



Tasmanian Council of Social Service Inc.

TasCOSS Submission on the *Bail Bill 2021*

March 2021



**INTEGRITY
COMPASSION
INFLUENCE**

About TasCOSS

TasCOSS's vision is for one Tasmania, free of poverty and inequality where everyone has the same opportunity. Our mission is two-fold: to act as the peak body for the community services industry in Tasmania; and to challenge and change the systems, attitudes and behaviours that create poverty, inequality and exclusion.

Our membership includes individuals and organisations active in the provision of community services to Tasmanians on low incomes or living in vulnerable circumstances. TasCOSS represents the interests of our members and their service users to government, regulators, the media and the public. Through our advocacy and policy development, we draw attention to the causes of poverty and disadvantage, and promote the adoption of effective solutions to address these issues.

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Introduction

Thank you for the opportunity to make a submission on the *Bail Bill 2021* (“the Bill”). Our submission is based on the views of our members, which include both services which work with victims of crime and those that work with those accused of crimes, as well as evidence-based research on effective approaches to issues of crime and justice.

TasCOSS made a submission to the Reforms to the Tasmanian Bail System Position Paper in 2018.¹ In that submission we focused on a particular issue put forward in the paper, the presumption against bail. Despite the strong objections of TasCOSS and other stakeholders, the current Bill incorporates the presumption against bail proposed in the Position Paper.² Rather than reiterate our concerns at length, we attach that submission. Its main points were that:

- the proposals embody a significant departure from the commitment to fundamental principles of criminal justice (the presumption of innocence) and human rights (the right to liberty);
- the proposed changes are not based on evidence; and
- they are likely to have a disproportionate effect on vulnerable people.

We note that neither the results of the consultation on the Position Paper nor the submissions made to that consultation were made public. The current consultation does not indicate whether and how the Bill responds to stakeholder concerns. This makes it difficult to assess the Bill, so TasCOSS recommends that the Department commit to making submissions it receives to public consultations publicly available as near as possible to the time they are received.

In our discussions with stakeholders for the current submission, more evidence has emerged of the harms the Bill would cause to those refused bail as well as to the court system and the broader community. These include:

- impede access to justice;
- put at risk relationships with children, housing and employment;
- increase the burden on and costs of an already stretched court and prison system;
- remove access to rehabilitation programs;
- increase the likelihood of reoffending.

Key Issues

Disproportionate impact on people experiencing vulnerability

Since our previous submission, evidence has come to light of the impact of Victorian bail laws that reverse the presumption in favour of bail. That state has seen an increase in vulnerable clients, including women, Indigenous people and those with mental health issues missing out on bail as a result of the

¹ https://issuu.com/tascoss7/docs/tascoss_submission_bail_reform_2802

² *Bail Bill 2021*, Part 2, s12 (4)

reversal of presumption of bail.³ In 2015, before the change to Victoria’s bail laws, there were an average of 479 Aboriginal people in custody, comprising 7.7% of the prison population and only 0.8% of the general population; by June 2019 there were 843 Aboriginal people in custody, or 10.4% of the prison population. The number of female prisoners also increased dramatically, from an average of 406 in 2015 to 575 in 2019, with the difference entirely consisting of unsentenced prisoners.⁴

Victorian Legal Aid Director of Criminal Law said of the impact of the reforms on vulnerable groups, “They have difficulty getting bail because they have to show ‘compelling reasons’ or ‘exceptional circumstances’, even though they are not facing a term of imprisonment and don’t pose any significant risk to the community.”⁵ The Tasmanian Bill introduces a similar test⁶ and we are informed by various stakeholders that the Bill will likely have similar impacts to those in Victoria.

A range of adverse consequences for those detained

People who are charged with relatively minor offences such as shoplifting are being refused bail and held on remand alongside someone who is charged with rape or murder. The increase in numbers of people on remand – Victoria has seen an increase from 25% of all prisoners in 2015 to 36% in 2018 – means that police and court cells are often at capacity, so some people must attend their bail hearing remotely. This impedes their access to legal advice and can affect their eligibility for bail, including for people who go on to receive a non-custodial sentence.⁷

A range of other consequences flow from removing the presumption of bail. These include:

- possible loss of employment; separation from families; children placed in foster care; reduced ability to prepare for legal proceedings; and exposure to the dangers of a prison environment;
- it presents multiple linked legal disadvantages: pre-trial detention is associated with an increased likelihood of pleading guilty, being more likely to be found guilty and being given a custodial sentence.⁸

More pressure on a stretched court system

In Tasmania the overstretched court system means there are significant delays for hearings. It can take 40 weeks for the Director of Public Prosecutions to drop a charge, so under the proposed law people could be imprisoned for up to 10 months before being released.

³ Karin Derkley, ‘Lawyers warn of bail crisis’, *Law Institute Journal*, October 2018 <https://www.liv.asn.au/Staying-Informed/LIJ/LIJ/October-2018/Lawyers-warn-of-bail-crisis>

⁴ Corrections Victoria, *Annual Prisoner Statistical Profile 2019-20*

⁵ *Ibid.*

⁶ *Bail Bill 2021*, s12(3)(b) and 12(4)

⁷ *A constellation of Circumstances: the drivers of women’s increasing rates of remand in Victoria*, July 2020, pp34-37 https://d3n8a8pro7vnm.cloudfront.net/fitzroylegal/pages/52/attachments/original/1594001770/Constellation_of_Circumstances_Report_digital_landscape.pdf?1594001770

⁸ https://www.parliament.vic.gov.au/publications/research-papers/download/36-research-papers/13893-no-bail-more-jail-breaking-the-nexus-between-community-protection-and-escalating-pre-trial-detention#_ftn28

If charges aren't dropped, people are often held on remand for up to two and a half years before trial. If they are then found innocent (which is the case for between 20% and 25% of those charged), there is no compensation for their imprisonment.⁹

TasCOSS has also been informed that the new Southern Remand Centre will have a capacity of 152 (at the time of writing there were 172 people on remand). Based on figures from other jurisdictions, Legal Aid estimates that if the Bill becomes law there could be as many as 300 people on remand. Presumably those who can't be accommodated in the new remand centre will be housed in the general prison population, exposing them to a range of risks.¹⁰

Lack of access to rehabilitation programs

A further issue with spending extended time in remand is that people are not given access to various programs such as drug and alcohol rehabilitation and counselling services. With Tasmania's recidivism rates already over 50%,¹¹ sending more people to jail without support they may need to overcome addictions, trauma and mental health issues they are more likely to offend/reoffend. Research backs this up, showing that even short term pre-trial detention contributes to future offending.¹² The Bill will therefore likely make the community less, not more, safe.

Scope of 'unacceptable risk' test

TasCOSS is aware of concerns from key stakeholders, including the Australian Lawyers and Alliance and Tasmania Legal Aid, with the drafting of s6 'Unacceptable risk.' We defer to their expertise and endorse their positions with regard to this section. We also note that the Bill makes provision for wearing an electronic monitoring device as a condition of bail.¹³ We believe that this will allow more people to be safely given bail.

TasCOSS members expressed concern that the existing interpretation of unacceptable risk does not always protect women from family violence offenders who are released on bail. We therefore recommend a review of existing education for judicial officers about the particular dynamics of family violence offending, with the aim of ensuring that the latest evidence is included. In particular, judicial officers should take account in the granting of bail offences that are known to be predictors of violent offending such as controlling someone's finances or stalking. Non-fatal strangulation, in particular, is increasingly recognised as a precursor to serious abuse and fatality.¹⁴

⁹ Communication with Legal Aid Tasmania, 4 March 2021

¹⁰ Ibid.

¹¹ 57% of Tasmanian prisoners are back in gaol within 2 years. Productivity Commission, *Report on Government Services 2021*

¹² <https://www.parliament.vic.gov.au/publications/research-papers/download/36-research-papers/13893-no-bail-more-jail-breaking-the-nexus-between-community-protection-and-escalating-pre-trial-detention>

¹³ *Bail Bill 2021*, s16(2)(a)

¹⁴ H. Douglas and R. Fitzgerald, 'Strangulation, domestic violence and the legal response,' *Sydney Law Review*, vol 36, 2014

<https://www.austlii.edu.au/au/journals/SyDLRev/2014/11.pdf>

The voices of people with lived experience of family violence should also be included in that education. Evidence shows that including voices of people with lived experience leads to better understanding of how laws, policies and processes impact victims.¹⁵

Conclusion

The proposed Bill represents an alarming departure from the human rights-based and long-standing legal principle that bail should be granted as the default, with only limited circumstances justifying refusal. If enacted, it will disproportionately affect people who are already in vulnerable circumstances and will place yet more pressure on a criminal justice system that is already under strain. We believe the Bill should be withdrawn *or* that it be amended to retain the presumption in favour of bail.

Recommendations

- That the Bill be withdrawn, *or* that it be amended so that it retains the presumption in favour of bail.
- Conduct a review of education for judicial officers on family violence offences to ensure that education incorporates the latest evidence, is conducted on a mandatory and regular basis and that it includes the voices of people with lived experience of family violence.
- That the Department of Justice commit to making submissions it receives to public consultations publicly available, as near as possible to the time they are received.

¹⁵ See for example the Victorian Victim Survivors' Advisory Council