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BAIL, REVERSE PRESUMPTIONS AND FAMILY VIOLENCE
Examining the implications of a presumption against bail in the family violence jurisdiction.

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Abstract

There has been a traditional presumption in favour of granting bail and this has been premised on the basis that defendant’s are presumed innocent until proved guilty and have a right to be released from detention unless just cause exists to continue that detention. Over time that presumption has been incrementally eroded by legislation imposing a reversal of the general presumption in favour of bail and this has occurred most often in reaction to high profile criminal offending. Those legislative amendments have mainly affected those accused of serious offending (such as murder, treason and espionage) and recidivist violent and property offenders.

There is a question now however about whether a subtle reverse presumption is operative in the family violence jurisdiction for all defendants charged with “family violence”. This query arises as a result of recent changes to the bail procedures in that court. If a reverse presumption is operative the follow up question is how that sits with a defendant’s NZBORA rights and how appropriate it is that those changes have not come about via legislative amendment.

This paper explores the history of reverse presumptions in New Zealand’s bail legislation and examines the changes to the family violence procedure. The conclusion reached is that it is arguable the Porirua Court is approaching bail in the family violence jurisdiction from a presumption against bail and that, in that circumstance, absent full NZBORA vetting that approach is inappropriate. It is further opined that, if this is the direction the pending amendments to the Bail Act 2000 are heading, it is likely NZBORA vetting will confirm that a blanket reverse bail presumption for offending categorised as “family violence” is an unjustified limitation on a defendant’s NZBORA rights.

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I Introduction

It is one thing to take into account the safety, wellbeing and interests of an affected person or an affected child, it is quite another to refuse liberty unless the defendant discharges the onus of proof cast on him ...¹

Justice Underwood, Supreme Court of Tasmania

Historically bail has been utilised to ensure a defendant attends at their next court appearance and the presumption has, with few exceptions, been that bail will be granted unless there is just cause for continued detention. The onus to prove “just cause” has traditionally been cast on the prosecution. With the advent of New Zealand’s formal bail legislation that presumption has slowly been eroded where in an increasing number of circumstances the defendant has the burden of justifying why bail should be granted and this burden has become more onerous as the safety of the victim (and public at large) has achieved paramount consideration.

In New Zealand this erosion has come about largely where repeat serious or violent offending has occurred and has been enacted in response to high profile criminal cases and a perceived need for politicians to be “tough on crime”. In response the Bail Act 2000 (“the Bail Act”) was enacted which included limited reverse presumptions which were then expanded in 2013 under the Bail Amendment Act 2013 (“the 2013 Amendment Act”). While those changes have come about through legislative amendment there is now a concern that a similar reversal is occurring in the family violence jurisdiction without corresponding legislative amendment. In that jurisdiction (specifically the Porirua District Court) policies and procedures have been adopted which have changed the way bail decisions for family violence offending are approached to arguably, a position where there is a presumption against bail being granted unless the defendant can satisfy the judiciary they are not a risk to the victim.

The question this paper analyses is how reverse bail presumptions sit with the New Zealand Bill of Rights Act 1990 (“NZBORA”), including the right of the defendant to be presumed innocent until proven guilty and how those rights can be balanced in the family violence jurisdiction against the need to protect the victim. A secondary question is if reverse presumptions are required in order to achieve an appropriate balance, is it appropriate for changes of that nature to be implemented by way of regulation or court initiated procedure rather than a fully vetted legislative amendment.

To answer these questions this paper first addresses the fundamentals of bail which includes a discussion on the origins of the aforementioned rights as well as what New Zealand’s current bail legislation looks like and how it has developed. From that platform, the family violence procedure at the Porirua District Court is outlined to provide an example of how that jurisdiction has changed its approach to bail and to consider whether an implicit reverse presumption is operative.

Before analysing how the right balance should be struck and how the changes, if required, should be implemented, the main issues with reverse presumptions are examined and reference is made to Australia, and New South Wales in particular where research has been undertaken regarding reverse bail presumptions in family violence legislation.

An analysis is then undertaken regarding how best to manage the very real issue of protecting victims whilst upholding the fundamental rights of criminal defendants and whether the family violence procedure and intended future legislation in that jurisdiction strikes the right balance and achieves the intended objectives.

This paper concludes that it is arguable the Porirua District Court has implemented a subtle reverse presumption when considering bail for defendants charged with “family violence”. In this authors opinion a blanket reverse presumption for the category of offending loosely defined as “family violence” is an unjustified limitation on a defendant’s NZBORA rights because the negative effects of the measure are likely to be disproportionate to the benefits. To that end, a reverse presumption of this kind should not be implemented through anything short of fully vetted legislation where due consideration can be given to NZBORA.

II A Traditional Presumption in Favour of Bail

There are two fundamentals of bail which are enshrined in NZBORA and which will frame this paper’s discussion on reverse presumptions. Firstly, anybody who is charged with a criminal offence has “the right to be presumed innocent until proved guilty according to law”, and secondly that person has the right to be “released (from custody) on reasonable terms and conditions unless there is just cause for continued detention”. The net effect of these rights has traditionally been the presumption that a defendant will be granted bail.

While there has been earlier debate regarding when NZBORA rights take effect, it has been accepted in modern case law that NZBORA rights exist pre-trial and particularly where pre-trial detention is contemplated. This seems appropriate given the refusal of bail equates to the deprivation of one’s liberty and thus it has been argued that “any bail laws should have

\footnote{New Zealand Bill of Rights Act 1990, s 25(c).}

\footnote{New Zealand Bill of Rights Act 1990, s 24(b).}
the presumed innocence of the accused as a starting point and the deprivation of liberty should only occur in exceptional cases. In *R v Blaikie*, a case which pre-dated the Bail Act but where the tests under the Bail Act largely emanate from, it was stated:

[7] Someone who has pleaded not guilty must be presumed to be innocent of the charged offending until proven guilty according to law (s 25(c) of the New Zealand Bill of Rights Act 1990). As already mentioned, such a person also enjoys the benefit of s 24 of that Act which requires that there be “just cause” for continued detention …

[14] It is the task of the Judge hearing a bail application to balance these various factors, giving due weight of course to the Bill of Rights guarantees, and to form a judgment upon whether bail should be granted and, if so, the conditions to attach to it.

It is of course accepted that NZBORA rights are not absolute and may be subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. The test for determining if a limit is demonstrably justified is set out in the Supreme Court case of *Hansen v R* and is utilised by the courts when assessing if a provision is seemingly inconsistent with NZBORA but also by the Attorney-General during a Bills passage through Parliament. In the former situation, if the court concludes that the legislative provision is an unjustified limitation it can issue a declaration to that effect but it cannot “hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or decline to apply any provision of the enactment” simply because the provision is inconsistent with NZBORA. In the history of NZBORA only one declaration has been issued by the courts.

In the latter instance, where a Bill is introduced into the House of Representatives, the Attorney-General must “bring to the attention of the House of Representatives any provision

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5 *R v Blaikie* (1999) 17 CRNZ 122 at 125-126 (CA).
6 New Zealand Bill of Rights Act 1990, s 5.
7 As set out in *B v Waitemata District Health Board* [2016] NZCA 184 at [108]: “Does the provision serve an objective sufficiently important to justify limitation of the right or freedom? If so, is the limit rationally connected with the objective?, Does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?, Is the limit in due proportion to the importance of the objective?”. It must be noted that there is only implied authority to issue a declaration of inconsistency rather than legislative authority and that issue is currently under appeal – see *Taylor & Ors v Attorney-General of New Zealand and Ors* [2016] NZHC 355 where the Court referred to the recent declaration of inconsistency made by the High Court and noted at [8]: “That judgment is under appeal. I am advised that it is not because the Crown disputes the inconsistency. Rather, the appeal is against the proposition that the High Court has the jurisdiction to make such a declaration of inconsistency”.
8 New Zealand Bill of Rights Act, s 4.
9 See *Taylor & Ors v Attorney-General of New Zealand* [2015] NZHC 1705 where the Court issued a declaration of inconsistency and stated at [79]: “Section 80(1)(d) of the Electoral Act 1993 (as amended by the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010) is inconsistent with the right to vote affirmed and guaranteed in s 12(a) of the New Zealand Bill of Rights Act 1990, and cannot be justified under s 5 of that Act”.
in the Bill that appears to be inconsistent with any rights and freedoms contained in [the] Bill of Rights".\textsuperscript{11} As of March 2016, the Attorney-General has tabled 70 reports in Parliament including one which addressed reverse presumptions in bail legislation.\textsuperscript{12} It must be noted that even where the Attorney-General concludes that a Bill or provision thereof is inconsistent with NZBORA that does not restrict Parliament from enacting the proposed legislation.\textsuperscript{13}

\textit{A The Presumption of Innocence}

The presumption of innocence is a fundamental principle of the criminal justice system and has existed long before its statutory recognition under NZBORA as a minimum standard of criminal procedure.\textsuperscript{14} Its foundation in the faith of humankind’s innate goodness was expressed in an early statement of its meaning and intent:\textsuperscript{15}

\ldots in the eyes of the law every man is honest and innocent unless it be proved legally to the contrary. In criminal prosecutions the presumption is in favour of the defendant for thus far it is to be hoped of all mankind, that they are not guilty in any such instances …

A later statement and one of the most famous expressions of its intent appears in the 1935 case of \textit{Woolmington v DPP} where Viscount Sankey opined:\textsuperscript{16}

Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt … the principle that the prosecution must prove the guilt of the prisoner is part of the common law and no attempt to whittle it down can be entertained.

Whilst accepting that NZBORA rights are not absolute it should be noted that the Chief Justice once opined that in her view section 25(c) described “an unqualified right to be presumed innocent and any restriction on it is inconsistent with s25(c)”.\textsuperscript{17} Her Honour later commented that “any ‘limitation’ of the presumption of innocence effectively denie[d] the right altogether”.\textsuperscript{18} Those views were not shared by the majority of the Court but do establish

\textsuperscript{11} \textit{New Zealand Bill of Rights Act}, s7.
\textsuperscript{12} Discussed in the section titled “Existing Reverse Presumptions in the Bail Act”.
\textsuperscript{13} As was the case with the Attorney-General’s report on the prisoner voting rights legislation and which ultimately received a declaration of inconsistency from the courts. See \textit{Taylor & Ors v Attorney-General of New Zealand} [2015] NZHC 1705 at [13].
\textsuperscript{14} \textit{New Zealand Bill of Rights Act}, s 25(c): “Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights … the right to be presumed innocent until proved guilty accordingly to law”.
\textsuperscript{15} Storrs Lectures “The Presumption of Innocence in Criminal Cases” (1896) 6 Yale Law Journal 185 at 190.
\textsuperscript{16} \textit{Woolmington v DPP} [1935] AC 462 (HL) at 481.
\textsuperscript{17} \textit{Hansen v R} [2007] NZSC 7 at [38]. At [264] Anderson J voiced a similar sentiment: “It is also fairly arguable that the burden of persuasion carried by the prosecution in criminal cases is so integral to a fair trial that no relaxation or reversal of it can be justified”.
\textsuperscript{18} \textit{Hansen v R} [2007] NZSC 7 at [41].
the reverence this particular right has had in the criminal justice system which confirms that any infringement must be carefully contemplated.

B “Just Cause for Continued Detention”

Section 24(b) of NZBORA states: “everyone who is charged with an offence shall be released on reasonable terms and conditions unless there is just cause for continued detention” and the Bail Act largely adopts that wording where in most cases a defendant is either bailable as of right\(^\text{19}\) or must be “released on reasonable terms and conditions unless the court is satisfied there is just cause for continued detention”.\(^\text{20}\)

The relationship between s 24(b) of NZBORA and s 7(5) of the Bail Act has been discussed by the courts and in an early case under the Bail Act, Harrison J confirmed the position that:\(^\text{21}\)

[4] All applications for bail start from the presumption found in s 24(b) New Zealand Bill of Rights Act 1990 – everyone charged with an offence shall be released on reasonable terms and conditions unless the prosecution show just cause for continued detention. The same presumption is repeated in s 7(5) Bail Act.

This right is inherently already qualified by the test for “just cause” which is outlined under section 8 of the Bail Act, as adopted from the common law.\(^\text{22}\) Section 8 requires the court to take into account whether there is a risk that the defendant may fail to appear in court; may interfere with witnesses or evidence; or may offend while on bail, and “any matter that would make it unjust to detain the defendant”.\(^\text{23}\)

There are a variety of discretionary factors the court may take into account when determining whether “just cause” exists\(^\text{24}\) but with reference to “family violence” one of the mandatory

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\(^\text{19}\) Bail Act 2000, s 7(1) “A defendant is bailable as of right who is charged with an offence that is not punishable by imprisonment”; s 7(2) “A defendant is bailable as of right who is charged with an offence for which the maximum punishment is less than 3 years’ imprisonment, unless the offence is one against section 194 of the Crimes Act 1961 (which relates to assault on a child, or by a male or a female) or against section 49 of the Domestic Violence Act 1995 (which relates to contravention of a protection order); s 7(3) “Despite anything in this section, a defendant who is charged with an offence punishable by imprisonment is not bailable as of right if the defendant has been previously convicted of an offence punishable by death or imprisonment”.

\(^\text{20}\) Bail Act 2000, s 7(5) “Subject to sections 9 to 17, a defendant who is charged with an offence and is not bailable as of right must be released by a court on reasonable terms and conditions unless the court is satisfied that there is just cause for continued detention”.

\(^\text{21}\) Hu v Police HC Auckland R34/03, 29 April 2003, at [4].

\(^\text{22}\) Including R v Blaikie, above n 5 at 125.

\(^\text{23}\) Bail Act 2000, s 8(1)(b).

\(^\text{24}\) Bail Act 2000, s 8(2) which includes: (a) the nature of the offence with which the defendant is charged, (b) the strength of the evidence and the probability of conviction, (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
considerations is “any views of a victim of an offence of a kind referred to in section 29 of the Victims’ Rights Act 2002” and where the defendant is charged with an offence against section 49 of the Domestic Violence Act 1995, “the courts paramount consideration is the need to protect the victim of the alleged offence”.

When enacting legislation which seemingly infringes NZBORA, in so far as it relates to bail, the legislature often invokes the test of “just cause” to justify the limitation. For example, it might be argued that a recidivist offenders history and therefore risk of re-offending places the victim at risk of harm and that cumulatively equates to “just cause”.

III Existing Reverse Presumptions in the Bail Act

Reverse bail presumptions (and onuses) are not a new phenomenon and prior to the Bail Act, New Zealand’s bail laws were strewn across a number of Acts such as the Crimes Act 1961 which included a reverse presumption for defendant’s charged with a “specified offence” and who had one or more prior convictions for a “specified offence” whether the same or different. In those circumstances the defendant had to satisfy the court on the balance of probabilities “that he or she would not, while on bail, commit any offence involving violence against or danger to the safety of any person”. In assessing that risk the need to protect the public was the “paramount consideration”.

That section ultimately became section 10 of the Bail Act but the Government did not stop there and reverse presumptions were taken even further under the Bail Act, most notably by section 12 which prescribes two circumstances which if met require that no defendant may

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25 Bail Act 2000, s 8(4). See also section 29 of the Victims’ Rights Act 2002 which defines “specified offence” as including: “An offence of another kind and that has led to the victim having ongoing fears, on reasonable grounds – for his or her physical safety or security; or for the physical safety or security of 1 or more members of his or her immediate family”, this would arguably capture most family violence offences.

26 Domestic Violence Act 1995, s 49: “Every person commits an offence who breaches a protection order by ... doing an act in contravention of the protection order; or failing to comply with any condition of the protection order”.

27 Bail Act 2000, s 8(5).

28 Crimes Act 1961, s 318 (repealed) defined “specified offence” as murder (both s 167 and s 168), manslaughter, attempt to murder, wounding with intent to cause previous bodily harm, wounding with intent to injure, injuring with intent to injure, using firearms against law enforcement, commission of a crime with a firearm, robbery and aggravated robbery.

29 Crimes Act 1961, s 318(5) (repealed).

30 Crimes Act 1961, s 318(3) (repealed).

31 Crimes Act 1961, s 318(4) (repealed).

32 Firstly, where the defendant is of or over the age of 17 years and is charged with an offence under the Crimes Act 1961 that carries a maximum sentence of 3 or more years’ imprisonment and at the time of the alleged commission of the offence was remanded at large or on bail awaiting trial for another offence under the Crimes Act 1961 that carries a maximum sentence of 3 or more years’ imprisonment and has at any time previously received a sentence of imprisonment; and secondly where the defendant is of or over the age of 17 years and is charged with an offence that carries a maximum sentence of 3 or more years’ imprisonment and has previously
be granted bail unless they satisfy the Judge on the balance of probabilities that they will not, while on bail or at large, commit "any offence involving violence against or danger to the safety of, any other person; or burglary or any other serious property offence". 33

Section 12 received significant attention during the passage of the Bail Act, which was originally introduced by Hon Phil Goff as a private members bill 34 and which initially imposed a presumption against bail "for those with 10 or more previous convictions for offences punishable by imprisonment, and who have also previously dishonoured bail conditions". 35 That reverse presumption was considered inconsistent with NZBORA with the Attorney-General of the day, Rt Hon Sir Douglas Graham, commenting: 36

This raises a prima facie issue under section 25(c) of BORA, which affirms the right to be presumed innocent until proved guilty according to law ... I note for the record my view that, if the provision for declining bail under section 319AA was based on "just cause", the reversal of onus would not be objectionable.

... it is a legitimate aim of the bail system to prevent offending while on bail and it is rational to assume that there is a substantial likelihood that an accused who has 10 or more previous convictions for imprisonable offences will offend while released on bail. However, the next question is whether it is proportionate (or just) in every case for such an accused to be declined bail, as a mandatory requirement, unless the judge is satisfied the offender will not offend while on bail. I conclude it is not.

... The key to designing a bail regime that achieves both the goals of this bill and consistency with section 24(b) of the BORA is to define a class of accused persons to which the regime applies that, if found guilty, are more likely than not to be sentenced to imprisonment.

Hon Phil Goff's private members bill was ultimately overtaken by a National Government Bill 37 and the latter Bill heeded the advice of the Attorney-General and tailored the reverse

33 Bail Act 2000, s 12(5).
34 The Crimes (Bail Reform) Bill 1999 introduced into Parliament on 1 April 1999.
35 (28 April 1999) 576 NZPD 16159-16160. Although the ACT party espoused a view that the Bill should go further stating (28 April 1999) 576 NZPD 16164-16165: "Where a victim objects to bail on reasonable grounds, the onus should be on the offender to establish that bail should be granted. This includes all serious criminal charges including those being charged for the first time ... ACT believes that where the police have sufficient evidence to charge a person for a crime involving serious offences, the onus of proof as to why someone should have bail should move from the police to the accused".
37 The Bail Bill, which ultimately became a Labour Government Bill after the 1999 election and Nationals defeat at the polls.
onus provision so it targeted a smaller group of defendants defined as recidivist violent and property offenders (as ultimately enacted under s 12 of the Bail Act).  

It was clear during the parliamentary debates on the Bail Bill that victims’ rights and a need to be “tough on crime” fuelled the passage of the Act. The following passages are particularly illuminating:

... Kevin Chadwick raped and bashed and left for dead an elderly Raumati woman, while on bail for another rape. This is the sort of thing that has possibly brought this Bill to the House. Hayden Taylor raped and murdered a young woman, Nicole Rankin, in Kumeu while on bail for a rape at knifepoint. Phillip Smith murdered a man, while on bail for sexually abusing the man’s son.  

...some members of the committee did feel that if it breached the New Zealand Bill of Rights Act in some way, then perhaps that Act itself needed amending to be able to accommodate a view that is widely held in the community, and that is that the rights of criminals are being put ahead of the rights of ordinary New Zealanders to be safe in their homes. So that is a very serious issue.  

...We should remind ourselves of the motivation for this bill. That motivation was the public’s deep concern about the number of seriously violent offenders who were getting bail, then continuing to commit offences while on bail.  

One particular development that dominated the debates after the 1999 election was the results of the citizens initiated referendum which took place on election day and posed the question of whether “greater emphasis” should be placed on victims needs and whether “minimum sentences and hard labour” should be imposed for all serious violent offenders. The voting

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38 See (31 August 1999) 580 NZPD 18927 where Rt Hon Sir Douglas Graham, the then Attorney-General confirmed that the advice from Crown Law was that the newly framed provision “was likely to be consistent with the New Zealand Bill of Rights Act because it [is] narrowly targeted at a group for which there [is] just cause to refuse bail”.

39 (31 August 1999) 580 NZPD 18929.

40 It should be noted that only 15 submissions were received by the Justice and Law Reform Committee and only six submissions were heard at the Select Committee stage, see (31 August 1999) 580 NZPD 18932.

41 (31 August 1999) 580 NZPD 18929.

42 (30 May 2000) 584 NZPD 2643.

43 See Tony Ryall “Citizens Initiated Referendum on Justice Issues To Be Held With General Election” (press release, 13 July 1999). Mr Norm Withers, whose mother had been the victim of a serious assault, promoted a petition for a referendum on the question of whether there “should be a reform of our justice system placing greater emphasis on the needs of victims, providing restitution and compensation for them and imposing minimum sentences and hard labour for all serious violent offenders”. The petition was signed by at least 10% of eligible electors and therefore took place on election day 1999. Whilst the public overwhelming voted “yes” to the question posed (92%), the question itself has been criticised as being too open and leading making it near impossible to vote “no” and therefore potentially not indicative of the general public’s view on the criminal justice system.
public overwhelmingly voted “yes” (92%) which the Government (particularly the National Party) took to mean that New Zealanders wanted tougher bail laws.\(^{44}\)

The presumption of innocence was given something akin to lip service from the majority of the parties other the Green Party which variously stated:\(^{45}\)

> The reversal of onus for deciding bail ... is a serious issue. If we are to remove the presumption that people on trial – we are not talking about people convicted; we are talking about people on trial and therefore presumed innocent – retain their freedom while awaiting trial, that must be done with caution, with calm reason, and it must be based on clear evidence.

The debate regarding reverse presumptions was thrust centre stage again in 2012 after the tragic murder of Christie Marceau at the hands of Akshay Chand while he was on bail for earlier serious offending against Christie.\(^{46}\) Christie’s family consistently called for the Bail Act to be substantively amended by, among other things, requiring judges to pay “particular regard to submissions made by victims and any personal threats made against victims” and removing the “strong presumption in favour of bail for persons under 20 where previously convicted of an offence punishable by imprisonment”.\(^{47}\) These calls ultimately resulted in a petition to Parliament\(^{48}\) which was considered at the same time the 2013 Amendment Act was introduced. That Act included the following proposed (and ultimately enacted) changes which expanded the pool of defendants caught by reverse presumptions:

- Amending section 15 of the Bail Act which provided a strong presumption in favour of bail for those “under 20 years” so that it only applies to “a defendant who is 17 years”.\(^{49}\)
- Introducing a reverse onus for the offence of murder.\(^{50}\)
- Expanding the definition of “specified offence” under section 10 of the Bail Act to include six additional offences.\(^{51}\)
- Enacting a reverse onus for “serious Class A drug offences”.\(^{52}\)

\(^{44}\) See (24 February 2000) 581 NZPD 790 where Hon Tony Ryall commented: “Ninety-two percent of our countrymen and countrywomen said New Zealand wants a more conservative justice system. National members are getting the message. We have got the message that we did not go far enough when we were in Government. The Bail Bill that we proposed did not go far enough”.\(^{45}\) (30 May 2000) 584 NZPD 2661.\(^{46}\) Anna Leask “Terrifying last moments at hands of insane killer” The New Zealand Herald (online ed, Auckland, 18 October 2012).\(^{47}\) Christie’s Law Website, [http://www.christieslaw.co.nz/what-we-want.html](http://www.christieslaw.co.nz/what-we-want.html)\(^{48}\) Report of the Law and Order Committee “Petition 2011/24 of Tracey Marceau on behalf of Christie’s Law Group and 58,000 Others” (undated).\(^{49}\) Bail Act 2000, s 15.\(^{50}\) Bail Act 2000, s 9A.\(^{51}\) The six offences introduced into the Bail Act 2000, s 10 were: sexual conduct with child under 12, sexual conduct with young person under 16, abduction for purpose of marriage or sexual connection, kidnapping, aggravated burglary and assault with intent to rob.\(^{52}\) Bail Act 2000, s 17A.
The debates echoed the earlier discussions in 1999/2000 and the calls for stronger bail laws to protect victims, even at the expense of the defendant’s rights: 53

We have no shame in saying that we support victims. We have no shame in saying that we think that the justice system needs to be moved further towards the rights of victims and away from the rights of those who commit crimes ... this is a continuation of National’s desire to rebalance the justice system more in favour of victims ...

The Green Party opposed the Bill on the basis that it eroded the presumption of innocence and stated: 54

... we have had erosions of the principle that a person is innocent until proven guilty, and part of that erosion has already ripped into the bail laws. This legislation, the Bail Amendment Bill, extends that erosion and continues that process of erosion by extending the reverse onus of the burden of proof.

... [I]t is extremely concerning that the Government even thinks it is possible to strike a balance while reversing the burden of proof. Reversing the burden of proof is, in fact, trading off a fundamental human right of persons to be presumed innocent until proven guilty.

The amendments were ultimately passed with the memory of Christie Marceau frequently invoked by Parliament 55 and despite the changes being unlikely to have prevented Akshay Chand from obtaining bail, had they been in place at the time of his offending. 56 In addition there was a frank acknowledgement that the rates of re-offending whilst on bail are relatively low and when people do offend, the offending is usually of a minor nature. 57

What becomes clear is the history of bail legislation in New Zealand is characterised by a reactionary response to albeit serious and tragic criminal offending and the accompanying theme of being “tough on crime”. 58 As accurately pointed out by the Green Party that is not a good way to develop the law. 59

53 (10 May 2012) 679 NZPD 2187.
54 (10 May 2012) 679 NZPD 2187 and Julie Anne Genter (Green) (10 May 2012) 679 NZPD 2197.
55 (2 July 2013) 691 NZPD 11524: “These changes, as I think the Minister correctly pointed out, arise largely out of the killing of Christie Marceau and the petition that arose out of that”.
56 Akshay Chand, at the time of Christie’s murder was 18 years of age and had no prior convictions therefore he would not have been caught by the amendments, although would not have had the benefit of the previously strong presumption in favour of bail for those “under 20 years of age”. He would however have simply been subject to the “just cause” test under s 8 of the Bail Act 2000. This was also acknowledged by Andrew Little (Labour) (2 July 2013) 691 NZPD 11524 who stated: “… the reality is that even under this Bill, it is likely that the court would find it difficult not to grant bail for a defendant of the nature of the defendant involved in the Christie Marceau killing in the circumstances in which that defendant was”.
57 (2 July 2013) 691 NZPD 11520 stated: “Ministry of Justice statistics ... show that nearly one in five persons on bail – 17 percent, to be precise – offend while they are on bail. Much of that offending is minor in nature – it may be not meeting all the conditions of bail...”.
58 This is not unique to New Zealand. In analyzing reverse presumptions in bail legislation pertaining to family violence across Australia, it was observed that “the erosion of the presumption in favour of bail ... usually
In recent times it is the pervasiveness of family violence which has come into political and public focus with the Ministry of Justice recording New Zealand as having the “highest reported rate of intimate partner violence in the developed world”. The statistics are certainly problematic, such as from 2013 which showed that “57% of violent interpersonal offences were committed by an intimate partner or other family member” and from 2015 where, “[p]olice responded to 109,328 family violence incidents” a figure up from 82,692 in 2009.

These statistics and the expressed desire to resolve the issue provide an explanation for the changes that have occurred in the family violence jurisdiction (to be shortly discussed) and it was a recommendation from the 2014 Family Violence Death Review Committee Report which led to some of the changes being implemented. In announcing the new procedures Justice Minister Hon Amy Adams expressed the Government’s wish to meet the risks caused by family violence and commented that “no one wants to be reading the next day in the paper as to what happened and then find out they didn’t know something as to what happened that potentially could have changed their decision”.

The short point however is that whilst there are some exceptions to the general presumption in favour of bail, which might apply to some of the defendants charged with offences defined as “family violence”, there is no legislative reverse presumption (or onus) which applies solely on the basis that the changed offending is categorised as “family violence”. The concern is that New Zealand may not be far away from imposing a reverse presumption of

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follows a horrific case and is more often a politically charged reaction public opinion than a carefully considered response” (see Australian Law Reform Commission and New South Wales Reform Commission, above n 1 at 418). A recent example is the calls for bail laws to be strengthened in Victoria after Dimitrious Gargasoulas drove his vehicle into the tram and pedestrian only section of Bourke Street killing five pedestrians. He was due in court that day having been bailed six days earlier (for offences including family violence) despite police opposition (see Richard Willingham and Tammy Mills “Bourke Street tragedy: Bail laws will change if needed says Daniel Andrew” The Age (online ed, Victoria, 22 January 2017).

59 (2 July 2013) 691 NZPD 11526: “It is not a trivial matter to deprive somebody of their liberty. It is the ultimate sanction of our legislative process, and to make it more difficult for individuals to get bail, based on a response to a very small number of cases, albeit tragic cases, we think is not the way to make good law”. 60 Ministry of Justice “Safer Sooner: Strengthening New Zealand’s Family Violence Laws” (13 September 2016).

61 Office of the Minister of Justice, Hon Amy Adams “REFORM OF FAMILY VIOLENCE LAW” (Cabinet Social Policy Committee, Paper Seeking Cabinet Agreement, undated).


63 See Family Violence Death Review Committee “Fourth Annual Report: January 2013 to December 2013” (Health Quality & Safety Commission New Zealand, June 2014) at 115 which recommended that “The Ministry of Justice, in partnership with New Zealand Police, strengthen the criminal and appellate courts’ ability to respond effectively to family violence charges by facilitating the provision of comprehensive information to judges to aid safe and robust decision making. This includes the provision of … information for bail applications that documents family violence offending histories and identifies harmful patterns of relating, including the number of protection orders against the defendant”.

64 Talia Shadwell “Justice Minister announces new family violence programme for bail decisions” Stuff (online ed, Wellington, 26 August 2015).
that type and may already be implicitly approaching bail from that standpoint in the family violence jurisdiction.

IV  THE PORIRUA FAMILY VIOLENCE COURT

A  Establishment

For the purposes of this paper it is the Porirua District Court's family violence jurisdiction ("the Porirua Court") which is analysed to provide an example of how that court has been managing bail applications and how the process has changed in the last two years in a way which might suggest a subtle reverse presumption.

The family violence jurisdiction is not unique to Porirua and was first established by judicial initiative in Waitakere in 2001, followed by Manukau in 2005 and in 2007 the jurisdiction was rolled out in Lower Hutt, Masterton, Porirua and Auckland. The goal of the family violence court is to provide a holistic and timely response to family violence as well as "enhancing safety for victims and families experiencing family violence and [encouraging] accountability among offenders". In a report recording the success of the Waitakere and Manukau models, on which the later courts are based, it was noted:

The Manukau and Waitakere FV Courts have had some success in meeting their objectives in spite of considerable difficulties. Victim safety is being enhanced by keeping victims' informed of developments with their case, and by providing opportunities for victims to contribute to the hearing. Bail conditions are set with safety in mind, and additional information is sought from Police and Probation Service.

One of the key focuses for the courts is victim safety and to that end it has been noted that "FV Courts seek to do everything possible to maintain the safety of victims and families".

B  Standard Procedure of the Court

When the police file a charge in the Porirua Court it is marked as "FV" by the registry if it is deemed to be "family violence" although there does not appear to be any clear definition of

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65 "Four new family violence courts to be set up" The New Zealand Herald (online ed, Auckland, 6 March 2007).
67 Knaggs, Leahy, Soboleva, and Ong at 48.
68 Knaggs, Leahy, Saboleva and Ong at 7.
69 The author was a practitioner in the Porirua District Court from 2010 to 2016 and has direct knowledge of the procedures and changes that took place over that time.
family violence which dictates this decision.\textsuperscript{70} It is likely the court takes guidance from the Domestic Violence Act 1995 which has the most comprehensive definition of “domestic (family) violence” being, “violence against [a] person by any other person with whom that person is, or has been, in a domestic relationship”.\textsuperscript{71} “Violence” is defined under s 3(2) and includes: “physical, sexual and psychological abuse”\textsuperscript{72} and “domestic relationship” is defined under section 4 as “a spouse or partner ... family member ... ordinarily shares a household with that person ... has a close personal relationship”.\textsuperscript{73}

Once marked “FV” the defendant’s charge is channelled through the court into the family violence list and this means that more often that not at the defendant’s first appearance, his or her case is remanded without a plea through to the family violence court which sits every second Wednesday. It is common at each sitting of the court for the same Judge to preside and the same police prosecutor to manage all family violence files for that area. It is a multi-agency court where representatives from various organisations including, Community Probation Officers, Victim Advisors, Restorative Justice Co-Ordinators and Victim Support Officers are present to, as noted above, provide a “holistic response” to family violence.\textsuperscript{74}

If a defendant pleads guilty it is common (at least for first time offenders) for them to be referred to a suitable family violence course and to then be monitored by the court at various intervals for compliance. During that time the defendant remains under bail conditions which usually includes a “not to contact the victim” provision. Where a not-guilty plea is entered the procedure in the family violence court follows the same procedure as for any other defended charge, namely the case management procedure set out in the Criminal Procedure Act 2011 although family violence cases are given priority in terms of court time.\textsuperscript{75}

\textit{C Recent Changes to Bail in the Family Violence Court}

As noted, outside of the Domestic Violence Act 1995, there is no clear definition of “family violence” and this is true with the Bail Act where the term is similarly not defined. This lack

\textsuperscript{70} This looks set to be a formalized process with the Ministry of Justice confirming that “Police will ‘flag’ all cases that involve family violence when they charge the perpetrator. Because the flag can result in the defendant being treated differently, the defendant can challenge the flag if they dispute that the case involves family violence ... the flat will also make it possible for family violence cases to be treated differently ... to ensure the safety of a victim of family violence is consistently considered in bail decisions” (see, Ministry of Justice, above n 60).

\textsuperscript{71} Domestic Violence Act 1995, s 3.

\textsuperscript{72} Domestic Violence Act 1995, s 3(4).

\textsuperscript{73} Domestic Violence Act 1995, s 4.

\textsuperscript{74} “Four new family violence courts to be set up” The New Zealand Herald (online ed, Auckland, 6 March 2007): “The Family Violence Court takes place at a regular time and place, with dedicated Family Violence Court Judges, Police Prosecutors, Community Probation Offices, Victim Advisors and court staff. Mr Barker said ... ‘dealing with family violence requires a co-ordinated approach. Much of the success of the Family Violence Court to date has been due to the co-operation and commitment of the judiciary, court staff and community groups”.

\textsuperscript{75} Criminal Procedure Act 2011, Part 3, Subpart 3, ss 54-59.
of clear definition had significant impact on defendants when the first change in how bail applications were managed took effect in early 2015 because it is not necessarily always clear what offences (and thus offenders) are captured by the definition and those who are captured are subject to a starkly different process, particularly as it relates to bail.76

At that time the court instituted a policy whereby all matters pertaining to bail where a family violence offence had been charged had to be referred to a judge for consideration. This was whether bail was opposed by the prosecution or not. In practice therefore, any time a defendant appeared in court charged with “family violence” the matter was removed from the Registrar’s List (where a defendant would ordinarily have their first appearance in court) and was placed in the Judge’s List for consideration. The purpose was to ensure that if the defendant was granted bail they were placed under appropriate conditions to meet any risks they posed and to protect the victim.

The second more fundamental change was announced on 27 August 2015 by Justice Minister Hon Amy Adams. The change involved the implementation of a pilot programme in the Porirua and Christchurch District Courts whereby Judges considering bail in the family violence jurisdiction would receive a “Family Violence Summary Report” which would detail “all recorded family violence incidents involving each defendant” and would include “police safety orders or protection orders, as well as any breaches of these”.77 It became clear when the change was announced that the new summaries would be prepared by the Police and could go further to include “information on alcohol issues … the number of times police were called out to family violence incidents – and how recently – as well as risk of access to weapons”.78 Internal Governmental documents record the intention that the reports would include information about “previous family violence incidents (including calls for service that did not result in an offence)”.79 The pilot programme commenced on 1 September 2015 and was slated to last for three months.

The court would therefore begin to receive information about alleged criminal offending as well as proven criminal offending and this would occur whether bail was opposed by the prosecution or not. Traditionally the judiciary had been provided with a summary of facts (prepared by the police), a copy of the defendant’s prior criminal history (including any

76 The difficulties with this lack of definition is set to be addressed by the Government as part of the amendments to current family violence legislation with the Ministry of Justice frankly acknowledging that “the current legal definition of family violence doesn’t reflect a modern understanding of family violence as an ongoing pattern of control that can take many different forms” and that “this can lead to inconsistent decisions about who the Act protects and in what circumstances” (see Ministry of Justice above n 60). This also likely means there is an inconsistency in which defendants are subject to the family violence procedure and thus the different treatment from the court.

77 Hon Amy Adams “Better information for Judges making family violence bail decisions” (press release, 26 August 2015).

78 Shadwell, above n 64.

offending committed while on bail) and if available, a victim impact statement. The breadth of information provided was thus a fundamental change.  

A further significant change came about via introduction of the Criminal Procedure (Transfer of Information) Regulations 2013 and amendment to the Family Court Rules 2002. The changes included the ability of courts to share information in circumstances where a domestic violence proceeding was in progress and where the respondent to that proceeding was also a defendant in a criminal proceeding charged with:

... an offence against section 49 of the Domestic Violence Act 1995 or an offence that involves the use of violence and is committed against a person with whom the respondent is or has been in domestic relationship ...

When this change was announced it was heralded as an additional step towards safer bail decisions.

... rules about whether the family court and criminal court can share information with each other have been relaxed so that judges in these courts will be able to better share more case information about family violence perpetrators ... [because] ... before now, this could only be shared if there had been a protection order in place when the family violence offence happened. The extra information will support criminal court judges making decisions such as whether to grant bail ...

Judges in the family violence jurisdiction now have an unprecedented level of information regarding a defendant’s history which is not confined to a proven history of offending but more broadly relates to any prior “incidents” considered “family violence” without clear definition of what that captures. This undoubtedly impacts on the starting point from which bail is considered and the chances of a defendant obtaining bail. The net effect is that obtaining bail when charged with “family violence” has become increasingly difficult where arguably bail is not granted unless the defendant can establish they do not pose a risk to the victim. The question then is whether these changes are achieving the purpose for which they were implemented, to protect victims.

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80 Whilst it is accepted that s 8(2)(d) provides discretion to the judiciary to consider “the character and past conduct or behavior, in particular proven criminal behavior, of the defendant” this is still largely predicated on proven offending rather than allegations and traditionally it had only been a defendant’s proven history submitted to the judiciary.

81 Criminal Procedure (Transfer of Information) Regulations 2013 defines “domestic violence proceeding” as “a proceeding in a Family Court or District Court under the Domestic Violence Act 1995 in which an application for a protection order — is pending or has been granted”.

82 Criminal Procedure (Transfer of Information) Regulations 2013, Clause 7.

83 Hon Amy Adams “Court rules changed to support family violence information sharing” (press release, 1 September 2016).
In an update on the new judicial summaries procedure the following issues were highlighted:84

There have been concerns raised about the FVS report triggering judicial requests for additional information about the previous family violence incidents involving the defendant that are detailed on the report. This is primarily occurring in Christchurch and primarily has implications for Police … we will investigate with Police and Judge Walker the possibility of improving the FVS report to capture these as the pilot progresses ….

The courts were thus seeking even more information regarding the alleged prior offending and it is unclear what sort of further information was (if any) provided to the courts in order to meet this need. It is concerning that the only implication identified was to the police rather than the implication to the defendant that the judiciary was seeking additional information regarding presumably, alleged rather than proven criminal activity placing a burden on the defendant to potentially respond, at a bail hearing, to prior allegations of violence.

On 9 May 2016 Hon Amy Adams and Hon Judith Collins announced that the pilot programme in Porirua and Christchurch would be expanded to Wellington, Wairarapa and Northland for a six month trial. The purpose of extending the pilot was said to include understanding how it affects workloads and “remand prisoner numbers”.85 There was no information provided as to the success and/or benefits of the programme in Porirua and Christchurch outside of an observation in an internal Government email that the judiciary had found the information packs “invaluable” and a “crucial resource in reducing risk, and therefore victim safety”.86 It was acknowledged however that “actual impact on victim safety” as a result of the measures, could not itself be quantified.87

D Further Changes Ahead

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85 Hon Amy Adams and Hon Judith Collins “Judiciary Summary bail decisions pilot expands” (press release, 2 May 2016).

86 Email: “RE Family Violence Summary Report” (26 April 2016) (Obtained under Official Information Act 1982 Request to the Office of Minister of Justice, Hon Amy Adams).

87 Ibid. This comment was in response to an email of the same date and title which posed the following question: “… presumably we also have a sense (if not some hard data) that the pilot is addressing the need it was designed to ie helping Judges make better informed bail decisions which ultimately keeps people safer? Are you able to provide some more information/clarification about that aspect?”.
The future of bail in the family violence jurisdiction is set to formally become victim centric with amendment to the Bail Act by way of “putting the safety of victims at the heart of bail decisions”.

In March 2016, Hon Amy Adams released a “Summary of Submissions” document which detailed the submissions received by the Government during the consultation process on the proposed amendments. Completely absent from that document is any discussion on the effect these changes might have on the presumption of innocence and the defendant’s rights as they pertain to bail. Rather the majority of submitters supported the proposed changes and in particular “requiring judges to make victim safety the paramount consideration in bail decisions about family violence offences or specific charges such as male assaults female” with many submitters going as far as to suggest that perpetrators be remanded in custody, electronically monitored or otherwise closely monitored for any family violence offence. Somewhat conversely it was noted that only “a small number of submissions supported extending the pilot bail information project where Police provide judges with a summary of all previous family violence offending whether or not bail is opposed”.

Whilst the exact wording of the proposed legislation is not currently available, it is arguable that the Government may be eyeing a shift towards a formal onus (or at a minimum a reverse presumption) where family violence offending is alleged. As seen in the current Bail Act, it is usually where a reverse onus is operative that the “safety of the victim” is the “paramount consideration”.

It is an apt time therefore to consider the main issues involved with reverse presumptions in bail legislation and in order to demonstrate these issues reference will be made to certain States in Australia which have had experience with reverse bail presumptions in respect of family violence offending.

V Reverse Bail Presumptions – The Arguments

The main driver behind strengthened bail laws in the family violence context is the need to protect victims and to reduce the occurrence of family violence. The arguments against

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88 Hon Amy Adams and Hon Anne Tolley “Early and effective intervention at heart of family violence changes” (press release, 13 September 2016).
89 Ministry of Justice “Strengthening New Zealand’s legislative response to family violence – Summary of Submissions” (March 2016) at 36.
90 Ministry of Justice, above n 91 at 37.
91 Ministry of Justice above n 91 at 38.
93 Victim safety is a “paramount” or “primary” consideration in section 8(5) which relates to an offence against section 49 of the Domestic Violence Act 1995 (no reverse onus); section 9A(5) which relates to the offence of murder (reverse onus); section 10(6) which relates to the list of “specified offences” (reverse onus); and section 12(7) which deals with recidivist violent and property offenders (reverse onus).
reverse presumptions focus on the erosion of the right to be presumed innocent until proven guilty and the unfortunate by product of increasing the prison population.

A Protecting Victims

Strengthened bail laws will protect victims because bail will not be granted unless the accused has proven they are not a risk to the victim (or general public). That is the thrust of this argument, the one which is predominantly relied upon by legislators. This argument closely aligns with the shift towards making the victim the central character in bail decisions because if the safety of the victim is the paramount consideration and that cannot be established, bail is unlikely to be granted.

The question is whether reverse presumptions do afford greater protection to victims. In a recent examination of reverse presumption bail legislation in certain Australian states, the authors concluded that “there is no evidence that [the] changes to the presumption that we have outlined have had an impact on reducing domestic violence and increased victim safety”.94 As has been frankly acknowledged by the New Zealand Government, in relation to the new judicial summaries, there is no quantifiable evidence that the changes have had any impact on victim safety.

Even if objective evidence existed to support the argument that victims are better protected by restricting a defendant’s right to bail, would this make the presumption of innocence and the right to be released unless just cause for continued detention, any less important? It ultimately becomes a question of competing rights where proponents of reverse presumptions have been criticized for erroneously equating “the importance of the presumption (of innocence) with the protection of the community” and therefore “unduly (elevating) protection of the community at the expense of the presumption of innocence in the decision to grant bail”.95 It becomes more complicated in New Zealand with the lack of an entrenched NZBORA and the existence of the Victims’ Rights Act 2002 which ensures victims views, for specified offences, are obtained and provided to the court.96 It is arguable therefore that the rights of the defendant and the victim are on equal footing.

In this author’s opinion however, victim safety does not reduce the importance of the presumption of innocence which is arguably the most important right especially at the point prior to evidence being heard and tested in a court of law and especially where pre-trial detention is contemplated. At that point the court is essentially making a risk determination based on past offending (for which the defendant has already been punished) and potential future offending (which may never even occur) both circumstances erode the presumption of innocence. If serious risk is present the prosecution should be able to establish a case for “just cause for continued detention” without the need to start with the presumption that bail won’t be granted or to place any burden on the defendant to prove a case for bail.

95 Sureshtha, above n 4 at 154.
96 Victims’ Rights Act 2002, s 29 (see above n 25)
B Reducing Incidents of Family Violence

This argument is bound up with the desire to protect victims because it is argued that restricting bail will reduce the incidence of family violence because defendants will be incarcerated or deterred from offending because of the strict legislative response.

Regrettably the Australian experience (specifically in New South Wales)\textsuperscript{97} has proven the opposite where not only has there been no empirical evidence to support a reduction in the incidence of domestic violence but in fact the presumption against bail has been noted as a factor that may actually:\textsuperscript{98}

... serve as a disincentive to victims to report family violence crimes ... [because] victims may not want the accused to be incarcerated and depending on the type of breach and history of violence, it may be in the best interests of the family for the accused to remain in employment.

This aptly reflects the reality of domestic violence where it is often not practical or in the victim’s interests to have the defendant immediately taken from the family home and held in custody or barred from the family home by way of bail conditions. An accused may be the sole-income earner for the family where a remand in custody can be economically devastating.\textsuperscript{99}

There seems then, and as established by the New South Wales experience, a real risk that any reduction in the incidence of family violence is a result of complainants not coming forward rather than the offending not occurring. That is a terrible by-product of a reverse presumption.

C Limiting the Presumption of Innocence

There is a general presumption in favour of bail because there is a presumption that an accused is innocent (until proven guilty) and absent strict justification an innocent person

\textsuperscript{97} Bail legislation in New South Wales has been fraught with difficulty. Starting with the Bail Act 1978, s 9A displaced the presumption in favour of bail for family violence offences and breach of protection orders in circumstances where the accused had a history of violence, had previously been violent to the victim of the alleged offence in the past or had failed to comply with a protective bail condition. That Act was repealed in 2013 when the Bail Act 2013 came into force and which enacted a general presumption in favour of bail. In the face of a number of high profile criminal cases that Act was then touted as “soft on crime” and was ultimately amended by the Bail Amendment Act 2014 which introduced a “show cause” test for “serious offences” (ss 16A and 16B). Whilst some of the serious offences would capture family violence there is no presumption against bail in a general sense for family violence offending. The 2014 Amendments have been criticised as a “retrograde step in the direction of the law” in so far as it pertains to the presumption of innocence (see Shrestha, above n 5 at 148-150). Because New South Wales has had experience with reverse presumptions for family violence and have examined the effects of such, it is considered appropriate to draw on the experience from that State.

\textsuperscript{98} Ng and Douglas, above n 94 at 55.

\textsuperscript{99} This was the case for a client of the author who was denied bail in the family violence court for a charge of male assaults female. He was the sole income earner for his family which included his partner, parents and siblings. Despite being an exemplary employee his employer was unable to hold his job for him and he was dismissed. His charge was ultimately downgraded and he was sentenced to supervision (ie: not imprisonment) and was released form custody after a 2 month remand. His partner was pregnant at the time and had expressed her regret at having come forward with her complaint.
should not be detained.\textsuperscript{100} If the presumption is reversed and “bail is denied to an individual who is merely accused of a criminal offence, the presumption of innocence is necessarily infringed”.\textsuperscript{101}

It has been argued in some cases that pre-trial detention is a form of punishment which is inconsistent with the presumption of innocence\textsuperscript{102} because it is either punishment for past offending or future offending.\textsuperscript{103} Put another way:\textsuperscript{104}

... to the extent that the detention relies on the present charge as part of the evidence that the accused might offend if released, it violates his right to be presumed innocent of that charge ... The second way in which the presumption of innocence may be deemed violated is by virtue of the prediction that the accused will be guilty in the future of other as yet uncommitted offences ... it is the accused’s disposition to commit further offences rather than the view that he will be guilty of them in the future that provides (in part) the warrant for his detention ... that disposition to commit criminal offences is not an acceptable basis for deprivation of liberty.

Where a refusal of bail (and thus liberty) is in itself an infringement on a defendant’s right to be presumed innocent it is inarguable that further restrictions on access to bail, such as with a reverse presumption or onus, furthers that infringement.

\textit{D} Higher Rates of Imprisonment and Disadvantaged Minorities

By implication, making bail more difficult to obtain will increase the prison population and this was frankly and proudly acknowledged by the Hon Phil Goff during the passage of the Bail Amendment Act 2013 when he stated, referring to the Bail Act 2000, “that Act lifted by 200 percent – 210 percent, actually – the number of people remanded in custody”.\textsuperscript{105} It was estimated that the 2013 amendment would potentially effect up to 350 people per year and would require an additional 50 prison beds.\textsuperscript{106} It is widely accepted therefore that an accepted by-product of reverse presumptions is the increase in the prison population.

In New South Wales the legislative reverse presumption was said to have led to a “steady increase in the number of bail refusals and the number of people being held on remand” with “the use of remand to avert risk and its contribution to the rapid growth in prison populations [becoming] a significant socio-legal issue”.\textsuperscript{107} Statistics from New South Wales (referring to the now repealed Bail Act 1978) showed that the “risk of bail refusal was lower in

\begin{footnotes}
\item[101] \textit{R v Hall} [2002] 3 SCR 309 cited in Davidson, above n 100 at 5.
\item[102] Anthony Pyne “Ten Proposals to Reduce Indigenous Over-Representation in Northern Territory Prisons” (2012) 16(2) AILR at 5.
\item[103] Pyne, above n 102 at 5.
\item[105] (27 August 2013) 693 NZPD 12873.
\item[106] (27 August 2013) 693 NZPD 12873.
\item[107] Ng and Douglas, above n 94 at 41.
\end{footnotes}
‘presumption in favour’ cases (2 per cent) compared to ‘neutral presumption’ (5 per cent) and ‘exceptional circumstances’ cases (5 per cent”).

In New Zealand, the prison population recently surpassed 10,000 inmates with 36% of those inmates being accused persons held on remand where only half of those on remand ultimately receive a prison sentence. To address this issue the Government announced approved plans to increase prison capacity on existing prison sites by approximately 1,800 beds at a construction cost of approximately $1 billion.

There is an additional concern that reverse presumptions disproportionately affect minorities and those of low socio-economic status. Such as people who have nowhere else to go (if restricted from going to their home) and no means of paying for alternative accommodation. Often if an accused is not able to put forward an address suitable to the prosecution and the court, they are declined bail. This can result in an accused pleading guilty merely to avoid a remand in prison. This concern was highlighted by the North Australian Aboriginal Justice Agency (NAAJA) when responding to a call for submissions on presumption against bail provisions. The NAAJA pointed to the “extreme injustices that can arise from overly punitive bail provisions” where “those pleading not guilty to breach domestic violence order charges ... may feel compelled to plead guilty to avoid lengthy remands in custody following refusals of bail ...”.

When the Government of the day announced an expansion of the Family Violence Court jurisdiction the then Chief District Court Judge, Judge Russell Johnson, commented that the court had resulted in more “guilty pleas” but in this author’s opinion that may not be a good thing and needs further exploration to assess the reasons for why the guilty pleas were entered to conclude whether this is a positive by product of the specialist court.

VI Analysis: Reaching the Right Balance in the Family Violence Court

Where there has traditionally been a presumption in favour of bail, there has been a shift in focus where the “aim of bail refusal ... [is] more an attempt to protect the community against dangerousness than to ensure court attendance”. In this respect the “dangerousness”

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108 Ng and Douglas, above n 94 at 41.
109 “Imagine my disappointment – Kim Workman’s open letter” Scoop Independent News (online ed, 29 July 2016): “The prison population is likely to reach 10,000 by the end of the year [it surpassed this number on 29/30 November 2016]. Between February 2014 and 2016, the remand population increased by approximately 40% and remand prisoners accounted for around 90% of the increase in the last year. Remand prisoners now make up 36% of all prisoners and only half of them will receive a prison sentence”.
110 Sam Sachdeva and Stacey Kirk “Government’s $1 billion plans to sleep 1800 more prisoners creating ‘schools for crime’ – Labour” Stuff (online ed, Wellington, 18 October 2016).
112 “Four new family violence courts to be set up” The New Zealand Herald (online ed, Auckland, 6 March 2007).
113 Alex Steel “Bail in Australia: legislative introduction and amendment since 1970” (University of New South Wales, January 2009) at 237.
referred to is ostensibly “assumed by the nature of the alleged offence”. This is in contrast to the case law from which the Bail Act emanated and where it was stated that:

The seriousness of the charge facing an accused will not in itself provide a justification for refusal of bail. There must be something additional which favours detention in the public interest and which is not outweighed by considerations favouring bail. That public interest must be unable to be met by the granting of bail upon terms.

At the outset therefore, the categorisation of an offence as “family violence” should not in itself be a ground for establishing “dangerousness” or that justification exists for approaching a consideration of bail from a negative presumption. Unfortunately, it is arguable that this is happening in the family violence jurisdiction as demonstrated by the procedures in place in the Porirua Court.

Specifically, it seems inevitable that the breadth of information now given to the judiciary in the family violence jurisdiction implicitly imposes a reverse presumption or onus on the defendant to establish that notwithstanding the material provided, bail should still be granted. This might involve the defendant having to address allegations of past violence where the allegation has not been tested or proven in court. How could a judge not be concerned of a heightened risk when confronted with not only a list of prior convictions (whether violent or otherwise) but also information regarding domestic violence “incidents” the defendant has allegedly been involved in yet have not resulted in an charge.

Whilst it is true that at present the views of the victim are considered as a matter of course and in certain circumstances are given paramount consideration, they do not presently on a blanket basis hold paramount status for family violence. The centralisation of victims is increasing however and the intention moving forward is that the victim’s views in family violence offending will be the “paramount consideration” in bail decisions. That fact coupled with the judiciaries’ access to information beyond a proven criminal history surely raises the prospect that there may be a tendency of the court to place undue weight on the victims’ untested statements and therefore the burden shifts further towards the defendant with a growing presumption against bail from the outset.

The issue with reliance on untested evidence was highlighted by the New Zealand Law Society in its response to the Government’s consultation paper relating to “Family Violence Risk Assessment and Management”:

The problem may be compounded when the reports do not contain accurate or sufficient detail of the alleged family violence events. The Law Society’s Criminal

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114 Steel, above n 113 at 5.
Law Committee is aware of an example of a bail report that listed numerous events as “family violence” and bail was refused. It was later discovered these events were things such as a neighbor calling noise control or the defendant himself calling the Police. The report omitted this detail and took some time and effort to unearth it.

It is useful that Australia and New South Wales in particular have already faced these similar issues and have considered the efficacy of reverse presumptions because lessons can be learned from those missteps. In a 2010 report, it was found that:116

- The safety of women and children is not best secured by creating a presumption against bail for all crimes in a family violence context;
- A presumption against bail could act as a disincentive to victims to report family violence crimes;
- A presumption against bail for all family violence offences appears to deny unfairly the accused the presumption of innocence;
- A presumption against bail seems inappropriate for some crimes in the family violence context (for example, the seriousness of breach of protection order varies and in some circumstances might not justify a presumption against bail).

The Report concluded that it could not support presumptions against bail for all crimes committed in a family violence context but qualified this by stating “that is not to say there should not be presumptions against bail for some family violence crimes, such as murder”.117 The core recommendation made was that “state and territory legislation should not contain presumptions against bail on the grounds only that an alleged crime occurred in a family violence context” and more specifically stated:

... the balance is best struck by generally maintaining a presumption in favour of bail – consistent with the presumption of the accused’s innocence – but removing the presumption in favour in certain specific circumstances. The Commissions make no specific recommendation about what those circumstances should be, but suggest that they would include, for example, where an accused has been violent against the victim in the past ...

Whilst it is not indicated whether the violence “in the past” must be established by way of prior convictions for violence relating to the same victim rather than mere allegations, it would be safest to limit the information in this way in order to avoid undue prejudice to the defendant in having to address allegations of past violence at a bail hearing.

In a later 2012 report from the New South Wales Law Reform Commission the following views were espoused with respect to presumptions in general:118

116 Australian Law Reform Commission and New South Wales Law Reform Commission, above n 1 at 419.
117 Australian Law Reform Commission and New South Wales Law Reform Commission, above n 1 at 419.
118 New South Wales Law Reform Commission “Bail” (NSWLRC R133, 2012) at [5.38].
It throws the emphasis onto the category of the offence with which the person is charged or onto other prescribed elements in the person’s criminal history, instead of a balanced assessment of all the considerations which bear rationally on the question of detention or release. It is voluminous, unwieldy, hugely complex and involves too blunt an approach. The results are frequently anomalous and unjust.

It is clear that a focus too heavily on a category of offending rather than a balanced analysis of the risks posed by the defendant on a case by case basis will lead to unjust results for many defendants and that cannot be sustained. The issue is how to strike the right balance and a useful starting point is captured in the following statement which addresses the issue with the “tough on crime” approach as well as espousing the correct goal of bail:

Bail ... should be viewed in light of a recognized human right to liberty. Bail conditions are about society’s interest in managing perceived risks. The balance of these factors should always be construed in light of the accused persons’ right to liberty. The question should be about the minimum restrictions necessary to get the person to court and protect society not the ‘privilege’ of bail. Presumptions do not advance this construction ... but bail laws are an easy target for legislatures looking to get tough on crime. This particular presumption creates injustices and reinforces a perception that the criminal justice system is there to lock people up. The presumption against bail for violent offenders should be abolished, or at least returned to a neutral presumption so that the focus moves from the nature of the allegation to the factors to be considered in balancing the rights of the accused against the interests of society.

In short the approach to bail in the family violence jurisdiction should be predicated on a case by case analysis of the risks presented by the individual defendant. There should be no restriction on judicial discretion by a blanket reverse presumption for the broad range of offences defined as “family violence” because as noted above there needs to be a move away from the “nature of the allegation” towards an analysis of the individual factors that should be considered in balancing the competing rights inevitably at play with this type of offending and each individual offender and victim.

A blanket reverse presumption for “family violence” will inevitably cause more prejudice to defendant’s than benefit to victim’s and will increase the prison population in what is already a congested environment. As noted by The Howard League for Penal Reform:119

A reverse burden of proof is likely to result in more people being remanded in custody, with various corresponding negative outcomes. In addition to the financial cost of incarceration, people on remand have their employment, and personal and social

119 Diana Taylor, Advocate on behalf of The Howard League Committee “Submission to the Law and Order Committee – Bail Amendment Bill” (undated but presented with reference to the 2013 Bail Amendment Act).
situations negatively affected. It is well known that those on remand are at greater risk of suicide than those who have been sentenced.

It might be argued that where a defendant poses little risk of re-offending or absconding whilst on bail that even where a reverse presumption applies, they are unlikely to be remanded in custody. As pointed out by the Human Rights Commission, that is not the point, but rather “the point is ... that the use of a reverse onus of proof undermines a fundamental tenet of our criminal justice system, namely the right to be presumed innocent until proved guilty”120.

Whilst a reverse presumption pushes the “tough on crime” narrative and elevation of victims rights will satisfy the victims’ rights movement, the reality is that evidence suggests reverse presumptions will not achieve the intended purposes of protecting the victims of offending and in fact will not only lead to a reduction in reports of family violence but will increase the already alarming prison population. The negative impact is thus seemingly out of proportion to the positive impact striving for and when statistics suggest that offending whilst on bail is minimal, it is time for a re-think on how to best tackle family violence and bail and at present the best option is a presumption in favour of bail with an individual approach to each case analysing the unique factors that each defendant and victim will bring to the court.

VII Conclusion

Reverse presumptions and onuses in bail legislation are not new to the New Zealand criminal justice system and are an accepted limit, in some circumstances, on NZBORA rights. In New Zealand those limitations have largely been imposed via legislation that has included a Select Committee process and NZBORA vetting. Where inconsistencies have been found the legislation has been amended to better achieve consistency.

The concern that this paper has addressed is the changes in the family violence jurisdiction, what those changes mean and how they have come about. It is arguable that the changes have resulted in an implicit albeit subtle reverse presumption when it comes to considering bail for family violence offending. Those changes have not come about via legislative amendment and have thus not been subject to any careful consideration of NZBORA. If a reverse presumption is indeed operative it is inappropriate that it has escaped NZBORA vetting and it is hoped that if the Government is eyeing a reverse presumption for family violence offending, on the basis of making the victims views the “paramount consideration”, that this will include full consideration of the defendant’s NZBORA rights and specifically the presumption of innocence.

120 Sylvia Bell, Human Rights Commission “Submission on the Bail Amendment Bill – Law and Order Select Committee” (undated but presented with reference to the 2013 Bail Amendment Act.
This author anticipates that any move towards a blanket reverse presumption for "family violence" offending will be found to be an unjustified limitation because whilst the aim of protecting victims is appropriate, a blanket ban which may capture those who are not in any event destined for incarceration, is a disproportionate response and unable to be demonstrably justified in this free and democratic society.
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