

A follow-up on the impact of the Bail Act 2013 (NSW) on trends in bail

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Aim: To examine the effect of the Bail Act 2013 (NSW) and subsequent 'show-cause' amendments on trends in the number and proportion of defendants being refused bail.

Method: Descriptive analysis of the number of defendants, proportion of all defendants and proportion of 'bail eligible' defendants refused bail each month in all NSW courts between February 2011 and May 2016. Kendall's tau is used to test for significance in trends in the pre- and post-intervention periods (i.e. before and after the Bail Act reforms).

Results: The number of defendants refused bail showed a significant increasing trend of 2.95 defendants per month ($p < .01$) for the pre-intervention period of February 2011 to May 2014, and a mean number of defendants of 1,042.57. The mean number of defendants rose to 1,264.19 defendants for the post-intervention period of January 2015 to May 2016. No significant trend was found for the post-intervention period ($p = .06$). The rise in mean post-intervention was higher than what would have been expected due to the increasing trend pre-intervention.

The proportion of all defendants being refused bail showed no significant trend either pre- or post-intervention ($p = .06$ pre-intervention and $p = .23$ post-intervention). There was a slight difference in mean proportion between the two periods (.098 pre-intervention vs .108 post-intervention). However, it seems likely that this slight difference can be attributed to the very slight (although statistically insignificant) trend pre-intervention. Taking both periods together, there appears to be a very slight but significant increasing trend ($p < .01$) across the whole period, with a mean rise of .0002 per month.

The proportion of 'bail eligible' defendants also showed a significant increasing trend pre-intervention by .001 per month ($p < .01$). However, the post-intervention proportion showed no significant trend ($p = .84$). The mean proportion per month increased from .276 to .326 between the pre- and post-intervention periods. Again, the increase in mean proportion between the two periods is higher than what would have been expected given the pre-intervention trend.

Conclusion: The Bail Act 2013 (NSW) and subsequent amendments appeared to have an effect on the number and proportion of bail eligible defendants refused bail. However, they appear to have had little to no effect on the proportion of all defendants refused bail. This suggests that defendants who had previously been released on bail are now having bail dispensed with or bail refused.

Keywords: Bail, remand, Bail Act 2013 (NSW), 'show cause' amendments.

Introduction

Over the last two years the NSW prison population has increased by 21%, reaching a high in June this year of 12,550. The increase is attributable in large part to a growth in prisoners on remand (i.e. unconvicted prisoners awaiting trial or sentence). Between July 2015 and June 2016, the number of prisoners on remand grew by 14.8%, from 3,633 to 4,170 (NSW Bureau of Crime Statistics and Research, 2016). Over the same period the number of sentenced prisoners grew by 2.8% (from 8,148 to 8,380). Concern has been expressed that reforms to the *Bail Act 2013* (NSW) may have resulted in an increase in the proportion of defendants refused bail and thereby contributed to the growth in the NSW remand population. This brief examines this issue.

When an offender comes into contact with the NSW Justice System, there are three outcomes that can occur at the initial court appearance. Bail can be dispensed with, the defendant can be released on bail or the defendant can be refused bail and placed in custody on remand. The *Bail Act 2013* (NSW) (hereafter referred to as the 'Bail Act') commenced in May 2014 as a means to simplify the bail decision process (White, 2014). Shortly after it commenced, a series of controversial bail decisions prompted the State Government to announce a review of the new Bail Act by former Labor Attorney General (now Judge), John Hatzistergos. Judge Hatzistergos completed the interim phase of his review in July 2014.

All his recommendations were accepted by the State Government. Two changes are of particular importance. The Bail Act was amended to require bail refusal for certain specified offences (known as 'show cause' offences) unless the accused person 'shows cause why his or her detention is not justified' (Judicial Commission of NSW, 2015). The operation of the unacceptable risk test was also altered. Since 28 January 2015 an accused person is determined to be of 'unacceptable risk' if bail concerns cannot be mitigated by bail conditions. People deemed to be of unacceptable risk are now required to be bail refused. These changes (and a number of others not of any consequence here) came into effect on 28 January 2015. We refer to them throughout this brief as the 'show cause' amendments.

The *Bail Act 2013* (NSW) and the subsequent 'show cause' amendments appear to have had significant short-term effects on the number and proportion of defendants being refused bail. Weatherburn and Fitzgerald (2015) looked at proportions of defendants refused bail by both police and the courts between January 2012 and May 2015. For both the courts and the police data, it was found that the percentage refused bail remained relatively constant (albeit with the courts showing much higher variance) until February 2014. Both trends then exhibited a sharp drop until June 2014 then a rise until January 2015 before settling again. Weatherburn, Corben, Ramsey and Fitzgerald (2016) looked at both the number and the proportion of defendants refused bail at their first court appearance

between March 2011 and September 2015. They also reported a sharp drop then a sharp rise concluding at June 2014 and January 2015 respectively. However, neither of these sources (due to lack of available data) examined the long-term effect of the Bail Act and its amendments on bail refusal. This is the main aim of this report: what effect has the *Bail Act 2013* (NSW) and the 'show cause' amendments (collectively referred to as the intervention period) had on:

1. The number of defendants refused bail each month in NSW courts between February 2011 and May 2016.
2. The proportion of all defendants refused bail each month (over the same period).
3. The proportion of 'bail eligible' defendants (i.e. excluding defendants for whom bail was dispensed with) each month (over the same period).

The raw number of defendants bail refused was examined as this will have the most direct effect on the prison population. The two proportions were examined to help explain any changes (or lack thereof) in the number of defendants being bail refused.

Note that changes in bail refusal (both numbers and proportions) *during* the intervention period (i.e. between the commencement of the Bail Act and the commencement of the 'show cause' amendments) were not considered in this study. This is because it is clear from previous research that the Bail Act and amendments had significant immediate effects on trends in bail refusal. However, the effect of these legislative changes together on bail refusal is currently unknown, and hence is the focus of this Bureau Brief.

Trends in bail refusal

Number of defendants refused bail in all NSW courts

Figure 1 shows the number of defendants refused bail each month in NSW courts between February 2011 and May 2016. The red and blue curves show the pre- and post-intervention periods respectively, with the two vertical lines showing the start and end of the intervention period (the introduction of the Bail Act and the 'show cause' amendments respectively). The broken blue and red lines show the pre- and post-intervention trend-lines. Both intervention periods appear to show an increasing trend. The pre-intervention period rises from just fewer than 1,000 defendants in February 2011 to approximately 1,100 defendants in May 2014, showing a significant ($p < .01$)¹ increasing trend of approximately 2.95 defendants per month. The post-intervention period rises from roughly 1,200 defendants to approximately 1,340 defendants, but this increasing trend is not significant ($p = .06$). The mean number of defendants in the post-intervention period (1,264.19 defendants) is notably higher than the pre-intervention period mean (1,042.57 defendants). While we would expect to see a higher mean in the post-

Figure 1. Number of defendants refused bail at first court appearance, Feb 2011 to May 2016

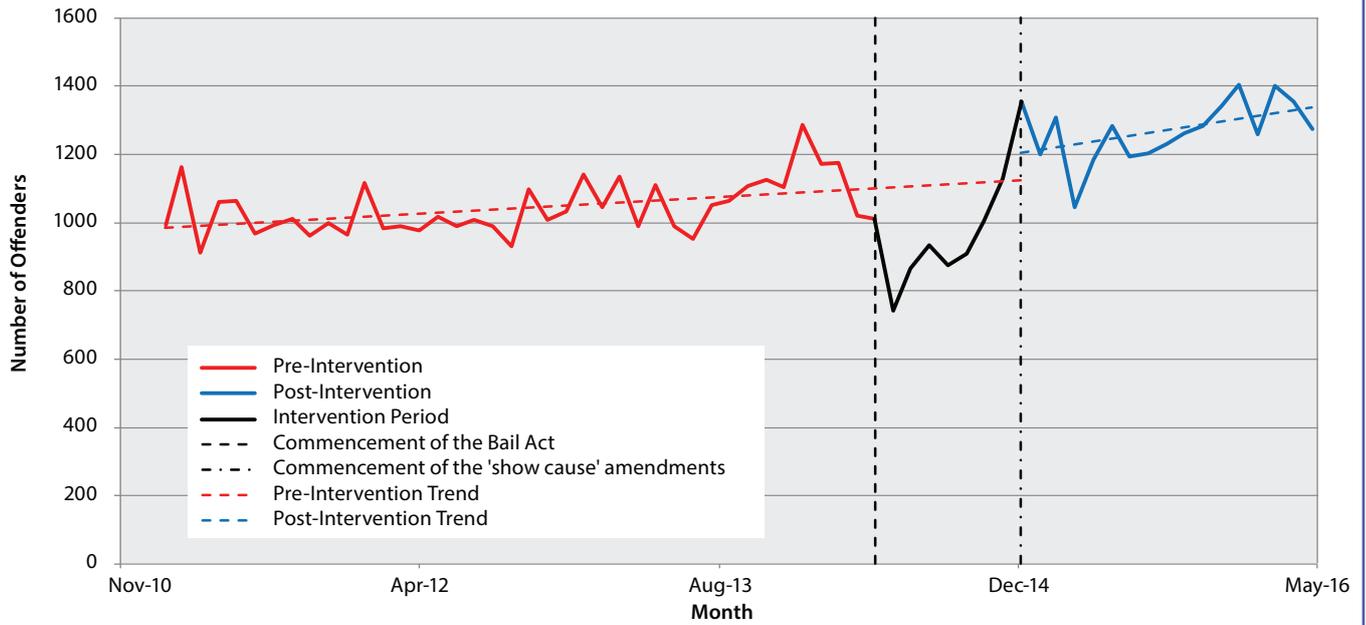
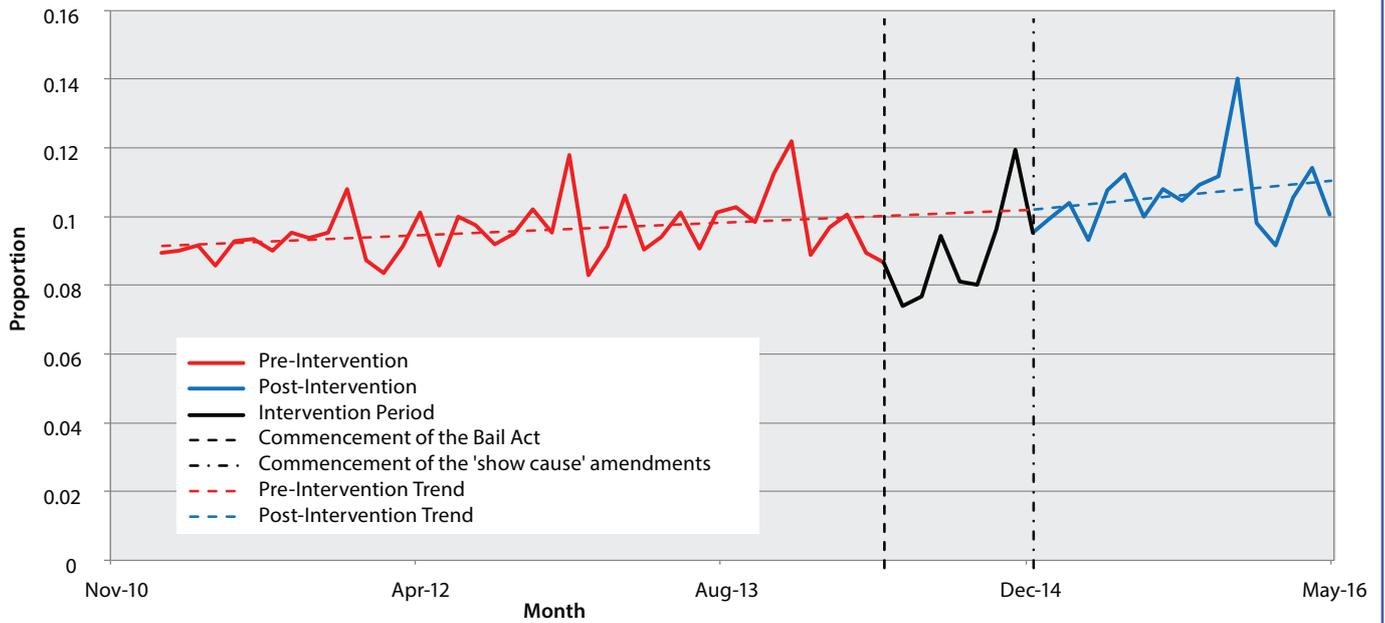


Figure 2. Proportion of all defendants refused bail at first court appearance, Feb 2011 to May 2016



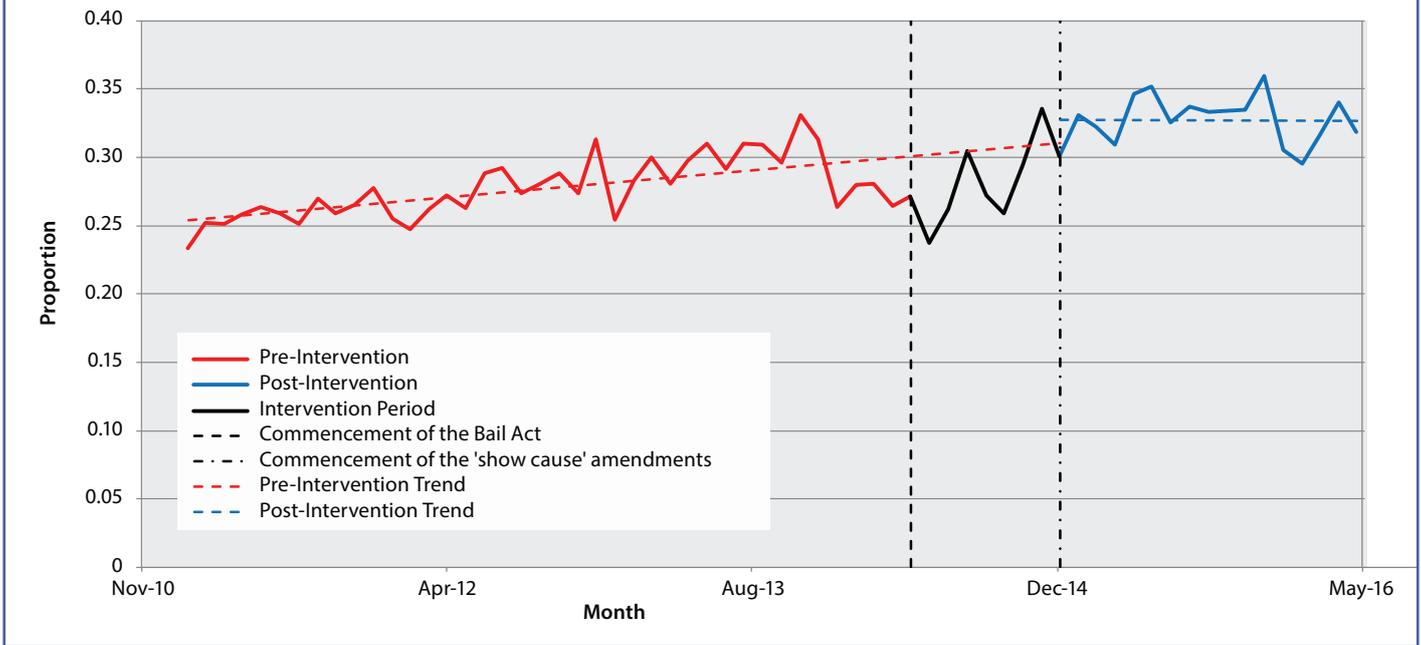
intervention period (given the increasing trend in the pre-intervention period), extending the trend-line (red dotted line) shows that the post-intervention is greater than what we would expect given the pre-intervention trend-line. This suggests that the intervention has resulted in an increase in the mean number of defendants refused bail.

Proportion of all defendants refused bail in all NSW courts

Figure 2 shows the *proportion* of all defendants refused bail each month. The red and blue curves again show the pre- and post-intervention periods respectively, with the two vertical lines showing the two interventions. Trend-lines

are again included. While there appears to be an increasing trend both pre- and post-intervention, neither trend on its own is statistically significant ($p = .06$ pre-intervention and $p = .23$ post-intervention). However, when taking both periods together, the increasing trend is significant ($p < .01$). What is notable here is that the trends seem to be very similar, and that extending the trend-line from the pre-intervention period to the post-intervention period shows that the proportion at the commencement of the post-intervention period is almost exactly at the expected level given the slight increase in the pre-intervention period. Therefore, while there is a difference in the mean proportion of defendants refused bail between the two

Figure 3. Proportion of bail eligible defendants refused bail at first court appearance, Feb 2011 to May 2016



periods (.098 pre-intervention vs. .108 post-intervention)², this is most likely due to the natural upward trend. This also seems to suggest that the effect of the intervention was to temporarily interrupt an existing rising trend, and that bail refusals returned to the expected level and rate of increase after the conclusion of the intervention period.

Proportion of 'bail eligible' defendants refused bail in all nsw courts

Figure 2 examined the proportion of *all* defendants refused bail, including defendants for whom bail was dispensed with at first instance. Changes in the number of these 'bail ineligible' defendants will have an effect on the proportion of all offenders refused bail even in the absence of a change in the number of defendants being refused or granted bail. Because of this, we also examined the proportion of *bail eligible* defendants, shown in Figure 3. The red and blue curves again show the pre- and post-intervention periods respectively, with the two vertical lines showing the intervention period. Trend-lines are again included. We can see a significant increasing trend in the proportion of bail eligible defendants being refused bail pre-intervention ($p < .01$), increasing from approximately 25% of bail eligible defendants and rising to nearly 30%. Post-intervention we see no significant trend ($p = .84$) but the proportion of bail refused defendants has clearly jumped (from a mean of .276 to .326). One aspect of the pre-intervention trend to note is the clear drop in the proportion just prior to the commencement of the Bail Act (December 2013 to April 2014). The reasons behind this drop are unclear but there are some suggestions it may have been due to a lack of police familiarity with the risk assessment procedure under the new Bail Act (Weatherburn and Fitzgerald 2015).

Summary

Previous work undertaken by BOCSAR suggests that the *Bail Act 2013* (NSW) and subsequent 'show cause' amendments had a substantial short-term impact on the number and proportion of defendants being refused bail. This Bureau Brief aimed to examine the more long-term effects of these legislative changes.

Figures 1 and 3 suggest that, prior to the intervention, both the number of bail-refused defendants and the proportion of bail-refused defendants (amongst those who were 'eligible') were increasing. In both instances, the (significantly positive) pre-intervention trend did not persist post-intervention but the mean number/proportion of bail refusals rose (to levels above those that could be explained by the trend). Figure 2 shows that the *Bail Act 2013* (NSW) and subsequent show cause amendments had no meaningful effect on either the base level or trend in the proportion of *all* defendants being refused bail. They have, however, increased the proportion of *bail eligible* defendants refused bail. The simplest explanation for this effect is that the *Bail Act 2013* (NSW) and/or subsequent show cause amendments have resulted in more cases where bail is dispensed with but where previously the defendant would have been released on bail, AND more cases where bail is refused but where defendants would have been previously granted bail. When comparing our findings to previous research, we recall that Weatherburn and colleagues (2016) found that the number of defendants being refused bail was increasing slightly over the period March 2011 to September 2015, while the proportion of defendants being refused bail was found by previous research to be either stable (Weatherburn & Fitzgerald,

2015) or rising slightly (Weatherburn and colleagues, 2016). These results are broadly consistent with the current analysis. The current analysis, however, goes beyond this earlier work by examining the longer term effects of this legislation, excluding the intervention period from the analysis, and considering bail refusals amongst a subset of defendants for whom bail was considered. It should be noted that the changes in bail could easily be the result of a change in the profile of matters coming before the courts, or a change in the subgroup of offenders for whom bail is dispensed. Further examination of bail refusal trends should account for these possibilities when determining the effect of the Bail Act and show cause amendments.

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Notes

1. Significance was calculated using Kendall's tau. This test is used for all statistical tests in this Bureau Brief. See Conover (1980) for details.
2. Means for the proportions are weighted by the total number of defendants each month.

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