Comment

Two Steps Back: The Presumption of Innocence and Changes to the *Bail Act 2013* (NSW)

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Abstract

The presumption of innocence is a fundamental right of the common law described as 'undoubted, axiomatic' and a 'golden thread running through English criminal law'.[1] In 2013, New South Wales enacted the *Bail Act 2013* (NSW), which was praised from all sides of politics for revitalising the presumption of innocence. However, subsequent to the enactment of the Act there were some concerns raised that it was 'soft on crime'.[2] Thus, the NSW Government announced a review of the Act. The Government has since enacted the *Bail Amendment Act 2014* (NSW), which adopts all 12 recommendations of the Review. The changes have been strongly criticised by legal academics and practitioners for allegedly violating the presumption of innocence. This comment analyses the changes to the *Bail Act 2013* (NSW) to determine whether they do indeed violate this fundamental right. It concludes that changes to the Act are misguided, as they are inconsistent with the presumption of innocence. Thus, the changes constitute a 'retrograde step' in the direction of the law.[3]

I Introduction

The presumption of innocence has lost much of its vigour lately, becoming something akin to a 'legal wallflower without much practical relevance'.[4] This sentiment is particularly apt in recent times given the state of bail laws in New South Wales. Shortly after the *Bail Act 2013* (NSW) ('*Bail Act 2013*') came into operation, revitalising the presumption of innocence and receiving support from all sides of politics,[5] criticisms in some sections of the media prompted the Government to announce a review of the Act by former Attorney-General John Hatzistergos. Almost immediately after Mr Hatzistergos

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1 *Woolmington v DPP* [1935] AC 462.

2 Julia Quilter, 'Not for Punishment: We Need to Understand Bail, Not Review It', *The Conversation* (online), 3 July 2014 <http://theconversation.com/not-for-punishment-we-need-to-understand-bail-not-review-it-28651>.

3 New South Wales Bar Association, 'Bail Change Threatens Rights' (Media Release, 5 August 2014) 1.

4 Carl-Friedrich Stuckenberg, 'Who is Presumed Innocent of What by Whom?' (2014) 8(2) *Criminal Law and Philosophy* 301, 301.

5 New South Wales Bar Association, above n 3, 1.

delivered his report, the NSW Cabinet accepted all 12 of his recommendations.[6] Shortly after, New South Wales Parliament passed the *Bail Amendment Act 2014* (NSW) enacting these recommendations. The amended Act commenced on the 28 January 2015.[7] It has attracted extremely strong criticism from legal academics and practitioners, and the changes have been described as a 'retrograde step which has the potential to threaten fundamental legal rights'[8] including the presumption of innocence. This is particularly concerning as the presumption of innocence is a fundamental right of the common law described as 'undoubted, axiomatic'[9] and a 'golden thread running through English criminal law'.[10] Although much reviled, the changes have not been subject to much scholarly analysis. It is the purpose of this comment to analyse the changes to the *Bail Act 2013* to form a conclusion as to whether they do, in fact, constitute a 'retrograde step'. It is the contention of this comment that the changes to the *Bail Act 2013* are inconsistent with the presumption of innocence.

II The Importance of the Presumption of Innocence

The presumption of innocence enjoys worldwide recognition as a fundamental procedural guarantee and has acquired the status of a human right.[11] The concept of the presumption dates back thousands of years to Ancient Rome and the Code of Justinian and it was subsequently incorporated into English law.[12] The importance of the concept to English common law is reflected in the oft-quoted statement of Viscount Sankey describing it as the 'golden thread running through English criminal law'.[13] There is little controversy that the concept of the presumption of innocence is part of Australian law. In *Momcilovic v The Queen*, it was accepted that the presumption is a 'constitutional right' that was *not* an 'unduly fragile' part of the common law of Australia.[14] Furthermore, Australia is party to the seven core human rights treaties — one of which, the *International Covenant on Civil and Political Rights*, guarantees the presumption of innocence.[15]

The presumption of innocence has been held to apply not only to the criminal trial itself, but also to pre-trial processes.[16] Bail is a most crucial stage of

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6 See New South Wales Government, 'Government Tightens Bail Laws' (Media Release, 5 August 2014) <https://www.nsw.gov.au/media-releases-premier/government-tightens-bail-laws>.

7 New South Wales, 'Commencement Proclamation under the *Bail Amendment Act 2014* No 52', LW 16 January 2015 (2015 No 12).

8 New South Wales Bar Association, above n 3, 1.

9 *Coffin v United States* (1895) 156 US 432.

10 *Woolmington v DPP* [1935] AC 462, 481–2.

11 Stuckenberg, above n 4, 302.

12 Andrew Stumer, *Presumption of Innocence: Evidential and Human Rights Perspectives* (Hart Publishing, 2010) 3.

13 *Woolmington v DPP,* [1935] AC 462, 481–2.

14 (2011) 245 CLR 1, 47.

15 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14(2).

16 Rachel Simpson, 'Bail in New South Wales' (Briefing Paper No 25/97, New South Wales Parliamentary Library Research Service, 1998) 3 citing *Griffiths v The Queen* (1977) 137 CLR 293.

pre-trial procedure for accused persons.[17] It has been said that the emphasis of modern bail is linked to the 'notions of release and liberty based on the fundamental concept of the presumption of innocence'.[18] The presumption of innocence means that pre-trial procedures should be conducted, as far as possible, as if the accused were innocent. This presumption acts as a restraint on the measures that may be taken against suspects in a period before trial. A charge against an accused is 'merely an allegation of criminality'.[19] 'As a legally innocent member of society, an accused has the right to be secure from detention and punishment prior to conviction'.[20] It has been argued that denial of bail is the clearest repudiation of the presumption of innocence.[21] While not all systems of pre-trial detention are inconsistent with the presumption of innocence, it is arguable that any bail laws should have the presumed innocence of the accused as a starting point and the deprivation of liberty should only occur in certain exceptional cases.

III The History of Bail in New South Wales

The relationship between the presumption of innocence and bail has a long and convoluted history in NSW. In 1978, the *Bail Act 1978* (NSW) was introduced in response to a NSW Law Reform Commission ('NSWLRC') report that identified NSW bail laws as being 'badly in need of an overhaul'.[22] Commencing operation in 1980, the *Bail Act 1978* (NSW) sought to balance the presumption of the innocence of the accused with the need to protect the community.[23] However, 'almost since the Act commenced operation … punitive reconfigurations' of the Act restricted the right to bail.[24] Consequently, the number of persons held on remand steadily increased.[25] These reconfigurations turned the *Bail Act* into a cumbersome statute described as 'one of the most convoluted and restrictive bail statutes in Australia'.[26]

The NSWLRC undertook a fundamental review of the *Bail Act 1978* (NSW) finding that a new, simplified Bail Act was required.[27] The NSW Government, incorporating parts of the NSWLRC report, introduced a new act: the *Bail Act 2013*. Under the new law, bail was considered 'on the basis of an

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17 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, 41.

18 Simpson, above n 15, 3.

19 Myles F McLellan, 'Bail and the Diminishing Presumption of Innocence' (2010) 15(1) *Canadian Criminal Law Review* 57, 58.

20 Ibid.

21 Mirko Bagaric, 'Bail: Time for Fundamental Reform' (2010) 6(3) *Original Law Review* 69, 69.

22 Criminal Law Review Division, NSW Attorney-General's Department, *Review of the Bail Act* (1992).

23 Booth and Townsley, above n 16.

24 Booth and Townsley, above n 16, 42–3. For example, the list of offences for which there was a presumption against bail expanded with a new tier of eligibility introduced whereby an accused would only be granted bail in respect of particular offences if exceptional circumstances justify the grant of bail; the presumption in favour of bail in relation to certain offences and certain defendants were also removed.

25 Ibid 45.

26 New South Wales Law Reform Commission, *Bail*, Report No 133 (2012) xviii.

27 Ibid.

assessment of risk in each alleged offender's circumstances, rather than relying on fixed presumptions based on the kind of offence involved'.[28] If the risk could not be alleviated by conditions then bail would be refused. However, s 3(2) added that the decision-maker ('bail authority') was 'to have regard to the presumption of innocence and the general right to be at liberty'.[29] The legislation was supported 'from all sides of politics and passed unanimously'[30] coming into force on 20 May 2014.[31]

Within weeks of enactment, bail was granted in a series of high profile cases decided under the new regime. These included Hassan Sam Ibrahim, the former head of the Parramatta chapter of the Nomads motorcycle gang, who was charged with selling illegal firearms; Steven Fesus, who was charged with murdering his wife; and Mahmoud Halwi, former President of the Comancheros motorcycle gang, who was charged with the murder of Peter Zervas during a brawl at Sydney Airport in 2009. [32] This led to accusations in the media that the new Act was 'soft on crime'.[33] Following a review by the former Attorney-General John Hatzistergos ('the Review'), the final report of the Review was made public on August 2014.[34] New South Wales Parliament subsequently passed the *Bail Amendment Act 2014* (NSW).

The Review recommended several important changes to the *Bail Act 2013*, all of which have been enacted by the *Bail Amendment Act 2014* (NSW).[35] For example, what had been s 3(2) of the Act, which required the bail authority to have regard to the presumption of innocence, was omitted and its contents moved to the Preamble.[36] A reference to the importance of bail decisions to 'the need to ensure the safety of victims, individuals and the community' was also inserted into the new Preamble.[37] Furthermore, the single uniform test for all bail decision was seen as being inadequate and 'challenged' in protecting the community.[38] Thus, in order to deal with community concerns regarding serious offenders, the new s 16A, introduces a 'show cause' provisions for serious offences. Under this provision, 'the bail authority '*must refuse* bail unless the accused person shows cause why his or her detention is not justified'.[39] Lastly, s 18(1)(o) of the amended Act now states that in relation to serious offences, when determining whether the accused person poses an unacceptable risk, the bail authority is to consider

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28 NSW Bar Association, above n 3, 1.
29 *Bail Act 2013* (NSW) s 3(2), as repealed by *Bail Amendment Act 2014* (NSW) sch 1 item 2.
30 NSW Bar Association, above n 3, 1.
31 John Hatzistergos, *Review of Bail Act 2013* (NSW Government, 2014) 5 [1].
32 David Brown and Julia Quilter, 'Speaking Too Soon: The Sabotage of Bail Reform in New South Wales' (2014) 3(3) *The International Journal for Crime, Justice and Social Democracy* 73, 76.
33 Quilter, above n 2.
34 Brown and Quilter, above n 31, 76.
35 The amended Act commenced operation on 28 January 2015: New South Wales, 'Commencement Proclamation under the *Bail Amendment Act 2014* No 52', LW 16 January 2015 (2015 No 12).
36 *Bail Amendment Act 2014* (NSW) sch 1 items 1–2.
37 Ibid.
38 Hatzistergos, above n 30, 52 [197].
39 *Bail Act 2013* (NSW) s 16A (emphasis added), as amended by *Bail Amendment Act 2014* (NSW) sch 1, item 6.

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

IV Are the New Changes to the *Bail Act 2013* (NSW) Consistent with the Presumption of Innocence?

We have already seen that the right to be presumed innocent is a concept enshrined in the criminal justice system[40] and has acquired the status of a human right.[41] Accordingly, this is a right that deserves to be protected vigorously by the legislature. The exercise of legislative power in Australia takes place in the constitutional setting of a 'liberal democracy founded on the principles and traditions of the common law'.[42] As the presumption of innocence is a fundamental right of the common law and a human right, Parliament should ensure that its laws are consistent with this right. In NSW, in the absence of a federal bill of rights or a charter of human rights analogous to the one in effect in Victoria, Parliament is the sole defender of human rights and civil liberties.[43] As the presumption of innocence is both, it can be argued that the NSW Parliament is under a moral imperative to protect the right to be presumed innocent in exercising its legislative power.[44] Unfortunately, however, in amending the *Bail Act 2013*, Parliament has encroached upon the fundamental right of the presumption of innocence.

V Analysis of the Proposed Changes

Recommendation 1 of the Review proposed to omit s 3(2) of the legislation, which required the bail authority to have regard to the presumption of innocence and the general right to be at liberty. The Review recommended that this be relegated to the Preamble, which would also note 'the importance of bail decisions to community safety'.[45] This recommendation has been enacted in the amended Act.[46]

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40 New South Wales Law Reform Commission, above n 25, 123.

41 Stuckenberg, above n 4, 302.

42 *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539, 587 (Lord Steyn).

43 See George Williams, 'The Federal Parliament and the Protection of Human Rights' (Research Paper No 20, 11 May 1999), in which Williams discussed the role of the Federal Parliament in protecting human rights — however, this view of Federal Parliament's role is also applicable to state parliaments.

44 Dicey's theory of parliamentary sovereignty would argue that parliament has the capacity to pass any laws including ex hypothesi a 'bad law': Albert V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 1889) 38. However, it has been increasingly recognised that '[o]ur evolving concept of the democratic process is moving beyond an exclusive emphasis on parliamentary supremacy and majority will': Anthony Mason, 'The Wilfred Fullagar Memorial Lecture: Future Directions in Australian Law' (1987) 13(3) *Monash Law Review* 149, 163. By virtue of their constitutional mandate to represent the people, parliament can reaffirm the human rights values and principles for which it stands by incorporating these values into all the laws that it passes. The concept of democratic process embraces 'a notion of responsible government which respects the fundamental rights and dignity of the individual': Anthony Mason, 'The Wilfred Fullagar Memorial Lecture: Future Directions in Australian Law' (1987) 13(3) *Monash Law Review* 149, 163.

45 Hatzistergos, above n 30, 6 [11].

In the old Act, s 3 was introduced to ensure that the presumption of innocence be considered as part of the bail decision-making process.[47] In proposing to remove s 3(2) from the purpose clause, the Review stated that the presumption of innocence should 'not operate as a stand-alone consideration aside from other objects such as the protection of the community'. [48] In effect, the recommendation equates the importance of the presumption with the protection of the community.

The effect of s 3(2) had been to act as a controlling factor in considering a determination of bail,[49] reinforcing that the accused is entitled to the presumption of innocence.[50] Recommendation 1, and its subsequent enactment, encroaches upon the presumption of innocence as it unduly elevates 'protection of the community' as a consideration when deciding to grant bail at the expense of the accused's right to be presumed innocent. While protection of the community is never explicitly defined, it is implicitly defined as protection from the risk of future crimes committed by the accused.[51] Protection of the community is inconsistent with the presumption of innocence and recommendation 1 is misguided in its attempt to equate the importance of the presumption with protection of the community.

Detention to prevent pre-trial absconding or interference with witnesses or evidence does not offend the presumption of innocence because the purpose of both is to ensure that the judicial process will be carried out unhampered and these restrictions are not premised on a view of the accused's guilt.[52] In contrast, a deprivation of liberty in order to prevent the accused from committing further offences violates the presumption because it is premised on a premature evaluation of the accused's guilt.[53] To illustrate, at a pre-trial stage, the accused must be presumed to be innocent of the offence charged; being charged with an offence does not create an extra incentive for an accused to commit offences unconnected to the trial.[54] There is no reason to think that the accused is more likely than other citizens to commit other offences. As Duff states, 'unless we are going to justify a general practice of pre-emptively detaining those whom we think likely to commit offences if left free, we cannot justify this ground for denying bail'.[55] The fact that an accused is facing trial cannot warrant detention to prevent offences unrelated to the trial.[56] To posit that bail should be denied to an accused for 'community safety' is to assume that the mere act of arrest transforms the accused into a criminal,

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46 *Bail Act 2013* (NSW) Preamble, as amended by *Bail Amendment Act 2014* (NSW) sch 1 item 1.
47 Hatzistergos, above n 30, 27 [83].
48 Hatzistergos, above n 30, 6 [10].
49 *R v Chamseddine* (Unreported, Supreme Court of New South Wales, Adamson J, 12 June 2014).
50 *R v Rokhzayi* [2014] NSWSC 958 (11 July 2014), 28.
51 See the unacceptable risk test in s 17(2) of the *Bail Act 2013*, which includes 'endanger the safety of victims, individuals or the community'.
52 Una Ni Raifeartaigh, 'Reconciling Bail Law with the Presumption of Innocence' (1997) 17(1) *Oxford Journal of Legal Studies* 1, 4–5.
53 Ibid.
54 RA Duff, 'Pre-Trial Detention and the Presumption of Innocence' in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds) *Prevention and the Limits of the Criminal Law* (Oxford University Press, 2013) 115, 128.
55 Ibid.
56 Ibid.

despite not having been found formally guilty of an offence.[57] It is more accurate to say that the accused should be presumed to be innocent of 'both past and future crimes until the reverse is proved'.[58] Furthermore, there is a fundamental problem in determining or predicting that the accused will commit violent acts while released on bail. As the NSW Bail Committee stated in 1976, refusal of bail 'rests upon an unproven factual assumption: that it is possible for courts to identify with some degree of accuracy people likely to commit crimes if released'.[59]

Recommendation 5 of the Review proposed to:

> Insert a provision that provides if the defendant is charged with a show cause offence, the bail authority must refuse to grant bail unless the defendant shows why the defendant's custody in detention is not justified.[60]

This has been enacted in s 16A of the amended Act. The reverse onus section assumes that bail will be denied for certain offences[61] unless the accused 'shows cause'. The new s 16A reverses the onus of proof as it requires the defendant to discharge a persuasive burden. If they do not discharge this burden, then they will be denied bail. This is in contrast to a traditional application of bail where the onus is on the Crown to demonstrate why the defendant should not be released on bail.[62]

Section 16A of the amended Act is inconsistent with the presumption of innocence. The accused is a legally innocent person. He or she is merely 'charged' with an offence. Until a trial takes place where his guilt is established beyond a reasonable doubt, the accused remains a legally innocent person and has a prima facie right to liberty. The seriousness of the alleged offence does not, and cannot, change the state of his legal innocence. The show cause provision effectively creates a presumption against bail — contingent not upon specific indications as to why the accused should be detained, but simply on the nature of the offence. Relying on the accused's present charge to justify the conclusion that the accused might offend if released violates right to be presumed innocent of that charge.[63]

Furthermore, reversing the burden of proof is also inconsistent with the presumption of innocence. The European Court of Human Rights in *Rokhlina* stated that in order for an accused to be deprived of his liberty, it is 'incumbent on the *domestic authorities* to establish and demonstrate the existence of concrete facts outweighing the rule of respect for individual liberty'.[64] Reversing the burden of proof on the accused to demonstrate the existence of facts as to why his or her liberty should be preserved (that is, requiring him or her to show cause) is tantamount to overturning the right to liberty and the principle that detention is

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57 Lynne N Henderson, 'The Wrongs of Victim's Rights' (1985) 37(4) *Stanford Law Review* 937, 973.
58 Duff, above n 54, 120.
59 New South Wales, *Report of the Bail Review Committee*, Parl Paper No 46 (1976) 30.
60 Hatzistergos, above n 30, 65.
61 Ibid. For a list of offences, see *Bail Act 2013* (NSW) s 16B, as amended by *Bail Amendment Act 2014* (NSW) sch 1 item 6.
62 *Re Martin (bail application)* (Unreported, Supreme Court of Northern Territory, Kearney J, 23 October 1997) 11.
63 Raifeartaigh, above n 52, 4–5.
64 *Rokhlina v Russia* (European Court of Human Rights, Application No 54071/00, 7 April 2005) [67] (emphasis added).

only permissible in exhaustively enumerated and strictly defined cases.[65] It takes the premise that the accused is guilty as a starting point and requires him or her to rebut that assumption.

Another aspect of the amended Act that is inconsistent with the presumption of innocence is the incorporation of the victim's views when making a bail decision. Adopting recommendation 3(2) of the Review, the new s 18(1)(o) of the amended Act stipulates that for serious offences, the views of the victim and victim's family should be taken into account, if available, 'to the extent relevant to a concern that the accused person could, could if released from custody, endanger the safety of victims, individuals or the community'.[66] Crime for many victims is a devastating experience and there is no doubt that most crime victims will be distressed and anxious about the outcome of bail applications.[67] Many crime victims do not want the relevant accused to be at liberty.[68] Most victims may have already pre-judged the accused's guilt and, having done so, will most likely think that the accused poses a danger to their safety or other members of the community if released on bail. Hellerstein suggests that the presence of a victim in a criminal proceeding is likely to be highly prejudicial;[69] the rights of the criminally accused can be easily neglected when the focus shifts on the victim.[70] This makes it easy to forget that at a pre-trial stage the accused is still legally innocent. Section 18(1)(o) permits consideration of the views of a victim in relation to a crime that the prosecution has not yet proved against an accused who is supposedly presumed to be innocent. This is clearly inconsistent with the presumption of innocence. Furthermore, through the unacceptable risk test, under which the safety of the victim is to be considered, and the wide range of conditions that may be imposed under the Act, the law already seeks to balance the concerns of the crime victim against the interests of the unconvicted accused. Thus, s 18(1)(o) is an unnecessary encroachment on the right of the accused to be presumed innocent.

VI Conclusion

To conclude, the changes to the *Bail Act 2013* are, indeed, retrograde and constitute a significant encroachment upon the presumption of innocence. This is for the following reasons:

(a) the changes unduly elevate protection of the community at the expense of presumption of innocence in the decision to grant bail;
(b) the 'show cause' provision for serious offences effectively reverses the burden of proof and is contrary to the presumption; and
(c) the amendment that the victim's views be taken into account in granting bail is unnecessary and highly prejudicial to the rights of the accused.

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65 *Woods v DPP (Vic)* [2014] VSC 1 (17 January 2014) 26.
66 *Bail Act 2013* (NSW) s 18(1)(o), as amended by *Bail Amendment Act 2014* (NSW) sch 1 item 8.
67 Booth and Townsley, above n 16, 54.
68 Ibid.
69 Dina R Hellerstein, 'Victim Impact Statement: Reform or Reprisal' (1989) 27(2) *American Criminal Law Review* 391, 398.
70 Ibid 395.