THE POLITICS OF BAIL REFORM: THE NEW SOUTH WALES BAIL ACT, 1976–2013

MAXWELL FRANCIS TAYLOR
Bachelor of Arts (University of NSW), Bachelor of Laws (University of NSW),
Bachelor of Arts (Honours) (Macquarie University)

Macquarie University Law School
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ABSTRACT

Many aspects of the criminal justice system have since the beginning of the 1980s been associated with what is described as a 'punitive turn'. By this is meant a more severe approach to issues such as sentencing. A range of reasons are given for this turn of events, some international, some local. Interaction between politicians and the public to produce a more punitive approach to the criminal justice system is associated with less attention to the advice of experts. This thesis considers whether such a punitive turn occurred in relation to bail law in NSW. If there was a punitive turn, when did it occur? Was it the only cause of changes in bail law in NSW? Was any punitive turn a result of local or international factors or both? Bail is associated with two of the basic principles that underpin Western societies – the presumption of innocence and the emphasis on freedom of the citizen. If there was a punitive turn associated with international trends, then the prospect for major reform by local campaigning becomes a very difficult task.

Those who wrote the NSW Bail Review Committee Report in 1976 and the Attorneys-General who made the decisions leading to changes in bail law in NSW have in the past not been systematically interviewed in relation to the reasons for these decisions that led to changes in bail law in NSW. The interviewing of those decision-makers is the central feature of this thesis. The interviews have been compared with written material such as second reading speeches, journal articles, print media and statistical material. Material on the campaign for bail reform in the years 2010-2013 is also considered, as is the response by Governments.

Consideration of the material in this thesis leads to the conclusion that, in every decade,

factors such as spectacular crime or type of crime, media attention, personal views of decision makers, government reports and government policy have to varying degrees been central to changes to bail law in NSW.

The contention in this thesis is that a punitive turn is not apparent in relation to changes in bail law in NSW until 1995. It is also contended that the punitive turn from that year was locally based until the year 2000. The punitive turn was an addition to factors that had been causing change in every decade since the 1970s. It is contended that because bail was never a matter that sat easily with a punitive approach it was possible to have the bail campaign and public debate about bail reform in 2010-2013.

The limits of a punitive turn can be seen in the public and media support for the bail reform campaign run from 2010 to 2013. The *Bail Act* proposed by the Labor Government in 2010 did not eliminate punitive elements that had been created by decades of amendments. The attempted introduction was not successfully completed. The *Bail Act* introduced by the Liberal Government in 2013, while not introducing all of the major reforms recommended by the NSW Law Reform Commission, cannot simplistically be described as punitive. It introduces important reforms in some areas and remains punitive in other areas. The 2012 Report of the NSW Law Reform Commission on bail is available as a benchmark for a new generation of campaigners to pursue bail reform in future years.

STATEMENT

I certify that the work in this thesis 'The Politics of Bail Reform: The New South Wales Bail Act, 1976-2013' has not been submitted for a degree at any other university or institution other than Macquarie University.

I also certify that the thesis is an original piece of research and it has been written by me. Any help and assistance that I have received in my research work and the preparation of the thesis itself have been appropriately acknowledged.

In addition, I certify that all information sources and literature used are indicated in the thesis.

The research presented in this thesis was approved by Macquarie University Ethics Review Committee, reference number 5201001489(D)[1] on 7 December 2010.

_____ Date: _____

Max Taylor. Student No: 41076613

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I had not given any thought as to the differences between a political campaign and a PhD on the politics of bail when in 2010 I participated in the first and undertook the second. Without the advice of Professor Denise Meyerson I doubt the PhD would have been completed. Her clear explanation of what a PhD must include by way of structure, theory and conclusion was matched by her patience in explaining that technical matters are not the same thing as trivia. My research into theory which allowed what had happened to be put into context would not have been possible without her advice.

I wish to also thank Professor David Weisbrot who was my supervisor at the beginning of the thesis and continued to assist with advice and comment on text after his retirement. Professor Weisbrot's enthusiasm about the idea of a PhD on what had happened to bail law in NSW since the 1970s was important for my confidence at a time when I had little idea of what was important in a PhD.

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THESIS FOR THE DEGREE OF DOCTOR OF PHILOSOPHY

Chapter 1

INTRODUCTION

1.1 INTRODUCTION

In this introductory chapter the basic principles in relation to bail at the time of the introduction of the *Bail Act 1978* (NSW) (‘*Bail Act’*) are set out. The chapter goes on to point out some major amendments to the Act in the following decades and the significance of a large increase in the number of individuals on remand. The research question underlying this thesis is explained with particular reference to whether the changes to the *Bail Act* were part of a ‘punitive turn’ in criminal justice in the Western world or were due to local issues or a combination of both. My contention is that a punitive turn is one of a number factors involved from the year 1995 but not before that. I also contend that international issues only contributed to the punitive turn after the year 2000. This chapter also sets out and explains methodology, including interviews with the relevant Attorneys-General and consideration of sources such as Parliamentary Debates, print media, journal articles and statistics. The literature review in this chapter considers issues such as: the relevant human rights framework; the implications for disadvantaged and Indigenous persons of making bail more difficult to get; the influence of the media; and public attitudes to bail. This chapter concludes with observations by a number of Attorneys-General on the importance of bail in a liberal democratic system that believes in the presumption of innocence.

1.2 BACKGROUND

In 1976 the NSW Bail Review Committee Report proposed a *Bail Act* that emphasised certain ideas. These included:

- The importance of 'balancing the right to liberty of someone who is legally presumed to be innocent, against the need of society to ensure that accused people are brought to trial';[1]
- A right to bail for lesser offences and a presumption in favour of bail for all other offences;[2]
- The idea that poverty and other forms of disadvantage should not play a part in consideration of bail;[3]
- Tests for granting bail should be restricted to the probability of appearance of the accused, the interests of the community and the interests of the accused;[4]
- Preventative detention should not be provided for in the *Bail Act*;[5]
- A rising hierarchy of bail conditions commencing with unconditional release and other non-monetary conditions;[6]
- Where bail is not obtained, second and further bail applications should be available within a maximum of eight days.[7]

[1] Kevin Anderson and Susan Armstrong, 'Report of the Bail Review Committee' (Parliament of New South Wales, 1976) 11.
[2] Ibid 19-20.
[3] Ibid 10, 13, 19-20.
[4] Ibid 21-32.
[5] Ibid 29.
[6] Ibid 14.
[7] Ibid 47.

Thirty two years ago, the then Attorney-General Frank Walker, in speaking to the Bail Bill 1978 (NSW), reinforced the importance of the liberty of the citizen when he said:

> Although it is perfectly true that the community must be protected against dangerous offenders, one must not lose sight of the circumstances, first that when bail is being considered, one is confronted with an alleged crime and an unconvicted accused person, and second that the liberty of the subject is one of the most fundamental and treasured concepts in our society.[8]

There have been many changes to bail law since 1976 and most of these have moved away from the ideas set out in the 1976 Report. The scope of this thesis is restricted to those changes that have increased the difficulty in gaining bail and played a part in increasing the numbers of adults on remand with resultant social and economic problems. [9]

The changes considered include:

- erosion of the presumption in favour of bail;
- introduction of bail only in 'exceptional circumstances' for certain types of crime;
- changes to the tests that are required when bail is being considered;
- changes to the conditions attached to bail;
- changes to the legal requirements related to second and subsequent bail applications.

However, legislation containing such changes has on some occasions also contained initiatives sensitive to the needs of defendants. These are also considered.

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[8] NSW, *Parliamentary Debates*, Legislative Assembly, 13 December 1978, 2020 (Frank Walker)
[9] Terry Hutchinson, *Researching and Writing in Law* (Lawbook Co, 3rd ed,, 2010) 158.

Issues concerning juveniles are not considered in this thesis. The history of juveniles in the criminal justice system is a major topic in its own right and to include the history of bail and juveniles would take the thesis beyond that which is manageable.

A brief timeline of the first occasion on which a particular type of major change was made provides an indicator of the length of time for which such changes have been occurring:

- When originally passed by the Parliament, the *Bail Act 1978* (NSW) included s 9(1)(c) which provided neither a presumption for or against bail for an offence concerning aggravated forms of robbery. This exception was not recommended by the Bail Review Committee in 1976;
- The *Bail (Personal and Family Violence) Amendment Act 1987* (NSW) included s 32(2A) which added specific issues concerning domestic violence to the criteria to be taken into account when considering whether bail should be granted. Section 37(5) provided that the same considerations were to be taken into account when setting bail conditions in domestic violence offences;
- The *Bail (Amendment) Act 1988* (NSW) included s 8A, which provided for a presumption against bail for offences concerning the most serious drug trafficking and supply charges under the *Drug Misuse and Trafficking Act 1985* (NSW);
- The *Bail Amendment Act 2003* (NSW) included s 9C, which provided for the first time that bail could only be granted in exceptional circumstances for the offence

of murder. The Act also included s 9D, which provided that bail could only be granted in exceptional circumstances for 'repeat offenders', defined as individuals with a previous conviction for a serious personal violence offence;

- The *Bail Amendment Act 2007* (NSW) included a replacement s 22A which provided for the first time that all courts were to refuse to entertain an application for bail on a second or later occasion unless the person was previously not legally represented or new facts or circumstances had arisen. Section 22A had up to that time been restricted to applications in the Supreme Court.

In speaking to the 2010 Rule of Law in Australia Conference, the then NSW Director of Public Prosecutions, Nicholas Cowdery, said:

> We seem to have come full circle with the progressively legislated removal of presumptions in favour of bail and the enactment of presumptions against with a corresponding rise in the remand population. These piecemeal amendments have often been in response to individual and atypical cases that have received tabloid publicity. As the NSW Bureau of Crime Statistics and Research (BOCSAR) has reported, many people refused bail have their charges withdrawn or are ultimately acquitted and many receive non-custodial dispositions of their cases. There is no recourse to compensation in such circumstances (as there is in some other countries, especially in Scandinavia).[10]

[10] Nicholas Cowdery, 'The Rule of Law and a Director of Public Prosecutions', (Speech delivered at the 2010 Rule of Law in Australia Conference, Sydney, 6 November, 2010)

1.3 RESEARCH QUESTION

The research question that I propose to consider is as follows: to what extent were the decisions resulting in the changes to bail law in NSW since 1976 a result of a widespread 'punitive turn'? The literature suggests that in many parts of the Western world there has been a long term 'punitive turn' in public and political opinion in relation to crime and punishment. This development is associated with increasing imprisonment rates, tougher penalties for crime, greater direct involvement of the public in decisions about criminal justice policy–making and diminished influence of experts.[11] According to Jonathan Simon and Richard Sparks:

> For as long as penal-welfarism, relatively low crime rates and a sense of optimism about the application of scientific expertise to crime control lasted, academic reflection on penal practices was almost totally swallowed up by professional expert production of knowledge of the purpose of penal reform and improvement.[12]

Simon and Sparks state that this situation changed in the 1970s due to rising crime rates, pessimism about scientific rehabilitation, criticism of prisons by those who wanted them abolished and those who saw them as demeaning and wanted prisoner rights and '[t]he emergence of disorder as a major social problem, exemplified by violent crime, but also evident in violent protest and violent police responses to protest'.[13] The punitive turn became more apparent in the 1980s. David Brown states:

> The most theoretically sophisticated explanations for this punitive turn and the rapid increase in the imprisonment rates across the West have increasingly looked to more

[11] Russell Hogg, 'Resisting a Law and Order Society' in Thalia Anthony and Chris Cunneen (eds), *The Critical Criminology Companion* (Hawkins Press, 2008) 280-281
[12] Jonathan Simon and Richard Sparks, 'Introduction' in Jonathan Simon and Richard Sparks (eds), *The Sage Handbook of Punishment and Society* (Sage Publications, 2013) , 7.
[13] Ibid.

> general changes in social, political, economic and cultural organisation rather than to any specific forces confined to the criminal justice sphere, in short the conditions of life in 'late modernity'.[14]

In the 2000s, increased emphasis was given to mass incarceration. Simon and Sparks write:

> The development of mass incarceration was explained with reference to political, economic and cultural developments. In terms of politics, mass imprisonment seemed to be a crucial source of legitimacy for a state battered by the failures of welfarism and the globalization of the economy.[15]

Were the changes to bail law in NSW simply a reaction to specific crimes or types of crime and the associated media and public outcry and unrelated to any underlying ideological or philosophical ideas of the kind described by Brown? Did evidence-based reform in relation to broader issues such as the rights of women and changes to the law on domestic violence result in amendments to bail law? Have decision-makers been conscious of bail as a pre-conviction and pre-sentence concept and has such consciousness limited any temptation to a punitive turn? Is the reality that the decisions relating to changes in bail law in NSW are best explained by a combination of some or all of the reasons set out above?

These are unresolved issues of significance. If changes to bail law are simply part of a Western development then major reform in the short term can be argued to be beyond

[14] David Brown, 'Continuity Rupture or Just More of the Volatile and Contradictory?' in John Pratt et al (eds), *The New Punitiveness* (Willan Publishing, 2005)
[15] Simon and Sparks, above n 12, 11.

reach. If, on the other hand, such changes have a more local explanation or an explanation that combines the local with international trends then there is the prospect for practical action and change.

This thesis argues that:

- A long term punitive turn does not provide an all-encompassing explanation for the changes to the law on bail in NSW.
- The decisions to bring about change were due to a combination of factors. These include one-off politically expedient measures in response to individual hard cases and the notoriety of particular types of crime at particular times. Media campaigns were important but this is true in each decade not just in more recent times. The changes to bail law also emerged from evidence based review of issues such as those concerning women and children and the law. The case for a punitive turn as a significant additional cause of increased remand levels is only apparent from 1995. International events as an additional cause contributing to a punitive turn concerning bail are only apparent from the year 2000.
- Because bail concerns the period before conviction or sentence, decisions concerning it have never fitted easily into the idea of a punitive turn.
- In the public debate about bail between 2010 and 2013, political decision makers were concerned to discuss the human and financial cost of denying bail because pre-conviction and pre-sentence decisions could not be discussed in punitive terms alone. The decision by the State Government to have the NSW Law

> Reform Commission undertake an inquiry into bail occurred in this period. The legislation in 2013 needs to be considered in the context of this broader debate.

1.4 METHODOLOGY

Interviews comprise a central feature of my methodology. Choice of participants for the study forms part of the design component of qualitative research.[16] Those to be interviewed were chosen on the basis that:

> Qualitative researchers are not (usually) concerned that these people or situations should be statistically representative because they do not seek to reach findings that are generalizable to an entire population. Instead, focused, in-depth studies are designed to go beyond description to find meaning, even if that meaning is related to an individual's experiences of the justice system (for instance), or the perceptions of a small number of people on access to justice (for instance). In-depth research affords the researcher the opportunity to learn how research participants understand the world and interact with each other.[17]
>
> .

Those interviewed included the two people who wrote the Bail Review Committee Report, 1976. They were in the best position to explain the problems related to bail that existed by the mid-1970s, why they were chosen to report on this sensitive political issue and the thinking that went into the development of their report. Those interviewed also included the relevant Attorneys-General. I have attempted to interview all those who did preside over such changes. The questions related to the politics

[16] Hutchinson, above n 9, 113.
[17] Lisa Webley, 'Qualitative Approaches To Empirical Legal Reseach' in Peter Cane and Herbert M Kritzer (eds), *Empirical Legal Research* (Oxford University Press, 2010) 926, 934.

surrounding particular changes and the detail of the changes with particular reference to changes to the *Bail Act*. To my knowledge this has not been attempted before. Obtaining interviews with those who wrote the Bail Review Committee Report, 1976 and a number of Attorneys-General is not a simple task. Preparing the set of questions for such interviews, given the range of changes to the *Bail Act* over time and given I could hardly expect them to come back a number of times, meant there was not time to interview other people such as Departmental advisers who may have been able to provide further insights into the politics of change. Within the time limit on a PhD I did the best I could with the information obtained from the decision maker to integrate the answers with other materials used in the PhD.

Not all Attorneys-General dealt with significant changes to bail and those who did not were not interviewed. In relation to very recent times different issues arose. John Hatzistergos explained that in relation to the Bail Bill 2010 and the ongoing debate on bail in the period of his immediate successor that the issue was best left for those currently in public life with the responsibility. His explanation is provided at 13.6. John Hatzistergos was prepared to deal with some issues from his period as Attorney-General by way of emailed questions and emailed answers. In seeking an interview with Greg Smith the current Attorney-General, it was conceded that it may not be possible given that he is actually in the position and would be dealing with current sensitive material. Greg Smith regretted that he could not participate due to his Parliamentary commitments and portfolio responsibilities. The explanation provided on his behalf is provided at 17.7.

Attorneys-General are, by definition, political people and the discussion in the interviews at times moved, either at their or my initiative, beyond the original question. They consisted on a number of occasions 'of an exchange of ideas between two people on a theme.'[18] As Webley notes:

> Some general rules apply to qualitative interviews. For instance, they should be either very loosely structured (the researcher may make use of prompts to steer the discussion through a series of issues deemed important by the researcher) or only semi-structured (the researcher will have some set questions to ask but the majority of questions will be open-ended rather than closed). If the respondent consents, interviews are generally taped where possible to allow the researcher to analyze the full transcript.

The interviews were recorded and transcribed verbatim. All interviews were semi-structured. As Karin Olson notes: '[i]n semi-structured interviews, researchers use information they have acquired to construct questions that are more focused.'[19] Preparation for the interviews involved extensive reading of materials from the relevant period, such as media reports and Parliamentary speeches, and no interview was attempted until all areas had been researched. I could not expect Attorneys-General to submit to being interviewed several times because of an omission on my part regarding the original material. Greater detail on the nature of these materials is set out later in 1.4. Materials considered were limited to those that address the issues set out at 1.2 above. They are: the erosion of the presumption in favour of bail; the introduction of

[18] Ibid 113.
[19] Karin Olson, *Essentials of Qualitative Interviewing,* Qualitative Essentials (Left Coast Press Inc, 2011), 40.

bail only in 'exceptional circumstances' for certain types of crime; changes to the tests that are required when bail is being considered; changes to the conditions attached to bail; and changes to the legal requirements related to second and later bail applications.

While the issues were limited to those set out in the last paragraph, the questions varied from interview to interview. The reason for that was that the detailed amendments to the *Bail Act* and the specific politics surrounding the change varied from one Attorney-General to another. Where government changed because of an election, then questions on the importance of that election for issues of law and order and in particular bail, were addressed to the relevant Attorneys-General. During the discussion in each interview additional questions arose. All quotes are preceded either by the actual question asked or an explanation of what the thrust of the question was.

While the thesis involves politics and the senior people in that field are resilient, that has not diminished efforts to ensure an ethical approach to all those involved in the interviews. As Joan E Sieber notes:

> [t]he ethics of social and behavioral research is about creating a mutually respectful, win-win relationship in which important and useful knowledge is sought, participants are pleased to respond candidly, valid results are obtained, and the community considers the conclusions constructive.[20]

Approval for this thesis was obtained from the Macquarie University Faculty of Arts Human Research Ethics Committee. The questions for each interview have been

[20] Joan E Sieber, 'Planning Ethically Responsible Reseach' in Leonard Bickman and Debra J Rog (eds), *The Sage Handbook of Applied Social Reseach Methods* (Sage Publications, 2009) 106.

provided to my supervisor and to the Ethics Committee. Procedures followed have been in accordance with university guidelines. Attached as an appendix is a copy of the approved 'Information and Consent' Form provided to each person who was interviewed.

In respect of each Government period (1976-88, for example), the thesis includes chapters based on the interviews and other materials that are referred to below. Primary and secondary sources from each period were considered. They are set out below. A wide range of materials were considered and in terms of use of time and resources it did not seem appropriate to widen the search for further materials. An example makes the point. Three Reports for government in the period 1981-1987 provided the basis for major and productive reforms concerning domestic violence that occurred in that period.[21] One of those papers, the Violence Against Women and Children Law Reform Task Force Consultation Paper of 1987, made recommendations on bail.[22] The Report to the Premier on a Survey of Non –Spousal Family Violence produced in the same year was widely discussed in the media and formed part of the argument for change that affected bail.[23]

[21] Dr Greg Woods (Chairperson), 'Report of NSW Task Force on Domestic Violence to Honourable N K Wran Q.C MP, Premier of NSW' (Women's Co-Ordination Unit, NSW Premier's Department, July 1981).
[22] Helen L'Orange (Chairperson), 'Violence Against Women and Children Law Reform Task Force Consultation Paper' (Women's Co-Ordination Unit, Premier's Department NSW, 1987).
[23] Helen L'Orange (Chairperson), 'Report to the Premier The Hon B J Unsworth by the NSW Domestic Violence Committee on A Survey of Non-Spousal Famil Violence' (Women's Co-Ordination Unit NSW Premier's Department., 1987)

News coverage in the *Sydney Morning Herald* and the *Daily Telegraph* for each of the periods was also considered. Many of the changes to the *Bail Act* were surrounded by spectacular media coverage of a particular crime or type of crime. An example is the media prominence given to armed robbery before the Bail Review Committee was set up in 1976[24] and also before the discussion of a Bail Bill in 1978.[25] Limited coverage of the *Sun* and the *Daily Mirror* in the 1970s and 1980s has been undertaken. Consideration of the media's influence is undertaken in the relevant chapter and in context.

Radio and television coverage does not form part of the thesis. First, to consider radio and television, given talkback radio and current affairs television have been available since the 1970s, involves too great a task. Secondly, having made enquiries, it is apparent that material from earlier eras is not always available for a variety of reasons, or is expensive and difficult to access.

Parliamentary debates in relation to all major changes have been considered. At a minimum, in each relevant debate I have considered the speech by the mover on behalf of the Government, lead spokesperson for the Opposition and the Reply. These debates were referred to in the questions I asked the Attorneys-General. They assisted because they were the words spoken and the explanation given at the time of the event. They also provided insight into whether or not the Government was under pressure from Opposition demands for even more severe punitive measures. The Parliamentary

[24] J O'Hara, 'Bail System Review Ordered', *Sydney Morning Herald* (Sydney), 3 July 1976, 3.
[25] 'Gunman, Hostage Die in Shootout', *Daily Telegraph* (Sydney), 18 November 1978, 1.

debates also provided an indicator through the words of speakers of the pressures created by outside issues such as concern about a particular crime or type of crime. Parliamentary debates are dealt with in context in the relevant chapters.

In October 2010, Attorney-General, John Hatzistergos, released a Review of the *Bail Act 1978* (NSW).[26] He also released an Exposure Draft of the Bail Bill 2010 (NSW).[27] The first document is 104 pages and the second 84 pages. They are considered in detail in chapter 15 of the thesis dealing with the debate over the proposals and the campaign for restoration of a liberal democratic *Bail Act*. The Parliamentary Paper produced in 2010 during the public debate on bail receives further consideration as part of that chapter.[28] Developments leading to the Draft Bill being withdrawn are considered in that chapter.

In 2011 the new State Liberal Government announced an enquiry into bail. It was undertaken by the NSW Law Reform Commission which produced its report in 2012. The report and surrounding events are considered as part of chapter 16 dealing with the NSW Law Reform Commission Report. The Government's response to the NSW Law Reform Commission Report and the subsequent legislation are considered in chapter 17.

Material on the 1988 and 1995 elections was considered. These are the elections in which Government changed hands. The election of 2011 was considered as part of the

[26] Criminal Law Review Division, 'Review of the Bail Act 1978' (NSW Department of Justice and Attorney General, October 2010)
[27] Criminal Law Review Division, 'Bail Bill 2010 Public Consultation Draft' (Department of Justice and Attorney General, October 2010)
[28] Lenny Roth, 'Bail law: developments, debate and statistics' (Briefing Paper 5, NSW Parliamentary Library Research Service, 2010)

developments in 2010 and 2011-2013. More limited consideration of other elections, particularly after 1995, was undertaken. Material included *The People's Choice*, which covers the politics of all State elections in the twentieth century.[29] The material was used in interviews to compare the secondary material on the election with the recollections of Attorneys-General who were involved in that election. The material was also used in its own right.

Statistical material is of fundamental importance when considering both the introduction of the Bail Bill and changes to the *Bail Act*. Relevant material was obtained from the NSW Bureau of Crime Statistics and Research, the Department of Corrective Services, the Australian Bureau of Statistics and the Australian Institute of Criminology. These organisations also provided useful observations and analysis based on their research results.

In summary, the thesis has relied on the following sources:

- Primary – Statutes, Regulations, Bills. The use of case law was extremely limited as the issue is the politics that brought about change.
- Secondary – Interviews, Journal Articles, Books, Parliamentary Debates, Parliamentary Research Papers, Parliamentary Committee Reports, Royal Commission Reports, Law Reform Commission Reports, Submissions to Government Inquiries, Newspaper articles, Research reports and Conference papers.

[29] M Hogan and D Clune (eds), *The People's Choice* (Parliament of NSW and University of Sydney, 2001)

1.5 LITERATURE REVIEW

The literature review for this thesis is in two parts. Literature on the punitive turn and its relevance to the politics of bail in NSW is central to the matters considered in this thesis. For that reason the literature on the punitive turn is the subject considered in chapter 3. A brief reference to the material set out in chapter 3 is provided in the chapter outline below. The literature review in this chapter will be restricted to some additional issues of interest. As explained at 1.4, a considerable amount of the material will be discussed in context in the relevant chapter.

1.5.1 Literature on the big picture crisis

Many practical questions concerning bail arise from fundamental legal principles such as the right to liberty and the presumption of innocence. The dramatic increase in the number of persons in NSW on remand raises the question as to whether NSW has struck the correct balance between the rights of the accused and the protection of the community.[30] The percentage of adults in NSW gaols who had not been tried or were awaiting sentence has risen from under 13% in 1982 to over a quarter of the total in 2012**.** The process has been far from even. The total was 9.2% as late as 1995 and surpassed 16% for the first time in 2000**.**[31] The cost of gaol for all categories of adult prisoners is over $1 billion dollars per annum.[32] The human cost of having large numbers of adults in gaol before conviction or sentence has been a matter of public controversy. In 2010, a man who never went to trial but was on remand for eight months received a

[30] Walker, above n 8.
[31] Simon Corben, 'NSW Inmate Census 2012' (Corrective Services NSW, December 2012), 71.
[32] Corporate Research Evaluation and Statistics, 'Facts and Figures ' (Facts and Figures 12th Edition Corrective Services NSW, March 2012).

beating and as a result lost teeth and part of the sight in one eye.[33] A Gaol Visitor pointed out that homeless persons with no fixed address were not likely to get bail.[34] Crime rates in general terms have been stable or in decline in NSW.[35] Whether these trends are related to the introduction of tougher bail laws has proven controversial.

1.5.2 Literature considering the right to bail and the erosion of the presumption in favour of bail.

When considering the literature on bail as a human right it is important to note at the outset that there is no absolute right to bail.[36] Section 8 of the *Bail Act* does provide for a right to bail for summary offences but even in that case there are certain limiting provisos. That said**,** the right to bail subject to certain provisos is nevertheless regarded as a human right, interlinked with the right to liberty and the presumption of innocence.

The connection between bail and human rights is to be found as far back as the seventeenth century. Dirk van Zyl Smit explains that accused persons: 'had at their disposal the English Bill of Rights 1688 1 Will & Mary sess 2, which laid down that "excessive Baile ought not to be required nor excessive Fines imposed nor cruell and

[33] Joel Gibson, ''No Bail - Go Directly to Jail'', *Spectrum The Sydney Morning Herald,* (Sydney), 19 April 2010. 5.
[34] Geoff Turnbull, 'Vanishing Bail Hits Homeless Hard', *Letters The Sydney Morning Herald* (Sydney), 19 April 2010
[35] Steve Moffatt and Derek Goh, 'An update of long-term trends in property and violent crime in NSW: 1990-2011.' (Crime and Justice Statistics Bureau Brief 78 NSW Bureau of Crime Statistics and Research, April 2012). NSW Bureau of Crime Statistics and Research, 'NSW Recorded Crime Statistics Quarterly Update September 2012' (NSW Bureau of Crime Statistics and Research, September 2012), 10, 11.
[36] Anderson and Armstrong, above n 1, 19.

unusual Punishments inflicted".'[37] Such practices did take place but the point is that the idea of this fundamental right was present in the 17th century in England. Excessive use of remand is a form of punishment. The need for proportionate punishment and punishment that was not cruel were issues forming part of Enlightenment thinking. Restrictions on such excesses were to be found in the Eighth Amendment to the United States Constitution and the French Declaration of the Rights of Man.[38] In the period since these two documents were written and particularly after World War II debate about human rights has become widespread.

The Universal Declaration of Human Rights, 1948, states:

> Article 9. No one shall be subjected to arbitrary arrest, detention or exile.
>
> Article 11. Everyone charged with a penal offence has a right to be presumed innocent until proved guilty according to law in a public trial at which he has all the guarantees necessary for his defence.[39]

Article 9(3) of the *International Covenant on Civil and Political Rights* states:

> It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and should occasion arise, the execution of judgment.[40]

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[37] Dirk van Zyl Smit, 'Punishment and Human Rights' in Jonathan Simon and Richard Sparks (eds), *The Sage Handbook of Punishment and Society* (Sage Publications, 2013) , 395, 396.
[38] Ibid 396.
[39] Lynn Hunt, *Inventing Human Rights* (W.W Norton and Company, 2007)225. Rachel Simpson, 'Bail in New South Wales' (Briefing Paper No 25, NSW Parliamentary Library Research Service, 1997) 23.
[40] Jeremy Gans et al, *Criminal Process and Human Rights* (The Federation Press, 2011) 168, Justice Terry Connolly, 'Golden Thread or Tattered Fabric Bail and the Presumption of Innocence' (Paper presented at the Law Council of Australia National Access to Justice and Pro Bono Conference, Melbourne, 11-12 August 2006) 2-3.

The conflict between the concept of human rights and bail only in special or exceptional circumstances was considered by Penfold J in *In the matter of an application for bail by Isa Islam* in the Australian Capital Territory (ACT) Supreme Court.[41] The *Human Rights Act 2004* (ACT) states in s 18(5): 'Anyone who is awaiting trial must not be detained in custody as a general rule, but his or her release may be subject to guarantees to appear for trial, at any stage of the judicial proceeding, and, if appropriate for execution of judgment.'[42] The charge in *Isa Islam's* case was attempted murder and s 9C of the *Bail Act 1992* (ACT) provided in such cases for a presumption against bail. Bail was only to be provided where special or exceptional circumstances were established. Penfold J stated:

> As a 'general rule' that is structured to implement a presumption against bail, and therefore in favour of the continued detention of a class of persons awaiting trial, I consider that s 9C is not compatible with the human rights recognised by s 18(5) of the Human Rights Act. My conclusion that s 9C is not human-rights compatible is in this case based on the imposition of a substantive threshold test before the substance of a bail application can be considered.[43]

These provisions make clear that the expectation of bail is part of what defines human rights and that detention before proof of guilt or sentence should be the exception. The importance of these ideas as part of our liberal democratic fabric is driven home by Don Weatherburn when he states:

> There are many procedures and rules directed toward this end which if jettisoned, would probably make it easier in the short term to reduce crime – refusing bail to

[41] *Re Islam* (2010) 244 FLR 158.
[42] *Human Rights Act 2004* (ACT) s 18(5).
[43] Penfold J, above n 41, 223.

> everyone charged with a criminal offence, for example, or locking up anyone seen loitering with a known offender. It is only necessary to look at the history of countries in which the public have lost respect for the rule of law, however, to see that such respect is critical to the maintenance of law and order. We therefore need to be mindful of the fact that there are some important constraints on the ways in which we can use the criminal justice system to prevent and control crime.[44]

Given the powerful statements concerning civil liberties set out above, it is not surprising that many authors have considered the basis on which pre-trial detention is justifiable. The likelihood of the person absconding or interfering with witnesses has been considered relevant. In contrast many would agree with Raifeartaigh Una Ni that 'a deprivation of liberty in order to prevent the accused from committing further offences violates the presumption of innocence because it is premised on the view that the accused is guilty.'[45]

The issue of preventative detention overlaps with matters concerning the punitive turn discussed in chapter 3 and the 'unacceptable risk' model for bail discussed in the last two chapters of the thesis. At this point it is appropriate to note the point made by Lucia Zedner that:

> [T]he demand to avert risk stems from the growth of penal populism, with its attendant calls for public protection, bolstered by media-fed perceptions of the risks of sexual predation, violent crime and terrorist threat. These contribute to a growing sense that

[44] D Weatherburn, *Law and Order in Australia* (The Federation Press, 2004) 116-117.
[45] Raifeartaigh Una Ni, 'Reconciling Bail Law with the Presumption of Innocence' (1997) 17(1) *Oxford Journal of Legal Studies* 1, 4.

> the presumption of innocence, proof beyond reasonable doubt and the requirement of proportionality in punishment are legal luxuries ill-suited to present perils.[46]

The importance of the presumption of innocence and the presumption of liberty is reinforced by consideration of the percentage of those not convicted from remand. The NSW Criminal Court Statistics show that in 2011, where a person was on remand in Local Court proceedings at the time of finalization, 9.0% had 'all charges dismissed', 'all charges dismissed without a hearing' or 'all charges otherwise disposed of'.[47] For the higher courts the figure for those acquitted of all charges, no charges proceeded with and all charges otherwise disposed of was 9.8%.[48]

Notwithstanding the importance of the presumption in favour of bail, there has been a continual process of erosion in NSW. The amendments have emphasised protection of the community and have gone in one direction, the erosion of the presumption in favour of bail, even though the amount of many types of crime is in decline. Georgia Brignell criticised the lack of a coherent philosophy behind the changes a decade ago.[49] Criticisms of the amendments to the presumption in favour of bail can also be found in earlier decades. For instance, a NSW Government issue paper in 1992 could see no rational basis for singling out aggravated robbery as an exception, found that close examination cast doubt on the need for the various presumptions, and noted the lack of

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[46] Lucia Zedner, 'Fixing the Future? The Pre-emptive Turn in Criminal Justice' in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance* (Hart Publishing, 2008) , 43.
[47] Bureau of Crime Statistics and Research, *NSW Criminal Court Statistics 2011 (2012)* , Table 1.6.
[48] Ibid Table 3.12.
[49] Georgia Brignell, 'Bail: An examination of Contemporary Issues' (November 2002) 24 *Sentencing Trends and Issues* 1-2.

proof of absconding problems in relation to drug offenders.[50] The lack of relationship between the seriousness of drug offences and absconding was also put into doubt by research produced in 1987 by Don Weatherburn, Meredith Quinn and Gabrielle Rich.[51]

The NSW Parliamentary Select Committee on the Increase in Prisoner Population considered bail in 2001. Its Final Report included the reminder that a number of people on remand are found not guilty. In evidence given to the Select Committee the President of the Law Society of NSW stated: 'the reason that the Law Society is quite upset about changes to the Bail Act that have been made over the years is that being on remand with bail refused is one of the worst possible features of a civilised society.'[52]

That the change away from the presumption in favour of bail has made a difference to remand numbers has been established by the NSW Bureau of Crime Statistics and Research (BOCSAR). In July 2002, legislation removing the presumption in favour of bail for various classes of repeat offenders commenced in NSW. Jacqueline Fitzgerald and Don Weatherburn considered the statistics on remand rates and the reasons for the legislative changes and noted:

> The principal objective of the *Bail Amendment (Repeat Offenders) Act 2002* (NSW) was to reduce the rate of absconding on bail. It sought to achieve this by removing the presumption in favour of bail from offenders whose antecedents or background put

[50] Criminal Law Review Division, 'Issue Paper. Review of the Bail Act' (NSW Attorney General's Department., 1992) 2-4.
[51] Don Weatherburn, Meredith Quinn and Gabrielle Rich, 'Drug Charges, Bail Decisions and Absconding' (June 1987) 20 *Australian and New Zealand Journal of Criminology*
[52] Select Committee of the NSW Legislative Council, '*Increas in Prisoner Population*' (2001) 45.

> them at higher risk of absconding. The legislation appears to have achieved both of these objectives.[53]

A 2010 study by Lucy Snowball, Lenny Roth and Don Weatherburn of the effects of the various presumptions found that the risk of bail refusal prior to controlling for other factors was: '48.6 per cent (exceptional circumstances), 20.9 per cent (presumption against), 29.0 per cent (presumption neutral) and 15.1 per cent (presumption in favour).'[54] Once allowance was made for a number of other factors such as the length of criminal record, it remained the case that the probability of bail refusal was higher if there was no presumption in favour of bail.[55] This particular paper is considered in more detail later in chapter 13 of the thesis.

1.5.3 Literature concerning the effects of bail laws and of changes to bail law on disadvantaged and indigenous accused.

In the Bail Review Committee Report, Kevin Anderson and Susan Armstrong made clear their concern about the over-representation of the disadvantaged amongst those on remand.[56] They state:

> 'Excessive reliance on the setting of money bail has largely replaced a proper consideration of whether or not the defendant should be released. The poor are often

[53] Jacqueline Fitzgerald and Don Weatherburn, 'The Impact of the Bail Amendment (Repeat Offenders) Act 2002.' (NSW Bureau of Crime Statistics and Research, 2004), 6.
[54] Lucy Snowball, Lenny Roth and Don Weatherburn, 'Bail Presumptions and the Risk of Bail Refusal: An Analysis of the NSW Bail Act' (Crime and Justice Statistics Bureau Brief 49 NSW Bureau of Crime Statistics and Research, July 2010), 4.
[55] Ibid 6.
[56] Anderson and Armstrong, above n 1, 12.

> held unnecessarily in prison, while those with ready money, perhaps the proceeds of the crime with which they are charged, are sometimes unjustifiably released.[57]

Tracey Booth and Lesley Townsley referring to the idea of accused persons with money making repeat bail applications and 'magistrate shopping' note that, 'In fact the evidence suggests that this is a tenuous claim and that people in prison are among the most poor and marginalized people in the community.'[58]

Rick Sarre is of the view that policy makers need to deal with the reality of who is in the prisons. They are the economically marginalised, those with poor education, those with mental health issues and those who are drug affected. He observes that: 'As a priority, governments should be providing a suite of health services in custodial settings, particularly targeting mental health.'[59]

Weatherburn notes: 'In the five years between 1997 and 2001, more than a quarter of the Aboriginal population of NSW appeared in a NSW court charged with a criminal offence. In 2001 more than one in ten Aboriginal men aged 20 to 24 received a prison sentence.'[60]
Snowball, Roth and Weatherburn noted in relation to the presumptions concerning bail that: 'Indigenous defendants are more likely to be refused bail than non-aboriginal defendants (even after controlling for other factors)'.[61]

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[57] Ibid 13.
[58] Tracey Booth and Lesley Townsley, 'The Process is the Punishment: The Case of Bail in New South Wales' (2009-2010) 21(1) *Current Issues in Criminal Justice* 41, 55.
[59] Rick Sarre, 'The Importance of Political Will in the Imprisonment Debate.' (2009-2010) 21(1) *Current Issues in Criminal Justice* , 159.
[60] Weatherburn, above n 44, 139-140.

The Aboriginal Legal Service (NSW/ACT) in its submission to the NSW Law Reform Commission inquiry into bail noted:

> The ability of a person with mental health or cognitive impairment to properly prepare their case may be hindered by the refusal of bail in ways that would not apply to other accused persons. For example, the ability to engage with support services which may assist with a person's post-release rehabilitation will be diminished, as will the ability of the person to properly communicate with their legal representatives.[62]

1.5.4 Literature considering the role of the media in bringing about changes to bail law.

The role of the media in bringing about changes to bail law has been an ongoing theme in the literature. Its presentation of spectacular criminal events played a part in the lead up to the introduction of the *Bail Act* in 1978. The media has also played a part in many of the amendments that have occurred since that clip away at fundamental freedoms.

As early as 1988 Rick Sarre pointed out in relation to bail in Australia that outrage sells newspapers and that it is not good enough simply to state that the media reflect public attitudes, 'particularly if the media have had a direct role to play in the shaping of those attitudes in the first place.'[63] Sarre considered the imperatives that drive Australian media and found they applied to the presentation of bail issues. The issues have

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[61] Snowball, Roth and Weatherburn, above, n 54, 6.
[62] Aboriginal Legal Service, Submission No BA 14 to NSW Law Reform Commission, *Inquiry on Bail*, 22 July 2011, 45.
[63] Rick Sarre, 'Distinguishing Meaningful Signals from Backgroun Noise' (Paper presented at the Bail or Remand? Conference, Canberra, 29 November 1988).

immediacy because they: seem to arise from nowhere; they are often dramatic; can be simplified with the result that key issues are often lost; allow stereotyping and pre-judging; produce titillation; can be used for structured access to expertise with the result that a particular point of view is given greater credibility; can be used as an excuse to avoid consideration of deeper socio-economic issues; and through plebian editorial policy can galvanise the community in support of the conservative status quo.[64]

Nick Economou and Stephen Tanner in discussing the media explain that many problems apparent to Sarre continue to be issues. Looking at the 'criteria of newsworthiness' they include interest, timeliness, consequence, proximity, conflict, human interest and novelty. They observe that these elements 'are universally recognised by journalists, editors and journalism educators around the world as being essential to a good news story.'[65] The more of these factors that are present 'the greater the chances of that information being converted into a story.'[66] They then consider the issue of 'processing the news'. A story will be processed in accordance with the views of the news organization. The authors explain that the result is 'routinisation', meaning that 'matters within an organization are dealt with so regularly and to a particular pattern that they become routine.'[67]

[64] Ibid 56-59.
[65] Nick Economou and Stephen Tanner, *Media, Power and Politics in Australia* (Pearson Education Australia, 2008), 98.
[66] Ibid.
[67] Ibid 105.

Weatherburn notes that when the media make demands concerning a crime or type of crime, '[p]oliticians come under enormous pressure to distort or misrepresent the facts on crime. Governments stand to retain office if they succeed in getting crime out of the news or persuade the public that crime is "under control".'[68]

1.5.5 Literature considering public attitudes.

The public's attitude to crime and the criminal justice system as a factor driving change has been considered. Research undertaken in 2007 suggested that public confidence in the criminal justice system was more prevalent 'among younger people; those who are better educated; those on higher incomes; those who know more about crime, conviction and sentencing.'[69] The type of media or other source used for access to information was also important. The authors concluded that the NSW public was poorly informed about crime and criminal justice. In relation to the media they stated: 'All too often, media reporting of crime and justice is distorted, selective and sensationalist.'[70]

Research on the same topic of public confidence in the NSW criminal justice system was undertaken in 2012 to consider amongst other things whether public attitudes had changed between 2007 and 2012.[71] The summary of results stated:

> Participants had high levels of confidence that the [Criminal Justice System] respects the rights of the accused and treats them fairly but lower levels of confidence that the CJS

[68] Weatherburn, above n 44, 2.
[69] Craig Jones, Don Weatherburn and Katherine McFarlane, 'Public confidence in the New South Wales criminal justice system' (NSW Bureau of Crime Statistics and Research, 2008) 12.
[70] Ibid 13.
[71] Lucy Snowball and Craig Jones, 'Public confidence in the NSW criminal justice system: 2012 update' (NSW Bureau of Crime Statistics and Research, November 2012).

> brings people to justice, deals with cases promptly or meets the needs of victims. With the exception of confidence in respecting the rights of the accused, confidence was significantly higher in 2012 than in 2007. The 2012 respondents were also more knowledgeable about crime and justice and less punitive than the 2007 respondents. Respondents tended to have higher levels of confidence in the police than the courts.[72]

After considering reasons for the increased confidence, the Report added:

> In the 2011 NSW election there was no sign of the law and order 'auctions' that have characterized previous election campaigns. It is interesting to note, therefore, that public punitiveness toward offenders has decreased while public confidence in the criminal justice system has increased.[73]

The Report did, however, caution that the extent of the effect of such factors should not be overstated.

1.6 CHAPTER OUTLINE.

The introductory chapter is followed by a chapter on what bail is, including a brief consideration of its history and importance. This is done by the use of the *Bail Act* definitions and secondary sources. These sources explain the history of bail in England, the form in which it was transferred to NSW, and its history in this State to the mid-1970s.

[72] Ibid 1.
[73] Ibid 11.

Chapter 3 involves a discussion of the literature on the causes of the changes to the *Bail Act* with particular reference to issues related to suggestions of a 'punitive turn.' The discussion will explain what the 'new punitiveness' is said to be, with particular reference to the views of criminologists David Garland[74] and John Pratt.[75] Issues such as challenges to rational thinking about bail, rising feelings of insecurity in the community, emotive and destructive themes, and political responses to these developments will be considered. Some of the material in the book *The New Punitiveness* will be discussed, focusing in particular on the emphasis in David Brown's scholarship on combining theory and empirical evidence.[76] There are numerous journal articles on bail in NSW either as a specific study or as part of a study of bail in a wider context. Two examples, discussed in Chapter three, are those provided by Tracey Booth and Lesley Townsley[77] and by Alex Steel.[78]

Subsequent chapters consider changes to the law of bail in the period of each Labor and Liberal Government. The thesis is divided into four periods. The 1988, 1995 and 2011 State elections will be considered at the end of the appropriate period because in those three elections the Government changed hands.

1976-1988. This period of State Labor Governments in NSW is considered in Chapters 4, 5 and 6. The circumstances surrounding the 1976 Bail Review Committee Report are

[74] David Garland, *The Culture of Control* (Oxford University Press, 2001)
[75] John Pratt, *Punishment and Civilisation* (Sage Publications, 2002 Reprinted 2005)
[76] Brown, above n 14, 27
[77] Booth and Townsley, above n 58.
[78] Alex Steel, 'Bail in Australia: legislative introduction and amendment since 1970' (Paper presented at the ANZ Critical Criminology Conference Proceedings, Monash Univesity Melbourne, 8-9 July 2009)

explored as are the concepts in the Report.[79] The reasons for the two year delay before the introduction of the *Bail Act* are discussed as is the content of the Act and the extent to which it reflected the findings and recommendations in the 1976 Report.[80] The implications of providing an exception to the presumption in favour of bail for aggravated robbery are considered. Amendments concerning drug supply and domestic violence and their implications for the presumption in favour of bail are related to the issues of short and long term causes of change. The same considerations are relevant to changes to s 32 of the *Bail Act*. That section deals with the criteria to be used when considering whether to grant bail. Kevin Anderson and Susan Armstrong, who wrote the Bail Review Committee Report, 1976, were interviewed. Attorneys-General Frank Walker and Terry Sheahan were also interviewed.

1988. This period is considered in Chapter 7. The extent to which 'law and order' politics played a part in the election that divided a Labor period of government from a Liberal period of government is canvassed.

1988-1995. This period is considered in Chapter 8. It was a period of Liberal Government. Amendments to the *Bail Act* removed the presumption in favour of bail for drug supply, personal or domestic violence and contravention of apprehended violence orders. These changes are considered as are amendments to the s32 tests for the provision of bail. In addition, changes to the presumption in relation to the charge of murder are discussed. The re-introduction of a *Summary Offences Act 1988* (NSW) had

[79] Anderson and Armstrong, above n 1.
[80] *Bail Act 1978* (NSW) as originally made.

implications for the provisions concerning the right to bail. These are considered. Attorney-General, John Dowd was interviewed.

1995. This year is considered in Chapter 9. The extent to which 'law and order' politics played a part in the election that divided a Liberal period of government from a Labor period of government is canvassed.

1995-2010. This period is considered in Chapters 10 to 12. This is again a period of Labor Governments. The discussion involves consideration of a wide range of amendments to the *Bail Act.* In relation to the presumption they cover drug supply, personal violence including malicious wounding and manslaughter, sexual assaults, firearm offences, breach of apprehended violence orders, repeat offenders and riot. The concept of bail for specific offences such as murder being available only in 'exceptional circumstances' in addition to presumption restrictions is considered in the light of NSW Bureau of Crime Statistics and Research material.[81] Amendments concerning the right to second and further bail applications are considered, as well as difficulties in meeting bail conditions, an issue of concern in the 1976 Report. Attorney-General, Jeff Shaw had died. His Chief of Staff, Adam Searle, was interviewed. Attorney-General, Bob Debus was interviewed. Attorney-General, John Hatzistergos was prepared to answer by email in response to emailed questions on a limited range of topics. `

[81] Snowball, Roth and Weatherburn, above n 54.

2010. The campaign for bail reform and the Bail Bill 2010 introduced by the Labor Government are considered in Chapter 13. The background to the withdrawal of the Bail Bill 2010 is discussed.[82]

2011. This year is considered in Chapter 14. The extent to which 'law and order' politics played a part in the election that divided a Labor period of government from a Liberal period of government is canvassed.

2011-2013. This period is considered in Chapters 15 – 17. Chapter 15 considers the amendments to the *Bail Act* introduced by the Liberal Government. Chapter 16 explains the lead up to and the content of the 2012 Law Reform Commission report on bail. Chapter 17 considers the Bail Bill introduced by the O'Farrell Government in 2013. The Bail Bill is compared with the recommendations of the Law Reform Commission.

Chapter 18 contains the conclusions to be drawn from the material in the thesis.

I believe that consideration in the thesis of a government by government approach to bail, which includes interviews with most of the relevant Attorneys-General, makes a contribution to knowledge of the factors that went into the making of the *Bail Act* and subsequent amendments. This approach also allows a better understanding of the extent of any punitive turn as a cause of changes and of alternative explanations of such changes. It also contributes to knowledge of what issues need to be considered and

[82] Bail Bill, 2010, above n 27.

those that need to be treated with caution in relation to future debates concerning changes. The politics of bail reform in 2010-2013 involved significant public debate about bail. Consideration of aspects of that debate and the reaction of those in power will contribute to knowledge about the circumstances in which and the methods by which basic principles associated with liberal democracy can be defended.

Chapter 2

THE IMPORTANCE OF BAIL AND THE HISTORY OF BAIL IN ENGLAND AND NEW SOUTH WALES

2.1 INTRODUCTION

In this chapter consideration is given to the nature of bail and its history. Such consideration is needed in order to understand the central importance of the concept in the justice system and the implications of making major changes to its provision. As the law on bail in NSW is historically based on the law on bail in England, the chapter considers the evolution of the law of bail in England. It then considers how that law was applied in NSW. The chapter also considers observations by NSW Attorneys-General about the important principles involved in the law of bail. The chapter concludes with an explanation of the law on bail in NSW in the mid-1970s prior to the Bail Review Committee Report of 1976.

2.2 WHAT IS BAIL?

Bail is 'authorisation to be at liberty under this Act, instead of in custody',[83] despite the person being charged with a criminal offence. That definition remains unchanged from when the *Bail Act 1978* (NSW) ('*Bail Act*') was first introduced. Bail is a form of conditional liberty. Bail enshrines one of the fundamental concepts that define a liberal democracy. Bail limits the possibility of a person disappearing into a gaol system while

[83] *Bail Act 1978* (NSW), s4.

the criminal legal procedure takes its course. Bail recognizes the presumption of innocence and, importantly, allows the accused to be actively involved in the preparation of the case that may decide the future direction of his or her life. Section 6 of the *Bail Act* makes clear that bail applies to all aspects of the legal process from pre-trial to appeal.

2.3 THE ENGLISH BACKGROUND TO BAIL IN NSW

It is not central to this thesis to discuss the history of bail in England. However, some brief comments reinforce the importance of the concept in relation to the ideas of justice and freedom. As Anderson and Armstrong noted in their Report of 1976: 'It is absurd but true that, in discussing bail in New South Wales, attention must be paid to the ancient history of the common law.'[84]

Sir James Stephen observed that the concept of bail is as old as the law of England and traced its history for over 800 years. Thus it is older than the *Habeas Corpus Act 1679* 31 Car 2 and the *Bill of Rights 1688* 1Wm & M sess 2. Sir James Stephen indicated that the right of the superior courts to grant bail for all offences had always been the case and that he was not aware that it had ever been disputed.[85]

In early medieval England, bail was a means of dealing with the period after arrest at a time when there was no preliminary enquiry and the arrival of the justices could take

[84] Anderson and Armstrong, above, n 1, 14.
[85] Sir James Stephen, *A History of the Criminal Law of England* (Lenox Hill, 1883 Reprinted 1973) 233-339 and 243.

years.[86] At that time bail was based on the 'idea of the accused's being placed in custody of his surety – thus in theory he was still in custody but such custody was not prison or police custody.'[87] A surety was a person who guaranteed that the accused would turn up at court and who, if the accused did not turn up was required to surrender himself. R. P Roulston observes that'[l]ater the sureties were permitted to forfeit promised sums of money instead of themselves if the accused failed to appear.'[88]

Bail was a discretionary power in the hands of the Sheriff based on the importance of the charge, the character of the accused and the strength of the evidence against the accused. The *Statute of Westminster 1275* 3 Edw 1, was intended to deal with abuses that had emerged by stating which offences could attract bail and which could not. The most serious offences did not attract bail while offences such as trespass and larceny did. This statute was the main foundation of bail law for 550 years. At this point the tests for bail included: the seriousness of the offence; the strength of the case; and the character of the accused.[89] By the end of the fifteenth century the Sheriff's power to decide who did and did not get bail had been transferred to the Justices.[90]

Consciousness of bail as a right can be found in the *Bill of Rights* which states that 'excessive Baile ought not to be required nor excessive Fines imposed nor cruel and

[86] Ibid 233-234
[87] Brian Donovan, *The Law of Bail* (Legal Books Pty Ltd, 1981) 19.
[88] R P Roulston, 'The Quest for Balance in Bail: The New South Wales Experience' in D Chappell and P Wilson (eds), *The Australian Criminal Justice System* ((Butterworths), 1972) 467, 469.
[89] Sir James Stephen, above n 85, 234-235.
[90] Donovan, above n 87, 23-24.

unusual Punishment inflicted.'[91] The *Habeas Corpus Act* via a writ served upon the gaoler required a return within three days and a requirement to provide bail.[92]

Sir James Stephen explained that the *Criminal Law Act 1826* 7 Geo. IV, ch 64 consolidated the law on bail and provided greater clarity as to the capacity of justices to provide bail in felonies and a wide range of misdemeanours.[93] Bail in relation to felony or suspicion of felony was to be available depending on the strong or small likelihood of conviction. The *Criminal Law Act* in s I explained that where the evidence 'raise[s] a strong presumption of the guilt of the person charged, such person shall be committed to prison by such Justice or Justices, in the manner herein-after mentioned; … and the evidence given in support of the charge shall, in their opinion, not be such as to raise a strong presumption of the guilt of the person charged and to require his or her committal, or such evidence shall be adduced on behalf of the person charged as shall in their opinion weaken the presumption of his or her guilt, but there shall notwithstanding appear to them, in either of such cases, to be sufficient ground for judicial enquiry into his or her guilt, the person charged shall be admitted to bail by such two Justices'.[94]

In 1848 the British Parliament passed two Acts known as Sir John Jervis Acts. They were the *Duties of Justices (Indictable Offences) Act* 11 & 12 Vict. c 42 and the *Duties of Justices (Summary Convictions) Act* 11 & 12 Vict. c 43. The first of these Acts clarified the

[91] *Bill of Rights, 1688* 1 Wm & M sess 2.
[92] Stephen, above n 85, 243.
[93] Ibid 238.
[94] *Criminal Law Act 1826,* 7 Geo 4, c 64

procedures to be used by Justices in Committal proceedings considering if a person should stand trial. Section III explained that where a person was brought before a Justice in relation to an indictment:

> such Justice or Justices, upon its being proved upon oath or affirmation before him or them that the person so apprehended is the same person who is charged and named in such indictment, shall, without further inquiry or examination, commit him for trial, or admit him to bail, in manner hereinafter mentioned;[95]

Section XXI explained that adjournments where the person was in custody were to be for no more than eight days. Sections XXII and XXIII explained that bail was available throughout the committal proceedings.

The *Duties of Justices (Summary Convictions) Act* provided for all aspects of matters dealt with in a summary manner. Section 3 allowed the Justice or Justices to adjourn matters and in such cases to 'commit the said defendant to the house of correction or other prison … or to discharge him upon his entering into a recognizance with or without surety or sureties, … conditioned for his appearance at the time and place to which such hearing shall be so adjourned'.[96]

Roulston explained that English legislation of 1898 'modified the absolute requirement as to sureties and gave the magistrates unfettered discretion to admit to bail, even on

[95] *Duties of Justices (Indictable Offences) Act 1848*, 11 & 12 Vict, c 42.
[96] *Duties of Justices (Summary Convictions) Act 1848*, 11 & 12 Vict. c 43.

his own recognizance, any person whom they have reason to believe will submit to trial.'[97]

2.4 WHAT ENGLISH LAW ON BAIL WAS APPLIED IN NSW?

The applicability of nineteenth century English law on bail to NSW has been discussed in a number of sources, there being some controversy as to what was applicable. The *Magna Carta*, the *Bill of Rights* and the *Habeas Corpus Act* were received into NSW at settlement.[98] These important documents collectively provide for a positive view of human rights in relation to bail. The idea that bail conditions should not be excessively difficult and that a person has a right to be brought before a court have been part of our thinking about bail since 1788. I am not suggesting that the law was fair to all persons. I contend, rather, that the law of bail was based on the English model and moving in a particular direction, which is associated with the idea of liberty until an offence is proven or sentence is passed.

In relation to the general standing of the English law at settlement, Donovan observes:

> Certain parts of the English law applied to New South Wales before the 1978 *Bail Act*. The general principle was that the English law at the date of settlement applied to the colony subject to the proviso that the common law as applied was consistent with the conditions then pertaining to the colony.[99]

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[97] Roulston, above n 88, 470.
[98] G D Woods, *A History of Criminal Law in New South Wales: The Colonial Period 1788-1900* (The Federation Press, 2002) 443.
[99] Donovan, above n 87, 27.

The common law included three tests for bail: the seriousness of the offence; the likelihood of guilt; and the outlawed character of the accused. Stephen traced these back to Bracton.[100] Roulston notes that these three concepts are almost certainly based on the likelihood of appearance of the accused. No single principle predominated.[101]

Roulston states the *Criminal Law Act 1826* was 'adopted by N.S.W. in 9 Geo. IV, No 1.'[102] **T**he English *Australian Courts Act 1828* 9 Geo 4, c 83'provided that all the laws of England in force at the time of passing, 'shall be applied in the administration of justice in the courts of New South Wales and Van Diemen's Land respectively, so far as the same can be applied within the said colonies'. [103] Roulston explains that English legislation of 1835 provided that 'all previous criteria were subordinated to the single criterion of the risk that the accused will not appear to take his trial.'[104] However, he explains that: 'This statute appears not to have been adopted in New South Wales, perhaps not surprisingly if one reflects on the conditions of the colony of New South Wales in 1835.'[105] Woods does not include the 1835 statute in his historical Table of Statutes.[106] The correct position appears to be that the 1826 statute was adopted in NSW but that the 1835 statute was not.

[100] Stephen, above n 85, 234.
[101] Roulston, above n 88, 469.
[102] Ibid, 469.
[103] *Australian Courts Act 1828*, 9 Geo IV, c 83.
[104] Roulston, above n 88, 469.
[105] Ibid 469.
[106] Woods, above n 98, 443-444.

The English *Duties of Justices (Indictable Offences) Act* is specifically referred to by Roulston as having been adopted in NSW in 1850. *Imperial Acts Adoption and Application Act 1850* 14 Vict., No 43. A reading of the Act confirms this to be so. Roulston states:

> The modern origin of the present magisterial discretion in granting bail rests on the Indictable Offences Act of 1848, which in effect provided that the committing magistrate may in his discretion admit to bail a person charged with any felony, or with any of a dozen assorted misdemeanors. In other crimes bail could not be refused.[107]

G D Woods also confirms that the *Duties of Justices* (*Indictable Offences) Act* and the *Duties of Justices (Summary Convictions) Act* of the same year were adopted in NSW on 1 December 1850.[108] I have explained these two statutes at 2.3 above. Woods explains that the *Duties of Justices (Summary Convictions) Act* provided Justices with powers in summary matters: 'prisoners could be detained pending hearings, or a form of bail could be granted by way of the issue of a recognizance (bond) to ensure further attendance.'[109] It is clear that 'both of Jervis's Acts were helpful in the practical administration of the criminal law in New South Wales after 1 December 1850.'[110]

In relation to the English *Bail Act 1898* 61 & 62 Vict 1 Roulston observed that this statute which,

> 'gave the magistrates unfettered discretion to admit to bail, even on his own recognizance, any person whom they have reason to believe will submit to trial was not

[107] Roulston, above n 88, 469.
[108] Woods, above n 98, 179.
[109] Ibid 178.
[110] Ibid 179.

adopted in New South Wales. It would be of considerable advantage to magistrates in this State if legislation of similar effect, even at this late stage, were enacted.'[111]

2.5 THE LAW OF BAIL IN THE TWENTIETH CENTURY IN NSW

By the 1970s the criteria relevant to bail in NSW were:

(1) Evidence which goes to the likelihood of the accused absconding.

(2) Evidence going to the likelihood of the accused committing further offences while on bail, or tampering with witnesses.

(3) Evidence which indicates that the accused should be released.[112]

The likelihood of further offences being committed while on bail was a modern development and as Anderson and Armstrong noted, '[b]ecause this criterion is a modern development it parameters are almost unlimited. Any evidence at all is admissible "that goes to the likelihood of further offences on bail."'[113]

In relation to magistrates and police, the *Justices Act 1902* (NSW) ('Justices Act') became the source of power from that year. The Act absorbed many aspects of the 1850 legislation. The Justices Act dealt with committals and summary offences. Bail was provided for in both areas of court activity. Section 33 of the Act provided for consideration of bail in committals where an adjournment was to occur. If bail was refused then an eight day limit applied to adjournments without consent. Section 42

[111] Roulston, above n 88, 470.
[112] Anderson and Armstrong, above n 1, 21.
[113] Ibid 29.

provided for consideration of bail where a person was committed. Section 69 provided for consideration of bail where the matter was punishable on summary conviction. [114]

Potential for inconsistency and difficulty existed because the powers of magistrates varied in relation to bail, depending on what type of issue was before them. Where the defendant was committed for trial, the magistrate had discretion to grant bail in cases concerning felony, attempted felony, assaults with intent to commit a felony and certain indictable misdemeanours (less serious than felonies) such as riot. In other misdemeanours bail was to be granted.[115] However, in consideration of bail in this situation, surety or sureties had to be found.[116] Such compulsion did not apply to other bail considerations. Roulston stated in 1972: 'This, it is suggested, is an unnecessarily inflexible requirement and should be repealed.'[117]

In committal hearings, s 33(2) of the *Justices Act* allowed for adjournment for no more than eight days. This limited the time that a defendant could be in gaol if bail had been refused under s 34. By amendment in 1909, however, the defendant could consent to a longer period. This is consistent with the idea of ensuring citizens are not arbitrarily detained. Inconsistently, no such eight day limit applied to refusal of bail for summary matters as set out in s 69 where an adjournment occurred under s 68. The result was

[114] *Justices Act 1902* (NSW) s33, s42, s69.
[115] Ibid s45
[116] Ibid s45.
[117] Roulston, above n 88, 471.

that the defendant might go to prison for being unable to meet bail conditions and that would be for an unlimited period.[118]

In the period between 1902 and 1978, the law of bail in courts presided over by magistrates had many of the features that are associated with the idea of liberty of the citizen and the presumption of innocence. However, this was not consistently the case. The type of crime being dealt with played a part in defining the magistrate's powers. All courts did use non-financial conditions, such as reporting to police and surrender of passport. However, the emphasis on money as a bail condition continued to disadvantage the poor. Anderson and Armstrong, writing in 1976, noted that '[b]ail in New South Wales has functioned as an almost exclusively financial system for so long that a deliberate policy favouring use of non-financial conditions will be needed to change it.'[119] After noting that magistrates were increasingly adopting the practice of letting defendants go at large, the authors stated: '[d]espite these practices, it seems unlikely that existing reliance on money bail can be reduced unless both police and courts are given clear authority to release defendants on a wide variety of non-financial conditions'.[120]

At the time of the introduction of the *Bail Act* in 1978, the Supreme Court had the inherent power to grant bail. I referred to Stephen earlier in regard to the superior courts. He stated: 'The power of the superior courts to bail in all cases whatever, even

[118] Anderson and Armstrong, above n 1, 14.
[119] Ibid 14.
[120] Ibid 14.

high treason, has no history. I do not know, indeed, that it has ever been disputed or modified.'[121] Roulston confirmed this as the basis of the power to bail in relation to the Supreme Court of NSW.[122] The Supreme Court had power to admit the person to bail at any stage of proceedings. This also applied to appeals to the Court of Criminal Appeal.[123]

The District Court, then known as the Courts of Quarter Sessions, also had power to grant bail. According to Roulston:

> The Courts of Quarter Sessions in respect to the offences within their jurisdiction, exercise concurrently with the Supreme Court the power to admit to bail persons who have been committed to, and are awaiting trial at, Quarter Sessions. This exercise of power is based predominantly on long accepted practice and as a necessary incident to the constitution of the court of trial rather than any explicit authority.[124]

However, Anderson and Armstrong pointed to alternate sources that expressed doubt about the power of the Courts of Quarter Session to provide bail before indictment. They recommended that any residual doubt be eliminated by statute.[125]

2.6 THE IMPORTANCE OF BAIL ACCORDING TO THE ATTORNEYS–GENERAL

After centuries of evolution, bail had become, by the 1970s, one of the pillars by which we define our liberal democracy. On page twelve of this thesis, I set out the views of Frank Walker, the Attorney–General who introduced the *Bail Act*. Those Attorneys-

[121] Stephen, above n 85, 243.
[122] Roulston, above n 88, 473.
[123] *Criminal Appeal Act 1912* (NSW), ss18(2), 22.
[124] Roulston, above n 88, 472.
[125] Anderson and Armstrong, above n 1, 39.

General who followed, notwithstanding their differing political allegiances, continued to emphasise the fundamental importance of bail in relation to our ideas of liberty and the presumption of innocence.

When introducing the 1986 Bail (Amendment) Bill Labor Attorney-General Terry Sheahan stated:

> When implementing these proposals, the Government has endeavoured as far as possible, to protect the rights of the accused person. It has striven to maintain the delicate balance between the rights of the individual and the requirements of the community.[126]

Liberal Attorney-General John Dowd stated in the Second Reading debate on the Bail (Amendment) Bill 1988 that:

> Though the community must be protected against dangerous offenders, it is important to bear in mind that what we are dealing with is an alleged crime by an unconvicted person. The right to liberty is one of the most fundamental and treasured concepts in our society and cannot be dismissed lightly. Under the *Bail Act* there is a presumption in favour of bail for most offences. This is consistent with the presumption of innocence which is a fundamental of criminal law.[127]

Labor Attorney–General Bob Debus stated in Reply on the Bail Amendment Bill 2003:

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[126] New South Wales *Parliamentary Debates* Legislative Assembly, 23 April, 1986, 2575 (Terry Sheahan)
[127] New south Wales, *Parliamentary Debates* Legislative Assembly, 25 May 1988, 551 (John Dowd)

> The determination of bail is a delicate balancing act between principles that are the foundation of the rule of law in a society such as ours and the protection of the community. The community is right to expect that it will be protected, but that must be done within a framework that continues to observe fundamental principles, such as the presumption of innocence. Several speakers in this debate and in a debate earlier today seem not to understand that there is such a thing as the presumption of innocence, as fundamental as that is to the very essence of our democracy.[128]

2.7 CONCLUSION

In 1976, the year the Bail Review Committee would consider bail, there were a number of aspects of bail that were unfair because of socio-economic issues and to make things more complex, the process depended on which court the citizen was in. All courts had the power to require defendants to be brought before the court and it was the expectation of defendants that they had a right to a bail hearing in relation to the period between arrest and trial or sentence. However, defendants, particularly the poor, the young, the migrant, the mentally ill and Aborigines and Torres Strait Islanders, were faced with a series of problems. The Bail Review Committee noted that these included: 'the need to make bail hearings more systematic and comprehensive; to reduce the emphasis on money bail; to codify the relevant criteria; and to eliminate anomalies in the powers of police and courts.'[129] Comprehension of language in laws and as used by

[128] New South Wales *Parliamentary Debates,* Legislative Assembly, 18 June 2003, 1700 (Bob Debus)
[129] Anderson and Armstrong, above n 1, 10.

lawyers at a time when two thirds of people appearing in magistrates' courts were unrepresented was a serious problem. So was lack of legal representation. [130]

By the early 1970s those matters which had to be taken into consideration when contemplating bail had developed as part of the common law. As Anderson and Armstrong noted: '[t]he considerations which police and courts may take into account when setting or refusing bail have never been laid down by statute in Australia, and can be established only by combing through a large number of court decisions.'[131] Many of the matters arose as a matter of common sense. These matters included the possibility of non-appearance of the accused at later parts of the proceedings; the seriousness of the offence; the strength of the Crown case; the severity of punishment; the accused's previous record, and the likelihood of tampering with witnesses or committing further offences; delay in court hearing; the right of the accused to be free to prepare his or her defences; and the economic and personal implications for the accused if bail were not granted.[132] Denial of bail was not to be retribution for possible future guilt. In *R v Wakefield,* it was stated: 'So that prima facie a person accused of a crime should be allowed his liberty before the hearing in order that the preparation of his case be as full and thorough and unfettered as possible.'[133]

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[130] Ibid 44.
[131] Ibid 21.
[132] R Watson and H Purnell, *Criminal Law in NSW* (Law Book Company, Australia, 1971) 353-354 and Roulston, above n 103, 474-482.
[133] *R v Wakefield* (1968-9) 89W.N Pt 1, 325, 327.

Problems in relation to bail arising from socio-economic disadvantage do not detract from the importance of bail in 1976. Finding the tests for bail in various court cases also created difficulties but that also does not detract from the fact that bail had evolved in a certain direction that emphasised the presumption of innocence and liberty. It is also important that the law on bail in 1976 emphasised balancing the rights of the defendant and the rights of the community to protection.

Given the importance of bail, given its history, evolving over centuries into something that helps distinguish and define a liberal democracy that values liberty and the presumption of innocence, given that there is no dispute about its importance and that the principles on which it is based have been applauded by politicians on both sides of the political divide, how did a society such as ours come to decimate a pillar of its own political structure? That is the issue that will dominate the rest of this thesis.

Chapter 3

THE NEW PUNITIVENESS – GENERAL THEORY AND ITS APPLICATION TO CHANGES TO BAIL LAW IN NSW

3.1 INTRODUCTION

This chapter commences with an explanation of what is meant by 'the new punitiveness'. This idea is important because it introduces the claim that all aspects of the criminal justice system are now subject to wider social forces, in some cases global. Various explanations for the punitive turn are considered. The explanations include the idea that in an era of global neo-liberal economics the State has taken on a diminished but punitive role. If such a punitive turn is the dominant factor in relation to bail, then achieving reform that restores liberal democratic ideas becomes a significantly more difficult matter than if the issues were locally based.

3.2 WHAT IS THE PUNITIVE TURN?

In his book Discipline and Punish, Michel Foucault argued that the form of punishment had been gradually moving since the eighteenth century from use of arbitrary physical force to a restrained, rational form in which discipline and productive development of the prisoner was emphasised. As Foucault states:

> To sum up, ever since the new penal system – that defined by the great codes of the eighteenth and nineteenth centuries – has been in operation, a general process has led judges to judge something other than crimes; they have been led in their sentences to do something other than judge; and the power of judging

> has been transferred, in part, to other authorities than the judge of the offence.[134]

The literature suggests that in many parts of the Western world there has been a long term 'punitive turn' in public and political opinion in relation to crime and criminal justice. The change is also referred to as 'penal populism'.[135] The literature indicates that these trends commenced in the late 1970s and early 1980s.

John Pratt in considering the work of Michel Foucault explains that:

> Much of what is described here as the new punitiveness may therefore be understood as forms of punishment that seem to violate the productive, restrained and rational tenets of modern disciplinary punishment and hark back, in different ways, to the emotive and destructive themes of sovereign punishment.[136]

Penal populism has been described by Pratt as follows:

> By penal populism, what I am referring to is the way in which policy is increasingly likely to be determined by governments in conjunction with those who claim to speak on behalf of the public (law and order lobbyists, talkback radio hosts, the popular press and so on.) In such ways, 'ordinary people' are no longer left out of policy making, but instead they, or more likely those who claim to speak on their behalf, have become important definers of its quantity and intensity.[137]

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[134] Michel Foucault, *Discipline and Punish* (Penguin Books, 1977) 22.
[135] John Pratt, 'Penal Populism and the Contemporary Role of Punishment' in Thalia Anthony and Chris Cunneen (eds), *The Critical Criminology Companion* (Hawkins Press, 2008) 265.
[136] John Pratt et al, 'Introduction' in John Pratt et al (eds), *The New Punitiveness* (Willan Publishing, 2005) xii-xiii
[137] Pratt, above n 135, 265.

3.3 EXPLANATIONS OF THE PUNITIVE TURN

It is appropriate to commence consideration of explanations of the punitive turn with the work of the prominent criminologist, David Garland, who is referred to by many authors dealing with punitiveness and the issue of bail. Garland discusses changes to the nature of society in the United Kingdom and the United States over a period of 25 years, including substantially rising prison numbers. Garland sees a punitive trend as part of the development of late modernity. The rise of the global economy and the demands of a free market are intermixed with the decline in power of the nation state. Ideas related to the welfare state have been replaced by fear and insecurity amongst citizens in relation to the urban poor, welfare claimants and minority groups. Garland observes:

> In the new economic order, only entrepreneurial conduct and prudent risk-management can offset the threat of insecurity: the state no longer acts as the insurer of last resort; citizenship no longer guarantees security. Like the system of criminal justice, the benefits structure of the welfare state has come to be viewed as a generator of problems and pathologies rather than a cure for them.[138]

The state can still punish those who have taken what is now seen as a decision to be involved in crime. The state takes on this role of control. It gives attention to this approach because it gains approval from those who support the free market and are concerned that their individual freedom may be restricted by those involved in crime.[139]

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[138] Garland, above n 74, 196-197.
[139] Ibid 193-205.

Garland is, of course, giving an overview in relation to Western societies. This thesis considers whether in relation to a narrow area such as bail in NSW after 1976 the trend towards a more punitive society has relevance and if so to what extent.

The work of the prominent criminologist, John Pratt, is referred to by those who deal with bail specifically. Pratt traces English prison records and other information from the nineteenth century to the present. Pratt refers to an 'emotive punitiveness' from the 1980s. He argues that there is a new axis of power between the public and the politicians, which makes demands but also expects rational efficiency in the running of public institutions such as courts and prisons. Judges' and magistrates' powers, to the extent that they interfere with the new expectations, are to be curtailed.[140] Pratt's explanation for this includes rising public anxiety. He explains growing international interdependence and observes:

> And within each state, the growing prominence of new social movements seem to challenge the legitimacy of the more long-established foundations of the civilized world (the nuclear family, police, church, trade unions, class solidarity and so on).[141]

Pratt also comments on civilizing and decivilising factors, referring to the work of Norbert Elias. By 'civilized' Pratt means the growth of the centralized power of the nation state, increased interdependency between citizens, and the internationalization of restraint. Decivilisation is related to the emergence of the neo-liberal state. Responsibility is delegated back on the community, who in turn 'come to feel more

[140] Pratt, above n 75, 166-192.
[141] Ibid 183.

insecure and more prone to emotional outbursts in a world where security and certainty are perceived as absent.'[142] With the growth of international economics and communications there has been a decline in the civilizing capacity of the nation state and both the civilizing and decivilising factors are now in play. Enormous increases in numbers in prison create demand for more effective state institutions to deal with the increased numbers.[143] Pratt notes that the new punitiveness does not mean a uniform collapse of rehabilitation programs and other positive improvements in conditions in gaols. Pratt explains this apparent contradiction when he states: 'Within the prison establishment itself, where there is much less scope for public penetration and scrutiny … sanitized language and the ameliorative trends continue to a large extent.' [144]

Both Garland and Pratt argue that social and financial costs impose limits on the punitive trend. This has also been considered in relation to prison numbers in Australia including those on remand. It has been pointed out by Eileen Baldry and others that 'at least in some sectors of public life, over-imprisonment is increasingly being defined as a problem that needs to be addressed.'[145] These authors suggest that one alternate proposal to ever increasing prison numbers is justice re-investment, which involves in relation to localities with a high concentration of crime that 'money that would have been spent on housing prisoners [being] diverted into programmes and services that can address underlying causes of crime in those communities.' The authors point to a

[142] Pratt, et al, above n 135, xxiv.
[143] John Pratt, 'Elias, Punishment, and decivilisation' in John Pratt *et al* (eds), *The New Punitiveness* (Willan Publishing 2005), 256 -271.
[144] Ibid 267-268.
[145] Eileen Baldry et al, 'Imprisoning Rationalities' (2011) 44 *Australian and New Zealand Journal of Criminology* 24, 36.

number of sources where justice re-investment has been proposed. They include the Legal and Constitutional Affairs Committee, Parliament of Australia (2009) *Access to Justice.* Canberra. Department of the Senate, Parliament House; Aboriginal and Torres Strait Islander Social Justice Commissioner (2010) *Social Justice Report 2009.* Sydney: Australian Human Rights Commission.[146]

Ian Loader suggests that in England in the 1950s and 1960s, penal issues were the preserve of liberal elitism. Loader means an elite:

> of politicians, senior administrators, penal reformers and academic criminologists wedded to the belief that government ought to respond to crime (and public anger and anxiety about crime) in ways that, above all, seek to preserve 'civilised values'.[147]

Loader then explains how and why the view of this elite was overturned in the following decades. The reasons include a decline in belief in the effectiveness of rehabilitation in the 1970s, the rise of law and order politics in the 1980s, and a populist and punitive turn in the 1990s.[148]

Loic Wacquant gives major emphasis to current politics when considering cultural shifts associated with the punitive turn. Waquant states in observations about the United States penal system:

> The grotesque overdevelopment of the penal sector over the last three decades is indeed the necessary counterpart to the shrivelling of the welfare sector, and

[146] Ibid, 36-37.
[147] Ian Loader, 'Fall of the Platonic Guardians' (July, 2006) 46.4 *British Journal of Criminology.* 561, 563.
[148] Ibid 571, 574, 578.

> the joining of the remnants of the dark ghetto with the penitentiary is the logical complement of the policy of criminalisation of poverty pursued by the country's authorities.[149]

Wacquant's explanation for this change 'is not the frequency and character of criminal activity but the attitude of the society and the responses of the authorities toward street delinquency and its principal source, urban poverty concentrated in the big cities.'[150] In a world dominated by neo-liberalism the purpose of incarcerating people is not only to reduce crime: 'it also has for mission to bolster the social, racial and economic order via the punitive regulation of the behaviours of the categories prone to visible and offensive deviance because they are regulated to the bottom of a polarizing class and caste structure.'[151] Wacquant also expresses concern about the decline of belief in rehabilitation and the role of the media in continually dealing with crime as a topic. He observes that: 'The result of this collusive triangular relationship between the political, media and penal fields has been the proliferation of repressive laws'[152]

Rob White relies on a Marxist emphasis on class to explain modern criminal justice as part of the control of the poor and disadvantaged. White states:

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[149] Loic Wacquant, 'The great penal leap backward: Incarceration in America from Nixon to Clinton' in John Pratt et al (eds), *The New Punitiveness* (Willan Publishing, 2005) 21.
[150] Ibid 15.
[151] Ibid.
[152] Ibid 19.

> The criminalization industries of the State and the media reflect concern about the growing reality of subsistence criminality driven by an expanding layer of poor and unemployed which has emerged out of global political-economic restructuring.[153]

White considers the method of intervention of the State in a society run in the interests of the capitalist system. He states:

> The crux of state intervention is how best to manage the problem of disadvantaged groups (their presence and activities), rather than to eradicate disadvantage— for to eradicate it would require action to reverse the polarizations in wealth and income, to pit the state directly in opposition to dominant class interests.[154]

David Brown and Russell Hogg suggest that what has emerged is what they call the 'uncivil politics of law and order'. Crime is depicted as an ever increasing problem that will overwhelm society without punitive initiatives. This leads to what they describe as the law and order of common sense. Brown and Hogg state:

> Faced with electors, law and order lobbyists and media pundits who are impatient with elaborate judicial procedures and procedural rights, many governments and politicians have been prepared to discard well-established principles and institutions of justice.[155]

On the other hand, in his chapter in the book *The New Punitiveness*, Brown provides interesting reminders about the need for caution in claims about the extent of the new punitiveness. His observations, in my opinion, are also relevant in considering bail reform. Brown, who has studied Australian prisons since the 1970s, considers the theory

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[153] Rob White, 'Class Analysis and the Crime Problem' in Thalia Anthony and Chris Cunneen (eds), *The Critical Criminology Companion* (Hawkins Press, 2008) 30, 37.
[154] Ibid 38.
[155] Russell Hogg and David Brown, *Rethinking Law and Order* (Pluto Press, 1998) 4.

of the new punitiveness and empirical evidence. He suggests that it is wrong to overplay the inclusive nature of society in the seventies and also wrong to underplay the penal welfare roots of many ongoing changes such as the greater welfare role of prison officers today.[156] The background of economic and social disadvantage for many coming into contact with the court and prison system meant that whatever the public rhetoric, there was going to be legal due process and penal welfare.[157]

3.4 USE OF THE PUNITIVE TURN TO EXPLAIN CHANGES IN BAIL LAW IN NSW

The contribution of punitive attitudes as an explanation for the changes in the *Bail Act* in NSW has been considered by Tracey Booth and Lesley Townsley. They refer to both Garland and Pratt, noting the punitive turn and giving a number of examples, including truth in sentencing, rising prison numbers and zero tolerance of crime. Booth and Townsley state:

> In the context of bail, punitive crime policies have led to the gradual erosion of the presumption in favour of bail in relation to many offences, the conflation of bail conditions and penalty (Freiberg and Morgan 2004; Edney 2007) and a steady increase in the number of persons being held as prisoners on remand.[158]

Booth and Townsley draw attention to the political imperatives that, in the face of moral outrage, have led to restrictive changes in the *Bail Act,* including changes to the presumption in favour of bail and the amendment in 2007 of s22A making repeat bail applications more difficult. The resultant leap in juvenile remand numbers and the lack

[156] Brown, above n 14, 37-38.
[157] Ibid, 39.
[158] Booth and Townsley, above n 58, 42.

of empirically based evidence for the change are criticized. Booth and Townsley acknowledge the development of therapeutic concepts and developments aimed at specific groups such as the indigenous and mentally ill, but overall the result of all of the above is, according to them, an undermining of the presumption of innocence and a decline in the defendant's rights and entitlement to liberty.[159]

Alex Steel also refers to Garland and Pratt and the rising numbers in prison on remand and considers whether there is a distinct penal culture in Australia that explains a rise in the punitive approach. He investigated whether there was a variation among jurisdictions within Australia. The situation in NSW was made clear when he stated: 'By contrast NSW stands out as both the jurisdiction that initially had the most liberal approach to bail, but has reacted to this since the late 1990s with a high degree of amendment to its bail laws.'[160] After considering punitive changes in all parts of Australia, Steel states: 'It is clear that NSW has by far a greater involvement by politicians in the setting of bail availability. To this extent it would appear that NSW is in an exceptional position in comparison to other Australian states.'[161]

3.5 CONCLUSION: ISSUES RAISED BY THE MATERIAL ON THE PUNITIVE TURN FOR THE RESEARCH QUESTION IN THIS THESIS

This thesis is concerned with evaluating and ultimately challenging the view that an evolving punitive turn explains or largely explains the changes in bail law in the period

[159] Ibid 41-58.
[160] Steel, above n 78, 232.
[161] Ibid 234.

since 1976. The thesis evaluates alternative explanations including the role played by crimes or forms of crime at a particular time, the role of the media in each decade including the 1970s before the punitive turn is said to have begun**,** the strong values held by politicians and developments over time in particular policy areas.

Both the number of remand prisoners in NSW and the percentage of all prisoners that they represent have increased dramatically in the period between 1980 and 2012. However, as explained at 1.5.1 above the figures fluctuated in the period to 1995 before steadily rising. Whether the figures at various times have been the result of the dominance of neo-liberalism and globalization with the State reduced to providing security as Garland suggests will be considered in later chapters. So will the role of penal populism and emotive punitiveness in which the public through spokespersons and the government combine to demand a more punitive approach as Pratt suggests. The decline of rehabilitation and the rise of law and order and a populist punitive turn as Loader suggests will be tested against the amendments to the *Bail Act* in NSW. Changes based on a conscious decision by the state as Wacquant and White's work suggest, or an abandonment of principle as Brown and Hogg's work might suggest, will be considered in later chapters as a cause of the changing figures. Those chapters will also consider whether reasons not associated with the theories described were the cause of the change in the figures and in particular the rise in prison numbers in more recent times.

As for civilizing and decivilising factors, it may be that such factors were as much in conflict in the 1970s as in any other later period. That too needs further consideration.

It is appropriate to end this chapter with a quote in which David Brown sums up what needs to be done if the theory concerning the punitive turn is to be related to the practice which brought about change to bail law in NSW. Brown observed:

> The empirical (already in part theoretically framed) does not 'speak for itself' and particular developments might be pointed to as illustrations of any or all of the various accounts of the 'punitive turn' outlined at the beginning of this chapter, or indeed accounts which challenge the existence or extent of such a turn.[162]

[162] Brown, above n 14, 35.

Chapter 4

THE REPORT OF THE BAIL REVIEW COMMITTEE, 1976

4.1 INTRODUCTION

In this chapter the lead up to and features of the NSW Bail Review Committee, 1976 will be considered. Material from interviews with the authors of the Report, Kevin Anderson and Susan Armstrong, form an important part of the chapter. The chapter commences with consideration of background factors concerning the political atmosphere at the time, the personalities of key political figures, the intellectual debate and the political response to the problems of bail. Those problems concerned inefficiency and unfairness in the way bail was decided but also included public concern over violent robberies and media demands for a tougher response to such crimes. The chapter concludes with consideration of the detail of the Report and its place in relation to any possible later punitive turn.

4.2 PERSONALITIES AND POLITICAL BACKGROUND

The aggressively reforming Whitlam Labor Government was dismissed on 11 November 1975. Malcolm Fraser was installed as Prime Minister and in the subsequent election the Labor Party was defeated. Nevertheless, the Labor Party led by Neville Wran was elected narrowly in New South Wales in May, 1976. I asked Frank Walker, the NSW Attorney-General in 1976, whether the defeat of the Federal Government diminished his desire to push for major reform. Walker explained in an interview with me:

> It did the opposite for me. I was very angry about the defeat of the Whitlam Government, very amazed about the victory of the Wran Government a short time thereafter. I saw this was a great era for reform, that the attitude of society was positive. I'd won the Georges River by-election on a law and order debate which Askin had thrown the whole resources of the Liberal Party into, even held it on the day of the large Moratorium, the Vietnam Moratorium and I won a safe Liberal seat on the issue of law and order. So I thought now was the time in history when there could be reforms made that suited my social view of society.[163]

It is significant that Frank Walker regarded the successful repelling of a law and order attack as justifying reform rather than shrinking from it and settling into a conservative response.

The Liberals had been in power in NSW since the 1960s. Both the left and right factions of the ALP came to the view that Wran was their best chance for victory in 1976. Wran, who had been a QC and industrial barrister, was not aligned with either faction and remained his own man. The Labor Party also made sure the election was fought on State issues. David Clune states:

> Wran was an economic conservative who placed a high priority on development, economic growth and jobs. As someone who had come up the hard way, he had first hand knowledge of what it was like to be poor and out of work. In other ways, Wran was more iconoclastic, particularly detesting rigid, unthinking, class–based conservatism. He was anti–wowser and inclined to civil libertarian beliefs.[164]

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[163] Interview with Frank Walker, Former Attorney General NSW (Sydney, 20 January, 2011) 13.
[164] D Clune, 'Elections, Policy and Politics' in T Bramston (ed), *The Wran Era* (Federation Press, 2006) 21.

The extent to which this is an accurate description of Wran's economic view does not need to be considered in this thesis. However, it is clear from the description set out above that on an issue such as bail, Wran would most likely have been a supporter of civil liberties and certainly would have had an excellent grasp of the legal issues involved.

New Attorney–General Frank Walker was 33 when the government was formed. He was from the Left faction and a qualified lawyer. Walker was a strong supporter of law reform. As he stated: '[c]entral to the theme of the government's law reform agenda was the enhancement of human rights and protection of our democratic freedoms.'[165] When I asked him about his beliefs reinforcing his desire for reform, he responded, 'Passionately. That was what I was in Parliament for, Law reform.'[166] Walker had previously practised in criminal law and had direct knowledge of the flaws in the bail provisions. Walker observed that '[j]ust about every one of the reforms I put before the Parliament had been in the Labor Party's Platform provision.'[167] Thus both the Labor Party and the Attorney–General of that era were interested in genuine social and legal reform, and the opportunity for bail reform was at hand. It is also noteworthy that the reforms were part of an established party platform of reform, and not merely a reaction to events.

[165] Frank Walker, 'Social policy and the reform agenda' in Troy Bramston (ed), *The Wran Era* (The Federation Press, 2006) , 174.
[166] Walker, above n 163, 12
[167] Ibid 13.

4.3 RESEARCH REPORTS ON BAIL FOR THE AUSTRALIAN LAW REFORM COMMISSION AND THE AUSTRALIAN GOVERNMENT COMMISSION OF INQUIRY INTO POVERTY

Research into reform of the law on bail had been going on for some time, and the surrounding circumstances were favourable. Susan Armstrong one of the co-authors of the Bail Review Committee Report, 1976, stated in an interview with me:

> It was an amazing time. There was international discussion but I don't think that many people in Australia were particularly cognizant of it. It does go back to the War on Poverty, which Lyndon Johnson set up… But I went to law school in 1966 and that was the exact time when all these things were happening in America… The ideas spread everywhere over the next few years but unless you read the law journals or something, you weren't particularly aware of it.[168]

In 1975 the Australian Law Reform Commission produced a Report on Criminal Investigation.[169] When I interviewed her for this thesis, Susan Armstrong explained why she had an opportunity to make a contribution on bail:

> Essentially I was trying to achieve law reform. The way to achieve law reform, I think, is to try to present what might be quite minority views as something of a groundswell movement. I didn't have any influence at all over the rest of the ALRC Report. That was really Gareth Evans with some help from other people. He thought it all through. But he hadn't done anything about bail so I really had the opportunity.[170]

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[168] Interview with Susan Armstrong, (Sydney, 7 February, 2011).
[169] Australian Law Reform Commission, 'Australian Law Reform Commission Report, No 2, An Interim Report' (Australian Law Reform Commission, 1975)
[170] Armstrong, above n 168, 6.

The ALRC Report included three distinct headings for police to take into account when considering bail:

- probability of appearance (tests to include prior record, family ties, employment, residence in area, time in area and in addition there was to be discretion);
- interests of the accused (length of time in custody and conditions of period in custody, need to be free to prepare case or any other reason, incapacity, points for certain personal and family attributes based on a system used in Manhattan;)
- protection of the community (intimidation of witnesses but not likelihood of new crimes as that involves preventative detention).[171]

The ALRC indicated that conditions where bail was granted should not be restricted to money bail. Conditions should be in a priority order ascending from unconditional bail. They would include agreement to non-financial conditions; third party signs as to defendant being a responsible person; unsecured agreement of the defendant or any other person; secured agreement of the defendant or any other person, conditional on payment of specified amount by defendant or any other person.[172] The ALRC was particularly concerned about Aborigines and Torres Strait Islanders, persons who cannot speak English and children. In each case it made specific additional recommendations including additional persons present to assist the defendant.[173]

[171] Australian Law Reform Commission, above n 169, 82-85.
[172] Ibid 85-87.
[173] Ibid 152-3.

In 1975 Armstrong was also the author of an essay for the Australian Government's Royal Commission of Inquiry into Poverty, conducted by Professor Ronald Sackville. It was entitled, 'Unconvicted prisoners: the problem of bail.'[174] Armstrong made extensive reference to the ALRC Report and to US, UK and Canadian material. Many of the issues that would be canvassed in the 1976 Bail Review Committee Report were raised in the 1975 essay. Examples of problems raised included: the need for greater consideration of the consequences of custody, such as lack of access to lawyers; lack of a job and the risk of losing existing employment; lack of contact with family; and being treated as if sentenced.[175] Armstrong also considered the overrepresentation of the poor and migrants in remand populations and the related problem of emphasis on money bail.[176]

The case of *R v Wakefield* is referred to at 2.7 above. Armstrong was supportive of the ideas set out in that case although she did not think they supported a presumption in favour of bail. Armstrong explained:

> However, this case is not generally regarded as having established a presumption in favour of bail. It has been accepted merely as a strong restatement of the old common law principle that in making bail decisions one factor which the court may consider is that the defendant should be free where possible to prepare his defence under the best possible conditions.[177]

[174] Susan Armstrong, 'Unconvicted prisoners: the problems of bail' (Australian Government Commission of Inquiry into Poverty, 1977)
[175] Ibid 3-10
[176] Ibid 14-15.
[177] Ibid 21.

Armstrong also considered international material, including UK Home Office material recommending a presumption in favour of bail. Armstrong criticized some Australian jurisdictions where reforms 'have not proved effective. One problem is certainly that they give only a right to have bail *set,* not a right to be released.'[178] Turning to USA precedents, Armstrong emphasized the need for conditions including non-financial conditions to be attached to bail and that such conditions be in a priority order, with onerous conditions only applied where necessary. Armstrong also proposed support for the Manhattan Bail Project scoring system whereby objective tests, an example of which would be amount of convictions, resulted in points needed to obtain bail. [179] The Recommendations in her essay supported a consciousness of the rights of the accused who has not been convicted or sentenced. Her essay went on to recommend criteria for considering whether there were grounds for release. She took the view that the only relevant grounds should be probability of appearance, interests of the accused and the protection of the community.[180]

The above material concerning political persons, political parties and intellectual deliberations could easily be taken as proof of the positions taken by Garland and Pratt. It suggests that the late 1960s and 1970s were an era when reform was more likely, when the condition of the poor was regarded as deserving serious state consideration, when market based beliefs were less dominant and when the public were less emotively punitive. The trade unions of the time were large, powerful and militant. Green Bans,

[178] Ibid 45.
[179] Ibid 46-51.
[180] Ibid 52-53.

that involved not constructing buildings where environmentally important bush or land or important historic buildings were to be found, commenced in 1970 and continued through the early 1970's with action by the NSW Branch of the Builders Labourers Federation.[181] The NSW Teachers Federation made use of industrial action in pursuit of educational demands.[182] In 1970 there had been a prison riot at Bathurst gaol. Riots by prisoners at other gaols followed and industrial action by prison staff also took place. In 1978 the report of the Nagle Royal Commission into prisons exposed many shortcomings in the period before that year. Organised crime and the club industry were also a matter of public debate. The 1973 Royal Commission of Justice Athol Moffitt looked into that industry.[183] Bail reform in the context set out might therefore appear to be part of a broader social reform movement that covers issues such as education, environmental degradation, worker power, law and order and prison reform.

However, before such a conclusion can be reached, it is important to consider factors other than the level of intellectual debate and the drive for reform. Speaking of this period the Australian social policy observer, Donald Horne observed:

> There was in the prevailing culture, however, a strong strand of belief that law and order were the true basis of freedom, and a long held wisdom among the customary rulers that law and order could be exploited to the advantage of the conservative political parties.[184]

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[181] Jack Mundey, *Green Bans and Beyond* (Angus and Robertson, 1981).
[182] Denis Fitzgerald, *Teaches and their times* (UNSW Press, 2011).
[183] Andrew Clark, 'Policing, Law and Order' in Troy Bramston (ed), *The Wran Era* (The Federation Press, 2006) , 155.
[184] D Horne, *Time of Hope, Australia 1966-72* (Angus and Robertson, 1980) 64

The reality was that the great majority of society would expect that if a spectacular law and order issue arose it would be dealt with as it would in any other era. How it was dealt with and why is what needs to be considered. As Frank Walker explained:

> The immediate background to the Bail Act of 1978, was events of 1976 relating to a criminal called Western which created a tremendous amount of media interest. That was the political issue that precipitated the [Bail Review Committee] study but the bail study that occurred thereafter was much broader and wider and much more socially relevant than a mere reaction to media interest.[185]

4.4 THE IMMEDIATE BACKGROUND TO THE SETTING UP OF THE BAIL REVIEW COMMITTEE IN 1976

In late June 1976, according to the *Herald* and *Telegraph*, a bank robber on bail after facing armed robbery charges, shot dead a bank manager and was subsequently shot dead by police. On 30 June, one day after the bank robber was shot, a page one article in the *Herald* appeared under the heading, 'Wran Calls for Files on Gunman'. The article quoted the Premier as saying in relation to bail: 'Obviously the court made the decision on the material before it but in retrospect, it was hardly one to be applauded.'[186] The article explained that Phillip Western had faced charges concerning two armed bank robberies with a total haul of $165,000. On 27 May, he had been granted bail with conditions including a $10,000 surety and daily reporting. Western was wanted for questioning in relation to the murder of a bank manager on 21 June.

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[185] F Walker, above n 163, 1

[186] 'Wran Calls for Files on Gunman', *Sydney Morning Herald* (Sydney), 30 June 1976, 1.

That murder had been a page one article on 21 June. It was a terrible crime. The article on 30 June included criticism of the bail decision by the Australian Bank Officers Association (ABOA) as the offender had a record as an armed bank robber. The ABOA stated its intention to approach the NSW government about this matter. By 1 July the *Herald* quoted the NSW Police Association, indicating that 'police had opposed bail in each of nine court appearances by Western between January and May.'[187]

The *Herald's* Editorial went through all the details and issues and observed that '[t]he Police Commissioner is justified in calling for a review of the system of bail granting.'[188] By 3 July, the *Herald* could report, 'Bail System Review Ordered'. In the accompanying article, Attorney General Frank Walker stated:

> I am very concerned that the best possible system exists to ensure that the innocent or potentially innocent are released on bail, rather than be left in prison. By the same token, I don't want to see the bail system used by criminals as a means of escaping jail in order to commit further offences.[189]

I asked Frank Walker about whether law and order pressure groups in later years, such as shock jocks and victim groups, have become more powerful than those in the 1970s. He replied:

> Oh, infinitely more powerful. You know, I spoke to the bank groups, the police and the owners of the banks that were equally concerned. They were losing money and they

[187] 'Wran Quizzes PM on Robber's Entry', *Sydney Morning Herald* (Sydney), 1 July, 1976, 2.
[188] Editorial, 'A Question of Bail', *Sydney Morning Herald* (Sydney), 1 July 1976, 6.
[189] O'Hara, above n 24, 3.

> had industrial problems flowing out of it. But I must say I was very interested in their approach to law and reform which was to avoid laws, criminal laws and find practical measures to prevent crime which was very much in line with my belief that a great deal of crime can be avoided.[190]

The *Telegraph's* articles over the days leading up to 3 July were along similar lines to those in the *Herald*. On 3 July, the *Telegraph* article was headed 'Inquiry ordered on bail system "flaws"', with Attorney–General Walker making many of the points referred to above and also being quoted as saying, 'We must ensure there is consistency in granting bail.'[191]

The Sun front page on 29 June, 1976 was headed, 'Bank Killer Shot Dead'. The article on the page stated, 'Police snipers shot dead bank killer Phillip Western in a wild beach-house gunfight at Avoca today.'[192]All of pages 1 and 2 were devoted to the story. The *Daily Mirror* front page on the same day was headed, 'Bank Killer Slain'. The sub heading above the front page article stated, 'Police Snipers in Wild Beach Shotgun Siege'.[193]

4.5 THE BAIL REVIEW COMMITTEE REPORT

On 14 July, 1976, Attorney General Walker appointed Susan Armstrong and Magistrate Kevin Anderson to a Bail Review Committee with terms of references he had just

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[190] Walker, above n 163,20.
[191] K Hooper, 'Inquiry Ordered On Bail System 'Flaws'', *Daily Telegraph* (Sydney), 3 July 1976, 15.
[192] Graham Davis, 'Bank Killer Shot Dead', *The Sun* (Sydney), 29 June 1976, 1.
[193] Jim Oram, Bill Jenkings and Michael Munro, 'Bank Killer Slain', *Daily Mirror* (Sydney), 29 June 1976, 1.

established. The terms of reference for the Committee covered bail as it related to police and courts:

> In particular the Committee was asked to report on:
>
> (a) what matters should be taken into consideration in determining whether or not bail should be granted;
>
> (b) what alternatives to the existing system of bail are available, and which of those alternatives, if any, are appropriate to the New South Wales criminal justice system;
>
> (c) whether or not there is a need to amend section 45, section 69 and/or any other bail provisions of the Justices Act, 1902;
>
> (d) whether or not, in respect of petty offences, it is desirable to eliminate the need for bail altogether or eliminate the requirement of sureties and if so, in respect of what type of offences, and on what conditions, if any;
>
> (e) whether or not the practice of justices of the peace to require affidavits of justification, or to require the deposit of cash or title deeds by a surety or sureties, as security, should be continued and if not, what alternatives, if any, should be adopted.[194]

The first thing to be noted about the Bail Review Committee's Report is the speed with which it was produced. The request from the Attorney General was made on 14 July, 1976. The Report was provided on 31 August, 1976.[195] It is a detailed document of 52 pages, with footnotes and appendices that amount to another 30 pages. Part of the

[194] Anderson and Armstrong, above n 1, 10.
[195] Ibid Cover letter at second page of Report

explanation for this high quality work in such a short period is that the Committee was able to piggyback on other recent work in the area such as the previously mentioned Law and Poverty Commission's document, 'Unconvicted prisoners: the problems of bail'. The Bail Report reflects the emphasis in those other documents on the needs of the poor, poorly educated and others suffering from disadvantage. The Bail Report also made use of the contemporary international material, particularly from the United Kingdom and the United States.

The second reason for speed and quality in relation to the Report was the choice of Kevin Anderson and Susan Armstrong as the principal members of the Bail Review Committee. Kevin Anderson had been a NSW magistrate for 12 years. He had been Chief Mining Warden and the quality of his work had impressed Frank Walker when Walker was part of the Opposition. Walker explained,

> Kevin Anderson I thought was the best magistrate in NSW… Also he was a man with a conscience, a man with a good social view of society, compassionate and kind. But he was also practical and I knew he wouldn't let me go overboard if things wouldn't work and he wouldn't put things forward that were impractical in the end.[196]

Susan Armstrong was well known on issues of law reform at the time. Frank Walker explained:

> I knew about Susan from my friend Peter Duncan who was the Attorney General in South Australia. I met her and I was very impressed by her social conscience but also by

[196] Walker, above n 163, 14.

> her academic skills. She was, like me, about reform. But the best thing about her was that she knew how to go about it.[197]

Anderson and Armstrong did not know each other before they became colleagues on the Bail Review Committee but by all accounts they worked well together. Kevin Anderson saw his role as being to bring practical experience of the Bench to the Committee's work.[198]

The Committee received written submissions from a wide range of organisations, including various bank officers' associations and bankers. This was to be expected given the events— including armed robbery of banks— that had occurred in the lead up to the establishment of the Committee. Other organisations that made submissions included the NSW Bar Association, the Law Society of NSW and the NSW Council for Civil Liberties. The Committee also consulted widely with judges, a number of police officers, prison officials, representatives of the Department of Youth and Community Services, university experts and prosecutors.[199]

The Committee had access to the preliminary findings of two important empirical studies it obtained with the assistance of the NSW Bureau of Crime Statistics and Research: a NSW bail census of 22 August, 1976 and a court record survey in relation to bail on a person's first appearance in court. Consideration of the results of the studies in

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[197] Ibid 14.
[198] Interview with Kevin Anderson (Sydney, 27 January, 2011) 3.
[199] Anderson and Armstrong, above n 1, Appendix A.

relation to the combined effect of bail refusal and inability to meet surety conditions including cash were of concern. One in four accused persons left the court in custody. Of those refused bail, 57.3% ultimately did not receive a custodial sentence. The Committee also noted the Poverty Commission finding that the poor, the young and recent migrants were significantly over-represented in the prison population.[200]

The earlier ALRC proposal for a greater range of bail conditions and the recommendation that they be set out in a priority list was supported by the Committee. The priorities ranged upwards from unconditional release, through signing for non–financial conditions by the defendant, and culminating in release on payment of money by the defendant or another person. This moved away from the traditional role of the surety as personally responsible. UK proposals provided an appropriate test for the identification of a suitable person – financial resources, character and proximity (kinship, place of residence).[201]

The Bail Review Committee proposed that bail could be dispensed with entirely in appropriate cases such as where a matter was adjourned for mention only.[202] It also proposed ex parte hearings in summary matters where the defendant failed to appear for the hearing. In such a case it recommended that there should be no action for non–appearance on bail.

[200] Ibid, 11-12
[201] Ibid, 17.
[202] Ibid 18.

Of fundamental importance was the Committee's proposal that there be an affirmative right to bail for offences where the penalty did not include imprisonment and for summary offences against good order (such as offensive behaviour). This right should apply to police and court bail, and should ensure that the conditions imposed could realistically be met by the defendant. The presumptive right to bail would not apply, however, where the defendant was incapacitated by intoxication, injury or use of narcotics.[203]

Kevin Anderson explained that part of the motivation of the proposed bail reform was to stop low-end charges being used to hold people while investigation continued: 'We were concerned and it was a common practice to use these holding charges.' When I mentioned a charge of vagrancy as an example he replied 'Yes. And vagrancy not long after this was abolished.'[204] These proposals were in accordance with ALRC recommendations and material produced for the Royal Commission of Inquiry into poverty.[205] The emphasis on liberty and avoiding disadvantage for the poor is apparent in these proposals. The interrelationship between international, national and state material is apparent, as is the importance of the strongly put views of those preparing the Report.

[203] Ibid 19, 20.
[204] K Anderson, above n 198, 8-9.
[205] Anderson and Armstrong, above n 1, 19-20.

The Bail Review Committee proposed a presumption in favour of bail where there was no right to bail.[206] Noting the disadvantage to migrants who do not ask for bail, as referred to in the Report to the Poverty Commission on Migrants and the Legal System,[207] the tendency of people to be overawed by the system and the use of excessive money amounts in setting bail,[208] the Committee recommended the onus should be on the prosecution to establish grounds for refusal of bail. No proposal has been more controversial than this one despite Susan Armstrong's clear analysis of the issues. As she explained:

> Well of course the onus should be on the prosecution. But that's all it is. It never requires a court or police officer to actually grant bail but what it does do is require them to look at the evidence to say that in these circumstances we are satisfied that it's not appropriate to grant release on any conditions or any conditions that can be met. So I actually saw it as something quite minor. I would have thought the radical approach would be to say there should not be a presumption, where the prosecution doesn't have the onus.[209]

After considering information from the Public Solicitor's Office and the common law criteria, the Committee adopted the ALRC recommendations in relation to the criteria for release on bail. Three traditional tests were chosen: the probability of appearance; the interests of the accused; and the interests of the community.

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[206] Ibid 20.
[207] Jakubowicz and Buckley, 'Migrants and the Legal System' (Report to the Commission of Inquiry inot Poverty, Law and Poverty Series, A.G.P.S, 1975) 24-25.
[208] Anderson and Armstrong, above n 1, 20.
[209] Armstrong, above n 168, 17.

The Bail Review Committee spent considerable time looking at USA and UK approaches to background and community ties as part of its consideration of what should form part of the tests for probability of appearance. Ultimately, it decided on the Manhattan Bail System, which provided points for various components concerning prior record, family ties, employment, residence and time in area and also allowed the use of discretion. The NSW Police Association indicated this system was working well in the US and had been trialed in NSW. The Manhattan Bail System had also been recommended by the ALRC.[210] The Bail Review Committee also decided that the seriousness of the charge should also be considered in relation to probability of appearance. The seriousness of the charge would include the nature of the charge, its seriousness and the strength of the evidence.

The Manhattan Bail System (MBS) proved controversial from the beginning. Required by s33 of the *Bail Act* as originally passed in 1978, it first appeared in the Bail Act Regulation as Regulation 8.[211] The MBS took the form of a test 'to be carried out' for a rating in relation to background and community ties. The rigorous application of a points system did not go down well with the judiciary. Kevin Anderson explained:

> Well, I must say that I was not so enthusiastic about it but I could see that it was an objective test. It was a way of ensuring that those matters were considered. I thought they could be considered in other ways. But it was said to have a good record in New York and other places and I thought it was worth a try.[212]

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[210] Anderson and Armstrong, above n 1, 25.
[211] *Bail Act Regulation, 1978,*(NSW) reg 8.
[212] Anderson, above n 198, 11-12.

Anderson himself had not filled in forms in relation to it. However, he added in relation to using the concepts informally: 'Yes, I'm sure it focused people's minds, not only judicial officers but police, police prosecutors when they were addressing the Court on the question of bail but also the legal representative.'[213] Regulation 8 was omitted from the Bail Act Regulation in 1993.[214]

The interests of the accused included many of the things mentioned earlier in the history of bail as emerging from the cases and forming part of the common law. The length of delay and the conditions of confinement were included as was 'the needs of the defendant to be free to prepare for court appearance, to obtain legal advice or for any other reason'.[215] The needs of the defendant in relation to intoxication, injury or use of narcotics were also to be considered.

The Bail Review Committee limited the interests of the community to concerns about interference with evidence, witnesses or jurors or re-arrest for a breach of bail. The Committee specifically rejected the possibility that more charges will be laid or the likelihood of further offences as falling within this category. Holding charges to allow investigation were viewed as a 'perversion of the bail system'.[216] In relation to possible offences while on bail, the Bail Review Committee Report stated:

> There is no doubt that by permitting courts to refuse bail on the ground that the accused may commit further offences, Australia has established a system of

[213] Ibid 11-12
[214] *Bail Act Regulation, 1993* (NSW) clause 2.
[215] Anderson and Armstrong, above n 1, 22.
[216] Ibid 1, 29.

> preventative detention, even though it is one limited to certain groups (people who have been charged with some offence) and certain periods (the time between arrest and trial).[217]

Susan Armstrong explained that 'this was the right recommendation and that if people were to tinker then it was better to tinker for naked political reasons if you like rather than try to suggest that this was something legitimate because there was no test for this.'[218]

The limits of public influence at that time can be seen in this recommendation. It can also be seen in Kevin Anderson's answer to a question about whether Western's case and the issue of bank robbery placed pressure on the Committee when preparing the Report. He replied, 'No. I can give you an example. We recommended that the likelihood of further offences on bail should not be a valid criterion for consideration on the question of bail.'[219] Susan Armstrong explained that at that time there was not a widespread public understanding of the detail of bail. The lack of knowledge created interest amongst journalists. She noted: 'But I got very good support because we were talking about things that weren't known, that people didn't have any understanding of. To say there was a groundswell, that there was a need for bail reform would be ridiculous'.[220]

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[217] Ibid 30.
[218] Armstrong, above n 168, 24.
[219] Anderson, above n 198, 6
[220] Armstrong, above n 168, 8.

In relation to the issue of possible offences while on bail, research available at the time was limited. The Bail Review Committee received a submission from Mayne Nickless Ltd. It also considered research published by that company which included 17 case studies of crimes committed on bail. The Report noted that '[t]hese are reproduced to demonstrate that "academics, do-gooders, some of our magistrates and judges, and even some of our gaolers are showing an unwillingness to impose rigid controls on criminals''. The report is unconvincing.'[221] As part of their submission, the Commonwealth Bank Officers produced figures for armed robbery offenders and the incidence of further offences by such offenders when on bail. The years used were 1974 and 1975. The figures showed 38.92% committed further offences. However, the further offences were not restricted to bank robbery and the seriousness of such offences was not stated. The NSW Bureau of Crime Statistics and Research study of armed robbery was not completed at the time.[222]

The later parts of the 1976 Report can be more briefly summarised. In relation to police bail, the Report made clear that arrest and bail were the last resort options and that summons and citing should be used wherever possible. A significant recommended change concerned s 153 of the *Justices Act* which provided for a defendant not released on a recognizance to be brought before a magistrate 'if he so demands'. The Committee recommended the step be taken as soon as practicable and not require a demand by the defendant.[223]

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[221] Anderson and Armstrong, above n 1, 30.
[222] Ibid 30.
[223] Ibid 32.

In relation to court bail, the Committee successfully recommended that the eight day adjournment limit on indictable offences be extended to all offences. Inconsistencies as to which offences could or could not be subject to bail were to be eliminated. Bail would apply to all of them. Having considered differing bail rights that existed depending on the stage of the proceedings or the nature of the court, the Committee recommended that bail apply to all stages of criminal proceedings.[224]

Procedures for police and court bail were to be tightened by requiring an explanation to defendants of their rights and by written reasons being recorded as to why bail was refused. The Committee also recommended a significant expansion of legal representation services in this area, and not merely at trial. The Committee relied on observations from the ALRC and the Law and Poverty Commission Report on the role, reach and importance of Legal Aid to support this conclusion. Delay was to be avoided by use of the eight day limit on adjournments, the use of consent to longer periods and limits on length of time between committal and committal for trial.

Remand in custody brought into play observations from the Poverty Commission Report, '*Unconvicted Prisoners: the Problems of Bail*'. Having noted that those in custody between arrest and trial are more likely to plead guilty, more likely to be convicted and more likely to be sentenced to imprisonment, the Committee recommended conditions under which they are kept that disadvantage such defendants

[224] Ibid 39.

as little as possible. The establishment of bail hostels was recommended to overcome overcrowding in prisons and avoid the placement of a range of people with different problems in the one place. The cost of keeping a large number of people in gaols on remand was noted.[225] Thirty-five years after the Bail Review Committee observations the number on remand remains a controversial public issue. The Committee recommended that if a person was on remand then procedures were needed to ensure they had adequate access to lawyers to prepare their case. This included provision on a single sheet of paper of all of their rights to correspondence and phone calls.[226]

4.6 CONCLUSION

Concern about law and order was apparent on a range of issues in the 1970s. They included industrial and criminal matters. Industrial unions were more militant then than they are today. Armed robbery, drug supply and alleged political and police corruption were constantly in the media. Politicians were prepared to use 'law and order' as a tactic if they believed it helped their cause.

Media coverage was vivid and demanding. Crime crisis headlines have been apparent in Sydney in every decade from and including the 1950s.[227] It can be conceded that shock jocks and other newer forms of media make law and order a more difficult issue for politicians to deal with than in the 1970s. However, that doesn't mean the media were not powerful on such matters at that time. It is important to remember that two major

[225] Ibid 48.
[226] Ibid 49.
[227] Hogg and Brown, above n 155, 22-3.

tabloid newspapers, *The Sun* and the *Daily Mirror*, existed at that time but had ceased to exist by the early 1990s. Frank Walker observed in relation to the Western matters which included bail and robbery:

> I had a big agenda. I had a lot of issues from Aboriginal land rights to law reform, summary offences, victimless crimes, that I had on my agenda. Women's rights. It went on and on. And so you did what you thought was most important first. But there is nothing like a media growl to get you focused on what you think is the priority. So that pushed bail up my priorities.[228]

In the 1970s powerful interest groups made their concern clear when a law and order issue arose. In the case of the bank robberies and murder alleged to have been caused by Phillip Western, the ABOA rightly approached the Government concerning the protection of their members and related issues concerning bail. The media articles of that time make clear that the NSW Police Association criticism was based on the fact that its members had opposed bail for Western on many occasions. The Police Commissioner was said by the *Sydney Morning Herald* to have called for a review of the system for granting bail. Frank Walker explained that modern victims groups are more powerful on an issue such as law and order than the pressure groups of the 1970s. However, he did hold discussions with such pressure groups and he did not ignore what they had to say. The Bail Review Committee was set up in July at the end of a period of intense media and pressure group demand.

[228] Walker, above n 163, 19.

It is significant that key individuals such as the Premier and the Attorney General were, by background and inclination, people who were not going to be panicked into severe law and order solutions to the crisis created by a spate of armed robberies and the Western case. Individuals do make a difference.

Ideas associated with the welfare state were still powerful in the community. The Poverty Commission Report and LRC Report referred to above indicate that in the mid 1970s the idea that the State could take initiatives to ensure fairness and hope still remained influential. The unions were powerful and demanding in relation to wealth distribution and power. The troubles in the prisons suggest the limits of penal welfarism in the 1970s. However, that does not detract from the hegemony of the penal welfarism approach as part of the hegemony of the welfare state in the decades after World War II. Frank Walker summarised the ethos of that time as follows: 'I think there was a welfare state view. It mightn't have created a welfare state in reality but there was a view there ought to be one. Things like safety nets and that were generally believed in.'[229]

The choice of Kevin Anderson and Susan Armstrong to write the Bail Review Committee Report, 1976, guaranteed a report that dealt with all aspects of bail and not merely the law and order components. Susan Armstrong's work had indicated a determination to provide fairness to the poor, young, mentally ill, migrant and other disadvantaged

[229] Ibid 24.

groups. Frank Walker regarded Kevin Anderson as the best magistrate in NSW and was impressed by his social conscience, compassion and practicality.

While it is true that the Bail Review Committee Report 1976 was produced in the period before it is claimed there was a punitive turn it nevertheless provided a powerful explanation for the need to move away from the punitive elements in the bail law of that time. A right to bail for lesser offences, a presumption in favour of bail for the rest and a rising hierarchy of bail conditions commencing with non-monetary conditions assists in overcoming disadvantages such as being poor. These provisions also reinforced those elements of the common law and statute that already favoured association of bail with the presumption of innocence and the liberty of the citizen. Tests for bail restricted to the issue of absconding, the rights of the accused and the welfare and protection of the community reflect what bail is supposed to be about. The rejection of holding charges and of preventative detention to avoid potential offences while on bail is a rejection of unjustified punishment. If there was to be a punitive turn in bail then it would have to overcome significant issues of principle.

Chapter 5

THE BAIL ACT, 1978

5.1 INTRODUCTION

This chapter considers the reasons for a two year delay between the production of the Bail Review Committee Report in 1976 and the Parliamentary Debate on the Bail Bill. Explanation is provided in relation to the extensive implementation in the Bail Bill of the recommendations of the Bail Review Committee. Important differences between the Report and the Bill concerning the likelihood of offences while on bail and the presumption in favour of bail not being applied to charges involving aggravated robbery are considered.

5.2 THE TWO YEAR DELAY BETWEEN THE BAIL REVIEW COMMITTEE REPORT IN 1976 AND THE *BAIL ACT* IN 1978

Nearly two years passed between the Report of the Bail Review Committee and Parliamentary consideration of the Bail Bill, 1978. It is superficial to argue that this is proof that startling events are needed to bring about change. Such events did play their part but there were other reasons for the amount of time involved. Susan Armstrong observed:

> I've done quite a bit of Law Reform Commission type stuff and having it

> implemented is, that's the big one. The ALRC Report ultimately was pretty well implemented across Australia in terms of its major recommendations but it took twenty years, twenty-five years.[230]

Kevin Anderson similarly noted about the delay that, 'in the scale of things, two years to get some radical reform up is not too bad.'[231] The Attorney-General responsible for shepherding the reform through the State Parliament, Frank Walker stated: 'Mind you it took a long time before the Report finally became law because there was a very long consultation process. I'm glad there was. It was a good start. I think it took about two years.'[232]

In those two years important research emerged. The two reports referred to by the Bail Review Committee (the Bail Census and the Court Record Survey) were completed and produced as a single report, the Bail Research Report 1, by the NSW Bureau of Crime Statistics and Research (BOCSAR).[233]

The Bail Research Report, including the Bail Census and the Court Record Survey, confirmed that the system of bail in NSW was in urgent need of overhaul. One set of statistics is enough to make the point. Material on the magistrates courts used in the court record survey showed that of the 227 refused bail in magistrates courts and finally dealt with in those courts, '66 (29%) received a custodial sentence, 31 (13.7%) were

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[230] Armstrong, above n 168, 30.
[231] Anderson, above n 198, 21.
[232] Walker, above n 163, 15.
[233] A Sutton, 'Bail Research Report 1' (NSW Bureau of Crime Statistics and Research, May 1977).

committed to hospital under the Inebriates Act, and 130 (57.3%) did not receive any kind of custodial sentence!'[234] The Report went on to add that, 'As 142 of the 145 cases where people given bail were not released required sureties, it seems that it may be possible to release many more people if alternatives to the surety system were used more frequently.'[235] Many of those on remand were confirmed as being unemployed or in occupations of low status. The Report reinforced the relationship between bail conditions and poverty when it noted that, '81.6% of the people being held in police stations had been granted bail but could not pay it.'[236] The Report concluded that '[t]he present bail system discriminates not only against the specific groups juveniles and aborigines but against the poor generally.'[237]

BOCSAR also completed Research Report 2 on armed robbery.[238] Those involved in providing information included various peak banking, taxi and service station organisations, police departments and security services. Armed robberies in the years 1975 and 1976 were considered. The number of armed robberies from all locations increased from 376 to 492. The most common location for armed robbery was the streets. In approximately half the robberies in both years the gain was $100 or less. In approximately 5% of cases the gain was $10,000 or more. The number of victims increased from 376 to 491.[239] The number of armed robberies was increasing and even

[234] Ibid, 6.
[235] Ibid, 19.
[236] Ibid, 19.
[237] Ibid, 20.
[238] A Sutton, 'Research Report 2, Armed Robbery' (NSW Bureau of Crime Statistics and Research, December 1977).
[239] Ibid, 4, 11, 16.

though the take in half the cases was small and the percentage of serious injury small, the reality was that the effects on victims would nonetheless be severe. In addition, there were the cases where death or serious injury occurred.

The report also considered the criminal history of offenders who had been arrested for offences committed in 1976. The results were known to the Government at the time of the 1978 Bill, for the Attorney-General stated in the debate: 'The latest report showed that 3.1% of people dealt with for armed robbery had committed the offence while on bail. However, statistics fail to take into account that few armed robbers get bail in the first place.'[240]

A Standing Committee on Bank Security was formed, consisting of a number of the organizations referred to above. The BOCSAR Report on armed robbery also included a Report on Bank Security after an Overseas Study Tour, by Detective Inspector Paul Delianis. The Inspector recommended bullet proof glass security screens, increased use of silent alarms and a number of other reforms concerning bank security. He did not mention or recommend changing bail provisions.[241]

In the period between the 1976 Committee Report and the 1978 *Bail Act*, a Criminal Law Review Division (CLRD) of the NSW Attorney-General's Department was established by Walker and it sought the views of judicial, legal, ministerial and departmental

[240] Walker, above n 8, 1849
[241] Sutton, above n 238, 30, 40, 41.

organizations. The CLRD then presented a Report to the Attorney-General on 1 August 1977.[242] I have been unable to obtain a copy. However, Frank Walker did recall the period. He stated: 'A lot of debate that went on was about the practicalities, the common sense, the difficulties of the law and what we were proposing. But there wasn't any real conflict about principles or about the Report that I recall.'[243]

5.3 THE IMPORTANT ROLE PLAYED BY VIOLENT ROBBERY IN THE PRODUCTION OF A BAIL BILL

It is reasonable to assume that major reform concerning bail eventually would have come before the Parliament. However, it did not do so in the period between August 1977 and November 1978. Once again the steady progress towards change was punctuated by a crisis concerning armed robbery and this issue played a sensational part in the press and ultimately in the speeches that led to legislation.

In November 1978 a bank robber seized several hostages. One hostage was killed before the gunman was shot during a police chase. The heading above the page 1 article in the *Herald* of 18 November, 1978 was 'Bank Robber and Hostage Die in Wild Police Chase'. The article went on to explain that the bank robber was on parole having served seven years of a seventeen year sentence. The article also referred to the fact that there were

[242] Donovan, above n 87, 3-4.
[243] Walker, above n 163, 26.

three other holdups in Sydney suburbs the day before.[244] The *Telegraph* used the entire front page and a heading, 'Gunman, Hostage Die in Shootout'.[245]

Media interest in armed robbery and a perceived inadequacy of the parole system remained intense. On 23 November, 1978, the *Herald* reported on 'Shots Fired at Policeman During Chase'. The article concerned two men in balaclavas robbing a bank.[246] The editorial of that day was headed 'The Parole System', and declared 'time is ripe for a thorough re-examination of the system.'[247] On 24 November articles about safebreakers appeared in the press. The *Telegraph* headline was '$1.7 m Bank Haul, Robbery is Biggest Yet'.[248] The additional pressure from media outlets (that no longer exist) can be found in the *Daily Mirror* front page of 20 November, 1978, which stated, 'Hostage Killer on Camera'. A large photo showing a man with a pistol taking money from the tray in a bank window and a person's head on the other side of the window was accompanied by an article which stated, 'This dramatic picture shows paroled hold–up man Kresimer Dragosevic robbing a bank only days before he murdered a hostage and was shot dead by police.'[249]

It is difficult to see how at this point the Government could do anything else but directly address the issue of armed robbery. A non-decision 'where Government may find it

[244] K Minchin and M O'Donnell, 'Bank Robber and Hostage Die in Wild Police Chase', *Sydney Morning Herald* (Sydney), 18 November 1978, 1.
[245] Daily Telegraph, above n 27, 1.
[246] P Molloy and K Neill, 'Shots Fired at Policeman During Chase', *Sydney Morning Herald* (Sydney), 23 November 1978, 3.
[247] Editorial, 'The Parole System', *Sydney Morning Herald* (Sydney), 23 November 1978, 6.
[248] B Bolton, '$1.7 m Bank Haul Robbery is Biggest Yet', *Daily Telegraph* (Sydney), 24 November 1978, 1.
[249] Bill Jenkings and Wayne Greer, 'Hostage Killer on Camera', *Daily Mirror* (Sydney), 20 November 1978 ,1.

easier not to discuss a matter' was not an option.[250] Armed robbery in the mid 1970's was a major concern and powerful organized groups and the public were demanding tougher laws in relation to it. As Frank Walker explained in relation to the role of armed robbery and the introduction of the Bail Bill:

> Well, unfortunately I think a key part because I was forced to compromise my view that there should be a presumption of bail in respect of all offences and I knew that take the one brick out of the wall, in the short term there's not a problem. There was the case that bank robberies were out of control, people were being killed. In the short term it wasn't a problem. But in the long term I knew it was inevitable that other Attorneys-General of whatever political persuasion, and it turns out the Labor ones who did the most damage, would take this example and use it. But there was a lot of good in this legislation and I was prepared to make the sacrifice of that because public opinion was very strong about it. I thought the whole thing may languish in the end if I didn't do something about that.[251]

On 29 November 1978 the Premier made an announcement which was reported on page 1 of the *Herald* under the heading, 'Helicopter, More Detectives, Parole Review, Crackdown on Crime'. The article referred to armed robberies and other violent crimes and noted, '[t]he measures included: The early introduction of planned legislation to tighten bail laws. A tougher approach to parole for criminals convicted of crimes involving violence and the use of firearms…'. The announcement went on to indicate that 'banks should be doing more to protect their employees.' There followed a sub-

[250] Bridgman and Davis, *The Australian Policy Handbook* (Allen and Unwin, 2004), 44.
[251] Walker, above n 163, 28.

heading, 'Talks With Banks Over Robberies', and an article asserting '[g]overnment action came 24 hours after Mr Wran met representatives of the banks and bank employees over the increase in the number of armed robberies.' The November case that led to deaths in a shootout was then referred to. The article then stated, 'The Premier conceded that Cabinet had been examining the bail system for some time.'[252] The *Telegraph* editorial on the same day, headed 'Violent Crime', stated: 'At the same time, as the *Daily Telegraph* has repeatedly requested, the State Government will also tighten bail laws and hasten the review of the parole system.'[253]

Agenda-setting was apparent in the demands of the media for the Government to tighten bail laws. The Government and the media attempted to define what mattered in the period leading up to the legislation. The critical and investigative component of media coverage was restricted to demands for legislation and a toughening of approach. No doubt the journalists were under considerable pressure to meet deadlines and the expectations of editors in how they dealt with the matter of armed robbery, murder and bail.[254] Alternative perspectives concerning the presumption of innocence and civil liberties did not get a run in the period leading up to the legislation. When talking of the 'doves' and 'hawks' in the debate about the Bail Review Committee Report, Frank Walker explained:

> Neither lobby at the time appeared interested in publicly debating the many jurisprudential issues raised in the Anderson – Armstrong Report. I found that

[252] K Kennedy, 'Helicopter, More Detectives, Parole Review', *Sydney Morning Herald* (Sydney), 29 November 1978, 1.
[253] Editorial, 'Violent Crime', *Daily Telegraph* (Sydney), 1978, 6.
[254] Economou and Tanner, above n 65, 104, 107.

> disappointing, I found journalists switching off when I was trying to talk about some of those issues.[255]

5.4 THE BAIL BILL

It is clear that given the philosophical outlook of the Premier and the Attorney-General, bail reform of a progressive type and with great benefit to all disadvantaged groups was going to be passed. They were assisted in their approach by the Attorney–General's knowledge that those in the field of law were not happy about many aspects of the existing system. As Frank Walker explained:

> What I would like to say first of all is what was wrong with the 1978 bail laws. I think the short answer is that both the community which had been incited by that media campaign and the legal profession who were fed up with an antiquated, broken down raft of barely comprehensible bail laws were saying that something should be done to modernise our bail system.[256]

It is also clear that in any decade, whatever the dominant political ideology of the day, bail reform is going to be affected by whatever crime crisis is apparent.

On 13 December, 1978, Attorney-General Frank Walker introduced the Bail Bill, 1978.[257] The Bill also introduced amendments to various other Acts related to bail. All of the major issues raised in the Bail Review Committee Report were considered.

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[255] Walker, above n 163, 3.
[256] Ibid 1.
[257] Walker, above n 8, 1843.

The Attorney-General referred to the Premier's announcement of 28 November and the surrounding 'tragic events'. In the same paragraph he mentioned the need for the banks to improve their use of 'protective devices'.[258] Ken Maddison, the Opposition spokesman, referred not only to the recent events but also to the Western case of 1976. Maddison also made reference to the representations by the bankers and bank unions. He criticized the length of time between the Report of the Bail Review Committee and the Bill.[259] It is clear that both sides of politics were under enormous pressure to be seen to be tough on violent crime.

The Opposition demanded that there be no presumption in favour of bail for 'all offences against any statute punishable by a sentence of imprisonment for a term of ten years or more.'[260] Maddison explained that the Opposition thought that selecting only those crimes of violence that related to aggravated robbery was unacceptable and that such serious crimes as murder, rape and malicious wounding should also be covered. This approach was at the other end of the spectrum from the Bail Review Committee Report recommendation that *all* crimes (where there was no right to bail) should be covered by a presumption in favour of bail.

The Government supported the great majority of the recommendations found in the Bail Review Committee Report. The Opposition indicated general support for the Bill. The Government, to its credit, did not yield to the Opposition's demands for a wide

[258] Ibid 1844
[259] NSW, *Parliamentary Debates*, Legislative Assembly, 13 November 1978, 1845 (K Maddison)
[260] Ibid 2024.

range of exceptions to the presumption in favour of bail. It could not, however, hold the line in relation to the increasing incidence of armed robbery. The Attorney-General explained that there would be no presumption in favour of bail for crimes covered by ss 95, 96, 97 and 98 of the *Crimes Act 1900* (NSW). These sections dealt with aggravated forms of robbery. Aggravation included physical violence, wounding, being armed with or using an offensive weapon.[261] The concession made in relation to aggravated forms of robbery meant that the uniformity of principle proposed in the Report was not met. This would be a limited problem for the next eight years but would take on more serious ramifications after that.

The Attorney-General explained that the Bill codified the criminal law in relation to bail. He acknowledged the work of the Bail Review Committee and the fact that the Report had been considered by the CLRD. He indicated that the poor, the young and migrants were over-represented in remand. The provisions in the Bill aimed to avoid social disadvantage being decisive in relation to who gets bail. The Bill applied to adults and juveniles. It would apply to all stages of the criminal process. There would be a right to bail for minor offences and a presumption in favour of bail for all other offences, with the exception of those mentioned above or where a person had previously failed to comply with bail conditions, had been convicted, or was incapacitated.[262]

Police bail was to be provided by an officer of the rank of sergeant or above and, where bail was not granted, the person was to be brought before a court as soon as reasonably

[261] Walker, above n 8, 1849, 2015.
[262] Ibid 2014.

practicable. Explanation of rights was to be provided by the police and in courts. Written reasons for a refusal of bail were to be noted. [263] Delay was a concern of the Committee and so court adjournments where bail was not granted were to be for a maximum of eight days. A person could make as many bail applications as he or she wished.[264]

The criteria to be considered for bail included the probability of appearance, the interests of the accused and the protection and welfare of the community.[265] In relation to the probability of appearance the Attorney General referred to the Committee's Report and the survey results showing that previously minimal information was being put before the courts in relation to a person's background, employment and community ties. A specific provision in relation to this was introduced. Affidavit evidence by police on the evidentiary basis of the case was recommended by the Committee but opposed by the CLRD. The Government did not implement the idea because of its potential to create delay. The person's record, including failures to answer bail, was included. The Government also included a rating system based on the Manhattan points system described at 4.5 above. Ken Maddison expressed reservations about its applicability unless it could be shown to be of relevance to NSW. However, he did not oppose the Manhattan system outright.[266]

The interests of the accused included: the length of incarceration and the conditions under which it would take place; the need to prepare the case; the needs of the person

[263] Ibid 2015.
[264] Ibid 2016.
[265] Ibid 2016.
[266] Maddison, above n 259, 2022-2023.

to be free for any lawful purpose; and whether or not the person was incapacitated because of intoxication or drug use or injury or in need of physical protection. These concepts did not prove controversial.[267]

What should be included in relation to the protection and welfare of the community did prove to be controversial. The Government included interference with evidence, witnesses or jurors and re-arrest for breach of a bail condition. The Report did not recommend that the potential for further offences should be included, seeing that as preventative detention. The Government, with Opposition support, did include consideration of future offences but with limitations. It was only to relate to offences involving violence or offences that were likely to be serious because of their consequences and only to be taken into account if it could be shown that the likelihood of the person committing the offence and the consequences outweighed the person's general right to be at liberty.[268]

The Report had proposed conditions relating to a grant of bail. These were adopted. The conditions of release were to rise from the least to the most onerous. The emphasis was on non–monetary conditions although monetary conditions could be imposed at the higher end of conditions. Greater certainty was to be ensured about who was an acceptable person to be regarded as a satisfactory surety.[269] A person could be arrested for breach of bail and failure to appear while on bail was made a separate offence

[267] Walker, above n 8, 2018.
[268] Ibid 2018.
[269] Ibid 2018.

punishable by gaol or fine.[270] There was to be an eight day limit on adjournments where a person did not get bail.[271]

All courts were given the power to review bail decisions. An application could be made by the accused, the police or the Crown. The Opposition opposed the capacity for unlimited bail applications. It proposed in Committee that after the first application, a further application required the applicant to establish that he or she was not represented by a lawyer on the immediate prior application or that new facts or circumstances had arisen.[272] Frank Walker conceded in his interview that judge shopping was being debated at the time but observed:

> But when it comes to bail I don't think that is such a bad thing. They might review a bit more evidence and you get bail. Sometimes you just miss out by a whisker on bail and if you can put a slightly better case together the next time, well maybe that's justice.[273]

5.5 CONCLUSION

The Bail Act 1978 was produced at the time that a punitive turn is said to be beginning. It was a progressive Act supported by an Attorney-General who wanted major progressive reform. The two year delay was caused by the ongoing discussion with relevant groups and within the Attorney-General's Department. According to those interviewed this was not an unusual timeline for a major reform. Spectacular media coverage of violent crime once again played an important role in speeding up the

[270] Ibid 2019.
[271] Ibid 2016.
[272] Maddison, above n 259, 2026.
[273] Walker, above n 163, 32.

process. The only significant differences to the recommendations of the Bail Review Committee concerned the provision of an exception to the presumption in favour of bail for the limited category of aggravated robbery offences and the rejection of the idea that the potential for offences on bail should not be considered. However, what potential offences could be considered was limited and thus was an improvement on practice at the time. More general proposals from the Opposition for exceptions to the presumption in favour of bail were rejected. The Act which commenced in 1980 was the antithesis of punitive.

Chapter 6.

THE 1980s: AMENDMENTS TO THE *BAIL ACT* IN THE LAST YEARS OF THE LABOR GOVERNMENT

6.1 INTRODUCTION

This chapter considers new issues that caused pressure for change to the *Bail Act*. They include illegal drug supply which became a matter of national concern. Why changes to the *Bail Act* became part of the response is discussed. Ultimately the *Bail Act* was amended for large scale drug suppliers so that there was no presumption for or against bail in such cases. The extent to which this change was part of a punitive turn is considered.

The new issues also include domestic violence in relation to which a number of reports emerged from the Premier's Department. As with drug supply, bail was not immune from consideration as part of the reform program. The nature of the changes to the Bail Act is discussed. The chapter considers whether this material provides evidence of a punitive turn.

The chapter also includes material on why bail applications were restricted in relation to the Court of Criminal Appeal in cases where conviction on indictment or sentence in such circumstances had occurred.

6.2 BACKGROUND

Frank Walker proved to be correct: so long as he was Attorney General there was no further erosion of conditions in the *Bail Act*. That continued to be the case for some time after he ceased holding the position. Between 1978 and 1986 no major changes occurred to the *Bail Act*. In 1986 the DPP was added to those who could request a review of bail decisions.

In Julie Stubbs's 1984 work, 'Bail Reform in NSW', she found that during the period since the *Bail Act*, *1978* commenced in 1980 there had been a move away from money bail. Greater use of a range of conditions for the particular person had occurred and fewer people were waiting for a surety in police stations. However, the number of Aboriginal people refused bail was much higher than the sample as a whole and this remained a serious concern. So did the number of juveniles refused bail.[274] Overall, however, Stubbs found that, '[t]he finding that over 90% of persons charged in the study period were released from custody prior to their appearance at court reflects favourably upon the legislation.'[275]

6.3 DRUG SUPPLY

As with armed robbery in the 1970s, drug supply emerged in the 1980s as a matter of such public concern that politicians were under considerable pressure 'to do something' about it. The national trend in fatal opioid overdose for those aged 15-44 began to rise

[274] J Stubbs, 'Bail Reform in NSW' (NSW Bureau of Crime Statistics and Research, 1984) 45-46, 89-95.
[275] Ibid 46.

in the late 1970s and continued to rise throughout the 1980s and up to 2000.[276] The issue of illegal drug supply became intermixed with the issue of organized crime and alleged police corruption. The media attention demanded action.

The NSW Government had set up the Commission to Inquire into NSW Police Administration in 1981 and a number of reforms, including anti-corruption measures, were introduced.[277] The Report nevertheless stated that, '[d]espite these developments, the 1980s saw a repetition of the scandals that had marked the preceding two decades.'[278] These scandals included allegations of police involvement in marijuana growing and drug trafficking; and gangland wars over drug trafficking.[279]

Popular concern about drug issues was confirmed by the establishment of three Royal Commissions on this topic between 1979 and 1983. The NSW Woodward Royal Commission into Drug Trafficking in 1979 made reference to police claims about the 'disproportionate number of alleged drug offenders, particularly major ones, absconding while on bail awaiting trial.'[280] However, Justice Woodward was of the view that s 32 of the *Bail Act*, including as it did the matters to be taken into account when considering an application for bail, was adequate to deal with the matter.

> The extreme step of prohibiting bail or creating a presumption against bail in respect of alleged drug traffickers should, in my view, not be implemented in New South Wales.

[276] Weatherburn, above n 44, 18.
[277] NSW, Royal Commission Into the NSW Police Service, *Report* (May 1997) 67.
[278] Ibid 71.
[279] Ibid 71-4.
[280] New South Wales, Royal Commission into Drug Trafficking, *Report* (1979) 1828.

> Although the impossibility of absolutely guaranteeing that any alleged criminal offender will not abscond on bail may apply with particular force to an arrested major drug trafficker, nevertheless such persons (major drug trafficker) do not appear to be disproportionately absent at the commencement of their trials.[281]

Expressing a contrary view, the Commonwealth Williams Royal Commission of Inquiry Into Drugs, 1980, referred to information concerning 'drug offenders' and absconding between 1972 and 1977. It concluded that absconding was 'becoming a national scandal.'[282] Justice Williams noted the provision in the *Bail Act* providing for no presumption in favour of bail for robbery with violence and recommended a similar provision in relation to Division 1 (most serious) drug offences.[283]

The Commonwealth Stewart Royal Commission of Inquiry into Drug Trafficking, 1983, considered the different views of the Woodward and Williams Royal Commissions about the claims that a disproportionate number of absconders were serious drug traffickers. Justice Stewart pointed out that the difference may have arisen because, 'there are in fact no statistics kept as a matter of course by any of the relevant Governments or any agency thereof which would permit the question to be answered with confidence.'[284] Justice Stewart did consider material made available from Victoria and Queensland that showed a drop in absconding after changes that made bail more difficult to obtain. He

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[281] Ibid 1830.
[282] Commonwealth, Royal Commission of Inquiry into Drugs, *National Report*, (1980) F35.
[283] Ibid F36.
[284] Commonwealth, Royal Commission of Inquiry into Drug Trafficking, (1983) 550-558 and 843

recommended that the *Bail Act* be amended to add serious drug trafficking charges to those for which there is no presumption in favour of bail.[285]

It is noteworthy that at the end of three Royal Commissions the NSW Government did not immediately change the presumption in favour of bail for serious drug supply. The Bail Review Committee Report and the legislation had established the direction of public policy. As Fenna notes in relation to new approaches that become part of the institutional system, 'policy making continues down that path because interests and assumptions become entrenched around them.'[286]

However, political pressure on the NSW Government over drug supply kept rising. Terry Sheahan was Attorney-General at the time and he explained in relation to illegal drug supply becoming the number one crime debated by the public and the media:

> I think that is fair to say. I don't have any statistical basis for that assertion or for agreeing with it but my recollection is that it was becoming a huge problem. Say, if you jumped forward to 1986 when Wran retired and Barry Unsworth became the Premier, Barry established a Portfolio with the drug offensive because he had a bad experience with the death of his own son in a drug related death never properly explained but not in this country. So we were pretty focused on that and I did drive the reform of the drug legislation to bring in the *Drug Misuse and Trafficking Act*.[287]

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[285] Ibid 843
[286] A Fenna, *Australian Public Policy* (Pearson Longman 2nd Ed, 2004) 136.
[287] Interview with His Honour Mr Terry Sheahan, (Land and Environment Court, Sydney, 10 June 2011) 2.

It is important to note that this was not simply a response to media pressure. Conviction within the Cabinet about a large scale problem was a powerful factor in the evolution of legislation to do with illegal drug supply. Nationally the issue had taken on the status of a campaign. The State Government introduced the *Drug Misuse and Trafficking Act 1985* (NSW). It provided a complete code for dealing with all types of use, supply and traffic in drugs for all types of illegal drugs. For the most serious charges it provided for life imprisonment and fines of $500,000. Attorney-General Sheehan noted in the debate on 26 November, 1985, 'this strategy has involved initiatives and legislation on every front in what the Premier has described as a "full scale war on illegal drugs"'.[288]

Media pressure and announcements were relentless. On 1 November, 1985 stories about the drug problem became intertwined with bail. The *Herald* ran a piece under the heading, 'Alleged Top Drug Dealer Vanishes in Victoria'. The story went on to explain that the charges involved 36 kilograms of heroin worth $25 million. The article also explained that prosecutors had twice tried to have the $50,000 bail revoked. The alleged drug importer was alleged to have $500,000 overseas.[289] The *Telegraph* explained the events on 2 November, 1985 under the heading, 'Big Suspect Jumps Bail', and added that a senior policeman stated that the person 'should never have been granted bail.'[290]

Other stories in the month of November, 1985 covered people getting 20 years gaol for heroin smuggling plans, the use of transit lounges to avoid prosecution, alleged police

[288] NSW *Parliamentary Debates*, Legislative Assembly, 26 November 1985, 10614-5 (Terry Sheahan)
[289] 'Alleged Top Drug Dealer Vanishes in Victoria', *Sydney Morning Herald* (Sydney), 1 November 1985
[290] 'Big Suspect Jumps Bail', *Daily Telegraph* (Sydney), 2 November 1985

bribes over drug matters, health risks from swallowing balloons filled with heroin and, importantly, page 1 coverage of 'How the Crime Authority Caught Its First Big Fish.'[291]

At the beginning of April 1986 the State Opposition complained that proposed legislation to seize the assets of crime had not yet been passed. The *Sydney Morning Herald* front page stated, 'Law Delay Helps Drug Dealers, Says Opposition'.[292] On 3 April the headline was 'Neddy Lives, Gang War Fear'. Neddy Smith, who had been hit by a car, was referred to as, 'Smith, described in court recently as a notorious criminal and drug trafficker'.[293] On 7 April the *Herald* reported, 'Plea To the Nation: Stamp Out Drugs'. This 'Drug Offensive' was launched by the Prime Minister and all of the State Premiers, and the television campaign had been launched on television the night before. 5.4 million copies of a 24 page colour booklet on drug abuse were delivered to all Australian homes.[294] In the middle of the month the *Telegraph* could report 'Mafia Killer Bazley Goes to Gaol for Life'.[295] This referred to court proceedings into the murder of Donald Mackay, who had been prominent in the campaign against illegal drugs in the Griffith area of NSW. The *Sun* was also strident in its demands. An article about the MacKay family's reaction to the court decision was headed, 'Now Get the Rest of the Mob'.[296]

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[291] A Keenan, 'How the Crime Authority Caught its First Big Fish', *Sydney Morning Herald* (Sydney), 14 November 1985, 1.
[292] M Coulton, 'Law Delay Helps Drug Dealers, Says Opposition', *Sydney Morning Herald* (Sydney), 1 April 1986, 5.
[293] J Scavo, 'Neddy' Lives, Gang War Fear', *Sydney Morning Herald* (Sydney), 3 April 1986
[294] R Dunn and M Coulton, 'Plea to the Nation: Stamp Out Drugs', *Sydney Morning Herald* (Sydney), 7 April 1986, 2.
[295] 'Mafia Killer Bazley Goes to Jail for Life', *Daily Telegraph* (Sydney), 17 April 1986
[296] Darren Horrigan, 'Now Get the Rest of the Mob', *The Sun* (Sydney), 17 April 1986, 5.

Implications arising from the Mackay murder and subsequent police investigations continued in the media throughout April. On 22 April the *Herald* and the *Telegraph* reported that a public inquiry would be held into the police investigation of the Mackay murder.[297]

On 23 April, 1986, Attorney-General Sheahan introduced the Bail (Amendment) Bill and the Drug Misuse and Trafficking (Amendment) Bill. The latter Bill involved the steps to be taken for the destruction of seized drugs. The destruction of these drugs would eliminate the risk of them finding their way back into the community. The amendment to the *Bail Act* added the commercial quantity of supplying of drugs charges (those with a maximum sentence of twenty years or life) to the category of offences where there would be no presumption in favour or against bail. Importantly, this was the first such initiative removing the presumption in favour of bail since the armed robbery exception in 1978.[298]

It is appropriate at this point to consider Terry Sheahan's explanation for the introduction of the changes. I asked him if he thought the public's attitude towards crime was hardening as the 80s went on or whether he thought it was simply a matter of dealing with particular issues at a particular time. Sheahan replied that:

> I think it's probably a mixture of both ... I think there was genuine, all this stuff we hear about soft penalties and the like, I think that was all well truly around in my time as a

[297] D Shanahan, P Bailey and D Muller, 'MacKay: Premier Orders Inquiry', *Sydney Morning Herald* (Sydney), 22 April 1986, 1, No author, 'MacKay Case Police Face Probe', *Daily Telegraph* (Sydney), 22 April 1986, 1.
[298] *Bail (Amendment) Act, 1986* (NSW) Schedule 1.

> Member of Parliament … People talk now about the shock jocks and all of that sort of stuff. I heard the Attorney say how compulsory it's got to be to read the *Telegraph*. He's lucky he wasn't a Minister when we had the *Telegraph*, the *Daily Mirror* and *The Sun* all in the one day. I mean you had everything sensationalized. If there was a murder overnight for example, in Sydney, the *Sun* newspaper first edition went before the *Mirror*. They went to bed about 10 o'clock the next morning. So it was headline news all day.[299]

These comments suggest that in every era the pressure on politicians to deal with crises as they emerge has always been great. The current pressure created by media on politicians is acknowledged but that does not justify ignoring the pressure created in earlier eras by media outlets that no longer exist.

In his 1988 paper concerning bail, remand and the media, discussed at 1.4.4 above, Rick Sarre reached important conclusions about the media. Amongst these, he states:

> How well the media perform their role of information transcribers is certainly open to question. Some forms of media do it better than others. Some proprietors do it better than others, and the fewer proprietors there are, of course, the less the chance that competition will force standards and responsibilities higher.[300]

Sarre avoids taking this expression of concern too far as an explanation for poor amendments to bail law. There are many other factors involved. However, he points out the media do have an important responsibility for 'unless they can act to alert us to the trends, dangers and warning signs which appear from time to time to frustrate the

[299] Sheahan, above n 287, 3.
[300] Sarre, above n 63, 64.

objectives of legitimate legal and social reform then they are failing in their duty.'[301] This approach strikes the right balance regarding the influence and importance of the media in relation to all aspects of the health of a liberal democracy including bail.

In the 1980s conservative media demands did not always lead to changes to drug laws and bail laws occurring at the same time. Terry Sheahan observed in relation to the period between 1980 and 1985, when there were no changes to bail presumptions in relation to drugs:

> I'm not sure we resisted. I'm just not sure it was in our consciousness. When I did the *Drug Misuse and Trafficking Act* I don't recall having any concerns about bail in that context and yet it was only 12 months later we decided to amend the presumption.[302]

Terry Sheahan did not put great importance on the fact that the Victorian drug suspect disappeared on bail in Victoria on 1 November, 1985 as a factor in the *Bail Act* amendments of April 1986. He stated: 'I don't recall it as a factor in that. I might have been aware of it happening at the time but I don't recall that. I'd have been very concerned if it had happened in NSW.'[303]

The media issues of April 1986 in relation to drug supply were of less importance than the context in which they occurred. In response to a question about whether high

[301] Ibid 65,
[302] Sheahan, above n 287, 5.
[303] Ibid, 6.

powered media coverage of alleged drug supply and murders played a part in the amendment of the *Bail Act* in that month, Sheahan observed:

> Well, I'm not sure I can answer that question definitively. I would have received some sort of advice or recommendation that we should do something about it. The Government had been in office for ten years at that stage. The inspirational leader had gone. There was an air of tentativeness about our approach to things. We'd been there a long time. There was a general feeling that we were approaching 12 years which seemed to be the limit of time that people got to be governments. I remember consciously thinking about that when you think that I was in Parliament with a bloke like Jack Renshaw who was in Parliament 40 years, saw governments come and go, came back as Treasurer in the Wran Government. After 10 years we were starting to get a bit panicky about things. Playing the man rather than the ball as far as the Opposition was concerned. I don't remember any particular incident. But you'd go to Cabinet and depending on what sensational things were happening, whether they were sensational or whether they were sensationally presented, and you'd go and be saying 'well what are we going to do about this?' and the relevant Minister would go away and give some consideration to it and come back with a recommendation.[304]

Sheahan added in relation to bail:

> I've had the opportunity to re-read the speeches and I can remember that now to some extent but I don't recall it being a matter of high policy. The other thing you've got to remember too, was there wasn't a great consciousness about the niceties of legislation in the legal area among the caucus members or the Cabinet. There was a perception, the reaction was more 'what on earth are you going to do about this. This bloke got let

[304] Ibid 6-7.

> out or this bloke didn't get let out or why can that happen in Victoria or why did that happen in Germany or whatever?[305]

These observations reinforce the view that it was not being increasingly tough on bail that was the issue. There were understandable concerns about the longevity of the Government, which would be an issue in any era, and concern about what was perceived as a national crisis concerning illegal drug supply and consumption.

In the Parliamentary debate at that time, Attorney-General Sheahan indicated he was acting in accordance with the recommendations of the Williams Royal Commission, which had recommended the removal of the presumption in favour of bail. He could have chosen the opposite view and the reasoning of the Woodward Royal Commission.

Frank Walker's concern about the precedent potential of armed robbery as an exception to the presumption in favour of bail proved correct when Attorney-General Sheahan stated in Parliament, 'The Bail Act already excepts people charged with armed robbery from the presumption of bail.'[306] In his interview, Terry Sheahan went on to explain that Departmental advice would have suggested the correct comparison of crimes in bail provisions. He also pointed out the difficulty of comparing crimes. He stated in relation to his comments in Parliament concerning the comparison with armed robbery:

> Now I remember that remark. In interpreting the potential threat to society it's very difficult. If the threat of an armed robbery is that somebody gets shot, that's a slightly

[305] Ibid 8.
[306] New South Wales, *Parliamentary Debates,* Legislative Assembly, 23 April 1986, 2578 (T Sheahan).

> different threat to society than the threat of a drug baron who is going to poison the minds and the physical systems of maybe a 1000 youngsters.[307]

The Government could have gone to the other extreme of a presumption against bail if media pressure and hardening public attitudes were the total explanation but it did not. The Attorney-General stated:

> When implementing these proposals, the Government has endeavoured, so far as is possible, to protect the rights of accused persons. It has striven to maintain the delicate balance between the rights of the individual and the requirements of the community.[308]

In his interview Terry Sheahan stated:

> I don't remember any pressures to go all the way but I do think that we thought then that [gaol] wasn't a real good place for people to be while they're awaiting trial. It was a very good place for convicted bad guys to be put but why is the punishment administered before the conviction and generally speaking, not that we wanted everybody to be out in the street or that we were trying to save money on prison or whatever it was but was it the right thing to do.[309]

As to moving to a position where there was no presumption for or against bail for the most serious drug offences, Sheahan added:

> I don't remember there being any contention about it. It just happened. It wasn't a matter of deep passion or commitment on my part or anybody else's part. I think we

[307] Sheahan, above n 287, 10.
[308] Sheahan, above n 306, 2575.
[309] Sheahan, above n 287, 8.

> just thought, 'well we've got to do something here. I mean you do incremental things. You move slowly with dramatic things that have implications for people's liberty.[310]

John Dowd, the Opposition spokesman, indicated support for the Bill. He noted the presumption of innocence issue in relation to bail but added: 'Far too much crime is committed by persons on bail and far too much intimidation of witnesses occurs prior to trials. I relate all that to too many people being granted bail.'[311]

6.4 IMPORTANT RESEARCH ON ABSCONDING BY BIG TIME DRUG DEALERS BECOMES AVAILABLE IN 1987

The question about what actually was happening in relation to absconding by serious drug offenders was finally explained in a 1987 paper by D Weatherburn, M Quinn and G Rich.[312] They defined serious drug charges as any drug charge proceeded with by way of indictment. The sample was restricted to matters in the NSW District Court that were finalized or resulted in a warrant for non-appearance in 1984. Within this group of matters they considered offences that carried life imprisonment (importation) and also supply and cultivate charges that carried a maximum sentence of fifteen or ten years.[313] The authors found, when considering cases where bail was granted, that '[t]here is no evidence of a relationship between principal charge and absconding.'[314] Further, '[i]t is

[310] Ibid 9.
[311] NSW, *Parliamentary Debates,* Legislative Assembly, 23 April 1986, 2801, (John Dowd)
[312] Weatherburn, Quinn and Rich, above n 51.
[313] Ibid 98.
[314] Ibid 103.

evident from inspection of the raw percentages that there is no evidence of a tendency for absconders to congregate in the higher drug quantity ranges.'[315] Perhaps the most sobering statistic is that arising from a table supplied by the authors which showed that 'in 44.8% (82) cases in which bail was known to have been refused or bail conditions known to have not been met *at some stage or other*, the defendant was ultimately found not guilty or given a non-custodial sentence.'[316]

6.5 AMENDMENT TO THE *BAIL ACT* AS IT RELATED TO THE COURT OF CRIMINAL APPEAL

In 1987 Attorney General Sheahan introduced an amendment to the Bail Act involving the Supreme Court. Section 3 of the *Bail (Amendment) Act 1987,* (NSW) provided that in an impending appeal to the NSW Court of Criminal Appeal (CCA) against a conviction on indictment or sentence passed in such circumstances or a pending appeal from the CCA to the High Court in relation to any such appeal, 'bail shall not be granted by the Court of Criminal Appeal unless it is established that special or exceptional circumstances exist justifying the grant of bail.'[317] The amendment involved a response to observations by the Court of Criminal Appeal in the case of *Hilton*.[318] In that case Chief Justice Street, supported by the other judges, considered whether longstanding common law provisions that in appeals from conviction or sentence the applicant had to show 'special or exceptional circumstances', still applied after the introduction of the *Bail Act.* The common law position was based on the removal of the presumption of innocence in

[315] Ibid 104.
[316] Ibid 106.
[317] *Bail (Amendment) Act, 1987*, (NSW) s3.
[318] *R v Hilton* (1987) (7) NSWLR 745, 746.

such cases because of the finding of guilt, the need to maintain the finality of the jury decision as to the person's guilt, consideration of changed circumstances that could arise if the person was granted bail and before a person returned to prison, and the risk of proliferation of appeals in the hope of gaining bail. The CCA concluded that the Bail Act was a code and excluded the common law. The Chief Justice observed that, '[i]t may well be, however, that the legislature may think it desirable to re-open consideration of this topic of the granting of bail pending appeal.'[319]

Attorney General Sheahan explained that the CCA had asked for the situation to be reviewed. This request had come from the Chief Justice. The Attorney General balanced two issues. On the one hand the finality of the jury decision should be respected and not regarded as a stepping stone. Further, there should not be an encouragement of the proliferation of appeals. Given these circumstances only arise following a conviction, the presumption of innocence no longer applied. On the other hand, the person who is later acquitted because of error or who has served most of the sentence in such circumstances has cause to complain. Balance was reached in the terms set out above. The Act, as amended, allowed for bail applications in the Court of Criminal Appeal where there was an appeal against conviction or sentence, but only in special or exceptional circumstances. It did not apply to de novo appeals.[320] The change was not opposed by the Opposition.

[319] Ibid 751.
[320] NSW, *Parliamentary Debates*, Legislative Assembly, 6 May 1987, 11247-11248 (Terry Sheahan)

6.6 NEW LAWS TO DEAL WITH FAMILY VIOLENCE AND THE IMPLICATIONS FOR THE *BAIL ACT*

The impetus for the long struggle to change public attitudes to domestic violence and violence against children was explained clearly in 1987:

> In the 1970's and 1980's the women's movement in New South Wales worked to focus community and government attention on the extent of violence directed in our society at women and children, often in the privacy of their homes and in personal relationships.[321]

The first women's refuge in NSW opened in 1974. Rising public consciousness of spousal and non-spousal domestic violence led the government to set up a Task Force on domestic violence in 1981. Its membership included a range of organisations supporting women and also legal bodies such as the CLRD. The Task Force recommended many reforms concerning police and courts. It did not make any proposal to change the presumption of bail but there was discussion of how to create 'cooling off' periods in domestic violence situations and how such a concept could be made consistent with a provision like s32 that set out the tests for bails. In 1983, the NSW Domestic Violence Committee was established to coordinate and monitor the government's domestic violence program. Major legal reforms were introduced concerning domestic violence as it relates to women currently or formerly married and women in an equivalent position. These included the creation of domestic violence orders. Sexual assault laws were changed in NSW during the early 1980's to provide a range of charges and make courts

[321] L'Orange, above n 22, 1.

more sensitive to the needs of women. The form associated with bail and domestic violence matters was changed to assist police by giving greater emphasis to the accused's demeanor and the possibility of reoffending. However, there was no change to the presumption in favour of bail.[322]

Legal reform in relation to children also took place in the early 1980's. In 1984, a Child Sexual Assault Task Force was established. Legal reforms in relation to a gradation of offences and penalties and court reforms that made consideration of the child more central were introduced. These legal reforms were part of a wider approach to dealing with issues concerning child sexual assault.[323] Once again there was no change to the presumption in favour of bail.

Terry Sheahan had no doubt that such changes brought about greater public consciousness of domestic violence. He also thought particular, highly publicised cases played their part. The approach had been consistent over time. Sheahan stated:

> Yes. There was a consistent pattern. We didn't have a Minister for Women's Affairs. I think there was a perception in our Government that that was a discriminatory type of thing. But Neville himself was the Minister for Women's Affairs basically. He was the one who had the Premier's Women's Advisory Council and all that stuff. That was fantastic.[324]

[322] Ibid 1-3, Woods, above n 21, 48-50, L'Orange, above n 23.
[323] L'Orange, above n 22, 3-4.
[324] Sheahan, above n 287, 14.

Asked about whether public attitudes about crimes concerning domestic violence, or violence against women and children, were hardening in the 1980's, Sheahan stated:

> Sure, that's the case. And I think it's the case that there was a degree of resolution within the Government about it too. Unsworth was very committed to this but it would be unfair to say that Wran wasn't. It was just the contingency of change of leadership which meant that Barry did that 87 stuff.[325]

In 1987 the approach to bail in relation to family violence began to change. In July of that year the Violence Against Women and Children Law Reform Task Force produced a Consultation Paper. Many important progressive reforms were recommended, including the widening of the relationships that would be covered by apprehended violence orders.

The Consultation Paper's Issue 27 concerned possible changes to the Bail Act. At that time, bail applied to proposals for orders under the Crimes Act. The Task Force proposed that there should be:

> an offence of breach of bail conditions in cases of offences against the person where these conditions were intended to ensure the protection of any victim. The presumption in favour of bail should remain but there should not be an automatic right to bail for this offence. The maximum penalty for this offence should be six month's imprisonment.[326]

It is of interest that the Victims of Crime Task Force (and the Domestic Violence Advocacy Service submission to that Task Force) recommended that an offence of

[325] Ibid, 14.
[326] L'Orange, above n 22, 108

breach of bail be created.[327] The capacity to review bail and withdraw it under s50 was not thought adequate. The respondent needed to understand that a penalty other than loss of bail was available.

The Consultation Paper also proposed additions to s32 and s37. Section 32 provided for consideration of protection and welfare of the community as an issue when considering bail. This was conceded, but it was thought that protection and welfare of the victim and all behavior giving rise to fear of domestic violence should be added based on the recommendations of the Report of the NSW Task Force on Services for Victims of Crime and the Domestic Violence Advocacy Service. According to the Victims of Crime Taskforce, this would 'direct the attention of prosecuting authorities and courts to the interests and needs of victims in the process of bail determination.'[328] Section 37 concerning whether a condition was too onerous was to contain a provision that what might seem onerous to the respondent, (loss of access to a vehicle for example), would be considered in the light of the effect on the alleged victim. Private informants should be able to seek a review of bail and the bail form used by police should be reformed.

In October 1987 (the month of the legislation changing the *Bail Act*), the Report to the Premier on a Survey of Non-Spousal Family Violence referred to at 1.4 above was published. The survey of 207 cases of non-spousal domestic violence concluded that non-spousal domestic violence was widespread, that few victims were aware of or went to the police or courts, and that those aware of such resources did not make use of

[327] Ibid 111-112.
[328] Ibid 110.

them. It was recommended that the scope of Apprehended Domestic Violence Orders be expanded and include a wider definition of 'family.' It was also recommended that community education programs be expanded and that education programs be provided for police, court officials and magistrates. Consideration was to be given to including assaults on family members as part of the definition of the domestic violence offence in s4 of the Crimes Act.[329]

6.7 MEDIA COVERAGE OF VIOLENCE TOWARDS WOMEN

Media attention to violence against women was also continuous in October 1987. On 6 and 7 October the *Sydney Morning Herald* gave prominence to a case involving a woman who had been sexually assaulted and murdered. The alleged perpetrator was on parole at the time. On 7 October an article in the *Herald* was headed, 'Govt Likely to Tighten Parole'. It went on to discuss tightening parole and the introduction of minimum sentences. The Premier announced that a five person Ministerial group would undertake a review these issues.[330] The *Daily Telegraph* covered the same stories.[331] On 8 October, the *Daily Telegraph* Editorial stated, '[t]here is one basic, overriding fact about the next State election. The party which offers more hope of beating the State's mounting law enforcement problems will be the victor.' Horrific rapes and murders were mentioned as part of the Editorial.[332] On 10 October the *Daily Telegraph* provided a full page of articles about recent sexual assaults and murders of women. On 11

[329] L'Orange, above n 23, 1-2.
[330] Mark Coulton and Andrew Keenan, 'Govt likely to tighten parole', *Sydney Morning Herald* (Sydney), 7 October 1987, 3.
[331] 'Alleged Killer Was On Parole', *Daily Telegraph* (Sydney), 7 October 1987
[332] Editorial, 'Enforcing the law is State's biggest need', *Daily Telegraph* (Sydney), 8 October 1987, 10.

October the *Sun Herald* headed page one with 'Massacre Survivor Tells'. Five people had been killed at Canley Vale. The alleged perpetrator was in a house 'before cornering the young woman he was after– she had jilted him and got engaged to another man.'[333] This matter was also covered by the *Daily Telegraph,* which on 13 October ran an article stating about the Vietnamese victims, 'They'd be reluctant to seek any outside help from the police or other officials.'[334] On 14 October the *Sydney Morning Herald* headed an article, 'Crime is Up by Nearly 9 Per Cent'. It observed that Mr George Paciullo [the Minister for Police and Emergency Services] 'said that one third of the 20 per cent increase in offences against the person was due to an increase in domestic assaults.'[335]

On 15 October the *Daily Telegraph* and the *Sydney Morning Herald* both reported that the State Government would pass legislation toughening penalties for pack rape, give wider powers to magistrates to seize weapons, and widen the range of persons to be protected by domestic violence orders. Court procedures would be changed to be more sensitive to the needs of women and children.[336] The Editorial page of the *Daily Telegraph* on that day contained four articles on violence towards women. The Editorial was headed, 'Horrific Crime Needs Tougher Penalty'. Tougher penalties for rape were mentioned and the wider domestic violence laws welcomed. The articles were headed: 'A harsher law for sex thugs', 'When the victim is on trial' and 'The women in a savage

[333] Frank Walker and Jane Southward, 'Massacre Survivor Tells', *Sun Herald* (Sydney), 11 October 1987, 1.
[334] Stuart McLean, 'Taboo may have cost five lives', *Daily Telegraph* (Sydney), 13 October 1987, 10.
[335] Mark Coulton, 'Crime is up by nearly 9 per cent', *Sydney Morning Herald* (Sydney), 14 October 1987, 2.
[336] Mark Coulton, 'Govt gets tough on sex crimes', *Sydney Morning Herald* (Sydney), 15 October 1987, 5.

jungle'. The second article explained the difficulties for women giving evidence in court and the third article gave examples of women who had been assaulted.[337]

On 19 October, under the heading 'Father, Son Attacks on Women Appall Unsworth', the *Sydney Morning Herald* considered the survey results concerning 207 women referred to above. The report noted the findings and recommendations and stated that the Premier 'said he was appalled at the extent of family violence as revealed from an analysis of 207 cases of women abused by members of their family other than their present or former husband.'[338] The *Herald* was supportive of the implications of the findings. A *Herald* Editorial on 24 October addressed Bar Association concerns about the new system and stated: 'The proposals appear to reconcile the desirability of protecting women and children from unnecessary additional trauma through the legal process with the preservation of the rights of the accused.'[339] On the same day the *Sun* devoted a whole page to articles about sexual assaults. The top part of the page was devoted to a story concerning the pursuit of a rapist alleged to have raped nine elderly women in seven years. A photo identity kit drawing was part of the article. Further down the page was a sketch of an angry man grabbing a desperate looking woman. The heading was 'When he finally gets caught he'll only get 8'. It then had a heading 'it's a joke'. The article stated 'The NSW Government's new "get tough" rape law reforms don't go far

[337] Editorial, 'Horrific Crime Nees Tougher Penalty', *Daily Telegraph* (Sydney), 15 October 1987, 10, David Armstrong, 'A harsher law for sex thugs', *Daily Telegraph* (Sydney), 15 October 1987, 10, Marian Horsly, 'When the victim is on trial', *Daily Telegraph* (Sydney), 15 October 1987, 10, Brad Lawson, 'The women in a savage jungle', *Daily Telegraph* (10.), 15 October 1987, 10.
[338] Tracey Aubin, 'Father, son attacks on women appall Unsworth', *Sydney Morning Herald* (Sydney), 19 October 1987, 3.
[339] Editorial, *Sydney Morning Herald* (Sydney), 24 October 1987, 30.

enough a number of leading authorities claim.'[340] The heading for a comment article by the Women's Editor was 'New sentences are just not enough'. The article observed, 'The State Government's new rape laws are laughable'.[341]

6.8 VIOLENCE TOWARDS WOMEN AND CHILDREND: LEGISLATION

It is clear from the material in the media that the issue of violence towards women and children was going to have to be dealt with as a matter of urgency. The Government's announcements add to that conclusion. However, it is also clear that the Government was intending to carry out the latest stages in an ongoing process of law reform in relation to women, children and the criminal law. That process included consideration of Reports from those who had devoted a great deal of time and effort to enhancing the rights of women and children in relation to the criminal law. The vast array of organisations that made submissions to, or were consulted by, the Violence Against Women and Children Law Reform Task Force are listed in Hansard and extend to more than two and a half pages.[342]

A number of worthwhile reforms were introduced. As Premier Unsworth explained when introducing the relevant Bills,

> The objectives of the Crimes (Personal and Family Violence) Amendment Bill are to strengthen generally the legal protection available to women and children who fear or are subject to physical or sexual assaults; to make the court processes less traumatic for

[340] 'When he finally gets caught he'll only get 8', *The Sun* (Sydney), 19 October 1987, 10.
[341] Karen Spresser, 'New sentences are just not enough', *Sun* (Sydney), 19 October 1987, 10.
[342] New South Wales, *Parliamentary Debates,* Legislative Assembly, 29 October 1987, 15463 (Barry Unsworth) 15468

> child and adult victim-witnesses; and to encourage women and children to report crimes against them and to seek the assistance of police and court processes in protecting themselves from threats of future violence.[343]

The Government did not implement all of the recommendations in relation to bail contained in the Violence Against Women and Children Task Force Report and the Survey Report. The *Bail (Personal and Family Violence) Amendment Act 1987* (NSW) introduced an amendment to s 9 of the *Bail Act* concerning the presumption in favour of bail. It proposed that a person was not entitled to bail if the offence was a domestic violence offence and the person had previously failed to comply with a bail condition for the offence which had been provided for the protection and welfare of the alleged victim unless the authorized officer is satisfied the person will comply in future. The proposal in the earlier report concerning an offence related to breach of bail was not implemented. When asked why, given all the reforms, improvements and messages in relation to violence against women and children, there was a need to amend s 9, Terry Sheahan observed:

> Well, it's bail on bail. I suppose the domestic violence environment was the classic place where the conditions of bail which may include some element of AVO, the conditions of bail focused on the victim. Not such in other circumstances. If you stick up the local TAB and you get bail you're not going back to the TAB but you may go back to the woman you're interested in or whatever it may be.[344]

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[343] Ibid
[344] Sheahan, above n 287, 18.

Section 32 in relation to criteria to be considered in bail applications was implemented in accordance with the recommendations. In the case of a domestic violence offence the authorized officer was to have regard to:

> the protection and welfare of the person against whom it is alleged that the offence has been committed; and any previous conduct of the accused which affects the likelihood that the accused person will commit a further domestic violence offence on that person while at liberty on bail.[345]

Section 37 dealing with restrictions on imposing bail conditions was also amended in accordance with the recommendations and in the same terms as the amendment of s 32.[346]

The issue of bail was not a dominant feature of the Premier's introduction or subsequent speeches in Parliament. Attorney General Terry Sheahan explained the proposals for bail reform in factual terms and in a speech in which he spoke of many other major reforms.[347] Liberal Shadow Attorney General John Dowd also spoke in factual terms in a speech that covered many other issues. In supporting the bail amendment to s 9, Dowd indicated that there was 'an element of recidivism in this area.'[348]

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[345] Bail (Personal and Family Violence) Amendment Bill 1987 (New South Wales), clauses 3.
[346] Ibid clause 4.
[347] New South Wales, *Parliamentary Debates,* Legislative Assembly, 17 November 1987, 16144 (Terry Sheahan)
[348] New South Wales, *Parliamentary Debates,* Legislative Assembly, 16139 (John Dowd)

The Reports had emphasised the need for education in the area of domestic violence as a preventative strategy. I asked Terry Sheahan why the effect of the amendment to s 9 could not have been achieved by better education for magistrates and judges. He explained:

> Well, bear in mind that you're within 12 months of the Judicial Commission legislation. Prior to that, no judicial education. … There's a culture now amongst judicial officers at whatever level to seek to learn and better one's self. The Judicial Commission was born out of a public political imperative to do something about complaints…[349]

Asked if at the time, amendment of the *Bail Act* seemed a better way to achieve an important change in attitude,. Sheahan stated:

> I think so because nobody had thought that the judicial education was here to stay. The Oppostion had said they would unwind the Judicial Commission. At the end of the day had they really tried to do that, they'd have said some of this stuff is pretty good, we ought to do it. And the best thing that ever happened to the judges was not only the betterment stuff with the educational statistics, but the complaint stuff because they didn't realize and some of them deny it till now, that it was the best thing that's ever happened to them.[350]

6.9 CONCLUSION

In the period up to 1988, when the NSW Labor Government was defeated, the Government was concerned about the growth of illegal drug supply and use, as were all

[349] Sheahan, above n 287, 17.
[350] Ibid 17.

governments in Australia at the time. It is true that this was a global issue with global economic and human implications. Media attention to drug supply matters was constant, including by tabloid papers that no longer exist. That point is not often discussed but is a reminder that politicians faced considerable pressure, as Terry Sheahan acknowledged. The *Drug Misuse and Trafficking Act 1985,* (NSW) provides for serious penalties upon conviction. On bail, however, the approach was consciously not as tough. I suggest that bail never fitted easily into theories concerning hardening public attitudes and governments acting accordingly. What should happen before a person was convicted or sentenced was being thought of in a different way, more consistent with the presumption of innocence. Consideration of bail was not central to the debate within the Government about how to deal with illegal drug issues. For the most serious offences involving a commercial level of drug supply there was a move to no presumption either in favour or against bail. Commercial level drug suppliers were not a massive component of those seeking bail. For the overwhelming majority of those facing drug related charges there remained a presumption in favour of bail.

A major wide-ranging reform program concerning the relationship between the criminal law and women and children was underway and was supported by reports and by both progressive and conservative political forces. Bail reform was recommended as part of this program. Reinforcing the view that this was not simply part of an evolving punitive turn is the fact that despite widespread media coverage of domestic violence matters the Government did not introduce a number of the tougher recommendations on bail found in the Reports. No offence relating to a breach of a bail condition concerning

personal violence was introduced. The amendment to s 9 concerning the presumption in the *Bail (Personal and Family Violence) Amendment Act 1987* was a serious matter. A starting point where 'a person is not entitled under this section to be granted bail in respect of an offence to which this section applies if', is an important move away from the presumption in favour of bail. However, it related only to a person who in a domestic violence offence had previously failed to comply with a bail condition for that offence and where the condition had been provided for the alleged victim. Bail could still be granted if the authorised officer was satisfied the defendant would comply in the future. Protection of women and children as a factor to be taken into account when considering granting bail and in relation to conditions related to bail is hardly a sign of a punitive turn.

The amendment concerning the Court of Criminal Appeal was at the request of the Chief Justice and reintroduced the situation at common law before the commencement of the Bail Act. Special and exceptional circumstances as a test for bail where a person has been convicted or sentenced in the District Court did not take a step in the direction of a punitive turn.

Chapter 7

THE 1988 NSW STATE ELECTION

7.1 INTRODUCTION

In this chapter the views of Terry Sheahan and John Dowd are considered in relation to the 1988 NSW State election. Material from other sources about the election is also considered. Issues such as the length of time the Labor Party had been in power and the retirement from office of a long term Premier are discussed. Issues such as balancing jobs in the timber industry and forestry preservation, gun control and attempts to deal with alleged corruption by setting up the Independent Commission Against Corruption (ICAC) are discussed. Sentencing as a law and order election issue is considered. Bail was not an issue in the election, and why that was the case is discussed.

7.2 THE ISSUES IN THE 1988 NSW STATE ELECTION

In October 1987 there was a dramatic stock market crash as part of an economic downturn in Australia. In early 1988 unemployment in NSW was at 7.9%. Election analysts J Hagan and C Clothier include these Federal issues in their factors affecting the 1988 State election, observing in relation to unemployment rates that: 'Nevertheless, despite nominal improvements in some regions, others such as the mid and far North Coast (13.2%), the Hunter (9.5%), the Illawarra and south-east (9.0%) and the south west of Sydney (8.9%) were suffering rates that remained stubbornly high.'[351]

[351] J Hagan and C Clothier, '1988' in M Hogan and D Clune (eds), *The People's Choice* (Parliament of NSW, University of Sydney, 2001) 251.

Hagan and Clothier also note that Neville Wran had retired from politics in 1986. His remarkable electoral victories were known in the media as "Wranslides." It was going to be a difficult job for whoever replaced him when combined with the reality that Labor had been in power for 12 years.

Other issues mentioned by Hagan and Clothier as having relevance in the 1988 election campaign include: gun control; expansion of national parks versus timber workers jobs; the nature of public works and in particular the Darling Harbour project and whether such money should be spent on schools and hospitals; the use of resources in hospitals and health administration; and law and order.[352] Hagan and Clothier explain:

> Both the issues of health care and law and order had particular appeal to an ageing population. In 1972, 8% of people in NSW were 65 years of age or older; by 1988, 11% of them were, and concentrations in particular electorates were much higher. The over 65's had increasing expectation of treatment by expensive medical technology, and a special interest in the quality of hospital care. Both the old and the not-so-old took an increasing interest in law and order as an issue in the eighties. Differences between male and female mortality meant that the majority of these senior citizens were widows, most frequently living alone.[353]

I asked Terry Sheahan about these issues and sought his opinion about their relative importance. In relation to whether he thought issues other than law and order were important, Terry Sheahan stated:

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[352] Ibid 268-272.
[353] Ibid 271.

> I do yes. I think every Member of Parliament who contested a seat in the 1988 election as an incumbent, and many of us lost on the Labor side, would say that law and order might have factored itself into some thinking but the major manifestation of that was gun control. Yes, I think the Government had all those difficulties that you listed. Incumbency for 12 years was a huge issue. I think that's just inevitable, wouldn't matter which Government, wouldn't matter whether a change of leader or what…[354]

Sheahan went on to relate the issues to his own and nearby electorates when he stated:

> But in the areas of my own electorate and of Albury and Monaro, I can't speak for the others, Akister in Monaro, Mair in Albury and me, the three of us in the areas of our electorates where the gun issue and forest conservation issue intersected, we lost.[355]

Sheahan was also not convinced of the general importance of law and order as an issue in the election. He explained: 'So I don't think the stuff we've talked about, law and order stuff, domestic violence stuff, other than peripherally and other than in my gut feeling about how my timber workers felt.'[356] By that he meant that proposed gun control laws in the context of laws on drink driving and domestic violence were seen by some as more proof of government control of their lives. He explained that the view amongst some was, 'Now they're saying I can't have a gun.'[357]

In chapter 6.7 above, I referred to wide media coverage of the October 1987 murder of a woman by a man who was on parole after serving four and a half years of a twelve

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[354] Sheahan, above n 287, 19.
[355] Ibid 21.
[356] Ibid 21.
[357] Ibid, 20.

year sentence. I also referred to other acts of extreme violence, including murders that were widely reported in the same month. The Government announced that a Ministerial task force would look into sentencing, including minimum sentences and parole. However, according to Hagan and Clothier, 'The Leader of the Opposition countered with the slogan, 'Truth in Sentencing' and promised to act upon it. It was a catch cry that had the virtues of powerful appeal without specific commitment, and the government found it hard to match.'[358]

Sheahan did take the view that the Liberal Party had run with truth in sentencing. 'The truth in sentencing was a big issue and they committed themselves to it and they went for it when they got there. That had been an undertow right through, particularly from 84 to 88.'[359] Support for the view that sentencing policy was an issue in the election can be found in the comments of the new Liberal Premier, Nick Greiner who according to Martin Laffin and Martin Painter stated:

> We ruthlessly separated the issues of getting elected from the issues of governing. I literally had a drawer for elections and a drawer for government. In the drawer for getting into government we had 'truth in sentencing' and populist things that were liable to win you votes…[360]

[358] Hagan and Clothier, above n 351, 272.
[359] Sheahan, above n 287, 21.
[360] Martin Laffin and Martin Painter, 'Introduction' in Martin Laffin and Martin Painter (eds), *Reform and Reversal* (Macmillan, 1995) 7, quoting Nick Greiner, Interview, December, 1994.

The incoming Attorney-General John Dowd also was of the view that issues other than law and order were relevant. In his view Barry Unsworth was not popular. He went on to state:

> He came in at the end of Wran's period when Wran had become on the nose because of issues of corruption. Guns were the big issue, corruption was an issue in State politics and therefore we resolved not to do anything because in that campaign we could only lose votes ... Law and order was not in fact a big issue at all. Federal issues were not big issues, privatization and all that, absolutely no effect on the State Government at all …[361]

I asked John Dowd about whether there had been a change in public attitude towards putting more people in prison by the late 1980s. He replied:

> Not particularly. People thought there should be more locking of them away… There had been a growing impact of radio shock jocks, so that gradually people were feeling and expressing the view that people weren't giving heavy enough sentences and they should lock them away and so on. There was a general trend in that way, fed by tabloids and shock jocks.[362]

Sheahan was of the view that elections increasingly were decided by factors in individual seats. As to whether law and order was a bigger issue in 1988 than in the mid 1970's, his view was:

> I don't have a perception that it was any worse. I think some of those issues have always been there. I think they've always been of concern or as I say, looking back and trying to

[361] Interview with John Dowd (Sydney, 3 December 2011). 1.
[362] Ibid 3.

> think what I thought about it in 88, there wouldn't have been much different, the same people would have had the same problems.[363]

In Sheahan's view the emphasis on neo liberalism did not change public attitudes about people in trouble with the law or in prison. Decade to decade he said, 'I don't think they've changed markedly, I think they're pretty much the same.'[364] Dowd didn't accept there was a less welfare state orientated view by the late 1980s. He stated: 'It wasn't a welfare state. It was a well–balanced society in which Governments provided for certain things and they didn't provide for others …'[365]

Importantly, Dowd expressed the view that bail reform was not an issue in the election. He stated:

> It was almost a non-event. If it was in the platform I wouldn't know. No-one would have referred to it, no-one made any speeches about it, Greiner's policy speech may have, I don't remember, it was a generic policy speech but things like bail were just not there.[366]

Sheahan expressed a similar view when he stated: 'I honestly can't recall, either in my electorate or in my Ministerial role having a representation from one person or a group about bail laws.'[367]Sheahan also observed that '[b]ail is only big news if somebody on bail commits another crime, I think. Of which a subset is the domestic stuff which we

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[363] Sheahan, above n 287, 22.
[364] Ibid 23.
[365] Dowd, above n 361, 2.
[366] Ibid, 2.
[367] Sheahan, above n 287, 24.

talked about.'[368]As for the importance of media pressure at that time, he noted, 'In those days, a McNair Anderson survey showed that most constituents in the bush got 95% of political information from the local newspaper. So the local newspaper was everything. They weren't into shock jocks and syndicated radio.'[369]

7.3 CONCLUSION

There appears to be no evidence that bail was an issue in the 1988 State election. The material does suggest that gun control and alleged corruption were issues in the 1988 election. Neither could be described as an example of a conservative/ non-conservative divide in the community. All voters of whatever worldview did not want corruption. A proposal for an Independent Commission Against Corruption did not prove a move to a punitive turn. Gun control was also a matter that had wide based community support as a means of reducing violence. The Liberal Opposition's emphasis on 'truth in sentencing' was an example of a law and order issue in the 1988 election where a more punitive approach was apparent. However, Terry Sheahan did not think public attitudes to law and order had become more severe by the late 1980s than they were in earlier decades. John Dowd thought there had been a gradual change but did not suggest that it had resulted in a fundamentally different position. Terry Sheahan explained that issues such as domestic violence laws played only a secondary role. Neither he nor John Dowd thought law and order was a fundamental issue in the election.

[368] Ibid 25.
[369] Ibid 24.

Chapter 8.

THE LIBERAL GOVERNMENT 1988-1995

8.1 INTRODUCTION

This chapter commences with consideration of changes to the *Bail Act* relating to drug supply. The Liberal Government introduced the first presumption against bail for the most serious supply charges. The reasons for that are considered but so are the reasons for increasing the maximum quantity of drugs that would define the least serious drug crime charges. The latter group of charges would be more likely to attract bail. Domestic and personal violence matters continued to attract reform initiatives and changes including changes to the *Bail Act* in 1990 and 1993 are considered. The implications arising from removing the presumption in favour of bail for murder charges is discussed and the relevance of a particular case and the media forms part of the discussion. The chapter then considers the reasons why the Government ensured that those facing the new imprisonment possibilities under the *Summary Offences Act 1988* (NSW) would continue to be covered by s 8 of the *Bail Act* dealing with the right to bail rather than the more difficult presumption issues under s 9. The chapter concludes with consideration of changes to the bail powers of the Supreme Court.

8.2 THE LIBERAL GOVERNMENT POLICY

The central feature of the new Liberal Government was administrative rationalism. That has been explained as: ‘In pursuing measures that we label ‘administrative

rationalisation', the Greiner Government was seeking economies and improvements in technical efficiency in the management of resources and the delivery of public services.'[370] The new Government did pursue social populism including more police, longer prison sentences and harsher prison conditions.[371]

In relation to penal policy, George Zdenkowski noted:

> The demise of the rehabilitation ethic and the rise of the new retributivism, based on a philosophy of just deserts; the convergence of a left liberal and conservative 'law and order' alliance in supporting in principle a just deserts philosophy for different reasons and with different implications for detailed policy development. (Brown *et al.* 1990.)[372]

It remained to be seen whether such a change would affect bail law. As explained in Chapter 7 bail was not an issue in the State election.

'Truth in sentencing' was introduced in NSW by providing in the *Sentencing Act* for a fixed minimum sentence.[373] The powers of the Ombudsman were restricted when investigating police matters, to matters where there is the possibility of a criminal charge and in a case where the Police Commissioner is of the view there may be dismissal proceedings. The Independent Commission Against Corruption (ICAC) was set up while the Corrective Services Commission arising out of the Nagle Royal Commission and Corrective Services Advisory Services, were abolished. Conditions in prisons were

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[370] Laffin and Painter, above n 360, 2.
[371] Ibid, 4.
[372] George Zdenkowski, 'Punishment Policy and Politics' in M Laffin and M Painter (eds), *Reform and Reversal* (Macmillan, 1995) 220, 221.
[373] *Sentencing Act, 1989* (NSW) *s5.*

toughened.[374] Having considered all of these factors, David Brown nevertheless cautioned against simplistic analysis and response:

> To assume the concealed hand of economic rationalism lurking in every instance, a grand strategy to be opposed with another similar all encompassing, leads to a neglect of the local, the specific, and to purely defensive responses where more imaginative strategies and new directions are required.[375]

Changes to bail law in the period of the Liberal Government need to be tested against explanations based on economic rationalism and a growing punitiveness, but also against explanation based upon the local, the specific and the defensive.

8.3 DRUG OFFENCES

On 25 May, 1988, Attorney-General John Dowd moved for suspension of standing orders so that a number of Bills could be introduced. They included the Independent Commission Against Corruption Bill and the Coroners (Amendment) Bill. He also mentioned that the Summary Offences (Replacement) Bill would be introduced the following Tuesday. Other Bills that were mentioned in support of the suspension of standing orders included Bills concerning drug crime. They were the Drug Misuse and Trafficking (Amendment) Bill and the Bail (Amendment) Bill.[376]

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[374] David Brown, 'Post election blues: Law and Order in NSW Inc' (Jun 1988) 13 *Legal Services Bulletin* 99-102.
[375] Ibid, 103.
[376] New South Wales, *Parliamentary Debates,* Legislative Assembly, 25 May 1988, 535 (John Dowd).

I asked John Dowd whether he believed the Government had a mandate for major changes to the criminal law. In relation to ICAC Dowd explained:

> So that happened to be a big issue for us but it's not really a law and order, lock them away issue at all. It dealt with corruption. … It would never put a lot of people in gaol but it would in fact change the culture. So it had nothing to do with law and order.[377]

Dowd went on to explain that:

> In relation to drugs there were some moves federally for changes to drug attitudes. The Party largely doesn't discuss these issues. The Liberal-National Parties are not bound by the external Party. They are there to do what they think they should do and there is no control from outside. There was almost no debate inside and maybe not a debate at all. What I did in my portfolio, with the exception of ICAC, which was partly mine and partly Greiner's, was what I thought should be done and therefore any discussion about drug amendments and consequential bail amendments were within my Department and my policy people, never involving anyone else. So it's a purely internal Departmental exercise based on what I thought should be done as early as we could, based on how the Department saw it being done.[378]

Consistent with the approach of the Government relating to concern for the community, the Attorney-General explained in his Second Reading Speech that the amendments to the *Drug Misuse and Trafficking Act* were being put forward because 'it is crucial that the provisions of the Act effectively serve the community in the war against drugs, for as the House would be only too aware, the success of the war against illegal drugs

[377] Dowd, above n 361, 4.
[378] Ibid.

determines very much the success of efforts against crime generally.'[379] In relation to the Bail Amendment Bill the Attorney-General also stated that, 'The major consideration underlying this bill is the protection and welfare of the community.'[380]

In his interview, John Dowd agreed that in the 1970s armed robbery had been perceived by the public as the number one crime. He also agreed that after three Royal Commissions and the widespread concern about drugs that in the 1980s illegal drug supply was perceived as the number one crime. He went on to observe:

> In Opposition I had spent a lot of time dealing with corruption within NSW. A large part of that corruption was drugs and drugs involve deaths of young people and not so young people and I was fighting the drug industry which had grown and grown substantially and had tentacles into corruption in the police force and other parts of the community.[381]

That explanation for the changes is consistent with what John Dowd stated as Attorney-General in the debate in 1988:

> Commercial drug trafficking offences are of a particularly insidious nature, and require special attention. It is almost inevitable that persons who traffic in large quantities of prohibited drugs are members of syndicates fostered by organized crime. These persons are motivated purely by greed and are concerned only with profits, at the expense of the hapless victims of their endeavours.[382]

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[379] Dowd above, n 376, 546.
[380] Ibid, 551.
[381] Dowd, above n 361, 6.
[382] Dowd, above n 376, 552.

Support for Dowd's claim that he and his Department were pushing for the change can be seen in an article in the *Daily Mirror* headed 'New assault on drug pushers':

> The government wants to switch emphasis from arresting drug users to ruining the business of the big drug merchants… In a related move, dealers will no longer readily get bail on their first court appearance. SUBMISSION. They will have to submit to a magistrate that bail is warranted instead of police having to say why it should not be granted. This is to stop the drug dealers getting bail and then leaving the country.[383]

Dowd, like Terry Sheahan, was not convinced that prior media pressure was of fundamental importance to his decision making. In relation to the *Sun* and the *Daily Mirror*, which remained in operation until the 1990s, he stated: 'I think that the loss of the evening tabloids meant that people weren't as satisfied as they were about those issues and it helped with the growth of the radio shock jocks.'[384] Dowd also stated in relation to the *Sun*, *Daily Mirror*, talkback radio and the question of whether pressure on politicians has increase over the decades:

> Well they were pressures but they also satisfied a need of the public. The afternoon radio now satisfies that need, the drive time radio satisfies that need and television of course was satisfying the need of most people. It was part of the beginning of the end of the print media which was moved along. People get their news simplistically and electronically rather than read newspapers.[385]

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[383] Malcolm Farr, 'New assault on drug pushers', *Daily Mirror* (Sydney), 25 May 1988, 7.
[384] Dowd, above n 361, 3.
[385] Ibid 11.

The amendments to the *Drug Misuse and Trafficking Act* provided both an easing of the potential for more severe penalties at the lower end based on the quantity of the drug and more severe penalty at the large scale drug supply end of drug supply. At the lower end the Attorney-General summed up the issue when he stated:

> Generally, the small quantity is one-tenth of the trafficable quantity and the indictable quantity is twice the trafficable quantity. The introduction of the Act has paralleled a sharp increase in the number of drug matters being dealt with on indictment in the District Court and a reduction in drug matters going before the Local Court.[386]

A number of concerns arose from these developments. Longer court delays would eventuate. Police would be tied up in District Court proceedings over relatively small amounts of drugs when such matters could just as effectively be dealt with in the Local Courts.[387] The Attorney-General expressed the view that the small, trafficable and indictable levels were wrongly set. Dowd stated: 'They do not properly distinguish between the addict, the addict-supplier and the commercial trafficker.'[388] Using heroin as an example, the Attorney-General explained that the quantity for all the illegal drugs in each of the cases small, trafficable and indictable would be increased to reflect reality based on the information available. It is difficult to see these initiatives as tough law and order provisions. The higher quantities allowed the opportunity for many more cases than previously to be dealt with by magistrates in the Local Court with subsequent lower penalties. The trafficable quantity which could be used as an evidentiary provision

[386] Dowd, above n 376, 547
[387] Ibid 547, 548.
[388] Ibid 547.

to establish 'deemed supply' would only arise when the new higher trafficable quantity was reached.

In his interview, John Dowd observed:

> So we took the opportunity to adjust things that had become anomalous. So that almost no-one would have noticed, in the public mind, these amendments at all. It wouldn't have been in the press. Nor would I have put it in the press because, you know, granting benefits to criminals. So this was something which I did because it was right to do it and had nothing to do with the public debate or law and order or whatever.[389]

While the changes set out above created a situation that is less punitive, the fines to be imposed for indictable matters punishable summarily were increased and thus made more punitive.[390] However, the range of penalties used in Courts and in particular the Local Courts suggest that increasing the weights at the lower end of the scale would allow more people to be dealt with by bonds and low level fines, particularly where the quantity was 'small'.

At the large end of the quantity scale the Government did take a tougher line for commercial and large commercial dealers. Again, using heroin as an example, the Attorney-General explained that the current indictable quantity was four grams and carried a 15 year maximum sentence and the commercial quantity was 1000 grams and carried a maximum penalty of life imprisonment. Fines were also part of each penalty.

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[389] Dowd, above n 361, 7.
[390] Dowd, above n 376, 549.

Dowd argued that: '[there] is a clear need for reduction in the commercial quantity and revision of the proportionalities that currently exist between the indictable and the commercial quantities.'[391] The old commercial quantity maximum was retained as the weight for a new 'large commercial quantity' that continue to carry a life sentence and a fine. A new commercial quantity set at 250 grams would carry a maximum sentence of 20 years and a fine. This would separate the new crime out from the indictable level crime.

The connection with bail law was apparent from the Attorney-General's speech:

> This revision has implications for the Bail Act reforms. The reduction in the commercial quantity by 75 per cent will mean that a broader class of persons will be faced with a presumption against bail if caught in possession of an amount in excess of the reduced commercial amount. The Government is making it as hard as it can for the drug trade and for drug dealers to continue in business.[392]

The Bail Amendment Bill 1988 introduced s 8A into the *Bail Act* and thus created a new category of offences for which there would be a presumption against bail. A presumption against bail had not existed in the *Bail Act* before these provisions. The new provision would apply to the commercial and large commercial quantity of drugs.[393] As a consequence:

> [A] person accused of an offence mentioned in this category is not to be granted bail in accordance with the Act unless the person satisfies the authorized officer or court that

[391] Ibid 549.
[392] Ibid 549.
[393] *Bail (Amendment) Act 1988* (NSW), Schedule 1.

> bail should not be refused. In other words, the onus is on the accused person to satisfy the court that bail should not be refused. The authorized officer or court must still consider, as for all offences, the criteria set out in section 32.[394]

Frank Walker's concern that the precedent of the armed robbery exception to the presumption in favour of bail would be used again and again proved true on this occasion. The Attorney-General explained that this exception had also been applied to commercial levels of drugs before the current move to a presumption against bail for those crimes. The exception providing for no presumption either for or against bail would now be applied to offences where the quantity of the drug was twice the new indictable amount but less than the new commercial amount and to *Customs Act*, 1901 (Cth) provisions for equivalent amounts of drugs. In the case of heroin this amount was set at 10 grams.[395]

Dowd emphasised the protection and welfare of the community in his speech. He explained that, '[t]he Government has not initiated these reforms lightly; it believes, however, that the community has an overriding interest in arresting the supply of prohibited drugs.'[396] The Attorney-General's observations about alleged crime, un-convicted person and the right to liberty referred to at 2.6 above appeared on the same page as the observations about the overriding interest in arresting the supply of prohibited drugs and the protection and welfare of the community. The tension

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[394] Dowd, above n 376, 551.
[395] Ibid 552.
[396] Ibid 551.

between these ideas was something that I pursued in the interview with John Dowd and in particular the idea of a presumption against bail. His response was: 'Because the presumptions for and against are only indicative and they're presumptions only. I was concerned to hit and hit hard the big drug operators. They're multi–million dollar industry people, the most loathsome scum you could ever hope to meet.'[397]

I pursued the matter of Dowd's own known views in support of the presumption of innocence and the rule of law and the concept of a presumption against bail. In relation to the need for these changes to bail law, Dowd suggested they were necessary:

> Because it obviously wasn't working. We were not deterring and I wanted to deter. Because very few people who are arrested on major drug charges are innocent. Very few are innocent. Some of them are found not guilty not withstanding that they are guilty. And I wanted to make it as hard for them as I could because when there is big money around and you grant bail people come up with the money. People go out there and earn more money. So drug area, when you've got a crime area with massive amounts of cash you have to make it harder.[398]

I pointed out to John Dowd that there was research around at the time which showed that big time drug dealers were no more likely to abscond than anybody else. He responded with the important point that for him the issue was never about absconding:

> No, no. it was, I wanted to stop, in effect, bail crime. I wanted these people taken out of the equation which is contrary to my normal philosophy on bail but I thought that

[397] Dowd, above n 361, 8.
[398] Ibid 9.

> people could come up with large amounts of money to go out and keep on doing what they are doing makes a mockery of the bail provisions.[399]

In his speech in Parliament, Dowd stated in relation to those offences for which there would be neither a presumption in favour or against bail:

> In practice the prosecution must still establish grounds as to why bail should be refused, but the likelihood of a person's being admitted to bail is less than for those charged with an offence to which the presumption in favour of bail applies.'[400]

Dowd explained the reason for the expanded category of neutral bail presumptions in his interview. It was introduced '[b]ecause presumptions are only presumptions and generally you've got to have a reason for putting in a presumption either way and if I didn't have a reason for putting it in then a neutral presumption that is to be decided on the facts is what I wanted.'[401]

The Opposition did not resist these proposals. The *Bail Act* became caught up in a bipartisan view that there was a need to be tough on a particular type of crime. In the 1970s the Liberal Opposition had wanted to go further than aggravated robbery for an exception to the presumption in favour of bail. The Labor Government refused and the exception was restricted. The Labor Opposition on this occasion criticised the Government for going 'soft on drugs.' Shadow Attorney-General Paul Whelan stated:

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[399] Ibid 10.
[400] Dowd, above n 376 552.
[401] Dowd, above n 361, 10.

> The Government is raising the weight of drugs deemed to be of trafficable quantity. Clearly a Government that has a mandate to do something about problems of drug misuse has an obligation to ensure that such weights are kept to a minimum so as to permit prosecution under the three headings I have mentioned.[402]

8.4 DOMESTIC AND PERSONAL VIOLENCE

The Bail (Amendment) Act 1988 also included changes to the matters to be taken into account by a judge or magistrate when considering bail in personal violence matters. At 6.8 above it was explained that in 1987 the Labor Government had added s 32(2A) to the *Bail Act* which provided that when an authorised officer was considering whether bail should be provided then additional criteria were to be considered if it was a domestic violence matter. These criteria included the protection and welfare of the alleged victim and any previous conduct of the accused which affected the likelihood of the accused committing a further domestic violence offence on that person while on bail. The same matters were required to be taken into account in s 37 concerning bail conditions.[403]

The Bail (Amendment) Act 1988 removed s32 (2A) and the section on the same issues in s 37 dealing with conditions for bail. In the same amendment s 32 was widened so that, in addition to consideration of the protection of the alleged victim, there was a requirement to also consider protection of close relatives of that victim and any other

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[402] New South Wales, *Parliamentary Debates,* Legislative Assembly, 31 May 1988, 886 (Paul Whelan).
[403] *Bail (Personal and Family Violence) Act 1987*, schedule 1.

person deemed to be in need of protection was to be taken into account. The term 'close relative' was defined in s4 to include:

(a) Any mother, father, wife, husband, daughter, son, step-daughter, step-son, sister, brother, half-sister, half-brother and de facto partner of the person; and

(b) If the person has a de facto partner, anyone who would be such a relative if the de facto partners were married.[404]

As these amendments occurred in s 32 (1) (b) they needed to be considered in addition to the provisions aimed at the protection and welfare of the community found in s 32 (c). Section 37 dealing with bail conditions was also amended to include the potential for conditions to protect close relatives and any other person deemed in need of protection.

I asked John Dowd if these changes had anything to do with the reports on domestic violence which had been commissioned by the previous government. He replied:

> No. It was just a logical extrapolation of who are in fact offended. I had practiced in the courts, I'd practiced in the criminal law. I could see that there hadn't been enough consideration given as to the people that ought to be taken into account. I hadn't effectively read those reports and this was only my own experience of life and my in effect amateur parliamentary draftsman thing. I always intellectually dealt with the issue myself to see where it ought to go and that's where I got that from.[405]

He went on to explain that a major concern was the type of people who carry out such acts of violence. He stated: 'The mentality of people like that, it's not a rational process,

[404] *Bail (Amendment) Act 1988*, above n 391, Schedule 2.
[405] Dowd, above n 361, 13.

and people's lashing out, is an irrational process and therefore you have to widen the people you actually contemplate.'[406]

Dowd explained that the changes to s 32 and s 37 were not a result of media or public demand:

> No. It was too subtle for that. I mean you are conscious of them. But largely in politics you don't have time to listen to the media but for reading the newspapers and so on. No, it was a question of, you were dealing with in a liberal democracy a very important piece of legislation. And while you're doing it you must do what's right, not what is politic.[407]

Further evidence of that greater consciousness was the expansion of Domestic Violence Orders in 1989 by the introduction of Apprehended Violence Orders that applied to all persons. Section 48 of the *Bail Act* concerning reviews of bail decisions was amended to take in this wider category.[408]

The Bail (Amendment) Bill 1990 proposed more detail be placed in s 32 in relation to sexual violence. The *Bail Act* in its original form had included the nature of the offence as a consideration for magistrates and judges in relation to the tests for absconding. The amendment added that requirement in relation to the test for protection and welfare of the community. Furthermore, in relation to that test, it added whether the offence was of 'sexual or violent nature'. In relation to the protection and welfare of the community

[406] Ibid 13.
[407] Ibid 15.
[408] *Crimes (Apprehended Violence) Amendment Act, 1989* (NSW)

test based on the likelihood of further offences while on bail, the *Bail Act* in its original 1978 form restricted consideration to crimes that involved violence or were likely to be serious by reason of the consequences. The amendment added to the violent nature component by making it 'sexual or violent nature'. It also required consideration of the effect of the offence on the victim, victims and the community generally. In addition the number of potential serious offences had to be considered.[409]

In the Parliamentary debate about these amendments the Attorney General stated:

> Concern has been expressed recently at the release on bail of some people who have been charged with offences of a violent or sexual nature. All defendants are of course presumed to be innocent unless proven otherwise, but the seriousness of these offences and the harm that could occur to members of the community if offences involving sexual assault or violence were committed after the person had been released on bail require that special consideration be given by those determining bail in such cases.[410]

In my interview with John Dowd I asked him about the recent concerns concerning people getting bail for offences of a violent or sexual nature. He replied:

> Probably the greatest unreported area of crime is sexual abuse. It happens in families, it happens in the country. I had one friend who practised in the bush who only had one brief in three years that was not a father-child sort of thing. I mean in the bush sexual depredation is massive and increasingly with the breakup of marriage where the

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[409] *Bail (Amendment) Act, 1990,* (NSW) Schedule 1.
[410] NSW, *Parliamentary Debates,* Legislative Assembly, 14 November, 1990, 9658, (John Dowd)

> stepfather, it's almost become a cliché, for approaches to young children and Lolita type situations. So I thought there was a much bigger issue out there than had previously been recognised. I used to practise in family law and I knew what was happening but so much of it goes unreported, and still today goes unreported, that I saw that as a gap that had to be dealt with.[411]

I also asked John Dowd why he thought there was a need for a specific reference to sexual matters given that violence was already referred to and sexual offences would generally be violent or at least serious because of their consequences. He explained that the amendment was necessary:

> Because there's a myriad of sexual offences that fall short of violence and do enormous damage. It can be verbal intimidation, it can be putting the hard word on, it can be quite subtle molesting, quite perverted actions which were not violent as such or did not necessarily involve physical contact…[412]

Preventative detention has always been a thorny question because of its implications for civil liberties. As mentioned at 4.5 in the thesis, the concept was specifically rejected by the Bail Review Committee, 1976. Nevertheless, consideration of potential crimes that were violent or serious because of their consequences was part of the Bail Act when introduced in 1978. I asked John Dowd why he wanted to expand this category to include sexual matters and estimates of the number of such potential crimes. He stated:

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[411] Dowd, above n 361, 16.
[412] Ibid 17.

> Bail crime fluctuates up and down. It is a matter of newspaper perceptions and the public go along with the newspaper views and I was probably unconsciously responding to that as an issue. Sexual matters are inadequately dealt with in crime and I generally wanted to take into account those matters and someone who, it's a bit like the way people talk about rehabilitation reoffending. If you've got sexual inclinations, you've got them and if you're selfish enough to want to harm other people in the process or not care whether you're harming them, you're going to do it again.[413]

In relation to civil liberties Dowd went on to state:

> Yes. I probably suppressed my own inclinations in doing this. The likelihood of further offences is a matter of protecting the society. I don't like doing it but it's a matter of the balance you have to strike in bail applications and in that balance likelihood of further offences is a matter of protection.[414]

Dowd stated that he did not introduce these changes because of public or media pressure. When asked about that issue he stated '[n]ot in the slightest. It's just the more you see, the more you learn through the media and through practice of the law and all of that. No, there was no big, there may have been some cases but I tried to do things because they were right rather than politic.'[415]

The Opposition supported the amendments but claimed the amendments were simply fine tuning the Bail Act to capture headlines. Paul Whelan stated: 'The Opposition will not be opposing the Bail (Amendment) Bill for the obvious reason that the Government

[413] Ibid 18.
[414] Ibid 18.
[415] Ibid 17.

would attempt to paint the Opposition as supporting violent criminals.'[416] Once again, for differing reasons the Government and Opposition were united in supporting an amendment to the Bail Act. The Opposition on this occasion was not proposing something more severe. Dowd denied that the amendments had anything to do with trying paint the Opposition into a corner.

8.5 THE 1993 AMENDMENTS CONCERNING DOMESTIC VIOLENCE

In 1993 there were significant changes made to the law concerning domestic violence. Important changes to the law on bail formed part of the larger picture. Once again an horrendous crime played a part in the development but so did ongoing concerns about the protection of women and children as reflected in a report.

The Report of the NSW Domestic Violence Committee was produced in 1991 as part of the NSW domestic violence strategic plan. The Report's terms of reference included legislation to 'provide immediate safety to women and children who are (or are at risk of becoming) victims of domestic violence.'[417] A wide range of submissions had been made to the Committee by government and non-government organisations and individuals. A Discussion Paper had been published. A study concluded that '100,000 women each year are likely to report or disclose domestic violence.'[418] Many more do not disclose. The considerable occurrence of domestic violence had been commented on in the 1981 and 1987 Reports referred to earlier in the thesis. Section 32 concerning

[416] NSW *Parliamentary Debates,* Legislative Assembly, 26 November, 1990, 10536 (Paul Whelan).
[417] J Woodruff, 'Report of the NSW Domestic Violence Committee' (Women's Coordination Unit, 1991) 5.
[418] Ibid 5.

the tests for bail had been amended during the earlier period. The 1991 Report indicated a lack of satisfaction with the results. It stated: 'Police and legal responses to domestic violence are frequently characterized by inconsistency of approach.'[419] The recommendations covered many fields. In relation to bail the Report recommended for police that 'bail should be refused on arrest for breach of an Apprehended Violence Order until the first court appearance.'[420] Recommendation 2.2.12 states:

> The presumption in favour of bail should be reversed so that there is a presumption against bail where an Apprehended Violence Order is breached and where bail conditions in respect of an Apprehended Violence Order application or domestic violence offence are breached.[421]

This Report, like those before it, proposed worthwhile reforms in relation to domestic violence. The proposals concerning police not granting bail for cases that involved breaches of AVOs and the reversal of the presumption in favour of bail in courts for such matters was part of this general reforming movement. Whether such restrictions on bail should have been introduced is a matter for debate. However, it would be wrong to suggest that the proposals clearly arose from a growing tendency towards law and order solutions. They can just as easily be characterised as representing part of an ongoing process in relation to enhancing the legal rights of women and children.

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[419] Ibid 6
[420] Ibid 13
[421] Ibid 16.

On 15 September 1993, the Premier, John Fahey, introduced legislation that would make major changes to the law on domestic violence and to related issues concerning bail.[422] In opening his Second Reading speech the Premier stated:

> Recent incidents of domestic violence, including the Andrea Patrick case, have raised the question of the capacity of the present criminal law to adequately respond to domestic violence situations. The Government has been for some time concerned about this serious social problem.[423]

This statement indicates that two issues were of prime concern in leading to the legislation. One was a serious crime involving a murder in a domestic context. The other was the ongoing development of policy concerning the criminal law as it relates to women and children. Public attitudes to domestic violence did justify concern. As Elizabeth Matka noted at the time:

> In a survey conducted for the Office of the Status of Women in 1988, it was found that one–third of those asked thought that domestic violence should be kept private, while 19% – about one in five – thought that such violence could be justified in some circumstances and 21% thought that domestic violence was not a crime.[424]

The headline on page 1 of the *Sydney Morning Herald* on 25 August 1993 was 'Govt pledges new laws to protect wives'. The article went on to state, 'The State Government has vowed to pass laws to protect people living under the threat of violence, in the

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[422] *Crimes (Domestic Violence) Amendment Act, 1993,* (NSW) *Bail (Domestic Violence) Amendment Act, 1993,* (NSW)
[423] NSW, *Parliamentary Debates,* Legislative Assembly, 15 September, 1993, 3217 (John Fahey)
[424] Elizabeth Matka, 'Domestic Violence in NSW' (NSW Bureau of Crime Statistics and Research, March 1991) 1.

wake of the murder of Miss Andrea Patrick.'[425] On the same page was another article headed, 'Police sought bail two days before killing'. It explained that the alleged perpetrator had been given bail in relation to Ms Patrick, two days earlier, on condition that he comply with an AVO condition to stay away from her.[426]

The Crimes (Domestic Violence) Amendment Bill, 1993: provided a new offence related to domestic violence; increased penalties for domestic violence offences; clarified that court interim orders can be made whether the defendant is or is not in court; and provided for the introduction of telephone interim orders. The Premier explained that the Bill 'implements many of the recommendations of the New South Wales domestic violence strategic plan by overcoming certain ambiguities and apparent weaknesses in the existing legislation.'[427] The Premier conceded that 'no legislation, of course, will deter persons who are committed to killing or injuring their partners or family members.'[428] The Premier made reference to statistics showing that 'over 80 per cent of all homicides in New South Wales are committed by a member of the victim's family or by an acquaintance.'[429]

The 1992 BOCSAR publication, Family, Acquaintance and Stranger Homicide in

[425] E Jurman, 'Government pledges new laws to protect wives', *Sydney Morning Herald* (Sydney), 25 August 1993, 1.
[426] M Riley, 'Police sought bail two days before killing', *Sydney Morning Herald* (Sydney), 25 August 1993, 1.
[427] Fahey, above n 423, 3217.
[428] Ibid 3218
[429] Ibid 3217

NSW [430] stated that 'in NSW, over the nineteen year period spanning 1968 to 1986, 80 per cent of homicides occurred within the family or among friends and acquaintances (Bonney 1987).'[431] The 1992 study considered all homicides in the years 1968 to 1986 where there was a known offender. Further references to this report are considered below. Concern for victims in a family situation was reinforced by the results which showed:

> For acquaintance homicides 78.9 per cent of victims were male and for stranger homicides 80.1 per cent of victims were male. In contrast less than half of the victims of family homicides were male. (41.6%). Insofar as homicide is concerned, women are clearly at greatest risk from members of their own families.[432]

The Premier in his speech noted that the Government had just undertaken a review of the Bail Act. He observed that, 'While overall the Act was found to be working well, significant shortcomings in its protection of victims were identified…'[433] The Premier expressed concern about balancing the protection of the community and victims against the rights of accused persons.[434] However, the Premier also stated that:

> The Government, therefore, considers it necessary that the courts be required to more carefully examine whether bail should be granted in these circumstances by removing the present presumption in favour of bail for murder. Relevant studies also indicate

[430] Marie Therese Nguyen da Huong and Pia Salmelainen, 'Family, Acquaintance and Stranger Homicide in NSW' (NSW Bureau of Crime Statistics and Research, 1992)
[431] Ibid 1.
[432] Ibid 5.
[433] Fahey, above n 423, 3218
[434] Ibid 3218

> referred to relevant studies showing that the best indicator of future violence is a past history of violence.[435]

The Bail (Domestic Violence) Amendment Bill removed the presumption in favour of bail in the case of a domestic violence offence or contravention of an apprehended domestic violence order by violence or intimidation where the accused had a history of violence against any person, (defined as found guilty in the last ten years of a personal violence offence against any person or an offence of contravening an AVO). The presumption in favour of bail was also removed where there had been previous violence against a person who it was the alleged victim of the charge whether or not the accused person had been convicted of an offence respect of that previous violence. Domestic violence orders covered spouse, de facto partner, a person living in the house but not as a tenant, a relative or a person in an intimate personal relationship with the defendant. The Bill also removed the presumption in favour of bail in cases of murder.[436] In no case, however, did the Bill provide for a presumption against bail.

The removal of the presumption in favour of bail for all murder charges, no matter what the surrounding events or background of the accused, raises important issues. In the 1992 BOCSAR report, Marie Therese Nguyen da Huong and Pia Salmelainen pointed out that:

> male offenders were responsible for 96.9 per cent of stranger homicides, 94.5 per cent of acquaintance homicides and 72.9 per cent of family homicides. Even though only 14.7

[435] Ibid 3218
[436] *Bail (Domestic Violence) Amendment Act, 1993* (NSW) s9(1) (f), s9A (1) (a-d)

> per cent of all homicide offenders were female, 27.1 per cent of the offenders in family homicides were female. Some of these homicides occur in response to long periods of abuse inflicted on women by their male spouses.[437]

The nature of the offence had to be taken into account by a court considering bail. There can be no doubt that murder is a serious offence. However, as the material above shows, the background factors leading to an allegation of murder varied enormously. The decision to provide a blanket rejection of the presumption in favour of bail for murder has never been reversed.

The Opposition supported the general amendments and proposed certain amendments to both Bills. Those amendments did not weaken the Government proposals for changes to the presumption in favour of bail. Paul Whelan also referred to the Report of the Domestic Violence Committee and the 'tragic and needless death of Andrea Patrick.'[438]

8.6 THE SUMMARY OFFENCES ACT 1988

The *Summary Offences Act*, 1988 reintroduced gaol terms for certain street offences. For example, offensive conduct or language at or near a public place or school would carry a maximum sentence of three months in prison or a fine of $600.[439] Prostitution near or in view of a public place or school also was the subject of a maximum three

[437] Da Huong and Salmelainen, above n 430, 9.
[438] NSW, *Parliamentary Debates,* Legislative Assembly, 17 November 1993, 5614 (Paul Whelan)
[439] *Summary Offences Act, 1988,* (NSW) *s4*

month gaol term or $600 fine.[440] A new offence concerning public assemblies of three or more persons where a reasonable person at the scene would fear for their personal safety because of violence or threat of violence involved a maximum penalty of six months in gaol or $1000 fine.[441]

The background to the changes to the penalties for street offences is beyond the scope of this thesis. The relevant issue is the effect on the *Bail Act*. Summary offences had been considered under s 8 of the *Bail Act*. The section applied to all sentences not punishable by a sentence of imprisonment and to summary offences prescribed in the regulations. The section provided an entitlement to bail unless: the person had previously failed to comply with bail undertakings or conditions; bail was dispensed with; the person was convicted and the conviction stayed; or the person was incapacitated because of intoxication, injury or the use of drugs.

The offences in the *Summary Offences Act* that carried a maximum penalty of a gaol term would under the existing provisions move from being considered under s 8 to being considered under the more stringent s 9 dealing with a presumption in favour of bail. In his second reading speech in relation to the Summary Offences Bill, Attorney-General John Dowd stated:

> Clause 38 will amend section 8 of the *Bail Act* 1978 to include offences under the *Summary Offences Act 1988* that are punishable by a sentence of imprisonment. At present, a right to bail under s 8 of the *Bail Act* exists for all offences that do not carry a

[440] Ibid s 19.
[441] Ibid s 28.

> sentence of imprisonment. By this amendment it is proposed to continue the right to bail for all summary offences.[442]

The penalties for street offences had thus been made tougher and it would have been easy enough in accordance with such an approach to leave those summary offences that carried a gaol sentence to be dealt with under s 9 and excluded from s 8 of the *Bail Act*. There also would have been value politically from a law and order point of view in leaving such offences to be dealt with under s 9. The tabloids encouraged a tough approach. On 31 May 1988 the *Daily Mirror* headed an article, 'Dowd Targets Street Crime.' The legislation was explained as dealing 'with the very public spectacle of streets and entire areas being at the mercy of thugs and hooligans often drunk, seldom capable of a civil word, and always threatening.'[443]

I asked John Dowd why he didn't pursue a tough law and order approach in relation to bail for summary offences. He explained: 'People that commit those offences, of course they should have a right to bail, because the only issue is are they going to turn up for the hearing. That's the only important thing.'[444] I asked him whether that was because they were summary offences rather than various more serious offences. He replied:

> Yes. They may not get a sentence, they may get a slap on the wrist, they may get a bond. How can you possibly justify people being incarcerated for a long time on something they get off or there be a bond to? The lesser the offence the less justification you've got to derogate from your primary concern, is will they answer bail.

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[442] NSW, *Parliamentary Debates,* Legislative Assembly, 31 May, 1988, 808 (John Dowd)
[443] Malcolm Farr, 'Dowd Targets Street Crime', *Daily Mirror* (Sydney), 31 May 1988, 8.
[444] Dowd, above n 361, 20.

> Otherwise, these are people who are out in the community. They have families to look after, girlfriends and boyfriends, and all that sort of thing, of course they should be on bail.[445]

The same non law and order approach to bail can be found in an amendment dealing with 'failure to appear' charges arising out of summary offences. This is a technical issue but one with serious implications. A person charged with an offence that did not carry a gaol sentence had a right to bail under s 8 of the *Bail Act*. However, if that person failed to appear then a charge under s 51 of failure to appear arose with a penalty equal to that for the offence charged. Section 8(1) made clear that a right to bail as part of a failure to appear charge did not exist. Section 9(1)(b) made clear that the same thing arose in relation to the presumption in favour of bail. As a result of all of the above, the assumptions about bail for failure to appear raised a real potential for bail refusal even though the actual offence did not carry a gaol sentence. As the Attorney General noted in the debate about the Bail (Further Amendment) Bill, 1988: 'It is a matter of concern that defendants who ultimately cannot receive a gaol term for either the original offence or the failing to appear offence may be in gaol, on remand, awaiting the determination of these matters.'[446] In his interview, John Dowd reiterated that position when he stated:

> There are a million reasons why people don't turn up, not all their own fault. Human beings forget. Human beings are so worried about it they will get themselves drunk or

[445] Ibid 20.
[446] NSW, *Parliamentary Debates,* Legislative Assembly, 31 August 1988, 962 (John Dowd)

> 'Oh my God,' or they will sleep in or whatever. Human animals do that sort of thing and you've got to accept the broad nature of human frailty.[447]

Dowd denied the Opposition claim that the amendment was really about reducing prison numbers. The amendment to the *Bail Act* had the effect of ensuring that s 9 concerning the presumption in favour of bail applied in such circumstances to charges that but for a failure to comply with bail conditions would be dealt with under s 8. It also ensured that in such circumstances s 9 applied to charges relating to failure to appear.[448]

8.7 RESTRICTIONS ON THE POWER OF THE SUPREME COURT TO GRANT BAIL AND THE ORIGINAL INTENTION OF SECTION 22A

In 1987 bail applications to the Court of Criminal Appeal had been restricted by Terry Sheahan. The reasons for that initiative are set out at 6.5 above. At this point it is enough to restate that in matters concerning appeals from conviction on indictment or sentence passed on conviction on indictment bail is only available in 'special or exceptional circumstances.'

In the *Bail Amendment Act, 1989*, s 22A provided for the Supreme Court to refuse to entertain a bail application where the Supreme Court had already dealt with such an application and: 'the court is not satisfied that there are special facts or special circumstances that justify the making of the application'.[449] The amendment restricted

[447] Dowd, above n 361, 21.
[448] *Bail (Further Amendment) Act 1988* (NSW) Schedule 1.
[449] *Bail (Amendment) Act, 1989* (NSW) Schedule 1.

the right to review of bail in the Supreme Court where the application arose from a bail decision in another court. The Act also provided for a special review where a person remained in custody because a bail condition could not be met. The application could be by the accused, the police or on the court's own motion. The Act also required the Governor of a prison where a person resided because a bail condition could not be met, to inform a court entitled to carry out a review of that situation within eight days of the persons entry into prison,

Attorney General John Dowd's concern in relation to applications for bail to the Supreme Court was explained in the Parliamentary debate. He stated: 'There has been a history of repeated bail applications of little merit being made to the Supreme Court.' He went on to state: 'The effect of this amendment will be to assist in the Government's commitment to reducing court delay by relieving the obligations of the Supreme Court to entertain meritless applications.'[450]

I asked John Dowd if the pressure for change on this occasion had come from the Supreme Court as had been the case in relation to the Court of Criminal Appeal (CCA). Dowd explained that his was not the case on this occasion. He stated: 'Internal. It was a question of what was a proper test to stop unnecessary applications.'[451]

In 1992, Liberal Attorney General Peter Collins introduced a further amendment in relation to the Supreme Court and bail. The *Bail (Amendment) Act*, 1992 provided that a

[450] NSW, *Parliamentary Debates,* Legislative Assembly, 3 May, 1989, 7329 (John Dowd)
[451] Dowd, above n 361, 23.

decision of the Supreme Court on bail could be reviewed by any other court if the defendant is before that other court and that court is satisfied there are 'special facts or special circumstances' that justify a review.[452] The Attorney General explained that the amendment was needed because of the CCA decision in *R v Masters, Richards and Wunderlich*. In that case the CCA found that the District Court had no power to revoke bail provided by the Supreme Court.[453] The suggestion for change came from the CCA. The Attorney General noted: 'The CCA in its decision in the case I mentioned, *Regina v Masters, Richards and Wunderlich*, said, "such a situation is absurd". In the Government's view it is more than absurd, it is dangerous.'[454]

8.8 CONCLUSION

The amendments to the *Drug Misuse and Trafficking Act 1985* and the *Bail Act 1978* introduced by the Liberal Government in 1988 were a mixed initiative. On the one hand the maximum quantity of drugs that would be covered by the least penal provisions was increased, which increased the number of people covered by such provisions. On the other hand the maximum fines in relation to such matters were increased. That leaves courts with a wide discretion in relation to bail and penalty and cannot be said to be a simple law and order measure. It is also important to remember that most people facing courts for drug offences will be at the lower end of the scale. In more serious cases where the issues concerned drug suppliers penalties became more severe. There was a law and order emphasis in introducing the first presumption against bail for commercial

[452] *Bail (Amendment) Act 1992* (NSW) s3.
[453] *R v Masters* (1992) 26 NSWLR 450, 452, 474-476.
[454] NSW, *Parliamentary Debates,* Legislative Assembly, 29 April 1992, (Peter Collins)

level dealing and no presumption either way for offences involving more than twice the indictable quantity. Those who were most severely hit under the new provisions were the more serious drug dealers.

Media attention to drug supply issues was continuous but John Dowd was genuinely concerned about the protection and welfare of the community. That concern led him to the view that the presumption in favour of bail, which he would normally support, would have to take second place when it came to drug supply. Dowd's explanation suggests that outside of issues concerning ICAC, changes to the criminal law had been fundamentally a result of the work of himself and his Department. There was no interference from the Liberal Party according to Dowd.

The changes to the *Bail Act* in relation to domestic violence between 1988 and 1993 appear to be based on a mixture of genuine concern, greater awareness through reports, a particular murder and media interest. Domestic and personal violence matters did not fit easily into law and order reasoning as the debate concerning protection of women and children was ongoing.

Expanding the range of people to be considered in bail applications in domestic violence matters to include close relatives is consistent with increasing knowledge concerning those who are at risk in such cases. The same conclusion applies to the 1988 widening of the category of people who could be protected by conditions. It is not punitive to provide for consideration of a wider group of 'close relatives' as part of the criteria to be

considered under s 32 in relation to the granting of bail. The same can be said in relation to regarding 'close relatives' as specially affected persons for the purpose of bail conditions. There is no suggestion of a change in the presumption or something else that could be called punitive. John Dowd explained that the changes were for him a matter of personal conviction and experience arising out of his experience of practicing in the law. While such changes do increase the potential for more bail rejections because of breaches of bail they were not part of a punitive turn. They reflected great consciousness of the need to protect women and children.

The 1990 amendment like that of 1988 was restricted to considerations within s 32. Whether an offence on bail was likely to be violent or to have serious consequences had always been considered Adding whether the offence was 'sexual' would in many cases have already been captured by the concept of violence. However, as not all sexual offences are associated with violence then adding the term is not punitive. It is true that particular change represents an expansion of the concept of preventative detention. Dowd was of the view that sexual matters cover a wide category of cases and that was a good reason to be specific. He also made reference to sexual offenders and the inclination to carry out such activity again. Media pressure does not seem to have been a factor in the introduction of these changes.

The 1993 amendments were partially in response to a specific murder and media coverage of that issue. They were also in response to further consideration of domestic violence reviews including the Report of the NSW Domestic Violence Committee and a

BOCSAR report. Parliamentarians clearly held strong views about homicide and its relation to domestic matters. Nevertheless, in relation to bail the Government did not implement the most severe recommendations of the Report of the NSW Domestic Violence Committee. Police were not required to refuse bail on arrest for a breach of an apprehended violence order until the first court appearance. A presumption against bail was not introduced where the issue was an apprehended violence order breach where there were bail conditions in respect of the apprehended violence application or a domestic violence offence. Nevertheless, the changes relating to the presumption placed the offence of murder in the neutral category. That was punitive. It did the same thing in relation to domestic violence offences and that involves a wide range of assaults and sexual assaults and other violent offences. It also applied to contravention of apprehended violence orders. However, the neutral presumption only applied in domestic violence offences and contravention of apprehended violence orders if the accused had a history of violence or previous violence against the alleged victim. The history of violence test limited any potential to be punitive. It required a finding of guilt in the last ten years of a personal violence offence against any person or contravention of an apprehended violence order by an act of violence.

It can be argued that the increase in the severity of punishment for street offences is an indicator of a law and order trend. However, it doesn't seem plausible to apply this to the amendment to the *Bail Act*. Given a chance to follow a law and order line, the Attorney General declined to do so and amended the *Bail Act* so that s 8 continued to apply to such offences where the maximum penalty involved a gaol sentence. His

reasons for doing so as explained in his interview are humane and based on personal considerations. It is hard to see how this fits with the assertion that all aspects of the criminal law were moving to the right as part of a worldwide neo liberal movement or as part of an attempt by government to assert itself in the face of the global economy.

Finally, the changes to the powers of the Supreme Court in relation to bail applications did no more than continue a process that had commenced under the previous Government. The concern was a practical one in relation to the number of bail applications to this level of court. Reform in relation to that matter would continue into the future.

Chapter 9

THE 1995 NSW STATE ELECTION

9.1 INTRODUCTION

Long term issues affecting the 1995 NSW State election such as the Government majority depending on the Independents and the events leading to the resignation of Premier Greiner are considered in this chapter. The importance of issues such as health and the environment in the 1995 election campaign will also be briefly considered. However, the chapter will emphasise law and order as an issue because in 1995, much more than in 1988, law and order was a powerful issue of fundamental importance in deciding the election outcome.

9.2 LONG TERM PROBLEMS FOR THE COALITION

According to Tony Smith,[455] the five years before the 1995 State Election proved to be a period of instability for the Coalition. The 1991 election had not returned the comfortable majority that was expected by the Liberal Party. The Government held 49 seats, the Opposition 46 and there were four independents. Reliance on independents did not guarantee stability. The Greiner Government had clearly defined aims, particularly in economics and public sector reform, but these were controversial and disputed.

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[455] Tony Smith, '1995' in M Hogan and D Clune (eds), *The People's Choice* (Parliament of NSW, University of Sydney, 2001) .

In October 1991, Terry Metherell, who had been a controversial Minister for Education and who had resigned from that position in 1990, resigned from the Liberal Party and sat on the cross benches. In 1992 the proposal to offer Metherell a position in the Environment Protection Authority and his subsequent resignation from Parliament led to controversy and an enquiry by ICAC. In June 1992 Premier Greiner resigned as Premier.[456] The Court of Appeal later found that Greiner's actions did not constitute corruption conduct but Greiner was gone from office by then.

John Fahey became the new Premier. Fahey was personally popular and the Government was not without a real chance of winning in 1995. Smith points to by-elections to point out that while the Government had heavy swings against it in 1992, there were swings to it in two cases in 1994.[457] Parramatta proved to be an exception but that does not detract from the overall situation that both parties had a real chance. In relation to all the matters set out above, Adam Searle, at that time Shadow Attorney General Jeff Shaw's Chief of Staff, observed:

> I think all of those things did play a part. In fact people forget that for almost four years the two parties were almost locked in a deadlock in terms of public support in the wake of the 91 hung Parliament election. When Greiner was forced out and Fahey became Premier there was a bit of a honeymoon. There was another spike, there were two spikes. One was when Sydney won the Olympics and the other one when the Premier, Fahey, tackled the person who sought to attack Prince Charles. Both those things saw

[456] Ibid 326-327.
[457] Ibid 336-337.

> significant spikes in his personal approval from memory and that of the Government but the scene across the four years was pretty much status quo.[458]

9.3 THE CAMPAIGN ISSUES IN 1995

Tony Smith states:

> Electoral analyst Antony Green felt that the Liberals faced a tough campaign. While Fahey led Carr in polls, his government was 'the underdog'. Green predicted that the campaign would turn on 'traditional staples of State politics: hospitals, roads, education and law and order'.[459]

The environment was a controversial issue in 1995. Issues concerning saving old growth forest, jobs in the timber industry and lifting tolls on certain freeways were all debated. Health was an issue with Labor promising to slash hospital waiting lists and the Liberals promising to treat an extra 45,000 patients per year. Smith notes that '[t]he Herald summed up the debate: "A public bidding war not unlike that being waged on law and order is being waged on health."'[460] Adam Searle also thought these issues were of importance and noted: 'They were big issues and in terms of the tolls I think you are looking at where Labor won two of those three seats. … The idea of having the [road] tolls put on and Labor's promise to lift the tolls was enormously important I think in terms of the ultimate outcome.'[461]

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[458] Interview with Adam Searle (Sydney, 16 April 2012). 2.
[459] Smith, above n 455, 340.
[460] Ibid 349.
[461] Searle, above n 458, 2.

Law and order was far more prominent as an issue in 1995 as compared with 1988. George Zdenkowski states:

> In the last weeks of the election campaign the law and order hysteria escalated to new heights. The objective data indicating that there was no law and order crisis did not trouble the major parties (*The Sydney Morning Herald* 16 March 1995). … The Fred Many issue dominated the campaign for over ten days with the major parties trading punches (*The Sydney Morning Herald* 11 March 1995).[462]

Fred Many had been convicted of sexual assault and attempted murder and was due to be released in March 1995. His sentence had been discounted because of information he provided. Newspaper headlines and political advertisements were a feature of the debate.[463] Smith observes that '[the] Fred Many issue paralysed the government campaign. Every morning, its advisers listened to the 2UE talkback shows and breathed a sigh of relief when the damage was contained.'[464] The Fred Many controversy followed on from the Gregory Kable controversy in which special legislation had been passed to keep Kable in gaol after the expiration of his sentence for homicide.

Zdenkowski explains that the Government announced a 'three strikes and you're in' policy in relation to sentencing repeat offenders. The Opposition announced a 'horrific crime' proposal in which one crime of that type would result in being gaoled for life.[465] Both parties promised to increase police numbers by 650. The Government began trials

[462] Zdenkowski, above n 372, 231.
[463] Ibid 231. Smith, above n 453, 341.
[464] Smith, above n 455, 349.
[465] Smith, above n 455, 348, Zdenkowski, above n 372, 231.

of new police powers to detain young people late at night in accordance with the *Children (Parental Responsibility) Act 1994 (NSW).* Labor promised to spend $5 million over four years on drug education. The Government pointed out it was already spending $1.3 million per year.[466]

The bidding war on law and order resulted in serious criticism from those involved in the criminal law process. Smith notes that:

> The 'law and order auction' was condemned by the Bar Association, the Law Society and Director of Public Prosecutions. Don Weatherburn, head of the Bureau of Crime Statistics and Research, denied that NSW was in the grip of a crime wave and said that proposed new sentencing laws were unlikely to reduce crime but would fill jails. The Director of Public Prosecutions complained that the bidding war on law and order was encroaching on judicial sentencing independence.[467]

I asked Adam Searle about how important law and order was in the election. Searle referred to the Gregory Kable and Fred Many matters as examples to explain that it was not simply a matter of politicians generating an issue: 'There was a cluster of, shall we say, controversial criminals. … my recollection is that there certainly was a lot of media interest. I wouldn't say it simply was the product of politicians.'[468] In relation to the issue of politicians creating an atmosphere of crime crisis, Searle stated:

> I don't know whether the politicians were saying there is a crisis. It was more saying look there are some examples of some serious imperfections in the criminal justice system

[466] Smith, above n 455, 349, Zdenkowski, above, 372, 231.
[467] Smith, above n 455, 348.
[468] Searle, above n 458, 3.

> typified by these, quite rightly, shocking cases and the issue was then should the system be fine-tuned to make sure these sorts of things don't happen again or if they do happen they are addressed in a way that is more in keeping with community expectations. I think that's where the political campaign was focused, at least from my recollection.'[469]

As to whether issues of crime were reduced to a law and order auction, Adam Searle referred to the tougher stance on crime and punishment by the previous Liberal Government and explained:

> I think one of the steps that Bob Carr as Opposition leader took was to say 'look if the Labor Party does have a weakness on that law and order issue we need to make sure that people understand that Labor actually isn't and hasn't historically been soft on crime'…[470]

Searle also explained that reforms of the criminal law including removing harsh legislation could then be put forward with credibility. It allowed the Labor Party '[to] say we are getting rid of these for social and other reasons, and because they don't work, but we're also doing these other things. We are not going to flinch on enforcing crime.'[471]

The material does not suggest that bail was an issue in the election. This was confirmed by Adam Searle who stated:

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[469] Ibid 3.
[470] Ibid 3.
[471] Ibid 3.

> No. Not during the election. I do remember when Jeff [Shaw QC] was the Attorney there were a range of issues that would always occur about magistrates giving bail where the *Telegraph* and Ray Hadley and others said they ought not to have and stuff like that and I do remember that there were concerns about the granting of bail and stuff like that but I don't recall it actually being an election issue in either 95 or 98 although I may be wrong about that.'[472]

The election resulted in a Labor victory. That party had 50 seats. The Liberal and National Parties between them had 46 seats. There were three independents. It could not be said to be decisive for either side.

9.4 CONCLUSION

Bail was not a specific issue in the 1995 State election but law and order was. The potential for a more punitive approach after the election to all criminal matters including bail became far more likely.

[472] Ibid 5.

Chapter 10.

THE EARLY YEARS OF THE LABOR GOVERNMENT: 1995 – 2000

10.1 INTRODUCTION

In this chapter the views of Adam Searle will be considered. Adam Searle was the Chief of Staff of former Attorney-General, Jeff Shaw. Jeff Shaw has passed away and Searle, now an MLC, was interviewed in relation to the period 1995 – 2000 when Jeff Shaw was Attorney-General.

Law and order had been a significant issue in the 1995 State Election. The Government's commitment to reform reflecting this tougher line on crime is considered. Spectacular media coverage of particular crimes is also noted as a cause of change in the law. However, a number of the reforms involved efforts to rehabilitate and in some cases were based on the findings of Royal Commissions and other bodies. These reforms are discussed.

The first crimes considered are those associated with murder, such as conspiracy to murder. The chapter then deals with the *Victims Rights Act 1996* (NSW). It is contended that this particular Act does not confirm claims about a punitive turn, at least as it relates to bail. It can be argued that its provisions were a positive initiative. The problem of ongoing dealing in drugs is dealt with as is the addition of this crime to those in s 9 of the Bail Act for which there is no presumption either for or against bail. The

context of the changes concerning drug charges also includes the establishment of the Drug Court and supervised injecting rooms. These matters are considered. The chapter deals with charges that involve serious violence including sexual violence. The modification of the presumption in favour of bail and the addition of provisions in relation to the tests for bail are considered as part of this discussion. Finally, the chapter deals with humane amendments to the *Bail Act* concerning the intellectually impaired and Aboriginal and Torres Strait Islanders.

10.2 SOME PROMINENT MEDIA ISSUES IN LATE 1994 AND 1995

In addition to the new Government's statements in the election campaign about being tough on crime there was also media pressure in relation to two violent crimes involving murder. On 9 December 1994 a nurse at Walgett Hospital who was on duty alone was dragged out of the hospital, sexually assaulted and murdered. This was a page 1 story in the *Daily Telegraph*.[473] The *Sydney Morning Herald* also gave the matter prominent coverage. The Secretary of the NSW Nurses Association stated that '[t]he NSW Nurses Association had urged the Government to close Walgett Hospital's geriatric ward because it was unsafe …' In the same article the Labor Leader of the Opposition, Bob Carr, 'called for an inquiry into why Ms Hoare was left alone in the isolated hospital without adequate security.'[474] When the issue of the right of investigators to demand blood, saliva and hair samples from the two men accused of the murder led to a CCA

[473] Jennifer Ezzy, 'Nurse Murder', *Daily Telegraph* (Sydney), 10 December 1994, 1.
[474] Sonya Sandham, 'Govt was warned on ward', *Sydney Morning Herald* (Sydney), 12 December 1994, 4.

decision that such a demand could not be enforced, there was a further round of publicity.[475]

Another widely publicised murder case also came back to prominence on 1 June 1995. On that day the Attorney-General made public a report by Justice Slattery into claims by Andrew Kalajzich that he had not been involved in the murder of his wife Megan in 1988. The murder had occurred while Mrs Kalajzich was in bed in her own home. The *Daily Telegraph* observed: '[but] rather than clearing his name, the 223 – page report tabled in State Parliament yesterday established a stronger case against him than at the original trial.' The article went on to state: 'And Justice Slattery has recommended the Director of Public Prosecutions examine whether charges should be laid against co-conspirator Kerry Orrock, who is serving a 12 year sentence for his part in the conspiracy for giving false evidence.'[476]

10.3. THE CRIMINAL LEGISLATION AMENDMENT BILL 1995

On 1 June 1995 Attorney-General Jeff Shaw, immediately after the tabling and discussion of the Report of Justice Slattery, introduced the Criminal Legislation Amendment Bill. He stated that:

> The Bill confirms this Government's commitment to addressing the problem of crime and improving the operation of the criminal justice system in this State. One of the Government's election promises, namely, that certain major crimes would carry a 'never

[475] Michael Sharp, 'Police may take samples', *Sydney Morning Herald* (Sydney), 1 June 1995, 5.
[476] Toni Allan, 'Calculating liar hurt own family', *Telegraph Mirror* (Sydney), 2 June 1995, 4.

> to be released' sentence, will be the subject of further amendment to the Crimes Act in the next parliamentary session.[477]

The Bill amended many Acts and in general was tougher on crime. The changes included a longer maximum sentence in burglary offences where a person is inside the premises at the time of the break-in. In relation to such burglaries the Attorney-General mentioned '[t]he current public concern for victims of "home invasion" and the terror experienced by them, has been acknowledged and answered by this proposal.'[478] The changes also included: an offence of act of indecency in front of an adult; an increase in the maximum time in which the prosecution could bring a charge of goods in custody in relation to motor vehicles; a new offence relating to providing drugs other than cannabis to a person under 16 with an associated long sentence; ensuring the validity of apprehended violence orders where a person thought to be over 18 proves to be younger than 18; and use of psychological reports in courts and conferment on the Court of Criminal Appeal of the power to sentence an absent respondent where the Crown has appealed.[479]

Another change related to the taking of forensic samples of blood, hair or saliva without consent. In his Second Reading Speech the Attorney-General explained that this change to the *Crimes Act* was brought about to 'reverse the effect of the decision of the Court

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[477] NSW, *Parliamentary Debates*, Legislative Council, 1 June 1995, 541 (Jeff Shaw)
[478] Ibid 542.
[479] *Criminal Legislation Amendment Act 1995* (NSW), Schedule 1.

of Appeal of 29 May 1995 in the unreported case of *Fernando & Anor v Commissioner of Police & Anor*, regarding police investigation into a homicide.'[480] This was the 1994 homicide concerning Ms Hoare mentioned in 10.2 above.

The Criminal Legislation Amendment Bill provided that s 9 of the *Bail Act* providing for a presumption in favour of bail would no longer apply to conspiracy to murder, attempted murder and sending a document threatening to kill or inflict bodily harm or death.[481] As mentioned at 8.5, the presumption in favour of bail for murder had already been lost and replaced with no presumption either for or against bail. The Attorney-General explained that '[t]his will better ensure the safety of victims of alleged crimes while the accused awaits trial.'[482] I asked Adam Searle why it was necessary to change the presumption in favour of bail. He explained:

> I think it reflected a concern and certainly the police had expressed concern over a number of years, that in relation to a number of specific cases. Obviously the police couldn't stop the courts granting bail for right and proper reasons according to the law of the time. But particularly where you were dealing with people who set out to kill other people in a murder, attempted murder or terrorizing potential victims there was a real concern about the inability of the police to protect witnesses and victims in those circumstances. And my recollection is that I don't recall Jeff having a terrible crisis of conscience about this.[483]

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[480] J Shaw, above n 477, 541.
[481] *Criminal Legislation Amendment Act 1995*, above, n 479, sch 1 cl 1.
[482] Shaw, above n 477, 542.
[483] Searle, above n 458, 5.

Adam Searle went on to add that he didn't believe the initiative on this matter had come from victims' groups. He stated, 'I don't recall that it had. My recollection is that it probably came from the DPP or if not him personally certainly from prosecutors.'[484]

The *Fernando* case involving the compulsory taking of DNA evidence, mentioned above, had involved the alleged perpetrator of one of the murders mentioned in 10.2 above. I asked Adam Searle whether either or both of these murders had played any part in bringing about those parts of the legislation that changed the presumption in favour of bail for murder related charges? He replied:

> I don't remember either of those matters or the kinds of facts situations that they dealt with giving rise to those parts of the Bill, the Act, that dealt with removing bail from a presumption in favour to a neutral. I remember that occurring more as a general approach within the Government in favour of moving away from a presumption in favour of bail in circumstances involving violence, death or attempts to cause death.[485]

Adam Searle's position does seem to be supported by the surrounding material. The changes to the *Bail Act* relating to conspiracy to murder and other homicide-related charges were an extension of existing law in relation to murder. The emphasis on law and order in the 1995 State Election made such changes more likely. The Walgett murder case was only discussed in the Parliamentary Debate in relation to the issue of the CCA decision concerning evidence arising from sampling. The Kalajzich murder was not mentioned by the Attorney-General in his speech. It would have been easy enough

[484] Ibid 6.
[485] Second interview with Adam Searle (Sydney, 9 May 2012). 1.

to mention both in the Parliamentary Debate. John Hannaford for the Opposition referred to the CCA case only in relation to sampling and did not mention either of the murders referred to above in discussing the changes to the presumption in favour of bail for conspiracy to murder and other homicide-related offences. Andrew Tink for the Opposition specifically referred to a person being home during an aggravated burglary in relation to tougher penalties but not in relation to murder. He went on to mention the Sandra Hoare murder but only in relation to the compulsory sampling issue.[486]

The Criminal Legislation Amendment Bill also strengthened the Supreme Court's ability to refuse to hear bail reviews if satisfied the review could be dealt with in the Local or District Court. I asked Adam Searle if the request had come from the Supreme Court as had been the case some years earlier in relation to the CCA (6.5 above). Searle replied, '[m]y recollection is that it did, certainly at a bureaucratic level. I don't know whether it came from the level of the Chief Justice but certainly there was a view that the Court itself didn't like to have as many bail applications for review as it did.'[487]

10.4 VICTIMS' RIGHTS

A further extension of the Government's concern about matters related to personal violence emerged in the form of the *Victims Rights Act 1996* (NSW). The relationship of that concern to the 1995 State Election is found in the remarks of the Attorney-General, in which he stated that '[t]he Government in its election policy platform recognised the

[486] NSW, *Parliamentary Debates*, Legislative Assembly, 8 June 1995, 1010 (Andrew Tink)
[487] Searle, above n 458, 8.

need for greater effort to be made in addressing the concerns and needs of crime victims in New South Wales.'[488]

The emergence of Victims Rights groups also played a part in the emergence of the *Victims Rights Act*. The Act came into force on 2 April 1997. According to the *Sydney Morning Herald* concerning one group: ' It spends a $200,000 – a – year government grant on a full–time co-ordinator … and employs a grief counselor … This is the victims lobby which is facing its biggest success so far – the coming into force on Wednesday of the Victims Rights Act.'[489]

A Charter of Victims Rights was produced in the new *Victims Rights Act.*[490] Referring to the Charter, Attorney-General Jeff Shaw stated: '[t]he principles espoused in the charter are designed to ensure that the needs of victims are factors to which consideration is given in decision making related to the administration of justice in this State.'[491] Controversy arose in relation to the use of victim impact statements in sentencing, particularly in murder cases. The Director of Public Prosecutions, Nicholas Cowdery, took the view that such a proposal 'risks placing greater value on the lives of the productive and loved murder victims than those who have nobody prepared to make a statement to the court on their behalf.'[492] The Attorney-General was not prepared to postpone implementation, explaining that there 'was a public consensus that victims of

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[488] New South Wales, *Parliamentary Debates*, Legislative Council, 15 April 1996, 972 (Jeff Shaw).
[489] Bernard Lagan, 'Love, justice and revenge', *Sydney Morning Herald* (Sydney), 29 March 1997, 23..
[490] *Victims Rights Act 1996* (NSW) pt 2.
[491] Shaw, above n 488, 973.
[492] Bernard Lagan, 'Victims rights law 'terrible' for judges', *Sydney Morning Herald* (Sydney), 27 March 1997. 3

crimes be able to demonstrate their psychological or physical injuries before their attackers were sentenced.'[493]

As to whether such changes in outlook represented a broader ideological change, Adam Searle stated:

> I think it was part of a reorientation of an approach to criminal justice to say, look, certainly we just need to face the facts about what these perpetrators have done. Let's not gloss over it. And that needs to be properly recognised and also the victims need to have a place. And I think it was part of, look I don't recall a time when the Labor Party was particularly soft on crime … Yeah, it probably was part of an ideological struggle but maybe more about how the Labor Party viewed crime. Frankly I think there had been an overestimation of what actually happened previously. I don't think in practical terms it was such a change. It was certainly a big change of language, the fact that Carr, as leader, wanted to own the criminal justice space rather than feeling defensive about it.[494]

A 'victim of crime' was defined in the new Act as someone who had suffered harm 'as a direct result of an act committed, or apparently committed, by another person in the course of a criminal offence.'[495] The harm related to either physical or mental harm or damaged, destroyed or taken property.

The Charter of Victims Rights included provisions related to bail. It stated:

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[493] Ibid 3.
[494] Searle, above n 458, 7.
[495] *Victims Rights Act*, above n 490, s 5.

6.11 Protection from accused

A victim's need or perceived need for protection should be put before a bail authority by the prosecutor in any bail application by the accused.

6.12 Information about special bail conditions

A victim should be informed about any special bail conditions imposed on the accused that are designed to protect the victim or the victim's family.

6.13 Information about outcome of bail application

A victim should be informed of the outcome of a bail application if the accused has been charged with sexual assault or other serious personal violence.[496]

Adam Searle explained the motivation for the changes when he stated:

> I remember myself actually being quite astounded that prosecutorial or law and order agencies just didn't as a matter of course do that. Now, to be fair to them there may have been hundreds of examples where they did, as a matter of courtesy, making sure that families of victims and witnesses knew all about what was happening with cases. And I certainly have a lot of friends who are coppers who say that it is always what they have done within time limitations. But they say making that a formal requirement was an important step. Also as part of re-orientating the police force. Remember we had had the Royal Commission and then there were all these charters of reform and integrity testing that came out. And I think as part of re-orientating police in terms of customer focus and who are their customers but society, actually saying that you have to treat

[496] Ibid s 6.11, 6.12, 6.13.

> everybody not just as part of the process but as real human beings caught up in a terrible drama.[497]

10.5 ONGOING DEALING IN DRUGS

In the Final Report of the Royal Commission into the NSW Police Service, the Hon Justice JRT Wood noted that '[m]uch of the corruption identified in this inquiry was connected to drug law enforcement.'[498] One of the many matters considered in relation to drug supply concerned the reality that:

> [t]hose who deal in drugs are seldom foolish enough to carry their supplies on their person. Street dealers in places such as Kings Cross and Cabramatta leave their working supplies nearby. When a sale is effected they deliver the commodity in a quantity generally less than the commercial or indictable amount.[499]

The Royal Commission recommended that the *Drug Misuse and Trafficking Act 1985* (NSW) be amended to create an indictable offence of 'engaging in commercial' supply to cover those involved in such ongoing dealing.[500]

Attorney-General Shaw introduced the Drug Misuse and Trafficking Amendment (Ongoing Dealing) Bill, 1998, to implement the recommendation of the Wood Royal Commission. There had been ongoing debate about drug dealing and in 1997 the Member for Eastwood, Andrew Tink, had introduced a private members bill that related to regular dealing. Tink had been highly critical of the Premier for allegedly not doing

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[497] Searle, above n 458, 8.
[498] Wood, above n 277, 223.
[499] Ibid 229.
[500] Ibid 230.

anything about ongoing drug dealing in Kings Cross and Cabramatta.[501] In his Second Reading speech Jeff Shaw referred to the Royal Commission and distinguished the Government's Bill from the private members bill.[502] The Government's Bill provided for an indictable offence where a person dealt in drugs other than cannabis on three occasions within 30 days. The quantity of the drug was irrelevant. The maximum penalty was 20 years gaol or $385,000 fine or both. Adam Searle explained the logic of the Government's position as follows:

> Now leave aside whether you thought the idea was a good or bad idea, and I will say this, Bob Carr when he moved for there to be a Police Royal Commission, and remember at the time this was seen as a high risk strategy by the Labor Opposition. … But Carr from an early stage committed himself to accept lock stock and barrel every recommendation that emerged from Wood and he made that pronouncement well in advance of Wood divesting himself of any views or ideas. And so the idea was that if there was to be any kind of departure or caviling with anything in the Wood Royal Commission it would have to be pretty important to warrant not being implemented. Those are the commitments that Carr made at successive elections.[503]

In earlier chapters of this thesis at 6.3 and 8.3, I explained how drug supply charges had been removed from the presumption in favour of bail to a presumption against bail for the most serious offences and no presumption either for or against bail for other supply charges. The new ongoing dealing offence was to be placed amongst those in which

[501] NSW, *Parliamentary Debates*, Legislative Assembly, 25 September 1997, 588-589 (Andrew Tink).
[502] NSW, *Parliamentary Debates*, Legislative Council, 24 June 1998, 6382 (Jeff Shaw).
[503] Searle, above n 458, 9.

there was no presumption either for or against bail.[504] The Royal Commission had not said anything in relation to bail and ongoing dealing. However, a decade had passed since drug supply charges had been removed from the presumption in favour of bail and the new matter passed into the changed category with little fanfare.

I asked Searle why, in such changes, there is always an additional pronouncement that the presumption in favour of bail has to go. He replied:

> I think it's possibly because it's an easy thing to do. It's an easier thing to do. Because as you know with the criminal justice system you can never be sure of an outcome because there's the deliberations of the jury and there is the judge drawing on the facts and circumstances in tailoring a sentence. And you can never be sure that the outcome is going to be what the politicians want. And so when the politicians themselves react to public pressure or even react to what they think should be the public policy settings and outcomes there aren't that many levers for them to utilize but bail is one of them. Levers include the movements from the presumption in favour to neutral or even the presumption against. It is an important lever as you would appreciate as a former magistrate and it's a relatively simple one for politicians to make changes to and will actually flow through the system.[505]

Searle went on to explain that,

> by removing the presumption in favour of bail to a neutral setting, again, it leaves it up to the court. If someone is a flight risk, then obviously he would usually be refused bail. If someone's not a flight risk, they are otherwise an upstanding citizen, they have a

[504] Shaw, above n 502, 6383.
[505] Searle, above n 458, 10.

> regular job or they are students or they can show they are not a flight risk then why wouldn't a court give them bail?[506]

The complexity of the approach to drugs and drug-related bail is apparent from two other pieces of legislation. The *Drug Court Act 1998* (NSW) set up the Drug Court in a attempt to provide humane alternatives to gaol for those facing incarceration for drug related crimes. Such a provision required bail to be dealt with in the period between a person being referred to the Drug Court and actually being brought to it and the period between a person being referred back to the Drug Court and being brought before it. The *Bail Act* was amended to include these periods without any modification of the presumption in favour of bail.[507] I asked Adam Searle where the idea for a Drug Court had come from. He explained:

> And this was an idea that Jeff had himself pioneered within the Government in saying, 'Look let's see if we can take a novel and innovative approach.' I think the idea, the kernel of an idea had emerged from Florida. There had been 'crack' courts and stuff like that where the courts were given extra powers to deal with repeat offenders, to supervise them periodically and make sure they were going clean and all that kind of stuff. The idea may have been American but Jeff saw that, "no, if we are going to be tough on crime then we've also got to have another form of intervention"[508].

The *Drug Summit Legislative Response Act, 1999* (NSW) provided for a medically supervised injection centre. This was controversial legislation at the time and remains

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[506] Ibid 11.
[507] *Drug Court Act 1998* (NSW) Sch 1 cl 2.
[508] Searle, above n 458, 11.

so. The Act also provided for amendment to the *Bail Act* to deal with another humane initiative, namely, a bail condition relating to a person being assessed, treated or rehabilitated in relation to drug or alcohol abuse. Where any of those situations arose then the condition required that the person enter into an agreement to participate.[509] I asked Adam Searle why this approach, given it was not tough on crime, gained favour with the Government. He explained:

> You can't stop importation of drugs and really you have to have a more sophisticated response to deal with the result and that's where Carr was persuaded by Jeff and my recollection is by[John] Della Bosca, to have a drug summit, to say, 'Let's not rush into anything, let's have a proper summit of experts and let's see what emerges on the other side.' And my recollection is that Bob himself was profoundly informed and moved by what he heard. Such that he was persuaded to have, at least on a trial basis, of the drug the injection room. It was of course a trial that was for over a decade. It was made permanent just before the 2011 election.[510]

As the approach to drug supply and drug users had involved both tough approaches and more humane approaches, it was appropriate to ask Adam Searle whether he saw the Government as being involved in a global war against drugs or involved in a more local initiative. He explained:

> It was a local thing. Heroin isn't made in Australia. It is imported. We are an island and we have porous borders. Customs can only do so much. So there was a recognition there was a global stage and setting where we couldn't do much about it. We just had

[509] *Drug Summit Legislative Response Act 1999* (NSW) Sch 3 cl 4.
[510] Searle, above n 458, 11.

> to deal with the end result. But I think it was part of Jeff's answer to say look, 'OK if we are going to toughen up on issues like bail and enforcement and create new offences like the commercial dealing, we are not in any way detracting from those, let's take a more sophisticated approach to this issue which has a significant human dimension and let's see whether we can't get some better outcomes by just trying a few things.'[511]

10.6 THE PRESUMPTION IN FAVOUR OF BAIL AND VIOLENT CRIME OTHER THAN HOMICIDE

In his Second Reading speech concerning the Bail Amendment Bill 1998, Attorney-General Jeff Shaw explained that a review of the *Bail Act* had been undertaken by the Government. Shaw went on to state:

> The review was undertaken because the issue of bail remains a matter of ongoing community concern. The proper balance between protection of the community and the rights of the accused is an important matter which warrants regular monitoring. Concern about the issue of bail has been heightened by a number of recent cases, including the tragic death of two Bega schoolgirls.[512]

Shaw then stated that the review showed that the *Bail Act* was generally working well. However, he also noted that 'a number of areas for improvement in the criminal justice system were identified, particularly in relation to serious offenders.'[513]

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[511] Ibid 12.
[512] NSW, *Parliamentary Debates,* Legislative Council, 27 October 1998, 8976 (Jeff Shaw).
[513] Ibid 8976.

The reference to the two Bega schoolgirls concerns horrendous murders covered widely by the media from November 1997. On 14 November the *Sydney Morning Herald* headed page 1, 'Aborted trial set Bega murder suspect free'. The associated article went on to explain that '[a] man being questioned … was on bail after his trial on multiple child sexual assault charges was aborted…'[514] On 15 November an article noted that '[t]he case has raised questions about the adequacy of bail provisions in NSW with the Opposition calling yesterday for tightening of the Bail Act.'[515] The *Daily Telegraph* of 14 November 1997 had two headings on page 1, 'The Bega Murders' and 'Freed on bail furore – Page 3'.[516] On 15 November the *Daily Telegraph* heading was 'Parents told the grim truth'. 'How Nicole and Lauren died'.[517] The associated article continued on to page 6. It is interesting to note that an article on the same page explained that statistics showed that '[j]udges and police are granting bail to fewer suspects while the number awaiting trial on serious charges has hit a record level.'[518] Media coverage of the trials of those involved would continue well into 1998.

I asked Searle what influence the Bega murders had on the introduction of the legislation. He stated:

> I think it might have presented the opportunity but I don't recall it being the causal factor. I seem to remember this was in train already or at least an idea or a set of ideas

[514] M Riley, 'Aborted trial set Bega murder suspect free', *Sydney Morning Herald* (Sydney), 14 November 1997, 1.
[515] M Riley, 'Suspect on bail 2 years facing sex charges', *Sydney Morning Herald* (Sydney), 15 November 1997, 6.
[516] 'The Bega murders', *Daily Telegraph* (Sydney), 14 November 1997, 1.
[517] Charles Miranda, 'Parents told the grim truth', *Daily Telegraph* (Sydney), 15 November 1997, 1.
[518] Rachel Morris, 'Its getting harder to win bail', *Daily Telegraph* (Sydney), 15 November 1997, 6.

> that had been kicking around. And it was one of those things where there might have been a fortunate or unfortunate correlation.[519]

Searle went on to add:

> Responsive in one sense but not causal. So that's my recollection, that this was already under serious consideration. The two events happened. The Government wasn't caught without anything to say. The Government was able to say, well actually this is what we're doing, it does respond to that situation but we were already doing it.[520]

In the context of this violent crime, the Attorney-General stated: 'I turn now to the specific provisions of the bill. Most importantly, items [1] and [2] of schedule 1 to the bill remove the presumption in favour of bail for eight serious offences.'[521] Those eight offences were: manslaughter; malicious wounding with intent; aggravated sexual assault; assault with intent to have intercourse; sexual intercourse with a child under 10 years of age; assault with intent to have intercourse with a child under 10 years of age; homosexual intercourse with a child under 10 years of age; and kidnapping. The Attorney-General pointed out that there were already charges concerning serious drug offences, armed and aggravated robbery, murder and domestic violence for which there was no presumption in favour of bail.[522]

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[519] Searle, above n 458, 13.
[520] Ibid, 13.
[521] Shaw, above n 512, 8976.
[522] Ibid 8977.

As Adam Searle's recollection was that public pressure arising from the Bega murders was not causal in relation to these reforms, I asked him why the Government felt the need to change the presumption in favour of bail in relation to these crimes. He stated:

> I think there was certainly a view, look why should there be any presumption. Like really, OK, you're charged with these crimes and they are pretty bad crimes, surely the issue of whether or not you should or shouldn't get bail should really be a matter for the circumstances of the particular matter. I know sometimes judicial officers feel the Parliament's not giving us any guidance about what we should do. There was certainly a political dimension. There were parts of the Government who were of the view there should never be any presumption in favour of bail but that didn't mean that everyone should be locked up.[523]

I raised with Searle the additional point that in Western societies the idea of the presumption of innocence and right to liberty are regarded as fundamental and the question of removing the presumption in favour of bail raises broader issues. In his answer he explained:

> I think that's probably because when you come to criminal justice there is a view, certainly amongst prosecutors and police, that a given defendant may not have done this crime but may well have done others. So it's just a question of whether you get lucky every now and again to put them away. But I think it was also part of this ongoing increasing awareness or view, look why should there be a presumption in favour? Why shouldn't the court say, is there a risk to the victims or witnesses, is there a flight risk. It really should be left up to the judicial officers without the Parliament saying that in

[523] Searle, above n 458, 14.

> certain matters there should be presumptions one way or another. I think that's where Jeff, I think left to his own devices, he probably wouldn't have done any of this and part of that was the circumstances of the leader that he was the Attorney for and some of the political circumstances. I think in his own mind he did accept that, look judges and magistrates really can tailor their bail decisions to the facts and circumstances without doing any injustice.[524]

The *Bail Act* was also amended to add an offence of contravening an apprehended domestic violence order to the category where if a bail condition in relation to a domestic violence offence was breached then there was no presumption in favour of bail. To that point the breach of bail test had only applied to the actual offence.[525] I asked Searle whether this was considered a law and order issue at the time. He replied:

> No. That was very much a women's rights issue … but I do remember there was ongoing concern and there had been in Opposition from women's rights groups about, 'well hang on, women who are subject to domestic violence, they can get all sorts of orders against the perpetrator but it's they who still have to leave the home' … Carr actually announced at one stage that perpetrators would have to leave the home, not the women. … I think those were the concerns that addressed that matter. It wasn't really tough on crime, although potentially it had that presentational opportunity. It was very much about protecting victims of crimes against women.[526]

[524] Ibid 14.
[525] *Bail Amendment Act 1998* (NSW) sch 1 cl 4.
[526] Searle, above n 458, 15.

Attorney-General Shaw also proposed some changes to the provisions in s 32 concerning whether it was likely a person would commit any serious offence while on bail. Section 32 deals with what considerations are to be taken into account when deciding if bail should be granted. Section 32 (1) (c) (v) added a provision that if the offence was a serious one as defined, then the court was also to consider whether 'at the time the person is alleged to have committed the offence, the person had been granted bail, or released on parole, in connection with any other serious offence.'[527] Section 32 (2A) provided that for the purposes of considering whether bail should be granted a 'serious offence' was, but was not limited to, an offence of a sexual or violent nature, its likely effect on the victim and or the community generally and the number of offences likely to be committed. The amendment added to the 'number of offences' component of s 32 (2A) the words 'or for which the person has been granted bail or released on parole.'

I suggested to Adam Searle that the criminal record and other parts of the *Bail Act* would already cover these changes to s 32. He stated:

> I think it was also part of a community educational thing because I think Jeff took the view there was no harm spelling out in legislation things that might already be required or might already be practice. But it was also part of saying, 'you know, these things are already happening and we can just now point to them'. And I think that was certainly his thinking about some of those ideas.[528]

[527] *Bail Amendment Act*, above n 525,Sch 1 cl 9.
[528] Searle, above n 458, 15.

While the Bail Amendment Bill 1998 generally provided for tougher laws on crime it also provided for important humane amendments. In December 1996 the NSW Law Reform Commission produced a Report on *People with an Intellectual Disability and the Criminal Justice System*. The Report dealt among other things with intellectual disability and bail.[529] After discussing the provisions in the *Bail Act,* the Report noted the problems for people with an intellectual disability, including:

- being unable to understand the requirements for bail;
- having a history of failing to comply with bail undertakings, owing for example, to lack of understanding or poor organisational skills;
- being mistaken for a person who is under the influence of alcohol or a drug owing to the person's behaviour; or
- having unstable living conditions or no family or community support.[530]

The Attorney-General referred specifically to the Report in introducing s 37 (2A) ensuring that before a bail condition was imposed on a person with an intellectual disability the authorised officer was to be satisfied as to the person's capacity to understand or comply with the bail condition.[531] Intellectual disability was defined widely in cl 12.

The Royal Commission into Aboriginal Deaths in Custody produced a Report in 1991. The material before the Royal Commission resulted in numerous recommendations including some related to bail. The Royal Commission noted:

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[529] NSW Law Reform Commission*, People with an Intellectual Disability and the Criminal Justice System,* Report No 80 (December 1996), 118.
[530] Ibid 119.
[531] Bail Amendment Act, above n 525, Sch 1 cl 11.

> The conclusions are clear. Aboriginal people die in custody at a rate relative to their proportion of the whole population which is totally unacceptable and which would not be tolerated if it occurred in the non–Aboriginal community. But this occurs not because Aboriginal people in custody are more likely to die than others in custody but because the Aboriginal population is grossly over-represented in custody. Too many Aboriginal people are in custody too often.[532]

After consideration of various issues including the relationship between Aboriginal people and the police, the Royal Commission recommended:

> That governments, in conjunction with Aboriginal Legal Services and Police Services, give consideration to amending bail legislation:
>
> a. To enable the same or another police officer to review a refusal of bail by a police officer.[533]

Attorney-General Shaw referred specifically to the Royal Commission recommendations. It is significant that he did not restrict the amendment to the Bail Act to Aboriginal people. He took the opportunity to apply the more progressive review provisions to all accused persons. He explained that '[t]his is to prevent an accused person from being unnecessarily detained, pending a court appearance.'[534] Section 43A was introduced and provided for a more senior police officer to review a bail decision so long as there was no delay in bringing a matter before a court. The earlier bail decision could be affirmed or varied. Without limiting the considerations involved, the more senior police

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[532] Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) Overview and Recommendations, 6.
[533] Ibid 52.
[534] Jeff Shaw, above n 512, 8977.

officer could consider whether the person was no longer incapacitated by intoxication, injury or use of a drug or was no longer at physical risk; whether there had been a significant change in circumstances; or whether exceptional circumstances existed justifying a change.[535]

Adam Searle confirmed that the reforms concerning intellectual impairment and bail review by a more senior police officer did emerge from the two reports mentioned above.[536]

10.7 CONCLUSION

Between 1995 and 2000 the percentage of those in gaol either not convicted or not sentenced rose from 9.2% to 16.8% of the total. The actual number in that category rose from 712 to 1434 in that period.[537] The explanation for the dramatic increase in the number denied bail was due to a combination of factors. It was not simply the result of further amendments to the *Bail Act*. Punitive amendments did occur but so did progressive ones. That mixture had occurred before. It needed more to create the figures set out above.

The atmosphere surrounding law and order had become more punitive as a result of the 1995 NSW State election. The punitive tone did not fade away after the election. The Government was determined to take the lead in dealing firmly with matters concerning

[535] Bail Amendment Act, above n 525, sch 1 cl 16.
[536] Searle, above n 458, 15.
[537] Corben, above n 31.

crime. Horrendous crimes and media coverage of them occurred with the punitive atmosphere as a background. Victims groups raised the expectation that attention to the background of perpetrators had to be balanced against the needs of victims. In this punitive atmosphere new amendments were added to those that had accumulated since 1986.

The murder of a nurse in 1994 in circumstances where she was dragged from a hospital and the murder of a woman in her own home in 1995 played a part in legislative change relating to crimes concerning burglary, home invasions, illegal drugs, goods in custody and also into relation to blood, hair and saliva sampling. There was wide media coverage of these events. However, Adam Searle did not believe the murders were the direct cause of the legislation and surrounding material gives weight to this assertion. According to Searle the bail amendments concerning a neutral presumption for matters related to murder such as conspiracy and attempt were a result of ongoing concerns by the police and the DPP's office about such crimes. The crime of murder had been moved into the neutral presumption category by the previous government. Searle did not believe victims' groups were influential in the changes to the *Bail Act*.

The murder of two schoolgirls in 1997 received wide media coverage and great public interest and was specifically mentioned by the Attorney-General in 1998 when the crime of manslaughter and a number of serious violence and sexual violence offences were transferred to the neutral presumption category. Adam Searle was of the view that while the Government was responsive to the murders, the crimes did not play a

causal role in the amendments. He explained that the Government had reviewed the *Bail Act* and that the changes were being prepared when the murders occurred. In the same legislation contravention of an AVO resulting from a bail condition breach became a crime and attracted a neutral presumption. 'Serious crime' as a part of the s 32 issues to be considered concerning the granting of bail was extended to include offences on bail or parole.

The amendment to the *Bail Act* relating to ongoing drug dealing should be seen in the context of the wider discussion on this matter arising out of a Royal Commission into the NSW Police Force. The Royal Commission had not recommended a change to bail in relation to this matter. The amendment in relation to bail seems to have been a product of the fact that all other drug supply charges had lost the presumption in favour of bail in earlier years. It would have appeared unusual to have this one serious drug charge with a presumption in favour of bail. It would also appear, from what Adam Searle said, that it was an opportunity for politicians to provide direction in judicial proceedings on bail in such a matter, the politicians believing the bail restriction reflected community expectation. That does reflect an emphasis on a more punitive and populist approach.

The *Drug Court Act* was a humane development for which appropriate bail provisions were provided. The *Drug Summit Legislative Response Act* was another humane development and it was appropriate that the Bail Act be amended to allow for a condition of bail to allow for assessment for treatment in relation to drugs.

The *Victims Rights Act,* as far as it relates to bail, was not a 'tough on crime' law. It ensured that victims would receive information in certain circumstances. That is a positive move. The issues on which they would receive information were already to be found in many parts of the *Bail Act*.

The amendment requiring intellectual disability to be taken into account was humane and in accordance with the ideas of the NSW Law Reform Commission. The provision for a more senior police officer to review a bail decision by a more junior officer arose out of the Royal Commission into Aboriginal Deaths in Custody but was applied to all persons seeking bail.

The changes restricting access to the Supreme Court to obtain bail do not support a punitive approach as the issue really concerned which Court should hear such matters rather than denying an opportunity to seek bail.

Chapter 11.

THE MIDDLE YEARS OF THE LABOR GOVERNMENT: 2001-2006

11.1 INTRODUCTION

A number of initiatives in the period 2001-2006 followed announcements by Labor Premier Bob Carr. Legislation concerning drug premises and legislation dealing with anti-gang legislation were preceded by such announcements. The announcements were tough on crime and punitive in their approach. In this chapter both announcements are considered in the context of world, national and local events that, according to Attorney-General Bob Debus, were an important part of the background to the development of legislation. The chapter also deals with the efforts of the Attorney-General to ensure that legislation in these times also took account of the needs of the disadvantaged in the community. The ongoing tension within Cabinet about the correct approach to bail forms the central focus of the chapter. Issues of racism and religion became mixed up in the public and media debate concerning a number of the matters and that added to the difficulty in maintaining a balanced *Bail Act*. Issues considered include drug supply, sexual assault, property offences, terrorism, riot and domestic violence.

11.2 THE PREMIER'S ANNOUNCEMENT ON CRIME IN CABRAMATTA

On 27 March 2001 Premier Bob Carr made a Ministerial Statement on the 'Cabramatta

Anti-Drug Strategy'.[538] The background involved longstanding public concern about drug supply and drug consumption issues in the southern Sydney suburb of Cabramatta. Significant numbers of migrants from Vietnam had come to Cabramatta and the media coverage, which was spectacular, linked the issues of drugs and violence to 'Asian drug gangs'. In the first few months of 2000 the *Daily Telegraph* covered stories concerning a gunman opening fire in a restaurant in Cabramatta, the number of murders in Cabramatta and surrounding areas and the police response. The *Daily Telegraph* announced: 'Special unit to fight gangs'. The article explained: '[t]he decision comes as police figures reveal that there were 12 shootings in Cabramatta in the past month.'[539] The trial of a man alleged to be involved in the murder of John Newman, the State Member of Parliament whose seat covered Cabramatta, continued throughout February 2000. Both the *Daily Telegraph* and the *Sydney Morning Herald* were highly critical of claims by the Police Commissioner that, after a police effort, the streets were safe again. The *Herald* Editorial on 8 March 2000 expressed the media view as follows:

> Fanned by crime statistics and sometimes blanket media coverage, Cabramatta has become, rightly or wrongly, synonymous with drugs, ethnic violence and murder. Yet against this impression, the State's most senior police officer now says that although the suburb previously had been a proverbial no-go zone, police have now reclaimed its streets and Cabramatta can no longer be regarded as a dangerous and difficult place. His claim has stunned local business and community leaders who believe that whatever recent improvements there might have been criminals now have regained the upper hand. They blame the backsliding on the combined effects of the lack of officers to walk

[538] NSW, *Parliamentary Debates*, Legislative Assembly, 27 March 2001, 12593 (Bob Carr) .
[539] 'Special unit to fight gangs', *Daily Telegraph* (Sydney), 5 February 2000, 9.

> the beat and poor management practices by senior officers. Two suspected murders and more than 40 shootings so far this year in Cabramatta, and the fact that the Local Area Commander, Mr Peter Horton, is facing a vote of no-confidence from junior officers, underscores local concerns.[540]

In his statement Premier Carr explained that the drugs were 100% imported and that the price of heroin had gone from $20 a hit to $200 – this being due to the police efforts to deal with the issues. The Premier went on to state:

> I have seen the problems with my own eyes. They need evidence-based plans and solutions. That is why today I announce an evidence based plan, to be mounted in three stages, which will apply statewide – not just at Cabramatta. Stage one is a criminal justice plan. Stage two is a plan for compulsory treatment and stage three is a plan for prevention and early intervention.[541]

The Premier then provided details of new laws concerning people who are lookouts at fortified drug fortresses, person who knowingly allow premises to be used as drug houses, medical involvement in searches and moving on people at railway stations. The Premier then noted that '[police] have reported at Cabramatta evidence of the same people engaged in both illegal drug supply and firearms trafficking. To target the trade in illegal firearms the Government will create new laws and increase existing penalties.'[542]

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[540] Editorial, 'Crime rates', *Sydney Morning Herald* (Sydney), 8 March 2000, 16.
[541] Carr above, n 538, 12593.
[542] Ibid 12593.

The Premier's observations about bail are important in considering whether a punitive turn had now developed:

> Further, the *Bail Act* will be amended to remove the presumption in favour of bail for those charged with handgun, prohibited firearm and offensive weapon offences. The last thing the police need is to see the alleged illegal gun dealer they arrested on the Monday appearing in the streets on bail on Tuesday.[543]

The fundamental concepts concerning bail and the presumption of innocence seem from this statement to have been made secondary to the needs of the police force in dealing with the crisis in Cabramatta.

The Premier then went on to explain a mixture of tough on crime initiatives. These included: building whatever amount of gaol cells were needed; adding a large number of police to the Cabramatta area; and providing interpreters. However, he also conceded that drug consumers were often homeless and had mental health issues. To deal with these problems for the individual addict he brought forward 500 extra places in the drug referral scheme in courts and also announced extra money for anti-drug education and schemes. The Leader of the Opposition, Ms Kerrie Chikorovski, while previously critical of the Government's approach, supported the initiative.

The Premier's statement was turned into legislation later in 2001. In his Second Reading Speech on the Police Powers (Drug Premises) Bill, 2001, (NSW), the Attorney-General, Bob Debus stated, 'This measure will give force to the announcement by the Premier in

[543] Ibid 12593.

this House in March this year that the Government is committed to giving law enforcement officers the powers they need to stop the drug trade in Cabramatta.'[544] The Attorney-General went on to discuss the sort of difficulties facing police as they try to get into often heavily fortified premises. By the time they managed to gain entry the drugs were often destroyed. The new provision meant that once premises were established as a 'drug premises' by way of evidence (syringes, computers with drug information on them, guns) further offences would follow.

The new Act amended the *Bail Act* in relation to concerns about guns and pistols. As Attorney-General Debus noted, this was 'aligned with the aim of stopping professional drug dealers, who are serious criminals who often use pistols and prohibited firearms such as sawn-off shotguns to assist in their activities.'[545] Section 9 concerning the presumption in favour of bail was once again amended to provide for no presumption either way where the offence concerned unauthorised possession or use of a firearm that is a prohibited firearm or pistol, within the meaning of the *Firearms Act 1966*, (NSW). The amendment went further and required an addition to s 32, which deals with the criteria to be considered in bail applications. When considering the welfare and protection of the community and specifically the 'violent nature' of the offence consideration had also to be given as to whether the allegation, 'involves the possession or use of an offensive weapon or instrument within the meaning of the *Crimes Act 1900*'.[546] The criteria provisions were also amended to require consideration of any

[544] NSW, *Parliamentary Debates*, Legislative Assembly, 30 May 2001, 13997 (Bob Debus).
[545] Ibid 13997.
[546] *Police Powers (Drug Premises) Act 2001* NSW, sch 1, cl 2.

prior criminal record for offences involving the possession or use of an offensive weapon where the offence before the court was of that type.[547] The amendments to the *Bail Act* also lengthened once again the spelling out of what types of matters are 'serious' for the purposes of considering whether bail should be granted. The amendment added 'or involves the possession or use of an offensive weapon or instrument within the meaning of the *Crimes Act 1900'*.[548]

I interviewed former Attorney-General, Bob Debus.[549] Concerning Cabramatta and drug supply issues he stated:

> Well, I think it may be said generally, that any change of the law of this nature would be one that was made against a concern of mine that we were reducing the civil liberty properly provided to all citizens in our society. I'm not saying that therefore I just plain or straight out opposed the changes of this nature. I guess in that particular case I had to accept that there was a degree of inevitability about them once you were talking about a package of measures to deal with the very particular circumstance of Cabramatta. I think it's fair to say I could not conceivably have persuaded the Cabinet not to proceed with those particular changes.[550]

However, Bob Debus also pointed out that: 'I think it is fair to say that Cabramatta gradually quietened down. It's in the way of these matters that it's often very difficult to

[547] Ibid cl 3.
[548] Ibid cl 4.
[549] Interview with Attorney-General, Bob Debus (Sydney, 23 October 2012).
[550] Ibid 2.

know what it was that was critical in the change in the social circumstances of a place that is afflicted as Cabramatta had been.'[551]

The difficulty facing the Government was reinforced by the Opposition argument that the Government was not being tough enough. Shadow Attorney-General Chris Hartcher attacked the Government. He stated:

> This Government has sought to ignore the ongoing problem of Cabramatta; and has sought to ignore the serious spread of drugs throughout the community. It has attempted to handle the problem by token gestures such as the injecting room at Kings Cross – an absolutely deplorable exercise in community surrender to the drug menace.[552]

11.3 ANTI-GANG LEGISLATION

Sexual assaults involving gangs also became mixed up with issues concerning the ethnic background of those accused of the crimes. As Kate Warner noted concerning a change in media attention about sexual assaults between 2000 and 2001:

> the Sydney Olympics were dominating the news coverage at this time and the media gave little coverage to the story until July 2001, when print, radio and television media reported gang rapes by Lebanese-Muslim Australians targeting white Australian women, particularly in the Bankstown area of south-western Sydney, which has one of the highest concentrations of Lebanese-background immigrants in Australia.[553]

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[551] Ibid 1.
[552] NSW, *Parliamentary Debates*, Legislative Assembly, 6 June 2001, 14504 (Peter Harcher).
[553] Kate Warner, 'Gang rape in Sydney: crime, the media, politics, race and sentencing.' (2004) 37.3 *Australian and New Zealand Journal of Criminology* 344, 345.

Warner went on to provide examples of the extent of media coverage of the issue. These included headlines in the *Sun-Herald* on July 29, 2001which proclaimed: '"70 Girls Attacked by Rape Gangs", "Police Warning on New Race Crime" and "Caucasian Women the Targets"'.[554] On 13 August the *Daily Telegraph* included a headline stating 'Increase rape penalty call'. The article explained that the Opposition was calling for a life sentence for such crimes whereas the then current maximum was 20 years.[555]

Don Weatherburn, the Director of the NSW Bureau of Crime Statistics and Research issued a statement refuting the claims about a 'crime wave' of sexual assault in the Bankstown area:

> The factual evidence on sexual assault in Bankstown provides no support whatever either for the claim that sexual violence in that areas is more prevalent than anywhere else in the State or for the claim that the incidence of sexual assault is rising in Bankstown.[556]

The media attention to the issue nevertheless continued.

Warner pointed out that sexual assaults involving Lebanese youth did occur in 2000. The first case to reach the courts involved two brothers who pleaded guilty in relation to events on 5 September 2000. There was an agreed statement of facts. The facts related to two 16 year old girls waiting for a taxi after trains had stopped and after hesitation accepting a lift from five youths. They were taken to a house and sexually assaulted at

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[554] Ibid 346.
[555] 'Increase rape penalty call', *Daily Telegraph* (Sydney), 13 August 2001, 8.
[556] NSW Bureau of Crime Statistics and Research, 'The facts on sexual assault in Bankstown' (Media release, 22 August 2001).

knife point for a number of hours. The issue drew renewed media and political attention when on 23 August, 2001 sentences were provided in the District Court ranging from maximums of 6 years to 18 months. It should be noted that the sentences were increased on appeal in 2002 to a maximum of 14 and 13 years.[557] However, in the period between August 2001 and March 2002 the media criticism was severe. On 24 August 2001, the *Daily Telegraph* provided a page 1 introduction, 'Jail term minimal – Taunts of rapists' to a page 6 article and an Editorial on the matter.[558] On August 15, 2002, after a trial lasting several months, a young Lebanese man, Bilal Skaf, who was the leader of a group involved in planned sexual assaults in the year 2000, received a 55 year gaol sentence. Once again there were national headlines. Other members of the gang were sentenced over the following months to long gaol terms.[559]

The Premier made a Ministerial Statement on 'Law and Order' on 4 September 2001.[560] Referring to the fact that the Director of Public Prosecutions has appeared on 'Stateline' the previous Friday night, Carr stated:

> Even the Director of Public Prosecutions, who has well known views, recognizes the valid case for longer sentences in case of gang rape. Today my Government will move to suspend standing orders in order to allow the introduction of the Crimes Amendment (Aggravated Sexual Assault in Company) Bill.[561]

The Premier then went on to explain the details of a number of Bills that increased criminal penalties. He made reference to aggravated sexual assault in company, non-

[557] Warner, above n 553, 346, 348.
[558] 'Jail term minimal', *Daily Telegraph* (Sydney), 24 August 2001, 1.
[559] Warner, above n 553, 349.
[560] NSW, Parliamentary Debates, Legislative Assembly, 4 September 2001, 16298 (Bob Carr).
[561] Ibid.

association or contact orders, recruiting children for crimes, gang related kidnapping, wounding, discharging guns while demanding money, car-jacking and demanding identity from people in cars in certain circumstances. They are discussed below.

In the Sir Frank Kitto Lecture, 2012 and in his interview Attorney-General Bob Debus provided a useful insight into the whole period from 2001 to 2005 and it is appropriate to quote him at length on the difficulties that face a Government in such circumstances. In the Kitto Lecture after pointing to a series of pack rapes and a murder by a husband on bail of his wife, all widely publicisied, Debus stated:

> Outside New South Wales the 'Tampa' incident, followed instantly by Commonwealth legislation to introduce the so-called 'Pacific Solution' for asylum-seekers, occurred in August 2001. Three months later the terrorist attack on the Twin Towers in New York traumatised the world, and caused an extreme legislative response in Australia. The Bali Bombing shocked us in 2002. A second Bali Bombing and the 7/7 Bombing in London followed the Djakarta Embassy Bombing in 2004. They all involved Australian victims. The London Bombing raised new fears about so called home grown terrorists and caused another extreme legislative response.[562]

In his interview for this thesis Bob Debus stated:

> [T]here was within the Government a lot of discussion and negotiation going on between the police, the Premier's Department, my Department and my office. I think it may factually be said that all of the matters we are talking about involved a continuous

[562] Bob Debus, 'The Devil's Triangle, Civil liberties and the relationship between the law, the media and the parliament' (Paper presented at the Sir Frank Kitto Lecture 2012, Faculty of Law, University of New England, 23 November 2012), 3.

> discussion. Sometimes it was quite heated and sometimes there was strong disagreement between us all. I began to understand in fact that in times of significant criminal activity there's a pretty natural structural conflict between the police portfolio and the Attorney-General's portfolio. It's the same all over Australia and presumably all over the world.[563]

Debus went on to point out when asked, whether he felt that when he was Attorney-General the expectations of the community were more punitive:

> So you had a series of events actually unrelated but in the minds of folk in the community, all in some way connected with young Muslim men out of control. You did have objectively speaking an increase in street crime and burglary. It took place over a long period and later statistics showed that it was beginning to fall again about the year 2000. But I guess we didn't know that then. This without any question fed into a tabloid hysteria. Some of the tabloid campaigns in those years reached a level of vituperation that had hardly been known before. And then on top of all that we had the Skaf rapes. And they were, I can't recall exactly when it was that we began to realize how awful they had been but we did begin to know these had been ghastly crimes which were by any account the sort of thing that would traumatise a community And here they were feeding into incoherent and deeply prejudiced ideas about young Muslim men. It was a very difficult time.[564]

When discussing legislation that introduced tougher penalties for gang sexual assaults, I asked Bob Debus whether in addition to the increased punitiveness, he felt the

[563] Debus, above n 549, 2.
[564] Ibid 3.

dominance of neo-liberal ideology in the world also contributed to the difficulties he faced in relation to maintaining a balance in the criminal justice system. He explained:

> I think at the time it's true that there were extraordinary increases in the punitive quality of the justice system of the United States. In Britain you'd had Thatcher and you were getting Blair. And Tony Blair's Labour Party had a lot to say about people's individual responsibilities. They had the famous slogan, 'Tough on crime, tough on the causes of crime'. And they tried to make a new settlement about preventing crime and being more severe on its commitment. And a lot of that, that kind of thinking, that milieu, transferred itself especially into the right wing of the Australian Labor Party. So I guess what I felt was, pretty besieged by these circumstances.[565]

The *Crimes Amendment (Aggravated Sexual Assault in Company) Act, 2001*, (NSW),[566] introduced on 1 October 2001, provided for another gradation in relation to sexual assault. Sexual assault without consent carried a 14 year maximum gaol sentence. Aggravated forms of such an offence carried a 20 year gaol sentence. The new offence involving such activity in company carried a sentence of life imprisonment.

Attorney-General Debus explained the reasoning behind the Bill:

> By creating the offence of aggravated sexual assault in company we recognize the reality of some offenders who together commit horrific sexual assaults upon their victims. … Group sexual assaults must be one of the most heinous crimes imaginable.[567]

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[565] Ibid 4.
[566] *Crimes Amendment (Aggravated Sexual Assault in Company) Act, 2001* NSW.
[567] NSW, *Parliamentary Debates,* Legislative Assembly, 4 September 2001, 16319 (Bob Debus).

Shadow Attorney-General Chris Hartcher noted:

> Recently a tragic incident took place in Sydney. Three hoodlums carried out the most vile and degrading attack upon two young girls whom they forced into their car at a railway station and took to a house where they repeatedly sexually assaulted them at knife point. I will not recount that incident, because it has been well illustrated throughout the print and electronic media.[568]

Given that many sexual offence categories had already lost the presumption in favour of bail it is not surprising that this also disappeared for sexual assault in company. Once again s 9 of the *Bail Act* was amended to place aggravated sexual assault in company in the group for which there was no presumption either for or against bail. The matter received no attention in the Parliamentary Debate. In his interview, Bob Debus confirmed that the change to the presumption in favour of bail was made for consistency with lesser offences that were already in that position.[569]

The concern about gangs was taken into the realm of vehicle offences by the *Crimes Amendment (Gang and Vehicle Related Offences) Act 2001,* (NSW). The Attorney General explained that 'this is part of the raft of legislative amendments which specifically target gang-related crime in New South Wales.'[570] Debus explained that it built upon the approach concerning gang related sexual assaults. He also referred to the Premier's statement in the Legislative Assembly a few weeks before to the effect that the government would deal with gang-related crime.

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[568] NSW, *Parliamentary Debates*, Legislative Assembly, 5 September 2001, 16373 (Chris Hartcher).
[569] Debus, above n 549, 4.
[570] NSW, *Parliamentary Debates*, Legislative Assembly, 17 October 2001,17519 (Bob Debus)

The Bill increased the penalties for a range of offences if committed in company. These included discharging a firearm with intent to do grievous bodily harm, using or possessing a weapon when resisting arrest while attempting to commit an indictable offence, maliciously wounding or inflicting grievous bodily harm, assault occasioning actual bodily harm and demanding property with intent to steal. The Bill also dealt with the 're-birthing' of cars. Penalties for car-jacking were also increased.

The Bill also dealt with threatening a person in order to get them to withhold information and recruitment of children for criminal activities such as couriering of drugs. The Attorney-General indicated that the Premier had expressed concern about this matter and went on to state: 'The new offence of recruiting children for the purposes of committing a criminal act clearly targets those adult offenders who prey upon children and initiate them into gang culture at an early age.'[571]

The *Bail Act* was not mentioned in the speech but an amendment was part of the parcel of changes. Section 85A was the new section on kidnapping. It included the holding of a person to ransom or for other advantage and the aggravated forms of the offence caused by its being in company or because actual bodily harm occurs. Increased penalties were provided for and other aspects of the law on that crime were also considered, in particular conflicting judicial decisions about substantial injury. In all cases the presumption in favour of bail was replaced by the neutral situation in which

[571] Ibid 17521.

there is neither a presumption in favour or against bail. I asked Bob Debus why there was a need to amend the presumption amongst all the other changes and he replied:

> I don't think I can really answer that. I don't think I can say what happened then except that it was consistent with the idea of a particularly abhorrent crime. Having bail presumptions that were consistent with other crimes of a particular abhorrence and that were in the community's mind at the time.[572]

I asked Bob Debus why such a range of personal violence and property offences were covered in the one Bill. He answered: 'I think that those Bills were the consequence of much agitation from the police and indeed from the Premier's Department and really it was an omnibus arrangement to try and deal again with the problems of gang activity'.[573]

11.4 STOPPING PEOPLE FROM ASSOCIATING WITH OTHER PEOPLE

On 26 October 2001, Parliamentary Secretary Tony Stewart MP on behalf of the Attorney-General introduced the Justice Legislation Amendment (Non-Association and Place Restriction) Bill 2001 (NSW). The Bill provided for non-association orders which prevented the person subject to the order from associating with other specified persons. It, too, was part of the anti-gang policy. Stewart stated, '[t]his Bill is a cornerstone of the Carr Government's comprehensive anti-gang package, which was announced by the Premier on 4 September.'[574] The impact of issues concerning drugs

[572] Debus, above n 549, 5.
[573] Ibid 5.
[574] NSW, *Parliamentary Debates*, Legislative Assembly, 26 October 2001, 18104 (Tony Stewart)

and Cabramatta was also made clear when he stated: 'The Carr Government has developed this bill, having regard to the success of the police drug bail scheme being trialed in Cabramatta.'[575]

The *Bail Act* was amended as a consequence of these changes. Section 36, dealing with conditions that could be attached to bail, was now to include the requirement that the accused enter into an agreement restricting the person from associating with specified persons or from frequenting or visiting a specified place or district. The names of those with whom the accused could not associate were not to be published. I asked Bob Debus whether he felt that the requirement for such a condition was already open to a court. He replied: '[y]es I did feel that. I did feel that and it can only have been included at the insistence of the Premier's Office, a deliberate measure to remind the community that the Government was serious but not one that I felt serious about'.[576]

11.5 CONFISCATING PASSPORTS IN CASES OF DEATH

In 2000 another death in dramatic circumstances led to further change to the *Bail Act*, this time in relation to seizing passports. Andrew Tink, the Liberal Member for Epping put forward the Bail Amendment (Confiscation of Passports) Bill 2000 (NSW). The Bill ultimately became the *Bail Amendment (Confiscation of Passports) Act 2002* (NSW). Tink was supported by the Minister for Police, Paul Whelan. Andrew Tink explained that:

> The particular case that has given rise to this bill and highlighted the ongoing need for legislation of this type is the case of truck driver Moslek Harra Mekhael who was

[575] Ibid 18104.
[576] Debus, above n 549, 5.

> involved in a fatal motor vehicle collision in Brookvale several weeks ago in which baby Scott Steele was incinerated in tragic circumstances. … The initial charge of negligent driving occasioning death is itself a grave charge. The failure of Mr Mekhael to attend court when required and his presumed absence overseas –I believe he was last heard of in Canada – call for urgent steps to be taken to amend the bail legislation.[577]

The specific case referred to by Andrew Tink had received publicity when it occurred. The *Daily Telegraph* headline on 4 August 2000 was 'Truck death driver flees the country'. The subheading was '[c]ourt issues warrant'. The article included pictures of the baby who was killed and Mr Mekhael. The article stated that nine cars had been involved in the pileup and the initial charge was negligent driving causing death when Mr Mekhael faced court. The article explained: '[b]ut police uncovering further evidence, have been unable to serve a further five charges, including manslaughter and attempting to pervert the course of justice, because he repeatedly excused himself from appearing in court citing illness.'[578]

The Act required that a person not be granted bail where an offence occasioned death unless the person surrendered their passport as a condition of bail. The onus lay on the person to establish in the circumstances of the case that a direction should be given that the condition not apply.[579] Bob Debus confirmed that the particular incident that had resulted in a man on bail leaving the country led to the amendment of the Bail Act.[580] I

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[577] NSW, *Parliamentary Debates*, Legislative Assembly, 10 August 2000, 8093 (Andrew Tink)
[578] Will Temple, 'Truck death driver flees country', *Daily Telegraph* (Sydney), 4 August 2000, 5.
[579] Bail Amendment (Confiscation of Passports) Act 2002, (NSW) Cl 2, Cl 3.
[580] Debus, above n 549, 6.

asked him about the unusual circumstances of a Bill arising out of an Opposition initiative. He explained: 'I would have to check that but you may well be right. The Government wishing to be seen to be sensitive to these kinds of concerns did that and presumably on the basis that I thought it didn't change very much'.[581]

11.6 RESTRICTIONS ON THE ABILITY OF REPEAT OFFENDERS TO GET BAIL

Repeat offenders became a matter on which numerous Parliamentarians commented when the Bail Amendment (Repeat Offenders) Bill 2002 (NSW) was introduced by Attorney-General Bob Debus. Debus and later speakers made specific mention of a BOCSAR report, 'Bail in NSW: Characteristics and Compliances.'[582] That report made a number of observations that would be significant in relation to the Bill. The Report showed that the number of people in Local Courts on bail at finalisation between 1995 and 2000 had fallen from 79.5% to 70.3%. In higher courts the figure had fallen from 68.3% to 57.8%.[583] The Report also showed that the number of people in Local Courts on bail with a single concurrent offence had fallen from 81.3% to 72%.[584] The figures for those on bail where there were more concurrent offences also had fallen. The figures for higher courts where there were concurrent offences reflected a similar picture. It had become tougher to get bail but a tougher approach to bail was nevertheless provided for in the Bill because the Report also showed that '14.6 per cent of cases finalised in the Local Courts in 2000 (for persons on bail) involved the non-appearance

[581] Ibid 6.
[582] Jacqui Allen Marilyn Chilvers, Peter Doak, 'Bail in NSW: Characteristics and Compliances' (September 2001) *Crime and Justice Statistics NSW Bureau of Crime Statistics and Research*
[583] Ibid 2-3.
[584] Ibid 3-5.

of a defendant for whom a warrant was issued by the court.'[585] It made no difference that there were no figures for the period before 1999 in relation to this matter. In 1999 the figure was 12.6%. It also made no difference that the figures in the higher courts for failure to appear had fallen from 6.2% to 5.3%.[586] Prior conviction statistics also were significant. The Report stated:

> Table 10 shows that persons with prior convictions are far more likely to have a warrant issued against them for failing to appear when on bail. In 2000, approximately 17.4 per cent of persons who had prior convictions had their case finalised in the Local Courts by having a warrant issued against them. For persons without prior convictions, only 4.0 per cent of cases were so finalised.[587]

I asked Bob Debus whether the issue of repeat offenders arose out of the Premier's Statements. He stated:

> They were arising in related but different circumstances. The 2002 Act was passed in the end just 12 months before a general election and the question of bail had become highly topical and controversial. The consequence of tabloid media campaigns again. Unexpected sources of concern. In 2002 BOCSAR put out a report on bail and they took some care to notice that on the one hand 10% of offenders were responsible for 40% of crime and that 17% of people with prior convictions absconded on bail.[588]

However, it is worth noting that many people in gaol at the time of finalization do not get a custodial sentence. As the BOCSAR Report noted, '[o]n average, just over half

[585] Ibid 9.
[586] Ibid 10.
[587] Ibid 10.
[588] Debus, above n 549, 6.

(51%) of all persons in custody (bail refused) at the time of final appearance in the Local Courts were sentenced to imprisonment between 1995 and 2000.'[589]

I asked Bob Debus about the full range of statistics in the BOCSAR report, which included those showing a decline in the number of defendants on bail at the time of the finalization of their matter. I asked him whether the problem was explaining in a politically acceptable way the complex issues raised in the report. On whether the report showed that Government had been tough on crime, Debus replied:

> That's true but the *Daily Telegraph* wasn't interested in the other bits. It's also true that during 1999 the ALP had said some things in its election campaign about targeting repeat offending. … The Opposition was screaming for a presumption against bail for all repeat offenders. And the police took the position that all repeat offenders should be subject to a neutral presumption. … And the new law in these circumstances and I guess it's a feeling of mine now that the tabloid voice was extremely loud. The voice of the liberal media was rather subdued.'[590]

Between the BOCSAR Report of September 2001 and the introduction of legislation a press conference was held by the Police Minister, Michael Costa, at which the Attorney-General was present. The *Sydney Morning Herald* gave it front page coverage on 14 January 2002 under the headline 'Costa pledge to slash crime'. The article stated:

> The Carr Government has promised a dramatic statewide drop in car theft, burglary and violent street crime under new laws denying bail to repeat offenders. … Mr Costa said

[589] Ibid 12.
[590] Ibid, 7.

> he had been told by police of magistrates granting bail to repeat offenders or to people with a history of failing to reappear in court who continued to commit crimes.[591]

The article went on to refer to the fact that the head of BOCSAR had indicated that the number in prison would rise by up to 400 from a base of 5600. Don Weatherburn was quoted as stating:

> They are absolutely right about two things. The first is a small proportion of recidivist offenders, that is the top 10 per cent, account for about 30 to 40 per cent of crime. The second thing is they are notorious for not turning up to court. One in four granted bail for break, enter and steal offences do not turn up to court.[592]

Bod Debus explained that:

> At this time the police proposition for the neutral presumption we calculated, that is people in my office calculated, was going to bring 1500 extra people into custody during the year. The proposals that were actually brought in in 2002, … we calculated would bring about 400 people.[593]

A new section 9B removed the presumption in favour of bail and provided for a neutral provision where, at the time of the offence, the person: was on bail; or on parole; or serving a sentence but was not in custody; or was subject to a good behaviour bond. Neutrality in relation to the presumption also applied if the person had previously been convicted of the offence of failing to appear. If the person was accused of an indictable

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[591] Les Kennedy, 'Costa pledge to slash crime', *Sydney Morning Herald* (Sydney), 14 January 2002, 1.
[592] Ibid.
[593] Debus, above n 549, 7.

offence and had been previously convicted of an indictable offence, whether dealt with on indictment or summarily, then neutrality in relation to the presumption applied.

In referring to the new s 9B(1), the Attorney-General stated: 'There appears, however, to be a growing category of accused persons who commit less serious crimes repeatedly. … This bill aims to target those offenders who commit less serious offences and are likely to do so again.''[594] The Attorney-General referred to the BOCSAR Report and noted with concern that 14.6% of accused failed to appear and a warrant was issued. The Attorney-General then explained that s 9 B(2) would remove the presumption in favour of bail where there had been a previous conviction for failure to appear. Perspective about the figure of 14.6% was left to the Labor Member Paul Lynch who, after expressing concern that the figure was high, stated: 'However, the problem I have with some of the debate around the bill is that people jump from that figure to a conclusion that this represents a significant increase in the rate and/or number of failures to appear. There is no warrant to make that assertion.'[595]

The Opposition position was that for repeat offenders there should be a presumption against bail. Chris Hartcher provided an insight into the pressures operating in the debate when he stated:

> The Government cannot claim any credit for allowing a situation to develop over the past seven years in which repeat offenders simply get bail and then go out and commit further offences. One issue in particular that the New South Wales police, the

[594] NSW, *Parliamentary Debates*, Legislative Assembly, 20 March 2002, 819 (Bob Debus).
[595] NSW, *Parliamentary Debates,* Legislative Assembly, 10 April 2002, 1280 (Paul Lynch).

> Opposition and talk-back radio listeners have complained about is that of people on bail committing further offences, or being in a position to commit further offences.[596]

I asked Bob Debus about internal Government debate about a presumption against bail, given that was the Opposition position. He replied:

> Oh yes, there were certainly people in the Labor Cabinet who would have been quite happy. And when we introduced that Bill in 2002 the Opposition Shadow Attorney-General, which was then Chris Hartcher, described it as a start. He said it was a step in the right direction.[597]

The Attorney-General explained in the Parliamentary debate that s 9B(3), indicating a neutral presumption where a person had a previous conviction for an indictable offence, should be read with new s 32(1)(b)(vi), which in such cases required the judicial officer to consider the nature of the person's criminal history, the number of previous indictable offence convictions and the time between them. The Attorney-General stated that '[i]t is a common maxim that past behaviour is a good predictor of future behaviour.'[598] It is worth noting that the criminal record of the person had been available for consideration since 1978 although not for the purposes of all the different criteria to be considered for a grant of bail in accordance with s 32 of the *Bail Act*.

Having made it more difficult for people to get bail via the amendments the Government then provided for humane considerations for the young, the intellectually

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[596] NSW, *Parlamentary Debates*, Legislative Assembly, 10 April 2002, 821 (Peter Harcher).
[597] Debus, above n 549, 8.
[598] Debus, above n 594, 819.

impaired and for Aboriginal and Torres Strait Islanders. Section 32 was amended to require residence, employment, family situation and background, and community ties to be taken into account and in the case of Aboriginal and Torres Strait Islanders the last of these factors should include extended family, kinship and other traditional ties to place.[599] The Attorney-General explained that unemployment and no appropriate residence are also matters of concern when it comes to setting conditions in relation to bail. He stated:

> This is particularly important for vulnerable accused persons such as juveniles, intellectually or mentally disabled persons or persons of an Aboriginal or Torres Strait Islander background. The provisions of proposed section 36(2A) simply allow the court to consider the appropriateness of bailing accused persons, particularly those of an Aboriginal or Torres Strait Islander background, to supervised bail accommodation if they are suitable and a place is available.[600]

I asked Bob Debus about the two elements of the Bill, namely the aspect which stiffened provisions but in limited circumstances and the aspect which was more humane. Debus explained that:

> Specifically it was an exception, it was an exception to the presumption in favour of bail if at the time of the offence you were on bail, you were on parole, you were serving a sentence, you were on a good behaviour bond or you had been convicted under s 51, which you will remember was the failure to appear. So that was at least a rational set of principles upon which to base the legislation. If some trust had been put in you and you

[599] Ibid 819.
[600] Ibid 820.

> broke the trust then the opposite assumption was introduced. And the other thing as you say, the other thing is that for the exception to be made to the presumption of bail you had to be charged with an indictable offence and had a previous conviction for an indictable offence. So still we were trying to limit the effect of the change in presumption and we also inserted … that new section which drew special attention or permitted a court to pay special attention to Aboriginal kinship and traditional ties, special needs of an offender including youth, Aboriginality, an intellectual disability and invited the court to consider the nature and seriousness of prior indictable offences.[601]

Debus went on to explain that:

> Well, I guess that the nature of that Bill is a demonstration of the political circumstances that existed at the time. I would say that leading members of the Carr Government, including Bob Carr himself, were not interested in pushing for more punitive responses to criminality just for the sake of it. They actually knew there were real community feelings, notwithstanding the fact that they were agitated by tabloid media campaigns and political rhetoric, that there were genuine concerns. And I accepted as a practising politician that you've got to respond to them. But nevertheless I tried wherever possible to take account of the realities faced by the offending population. So both aspects of that Bill were conscious, both aspects of that Bill were thought out in that respect.[602]

This 'humane' approach, contrasting as it does with the tough on crime approach in other parts of the legislative program, was also reflected in the Crimes Legislation Amendment (Criminal Justice Interventions) Bill 2002 (NSW). A number of Acts were amended to provide for legislative control of intervention programs which were found

[601] Debus, above n 549, 8.
[602] Ibid.

in both the public and private sector. In relation to the *Bail Act,* s 36 concerning conditions already included agreement to assessment for drug and alcohol programs and participation in the programs. The Bill extended these provisions to include 'assessment for participation, or participation, in an intervention program…'[603] Section 37, concerning the purposes of conditions, was extended to include 'reducing the likelihood of future offending being committed by promoting the treatment or rehabilitation of the accused person…'[604] Bob Debus explained this important development did not emerge from the Premier's statements. However such treatment or rehabilitation of the accused person would fit in with efforts to reduce repeat offending. Debus stated:

> No. At the time there was a program that you'll be familiar with just beginning called MERIT (The Magistrates Early Referral Into Treatment Program). … And we kind of all knew at the time, we all intuited that this was going to be a successful program and indeed it was. And it's worth saying in the context of the 2002 Bail Amendment Repeat Offenders Act that we knew that it would still be possible for Magistrates to use the legislation to put people into MERIT. … A lot of the intervention programs were just simply not based on a clear legislative mandate and all our advice was that we had better do that.[605]

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11.7 COMMONWEALTH OFFENCES CONCERNING DRUG SUPPLY

The Crimes Legislation Amendment Bill 2002 (NSW) amended a number of Acts of Parliament. In relation to the *Bail Act* it ensured that s 8A the presumption against bail

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[603] NSW, *Parliamentary Debates*, Legislative Assembly, 12 November 2002, 6557 (Kevin Stewart).
[604] Ibid 6557.
[605] Debus, above n 549, 9.

and s 9 the neutral presumption continued to apply to Commonwealth legislation relating to drug offences after amendments to that legislation. Former Attorney-General Debus confirmed this approach was taken to be consistent with existing provisions.[606] The Bill also removed the presumption in favour of bail for offences that occurred while a person was in custody. Before the change the presumption in favour of bail applied where other matters causing the person to be in custody would be finalised before the end of the bail period. The Supreme Court was given power for a limited review of bail conditions arising from another court's decision and where the person had not been able to comply with the condition and was in custody.[607]

11.8 BAIL ONLY IN EXCEPTIONAL CIRCUMSTANCES.

The Bail Amendment Bill 2003 (NSW) introduced a fundamental change to the idea of bail as a protection for liberty and the presumption of innocence. That Bill introduced the concept that for certain offences such as murder (s 9C) and for repeat offenders (previous conviction for serious personal violence offence) (s 9D), bail was only to be granted in 'exceptional circumstances'. Serious personal violence offences included most personal violence offences in the *Crimes Act 1900* (NSW). In addition, s 25A provided that where a magistrate granted bail in relation to a serious offence (murder, or any other offence punishable by imprisonment for life, or offences involving sexual intercourse, or an attempt to have sexual intercourse with a person under the age of 16) and a police officer or lawyer appearing for the Crown informed the magistrate that a

[606] Ibid 9.
[607] *Crimes Legislation Amendment Act 2002* (NSW)

review by the Supreme Court would be sought, then a stay until the review, withdrawal or three days, whichever was the shorter, applied.[608]

No clearer explanation for the introduction of these fundamental changes could be provided than that given by Parliamentary Secretary Bryce Gaudry on behalf of the Attorney-General. In the Second Reading speech he stated:

> This bill continues our ongoing reform of bail law, which began last July with the introduction of the *Bail (Repeat Offenders) Act*. These amendments build on those reforms to further protect victims and the community, particularly women, from serious personal violence offenders. Honourable members will remember the tragic murder of Patricia van Koeverden at Newcastle in April this year by her estranged husband, Toni Bardakos. The community was rightly outraged that he was granted bail, and tragically, the fears of those who knew him were realised.[609]

Bryce Gaudry conceded that '[t]he tragic van Koeverden case has accelerated our bail reform program in relation to serious violent offenders in two respects.'[610] This was a reference to the new sections, s 9C and s 9D.

I asked Bob Debus what role the murder of Patricia van Koeverden played in the introduction of the legislation. He stated:

> The murder was the culmination. We still had the tabloid campaigns going on. … But you had Ken Moroney [NSW Police Commissioner] saying and this is reported in the media, 'I'm fed up with courts letting the community and the police down and I've ordered the

[608] Bail Amendment Bill 2003 (NSW) Cl 2, Cl 3.
[609] NSW, *Parliamentary Debates*, Legislative Assembly, 30 May 2003, 1545 (Mr Gaudry)
[610] Ibid.

> tracking of magistrates decisions'. He actually described his Department being at loggerheads with mine over questions of bail reform. It's in that kind of atmosphere that a repeat violent offender on bail murdered his wife at Newcastle.[611]

The reference by Bryce Gaudry to the specific case of Patricia van Koeverden deals with events at the end of April 2003. The *Sydney Morning Herald* on 30 April contained an article headed, 'Man who shot ex-wife dead was out on bail'. The related article explained that 'A man who shot dead his former de facto wife before turning the gun on himself in Newcastle yesterday was on bail on charges that he abducted and raped her last month.'[612] On 1 May 2003, page one of the *Daily Telegraph* contained a picture of the woman who had been murdered and the heading, 'This woman's husband was given bail after raping and torturing her. Then he killed her. – The NSW bail scandal: Full Report, pages 4, 5'. The article on the later pages was under the heading: 'State may adopt tough ACT law'. It explained that [f]or the past four years police have wanted the NSW Government to tighten the bail laws for repeat offenders. The Government said last night it was working on a proposal.'[613].

There can be no doubt that acts involving domestic violence and culminating in murder were and are serious matters. Bryce Gaudry referred to figures showing amongst other things that 90% of adult women victims of lethal violence were killed within an intimate context. Gaudry also pointed to 24,667 domestic violence assaults recorded in NSW in

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[611] Debus, above n 549, 10.
[612] Greg Wendt Dan Proudman, Michael Condon, 'Man who shot ex-wife dead was out on bail', *Sydney Morning Herald* (Sydney), 30 April 2003, 10.
[613] 'This woman's husband was given bail after raping and torturing her. Then he killed her - The NSW bail scandal', *Daily Telegraph* (Sydney), 1 May 2003, 1, 4, 5.

2002.[614] He also explained that police were developing a domestic violence checklist for courts, including more detail about the defendant and risk to the complainant. The figure of 24,667 is referred to in the NSW Recorded Crime Statistics for 2002.[615] The figure in 2000 was 20,385 and in 2001 it was 23,168. That Report also provides a 'Summary of Trends' for the 12 months period January to December 2001 and January to December 2002. Murder, assault, sexual assault, indecent assault and act of indecency, and other sexual offences are listed as categories in the 'Offences where there was no upward or downward trend'.[616] Other categories were 'significant downward trend' and significant upward trend'. The Report observes for the crime of murder that '[w]ith such small numbers of murder victims, the month to month variation is extremely marked. For this reason it is difficult to detect trends over such a short period. Because of the small numbers of murder victims, it is not sensible to make regional comparisons.'[617] Graphs supporting the findings are provided and in relation to 'domestic assault' once again the finding is 'no statistically significant upward or downward trend.'[618]

Providing for bail only in exceptional circumstances is a serious derogation from the fundamental principle in a liberal democracy that supports the presumption of innocence. The statistics above show that for many offences of violence, including sexual offences and murder, there was not an upward trend let alone a dramatic one.

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[614] Gaudry, above n 609, 1545.
[615] Jackie Fitzgerald Peter Doak, Mark Ramsay, 'NSW Recorded Crime Statistics 2002' (2002) *NSW Recorded Crime Statistics, NSW Bureau of Crime Statistics and Research* , 45.
[616] Ibid 4.
[617] Ibid 5.
[618] Ibid 6.

However, Bob Debus was faced with the politics of the day. As Debus told me, concerning the importance a murder such as that of Patricia van Koeverden in relation to developing a program concerning domestic violence:

> I think we would say then if we were going to introduce it that we were developing a program but I think it's probably more likely that we were still arm wrestling about what should be done and that murder finished me off. I point out that Bryce Gaudry was a quite left-wing civil libertarian. The murder happened in his electorate. So it's always a big clue. You mentioned before that Tony Stewart, the Member for Lakemba, introduced one Bill for me. Now Bryce Gaudry's doing another because in each case it was in their Electorate that that had precipitated the Government into some kind of action had actually occurred. And where there's simply a white heat of public opinion. So, as I say, it is important to remember that this Patricia van Koeverden case was used by the tabloid media as well as the Opposition to revive memory of the so-called Bega school girls murder. Now that was a murder, as you will remember, again, simply horrified the community, traumatized the community. It was like the Bilal Skaf rape trial. It's impossible, I sometimes think about what it felt like to go and stand in front of the media and make an argument on the basis of general principle for something less than extreme punitive treatment of somebody who had committed a murder in those kinds of circumstances.[619]

There seems little doubt that the lead up to the State Election, which had taken place on 22 March 2003, also placed pressure on the Government to implement the changes. Andrew Tink speaking for the Opposition stated: 'I do not wish to be overly repetitive

[619] Debus, above n 549, 11.

but if the law was as the Government represented it during the election campaign, Trish van Koeverden would be alive today.'[620] Analysis of the issues leading up to the election noted that:

> the government seemed most sensitive to public law-and-order fears, fuelled by stories of Asian drug gangs and organised rapes by Lebanese Muslim gangs in Sydney's west. … [T]he Premier intensified his own law-and-order rhetoric, echoing the tabloid and talkback media.[621]

When speaking of the nature of these changes, Bob Debus referred to the role of Andrew Tink. Bob Debus referred to the Second Reading speech by Andrew Tink in May 2003 when Tink moved a Private Members Bill, the Bail Amendment Repeat Offenders Bill. Debus regarded Tink as a competent Opposition spokesperson and went on to state:

> I think it is sufficient reflection of the spirit of the times that Andrew Tink could make a speech in which he opens up saying that he wishes to dedicate this Bill to Patricia van Koeverden who was brutally murdered that week by a repeat violent offender. I also wish, he says, to dedicate the Bill to Nicole Collins and Lauren Barry, the Bega school girls who were brutally murdered some years ago by a repeat offender. And he goes on to argue that complete change in the principle of granting bail for these serious offenders.[622]

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[620] NSW, Parliamentary Debates, Legislative Assembly, 18 June 2003, 1678 (Andrew Tink).
[621] Rodney Smith, 'Commentary The New South Wales Election of 22 March 2003' (2003) Volume 38, No 3, November *Australian Journal of Political Science* 549, 551.
[622] Debus, above n 549, 10.

In reply the Attorney-General pointed out that the Government had introduced repeat offender legislation in 2002 and that this covered the less serious property offences. He then went on to note the impact of the changing bail law as reflected by the number of accused persons on remand rising by 300 since July 2002. The Attorney-General then made the comments about balance, the presumption of innocence and liberal democracy quoted at 2.6 above.

I asked Bob Debus about his Speech in Reply, in which he referred to the number in prison but also to the important principle involved in the presumption of innocence and whether that reflected the situation he had been describing. He replied:

> Yes it did and it reflected the fact that I was doing what I could to preserve the respect for these principles within the Government. Sometimes the Premier's press releases and mine were different and I've seen, in a recent Law Reform Commission report, I've seen it's remarked that these are not quite the same. As if that was a mistake.[623]

11.9 FURTHER LEGISLATION ON FIREARMS AND PROPERTY OFFENCES

On 23 September 2003 the *Daily Telegraph* headed an article 'Law trains sights on illegal guns'. The associated article stated:

> Tougher penalties, an overhaul of the security industry and blocking legal loopholes are part of a State Government crackdown on the thriving illegal gun trade … The move driven by the Police Minister, John Watkins, comes after the *Daily Telegraph* revealed the theft of 34 handguns from a security company this month.[624]

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[623] Ibid, 11.
[624] Angela Kamper, 'Law trains sights on illegal guns', *Daily Telegraph* (Sydney), 23 September 2003, 3.

The article went on to explain that since the beginning of August there had been six drive-by shootings. It also listed tougher penalties for stealing handguns that would be introduced by the Government.

On 24 September 2003 the *Sydney Morning Herald* headed an article 'Gun controls fail to check criminals'. In the associated article, which discussed the adequacy of resources and money available to the NSW Firearms Registry, it was stated that '[i]nternal registry reports reveal that more than 12000 firearms have gone missing from official records and are now regarded as untraceable'. The article also observed that '[t]he revelations are an embarrassment for the State Government, which yesterday announced it would crack down on illegal handguns by introducing tougher powers, penalties and cash rewards. This is in contrast to a refusal to address registry concerns.'[625]

In speaking to the Bail Amendment (Firearms and Property Offences) Bill 2003 (NSW), John Watkins, Minister for Police, explained that:

> As announced by the Premier, these amendments form stage two of the bail amendments this year. They build upon previous amendments in relation to serious personal violence offenders and address certain community concerns in relation to recent firearms offences. They were substantially adopted from a report produced by an internal working party.[626]

John Watkins explained that s 8B would provide for a presumption against bail for 'serious firearm and weapons offences'. A range of offences listed in the *Crimes Act*

[625] Robert Wainright, 'Gun controls fail to check criminals', *Sydney Morning Herald* (Sydney), 24 September 2003, 5.
[626] NSW, *Parliamentary Debates*, Legislative Assembly, 2 December 2003, 5632 (John Watkins).

1900 (NSW) and new offences including s 93GA concerning firing at a dwelling house or building arising from the *Crimes Legislation Amendment (Public Safety) Act 2003* NSW were covered by the definition. So were a number of offences in the *Firearms Act, 1966*.[627]

John Watkins, in his Second Reading speech during the debate concerning the Crimes Legislation Amendment (Public Safety) Bill 2003, pointed to BOCSAR research showing a decline in the use of handguns where assaults or intended assaults are involved but noted:

> However, as recent incidents have shown, there is never any room for complacency in relation to illegal gun crime. There is clearly more work to be done. That is why on 23 September I released a package of measures to improve the comprehensive co-ordinated approach taken by NSW Police to illegal gun availability, detection, apprehension and prosecution.[628]

John Watkins also noted in the Bail Amendment (Firearms and Property Offences) Bill Second Reading debate that: 'Criminology research has repeatedly shown that a small percentage of offenders are responsible for a large percentage of crime.'[629] The Bill contained additional restrictions on bail. John Watkins explained that:

> Schedule 1 [2] also inserts proposed section 8C into the *Bail Act* to provide for a presumption against bail for a repeat property offender. A repeat property offender is defined as a person who has one or more convictions in the past two years, at least one

[627] Ibid.
[628] NSW, Parliamentary Debates, Legislative Assembly, 29 October 2003, 4352 (John Watkins).
[629] Watkins, above n 626, 5633.

> of which is robbery or burglary related and who has two or more outstanding charges which are robbery or burglary related. These provisions specifically target persons who commit more offences while on bail.[630]

The Minister went on to note that repeat property offenders often have serious drug problems and that the Government intended to carry out rehabilitation as part of the strategy of reducing repeat offending. An interdepartmental working group would report to Cabinet within six months on programs that may include:

> Intensive supervision and case management programs for repeat offenders …; Fast tracking the implementation of the MERIT program at major Sydney Local Courts; Preparation of remanded repeat offenders for priority entry into the proposed Drug Treatment Correctional Centre and/or the Drug Court.[631]

The Minister explained that there was overlap between the new provision s 8C (repeat property offences) and the already existent s 9D (serious personal violence offences). The Minister stated:

> [T]his is because offences like robbery have elements of both serious personal violence offences and serious property offences. In circumstances where both sections 8C and 9D apply the Bill provides in schedule 1 [6] that the section 9D and test of exceptional circumstances will prevail.[632]

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[630] Ibid.
[631] Ibid.
[632] Ibid.

Other parts of the Bill added s 8B and s 8C to the matters to be considered for bail in accordance with s 32 of the *Bail Act* and allowed a failure to appear charge to be dealt with in addition to the substantive charge where the substantive charge was dealt with in the absence of the defendant.[633]

I asked Bob Debus of his recall of the events surrounding this legislation. He explained the problems of trying to rationalise the bail laws in a working party made up of representatives from the Premier's, Police and Attorney-General's Departments:

> We would at least have given consideration to reducing the technical complexity of the legislation and removing inconsistencies. But that never happened and it never happened because we could not get internal agreement in the Government. The present legislation that you are mentioning is another case. … The other members of the working party wanted a much broader class of offenders to be captured in that last change and I was successful to a limited extent of reducing the presumption or the application of this change to two separated fresh charges, with prior charges within the previous two years. It's another instance of the debate being shifted away from the principles that you would have understood to be appropriate to bail. That really wasn't the debate. The debate was about how far we go away from such principles.[634]

11.10 TERRORISM

NSW bail laws apply to Commonwealth offences tried in NSW courts. In 2002 the Commonwealth and States agreed to refer to the Commonwealth responsibility for

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[633] Ibid.
[634] Debus, above n 549, 12.

dealing legislatively with terrorist matters. The Commonwealth then introduced a wide ranging set of anti-terrorist laws. Attorney-General Debus introduced the Bail Amendment (Terrorism) Bill 2004 (NSW). He explained that '[o]n 13 May the Government announced a whole range of counter-terrorist measures, including the amendment of the Bail Act, to create a presumption against bail for persons charged with Commonwealth terrorist offences.'[635] The addition was achieved by amending s 8A dealing with a presumption against bail for serious drug offences including Commonwealth offences to also include terrorist offences.

The first and second reading debates on the Bill took place on 3 June 2004. Shadow Attorney-General Andrew Tink made reference to Bilal Khazal, who had been accused of collecting and making documents likely to facilitate terrorist acts. Khazal had been granted bail the day before. Tink stated:

> As I said earlier, the Leader of the House suspended standing and sessional orders last night just after 8 o'clock to allow a number of bills to receive urgent consideration. This bill was not one of them, even though by that stage the circumstances of the Bilal Khazal case had been reported in just about every electronic media outlet for a couple of hours.[636]

The Attorney-General said in Reply 'that we must continue to fight terrorism with the tools of democracy. If we were to abandon those principles in the fight against terrorism, the terrorists would win.'[637]

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[635] NSW, *Parliamentary Debates*, Legislative Assembly, 3 June 2004, 9599 (Bob Debus).
[636] NSW, *Parliamentary Debates*, Legislative Assembly, 3 June 2004, 9599 (Andrew Tink).
[637] Debus, above n 635, 9602.

Media attention to terrorist-related issues had been intense in the period immediately before the legislation. On 2 June 2004 the *Daily Telegraph* under the heading 'What a joke' stated: '[t]errorist Jack Roche will be free in less than three years – despite confessing to plotting a deadly bombing campaign for Osama bin Laden's al Qaeda.'[638] On 3 June 2004 the page 1 headline in the *Daily Telegraph* stated: 'Courting danger' and the sub-heading 'Fury as another terror suspect released on bail'. The associated article stated:

> Another court has let a terror suspect walk free – a former Qantas baggage handler bailed on charges of making documents likely to facilitate terrorism. … Premier Bob Carr was outraged at the latest in a series of court rulings on terrorism. 'I can't understand it, it makes no sense,' he said. … Federal Attorney-General Philip Ruddock yesterday told the *Daily Telegraph* he would discuss with Cabinet plans to have an automatic presumption against bail for anyone facing serious terrorism charges.'[639]

The *Sydney Morning Herald* was also critical of the bail decision, providing a page 1 headline of 'Fury at terror suspect's bail' and a sub-heading of 'Freed man linked to Lebanon absconder'. The article stated that: '[a] former Qantas baggage handler at Sydney Airport charged with a terrorist offence has been granted bail even though police allege that he helped another suspect terrorist to jump bail and flee to Lebanon.'[640]

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[638] Vivienne Oakley, 'What a joke', *Daily Telegraph* (Sydney), 2 June 2004, 1.
[639] Charles Miranda Nicolle Fenech, 'Courting danger', *Daily Telegraph* (Sydney), 3 June 2004, 1.
[640] Cynthia Bonham Ellen Connolly, Les Kennedy, 'Fury at terror suspect's bail', *Sydney Morning Herald* (Sydney), 3 June 2004, 1.

I asked Bob Debus whether it was the local issues set out above or the general global concerns about terrorism that led to the changes on bail. He responded: '[b]oth. And I have to say to you frankly, I don't think I argued much, there being no point in those circumstances'.[641]

11.11 THE RESPONSE TO RIOT

On 15 December 2005 the NSW Parliament was recalled by the Premier to deal with the Law Enforcement Legislation Amendment (Public Safety) Bill 2005 (NSW). Premier Morris Iemma opened the debate by stating:

> I thank all honourable members for gathering today to show our united resolve in the face of thuggery, intimidation and violence. I have recalled the Parliament for one simple reason: new powers to uphold public order. We are here to make sure that the police get the powers they need. Louts and criminals have effectively declared war on our society and we are not going to let them undermine our way of life. They will face tough new powers which I will now detail to the House.[642]

The dramatic recalling of Parliament and the tone of the Premier's statement reflect the reaction to events at Cronulla the previous weekend and which had continued during the following week. Racial issues became mixed with the behaviour of large numbers of youths involved in what was described as riotous behaviour. Frank Sartor's electorate covered the relevant area and he observed in relation to the specifics that '[it] is at the crossroads of Bay Street and Grand Parade, but more importantly, it is at the crossroads

[641] Debus, above n 549, 12.
[642] NSW, *Parliamentary Debates*, Legislative Assembly, 15 December, 2005, 20621 (Morris Iemma).

of many cultures – Anglo-Australian, Greek, Macedonian, Chinese, Lebanese and Italian. It deserves better than to be the stomping ground of stupid hooligans.'[643] The Leader of the Opposition supported the Bill being rushed through the Parliament in a day but did not think it was strong enough.

Prominent media coverage accompanied the events at Cronulla and subsequent developments. The *Sydney Morning Herald* page 1 headline on 12 December 2005 leading in to articles was 'Race riots explode'. Sub-headings included: 'Violence hits six suburbs', 'Mob bashes scapegoats' and 'Thousands chant slurs'.[644] Articles in the *Herald* continued well into the following week. On 15 December, that publication announced 'Asian leaders quiz PM over riots'.[645] The *Daily Telegraph* also ran front page stories on the matter. On 16 December 2005 there was a page 1 headline 'Drawing a line in the sand'. The associated article stated: 'Cronulla will be barricaded and filled with 1500 police this weekend in the biggest anti-crime operation since the Olympics in a bid to prevent a repeat of last Sunday's race riots.'[646]

I asked the Attorney-General of the period, Bob Debus, whether this was one of those occasions when politicians must be seen to act. He replied:

> Well, if politicians must be seen to act this certainly would have been one of them. When you think about the accumulation of events in Sydney, in Australia, in the world somehow conspiring to encourage hostile prejudice against Islamic youth by substantial

[643] NSW, *Parliamentary Debates*, Legislative Assembly, 15 December 2005, 20628 (Frank Sartor).
[644] 'Race riots explode', *Sydney Morning Herald* (Sydney), 12 December 2005, 1.
[645] 'Asian leaders quiz PM over riots', *Sydney Morning Herald* (Sydney), 15 December 2005, 1.
[646] Rhett Watson, 'Drawing a line of steel in the sand', *Daily Telegraph* (Sydney), 16 December 2005, 1.

> sections of our community, you could've hardly thought of a better way to finish it off than having the 2005 Cronulla Riots. … I guess I knew that this was one in which the Government simply had to do, it was appropriate that he should recall the Parliament. And it was appropriate that we should do something causing as little harm as possible to the general principles of the law.[647]

Not surprisingly the resulting Bill gave the police sweeping new powers. The *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) was amended to include a range of provisions in a new Part, 6A. These included the power, if the Commissioner, Deputy Commissioner or Assistant Commissioner believed a large scale public disorder was occurring or threatened, to order the lockdown of the area and then without warrant search persons and vehicles, demand identity, and seize vehicles and phones. The power to close licensed premises was also provided for in such circumstances. The lockdown could last for up to 48 hours or longer if extended by the Supreme Court. The right to demand proof of identity of all those in vehicles where an indictable offence was suspected was also provided for. The *Crimes Act 1900* (NSW) was also amended to provide for more serious sentencing in cases where assaults and assaults causing actual bodily harm occurred during such public disorder. The penalty for the offence of riot was increased from 10 to 15 years and for the offence of affray from 5 to 10 years.

It was unlikely that bail would be exempted from the general 'tough on crime' line. It was likely that courts that granted bail in relation to charges arising out of the Cronulla

[647] Debus, above n 549, 13.

Riot would be criticised. The Bill provided for a presumption against bail for the crime of riot or other offences punishable by imprisonment for two years or more where alleged to have taken place in a large-scale public disorder or during police efforts to control the disorder.[648] The Premier stated:

> The final measure I want to address is changes to the *Bail Act 1978*. Twenty-three rioters charged over Sunday's riots have been granted bail, one of whom had been granted bail days earlier for assault and destroying property. It is unacceptable that such thugs and morons are automatically granted bail, just to be given the chance to wreak further havoc. This bill will help shut the revolving door by creating a presumption against bail for riot and for any other offence that is punishable by imprisonment for two years or more, where that offence is committed in the course of the person participating in a large-scale public disorder, or in connection with the exercise of police powers to prevent or control such a disorder or the threat of such a disorder.[649]

I asked Bob Debus whether this was an occasion where, whatever his own view, bail was not going to be ignored. He replied:

> That's right because by then the question of bail in public discourse, and despite any efforts of mine, was treated as a kind of touchstone of weakness, treated in the tabloid media as a touchstone of weakness in the criminal justice system. That was the problem that I faced and that of course the judiciary from a somewhat different perspective faced at the time. I don't think there is much, it can't be varnished that particular truth.[650]

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[648] *Law Enforcement Legislation Amendment (Public Safety) Act 2005* (NSW) sch 3, cl 1.
[649] Iemma, above note 642, 20622.
[650] Debus, above n 549, 14.

11.12 GANG RELATED CAR AND VESSEL THEFT

Parliamentary Secretary Alison Megarrity, on behalf of Attorney-General Bob Debus, introduced the Crimes Amendment (Organised Car and Boat Theft) Bill 2006 (NSW). The Bill aimed to update what the Government saw as outdated sections of the *Crimes Act 1900* in relation to the theft of and use of parts from cars and vessels. Rebirthing activities were said to cost NSW $100 million annually and to be run by organised car thief syndicates. The Parliamentary Secretary noted that '[t]he major innovation of the bill is to create an offence of knowingly facilitating an organized car or boat rebirthing activity, which carries a maximum penalty of 14 years imprisonment.'[651] Other related offences were also provided for. The *Bail Act* was amended to reflect the changes to those involved where they were repeat offenders. This was done by widening the definition of serious property offence for the purposes of the presumption against bail to include vehicles and vessels.[652]

11.13 LIFETIME PAROLE THE PRESUMPTION IN FAVOUR OF BAIL

So called 'truth in sentencing' legislation introduced in 1989 resulted in a life sentence literally meaning what it said. However, in 2006 there were people in the system who had received life sentences before 1989. The Attorney-General explained that the Bail Amendment (Lifetime Parole) Bill, 2006, (NSW) was aimed at that small group of people, namely prisoners on parole who had received a lifetime sentence. As Bob Debus noted:

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[651] NSW, *Parliamentary Debates*, Legislative Assembly, 28 March 2006, 21579 (Alison Megarrity).
[652] Crimes Amendment (Organised Car and Boat Theft) Bill, 2006 (NSW) sch 2, cl 2.1.

> To be on parole for life a prisoner must have been sentenced to imprisonment for life before the introduction of the so-called truth in sentencing reforms, which commenced in 1989, and have had their life sentence redetermined under the transitional provisions.[653]

The amendment inserted s 8E of the *Bail Act* which provides for a presumption against bail where a person covered by the Bill was charged with a crime that carried a gaol sentence. Section 9D, concerning bail in exceptional circumstances for repeat offenders involved in serious personal violence offences, was amended to ensure that s 9D continued to apply where relevant. Section 32 relating to matters to be taken into account when considering bail, was also amended to refer to s 8E.[654]

11.14 DOMESTIC VIOLENCE 2006

In 2002 the NSW Law Reform Commission (NSWLRC) was provided with a reference by Attorney-General Bob Debus to review Part 15A of the *Crimes Act*. That Part dealt with domestic violence and apprehended violence orders. The Report was produced in 2003.[655] As was noted by Neville Newell, Parliamentary Secretary, in his Second Reading speech:

> The Law Reform Commission report contains 56 recommendations for fine- tuning the operation of AVOs and further enhancing the protection they provide. The report was

[653] NSW, Parliamentary Debates, Legislative Assembly, 19 September 2006, 1856 (Bob Debus).
[654] Bail Amendment (Lifetime Parole) Bill 2006 (NSW). Sch , cl 1, cl 3, cl 4
[655] NSW Law Reform Commission, *Apprehended Violence Orders,* Report 103 (2003).

> the culmination of over 12 months research and extensive consultation. Many of these recommendations have been adopted by the Government in the bill.'[656]

It seems difficult to declare these changes to be part of a law and order initiative driven by a punitive turn. They seem to be part of the ongoing changes to the law as it relates to the increased protection of women and children. Bob Debus confirmed this when asked if there were any reasons for the legislation other than the LRC Report. He responded, 'No, that was mercifully free of the kind of community and tabloid agitation and hysteria that had affected many elements of the crimes legislation'.[657]

Section 12 of the LRC Report dealt with 'stalking and intimidation.' It considered the effectiveness of the existing provisions and submissions on those provisions. It recommended:

> RECOMMENDATION 55
>
> The definition of 'intimidation' in s 562A should be amended to mean:
>
> - Any conduct amounting to harassment or molestation, or
> - Any conduct that causes any other person to fear for his or her safety, including damage to property.
>
> Intimidation may include approaches conducted through technologically-assisted means, such as telephoning, emailing or mobile telephone text messaging.
>
> RECOMMENDATION 56
>
> The definition of 'stalking' in s 562A should be amended as follows:

[656] NSW, *Parliamentary Debates*, Legislative Assembly, 6 September 2006, 1592 (Neville Newell).
[657] Debus, above n 549, 14.

> Stalking includes the following of a person about or the watching or frequenting of the vicinity of or an approach to a person's place of residence, business or work.[658]

Parliamentary Secretary Neville Newell introduced a number of proposed changes on behalf of the Government. Newell noted in relation to stalking, '[i]mportantly, the definition of stalking has been amended to make it inclusive rather than exclusive.'[659]

There was no reference to bail in Section 12 of the Report but an amendment to the *Bail Act* was introduced as part of the *Crimes Amendment (Apprehended Violence) Act 2006* (NSW).[660] Bail was not referred to in the Parliamentary Debate. The amendment to the Bail Act was to include the new offence under s 545AB of the *Crimes Act* in the exceptions from the presumption in favour of bail in s 9 of the *Bail Act*. It provided for a penalty of a maximum of five years in gaol or a fine of 50 penalty units for stalking or intimidation with intent to cause fear of physical or mental harm. The wording was similar to s 562AB which was already in the exceptions to the presumption in favour of bail. However, the amendment contained additional sub sections dealing with a court having regard to a pattern of violence, especially violence constituting a domestic violence offence, in the person's behaviour. The broader definitions of intimidation and stalking applied to the section. Given the similarity to s 562AB and the existing range of exceptions to the presumption in favour of bail for domestic violence related crime, it would appear the amendment to the *Bail Act* was made for consistency. Bob Debus

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[658] NSW Law Reform Commission, above, n 655, 12.41.
[659] Newell, above n 656, 1592.
[660] *Crimes Amendment (Apprehended Violence) Act* 2006 (NSW) sch 3.

confirmed this when he stated, 'yes, and I guess because we thought that a court as a matter of fact was likely in any event to be very careful about granting bail in such circumstances.'[661]

11.15 EXTENDED SUPERVISION AND CONTINUING DETENTION OF SERIOUS SEX OFFENDERS

In late 2005 issues concerning sentences for serious sex offenders had become controversial. The controversy also applied to re-offending by such offenders. The background was discussed on Stateline NSW on the ABC TV on 12 May 2006. The reporter, Adrian Raschella, referred to a range of changes to the criminal law in NSW. Raschella made the general observation that '[h]eadline-grabbing events have been followed by significant changes to the criminal justice system, such as a quick change to the law after the Cronulla riots so alleged rioters now face a presumption against bail.'[662] During the discussion Raschella raised the issue of continuing detention and serious sexual offenders. He stated:

> This week the Supreme Court was due to test a new law passed just weeks ago, referred to as 'continuing detention'. It lets the government ask a judge to keep a serial sex offender in jail indefinitely for fear he may offend again, even after he's served his sentence. It was introduced to keep William Gallagher in gaol. Now his visa has been revoked and he's due to be deported instead. Public defender Anthony Cook says the continuing detention law is one of the most offensive changes to date.[663]

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[661] Debus, above n 549, 15.
[662] ABC Television, 'Reforms Ruffle Lawyers', *Stateline NSW*, 12 May 2006 (Adrian Raschella).
[663] Ibid.

After some other views were stated, Bob Debus who was one of the discussants, observed:

> We are one of the later states to adopt this particular sort of legislation which applies in cases of enormous difficulty, where you have a serial and serious paedophile who will not subject themselves to any treatment and who, the evidence must show, is going to go out the gates of the prison and commit those offences all over again.[664]

On 29 March 2006, Carl Scully, Minister for Police, speaking on behalf of Attorney-General Bob Debus, delivered the Second Reading Speech in relation to the Crimes (Serious Sex Offenders) Bill 2006. He indicated the Government's commitment to protecting the community from sex offenders. Scully also pointed out that:

> [w]hile legislation of this kind is a first for New South Wales, a number of other jurisdictions have enacted laws directed at serious high-risk sex offenders that provide for a variety of options including mandated treatment, community registration, and protracted supervision beyond the duration of a sentence.[665]

In relation to such initiatives Scully made reference to legislation in New Zealand, Victoria, Western Australia and Queensland.[666]

The Opposition, while agreeing with the legislation, raised the issue of William Gallagher. Chris Hartcher stated: 'Finally, 12 months before the election and when

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[664] Ibid.
[665] NSW, *Parliamentary Debates,* Legislative Assembly,29 March 2006, 21730 (Carl Scully).
[666] Ibid.

William Gallagher is about to be released, the Labor Party has realized the seriousness of the situation and has introduced legislation.'[667]

In response to my question as to the relevance of William Gallagher as a factor involved in the introduction of the legislation, Bob Debus stated that he did think:

> it was because of Gallagher, and no doubt a few more like him who were due for parole. As stated in the House, other jurisdictions had had this type of jurisdiction for some time and after we did something similar for alleged terrorists, it was really only a matter of time.[668]

The Bill provided for 'extended supervision orders' for sex offenders who had been imprisoned. It also provided for 'continuing detention orders' in relation to sex offenders. Both orders could only be applied for by the Attorney-General. The application for either order would be made to the Supreme Court in the last six months of a sentence for the extension of that sentence for up to five years. Section 28 made clear that the *Bail Act* would not apply to such proceedings. Bob Debus explained that apart from two offences, '[t]he remainder of the Bill was not about offences but civil proceedings so the *Bail Act* didn't apply.'[669] The two offences where the *Bail Act* did apply were for breach of an 'extended supervision order' (s12) or proceedings for not providing information concerning the behaviour of a sexual offender (s 25(2).

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[667] NSW, Parliamentary Debates, Legislative Assembly, 29 March 2006, 21735 (Chris Hartcher)
[668] Email from Bob Debus to Max Taylor, 3 December 2012.
[669] Ibid.

William Gallagher was to be released from gaol on 16 April 2006. The new legislation received assent on 3 April 2006. An application to the Supreme Court for an interim continuing detention order or alternatively an extended supervision order was made on 7 April 2006. The interim continuing detention order was granted on 13 April 2006.[670]

11.16 CONCLUSION

It is clear from all the sources, including the then Attorney-General, Bob Debus that events between 2001 and 2007 made it very difficult to maintain ideas associated with liberty and the presumption of innocence when changes to bail law were being considered.

In 2001 at the international level the events of 9/11 involving an attack by terrorists killing thousands of people in New York created fear of terrorists, and in particular Muslim terrorists, which in the West has never fully dissipated. Security became the dominant theme in many parts of the Western world. The arrival in Australia in August 2001 of the ship the Tampa with asylum seekers on board became central to a Federal Election in Australia and also contributed to a feeling that security was the dominant issue.

In Sydney sexual assaults of non-Muslim women by men who were Lebanese Muslims added racism to the fear of religious extremists in relation to issues concerning punishment and security. In addition, the Cronulla Riot pitched non-Muslim and Muslim

[670] *Attorney-General for the State of New South Wales v Gallagher* [2006] NSWSC, 13 April 2006, 340.

youth into conflict and the authorities came under pressure to provide even more security.

The issue of Vietnamese asylum seekers in Cabramatta, while it did not involve Muslims, did involve Asians and widespread drug dealing. There was a sense that the authorities had lost control. Once again re-asserting authority and security was seen as the important issue.

The media was relentless in its demand that the Government crackdown on crime and criminals in relation to many of these issues. Headlines over Cabramatta, sexual assaults, terrorists and the Cronulla Riots represented part of a much larger picture of media attention to crime and security.

It is not surprising that in this climate the Premier, Bob Carr, should have made two statements in the Parliament. One dealt with drugs in Cabramatta and the other with gang activity. Both made clear that a punitive approach would be taken although in the case of drugs there was also recognition of the need for support initiatives for drug users.

The general features considered above took specific shape in legislation and bail was often only one issue amongst many. The Attorney-General often found himself holding the line in support of principle as best he could.

In relation to Cabramatta the *Bail Act* was changed in relation to guns and pistols as part of a raft of measures to break into fortified premises. Attorney-General Bob Debus was not going to get Cabinet to move away from that position and the presumption on bail was moved to the neutral position but it was not a presumption against bail. Consideration of possession or use of firearms was to be added to the considerations in s 32 related to protecting the community. It is reasonable to suggest that a court would do that with or without additional legislation.

The massive public outcry over sexual assaults by gangs led to tougher legislation for such activity. Changes to the *Bail Act* did not form part of the Parliamentary Debate. Nevertheless, many sexual crimes already had a neutral presumption in relation to bail and it was never going to be the case that the most serious of all such crimes was going to retain a presumption in favour of bail in such circumstances. It was not a presumption against bail. The later law on kidnapping also fits into this picture as once again the presumption was made neutral. Bob Debus's observation that, '[h]aving bail presumptions that were consistent with other crimes of a particular abhorrence and that were in the community's mind at the time' summed up the situation well.[671]

Conditions to be attached to bail were also subject to pressure for change arising from anti-gang legislation and specific incidents. A death related to a vehicle incident resulted in a person concerned fleeing overseas. The *Bail Act* was changed to provide for the compulsory taking of passports in the case of death as a bail condition. Bob Debus

[671] Debus, above n 549, 5.

explained that non-association conditions were added at the request of the Premier's Department as part of the anti-gang laws.

In the general climate described earlier in this conclusion, it was always likely that there would be a demand for repeat offenders to be faced with tougher measures. The 2001 BOCSAR Report on bail in NSW provided statistics that were favourable to the view that fewer people were getting bail. However, it also explained the significant amount of crime related to repeat offenders. The media concentrated on this fact in a period 12 months before a general election. Once again Attorney-General Debus was able to limit but not reverse the trend. A neutral presumption concerning bail was introduced where the person was on bail, on parole, on a good behaviour bond or serving a sentence but not in gaol. It also applied to failure to appear charges and if a person charged with an indictable offence had previously been convicted of an indictable offence. This is a far more restricted group than that wanted by some members of the Cabinet and by the Opposition.

Holding to the principles concerning bail and repeat offenders became more difficult in 2003 when in the face of public and media criticism about the amount of illegal guns in the community and gun related crime the Government toughened laws about such activities. Presumptions against bail were introduced for repeat property offenders and serious firearm and weapon offences. Debus explained that other members of a Government working party wanted these provisions to cover a wide category of persons. He was able to restrict the repeat property category to individuals who had

one or more convictions in the past two years, at least one of which was robbery or burglary related, and who had two or more outstanding charges which were robbery or burglary related.

Not all amendments were punitive. The *Bail Act* was amended in 2002 to ensure greater concentration on issues arising from Aboriginal and Torres Strait Islander status, youth, and intellectual impairment. A further amendment in that year widened the capacity for intervention programs.

Throughout the thesis domestic violence has been a topic that does not fit in easily with claims of a more punitive turn. However, in the period 2001-2007 domestic violence did provide the basis for one change that was punitive. The punitive change overlapped the more punitive approach to repeat offenders. The Government was in internal debate about these two issues when the murder of a woman in Newcastle by her estranged husband who was on bail brought things to a head. The media not only gave this matter wide coverage but also referred back to earlier horrific murders. The introduction in the *Bail Amendment Act 2003* of bail only in exceptional circumstances for the crime of murder and also for repeat offenders with a record for serious personal violence offences was a serious change to the principles underpinning the concept of bail. Bob Debus referred to these principles in his speech in reply. In his interview he explained how difficult it was to front the media and defend such principles when the public call was for extreme punitive measures.

The 2006 changes to bail arising from domestic violence issues do not fit easily into the punitive turn approach. General reforms arising from the 2003 NSW LRC Report on Apprehended Violence Orders were implemented as part of the now decades long program. Amendments in the *Crimes Amendment (Apprehended Violence) Act 2006* concerning stalking and intimidation were part of the recommendations and existing laws on these matters attracted a neutral presumption. That approach was continued for the purposes of consistency.

In relation to the Cronulla Riot in 2005 it was inevitable that Parliament would be recalled and that media and public expectation would remain massive. Once again bail was only one part of a range of new security based laws. In such a climate it was not surprising that a presumption against bail was introduced for the crime of riot. Bob Debus pointed out that: 'by then the question of bail in public discourse, and despite any efforts of mine, was treated as a kind of touchstone of weakness, treated in the tabloid media as a touchstone of weakness in the criminal justice system'.[672]

The complexity in politics of dealing with serious sex offenders resulted in extended supervision orders and continuing detention orders. I referred to the pressure on Attorney-General, Bob Debus to deal with a specific case. In the Parliamentary debate Carl Scully pointed out that legislation concerning such persons existed in Queensland, Western Australia and Victoria. On the other hand such extensions of sentence raise issues concerning a breach of human rights as set out in the International Covenant on

[672] Ibid 14.

Civil and Political Rights: Article 9(1) concerning the right to liberty; and Article 14(7) concerning the right not to be punished again for an offence. Bernadette McSherry has noted in relation to two Australian cases that the Human Rights Committee of the United Nations found that continued detention: amounted to a fresh term of imprisonment in the absence of a conviction; provided a heavier penalty than normally applicable; as a civil proceeding did not meet the due process guarantees under Article 14 of the ICCPR for a fair trial in which a penal sentence is imposed; and required the Courts to make a finding of fact on the suspected future behaviour of a past offender.[673]

[673] Bernadette McSherry, 'Preventive Detention of Sex Offenders: Recent trends' (Paper presented at the Professional Legal Aid Education Seminar, Victoria Legal Aid, Lionel Murphy Centre,Melbourne, 14 July 2010), 6.

Chapter 12

THE FINAL YEARS OF THE LABOR GOVERNMENT: 2007-2011

12.1 INTRODUCTION

This chapter deals with measures following the State Election of 2007. The limited role of law and order as an issue in the campaign is considered. In the period after 2007 there were a small number of changes to the *Bail Act*, introduced by the Labor Government including some concerning domestic violence. The laws introduced in some cases, such as legislation limiting second and later bail applications, had wide ranging effects. In other cases, such as the laws aimed at bikie gangs, the number of individuals affected was smaller but the limitation of civil liberties was great and the High Court became involved. The tough approach was extended to weapon offences and this will be considered. The most important matter concerning bail in the period was the Bail Bill introduced in 2010. That matter is considered in chapter 13 of the thesis.

12.2 THE 2007 NSW STATE ELECTION

The State election of 24 March 2007 saw the Labor Party returned to power. It was not an election campaign based on law and order or other decisive issues. As has been noted:

> Labor's NSW election win, the party's twenty first consecutive victory at State and Territory level in Australia since 1998, was an underwhelming affair to many. On election day *The Australian* declared 'Both Sides Have Failed in NSW'. Separate polls in

> the two main dailies, the *Sydney Morning Herald* and the *Daily Telegraph*, revealed voters were unimpressed with either option.[674]

David Clune, Manager Research Services, NSW Parliamentary Library, concluded that: '[t]he 2007 election was unusual in that a 12 year-old Government that was widely perceived as not adequately delivering the basic services that State politics revolves around was re-elected relatively unscathed.'[675] Clune explained that the Coalition was '[i]nternally divided and with a Leader voters did not respond to, the Liberal Party also ran a poor campaign.'[676] Labor ran a good campaign and [Opposition Leader Morris] 'Iemma built up a likeable and trustworthy image. He was able to persuade the electorate that although he hadn't yet had time to solve current problems he could be trusted to do so in the future.'[677]

While law and order was not a dominant issue in the election, law and order issues were raised and discussed. The Opposition proposed dropping the minimum age for criminal responsibility and introducing 'anti-social behaviour orders'. Rather than gaining support for Opposition Leader Debnam, 'these policies were widely seen as a desperate and reckless attempt by Debnam to generate publicity.'[678] The Government said it would introduce 'better behaviour orders'.[679]

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[674] Benjamin Spies-Butcher, 'The NSW Election of 24 March 2007: Explaining the Re-Election of an unpopular Government' (4 December 2007) 42(4) *Australina Journal of Political Science* , 693.
[675] David Clune, ''Morris' Minor Miracle': The March 2007 NSW Election' (2007) 22(2), *Australasian Parliamentary Review* 195, 208.
[676] Ibid.
[677] Ibid 209.
[678] Ibid 204.
[679] Andrew Clennell, 'Kid's in Libs sights, again', *Sydney Morning Herald* (Sydney), 5 March 2007.

According to an article in the *Sydney Morning Herald* concerning the policy launch by the Labor Party on 18 February 2007, Premier Morris Iemma explained that:

> he would introduce a domestic violence charge that would 'name and shame' all offenders. Traditionally such offences carry an assault charge. He promised to create a, 'family and domestic violence unit' in the police force to which 40 officers would be assigned. 'Nothing dismays me more than domestic violence. It's a blot on our society,' Mr Iemma said.[680]

The commitment to the importance of dealing with domestic violence was reiterated in the debate between the Premier and the Leader of the Opposition on ABC TV 'Stateline'. The Premier stated, 'domestic violence is a big issue. It is a disgrace, and that's why I've made it one of the priorities of my government.'[681]

On March 9 the *Daily Telegraph* noted that '[t]he new laws, part of an election announcement, include changing Apprehended Violence Orders to better protect children and more powers for police to search homes and seize threatening weapons.'[682]

On 26 February the *Daily Telegraph* headed an article 'Shotgun wielding woman set free'. The article explained that:

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[680] Andrew Clenell, Anne Davies and Daniel Lewis, 'Election launch 18 February', *Sydney Morning Herald* (Sydney), 19 February 2007, 1.
[681] ABC, 'Iemma v Debnam', *Stateline,* 16 February 2007 (Morris Iemma).
[682] Clare Masters, 'Victims inspire law changes', *Daily Telegraph* (Sydney), 9 March 2007, 10.

> A loophole in the State's supposedly tough gun laws has allowed a woman, 20, charged with possessing two sawn-off shotguns to walk free on bail. In hearing Byrne's bail application, Registrar David Piper said he found it 'quite puzzling a presumption against bail did not apply'.[683]

The article went on to explain that a number of firearm offences do have a presumption against bail but this does not include an offence concerning possession of a shortened firearm.

The issue of such weapons was considered in the State election campaign. In his Second Reading Speech on the Bail Amendment Bill 2007, Attorney-General John Hatzistergos referred back to the election when he stated:

> I now turn to the detail of the bill. The bill makes amendments to Bail Act 1978 designed to improve the administration of the bail system in New South Wales. It implements the Government's commitment at the last election. Schedule 1 item [1] adds additional firearms offences to the list of those to which a presumption against bail applies.[684]

The presumption against bail was extended to two offences one of which was the offence of shortening a firearm. Greg Smith for the Opposition agreed that the change was raised in the State election when he stated: '[t]he changes are in line with the Government's commitments at the State election to reform bail with respect to certain firearm offences.'[685]

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[683] Lillian Saleh, 'Shotgun wielding woman set free', *Daily Telegraph* (Sydney), 26 February 2007, 11.
[684] NSW, Parliamentary Debates, Legislative Council, 17 October 2007, 2669 (John Hatzistergos)
[685] NSW, *Parliamentary Debates*, Legislative Assembly, 7 November 2007, 3646 (Greg Smith).

That law and order was an issue but not in the front rank on this occasion can be seen in the *Sydney Morning Herald* Editorial of 20 March which stated:

> The law and order auction has been proceeding steadily through the state election campaign, though it has not perhaps reached the intensity which might have been expected if the race had been close. That is one of the good things to emerge from this lackluster contest. But even so, there are developments to regret.[686]

The Editorial went on to discuss promises by both sides, including those already mentioned as well as pledges to increase police numbers.

12.3. FURTHER REFORMS IN RELATION TO DOMESTIC VIOLENCE

Further reform in 2007 concerning domestic violence was not part of a punitive turn. The Crimes (Domestic and Personal Violence) Bill 2007 was introduced on 16 November 2007. As explained by Parliamentary Secretary, Tanya Gadiel in introducing the Bill, the aim was to place apprehended violence orders and associated personal violence issues in a stand-alone Act.[687] She pointed out that many other States and Territories had such legislation. Gadiel referred to a range of studies showing the wide extent of domestic violence. Amongst those was the observation that:

> The Australian Bureau of Statistics estimates that approximately one in three or 33 per cent of women have experienced sexual violence at some stage in their lives since the age of 15. The Women's Safety Survey found that 24 per cent of women who had

[686] Editorial, 'Auction without dollars or sense', *Sydney Morning Herald* (Sydney), 20 March 2007.
[687] *Crimes (Domestic and Personal Violence) Act 2007* (NSW)

> experienced violence at the hands of their current partner in the last 12 months were currently living in fear.[688]

These disturbing figures reflected themes that have arisen throughout this thesis concerning domestic and family violence. In October 2005 BOCSAR noted, '[s]omewhere between six and nine per cent of Australian women aged 18 and over are physically assaulted each year. In the majority of cases the assailant is a man they know.'[689]

In the new Act offences found proven and which involved a defendant committing the offence 'against another person with whom the person who commits the offence has or had a domestic relationship', were to be recorded on the criminal record as a domestic violence offence.[690] When domestic violence orders were made for adults then they were also to be made for any child with whom the victim had a domestic relationship.

Bail was not a feature of Gadiel's speech, nor the speech by Greg Smith for the Opposition. Nevertheless the *Bail Act* was amended. The new offence under s 13 of 'Stalking or intimidation with intent to cause fear of physical or mental harm' was included amongst those for which there was no presumption in favour of bail. That is consistent with existing legislation in relation to s 545AB of the *Crimes Act*. (see 11.14 above).

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[688] NSW, *Parliamentary Debates*, Legislative Assembly, 16 November 2007, 4327 (Tanya Gadiel)
[689] Julie People, 'Trends and patterns in domestic violence - assaults ' (October 2005) 89 *Crime and Justice Bulletin NSW Bureau of Crime Statistics and Research* , 11.
[690] *Crimes (Domestic and Personal Violence) Act*, above n 687, s 11.

12.4 EXTENDED SUPERVISION ORDERS, CONTINUING DETENTION ORDERS AND BAIL ONLY IN EXCEPTIONAL CIRCUMSTANCES

On 28 November 2007 the Law Enforcement and Other Legislation Amendment Bill 2007, was introduced by the Attorney-General, John Hatzistergos. The Bill dealt with amendments arising out of the Ombudsman's review of the Cronulla riot and other matters.

The Bill also dealt with amendments to clarify the operation of the *Crimes (Serious Sex Offenders) Act 2006*. The amendments to the *Crimes (Serious Sex Offenders) Act 2006* were stated to be 'part of the Government's ongoing commitment to ensure the protection of the community from serious recidivist sex offenders.'[691] The major changes had taken place in 2006 and are discussed at 11.15 above. The amendments in 2007 included provisions concerning the primary purpose of the Act. Originally the object of the orders had been to protect the community and rehabilitate serious sex offenders. The amendment made the protection of the community the 'primary' object of the Act and reduced rehabilitation to 'another' object. However, that still left both objects in the Act. A number of administrative amendments were also included concerning such matters as who may bring applications and the imposing of a residential address by the Commissioner of Corrective Services. The Bill also provided for application to the Supreme Court for a continuing detention order where a person had been found guilty of failing to comply with an extended supervision order. It also

[691] NSW, *Parliamentary Debates*, Legislative Council, 28 November 2007, 4506 (John Hatzistergos)

provided for revocation of parole where a person had been made subject of a continuing detention order.

As explained in 11.15 above, bail did not apply to applications for 'continuing detention orders' and 'extended supervision orders under the *Crimes (Serious Sex Offenders) Act 2006*. There were two offences where the *Bail Act* did apply. The Law Enforcement and Other Legislation Amendment Bill 2007 introduced s 8F which provided for a presumption against bail for a person accused of an offence of breaching a 'supervision order' under s 12 of the *Crimes (Serious Sex Offenders) Act.* It also made s 8F a matter to be considered when contemplating the tests for bail under s 32 of the *Bail Act*. The amendments concerning the presumption against bail, while serious, are an extension of the specific matters that arose in 2006 and resulted in the substantive legislation in that year.

Attorney-General John Hatzistergos noted in a 2008 media release: 'Since the laws were introduced, NSW has successfully applied to the Supreme Court of NSW to keep eight high-risk sex offenders behind bars or put on strict supervision orders if released.'[692] This does not detract from the point made at 11.15 above and in the conclusion to that chapter that the issues concerning serious sex offenders arose out of specific cases in 2006. As such the development of the law is consistent with the approach in each of the previous decades where a specific issue concerning the criminal law arose.

[692] John Hatzistergos, 'Tougher Laws to Guard Against Sex Predators' (Media release 4 June 2008)

The 2007 Bill also added the offence of attempting or assaulting with intent to have sexual intercourse with a child between the ages of 10 and 16 years, to s 9D of the *Bail Act* under which repeat offenders could only be granted bail in exceptional circumstances. As explained at 11.8 above, in 2003 bail only in exceptional circumstances had been applied to repeat offenders in relation to a large group of personal violence offences.

12.5 LIMITING THE RIGHT TO SECOND AND LATER BAIL APPLICATIONS

As mentioned at 12.2 above the *Bail Amendment Act 2007* (NSW) added firearm crimes to the list for which there would be a presumption against bail and updated references to the *Crimes Act* in relation to serious personal violence offences for which there would be neither a presumption for or against bail.

Most of the amendments to the Bail Act discussed in the thesis were introduced before 2007. The *Bail Amendment Act 2007* limited access to second and later bail applications. This proved to be controversial.

The opening two paragraphs of Attorney-General Hatzistergos's Second Reading Speech set out clearly the Government's position on bail:

> The Government is pleased to introduce the Bail Amendment Bill 2007. The bill builds on the Government's extensive reforms over the past years to strengthen our bail laws and ensure the community is properly protected while defendants are awaiting trial.
>
> New South Wales now has the toughest bail laws in Australia. Over the last few years we

> have cracked down on repeat offenders – people who habitually come before our courts time and again. Part of those changes includes removing the presumption in favour of bail for a large number of crimes. We have also introduced presumptions against bail for crimes including drug importation, firearm offences, repeat property offences and riots, and an even more demanding exceptional circumstances test for murder and serious personal violence, including sexual assault.
>
> Those types of offenders now have a much tougher time being granted bail under our rigorous system. These extensive changes have delivered results. There is no doubt that the inmate population, particularly those on remand, has risen considerably as a result of the changes. In fact the number of remand prisoners has increased by 20 per cent in the last three years alone and new jails are being opened to accommodate the increase. The latest figures from the New South Wales reoffending database on bail decisions have shown that from 1995 to 2005 bail refusals in the District Court and Supreme Court have almost doubled with an increase from 25.8 per cent to 46.4 per cent.[693]

I asked former Attorney-General Hatzistergos in an emailed interview question:

> As a presumption about bail does not decide whether the person gets bail (that being decided by the tests for bail such as absconding, protection of the community and the needs of the accused) why did you believe it important for a number of offences that the presumption in favour of bail be replaced by a presumption against bail, a neutral presumption or bail only in exceptional circumstances?

Hatzistergos in his reply stated: 'The appropriate application of presumptions was laid down by the Court of Appeal in *Gerdikian v DPP* [2006] NSWCA 275. The significant

[693] Hatzistergos, above n 691, 2669

changes to changes to presumptions were carried out under my predecessors.'[694] As acknowledged above and at 12.1, John Hatzistergos is correct that most changes to the *Bail Act* had occurred before he became Attorney-General. The case referred to did lay down the appropriate application of presumptions, in particular the presumption against bail.[695] In response to a follow up question: '[d]id the sharply rising remand rate and its financial cost lead you to reconsider whether the tough approach, at least as it related to the presumptions concerning bail, needed to be reviewed?', Hatzistergos replied 'No'.[696]

The Bill provided for an amendment to s 22A of the *Bail Act*. That section had provided for the Supreme Court to refuse to hear bail applications in certain circumstances. (See 8.7 above). The new amendment required a court to 'refuse to entertain an application for bail by a person accused of an offence if an application by the person in relation to that bail has already been made unless:'. The exceptions involved not being legally represented when the application for bail was previously dealt with, or 'the court is satisfied that new facts or circumstances have arisen since the previous application that justify the making of another application.'[697] A court continued to also be able to refuse to hear an application for bail on the basis it was 'frivolous or vexatious.'[698] In addition,

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[694] Email from John Hatzistergos to Max Taylor, 15 February 2013.
[695] Commonwealth DPP v Germakian (2006) 166 A Crim R 201is, I believe, the case being referred to. Its reference, [2006] NSWCA 275, has the same page number as that referred to in the email response. I could not find a case referring to Gerdikian. Germakian, a case in the NSW Court of Appeal in 2006 and before the legislation concerning amendment to s 22A, explained the manner in which the 'presumption against bail' would be interpreted.
[696] Hatzistergos, above n 694.
[697] Bail Amendment Bill 2007 (NSW) cl 3.
[698] Ibid.

the amendment used the tests set out above to restrict the powers of lawyers to make applications. The right to seek a review of a decision was retained.[699]

The reasons for these major changes were explained by Attorney-General Hatzistergos: '[t]he changes will also prevent what is known as "magistrate shopping"–the process of going from magistrate to magistrate, or judge to judge, with the hope of obtaining a different outcome.' No details of the extent of this practice were provided. The Attorney-General also explained that '[t]his will help guard against repetitive bail applications that have no chance of success and can greatly disturb the victim and induce worry and anxiety at the prospect of the defendant's release.'[700] No detail in relation to the extent of this problem was provided. Given the provisos, the Attorney-General was of the view that '[t]he changes strike an appropriate balance between offering greater protection to victims of crime and preserving the rights of an accused to apply to a court for bail.'[701]

The issues of 'magistrate shopping' and 'further anguish upon victims' were the subject of questions sent by email to John Hatzistergos. The questions asked for his reasons for being concerned about these issues and whether any organisations had expressed concern about them. The questions also asked why Hatzistergos thought the issues were of enough concern to require the amendment of the *Bail Act*. He replied by email explaining that background to section 22A could be found in the Second Reading

[699] Ibid.
[700] Hatzistergos, above n 691, 2670.
[701] Ibid.

speech, press releases and media commentary and then stated: 'The amendments were the subject of an election commitment made in the 2007 election campaign, endorsed at that election by the people and subject to consultation.'[702]

Greg Smith in speaking for the Opposition saw the Bill applying the restrictions then applying to applications for bail made to the Supreme Court.[703] The Opposition did not oppose the Bill. In relation to magistrate shopping Greg Smith noted: 'The aim of the bill, generally, is to restrict magistrate or judge shopping–and there is no doubt that that occurs, I have seen it.'[704]

Juveniles are not the subject of this thesis. However, the number of juveniles on remand played a part in the campaign for bail reform that commenced in 2010. It is appropriate to mention that the *Bail Amendment Act* 2007 came into force on 14 December 2007. BOCSAR noted that: '[b]etween 2007 and 2008 the juvenile remand population in New South Wales (NSW) grew by 32 per cent, from an average of 181 per day to 239 per day.'[705] BOCSAR concluded that: [t]here was a significant increase in the average length of stay on remand after December 2007.'[706] BOCSAR concluded that s 22A was the cause of this[707] and was one of the causes of the increased number of juveniles on remand.[708]

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[702] Hatzistergos, above n 694.
[703] Smith, above n 685, 3646.
[704] Ibid 3647.
[705] Sumitra Vignaendra et al, 'Recent trends in legal proceedings for breach of bail, juvenile remand and crime' (May 2009) 128 *Crime and Justice Bulletin NSW Bureau of Crime Statistics and Research* , 4.
[706] Ibid 3.
[707] Ibid.
[708] Ibid 4.

The amendments to s 22A received major criticism. Tracey Booth and Lesley Townsley in their discussion of the punitive turn and the implications of the amendments to s 22A observed:

> It is our contention that s 22A is ill thought out non-rational law making and without sufficient empirical foundation. Despite the rhetoric of crime victims' interests, it can be characterized as a blatant 'get tough on crime' policy that has become all too common in recent years. The provision represents a significant encroachment upon an accused person's entitlement to bail that is not dependent upon the nature of the offence, the circumstances of the accused or even the potential danger to victims and/or the community.[709]

Booth and Townsley added:

> There is no evidence to suggest that there are any, let alone a small number of people, who are 'cashed up' and 'magistrate shopping'. In light of the evidence of the detrimental effects of being held on remand, it is difficult to conclude that these reforms are anything other than punitive law and order policy.[710]

John Hatzistergos was asked in an email: [w]hy did you believe that the change should provide that "the court will not be able to proceed" rather than leaving it to the discretion of the court as to whether it proceeded even if no "new facts or circumstances have arisen since the previous application?"' He replied by email that

[709] Booth and Townsley, above n 58, 43.
[710] Ibid 56.

'[t]he government had a clear policy commitment endorsed at the election. As incoming AG I had the responsibility to action that commitment.'[711]

The controversy over the amendments to s 22A led to further amendment to correct problems that began to emerge. The *Courts and Crimes Legislation Further Amendment Act, 2008* (NSW) provided for the refusal to hear a second or later application for bail to be no longer by 'a court' but to now be by 'the court'. The change was too overcome the view taken by courts of different jurisdictions, (District and Local Courts for example) that the legislation meant a decision in one jurisdiction covered all jurisdictions. The problems that had arisen were explained by Attorney-General Hatzistergos when he stated:

> The ambiguity in section 22A was highlighted in the District Court matter of R v Petrovski [2008] NSWDC 110. This issue has been raised with my department and me by a number of people, and in particular I acknowledge the Hon. John Ajaka for bringing this issue to my attention.[712]

In relation to changed circumstances, the Attorney-General added, '[w]hen circumstances have changed, and for the purpose of this section circumstances are to be construed broadly, then an accused has the ability to apply for bail.'[713]

The controversy over s 22A was not resolved by the 2008 amendment and the call by the Attorney-General in his Second Reading speech for broad interpretation of changed

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[711] Hatzistergos, above n 694.
[712] NSW, *Parliamentary Debates*, Legislative Council, 27 November 2008, 11974 (John Hatzistergos).
[713] Ibid.

circumstances. The *Courts and Crimes Legislation Amendment Act, 2009* (NSW) provided for further changes. The grounds for a further application for bail were changed to include:

(a) The person was not legally represented when the previous application was dealt with and the person now has legal representation, or

(b) Information relevant to the grant of bail is to be presented in the application that was not presented to the court in the previous application, or

(c) Circumstances relevant to the grant of bail have changed since the previous application was made.[714]

In addition, because of these amendments, lawyers had a wider discretion in deciding whether they 'may refuse to make a further application' as compared with the original amendment in 2007 restricting that discretion to non-legal representation and new facts and circumstances since the previous application. It should be noted in this regard that (c) above refers to 'circumstances' rather than 'new facts or circumstances' as found in the amendment of 2007.[715]

Attorney-General Hatzistergos after referring to 'magistrate shopping' and avoiding 'further anguish upon victims' explained the problems when he stated: '[t]hese policy goals remain valid. However, it has become apparent that there has been significant misapplication of the section, which has coincided with an increase in the number of people being remanded in custody.'[716] The Attorney-General went on to explain that

[714] *Courts and Crimes Legislation Amendment Act 2009* (NSW) sch 2 cl 2.1.
[715] Ibid.
[716] NSW, *Parliamentary Debates*, Legislative Council, 29 October 2009, 18984 (John Hatzistergos)

the word 'new' had been removed in relation to 'circumstances'. He then gave examples of what the court might now consider. These included reports, sureties, money for surety purposes, residency, supervision, rehabilitation, delay, change in health or mental state, change in circumstances of dependent or family member, change in strength of case, withdrawal of charges or finalization of the matter. What could not be done was to apply for bail 'simply because he or she happens to be in court that day or because a "sympathetic judge" is sitting, or, in the most despicable of circumstances, because he or she wants to harass the victim.'[717] The NSW Law Society had proposed that young people be exempted from the effects of the amendment to s 22A. This was rejected because it would undermine the policy of protecting victims from the stress of repeat bail applications and the policy of avoiding 'judge shopping'. The Attorney-General expressed the view that issues concerning young people giving inadequate instructions on the first occasion in court would be overcome by the latest amendments.[718]

I asked John Hatzistergos by email: '[d]o you believe the need for the amendment to the Bail Act arose from a "significant misapplication" of the amendment to s 22A in 2007 or was the amendment of s 22A in 2007 too rigid or was it a combination of both?' He replied:

> Practices developed amongst practitioners which took a very conservative approach to the legislation. Furthermore there was a reluctance to test the interpretation on appeal.

[717] Ibid.
[718] Ibid.

> The government consulted widely with stakeholders to ensure the objects of the reforms did not visit unintended consequences.[719]

12.6 FURTHER LEGISLATION CONCERNING GANGS, WEAPONS AND FIREARMS

In 11.3 and 11.4 above the thesis dealt with anti-gang legislation. In 2009 another political issue led to further response by the Government. On 22 March 2009 bikie gangs brawled with fatal consequences at Sydney Airport.

The media response to the airport brawl was immense. The *Daily Telegraph* front page headline on 23 March 2009 stated: 'Bikie war explodes'. The subheadings were 'Man bashed to death at airport', 'Machinegun fired in street ambush', and 'Police get tough on outlaw gangs'. The associated article stated that: '[t]he escalation of violence between rival gang members fighting over control of the drug trade and the city's streets has finally forced the State Government into action.'[720] The *Sydney Morning Herald* also gave the issue front page coverage. The headline was 'Bikie killed in airport brawl'. The subheadings were 'Terrified travelers witness savage beating', and 'Premier pledges crackdown on gangs'. The associated article explained that '[t]he Premier, Nathan Rees, immediately announced that he would meet the Police Commissioner, Andrew Scipione this morning to discuss tough new anti-bikie legislation'.[721]

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[719] Hatzistergos, above n 694.
[720] Karen Lawrence, 'Bikie war explodes', *Daily Telegraph* (Sydney), 23 March 2009, 1.
[721] Les Kennedy Dylan Welch, Ellie Harvey, 'Bikie killed in airport brawl', *Sydney Morning Herald* (Sydney), 23 March 2009, 1.

On 2 April 2009 Premier, Rees introduced the Crimes (Criminal Organisations Control) Bill (NSW). In doing so the Premier stated:

> Ten days ago bikie gangs crossed the line and risked public safety at Sydney Airport. Since then there have been frequent shootings in public streets. Last week the Commissioner of Police briefed the Attorney-General and the Minister for Police on what police needed to fight outlaw motorcycle gangs. Since the terrible incident at Sydney Airport, 12 members of various outlaw motorcycle gangs have been arrested.[722]

The Bill allowed a Supreme Court judge to declare a bikie gang a criminal organization. If so declared then a control order could be sought in relation to one or more of the persons in the gang. As the Premier explained:

> The controlled member will not be able to associate with another controlled member of that gang. If they do, they will risk two years jail for the first offence. Do it again and they will risk five years in jail. To help take these gang members off the street there will be no presumption in favour of bail for this offence.[723]

Other measures in the Bill included the possibility of being stripped of a licence to work in industries that create high risk such as security, racing, liquor and motor trading and of also being stripped of a firearm licence. Schedule 1 of the Bill made clear that in relation to the offence of association between members of declared organisations subject to interim control order or control order the presumption in favour of bail was replaced by no presumption either in favour or against bail.[724]

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[722] NSW, *Parliamentary Debates*, Legislative Assembly, 2 April 2009, 14440 (Nathan Rees).
[723] Ibid
[724] Crimes (Criminal Organisations Control) Bill (NSW) sch 1.

Ultimately in *Wainohu v New South Wales*[725] the matter came before the High Court as the result of the Acting Police Commissioner making an application for a declaration in the Supreme Court. Nicola McGarrity notes:

> In Wainohu, the High Court held that a duty to give reasons was an essential characteristic of a court. Section 13(2) of the CCOCA stated that eligible judges did not have to give reasons for declaring, or refusing to declare, an organisation. The High Court therefore concluded, with Heydon J in dissent, the CCOCA was unconstitutional.[726]

McGarrity also observes that '[t]he bikie control order laws make significant intrusions into fundamental human rights. The declaration of organisations unashamedly targets the freedoms of speech and association.'[727] While the erosion of the presumption in favour of bail was not the matter of direct importance in the High Court decision, it was nevertheless part of the package of eroded liberties in the legislation.

In June 2009 the police put out a Review on the use of the *Weapons Prohibition Act 1999* (NSW).[728] It should be made clear that 'weapons' involves a number of items that are not covered by firearm legislation. As explained in the Review, '[t]he Schedule of Prohibited Weapons lists a broad range of items – from knives and grenades, to flamethrowers and nunchaku.'[729] It does include military style firearms. In relation to military style prohibited weapons the Review pointed out that that s 8B of the *Bail Act* provided a presumption against bail for serious firearm offences such as causing danger

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[725] *Wainohu v The State of NSW* (2011) 243 CLR 181.
[726] NIcola McGarrity, 'From Terrorism To Bikies' (2012) 37(3) *Alternative Law Journal* 166, 167.
[727] Ibid 168.
[728] 'Report of the Review of the Weapons Prohibition Act 1998 and Weapons Prohibition Regulation 1999' (June 2009) *Ministry of Police*
[729] Ibid 4.

with a firearm or firing at a dwelling or house. In relation to such weapons it recommended that:

> Currently, there are no presumptions against bail for weapons offences. If presumptions against bail for unauthorized possession, sale and purchase of weapons are included in the Bail Act 1978, the Courts would be impelled not to grant bail, unless a very strong argument was made to the contrary.
>
> Due to the gravity of denying bail to an offender, it is recommended that only illegal possession, purchase and sale of military style prohibited weapons be included as offences which would result in a presumption against bail.[730]

On 2 June 2010 Parliamentary Secretary Penny Sharpe explained that the Weapons and Firearms Legislation Amendment Bill, 2010 would introduce a number of changes to the *Weapons Prohibitions Act 1998*, NSW. New items such as improvised explosive devices and taser-proof clothing would be added to matters covered by the schedules. A separate schedule of military-style weapons was introduced. Sharpe went on to say that:

> The bill also includes offences related to military-style prohibited weapons both as offences for which there is an assumption against bail in the *Bail Act* and offences that are to be prosecuted on indictment only. This is appropriate considering the potential risk to public safety represented by these items.[731]

[730] Ibid 29.
[731] NSW, *Parliamentary Debates*, Legislative Council, 2 June 2010, 23522 (Penny Sharpe).

The *Bail Act* was amended to include in s 8B relating to a presumption against bail for serious firearms and weapons offences, offences. These included possession and use of military-style weapons as well as selling and manufacturing such weapons.[732]

12.7 CONCLUSION

The 2007 State Election was not fought on the grounds of law and order or punitive laws. There was, however, discussion of a number of issues related to law and order. They included domestic violence and weapon offences.

A separate Act related to domestic violence was a means of raising consciousness about the widespread problem of domestic violence. The changes regarding what was recorded on a criminal record where a domestic violence matter was involved does not reflect a punitive turn. The change to the *Bail Act* concerning the presumption placed a charge concerning stalking or intimidation with intent to cause fear of physical or mental harm into the same bail category as that for similar charges that existed at the time. That is there would be no presumption either in favour or against bail.

The initial change to s 22A of the Bail Act made second and later bail applications significantly more difficult. The Second Reading speech by the Attorney-General made clear that the Government had, for a considerable period of time, been following a tough line on bail. The new tough amendment was explained as being introduced to minimize judge and magistrate shopping and to protect victims. The right to come back

[732] *Weapons and Firearms Legislation Amendment Act 2010* (NSW) sch 3.1.

remained but the chances of success or even being heard were reduced dramatically. Critics associated the amendment with the rise in numbers on remand in adult and juvenile detention. The Attorney-General, John Hatzistergos, explained that the problem arose because of the conservative approach of practitioners and the reluctance to appeal decisions. The two subsequent amendments concerning s 22A of the *Bail Act* did provide for significantly more flexibility in making second and later bail applications. However, the increased number of adults and juveniles on remand, whether because of unsuccessful second or later bail applications, failure to make such applications or the generally more punitive atmosphere, remained a problem after 2009. Restoration of the position where s 22A only applied to the Supreme Court formed part of the campaign for reform in 2010.

The gang violence at the airport and the surrounding media and public disquiet were always going to result in a tough response from the Government. It has been noted a number of times in this thesis that the reality of politics requires that events of that type be seen to be the subject of a tough response. It was hardly surprising that a presumption against bail was introduced in relation to association offences. What the approach confirmed was continuity with amendments from earlier in the years of this century. The High Court's decision that the legislation was invalid reinforces the point that it was punitive and corrosive of the separation of powers. That it would be put up again in 2012 showed that the High Court decision did not lead to a review of thinking about the underlying punitive approach. Bail in relation to weapons offences was also

made difficult to get, again not surprising given the attitude to gangs and the already tough approach to bail for firearm offences.

Chapter 13

THE CAMPAIGN FOR BAIL REFORM – THE LABOR GOVERNMENT 2010

13.1 INTRODUCTION

This chapter commences with a brief overview of the nature of the Bail Act at the end of 2009. By that time many of the concepts that would be associated with the presumption of innocence and liberty of the citizen had disappeared. The second issue considered is the setting up of the Bail Reform Alliance and why the Alliance could be set up successfully in 2010. The next section of the chapter considers the campaign for bail reform and includes the important part played by the *Sydney Morning Herald* and by senior members of the legal profession including the judiciary. The involvement of politicians in the ongoing debate meant that the bail issue gained a high profile and that a contest for the high moral ground could be undertaken. The draft Bail Bill released with a review of bail in October 2010 set out the Government's position. The Bill attempted to make the Bail Act easier to deal with. Whether it did this was contentious. However, the fundamental source of dispute was that the Bill: didn't restore the presumption in favour of bail; removed bail only in exceptional circumstances; eased the difficulty in gaining bail on a second or later application; or removed clutter in the legislation. As the document became the central feature of the final part of the 2010 debate, the chapter concludes with discussion of the events that led to the Bill not being put before the Parliament.

13.2 THE BAIL ACT AT THE END OF 2009

By the end of 2009 the *Bail Act* was not recognisable in relation to many of the principles outlined in the Bail Review Committee Report, 1976. (See 4.5 above). The presumption in favour of bail no longer applied in relation to many crimes. For some crimes there was now a presumption against bail. For a number of crimes bail could only to be provided in exceptional circumstances. The tests to be considered in relation to the granting of bail had been made complex with many more specified hurdles to be considered before bail could be granted. Issues concerning second and later bail applications continued to be publically discussed. The percentage of prisoners who were awaiting trial or sentence had risen to 23.2% of the total.[733] The human and financial cost had also risen significantly.

13.3 THE SETTING UP OF THE BAIL REFORM ALLIANCE

Throughout its history there had been critics of the adverse changes to bail and the *Bail Act*. Sometimes there have been criticisms of general trends towards a more punitive approach on issues of crime and justice which had implications for bail. On other occasions the criticism relates to a specific change to the *Bail Act*. (For examples of both types of criticism see 1.1, 1.4, chapter 3, 6.3-6.4, and 12.5 above). Efforts by civil society groups were also of considerable importance. As Roth notes:

> Concerned about the growing number of children and young people being held on remand, in October 2009 a coalition of 12 non-government organisations (including

[733] Corben, above n 31, 71

Uniting Care Burnside, the Council of Social Service of NSW and the Youth Justice Coalition) released a position paper on bail and young people.[734]

The NSW Bar Association and the NSW Law Society were also active in relation to issues concerning bail reform.

Media concern about the growing number of people in gaol, particularly young people, was also apparent. Columnist Adele Horin wrote some major articles in the *Sydney Morning Herald* that were critical of the large numbers of young people on remand. Horin noted '[i]f there is anything dumber and sadder than juvenile delinquents, it's a government that abandons reason and evidence to pursue a law-and-order crackdown against the young.'[735]

In general terms governments did not yield to these criticisms. There were some positive changes, for example, in relation to the requirement to consider the needs of Aborigines and Torres Strait Islanders, the intellectually impaired and the mentally ill when considering the tests for granting bail. Intervention to deal with drug related issues was improved (See 10.6 and 11.6 above). However, a greater emphasis on the welfare and protection of the community without comparable attention to the rights of defendants meant that by the end of 2009 the *Bail Act* was thought by critics to be in need of major reform. Rising numbers on remand and the associated financial cost combined with a significant increase in difficulty for practitioners using the *Bail Act*

[734] Roth, above n 28, 12.
[735] Adele Horin, 'Dumb and dumber aas delinquent laws waste lives of young offenders', *Sydney Morning Herald* (Sydney), 27-28 June 2009, 13.

added provided additional issues pointed to by critics. By the end of 2009 the moment had arrived when a serious attempt could be made to reverse decades of conservative change.

At the 25 November 2009 Committee meeting of the NSW Council for Civil Liberties (CCL) I distributed a paper on the state of bail in NSW. It was based on my experience as a former magistrate in relation to the issues and as a former union president and secretary in relation to the strategy and tactics.[736] It set out many of the concerns about bail that had arisen in the previous thirty one years. It stated in part:

> For thirty years the Council for Civil Liberties, the Law Society and the Bar Association have made submissions to governments complaining about the erosion of the presumption in favour of bail. … On many occasions a crime occurs and an interest group or a number of them come out demanding a toughening of laws in relation to that crime. Sadly, the first Act the politicians often reach for is the *Bail Act*. Only a coalition running a serious ongoing campaign can hope to stop the trend and have some chance of reversing it.[737]

The paper then considered strategy and tactics including the need for an alliance of high profile organisations in the field, the importance of seizing the high moral ground, meetings with politicians from all parties, media issues and public events.

The CCL Committee carried a resolution which stated in part: '[a]fter a discussion it was agreed to support the campaign. It was noted that other groups (especially re Aboriginal

[736] Max Taylor, 'Proposal in relation to a campaign coalition in relation to the erosion of the presumption in favour of bail' (25 November 2009) *Committee Meeting NSW Council for Civil Liberties* .
[737] Ibid

and juvenile persons) were active in this area and that there was opportunity for the formation of coalitions.'[738]

In the period between the November CCL meeting and a meeting on 27 January 2010 discussions with a number of prominent organisations with an interest in bail took place. Out of these discussions the Bail Reform Alliance was formed. It consisted initially of the NSW CCL, NSW Law Society, NSW Public Service Association (the Law Society and PSA had coverage of all private and public solicitors involved in bail applications), NSW Welfare Rights Centre and NSW Young Lawyers.

13.4 THE CAMPAIGN FOR BAIL REFORM

In February 2010 meetings on behalf of the Bail Reform Alliance were sought with the Attorney-General, John Hatzistergos, and the Shadow Attorney-General, Greg Smith. The issues to be discussed included the restoration of the presumption in favour of bail, removal of bail only in 'exceptional circumstances' and problems arising out of provisions dealing with second and later bail applications. Two proposals were suggested. They were:

> you announce a timetable for reforms that will restore these important civil liberties and the separation of powers. If the first proposal is unacceptable to you then we propose that after thirty two years it is time for a public enquiry like that in 1976 which led to the original *Bail Act*, 1978.[739]

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[738] 'General business 10.2' (25 November 2009) *Minutes of a meeting of the Committee of the NSW Council for Civil Liberties* , 4.

[739] 'Draft letter to Attorney-General and Shadow Attorney-General' (27 January 2010) *Minutes of a meeting of the Committee of the NSW Council for Civil Liberties*

Meetings were held with a representative of the Attorney-General and with the Shadow Attorney-General, Greg Smith, in March 2010. At the meeting with the representative of the Attorney-General the Bail Reform Alliance was informed that the Attorney-General intended to put the *Bail Act* out for public consideration in a few months. The review was to result in a revision being put before the Parliament before Christmas. There was to be public input. However, the enquiry process was to be through the Attorney-General's Department rather than a process independent of that Department, which had been a feature of the approach in 1976.[740]

An important moment in the campaign, because it raised the public profile of the matter, occurred on 31 March when an article involving comment by the Attorney-General appeared in the *Sydney Morning Herald*.[741] The article stated:

> The NSW Attorney-General, John Hatzistergos, has admitted that the state needs to act to reduce its soaring jail population, which topped 10,000 last year and continues to rise. But the state's tough sentencing and bail laws would stay, he said, because the record number of prisoners was the reason most types of crime were falling. Instead, the government was putting its faith in a suite of rehabilitation programs to reduce reoffending by 10 per cent by 2016.[742]

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[740] 'Report and recommendation for Council of Civil Liberties in relation to bail campaign' (28 April 2010) *Minutes of a meeting of the Committee of the NSW Council for Civil Liberties*
[741] Joel Gibson, 'Tough bail laws to stay despite jail population', *Sydney Morning Herald* (Sydney), 31 March 2010, 11.
[742] Ibid.

The opportunity for public debate opened up by the Attorney-General's observations was taken up in a follow up article on 9 April and headed 'Cowdery backs call to change bail laws'.[743] The article stated, '[t]he Director of Public Prosecutions, Nicholas, Cowdery, QC, has offered his public support for a powerful new lobby group, the Bail Reform Alliance, which represents those who deal with bail laws at a grassroots level.'[744] The article included quotes from the Director of Public Prosecutions, the President of the NSW Law Society and myself on behalf of the Bail Reform Alliance. It also included the statement that, '[t]he government is rewriting the Bail Act but does not intend major policy changes, Mr Hatzistergos has told the *Herald*.'[745]

The two *Sydney Morning Herald* articles set the tone for the debate which followed for the rest of the year. Those who wanted reform wanted major reform. The Government on the other hand, while indicating it would support some reform, was not intending that the reform be of a root and branch type. The fight for the high moral ground would now begin.

During April 2010 a number of letters to the editor on bail appeared in the *Sydney Morning Herald*. They were supportive of major reform. One of the letters was from the Official Visitor at Parklea Correctional Centre.[746] A full page article in the weekend News Review section of the *Sydney Morning Herald* on April 17 set out all the positions on the issue and importantly included comment by people who had not received bail and had

[743] Joel Gibson, 'Cowdery backs call to change bail laws', *Sydney Morning Herald* (Sydney), 9 April 2010, 3.
[744] Ibid.
[745] Ibid.
[746] Geoff Turnbull, 'Vanishing bail hits homeless hard', *Sydney Morning Herald* (Sydney), 12 April 2010.

been injured whilst in gaol.[747] The article explained that in relation to a case withdrawn on the day of the trial the judge had been critical of the prosecution leaving the decision so late. However, the article added, '[t]he dressing down was small consolation for the now-19 year old Mr Filipetti, who will never get those eight months or his full vision back. His time inside was a nightmare, he said, and its legacy remained.'[748] On 20 April the *Sydney Morning Herald* Editorial was headed 'Disappearing right to bail'.[749] It was highly critical of the Government's approach to bail. In relation to the Government's claim that the tough laws reduced crime the Editorial observed:

> But people in Victoria feel safer than we do. It's not just perception, but the reality: Victorians are statistically less likely to be victims of personal crimes, murder, assault, robbery, break-ins and burglary and car theft. Yet Victoria has about half as many prisoners and half the imprisonment rate of NSW.[750]

That the issue of bail was now a major public controversy was indicated by the fact that a Parliamentary Briefing Paper on the subject was produced on the matter in May 2010.[751] Briefing papers are sent to all Parliamentarians. The 36 page document explained all of the issues in chapters headed: 'Summary; Introduction; Changes to bail laws: 1978–2002; Changes to bail laws: 2003–2010; Recent criticisms of bail laws; Reports on bail and young people; Trends in bail outcomes; Trends in the remand population; Review of bail laws in Victoria; Conclusion'.[752] The Conclusion noted:

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[747] Joel Gibson, 'No bail - go directly to jail', *Sydney Morning Herald* (Sydney), 17-18 April 2010, 5.
[748] Ibid.
[749] Editorial, 'Disappearing right to bail', *Sydney Morning Herald* (Sydney), 20 April 2010, 10.
[750] Ibid.
[751] Roth, above n 28.
[752] Ibid .

> Changes to bail laws since 2002 have followed the dominant trend of making it more difficult for accused persons to obtain bail; both in relation to a range of offences, and where the accused person is regarded as a 'repeat offender'. These changes have been justified on the basis that they provide greater protection for the community against the risk that such persons will commit offences while awaiting trial. However, critics have argued that the changes have largely been ad hoc responses to particular crime incidents, and that a good case has not been made out for reforms that have undermined an accused person's right to the presumption of innocence.[753]

The Conclusion then went on to point to certain factual conclusions from the statistics. These included the doubling of the proportion of persons refused bail in the Local Courts and Higher Courts between 1993 and 2007 and a substantial increase in remand numbers since 1993; a small percentage of those refused bail being found not guilty but a significant percentage not being given a custodial sentence; and a decline in failure to appear.[754]

The campaign continued to receive support from the then Director of Public Prosecutions, Nicholas Cowdery. In a conference paper presented later in 2010 the DPP considered bail amongst other aspects of the rule of law. He expressed concern about the burgeoning number of prisoners on remand, the progressively legislated removal of presumptions in favour of bail, the introduction of presumptions against bail, the role of individual cases attracting media attention and the number of people who having been refused bail are later acquitted or receive non gaol sentences. The DPP also referred to a

[753] Ibid 26.
[754] Ibid 27.

Sydney Morning Herald editorial raising similar criticisms. He pointed out that 'The Bail Reform Alliance in NSW was set up to address these issues, headed by a former magistrate.'[755] Dealing later in the paper with his wish list the DPP stated:

> If I had a legislative wand and I would create a Bail Act quite unlike the draft that is out for consultation… an Act that assisted in reducing the number of persons in custody on remand, especially juveniles and Aborigines – an Act that reduced the number of people in custody on remand whose charges are discontinued or who are later acquitted or sentenced to non-custodial penalties.[756]

The DPP made reference in his paper to other papers that were part of the 2010 literature on calls for change to bail laws. One of those references was to a speech by the Chief Justice of the District Court to the Legal Aid Conference.

On 2 June 2010 the Chief Judge of the District Court, Chief Justice R O Blanch, addressed the Conference of the NSW Legal Aid Solicitors. After comparing the different numbers in prison in Victoria and NSW and the financial costs of the large numbers on remand in NSW, Chief Judge Blanch stated:

> The reason for the difference is clearly changes to the *Bail Act* in New South Wales creating presumptions against bail for many offences and removing the presumption in favour of bail for others. Changes to bail laws in this State have significantly been driven by particular incidents. … This raises the question whether it would be useful now to

[755] Cowdery, above n 10, 13.
[756] Ibid 16.

> have a calm review of the Act with a view to reducing the number of offences where there is no presumption in favour of bail.[757]

The observations of the Chief Judge were considered in an article in the *Sydney Morning Herald* on 18 June.[758] Shadow Attorney-General Greg Smith was said to be in 'the process of recommending that a review of bail and sentencing laws by a retired judge become opposition policy.' Smith was quoted as saying: 'I've been saying for some time we need to rewrite the Bail Act … Bail should only be refused where there's a likelihood of further crime being committed or it's likely you are going to interfere with witnesses or abscond'.[759]

The events in June led to an editorial in the *Sydney Morning Herald*.[760] While expressing the hope that there would not be another law and order auction in the next State Election, the editorial went carefully through the competing political positions on bail and stated: '[i]s anything being achieved by all this? Politicians cite a leveling or reduction in the incidence of certain crimes, but it is equally likely that the buoyant economic conditions and low unemployment have made crime less attractive.'[761]

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[757] Chief Justice R O Blanch, 'Address to legal aid conference' (Paper presented at the Legal Aid Conference, Sydney, 2 June 2010), 2.
[758] Joel Gibson, 'Top Judge Targets Tough Jail Sentences', *Sydney Morning Herald* (Sydney), 18 June 2010, 1.
[759] Ibid.
[760] Editorial, 'All done, let's hope, in law-and-order auction', *Sydney Morning Herald* (Sydney), 19-20 June 2010, 8.
[761] Ibid.

The CCL had a discussion with an adviser to the Premier in May. On the strength of all of the above the Council for Civil Liberties sought a meeting with the Premier on the issue of bail.[762]

August 2010 was dominated by the Federal election. The Bail Reform Alliance used the time to discuss its approach to the NSW State election scheduled for 2011. However, the issue of bail did not disappear from the media. While this thesis does not cover juveniles and bail, it is relevant to point out that at certain times in 2010 the media debate about bail was generated by issues concerning juveniles. Two examples from an article in the *Sydney Morning Herald* on 9 August make the point.[763] The Council for Civil Liberties had obtained via Freedom of Information application material on assaults in juvenile detention centres. The Sydney Morning Herald article noted that '[t]he number of assaults involving children awaiting trial in the state's overcrowded detention centres is close to record highs, with an average of 20 a month in the last financial year.'[764] The article went on to explain that the CCL linked the problem to the State's tough bail laws. The article also referred to earlier matters in June which had been widely publicised, concerning a report to the Government on juvenile justice and the resignation of the Minister. It noted that:

> The NSW government has lost a minister and a key adviser in recent months over its approach to locking up young people. The former juvenile justice minister Graham West

[762] Max Taylor and Pauline Wright, 'Bail and Legal Panel Subcommittee Report' (June 2010) (221) *Civil Liberty* , 4.
[763] Joel Gibson, 'Juvenile detainees at greater risk of assault', *Sydney Morning Herald* (Sydney), 9 August 2010, 2.
[764] Ibid

> resigned in June after the cabinet axed a budget measure to redirect funding into diversionary programs without informing him.'[765]

The 9 August article led to radio and television interviews on the issue of bail for members of the Council for Civil Liberties later in the day.

On 7 September 2010 the Community Justice Coalition and the International Commission of Jurists, Australia held a seminar at Parliament House on 'Human Rights in Prison: Setting a Reform Agenda'. John Dowd, the former Attorney-General is a prominent member of the International Commission of Jurists and participated in the meeting. The speakers included David Brown whose work has been referred to in a number of places in this thesis. I spoke on behalf of the Bail Reform Alliance. My topic was bail. Greg Smith was at the seminar.

13.5 THE BAIL BILL 2010

On 13 October 2010 the Criminal Law Review Division of the Attorney-General's Department released a 'Review of *Bail Act 1978* (NSW)'[766] and a 'public consultation draft Bail Bill 2010'[767]. The associated media release by Attorney-General John Hatzistergos also set out the Government's position.

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[765] Ibid.

[766] 'Review of Bail Act 1978 (NSW)' (Report, Criminal Law Review NSW Department of Justice and Attorney-General, October 2010).

[767] 'Public consultation draft Bail Bill 2010' (Draft Bail Bill, Criminal Law Review NSW Department of Justice and Attorney-General, 13 October 2010).

A number of positive initiatives were set out in the documents. The media release and the Review explained that the continuous amendments had made the *Bail Act* complex.[768] The Draft Bill attempted to simplify language and place relevant aspects together. The Review recommended initiatives for filling gaps in the obtaining of bail statistics.[769] It also recommended clearing up confusion about when it is unlawful to publish that a named person is someone the defendant should not associate with.[770] Clarification is found in clause 69 of the Bill. The Review also recommended an information resource concerning bail review for accused not able to meet bail conditions,[771] an information resource for sureties and a regulation clarifying who is an 'acceptable person',[772] plain English bail forms and Court Attendance Notices[773] Bail Working Groups were recommended to establish a program to assist persons comply with bail conditions,[774] bail supervision programs for adults[775] and implementation of proposals put forward by the Aboriginal Justice Advisory Committee.[776] Several other recommendations in relation to assisting Aboriginal and Torres Strait Islanders to use the court system were also proposed.[777] The Review also recommended that the requirement that Courts take into account intellectual disability before imposing a bail

[768] Review of the Bail Act, above n 766, 29.
[769] Ibid 32.
[770] Ibid 59.
[771] Ibid .
[772] Ibid 68.
[773] Ibid 62.
[774] Ibid 65.
[775] Ibid 72.
[776] Ibid 78.
[777] Ibid.

condition be expanded to include persons suffering from a mental illness, young persons and Aboriginal or Torres Strait Islander people.[778]

The Review after considering the fact that electronic monitoring was available in some other jurisdictions, the expense of full time custody and the fact that 'a large number of accused persons who are remanded in custody are later acquitted,'[779] recommended that '[t]he Government develop and pilot a system of electronic monitoring of accused persons who would otherwise be remanded in full custody.'[780]

The various presumptions concerning bail were considered with the tests for bail found in s 32 of the *Bail Act* and the concept of Objects of the Act. A recent BOCSAR report formed part of the background to considering these matters in the Review.[781]

The BOCSAR report found that:

> [t]able 3 confirms the point made earlier – while the presumptions have a significant impact on the probability of imprisonment they do not have as large an effect as other defendant characteristics, such as large numbers of prior convictions and/or three or more concurrent offences.[782]

[778] Ibid 84.
[779] Ibid 60
[780] Ibid 61.
[781] Snowball, Roth, Weatherburn, above n 54.
[782] Ibid 5.

The BOCSAR report noted that those for whom there was a presumption against bail or where bail was only available in exceptional circumstances were less likely to get bail.[783] It also noted that those in the bail neutral category were less likely to be granted bail than those in the category where there was a presumption against bail.[784] The report added:

> The explanation for the higher rate of bail refusal among defendants who fall into the 'Bail neutral' category, than among defendants in the 'presumption against bail' category may lie in differences between the two categories in the proportion of defendants charged with violent offences. [785]

The category 'bail neutral' contained many offences involving violence.

It is important to state at this point that none of the BOCSAR material suggested that presumptions are unimportant. It should also be stated that none of the BOCSAR material suggested that a presumption in favour of bail provides other than the best chance for the defendant amongst the presumptions.

The Review of the Bail Act concluded after considering the BOCSAR report that:

> While this confirms that, as intended, bail presumptions are not determining bail outcomes BOCSAR's report concluded that: 'The prior criminal record of an offender, the number of concurrent offences and the time taken to finalise a case, it should be remembered, are all relevant considerations under s 32 of the NSW Bail Act. The greater weight placed on these factors than on the bail presumptions is only a puzzle if one

[783] Ibid.
[784] Ibid 6.
[785] Ibid.

> regards the presumptions surrounding bail as more important. The Bail Act gives little guidance on this point. Courts must consider both the criteria for bail and the presumptions surrounding bail.' … To address these concerns, it is proposed that in redrafting the Bail Act and reorganizing it with a clearer and more logical structure, the section 32 criteria be replaced with clear objects at the front of the Act that will ensure decision-makers are provided with clear guidance as to the sorts of matters that are to be paramount considerations in the making of decisions.[786]

In relation to s 32 dealing with criteria to be taken into account in bail applications the CLRD Review paper noted:

> The criteria to be considered in bail applications in s 32 were developed when there was a general presumption in favour of bail with a few exceptions. In determining bail, consideration must first be given to what, if any, presumption applies and then to turn to the separate considerations under s 32. There is now considerable overlap with the matters to be considered in s 32 and the matters that affect the initial presumption.[787]

The Review had noted that s 32 included the interests of the person, the time they may have to spend in custody and their need to be free to obtain legal advice as one of the criteria to be considered.[788] However, the media release of the Attorney-General stated that: '[t]he new laws will make it clear the objects of bail are to ensure defendants turn up to court, to protect the community and to prevent any interference with the course

[786] Review of Bail, above 766, 50.
[787] Ibid 49.
[788] Ibid 49.

of justice'[789] Clause 3, of the Bill, 'Objects of Act', set out objects as proposed in the media release. The rights of the accused were not placed in the Objects.[790]

The draft Bail Bill in (ss 48 –59) made clear that levels of offences (levels 1-5) would be associated with presumption categories: bail granted with some limitations for minor offences; a presumption in favour of bail; no presumption for or against bail; a presumption against bail; and bail only to be granted in 'exceptional circumstances'. Schedule 1 and Schedule 2 at the back of the Bill set out which charges were in which categories.[791]

The Review, also recommended a checklist of factors in domestic violence be developed by the Attorney-General's Department, NSW Police Force and other key stakeholders. It would be a reminder to prosecutors of the matters that should be considered and be available to be filed in court.[792]

The Review did not recommend the removal of s 22A which had restricted the issues that could be raised in second or later bail applications. Nor did the Review recommend the restriction of its ambit to applications made to the Supreme Court. The Review explained the problems that had occurred since 2007 when it stated: '[s]ince the introduction of the new amendment there has been considerable confusion about how

[789] John Hatzistergos, 'New bail laws released for public comment' (Media release, 13 October 2010)
[790] Draft Bail Bill, above n 767, Cl 3.
[791] Ibid s 48 – s 59, sch 1, sch 2.
[792] Review of bail, above n 766, 50.

to apply s 22A(1) because of the term "a Court".'[793] The Review went on to explain that courts were interpreting the term to mean that, for example, the District Court could not hear an application for bail arising out of a failure to gain bail in the Local Court. The Review explained that the Government had tried to clear up the confusion by a recent amendment to s 22A limiting the refusal to hear the application to a court of the same jurisdiction. The Review noted that some lawyers had concluded that the best hope for their clients lay in having everything prepared for the first application for bail. The Review conceded that lawyers were delaying what they saw as their clients' one chance at bail and noted that, 'some defendants are spending longer periods of time on remand prior to making an application for bail.'[794] However, the Review pointed out that the Government had also amended the section to allow an application if there was new information available to present to the court. The Review concluded that '[i]n the light of these recent improvements to the operation of the section, it is not recommended that any further amendment be made.'[795]

Finally, Clause 40 of the Draft Bill increased the limitation on the length of adjournments where bail was refused from eight to 42 days. This dramatic increase in the potential time that could be spent in custody on remand was to be applied to both adults and juveniles.[796] On the other hand where a person was granted bail but could not meet a

[793] Ibid 55.
[794] Ibid 56.
[795] Ibid.
[796] Draft Bail Bill, above n 767, cl 40.

residential condition then the court was to be informed within two days and in relation to any other condition, within eight days.[797]

13.6 THE WITHDRAWAL OF THE BAIL BILL

On 14 October the *Sydney Morning Herald* noted that '[the] government review recommended rewriting bail laws without making significant changes to who qualifies for bail.' The article explained that the Attorney-General was of the view that applications would become simpler. On behalf of the Bail Reform Alliance I was reported as observing that the Government had missed a chance to remedy the Bail Act.[798] The front page of the Saturday *Sydney Morning Herald* saw the dramatic involvement in the ongoing debate of the heads of jurisdiction of the NSW Courts.[799] The NSW Chief Justice, James Spigelman was quoted as stating:

> There are quite a number of people in prison who probably shouldn't be there. … When you refuse bail to a higher proportion of those accused of crime you are going to get an increase in the proportion of persons who are subsequently acquitted. That's the kind of group that with the benefit of hindsight … shouldn't have been in jail.[800]

The concerns of the Chief Judge of the District Court, Reginald Blanch, and the Chief Magistrate, Graeme Henson, in relation to bail were also referred to in the article. On 26 October 2010 the *Sydney Morning Herald* considered court delays and the implications for those on bail. The associated article stated that '[m]ore than 1400 adults and

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[797] Ibid cl 41.
[798] Joel Gibson, 'Electronic bail to keep accused out of prison', *Sydney Morning Herald* (Sydney), 14 October 2010, 7.
[799] Joel Gibson and Deborah Snow, 'End law and order elections, say judges', *Sydney Morning Herald* (Sydney), 16-17 October 2010, 1.
[800] Ibid.

children who were never convicted of a crime were imprisoned last year, some for months, and the time people spend behind bars before being cleared by the courts is getting longer.'[801]

By 1 November it was clear that a wide range of groups associated with the legal system were not happy with the proposed changes. The front page article in the *Sydney Morning Herald* was headed, 'Lawyers express their contempt for tough new changes to bail laws'.[802] The article included criticism from the DPP who was said to be of the view that 'the laws would probably increase remand populations because they do not improve on the "complex and unfair" Bail Act.'[803] The article also stated that '[t]he Bar Association has warned the government in similar terms, saying it is disturbed by adult remand populations that are up 80 per cent in a decade and juvenile remand numbers that have increased by 30 per cent from 2004 to 2007.'[804] According to the article, criminologists Julie Stubbs and Alex Steel had 'asked the government whether it wants a Bail Act or in fact a Remand Act, because it ignores the "fundamental right to liberty of someone who is presumed innocent."'[805] The article also stated that:

> The Law Society opposes the extended 42 day limit on adjournments of bail applications, its president, Mary Macken, said. The Society says considering only factors

[801] Geesche Jacobsen and Nick Ralston, 'Court delays mean more jail time for innocent', *Sydney Morning Herald* (Sydney), 26 October 2010.
[802] Joel Gibson, 'Lawyers express their contempt for tough new changes to bail laws', *Sydney Morning Herald* (Sydney), 1 November 2010, 1.
[803] Ibid.
[804] Ibid.
[805] Ibid.

> that count against the accused "will likely result in an increase in the number of people who are refused bail".[806]

In the same article I explained on behalf of the Council for Civil Liberties that 'the new limit would combine with section 22A, which allows new bail applications only if there is new information or changed circumstances, to make review of bail decisions almost impossible for the poor, vulnerable and young.'[807] The article stated that '[t]he Public Service Association, the Teachers' Federation and the NSW Council for Social Services have expressed the same fears, particularly for juveniles.'[808] The article made clear that '[p]olice and victims' groups do not share their concerns but the Police Association warned against proposals to dump a list of bail criteria that included the rights of the accused, because it provided useful guidance.'[809]

On 6 November, DPP Nicholas Cowdery presented the paper referred to in 1.1 and 1.4 above.[810] As explained in those subsections the speech contained a number of criticisms of the situation in relation to bail in NSW. Under the heading 'Punitiveness' it stated in part:

> It might also be remarked that if imprisonment reduces criminal offending, then NSW's crime rates should be significantly lower than those in Victoria – but they are not. … Furthermore, in NSW 25% of the prison population is unsentenced – on remand. In

[806] Ibid.
[807] Ibid.
[808] Ibid.
[809] Ibid.
[810] Cowdery, above n 10, 9.

> Victoria the figure is 18% (where the delays in coming to trial, however, are significantly greater than in NSW).[811]

In relation to the new Bill, Cowdery observed: '[t]here is a new Bail Bill out now for speedy public consultation. The Opposition has declared it will be repealed and replaced if enacted by this Government (and there is a change on 26 March 2011)'[812].

The Review and the Draft Bill were released on 13 October. The media release required a response by 27 October. The Review was a document of 106 pages and the Draft Bill a document of 84 pages. It was not a lot of time to consider all aspects of bail in NSW. Extracts from three responses will explain the extent of the concern about the short period for responses and the content of the draft Bill.

The Police Association observed: '[a]t the outset, we must note that the length of time given for a detailed analysis of both the recommendations of the review and the draft Bill is insufficient for a fully considered response.'[813] The Police Association agreed that there was a need to improve on the current wording of the *Bail Act*. It also thought that '[t]he current five bail classifications are confusing. A ready reckoner of offences and their bail classification would make bail considerations much easier for police and so this recommendation is supported.'[814] However, the Police Association did not take issue with the need for the continuation of various classifications. The submission stated: '[i]n

[811] Ibid 12.
[812] Ibid 14.
[813] Greg Chilvers, Police Association, Submission to Criminal Law Review, *Review of Bail Act 1978 (NSW),* 27 October 2010 , 1.
[814] Ibid 2.

summary the Association does not support any amendment to the legislation that removes offences from presumption, either for or against bail.'[815] The Police Association was concerned about the tests for bail set out in s 32 being removed and replaced with reliance upon the 'Objects'. The submission stated in relation to this matter:

> This recommendation is unclear and the draft Bill seems to have taken a narrow view of the recommendation by removing the guidance of the current s 32. The objects that are contained in the draft Bill are broad (and we would maintain) insufficient to give practical assistance to decision makers.[816]

The Law Society made clear its concerns about the rushed process and the content of the Bill by stating that its Criminal Law Committee and Juvenile Justice Committee had considered the material and that, '[t]he Committees' primary position is that the draft Bill should not be introduced into Parliament. The review of the current Bail Act should be referred to a Parliamentary Committee or a public inquiry…'. [817] The Law Society also stated that:

> The provisions are poorly drafted, the operation of the Bill is complicated, and the new levels of offences are unnecessarily complicated. The removal of the s 32 criteria from the Bill and an inadequate objects section provides little guidance for decision makers, and will likely result in an increase in the number of people who are refused bail.[818]

The Law Society submission went on to detail these and other criticisms of the documents such as the retention of s 22A on second and further bail applications

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[815] Ibid 3.
[816] Ibid 3.
[817] Mary Macken Law Society, Submission to Criminal Law Review, *Review of Bail Act, 1978 (NSW)*, 27 October 2010. 1.
[818] Ibid.

without amendment and the extension of the maximum adjournment without consent from 8 to 42 days.[819]

The CCL set out its criticisms in a submission and stated in its 'Conclusion' that it saw no point in putting the draft Bail Bill before Parliament. The submission explained that:

> The Council's primary position is that fundamental changes such as the restoration of the presumption in favour of bail, removal of the exceptional circumstances provision for certain crimes, modification of s 22A so that it only applies as a discretion in the Supreme Court, restoration of the eight day limit for adjournments where there is no consent and removal of clutter from s 32 need to occur immediately. If that is not to occur then the Council calls for a public inquiry into the Bail Act, independently chaired, and with public recommendations before any Bill is put before the Parliament.[820]

Three of the organisations in the Bail Reform Alliance– the Council for Civil Liberties, the Public Service Association and the NSW Teachers Federation– decided in early November not to attend the round table discussions. They were of the view that there were too many problems in the Draft Bill to be fixed by way of amendment.

There were ongoing criticisms of the Government's draft Bill from mid-October to mid-November as well as the undue haste of the process. I referred earlier in this section of the thesis to the Director of Public Prosecutions explaining on 6 November that the Shadow Attorney-General had indicated that if the Labor Government's Bill became law

[819] Ibid Annexure 1.
[820] Max Taylor Council for Civil Liberties, Submission to Criminal Law Review, *Review of Bail Act 1978 (NSW)*, 27 October 2010, 12.

it would be repealed and replaced by one drafted by a Liberal government. In the following week I had a discussion with Greg Smith on behalf of the Bail Reform Alliance about the Opposition's position on the draft Bill. All of our criticisms of the Bill were raised. While no final commitment was given to oppose the Bill in Parliament, the tenor of the meeting with the Shadow Attorney-General made this seem like a real possibility.[821]

The question remained as to what the crossbench position would be in the Legislative Council. All of the crossbench groups met on the Tuesday before Parliament in the weeks when Parliament was sitting. A meeting with the Greens, Family First, Christian Democrats and Shooters and Fishers was organised for Tuesday 23 November 2010. The Bail Reform Alliance representatives received a fair hearing. The Alliance representatives explained that the Bill was beyond amendment and that our primary aims were not going to be met. The Alliance representatives called for a public enquiry with an independent chairperson and recommendations made public before any Bill was put before the Parliament.[822] Once again, at the end of the meeting, there seemed to be a real chance that the draft Bill would not pass the Legislative Council.

Later on 23 November 2010, Greens MLC David Shoebridge on behalf of the Greens asked the Attorney-General in the Legislative Council about the criticisms received, the future of the roundtable and whether the draft Bill would be presented to the Parliament before the March 2011 election. Attorney-General Hatzistergos explained

[821] .Max Taylor, 'Bail and Legal Panel Report' (March 2011) 224 *Civil Liberty* , 11.
[822] Ibid.

the current problems with the *Bail Act* as involving complexity due to numerous amendments and that 'the draft bill aims at being clearer and simple to navigate to enable police to devote more time to front-line duties, to assist the judiciary to consistently apply the laws and to make it easier for victims and defendants to understand the process.'[823] The Attorney-General then explained the background and reasons for a trial of electronic monitoring, the proposal that it was believed would provide clearer information to defendants about their right to have bail decisions reconsidered, the proposal for a bail checklist to protect victims of domestic violence, the intention to rewrite court documents to make them more understandable for those with special needs, and the intention of 'improving opportunities for indigenous people to have a greater input into the bail process.'[824] The Attorney-General conceded that '[w]hile the *Bail Act* review does not recommend changes to section 22A, a new section 24 clarifies that a person refused bail can reapply to a higher court.'[825]

The Attorney-General also explained that the Government had sought public comment and convened a stakeholder meeting chaired by Justice Megan Latham of the Supreme Court. The Attorney-General then remarked that:

> I understand that some stakeholders have raised concern about the time they were given to provide comment on the exposure bill. While I had hoped to release the draft exposure bill earlier than we did, the reality is that the bill required a significant amount

[823] NSW, *Parliamentary Debates*, Legislative Council, 23 November 2010, 27836 (John Hatzistergos)
[824] Ibid.
[825] Ibid.

> of drafting and settlement, and this limited the opportunity that people had to contribute to the review process.[826]

The Attorney-General explained that these problems had truncated the time for public response. He then explained that:

> To compensate for that, we had the roundtable and, as I mentioned earlier, some extraordinary means to enable stakeholders to communicate their views. Recently I wrote to Justice Latham to ask what the members of the stakeholder roundtable wished to do; whether they wanted to go ahead with the legislation in this session or whether they needed more time. I indicated that I would take whatever direction they wanted. They asked for additional time. I have agreed to give it to them.[827]

The draft Bail Bill was not presented again to Parliament before the State election. The *Sydney Morning Herald* heading summed up the situation when it stated: '*Bail Act* changes stymied as Attorney-General concedes lack of support'.[828] The associated article stated: '[t]he Attorney-General, John Hatzistergos, has shelved planned changes to the state's *Bail Act* after it was clear crossbenchers would not back the government, ensuring the act will remain untouched before the election.'[829]

It should finally be noted that in the phone conversation with John Hatzistergos, preceding the email questions concerning bail and his subsequent emailed answers, the

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[826] Ibid.
[827] Ibid.
[828] Alexandra Smith, 'Bail act changes stymied as Attorney-General concedes lack of support', *Sydney Morning Herald* (Sydney), 25 November 2010.
[829] Ibid.

issue of discussing the Bail Bill 2010 and surrounding events was discussed. John Hatzistergos confirmed in the email his position in that conversation. He stated:

> [a]s I indicated in our phone discussion, I do not wish to enter public debates on subjects relating to my former responsibilities or proposals by my successor. To the extent bail continues to be a topic of interest it is best left to those in public life with the responsibility. The Parliamentary Library I am sure has access to much information to when I was in office.[830]

13.7 CONCLUSION

Three decades on from the introduction of the *Bail Act 1978* it became possible to challenge the continued erosion of concepts associated with the presumption of innocence and liberty of the citizen. This may not have been possible in earlier decades. However, by 2010 there were a vast array of exceptions to the presumption in favour of bail. In addition, there were now a number of charges for which bail could be provided only in exceptional circumstances. The straightforward tests for bail in s 32 of the *Bail Act*, as originally introduced, had been turned into pages of complexity. Changes to s 22A of the Bail Act had created controversy over second and later bail applications. Amendments aimed at resolving the problem did not lessen the controversy over the matter. Further, financial pressure had become a real issue after three decades as over a billion dollars a year was spent on adult gaols and the numbers in custody on remand kept rising. Significant amounts of that money could have been spent on education, health and welfare. Nor could neo-liberal claims about the need for a smaller public sector be raised for a reduction in remand numbers would reduce cost. The

[830] Hatzistergos, above n 694.

Government could choose to continue to make public use of a punitive approach but three decades of amendments had resulted in a crisis concerning bail and this allowed an alternate view to be put with some hope of support from the media and the public.

The Bail Reform Alliance was not the first organisation to attempt reform during this period, but by 2010 public recognition of the issues was much more likely. The organisations involved in the Alliance were all well-known pressure groups with a direct or indirect interest in the field. They could not easily be ignored and the Alliance was able to gain access to discussions with politicians from all political parties.

Important elements in the media, and particularly the *Sydney Morning Herald*, were supportive of the need for major reform. Elements in the media that might have been expected to lash out at suggestions of reform did not do so in any consistent or damaging way in 2010. Significantly, many major figures involved in the criminal justice system including heads of the jurisdictions came out in favour of reform. The combination of major media coverage and comment by leaders in the field gave the issue of bail reform a high profile and pushed the political debate away from the standard 'law and order' and 'tough on crime' approach.

The Government's draft Bail Bill 2010 attempted to limit reform to simplifying the *Bail Act* and making the existing system more manageable. In not attempting major reform in any of the areas that had been part of the public debate the Government ensured that the debate would heat up rather than going away. The distance that the debate

had moved away from thirty years of ‘tough’ amendments can be seen in the fact that neither the Liberal Opposition nor the crossbenches seemed likely to support the Bill. The Government claimed in Parliament that the deferral of the Bill was because the roundtable group needed more time. The short time for submissions and the roundtable discussion made that quite likely. However, it is also realistic to suggest that after the 12 month campaign the Government knew that the whole exercise was going to fail in the Legislative Council and withdrawal of the Bill was its best option.

Chapter 14

THE NSW STATE ELECTION 2011

14.1 INTRODUCTION

This short chapter considers the issues in the NSW State election of 2011. Law and order was not a significant issue but commitments on bail were made by the political parties and are considered. The positive approach by the media to bail reform is also considered

14.2 THE SUBSTANTIVE ISSUES

The March 2011 NSW State election 'produced the largest two-party swing in recent Australian election history, ending 16 years of Labor Governent.'[831] Election issues raised by Shawn Wilson and Ben Spies-Butcher include mass departures before the election of Labor Parliamentary members: the loss of Green preferences; voter dissatisfaction beyond the normal gripes; electricity privatization; length of time in office; and instability of leadership as exemplified by three different Premiers after the departure of Bob Carr. An example of the last of these issues can be found in the *Sydney Morning Herald* of 3 December 2009. The front page headline stated: 'Knives out for Rees as Sartor buries hatchet with Tripodi'. The associated article stated: [t]he premiership of Nathan Rees is under threat today, with Frank Sartor preparing for a challenge and powerbrokers Eddie Obeid and Joe Tripodi jockeying to put Kristina

[831] Shawn Wilson and Ben Spies-Butcher, 'The March elections of 2011' (2012) 47(2) *Australian Journal of Political Science* 285.

Keneally up for the job.'[832] Kristina Keneally later became Premier. Law and order was not an election issue.

14.3 DISCUSSION OF LAW AND ORDER DURING THE ELECTION PERIOD

That law and order was not going to be a major issue was made clear when the Shadow Attorney-General, Greg Smith was reported as 'recommending an independent review of bail and sentencing laws as part of opposition policy.[833] The *Sydney Morning Herald* was able to observe in an Editorial that:

> Locking people up is usually a big part of the auction. This time, though, there are some signs – small, but encouraging signs – that the auction may be taking place in reverse. The shadow Attorney-General, Greg Smith, has said he wants the opposition to promise a review of bail and sentencing laws as part of its policy. (The government wants to change the Bail Act too, but only to make it clearer, not to change its effect.)[834]

While law and order was not a dominant issue in the election, public debate over bail continued. The Community Justice Coalition and the International Commission of Jurists Australia sent out a questionnaire to the three major political parties and then held a seminar with the opportunity for questions.[835] The intention was that the questionnaire and submission would 'be circulated to every major party Secretariat, to every Minister and Member of the NSW State Parliament and to every candidate of the major political

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[832] Andrew Clennell and Louise Hall, 'Knives out for Rees as Sartor buries hatchet with Tripodi', *Sydney Morning Herald* (Sydney), 11 December 2009, 1.
[833] Gibson, above, n 758, 1.
[834] Editorial, above n760 8.
[835] Community Justice Coalition, 'Pre 2011 State Election Submission and Questionnaire for specific reforms to the NSW Prison System' (Media release, 8 November 2010).

parties who will be asked to provide a detailed response by 31 January 2011.'[836] The two organisations also organised a public seminar on all aspects of prisons as they affect adults and juveniles. Bail was discussed as part of the process.

The Labor Party addressed the issues but on the question '[w]ill you commit to amending the *Bail Act 1978* (NSW) to reducing the number of provisions enacted which prevent the presumption in favour of bail', it replied, '[t]he Government has recently released a new draft Exposure Bill proposing a new *Bail Act*. The Bill is currently being examined by a stakeholder roundtable chaired by Justice Megan Latham. The roundtable is considering a number of issues.'[837] As the Exposure Bill had not been put before the Parliament after a great deal of hostile objection to many of its provisions this answer did not satisfy those seeking major reform.

The response by the Greens concerning bail included the statement:

> Given the large increases in the numbers of people held on remand and the time they are held clearly this is an area in which significant change is required. The Greens are committed to a serious review of the bail system in NSW which will reintroduce the presumption in favour of bail.'[838]

The Liberal Party response included the statement that, '[t]he NSW Liberals and Nationals shall conduct a review of the *Bail Act 1978* (NSW) with a view to enacting a

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[836] Ibid.
[837] NSW Government, Submission to Community Justice Coalition, *Pre 2011 State Election submission and questionnaire for specfic reforms to the NSW Prison System,* February 2011, 22.
[838] David Shoebridge, Submission to Community Justice Coalition, Supplementary Comments, *Pre 2011 State Election submission and quesionnaire for specific reforms to the NSW Prison System,* 3.

new *Bail Act* which is written in simple language and which provides a better balance of presumptions in favour of and against bail.'[839] Greg Smith reiterated this position at the seminar.[840]

The Law Society of NSW put out a 'Justice and Fairness Policy Platform' for the 2011 State election. In relation to bail it explained the history of amendments to the *Bail Act* and then stated:

> For this reason, the Law Society of NSW is keen to see a wide-ranging and comprehensive review of the provisions of the *Bail Act 1978*, with extensive consultation. Broadly stated, the aim of such a review should be to ensure that the Act operates as a coherent whole to provide appropriately for the protection of the public while maintaining the underlying presumption in favour of bail.[841]

The *Sydney Morning Herald* continued to publish articles on the issue of bail. In the weekend edition of 15-16 January 2011 a headline read: 'Tough bail laws risk punishing the innocent'. Amongst those who commented in the article was Greg Smith who stated: 'A lot of people have been concerned in recent times that the presumption of innocence does not seem to be honoured as strongly as it was in the past so that bail is refused and used as part of the punishment.'[842] Associated articles on the same page dealt with a specific example of a man who spent a long period on remand and with

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[839] Mark Neeham, Submision to Community Justice Coalition, *Pre 2011 State Election submissions and questionnaire for specific reforms to the NSW Prison System,* 31 January 2011, 15.
[840] 'Sub committee 8.2' (23 February 2011) *Minutes of a meeting of the Committee of the NSW Council for Civil Liberties,* 3.
[841] 'Justice and fairness policy platform 2011 State Election' (Law Society of NSW) 12.
[842] Geesche Jacobsen, 'Tough bail laws risk punishing the innocent', *Sydney Morning Herald* (Sydney), 15-16 January 2011, 14.

issues concerning the police view on recidivism.[843] On 7 February an article in the *Sydney Morning Herald* discussed BOCSAR findings on why NSW had higher imprisonment rates than Victoria.[844] The material had been released on 6 February with a cover statement that explained:

> The Bureau attributes the higher NSW imprisonment rate to four factors:
>
> 1. A higher court appearance rate (3196.8/100,000 pop, compared with 2.542.1/100,000 pop in Victoria);
> 2. A higher likelihood of conviction (85.7%, compared with 79% in Victoria);
> 3. Greater use of imprisonment (7.5% of convicted offenders sent to prison, compared with 5.4% in Victoria); and
> 4. A much higher rate of remand (47.3 per 100,000 pop on remand, compared with 19.3 per 100,000 pop in Victoria).
>
> The Bureau found no differences between NSW and Victoria in the length of time spent by prisoners placed on remand. The higher NSW remand rate appeared to be due to either a higher rate of bail refusal and/or a higher rate of bail revocation.[845]

These are important factors in relation to the granting of bail. The BOCSAR material referred to at 13.5 above discusses in detail the factors involved in high remand rates in NSW. Number of convictions is one example of factors mentioned. BOCSAR makes clear

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[843] Ibid.
[844] Geesche Jacobsen, 'Higher crime rate behind the higher NSW jail rate', *Sydney Morning Herald* (Sydney), 7 February 2011.
[845] NSW Bureau of Crime Statistics and Research, 'Why does NSW have a higher imprisonment rate than Victoria' (Public release, 6 February 2011).

that the presumption in favour of bail, the neutral presumption and the presumption against bail are also important factors although not as important as some others. Sue King, David Bamford and Rick Sarre note that in Victoria in relation to the various presumptions there was a flexible approach. They state:

> This flexibility in implementing the law reflects a culture at every level of the remand decision-making of limiting the use of custodial remand to circumstances where it is clearly needed and would not be overturned on review or on fresh application later in the remand process. This approach was not approved by all, with some decision-makers advocating a stricter application of the reverse onus provisions.[846]

King, Bamford and Sarre emphasise the importance of issues other than presumptions such as characteristics of defendants (being a young male or being an Indigenous person for example), drug use and mental health**.**[847]

14.4 CONCLUSION

Law and order was not a significant issue in the State election of 2011. However, in relation to bail the public debate of 2010 continued into the period leading to the election. The political parties put forward proposals on bail and these were in general positive. The media approach was also supportive of change rather than demanding more punitive amendments. The Liberal Party committed itself to an independent

[846] Sue King, David Bamford and Rick Sarre, 'Discretion Decision-Making in a Dynamci Context: The Influences on Remand Decision-Makers in Two Australian Jurisdictions' (July 2009) 21(1) *Current Issues in Criminal Justice* 24, 31.
[847] Ibid 31-33.

enquiry into bail if elected. If punitive populism demanded a relentless drive towards a tough stance on bail then such an initiative would have been damaging.

Chapter 15

THE LIBERAL GOVERNMENT 2011-2012.

15.1 INTRODUCTION

This chapter considers the actual changes to bail law in the Liberal period to the end of 2012. Changes associated with the LRC Report 2012 are considered in later chapters. The changes made to the *Bail Act* concerning gang activity and drive by shootings is considered as is changes to consorting legislation. In both cases the changes to bail law follow long established patterns of reacting to an immediate crisis in which there is widespread media and public concern.

15.2 GANGS AND FIREARMS

Drive-by shootings and claims about gang violence continued to be a feature of NSW politics after the election of the Liberal Government. An 'e-brief' put out by the NSW Parliamentary Library in February 2012 noted, '[o]ver the past year, there have been a large number of shootings, including drive-by shootings, in South-Western and Western Sydney. This has given rise to great concern in the community.'[848] The 'e-brief' went on to look at statistics on four types of violence involving firearms in the period from 2000 to 2010. They were: shoot with intent to murder; shoot with intent other than to murder; discharge firearm into premises; and unlawfully discharge firearm. The e-brief explained: 'There was a significant downward trend over the 10 year period in three of the categories of shooting offences in both NSW and Sydney (a reliable trend test could

[848] Lenny Roth, Gun violence: an update, (Research Paper No e-brief 5/2012, Parliamentary Library, NSW Parliament, February 2012) 1.

not be conducted for 'shoot with intent to murder')'.[849] The release of the NSW Recorded Crime Statistics for the June 2011 quarter led to the conclusion that for the offences of 'unlawfully discharge firearm' and 'discharge firearm into premises' the situation was stable.[850] However, BOCSAR published updated material in February 2012 concerning the period from October 2010 to September 2011. 'In both cases, there was an increase on the number of incidents compared to the previous year.'[851]

Media pressure in relation to gang-related violence was intense. A heading on 5 January 2012 in the *Daily Telegraph* read 'Bikie war fears as man shot dead outside his home'.[852] On 11 January 2012 a headline in the *Daily Telegraph* read 'Drive-by shootings designed to "send a message"'. The associated article explained that '[t]wo homes were targeted … Up to 36 bullets were fired at a home and car in Arncliffe …'[853] On 12 January 2012 the *Daily Telegraph* headed an article 'Bite the bullet, Barry'. The associated article stated that [t]here have been 47 drive-by shootings in Sydney since the election of Barry O'Farrell last March – more than one a week and the Opposition yesterday called on the Government to find the will to end a "gang war".'[854] The *Daily Telegraph* article on the same page offered the chance to see the full list of drive-by shootings online.

[849] Ibid 2.
[850] Ibid 4.
[851] Ibid.
[852] 'Bikie war fears as man shot dead outside his home', *Daily Telegraph* (Sydney), 5 January 2012, 2.
[853] Clemintine Cuneo, 'Drive-by shootings designed to 'send a message'', *Daily Telegraph* (Sydney), 11 January 2012, 6.
[854] Andrew Clennell, 'Bite the bullet, Barry', *Daily Telegraph* (Sydney), 12 January 2012, 11.

15.3 GOVERNMENT POLICY ON GANG VIOLENCE AND DRIVE-BY SHOOTING

On 14 February 2012 the new Liberal Premier, Barry O'Farrell, responded to a question without notice in Parliament on organised crime. The Premier stated:

> The Government will always seek to support the New South Wales Police Force in its work to keep our streets safe. The recent spate of drive-by shootings in western Sydney has outraged the community, and understandably so. Members opposite talk about 66 drive-by shootings since the election of this Government. One drive-by shooting is unacceptable.[855]

The part of the debate that follows the Premier's statement said a great deal about the issues in this thesis. After discussion about whether the number of drive-by shootings was 62 or 66 and the numbers when Labor was in power, there was the following exchange:

> Mr Nathan Rees: 'You'll let them out again'.
>
> Mr Barry O'Farrell: The member for Toongabbie says we will let them out. They are Labor bail laws and they are Labor members on the judiciary – what is the argument?
>
> Ms Linda Burney: Don't say that about the judiciary.
>
> Mr Barry O'Farrell: I will say what I like about the judiciary, including incompetent magistrates.[856]

The Premier made it clear that laws would be introduced.

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[855] NSW, *Parliamentary Debates*, Legislative Assembly, 14 February 2012, 8098 (Barry O'Farrell).
[856] Ibid.

On the same day Attorney-General, Greg Smith also dealt with a question without notice on the issue of outlaw motorcycle gangs. After referring to the earlier High Court decision and the failed 2009 legislation the Attorney-General stated:

> The High Court was concerned that judges were being asked to accept the word of the police commissioner without undertaking any inquiries of their own. Judges will now be required to give reasons for declaring a criminal organization and amendments will be moved to cover the provision of confidential information.[857]

15.4 LEGISLATION ON GANGS AND FIREARMS

On the same day as the two Government policy statements, the Attorney-General introduced the Crimes Amendment (Consorting and Organised Crime) Bill, 2012. Amongst other things the Attorney-General explained that:

> Section 93GA of the Crimes Act currently creates an offence of firing a firearm at a dwelling house or other building with reckless disregard for the safety of any person, punishable by 14 years imprisonment. Sadly, the recent spate of drive-by shootings is nothing new to the people of Sydney and New South Wales. Since 2006 there has been an average of 73 to 78 drive-by shootings annually, and between October 2008 and September 2009 that number peaked when there were 102 instances of shooting.[858]

A new offence involving firing at a dwelling-house or other building in the course of organized criminal activity with reckless disregard for the safety of any person, was

[857] NSW, Parliamentary Debates, Legislative Assembly, 14 February 2012, 8100 (Greg Smith).
[858] NSW, *Parliamentary Debates*, Legislative Assembly, 14 February 2012, 8129 (Greg Smith)

introduced. It involved a maximum gaol sentence of 16 years.[859] No emphasis was given to bail in the discussion of the new offence. All other offences in s 93GA of the Crimes Act concerning firing at a dwelling-house or buildings were subject to a presumption against bail. It was not surprising in that context that the new offence would also attract a presumption against bail.

The Bill also dealt with the offence of consorting. The Attorney-General explained that in relation to consorting:

> The bill proposes to amend the basic participation offence so that, rather than requiring a person to have known that the group was a criminal group and to know or be reckless as to whether the participation contributed to criminal activity, a person will commit an offence where he or she ought reasonably to have known those things.[860]

On 15 February the Attorney-General introduced the Crimes (Criminal Organisations Control) Bill 2012. The Bill attempted to deal with the High Court criticisms of the *Crimes (Criminal Organisations Control) Act 2009* (See 12.6 above). As Greg Smith explained:

> Due to the decision of the High Court, the *Crimes (Criminal Organisations Control) Act 2009* will have to be repealed. The Crimes (Criminal Organisations Control) Bill 2012 will do that and re-enact the Act in a form which repairs the identified constitutional shortcomings. The Crimes (Criminal Organisations Control) Bill 2012 will specify that

[859] *Crimes Amendment (Consorting and Organised Crime) Act 2012* (NSW) sch 1.
[860] Smith, above n 857, 8129.

> where an eligible judge makes a declaration, revokes a decision or refuses an application, the eligible judge is required to provide reasons for doing so.[861]

Section 26 of the *Crimes (Criminal Organisations Control) Act 2012* provided for a range of offences arising from association between members of declared organisations subject to interim control orders or control orders. Schedule 1 of the Act provided that these new offences would be placed in the category in the *Bail Act* where there would be neither a presumption for or against bail. As Nicola McGarrity observes, 'the states did not take the opportunity to reconsider whether bikie control orders are necessary and proportionate to respond to the threat of organised crime.'[862]

On 15 February the Firearms Amendment (Ammunition Control) Bill 2012 introduced tighter controls on the recording of sales and the sale of ammunition for firearms. The changes did not involve further change to the *Bail Act.*

15.5 CONCLUSION

Not one of the changes to the *Bail Act* set out in this Chapter was inconsistent with the approach of the previous Government. The reasons for the decisions were also consistent with previous practice. The legislative changes in this part of the new Government's program were punitive.

Matters concerning gangs and drive-by shootings were widely reported in the media and were the subject of public concern. The Government in accord with the approach of

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[861]

[862] McGarrity, above n 726, 168.

previous Governments proceeded to introduce tough new laws on such shootings where there was an organized crime component. As other drive-by shooting offences were the subject of a presumption against bail it was not surprising that this new and very serious offence would also have a presumption against bail. Legislation was also passed that attempted to overcome the High Court's criticisms of earlier laws concerning control orders in relation to proscribed organisations. Offences that arose from association between persons in such declared organisations that were subject to a control order or interim control order were to be subject to neither a presumption for or against bail.

CHAPTER 16

THE CAMPAIGN FOR BAIL REFORM – THE LIBERAL GOVERNMENT 2011-2012

16.1 INTRODUCTION

In this chapter consideration is given to events leading up to the 2012 NSW Law Reform Commission Report on bail (LRC Report). The rest of the chapter is made up of consideration of the LRC Report.[863]

16.2 THE LEAD UP TO THE ANNOUNCEMENT OF THE NSW LAW REFORM COMMISSION REPORT ON BAIL

Before the 2011 State election the Liberal Party promised in the media that if elected it would initiate an independent review of the *Bail Act* (See chapter 14). In 2011 the approach of the *Sydney Morning Herald* remained positive towards the need for bail reform and there was no attack in the *Daily Telegraph*. On 6 April in an article on the front page of the *Sydney Morning Herald*, Attorney-General Greg Smith 'listed his first priorities as appointing a new chief justice and director of public prosecutions, closely followed by reviews of the *Bail Act*, sentencing legislation and standard non-parole periods.'[864]

Issues in Juvenile Justice Centres played a part in the lead up to the announcement in June of an inquiry. On April 12 the *Sydney Morning Herald* headed an article, 'Juvenile

[863] NSW Law Reform Commission, *Bail,* Report No 133 (2012).
[864] Geesche Jacobsen, 'Spray and pay: repeat graffiti offenders face jail, says A-G', *Sydney Morning Herald* (Sydney), 6 April 2011, 1.

detainees' shocking histories'. The associated article discussed the destructive effects of putting enormous numbers of young people in juvenile justice and stated: 'More than half the young people in NSW juvenile detention facilities were abused as children and nearly 40 per cent of the girls were sexually abused, a government report reveals.'[865]

On 10 June under the heading 'Premier acts on promise to review juvenile detention' an article in the *Sydney Morning Herald* stated:

> The Premier, Barry O'Farrell, yesterday appointed a retired Supreme Court judge, Hal Sperling, QC, to lead a comprehensive 'root-and-branch' review of the Bail Act and to report in November. Mr Sperling will be backed up by the NSW Law Reform Commission.[866]

The Premier expressed particular concern about the number of juveniles on remand. The initiative was welcomed by those involved in the criminal justice system.

On 8 June 2011 the NSW Law Reform Commission received a reference to review issues concerning bail. The Lead Commissioner amongst those participating in the review was retired Supreme Court Judge, The Hon Hal Sperling QC.[867]

The terms of reference for the inquiry included the following:

> [T]he Commission should develop a legislative framework that provides access to bail in appropriate cases having regard to:

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[865] Adele Horin, 'Juvenile detainees' shocking histories', *Sydney Morning Herald* (Sydney), 12 April 2011, 5.
[866] Anna Patty, 'Premier acts on promise to review juvenile detention', *Sydney Morning Herald* (Sydney), 10 June 2011.
[867] LRC Report, above n863 xiii, xv.

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

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

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

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

5. the desirability of maintaining s 22A;

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

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

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

9. any other related matter.[868]

Forty written submissions were provided to the NSWLRC. Nine months of research and consultation took place before the final Report was provided to the Attorney-General in

[868] Ibid xv.

April 2012.[869] The LRC Report is 363 pages in length and it is not possible in the thesis to provide a detailed discussion of all its provisions. I briefly refer to those chapters where there are no recommendations and concentrate on those chapters where there are recommendations relevant to the politics of bail in NSW.

16.3 THE NSW LAW REFORM COMMISSION REPORT ON BAIL

Chapter 1, 'Introduction to the bail review', dealt with previous reviews, the nature of the current review, the process and the scope of the report. It did not include any recommendations.

Chapter 2, 'Bail and the criminal justice system', considered the structure and purpose of the criminal justice system, principles that protect liberty and fairness in the criminal justice system and framing bail legislation in response to the objectives and principles of the criminal justice system. It did not contain any recommendations.

Chapter 3, 'The history of bail law in NSW', included the early history of bail in England; pre *Bail Act* common law in NSW; codification and reform in relation to bail; the 1976 Report of the Bail Review Committee; the *Bail Act* 1978 (NSW); amendments relating to presumptions; and a conclusion. This chapter contains no recommendations. In relation to thirty years of amendments to the *Bail Act* it explained that: 'many of the amendments were intended to restrict access to bail. The evidence presented in this

[869] Ibid iii.

chapter and the next indicates that this aim has been achieved.'[870] After noting the same effect in relation to attempts to reduce the failure to appear and the special concerns that must be addressed in relation to domestic violence, it observed that more broadly the amendments were intended to enhance the protection of the community. In relation to this it stated that: 'We note that in the last decade, crime rates have decreased across Australia. This suggests that the decline in NSW is part of a wider trend, rather than a consequence of changes in bail law and practice specific to NSW.'[871]

Chapter 4 dealt with 'Trends in remand'. It dealt with increasing remand numbers and rates, the drivers of increasing remand rates and the special situation of young people and indigenous defendants. The chapter contained no recommendations. In the conclusion it was stated:

> The data presented in this chapter demonstrates that the number of people in unsentenced detention has increased rapidly in the last 20 years, and is significantly higher than in comparable Australian jurisdictions. In particular, the rates of unsentenced detention for Indigenous people and young people are of concern.[872]

Chapter 5 dealt with 'Consequences of remand'. It considered the hardship of imprisonment, remandees not found guilty or who do not receive a custodial sentence, effects of imprisonment which are particular to remandees, and financial cost to the community. The chapter contained no recommendations. In its conclusion it was stated:

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[870] Ibid 42.
[871] Ibid 43.
[872] Ibid 62.

'Of significant concern is the potential for detention and its effects to be criminogenic – that is, a cause of further offending.'[873]

Chapter 6 dealt with 'Language and structure'. After considering the background of some of the language including connection with the common law, the LRC Report recommended that 'A new *Bail Act* should be drafted in plain English language, so as to be readily understandable, and with clear and logical structure.'[874] It went on to discuss specific terms in the current *Bail Act*. The chapter then considered the structure of the *Bail Act*. It proposed simplifying current procedures in relation to conditions attached to bail. Currently true conditions and directions that would better be described as conduct directions are called conditions. The submissions on the issue of whether the current concept of an agreement to enter conditions should be replaced with conduct directions varied. However, the Redfern Legal Centre was of the view that the agreement was really a matter of 'appearance' and the President of the Children's Court expressed the view that 'children mostly do not understand what a bail undertaking is'.[875] The proposal for change to a conduct direction prevailed. The LRC Report stated: 'Notice of a condition or conduct direction should be given to the person in writing and in plain English.'[876] The recommendations also included the elimination of repeated renewals of bail by providing for the decision to grant bail to continue in force unless varied or detention was ordered.

[873] Ibid 78
[874] Ibid 83.
[875] Ibid 86
[876] Ibid 88.

Chapter 7 dealt with 'Entitlement and discretion to release'. The LRC considered issues concerned with entitlement to bail for minor offences as set out in s 8(1) of the *Bail Act.* It also considered the position in the Australian Capital Territory and New Zealand, as those two places had an equivalent provision. The LRC then went on to consider what offences should be covered by an entitlement to bail. The LRC considered whether bail should be dispensed with for young people referred to youth justice conferences. Whether it was appropriate to impose conditions where there was to be an entitlement to bail was considered, as were exceptions to the entitlement because of issues such as, incapacity due to intoxication. The LRC then considered submissions. The LRC Report noted that:

> A number of stakeholders called for the Bail Act to require bail to be automatically dispensed with for fine only offences, for young people referred to Youth Justice Conferences, or for people charged with offensive conduct. … The NSW Police Force submission opposed automatic dispensing with bail for fine only offences and matters dealt with by Youth Justice Conference.[877]

The LRC Report provided recommendations that did not automatically dispense with bail. It also did not recommend continuing with the provision in s 8 of the *Bail Act* that provided for an entitlement to bail for *Summary Offences Act 1988* (NSW) matters where a sentence of imprisonment was available. This reflected the position of the NSW Police Force and the Police Association.[878] The LRC Report stated: '[w]e agree that the entitlement to release should not apply to offences carrying a real risk of harm to

[877] Ibid 104
[878] Ibid 95.

others.'[879] The LRC Report recommended that entitlement to release not apply to offences in the *Summary Offences Act* relating to knives, offensive implements, violent disorder, custody or use of a laser in a public place and child sex offenders.[880] On the other hand the LRC Report recommended an entitlement to release without conditions or conduct directions for fine only offences and public order offences in the *Summary Offences Act*. The LRC Report pointed out that '[w]here imprisonment is not a possible penalty for the offence, it is unjust for a person to be at risk of detention – even briefly – for breach of a conduct requirement.'[881] If there were to be no conditions or conduct directions in such cases: 'the question does not arise of having an exception that applies in circumstances where a person has breached such a condition or conduct direction.'[882] In relation to intoxication, drug use and physical injury the LRC Report thought that rather than denying the entitlement to bail it was more appropriate to use police powers under s 206 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).[883]

Chapter 7 also dealt with the discretion to release. After considering interstate material the LRC Report concluded that:

> A provision such as s 10 has scope for operation in all cases where there is not an entitlement to bail and where the court, accordingly, has a discretion whether to release, unconditionally or conditionally, or to detain. The provision provides a

[879] Ibid 96.
[880] Ibid 102.
[881] Ibid 98.
[882] Ibid 100.
[883] Ibid 100.

> convenient and efficient method of dealing with a case that is obviously one for unconditional release.[884]

Chapter 8 dealt with 'Presumptions'. The chapter dealt with concepts and issues that have appeared throughout this thesis. These included the presumption in favour of bail, the presumption against bail, neutral presumption and charges where bail would only be provided in exceptional circumstances. The issues dealt with also included the history of amendments, the effects of the amendments on detention rates, other jurisdictions and other reports.

There was broad agreement amongst those making submissions to the LRC inquiry that having a range of presumptions was not helpful. The Chief Magistrate felt that grouping offences into a range of presumptions had little relationship to 'consideration of the discrete circumstances of each accused person'.[885] The NSW Police Force thought presumptions can create artificial distinctions.[886] 'The NSW Bar Association submitted that the large number of offences that attract a presumption against bail are 'probably the single biggest reason why there are so many people in remand custody.'[887]

If the range of presumptions was to go then what was to replace it? The LRC Report noted that: '[t]he overwhelming majority of submissions advocated the removal of the existing scheme of presumptions, exceptions and special circumstances, and its

[884] Ibid 104.
[885] Ibid 115.
[886] Ibid.
[887] Ibid 116.

replacement with a uniform presumption in favour of release in some form.'[888] This position was consistent with the justification model, one of two models considered in chapter 10 of the LRC Report. 'The NSW Bail Act includes an example of the justification model. It provides that a person is entitled to be granted bail unless the bail authority is satisfied, after considering the matters in s 32, that refusal is justified.'[889]

The LRC position on presumptions was only reached after considering and rejecting a different position put forward by the police. The NSW Police Association advocated retention of the presumptions against bail in the current legislation.[890] The NSW Police Force put forward the concept of 'risk management'.[891] Risk management involves weighing the interests of the accused against the interests of the community. It would look to eliminate the risk by refusing bail to those deemed a high risk, setting conditions for those deemed a medium risk, providing unconditional bail to those deemed a low risk and dispensing with bail for those considered no risk. Later, in correspondence dated 24 February 2012, the NSW Police Force called for presumptions to apply to each risk category.[892]

The NSW Police Force submission made clear that it was opposed to a key provision of the Victorian risk management system that related to presumptions:

[888] Ibid.
[889] Ibid 145.
[890] Ibid 118.
[891] Ibid.
[892] Ibid 119.

> At the outset, 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.[893]

Section 4 of the Victorian *Bail Act* commences with the words:

> Accused held in custody entitled to bail
>
> 4. Accused held in custody entitled to bail
>
> (1) Any person accused of an offence and being held in custody in relation to that offence shall be granted bail –[894]

That Act then sets out the circumstances in which bail is to be granted and various other matters including the 'unacceptable risk' test. The Victorian *Bail Act* also includes in some cases bail only in exceptional circumstances. Nevertheless, the fact remains that the unacceptable risk test in the Victorian *Bail Act* is subject to the provisions set out in s 4 above.

The LRC Report noted that: 'We understand the NSW Police Force to be concerned that a uniform presumption in favour of bail would overwhelm all other factors and result in people who should be detained being released. We do not think this would be the case.'[895]

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[893] NSW Police Force, *Submission BA 39* to NSW Law Reform Commisison, *Enquiry on Bail,* 27 October 2011, Appendix p 1.
[894] *Bail Act 1977* (Vic) s 4.
[895] LRC Report, above n 863, 122.

The risk management approach was rejected in the LRC Report. The LRC Report preferred the justification model. The LRC Report explained that the two systems were similar but went on to state:

> However, it is more difficult to include explicit reference to the interests of the person within the unacceptable risk model. Of the two Australian jurisdictions that use this model, neither mentions the interests of the person. Of course, these interests are necessarily taken into account in deciding whether a risk is unacceptable, but they are not explicit in the statutes. The justification model can more easily incorporate reference to the interests of the person, as is done in New South Wales, the Australian Capital Territory, and the Northern Territory. It can also more easily incorporate reference to basic legal principles. It has the advantage of being familiar to authorities and practitioners in this State.[896]

The LRC Report made its position clear when it stated:

> We strongly recommend a uniform presumption in favour of bail (with the sole exception of bail pending appeal against conviction or sentence). That would accord with basic legal principles and concepts enshrined in the criminal justice system, particularly the value of personal liberty and its corollary, the presumption of innocence. The submissions we have received provide overwhelming support for that approach.[897]

Chapter 10 of the LRC Report considered other aspects of the tests for the granting of bail. It noted that the majority of submissions supported an exhaustive list of considerations and the LRC Report took that approach. Noting support in the

[896] Ibid 145.
[897] Ibid 123.

submissions for the inclusion of basic legal principles the LRC Report recommended a new consideration: 'the public interest in freedom and securing justice according to law'.[898] This was consistent with the majority of submissions. The considerations would include: the likelihood of the person absconding; a history of failure to appear and the court is satisfied that will happen again; interference with witnesses, evidence or jurors; being charged with an indictable offence while subject to conditional release in relation to another indictable offence charge or having been convicted of a previous indictable offence; the likelihood that if released the person will harm or threaten harm to a person and in particular anyone with whom the person is in a domestic relationship; the protection and welfare of the community having regard to the likelihood that if released, the person will commit offences (restricted to offences causing death or injury, sex offences, offences involving serious loss or damage to property and offences giving rise to substantial risk of death, injury or serious loss or damage to property); and the interests of the person and of the person's family and associates.[899] The recommendations also made clear that detention should be a last resort and that a person should not be detained unless a custodial sentence is likely to eventuate.

Chapter 9 dealt with 'Release pending appeal'. After considering the complexity of the appeal process, depending on which level of court was being appealed from, the LRC Report observed that '[i]t can be seen that there are several potential avenues for

[898] Ibid 149.
[899] Ibid 162.

appeal in relation to proceedings heard in the Local Court, District Court and Supreme Court, and in relation to appeals from decisions of the Court of Criminal Appeal.'[900]

In relation to appeal to the Court of Criminal Appeal from conviction or sentence in the District Court or from a bail decision by the Supreme Court the current position is that s 30AA of the *Bail Act* requires special or exceptional circumstances to be established. This is the case throughout Australia and has long been the common law position given that the presumption of innocence no longer applies. No good reason was found to require replacement of this approach.

In relation to appeals from the Local Court to the District Court or the Supreme Court, the LRC Report concluded that applications for release pending such appeals

> should be governed by the same considerations that apply to applications for release pre-trial, where they are relevant. … [we] are however of the view that an additional consideration should apply, namely that the application is shown to have a reasonably arguable prospect of success.[901]

Chapter 11 dealt with 'Special needs and vulnerabilities'. The LRC Report noted that the current *Bail Act* s 32(1)(b)(v) requires consideration of the special needs of a person under the age of 18 years, or who has an intellectual disability, or is mentally ill, or is an Aboriginal person or a Torres Strait Islander. However, the Report noted that:

'[s]ubmissions and other evidence before this review indicate that, despite s 32,

[900] Ibid 128.
[901] Ibid 137.

decision makers do not always appropriately take into account the particular circumstances of these defendants.'[902]

In relation to young people the LRC Report noted that the *Declaration of the Rights of the Child* requires special safeguards, care and legal protection for children. After considering the submissions the LRC Report pointed out that '[y]oung people's dependence is directly related to the problem of homelessness among young people.'[903] The Report also referred to immature brain development in causing impulsivity and lack of foresight, and the effect of life circumstances such as poor education, a parent in prison, need for medication, child abuse and limited intellectual ability.[904] Incarceration on remand was found to loosen family ties, increase mental illness, increase subsequent offending and lower job prospects.

The LRC Report did not support the need for a separate *Bail Act* for young people, concluding that this would create unnecessary duplication. The additional recommendations included the transposition with some modifications of s 6 of the *Children (Criminal Proceedings) Act 1997* (NSW) into a new *Bail Act*. Those provisions include: consideration of the rights of young people before the law; continuity in education and work; safe and secure accommodation if possible at home; detention as a

[902] Ibid 168.
[903] Ibid 169.
[904] Ibid 170.

last resort; underdeveloped capacity for decision making; and the need to ensure an understanding of conditions.[905]

In relation to mental health and cognitive difficulties the LRC Report accepted the point made in submissions that there was a need for a wider definition of these matters to reflect modern knowledge. It also noted that 'there is significant over-representation of people with mental health and cognitive impairments within prison, court and juvenile justice populations.'[906] Mental health issues could be made worse by incarceration. Of importance was the observation in relation to repeat offenders and mental health that: '[t]he presumptions against bail for repeat offenders in s 8C and 9 D therefore disproportionately affect those defendants and our recommendations regarding presumptions are particularly relevant.'[907] The LRC Report reminded readers that Australia had ratified the *Convention on the Rights of Persons with Disabilities* which requires parties to ensure people with disabilities enjoy the right to liberty and security of person, 'and are not deprived of their liberty unlawfully or arbitrarily.'[908]As a result of all of the above the LRC Report recommended that the matters to be taken into account for those with a mental health or cognitive impairment should include: the ability to understand conditions and conduct directions; the need to access and undergo treatment, added impact of prison, reports tendered by the defence concerning

[905] Ibid 175.
[906] Ibid 178.
[907] Ibid 179.
[908] Ibid.

cognitive or mental health impairment and no adverse inference from the lack of a report.[909]

In relation to Aborigines and Torres Strait Islanders the LRC Report observed that:

> [c]reating a uniform presumption in favour of release and limiting conditions to those that are necessary to avoid detention are important steps towards reducing the numbers of Aboriginal people on remand and subject to onerous bail conditions.[910]

In relation to the matters to be taken into account in relation to Aborigines and Torres Strait Islanders, the LRC Report recommended including identity, culture and heritage including extended family, traditional ties to place, mobile and flexible living arrangements, and any other relevant cultural issue or obligation.[911]

The LRC Report considered the needs of people with special needs and vulnerabilities including issues concerning sexuality, religion and family ties. It concluded that: 'the authority must take into account (in addition to any other requirements) any special vulnerability or need of the person.'[912]

Chapter 12 dealt with 'Conditions and conduct requirements: Background'. It did not contain any recommendations. The LRC Report pointed out that directions as to conduct and actual conditions were treated as conditions in the current *Bail Act*. The LRC Report resolved to 'use the term "conduct requirement" when we speak about conduct

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[909] Ibid 180.
[910] Ibid 185.
[911] Ibid.
[912] Ibid 189.

requirements embodied in a bail agreement under the current legislation or when speaking about bail law generally.'[913] After considering the submissions on conditions and on the current approach to enforcement the LRC Report concluded:

> [T]he use of conditions and conduct requirements has a clear and legitimate purpose in ensuring that a person appears in court, does not commit serious crime while released, and does not threaten the safety of particular people or the integrity of the court process. … Conduct requirements appear to be imposed routinely and unnecessarily without tailoring the situation to the individual. … The consequence has been a substantial increase in the number of people in detention pending trial … In these circumstances, there is a strong case for looking closely at the justification for imposing conditions and conduct requirements.[914]

Chapter 13 concerned 'What conditions and conduct directions should be allowed'. Lack of accommodation receives attention in several parts of the chapter. Corrective Services pointed out there was no dedicated bail accommodation in NSW and the LRC Report recommended that this concept should be dropped in the *Bail Act*. In relation to adults the LRC Report suggested that bail support would reduce the cost caused by incarceration. It noted that '[t]here is a lack of public facilities for the accommodation of homeless adults and young people who have nowhere to live and who should be released on all other grounds.'[915] In relation to juveniles the LRC Report accepted the view of the Children's Court that the Court should not release juveniles until

[913] Ibid 192.
[914] Ibid 212.
[915] Ibid 219.

accommodation is available. Accommodation is almost always found in a relatively short space of time.[916]

The LRC Report concluded that the conditions specified should be the only ones, consistent with the existing legislation. However, conduct directions should not be limited other than as specified in the Report. The conditions recommended were consistent with those in the existing legislation. In addition to those mentioned above they included: financial and security conditions; surrender of a passport but not restricted to cases involving death; and conditions and conduct directions to facilitate assessment and participation in treatment, intervention or rehabilitation.[917]

Chapter 14 dealt with 'How conditions and conduct directions should be decided'. Consistent with the current *Bail Act* the LRC Report recommended that neither a condition nor a conduct direction should be imposed unless justified. The existing purposes for such conditions and conduct directions, including promoting effective law enforcement and protection and welfare of the community, were found to be too wide. The LRC Report recommended that '[t]he considerations to be taken into account in deciding whether to impose a condition or a conduct direction should be the same as apply to a decision whether to release or detain a person.'[918] Having considered the limited financial resources of young people who come into contact with the criminal justice system and submissions on that matter, the LRC Report recommended that

[916] Ibid.
[917] Ibid 220.
[918] Ibid 226.

financial conditions for the young be limited to serious indictable offences.[919] For adults it recommended financial conditions only if there was a likelihood of absconding.

After considering many submissions critical of bail conditions as a means of enforcing welfare provisions the LRC Report concluded that: '[W]e agree with the weight of submissions on this topic, that welfare orientated conduct requirements are ill suited to meeting those needs.'[920] Other provisions recommended were consistent with the current *Bail Act*. They included: family, community or other support; conditions and conduct directions not to be more onerous than necessary; and compliance be reasonably practicable.

Chapter 15 dealt with 'Failure to comply with a condition or to observe a conduct direction'. The chapter dealt with conditions and conduct directions separately. Section 54A of the *Bail Act* provides that a person who cannot meet a condition of bail be brought before a court no later than eight days after being received into custody. The LRC Report found that '[t]he majority of submissions support reducing the time for notice concerning both adults and young people.'[921] The NSW Police Force supported the status quo. The LRC Report recommended that the provisions requiring eight days notice to an appropriate court be retained but 'if the person is a young person under 18, notice must be given within two days, and every two days thereafter.'[922] Notice of the listing should be given to legal representatives on the record and to the Aboriginal Legal

[919] Ibid 231.
[920] Ibid 232.
[921] Ibid 236.
[922] Ibid 239.

Service if the person is unrepresented and of Aboriginal or Torres Strait Islander background.

In relation to conduct directions the LRC Report considered the various options open to a police officer when a breach is suspected. A number of submissions proposed that police consider options in order of severity. This was opposed by the NSW Police Force and the Police Association and ultimately found to be unnecessary by the LRC. It recommended that the police officer could:

1 (a) (i) take no action,

(ii) issue a warning,

(iii) require the person to attend court by notice without arresting the person, or

(iv) arrest the person and take them as soon as practicable before a court.

(b) that in considering what course to take the police officer must have regard to: (i) the relative seriousness or triviality of the suspected failure (including threatened failure),

(ii) whether the person has reasonable excuse for the failure,

(iii) that arrest is a last resort,

(iv) insofar as they are apparent to or known by the officer, the person's age and any cognitive mental health impairment.

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

> (d) that upon being satisfied that the person has failed, or was about to fail, to comply with a conduct direction, a court may redetermine whether to release or detain the person and whether to impose a condition or a conduct direction.[923]

Chapter 16 dealt with the 'Implications of *Lawson v Dunlevy*. This was a reference to the then recent decision of the Supreme Court concerning enforcement of bail conditions by further conditions. An example would be a condition not to consume alcohol enforced by a requirement to submit to a breath test when requested by a police officer. Section 37 of the *Bail Act* provides the purposes for which there can be a bail condition. These include promoting effective law enforcement and protection and welfare of the community. The Supreme Court found that conditions that enforce other conditions do not enforce the criminal law as the failure to comply with them leads to a return to court, not a penalty. Nor did the enforcement provision directly protect persons or the community from future offences. The test was vague and onerous.[924] After considering the issues and noting that courts and police had imposed such conduct requirements the LRC Report stated:

> [I]t would appear that too often such requirements have been imposed as a matter of routine rather than as a result of a close consideration of their need in the individual case, and that there have been occasions where curfew monitoring in particular has been excessive or unreasonable.[925]

[923] Ibid 243.
[924] Ibid 246.
[925] Ibid 250.

Importantly, given legislation to be discussed in the next chapter, the LRC Report also stated in relation to safeguards that: '[p]ossibly it should also depend on the presence of a reasonable suspicion that the released person is failing to comply with the relevant direction.'[926] This is not an alternative to other options. It is an addition.

Enforcement conduct directions were recommended but with safeguards. Such directions should be 'reasonable in the circumstances, having regard to the history of the released person and the likelihood or risk of that person breaching the underlying conduct direction'.[927] They should state with precision what is required and 'specify such limits on the frequency with which the power can be exercised or the places or times at which it can be exercised to ensure that it is not unduly onerous in all the circumstances.'[928]

Chapter 17 dealt with 'The offence of failing to appear'. The LRC Report concluded that the offence of failure to appear should continue but that it should be restricted to cases that could be regarded as serious because conditions or conduct directions have been imposed with the grant of bail. These are cases where 'otherwise the authority would detain the person. Such serious cases justify a penalty on failure to attend.'[929] Having considered interstate maximum sentences for the offence the LRC Report recommended that the current three year maximum be reduced to two years.

[926] Bid 251.
[927] Ibid 252.
[928] Ibid.
[929] Ibid 254.

Chapter 18 dealt with 'Applications for release, detention and variation'. This involved procedural matters which are outside the scope of this thesis.

Chapter 19 dealt with 'Refusal to hear applications'. The chapter considered: s 22A of the *Bail Act* concerning refusal to hear second and later bail applications; a discretion to refuse to hear frivolous or vexatious applications; and the right of the Supreme Court to hear applications. The legislative history of s 22A was reviewed, including its origin as a means of allowing the Supreme Court to refuse to hear repeat applications unless there were 'special facts or special circumstances that justify the making of the application.'[930] The Report explained the 2007 amendment requiring courts to refuse to hear applications unless a limited range of grounds were met, and the 2009 amendment expanding those grounds. These matters, including the dramatic rise in the length of stay in custody of juveniles, are considered at 12.5 above.

While the submissions generally supported retaining the 'frivolous and vexatious' test, the Report noted that '[a] number of submissions were opposed to any change relating to repeat applications. These were the Office of the Director of Public Prosecutions, the NSW Police Force, and the Police Association of NSW.'[931] A number of submissions supported 'total repeal of s 22A insofar as it relates to repeat applications. These were Legal Aid NSW, NSW Council for Civil Liberties, the Shopfront Youth Legal Centre and the Redfern Legal Centre.'[932]

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[930] Ibid 278.
[931] Ibid 282.
[932] Ibid 283.

Ultimately the LRC Report recommended that the discretion to refuse to hear an application for release on the grounds that the application is frivolous or vexatious should be retained. It recommended adding, or is 'without substance or has no reasonable prospect of success.'[933] The LRC Report also recommended retaining the Supreme Court power to refuse to hear applications that could be dealt with in the Local Court or the District Court.

After considering the reasons given for requiring courts not to hear applications, such as forum shopping and protecting victims, the LRC Report concluded that '[i]t is by no means clear that the courts are in need of protection from what would otherwise be a burden of wasteful repeat applications.'[934] However, the area most in need of reform was the application of s 22A to young people. Young people were not found to be making unnecessary bail applications. The LRC Report found that:

> a young person's inexperience of life and intellectual immaturity can impact upon the ability to comprehend fully his or her situation and the workings of the criminal justice system. It may also take time for the young person to develop trust and confidence in his or her lawyer.[935]

The LRC Report concluded that young people should be excluded from the repeat provision aspects of s22A. Following an ACT precedent the LRC Report recommended for adults that two applications should be available before the provisions of s 22A

[933] Ibid 290.
[934] Ibid 286.
[935] Ibid 287.

became relevant. This would strike the right balance between protecting the criminal justice system from unnecessary and wasteful repeat applications on the one hand and protecting the rights and liberty of the accused on the other.[936]

The LRC Report recommended that variation of release conditions or conduct directions should be subject to s 22A 'if the variation application is the same or substantially the same as previous applications.'[937] The provision allowing a lawyer to refuse to make the bail application was found to be unsatisfactory for it is for courts to judge the merits of the application.

Chapter 20 dealt with 'Electronic monitoring'. The LRC Report pointed out that it cost $276 per day to keep a person in remand compared with $47 per day for home detention with electronic monitoring. Such monitoring is nevertheless a substantial restriction on liberty and the LRC Report recommended: '[t]he target group for a pilot scheme might be those who are in custody and are likely to spend 1 to 6 months in detention, a group which in 2010 comprised 1,919 people.'[938] Such monitoring should be taken into account on sentencing.

The complexity of the issues involved in electronic monitoring has been considered by Anthea Hucklesby.[939] Her research was set in England. Hucklesby noted that all

[936] Ibid 288.
[937] Ibid 289.
[938] Ibid 299.
[939] Anthea Hucklesby, 'The working life of electronic monitoring officers' (2011) 11 *Criminology and Criminal Justice* 59,

monitoring officers are concerned about personal safety. Hucklesby also noted that three working credos were important. She observed:

> The credos form a continuum based upon three aspects of their working values: the extent to which they empathized with offenders' situations and trusted them; pragmatic considerations about getting the job done; and the extent to which they saw their role as providing offenders with information, guidance and support.[940]

Neither the LRC Report recommendation nor the research of Hucklesby suggest or establish a general punitive approach.

Chapter 21 dealt with 'Monitoring and review of a new Bail Act' and Chapter 22 dealt with 'Outstanding issues'. I do not propose to address these issues.

16.4 THE MEDIA DURING THE LEAD UP TO THE RELEASE OF THE LAW REFORM COMMISSION REPORT

On 26 October 2011, under the heading 'Unfair bail laws used as punishment: magistrate', the *Sydney Morning Herald* reported on submissions to the LRC bail inquiry. The *Herald* explained that most submissions were supportive of a relaxation and simplification of the law on bail. Quoting from the submission of the NSW Chief Magistrate, Graeme Henson, the article stated that 'prosecutors had a "culture that bail

[940] Ibid 71.

should be opposed" and that the judiciary was often "forced into a semblance of complicity" in executing their agenda.'[941]

The media tone took on a new dimension in 2012. The *Sydney Morning Herald* remained supportive of reform but the *Daily Telegraph* came out swinging in opposition to bail reform. On 23 January a *Herald* article was headed, 'Smith considering bail changes to cut remand numbers'.[942] On 1 February the *Daily Telegraph* page 1 headline was 'Exclusive: Gays, minorities get bail but the rest … Go straight to jail'. Greg Smith was portrayed (literally) on the page as a 'marshmallow man'. The appeal to various forms of prejudice set out in these words is self-evident. The associated article in the *Daily Telegraph* states:

> Gays, lesbians and other 'vulnerable' people will have a better chance of avoiding jail under a review designed to soften the State's bail laws. The proposal is currently before the Attorney-General Greg Smith – the man who has, since entering government gone soft on crime and punishment.[943]

The article went on to explain that: '[i]n a decision which has angered police, the presumption against bail for serious offences such as murder, armed robbery, firearms offences and serious sexual assault would also be removed under the proposals from the Law Reform Commission.' The article went on to state: '[l]ast night in response to questions from the *Daily Telegraph*, Mr Smith's spokesman promised that: "The NSW

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[941] Geesche Jacobsen, 'Unfair bail laws used as punishment: magistrate', *Sydney Morning Herald* (Sydney), 26 October 2011, 6.
[942] Anna Patty, 'Smith considering bail changes to cut remand numbers', *Sydney Morning Herald* (Sydney), 23 January 2012
[943] Andrew Clennell, 'Exclusive: Gays, minorities get bail but the rest ... Go striaight to jail', *Daily Telegraph* (Sydney), 1 February 2012, 1.

government will not be changing the bail laws to allow accused murderers, rapists and armed robbers to roam our streets."' The article also included the observation that: 'NSW Police Association president Scott Weber called for the review to be made public and for it to be rejected.'[944] On February 6 the *Daily Telegraph* headed an article: 'Accused goes home while burned boy goes to hospital'. The article stated: 'As a 15 year old youth walked free at the weekend after allegedly causing severe burns to another youth, New South Wales Attorney-General Greg Smith appears determined to spare more juveniles from detention.'[945] The article then attacked Greg Smith in relation to his approach to providing bail and sentencing for youth. Police criticism was followed up by criticism from a '[a] senior government source'.

The *Telegraph* articles were important given the different target audiences for the *Sydney Morning Herald* and the *Daily Telegraph* and the public opposition by the police. Although it was not going to shake the resolve of the LRC to produce an independent report, what effect it would have on the Government remained to be seen. This concern was heightened on 2 April 2012 when Anna Patty observed in the *Sydney Morning Herald*: 'But some lawyers fear [Greg Smith] will not succeed in getting more far-reaching reforms to liberalise presumptions against bail – strongly opposed by police – past his conservative cabinet colleagues.' Ominously, after stating he had the support of the Premier and his colleagues, Greg Smith was quoted as saying: 'That doesn't mean

[944] Ibid.
[945] 'Accused goes home while burned boy goes to hospital', *Daily Telegraph* (Sydney), 6 February 2012.

there won't be modifications, perhaps to some of the recommendations that have been made'.[946]

Concern was heightened by the Premier's observations on page one of the *Sydney Morning Herald* in relation to a person given bail and accused of burning a police vehicle:

> I am appalled and angry by this decision. It is about time members of the judiciary stopped living in a parallel universe and understood that Sydney is in the midst of a serious bikie-gang war … It is another reason why the state's bail laws need the review that we are subjecting them to.[947]

The Premier's comments led to a number of critical responses in the *Sydney Morning Herald*. Given the heading of the article they appeared in it is appropriate to include: 'Max Taylor, a former magistrate, described Mr O'Farrell's rhetoric as "thuggish", saying it matched that of the former Labor Government.'[948]

16.5 CONCLUSION

At the 2011 NSW State election Attorney-General Smith had committed the Government to an independent inquiry into bail. Carrying out that inquiry through the NSW LRC added to confidence about the process. The Bail Reform Alliance and other organisations wanting bail reform remained active. Media coverage favoured a less

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[946] Anna Patty, 'Battle looms on bail change to keep juveniles out of jail', *Sydney Morning Herald* (Sydney), 2 April 2012, 5.
[947] Lisa Davies and Anna Patty, 'Judiciary out of touch, says furious O'Farrell as bikie is freed on bail', *Sydney Morning Herald* (Sydney), 27 April 2012, 1.
[948] Anna Patty, 'O'Farrell's 'thuggish' rhetoric on bail worries law bodies', *Sydney Morning Herald* (Sydney), 7 May 2012, 3.

punitive turn. The *Sydney Morning Herald* remained supportive of bail reform. Articles concerning the background of physical and sexual abuse associated with many juveniles who come into contact with the juvenile justice system added pressure for serious consideration of issues related to bail. BOCSAR pointed to a much higher remand rate as one of four reasons explaining why NSW had much higher imprisonment rates than Victoria. Bail reform was not a fundamental challenge to neo liberal orthodoxy concerning market dominance and a small public sector. Bail reform would reduce the financial cost of the prison system. The terms of reference handed to the Law Reform Commission were wide. This too reflected a less punitive approach to the issue of bail.

It was clear from the first five chapters of the LRC Report that its approach was going to give serious consideration to issues such as the presumption of innocence, human rights such as the right to liberty, no punishment without conviction and the special needs of the young and disadvantaged. Those chapters contain criticisms of the numerous punitive amendments that occurred after the *Bail Act* was introduced in 1978. They also contain confirmation of the direct connection between the amendments and increased remand numbers. Chapter 5 reminded readers of the hardship associated with remand, the financial cost and the enhanced prospect of further offending as a result of the experience. Nevertheless, as Chapter 7 dealing with the right to release for lesser offences established, the LRC Report cannot be accused of extremism. While the right to bail without conditions or conduct directions was recommended, the recommendation did not continue the current provision in s 8 of the *Bail Act* providing for an entitlement

to bail where an offence under the *Summary Offences Act* carried a potential gaol sentence.

The recommendations commenced in chapter 6. In that chapter the LRC Report recommended that language be simplified. It also proposed distinguishing between conditions and conduct directions and elimination of the need for repeat applications for bail when bail had been granted.

The support in Chapters 8 and 10 for a universal presumption in favour of bail and the rejection of the risk management model in favour of the justification model provide a clear example of the rejection of the punitive approach to bail. The support for these concepts required the rejection of the submissions of the NSW Police Force and the NSW Police Association. The approach was based on support for legal principles and the idea of personal liberty. This approach was reinforced by adding to the current tests for bail a test based on the public interest and freedom and securing justice according to law.

The recommendations on appeals found in Chapter 9 do not vary existing provisions in a manner that points to a punitive or non-punitive approach.

The *Bail Act* currently requires consideration of youth, mental health, intellectual disability and Aboriginal and Torres Strait Island background. However, after concluding that such issues were not always considered the LRC Report in Chapter 11 strengthened

the non-punitive provisions. It also recommended that s 6 of the *Children (Criminal Proceedings) Act* relating to rights and other concerns about children be placed in the *Bail Act*. The LRC also pointed out that introducing a uniform presumption in favour of bail would also assist Aborigines and Torres Strait Islanders.

Chapters 12 to 16 dealt with various aspects of conditions and conduct directions. The LRC Report was critical in noting the routine use of conduct requirements and the rise in remand rates. It also noted the lack of accommodation for the homeless, pointed out the financial saving on prisons by providing such accommodation and recommended that juveniles should not be released until accommodation is confirmed. The conditions provided for in the current *Bail Act* were found to be adequate and were recommended for continued use. On the other hand conduct directions should not be so limited. In either case, the Report emphasised that they must be justified for the purposes of bail and not used for welfare purposes. Financial conditions should be used only in limited circumstances for juveniles and adults. None of this is punitive and all of it would assist defendants to comply with bail conditions and conduct directions. The same can be said for the recommendation to reduce to two days the time limit for bringing a juvenile who cannot meet a bail condition back before the court. The LRC did not support a hierarchy of options for a police officer considering a potential breach of condition or conduct direction. Such a hierarchy had been opposed by the NSW Police Force and the Police Association. However, the LRC Report did recommend a police officer take into account a variety of factors and have the power to discontinue arrest. Enforcement conduct

directions were recommended but with safeguards. None of these proposals was punitive.

Chapter 17 continued the provisions concerning failure to appear but recommended reduction of the maximum sentence for offence from three years to two years.

The right to reject frivolous and vexatious bail applications was recommended for retention. However, the LRC Report was concerned about the law and its consequences in relation to second and subsequent bail applications. In chapter 19 the LRC Report found that young people were not making unnecessary bail applications and recommended their exclusion from the provisions of s 22A of the *Bail Act*. Two applications free of S 22A were recommended for adults. Once again the approach was not punitive.

While electronic monitoring can be seen as punitive it was not clearly so when limited to a pilot scheme amongst those likely to spend one to six months in custody before trial or sentence. Such time should be taken into account in sentencing. It was clearly financially cheaper than remand.

Overall, the recommendations of the LRC Report represented an enormous improvement on the *Bail Act* in the form it had taken by 2012. However, by 2012 the media response to bail reform had become far more mixed than it had been in 2011.

The *Daily Telegraph* was savagely critical of proposals for reform. The question remained as to what the Government was prepared to do to implement it.

CHAPTER 17

THE LIBERAL GOVERNMENT RESPONSE TO THE LRC REPORT ON BAIL

17.1 INTRODUCTION

In this chapter the history of the Government's response to the Law Reform Commission's report is considered. The Government's views are to be found in the remarks of the Attorney-General before the Budget Estimates Committee, legislation on enforcement of bail conditions, and the Bail Bill 2013. The media debate at various points in this ongoing process is also considered.

17.2 THE BUDGET ESTIMATES COMMITTEE

Attorney-General, Greg Smith appeared at the Budget Estimates 2012-13 on 10 October 2012.[949] The questions related to all aspects of the Minister's area of responsibility but I will deal only with observations relevant to bail. The Attorney-General explained that the LRC Report on bail was being carefully considered and that a response would be available by the end of November.[950]

Throughout the proceedings the Attorney-General made clear that his Department was subject to the general financial restrictions that had been applied to all Departments by

[949] General Purpose Standing Committee No 4, Parliament of NSW, *Examination of proposed expenditure of the portfolio area Attorney-General, Justice* (2012-13).
[950] Ibid 15, 33.

the Government.[951] The financial pressure took on added meaning when officers with the Attorney-General explained that the proportion of adult prisoners on remand made up 26.3% of the total. Concern about the numbers on remand was heightened by the added information that 53% of young people in custody were on remand.[952] While Aboriginal young people only made up approximately 3% of that age group, they made up 50% of those in custody.[953] The Attorney-General also acknowledged the problem of young people on remand and homelessness when he stated: 'Our Government is giving assistance to non-government organisations to provide accommodation for homeless young people. A substantial number apparently are bail refused because they cannot comply with that condition.'[954]

The Attorney-General's explanation concerning the LRC Report would prove to be important when the Government later made its announcement on bail. Smith stated:

> We are considering the Law Reform Commission's report on bail and we have decided to implement a risk management approach which looks at the dangers of prisoners reoffending or people charged not attending court when required, interfering with witnesses or victims again. I expect that when that approach is applied in the legislation by courts that fewer offenders or alleged offenders will have bail refused.[955]

As discussed at chapter 16.3 the LRC Report specifically rejected the risk management approach and favoured a presumption in favour of bail and a justification model.

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[951] Ibid, 3, 5, 6, 19, 31,
[952] Ibid 33.
[953] Ibid 34.
[954] Ibid.
[955] Ibid 33.

17.3 THE MEDIA DEBATE OVER BAIL IN THE SECOND HALF OF 2012

The Bail Reform Alliance held a 'Reform the Bail System Now' forum on 6 June. The intention was to keep the issue of bail reform before the public and in the media. The forum generated important media coverage. [956]

The *Sydney Morning Herald's* response to the public release of the LRC Report was positive. In an article on 14 June the *Sydney Morning Herald* explained what the Report had to say.[957] On 15 June a further *Sydney Morning Herald* article included positive responses to the LRC Report. However the article also stated that: '[t]he opposition from police is likely to fuel tensions within cabinet as it debates the recommendations. The Attorney-General, Greg Smith, will need to persuade colleagues including the Police Minister, Mike Gallacher, to agree to the changes.'[958] On 18 June a pro bail reform Editorial appeared in the *Sydney Morning Herald*.[959] The *Daily Telegraph* with some radio commentator support continued the attack on bail reform. In the *Sydney Morning Herald* Richard Ackland observed:

> Who would have picked the hard-line Christian warrior Attorney-General, Greg Smith, as a 'leftie masquerading as a conservative?' That's the view of 2GB's morning show judge and juror, former taxi driver and game caller, Ray Hadley, talking yesterday about the NSW Law Reform Commission's review of the Bail Act … Ray was going full bore against the Commission's recommended changes to the Act, threatening to bring the

[956] As convener of the Bail Reform Alliance I appeared on the ABC 702 drive program on the afternoon before the forum.
[957] Anna Patty, 'Bail for youth must be easier, review finds', *Sydney Morning Herald* (Sydney), 14 June 2012, 1.
[958] Anna Patty, 'Police fight bail law softening as welfare groups back review', *Sydney Morning Herald* (Sydney), 15 June 2012, 3.
[959] Editorial, 'Attorney Smith faces toughest test', *Sydney Morning Herald* (Sydney), 18 June 2012, 12.

> government crashing to the ground. His studio claqueur was the Telegraph reporter Andrew Clennell, who thought this was 'one of the most left wing reports on law and order'. The opening line of his story yesterday said: 'Accused murderers and rapists would be allowed out of jail while awaiting trial, under an overhaul of NSW bail laws'.[960]

The approach the Government was considering was explained by Greg Smith in the *Sydney Morning Herald* on 27 June 2012: 'There will be no weakening [of the bail laws] but we will have a smarter bail law, one based on risk management, which is what I was proposing, which the Premier has accepted, and which will hopefully mean more transparent decisions on bail'.[961]

Those who wanted a conservative response to the LRC Report received powerful support on 7 August when the NSW Police Commissioner Andrew Scipione expressed his views in the *Daily Telegraph.* Under the heading 'Freeing up bail would be a crime' the Commissioner explained that the current presumption against bail for certain offences worked well. The article stated that the Commissioner 'was confident that "common sense will prevail" when it comes to a cabinet decision on the matter expected later this year.'[962] The Police Commissioner also stated:

> I don't think that was Greg Smith's report, I think it was the Law Reform Commission's report. We have a different view. The beauty of Australia is everyone's entitled to a

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[960] Richard Ackland, 'Hanged, drawn and quartered - and that's just the Bail Act', *Sydney Morning Herald* (Sydney), 15 June 2012, 13.
[961] Anna Patty, 'NSW to back turnaround on bail conditions', *Sydney Morning Herald* (Sydney), 27 June 2012, .
[962] Andrew Clennell, 'Freeing up bail would be a crime', *Daily Telegraph* (Sydney), 7 August 2012, 14.

> view. We're looking forward to what comes out of the final decision and of course we're sure that our strong representations will have an impact.[963]

17.4 ENFORCEMENT CONDITIONS – EARLY LEGISLATION

On 10 September the Attorney-General announced the first actual response to the LRC Report. It concerned enforcement conduct directions. This matter and *Lawson v Dunlevy* were discussed at 16.3 above. The LRC Report had considered enforcement conduct directions and was critical of how they had been used in practice but recommended their continuation with stringent safeguards. No other parts of the LRC Report were the subject of legislation in September and the singling out of enforcement had about it the sound of a return to a punitive approach. A *Sydney Morning Herald* article explained that: '[t]he Attorney-General, Greg Smith, has asked for an urgent response to a recommendation from a review of the NSW Bail Act for a new provision to give police extra powers [to] allow [them] to enforce bail conditions'.[964] The article included my own observations on behalf of the Bail Reform Alliance concerning the failure to bring forward the other issues in the LRC Report. The decision by the Attorney-General was applauded by the Police Association.

On 24 October 2012 the Minister for Police and Emergency Services, Michael Gallacher, introduced the Bail Amendment (Enforcement Conditions) Bill 2012. Why did the

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[963] Ibid.
[964] Anna Patty, 'Reforms may boost police power', *Sydney Morning Herald* (Sydney), 10 September 2012, 3.

Government bring only this one issue forward given the wide range of issues discussed in the LRC Report? The Minister for Police explained to the Legislative Council that:

> The NSW Police Force has advised the Government that the absence of enforcement conditions is negatively impacting on their ability to check that an accused person or persons are complying with their bail conditions. The Government is committed to ensuring that the NSW Police Force has all the tools necessary to properly enforce the law.[965]

The Bill provided for enforcement conditions to enforce an underlying bail condition. The Bill did meet a number of concerns expressed in the LRC Report in that it required the enforcement condition to specify: the kind of direction; the circumstances in which the direction can be given and; the underlying condition. An enforcement condition could be provided only by a court and sought only by the prosecutor. The enforcement condition had to be reasonable and necessary as found from: consideration of the history of the accused; the likelihood or risk of further offences on bail and; the extent to which other persons would be unreasonably affected. [966] However, the Bill parted company with the LRC Report in clause (6)(b). The clause dealt with the power of the police to give the directions. Clause (6)(a) required that to be 'in the circumstances specified in the enforcement condition'. The clause then went on to state: 'or (b) at any other time the police officer has a reasonable suspicion that the accused person has contravened the underlying bail condition in connection with which the enforcement

[965] NSW, *Parliamentary Debates*, Legislative Council, 24 October 2012, 16261 (Michael Gallacher).
[966] Bail Amendment (Enforcement Condtions) Bill 2012 (NSW), Cl 3,4, 5.

condition is imposed.'[967] As explained at 16.3 above, the LRC Report provided for 'reasonable suspicion' to be a further restriction on enforcement directions consistent with the idea of personal liberty. However, the Government decided to give the police a blank cheque. The Law Society had criticised the effect of sub clause (b) which had the effect of overriding sub clause (a). This criticism was mentioned by the Labor Party and the clause was the subject of an amendment by the Greens David Shoebridge, who stated: '[to] limit the concerns of The Greens I propose to move an amendment to conflate the two elements contained in the new section 37AA (6). I make it clear that The Greens endorse the position expressed by the New South Wales Law Society.'[968] The amendment was defeated by the Government.

17.5 THE MEDIA DEBATE IMMEDIATELY BEFORE THE FINAL RESPONSE

It was clear by the last week of November that the Government was about to make its major announcement on the LRC Report. The *Sunday Telegraph* stated: 'Mr Smith told the *Sunday Telegraph* that the government's response to the review, expected this week, would be "sympathetic" to the report.'[969] On 26 November the *Daily Telegraph* claimed an 'Exclusive' under the heading 'Court to get soft options for bail'. The article mentioned the 'risk assessment' approach but opened with: '[d]rug traffickers, robbers, kidnappers, repeat break and enter offenders and even those funding terrorism will no

[967] Ibid Cl (6) (b).
[968] NSW, *Parliamentary Debates*, Legislative Council, 13 November 2012, 16627 (David Shoebridge).
[969] 'Bail law reforms', *Sunday Telegraph* (Sydney), 25 November 2012, 5.

longer have a presumption against bail under new laws to be brought to cabinet by Attorney-General Greg Smith today.'[970]

The Bail Reform Alliance attempted to keep the pressure on the Government in the short period before the announcement of a response to the LRC Report. On the morning of 28 November the 702 ABC radio breakfast program interviewed me on behalf of the Bail Reform Alliance in relation to the importance of the Government implementing the LRC Report. The interview related to issues that had appeared that morning in an opinion piece I wrote for the *Sydney Morning Herald*. That article enumerated what was economically and socially wrong with the current NSW bail system and supported the LRC Report.[971] Later that day the Government's response was made public. On Friday 30 November, Attorney-General, Greg Smith, the President of the Bar Association, Gaol Visitor, Geoff Turnbull and I all gave our views about the response on the ABC television program *7.30 Report, NSW* hosted by senior journalist Quentin Dempster.

17.6 THE NSW GOVERNMENT RESPONSE TO THE LRC REPORT

The Premier's press release on 28 November 2012 explained that a, 'new risk management approach for deciding who does and does not get bail will put the safety of the community first'.[972] The release also included the Police Minister explaining that: 'bail was designed to ensure alleged criminals did not interfere with witnesses, flee the

[970] Andrew Clennell, 'Court to get soft options for bail', *Daily Telegraph* (Sydney), 26 November 2012, 3.
[971] Max Taylor, 'Bail reform an economic way to right injustices', *Sydney Morning Herald* (Sydney), 28 November 2012, 11.
[972] Barry O'Farrell, 'New bail laws to put community safety first' (Media Release, 28 November 2012)

country or commit further crimes.'[973] The police approach was explained. Commander Police Prosecutions, Chief Superintendent Tony Trichter, said: 'We welcome what is a modernisation of state bail laws. We have been asking for changes to the bail legislation for about five years along the lines we have seen today.'[974]

The more detailed Government approach was attached to the media release headed: 'NSW Government response to the NSW Law Reform Commission Report on Bail November 2012.'[975] Changes proposed in the attachment took form in the clauses of the Bail Bill 2013 and will be considered as part of the analysis of the Bill. The attachment stated:

> {t]he key feature of the Government's new bail model is that it operates without a system of offence-based presumptions. Instead, the new model requires the bail authority to assess the risk posed by an accused person when deciding whether to release or remand them. If the bail authority is satisfied that the accused does not present an unacceptable risk, the accused person will be released on unconditional bail.[976]

17.7 THE BAIL BILL 2013

Some aspects of the Bail Bill 2013 represent an improvement to the *Bail Act* in its current state after 30 years of amendment. It cannot be claimed that it reflects a

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[973] Ibid.
[974] Ibid.
[975] NSW Government, *NSW Government response to the NSW Law Reform Commission Report on Bail,* (November 2012)
[976] Ibid 2.

punitive turn. It is simply a mixed bag which fails to take up a number of the major reforms recommended by the Law Reform Commission.

There are provisions in the Bill that will allow courageous practitioners to pursue concepts associated with liberty. Clause 3 states: '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.'[977] Consistent with this approach cl 7 defines bail as: 'Bail is authority to be at liberty for an offence.' The word 'liberty' has been part of the definition of bail since 1978. Having regard to these principles is not, however, in the same league as a presumption in favour of bail. The Law Reform Commission found the current presumption against bail and the concept of no presumption either in favour or against bail as inconsistent with the presumption of innocence.[978] The Law Reform Commission recommended a presumption in favour of bail for all offences.[979] There is something ironic about politicians, whose predecessors introduced all the amendments that undermined the original ideas in the Bail Act, then complaining about the resultant complexity caused by the range of presumptions. It is also ironic that this problem created by politicians is then resolved by getting rid of all presumptions including the presumption in favour of bail. As Attorney-General, Greg Smith stated in his Second Reading speech, after noting that the *Bail Act* had been amended by 80 other Acts and stating that the Government would support a risk management approach:

[977] Bail Bill 2013 (NSW), cl 3.
[978] Law Reform Commission Report on Bail, above, n 863, 121.
[979] Ibid 123.

> A significant feature of the Bill is that it operates without the complex scheme of offence-based presumptions contained in the existing Act. Under current bail laws, some offences carry a presumption in favour of bail, others carry a presumption against and there are offences where no presumptions apply. This has added a layer of significant complexity to bail decision-making which the Bill's unacceptable-risk test is intended to avoid.[980]

Clause 5 makes clear that all stages of the criminal justice system including appeals are covered by the Bill. Clause 9 provides that a police officer may decide to release a person without bail and cl 10 provides for a court to dispense with bail.

Clause 12 concerning duration of bail deals with the problem of courts feeling the need to renew bail every time the person appears in court. This problem was drawn to the Law Reform Commission's attention and it recommended that bail 'should remain in force unless varied or unless detention is ordered, with no need to continue the order expressly.'[981] Clause 12 implements the Law Reform Commission's recommendation in this respect.

The Law Reform Commission found that the current bail undertaking to appear and the various bail conditions that can be entered into including conduct directions result in documents that are too complex. The LRC recommended a notice of listing which is to be acknowledged. The notice should contain information on the penalty for non-

[980] NSW, *Parliamentary Debates*, Legislative Assembly, 1 May 2013, 19839 (Greg Smith).
[981] Law Reform Commission Report on bail, above n 863, 89.

appearance, the liability to arrest, the consequences of committing an offence on bail and the fact that it can be an aggravating matter in sentencing. The LRC recommended that conduct directions be issued separately in writing and explained.[982] These proposals for simplification are set out in clause 14 and s 33: 'bail acknowledgments'.

Part 3 of the Bill sets out the new 'unacceptable risk' approach to bail. The discussion of the 'unacceptable risk' model and the 'justification model' is set out at 16.3 above. NSW currently has a justification model. The fundamental point is that the justification model 'provides that a person is entitled to be granted bail unless the bail authority is satisfied, after considering the matters in s 32, that refusal is justified.'[983] As set out at 16.3 the Law Reform Commission rejected the unacceptable risk model and supported the justification model.

Given all of the above in relation to unacceptable risk it is hardly surprising that the media release by the Attorney-General that explained the new Bill should observe that '[t]he legislation has the support of NSW Police who can enforce bail conditions and arrest those that fail to comply'. The media release also explains that: '[t]his legislation will put the safety of the community, victims and witnesses first, rather than focusing on the alleged offence according to a complex system of presumptions'.[984]

[982] Ibid 87.
[983] Ibid 145.
[984] Greg Smith, 'New Bail Bill To Be Introduced' (Media release, 30 April 2013).

Clause 16 of the Bill sets out a flowchart indicating how the unacceptable risk model will work. In his Second Reading speech the Attorney-General explained that the police and courts had been consulted, 'and feedback provided confirms that the flowchart is a welcome addition to the legislation.'[985] Subsequent Divisions and sections of Part 3 explain aspects of the flowchart.

Clause 17(1) states: 'A bail authority must, before making a bail decision, consider whether there are any unacceptable risks.' Clause 17(2) explains that unacceptable risk arises if the person 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.

As explained at chapter 16.3 above, the Law Reform Commission rejected the unacceptable risk model because it is more difficult to include reference to the interests of the person and reference to legal principle within such a model. The NSW *Bail Act* reinforces the Law Reform Commission's point by making clear in s 32 (1)(b), when explaining criteria to be considered in bail applications, that one of the major headings with subheadings within is: 'the interests of the person'.

[985] Smith, above n 980, 19840.

Clause 17 (3) of the Bail Bill states what is to be considered when deciding whether there is an unacceptable risk as described in cl 17(2). The concerns of the accused to be free to prepare their case and for any other lawful purpose are included. That, nevertheless, does not detract from the fact that the interests of the person cannot be one of the primary matters in an unacceptable risk test whereas it is in a justification model.

Other matters to be considered in cl 17(3) when deciding whether there is an unacceptable risk are those to be expected, including background; community ties; record; previous serious offence on bail; background of non-compliance of bail acknowledgments; bail conditions; apprehended violence orders; parole orders or good behaviour bonds; seriousness and strength of the case; history of violence; likelihood of a custodial sentence and length of time in custody if bail is refused. Vulnerability because of youth, being an Aboriginal or Torres Strait Islander, or cognitive or mental health impairment is also to be considered. In appeals from conviction or sentence a reasonably arguable prospect of success is to be considered. These proposals are consistent with the recommendations of the Law Reform Commission.[986] Consideration of the conditions under which a person would be held in custody is to be found in the current *Bail Act.* The LRC report recommended the retention of the provision. It is a disturbing that this provision is not found in the Bail Bill.[987]

[986] Law Reform Commission Report, above n 863, 162-5.
[987] Ibid 165.

In the Parliamentary Debate on the Bail Bill, Greens MLC David Shoebridge moved an amendment inserting the words 'and the conditions under which the accused person would be held in custody'.[988] This addition to the length of time in custody provision would have restored the current position. The Government rejected the amendment. Michael Gallacher, the Minister for Police and Emergency Services explained that:

> The majority of bail decisions are made by police officers at the point of arrest or by courts shortly thereafter. At that stage it will rarely be the case that there will be any information about the custodial conditions under which the accused will be held as they will either be in police custody or will have only just entered the custody of Corrective Services. Bail authorities should not have to try to ascertain this information at the point of making a bail decision: it would have the potential to slow down bail applications leading to longer periods in remand.[989]

Michael Gallacher expressed the view that clause 17 allowing for the circumstances of the accused and any special vulnerability of the accused to be taken into account, 'provides adequate scope to consider the types of matters at which the amendment is directed.[990]

Clause 17(4) explains that a 'serious offence or the seriousness of an offence' includes but is not limited to: sexual offences or violent nature within the meaning of the *Crimes Act 1900*; possession or use of an offensive weapon or instrument; likely effect on any victim and the community generally; and the number of offences likely to be committed

[988] NSW, *Parliamentary Debates*, Legislative Council, 22 May 2013, 20564 (David Shoebridge).
[989] NSW, *Parliamentary Debates*, Legislative Council, 22 May 2013, 20568 (Michael Gallacher).
[990] Ibid.

or for which the person has been granted bail or released on parole. This is a wide ranging provision.

As discussed at 4.5 above the Bail Review Committee in 1976 under the heading 'Criteria which may not be considered' in relation to considerations for granting bail, specifically rejected the idea of estimates of future potential to commit crimes. It observed that '[t]he place of this criterion in the common law is obscure: it does not appear in the classical statements, but in practice this newer ground for refusing bail has become one of the most important considerations.'[991] The Report also stated:

> There is no doubt that by permitting courts to refuse bail on the ground that the accused may commit further offences, Australia has established a system of preventative detention, even though it is one limited to certain groups (people who have been charged with some offence) and certain periods (the time between arrest and trial).[992]

As explained above at 5.4 the *Bail Act* as originally passed did include a restricted form of consideration of future offences in s 32 under the major heading 'protection and welfare of the community'. Offences that could be considered had to be 'likely to involve violence or otherwise to be serious by reason of its likely consequences'.[993] In addition, the general use of that consideration was reduced in *the Bail Act 1978* because the justification model commenced with the right to bail for lesser offences and the presumption in favour of bail for nearly all other offences.

[991] Anderson and Armstrong, above n 1, 29.
[992] Ibid 30.
[993] Bail Act in original form, above n 80, s 32(2)(b).

As explained at 16.3 above, the LRC Report did provide for consideration of the likelihood of committing a serious offence but in the context of recommending a uniform presumption in favour of bail. It found that decades of amendments had led the Bail Act to include, 'a series of complex and intricate provisions regarding the likelihood of committing a serious offence if released on bail.'[994] However, 'risk' never became the central feature of the system. The wide ranging definition of 'serious offence' is one of the central considerations for bail in the new system. As explained at 16.3 above the LRC Report restricted the offences that could be considered. They included serious offences causing injury, death, serious loss or damage to property or offences 'which give rise to a substantial risk of causing death or injury or serious loss of or damage to property.'[995] Sexual offences were also included.

What are the implications of making future offences one of four major components of the 'unacceptable risk' test and without any presumption in favour of bail? Denise Meyerson explains that '[t]he traditional backwards-looking, reactive response of the law to harmful conduct – is shifting and emphasis is increasingly placed on preventing harmful conduct before it occurs.'[996] Meyerson goes on to explain that '[i]t is obvious that such measures pose numerous problems of political morality, not least by eliciting our great fear of aribitrary restraint and our aversion to the State curtailing our liberty

[994] Law Reform Commission Report, above n 863, 156.
[995] Ibid 163.
[996] Denise Meyerson, 'Risks, rights, statistics and compulsory measures' (December 2009) Volume 31(4) *The Sydney Law Review* , 507.

other than as for punishment for breach of the law.'[997] The issue of human rights and bail is discussed at 1.5.2 above. Meyerson is not suggesting that there is no role for preventative measures. However, given the seriousness of the issues concerning rights and morality that are involved, she is concerned about the risk of error. She notes that, '[t]he lower we require the likelihood of the harm to be and the lower we require our degree of confidence in the predictions to be, the higher the risk of the erroneous deprivation of liberty.'[998] The Bail Bill lowers the level of harm required to establish unacceptable risk because of risk of a future serious offence to the level of generality. The test set is the lowest possible, the balance of probability (cl 32).

Andrew Ashworth also expresses concern about the threat to human rights in protecting people from preventative justice. Ashworth states that,

> [p]rotection from harm, particularly where it is aimed at an individual, should be taken seriously; yet Mill's warning that the state's preventative function is liable to abuse should not be neglected, since, as he observed, it is possible to regard almost any form of human conduct as a potential threat to some value or interest. A brief discussion of the justifications for depriving people of their liberty in order to prevent harm to others suggests that this power should be reserved for extreme situations.[999]

The general nature of 'risk' as related to future offences as described in the Bail Bill has much in common with the wide concepts of 'uncertainty' and 'precaution'. Lucia

[997] Ibid 510.
[998] Ibid 533.
[999] Andrew Ashworth, 'Criminal Law, Human Rights and Preventative Justice' in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance* (Hart Publishing, 2008) 87, 107.

Zedner explains that '[t]he precautionary principle seeks to fix the future not by attempting to calculate risk but by providing a framework for decision-making in the absence of scientific knowledge.'[1000] Zedner notes that,

> Although the principle is applicable in law only in respect of grave and irreversible harms the culture of precaution is spreading downwards to provide a warrant for decision-making in situations of uncertainty even where the anticipated harms are of considerably lesser gravity. What began life as a legal principle narrowly applicable within administrative law has come to inform a larger and altogether less principled precautionary approach that serves less as a constraint upon public officials than as a licence.[1001]

In his Second Reading speech the Attorney-General noted that section 3, '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.'[1002] This is in accordance with the LRC Report. However, that Report discussed those principles in the context of a justification model in the following form: 'A person is entitled to be released unless detention is justified having regard to the considerations set out in the following recommendations.'[1003] The LRC recommendations commence with: '[t]he

[1000] Zedner, above, n 46, 46.
[1001] Ibid.
[1002] Smith, above n 980, 19839.
[1003] Law Reform Commission Report, above n 863, 162.

public interest in freedom and securing justice according to law.'[1004] When considering this provision an 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.[1005]

In the Parliamentary Debate on the Bail Bill in the Legislative Council, David Shoebridge proposed that the Bill make clear that: '[i]n any bail proceedings the onus of establishing that there is an unacceptable risk lies on the prosecution.'[1006] The Government rejected this proposal but Michael Gallacher, the Minister for Police and Emergency Services, did state that:

> Under the Government's bill, if the prosecution asserts that there is an unacceptable risk associated with granting bail, the prosecution will have to establish the existence of an unacceptable risk. The standard of proof will be on the balance of probabilities, as is the case under the current Bail Act.[1007]

[1004] Ibid.
[1005] Ibid 163.
[1006] Shoebridge, above n 988, 20583.
[1007] Gallaher, above n 989, 20584.

Clauses 18 of the Bail Bill explains that if after considering the tests there is not an unacceptable risk then the person may be released without bail, bail may be dispensed with, or bail may be granted without conditions. Clause 19 explains that if there is an unacceptable risk then bail can be granted or refused. Clause 20 makes clear that refusal is only to occur if the unacceptable risk cannot be dealt with by bail conditions.

Clause 21 provides for a right to release for fine-only offences and an offence under the *Summary Offences Act 1988* other than excluded offences such as obscene exposure, violent disorder and knife offences where there is a previous conviction under the relevant section. Other excluded offences include using a laser in a public place and loitering by a convicted child sexual offender near a premises frequented by children. There is also a right to bail for an offence dealt with by conference under Part 5 of the *Young Offenders Act 1997*. Where there is a right to bail then bail cannot be refused. However, conditions can be applied where it is decided bail is required. The provisions concerning right to release are generally in accord with the recommendations of the LRC Report.[1008] However, clause 78(4) provides that a bail authority may revoke or refuse bail where there is a right to bail and the bail authority is satisfied the person has failed or was about to fail to comply with a bail acknowledgment or a bail condition. That clause is not in line with the recommendations of the LRC Report.[1009] The Government did not accept an amendment to correct this situation. Michael Gallacher explained that '[t]hese provisions are consistent with the position under the current Bail Act whereby

[1008] Law Reform Commission Report, above n 863, 102.
[1009] Ibid.

bail can be revoked for an offence for which there is a right to release. … It would allow an accused person to continually breach their bail for a right to release offence'.[1010]

Clause 22 deals with appeals against conviction or sentence on indictment pending in the Court of Criminal Appeal. It also deals with appeals to the High Court in such circumstances. A court is not to grant bail or dispense with bail in such circumstances unless there are special or exceptional circumstances. The provision is consistent with previous practice and the LRC Report.[1011]

The Attorney-General in his Second Reading speech said:

> [in] its report the Law Reform Commission noted concerns expressed by many stakeholders about the increasing use of bail conditions to address issues related to welfare of the accused rather than achieving the traditional aims of bail, such as ensuring the accused's attendance at court.[1012]

The Law Reform Commission did express concern about this matter, as did a number of the submissions to the Commission. The Law Reform Commission recommended that conditions and conduct directions must be reasonably practicable, not more onerous than necessary and not imposed in relation to considerations of welfare rather than bail.[1013] Clauses 23, 24 and 25 of the Bail Bill provide for conditions and conduct requirements consistent with the concepts set out above.

[1010] Gallacher, above n 989, 20583.
[1011] Law Reform Commission Report, above n 863, 135.
[1012] Smith, above n 980, 19841.
[1013] Law Reform Commission Report, above n 863, 233.

Clauses 26, 27 and 28 provide for conditions found in the current *Bail Act*. They include provisions for agreeing to forfeit money or actually paying in money as a guarantee of appearance in court. They also include character acknowledgments. Accommodation requirements in relation to children provide for release after such accommodation is found. It is significant that where a court imposes an accommodation requirement for a child it must relist the matter every two days until accommodation is found. The accommodation provision is in accordance with the Law Reform Commission Report.[1014]

Clause 29 explains that pre-release requirements are limited to the surrender of a passport, a security requirement, a requirement for character acknowledgment and an accommodation requirement.

At 16.3 and 17.4 above this thesis discusses enforcement of bail conditions. Clauses 30, 77 and 81 place the provisions found in the Bail Amendment (Enforcement Conditions) Bill into the new Bill and provided for guidance to police officers as to the approach to take. Clause 77(1) provides for a police officer who believes on reasonable grounds that a person has not complied with a bail acknowledgment or a bail condition to take no action, issue a warning, issue a notice to appear before a court, issue a court attendance notice, or 'arrest the person, without a warrant and take the person as soon as practicable before a court or authorised justice'.[1015] A police officer may discontinue the arrest. The police officer must take into account the seriousness of the failure, reasonable excuse, personal attributes and whether alternatives to arrest are

[1014] Ibid.
[1015] Bail Bill, above n 977, cl 77(1)(e).

appropriate in the circumstances. This is in line with the recommendations of the Law Reform Commission. However, cl 81 renews the provision that a police officer may give a direction of a kind specified in the enforcement condition:

(a) In the circumstances specified in the enforcement condition, or

(b) At any other time the police officer has a reasonable suspicion that the accused person has contravened the underlying bail condition in connection with which the enforcement condition is imposed.

As explained at 17.4 above cl 81(b) was not recommended by the Law Reform Commission.[1016]

Clause 40 allows for stays of bail decisions in 'serious offences' (murder or any other offence punishable by imprisonment for life and sexual intercourse or attempt to have sexual intercourse with a person under 16) where the Crown indicates immediately an intention to take the matter to the Supreme Court. The maximum time for the stay is three days. Clause 41 continues the eight day limit on adjournments where the accused is denied bail and does not consent to a longer adjournment. Clause 42 provides that a court is to be informed within eight days that a person remains in custody because a condition cannot be met. As explained above, cl 28(4) reduces the limit to two days in relation to accommodation for juveniles.

Part 5 deals with powers to make and vary bail decisions and includes current provisions concerning the powers of police and courts. In the current *Bail Act,* incapacity due to

[1016] Law Reform Commission Report, above n 863, 252.

intoxication, drug use or injury can result in denial of bail. The Law Reform Commission recommended that this no longer be the case.[1017] It explained that about half of the submissions said the provision should be retained on duty of care grounds and half said it should be removed because of the concepts involved in bail.[1018] The Law Reform Commission pointed out that the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) provided for the police to detain an intoxicated person in need of physical protection.[1019] In his Second Reading speech the Attorney-General explained that clause 44 'incorporates a provision allowing police to defer a bail decision if a person is intoxicated as defined in clause 4 of the bill, but stipulates that this deferral must not cause delay in bringing the person before a court or authorised justice.'[1020] The same power is provided to courts in relation to dealing with intoxicated persons at clause 56.

The Law Reform Commission noted that there was confusion about the power of a more senior police officer to review a bail decision. The matter is cleared up in cl 47 which stipulates that the more senior officer may review without request, must review on request and that neither approach must delay court appearance.[1021] The Law Reform Commission also noted the need to clarify and simplify applications for release, detention and variation.[1022] These concerns are met in clauses 49, 50 and 51 which explain that there will be applications by accused persons for release, by prosecutors for detention and by interested persons for variations. 'Interested persons' include the

[1017] Ibid 100, 158.
[1018] Ibid 158.
[1019] Ibid.
[1020] Smith, above n 980, 19842.
[1021] Law Reform Commission Report, above n 863, 259.
[1022] Ibid 267.

person subject to a release order, the informant, the complainant or person being protected in domestic violence matters, the prosecutor and the Attorney-General.

Part 6 deals with the power of courts to hear bail applications. The Attorney-General notes one change, in that cl 66 (allowing the Supreme Court to hear a variation application or detention application where a bail decision has already been made by the District Court), 'differs from the existing Act whereby decisions of the District Court can be reviewed only by the Court of Criminal Appeal.'[1023]

Part 7 contains general provisions about bail applications. Clause 72(2) explains that, in accordance with the Law Reform Commission Report recommendation,[1024] a court must not refuse to hear an application for bail on the first appearance because notice has not been given to the prosecutor. The matter may be adjourned. Clause 73(1) allows a court to refuse to hear an application because it is frivolous, vexatious or without substance or has no reasonable chance of success. Clause 73(3) ensures that the right to be heard on a first appearance overrides other parts of Clause 73.

Clause 74 deals with issues raised by s 22A of the current *Bail Act*. As explained at 16.3 and 17.6, above that section deals with repeat bail applications and because of amendments has become an issue in relation to the increase in the numbers on remand. The Law Reform Commission recommended that s 22A should be retained but should not apply to:

[1023] Smith, above n 980, 19843.
[1024] Law Reform Commission Report, above n 863, 275.

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

(b) To an adult unless the person has already made two applications to the court.[1025]

The Law Reform Commission also recommended the adding of a ground for consideration: 'any other matter which, in the opinion of the court, is a relevant consideration.'[1026] The Attorney-General noted that:

> The Law Reform Commission's review noted the particular difficulties that can be faced by legal practitioners when taking instructions from juveniles at the early stages of proceedings. This additional ground for further detention application has been included in recognition of that difficulty.[1027]

The Law Reform Commission's recommendation for two adult applications before s 22A applies was not taken up. For those who are young and who should be kept out of gaol as much as possible there is the provision for one extra application before s 22A applies. The general discretion recommendation in relation to courts was not taken up. An amendment moved by David Shoebridge to implement the Law Reform Commission recommendations in this regard was rejected. Michael Gallacher explained that: '[t]he accused would have been refused bail in the first place because they represented an unacceptable risk to the community. If there is no new relevant information or change to their circumstances why should they be able to make unlimited applications?'[1028]

[1025] Ibid 290.
[1026] Ibid.
[1027] Smith, above n 980, 19844.
[1028] Gallacher, above n 989, 20586.

Clauses 78 and 79 provide the powers of a bail authority to deal with failure to comply with a bail acknowledgment and the offence of failure to appear in court. It is a positive development to include a requirement that the bail authority only refuse bail for failure to comply with a bail acknowledgment if after 'having considered all possible alternatives, the decision to refuse bail is justified.'[1029] On the other hand the Law Reform Commission recommended that the maximum penalty for a failure to appear offence be two years in gaol.[1030] The Bill retains the maximum of three years in gaol and or a fine of 30 penalty units ($3,300).

Part 9 of the Bail Bill 'remakes and simplifies provisions in the existing Act relating to bail security requirements.'[1031] Part 10 of the Bail Bill 'contains a number of miscellaneous provisions which are generally consistent with ancillary and machinery provisions in the existing Act.'[1032]

The Bail Bill was not amended and became the *Bail Act 2013* (NSW). It was assented to on 27 May 2013.

It should finally be noted that it was not possible to interview the Attorney-General, Greg Smith, in relation to the matters discussed in this chapter. He was approached for an interview in relation to the matters discussed in the PhD. It was acknowledged in the letter that his position as the current Attorney-General may not make it possible for him

[1029] Bail Bill, above n 977, cl 78 (2)(b).
[1030] Law Reform Commission Report, above n 863, 256.
[1031] Smith, above n 980, 19844.
[1032] Ibid.

to participate. In response the Director Community Relations Unit stated: '[t]he Attorney-General appreciates the courtesy of your offer to include him in your interviews, but regrets he cannot accept due to his Parliamentary commitments and portfolio responsibilities.'[1033]

17.8 CONCLUSION

By the time of the Attorney-General's appearance at the Estimates Committee in October 2012 the Government was already indicating that it was prepared to move away from the Law Reform Commission's key recommendations for a uniform presumption in favour of bail and the justification model. The Attorney-General indicated a Government preference for a risk management approach.

Dispute about bail reform intensified in the media in 2012. The *Sydney Morning Herald* remained a strong supporter of reform. The ABC also gave significant coverage to those pushing the agenda for reform. The *Daily Telegraph* and the radio shock-jocks were far more aggressive about opposing reform in 2012 as compared with 2011. The intervention of the Police Commissioner in August in the *Daily Telegraph* added to the pressure on the Government to modify the recommendations of the Law Reform Commission. Protection of the community was referred to repeatedly by Government spokespersons. The rights of the accused did not receive the same prominence in the Government's public comment.

[1033] Letter from Director of Community Relations Unit, Office of the NSW Attorney-General to Max Taylor,16 April 2013

The power of the police in the ongoing debate about bail can be seen in the bringing forward of the enforcement provisions of the *Bail Act* which had been thrown into doubt by the case of *Dawson v Dunlevy.* No other section of the Law Reform Commission report was dealt with in such an urgent manner. Both the Attorney-General and the Minister for Police indicated the police concern. The Law Reform Commission had recommended the continuation of the enforcement of underlying bail conditions but with a considerable number of safeguards. A number of the safeguards are found in the *Bail Amendment (Enforcement Conditions) Act.* However, the legislation did not support all of the Law Reform Commission recommendations on the limitation of police power as to where and when enforcement directions could be given.

Reference to police support is also found in the Premier's press release of 28 November 2012 explaining the new risk management approach. A senior police officer was quoted as welcoming the proposed change. A reference to police support can also be found in the Attorney-General's media release announcing the introduction of the Bail Bill 2013.

Support by the police for the Government's response to the Law Reform Commission report does not prove a punitive turn. Ultimately the Bail Bill is a mixed bag. Examples of positive initiatives include: the requirement to bring a juvenile back to court after a maximum of two days rather than eight days where an accommodation pre-release requirement cannot be met; a second chance for juveniles to apply for bail before s 22A applies (the Law Reform Commission recommended s 22A not apply to juveniles); clarification that there is no need to raise bail for review every time the matter comes

back before a court; requiring a review of a bail decision by a more senior police officer where it is requested by the defendant; removal of the practice of using bail conditions for welfare purposes rather than matters specifically to do with bail; and the removal of a lot of the clutter that had accumulated over the decades. The right to release for fine only matters and, with clearly defined exceptions, offences under the *Summary Offences Act* does not represent a punitive turn when compared with the current provisions. It is also not punitive to continue the requirement for 'special or exceptional circumstances' in appeals to the Court of Criminal Appeal in appeals against conviction or sentence. Requiring a police officer to consider a range of options from no action to arrest, when holding a 'reasonable suspicion' that a person has not complied with a bail acknowledgment or bail condition, cannot be construed as punitive. However, the legislation contains the provision that a police officer can give an enforcement direction at any time the officer has a reasonable suspicion there has been a contravention of the underlying condition. That was not the recommendation of the LRC Report.

On the other hand, the rejection of the justification model and a uniform presumption in favour of bail is a major disappointment. It is true that the presumption against bail for some offences, the neutral presumption for a large number of offences, and bail only in exceptional circumstances, disappear. It is also true that in many cases those provisions applied to serious offences and added to the difficulty of getting bail in circumstances where it was less likely to be obtained. However, it should also be remembered that the presumption in favour of bail that currently applies to many offences also disappears. The fundamental point is that defendants will not commence

bail proceedings with a presumption in favour of bail. The risk management model does not allow the rights of the defendant to stand on an equal footing with other concerns such as absconding and the welfare of the community. Consideration of potential future serious offences in the context of a risk management approach with no presumption in favour of bail is a detrimental step. Having regard to the presumption of innocence and the general right to liberty is no substitute. However, those two matters are to be taken into account when considering risk management as is the defendant's need to prepare their case and carry out other lawful purposes. Conditions and pre-release requirements found in the current *Bail Act* are continued.

Chapter 18

CONCLUSION

The history of bail in NSW does not support a claim that punitive changes were part of a global punitive turn commencing in the early 1980s. The evidence suggests that there was no punitive turn in relation to bail between 1976 and 1995. That is the case whether the test for the punitive turn is the growth of neo-liberalism and globalization with the role of the State reduced to providing security; the rise of penal populism; control of an underclass; the decline of rehabilitation and the rise of law and order; or abandonment by Governments of longstanding principles. Certain themes such as spectacular crimes or types of crimes, reports to government and media coverage of crime were relevant in every decade, not simply in more recent times when a punitive turn is also apparent. It is a matter of fact that within the prison population the percentage of those awaiting trial or sentence fell from 12.3% in 1982 to 9.2% in 1995. It is also a fact that the number of prisoners in this category fell from 734 to 712 between 1988 and 1995.[1034]

Adding to the difficulty of Government in every era has been the tendency for the Opposition to demand even tougher laws than those being proposed by the Government. As Rick Sarre notes, '[s]adly, however, for the most part governments and opposition do not usually disagree on justice policy.'[1035] Sarre adds that from the mid-

[1034] Corben, above n 31.
[1035] Rick Sarre, 'We Get The Crime We Deserve: Exploring The Disconect In 'Law And Order' Politics' (2011) 18 *James Cook Univesity Law Journal* 144, 153.

1990s 'it became standard political competition to posture over who was toughest on crime, setting up a dynamic that no-one, up to now, has had the courage to end.'[1036]

From 1995 to the year 2000 a punitive turn based on local issues was apparent as an additional factor alongside more traditional ones as a cause of punitive amendments to the *Bail Act*. From the year 2000 onwards the punitive turn was influenced by both international and national events. By the year 2000 the percentage awaiting trial or sentence had risen to 16.8% of the total. By 2011 that figure was 26.2%.[1037] From 2010 onwards, parallel to the punitive turn, a campaign for non-punitive reform received major institutional and media support. The Bail Bill 2013 does not implement some of the key elements in the NSW Law Reform Commission Report on bail. However, other progressive components of the LRC Report are implemented. Hence it would be wrong to describe the Bail Bill as simply punitive.

Bail in England can be traced back a millennium. It was and is regarded as an important concept that has become associated with concepts such as the presumption of innocence and liberty of the citizen. English law on bail was received in NSW in 1788 and by the mid-1970s contained certain features created by a combination of the common law and statute. They were evidence going to the likelihood of absconding and further offences while on bail and evidence that the defendant should be released. It was illegal to allow anyone to languish in gaol without a consideration of bail. A longstanding system with such features was never going to be easy to make part of a punitive turn.

[1036] Ibid 154.
[1037] Corben, above n 31.

The events surrounding the introduction of the *Bail Act* provide examples of all the elements that place pressure on politicians of any era. Media attention to the ongoing outbreak of armed robbery was unrelenting. Two additional tabloids, *The Sun* and the *Daily Mirror*, existed at that time. That media pressure played a part in the introduction of the Bail Review Committee and the Bail Bill. It also played a part in the modification of the presumption in favour of bail for charges of aggravated robbery. Pressure groups representing those directly affected by the armed robberies, such as the bank unions and the bankers, made understandable demands for a tougher approach to bail. Such interest groups are further evidence that pressure about the nature of bail did not arise only later with the emergence of victims' groups.

The list of submissions to the Bail Review Committee, including those from the Law Society and the Council for Civil Liberties, makes clear that there were also powerful groups demanding progressive change. It would have been easy to agree with the Opposition that there should be wide ranging exceptions to the presumption in favour of bail. Yet the Premier and the Attorney General supported reform and this should be seen as important in its own right. Kevin Anderson and Susan Armstrong were also people who supported reform. People do make a difference.

The Bail Review Committee Report recommendations concerning a right to bail for lesser offences; a presumption in favour of bail for other offences; a rising hierarchy of bail conditions; and tests for bail limited to the risk of absconding, the rights of the

accused and the welfare and protection of the community represent the best of evolving historical ideas concerning bail. The differences between the Report and the Bill reflect the reaction to political reality in that particular period. The issue of aggravated robbery was simply too emotive and dramatic to be withstood in order to achieve a 'perfect reform'. The Report recommendation that preventative detention not form part of the *Bail Act* was rejected. Courts at the time assessed the likelihood of further offences on bail. In a restricted manner that approach continued where the offence involved the likelihood of violence or where the consequences of such a crime were likely to be serious. That is an improvement on practice at the time.

The beginning of the punitive turn in criminal justice is placed at the end of the 1970s. The *Bail Act* took effect from 1980. Between then and 1986 there was no major amendment to the *Bail Act*.

Severe penalties in the *Drug Misuse and Trafficking Act 1985* (NSW) were part of a national effort to deal with the global issue of drug supply. Three Royal Commissions and drug summits are evidence of that. There was spectacular media coverage of drug related issues. Bail was not the central issue and movement in 1986 to the neutral category of presumption for the limited number of commercial level drug dealers does not establish a punitive turn in relation to bail. Attorney-General Sheahan in his interview made clear that the changes to the *Bail Act* were not central to dealing with what was seen as an important national issue. Attorney-General Dowd was personally convinced of the need for tougher bail conditions for commercial level drug dealers.

There was a more punitive approach to penalty and bail for the limited number of serious drug dealers. However, the same punitive approach was not consistently applied to all those involved in drug issues. By raising the maximum quantities of drugs covered by the least serious offences the Government made bail easier to obtain for a significant number of people at the bottom of the hierarchy of involvement.

Calls for reform of the criminal justice system in relation to women and children were ongoing throughout the 1980s and early 1990s. A number of Reports to various Governments reinforced the need for change. Reform was supported by all sides of politics. Major constructive legislative changes took place. However, in relation to bail Governments were more cautious about punitive proposals. The Labor Government did not introduce an offence concerning breach of bail in relation to a personal violence offence. A neutral presumption was introduced in breach of bail matters in the limited circumstances where there was a previous failure to comply with a condition for the specific offence and that condition was provided for the protection of the victim. The Liberal Government adding 'close relatives' to those to be considered when deciding whether to grant bail reflects increased knowledge of who needs to be protected. Adding the word 'sexual' to considerations of violence in bail proceedings would add some matters but many sexual crimes are violent and were already covered. A particular murder and its coverage did play a part in the 1993 amendments. More punitive measures were introduced in relation to domestic violence offences. However, the *Bail (Domestic Violence) Amendment Act* was far more of a mixed bag. The most punitive of the recommendations of the Report of the NSW Domestic Violence

Committee were not implemented. Police were not required to refuse bail on arrest for breach of an apprehended violence order. A presumption against bail in matters involving AVO breaches and applications and domestic violence offences was not introduced. A neutral presumption for murder was more punitive because there were no offsetting limitations. A neutral presumption for a range of domestic violence offences was more punitive but was to be applied only where the accused had a history of violence (guilty in the previous 10 years of a personal violence offence or contravention of an AVO by act of violence) or was involved in previous violence against the victim.

More severe penalties including gaol terms were introduced in the *Summary Offences Act 1988.* It would have been easy to take summary offences out of the right to bail provisions set out in s 8 of the *Bail Act*. In fact the Government legislated to ensure they remained covered by that section.

The amendment in relation to special and exceptional circumstances being required after conviction or sentence for the Court of Criminal Appeal to grant bail did no more than restore the position at common law before the introduction of the *Bail Act*. Allowing any court to review a Supreme Court bail decision rather than restricting it to the Supreme Court was a sensible administrative move. It was not punitive.

It is clear from the material that issues other than law and order were of greater importance in deciding the 1988 NSW State election in which government changed

hands. Proposals to reduce corruption and to provide for greater gun control are not proof of a punitive attitude to law and order. By contrast law and order was a dominant issue in the 1995 election where government once again changed hands. It was described as a law and order auction in the media. The 'auction' was condemned by the Bar Association, the Law Society and the Director of Public Prosecutions.

A number of punitive laws related to more severe sentences were introduced in the period 1995-2000. The punitive approach to law and order apparent in the 1995 State election continued in the years that followed. The Government was determined to keep control of the law and order agenda. There was also a more punitive approach to bail. As in previous decades there were punitive and non-punitive amendments to the *Bail Act*. Horrendous crimes, media coverage of them and Government reports were also apparent as in previous decades but now occurred against the punitive background towards crime. It was in such a punitive atmosphere that those amendments that had accumulated since 1986 were combined with the new amendments.

Murders in 1994, 1995 and 1997 attracted widespread media attention and played a part in punitive amendments to the criminal law and to the *Bail Act*. The 1997 murder of two schoolgirls was specifically mentioned by the Attorney-General in the Parliamentary debate. However, the importance of the murders in relation to bail should not be overstated. Adam Searle pointed out that the Government was considering changes to the Bail Act quite separately from these events and that initiative also came from the police. Searle also pointed out that there was 'certainly a big change of language, the

fact that Carr, as leader, wanted to own the criminal justice space rather than feeling defensive about it.'[1038]

The charge of murder already attracted a neutral presumption in 1995 and the addition of related matters such as conspiracy to murder or attempt murder was consistent with that punitive provision. The addition in 1998 of manslaughter and a range of violent offences to the neutral category was consistent with the punitive approach. Consistency is also the explanation for a neutral presumption for the charge of ongoing drug dealing. The charge arose out of the recommendations of the Royal Commission into Police. The presumption arose out of the pre-existing neutral presumption for other drug supply charges.

The *Bail Amendment Act 1998* (NSW) created an offence concerning the contravention of an apprehended domestic violence order by breach of a bail condition. A neutral presumption would apply. This was a matter concerning women's rights but was also more punitive in relation to crime. The amendments to s 32 concerning criteria to be considered in bail applications added in the case of a 'serious offence' consideration of whether at the time the person had been granted bail or released on parole in connection with any other serious offence.

As with earlier decades, important non-punitive initiatives were taken. The *Drug Court Act,* the *Drug Summit Legislation Response Act* and the bail provisions in the *Victims*

[1038] Searle, above n 458, 7.

Rights Act reflect that situation. Having the accused assessed for assistance and provided with alternatives to punishment where drug addicted is enlightened and was associated with a presumption in favour of bail. Providing that victims must receive information concerning the progress of bail in their matter is not punitive. It is not punitive to ensure, in accordance with the NSWLRC report *People with an Intellectual Disbability and the Criminal Justice System,* that intellectual impairment is taken into account when considering bail. It is not punitive to ensure, in accordance with the recommendations of the Royal Commission into Aboriginal Deaths in Custody, that a more senior police officer can reconsider a bail decision. Applying the principle to all citizens is not punitive. The Supreme Court refusing to hear a referral concerning bail, if another court could hear it, does no more than continue earlier moves to administrative efficiency in the Court of Criminal Appeal and Supreme Court.

Between 2000 and 2007 the punitive turn was to be influenced by international and local issues. International events concerning terrorism and the arrival of asylum seekers contributed in that period to punitive attitudes. Local issues in relation to drugs, sexual assault and riot became intermixed with issues concerning racism. The media was relentless in its coverage of these events. Adding to the likelihood of a punitive approach were two statements by the Premier in 2001, one on drug dealing in Cabramatta and the other on gang activity. These statements covered such issues as murder, drug dealing, property offences, sexual assaults and firearms. While the Attorney-General was able to curb demands for even more punitive penalties and limitations on bail, it was politically very difficult to withstand many of the demands.

A neutral presumption for pistol and gun offences was associated with efforts to break into fortified drug premises in Cabramatta. Non-association conditions were also a response to drugs and Cabramatta. Horrendous sexual assaults in company, which were associated in the media with issues of race and religion, led to criminal legislation, and as a neutral presumption applied to less serious sexual offences it was inevitable it would apply to such offence in company. The 2002 NSWLRC report on domestic violence led to a neutral presumption for stalking and intimidation offences. That was already the case for similar offences. The *Bail Amendment (Repeat Offenders) Act 2002* (NSW) was a response to the BOCSAR report 'Bail in NSW: Characteristic and Compliances', which, while showing a drop in the number on bail at finalisation of matters, also showed significant crime was carried out by repeat offenders. As Bob Debus pointed out, crime by repeat offenders was what the media concentrated on 12 months before an election. The Act provided for a neutral presumption where, at the time of the offence, the person was on bail, parole, a good behaviour bond, or given a sentence but not in gaol. The neutral presumption also applied to persons with a previous conviction for failure to appear or who had a previous indictable offence conviction where the new offence was indictable. In all of these cases despite media and Opposition demands, no presumption against bail was introduced.

However, some presumptions against bail were introduced in the period. Controversy and media coverage concerning drive-by shootings and stolen and missing guns led to a presumption against bail for a range of firearm offences. The same legislation, the *Bail*

Amendment (Firearms and Property Offences) Act 2003(NSW), also introduced a presumption against bail for repeat property offences. However, in this case the Attorney-General was able to restrict what could be considered to one or more convictions in the past two years, at least one of which was robbery or burglary-related and the defendant was facing two or more outstanding charges that were robbery or burglary related. The Cronulla Riot, with its overlap into issues of religion, when mixed with the massive associated media coverage left no room to move in relation to bail. Amongst the dramatically widened security powers a presumption against bail was introduced for the crime of riot. Following the release on bail of a man accused of facilitating terrorist acts, terrorism was added to serious Commonwealth drug offences for which there was a presumption against bail.

Response to public outrage and the themes of repeat offenders and potential offences can be seen in the decision to introduce bail only in 'exceptional circumstances' for the charge of murder and for repeat offenders where the previous conviction was for a serious personal violence offence. There had been spectacular coverage of the murder of a woman by her estranged husband who was on bail at the time for violent crime against her. The non-appearance in court of a man involved in a fatal motor vehicle collision led to the condition of confiscating the passport of a person alleged to have caused death. These themes can also be seen in the response to the impending release of a serious sex offender. Applications for extended supervision orders and continuing detention orders were said to be civil matters with the result that bail was limited to a limited range of related matters such as breaching a supervision order.

As with previous periods, initiatives were taken that were not punitive. The requirement to take into account when considering bail youth, intellectual impairment or Aboriginal or Torres Strait Islander status of the defendant were all positive moves. Providing for intervention programs related to drug and alcohol abuse as a condition of bail was also not a punitive initiative.

Changes to the *Bail Act* were less frequent in the period 2007-2011. The introduction of a separate Act concerning domestic violence was not a punitive initiative and a neutral presumption for a new charge concerning stalking and intimidation continued the existing statutory approach. Public outrage and wide media coverage of gang violence at Sydney airport led to tough laws concerning persons associating in declared criminal organisations. A neutral presumption rather than a presumption against bail was introduced in such cases. The changes to s 22A of the *Bail Act* concerning second and later bail applications did make the likelihood of bail in such circumstances more difficult. However, more flexibility as to reasons for the application and more flexibility for the legal representative were introduced by two subsequent amendments. While the punitive atmosphere continued, it is not the case that the legislation in the period 2007-2011 was more punitive than that which had gone before.

In 2011-2012 the Liberal Government continued the punitive approach when dealing with matters not associated with the LRC report on bail. Public and media concern about drive-by shootings led to tough new laws where there was an organised crime

component. The new charge was added to the already existing drive-by shooting matters that were subject to a presumption against bail. The High Court's rejection of legislation concerning control orders and proscribed organisations did not lead to a rethink of the whole issue. New legislation required courts to give reasons for their decisions in such matters. The neutral presumption in relation to charges remained.

By 2010 the gaol system was costing NSW over $1 billion per year and nearly a quarter of those interned had not been tried or sentenced. Cutting such public cost was no threat to neo-liberalism. The accumulated effect of decades of amendments to the *Bail Act* had led to an Act that was widely criticised by practitioners and some sections of the media. In particular the *Sydney Morning Herald* was supportive of reform while at the same time the conservative media was relatively quiet. The Bail Reform Alliance was not the first organisation to demand reform of the *Bail Act* but in such a climate it was possible for the reform point of view to receive widespread coverage and support. In addition, leading figures in the criminal justice system came out in support of reform.

The Government's draft Bail Bill 2010 attempted to simplify the *Bail Act* and make it more manageable. It did not introduce the major reforms demanded by those who thought that was required. Neither the Liberal Opposition nor the crossbenches publicly supported the Government's position or a position that was even tougher on bail. The Government claimed that the withdrawal of the Bill from Parliament was because the roundtable group needed more time. The short time for submissions and the roundtable discussion provide support for that explanation. However, it is also possible that after

the campaign and the lobbying the Government knew the Bill would not have the numbers in the Legislative Council.

The NSW State election of 2011 was not decided by law and order issues. However, the debate on bail and media coverage of it did continue throughout the campaign. Most importantly, the Liberal Party promised that, if elected, it would undertake an independent enquiry into the functioning of the *Bail Act.*

The new Government delivered on its promise and the Law Reform Commission was provided with wide terms of reference in order to consider all aspects of bail. The atmosphere surrounding the enquiry remained positive. The *Sydney Morning Herald* and BOCSAR research continued to place the spotlight on remand issues and pressure groups such as the Bail Reform Alliance remained active. As in 2010, neo-liberalism would be served by the financial savings that would arise from reducing the numbers on remand.

The LRC Report, refreshingly, (given many years of restrictive amendments of the *Bail Act*), gave emphasis to the presumption of innocence, human rights, no punishment without conviction and the special needs of the young and disadvantaged. Like its 2010 predecessor, it recommended simplified language and more efficient procedures. Unlike its 2010 predecessor, it recommended a universal presumption in favour of bail. In doing so it rejected police submissions concerning a risk management approach because such an approach was too restrictive in relation to the rights of the accused as a factor

to be taken into account when considering bail. The LRC Report recommended a right to bail for lesser offences but not where such offences involved a sentence of gaol. Those developments that required consideration of youth, mental health, cognitive impairment and Aboriginal or Torres Strait Islander status were continued and extended.

The LRC Report took considerable interest in conditions associated with bail and the causes of failure to comply with them. It was critical of the use of conditions for welfare purposes rather than for purposes associated with bail. It was also critical of the routine use of enforcement directions associated with bail conditions, and of the lack of accommodation for the homeless. Its recommendations for a distinction between true conditions and conduct directions, limitations on the use of enforcement directions, limitations on the use of financial conditions, provision of accommodation, requirement that a juvenile who cannot meet conditions be returned to court within two days, and avoidance of welfare-based conditions reflect its concerns.

The appeal recommendations reflected existing legislation. However, in relation to second and later bail applications, having noted that young people were not making unnecessary bail applications, the LRC Report recommended s 22A not apply to young people and only after two attempts at bail by adults.

The media and public debate concerning bail reform became more contentious in 2012. The *Sydney Morning Herald's* support and ABC's provision of informed debate were now

offset by savage attacks from the conservative media in print and radio. The intervention of the Police Commissioner Andrew Scipione in August 2012 added to the pressure. Government comment began to give greater emphasis to the protection of the community and less to the rights of the accused.

In October 2012 Attorney-General Smith explained to the Estimates Committee the Government's preference for a risk management approach to bail. In the same month Minister for Police and Emergency Services Michael Gallacher introduced legislation that continued the enforcement of underlying conditions. This was consistent with the LRC Report but critically did not limit police power as to where and when enforcement conditions could be given. No other part of the LRC Report was rushed forward in this manner.

In November a last flurry of media activity by the Bail Reform Alliance preceded the Government's announcement of its response to the LRC Report. The response was welcomed by the police. The Bail Bill 2013 reflected the November response. It was not a uniformly punitive Bill. There are improvements for juveniles in relation to conditions and second and later bail applications. Removal of the use of bail for welfare purposes for adults and juveniles is consistent with the LRC Report. It is now clear that bail does not have to be reviewed every time a matter comes back to court. Review of a bail decision by a more senior police officer, providing a range of options other than arrest for police considering a breach, and explanation of enforcement directions are all consistent with or widen existing provisions. However, the failure to limit beyond a

'reasonable suspicion' when and where a police officer can carry out an enforcement direction is more punitive than the LRC recommendation. The provisions concerning right to release for lesser matters and in relation to appeals are in accordance with the LRC Report.

While it is true that the presumption against bail, the neutral presumption and bail only in 'exceptional circumstances' are gone, so is the presumption in favour of bail. No amount of discussion of the relative benefit of such a change for particular charges offsets the basic point that a defendant will not commence bail proceedings with a presumption in favour of bail. The risk management model downgrades the rights of the defendant as a consideration when compared with concerns such as absconding and the welfare of the community.

In summary: Between 1976 and 2013 the approach by Governments to bail legislation varied. It is true that in the second half of the 1970s a progressive mood concerning bail was converted into the *Bail Act*. However, it should also be noted that from the Act's commencement in 1980 there were no major changes for six years. That is well into the neo-liberal period. Changes to punishment for some crimes in the period between 1986 and 1995 did become more severe. However, changes to the law on bail in relation to such matters were not consistently punitive. In some cases the law became less punitive. In the matter of domestic violence the law was changed to improve the situation for women and children but more severe bail proposals were sometimes rejected. It is not surprising the percentage on remand declined.

Between 1995 and 2013 the law on bail for specific crimes did become more punitive following a law and order State election in 1995. The punitive turn was based on local issues until the year 2000 but from that point international issues were also important in the creation of a punitive atmosphere. The punitive approach in relation to specific crimes was continued by Labor and Liberal Governments. However, from 2010 there was a demand for a move away from the punitive approach and that demand received important institutional, public and media support. In the period of flux from 2010 both the Labor and Liberal Governments made attempts at reform. The 2010 proposals were as punitive as the law that existed at the time but were never finalised in Parliament. The 2012 Law Reform Commission Report was a non-punitive document that reflected demands for major reform. The Liberal Government's response was a mixed bag that implemented some of the LRC recommendations and rejected other major proposals. It was not consistently punitive. When it comes to major bail reform there has not been any overarching punitive turn that makes campaigning unlikely to succeed. The 2012 LCR Report now exists and should be the basis of future campaigning by younger activists who believe in the basic principles of liberal democracy.

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