

## CHANGING THE RULES ON BAIL: AN ANALYSIS OF RECENT LEGISLATIVE REFORMS IN THREE AUSTRALIAN JURISDICTIONS

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*Bail decisions are a high-volume and hugely consequential component of the Australian criminal justice system, and yet, laws governing access to bail have rarely been the subject of systematic analysis. This article sheds new light on how bail laws have changed and what this reveals about how and why governments employ the criminal law as a public policy tool. Working with a dataset of 71 statutes enacted in New South Wales, Queensland and Victoria during the 10-year period between 2009 and 2018, we employ a combination of quantitative and qualitative analysis to illuminate key features and patterns. Our main findings are that bail law remains an active site of statutory reform, and that the object of mitigating harm-risk routinely takes priority over the fundamental rights of the accused. As a consequence, the strong trajectory of contemporary bail law reform has been to restrict rather than expand access to bail.*

### I INTRODUCTION

The regularity and intensity with which governments make changes to the rules and procedures of criminal law – and so, to the parameters of criminalisation and punishment – has been the subject of considerable scholarly attention for some time.<sup>1</sup> Despite the fact that bail decisions are a high-volume and hugely consequential component of the Australian criminal justice system, and that bail laws have been an active site of legislative amendment, there have been few systematic studies of changes to bail laws over time.<sup>2</sup> Studies concerning bail reform are often limited to examining

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- 1 See Russell Hogg and David Brown, *Rethinking Law and Order* (Pluto Press, 1998); Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press, 2008); RA Duff et al (eds), *The Boundaries of the Criminal Law* (Oxford University Press, 2010); RA Duff et al (eds), *The Structures of the Criminal Law* (Oxford University Press, 2011); RA Duff et al (eds), *The Constitution of the Criminal Law* (Oxford University Press, 2013); RA Duff et al (eds), *Criminalization: The Political Morality of the Criminal Law* (Oxford University Press, 2014); James Chalmers and Fiona Leverick, 'Quantifying Criminalization' in RA Duff et al (eds), *Criminalization: The Political Morality of the Criminal Law* (Oxford University Press, 2014) 54; David Brown, 'Criminalisation and Normative Theory' (2013) 25(2) *Current Issues in Criminal Justice* 605; Luke McNamara, 'Editorial: In Search of Principles and Processes for Sound Criminal Law-Making' (2017) 41(1) *Criminal Law Journal* 3.
- 2 For notable exceptions, see Alex Steel, 'Bail in Australia: Legislative Introduction and Amendment Since 1970' (Conference Paper, Australia and New Zealand Critical Criminology Conference, January 2009); New South

specific instances of legislative change to bail laws,<sup>3</sup> and how those changes may affect particular vulnerable groups.<sup>4</sup> While the creation of new offences and tougher sentencing regimes rightly attract scrutiny and critical attention,<sup>5</sup> so-called ‘procedural’ amendments, such as changes to the legislative rules governing access to bail, are equally deserving of analysis. Influenced by recent work on ‘modalities’ of criminalisation – which seeks to illuminate the multitude of ways in which the parameters of criminal law and penalty expand (and contract)<sup>6</sup> – and the ‘processes’ of criminalisation – the paths that can account for the enactment of any given criminal law statute<sup>7</sup> – this article draws attention to the drivers and effects of cumulative recalibration of the rules on access to bail in New South Wales (‘NSW’), Queensland and Victoria over the last decade. A central feature of the bail reform landscape that we seek to highlight is the instability of bail rules, and their susceptibility to legislative amendments.

Bail is the conditional grant of liberty to a person charged with the commission of a criminal offence,<sup>8</sup> minimally dependent upon ‘an undertaking ... to appear before the court when called on to do so’.<sup>9</sup> Until the 1970s, the rules of bail were largely a matter of common law doctrine,<sup>10</sup> although a degree of legislative codification had occurred in

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Wales Law Reform Commission, *Bail* (Report No 133, April 2012) 29–43; Lorana Bartels et al, ‘Bail, Risk and Law Reform: A Review of Bail Legislation across Australia’ (2018) 42(2) *Criminal Law Journal* 91; Lenny Roth, ‘Bail Law: Developments, Debate and Statistics (Briefing Paper, Parliamentary Research Service, Parliament of New South Wales, June 2010). For an early analysis of the structure, processes and factors contributing to remand specifically in Victoria, South Australia and Western Australia see David Bamford, Sue King and Rick Sarre, ‘Factors Affecting Remand in Custody: A Study of Bail Practices in Victoria, South Australia and Western Australia’ (Research and Public Policy Series No 23, Australian Institute of Criminology, June 1999); Sue King, David Bamford, and Rick Sarre, ‘Factors That Influence Remand in Custody’ (Final Report, November 2005).

- 3 See Tracey Booth and Lesley Townsley, ‘The Process Is the Punishment: The Case of Bail in New South Wales’ (2009) 21(1) *Current Issues in Criminal Justice* 41; Julie Stubbs, ‘Re-examining Bail and Remand for Young People in NSW’ (2010) 43(3) *Australian and New Zealand Journal of Criminology* 485; David Brown and Julia Quilter, ‘Speaking Too Soon: The Sabotage of Bail Reform in New South Wales’ (2014) 3(3) *International Journal for Crime, Justice and Social Democracy* 73; Victorian Law Reform Commission, *Review of the Bail Act* (Final Report, January 2007).
- 4 See Caitlin Weatherby-Fell, ‘A Complete Overhaul of the Bail System? The Incoming New South Wales *Bail Act 2013* and Aboriginal Juvenile Offenders’ (2014) 8(11) *Indigenous Law Bulletin* 24; Stubbs (n 3); Katherine Boyle ‘“The More Things Change ...”: Bail and the Incarceration of Homeless Young People’ (2009) 21(1) *Current Issues in Criminal Justice* 59; Isabelle Bartkowiak-Théron and Anna Corbo Crehan, ‘“For When Equality Is Given to Unequals, the Result Is Inequality”: The Socio-Legal Ethics of Vulnerable People’ in Isabelle Bartkowiak-Théron and Nicole L Asquith (eds), *Policing Vulnerability* (Federation Press, 2012) 33, 33–46.
- 5 See Arlie Loughnan, ‘Drink Spiking and Rock Throwing: The Creation and Construction of Criminal Offences in the Current Era’ (2010) 35(1) *Alternative Law Journal* 18; Julia Quilter, ‘One-Punch Laws, Mandatory Minimums and “Alcohol-Fuelled” as an Aggravating Factor: Implications for NSW Criminal Law’ (2014) 3(1) *International Journal for Crime, Justice and Social Democracy* 81.
- 6 Luke McNamara et al, ‘Theorising Criminalisation: The Value of a Modalities Approach’ (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 91, 94–7.
- 7 Luke McNamara et al, ‘Understanding Processes of Criminalisation: Insights from an Australian Study of Criminal Law-Making’ [2019] *Criminology and Criminal Justice* 10.1177/1748895819868519:1–21.
- 8 *Re S* (2005) 157 A Crim R 451, 452 (Slicer J), citing *Griffiths v The Queen* (1977) 137 CLR 293. See also *Re Application for Bail by Breen* (2009) 172 ACTR 21, 27 [56] (Refshauge J).
- 9 *Webster v South Australia* (2003) 87 SASR 17, 37 (Gray J), citing *Bail Act 1985* (SA) s 6. See also *DPP v Serratore* (1995) 38 NSWLR 137, 157 (Santow AJA); *R v Collins* (2002) 127 A Crim R 95, 99 (Gray J). 10 Steel (n 2) 229.

some jurisdictions.<sup>11</sup> Between 1977 and 1994, each state and territory introduced a single statute that codified, consolidated and amended bail laws.<sup>12</sup> As a result, the shape of bail laws now rests largely in the hands of the state and territory governments, although judicial decision-making inevitably continues to play a role.

At the heart of a bail determination lies a *balancing* act: protecting fundamental rights while also ensuring that risks concerning the accused's behaviour are mitigated. Thus, bail is designed to protect common law rights that are fundamental to the criminal justice system, including the right to personal liberty, the ancillary presumption of innocence, and the right not to be punished prior to a finding of guilt.<sup>13</sup> With the exception of Tasmania,<sup>14</sup> the bail statutes of each state and territory in Australia balance these rights with the risk that an accused person will fail to appear at court, commit a further offence while on bail, endanger the community, or interfere with the course of justice<sup>15</sup> – referred to in this article as ‘harm-risk minimisation’. The transition to bail statutes has enabled more accurate analysis of how bail laws change over time – and these primary bail statutes have not remained static. They have been the subject of (more or less) regular amendments – small and large – over their lives. When bail laws are substantively modified, the balance between fundamental rights and harm-risk minimisation shifts. This article explores how the balance has been influenced by a succession of legislative reforms over the last decade in NSW, Queensland and Victoria and why those changes have occurred.

A recurring feature of the legislative amendments in recent times is that governments have brought reforms in response to serious and highly publicised tragedies (‘signal crimes’)<sup>16</sup> which are quickly read as an indictment on the adequacy of bail laws. Such instances include the Bourke Street Mall attack in Melbourne in January 2017, when, while on bail, Dimitriou Gargasoulas drove his car into pedestrians killing

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11 For instance, in Queensland, the *Bail Act 1980* (Qld) was legislated to ‘consolidate and amend the law relating to bail’, with bail laws at that time ‘found not only in the *Justices Act* but also in the *Criminal Code* and other legislation’: Queensland, *Parliamentary Debates*, Legislative Assembly, 31 October 1979, 1573–4 (William Lickiss). In Tasmania, a small degree of codification had occurred via the *Justices Act 1959* (Tas): see ss 35, 59, 60, 62–5 of the *Justices Act 1959* (Tas) as enacted. For further additions made in the interim, see the insertion of ss 34–36A by the *Justices Act 1974* (Tas) which provided legal tests and procedure for bail determinations.

12 The relevant Acts were: in Victoria, the *Bail Act 1977* (Vic); in New South Wales, the *Bail Act 1978* (NSW) (which has since been replaced by the *Bail Act 2013* (NSW)); in Queensland, the *Bail Act 1980* (Qld); in Western Australia, the *Bail Act 1982* (WA); in the Northern Territory, the *Bail Act 1982* (NT); in South Australia, the *Bail Act 1985* (SA); in the Australian Capital Territory, the *Bail Act 1992* (ACT); and in Tasmania, the *Bail Act 1994* (Tas).

13 New South Wales Law Reform Commission (n 2) 9; *R v Xie* [2015] NSWSC 1833, [43] (Fullerton J); *R v Melmeth* [2015] NSWSC 1762, [5] (Schmidt J); *Woods v DPP* (Vic) (2014) 238 A Crim R 84, 89–90 (Bell J); *R v K* [2017] SASC 6, [10] (Hinton J).

14 In the Tasmanian context, the considerations relevant to the court's relatively unfettered discretion are contained in the common law, however, similar considerations are relevant to bail determinations: *S v White* [2005] TASSC 27, [3] (Blow J). See also *R v Fisher* (1964) 14 Tas R 12. However, it is to be noted that in January 2018, the Tasmanian Department of Justice released a Position Paper outlining various proposals for inclusion in the Tasmanian bail legislation: Department of Justice (Tas), *Reforms to the Tasmanian Bail System* (Position Paper, January 2018). The proposals, which to date have not been introduced to the Tasmanian Parliament, clearly engage the same balancing exercise. For instance, Proposal 2 suggests the introduction of an objects clause that seeks to promote the presumption of innocence and right to liberty whilst also ensuring the safety of victims, individuals and the community, and protecting the integrity of the justice system. The balancing exercise is likewise apparent in Proposal 5, which proposes a presumption in favour of bail to be displaced if particular unacceptable risks are present.

15 *Bail Act 1992* (ACT) s 22; *Bail Act 2013* (NSW) ss 17, 19; *Bail Act 1982* (NT) s 24; *Bail Act 1980* (Qld) s 16; *Bail Act 1985* (SA) s 10; *Bail Act 1977* (Vic) s 4E; *Bail Act 1982* (WA) sch 1 pt C cl 1.

16 Martin Innes, *Signal Crimes: Social Reactions to Crime, Disorder and Control* (Oxford University Press, 2014).

six and injuring many more,<sup>17</sup> the vicious murder of Teresa Bradford in Queensland by her estranged husband who was on bail with respect to alleged domestic violence offences, and the 2014 Lindt Café siege at Martin Place in Sydney at the hands of Man Haron Monis, on bail at the time, leading to the deaths of two hostages and Monis himself.<sup>18</sup> Following such severe and high-profile events, governments often seek to urgently review bail regimes,<sup>19</sup> appearing determined to ‘fix’ identified flaws in the risk management framework offered by bail laws, typically by decreasing access to bail,<sup>20</sup> with consequential effects.<sup>21</sup>

Rather than interrogate the details of these and other particular instances of bail reform in isolation, our approach in this article is to step back and examine patterns of bail reform over a longer period of time, namely, the decade from 2009–18. This period has been carefully chosen as it takes up from where Alex Steel’s 1992–2008 bail study (discussed below) concluded, allowing us to make comparisons with his earlier work. While there is value in a national study, one limitation of such an approach is that it does not allow for detailed analysis of changes over time in specific jurisdictions.<sup>22</sup> We have chosen instead to conduct a three-jurisdiction study (NSW, Queensland and Victoria) of changes to bail regimes, utilising both quantitative and qualitative methods.

These novel features of our systematic study have facilitated fresh insights about contemporary bail law reform. We found that recalibration of the rules governing access to bail continues to have a primarily restrictive character, though not universally so. Looking at the range of drivers and influences behind restrictive bail reforms we identified three main themes: the role of ‘trigger’ incidents typically involving tragic fatalities; an expressed need for enhanced ‘community safety’; and amendments targeting ‘demonised’ groups. Looking beyond these more obvious influences, we found that the small number of instances of amendments that increased access to bail

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- 17 Emily Woods and Ebony Bowden, ‘Bourke Street Attack: Sixth Murder Charge for Dimitrios “Jimmy” Gargasoulas’, *The Age* (online, 31 March 2017) <<http://www.theage.com.au/victoria/bourke-street-attack-sixth-murder-charge-for-dimitrios-jimmy-gargasoulas-20170331-gvaxpd.html>>.
- 18 Michael Atkin, ‘Family of Murdered Mother Teresa Bradford Speaks Out, Says Queensland Government Must Do More “to Save Lives”’, *ABC News* (online, 17 April 2017) <<http://www.abc.net.au/news/2017-04-17/teresa-bradford-family-speak-out/8447676>>; ‘Teresa Bradford Death Sparks Bail System Review for Domestic Violence Offenders in Queensland’, *ABC News* (online, 2 February 2017) <<http://www.abc.net.au/news/2017-02-02/pimpama-deaths-qld-review-bail-system-domestic-violence-offender/8234164>> (‘Bradford Death Sparks Bail System Review’); *Bail (Domestic Violence) and Another Act Amendment Act 2017* (Qld); ‘Sydney Siege: Two Hostages and Gunman Dead after Heavily Armed Police Storm Lindt Café in Martin Place’, *ABC News* (online, 16 December 2014) <<https://www.abc.net.au/news/2014-12-16/sydney-siege-gunman-two-hostages-dead/5969162>>.
- 19 For example, following the Bourke Street Mall tragedy, see Daniel Andrews, ‘Major Shake Up of Victoria’s Bail System’ (Media Release, 23 January 2017). This led to the Hon Paul Coghlan QC’s review including Paul Coghlan, *Bail Review: First Advice to the Victorian Government* (Report, 3 April 2017) and the subsequent passing of the *Bail Amendment (Stage One) Act 2017* (Vic). In relation to the Lindt Café Siege, see Michael Thawley and Blair Comley, ‘Martin Place Siege: Joint Commonwealth – New South Wales Review’ (Report, Department of the Prime Minister and Cabinet and Department of Premier and Cabinet, January 2015) 2, 35–44. See also the lengthy coronial inquest: Michael Barnes, *Inquest into the Deaths Arising from the Lindt Café Siege: Findings and Recommendations* (Coronial Inquest, May 2017).
- 20 See Pat O’Malley, *Crime and Risk* (Sage, 2010); Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford University Press, 2014).
- 21 For example, a recent NSW Bureau of Crime Statistics and Research report has found that people who are denied bail are more likely to be sentenced to a prison term on conviction: Sara Rahman, NSW Bureau of Crime Statistics and Research, ‘The Marginal Effect of Bail Decisions on Imprisonment, Failure to Appear, and Crime’ (Crime and Justice Bulletin No 224, May 2019).
- 22 Bartels et al (n 2) completed a descriptive national survey for the period 2012–17.

were related to ‘roll-backs’ associated with earlier amendments considered to be overly restrictive or extreme; justifications based on ‘vulnerable groups’; and evidence-based overhauls to bail regimes such as those recommended by a law reform commission. In doing so, this study recognises the range of ways in which, and reasons why, the rules of bail are adjusted (including changes that *increase* access to bail) which is important both for what it reveals about bail law specifically and criminalisation generally.

The body of this article is in three parts. Part II describes the methodology for the research and Part III summarises our quantitative findings. The largest part of the article (Part IV) is devoted to our qualitative analysis.

## II METHODOLOGY

The research design for this project builds on a primarily quantitative exercise undertaken by Steel a decade earlier, covering the period 1 January 1992 to 31 December 2008.<sup>23</sup> Steel catalogued amendments to bail statutes, giving a count of one to each discrete piece of amending legislation passed and classifying each Act in terms of whether it made a ‘significant’ change to the rules on bail, and, if so, whether the change was ‘punitive’ or ‘administrative’.<sup>24</sup> Steel did not observe any class of amendments increasing access to bail.

Steel defined ‘significant’ amendments as ‘any amendment that does more than alter terminology or references to other Acts’, such as incorporating gender-neutral terminology.<sup>25</sup> ‘Administrative’ changes were ‘those that involved a change to the way in which applications for bail were processed, breaches proceeded against, etc’ but which, on their face, did not appear to be intended to increase or decrease the remand population.<sup>26</sup> A ‘punitive’ change was defined as one ‘that related to a change in the presumptions or restrictions on bail for certain classes of offences or offenders; or a change in the nature of the considerations in determination of applications’.<sup>27</sup> By definition, punitive changes were designed to reduce access to bail. Steel found that 55% of the 109 significant changes to Australian bail laws between 1992–2008 had a ‘punitive’ character. NSW was the national ‘leader’ in punitive changes to bail rules with 25 significant amendments, 23 (92%) of which were punitive.<sup>28</sup>

For our study, we employed a mixed-method research design, using both quantitative and qualitative approaches, including a modified version of Steel’s typology. We collected all legislative amendments to the primary *Bail Acts* passed in NSW,<sup>29</sup> Queensland,<sup>30</sup> and Victoria<sup>31</sup> for the 10-year period between 1 January 2009 and

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23 Steel (n 2). It is noted that, while Steel did not explicitly state that his quantitative research ranged from 1 January 1992 to 31 December 2008, it was implied. In 2012 the NSW Law Reform Commission conducted a similar NSW-only exercise for the period 1986–2012, with a focus on amendments that made changes to bail *presumptions*: New South Wales Law Reform Commission (n 2) 29–43.

24 Steel counted the number of amending statutes, rather than the number of changes brought about by those statutes: Steel (n 2) 230.

25 Ibid 231.

26 Ibid 233.

27 Ibid.

28 Ibid 231–4, 240–3.

29 First, the *Bail Act 1978* (NSW), and then its replacement, the *Bail Act 2013* (NSW).

30 *Bail Act 1980* (Qld).

31 *Bail Act 1977* (Vic).

31 December 2018.<sup>32</sup> We focused on these three jurisdictions because they are the largest in Australia, and have experienced the most legislative activity in the period under study.<sup>33</sup> Furthermore, limiting the study to three jurisdictions allows for detailed qualitative analysis (as noted in Part I).

We used Steel's definition of 'significant' amendment to identify those statutes that warranted more detailed analysis. The 'significant' amending statutes were then divided into one of three new categories: changes that were designed to *increase* access to bail (such as removing an offence category from those to which a presumption against bail applies); changes that were designed to *decrease* access to bail (such as introducing new presumptions against bail for certain offence categories); and changes that were 'administrative' (ie neutral in their implications for access to bail).<sup>34</sup>

While a simple typology like this is useful for basic quantification, we recognised that it could not account for the magnitude of any particular change to bail laws. For example, one statute may modestly decrease access to bail for a particular category of alleged offenders, while another might completely overhaul a jurisdiction's bail rules – and yet each instance would only be counted once. In order to overcome such limitations, we undertook qualitative analysis of each amending Act so as to better understand the nature and context of the changes. To that end, we conducted online searches of parliamentary records (Hansard) for each of the three jurisdictions in relation to all amending legislation and second reading speeches as well as reviewing any reports informing the changes, and relevant media analysis and commentary. This material was subjected to thematic content analysis<sup>35</sup> to identify the factors and patterns relevantly associated with amendments that either increased or decreased access to bail. This element of our research design yielded valuable insights into the nature, triggers, processes, and political discourse surrounding changes to bail rules.

### III QUANTITATIVE ANALYSIS

#### A Results

Across the examined jurisdictions, 71 amending Acts were passed during the review period (25 in NSW; 19 in Queensland; and 27 in Victoria). Of these, 42 (59%) were assessed as making 'significant' amendments (16 (64%) in NSW; 12 (63%) in Queensland; and 14 (52%) in Victoria).<sup>36</sup> Of those significant amending Acts, we classified 22 (52%) as designed to decrease access to bail, 6 (14%) as designed to increase access to bail and 15 as administrative (noting that one Victorian amending Act was counted twice as it was designed to simultaneously increase and decrease access to bail).<sup>37</sup>

One of the aims of the present study was to determine whether the patterns identified by Steel in his 2009 study – that is, high volumes of legislative reform with a heavy

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32 This process was facilitated by using the 'History of Amendments' tool in respect of each core *Bail Act* in the online legislation database 'Lawlex' (at <<http://www.lawlex.com.au>>). This generated a list of the amending legislation which could be downloaded for analysis. The lists were compared with the historical notes annexed to each of the *Bail Acts*.

33 South Australia has also experienced significant legislative amendments to the *Bail Act 1985* (SA). See also Bartels et al (n 2).

34 Like Steel, we counted each discrete amending Act once rather than the number of changes brought by each Act.

35 John W Creswell and Cheryl N Poth, *Qualitative Inquiry and Research Design* (Sage, 4<sup>th</sup> ed, 2016).

36 Of the 29 'insignificant' amendments, 9 were in NSW; 7 were in Queensland; and 13 were in Victoria.

37 The *Bail Amendment Act 2016* (Vic) was counted twice.

emphasis on restricting access to bail<sup>38</sup> – were still in operation in NSW, Queensland and Victoria. We identified some notable changes over time and between jurisdictions. In summary, the 2009–18 period saw a more mixed picture of governmental intervention than was evidenced during the period under review in Steel’s research.

Table 1 summarises our findings for the 2009–18 period in addition to data from Steel’s study covering the 1992–2008 period.<sup>39</sup>

Table 1: No and Type of Significant Amendments – NSW, Qld, Vic: 1992–2018

Period	Change Type	NSW	Qld	Vic	Total
2009 to 2018 (10 years)	Significant changes	16	12	14	42
	Changes decreasing access to bail	7 (44%)	7 (58%)	8 (57%)	22 (52%)
	Changes increasing access to bail	2 (12.5%)	2 (17%)	2 (14%)	6 (14%)
	Administrative changes	7	3	5	15
1992 to 2008 (17 years)	Significant changes	25	19	13	57
	Punitive changes	23 (92%)	3 (16%)	6 (46%)	32 (56%)
	Changes increasing access to bail	0 (0%)	0 (0%)	0 (0%)	0 (0%)
	Administrative changes	2 (8%)	16 (84%)	7 (54%)	25 (44%)

The 22 instances of amendments designed to decrease bail included:

- the removal of presumptions in favour of bail for particular offences;
- the creation of presumptions against bail for particular offences or on the basis of membership of a criminal organisation or particular group;<sup>40</sup>
- raising the threshold test with respect to rebutting presumptions against bail;
- the introduction of additional considerations to the determination of bail;<sup>41</sup>
- the creation of new conditions imposable upon a bail applicant;<sup>42</sup>
- the creation of mandatory bail conditions for particular offences or persons;<sup>43</sup>
- making it mandatory for a bail authority to consider the imposition of certain bail conditions;

38 Steel (n 2).

39 A full list of the categorised legislation is contained in the Appendix.

40 For instance, presumptions against bail for offences concerning terrorism, organised crime, domestic violence and sex offences.

41 For instance, the introduction of a consideration concerning the views of the victim or victim’s family and a consideration as to whether the bail applicant had shown any public support for terrorism.

42 For instance, the creation of a condition requiring a GPS tracking device to be worn.

43 For instance, a mandatory condition requiring a bail applicant’s passport to be surrendered if they are not a permanent Australian resident or an Australian citizen.

- additional restrictions on making fresh bail applications; and
- the introduction of offences for breaching bail conditions and committing further offences whilst on bail.

The number of amendments decreasing access to bail far outweighed the number of amendments increasing access to bail, as Table 1 shows. Furthermore, the percentage of amendments decreasing access to bail (52%) was roughly similar to the percentage of ‘punitive’ changes in Steel’s study (56%) – reflecting a continuing legislative trend towards reducing access to bail. In terms of frequency of changes in our 10-year study, it is noted that in Victoria there were eight amendments reducing access to bail compared to six in Steel’s longer 17-year survey. An increase in frequency was also observed in Queensland, with seven such amending statutes passed during our study compared with only three during Steel’s study. However, there was a marked slowing of the frequency of changes that decreased access to bail in NSW compared to the frequency of punitive changes in Steel’s study (respectively, 6 versus 23).

While the dominant character of bail reform, therefore, remains inclined towards restricting access to bail, our study did identify some counter-currents, with 14% of significant changes to bail laws designed to *increase* access to bail (12.5% in NSW; 17% in Queensland; and 14% in Victoria).<sup>44</sup> Amendments designed to increase access to bail included:

- removing the presumption against bail for certain offences;<sup>45</sup>
- removing a mandatory requirement for a bailed defendant to undertake the Drug and Alcohol Assessment Referral course;<sup>46</sup>
- increasing the availability of repeat bail applications;<sup>47</sup> and
- legislative requirements to make remanding children in custody a matter of last resort.<sup>48</sup>

Notably, Steel’s study did not find any legislative amendments that increased access to bail. While this is an important difference to the current period under evaluation (as will be discussed in the next part of the article), often amendments designed to increase access to bail were short-lived, with political priorities often returning to prioritising ‘harm-risk mitigation’.

#### IV QUALITATIVE ANALYSIS

Qualitative analysis of the 71 statutes in the study’s review period identified six key themes – three related to changes that decreased access to bail, and three related to (the less common) changes that increased access to bail.<sup>49</sup> Amendments that *decreased* access to bail often: followed a ‘trigger’ incident; were explained on the basis of ‘community safety’ considerations; or were justified as necessary to target ‘demonised’

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44 *Courts and Crimes Legislation Amendment Act 2009* (NSW) sch 2 cl 2.1, as enacted; *Bail Amendment Act 2010* (Vic); *Bail Act 2013* (NSW); *Bail Amendment Act 2016* (Vic); *Serious and Organised Crime Legislation Amendment Act 2016* (Qld); *Tackling Alcohol-Fuelled Violence Legislation Amendment Act 2016* (Qld).

45 *Serious and Organised Crime Legislation Amendment Act 2016* (Qld).

46 *Tackling Alcohol-Fuelled Violence Legislation Amendment Act 2016* (Qld).

47 *Courts and Crimes Legislation Amendment Act 2009* (NSW).

48 *Bail Amendment Act 2016* (Vic).

49 An additional theme we identified was that domestic violence prevention was the focus of a number of significant amendments decreasing access to bail.



groups.<sup>50</sup> Amendments that *increased* access to bail were identified as: reactions to earlier amendments (typically, by a previous government) considered to be overly restrictive; adjustments to increase access to bail for vulnerable groups (in this case, children); and comprehensive, evidence-based overhauls to the bail regimes. It is to be noted that these themes are not exclusive and have a degree of overlap. However, we have found them useful in explaining and characterising the various (and often similar) types of changes observed. For instance, while some instances of amendments targeting ‘demonised’ groups could be described as involving a ‘trigger’ incident, we have treated this as a separate influence so as to capture the impact of pre-existing attitudes towards particular groups such as bikie gangs and terrorists.<sup>51</sup>

A notable difference between the two types of bail reform was the law-making process<sup>52</sup> associated with amending the *Bail Acts*. Amendments that decreased access to bail were often characterised by what we consider to be an absence of consultation with experts and legal stakeholders, or the undertaking of research and obtaining of evidence, prior to making changes. By contrast, amendments that increased access to bail were often associated with evidence-based and well-considered reform processes, but were susceptible to being unwound by a subsequent return to a more punitive political climate.

## A Amendments That Decreased Access to Bail

### 1 *The Role of Trigger Cases in Instigating Changes That Decreased Access to Bail*

Of the 22 instances of legislative amendment that decreased access to bail, 10 (45%) were responses to ‘trigger’ cases – often extremely violent incidents involving fatalities and a high degree of media attention that created a political incentive for action.<sup>53</sup> Four

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50 Luke McNamara and Julia Quilter, ‘The “Bikie Effect” and Other Forms of Demonisation: The Origins and Effects of Hyper-Criminalisation’ (2016) 34(2) *Law in Context* 5. The groups targeted in the 2009–18 period were outlaw motorcycle gangs, suspected terrorists, and suspected sexual offenders.

51 *Ibid.*

52 McNamara et al (n 7).

53 The amendments made pursuant to trigger cases were: *Crimes (Criminal Organisations Control) Act 2009* (NSW) in response to the 22 March 2009 Sydney Airport brawl between the Hells Angels and the Comancheros; New South Wales, *Parliamentary Debates*, Legislative Assembly, 2 April 2009, 14440 (Nathan Rees); *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) in response to the 27 September 2013 brawl between the Bandidos and Finks at Broadbeach: Queensland, *Parliamentary Debates*, Legislative Assembly, 15 October 2013, 3208 (Campbell Newman); *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act 2013* (Qld) in response to restrictive judicial interpretation of an earlier introduced presumption against bail: Queensland, *Parliamentary Debates*, Legislative Assembly, 21 November 2013, 4201 (Jarrod Bleijie); *Bail Amendment Act 2014* (NSW) in response to the June 2014 decisions to grant bail to Steven Fesus, Hassan Ibrahim, and Mahmoud Hawi under the new *Bail Act 2013* (NSW): Brown and Quilter (n 3) 76–80; *Bail Amendment Act 2015* (NSW) in response to the Lindt Café siege perpetrated by Man Haron Monis on 15–16 December 2014, and the murder of Police officer Curtis Cheng by Farhad Khalil Mohammad Jabar at Parramatta Police station on 2 October 2015: New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 October 2015, 4610 (Gabrielle Upton); *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) in response to the 17 March 2015 murder of Masa Vukotic by Sean Price, among other offences: Victoria, *Parliamentary Debates*, Legislative Assembly, 2 September 2015, 3007 (Wade Noonan); *Bail (Domestic Violence) and Another Act Amendment Act 2017* (Qld) in response to the 31 January 2017 murder of Teresa Bradford by estranged husband David Bradford: Queensland, *Parliamentary Debates*, Legislative Assembly, 22 March 2017, 766 (Tim Nicholls); *Bail Amendment (Stage One) Act 2017* (Vic) in response to the Bourke Street Mall attack on 20 January 2017: Victoria, *Parliamentary Debates*, Legislative Assembly, 25 May 2017, 1492 (Martin Pakula); *Justice Legislation Amendment (Terrorism) Act 2018* (Vic) in response to the Brighton siege whereby Yacqub Khayre (who was on parole but not bail) killed a man, held a

categories of trigger cases were used to justify changes that decreased access to bail: four cases where the bailed accused engaged in further offending whilst at liberty; a series of three controversial grants of bail unaccompanied by further offending or breach of conditions; three cases unrelated to bail where reactive, widespread criminal law reforms nonetheless ‘captured’ bail laws; and one case involving judicial interpretation of the law. The four cases in the first category will be analysed in this section with the other categories explored during the subsequent discussion of the remaining themes.

There were four instances of amendments to bail laws directly triggered by cases whereby the bailed accused engaged in further offending whilst at liberty.<sup>54</sup> Perhaps the most widely publicised was the Bourke Street Mall attack by Dimitrios Gargasoulas on 20 January 2017. At the time of the attack, Gargasoulas was on bail, granted by an after-hours bail justice on 14 January 2017.<sup>55</sup> According to media reports, Gargasoulas was on bail in relation to a series of offences including dangerous driving, stealing a car, ignoring a police direction to stop, driving whilst disqualified, and ‘skipping’ bail.<sup>56</sup> In response, the Andrews Labor Government announced a comprehensive review of the Victorian bail regime to be conducted by former Supreme Court Justice and Director of Public Prosecutions, the Hon Paul Coghlan QC.<sup>57</sup>

The *Bail Amendment (Stage One) Act 2017* (Vic) implemented a number of recommendations made in Coghlan’s first advice.<sup>58</sup> It passed Parliament on 8 June 2017, with most of the amendments coming into operation on 21 May 2018 and the remaining provisions commencing on 1 July 2018.<sup>59</sup> These amendments were described as the ‘first stage of this Government’s reform to the *Bail Act* to increase community safety

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woman hostage and shot three police officers: Victoria, *Parliamentary Debates*, Legislative Assembly, 10 May 2018, 1338 (Martin Pakula).

- 54 The Bourke Street Mall attack; the Lindt Café siege; the murder of Masa Vukotic by Sean Price; and the murder of Teresa Bradford by estranged husband David Bradford. It is additionally noted that whilst the *Terrorism (High Risk Offenders) Act 2017* (NSW) was not a direct and immediate response to the Lindt Café siege, it was referred to in the second reading speech introducing the legislation: New South Wales, *Parliamentary Debates*, Legislative Assembly, 15 November 2017, 53–4 (Mark Speakman). Therefore, five legislative changes can be linked with these four trigger cases.
- 55 ‘Melbourne Car Attack: Accused Bourke St Killer Dimitrios Gargasoulas Charged with Five Counts of Murder’, *ABC News* (online, 23 January 2017) <<http://www.abc.net.au/news/2017-01-23/accused-bourke-st-killer-charged-with-five-counts-of-murder/8204148>>; Bianca Hall, ‘Court Documents Unclear if Police Opposed Bail, Magistrate Says’, *The Age* (online, 25 January 2017) <<http://www.theage.com.au/victoria/court-documents-unclear-if-police-opposed-bail-magistrate-says-20170125-gtyk7s.html>>; ‘Bourke Street Accused “Claimed to be a Police Informer”’, *The Australian* (online, 26 August 2017) <<http://www.theaustralian.com.au/news/nation/bourke-street-accused-claimed-to-be-a-police-informer/news-story/4aa0e57dad88fc80a83304b747969793>>.
- 56 Anthony Dowsley and James Campbell, ‘Bourke St Rampage Accused Freed Days before Tragedy after Claiming He Was Police Snitch’, *Herald Sun* (online, 25 August 2017) <<http://www.heraldsun.com.au/news/law-order/bourke-st-rampage-accused-freed-days-before-tragedy-after-claiming-he-was-police-snitch/news-story/bcfe083bd6a856ae274b28e9d45d3a7d>>; Hall (n 55); Shannon Deery, ‘Bourke St Rampage Accused Dimitrios Gargasoulas Avoids Court Appearance’, *Herald Sun* (online, 20 March 2017) <<http://www.heraldsun.com.au/news/law-order/bourke-st-rampage-accused-dimitrios-gargasoulas-avoids-court-appearance/news-story/46a6afb9bdb8102e24c2b469e31d8e7d>>. It is noted that earlier reports suggested that Gargasoulas was on bail with respect to an alleged assault of his mother’s partner: see Anthony Galloway and Mark Buttler, ‘Fatal CBD Horror Leads to Bail Law Review’, *Herald Sun* (online, 23 January 2017) <<http://www.heraldsun.com.au/news/victoria/fatal-cbd-horror-leads-to-bail-law-review/news-story/0ec1e7d8c5b66f25a81f48076f88a992>>.
- 57 Andrews (n 19).
- 58 Coghlan (n 19).
- 59 *Bail Amendment (Stage One) Act 2017* (Vic) s 2(2), Endnotes; Victoria, *Victoria Government Gazette*, No S218, 15 May 2018, 1; *Bail Act 1977* (Vic), Endnotes, Table of Amendments.

and public confidence in the bail system'.<sup>60</sup> Importantly, while some of the reforms may have prevented Gargasoulas from obtaining bail (had they been in place when the decision was made), many changes went beyond the scope of his particular circumstances.

With respect to the amendments that could be viewed as related to Gargasoulas' bail determination, the offence of 'aggravated carjacking' (which *may* correspond to his alleged car theft charge) was elevated from a presumption against bail requiring the applicant to 'show cause' as to why detention in custody was not justified to the more onerous presumption against bail requiring 'exceptional circumstances' to be demonstrated.<sup>61</sup> Further amendments exclude bail justices from determining bail applications for 'exceptional circumstances' offences, with this authority now vesting with the courts.<sup>62</sup> The bail justice system is unique to Victoria and involves citizen volunteers, who have completed the Bail Justice Training Program, to make bail decisions in the event that a person is arrested on a weekend or public holiday, rather than the process having to be suspended until court is next in session.<sup>63</sup>

If Gargasoulas had been charged with car theft, he would now have had to rebut the presumption against bail with a higher threshold and at a court (rather than a bail justice) hearing, which may indeed have influenced the outcome. However, a range of legislative changes that decreased access to bail would have had no bearing on the determination in his case. Presumptions against bail were created for the offences of rape, manslaughter, child homicide and armed robbery, while the offence of aggravated home invasion was elevated from a 'show cause' presumption to the 'exceptional circumstances' category.<sup>64</sup> Furthermore, the 'show cause' threshold was raised to the more rigorous terminology of 'shows compelling reason',<sup>65</sup> making it more difficult for an accused to secure bail for a range of offences unrelated to the Bourke Street Mall tragedy, such as kidnapping and cultivation of narcotic plants.<sup>66</sup> This demonstrates how trigger cases can lead to wide-ranging 'punitive' changes, exceeding the specificity of the issues that initially instigate the intervention.

While trigger cases may result in wide-ranging reforms beyond the circumstances of the particular case, there were instances of intervention that reflect the trigger case very specifically. For instance, following the 2015 murder of Masa Vukotic by Sean Price, who was granted bail in October 2014 and was also subject to a post-custodial supervision order for serious sex offenders,<sup>67</sup> two presumptions against bail were

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60 Victoria, *Parliamentary Debates*, 25 May 2017 (n 53) 1492 (Martin Pakula).

61 Coghlan (n 19) 50.

62 *Bail Amendment (Stage One) Act 2017* (Vic) s 11(2) (inserting s 13(3) into the *Bail Act 1977* (Vic)).

63 See Emma Colvin, 'Bail Justices in Victoria: Perceptions and Experiences' (2017) 29(2) *Current Issues in Criminal Justice* 123.

64 *Bail Amendment (Stage One) Act 2017* (Vic) s 13 (inserting schs 1 and 2 into the *Bail Act 1977* (Vic)).

65 *Ibid* s 5(8) (modifying s 4(4) of the *Bail Act 1977* (Vic)). This was despite Coghlan's recommendation to change the 'show cause' terminology to 'show good reason': Coghlan (n 19) 3. The government conceded that the change in terminology 'will in some cases mean that a bail decision-maker applies a more rigorous approach to the question of bail': Victoria, *Parliamentary Debates*, 25 May 2017 (n 53) 1491 (Martin Pakula).

66 *Bail Amendment (Stage One) Act 2017* (Vic) ss 5(8), 13. See also schs 1 cls 6(c)-(d), 2 cl 21. It is noted that, unlike the first stage changes, the *Bail Amendment (Stage Two) Act 2018* (Vic) which commenced on 1 July 2018 did not encompass reform designed to decrease access to bail. The significant changes restructured provisions containing the three tests applied in making bail decisions ('exceptional circumstances', 'show compelling reason' and 'unacceptable risk') so as to provide greater clarity: s 7. A useful flowchart was also inserted: s 6. These and the other changes were best characterised as 'administrative' in nature.

67 Complex Adult Victim Sex Offender Management Review Panel, *Advice on the Legislative and Governance Models under the Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) (Report, November 2015)

created.<sup>68</sup> These presumptions mirror the circumstances of the case, applying to those charged with indictable offences if subject to such post-custodial supervision.<sup>69</sup>

Another high-profile trigger case was the 2017 Gold Coast murder of Teresa Bradford by her estranged husband, David Bradford, who subsequently committed suicide.<sup>70</sup> David Bradford was on bail in relation to serious domestic violence offences against Ms Bradford.<sup>71</sup> In direct response to these events, Opposition Leader, Tim Nicholls,<sup>72</sup> introduced a private member's Bill proposing restrictive changes to bail laws focused on persons charged with domestic violence offences.<sup>73</sup> Ultimately, the Bill passed with some amendments. Presumptions against bail were created for a number of domestic violence offences,<sup>74</sup> a consideration regarding domestic violence risk was added to the 'unacceptable risk' determination,<sup>75</sup> and a bail condition requiring suitable bail applicants to wear GPS tracking devices was created.<sup>76</sup>

A very widely publicised trigger case was the Lindt Café siege at Martin Place in Sydney, NSW, which took place in 2014.<sup>77</sup> In the morning of 15 December, Man Haron Monis, armed with a shotgun, took a number of hostages in the Café. After a 17-hour stand-off the situation culminated in gunfire during which two hostages and the offender were killed. At the time, Monis was on bail with respect to charges of being an accessory before and after the fact to the murder of his previous partner as well as a number of

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vi, 1. The post-custodial supervision order was made under the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) s 9 on the basis of an unacceptable risk of harm existing with respect to the community.

68 *Serious Sex Offenders (Detention and Supervision) and Other Acts Amendment Act 2015* (Vic) s 40; Victoria, *Parliamentary Debates* (n 53) 3009 (Wade Noonan).

69 *Bail Act 1977* (Vic) ss 4(4)(cd)–(ce) (as introduced by the *Serious Sex Offenders (Detention and Supervision) and Other Acts Amendment Act 2015* (Vic)).

70 Atkin (n 18).

71 This followed a successful bail application on 12 January 2017 with respect to offences including: choking; assault occasioning actual bodily harm; deprivation of liberty; and common assault. These offences allegedly occurred on 28 November 2016: 'Bradford Death Sparks Bail System Review' (n 18); 'Lawyer "Gobsmacked" by Murder-Suicide after Client's Bail', *97.3FM* (online, 1 February 2017) <<http://www.973fm.com.au/newsroom/lawyer-gobsmacked-by-murder-suicide-after-client-was-bailed>>.

72 *Bail (Domestic Violence) and Another Act Amendment Bill 2017* (Qld).

73 The proposed changes included: reversing the presumption for bail with respect to alleged offenders charged with relevant domestic violence offences; the establishment of a special bail condition allowing a GPS tracker to be installed on a person charged with a domestic violence offence; a new alert system informing victims of domestic violence when the defendant applies for bail, is released on bail, or receives a variation to a bail condition; and a provision allowing for urgent review of bail decisions by a higher court, with the original bail decision able to be stayed for up to three business days: Queensland, *Parliamentary Debates*, Legislative Assembly, 14 February 2017, 40–1 (Tim Nicholls).

74 Sections 16(3)(g) and 16(7) were inserted into the *Bail Act 1980* (Qld) by the *Bail (Domestic Violence) and Another Act Amendment Act 2017* (Qld) ss 6(3)–(4). Section 16(3)(g) created a presumption against bail for 'a relevant offence', which was defined by s 16(7) to include the offences of: choking, suffocation or strangulation in a domestic setting; domestic violence offences punishable by at least seven years; threatening violence, deprivation of liberty, and dangerous operation of a vehicle, if the offence is a domestic violence offence; and so forth.

75 *Bail Act 1980* (Qld) s 16(2)(f) as inserted by the *Bail (Domestic Violence) and Another Act Amendment Act 2017* (Qld) s 6(1). If a defendant is charged with domestic violence, the risk of further domestic violence must now be considered.

76 *Bail Act 1980* (Qld) ss 11(9B)–(9C) as inserted by the *Bail (Domestic Violence) and Another Act Amendment Act 2017* (Qld) s 4(1). The court was empowered to impose a condition requiring any defendant to wear such a tracking device, not just an alleged domestic violence offender as originally proposed by the *Bail (Domestic Violence) and Another Act Amendment Bill 2017* (Qld) cl 4(1).

77 Thawley and Comley (n 19) 2.

sexual offences.<sup>78</sup> The *Bail Amendment Act 2015* (NSW) was subsequently passed,<sup>79</sup> making two significant changes to NSW bail laws.<sup>80</sup>

The first change was in line with a recommendation in the Joint Commonwealth and NSW Review into the Lindt Café siege to provide for a number of mandatory considerations relevant to assessing bail decisions.<sup>81</sup> These included whether the accused person has: any associations with a terrorist organisation; any associations or affiliation with any persons or groups advocating support for terrorist acts or violent extremism; or made statements or carried out activities advocating support for terrorist acts or violent extremism.<sup>82</sup> The second significant change, not canvassed by the Joint Review, was the introduction of a *new* test requiring bail to be refused unless ‘exceptional circumstances’ are shown. It applies to an accused person who is charged with being a member of a terrorist organisation or who is charged with *any* offence in circumstances where the person has previously been convicted of terrorism offences, is subject to a terrorism control order or is contemporaneously facing terrorism charges.<sup>83</sup>

In these examples we observe governments (and oppositions) enacting amendments in a climate of significant media pressure to ‘fix’ the bail system in light of the tragic events.<sup>84</sup> Trigger cases become a ‘green-light’ to engage in punitive law-making that further restricts access to bail. While some reforms are ‘trigger specific’ (ie amendments that address the circumstances of the trigger case) a number of these amendments are ‘trigger widening’, restricting a citizen’s right to bail whose circumstances have little relationship to these tragedies. Furthermore, the focus on individual trigger cases as

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78 Ibid vi.

79 Alongside the *Terrorism (Police Powers) Amendment Act 2015* (NSW).

80 New South Wales, *Parliamentary Debates* (n 53) 4614 (Gabrielle Upton). It is noted that the ‘events in Parramatta’ (referring to the murder of Curtis Cheng) were also alluded to in the introduction of this legislation. However, the focus of the second reading speech and the media in instituting these changes was the Lindt Café siege. In this regard, see ‘New NSW Bail and Firearms Laws Announced in Response to Lindt Café Sydney Siege’, *ABC News* (online, 28 August 2015) <<https://www.abc.net.au/news/2015-08-28/mike-baird-announces-bail-and-illegal-firearms-reform/6732332>>.

81 Thawley and Comley (n 19) iv.

82 See newly inserted ss 18(1)(q)–(s) of the *Bail Act 2013* (NSW).

83 See newly inserted s 22A of the *Bail Act 2013* (NSW). Interestingly, the Lindt Café siege was again cited in the introduction of the *Terrorism (High Risk Offenders) Act 2017* (NSW), a statute which introduced a scheme for the extended supervision and continuing detention of offenders at the end of their imprisonment sentences in circumstances where they still pose an unacceptable risk of committing a serious terrorism offence. In the context of bail, that Act introduced a ‘show cause’ requirement for those charged with failing to comply with a supervision order and the mandatory consideration of whether the accused has a history of non-compliance with such orders. These changes were facilitated by extending the definition of ‘supervision order’ in s 4 of the *Bail Act 2013* (NSW) to include a supervision order under the *Terrorism (High Risk Offenders) Act 2017* (NSW), with the phrase ‘supervision order’ pre-existing under s 16B(1)(i) (show cause offences) and s 18(1)(f)(x) (relevant considerations) of the *Bail Act 2013* (NSW).

84 For example, Atkin (n 18); ‘Bradford Death Sparks Bail System Review’ (n 18); Greg Stolz and Jessica Marszalek, ‘Mum’s Murder Sparks Demands for Bail Review’, *The Courier Mail* (online, 1 February 2017) <<http://www.couriermail.com.au/news/queensland/crime-and-justice/mums-murder-sparks-demands-for-bail-review/news-story/06028b64d8beefcfee150d30cde411d5>>; Jorge Branco, ‘Teresa Bradford Murder Sparks Domestic Violence Bail Review’, *The Age* (online, 2 February 2017) <<http://www.theage.com.au/queensland/teresa-bradford-murder-sparks-domestic-violence-bail-review-20170201-gu3kzv>>; ‘Teresa Bradford Murder: Victims Would Be Told of Bail Application under LNP Bill’, *The Sydney Morning Herald* (online, 5 February 2017) <<http://www.smh.com.au/queensland/teresa-bradford-murder-victims-would-be-told-of-bail-application-under-lnp-bill-20170205-gu5x7k>>; Amy Dale, Janet Fife-Yeomans and Alicia Wood, ‘New Laws Allow Accused Wife Killer Steven Fesus to Be Released after Three Prior Refusals’, *The Daily Telegraph* (online, 16 June 2014) <<https://www.dailytelegraph.com.au/news/nsw/new-laws-allow-accused-wife-killer-steven-fesus-to-be-released-after-three-prior-refusals/news-story/33085b4e2002e208735df6810b360ca1>>. See also Brown and Quilter (n 3).

drivers for legislative change obscures the fact that the amendments apply generally and typically to categories of offences which bear little or no relation to the trigger case.

## 2 *Emphasis on ‘Community Safety’*

Our analysis of the second reading speeches associated with each of the changes across the examined jurisdictions between 2009 and 2018 found that the overwhelming rhetoric used to justify restrictive changes to bail during the review period was enhanced ‘community safety.’<sup>85</sup> While community safety is a legitimate concern with respect to bail, so too are fundamental rights (such as the presumption of innocence), which were frequently absent from the conversation. An example of this pattern is provided in the then Victorian Attorney General’s second reading speech introducing the Bail Amendment Bill 2013 (Vic): ‘[t]oo often those who are released on bail commit serious offences and breach their bail conditions’<sup>86</sup> – even though no reference was made to any data or reports in support of the claim. The Attorney-General then proceeded to iterate that the ‘reforms will help make Victorian communities safer and strengthen community confidence in the bail system’.<sup>87</sup> No reference to fundamental rights (such as the presumption of innocence) was made. In another example, the then NSW Attorney-General said in her second reading speech introducing the Bail Amendment Bill 2015 (NSW) that the ‘[g]overnment is resolved to take all possible steps to protect the community from the risk of terrorism’,<sup>88</sup> and with respect to considerations of ‘civil liberties’, ‘protection of the community must remain the paramount concern’.<sup>89</sup> The discourse used to justify these amendments lacks any specific information about *how* this will make the community ‘safer’ and fails to recognise the potential for such amendments to draw within their ambit those who should not be targeted. The mere appeal to ‘community safety’ in isolation is sufficient to justify significant restrictions on access to bail.

On the occasions that fundamental rights were raised in the second reading speeches we examined, it was often a fleeting remark, with precedence afforded to community safety and harm-risk mitigation. For instance, in the second reading speech to the *Bail Amendment Act 2014* (NSW), the then Attorney-General briefly mentioned a fundamental right (protection of the right to liberty), but only for the purpose of outlining the relegation of it from the ‘Purpose of Act’ section to the Preamble.<sup>90</sup> No comment was made about the importance of protecting the right of an accused person to be at liberty or how such a right would be affected through the forthcoming changes. We argue that it is concerning that the political discourse frequently excludes consideration of fundamental rights, given that they are necessarily restricted whenever punitive intervention occurs.

In our analysis, the strength of the community-protection-centred discourse intensified where changes to bail laws were part of wider reforms, particularly those targeting demonised groups such as outlaw motorcycle gangs (discussed further below). For instance, in introducing the punitive bail-restrictive measures following a brawl

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85 We found that ‘community safety’ was either directly referenced or alluded to in 91% of the second reading speeches during this period.

86 Victoria, *Parliamentary Debates*, Legislative Assembly, 17 April 2013, 1266 (Robert Clark).

87 *Ibid.*

88 New South Wales, *Parliamentary Debates* (n 53) 4610 (Gabrielle Upton).

89 *Ibid* 4616.

90 New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 August 2014, 30504 (Brad Hazzard).

between members of the Bandidos and Finks outside a restaurant at Broadbeach in Queensland in 2013,<sup>91</sup> Premier Campbell Newman announced that the new legislation<sup>92</sup> embodied ‘very tough laws ... the toughest in Australia’.<sup>93</sup> The Attorney-General said that the swift measures were needed ‘to ensure the community is protected from these vicious, violent thugs’,<sup>94</sup> and stated that ‘this government believes members or associates of criminal motorcycle gangs should be in jail and not get bail’.<sup>95</sup> Moreover, Liberal MP Jann Stuckey said that ‘some civil libertarians have even referred to [the amendments] as draconian – we make no apologies for this hard-hitting stance’.<sup>96</sup> This demonstrates clear precedence being given to community safety over fundamental rights in light of the purportedly strong and immediate need for protection from outlaw motorcycle gangs. It also reflects the trend identified in Part III of the article – namely, that the majority of amendments to bail laws in both the Steel study and our own have decreased access to bail, with very few amendments enhancing access to bail.

### 3 ‘Demonisation’

In our study we found that bail laws are, at times, ‘captured’ by wider criminal law reforms targeting specific groups, especially ‘demonised’ groups, such as outlaw motorcycle gangs and those said to be linked with terrorism.<sup>97</sup> By ‘demonisation’ we refer to the discursive construction of members of a particular group as ‘folk devils’, in the language of Cohen’s classic ‘moral panic’ analysis.<sup>98</sup> Members of demonised groups are prefigured, based on their past behaviours or deemed exploits, as ‘so contemptible ... that extraordinary measures are required (and justified) in order to quell them and re-establish social order’.<sup>99</sup> They are imbued with inherent ‘dangerousness’, and this attribute justifies restrictive and punitive measures that might otherwise be regarded as excessive and objectionable in a liberal democratic society.<sup>100</sup> During the period of our study we found three instances of restrictive amendments to bail laws in relation to cases unrelated to issues relevant to bail but justified based on an appeal to such demonised groups.<sup>101</sup>

91 Queensland, *Parliamentary Debates* (n 53) 3208 (Campbell Newman); Greg Stolz, ‘How One Text Message Launched Broadbeach Biker Brawl’, *The Courier Mail* (online, 4 May 2015) <<http://www.couriermail.com.au/news/queensland/how-one-text-message-launched-broadbeach-biker-brawl/news-story/464eca5d7f7dfd9372fed6de118c92c9>>.

92 *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld).

93 Queensland, *Parliamentary Debates* (n 53) 3208 (Campbell Newman).

94 Queensland, *Parliamentary Debates*, Legislative Assembly, 15 October 2013, 3156 (Jarrod Bleijie).

95 *Ibid* 3157.

96 Queensland, *Parliamentary Debates*, Legislative Assembly, 15 October 2013, 3226 (Jann Stuckey).

97 McNamara and Quilter (n 50) 6.

98 Stanley Cohen, *Folk Devils and Moral Panics* (Routledge, 3<sup>rd</sup> ed, 2002).

99 McNamara and Quilter (n 50) 6.

100 Michalis Lianos and Mary Douglas, ‘Dangerization and the End of Deviance: The Institutional Environment’ in David Garland and Richard Sparks (eds), *Criminology and Social Theory* (Oxford University Press, 2000) 103. See also Jonathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford University Press, 2007) 77; John Pratt, *Governing the Dangerous: Dangerousness, Law and Social Change* (Federation Press, 1997).

101 *Crimes (Criminal Organisations Control) Act 2009* (NSW) in response to the 22 March 2009 Sydney Airport brawl between the Hells Angels and the Comancheros: New South Wales, *Parliamentary Debates* (n 53) 14440 (Nathan Rees); *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) in response to the 27 September 2013 brawl between the Bandidos and Finks at Broadbeach: Newman (n 53) 3208; *Justice Legislation Amendment (Terrorism) Act 2018* (Vic) in response to the Brighton siege whereby Yacqub Khayre (who was on parole but not bail) killed a man, held a woman hostage and shot three police officers: Victoria, *Parliamentary Debates*, 10 May 2018 (n 53) 1338 (Martin Pakula). It is further noted that the murder of police

In response to the bikie brawl between the Bandidos and Finks referred to above, and as part of a three-Bill reform package that brought about a range of changes (including the introduction of control orders and increased regulation of the tattoo parlour industry),<sup>102</sup> a presumption against bail was introduced. This required bail applicants to ‘show cause’ as to why their detention in custody was not justified and was applicable where the defendant was a ‘participant in a criminal organisation’.<sup>103</sup> It did not matter whether the offence charged was ‘indictable’, ‘simple’, or ‘regulatory’.<sup>104</sup> Furthermore, in the event that the bail applicant did ‘show cause’, it was a mandatory condition of bail that their passport be surrendered.<sup>105</sup> However, we could not locate any reports indicating that any of the alleged offenders were on bail. Indeed, there was no evident connection with bail whatsoever. Despite this, bail laws were swept up by wider ‘law and order’ style reform.<sup>106</sup> This illustrates one way in which the demonisation of particular groups can be used by governments as a blanket justification for broader reforms.<sup>107</sup>

A very similar response occurred in NSW, with legislative changes following a brawl at Sydney Airport between the Hells Angels and the Comancheros on 22 March 2009,<sup>108</sup> during which a Hells Angels bikie was killed.<sup>109</sup> Significant and wide-ranging criminal law reforms were made, including the introduction of control orders and laws preventing criminal organisation members from engaging in certain industries, and the creation of a new association offence.<sup>110</sup> Although the events were not related to bail in any identifiable way, then Premier Nathan Rees said that ‘[t]o help take these gang members off the streets there will be no presumption in favour of bail for this [new] offence’.<sup>111</sup> Discourse of this nature demonstrates what Brown and Quilter have dubbed conflation of ‘accusation, guilt and punishment’,<sup>112</sup> showing disregard to the presumption of innocence, and demonstrating punitive redress justified upon the demonisation of outlaw motorcycle gangs.<sup>113</sup>

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officer Curtis Cheng by Farhad Khalil, which was said to contribute to the introduction of the *Bail Amendment Act 2015* (NSW) (along with the Lindt Café siege), was unrelated to bail: New South Wales, *Parliamentary Debates* (n 53) 4610 (Gabrielle Upton).

102 Tattoo Parlours Bill 2013 (Qld); Criminal Law (Criminal Organisations Disruption) Amendment Bill 2013 (Qld); Vicious Lawless Association Disestablishment Bill 2013 (Qld).

103 *Bail Act 1980* (Qld) s 16(3A) inserted by *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) s 4(1).

104 *Bail Act 1980* (Qld) s 16(3C) inserted by *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) s 4(1).

105 *Bail Act 1980* (Qld) s 16(3A)(b) inserted by *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) s 4(1).

106 Hogg and Brown (n 1).

107 McNamara and Quilter (n 50).

108 *Crimes (Criminal Organisations Control) Act 2009* (NSW).

109 Dylan Welch, Les Kennedy and Ellie Harvey, ‘Bikie Killed in Sydney Airport Brawl’, *The Sydney Morning Herald* (online, 23 March 2009) <<http://www.smh.com.au/national/bikie-killed-in-sydney-airport-brawl-20090322-95xc.html>>.

110 The new offence, which concerned association between members of declared organisations subject to control orders, was introduced under s 26 of the *Crimes (Criminal Organisations Control) Act 2009* (NSW).

111 New South Wales, *Parliamentary Debates* (n 53) 14440 (Nathan Rees).

112 Brown and Quilter (n 3) 87.

113 Indeed, this type of demonisation was not uncommon in the 2009–18 period. Punitive changes to bail laws also occurred in New South Wales in 2014 following controversial grants of bail to Mahmoud Hawi, former President of the Comancheros, and Hassan ‘Sam’ Ibrahim, former head of the Parramatta chapter of the Nomads: *ibid* 76.



There was one instance of a restrictive change made to overcome a judicial decision which had interpreted a previous amendment to criminal organisations in a narrow and less restrictive way. The presumption against bail for ‘participants’ of criminal organisations introduced in Queensland in 2013 (discussed above) had been interpreted by the Supreme Court as applicable to persons who were ‘participants’ *at the time* of the bail application<sup>114</sup> – the net effect of this decision was to narrow the operation of the presumption against bail. The government response was to expunge the effect of this decision by passing legislation re-establishing the more expansive punitive stance taken to bail prior to the decision. Thus, the wording of the provision was broadened to encapsulate the situation where ‘it is alleged the defendant is, or has at any time been’, a participant in a criminal organisation.<sup>115</sup> In the second reading speech it was said: ‘[t]his clarifies that the intention of the legislature in the original legislation is to ensure that criminal motorcycle gang members cannot simply throw in the towel by throwing in their colours ...’.<sup>116</sup> This example is unique in that the response was in relation to restrictive judicial interpretation following clumsy legislative drafting of an earlier amendment, as opposed to an extreme case involving community harm or public violence. It does, however, demonstrate how outlaw motorcycle gangs continue to be the targets of restrictive legislative conditions such as in relation to bail.

Demonisation can also be observed in the context of terrorism. In Victoria, widespread reforms affecting bail laws followed events on 5 June 2017 when Yacqub Khayre (who was on parole, not on bail) killed a man, held a woman hostage and shot three police officers in the terrorism-related siege in the Melbourne suburb of Brighton.<sup>117</sup> These events precipitated a national debate over the need for further restrictions, and, on 9 June, then Prime Minister Turnbull announced that all states and territories had agreed to introduce presumptions against bail for accused persons ‘who have demonstrated support for, or have links to, terrorist activity’.<sup>118</sup> Victoria moved swiftly, and established an Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers. The Panel’s recommendations formed the basis for the *Justice Legislation Amendment (Terrorism) Act 2018* (Vic). In introducing the Bill, Attorney-General Martin Pakula referred to ‘a number of violent incidents in Australia’ including the terrorism-motivated ‘siege and hostage incident in Brighton in June 2017’ and said that ‘wide-ranging reforms in this Bill will support the safety of Victorians by

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114 *Da Silva v DPP (Qld)* [2013] QSC 316.

115 *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act 2013* (Qld) s 7, which amended s 16(3A) of the *Bail Act 1980* (Qld).

116 Queensland, *Parliamentary Debates*, 21 November 2013 (n 53) 4201 (Jarrod Bleijie). The Bill was introduced in the evening of 19 November 2013, with the report due by 10am on 21 November 2013 – a remarkably short period of consideration: Department of Justice and Attorney-General (Qld), *Taskforce on Organised Crime Legislation* (Report, 31 March 2016) 148.

117 Josh Butler, ‘Bail, Parole Crackdown on Terror Supporters, in Federal Extremism Shake-Up’, *Huffington Post* (online, 9 June 2017) <[http://www.huffingtonpost.com.au/2017/06/09/bail-parole-crackdown-on-terror-supporters-in-federal-extremis\\_a\\_22133698/](http://www.huffingtonpost.com.au/2017/06/09/bail-parole-crackdown-on-terror-supporters-in-federal-extremis_a_22133698/)>; Dan Oakes and Sam Clark, ‘Brighton Siege Gunman Yacqub Khayre Not on Anti-Terror Cops’ Radar Despite Extensive Criminal History’, *ABC News* (online, 21 June 2017) <<http://www.abc.net.au/news/2017-06-06/brighton-siege-gunman-yacqub-khayre-had-criminal-history/8592560>>; ‘Brighton Siege: Melbourne Police Launch Terror Probe, Investigate if Escort Was Used to Lure Officers’, *ABC News* (online, 6 June 2017) <<http://www.abc.net.au/news/2017-06-06/islamic-state-claims-responsibility-for-brighton-siege/8591540>>.

118 Council of Australian Governments, *COAG Communiqué* (Report, 9 June 2017) 1.

ensuring that Victoria Police and other justice agencies are equipped with the tools they need to address the threat of violent extremism, and keep our community safe.<sup>119</sup>

The effect of the amendments in Victoria is that, if an accused has a ‘terrorism record’ (having a conviction for a terrorism or foreign incursion offence or being subject to a terrorism related order)<sup>120</sup> or the court considers that ‘there is a risk that the person will commit a terrorism or foreign incursion offence’ (in circumstances where the prosecutor has ‘terrorism risk information’ concerning the accused and alleges there is such a risk),<sup>121</sup> new or stricter presumptions against bail apply.

The events in Queensland, NSW and Victoria exemplify bail laws being captured by wider reform, triggered by cases unrelated to bail, but justified through the demonisation of motorcycle gangs or alleged terrorists. There is no issue with bail laws being amended in conjunction with other areas of the criminal law. However, one could argue that it is problematic that punitive interference with bail laws occurs in response to unrelated cases, especially when there is little or no evidence, consultation or review supporting the changes.

## B Amendments That Increased Access to Bail

As noted in Part III of this article, six (14%) of the statutes reviewed were designed to adjust the status quo so as to increase access to bail. First, punitive measures were reversed on two occasions following a change of government. Secondly, two jurisdictions demonstrated a less restrictive or ‘softer’ governmental approach to bail in response to increasing youth remand rates. Thirdly, there were two instances of widely-consulted overhauls to bail legislation backed by Law Reform Commission recommendations. These overhauls preceded a later recommencement of the punitive trend.

### 1 Roll-Back of Earlier Reforms Considered Excessively Punitive

Although it is less common for governments to relieve the strictness of bail laws, especially in light of the politicised nature of bail, there were two examples of this in Queensland which may be attributed to the severity of the measures introduced by the prior government. During the tenure of the Campbell Newman Liberal/National Government, a series of legislative reforms (primarily directed towards outlaw motorcycle gangs) were introduced. Amongst those reforms were two punitive changes

119 Victoria, *Parliamentary Debates*, 10 May 2018 (n 53) 1338 (Martin Pakula).

120 Newly inserted s 3AAB contains the definition of ‘terrorism record’. Definitions of ‘terrorism or foreign incursion offence’ and ‘terrorism-related order’ were inserted into s 3 of the *Bail Act 1977* (Vic).

121 See newly inserted s 8AA of the *Bail Act 1977* (Vic), specifically ss 8AA(1)(c)(i)–(ii). ‘Terrorism risk information’ refers to both an assessment made by a specified entity that there is a risk the person will commit a terrorism or foreign incursion offence and the information relied upon in making that assessment: at ss 3AAC(1)–(2). The prescribed bodies include the Australian Crime Commission, Victoria Police, the Australian Federal Police, Australian Security Intelligence Organisation, police forces of other states and territories and the Department of Home Affairs of the Commonwealth: at s 3AAC(2). This information includes the person having expressed support for the doing of a terrorist act, a terrorist organisation or the provision of resources to a terrorist organisation or having an association with a terrorist organisation: at ss 3AAC(3)(a), 3AAC(3)(b)(iii). It also includes information relating to a current or past association with another person who has expressed support terrorist acts, terrorist organisations or funding terrorist organisations and associations with persons who have been directly or indirectly engaged in preparing for, planning, assisting in, or fostering the doing of, a terrorist act: at ss 3AAC(3)(b)(i)–(ii). Note that the court cannot have regard to terrorism risk information regarding the accused having one of the relevant associations unless the accused has requisite knowledge thereof: at s 8AA(4).

to bail laws brought about in 2013 and 2014. Following the Anastacia Palaszczuk Labor Government coming into power, those changes were rolled back in 2016.

The first ‘roll-back’ concerned the presumption against bail for participants in criminal organisations introduced in 2013, which specifically targeted outlaw motorcycle gangs (as discussed above). The presumption, which applied irrespective of whether the offence was indictable, simple, or regulatory, together with the mandatory condition that a successful applicant surrender their passport, was repealed.<sup>122</sup> This was preceded by a review conducted by the Taskforce on Organised Crime Legislation,<sup>123</sup> which unanimously agreed that these amendments should be abolished.<sup>124</sup> The Taskforce held that the presumption against bail was ‘unnecessary, unreasonable and disproportionate’,<sup>125</sup> and that the mandatory passport-surrender condition was ‘unnecessary and administratively cumbersome’.<sup>126</sup>

The second ‘roll-back’ concerned further changes made by the Newman Government in 2014. A mandatory bail condition requiring the completion of the ‘Drug and Alcohol Assessment Referral’ (‘DAAR’) course had been introduced and was to be imposed if the bail applicant was charged with a ‘prescribed offence’, being a specified violence offence,<sup>127</sup> allegedly committed by a person in a public place whilst adversely affected by an intoxicating substance.<sup>128</sup> One submission made to the Committee that considered the 2014 amendments expressed strong concerns that the mandatory nature of the condition eliminated consideration of individual circumstances, such as homelessness, residence in remote communities, and issues such as alcoholism and mental health.<sup>129</sup> This resonated with the Committee which remained ‘concerned about the mandatory nature of the DAAR course’,<sup>130</sup> and specifically about the ability of alleged offenders from disadvantaged groups to comply with the bail condition. This issue was particularly important as a breach of the new condition could lead to *revocation* of bail and thus denial of fundamental rights.<sup>131</sup> It also constituted a criminal offence punishable by two years’ imprisonment.<sup>132</sup> Nonetheless, the amendments were introduced.

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122 The *Serious and Organised Crime Legislation Amendment Act 2016* (Qld) s 7(2) repealed ss 16(3A)–(3D) of the *Bail Act 1980* (Qld). It is noted that this legislation also removed the presumptions against bail for contravention of a ‘control order’ and ‘public safety order’ under ss 24, 38 of the *Criminal Organisation Act 2009* (Qld): at s 492. However, new presumptions against bail were created with respect to analogous offences under the *Penalties and Sentences Act 1992* (Qld) and *Peace and Good Behaviour Act 1982* (Qld).

123 Department of Justice and Attorney-General (Qld) (n 116).

124 *Ibid* 152.

125 *Ibid*.

126 *Ibid*.

127 Such offences had included: affray; common assault; assaults occasioning grievous bodily harm; and actual bodily harm: *Safe Night Out Legislation Amendment Act 2014* (Qld) s 5 inserting s 11AB into the *Bail Act 1980* (Qld).

128 *Ibid*.

129 Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd, Submission No 25 to Legal Affairs and Community Safety Committee, *Safe Night Out Legislation Amendment Bill 2014*, 2–3.

130 Legal Affairs and Community Safety Committee, Parliament of Queensland, *Safe Night Out Legislation Amendment Bill 2014* (Report No 70, 18 August 2014) 36. While Attorney-General Jarrod Bleijie said that persons on bail in rural areas would be able to undertake the course ‘using a range of communication methods’ such as video-conferencing or technology such as Skype: Queensland, *Parliamentary Debates*, Legislative Assembly, 26 August 2014, 2656 (Jarrod Bleijie), problems surrounding access to such technology were not addressed, and the primary issue that bail authorities were unable to respect the individual circumstances of a bail applicant remained.

131 *Bail Act 1980* (Qld) s 30.

132 *Ibid* s 29.

At the time that the DAAR condition was debated, then Labor Opposition Leader, Anastacia Palaszczuk, voiced strong criticism of the mandatory condition, arguing that ‘judicial officers should always maintain a discretion because if they know that the person is unable to properly utilise this service and if completion is a condition of their bail then the only result can be that the person ends up being arrested for a breach of bail down the track’.<sup>133</sup> In 2016, after coming into power the previous year, the Palaszczuk Government repealed and replaced the mandatory DAAR course condition.<sup>134</sup> The new provision provided courts (as opposed to police and courts) with a *discretion* to impose a condition requiring completion of the DAAR course, and only with the bail applicant’s consent.<sup>135</sup> Breach of the condition was also decriminalised.<sup>136</sup>

On one view, these rare instances of legislative reforms that increase access to bail might be seen as a successor government ‘scoring points’ at the expense of the previous government. However, we would argue that they are nonetheless noteworthy because they illustrate that bail reform is not always restrictive, and that, in certain circumstances such as these, governments may be prepared to increase rather than reduce access to bail.

## 2 Concessions for Young Offenders

One of the few offender ‘categories’ for which governments are less inclined to be punitive is young people. This was evident on two occasions between 2009 and 2018 – once in NSW and once in Victoria.

The first change of this nature occurred in NSW, which also constituted a roll-back of an earlier bail-restricting amendment. However, it was not instigated following a change in government. Rather, it was induced by pressure caused by increasing youth remand rates.

In 2007, changes had been made to section 22A of the Bail Act 1978 (NSW),<sup>137</sup> a provision prohibiting repeat bail applications unless certain grounds were established. The changes applied section 22A to all courts, as opposed to the Supreme Court alone.<sup>138</sup> Furthermore, the grounds for repeat applications were narrowed. Fresh applications could only be brought if the applicant was not previously represented, or the court was satisfied that ‘new facts or circumstances have arisen since the previous application’, sufficient to justify a new application.<sup>139</sup> This meant that an accused person whose bail had previously been refused by any court was unable to re-apply for bail unless one of these grounds was established.

In introducing the changes to section 22A, the Attorney-General, John Hatzistergos, announced that ‘New South Wales now has the toughest bail laws in Australia’,

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133 Queensland, *Parliamentary Debates*, Legislative Assembly, 26 August 2014, 2670 (Anastacia Palaszczuk, Leader of the Opposition). Palaszczuk further argued that the mandatory condition ‘could unnecessarily tie up valuable police resources processing and charging offenders for relatively minor breaches of bail when they never had any hope of complying with the condition’: at 2670.

134 *Bail Act 1980* (Qld) s 11AB, pursuant to the *Tackling Alcohol-Fuelled Violence Legislation Amendment Act 2016* (Qld) s 5.

135 *Bail Act 1980* (Qld) s 11AB.

136 *Ibid* s 11AB(2).

137 *Bail Act 1978* (NSW).

138 *Bail Amendment Act 2007* (NSW) sch 1 cl 3.

139 *Ibid*. The previous s 22A prohibited fresh applications unless the Supreme Court was satisfied that ‘special facts or special circumstances’ justified the application, as opposed to ‘new facts or circumstances’ arising since the previous application. Furthermore, the amendments prohibited lawyers from making fresh applications on behalf of their clients unless they were satisfied that one of the grounds applied.

following years of punitive amendments made to ‘ensure the community is properly protected while defendants are awaiting trial’.<sup>140</sup> However, scrutiny subsequently arose as youth remand rates were increasing. District Court Judge Haesler, in his then role as Deputy Senior Public Defender, directly commented on the ‘dramatic effect’ section 22A was having on the number of ‘child detainees’.<sup>141</sup> In fact, data from the NSW Bureau of Crime Statistics and Research showed that the time youths were spending on remand had substantially increased following the amendments,<sup>142</sup> in turn increasing ‘the number on remand at any one time’.<sup>143</sup> The severity of the section 22A restrictions were consequently rolled back in 2009.<sup>144</sup> In the process, the government conceded that the restrictive amendments to section 22A had ‘coincided with an increase in the number of people being remanded in custody’.<sup>145</sup>

The second example comes from Victoria in 2016.<sup>146</sup> This statute was unique in that it brought about changes that decreased access to bail, many of which were tailored towards alleged terrorists (as noted above), while at the same time, producing increased access to bail for children.

The Attorney-General recognised that ‘[t]he number of children remanded has increased considerably since 2012. For children aged 10–14 years, in particular, remand admissions have tripled and the number of children arrested and charged for Bail Act offences has significantly increased’.<sup>147</sup> Accordingly, a range of measures were enacted, some of which were recommended by the Victorian Law Reform Commission (‘VLRC’) in 2007.<sup>148</sup> A number of special factors, to be considered when determining bail or imposing conditions, were introduced.<sup>149</sup> For instance, it became mandatory to consider all other options before remanding a child and to consider the desirability of allowing the living arrangements, education, training, or employment of the child to continue without interruption or disturbance. Bail could no longer be refused to a child on the sole basis that adequate accommodation was unavailable.<sup>150</sup> Courts were prevented from remanding a child for longer than ‘21 clear days’ without a review taking place.<sup>151</sup> Furthermore, the offence for breach of bail conditions was rendered inapplicable to children.<sup>152</sup> However, in the same instrument, presumptions against bail

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140 New South Wales, *Parliamentary Debates*, Legislative Council, 17 October 2007, 2670 (John Hatzistergos). Furthermore, the restrictions were said to ‘guard against unnecessary, repeated bail applications that serve only to inflict further anguish upon victims’, with reference to the prevention of ‘magistrate shopping’.

141 New South Wales Law Reform Commission (n 2) 281. Haesler had said: ‘The newly amended s 22A of the *Bail Act 1978* has had an immediate and dramatic effect on the number of prisoners and child detainees on remand. Baxter Juvenile Detention Centre is full. Kids [are] doubling up in cells meant for one and are sleeping in the spare visitors rooms’: Andrew Haesler, ‘Bail Laws 2008: s 22A *Bail Act 1978*’ (Seminar Paper, NSW Criminal Defence Lawyer’s Association, 16 April 2008).

142 New South Wales Law Reform Commission (n 2) 280–1.

143 Stubbs (n 3) 490.

144 Pursuant to the *Courts and Crimes Legislation Amendment Act 2009* (NSW) sch 2 cl 2.1. The ground permitting further applications relating to ‘new facts’ was repealed and replaced with the ground to include any relevant information ‘not presented to the court in the previous application’.

145 New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 October 2009, 18628 (Barry Collier).

146 *Bail Amendment Act 2016* (Vic).

147 Victoria, *Parliamentary Debates*, Legislative Assembly, 25 November 2015, 4968 (Martin Pakula).

148 Victorian Law Reform Commission (n 3). Specifically, Recommendations 128–9 were incorporated into the newly inserted s 3B of the *Bail Act 1977* (Vic).

149 Indeed, the factors are relevant when a ‘determination’ under the *Bail Act 1977* (Vic) is made: s 3B(1).

150 *Ibid* s 3B(3).

151 *Ibid* ss 12(1AA)–(1AB).

152 *Ibid* s 30A(3).

were created for two terrorism-related offences,<sup>153</sup> and terrorism-related considerations were created with respect to the ‘unacceptable risk’ test, namely, whether the accused had expressed public support for a terrorist act, or publicly supported or provided resources to a terrorist organisation.<sup>154</sup>

The stark contrast between the attitude towards bail access reflected in these examples, and the pattern of measures directed at groups such as outlaw motorcycle gangs and alleged terrorists, is another reminder that bail law reform defies simple characterisation. Where governments frequently target publicly demonised groups,<sup>155</sup> and use harm-risk minimisation rationales to restrict access to bail, it is evident that, in the case of children, other considerations may come into play including a stronger commitment to avoiding detention.

### 3 Comprehensive Evidence-Based Overhauls

Between 2009 and 2018 there were two occasions of significant change to bail regimes with the backing of law reform commission (‘LRC’) reviews and wide stakeholder consultation – a complete overhaul in NSW and a partial overhaul in Victoria. These are rare examples of evidence-based reform to bail laws. Interestingly, the political discourse informing these changes seemed to be transformed by the analysis contained in the LRC reports, with fundamental rights receiving greater attention. However, with particular emphasis on the subsequent events in NSW, the focus quickly returned to community safety.

The overhaul to the NSW bail system has been well documented.<sup>156</sup> Simply put, the *Bail Act 2013* (NSW) replaced the old regime,<sup>157</sup> incorporating a range of NSW Law Reform Commission (‘NSWLRC’) recommendations.<sup>158</sup> This included removal of the complex presumptions system in favour of the ‘unacceptable risk’ model,<sup>159</sup> legislative redrafting in plain English,<sup>160</sup> restrictions on the imposition of bail conditions,<sup>161</sup> and a requirement that bail authorities consider the presumption of innocence and general right of an accused person to be at liberty when making decisions.<sup>162</sup> Ultimately, the overhaul embodied a balanced and sensible ‘resetting’ of the NSW bail regime after some 35 years of repeated, punitive amendment. Although not a ‘pure’ enactment of the NSWLRC’s recommendations, the *Bail Act 2013* received bipartisan support and was widely regarded by commentators and stakeholders as an instance of quality law reform.<sup>163</sup>

However, any expectation that the *Bail Act 2013* (NSW) marked a decisive move away from the long-term punitive adjustment to the rules on bail was soon dashed. Shortly after the new and improved bail regime came into operation, the NSW Government responded to three cases which involved controversial decisions to grant

153 *Ibid* s 4(2)(b). The offences are under ss 4B(1) and 21W of the *Terrorism Community Protection Act 2003* (Vic).

154 *Bail Act 1977* (Vic) s 4(3)(ba).

155 McNamara and Quilter (n 50).

156 Brown and Quilter (n 3).

157 *Bail Act 1978* (NSW).

158 New South Wales Law Reform Commission (n 2).

159 New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 May 2013, 19839 (Greg Smith).

160 *Ibid*.

161 *Ibid* 19841.

162 *Bail Act 2013* (NSW) s 3, as enacted.

163 David Shoebridge, ‘Law Reform: Bail Law Reforms in NSW’ (2014) 39(2) *Alternative Law Journal* 132.

an accused person bail.<sup>164</sup> These bail grants were unaccompanied by further offending or breach of conditions but became controversial due to media ‘hijack[ing]’ of sensible discussion,<sup>165</sup> with bail granted to ‘figures who evoked popular anxiety and anger’,<sup>166</sup> creating ‘concerns in the community’.<sup>167</sup> This illustrates that the imperative of community safety can quickly re-emerge and exert influence on policy-making and law reform, even at a time when more considered and sober assessment appeared to be widely embraced.

In what may be seen as giving in to media-driven pressure in the context of an upcoming election on 28 March 2015,<sup>168</sup> the Baird Government commissioned former Attorney-General John Hatzistergos to review the new Act, which took little more than a month to complete.<sup>169</sup> All of the recommendations were adopted.<sup>170</sup> This was notwithstanding the fact that the new regime had been in place for little more than a month, when no data was available to conduct a legitimate, evidence-based review of its efficacy.<sup>171</sup> No community harm had eventuated with respect to the three decisions instigating the review. Furthermore, the new Act had been based on an extensive and well-considered NSWLRC interrogation of the NSW bail regime,<sup>172</sup> and had received bipartisan support.<sup>173</sup> As a result, many of the positive reforms were quickly undone.<sup>174</sup>

This illustrates the power of the media to instigate punitive change to bail laws with little or no evidence supporting the change<sup>175</sup> and how, as a result, fundamental rights can be of secondary concern.

The partial overhaul to the Victorian bail system occurred in 2010. After nearly two years of consideration and wide consultation,<sup>176</sup> on 1 January 2007 the VLRC released its report. It made 157 recommendations.<sup>177</sup> These recommendations centred on

164 Brown and Quilter (n 3) 76. Bail was granted to: Mahmoud Hawi (former President of the Comancheros motorcycle gang); Hassan ‘Sam’ Ibrahim (former head of the Nomad motorcycle gang’s Parramatta chapter); and Steven Fesus, who had been accused of murdering his wife 17 years earlier.

165 Ibid 74, quoting David Shoebridge, ‘Law Reform: Bail Law Reforms in NSW’ (2014) 39(2) *Alternative Law Journal* 132, 133.

166 Ibid 76.

167 New South Wales, *Parliamentary Debates* (n 90) 30504 (Brad Hazzard).

168 ‘Federal, State and Territory Election Dates from 1946 to the Present’, *Australian Electoral Commission* (Web Page, 8 August 2016)

<[http://www.aec.gov.au/Elections/Australian\\_Electoral\\_History/Federal\\_State\\_and\\_Territory\\_elections\\_dates\\_1946\\_Present.htm](http://www.aec.gov.au/Elections/Australian_Electoral_History/Federal_State_and_Territory_elections_dates_1946_Present.htm)>.

169 Brown and Quilter (n 3) 76.

170 New South Wales, *Parliamentary Debates* (n 90) 30504 (Brad Hazzard). The changes were adopted by way of the *Bail Amendment Act 2014* (NSW).

171 Indeed, Hatzistergos conceded that ‘the *Bail Act* is still very new, and adequate data is not yet available’: John Hatzistergos, *Review of the Bail Act 2013* (Report, July 2014) 14.

172 New South Wales Law Reform Commission (n 2).

173 Brown and Quilter (n 3) 74.

174 Ibid 79–82. Presumptions against bail were reintroduced in the form of ‘show cause’ offences. The new restriction that bail conditions could only be imposed to mitigate an identified ‘unacceptable risk’ for the purpose of mediating the over-imposition of restrictive bail conditions was also unwound. Even if there is no ‘unacceptable risk’, s 20A permits the imposition of conditions on the basis of a ‘concern’ that a harm-risk will eventuate – a much lower threshold. The presumption of innocence and right to liberty were relegated from the ‘Purpose of Act’ section to the Preamble, likely reducing or eliminating these considerations from bail determinations. It is noted that further changes designed to decrease access to bail following the second (and final) report of Hatzistergos were introduced in the *Bail Amendment Act 2015* (NSW): see John Hatzistergos, *Review of the Bail Act 2013* (Final Report, June 2015).

175 Brown and Quilter (n 3) 74.

176 Victorian Law Reform Commission (n 3) 22.

177 Ibid 9–18.

simplifying bail laws and the tests surrounding bail grants, improving clarity around the imposition of conditions, and the creation of special considerations for marginalised and disadvantaged groups, such as Aboriginal peoples.<sup>178</sup> The Labor Government endeavoured to respond in two stages. The first stage incorporated 40 of the VLRC recommendations, with a focus on ‘clarification of the existing law and enhancement of the operation of the bail system’.<sup>179</sup> The second stage was to look at the more substantive recommendations of the VLRC, including repealing and replacing the *Bail Act 1978* (Vic). A new Act was to be drafted in plain English,<sup>180</sup> removing all presumptions against bail and replacing them with the ‘unacceptable risk’ test.<sup>181</sup>

With respect to the first stage, a number of measured changes were made.<sup>182</sup> The system of volunteer ‘bail justices’, who deal with after-hours bail applications, was given a new framework. That framework included amendments to ensure that accused persons remanded by a bail justice would be brought before a court at the earliest opportunity, as opposed to the previous maximum of eight days.<sup>183</sup> The sequence with which different types of bail conditions were to be considered was reconfigured to reflect the decision-making practice in place at the time.<sup>184</sup> A new ground permitting repeat bail applications was inserted,<sup>185</sup> with fresh applications permitted if a *bail justice* had refused or revoked bail – a measure said to reflect ‘the limited resources available to accused people in bail justice hearings, in contrast to court hearings’.<sup>186</sup> Furthermore, a new consideration for bail determinations was inserted via section 3A, requiring the decision-maker to take into account any issues that arise due to the person’s Aboriginality, including their cultural background.

Ultimately, the first-stage changes represented a partial ‘resetting’ of the Victorian bail laws, underpinned by wide consultation with justice system stakeholders and lengthy consideration. The changes were reflective of a government giving consideration to both fundamental rights and harm-risk mitigation, which was evident in the surrounding political discourse. In the second reading speech to the *Bail Amendment Act 2010* (Vic), John Lenders said:

To remand a person in custody, pending a hearing of his or her criminal offence, is a significant step to take. An accused person is presumed innocent until proven otherwise, and has a right to bail. Yet in some cases the criminal justice system recognises that a person must be kept in custody to ensure the safety of witnesses; or the safety of the community; or to ensure that the accused will appear in court ...

In considering these recommendations, the government will continue to consult with those who work with the bail system every day, and will continue to balance the need to

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178 Ibid 6–18.

179 Victoria, *Parliamentary Debates*, Legislative Council, 29 July 2010, 3501 (John Lenders).

180 Victorian Law Reform Commission (n 3) 6. The *Bail Act 1977* (Vic) had maintained the ‘same structure, language and drafting style’ of the 1970s.

181 Victorian Law Reform Commission (n 3) 7; Victoria, *Parliamentary Debates* (n 179) 3501 (John Lenders).

182 *Bail Amendment Act 2010* (Vic).

183 Section 12(1A) of the *Bail Act 1977* (Vic) was amended so that a person remanded by a bail justice was to appear before a court on the next working day, or, if not practicable, within two working days: *Bail Amendment Act 2010* (Vic) s 11(2).

184 Victoria, *Parliamentary Debates* (n 179) 3501 (John Lenders). The legislative emphasis shifted from deposits of money, sureties, and the provision of security, to conditions relating to conduct.

185 In addition to the existing grounds requiring ‘new facts or circumstances’ or that the applicant was not represented by a legal practitioner at the earlier hearing: see *Bail Act 1977* (Vic) s 18(4) as at 1 January 2011.

186 *Bail Act 1977* (Vic) s 18AA; Victoria, *Parliamentary Debates* (n 179) 3502 (John Lenders).



ensure community safety with the integrity of the criminal justice system and an individual's right to liberty.<sup>187</sup>

However, following a change of government in December 2010, the second and more substantive stage of reforms, including the removal of the presumption-based system, never took place. Instead, a series of punitive interventions ensued over the following years, including the introduction of: presumptions against bail for carjacking and home invasion offences;<sup>188</sup> new offences for breaching bail;<sup>189</sup> presumptions against bail concerning terrorism-related offences;<sup>190</sup> and increased penalties for failing to answer bail.<sup>191</sup> Once again, bail reform had a punitive focus.

## V CONCLUSION

This article has demonstrated that bail reform in Australia continues to be dominated by an approach that prioritises harm-risk mitigation over fundamental rights, and which incrementally *decreases* access to bail. Several instances of statutory amendments that *increased* access to bail in the period 2009–18 suggested the emergence of a more balanced approach by governments. However, these amendments were atypical: mere corrections of some of the previous bail-restricting changes, isolated instances limited to young people, or short-lived experiments in evidence-based law reform. None of them represented an *ongoing* substantive embrace of the principle that the presumption of innocence and the other fundamental rights of the accused should be a significant consideration in the shaping of bail laws. The trajectory of adjustments to the rules on bail remains punitive – a trend that can be traced back for more than three decades.<sup>192</sup>

It is troubling that there is willingness to hastily make significant changes to the rules on bail in the wake of single high-profile cases – whether of a serious crime committed by a person on bail, or the grant of bail to a notorious individual. The dynamics associated with this sort of reactive law-making – including rhetoric about ‘community safety’ and expectations of fast action – are often at odds with considered, consultative and evidence-based approaches to change that are the hallmarks of criminal law reform that has integrity. It is to be remembered that there are tens of thousands of bail decisions made each year (with more than 500,000 bail hearings between January 2012 and January 2015 in NSW alone),<sup>193</sup> and that tragic cases where persons go on to commit highly consequential further offending make up an extremely small number, with only four such cases identified in our 10-year study of NSW, Victoria and Queensland. It is important to view such instances in this broader context.

The frequent absence of any meaningful review or consultation with experts and legal stakeholders before statutory amendments were made was also a concerning finding. Even where such processes were undertaken, they were often under-resourced, temporally limited, and politically constrained. In addition, independent recommendations were not often adopted or were significantly modified. Furthermore,

187 Victoria, *Parliamentary Debates* (n 179) 3500–1 (John Lenders).

188 *Crimes Amendment (Carjacking and Home Invasion) Act 2016* (Vic).

189 *Bail Amendment Bill 2013* (Vic).

190 *Bail Amendment Act 2016* (Vic).

191 *Ibid.*

192 New South Wales Law Reform Commission (n 2) 29–43.

193 Steve Young and Suzanne Poynton, NSW Bureau of Crime Statistics and Research, *Did the 2013 Bail Act Increase the Risk of Bail Refusal? Evidence from a Quasi-Experiment in New South Wales* (Crime and Justice Bulletin No 212, April 2018) 3.

the fundamental rights of the accused were frequently absent from the political discourse surrounding bail restricting actions by governments. The priority afforded to harm-risk mitigation, and the need to ‘guarantee’ community safety, were the dominant themes of debates and justifications for change. A particularly alarming example was Victorian Labor Premier Daniel Andrews announcing the review of the Victorian bail regime following the Bourke Street Mall attack. Andrews stated that ‘[i]t’s our job to take the frustration, anger and the deep sadness that Victorians feel after the Bourke Street tragedy and to make sure that’s put into reform and change’, further adding, before the review had even commenced, ‘[i]t is very clear that our bail system needs a major shake-up’.<sup>194</sup> Tugging at the heartstrings of constituents through impulsive promises may be perceived by some politicians as a vote winner. However, it would be preferable if governments exercised more restraint so that ill-considered reforms do not unmeritoriously interfere with fundamental rights. The ‘guarantee’ of community safety that is offered by such a declaration is a mirage. As McNamara et al have observed: ‘Wisdom *after* the event and the promise of future vigilance ... ignores the fallibility of all efforts to predict future criminal behaviour. It indulges a fantasy of total control and seamless security against criminal risks, a perpetual summons to push out the frontier of criminalisation’.<sup>195</sup>

Another problematic finding was that evidence-based and consultative approaches in support of comprehensive overhauls of bail laws – of the sort conducted by LRCs – are rare and have a short shelf-life. In Victoria, the overhaul was only partially completed. The substantive reforms recommended by the VLRC never materialised, despite political promises. In its place, a series of restrictive changes were made over the ensuing years. In NSW, a well-informed and balanced recalibration of the bail system, underpinned by a high-quality report from the NSWLRC, was subsequently displaced following media pressure. The Government’s position dramatically returned to more restrictive bail settings in line with what were assumed to be the electorate’s expectations and the law was quickly re-written in these terms.

When governments are considering legislative adjustment to the laws governing access to bail, greater recognition needs to be afforded to the fact that, at the heart of the bail system, there is a delicate compromise between protecting the fundamental rights of an accused person (who may indeed be innocent of the offence alleged) and the object of harm-risk mitigation. It is axiomatic that protection of alleged victims, individuals and the community is a concern that legitimately justifies denying an accused person his or her fundamental rights in circumstances where that person presents an unacceptable risk. However, unless the presumption of innocence and right to liberty are abandoned entirely, and all accused persons are routinely remanded, it is inevitable that, at times, accused persons on bail will commit further offences, fail to appear, or interfere with the course of justice. Such occurrences do not necessarily reflect systemic failure requiring rectification, but rather, are a demonstration of the compromise in action. By the same token, the fact that a significant number of accused persons are denied bail but are subsequently acquitted does not of itself indicate

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194 Andrews (n 19).

195 McNamara et al (n 6) 107 (emphasis added).

systemic failure.<sup>196</sup> Both instances are an unfortunate yet inevitable cost of the imperfect exercise of predicting future human behaviour in making bail decisions.

There are a number of practical measures governments can take so as to more aptly achieve principled bail reform. Trigger cases should be viewed in light of the broader bail system. In this regard, statistics can assist in understanding the number of persons on bail who engage in re-offending, the severity of those offences, and whether persons charged with particular types of offences (such as domestic violence offences) pose greater risks of committing further offences. Crime statistics bodies, such as the NSW Bureau of Crime Statistics and Research, can provide very useful data and information. When 'trigger' cases do arise, comprehensive reviews should be undertaken before governments conclude and publicly announce that bail laws will be amended. These reviews should involve analysis of the evidence before the bail decision-maker, the conditions imposed, the reasons given for the decision, and the circumstances of the further offending. Reviews of this nature will reveal much about whether the bail decision was appropriate and whether there are issues in the decision-making process that require redress. Public announcements that a review is to be undertaken can be properly made to reassure the community that any identified issues will be addressed. It is further suggested that changes to bail law should commonly, if not invariably, involve consultation with judges, magistrates, legal practitioners, academics and other experts, as well as embracing recommendations by law reform commissions and other consultative bodies. Consultation of this kind provides rich insights and perspectives which can inform the most appropriate action to be taken. Lastly, it should be remembered that there is no benefit in rushing through changes to bail laws, which has commonly occurred in response to 'trigger' cases. As we have shown, trigger cases are isolated and infrequent and therefore do not create a need for urgent legislative intervention, particularly before the issues (if any) are identified and properly considered. Media pressure to adopt quick changes should be handled accordingly. It is our view that, with these measures in mind, governments will be much better positioned to approach the difficult task of balancing harm-risk mitigation and fundamental rights.

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196 For instance, in 2008 in both Local and higher Courts in NSW, about 9% of defendants who were bail refused were either acquitted or the charges were withdrawn: Roth (n 2) 20, citing NSW Bureau of Crime Statistics and Research, *NSW Criminal Court Statistics 2008* (Report, 2009) 24, 102.

## VI APPENDIX

### A Amending Acts Causing ‘Significant’ Amendments to the *Bail Acts* in New South Wales, Queensland and Victoria: 2009–18

#### 1 New South Wales

1. *Crimes (Criminal Organisations Control) Act 2009* (NSW)
2. *Courts and Crimes Legislation Amendment Act 2009* (NSW)
3. *Weapons and Firearms Legislation Amendment Act 2010* (NSW)
4. *Courts and Other Legislation Amendment Act 2012* (NSW)
5. *Bail Act (Enforcement Conditions) Act 2012* (NSW)
6. *Crimes (Criminal Organisations Control) Act 2012* (NSW)
7. *Bail Act 2013* (NSW)
8. *Bail (Consequential Amendments) Act 2014* (NSW)
9. *Bail Amendment Act 2014* (NSW)
10. *Bail Amendment Act 2015* (NSW)
11. *Industrial Relations Amendment (Industrial Court) Act 2016* (NSW)
12. *Justice Portfolio Legislation (Miscellaneous Amendments) Act 2016* (NSW)
13. *Justice Legislation Amendment Act 2017* (NSW)
14. *Justice Legislation Amendment Act (No 2) 2017* (NSW)
15. *Terrorism (High Risk Offenders) Act 2017* (NSW)
16. *Justice Legislation Amendment Act (No 3) 2018* (NSW)

#### 2 Queensland

1. *Criminal Organisation Act 2009* (Qld)
2. *Civil and Criminal Justice Reform and Modernisation Amendment Act 2010* (Qld)
3. *Justice and Other Legislation Amendment Act 2010* (Qld)
4. *Liquor and Other Legislation Amendment Act 2010* (Qld)
5. *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld)
6. *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act 2013* (Qld)
7. *Criminal Law Amendment Act 2014* (Qld)
8. *Safe Night Out Legislation Amendment Act 2014* (Qld)
9. *Tackling Alcohol-Fuelled Violence Legislation Amendment Act 2016* (Qld)
10. *Serious and Organised Crime Legislation Amendment Act 2016* (Qld)
11. *Criminal Law Amendment Act 2017* (Qld)
12. *Bail (Domestic Violence) and Another Act Amendment Act 2017* (Qld)

#### 3 Victoria

1. *Bail Amendment Act 2010* (Vic)
2. *Justice Legislation Amendment (Protective Services Officers) Act 2011* (Vic)

3. *Justice Legislation Amendment (Family Violence and Other Matters) Act 2012* (Vic)
4. *Bail Amendment Act 2013* (Vic)
5. *Serious Sex Offenders (Detention and Supervision) and Other Acts Amendment Act 2015* (Vic)
6. *Bail Amendment Act 2016* (Vic)
7. *Crimes Amendment (Carjacking and Home Invasion) Act 2016* (Vic)
8. *Sentencing (Community Correction Order) and Other Acts Amendment Act 2016* (Vic)
9. *Bail Amendment (Stage One) Act 2017* (Vic)
10. *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017* (Vic)
11. *Justice Legislation Amendment (Protective Services Officers and Other Matters) Act 2017* (Vic)
12. *Crimes Legislation Amendment (Protection of Emergency Workers and Others) Act 2017* (Vic)
13. *Bail Amendment (Stage Two) Act 2018* (Vic)
14. *Justice Legislation Amendment (Terrorism) Act 2018* (Vic)

## **B Amending Acts Causing ‘Insignificant’ Amendments to the *Bail Acts* in New South Wales, Queensland and Victoria: 2009–18**

### **1 New South Wales**

1. *Industrial Relations Amendment (Jurisdiction of Industrial Relations Commission) Act 2009* (NSW)
2. *Industrial Relations Further Amendment (Jurisdiction of Industrial Relations Commission) Act 2009* (NSW)
3. *Relationships Register Act 2010* (NSW)
4. *Statute Law (Miscellaneous Provisions) (No 2) Act 2011* (NSW)
5. *Road Transport Legislation (Repeal and Amendment) Act 2013* (NSW)
6. *Crimes (Serious Sex Offenders) Amendment Act 2013* (NSW)
7. *Fines Amendment Act 2013* (NSW)
8. *Statute Law (Miscellaneous Provisions) Act (No 2) 2014* (NSW)
9. *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW)

### **2 Queensland**

1. *Juvenile Justice and Other Acts Amendment Act 2009* (Qld)
2. *Forensic Disability Act 2011* (Qld)
3. *Criminal Law and Other Legislation Amendment Act 2013* (Qld)
4. *Racing Integrity Act 2016* (Qld)
5. *Mental Health Act 2016* (Qld)

6. *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act 2016* (Qld)
7. *Victims of Crime Assistance and Other Legislation Amendment Act 2017* (Qld)

### **3 Victoria**

1. *Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009* (Vic)
2. *Statute Law Amendment (Evidence Consequential Provisions) Act 2009* (Vic)
3. *Statute Law Amendment (National Health Practitioner Regulation) Act 2010* (Vic)
4. *Personal Safety Intervention Orders Act 2010* (Vic)
5. *Legal Profession Uniform Law Application Act 2014* (Vic)
6. *Honorary Justices Act 2014* (Vic)
7. *Victoria Police Amendment (Consequential and Other Matters) Act 2014* (Vic)
8. *Fines Reform Act 2014* (Vic)
9. *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic)
10. *Fines Reform Amendment Act 2017* (Vic)
11. *Corrections Legislation Further Amendment Act 2017* (Vic)
12. *Serious Offenders Act 2018* (Vic)
13. *Oaths and Affirmations Act 2018* (Vic)

## **C Amending Acts Designed to Decrease Access to Bail in New South Wales, Queensland and Victoria: 2009–18**

### **1 New South Wales**

1. *Crimes (Criminal Organisations Control) Act 2009* (NSW)
2. *Weapons and Firearms Legislation Amendment Act 2010* (NSW)
3. *Bail Amendment Act 2014* (NSW)
4. *Bail Amendment Act 2015* (NSW)
5. *Justice Legislation Amendment Act 2017* (NSW)
6. *Terrorism (High Risk Offenders) Act 2017* (NSW)
7. *Justice Legislation Amendment Act (No 3) 2018* (NSW)

### **2 Queensland**

1. *Criminal Organisation Act 2009* (Qld)
2. *Liquor and Other Legislation Amendment Act 2010* (Qld)
3. *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld)
4. *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act 2013* (Qld)
5. *Criminal Law Amendment Act 2014* (Qld)
6. *Safe Night Out Legislation Amendment Act 2014* (Qld)
7. *Bail (Domestic Violence) and Another Act Amendment Act 2017* (Qld)

### 3 *Victoria*

1. *Justice Legislation Amendment (Family Violence and Other Matters) Act 2012* (Vic)
2. *Bail Amendment Act 2013* (Vic)
3. *Serious Sex Offenders (Detention and Supervision) and Other Acts Amendment Act 2015* (Vic)
4. *Bail Amendment Act 2016* (Vic)
5. *Crimes Amendment (Carjacking and Home Invasion) Act 2016* (Vic)
6. *Bail Amendment (Stage One) Act 2017* (Vic)
7. *Crimes Legislation Amendment (Protection of Emergency Workers and Others) Act 2017* (Vic)
8. *Justice Legislation Amendment (Terrorism) Act 2018* (Vic)

## **D Amending Acts Designed to Increase Access to Bail in New South Wales, Queensland and Victoria: 2009–18**

### 1 *New South Wales*

1. *Courts and Crimes Legislation Amendment Act 2009* (NSW)
2. *Bail Act 2013* (NSW)

### 2 *Queensland*

1. *Serious and Organised Crime Legislation Amendment Act 2016* (Qld)
2. *Tackling Alcohol-Fuelled Violence Legislation Amendment Act 2016* (Qld)

### 3 *Victoria*

1. *Bail Amendment Act 2010* (Vic)
2. *Bail Amendment Act 2016* (Vic)

## **E Amending Acts Designated as ‘Administrative’ in Nature in New South Wales, Queensland and Victoria: 2009–18**

### 1 *New South Wales*

1. *Courts and Other Legislation Amendment Act 2012* (NSW)
2. *Bail Act (Enforcement Conditions) Act 2012* (NSW)
3. *Crimes (Criminal Organisations Control) Act 2012* (NSW)
4. *Bail (Consequential Amendments) Act 2014* (NSW)
5. *Industrial Relations Amendment (Industrial Court) Act 2016* (NSW)
6. *Justice Portfolio Legislation (Miscellaneous Amendments) Act 2016* (NSW)
7. *Justice Legislation Amendment (No 2) Act 2017* (NSW)

### 2 *Queensland*

1. *Civil and Criminal Justice Reform and Modernisation Amendment Act 2010* (Qld)

2. *Justice and Other Legislation Amendment Act 2010* (Qld)
3. *Criminal Law Amendment Act 2017* (Qld)

### **3 Victoria**

1. *Justice Legislation Amendment (Protective Services Officers) Act 2011* (Vic)
2. *Sentencing (Community Correction Order) and Other Acts Amendment Act 2016* (Vic)
3. *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017* (Vic)
4. *Justice Legislation Amendment (Protective Services Officers and Other Matters) Act 2017* (Vic)
5. *Bail Amendment (Stage Two) Act 2018* (Vic)