

Factors Affecting Remand in Custody

**A Study of Bail Practices in Victoria,
South Australia and Western Australia**

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A Study of Bail Practices in Victoria, South Australia and Western Australia

Research Consultancy for the Criminology Research Council*

David Bamford, Sue King and Rick Sarre**

* This is a project supported by a grant from the Criminology Research Council. The views expressed are the responsibility of the authors and are not necessarily those of the Council.

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Foreword

At any time, around 15 per cent of Australia's 20,000 prisoners are on remand, that is, they are in custody but have not been sentenced. They are held in custody to ensure they will appear in court to answer charges, or to protect the community, or victims, or witnesses. Many people on remand do not serve a further period of imprisonment. Furthermore, the rate of remand varies significantly around the jurisdictions.

The Criminology Research Council sought to learn more about the structure and processes of remand in Australia. It put to tender a research proposal to:

- Identify the factors that may influence the processes and the rates of adult remand in custody which may contribute to variations in remand rates between jurisdictions.
- Describe how remands are managed in the Australian criminal justice systems in general, by the design of "process maps".
- Identify research gaps and priorities for future research needs.
- Develop a "blue print" for further research focussing on variations around Australia and assessment of best practice in relation to remand decision-making processes.

The project was carried out by three scholars from South Australia, David Bamford, Sue King, and Rick Sarre. This monograph reports on the consultancy.

This monograph is published for the Criminology Research Council by the Australian Institute of Criminology which administers the Criminology Research Council.

Adam Graycar
Director, Australian Institute of Criminology

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Criminology Research Council Advisory Committee

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The assistance of the Advisory Committee in responding to our developing work was invaluable. We appreciated the range of perspectives brought to bear on the work and the depth of experience and expertise that we were able to access in the committee. We also appreciate the generous support provided by individual members of the committee in ensuring that we gained the information we were seeking and introducing us to those people most able to assist us. Without this support the task would have been overwhelming.

Individual Researchers

There are several researchers who provided particular assistance in our work and we thank them.

- Mr David Worswick who ably supported our research and who acted as research assistant for this project as well as authoring a part of the report.
- Ms Jayne Marshall, South Australian Attorney-General's Department, Office of Crime Statistics whose work on remand in custody in South Australia served as a starting point for many of the areas of our own research.
- Mr Peter Marshall, Policy and Legislation Division, Ministry of Justice, Western Australia
- Ms Anna Ferrante, Crime Research Centre, University of Western Australia.

The Project Support Team

Ms Vanessa Lowe, who provided technical support in producing the final report;

Ms Juliette Antooley, who translated our enthusiastic scribbles into respectable process maps;

Ms Debra Sarre, who attended to issues of style and presentation and who created the many graphics and ensured they appeared in the final report in the correct places.

Social Policy Research Group

We are grateful to Bev O'Brien of the Social Policy Research Group, University of South Australia for her support in negotiating the various administrative steps in undertaking a research project of this size across two institutions.

A full list of contacts with whom we consulted in the course of our research is included as **Appendix 1**.

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Executive Summary

This study, commissioned by the Criminology Research Council, is set out to identify the factors that may influence the processes and rates of adult remand in custody, and which may potentially contribute to variations in remand rates between jurisdictions. It is focused specifically on three jurisdictions in Australia—Victoria, South Australia, and Western Australia.

This report describes a part of the Criminology Research Council project. It aims to:

- Identify the factors that may influence the processes and the rates of adult remand in custody which may contribute to variations in remand rates between jurisdictions.
- Describe how remands are managed in the Australian criminal justice systems in general, by the design of ‘process maps’.
- Identify research gaps and priorities for future research needs, and develop a “blue print” for further research focussing on variations around Australia and assessment of best practice in relation to remand decision-making processes.

The results indicate that there are significant differences in remand rates between jurisdictions. For instance, Victoria has a lower rate of remand in custody compared to South Australia and Western Australia. Although this study has not isolated any single factor that stands out as the explanation for different rates of remand in custody between jurisdictions, a broader picture of the remand in custody process has been developed. It has been demonstrated that explaining jurisdictional variations as a product of number of accused persons in custody and the time they remain in custody is inadequate for evaluating the fairness and efficiency of the remand in custody system. Rather, remand in custody outcomes can be seen as the result of a complex interweaving of legislative provisions and interpretations by magistrates and other actors in the process.

Part 1 Introduction

This study explores the factors affecting rates of remand in custody in Australia. In particular, the research examines the environment in which decisions to remand accused persons in custody are made and the outcome of these decisions. While the findings should be of interest to all Australian jurisdictions, this study has focused specifically on three jurisdictions—Victoria, South Australia, and Western Australia.

1.1 The Significance of Remanding People in Custody

One of the most serious actions a state can take in relation to its citizens is to deprive them of their liberty. The deprivation of liberty through the sentence of imprisonment as punishment for a proven offence is an issue taken seriously by the courts and by the community. The placing in custody of a person who is still presumed innocent (as is the case

with most people remanded in custody) should be of major concern to the courts and to the community. Approximately 15 per cent of the over 18,000 prisoners in this country are currently on remand and have not been sentenced.¹ These numbers are significant.

The fundamental reason for remanding individuals in custody is to ensure that they will attend court as required to answer the charges made against them. In addition, the need to protect the integrity of the justice system has resulted in the development of the practice of remanding accused persons in custody where it is deemed necessary to protect witnesses. Many jurisdictions also remand a person in custody on occasions when it is seen to be necessary to ensure the safety of the accused person. Furthermore, in the interest of public safety, many jurisdictions have authorised the remanding of a person in custody if it is necessary to ensure that further offences are not committed before the completion of a trial.

¹ ABS Corrective Services 4512.0, March Quarter 1998, p.4.

The decision to remand an accused person in custody has consequences for both the individual and the community. For the individual accused, the outcomes of being remanded in custody can be classified as justice outcomes and social outcomes. For the community, outcomes of remanding citizens in custody can be described in terms of the operation of the justice system and in financial outcomes.

We focus first on the justice outcomes for the individual of the remand in custody process. Research has demonstrated that being remanded in custody is associated with an increased likelihood of a plea of guilty, an increased likelihood of an accused being convicted in response to a plea of not guilty, and an increased likelihood of a sentence of imprisonment (Doherty and East 1985, p. 262). Moreover, a recent South Australian study identified that many people who are remanded in custody (it may be as high as 50 per cent) do not serve a further period of imprisonment after the completion of the remand occasion (Marshall and Reynolds 1998).² Walker (1984) showed that a majority of remandees are not sentenced to prison in all Australian jurisdictions.

There are also social outcomes for individual accused persons. Remand in custody increases the probability of social disruption. It removes an individual from his or her social support from family, friends, or others in the community. This may occur as a result of institutionalisation or the remand location may be too far from the individual's support network, making it difficult for people to visit. Remand in custody interrupts the capacity of the individual to assume family and social responsibilities and leaves others to provide for any dependants, whether these are children, parents, or other intimates. At the same time, remand in custody places the individual in institutional custody at a time of high vulnerability. This increases pressures upon the individual and the potential risk of self-harm of a physical or psychological nature.³

For the community, the financial outcomes of decisions about remanding citizens in custody involve both the high cost of incarceration for the state and the cost of enforcing court decisions and attendance, as well as any delays to court operations. Moreover, a high remand rate contributes significantly to the costs of imprisonment borne by each

² It may be that many of these prisoners received a period of imprisonment. However, the start date of sentences is backdated to the date the prisoner enters prison in many instances. Where the time already served was equal to, or greater than, the backdated sentence, the prisoner would have been released from court as the sentence would have been considered served.

³ Western Australia 1997, Royal Commission into Aboriginal Deaths in Custody 1991, Royal Commission Government Response Monitoring Unit 1997.

jurisdiction. The number of people remanded in custody contributes to the overall imprisonment numbers and to pressures on the prison stock.⁴

By the same token, there may be costs associated with bail. If an individual is not remanded in custody and then fails to attend court at the required time, the community bears the cost of wasted court time on the appointed day, the issue of a warrant for arrest, and the execution of that warrant. Whilst the focus of this study is not to compare financial outcomes, it can be noted that the cost of an individual failing to attend court as required is significant as it involves the time of many public servants to rectify the matter.

Thus, it is the community's desire to achieve particular outcomes for the justice system, not necessarily a financial imperative, that drives the remand in custody process. The necessity to ensure that an individual appears in court, the justice processes are not tampered with, and the safety of the community during the criminal justice process are the basis for deciding that an individual be remanded in custody. To ensure community confidence in the criminal

justice system, it is important that these outcomes are reliably and fairly achieved.

The number of people currently being remanded in custody, and the length of time for which they are remanded, has caused justifiable concern. However, little research has been carried out in an attempt to understand the range of factors which affect remand in custody in Australia. This study is designed to fill that research gap.

1.2 The Research Brief

The Criminology Research Council designed a specific research proposal that sought to develop a broader understanding of the remand in custody process for adults. The Council identified a two-stage research process:

Stage 1

- The identification of the factors that may influence the processes and the rates of adult remand in custody which may contribute to variations in remand rates between jurisdictions.

⁴ Of course, not all of these capital and recurrent costs of holding an individual in custody on remand are additional costs. If an individual is subsequently sentenced to imprisonment, the time spent in custody whilst on remand is deducted from the sentence to be served. Thus for those individuals sentenced to custody, the community would bear the cost of their imprisonment regardless of whether they are remanded in custody. Additional expenditures as a result of remanding individuals in custody is, strictly speaking, for those individuals who do not subsequently receive a custodial sentence.

- A description of how remands are managed in the Australian criminal justice systems in general, by the design of “process maps”.
- Identification of research gaps and priorities for future research needs.
- Development of a potential “blue print” or research proposal for Stage 2 targeting the factors that contribute to variations in remand rates within all jurisdictions.

Stage 2

- A detailed analysis of how the factors contributing to the determination of remand rates may contribute to variations between jurisdictions—principally, South Australia, Western Australia, and Victoria.
- An assessment of “best practice” in relation to remand decision-making processes.
- An identification of the policy implications of the research findings, including whether an identified remand in custody rate is an “appropriate” one.⁵

This report describes the study undertaken as Stage 1 of the Criminology Research Council project. The conclusions and recommendations found in Parts 6 and

7 herein are designed to form the platform upon which further research can be constructed.

1.3 Research Approach

This study recognises that the decision to detain a person in custody is made by an authorised police officer, an officer of the court, bail justice (Victoria only), magistrate, or judge. However, the study is premised on the recognition that the decision to remand, or not to remand, person in custody is influenced by a broad range of factors.

As illustrated in Figure 1, the number of people in detention as a result of a decision to remand them in custody is a product of the number of people for whom the remand in custody decision is made and the length of time for which they are remanded.

Each of these factors is influenced by:

- Interactions between judicial or quasi-judicial decision-makers and individual accused persons within a particular legislative framework.
- Characteristics of the criminal justice system in a specific jurisdiction.

⁵ One could envisage implications in relation to human rights concerns, government budgets, offending rates, suicide rates, and so forth.

- Broader characteristics of the communities within which the justice system is operating.

The factors that influence the final remand position are illustrated in Figure 2. This figure will be expanded to illustrate the inter-relationship

between the factors of each segment (Figure 18). Each of these broad issues will be examined in the pages to follow in an attempt to show the overall complexity of the issues surrounding the remand in custody process and its outcomes.

Figure 1: Factors Influencing Remand Position: At First Glance

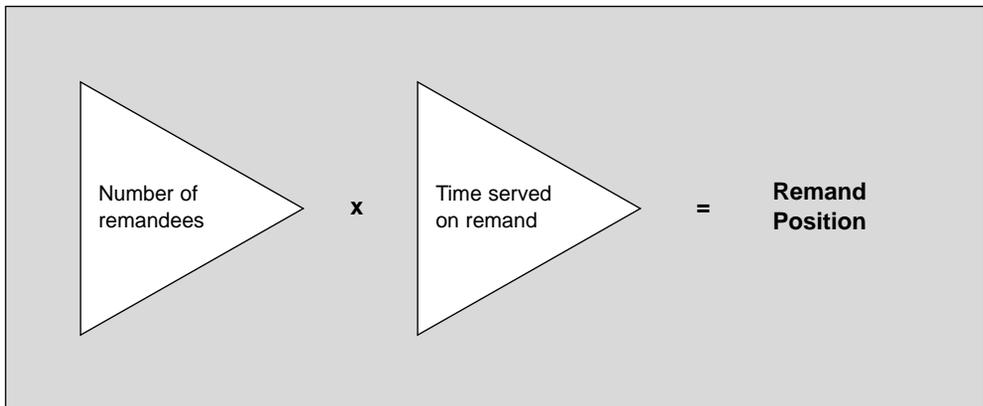
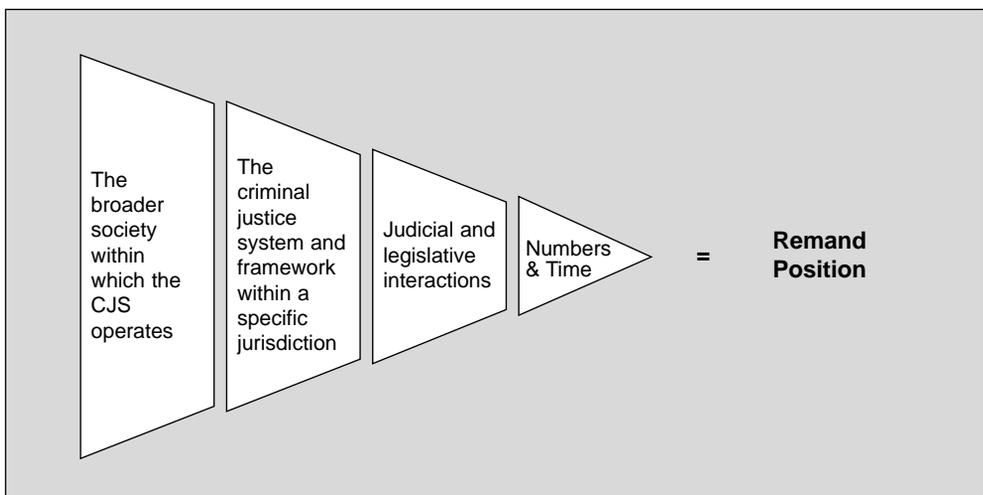


Figure 2: Factors Influencing Remand Position: The Wider View



1.4 Research Methodology

The research process used two approaches:

- The first approach was to explore the remand in custody process and seek to unravel each stage from an offender's initial contact with the police to disposition of the case. Thus, "process maps" were developed to describe the interactions between the defendant and the criminal justice system. These interactions were analysed in terms of the decision-makers, the other actors, and influences which affect the decision-making process.⁶
- The second approach was to develop a conceptual framework. This framework describes the narrow context within which the remand in custody decisions are made; as well as the broader context, in terms of the justice system and the community, that influences these decisions. Correlative data were examined in this process.

To this end, the researchers undertook the following tasks:

- Compiled a literature review (Part 2).
- Collated and compared bail legislation (Acts and Regulations) from around Australia (Part 3).
- Developed "process maps" both to guide the reader visually through the various processes and illustrate statistical data about the remand in custody process (Part 4).
- Investigated some correlative data that may point to the broader social variables that influence the remand in custody process (Part 5).
- Created a conceptual framework to describe the factors affecting remand in custody which allows for delineation of the lines of further research (Part 6).
- Made a series of specific recommendations for future research (Part 7).

Further discussion of the methodology of this study is found in **Appendices 3 and 4**.

⁶ This research study has, at the advice of the Criminology Research Council Advisory Committee, focused specifically on three jurisdictions in Australia: Victoria, South Australia, and Western Australia. Some differences in practice were explored through interviews conducted in each jurisdiction by a member of the research team.

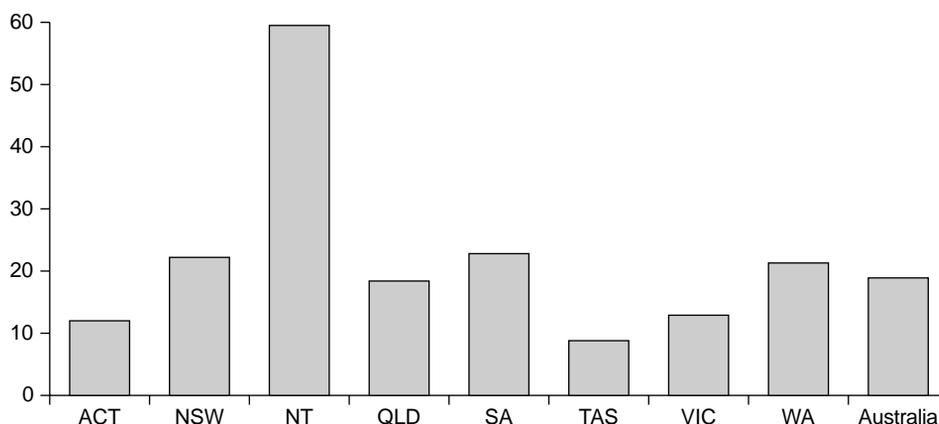
Part 2 Factors Contributing to the Remand Rate

2.1 Remand in Custody Data

On 1 March 1998,⁷ there were 18,425 prisoners in Australia. Of these, 15,661 (85 per cent) were sentenced and 2,764 (15 per cent) were remanded in custody waiting for trial or sentence.⁸ However, this is not to say that remand numbers are spread evenly around the nation. There are significantly different

rates of custodial remand across all jurisdictions in Australia. The remand rate (prisoners on remand per 100,000 adult population) per jurisdiction is identified below. **Figure 3** shows that Northern Territory has the highest remand in custody rate in the country, the rate in South Australia is almost double that of Victoria, and the rate in Western Australia is just less than South Australia.

Figure 3: March Quarter 1998 Remand Rates (Number of Prisoners on Remand per 100,000 Adult Population of that Jurisdiction)



Source: ABS (Corrective Services Australia, March 1998, cat. no. 4512.0).

⁷ The most recent national figures available.

⁸ ABS Corrective Services 4512.0, March Quarter 1998, p. 4.

Figure 4 is a pictorial representation of Table 1. Both Table 1 and Figure 4 show differences in rates. There are a number of possible explanations for the variations between jurisdictions. However, it would be difficult to determine the most influential reasons contributing to the differences. This report explores the factors which influences these variations.

2.2 The Key Variables

As illustrated in **Figure 1**, the remand in custody position is usually recognised as the product of two key variables:

- The number of offenders actually being remanded in custody by the

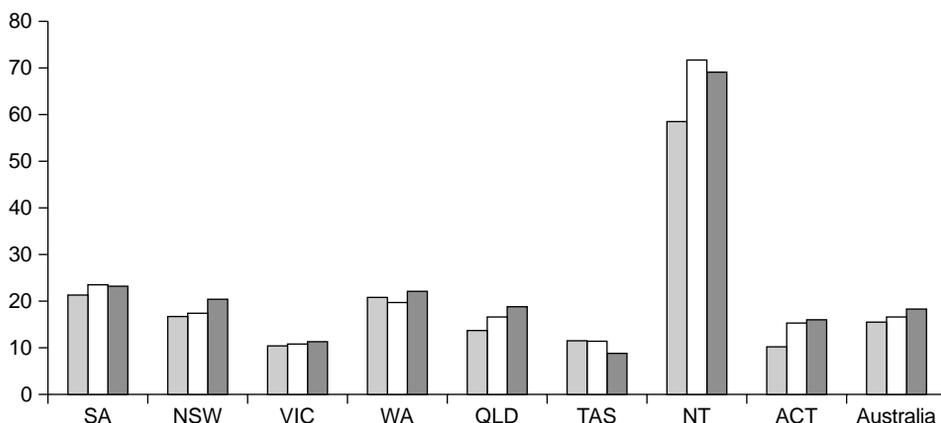
Table 1: Average Monthly Custodial Remand Rates in the Last Three Years—Australian Jurisdictions

| Jurisdiction | Average monthly remand rate 1995 | Average monthly remand rate 1996 | Average monthly remand rate 1997 |
|--------------|----------------------------------|----------------------------------|----------------------------------|
| SA | 21.3 | 23.5 | 23.2 |
| NSW | 16.7 | 17.4 | 20.4 |
| VIC | 10.4 | 10.8 | 11.3 |
| WA | 20.8 | 19.7 | 22.1 |
| QLD | 13.7 | 16.6 | 18.8 |
| TAS | 11.5 | 11.4 | 8.8 |
| NT | 58.5 | 71.7 | 69.1 |
| ACT | 10.2 | 15.3 | 16.0 |
| Australia | 15.5 | 16.6 | 18.3 |

Note: Average monthly remand rate is derived by adding the remand rates obtained every month over one year, and dividing by 12.

Source: Marshall and Reynolds 1998, p 31, as Table 10.

Figure 4: Average Monthly Custodial Remand Rate by Jurisdiction 1995–1997



Source: Marshall and Reynolds 1998, p 32, as Figure 12.

courts and entering the correctional system. That is, the number of offenders who were refused bail or did not lodge an application.

- The average length of time remandees are required to stay on remand.⁹

However, there is a weakness in relying too heavily on these variables to present accurately the remand in custody position. The counting practices may not be uniform and exactly how the rate of “time on remand” contributes to the variations in remand rate between jurisdictions is not straightforward.

2.2.1 Calculating the Number of Remandees—Counting Practices

There are variations in the way in which remand numbers are counted. While standardised “counting rules” are supposed to apply in the statistical units across the nation, it is not clear that each jurisdiction is counting remand data in the same way. For example, the age of an “adult” (for the purpose of the count) differs—being 18 in New South Wales, South Australia, Western Australia, and 17 in Victoria, Queensland, Tasmania, Northern Territory, and the Australian Capital

Territory. Furthermore, there may be differences in the way in which a person who comes in and out of remand is counted. The definition of an “episode” differs between jurisdictions. For example, if a prisoner is released on bail and later breaches a condition of bail and is remanded in custody, is he or she counted once or twice? In South Australia, if a person is serving a short period of time in custody on fine default, and is on remand for another offence at the same time, then this is not counted as part of the remand rate since he/she is serving a “sentence”. Although this may have been corrected in the Australian Bureau of Statistics (ABS) counting practices,¹⁰ there may be variations between jurisdictions. Furthermore, South Australia excludes home detainees from the count of remandees. In sum, if it is not feasible to compare remand rates due to the difference in counting practices, it is impossible to conclude that there are *significant* differences in remand rates between jurisdictions around the country.

2.2.2 Length of Time on Remand

The number of prison beds occupied by remandees is influenced by the number of remandees and the length

⁹ Usually determined by the administrative delays and back-logs in the trial lists.

¹⁰ ABS Corrective Services, March Quarter 1998, p. 25.

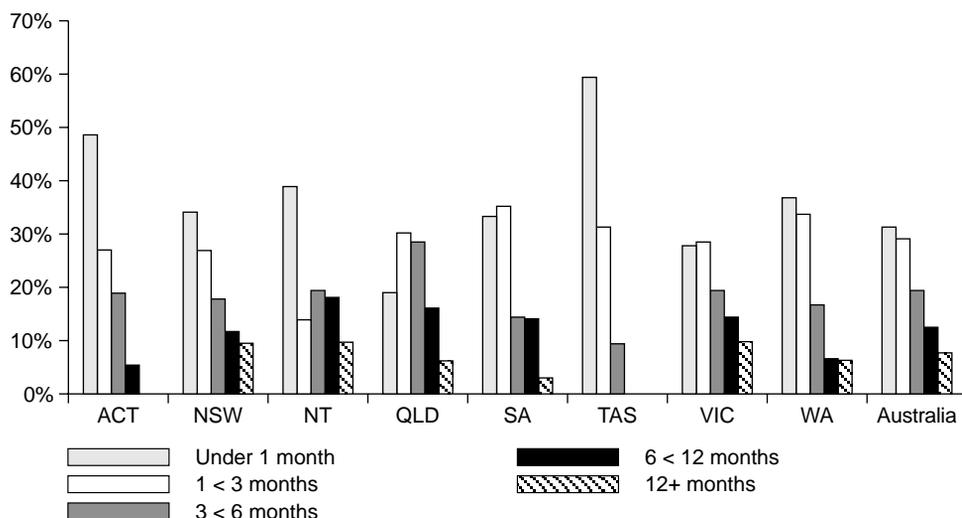
of time they are remanded. The actual period is influenced by a range of factors relating to the administration of the court process and the conduct of the particular case. Whilst higher courts contribute fewer remandees into the remand in custody process, on average each remandee from the higher court will spend longer in custody.

It appears that the period of remand is not directly related to the remand rate. For instance, South Australia has one of the shortest “length of time on remand” averages but maintains a high remand rate. In June 1996, approximately 12 per cent of South Australia’s remand in custody prisoners spent 6–12 months in

custody, the figure dropped to 5 per cent of cases over 12 months (Marshall and Reynolds 1998).¹¹ Victoria’s percentages, where its remand rate is just over half that of South Australia, were 17 per cent and 8 per cent respectively. More recent figures show that these differences have not altered. **Figure 5** presents the comparison of time served on remand in each jurisdiction.

It may be too simple to attempt to explain jurisdictional variations by intersecting the number remandees with the length of time served on remand. In order to explain how the rate is influenced, it is necessary to explore the literature.

Figure 5: Time Served on Remand by Jurisdiction, Unsentenced Prisoners, as at 30 June 1997



Source: ABS (Prisoners in Australia 1997), p 57.

¹¹ These figures may have to be treated with some caution since they are not calculated proportionate to population.

2.3 Literature Review

2.3.1 Methodology

The literature review for this study commenced with the development of a database of publicly available material on bail and remand in custody. Two methodologies were adopted:

- *General searches of electronic databases* (LegalTrac, Lexis/Nexis, CINCH, AGIS, and various criminology websites).
- “*Snowballing*” (identification of material relating to bail or remand in custody referred to in the literature we had collected). From this database, materials were assessed to see if they are useful in the development of this consultancy and, if so, steps were taken to obtain them. Significant amounts of the literature were obtained and stored in electronic form.

Most of the material examined was sourced from Australia or the United Kingdom.

2.3.2 Overview

Bail and remand in custody issues have attracted the attention of a wide range of observers in the criminal justice system. While many of the unsatisfactory aspects of the law relating to bail were recognised by the middle of the twentieth century, it is only in the last thirty years that there has been a concerted effort to study and to alter the law. Most of the literature has resulted in, or from, attempts by governments to reform the law of bail. The mix of common law and statutory provisions has led to a complex legal situation with apparent inconsistency in application. Both the United States and the United Kingdom began significant bail law reform in the 1960s leading to legislative amendment with the *Bail Reform Acts* 1966 and 1984 in the United States and to the *Criminal Justice Act* 1967 and the *Bail Act* 1976 in England.

The pattern has been similar in Australia, with inquiries into the state of the law of bail in the 1970s and 1980s¹² leading to legislative reform.¹³ These inquiries, created because of concerns about the inequitable treatment of offenders by the existing

¹² Australian Law Reform Commission 1975, New South Wales Bureau of Crime Statistics and Research 1977, Victoria Statute Law Revision Committee 1975, Western Australia 1979; South Australia 1986.

¹³ New South Wales: *Bail Act* 1978; Victoria: *Bail Act* 1977; South Australia: *Bail Act* 1985, Queensland: *Bail Act* 1980, Western Australia: *Bail Act* 1982 (proclaimed 1989). Tasmania enacted a *Bail Act* in 1994.

bail process, led to codification of criteria and procedural protection for those held in custody awaiting disposition of their matters. Subsequent to the wave of legislative reforms in the 1970s and early 1980s came another wave of governmental inquiries reviewing the effect of the earlier reforms. These, along with a number of inquiries driven by concern at the growing number of defendants remanded in custody over the last ten years, have produced another rich vein of literature on the remand in custody process.¹⁴

In the last decade more academic attention has been devoted to the study of the bail process. Recognition that legislative reforms have not achieved the desired results of better targeting of remand in custody, together with concerns about increasing rates of custodial remand, has led to a range of government-sponsored studies aimed at investigating custodial remand processes. In a contradictory direction, there has been some effort—directed probably from political pressures—to address community concerns at the perceived problem of offences committed by offenders whilst on bail.

Academic literature has focused predominantly on analysis of the criteria upon which bail is given. As

illustrated above, the primary function of bail law is an assessment of whether an offender will attend court at the requisite time to face the next stage or disposition of the charge. Two other criteria are commonly used: the risk that the offender will interfere or disrupt the criminal justice process (for example, intimidating witnesses or victims, and destroying evidence) and the risk that the offender may commit other or further offences whilst on bail. The last of these criteria raises the difficulty of reconciling the concept of preventive detention with the fundamental precepts of our legal system.

Significant bureaucratic attention has also been focused on those steps taken to improve bail or remand in custody procedures. In addition to legislative reforms referred to above, the major changes have included improving the quality of the information available to decision-makers, providing formalised criteria with mathematical weightings to reduce the arbitrariness and inconsistency of decision-making, and increasing the range of alternatives to custodial remand available to decision-makers.

What appears to be missing from the literature is investigation and analysis of other parts of the remand in custody process. There is little analysis of

¹⁴ Queensland Law Reform Commission 1993a, 1993b, Law Reform Commission of Victoria 1992, South Australia 1997, Western Australia 1997.

police decisions to arrest, and whilst limited attention has been given to the importance of police decisions on police bail in the bail process, little is known about that process.¹⁵ Police decision-making is also recognised as important at the judicial stage of the process, particularly in terms of recommendations to prosecutors, but that is not a well understood process.

2.3.3 Description of Remand in Custody Processes

Surprisingly, little attention has been given by academics to the study of the bail from a *procedural process* perspective. Whilst many of the government inquiries have considered issues relating to bail procedures (for example, who can grant bail, when can it be granted, the forms of bail, the consequences of not complying with bail agreements, and what defendants must be told about bail), little attention has been paid to decision-making processes. The work that has been done has tended to focus simply on the actual judicial decisions relating to bail.

To illustrate the significance of the different phases in the remand in custody process, **Table 2** presents the

number of defendants proceeding through each stage of the process in the Home Office's 1993 and 1994 *Remand in Custody* study. The level of consistency in outcome between the different phases is discussed below.

2.3.4 The Judicial Process

Whilst the end-point of the judicial process involves the judicial officer as the ultimate decision-maker, the literature suggests that his or her role in the process as a whole is largely supervisory and only an active actor in a small proportion of the remand in custody decisions:

The picture which is painted by the legal and statutory rules governing remand decisions in magistrates' courts is one where the magistrates are the decision makers. They arrive at their decisions after an adversarial remand hearing in which the prosecution and defence present their cases, including relevant information to the court. These hearings are conducted in public according to legal rules. Therefore such a process adheres to the due process requirements of judicial fact-finding and decision making. However, in reality, the decision making process is largely

¹⁵ Of particular importance is Home Office research in England investigating entry into the criminal justice system—see Phillips, S. C. & Brown, D. 1998. In Australia, the Royal Commission into Aboriginal Deaths in Custody investigated police arrest and bail decisions in a large number of cases. See *Royal Commission into Aboriginal Deaths in Custody*, 1991.

an administrative process conducted in private by participants other than the magistracy according to discretionary and hidden rules. This process is generally characterised by uncontested remand hearings where the effective decisions are made out of court, by professional participants, prior to the court hearing. The magistrates' role is limited simply to "rubber stamping" their recommendations in the majority of cases (Hucklesby 1997b).

Evidence for this is found in the empirical studies in three major ways:

- The small number of contested decisions in the judicial process.

- The brevity of the judicial bail application process.
- The high degree of probability that judicial decisions merely confirm decisions already made about remand in custody.

2.3.4.1 Number of Contested Decisions

The literature is consistent in recognising that the bulk of decisions relating to bail are made by judicial officers about defendants who are already on bail. In South Australia, it was estimated that 90 per cent of those arrested were released on police bail in 1998 (McAvaney 1991, p. 74).¹⁶ While the literature does not contain

Table 2: Decision Tree of British Remand Decisions—Persons Remanded by the Courts in Five Areas in 1993 and 1994

| Total remanded 100% (3667) | | | | | | |
|-------------------------------|--------------------|------------------|------------------------------|--------------------|------------------|-----------|
| Police decision | | | Police custody | | | |
| Police bail 58% (2115) | | | Police custody 42% (1552) | | | |
| CPS | Unconditional bail | Conditional bail | Custody | Unconditional bail | Conditional bail | Custody |
| | 92% (1958) | 7% (141) | 1% (16) | 6% (93) | 46% (707) | 48% (752) |
| Court decision | | | | | | |
| Unconditional bail | 99% (1945) | 10% (14) | – | 90% (84) | 4% (31) | 2% (13) |
| Conditional bail | 1% (12) | 87% (122) | * (7) | 8% (7) | 90% (635) | 22% (169) |
| Custody | * (1) | 3% (5) | * (9) | 2% (2) | 6% (41) | 76% (570) |

* Statistically insignificant sample

Source: Morgan and Henderson, *Remand Decisions and Offending on Bail: Evaluation of the Bail Process Project*, (Home Office Research Study 184, Home Office, London, 1994), p 37.

¹⁶ This figure is somewhat confirmed by research conducted for the Law Reform Commission of Victoria (1992, p. 45), which found that 92 per cent of those arrested obtained bail from police or a bail justice.

much statistical data on the numbers and proportions granted police bail, the most recent research on police arrests from the United Kingdom indicates that rates of police bail in individual police stations vary from 48 per cent to 95 per cent, with an overall average of 72 per cent of those charged after arrest being granted police bail (Phillips and Brown 1998, pp. 115–18).¹⁷

The great proportion of defendants obtaining police bail results in a smaller proportion of contested applications. Contested applications most commonly arise when a person refused police bail applies for court bail, but the literature reveals a significant number of cases where persons kept in custody by police do not apply for court bail.

Hucklesby observed that the prosecution did not oppose bail in 85 per cent of cases and in the 15 per cent where bail was opposed, the defendants did not challenge the prosecution position in almost half the cases. “This means that in only 9 per cent of all cases observed was the outcome of the remand hearing contested in court” (Hucklesby 1997b, p. 271). These figures show a significant increase in the proportion not contesting remand in custody discussed in the earlier Cobden Trust

research. This research revealed that for approximately 25 per cent of those remanded in custody, imprisonment had occurred “without any discussion about bail having taken place in court” (King 1971, p. 71). This is roughly consistent with Zander’s (1979) study of London magistrates’ courts which found bail was unopposed by prosecution in 75 per cent of cases and with Doherty and East’s (1985, p. 262) finding of 82 per cent. The latter study also found that there was only a contest between prosecution and defence in 15 per cent of the hearings.

The significant number of defendants not objecting to being remanded in custody has been the subject of some discussion. This was an unexpected finding by the Vera Foundation in England in the mid-1980s arising from research into pilot bail information schemes. Across five English courts, the percentages of defendants in custody not asking for bail at first appearance ranged from 51 per cent to 76 per cent (Brink and Stone 1988).¹⁸ Comparative figures for Australia do not appear in the literature although one might anticipate that they would be lower. For the period in which these studies were carried out, English magistrates’ courts regarded

¹⁷ This is consistent with the findings of the Bail Process Project, which found police bail granted in 58 per cent of cases where a bail decision required. Both these surveys were carried out before 1994 when English police were given power to place conditions on bail. Prior to 1994, the police had to either grant unconditional bail or remand in custody.

¹⁸ Also Morgan 1989, p. 488.

themselves bound by the English Court of Appeal decision in *R v. Nottingham Justices, ex parte Davies*.¹⁹ This case appeared to support the practice of only allowing a defendant one application for bail, which meant that defence lawyers were not willing to make bail applications until they were fully prepared, and the application enjoyed the best prospects of success. The timing and arrangement of court business meant that defendants in police custody were brought in at the first opportunity and often the defence solicitor or duty solicitor (from legal aid) would not be in a position to obtain proper instructions. The practice of restricting defendants to one bail application is not a common feature of Australian courts; thus, there is not such a disincentive to bring on applications for bail at the first opportunity.

2.3.4.2 Length of Judicial Process

Studies of bail hearings in magistrates' courts in both Australia and the United Kingdom consistently report that the bail hearings are usually of short duration. In Australia, Armstrong's (1977) study reported that the majority of bail hearings took less than two minutes. The Cobden Trust's observations of over 1,000 bail decisions in 1970 found the average

duration of bail hearings was three minutes, with 80 per cent being less than five minutes (King 1971, p. 17). Zander's (1979, p. 108) study of London Magistrates' Court found that 86 per cent of bail hearings lasted less than five minutes. A study of Cardiff's Magistrates' Court in 1981–82 revealed 62 per cent of hearings taking less than two minutes and 96 per cent within ten minutes. These figures may be partially explained by the large proportion of bail decisions that are uncontested. Doherty and East then analysed the length of hearings where bail hearings resulted in a remand in custody and still found the time taken in the judicial process was still very short—38 per cent dealt with in less than two minutes and 87 per cent in less than ten minutes (Doherty and East 1985, p. 262).

The implication arising out of the brevity of bail hearings is that the bail decision is not based on what happens in court, but what has happened prior to the hearing. This is an important observation given the findings of this consultancy as a whole.

2.3.4.3 Bail Outcomes and Their Relationship to Prior Decisions

The research demonstrates a consistency between judicial decisions on bail and the decisions of police with respect to police bail. Furthermore,

¹⁹ [1980] 2 All ER 775.

there is a significant correlation between police and court bail decisions at the immediate stage—between the attitude of the prosecution and the outcome of the court bail decision.

In Australia, empirical work based on observation and recording of judicial processes has been infrequent, with most of the work being conducted in the 1970s and 1980s. The study by Armstrong (1977) and David and Ward (1987, pp. 326, 333–334) reported that:

... there is evidence that a substantial proportion of those remanded in custody are held in custody because magistrates tend not to release accused who have been refused bail by police when first apprehended. If the police are willing to grant bail to an accused, a magistrate is more likely not to remand the accused to custody.²⁰

In the United Kingdom, a consistent conclusion reached in studies from the 1970s, with perhaps one exception, has been that police decisions play an important role in the judicial process (Doherty and East 1985, p. 255). The Cobden Trust concluded “magistrates, particularly lay magistrates, still rely heavily on the police’s opinion as to whether or not bail ought to be given.”

(King 1971, p. 45). Zander (1979) found that police did not oppose bail in 75 per cent of cases and that bail almost invariably followed. For the 25 per cent of cases where bail was opposed, 58 per cent resulted in bail in being refused. The cases where the outcome was contrary to the prosecution position were found to be where relatively minor crimes were involved.

Doherty and East’s (1985) study found a strong relationship between police attitude and court outcomes. With respect to those granted police bail, the court allowed bail in every case. For those whom the police had held in custody, 71 per cent were released on bail by the court.²¹ However, for those whom police maintained their objection to bail, over 75 per cent were remanded in custody. The more recent work by Hucklesby (1994, 1996, 1997a, 1997b) and the Home Office (1997a, 1997b, 1997c, 1998) reflects a high level of consistency between police decision on bail, prosecution attitude, and judicial outcome. Hucklesby reported that while the Crown Prosecutor Service (CPS) sought either conditional bail or remand in custody in 15 per cent of the bail hearings, there was a “high concordance rate between CPS remand request and the magistrate’s

²⁰ David and Ward’s observations were made in 1984 and reported in 1987.

²¹ This high figure includes those for whom police no longer objected to bail at the court hearing. The low number obtaining police bail may be partly explained by the inability of police at that time to release defendants on conditional bail.

remand decision with the magistrates almost always agreeing with the CPS assessment” (Hucklesby 1997a, p. 134).²² The Home Office studies found that for defendants refused police bail, about one-third were remanded in custody by the court. For those defendants granted police bail, the courts continued their bail status in 92 per cent of cases. High consistency was also found between prosecution recommendation and bail outcome—if bail was recommended by the CPS, then 90 per cent of those defendants obtained bail. If CPS sought a remand in custody then 76 per cent of those defendants were remanded in custody (Morgan and Henderson 1998, p. 37).

The consistency is not surprising given that police, prosecutors, and magistrates apply the same criteria to the same defendants. However, this finding raises a suspicion that bail decisions are made well prior to the hearing and the judicial officer merely confirms those decisions.

Some commentators have argued that court culture should play a crucial role in explaining variations in the use of bail. “Court culture” has been defined as “a set of informal norms that are mediated through the working relationships of the various participants”. Researchers have characterised participants in the court process as a “courtroom work group”

who have a common goal of getting the work done. This is often done co-operatively and the “informal norms of work groups permit predictable routines to develop which reduce risk and uncertainty and provide for the efficient disposal of cases” (Hucklesby 1997a, pp. 130–31). It is the differences in local court cultures that are said to explain why some cases which seem objectively similar often have different results. Whilst used to investigate and explain other court phenomena, for example, delays (Church 1982) and sentencing disparities (Rumgay 1995), it may be a useful tool in explaining some bail variations.

Finally, counsels’ relationships in the remand process are clearly complementary and iterative. Both the prosecutor and the defence counsel are likely to adopt positions that are going to maintain their credibility with magistrates (McConville et al. 1994, p. 181 and Hucklesby 1996, p. 229). Yet, magistrates indicate that they are also influenced by the positions adopted by the parties appearing before them. If the parties are agreed as to the appropriate outcome, then it appears to require exceptional reasons for the magistrate to challenge that position. It is this set of informal norms, influenced by the administrative and internal decision-

²² The courts agreed with CPS request for remand on bail in 99 per cent of cases and 86 per cent with requests for remand in custody.

making processes, and the participants in the process, that appear to be the key to understanding the remand in custody process.²³

2.3.5 Summary

The literature suggests that the key to understanding the remand in custody process is to move outside of the judicial realm and focus on issues that arise prior to the judicial hearing. Thus, this study reviews and analyses the decisions made by the *non*-judicial participants in the process, especially the important role police decision-making plays in the process, and the importance of prosecutorial information provision.

As Hucklesby argues,

[some] of the most influential decision-makers in the remand process are the CPS. Research evidence suggests that the recommendations which they make are of paramount importance to the outcome of the case (Hucklesby 1997b, p. 275).

Yet, the processes by which prosecutors formulate their positions on whether bail is appropriate remain largely uninvestigated in Australia.

²³ Hucklesby (1996, pp. 140–41) found that within the three courts sitting in the same area, there were significant differences between two courts when compared to the third. As they appeared to have the same sort of defendants, the variation in remand in custody rates was explained by the different court cultures between the anomalous court and the other two.

Part 3 Review of Australian Bail Legislation

3.1 Introduction

In order to explore the possibility that variations in remand rates may simply be a reflection of the rules by which bail decisions are made, it is important to review the legislation. This process would have been difficult if it had been undertaken two decades ago. Nowadays, all Australian jurisdictions have largely replaced the common law relating to bail with legislative provisions.²⁴ The legislation frequently contains similar or mirroring provisions (refer **Appendix 2**). The *Bail Acts* of South Australia and the Northern Territory have been held to be complete codes governing the granting of bail.²⁵

3.2 The Availability of Bail

Theoretically, bail is available at all stages of the criminal process until the

final appeal. Subject to the legislation providing otherwise, the situation is as follows in each of the jurisdictions in Australia:

Australian Capital Territory: Bail is available for any period where the accused persons are not required to attend court, provided that they are not convicted and in prison for some other offence.²⁶

New South Wales, Northern Territory, Queensland, and South Australia: Extensive criteria relating to the availability of bail including the time between charge and first appearance, between committal and trial or sentence, during adjournments of trial, and between the lodging of an appeal and its hearing.²⁷

Victoria: Any person who cannot be brought before a court within 24 hours *shall* be granted bail, and where it is impracticable to bring an

²⁴ *Bail Act 1992* (ACT); *Bail Act 1978* (NSW); *Bail Act 1982* (NT); *Bail Act 1980* (Qld); *Bail Act 1985* (SA); *Bail Act 1994* (Tas); *Bail Act 1977* (Vic); *Bail Act 1982* (WA) (currently under review).

²⁵ *Panagiotidis v. Jakacic* (1986) 41 SASR 591; *Birdwood v. Murphy* (unreported, 3/9/97, SC NT Mildren J, JA 54/1997). The *Bail Act 1982* (NT) s 49 abolishes common law rights to grant bail.

²⁶ *Bail Act 1992* (ACT) s 5.

²⁷ *Bail Act 1978* (NSW) s 6; *Bail Act 1982* (NT) s 6; *Bail Act 1980* (Qld) s 8(1); *Bail Act 1985* (SA) s 4.

accused in custody before a court forthwith, bail *may* be granted.²⁸

Western Australia: The defendant has a right to have their case considered as soon as it is practicable. There is no real statement as to when bail is available; instead, the *Bail Act* lists those situations where it is not.

Tasmania: Police are required to admit a person to bail unless there are reasonable grounds to believe that this would be undesirable in the interests of justice.²⁹

3.2.1 Presumption Against Bail and its Significance

Statutory presumptions against bail for certain offences exist in New South Wales, the Northern Territory, and Victoria. The Western Australian parliament is currently considering a similar measure. In the main, there is a presumption against the granting of bail where the accused is charged with a serious drug-related offence,³⁰ where there is a history or threat of domestic violence,³¹ and in cases of murder and treason.³²

The presumption most commonly arises, however, in relation to serious drug offences. In New South Wales and Victoria, the *Bail Acts* provide that only in exceptional circumstances can a person accused of the cultivation, supply, or possession of commercial quantities of prohibited plants/narcotic substances be granted bail. The same presumption applies to those knowingly involved in, or anyone involved in conspiracy to, commit offences. Also included in the *Bail Acts* of New South Wales, the Northern Territory, and Victoria is a presumption against bail where the accused is charged with a breach of the *Customs Act 1901* (Commonwealth).

Specifically, those offences relate to commercial quantities of narcotic goods that give rise to a presumption of trafficking. Can these presumptions be a significant point of departure between jurisdictions that may influence different remand rates? The evidence is scant.³³

3.3 Power to Grant Bail—Police Officers

While under the common law police officers have no power to grant bail, legislation has given certain police

²⁸ *Bail Act 1977* (Vic) s 10(1).

²⁹ *Justices Act 1959* (Tas) ss 34(1), 62, 63, 117A, 122.

³⁰ *Bail Act 1978* (NSW) s 8A, *Bail Act 1982* (NT) s 7A(1)(c) and (d), *Bail Act 1977* (Vic) s 4(2)(aa).

³¹ *Bail Act 1978* (NSW) s 9A, *Bail Act 1977* (Vic) s 4(2)(d)(i).

³² *Bail Act 1982* (NT) s 7A(1)(a) and (b), *Bail Act 1977* (Vic) s 4(2)(a).

³³ On this issue, refer to the discussion in Section 5.3.3.

officers power to release defendants on bail. In almost all jurisdictions, bail can only be granted by a police officer of the rank of sergeant or above, or by an officer in charge of a police station (or watchhouse or lock-up in Queensland) at the time.³⁴ In Tasmania, any police officer, or an officer in charge of a police station, may grant bail.³⁵

3.4 Police Procedure on Arrest

Once arrested, a suspect is required to be taken into custody and delivered to a police station as soon as practicable. There are a number of requirements regarding bail that flow therefrom in each jurisdiction.

Firstly, the police officer shall inform the suspect of his or her entitlement to bail,³⁶ but in Tasmania and Queensland the police officer is required to investigate only whether or not bail should be granted.³⁷

Secondly, a suspect has a right to communicate with a lawyer. In some jurisdictions it is expressly placed in the bail legislation,³⁸ in others—namely Queensland, South Australia, Victoria, and Western Australia—it is to be found elsewhere, for example, in summary offences legislation, police regulations, and the common law.

Thirdly, a suspect has a right to an interpreter where necessary. In the Australian Capital Territory, where the suspect cannot speak or understand the English language, he or she has a right to a “competent interpreter”.³⁹ In Tasmania, there is a right to an interpreter if the suspect does not “have a knowledge of the English language that is sufficient to enable the person to understand the questioning or investigation”.⁴⁰ In New South Wales, the Northern Territory, Queensland and Victoria, the right is unclear. Although not guaranteeing an interpreter, a South Australian bail authority is permitted to dispense with the need for a written application where the applicant is illiterate or has “imperfect command of the English

³⁴ *Bail Act 1992* (ACT) s 14; *Bail Act 1978* (NSW) s 17; *Bail Act 1982* (NT) s 16(5); *Bail Act 1980* (Qld) s 14(1); *Bail Act 1985* (SA) s 5(e); *Justices Act 1959* (Tas) s 34(1), *Bail Act 1977* (Vic) ss 11, 27; *Bail Act 1982* (WA) s 3.

³⁵ *Justices Act 1959* (Tas) s 34(1).

³⁶ *Bail Act 1992* (ACT) s 13(1)(c); *Bail Act 1978* (NSW) s 18(1), also the *Bail Regulations 1994* (NSW) Sch 1 Form 2; *Bail Act 1982* (NT) s 16(2)(a) “may inform”; *Bail Act 1985* (SA) s 13(1); *Bail Act 1977* (Vic) s 10(2); *Bail Act 1982* (WA) s 8(1).

³⁷ *Justices Act 1959* (Tas) s 34(1); *Bail Act 1980* (Qld) s 7(1)(a).

³⁸ *Bail Act 1992* (ACT) s 13(1)(c)(i); *Bail Act 1978* (NSW) s 18(1); *Bail Act 1982* (NT) s 16(2)(b) (only so far as practicable); *Summary Offences Act 1953* (SA) s 79a(1)(b)(i); *Criminal Law (Detention and Interrogation) Act 1995* (Tas) s 6(1)(b).

³⁹ *Bail Act 1992* (ACT) s 13(1)(c)(iii).

⁴⁰ *Criminal Law (Detention and Interrogation) Act 1995* (Tas) s 5(1).

language”.⁴¹ There is also provision in South Australia for an interpreter where English is not the suspect’s first language and they are to be interrogated.⁴² In Western Australia, the police officer must give the defendant “such assistance as he may reasonably require” in order to explain the main processes involved in a bail application and the nature of a bail undertaking where the defendant is “unable or insufficiently able, to read, speak, or write English”.⁴³

Fourthly, a suspect has a right to have a friend present. In the Australian Capital Territory, the police officer shall inform the suspect that he or she may “communicate with any person of his or her choice, being a person who may reasonably be expected to assist him or her in connection with the provision of bail”.⁴⁴ In the Northern Territory, the police may “as far as practicable, ensure that the person charged is able to communicate with ... any other person of his choosing in connection with an application for bail.”⁴⁵ In Tasmania, a police officer conducting an investigation must inform the person in custody that he or she may communicate with a friend or relative, but there is no provision in the *Bail Act* about this.⁴⁶ Other States do not have

any such provision in their bail legislation.

Fifthly, two jurisdictions require certain facilities regarding personal ablutions to be provided to the accused. In the Australian Capital Territory and New South Wales, accused persons are entitled to facilities to wash, shower or bathe, and (where appropriate) to shave, as well as facilities to enable them to change their clothing.⁴⁷

3.5 The Bail Hearing

Bail hearings are contemplated in the legislation of all jurisdictions. These are largely administrative procedures but the bail legislation has relaxed the rules of evidence in this area. Whilst bail hearings may be conducted by authorised police officers or courts, the legislation sets out criteria which pertain to police only (Australian Capital Territory and Tasmania), to both the police and the courts (New South Wales, Northern Territory, South Australia, and Western Australia), or to the courts only (Victoria). A common legislative thread is the requirement that police or courts act only on relevant and reliable evidence.

⁴¹ *Bail Act 1985* (SA) s 8(1a)(a).

⁴² *Summary Offences Act 1953* (SA) s 79a(1)(b)(ii).

⁴³ *Bail Act 1982* (WA) s 8(1)(c).

⁴⁴ *Bail Act 1992* (ACT) s 13(1)(c)(iv).

⁴⁵ *Bail Act 1982* (NT) s 16(2)(b).

⁴⁶ *Criminal Law (Detention and Interrogation) Act 1995* (Tas) s 6(1)(a).

⁴⁷ *Bail Act 1992* (ACT) s 18(1)(c) and (d); *Bail Act 1978* (NSW) s 21, *Bail Regulations 1994* (NSW) r 6.

3.5.1 Provisions Relating to Hearings by the Police Only

In the Australian Capital Territory, the police officer considering bail shall permit the accused to have a lawyer present, and may take evidence from other police involved in investigating the matter.⁴⁸ In Tasmania, the police officer is simply required to “inquire into the case”.⁴⁹

3.5.2 Provisions Relating to Hearings by the Police and the Court

In New South Wales and the Northern Territory, evidence or information which is, on the balance of probabilities, trustworthy or credible in the circumstances may be taken into account.⁵⁰ In South Australia, the bail authority may make inquiries, but only a court may take evidence on oath and allow for cross-examination.⁵¹ In Western Australia, a court or police officer may adjourn a bail determination if they think that it is necessary to obtain more information

for the purpose of making the decision. The legislation makes it clear that this must not interfere with the right of a defendant to be brought before a court as soon as practicable. In Western Australia, statements made by an accused at a bail determination are not admissible against them in subsequent proceedings.⁵²

3.5.3 Provisions Relating to Court Hearings Only

In Queensland and Victoria, an accused may not be examined or cross-examined about the alleged offence. The court may make investigations, and receive evidence which is considered to be trustworthy and credible.⁵³

3.6 Police Power to Release on Bail

Police have the express power to release an accused on bail. In most jurisdictions this power is in the bail legislation. It is implicit in both the Western Australian *Bail Act* and the Tasmanian *Justices Act*.⁵⁴

⁴⁸ *Bail Act 1992 (ACT)* s 15(1).

⁴⁹ *Justices Act 1959 (Tas)* s 34.

⁵⁰ *Bail Act 1978 (NSW)* s 32(3); *Bail Act 1982 (NT)* ss 24(2), 46.

⁵¹ *Bail Act 1985 (SA)* s 9.

⁵² *Bail Act 1982 (WA)* ss 9, 25.

⁵³ *Bail Act 1980 (Qld)* s 15; *Bail Act 1977 (Vic)* s 8. See also *Bail Act 1992 (ACT)* s 19(6).

⁵⁴ *Bail Act 1992 (ACT)* s 15; *Bail Act 1978 (NSW)* s 37; *Bail Act 1982 (NT)* ss 7(1), 16; *Bail Act 1980 (Qld)* s 14(1); *Bail Act 1985 (SA)* s 5(2)(a); *Bail Act 1994 (Tas)* s 5(1)(a), *Justices Act 1959 (Tas)* s 34(1); *Bail Act 1977 (Vic)* ss 11, 12; *Bail Act 1982 (WA)* s 5(1)(b).

3.7 Refusal of Police Bail—Requirement for Reasons

Reasons must be given where bail is refused by police officers in all jurisdictions except the Northern Territory and Tasmania. In the Australian Capital Territory, the police officer who refuses bail or facilities, and does not inform the suspect of their right to a legal practitioner, for reasons of community safety or loss, destruction or fabrication of evidence shall record their reasons.⁵⁵ In New South Wales, the requirement for reasons is far wider, extending to all situations where bail is refused. In New South Wales, Queensland, and South Australia these reasons must be recorded.⁵⁶ In Victoria, where bail is refused a statement of such refusal and the grounds for refusal are required.⁵⁷ In Western Australia, a bail record must be made in all cases of refusal, or where bail is granted with conditions; the defendant and the

prosecutor are also entitled to copies.⁵⁸

3.8 Requirement that the Accused be Brought Before a Court

Subject to the exception for the provision of additional time for assisting police with their enquiries, a person who is arrested should be brought before a court as soon as possible. The *Bail Acts* indicate that the accused is to be brought before a court:

- “as soon as practicable”: ACT,⁵⁹ NT,⁶⁰ Queensland,⁶¹ Tasmania.⁶²
- “as soon as reasonably practicable”: NSW,⁶³ SA,⁶⁴ WA.⁶⁵
- “forthwith”: Victoria (where it is not practicable for bail to be granted forthwith, bail *may* be granted; where it is not practicable to bring the accused before a court within

⁵⁵ *Bail Act 1992* (ACT) s 16(2a).

⁵⁶ *Bail Act 1978* (NSW) s 38; *Bail Act 1980* (Qld) s 7(3); *Bail Act 1985* (SA) s 12(1).

⁵⁷ *Bail Act 1977* (Vic) s 12(2); see also s 4(4)(d)(ii).

⁵⁸ *Bail Act 1982* (WA) s 26.

⁵⁹ *Bail Act 1992* (ACT) s 17 (and in any case, within 48 hours).

⁶⁰ *Police Administration Act 1979* (NT) s 137.

⁶¹ *Bail Act 1980* (Qld) s 7(1)(b) (within 24 hours).

⁶² *Criminal Law (Detention and Interrogation) Act 1995* (Tas) s 4.

⁶³ *Bail Act 1978* (NSW) s 18.

⁶⁴ *Bail Act 1985* (SA) s 13(3) (“as soon as reasonably practicable” or before 4 pm of the next working day). In *R v. Bell* (1994) 77 A Crim R 213, it was indicated that what is reasonably practicable depends on the administrative arrangements at the time.

⁶⁵ *Bail Act 1982* (WA) ss 5(1)(b), 3 (s 3 defines “as soon as practicable” to mean “as soon as is reasonably practicable”).

24 hours, bail *shall* be granted unless the Act provides otherwise).⁶⁶

The Victorian bail legislation is significantly different from other jurisdictions in that it creates an additional bail authority, the *bail justices*. Where a defendant is not granted police bail, he or she can apply for bail with a bail justice who is available “on call”. Alternatively, if a court is sitting, the defendant must be brought before the court “forthwith”.

3.9 Bail Criteria

With the exception of Tasmania, the criteria for the granting of bail are outlined in the relevant *Bail Acts*. Most jurisdictions divide the criteria into three broad categories:

- The probability of the person appearing in court;
- The interests of the person charged; and
- The protection of the community.

3.9.1 The Probability that the Offender will Re-Appear

This broad heading requires the police or court to consider whether the accused will appear in court having regard to the following criteria:

- The background and community ties of the person indicated by the nature of their home environment, employment status, and their prior criminal record.⁶⁷ These factors are not specifically outlined in the Western Australian legislation since the *Bail Act 1982* only requires that the probability of re-appearance be assessed.⁶⁸
- The nature and seriousness of the offence, including the strength of evidence against that person.⁶⁹ This is not specifically alluded to in the Western Australian *Bail Act*, but is at the bail authority’s discretion.
- Any previous failures to attend court pursuant to a bail undertaking.⁷⁰ This is not a feature of the Australian Capital Territory legislation. In Western Australia, it

⁶⁶ *Bail Act 1977* (Vic) s 10(1).

⁶⁷ *Bail Act 1992* (ACT) s 22(1)(a)(i); *Bail Act 1978* (NSW) s 32(1)(a); *Bail Act 1982* (NT) s 24(1)(a)(i); *Bail Act 1980* (Qld) s 16; *Bail Act 1985* (SA) s 10(1)(b); *Bail Act 1977* (Vic) s 4(3)(b).

⁶⁸ *Bail Act 1982* (WA) Sch 1, Pt C, s 1(a)(i).

⁶⁹ *Bail Act 1992* (ACT) s 22(1)(a)(ii); *Bail Act 1978* (NSW) s 32(1)(a)(iii); *Bail Act 1982* (NT) s 24(1)(a)(iii); *Bail Act 1980* (Qld) s 16(2)(a), (d); *Bail Act 1985* (SA) s 10(1)(a) (gravity of the offence only); *Bail Act 1977* (Vic) s 4(3)(a), (d).

⁷⁰ *Bail Act 1978* (NSW) s 32(1)(a)(ii); *Bail Act 1982* (NT) s 24(1)(a)(ii); *Bail Act 1980* (Qld) s 16(2)(c); *Bail Act 1985* (SA) s 10(1)(e); *Bail Act 1977* (Vic) s 4(3)(c).

appears to be within the bail authority's discretion.

- Any specific evidence indicating whether or not it is probable that the person will appear in court.⁷¹
- The attitude, if expressed to the court, of the alleged victim of the offence (Victoria only).⁷²

3.9.2 The Interests of the Person Charged

This factor includes:

- The period that the person may be held in custody if bail is refused and the custody conditions.⁷³
- The need of the person to be free in order to prepare for their court appearance, and includes obtaining legal advice⁷⁴ and, in New South Wales and the Northern Territory, for any lawful purpose.
- The accused person's need for physical protection due to intoxication, injury, drug use, or

other causes⁷⁵ (including the need for medical care in South Australia).

3.9.3 The Protection of the Victim/Close Relatives⁷⁶

These criteria are specified in the bail legislation of New South Wales, the Northern Territory (threats of domestic violence), Queensland (endangering the safety or welfare of a victim, South Australia (a bail authority must give primary consideration to the victim), and Tasmania (must consider a victim's interests to be of paramount interest).

3.9.4 The Protection of the Community

- The likelihood of the accused interfering with evidence, intimidating witnesses or otherwise obstructing the course of justice.⁷⁷

⁷¹ *Bail Act 1978* (NSW) s 32(1)(a)(iv); *Bail Act 1982* (NT) s 24(1)(a)(iv).

⁷² *Bail Act 1977* (Vic) s 4(3)(e).

⁷³ *Bail Act 1992* (ACT) s 22(1)(b)(i); *Bail Act 1978* (NSW) s 32(1)(b)(i); *Bail Act 1982* (NT) s 24(1)(b)(i).

⁷⁴ *Bail Act 1992* (ACT) s 22(1)(b)(ii); *Bail Act 1978* (NSW) s 32(1)(b)(ii); *Bail Act 1982* (NT) s 24(1)(b)(ii).

⁷⁵ *Bail Act 1992* (ACT) s 22(1)(b)(iii); *Bail Act 1978* (NSW) s 32(1)(b)(iv); *Bail Act 1982* (NT) s 24(1)(b)(iv); *Bail Act 1985* (SA) s 10(1)(d); *Bail Act 1982* (WA) Sch 1, Pt C, s 1(b).

⁷⁶ *Bail Act 1978* (NSW) s 32(1)(b1); *Bail Act 1982* (NT) s 24(1)(d); *Bail Act 1980* (Qld) s 16(1)(a)(ii)(B); *Bail Act 1985* (SA) s 10(4); *Justices Act 1957* (Tas) ss 34–35.

⁷⁷ *Bail Act 1992* (ACT) s 22(1)(c)(i); *Bail Act 1978* (NSW) s 32(1)(c)(iii); *Bail Act 1982* (NT) s 24(1)(c)(ii); *Bail Act 1980* (Qld) s 16(1)(a)(ii)(C); *Bail Act 1985* (SA) s 10(1)(b)(iii); *Bail Act 1982* (WA) Sch 1, Pt C, s 1(a)(iv).

- The likelihood of the accused committing an offence while on bail.⁷⁸
- The nature of the offence, its seriousness, and category.⁷⁹

3.9.5 Miscellaneous

- Whether the prosecutor has put forward grounds for opposing bail.⁸⁰
- Whether, as regards the period when the defendant is on trial, there are grounds for believing that if he or she is not kept in custody,

the proper conduct of the trial may be prejudiced.⁸¹

3.10 Conditions Attaching to Bail Agreements/Undertakings

Table 3 demonstrates that conditions attaching to bail agreements are not uniform in Australia.

Most *Bail Acts* contain a provision that the condition(s) imposed are not to be too onerous having in mind the nature

Table 3: Conditions Attaching to Bail Agreements/Undertakings

| | ACT | NSW | NT | Qld | SA | Tas | Vic | WA |
|---|-----|-----|----|-----|----|-----|-----|----|
| Enter an agreement/undertaking | ✓ | ✓ | ✓ | ✓ | ✓ | | ✓ | |
| Provision of a surety | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Release on evidence of character | ✓ | ✓ | ✓ | | ✓ | | | ✓ |
| Require the deposit of monies | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Reporting requirement | ✓ | | | | ✓ | ✓ | | |
| Residency requirement | ✓ | | | | ✓ | | | ✓ |
| Requirement to undergo medical or dental treatment | ✓ | | | ✓ | ✓ | | | ✓ |
| Requirement to undergo rehabilitation | ✓ | | | | | | | |
| Geographic restraint/restraining order | ✓ | | | | ✓ | ✓ | | ✓ |
| Surrender of passport | ✓ | | ✓ | | ✓ | | | |
| Notification of the Director of Public Prosecutions | | | | ✓ | ✓ | | | |

⁷⁸ *Bail Act 1992* (ACT) s 22(1)(c)(ii); *Bail Act 1978* (NSW) s 32(1)(b)(iv); *Bail Act 1982* (NT) s 24(1)(c)(iii); *Bail Act 1980* (Qld) s 16(1)(a)(ii)(A); *Bail Act 1985* (SA) s 10(1)(b)(ii).

⁷⁹ *Bail Act 1978* (NSW) s 32(1)(c)(i) (includes consideration as to whether offence is of a sexual or violent nature); *Bail Act 1982* (NT) s 24(1)(c-d); *Bail Act 1980* (Qld) s 16(3) (includes firearms offences and use of explosives).

⁸⁰ *Bail Act 1982* (WA) Sch 1 Pt C, s 1(c).

⁸¹ *Bail Act 1982* (WA) Sch 1 Pt C, s 1(d).

of the offence. In Queensland, Tasmania, and Western Australia, there is a wide discretionary power to impose conditions that the court thinks fit (Queensland) or “necessary or desirable” (Tasmania), or “desirable to ensure the performance of an undertaking” (Western Australia). Despite this, there is evidence, notably from Western Australia, that there is extensive use of sureties.

3.11 Bail Regulations

Each jurisdiction has enacted bail regulations. In the main, they contain the various forms that are used in any bail application and other procedures. These forms commonly cover applications for bail, the bail agreement/undertaking and any conditions attached, the time and place of the next appearance, guarantors/sureties, warrants for the arrest of persons in breach of bail conditions, and applications for review of bail decisions.

3.12 Conclusion

Review of the legislation suggests that legislative variations between jurisdictions alone are probably insufficient to significantly influence remand rates. However, legislative provisions relating to the granting of bail may be important in shaping

attitudes of decision-makers at all points in the system to remand.

Two issues of difference between the jurisdictions stand out. The first is the presumption *against* bail in serious drug cases. On this issue, Victoria’s presumption is stronger than South Australia’s, hence, focusing on this factor alone is not sufficient to understand variations in remand rates.

The second is the noteworthy factor that Victorian legislation contains the reminder that unless a defendant can be taken before a court forthwith, the police should grant bail unless there are persuasive reasons to the contrary. If they do refuse bail, the defendants must be told of their rights to be taken forthwith before a bail justice.

Part 4: The Contribution of the Justice Process to Remand in Custody Outcomes

4.1 Overview

To this point, it is easy to form the conclusion that there are many causal factors in the determination of a remand rate. Moreover, variations in remand rates are not caused simply by legislative differences between jurisdictions. The factors that influence the rate are buried deeper into the criminal justice system. In this part, we explore the processes and interactions of the various components of that system and their influence on the remand outcome.

4.1.1 Methodology

To investigate the processes and interactions forming the remand in custody process we sought to identify the key actors and phases in that process. This was achieved by preparing process maps based on the procedures set out in the bail and related legislation. These were then discussed with some of the key actors from the various jurisdictions studied and other participants in the criminal justice system.

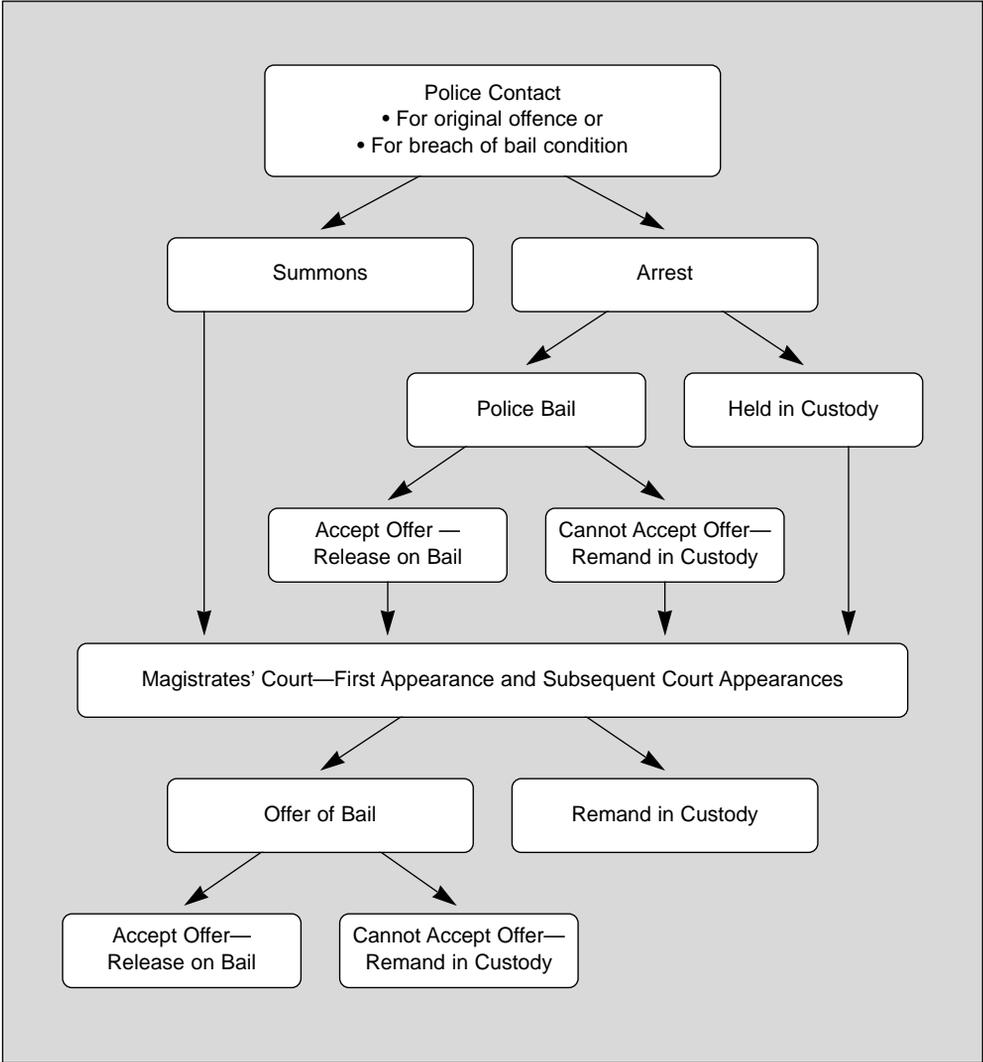
Diagram 1 has been developed to emphasise the commonalities of the remand in custody process between jurisdictions, differences in legislation, and structure of criminal justice procedures for different jurisdictions result in significant differences in the process maps. For Victoria, a separate process map has been created to show the existence of the *bail justice* in the system (**Diagram 1A**). Utilisation of a process description provides an opportunity for the identification of key “filter points” in the process. These are points at which, through the exercise of discretion, individuals are filtered into or out of remand in custody.

4.2 Process “Phases”

To enable analysis of the interactions and decisions made at those key filter points the process map was divided into three phases:

- apprehension phase;
- police bail phase; and
- court bail phase.

Diagram 1: Remand in Custody Process: Description of Decision-Making



**Diagram 1A: Remand in Custody Process (Victoria):
Description of Decision-Making**

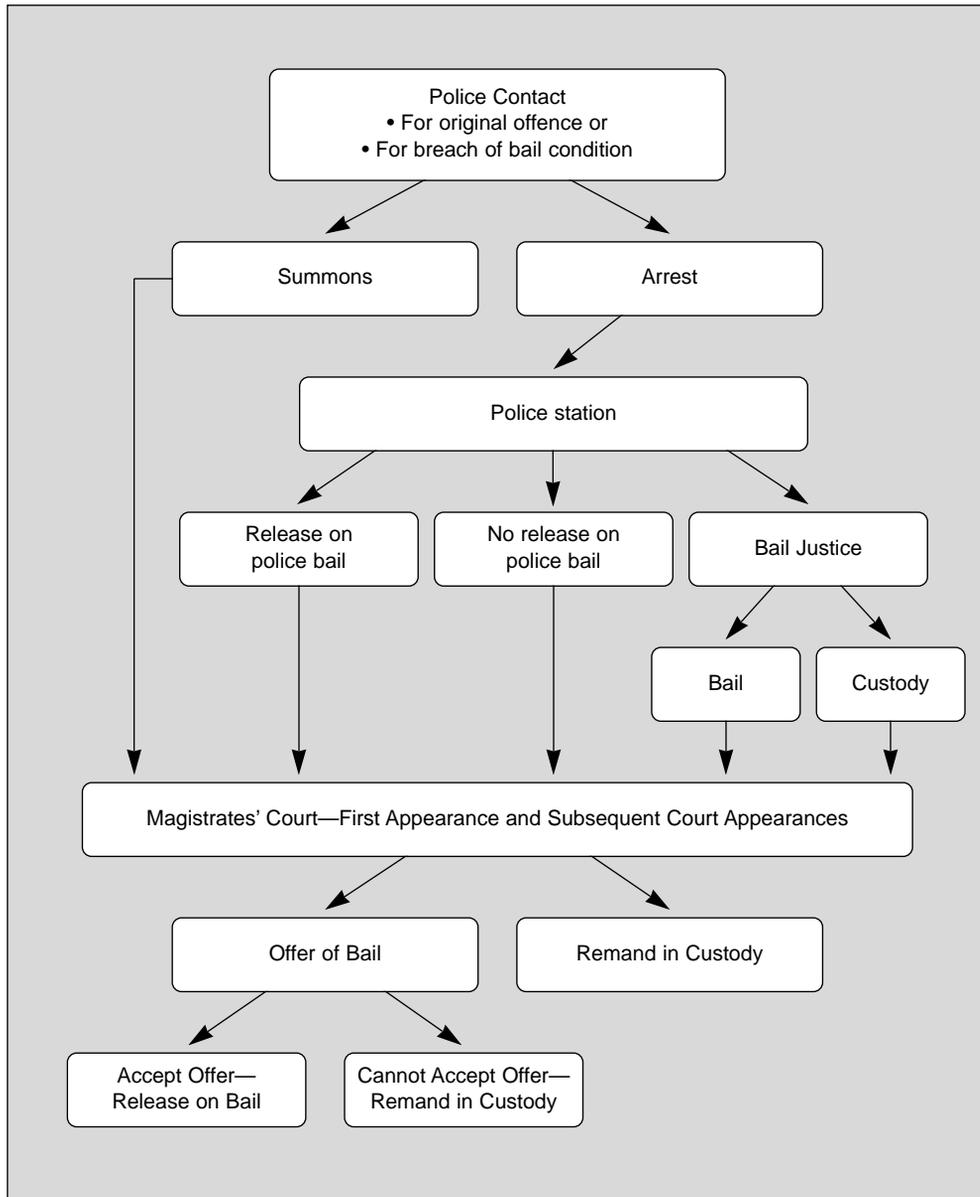
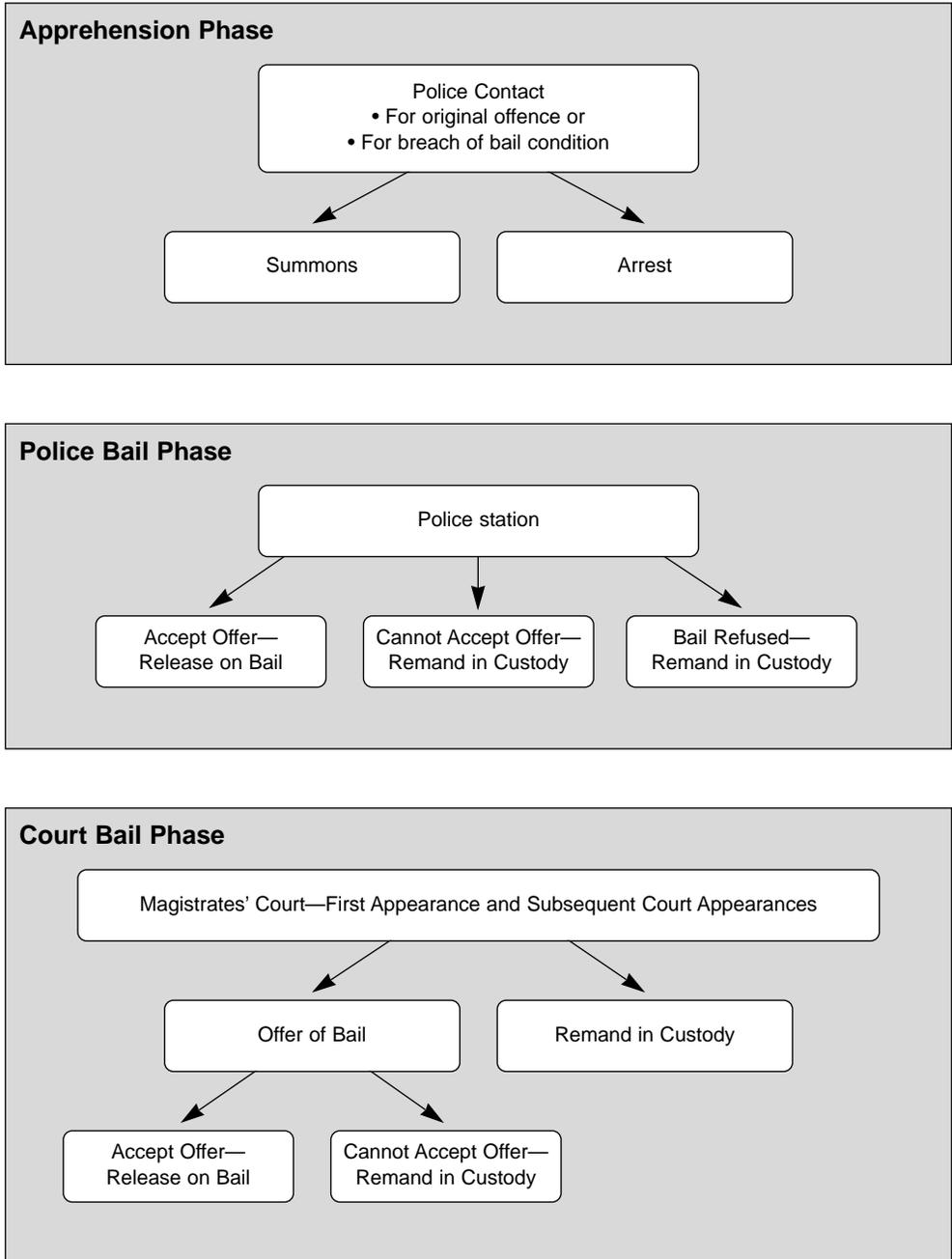


Diagram 2: Remand in Custody Process: Description of Decision-making Identification of Phases



4.2.1 The Apprehension Phase

The remand in custody process commences with the alleged or assumed commission of an offence, the identification and apprehension of an individual who is allegedly responsible, and the decision by police to arrest, report, or caution that individual. In identifying the factors that affect remand in custody, the contribution of this initial phase of the process lies in the degree to which these options are available or utilised. If the decision is made to caution the individual, the possibility of being remanded in custody does not arise. If the alleged offender is merely reported, then that individual moves out of the remand in custody process and is brought to court for the determination of innocence or guilt and punishment through the summons process of the justice system. Furthermore, for some offences, a summons leaves open to the defendant the possibility of his or her not appearing in court in person, but “appearing” by way of representation by counsel or by written plea of guilty.

Once an individual is arrested and taken into custody, however, decisions about how the matter will proceed

through the criminal justice process take a significantly different turn.

4.2.2 The Police Bail Phase

Following the arrest of an individual, police are required to make decisions about the most appropriate process to bring the defendant before the court. Police may decide to proceed by way of remanding the defendant in custody or offering bail. Each of these processes has a different consequence for the defendant and for the justice system.

If an offer of bail is not made, the defendant is remanded in custody.⁸² Even a decision to offer bail can be expected to have significant impact on the future remand in custody process. It may be accompanied by a requirement that the defendant provides a guarantor, or a surety, or that the bailee meets other conditions, creating the possibility that the individual may not be able to accept the offer of bail immediately or at all. A person may be remanded in custody for some days whilst arrangements are made to meet the bail conditions. Even if bail is obtained, the conditions upon which it is granted can have implications for the remand in custody process if they lead to subsequent

⁸² In Victoria, a person must be advised of the right to be brought before a ‘bail justice’ if police bail is not granted.

breaches of bail and re-entry into police custody.

The Police Bail phase of the process concludes when the individual leaves the police station tied by certain conditions of bail, or when the individual is placed in police custody until the first court hearing.

4.2.3 The Court Bail Phase

There is a distinction that needs to be drawn between the lower and higher courts, as follows:

Magistrates' Courts

Persons appearing in court may have their case disposed of in a single sitting of the court or may be required to return to court on subsequent occasions. Each time an individual appears before the court, the decision to remand in custody or to grant bail is reviewed. Failure to appear in court at the appointed time and day results in the issuing of a warrant for arrest and restarts the process through the apprehension phase. The outcome of the appearance before a magistrate will either be the determination of a case or referral to a higher court.

Higher Courts

The higher court bail process is one that affects a smaller number of defendants. However, this phase of the

bail process warrants separate attention as the cases heard in the higher courts are more serious and often more complex, and thus require more time in preparation and in hearing time. An individual remanded in custody for a hearing in a higher court may be remanded in custody for significant periods of time. The remand in custody process does not conclude until the disposal of the case. In some matters (typically the more serious) there may be a period in which an individual is found guilty and is remanded in custody awaiting sentence. This part of the process will not receive significant attention in this study.

4.3 Research Questions

Identification of the apprehension, police bail and court bail phases “filter points” led to the focus of the following research questions:

1. *Do the three jurisdictions have different outcomes at each phase of the remand in custody process?*
2. *Do the three different jurisdictions have policies or practices that might affect the outcomes at each of the phases in the remand in custody process?*

To test these research questions, and the availability of data to answer them,

the research focused on the three identified jurisdictions. The initial approach to each jurisdiction was through the identified member of the Criminology Research Council Advisory Committee. From these contacts, the research sought to identify who within each jurisdiction might have appropriate information and would be willing to be interviewed. The number of justice agencies from whom the information was required and the range of responses from the jurisdictions are indicative of the challenges of understanding the remand in custody process. Courts authorities, correctional services, police and crime statistics units within broader justice portfolios all made a contribution.

4.4 Findings on Outcomes

Question 1: *Do the three jurisdictions have different outcomes at each phase of the remand in custody process?*

4.4.1 South Australia

South Australia is at the forefront in the publication of criminal justice statistics. The South Australian Office of Crime Statistics collates a large amount of information that is published annually. For the purposes of this research, the

Crime and Justice in South Australia 1996: A Statistical Report (Office of Crime Statistics 1997) was used, along with the (then draft) report on Remand in Custody in South Australia (Marshall and Reynolds 1998).

The relevant aspects of the *Crime and Justice* publication for this project lie in the statistics on bail status at final disposition of matters in both magistrates' courts and higher courts. The Marshall and Reynolds report used a more recent data set to provide an analysis of the initial method of entry into the court system, contrasting the custody position at final outcome. Limited data were available from these sources on the intervening phase in the remand in custody process, the police bail phase.

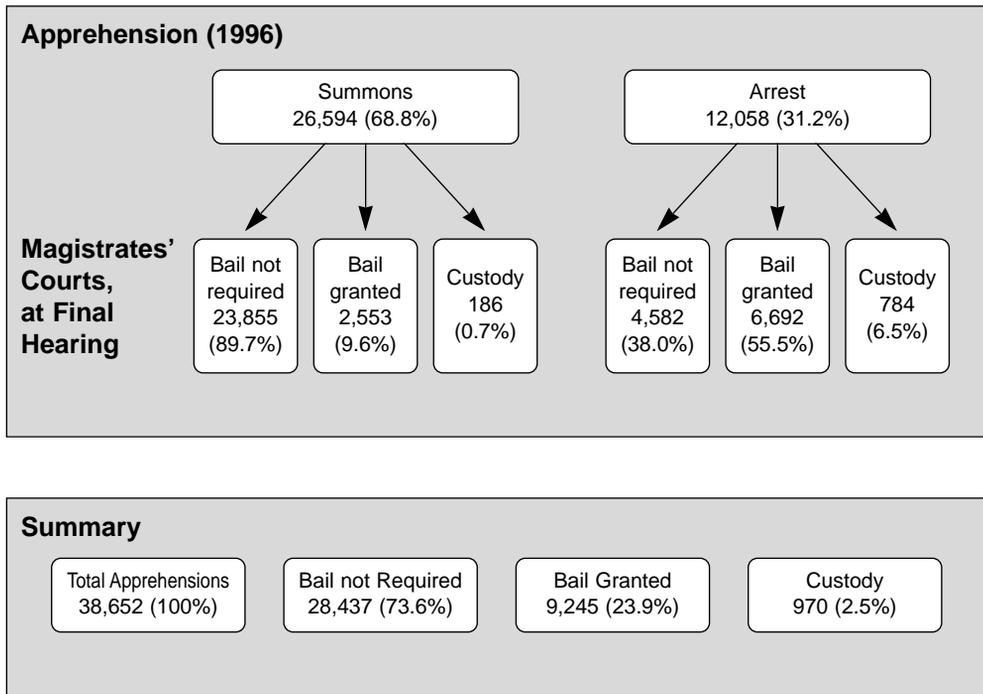
The statistics reveal that, compared to Victoria and Western Australia, South Australia has the highest proportion of matters entering the court system by way of summons (68.8 per cent), with the remaining 31.2 per cent being those arrested. Hence, a majority of defendants apprehended by police by-pass the police bail phase altogether. Furthermore, 38 per cent of those arrested by-pass the remand in custody process altogether, designated in **Diagram 3** as "bail not required". It is not entirely clear whether some of these defendants were released from police custody in order to be summoned, or later in the process the need for bail was thought to be

unnecessary. Whatever the reason, by the time matters reached the magistrates' courts in 1996, 28,437 of the 38,652 matters (or 73.6 per cent of defendants) did not require a decision on bail.

The disadvantage of statisticians selecting "bail status at final disposition" as their counting practice is that it does not allow for analysis of police bail outcomes. It also only reveals the bail decisions of the penultimate court hearing. Thus, a number of those defendants who appear in the data as having been granted bail may, at prior stages, have been remanded in custody. Similarly, those in custody at the final hearing

may have had bail granted at some prior stage. However, *Crime and Justice in South Australia 1996*, Table 3.33 (p. 138) does provide limited insight into police bail outcomes, as represented in **Diagram 3A**. These data distinguish between matters finalised at first hearing and those requiring more than one hearing. For matters requiring only one hearing, the penultimate step in the remand in custody process was the police bail phase. The data revealed that 16,633 defendants did not require a bail decision. Of the remaining 510 defendants who required a bail decision, 446 (87.5 per cent) obtained bail and 64 (12.5 per cent) were remanded in

Diagram 3: Remand In Custody Process: Bail/Remand In Custody: South Australia



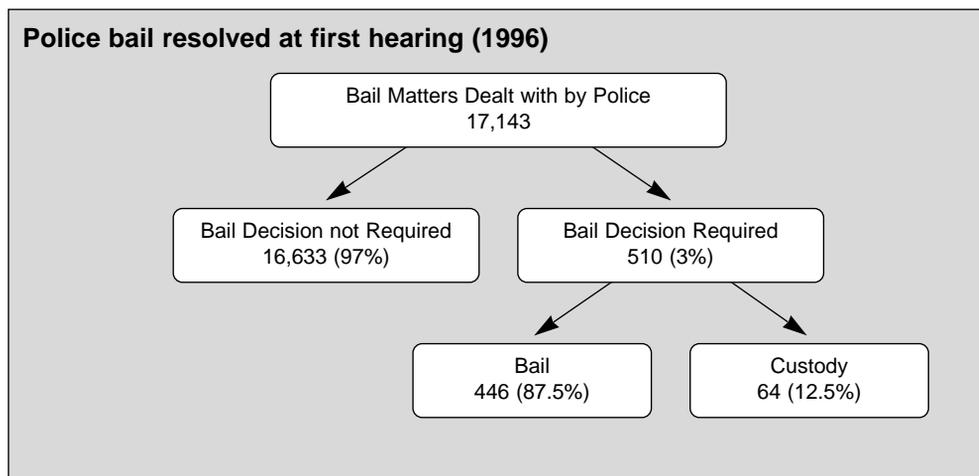
custody. These figures are consistent with earlier police estimates of police bail to remand in custody (McAvaney 1991, p. 74).⁸³

In summary, in South Australia only 6.5 per cent of those arrested were in custody at time of disposition of their matter and, for those summoned, the proportion was 0.7 per cent. Of the total defendants apprehended, only 970 out of 38,652 (or 2.5 per cent) were in custody at the final disposition of their matter in the Magistrates' Court.

4.4.2 Victoria

The Victorian Ministry of Justice collects statistical data from a range of justice agencies. The main data set used was the case flow management data on first bail applications. This data set recorded for each level in the remand in custody process the number of persons granted and refused bail (see **Diagram 4**), and on what conditions.⁸⁴ Data for the year 1995⁸⁵ were used, as they also provided the

Diagram 3A: Remand in Custody Process: Police Bail (South Australia)



⁸³ McAvaney (1991) maintained that at least 90 per cent of applicants for police bail were successful with 10 per cent being remanded into police custody. In discussing the process maps with SAPOL in October 1998 the same figures were offered as estimates of the bail rate at the police bail phase.

⁸⁴ These data include details of conditions placed on those who are granted bail. In 1995 the police granted bail with a personal undertaking in 99.9 per cent of cases. A surety was required in only 0.1 per cent of cases. At the bail justice level the proportion granted bail on personal undertaking fell to 94 per cent, with 5 per cent requiring a surety. For those whose first bail application was at the Magistrates' Court, the proportion obtaining bail on a personal undertaking fell to 88.6 per cent with 8.7 per cent requiring a surety, and the remainder either by deposit or both deposit and surety.

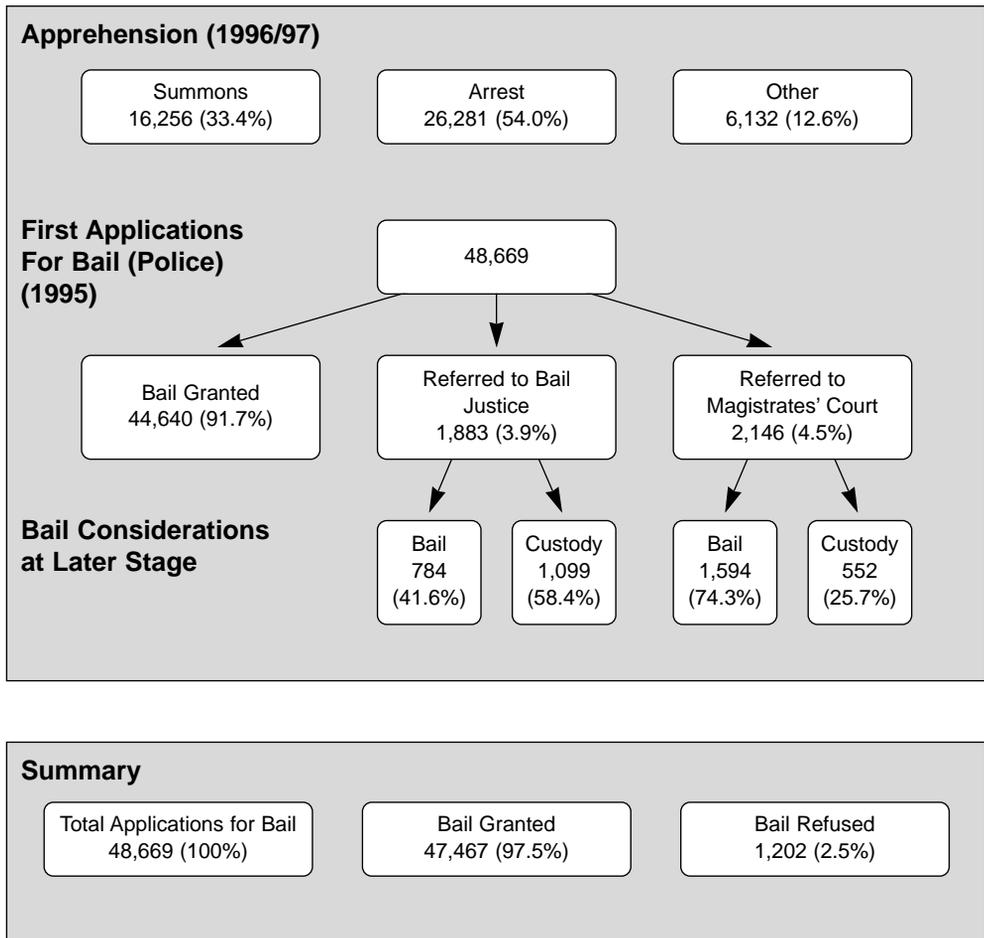
⁸⁵ Court Flow Analysis, Ministry of Justice.

outcomes of the applications made for bail by those refused bail by bail justices. As these were not first applications, these figures do not appear in the usual data set but were obtained subsequently for other purposes and made available to the consultants. From the study by Marshall and Reynolds (1998), data on entry to the court system were

obtained, but only for the year 1996/97. These reveal that 33.4 per cent of all matters are dealt with by way of summons, and 54 per cent by arrest.

Of significance here is the very high proportion of persons arrested who obtained bail. Of those arrested and for whom a bail decision was required, 91.7 per cent obtained bail from the

Diagram 4: Remand in Custody Process: Bail/Remand in Custody (Victoria)



police.⁸⁶ Defendants appearing before a bail justice will have already made application to the police unsuccessfully, therefore it is perhaps not surprising the percentage granted bail at this hearing falls to 41.6 per cent. It is of some interest that when matters are dealt with by the court, the percentage of cases where bail is granted rises to 74.3 per cent, but this figure essentially represents those who came from police custody and by-passed bail justices altogether.⁸⁷

These data do not reveal the complete picture as those defendants who do not apply for bail at all are not counted and neither are those who apply for bail more than once in the magistrates' courts.

The phenomenon, observed in South Australia, of large proportions of those arrested not requiring decisions about bail does not seem to occur in Victoria. To obtain a better understanding of the situation would require collecting data on bail status at final disposition, as in South Australia, not first application.

With respect to remand in custody numbers, discussions in Victoria reveal that a significant number of defendants remanded in custody remain in *police* custody. Reference was made to the

“thirty day rule” which, apparently, operates as a rough operational guide determining when ownership or responsibility for remandees is transferred from police to correctional services. The potential for understating remand numbers in the National Prison Census requires investigation.⁸⁸

The remand in custody outcome for Victoria is that 97.5 per cent of those arrested receive bail either as a police bail or proceed further through the remand in custody process, leaving only 2.5 per cent of those arrested in custody.

4.4.3 Western Australia

Some source materials for Western Australia are readily available but there are some gaps. Criminal justice statistics are published by the Crime Research Centre, University of Western Australia, along with certain data sets by the West Australian Ministry of Justice. The most recent statistical report, *Crime and Justice Statistics for Western Australia 1996*,⁸⁹ contains data about numbers arrested compared to those proceeded with by way of summons (Ferrante et al. 1998).

⁸⁶ Police can refuse bail, but in that event the defendant *must* be brought before a bail justice or magistrates' court.

⁸⁷ 449 of those remanded in custody by bail justices in this data set subsequently obtained bail in the magistrates' courts.

⁸⁸ An unanswered question is whether remandees held in Gazetted police prisons may be counted in the National Prison Census.

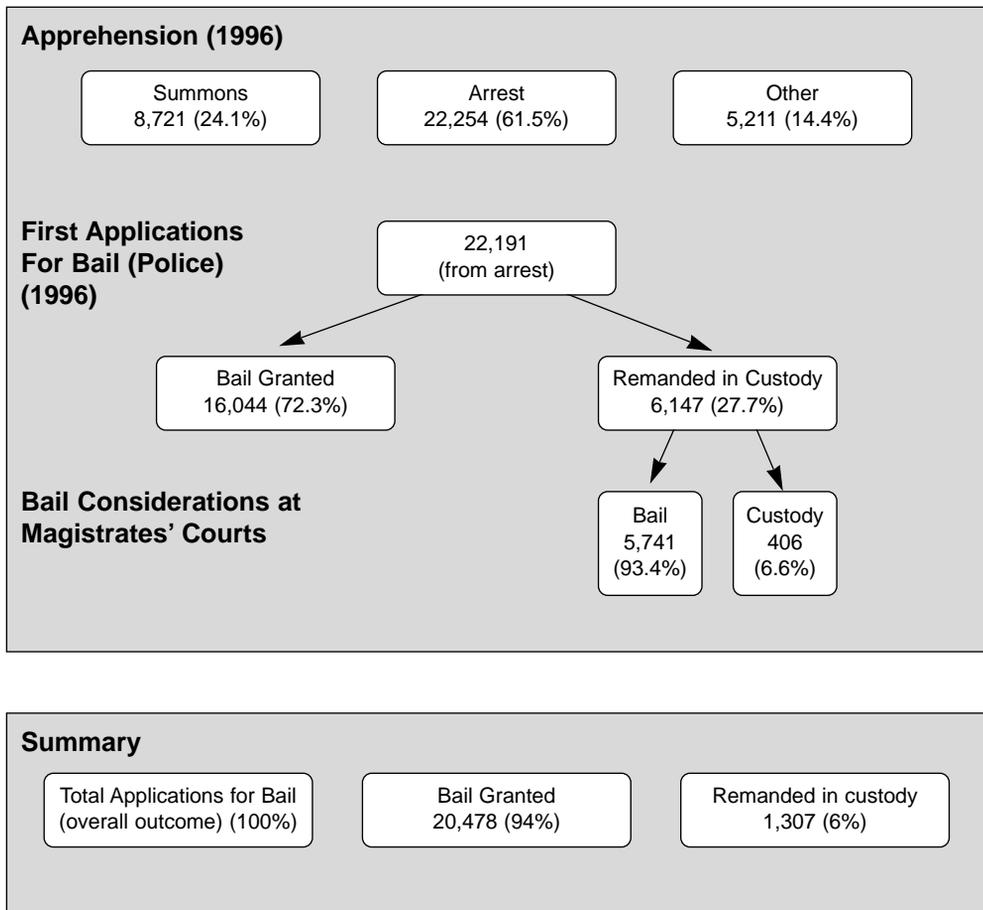
⁸⁹ The chapter is headed “Police Apprehensions and Juvenile Cautions” (Ferrante et al. 1998, Table 1, p. 38), and contains a 1996 figure of 36,186 persons arrested.

The 36,186 defendants referred to under the heading *Arrest Processing* are said to be those defendants apprehended and charged. Of those 36,186 defendants,⁹⁰ 24.1 per cent were proceeded with by way of summons, and 61.5 per cent were arrested, as illustrated by **Diagram 5**. Of those arrested, 16,044

(72.3 per cent) were granted police bail and 6,147 (27.7 per cent) were refused bail.

Unfortunately the data on magistrates' court bail outcomes are incomplete. The Auditor-General (WA) Performance Examination, *Waiting for Justice: Bail and Prisoners in Remand*,

Diagram 5: Remand in Custody Process: Bail/Remand in Custody (Western Australia)



⁹⁰ According to "Police Apprehensions and Juvenile Cautions" (Ferrante et al. 1998, Table 1, p. 38), a 1996 figure of 36,186 persons are arrested. However, this figure is probably the number *apprehended* which includes those summoned as well as those arrested (Figure 2.5 and text at 2.3.3 p. 43). The arrest figure, based on bail and custody figures, should be 22,191.

provides some overall statistics for bail and remand in custody after first appearance for the financial year 1996/97.⁹¹ But these were expressed as percentages without any break-down concerning how defendants entered the court system, although there is data concerning bail undertakings and sureties.⁹²

In summary, while there is no break-down of number of persons refused police bail who were then granted bail in court, the remand in custody outcome for Western Australia after first appearance in the Magistrates' Court is that 94 per cent of defendants have obtained bail, while 6 per cent are remanded in custody.

4.4.4 Conclusions

An exploration of the three identified jurisdictions has highlighted the lack of operational data published about the remand in custody process, and a lack of consistency in nomenclature and rules of counting. While there are increasing amounts of valuable data on outcomes, for example, police statistics relating to numbers and profiles of offenders, court statistics on outcomes of cases by offence and profile of defendants, correctional statistics on defendants ending up in

custody, statistics that illustrate how the system operates are scarce. Where the statistics are available, cross-jurisdictional comparisons are difficult, for the various jurisdictions have not only tended to focus on different stages in the criminal justice process, but have used different counting rules and definitions at different stages of the process. For this reason, the "maps" found in the diagrams all look different.

Ascertaining the proportions in each jurisdiction of defendants arrested, summoned, or dealt with by diversionary schemes is difficult. Some jurisdictions appear to use the term "apprehension" to mean arrest. Moreover, in addition to those arrested and then released, there are significant numbers arrested in South Australia who escape the bail/ remand in custody process altogether. As Victoria and Western Australia count bail status earlier in the process, there is nothing to indicate whether a similar practice exists in those jurisdictions. South Australian figures, because they only relate to bail status at final disposition, do not allow us to identify where, or why, this change occurs in the process.

If that were not frustrating enough, the problem is compounded by the

⁹¹ Western Australia 1997.

⁹² The Auditor-General's examination found that 79 per cent of those on bail were released on their own undertakings, 16 per cent were required to provide a surety and 5 per cent were released with no requirements.

number of cases that proceed by way of summons. Employing this option in South Australia allows the accused to avoid the police bail phase, although defendants may then require a bail decision at the Magistrates' Court.

Looking at overall outcomes, the picture is thus not at all clear, although it is possible to draw some conclusions. In Western Australia, 6 per cent of all defendants are remanded in custody after their first court appearance. In Victoria, only 2.5 per cent of those arrested are finally remanded in custody. In South Australia, 6.5 per cent of those arrested are kept in custody and 2.5 per cent of all defendants are remanded in custody at final disposition. Further research and coordinated data collections by the States are required in order to identify whether different outcomes at the filter points discussed contribute significantly to the different rates of remand in custody in different jurisdictions. However, the analysis produced sufficient information for one to speculate that there are likely to be different outcomes at each of these phases. Victoria appears to have proportionately fewer defendants entering the remand in custody process at police and court bail phases.

Given these differences in outcomes at the different phases of the remand in custody process, the research then

attempted to explore whether it could identify any differences in policy or practice in each of the jurisdictions at each phase. This led to the second research question—Do the three different jurisdictions have policies or practices that might affect the outcomes at each of the phases in the remand in custody process?

4.5 Findings on Policies and Practices

Question 2: *Do the three different jurisdictions have policies or practices that might affect the outcomes at each of the phases in the remand in custody process?*

4.5.1 Policies and Practices at the Apprehension Phase

Following the apprehension of an alleged offender, the decision that must be taken to caution, report, or arrest is an important filter point. Interviews with key actors led to the identification of policies and practices in several areas that would affect remand in custody outcomes. They were policies relating to the availability and use of diversionary schemes, policies making arrest the last resort,

and both evidentiary and administrative practices.

• **Diversionsary schemes**

There are differences in the availability of cautioning schemes for adult defendants and an observable trend to increase the scope of such schemes. Cautioning of adult offenders is limited to a number of specific offences in Victoria and Western Australia. Victoria, with the most well established system of cautioning, has permitted this practice for shoplifting offences since 1985 and since September 1998 for certain cannabis-related offences. It has also introduced a pilot program extending the cautioning procedure to certain other illicit drug offences. Western Australia has recently commenced a cautioning system for adults apprehended for the possession of cannabis. If police exercise this option, the matter is finalised at this point and there is no possibility of the individual being remanded in custody.

In South Australia, the formal cautioning of adults is not an option. However, since 1986, police have been authorised to deal with the possession of some quantities of cannabis by way of “expiation” notices (Sarre 1990, Sutton and Sarre 1992). Failure to expiate any offence by payment of a fine results in the issuing of a summons.

• **Making arrest the last resort**

If the alleged offence is one which cautioning or expiation is not an option, a police officer, upon identification of an alleged offender, is faced with the choice between issuing a summons and arresting the individual. Many police Standing Orders or General Orders direct police to proceed by summons rather than by arrest wherever appropriate. Some jurisdictions, for example Victoria, have limited the choice available to police by enacting requirements for lawful arrest that include a reasonable belief in the necessity of arrest. The arrest has to be necessary for one of the following reasons:

- to ensure attendance at court;
- to preserve public order;
- to prevent continuation or repetition of the offence; or
- to ensure the safety or welfare of the public or offender.

South Australia and Western Australia do not have statutory provisions emphasising the preference for summons over arrest. This may be a significant feature in different rates of remand.

• **Evidentiary practices**

The decision to arrest or summons an individual in relation to an offence may be affected by the needs of the

investigators of the crime concerned. Different provisions apply in different jurisdictions in relation to the obtaining of evidence involving a person not arrested for a crime. The investigative powers of police are generally considerably greater after arrest. Arresting a defendant provides police with the power to fingerprint and photograph, to apply to take biological samples, and in some States affects the extent of search and seizure that is permissible.

In South Australia and Western Australia, the ability to obtain, compulsorily, information about a defendant, including fingerprints, photographs, handwriting samples, only arises after arrest. In South Australia, the right arises when a defendant is in custody and has been charged, whereas in Western Australia it arises after arrest.⁹³ By way of contrast, Victorian police are able to take fingerprints and similar evidence from a person charged with, or who has been summoned to answer charges relating to, indictable offences as well as a variety of summary offences.⁹⁴

A similar situation applies with respect to medical examinations and the taking of biological samples. In South Australia and Western Australia, police are able to request a qualified medical

practitioner to conduct an examination (using reasonable force as is necessary) of a person in lawful custody.⁹⁵ The Victorian provisions allow police to "... request a person to give samples if there are reasonable grounds to believe that such a sample would tend to confirm or disprove the involvement of the person in the commission of an indictable offence" (Fox 1992). The samples, which include intimate and non-intimate samples, are generally broader than most other jurisdictions. The samples can be taken with consent or compulsorily by court order.

Furthermore the power to search persons or premises differs between all three jurisdictions. Whilst South Australia may be said to grant police the widest search powers (the only State to still have general search warrants), certain powers to search flow from arrest in both South Australia and Western Australia. In Victoria, there is a more circumscribed power of search upon arrest.

The effect of these differences in evidence-collecting powers is that there is a significantly greater incentive to arrest defendants in South Australia and Western Australia than in Victoria. Police in Western Australia suggested that the most successful means of reducing arrest rates in

⁹³ Section 81(4) *Summary Offences Act 1953* (SA); s50AA *Police Act 1892* (WA).

⁹⁴ Section 464K *Crimes Act 1953* (Vic), see Bishop 1998, p. 174.

⁹⁵ Section 81(2) *Summary Offences Act 1953* (SA), s 236 *Criminal Code* (WA).

Western Australia would be to reduce the use of arrest as the threshold for a variety of investigatory or evidence-collection tools. Victoria not only gives generally broader evidence collection powers with respect to individuals, but also makes them available to police without requiring arrest. The protection of civil liberties is achieved by requiring magistrates' approval when the suspect does not consent. Powers of search and seizure are less closely tied to arrest without warrant, thus making that process less attractive.

• **Police administrative factors**

In different jurisdictions the decision to arrest or to summons an individual will have different consequences for the apprehending officer. Initial discussions in all jurisdictions identified that each of these processes involves the case officer in a different type of administrative activity. Perceived workload implications may become a factor in the exercise of discretion to arrest rather than summon. The issue of a summons involves significantly more paper work than carrying out an arrest. The summons process generally requires provision of information (often sworn) to a court official who has to exercise a judicial discretion as to whether sufficient grounds have been made out for the issue. The summons must then be served on the defendant, and appropriate records of means of service kept. The summons process

thus has an inherently longer time frame.

It would appear that in South Australia and Western Australia, there are incentives that would encourage a police practice to choose arrest over summons. There are evidentiary and administrative incentives that do not appear to exist to the same degree in Victoria. Furthermore, Victoria has placed its policy of preferring the use of summonses rather than arrest in statutory form which one would expect influences both practice and general police culture.

4.5.2 Policy and Practices at the Police Bail Phase

Precise information about the police bail phase is not well documented. A number of possible policies and practices that impact upon decision-making at the police bail phase have been described in the course of the research. There is no evidence that would allow us to prove, or disprove, the accuracy of these assertions that are documented as possible areas for future research.

They can be grouped as:

- nature of the behaviour leading to arrest;
- police administrative practices; and
- bail-related practices.

- **Nature of the behaviour leading to arrest**

Two areas of practice may impact on remand in custody outcomes—the decision concerning with which offence a defendant is to be charged and the related, but separate, issue concerning how serious police regard the behaviour or the offence with which a defendant has been arrested. A key influence on both of these may be the legislative and social determinants that result in the definition of an offence by a police officer. This study has canvassed differences in bail laws around Australia. In so doing, it has identified that in some jurisdictions there is a presumption against bail where the accused is charged with a serious drug-related offence. The police choice of serious offence or an associated (lesser) offence, for which such a presumption does not exist, will be an important determinant of whether or not the individual is remanded in custody.

When the nature of the offence does not raise the possibility of a presumption against bail, other criteria, which are written into bail legislation, clearly reflect an assessment of the seriousness of the offence. These criteria, such as the protection of the community, would encourage a bail authority to be more cautious about granting bail for more serious offences than for less serious offences. Indeed, in all three jurisdictions, the

seriousness of the offence is a matter which bail decision-makers can take into account in making their assessments of the risk that the defendant may not appear, may continue to offend, or may interfere with the judicial process. Thus, the precise offence with which an individual is charged will influence the possibility of his or her being remanded in custody. The research has found no literature that examines this point of the remand in custody process for adults and has found very little statistical material about what decisions are actually being taken in police stations in relation to these questions.

Related to the nature of the offence are the practices relating to defendants arrested pursuant to a “bench warrant” for failing to appear to court or other breaches of bail conditions. South Australia and Western Australia require the defendant to be produced at court and there is no ability to grant police bail. This is particularly the case when the breach is that the individual did not attend court as required by the bail conditions. Victoria appears to have adopted a different policy approach enacting certain provisions that enable the magistrate to issue the warrant to make a bail certification that will allow police to release the defendant on bail.

The impact of having to produce in court those breaching bail on the number of people remanded in custody is not able to be determined

from the statistics available. However, small informal studies in several jurisdictions indicate that many people remanded in custody at a particular point in time are also granted bail at other times in the process. The most common situation appears to be failure to appear in court at the time required. Police and criminal justice administrators recognised that this could divert considerable police resources from other policing duties. The degree to which this happens has not been closely investigated.⁹⁶ Nevertheless, it was suggested that many, if not most, of these were not deliberate attempts to abscond, or necessarily avoid, court but a symptom of the dysfunctional nature of the lives of many of those appearing before magistrates' courts.

Although it has been difficult to examine the policies and practices to ascertain their content to see if they differ, one would expect that they would affect remand in custody outcomes. This particular aspect of the remand in custody process requires further research.

• **Police administrative practices**

Our exploratory research indicates that there may be differences in the degree to which the different jurisdictions have

developed policies to guide police in their decisions on bail. In South Australia, the police use legislation as their only formal documentary guide for decisions about remand in custody. Clearly, however, interpretation of the legislation is shaped by decisions of both lower and higher courts about bail processes and the appropriateness of particular exercises of discretion. Victorian police have a set of orders and operational policies guiding their work in this area. Western Australian police have detailed orders and policies on arrest, bail, and prosecution services generally. Some of these were available to the researchers and others require the Commissioner of Police's approval for release.

A more significant difference between the States is the role of the arresting officer (usually described as the "informant") and the role of the police prosecution services. In all States, the arresting officer is an important key actor in the process. This officer's views on whether a defendant should be granted bail appear to carry considerable weight. Nevertheless, the bail decision-maker is often of significantly higher rank or experience than the arresting officer, and will make an independent judgement on the question of granting bail.

⁹⁶ Although the Office of the Auditor-General (WA) did attempt to quantify this. See Western Australia 1997.

The attitude of the arresting officer to bail may be affected by the administrative arrangements for bail process. Although this will be further discussed in the following section covering the court bail phase, in Victoria there are significant administrative and resource implications for the arresting officer if bail is to be refused and the defendant exercises his or her rights to seek bail from a bail justice or a court. In Victoria, the bail hearing is quite different. The practice is that the arresting officer has to attend court and may be required to give oral evidence and undergo cross-examination. These do not appear to exist to the same degree in South Australia and Western Australia.

In Victoria, certain police officers have the power to grant bail to an individual, but in effect not to refuse it. If it is not possible to take defendants before a court forthwith and police bail is refused, defendants must be informed of their right to apply to a bail justice. If that right is exercised, the police must bring the defendant before the bail justice forthwith. The bail justice is available on call. The import of this is that once police bail is refused, and the defendant wishes to seek bail, the matter proceeds almost immediately out of police hands and into the broader criminal justice system. This involves further administrative requirements on the police who are required to produce to the bail justice

all warrants and papers relating to the defendant on which the police officer has to endorse the reasons for refusing bail.

Neither South Australia or Western Australia have adopted the policy of limiting the effect of the refusal of police bail by creating an immediate independent review of that decision by a bail justice.

- **Bail-related factors**

Bail decision-makers are engaging in risk assessment. The contribution of the seriousness of the offence to this assessment has been discussed above. Bail Acts identify other factors such as antecedents, character, and history of prior breaches of bail.

Discussions with police indicate that the two criteria most often used to refuse bail are the risk of the accused not attending and the risk of offences being committed whilst the accused is on bail. Police report that interfering with judicial process and safety of the defendant are less common concerns.

Victorian police in particular emphasised that, within the police service, there is a cultural expectation that a person would be granted bail. It was said that there needed to be very good grounds to have a person remanded in custody. Even characteristics such as homelessness were not seen as automatically constituting a poor bail risk. Police suggested they often knew the local

“identities” and would grant bail unless the accused had a history of bail breach. If a person was not known to police and had no permanent address or significant local ties, then there was a greater likelihood police would seek to have the person remanded in custody.

South Australian and Western Australian police also indicated that the overwhelming number of persons arrested were granted police bail. However, whether the cultural expectation of bail exists as claimed for Victoria is not clear.

4.5.3 Policies and Practices at the Court Bail Phase

In most jurisdictions, significantly more information becomes available once an accused person appears before a court and, if remanded in custody, is moved to correctional facilities.⁹⁷

Whilst at this phase in remand in custody process a range of new actors may enter the process and influence the decision-making, the legislatively determined criteria for granting of bail

are the same at this phase as they were in the previous police bail phase.

Reasons for refusing bail may be recorded on a court file, but this is not automatic in most jurisdictions and it does not get placed into the court computer system for ease of analysis. However, outcomes of the remand in custody process at this stage may provide some indicators of factors that influence remand in custody.

Research on various aspects of court practice has not been fully developed in Australia. Most attention has focused on the magistrates and their key role as the final decision-makers.⁹⁸ It is clear that magistrates are involved in an iterative process. Prosecutors acknowledge that their approach to bail matters is influenced by knowing which magistrate they are going to appear before. Magistrates develop working relationships with prosecutors and defence counsel that are necessary if the volume of work is not to overwhelm the court. Understanding of the practices of the other actors is even less advanced.

Several areas of policy and practice that impact on the remand in custody

⁹⁷ In Victoria the remanded defendant may remain within police custody as discussed earlier.

⁹⁸ The South Australia Courts Administration Authority (CAA), on instructions from the Remand Rate Working Group in South Australia, conducted a survey of magistrates which produced an unpublished and inconclusive report in 1998. It reviewed, amongst other things, magistrates' assessment of the operation of the *Bail Act 1985 (SA)*, the efficacy of current procedures, bail assessments and bail hostels. It did not review, specifically, magistrates' decisions regarding bail. The Chief Magistrate has undertaken a supplementary survey.

process have now been identified.

They include:

- the level of consistency between decisions on police bail and court bail;
- the conduct of contested bail hearings;
- the role of police prosecutors;
- the use of sureties when granting bail;
- the availability of options to custodial remand; and
- the delay in applying for court bail.

- **The level of consistency between decisions on police bail and court bail**

As discussed in the literature review, observational studies have suggested a close correlation between court bail outcomes and police bail outcomes. Prosecutors in all three jurisdictions thought it would be very rare for a magistrate to question the issue of bail or remand in custody if both prosecution and defence are consenting. Similarly, the police believe if a person was on police bail then there was little prospect of having that person remanded in custody by the court unless there had been a breach of bail or very different and new circumstances.

It is on the contested decisions that magistrates focus their time and resources. Discussions with prosecutors in the three jurisdictions indicated that they believe magistrates

agree with prosecution

recommendations or position in

50 per cent to 80 per cent of cases.

The observational studies in England vary but are consistent with this range.

These findings have greatest implications for the earlier phases of the remand in custody process.

It suggests that persuading the police to grant bail, or the prosecutors to not oppose bail, is likely to have greatest impact on remand in custody outcomes.

- **The conduct of contested bail hearings**

There are significant differences in the conduct of contested bail hearings. In Victoria, there is a substantial hearing into the matter. As discussed, the arresting officer often has to attend, give evidence, and be cross-examined. Other witnesses may be called to establish character, domestic arrangements, and so forth. Contested bail applications can take several hours. In South Australia and Western Australia, even the contested hearings are usually done without oral evidence. The nature of the bail hearing in the magistrates' court is usually on the documents with evidence from the bar table. The facts are generally not disputed and the time is spent on the arguments, which are generally brief, going to the criteria for bail.

It is reasonable to expect that the demands placed on arresting officers

in Victoria would be perceived by police as interference with normal police duties and would act as a disincentive to seeking remand in custody. Neither arresting police or prosecutors in South Australia and Western Australia have such resourcing or administrative concerns consequent upon their decisions to oppose police bail.

• **The role of police prosecutors**

The different role of arresting officers in Victoria compared to the other States has been mentioned. Similarly, the role of prosecutors differs. In South Australia and Western Australia, police prosecutors perceive they have an independent role, acting for the Police Service and in the community's interests. The *Western Australian Guidelines for Prosecutors* expressly emphasises the police prosecutors' role as "officers of the court". They are encouraged to see themselves as making independent decisions (with appropriate accountability mechanisms) on matters relating the criminal justice system. No doubt the operational needs of the arresting police officers are influential, but prosecutors see themselves as being able to exercise a significant degree of discretion. It was suggested in both jurisdictions that it is unusual for the prosecutor to advocate something contrary to the arresting officer's wishes on bail matters. This accords with the administrative arrangements

discussed under Police Bail whereby the prosecution retain ownership of the matter when it is in the court process.

By contrast, in Victoria, research indicates that the prosecutors are more likely to see themselves as acting on the instructions of the arresting officer. The arresting officer will usually seek and accept the advice of the prosecutors on issues such as bail if a custodial remand is being sought, but the final decision lies with the arresting officer. Again, this accords with the administrative structure whereby "ownership" of the matter remains with the arresting officers. They attend court and even have responsibility for documenting the outcomes of the bail hearing for the file and ensuring it is forwarded for entry into the computer information system.

The significance of this is that prosecutors perhaps play a less significant role in the process than initially thought. Unlike England, where prosecutions are brought by the CPS, in Australia the prosecutors, especially in Victoria, are more significantly influenced by operational police, particularly the arresting officers.

In South Australia and Western Australia, administration of cases is passed to the prosecution branch, which has carriage of the matter. The arresting officer will not be closely involved with the early court procedures. Should police bail not be

offered, the arresting officer leaves written information (constituting “the brief”) for the prosecution. In South Australia and Western Australia, the arresting officer has no other part to play.

- **The use of sureties when granting bail**

There appear to be differences in practices between (as well as within) jurisdictions to the issue of conditions attaching to bail. Victoria, as discussed earlier, uses financial conditions, particularly sureties, very rarely. In South Australia, statistics are not available but there are no presumptions that certain offences require sureties. By contrast, in Western Australia sureties are frequently required. This has led to significant difficulties. The Auditor-General found significant number of defendants who had been granted bail but who were unable to organise sureties. Some 25 per cent of those in custody are there because they had been unable to organise a surety of \$1000 or less. There is an operational policy that sureties are to be required for defendants charged with indictable offences. The source of this policy is not clear but it appears to be a matter of practice rather than law.

- **The availability of options to custodial remand**

In some jurisdictions, a number of bail diversion schemes operate. In South Australia, home detention is available. In Western Australia, both community hostels and home detention are available. Defendants may seek such options when faced with custodial remand, but before such orders are made the views of the relevant Correctional Services officers are usually obtained. It was suggested that the use of these alternatives in Western Australia led to a “net widening” effect; thus, it was only used in a very small number of cases. It may be that jurisdictions where there are available alternatives to custody, namely bail hostels, home detention and shorter remand periods, may hold more remandees simply because these custodial options do not appear to be as onerous as more intensive and invasive forms of supervision.

- **The delay in applying for court bail**

In the course of the research, it was pointed out by a number of practitioners, both police and lawyers, that the expectations of the defendant and defendant’s counsel is an important influence on whether or not, and at what point, bail is sought. There are a number of factors that might influence attitudes and expectations about the granting of bail at this point,

and it was suggested that in some instances the defendant will not proceed to apply for bail immediately upon arrest.

One influence may be a legislative restriction on the number of times that a person can apply for bail. In some jurisdictions, where the application for bail in some matters is seriously contested, counsel will choose to delay the application for bail until the strongest case can be made. This may involve locating family or others in the defendant's social network or gathering more information about the defendant's circumstances to put to the court.

Even where there is no legal limit on the number of bail applications a defendant can make, it was suggested that some custodial remands occur because lawyers are unwilling, or unable, to attend the police cells before the defendant appears in court. This means the lawyers are unprepared and the matter may be adjourned for some time to allow the lawyer prepare the bail application. Custodial matters are first on the list in most courts, allowing very little time for the lawyers to take instructions.

This list of practices is neither exhaustive nor listed in any particular order. It does seem that there are significant differences in policy and practice at the court bail phase in Victoria that are consistent with it

having a lower remand rate than the other jurisdictions studied.

4.6 Conclusions

This part addressed two key research questions:

1. Do the three jurisdictions have different outcomes at each filter point at each phase of the remand in custody process?
2. Do the three jurisdictions have different policies and practices that might affect the outcomes at each phase of the remand in custody process?

The research indicates that, due to different counting practices and administrative differences, it is extremely difficult to make inter-jurisdictional comparisons of outcomes in relation to these different filter points. However, there is some data which would support the hypothesis that different police, prosecutorial, magisterial, legal, and correctional practices in the three identified jurisdictions do move different percentages of those identified as offending into remand in custody at the different phases.

It would seem that, at all phases of the remand in custody process, there are both policies and practices in Victoria that favour the granting of bail. At the apprehension phase, arrest in other

States provides police with advantages that do not exist to the same degree in Victoria. At the police bail phase, it seems that the presumption that a person is to be taken before a court forthwith following arrest, the administrative requirements placed on police, coupled with the intervention of a bail justice if police bail is refused, create a higher practical threshold before police bail is refused. Some of these administrative requirements also apply at the court bail phase. Because of the practice of more complex contested hearings and minimal use of financial conditions, Victorian prosecutors have less incentive to seek remands in custody.

However, the actual impact of these policies and practices could not be quantified in this study. Even if these policies and practices could affect outcomes at the different phases of the remand in custody process, this does not mean other factors could not be at play. To investigate this possibility this research moved into a broader context:

Do these communities have different social and political characteristics in the area of law and order that may be influencing remand in custody outcomes?

This is the question posed in the next part of this report.

Part 5 Remand in Custody: The Wider Community Context

5.1 Introduction

The study to date has developed the hypothesis that the factors affecting remand in custody can be identified at all stages of the remand in custody process. It has been determined that this process starts at the point at which an accused comes into contact with the justice system. However, the logical extension of the hypothesis is that the rate of remand in custody can be affected by factors beyond the defined scope of the process. This study has found (Part 4) that the justice process itself impacts significantly on remand outcomes. If, for example, the availability of supervised alternatives to remand in custody influences the rate of remand in custody, one is led to explore why one jurisdiction may have in place a range of alternatives to remand in custody, and another jurisdiction has none.

This led to the development of the broader research question

Do communities have different social and political characteristics in the area of law and order that may be influencing remand in custody outcomes?

In considering this question, one is able to draw on a wide spectrum of sociological and criminological research to identify characteristics of communities that should be examined in a preliminary exploration. These can be classified under two main rubrics:

1. Social and economic factors

including, for example,

- offenders' profiles generally;
- the proportion of Indigenous peoples in the general population of the jurisdiction; and
- the unemployment rate of the jurisdiction.

2. Law and order issues

including, for example,

- the imprisonment rate;
- police numbers in the jurisdiction; and
- the crime rate generally, especially regarding violent crimes against the person (which crimes are more likely to attract a custodial sentence). In other words, the sheer number of people coming to the attention of the police, and the reasons for same.

5.2 Social and Economic Factors

5.2.1 Offenders' Profiles

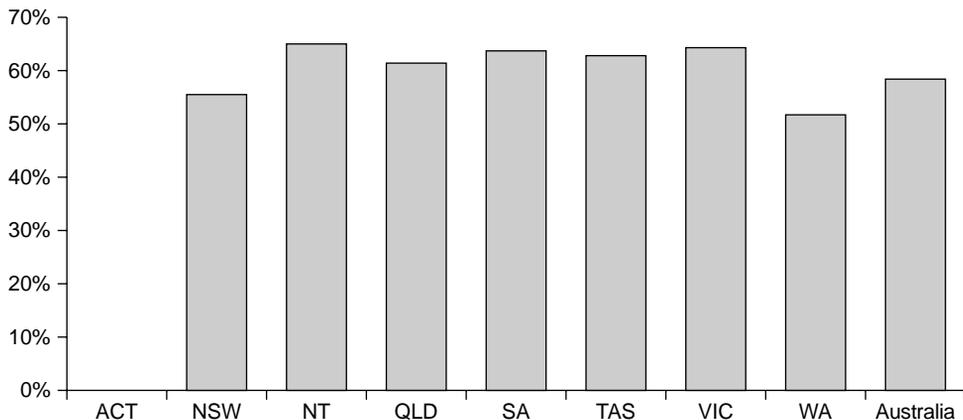
Offenders' profiles generally could include factors such as:

- prior offending records, antecedents, of accused persons (see below **Figure 6** and **Figure 7**);
- the number of breaches of bail conditions (including the requirement to appear in court), viz. the rate of pre-hearing absconding; and
- the reliability and availability of guarantors, in cases where bail conditions have been set.

ABS data reveal that while about 63 per cent of South Australia's remandees have a prior record, there is little unusual in the figures across the board, although in every jurisdiction except South Australia and Western Australia, the "priors" percentage of *sentenced* prisoners is significantly higher than for remandees. It is virtually the same in Western Australia and South Australia.

In other words, there appears not to be any clear picture emerging from an accused's prior record that would indicate why variations in remand rates exist. There are no available data that would allow cross-jurisdictional comparisons of rates of pre-hearing absconding and the reliability and availability of guarantors.

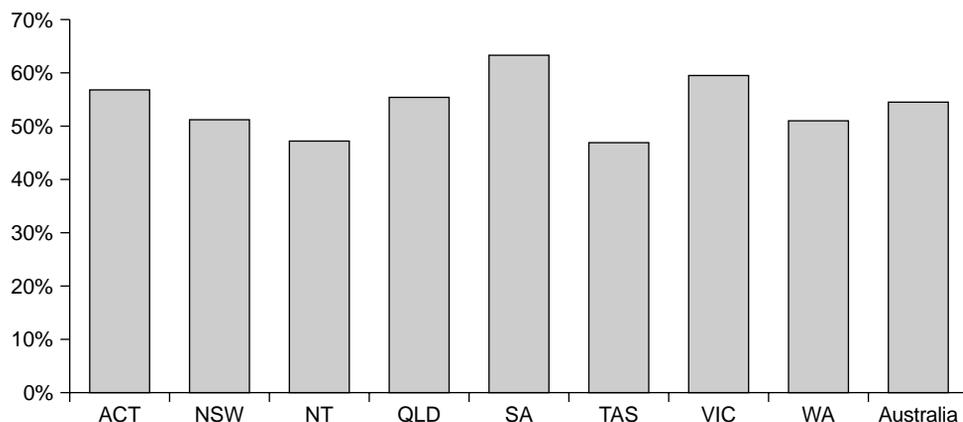
Figure 6: Legal Status by Known Prior Adult Imprisonment, Sentenced Prisoner, as at 30 June 1997



* Australian Capital Territory is included in New South Wales

Source: ABS (Prisoners in Australia, 1997, Unpublished data).

Figure 7: Legal Status by Known Prior Adult Imprisonment, Unsentenced Prisoners, as at 30 June 1997



Source: ABS (Prisoners in Australia, 1997, Unpublished data).

5.2.2 The Proportion of Indigenous Peoples in the General Population of the Jurisdiction

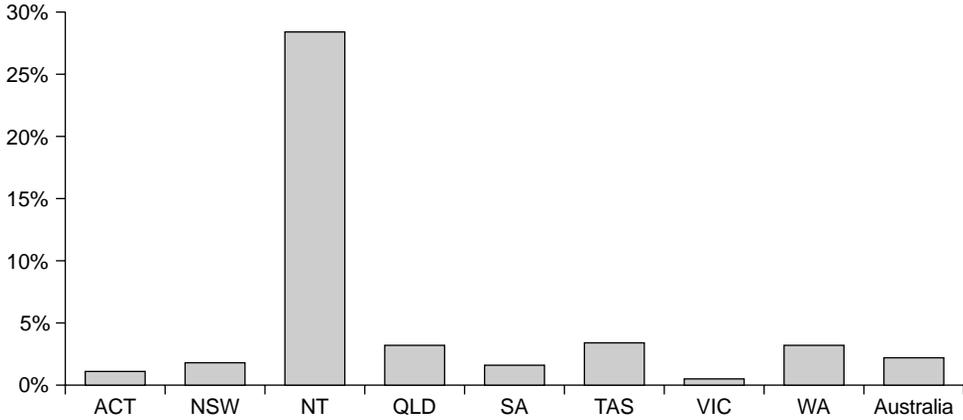
There are differences in the racial compositions of the populations of Australian jurisdictions. This could help to explain some of the variance in remand rates, especially between the Northern Territory and the others.

Figure 8 shows that the Northern Territory has an Indigenous population of 28.4 per cent, compared to 1.6 per cent in South Australia and 0.5 per cent in Victoria. Queensland and

Western Australia are both higher than South Australia, at 3.2 per cent.

The National Police Custody Survey in 1995, as illustrated in **Figure 9**, revealed that the Northern Territory has the highest percentage of Indigenous people in police custody and Victoria the lowest (the same as the relative populations). But, when the comparison is based upon the custody rates per 100,000 population, and compares Indigenous with non-Indigenous rates of remand in custody, Western Australia has an over-representation of 39 times, the Northern Territory is only 11 times, South Australia is 29 times, and Victoria 12 times.

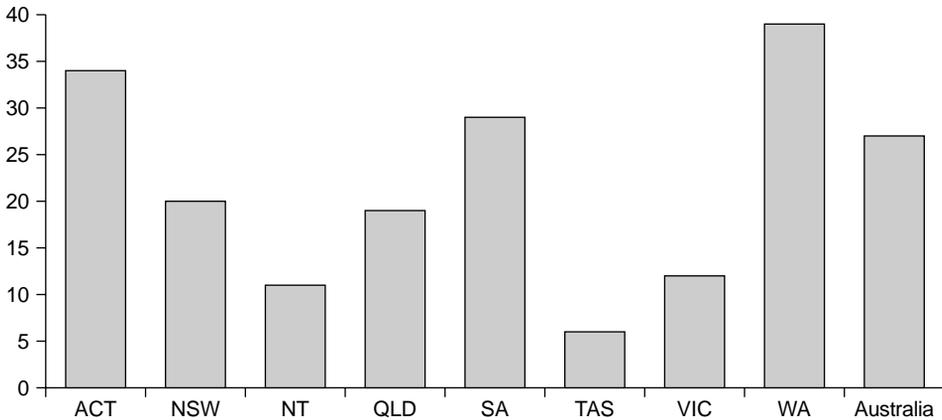
Figure 8: Percentages of Estimated Resident Populations that are Indigenous Persons, as at 30 June 1998



Source: ABS (Australian Demographic Statistics, June Quarter 1998, cat. no. 3101.0).

Note: Australian figure includes other Territories.

Figure 9: Police Custody Rates per 100,000 Population as at August 1995, Ratio Indigenous Rate to Non-Indigenous Rate as Over-representation



Source: Carcach and McDonald, 1997, p 8.

In 1997, the following percentages of Indigenous inmates applied to imprisonment numbers, as indicated in **Table 4**.

In 1997, the following percentages of Indigenous inmates applied to remand

in custody numbers, as indicated in **Table 5**.

In pictorial form the graph can be illustrated as in **Figure 10**.

While there is no exact “fit” with remand rates, there appears to be a

Table 4: Percentage of Indigenous Prisoners, as at 30 June 1997

| Jurisdiction | Number of prisoners | Indigenous (%) |
|--------------------|---------------------|----------------|
| Queensland | 3,839 | 24.5% |
| New South Wales | 7,957 | 12.7% |
| South Australia | 1,492 | 18.0% |
| Victoria | 2,643 | 5.0% |
| Western Australia | 2,245 | 33.4% |
| Tasmania | 263 | 12.9% |
| Northern Territory | 606 | 72.4% |

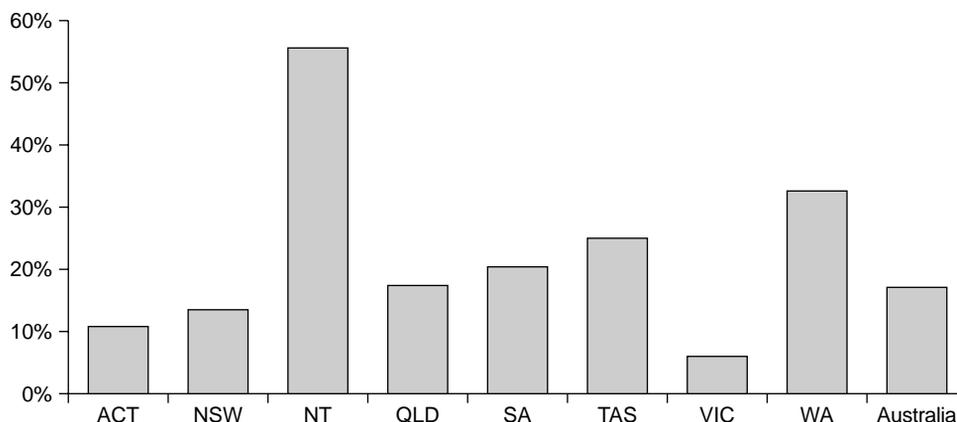
Source: ABS (Prisoners in Australia 1997), p 97

Table 5: Percentage of Indigenous Remandees, as at 30 June 1997

| Jurisdiction | Number of remandees | %Indigenous |
|--------------------|---------------------|-------------|
| Queensland | 453 | 17.4% |
| New South Wales | 991 | 13.5% |
| South Australia | 270 | 20.4% |
| Victoria | 417 | 6.0% |
| Western Australia | 288 | 32.6% |
| Tasmania | 32 | 25.0% |
| Northern Territory | 72 | 55.6% |

Source: ABS (Prisoners in Australia 1997, unpublished data).

Figure 10: Indigenous Unsentenced Prisoners as Percentage of Total Prison Population, as at 30 June 1997



Source: ABS (Prisoners in Australia 1997, unpublished data, Table 4.30).

strong correlation between remand rates and Indigenous prisoner numbers. The regression analysis in Figure 15 and section 5.3.3 (infra) further illustrate this point.

5.2.3 The Unemployment Rate of the Jurisdiction

Is it possible that unemployment may be identified as a factor? Refer to **Figure 11**. South Australia’s rate at August 1998, seasonally adjusted, was 10.4 per cent while Victoria’s was 8.2 per cent. Yet, Tasmania’s rate was at 11.6 per cent and the Northern Territory was only 4.2 per cent.

On its own, unemployment as a variable does not hold any correlative

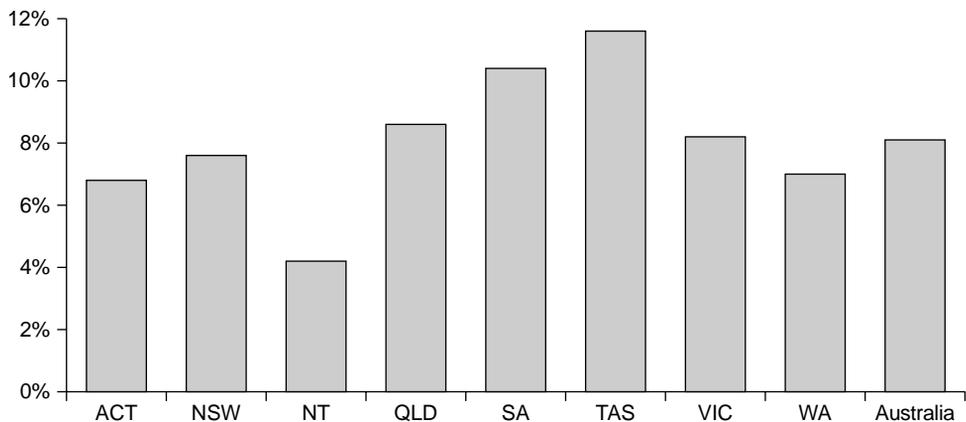
clues, but further regression analysis should not be ruled out.

5.3. Law and Order Issues

Factors that may have a bearing on the “law and order” climate of a jurisdiction generally could include the following:

- the imprisonment rate;
- police numbers in the jurisdiction; and
- the crime rate generally, especially regarding violent crimes against the person (which crimes are more likely to attract a final custodial sentence). In other words, the

Figure 11: Unemployment Rates Seasonally Adjusted⁹⁹— August 1998



Source: ABS (Labour Force, Australia, August 1998).

⁹⁹ The Northern Territory and Australian Capital Territory rates are trend series rather than seasonally adjusted.

sheer number of people coming to the attention of the police, and the reasons for same.

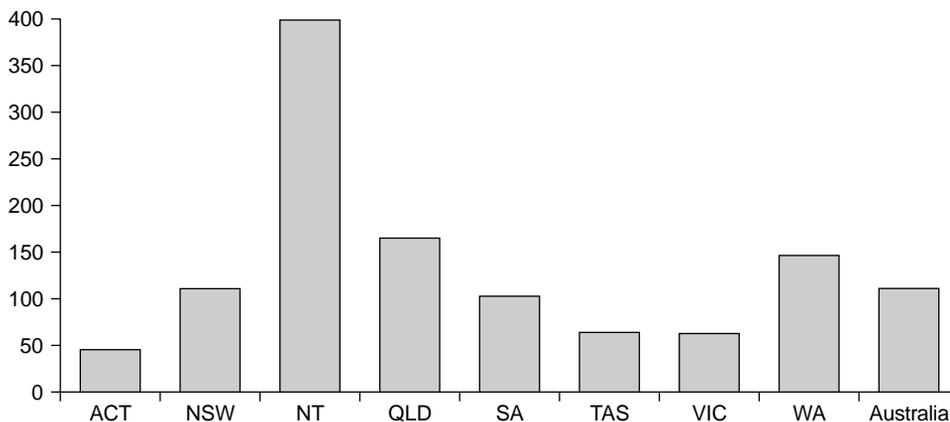
5.3.1 Imprisonment Rates

As depicted in **Figure 12**, imprisonment rates generally differ across jurisdictions, as is the case with remand rates. An important observation that is immediately apparent is that Victoria's imprisonment rate is half of that of South Australia, and one-eighth of the rate of the Northern Territory. Again, this may hold a correlative clue, although further regression analysis would be desirable.

5.3.2 Police Numbers

The following comparisons indicate something of the relative police activities in the three key jurisdictions.¹⁰⁰ This may be a factor in regulating the number of occasions that police and the public interact. The figures in **Table 6** show differences between jurisdictions, with South Australia and Western Australia higher than the rest of Australia and significantly higher than Victoria.

Figure 12: March Quarter 1998, Imprisonment Rate: Numbers in Prison per 100,000 Population



Source: ABS (Corrective Services Australia, March Quarter 1998, cat. No. 4512.0), p. 13.

¹⁰⁰ Accurate figures concerning the compositions of Australia's police services, sworn and public service personnel by rank and gender, are available on the Australian Institute of Criminology's home page: <http://www.aic.gov.au/stats/index.html>

Table 6: Number of police per jurisdiction at 30 June 98

| | Number of Sworn Police Officers per head of population* | | | |
|-------------------|---|-------------------|---------------|-------------------------|
| | No. police 1998 | Population ('000) | Rate/ 100,000 | Compared with Australia |
| Australia | 42,939 | 18,709 | 229.5 | |
| South Australia | 3,574 | 1,485 | 240.6 | + |
| Victoria | 10,033 | 4,649 | 215.8 | - |
| Western Australia | 4,830 | 1,824 | 264.7 | + |

* approximate numbers only

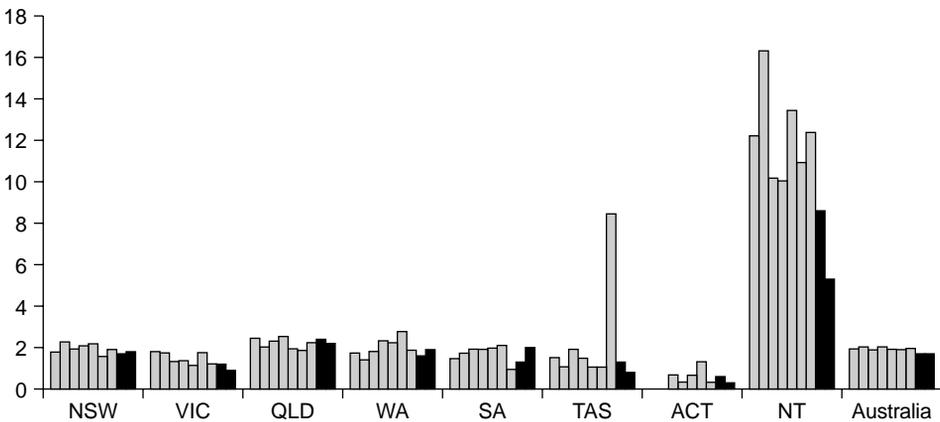
5.3.3 Violent Crime Statistics

Figure 13 illustrates differences in homicides between all jurisdictions. With the exception of the Northern Territory (outside of this study) which does hint generally at a link between violent crime and remand rates, there is no clear picture that indicates a correlation with remand rates in the jurisdictions under scrutiny in the study.

However, add the full range of violent crimes against the person and a startling picture begins to emerge.

Figure 14 shows the rate (per 100,000) of violent crimes reported to the police in the year 1998 per Australian jurisdiction. The rate represented in the graph is simply an addition of the rates for murder and attempted murder, manslaughter, driving causing death, and assault including sexual assault, kidnapping and abduction, and robbery (both armed and unarmed). The pattern is

Figure 13: Australia, Homicide Victimization Rates per 100,000 population, 1 July 1989–30 June 1998



Source: Mouzos 1998, Australian Institute of Criminology, unpublished data.

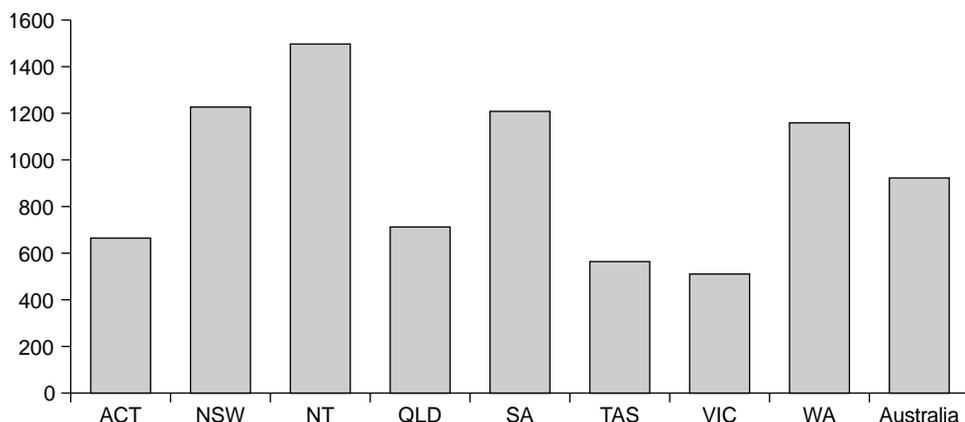
similar to the rates of previous years (Mukherjee et al. 1997).

Now review again the remand rates of all jurisdictions in Australia (Figure 3). The patterns are quite similar to the violent crimes reported across all jurisdictions in Australia. What can be made of this correlation? The first reaction is to doubt the data which report that Victorian violent crime rates are half of the rates of South Australia.¹⁰¹ The suspicion remains that a significant factor in these differences is the comparability of data. It appears likely, if one reviews the statistics on assaults withdrawn,

that different counting rules may apply.¹⁰² Be that as it may, one can simply speculate how much difference there is in crime rates, especially rates of violent crime, between the jurisdictions and how this affects remand in custody rates.

There may be some clues worth pursuing regarding Indigenous rates and offence type. Refer back to **Figure 10** from the 1997 prison census, which highlighted differences between jurisdictions in relation to the number of remandees who are Indigenous. Now compare the rates when the most serious offence (“mso”)

Figure 14: Violent Crimes Reported to the Police 1995–96 per 100,000 Population



Source: Mukherjee et al. 1997.

¹⁰¹ The official reported crimes data are confirmed by 1996 data found in the *Report on Government Services*, vol. 1, 1998, p. 314. Compare the reporting rates (p. 304), which indicate slightly higher reporting in South Australia (not significant) and police satisfaction rates (p. 302) which indicate no difference between South Australia and Victoria. Interestingly there is less difference in the assault figures for estimated total victims of crime (p. 323) reported and unreported 1995 (Victoria 2,400 per 100,000, South Australia 2,900 per 100,000, and Western Australia 2,600 per 100,000).

¹⁰² ABS, Recorded Crime, 4510.0, 1997, *Victims of Assault: Outcomes of Investigations* (p. 50), has Victorian percentages a third of the South Australia and Western Australia figures, and half the national average. This suggests that matters that are likely not to be proceeded with are disposed of much earlier in time, and perhaps before they are counted at all.

for which the person is remanded, assault is nested with Indigenous racial origin group. There are some dramatic shifts, as shown in **Figure 15**. Of Indigenous remandees in South Australia and Western Australia, 29 per cent are on an assault charge. In Victoria and Tasmania, the figure is 0 per cent. In other words, add to the racial distribution of a jurisdiction an attitude of police and magistrates that those accused of assault will generally be remanded in custody, and the remand rate increases dramatically.

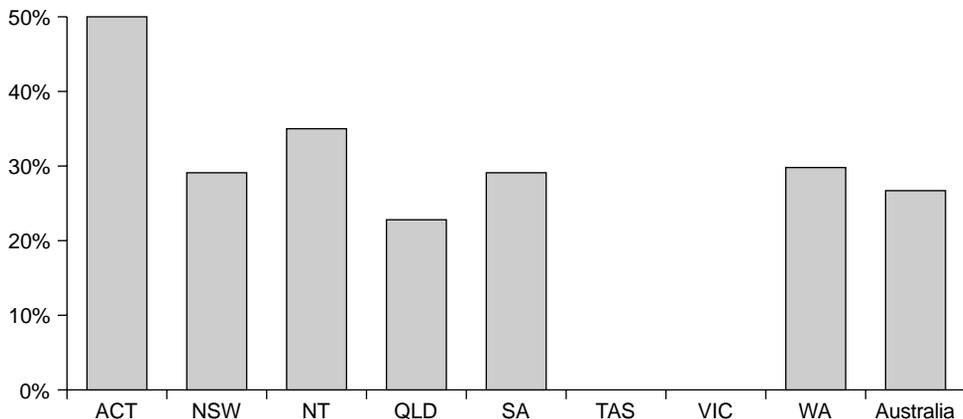
5.3.3 Community Responses to Specific Problems

Communities have legislated specific responses to some crimes. An

example of this is drug trafficking. Does it make a difference to remand rates to have a presumption against bail in cases involving alleged drug trafficking? It is unlikely. There is a great disparity in the figures on unsentenced prisoners held in each jurisdiction at 30 June 1997 for serious drug-trafficking offences (as their “most serious offence” or “mso”). In Victoria, 23.1 per cent of Victorian remandees who have no prior imprisonment record are those whose “mso” is dealing and/or trafficking drugs (n = 39 out of 169 remandees). The figure is 4 per cent (4 out of 99) in South Australia and 3.5 per cent (5 out of 141) in Western Australia. **Figures 16 and 17** illustrate this point.

Where remandees have prior imprisonment records the comparisons are 13.7 per cent, 2.3 per cent, and 0 per cent respectively.

Figure 15: Unsentenced Prisoners: Where “most serious offence” is Assault, with Indigenous Racial Origin Group, as at 30 June 1997

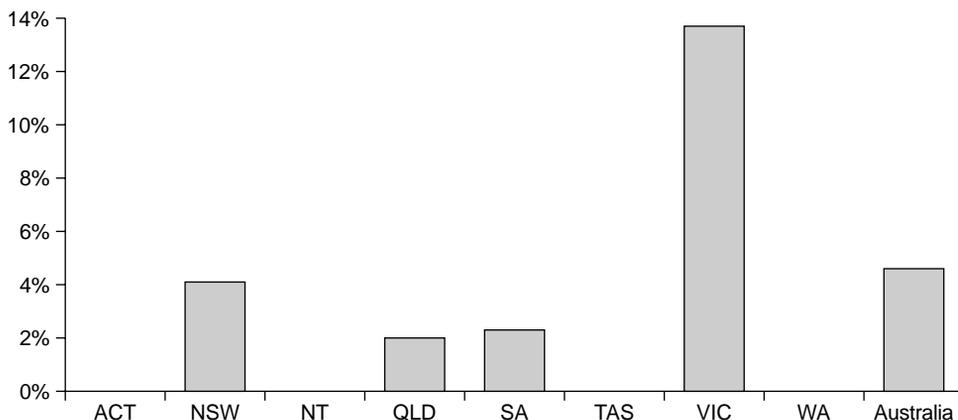


Source: ABS (Prisoners in Australia 1997, unpublished data).

This is an interesting finding, given that a presumption *against* bail should, one would have thought, *increase* a jurisdiction's remand rate. Yet, the remand rate in Victoria, where the presumption is strong, is very low. The

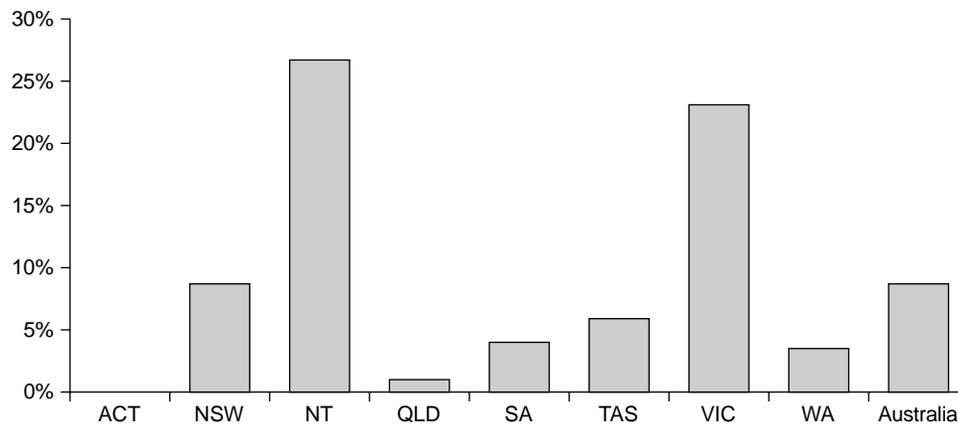
answer to the conundrum is found by comparing these figures with assault figures. In South Australia, 12.3 per cent of unsentenced prisoners (where there is a record of prior imprisonment) have an "mso" of assault, the figure is

Figure 16: Unsented Prisoners Where "most serious offence" is Deal/Traffic Drugs, Where no Prior Imprisonment, as at 30 June 1997



Source: ABS (Prisoners in Australia 1997, unpublished data).

Figure 17: Unsented Prisoners Where "most serious offence" is Deal/Traffic Drugs, Where there has been Prior Imprisonment, as at 30 June 1997



Source: ABS (Prisoners in Australia 1997, unpublished data).

26.5 per cent in Western Australia, and 2 per cent in Victoria. In other words, Victoria does not remand persons for assault at the same rate as the other two States, and assault charges are far more common than serious drug charges. If Victoria did not have a presumption against bail in drug-trafficking charges, hence a disproportionate number of remandees accused of drug-related charges, the variation in remand rate between Victoria and, say, South Australia would be even greater than it currently is.

5.4 Conclusion

The factors listed above are, of course, merely correlative clues. But they seem to indicate that the racial composition of a jurisdiction, the rates of crimes, and the types of crimes, for example, assault, are significant variables to use when predicting a jurisdiction's remand rate. The simple fact remains that Victoria has a lower imprisonment rate, fewer police per 100,000 population, a lower violent crime rate, a very much lower proportion of Indigenous people in the population, and its courts (and police) appear more reluctant to remand a person in custody for the offence of assault than is the case in Western Australia and South Australia. It should not be surprising that, on these

correlative clues alone, Victoria has a low remand in custody rate compared to South Australia and Western Australia (if not elsewhere).

But the links are not entirely clear. Western Australia has a far greater over-representation of Indigenous prisoners and remandees than South Australia, a higher imprisonment rate generally, and a larger Indigenous population than South Australia. Yet, their remand rates are virtually identical. Perhaps the distinguishing feature is their lower violent crime rate. So which factors are *crucial* to the final determination? The answers are unclear.

The above discussion is not meant to be exhaustive. There are a number of other factors or variables that could have been explored for their potential to provide correlative clues. Such matters could include the attitudes of police and courts to the issue of taking "domestic violence" seriously, the prevailing political mood (for example, in an election year candidates like to be seen as being "tough" on crime), the issue of prison over-crowding, the potential for suicide by prisoners, and the influence of victims' attitudes to the remand question. There is also the issue of the artificiality of State boundaries in collating statistics, a limitation that has been identified recently by the ABS.¹⁰³

¹⁰³ Refer to Ross 1999.

There may be potential to explore a number of these and other related issues in the future lifetime of this study.

Part 6 Conclusions

6.1 Overview

This study set out to identify the factors that may influence the processes and rates of adult remand in custody and which may potentially contribute to variations in remand rates between jurisdictions. In this section of the report, the analysis of remand in custody processes and recommendations for future research in this area are presented.

As expected, this study has not isolated any single factor that stands out as the explanation for different rates of remand in custody between jurisdictions. However, a broader picture of the remand in custody process has been developed. It has been demonstrated that explaining jurisdictional variations as a product of number of accused persons in custody and the time they remain in custody is inadequate for evaluating the fairness and efficiency of the remand in custody system. Rather, remand in custody outcomes can be seen as the result of a complex interweaving of legislative provisions and interpretations by magistrates and other actors in the process.

It should be noted that throughout our report we have identified the difficulties of comparing statistics from different jurisdictions. One cannot assume that the counting practices and definitions in each jurisdiction are the same.

That having been said, some tentative conclusions about differences between a jurisdiction with a low rate of remand in custody (Victoria) and jurisdictions with a higher rate of remand in custody (South Australia and Western Australia) can be drawn. It is important to note, however, that the distinctions identified here should not be read as explanations. As discussed in Part 5, it is possible that the low number of offences identified within that jurisdiction, and thus the low number of accused persons coming into contact with Victorian police, are the most significant causal features of the low remand rate. Equally, however, the result may depend upon the differences in practice in the management of issues relating to bail and remand in custody. At this stage, it is impossible to say which is the more important factor.

This study focused on remand in custody outcomes as a result of a

series of decisions made by the accused and other actors from the time of first contact with police until the disposition of the case. Drawing together the findings in the order suggested by the remand in custody process will highlight future research priorities.

6.2 Apprehension Phase

At this point in the process, the accused is identified by police, the offence is identified, and decisions are made about how the matter is to be advanced. Some of the key statistics relating to people remanded in custody start to be shaped at this point in the process. It is possible that the age, race, and gender profile of those people remanded in custody is shaped by the age, race, and gender profile of those who come into contact with the police at this point. However, we have not been able to identify appropriate statistics to explore the extent to which the remand in custody process affects people of different age, race, or gender.

Our investigations have identified two decisions made in the apprehension phase that have a significant impact on the number of people remanded in custody. The first decision is the identification of the offence and the second decision is whether to arrest

the accused or to proceed by way of summons.

The nature of the offence identified by police will affect remand in custody outcomes. Some behaviours can be interpreted to constitute one of a range of offences (this is the basis for plea bargaining in some jurisdictions) and the original definition of the offence will impact on remand and bail decision-making. In some jurisdictions, there is a presumption against bail for certain offences and in all jurisdictions the seriousness of the offence is one of the criteria to be considered in granting bail.

If a decision is made to arrest, then the question of granting of bail or remanding in custody arises. If the decision is to proceed by way of summons, then this may not be the case. There is considerable difference in the use of language in this area between jurisdictions. In some jurisdictions, apprehension and arrest are used as synonyms.

The preliminary research has indicated some differences between the low remand rate jurisdictions and higher remand rate jurisdictions. However, these do not all point in the obvious direction. Despite its high rate of remand in custody, South Australia would appear to have the highest proportion of matters entering the criminal courts by way of summons. However, in Victoria the seriousness of arrest is recognised in the legislative

provision that an arrest occurs only when there is a reasonable belief in the necessity of arrest rather than proceeding by way of summons. Victorian police do not need to arrest a person to be enabled to collect specific evidence such as fingerprints and to order medical examinations. However, in both South Australia and Western Australia the right to collect this evidence arises after arrest.

Victoria (along with New South Wales and the Northern Territory) has a legislated presumption against bail for some offences. This is not the case in either South Australia or Western Australia at the time of this study.

Future research:

The exercise of police discretion in the apprehension phase is little documented and the data available are limited. The decisions are taken in the many busy police stations throughout Australia and the extent to which standardised practice exists is unclear. To understand police practice at this point, data must be collected to indicate for each individual accused of an offence:

- What are the behaviours that constitute the offence?
- What is the offence with which the individual is charged?

- What other relevant information exists about the alleged offender?
- What decision is made about how the matter is to be moved forward?¹⁰⁴

Data collection should occur in a context that clarifies the use of language between arrest and apprehension to ensure that data between jurisdictions are comparable.

In cases where the decision is made to arrest the accused, further data are needed to allow the exploration of why an arrest is made. In particular the research to date has suggested that the decision to arrest may be a result of the need to collect information for police investigation.

Further clarification is needed of the implications for the work of individual police officers of the decision to proceed by way of summons or arrest. Our preliminary investigation suggests that the implications are very different in different jurisdictions. It may be that the decision to proceed by way of arrest or summons is influenced by the amount of time a police officer requires or the certainty of the outcome of either process.

In order to establish “best practice” in the area of remand in custody, it is necessary to explore the consequences of the decisions being

¹⁰⁴ In particular the decision about whether to arrest or to summons.

made concerning each phase of the process. Whilst it is clear that use of a summons avoids the remand in custody process, we have no evidence about the overall outcome for the justice system. It is important that future research in this area evaluates outcomes of arresting or reporting an individual. For example, is there any difference in the delay experienced by the court, or the outcomes in relation to the integrity of the justice process, or incidence of other offending behaviour between matters dealt with by arrest and matters dealt with by summons?

6.3 Police Bail Phase

The individuals who are arrested then move to the police bail phase of the remand in custody process. The research indicates that in addition to the decision about whether or not to grant bail, a further important decision in this phase relates to the imposition of conditions on the granting of bail.

The decision to grant police bail is significant as the research indicates that it is unlikely that this bail will be revoked by the court when the police still support the granting of bail. Thus, an individual granted police bail is only likely to enter custody if a breach of bail conditions occurs.

The decision to grant or refuse police bail requires the balancing of a

number of competing interests in each situation. In Victoria and Western Australia, the discretion of individual decision-makers is exercised in the context of orders and operational policies. Such guidelines do not appear to exist in South Australia where decision-makers are guided by the legislation. There appears to be no evidence as to how consistently decisions are made within each jurisdiction.

A significant difference between the low remand rate jurisdiction (Victoria) and higher remand rate in the other two jurisdictions (South Australia and Western Australia) lies in the involvement of the bail justice. The statistics seem to indicate that accused persons in Victoria are granted bail before their first court appearance more frequently than in South Australia. To what extent this results from the different structures in place needs further investigation.

There is little known about the imposition of conditions of bail by police. The ability of an accused to accept an offer of bail is dependent upon his or her ability to meet any conditions imposed. It is not clear to what extent practices in this area are consistent within each jurisdiction. Certainly there appears to be significant differences between jurisdictions, with Western Australia reporting high use of sureties associated with bail.

There is also little known about the dynamics which result in some accused not seeking bail. Anecdotal evidence suggests that on many occasions this is the result of knowledge of the accused or the accused's legal representatives of the criminal justice system, and an assessment that bail would not be granted. However, it is important to identify this as an area for future research as focusing on remand in custody decision-making will entirely overlook these individuals.

Future research:

Analysis of the remand in custody process suggests that there are two streams of future research that are important in relation to the police bail phase. The first of these is research about current practice and its immediate outcomes and the second is research about the effectiveness of the different practices being undertaken and results for the justice system.

The Victorian bail justice system requires evaluation. To what extent does this result in a different assessment of individual accused in relation to bail? Is there any difference between the criteria being used in Victoria as a result of this process and those being used in other jurisdictions? Does Victoria, with its apparently higher rate of granting police bail, make different use of bail conditions?

Is there any difference in the rate at which people do not apply for bail between Victoria and other jurisdictions?

For other jurisdictions, there is a need to explore the criteria used to determine whether an individual is granted police bail. Is there a difference in effect between those jurisdictions where policies are documented and a jurisdiction like South Australia where the legislation provides the framework for assessment?

A high or low rate of granting of police bail cannot be assumed to be of merit without a consideration of the impact of granting, or not granting, bail on the justice system. To evaluate the appropriateness of the granting of bail to an individual requires the identification of the outcome of that decision. Ideally, this should be evaluated on a case by case basis by assessing:

- whether the individual attended court on the required occasion(s);
- whether the individual took actions designed to pervert the course of justice; and
- whether the individual committed other offences whilst on bail.

The second and third of these criteria are difficult to assess other than in the formal sense of whether the individual was found guilty of such actions.

However, the first criterion can be established from court records. In some jurisdictions, this research could be undertaken by the appropriate programming of justice information systems.

Should the resources not be available to conduct a case by case evaluation, then a more general evaluation of decisions relating to police bail could be made by establishing the incidence of individuals not appearing in court when on police bail or of being convicted of crimes whilst on police bail.

6.4 Court Bail Phase

It is on contested bail matters that magistrates and judges focus their time and resources. Where police (or prosecution) and accused agree on whether that bail, and any condition currently applying, is appropriate or that it is not required, the magistrate does not usually intervene. It can be argued that this phase of the remand in custody process warrants particular attention because this is the point at which individual disputed matters are determined and the court policy is declared. The influence of this declared policy is not easily identified, but is anecdotally reported.

The research has indicated that there are significant differences between jurisdictions in the handling of the

court bail phase. In Victoria, if a bail decision is disputed there is a substantial hearing. The arresting officer is expected to attend and other witnesses may be called. In Western Australia and South Australia, disputed bail hearings are handled more briskly and the police prosecutor represents the interests of the police in the matter.

Overall, the research indicates that in Victoria, where police bail appears to be granted more frequently than in other jurisdictions, there are several procedural differences if police do not wish to grant bail. In the first instance, the matter is forwarded to the bail justice. If refused at this point, then the matter goes to court and the arresting officer is required to attend and give evidence. It is difficult to evaluate the impact of these differences and, if future research were required in this area, interviews with arresting officers would be required to establish the extent to which these procedural differences may influence them. It may be that all that is required is to establish more definitely that the cumulative effect of these different procedures is, in fact, to result in a higher level of granting of police bail.

Future research:

This has been the phase of the remand in custody process that has attracted the most research. However, there is little recent Australian documentation of practice in this area;

for example, concerning the extent to which the judicial decision-makers reverse earlier bail decisions.

Although this matter is of intense interest and debate amongst police, magistrates, and judges, it may not be a high priority for future research. Whether a magistrate supports the refusal of bail in 50 per cent or 80 per cent of the disputed bail applications will have very limited impact on the number of people remanded in custody. Decisions at earlier phases of the remand in custody process have the potential to have a far greater effect on the numbers and are also much less available for public scrutiny and thus warrant more urgent attention.

6.5 Future Research on Remand in Custody Generally—A New Tool?

The next stage of any further research on remand could be:

- to conduct a detailed analysis of how factors contributing to the determination of remand rates may contribute to variations between jurisdictions;
- to make an assessment of “best practice” in relation to remand decision-making processes; and

- to identify the policy implications of the research findings, including whether an identified remand in custody rate is an appropriate one.

This study has highlighted the inadequacy of the remand rate as an indicator of “best practice” in relation to remand in custody. It is necessary to be able to distinguish between those jurisdictions that have a low remand in custody rate (and perhaps low imprisonment rates) as a result of the different social and political forces that define crime and result in offending behaviour, and those that have a low remand rate as a result of how they manage accused persons. Although Victoria has a low rate of remand in custody, it is possible that, as this figure is calculated per head of adult population, it is influenced by the offending behaviour within the Victorian community.

It would seem that if the focus is to be on the management of accused people then a new indicator should be developed to compare the number of people remanded in custody with the number of people required to appear before the court for an offence. This indicator would identify a jurisdiction as having a low remand indicator if a very low proportion of those required to appear before the court were remanded in custody. It would, in some senses, be independent of the offending behaviour in the community, but not, of course, of the offending

behaviour of individual accused. This is because individuals failing to attend court as required and breaching bail conditions would be held in custody and thus counted in this figure.

The development of this new indicator should be the first priority for further research concerning remand in custody. Having established this indicator, the impact of different practices on the remand in custody indicator can be explored. This study has highlighted many areas of practice which require further documentation and evaluation. The remand indicator is a tool for indicating the effect of these practices on rates of remand in custody.

This new indicator may then allow the identification of “best practice” in relation to remand in custody, as different practices could be evaluated both for their impact on the remand indicator, and also on the goals which remand in custody aims for, namely to:

- ensure that the accused appears before the court as required;
- ensure that witnesses are not influenced and that the accused is safe; and
- ensure the safety of the community, including victims, pending the outcome of the trial.

Part 7 Recommendations

The following are recommendations for further research:

i) Finding a More Useful Indicator of Remand Performance

A better indicator must be developed to compare the number of people remanded in custody with the number of people required to appear before the court charged with an alleged offence. This indicator would then identify a jurisdiction as having a low remand indicator if a low proportion of those required to appear before the court were remanded in custody.

This new indicator may allow for the identification of “best practice” in relation to remand in custody, as different practices could be evaluated both for their impact on the remand indicator, and also on the goals which remand in custody exists to serve.

ii) Other Issues

1. That administrative practices in each jurisdiction be more closely scrutinised to determine whether there is something occurring at the various filter points (apprehension,

police bail and court bail) that provides a disincentive to remand a person in custody, specifically,

- the choice of summons, report, caution or arrest;
- the choice of offence with which an individual is charged; and
- the organisational culture within which individual police make recommendations and decisions about the granting of police bail.

2. That the Victorian “bail justice” concept be reviewed for its potential applicability in other jurisdictions.
3. That the effect of different counting practices and terminology on remand rates be explored, especially the points at which data are collected and the definitions used, for example, the distinction between “arrest” and “apprehension”.
4. That magistrates’ decisions be explored further in each jurisdiction not so much to determine what factors or criteria influence magistrates’ assessments of bail risks but rather to determine the level of consistency between police

recommendations, prosecutorial attitudes, and final remand in custody outcomes.

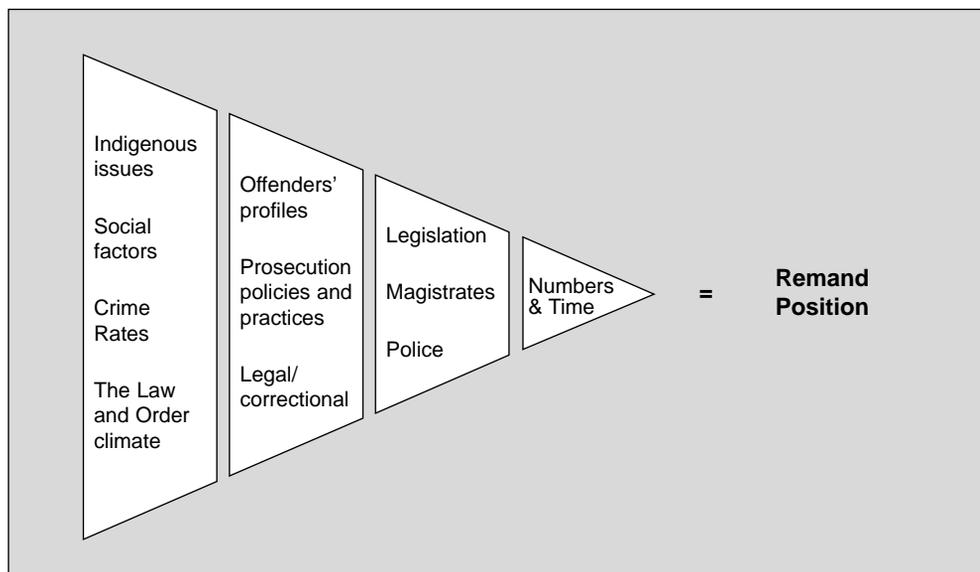
5. That non-custodial alternatives to custodial remand be explored both for their effects in reducing custodial populations and their possible “net-widening” effects.
6. That the violent crime rates for each jurisdiction under scrutiny be analysed more closely to determine

whether or not the variance in remand rates is simply a practical outcome of the number of serious matters that come to the attention of police and hence the courts.

7. That Indigenous issues be better explored as variables which may be key to the remand rate of a given jurisdiction.

In sum, the diagram **Figure 2** now can be developed as follows:

Figure 18: Factors Influencing Remand Position: The Wider View



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Appendices

APPENDIX 1 Jurisdictional Contact Details:

Northern Territory

Police

Senior Sergeant Peter Thomas, OIC,
Summary Prosecutions.

Justice/Attorney-Generals

Ms Margaret Lyons, Secretary,
Attorney-General's Department
Northern Territory Government.

Courts

Mr Martin Toohey, CEO Courts
Administration.

Corrections

Mr David Moore, Commissioner,
Northern Territory Correctional
Services.

Western Australia

Police

Mr Steve Robbins, Police Prosecuting
Branch, Central Law Courts.

Justice

Mr Peter Marshall, Policy and
Legislation Division, Ministry of
Justice.

Victoria

Police

Mr Laurie Atkins, Secretary, Research
Coordinating Committee, Policy
Research and Advice Unit Victoria
Police.

Justice Dept/Statistics

Dr Inez Dussuyez, Criminal Justice
Statistics and Research Unit,
Department of Justice.

Corrections

Secretary, Department of Justice
Corrections, Strategic Policy Branch.

South Australia

Police

S/Sgt Fred Wojtasik, Prosecution
Services Division, SAPOL.

Justice/Statistics/Courts administration

Ms Jayne Marshall, Office of Crime
Statistics.

John Wright, Corporate Services Unit,
Courts Admin Authority.

Corrections

Mike Reynolds, Strategic Services
Division, Department for Correctional
Services.

Queensland

Police

Senior Sergeant Bob Gee, Office of
the Commissioner, Queensland Police
Service.

Dr Chris Leithner, Manager, Review
and Evaluation, Inspectorate and
Evaluation Branch, Queensland Police
Service.

**Department of Justice/courts
administration**

Mr Peter Kent, Exec Officer, Courts
Strategy and Research Branch,
Queensland Department of Justice.

Mr Geoffrey Tillack, Courts Division,
Queensland Department of Justice.

Corrections

Mr Brenton Michael, Senior Advisor,
Statistical Analysis, Planning Branch,
Queensland Corrective Services
Commission.

New South Wales

Police

Supt. Steve Ireland, Reform
Coordination Unit, New South Wales
Police.

Senior Sergeant Tony Trichter,
Prosecutor Training Unit.

Dr Chris Devery, Head of School, New
South Wales Police Academy.

Crime Statistics

Dr Don Weatherburn, Director Bureau
of Crime Research and Statistics.

Corrections

Barbara Thompson, Research and
Statistics Unit, New South Wales
Department of Corrective Services.

Tasmania

No response received for information
for contacts.

Other:

ABS

Ian Appleby and Tony Ward of the
National Centre for Crime and Justice
Statistics, Australian Bureau of
Statistics.

APPENDIX 2 Legislative Comparison Tables

Comparisons of Bail Act Features Australia-wide

| FEATURE | ACT | NSW | NT | QLD | SA | TAS | VIC | WA |
|--|---|--|---|---|---|--|--|--|
| Availability of bail—Any period where not required to be in court | s 5 | s 6 | s 6 | s 8(1) | s 4 | JA ss 62–63, 117A(2), 122 | s 4 | s 7A |
| Distinguishes bail with respect to minor offences and breach of the peace, bail following arrest for breach of peace, bail for serious offences, bail in domestic violence situations and bail for sentenced prisoners | ss 7, 7A, 8, 8A and 9 respectively | s 8 (minors) s 8A (drugs) | | s 13 Only Sup Ct can grant bail in crimes with a life sentence | Bail can be granted in domestic violence situation: <i>Leeuwen v SA</i> (1997 Sup Ct) | | s 13(2) Sup Ct to hear bail app in murder or treason cases s 4 no bail in murder, drug violence case | s 15 (Sup Ct to hear bail app in murder cases); Schedule 1 (3A) |
| Court may dispense with requirement for bail | s 10 | s 10 | s 9 | | | | | s 18 |
| Police Bail | s 13 | s 17 | s 16 | s 7 | | s 5 | | s 29(f) |
| Police must inform suspect that they may apply for bail, communicate with a lawyer or other person | ss 13(c), 47 | s 18(1) s 19 | s 16(2)(a) s 16(2)(b) | | s 13(1) | see <i>Crim Law(D&I) Act</i> ss 5, 6 | s 10(2) | s 8(1) |
| Rank of Police Officer able to grant police bail | s 14 ("authorised officer")—see definitions s 3(1) | s 17 (Rank of sergeant or above or in charge of police station) | s 16(5) (Rank of sergeant or above or in charge of police station) | s 14(1) Police Officer in charge of watchhouse, lock-up or police station) | s 5(e) (Rank of sergeant or above or in charge of police station) | s 34 <i>Justices Act</i> any officer or one in charge of police station | s 11, s 27 (Rank of sergeant or above or in charge of police station) | s 3 (Rank of sergeant or above or in charge of police station) |
| Power of Police to release on bail, with or without conditions | s 15 | s 37 | ss 16 and 7(1) | s 14(1) | s 5(2)(a) | contemplated see s 5(1)(a) | ss 11 and 12 | contemplated see s 5(1)(b) |
| Refusal of bail by police—requirement of reasons | s 16(2A) | s 38 | | s 7(3) | s 12(1) | | s 12(b) | s 26 |

Comparisons of Bail Act Features Australia-wide continued

| FEATURE | ACT | NSW | NT | QLD | SA | TAS | VIC | WA |
|---|--|---|---|---|--|---|---|--|
| Requirement to notify victim of domestic violence that suspect has been released on bail | s 16(3) | | | | | | | |
| Charged Person to be brought before the court within a certain timeframe | s 17 (as soon as possible, or no later than 48 hours) | s 18(2) "as soon as reasonably practicable" | s 137 "as soon as practicable" <i>Police Administration Act</i> s 137 | s 7(1)(b) "forthwith" or "within 24 hrs unless Act provides otherwise" "as soon as is practicable" means reasonably pract. see s 3 definition | s 13(3) "brought to court as soon as reasonably practicable, but in any event before 4 pm on the following working day" | s 3 <i>Criminal Law (Detention and Interrogation) Act 1995</i> "as soon as practicable" | s 4(1)(a) "should be within 24 hours" s 10 deals with situations where it is not reasonably practicable to bring to court "forthwith" | ss 5, 6, 50G, and 61 "as soon as practicable" or within 7 days—Sch 1, Part C, s 7 |
| Provision of facilities to suspect (shower, toilet etc) | s 18 | s 21 (need only provide these after 4 hours) | | | | s 6(7) <i>Crim Law (P&I) Act 1995</i> —for lawyer. | | |
| Court Bail—Jurisdiction and Applications | s 19 | ss 22A–30 | | ss 8(1), 33C | | ss 6 and 7 | | Schedule 1 |
| Bail—Multiple Offences | s 21 | | s 17 | | | | | |
| Criteria for Granting Bail | ss 22, 23 (distinguishes adult and child bail) | s 32 | s 24 (criteria for police and court bail) | s 16 (criteria for refusal of Bail) | s 10 | s 34(2) <i>Justices Act</i> protecting victims | s 4(2)(d) | Schedule 1 Part C section 1 |
| Court or Police to take account of victim's need for protection when deciding to grant bail | s 23A | s 37(1)(b) "specially affected" | s 24(1)(d) | ss 16(d), (e) and 16(2) | s 11(2a) | ss 34(2) and 35 of <i>Justices Act</i> | | |

Comparisons of Bail Act Features Australia-wide continued

| FEATURE | ACT | NSW | NT | QLD | SA | TAS | VIC | WA |
|--|---|-------------------|--|----------------------------------|---------------------|--|--------------------------------------|-------------------------|
| Bail Conditions | ss 24, 25, 26 distinguishes adults and children | s 36 | s 27 | ss 11 and 20 ss 21–26 (sureties) | s 11(2) | s 5(3) (police bail) s 7(4) and (5) court bail | s 15 | ss 17 Schedule 1—Part D |
| Recording of Reasons for Bail Decision | s 27 | s 38 (in writing) | | s 16(3) | | | s 4(4)(d)(ii) s 12(b) | |
| Bail Undertaking/Bail Agreement | s 28 | ss 34 and 39 | ss 25 and 27(5) (in writing) | s 20 bail undertaking | s 6 bail agreement | | | s 28 bail undertaking |
| Written Notice of Bail Conditions | s 34 | ss 36, 38 and 54 | s 42 | | | s 5(1)(a) | s 17 | s 30 |
| Review of Bail Decisions | ss 38–40 (police) ss 41–46A (courts) | ss 44–49 | s 33 (police) s 34 (court) s 35 (Sup Ct) | | ss 14, 15 and 15(a) | | s 18 | |
| Failure to answer bail Breach of Bail | s 49 (max penalty 2 yrs jail) | ss 50–53 | ss 38 and 39 | s 28(1) | ss 17, 17A and 18 | ss 5(5), 5(5A), 9 and 10 | ss 24 and 30 | s 51 |
| Act applies whether or not person is aged 18 | s 4 | s 5 | s 4 (whether over 17 or not) | | | | s 13 (whether over 21 years old) | s 65 |
| Presumption in favour of bail | | s 9 | s 8 | | | | | |
| Presumption against bail | | ss 8A and 9A | s 7A (murder and treason) | | | | s 4(2) (murder, drugs, violence etc) | |

Comparisons of Bail Act Features Australia-wide continued

| FEATURE | ACT | NSW | NT | QLD | SA | TAS | VIC | WA |
|---|--|--|---|---|---------------------------------|---------------------|--|---|
| No Limit on number of Bail Applications | s 19(2) | s 22 | s 19(1) | | s 12(2) | | | |
| Civil Standard of Proof | | s 59 | s 46 | | | | | |
| Requirement of Bail Register | | | s 18 | s 7(3) | | | | |
| Court power to revoke bail | | | | s 30(2) | s 6(5) | ss 24, 25 and 26(4) | | |
| Power to enlarge or vary bail | | | | ss 7(5), 8(1)(b), 10(2), 17(2) and 30(2) | s 6(4) (vary) s 11(10) | s 11 | | ss 54 and 55 |
| Power of Bail Authority to make enquiries and hear evidence | s 19(6) | | | s 15(a) | s 9 | | | |
| Modifications to the Rules of Evidence | s 19(6) court may hear any evidence that it considers "relevant and reliable" | s 32(3) court may hear any evidence it considers "credible or trustworthy in the circumstances" | s 24(2) court may use hearsay evidence | s 15 court may hear any evidence that it considers credible or trustworthy | s 9 normal rules of evidence | | s 8 court may hear any evidence that it considers credible or trustworthy | s 22 includes evidence not normally admissible in a court of law |
| Requirement that accused is aware of facilities necessary to have bail undertaking read or translated | | | | | | | | s 30(3) |
| Notice to Victim of Bail Decision | | | | | | | | |

APPENDIX 3

Methodology

1. Review and assessment of the literature.
2. Identification of the gaps in the literature and existing information.
3. Legislative review: by each Australian jurisdiction—including availability of bail, power to grant bail, police procedure on arrest, the bail hearing, bail criteria, bail conditions, and bail regulations.
4. “Process Mapping”—arrest, police bail, court bail stages.
5. National consultations—making jurisdictional contacts, questionnaires sent to specific discipline contacts, and data collection.
6. Analysis, including:
 - Remand variables and discussion.
 - Searching for correlations.
 - Determining what data are available.
 - What is measurable?
 - What exists?
 - How comparable is it?
 - Determining what the data may reveal.
7. Report writing.

APPENDIX 4

Data Collection

Availability: Notes

for Future

Researchers

Having determined what we need to find out, in a way that is measurable, the next question was, “what data are available?” Are there data available which can help researchers with any of the above questions, and, if so, is it systematically collected by jurisdictions in a manner that is easily comparable?

In order to gauge this, the consultants sent a questionnaire to the key stakeholder groups and individuals whom we were able to identify or who self-identified upon receiving a letter from the CRC (the list of recipients appears in Appendix 1). We sought advice on whether a number of seemingly apposite topics had been

the subject of regular counting or recording and, if so, could this recording be compared across jurisdictions in a meaningful way? In all, 18 questionnaires were sent.¹⁰⁵

Responses

While the number of potential factors that determine the remand in custody rate is great, some of the more significant ones (identified by the literature and simple correlation clues) are mentioned here. According to UK literature, the police decision to arrest or summons a person drawn to their attention, to grant or deny bail at the first opportunity, and their attitude to the question of bail when a matter first comes before a magistrate has a significant affect upon the remand in custody process.¹⁰⁶ One might have suspected that there is no *systematic* collation of available data regarding police bail decisions in any jurisdiction such that any meaningful comparisons can be made.¹⁰⁷ The questionnaire

¹⁰⁵ Seeking information on the record keeping of the following: (1) Daily average of persons remanded in custody in the correctional system. (2) Any data/number of persons remanded in police custody by police. (3) Monthly census of persons remanded in custody in the correctional system. (4) Remand in Custody (RIC) numbers as a percentage of the total prison population. (5) Remand rate per 100,000 population generally. (6) Bail or RIC status at final magistrates' (or equivalent court appearance). (7) Bail or RIC status at final Magistrates' Court appearance by major charge. (8) The final penalty compared to bail or RIC status at first hearing. (9) Data on breaches of bail and/or estreatment. (10) Average time spent on remand. (11) Police arrests compared to summons of individuals coming to police attention. (12) Police 'clear-up' rates. (13) The unemployment rate of the State or Territory. (14) The percentage of Indigenous population in the State or Territory. (15) The number of available beds in remand facilities. (16) The imprisonment rate per 100,000 population.

¹⁰⁶ There appears to be a correlation between the status (remand in custody) of an individual brought before the criminal courts in South Australia and a greater likelihood of a finding of guilt, as well as a greater likelihood of a custodial sentence (Marshall and Reynolds 1998).

¹⁰⁷ Interestingly the official remand rate of each jurisdiction does not include the number of persons in police custody. However, this information is available in a separate form in the National Police Custody Surveys that have been conducted in 1988, 1992 and 1995.

was designed partially with this issue in mind. In South Australia, Victoria, and New South Wales, if not elsewhere, *the number of arrested persons denied bail by police* are recorded, but the data are not routinely fed into comparable justice statistics.¹⁰⁸ Similarly, *police choice of arrest compared to summons* is recorded in the jurisdictions that responded to the questionnaire, as information on “case type”, and would need to be retrieved from police-specific data from police statisticians. *Estreatment/bail breaches data* are available in South Australia through the OCS, from court statistics in Victoria, and from the Bureau of Crime Statistics in New South Wales. *Court appearance remand information, status by charge and penalty data* are collected by South Australia’s OCS and the New South Wales Bureau of Crime Statistics as well as the Department of Justice Victoria. *Beds availability and locality data* are available from all corrections data sources.

¹⁰⁸ Refer Carcach and McDonald 1997.