved.
285. The culture is still developing. There are however a number of non-legislative initiatives that we can put in place to improve the current system.

10.1 Increased training for private legal practitioners

286. Private legal practitioners play a key role in bail decisions. It is important they have a high standard of advocacy skills and are familiar with the new model of bail.
287. During the course of the review it was apparent that whilst there was a strong emphasis on training amongst public legal practitioners, training for private practitioners requires further emphasis.
288. This is a matter which has been raised with the Law Society in the course of consultations.

10.2 Increased training for magistrates, registrars and deputy registrars

289. The Local Court makes hundreds of bail decisions on a daily basis. There would be significant benefit in additional training being provided, particularly so far as the Act applies to serious offenders.
290. Whilst constituting a relatively small number of the overall persons before the Court, the personal circumstances and offending detail present unique challenges in the evaluative exercise.

10.3 Greater access to Supreme Court judgments

291. Supreme Court decisions provide useful guidance to other bail authorities.
292. Some decisions have been published, either as a redacted version or in full for a restricted time period.
293. Recognising possible issues relating to ongoing trials, publication should be advanced as deemed appropriate in the circumstances of the case.

Recommendation 10

That the Law Society provide increased training to its members (particularly private practitioners) on the new *Bail Act 2013* (NSW) and advocacy skills in general.

Recommendation 11

That the Local Court and/or Judicial Commission provide increased training to magistrates, registrars and deputy registrars dealing with bail applications where a serious offence is involved.

Recommendation 12

Wherever practicable, arrangements should be made to publish Supreme Court judgments regarding bail on an appropriate basis.

11. Conclusion

294. The new *Bail Act 2013* with its unacceptable risk model is a significant shift from the previous offence-based presumptions. As with any significant piece of legislation, it will take time for the new Act to become embedded in practice.
295. Over the course of this review, I have had unrestricted access to stakeholders and resources. I take this opportunity to thank all those who have been involved for their dedication to the administration of justice.
296. This review has focused on the underlying policy behind the Act. The recommendations in this report are intended to improve the operation of the *Bail Act 2013* so that it can better achieve its objectives. A significant amount of time and effort has been spent preparing police, judicial officers and the legal profession for the new Act. The recommendations therefore work within the existing model of unacceptable risk.
297. There are a number of proposals that stakeholders have raised that are considered outside the scope of this review. These proposals are better considered by the Bail Monitoring Group. I will liaise with this group over the next 12 months and will assist with considering these proposals as required.

Below is the list of stakeholders consulted over the course of the review:

- Ministry for Police and Emergency Services
- Department of Justice
- NSW Police Force
- NSW Police Association
- The Office of the Director of Public Prosecutions
- Public Defenders Office
- Legal Aid NSW
- Aboriginal Legal Service
- Law Society of NSW
- NSW Bar Association
- The Local Court (Chief Magistrates and Deputy Chief Magistrates)
- Thomas Kelly Youth Foundation
- Victims' groups (Homicide Victims' Support Group, Enough is Enough and Victims of Crime Assistance League)
- Council for Civil Liberties

Bail Act Monitoring Group

Terms of Reference

- The Bail Act Monitoring Group will monitor the operation of the new *Bail Act 2013* (“the Act”) to ensure it is meeting its policy objectives. The Monitoring Group will have particular regard to the following matters:
 1. Is the Act simple and easy to apply and understand?
 2. Does it enable more transparent and consistent decision making?
 3. Does it better achieve the goal of protecting the community while appropriately safeguarding the rights of the accused person?
- In assessing whether the Act is meeting these goals, the Monitoring Group will review trend data on bail, including:
 - bail decision outcomes
 - types of conditions imposed
 - effectiveness of bail conditions
 - the enforcement of bail including the way police respond to breaches of bail conditions
 - the average length of remand
 - number of senior police officer reviews of decisions to grant conditional bail and refuse bail.
- The Monitoring Group will also review bail processes and procedures to identify whether there is any need for them to be modified to ensure that the Act operates as intended.
- The Monitoring Group will report back to the Attorney General, Minister for Police and Secretary of the Department of Justice, initially on a monthly basis, on trends in bail decision making under the Act and action taken or proposed to be taken in relation to issues identified.