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by Lenny Roth

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by

Lenny Roth

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SUMMARY

Bail enables a person in custody who is charged with a criminal offence to be released from custody on the condition that he or she undertakes to appear in court and observe any specified conditions. Bail laws attempt to strike the right balance between not infringing upon the liberty of an accused person who is entitled to the presumption of innocence, and ensuring that an accused person will attend court and will not interfere with witnesses or commit other offences. This paper updates a 2002 Briefing Paper on Bail Law and Practice.

Changes to bail laws: 2003-2010

The changes in this period included the introduction of:

- A very stringent test for granting bail to persons accused of murder and persons who are 'repeat serious personal violence offenders';
- A presumption against bail for 'repeat property offenders';
- A presumption against bail for other offences including certain firearms offences, drug offences, terrorism offences and riot offences.

The NSW Government justified these changes primarily on the basis that they provide greater protection to the community against the risk that persons will commit offences while awaiting trial. In 2007, the Government also introduced new limits on the number of bail applications that can be made to a court. These new limits aimed to prevent 'magistrate shopping' and repeated bail applications 'that serve only to inflict further anguish upon victims'. [4]

Recent criticism of bail laws

A newly formed lobby group known as the Bail Reform Alliance (made up of a number of organisations including the NSW Law Society) has criticised changes over the last two decades, which have removed the presumption in favour of bail for a large number of offences. The Alliance argues that the changes have largely been ad hoc responses to particular crime incidents, and that a good case has not been made out for reforms that have undermined an accused person's right to the presumption of innocence. A group of non-government organisations has also recently expressed concerns over the increasing number of young people on remand and it has made recommendations to address this. It has been reported that, while the Government is proposing to make 'operational' changes to the *Bail Act*, it is not planning to make any major policy changes at this time. [5]

Reports on bail and young people

Several inquiries have examined issues arising in relation to young people and bail. These include the NSW Law Reform Commission's 2005 report on Young Offenders, and, more recently, the Strategic Review of Juvenile Justice by Noetic Solutions Pty Limited. These reviews have made recommendations directed at making the *Bail Act* more appropriate for young people, ensuring that inappropriate bail conditions are not imposed on young people, and addressing the lack of suitable bail accommodation for young people. In relation to bail accommodation, recent NSW Government initiatives include developing a Bail Assistance Line, and running a pilot program at Parramatta Children's Court. [6]

Trends in bail outcomes

- Between 1993 and 1997, the proportion of defendants who were refused bail doubled in both Local Courts and Higher Courts;
- In 2008, about 9 percent of defendants who were refused bail in Local Courts and Higher Courts were not found guilty of an offence.
- A 1995-2000 study found that only 51 percent of Local Court defendants who were refused bail received a custodial sentence (in the Higher Courts, 81 percent of defendants refused bail received a custodial sentence).
- In 2008/09 only 22 percent of young people with a remand episode received a control order within 12 months;
- Between 2001 and 2008, the proportion of defendants on bail who failed to appear in the Local court declined from 19.0 percent to 8.7 percent;
- There are no available statistics in NSW on the number of persons who commit an offence while on bail. [7]

Trends in the remand population

- Between 1993 and 2009, the number of prisoners on remand has more than tripled and the proportion of all prisoners who are on remand has more than doubled (in 2009, the proportion was 23 percent);
- Of all Australian jurisdictions, NSW has the third highest proportion of prisoners who are on remand and the third highest remand rate per 100,000 of the State adult population;
- Since 2004/05, the average daily number of young people on remand has increased by 82 percent (from 125 to 227);
- A BOCSAR study found that two factors contributing to the increase in the number of young people on remand between 2007 and 2008 were an increase in police activity in relation to breach of bail, and the 2007 changes which limited the number of bail applications that can be made;
- A recent BOCSAR study found no significant relationship between the growth in the juvenile remand population and the fall in property crime (no studies have been conducted on whether there is a relationship between the growth of the adult remand population and crime rates). [8]

Review of bail laws in Victoria

In October 2007, the Victorian Law Reform Commission published a report on bail laws in Victoria. The Commission made over 150 recommendations to improve bail law and practices including that:

- There should be no presumption against bail for any offence – bail decisions should be made on the basis of unacceptable risk;
- The Act should be amended to make it more appropriate for young people;
- Bail support services should be improved for indigenous persons and other marginalised groups who are overrepresented in the justice system.

The Victorian Government is considering these recommendations. [9]

1. INTRODUCTION

Bail enables a person in custody who is charged with a criminal offence to be released from custody on the condition that he or she undertakes to appear in court and observe any specified conditions. Bail laws provide the framework within which the police and courts make decisions on bail. The laws attempt to strike the right balance between:

- Not infringing upon the liberty of an accused person who is entitled to the presumption of innocence; and
- Ensuring that an accused person will attend court and will not interfere with witnesses or commit other offences.

When the *Bail Act* was enacted in NSW in 1978, the then Attorney General, Hon Frank Walker, stated that the laws ‘attempt to strike the necessarily delicate balance between the right of an unconvicted accused person to be at liberty...on the one hand, and the protection and welfare of the community on the other.’¹

Updating a 2002 [Briefing Paper](#) on bail law and practice in NSW², this paper reviews recent changes to bail laws and it outlines certain criticisms of these laws. The paper also looks at reports that have discussed bail laws in relation to young people. Statistical trends in bail outcomes and the number of remand prisoners are also examined. The last section discusses a 2007 review of bail laws in Victoria.

2. BAIL LAWS IN NSW

Bail only becomes an issue if police arrest a person and charge them with an offence. This is not the only way that police can institute criminal proceedings. An alternative way is to issue the alleged offender with a Court Attendance Notice.

A brief summary of the *Bail Act 1978* (NSW) is presented below.

Adults and children: It is important to note that the Act applies to children as well as adults (section 5 of the Act). However, a provision enacted in 2002 requires any special needs of children to be taken into account when assessing an application for bail.

Who may grant bail? A senior police officer may grant bail to an accused person. If police refuse bail, the accused must be brought to a court as soon as is practicable for the court to exercise its bail powers (sections 17, 20).

Grant of bail for certain periods: Bail may be granted for one or more periods of time corresponding to different stages of criminal proceedings. These include, for example:

- The period between the person being charged with the offence and the person’s first appearance in court;

¹ Hon F Walker, *NSWPD*, 14 December 1978, p2020.

² R Johns, *Bail Law and Practice: Recent Developments*, Briefing Paper No. 15/02, 2002. See also R Simpson, [Bail Law in New South Wales](#), Briefing Paper No 25/97.

- The period between committal for trial or sentence and the person being brought before the District or Supreme Court; and
- The period between the lodging of an appeal and its determination (section 6).

Minor offences – entitlement to bail: There is a general right to be granted bail for offences not punishable by imprisonment and for offences under the *Summary Offences Act 1988* that are punishable by imprisonment (section 8).

Criteria for making decisions: For other offences, the police or court must make a decision about whether to grant bail after having regard to four criteria (section 32):

- The probability of whether the accused will appear in court;
- The interests of the accused;
- The protection of alleged victims and relatives; and
- The protection and welfare of the community

In relation to each of these criteria, the Act sets out a range of matters that must be considered. For example, in relation to the interests of the accused, two of the matters that must be considered are the needs of the person to be free for any lawful purpose, and the period that the person may be obliged to spend in custody if bail is refused. Examples of matters to be taken into account in relation to the protection and welfare of the community are the nature and seriousness of the offence, and whether or not it is likely that the person will commit any serious offence while on bail.

Bail presumptions: There are also rules that apply to the determination of bail applications. In summary:

- For most offences, there is a presumption in favour of bail (section 9);
- For certain offences and certain repeat offenders, there is no presumption in favour of bail (sections 9, 9A, 9B);
- For certain offences and repeat property offenders, there is a presumption against bail (sections 8A-8F);
- For the offence of murder and repeat serious violence offenders, bail is only to be granted in exceptional circumstances (sections 9C, 9D).

A presumption in favour of bail means that bail is to be granted unless the police officer or court is satisfied that bail should be refused (the onus is on the police or prosecution). A presumption against bail means that bail is not to be granted unless the accused person satisfies the police officer or court that bail should not be refused.

Bail undertaking: A person is not to be released on bail unless the person undertakes in writing to appear in court on such day and at such time as specified; and to notify the court of any change in the person's residential address (section 34).

Bail conditions: Bail may be granted unconditionally, or subject to one or more conditions (section 36). Conditions should only be imposed for the purpose of:

- Promoting effective law enforcement;
- The protection and welfare of a specially affected person;

- The protection of the welfare of the community; or
- Reducing the likelihood of future offences being committed by promoting the treatment or rehabilitation of the accused.

A wide range of bail conditions may be imposed including:

- The accused person agreeing to observe requirements as to his or her conduct;
- The accused, or an acceptable person, depositing with the court a sum of money and agreeing to forfeit it if the accused fails to appear in court;
- The accused person surrendering his or her passport;
- The accused person agreeing to not associate with a specified person or agreeing to not visit a specified place.

Bail conditions should not be imposed that are more onerous for the accused person than appear to the police officer or court to be required: (a) by the nature of the offence, (b) for the protection and welfare of any specially affected person, or (c) by the circumstances of the accused person (section 37).

Dispensing with bail: Except for certain serious offences for which there is a presumption against granting bail (see sections 8A-8F), police and courts can dispense with the requirement for bail (section 10). This means that the person is entitled to be at liberty until they are required to appear in court but they are not required to give the court a bail undertaking or comply with any conditions.

Review of bail decisions: Bail decisions are subject to review, either at the request of the accused, or of the police or DPP (sections 44-48). A court can review the decision of a court at the same or lower level of jurisdiction: e.g. a District Court Judge can review a decision made by another District Court Judge or by the Local Court.

Breach of bail: If a police officer believes on reasonable grounds that a person on bail has failed to comply with, or is about to fail to comply with, a bail undertaking or a bail condition, the officer may arrest the person (section 50). The court may release the person on bail or revoke bail. A person who, without reasonable excuse, fails to appear in court in accordance with a bail undertaking is guilty of an offence (section 51).

3. CHANGES TO BAIL LAWS: 1978-2002

The 2002 [Briefing Paper](#) outlined the main changes to bail laws in this period. A brief summary is presented below.

3.1 Changes from 1978 to 2001

When the *Bail Act* was enacted in 1978, it created a presumption in favour of bail for all offences except violent robbery and armed robbery. The 1976 report of the Bail Review Committee, which led to the 1978 Act, had proposed a presumption in favour of bail for all offences punishable by imprisonment but the NSW Government introduced the exceptions in response to widespread criticism about 'the shooting of a bank manager during the commission of an armed robbery by a person already on bail'.³ The then

³ D Weatherburn, M Quinn and G Rich, 'Drug charges, bail decisions and absconding', (1987) 20

Attorney General, Hon Frank Walker, explained:

This Government is well aware of the widespread feeling in the community of a need to take a firm and exemplary stand in relation to serious and violent crime, particularly the offences of armed and otherwise violent robbery.⁴

Between 1987 and 2001, the presumption in favour of bail was removed for several other offences. As the 2002 briefing paper stated:

...the presumption in favour of bail [was removed] for certain domestic violence offenders in 1987, murder in 1993, manslaughter and a range of sexual crimes in 1998, possession of prohibited firearms in 2001, and so on. A presumption against bail was imposed in 1988 upon certain drug offences involving commercial quantities.⁵

The 2002 briefing paper also noted that changes had been made 'to make the bail process fairer for applications, victims or other affected parties'.⁶ For example, changes in 1988 to require the police or court, when making bail decisions, to take into account the protection of victims and their close relatives; and changes in 1989 to provide for a special review of bail conditions when a person who has been granted bail remains in custody because they were unable to meet the bail conditions. The 2002 paper also noted, 'recently bail conditions have become more explicit in specifying the types of restraints that may be imposed on an applicant's conduct'.⁷

3.2 Changes in 2002

Significant changes were made to bail laws in 2002. These included:

- New provisions targeting 'repeat offenders' who apply for bail;
- New provisions that require police officers and courts, when making bail decisions, to take into account any special needs arising from the fact that the accused person is a child, or is an Aboriginal person or Torres Strait Islander, or has an intellectual disability or mental illness;
- New provisions to allow bail to be granted on condition that the accused person agrees to participate in an intervention program (prescribed under the *Criminal Procedure Act 1986*) or other program for treatment or rehabilitation;⁸

Australian and New Zealand Journal of Criminology 95.

⁴ Hon F Walker, *NSWPD*, 14 December 1978, p2015.

⁵ R Johns, *Bail Law and Practice: Recent Developments*, Briefing Paper No 15/02, Exec Sum.

⁶ R Johns, n5, Exec Sum.

⁷ R Johns, n5, Exec Sum.

⁸ The first two of the reforms listed above were enacted by the *Bail Amendment (Repeat Offenders) Act 2002* (NSW). The third reform was enacted by the *Crimes Legislation Amendment (Criminal Justice Interventions) Act 2002* (NSW). Note that bail could previously be granted on the condition that the accused person agrees to participate in 'drug or alcohol treatment or rehabilitation'.

The new provisions targeting repeat offenders state that the presumption in favour of bail does not apply to a person accused of an offence:

- If the offence is an indictable offence and the person has previously been convicted of an indictable offence; or
- If, at the time of the alleged offence, the person was on bail, on parole, serving a non-custodial sentence, or on a good behaviour bond; or
- If the person has previously been convicted of an offence of failing to appear in court pursuant to a bail undertaking. (see section 9B of the Act)

The background to, and debate about, the changes targeting repeat offenders were outlined in the 2002 briefing paper. A major impetus for these changes was a [report](#) by the Bureau of Crime Statistics and Research (BOCSAR), which reported a number of findings including that over 14 percent of defendants on bail failed to appear in Local Court matters; and that defendants on bail with prior convictions were far more likely to fail to appear in Local Court matters than defendants without prior convictions.⁹

In 2004, BOCSAR published a [study](#) on the impact of the reforms over the first 18 months.¹⁰ It found that there was a significant decrease in the proportion of people failing to appear in both the Local and Higher Courts. In the Local Court the proportion of people failing to appear dropped from 11.6 percent (in the 18 months prior to the reforms) to 9.4 percent (in the 18 months after the reforms). Data provided by BOCSAR to the NSW Parliamentary Library shows that, since 2001 there has been a steady decline in the proportion of defendants on bail who have failed to appear in the Local Court (in 2008, 8.7 percent of defendants on bail failed to appear).

The 2004 study also found that new provisions to make it easier for juveniles and indigenous persons to obtain bail had not resulted in lower bail refusal rates. For indigenous adults, bail refusal rates had actually increased (from 17.3 percent to 19.8 percent). Fitzgerald and Weatherburn thought this was probably due to the impact of the repeat offender provisions since indigenous adults are more likely than non-indigenous adults to appear in court with a prior criminal record.

4. CHANGES TO BAIL LAWS: 2003-2010

4.1 Stringent bail test for murder and serious violence ‘repeat offenders’

In July 2003, changes were enacted to provide that bail is not to be granted to a person charged with murder, or to a person charged with a serious personal violence offence who has previously been convicted of such an offence, unless exceptional circumstances justify the grant of bail.¹¹ Several offences were listed as ‘serious personal violence offences’ including serious assaults, sexual assaults, and armed robbery. What amounts to ‘exceptional circumstances’ is to be decided on a case-by-case basis but the then Minister for Justice, Hon John Hatzistergos MLC, stated:

⁹ The report is discussed in R Johns, n5, p29-31.

¹⁰ J Fitzgerald and D Weatherburn, *The impact of the Bail Amendment (Repeat Offenders) Act 2002*, Contemporary Issues in Crime and Justice No. 83, BOCSAR, August 2004.

¹¹ *Bail Amendment Act 2003* (NSW).

...it might include cases involving a battered wife, or a strong self-defence case or a weak prosecution case. It might also include a case in which the defendant is in urgent need of medical attention or has an intellectual disability, or a case in which the court is satisfied that the offender poses no further threat to the victim or the community.¹²

These provisions were introduced in response to the murder of a woman by her estranged husband. When the murder was committed, the husband was on bail in relation to charges of serious violence towards her. When introducing the amendment bill to Parliament, the Minister for Justice stated:

These amendments build on [the 2002 repeat offender reforms] to further protect victims and the community, and in particular women, from serious personal violence offenders. Honourable members will remember the tragic murder of Patricia van Koeverden at Newcastle in April this year by her estranged husband. The community was rightly outraged that Toni Bardakos should have been granted bail...¹³

The Minister also commented, 'the Government's bail reforms are underpinned by the principle that the more serious the alleged offence, the harder it will be to secure bail'.¹⁴

4.2 Stay of decisions to grant bail for serious offences

The same amendment Act also introduced a procedure for temporarily staying a magistrate or judge's decision to grant bail to a person accused of a serious offence.¹⁵ If the police or the Director of Public Prosecutions makes a request, a decision to grant bail to a person accused of a serious offence can be stayed for up to three business days pending a review by the Supreme Court (the effect of the stay is that the accused person will remain in custody). A 'serious offence' includes murder, any other offence punishable by imprisonment for life, and a serious child sex offence.

4.3 Presumption against bail for 'repeat property offenders'

Later in 2003, changes were made to provide for a presumption against bail for repeat property offenders.¹⁶ A repeat property offender is a person who is accused of two or more serious property offences (not arising out of the same circumstances) and who was convicted of a serious property offence in the past two years. A 'serious property offence' includes a number of robbery and stealing offences in the *Crimes Act 1900* (NSW). The Minister for Justice noted that the amendments were adopted from a report produced by an internal working party. The Minister also explained:

These provisions specifically target persons who commit more offences while on bail. The proposal is based on the strategy that by identifying certain categories of offences charged in combination with the criminal history of the person charged, high-risk persons

¹² Hon J Hatzistergos MLC, [NSWPD](#), 24 June 2003.

¹³ Hon J Hatzistergos MLC, [NSWPD](#), 24 June 2003.

¹⁴ Hon J Hatzistergos MLC, [NSWPD](#), 24 June 2003.

¹⁵ *Bail Amendment Act 2003* (NSW).

¹⁶ *Bail Amendment (Firearms and Property Offences) Act 2003* (NSW).

may be identified and incapacitated, thereby preventing them from offending in the future. Criminology research has repeatedly shown that a small percentage of offenders are responsible for a large percentage of crime. This is especially the case in relation to property offences.¹⁷

The Minister also discussed the need for programs to reduce recidivism:

Incapacitation of repeat property offenders through remand in custody has the benefit to the community for the period that the offender is in custody. However, the Government also recognises that more long-term benefit can be gained if efforts are directed towards rehabilitating offenders once they have been identified. This may be achieved by addressing the cause of the person's offending, for instance a heroin dependency. Cabinet has given its imprimatur for the establishment of an inter-departmental working group to investigate the expansion or trialling of a range of evidence-based programs that are demonstrated as effective at reducing recidivism.¹⁸

4.4 Presumption against bail for other offences and certain persons

Since 2002 a presumption against bail has been introduced in relation to a number of other offences and in relation to certain persons.

Firearms offences: Legislation enacted in 2003 introduced a presumption against bail for certain firearms offences.¹⁹ When introducing the legislation, the Minister for Justice stated that the changes 'would address community concerns in relation to recent firearms offences'. The Minister explained the changes as follows:

Currently there is only one exception to the presumption in favour of bail for firearms offences, namely, offences under section 7 of the Firearms Act 1996 that relate to prohibited firearms and pistols. There are, however, a number of other serious firearms offences, apart from those in section 7 of the Act, that relate to prohibited firearms, pistols and danger to the public. The Government wishes to send a clear message that the possession of prohibited firearms and pistols is an extremely serious matter.²⁰

In 2007, a presumption against bail was created for two additional firearms offences: the offence of prescribed persons (which includes persons convicted of certain offences) being involved in a firearms dealing business, and the offence of shortening a firearm.²¹ The Minister for Justice stated, 'the changes are necessary to ensure that the legislation is consistent with regard to serious firearm offences of similar gravity'.²²

Terrorism offences: In 2004, legislation introduced a presumption against bail for

¹⁷ Hon J Hatzistergos MLC, [NSWPD](#), 2 December 2003.

¹⁸ Hon J Hatzistergos MLC, [NSWPD](#), 2 December 2003.

¹⁹ *Bail Amendment (Firearms and Property Offences) Act 2003* (NSW).

²⁰ Hon J Hatzistergos MLC, [NSWPD](#), 2 December 2003.

²¹ *Bail Amendment Act 2007* (NSW).

²² Hon J Hatzistergos MLC, [NSWPD](#), 17 October 2007.

Commonwealth terrorism offences.²³ This was one of a number of anti-terrorism law reform measures enacted in NSW in 2004 and 2005.

Riot offences: In December 2005, legislation was enacted in response to the Cronulla riots.²⁴ One component of this was the introduction of a presumption against bail for riot offences, and for other serious offences committed in the course of a large-scale public disorder or in connection with the exercise of police powers to prevent or control such a 'public disorder'. The then Premier, Hon Morris Iemma, stated:

Twenty-three rioters charged over Sunday's riots have been granted bail, one of whom had been granted bail days earlier for assault and destroying property. It is unacceptable that such thugs and morons are automatically granted bail, just to be given the chance to wreak further havoc. This bill will help shut that revolving door... That way the police can do their jobs knowing that they will be backed up.²⁵

Drug offences: In 2006, a presumption against bail was created for new drug offences.²⁶ These include the offence of enhanced indoor cultivation of prohibited plants for a commercial purpose; and the offence of manufacturing or producing a commercial quantity of a prohibited drug when a child is exposed to the manufacturing process.

Persons on life parole: In 2006, a presumption against bail was created for persons on parole for life who are charged with an offence punishable by imprisonment.²⁷ The then Attorney General, Hon Bob Debus, stated:

This is a targeted amendment that will apply to a small group of prisoners who have had a life sentence imposed upon them but who have been released on parole for the rest of their life. To be on parole for life a prisoner must have been sentenced to imprisonment for life before the introduction of the so-called truth in sentencing reforms, which commenced in 1989, and have had their life sentence redetermined under the transitional provisions. This category of person is quite unlike any other group in society. The community might reasonably expect that lifetime parolees, following release from prison, should make every effort not to come into contact with the criminal justice system again.²⁸

Serious sex offenders: In 2007, a presumption against bail was created for serious sex offenders who commit an offence by breaching a supervision order imposed on them.²⁹ This provision was introduced as part of a number of amendments that aimed 'to ensure the protection of the community from serious recidivist sex offenders'.³⁰

²³ *Bail Amendment (Terrorism) Act 2004* (NSW).

²⁴ *Law Enforcement Legislation Amendment (Public Safety) Act 2005* (NSW).

²⁵ Hon M Iemma, [NSWPD](#), 15 December 2005.

²⁶ *Crimes and Courts Legislation Amendment Act 2006* (NSW).

²⁷ *Bail Amendment (Lifetime Parole) Act 2006* (NSW).

²⁸ Hon B Debus, [NSWPD](#), 19 September 2006.

²⁹ *Law Enforcement and Other Legislation Amendment Act 2007* (NSW).

³⁰ Hon J Hatzistergos, [NSWPD](#), 28 November 2007.

4.5 Limit on number of bail applications

Section 22A of the *Bail Act* already restricted the number of bail applications that could be made to the Supreme Court. In 2007, a provision was enacted to limit the number of bail applications that a person can make to *any* court. The new section 22A stated:

A court is to refuse to entertain an application for bail by a person accused of an offence if an application by the person in relation to that bail has already been made and dealt with by a court, unless:

- (a) the person was not legally represented when the previous application was dealt with, and the person now has legal representation, or
- (b) the court is satisfied that new facts or circumstances have arisen since the previous application that justify the making of another application.

The Attorney General explained the reasons for the new provision:

Currently there is no limit to the number of times an accused person with access to money who can fund ongoing legal representation can apply to the Local Court for bail. The changes are necessary to guard against unnecessary, repeated bail applications that serve only to inflict further anguish upon victims'.³¹

The Attorney General also said that the changes would prevent 'what is known as magistrate shopping – the process of going from magistrate to magistrate, or judge to judge, with hope of obtaining a different outcome'.³²

In 2008, section 22A was amended to clarify that it only applies if a bail application is made to a court *of the same jurisdiction* as the court that dealt with the previous bail application.³³ For example, the section would not apply if a person is refused bail by a Local Court magistrate and the person later applies for bail in the District Court.³⁴

In 2009, another amendment was made to clarify the meaning of the exception for 'new facts and circumstances'.³⁵ The Attorney General explained that, 'it has become apparent that there has been a significant misapplication of the section, which has coincided with an increase in the number of people being remanded in custody'.³⁶ Section 22A now states that a further bail application can be made if:

- The person was not legally represented when the previous application was dealt with, and is now represented; or

³¹ Hon J Hatzistergos MLC, [NSWPD](#), 17 October 2007.

³² Hon J Hatzistergos MLC, n32.

³³ *Courts and Crimes Legislation Further Amendment Act 2008* (NSW).

³⁴ See *Bail Act 1978* (NSW), section 26 as to the power of the District Court to grant bail.

³⁵ *Courts and Crimes Legislation Amendment Act 2009* (NSW).

³⁶ Hon J Hatzistergos MLC, [NSWPD](#), 29 October 2009.

- Relevant information is to be presented to the court that was not presented in the previous application; or
- Circumstances relevant to the grant of bail have changed since the previous application.

5. RECENT CRITICISM OF BAIL LAWS

5.1 Criticism of exceptions to presumption in favour of bail

A newly formed lobby group known as the Bail Reform Alliance recently called for reforms to bail laws in NSW. The Alliance is comprised of the NSW Council for Civil Liberties, the NSW Law Society, the NSW Public Service Association, NSW Young Lawyers, and the NSW Welfare Rights Centre. On 4 March 2010, the Alliance convenor, retired magistrate, Max Taylor, wrote to the Attorney General, Hon John Hatzistergos MLC, to outline the concerns. The letter stated:

The presumption in favour of bail found in section 9 of the Act has over the last thirty-two years been replaced in the case of many serious crimes with either no presumption in favour or against bail or a presumption against bail...

...it is difficult to see the justification for the erosion of section 9 when section 32 provides a wide range of matters to be considered by Magistrates and Judges when contemplating bail. The changes over the years have often been associated with a particular crime or crisis concerning a particular type of crime and media attention to it.³⁷

The letter also stated that the Alliance was concerned about an infringement of the separation of powers between the legislature and judiciary. It submitted:

After 32 years of modifications and additions...the question arises as to whether Parliament's undoubted power to pass legislation in relation to crime and justice issues has come to include directions as to how the Courts should carry out their functions.³⁸

The Alliance called for reforms to bail laws to restore important civil liberties and the separation of powers, or alternatively, a public inquiry into bail laws.

An [article](#) in the *Sydney Morning Herald* in April 2010 reported on the campaign by the Bail Reform Alliance. It stated:

Mr Taylor said governments of both persuasions had undermined the notion of "innocent until proven guilty" by "smashing" the presumption in favour of bail for a string of offences.

Tougher bail laws have helped swell the number of prisoners on remand to more than 20 per cent of the jail population...without evidence it leads to falling crime rates, he said.³⁹

³⁷ Bail Reform Alliance, letter to NSW Attorney General, Hon J Hatzistergos MLC, 4 March 2010.

³⁸ As to the constitutional constraints on State Parliaments in relation to State Courts, see *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51. The *Kable* principle has been relied on successfully in only a few cases: one recent example of this was *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 261 ALR 220.

³⁹ J Gibson, 'Cowdrey backs call to change bail laws', [SMH](#), 9 April 2010.

The article also reported that the Director of Public Prosecutions, Nicholas Cowdrey QC, had offered his support to the Alliance. Mr Cowdrey was quoted as saying:

In recent times, almost by stealth and often in the fashion of politically driven knee-jerk reaction, ad hoc amendment of the legislation has eroded the right to bail and swelled prisoner numbers, some of whom are not later convicted of offences.

On the other hand, the Secretary of the Police Association, Peter Remfry 'said he believed tough bail laws had helped reduce crime and police would prefer to see a presumption against bail for an increased number of serious offences'.⁴⁰

In terms of the Government's position, the article stated:

The government is rewriting the Bail Act but does not intend major policy changes...

It will seek public comment this year on a draft bill and a discussion paper proposing what it calls "operational initiatives" to improve the bail system.⁴¹

An earlier [article](#) about the rising prisoner population in NSW reported the following views of the NSW Attorney General:

The NSW Attorney General, John Hatzistergos, has admitted that the state needs to act to reduce its soaring jail population...

But the state's tough sentencing and bail laws would stay, he said, because the record number of prisoners was the reason most types of crime were falling.

Instead, the government was putting its faith in a suite of rehabilitation programs to reduce reoffending by 10 percent by 2016.⁴²

5.2 Criticism of new limits on the number of bail applications

There has been criticism of the 2007 changes to section 22A, which limit the number of bail applications that can be made to a court. In an article published in July 2009 (before section 22A was further amended to clarify its operation), two law lecturers from the University of Technology, Sydney, commented:

It is our contention that s22A is ill thought out non-rational law making and without sufficient empirical foundation. Despite the rhetoric of crime victims' interests, it can be characterised as a blatant 'get tough on crime' policy that has become all too common in recent years.⁴³

Booth and Townsley claimed that the Government offered no evidence in support of the

⁴⁰ J Gibson, n39.

⁴¹ J Gibson, 'Cowdrey backs call to change bail laws', [SMH](#), 9 April 2010.

⁴² J Gibson, 'Tough bail laws to stay despite jail population', [SMH](#), 31 March 2010.

⁴³ T Booth and L Townsley, 'The Process is the Punishment: The Case of Bail in New South Wales', (2009) 21(1) *Current Issues in Criminal Justice* 41at p43.

two premises for the reforms: namely, that repeated bail applications cause anguish to victims, and that defendants with access to money engage in magistrate shopping. Booth and Townsley also argued that ‘the anguish of victims generated by bail applications...is arguably only an issue to a small group of victims of serious crimes of violence’. In addition, they stated that ‘the image of the “cashed up” accused person runs counter to the profile of NSW prisoners’. They concluded:

Bail has clearly been reconfigured to demote the interests of an accused’s right to be at liberty until proven guilty, and to promote factors such as the improved administration of justice and the concerns of victims of crime. This is not to say that these concerns are not important. The point is that the government could be exploring alternative ways to balance these interests. We have suggested two possible alternatives, namely improved support and information for crime victims, and/or an increase in the range of bail conditions so as to alleviate the potential anxiety of certain victims.⁴⁴

Booth and Townsley also pointed out that Victoria is the only other State that has a similar provision, and that the Victorian Law Reform Commission recommended in 2007 that this provision be modified. The Commission recommended:

...the new Bail Act should stipulate that an accused may be represented at a bail application made within two court-sitting days after arrest without having to show new facts or circumstances on a subsequent application.⁴⁵

This would address the problem that was outlined in a recent [article](#) in the *Sydney Morning Herald*. The article reported that because of section 22A, ‘solicitors routinely advise their clients not to apply for bail at their first appearance - usually a day after arrest and too soon to have everything in order’.⁴⁶ This can mean that even defendants who have a strong case for bail spend some time in prison.

The impact of section 22A on young people is another issue that the Bail Reform Alliance raised in its letter to the NSW Attorney General.

5.3 Criticism of bail laws in relation to young people

Concerned about the growing number of children and young people being held on remand, in October 2009 a coalition of 12 non-government organisations (including Uniting Care Burnside, the Council of Social Service of NSW, and the Youth Justice Coalition) released a [position paper](#) on bail and young people.⁴⁷ The paper noted that only 16 percent of young people on remand go on to receive a custodial sentence and therefore the vast majority of them are spending unnecessary time in detention.

⁴⁴ Booth and Townsley, n43, p56.

⁴⁵ Victorian Law Reform Commission, [Review of the Bail Act: Final Report](#), 2007, p108.

⁴⁶ J Gibson, ‘No bail – go directly to jail’, [SMH](#), 17-18 April 2010.

⁴⁷ UnitingCare Burnside, NCOSS, *Releasing the pressure on remand: Bail support solutions for children and young people in New South Wales*, October 2009.

According to the paper, the consequences of the high remand rate include unnecessarily exposing thousands of children to an environment that could have an adverse effect on their future life chances, and a higher number of young people being at risk of cycling through the prison systems. The paper also referred to 'recent allegations of overcrowding and increased assaults in Juvenile Justice Centres throughout New South Wales'. The paper argued that the current bail policies were 'likely to compound rather than alleviate juvenile crime'.

The paper identified three main reasons for the increase in the number of juveniles on remand. Firstly, the lack of suitable accommodation options for young people who would otherwise be released on bail. Secondly, the 2007 changes to section 22A, which restricted the number of bail applications that can be made. The paper cited research by BOCSAR that the amendments had increased the time that young people spend on remand. The third reason was that bail conditions are imposed on young people that are difficult to comply with but which are proactively policed.

The paper proposed several solutions including:

- Setting up a Residential Bail Support Program funded by the NSW Government and delivered by the non-government sector;
- Changing court processes to ensure that a lack of accommodation is not a sufficient reason to refuse bail to a young person; and
- Exempting young people from the restrictions in section 22A.

In February 2010, the Youth Justice Coalition published a further [report](#), which outlined the findings of a survey of young people appearing in the Children's Court at Parramatta. The report also made recommendations to reduce the number of young people on remand. Some of these recommendations were the same as those in the position paper referred to above; but others were aimed at changing police practices in relation to young people who breach their bail conditions.⁴⁸

6. REPORTS ON BAIL AND YOUNG PEOPLE

6.1 NSW Law Reform Commission (2005)

The NSW Law Reform Commission's 2005 [report](#) on young offenders recommended a number of changes to bail laws to make them more appropriate for young people.⁴⁹ By way of introduction, the Commission stated:

Bail is a crucial point of the criminal justice process for young people at which policing, care issues, and court procedures intersect. The special problems facing young people with respect to bail tend towards undermining the policies upon which juvenile justice in New South Wales is based, and have the potential to impact seriously on the sentencing of young offenders. In addition, bail refusal, or the imposition of harsh bail conditions, may have a particularly punitive effect on young people.⁵⁰

⁴⁸ Youth Justice Coalition, *Bail Me Out: NSW Young People and Bail*, February 2010.

⁴⁹ NSW Law Reform Commission, *Young Offenders*, [Report 104](#), December 2005.

⁵⁰ NSWLRC, n49, p230

While the Commission did not support a ‘blanket presumption in favour of bail for young people’, it recommended that the Act should include separate bail criteria for young people, which incorporate the principles in section 6 of the *Children (Criminal Proceedings) Act 1987* (“CCP Act”).⁵¹ These include:

- that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance,
- that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption, and
- that it is desirable, wherever possible, to allow a child to reside in his or her own home.

The Commission also addressed the issue of bail conditions. It noted that ‘the practice of imposing harsh and inappropriate bail conditions on young people has been the subject of repeated concern over the last decade’.⁵² The Commission referred to concerns about conditions such as curfews, reporting to police stations, and area and non-association restrictions. It recommended that the Act be amended to provide that bail conditions for young people must be reasonable having regard to the principles in section 6 of the CCP Act, and are not excessive or unrealistic.⁵³

The Commission also recommended that the 2002 changes, which removed the presumption in favour of bail for repeat offenders, should not apply to young people.⁵⁴ The Commission explained that:

We acknowledge that there is no evidence that the amendments are disadvantaging young people. Nevertheless, we believe that the law should allow individualised responses to individual offences by young persons. The fact that a young person is already on bail, on parole, on a good behaviour bond, or serving a non-custodial sentence should not remove any presumption in favour of bail in relation to a subsequent alleged offence. Young people should be held in remand as a last resort.⁵⁵

The Commission also examined concerns about young people who are not released on bail due to a lack of suitable accommodation. The report explained:

... current court practice for dealing with a young person who is unable to provide an appropriate address for residence, but is otherwise suitable for bail, is to impose a condition that the young person resides as approved by the Department of Juvenile Justice (“DJJ”). Where a young person is under the age of 16, the DJJ must notify the Department of Community Services. After consultation, the Departments jointly place the young person in accommodation. However, Shopfront [Youth Legal Centre] observed that young people often remain in custody because the Department of Community Services is “unable or unwilling” to find accommodation.⁵⁶

⁵¹ NSWLRC, n49, Rec10.2, p244

⁵² NSWLRC, n49, p248.

⁵³ NSWLRC, n49, Rec10.6, p256.

⁵⁴ NSWLRC, n49, Rec10.9, p260.

⁵⁵ NSWLRC, n49, p260.

⁵⁶ NSWLRC, n49, p245.

The Commission stated that ‘there was a consensus among submissions that there is a pressing need for accommodation alternatives, so that more young people may be granted bail.’⁵⁷ It recommended that the NSW Government establish a Working Party to consider the provision of bail accommodation for young people.⁵⁸

The NSW Government has not proposed any changes to the *Bail Act* in response to the Law Reform Commission’s recommendations.

6.2 Wood Special Commission of Inquiry (2008)

The shortage of bail accommodation for young people was also raised during the 2008 Special Commission of Inquiry into Child Protection Services in NSW. The [report](#) stated:

In the absence of dedicated bail facilities for young people, many have been held remanded in detention for significant periods, with potentially adverse consequences for their prospects and rehabilitation.⁵⁹

The report cited figures provided by Juvenile Justice:

A recent review of remand cases undertaken by Juvenile Justice over a period of three months (first quarter of 2006/07) found that 90 per cent of these did not meet bail conditions in the first instance and spent an average of eight days in custody. Ninety-five per cent of those remanded during the review period had court imposed bail conditions to ‘reside as directed’.⁶⁰

Particular concerns were raised about indigenous young people:

The difficulties in securing the release on bail of young Aboriginals has been particularly problematic. It needs to be addressed, as a matter of urgency, given the disproportionately high number of Aboriginal children and young people who come into contact with the juvenile justice system.⁶¹

The report noted two recent NSW Government initiatives. The first was ‘a trial of an integrated case management project to be conducted out of Parramatta Children’s Court commencing in December 2008’. The second was the Intensive Bail Support Program, which was ‘in its early stages and seemingly the subject of limited funding’.

The report recommended that Juvenile Justice set up an after hours bail placement service, which is available to young people aged between 10 and 18, who are at risk of being remanded in custody or who require bail accommodation.⁶² This should be similar

⁵⁷ NSWLRC, n49, p262.

⁵⁸ NSWLRC, n49, Rec10.10, p263.

⁵⁹ Hon James Wood AO QC, *Special Commission of Inquiry into Child Protection Services in New South Wales*, November 2008, [Volume 2](#), p 558.

⁶⁰ Wood Inquiry Report, n59, p558.

⁶¹ Wood Inquiry Report, n59, p562.

⁶² Wood Inquiry Report, n59, p584.

to the Central After Hours Bail Placement Service in Victoria, or the Conditional Bail Program and Youth Bail Accommodation Service in Queensland.⁶³

The NSW Government supported this recommendation in principle⁶⁴ and the 2009/10 budget allocated funding to Juvenile Justice for a bail hotline:

The Bail Hotline will provide an after-hours service for young people who are being held by police and who need information or assistance to enter into bail undertakings. The service will operate 24 hours a day, seven days a week...⁶⁵

The support provided will include finding accommodation. The hotline is to be known as the Bail Assistance Line and, initially, it will 'be piloted for 12 months in three locations across the Sydney Metropolitan, Northern and Western Regions'.⁶⁶ According to Juvenile Justice, the hotline is due to commence in June 2010 for the Dubbo region and it will then be rolled out to Western Sydney and Newcastle.⁶⁷

In March 2010, the Government announced a pilot program that will be run by both Juvenile Justice and Community Services to link homeless young people to extra supports to keep them out of custody and help reduce re-offending.⁶⁸ The program will run out of Parramatta Children's Court and it will focus on young people under 16 who are facing custody if they cannot find suitable accommodation.

6.3 Strategic Review of Juvenile Justice (2010)

The Minister for Juvenile Justice commissioned Noetic Solutions Pty Limited to undertake a review of the juvenile justice system in NSW. The review [report](#) was published in April 2010 together with the NSW Government's [response](#). A brief summary of the recommendations and responses on bail is presented below.

Law reform: The report recommended that the principles in section 6 of the CCP Act should apply to all aspects of bail proceedings, or that the Bail Act should be amended to introduce separate criteria for young people consistent with those principles.⁶⁹ The Government did not support this recommendation. It stated that the principles in section 6 of the CCP Act already apply to bail determinations except to the extent of any

⁶³ These bail support services are discussed in G Denning Cotter, [Bail Support in Australia](#), Indigenous Justice Clearinghouse, April 2008.

⁶⁴ NSW Government, [Keep Them Safe: A Shared Approach to Child Well-being 2009-2014](#), March 2009, p79

⁶⁵ NSW Treasury, [Budget Estimates 2009-10](#), Budget Paper No. 3, p15-4.

⁶⁶ NSW Juvenile Justice, [Annual Report 2008-2009](#), p21.

⁶⁷ Personal communication with NSW Juvenile Justice, 27 May 2010.

⁶⁸ Hon Graham West MP, Hon Linda Burney MP, 'New Support for Homeless Young Offenders', [Media Release](#), 23/3/10.

⁶⁹ Noetic Solutions Pty Limited, *A Strategic Review of the New South Wales Juvenile Justice System: Report for the Minister of Juvenile Justice*, April 2010, Rec6-7, p50-51

inconsistency with the *Bail Act*; and it noted that the *Bail Act* already requires the special needs of children to be taken into account. The Government added that it 'is also committed to an ongoing process of review and evaluation of the *Bail Act* and it is anticipated that a Review of the Act will be released for public comment'.⁷⁰

Bail conditions: the report recommended that:

- Police and Juvenile Justice establish ongoing monitoring arrangements to ensure that appropriate conditions are being imposed on young people;
- Systems and protocols are established to ensure that all young people can understand and comply with conditions before they are imposed.⁷¹

The Government did not support these recommendations. It stated:

The Government has put in place a number of support services and strategies to assist young people in meeting their bail conditions, including legislative requirements relating to young people in police custody, advice services and legal representation. The *Bail Act* also enables a person to seek a review of a bail decision in the Supreme Court.⁷²

Policing of bail conditions: The report also addressed the issue of proactive policing and arrest of young people for technical breaches of bail conditions. It recommended that:

The NSW Police Force develop a risk management framework, and associated education and training, to apply a risk based approach to children and young people found to be breaching their bail conditions.⁷³

The Government, in its response to a number of recommendations about policing, outlined policing policy and initiatives in relation to young people but did not respond to the specific recommendation about policing of bail conditions.⁷⁴

Bail support: The report noted that Juvenile Justice supports children and young people to find suitable accommodation by funding a range of services and programs.⁷⁵ However it stated that 'overall, accommodation options for the placement of children and young people are limited, and virtually non-existent in rural NSW'. The report recommended that Juvenile Justice:

- Assume legislative responsibility for placing young people in suitable accommodation when they are given 'reside as directed' bail conditions;
- Review every 48 hours the situation of every young person remanded in custody

⁷⁰ NSW Government, *Government Response to NSW Juvenile Justice Review*, April 2010, p9-10.

⁷¹ Noetic Solutions, n69, Rec18-19, p67

⁷² NSW Government, n70, p9-10.

⁷³ Noetic Solutions, n69, Rec41, p103.

⁷⁴ NSW Government, n70, p27-28.

⁷⁵ Noetic Solutions, n69, p72.

- due to lack of suitable accommodation;
- Expand the existing model of establishing agreements with accommodation service providers to guarantee placements for young people who would be held on remand if they were unable to find suitable accommodation. Sufficient funding should be provided to ensure that current and future demand is met.⁷⁶

The report did not recommend establishing a Residential Bail Support Program as proposed by UnitingCare Burnside. The report stated:

...the Review believes that expanding the current Juvenile Justice model of funding existing accommodation providers to guarantee beds provides better value for money. It is understood that there have been several attempts at Residential Bail Support Programs or 'bail hostels' that have previously failed. Some of the reasons behind the failures include grouping several at risk young people together, highly resource intensive (less than custody, but more so than funding existing service providers) and there is often a lack of critical mass to sustain the program, especially in rural areas.⁷⁷

The Government's response outlined what Juvenile Justice was doing in relation to bail support but did not respond to the specific recommendations referred to above. Juvenile Justice action in relation to bail support included:

- Using the Youth Accommodation Line, which identifies vacancies on a daily basis in youth accommodation services for young people in custody;
- Using brokerage funds to purchase additional support/services for young people who would otherwise be remanded in custody;
- Developing the Bail Assistance Line to address a range of factors including accommodation issues that may result in a young person being remanded.⁷⁸

7. TRENDS IN BAIL OUTCOMES

7.1 Persons who are refused bail

BOCSAR recently examined bail outcomes in Local Courts and Higher Courts (District Courts and Supreme Court) in the period from 1993 to 2007.⁷⁹ The [study](#) found:

- *Local Court*: the proportion of defendants who were refused bail rose significantly for all 11 major offence categories; and the proportion of defendants who were refused bail for any offence doubled from 3.6 percent to 7.6 percent.
- *Higher Courts*: the proportion of defendants who were refused bail rose significantly for all ten major offence categories; and the proportion of defendants

⁷⁶ Noetic Solutions, n69, Rec20-24, p72-74

⁷⁷ Noetic Solutions, n69, p73.

⁷⁸ NSW Government, n70, p11.

⁷⁹ R Lulham and J Fitzgerald, *Trends in bail and sentencing outcomes in New South Wales Criminal Courts: 1993-2007*, Contemporary Issues in Crime and Justice No. 124, BOCSAR, November 2008.

who were refused bail for any offence doubled from 23.8 percent to 47.6 percent.

It is important to note that, in this study, defendants who were classified as 'refused bail' included defendants who were in custody for a prior offence (and who would therefore not be eligible for bail).⁸⁰ Excluding this last category of defendants from the analysis results in a lower proportion of defendants who were 'refused bail'. For example, in Local Court matters in 2007, the proportion of defendants who were actually refused bail was 5.9 percent (compared to the figure of 7.6 percent shown in the study).⁸¹

BOCSAR did not examine the reasons for the upward trend. It stated that 'unpacking the reasons why [NSW Criminal Courts] have delivered bail and sentencing outcomes that are more restrictive and severe is a difficult analytic task'.⁸² The report noted several possible contributing factors including:

- Bail law changes in 2002 and 2003;
- Media, community and political pressure on judges to be harsher on criminals;
- Possible changes in profiles of defendants appearing in court such as (possibly) greater seriousness in past and present offending.

Trends in bail outcomes for indigenous defendants have not been studied but it appears that a greater proportion of indigenous persons are refused bail compared to non-indigenous persons. A report by the Aboriginal Justice Advisory Council found that in 1999, 10 percent of indigenous defendants who appeared in Local Courts were refused bail, compared to 4 percent for non-indigenous defendants.⁸³ A 2004 BOSCAR [study](#) found that in the 18 months from July 2002 to December 2003, almost 20 percent of adult indigenous defendants who appeared in all courts were in custody at the time of charge finalisation, compared to 7 percent of non-indigenous adults.⁸⁴

Trends in bail outcomes for juvenile defendants have also not been studied. A recent BOCSAR bulletin stated, 'it is impossible to obtain consistent data on the proportion of juvenile defendants refused bail any earlier than 2006'.⁸⁵ Annual court statistics published by BOCSAR show that from 2006 to 2008, the proportion of juveniles who were refused bail in the Children's Court rose from 13 percent to 16 percent.⁸⁶

⁸⁰ Personal communication with BOCSAR on 13 May 2009.

⁸¹ BOCSAR, [NSW Criminal Court Statistics 2007](#), p4; and see Table 1.6 (p24).

⁸² Lulham and Fitzgerald, n79, p6.

⁸³ See R Johns, n5, p32.

⁸⁴ Fitzgerald and Weatherburn, n10, p4.

⁸⁵ S Vignaendra, S Moffat, D Weatherburn and E Heller, *Recent trends in legal proceedings for breach of bail, juvenile remand and crime*, Contemporary Issues in Crime and Justice No. 128, BOCSAR, 2009, p1.

⁸⁶ See BOCSAR, [NSW Criminal Court Statistics 2008](#), p9 and Table 2.2; and *NSW Criminal Court Statistics 2008*, p9 and Table 2.2. Note that not all persons under the age of 18 have their charges finalised in the Children's Court.

7.2 Persons refused bail who are not found guilty

Annual court statistics published by BOCSAR show outcomes for persons who, at the time of finalisation of their charges, were recorded as having been refused bail. In [2008](#), in both the Local Court and Higher Courts, about 9 percent of defendants who were refused bail were not found to be guilty of an offence.⁸⁷ Either the matter did not proceed to a trial or they were acquitted after a trial. In terms of trends, for Higher Court matters, the proportion of defendants refused bail who were not found guilty has not changed much since 2000.⁸⁸ For Local Court matters, trends cannot be determined as pre-2006 figures are not comparable with later figures.⁸⁹

7.3 Time spent in custody for those not found guilty

According to the annual court statistics for 2008:

- *Local Court:* The median time length of time between first court appearance and final determination of the charges was 43 days for defendants refused bail whose charges were dismissed after a hearing (60 days for defendants refused bail whose charges were dismissed without a hearing).⁹⁰ The median duration between offence and the first court appearance was 2 days.
- *District Court:* The median length of time between the committal and the outcome was 190 days for defendants refused bail who were acquitted of all charges after a hearing (155 days for defendants whose charges were not proceeded with).⁹¹ The median duration between offence and committal was 228 days but some of this time may not have been spent in custody.

7.4 Persons refused bail who are sentenced to imprisonment

The annual court statistics published by BOCSAR do not show what proportion of persons who were refused bail ultimately received a custodial sentence. However, a BOCSAR [study](#) of outcomes in NSW criminal courts from 1995 to 2000 found that:

On average, just over half (51%) of all persons in custody (bail refused) at the time of final appearance in the Local Court were sentenced to imprisonment...In the Higher Courts, approximately 81 percent of persons on remand at the time of case finalisation were imprisoned.⁹²

⁸⁷ BOCSAR, [NSW Criminal Court Statistics 2008](#), Table 1.6, p24; and Table 3.10, p102. I. There is a note in the annual court statistics under Table 3.10 explaining the statistics for the Higher Courts include persons who were refused bail, persons who could not meet their bail and persons who were in custody for a prior offence. No such note appears in relation to the Local Court statistics.

⁸⁸ BOCSAR *NSW Criminal Court Statistics* for each of the years from 2000 to 2008: e.g. BOCSAR, [NSW Criminal Court Statistics 2000](#), Table 3.13, p128.

⁸⁹ BOCSAR, *NSW Criminal Court Statistics 2006*, Table 1.6, p24, and p118 ('withdrawn charges').

⁹⁰ BOCSAR, *NSW Criminal Court Statistics 2008*, Table 1.12, p48.

⁹¹ BOCSAR, *NSW Criminal Court Statistics 2008*, Table 3.11b, p104.

⁹² M Chilvers, J Allen, and P Doak, *Absconding on Bail*, Contemporary Issues in Crime and Justice

In relation to young offenders, figures published by NSW Juvenile Justice show that in 2008/09, only 22 percent of young people with a remand episode received a control order within 12 months (i.e. a sentence of detention in a Juvenile Justice Centre).⁹³ In the previous year, only 18 percent received a control order within 12 months.

7.5 Persons granted bail who fail to appear in court

BOCSAR conducted a [study](#) of court matters finalised in NSW Criminal Courts in 2000.⁹⁴ In the Local Court, the defendant failed to appear, and a warrant was issued for their arrest, in 14.6 percent of matters finalised for persons on bail. In the Higher Courts, the proportion of finalised matters where the defendant failed to appear was much lower (5 percent). Data provided by BOCSAR to the NSW Parliamentary Library (set out in the Table below) shows that, for matters finalised in the Local Court, the proportion of defendants who failed to appear, and where an arrest warrant was issued, increased between 2000 and 2001 (from 14.6 percent to 19 percent) but has steadily declined since then (in 2008, the rate was 8.7 percent).

NSW Local Criminal Court Statistics: 2000-2008

Number of persons* on bail, by type of finalisation (figures are percentages)

	2000	2001	2002	2003	2004	2005	2006	2007	2008
Type of finalisation	%	%	%	%	%	%	%	%	%
Defendant failed to appear, arrest warrant issued	14.6	19.0	16.4	14.4	13.3	12.4	11.7	10.1	8.7
Defendant convicted ex parte**	7.3	8.0	7.1	5.8	6.4	5.6	5.2	5.0	4.7
Defendant appeared or otherwise finalised	78.1	73.0	76.5	79.8	80.3	82.0	83.1	84.8	86.6
Total	100	100	100	100	100	100	100	100	100

*Includes persons who were brought to Local Courts by charge or Police Bail CAN.

**The defendants in this category failed to appear and were convicted in their absence. The court did not issue a warrant for their arrest.

Source: NSW Bureau of Crime Statistics and Research. Note that the full dataset (which includes figures on the number of defendants in each category) is reproduced in **Appendix A**.

7.6 Persons who offend while on bail

Surprisingly, there are no available statistics in NSW on the number of persons who commit an offence while on bail. In 2007, the Victorian Law Reform Commission referred to studies that had been conducted in Victoria and other jurisdictions:

The LRCV referred to a pilot research project undertaken by the AIC in Victoria in 1991 which found a very high rate of offending while on bail – 31% - though this must be treated with caution as it looked at only a very small sample. The Tasmanian Law Reform

No. 68, BOCSAR, 2002, p10.

⁹³ NSW Juvenile Justice, [Annual Report 2008/09](#), p54.

⁹⁴ Chilvers et al, n92, p10.

Institute looked at offending while on bail in 2004 using a larger sample. It found that 25.7% of people charged were already on bail. They were most likely to be charged with a property offence, and to be already on bail for a property offence. More comprehensive New Zealand studies using huge samples also found that the main offences committed while on bail were property offences, but found a lower rate of offending – about 20%. Interestingly, research indicates that age, as opposed to offence type, may be a better determinant of whether an accused will offend on bail. King, Bamford and Sarre looked at studies [which] found that the rate of offending on bail increases as the age of the offender decreases. The highest offending occurred in the younger age groups.⁹⁵

King, Bamford and Sarre have summarised this evidence as follows:

Morgan and Henderson [in a UK study] found that 29 per cent of defendants under the age of 18 committed offences whilst on bail compared to 13 per cent of those aged over 21... Similar results were found by Lash in the study of offending on bail in New Zealand in 1994. She found the age cohorts with the highest rate of offending on bail were the 17-19 year olds, of whom 27 per cent offended whilst on bail. By comparison, approximately 16 per cent of offenders aged between 30 and 34 offended whilst on bail.⁹⁶

8. TRENDS IN THE REMAND POPULATION

8.1 Persons on remand managed by Corrective Services

According to the [NSW Inmate Census 2009](#), on 30 June 2009, Corrective Services managed 2,608 prisoners who were on remand.⁹⁷ This represented 23 percent of the total 11,160 prisoners managed by Corrective Services. Between 1993 and 2009, the number of prisoners on remand has more than tripled and the proportion of all prisoners who are on remand has more than doubled.⁹⁸ The reasons for the increase in the remand population over this entire period have not been examined. The most recent BOCSAR [study](#) was in 2000 and it examined the rise in remand numbers between 1994 and 2000.⁹⁹ It found that there were several contributing factors including:

- An increase in the overall number of persons appearing in the Local Court;
- An increase in the number of persons appearing for some offences with a high rate of bail refusal;
- An increase in the rates of bail refusal; and
- An increase in court delay in the Higher Courts.

⁹⁵ Victorian Law Reform Commission, *Review of the Bail Act: Final Report*, October 2007, p47.

⁹⁶ S King, D Bamford and R Sarre, 'The Remand Strategy: Assessing Outcomes', (2008) 19(1) *Current Issues in Criminal Justice* 327 at 339.

⁹⁷ Corrective Services NSW, *NSW Inmate Census 2009*, March 2010, p5

⁹⁸ Corrective Services NSW, *NSW Inmate Census 2009*, March 2010, p71.

⁹⁹ J Fitzgerald, *Increases in the NSW Remand Population*, Bureau Brief, BOCSAR, November 2000.

8.2 Young people on remand managed by Juvenile Justice

According to NSW Juvenile Justice annual reports:

- In 2008/09, 4,634 young people were admitted to juvenile justice centres on remand.¹⁰⁰ This was a 35 percent increase on the figure for the 2004/05 year.¹⁰¹
- In 2008/09, the average daily number of young people on remand was 227.¹⁰² This represented more than half (53 percent) of the average daily total of all young persons in juvenile justice centres (427).
- Since 2004/05, the average daily number of young people on remand has increased by 82 percent (from 125 to 227); and the proportion of young people on remand has increased from 44 percent to 53 percent.¹⁰³

Figures provided by NSW Juvenile Justice to the NSW Auditor General show that in 2009, 36 percent of young people on remand in a juvenile justice centre were indigenous persons (a slightly lower percentage than 2005).¹⁰⁴

A recent BOCSAR [study](#) examined two factors that could have contributed to the 32 percent increase in the average daily number of young people on remand between 2007 and 2008.¹⁰⁵ The two factors were: (i) an increase in the number of juveniles proceeded against for breach of bail; and (ii) changes to section 22A in 2007, which limited the number of bail applications that can be made. These two factors were chosen because they were 'relatively easy to test'. The report concluded:

Police activity in relation to breach of bail and the introduction of s.22A are both putting upward pressure on the juvenile remand population, the first by increasing the number of juveniles placed on remand, the second by increasing the average length of stay on remand... Although their influence was significant, it should not be assumed that these are the only factors behind the growth in the juvenile remand population.¹⁰⁶

¹⁰⁰ NSW Juvenile Justice, [Annual Report 2008/09](#), p52.

¹⁰¹ NSW Juvenile Justice, [Annual Report 2008/09](#), p52.

¹⁰² NSW Juvenile Justice, n100, p51.

¹⁰³ See NSW Juvenile Justice Annual Reports for the years from 2004/05 to 2008/09. Note that in 1998/99, the average daily number of young people on remand was 154 and this represented 40 percent of the average daily number of all young persons in juvenile justice centres.

¹⁰⁴ NSW Auditor General, [Auditor General's Report to Parliament 2009](#), Volume 6, Department of Juvenile Justice, p1

¹⁰⁵ S Vignaendra, S Moffat, D Weatherburn and E Heller, *Recent trends in legal proceedings for breach of bail, juvenile remand and crime*, Contemporary Issues in Crime and Justice No. 128, BOCSAR, May 2009.

¹⁰⁶ Vignaendra et al, n105, p4.

8.3 The effect of remand numbers on crime rates

The same BOCSAR study also looked at whether growth in the juvenile remand population between 1998 and 2008 had any impact on levels of property crime. It focused on property crime because it had been falling over the previous few years (whereas violent crime had not fallen). The report found that there was no significant relationship between the growth in juvenile remand and property crime.¹⁰⁷ No studies have examined the relationship between adult remand numbers and crime rates.¹⁰⁸

8.4 Comparisons with other States

According to the [Australian Bureau of Statistics](#), in the December 2009 quarter:

- NSW had the third highest proportion of prisoners who were on remand (25 percent).¹⁰⁹ The two jurisdictions with higher proportions of remand prisoners were the ACT (41 percent) and South Australia (34 percent). Western Australia had the lowest proportion (15 percent).
- NSW also had the third highest remand rate, which was 47 remand prisoners per 100,000 of the NSW adult population.¹¹⁰ The two jurisdictions with higher remand rates were the Northern Territory (150), and South Australia (52). Victoria had the lowest remand rate (21).

In 2006, Sarre, King and Bamford published [findings](#) on the reasons for the differences in remand rates in Victoria (the lowest in Australia) and South Australia (the highest of all the States).¹¹¹ They concluded:

... the critical factors are to be found in the personal characteristics that draw certain individuals to the attention of police and hence into the criminal justice system, but more significantly, in the decision-making processes once those individuals have been selected. That is, the policies and practices of police, police custody sergeants and court bail authorities in relation to bail (and the formal and informal rules that empower and constrain them) are crucial to the determination of remand trends. Four critical factors are: bail legislation, accountability for decision-making, agency procedures, and an emphasis upon therapeutic justice.¹¹²

¹⁰⁷ Vignaendra et al, n105, p4.

¹⁰⁸ See comments by Dr Don Weatherburn in the article by J Gibson referred to at n46.

¹⁰⁹ ABS, *Corrective Services Australia: December Quarter 2009*, Cat 4512.0, 18 March 2010, p17.

¹¹⁰ ABS, n109, p18.

¹¹¹ R Sarre, S King and D Bamford, *Remand in Custody: critical factors and key issues*, Trends and Issues in Criminal Justice No. 310, Australian Institute of Criminology, May 2006. For the full research report, see King et al, [Factors that influence remand in custody: Final Report to the Criminology Research Council](#), November 2005.

¹¹² Sarre et al (AIC), n111, p3

In relation to bail legislation, Sarre et al explained that the Victorian Act had fewer grounds that could be relied on for refusing bail; and, although the Victorian Act contained reverse onus provisions for some offences (which would make it more difficult for persons to obtain bail), decision-makers did not strictly apply these provisions in all situations. Sarre et al explained the other three critical factors as follows:

- *Accountability*: In Victoria, there was greater accountability in bail decision-making. For example, in Victoria the Bail Justices system provided a greater opportunity to review police remand decisions. In addition, courts engaged in better scrutiny of information in bail applications;
- *Agency procedures*: In South Australia, police bail decisions were more closely linked to operational policing objectives. For example, it was not uncommon to find operational polices that used custodial remand as an incapacitation strategy to achieve crime reduction goals;
- *Therapeutic justice*: Some magistrates in Victoria adopted a therapeutic justice approach and this enabled Victorian courts to attract a greater range of resources to help defendants with alternatives to custody.¹¹³

9. REVIEW OF BAIL LAWS IN VICTORIA

In October 2007, the Victorian Law Reform Commission published a [report](#) on bail laws in Victoria.¹¹⁴ The Commission was of the view that the Act should be rewritten to make it easier to understand and the Commission made over 150 recommendations to improve bail laws and practices. Some significant recommendations were:

- *No presumptions against bail*: Bail decisions should be made on the basis of unacceptable risk. There should be no presumption against bail for any offence in the new Act.¹¹⁵ The Commission considered that the reverse onus tests create confusion, obscure risk as the key issue of a bail decision, erode the presumption of innocence, and are unfair and unnecessary.
- *Police guidelines for arrest/summons*: Victoria Police should develop and publish a clear policy setting out the criteria used to determine whether to proceed against a person by arrest or summons.¹¹⁶ This decision by police determines whether the question of bail arises. The Commission expressed concern that ‘the current decision-making process lacks transparency’.
- *Review of bail conditions*: The Act should require the court to review bail conditions set by police at the first mention date to ensure that they are appropriate, and are no more onerous than necessary to secure one or more of

¹¹³ Sarre et al (AIC), n111, p3-4.

¹¹⁴ Victorian Law Reform Commission, *Review of the Bail Act: Final Report*, October 2007.

¹¹⁵ VLRC, n114, Rec12, p52.

¹¹⁶ VLRC, n114, Rec14, p56-57.

the purposes of bail.¹¹⁷ The Commission stated that court monitoring would also ensure that persons who may be assisted by bail support services can be referred by the court if this has not already been arranged.

- *Children:* The Act should require a decision-maker to consider child-specific factors when making a bail decision for a child, and when considering what bail conditions should be imposed on a child: e.g. the need to strengthen and preserve the relationship with the child and the child's family, and the desirability of allowing the education, training or employment of the child to continue without interruption.¹¹⁸ The Commission also recommended that a child-specific bail support program be established in the Children's Court.¹¹⁹
- *Indigenous persons and other marginalised groups:* The Commission made several recommendations aimed at improving bail support services for indigenous persons and other marginalised groups who are overrepresented in the criminal justice system: including people with substance abuse problems, homeless people and people with cognitive impairments.¹²⁰

The Victorian Government is considering the Commission's recommendations in two stages. In October 2009, the Government released a discussion paper on stage one of the reform project, which states that 'stage one reforms are intended to improve the useability of the Bail Act without significant amendment to the Act'.¹²¹ None of the recommendations outlined above are being considered as part of the stage one reforms. According to the discussion paper, 'stage two of the project will consider the remaining VLRC recommendations, apart from those addressed by other projects. It is intended that stage two of the project will be progressed in 2011'.¹²²

10. CONCLUSION

Changes to bail laws since 2002 have followed the dominant trend of making it more difficult for accused persons to obtain bail: both in relation to a range of offences, and where the accused person is regarded as a 'repeat offender'. These changes have been justified on the basis that they provide greater protection for the community against the risk that such persons will commit offences while awaiting trial. However, critics have argued that the changes have largely been ad hoc responses to particular crime incidents, and that a good case has not been made out for reforms that have undermined an accused person's right to the presumption of innocence.

¹¹⁷ VLRC, n114, Rec100, p127.

¹¹⁸ VLRC, n114, Recs128-129, p156-158.

¹¹⁹ VLRC, n114, Rec130, p158.

¹²⁰ VLRC, n114, Rec135-157, Ch10-11.

¹²¹ Victorian Department of Justice, *Bail Reform Project Stage One*, October 2009, p7.

¹²² Victorian Department of Justice, n121, p7.

What can be said about the statistics?

- Between 1993 and 2007, the proportion of persons who were refused bail doubled in both the Local Court and Higher Courts;
- While a small proportion of defendants who are refused bail are found not guilty (less than 10 percent), a significant proportion of defendants refused bail (and especially young people) do not ultimately receive a custodial sentence.
- Since 2001, there has been a steady decline in the proportion of defendants on bail who failed to appear in the Local Court;
- There are no available statistics in NSW (past or present) on the proportion of defendants who commit offences whilst on bail;
- Since 1993, the remand prisoner population has increased substantially. The reasons for this trend have not been examined since 2000;
- Between 2004/05 and 2008/09, the juvenile remand population increased by 82 percent. A recent BOCSAR study found that two factors that led to the 32 percent increase between 2007 and 2008 were an increase in police activity in relation to breach of bail, and changes to section 22A of the *Bail Act*;
- A recent BOCSAR study found that there was no significant relationship between the rise in the juvenile remand population and falling rates of property crime.

In relation to young people and bail, one important issue is that a significant number of young people are spending time on remand because of a lack of suitable bail accommodation. The recent review of juvenile justice considered a proposal from UnitingCare Burnside for the establishment of a Residential Bail Support Program, but the review decided that expanding the current model of funding existing accommodation providers to guarantee beds would provide better value for money. Recent NSW Government initiatives in this area include developing a Bail Assistance Line, and running a pilot bail support program at Parramatta Children's Court.

APPENDIX A

NSW Local Criminal Courts Statistics 1999-2008
 Number of persons* on bail, by type of finalisation

Type of finalisation	Year																			
	1999		2000		2001		2002		2003		2004		2005		2006		2007		2008	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%
Defendant failed to appear, arrest warrant issued	3,788	12.9	4,464	14.6	7,118	19.0	6,531	16.4	5,332	14.4	4,290	13.3	4,210	12.4	3,993	11.7	3,581	10.1	3,194	8.7
Defendant convicted ex parte	2,023	6.9	2,239	7.3	3,012	8.0	2,833	7.1	2,162	5.8	2,047	6.4	1,898	5.6	1,759	5.2	1,781	5.0	1,746	4.7
Defendant Appeared or otherwise finalised	23,593	80.2	23,883	78.1	27,355	73.0	30,442	76.5	29,522	79.8	25,846	80.3	27,881	82.0	28,259	83.1	29,978	84.8	31,888	86.6
Total	29,404	100.0	30,586	100.0	37,485	100.0	39,806	100.0	37,016	100.0	32,183	100.0	33,989	100.0	34,011	100.0	35,340	100.0	36,828	100.0

* Includes persons who were brought to Local Courts by charge or Police Bail CAN

Source: NSW Bureau of Crime Statistics and Research