



NSW GOVERNMENT RESPONSE

TO

THE NSW LAW REFORM COMMISSION

REPORT ON BAIL

NOVEMBER 2012

Introduction

In 1978, laws relating to bail in NSW were consolidated and codified for the first time. Since the introduction of the *Bail Act 1978*, there have been 85 amending Acts to the Bail Act, and as a result the legislation is complex and can be difficult to understand and apply. These numerous changes have resulted in:

- a lack of consistency in bail decisions;
- the incorrect application of the legislation and the inappropriate granting of bail in some cases; and
- the community having a poor understanding of the role of bail and a reduced confidence in the effectiveness of the criminal justice system.

On 8 June 2011, the Attorney General asked the NSW Law Reform Commission (LRC) to undertake a fundamental review of bail law. The LRC provided a comprehensive report to the Government, which recommended a significant overhaul of bail law in NSW.

Following a review of the LRC's recommendations the Government decided to develop a new Bail Act to achieve:

- Protection of the community;
- Consistency in decision making; and
- Simplicity in approach so that the Act is easily understandable.

The Government has built on the extensive work of the LRC and has developed a new bail model which forms the core of a new Act that will be introduced in 2013.

The key feature of the Government's new bail model is that it operates without a system of offence-based presumptions. Instead, the new model requires the bail authority to assess the risk posed by an accused person when deciding whether to release or remand them.

If the bail authority is satisfied that the accused does not present an unacceptable risk, the accused person will be released on unconditional bail.

If the bail authority is satisfied an accused presents an unacceptable risk, the bail authority will assess whether the risk can be mitigated by the imposition of conditions (such as non-association orders, curfews or place restrictions). If the bail authority is satisfied that the risk can be mitigated by conditions, the accused will be released to conditional bail.

If the bail authority is satisfied that the risk cannot be mitigated, the accused will be remanded in custody until trial.

The new model is intended to be simple, clear, and easy to understand and apply.

The new Bail Act

The new Act will clearly articulate the purpose of bail legislation, which is to provide a legislative framework to determine whether a person, accused of a criminal offence, should be detained or released, with or without, conditions.

The new Act will also have regard to the core principles underpinning our criminal justice system including the presumption of innocence and the general entitlement to be at liberty. If there is an unacceptable risk that an accused person will not appear in court or if they represent an unacceptable risk to the community, they will be detained in custody.

Granting of bail

For all fine only offences and offences under the *Summary Offences Act* (with some exceptions) there will be a right to release. In some circumstances the bail authority (either police or the court) will be able to impose conditions on a person for fine only offences.

In making the decision to detain or release, the bail authority must consider whether there is an unacceptable risk that, if released, the accused will:

- Fail to appear;
- Commit a 'serious offence' (meaning an offence of a sexual or violent nature, or with a weapon, or which the bail authority considers is likely to affect a victim or the community);
- Endanger the safety of victims, individuals or the community; or
- Interfere with witnesses or evidence.

When assessing if the risk is unacceptable the bail authority will take into account the following factors:

- The person's background, including criminal history, circumstances and community ties;
- The nature and seriousness of the offence;
- The strength of the prosecution case;
- Whether the accused person has a history of violence;
- Whether the accused person has previously committed a serious offence while on bail;
- Whether the accused person has a pattern of non-compliance with: bail; an Apprehended Violence Order (AVO); parole; or, good behaviour bond;
- Any special vulnerability or needs the person has including because of youth, Aboriginal and Torres Strait Islander (ATSI) status and cognitive or mental health impairment;
- Need for the person to be free to prepare for their appearance in court or obtain legal advice;
- Need for the person to be free for any other lawful purpose;
- Length of time the person is likely to spend in custody if bail is refused; or
- Whether there is a likelihood of a custodial sentence.

Importantly, under the new model, a person who is an unacceptable flight risk, or who poses an unacceptable risk to the community, or individuals, which cannot be mitigated, will not be released on bail.

Imposing bail conditions

Where the bail authority determines there is an unacceptable risk, the bail authority will assess if the risk can be mitigated by imposing bail conditions.

Bail conditions:

- must be reasonable, proportionate and appropriate to the circumstances to address the unacceptable risk;
- should only be directed to mitigating the risk and should not be more onerous than required; and
- should be reasonably practicable to comply with.

Enforcing bail conditions

When enforcing bail breaches, the Government accepts the LRC position that arrest should not be the universal response to a breach. However, in the new bail model, police will retain the discretion to arrest as a response to a breach when appropriate.

Under the new model, when a breach of a bail condition has been identified, police may either:

- take no action;
- issue a warning;
- require the person to attend court by issuing a notice; or
- arrest the person and take them before a court.

In considering what course of action to take when responding to breach, the police officer will be required to consider the relative seriousness or triviality of the suspected breach, whether the person has a reasonable excuse for the breach, the personal attributes and circumstances of the person, (known or apparent to the officer) and whether an alternative course of action to arrest is appropriate in the circumstances. The police response will depend on the circumstances of the breach, and the first response may be arrest if considered appropriate.

Repeat bail applications

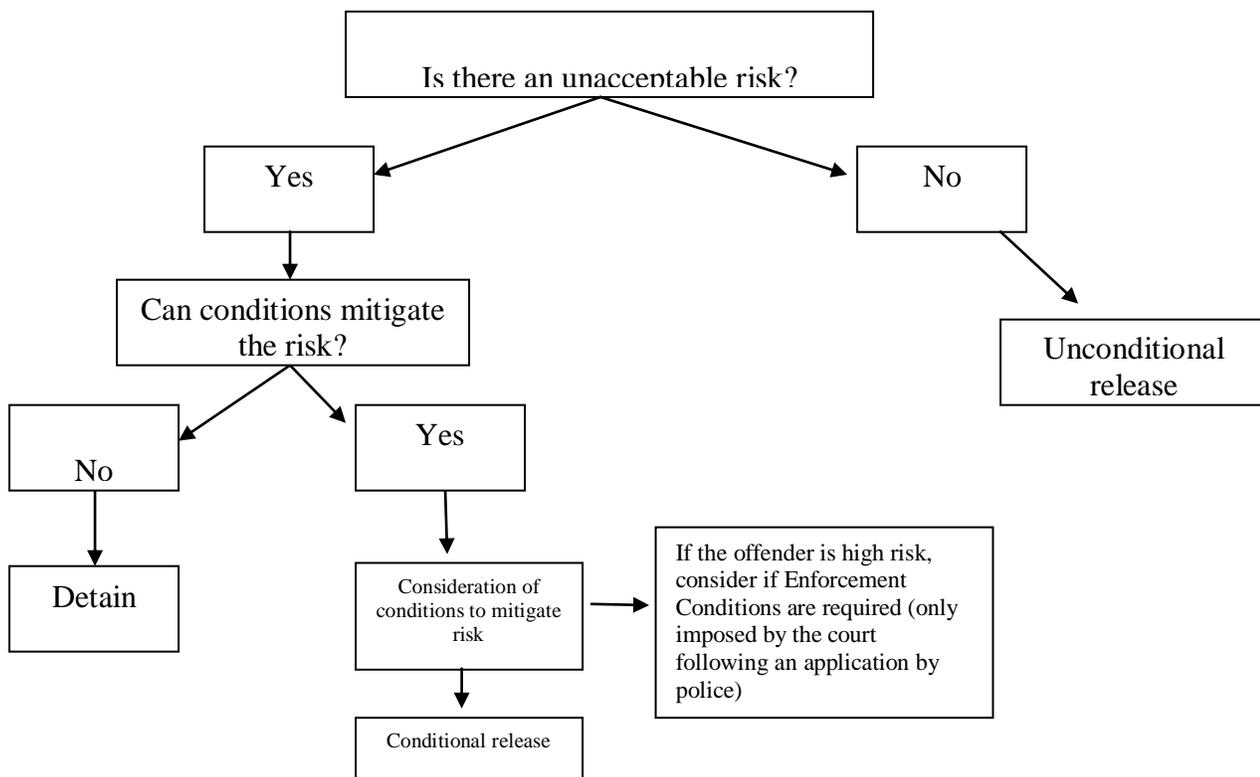
Although the data on this issue is inconclusive, there has been a suggestion that restricting repeat bail applications for young people may have led to increased juvenile remand rates.

Section 22A of the current Bail Act restricts a person from applying for bail if a bail application has already been dealt with by the court. The LRC recommends that the restriction on subsequent bail applications be retained primarily to prevent 'Magistrate shopping,' but that the restrictions on subsequent applications be less stringent. The LRC also recommends the restrictions on repeat bail applications not apply to young people.

The Government is of the view that repeat applications should be appropriately restricted to prevent 'magistrate shopping' and trauma for victims when an accused person repeatedly applies for bail. However, the Government acknowledges it is often more difficult for young people to adequately brief legal counsel at the first court appearance, due to their age and inexperience. With the current restrictions on repeat bail applications, legal practitioners are sometimes hesitant to apply for bail at the first opportunity, as they fear the application may be unsuccessful, and they won't have further grounds available to justify making a second application for bail.

The new Bail Act will therefore provide for a young person to apply for bail a second time, as of right, if the initial bail application was made on the day of first court appearance. This should remove any disincentive to practitioners making a bail application at the first possible opportunity, and if refused, will allow the practitioner a chance to receive more thorough instructions from the young person before making a second application. Existing provisions, allowing subsequent applications where there is new information or circumstances, will be retained in the new Act.

Proposed Bail model – flow chart



Amendments to current legislation

In February this year, the Supreme Court handed down the decision of *Lawson v Dunlevy* [2012] NSWSC 48, which determined that a condition of bail requiring a person to submit to an alcohol breath test when requested by a police officer is unlawful. The decision invalidated any bail condition imposed for the purposes of facilitating bail compliance monitoring (“an enforcement condition”), such as the commonly imposed condition requiring that a person under a curfew condition present at any time for a compliance check.

Enforcement conditions are an important component in operational policing to ensure high risk offenders are complying with their bail conditions. The NSW Police Force advised the Government that following *Lawson v Dunlevy*, the absence of enforcement conditions was negatively impacting on their ability to check that accused persons are complying with their bail.

In its report, the LRC recommended consultation on a framework for enforcement conditions, which it referred to as enforcement conduct directions. Given the impact that the absence of enforcement conditions had on police operations, the Government decided to bring forward its response to this recommendation and consulted legal stakeholders accordingly. Following consultation, the Government decided that amendments should be made to the existing Bail Act to authorise the imposition of enforcement conditions. The Bail Amendment (Enforcement Conditions) Bill 2012, was introduced to Parliament on 24 October 2012 and assented to on 20 November 2012.

The reforms incorporate elements of the framework recommended by the LRC while still providing flexibility to courts when imposing enforcement conditions. The provisions include safeguards to ensure that enforcement conditions are not imposed in inappropriate cases or in a way which makes compliance too onerous.

The Government proposes to incorporate a scheme of enforcement conditions in the new Bail Act. The amendments to the existing Act will operate as a trial of enforcement conditions to assess their impact before the new Act commences.

Implementation of the new Bail Act

The new bail model is a paradigm shift. It is a completely different approach to the current model which has been in place in NSW since 1978. In order to ensure it is effectively implemented, a wide ranging education campaign will be required for legal practitioners and the judiciary. In addition, changes will need to be made to Justice Link, the Computerised Operational Police System (COPS) and bail forms.

The legislation will be introduced in 2013, and the Government expects it will commence in 2014 following an education campaign. The legislation will be evaluated three years after commencement to ensure it is meeting its policy objectives. In order to be effectively evaluated, accurate data collection will be crucial. The Bureau of Crime Statistics and Research (BOCSAR) has been consulted in relation to this issue.

The LRC noted the significant gaps in the current data in relation to bail, and that the data relating to remand rates is inconsistent. In order to effectively evaluate the new

legislation, data collection methods will be improved before the new model is implemented. This will require enhancements to both the COPS and Justice Link databases.

Conclusion

The Government acknowledges the development of a new Bail Act would not have been possible without the important groundwork and consultation undertaken by the LRC.

The new bail legislation is intended to be simple and easy to apply and understand. This should enable more transparent and consistent bail decision making. Unlike the existing Bail Act, the new legislation will not have a system of offence based presumptions. It is the scheme of presumptions that has been subject to the majority of the amendments to the Act over the years, which resulted in NSW having one of the most convoluted and restrictive Bail Acts in Australia.

The Government anticipates that dispensing with the system of presumptions will not only simplify the bail decision making process, but will also result in fewer amendments to the legislation, enabling it to remain simple and clear, as was intended when the original bail laws were codified in 1978.

Attached is a table outlining the broad Government response to the LRC recommendations. The response addresses the LRC's policy concerns and intent, rather than responding to each of the 94 recommendations individually. Many of the LRC recommendations deal with issues of concern in the current legislation, and as a new Act is being drafted, they may not be relevant to the new legislation. The full recommendations of the LRC are also attached.

LRC Chapter	LRC Recommendation	Government Response
Chapters 1-5 provide the history of bail law, background information patterns of remand rates in NSW.	There are no recommendations related to Chapters 1-5.	
Chapter 6: Language and Structure.	<p>The LRC recommends a new plain English Bail Act be drafted, and that the language of the legislation be simplified and modernised to make it more easily understood.</p> <p>The LRC suggests the terminology in the legislation be replaced with plain English, so as to make the legislation more accessible. For example, the LRC recommends the term 'bail' be replaced by 'release pending proceedings' or 'detain pending proceedings'.</p>	<p>The Government has agreed a new Bail Act will be drafted that is simple and easy to understand. The new Act is currently being drafted, and will be introduced to Parliament early 2013.</p> <p>The Government strongly supports the LRC recommendation that the legislation be drafted in plain English so it is easily understood, not only by police and legal professionals who have to apply the legislation, but also by the general public, and those who are impacted by the legislation.</p> <p>In relation to terminology, the Government has decided to retain the term 'bail' as the term has always been used in NSW and other jurisdictions and is easily understood by the legal profession and the general public.</p>
Chapter 7: Entitlement and discretion to release.	In this chapter, the LRC recommends that a new Bail Act should include an 'entitlement to release without conditions' for all fine only offences and offences under the <i>Summary Offences Act</i> (with a few exceptions regarding public order offences)	The new Act will include an entitlement to release for fine only offences, and for offences under the <i>Summary Offences Act</i> (with the exception of some offences such as loitering by convicted sex offenders, using laser pointers and some

LRC Chapter	LRC Recommendation	Government Response
		<p>knife offences).</p> <p>The Government has decided that it will be necessary to retain the option of placing bail conditions on a person for a fine only offence or offence under the Summary Offences Act, however, restrictions will apply to ensure that conditions are only targeted at risk (see Chapter 14 below).</p>
Chapter 8: Presumptions.	The LRC recommends all current presumptions be replaced with a uniform presumption in favour of release (except for entitlement to release as noted above, and in appeal cases where the person is already incarcerated).	<p>The current system of presumptions is complicated and difficult to understand and apply.</p> <p>The Government has developed a new bail model which dispenses with the system of presumptions and adopts a risk management approach to bail decisions.</p> <p>Under this model, the decision to release or detain a person will be determined by the individual risk they pose , not by the offence they have allegedly committed. This system is clear and simple and means a person who presents an unacceptable risk of flight or risk to the community, which cannot be mitigated with conditions, will not be released on bail.</p>
Chapter 9: Release pending appeal.	The LRC recommends retention of the existing exceptional circumstances test for	The Government supports retention of the existing bail test in relation to appeals to

LRC Chapter	LRC Recommendation	Government Response
	<p>bail in relation to appeals to the Court of Criminal Appeal and the High Court.</p> <p>In relation to other appeal matters, the LRC recommends that bail should only be granted if the court is satisfied that the appeal has a reasonably arguable prospect of success.</p> <p>The LRC also recommended that the appeal legislation be consolidated.</p>	<p>the Court of Criminal Appeal and the High Court.</p> <p>In relation to other appeal matters, the Government support's the LRC's recommendation in principle and will consider how best to implement this proposal in drafting the new Bail Act.</p> <p>The LRC's recommendation in relation to consolidating the appeal legislation will be subject of further consideration by the Department of Attorney General and Justice.</p>

LRC Chapter	LRC Recommendation	Government Response
Chapter 10: Considerations	<p>The LRC notes in this Chapter there are two models in Australia for incorporating the considerations to be taken into account when deciding whether a person is to be released or detained: the “unacceptable risk model” and the “justification model”. The LRC noted both models are very similar, but the LRC recommends the justification model be adopted in the new Act as it is the model already in place in NSW, and is therefore familiar to practitioners, and can more easily incorporate the interests of the accused person.</p> <p>The remaining recommendations in this Chapter deal with the factors the bail authority is to take into account when making a bail determination.</p>	<p>The Government has adopted a risk management approach to bail, which is similar to the ‘unacceptable risk model’ referred to by the LRC.</p> <p>The list of factors for consideration in the new legislation align with a number of the considerations proposed by the LRC, particularly those related to the protection of the community and particular people; the integrity of the criminal justice system; and the interests of the accused person.</p>
Chapter 11: Special needs and vulnerabilities.	<p>The LRC recommends special considerations be given to the needs and vulnerabilities of some groups of people, in particular, young people, people with a cognitive or mental health impairment and Aboriginal and Torres Strait Islander people. The LRC suggests there should be specific considerations associated with these special vulnerabilities.</p>	<p>The Government acknowledges that some members of particular groups may have special needs and be vulnerable, particularly in the context of the criminal justice system. The new Act will require the bail authority to consider the special vulnerability or needs of the accused when determining bail, including because of youth, ATSI status or cognitive or mental health impairment. This ensures the special vulnerabilities and needs of these groups of people are adequately addressed in the bail decision making</p>

LRC Chapter	LRC Recommendation	Government Response
		process.
Chapter 12: Conditions and conduct requirements.	The LRC makes no recommendations in this chapter.	
Chapters 13 and 14: What conditions and conduct directions should be allowed and how they should be decided.	<p>In this Chapter, the LRC recommends that:</p> <ul style="list-style-type: none"> • most types of bail condition presently permitted under the Bail Act be retained; • the conditions specified in the Act should be exhaustive but the permitted conduct directions should not be exhaustive; • a condition or conduct direction should not be imposed unless it is justified, and should not be more onerous than required; • a conduct requirement should not be imposed for the welfare of the person unless it is otherwise justified. 	<p>The new Act will align with the intent of the LRC’s recommendations with respect to conditions.</p> <p>The new legislation will contain a provision that conditions should not be more onerous than required to address the identified risk.</p> <p>As recommended by the LRC, the same risk assessment process will be required for considering the imposition of conditions, as when making a bail determination.</p> <p>The decision is a two-step process. First, the bail authority determines if there is an unacceptable risk. Second they consider whether the risk can be mitigated with targeted conditions. If the answer is no, the person is detained in custody until trial. If the risks can be mitigated with appropriate conditions, the person is released until their trial.</p>
Chapter 15: Failure to comply with a condition or observe a conduct direction.	The LRC recommends that the new Act specify the available responses to a breach of bail. Further, it recommends that the Act	The Government agrees arrest should not be the universal response to a breach, however, is of the view police should

LRC Chapter	LRC Recommendation	Government Response
	<p>specify a number of matters that police are to take into account when responding to a breach of bail conditions. In particular, the LRC recommends that arrest should be a last resort.</p>	<p>have the discretion to arrest as a response to a breach when appropriate.</p> <p>The new legislation will provide guidance for police in considering what course of action to take when responding to a breach.</p>
<p>Chapter 16: Implications of <i>Lawson v Dunlevy</i></p>	<p>This chapter examines the implications arising from the decision of <i>Lawson v Dunlevy</i> which invalidated any bail condition imposed for the purposes of facilitating bail compliance monitoring.</p> <p>The LRC recommended consultation on a framework for enforcement conditions, which it referred to as enforcement conduct directions.</p>	<p>The Government undertook consultation on this recommendation as proposed by the LRC. The NSW Police Force advised the Government that <i>Lawson v Dunlevy</i> had negatively impacted on their ability to monitor bail compliance.</p> <p>Given the impact that the decision was having on police operations, the Government decided to bring forward its response to this recommendation and make amendments to the existing Bail Act to authorise the imposition of enforcement conditions. The Bail Amendment (Enforcement Conditions) Bill 2012, was introduced to Parliament on 24 October 2012 and assented to on 20 November 2012.</p> <p>The Government proposes to incorporate a scheme of enforcement conditions in the new Bail Act. The impact of the amendments to the existing Act will be assessed before the new Act</p>

LRC Chapter	LRC Recommendation	Government Response
		commences.
Chapter 17: The offence of failing to appear.	The LRC recommends the offence of failing to appear be retained.	The Government agrees the offence of 'failing to appear' be retained with a maximum penalty of three years imprisonment, as in the current legislation.
Chapter 18: Applications for release, detention and variation.	This chapter considers procedural issues relating to applications for release, detention and variation of conditions	The Government has adopted the substance of the LRC's recommendations with respect to appeals and variations.
Chapter 19: Refusing to hear applications.	<p>The LRC recommended that the provisions requiring the court to refuse to hear a subsequent bail application should be retained, but that the restrictions should be less stringent.</p> <p>The LRC further recommends there should be no restrictions on repeat bail applications by young people and that adults should be entitled to a second bail application as of right.</p>	<p>The Government does not support the LRC proposals that juveniles be excluded from this provision and adults be entitled to a second bail application as of right. The Government is of the view that repeat applications should be appropriately restricted to prevent 'magistrate shopping' and trauma for victims when an accused person repeatedly applies for bail.</p> <p>However, the Government acknowledges it is often more difficult for children to adequately brief legal counsel at the first court appearance, due to their age and inexperience.</p> <p>The Government will therefore make provision in the new legislation for juveniles to apply for bail a second time, as of right, if the initial bail application was made on the day of first court appearance.</p>

LRC Chapter	LRC Recommendation	Government Response
		Existing provisions, allowing subsequent applications where there is new information or circumstances, will be retained in the new Act.
Chapter 20: Electronic monitoring.	In relation to electronic monitoring, the LRC suggests an electronic monitoring scheme be piloted, but notes this issue requires more consideration.	The Government agrees this issue requires more consideration. Should a scheme for electronic bail ultimately proceed, it is anticipated that it can be incorporated into the proposed framework of the new Act.
Chapter 21: Monitoring and review of the new Bail Act.	<p>This chapter recommends the Act should be reviewed after 3 years to determine whether it is meeting its policy objectives.</p> <p>The LRC also recommends the government improve data collection methods in relation to bail to enable the Act to be reviewed effectively.</p>	<p>The Government has accepted the recommendation of the LRC that a statutory review be conducted of the new Bail Act as soon as practicable after the period of three years from the commencement date of the new legislation.</p> <p>The Review will determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.</p> <p>In relation to data collection, the Government recognises there are significant gaps in the available data, which makes it difficult to compare data and establish reliable trends. The Government is aiming to streamline data collection methods to ensure the new legislation can be appropriately</p>

LRC Chapter	LRC Recommendation	Government Response
		monitored.
Chapter 22: Outstanding issues.	This chapter deals with miscellaneous issues which will need to be addressed in the new Bail Act.	The Government notes the LRC comments in relation to these issues, and agrees they are best worked through in the context of redrafting a simplified new Act.

Law Reform Commission – Report 133, Bail Recommendations

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

Chapter 6 – Language and structure

- 6.1 (1) A new Bail Act should be drafted in plain English language, so as to be readily understandable, and with a clear and logical structure.
- (2) The terminology used in the new Bail Act should be changed:
- “release pending proceedings” should replace “bail” and “grant bail”
 - “detain pending proceedings” should replace “refuse bail”.
- (3) Proceedings should be defined to include trial, and a sentencing hearing or an appeal.
- 6.2 (1) The bail undertaking should be replaced with a notice of a listing.
- (2) The notice should include:
- (a) a statement explaining the circumstances in which failure to appear will constitute an offence;
 - (b) a warning that committing an offence while released pending proceedings could result in a more severe sentence for the offence.
- (3) The condition that the person enter into an agreement to observe specified conduct requirements should be replaced by a conduct direction.
- (4) Notice of a condition or conduct direction should be given to the person in writing and in plain English.
- (5) The person should be required to acknowledge in writing receipt of the notice of listing and the notice of any condition or conduct direction imposed.
- (6) The authority* should take all reasonable steps to ensure that the person has understood any condition or conduct direction imposed.
- (7) The court officer or police officer giving the defendant a notice of listing or a notice of a condition or conduct direction should be required to take all reasonable steps to ensure the defendant understands the content and implications of the documents.
- * Authority in these recommendations means a person or court having authority to release a person at any stage before completion of the proceedings, including authorised police officers and authorised justices (who are court staff).

6.3 A new Bail Act should provide that any decision as to release, with or without a condition or a conduct direction, should remain in force unless varied or unless detention is ordered, with no need to continue the order expressly.

Chapter 7 – Entitlement and discretion to release

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

- (5) Entitlement to release should apply to a young person referred to a Youth Justice Conference irrespective of the offence.
- (6) The current exception to an entitlement to release when a person has previously failed to comply with a bail undertaking or a bail condition in relation to the offence, should not be retained.
- (7) The current exception to entitlement to release relating to a person who is incapacitated by intoxication, injury or use of a drug or is otherwise in danger of physical injury or in need of physical protection, should not be retained.
- (8) New legislation should make clear that an entitlement to release in the case of a specified minor offence should not preclude the commission of that offence being taken into account as relevant in some other proceeding (such proceedings for a breach of a conduct direction, or sentencing proceedings).

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

Chapter 8 – Presumptions

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

Chapter 9 – Release pending appeal

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

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

- 9.3 (1) Consideration should be given to amalgamation of the Criminal Appeal Act 1912 (NSW) and the Crimes (Appeal and Review) Act 2001 (NSW) into a single statute.
- (2) Consideration should also be given to clarifying the relevant appeal provisions to ensure that, where the offender has been released pending the appeal, the court determining the appeal has sufficient power to order the commencement or recommencement of the original sentence, so as to give effect to the decision of that court.

Chapter 10 – Considerations

10.1 The justification model for a presumption in favour of release, as incorporated in the current Bail Act 1978, should be retained in a new Bail Act, as follows: A person is entitled to be released unless detention is justified having regard to the considerations set out in the following recommendations.

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

- (b) The integrity of the criminal justice system having regard to, and only to:
 - (i) the likelihood that, if released, the person will abscond (as defined in Recommendation 10.4);
 - (ii) the fact that the person has a history of persistent failure to attend court for whatever reason and the authority is satisfied that the person is unlikely to attend court on a future occasion as required if released;
 - (iii) the likelihood that, if released, the person will interfere with the course of justice, such as by interfering with evidence, witnesses or jurors;
 - (iv) the fact that the person, being charged with an indictable offence committed while subject to conditional liberty and:
 - (A) has one or more pending charges for an indictable offence committed while subject to conditional liberty; or
 - (B) has been convicted on one or more prior occasions of an indictable offence committed while subject to conditional liberty.
 “Subject to conditional liberty” means being released pending proceedings, or being on parole, or serving a sentence of imprisonment by way of home detention or an intensive corrections order, or being subject to a suspended sentence or a good behaviour bond.
- (c) The likelihood that, if released, the person will harm or threaten harm to any particular person or people including, in particular, anyone with whom the person is in a domestic relationship as defined in the Crimes (Domestic and Personal Violence) Act 2007 (NSW).
- (d) The protection and welfare of the community having regard to and only to the likelihood that, if released, the person will commit:
 - (i) an offence causing death or injury, or
 - (ii) a sex offence, or
 - (iii) an offence involving serious loss of or damage to property, or
 - (iv) an offence or series of offences which give rise to a substantial risk of causing death or injury or serious loss of or damage to property.
- (e) The interests of the person and of the person’s family and associates.

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

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

- (a) The entitlement of every person in a free society to liberty, freedom of action and freedom from unnecessary constraint in daily life.
- (b) The presumption of innocence whenever a person is charged with an offence.
- (c) There should be no detention by the state without just cause.
- (d) There should be no punishment by the state without conviction according to law.
- (e) The public interest in a fair trial for both the state and the person charged with an offence.

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

- (2) In considering the likelihood of absconding or whether the authority is satisfied that the person is unlikely to appear on a future occasion, the authority must consider:
- (a) the strength or otherwise of the person's family and community ties, including employment, business and other associations, extended family and kinship ties and the traditional ties of Aboriginal people and Torres Strait Islanders,
 - (b) the likelihood of conviction for the offence charged and, if convicted, the likelihood of a custodial sentence and the likely duration of any such sentence,
 - (c) whether the person has a history of absconding or otherwise failing to appear or of attending court as required (including the circumstances of any prior failure to appear),
 - (d) any specific evidence indicating whether or not the person is likely to abscond or fail to appear (as the case may be).

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

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

- (a) the person has a history of violence,
- (b) the person has been violent to the other person in the past (whether or not the accused person has been convicted of an offence in respect of the violence),
- (c) the person has failed to comply with a conduct direction in respect of the offence to which this section applies that was imposed for the protection and welfare of the other person,
- (d) in the opinion of the bail authority, the accused person will comply with any such requirement in the future.

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

- (a) the person's interest in liberty, freedom of action and freedom from unnecessary constraint in daily life,
- (b) the period that the person may be obliged to spend in custody if detained and the conditions under which the person would be detained,
- (c) the prospect that the person will not be able to prepare optimally for trial and participate optimally in the trial,
- (d) the physical and psychological hardship of imprisonment,
- (e) the consequential hardship for the individual, such as the effect on housing, not being employed, not being able to service financial commitments, and the stigma of having been to prison,
- (f) hardship for the person's family, such as loss of financial support, loss of housing and the impact on children from loss of parental care,
- (g) hardship for the person's associates, such as an employer, a business partner or a creditor, and
- (h) any special vulnerability or need of any child or young person, of a person with a cognitive or mental health impairment, or an Aboriginal person or Torres Strait Islander, or of any other person.

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

- (a) the nature and seriousness of the offence charged including whether the offence charged involves firearms, explosives, prohibited weapons or terrorism
- (b) the strength or otherwise of the prosecution case
- (c) a history of prior offences
- (d) previous failure to comply with a conduct direction or a conduct requirement imposed as part of a bail agreement under the Bail Act 1978.

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

- (1) Detention is a measure of last resort and a person must be released if a reason for detention is sufficiently satisfied by setting conditions of release or by giving a conduct direction.
- (2) A person must not be detained unless a custodial sentence is likely.
- (3) An authority must not order a person to be detained for longer than the likely duration of a custodial sentence. A court or authorised justice may disregard this rule, provided that the matter is listed for reconsideration at a sufficiently early time to ensure that the person is not detained for longer than the likely duration of a sentence for the offence with which the person is charged.
- (4) In assessing the matters referred to in (2) and (3) above the authority is to make its best estimate having regard to the experience and information of the person constituting the authority on the particular occasion.

Chapter 11 – Special needs and vulnerabilities

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

- (a) that young people have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard and a right to participate in the processes that lead to decisions that affect them,
- (b) that it is desirable, wherever possible, to allow the education or employment of a young person to proceed without interruption,
- (c) that it is desirable for a young person to reside in safe, secure and stable accommodation, and,
- (d) that the detention or imprisonment of a young person is to be used only as a measure of last resort and for the shortest appropriate period of time,
- (e) the young person's ability to understand and to comply with conditions or conduct directions, and
- (f) that young people have undeveloped capacity for complex decision-making, planning and the inhibition of impulsive behaviours.

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

- (a) the person's ability to understand and comply with conditions or conduct directions,
- (b) the person's need to access treatment or support in the community,
- (c) the person's need to undergo assessment to determine eligibility for treatment or support,
- (d) any additional impact of imprisonment on the person as a result of their cognitive or mental health impairment,
- (e) any report tendered on behalf of a defendant in relation to the person's cognitive or mental health impairment,

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

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

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

- (i) connections with and obligations to extended family
- (ii) traditional ties to place
- (iii) mobile and flexible living arrangements
- (iv) any other relevant cultural issue or obligation.

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

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

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

Chapter 13 – What conditions and conduct directions should be allowed

13.1 A new Bail Act should:

- (1) specify that the only permitted conditions are those referred to in the recommendations below;
- (2) not limit the kind of conduct direction that may be imposed, subject to any limitations (including limitations as to purpose) recommended in this report.

13.2 A new Bail Act should continue to provide that financial and security conditions may be imposed, based on the current provisions of the Bail Act 1978 (NSW).

13.3 (1) A new Bail Act should continue to provide that surrender of a passport may be a condition of release, based on s 36(2)(i) of the Bail Act 1978 (NSW), subject to being satisfied that a passport or passports exist.

(2) A new Bail Act should not retain the provision requiring that any passport be surrendered in the case of an offence causing death (s 37A of the Bail Act 1978 (NSW)).

13.4 (1) A new Bail Act should allow the imposition of conditions and conduct directions to facilitate assessment and participation in a treatment, intervention or rehabilitation program, based on s 36A of the Bail Act 1978 (NSW).

(2) A new Bail Act should provide:

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

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

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

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

- (a) the Children's Court may impose a condition that the young person is not to be released until the court is informed by the Department of Family and Community Services or Juvenile Justice NSW that suitable accommodation is available,
- (b) the Court may also impose a conduct direction that, upon release, the young person is to reside at such accommodation as may be directed by the relevant agency,
- (c) information that suitable accommodation is available may be lodged with the court in writing, specifying the address of such accommodation,
- (d) upon provision of such information and subject to compliance with any other condition the young person must be released without any requirement that the matter be re-listed before the court,
- (e) upon imposing a condition pursuant to this provision, the Court must re-list the matter for further hearing every 2 days until the Court is notified in writing that suitable accommodation has become available and its address,
- (f) at any stage in this process, the court may direct any relevant department to provide up to date information concerning action being taken to provide suitable accommodation.

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

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

Chapter 14 – How conditions and conduct directions should be decided

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

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

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

- (a) not impose a condition or conduct direction unless the authority is of the opinion that, without such a condition or conduct direction, the person should be detained pending proceedings having regard to the considerations and rules applicable to a decision whether to release or detain;
- (b) consider whether the person has family, community or other support available to assist the person in complying with a condition and conduct direction
- (c) not impose a condition or conduct direction that is more onerous or more restrictive of the person's daily life than is necessary having regard to the considerations and rules applicable to a decision whether to release or detain;
- (d) not impose a condition or conduct direction unless the authority is satisfied that compliance is reasonably practicable;
- (e) not impose a financial condition concerning the forfeiture of an amount of money, with or without security, in relation to a young person under 18 years, except if charged with a serious indictable offence (as defined in s 4 of the Crimes Act);
- (f) not impose a financial condition concerning the forfeiture of an amount of money, with or without security, in relation to an adult unless the bail authority is satisfied that:

- (i) there would otherwise be a likelihood of the person absconding or being unlikely to appear on a future occasion having regard to the considerations mentioned in Recommendation 10.5(2), and
 - (ii) payment of the sum involved is or is likely to be within the means of the person or people who may be liable to pay that sum;
- (g) not impose a condition or conduct direction for the purpose of promoting the welfare of the person unless it is otherwise justified having regard to the considerations set out in the Act.

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

Chapter 15 – Failure to comply with a condition or to observe a conduct direction

15.1 (1) A new Bail Act should provide that if a person remains in custody because a condition of release has not been met:

- (a) a court of competent jurisdiction (to be defined for the purpose of the provision) must be notified to that effect by the government agency holding the person in custody, within eight days from the date on which the decision was made to impose the condition,
- (b) such a notice must continue to be given, periodically, each 14 days after the expiration of the initial period of eight days, if the person continues to be in custody, subject to a decision by the court or by the person that such periodic notice is not required,
- (c) if the person is a young person under 18, notice must be given within two days, and every two days thereafter.
- (d) upon receiving any such initial or periodic notice, the court must list the matter at the earliest possible time, at which time the court may, pursuant to an application by the person or by any other person competent to make an application or of its own motion, decide afresh whether the person should be released or detained and what conditions or conduct direction (if any) should be imposed,
- (e) notice of such listing must be given to such legal representatives as are on the record; if the person has been unrepresented and is an Aboriginal person or Torres Strait Islander, then to the Aboriginal Legal Service; and, if a young person, then to Juvenile Justice or to the Department of Family and Community Services if the young person is in care of the Department,
- (f) at any stage in the process, the court may direct any government agency with responsibility for the welfare of the person to explain to the court why the condition has not been complied with and what steps are being taken to comply with the condition, and
- (g) these provisions do not apply where a court decides that a young person not be released unless the court is notified that suitable accommodation is available.

(2) Consideration should be given to whether it would be practicable to specify a shorter period for giving the initial notice.

(3) Section 258 of the Crimes (Administration of Sentences) Act 1999 (NSW) should be repealed.

15.2 (1) A new Bail Act should provide:

- (a) that if a police officer believes, on reasonable grounds, that a person is failing, has failed or is about to fail to comply with a conduct direction, the police officer may:
 - (i) take no action,
 - (ii) issue a warning,
 - (iii) require the person to attend court by notice without arresting the person, or
 - (iv) arrest the person and take them as soon as practicable before a court.
- (b) that, in considering what course of to take, the police officer must have regard to:
 - (i) the relative seriousness or triviality of the suspected failure (including threatened failure),
 - (ii) whether the person has reasonable excuse for the failure,
 - (iii) that arrest is a last resort,
 - (iv) insofar as they are apparent to or known by the officer, the person's age and any cognitive or mental health impairment.
- (c) that, if the person is arrested, the officer may afterwards discontinue the arrest.
- (d) that, upon being satisfied that the person has failed, or was about to fail, to comply with a conduct direction, a court may redetermine whether to release or detain the person and whether to impose a condition or a conduct direction.

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

15.3 A new Bail Act should provide that failure to comply with a conduct direction does not constitute contempt of court.

Chapter 16 – Implications of Lawson v Dunlevy

16.1 The government should consult, in the course of considering this Report and of drafting a new Bail Act, on the need to provide for a mechanism for imposing enforcement conduct directions. The following framework could be used as a basis for consultation:

- (1) An enforcement conduct direction should be defined as a direction that requires a released person to submit to any form of testing, or to comply with a police instruction, that is imposed in support of monitoring that person's compliance with another conduct direction (the underlying conduct direction).
- (2) An authority may impose an enforcement conduct direction if the authority considers that:
 - (a) without such a direction, police would not have adequate opportunity to detect and act on noncompliance with the underlying conduct direction, and
 - (b) the imposition of the enforcement conduct direction is reasonable in the circumstances, having regard to the history of the released person and the likelihood or risk of that person breaching the underlying conduct direction.
- (3) The conduct enforcement direction must:
 - (a) state with precision what is required (for example, it must identify with precision, the form of the testing that may be employed); and
 - (b) specify such limits on the frequency with which the power can be exercised or the places or times at which it can be exercised, to ensure that it is not unduly onerous in all the circumstances.
- (4) The NSW Police Force should develop standard operating procedures for monitoring release compliance and enforcement that would recognise the foregoing requirements.
- (5) In the event of alcohol or drug testing being accepted as suitable enforcement conduct directions then it would be convenient for the new Bail Act to include a set of provisions akin to

the existing Acts and Regulations that variously permit and regulate alcohol and drug testing and analysis and the use of the results of any such exercise of power.

Chapter 17 – The offence of failing to appear

- 17.1 (1) A new Bail Act should retain the offence of failing to appear but only in relation to a person
- (a) who has been released with a condition or a conduct direction being imposed, or
 - (b) who fails to appear on sentence.
- (2) The maximum penalty for the offence should be two years imprisonment.
- (3) A new Bail Act should reflect the general law of accumulation of sentences, and not retain the current provisions which exempt this offence from the usual principles relating to accumulation of sentences.

Chapter 18 – Applications for release, detention and variation

18.1 A new Bail Act should provide that:

- (1) Where an authorised officer has refused to release a person from custody or has imposed conditions or conduct directions:
- (a) a more senior police officer of or above the rank of sergeant:
 - (i) may review the decision of the authorised officer (without a request from the person), and
 - (ii) must review the decision of the authorised officer if the person requests it, unless such a review would cause any delay in bringing the matter before an authorised justice, a magistrate or a court;
 - (b) the review may be of:
 - (i) the refusal to release the person from custody; or
 - (ii) any conditions or conduct direction imposed by the authorised officer making the original decision.
- (2) The requirement that police provide an accused person with information about his or her entitlement to, or eligibility for, release, should include a requirement that the person be advised of his or her entitlement to seek review by a more senior authorised officer.

- 18.2 (1) The system of court review under Part 6 of the Bail Act 1978 (NSW) should be simplified and included in a regime that allows for three forms of application, namely:
- (a) If a person is subject to a decision to detain the person, the person may apply for an order that the person be released. On such an application, the court may affirm the prior decision to detain the person or may release the person with or without a condition or a conduct direction.
 - (b) If a person is subject to a decision to release the person with or without a condition or conduct direction, a prosecutor may apply for an order that the person be detained. On such an application, the court may affirm the prior decision to release the person with any condition or conduct direction that was imposed, may vary a condition or a conduct direction, impose a new condition or conduct direction, or order that the person be detained.
 - (c) An application for the variation of a condition and/or conduct direction may be made by:
 - (i) a person subject to the release order;
 - (ii) the informant (being a police officer) or complainant in the case of bail granted in respect of a domestic violence offence or an application for an order under the Crimes (Domestic and Personal Violence) Act 2007 (NSW);
 - (iii) the prosecutor; and
 - (iv) the Attorney General.

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

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

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

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

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

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

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

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

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

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

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

(5) The Local Court should have a concurrent jurisdiction to entertain an application for variation of a condition or conduct direction imposed by that court or by the Supreme Court or by the District Court, subject to paragraph (6).

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

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

(8) An application for detention may be made:

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

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

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

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

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

- (a) the court must hear any application for an order to release the person or to remove or vary any condition or conduct direction, without requiring that notice of the application be given to the prosecutor, but may adjourn the hearing if necessary in the interests of justice;
- (b) the court may, of its own motion, make an order to release the person or to remove or vary any condition or conduct direction, provided that any such order is for the benefit of the person.

Chapter 19 – Refusal to hear applications

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

- (1) The provision (currently s 22A(2)) that a court may refuse to entertain an application for release if satisfied that the application is frivolous or vexatious should include the additional grounds that the application is “without substance or has no reasonable prospect of success”.
- (2) The provision (currently s 22A(3)) allowing the Supreme Court to refuse to entertain an application if it comprises a bail condition review (a variation application under our recommendations) which could be dealt with in the Local Court or in the District Court should be retained.
- (3) The provision (currently s 22A(1) and (1A)) proscribing repeat applications unless there are grounds for further application should be retained, but should not apply to:
 - (a) a person who was under 18 years at the time of the offence and is under 21 years at the time of the application, or
 - (b) to an adult unless the person has already made two applications to the court.
- (4) An additional ground for further application should be provided: any other matter which, in the opinion of the court, is a relevant consideration.
- (5) The provision for refusal to hear a release application should be extended to apply to an application for variation of a condition or conduct direction that is the same or substantially the same as previously sought.
- (6) The provision (currently s 22A(5)) allowing a lawyer to refuse to make a further application should not be retained.

Chapter 20 – Electronic monitoring

- 20.1 (1) Consideration should be given to the establishing a pilot scheme of release subject to electronic monitoring, with the following features:
- (a) the scheme should be limited to people who have already been detained and who are likely to spend a substantial amount of time in detention;
 - (b) monitoring of compliance should be carried out by the Community Compliance and Monitoring Group of Corrective Services NSW;
 - (c) it should be possible for time spent on release with electronic monitoring to be taken into account on sentence.
- (2) In developing the scheme, further consideration be given to:
- (a) whether a scheme is best achieved administratively or by statute; and
 - (b) the procedure for applying for release with electronic monitoring.

Chapter 21 – Monitoring and review of a new Bail Act

21.1 (1) A new Bail Act should contain a provision requiring the Minister to conduct a review of the Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

(2) The review should be undertaken as soon as possible after the period of three years from the date of assent to the Act. A report on the outcome of the review should be tabled in each House of Parliament within 12 months after the end of the period of three years

21.2 The government should, as soon as practicable, establish a process to improve the collection and reporting of data required for an effective review of a new Bail Act.