Brooke Marriner

THE LAW ON BAIL: A CASE FOR REFORM

Submitted for the LLB (Honours) Degree

Faculty of Law

Victoria University of Wellington

2018

Abstract

The Bail Amendment Act 2013 came into effect on 4 September 2013. The Act reversed the onus of proof in certain cases: for murder, Class A drug offences, and some specified offences, the starting point is a presumption that the accused will not be granted bail. The accused bears the onus of proving that they should. This paper examines the Bail Amendment Act, explains why the reverse onus is undesirable, and suggests an appropriate option for reform. This paper is particularly interested in a holistic reform option: one that takes into account the rights and interests of relevant parties after considering the underlying issues and barriers in New Zealand's bail system.

Word length

The text of this paper (excluding abstract, table of contents, appendices, footnotes and bibliography) comprises approximately 8,000 words.

Subjects and Topics

Bail Amendment Act 2013

Criminal Law - Criminal Procedure - Bail

Table of Contents

I Introduction

In New Zealand, persons charged with an offence may be granted bail while they await trial. The starting point is a presumption of bail which can be rebutted. A variety of factors are considered, such as the likelihood of the accused failing to appear in court, interfering with witnesses or evidence, and offending while on bail.[1] However, the story is different in some cases: for murder, Class A drug offences, or specified offences,[2] the accused bears the onus of proving to the court that they *do not* pose any of the risks mentioned above. The reverse onus was brought into effect by the Bail Amendment Act 2013 after the death of Christie Marceau. Bail law has recently been brought back into the spotlight. In February 2018, the Minister of Justice requested official advice on bail laws in New Zealand.[3] In March 2018, the Coroner released a report on Christie Marceau's death, recommending changes to the bail system.[4] Part II of this paper will explain the developments that lead to our current system. Part III will consider the arguments for reform. The reverse onus is an infringement on the rights of accused persons, and is not necessary to fulfil the purposes and objectives of bail. This part also considers the interests of relevant parties in a bail decision, as a matter of policy, and underlying issues in our bail system. Part IV will demonstrate that judicial discretion exercised on the merits of each case is more appropriate for decisions affecting the liberty of a person who has not yet been proven guilty. Practical measures, such as the use of bail hostels and electronic monitoring, can be taken to mitigate the risk posed to public safety or specific victims when bail is granted. These measures can also contribute to resolving some of the practical issues presented by our current bail system.

---

[1] Bail Act 2000, s 8. See Appendix A.
[2] Section 10.
This includes a range of sexual offences, violent offences, and property offences.
[3] Issac Davidson "Justice Minister Andrew Little hints at law changes as prison population climbs" *New Zealand Herald* (online ed, New Zealand, 20 April 2018).
[4] See generally: *An inquest into the death of CHRISTIE ALEXIS LESLEY MARCEAU* Coroner's Court Auckland CSU-2011-AUK-001471, 5 March 2018.

II Bail Amendment Act 2013

A Origins of Bail

Historically, individuals accused of crimes were granted bail in exchange for a guarantee, in cash, that they would stand trial.[5] Eventually, this evolved in England to include detention where a person was subject to the death penalty and posed a risk of fleeing before trial.[6] Preventing flight was the ultimate, perhaps only, purpose of bail, though there have always been arguments that bail is also a means of protecting the public.[7] Similarly, historic bail decisions in the United States treated risk of flight as the primary consideration when granting bail.[8] Danger to public safety was a secondary purpose, only persuasive where the risk posed was such that danger could only be prevented by keeping the accused imprisoned.[9] Yet today, the policy behind bail law centres around public safety.[10] Canadian authority acknowledges public safety as a valid purpose of bail.[11] A 1973 summary of a United States survey on bail cited risk of flight, preventative detention, deterrence, public safety and punitive measure as aims of bail.[12] Public safety seems to now be generally accepted as a legitimate aim of bail.

B Social and Political Climate

In the years preceding the Bail Amendment Act 2013, there were a number of high-profile offences carried out by individuals on bail. These offences attracted significant media attention and criticism of New Zealand's 'failing' justice system.

In 2005, Michael Curran was granted bail while awaiting trial for a charge of manslaughter, after killing Natasha Hayden.[13] He had previous convictions for perverting the course of

---

[5] John S. Goldkamp *Two Classes of Accused: A Study of Bail and Detention in American Justice* (Ballinger Publishing Company, Cambridge Massachusetts, 1979) at (5) - (18).
[6] At (16).
[7] At (18)
[8] Discussed at (29).
[9] Discussed at (29).
[10] See generally: (10 May 2012) 679 NZPD 2180; (02 July 2013) 691 NZPD 11518; (27 August 2013) 693 NZPD 12881.
[11] See Rt Hon Sir Douglas Graham *Report of the Attorney-General on the Crimes (Bail Reform) Bill* (Attorney General Report, 1999) at (3-4), citing *R v Morales* [1992] 3 SCR 711.
[12] Paul Bernard Wice *Bail and its Reform: A National Survey Summary Report* (US Department of Justice, October 1973) at (5).
[13] *Curran v R* HC Tauranga CRI-2005-070-765, 7 July 2005 at [30] - [33].

justice after convincing friends and family to produce a false alibi on his behalf.[14] While on bail, Curran killed Aaliyah, the two-year old daughter of neighbourhood friends.[15] Shortly before Curran's trial, his wife produced new evidence and admitted to lying on his behalf.[16] Curran was convicted of both charges.[17] Media platforms criticised the justice system for releasing Curran on bail, allowing a 'tragic' and 'preventable' death.[18]

On 8 September 2007, Augustine Borrell was killed by Haiden Davis following an altercation at a service station in Herne Bay.[19] Davis was granted bail, subject to a 24 hour curfew condition.[20] Media coverage brought multiple 'red flags' to the public's attention to demonstrate why Borrell's murder was preventable: Davis was on bail at the time for aggravated assault and theft which also took place in Herne Bay.[21] He had 25 previous convictions.[22] Eighteen were for violent offences.[23] His bail conditions had been breached twice.[24] The Sensible Sentencing Trust cited Davis' continued breach of bail conditions as evidence of a "criminal friendly, offender-centred legal process".[25] By implication, Davis should not have been on bail, and should not have had any opportunity to offend. The victim's family also spoke out, condemning the justice system for releasing Davis if he could not be closely monitored, and for granting bail to Davis a second time.[26]

In September 2011, Akshay Chand kidnapped Christie Marceau and threatened her with a knife with intent to sexually violate her.[27] Christie wrote a letter to the court, outlining her fear of further harm if Chand was granted bail, and explaining the proximity of her house to Chand's.[28] Despite this, Chand was granted bail for these charges, subject to a 24 hour

---

[14] At [21] - [24].
[15] See a summary of the facts in sentencing: *R v Curran* HC Tauranga CRI-2005-070-6292, 1 February 2008 at [15-25].
[16] *Curran v R*, above n 13 at [9] - [12].
[17] See generally: *R v Curran* HC Tauranga CRI-2005-070-765, 30 June 2006; sentencing decision: *R v Curran* above n 15.
[18] Juliet Rowan "22 convictions, but a judge set him free" *New Zealand Herald* (online ed, New Zealand, 17 November 2007).
[19] See a summary of facts on appeal: *Davis v R* [2011] NZCA 380 at [4] - [12].
[20] *R v Davis* HC Auckland CRI-2008-004-4086, 22 August 2008 at [3] - [4].
[21] Jared Savage and Andrew Koubaridis with New Zealand Police Association "Father blames bail system for son's murder" *New Zealand Herald* (online ed, New Zealand, 31 March 2009).
[22] Savage and Koubaridis, above n 21.
[23] Savage and Koubaridis, above n 21.
[24] Stuff with New Zealand Police Association "Borrell's father slams justice system" (online ed, New Zealand, 2 April 2009).
[25] Stuff with New Zealand Police Association, above n 24.
[26] Savage and Koubaridis, above n 21.
[27] *R v Chand* [2012] NZHC 2745 at [1] - [9].
[28] At [11] - [12].

curfew.[29] On November 2011, Christie was stabbed to death in her backyard by Chand.[30] Chand was convicted of kidnapping,[31] but found not guilty of murder due to insanity.[32] Public outrage followed Christie's death. Her family spoke out about the flaws of New Zealand's justice and mental health system.[33] A campaign named 'Christie's Law' began, petitioning to change bail law in New Zealand.[34]

Prolific media coverage of the incidents meant that bail law, and the apparent risk of individuals on bail, became an issue frequently discussed in the media. The stories of each of the victims above are highly emotive, rightfully described as tragedies. Policymakers are often influenced by 'public opinion' for crime related issues.[35] The theory of penal populism explains this well: politicians adopt 'tough on crime' stances as a method of gaining electoral votes, framing their policies as a means of protecting the public to quell public concern.[36] The consequence is an increasingly punitive approach to criminal justice.[37] The political background to the Bail Amendment Act 2013 lends support to this theory. In 2010, sentencing was reformed to introduce the three strikes law, which made sentences harsher for defendants who had been previously convicted and warned under the regime.[38] Defendants charged with murder were to receive sentences of life imprisonment, without parole in many cases.[39] The Victims' Rights Amendment Act 2014 came into force shortly after the Bail Amendment Act. It developed a Victims' Code,[40] broadened the scope of information permitted in victim impact statements,[41] and ensured victims were notified of outcomes of bail decisions, including conditions imposed.[42] Discussion of bail law critiqued the weight that judges put on victim impact statements, saying victims should be

[29] At [12].
[30] At [15-18].
[31] See generally: *R v Chand* [2012] NZHC 2746.
[32] See generally: *R v Chand* above n 27.
[33] Anna Leask "Christie's death: An inquest at last" *New Zealand Herald* (online ed, New Zealand, 16 December 2013).
[34] Christie's Law "Christie's Law. Help Change the Bail Act" (preceding Bail Amendment Act 2013) <www.christieslaw.org.nz>.
[35] See generally: John Pratt and Marie Clark "Penal Populism in New Zealand" (2005) 7 Sage Journals 303.
[36] See generally: Pratt and Clark, above n 35.
[37] See generally: Pratt and Clark, above n 35.
[38] Sentencing Act 2000, ss 86B, 86C, 86D, 86E.
[39] Sentencing Act 2000, s 86E.
[40] Ministry of Justice "Victims Code" (September 2016) Victims Information <www.victimsinfo.govt.nz>.
[41] Victim's Rights Act 2002, s 22.
[42] Victim's Rights Act 2002, s 34(1A).

more heavily considered in bail decisions.[43] The climate surrounding the bail amendment was one of increasing penal punitiveness and increasing focus on protecting vulnerable members of the public. Coupled with widespread media coverage of offending on bail in the early 2000s, this created demand for a harsher approach to bail. Following Christie Marceau's death, the Bail Amendment Bill 2012 was introduced to Parliament. The Law and Order Select Committee received submissions from family and friends of many of the victims discussed above, and numerous New Zealanders who felt personally affronted by these incidents.[44] Politicians focussed on these emotive, highly publicised bail cases to gain election votes and party support: to ignore them could have been political suicide.[45]

C Legislative Drivers

Public opinion on bail had a strong impact. At the first reading of the Bail Amendment Bill, a general consensus was clear: legislative change was necessary to maintain public confidence in the integrity of the bail system.[46] The House prioritised putting victims at the heart of the justice system and forcing the judiciary to put public safety at the forefront of their bail decisions.[47] These two objectives are interesting. Firstly, it was mentioned in the reading of the Bill that only 20 per cent of accused persons are on bail, evidence that judges are already exercising discretion, considering public safety.[48] Secondly, the Bill itself made no direct mention of victims' rights.[49] Rather, one can assume that victims were put at the heart of the justice system by an increased focus on protecting the public from individuals offending on bail. Indeed, the Law and Order Select Committee found that the reverse burden of proof would make public safety paramount, and consequently, ensure victim's rights are a primary consideration.[50] It was suggested that the cause of offending on bail

---

[43] Christina Coulam "Submission to the Law and Order Committee on the Bail Amendment Bill 2012"; Christie's Law Campaign "Submission to the Law and Order Committee on the Bail Amendment Bill 2012"; Tracey Marceau "Submission to the Law and Order Committee on the Bail Amendment Bill 2012"; Savage and Koubaridis, above n 21.

[44] See, for example, Tracey Marceau "Submission to the Law and Order Committee on the Bail Amendment Bill 2012"
Christie's Law Campaign "Submission to the Law and Order Committee on the Bail Amendment Bill 2012"
Christina Coulam "Submission to the Law and Order Committee on the Bail Amendment Bill 2012"
Robyn Hanson "Submission to the Law and Order Committee on the Bail Amendment Bill 2012"

[45] See generally: Pratt and Clark above n 33.

[46] See first reading of the Bill: (10 May 2012) 679 NZPD 2180.

[47] See first reading of the Bill, above n 46.

[48] See first reading of the Bill, above n 46.

[49] See generally: Bail Amendment Act 2013; Bail Amendment Bill 2011 (17-2).

[50] Bail Amendment Bill 2011 (17-2) (select committee report) at [64 - 65].

was lack of support for individuals on bail and lack of supervision, monitoring and enforcement of bail conditions.[51]

The second reading affirmed the aforementioned policy approaches of the Bill. Yet where the first reading addressed the causes of offending on bail and the risks of the current system, the second reading focussed on responding appropriately to the *consequences* of offending on bail. The House acknowledged that while one in five people offend while on bail, the majority of offending was minor.[52] Despite this, those few serious offences had disproportionately large impacts on victims and their families.[53] The House expressed sympathy and remorse for Christie Marceau's family, citing the 58,000-signature strong petition on 'Christie's Law'.[54]

Throughout the readings of the Bill, the potential effects of the bail amendment were discussed. Fundamental rights such as the presumption of innocence, the right not to be arbitrarily detained, and the right to a fair trial could be impacted.[55] The Ministry of Justice explained that these rights would not be significantly infringed.[56] The accused would either be in the best position to provide information to the court on the risk they pose, or the decision would require qualitative judicial assessment of evidence.[57] In either case, the party who bears the onus of proof makes no practical difference. Custodial rates would inevitably increase, but this was anticipated to be a modest increase.[58] Any increase was justified because offending on bail would reduce, increasing public safety and achieving the Bill's purpose.[59]

Unsurprisingly given the social and political climate, the bill was overwhelmingly supported in the third reading with 102 ayes and 19 noes.[60]

---

[51] See first reading of the Bill, above n 46.
[52] See second reading of the Bill: (02 July 2013) 691 NZPD 11518.
[53] See second reading of the Bill, above n 52.
[54] See second reading of the bill: above n 52.
[55] See first reading of the Bill, above n 46; see second reading of the Bill, above n 54.
[56] Ministry of Justice "Departmental Report for the Law and Order Committee Bail Amendment Bill" (19 September 2012) at [24].
[57] At [24].
[58] Bail Amendment Bill 2011 (17-2) (select committee report) at (2)
[59] Bail Amendment Bill 2011 (17-2) (select committee report) at (2)
[60] See third reading of the Bill: (27 August 2013) 693 NZPD 12881.

III Need for Reform

New Zealand prisons currently have capacity for only 355 more prisoners.[61] The Minister of Justice, the Hon Andrew Little, has expressed concern that the amendment resulted in an increase in New Zealand's prison population, committing to reviewing bail law.[62]

New Zealand's prison population has increased by 18.3 per cent from 2012 to 2018 - the remand population has increased by *42.4 per cent.*[63] The percentage of the prison population that is on remand has increased from 21 per cent in 2012 to 31 per cent in 2018.[64] Contrary to the extra 50 prison beds the Ministry of Justice estimated, 800 extra beds are required.[65] Overloading the prison system can result in notable fiscal cost, and put pressure on the availability and quality of prison resources. To begin with, this is a strong argument for reform. Secondly, the bail amendment is inconsistent with the rights of accused people. Thirdly, there are policy considerations and underlying issues with bail which should be accounted for.

A Consistency with Rights

The New Zealand Bill of Rights Act (NZBORA) gives accused persons:

- the right to adequate time and facilities to prepare a defence;[66]
- the right to be released on reasonable terms and conditions unless there is a just cause for continued detention,[67] and;
- the right to be presumed innocent until proven guilty.[68]

---

[61] Davidson, above n 3.
[62] Radio New Zealand "Bail law changes led to prison population increase - Little" (online ed, New Zealand, 24 February 2018).
[63] Department of Corrections "Prison facts and statistics - March 2012" (31 March 2018); Department of Corrections "Prison facts and statistics - March 2018" (31 March 2018).
Percentages calculated from the following: Between March 2012 and March 2018, New Zealand's prison population increased from 8,698 to 10,645. The population of prisoners on remand increased from 1,910 prisoners to 3,316.
[64] Department of Corrections "Prison facts and statistics - March 2012"; "Prison facts and statistics - March 2018" above n 63.
[65] Davidson, above n 3.
[66] New Zealand Bill of Rights Act, s 24(d)
[67] Section 24(b)
[68] Section 25(c).

Rights can be justifiably infringed where the infringement serves an important societal goal, and is rational and proportionate.[69] As discussed above, the Ministry of Justice reported that the reverse onus in the Bail Amendment Act 2013 would not significantly infringe on these rights. However, this paper will demonstrate that this is not the case.

1 Presumption of innocence

In 1935, the House of Lords described the presumption of innocence as the 'golden thread' that holds criminal law together.[70] It is a universal human right.[71] The state is significantly better resourced than any natural person: placing the burden of proof on the state ensures that individual rights are not infringed without just cause. Yet there may be some argument about whether the principle applies to bail decisions. The Ministry of Justice pointed out that bail is concerned with the risk of anticipated future behaviour, not punishment for past conduct.[72] The accused person's rights are adequately provided for in the other NZBORA provisions.[73] Yet imprisonment is a measure usually reserved for individuals convicted of serious offences. Pretrial detention treats a person as if they are *not* innocent. Consequently, the presumption of innocence is central to the law on bail.

The reverse onus applies regardless of whether the accused poses any *real* risk to public safety. It is assumed that there is one. It is also assumed that those who offend on bail are the individuals who will be captured by the reverse onus. This is untrue. Firstly, the risk of persons accused of murder offending while on bail is relatively low. Of the 409 people charged with murder between 2004 and 2009, 156 were granted bail.[74] Of that number, only three committed a further serious violent offence - only one of which was murder.[75] The risk of serious offending on bail by those accused of murder is less than *two per cent.*

---

[69] Above n 11, at (2-3), citing generally *R v Oakes* [1986] 1 SCR 103.
NZBORA is modelled from the Canadian Charter of Rights. Canadian authority on bill of rights issues is highly persuasive in New Zealand.
[70] See generally: *Woolmington v DPP* [1935] UKHL 1.
[71] Universal Declaration of Human Rights GA Res 217, S-CLXXXIII (1948), art 11.
[72] Letter from Austin Powell (Crown Counsel) to (Attorney General) regarding the Bail Amendment Bill 2012*(*4 May 2012) at [4].
[73] At [5].
[74] Agency Disclosure Statement "Bail Amendment Bill: Review of aspects of the bail system" (Ministry of Justice, 2012) at (36) - (37); Kris Gledhill "The Bail Amendment Act 2013: A Brief Human Rights Audit" (February 14 2014) Auckland District Law Society <www.adls.org.nz>.
[75] Ministry of Justice Research and Evaluation Unit "Research Findings No 3: Trends in the use of bail and offending while on bail 1990-1999" (January 2003) ISSN 1175-9984 at (4).

This also demonstrates that the courts were exercising their discretion cautiously and effectively before the amendment. Secondly, the majority of offending while on bail occurred by people charged with a property offence or an offence against justice[76] - such offences are often not captured by the reverse onus.[77] In fact, only sixteen per cent of those charged with violent offences offended while on bail.[78] The amendment also assumes that those who are subject to the reverse onus are the individuals who would participate in the *type* of offending that poses a risk to the public. Contrary to this, the most common offences on bail are property offences (32 per cent), traffic offences (20 per cent), and offences against justice (20 per cent).[79] While undesirable, these do not pose any significant risk to public safety.

There is no rational evidence proving that persons charged with murder, Class A drug offences or specified offences pose a heightened risk to public safety. The only connection that can be drawn is between the *gravity* of risk a person poses, depending on the charge they are facing. This is a clear contravention of the presumption of innocence: it proceeds on the basis that individuals charged with offences will be convicted of them. Yet in 2017, 76 per cent of adult charges resulted in a conviction, but only 13 per cent of those convictions resulted in a custodial sentence.[80] It is inevitable that a significant number of people are remanded in pre-trial custody, but do not receive custodial sentences.

Conversely, there is evidence that a person is likely to reoffend if they have a long history of offending, have previously offended on bail, or have previously been convicted of a violence crime.[81] This is likely the objective of requiring a previous conviction of a specified offence. The issue is that this assumes the accused has carried out the offence they have been charged with *and* that they will offend on bail, without any specific evidence presented to the court. This speaks nothing to the accused's risk to public safety, only to the seriousness of the offence charged, and will inevitably cast the net

[76] At (4)
[77] Bail Act 2000, s 10.
[78] Ministry of Justice Research and Evaluation Unit, above n 75 at (4).
[79] At (10).
[80] Ministry of Justice "Adult Conviction and Sentencing Statistics: Data Highlights for 2017" <www.justice.govt.nz>.
[81] B.H.K Donovan *The Law of Bail: Practice, Procedure and Principles* (Hogbin Poole Printers Ltd, 1981) at (108-109).

disproportionately wider than necessary.

The burden of proof generally lies on the prosecution in criminal procedure. This is their constitutional role - not the accused's. If there is a genuine risk to public safety, the prosecution should identify and prove this to the court.[82] This is especially viable where New Zealand courts are already demonstrably exercising their discretion.[83]

2 Right to release unless just cause for detention

The right to release avoids unnecessary disruption to employment and family and social life.[84] It protects people charged with offences from the societal stigma they may be subjected to for having spent time in custody.[85] It is a safeguard against imposing the physical, emotional and psychological hardships of imprisonment on a person who has not yet been convicted of any crime.[86] Evidence demonstrates that pre-trial custody can also influence the outcome: the New Zealand Oxley study (control tested for seriousness of offence) in 1979 discovered that individuals were more likely to be convicted if they had been in pre-trial custody.[87] There are a number of possible reasons. Individuals detained in pre-trial custody may be pressured by the stress of imprisonment to plead guilty, perhaps to reduce their sentence and the overall time spent in imprisonment.[88] Judges and juries may be subconsciously influenced to find guilt where a prisoner is brought into a courtroom, compared to when a person is present due to their own autonomy and has ample time to present the image of themselves they would like to.[89] Being remanded in custody may deprive the accused of the opportunity to demonstrate good behaviour on bail at sentencing stage, to mitigate or reduce their penalty.[90] The issue is that the reverse onus means the courts will automatically proceed from the basis that there *is* just cause for

---

[82] Kris Gledhill, above n 74.
[83] See discussion earlier in this paper, under 'Legislative Drivers'.
[84] Goldkamp *Two Classes of Accused*, above n 5 at (11).
[85] At (11).
[86] At (11).
[87] Oxley study affirmed and cited in: Bureau of Crime Statistics and Research *Bail Reform in N.S.W.* (Department of the Attorney General, 1984) at (4).
[88] Goldkamp *Two Classes of Accused*, above n 5 at (186).
The Oxley study did not prove a causal connection between the two. It is nevertheless likely to be a psychological influence on the accused, if not advice given to them by their attorney.
[89] At (186).
[90] Bureau of Crime Statistics and Research, above n 87 at (4).

detention. As discussed earlier, there is no safety benefit to remanding an accused person in custody who would not offend while on bail - or a person who will not consequently be convicted.[91] The risk a person poses to the public while on bail is dependent on their propensity to carry out crime.[92] Simply being charged with an offence is no evidence of this risk. If it were, then there is also just cause to detain defendants who are acquitted and individuals who are released upon serving sentences.[93] This is obviously not justified on any principled grounds.

3 Right to prepare a defence

Pre-trial detention can significantly hinder the ability of an accused person to prepare a defence, most obviously because it hinders that person's ability to liaise with a legal representative. Those remanded in custody are limited by restricted visiting hours, remote locations,[94] minimal privacy or resourcing for preparing of a case, and censored communication.[95] Legal aid fees do little to contribute to the costs borne by attorneys representing clients in custody.[96] However, the right is not absolute,[97] and this paper does not argue that in some cases, detention will inevitably be justified. The issue is, again, that the reverse presumption means the courts will proceed from the basis that the right to prepare a defence is automatically outweighed. The accused will bear the burden of proving that they will face difficulties in preparing a defence. Because of this reverse onus, evidence would likely need to be exceptional to outweigh the presumed risk to public safety. Given the substantial resourcing of the Crown compared to a defendant, this is a considerable disadvantage. Infringing this right without evidence of risk to public safety is not rational or proportionate, and cannot be justified.

---

[91] Agency Disclosure Statement (Ministry of Justice, 2012), above n 24 at [19].
[92] Donovan, above n 81 at (109-110).
[93] At (109-110).
[94] *Curran v R*, above n 13 at [28].
[95] Bernard Wice, above n 12, at (23).
[96] *Curran v R*, above n 13 at [29].
[97] Donovan, above n 81 at (105).

B Policy Considerations

1 Interests of the accused

Imprisonment is not usually the first step the State will take to respond to persons charged with or convicted of offences. Numerous alternatives may be considered: home detention, community detention, community service. Imprisonment has serious impacts on people. Prisoners become dependents and are deprived of employment opportunities, which affects not only the individual, but their family and other dependents.[98] Those who face imprisonment risk losing employment, family connections, and social ties.[99] They are deprived of their support network.[100] Limited visiting hours and remote locations seriously limit the ability of prisoners to retain family and social connections.[101] In New Zealand, prisoners are entitled to one thirty minute visit per week, though some prisons may allow more than this.[102] Visiting days are weekdays, so children, partners or friends who are in school or at work are often unable to visit regularly.[103]

Imprisonment contributes to self-identification as a criminal, causing psychological alienation from their communities and support networks.[104] People who spend time in custody may consequently suffer from long term psychological effects and diminished self worth. Medical and psychiatric services in prisons are typically of limited availability, and often lesser resourced than community services.[105] Prisoners on remand have no access to reintegration support in prison: they are not offered the training courses or rehabilitation programmes that are available to sentenced prisoners.[106] Individuals on remand cannot be compelled to participate because they have not been convicted, and the expense of offering them is perceived a waste of resources.[107]

---

[98] Bureau of Crime Statistics and Research, above n 87 at (4).
[99] At (4).
[100] At (4).
[101] Bernard Wice, above n 12 at (23).
[102] Department of Corrections "Visits" Corrections Department New Zealand <www.corrections.govt.nz>.
[103] Anne Marie May "Relaxing bail laws: how risky is it?" *Radio New Zealand* (online ed, New Zealand, 25 June 2018).
[104] Ministry of Justice "Departmental Report", above n 56 at [52].
[105] Bernard Wice, above n 12 at (23).
[106] May, above n 103.
[107] May, above n 103.

Research in the United States shows that prisoners are often subjected to violence or abuse, and in some situations, there are not enough guards to provide adequate supervision or protection.[108] In others, guards are simply unable to intervene.[109] Prisons in New Zealand serve as recruitment ground for gangs.[110] Not only does this increase the danger to prisoners, it can make remand in custody more harmful to the future of an accused person than bail. It may, in fact, result in more overall offending than bail would.

It is also key to note that the two parties involved in criminal cases are the state and the accused. Imprisonment is an exercise of State power, seriously limiting a person's right to liberty. Logically, any approach that decides whether a person's rights are severely limited or not should begin with that person.

2 Interests of victims

Victims bear many of the costs of crime.[111] Granting bail can place victims in dangerous situations causing them to fear for their safety.[112] They may be vulnerable to actual or perceived risks of further harm. Victims of crime should feel safe in their homes and communities, protected from those who have harmed them. Their liberty and safety should be prioritised over the liberty of the accused.[113] The discourse surrounding the bail amendment largely focussed on putting more weight on victims' interests and making victims more central to the process.[114]

There are classes of victims who are particularly vulnerable in bail decisions. In cases of family violence, for example, granting bail would be a significant risk to the victim's safety. Family violence is a pattern of abusive behaviour used by and between individuals

---

[108] Bernard Wice, above n 12 at (23).
[109] At (23).
[110] May, above n 103.
[111] Elizabeth K Drake, Steve Aos and Marna G.Miller "Evidence-Based Public Policy Options to Reduce Crime and Criminal Justice Costs: Implications in Washington State" (2009) 4 Victims & Offenders 170 .
[112] Tracey Marceau "Submission to the Law and Order Committee on the Bail Amendment Bill 2012".
[113] Tracey Marceau "Submission to the Law and Order Committee on the Bail Amendment Bill 2012".
[114] Bail Amendment Bill 2011 (17-2) (select committee report) at [64 - 65]; Christina Coulam "Submission to the Law and Order Committee on the Bail Amendment Bill 2012"; Christie's Law Campaign "Submission to the Law and Order Committee on the Bail Amendment Bill 2012"; Tracey Marceau "Submission to the Law and Order Committee on the Bail Amendment Bill 2012"; Savage and Koubaridis, above n 21.

that can have multiple victims.[115] It involves entrapment, coercion, and controlling behaviour, and causes physical, emotional and psychological harm.[116] Bail decisions do not usually account for this. When aggressors are charged, their actions are often viewed as incidents of harm rather than an aspect of ongoing coercive control.[117] As isolated incidents, bail is often granted.[118] During the bail period, contacting the police may not be a helpful or viable option and may result in immediate retribution from the aggressor.[119] Consequently, the victim will receive no release from the coercive control or risk of retribution from their predominant aggressor at pre-trial stage, which causes significant risk to the victims' personal safety. Evidence also shows that victims of family violence are unlikely to report further incidences if their first instance of help-seeking was unsuccessful.[120] If criminal charges seem to have no effect, it is therefore unlikely that cumulative 'incidents' would come before a court.

The Victims Right Act 2014 came into force shortly after the Bail Amendment Act 2013 and may be perceived to resolve this issue. It legislated numerous victims' rights: the right to be treated fairly and with respect, courtesy, and compassion;[121] and the right to provide victim impact statements at sentencing, detailing the effects of the offending and their views.[122] This does not extend to bail decisions unless the offence is of a specified type, such as: certain sexual offences, offences resulting in serious injury, incapacity or death, or an offence resulting in ongoing fears on reasonable grounds for physical safety and security.[123] In those circumstances, the court has discretion to consider the victim's views, and the prosecution has an obligation to make reasonable efforts to ascertain the victim's views and communicate this to the court for the purposes of bail.[124] However, prosecutors

[115] Elaine Mossman, Judy Paulin and Nan Wehipeihana *Evaluation of the family violence Integrated Safety Response pilot* (Social Policy Evaluation and Research Unit, August 2017) at (13).
[116] At (13).
[117] Family Violence Death Review Committee *Fifth Report: January 2014 to December 2015* (Health Quality and Safety Commission New Zealand, February 2016) at (126).
[118] At (31).
[119] At (28).
[120] At (31).
[121] Ministry of Justice "Victims Code", above n 40.
[122] Victims Rights Act 2014, s 17AB.
[123] Victims Rights Act 2014, s 30.
[124] Victims Rights Act 2014, ss 29 and 29A.

act in the public interest when prosecuting individuals.[125] They do not act in the interests of victims, or families of victims, in the same way that a private lawyer might.[126] Victim impact statements also make the victim responsible for ensuring they are adequately considered and protected in bail decisions: although the prosecution plays a role, the duty essentially lies with the victim, which can be a barrier, especially in cases of family violence.[127] Consequently, an argument could be made that victims' views may be disregarded in bail decisions. The court has no obligation to hear or account for victim impact statements, and the prosecution is acting on behalf of the public, not in the interests of the victim.

3 Underlying issues with the bail system

a) Overrepresentation of minorities

A 2008 report in New Zealand indicated that Māori account for the largest proportion of remand orders.[128] The number of Māori on remand increased at a faster rate than any other ethnic group.[129] In 2007, Māori were four to five times more likely to be apprehended, prosecuted and convicted than other ethnicities, Pasifika twice as likely.[130] Māori were seven and a half times more likely to receive a custodial sentence or be remanded in custody than New Zealand Europeans.[131] Pasifika were two and a half times more likely.[132] In light of this, the reverse onus inevitably had a significant impact on Māori and Pasifika, who have disproportionately high lists of previous convictions, and are far more likely to be apprehended, charged, and remanded in custody than those of other ethnicities.

The report did not investigate or analyse potential reasons, though these can be inferred.[133] Firstly, Māori encounter difficulties proposing a bailable address, whether due to reduced

---

[125] Crown Law Office "Victims of Crime - Guidance for Prosecutors" (6 December 2014).
[126] Crown Law Office "Victims of Crime - Guidance for Prosecutors" above n 125.
[127] Family Violence Death Review Committee, above n 117 at (126).
[128] Bronwyn Morrison *Identifying and Responding to Bias in the Criminal Justice System: A Review of International and New Zealand Research* (Ministry of Justice, November 2009) at (50), citing a 2008 Department of Corrections report.
[129] At (50), citing a 2008 Department of Corrections report.
[130] At (18).
[131] At (18).
[132] At (18).
[133] At (50).

family connections or willingness.[134] Consequently, many Māori are remanded in custody where they could be eligible for bail. Research continuously shows that factors such as offence seriousness, evidentiary strength, legal history, background context, victim preferences and socioeconomic status account for a significant amount of the variation across ethnic groups.[135] This could be unconscious or structural bias in the system,[136] such as higher policing in Māori and Pasifika communities categorised as high risk, or bail considerations disproportionately targeting these ethnicities. It may be that traditional Māori systems of collective liability focussed on righting a wrong and healing all parties from shame rather than punishing an individual. [137] The adversarial nature of New Zealand's justice system is a stark contrast and takes little account of tikanga or other cultural considerations.

b) Efficiency and expediency

New Zealand courts have been under intense pressure over the last few decades. In December 2009, a report on court workloads found that the volume of cases was increasing, but capacity to hear them was extremely limited, resulting in increasing wait times.[138] The workload of courts in the criminal jurisdiction was projected to increase.[139] Cases were becoming more complex, taking longer to get to trial and reach resolution.[140] Pressure on the court system has long been a policy consideration. The wider the discretion a judge has at each stage in a process, the longer each case can take. It is fair to assume that efficiency and expediency were relevant policy factors in the Bail Amendment Act 2013. Reversing the onus of proof in some situations reduces the degree of litigation required in bail applications by making it far more unlikely the accused will be released, and reducing judicial discretion required in such cases.

---

[134] At (18).
[135] At (12).
[136] At (12).
[137]See generally: John Patterson "A Māori Concept of Collective Responsibility" in Oddie and Perrett (ed) *Justice, Ethics and New Zealand Society* (Oxford University Press, Auckland, 1992).
[138] Lyn Provost *Ministry of Justice: Supporting the management of court workloads* (Auditor-General, December 2009) at [1.1].
[139] At [1.11].
[140] At [1.17].

c) Access to bail

Bail conditions are often imposed on accused persons when bail is granted.[141] The Police or prosecution regularly oppose bail on the grounds that the proposed address is inappropriate or impractical for bail.[142] The occupants of the address may be unwilling to offer the residence for bail. This presents obvious difficulties for accused persons who are homeless, do not have a supportive family or friend network, or whose address is inappropriate for other reasons. If bail is refused, the accused can apply for electronic monitoring (EM).[143] EM bail requires a report inquiring into the practicality of the proposed address,[144] and informed consent from occupants of said address.[145] This can be more difficult: not all properties are appropriate for EM technology, and not all occupants will consent to installation.[146] The Minister of Justice, the Hon Andrew Little, has suggested that Housing New Zealand (HNZ) has an informal policy that routinely refuses state houses as bailable locations.[147] Mr Little's statement has been backed up by criminal defence lawyers[148] and the president of the Criminal Bar Association.[149] HNZ denied the allegation.[150] An Official Information Act request to HNZ demonstrated that permission is generally given for people who are usual residents in HNZ properties, but that approval from HNZ is required for additional persons to be bailed at their properties.[151] If Police are planning to oppose bail, they may seek advice from HNZ as to the suitability of the address.[152] At this point, there is little substantiated evidence, and responsibility for assessing housing need and managing the housing waitlist shifted to the Ministry of Social

---

[141] Bail Act 2000, s 30.
[142] John S. Goldkamp, Michael R. Gottfredson, Peter R. Jones, Doris Weiland *Pretrial release in the criminal court* (Springer, Boston, 1995) at (191); Duncan Consulting Services *EM Bail Evaluation for NZ Police* (New Zealand Police, February 2008) at [3.9] to [3.11]. See generally: Dr Martinovic "New Zealand's extensive electronic monitoring application: "Out on a limb" or "leading the world"?" (July 2017) Department of Corrections <www.corrections.govt.nz>.
[143] Bail Act 2000, s 30C; s 30D.
[144] Bail Act 2000, s 30F.
[145] Bail Act 2000, s 30G.
[146] See generally: Duncan Consulting Services, above n 142.
[147] Radio New Zealand "Lawyers back minister's claims people on bail blocked from homes" *Scoop Independent News* (online ed, New Zealand, 23 May 2018).
[148] Stephen Bonnar QC, cited in Radio New Zealand "Lawyers back minister's claims people on bail blocked from homes" *Scoop Independent News* (online ed, New Zealand, 23 May 2018).
[149] Len Anderson, cited in Radio New Zealand "Lawyers back minister's claims…" above n 148.
[150] Chief Operating Officer, Paul Commons, issued a statement cited in Radio New Zealand "Lawyers back minister's claims…" above n 148.
[151] Housing New Zealand "Tenancy Agreements 2010" (Obtained under Official Information Act 1982 Request from Just Speak to Housing New Zealand).
[152] Housing New Zealand "Relevant sections from Housing New Zealand's Memorandum of Understanding with Police and Department of Corrections" (2009) (Obtained under Official Information Act 1982 Request from Just Speak to Housing New Zealand).

Development in 2014.[153] Regardless, the suggestion is an indication of the practical difficulties accused persons face in finding a bailable address.

IV Reform

A Alternatives to Pretrial Custody

In the 1970s, England and Wale's prison population was increasing. Like New Zealand, the social and political climate fostered harsher punitive measures and support for victims' rights.[154] Offending on bail was highly publicised and sensationalised.[155] Yet the remand population remained stable.[156] England and Wales used diversion methods as an alternative to custody: warnings, cautions, or police bail;[157] electronic monitoring;[158] and the use of state-supplied accommodation services, such as bail hostels or treatment facilities.[159] It is acknowledged that this example is four decades old. However, it provides evidence of alternatives to custody in a social and political climate very similar to the one presented in this paper. This paper will explore the extent to which bail hostels and electronic monitoring could be utilised in New Zealand to overcome practical barriers to bail. Diversion methods will not be discussed in this context: individuals who are subject to the reverse onus are typically charged with medium to serious offences, and are unlikely to be diverted through warnings, cautions or police bail in practice.

1 Bail hostels.

Bail hostels were introduced to England and Wales in 1974 to provide homeless persons with a bailable location and create an alternative to custody where courts did not have enough information on the accused's proposed address.[160] Hostels were managed and

---

[153] Housing New Zealand, above n 151.
[154] Anthea Huckelsby "Keeping the Lid on the Prison Remand Population: The Experience in England and Wales" (2009) 21 Current Issues in Criminal Justice 3 at (4).
[155] At (4).
[156] At (4).
[157] At (7-8).
[158] At (11).
[159] At (12).
[160] John Pratt and Kathryn Bray "Bail Hostels - Alternatives to Custody" (1985) 25 British Journal of Criminology 160 at (161-162).

supervised by probation officers.[161] Residents in the hostels had a very low rate of absconding.[162] The majority of breaches resulted in return to custody, which may have served as a deterrent.[163] Of the eight residents who had previously been living in their marital home, seven had been charged with offences against their children or spouse,[164] demonstrating that hostels could be an effective means to protect victims of family violence while the accused is on bail. Hostels were being utilised by persons who were poor, unemployed, uneducated, or suffering from social problems.[165] Yet residents of hostels were not serious offenders, and most residents' families *could* have provided a bailable address.[166]

Unfortunately, qualitative research showed that bail hostels were likely being used as alternatives to granting bail in the community or home, rather than as an alternative to pretrial custody.[167] Defence counsel may recommend applying for a hostel as a 'safer' option than bail at a proposed home address.[168] Evidence demonstrated that bail was often declined if the application was opposed by Police, and (whether in a hostel or not) only became a realistic option when the Police did *not* object.[169] Eventually, hostels became almost exclusively used for high-risk offenders serving a sentence rather than for bail.[170] In 2007, 'approved premises' replaced hostels, providing accommodation and support for low-risk individuals on remand.[171] There is no evidence that approved premises have diverted people from custody,[172] likely because the option is only open to low-risk individuals.

Bail hostels could be a useful mechanism to reduce some of the practical barriers to bail faced by accused persons in New Zealand. They could be particularly helpful for victims of family violence: hostels provide alternative accommodation so the accused is not bailed

[161] At (161-162).
[162] At (167).
[163] At (167).
[164] At (164).
[165] At (168).
[166] At (168).
[167] At (162).
[168] At (169).
[169] At (171).
[170] Huckelsby, above n 154 at (13).
[171] At (13).
[172] At (13).

to their home or unjustly detained in custody. This relies, however, on hostels being located a sufficient distance from the victim's home, which could create further accessibility issues. For the hostels to be economically viable, a sufficient number of people need to utilise them. Not all low-risk persons will require accommodation in a hostel, and the option should not be restricted by 'risk' criteria. Eligibility will always be an issue that requires consideration on a case-by-case basis, on similar grounds to a regular bail application. Criteria will be discussed further later in the paper. Hostels should be available in various central locations - Auckland, Wellington and Christchurch at a minimum. Multiple options ensure accused persons can be remanded in locations where they have no access to specifically identified victims. Central locations enable residents who are not subject to 24 hour curfews to find employment and access outhouse treatment, rehabilitation and medical resources. The disadvantage is that, similarly to custody, the accused may be removed from their support networks, families, and employment.

England and Wales experienced difficulty effectively implementing bail hostels. This needs to be addressed for the scheme to succeed in New Zealand. Hostels need to provide a real and practical alternative to pretrial custody - they are not desirable when less restrictive conditions, such as regular bail, would suffice. This was the major shortcoming in the England and Wales hostel system. To resolve this, hostel accommodation should only become available once a regular bail application has been declined. Hostel accommodation would become a last resort, rather than a 'safe option'. However, applying for bail at multiple stages may increase the likelihood of police opposing bail, and will certainly increase the workload of the courts. This will be discussed further later in the paper.

2 Electronic monitoring

EM bail has been utilised in New Zealand since the 1990s, imposed as a monitoring method if regular bail is declined.[173] It is used to ensure the accused appears in court, does not

[173] Martinovic, above n 142.

interfere with witnesses, and does not offend on bail.[174] EM bail reports are prepared by specialist members of the Police or Department of Corrections and presented to the courts by Police prosecutors.[175] The reports examine the viability of EM, considering public safety; the interests of the victims, and the suitability of the location for EM technology and proximity to a 24-hour police station.[176] The rate of offending on EM bail is low, at only seven per cent in 2011, but it is only granted in 30 per cent of cases.[177]

EM avoids subjecting accused persons to many of the difficulties of imprisonment by enabling bail to be granted at a proposed address, while imposing stringent monitoring conditions. It allows access to community treatment facilities, rehabilitation programmes, and education programmes. These can be imposed as conditions and enforced by EM, while mitigating risk to public safety.[178] Because EM focuses heavily on surveillance, it is not often criticised as being 'soft' on crime, sometimes viewed as a punitive measure.[179] It can mitigate some of the risks posed to victims or the public. Police are able to determine the accused's location at given times, verifying whether conditions have been breached. This can act as a deterrent, and ensure more restrictive measures can be put in place if breaches are detected and proven (for example, custody). Studies on EM as a sentencing condition for high-risk offenders proved that EM is effective at suppressing crime for its duration, though unsuccessful in preventing later reoffending.[180] In a bail context, this lends support to the argument that EM can deter offending on bail. Finally, EM bail is significantly more cost-effective than pretrial custody:[181] for example, fiscal saving in Argentina was $15, 840 USD per year.[182]

However, there are risks associated with EM. Firstly, like bail hostels, EM is only desirable

[174] Bail Amendment Act 2000, s 30A.
[175] Duncan Consulting Services, above n 142 at [3.7].
[176] At [3.7].
[177] Martinovic, above n 142.
[178] Mary A Finn and Suzanne Muirhead-Steves "The effectiveness of electronic monitoring with violent male parolees" (2006) 19 Justice Quarterly 293 at (296).
[179] At (296-297).
[180] Mark Renzema and Evan Mayo-Wilson "Can electronic monitoring reduce crime for moderate to high risk offenders?" (2005) 1 Journal of Experimental Criminology 215 at (232).
[181] Martinovic, above n 142.
[182] Di Tella "Criminal Recidivism after Prison and Electronic Monitoring" (2013) 121 Journal of Political Economy 28.

as a less restrictive measure - when the accused would otherwise be in custody. It is an infringement of the accused's privacy that should not be taken lightly. EM bail is a significant deprivation of autonomy.[183] It can subject accused persons to social stigma, it restricts liberty and freedom, and is consequently viewed as a punitive measure.[184] However, pilots in England and Wales suggested that only *half* of those on EM would have been in custody otherwise.[185] The system in New Zealand should be cautious to mitigate this risk. Secondly, while EM equipment is reliable and effective at detecting breaches,[186] its impact on public safety depends on the response rate of Police: delays may give the impression that individuals can breach with impunity.[187] This may create a political risk in using EM as an alternative to custody, or mean it is not a viable alternative for accused persons if Police resourcing is an issue at the time of application. This is particularly important where Police regularly oppose EM. Police opposed 83 per cent of applications in the first seven months of EM bail,[188] and 72 per cent of applications opposed by Police were declined.[189] It is important to note that Police are often involved in preparing EM bail reports.[190] The department responsible is managed by the Police Prosecution Service.[191] Thirdly, there are barriers to EM: accessibility of EM-appropriate bail addresses are an ongoing issue, and legal aid fees for EM bail are often described as inadequate.[192]

B Proposed Reform

1 Reforming the reverse onus.

The traditional purpose of bail was to mitigate the risk of flight.[193] Using pre-trial custody as a means of public protection was a departure, albeit one that is now widely accepted. It is not argued that public safety is an insufficient reason to detain a person accused of an offence. However, this departure is justified based on the *risk posed to public safety by*

---

[183] Brian K Payne and Randy R. Gainey "A Qualitative Assessment of the Pains Experienced on Electronic Monitoring" (1998) 2 International Journal of Offender Therapy and Comparative Criminology 149 at (154).
[184] At (154).
[185] Huckelsby, above n 154 at (12).
[186] Comptroller and Auditor General *The Electronic Monitoring of Adult Offenders* (Great Britain National Audit Office, HC 800 Session 2005-2006, February 2006) at [9]; Martinovic, above n 142.
[187] Comptroller and Auditor General, above n 185 at [12].
[188] Duncan Consulting, above n 142 at [4.6].
[189] At [4.11]; [3.11].
[190] Martinovic, above n 142.
[191] Duncan Consulting Services, above n 142 at [3.11].
[192] At [5.13].
[193] Donovan, above n 81 at (19).

individuals on remand. No public safety benefit can be drawn from detaining a person that was never going to offend while on remand. Consequently, there is no justification for infringing on the presumption of innocence and the right to be released unless there is just cause for detention without such a risk being proven. This task is best served by evidence being put forward by both prosecution and defence, not by a reverse burden of proof.

The reverse burden of proof should be removed from the Bail Act 2000. In its place, a number of factors for judicial consideration should be put in place. Section 8 of the Bail Act 2000 (see Appendix A) lists the mandatory and discretionary considerations currently used for individuals who are not subject to the reverse onus. Any formulation of factors for consideration should have regard to the issues in our bail system discussed in this paper:

- Protecting the public;
- Protecting victims;
- The accused's interests;
- Desirability of efficiency and expediency;
- Accessibility of bail
- Overrepresentation of minorities

The current mandatory considerations account for the undesirability of unnecessary imprisonment by considering any matter that would make it unjust to detain the accused. They technically account for protecting the public and protecting specific victims by considering the likelihood of offending on bail. However, given the centrality of both considerations to the Bail Amendment Act 2013, removing the reverse onus and returning to s 8 could be a serious political risk. As discussed earlier, public opinion has a strong influence over penal policy. Removing the reverse onus could result in public disenfranchisement with the government. If a further high-profile tragedy occurred, the effects could be disastrous politically. To retain public confidence, reference to protection of the general public *and* specific victims should be made in s 8 as a mandatory consideration for bail. Placing these policy considerations at the centre of bail decisions could somewhat mitigate political risk and maintain public confidence in the justice system.

Explicitly referencing risk to victims should accommodate their interests appropriately. It forces the issue as a mandatory consideration. This information can be provided through victim impact statements, which the prosecution is obliged to bring to the court's attention.[194] However, this makes the victim responsible for expressing opposition to bail.[195] This is a particular barrier in cases of family violence.[196] Section 8 currently accounts for victims of family violence if the accused is charged under the Family Violence Act.[197] Not all family violence cases will fall under this heading. Unfortunately, this is an issue that requires a cohesive, system-wide response.[198] It is difficult to incorporate appropriate processes into legislation: this would likely be a practical issue. A judge is only able to consider the evidence provided to them. The key is ensuring necessary evidence *is* provided. There are existing frameworks for assessing the risk of recurrent harm in family violence cases.[199] Risk frameworks should be made available to Police and Crown Law to ensure appropriate evidence is provided to the court. Crown Law should amend its guiding documents for prosecutors to include an instruction to consider and use these frameworks in appropriate cases.

This proposal does not address efficiency or expediency. Pressure on the courts is not an issue that can be resolved by altering the process of one aspect of the justice system. Furthermore, it is inefficient to hold an increasing number of accused persons in custody. The pressure on courts will only be displaced to the prison system. Regardless, the accused's right to have bail applications decided fairly should outweigh any efficiency or expediency advantage. This proposal does not address access to bail or disproportionate representation of minorities. To reform systemic issues such as these, changes in the process of the bail system should be made. Access to bail will be discussed below. Unfortunately, this process is unlikely to affect institutional or unconscious contributors to overrepresentation of minorities. This issue is present across the justice sector, and is

[194] Crown Law Office "Victims of Crime - Guidance for Prosecutors", above n 125.
[195] Family Violence Death Review Committee, above n 117 at (126).
[196] At (126).
[197] Bail Act 2000, s 8(5). See Appendix A.
[198] Mossman, Paulin and Wehipeihana, above n 115 at (16).
[199] At (27).

outside the scope of reform presented by this paper.

2 Reforming the process

There are two options:

- Applications are general, and can include regular, EM, or hostel bail.
- Bail hostels and EM are unavailable unless regular bail is declined.

Option one ensures all opportunities are open to the accused at first bail application. This is particularly relevant where the accused does not have an appropriate bail address at first instance and requires a bail hostel. All parties can adduce relevant evidence. If Police or the prosecution are opposing bail, a 'middle ground' could be reached more easily using bail hostels or EM. It is more time efficient and reduces pressure on the courts by having *one* bail hearing rather than multiple. However, defence counsel may recommend the accused applies for more restrictive measures at first instance as a 'safe option'. There is a risk that bail hostels and EM could simply become more restrictive measures of regular bail, rather than an alternative to pretrial custody. This is the strongest argument for option two. However, this adds time and increases pressure on the courts. Given the experience in England and Wales, the safer option is to mitigate this risk by making hostels and EM unavailable until regular bail is declined. Accommodation in a bail hostel and EM are both more restrictive measures than regular bail, using increased measures of monitoring and supervision. Using bail hostels in conjunction with EM is more restrictive again. The two could be used in conjunction for accused persons who pose a high risk to safety. This could make bail an option for more accused persons, mitigate risk to the public or victims, and retain public confidence in the justice system.

There are issues with this approach that should be addressed. Offering EM and accommodation in a bail hostel as a more restrictive option at second stage could increase fiscal cost. Using EM as an alternative to bail has proven to result in significant fiscal saving, but the costs of a bail hostel are likely comparable to imprisonment. As individual measures, the fiscal cost of bail hostels could likely be absorbed by savings drawn from using EM instead of custody. Coupling hostel accommodation with EM for high risk

offenders would likely result in additional cost. Ideally, this would be minimised: persons who pose a significant risk to public safety would likely not succeed in a bail application, and would be remanded in custody. Lower risk individuals should apply for regular bail, medium risk for accommodation or EM as separate measures. High risk persons applying for this combined approach would consequently be relatively closed. The second issue is regular Police opposition on bail applications, whether regular or EM. This could be due to the operational focus and nature of the Police resulting in a systematic tendency to oppose bail applications.[200] The issue is that EM bail reports are prepared by the Police, and managed by Police Prosecution Services. If bail hostels were introduced in New Zealand, a similar issue would likely arise. The Police are interested parties in bail applications: it is the Police who monitor and enforce bail conditions, and the Police who are charged with protecting the public.[201] The task of preparing bail reports may more appropriately be carried out by the Department of Corrections as an uninterested third party. The department currently prepares reports for EM in sentencing and coordinates with Police on bail reports, demonstrating sufficient expertise.[202] This leaves the Police and the accused free to adduce evidence and raise arguments on the appropriateness of bail where relevant.

V Conclusion

Accused persons have the right to be presumed innocent until proven guilty, the right to prepare a defence, and the right to be released unless there is just cause for detention. The reverse onus is an unjustified infringement on these rights. These rights were infringed upon in the interests of public safety. Yet it is not rational - there is no evidence that the individuals captured by the reverse onus provision are the individuals that pose a risk to public safety. The provision casts the net wider than necessary. The public can be protected by less infringing methods, as explained by this paper. In considering an appropriate reform, there are numerous policy considerations and practical issues to be considered: protecting victims; having an efficient and expedient justice system; maintaining public

---

[200] Duncan Consulting Services, above n 142 at [4.7].
[201] Department of Corrections "Electronic Monitoring on Bail (EM Bail)" <www.corrections.govt.nz>.
[202] Martinovic, above n 142.

confidence in the justice system; ensuring bail is accessible; and ensuring minorities are not over-represented in custody. Balancing these objectives is complicated, and in some cases, cannot be achieved by bail law alone. This paper presents the following reform option as an appropriate balance. The reverse onus should be repealed. Section 8 of the Bail Act 2000 should apply in all cases. The section should add risk of harm to the public or victims as a mandatory consideration. Risk frameworks for aggressors of family violence should be made available to Crown Law and included as guidance for prosecutors in order to adequately address the needs of victims of family violence. Bail hostels should be introduced to Auckland, Wellington and Christchurch. These can be used as a more restrictive measure of bail in conjunction with EM and provide accommodation for persons who cannot provide a bailable address. Finally, the Department of Corrections should take responsibility for preparing EM bail reports to mitigate bias or conflict between the interests of Police and the accused in bail applications.

Word count

The text of this paper (excluding table of contents, bibliographic footnotes, appendices and bibliography) comprises exactly 7,948 words.

VI Appendix A

Bail Act 2000

8 Consideration of just cause for continued detention

(1) In considering whether there is just cause for continued detention, the court must take into account—

(a) whether there is a risk that—

(i) the defendant may fail to appear in court on the date to which the defendant has been remanded; or

(ii) the defendant may interfere with witnesses or evidence; or

(iii) the defendant may offend while on bail; and

(b) any matter that would make it unjust to detain the defendant.

(2) In considering whether there is just cause for continued detention under subsection (1), the court may take into account the following:

(a) the nature of the offence with which the defendant is charged, and whether it is a grave or less serious one of its kind:

(b) the strength of the evidence and the probability of conviction or otherwise:

(c) the seriousness of the punishment to which the defendant is liable, and the severity of the punishment that is likely to be imposed:

(d) the character and past conduct or behaviour, in particular proven criminal behaviour, of the defendant:

(e) whether the defendant has a history of offending while on bail, or breaching court orders, including orders imposing bail conditions:

(f) the likely length of time before the matter comes to hearing or trial:

(g) the possibility of prejudice to the defence in the preparation of the defence if the defendant is remanded in custody:

(h) any other special matter that is relevant in the particular circumstances.

(3) *[Repealed]*

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

(4A) When considering an application for bail, the court must not take into account the fact that the defendant has provided, or may provide, information relating to the investigation or prosecution of any offence, including any offence committed or alleged to have been committed by the defendant.

(4B) However, despite subsection (4A), the court may take into account the cooperation by the defendant with authorities in the investigation or prosecution of any offence if that cooperation is relevant to the court's assessment of the risk that the defendant will fail to appear in court, interfere with witnesses or evidence, or offend while on bail.

(5) In deciding, in relation to a defendant charged with an offence against section 49 of the Domestic Violence Act 1995, whether or not to grant bail to the defendant or allow the defendant to go at large, the court's paramount consideration is the need to protect the victim of the alleged offence.

VI Bibliography

A Cases

1 New Zealand

An inquest into the death of CHRISTIE ALEXIS LESLEY MARCEAU Coroner's Court Auckland CSU-2011-AUK-001471, 5 March 2018.

R v Chand [2012] NZHC 2745

Curran v R HC Tauranga CRI-2005-070-765, 7 July 2005

R v Curran HC Tauranga CRI-2005-070-765, 30 June 2006

R v Curran HC Tauranga CRI-2005-070-6292, 1 February 2008

R v Davis HC Auckland CRI-2008-004-4086, 22 August 2008

Davis v R [2011] NZCA 380

2 *Canada*

R v Morales [1992] 3 SCR 711

R v Oakes [1986] 1 SCR 103

3 *England and Wales*

Woolmington v DPP [1935] UKHL 1

B Legislation

1 Acts

New Zealand Bill of Rights Act 1990

Victims' Rights Amendment Act 2014

Bail Act 2000

Bail Amendment Act 2013

2 Bills

Bail Amendment Bill 2012 (17-2)

C Books and Chapters of Books

Bureau of Crime Statistics and Research *Bail Reform in N.S.W.* (Department of the Attorney General, 1984)

B.H.K Donovan *The Law of Bail: Practice, Procedure and Principles* (Hogbin Poole Printers Ltd, 1981).

John S. Goldkamp *Two Classes of Accused: A Study of Bail and Detention in American Justice* (Ballinger Publishing Company, Cambridge Massachusetts, 1979).

John S. Goldkamp, Michael R. Gottfredson, Peter R. Jones, Doris Weiland *Pretrial release in the criminal court* (Springer, Boston, 1995).

John Patterson "A Māori Concept of Collective Responsibility" in Oddie and Perrett (ed) *Justice, Ethics and New Zealand Society* (Oxford University Press, Auckland, 1992).

Paul Bernard Wice *Bail and its Reform: A National Survey Summary Report* (US Department of Justice, October 1973)

D Journal Articles

Elizabeth K Drake, Steve Aos and Marna G.Miller "Evidence-Based Public Policy Options to Reduce Crime and Criminal Justice Costs: Implications in Washington State" (2009) 4 Victims & Offenders 170

Mary A Finn and Suzanne Muirhead-Steves "The effectiveness of electronic monitoring with violent male parolees" (2006) 19 Justice Quarterly 293

Anthea Huckelsby "Keeping the Lid on the Prison Remand Population: The Experience in England and Wales" (2009) 21 Current Issues in Criminal Justice 3

Brian K Payne and Randy R. Gainey "A Qualitative Assessment of the Pains Experienced on Electronic Monitoring" (1998) 2 International Journal of Offender Therapy and Comparative Criminology 149.

John Pratt and Kathryn Bray “Bail Hostels - Alternatives to Custody” (1985) 25 British Journal of Criminology 160.

John Pratt and Marie Clark “Penal Populism in New Zealand” (2005) 7 Sage Journals 303.

Mark Renzema and Evan Mayo-Wilson “Can electronic monitoring reduce crime for moderate to high risk offenders?” (2005) 1 Journal of Experimental Criminology 215

Di Tella “Criminal Recidivism after Prison and Electronic Monitoring” (2013) 121 Journal of Political Economy 28

Marie VanNostrand “Alternatives to pretrial detention: Southern district of Iowa, a case study” (2010) 74 Federal Probation 11.

E Parliamentary and Government Materials

1 Parliamentary debates

(10 May 2012) 679 NZPD 2180.

(02 July 2013) 691 NZPD 11518.

(27 August 2013) 693 NZPD 12881.

2 Government materials

Agency Disclosure Statement “Bail Amendment Bill: Review of aspects of the bail system” (Ministry of Justice, 2012)

Bail Amendment Bill 2011 (17-2) (select committee report)

Rt Hon Sir Douglas Graham *Report of the Attorney-General on the Crimes (Bail Reform) Bill* (Attorney General Report, 1999)

Ministry of Justice Research and Evaluation Unit "Research Findings No 3: Trends in the use of bail and offending while on bail 1990-1999” (January 2003) ISSN 1175-9984

Ministry of Justice "Departmental Report for the Law and Order Committee Bail Amendment Bill” (19 September 2012)

Bronwyn Morrison *Identifying and Responding to Bias in the Criminal Justice System: A Review of International and New Zealand Research* (Ministry of Justice, November 2009)

Lyn Provost *Ministry of Justice: Supporting the management of court workloads* (Auditor-General, December 2009)

Statistics New Zealand *Review of Crime and Criminal Justice Statistics: Consultation Paper* (2008)

3 Select committee submissions

Auckland District Law Society's Incorporated Criminal Law Committee "Submission to the Law and Order Committee on the Bail Amendment Bill 2012"

Christie's Law Campaign "Submission to the Law and Order Committee on the Bail Amendment Bill 2012"

Christina Coulam "Submission to the Law and Order Committee on the Bail Amendment Bill 2012"

Robyn Hanson "Submission to the Law and Order Committee on the Bail Amendment Bill 2012"

Tracey Marceau "Submission to the Law and Order Committee on the Bail Amendment Bill 2012"

New Zealand Police Association "Submission to the Law and Order Committee on the Bail Amendment Bill 2012"

F Reports

1 New Zealand

Duncan Consulting Services *EM Bail Evaluation for NZ Police* (New Zealand Police, February 2008)

Family Violence Death Review Committee *Fifth Report: January 2014 to December 2015* (Health Quality and Safety Commission New Zealand, February 2016)

Elaine Mossman, Judy Paulin and Nan Wehipeihana *Evaluation of the family violence Integrated Safety Response pilot* (Social Policy Evaluation and Research Unit, August 2017)

Penal Reform International *Pretrial Detention and its alternatives in Armenia* (January 2012)

2 England and Wales

Comptroller and Auditor General *The Electronic Monitoring of Adult Offenders* (Great Britain National Audit Office, HC 800 Session 2005-2006, February 2006)

G Publications and Press Releases

Crown Law Office "Victims of Crime - Guidance for Prosecutors" (6 December 2014)
Beehive New Zealand “Collins delivers on tougher bail laws” (press release, 28 August 2013).

Sensible Sentencing Trust New Zealand “Inquest into the death of Christie Marceau is a whitewash” (press release, 9 March 2018).

H Internet Resources

1 Webpages

Department of Corrections “Electronic Monitoring on Bail (EM Bail)” <www.corrections.govt.nz>.

Department of Corrections “Prison facts and statistics - March 2018” (31 March 2018); “Prison facts and statistics - March 2017” (31 March 2017); “Prison facts and statistics - March 2016” (31 March 2016); “Prison facts and statistics - March 2015” (31 March 2015); “Prison facts and statistics - March 2014” (31 March 2014); “Prison facts and statistics - March 2013” (31 March 2013); “Prison facts and statistics - March 2012” (31 March 2012); “Prison facts and statistics - March 2011” (31 March 2011) <www.corrections.govt.nz>

Department of Corrections "Trends in the Offender Population 2014/15*”* (2015) <www.corrections.govt.nz>

Pete George “Bail law and remand prison numbers” (2018) Your NZ <www.yournz.org>

Ministry of Justice “Adult Conviction and Sentencing Statistics: Data Highlights for 2017” <www.justice.govt.nz>

Ministry of Justice “Victims Code” (September 2016) Victims Information <www.victimsinfo.govt.nz>

Just Speak “Bailing out the justice system: reopening the window of opportunity” (April 27 2017) <www.justspeak.org.nz>

Christie’s Law “Christie’s Law. Help Change the Bail Act” (preceding Bail Amendment Act 2013) <www.christieslaw.org.nz>

Kris Gledhill “The Bail Amendment Act 2013: A Brief Human Rights Audit” (February 14 2014) Auckland District Law Society <www.adls.org.nz>

2 Newspaper Articles

Issac Davidson “Justice Minister Andrew Little hints at law changes as prison population climbs” *New Zealand Herald* (online ed, New Zealand, 20 April 2018).

Anna Leask “Christie’s death: An inquest at last” *New Zealand Herald* (online ed, New Zealand, 16 December 2013)

Anna Leask “Terrifying last moments at hands of insane killer” *New Zealand Herald* (online ed, New Zealand, 13 June 2017)

Keith Lynch “Devoted mother Vanessa Pickering meets violent end” *Stuff* (online ed, New Zealand, 15 February 2011)

Anne Marie May "Relaxing bail laws: how risky is it?” *Radio New Zealand* (online ed, New Zealand, 25 June 2018)

Jared Savage and Andrew Koubaridis with New Zealand Police Association “Father blames bail system for son’s murder” *New Zealand Herald* (online ed, New Zealand, 31 March 2009)

Radio New Zealand “Lawyers back minister’s claims people on bail blocked from homes” *Scoop Independent News* (online ed, New Zealand, 23 May 2018)

Radio New Zealand “Bail law changes led to prison population increase - Little” (online ed, New Zealand, 24 February 2018)

Juliet Rowan “22 convictions, but a judge set him free” *New Zealand Herald* (online ed, New Zealand, 17 November 2007)

Stuff with New Zealand Police Association “Borrell’s father slams justice system” (online ed, New Zealand, 2 April 2009)

I Other Resources

Housing New Zealand “Tenancy Agreements 2010” (Obtained under Official Information Act 1982 Request from Just Speak to Housing New Zealand).

Housing New Zealand “Relevant sections from Housing New Zealand’s Memorandum of Understanding with Police and Department of Corrections” (2009) (Obtained under Official Information Act 1982 Request from Just Speak to Housing New Zealand

Letter from Austin Powell (Crown Counsel) to (Attorney General) regarding the Bail Amendment Bill 2012*(*4 May 2012)

Universal Declaration of Human Rights GA Res 217, S-CLXXXIII (1948)