



## The New South Wales Public Defenders

By Dina Yehia SC

On 18 May 1967 an article featured in the *Sydney Morning Herald* about the New South Wales Public Defenders Office. In reporting on the increase in demand for legal aid the journalist wrote:

The sharp increase in the demand for legal aid in criminal cases during the last 18 months arises primarily from a spectacular run of acquittals and good behaviour bonds for those represented by the persuasive Public Defenders, but it is also partly due to the increase in crime and the cost of engaging private counsel.

A solicitor with a large criminal practice recently told a client with limited finance: 'apply for the public defender. He gets them off – and it's free!' Similar advice is being echoed along the corridors of Long Bay gaol.

The Public Defenders Office started in 1941. The first public defender to be appointed was Gordon Champion who sadly passed away as a result of a heart attack on his way to Darlinghurst Court. By 1967 there were three public defenders (all male). The legal aid first day fee was \$36, \$38 for murder, manslaughter and rape.

Some things have changed over the 42 years since 1967. We now have 25 public defenders, seven of whom are women. The remuneration has improved considerably.

But, in other respects, things have not changed at all. In 1967 public defender Mr Vizzard QC appeared for a notorious child kidnapper and murderer, Stephen Leslie Bradley. It was reported in the *Sydney Morning Herald* that Vizzard QC, next to Bradley, seemed to be the most hated man in Sydney.

Public defenders continue to be briefed in serious criminal trials both in the District and Supreme courts. They continue to appear for some of the most unpopular clients facing criminal prosecution.

Together with counsel at the private bar conducting serious criminal trials, the work of public defenders is intense and the responsibility great.

Of the 25 public defenders a number are based in regional centres such as Newcastle, Lismore, Dubbo and Wollongong. We are briefed by the Legal Aid Commission, the Aboriginal Legal Service, community legal services and private solicitors with a grant of legal aid.

While most of our work involves the cut and thrust of

trial practice, a significant proportion (28 per cent) involves appellate work in the Court of Criminal Appeal and High Court.

An important function of the public defenders is to provide a mentoring and educational role for young practitioners. We provide an important resource by way of telephone advice to practitioners (over 637 in 2009–2010) and brief written advice to the profession on legal, ethical and practice issues.

The public defenders website is also a resource for the profession, students and the general public. It provides sentencing tables, papers relating to a variety of legal topics and features the John Stratton 'Criminal Law Survival Kit'. The website received over 363,000 hits in 2009–2010.

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One of the functions of the public defenders under the Public Defender Act is the provision of advice to the attorney general and others on law reform. We make submissions on criminal law reform at the request of the NSW and Australian Law Reform Commissions, Criminal Law Review and parliamentary committees of inquiry.

### Changes in the law

Those of us who practise in the field of criminal law (both public and private counsel) have seen a number of changes in the criminal justice system over the last couple of decades. Some of these changes are a cause of concern. There has been a significant increase in the New South Wales prison population in the last decade and an apparent lack of vision and commitment with respect to how we deal more effectively with those processed through the system.

A number of factors may contribute to increased imprisonment rates. A higher crime rate and more effective law enforcement may mean more people are committing crime and more arrests and convictions than ever before. However, these are not the only factors. Indeed, a review of the crime statistics in the

24 months leading up to December 2010 reveals that among 17 major offence categories, the picture is one of stable or falling crime. Ten of the 17 major offence categories are stable and seven are trending downwards.<sup>1</sup>

While there is evidence of an upward trend in offences relating to the possession and trafficking of drugs, overall the director of the Bureau of Crime Statistics and Research (BOSCAR), Dr Weatherburn, is of the opinion that there is a general pattern of stable or falling crime rates.

Two factors that undeniably contribute to the increase in the rate of imprisonment in New South Wales are changes to the law in the areas of bail and sentencing.

In a 2010 Report, BOSCAR found that the NSW imprisonment rate is about twice that of Victoria.<sup>2</sup> Adjusted for population size, the per capita rate at which NSW sends convicted offenders to prison (204 per 100,000 population) is twice that of Victoria (104 per 100,000 population) This fact, and the higher remand rate in NSW are the main reasons for the higher prison population.

In 2009 Victoria had 813 adult defendants in prison on remand, giving it a remand rate of 19.3 per 100,000 population. By contrast, in the same year NSW had 2,592 defendants on remand, giving it a remand rate of 47.3 per 100,000 population. The higher NSW remand rate is due to higher bail refusal rate and higher bail revocation rate.

### Bail

The fundamental purpose of the Bail Act is to permit release from custody of persons arrested and charged with an offence, but to provide for holding persons on remand on limited grounds. The right to liberty prior to conviction is not a lofty idea but a fundamental right. It is a function of the presumption of innocence.

However, the percentage of prisoners on remand has been trending upwards for some time with 25 per cent of New South Wales prisoners held on remand. Alarmingly, the proportion of juveniles held on remand is even higher. An increasing number of children and young people in NSW are being held on remand in the state's juvenile detention centres. In 2006, 3,623



Photo: iStockphoto.com

children and young people were admitted into custody on remand and by 2008 this figure had increased to 5,081 (NSW Auditor General 2008)<sup>3</sup>.

Only one in seven, or 16 per cent of children and young people on remand will go on to receive a custodial sentence. In NSW 38.8 per cent of all children and young people on remand are Aboriginal or Torres Strait

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Islander. These statistics raise serious concerns about the operation and application of the Bail Act.

Considering that only 16 per cent of children on remand go on to receive a custodial sentence, a large number of children and young people are being unnecessarily exposed to an environment that can have a detrimental effect on their future and, arguably compounds, rather than alleviates recidivism rates.

A brief review of the various amendments to the Bail Act quickly highlights the more restrictive approach taken to bail since the Bail Act was enacted in NSW in 1978. When the Bail Act was enacted it created a presumption in favour of bail for all offences except violent or armed robbery. Although the 1976 *Report of the Bail Review Committee* had recommended a presumption in favour of bail for all offences punishable by imprisonment, the NSW government introduced the exceptions in response to public response to the shooting of a bank manager during an armed robbery by a person already on bail.

In 1986 an amendment to the Bail Act removed the presumption in favour of bail in relation to some serious drug offences. In the 25 years since then, 18 other amending Acts have removed the presumption in favour of bail for a number of offences.

In 2002 and 2003, the New South Wales Government introduced amendments to remove the presumption in favour of bail in relation to different types of 'repeat offenders', including 'repeat property offenders'. Further amendments in 2003, introduced the requirement that bail only be granted in exceptional circumstances if an accused is charged with murder, or charged with a 'serious personal violence offence'.

In practical terms the introduction of the 'exceptional circumstances' category means that numerous accused charged with murder are remanded for lengthy periods before they face trial. Where there is an acquittal at trial, there is little recourse by an individual to be compensated for the months or years spent on remand.

*Between 1993 and 2007, higher courts and local courts appear to have become more severe in the sentencing of convicted offenders.*

In 2007 the Bail Act was again amended with the introduction of section 22A. Under this amendment, accused persons can only make one application for bail except under certain limited circumstances. A recent report by BOSCAR demonstrates that this amendment has increased the numbers of remandees, as children and young people are remaining in custody for longer periods unable to reapply for bail.<sup>4</sup>

The current bail laws fail 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 attends court and does not interfere with witnesses or commit other offences.

This failure can only be addressed by a comprehensive review of the Bail Act with particular focus on the abolition of the presumptions against bail and the repeal of s 22A.

### **Sentencing**

Another factor that has contributed to the increase in the rate of imprisonment in New South Wales is the increased use of imprisonment as a sanction and the increase length of prison sentences. Between 1993 and 2007, higher courts and local courts appear to have become more severe in the sentencing of convicted offenders. The increase in both the imposition of gaol sentences and the length of those sentences has contributed to the 50.3 per cent increase in the NSW prison population over the same period.

*Sentencing in New South Wales courts is an issue of major public interest. Unfortunately, the media often portrays NSW courts as being increasingly lenient. The evidence, of course, suggests otherwise.*

Of particular concern are the appalling figures of Indigenous people in custody. Indigenous people make up 21.3 per cent of the NSW prison population (of a total 2.1 per cent of the general population). The imprisonment rate of Indigenous Australians is more than 13 times higher than the imprisonment rate of non-Indigenous Australians. Indigenous males account for 20.8 per cent of full time male prisoners and indigenous females 27.6 per cent of the full time female prison population.<sup>5</sup>

Sentencing in New South Wales courts is an issue of major public interest. Unfortunately, the media often portrays NSW courts as being increasingly lenient. The evidence, of course, suggests otherwise. The following tables display the increase in the imposition and length of prison sentences in NSW local courts between 1993 and 2007:<sup>6</sup>

**Table 5. Percentage of convicted offenders imprisoned, by principal offence, NSW local courts, 1993 to 2007**

	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	Trend
Assault	7.5	8.1	9.1	8.0	7.9	8.9	8.8	7.8	8.4	9.1	10.0	10.1	10.4	11.5	10.8	Upward**
Sexual assault & related offences	15.7	13.6	15.1	17.1	14.6	12.7	15.2	16.1	24.6	21.8	21.7	30.7	27.1	24.0	24.3	Upward*
Robbery	75.0	58.3	27.0	40.5	40.9	47.9	49.1	25.8	45.7	40.7	45.7	50.0	51.4	44.3	45.3	Stable
Break & enter	33.7	33.9	36.9	39.3	40.2	42.8	44.4	41.1	44.6	44.7	46.1	48.5	49.7	48.8	48.5	Upward**
Theft (except motor vehicles)	8.0	8.1	8.0	8.5	9.0	10.9	11.7	11.8	11.4	11.5	10.7	12.9	12.6	12.5	12.4	Upward**
Motor vehicle theft & related offences	31.9	31.8	33.6	33.3	39.6	33.6	34.8	33.7	39.9	38.5	38.5	40.3	42.2	42.0	39.5	Upward**
Fraud & related offences	8.8	9.2	9.7	7.9	7.9	11.2	10.2	9.8	8.7	9.0	9.0	9.3	10.2	8.1	9.4	Stable
Deal, traffic or cultivate illicit drugs	8.5	7.9	9.8	9.8	10.7	9.2	11.4	10.2	14.8	13.4	13.5	12.2	14.7	14.3	13.3	Upward*
Property damage	2.9	2.7	3.0	3.5	3.6	3.5	4.1	3.7	4.4	4.4	4.4	4.7	4.9	4.5	5.1	Upward**
High range PCA	2.5	2.8	3.3	2.2	2.6	2.9	2.6	2.3	2.2	2.8	2.9	3.9	4.3	5.0	5.1	Upward*
Breach of domestic violence order	13.2	13.9	14.0	10.6	11.1	11.5	12.1	11.0	9.9	10.9	10.0	12.3	12.4	13.0	16.0	Stable

\* Statistically significant at < .05

\*\* Statistically significant at < .001

**Table 6: Average length of prison sentence (months) imposed against convicted persons, by principal offence, NSW local courts, 1993 to 2007**

	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	Trend
Assault	4.5	4.2	4.3	4.3	4.3	4.6	4.4	4.8	5.0	5.0	5.6	6.0	6.2	6.2	6.2	Upward**
Sexual assault & related offences	6.6	5.1	6.8	5.3	7.2	6.7	5.9	8.6	6.9	6.3	7.3	7.6	7.1	7.6	7.1	Upward*
Robbery	8.4	8.4	7.1	6.3	6.6	8.0	8.1	5.4	6.3	7.7	7.2	6.9	8.4	7.1	7.6	Stable
Break & enter	8.0	7.9	7.7	7.4	7.7	7.6	7.5	7.4	7.5	8.2	8.4	8.6	8.7	8.9	8.5	Upward*
Theft (except motor vehicles)	4.2	4.4	3.8	4.1	4.2	4.2	4.0	4.0	4.2	4.5	4.8	5.0	4.9	5.0	4.8	Upward*
Motor vehicle theft & related offences	7.2	7.1	7.3	6.6	6.7	6.7	6.1	6.3	6.2	6.9	7.0	7.0	7.6	7.8	6.8	Stable
Fraud & related offences	5.0	5.1	5.2	5.3	5.2	5.1	5.2	5.4	5.2	5.9	5.7	6.3	6.1	6.1	6.2	Upward**
Deal, traffic or cultivate illicit drugs	4.9	5.3	5.4	5.1	5.9	6.1	6.6	6.1	6.7	7.2	7.6	7.6	6.9	7.2	6.7	Upward**
Property damage	2.9	2.8	3.1	3.2	3.2	3.1	3.7	3.5	3.7	3.9	4.0	3.5	3.6	4.2	3.9	Upward**
High range PCA	4.5	4.1	4.7	4.5	4.6	5.1	5.5	5.4	5.4	5.9	6.5	6.3	6.9	7.1	7.0	Upward**
Breach of domestic violence order	2.1	2.7	2.7	2.6	2.8	2.8	3.2	3.4	3.4	4.1	4.5	4.6	4.4	4.7	4.5	Upward**

\* Statistically significant at < .05

\*\* Statistically significant at < .001

There have been several major sentencing reforms that may have impacted upon the sentencing trends, most notably the introduction of the *Crimes (Standard Minimum Sentencing) Act 2002* (NSW). No doubt some of these reforms have been motivated by demands from some segments of the community for heavier sentences.

A study conducted by the Judicial Commission of NSW considered the effects of Division 1A of the *Crimes (Sentencing Procedure) Act 1999* (standard non-parole periods) on the duration of full-time imprisonment. Only three of the offences in the table to Division 1A had sufficient numbers to warrant a comparison between the sentences in the pre and post-periods that was statistically significant. The study found that both the length of the non-parole period and the full terms of sentences increased for these offences.<sup>7</sup>

The largest increase occurred for the offence of wounding with intent to do grievous bodily harm. The term of sentence increased by 60 per cent with the median non-parole period more than doubling.

For sexual assault (s61 of the Crimes Act) the median full term increased by 28.6 per cent with the median non-parole period increasing by 60 per cent.

For murder, the median full term increased by 27.8 per cent with the median non-parole period increasing by 17.9 per cent.

There is little, if any, evidence that increase in prison sentences reduces the rate of crime in the community. If the primary purpose of increases in imprisonment is to fulfil principles of retribution and denunciation, we have to ask ourselves at what cost?

The financial cost to the community of locking people up has become obscene. It costs more than \$200 a day to keep an offender in custody. In 2008, net recurrent and capital expenditure on prisons in Australia exceeded \$2.6 billion per annum.<sup>8</sup> One ponders the real achievements that could be made if even a modest percentage of this outlay was re-directed to rehabilitative initiatives such as post release programs.

The social cost of an increasingly punitive society is much harder to quantify. Minds will differ as to whether harsher custodial penalties really address the fears and concerns of the community. Interestingly, a jury survey conducted in Tasmania between September

2007 and October 2009 revealed that 52 per cent of jurors surveyed chose more lenient sentences than the sentencing judge had imposed and only 44 per cent were more severe than the judge. The study surveyed 698 jurors from 138 trials.<sup>9</sup>

The study provides some evidence that a better-informed public could have an impact upon community perception that sentences are too lenient. The results suggested that modest improvements in knowledge levels could be gained by providing better information and potentially change attitudes.

Politicians should not be afraid to conduct a comprehensive review of bail and sentencing laws in this state. The concern that politicians are judged poorly if perceived to be 'soft on crime' can only be properly redressed by putting in place mechanisms that ensure a well-informed community. Some initiatives have already been taken in that direction. Publishing sentencing judgments is one such initiative but more needs to be done by way of community education and by correcting the inaccurate and emotive scaremongering that emanates from some talkback radio.

True reform in the area of bail and sentencing will require resolve, courage and rational debate. In the meantime offenders are being imprisoned at a higher rate and to longer sentences. These increases place a heavy burden on the state's resources including on the Public Defenders Office.

### Endnotes

1. 'NSW Recorded Crime Statistics 2010' NSW Bureau of Crime and Statistics and Research, 19 April 2011.
2. 'Why Does NSW have a Higher Imprisonment Rate Than Victoria?' BOSCAR 2010.
3. 'Releasing the Pressure on Remand', Youth and Justice Coalition's Bail Me Out Young Offenders and Bail Report, September 2009.
4. BOSCAR: Vignaendra et al (2009).
5. Corben S (2010) NSW Inmate Census, Sydney: Corrective Service NSW.
6. 'Trend in Bail and Sentencing Outcomes in NSW Criminal Courts: 1993-2007', Lulham et al BOSCAR November 2008.
7. 'The impact of standard non-parole period sentencing scheme on sentencing patterns in NSW', Judicial Commission of NSW May 2010, p.57.
8. 'Prison populations and correctional outlays: The effect of reducing re-imprisonment', Weatherburn et al BOSCAR, December 2009.
9. 'Public judgment on sentencing: Final results from the Tasmanian Jury Sentencing Study', Warner et al, *Australian Institute of Criminology*, No 407 February 2011.