

## SUBMISSION ON EXTENDING THE SHOW CAUSE PROVISIONS IN THE BAIL AMENDMENT ACT 2014

Corrective Services NSW plays no role in determining whether an accused person should be released on bail and has no control over whether a person is remanded in custody. It is a matter for bail authorities applying the *Bail Act 2013* ('**Bail Act**') to determine these matters.

From an operational perspective, the main significance of proposals to amend bail laws for Corrective Services NSW is the effect they may have on the inmate population, the resources available to manage inmates, and strategies to reduce reoffending and improve community safety.

### SENTENCING COUNCIL REVIEW

The amendments made to the Bail Act by the *Bail Amendment Act 2014* ('**the Amendment Act**') will, when they come into force, require a bail authority to refuse bail unless the accused person can 'show cause' why his or her detention is not justified, if the person is charged with certain offences, including:

- offences punishable by life imprisonment,
- certain serious violence and sex offences, and
- serious indictable offences committed by the accused person while on bail or parole.<sup>1</sup>

Even if the person can successfully show cause why his or her detention is not justified, the bail authority must still be satisfied that he or she does not pose an unacceptable risk before granting bail.<sup>2</sup>

The Sentencing Council is reviewing whether the show cause requirements should be applied to an accused person who is charged with committing a serious indictable offence:

- while subject to a good behaviour bond, intervention program order, intensive correction order; or
- while serving a sentence in the community; or
- while in custody.

### PERSONS AFFECTED BY THE PROPOSAL

As of 1 November 2014:

- 4,574 offenders were on parole
- 7,053 offenders were subject to good behaviour bonds
- 2,122 offenders were subject to suspended sentences

<sup>1</sup> *Bail Act 2013*, s 16A(1) and s 16B(1), as amended by the *Bail Amendment Act 2014*.

<sup>2</sup> *Bail Act 2013*, s 16A(2) and 19(1), as amended by the *Bail Amendment Act 2014*.



- 3,217 offenders were subject to community service orders
- 243 offenders were subject to Drug Court orders
- 1,366 offenders were subject to intensive correction orders, and
- 97 offenders were subject to home detention orders.<sup>3</sup>

In addition, Corrective Services NSW was supervising 39 offenders on bail who were awaiting sentencing. Corrective Services NSW does not supervise intervention program orders.

As of 2 November 2014 there were 10,547 inmates in full-time custody.

The show cause provisions in the Amendment Act and the proposed extension of them to a wider range of offenders will introduce a more stringent bail regime for offenders charged with serious indictable offences, than is currently in force under the Bail Act.

### **EFFECTS OF TIGHTER BAIL LAWS**

The increased number of inmates on remand and their increasing size as a proportion of the overall inmate population has been a major feature of correctional management in NSW for at least two decades. On 30 June 1995 the total inmate population was 6,384, of whom 703 inmates (11%) were on remand.<sup>4</sup> On 30 June 2014 the total inmate population was 10,578, of whom 2,749 (26%) were on remand.<sup>5</sup>

The NSW Law Reform Commission's (LRC) 2012 report on bail reviewed the history of bail law in NSW and bail trends.<sup>6</sup> The LRC referred to analysis by the Bureau of Crime Statistics and Research (BOCSAR) which showed that legislative presumptions can exert a significant effect on bail refusals.<sup>7</sup>

After adjusting for the effects of other factors, BOCSAR's study of NSW bail legislation found the risk of bail refusal was higher for defendants charged with offences where there was a presumption against bail or where bail should only be granted in exceptional circumstances.<sup>8</sup> In particular, the *Bail Amendment (Repeat Offenders) Act 2002*, which removed the presumption in favour of bail for persons accused of committing an offence while on bail, parole, or some other form of

<sup>3</sup> These statistics do not represent the sum of persons across orders as some individual offenders may be subject to more than one order type.

<sup>4</sup> Corrective Services NSW, *Inmate Census 1995*, (1995) 16.

<sup>5</sup> Corrective Services NSW, *Inmate Census 2014*, (2014) 3.

<sup>6</sup> NSW Law Reform Commission, *Bail*, Report No 133 (2012) Chapters 3 and 4.

<sup>7</sup> NSW Law Reform Commission, *Bail*, Report No 133 (2012) at 3.70 and 4.45.

<sup>8</sup> L Snowball, L Roth and D Weatherburn, *Bail Presumptions and Risk of Bail Refusal: An Analysis of the NSW Bail Act*, Issue Paper No 49 (NSW Bureau of Crimes Statistics and Research, 2010).



conditional liberty, had a significant impact on bail refusal and remand rates. The bail refusal rate for defendants in NSW courts rose by 7% after it was implemented.<sup>9</sup>

The LRC concluded there was clear evidence that the policy shifts in favour of a more restrictive bail regime under the former Act contributed significantly to the increase in the remand population.<sup>10</sup>

## **OUTCOMES ASSOCIATED WITH INCREASED REMAND POPULATION**

There are some benefits to the community in remanding accused persons in custody. Holding a person in full-time custody means they present a much lower risk to community safety and of absconding, failing to attend court and interfering with evidence, jurors and witnesses, than they would if released on bail. In the case of offenders assessed as a higher risk of reoffending, or who have a history of serious offending or failing to comply with bail, these will be significant factors in a bail authority's decision to refuse bail. However, there are costs associated with a higher remand population.

The cost of incarcerating remand inmates is higher than that for all inmates. In 2012-2013, the cost per remand inmate per day was \$203 (\$74,095 per annum), compared to \$189 per day (\$68,985 per annum) for all inmates.<sup>11</sup> Persons on remand are some of the most resource intensive inmates to manage. They require careful screening and monitoring, transport and escorts between correctional centres and courts, and security around family and legal visits. In addition, providing accommodation and services for persons on remand impacts on the availability of accommodation and services for sentenced inmates.

In addition to the burden placed on the Corrective Services budget, an increased remand population presents other challenges. Research indicates that incarcerating a person may increase the person's risk of subsequent reoffending and returning to custody.<sup>12</sup> Professor Eileen Baldry has observed that the criminogenic effect of incarceration affects all prisoners, whether sentenced or on remand.<sup>13</sup>

The literature suggests various reasons for the criminogenic effect of incarceration. A person remanded in custody risks losing accommodation and employment, and experiences difficulty maintaining support from family, friends and the community.

<sup>9</sup> NSW Law Reform Commission, *Bail*, Report No 133 (2012) at 3.50 and 3.55; J Fitzgerald and D Weatherburn, *The impact of the Bail Amendment (Repeat Offenders) Act 2002*, Crime and Justice Bulletin No 68 (NSW Bureau of Crimes Statistics and Research, 2004) 1.

<sup>10</sup> NSW Law Reform Commission, *Bail*, Report No 133 (2012) at 4.45.

<sup>11</sup> Audit Office of NSW, *Report to Parliament*, (2014) Vol 8, 43.

<sup>12</sup> L Vieraitis and Ors, "The Criminogenic Effects of Imprisonment: Evidence from State Panel Data, 1974-2002", 6(3) *Criminology and Public Policy*, (2007) 589-622; F Cullen & Ors, "Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science", 91(3) *The Prison Journal Supplement* (2011) 48S-65S; Byrne J, "After the Fall: Assessing the Impact of the Great Prison Experiment on Future Crime Control Policy", 77(3) *Federal Probation* (2013) 3-14.

<sup>13</sup> E Baldry, "Recidivism and the role of social factors post-release", 81 *Precedent* 4-7; E Baldry, "The booming industry: Australian prisons." NSW: School of Social Sciences and International Studies (2008) 11-12.



This can lead to significant problems when the person returns to the community. Lack of suitable accommodation, employment and family or social support are factors that are commonly associated with recidivism. The difficulties of addressing these issues can be compounded by the person's exposure to the social stigmatisation of having been in prison. Helping the person regain housing and work and to resettle in the community incurs further costs for government agencies and the non-government sector.

Remanding a person on a community based sentence in custody interrupts his or her participation in community programs and services that promote rehabilitation and reintegration into the community. Time spent in custody on remand cannot be used to effectively target offending behaviour, as intensive custodial programs target sentenced inmates. Effective case plans and treatment programs depend on Corrective Services NSW having the relevant findings of fact and recommendations of the sentencing court.

There is also a "school of crime" argument that persons in custody are exposed to anti-social and pro-criminal attitudes, learn new ways to commit crimes or improve their techniques, and develop criminal networks and associations. Corrective Services NSW aims to keep remand inmates separate from sentenced inmates. There are dedicated remand centres in Sydney and dedicated remand wings at centres in regional NSW. However, it is not always possible to keep remand and sentenced inmates separate.

In its submission to the LRC's review of bail, Corrective Services NSW referred to records which indicated that a large number of persons on remand do not receive sentences of imprisonment during the same episode of their remand. In 2010 the following outcomes applied to 55% of persons who were released from custody after a period on remand:

- released to bail conditions
- received a non-custodial sentence
- served the full custodial sentence while on remand (with no further custodial sanction imposed)
- had the charges against him or her dismissed, or
- found not guilty.

A significant number of these offenders could be managed in the community instead of being remanded in custody.

Although these issues may appear to be self-evident, the research on the criminogenic effect of incarceration is not conclusive.<sup>14</sup> Most research has been conducted overseas, where conditions are different from those in Australia, and

---

<sup>14</sup> D Weatherburn, *The Effect of Prison on Adult Reoffending*, Crime and Justice Bulletin No 143 (NSW Bureau of Crimes Statistics and Research, 2010) 3-4.



Australian research is limited and open to question. Studies have concentrated on the effect of incarceration on all inmates and do not appear to have explored its effect specifically on remand inmates.<sup>15</sup> It is unknown whether prison deters some offenders from reoffending while increasing the risk of re-offending for others.<sup>16</sup>

## POTENTIAL EFFECTS OF THE PROPOSAL

Inmate population projection is not an exact science. The NSW inmate population has fluctuated in recent years due to a variety of factors. A BOCSAR paper attributed the decline in the inmate population from 10,322 in July 2009 to 9,626 in December 2011, to a reduction in the number of offenders serving sentences for assault, break and enter, theft and traffic offences.<sup>17</sup> The remand population increased in the same period, but there were no significant changes to bail laws during this time.

In October 2014 BOCSAR reported the inmate population had risen again to 10,825 in April 2014.<sup>18</sup> The Bail Act came into force on 20 May 2014 and by September 2014, the inmate population had fallen to 10,426. In this case, most of the reduction was due to a decrease in the number of persons on remand.<sup>19</sup> The Director of BOCSAR stated the decline was partly seasonal and partly due to a reduction in police use of bail court attendance notices (CAN) in the period leading up to and immediately after the commencement of the Bail Act. As police use of bail CANs is increasing again, it is unlikely the fall in remand numbers will continue.<sup>20</sup>

It is difficult to predict whether the NSW inmate population will rise as it has done in recent decades, or follow the fluctuations of the last few years. Extending the show cause provisions in the Amendment Act to a wider range of offenders in the community will make it harder for them to get bail. Past experience suggests that a more restrictive bail regime is likely to increase the remand population. A higher inmate population will increase demand on government resources, which could be targeted at other spending priorities.

---

<sup>15</sup> NSW Law Reform Commission, *Bail*, Report No 133 (2012) at 5.21.

<sup>16</sup> D Weatherburn, *The Effect of Prison on Adult Reoffending*, Crime and Justice Bulletin No 143 (NSW Bureau of Crimes Statistics and Research, 2010) 10.

<sup>17</sup> J Fitzgerald and S Corben, *Why is the NSW prison population falling?* Issue Paper No 80 (NSW Bureau of Crime Research and Statistics, 2012).

<sup>18</sup> NSW Bureau of Crime Research and Statistics, "NSW Custody Statistics: Quarterly Update September 2014", 20 October 2014, 27.

<sup>19</sup> NSW Bureau of Crime Research and Statistics, "NSW Custody Statistics: Quarterly Update September 2014", 20 October 2014, 27.

<sup>20</sup> NSW Bureau of Crime Research and Statistics, "NSW Custody Statistics: Quarterly Update Sep 2014", Media Release, 20 October 2014.