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Abstract | In this paper we seek to review the rapid rise in remand in custody rates in Australia. In particular, and in response, we ask and discuss three specific questions:

1. To what extent do defendants applying for bail have vulnerabilities?
2. To what extent can risk analysis tools that seek to predict breach of bail terms be relied upon?
3. To what extent can the emerging pre-trial services programs in Australia reduce remand in custody populations?

Bail practices and policy alternatives in Australia

Max Travers, Emma Colvin, Isabelle Bartkowiak-Théron, Rick Sarre, Andrew Day, Christine Bond

There was a rapid increase in the remand in custody population in Australia between 2008 and 2018, partly caused by legislative responses to some high profile offences committed by defendants while on bail. The proportion of remand prisoners in the Australian prison population also increased, from 20 percent to 30 percent, during this time (Australian Bureau of Statistics 2018). In New South Wales, the proportion of unsentenced prisoners in relation to the overall prison population in 2008 was 23 percent; today it is 34 percent. In Victoria, the proportion of unsentenced prisoners in relation to the overall prison population in 2008 was 19 percent; today it is 36 percent.

Commonwealth and state governments should be concerned about a rising remand population for four reasons. Imprisoning people is expensive (Sarre, King & Bamford 2006), and there is substantial evidence that it leads to more crime. An unremitting remand policy is unfair on defendants who are not likely to commit serious offences while on bail, especially for those who later receive a non-custodial sentence (McMahon 2019; New South Wales Law Reform Commission 2012). Finally, there is concern that the presumption in favour of bail (a manifestation of the presumption of innocence) is being eroded.

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This is an emotionally charged field of criminal justice policy. Our approach in this study was to explore bail and remand policy that might provide protection to the public, maintain budget responsibility and, at the same time, achieve fair outcomes for all concerned.

Bail legislation

There are two common law presumptions relevant here: that accused persons are innocent until found guilty, and that the defendant has a right to bail (New South Wales Law Reform Commission 2012). Jurisdictions in Australia respect these principles, as the factors to be considered in determining 'unacceptable risks' under the *Bail Act 1977* in Victoria show:

> (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.

Note the important consideration, in subsection 3(f), regarding the conditions that may be imposed to address an unacceptable risk. Bail conditions that are 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.

Bail legislation has become more complex because legislators have reversed the onus of proof for particular offences (thereby challenging the presumption of innocence). Some states have introduced 'double' tests intended to allay public fears that serious offences might be committed while persons are on bail. We examine the current status of bail determinants in the four jurisdictions under our gaze.

Tasmania

The *Justices Act 1959* (Tas) sets out the criteria to be used in deciding bail applications, with more guidance provided by the case of *R v Fisher* (1964). There is a presumption of bail. The *Family Violence Act 2004* (Tas), however, reverses 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. There have been several amendments over time, however, making it more difficult for those charged with particular offences to obtain bail. The *Bail (Miscellaneous) Amendment Act 2017* (SA) reversed the burden of proof for defendants who had breached an intervention (family violence) order.

New South Wales

Following a review by the New South Wales Law Reform Commission (2012), the government enacted the *Bail Act 2013* with the aim of simplifying the law. This was perceived by some as going 'soft on crime', leading to the enactment of the *Bail Amendment Act 2014* (NSW) and the *Bail Amendment Act 2015* (NSW). This legislation introduced an 'unacceptable risk' test, along with a 'show cause' test for serious offences.

Victoria

The *Bail Act 1977* (Vic) was amended by the *Bail Amendment (Stage 1) Act 2017*, which requires defendants to supply a 'compelling reason' or demonstrate 'exceptional circumstances' in order to be granted bail. The *Bail Amendment (Stage 2) Act 2018* contains diagrams that enable judicial officers and lawyers to navigate the complex provisions (see McMahon 2019).

Research questions

Our study had three aims:

- to identify the extent to which offender vulnerabilities, such as having a drug problem or mental illness, are relevant when a bail authority makes a bail order for adult defendants in mainstream criminal courts;
- to review the possibility of using predictive tools that serve to isolate the risk factors that may predict offending on bail 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 may curtail the growing remand population.

Methods

This project drew on the in kind support of a research group based in five universities. Building on a pilot project conducted in 2014 in Tasmania, we designed a project that collected data over two years. Observational studies are a proven methodology (Allan et al. 2005). In the whole project, we observed 150 applications:

- Hobart, Tasmania 2014–15 (20 fieldwork days, 58 applications observed);
- Adelaide, South Australia 2017–18 (4 fieldwork days, 29 applications observed);
- Sydney, New South Wales 2017–18 (10 fieldwork days, 37 applications observed); and
- Melbourne, Victoria 2017–18 (6 fieldwork days, 26 applications observed).

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

Quantitative research

Observing 150 applications enabled quantitative findings. 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, we were looking for whether vulnerability attributes such as alcohol or drug consumption, mental ill-health or acquired brain injury were mentioned as relevant to the case. During the process, we also attempted to locate vulnerabilities that were left aside as possibly discriminatory against the defendant or as irrelevant to the case.

Qualitative research

We also wanted to understand the legal and practical issues in bail decision-making. Therefore, we recorded the submissions made at hearings and the reasons for decisions made by magistrates in as much detail as possible. On some occasions, we conducted interviews with practitioners immediately following hearings.

State comparisons

The Australian Bureau of Statistics (2018) gives the proportion of the remand population in each state in 2008 and compares this with the proportion in 2018 (see Table 1).

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 significant growth in three jurisdictions is obvious. Institutional differences between states include legislative differences, but there are also informal practices that may be distinctive to a particular court (or even specific to individual magistrates). For example, there is a significant difference between Victoria, with its integrated program of pre-trial services, and other states, where services are provided on an ad hoc basis by different agencies.

Defendant vulnerabilities

Our first question was how courts respond to vulnerabilities when making bail orders.

The term ‘vulnerability’ is used across disciplines to include factors such as mental illness, homelessness, drug and alcohol use and cognitive impairment, compounded by structural inequalities such as gender, race and class (Bartkowiak-Théron & Asquith 2012; Enang et al. 2019). In this paper, we are defining vulnerability broadly—that is, recognising structural causes.

The extent of vulnerabilities

Table 2 shows our overall finding that just under 50 percent of cases indicated vulnerable characteristics of defendants. This is lower than findings made by other studies conducted in prisons.

Table 2: Vulnerabilities in applications

Total cases observed	Presence of vulnerability	No indication of vulnerability
150	70 (47%)	80 (53%)

Responses to vulnerabilities

There are already powers within legislation to require defendants to obtain support, with their consent; for example, the *Bail Act 1985* (SA) s 11(6). However, in most applications we observed, even in Victoria, we found that most magistrates were only interested in strictly legal considerations.

Legal relevance

We observed a number of applications in which there appeared to be some vulnerability that might relate to offending but which was not commented on by the legal practitioners; we also noted some vulnerabilities that were unrelated to cases. In some applications, magistrates asked whether there were 'custody issues', putting a note on the file asking medical officers in prisons to address some particular problem. However, we observed (see Box 1) that courts were not directly involved in providing such services or in addressing such problems proactively.

Box 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 because of 'the screaming in my head'. The magistrate renewed the bail with the same conditions. No one mentioned at the hearing that this defendant possibly suffered from a mental illness.

Inadequate services

Particular difficulties were caused in states in which there were inadequate services. We observed the following bail refusal (Box 2) 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 2: A defendant with a cognitive impairment

This 31-year-old male defendant appeared by video link. There were allegations of his 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 had been 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, they said, to report daily to police, and he could reside at his mother's house. The magistrate noted that 'the court is not satisfied that cause has been shown'. Bail was refused.

The magistrate in this case discussed the risk that the defendant posed to police and the community but did not address defence counsel's submission that the defendant was struggling in custody. There were no resources available to the court to address such issues.

Policy implications

The key finding is that many defendants have vulnerabilities, but magistrates followed strictly legal criteria in their bail decision-making. Where magistrates did show an interest in a defendant's vulnerabilities as they might affect bail risk, and occasionally beyond bail risk, they were restrained by the limited support resources available and accessible. A significant proportion of these defendants are remanded in custody. It is arguable that an investment in pre-trial services outside of custody might address the vulnerabilities and keep these defendants on bail.

Risk analysis and bail decision-making

The project's second aim was to identify the risk factors that predict offending on bail and failure to appear. Magistrates already use legislative guidelines, such as the extent of previous offending, the seriousness of the offence charged or prior breaches of bail, to assess risk factors. However, we were interested in whether there are alternative ways of assessing risk.

Judicial discretion

Of our sample of 150 applications, approximately half were successful and half unsuccessful (see Table 3).

Table 3: Outcomes of applications

	Applications	Accepted	Refused
Hobart	58	30	28
Adelaide	29	23	6
Sydney	37	22	15
Melbourne	26	11	15
Total	150	86	64

To get a sense of how judicial discretion works, it is only necessary to look at one example in which the magistrate applies the law to a set of facts. The example in Box 3 summarises an application made in Tasmania. Although this resulted in an adjournment, it provides a good illustration of how a judicial decision involves using individual judgement.

Box 3: Judicial discretion in action

The defendant was a 27-year-old male who worked as a chef in Hobart and had lived in Queensland. The prosecutor, reading out extracts from the police summary, outlined the opposition to bail. 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 defence lawyer was invited to make a submission. Her instructions were that this was a brief relationship that had ended. The defendant had recently been offered a position as a chef in Launceston. He planned to move to Launceston the next day. Legal aid was trying to contact the restaurant owner.

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 [of the *Family Violence Act 2004*] justifies remanding in custody or to put it another way justifies being bailed'.

He was going to adjourn the matter until 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'.

The considerations are easy to understand and apply. In the case of domestic violence cases in Tasmania, the burden of proof has been reversed. However, we observed applications in which defendants living in Hobart, who were charged with similar offences, were granted bail subject to an order restricting them from visiting parts of the city. This illustrates how, under the current system, magistrates exercise considerable discretion in making bail decisions.

The assessment of risk

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 (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, in fact, be relied on to appear, based only on a verbal undertaking. This led to the development of a series of structured tools that rate each defendant on 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. Although diverse in form, length and content, these 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.

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 only those factors that are demonstrably associated with bail success (Mamalian 2011).

A recent survey conducted by DeMichele, Baumgartner and Barrick (2019) of 171 US criminal justice professionals suggested that there is stakeholder support across 30 different jurisdictions for risk analysis and broad agreement about those factors that are most important to bail decision-making. Nearly all (98%) of the judges surveyed indicated that the risk assessment tool 'sometimes' informed their decision. Most of the participants in this study agreed that the use of the risk assessment tool improved case flow efficiency.

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 to collect background information about applicants 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—that would not otherwise be available to the court but is considered relevant to bail decision-making. It is an example of the first stage of implementing an approach to bail decision-making that resembles those developed in the United States.

It is currently not possible to supply Australian courts with a decision-making tool that is derived from actuarial data. 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. Courts in the United States are very different institutions to those in Australia, and their guiding legislation and the profile of the population of those appearing before them differ too. We suggest that considerable caution be exercised before implementing such approaches.

We also have concerns about the practice of relying solely on actuarial data (particularly when operationalised in algorithms) to replace judicial discretion. In our view, there is clearly a place for scientific evidence about risk and vulnerability circumstances in court considerations of whether (or not) bail should be granted. However, there should be more detailed analysis in Australian settings before we go too far down that path.

The provision of pre-trial services

The third research focus of our project was the investigation of emerging pre-trial services programs in Australia. It is axiomatic that not only the presence of risk, but also the likelihood of that risk being successfully mitigated through the imposition of bail conditions, must be considered in arriving at a bail decision. The ways in which referral to specialist bail support programs might assist the defendant to complete a period of bail successfully deserve particular consideration. A review by Willis (2017) identified at least one such bail support program or service in each Australian state and territory and noted that these programs shared substantial commonalities. The key point here 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 also be able to comply with a program if appropriate pre-trial support is provided.

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. They are distinctive in two respects. Firstly, the services are available to eligible defendants who plead not guilty. Secondly, because pre-trial services are available at the pre-trial stage, they can influence sentencing. Because most pre-trial services (especially those that employ universal screening) aim to detect forms of vulnerability, they are at the forefront of the services that are likely to reduce recidivism. Further, success on a drug rehabilitation program may lead a magistrate to make a community-based bail order instead of imposing a custodial remand.

The distinction between ad hoc and integrated services

A variety of local agencies, along with the Forensic Mental Health Service funded by departments of health around the country, already deliver pre-trial services to defendants in Australia. There is, however, an important distinction between states in which services are available on an ad hoc basis to defence lawyers, and Victoria, the state which has a program of integrated services. The difference partly relates to funding. The integrated program has a funding arrangement that enables agencies to draw on a variety of welfare and specialist services. 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.

Individualised casework

We were unable to interview service providers directly for this study. We are, however, able to draw on our interviews with caseworkers to convey a sense of the specialist nature of services.

Drug and alcohol programs

There is not a standardised response to drug addiction. The following interview extract shows that caseworkers suggest an individualised program, and agencies offering services may make further refinements.

Box 4: Interview with a manager of a pre-trial services agency

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

Manager: 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.

Housing

Our interviews with Victorian case managers were interesting, because a debate was taking place within the government about how to support the criminal justice system with housing services. When the Court Integrated Services Program (CISP) was established, integrating courts with available and specialised bail services such as accommodation, it was assumed that providing housing would reduce offending and reduce the remand population. Indeed, magistrates were more willing to grant bail if a defendant had stable housing.

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, a magistrate in Victoria can 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. Magistrates in this court have the opportunity to conduct judicial monitoring, if they believe that this would assist in rehabilitation.

Box 5: 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.'

With the support of legal practitioners and the Victoria government, CISP is expanding. In 2018, 14 percent of defendants were assisted by the program.

Conclusion: Developing bail policy

Before the current era of tough bail legislation, there was a central principle that defendants should be presumed innocent and have a right to liberty before trial. We accept that this principle no longer has widespread public support, given Australia's recent history of some terrible offences committed by defendants who were on bail (Coghlan 2017). However, some interesting developments are taking place in Australian criminal courts, not least the provision of pre-trial services through the CISP in Victoria. We have given an outline in this paper, and more details and analysis are available in our full report (Travers et al. 2020).

With the proper information available to them, and services in place, magistrates and other bail authorities may be in a position to grant bail more often and so reduce the pressures on custodial remand populations. Such information would reflect the vulnerabilities that persist in the lives of people charged with criminal offences and may guide the direction of these defendants to appropriate pre-trial services. All players in the bail or remand space should be well aware of those services. In the future, actuarial tools may assist bail authorities to assess risk with some degree of assurance. In such a justice scenario, the public can be protected, and confidence maintained in the criminal justice system, without our communities having to accept further rises in the remand population as inevitable and desirable.

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Dr Max Travers is a Senior Lecturer, School of Social Sciences, at the University of Tasmania.

Emma Colvin is a Senior Lecturer, Centre for Law and Justice, at Charles Sturt University.

Isabelle Bartkowiak-Théron is a Senior Lecturer and Discipline Coordinator Police Studies, School of Social Sciences, at the University of Tasmania.

Rick Sarre is a Professor and Dean of Law at the University of South Australia.

Andrew Day is an Enterprise Professor, School of Social and Political Sciences, at the University of Melbourne.

Christine Bond is an Associate Professor, School of Criminology and Criminal Justice, at Griffith University.

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GPO Box 1936
Canberra ACT 2601, Australia

Tel: 02 6268 7166

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