

# Corrective Services NSW

Submission to Law Reform Commission

Review of discreet aspects of the  
Bail Act 2013

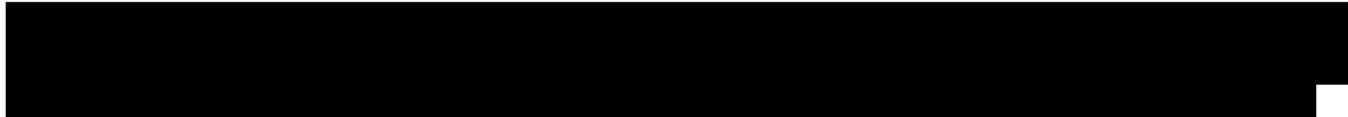


## Overview

Corrective Services NSW (CSNSW) welcomes the opportunity to make a submission on the Law Reform Commission's review on:

1. Whether the existing list of firearms offences treated as 'show cause' offences under the *Bail Act 2013* (Bail Act) should be expanded.
2. Whether further legislative guidance should be provided on the meaning of 'criminal associations' under the Bail Act.
3. Whether the list of offences relating to criminal associations that are treated as 'show cause' offences under the Bail Act should be expanded.

CSNSW has no role in determining whether an accused person should be released on bail or remanded in custody. However, CSNSW notes that expanding the list of firearms and criminal associations offences which are subject to the "show cause" requirement in the Bail Act will lead to increases in the remand population. This could have a disproportionate impact on the number of Aboriginal inmates received in custody and undermine efforts by CSNSW to reduce reoffending.



It is also important to point out that amendments to the Bail Act can impact other groups such as women and those with mental illness and/or cognitive impairment.

## Statistics

The remand population in NSW fluctuates based on various factors including court scheduling, police resourcing, changes in practices and policies of bail authorities.

In previous submissions concerning bail reform, CSNSW has consistently referred to significant increases in the remand population over time. Currently, the population has increased from approximately 700 in 1995, to just over 4,500 in 2019.<sup>1</sup>

As at 22 September 2022, CSNSW had a total population of 12,659 inmates, of which 4,744 (37.5%) were on remand.<sup>2</sup>

The increase in the remand population has been a contributing factor to the incarceration crisis of Aboriginal and Torres Strait Island people, with ATSI people, disproportionately represented among the remand population. In this regard, figures from BOCSAR for the June 2022 quarter show that while the overall adult prison population remains low, the number of Aboriginal adults in custody grew by 3.4% or 117 people since March 2022.<sup>3</sup> There were 3,581 Aboriginal inmates, of which 1,451 were on remand. This reflects an increase of 288 more Aboriginal inmates on remand since the June 2019 quarter.<sup>4</sup> The proportion of the adult custody population who are Aboriginal is at its highest level since 2013, at 29.0%.

In relation to women, the average daily female inmate population reached a peak of 1,042 in 2017/18, but declined by 21% to an average of 828 in 2021/22. Over the same period, the average daily female remand population also decreased by 19.5%. The initial impact of COVID-

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<sup>1</sup> Corrective Services NSW, *Inmate Census 2019*, (2019) 5.

<sup>2</sup> Offender Population Report, Corrections Research Evaluation & Statistics (25 September 2022)

<sup>3</sup> NSW Custody Statistics: Quarterly update June 2022

<sup>4</sup> Ibid

19 saw an almost 30% reduction in the female remand population, with a significant increase in the number of women being granted police and court bail. However, with the lifting of COVID-19 restrictions, the number of women remanded to custody has started to increase. As at 22 September 2022, the total female prison population was 812, of which 312 were on remand.

CSNSW also has data which outlines the number (and proportion) of remand receptions who stay less than 30 days and those who stay 30 days or more. Table 3 (page 5) sets out the time on remand and outcome. A significant number of people (1334 or 31.94%) were still on remand after four months or longer pending finalisation of their court matters. The length of time a person spends on remand depends on bail finalisation, court availability, legal representation, and other variables.

### **Impact of tighter bail laws on remand numbers**

In its previous submission to the LRC review of bail (2012), CSNSW noted the LRC's review of the history of bail law in NSW and bail trends.<sup>5</sup> In its final Report, the LRC also made reference to previous work done by BOCSAR which highlighted that legislative presumptions can exert a significant effect on bail refusals.<sup>6</sup> An example mentioned in the LRC's final Report was 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 conditional liberty.

The LRC noted BOCSAR's findings that the amending Act had a significant impact on bail refusal and remand rates, with the bail refusal rate for defendants in NSW courts having increased by 7% after the Act had been implemented.<sup>7</sup> The LRC concluded that the policy shifts in favour of a more restrictive bail regime contributed significantly to the increase in the remand population.<sup>8</sup>

In 2021 BOCSAR also found that some of the growth in the NSW remand population had been due to the bail laws introduced in 2014, and amended in 2015 (with the introduction of the show cause amendments).<sup>9</sup> Referring to its previous research in 2018, BOCSAR highlighted that:

Defendants charged with non-minor offences after the show cause amendments came into effect were 11 per cent more likely to be bail refused by the court and eight per cent more likely to be refused bail by the police compared with those charged while the *Bail Act 1978*...was in force.<sup>10</sup>

Further, "an even greater impact on bail refusal rates was observed for high-risk offenders (those with prior prison sentences) and adult Aboriginal defendants".<sup>11</sup>

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<sup>5</sup> NSW Law Reform Commission, *Bail*, Report No 133 (2012) Chapters 3 and 4.

<sup>6</sup> *Ibid.*, at 3.70 and 4.45.

<sup>7</sup> *Ibid.* at 3.53, quoting 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>8</sup> NSW Law Reform Commission, *Bail*, Report No 133 (2012) at 4.45.

<sup>9</sup> Ilya Klauzner and Steve Yeong, 'What factors influence police and court bail decisions?', Crime and Justice Bulletin No 236 (NSW Bureau of Crimes Statistics and Research, 2021), 2

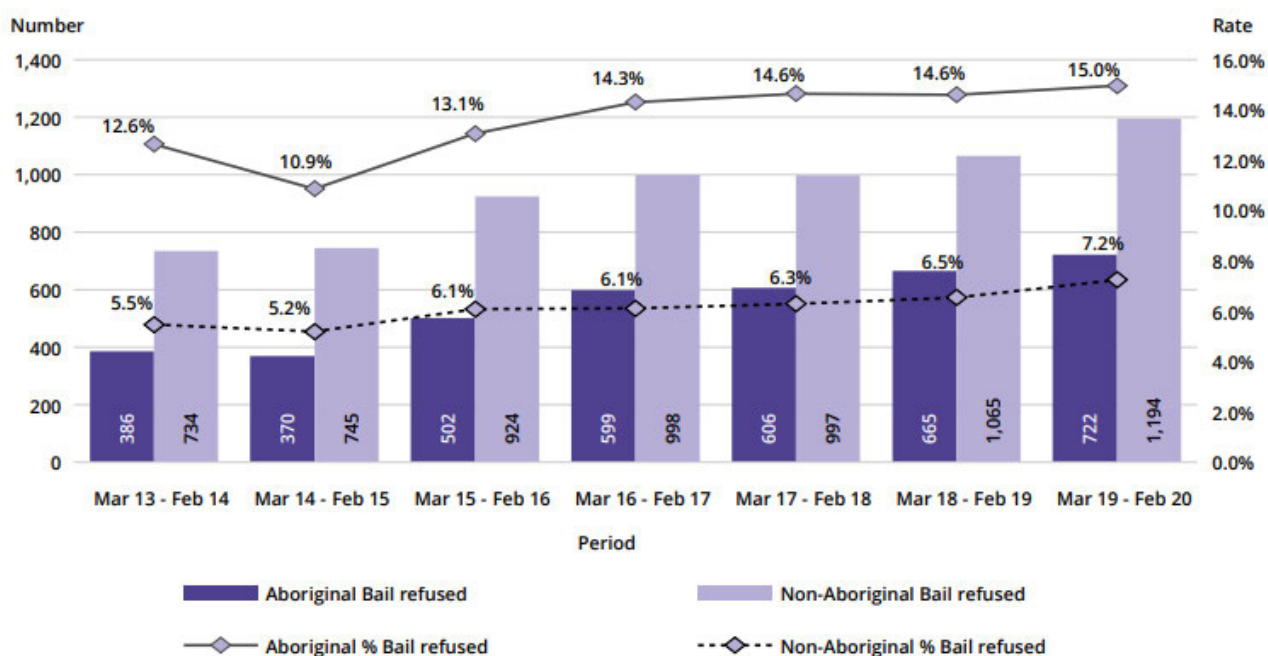
<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

Recent work published by BOCSAR<sup>12</sup> has shown an increase in bail refusal rates for Aboriginal women attributed to the timing of the increase was associated with “show cause’ amendments to the bail Act.

Figure below from this report

“shows that the bail refusal rate for Aboriginal females was considerably higher in the 12 months to February 2020 than in the 12 months to February 2014 (15.0% versus 12.6% respectively). Since March 2016 the bail refusal rate has remained largely stable for Aboriginal females. The timing of the increase in bail refusals is consistent with the ‘Show Cause’ amendments to the Bail Act 2013 which commenced in January 2015 and increased the rate of bail refusal in certain circumstances (for further details see Yeong & Poynton, 2018; Weatherburn & Fitzgerald, 2015).<sup>16</sup>”



### Expanding list of offences in the show cause provisions

In terms of the current LRC reference, data provided by BOCSAR indicates that a significant number of adults (including Aboriginal offenders) on bail or who had bail dispensed with, whose most serious offence was under the *Firearms Act 1996*, did not receive a custodial sentence at finalisation of their court matter.

For firearms offences, Table 1a (page 3) shows that in 2021, of a total of 905 adult offenders whose most serious offence was under the *Firearms Act 1996*, 202 (or 21%) were on bail, 546 (or 56%) had bail dispensed with and 111 (12%) were bail refused. Table 2a shows that of the 202 offenders on bail, only 14 (or 6.9%) received a custodial penalty, while 188 received another

<sup>12</sup> Trends in the Aboriginal female adult custodial population in NSW, March 2013 to February 2021 Amy Pisani, Keely Sinclair and Sara Rahman Crime and Justice Statistics Bureau Brief NO 161 (2022)

penalty. Only 5 (0.9%) who had bail dispensed with received a custodial penalty, compared to 531 who received another penalty. A similar trend is seen in 2019 and 2020 (see page 3).

For Aboriginal people, Table 1b (page 4) shows that in 2021, a total of 165 Aboriginal people whose most serious offence was under the *Firearms Act 1996*, did not receive a custodial sentence at finalisation of their court matter. While a large number (28 out of 33) bail refused offenders received a custodial sentence, only 3 of 34 offenders on bail received a custodial penalty (Table 2b, page 4). Where bail was dispensed with, only 1 in a total of 58 Aboriginal offenders received a custodial penalty. A similar trend is seen in 2019 and 2020, however, where bail was dispensed with, none of the offenders received a custodial sentence.

Based on this data, it is reasonable to assume that expanding the current list of offences in the show cause provisions to include further firearms offences will result in a larger number of offenders being bail refused and remanded into custody. Many of these offenders may still receive an alternative penalty to a custodial sentence.

### **Impact on CSNSW, offenders and the community**

While acknowledging there are some benefits to the community in remanding accused persons in custody to ensure the safety of the community, the high cost of remanding defendants does not appear to be justified by low rates of custodial sentences imposed on an offender. The average cost per inmate per day for sentenced inmates is \$265.16 compared to \$12.73 for offenders in the community (excluding capital costs).<sup>13</sup> The cost per inmate per day in secure facilities where remand inmates can be held is \$284.88.<sup>14</sup>

Increases in the remand population also create operational and other challenges. This includes increased screening and monitoring of inmates on remand, managing increases in transport and escorts between correctional centres and courts, managing security around family and legal visits, and increased pressure on bed availability. Increases also impact CSNSW's capacity to provide effective programs and services to inmates which aim to reduce reoffending. This compounds the risk of reoffending once an inmate is released into the community.

Russell and Baldry have also observed the criminogenic effects of prison, which applies to both sentenced and remand inmates, and recent increases in the prison population of women, Aboriginal offenders and those with mental illness and/or cognitive impairment.<sup>15</sup>

In previous submissions on bail reform, CSNSW has also pointed out that a person remanded in custody risks losing accommodation and employment, and experiences difficulty maintaining support from family, friends and the community.<sup>16</sup> 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.<sup>17</sup>

A higher inmate population also increases demand on government resources, which could be targeted at other spending priorities. This includes the implementation of reforms under the Premier's Priority to Reduce Adult Reoffending by 5% by 2023.

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<sup>13</sup> Productivity Commission, Report on Government Services 2022.

<sup>14</sup> Ibid.

<sup>15</sup> Russell, S & Baldry, E, "The Booming Industry continued: Australian Prisons A 2020 update" NSW: School of Social Sciences and International Studies (2020) 13.

<sup>16</sup> CSNSW submission to Sentencing Council Review on Bail - Additional show cause offences (2015) 3-4

<sup>17</sup> Ibid.



[REDACTED]

This includes a reduction on the rate of Aboriginal and Torres Strait Islander adults held in incarceration by 15 per cent by 2031.

### **Criminal Associations**

The inclusion of criminal associations in section 18 indicates an assumption that a person's criminal associations can raise a concern that should be taken into account when determining whether that person poses an unacceptable risk of the relevant kind if granted bail. Although the second reading speech to the Act which introduced section 18(1)(g) observed that an accused person's links to "organised crime networks" can affect their level of risk, such as by giving them the means to flee the jurisdiction or continue criminal activity, the definition of criminal associations is not limited to relationships with persons involved in organised crime. Further, there is nothing in the Act that indicates the nature of the association required to enliven this provision.

As noted by the High Court in *Vella v Commissioner of Police (NSW)* (referencing the earlier case of *Thomas v Mowbray*):

"balancing exercises in many areas of the law involve broadly expressed criteria which constrain the liberty of the subject in circumstances other than in consequence of the commission of a criminal act. Whether those exercises concern bail applications, binding a person over to keep the peace, applications for apprehended violence orders, preventive orders for the continued detention of sex offenders, or even injunctions to constrain the likely commission of an offence, the judicial process and method of applying that balancing exercise is one that develops and refines rules and principles whose clarity increases over time."<sup>19</sup>

The Court also stated that:

"there is nothing antithetical to the judicial process...in open-textured legislation that establishes broad principles to be developed and applied by courts. The application of these rules to persons by courts is the very nature of the judicial process. It may be that, even after the rules become refined and developed, there will remain considerable latitude for courts to craft orders that relate to the particular person. That is how courts of equity operated for hundreds of years. It remains the case, including by the grant of orders restricting liberty by reference to predictive considerations in numerous areas including bail applications, sentencing hearings, custody and access disputes, and almost every day in applications for interim or interlocutory injunctions."<sup>20</sup>

Accordingly, it could be expected that the courts over time will refine the understanding of the term "criminal associations" in the context of the *Bail Act* and the statutory criteria which it is called on to consider without the need for further definition.

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<sup>18</sup> [REDACTED]

<sup>19</sup> *Vella v Commissioner of Police (NSW)* [2019] HCA 38 at [63]

<sup>20</sup> *Ibid* at [80].

As the High Court has acknowledged that there is a long history of laws concerned to prevent or impede criminal conduct by imposing restrictions on certain classes or groups of persons and on their freedom of association.<sup>21</sup> In the case of *Johanson v Dixon*, the High Court held that the offence of 'habitually consorting' could be made out without any proof that the association was for an unlawful or criminal purpose or indeed for any particular purpose.<sup>22</sup> This may lend support to an open ended understanding of "criminal associations" subject only to the assessment of risk created in the individual case before the court.

However, as the High Court noted in *Tajjour v New South Wales*, consorting required more than 'mere association' but a degree of companionship or of seeking out the company of the other person.<sup>23</sup> Further, as the High Court noted in the matter of, 'there is no real prospect of a person committing an offence because they meet with convicted offenders on some occasions.'<sup>24</sup> In light of these observations, arguably there is a basis for some additional factors or qualifications to be included in the definition of "criminal associations" to avoid the provision capturing people living in families and communities with high incidences of criminal offending and engagement with the criminal justice system.

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<sup>21</sup> *South Australia v Totani* [2010] HCA 39 at [33]

<sup>22</sup> *Johanson v Dixon and Another* (1979) 25 ALR 65 at 70

<sup>23</sup> *Tajjour v New South Wales* [2014] HCA 35 at [101]

<sup>24</sup> *Ibid* at [108]

## Adult offenders

**Table 1a: Finalised court appearances\* involving adults where the most serious offence was under the Firearms Act 1996; bail status at finalisation (source: BOCSAR, 21 September 2022)**

Bail status at finalisation	2019		2020		2021	
	No.	%	No.	%	No.	%
In custody for a prior offence	69	8%	97	10%	95	10%
Bail refused	117	13%	97	10%	111	12%
Warrant executed - Police custody	5	1%	1	0%	6	1%
On bail	210	24%	192	21%	202	21%
Bail dispensed with	472	54%	539	58%	536	56%
Total	873	100%	926	100%	950	100%

**Table 2a: Finalised court appearances\* involving adults where the most serious offence was under the Firearms Act 1996; bail status at finalisation by custodial penalty (source: BOCSAR)**

		2019	2020	2021
In custody for a prior offence	Custody	65	87	85
	Other penalty #	4	10	10
	Total	69	97	95
	% custodial penalty	94.2%	89.7%	89.5%
Bail refused	Custody	94	86	85
	Other penalty #	23	11	26
	Total	117	97	111
	% custodial penalty	80.3%	88.7%	76.6%
Warrant executed - Police custody	Custody	0	0	0
	Other penalty #	5	1	6
	Total	5	1	6
	% custodial penalty	0.0%	0.0%	0.0%
On bail	Custody	23	15	14
	Other penalty #	187	177	188
	Total	210	192	202
	% custodial penalty	11.0%	7.8%	6.9%
Bail dispensed with	Custody	1	0	5
	Other penalty #	471	539	531
	Total	472	539	536
	% custodial penalty	0.2%	0.0%	0.9%
Total	Custody	183	188	189
	Other penalty #	690	738	761
	Total	873	926	950
	% custodial penalty	21.0%	20.3%	19.9%

\* The persons included in the table above are not a count of unique people. Each person appears only once for each finalised court appearance (for their principal proven offence) but if a person has more than one finalised court appearance in the reference period they will appear in the table multiple times.

\*\* 'Other penalty' includes a supervised community sentence, unsupervised community sentence, a fine and other penalties such as no action taken on a breach of bond, dismissed after Youth Justice Conference, Juvenile offence proved, dismissed, and Unknown penalties



## Aboriginal adults

**Table 1b. Finalised court appearances\* involving Aboriginal adults where the most serious offence was under the Firearms Act 1996; bail status at finalisation (source: BOCSAR)**

<b>Bail status at finalisation</b>	<b>2019</b>		<b>2020</b>		<b>2021</b>	
	No.	%	No.	%	No.	%
In custody for a prior offence	27	20%	41	23%	39	24%
Bail refused	38	28%	30	17%	33	20%
Warrant executed - Police custody	0	0%	1	1%	1	1%
On bail	38	28%	41	23%	34	21%
Bail dispensed with	33	24%	64	36%	58	35%
<b>Total</b>	<b>136</b>	<b>100%</b>	<b>177</b>	<b>100%</b>	<b>165</b>	<b>100%</b>

**Table 2b. Finalised court appearances\* involving Aboriginal adults where the most serious offence was under the Firearms Act 1996; bail status at finalisation by custodial penalty (source: BOCSAR)**

		<b>2019</b>	<b>2020</b>	<b>2021</b>
In custody for a prior offence	Custody	25	34	32
	Other penalty #	2	7	7
	<b>Total</b>	<b>27</b>	<b>41</b>	<b>39</b>
	% custodial penalty	92.6%	82.9%	82.1%
Bail refused	Custody	30	25	28
	Other penalty #	8	5	5
	<b>Total</b>	<b>38</b>	<b>30</b>	<b>33</b>
	% custodial penalty	78.9%	83.3%	84.8%
Warrant executed - Police custody	Custody	0	0	0
	Other penalty #	0	1	1
	<b>Total</b>	<b>0</b>	<b>1</b>	<b>1</b>
	% custodial penalty	na	0.0%	0.0%
On bail	Custody	4	5	3
	Other penalty #	34	36	31
	<b>Total</b>	<b>38</b>	<b>41</b>	<b>34</b>
	% custodial penalty	10.5%	12.2%	8.8%
Bail dispensed with	Custody	0	0	1
	Other penalty #	33	64	57
	<b>Total</b>	<b>33</b>	<b>64</b>	<b>58</b>
	% custodial penalty	0.0%	0.0%	1.7%
<b>Total</b>	Custody	59	64	64
	Other penalty #	77	113	101
	<b>Total</b>	<b>136</b>	<b>177</b>	<b>165</b>
	% custodial penalty	43.4%	36.2%	38.8%

**Table 3: Average length on remand: 2021/22 (source: CRES)**

<b>Period</b>	<b>Subsequent sentence</b>	<b>Released as unconvicted</b>	<b>Still on remand</b>	<b>TOTAL</b>	<b>Percent</b>
1 day	884	332	15	1231	4.49%
2-7 days	1047	1387	84	2518	9.19%
8-<30 days	4344	1942	265	6551	23.92%
1-4mths	3812	3877	652	8341	30.45%
4mths+	5542	1873	1334	8749	31.94%
<b>TOTAL</b>	15629	9411	2350	27390	100.00%
<b>PERCENT</b>	57.06%	34.36%	8.58%	100%	