

## BAIL PRESUMPTIONS AND RISK OF BAIL REFUSAL: AN ANALYSIS OF THE NSW BAIL ACT

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**Aim:** To examine the relationship between various statutory presumptions surrounding bail and the risk of bail refusal.

**Method:** A total 37,165 cases where defendants were either granted or refused bail by a Local Court were analysed to determine what impact the presumptions surrounding bail had on the risk of bail refusal. Controls included in the analysis were age; gender; Indigenous status of the defendant; number of concurrent offences; the number of prior criminal convictions; whether the offender had a previous conviction for a breach offence; the number of days between the date of first court appearance and the date of finalisation; whether the defendant had legal representation in the current case; and the plea in the current case at time of finalisation.

**Results:** After adjusting for the effects of other factors, the risk of bail refusal was found to be higher for those charged with offences where there was a presumption against bail or where bail should only be granted in 'exceptional circumstances'. The risk of bail was also elevated for those with a larger number of prior convictions and/or concurrent offences. Three main anomalies were noted. Firstly, nearly half of those falling into the 'exceptional circumstance' category were on bail at their final court appearance. Secondly, factors such as prior criminal record, number of concurrent offences and delay in finalising a case, exert a much stronger influence on the risk of bail refusal than the presumptions surrounding bail. Thirdly, the bail refusal risk was higher for those charged with offences where there was no presumption for or against bail than for those charged with offences involving a presumption against bail.

**Conclusion:** The NSW Bail Act may need some simplification and clarification.

**Keywords:** NSW Bail Act, presumptions, predictors, risk of bail refusal

### 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 attempt to strike the right balance between, on the one hand, not infringing upon the liberty of an accused person who is entitled to the presumption of innocence and, on the other hand, ensuring that an accused person attends court and does not interfere with witnesses or commit other offences.

When the Bail Act was enacted in NSW in 1978 it created a presumption in favour of bail for all offences except violent or armed robbery. Since then, numerous changes have been made to the Act and it is now considerably more complex than it was when first passed. When considering whether or not to grant or refuse bail, courts must now distinguish between four types of cases: (a) cases where there is a presumption in favour of bail; (b) cases where there is no presumption in favour or against bail; (c) cases where there is a presumption against bail; and (d) cases where bail can only be granted in exceptional circumstances.

No previous Australian studies have examined the relative importance of various factors in shaping the decision to grant or refuse bail. The main purpose of this report is to see how the presumptions contained in the NSW Bail Act 1978 influence the likelihood of bail refusal. However, the report also examines the influence of age, gender, Indigenous status, time between first and final court appearance, number of concurrent offences, prior criminal record, plea and legal representation on the likelihood of bail refusal. Before describing the study in detail, the report provides a summary of the statutory criteria for making bail decisions and a brief history and outline of the bail presumptions.

### CRITERIA FOR BAIL DECISIONS

Subject to a few exceptions, there is a general right to be granted bail if a person is charged with an offence not punishable by imprisonment or an offence under the Summary Offences Act 1988 that is punishable by imprisonment (s.8). For all other offences, when an authorised police officer or court is deciding whether or not to grant bail to an accused person,

the officer or court must have regard to the matters set out in section 32, so far as they can reasonably be ascertained. No other matters can be considered unless the bail decision relates to an offence for which there is a presumption against bail, or for which there is a requirement that bail is only to be granted in exceptional circumstances (see s.32(6), (7)). The four main criteria in section 32 are:

1. The probability of whether the accused will appear in court in respect of the offence;
2. The interests of the accused person;
3. The protection of alleged victims and their close relatives; and
4. The protection and welfare of the community.

For each of these criteria (except the third one), the officer or court must have regard to a number of listed factors. These are summarised below.

### **Probability of appearing in court:**

- the person's background and community ties as indicated by a number of matters, including the person's prior criminal record;
- any previous failure to appear in court pursuant to a bail undertaking;
- the circumstances of the offence (including its nature and seriousness), the strength of the evidence against the person and the severity of the probable penalty;
- any specific evidence indicating whether or not it is probable that the person will appear in court.

### **Interests of the accused person:**

- the period that the person may be obliged to spend in custody if bail is refused;
- the needs of the person to be free to prepare for his/her appearance in court or to obtain legal advice or both;
- the needs of the person to be free for any other lawful purpose;
- if the person is under the age of 18 years, or is an Aboriginal person or a Torres Strait Islander, or has an intellectual disability or is mentally ill, or any special needs of the person arising from that fact;
- if the person is accused of an indictable offence and the person has previously been convicted of an indictable offence – the nature of the person's criminal history.

### **Protection and welfare of community:**

- the nature and seriousness of the offence, in particular whether the offence is of a sexual or violent nature or involves the possession or use of an offensive weapon;
- whether or not the person has failed to observe a reasonable bail condition previously imposed in respect of the offence;
- the likelihood of the person interfering with evidence, witnesses or jurors;
- whether or not it is likely that the person will commit any

serious offence while on bail (but only if the person is likely to commit a serious offence and this likelihood, and the likely consequences, outweighs the person's general right to liberty);

- if the offence is a serious offence – whether, at the time of the alleged offence, the person had been granted bail, or released on parole, for any other serious offence;
- if the offence involves possession or use of an offensive weapon – any prior criminal record of the person in respect of such an offence.

## **BAIL PRESUMPTIONS**

When deciding whether or not to grant bail to a defendant, the authorised police officer or court must also have regard to the bail presumption that applies to the offence.

### **Brief history of reforms<sup>4</sup>**

As already noted, when the Bail Act was enacted in 1978, it created a presumption in favour of bail for all offences, except violent or 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' (Weatherburn, Quinn & Rich, 1987). The then Attorney General, the Hon. Frank Walker, explained that the Government was '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'.<sup>5</sup>

In 1986, an amendment to the Bail Act removed the presumption in favour of bail in relation to some serious drug offences, including supplying or manufacturing a commercial quantity of a prohibited drug. In the 24 years since then, 18 other amending Acts have removed the presumption in favour of bail for one or more offences, or for certain defendants (see the chronology in Appendix 1). In some cases, these reforms applied to existing offences, but in other cases they related to newly created offences (e.g. terrorism offences enacted in 2002). Prior to 2003, almost all of the relevant amending Acts removed the presumption in favour of bail for certain offences/defendants but did not create a presumption against bail. The exception to this was a 1988 Act that created a presumption against bail for serious drug offences, including those covered by the 1986 changes. Since 2003, almost all of the reforms have established a presumption against bail for certain offences/defendants.

In 2002 and 2003, the NSW Government introduced reforms targeting different types of 'repeat offenders' and it is worth outlining these changes in more detail. As a result of the 2002 reforms, the presumption in favour of bail does not apply to an accused person:

- 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 (in

relation to another offence) 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 s. 9B)

In July 2003, further provisions were enacted in response to the murder of a woman by her estranged husband. At the time of the murder, the husband was on bail in relation to charges of serious violence towards her. Under the reforms, 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 (see ss.9C, 9D). A range of offences are listed as 'serious personal violence offences', including serious assaults, sexual assaults, and armed robbery.

In December 2003, a further amending Act introduced a presumption against bail for 'repeat property offenders'. A 'repeat property offender' is defined as 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 (see s.8C). 'Serious property offences' include a number of robbery, stealing and housebreaking offences.

## Current exceptions to presumption in favour of bail

Table 1 summarises the current exceptions to the presumption in favour of bail.

### What do the presumptions mean?

Where the presumption in favour of bail applies, the Act states that the defendant is entitled to be granted bail unless the authorised police officer or court is satisfied that it is justified in refusing bail, or the person is convicted of the offence (see s.9(2)). Where there is no presumption in favour of or against bail, the Act is silent. Where the presumption against bail

applies, the Act states that bail is not to be granted unless the defendant satisfies the officer or court that bail should not be refused (e.g. see s.8A(2)). According to a number of Supreme Court decisions, this is not simply a reverse onus provision. In *R v Amare Iskandar* (2001) 120 A Crim R 302, Sperling J referred to previous decisions and stated (at 305):

*[Where the presumption against bail applies] an application for bail should normally or ordinarily be refused. A heavy burden rests on the applicant to satisfy the court that bail should be granted. The strength of the Crown case is the prime but not exclusive consideration. Countervailing circumstances common to applications for bail in the generality are to be accorded less weight than in the ordinary case. The application must be somehow special if the Crown case in support of the charge is strong.<sup>6</sup>*

### What are 'exceptional circumstances'?

As noted above, as a result of reforms in 2003, bail is only to be granted in exceptional circumstances if the defendant is charged with murder, or is charged with a 'serious personal violence offence' and has previously been convicted of such an offence. When introducing these reforms, the then Minister for Justice, the Hon. John Hatzistergos MLC, said:

*Exceptional circumstances will be left to the courts to decide on an individual, case-by-case basis. However, 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.<sup>7</sup>*

The 'exceptional circumstances' requirement has been discussed by the Supreme Court. In *R v Young* [2006] NSWSC 1499, Johnson J stated (at para. 20):

*...exceptional circumstances may be found in a case by the coincidence of a number of features. These can include features subjective to the particular applicant, features which bear upon the nature of the alleged offence and features which emphasise that, absent this particular test, the applicant is otherwise a person who will answer bail.*

**Table 1: Outline of the bail presumptions**

No presumption in favour or against bail (ss.9, 9A)	Presumption against bail (ss.8A-8F)	Bail only in exceptional circumstances (ss.9C, 9D)
A number of drug offences – mainly offences involving twice the indictable quantity	A number of drug offences – mainly offences involving a commercial quantity	Murder
Violent or armed robbery	A number of firearms and weapons offences	'Serious personal violence repeat offenders'
Domestic violence offences, where history of violence	Terrorism offences	
Attempt to murder, and conspiracy to commit murder	Riot offences, and serious offences in course of riot	
Manslaughter	'Repeat property offenders'	
Wounding or grievous bodily harm with intent	Persons on lifetime parole – offences punishable by sentence of imprisonment	
Kidnapping	Serious sex offender - breach of supervision order.	
Aggravated sexual assault; assault with intent to have sexual intercourse; sexual intercourse with a child who is under the age of 10		
'Repeat offenders' (except those 'repeat offenders' noted in the other columns)		
Breach of a control order by a controlled member of a declared criminal organisation		

In *R v Tilman* [2008] NSWSC 1227, Johnson J stated (at para. 15) that, when the Court is considering whether there are exceptional circumstances justifying the grant of bail, 'the Court is considering all factors which bear upon the application (including s.32) factors'.

## THE CURRENT STUDY

The principal focus of this study is on the likelihood of bail refusal in each of the presumptions mentioned above. In examining the effect of these presumptions on the likelihood of bail refusal, it is necessary to control for other factors that might also affect the decision to grant or refuse bail.<sup>8</sup> As noted earlier, the criteria to be considered in relation to bail applications are set out in s32 of the NSW Bail Act (1978). They include the likelihood of appearing in court, the defendant's background and community ties (including, for Aboriginal people, their ties to extended family), the period that a person may be obliged to spend in custody if bail is refused and the likelihood of them committing further offences. The likelihood of committing further offences has been shown to be related to age, gender, prior convictions and the number of concurrent offences (Smith & Jones 2008). Defendants who are legally represented may be more likely to be granted bail. Defendants who plead guilty and who face serious offences, on the other hand, may be more likely to be refused bail. Therefore, the controls included in the present study are:

- age of defendant at the time of finalisation in the index appearance;
- gender of defendant;
- Indigenous status of the defendant;
- the number of concurrent offences (excluding concurrent property offences classified in the presumptions);
- the number of prior cases where the defendant had been found guilty (and the conviction recorded) of at least one offence – excluding previous property and personal violence offences classified in the presumptions;
- whether the offender had a previous conviction for a breach offence (including breach of a custodial order, breach of a community based order and breach of a restraining order);
- the number of days between the date of first court appearance and the date of finalisation;
- whether the defendant had legal representation in the current case; and
- the plea in the current case at time of finalisation.

All of these factors are relevant when a magistrate or judge is considering whether or not to grant bail (see s.32, NSW Bail Act 1978, as amended).

The bail status of a defendant can change from the first to the final court appearance. The effects of the statutory presumptions may differ, depending on the point at which bail status is being determined. Unfortunately, information on bail at initial court appearance is not routinely kept. The outcome variable in the current study is therefore bail status at the time

of case finalisation.<sup>9</sup> The dataset from which the data for this study are drawn contains four bail classifications: 'Bail dispensed with', 'On bail', 'Bail refused' and 'In custody'. Persons who fall into the category 'bail dispensed with' are rarely refused bail. Because our focus is on the decision to refuse bail where refusal is a realistic possibility, our analysis is limited to defendants in the 'On bail' or 'Bail refused' categories.

## DATA AND METHODOLOGY

The data used in this study were extracted from BOCSAR's Reoffending Database (ROD) (Hua & Fitzgerald 2006). Only adult defendants who appeared before a Local Court for a matter that was finalised in 2008 were included. A number of defendants met these criteria for more than one case finalised in 2008. When this happened, only the most recent case was retained. The 2008 case included in the study is referred to as the index court appearance.

In total 37,165 defendants were included in the final dataset. Of these, 6,103 (16.4 per cent) were refused bail. There were also defendants with an Unknown Indigenous status (544 defendants) and/or legal representation (1,358 defendants). Rather than excluding these defendants and risk losing substantial information, two additional variables were created in the model - 'Indigenous status unknown' and 'legal representation unknown'.

A logistic regression model was developed to determine which factors were independently related to the decision to refuse bail. The model was validated by examining appropriate diagnostics and using a 50 per cent cross-validation approach. Marginal effects were then developed using the parameter estimates in the logistic regression model in order to assess the impact of a number of variables of interest.

## RESULTS

The unadjusted risks of bail refusal for each of the bail provisions (i.e. the risk of bail refusal in each category of bail presumption prior to controlling for other factors) were: 48.6 per cent (exceptional circumstance), 20.9 per cent (presumption against) 29.0 per cent (presumption neutral) and 15.1 per cent (presumption in favour). Table 2 shows the results of the logistic regression modelling. The model allows us to see the effects of the presumptions on risk of bail refusal when other factors have been held constant.<sup>10</sup> It also allows us to gauge the influence of all other measured factors. Note that the results for the 'legal representation unknown' category have not been included here, although it was a significant variable in the model. The term 'bail neutral' in the table refers to offences where there is no presumption for or against bail.

The results in Table 2 show, as expected, that bail is less likely to be granted when the defendant:

- is male;
- has a larger number of concurrent offences;
- has a longer prior criminal record;
- is older;
- is in a case that is finalised relatively quickly;

**Table 2: Logistic regression results, modelling the likelihood of bail refusal**

Comparison	Parameter estimate	P-value <sup>11</sup>	Odds ratio (with CI)
Intercept	-6.80 (0.11)	<0.0001	N/A
Age under 25 vs. Aged 25 or over	0.10 (0.04)	0.001	1.11 (1.03 - 1.20)
Male vs. Female	0.31 (0.05)	<0.0001	1.37 (1.24 - 1.51)
Indigenous vs. Non-Indigenous or Unknown	0.15 (0.04)	<0.0001	1.17 (1.08 - 1.26)
Guilty plea vs. Other	0.19 (0.04)	<.0001	1.21 (1.11 - 1.31)
One concurrent offence vs. No concurrent offences	0.44 (0.04)	<0.0001	1.55 (1.42 - 1.69)
Two concurrent offences vs. No concurrent offences	0.75 (0.05)	<0.0001	2.13 (1.92 - 2.35)
Three or more concurrent offences vs. No concurrent offences	1.67 (0.05)	<0.0001	5.33 (4.88 - 5.83)
Prior convictions <sup>12</sup>	0.18 (0.00)	<0.0001	1.20 (1.19 - 1.21)
Prior breach conviction vs. No prior breach conviction	0.32 (0.05)	<0.0001	1.37 (1.24 - 1.52)
Time difference less than 5 days vs. 90 days or over	1.61 (0.05)	<0.0001	4.98 (4.56 - 5.45)
Time difference between 5 and 29 days vs. 90 days or over	1.10 (0.05)	<0.0001	3.01 (2.70 - 3.35)
Time difference between 30 and 59 days vs. 90 days or over	0.61 (0.05)	<0.0001	1.83 (1.65 - 2.03)
Time difference between 60 and 89 days vs. 90 days or over	0.37 (0.06)	<0.0001	1.45 (1.30 - 1.63)
Legal representation vs. No legal representation	2.49 (0.09)	<0.0001	12.03 (10.16 - 14.24)
Presumption neutral vs. Other	0.76 (0.08)	<0.0001	2.15 (1.83 - 2.53)
Presumption against vs. Other	0.24 (0.08)	0.0043	1.28 (1.09 - 1.51)
Exceptional circumstances vs. Other	0.79 (0.08)	<0.0001	2.20 (1.87 - 2.59)
Hosmer-Lemeshow = 13.45 (df = 8) p-value = 0.0972			
Area under ROC curve = 0.838			
Deviance = 6307.24 (d.f = 6373) p-value = 0.7186			

- has committed an offence where bail can only be granted in exceptional circumstances or where there is a presumption against bail.

There are, however, a number of surprising findings, namely:

- Indigenous defendants are more likely to be refused bail than non-Indigenous defendants (even after controlling for other factors);
- defendants who are legally represented are more likely to be refused bail than defendants who are not legally represented (even after controlling other factors);
- defendants whose offences fall into the 'bail neutral' category are more likely to be refused bail than defendants whose offences invoke a presumption against bail.
- case characteristics such as the defendant's prior criminal record, the number of concurrent offences and the time delay between first and final appearance exert stronger effects on the likelihood of bail refusal than the category of bail presumption into which a defendant falls;

It is interesting to note, moreover, that the legal presumptions for or against bail are not the most influential determinants of the decision to refuse bail. Inspection of the relevant odds ratios indicates, for example, that the number of concurrent offences and the time between first and final appearance exert a much stronger influence on the decision to refuse bail than whether or not the defendant fits in the category of exceptional circumstances or presumption against bail. Prior convictions have been included as a continuous variable, so the parameter value only shows the increase in the odds of bail refusal for each additional conviction. For those with 12 prior convictions, the parameter value is 2.16 – one of the largest effects in the model.

## Marginal effects

Odds ratios are not directly interpretable as risks. To say, for example, that the odds of a male being refused bail are 1.39 times higher than the odds of a female being refused bail is not the same as saying that their chances of bail refusal are 1.39 times higher. To calculate the risks of bail refusal for a person given a specified characteristic, we must fix the values of all their other characteristics.

Table 3 shows the probability of bail refusal for a base case involving a non-Indigenous male aged 25 years or more, who is legally represented, pleads guilty, has no concurrent offences, no prior convictions, no previous breach offence, whose case took more than 90 days to be finalised and who committed an offence where there was a presumption in favour of bail. The risk of bail refusal in such a case is 2.1 per cent. The remaining entries in Table 3 show the risk of bail refusal (second last column) and the marginal effect (last column) as key elements of the base case are altered. For example, a person with all the characteristics mentioned above but who has three or more concurrent offences faces an 11.8 per cent chance of bail refusal. The marginal effect of this factor is 9.4 percentage points, indicating that their risk of bail refusal is 9.4 percentage points higher than someone with the base case characteristics.

Table 3 confirms the point made earlier - while the presumptions have a significant impact on the probability of imprisonment, they do not have as large an effect as other defendant characteristics, such as large numbers of prior convictions and/or three or more concurrent offences. A short time period between initial court appearance and finalisation also exerts a larger marginal effect than each of the three presumptions.

**Table 3: Probability of bail refusal and marginal effect given defendant characteristics**

		Probability of bail refusal (per cent)	Marginal effect (percentage points)
Base case with Presumptions		2.1	
	Neutral	5.1	2.7
	Against	3.0	0.6
	Exceptional circumstances	5.3	2.9
Concurrent offences			
	Two	5.0	2.6
	Three or more	11.8	9.4
Prior offences			
	One	2.9	0.5
	Five	6.2	3.8
	Ten	15.2	12.8
Time difference			
	Less than 5 days	10.9	8.5
	Between 5 and 29 days	6.9	4.5

## DISCUSSION

The main purpose of this report was to see how the presumptions concerning bail contained in the NSW Bail Act 1978 influence the likelihood of bail refusal. The report also examined the influence of age, gender, Indigenous status, time between first and final court appearance, number of concurrent offences, prior criminal record, plea and legal representation on the likelihood of bail refusal.

Most of the findings require neither explanation nor comment. They are what one would expect given the provisions of the NSW Bail Act. It is not surprising to observe, for example, that bail is less likely to be granted where a defendant has a larger number of concurrent offences, a longer prior criminal record, a prior conviction for breaching a court order or has committed an offence where there is a presumption against bail or bail is only able to be granted in exceptional circumstances. Nor is it surprising to see that defendants are more likely to be granted bail if there is a long delay between initiation and finalisation of criminal proceedings. A number of findings, however, are unexpected and warrant some discussion. In particular, it is not immediately clear why:

1. Indigenous defendants are more likely to be refused bail than non-Indigenous defendants (even after controlling for other factors);
2. defendants who are legally represented are more likely to be refused bail than defendants who are not legally represented (even after controlling other factors);
3. defendants whose offences fall into the 'bail neutral' category are more likely to be refused bail than defendants whose offences invoke a presumption against bail.
4. more than 50 per cent of defendants charged with offences where bail can only be granted in exceptional circumstances and more than 79 per cent of defendants facing charges where there is a presumption against bail, were on bail at their final court appearance;
5. case characteristics such as the defendant's prior criminal record, the number of concurrent offences and the time delay between first and final appearance exert stronger

effects on the likelihood of bail refusal than the category of bail presumption into which a defendant falls;

The first two findings are relatively easy to explain. The fact that Indigenous defendants are more likely to be refused bail than non-Indigenous defendants, even after controlling for other factors, probably reflects our failure to control for several important bail considerations, such as the strength of a defendant's community ties, the strength of the evidence against the accused and any previous failure to appear in court pursuant to a previous bail undertaking. It is possible, in other words, that the significant effect of Indigenous status on the risk of bail refusal merely reflects the influence of factors we were unable to measure but which are legitimate considerations in relation to bail. It should be noted in this connection that the odds ratio associated with Indigenous status (1.18) is one of the smallest in the model. It would not take much to render the effect of this variable non-significant. The second finding, that defendants who are legally represented are more likely to be refused bail, may seem counter-intuitive but it is probably a selection effect. In other words, it is not that courts are less likely to grant bail to a legally represented defendant but that defendants are more likely to obtain legal representation when charged with an offence that might result in bail refusal.

The explanation for the higher rate of bail refusal among defendants who fall into the 'Bail neutral' category than among defendants in the 'presumption against bail' category may lie in differences between the two categories in the proportion of defendants charged with violent offences. As can be seen from Table 1, the category 'bail neutral' includes violent or armed robbery, domestic violence offences, attempted murder/conspiracy to murder, manslaughter, wounding or grievous bodily harm with intent, kidnapping, aggravated sexual assault, assault with intent to have sexual intercourse and sexual intercourse with a child under 10. The category 'presumption against bail', on the other hand, would be (numerically) dominated by repeat property offenders. Past research has shown that conviction for a violent offence greatly increases the risk of a prison sentence (Snowball & Weatherburn 2007). Since under s.32 of the Bail Act, courts are obliged to consider whether the offence is of a sexual or violent nature and the severity of the penalty or probable penalty, it is perhaps not surprising that the likelihood of bail refusal is higher for defendants who fall into the 'bail neutral' category.

The fact that bail was granted to nearly half of the defendants in the 'exceptional circumstances' category and to nearly 80 per cent of offenders in the 'presumption against bail' category is somewhat puzzling. Part of the explanation for the high percentage granted bail may be that this study did not look at persons charged with offences dealt with by the Higher Criminal Courts. Even so, as noted earlier in the paper, where the presumption against bail applies, the Bail Act states that bail is not to be granted unless the defendant satisfies the officer or court that bail should not be refused. This has been interpreted by the NSW Supreme Court as implying that an application for bail where there is a presumption against bail should 'normally or ordinarily' be refused. If bail should normally be refused when there is a presumption against bail, one would expect it to be even more likely to be refused where the 'exceptional

circumstances' provision applies. Bail is certainly less likely to be granted to people facing charges that fit into the 'exceptional circumstances' category than to people facing charges where a presumption against bail exists. However in neither type of case could it fairly be said that bail is 'normally' or 'ordinarily' refused.

It is possible that the courts view the 'exceptional circumstances' requirement as excessively severe. It is also possible that the courts may take a broad view of what constitutes exceptional circumstances. The examples of 'exceptional circumstances' given by the Attorney General included cases involving violence against a woman by her husband, a strong self-defence case, a weak prosecution case, a case in which the defendant is in urgent need of medical attention or has an intellectual disability and a case in which the court is satisfied that the offender poses no further threat to the victim or the community. There may be many cases which, so far as courts are concerned, fit into one or more of these categories. It is also worth remembering in this context that the presumptions surrounding bail are not the only relevant consideration for courts. Many defendants facing charges where bail is supposed to be granted only in exceptional circumstances may meet all the other criteria set down in section 32 of the Bail Act for bail to be granted. If this is the reason for the high proportion of defendants granted bail whose charges place them in the presumption against bail or exceptional circumstance provision categories, there would seem to be some tension between the presumptions and the criteria set down in section 32.

This leaves us with the question of why the prior criminal record of an offender, the number of concurrent offences and the time taken to finalise the case exert a much bigger effect on the likelihood of bail refusal in any particular case than the presumptions surrounding bail. The prior criminal record of an offender, the number of concurrent offences and the time taken to finalise a case, it should be remembered, are all relevant considerations under section 32 of the NSW Bail Act. The greater weight placed on these factors than on the bail presumptions is only a puzzle if one regards the presumptions surrounding bail as more important. The Bail Act gives little guidance on this point. Courts must consider both the criteria for bail and the presumptions surrounding bail. What they should 'normally or ordinarily' do when confronted with a defendant who satisfies most or all of the section 32 criteria for bail to be granted but whose offences and prior record place them in a category where there is a presumption against bail or where bail is only to be granted in 'exceptional circumstances', appears rather unclear.

## REFERENCES

- Chilvers, M Allen, J & Doak, P 2001, Bail in NSW: Characteristics and compliance. *Bureau Brief* (No. 15), NSW Bureau of Crime Statistics and Research, Sydney.
- Fitzgerald, J & Weatherburn, D 2004, The impact of the Bail Amendment (Repeat Offenders) Act 2002. *Crime and Justice Bulletin* (No. 83), NSW Bureau of Crime Statistics and Research, Sydney.
- Smith, NE & Jones, C 2008, Monitoring trends in re-offending among adult and juvenile offenders given non-custodial

sanctions, *Crime and Justice Bulletin* (No. 110), NSW Bureau of Crime Statistics and Research, Sydney.

Snowball, L & Weatherburn, D. 2007, Does racial bias in sentencing contribute to Indigenous over-representation in prison? *Australian and New Zealand Journal of Criminology*, vol. 40, no. 3, pp. 272-290.

Weatherburn, D Quinn, M & Rich, G 1987. Drug charges, bail decisions and absconding. *Australian and New Zealand Journal of Criminology*, vol. 20, no. 2, pp. 95-109.

## NOTES

1. Senior Research Officer, NSW Bureau of Crime Statistics and Research.
2. Research Officer, NSW Parliamentary Library Research Service.
3. Director, NSW Bureau of Crime Statistics and Research.
4. This section is based on Roth, L. Bail law: developments, debate and statistics, NSW Parliamentary Library Research Service (Briefing Paper 5/2010)
5. Hon. F. Walker, Hansard, Legislative Assembly, 14 December 1978, p. 2015.
6. The NSW Court of Appeal applied this interpretation in *Director of Public Prosecutions v Germakian* (2006) 166 A Crim R 201. However, note that in *R v Khazal* [2004] NSWSC 548, James J did not adopt this interpretation in relation to the offence in question (see paras. [28]-[30], [40]-[41]).
7. Hon. J. Hatzistergos MLC, Hansard, Legislative Council, 24 June 2003, p. 1888.
8. Note that when an offender fell into more than one category they were classified according to the most serious category. For example, if an offender fell into both "Bail neutral" and "Bail against", they were only put into the "Bail against" category.
9. Although bail status is not routinely kept, an examination of cases dealt with between December 2009 and May 2010 revealed that in only about one per cent of cases was the accused initially refused bail and then later granted bail.
10. Note that the parameter for the "Indigenous unknown" category was not significantly different from the base case "Non-Indigenous" and was therefore incorporated into the base case. However, the "Legal representation unknown" category did differ from the base case "No legal representation" and subsequently was included separately in the final model.
11. Note that a P-value of less than 0.05 indicates that the variable in question exerts a significant effect on the risk of bail refusal. An odds ratio above one suggests that the variable is positively associated with the decision to refuse bail. That is, a defendant with that characteristic is more likely to be refused bail than a defendant without the comparison characteristic, when other characteristics are held constant.
12. This was modelled as a continuous variable and coded as 1,2,3,4,5,6,7,8,9,10,11,12+. The final category was grouped in this manner in order to ensure the variable remained linear against the logit of the outcome variable. For this reason, the variable can only be interpreted for 12 or less prior convictions

# APPENDIX 1

## Changes to the presumption in favour of bail since 1978

Amending legislation	Commencement	Summary of provision
Bail (Amendment) Act 1986	25/05/1986	Added possession or supply of commercial quantities of prohibited drugs to the exceptions to the presumption in favour of bail.
Bail (Personal and Family Violence) Amendment Act 1987	29/10/1987	Introduced an exception to the presumption in favour of bail in the case of a domestic violence offence, where the accused person has previously failed to comply with any bail condition imposed for the protection and welfare of the victim. This presumption is restored only if the relevant officer or Court is satisfied that those bail conditions will be observed in the future.
Bail (Amendment) Act 1988	21/08/1988	Inserted s.8A, creating a presumption against bail for possession or supply of commercial quantities of prohibited drugs (i.e. the offences covered by the 1986 amendments) and drug importation offences involving commercial quantities. In addition, created an exception to the presumption in favour of bail (but not a presumption against bail) for similar drug offences involving twice the indictable quantity of prohibited drugs, and for drug importation offences involving twice the indictable quantity.
Bail (Domestic Violence) Amendment Act 1993	2/12/1993	Included murder in the s.9 exceptions, and added s.9A, an exception to the presumption of bail for domestic violence offences, where the accused has a history of violence (this extended the exception created in 1987).
Criminal Legislation Amendment Act 1995	1/07/1995	Introduced new exceptions to the presumption in favour of bail for conspiracy, threats and attempts to murder.
Drug Misuse and Trafficking (Ongoing Dealing) Act 1998	7/08/1998	Introduced an exception to the presumption in favour of bail for the new offence of supplying a prohibited drug on an ongoing basis.
Bail (Amendment) Act 1998	11/08/1998	Introduced further exceptions to the presumption in favour of bail, including manslaughter (s.18); wounding etc with intent to do bodily harm or resist arrest (s.33); aggravated sexual assault (s.61J); assault with intent to have sexual intercourse (s.61K); sexual intercourse – child under 10 years (s.78H); and kidnapping (s.90A).
Police Powers (Drug Premises) Act 2001	1/07/2001	Added another exception to the presumption in favour of bail for an offence under the Firearms Act 1996 relating to the unauthorized possession or use of a firearm that is a prohibited firearm or a pistol.
Crimes Amendment (Aggravated Sexual Assault in Company) Act 2001	1/10/2001	Added the new offence of aggravated sexual assault in company (s.61JA Crimes Act) to the list of exceptions to the presumption in favour of bail.
Bail Amendment (Repeat Offenders) Act 2002	1/07/2002	Inserted s.9B into the Act. The section provides for an additional exception to the presumption in favour of bail for three types of defendants: (i) persons accused of an indictable offence who have previously been convicted of an indictable offence; (ii) persons who have been accused of committing an offence while on bail, or on parole, or serving a non-custodial sentence, or subject to a good behaviour bond; and (iii) persons previously convicted of an offence of failing to appear in court pursuant to a bail undertaking.
Bail Amendment Bill 2003	7/07/2003	Inserted ss.9C and 9D, which provided that bail is not to be granted to persons charged with murder, or persons charged with a serious personal violence offence who have previously been convicted of such an offence, unless exceptional circumstances justify the grant of bail. A "serious personal violence offence" includes domestic violence offences, murder, manslaughter, kidnapping, sexual assault and serious assaults.
Bail Amendment (Firearms and Property Offenders) Act 2003	5/12/2003	Inserted s.8B into the Bail Act 1978, which provides for a presumption against the granting of bail for persons accused of certain firearm and weapons offences (including the offence subject to the 2001 changes).
		In addition, inserted s.8C, which provides for a presumption against bail for a 'repeat property offender', which is defined as 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 several robbery and stealing offences.
Bail Amendment (Terrorism) Bill 2004	4/06/2004	Amended s.8A, to apply a presumption against bail for new terrorism offences
Law Enforcement Legislation Amendment (Public Safety) Act 2005	15/12/2005	Inserted s.8D, which provides for a presumption against bail for riot offences, and for other serious offences committed in the course of a large-scale public disorder.
Bail Amendment (Lifetime Parole) Bill 2006	27/10/2006	Inserted s.8E into the Act, which provides for a presumption against bail for persons on lifetime parole who are accused of offences carrying prison terms.
Crimes and Courts Legislation Amendment Act 2006	29/11/2006	Amended s. 8A, to apply a presumption against bail to certain newly created hydroponic cannabis offences and the offence of manufacturing or producing in the presence of children an amount of a prohibited drug that is not less than the applicable commercial quantity.
Law Enforcement and Other Legislation Amendment Act 2007	21/12/2007	Inserted s.8F into the Act, which provides for a presumption against bail for serious sex offenders accused of breaching a supervision order imposed on them under the Crimes (Serious Sex Offenders) Act 2006.
Bail Amendment Act 2007	14/12/2007	Amended s.8B, to apply a presumption against bail to two additional firearms offences: the offence of prescribed persons being involved in a firearms dealing business, and the offence of shortening a firearm.
Crimes (Criminal Organisations) Control Act 2009	3/04/2009	Amended s.9, to create an exception to the presumption in favour of bail for an offence under new laws targeting criminal organisations: a controlled member of a declared organisation commits an offence if he or she associates with another controlled member of the declared organisation.

Source: Adapted from a chronology produced by the NSW Criminal Law Review Division, NSW Attorney General's Department.