

The impact of the NSW Bail Act (2013) on trends in bail and remand in New South Wales

Don Weatherburn and Jacqueline Fitzgerald

Aim: To consider trends in bail and remand prior to and immediately following the implementation of the Bail Act (2013) on 20 May 2014 and the 'show cause' amendments on 28 January 2015.

Method: Descriptive analysis of trends in police use of Bail CANs, police bail refusal, court bail refusal and the remand population.

Results: The NSW Bail Act (2013) and the 'show cause' amendments subsequently made to it have not increased the police or court bail refusal rate above the level that prevailed in the two years prior to the introduction of the Act. This is despite the bail refusal rate for persons charged with 'show cause' offences being very high. It is not known whether the 'show cause' amendments have increased the likelihood of bail refusal for offences to which they apply or whether persons charged with these offences were always highly likely to be refused bail. The level of agreement between police and courts in relation to bail refusal has increased.

Following the introduction of the NSW Bail Act 2013, there was a sharp transient fall in the percentage of defendants refused bail by police and courts. The police bail refusal rate is now around two percentage points lower than it was in 2012 and 2013. The court bail refusal rate has returned to the level that prevailed in 2012 and 2013.

The remand population is much higher now than it was prior to the introduction of the NSW Bail Act (2013). The bail reforms at this stage appear to have made little if any contribution to this increase. Instead, it would appear to be due to two factors: (a) a sharp increase in January 2015 in the number of bail breaches that resulted in bail refusal (not the proportion) and (b) an increase in the total number of people with court proceedings commenced against them between December 2014 and March 2015.

Conclusion: The NSW Bail Act (2013) (as amended) does not appear at this stage to have increased the percentage of persons refused bail or the size of the remand population. Further monitoring and analysis will be necessary to confirm this.

Keywords: Bail, remand, Bail Act (2013), Bail Court Attendance Notice, unacceptable risk, show cause offence.

Introduction

The NSW Bail Act (2013) (hereafter referred to as the 'Act') replaced a complex set of presumptions concerning bail with a single 'unacceptable risk' test. Under previous bail legislation in New South Wales (NSW), some offences carried a presumption in favour of bail, some carried a presumption against and some carried no presumption at all. There was a perceived need to simplify and improve understanding of the bail decision process (NSW Law Reform Commission 2012). Introducing the new legislation, the then Attorney General, Greg Smith QC, noted that:

"Rather than rely on presumptions, the bill requires the bail authority to consider particular risks when determining bail, namely, the risk that the accused will fail to appear, commit a serious offence, endanger the safety of individuals or the community, or interfere with witnesses." (Smith, second-reading speech, p.88)

The Bail Act (2013) sets out certain criteria that have to be taken into account when a bail authority is deciding whether a person poses an unacceptable risk. At the time of its introduction, if the bail authority reached the conclusion that the person posed an unacceptable risk, it had to consider whether that risk could

be mitigated through the imposition of certain conditions. If it could mitigate the risk, the person could be released on bail. If not, bail had to be refused (for further detail, see White 2014). The Act was assented to on 27 May 2013 and commenced operation on 20 May 2014.

Shortly after it commenced, a series of controversial bail decisions granting bail 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. 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 offences to which the 'show cause' requirement applies include those with a maximum penalty of life imprisonment and serious indictable offences involving sexual intercourse with children, repeat serious personal violence or committed while on bail or parole (see full list in Appendix). If an accused person is able to 'show cause' or if they are not charged with a show cause offence the unacceptable risk test is applied by the bail authority.

The purpose of this report is two-fold. The first is to summarise trends in bail in the period leading up to and immediately following the introduction of the new Bail Act and the amendment just referred to. The second is to discuss the effect of reforms to the Bail Act on the remand population.

The police and bail

In NSW, police have a number of options when it comes to initiating criminal proceedings against a suspected offender. Alleged offenders are brought before the NSW Criminal Courts by court attendance notice (CAN). There are four types of Police CAN, known respectively as Bail CANs, No Bail CANs, Field CANs and Future CANs.

Bail CANs are generally used where the police wish to set some bail conditions or to refuse bail entirely. This type of CAN is normally used where the offence is serious, the offender is a repeat offender or the police have concerns that the accused may not turn up at court or may interfere with witnesses or jurors. No-Bail CANs are usually issued for less serious offences and where the police do not have serious concerns about the person failing to appear

or re-offending. Field CANs are similar to No Bail CANs but are issued on the spot (like an infringement notice) without the need to go to the police station. Future CANs, previously referred to as a summons, are sent to the defendant through the mail on a later date, often several weeks after the alleged offence.

When criminal proceedings take the form of a No Bail, Field or Future CAN, bail is effectively being dispensed with. The accused does not have to sign a bail undertaking and does not have to abide by any conditions during the period leading up to the date on which they are due to appear in court. The possibility of bail refusal by police only arises when police proceed against a suspected offender using a Bail CAN. In this instance the alleged offender is arrested, taken to a police station, fingerprinted and the details of the person and all charges are recorded.

Police make an initial decision whether to remand, bail or unconditionally release a defendant in the lead up to their court date. If the police decide to remand a defendant, he/she is then brought before the court, usually within 24 hours. The court may continue or alter the defendant's bail status.

Trends in bail refusal

Figure 1 shows the monthly percentage of defendants refused bail by police. The first vertical line in this and succeeding figures indicates the point at which the Bail Act commenced operation. The second vertical line shows the point at which the 'show cause' amendment commenced operation.

The percentage refused bail by police hovered between 18 and 20 per cent through 2012 and 2013. From February 2014 it fell very sharply in the lead up to and following the commencement of the Bail Act, reaching a low of 12.5 per cent in June. It then rose and since the show cause amendment has stabilised at around 16 per cent. This is around two percentage points lower than the rate of police bail refusal that prevailed throughout 2012 and 2013. The commencement of the new Bail Act, therefore, does not appear to have increased the rate of police bail refusal. If anything, it has reduced it. There is no indication that the 'show cause' amendment increased the overall rate of police bail refusal above the level that prevailed in 2012 and 2013. At this stage, however, the number of

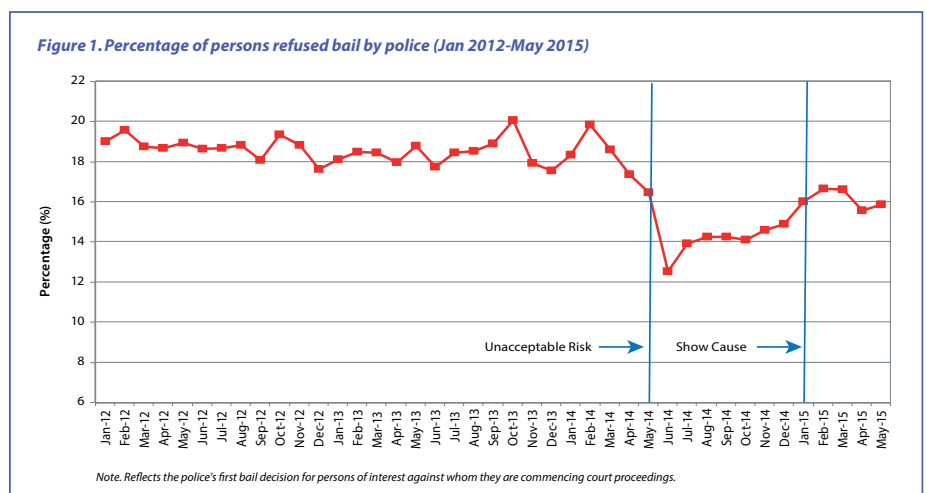


Figure 2. Number of Bail CANs and percentage refused bail by police (Jan 2012-May 2015)

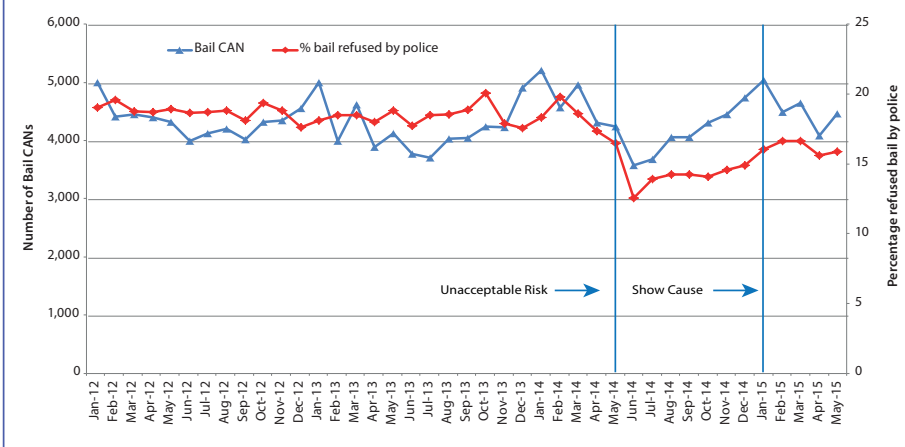
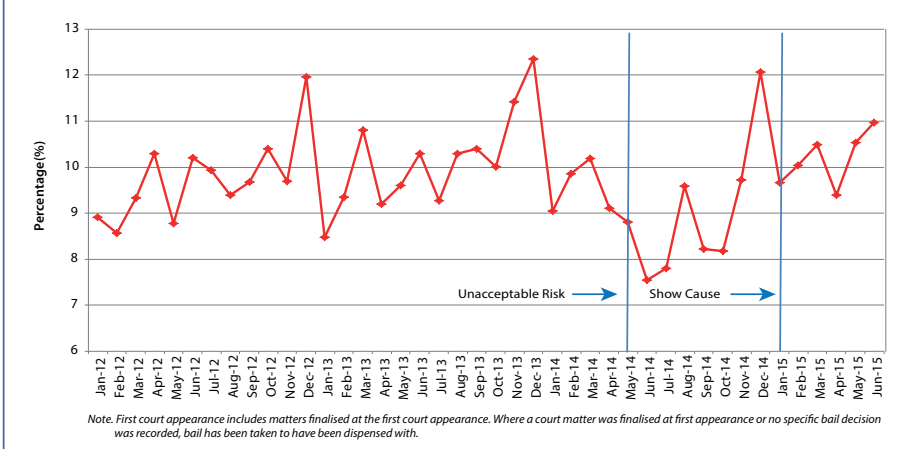
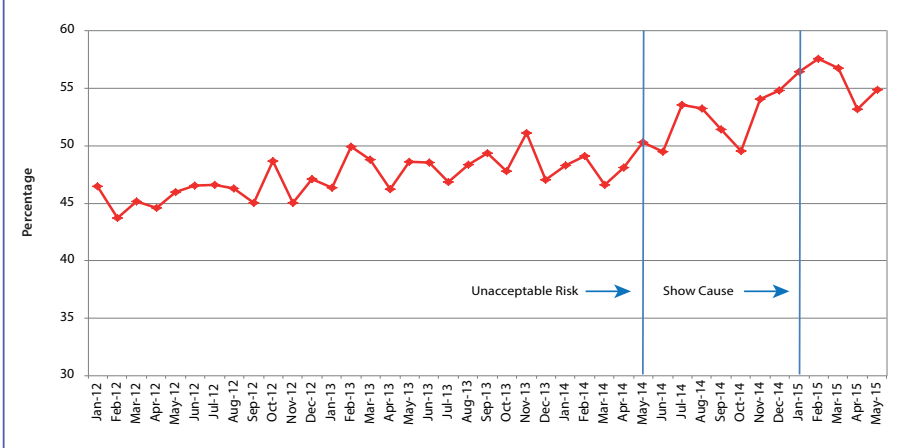


Figure 3. Percentage of persons refused bail at first court appearance (court decision) (Jan 2012-June 2015)



Note. First court appearance includes matters finalised at the first court appearance. Where a court matter was finalised at first appearance or no specific bail decision was recorded, bail has been taken to have been dispensed with.

Figure 4. Percentage of persons initially refused bail by police who are also refused bail by the court (Jan 2012-May 2015)



observations following the amendment is quite small. It will be some time before we can fully gauge the impact of the 'show cause' amendments to the Bail Act.

Figure 2 shows both the percentage refused bail by police (red line) and the number of Bail CANs issued by police (blue line). The sharp dip and subsequent increase in the percentage of people refused bail by police is reflected in the number of Bail CANs issued by police. This suggests that the fall in the percentage of defendants refused bail following the introduction of the Bail Act was not due to anything inherent

in the Act but to a transient change in the method by which police chose to proceed against offenders.

Figure 3 shows the percentage of persons refused bail by the courts at their first court appearance. Apart from peaks each December (when the courts go into recess) the series is fairly stable up until the point where the Act commences at which point there is an uncharacteristic fall in court bail refusal rates (i.e. in June and July 2014). As was the pattern with the percentage of defendants refused bail by police, the percentage refused bail by the courts recovers after that. At this stage it appears the court bail refusal rate has returned to the level that prevailed throughout 2012 and 2013. There is certainly no indication that the Bail Act or the show cause amendment increased the tendency of the courts to refuse bail beyond historic levels.

Consistency in bail decision making

The fact that courts often grant bail where police have initially refused it and that police are now refusing bail less frequently raises the question of whether the level of agreement between police and court bail decisions has increased. The evidence on this can be seen in Figure 4, which shows the court bail decision in respect to defendants who were initially refused bail by police.

The level of agreement between police and courts in bail decisions has been steadily increasing and appears to have accelerated in the wake of the Bail Act. In the 12 months between June 2013 and May 2014 (when the Bail Act commenced), courts on average refused bail to 48.5 per cent of those refused bail by police. In the following 12 months (between June 2014 and May 2015), that figure had risen to an average of 53.7 per cent.

The trend in remand

Figure 5 shows the trend in the number of prisoners on remand in NSW before and after the commencement of the Bail Act. As usual, the points at which the new Bail Act and the 'show cause' amendments commenced are indicated by the vertical lines.

There are two noteworthy features of Figure 5. The first is that spikes in the remand population appear in January every year but these spikes have been becoming progressively larger and more protracted in recent years. The 26 per cent spike in the remand population between the week ending on 21 December

2014 and the week ending 1 March 2015, for example, compares with a 20 per cent spike over the period between 22 December 2013 to 2 March 2014 and a 13 per cent spike over the period between 23 December 2012 and 3 March 2013. In 2012 and in 2013 the remand population began to stabilise from February onwards but in 2015, the seasonal spike in remand continued to increase up to July. The second feature is that, although the percentage refused bail by police and courts began an irregular upward trend between July and October 2014 (see Figures 1 and 3); the remand population did not begin its sharp increase until December 2014.

The fact that the remand population did not rise in tandem with the percentage of people refused bail by police and courts between June 2014 and January 2015 suggests that the growth in the remand population had little to do with changes in police or court bail decisions. This conclusion is strengthened by the observation that, since the commencement of the Act, police and court bail refusal rates have stabilised at a level either comparable to (courts) or below (police) the levels that prevailed prior to the new Bail Act, whereas the same is certainly not true of the remand population. Nor does it appear that the 'show cause' amendments contributed to the growth in remand. The number of prisoners on remand certainly increased after commencement of the 'show cause' amendments. Inspection of Figure 5, however, makes it clear that this increase began before the amendments. In fact the remand population rose by 19 per cent in the five weeks between the week ending on 21 December 2014 and the week ending 25 January 2015. As noted earlier, the 'show cause' amendments did not come into effect until 28 January 2015.

There is other evidence that counts against the hypothesis that the 'show cause' amendments contributed to the remand population. Figure 6, below, shows the trend in the percentage of defendants refused bail at first court appearance for homicide and related offences. Sixty-seven per cent of these offences fall into the 'show cause' category. The data following the 'show cause' amendment are sparse but there does not appear to have been any increase, beyond historic levels, in the percentage refused bail following the introduction of the 'show cause' amendments.

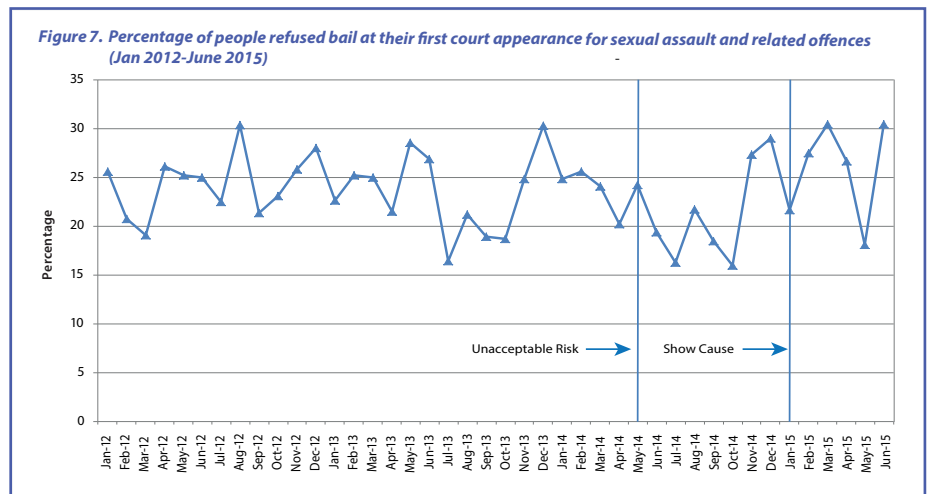
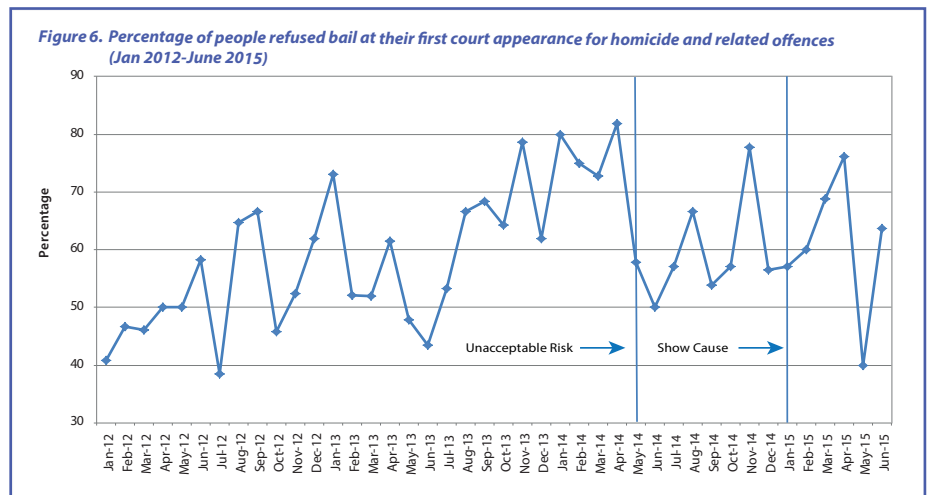
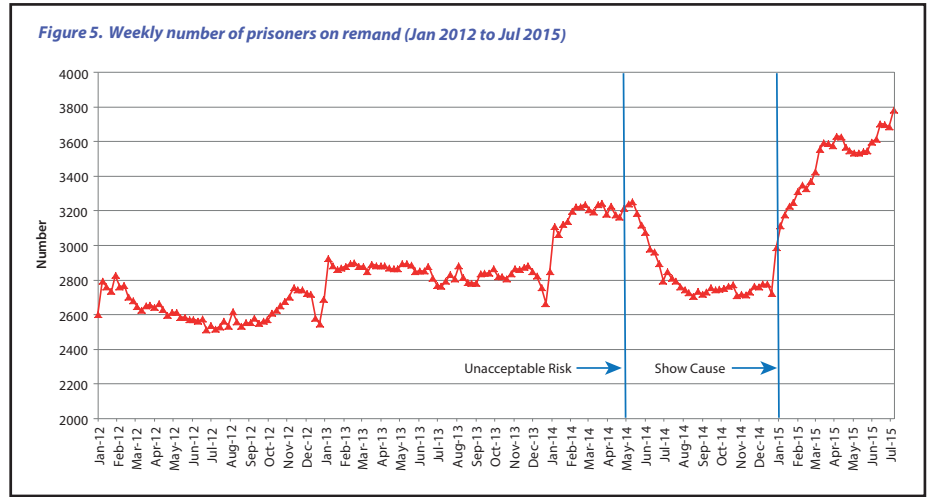
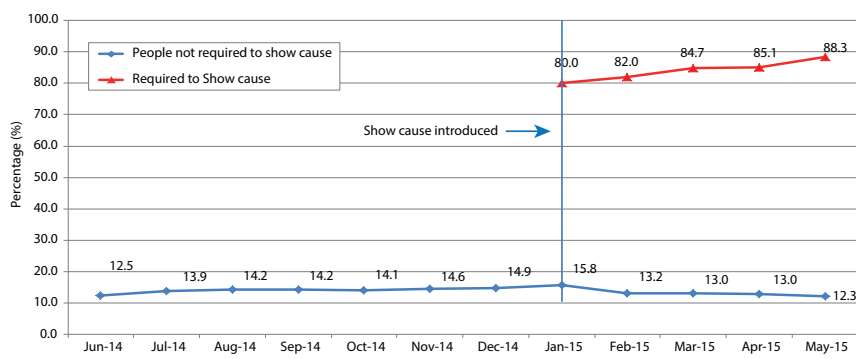


Figure 7 shows the same trend for sexual assault and related offences. Twenty per cent of these offences fall into the 'show cause' category. Once again, there is no indication that rates of bail refusal were higher after the introduction of the 'show cause' amendments than prior to the Bail Act.

Incidentally, Figures 6 and 7 should not be interpreted as indicating that persons charged with 'show cause' offences are just as likely to be refused bail as those who do not have to show cause. In fact, as can be seen from Figure 8 there are

Figure 8. Police bail refusal rate for persons required to 'show cause' and all other persons (Jun 2014 - May 2015)



Notes. This figure reflects the Show cause categorisation made by police (not courts). Prior to January 2015 'Show cause' did not exist so throughout 2014 no one was required to show cause and at that time the series 'people not required' to show cause includes all people.

Other influences on the remand population

If the remand population has risen for reasons other than an increase in the rate of bail refusal by police and courts, we are left with the question of why. Two factors stand out as potential causes. The first is an increase in people being remanded having breached their bail. Bail breaches could contribute to the remand population by either an increased volume of bail breaches coming to court or an increase in the proportion of bail breaches resulting in bail revocation. Figure 9 shows evidence for the former². As can be seen from Figure 9, the number of bail breaches resulting in bail refusal increased steadily between June 2014 and December 2014 but spiked at 374 in January 2015 (see Figure 9) before stabilising at the high rate of between 250 and 300 a month. In contrast the proportion of bail breaches resulting in bail refusal has remained constant at around 35 per cent.

The second factor is a growth in the total number of people with court proceedings commenced against them between December and March over the last four years (see Figure 10).

Summary

There are three key findings in this report. The first is that the NSW Bail Act (2013) and the 'show cause' amendments subsequently made to it have not increased either the police or (more importantly) first court bail refusal above the level that prevailed in the two years prior to the introduction of the Act. Indeed, at present, the police bail refusal rate is somewhat lower than it was in 2012 and 2013. Following the introduction of the NSW Bail Act, there was a sharp *transient* fall in the percentage of defendants refused bail by police and

courts. The cause of this fall is not known for certain but senior police spoken to by the first author suggested that it may have been the result of a lack of police familiarity with the risk assessment procedure under the new Act. This would explain why police use of Bail CANs temporarily declined following the introduction of the Act.

The second key finding is that the level of agreement between police and courts in relation to bail refusal has increased. In the 12 months between June 2013 and May 2014 (when the Bail Act commenced), courts on average refused bail to 48.5 per

Figure 9. Number and percentage of Bail breaches established in the Local Court which result in bail refusal (Jun 2014 to Jun 2015)

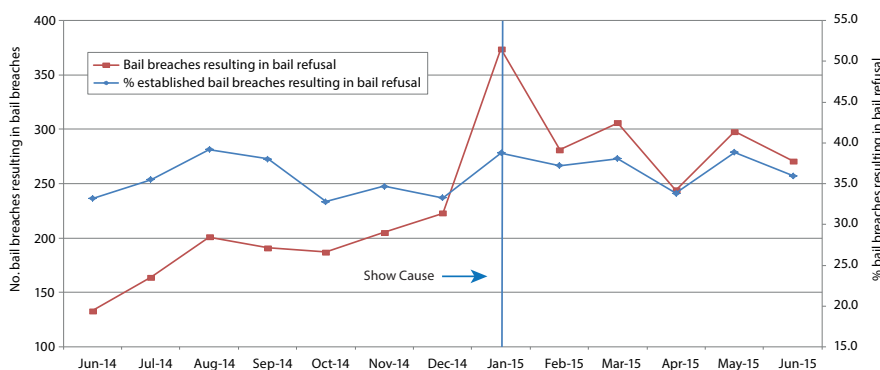
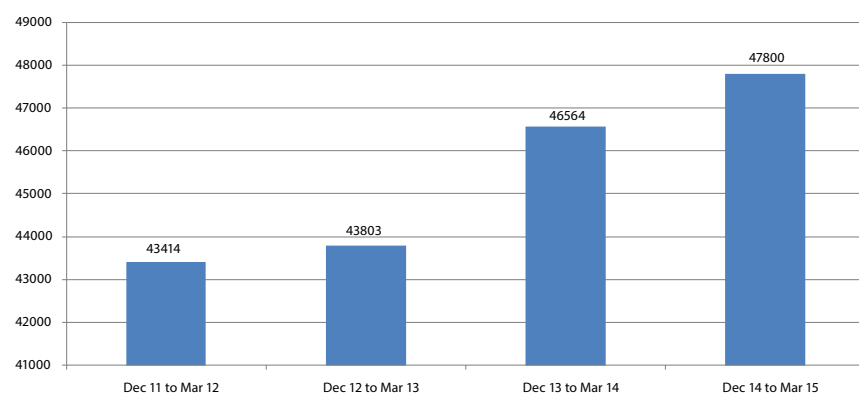


Figure 10. Number of first court appearances between December and March over the past four years



substantial differences in the risk of bail refusal for persons required to 'show cause' versus other people brought to court¹. It should be noted that only around five per cent of people charged are required to show cause, so while the bail refusal rate for this group is extremely high its influence on the overall bail refusal rate is limited. Whether the 'show cause' amendments have increased the likelihood of bail refusal for offences to which they apply or whether persons charged with these offences were always highly likely to be refused bail is unclear at this stage.

cent of those refused bail by police. In the following 12 months (between June 2014 and May 2015); that figure had risen to an average of 53.7 per cent. The third finding is that, although the remand population has increased significantly from December 2014 onwards, the lack of any long lasting increase in bail refusal rates (above historical levels) suggests that Bail Act reforms appear to have made little if any contribution to this increase. Instead, it would appear to be due to two factors: (a) sharp increase in January 2015 in the number of bail breaches that resulted in bail refusal (not the proportion) and (b) an increase in the total number of people with court proceedings commenced against them between December and March.

There is one key caveat surrounding the findings in this report. The rate of bail refusal is strongly influenced by the offence profile, prior criminal history and subjective particulars of defendants coming before the courts. Except in relation to Figures 6 and 7, the analysis presented here implicitly assumes that this profile and these particulars have remained relatively constant over the relatively short follow-up period covered by the report. This may be a reasonable assumption over the short term but over the longer term any analysis of changes in the rate of bail refusal before and after the Bail Act (2013) (as amended) will need to introduce explicit controls for changes in the offence and offender profile coming before the courts.

Notes

1. Note that prior to January 2015 'show cause' did not exist so throughout 2014 everyone falls in the 'not required to show cause' category.
2. Note, data on bail breaches established in the Local Court is not available prior to the implementation of the Bail Act (2013).

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Appendix

The offences to which the 'show cause' requirement applies are detailed in section 16B of the NSW Bail Act (2014) which is reproduced below:

- (1) For the purposes of this Act, each of the following offences is a "show cause offence":
 - (a) an offence that is punishable by imprisonment for life,
 - (b) a serious indictable offence that involves:
 - (i) sexual intercourse with a person under the age of 16 years by a person who is of or above the age of 18 years, or
 - (ii) the infliction of actual bodily harm with intent to have sexual intercourse with a person under the age of 16 years by a person who is of or above the age of 18 years,
 - (c) a serious personal violence offence, or an offence involving wounding or the infliction of grievous bodily harm, if the accused person has previously been convicted of a serious personal violence offence,
 - (d) any of the following offences:
 - (i) a serious indictable offence under Part 3 or 3A of the Crimes Act 1900 or under the Firearms Act 1996 that involves the use of a firearm,
 - (ii) an indictable offence that involves the unlawful possession of a pistol or prohibited firearm in a public place,
 - (iii) a serious indictable offence under the Firearms Act that involves acquiring, supplying or manufacturing a pistol or prohibited firearm,
 - (e) any of the following offences:
 - (i) a serious indictable offence under Part 3 or 3A of the Crimes Act 1900 or under the Weapons Prohibition Act 1998 that involves the use of a military-style weapon,
 - (ii) an indictable offence that involves the unlawful possession of a military-style weapon,
 - (iii) a serious indictable offence under the Weapons Prohibition Act 1998 that involves buying, selling or manufacturing a military-style weapon or selling, on 3 or more separate occasions, any prohibited weapon,
 - (f) an offence under the Drug Misuse and Trafficking Act 1985 that involves the cultivation, supply, possession, manufacture or production of a commercial quantity of a prohibited drug or prohibited plant within the meaning of that Act,

- (g) an offence under Part 9.1 of the Criminal Code set out in the Schedule to the Criminal Code Act 1995 of the Commonwealth that involves the possession, trafficking, cultivation, sale, manufacture, importation, exportation or supply of a commercial quantity of a serious drug within the meaning of that Code,
- (h) a serious indictable offence that is committed by an accused person:
- (i) while on bail, or
 - (ii) while on parole,
 - (i) an indictable offence, or an offence of failing to comply with a supervision order, committed by an accused person while subject to a supervision order,
- (j) a serious indictable offence of attempting to commit an offence mentioned elsewhere in this section,
- (k) a serious indictable offence (however described) of assisting, aiding, abetting, counselling, procuring, soliciting, being an accessory to, encouraging, inciting or conspiring to commit an offence mentioned elsewhere in this section.
- (2) In this section, a reference to the facts or circumstances of an offence includes a reference to the alleged facts or circumstances of an offence.

(3) In this section:

“firearm”

“prohibited firearm”

“pistol”

“use”

“acquire”

“supply”

“possession” of a firearm, have the same meanings as in the Firearms Act 1996

“prohibited weapon”

“military-style weapon”

“use”

“buy”

“sell”

“manufacture”

“possession” of a prohibited weapon, have the same meanings as in the Weapons Prohibition Act 1998.

“serious indictable offence” has the same meaning as in the Crimes Act 1900.

“serious personal violence offence” means an offence under Part 3 of the Crimes Act 1900 that is punishable by imprisonment for a term of 14 years or more.

“supervision order” means an extended supervision order or an interim supervision order under the Crimes (High Risk Offenders) Act 2006.