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RESEARCH GRANT

# Bail decision-making and pre-trial services: A comparative study of magistrates courts in four Australian states

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# Acronyms and abbreviations

|        |   |
|--------|---|
| ABI    | Acquired brain injuries   |
| ABS    | Australian Bureau of Statistics                                   |
| AOD    | Alcohol and other drugs   |
| CCO    | Community Corrections Orders                                      |
| CISP   | Court Integrated Services Program                                 |
| HREC   | Human Research Ethics Committee                                   |
| MERIT  | Magistrates early referral into treatment                         |
| NHMRC  | National Health and Medical Research Council                      |
| SCRGSP | Steering Committee for the Review of Government Service Provision |



# Abstract

The remand population in Australia rapidly increased between 2008 and 2018, partly caused by legislative responses to some terrible offences committed by defendants while on bail. In this report from an inter-disciplinary research project funded by a Criminology Research Grant, we seek to answer three questions: the extent to which defendants applying for bail have vulnerabilities; to what extent risk analysis tools that purport to predict offending on bail and failure to appear can be relied upon; and the extent to which the emerging pre-trial services programs in Australia can reduce the remand population.



# Executive summary

The proportion of remand prisoners in the Australian adult prison population has increased from 20 percent to 30 percent in the last three years (ABS 2018). An increase of this magnitude deserves attention from policymakers and criminologists alike. It is timely, therefore, to look closely at a largely neglected area in criminal justice research: how bail decisions are made. This is a politically sensitive area of policy, given the number of terrible offences committed by defendants on bail, including the killer of Jill Meagher, the perpetrator of the Bourke Street horror in Victoria and the offender behind the Lindt Café siege in Sydney.

The law on bail varies between jurisdictions but has two main objectives: to ensure that a defendant attends the next court date; and to prevent new offences from being committed. A presumption that defendants should obtain bail has gradually been eroded through legislative reforms (eg McMahon 2019; New South Wales Law Reform Commission 2012). Remand makes it more difficult for an accused person to prepare a defence, damages the lives of defendants and is costly for governments. It is concerning that it has become more difficult to obtain bail at a time when there is no evidence that crime is increasing. Indeed, much evidence indicates that the incidence of violent and property crime in Australia is on a steady decline, for reasons not associated with imprisonment rates.

The study had three aims:

- to identify offender vulnerabilities that are relevant when a bail authority makes a bail order for adult defendants in criminal courts;
- to identify the risk factors that predict offending on bail, witness interference and failure to appear; and
- to make evidence-based policy recommendations on how to extend pre-trial services in ways that are appropriate for Australian courts and that reduce the growing remand population.

The issue connecting the above three questions is: how might the criminal justice system best respond to defendants who present with vulnerabilities and risk factors, while maintaining public confidence in the bail system? This study suggests a middle way between respecting the presumption in favour of bail and adopting an excessively cautious approach when considering bail. It proposes two distinct areas of policy for consideration. Firstly, defendants with vulnerabilities can be offered support to keep them out of prison. Secondly, structured approaches can be employed to assess the risk of bail failure and support decision-making.



This study employed mixed methods to address these questions. The aim was to observe and analyse 100 bail applications, employing quantitative and qualitative methods. In the end, we observed 150 applications: 58 in Tasmania, 29 in South Australia, 37 in New South Wales, and 26 in Victoria. In our analysis, we drew on the information available to observers in court rather than on, for example, files supplied by agencies. Despite obtaining provisional support from police organisations, we were not given access to the eventual outcomes from prosecution files (whether or not there were breaches of bail). We were therefore not able to conduct even a basic examination that might have been useful to the development or validation of specialist risk assessment tools. However, our court observations proved a valuable method in understanding bail decisions and in examining responses to defendants with vulnerabilities. This method complements the analysis of legislation and descriptive data by showing in detail how courts make bail decisions in practice. We also interviewed 26 practitioners, including magistrates, defence lawyers, prosecutors and those offering pre-trial services.

Vulnerability is a concept employed by welfare professionals and, increasingly, by criminal courts in relation to groups that present with a range of difficulties, including drug use, mental illness and homelessness. Half of the defendants we observed were assessed as having some kind of vulnerability, although this was not always addressed in bail orders. In some cases, a problem was acknowledged, but it was not possible to draw on assistance from overstretched services; in others, an alcohol problem or a mental illness was not seen as relevant to the legal issues under consideration by the court. In addition, some of the vulnerabilities clearly arose from structural disadvantage. Deep-seated social problems, such as poverty and Aboriginal and Torres Strait Islander disadvantage, cannot be addressed by the courts.

In order to understand risk analysis, it is important to understand the nature of judicial discretion. All magistrates are required to weigh up the factors in each application carefully when applying the law, but we observed that some magistrates refused almost every application, while others accepted almost every application. Providing judicial officers with actuarial information about who is most likely to succeed on bail is common in US courts but is not established practice in Australia. Critics claim that risk analysis of this type discriminates against certain defendants, and there are concerns about a lack of transparency.

In many parts of the United States, defendants who are considered to be at medium risk are provided with pre-trial services that aim to manage the risk effectively. The key element here is that the court makes this assessment and provides the services. In most Australian states, pre-trial services are offered on an ad hoc basis; defendants and defence lawyers request support and argue that this strengthens the case to grant bail. In Victoria, however, the Court Integrated Services Program (CISP) offers a four-month program for eligible defendants in which a specialist caseworker makes an assessment and provides access to a wide range of specialist services financed by the state government. Our study could not collect in-depth information that might enable us to assess the effectiveness or fairness of this approach, but caseworkers reported that the program does offer a way forward that other jurisdictions could consider.



The prospects for reform differ among the four states that we studied. Tasmania has recently decided to introduce bail legislation modelled on the ‘tough’ approach adopted in other states. South Australia has introduced innovations such as electronic monitoring of those on remand through home detention. New South Wales is also trialling a new bail information scheme. Victoria has introduced an ‘exceptional circumstances’ test, while also investing in the delivery of pre-trial services.

This report concludes by identifying a number of ways in which court decision-making and processes could change. Some new initiatives have already been established, and further investment in the provision of services gives judicial officers more options in a context in which legislation has become tougher. Although the issues are complex, the conclusion is that it is quite possible for governments both to protect the public and to contain the growing prison population. To do this, governments will need to work closely with all stakeholders, to share information about effective practice and evaluate new initiatives.



# Introduction

The proportion of remand prisoners in the Australian adult prison population has increased from 20 percent to 30 percent in the last three years (ABS 2018). Details from two states illustrate the magnitude of these changes. In New South Wales, the proportion of unsentenced prisoners in relation to the overall prison population in 2008 was 23 percent, and today it is 34 percent. In Victoria, the proportion of unsentenced prisoners in relation to the overall prison population in 2008 was 19 percent, and today it is 36 percent. Victoria has experienced a particularly dramatic rise in the last year: there was a 22 percent increase in the proportion of unsentenced prisoners in relation to the overall prison population.

An increase in the remand population does not necessarily result in a significant rise in the overall prison population of sentenced and unsentenced prisoners. However, the proportion of remand prisoners in Victoria increased by 22 percent, to 35 percent of the adult prison population, between 2017 and 2018 (ABS 2018). Some defendants spend significant time in custody and yet later receive non-custodial sentences (New South Wales Law Reform Commission 2012). Criminological research has found that time in prison damages people's lives, makes it difficult for them to obtain legal advice and is criminogenic (Baldry et al. 2011). Setting aside what are often technical arguments about outcomes, it is concerning that the general presumption in favour of bail, on the basis that an accused person is innocent until proven guilty, is gradually being eroded at a time when there is little evidence that crime is on the increase (Weatherburn 2016). It is timely to look closely at how bail decisions are made, a largely neglected area in criminal justice research.

The first part of this *Introduction* will provide a brief summary of the current legislation on bail in four states (building on Bartels et al. 2018). It will also consider bail as a policy challenge, in the light of the great public and political interest in bail that follows high profile cases, including the Bourke Street murders and the Lindt Café siege. The second part will introduce the research questions and outline the mixed methods we employed to address these questions.

## Bail legislation in four states

There are two entrenched common law presumptions: that accused persons are innocent until being found guilty, and that the defendant has a right to bail (New South Wales Law Reform Commission 2012, chapter 2). Modern jurisdictions in Australia respect the principles, while

asking judicial officers to consider the risks of whether a defendant will attend the next court hearing or might commit offences while on bail. The bail authority also has to assess the risk of defendants harming themselves or interfering with witnesses. Legislation in the more populous states is complex, because amendments are made constantly. There are also terminological differences. However, magistrates in each state reported that the key issues to be considered were easy to understand and apply and had not substantially changed.

Here, for example, are some of the factors to be considered in determining whether there is an unacceptable risk under the *Bail Act 1977* in Victoria:

- (3) In assessing in relation to any event mentioned in subsection (2)(d)(i) whether the circumstances constitute an unacceptable risk the court shall have regard to all matters appearing to be relevant and in particular, without in any way limiting the generality of the foregoing, to such of the following considerations as appear to be relevant, that is to say—
- (a) the nature and seriousness of the offence;
  - (b) the character, antecedents, associations, home environment and background of the accused;
  - (c) the history of any previous grants of bail to the accused;
  - (d) the strength of the evidence against the accused;
  - (e) the attitude, if expressed to the court, of the alleged victim of the offence to the grant of bail;
  - (f) any conditions that may be imposed to address the circumstances which may constitute an unacceptable risk.

The way in which these circumstances are phrased gives considerable discretion to magistrates in determining whether there is an unacceptable risk. For example, the statute does not define what constitutes a serious offence. Nor does the list require magistrates to give priority to any factor.

One important consideration, in subsection 3(f), is whether bail conditions can be imposed that reduce or manage the unacceptable risk (make it acceptable). Bail conditions often imposed include a requirement to report to a police station, perhaps twice a week; a place restriction; and a curfew. In practice, such orders make it possible for many defendants to be granted bail.

The complexity of bail legislation has arisen because legislators have reversed the onus of proof for particular offences, and some states have introduced double tests intended to allay public concerns after high-profile offences committed by offenders on bail. This history is thoroughly reviewed in the larger states by other reports (eg Coghlan 2017a, 2017b; McMahon 2019; New South Wales Law Reform Commission 2012). Some background information will clarify our interest in defendant vulnerabilities, risk assessment and pre-trial services.

### Tasmania

The *Justices Act 1959* (Tas) sets out the criteria to be used in deciding bail applications, with more detail provided by the case of *R v Fisher* [1964] (Tas). There is a presumption of bail. The *Family Violence Act 2004* (Tas) reversed the burden of proof for defendants charged with offences relating to family violence. The government has stated its intention of introducing an ‘unacceptable risk’ test through new legislation.

### South Australia

The main statute remains the *Bail Act 1985* (SA). It gives a right to bail, subject to exceptions for serious offences (although it is possible to demonstrate ‘special circumstances’). There have been several amendments over time, making it more difficult for those charged with particular offences to obtain bail. The most controversial was the *Bail (Miscellaneous) Amendment Act 2017* (SA). This reversed the burden of proof for defendants who had breached an intervention (family violence) order.

### New South Wales

Bail law in this state is complex. Following a review by the New South Wales Law Reform Commission (2012), the government enacted the *Bail Act 2013* (NSW) to simplify the law. Some saw this as ‘soft on crime’, and a new Attorney-General responded by enacting the *Bail Amendment Act 2014* (NSW) and the *Bail Amendment Act 2015* (NSW). This legislation introduced an ‘unacceptable risk’ test, with a ‘show cause’ test for serious offences.

### Victoria

The *Bail Act 1977* (Vic) has been amended several times in recent years. A ‘show cause’ test was introduced in 2017 for defendants facing a variety of charges. The *Bail Amendment (Stage 1) Act 2017* requires defendants to supply a ‘compelling reason’ or demonstrate ‘exceptional circumstances’. This is controversial, because the wording of the amendment catches minor offences committed while breaching bail. The *Bail Amendment (Stage 2) Act* (Vic) revised the three tests. The current bail legislation contains diagrams that enable judicial officers and lawyers to navigate the complex provisions (see McMahon 2019).

## Bail as a policy challenge

Governments in democratic societies face challenges in every aspect of criminal justice policy. They must respond to political pressure from groups campaigning for due process and, more often, for crime control (Brown & Hogg 1996; Packer 1964). They can only draw on limited financial resources. They often have no direct levers on agencies such as the police or criminal courts. In the case of bail, most states appear to show little interest in, or policy urgency for, changing existing practices, but there are also few opportunities to explore or pursue new initiatives. Policy has been influenced by legitimate concerns and political pressures that have arisen from a series of terrible offences committed by defendants on bail. These have resulted in ‘tough’ bail laws and in judicial officers exercising greater caution in granting bail. Criminologists hold different views on these issues.

### *Offences committed by defendants while on bail*

While similar issues are reported in other jurisdictions, Australia seems to have experienced particular problems in relation to its bail system. The murder of journalist Jill Meagher in September 2012 left the public with the view that decision-makers had been too quick to accept that a serial rapist had reformed (Dowsley, Flower & Carlyon 2015). The Bourke Street massacre committed by James Gargasoulas in January 2017 while he was on bail was also deemed unacceptable to the public (Cooper 2017). Six people died, including a baby. In Sydney, bail was also scrutinised by the media after the Lindt Café siege in December 2014 (Australian Associated Press 2017). Perpetrator Man Haron Monis, who was responsible for the deaths of two hostages, was out on bail despite facing a number of charges, some allegedly committed while he was on bail.

These were terrible offences, but it should be noted that it is not clear whether these defendants obtained bail because of any perceived leniency in the bail legislation. In some cases, decision-makers did not have access to full information about previous offending, because of administrative errors in overworked agencies (State Coroner of NSW 2017). No one could have predicted that Gargasoulas would commit mass murder. Put differently: if the bail law required magistrates or bail justices to refuse bail in these circumstances, very large numbers of defendants would be refused bail. This illustrates how governments and the different agencies need to strike a difficult balance in a politicised environment.

### *Finding a middle way*

A middle way in bail policy would provide protection to the public but also safeguard the rights of defendants and the presumption of innocence. In this report, we advocate the provision of pre-trial services following an assessment of risk. The aim is to keep as many defendants as possible out of prison but, at the same time, to control and monitor behaviour more closely than in the current system. In addition, the programs available at the pre-trial stage are intended to address the social and psychological causes of offending. Pre-trial programs also have the potential to disrupt existing services and even to change the nature of judicial work. These issues are considered later in this report. Despite known objections, we see pre-trial services as a promising initiative that, if expanded, could substantially lower the remand prison population.

## **Research questions**

Before considering policy options, it is important to have a sound understanding of how bail decision-making works. We adopted an exploratory approach to unpacking the issues. This study had three aims:

- to identify offender vulnerabilities that are relevant when a bail authority makes a bail order for adult defendants in criminal courts;
- to identify the risk factors that predict offending on bail, witness interference and failure to appear; and
- to make evidence-based policy recommendations on how to extend pre-trial services in ways that are appropriate for Australian courts, and that reduce the growing remand population.

## Methodology

Our study sought to contribute to policy making by obtaining evidence about how bail decisions are currently made and about policy alternatives. We employed a variety of quantitative and qualitative methods. Policy alternatives around bail are most likely to develop if criminal justice agencies routinely collect information about bail outcomes. Agencies in Australia have limited resources available for research and are only able to collect limited information. Institutional and political sensitivities make it difficult to share information between agencies or with the public.

In this study, we took advantage of the public nature of criminal courts to investigate how bail decisions are made. We also approached legal practitioners, including magistrates, defence lawyers and prosecutors, and interviewed them about their work. We also interviewed practitioners who provided pre-trial services.

### *Project design*

This project was designed with practical objectives over a two year period, drawing on the in-kind support of a research group based in five universities. The research group included researchers from a variety of disciplines: law, sociology, anthropology, criminology and psychology. These researchers work in a variety of applied fields, such as legal studies and police studies. Each researcher has contributed to data collection, analysis, development of a policy message or writing up reports. The internal meeting for the project was designed to explore how different disciplines could contribute to understanding bail decisions.

One objective was to disseminate findings to different audiences. This report is mainly aimed at policymakers and practitioners in Australia, although it will reach a wider audience. We also plan to publish a monograph that will present data and discuss policy and theoretical issues at greater length. A policy workshop in September 2019 brought together researchers, working in this field, with magistrates, policy officers and others who are interested in bail reform.

To achieve these objectives over two years, we designed a project that would collect data through court observation of over 100 bail applications, building on a pilot study already conducted in Tasmania in 2014. In the whole project, we observed 150 applications:

- Hobart, Tasmania in 2014–15
  - 20 fieldwork days
  - 58 applications observed;
- Adelaide, South Australia 2017–18 (Central Magistrates Court)
  - 4 fieldwork days
  - 29 applications observed;
- Sydney, New South Wales 2017–18
  - 10 fieldwork days
  - 37 applications observed (5 courts);

- Melbourne, Victoria 2017–18 (Central Magistrates' Court)
  - 6 fieldwork days
  - 26 applications observed.

During these visits, we interviewed 26 practitioners. These included magistrates, defence lawyers and prosecutors, but also practitioners who delivered or coordinated pre-trial services.

### *Quantitative research*

Observing 150 applications enables quantitative findings. The most useful in relation to our research project were descriptive statistics. We were able to record, for example, how many of the bail applications observed were granted. We also identified the proportion of applications in which a vulnerability was mentioned during the hearing.

When observing hearings, the team decided to take a liberal, grounded approach to identifying vulnerabilities. A structured, normative 'tick-in-the box' approach would not have been feasible, for three reasons:

- Not all vulnerabilities were openly identified by legal practitioners during hearings, because they had nothing to do with the case or because of potentially discriminatory factors towards the defendant.
- Not all vulnerabilities (especially medical ones) would have been identifiable at the time anyway, because of potential absence of clinical diagnosis, and with clinical assessment pending or ordered by the courts.
- Not all defendants 'out' their vulnerabilities, because they do not want to admit to them.

The team was therefore looking for whether problems such as alcohol, drugs, mental ill-health, poverty, unemployment or brain injuries were mentioned. We also noted whether such issues as Indigenous Australian identity or language difficulties were raised. This could be viewed as a generous measure: were these factors relevant to a bail decision, or incidental? Their assessment could also be seen as purely normative: a vulnerability might have been raised, while not having any bearing on the case, and could have been left aside by all parties. One strength of this observational methodology is that we can supply examples of applications. For example, in Application 1 (see *Legal relevance* subsection), the prosecutor mentioned a defendant's alcohol problem. At other times, the ethnicity of the defendant was visible but had nothing to do with the case. The reader is able to make this assessment. This is a rigorous, transparent methodology that recognises the difficulties in measurement but reaches conclusions.

There are potential sampling problems in any study that collects data through court observation. For example, one conclusion from our data in New South Wales was that most applications in this state were refused. However, at that point we had only observed one magistrate, and we were told by defence lawyers that he refused most applications. This is relevant to making findings about the exercise of judicial discretion, rather than the extent to which defendants had vulnerabilities. For each question, we overcame this potential problem by observing 150 bail applications.



We considered two other types of quantitative analysis but did not pursue them because of problems with obtaining data. The first was identifying possible causes of being granted or refused bail—factors that might influence decisions (Allan et al. 2005). One difficulty was that factors that might be expected to be important, such as the seriousness of the substantive offence, were not always available from observing hearings. This type of analysis might be possible through obtaining access to files of applications observed in court. In addition, the relatively small number of 150 applications would make it difficult to conduct a regression analysis to identify the causal effect of different factors. Our main reason for not pursuing this line of enquiry was that it did not answer the research questions. We wanted to know, for example, in relation to the first question, what considerations were employed in response to defendants with vulnerabilities. It would not assist to know whether having a vulnerability was statistically significant in determining whether a defendant was refused or granted bail.

Our second question asks about the risk factors that predict offending on bail and failure to appear. It is difficult to identify possible risk factors, such as the seriousness of the substantive offence (the independent variable) in observed hearings. It would require access to files, or the imposition of more demands on practitioners following hearings, to obtain this information. An even greater challenge lies in identifying the outcome of cases, in particular whether there was ‘offending on bail and failure to appear’ (the dependent variable). We found that police organisations were willing to assist in principle but experienced difficulties in tracking outcomes. This may simply be because officers on the ground have too little time, and the information is not easily available in police records.

### *Qualitative research*

Qualitative researchers seek to understand the meaningful character of social life. The issue was recently explained by Howard Becker (2017: 39–40):

I’ll use “qualitative” to describe research that pays attention to details and nuances of meaning in the varying kinds of material that make its subject matter and usually (not always) describes its data in words rather than numbers. Its primary data may be the researchers’ observations or more or less verbatim accounts of interviews, historical materials and so on. The researchers take the meaning of the material as something for them to discover, rather than as an unproblematic given.

Our objective was to understand the legal and practical issues in bail decision-making. This required observing bail applications in court. Our researchers recorded the submissions made at hearings and the decisions made by magistrates in as much detail as possible. In a quantitative study, researchers employ a checklist to record variables that are later analysed. In qualitative research, an observer comes away with pages of notes. In this report, we have written up some of these observations as vignettes. Although we did not have access to the documents consulted during hearings, such as each defendant’s prior record, we could overhear practitioners talking about these issues.

We interviewed many practitioners about their work. Ethnography as a research method seeks to obtain different types of qualitative data. Some of the information reported is based on personal communications—private comments to the researcher. Such comments are valuable, although they should not be seen as equivalent to information obtained through interviewing many practitioners or attending meetings in closed organisations.

Some courts and local police divisions gave considerable assistance, so the difficulties can be exaggerated. In most cases, we met practitioners outside hearings and asked general questions about some of the bail decisions we observed, as well as questions about the process as a whole. This approach was particularly helpful to our understanding of considerations about granting or refusing bail. We will draw on these observations in the sections below when describing responses to defendants with vulnerabilities and the importance of discretion in judicial work.

Another objective was to understand the emergence of pre-trial services in Australia. We did not have the resources to approach a wide range of agencies, such as those providing drug rehabilitation programs in each state. Nor did we have the resources or permission to conduct an in-depth study of the CISP in Victoria or the Magistrates early referral into treatment (MERIT) program in New South Wales. The extent to which the internal workings and possible problems encountered by any publicly funded agency should be available for public scrutiny is a matter for political debate. When it began, CISP was evaluated and the findings made public (Ross 2009). In recent years, consultants were employed to conduct internal evaluations. However, we received some assistance from this agency, despite writing about a potentially controversial initiative in a highly charged political environment. We obtained permission for a group interview with case managers, reported below. In other courts, we interviewed practitioners who supplied what we describe as ad hoc pre-trial services.

### *Ethics approvals*

Ethics approval is not required to observe public legal hearings (NHMRC 2018). However, we needed permission to conduct interviews and to analyse information from documents. For this reason, it was necessary to seek approval to observe hearings. We obtained ethics approvals in two stages.

#### **Stage 1**

In March 2017, we obtained Stage 1 ethics approval from the University of Tasmania Social Sciences Human Research Ethics Committee (HREC). This was endorsed by ethics committees in South Australia and New South Wales. We later obtained approval from the Justice HREC in Victoria. Stage 1 approval meant that we could observe hearings and interview practitioners, other than prosecutors.

## Stage 2

During 2017, we submitted ethics applications to police organisations in Tasmania, South Australia and New South Wales. Stage 1 of the application process was to obtain permission to interview prosecutors. We also went further, applying to obtain ‘bail outcomes’ for 100 defendants—to determine whether a defendant who was granted bail met bail. We obtained approval from South Australia Police, Tasmania Police and the New South Wales Police Force. We also obtained Stage 2 approval from the Social Sciences HREC (Tasmania) in September. We did not submit an application to Victoria Police, partly because there was a delay in obtaining Stage 1 ethics approval from the Justice HREC (Victoria).

Applying for ethics permission is an elaborate process; 11 applications were needed for this relatively small project. There were delays in obtaining permission from one ethics committee. The applications are, however, a means of developing positive relationships with agencies.

## Comparing bail systems in four states

Australian criminologists do not often use comparison between jurisdictions as a method because of logistical difficulties. There is no national criminal justice policy, and geographical distances have to be overcome in conducting empirical research. There are also some considerable methodological problems that arise when researchers make comparisons. It seems, for example, good science to identify statistical variations and then find some process or procedure that explains the variations. Some studies have tried to explain leniency in Victoria, evident in sentencing and bail decisions from official statistics over a long period, through identifying a distinctive ‘court culture’ or some procedure that looks distinctive compared with other states (Sarre, King & Bamford 2006). The difficulty in relation to bail in Victoria is that the remand population has rapidly increased in the last three years (ABS 2018), despite this cultural distinctiveness. In other states, which might seem conservative or to have a tough approach, there is still interest in new ideas, especially among those that have established specialist courts. This suggests that some care is needed when drawing conclusions regarding differences between the bail systems.

### *Statistical differences*

The states in which we conducted research for this project were Tasmania, South Australia, New South Wales and Victoria. The Australian Bureau of Statistics (2018) data gives the proportion of the remand population in each state in 2018 and compares this with the proportion in 2008 (Table 1). States are listed in the order in which we conducted observations:

| Table 1: Proportion of remand population across states, 2008 and 2018 |                                     |      |
|---|-------------------------------------|------|
| State   | Proportion of remand population (%) |      |
|   | 2008                                | 2018 |
| Tasmania  | 20.8                                | 28.8 |
| South Australia   | 37.3                                | 33.3 |
| New South Wales   | 23.4                                | 33.5 |
| Victoria  | 19.2                                | 36.3 |

The most striking change has taken place in Victoria. The proportion of the remand population averaged between 20 and 30 percent in the period 2008–2014 but rose to over 30 percent after 2015. In this state, there was a 22 percent increase in the remand population between 2017 and 2018. This cannot be attributed to legislative change; new legislation was introduced only in May 2018. One likely cause is that magistrates became more cautious, because of increased scrutiny in the wake of high profile cases. The remand population in Tasmania has risen over ten years. The *Family Violence Act 2004* (Tas) reversed the burden of proof for defendants charged with domestic violence. It seems unlikely that this statute by itself has caused an increase in the remand population. South Australia and New South Wales have a reputation for a highly cautious response to bail; they have had, for a long time, the largest proportions of remand prisoners in relation to their prison populations in the country. Today, their remand populations are less notorious by comparison.

### *Distinctive court cultures?*

Whatever the statistical differences, there are institutional differences between states. These are sometimes described as ‘court cultures’. This term refers both to legislative differences and also to informal practices that are distinctive to a particular court. Victoria is, for example, distinctive by virtue of an informal policy that requires police officers to give evidence in contested bail applications. South Australia is distinctive in having a separate organisation (the Sheriff’s office) that is responsible for providing security in courts. It is not clear whether these institutional differences affect bail decisions.

We came across some interesting differences in the ways police approach bail, although this study is not concerned with police bail. Nonetheless, in Tasmania, which had the lowest proportion of remand prisoners in relation to the adult prison population, all the applications we observed in court arose from a breach of bail granted by the police. In the other states, many applications were made after the police refused bail. This seemed particularly true in New South Wales. We observed applications in which the police had refused bail for defendants charged with minor offences.

We remain cautious, therefore, when making comparisons. It is clear that there are differences in the ways courts respond to bail. There are different legislative frameworks. There is also a significant difference between Victoria, which has an integrated program of pre-trial services, and other states, in which services are often provided on an ad hoc basis by different agencies. We are not, however, recommending the institutional arrangements in Victoria as suitable for all states. Instead, we are seeking to raise awareness of a number of policy initiatives, including the US approach to risk analysis, that have not yet been tried in Australia.

## **Summary: Objectives and methods**

In this report, we focus on three questions: how courts respond to vulnerabilities; the possibilities in employing risk analysis as an alternative to judicial discretion; and the appropriateness of pre-trial services in Australian criminal courts. We present data and evidence about these questions and discuss the policy implications of our findings. Our report concludes by discussing initiatives that may assist in reducing or containing the rising remand population. For the most part, this is intended to be an exploratory discussion of policy issues, drawing on the evidence available from observing hearings and interviewing practitioners.



# Defendant vulnerabilities and bail orders

This section seeks to address the first of the three research questions posed in this project: how courts respond to vulnerabilities. It will present data collected in the court observation and interviews to explore the extent to which the vulnerability of defendants is acknowledged and responded to in the courts. This section canvasses the concept of vulnerability; presents some brief descriptive data of the presence of vulnerability adduced in the observations; examines responses to vulnerability and the different types of vulnerability observed; discusses underlying structural determinants of vulnerability and their impact on bail decision-making; and, finally, presents some policy implications of the issues outlined.

## The concept of vulnerability

It is important to acknowledge that the term ‘vulnerability’ cannot be used unproblematically (Howes, Bartkowiak-Théron & Asquith 2016). The term itself has historically implied a weakness and lack of agency that many from perceived ‘vulnerable’ groups may not accept. Recent redefinitions of the terms embrace vulnerability as a fundamental trait of any person, which can be conceived in terms of permanent (like ethnicity or disability), transient (in some cases of homelessness), layered (multiple morbidities) or temporary (unemployment) individual or collective attributes. Although this research uses the term vulnerability throughout, it is understood that this term may mean different things to different people and groups.

Generally, markers of vulnerability include factors such as gender, race and class, compounded by factors such as mental illness, homelessness, and drug and alcohol use (Bartkowiak-Théron & Asquith 2012; Bartkowiak-Théron & Corbo-Crehan 2010). However, normative lists of vulnerability increase with time, and new forms of vulnerability appear in social debates according to their political salience or their discovery through technological or medical progress. Significantly, ‘outsider’ groups sometimes experience multiple forms of inequality and include members of multi-level disadvantaged clusters. Because these identity descriptors include multiple group memberships, there is no single culturally determined identity descriptor relevant to a member of a group. Herring and Henderson (2012: 633) believe that this ‘dynamic’ character of vulnerability demonstrates critical diversity: one signifier of

vulnerability cannot be accounted for on its own, but rather in conjunction with other signifiers of vulnerability (especially in cases of temporary vulnerability). Essentially, static signifiers such as race, gender and age are combined with ‘thick’ conceptualisations of needs (Fraser 1989), such as substance use, mental illness and homelessness, to construct politically defined vulnerability.

Moore and Lyons (2007) argue that the needs of vulnerable people are being conflated with risk: need is perceived as risk by criminal justice practitioners, and vulnerabilities become risk factors in need of mitigation, often through intervention and control. Stanford (2012) also points out that vulnerable people can be perceived as actual risks themselves, as much as they are considered ‘at risk’. This may have a net-widening effect, whereby vulnerable people are criminalised because of the presence of perceived risk factors in their lives, not because of criminal behaviour. It is widely agreed that vulnerable people as a whole are over-represented at all stages of the criminal justice system (over-incarceration of indigenous people around the colonised world, of people with cognitive disabilities or with mental health issues; Baldry 2009). This over-representation of vulnerability is translated at the bail and remand stage of the court process into a refusal to grant bail to so called ‘risky’ individuals (Hannah-Moffat & Maurutto 2013). The over-representation of vulnerable and marginalised people on remand, and the way criminal justice responses to vulnerability compound and inflate this over-representation, are also of continuing concern (Baldry 2009).

In the four jurisdictions studied, the concept of vulnerability is used by criminal justice and social work practitioners in broad terms, but also in manners that are dictated by the law. For example, the use of the term in New South Wales is governed by the *NSW Law Enforcement (Powers and Responsibilities) Act 2003* and its Regulations (2005, 2016). They clearly articulate five broad categories of vulnerability according to age, spoken language and cultural background, mental illness and disability. In broad terms, however, most of the local laws acknowledge vulnerability by default.

## The extent of vulnerabilities

Court observation is a useful methodological tool for identifying defendants’ social and psychological vulnerabilities. Defence lawyers may raise vulnerabilities in bail hearing submissions; the prosecution may raise a particular vulnerability as an obstacle to their supporting bail; and magistrates may try to mitigate perceived risk, based on a defendant’s presentation of certain vulnerable characteristics. We were able to record the markers of vulnerability, the way they were drawn upon by practitioners and the response of the courts to vulnerability in bail decisions (see the discussion of transparency and measurement in the *Quantitative research* section).

In our study, just under 50 percent of cases revealed vulnerable characteristics of the defendants (see Table 2). This is a lower proportion than has been found in studies conducted in prisons, but those studies had larger sample sizes (for discussion, see Baldry et al. 2003). It is possible that what was recorded by researchers did not pick up vulnerabilities that may have



been relevant but were not mentioned in open court. Sometimes, magistrates have access to printed reports with details that are not read out in court, so researchers are unable to record them. Our interview data also showed that some practitioners may deliberately omit their clients' vulnerable characteristics from their submissions. Further, our sample size is relatively small; it cannot provide representative statistics, only illustrative inferences. Therefore, our data may underestimate the extent to which defendants have such vulnerabilities.

Of the 70 defendants observed who presented with some form of vulnerability, many had multiple markers of vulnerability, confirming prior research that vulnerability generally consists of multiple intersecting social determinants (Herring & Henderson 2012; Moore & Haysom 2014). Our finding that almost half of the defendants presented with vulnerability markers is still significant, given that many of these people may benefit from welfare interventions. The CISP managers interviewed believed that half of the defendants could be bailed if welfare interventions were more accessible and available.

| Table 2: Vulnerability of defendants |                                    |   |
|--------------------------------------|------------------------------------|---|
| Total number of cases observed       | Presence of vulnerability<br>n (%) | No indication of vulnerability<br>n (%) |
| 150                                  | 70 (47)                            | 80 (53)                                 |

### Bail legislation and vulnerabilities

A key question for this study is how criminal courts respond to vulnerabilities—and what policy alternatives there might be. Vulnerabilities are (or should be) flagged, ahead of the court process, by police in charge of the case (see our earlier point about vulnerable offenders under the *Law Enforcement (Powers and Responsibilities) Act 2003* (NSW), Part 9). Vulnerabilities should therefore be known to all legal actors prior to bail hearing stage; there are already powers within legislation either to require defendants to obtain support or, in the case of integrated services in Victoria, to divert defendants to a pre-trial services program. The *Justices Act 1994* (Tas), s 7(5)(c), gives magistrates the power to ask a defendant to be assessed for a brain injury; the defendant has the right to refuse. The *Bail Act 1985* (SA), s 11(6), gives magistrates the power to order supervision by a Community Corrections officer. The *Bail Act 1977* (Vic), s 5AAA(4), gives magistrates the power to refer a defendant to bail support services. The *Bail Act 2013* (NSW), s 28, gives magistrates the power to impose an accommodation order for the purposes of receiving residential treatment.

However, in most of the applications we observed, even in Victoria, we found that most magistrates did not use their powers to make therapeutic orders, unless such magistrates were known for working in therapeutic or problem-solving court listings. They did not normally ask about the details of treatment or seek to obtain information that was not legally relevant.



### *Bail orders*

Magistrates are asked to take into account a variety of factors under existing legislation, including vulnerabilities, as prescribed by, or in the absence of, legislation on vulnerability in their jurisdiction. They also have the power to ask defendants to seek, or to continue, treatment. In some cases, defendants ask through their lawyers for such issues to be taken into account, when applying for bail. In most cases, the issues are not raised, either because it is feared that they might lead to adverse outcomes or because it is difficult or expensive to access services.

### *Legal relevance*

While magistrates can take account of vulnerabilities, their main task is to apply the criminal law. We observed a number of applications in which there appeared to be some vulnerability that might relate to offending but was not commented on by the practitioners. In other applications, magistrates often asked whether there were ‘custody issues’, putting a note on the file asking medical officers in prisons to address some problem. However, the court was not directly involved in providing such services or in addressing such problems proactively.

#### **Box 1: Application 1—Ignoring a vulnerability**

The defendant had breached bail through not reporting to a police station. He told the court through a video link that this was due to ‘the screaming in my head’. The magistrate renewed the bail with the same conditions. No one mentioned at the hearing that there was a possible mental illness, although it was possible that everyone knew about this and that treatment was provided in the remand centre.

## **Types of vulnerability**

This subsection canvasses the vulnerabilities that were most apparent in the observation data. These vulnerabilities include the use of alcohol and other drugs, mental health issues, brain injury or cognitive impairment, and homelessness.

### *Alcohol and other drugs*

Problematic use of alcohol and other drugs by defendants is often a significant factor in bail decision-making and in the imposition of bail conditions. Alcohol and other drugs have been shown to have a causal link to certain types of offences. For example, research has established a link between alcohol consumption and intimate partner violence (Brem et al. 2018). While there is much debate among criminologists about the link between drugs and crime, arguably, the courts accept that there is a link (Bennet & Edwards 2015). In many cases of domestic violence, offending is partly caused by excessive drinking. Where defendants present with risk associated with drug and alcohol use, magistrates may impose conditions to mitigate these risks and allow bail where, without such conditions, the defendant would be remanded. These might range from relatively minor interventions, such as requiring the defendant to make an appointment with a doctor, to bailing the defendant with a residence condition at a secure treatment facility. The following observation from Tasmania provides an example of this practice.

**Box 2: Application 2—Breaching a restraint order; *Family Violence Act 2004* (Tas)**

The defendant was a heavy drinker and engaged in acts of violence against an ex-partner. He was brought to court for breaching the restraint order. It was clear that this was not the first breach, and this incident happened only a short time after being released on his most recent bail. He went to the house of his ex-partner, who was not there at the time, in contravention of the order. The prosecutor noted: 'it is a situation where a rational person would not have gone, but a rational person would not commit the other offences'. The prosecutor indicated that he would be happy for bail to be granted on section 12 grounds, provided the defendant was admitted to the residential program available locally. However, this was not possible because of a six-week period of assessment. No one from the program was in court, although a welfare officer from a religious charity happened to be there and could contact the program after the hearing.

While the magistrate was content to grant bail to the defendant to attend a residential program, the lack of available places jeopardised the granting of bail. People with alcohol and drug issues who are seeking bail may be incarcerated because of this lack of places and resources to treat the possible cause of their offending. This has several policy implications. Firstly, the cost of keeping a person in custody is high, and the money spent on custody could instead be used to treat a person. Secondly, this has consequences for rehabilitation. Evidence of high recidivism rates suggests that rehabilitation is not necessarily a likely outcome of incarceration (SCRGSP 2018). If the ultimate objective is to stop crime from being committed, rehabilitating people successfully is an important goal.

It is essential to acknowledge the importance of jurisdictional differences. In Tasmania, there are no integrated bail support services (see the details below on bail support services). It is possible that, had this scenario played out in a court with integrated services, the outcome might have been different. If nothing else, it is likely that there would have been caseworkers present in court to conduct assessments and provide referrals.

### *Mental illness*

As therapeutic jurisprudence frameworks become more mainstream in jurisdictions across the world, Australian courts are much more likely to recognise mental health issues as indicators of vulnerability that cannot be ignored in court processes and decisions (McMahon & Wexler 2004). In particular, some jurisdictions have initiated specialist courts and court-ordered treatment programs to mitigate mental health risks, including during the pre-trial period. For example, mental health courts or diversion lists have been set up in Tasmania, South Australia and Victoria. These courts operate as deferred sentencing processes in which magistrates supervise defendants who have pleaded guilty, with successful defendants able to be kept out of custody (Newitt & Stojcevski 2009). The court supervises the process through regular progress hearings and referrals if needed. However, one limitation of this therapeutic diversion is that entry to the mental health list is only allowed to those with a diagnosed mental illness. This may mean that people with other mental health concerns, even serious concerns, may not be deemed eligible.

The following extract from a transcript of a bail hearing in Tasmania demonstrates the magistrate's awareness of mental health issues and illustrates how this particular magistrate attempted to address these in the decision-making. The defendant in question had used a pitchfork to attack an elderly neighbour. Here, the magistrate explores the reasons for offending and draws the link with mental health issues. The magistrate then attempts to get a mental health assessment completed in custody.

**Box 3: Application 3—Responding to a defendant with a potential psychiatric problem**

It was alleged by the prosecution that the defendant had attacked his elderly neighbour. He had become enraged, thinking that the neighbour had been staring at him. He grabbed the neighbour through the flyscreen of the window and attempted to pull him through the window. The defendant was placed under arrest and detained overnight. There was a problem in conducting an interview. Forensic services attended the scene and found a large pitchfork covered in blood. It was likely that this had been used to puncture the victim's body.

At 9.15 am, the defendant participated in a recorded interview. The defendant stated that he had six beers during the day. He had ongoing issues with the complainant. The complainant had poisoned his dog six months ago and, he complained, stared at him all the time. He stated that he had had enough. He denied using the pitchfork and stated that he did not use excessive force.

The legal aid lawyer submitted that the defendant had resided at the property for two and a half years. His instructions were that he could reside with his 26-year-old daughter. He had two other daughters, aged six years and 10 years. He was the sole carer. He last breached bail in 2003. He could comply with the conditions of a curfew if required and comply with conditions. The lawyer submitted that he could be placed under a restraining order not to go to that address.

The magistrate thought for a few minutes: 'This is another case where one imagines the prosecution summary of the charges perhaps misses the mark a bit'. This was because the behaviour suggested paranoia and mental instability. If he had a surety, not a daughter but someone in authority prepared to take an interest, the magistrate might take a different view. In the meantime, he would like 'some evaluation of the applicant to fill in the holes'. The magistrate invited the prosecution to ask for an order that the defendant be examined. Bail was refused for a month.

In this case, the magistrate neither granted nor refused bail, leaving the application open while further information could be obtained relating to the defendant's offending and any mitigation of risks. The three-week adjournment left time for the assessment to be done and for the same magistrate to be present at the next hearing (for consistency). This meant that the defendant would spend another three weeks in custody before a plea could be entered or a final decision made on bail.

This example shows how practitioners in the courts in all four jurisdictions are equally time poor and resource poor. There is little time to investigate social or psychological issues. The legal aid lawyer had little time to take instructions, because she had an hour to see six defendants. The prosecutor did not raise mental health issues or suggest assessments to alleviate concerns. It was the magistrate in this case who demonstrated awareness of the

issues presenting, while unable to resolve it at that time. In this application, we learn very little about the defendant beyond the brief submissions of the defence. It may be that the experience of the magistrate made it possible to draw out inferences about the defendant's psychological and social issues from the facts. Again, a lack of resources, in the form of possible treatment programs or residential facilities, frustrates the outcome.

### *Brain injury or cognitive impairment*

People with acquired brain injury (ABI) are particularly over-represented in the criminal justice system (Lansdell et al. 2018). As is the case with many people experiencing vulnerability, comorbidity is an issue, and people with ABIs often present with other multiple markers of vulnerability (Perkes et al. 2011). A significant issue in the criminal justice system, particularly in relation to bail, is the expectation placed on defendants with an ABI to comply with court orders. Defendants with an ABI may be unable to understand multiple, complex bail conditions such as reporting at a police station multiple times a week or being obliged to attend multiple interventionist appointments. Our observations provided multiple examples of extensive, sometimes confusing, conditions being meted out in order to grant bail. One magistrate in New South Wales numbered conditions as he read out his decisions in a bail application, illustrating how long the list of conditions could be. It was not unusual for 15 to 20 conditions to be added to bail. For people with cognitive impairments such as ABIs, it is arguable that the court sets them up to fail by placing unrealistic expectations on them to comply.

We observed the following bail refusal in New South Wales. It offers an example of how a vulnerable defendant, who presented with multiple markers of vulnerability, including cognitive impairment, was dealt with by the magistrate:

#### **Box 4: Application 4—A defendant with a cognitive impairment**

This 31-year-old male defendant appeared by video link. There was some confusion at the start as to whether this was a 'show cause' scenario in the New South Wales legislation. The magistrate asked the prosecution to demonstrate this. The prosecution argued that this was an indictable offence. There were allegations of threatening police with a machete. The defence lawyer submitted that the defendant had been in jail many times for similar offences and was 'struggling in custody'. He had medical conditions for which he required treatment.

The magistrate noted that the defendant had served multiple terms of imprisonment. He was stabbed when he was 16 and blinded in one eye. He had mental health issues (schizophrenia and bipolar depression) and an intellectual disability. The defendant was supported by his pregnant sister and mother. They offered a \$2,000 surety. They would assist him to report daily, and he could reside at his mother's house.

The defendant was visibly upset and crying during the hearing. He said that he had failed his family and wanted a new start. He had stopped taking his medications that 'made me think weirdly'. He felt that jail was not helping him. He was scared of the police who 'kept attacking him'.

The magistrate noted: 'The court is not satisfied that cause has been shown.' Bail was refused. Someone in the public gallery shouted 'He needs help.' The defendant responded, 'You've got to be kidding me. This shit is on your head, Your Honour' and called out to his sister.

The magistrate in this case discussed the risk the defendant posed to police and the community, but did not address the defence's submission about the defendant struggling in custody.

### *Homelessness*

Prior research has already demonstrated a strong link between housing instability and bail refusal, particularly for younger defendants (Boyle 2009; Stubbs 2010). Courts treat homelessness as a bail risk and are unwilling to bail a person without evidence of a stable address. Often, bail is granted with a residence condition—that is, a person is required to reside at a specific address or be in breach of their bail. The court needs to have a means of contacting a person to ensure that they attend court. Traditional mailing services are still the primary delivery tool of the courts. Therefore, a bailed person needs to provide postal address details. Where possible, attempts were made to find alternative accommodation for defendants without suitable accommodation. For example, in South Australia, a religious charity has built a bail hostel with 40 beds. Provided there was a place, a defendant could obtain bail.

People who were not homeless at the time of their offence may experience housing instability because of their purported offending behaviour. For example, domestic violence incidents may result in the defendant being unable to return to their usual place of residence. Homelessness is more complex than simply the number of defendants living on the streets (Chamberlain & McKenzie 2006). Only 15 of the 150 defendants observed were living on the streets. Other defendants were residing in hostels or temporary accommodation. The following application provides an example of the use of hostel accommodation to mitigate the accommodation risk:

#### **Box 5: Application 5—A homeless defendant**

The prosecutor submitted that the defendant had committed serious offences and was a danger to the public. He had committed a reckless and senseless assault that caused injuries. He was also on a bond for common assault that still had a length to run.

The defence lawyer confirmed that the defendant was homeless. He had a disability pension from a number of head injuries. He could report daily to the nearest police station. He was at risk of a custodial sentence, but 'not necessarily a full-time sentence'. The magistrate gave the following summary when granting bail:

'Mr H has assault charges. In the middle of the city he threw a bottle in the air and it struck a passer-by on the leg causing actual bodily harm...The prosecution opposes bail. I note the length of his record, but in the last 10 years there has only been one common assault, a street offence. He had a good behaviour bond and was released last July. His last custody was served in 2002. Going back, there is non-compliance with bail conditions, but several years ago. I'm paying attention to homelessness, history of violence and there appears a very strong prosecution case. It is accepted that he could receive 4–6 months in custody. Given the allegation, he would not receive full-time custody in the sentence. I note these problems. The remedy is daily reporting and restrictions on alcohol and drugs. Bail is granted subject to these orders. To report to...police station 8am–8pm daily. Not to drink alcohol or take drugs. And a place restriction [to avoid the corner of two streets where he had been living]'

The magistrate asked the defendant to 'stay away from those with alcohol and drugs'.

When the police saw him, they would see if he had been drinking.

In this case, a hostel may provide an opportunity for supervision and, possibly, treatment, in addition to mitigating the more practical risk of not having a mailing address.

However, there is also potential for hostel accommodation to present additional risks or exacerbate existing risks. A defendant may be bailed to a hostel with a condition not to use drugs or alcohol (as in the above example), but drugs and alcohol may be used by other residents, and there may be easy access to illicit substances. This would present a challenge to a defendant ordered to stay clean. Further, vulnerable defendants may be at risk of victimisation by other residents.

## Structural inequalities and bail

This research demonstrates that the presence of complex, multiple markers of vulnerability is significant in bail refusal. Being vulnerable, in any way or form, is considered a risk—and therefore an impediment to being granted bail. It is also significant in relation to the granting of bail with multiple, and often stringent, bail conditions. Criminal justice mechanisms are increasingly relied upon to manage people with complex needs. Risk approaches are a manifestation of these trends towards controlling instability. However, it is important to examine the impact of structural and systemic issues in bail refusal for vulnerable defendants. Risk and needs rhetoric focuses on the individual. Scraton's primary determining contexts (Scraton & Chadwick 1991) may be used to understand criminalisation, marginalisation and the reproduction of structural inequality and injustice. Scraton (2007) and Sim, Scraton and Gordon (1987) argue that, rather than focusing on individuals, criminological scholars should look to social structures and identifiers to understand more about the structural forms of oppression and how the structure determines a person's identity and place in society. Scraton and Chadwick (1991: 161) believe that 'questions of power, legitimacy, marginalization and criminalization could only be addressed with reference to the structural relations of production, reproduction and neo-colonialism as the primary determining context'. Sim, Scraton and Gordon (1987) argue that vulnerable groups experience imbrications of inequality, and their experiences in criminal justice are driven by these structural determining contexts. Asquith, Bartkowiak-Théron and Roberts (2016) argue that the criminal justice system exacerbates those inequalities, rendering the vulnerable person even more helpless, prone to recidivism or likely to become unwell at the other end. One of our interviewed practitioners equated this to 'setting a vulnerable defendant to fail'. These arguments contrast with the risk-focused approach of the criminal justice system and highlight the problematic nature of its focus on individual pathologies and behaviours.

The construction of needs by institutions and the state and access to services and support (Fraser 1989) also impact on the construction of vulnerability. Membership of a social or ethnic group does not always equate to vulnerability in itself. For example, a woman of non-English-speaking background can be a member of multiple groups identified as vulnerable, but she is not, in herself, necessarily vulnerable. However, an interaction with the criminal justice system may result in her being classified as vulnerable. Indeed, her experience of the criminal justice system may compound vulnerability.

There are potentially negative effects of labelling a person vulnerable. Mechanisms in the criminal justice system may then be focused upon individual characteristics, labelled as pathologies, rather than structural problems associated with disadvantage and poverty (Rose 2000).

## Summary and policy implications

The key finding of this section is that, in most of the locations observed in this research, magistrates restricted their bail decision-making to a strict following of legislated legal criteria. There was a partial exception to this in Victoria, probably because of the embedded bail support services in many of their courts. The primary bail concerns were the committing of alleged offences while on bail and failure to appear, with the idea that most vulnerabilities could contribute to the latter. Most magistrates showed little or no interest in the social or psychological causes of offending, unless they were directly relevant to the assessment of risk in a bail decision.

Where magistrates did show an interest in a defendant's vulnerabilities pertaining to bail risk, and occasionally beyond bail risk, they were constrained by limited access to support services. Mindful also that defendants were still innocent until proven guilty, many courts did not order rehabilitative programs until after conviction. However, where defendants' only other option was remand, some magistrates ordered residential treatment to avoid remand imprisonment. This again was hampered by a lack of available referrals and places. From a policy perspective, the amount of money spent incarcerating remand prisoners would be far in excess of the money provided to programs and ancillary support services (housing and residential rehabilitation) that would divert people away from the costly prison system and the proven disadvantages that time in custody carries.

Many practitioners in the criminal justice system prefer a more nuanced, social approach to decision-making in the courts, rather than restricting decisions to legal issues. There are already many examples of how some vulnerability markers are specifically addressed in the court system: Children's Courts, Mental Health Courts and courts specifically for Indigenous Australians, such as Koori Courts. However, many of these initiatives are based on specific, acknowledged vulnerabilities. Many vulnerable defendants are not eligible for such interventions, despite presenting with multiple forms of vulnerability. Expanding pre-trial services and increasing resources in ancillary support services may address this gap. Political will is needed for this. Many pilot studies are abandoned, or programs only funded for 12-month periods. Securing ongoing funding is perhaps harder than securing initial funding. Further, all practitioners, including magistrates, prosecutors and defence lawyers, need to embrace these approaches.





# Risk analysis and bail decisions

Understanding the guiding legislation is a prerequisite for understanding bail decision-making. For example, it might be argued that the simplest reason why the proportion of remand prisoners has increased over the last 10 years is that bail laws, especially in New South Wales and Victoria, have become more restrictive. In both jurisdictions, the burden of proof regarding eligibility for bail for many offences has been placed on defendants; previously, there was a presumption of the right to bail. In the current political climate, in the context of heightened sensitivities following the events of Lindt Café (2015) and Bourke Street (2017), it seems unlikely that these legislative reforms will be revised.

As a general principle of Australian law, the application of bail legislation must be consistent with the presumption of innocence. This means that bail should only be refused where there are adequate grounds to do so, notwithstanding the requirement to ‘show cause’ when serious offences are under consideration, as set out, for example, in Division 1A of the *Bail Act 2013* (NSW). The central consideration for the court in these matters is referred to as the unacceptable risk test. This broadly relates to the likelihood that an accused person, if released from custody, will: fail to appear at any future proceedings for the charges; commit a serious offence; endanger the safety of victims, individuals or the community; or interfere with witnesses or evidence.

## Judicial discretion

The way in which Australian legislation is phrased gives a high level of discretion to the legal decision-maker, often referred to as the ‘bail authority’ in Australian legislation, as to how ‘unacceptable risk’ should be defined and the relevant legislation applied.

### *The extent of discretion*

Our overall sample of 150 cases showed that approximately half the applications for bail were successful, and half were unsuccessful (Table 3).

| Table 3: Outcomes of bail applications |       |          |         |
|--|-------|----------|---------|
|  | Total | Accepted | Refused |
| Hobart                                 | 58    | 30       | 28      |
| Adelaide                               | 29    | 23       | 6       |
| Sydney                                 | 37    | 22       | 15      |
| Melbourne                              | 26    | 11       | 15      |
| Total                                  | 150   | 86       | 64      |

This was an interesting finding, in view of the political debates about bail decision-making. Criminologists sometimes imply that magistrates refuse most applications, perhaps responding to political pressures or concerns about offences on bail (Cunneen et al. 2013). But this is not suggested by the refusal rate. Those seeking tougher bail laws suggest that magistrates are excessively lenient, but there is no evidence for leniency, unless you believe that most applications should be refused. What these applications seem to suggest is that magistrates exercise considerable discretion when weighing up evidence and applying the law.

### *A Tasmanian application*

In order to get a sense of how judicial decision-making occurs in the courtroom, it is useful to look at one example from our observations. Although this is a Tasmanian case (Box 6, below) that resulted in an adjournment, it illustrates how factors in legislation and case law in different states can be applied. It also shows how a magistrate used his individual judgement to apply the law to the facts of the case to arrive at a decision. While it is only one application, it does illustrate discretion in the decision-making process (see Hinton 2019).

#### **Box 6: Application 6—Making a bail decision**

The defendant was a male in his late 20s who worked as a chef in Hobart and had lived in another state. The prosecutor, reading out extracts from the police summary, outlined the opposition to bail. He noted that there were admitted previous convictions of taking cars and drink driving. These indicated that the defendant had a drink problem. He outlined the circumstances of this offence. The defendant had been living with the victim for three months. He arrived home intoxicated at 11.30 at night and abused the victim. She said that she wanted to end the relationship. He held her by the throat and pushed her head against a stairwell. The defendant only stopped when two neighbours came over. He closed the door on them, and they called the police.

The defendant was taken to a police station and charged. When he had sobered up, he was released under a police Family Violence Order. When the police attended the victim the next day, the defendant was within 50 metres of her house. He had breached the order and should be refused bail. The prosecutor argued that there was a 'flight risk'. In addition, the victim understood that he was about to move to another town and so might not answer bail. He had not provided a surety. He had failed to satisfy section 12 and should be refused bail.

The defence lawyer was invited to make a submission. She noted that the defendant had worked as a chef for three years and was in reasonable health. Her instructions were that this was a brief relationship that had ended. The defendant had recently been offered the position of chef in Launceston. He planned to move to Launceston the next day. Legal aid was trying to contact the restaurant owner. There was a breach of the Family Violence Order, but the police were present at the time. He was permitted to recover his belongings while the police were present.

The magistrate asked whether there was a surety. The legal aid lawyer said that there was no surety. However, the employer was a possible surety.

The magistrate considered the papers for a few minutes, with his hand on his chin. He noted that this application was 'partly on the borderline' and that he was 'frankly unclear on whether section 12 justifies remanding in custody or to put it another way justifies being bailed'. He was going to adjourn the matter till the next morning for two reasons.

The first was to establish whether there was a surety. If there was no surety, he needed to know about this. He also needed documentary confirmation that the defendant really was going to be employed, and 'more important I receive confirmation that he is going to be living in accommodation in Launceston'.

In considering the ways in which judicial discretion might have been applied in this case, it is helpful to consider each of the six factors listed in the extract from Victorian legislation supplied in the *Introduction*. The same considerations are recommended in the Tasmanian case of *R v Fisher* [1964], but they are presented more clearly as a list in the Victorian statute.

#### **The nature and seriousness of the offence**

The magistrate did not comment on the offence in his remarks. However, the legislation in Tasmania views offences relating to domestic violence as serious. The burden of proof is reversed in such cases by s 12 of the *Family Violence Act 2005* (Tas). In an ordinary case of assault, the defendant would have the right to a presumption of obtaining bail (even for a very serious offence); but, if the offence involves domestic violence, the defendant has to prove that the alleged victim would not be at risk.

#### **The character, antecedents, associations, home environment and background of the accused**

The magistrate can take into account any factor that seems relevant to whether a defendant will attend at the next court hearing or commit further alleged offences on bail. In this case, the prosecution sought to suggest that, because the defendant had been convicted of a drink driving offence (possibly some years earlier), there was an underlying problem of alcohol abuse. In addition, the prosecutor argued that, because of the defendant's connections to Queensland, there was a flight risk. The magistrate did not offer a view on either of these concerns at the hearing. The defence lawyer, however, focused on the defendant's instructions that he (the defendant) was moving to Launceston. The magistrate saw this as the most important issue, although it is unclear why this should make such a difference. Launceston is a

three-hour drive from Hobart on quite a demanding road. Even so, the distance would not prevent someone who was determined to breach a Family Violence Order from doing so. We also observed other applications (following similar alleged offences) in which defendants were given a place restriction within Hobart, suggesting that magistrates assess such risks differently.

#### **The history of any previous grants of bail to the accused**

This was not mentioned in the hearing. A legal aid lawyer told us that, if there were no prior breaches, this greatly strengthened an application.

#### **The strength of the evidence against the accused**

The defence lawyer did not contest the allegation. However, this was a plea of not guilty. One omission on the part of the prosecution was evidence about injuries. In most cases of assault, this evidence is presented in bail applications. It was not clear from observing hearings, however, how legal practitioners deal with such issues.

#### **The attitude, if expressed to the court, of the alleged victim of the offence to the granting of bail**

In this application, the alleged victim did not seem concerned about her safety if the defendant moved to Launceston. Her primary concern was that he would not attend the next hearing.

#### **Any conditions that may be imposed to address the circumstances which may constitute an unacceptable risk**

The conditions for this applicant might be a surety—someone who would promise to pay money into court and to have it forfeited if the defendant did not appear. It appears that the magistrate and defence lawyer were doubtful that this defendant, with limited community support, could supply a surety.

Another condition would be a ‘place’ restriction. These considerations are easy to understand and apply, although there are different ways of establishing and weighing up the facts. It is also unclear what the law, in the sense of the burden of proof, means. As noted above, the burden of proof regarding eligibility for bail in domestic violence cases in Tasmania has been reversed, and defendants now have to prove that they do not pose a risk. But magistrates still exercise considerable discretion when applying such tests. This magistrate described the facts of this case as ‘partly on the borderline’ and stated that he was ‘frankly unclear on whether section 12 [of the *Family Violence Act 2004* (Tas)] justifies remanding in custody or to put it another way justifies [the defendant] being bailed’. It was not clear how he defined the border between an application that should be accepted and one that should be refused. We observed other applications in which defendants living in Hobart who had been charged with similar offences were granted bail, subject to an order restricting them from visiting a particular part of the city. We also observed applications in which defendants obtained bail after breaching a ‘place’ restriction.

### *Calculating time on remand*

Another issue that appears to influence a bail decision is how long a defendant would spend in prison if found guilty of the substantive offence. In Application 7, the magistrate considered the relevance of the time it would take to schedule a contested hearing.

#### **Box 7: Application 7—Calculating the length of time on remand**

This female defendant was the sole carer for her mother. The defendant was facing several charges, including offences involving violence. A finding of guilt on some charges would activate a suspended sentence of three months' imprisonment. Probably for this reason, she had not been attending court. At a first hearing, the magistrate asked the court to contact her lawyer, who knew most about the history of the matter. Defence lawyers were not paid for bail applications but would assist the court when requested.

At a hearing the next morning, the defence lawyer provided information on each of the charges. She took instructions on whether the defendant would plead guilty or not guilty. She also estimated how long each trial would take. The magistrate thought that she should be bailed. He made this decision 'for no reason other than the matters would take a long time to resolve'. He also noted that the defendant's residence arrangements seemed stable.

### *Interpreting legislation*

A final example of the use of judicial discretion comes from an application we observed in New South Wales. A magistrate was asked to determine whether the defendant had 'shown cause' (Application 8). In these cases, the defendant is required to prove exceptional circumstances or compelling reasons to be granted bail, with the prosecutor typically arguing that there is still an unacceptable risk. In this case, it appeared that prosecutors were framing charges in order to take advantage of the 'show cause' provisions, although the magistrate sided with the legal aid lawyer who questioned the basis of this.

#### **Box 8: Application 8—'Showing cause'**

This defendant in New South Wales had breached bail by being intoxicated in a public place. He had mistakenly thought that a bar was not a public place. He was also charged with the new offence of affray. This triggered the 'show cause' provisions in the legislation. He had committed an indictable offence while on bail.

The legal aid lawyer argued that the 'show cause' seemed to be a case of common assault. The defendant had waved a fork at an officer. It was certainly 'at the low end of affray'. The magistrate agreed with this submission. The prosecution immediately withdrew the objection to bail, provided that there was a residence and alcohol restriction. The magistrate noted that there were already these restrictions in place. He advised the defendant that he should only drink in a private dwelling.

These examples from our court observations suggest to us that the outcome of a bail application will often depend on which particular magistrate or judge hears the application. They are not mechanically applying the law to arrive at a decision, but carefully weighing up

those factors suggested by legislation. The principle that judicial officers should exercise discretion from within a legal framework is widely accepted in Australia. However, there are other models, based on an analysis of risk; we will discuss these now.

## The assessment of risk

There are two key considerations that arise in making any decision to award (or to refuse) bail. The first is the level of risk that a defendant presents with, and the second is the extent to which services and conditions can be put in place to mitigate any risk. As noted in *Dale v DPP* [2009], there is always the risk of an adverse outcome if bail is awarded, however stringent the conditions may be. In practice, then, the question facing judicial officers is whether such risk remains at a level that the community would consider to be acceptable. One of the first things to note is the importance of distinguishing between ‘probability’ and ‘acceptability’, or the idea that risk may be considered unacceptable even when the occurrence of the event is less probable than not (*Haidy v DPP* [2004]), with acceptability depending on the extent to which risk can be expected to reduce following the imposition of appropriate conditions (Johnson 2014).

The assessment of the risk of a defendant not complying with a bail order is an area that has attracted the attention of researchers for many years now, dating back to the publication of a landmark study conducted in New York in the 1960s. The Manhattan Bail Project (Ares, Ranklin & Sturz 1963) arose from concerns that too many people were being remanded into custody simply because they could not afford the surety that would allow bail to be granted. Researchers were able to demonstrate that many of these defendants could, however, be relied on to appear, based only upon a verbal undertaking. This led to the development of a series of structured tools that rate each defendant against a number of variables shown to be associated with risk; this assessment was then used to assist bail decision-making. According to Betchel et al. (2017), the most common risk factors coded in these instruments are:

- current charge;
- prior convictions;
- prior incarcerations;
- pending charges;
- history of failure to appear;
- community ties and residential stability;
- substance abuse;
- employment and education; and
- age.

Formal actuarial risk assessment tools soon emerged, with Picard et al. (2017) observing that at least 60 different risk assessment tools are currently in use across the United States. These are described as diverse in form, length and content, but they generally calculate a risk score for each defendant. The simplest rely exclusively on criminal records, and others employ

algorithms or incorporate an interview with the defendant. It is also fairly common for courts to use decision-trees and grids to take charge severity into account, along with assessed risk, when making bail decisions (see below).

‘Community ties’ is commonly identified as a risk factor, following the original Manhattan studies, but there is more recent evidence that it does not add to the predictive power of a pre-trial risk tool (see Cadigan & Lowenkamp 2011; Lowenkamp & Whetzel 2009; Winterfield, Coggeshall & Harrell 2003). Betchel et al. (2017) have recently identified 16 different risk assessment studies that report sufficient data for an effect size to be calculated. Collectively, these studies reported data on 391,521 defendants. Despite significant variation across effect sizes, and what was described as a ‘methodologically weak’ body of research, the mean effect size of 0.27 falls between the cut-offs for a ‘medium’ and ‘large’ effect size (Rice & Harris 2005), which is considered good in the context of other prediction research (Desmarais & Singh 2013). In other words, there is evidence that bail risk assessment tools are able to successfully predict the likelihood of a defendant completing the pre-trial period and proceeding to trial. For Betchel et al. (2017), the use of these tools represents best practice in bail decision-making.

The logic of adopting a more structured approach to bail decision-making is based on the understanding that judicial officers are expected to make complex decisions about risk in a very short time, often based on limited information, and are solely reliant on prior experience and personal intuition. Risk assessment tools have the potential to improve the accuracy of predictions about future behaviour and overcome the potential for bias by requiring decision-makers to consider those factors that are demonstrably associated with bail success (Pretrial Justice Institute 2012). It has been suggested that decision-making thus becomes more rational and more transparent (Goldkamp & Gottfredson 1985), allaying concerns expressed by Allan et al. (2005: 10) in their review of Australian bail decision-making: ‘Bail legislation is vague, constructs are ill-defined and silent on exactly what information magistrates should use and how that information should be weighted and integrated’. There is also evidence from other studies conducted in the United States that bail is more likely to be granted when judges are provided with information about those factors considered relevant to the likelihood of new offences being committed while on bail (eg Clark & Henry 2003), thereby avoiding unnecessary imprisonment (eg Coopridge 2009). Moreover, when they are not used, the prison population nearly doubles (National Institute of Justice 2001). In summary, it has been suggested that the use of risk assessment tools results in a more just, more rational, less costly bail system (Mamalian 2011).

The specific way in which risk assessment tools are used in the United States can, however, vary considerably (Van Brunt & Bowman 2018). The Public Safety Assessment Court (PSA-Court) warrants particular attention here as an example of one approach that does not simply rely on algorithms to determine bail application outcomes (see Koepke & Robinson 2018; Oswald 2018). The PSA-Court approach begins prior to the first appearance, with a pre-trial officer reviewing the defendant’s criminal history record to identify the presence of any risk factors. The presence (or absence) of up to nine risk factors (eg pending charges at time of arrest, prior convictions, prior failure to appear, age) is then used to predict three specific



outcomes: failure to appear; new criminal activity; and new violent criminal activity. Scores are then imported into a decision-making framework and converted into a clear recommendation, which can range from release on one's own recognisance (an undertaking to appear) or release subject to various levels of supervision (eg with electronic monitoring) to detention (remand to custody). This recommendation is then provided to the court. The legal decision-maker can consider it as evidence when arriving at a final judgement.

A recent survey conducted by DeMichele et al. (2019) of 171 US criminal justice professionals suggested that there is stakeholder support across 30 different jurisdictions for the PSA-Court approach and broad agreement about those factors that are most important for bail decision-making (eg current and pending charges, criminal history, prior failure to appear, victim injury and weapon involvement). Nearly all (98%) of the judges surveyed indicated that the risk assessment tool 'sometimes' informed their decisions. Most of the participants in this study also agreed that the use of the risk assessment tool improved case flow efficiency. They saw its particular strengths as having a basis in research, being able to provide separate scores for different types of risk and improving time efficiency (because it does not rely on a defendant interview). Others, however, reported that the lack of a defendant interview was a weakness in the approach. They were concerned that the assessment omitted important factors and led to a loss of judicial discretion.

## Bail information schemes

Although structured approaches to risk assessment have not been adopted in Australian courts, the Attorney General's Office in New South Wales supported a pilot scheme in 2018, to collect background information about each applicant and to provide this to the magistrate or bail authority. This involves the preparation of a short report containing information about the availability of accommodation, family circumstances or ongoing medical treatment. Such information would not otherwise be available to the court, although it could be considered relevant to bail decision-making. To that extent, it is an example of the first stage of implementation of an approach to bail decision-making that resembles those developed in the United States. We review the objectives and results of this pilot later, in the section titled *Discussion: The road forward*.

It is axiomatic that the presence of risk is not the only factor that needs to be considered before arriving at a bail decision. The likelihood of that risk being successfully mitigated through the imposition of bail conditions is also important. Maurutto and Hannah-Moffat (2017) have argued that specialist courts can use bail conditions to manage risk, compel treatment and require that defendants use and report to community agencies offering welfare services (such as job readiness programs, temporary housing, mentoring and health care). Conditions often considered include a requirement for the defendant to report to a police station, perhaps twice a week; a place restriction; and/or a curfew. In some cases, a defendant can also be required to seek, or continue to obtain, help from a welfare or health professional (VanNostrand, Keebler & Luminosity Inc 2009; VanNostrand & Rose 2009). Specific conditions that can be imposed to manage flight risk include financial conditions like bonds (to incentivise

defendants to return to court instead of fleeing); unsecured bonds, where defendants pay nothing up front but are penalised if they fail to return to court; supervision conditions such as travel restrictions; supervision by a designated custodian; regular reporting requirements at a pre-trial service; residency programs at halfway houses; and electronic monitoring.

Other statutory conditions intended to manage or mitigate dangerousness or related witness safety concerns include being directed to avoid contact with alleged victims and witnesses, to comply with a curfew and to refrain from possessing weapons. Courts often view drug or alcohol abuse as directly increasing the risk that a defendant will engage in certain types of offending.

The ways in which referral to a specialist bail support program might support the defendant to successfully complete a period of bail deserve particular consideration. A review by Willis (2017) identified at least one bail support program or service in each Australian state and territory, noting that these programs share substantial commonalities. The key point here, however, is that the distinction between risk assessment and risk management is a particularly important one, because even those assessed to be at high risk of bail failure may be able to successfully comply if appropriate pre-trial support is provided.

## Summary and policy implications

This section of the report has considered the importance of understanding the legislative context in which discretion can be applied and how the adoption of structured approaches to risk assessments (using algorithmic tools) can inform and support legal decision-making.

It is currently not possible to supply Australian courts with a decision-making tool that is derived from actuarial data about who is likely to successfully comply with a bail order. To produce such a guide would require a program of research that measures the risk of different groups of offenders breaching bail and identifies the risk factors that are relevant. Given that courts in the United States are very different institutions to those in Australia, as are their guiding legislation and the profile of the population of those appearing before them, we suggest that considerable caution is needed before implementing approaches that are founded on data derived from other countries. We also have concerns about the practice of relying solely on actuarial data (particularly when operationalised in algorithms) to replace judicial discretion. However, in our view, there is clearly a place for scientific evidence about risk in court considerations of whether (or not) bail should be granted.



# The provision of pre-trial services

An important additional element of pre-trial services in the United States is that risk analysis is employed to identify three types of defendants. Defendants who are assessed to be high risk are refused bail. Defendants who are considered to be low risk are granted bail. But there are also medium-risk defendants. These are considered to have a risk that can be managed by placing them on an appropriate pre-trial program.

This section will explain pre-trial services, making a distinction between those offered on an ad hoc basis and integrated services. It will describe in more detail some services offered, drawing mainly on a group interview with caseworkers from the CISP in Victoria. It will conclude by considering the effectiveness and fairness of these services and the relationship with therapeutic jurisprudence.

## What are pre-trial services?

Pre-trial services are welfare services offered to defendants while they are on bail or as a condition of obtaining bail (see Willis 2017 for a review of bail support schemes). They are distinctive in two respects. Firstly, the services are available to eligible defendants who plead not guilty. Defendants normally get access to services such as drug rehabilitation when they receive a community order or, in some states, if they are sentenced to a term of imprisonment. In pre-trial programs, the defendant has not been found guilty, whether through pleading guilty or after a contested hearing. Secondly, because pre-trial services are available at the pre-trial stage, they can influence sentencing. Success on a drug rehabilitation program may lead a magistrate to make a community order, rather than imposing a custodial sentence.

Welfare professionals view many, although not all, of the eligible defendants as having what we described above (in the section titled *The concept of vulnerability*) as vulnerabilities. We found that half of the 150 defendants we observed making bail applications had some kind of vulnerability—such as being a drug addict, having a mental illness or being homeless. The principle informing pre-trial services is that offering a service not only keeps the defendant out of prison, but also helps the defendant by addressing underlying causes of offending.

### *The distinction between ad hoc and integrated services*

A variety of local agencies already deliver pre-trial services to defendants in Australia. To some extent, the Forensic Mental Health Service, funded by health departments, will refer defendants to hospital or arrange treatment in prison—provided that they have been diagnosed with a serious mental illness (O'Donahoo & Simmonds 2016). There is, however, an important distinction between states in which services are available on an ad hoc basis to the court or, more usually, defence lawyers, and Victoria, the state which has a program of integrated services. There are further distinctions between the models employed in different states. In New South Wales, drug counselling is offered by the MERIT program to defendants who have been granted bail (see Willis 2017).

The difference partly relates to funding. The integrated program has a funding arrangement in which it can draw on a variety of welfare and specialist services. In the case of ad hoc programs, services may be subsidised or provided without charge by not-for-profit organisations, but many defendants have to pay for services such as drug treatment. We found that, because there is limited funding, there was a shortage of services in Tasmania and South Australia. There were waiting lists to access services, and that often resulted in defendants being remanded when they might have otherwise been granted bail.

There are also differences in the way services are delivered. In an integrated program, the government pays for caseworkers who assess the eligibility of defendants and arrange services from different providers. This report does not provide a comprehensive account of how services are delivered or how specialist welfare professionals understand their work. We can, however, give a sense of the specialist expertise that is available to defendants in Victoria.

### *The Court Integrated Services Program in Victoria*

The CISP was established in 2009 through the efforts of then Attorney-General Rob Hulls. The program offers case management and referral to support services, such as housing and drug treatment, and can be put in place at any time from arrest until sentencing (Magistrates' Court of Victoria 2019). It is undergoing a period of expansion in three respects. Firstly, the program is being offered in more courts. Secondly, it is taking on more clients. We were told that 14 percent of defendants in the Melbourne Magistrates' Court are assisted by the program. More defence lawyers are recommending their clients, and more magistrates are suggesting that lawyers contact CISP for an assessment. Thirdly, caseworkers have a more prominent role during hearings. In the Night Court that hears bail applications, CISP officers work with magistrates in making assessments. This expansion has been funded through an investment of \$50m in the program. This is a smaller amount than is allocated to services concerned with domestic violence offences, or to Community Corrections. Nevertheless, it has allowed the agency to grow. There is a capacity to take on more clients, and we were told that the aim is to keep slightly ahead of demand.

## Services

We were unable to interview most service providers directly in this study. There are several different occupational communities, and specialists often have backgrounds in health and welfare. However, based on our interviews with caseworkers, we are able to convey a sense of the specialist nature of services. We are grateful to CISP for making possible a group interview with three caseworkers and two managers.

### *Drug and alcohol programs*

There is a growing international literature on drug courts in which a small minority of defendants who plead guilty undergo therapeutic supervision from a magistrate, supported by welfare professionals (see, for example, Blagg 2008; Burns & Peyrot 2003). Pre-trial services programs differ in two respects. Firstly, while techniques from therapeutic jurisprudence are sometimes employed (see the section *Pre-trial services and therapeutic jurisprudence* subsection), the treatment or support is delivered to most defendants as a straightforward service. Secondly, defendants who plead not guilty are eligible for the services. We identified about 40 percent of defendants, observed in 150 applications, as having a drug problem that was mentioned during a hearing. The actual proportion may be much higher, because defence lawyers told us that defendants were often reluctant to acknowledge these problems. Allan et al. (2005) found that admitting to a drug problem increased the chances of being denied bail.

We also discovered, even from a few interviews with caseworkers, that there are different types of drug programs. There is not a standardised response to drug addiction. Instead, caseworkers suggest an individualised program, and agencies offering services may make further refinements.

#### Box 9: Interview

**Q:** Is the treatment individualised and you've got a wide range of options? Or is it a one size fits all?

**CW1:** I guess it depends on the outcome. Because we would refer clients to a drug and alcohol clinician for initial assessments, and the client and the clinician will work together to put together a bit of a treatment plan in terms of their drug and alcohol specific support. So, we liaise with the clinician and the clients and so we're pretty open with them. But ultimately, it's between the clients and the clinician.

**Manager:** And as a general rule, this is where the role of the case manager comes in. They do an assessment and figure out what that person needs in terms of what range of services. And then which service is the best fit in terms of geography and personality and gender and all of those sorts of things. So, this is really the role of the case manager to say: 'Okay I have someone from—a Horn of Africa refugee who's living in this area with this problem. Therefore this service will be the right service provider and do the linkage. So, it's individualised in that way. And then good services that we send people to will then individualise even further. So, the drug and alcohol will do an assessment saying: 'This person needs a sequence of some initial counselling on withdrawal, and then some more counselling, and then possibly a residential rehab', and they will then line all that up. So, there are a couple of layers where it is individualised.

### *Acquired brain injuries (ABIs)*

A similar individualised approach was employed in assisting defendants with brain injuries. Diagnosing different conditions requires care. There was some optimism that a suitable plan that might involve a ‘supported accommodation arrangement’ could result in improving the client’s wellbeing as well as reducing crime. CISP were fortunate in being able to draw on ‘some of the best neuro-psychology assessors in the country’. They would offer their services because of the complexity of the clients charged with criminal offences.

### *Housing*

A third example of services is housing. This is an area where there is a debate on the most effective way of assisting clients. Magistrates are more willing to grant bail if a defendant has stable housing. In South Australia, a religious charity had funded a bail hostel, with 40 places, to assist the court. In Tasmania, another charity had asked the government to part-fund a small hostel.

Our interviews with case managers in CISP were interesting because a debate was taking place within the government on how to support the criminal justice system with housing services. When CISP was established, it was assumed that providing housing would reduce offending and reduce the remand population. But the Victorian government has now started to change its view on the value of housing. It was not seen as effective in reducing offending. (Note: the internal information collected on outcomes was not available to the researchers.) Further, it was impossible to meet the demand for housing without affecting quality. There were only a few hundred beds available in the criminal justice system, and there was an argument that Corrections should have priority in assisting ex-prisoners. According to our informant, it was not clear how the housing policy would develop across agencies.

#### **Box 10: CISP manager speaking about housing services**

There’s only a couple of hundred of those beds in the state serviced for the criminal justice system. But I actually think the housing issue is one that, as a system, we’re struggling with. And we’re actually trying to do some work on this. Because Corrections have also got the problem around people finishing prison or going to CCOs [Community Corrections Orders]. There’s a systemic criminal justice housing issue that’s a subset of a much broader homelessness issue in this state. So, we’re looking at doing some fairly high-level work within government, across government departments, because it’s a major issue. And we don’t quite know what the solutions are.

### **Assessing pre-trial services**

Those providing government services are often expected to demonstrate effectiveness. They also need to consider whether the rights of clients are protected. The requirement for evaluation, however, seems to vary considerably between public sector agencies. In some



cases, where funding is limited, evaluations are only one means by which scarce resources are allocated to different programs. In other cases, where there is generous resourcing and political support, there seems to be no requirement for evaluation. CISP in Victoria has not been evaluated by an independent agency since 2009, although there have been internal evaluations that supported the expansion of the program.

### *Effectiveness*

Because there have not been any recent evaluations, it may be appropriate for this report to consider how this kind of program might be evaluated. One measure might be the number of clients assisted by the program. We might expect a steady increase in referrals to CISP. There has also been an expansion from the Magistrates' Court in Melbourne to suburban and regional courts. We would expect those receiving the services to be satisfied, partly because the alternative would mean spending a few months in prison. Different perspectives are not normally explored in great depth in evaluations. Stakeholders and consumers would certainly hold a variety of views, as might be expected in relation to any service provided by a government agency. It would be unusual if rapid expansion did not lead to some organisational problems.

Yet evaluations also call for careful thinking about performance indicators. Measuring the effects of programs on those who are designed to benefit from them, the defendants, is one difficult issue. It would be interesting to know what proportion of defendants on these supervised programs attend their next hearing date, or whether completion of a four-month program leads to desistance from offending—an important consideration, because half of prisoners in 2017–18 were previously imprisoned under sentence (ABS 2018). There is also the potential problem that what appears to be a successful outcome results from selecting people onto the program who are likely to succeed. This is why the use of control groups is seen as important in the evaluation community. It might be misleading to celebrate the achievements of any program if a hypothetical group of defendants with the same characteristics who did not attend the program also met bail.

There are many challenges in conducting a rigorous evaluation, whether this looks at the factors that cause outcomes or seeks to understand the work involved in assisting one client. We were interested to find that caseworkers believed that any progress was an important achievement for clients, who were all seen as having the potential for recovery over a long period.

#### **Box 11: Caseworker speaking about making progress**

It might be that the first time they work with us they don't want to address a certain issue. Or they address it in one way that's not as effective. They come back a second time, say for example, with AOD they might just agree to do some counselling. And then they come back a second time and they think, 'I want to look at something different'. We've worked with clients who have gone into detox, lasted two days, come back again and worked with us. And actually, gone through and completed residential withdrawal and gone onto residential rehabilitation, but it's incremental for them.



## Fairness

Much has been written about specialist courts in which defendants plead guilty. Critics have argued that defendants must experience some degree of coercion in drug courts, because not participating might result in a sentence of imprisonment (Hannah-Moffat & Maurutto 2013). These programs place high personal demands on those awaiting to be sentenced, with the threat of short periods of imprisonment if there is a relapse into drug use.

In the case of pre-trial services, there has, so far, been less critical examination of how programs work or the experiences of defendants. Castellano's (2011) ethnographic study of a court in California is an important exception. Castellano worked in a pre-trial program, so she provides more detail about its work in the courts than this report can. She noted that key decisions on bail were made by three agencies, rather than judicial officers. She demonstrates that decisions were made on arbitrary grounds. There was also pressure on defendants to comply with demanding levels of supervision, including daily meetings, although her view was that risk could have been managed with fewer, or no, conditions. Castellano reminds us that these defendants were pleading not guilty and should be entitled to the right to bail. Critics argue that this right is being eroded, both in specialist courts (which sentence a small proportion of defendants) and by pre-trial programs.

Assessing issues relating to fairness would require examination of some cases, of defendants who applied for services, in greater depth than was possible in this study. Our interviews did not reveal great levels of concern among practitioners in Victoria about the potential unfairness of providing pre-trial services to eligible defendants. Caseworkers advised that participation was voluntary, and individuals benefited from the programs, for example in seeking to overcome a drug addiction. It is perhaps a little concerning that few people in this field seem to acknowledge that there might be pressure on defendants.

### Box 12: Caseworkers speaking about voluntary participation

**CW4:** There's a window of opportunity that we're trying to exploit and yes, it's voluntary, but we're putting the choices before the person. We're laying them out and we're making it easier for them to get to those things. For the person who's not sure we have a technique in motivational interviewing but it's a way of—

**Manager:** Talking to someone and a way that actually leads them to realise, 'Oh that would be a good idea if I address that particular issue'. Try and lead them to make that conclusion for themselves, because that's more robust than someone else telling you, 'You've got a problem go and sort it'. So, there's a number of nuances in all of that. And the other thing we've got—at the blunt level it's stick and carrot. They're on bail, at any moment they can go back into custody until their matter is finalised. If they go in this program, that's something a lawyer can use to say, 'Well, a CCO rather than prison, Your Honour'.

## Pre-trial services and therapeutic jurisprudence

The delivery of pre-trial services does not require the use of techniques of judicial monitoring found in some specialist courts. For example, it is possible for a magistrate in Victoria to grant a defendant bail—with conditions to complete a four-month program offered by CISP—without meeting the defendant until after completion of the program. However, magistrates in this court who support the CISP program have the opportunity to conduct judicial monitoring, if they believe that this would assist in rehabilitation. On one occasion, we were told of what seemed to be a ‘rationing’ system for magistrates. They were allowed to send a number of defendants for a CISP assessment each month. This suggests that there was greater demand than resources. It appeared, from observing hearings, that there was a waiting list of a few weeks for assessments at that time, although magistrates could request to fast-track defendants.

During our fieldwork, based on observing five magistrates in Melbourne, we found that some magistrates did not accept some CISP reports. Those defendants did not obtain bail. Other magistrates suggested that defendants refused bail should contact the CISP office to be assessed. Interestingly, we observed most examples of judicial monitoring employed in relation to sentencing defendants who were in breach of Community Corrections Orders. These magistrates apparently viewed CISP programs as more successful in rehabilitating such offenders than those offered by Community Corrections. It is difficult to comment, given our limited access. One possible explanation is that defendants knew that this was a final chance before receiving a custodial sentence, or perhaps judicial monitoring was only available for defendants on the CISP program. Judicial monitoring was seen as enhancing the value of drug treatment, although this was not required when bail was granted with these conditions (see Box 13).

### Box 13: Application 9—Judicial monitoring of a defendant

A female defendant in Victoria had breached bail because of a continuing drug habit. The magistrate asked for a CISP assessment. He spoke to the defendant directly, rather than through her lawyers:

‘If you can be assessed, I want proof you’re not using drugs. In order for me to release you from prison and put you on a court order, you have to show you are not as dreadful as last time. You can come back to me. You can do a therapeutic court order. But if you mess up, I’ll say, well, you haven’t done enough time. I’m available next week.

Well, let’s check with CISP. Ms H we’ll need to negotiate with CISP. The first time I can see you is a week on Monday. I’m prepared then to grant you bail and see you every month. If CISP aren’t happy with you then I’m not. You’ve got to make a decision if you want to be on drugs the rest of your life. It’s up to you.’

The magistrate asked the defendant whether she had any questions, and whether she was happy with this proposal. She nodded. The magistrate explained that her lawyer would be in touch. Her first task was to pass the interview. Then he would see her each month starting next week.

## Summary and policy implications

This section has given an overview of services offered to defendants, mainly drawing on a group interview with caseworkers from the CISP in Victoria. In Tasmania and South Australia, services are available on an ad hoc basis. In New South Wales, some services are available to defendants granted bail through the MERIT program (see following section). In each jurisdiction, defence lawyers have the option of arranging support for defendants with vulnerabilities, to strengthen bail applications. There are facilities in each state that provide free assistance, including a bail hostel in South Australia that has 40 places. Victoria is currently different, offering an integrated program funded by the state government. This makes it easier for defence lawyers and magistrates to access the services.

More research is needed to understand the different services offered. Our understanding is that CISP is expanding, with the support of legal practitioners and the state government. In 2018, 14 percent of defendants were assisted by the program. Although performance statistics are not publicly available, we were told that there is a high success rate in reducing recidivism. The methodology for collecting this information is also unavailable. Certainly, those magistrates who employ these services seem enthusiastic about the results. Against that, a high success rate might be expected if those most likely to succeed are approved in an assessment process. We were, however, told that the program worked best for difficult clients—those who had been given many chances yet continued to take drugs. There is more to be discovered about how such services work, and there will be opportunities to share best practice if these programs develop nationally.

Finally, we noted two distinctive features of this integrated program in Australia. Firstly, some magistrates in Victoria seem willing to employ techniques such as judicial monitoring for defendants granted bail with conditions. These techniques are not only employed in specialist courts in which defendants plead guilty. Only a few magistrates may be monitoring progress through monthly meetings, but it is a significant development. Secondly, in contrast to most programs in the United States, the provision of pre-trial services does not involve measuring risk. Defendants are not put into three groups in a screening process, leading to different responses. Instead, defendants are eligible for the CISP program if they have social or psychological needs. There is no attempt in these courts to influence magistrates through a bail information scheme. However, magistrates may be influenced by the information supplied by CISP and by the availability of services.

It is difficult to be sure whether the CISP program is effective in reducing the remand population. There has, after all, been a substantial rise in the remand population in Victoria in the last few years, and CISP has expanded during the same period. Any reduction in the remand population because of the offer of this support to some defendants has been offset, it appears, by the new bail legislation that affects all defendants. We were told by managers that many more defendants with vulnerabilities could be assisted: perhaps up to 50 percent of those applying for bail.



# Discussion: The road forward

Strang and Gerull (1990) responded to what was considered a high remand population at the time, having grown since the 1970s. In the late 1990s, Bamford, King and Sarre (1999; see also Sarre et al. 2006) conducted research when the remand population had almost doubled. When we submitted a proposal for this study, the remand population had reached 20 percent as a proportion of the adult prison population. Today, it has reached 30 percent. The reasons are not entirely clear. It is possible that the recognition of domestic violence as a crime and a more effective police response since the 1970s may account for a large number of defendants being refused bail. It is also possible that drug trafficking, one consequence of globalisation, leads to an increase in the proportion of remand prisoners in the adult prison population. The simplest explanation is that bail laws have become more restrictive over time, through the reversal of the burden of proof and the introduction of multiple tests. Even when bail laws have not changed, magistrates as a whole have responded to public sentiment by adopting a tougher approach in bail decisions.

When making bail policy, elected politicians—or those seeking election—respond to community concerns. It is arguable that populist responses to shocking bail outcomes are based on an inadequate understanding that exaggerates the actual risk and imposes unnecessary costs on an already overstretched criminal justice system. Most defendants do not commit serial offences, mass murder or acts of terrorism while on bail. Even so, a desire among the public for tougher laws to reduce the risk of such rare offences is understandable. Nor should one view the public as being naïve about the costs. Surveys have shown that Australian citizens are prepared to pay higher taxes to employ police and build more prisons in order to feel safe. They are also unsympathetic to the argument that resources should be spent on rehabilitating defendants, when there are more deserving recipients (see the online responses to Sarre 2017). Governments may invest in programs and services that assist defendants with vulnerabilities (see *Defendant vulnerabilities and bail orders*), but this will never be a priority. It is more politically acceptable to build more prisons and employ more prosecutors and police.

Despite these constraints on policymaking, governments know that the current remand population is only sustainable at a high cost. It also diverts resources that could be employed in improving other services, not only in the criminal justice system. Spending large sums on prisons does not necessarily make us safer; it may even lead to those incarcerated going on to commit more offences upon release. Ministers, policy officers and those managing agencies, who have been trained to analyse evidence and weigh up costs and benefits, are open to suggestions on policy alternatives. In this conclusion, we outline a middle way that seeks to influence judicial discretion without proposing changes in legislation.

## Developing bail policy

There are currently no programmatic statements by Commonwealth or state governments that set out objectives in bail policy. Criminal justice policy as a whole has a variety of objectives, some conflicting. We draw attention to two principles or values in modern criminal justice systems:

- Punishment should be proportionate to offending.
- There should be efforts to reduce crime, in addition to punishing offenders.

There are considerable challenges for policymakers and for managers in criminal justice agencies who seek to realise these principles in relation to bail. The remand population, as a proportion of the adult prison population, has risen from 20 to 30 percent over the last three years. There has been a steady rise since the 1970s. This suggests that there is a punitive response, even without trying to measure the average time spent in custody or whether some of those remanded ultimately receive a non-custodial sentence. The risk of not appearing for the next hearing or committing offences on bail cannot have increased to the same extent.

Many initiatives seek to reduce crime and rehabilitate offenders, particularly after sentence. But little is done at the pre-trial stage in Australia. Our research found that 50 percent of the 150 defendants observed applying for bail had some kind of vulnerability, such as a drug habit or mental health problem. Outside Victoria, there was almost no response by the courts. No services were provided, although defendants could seek support themselves. One telling statistic is that 50 percent of prisoners have previously been imprisoned under sentence. This suggests that more could be done to address the underlying causes of crime at each stage of the criminal justice process.

Bail policy should seek to achieve a balance between five objectives:

- to recognise that defendants are innocent until being found guilty through legal procedures that protect due process rights;
- to protect the public from the risk of offences committed on bail;
- to maintain confidence in the criminal justice system;
- to contain the continued trend upwards in the remand population; and
- to address the needs and problems of defendants with vulnerabilities.

Before the current era of bail legislation, there was a central principle that defendants should be considered innocent and should have a right to liberty before their trial. We accept, given several recent high-profile cases committed on bail in Australia, that this principle no longer has widespread public support. We also acknowledge that some of the bail conditions observed here addressed the commission of a crime that had not been proven yet, implying a future verdict of guilt. Nevertheless, in the interests of protecting due process rights and using public funds effectively, we would still argue for a middle way that does not lead to mass incarceration.

Addressing the circumstances of defendants with vulnerabilities may be the most promising means of achieving this middle way. In the applications we observed, approximately half of such defendants obtained bail. But if these defendants received suitable support and programs

at the pre-trial stage, the remand population could be significantly reduced. In cases where vulnerability is a direct cause of the offending, such support could also reduce or prevent future offending altogether. This may happen over time in Victoria, if the CISP program is expanded. This program currently assists 14 percent of defendants, but, according to our informants, 50 percent might be eligible for its support. In contrast, around half of defendants in pre-trial programs developed in the United States are given support. Although there are debates about the size of the effect, proponents argue that this has resulted in a significant reduction in the remand population.

Pre-trial services should be conceptualised as distinct reform initiatives that could be pursued. Some might be expensive, but others could be implemented with relatively little cost. The first, most costly, initiative is to provide specialist pre-trial services through criminal courts. Most states are not in a position to pay for drug treatment programs or provide housing. Another expensive initiative is to provide information about defendants to magistrates. Bail information schemes have been proven, in the Manhattan Bail Project and subsequent programs, to reduce the remand rate in US courts (see *Risk analysis and bail decisions*). In under-resourced criminal courts, there is not always time for defence lawyers to obtain information that might make a difference in bail applications. The establishment of a bail information scheme would involve employing staff, whether in an existing or new agency, who would meet defendants before hearings and supply reports to legal aid lawyers or directly to magistrates.

Some interviewees believed that it is time for a state to establish an integrated database to improve workflow in courts. To date, there is no funding to improve established systems, although the linked databases under Justice Connect in Tasmania are promising. In our view, it would be helpful for magistrates to see at a glance the risk of releasing a defendant with particular characteristics on bail. It would also be helpful for government officials and the public to see bail outcomes. This may seem overly managerial, but sharing information and transparency would improve efficiency and accountability without undermining judicial independence.

The cheapest reform initiative is to send reminders to defendants about their next court hearing. We observed magistrates asking defendants to put the date of the next hearing 'on your fridge'. Given the fact that defendants often have difficult, chaotic and disorganised lives (assessed by middle-class standards), it is not surprising that they miss court hearings (Bamford, King & Sarre 1999). We came across services offered in courts by religious charities that provided meals, because it was known that some defendants had not eaten for days. Some had difficulty finding relatives or friends to look after their children while they attended court. Some could not afford public transport into city centres. Others mistakenly believed that a legal obligation would disappear if they missed a hearing. This suggests that some supervision and support would reduce the number of warrants required to be issued when defendants do not attend court. Yet it is not currently the task of criminal courts to maintain contact with defendants on bail orders.

With the partial exception of Victoria, none of these reforms has been introduced in Australian criminal courts. The only change since the 1970s is that legislation has made it more difficult to obtain bail.



## Prospects for reform: Four states

Courts are continually changing in a complex political environment. These processes are difficult for criminologists to study, because they have little access to the discussions and policy debates that take place behind the scenes. It is, however, possible to piece together a sense of what has been happening in different states. It should also be added that those magistrates and managers in agencies who have assisted us are, in different ways, part of a reform movement. They cannot, however, achieve much without resourcing and political support, which is only possible in the more populous states.

### *Tasmania*

We started our study in Tasmania, encouraged by practitioners, politicians and community groups who were interested in court reform. In particular, then Chief Magistrate Michael Hill had established a drug court and mental illness court which heavily used bail conditions as legal pathways to secure therapeutic interventions for vulnerable defendants (Newitt & Stojcevski 2009). The drug court received some government funding. The mental illness court was an informal arrangement, through managing court lists. These initiatives illustrate how change is possible in a small court but also highlight the challenges. Concerns have been expressed about staffing in every magistrates court, including the resourcing of legal aid lawyers.

In terms of bail, Tasmania has until recently drawn on common law principles that are generous towards applicants. There have been some significant changes. The *Family Violence Act 2004* was a tough response to a rise in domestic violence. Section 12 reversed the burden of proof in bail applications for defendants charged with offences relating to domestic violence. In January 2018, the state government proposed a new bail law that would introduce an 'unacceptable risk' test based on legislation in some mainland states (Department of Justice 2018). This would effectively reverse the burden of proof for many defendants not charged with domestic violence. In Tasmania, there are limited resources to support rehabilitation programs, and governments have prioritised initiatives in prisons. This is not meant to suggest that practitioners and policymakers have no interest in bail reform. They have to work within resources and political possibilities.

### *South Australia*

South Australia stood out in the national statistics for many years as having a large remand population as a proportion of the prison population (Sarre, King & Bamford 2006). This jurisdiction took a lead in establishing a drug court, a mental health court and a specialist court for Indigenous Australians. It has also helped a religious charity to establish a 40-place bail hostel.

Given its size, South Australia would have difficulty funding major initiatives that might reduce the remand population. There is a pre-trial program in which defendants can receive supervision and support from Community Corrections. However, this has a low profile in the court. Our impression is that it is only used by a few magistrates. The bail hostel appears to be used to assist remand prisoners, charged with serious offences, who have already spent over a year in the remand centre. The objective is to house defendants charged with minor offences



for short periods. This illustrates how initiatives to reduce the remand program depend on adequate resourcing for magistrates and other practitioners.

South Australia has responded imaginatively to the growing numbers on remand by establishing a system of electronic monitoring. We were told that the remand population statistics included defendants who were detained at home. We only observed a few applications in which defendants were recommended for assessments or in which there had been a breach of the conditions. It takes a week to assess a defendant as suitable.

### *New South Wales*

New South Wales has also established drug and mental health courts and a specialist court for Indigenous Australian offenders. In relation to bail, there is the long-established MERIT program (see Passey et al. 2007). This offers drug rehabilitation and other programs to defendants who have been granted bail. This should be distinguished from pre-trial programs, in which defendants obtain bail because they are admitted onto programs. However, magistrates consider eligibility for MERIT when making bail decisions. In other words, the availability of the program helps some defendants to obtain bail.

Otherwise, few initiatives in New South Wales seek to reduce the remand population. Reports published by different agencies seem to discount the significance of vulnerabilities such as being homeless (Ayres, Heggie & Neto 2010) or having a drug problem (NSW Law Reform Commission 2012) in causing crime. There was, however, an initiative being pursued by the Attorney General's Office while we conducted fieldwork during 2017, as part of what was called the Transformation Program. The overall aim was to reduce the prison population. The bail initiative was an attempt to establish what we have been calling an information scheme. Bail Information Officers would collect information about defendants and supply reports to magistrates. It was expected that magistrates would be more likely to grant bail to defendants when they had better information about vulnerabilities.

However, the Bail Information Officer pilot was cancelled after one year. It ran into difficulties, partly because the different programs were competing for limited funds. In an early evaluation, Donnelly and Corben (2018) found that the information scheme did not appear to influence magistrates. There were also criticisms from agencies. Legal Aid was concerned that reports revealed personal information about, for example, drug use. Providing this information to a magistrate might make it more difficult for people to obtain bail. Another objection from different agencies, reportedly including the police, was that collecting and processing the information resulted in administrative work. This illustrates the practical and political difficulties in pursuing new initiatives. It seems possible that there may be further initiatives within New South Wales that seek to reduce the remand population. As in other states, there are concerns about prison overcrowding and the expense of a growing prison population.

### *Victoria*

Victoria is the only state that has an integrated system of pre-trial services. Eligible defendants are offered a four-month program in which they have access to drug programs and other services, accessed through caseworkers. Defendants can apply to the CISP office in Magistrates'

Courts for an assessment. Since mid-2018, officers are part of the workgroup in the after-hours Night Court. Although the program has not been publicly evaluated recently, we were told that there has been some success in keeping defendants out of prison. The program can access high-quality programs offered by welfare agencies. There is relatively generous funding through the Department of Justice and Community Safety, and this seems likely to continue.

## What further research is needed?

We have not sought to answer every question relating to bail, nor to provide a complete picture of bail decisions. Instead, we have presented quantitative and qualitative findings that partly answer our three research questions. Drawing on the observation of hearings, we have considered the nature of judicial discretion. We have discussed the considerations involved in seeking to influence bail outcomes. We have also provided some details on how pre-trial services operate and on reform initiatives around bail in four Australian states. It would be interesting to pursue many more questions about bail issues—questions about regional variations or discrimination against particular groups, including Indigenous Australian defendants, have not been given much emphasis in this study (see, for example, Sanderson, Mazerolle & Anderson-Bond 2011). Instead, we have focused on drawing attention to different ways of approaching bail, including the value of risk analysis and the potential of pre-trial services. Critics in the United States have argued that some kinds of risk analysis are discriminatory (Schlesinger 2005). Some questions are too difficult to pursue and answer in a short study such as ours.

Our hope is to conduct a national study employing a similar methodology, based on observing applications and interviewing practitioners, in the future. These methods have the merit of being relatively unobtrusive, while making it possible to share information about emerging initiatives among both practitioners and the public. We would also like to learn more about how pre-trial programs operate in other international jurisdictions. It may be possible to develop an actuarial guide that assists magistrates (see Spivak 2018). A longer, in-depth study of a pre-trial agency would improve our understanding of services, because it is these services that appear to be the key.

## Conclusion

The policy challenge considered in this report is how to contain the rise in the remand population, while maintaining confidence in the bail system. Policy options discussed include bail information and support schemes, risk analysis and pre-trial services. In this research project, we have obtained basic information that will assist policymakers, practitioners and the wider criminological community. We hope that this study will start a conversation about bail policy that goes further than simply seeking changes in legal tests and recognises the significance of vulnerabilities and the availability of pre-trial services in reducing remand populations.

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