



# *Review of the Bail Act 2013*

John Hatzistergos

June 2015

Final report

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## Terms of Reference

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

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

However, concerns have been expressed by the community and victims about the new bail regime. To ensure victim and community confidence in NSW's bail laws and that community safety is paramount, the Review is to consider whether the *Bail Act 2013* is appropriately framed to achieve its objectives including:

- The protection of the community
- Consistency of decision-making
- The need for laws to be easily understood and applied.

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

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

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

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

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

## Executive Summary

1. The new *Bail Act 2013*, which came into force on 20 May 2014, was based on an “unacceptable risk” model. This model required bail authorities to focus on the risk that an individual person posed when making a bail decision.
2. Shortly after the Act’s commencement, a select number of bail decisions caused concern for police, victims and the community. This concern prompted the Premier and the then Attorney General to commission an independent review of the Act to ensure it was framed to achieve its objectives.
3. The Interim Review report was publically released on 5 August 2014. It made 12 recommendations to the Government, proposing various changes to the *Bail Act 2013* and a number of non-legislative initiatives to improve the system. Key recommendations included introducing a show cause requirement where the accused was charged with particular serious offences; simplifying the previous two-stage unacceptable risk test to a one-stage test; introducing additional considerations when a bail authority was assessing risk; and additional training for legal practitioners and magistrates.
4. The Government accepted all these recommendations and the Parliament passed the *Bail Amendment Act 2014* in September 2014 to introduce the legislative changes.
5. These legislative changes commenced on 28 January 2015.
6. This Final Review focuses on the application of the *Bail Act 2013*, particularly after the commencement of the *Bail Amendment Act 2014*. The review has not considered the bail issues arising from the Martin Place Siege as these were the subject of a Joint Commonwealth –NSW review released in January 2015. The Government has made separate announcements in this respect.
7. Similar to the Interim Review, the methodology involved consultation with key stakeholders and a review of bail decisions that were raised in public commentary or referred to by stakeholders. Focus was placed on bail decisions made after 28 January 2015 in order to identify any issues arising from the changes. As previously, the Review

has also drawn on the work of law reform commissions around Australia and from data provided by NSW Bureau of Crime Statistics and Research (BOCSAR).

### 1.1 The ‘show cause’ requirement (Chapter 2)

8. The ‘show cause’ requirement is contained in Division 1A of Part 3 of the legislation. It requires an accused person to show cause for certain serious offences as set out in section 16B of the *Bail Act 2013*.
9. Select decisions made shortly after the introduction of the show cause requirement demonstrated some level of confusion as to how this additional test should operate. The confusion particularly stemmed from how the show cause requirement operated in conjunction with the unacceptable risk test. The report of the Interim Review, the legislation and the then Attorney’s Second Reading Speech all make clear that the intention was for both tests to be applied separately. NSW bail authorities were to draw on the decisions in Victoria and Queensland, which also have similar show cause requirements.
10. More recent decisions by superior courts in NSW have confirmed this two stage process, with an onus on the accused to demonstrate why their detention is not justified.
11. The growing body of case law in NSW is demonstrating the types of issues that a bail authority should take into account in determining whether an accused has shown cause.
12. The specific offences originally included in the show cause requirement were those where the gravity of the offence and the public interest is of such significance that it is recommended the alleged offender must show cause why their detention is not justified.
13. Over the course of consultation in this final phase, a number of stakeholders sought review of some of the offences included in the show cause category in section 16B of the *Bail Act 2013*. Any revisions to the specific offences in the show cause category should be referred to the Sentencing Council. This report therefore does not make any recommendations to change the offences included in section 16B.

14. The Act should however be amended to include in the show cause category any serious indictable offences committed by an accused person subject to an arrest warrant following a failure to appear on bail or following parole revocation (**Recommendation 1**).

### 1.2 Operation of the unacceptable risk test (Chapter 3)

15. The Interim Report emphasised that the unacceptable risk test should not be diluted by the insertion of the show cause requirement. Rather it was intended to be strengthened by increasing the range of matters that could be taken into account in determining unacceptable risk.
16. Recent decisions by courts demonstrate how the nature and seriousness of the offence should be taken into account when determining if there is an unacceptable risk.
17. There has been some argument as to whether the list of factors in section 18 of the *Bail Act 2013* adequately deals with the position of an accused person who has been found guilty and is awaiting sentence in circumstances where imprisonment is probable. This is a factor relevant to risk.
18. To clarify the position, the Act should be amended to explicitly cover this situation (**Recommendation 2**).
19. Section 18(1)(f) of the *Bail Act 2013* should also be expanded to include an accused's history of compliance or non-compliance with a home detention order, an intensive correction order or a suspended sentence, as also being relevant considerations going towards risk (**Recommendation 3**).

### 1.3 Bail pending an appeal to the Court of Criminal Appeal (Chapter 4)

20. The Court of Criminal Appeal recently considered the application of the amended section 22 of the *Bail Act 2013*. Section 22 specifies that a court is not to grant bail unless special or exceptional circumstances exist in very specific cases.
21. Its decision demonstrates the application of the two-stage process when this section is engaged.



#### 1.4 Training for police, judiciary and legal practitioners (Chapter 5)

22. Thorough and accurate training on the amendments to the *Bail Act 2013* as a result of the *Bail Amendment Act 2014* is essential.
23. NSW Police has done a thorough job of training its members and updating its systems as a result of the changes to the *Bail Act 2013* and are to be commended.
24. Whilst the Judicial Commission of NSW has also offered training for judicial officers in relation to the *Bail Amendment Act 2014* and the Bench Book for the Local Court has been updated to reflect changes, additional assistance should be provided to judicial officers with Bench Books and training updated to reflect case law on:
- The types of issues that a court should take into account in determining whether an accused has shown cause, with regular updates on the case law
  - The application of the unacceptable risk test, again, with reference to new case law
  - Re-applying the show cause requirement and the unacceptable risk test when deciding whether to revoke bail (**Recommendation 4**).
25. Legal Aid and the Office of the Director of Public Prosecutions (ODPP) have offered training for legal practitioners following the Interim Report's recommendations. Legal Aid in particular has developed an invaluable list of relevant decisions, updated regularly on their website.
26. The NSW Law Society and the NSW Bar Association have committed to running training on bail legislation, and advocacy in general, to their members going forward. This training must be offered as a matter of priority, particularly focusing on the show cause requirement and the unacceptable risk test (**Recommendation 5**).

#### 1.5 Treatment of domestic violence offences in bail decisions (Chapter 6)

27. The *Bail Act 2013* does not include domestic violence offences specifically as a show cause offence under section 16B. It is however eminently possible that an accused charged with a domestic violence offence would be subject to the show cause requirement.

28. Although the position across Australia varies, the position in NSW appears consistent with the findings of a joint report by the Australian Law Reform Commission and the NSW Law Reform Commission into family violence, numbers 114 and 128 respectively.
29. Additional training for judicial officers in the dynamics of domestic violence and additional guidance on how to recognise particularly serious and escalating behaviour is essential. The Judicial Commission should develop a checklist or additional guidance for judicial officers to use when assessing risk in bail decisions involving domestic violence **(Recommendation 6)**.

### 1.6 New offence for breach of bail (Chapter 7)

30. During the Interim Review, the NSW Police put forward the proposal of a new offence for breaching conduct requirements of bail. The proposed offence was based on the Victorian legislation.
31. At the time, the Interim Review recommended that the issue would be best dealt with by the Bail Monitoring Group, once additional data was available.
32. The issue has again been raised by NSW Police in the context of the final phase of the Review.
33. Repeat breaches of bail conditions are a real issue for NSW Police, and a concern for community safety. Whilst there are a number of actions that Police can and do take to deal with repeat breaches, such as issuing warnings, there are some situations where the repeat nature of the breaches or the seriousness of a particular breach is such that bail should be revoked.
34. Section 78(2)(b) of the *Bail Act 2013* specifies that a bail authority can only refuse bail where they have considered all possible alternatives. This is anomalous. Conditions are imposed to address bail concerns. Any breach, once it has been established, must be considered in its context, re-applying the show cause requirement (where invoked) and the unacceptable risk test. Whether or not those bail concerns are elevated to the point of unacceptable risk or would result in an accused failing to show cause is a matter which can only be dealt with by re-conducting these two tests. Section 78(2)(b) was not

recommended by the 2012 NSW Law Reform Commission report on bail (report number 133), nor was it contained in the 1978 Act.

35. Section 78(2)(b) of the *Bail Act 2013* should therefore be repealed, to remove the requirement for bail authorities to consider all possible alternatives in deciding whether to refuse bail following revocation (**Recommendation 7**).
36. It is important that all warnings issued by either police or courts are taken into account when dealing with repeat breaches of bail. In the context of section 18(1)(f) of the *Bail Act 2013*, all warnings given in relation to breaches of bail should be recorded and taken into account in determining the action to be taken following the establishment of a breach (**Recommendation 8**).
37. The NSW Police should also consider developing guidelines for officers in deciding how to exercise their discretion in enforcing bail conditions under section 77 of the *Bail Act 2013* (**Recommendation 9**).
38. The NSW Police Force has also proposed a new offence of committing an indictable offence whilst on bail, again similar to the Victorian legislation.
39. The NSW Law Reform Commission has separately and more broadly dealt with offending on conditional liberty. Any such new offence is best considered in this broader context. The Bail Monitoring Group is best placed to consider this issue or any alternative response (**Recommendation 10**).

### 1.7 Electronic Monitoring (Chapter 11)

40. The *Bail Act 2013* does not make specific provision for electronic monitoring in bail matters. However, it is clear that the potential for electronic monitoring to be imposed as a condition of bail cannot be excluded.
41. Given that a number of cases in NSW have discussed the possibility of electronic monitoring of offenders whilst on bail, there would be value in a legislative and policy framework for this. The NSW Government should consider the future use of electronic

monitoring of offenders, either as a condition of bail, or for those who are already detained, as an e-remand scheme (**Recommendation 11**).

### 1.8 Other issues in the *Bail Act 2013* (Chapter 12)

42. A range of other issues regarding the operation of the *Bail Act 2013* have arisen during consultation with stakeholders in the final phase of the Review.
43. The ODPP raised the issue that the requirement contained in clause 17 of the Bail Regulation 2014 that detention applications should be in writing before a judicial officer considers an application to detain or vary bail, was too onerous in practice. Clause 17 should be amended so that the obligation on the prosecution to make a written detention application is only where practicable, and that a court is not to decline to hear a detention application on the basis of such an application not being in writing (**Recommendation 12**).
44. It was submitted on behalf of the NSW Supreme Court that the Court of Criminal Appeal ought to be granted an error-based jurisdiction in the reviewing of bail decisions, replacing the current de novo hearing of bail reviews. The NSW Government should consider the appropriateness of an error-based jurisdiction for appeals of bail decisions from the Supreme Court to the Court of Criminal Appeal when considering the NSW Law Reform Commission's Report 140 on criminal appeals (**Recommendation 13**).
45. It has also been submitted that the pre-release requirements in section 29 of the *Bail Act 2013* require expanding to allow an accused person to be allowed release from police custody and into the custody of another, in order to facilitate attendance at hospitals, rehabilitation centres and other similar facilities without the need to impinge upon police resources. Amendment is required in the *Bail Act 2013* so that a Court can make such a pre-release requirement in such circumstances (**Recommendation 14**).
46. The NSW Police Force submitted that police officers should be extended the power to make a bail determination at a place other than a police station in certain circumstances. It is recommended that the *Bail Act 2013* be amended to allow NSW Police to make such a bail determination whilst a person is under arrest at a hospital or following a mental health assessment (**Recommendation 15**).

### **1.9 Ongoing monitoring of the Bail Act 2013 (Chapter 13)**

47. The Bail Monitoring Group has been closely following the implementation and operation of the *Bail Act 2013*.
48. This group should continue to meet for at least another 12 months, to ensure that the Act is closely monitored going forward and that the proposals of this Review are followed through.

## Recommendations

### Recommendation 1

The *Bail Act 2013* should be amended to include in the show cause category any serious indictable offences committed by an accused person subject to an arrest warrant following a failure to appear on bail or following parole revocation.

### Recommendation 2

Amend the *Bail Act 2013* to enable redetermination of bail pending sentence, taking into account where an accused is found guilty and a custodial sentence is probable.

### Recommendation 3

Amend section 18(1)(f) of the *Bail Act 2013* to include an accused's history of compliance or non-compliance with a home detention order, an intensive correction order or a suspended sentence.

### Recommendation 4

Judicial officers should be provided with additional assistance with bench books and training updated to reflect case law on:

- The types of issues that a court should take into account in determining whether an accused has shown cause, with regular updates on the case law
- The application of the unacceptable risk test, again, with reference to new case law
- Re-applying the show cause requirement and the unacceptable risk test when deciding whether to revoke bail.

### Recommendation 5

The Law Society and the Bar Association should conduct training for its members on the changes to the *Bail Act 2013*, and in particular the show cause requirement and the unacceptable risk test.

Further training should be run on advocacy skills in general, for private legal practitioners.

This training should be held as a matter of priority.

### Recommendation 6

The Judicial Commission should work in developing a checklist or additional guidance for judicial officers to use in assessing risk in bail decisions involving domestic violence.

### **Recommendation 7**

Repeal section 78(2)(b) of the *Bail Act 2013* so as to remove the requirement for bail authorities to consider all possible alternatives in deciding whether to refuse bail following revocation.

### **Recommendation 8**

Ensure in the context of section 18(1)(f) of the *Bail Act 2013* that all warnings given by bail authorities in relation to breaches of conditions are recorded and taken into account in determining action to be taken following establishment of breach.

### **Recommendation 9**

NSW Police should consider developing guidelines for officers in deciding how to exercise their discretion in enforcing bail conditions under section 77 of the *Bail Act 2013*.

### **Recommendation 10**

The Bail Monitoring Group should consider whether a specific offence for committing an indictable offence whilst on bail should be introduced.

### **Recommendation 11**

The NSW Government should consider the future use of electronic monitoring of offenders, either as a condition of bail, or for those who are already detained, as an e-remand scheme in the circumstances outlined.

### **Recommendation 12**

Regulation 17 should be amended so that the obligation on the prosecution to make a written detention application is only where practicable, and that a court is not to decline to hear a detention application on the basis of such an application not being in writing.

### **Recommendation 13**

The NSW Government should consider the appropriateness of an error-based jurisdiction for appeals of bail decisions from the Supreme Court to the Court of Criminal Appeal.

This could be done when considering the NSW Law Reform Commission's Report 140 on criminal appeals.

**Recommendation 14**

Amend the *Bail Act 2013* to provide that a Court can make a pre-release requirement allowing a person to be released into the custody of another in order to facilitate attendance at rehabilitation centres and other similar facilities.

**Recommendation 15**

Amend the *Bail Act 2013* to allow NSW Police to make a bail determination whilst a person is under arrest at a hospital or following a mental health assessment.



## 1. Introduction

1. The *Bail Act 2013* came into force on 20 May 2014. The Act introduced a new “unacceptable risk” model which replaced the complex set of presumptions that existed under the previous legislation.
2. This model was developed after much consideration. It was intended to better protect the community by giving the bail authority a higher degree of discretion, focusing on the risk that an individual posed.
3. The key feature of the model was that it required the bail authority to determine whether the accused would pose an unacceptable risk if released from custody. This was an unacceptable risk of:
  - failing to appear at any proceedings for the offence, or
  - committing a serious offence, or
  - endangering the safety of victims, individuals or the community, or
  - interfering with witnesses or evidence.<sup>1</sup>
4. If the bail authority was satisfied that the accused presented an unacceptable risk, they then had to consider whether that risk could be mitigated by bail conditions. If the risk could be sufficiently mitigated, conditional bail was granted. If it could not, bail was refused.
5. Following the commencement of the 2013 Act, a select number of bail decisions generated significant community concern. These bail decisions related to people released on bail in circumstances where it was contended that the alleged offences were extremely serious, or people who had criminal histories.
6. In light of this, the NSW Premier Mike Baird and then Attorney General Brad Hazzard commissioned an independent review of the *Bail Act 2013*. This review was to be undertaken in two stages, over a 12-month period.

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<sup>1</sup> Section 17(2), *Bail Act 2013*, historical version for 21 May 2014 to 27 January 2015.

7. In the first stage, the Review was tasked with considering whether the legislation was appropriately framed to achieve its objectives of protecting the community; consistency of decision-making; and the need for the laws to be easily understood and applied.
8. The Review was asked to specifically consider:
  - Whether the risk-based approach sufficiently reduced the risk that the accused may endanger the safety of victims, individuals or the community; commit a serious offence whilst on bail; interfere with a witness or evidence; or fail to attend court
  - Whether the Act struck the right balance in protecting the community and the integrity of the justice system
  - Recent judgments and implications of the new Act.
9. An Interim Report was presented to the Premier and Attorney General in July 2014.
10. In it, 12 recommendations were made for change. These recommendations primarily related to strengthening the test for bail for a person charged with a serious offence, and fostering a new culture amongst police, judicial officers and legal practitioners when involved in bail decisions.
11. Key recommendations included:
  - Introducing a new ‘show cause’ requirement if an adult offender is charged with a certain serious offence, whereby the bail authority must refuse to grant bail unless the accused shows cause why their detention in custody is not justified
  - Replacing the former two-stage unacceptable risk test with a one-stage test, in which any conditions that may be imposed and the reasonable likelihood of them being complied with are considerations in determining whether an accused presents an unacceptable risk
  - Introducing additional requirements a bail authority must take into account in assessing an accused’s bail concerns
  - Additional training for magistrates, registrars, deputy registrars and legal practitioners on the *Bail Act 2013*.
12. The Government accepted all of the recommendations in the Interim Report.

13. The Bail Amendment Bill 2014 was introduced into Parliament on 13 August 2014 to give legislative effect to the changes. The Bill passed without amendment on 17 September 2014.
14. The *Bail Amendment Act 2014* came into operation on 28 January 2015.
15. During the intervening four-month period, NSW Police and the courts implemented training programmes and changed policies and tools to implement these changes. This was a significant undertaking, particularly for NSW Police. The outcome was a relatively smooth transition.
16. The second and final phase of the Review considers how the changes resulting from the interim report have been implemented. In particular, this report considers:
  - How the ‘show cause’ requirement and unacceptable risk test have been applied
  - What has been the impact of the new show cause requirement
  - Whether victims’ issues, particularly in cases involving domestic violence, are appropriately addressed
  - Increasing incidents of applications seeking electronic monitoring as a means of managing risk
  - Incidents of breaches of bail and how these should be responded to
  - A number of other issues raised by stakeholders
  - Whether any further changes are required.
17. The Review has not considered any of the issues raised in bail decisions involving Man Haron Monis, as this was the subject of a separate Commonwealth and NSW review. Any changes to the *Bail Act 2013* that flow from the recommendations of that review or other initiatives must be consistent with the overall structure of the Act.

## 2. The ‘show cause’ requirement

18. Division 1A of the *Bail Act 2013* introduces the show cause requirement.

19. Section 16A specifies that:

*(1) A bail authority making a bail decision for a show cause offence must refuse bail unless the accused person shows cause why his or her detention is not justified.*

*(2) If the accused person does show cause why his or her detention is not justified, the bail authority must make a bail decision in accordance with Division 2 (Unacceptable risk test—all offences).*

*(3) This section does not apply if the accused person was under the age of 18 years at the time of the offence.<sup>2</sup>*

20. Section 16B goes on to specify the types of offences that the show cause requirement applies to:

*(1) For the purposes of this Act, each of the following offences is a **show cause offence**:*

*(a) an offence that is punishable by imprisonment for life,*

*(b) a serious indictable offence that involves:*

*(i) sexual intercourse with a person under the age of 16 years by a person who is of or above the age of 18 years, or*

*(ii) the infliction of actual bodily harm with intent to have sexual intercourse with a person under the age of 16 years by a person who is of or above the age of 18 years,*

*(c) a serious personal violence offence, or an offence involving wounding or the infliction of grievous bodily harm, if the accused person has previously been convicted of a serious personal violence offence,*

*(d) any of the following offences:*

*(i) a serious indictable offence under Part 3 or 3A of the Crimes Act 1900 or under the Firearms Act 1996 that involves the use of a firearm,*

*(ii) an indictable offence that involves the unlawful possession of a pistol or prohibited firearm in a public place,*

*(iii) a serious indictable offence under the Firearms Act 1996 that involves acquiring, supplying or manufacturing a pistol or prohibited firearm,*

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<sup>2</sup> Section 16A *Bail Act 2013* (NSW).

(e) *any of the following offences:*

- (i) *a serious indictable offence under Part 3 or 3A of the Crimes Act 1900 or under the Weapons Prohibition Act 1998 that involves the use of a military-style weapon,*
- (ii) *an indictable offence that involves the unlawful possession of a military-style weapon,*
- (iii) *a serious indictable offence under the Weapons Prohibition Act 1998 that involves buying, selling or manufacturing a military-style weapon or selling, on 3 or more separate occasions, any prohibited weapon,*

(f) *an offence under the Drug Misuse and Trafficking Act 1985 that involves the cultivation, supply, possession, manufacture or production of a commercial quantity of a prohibited drug or prohibited plant within the meaning of that Act,*

(g) *an offence under Part 9.1 of the Criminal Code set out in the Schedule to the Criminal Code Act 1995 of the Commonwealth that involves the possession, trafficking, cultivation, sale, manufacture, importation, exportation or supply of a commercial quantity of a serious drug within the meaning of that Code,*

(h) *a serious indictable offence that is committed by an accused person:*

(i) *while on bail, or*

(ii) *while on parole,*

(i) *an indictable offence, or an offence of failing to comply with a supervision order, committed by an accused person while subject to a supervision order,*

(j) *a serious indictable offence of attempting to commit an offence mentioned elsewhere in this section,*

(k) *a serious indictable offence (however described) of assisting, aiding, abetting, counselling, procuring, soliciting, being an accessory to, encouraging, inciting or conspiring to commit an offence mentioned elsewhere in this section.*

(2) *In this section, a reference to the facts or circumstances of an offence includes a reference to the alleged facts or circumstances of an offence.*

(3) *In this section:*

***firearm, prohibited firearm and pistol, and use, acquire, supply or possession*** of a firearm, have the same meanings as in the Firearms Act 1996.

***prohibited weapon and military-style weapon, and use, buy, sell, manufacture or possession*** of a prohibited weapon, have the same meanings as in the Weapons Prohibition Act 1998.

***serious indictable offence*** has the same meaning as in the Crimes Act 1900.

***serious personal violence offence*** means an offence under Part 3 of the Crimes Act 1900 that is punishable by imprisonment for a term of 14 years or more.

*supervision order means an extended supervision order or an interim supervision order under the Crimes (High Risk Offenders) Act 2006.*<sup>3</sup>

21. The purpose of the show cause requirement is to clearly place an onus on the accused. Where an accused charged with a show cause offence cannot demonstrate why their detention is not justified, they must be refused bail.
22. Similar models are in place in both Victoria and Queensland.

## **2.1 Intended operation of the show cause requirement**

23. The Interim Report of the Review of the *Bail Act 2013* went into considerable detail about why this requirement was recommended, and how it has been applied in these other jurisdictions.
24. In particular, the Interim Report outlined a rationale for the show cause requirement which was variously stated as follows:

“...in cases where the likelihood of the risk eventuating is outweighed by the consequences should the risk materialise”.<sup>4</sup>

“This test should apply to offenders whose alleged offences are such that in the ordinary course, the consequences of materialisation of the risk to the community and the administration of justice are such that they outweigh the likelihood of it occurring”.<sup>5</sup>

“...the gravity of these offences and the public interest is of such significance that it is recommended the alleged offender must show cause”.<sup>6</sup>

“That is, the offence by its nature and circumstances is so serious that the onus shifts to the accused to establish why bail should be granted as detention in custody is not justified”.<sup>7</sup>

25. The flowcharts set out in Section 16 of the *Bail Act 2013* make it clear that the show cause requirement is separate to the unacceptable risk.

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<sup>3</sup> Section 16B *Bail Act 2013* (NSW), emphasis in original.

<sup>4</sup> Review of the *Bail Act 2013*, July 2014 at [18].

<sup>5</sup> Review of the *Bail Act 2013*, July 2014 at [277].

<sup>6</sup> Review of the *Bail Act 2013*, July 2014 at [231].

<sup>7</sup> Review of the *Bail Act 2013*, July 2014 at [231].

26. Flowchart 2 in section 16 sets out the process that a bail authority must go through in assessing whether an accused would present an unacceptable risk. This involves considering all of the factors in section 18, including whether there are any bail conditions that could reasonably be imposed to address any bail concerns.
27. The then Attorney General clearly spelt out the intent behind the show cause requirement in his Second Reading Speech:

*[The] new section 16A provides that for show cause offences bail must be refused unless the accused shows cause where his or her detention is not justified. This shift of onus is an important change...Unlike presumptions, determining show cause will not be the end of the matter. If a person shows cause, he or she will still be subject to the unacceptable risk test.*<sup>8</sup>

28. The Second Reading Speech makes explicit reference to the fact that bail authorities in NSW should have regard to the approach taken in Victoria and Queensland when applying the show cause requirement.<sup>9</sup> This included considerations such as the strength of the prosecution case, preventable delays and urgent personal situations, such as the need for medical treatment.

## 2.2 Approaches to ‘show cause’ in Queensland and Victoria

29. Bearing in mind the current state of the authorities as to the content of show cause, it is useful to restate and update the position in Queensland and Victoria.
30. In *Lacey v DPP*<sup>10</sup>, the Queensland Court of Appeal considered the grounds by which an applicant could “show cause”. It appeared to regard the strength of the Crown case, the risks associated with flight, re-offending, interference with Crown witnesses, and the length and reasons for delay in making this determination. In dismissing the appeal, the court rejected the suggestion that delay itself shows cause, stating:

*the length of delay, the reasons for that delay and the strength of the Crown case will always be matters of degree which must be balanced to arrive at a decision as to whether bail should be granted. Glossing the statute, in the manner urged by the appellants, substitutes for the balancing of competing factors required by the statute an evaluative exercise in which the length of detention is of overwhelming*

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<sup>8</sup> Attorney General’s Second Reading Speech, Bail Amendment Bill 2014, NSW Parliamentary Debates, 13 August 2014 page 2.

<sup>9</sup> Ibid.

<sup>10</sup> *Lacey v DPP* [2007] QCA 413.

*importance. Moreover, the differences in the character of each of those competing factors render an evaluative exercise of the type for which the appellants contend largely meaningless. The strength of a Crown case and the consequent risks of flight or interference with Crown witnesses do not diminish as the length of time to trial increases. On the other hand, in a case in which it is demonstrated that the time in custody on remand will likely exceed any custodial sentence which might be imposed after conviction, the relative importance of time may very well be regarded by the judge as outweighing the other relevant factors. The essence of the exercise of the judge's discretion is to balance competing considerations and to weigh the relative importance which the different factors bear in the context of the decision which needs to be made. That exercise of discretion is not an empirical exercise; there are no bright lines drawn to determine conclusively when one important factor outweighs another.*<sup>11</sup>

31. In summary, the Court appeared to regard the strength of the Crown case, the risks associated with flight, re-offending and interference with Crown witnesses as matters against which the cited justification of delay needed to be weighed, stating:

*... the part of the appellants' case upon which most reliance was placed was the length of time they would spend in jail awaiting trial if committed. That factor and the other factors identified by his Honour, namely risks of flight, risks of re-offence and risks of interference with witnesses, were the important factors which were weighed for the purposes of determining whether or not cause had been shown.*<sup>12</sup>

32. Subsequently, the Queensland Court of Appeal again came to consider the position in *Sica v DPP*<sup>13</sup>. Chesterman JA (with whom the Chief Justice and Keane JA agreed) drew an analogy with the former section 8A of the *Bail Act 1978* (NSW) (which applied to serious drug offences) and referred to *Commonwealth DPP v Germakian* [2006] NSWCA 275, an unreported judgment of Hunt J, and a judgment of Sperling J in *R v Iskandar* (2001) 120 A Crim R 302 at 305. Chesterman JA stated:

*I do not understand the expressions of principle [relevant to s 8A of the Bail Act 1978 NSW] to differ from the principles applicable to applications for bail under s 16. The cases do not say "that the court must make an assessment of the strength of the Crown case. One point they make is that assessments when made are important to the discretion. They also emphasise the abnormal or extraordinary nature of the grant of bail in cases to which the section (s 16(3) of the Bail Act 1980 (Qld)) applies."*<sup>14</sup>

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<sup>11</sup> Ibid at [13].

<sup>12</sup> Ibid at [17].

<sup>13</sup> *Sica v DPP* [2010] QCA 18 at [52]–[54].

<sup>14</sup> Ibid at [54].



33. The approach taken in Victoria to show cause is centered on an examination of the unacceptable risk factors. There is, however, a divergence in opinion as to whether the test is a one or two-step process.

34. In *DPP v Phillip Anthony Harika*<sup>15</sup> Gillard J set out some of the principles which apply in determining whether to “show cause” under the analogous provisions of the *Bail Act 1977* (Vic), stating:

*Any person accused of an offence is entitled to bail. That is the general rule laid down by s4(1) of the Act. However, in some circumstances, the right to bail is abrogated and instead, the applicant must prove to the satisfaction of a Judge of this Court "why his detention in custody is not justified". See s4(4). The applicant for bail has the burden of proving that his detention in custody is not justified. However, that is not the end of the inquiry. If [the applicant] establishes cause, the Court shall refuse bail if it is satisfied there is an unacceptable risk that if the applicant is released on bail, he may commit one or more of the prohibited acts set out in s. 4(2)(d). These include failing to answer bail, committing another offence whilst on bail or interfering with a witness. The factors that must be weighed in considering the question of unacceptable risk are set out in s. 4(3). It is noted that the Court must consider all relevant matters, and the list of specified ones is not exhaustive. The Court is bound to consider the nature and seriousness of the offence, the background of the accused, the history of previous grants of bail, the strength of the evidence against him, and also the attitude, if expressed to the Court, of the alleged victim...*

*The burden of establishing unacceptable risk lies upon the Crown.*

*The two inquiries can overlap, in the sense that the unacceptable risk factors have to be weighed, when considering whether the applicant for bail has shown cause.*

*The Act does not define what is meant by the phrase "shows cause why his detention in custody is not justified". It is trite to observe that all relevant circumstances must be weighed, leading to the conclusion that the detention in custody is not justified.*

*In considering the issue of cause, the Court must not overlook the object of s. 4(4) of the Act. The Legislature has concluded that it is inappropriate that a person who commits a serious offence, and in the course of commission, uses or threatens to use an offensive weapon, should be at large, pending committal or trial. The probabilities are high that such a person will be committed to prison upon conviction. There are risks of failing to answer bail and committing a violent crime with grave consequences to the victim. Because of these factors, the Legislature intended that the person should not be at large, pending the trial.<sup>16</sup>*

35. In applying the show cause provision to the facts of the case and allowing the appeal, His Honour went on to state:

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<sup>15</sup> *DPP v Phillip Anthony Harika* [2001] VSC 237.

<sup>16</sup> *Ibid* at [41]–[45].

*In determining the issue of cause, it is necessary, at the outset, to identify the factors which led the Legislature to decree that bail should be refused. What those factors are, will depend upon the circumstances of each case.*

*The relevant factors on the application by the respondent were, first, a weapon had been used during the commission of the alleged offence, which showed a propensity to resort to violence; secondly, the presence of the weapon provided the potential to cause serious physical and/or mental injury to a victim; thirdly, the probabilities are high that upon conviction, the respondent would be sentenced to a substantial term of imprisonment which may encourage him not to answer bail; and finally, there is a risk of the commission of another similar-type offence.*

*These seem to me to be the relevant factors which underpin the decision by the Legislature to refuse bail where a person, in the commission of an indictable offence, uses an offensive weapon. There may be other factors which would be relevant.*

*The respondent, as an applicant for bail, had to provide cogent evidence to answer these concerns before it could be said that his detention in custody was not justified. In considering the factors, the background of the respondent, his prior convictions, the strength of the case against him, and the history of previous grants of bail, were all relevant.*

*His detention would not be justified if it was established that the risk of repeat offending was extremely remote, that the case against him was weak, that the probabilities were that he would not be sentenced to a term of imprisonment, that the use of violence was completely out of character, and that the possibility of re-offending, using a weapon, was remote. In considering the issue of cause, it is necessary to consider the applicant's past in making an assessment of whether he should be detained.<sup>17</sup>*

36. The two-step approach taken by Gillard J was not followed in *An Application for Bail by Asmar*.<sup>18</sup> In that case, Maxwell P took the view at [11] that there was only one question in a show cause case, which was: “*Has the applicant shown cause why his/her detention in custody is not justified*”. He stated:

*[12] This does not mean that the “unacceptable risk” issues identified by s 4(2)(d) are excluded from consideration. On the contrary, those issues must be at the heart of any consideration of whether a person's pre-trial detention is justified. Parliament has made clear in s 4(2)(d) and in s 5(2) that an assessment of those risks is central to the decision whether or not a person should be released on bail and, if so, on what conditions. To ask (as s 4(4) does) whether the person's detention is justified is simply to ask the same question in a different way. The same considerations must be relevant.*

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<sup>17</sup> Ibid at [60]–[64].

<sup>18</sup> *An Application for Bail by Asmar* [2005] VSC 487.

***[13] There may, of course, be additional considerations which, in a particular case, might be said to justify the person's continued detention.***<sup>19</sup>

37. More recently, Garde J in *In Re Application by Michael James Murray*<sup>20</sup> expressed a similar view as did Forrest J in *Re Application for Bail by Jamie Lee Robinson*.<sup>21</sup>
38. However, in a subsequent decision *R v Paterson*,<sup>22</sup> Gillard J maintained the approach in *Harika* (supra). In a more recent decision of *Woods v DPP*<sup>23</sup> Bell J also preferred the general approach taken by Gillard J in *Harika* (supra) stating:

*I am respectfully in general agreement with the reasoning in Gillard J in Harika and Paterson. It is more consistent with the presumption of innocence and the prosecutorial onus of proof. A troubling feature of the interpretation of Maxwell P in Asmar is that, as regards unacceptable risk, it reverses the onus of proof. It effectively transfers that onus from the prosecution (who would normally carry it, as with the prosecutorial onus generally) to the applicant (who would normally not, consistently with the presumption of innocence). Having regard to the negative and evaluative nature of the test, this is surprising, for it is very difficult for someone to prove a negative, even more difficult for someone to prove that he or she does not offend a standard expressed in terms of risk and more difficult again when the standard is expressed in terms of unacceptable risk, especially because the relevant information will almost always be in the possession, or mostly in the possession, of the police.*

*There is nothing in the nature of the show cause test in s 4(4)(a)-(d) which necessarily requires applicants to disprove what would normally be for the prosecution to prove, ie that the applicant represents an unacceptable risk of specified in s 4(2)(d)(i). The provisions creating the exceptional circumstances test in s 4(2)(a)-(aa) have not been interpreted in that way and I cannot see why the provisions creating the show cause test would be interpreted differently (and to the disadvantage of applicants) in that respect. Consistently with the presumption of innocence and the prosecutorial onus of proof, s 4(2)(d)(i) gives effect to the principle that the liberty and freedom of movement of the applicant is to be denied on the ground that he or she represents an unacceptable risk only where the prosecution discharges the onus of establishing that to the satisfaction of the court. With great respect to those who have concluded otherwise, I cannot see anything in the provisions of s 4(4)(a)-(d) or the other provisions of the Bail Act which reverses this onus in show cause situations.*

*On the proper interpretation of the provisions, the onus is on the applicant with respect to showing cause and on the prosecution with respect to unacceptable risk. I respectfully agree with the conclusion in Harika and Paterson on the one hand and Asmar on the other that unacceptable risk is very important in relation to whether*

<sup>19</sup> Ibid at [12]–[13]. Emphasis added.

<sup>20</sup> *Re Application by Michael James Murray* [2014] VSC 249 at [15].

<sup>21</sup> *Re Application for Bail by Jamie Lee Robinson* [2015] VSC 5 at [13].

<sup>22</sup> *R v Paterson* [2006] VSC 268.

<sup>23</sup> *Woods v DPP* [2014] VSC 1.

*cause has been shown. The applicant for bail and the prosecution contribute to the process of consideration according to the different onuses which they bear. If the prosecution fails to establish unacceptable risk, this will count in the applicant's favour in the show-cause assessment. If the prosecution establishes unacceptable risk, this will count against the applicant in that assessment; in practical terms, it will be dispositive because, under s 4(2)(d)(i), bail must be refused where the prosecution satisfies the court that the applicant represents an unacceptable risk.*<sup>24</sup>

39. The Victorian Court of Appeal has not yet determined which approach is correct, although most decisions have followed *An Application for Bail by Asmar* (supra).

### 2.3 Application of the show cause requirement in NSW

40. A number of Supreme Court of NSW decisions have considered the application of the “show cause requirement”.

41. In *R v Kirby*,<sup>25</sup> Garling J stated:

*The provisions of s 16A(1) say that the Court may give a bail decision in these circumstances: “...must refuse bail unless the accused person shows cause why his or her detention is not justified.” The Act, as amended, does not define what “cause” is. Now is not the time to write at length or to speak at length as to what may or may not comprise sufficient cause. One thing is plain: by reference to provisions of s 22(2) of the amended Act, that showing cause does not mean, except for the particular offences there identified, that special or exceptional circumstances must exist.*

42. In *M v R*,<sup>26</sup> when considering a bail application for an accused charged with, amongst other offences, a show cause offence, McCallum J stated:

*[5] It is not entirely clear how in the case of a show cause requirement the two tasks for the bail authority are to be approached. The scheme of the Act suggests a two-stage task in which the Court would first call upon the accused person to show cause why his or her detention is “not justified”. Subsection 2 of s 16A provides that, if the accused person does show cause why his or her detention is not justified, the bail authority must make a bail decision in accordance with Division 2 of Part 3, which is the unacceptable risk test. That test applies to all offences.*

*[6] Subsection 1 of s 16A provides that the bail authority must refuse bail unless the accused person shows cause in the stated terms. The scheme of the Act thus appears to be that, upon cause being shown, and only at that point, the Court must proceed to assess any bail concerns in accordance with Division 2. That impression is fortified by the provision of s 19(3), which states “if the offence is a show cause offence, the*

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<sup>24</sup> Ibid at [56]–[58].

<sup>25</sup> Unreported, Supreme Court of NSW, 2 February 2015 at page 2

<sup>26</sup> *M v R* [2015] NSWSC 138

*fact that the accused person has shown cause that his or her detention is not justified is not relevant to the determination of whether or not there is an unacceptable risk.*

*[7] Upon analysis, however, and having had the benefit of hearing a large number of bail applications over the past week, I have reached the conclusion that the apparent simplicity of a two-stage approach is illusory. The content of the requirement, as already noted, is to show cause why a person's detention is "not justified".*

*[8] Having regard to the content of that requirement, it is difficult to conceive how an applicant could show cause without addressing any relevant bail concerns. The issue whether an applicant has shown cause in my view must inevitably be informed by the outcome of the risk assessment, since the Act contemplates that the detention of a person who poses an unacceptable risk of the kind identified is justified. Conversely, it is difficult to conceive of a finding that an applicant had failed to show cause in circumstances where there was no unacceptable risk. The absence of any unacceptable risk would, I think, inevitably point to the conclusion that the detention was not justified, bearing in mind the common law principles to which I have referred.*

43. Her Honour considered what additional onus, if any, the show cause requirement placed on an accused and held:

*[12] There is nothing in Division 1A of the Act (which contains the provisions relating to the show cause requirement) to suggest the imposition of any additional requirement, that is, there is nothing to suggest that in a case where there is no unacceptable risk, the Court could still refuse bail unless the applicant was able to show cause. To construe the Act in any other way would, in my view, subvert the well-established principles of the common law.*

44. In construing the show cause requirements, McCallum J stated:

*[13] Section 16A must nonetheless be construed so as to have some work to do. In my view, the section should be understood to have the object of instructing the bail authority that, in the case of a show cause requirement, the circumstance that triggered the requirement is likely to inform the assessment of any bail concerns and the evaluative judgment as to the acceptability of any risk established. In some instances, the circumstance giving rise to the show cause requirement is in itself likely to reveal a bail concern. For example, s 16B(1)(d) specifies, as show cause offences, a series of offences relating to firearms, pistols, prohibited weapons and the like. Similarly, s 16B(1)(f) specifies as show cause offences offences under the Drug Misuse and Trafficking Act 1985 (NSW) involving the cultivation, supply, possession, manufacture or production of a commercial quantity of a prohibited drug.*

*[14] The Act guides the court that it must have regard to the common or notorious features of such offences. For example, a strong Crown case as to the commission of an indictable offence involving the unlawful possession of a pistol in a public place would guide the Court in the assessment of a bail concern as to the safety of the community. Similarly, a strong Crown case alleging an offence under the Drug Misuse and Trafficking Act of the kind to which I have referred would guide the Court*

*as to the likelihood of an applicant re-offending, the insidiousness of an addiction to some prohibited drugs, such as Ice, being a matter of notoriety.*

45. In short, McCallum J saw the utility of the show cause requirement as demonstrating the seriousness of the offence, to be taken into account when assessing an individual's bail concerns. The show cause requirement was *not* viewed as a separate requirement in its own right. The judgment did not go into any separate consideration of whether the accused has shown cause that their detention was not justified. Instead, McCallum J considered the section 18 factors in assessing whether the accused would present an unacceptable risk if released.

46. On the same day as the decision in *M v R*, Wilson J in *R v Najem*<sup>27</sup> allowed a detention application, clearly taking a two-stage approach. In doing so, her Honour held:

*One must weigh up the competing issues that the Court must consider. On one hand, the applicant's need to be at liberty to prepare his defence, the likely delay in bringing these matters to a final disposition, (which if they are dealt with summarily, could be expected to be perhaps some months, and if they are dealt with on indictment, could be as much as a year), and the applicant's interests to be at liberty principally so that he can obtain appropriate medical treatment. On the other are matters connected with, on the objective evidence, his criminal history, which suggests that he has in the past shown a level of disregard for the orders of a court.*

*Whilst I consider that the applicant has discharged the onus and he has thus brought the Court to consider the question of whether risks are unacceptable or can be mitigated adequately, I am not persuaded that the risks can in fact be mitigated by the bail conditions that are proposed. It seems me that there is a significant risk of the commission of further offences whilst on bail and, having regard to the applicant's criminal history, something more would be required to adequately address those risks.*

*Accordingly, bail is refused.*

47. In *R v Ebrahimi*<sup>28</sup> Beech Jones J considered the approach of McCallum J in *M v R* and stated:

*[8] It seems that, on the approach stated by McCallum J in M v R, the combined effect of s 16A and s 19 is that in cases where the applicant for bail faces a show cause offence, then that applicant must demonstrate that there is not an unacceptable risk (see M v R at [16]). As her Honour realised in M v R at [7], this approach appears to reflect a one stage approach rather than a two stage approach. The adoption of a one stage approach appears to sit uneasily with the structure of*

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<sup>27</sup> Unreported, Supreme Court of NSW, 18 February 2015.

<sup>28</sup> *R v Ebrahimi* [2015] NSWSC 335.

*Division 3, in particular the flow chart referred to in s 16 and the terms of s 16A(2). They appear to contemplate a two stage approach.*

*[9] The equivalent provisions in Victoria appear to have given rise to a disagreement about whether there is a one stage or two stage test (see Director of Public Prosecutions v Harika [2001] VSC 237, Asmar v the Crown [2005] VSC 487 and Woods v Director of Public Prosecutions [2014] VSC 1 at [49]ff).*

*[10] These difficulties all appear to follow from the failure of the legislation to explain what “justified” means in s 16A(1). In particular, the legislation does not specify whether that it is a reference to detention not being justified by reference to the bail concerns identified in s 17(2) or by reference to something else.*

*[11] For the purpose of this application I will adopt the approach of McCallum J in M v R. However, I note that, even if I was to adopt a two stage approach, it would not affect the outcome of the application.*

48. More definitive guidance on the show cause requirement was provided by the NSW Court of Appeal in *Director of Public Prosecutions (NSW) v Tikomaimaleya*.<sup>29</sup>
49. This case involved a detention application by the ODPP, pursuant to section 50 of the *Bail Act 2013*. The respondent had been granted bail following a verdict of guilty by a jury for an offence of sexual intercourse with a person under the age of 10.
50. The Court of Appeal considered section 16A of the *Bail Act 2013* and stated:

*[16] The terms of [section 16A] subs (2) make it clear that there is a two-step process involved in determining bail release and detention applications for show cause offences. That this is so is further confirmed by a flow chart in s 16; the provision in s 17(4) that s 17 does not apply if bail is refused under Div 1A; and the provision in s 19(3) that in relation to a show cause offence, the fact that the accused person has shown cause that detention is not justified is not relevant to the determination of whether or not there is an unacceptable risk.*

*[17] If a person is charged with an offence of a type listed in s 16B succeeds in showing cause why his or her detention is not justified pursuant to s 16A(1), it is necessary for a bail authority to consider whether there is an “unacceptable risk” that the person will fail to appear; commit a serious offence; endanger the safety of victims, individuals or the community; or interfere with witnesses: s 19(2). Bail must be refused if the bail authority is satisfied that there is an unacceptable risk: s 19(1). If there are no unacceptable risks, bail must be granted, with or without conditions; or the person may be released without bail; or bail may be dispensed with: s 20.*

51. In considering *M v R*, the Court of Appeal noted:

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<sup>29</sup> *Director of Public Prosecutions (NSW) v Tikomaimaleya* [2015] NSWCA 83.

*[24] We accept that in many cases it may well be that matters that are relevant to the unacceptable risk test will also be relevant to the show cause test and that, if there is nothing else that appears to the bail authority to be relevant to either test, the consideration of the show cause requirement will, if resolved in favour of the accused person, necessarily resolve the unacceptable risk test in his or her favour as well.*

*[25] It is important, however, that the two tests not be conflated. Determination of the unacceptable risk test is not determinative of the show cause test. [Emphasis added]*

52. By using the two-stage process, the Court was able to take into account the fact that the respondent had already been found guilty by a jury in assessing whether he had shown cause. This is not one of the considerations that is specifically included in the exhaustive list of factors in assessing unacceptable risk, at section 18.
53. Accordingly, the detention application was granted after the Court found that the accused had not shown cause why his detention was not justified.
54. The circumstances in *Tikomaimaleya* demonstrate the importance of maintaining flexibility in the types of issues a bail authority can consider in determining whether an accused has shown cause. The list of bail considerations in section 18 of the *Bail Act 2013* is exhaustive. The show cause requirement, in applying to people charged with serious offences, should not be so limited.
55. The decision in *Tikomaimaleya* also bears some relationship with what Maxwell P stated at [12] – [13] in *Re an app'n for bail by Asmar*<sup>30</sup> in relation to the Victorian equivalent provisions.<sup>31</sup> The reasoning in *Tikomaimaleya* was subsequently followed in *El-Hilli and Melville v R*<sup>32</sup> which will be discussed below.

## 2.4 The onus on the accused to demonstrate show cause

56. The show cause requirement is intended to place a clear onus on the accused to demonstrate why their detention is not justified. In *M v R*, McCallum J expressed the view that the relevant onus is a persuasive one stating:

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<sup>30</sup> *Re an app'n for bail by Asmar* [2005] VSC 487.

<sup>31</sup> See earlier discussion.

<sup>32</sup> *El-Hilli and Melville v R* [2015] NSWCCA 146.



*[15] Importantly, I would construe s 16A as imposing on an applicant the task of persuading the Court that any such obvious bail concern did not give rise to an unacceptable risk of the kind specified in the Act. In saying so, I do not mean to suggest that the Act imposes any formal onus of proof in the traditional sense. The Act makes it clear in s 32 that any matter that must be decided by the bail authority in exercising a function in relation to bail is to be decided on the balance of probabilities, but the rules of evidence do not apply in that task. Rather, the bail authority may take into account any evidence or information it considers credible or trustworthy in the circumstances: see s 31 of the Act.*

***[16] But the Court should not approach the show cause requirement, in my view, on the ground that an applicant must go further in order to show cause why his or her detention is not justified or bears any higher onus than to persuade the Court that there is no unacceptable risk having regard to the bail conditions that could reasonably be imposed to address any bail concerns in accordance with s 20A.<sup>33</sup>***

57. This view accords with the position recently taken in Victoria<sup>34</sup> although in one instance in Queensland it has been held that in the context of that State's equivalent provision, both the persuasive and evidential burden was on the accused.<sup>35</sup>

58. In *R v Tikomaimaleya* (supra), the Court of Appeal stated:

*[25] ....The show cause test by its terms requires an accused person to demonstrate why, on the balance of probabilities (s 32), his or her detention is not justified. The justification or otherwise of detention is a matter to be determined by a consideration of all of the evidence or information the bail authority considers credible or trustworthy in the circumstances (s 31(1)) and not just by a consideration of those matters exhaustively listed in s 18 required to be considered for the unacceptable risk assessment.*

59. In *M v R* (supra), McCallum J expressed the view that the show cause requirement did not give rise to a presumption. Specifically, her Honour stated:

*[8] The Crown in the present case provided detailed and helpful written submissions addressed in part to those questions. The submissions opened with the proposition that a person charged with a show cause offence "would normally or ordinarily be refused bail" and faces a heavy burden to persuade the Court that bail should be granted.*

*[9] In my view, the application of the Act cannot and should not be generalized in those terms. While the precise content of the show cause requirement is elusive, it is not in my view to be construed as imposing so fundamental an intrusion on the common law principles to which I have referred. The Court should be careful not to construe the Act in such a way as to put a gloss on the terms of the section, which*

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<sup>33</sup> *M v R* [2015] NSWSC, emphasis added.

<sup>34</sup> *In Re Carl Guirguis* [2015] VSC242 at [40]-[41] per Priest JA.

<sup>35</sup> *Van Ttongeran v Office of the DPP* [2013] QMC16 at [110] per Carmody J.

*appears to me to require the Court to approach each case on its merits with no presumption as to the likely or proper outcome of the release application.*

60. The common law principles referred to in her Honour's decision were described as follows:

*[4] ...The presumption of innocence is, of course, a fundamental premise of the criminal justice system; the right of a person to be at liberty a fundamental aspect of the common law right of freedom of movement. I do not think their removal from the objects section of the Act derogates from those fundamental common law principles.*

61. To the extent this relates to the content of the show cause requirement, it appears contrary to the approach taken both in Queensland<sup>36</sup> and to some extent in Victoria.<sup>37</sup>

62. In *R v Tikomaimaleya* (supra), the Court of Appeal made the following observation:

*[27] The Director also made relatively brief submissions as to the content of the show cause test in Div 1A. He cited a single authority, a decision of a magistrate in Queensland: Landsowne v Director of Public Prosecutions (Qld) [2013] QMC 19. A number of other interstate authorities are available in which there is discussion of a show cause test in bail legislation in those jurisdictions. However, in the absence of full argument on the issue it would be appropriate to defer more detailed analysis which is now more likely to occur in the Court of Criminal Appeal.*

## **2.5 Factors to be considered in determining bail in show cause offences**

63. Examples of cases where the onus to show cause has been discharged include:

- *Alchin v R*<sup>38</sup> where Mc Callum J found cause shown in circumstances involving the recent birth of a child, the likely lengthy period of remand, the fact that the case involved one word against another in circumstances of conflict between two families, and where remand would perpetuate disadvantage and deprivation and conditions can be imposed to break the cycle.
- *Benzce v R* and *Yates v R*<sup>39</sup> where Mc Callum J granted release applications finding the show cause requirement satisfied in order to undertake full time residential rehabilitation.
- *R v Moukhallaletti*<sup>40</sup> where Hidden J found show cause satisfied on grounds that the accused had a severe eye condition leading to loss of vision, making trial preparations difficult; significant career responsibilities; and the likely length of the proceedings.

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<sup>36</sup> *Sica v DPP* [2010] QCA18 in particular Chesterman JA (with whom de Jersey CJ and Keane JA agreed at [54]).

<sup>37</sup> *DPP v Harika* [2001] VSC 237.

<sup>38</sup> Unreported, Supreme Court of NSW, 16 February 2015.

<sup>39</sup> *Benzce v R* and *Yates v R* [2015] NSWSC 139.

<sup>40</sup> Unreported, Supreme Court of NSW, 16 April 2015.

- *R v Kirby* (supra) where Garling J considered the length of the sentence likely to be imposed (being at the very lowest end), the significant time already spent in custody and the fact that the accused's past criminal history related to a period of past drug addiction combined.
- *R v Najem* (supra) where Wilson J considered access to appropriate and proper medical treatment could be capable of discharging the show cause onus.
- *R v Awad*<sup>41</sup> where Davies J found cause and granted bail notwithstanding that the accused was alleged to have committed an offence on bail bearing in mind what was described as the "relatively low level of seriousness" of the offence charged. The Crown in that case neither had a view in favour or against bail being granted.

64. In its submission to the Review, the Aboriginal Legal Service drew attention to the decisions in *M v R* (supra) and *DPP v Tikomaimaleya* (supra) to claim:

"that the show cause test remains the subject of some confusion, and risks misapplication particularly when applied by decision makers who do not have formal legal qualifications or in circumstances of significant work pressure. In the experience of ALS solicitors, it is not unusual for the show cause requirement to operate as a presumption against bail, such that a client who might otherwise satisfy the unacceptable risk test will be refused bail.

Accordingly, the ALS suggests that what might amount to satisfaction of the show cause requirement should be clarified to include (1) that the person is unlikely to be sentenced to full time imprisonment, or (2) that there is no unacceptable risk as defined in section 19(2) of the Bail Act.<sup>42</sup>"

65. This submission is not supported. Other stakeholders consulted in this Review did not make submissions advocating defining "show cause". The Law Society of NSW Juvenile Justice and Criminal Law Committees in particular noted:

"The Committees are of the view that the determination of the content of the test for the show cause requirement ought to be left to the common law to develop. The Courts are no stranger to developing a body of jurisprudence in relation to the exact meaning of a particular expression used in legislation. This process tends to yield good law and provides flexibility to meet changing circumstances and community views."<sup>43</sup>

66. *DPP v Tikomaimaleya* (supra) clearly establishes that the unacceptable risk test does not define the extent of the show cause requirement. Furthermore, the cases referred to above such as *R v Awad* (supra) and *R v Kirby* (supra) demonstrate that the Courts look at the level of alleged offending when considering the show cause requirement brought about by alleged

<sup>41</sup> Unreported, Supreme Court of NSW, 3 February 2015.

<sup>42</sup> The Aboriginal Legal Service submission, 1 June 2015, at [17]–[18].

<sup>43</sup> The Law Society of NSW Juvenile Justice and Criminal Law Committee submission, 15 June 2015.

offending on bail. The question of raising the relevant threshold for alleged offending on bail will be discussed later in this Report.

- 67. The desirability of maintaining some flexibility has been referred to earlier. As with any new legislation, its provisions fall for ongoing application and interpretation.
- 68. The show cause requirement has however been extensively considered in Queensland and Victoria and it was the clear intention of the Interim Review<sup>44</sup> and the Second Reading Speech<sup>45</sup> that authorities in those states would assist in guiding interpretation.
- 69. The need for additional education is considered elsewhere in this Report.

## **2.6 What offences should be show cause offences**

- 70. During the course of the Review, a number of stakeholders sought review of some of the show cause categories.
- 71. The ODPP sought inclusion of aggravated sexual assault. In support of its argument, the Director drew particular attention to the decision of the Court of Criminal Appeal in *R v Kugor*.<sup>46</sup>
- 72. The ODPP has also pointed out that section 16B(1)(c) includes in the show cause category offences involving serious personal violence or involving wounding/infliction of grievous bodily harm where the accused has previously been convicted of a serious personal violence offence. A similar provision in the 1978 Act (section 9D(4)) included in the definition of serious personal violence offence similar offences committed interstate or overseas.
- 73. Aboriginal Legal Service proposed narrowing the definition of “serious indictable offences” in section 16B(1)(h) to include only strictly indictable offences and Table 1 offences in Schedule 1 to the *Criminal Procedure Act 1986*, or to include offences with a maximum penalty of 10 years or more.

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<sup>44</sup> Review of the Bail Act 2013, July 2014 at [225].

<sup>45</sup> Attorney General’s Second Reading Speech, *Bail Amendment Bill 2014*, NSW Parliamentary Debates, 13 August 2014 page 2.

<sup>46</sup> *R v Kugor* [2015] NSWCCA 14.

74. At the request of the former Attorney General Hazzard, the NSW Sentencing Council was asked to consider the following:
- Whether the show cause requirement should be extended to include “on sentence” offences, meaning serious indictable offences committed while the person was:
    - subject to a good behaviour bond, intervention program order, intensive correction order, or
    - serving a sentence in the community, or
    - in custody
  - Reviewing the definition of serious personal violence offences
  - Reviewing the existing category of committing a serious indictable offence while on bail.
75. The NSW Government will be separately considering the Sentencing Council’s recommendations. This Report therefore does not elaborate on these issues, nor does it make any specific recommendations about changes to the offences included in the show cause requirement.
76. The submission of the Aboriginal Legal Service to raise the threshold of offending on bail or parole will be subject to the Sentencing Council’s further report once further data is received.
77. However, there is an issue not relating to offences which the Review considers requires attention. This relates to circumstances where an accused on bail has failed to appear leading to bail being revoked and a warrant being issued. In such a case, any offence alleged to have been committed whilst the warrant is outstanding would not be captured by the terms of section 16B(h), assuming bail is revoked in the accused’s absence.
78. In their submission to the Review, the ODPP submits that this position is anomalous and should be corrected in the legislation.
79. This proposal appeared non-controversial amongst other stakeholders and, in particular, it found support from representatives of the Local Court magistracy. It should be stated that the view from the Local Court was that the addition of a serious indictable offence committed by a person who is subject to an arrest warrant to the show cause list would assist the

functionality of the court process where a person fails to appear, and would fall within the ambit of the intention of the Act.

80. Ordinarily, this would not be an issue if the accused were to remain on bail while a warrant for failing to appear was outstanding.
81. Similarly where parole is revoked and a warrant issued, any offence committed in the interim would not be a show cause offence.<sup>47</sup> This should also be remedied in the Act.

### **Recommendation 1**

The *Bail Act 2013* should be amended to include in the show cause category any serious indictable offences committed by an accused person subject to an arrest warrant following a failure to appear on bail or following parole revocation.

## **2.7 Impact of the show cause requirement on the remand population**

82. At paragraph [6] of the Interim Report, the Review stated:
- “the Review has focused on underlying policy issues. Given its targeted focus, the review has not been hampered by a lack of data.”
83. Nevertheless, in light of public commentary, it would be prudent to address issues as to the impact of the reforms on the remand population.
84. The remand population rose sharply in the first three months of 2015, from 2723 inmates on 21 December 2014 to 3556 on 8 May 2015. It should be noted that each year there is a large spike in the remand population while courts go into recess over the Christmas holidays.<sup>48</sup> The most recent seasonal increase in remand numbers is larger than in previous years.
85. Data prepared for the purposes of this review by the Bureau of Crime Statistics and Research (BOCSAR) at Appendix C indicates that the bail refusal rate by courts was around 10 per cent in February, March and April 2015 (Figure 3a). This is not noticeably higher than in previous years, including for those specific offences that may be particularly affected by the

<sup>47</sup> *R v Mariam*, Unreported, Supreme Court of NSW, 14 May 2015 at page 5.

<sup>48</sup> Neil Donnelly, Imogen Halstead, Simon Corben and Don Weatherburn, *The 2015 NSW prison population forecast*, Issues Paper No 105, NSW Bureau of Crime Statistics and Research, April 2015, page 1.

show cause legislation (Figures 3b and 3c). This data does not include the bail refusal rate by police, and represents only a three-month period since the show cause requirement commenced.

86. BOCSAR advises that the data shows that the number of people entering the court system in December 2014 through to March 2015 has been unusually high (Figures 4a and 4b). Thus, while bail refusal rates have been relatively stable, more individuals are being remanded due to an increase in the number of people subject to a bail decision.
87. The data also shows that there has been an increase in the number of bail breaches established in the Local Court (Figure 5a). This data is only available from June 2014 to date. Whilst the series is not long, the data shows that the number of bail breaches established in the four months between January 2015 and April 2015 is higher than in any of the previous seven months. No data is available to date on whether the increase in established bail breaches has led to an increase in bail revocations.
88. This trend of an increase in established bail breaches is consistent with police recorded data, which shows that the number of bail breach incidents in the first quarter of 2015 was the highest of any quarter in the past three years (Figure 5b).
89. BOCSAR data shows that there has not been any noticeable increase in the percentage of defendants' bail refused following the introduction of the show cause requirement.
90. The remand population increased in early 2015 largely due to the regular seasonal increase associated with the courts' Christmas recess. The remand population may have increased more than usual this year due to the increased number of defendants being brought before the courts and/or the increased number of bail breaches (if that has corresponded with more bail revocations).

## **2.8 Impact of the show cause requirement on the profile of remandees**

91. Despite this early data indicating that the introduction of the show cause requirement cannot be attributed as one of the primary reasons for the increase in the remand population, the more important question is the profile of those remanded.

92. Data provided by NSW Police shows 2139 offenders who were subject to the show cause requirement were refused bail by police, from the introduction of the show cause requirement on 28 January 2015 through to 17 June 2015. This total includes matters where the accused had shown cause but was then found to be an unacceptable risk.
93. Of the 2139 offenders refused bail by police, 1793 were also refused bail by the Court. This means that 84 per cent of offenders subject to the show cause requirement who were refused bail by police were also refused bail by the court.
94. Data also provided by NSW Police shows that 10,204 offenders were refused bail by police on the basis that they were found to present an unacceptable risk, from 28 January 2015 through to 17 June 2015.
95. Of the 10,204 offenders refused bail by police, 5005 of these were also refused bail by the courts. This means that 49 per cent of offenders who were refused bail by police on the basis that they were found to be unacceptable risk were also refused bail by the courts.
96. Unlike when police are making a bail decision, at Court, accused persons are far more likely to be legally represented at court, and new information may have come to light since the initial police bail decision.



### 3. Operation of the unacceptable risk test

#### 3.1 Taking into account the nature and seriousness of the offence

97. At [226] of the Interim Report, the Review stated, with reference to the show cause requirement, as follows:

“It is important that the risk assessment process should not be diluted by this approach as it will continue to operate across a broad range of offending and in some circumstances in conjunction with the show cause test.”

98. At [243] of the Interim Report it was stated, by way of example:

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

99. A demonstration of this is to be found in *R v Abdulrahman*.<sup>49</sup> That case involved a detention application where the applicant for bail had been charged with 27 firearms offences. A number of these offences were in contravention of section 7(1) of the *Firearms Act 1996*; a number in contravention of section 7A(1) of the Act and an offence under section 51D(2) of the Act of possessing more than 3 firearms, any of which being a prohibited firearm. In that case, notwithstanding the length of time which the accused would have awaited trial, the state of the accused’s wife’s health and the fact that the accused only had one offence for common assault on his record for which he received a section 10 bond, the detention application was granted. Davies J held:

*“The concern I have, as the Crown has submitted, is that by the serious nature of the offences, the respondent will fail to appear at any proceedings and will endanger or may endanger the safety of the community and commit further serious offences. It is a reasonable inference and it is an inference that I draw, that the amount and type of weapons that were found in the respondent’s premises mean that he has criminal associations, with the result that he poses an unacceptable risk of continuing to commit serious offences and thereby, endanger the community.”*

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<sup>49</sup> Unreported, Supreme Court of NSW, 28 May 2015.

*The maximum penalty for the s 51D offences is twenty years imprisonment with a standard non-parole period of ten years. The maximum penalty for the s 7(1) offences is fourteen years with a standard non-parole period of three years.*

*If the respondent is convicted of these offences, and the likelihood is that it will be a conviction on a large group of them or none at all, he will be sentenced to a long period of imprisonment. That is a strong motivation, in the circumstances, for him not to appear in court.*

*I cannot be satisfied that the bail concern I have are met by the conditions proposed and those that are currently in place. I find, therefore, that the respondent is an unacceptable risk of failing to appear, continuing to commit serious offences and endangering the safety of the community, and I order his detention.”*

100. The decision in this case focused on the nature and seriousness of the offence, the strength of the prosecution’s case, an inference of criminal association and a likelihood of a lengthy period of imprisonment if convicted. All these factors were found by the Court to produce an unacceptable risk in the circumstances.
101. The significance of the nature and seriousness of the offence was also considered in the detention application before Campbell J in *R v Khamis and Hussain*.<sup>50</sup> This was a case which also involved a non-show cause matter, being aggravated sexual assault pursuant to section 61J of the *Crimes Act 1900*. The circumstances of aggravation were that the offences were committed in company. The accused were convicted but allowed bail by the trial judge pending sentence. In granting the detention application, Campbell J focused on the nature and seriousness of the offence and the conclusive nature of the prosecution case between conviction and sentence. His Honour stated:

*“ It has long been recognised, however, as the reference by counsel to R v Hilton (1987) 7 NSWLR 745 demonstrates, that after conviction although the law in regard to bail or a grant of it remains the same, things change.*

*In Giordana (1982) 31 SASR 241 King CJ pointed out that in dealing with appeals bail it is the totality of the circumstances that must be looked at. Hilton was also a case dealing with appeals bail but I think there is an obvious and strong analogy between bail pending an appeal and bail pending sentence following conviction for a serious offence, although I acknowledge that special statutory considerations govern the former. King CJ also said, yet I acknowledge not in the same statutory context as we are dealing with, at p 242:*

*“Before and during trial the primary, although not the only consideration, is whether the applicant will appear when required to do so. This consideration has only a minor bearing on the grant of bail after conviction. Obviously bail*

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<sup>50</sup> Unreported, Supreme Court of NSW, 4 June 2015.

*after conviction would not be granted unless the circumstances were such as would have indicated bail before and during trial. After conviction, however, other cogent factors also come into consideration.”*

*Some of those other cogent considerations were referred to by the High Court of Australia in United Mexican States v Cabal (2001) 209 CLR 165 at 181 where it was pointed out by their Honours that the totality of the circumstances are not exhausted by reference to the position of the applicant alone. In this case the totality of the circumstances are not exhausted by reference to the position of each respondent alone.*

*The significance of the nature and seriousness of the offence and the conclusive nature of the prosecution case between conviction and sentence is that there is a public interest involved in having convicted persons serve their sentence as soon as practicable. The legislation currently in force does not require exceptional circumstances and I will not apply such a test. That public interest is related to the fundamental significance of the verdict of a jury is the administration of criminal justice. To put it in ordinary language and adopting ideas that have been perhaps better expressed by other judges, there is likely to be a sense of unease in the community when persons who have been convicted of serious criminal offences of a type which involve a high probability of a long custodial sentence as punishment are seen to walk free as though nothing has happened and as though the verdict of the jury was somehow contingent.*

*I fully appreciate that the learned trial judge enjoyed advantages that I do not enjoy. I acknowledge that his Honour, with great respect, stated that the starting point is a significant custodial sentence. He also referred to the consideration that there may be some unusual features to these cases. I must say, acknowledging his vantage point, I do not see them. Assuming that there are such and acknowledging that will be a very strong subjective case to be advanced on the part of each respondent, I find it difficult to conceive that upon proceedings upon sentence in an offence which carries a standard non-parole period of 10 years following conviction by a jury, and not upon a plea of guilty, that other than condign punishment will be passed involving a significant custodial sentence. It seems to me that in deciding the significance of the seriousness of the offending and the conclusive nature of the Crown case, those matters loom large in my discretionary decision and in my assessment of the bail concerns in this case.*

*Bearing those matters firmly in mind, I am not persuaded that the risk of flight in those circumstances, when viewed through the prism of the public interest I have referred to, can in these cases be sufficiently mitigated by the imposition of even stringent conditions of the type that appear to have been in place already. I am satisfied that there is an unacceptable risk of flight and I refuse bail.”*

### **3.2 Taking into account an offender's conviction**

102. The ODPP has specifically raised the issue of a capacity of section 18 of the Act to deal with the position of an accused person who has been found guilty by a judge or jury and is awaiting sentence. Specifically, the ODPP was of the view that it was perverse that the Act

should require the same test upon conviction following trial as would apply to bail applications upon arrest.

103. The ODPP draws note to the fact that in the 1978 Act, this situation was dealt with by the loss of entitlement to bail (section 9(2)(b)). The ODPP suggested that this issue could be addressed in one of two ways, either by allowing a judge to revoke bail where a guilty verdict has been returned and a judge is satisfied that full time custody is probable; or by adding an appropriate clause to section 18(1).
104. Notwithstanding the decision of Campbell J in *R v Khamis and Hussain* (supra), it appears appropriate to clarify the position raised by the Director. The Review recommends amending section 18 to cover this situation. The precise vehicle can be considered in consultation with Parliamentary Counsel.
105. The Review has raised with Corrective Services NSW (CSNSW) the practical implications of this in terms of access to incarcerated persons by legal representatives. CSNSW has advised the Review that there is work underway to increase the number of remand beds in the Sydney metropolitan area. This is being done through the creation of additional capacity in existing complexes.
106. CSNSW is also increasing the access of un-sentenced inmates to legal representatives via Audio Visual Links (AVL). The Video Conferencing Scheduling System (VCSS) is currently scheduling over 20,000 video conferences annually between inmates and legal practitioners. CSNSW is expanding the capacity in the Metropolitan Remand and Reception Centre video conferencing facility, which will provide more than 20 video conferencing systems through which inmates can maintain contact with legal practitioners. Also, schedule telephones were installed at 16 correctional centres in May 2015, allowing telephone contact with legal practitioners to be scheduled through VCSS. Previously, inmates were limited to using the inmate telephone system for calls with legal practitioners without the capacity to make appointments and legal practitioners had no capacity to make inbound telephone calls.
107. A pilot will commence in July 2015 allowing private legal practitioners to access VCSS. This will allow practitioners to schedule times with inmates and use their own iPads to contact their clients. This pilot will ensure security and connectivity concerns are addressed prior to state-wide roll-out.

108. CSNSW will also benefit from the Justice AVL Consolidation Project which will augment the current system by installing 80 additional professional video conferencing facilities across NSW correctional centres over the next four years.

### **Recommendation 2**

Amend the *Bail Act 2013* to enable redetermination of bail pending sentence, taking into account where an accused is found guilty and a custodial sentence is probable.

### **3.3 Consideration of an accused's criminal associations**

109. Another feature of the amendments introduced by the *Bail Amendment Act 2014* was section 18(1)(g), which requires the Court to provide an assessment of bail concerns to take account of whether an accused person has any criminal association.
110. In *R v Ebrahimi* (supra), a stringent approach was taken. This case concerned six charges arising out of importation of pseudoephedrine and other precursor drugs. Beech-Jones J stated:

*[42] The next potentially relevant factor is whether the applicant has any criminal associations (s 18(1)(g)). The Crown facts refer to certain matters which it contends points to a connection between the applicant and the "Hell's Angels Motorcycle Gang". In particular, there are, according to the Crown, various encrypted Blackberry messages which indicate that the applicant was aware that the authorities were looking for members of that gang and was concerned he might be one of the persons being sought.*

*[43] Assertions of criminal associations of this kind often generate much heat in these applications, but little light. To truly assist in assessing bail concerns the Court needs to know much more about the nature of the association, the nature of the alleged criminality that the alleged criminal associations have engaged in in the past and the material that provides a basis of believing the applicant has contacts with persons who could provide him some assistance if he wished to abscond. Beyond stating that, I cannot take this matter any further. It does not play any significant part in my overall decision.*

111. In *R v Abdulrahman* (supra) however, Davies J was able to infer criminal associations on the basis of the amount and type of weapons found in the respondent's premises.

### 3.4 Consideration of the views of the victim

112. A further addition brought in by the 2014 Amendment Act was section 18(1)(o) which reads as follows:

*“(1) A bail authority is to consider the following matters, and only the following matters, in an assessment of bail concerns under this Division”*

...

*(o) in the cause of a serious offence, the views of any victim of the offence or any family member of a victim (if available to the bail authority), to the extent relevant to a concern that the accused person could, if released from custody, endanger the safety of victims, individuals or the community”*

113. This provision was considered by McCallum J in *R v Moustafa Mariam* (supra). In that case, the Police submitted a letter from a detective asserting that during the hearing, on committal proceedings of charges of perverting the course of justice, two persons who were close associates of the applicant and were present in the public gallery. One of the men removed his shirt and replaced it with one illustrate with pistols on the front and the text ‘In God We Trust’ and the text ‘Retaliation is a Must’ on the back.
114. On the basis of this, a strong belief was expressed that this was an indicator that the applicant was intending to retaliate against the witness or his family for his evidence. Her Honour noted that this was a perception, nevertheless the meaning of the Police views were clear. In taking it into account, Her Honour stated:

*“The Act plainly contemplates that the Court should receive the views of police in assessing bail concerns. One context in which that must occur is s18(o) which requires the Court to consider the views of any victim of the offence. It is plain from the Second Reading Speech that Parliament contemplated such views would be put before the Court by police. The Attorney General said:*

*“For serious offences, the views of the victim or a family member of a victim will also have to be considered to the extent that they are relevant to assessing the risk of the accused endangering the victim or the community if released. This is not intended to place a burden on victims and subject them to extra questioning, it simply allows police to put forward the information they have available from the victim at that time. Significantly the bail authority will now have to consider any conditions that can reasonably be imposed to address bail concerns at the same time it assesses the bail concerns.”*

*The material to which I have referred is not material from the victim but material from the police about their concerns about the safety of the victim. Contrary to Mr*

*Scragg's submission, I regard it as a mandatory consideration to which s18 requires me to have regard.*

*I would, however, accept Mr Scragg's submission that I should take a cautious approach as to what conclusion to draw from the incident described. He submitted that it is not open to me to conclude that the applicant was responsible for that incident and that to take that approach could only be based on conjecture or speculation. Further, as already noted, it was an act directed rather at police than the victim.*

*Conversely, however, I think it would be naive of the Court and possibly subvert the purpose of s18(1)(o) to disregard such views. I accept that it is easy for police with their arguably particular interest in matters of criminal justice to overstate or place a different emphasis on certain concerns that they have and the Court should not accept such views unqualified or without assessing them carefully. Conversely, however, the views of police can be an important source of information for a Court considering a bail application to temper the appearance of the material presented in support of a bail application which might not otherwise be available to the Court.*

*In making those remarks, I bear in mind the fact that the rules of evidence do not apply in a bail application and the Court is required to take into account any evidence or information it considers credible or trustworthy.*

*The views of police put forward in the present case, in my view, fall into that description of being credible or trustworthy but I approach them with the caution suggested by Mr Scragg."*

115. The Review reinforces the importance of seeking victims' views for the purposes of section 18(1)(o) in appropriate cases.

### **3.5 An accused's history of compliance**

116. An accused's history of compliance with previous orders, conditions or bonds is a factor that a bail authority must consider in assessing bail concerns. This is set out in section 18(1)(f) of the *Bail Act 2013*. It is of note that this list is exhaustive.
117. The purpose of this consideration goes towards the level of risk that a person presents, were they to be released on bail and the likelihood of their compliance with a particular bail condition/s.
118. In addition to the types of orders, conditions and bonds included in section 18(1)(f), an accused's history of compliance with a home detention order, intensive correction order or suspended sentence are also relevant considerations.

119. An accused's history of compliance with these custodial sentences may assist in assessing the level of risk and likelihood of future compliance with orders and conditions.
120. The Review recommends that these custodial sentences be included in section 18(1)(f).

### **Recommendation 3**

Amend section 18(1)(f) of the *Bail Act 2013* to include an accused's history of compliance or non-compliance with a home detention order, an intensive correction order or a suspended sentence.



## 4. Bail pending an appeal to the Court of Criminal Appeal

121. Pursuant to Schedule 1, clause [10] of the *Bail Amendment Act 2014*, section 22 of the *Bail Act 2013* was amended by the insertion of section 22(2), indicating where an offence for which an appeal is pending to the Court of Criminal Appeal against conviction on indictment or sentence imposed or an offence where there is an appeal pending from the Court of Criminal Appeal to the High Court of Australia, show cause requirements do not apply if the offence is a show cause offence.

122. Pursuant to section 22(3), in the aforementioned circumstances, the unacceptable risk test applies subject to the requirement that special or exceptional circumstances exist to justify the bail decision.

123. Section 22 in full, reads as follows:

*“22 General limitation on court’s power to release*

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

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

*(i) a conviction on indictment, or*

*(ii) a sentence imposed on conviction on indictment,*

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

*(2) If the offence is a show cause offence, the requirement that the accused person establish that special or exceptional circumstances exist that justify a decision to grant bail or dispense with bail applies instead of the requirement that the accused person show cause why his or her detention is not justified.*

*(3) Subject to subsection (1), Division 2 (Unacceptable risk test-all offences) applies to a bail decision made by a court under this section.”*

124. Following the decision in *DPP v Tikomaimaleya* (supra), the Court of Criminal Appeal came to consider the application of these provisions in *El-Hilli and Melville v R*<sup>51</sup>.

125. In this decision, Hamill J (with whom Simpson and Davies JJ agreed) stated:

*[11] Two things can immediately be observed about s 22. First, in cases where there is a “show cause requirement” under Division 1A (ss 16A-16B), the requirement to establish special and exceptional circumstances applies rather than the show cause requirement. This suggests that the requirement to establish special and exceptional circumstances is at least as onerous as the requirement to show cause. Second, subject to the operation of s 22(1), the unacceptable risk test in Division 2 (ss 17-20A) applies to a bail decision made under s 22. The present case does not involve an offence in relation to which there is a show cause requirement. However, s 22 is engaged and the applicants must establish that there are special and exceptional circumstances justifying the grant of bail.*

*[12] In DPP v Tikomaimaleya the Court of Appeal (Beazley P, RA Hulme and Adamson JJ) held that the terms of s 16A(2) concerning offences where there is a “show cause” requirement “make it clear that there is a two-step process involved in determining bail release and detention applications for show cause offences”. However, having referred to the comments of McCallum J in M v R [2015] NSWSC 138, the Court said at [24]-[25]:*

*“ [24] We accept that in many cases it may well be that matters that are relevant to the unacceptable risk test will also be relevant to the show cause test and that, if there is nothing else that appears to the bail authority to be relevant to either test, the consideration of the show cause requirement will, if resolved in favour of the accused person, necessarily resolve the unacceptable risk test in his or her favour as well.*

*[25] It is important, however, that the two tests not be conflated. Determination of the unacceptable risk test is not determinative of the show cause test. The show cause test by its terms requires an accused person to demonstrate why, on the balance of probabilities (s 32), his or her detention is not justified. The justification or otherwise of detention is a matter to be determined by a consideration of all of the evidence or information the bail authority considers credible or trustworthy in the circumstances (s 31(1)) and not just by a consideration of those matters exhaustively listed in s 18 required to be considered for the unacceptable risk assessment.”*

*[13] Given that the “special or exceptional” circumstances requirement in s 22 replaces the show cause requirement (where applicable) and the structure of the Bail Act, the same reasoning employed by the Court of Appeal in DPP v Tikomaimaleya supports the following propositions. First, where s 22 is engaged, there are two stages. The applicant must demonstrate that “special and exceptional circumstances exist justifying the [decision to grant bail]”. Then the Court must apply the “unacceptable risk test” and do so by application of the exhaustive list of matters set out in s 18. The second proposition is that the same factors and evidence may operate*

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<sup>51</sup> *El-Hilli and Melville v R* [2015] NSWCCA 146

*at both stages. Where an applicant establishes special and exceptional circumstances, it is likely that the same material will also succeed in satisfying the unacceptable risk test. However, that cannot be stated as a universal proposition and the bail authority must apply each test in accordance with the terms of the Act. A case may arise where a particular matter qualifies as a “special or exceptional circumstance” and yet the application of the unacceptable risk test results in the refusal of bail. Such a case is likely to be rare because the “unacceptable risk” factors are imported in the “special or exceptional circumstances” requirement by s 22(3).*

126. This case demonstrates the operation of the two tests to be applied when section 22 is engaged.

## 5. Training for police, judiciary and legal practitioners

127. Thorough and accurate training on the amendments to the *Bail Act 2013* as a result of the *Bail Amendment Bill 2014* is essential.
128. A key recommendation of the interim report was additional training for the judiciary and legal practitioners.
129. Additional training for police was obviously required, given fairly significant changes and the volume of bail decisions made by police on a daily basis.
130. The need for additional training was part of the reason the Bill's commencement was delayed by some four months.

### 5.1 Training for NSW Police

131. NSW Police changed their risk assessment tool and computer systems to accommodate the show cause requirement and the one-stage unacceptable risk test. This was a significant undertaking.
132. All NSW police officers were given online and face-to-face training in the changes to the legislation and police systems.
133. Comprehensive face-to-face training was given to all:
  - Custody managers / facilitators
  - Police prosecutors
  - Bail and custody regional trainers
  - Education Development Officers
  - Domestic Violence Regional and Liaison Officers
  - LAC Advocates
  - Technical and support staff
  - Operational Information Agency staff.
134. Staff had to complete the training prior to the commencement of the changes.

135. Importantly, NSW Police used LAC Advocates to champion the changes. Advocates were drawn from the field, provided with a two-day training session, and were then used to train colleagues and provide ongoing support.
136. A comprehensive training package was developed for these staff, along with publications made available to all. Separate DVDs were also developed for officers and police prosecutors.
137. The Police training and publications made very clear that where the accused is charged with a show cause offence, they must be refused bail unless they can show why their detention is not justified.
138. The material requires police to take into account three factors when determining whether an accused has shown cause:
1. The strength of the prosecution case
  2. Whether the length of time the accused will spend in custody on remand is likely to exceed any custodial sentence that might be imposed
  3. Whether the accused has urgent or special medical needs or responsibilities.
139. These three considerations are in line with the case law in Victoria and Queensland.
140. The material explicitly states that even if the accused does show cause, it does not mean that they are automatically released. Rather, the bail officer must then move on to complete the risk assessment for the accused.
141. NSW Police's computer system, WebCOPS, was updated to automatically detect the offences that are obviously show cause matters. Some show cause offences obviously rely on the specific facts of the case or the accused's criminal history. WebCOPS guides bail officers through this process.
142. The training and publications also covered the one-stage unacceptable risk test, and the additional considerations that a bail authority must take into account in assessing risk (such as the views of the victim or victim's family for serious offences).

143. The training and material emphasise that in assessing whether a bail concern qualifies as an unacceptable risk, police must consider both the likelihood of the event happening and its consequences.
144. Importantly, the training and materials covered the changes to the imposition of bail conditions, set out in section 20A. In particular, NSW Police covered the introduction of section 20A(2)(f), which now specifies that a bail condition can only be imposed if there are reasonable grounds to believe that the condition is likely to be complied with by the accused.
145. This means that if the accused has a history of non-compliance with a bail condition/s that would otherwise operate to reduce the level of risk, this condition cannot be imposed. If there are no other bail conditions that could reduce this particular risk, then bail must be refused.
146. The training and material also gave further guidance on when bail conditions are necessary to address a bail concern.
147. NSW Police has done a thorough job of training its members and updating its systems as a result of the changes to the *Bail Act 2013*. They are to be commended.

## 5.2 Training for the judiciary

148. The Judicial Commission of NSW offered various training for judicial officers in relation to the implementation of the *Bail Amendment Act 2014*.
149. All metropolitan magistrates and acting magistrates have now attended training on the new Act.
150. A training DVD was produced, providing an overview of the key changes following the enactment of the *Bail Amendment Act 2014* and in particular, how the changes would affect the work of the Local Court. This DVD was made available to all judicial officers.
151. The Judicial Commission also ran seminars in February 2015 on the changes as a result of the *Bail Amendment Act 2014*, working through a number of scenarios. Separate sessions were run for the Supreme Court and the District Court.

152. The Bench Book for the Local Court was also updated to reflect the changes.
153. The Bench Book reproduces the two flow charts from section 16 of the *Bail Act 2013*.<sup>52</sup> The Bench Book makes clear that the process for a bail decision is *two-stage*. It also reproduces relevant sections from the then Attorney General's Second Reading Speech, relating to the operation of the show cause requirement.
154. Whilst Bench Books generally reproduce relevant sections of the legislation, they should be updated with case annotations. This should include details of the provisions relevant to detention applications seeking revocation.
155. The Bench Book does however reflect the changes to general rules for bail conditions under section 20A<sup>53</sup> with a comprehensive table showing the different bail conditions that can be imposed and when they are available.

#### **Recommendation 4**

Judicial officers should be provided with additional assistance with bench books and training updated to reflect case law on:

- The types of issues that a court should take into account in determining whether an accused has shown cause, with regular updates on the case law
- The application of the unacceptable risk test, again, with reference to new case law
- Re-applying the show cause requirement and the unacceptable risk test when deciding whether to revoke bail

### **5.3 Training for legal practitioners**

156. Legal Aid has offered a number of training sessions for both its members and private practitioners following the recommendations in the Interim Report.

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<sup>52</sup> Local Court Bench Book, January 2015, page 855.

<sup>53</sup> Ibid page 860.

157. These sessions focused on the changes in the *Bail Amendment Bill 2014*, with each session delivered at a Legal Aid office. One of the sessions was also filmed and the footage made available online.
158. In addition, Legal Aid delivered a session on the bail amendments as part of two conferences.
159. They have also made resources available to lawyers, including an online bail resources page that includes papers and video presentations of training. This resources page also includes a list of key bail decisions from the NSW Supreme Court and Victoria and Queensland. The review has been advised that this case list continues to be updated and thus reflects the ongoing judicial interpretation of the *Bail Act 2013*.
160. The Review considers that this is an invaluable resource for all practitioners.
161. The ODPP also offered training and guidance to its prosecutors. The training since August 2014 has included a one-hour Mandatory Continuing Legal Education session on the amendments, made available to all staff; a presentation by the Director at the Crown Prosecutors Conference; and a presentation at an ODPP solicitors' workshop.
162. The ODPP has also made available online a number of resources for staff on issues relating to bail, including papers, instructions and bail decisions.
163. It is also essential that private legal practitioners have access to comprehensive and ongoing training on the *Bail Act 2013*. The anecdotal and transcript-based evidence reviewed demonstrates this need.
164. The Bar Association and the Law Society have committed to running training on bail legislation, and advocacy in general, to their members.
165. This training must be offered as a matter of priority.

### **Recommendation 5**

The Law Society and the Bar Association should conduct training for its members on the changes to the *Bail Act 2013*, and in particular the show cause requirement and the



unacceptable risk test.

Further training should be run on advocacy skills in general, for private legal practitioners.

This training should be held as a matter of priority.

## 6. Treatment of domestic violence offences in bail decisions

### 6.1 NSW's treatment of domestic violence offences in bail decisions

166. Domestic violence offences have serious social and economic impacts on both individuals and society.
167. Whilst many of the offences are covered in the *Crimes Act 1900*, some of the different challenges and characteristics of domestic violence offences are recognised in the separate *Crimes (Domestic and Personal Violence) Act 2007*. In particular, the latter includes a separate offence for domestic violence, to help identify repeat offenders.
168. The *Bail Act 2013* does not include domestic violence offences specifically as a show cause offence under section 16B.
169. It is however eminently possible that an accused charged with a domestic violence offence would be subject to the show cause requirement. Offence categories in section 16B that are particularly relevant include offences that are punishable by imprisonment for life;<sup>54</sup> a serious personal violence offence, or an offence involving wounding or the infliction of grievous body harm, if the accused person has previously been convicted of a serious personal violence offence;<sup>55</sup> or a serious indictable offence that is committed whilst on bail or parole.<sup>56</sup>
170. In addition to this, several of the section 18 factors that a bail authority must take into account in assessing a person's level of risk would be highly pertinent to domestic violence offences. These include:
- The accused person's background, including criminal history<sup>57</sup>
  - The nature and seriousness of the offence<sup>58</sup>
  - Whether the accused has a history of violence<sup>59</sup>
  - Whether the accused has a history of compliance or non-compliance with apprehended violence orders<sup>60</sup>

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<sup>54</sup> Section 16B(1)(a) *Bail Act 2013*.

<sup>55</sup> Section 16B(1)(c) *Bail Act 2013*.

<sup>56</sup> Section 16B(1)(h) *Bail Act 2013*.

<sup>57</sup> Section 18(1)(a) *Bail Act 2013*.

<sup>58</sup> Section 18(1)(b) *Bail Act 2013*.

<sup>59</sup> Section 18(1)(d) *Bail Act 2013*.

- The conduct of the accused towards any victim of the offence after the offence<sup>61</sup>
- In the case of a serious offence, the views of any victim or family member of the victim.<sup>62</sup>

171. The above is most likely to capture domestic violence offences where there is a pattern of violence.
172. Where the offence before a bail authority relates to a first instance of domestic violence, the fact that the allegations are of domestic violence would not necessarily be a consideration. It could however be argued that where the allegations are of domestic violence, this should be considered in the “nature and seriousness of the offence” when assessing bail concerns.
173. The position across other Australian jurisdictions varies.

## **6.2 Recommendations of the Australian Law Reform Commission and NSW Law Reform Commission**

174. Two reports recently looked at the issue of family violence in the context of bail decisions. These were the joint report of the Australian Law Reform Commission (ALRC) and the NSW Law Reform Commission (NSWLRC) into family violence,<sup>63</sup> and the NSW Law Reform Commission’s report on bail.<sup>64</sup>
175. The joint report of the ALRC and the NSWLRC considered whether there should be a presumption for or against granting bail for crimes committed in a family violence context. The Commissions did not consider that creating a presumption against bail for all of these offences was the best way to ensure the safety of women and children.<sup>65</sup> This was because such a presumption may act as a disincentive for victims to report family violence crimes, thus undermining the safety of the victim. The Commissions also felt that such a presumption

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<sup>60</sup> Section 18(1)(f) *Bail Act 2013*.

<sup>61</sup> Section 18(1)(n) *Bail Act 2013*.

<sup>62</sup> Section 18(1)(o) *Bail Act 2013*.

<sup>63</sup> Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – a national legal response*, October 2010, ALRC Report 114, NSWLRC Report 128.

<sup>64</sup> NSW Law Reform Commission, *Bail*, April 2012, NSWLRC Report 133.

<sup>65</sup> Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – a national legal response*, October 2010, NSWLRC Report 128, page 419.

may unfairly deny the accused the presumption of innocence, particularly given the spectrum of offending behaviour.<sup>66</sup>

176. Instead, the Commissions recommended maintaining the presumption in favour of bail but removing the presumption in specific circumstances. The Commission did not recommend what those circumstances should be, but suggested that it should include where the accused has been violent against the victim in the past.<sup>67</sup>
177. The NSWLRC again considered the issue in its 2012 report. In it, the LRC recommended that a bail authority must consider specific factors in assessing the likelihood that, if released, the person would harm or threaten harm to a person in a domestic relationship.<sup>68</sup> These factors included whether:
- The person has a history of violence
  - The person has been violent to the other person in the past (whether or not the accused person has been convicted of an offence in respect of the violence)
  - The person has failed to comply with a conduct direction in respect of the offence to which this section applies that was imposed for the protection and welfare of the other person
  - In the opinion of the bail authority, the accused person will comply with any such requirement in the future.
178. This list has been largely captured in the *Bail Act 2013*, in the list of factors a bail authority must take into account in section 18 and the specific requirement in section 20A(2)(f) for the bail authority to be satisfied that there are reasonable grounds to believe that the accused person is likely to comply with the condition.

### **6.3 Raising awareness of domestic violence offences in NSW bail determinations**

179. Domestic violence offences are extremely serious, and can have significant implications.

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<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> NSW Law Reform Commission, *Bail*, April 2012, NSWLRC Report 133, Recommendation 10.6.

180. However there is a spectrum of offences where domestic violence is concerned, and consistent with the report referred to, any changes must not have the unintended consequence of reducing reporting of these offences.
181. In considering whether additional safeguards are needed in the legislation, it is useful to consider the broadest categories first and then go through a narrowing process, if required.
182. The broadest category is to make a breach of an Apprehended Domestic Violence Order (ADVO) a show cause offence, where the accused has been found guilty of contravening another ADVO in a certain preceding time period. This would be similar to the Northern Territory's recent amendments.
183. ADVOs are intended to protect individuals who have experienced, or are at risk of experiencing, domestic violence.
184. In 2013:
- 25,535 ADVOs were granted by Local Courts in NSW
  - 11,688 ADVO breaches were recorded by NSW Police
  - 8900 people were proceeded against to court by NSW Police.<sup>69</sup>
185. Whilst the number of ADVOs granted by Local Courts in NSW has not gone up significantly, there was a significant increase in both the number of ADVO breaches recorded by police, and the number of people proceeded against to court. Over a five-year period from 2009 to 2013, the number of people proceeded against to court by police was about one third the total number of ADVOs granted.<sup>70</sup>
186. ADVO breaches are one of the most common statutory offences sentenced in the NSW Local Court. The Judicial Commission of NSW reported that in 2010, there were 3777 cases of

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<sup>69</sup> Lily Trimboli, *Persons convicted of breaching Apprehended Domestic Violence Orders: their characteristics and penalties*, Issues Paper No 102, NSW Bureau of Crime Statistics and Research, January 2015, page 4.

<sup>70</sup> Ibid, page 2

knowingly contravening an ADVO, making up 3.7 per cent of all NSW Local Court cases, and the eighth most common statutory offence sentenced that year.<sup>71</sup>

187. Of the 3154 people in 2013 who were found guilty of breaching an ADVO as their principal offence, the majority (84.6 per cent) entered a guilty plea. The most common principal penalties imposed included:
- Good behaviour bond without supervision (22.5 per cent) for an average of 14 months
  - Fine (17.8 per cent) at an average of \$432
  - Good behaviour bond with supervision (15.5 per cent) for an average of 16 months
  - Imprisonment (12.4 per cent) for an average of four months
  - Good behaviour bond without conviction (9.3 per cent) for an average of 12 months.<sup>72</sup>
188. Of the 5023 people with a court appearance in 2013 involving at least one proven breach of an ADVO offence:
- 22.2 per cent had no proven court appearances of any type in the preceding five years
  - 53.3 per cent of offenders had at least one prior proven court appearance for a violent offence (the main categories of these offences being assault and stalking)
  - 28.7 per cent had at least one prior conviction for breach of an ADVO.<sup>73</sup>
189. There is work underway by the NSW Government and various legal stakeholders to improve compliance with ADVOs. This includes work that the Department of Premier's Behavioural Insights Unit and the Department of Justice is undertaking to simplify ADVOs. The simplified ADVO will be aimed at making it easier for both defendants and protected persons to understand the orders. A second phase of work will explore ways to improve court processes and better engage with defendants to improve compliance rates.
190. The NSW Government also introduced measures in May 2014 to allow senior police to issue provisional ADVOs. Under these new powers, defendants may also be directed to a police station, and can be detained for up to two hours until the ADVO is served.

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<sup>71</sup> Georgia Brignell, Zeinab Baghizadeh, Patrizia Poletti, *Common offences in the NSW Local Court: 2010*, Sentencing Trends and Issues No 40, May 2012, page 7, quoted in Christopher Angus, *Domestic and Family Violence*, Briefing Paper No 5/2015, NSW Parliamentary Research Service.

<sup>72</sup> Lily Trimboli, *Persons convicted of breaching Apprehended Domestic Violence Orders: their characteristics and penalties*, Issues Paper No 102, NSW Bureau of Crime s and Research, January 2015, page 3.

<sup>73</sup> Ibid page 4.

191. Despite this work underway, the current high volume of breaches suggests that a breach of an ADVO, even where a previous breach has been found, is not in itself grounds for a show cause offence. To do so may have an impact on the high rate of guilty pleas. This would not only have an impact on the workload of Local Courts in NSW - more importantly, it could put victims through the trauma of a contested court case.
192. Where an offender however has breached an ADVO, and this breach involves violence or the threatened use of violence, and the offender has been charged with another relevant offence in the preceding two years (such as stalking or breaching another ADVO where the initial breach involved violence or the threatened use of violence) this could be classified as a show cause offence.
193. Such a provision is similar to the Victorian legislation, which includes several offences relevant to domestic violence as show cause offences. All of these offences become show cause offences where in the preceding 10 years, the accused has been convicted or found guilty of the same offence or where they have used or threatened to use violence against any person in the course of committing an offence; or if the court is satisfied that on a separate occasion, the accused used or threatened to use violence against the alleged victim whether or not they were convicted, found guilty, or charged with the offence.
194. In all circumstances, the Review considers that broadening the show cause provisions to include domestic violence offences is not the most appropriate means of addressing this issue. The number of offenders and the spectrum of behaviour is too great. The potential impact on reporting rates is also a major consideration.
195. Instead, additional training for judicial officers in the dynamics of domestic violence and additional guidance on how to recognise particularly serious and escalating behaviour is important. This is the best means of identifying situations where an accused's circumstances are such that support a refusal of bail, recognising that each case of domestic violence will often have some common factors, and some unique.
196. This training could be based on a model used by the NSW Police's Domestic Violence Safety Assessment Tool (DVSAT). This tool was recently piloted in specific locations, and is scheduled for rollout.

197. The DVSAT is an evidence-based tool used to identify the level of threat of future harm to victims of domestic violence. The first part contains 25 risk identification questions to be asked of people in intimate partner relationships, with the second part relating to all domestic violence incidents (intimate and non-intimate). The tool then identifies a victim at one of two threat levels, either “at threat” or “serious threat”.
198. Victims are assessed as being at serious threat if there are 12 or more “yes” answers in the first part of the questionnaire; based on police professional judgment; or meeting the NSW Police standard for repeat victimisation.
199. The use of an objective checklist or some other type of guidance may assist when making decisions in these very difficult cases.
200. This guidance material could complement the work of the Australasian Institute of Judicial Administration and the University of Queensland in developing a National Family Violence Bench Book, recently announced by the Commonwealth Government.<sup>74</sup>

### **Recommendation 6**

The Judicial Commission should work in developing a checklist or additional guidance for judicial officers to use in assessing risk in bail decisions involving domestic violence.

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<sup>74</sup> Joint Press Release by the Attorney General and Minister Assisting The Prime Minister for Women dated 9 June 2015.



## 7. New offence for breach of bail

201. During the Interim Review of the *Bail Act 2013*, the NSW Police Force proposed new and separate offences for:

- breaching conduct requirements; and
- committing an indictable offence whilst on bail.

202. The reason for the proposal was to deter people from continually breaching bail. There were particular concerns that an accused person may be arrested for breach of bail and yet released again with the same or lesser bail conditions.

### 7.1 The proposed offences

203. The two proposed offences are based on Victorian *Bail Act 1997*. The introduction of these offences in 2013 in Victoria were said to be in response to the high numbers of breaches of bail conduct requirements, however no supporting data was provided.

204. The offences were proposed in order to strengthen bail laws by providing a penalty for contravention of bail conditions and for committing a serious offence whilst on bail and to send a clear message to offenders that bail conditions should not be contravened. The offences were also intended to ensure that contraventions of bail conditions and offences committed whilst on bail appear on criminal records to inform any later bail decisions.

205. Regarding the penalty, the Victorian Explanatory Memorandum details that in imposing a sentence for the original offence, the offence committed whilst on bail, and the offence under section 30B, the courts will apply the common law relating to proportionality and totality, and appropriately penalise the different aspects of offending covered by each offence.

206. Section 30A of the Victorian *Bail Act 1997* reads as follows:

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

*Penalty: 30 penalty units or 3 months imprisonment*

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

207. A ‘conduct condition’ includes<sup>75</sup>:

- Reporting to a police station
- Residing at a particular address
- Observing curfew times
- Desisting from contacting certain people
- Surrendering a passport
- Not going to a particular place
- Not driving a vehicle or carry passengers
- Not consuming alcohol or using drugs.

208. Under the offence in Victoria:

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

209. Other states and territories have analogous offences for breaching bail. These were identified in the Interim Report.<sup>76</sup>

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<sup>75</sup> Section 5 *Bail Act 1977* (Vic).

<sup>76</sup> Review of the Bail Act 2013, July 2014 at [266].

## 7.2 Existing NSW breach of bail offences

210. As detailed in Chapter 9 of the Interim Report, NSW does not have a specific offence for breaching bail conditions. However, the *Bail Act 2013*, the *Crimes Act 1900*, and the *Crimes (Sentencing Procedure) Act 1999* have a number of useful provisions for addressing breach of bail, by providing the power to enforce bail conditions and make certain actions or lack of action of an accused on bail, an offence.

211. These provisions include the following:

- Section 77 of the *Bail Act 2013* provides for a number of actions that can be taken when a police officer believes, on reasonable grounds, that a person has failed to comply with, or is about to fail to comply with bail, including arresting the person without a warrant and taking them before the court.
- If a person has failed to comply with bail, section 78(2) of the *Bail Act 2013* provides a bail authority with the power to revoke or refuse bail if they are satisfied that this action is justified after considering all possible alternatives.
- Section 79 of the *Bail Act 2013* makes it an offence to fail to appear before a court, without a reasonable excuse, in accordance with a bail acknowledgement. This has a maximum penalty of 30 penalty units or three years imprisonment.
- Following the Interim Review, the *Bail Amendment Act 2014* introduced a show cause category for serious indictable offences committed whilst on bail. This is another mechanism to increase the ability to revoke bail.
- Any breach of bail conditions in relation to conduct requirements may also potentially be dealt with as public justice offences under Part 7, Division 3 of the *Crimes Act 1900*. This covers some of the ‘conduct conditions’ such as tampering with evidence which carries a maximum penalty of 10 years imprisonment, or threatening or intimidating victims or witnesses which carries a maximum penalty of 7 years imprisonment. It should be noted that these provisions cover particularly serious breaches only.
- Section 21A of the *Crimes (Sentencing Procedure) Act 1999* also makes an offence committed on bail an aggravating factor in sentencing.

212. Thus, the existing arrangements in NSW attempt to deter people from breaching bail conduct requirements by the ability to revoke bail, rather than making it an offence once the condition is breached or an offence committed whilst on bail, with only specific circumstances in which an action by the accused on bail will be an offence.

### 7.3 Proposed new offence for breaching a bail condition

213. In the Interim Report of the Review, the recommendation contained in [281] stated:

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

- Revocation of bail; and
- Offences committed while a person is on bail, being an aggravating factor in sentencing; and
- The existing offences of failing to appear and interference with the justice system.

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

214. In the context of this Final Report, the NSW Police have submitted a sequence of case descriptions and facts where Police have brought breaches of conditions to the Court’s attention. It suffices to state that whilst the number of cases presented is not large, the circumstances of some of those cases appear to raise concern.
215. A case study is presented below, demonstrating the repeat nature of these breaches. This case study is typical of the examples provided by Police.

#### Case study 1

John<sup>77</sup> is a 20 year-old man with a lengthy history of breaching bail conditions, being apprehended by police and released on conditional bail by the court.

John is charged with an affray in 2014 in which a bystander was seriously injured. He was subsequently granted conditional bail, including a non-association condition and a curfew.

Following another suspected offence, Police arrested John for breaching his curfew and the

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<sup>77</sup> Names have been changed.

non-association condition. John was brought before a court the next day and was granted conditional bail, with equivalent conditions.

Police again arrested John the following night for breaching his curfew, refused bail and brought John before a court the following day. John was again granted condition bail, with the curfew condition being removed.

Since then, John has repeatedly breached his bail conditions, been arrested by Police, refused bail and then subsequently granted bail by the courts with no additional conditions.

216. In their submission to the Review of June 2015, the Police refer to such examples and state as follows:

“The NSW Police Force report that some magistrates repeatedly grant bail to people who have a significant history of breaching bail... These cases show that a person breached their bail with virtual impunity and a magistrate continues to release them on bail. The person faces no penalty from continual breaches and there is no deterrent to change their behaviour. Indeed, the Police experience is that breach of bail conditions, including repeated breaches, can actually lead to those conditions being withdrawn by the courts. This may be seen as rewarding the accused’s contempt for the Court’s original orders.

The sorts of bail conditions that the people breach are wide ranging but typically breaches are about resident’s conditions; curfews; reporting at specified times and places and non-association or contact orders.”

217. The Review accepts that the information provided would raise questions as to why revocation action was not taken. Information was sought from the ODPP as to the number of applications for review of decisions following an establishment of a breach of condition. The ODPP advised that, as at 11 June 2014, only one such application was recorded as having been received from Police. In this instance, the Director brought a detention application which was successful.
218. It is important to understand that the *Bail Act 2013* does not envisage that every breach of bail conditions should be put to the court’s immediate attention.

219. Consistent with the LRC's recommendation,<sup>78</sup> the enacted changes gave Police discretion in how to deal with a suspected breach. This is reflected in section 77 of the *Bail Act 2013* in the following terms:

*77 Actions that may be taken to enforce bail requirements*

*(1) A police officer who believes, on reasonable grounds, that a person has failed to comply with, or is about to fail to comply with, a bail acknowledgment or a bail condition, may:*

*(a) decide to take no action in respect of the failure or threatened failure, or*

*(b) issue a warning to the person, or*

*(c) issue a notice to the person (an "application notice" ) that requires the person to appear before a court or authorised justice, or*

*(d) issue a court attendance notice to the person (if the police officer believes the failure is an offence), or*

*(e) arrest the person, without warrant, and take the person as soon as practicable before a court or authorised justice, or*

*(f) apply to an authorised justice for a warrant to arrest the person.*

*(2) However, if a police officer arrests a person, without warrant, because of a failure or threatened failure to comply with a bail acknowledgment or a bail condition, the police officer may decide to discontinue the arrest and release the person (with or without issuing a warning or notice).*

*(3) The following matters are to be considered by a police officer in deciding whether to take action, and what action to take (but do not limit the matters that can be considered):*

*(a) the relative seriousness or triviality of the failure or threatened failure,*

*(b) whether the person has a reasonable excuse for the failure or threatened failure,*

*(c) the personal attributes and circumstances of the person, to the extent known to the police officer,*

*(d) whether an alternative course of action to arrest is appropriate in the circumstances.*

*(4) An authorised justice may, on application by a police officer under this section, issue a warrant to apprehend a person granted bail and bring the person before a court or authorised justice.*

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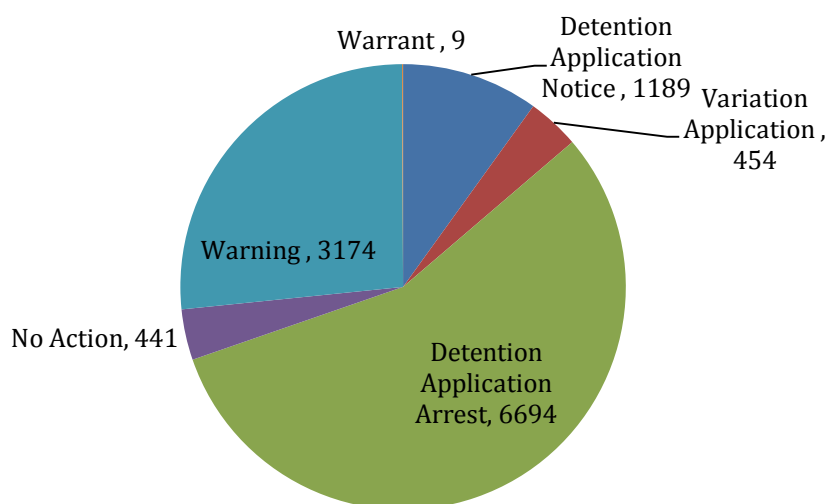
<sup>78</sup> NSW Law Reform Commission, *Bail*, April 2012, NSWLRC Report 133 at [15.30]-[15.32].

*(5) If a warrant for the arrest of a person is issued under this Act or any other Act or law, a police officer must, despite subsection (1), deal with the person in accordance with the warrant.*

*Note: Section 101 of the Law Enforcement (Powers and Responsibilities) Act 2002 gives power to a police officer to arrest a person in accordance with a warrant.*

*(6) The regulations may make further provision for application notices.*

220. The Review understands that Police conducted an internal education campaign encouraging police to consider a warning for minor and technical breaches, in response to section 77 of the *Bail Act 2013*, and extensive training was provided.
221. Figure 5b at Appendix C shows that there were 9,233 breach of bail incidents recorded by NSW Police in the first quarter of 2015. This was the highest of any quarter in the past three years.
222. Data provided by NSW Police also demonstrates that Police are exercising their discretion in dealing with these breaches.
223. A data sample of 11,961 bail breaches recorded by NSW Police from the commencement of the new Act on 20 May 2014 through to 12 June 2015, shows that over a quarter of bail breaches (n=3174) were dealt with through a warning being issued to the offender.



*Figure 1: Data sample of action taken by NSW Police in response to a breach of bail, 20 May 2014 – 12 June 2015*

224. The relevant incidents of breach need to be considered in the context of the 2013 Act and not its predecessor. This is because the 2013 Act has significantly reduced the circumstances and kinds of conditions that may be imposed by bail authorities. Moreover, the incidence of breach detected will vary with Police activity.
225. Figure 5a at Appendix C shows the number of breach incidents established in existing criminal cases before the Local Court. The number of breach of bail incidents has grown since 2014.
226. Figure 6 at Appendix C represents the proportion of bail breaches established by reference to specific conditions. Commission of a further offence is the highest of all the types of breaches established.
227. The perception of a failure to take action on repeated breaches needs to be considered in terms of the legislative scheme. The grant of bail is determined in accordance with Part 3 of the 2013 Act. This means that except in those cases where there is a right to release under section 21, bail needs to be considered in terms of the show cause requirement and unacceptable risk test. This includes the default position under section 16A that bail must be refused for show cause offences and that, as part of an assessment of bail concerns under section 18 for the purposes of determining an unacceptable risk, the bail authority is to consider an exhaustive list of factors at section 18(1), including:
- “(f) whether the accused has a history of compliance or non-compliance with (...bail conditions)*
- ...
- “(p) the bail conditions that could reasonably be imposed to address any bail concerns in accordance with section 20A”*
228. Section 20A only enables the bail authority to impose conditions if satisfied as to various factors including:
- “(2)(f) There are reasonable grounds to believe that the condition is likely to be complied with by the accused person.”*
229. Quite apart from these provisions, the nature and circumstances of the charges faced by an accused and the assessment of bail terms can change significantly depending on the nature of the breach. Section 75 of the 2013 Act states as follows:



*“75 Fresh application to be dealt with as new hearing*

*Any bail application heard by a court or authorised justice is to be dealt with as a new hearing, and evidence or information may be given in addition to, or in substitution for, the evidence or information given in relation to an earlier bail decision”*

230. In the context of action that a bail authority may take when a breach is reported to it, the requirements of section 78 need to be considered. These state as follows:

*“78 Powers of bail authorities*

*(1) A relevant bail authority before which an accused person is brought or appears may, if satisfied that the person has failed or was about to fail to comply with a bail acknowledgment or a bail condition:*

- (a) release the person on the person’s original bail, or*
- (b) vary the bail decision that applies to the person.*

*(2) The bail authority may revoke or refuse bail only if satisfied that:*

*(a) the person has failed or was about to fail to comply with a bail acknowledgment or bail conditions, and*

***(b) having considered all possible alternatives, the decision to refuse bail is justified.** [Emphasis added]*

*(3) Part 3 applies to the exercise by the bail authority of its functions under this section.*

*(4) However, a bail authority may revoke or refuse bail under this section even if the offence is an offence for which there is a right of release under Part 3. An offence ceases to be an offence for which there is a right to release if bail is revoked or refused under this section.*

*(5) This section does not give an authorised justice power to vary enforcement conditions or impose new enforcement conditions. However, an enforcement condition imposed by a court may be reimposed by an authorised justice.*

*(6) In this section, a*

*"relevant bail authority" means:*

- (a) an authorised justice, or*
- (b) the Local Court, or*
- (c) a court before which the person is required to appear by his or her bail acknowledgment.”*

231. The evident purpose of section 78(2)(b) is to require a bail authority to revoke or refuse bail only when satisfied that the breach has been established and the requirement to consider all possible alternatives to the refusal of bail; the latter appears anomalous. Particularly, it appears anomalous with the obligation in section 78(3) to apply Part 3 of the Act and the power under section 78(4) to revoke or refuse bail even if the offence is one for which there is a right to release under that part.
232. Section 78(2)(b) was not recommended by the LRC Report 133.<sup>79</sup> Nor was it contained in the 1978 Act. Any breach, once it has been established, needs to be viewed in its context. A breach of a contact requirement in a case involving domestic violence or place restriction involving allegations of child sexual abuse may be viewed as significantly changing the risk profile of the accused. Similarly, breach of a curfew involving allegations of break, enter and steal during the night may also change the accused's risk profile.
233. It is for this reason the effect of a breach in raising risk and diminishing cause will vary according to their circumstances. Some breaches would clearly be technical, particularly if committed irregularly by persons of cognitive impairment. In others, less so.
234. Matters need to be assessed in the context of the criteria set forth in Part 3. To this extent, the requirement to consider all possible alternatives appears, at best, a distraction and, at worst, an elevation of the accused's interests so as to distort the statutory function otherwise contained in Part 3. The Review is satisfied that this goes some length towards explaining the decisions which were taken by bail authorities in cases complained of.
235. Conditions are imposed to address bail concerns. Whether or not those bail concerns are elevated to the point of unacceptable risk or would result in an accused failing to show cause is a matter which can only be dealt with by conducting the process referred to earlier. If indeed breaches have been detected in the circumstances referred to above and the nature of those breaches are such that it poses a danger or raises concern, then it is difficult to understand how a statutory offence of the kind referred to in Victoria would provide any deterrence to the contrary. Further it may well be viewed as a vehicle to avoiding revocation and refusal of bail.

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<sup>79</sup> NSW Law Reform Commission report, *Bail*, April 2012, Report 133.

236. Breaches of conditions under the *Bail Act 2013* are to be established on the balance of probabilities, in accordance with section 32 and, pursuant to section 31, the rules of evidence do not apply. With a criminal offence, not only would the rules of evidence apply, but matters would need to be established beyond reasonable doubt, including in the case of the Victorian statute, an absence of “reasonable excuse.” In the latter instance, a hearing in relation to the charge would need to be scheduled to occur at a later time during which bail may well be granted. It is also noteworthy that the Victorian Law Reform Commission opposed the offence of breach of conditions.<sup>80</sup> The report concluded:

*“The addition of this offence would have a disproportionate impact on accused people with drug addiction, mental illness, homelessness and disabilities. It could also have a disproportionate impact on children and young people who may not at first appreciate the seriousness of adhering to conditions. This charge would result in a conviction of a breach offence making it harder to get bail in the future.”*

237. For these reasons the Review considers, on the basis of the information provided to it, that the most appropriate course is to recommend a deletion of section 78(2)(b) of the *Bail Act 2013* so as to make clear to bail authorities that the show cause requirement and unacceptable risk test need to be reconsidered in a way unencumbered by this consideration once a breach is established.

238. In this respect it is important for the bail authority to consider all warnings that have been given either by police or bail authorities, given the fact that any non-compliance with conditions raises the very issue postulated by sections 18(1)(f) and 20A (2)(f) of the 2013 Act.

239. The Review understands that whilst information about all warnings issued by NSW Police in response to a suspected breach of bail is systematically recorded and provided to the courts, any warnings issued by the courts are not recorded consistently, or even necessarily taken into account in future bail decisions. This situation should be rectified.

240. Consideration should also be given by Police to developing guidelines to assist decision makers in exercising their functions under section 77. Whilst other strategies could be employed to improve compliance, the requirements of sections 18(1)(f), s18(1)(p) and 20A(2)(f) in particular should be engaged in a revocations/detention application.

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<sup>80</sup> Victorian Law Reform Commission report, *Review of the Bail Act: Final Report*, October 2007, page 128.

### **Recommendation 7**

Repeal section 78(2)(b) of the *Bail Act 2013* so as to remove the requirement for bail authorities to consider all possible alternatives in deciding whether to refuse bail following revocation.

### **Recommendation 8**

Ensure in the context of section 18(1)(f) of the *Bail Act 2013* that all warnings given by bail authorities in relation to breaches of conditions are recorded and taken into account in determining action to be taken following establishment of breach.

### **Recommendation 9**

NSW Police should consider developing guidelines for officers in deciding how to exercise their discretion in enforcing bail conditions under section 77 of the *Bail Act 2013*.

## **7.4 Proposed new offence for committing an indictable offence whilst on bail**

241. NSW Police also proposed implementing a specific offence for committing an indictable offence whilst on bail, similar to section 30B of the Victorian *Bail Act 1997*:

*An accused on bail must not commit an indictable offence whilst on bail.  
Penalty: 30 penalty units or 3 months imprisonment.*

242. The consequences that follow in the event of the commission of an offence on bail are currently dealt with under section 21A(2)(j) of the *Crimes (Sentencing Procedure) Act 1999* which makes such a factor an aggravating factor on sentencing. The issue of reform was considered more broadly by the Law Reform Commission in their Report 139 on Sentencing at 4.156-4.161<sup>81</sup>. At 4.159 the Commission stated:

*“..... a court can properly take each situation into account as a factor particularly requiring specific deterrence, denunciation, and protection of the community (subject to the Veen [No 2] approach to proportionality) as well as showing that the offender’s prospects of rehabilitation are reduced. The courts must consider the fact of reoffending in light of these purposes of sentencing, consistently with the approach taken in R v McNaughton, rather than by elevating the objective seriousness of the new offence. That this is the proper approach further*

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<sup>81</sup> NSW Law Reform Commission report, *Sentencing*, April 2012, Report 139, pages 105-6

*demonstrates the failure of s 21A to differentiate factors of “aggravation” between those facts that relate to the “nature, circumstances and seriousness” of the offence, viewed objectively, and matters personal to the offender that operate adversely for sentencing purposes.*

*Courts have taken the same approach against those who reoffend while subject to a community service order that has been taken against those who offend on conditional release on parole or on bail, on the basis that although it is a sentence imposed instead of imprisonment, it is subject to revocation upon breach. Courts have also considered this approach can apply to those who reoffend while subject to a suspended sentence of imprisonment.”*

243. The recommendation in that Report was to delete section 21A(2) (j) and replace it with a stand-alone provision to the following effect:

*Recommendation 4.7: Reoffending while on conditional liberty or unlawfully at large to be addressed separately*

*(1) A revised Crimes (Sentencing) Act should contain a stand-alone provision to the effect that the court, when sentencing for an offence that was committed while on conditional liberty or while unlawfully at large, should take the fact it was so committed into account when assessing the need for the sentence to contain an additional element of specific deterrence, denunciation and/or community protection, and also when assessing the offender’s prospects of rehabilitation.*

*(2) There should be a definition of the expressions “conditional liberty” and “unlawfully at large” to take into account the sentences that become available under a revised Crimes (Sentencing) Act, as well as circumstances involving escape or failure to comply with any conditions imposed under any sentence that allows the offender to serve a sentence in the community.<sup>82</sup>*

244. The Review considers that the LRC recommendation may be a more appropriate vehicle to reflect the severity of the breach which may vary from case to case. It follows that the Police proposal should be considered in the context of any government action on the report’s recommendations. This could be done by the Bail Monitoring Group.

#### **Recommendation 10**

The Bail Monitoring Group should consider whether a specific offence for committing an indictable offence whilst on bail should be introduced.

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<sup>82</sup> NSW Law Reform Commission report, *Sentencing*, April 2012, Report 139, page 106

## 8. Electronic monitoring

245. Electronic monitoring schemes can operate at different stages in the criminal justice system, including before trial as a bail condition upon which a defendant is released on bail, or in support of a bail condition.
246. Based on practices in other jurisdictions on the electronic monitoring scheme, also referred to as ‘e-bail’ or ‘e-remand’, a person is usually required to wear an electronic device at all times, typically an ankle bracelet, which emits signals. A corresponding device installed in the person’s home relays the signal to a monitoring station. If the wearer travels too far from home, enters a prohibited area, or tampers with the device, authorities are alerted. How the electronic monitoring scheme works depends on the technology available and used by each jurisdiction.
247. This is the case in NSW, if Corrective Services NSW (CSNSW) is electronically monitoring an offender. The person must wear an electronic anklet at all times and have a beacon installed in their residence. When outside of their home, the anklet communicates using a combination of GPS tracking to determine their position and the mobile phone network to relay this information back to a monitoring room managed by Corrective Services NSW.
248. Offenders are generally required to submit schedules of their movements a week in advance, which must be approved by the supervising officer. This schedule is used by the monitoring room to determine compliance.
249. The Review was informed that currently, electronic monitoring by CSNSW is primarily used in relation to inmates subject to work release, home detainees, a small number of parolees and offenders subject to extended supervision under the *Crimes (High Risk Offenders) Act 2006*. With the exceptions of home detention and day leave, both of which relate to the management of inmates still serving their sentence prior to parole, electronic monitoring by CSNSW is reserved for a very small number of high risk and serious offenders. There are only around 40 such offenders in the community at any given time.
250. At the moment, in most Australian jurisdictions, electronic monitoring may be possible under the arrangements when imposing bail conditions. These are described in Appendix B.

251. Chapter 20 of the LRC Report 133<sup>83</sup> contains a detailed discussion of the operation of electronic monitoring in bail situations. In recommendation 20.1, the Commission detailed:

*“Recommendation 20.1: A Pilot electronic monitoring scheme*

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

- a. The scheme should be limited to people who have already been detained and who are likely to spend a substantial amount of time in detention;*
- b. Monitoring of compliance should be carried out by the Community Compliance and Monitoring Group of Corrective Services NSW;*
- c. It should be possible for time spent on release with electronic monitoring to be taken into account on sentence.*

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

- a. Whether a scheme is best achieved administratively or by statute; and*
- b. The procedure for applying for release with electronic monitoring.”*

252. The *Bail Act 2013* does not make specific provision for electronic monitoring in bail matters.

253. In similar circumstances, the Court of Appeal in Queensland held in *Lacey v DPP*<sup>84</sup> that electronic monitoring was not available in that state. At [21]-[22] Williams and Keane JJA and Daubney J held:

*[21] Insofar as the appellants now seek to contend that the fitting of electronic monitoring devices may reduce the risks of flight and interference with Crown witnesses to an acceptable level, the position is the same as it was at the time of the original refusal of bail, namely that this form of constraint is not available in Queensland in respect of persons on bail. Provision for this form of constraint is made in the Dangerous Prisoners (Sexual Offences) Act 2003 (Qld). Significantly, no such provision is made by the Bail Act, and the evidence is that the facilities necessary to electronically monitor persons on bail are not available. It is not to the point that the appellants have indicated a preparedness to wear such devices; the use of such devices for monitoring bail is not a practical option. It is pointless and impractical to impose a condition which cannot be monitored and enforced. As neither police nor Corrective Services personnel have been equipped by government to carry out the necessary monitoring, no such condition could be attached to a bail order.*

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<sup>83</sup> NSW Law Reform Commission report, *Bail*, April 2012, Report 133.

<sup>84</sup> *Lacey v DPP* [2007] QCA 413

*[22] A decision as to whether bail should be granted would therefore be made on the basis that the condition proposed by the appellants as to the wearing of electronic monitoring devices will not, in fact, be satisfied. The appellants argue that, if they are to be kept in detention for a long period prior to trial, the failure of the State to make electronic monitoring devices available is an indication of the lack of proper justification of their continued detention. They say that, if the State cannot ensure a prompt trial, the State cannot justify their detention pending trial, by a failure to provide an alternative to detention in custody which addresses the risks of releasing them from detention. But the Bail Act requires the decision to be made on the basis that this alternative constraint is not an option available to the executive authorities to reduce to an acceptable level the risks of flight or interference with witnesses. It is not for the Court to call into question the wisdom of the position adopted by the legislature in this regard.*

254. Notwithstanding this approach, NSW has seen a number of instances where applications for electronic monitoring as part of bail have been sought.

255. In *R v Medich*<sup>85</sup> and *R v RS*<sup>86</sup>, the accused was placed under a bail condition of electronic monitoring. Both these cases were under the *Bail Act 1978*.

256. Since those cases, in *R v Ebrahimi*<sup>87</sup>, Beech-Jones J considered the potential to make provision for electronic monitoring in bail and held at [31]-[33] as follows:

*“An unusual aspect of this application is that the applicant puts forward, as a possible bail condition, his preparedness to not only comply with a system of electronic monitoring but to supply that system and meet its cost. Evidence was received from Mr Paul Keen. Mr Keen is a director of a company that is the distributor for an electronic monitoring and tracking system which is specifically designed for the criminal justice system. He explained in some detail the use of the systems in jurisdictions outside of New South Wales. He stated that, if bail was granted and the system was implemented, it would involve one of the representatives of his company attending at the gaol from which the applicant would be released and placing on his ankle or wrist a watch-like device. Under this system the applicant would also be required to carry a device that was effectively a modified mobile phone.*

*Mr Keen explained that the monitoring system can be calibrated so as to set off an alarm if the applicant either moved outside a specified inclusion zone or moved into a specified exclusion zone. Mr Keen explained that, if a so-called violation event occurred, then an electronic message would be automatically generated and sent to an officer of his company as well as any police officer who was listed with this company as responsible for the supervision of the applicant's bail. It was apparent from Mr Keen's evidence that a person who has a monitoring device can easily remove it. However, any attempt to do so or to tamper with the device generates a*

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<sup>85</sup> *R v Medich* [2010] NSWSC 1488

<sup>86</sup> *R v RS* [2011] NSWSC 103

<sup>87</sup> *R v Ebrahimi* [2015] NSWSC 335



*message of the kind that I just referred to. One potential technical limitation of the device is that the system of monitoring is dependent upon the adequacy of the local mobile phone coverage and GPS satellite system.*

*The Crown tendered a letter from an Assistant Commissioner of Police. The Assistant Commissioner expressed some concerns about the use of untested monitoring devices in bail applications. One matter noted was the lack of any legislative scheme to enable this to occur. The legal context in which this is being considered is, as I have stated, the Bail Act. The Bail Act does not authorise the Court to impose obligations on third parties. However, it is not unknown in bail applications that the Court will make its own assessment as to the willingness and capacity of some third parties to provide supervision of persons on bail. The most obvious example of this is residential rehabilitation services. Otherwise there is nothing in the Bail Act that precludes the Court from concluding, in a particular case, that persons providing electronic monitoring systems are both honest and have the capacity to provide some degree of comfort as to the whereabouts of an applicant for bail and their compliance with bail conditions.”*

257. Further applications have since been made relating to electronic monitoring.

258. In the recent case of *R v Moukhallaletti*,<sup>88</sup> the Supreme Court considered imposing electronic monitoring through an ankle bracelet as a bail condition but subsequently changed that to monitoring through a mobile phone, noting that electronic monitoring is a ‘rare bail condition’ and is only used when there is a ‘very serious matter’ before the courts. In the course of exchange with Counsel, the following was stated:

*‘I’m contemplating electronic monitoring which is another matter which is raised. I haven’t done that before as a bail condition. Ms Crown, I don’t know whether you can assist me on that, I’m not even quite sure how to express it...’ The mobile phone one is easy to impose. My only concern about electronic monitoring is I have dealt with it frequently enough in high risk offender matters but it is, I suspect from the administration point of view, fairly time consuming and expensive, I don’t know. Even though it is clearly a very beneficial condition, it is not one you lightly impose, particularly because of the weight it may place upon authorities to monitor it; whereas the mobile phone, I think the way your leader put it, was using only one mobile phone which is to be kept on and charged at all times such that his movements and communications be monitored.’*

259. It is clear that the potential for electronic monitoring to be imposed as a condition of bail cannot be excluded on the basis that of the aforementioned authorities. Moreover cases demonstrate increasing tendency to impose arrangements involving curfews and effective house arrest through conditions requiring the accused to be accompanied when leaving his or her residence and to carry and answer a mobile phone.

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<sup>88</sup> Unreported, Supreme Court of NSW, 16 April 2015.

## 8.1 Future use of electronic monitoring in NSW

260. Given that a number of cases in NSW have discussed the possibility of electronic monitoring of offenders whilst on bail, there would be use in a legislative and policy framework for this.
261. The NSW Government may wish to consider a pilot scheme along the lines of that recommended by the NSW Law Reform Commission. This was a pilot for electronic monitoring of people who have already been detained and who are likely to spend a substantial amount of time in detention.<sup>89</sup>

### **Recommendation 11**

The NSW Government should consider the future use of electronic monitoring of offenders, either as a condition of bail, or for those who are already detained, as an e-remand scheme in the circumstances outlined above.

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<sup>89</sup> NSW Law Reform Commission report, *Bail*, April 2012, Report 133, Recommendation 20.1.

## 9. Other issues in the *Bail Act 2013*

262. In consultation with stakeholders in relation to the implementation of the *Bail Act 2013*, a range of other issues arose. These are outlined below.

### 9.1 Detention applications

263. Concern was raised by the ODPP that the requirement that detention applications be in writing before a judicial officer considers an application to detain or vary bail was too onerous in practice.
264. The requirement stems from the shift in the 1978 Act, where the bail grant required regular consideration at each stage of proceedings, to the current provisions, where the grant of bail is continuous. While the grant of bail is continuous, sections 13 and 14 make it clear that the accused must appear before the court as required and the grant of bail does not entitle them to be at liberty at that time. It follows that there is, therefore, no requirement for the court to formally continue bail at every adjournment.
265. Section 50 provides for the prosecution to make a detention application as follows:

*“50 Prosecutor may make detention application*

*(1) The prosecutor in proceedings for an offence may apply to a court or authorised justice for the refusal or revocation of bail for an offence.”*

266. Clause 17 of the Bail Regulation 2014 provides as follows:

*“17 Making of detention application*

*(1) A prosecutor is to make a detention application in writing and in the approved form.*

*(2) A court or authorised justice may make a decision on a detention application even if the application does not comply with this clause.*

*(3) A prosecutor may, in one detention application, make a detention application in respect of more than one offence committed or alleged to have been committed by the same person.”*

267. Although clause 17(2) allows for the requirement of writing in clause 17(1) to be dispensed with, the ODPP submits that lawyers are reporting that many judicial officers are refusing to hear prosecutors on an application to detain or vary unless preceded by a written detention application. The ODPP stated that this is more likely to occur on a busy list day, where there is little time available to the court.
268. The ODPP requested that this be rectified.
269. This proposal appeared non-controversial among all other stakeholders.

### **Recommendation 12**

Regulation 17 should be amended so that the obligation on the prosecution to make a written detention application is only where practicable, and that a court is not to decline to hear a detention application on the basis of such an application not being in writing.

## **9.2 Error-based jurisdiction**

270. It was submitted on behalf of the Supreme Court that the Court of Criminal Appeal ought to be granted an error-based jurisdiction in the reviewing of bail grants and refusals, which would replace the current de novo hearing of bail reviews. This would be limited to the circumstances in section 67(1)(e) of the *Bail Act 2013*.
271. It is submitted that the jurisdiction would expedite the bail review process in the Court of Criminal Appeal and not necessitate the rehearing of a case's facts where they are non-controversial. Further, it is contended that before a matter reaches the Court, the parties would ordinarily already have had two de novo hearings, and an error jurisdiction is more compatible with the role of the Court of Criminal Appeal.
272. The position in other states and territories varies.
273. The ODPP has indicated that it would support such a submission. The NSW Bar Association was consulted but does not support such an approach.
274. Public Defenders opposed the proposal, submitting that there is no demonstrated evidence of the overuse, or inappropriate use, of section 67(1)(e) of the *Bail Act 2013*. Public Defenders

note that the potential for an appeal to the Court of Criminal Appeal is open to both a defendant and the prosecution.

275. In relation to the argument that such a change could expedite the bail review process, Public Defenders refer to the potential for delay where parties have to prepare appropriate materials for the Court, such as the transcript of reasons and evidence. They state that an advantage to a de novo hearing is that there is no need to delay an application and deprive a person of their liberty, pending these materials being ready.
276. Public Defenders also point to the fact that the current section 67(1)(e) of the *Bail Act 2013* allows both applicant and the prosecution an avenue to have a bail decision reconsidered on all, not limited, information, important in situations where the information available to both sides is dynamic. If an error-based jurisdiction were adopted, evidence of changed circumstances would only be permitted where error had been established, notwithstanding that a change in circumstances could affect the merit or otherwise of the application.
277. The Review considers that this proposal warrants further consideration following consultation with stakeholders. This could most appropriately be done in the context of the broader examination of the role of the Court of Criminal Appeal as envisaged in NSWLRC Report 140 on criminal appeals

### **Recommendation 13**

The NSW Government should consider the appropriateness of an error-based jurisdiction for appeals of bail decisions from the Supreme Court to the Court of Criminal Appeal.

This could be done when considering the NSW Law Reform Commission's Report 140 on criminal appeals.

### 9.3 Pre-release requirements

278. It has also been submitted by a range of stakeholders,<sup>90</sup> independently, that the pre-release requirements in section 29, which are closed, require expanding to allow an accused person to be allowed release from police custody and into the custody of another in order to facilitate attendance at hospitals, rehabilitation centres and other similar facilities without the need to impinge upon police resources.
279. The ODPP submitted that under the current legislation, it seems that a condition such as “*not to be released except into the custody of X and then to proceed directly to XYZ rehabilitation centre*” is beyond power.
280. Apparently such conditions were made by courts under the previous Act.
281. The ODPP submitted that the reason for such a requirement was that courts were satisfied that bail requiring residence in a rehabilitation facility was adequate to deal with the concern of possible re-offending, and reinforcing the requirement by ensuring the accused would be physically escorted to that facility.
282. This submission and its reasoning appeared uncontroversial among stakeholders.

#### **Recommendation 14**

Amend the *Bail Act 2013* to provide that a Court can make a pre-release requirement allowing a person to be released into the custody of another in order to facilitate attendance at rehabilitation centres and other similar facilities.

### 9.4 Police bail at a hospital or after mental health assessment

283. The NSW Police Force submit that police officers should be extended the power to make a bail determination at a place other than a police station in order that Police may grant bail while a person is under arrest at a hospital or following a mental health assessment where a person is found not to be mentally ill.

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<sup>90</sup> These have included the ODPP, Legal Aid, NSW Law Society, NSW Police Association, NSW Police Force and MPES.

284. The Police submit:

“The Act provides an accused must be at a police station in order for a police officer to make a bail decision. If a person is under arrest at a hospital, police organise a bedside court involving a Registrar and court officer to determine bail. While this is an option, it is impractical for both police and the courts.”

285. And that:

“Accordingly, Police propose changing the Act to allow a bail decision to be made where a person accused of an offence is under arrest at a medical facility or other place receiving medical treatment and is unable to attend a police station due to incapacity or illness.”

286. This proposal was supported by the Bail Monitoring Group.

287. Further, the Police submit, pursuant to section 33 of the *Mental Health (Forensic Provisions) Act 1990*, that:

“When a mental health assessment is ordered, police take the person to a mental health facility. If the person is not found to be mentally ill and the courts are closed, police must lodge him or her in police or corrective services cells overnight and place them before the court the next day. More often than not, the accused is placed in police cells.

This ties up policing resources and means that either there are fewer police on the streets or police have to pay a lot of overtime expenses.”

288. The rationale is similar to allowing police to make a bail decision whilst a person is under arrest at a hospital, and the proposal is therefore supported.

### **Recommendation 15**

Amend the *Bail Act 2013* to allow NSW Police to make a bail determination whilst a person is under arrest at a hospital or following a mental health assessment.

## **10. Ongoing monitoring of the Bail Act 2013**

289. Over the past 12 months, I have had the benefit of attending the meetings of the Bail Monitoring Group. This group is made up of representatives from the Department of Justice, NSW Police, Legal Aid, the ODPP, BOCSAR and the Department of Premier and Cabinet.
290. This group has provided a regular forum for stakeholders to raise issues regarding the *Bail Act 2013*. A number of issues have been resolved through this group.
291. This group should continue to meet for at least another 12 months, to ensure that the Act is closely monitored.
292. There are also a number of proposals that were raised during the course of the Review that are better dealt with by the Bail Monitoring Group. This includes a new offence for an indictable offence committed whilst on bail; simplifying police powers of arrest for breach of bail; and strengthening the operation of enforcement conditions.



## 11. Conclusion

293. The *Bail Act 2013* has now been in operation for just over 12 months.
294. The more recent amendments, such as the show cause requirement and the one-stage unacceptable risk test, have been in place for a shorter period, since 28 January 2015.
295. This is nevertheless a useful time to reflect on how the Act is operating and whether it is striking the right balance between protecting the community and maintaining the integrity of the justice system.
296. Overall, the *Bail Act 2013* has been operating well since the Interim Report of the Review.
297. The legislative framework is in place to ensure that people charged with certain serious offences are given additional consideration by bail authorities when making bail decisions.
298. There is a growing body of case law providing guidance on how the show cause requirement and the unacceptable risk test operate. This has been complemented by the comprehensive training and resources developed on the Act, in particular by NSW Police and Legal Aid. There is still further guidance needed for judicial officers and the private legal profession.
299. In the Interim Report of the Review, reference was made to the fact the culture of the *Bail Act 2013* was still developing. This will continue to be the case for some time. In this context, it is important that the recommendations relevant to ongoing training and information sharing continue.
300. Judgement cannot be legislated. It can only be formed on the basis of the legislated structure and the material presented at the time.
301. The Act must still be closely monitored to ensure that any operational issues are swiftly dealt with. The role of the Bail Monitoring Group continues to be important, going forward. There are a number of proposals that were raised by stakeholders during the course of the Review that have been referred to the NSW Government for further consideration.

302. It is with this careful and ongoing observation that the *Bail Act 2013* will continue to operate effectively.

## **Appendix A - List of stakeholders consulted**

Below is the list of stakeholders consulted over final phase of the Review:

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

## Appendix B - Use of electronic monitoring of offenders in other jurisdictions

The table below summarises the Australian jurisdictions that have e-bail available, as well as New Zealand.

Jurisdiction /Country	Legislation/Cases	Details	Frequency of use
NSW	<p><u>Bail Act 2013</u></p> <p>The Act does not specifically mention electronic monitoring.</p> <p><u>Cases</u></p> <p>However, the Supreme Court of NSW previously imposed electronic monitoring as a condition of bail under the previous Bail Act:</p> <ul style="list-style-type: none"> <li>• <i>R v Medich</i> [2010] NSWSC 1488</li> <li>• <i>R v RS</i> [2011] NSWSC 103 – required the defendants to submit to and fund their own monitoring by a private company.</li> </ul> <p>The Supreme Court of NSW has also imposed electronic monitoring as a condition of bail under the current Bail Act:</p> <ul style="list-style-type: none"> <li>• <i>R v Moukhallaletti</i> [2015]</li> <li>- His Honour noted electronic monitoring ‘is not one you lightly impose, particularly because of the weight it may place upon authorities to monitor it’.</li> </ul>	<p><u>Eligibility</u></p> <ul style="list-style-type: none"> <li>• CSNSW only provides bail supervision where s11 of the <i>Crimes (Sentencing Procedures) Act 1999</i> applies – offenders who have been convicted of an offence but are yet to be sentenced, where bail is continued for rehabilitative purposes.</li> <li>• CSNSW does not provide supervision of individuals on bail prior to conviction primarily because community supervision is focused on addressing offending behaviour.</li> </ul> <p><u>How it works</u></p> <ul style="list-style-type: none"> <li>• Offenders are required to wear an electronic anklet at all times, and have a beacon installed in their residence to detect signals from the anklet whilst they are at home. When outside of their home, the anklet communicates using a combination of GPS tracking to determine their position and the mobile phone network to relay this information back to a monitoring room managed by CSNSW.</li> <li>• Offenders are generally required to submit schedules of their movements a week in advance, which must be approved by the supervising officer. This schedule is used by the monitoring room to determine compliance.</li> </ul>	<p>The number of offenders subject to bail supervision by CSNSW averages less than 100 at any given time.</p> <p>With exceptions of home detention and day leave, electronic monitoring by CSNSW is reserved for a very small number of high risk and serious offenders. There are approximately only 40 such offenders in the community at any given time.</p>
WA	<p><u>Bail Act 1982</u></p> <p>Section 28(2)(d) of the Act states a ‘home detention</p>	<p><u>Eligibility</u></p> <ul style="list-style-type: none"> <li>• The accused must be over 17 years of age.</li> </ul>	<p>There is no data on frequency of use</p>

Jurisdiction /Country	Legislation/Cases	Details	Frequency of use
	<p>condition' may be 'imposed as a condition on a grant of bail to the accused'. However, this is limited to those over the age of 17 years and the judicial officer must be satisfied that:</p> <p><i>(a) after considering a report from a community corrections officer about the accused and his circumstances, that the accused is suitable to be subject to a home detention condition; and</i></p> <p><i>(b) that the place where it is proposed the accused will remain while subject to the home detention condition is a suitable place; and</i></p> <p><i>(c) that unless a home detention condition is imposed, the accused will not be released on bail.</i></p> <p>Thus, only judicial officers can impose home detention and it is considered an alternative to custody where there is no prospect of bail (where the accused is released on their own responsibility pending trial or outcome of any criminal proceedings).</p> <p><i>Section 50K Monitoring equipment, retrieving</i></p> <p><i>If under rules made under section 50L any device or equipment has been installed at the place where an accused is required by a home detention condition to remain, section 118 of the Sentence Administration Act 2003 applies.</i></p> <p><i>Section 50L Rules for this Part</i></p> <p><i>(1)The CEO (corrections) may, with the approval of the Minister, make rules for the purposes of this Part which may provide for the manner of ensuring that accused</i></p>	<ul style="list-style-type: none"> <li>The court must be satisfied with a defendant's suitability for home detention or release into a community hostel. A suitability report from a community corrections officer must be submitted and the court must be satisfied that, unless home detention or community hostel condition was imposed, the defendant would not be able to be released on bail.</li> <li>The accused must have a suitable place to live. The report from a community corrections officer might include the views of people at the nominated home, indicating they understand and accept the home detention conditions<sup>91</sup>.</li> </ul> <p><u>How it works</u></p> <ul style="list-style-type: none"> <li>The accused wears a device or permits the installation of a device in the place where the person is required to remain.</li> <li>The accused is required to be at home 24 hours a day, unless otherwise approved by a community corrections officer or specified in the bail undertaking. They will also be required to abide by any other conditions of bail set by the court.</li> </ul> <p><u>Consequences of Breach</u></p> <p>Bail may be cancelled if any of the conditions are breached. In the case of home detention, the manager of the Community Corrections Centre being attended can cancel bail and issue a warrant for the defendant's arrest and return to court. The court may renew bail or remand the defendant in custody to appear again at a later date.</p>	publically available.

<sup>91</sup> Corrective Services WA Fact Sheet, available at <https://www.correctiveservices.wa.gov.au/files/probation-parole/conditional-bail-fact-sheet.pdf>

Jurisdiction /Country	Legislation/Cases	Details	Frequency of use
	<p><i>persons are complying with home detention conditions and for conditions to be applied to accused persons granted bail subject to home detention conditions including conditions —</i></p> <p><i>(a)requiring an accused to wear any device;</i></p> <p><i>(b)requiring an accused to permit the CEO (corrections) to install any device or equipment at the place where the accused is required by a home detention condition to remain.</i></p>		
SA	<p><u>Bail Act 1985</u></p> <p>There is no specific mention of electronic monitoring on bail in the Act.</p> <p>However, section 11(2) of the Act allows bail authorities to impose a condition requiring an accused person to remain at his/her residence except for authorised activities such as employment.</p> <p><u>Cases</u></p> <p>The Supreme Court in <i>R v Blayney</i> [2002] SASC 184 has interpreted section 11(2) as authority to order electronic monitoring on bail, at least where the applicant is willing.</p> <p>Like in WA, it is considered an alternative to custody</p>	<p><u>Eligibility</u></p> <ul style="list-style-type: none"> <li>• The accused must have stable accommodation with telephone facilities. The Magistrate may order a home detention bail assessment report to confirm whether accommodation is suitable for connection to the electronic facilities and wristlet by which home detention bail is monitored.</li> <li>• There is a view that home detention bail conditions should not be imposed unless applied for or consented to by the Crown (see section 11(3) of the Act and <i>R v Duke</i> [1999] SASC 431).</li> <li>• However, the Court has discretion to order home detention bail where resources are available to effect home detention supervision despite Crown opposition to release from custody (see <i>R v Quinn</i> [2004] SASC 41 and <i>R v Cooke</i> (2003) 231 LSJS 406; [2003] SASC 403).<sup>92</sup></li> </ul> <p><u>How it works</u><sup>93</sup></p> <ul style="list-style-type: none"> <li>• It can involve the accused wearing an electronic bracelet/anklet to monitor their movements, and requires the accused to seek permission from their Correctional Services Officer to leave their</li> </ul>	<p>There is no data on frequency of use publicly available.</p> <p>Home detention for unsentenced offenders commenced in January 1987.</p>

<sup>92</sup> Legal Services Commission SA website, available at <http://www.lsc.sa.gov.au/dsh/ch08s12.php>

<sup>93</sup> Director of Public Prosecutions SA Bail Fact Sheet, available at <http://www.dpp.sa.gov.au/02/Bail%20Fact%20Sheet.pdf>

Jurisdiction /Country	Legislation/Cases	Details	Frequency of use
	where there is no prospect of simple bail.	<p>place of residence for any purpose.</p> <ul style="list-style-type: none"> <li>The Department of Correctional Services officers undertake “spot checks” on people on home detention bail, to check they are complying with the conditions of the bail agreement. In limited circumstances (eg. an emergency visit to doctor) people on home detention bail may have a valid reason for being absent without permission.</li> </ul>	
NT	<p><u>Bail Act</u></p> <p>There is reference to monitoring devices in section 27A(1) of the Act:</p> <ul style="list-style-type: none"> <li>Section 27A(1)(f) requires an accused to reside at a specified place.</li> <li>Section 27A(1)(ia) for bail granted by a court other than the Youth Justice Court – requires the accused person: <ol style="list-style-type: none"> <li><i>To wear or have attached an approved monitoring device while on bail or the lesser period ordered by the court; and</i></li> <li><i>To allow the placing or installation in, and retrieval from, a specified place of anything necessary for the effective operation of the monitoring device</i></li> </ol> </li> <li>S27A(1)(ib) for bail granted by a court other than the Youth Justice Court – requires the accused person: <ol style="list-style-type: none"> <li><i>To give a sample of the accused person’s voice for use with an approved monitoring device; and</i></li> <li><i>To comply with the reasonable directions of a probation and parole officer in the use of the device for the effective monitoring of the accused person’s activities while on bail.</i></li> </ol> </li> </ul>	<p><u>NT Government work</u></p> <ul style="list-style-type: none"> <li>Currently, youths can only be bailed with electronic monitoring by an order from the Supreme Court.</li> </ul> <p><u>How it works</u></p> <ul style="list-style-type: none"> <li>The accused wears an electronic bracelet which sends an electronic signal to a manned control room to detect when he/she is in breach of a curfew or in a ‘no go’ area.</li> </ul>	Tracking bracelets are currently being worn by 108 offenders across the NT serving out their sentence or on parole or other community-based orders.
New Zealand	<p><u>Bail Act 2000</u></p> <p>In 2013, sections 30A to 30S were inserted, specifying</p>	<p><u>Eligibility</u></p> <ul style="list-style-type: none"> <li>It is available for suitable defendants and young people (12-17) who would otherwise continue to be held in custody, in prison, or in the</li> </ul>	NZ has had an electronic monitoring scheme called EM Bail since 2006.

Jurisdiction /Country	Legislation/Cases	Details	Frequency of use
	<p>‘electronic monitoring condition’ as part of court bail.</p> <ul style="list-style-type: none"> <li>Section 30A states that the purpose of the EM condition is to: <i>‘restrict and monitor a defendant’s movements to ensure that the defendant:</i> <ol style="list-style-type: none"> <li><i>Appears in court on the date to which the defendant has been remanded</i></li> <li><i>Does not interfere with any witnesses or any evidence against the defendant</i></li> <li><i>Does not commit any offence while on bail.’</i></li> </ol> </li> <li>Section 30B states when the court may grant bail with an EM condition: <ol style="list-style-type: none"> <li>(1) <i>A court may grant bail with an EM condition if the defendant—</i> <ol style="list-style-type: none"> <li><i>is eligible for bail with an EM condition; and</i></li> <li><i>the court has satisfied itself as to the matters set out in section 30I.</i></li> </ol> </li> <li>(2) <i>A defendant is eligible for bail with an EM condition if the defendant—</i> <ol style="list-style-type: none"> <li><i>is in custody on remand, including if he or she has consented to being remanded in custody; and</i></li> <li><i>is not liable to be detained in custody under any other sentence or order; and</i></li> <li><i>if bail with an EM condition is granted, is likely to be on bail with an EM condition for not less than 14 days.</i></li> </ol> </li> <li>(3) <i>Nothing in this section limits the discretion of a court to remand the defendant in custody if there is just cause for continued detention.</i></li> <li>(4) <i>For the purposes of the grant of bail with an EM condition, <b>court</b> includes a Registrar in any circumstance in</i> </li> </ol> </li> </ul>	<p>instance of a young person in a youth residence, while they wait for a court hearing.</p> <ul style="list-style-type: none"> <li>The accused is required to make a new application to the court for release with electronic monitoring as a bail condition. If an application is made, Department of Corrections undertake a suitability report as to whether the device would work at the proposed address. The report also considers consent by other people at the proposed residential address.</li> </ul> <p><u>How it works</u></p> <ul style="list-style-type: none"> <li>It works similarly to home detention and allows the accused to live at home, wearing an electronic anklet as part of their bail conditions.<sup>94</sup></li> <li>The ankle bracelet is worn at all times and is used to communicate to a monitoring unit at the accused’s home</li> <li>The anklet is monitored by a security company and lets them know the accused is where they are supposed to be.</li> </ul> <p><u>Consequences of Breach</u></p> <ul style="list-style-type: none"> <li>The anklet will trigger an alarm, and police will arrive to check on the accused if they: <ul style="list-style-type: none"> <li>try to take off the anklet</li> <li>do not charge the equipment</li> <li>leave the address without permission</li> <li>is late back from a planned absence.</li> </ul> </li> <li>The accused can be arrested and have to appear before the Court</li> </ul>	<p>As at 31 December 2010, 175 people were on EM bail across NZ. The average period that defendants spent on EM bail was just over 132 days (around four and a half months).</p> <p>More recent statistics are not publically available.</p>

<sup>94</sup> Department of Corrections NZ Information Sheet for Applicants on EM Bail available at [http://www.corrections.govt.nz/\\_data/assets/pdf\\_file/0003/702579/EMB\\_Information\\_Sheet\\_for\\_Applicants.pdf](http://www.corrections.govt.nz/_data/assets/pdf_file/0003/702579/EMB_Information_Sheet_for_Applicants.pdf).  
Department of Corrections NZ website available at [http://www.corrections.govt.nz/working\\_with\\_offenders/courts\\_and\\_pre-sentencing/em\\_bail.html](http://www.corrections.govt.nz/working_with_offenders/courts_and_pre-sentencing/em_bail.html)



Jurisdiction /Country	Legislation/Cases	Details	Frequency of use
	<p><i>which a Registrar is empowered to grant bail.</i></p> <ul style="list-style-type: none"> <li>• Section 30I lists the matters the court must be satisfied about before granting bail with an EM condition:</li> </ul> <p><i>(1)The court hearing an application made under section 30D must, before granting bail with an EM condition, be satisfied that—</i></p> <ol style="list-style-type: none"> <li><i>the defendant has been made aware of and understands his or her obligations under the EM condition; and</i></li> <li><i>the defendant agrees to comply with the requirements of the EM condition; and</i></li> <li><i>it is practicable for the defendant to remain at the proposed EM address on bail with an EM condition; and</i></li> <li><i>the proposed EM address is appropriate for the purpose of bail with an EM condition; and</i></li> <li><i>every relevant occupant of the proposed EM address has consented to the defendant remaining at the proposed EM address while on bail with an EM condition; and</i></li> <li><i>in each case the consent of the relevant occupant has been obtained after the steps set out in section 30G(2) have been followed.</i></li> </ol> <p><i>(2)In considering whether to grant bail with an EM condition, the court—</i></p> <ol style="list-style-type: none"> <li><i>must consider the EM report or previous EM report referred to in section 30F(1); and</i></li> <li><i>in particular, must have regard to any evidence of violence between the defendant and any occupant of the proposed EM address; and</i></li> <li><i>may have regard to any other relevant information.</i></li> </ol> <p>Like WA, it is considered an alternative to remand and is restricted to those denied bail on relatively serious charges who are likely to spend a long time on remand awaiting trial (see section 30B).</p>	<p>who will decide whether the EM bail should continue.</p>	

## Appendix C - Data from Bureau of Crime Statistics and Research, June 2015

Slide 1

Patterns in remand and bail  
NSW Criminal Courts and Police Statistics  
June 2015

NSW Bureau of Crime Statistics and  
Research

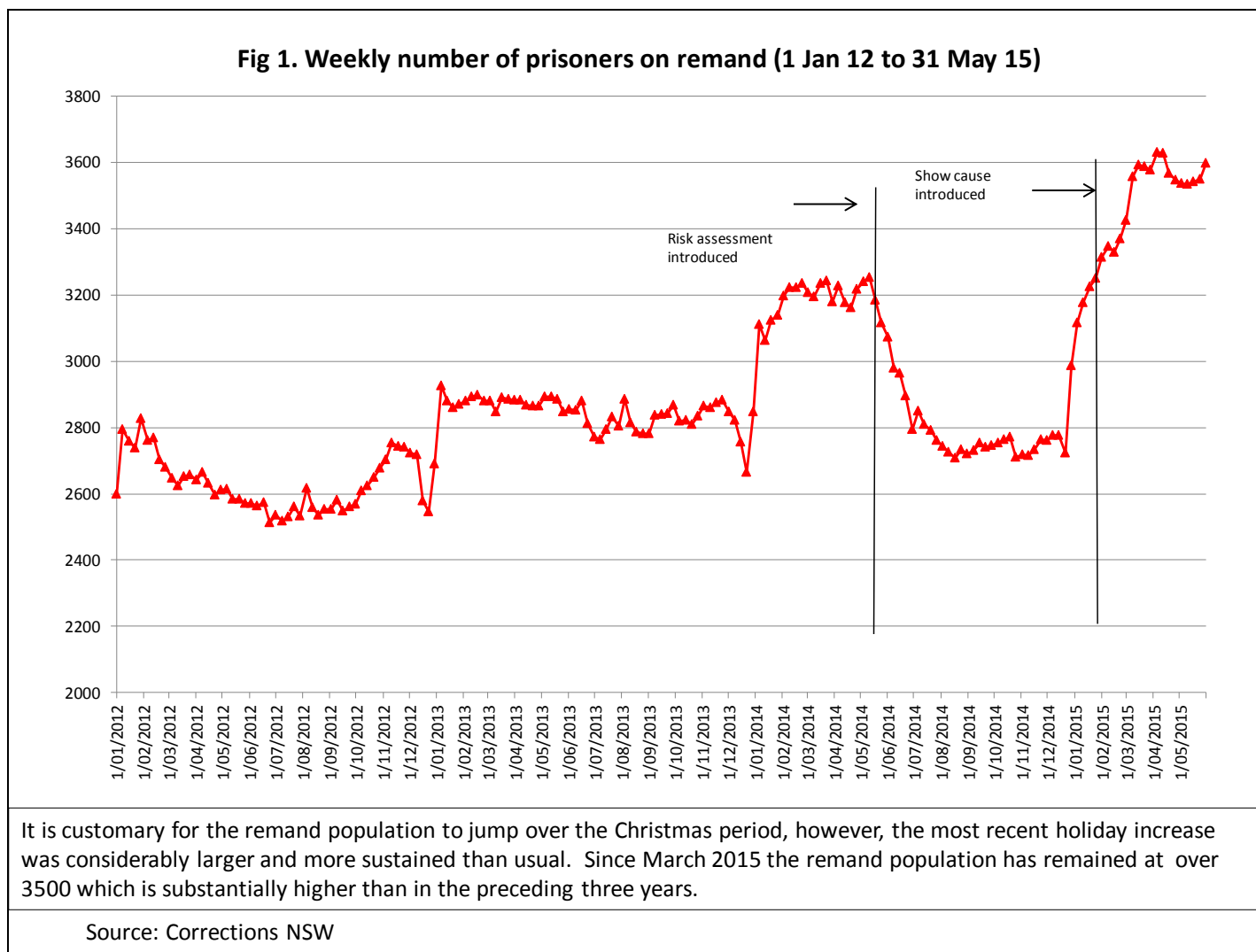
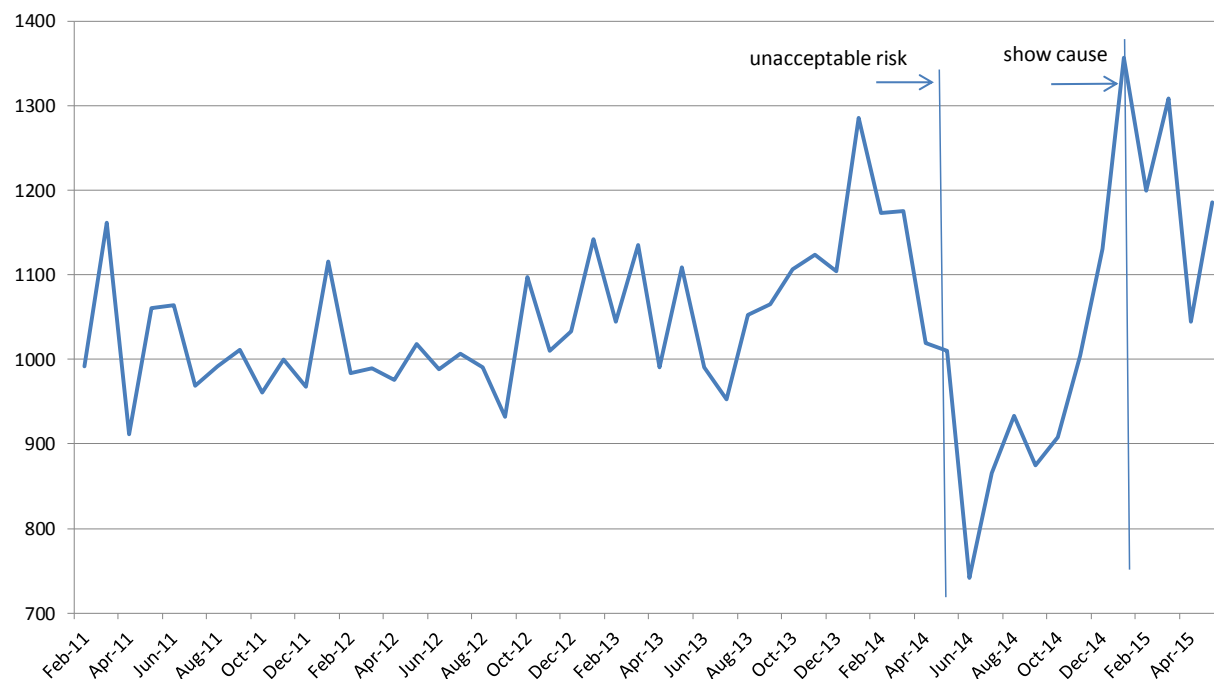


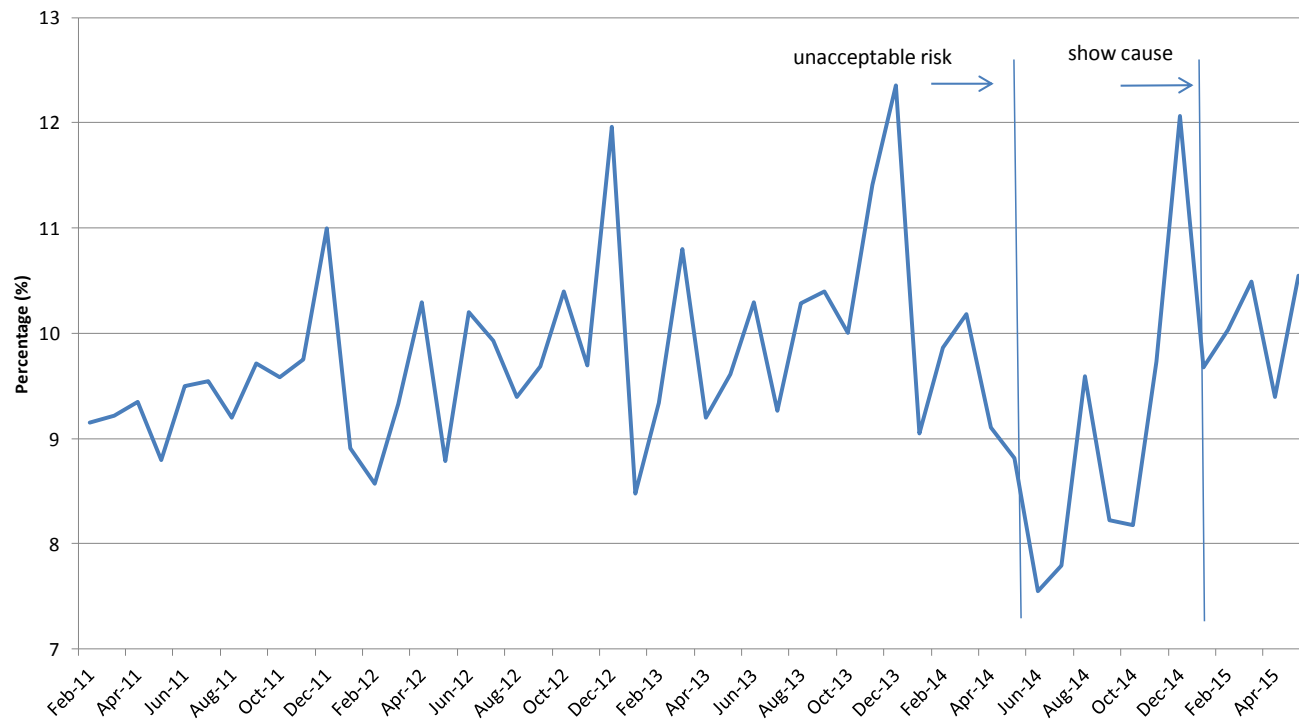
Fig 2. Number of people with bail status: 'bail refused' at first court appearance (court decision), Feb 11 to May 15



The number of people appearing in court 'bail refused' was higher in January 2015 than in any month in the previous four years and remained high in February, March and May 2015. These high figures could be due to a higher proportion of defendants being refused bail or an overall increase in the volume of people being brought before the courts.

Note: First court appearance includes matters finalised at the first court appearance. Where a court matter was finalised at first appearance and no specific bail decision was recorded, bail has been taken to have been dispensed with.

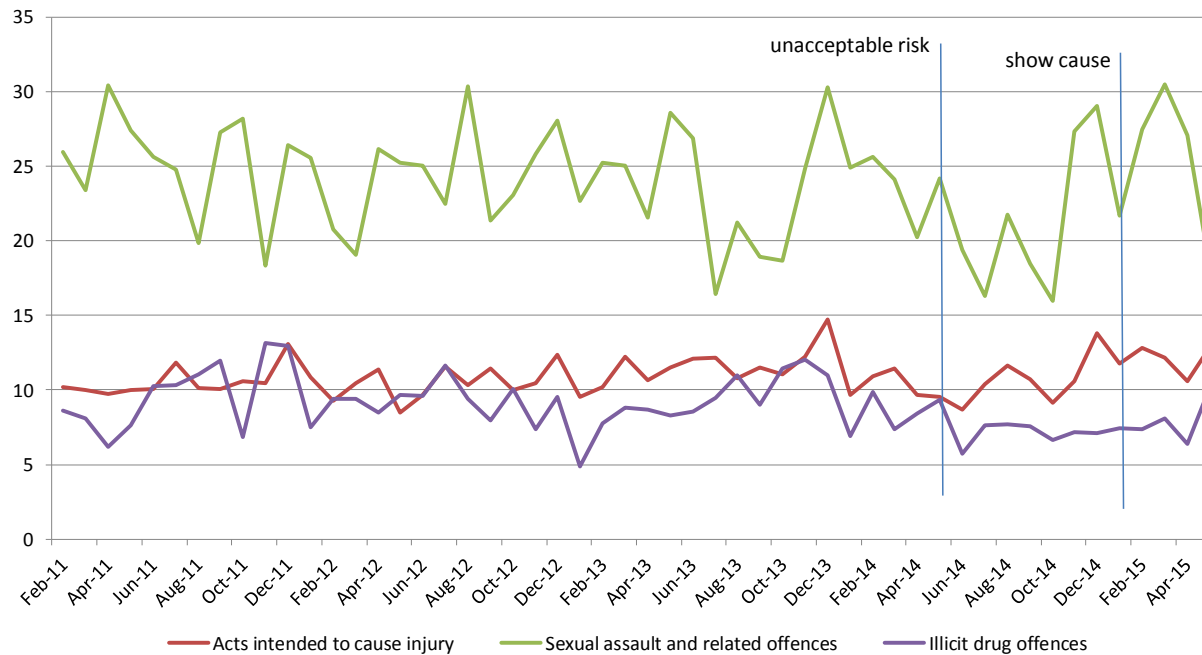
Figure 3a. Percentage of people with bail status 'Bail refused' at their first court appearance (court decision), Feb 11 to May 15



In the first four months of 2015 the percentage of people appearing in court who were 'bail refused' at their first court appearance was equivalent to 2012 and 2013. Figure 3 suggests that the bail refusal rate has remained stable since January 2015 (ie it has not increased).

Note: First court appearance includes matters finalised at the first court appearance. Where a court matter was finalised at first appearance and no specific bail decision was recorded, bail has been taken to have been dispensed with.

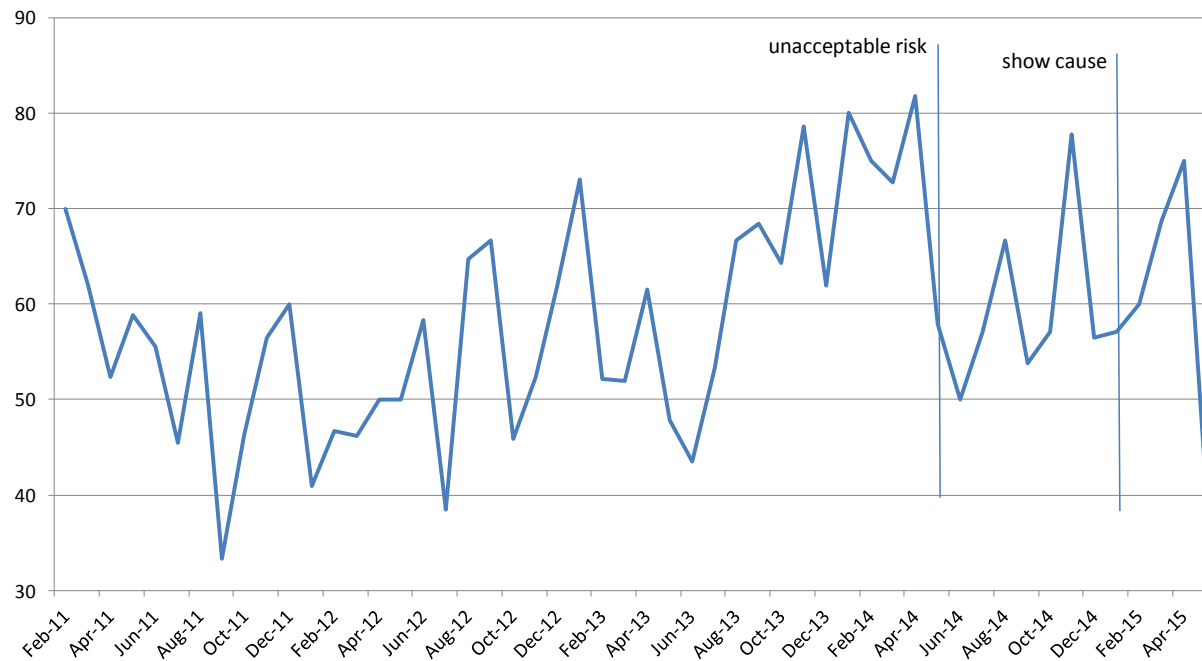
Figure 3b. Percentage of people with bail status 'Bail refused' at their first court appearance for Acts intended to cause injury, Sexual assault and related offences and Illicit drug offences, Feb 2011 to May 2015



Among the three offence groups shown, the percentage of people appearing in court who were 'bail refused' at first court appearance in 2015 is not noticeably different to previous years. A longer series is desirable, however, to properly consider trends.

Note: First court appearance includes matters finalised at the first court appearance. Where a court matter was finalised at first appearance and no specific bail decision was recorded, bail has been taken to have been dispensed with.

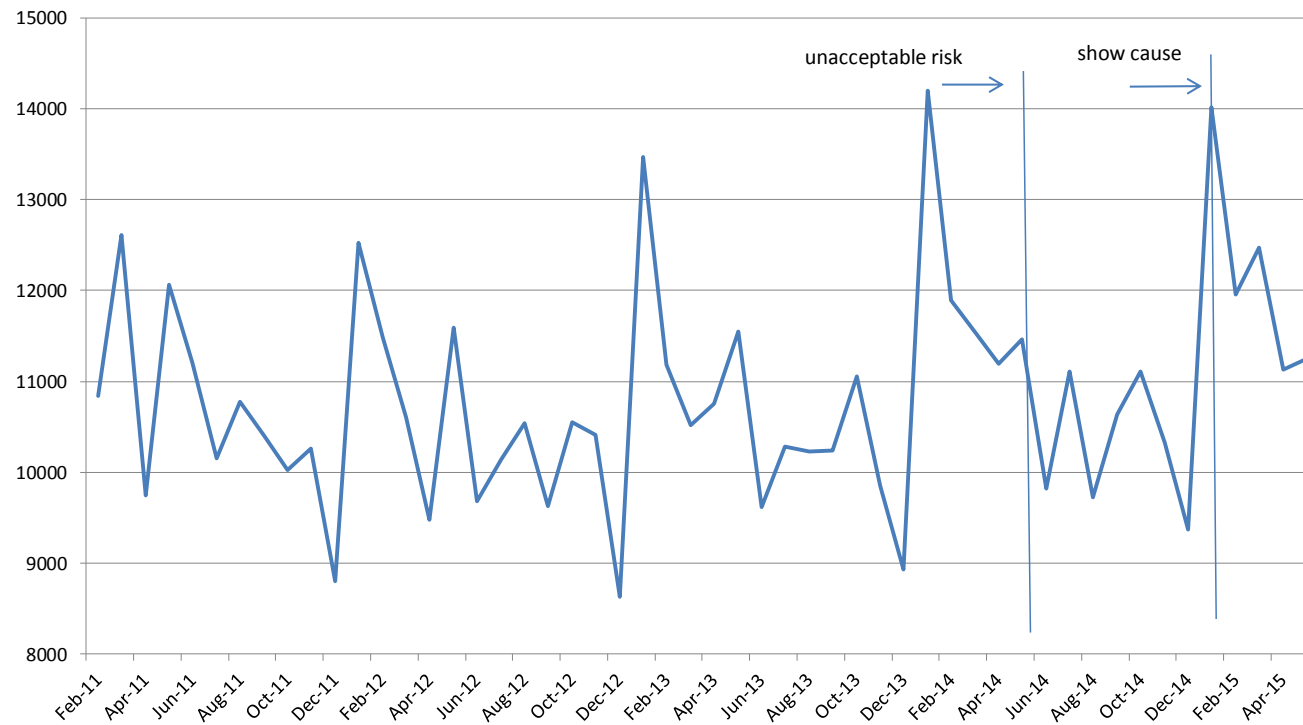
Figure 3c. Percentage of people with bail status: 'Bail refused' after their first court appearance for Homicide and related offences, Feb 2011 to April 2015



Among people charged with homicide and related offences, the percentage appearing in court who were 'bail refused' at first court appearance in 2015 is not noticeably different to previous years. A longer series is desirable, however, to properly consider trends.

Note: First court appearance includes matters finalised at the first court appearance. Where a court matter was finalised at first appearance and no specific bail decision was recorded, bail has been taken to have been dispensed with.

Fig 4a. Number of first appearances in the Local Court, Feb 11 to May 15

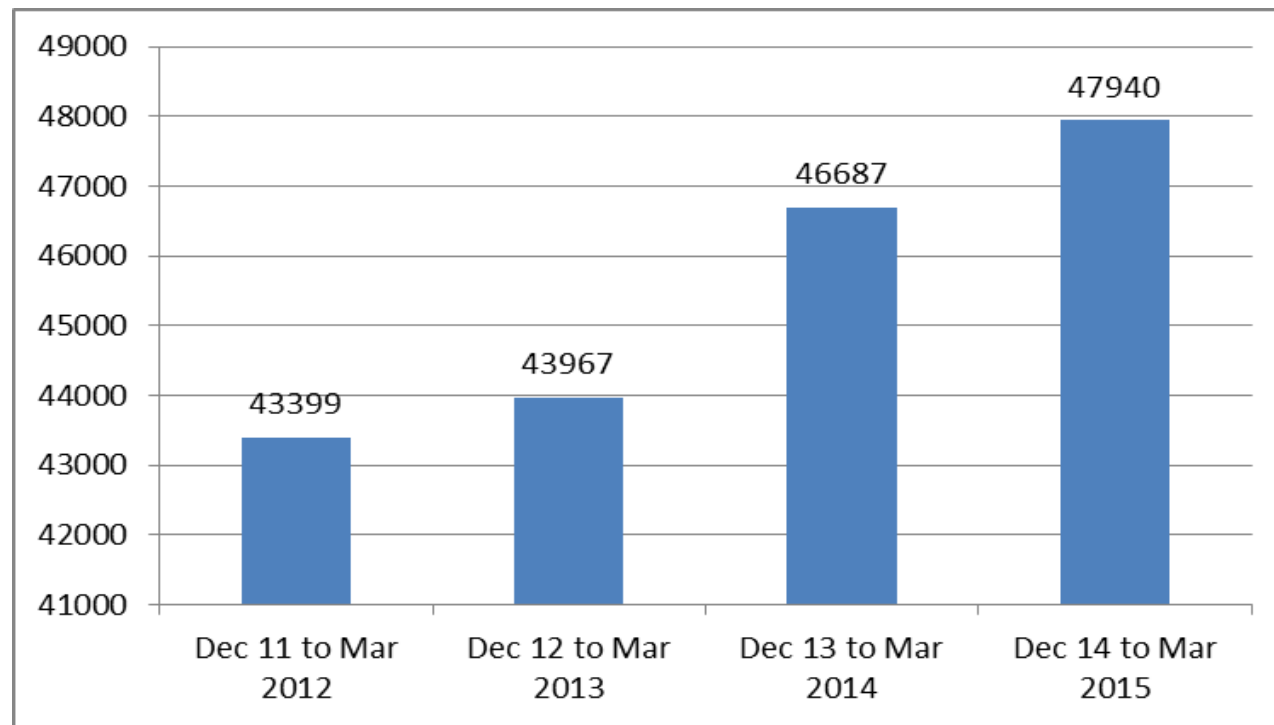


The overall number of defendants appearing before the courts in January, February and March 2015 was historically high relative to previous years. This suggests that the high number of people appearing in court 'bail refused' (as seen in Figure 2) is at least partly a function of more people appearing in court in general.

Note: First court appearance includes matters finalised at the first court appearance. Where a court matter was finalised at first appearance and no specific bail decision was recorded, bail has been taken to have been dispensed with.



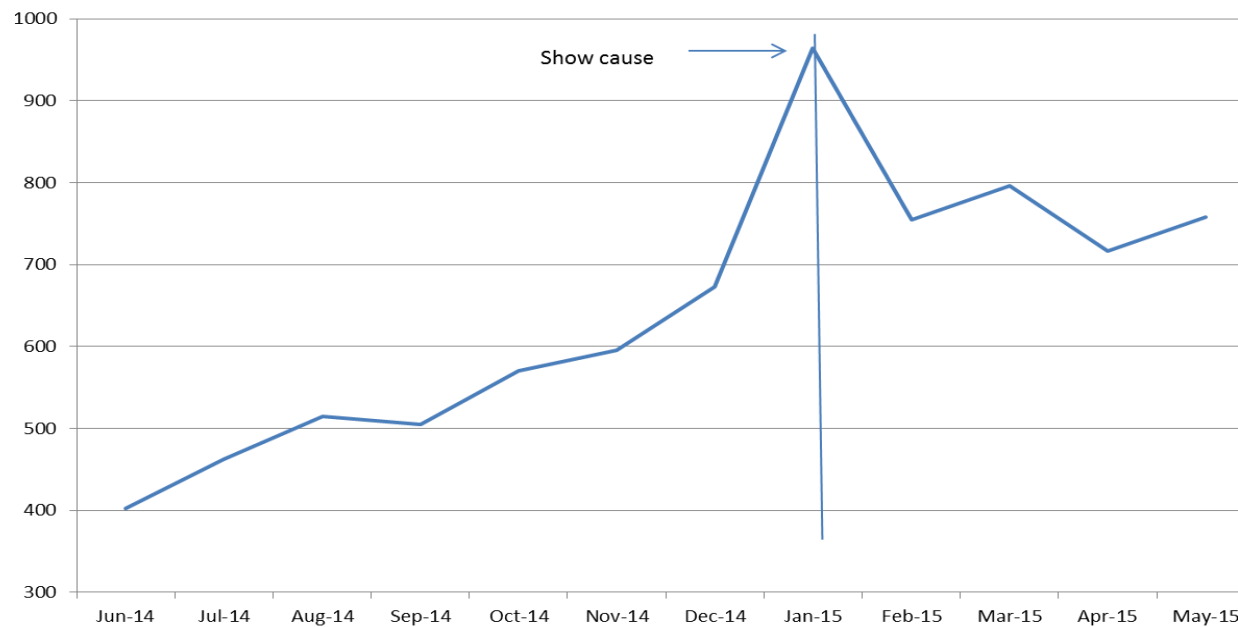
Figure 4b. Number of first court appearances between December and March in the last four years



This figure more clearly illustrates the result in Figure 4a that the number of people entering the court system in December 2014 and January, February and March 2015 was higher than in previous years.

Note: First court appearance includes matters finalised at the first court appearance. Where a court matter was finalised at first appearance and no specific bail decision was recorded, bail has been taken to have been dispensed with.

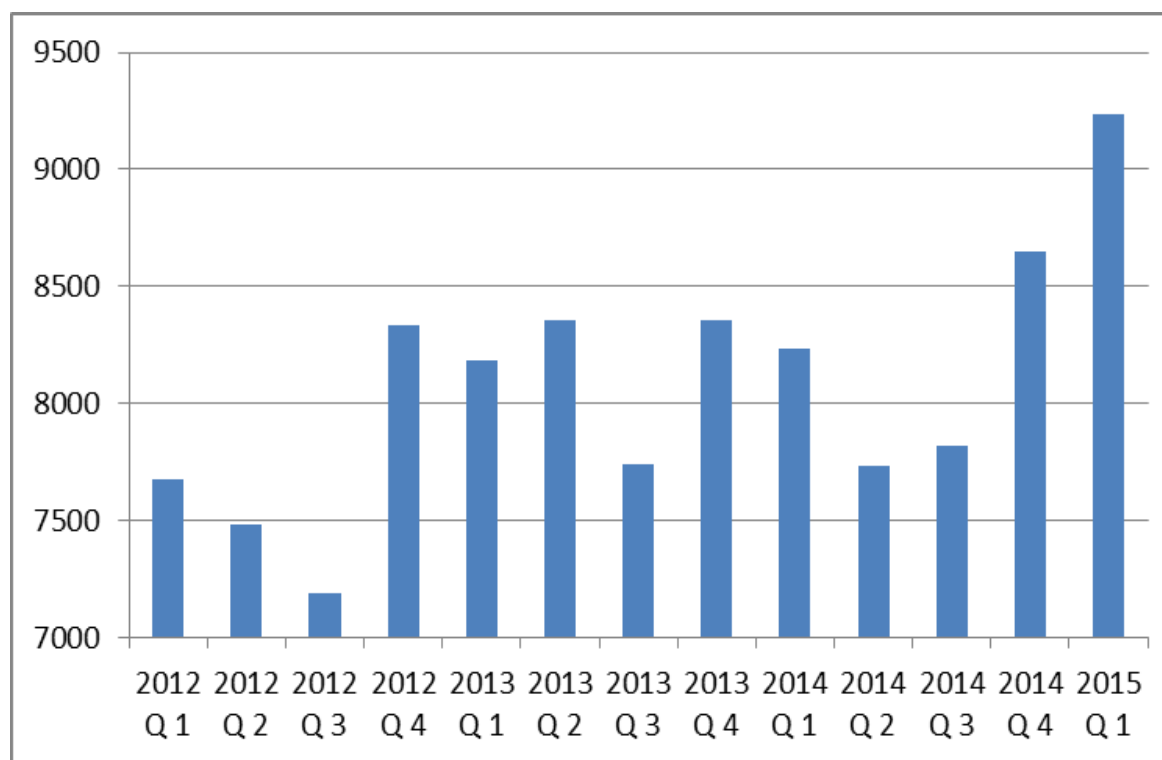
Fig 5a. Total breach bail incidents established in the Local Court on existing cases, Jun 14 to May 15



There were more bail breaches established in court in January 2015 than in any other month since these records began. The number of monthly bail breaches remained high from February to May 2015 relative to 2014 figures.

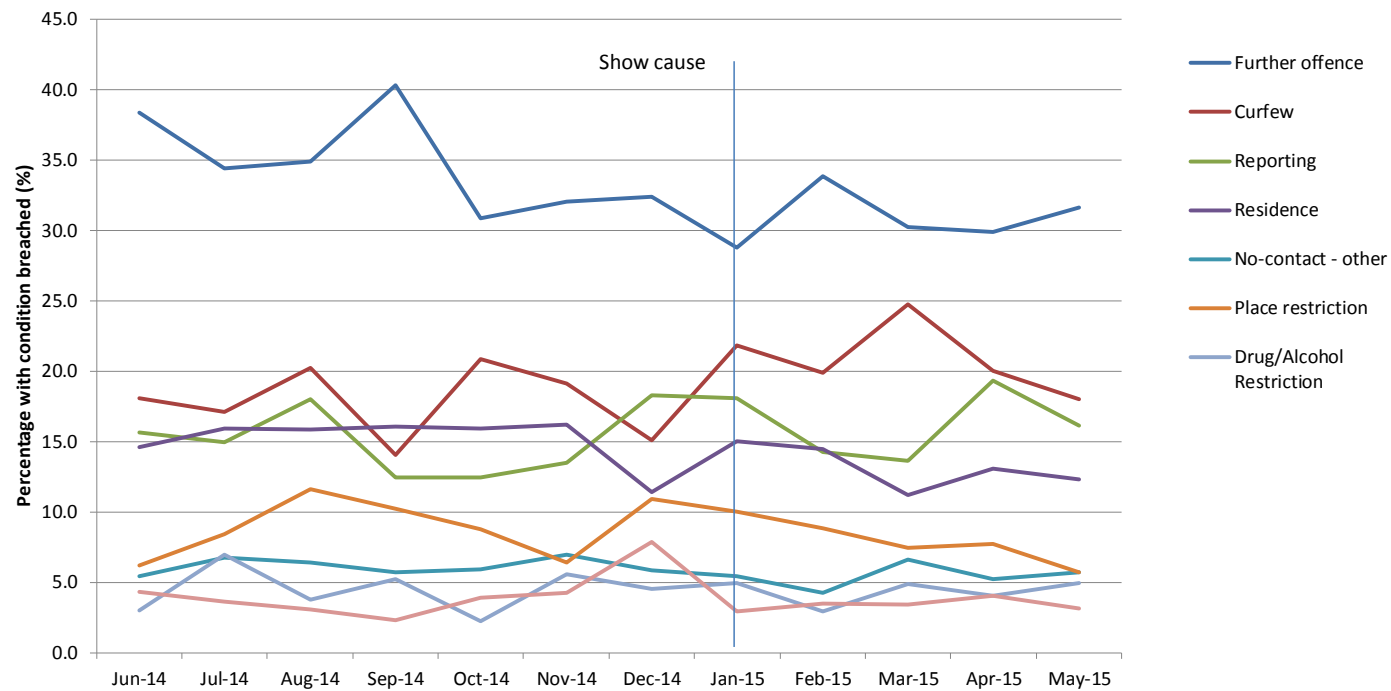
Note: These data are based on a JusticeLink notation available to courts since May 2014 which specifically signifies that a bail breach has been established.

**Figure 5b. Quarterly incidents of breach bail recorded by NSW Police**  
(nb. these incidents do not necessarily result in court action)



There were 9233 breach bail incidents detected and recorded by police in the first quarter of 2015, the highest of any quarter in the past three years. Note only a proportion of these matters end up in court for detention application/bail re-determination.

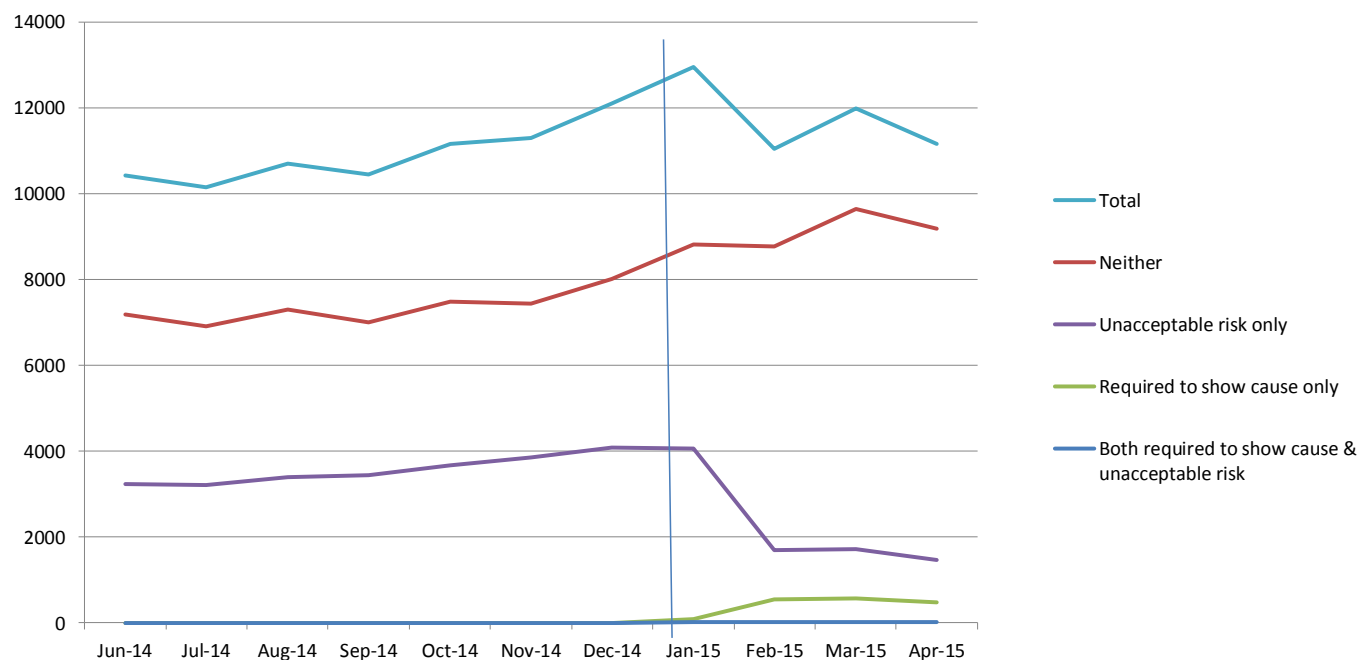
Figure 6. Proportion of bail breaches established by specific conditions breached (Jun 14 to May 15)



The infraction/s behind court established bail breaches have remained roughly consistent since June 2014 with the exception of a small decrease in the proportion of bail breaches relating to a further offence.

Notes: More than one condition can be breached in one incident and all breached conditions are shown here so the totals may sum to more than 100%. Conditions which are infrequently breached are omitted from the figure, including treatment assessment and 'supervision'. In about 8% to 17% of breaches there are no conditions recorded. These % only include breaches where the conditions were recorded.

Fig 7. POIs proceeded against to court by whether they were categorised as show cause, unacceptable risk, both or neither (Jun 14 to April 15)



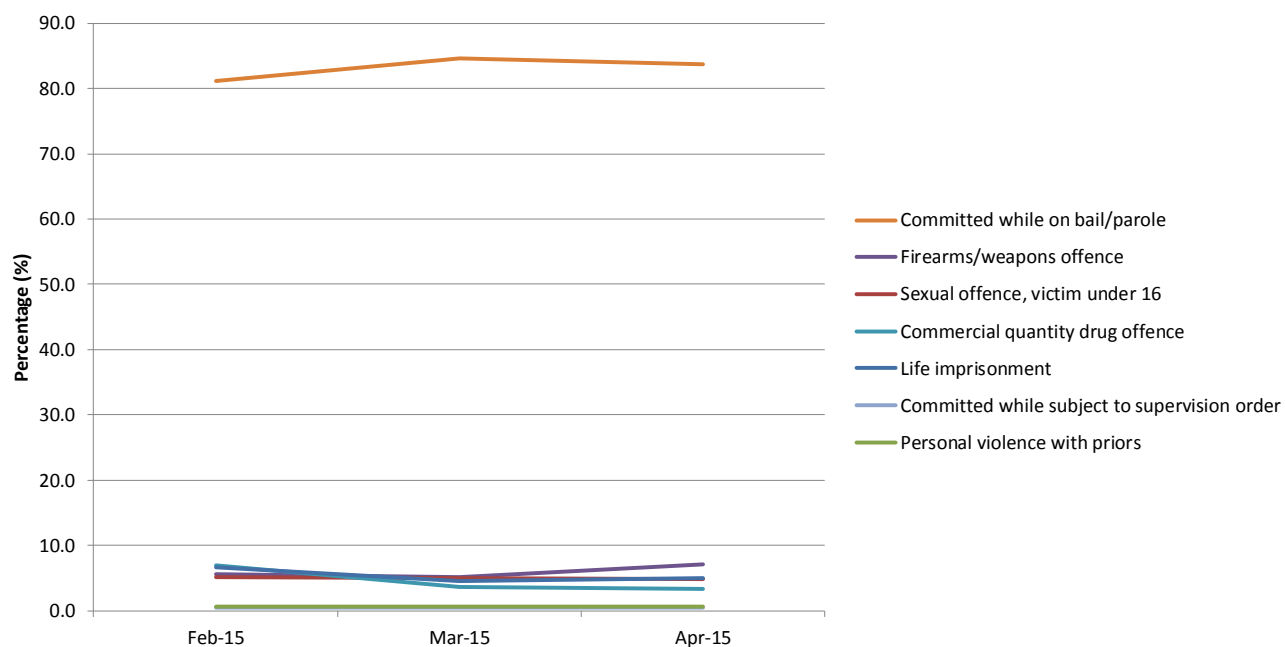
In April 2015 police commenced court proceedings against 11,147 people. Of these, police determined 484 people had to 'show cause' (4.3% of the total); an additional 1468 people were considered to be 'unacceptable risk' (13.2% of the total). 19 individuals were deemed to be both 'show cause' and unacceptable risk.

Notes: Based on Show cause and unacceptable risk categorisation made by police (not court)

The nature of 'unacceptable risk' changed with the introduction of the Show cause legislation in January 2015

'Both show cause and unacceptable risk' means that the person managed to show cause but then failed the unacceptable risk test

Fig 8. POs proceeded against to court who are in the 'Show cause' category by the relevant show cause factor (percentage)



Overwhelmingly most people required to 'show cause' had to do so because they offended while on bail or parole (84% in April 2015).

Notes: 1. if a person falls under more than one show cause category they are counted in both.  
2. Based on Show cause categorisation made by police (not court)