The Remand Strategy: Assessing Outcomes

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Abstract

The continuing increases in the numbers of people in prison because they have been refused bail, together with the differential rates at which people in the various Australian jurisdictions are remanded in custody, raise urgent questions about the use of custodial remand. Traditionally, such questions have been addressed by a focus on judicial decision-making. This article takes a step back from this rather narrow perspective and focuses, rather, on the purposes and outcomes of custodial remand in terms of justice policy. It explores desired policy goals and objectives, implementation systems and indicators of bail policies by a measure of their 'effectiveness'. Remand in custody and its alternative, bail, are conceptualised in this paper as strategies. The article explores the purposes for which remand strategies are utilised, the effect of competing goals on remand decision-makers, and how achievements of the goals of custodial remand (and its alternatives) could be better measured.

Introduction

Remand decision-making occurs in a context of conflicting goals established both from within bail legislation and from the broader policy contexts in which remand decision-makers (and those who support them) operate. Remand decision-makers are required to preserve the integrity and credibility of the justice system, to ensure the protection of the community and, at the same time, to take account of the best interests of defendants. The resultant conflict means that a single indicator of remand strategy effectiveness cannot be developed. Instead, judicial administrators need to focus on indicators of particular goals. Focusing on evaluating the remand strategy in this way brings to the fore issues in judicial administration that are seldom addressed in public forums. In particular, this article asks what performance benchmarks should be established for a remand strategy, and how

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innovative ways of achieving the goals of custodial remand can be more effectively fostered. The article argues that, without greater clarity of focus on the purposes for which the remand strategy should be deployed, custodial remand is in danger of being utilised for policy purposes other than those initially sought and pursued by legislators.

Research Background

This article has been developed from a cross jurisdictional exploration of the factors that influence remand in custody which was undertaken for the Criminology Research Council by the authors in two stages between 1999 and 2005. This research had three foci:

1 to search for critical factors that determine and affect the rates at which people enter Australian corrections systems as remandees;

2 to study the effects of custodial remand on key outcomes for the criminal justice system; and

3 to consider principles of good practice and policy implications arising from that consideration.

The research indicated that remand rates result from the interaction of the personal characteristics of the defendant and the policy and practices of decision-makers. Furthermore, it suggested that the key to understanding the remand in custody process is for researchers to move outside the courtroom and to focus on issues that arise *prior* to the judicial hearing (King et al. 2005; Sarre et al. 2006).

The research found differences in legislation and approaches to custodial remand in Victoria and South Australia. The Victorian custodial remand system provides greater accountability for bail decision-makers, more scrutiny by courts of the information in bail decisions and significant provision of resources to support defendants at risk of being remanded in custody.[1] Furthermore, in some Victorian courts there is explicit acceptance of the concept of 'therapeutic jurisprudence' (e.g. Birgden 2004), and bail decision-making is influenced by this. In South Australia, the research identified 'intelligence-led' policing strategies as having a significant impact on the workings of the remand process.

The research also identified that insufficient attention has been paid to the purposes of the remand process and to the question of whether certain justice strategies achieved these purposes. This article reports and develops this aspect of the research by analysing the purposes of custodial remand and developing measurable indicators to assess the effectiveness with which these purposes are met, recognising that remand decision-making takes place within the context of competing goals and conflicting policy imperatives.

Methodology

The research design located the research within two Australian jurisdictions (South Australia and Victoria) that had very different outputs in relation to levels of remand in custody. This enabled better identification and probing of the effects of different remand practices. South Australia uses remand more frequently than any other state, whereas the Victorian remand rate is the lowest of any Australian jurisdiction (Bamford et al. 1999; Sarre et al. 2006).

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1 Subsequent to this research the Victorian Law Reform Commission has published its Review of the Bail Act. See Victorian Law Reform Commission (2007).

A complication of the research design was that the different performances of the two jurisdictions were not related solely to remand practices and outcomes. Victoria consistently has a low rate of recorded crime against people and property (SCRGSP 2004:5.10, 5.11). Moreover, it has the lowest imprisonment rate of any Australian state (ABS 2006). South Australia, on the other hand, whilst also enjoying a relatively low imprisonment rate compared to the rest of Australia, records an imprisonment rate that is higher than the rate in Victoria (see below). The question of why Victoria has such a different level of recorded criminal activity compared to other Australian jurisdictions has been a matter for discussion over many years and remains largely unresolved (see discussion in Carcach & Makkai 2002). Certainly, though, it was not possible to isolate the outcomes of remand in custody processes from this context alone.

The study of the effect of custodial remand on desired justice outcomes was undertaken through a detailed comparative study of the relevant legislation, a review of the data available (albeit limited) and interviews with key informants in Victoria and South Australia. The legislative study focused both on provisions of the Bail Acts of the jurisdictions, and on other legislative provisions concerning bail. The result of this analysis provided a basis for interviews with key actors, including magistrates, police, court administrators, lawyers and others involved in support to defendants. Research concerning the policy context of remand decision-making and desired justice outcomes was undertaken concurrently with research exploring remand processes and factors that influence the rate of remand in custody.

The Remand Strategy

The need for remand or bail arises once an individual has been arrested for an alleged offence. It results from the time taken for a defendant's case to progress through the criminal justice system to determination of guilt or innocence by the courts and, as required, sentence. During this period, decisions about the liberty of the defendant are made by police and judicial officers and the result is that the defendant is either granted bail (trusted to return to court when required) or remanded in custody (held in prison).

Key decisions about remand or bail are made at three different points in the processes through which a defendant's case is progressed. At the Apprehension Phase, the investigating police officer will decide how the offence is to be described and whether to arrest the defendant or to proceed by way of summons, or, in some jurisdictions, by a court attendance notice or equivalent. If the defendant is not arrested, then the issue of custodial remand will not arise.

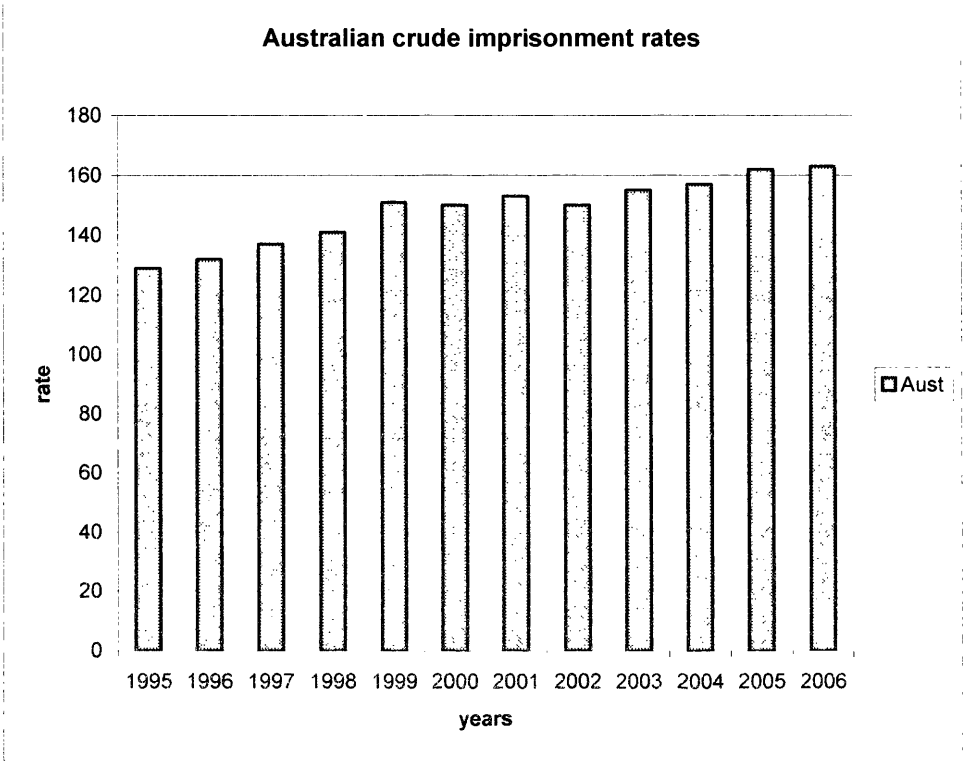
At the next point in the process, the Police Bail Phase, bail can be granted by the police and, if refused, the defendant has rights of appeal (which rights differ from jurisdiction to jurisdiction). The ultimate decision-making with respect to custodial remand or bail occurs in the Court Bail Phase where judicial decision-makers review all matters relevant to the defendant. However, it is extremely rare for a judicial decision-maker to refuse bail if it has already been granted at the police bail phase and the police do not argue for its refusal (King et al. 2005).

Remand Strategy Contribution to Prison Populations

Custodial remand contributes to the increasing prisoner numbers in Australia. In 1996, there were 18,193 prisoners in Australia. By 30 June 2006, this figure had jumped to 25,790, an increase of almost 43 per cent in a decade, and well in excess of the growth rate of the

Australian adult population generally. A decade ago, the Australian imprisonment rate was around 133 per 100,000 adult population. By 2005, the rate was 163 per 100,000 population and it remains at that rate currently (ABS 2006, see Figure 1).

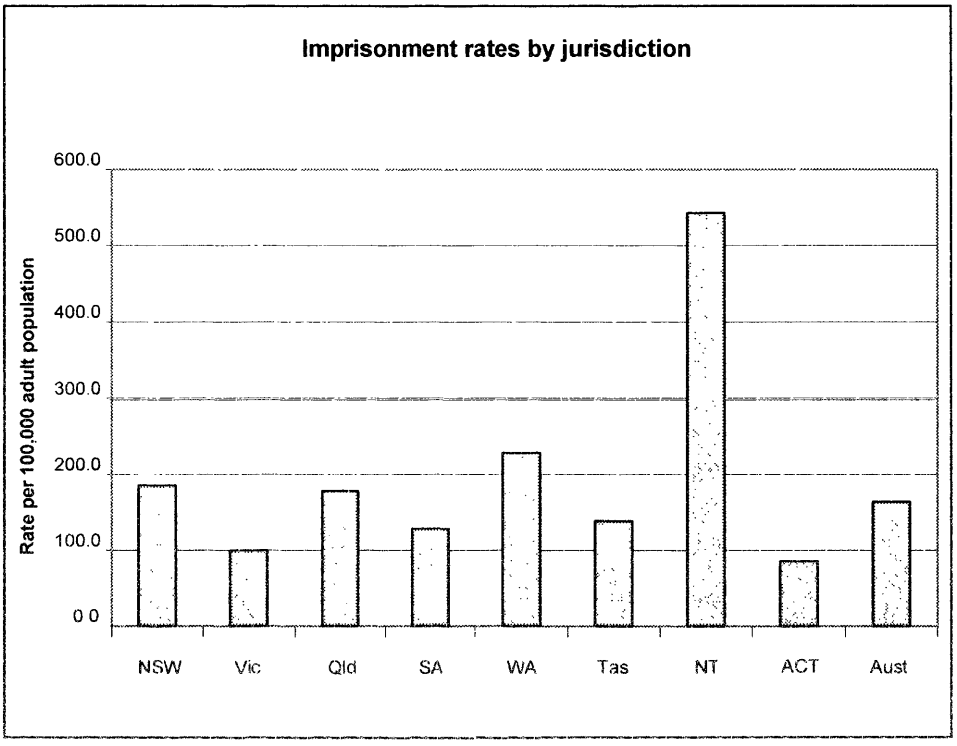
Figure 1: Imprisonment rates Australia 1995-2006 Source: ABS (2006)



As depicted in Figure 2, the Northern Territory currently has the highest rate of imprisonment, with 542 prisoners per 100,000 adult population. South Australia's rate is 130 per 100,000, while Victoria's rate is significantly lower, at 100 per 100,000 (ABS 2006). Of those prisoners in custody at 30 June 1996, 15,887 had been sentenced and 2,306 had been remanded in custody awaiting trial or sentence. By 30 June 2006, the number of sentenced prisoners had grown to 20,209 and the number of unsentenced prisoners had increased to 5,581. This means that the proportion of the Australian prisoner population who are unsentenced has increased from 12.6 per cent in 1996 to 21.6 per cent in 2006. This reflects an increasing number of people remanded in custody.

Australian jurisdictions have made differential use of the remand strategy, which has resulted in different pressures on prisons within the jurisdictions. The strong South Australian policy imperative to remand people in custody is highlighted by the fact that, while the South Australian proportion of remandees in the prison population has grown from 16 per cent to 33 per cent over the period 1996-2006, the Victorian proportion has remained relatively stable.

Figure 2: Imprisonment rates by jurisdiction: Australia 2006 Source: ABS (2006)



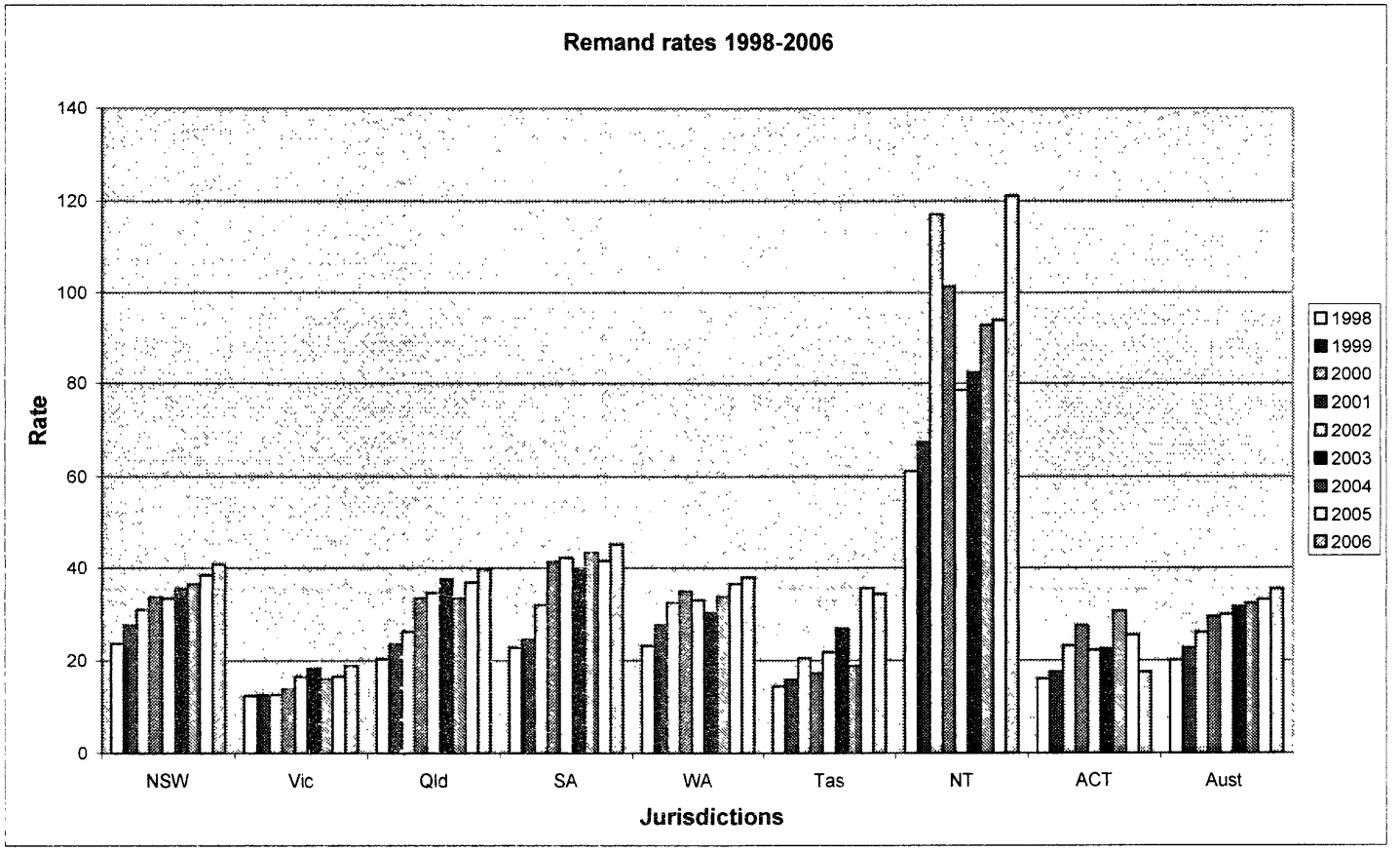
In fact, the Victorian proportion was 14 per cent in 1995, when the SA proportion was 16 per cent (ABS 2002, companion data). South Australia hovered between 16 and 20 per cent until 2000 when it jumped to 27 per cent and to 33 per cent by 2006. While there have been increases in Victoria, and Australia as a whole, the increases in South Australia are out of all proportion with trends elsewhere.

Remand Rates

In order to describe the level of remand activity within a jurisdiction, the remand rate (number of prisoners on custodial remand per 100,000 adult population) provides an effective and useful measure. There are substantially different rates of custodial remand across all jurisdictions in Australia (Sarre et al. 2006). The Northern Territory has had the highest remand in custody rate in the country for all of the years since the Australian Bureau of Statistics began counting, and reflects, simply, the massively disproportionate rate at which Indigenous Australians are imprisoned in Australia (Sarre 2005). Although dropping dramatically after 2000 (ABS 2003), the Territory's rate spiked considerably in 2006. South Australia in 1998 had a remand rate comparable to that of New South Wales and Western Australia. It now has the highest remand rate of all states. Victoria consistently has had the lowest remand rate of any Australian jurisdiction and it hovers between a half and a third of the South Australian rate. By way of illustration, in 2006, the Australian remand rate was 35.4, in South Australia it was 45.2, while in Victoria it was 18.8 (ABS 2006).

Figure 3 Remand in custody rates (all jurisdictions) Australia 1998-2006

Sources: ABS Corrective Services Australia (4512.0) for years 1998-2003; ABS Prisoners in Australia (4517.0) for years 2004-2006, based upon single-day census data, and, for 2006, based upon preliminary statistics from the Australian Demographic Statistics June 2006, ABS cat. 3101.0



The Purpose of the Custodial Remand Strategy

The impetus for the increasing use of the remand strategy in some Australian jurisdictions is usefully explored through a study of the role served by custodial remand within the justice system. Bail Acts of specific jurisdictions describe the purpose of custodial remand. They include reference to the factors that courts should take into account when deciding to remand a defendant in custody. It is of interest that the description of the purpose of custodial remand is dealt with differently in the two jurisdictions in this study.

The Victorian *Bail Act* 1977 provides greater clarity, through its structure, than the South Australian *Bail Act* 1985. Section (4)(2)(d) of the Victorian Act sets out what behaviour or outcomes the Act is seeking to avoid, and s4(3) lists some of the factors or information the bail authority might take into account in reaching his/her decision. By contrast, the South Australian Act merges these two things together.

The purpose of bail is covered in s4(2)(d) *Bail Act* 1977 (Vic) which provides that bail will be refused if a court is satisfied

> (i) that there is an unacceptable risk that the accused person if released on bail would –
>
> fail to surrender himself into custody in answer to his bail; commit an offence whilst on bail; endanger the safety or welfare of members of the public; or interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person.
>
> ...
>
> (iii) that it has not been practicable to obtain sufficient information for the purpose of deciding any question referred to in this subsection for want of time since the institution of the proceedings against him.

To assist bail authorities when they are considering whether to remand a defendant in custody, the Victorian Act then continues, in s4(3), by providing further guidance on those factors to which that bail authority should have regard.

The South Australian *Bail Act* 1985, unlike the Victorian Act, merges the purpose or outcomes remand in custody is intended to achieve with the factors the bail authority should take into account in deciding the level of risk. Section 10(1) of the *Bail Act* 1985 (SA) provides that an applicant should be released on bail unless, having regard to –

> (a) the gravity of the offence in respect of which the applicant has been taken into custody;
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> (b) the likelihood (if any) that the applicant would, if released–
>
> (i) abscond;
>
> (ii) offend again;
>
> (iii) interfere with evidence, intimidate or suborn witnesses, or hinder police inquiries;
>
> ...
>
> (d) any need that the applicant may have for physical protection;
>
> (e) any medical or other care that the applicant may require;
>
> (f) any previous occasions on which the applicant may have contravened or failed to comply with a term or condition of a bail agreement;
>
> (g) any other relevant matter,
>
> the bail authority considers the applicant should not be released.

Furthermore, s10(4) provides

> Despite the other provisions of this section, where there is a victim of the offence, the bail authority must, in determining whether the applicant should be released on bail, give primary consideration to the need that the victim may have, or perceive, for physical protection from the applicant.

Strictly speaking, the matters listed in paragraphs (b), (d) and (e) of s10(1) describe the outcomes the South Australian Act is trying to address, while those matters in paragraphs (a) and (f) are the factors or information relevant to assessing the level of risk. For example, the gravity of offence (a) is relevant information in determining the risk of the accused absconding or interfering with police investigations on the basis that the more serious the offence, the greater the incentive one might have to abscond or attempt to pervert the course of justice.

Despite these differences in structure and expression, three broad goals that the custodial remand strategy is seeking to achieve can be identified from these Bail Acts. They are to

1 ensure the integrity and credibility of the justice system;

2 protect the community; and

3 safeguard the best interests of the defendant.

Our research in Victoria and South Australia demonstrates that how these goals are understood influences the use of both custodial remand and alternative strategies that can be utilised to achieve the goals.

1. Ensuring the Integrity and Credibility of the Justice System

The integrity and credibility of the justice system have been the traditional focus of custodial remand (Bottomley 1968:40). To this end, justice administrators have focused on ensuring that the defendant attends court when required to do so and that the process of investigation and trial is not compromised by improper conduct on the part of the defendant either through interfering with witnesses, or the destruction of evidence.

Ensuring the defendant attends court is very important within the Anglo-Australian criminal justice system. Courts have been very hesitant to allow criminal trials to proceed in the absence of the defendant. Apart from relatively minor matters in the summary jurisdiction, the absence of the defendant inevitably means postponement of the trial. Both the Victorian and South Australian Bail Acts provide that a person should be refused bail if there is an unacceptable risk that that person would fail to attend court as required (*Bail Act* 1977 (Vic) s4(2)(d) and *Bail Act* 1985 (SA) s10(1)(b)(i)). Indeed, the research concluded that ensuring that the defendant attends court as required is the most commonly identified focus of remand/bail decision-makers.

However, despite a common emphasis on the importance of the defendant attending court as required, the issue is conceptualised very differently in the two jurisdictions. In Victoria, the Act refers to the risk that the defendant will 'fail to surrender himself into custody in answer to his bail' while the South Australian Act refers to the risk of the defendant 'absconding'. The concept of 'failure to surrender' is more akin to failure to appear, and allows for the recognition of a range of possible motives or explanations for non-attendance. The concept of 'absconding' conveys a deliberate intent to avoid the court process and any consequences of the conduct that has given rise to the charge.

In addition to custodial remand as a strategy to ensure that the defendant attends court, remand decision-makers are provided with a range of alternative strategies to increase the likelihood that a defendant granted bail will attend court when required. These strategies

include requiring a surety from a defendant to add an incentive for the defendant to attend court, asking for a guarantor, and placing conditions on bail. Conditions aimed at ensuring attendance at court include residential requirements (the defendant must reside at a specified address), reporting requirements (the defendant must report to police on a regular basis), and restrictions on international travel (the defendant must surrender his/her passport).

Protection of the court processes is also important in ensuring the integrity of the justice system. The safety of witnesses and any other factors relating to the protection of court processes can be served by custodial remand to ensure that the role of the court as the final arbiter of guilt and sentence cannot be subverted by an accused tampering with essential elements of a case. This is identified as an important (although a less frequent) issue faced by bail decision-makers. Strategies other than custodial remand utilised to protect court processes include, for example, bail granted with prohibitions on contacting specified persons.

In addition, the remand strategy impacts on the perceived fairness of justice decision-making and thereby on the integrity and credibility of the justice system. The extent to which alleged offenders are treated equally has long been recognised as an important attribute of the justice system (see *Leeth v Commonwealth* (1992) and *Walker v NSW* (1999)). Assessing the effect of a remand strategy's ability to ensure the integrity and credibility of the justice system must include an assessment of its impact on groups within the community – whether groups are distinguished by race, gender or socio-economic status.

2. Ensuring the Protection of the Community

The goal of protecting the community is differently expressed in the Victorian and South Australian Acts, with Victorian bail decision-makers being required to take into account the risk the defendant may '... endanger the safety or welfare of members of the public' (*Bail Act* 1977 (Vic) s4(2)(d)(i)) and South Australian decision-makers asked to focus on the narrower consideration of the risk of 'offending again' (*Bail Act* 1985 (SA) s10(1)(b)(ii)).

Preventing offending in order to protect the community was identified to the researchers as a high priority by police involved in bail decision-making. Not only was bail decision-making influenced by the seriousness of the offence and thus the potential harm caused by the commission of a further offence whilst on bail, the assessment of whether the offender was involved in an ongoing pattern of criminal behaviour also influenced bail decision-making. This was particularly an issue in situations where offenders who were currently on bail were found to be in breach of conditions of bail or were detected committing further offences.

In particular, in considering the protection of the community, the interests of the victim are of concern to bail decision-makers. Since 1994, the South Australian legislation has included a requirement that the bail decision-maker must, where there is a victim, '... give primary consideration to the need that the victim may have, or perceive, for physical protection from the [defendant]' (*Bail Act* 1985 (SA) s10(4)). The Victorian Act (less clearly) ties the needs of victims to protection, although it provides that the bail decision-maker must take into account '... the attitude, if expressed to the court, of the alleged victim of the offence to the grant of bail' (*Bail Act* 1977 (Vic) s4(3)(e)).

Bail decision-makers identified that the protection of the victim was a particular issue in cases involving domestic violence offences. Conditions on bail and restraint orders were

identified as being useful to enable the achievement of the safety of the victim without the necessity of custodial remand.

Strategies to address the protection of the community (without remanding defendants in custody) include the home detention bail provisions in South Australia, which, with or without electronic monitoring, require the defendant to reside at an address and remain on the premises, except by prior permission of a supervising officer. Even without home detention, bail conditions can include the requirement to comply with a curfew, to observe exclusion zones (whereby a defendant is excluded from attending areas of known criminal activity), and to refrain from consorting with specified persons.

3. Ensuring the Best Interests of the Defendant

As a primary focus of remand and bail decision-making, the criterion 'best interests of the defendant' is little discussed by justice professionals. However, legal principles expressing defendants' rights, such as the principle that a person is innocent until proven guilty, provide an important philosophical context for all remand decision-making. Derived from this principle is the position that a person cannot be imprisoned (i.e. held in preventative detention) on the basis that they may commit a crime. This principle underpins modern criminal legal practice. The approach generally is further reinforced by the general sentencing principle that holds that imprisonment is to be used as a last resort, a guideline that applies to custodial remand as well as to imprisonment as a sentence.

The 'best interests' of the defendant are usually equated with liberty (and thus the granting of bail). Custodial remand removes the defendant from social support and limits access to legal services at a crucial time (Bamford et al. 1999) and has been associated with increased risk of subsequent imprisonment (Doherty & East 1985:262). However, giving attention to this goal may also justify remand in custody in certain situations. The South Australian *Bail Act* recognises as relevant factors in determining whether to grant bail any need that the applicant may have for physical protection, or any medical or other care that the applicant may require (*Bail Act* 1985 (SA) s10(1)(d) & (e)).

Although the Victorian Act is silent with respect to these matters, the current research revealed that some remand decision-makers have followed the development of the concept of 'therapeutic justice' and now apply it to remand (Birgden 2004). 'Therapeutic remand' identifies that one goal of the remand process is to enable the defendant to gain access to services or treatment thought to be needed in order for the court to address some of the underlying issues giving rise to the defendant's criminal conduct. Victorian remand decision-makers, at the time the research was undertaken, demonstrated familiarity with the availability of, as well as the limitations of, a range of programmes including the Bail Advocacy Unit, the forensic medical officer and psychiatric nurse, the CREDIT program, the WISE (employment program) and BASIS (Dandenong) (King et al. 2005).

The best interests of the defendant also shape the use of alternative strategies to custodial remand, through the granting of bail with conditions. Bail conditions can be used to require the defendant to access certain services or to seek medical treatment. They may also require the defendant to refrain from improperly using controlled substances and to undergo drug testing. While such conditions are not specifically provided in the Bail Acts, s5(4) of the *Bail Act* 1977 (Vic) does provide that one of the conditions of bail may be that the defendant undergo a medical examination.

While remand decision-makers suggest that the goal of ensuring that the defendant receives needed therapeutic support is less influential in remand decision-making than the other goals, especially at police phases of the remand process, its influence is, in part, a

reflection of the remand decision-makers' assessment of the lack of availability of appropriate services in the community.

Competing Goals and Conflicting Policy Imperatives

The goals Bail Acts seek to achieve are interrelated, but, paradoxically, they may be in conflict with one another and with other important justice principles. Achieving the best interests of the defendant and the protection of the community at the same time, for example, may create conflicting pressures. Without the presumption of innocence, the imperative of achieving other justice outcomes may result in very high rates of custodial remand.

Additional tensions can result from the fact that remand decision-making occurs in the context of the broader justice system. Although Bail Act criteria provide a framework for decision-making about filtering people into or out of custody, the bail decision-maker operates within a range of intersecting policy systems. This can create tensions that result from the competing responsibilities of the remand decision-maker. These tensions can be seen to occur at each of the phases of remand decision-making.

Apprehension Phase

In the apprehension phase, the police officer is the key decision-maker. This officer, who will make the fundamental decision about whether to arrest or to summons a defendant, is also at this point the chief investigator of the alleged crime. Decision-making about bail intersects with decision-making about criminal investigation and, in part, the choice of strategy is influenced by the definition of the crime committed, the evidence collection process that is required, and the need to achieve a range of justice outcomes including, but not only, those identified in the legislation. Additional justice outcomes that the police officer may have in mind at this point include the numbers of people held in police cells, the need to foster safer communities and the imperative of improving clearance rates of crimes.

Police Bail Phase

At the police bail phase, the bail decision-maker is operating within a local service area which is, in many jurisdictions, accountable for its performance. Performance targets include both criminal activity levels and crime clearance rates. Remand in custody can be seen to be a strategy that impacts on those performance areas. The 'intelligence-led policing' model that is being utilised in both Victoria and South Australia encourages the targeting of offenders and the application of preventative measures (Ratcliffe 2001:5). This influences police decision-making about the need for custodial remand when there is an expectation of repeat offending, even when this offence itself may not warrant a custodial sentence. Decision-making about bail or remand in the police bail phase may be directed at outcomes relating to the local service area's performance, Bail Act criteria and the utilisation of police resources required to process a custodial remand.

Court Bail Phase

Offenders remanded in custody by police are brought before a judicial decision-maker. However, prior to this, the defendant will usually be visited by the duty solicitor from the Legal Services Commission (or equivalent) unless the defendant has organised his/her own

lawyer. The duty solicitor will attempt to ascertain the factors influencing the police attitude to bail and may negotiate the basis for a successful bail application.

Others who may contribute to decision-making in this phase of the process include staff who work in support programs such as, in Victoria, the former Bail Advocacy and Support Programme (BASP), CREDIT and Court Integrated Services or, in South Australia, the Department for Correctional Services' Courts Unit. The bail support workers will interview selected defendants before the bail application and attempt to address those factors that may prevent bail being granted. Examples of their activities include organising accommodation, referrals to drug, alcohol, medical and mental health services and provision of such information to the court to assist the court in its decision on the bail application. A more elaborate assessment process is required if home detention bail is to be considered, and this will involve interviews with family members. In recent years, there has been a growing use of diversionary programmes, which may involve defendants being subject to bail requirements to comply with treatment regimes or other rehabilitative programmes normally associated with sentencing. Preparation for such bail conditions requires significant assessment and negotiation with the defendant.

Professionals contributing to remand decision-making through these processes are also operating within other policy systems. For example, correctional services staff provide support to remand decision-makers whilst being aware of key performance areas relating to safety of defendants in custody and cell occupancy rates. At the same time, their efficacy in providing credible non custodial options for defendants is constrained by resourcing levels and the need to produce multiple reports rapidly (King et al. 2005:97).

Bail legislation, together with the broader policy contexts in which remand decision-makers operate thus create a context in which the remand strategy is being utilised to achieve conflicting goals. The effectiveness, then, of the remand strategy cannot be assessed in broad terms, but rather must be evaluated in terms of specific goals to be achieved.

Assessing the Remand Strategy

Assessment of custodial remand has often focused not on its effectiveness in achieving the goals established in the Bail Acts, but rather on remand and imprisonment rates (see for example Law Reform Commission of Victoria 1992; Queensland Law Reform Commission 1993). However, alternative effectiveness measures may contribute to better remand decision-making by providing information about the extent to which particular justice outcomes are being achieved as a result of the use of the remand strategy. Such assessment would require the identification of indicators of the desired outcomes and the collection of data not just about the result of decisions that are made in individual cases, but rather about the aggregate of decisions made in a particular jurisdiction. It is possible to derive measurable indicators for each of the three goals of custodial remand identified (above) in the analysis of the bail legislation, namely ensuring the integrity and credibility of the justice system, assisting the protection of the community and safeguarding the care and protection of the defendant.

Measurable Indicators

The contribution of the remand strategy to ensuring the integrity and credibility of the justice system could be assessed by measuring a number of matters, for example the

- percentage of bailed defendants attending court;

- percentage of witnesses giving evidence without harassment;
- relative numbers of Indigenous and non-Indigenous Australians remanded in custody;
- relative numbers of males and females remanded in custody.

Although attendance at court and the race and gender of defendants are indicators that could be analysed using quantitative methodologies, determining 'safety of witnesses giving evidence,' for example, would require a qualitative assessment methodology, including 'after the case' interviews.

Using currently collected data, it is possible to indicate 'attendance at court as required' in the negative by the number of warrants issued for failure to attend court. The most recent Australian research exploring this issue was carried out by the New South Wales Bureau of Crime Statistics and Research (BOCSAR). Looking at defendants who failed to appear while on bail, BOCSAR researchers found that, from 1999 to 2000, between 12.6 per cent and 14.6 per cent of persons on bail had not attended court as required and a warrant for their arrest had been issued (Chilvers et al. 2002). The researchers also found a significant difference between defendants appearing in local courts and those appearing in higher courts. The percentage of defendants failing to appear in higher courts over that period fell from 6.2 per cent to 5.3 per cent. Looking at the profile of defendants that failed to appear, the research showed that those with prior convictions were three to four times more likely to fail to appear. Similarly, the rate at which defendants failed to appear increased as the number of charges against a defendant increased. Defendants charged with theft, break and enter, burglary and receiving were more likely to fail to appear in court (Chilvers et al. 2002).

Protection of the community through the remand strategy could be assessed by the number and seriousness of offences committed by individuals whilst on bail, and the number of victims experiencing less distress or increased safety as a result of remand decisions. Offending on bail is not a statistic that is available through current data collection systems in Australian jurisdictions however. Reflecting public and political concerns, governments have commissioned a number of studies over the last twenty years that have attempted to ascertain levels of offending on bail, but these are based on analyses of police and court records, and thus rely on solved crimes (King et al. 2005:24). The number of offences that go unreported or unsolved means that the studies are not able to provide an accurate picture of the real level of offending. Furthermore, some studies look at bailed defendants *charged* with offences whereas other look at those *convicted* of offences.

Despite these differences, some common patterns can be identified from the research. In particular there is a recurring finding that the rate of offending increases as the age of the offender decreases, with the highest offending occurring in the younger age cohorts. Morgan and Henderson found that 29 per cent of defendants under the age of 18 committed offences whilst on bail compared to 13 per cent of those aged over 21 (Morgan & Henderson (1998) cited in Hucklesby & Marshall 2000:154). Similar results were found by Lash in the study of offending on bail in New Zealand in 1994. She found the age cohorts with the highest rate of offending on bail were the 17 to 19-year-olds, of whom over 27 per cent offended whilst on bail. By comparison approximately 16 per cent of offenders aged between 30 and 34 offended whilst on bail (Lash 1998: Table 4.2).

Victims' experience of safety through police and court processes has not been the subject of reported studies and is not measured in current court data collections strategies. Evaluating victim experience of safety would require qualitative data collection methods that could be built into the processes established in most jurisdictions for informing victims

about case-related matters. The collection and assessment of such data would be an imperative for a justice system that is attempting to improve its sensitivity and responsiveness to victims' needs.

The goal of ensuring the best interests of the defendant, whilst broad, can certainly be evaluated in terms of ensuring the safety of the defendant. Studies of deaths in custody have found that remandees are particularly vulnerable. Highlighted by the Royal Commission into Aboriginal Deaths in Custody in 1991 (Johnston 1991), the issue of deaths in custody of Indigenous Australians and non-Indigenous Australians has become a key performance indicator for correctional administrators in the last decade (SCRGSP 2007:Section 7). Data available to evaluate the effectiveness of the remand strategy in ensuring defendant safety are the number of remanded defendants who die in custody and the percentage of remanded defendants experiencing assault or other incidents whilst in prison.

The number of deaths in custody of unsentenced prisoners is one of the few indicators of remand effectiveness that are currently recorded in justice data collection processes. In the ten years from 1996-2005, 538 prisoners died in custody in Australian jurisdictions. Of these, 184 were unsentenced prisoners. As this is 34 per cent of the total deaths in custody, it is disproportionate to the representation of remandees in the prison population (Joudo 2006:15). The safety of the defendant, then, must become a more important concern for remand decision-makers.

Establishing a Benchmark

The collection of data indicating the extent to which the remand strategy can achieve the goals it is designed to achieve is but one step in evaluating effectiveness. Judicial administrators must be able to measure these data against performance benchmarks. Focusing just on the goal of custodial remand to ensure that defendants appear in court as required, what level of non attendance at court results in a deterioration in integrity and credibility of the justice system? Is the only acceptable level of non-attendance at court zero? An alternative approach can be developed if we reconceptualise the question of attendance in court by probing the assumption that a 100 per cent attendance rate is achievable. Magistrates' court attendance might be compared to outpatients' clinics in public hospitals or school attendance. By thinking in this manner, the act of non-attendance is reconceptualised from absconding (with the associated outcome of challenging the credibility and integrity of the justice system) to an administrative problem. The outcome of such a re-conceptualisation is that custodial remand would be reserved only for individuals who could be seriously considered to be in danger of absconding. All other defendants would then be assumed to be locatable, if not on the first day they are expected in court, then on some subsequent day, and they would then be managed through normal administrative processes.

Would such an approach decrease the number of people remanded in custody? Focusing on the question of attendance in court in a new manner may remove the need for custodial remand in relation to that outcome, but other outcomes may still need to be addressed in relation to the same individual defendants. For example, the goal of community safety (which may be influencing remand decision-making at the apprehension, police bail and court bail phases) may be compromised by releasing more defendants on bail, whereas the goal of achieving the best interests of the defendant may be significantly improved by this change in strategy.

Innovative Strategies

The competing goals of the Bail Acts and the pressures of the broader policy context in which remand decision-making occurs is the source of the variety of practices that develop within and between jurisdictions in relation to remand decision-making. Over time, practice within a jurisdiction develops a range of acceptable accommodations to the conflict that each decision-maker experiences. As an example, police bail decision-makers in some jurisdictions operate within an environment whereby intelligence-led policing strategies encourage the use of custodial remand as an incapacitation strategy. Custodial remand is used to remove potential offenders from the streets in order to achieve crime reduction targets. Consider the following quote from a police officer:

> Because prosecutors now belong, if you like, to the same police managers that have this obligation to be applying the policing model that has this inherent component of targeting, disrupting particular individuals, then prosecutors are expected, as part of that single unit structure, to be accommodating, if you like, of the organisational intent. (Police interviewee, cited in King et al. 2005:93)

The resulting decisions became enshrined in practice within agencies and take account of the tension between agency needs. Stability in these areas might last for months or even years, but the existence of the tensions means that a reworking of the balance in the use of custodial remand as a strategy will become necessary on a regular basis.

Innovative practice amongst remand decision-makers and those who provide support to the remand system can be seen to result from the desire to resolve a particular set of tensions in a particular context. The interaction of intelligence-led policing with custodial remand as described above illustrates this tension. A clearer focus on the goals of custodial remand would create a judicial administration context in which such innovation is goal directed and not subverted by the demands of other policy contexts. Innovation then becomes an attribute to cultivate, and practices could be shared amongst remand decision-makers with a view to increasing the range of effective alternatives to custodial remand.

The current research identified that remand decision-makers were aware that the changing social and technological contexts in which they worked were creating new opportunities not envisaged at the time of the drafting of bail legislation. For example, innovative practice in some jurisdictions has focused on defendant disorganisation as a cause of non-attendance.[2] The availability of relatively new mobile phone technology allows some defendants to be contacted regardless of their transitory residence patterns. In one court in South Australia, the registrar is trying to lower the level of non-attendance by taking the mobile phone numbers of defendants and ringing them if they fail to appear. If he is able to locate them, and they have just made an error, he reschedules their appearance for later in the day. In Victoria, an active monitoring role is taken on by the bail advocacy programme, which works to ensure that their nominated clients appear in court on the appropriate day. The strategies adopted include telephone calls to residences, provision of taxi vouchers and use of informal networks to get messages delivered.

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2 Goldkamp and White (2006) report experimental research in Philadelphia, US, in which models of pre-trial supervision were evaluated This research suggests that such strategies also require effective sanctions.

Conclusion

The research described in this article was commissioned at a time when the use of custodial remand as a strategy to achieve justice outcomes was being challenged. The challenges were not unidirectional. The 'law and order' policies that are becoming more politically acceptable create pressures in one direction, whilst pragmatic resourcing pressures (such as the cost of custodial remand as well as philosophical issues relating to justice system governance and the rights of the individual defendant) create pressures in other directions. For example, the move in some jurisdictions to reverse the presumption of bail for certain offences creates an onus on the defendant to establish why bail should be granted. Whilst satisfying the political need to be seen to be dealing firmly with some offenders, the likely outcome (more remandees in custody) is unlikely to have been considered in a wider context.

Studying remand in custody as a strategy in a system of interconnecting decision-makers has revealed that the final decision on bail in relation to an individual offender is the result of a number of decisions. Whilst decision-makers exercise their own authority and responsibility in regard to a remand or bail decision, the context in which they operate is shaped by the decisions of other actors, and a range of policy objectives.

The traditional understanding of the remand decision is that it provides a mechanism for ensuring defendants attend court for determination of the charges against them following their arrest. However, the growing use of remand as preventative detention (and more recently the development of overlaps with the sentencing process) has highlighted how easily other considerations may subvert the traditional understanding.

Decision-makers are also operating with a minimum of information both about the effect of the remand/bail decision on an individual defendant, and about the extent to which the remand strategy overall is achieving the desired legislative outcomes. In the absence of this information, the remand process is at constant risk of coming adrift from broader criminal justice policy considerations.

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