

CORRECTIVE SERVICES NSW SUBMISSION ON REVIEW OF BAIL ACT 1978

Corrective Services NSW (CSNSW) confines its comments to those issues which most significantly affect it, given that many of the issues raised in the Discussion Paper are not within the remit of CSNSW.

In doing so, CSNSW has considered the previous Consultation Paper entitled "Review of *Bail Act 1978* (NSW)" published by the Criminal Law Review Division, NSW Department of Attorney General and Justice ("the 2010 consultation paper") and the submissions provided in response to the Review.

INCREASES IN INMATE POPULATION

In recent years, CSNSW has faced the constant challenge of managing an increasing inmate population. The diverse, and difficult to manage, mix of offenders is complicated by an increase in the number of inmates who are on remand.

As at 30 June 1994, the total full-time custody population was **6,420**. Of this figure, **741** inmates were being held on remand. By comparison, as at 3 July 2011, the total full-time custody population was **10,010** inmates. Of this figure, **2,773** inmates were being held on remand.

The 2011 figure shows an increase of **274%** in the total remand population since 1994 compared with an increase of **56%** in the full-time custody population. Over the same period, the remand population as a proportion of the full-time custody population increased from **11.5%** to **27.7%**. See Figures 1 and 2 attached to this Paper.

As well as persons on remand in custody, CSNSW (through its Community Offender Services division, which includes the Probation and Parole Service) supervises a number of persons on "bail supervision" in the community¹. Figures as at 3 July 2011 indicate there were 209 offenders subject to bail supervision; there was a case intake of 68 bail supervision orders in that calendar month².

CSNSW records indicate that a large number of persons on remand are ultimately not given sentences of imprisonment during the same episode of their remand. In 2010, **5,218 (or 55%)** of a total of **10,342** persons on remand released from custody were 'unconvicted' on their date of release. 'Unconvicted' in this context means that either the person was: released to bail conditions; received a non-custodial sentence; had already served his or her full custodial sentence while on remand (and there was no further custodial sanction imposed); or the charges laid against him or her were dismissed; or he or she was found to be not guilty.

Of the abovementioned **5,218** persons on remand:

¹ In general, Community Offender Services provides services in respect of persons *who have been convicted*. The only role which the Probation and Parole Service has in respect of bail arises when a court *convicts*, but does not immediately sentence an offender, and the court at time of conviction grants bail subject to Probation and Parole Service supervision.

² CSNSW Weekly stats 3 July 2011.

- **3,299** (63%) spent 0 – 1 month in custody on remand;
- **1,600** (31%) spent 1 – 4 months in custody on remand; and
- **319** (6%) spent more than 4 months in custody on remand.

Time spent on remand represents a lost opportunity (when the offender's sentence is backdated for example) for the offender to participate in rehabilitative programs given that most intensive custodial programs target only sentenced inmates. This in turn, has a negative impact on efforts by CSNSW to reduce rates of recidivism.

The majority of male remand inmates are held at the Metropolitan Remand and Reception Centre (MRRC). The majority of female remand inmates are held at Silverwater Women's Correctional centre (SWCC).

For the financial year 2008/09, the average direct cost of remand inmates at the MRRC was \$163.50 in comparison with an average direct cost of \$158.00 for male inmates. The average direct cost of remand inmates at the SWCC was \$330.80 in comparison with an average direct cost per female sentenced inmate of \$239.40.

The statistics detailed above suggest that the daily cost of incarceration for many people on remand is not cost effective, and that this expenditure could be utilised in another way to reduce reoffending/recidivism. It should also be noted that the experience of prison in itself can have an effect on an individual's likelihood to reoffend when they are released³.

Remand inmates are some of the most resource intensive inmates in the correctional system. This is because despite many being in custody for only a few days, remand inmates require screening, intense monitoring, escorts, and security around family and legal visits. The need to make accommodation available for remand inmates has a direct impact on the availability of accommodation in correctional centres for sentenced inmates. CSNSW must therefore endeavour to keep pace with the increase in the remand inmate population in terms of accommodation and other resources, as well as remain focused on the rehabilitation and management of the sentenced population.

ROLE OF CORRECTIVE SERVICES NSW IN THE BAIL PROCESS

CSNSW and its officers are specifically mentioned only in sections 4(1)(b), 35(c) and 54A(2) of the *Bail Act 1978*. The Minister for Corrective Services (Minister for Justice) is mentioned in section 36(2B). Nevertheless, as prefaced above, the impact of the Act on CSNSW is significant, given that every person who is in custody on remand is a person about whom a court has made a decision in relation to bail.

CSNSW has responsibility under the bail law to:

- Provide secure custody for persons refused bail;

³ Kovandzic, Tomislav, V and Vieratis, LM, (2007) *The Criminogenic Effects of Imprisonment: Evidence From State Panel Data, 1974-2002*, University of Texas at Dallas.

- Provide secure custody for persons granted bail but unable to meet bail conditions;
- Release persons from custody consequent upon a grant of bail or upon the requirement for bail being dispensed with;
- Release persons granted bail who are initially unable to meet bail conditions but who subsequently meet bail conditions;
- receive bail undertakings from acceptable persons in respect of persons who are granted conditional bail (and to assess whether a person is an acceptable person and the nature and sufficiency of the surety offered); and
- Give to an appropriate court (ie, a court authorised to conduct a bail condition review) notice that a person is still in custody because of a failure to meet a bail condition, within 8 days of the person being received into custody.

A further responsibility of the Minister for Corrective Services⁴ under the current *Bail Act 1978* is to ensure that adequate and appropriate accommodation for persons on bail is available for the placement of persons on bail [section 36(2B)].

PART 2: RIGHT TO RELEASE FOR CERTAIN OFFENCES

The 2010 consultation paper noted that the decision to remand an accused person in custody has consequences for both the individual and the community. The financial and social consequences include:

- being unable to care for children or other family members, with children being placed in out-of-home care and families being placed at social and economic disadvantage;
- if employed, losing their job;
- likely loss of accommodation and subsequent risk of homelessness post-release;
- inconsistency of, and disruption to medical care;
- stress and anxiety as a result of the gaol experience;
- greater risk of further offending/re-offending as a result of the gaol experience (gaol is of itself, criminogenic⁵);
- being deprived of their liberty and unable to participate in ordinary life;
- difficulty in preparing their defence to the charge;
- incurring a stigma associated with being in prison, and resulting social isolation; and
- if they are not found guilty of the charges, the hardship/disruption they have suffered as a result of being held on remand cannot be redressed.

It is therefore important that bail laws be carefully balanced to ensure that accused people are only remanded where it is necessary to achieve the stated aims of bail.

⁴ Note that the Corrective Services NSW portfolio is now under the responsibility of the Attorney General, and Minister for Justice.

⁵ Pritikin, M H (2009), *Is Prison Increasing Crime?* Wisconsin Law Review and Kovandzic, Tomislav, V and Vieratis, LM, (2007) *The Criminogenic Effects of Imprisonment: Evidence From State Panel Data, 1974-2002*, University of Texas at Dallas.

Section 8: Right to release on bail for minor offences

Section 8 applies to all offences not punishable by a sentence of imprisonment (except in default of payment of a fine). CSNSW notes that imprisonment under the *Fines Act 1996* is for breach of the community service order or the requirements imposed with respect to the order, rather than in default of payment of the fine.

PART 3: PRESUMPTIONS AGAINST AND IN FAVOUR OF BAIL AND CASES IN WHICH BAIL IS TO BE GRANTED IN EXCEPTIONAL CIRCUMSTANCES ONLY

CSNSW makes no comment on presumptions and criteria for bail except for offenders subject to conditional liberty. In this regard, section 9B(1) of the Act removes the presumption in favour of bail for persons subject to any form of conditional liberty, namely any person who, at the time the offence was alleged to have been committed, was at liberty on bail [s. 9B(1)(a)], or on parole [s.9B(1)(b)], or serving a sentence but not in custody⁶ [s.9B(1)(c)], or subject to a good behaviour bond or an intervention program order [s.9B(1)(d)].

CSNSW is of the view that there may be merit in there being flexibility in any conditional liberty 'presumptions scheme'. It is arguable that there should be proportionality between the consequences of offending while on conditional liberty, the nature and severity of the alleged offence, the nature and severity of the offender's original offence, and the overall compliance of an offender with the conditional liberty granted (including the length of any conditional liberty period, the portion successfully completed and the portion remaining).

PART 9: BAIL CONDITIONS

CSNSW submits that the *Bail Act 1978* should provide for the consideration of the appropriateness of specific bail conditions for offences which do not attract a custodial sentence. Moreover, failure to comply with bail conditions should not result in an automatic loss of entitlement to bail on a minor offence. The 2010 consultation paper noted that many matters involve minor breaches of bail conditions, for example, a minor breach of a curfew requirement.

Bail Support Programs

CSNSW supports recommendation 13 in the 2010 consultation paper, which recommends the establishment of a Bail Support Program to assist persons comply with bail conditions, including those with special needs. CSNSW notes with interest, a recent evaluation of the Victorian Bail Support Program⁷. The evaluation found that the program was well-designed; is delivering services to an appropriate target group; and there is satisfaction expressed about the way the program works among both its clients and its key end users (magistrates).

An example of a bail support program in NSW is the pilot Bail Support Pathways Program (BSPP) for which CSNSW commissioned a piece of research to inform the development of this project which CSNSW leads as part of the NSW Homelessness

⁶ For example, home detention, periodic detention other than the weekly custodial period, or subject to a community service order which has not been completed

⁷ Bail Support Program Evaluation, Report to Corrections Victoria, March 2008, prepared by M & P Henderson & Associates Pty Ltd

Action Plan and is attached as Appendix 1 for further information/context.⁸ This is a partnership project which is being funded under the NSW Homelessness Action Plan over a period of 2 years and is currently being piloted at Central Local Court. CSNSW is the lead agency in relation to the project. Partner agencies include Legal Aid NSW, Department of Family and Community Services (Housing NSW and Community Services), NSW Department of Health, and Aboriginal Legal Service, as well as non-government agencies, including social housing providers.

The BSPP aims to provide long-term tenancies and supports necessary to sustain tenancies as well as reducing the risk of offending. In addition, the BSPP aims to reduce the number of homeless defendants in correctional facilities by providing short-term supported accommodation options prior to sentencing, and sustainable tenancies at the post sentence stage. The model consists of a three-stage process covering assessment and entry onto the program at either pre or post conviction stage; short-term accommodation and intensive support pending conviction and/or sentencing; and, finally, transition to supported sustained accommodation when court matters are finalised. Compliance with the BSPP requirements is a condition of bail.

Individual case plans are prepared for BSPP clients which include referral to government and non-government services to address mental health, disability services and drug and alcohol issues as required, as well as the provision of living skills programs. An application to Housing NSW and/or other social housing providers is made immediately upon acceptance of the defendant into the BSPP, however, access to longer term housing may remain a challenge owing to housing shortages.

CSNSW proposes to evaluate the BSPP, including its impact on rates of re-offending and the cost-benefit of operating the program, compared with the cost of incarceration. It is important to note, however, that the BSPP is a pilot project, with only a small number of offenders participating at any one time (15), with funding under the NSW Homelessness Action Plan due to end in June 2013. As such, the BSPP is unlikely to have any significant impact in terms of reducing the remand population.

Electronic monitoring of accused persons on bail

CSNSW notes recommendation 10 in the 2010 consultation paper, which recommends that the Government develop and pilot a system of electronic monitoring of accused persons who would otherwise be remanded in custody, following a refusal by a court to grant bail.

CSNSW supports in principle the establishment and operation of a pilot scheme in NSW that allows for the electronic monitoring of accused persons as a condition of bail. The pilot scheme should only apply to offenders who are remanded in custody but not yet sentenced. Supervised bail should not extend to those offenders who have been convicted but who await sentence, or who have been convicted and sentenced and who have lodged an appeal.

⁸ Sotiri, M (2010) 'Bail Support Programs: A literature review and analysis, and design of a pilot model for use in the NSW context, CSNSW, Sydney.

In the event that a pilot scheme is established, before being electronically monitored, an accused person would need to be subject to a suitability assessment and would need to have suitable residential accommodation in an approved residence.

Section 36(2B) of the Bail Act

Section 36(2B) of the *Bail Act 1978*, inserted by the *Bail Amendment (Repeat Offenders) Act 2002*, states:

The Minister for Corrective Services is to ensure that adequate and appropriate accommodation for persons on bail is available for the purposes of the placement of persons on bail.

CSNSW considers that the section is unworkable and should be repealed. It is considered that if the section were relied upon by bail applicants, many magistrates would not grant bail to certain types of people unless CSNSW is able to provide suitable accommodation. The fact that a community group or family member may be able to provide such accommodation will be overlooked. In effect, the taxpayer would become responsible for supporting offenders on bail; even in situations where the accused may have other options to obtain accommodation.

To date, there have been no known instances of an applicant for bail seeking to use section 36(2B) of the Act. If, however, the section is not considered to be moribund and there is some need for CSNSW to provide bail accommodation on demand, no such need has been demonstrated by the operation of the Act.

Bail Hostels

The 2010 consultation paper noted that the *Bail Amendment (Repeat Offenders) Act 2002* introduced a legislative basis for bail hostels - section 36(2)(a) provides that an accused person may enter into an agreement to reside, while at liberty on bail, in accommodation for persons on bail. The discussion paper also notes that no bail hostels for adults have been established. In order to be effective, any bail hostel model must be flexible, allowing for options like brokerage to ensure that accommodation and accompanying support can be tailored to the individual.

CSNSW, over the years, has argued against the introduction of bail hostels. As most persons directed to a bail hostel would be removed from their normal residential area it may mean that some are unable to maintain their normal employment (or some may already be unemployed). In such cases, CSNSW may be expected to provide programs and services which would increase the bail hostel operational costs.

CSNSW-run bail hostels may lead to net-widening, since courts could be attracted to the perceived quality of supervision and provision of programs rather than the provision of accommodation. Such bail hostels could quickly become "a gaol by another name", negating their very purpose.

CSNSW's Corporate Research Evaluation and Statistics branch has undertaken research on bail refusal and homelessness in NSW. This report⁹, completed in 2010, is attached for additional information at Appendix 2.

⁹ Aryes, S, de Almeida Neto, A and Heggie, K. (2010) 'Bail Refused and Homelessness Affecting Remandees in NSW', CSNSW, Corporate Research Evaluation and Statistics, Sydney.

Section 37A: Passport surrender requirements

The *Bail Act 1978* should contain a requirement that the Court, when imposing a condition requiring the person to surrender to the authorised officer or court any passport held by the person, is to make inquiries to confirm that a passport exists and to specify when a passport is required to be surrendered. This would avoid an accused person spending more time in custody than is lawfully required as a result of CSNSW officers spending considerable time searching for passports required to be surrendered.

PART 12: YOUNG PEOPLE

The *Children (Detention Centres) Act 1987* provides that juvenile detainees may, under some circumstances be transferred to a juvenile correctional centre or an adult correctional centre. Detainees over the age of 16 years may be transferred to a juvenile correctional centre by order of the Director General of Juvenile Justice made with the consent of the Commissioner of Corrective Services.

As at 3 July 2011, CSNSW had a total of 20 juvenile inmates under the age of 18 years in custody.

CSNSW supports a number of previous submissions made to the 2010 consultation paper that children and young people should be considered separately to adults when bail is granted or refused.

PART 13 PEOPLE WITH A COGNITIVE OR MENTAL HEALTH IMPAIRMENT

CSNSW submits that a broader definition of "cognitive impairment" should be used in the *Bail Act* rather than "intellectual disability". This definition should include people who acquired their impaired level of cognitive functioning after the developmental period (i.e. have had an acquired brain injury including various forms of dementia) or are functioning on a verbal level in the range of borderline to extremely low IQ (i.e. below 75 verbal IQ score).

It is also important that offenders with a mental illness or intellectual disability are appropriately identified and assessed for their risk of offending whilst on bail.

CSNSW would welcome the opportunity to discuss this issue in further detail with the Commission.

PART 14: INDIGENOUS PEOPLES

As at 30 June 1994, 741 offenders were being held on remand, of which 92 were Aboriginal. As at 3 July 2011, 2,773 offenders were held on remand, of which 606 were Aboriginal. The 2011 figures represent a 559% increase in the total Aboriginal remand population since 1994.

Increases in the number of Aboriginal and Torres Strait Islander (ATSI) remandees are disappointing, particularly since the "special need" provisions of sections 32(1)(a)(i)-(ia) and 32(1)(b)(v) were inserted by the *Bail (Repeat Offenders) Act 2002* to overcome an expected adverse impact of the Act on ATSI people. The bail law

therefore needs to more closely examine the drafting of the "special needs" provisions relating to ATSI peoples.