Discretionary Decision-Making in a Dynamic Context: The Influences on Remand Decision-Makers in Two Australian Jurisdictions

Sue King, David Bamford and Rick Sarre*

Abstract

Custodial remand processes, whilst governed in Australian jurisdictions by specific legislation, occur in a complex social and justice context. Legislation across the country contains similar or mirroring provisions, but the implementation of this legislation involves an array of decision-makers, and a range of defendants and their supporters. The decision-making occurs in a judicial context that has developed precedent and settled practice over time, but bail practices vary considerably. This article explores these contextual themes.

Introduction

Decisions about bail and custodial remand occur from the moment that an individual comes in contact with the police in relation to an offence. If a person is arrested and brought to a police station then a decision must be made about whether to hold the defendant in custody or grant bail. Technically bail decision-making continues from this point until the final court hearing at which a defendant is sentenced. However, for all practical purposes, bail decision-making can be conceptualised as occurring most actively at three points in a defendant's progression through the justice system – at the point of apprehension, at the police station and in court. In relation to a particular case, there are therefore, many bail decision-makers who either make a direct decision or who have the capacity to review the decision that has been made.

Traditionally remand decisions have been reviewed on an individual case by case basis and are governed by the provisions of bail legislation. However the aggregation of the outcomes of bail decision-making in the statistics recording numbers of individuals remanded in custody and remand rates suggests that different patterns of remand decision-making occur in different jurisdictions (Sarre et al. 2006).

In this article we argue that the key to understanding these patterns involves recognising the way that the discretion of remand decision-makers is shaped by the legislative, social

* Dr Sue King, School of Psychology, Social Work and Social Policy, University of South Australia; Professor David Bamford, School of Law, Flinders University; Professor Rick Sarre, School of Commerce, University of South Australia.

and organisational contexts in which they operate. Furthermore, we suggest that jurisdictions develop cultures around remand decision-making as a result of the intersection of these contexts and that this culture is perpetuated by the beliefs of remand decision-makers about their roles and the processes of remand decision-making, specifically the speed and limited review of bail decisions. Recognising the importance of equity in remand outcomes, we argue that consistency in remand decision-making could be enhanced by the creation of intra-organisational discussions amongst remand decision-makers and inter-organisational feedback loops created by more focused data collection.

Bail Research

There have been two waves of bail research and reform. In the 1970s and 1980s, across Australia and much of the common law world, government inquiries were established to address concerns that defendants were being unnecessarily remanded in custody. For example, in Australia governments commissioned the following inquiries: Commonwealth: Australian Law Reform Commission, *Criminal Investigation*, 1975; NSW: Bail Review Committee, 1976; Victoria: Statute Law Revision Committee, *Bail Procedures*, 1975 and the Victorian Law Reform Commission, *Review of the Bail Act*, 2007; Western Australia: Law Reform Commission, *Bail*, 1979; South Australia: *Review of Bail in South Australia*, 1984. These inquiries led to legislative reforms that, to a degree, codified the common law principles for the granting of bail and the bail process. Defendants were to be given prompt access to courts, measures were introduced to improve the quality of information available to bail decision-makers and procedures were put in place to minimise the requirement of cash sureties or guarantors.

Over the last decade, a second wave of bail reforms has attempted to make the grant of bail less likely for a range of defendants, that is, a shift in the opposite direction. This followed increasing media concern about offending on bail and the granting of bail to defendants charged with serious crimes. One response was to introduce or increase the range of offences carrying 'reverse onus' provisions, namely where there is a presumption against bail, thereby requiring an accused person to satisfy the court that bail should be granted (Brignell 2002; Roth 2006:38-40; Lulham & Fitzgerald 2008). However, along with this tightening of the availability of bail, some jurisdictions have also increased the alternatives to custodial remand and, as part of this trend, introduced intervention orders whereby the courts can require defendants to undertake therapeutic programs whilst awaiting trial (Freiberg & Morgan 2004:220; Roth 2006; Mather 2008).

Research into bail decision-making in common law jurisdictions has been predominantly focused on the court stage of the bail process (Jones 1987:155). A survey of the literature reveals little has changed since 1987. With over 95% of criminal matters being dealt with by magistrates (as well as having jurisdiction over most criminal cases, magistrates courts are also the entry point for cases falling within the jurisdiction of higher courts (SCRGSP 2009 Table 7.2)), these judicial officers continue to occupy a central role in the court process. They are thus a natural focus of bail research. Bail in the Anglo-Australian common law courts has been consistently found to be a largely cursory process, with judicial decision-makers usually working in high volume environments, with considerable time pressures and limited information (Bamford et al. 1999a; Hucklesby 1996:213). Dhami and Ayton refer to this as the 'fast and frugal' model of decision-making and point out that it is inconsistent with the legal system ideal of due process decisions (Dhami & Ayton 2001:141).

Empirical research has highlighted the relatively short time spent by courts in determining bail applications. In the 1970s research in England found the average duration of bail hearings was 3 minutes (King 1971:17) and in Australia the average was 2 minutes (Armstrong 1977). Subsequent research in the United Kingdom in the 1980s confirmed the brevity of bail hearings in court (Doherty & East 1985:262). More recent Australian research found that in South Australia the median time for contested bail hearings was 5 minutes whereas in Victoria it was 18 minutes (Sarre et al. 2006:4). The same research found that only 40% of bail applications were contested in court (Sarre et al. 2006:4).

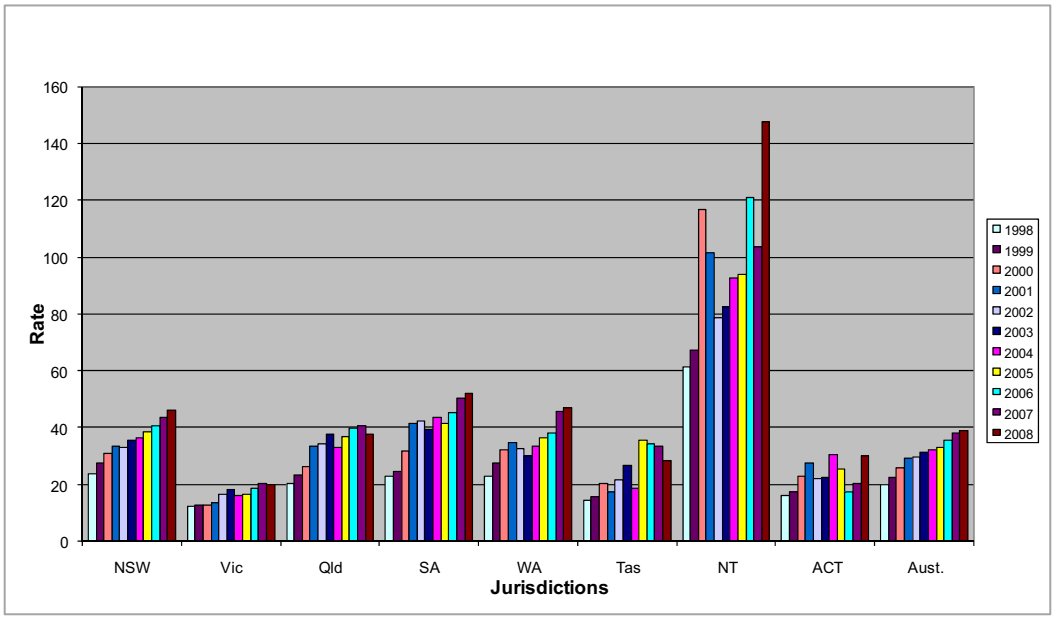
The brevity of hearing and the levels of contestation suggest that court decisions are heavily influenced by the decisions made prior to court. As Hucklesby concluded in her study of Welsh courts '[t]he effective remand decisions are taken prior to the remand hearings …' (Hucklesby 1996:230). They are decisions made by police officers, either as arresting officers, officers in charge of police cells or prosecutors who operate within organisations with competing and at times conflicting goals and are thus less open to scrutiny than decisions made in open court. There is thus considerable scope for policy and other factors to influence bail decision-making (Jones 1987:164).

Recent Australian Research

This article draws on Criminology Research Council funded research that focused on identifying factors that have shaped changes in remand rates over a particular time period in the jurisdictions of South Australia and Victoria.

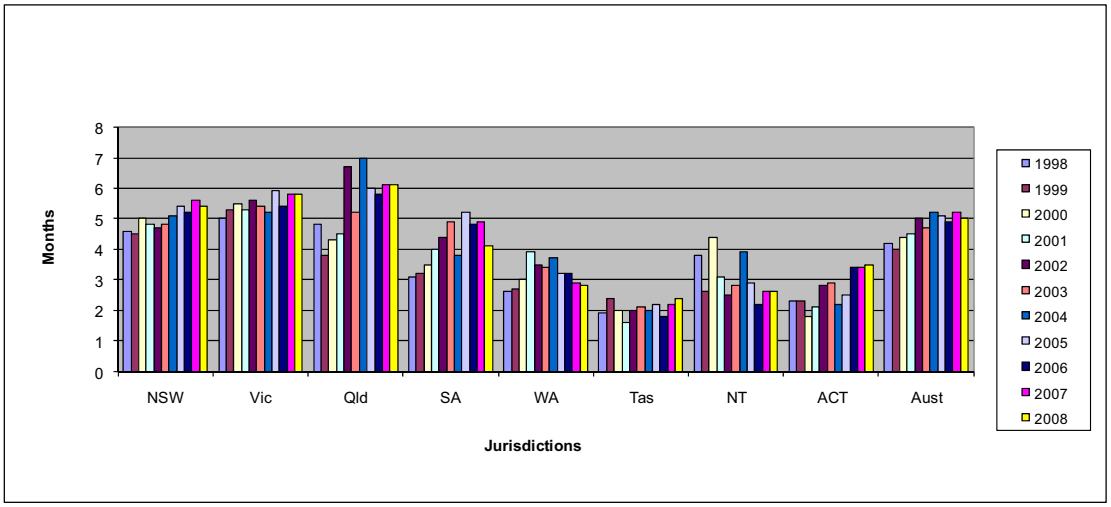
Over the past decade South Australia and Victoria represent the highest and the lowest remand rates of Australian states. The rates of remand (remandees per 100,000 population) from 1998 to 2008 are found in Figure 1.

Figure 1: Australian Remand Rates 1998 to 2008 (Source: ABS 2008)



This is despite the finding that South Australia has a relatively short average time on remand, currently around 4.1 months, which is a shorter period than those found in NSW (5.4) or in Victoria (5.8) or in Queensland (6.1) (see Figure 2).

Figure 2: Average Time Spent in Custody on Remand (Australia) (Source: ABS 2008)



The research design used two jurisdictions to provide an opportunity to examine data and processes using both inter-jurisdictional and intra-jurisdictional comparisons. The inter-jurisdictional approach (Sarre et al. 2006) took each jurisdiction as a site in which remand decision-making was occurring, identified the different outputs of that decision-making, and took a correlational approach to identifying factors that could be seen to account for the different outputs. The intra-jurisdictional approach focused on the changing remand outputs over time that had been identified, and a correlational exploration was utilised to explore the factors that contributed to this change. Such an analytic approach assumed greater importance in the research design as the difficulties of obtaining comparable data for an inter-jurisdictional comparison were identified. In each of these analytic approaches the data used to explore the critical factors was both qualitative and quantitative. The research drew on statistical data from the Australian Bureau of Statistics, the South Australian Department for Correctional Services and the Victorian Department of Justice. The research method included a court observation study in central and outer metropolitan courts and interviews with key informants in the justice systems of both jurisdictions (Sarre et al. 2006; King et al. 2008).

In the discussion that follows we look at the legislative, social and organisational contexts of remand decision-making with a view to throwing some light on the factors that influence decision-makers. In the interests of ensuring that discretionary remand decision-making is made with consistency, we consider a range of strategies that would enable the sharing of information between decision-makers without compromising the independence of the bail authority in individual cases.

The Legislative Context of Bail Decision-Making

Bail and custodial remand are central to the workings of the criminal justice system. As long as the common law courts have existed a power to grant bail appears to have co-existed. Initially the power to grant bail was held by sheriffs and early bail legislation (e.g. the *Statute of Westminster* 1275) was aimed at curbing the abuses that had arisen around the granting of bail. The *Statute of Westminster* even made it an offence to refuse bail when bail was available. Similarly the Bill of Rights of 1688 required that bail not be excessive and a similar provision was added to the United States Constitution by the Eighth Amendment.

The history of bail legislation reflects attempts to deal with issues similar to those found in contemporary debates about bail law. These include for what sorts of offences bail should be available, and how to ensure bail requirements do not become oppressive. The purpose of bail was to prevent the unnecessary detention of a defendant before conviction; however a person would not be granted bail if there was an unacceptable risk that they would not appear at court if not imprisoned. As Blackstone's *Commentaries* noted 200 years ago:

> What the nature of bail is, hath been shown in the preceding book; viz. a delivery, or bailment, of a person to his sureties, upon their giving (together with himself) sufficient security for his appearance he being supposed to continue in their friendly custody, instead of going to gaol (Blackstone 1979:293).

The use of custodial remand as a preventative measure, that is, to prevent further offending, is a relatively recent development in bail law. The early works do not appear to justify remand in custody on preventative grounds. As Metzmeier (1996) shows, the notion of bail being refused to prevent possible further offending only developed in the United Kingdom in the 1940s following *R v Phillips* when the Court of Criminal Appeal held that a persistent offender could be refused bail on the grounds he or she might commit other offences. And indeed, this was initially resisted in some jurisdictions. While 'preventative detention' had been adopted in New Zealand in the 1950s and in Canada in the 1960s, in Ireland preventing re-offending whilst on bail only became a ground for refusing bail following a constitutional amendment passed by referendum in 1996 and even then it only permits refusal of bail for defendants charged with committing serious offences who on reasonable grounds were thought to be likely to commit further serious offences. In Australia, the New South Wales decision of *R v Appleby* adopted the *R v Phillips* preventative approach in 1966 (Metzmeier 1996).

In the legislative context, the decision to grant bail or remand in custody has several unusual characteristics from a court's perspective. The first is that the bail decision is not a final order; not only can it be revoked but also a defendant refused bail can reapply for bail (*Webster v South Australia* at [95]). Secondly while the decision can be characterised as administrative, it is clearly, at least in so far as Supreme Court decisions are concerned, a judicial act done in the exercise of judicial power (*Webster v South Australia* at [23]). Yet, just as it was a power initially exercised by the sheriffs in medieval England, it is also a power exercised by police. Thirdly, contrary to traditional Anglo-Australian judicial functions, bail applications have an 'inquisitorial' element. Bail authorities may make inquiries, on oath (if in court) or otherwise, to ascertain relevant information.

Legislative Statements of Bail Purpose and Factors to Take into Account when Considering Bail

Nowadays, all Australian jurisdictions have largely replaced the common law relating to bail with legislative provisions. The legislation frequently contains similar or mirroring provisions. The *Bail Acts* of South Australia and the Northern Territory have been held to be complete codes governing the granting of bail (*Webster v South Australia*). Being a code means that the Act

> governs exclusively the topic or subject that it regulates, and relevantly that the only remedies to be permitted in relation to that matter are the remedies provided by the Act. The … [Bail] Act is a code on the topic of the power to grant bail, and the procedure to be followed in connection with the grant of bail, on the terms on which bail is to be granted and on enforcement and termination of bail (*Webster v South Australia* at [49] & [51]).

The major elements of the *Bail Act* 1977 (Vic) and *Bail Act* 1985 (SA) have remained relatively unchanged since their enactment. The purpose for remanding defendants in custody is to be found in these Acts along with some indication of the factors that courts should take into account when deciding to remand a defendant in custody. This can be illustrated by the Victorian *Bail Act* in which s4(2)(d) 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 and 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.

Section 4(3) then lists the matters that could be taken into consideration in reaching a decision on bail:

> (a) the nature and seriousness of the offence;
>
> (b) the character, antecedents, associations, home environment and background of the accused person;
>
> (c) the history of any previous grants of bail to the accused person;
>
> (d) the strength of the evidence against the accused person;
>
> (e) the attitude, if expressed to the court, of the alleged victim of the offence to the grant of bail.

Alongside significant similarities between jurisdictions on these matters there are also differences that express aspects of the legal and social contexts in which remand decision-making occurs. For example, in South Australia there is an emphasis on the primacy given to the need to protect the victim in s10(4) and although in both jurisdictions there is a presumption that a defendant is entitled to bail (*Bail Act* 1977 (Vic) s4; *Bail Ac*t 1985 (SA) s10), the Victorian Act contains significant exceptions to the presumption in specified circumstances whereas until recently in South Australia the presumption was continued for all offences until conviction.

Legislative Influence on Remand Decision-Makers

The Bail Acts provide the foundation upon which each jurisdiction's practices and policies have developed. Bail decision-makers in both jurisdictions place great emphasis on the Bail Act and its impact on their decision-making. South Australian interview respondents were generally uncritical of the Act and did not see it as being particularly constraining of decision-making. By contrast, the reverse onus provisions of the Victorian Act were seen to create complexity and, in some cases, confusion and to be something that might create

injustice in some situations. One consequence was that in practice a flexible approach was taken by some bail decision-makers to the reverse onus provisions, developing practices in line with their perceptions of the pro-bail philosophy underpinning the *Bail Act*.

Legislative differences between Victoria and South Australia meant that there were marked differences between processes in the two jurisdictions after the initial decision to remand in custody. The existence of bail justices in Victoria inserts an additional review process not found in South Australia (except for the limited telephone review service). A Bail Justice serves in a role not unlike that of a Justice of the Peace. It is a voluntary office. A Bail Justice can, out of hours, hear bail applications (under the *Bail Act* 1977) and applications for Interim Accommodation Orders for children (under the *Children, Youth and Families Act* 2005) anywhere in Victoria. The value of the bail justice process from a systemic perspective lies not in changing bail decisions – interviewees report very few police bail decisions are changed by bail justices – but in other culture-creating effects. It provides an immediate accountability measure and promotes better targeting of custodial remand decisions (Sarre et al. 2006).

The 20 to 30 minute hearings conducted by the Bail Justice have important symbolic value, making the arresting officers much more accountable for their decisions to seek custodial remand. The use of sworn evidence in the Bail Justice hearing also contributed to the accountability of the arresting officer. This process also increases transaction costs for those seeking custodial remand. For the arresting officer there is the requirement that they attend the bail justice hearing and give evidence. More broadly the police may have to facilitate the attendance of the bail justice who is on-call, ringing and disturbing the justice and assisting with transport. As one police officer reported:

> *You always get someone but whether you have to go out and get somebody. Sometimes it's – I wouldn't say a hassle – but sometimes it takes a bit of organisation to actually go and get the bail justice.* (Police)

This emphasis on accountability was not as visible in South Australia, on the other hand, which has a telephone review process which is only used if a person is not going before a court before 4pm of the following day and the person has made written application for such a review. The result is a week-end provision that is rarely used.

This different culture of accountability between the jurisdictions is reinforced at the court bail phase. The Victorian process continues to involve the arresting officers, requiring them to take some responsibility for their decision to recommend against bail by attending court to give sworn evidence. This may, if the arrest happens overnight, mean that the arresting officers will have to attend court after the end of their shift. Aside from the clear personal inconvenience this has resource implications, diverting operational police from their normal policing work. One interviewee gave a practical illustration of the impact of the arresting officer having to attend court on bail hearings in the following terms.

> *Especially if you are rostered on to do the van the next day and you can't do the van; that takes the van off the road, especially at a small police station. I'm fortunate that I work at a big police station and if I get taken off the van somebody can take over. At a smaller police station, if you have got to go to court the next day for a remand, the van's off the road.* (Police)

In South Australia the operational police rarely have any role once police bail has been refused. The matter then becomes a matter for the police prosecutor to handle. This is possible because the South Australian court process does not require police to give sworn evidence. As a result, operational police have little personal accountability for the remand decision-making in which they are involved.

This was confirmed by a court observation study. In South Australia, three quarters of bail decisions were decided without evidence being produced and when evidence was given it was usually a bail assessment report. By contrast, in Victoria over three quarters of bail decisions followed the presentation of evidence.

Reconciling Competing Legislative Principles

Influences on remand decision-making are most obvious where the legislative guidance is perceived to be unclear. The implementation of the reverse onus provisions in Victoria appeared to be a difficult area of practice. The reverse onus provisions reverse the presumption of bail so the defendant has to either demonstrate 'exceptional circumstances' in some situations or, in others, 'show cause' why bail should be granted. Decision-makers discussed their perception that the reverse onus provisions created inappropriate custodial remand in some situations. The example of some repeat minor offences falling within reverse onus provisions (so there was a presumption against bail) was said to be one such situation. As a result of these perceived injustices some remand decision-makers turned a Nelsonian eye to the requirements of the section.

> *...and then there's a 'show cause' situation where they're allegedly to have committed further shoplifting whilst on bail. ... I think the police actually close a blind eye to the fact that it's 'show cause' anyway in a lot of those cases, and in my experience they don't actually fill in their reasons for granting bail in a 'show cause' situation.* (Bail justice)

> *You tend to go, dare I say it, around the Bail Act a little, for practicality purposes. An example for that would be if you had a shoplifter who does a $10 shop theft, gets caught and for some reason gets bailed. If he gets caught that day, the next day, whenever, prior to the court case, and he gets caught shoplifting again, we're talking indictable offences, so he's on bail for an indictable, he's committed an indictable offence whilst on bail. He automatically falls into 'show cause'. Realistically, a bail justice or a court won't remand somebody on that, even though the Bail Act says they are to go before the bail justice. So it then falls back on us to not so much breach the Bail Act, but to take a practical view of it which in turn may open us up to criticism later on.* (Police)

This flexibility in implementing the law reflects a culture at every level of the remand decision-making of limiting the use of custodial remand to circumstances where it is clearly needed and would not be overturned on review or on fresh application later in the remand process. This approach was not approved by all, with some decision-makers advocating a stricter application of the reverse onus provisions.

The Social Context of Remand Decision-Making

In addition to the influence of the legislative context, remand decision-making is shaped by the social context of both the justice agencies and the defendant. The assessment of risk (of non-appearance in court and of re-offending) that underpins remand decision-making involves assessments of the defendant as a complex human being whose behaviour is shaped by personal characteristics, social connectivity and access to resources.

Characteristics of Defendants

Remandees are overwhelmingly young males, and the distribution of charge types for which they are remanded is generally similar to the distribution of offences in the sentenced prisoner population. Remandees are more likely than other prisoners to be homeless, unemployed or have some form of mental disorder (Morgan & Henderson 1998).

The continuing over-representation of Indigenous persons as offenders in the criminal justice system has long been recognised. Overall in Australia, Indigenous prisoners are about 24% of the prison population and about 23% of the remand population, yet they represent just 2% of the Australian population. While the rate of imprisonment in Australia is around 169 per 100,000, the figure masks the disparities between black and white Australians. The imprisonment rate of non-Indigenous Australians is 128.6 per 100,000. The imprisonment rate for Indigenous Australians is 2,223 per 100,000 Indigenous population (ABS 2008). Across Australia, there is hardly any difference between the percentage of the Indigenous and non-Indigenous remand populations. In both populations the proportion of unsentenced to sentenced prisoners is around 1:4 (ABS 2008).

In our 1999 study, however, we identified significant regional differences in imprisonment and custodial remand rates. We found, for example, large differences between South Australia and Victoria. In Victoria, around 4.5% of all prisoners were Indigenous (Aboriginal or Torres Strait Islander origin), compared with around 20% of remandees. In South Australia, Indigenous prisoners comprised about 17% of the total prisoner population, but between 35% and 40% of remandees (Bamford et al. 1999b, Table A2 Appendix A). The representation of Indigenous people overall is substantially higher in South Australia, but the 'over-representation' of Indigenous people as remandees is less in South Australia than Victoria, where it is roughly 400%.

Remand decision-makers identified that changes in defendant characteristics have been significant in recent years. The increased prevalence of drug-using defendants and the greater visibility of defendants with mental ill-health were seen to have changed the remand decision-making and its outcomes. This increased identification of the social causes of offending behaviour can be seen to have shaped decision-makers' responses to the remand decision.

Drug Using Defendants

Whilst there is limited data collection about drug use amongst remandees, what there is suggests an increase in the prevalence of drug use (DUMA 2008). The growth in drug-related crime and defendants with drug abuse histories was described by almost all respondents as being a major influence on the remand process.

> *... [D]ifferent factors influence different things. Years ago, when people were paid by cash, getting historical here, and money was moved around, armed robberies were of a great influence, so there you're talking serious, violent crime, so the process of getting somebody remanded in that circumstance wasn't hard. Drugs themselves, as such, we didn't have the dealings with heroin and things 25 years ago, and we certainly do now, and now we've moved into the heroin stage. Quite often here we'll deal with a low level heroin trafficker. When I say low level, they're just selling two or three caps on the street, but they're doing it many times, rather than a big situation.* (Police)

> *And, as the years go on, you'll get people who are mentally unstable. ... you seem to be dealing with a lot more drug affected people now. A sign of the times I think.* (Police)

> *... I've noticed changes in patterns over the years, over 20 years. When I used to remand crooks, they were crooks as in they were armed robbers and burglars and they needed the money to feed them or their families or whatever ... Nowadays they need the money to feed a drug addiction, and the only way to stop when they're running hot is to remand them, I'd say 85 per cent of the people – or probably 75 per cent of people inside have drug habits and that's why they're offending and that's why they're inside. And I say that extremely confidently.* (Police)

Interviewees suggested that the increase in drug dependent defendants was impacting on remand in custody in two ways. Often defendants were affected by drugs when they were arrested, creating management issues for those responsible for their custody. Such defendants also had reduced capacity to manage within the justice system and it was a police and bail justice perception that, for some people, the time in which they are initially remanded in custody allows them to 'come down' from their drugs and prepare a coherent story about how they will manage whilst on bail. Thus some interviewees remarked that it was quite understandable that some defendants who were refused police bail would be granted court bail as they presented very differently by the time they got to court.

The second way in which the growth in drug dependent defendants is impacting on custodial remand rates relates to the nature of the offences they are committing. Often these defendants are arrested for relatively minor offences for which a custodial sentence was very unlikely, yet because of their drug affected state, these defendants posed a real risk of re-offending and thus could not be granted bail.

Defendants with Mental Health Problems

The increased visibility of defendants with mental health issues within the justice system has been noted. Defendants with mental health problems were identified by remand decision-makers as coming to their attention more frequently.

> *... One of the major issues we've come across recently is that the remand system seems to have become the dumping ground for people with mental health problems and with intellectual disabilities ... There has been a massive increase of people with mental health issues who are in the remand system and who've got nowhere to go.* (Legal aid)

Mentally ill defendants present bail authorities with treatment issues and require the justice system to interact with mental health services. The lack of such services may lead, in some cases, to defendants who would more appropriately be placed within a therapeutic environment being placed in custody. Some bail decision-makers suggested that, on occasion, such defendants were remanded in custody because there was a better prospect of defendants accessing some form of treatment than if they were released on bail. Even if they would otherwise be granted bail, many of these defendants lack stable accommodation and the resources to ensure that they will attend court as required.

The recognition of the complex social characteristics of defendants is of philosophical and practical importance for remand decision-making. Philosophically speaking, the recognition that gender, race, mental health, homelessness and drug use influence the behaviour of defendants has created a framework for the exercise of decision-making discretion developed not just from legal analysis but also from social analysis. Practically speaking, the recognition of these influences translated into a range of positions about the options for addressing the problems that led to offending behaviour both in the short term of the remand period and, for some decision-makers, in the longer term. For some decision-makers, particularly police, the complexity of social issues led to a level of resignation and hopelessness about change in individuals. These decision-makers saw the recidivist behaviours (resulting from unaddressed social causes) giving rise to a risk to both the defendant and the society. For other decision-makers, locating the primary influence on individual behaviour in the social arena created the option of social intervention to bring about change. Although this was somewhat evident in some remand decision-makers in South Australia, it was most obvious in Victoria. There is no doubt that this thinking made a significant contribution to the culture of therapeutic justice found in the *organisational* context of remand decision-making, to which we now turn.

The Organisational Context of Remand Decision-Making

The organisational context in which remand decision-makers operate includes both their own agency and those of other remand decision-makers. Differences in practice develop as a result of a combination of factors and, notwithstanding the independence of each decision, a jurisdictional culture can be identified in relation to bail policy. Bail decision-makers are interconnected both through the capacity of later decision-makers to review the decisions of earlier decision-makers and through the policy contexts in which they operate. This is not to say that they do not make independent assessments of the facts in a particular situation, but rather to recognise that this assessment is shaped by the broader context.

Bail legislation establishes the accountability mechanisms on which the proper working of the remand system depends. However, the effectiveness of the review mechanisms is influenced by the practices and policies within the jurisdiction. The structures that surround the review of custodial remand can be seen to shape a jurisdictional culture. In both Victoria and South Australia the decision to seek custodial remand is first raised by the arresting police officer. While the actual decision is made by the relevant custodial supervisor (usually the custody sergeant) this can be characterised as a review of the arresting officer's decision. No interviewees reported regular differences of opinion at this point in the remand decision-making process. One interviewee reported that in 10 years of service only twice had the arresting officer's recommendations being questioned and that was in relation to the issue of conditions. Another operational officer with many years experience said that, insofar as disagreements with custody supervisors were concerned,

> *generally we'll come to same the conclusion based upon the facts that we've identified in relation to a suspect. It's been my experience you'll ultimately come to the same conclusion.* (Police)

Operational requirements and strategies influenced remand decision-makers, and custodial remand was used to serve broader agency objectives such as crime reduction. The influence of the organisational context was most obvious when considering the influence on police decision-making. The influence was exercised in several ways. At the police bail decision stage, operational requirements such as the needs of the investigation frequently influence decision-making.

Changed policy in relation to arrest was identified in South Australia, where it was suggested that the police were being encouraged to arrest in situations when a summons might previously have been seen as appropriate:

> *I guess there's more emphasis on arrest now then there was prior to the LSA concept coming into being, which was 1997. Because once again, what we think about bail, we are now encouraged to make the same decision about arrests. Where some people may have been satisfied to report, it's now, 'Why aren't you arresting this person? This person has committed these crimes. We're targeting these crimes, so why haven't you arrested him?' which is fair enough.* (Police)

A further influence on decision-making is the need to achieve organisational performance standards. 'Targeted offenders', who were persons targeted by police intelligence units as recidivist offenders, might have been subject to bail conditions that were easily breached. This could lead to the defendant being re-arrested and having a greater prospect of being remanded in custody.

> *[Operational police] were given particular tasks to ensure that people were complying with bail, so that would impact on what we'd do for the day. We were given ... we would target*

people who were recidivist offenders and/or who had committed crimes that fitted into our strategic intelligence requirements, for example breaks, and would then make sure that they were complying with their conditions. And the conditions are usually curfew, to be in a particular place at a particular time, and not to be out and about or not to associate with people.

Interviewer: And so, if you found someone, for example who was outside their curfew hours …

… there was an expectation - and rightly so - that we should arrest them and refuse bail because they were not complying with bail conditions. And it was a tool to be used to try and curb people committing a particular crime, and to show that we were taking bail seriously.

However there were limits to the extent of the influence of organisational policy. In South Australia differences in approach were acknowledged.

We are influenced by SAPOL policy. I mean, some of the older sergeants who have worked in the watch house for a long period of time, they take their position as the bail authority almost to the extreme where they will not be told how to make a decision. But I mean, and I emphasise extreme, whereas I think as employees of an organisation like SAPOL we've all got to be focused on achieving the same goals. If management are saying these factors should be influencing your decision, well, I see nothing wrong with that, where some people would. I'm not saying that they wouldn't comply with those directions but they … they don't take offence, I suppose it's umbrage. They think, 'well, you're telling me what to do. You have no position to, when I'm the one that makes the decisions,' which is correct at the end of the day, but we're all trying to achieve the same goal. (Police)

In Victoria, none of the interviewees discussed bail and custodial remand as a tool of policing strategy. Generally Victorian informants indicated that there had been no change of policing strategies and were either not aware of targeted 'intelligence-led' policing strategy or thought it did not affect the remand system.

The intersection of organisational policy and broader justice policy is complex and evolving as a result of the managerial context in which justice agencies are operating. The prevention of offending and, in particular, the need to address victim concerns are legislatively mandated goals of remand. These goals are also reflected in the performance expectations of the agency. Whilst the blatant use of bail conditions to achieve a general incapacitation of defendants is a practice that warrants further exploration and consideration, the use of remand to contribute to community safety is in accord with the justice policy directions of governments in recent decades. The expansion of the purposes of custodial remand can also be seen in the focus by decision-makers on the needs of the defendant, most clearly demonstrated in the therapeutic justice approach to remand displayed most keenly in Victoria. It is to that emphasis that we now turn.

Remand as a Therapeutic Strategy

Decision-makers are influenced by their views of their roles. This applies to their decisions in individual cases as well as in the development of practice and policy. The jurisdictional culture in Victoria embedded a perception of their role that was not evident in South Australia. Some Victorian magistrates have adopted what has been described as the 'therapeutic justice' model. Under this model the law explores opportunities to act as therapeutically utilising social science knowledge (Freiberg 2003). This assumption of the therapeutic role appears to be, in part, a response to the changing characteristics of the defendants appearing in the remand system. This philosophy, along with the use of relevant support services, promotes the use of bail in circumstances that would otherwise have led to custodial remand.

> *Therapeutic justice is a phrase that you hear a lot these days. I'm being quite neutral when I speak about that: I'm still thinking about it. There's a real concern, I think these days, and a positive one, of magistrates wanting to get involved in welfare issues in so far as people charged are concerned, which I think, in this state anyway, increases the likelihood particularly in less serious matters, of bail.* (Prosecutor)

The essence of the approach is an attempt to use the criminal justice process to deal with some of the underlying causes that have led to offending. Without disputing the priority of protection of the community, proponents of this approach argue that bail through use of conditions should be used to address issues of drug dependency and poor mental health that bedevil the criminal justice system.

> *... as I have said the primary job [of the court] is to protect the community and the best way of protecting the community, whether at the bail stage or sentence stage, is to address those issues that might lead to offending, and why not start at the very outset? That then might also give you a trigger, or a justification for releasing somebody on bail.* (Court official)

Although a similar approach may exist in South Australia, what was apparent from our research was that it went completely unreported in South Australia, whereas in Victoria the therapeutic justice approach was raised by a number of decision-makers. Aligned with this approach was the development of a range of services to support the court in assessing defendants and to help defendants to comply with bail requirements and address some of the underlying causes of their offending. The confidence of decision-makers in these support services was a significant influence on their decisions in relation to bail and remand. Differences across the court system were said to exist in Victoria. The Melbourne Magistrates Court had a level of support services that did not exist in suburban or regional courts. There was also a suggestion from some police that regional and suburban courts tended to be more conservative in their approach to granting bail than the Melbourne Magistrates Court. However other police either believed there was no difference or, if there was a difference, that it was due to differences in the nature of the offences being dealt with and in the sorts of defendants appearing in the different courts.

The Inter-Organisational Context

Whilst bail decision-makers operate within their own institutional or agency contexts and policy frameworks, however, there was no sense of organisational 'connection' to other remand decision-makers. Decisions balancing the need to ensure community safety and to ensure that the defendant was present in court when required, and the right of the defendant to receive bail since they were presumed innocent, were made by individual decision-makers with limited understanding of how other agencies in the system were handling general issues relating to bail. And yet the decisions in one organisation were highly influential on the activities of others.

Magistrates in both South Australia and Victoria indicated that they could see the effect of police operational decisions (such as focusing on a particular offence) in the remand hearings that came before them and that these decisions had a significant influence on the characteristics of offenders coming into the system and on workflows throughout the system. Police decision-makers identified that they made decisions cognisant of the factors that they believed would influence those who made the subsequent remand decision in the case. They were sensitive to having their decision not to grant bail overturned by later remand decision-makers whilst at the same time acknowledging that 24 hours in the police cell enabled a defendant to present a more coherent proposal about bail (sometimes with the assistance of a solicitor). Police reported that in some cases it was not worth pursuing custodial remand at the police bail stage because even if granted it would be set aside by the

courts. The disincentive to seek custodial remand – although reported in both jurisdictions – could be expected to be greater in Victoria, where the obligations on police are far greater than in South Australia.

> *My perception would be that [at the end of the process] they all seem to get bail, they don't get remanded. Whether that's a good thing or a bad thing, I don't know. The people that they uniformly deal with, they're not your more serious offenders, they always seem to get bail ...* (Police)

Several police interviewees pointed out that whilst the police work 24 hours a day, seven days a week, courts still only sit restricted hours five days a week. They questioned why this disjunction is accepted without question, and suggested an exploration of the benefits of extended court sittings.

Despite the fact that the ways in which different agencies in the process operate directly impact on how other agencies process or decide remand matters, there appear to be few structures to enable formal (or even in some cases informal) consultation and discussion between them about the operation of the remand system.

Conclusion

The importance of like cases getting a like decision about remand, bail and conditions was recognised throughout the system in both jurisdictions. The broad discretion given to decision-makers and the limited time allocated for their decision-making can lead to considerable variety in approaches to bail decisions. The requirement that decision-makers at each point in the remand process be independent makes developing appropriate quality control mechanisms difficult.

There appear to be very few processes for internal quality control or review of decision-making in Victoria or South Australia. Within the jurisdictions, there are few explicit conversations, even between key actors performing similar roles (e.g. custody sergeants or magistrates about the exercise of decision-making in relation to bail). External review in individual cases is provided by the statutory review processes ending with a review or appeal jurisdiction exercised by the Supreme Courts. However there are few opportunities for review of the collective results of decision-making.

None of the institutions involved in the remand in custody process included remand process outcomes in their performance indicators. Indeed, as our statistical research revealed, institutions had very little data on remand at all. While remand decision-makers do record decisions and reasons, this information is not collated. Police, for example, at the time of this research were not able to determine easily the numbers of defendants granted police bail, nor, in aggregate, the reasons why police bail was refused. The courts were only in a slightly better position. As a consequence, many interviewees had little or no idea of whether remand rates were changing, although all had detailed knowledge of how decisions were made in individual cases and the factors influencing an individual decision.

A number of strategies aimed at achieving consistency of decision-making within the legislative framework were identified by Victorians. Bail justices have embarked upon a structured training program in recent years which is expected to improve the quality of decision-making, including familiarity with the detail of the 'exceptional circumstances' and 'show cause' provisions. Associated with this training is an improved data collection process. Magistrates are provided with training opportunities and, when deciding bail

applications, they have the benefit of a computer on the bench that provides a checklist of criteria and the relevant statutory form which records the reasons why bail has been refused. This provides magistrates with a tool for the systematic review of the bail decision to be made, and may contribute to a more standardised decision-making process.

There would appear to be potential within police stations for the development of standardised bail decision-making. Indeed, custody sergeants we interviewed asserted their right to have the final say in the question of police bail. However, our other police interviewees emphasised that the arresting officer or informant was not formally constrained by internal review processes. In fact, one police interviewee suggested that some of the changes to remand decision-making by police could be attributed to the fact that there had been an influx of new police onto the streets, and that these police had not yet come to appreciate the advantage for the police in remanding a defendant in custody.

Data collection about bail decision-making allows for both the creation of a feedback loop to decision-makers and the identification of the range of decisions being made by decision-makers. Current data collection processes may allow the identification of remand outcomes of individual cases that come before the courts. They do not allow the identification of remand outcomes in an individual police station, or by individual decision-makers (e.g. a particular bail justice or a particular magistrate). Several interviewees identified the need for more detailed data collection in terms of decision-making by groups of remand decision-makers: police, magistrates or bail justices. This information would be used to identify more clearly training needs and the perceived need for services to enable the granting of bail to particular classes of defendants.

Policy decisions such as police directives to use custodial remand to meet crime reduction targets, or to promote arrest over proceeding by way of summons – when in the ordinary course a summons would have been a possible alternative – do not take into account broader implications for the criminal justice system. While the independence of each of the justice institutions is an essential feature of each institution, there needs to be a structured process to enable discussion and consideration of how an individual institution's actions or policies supports or frustrates the achievements of the broader goals and objectives of the remand in custody process generally.

Cases

R v Appleby [1966] NSWLR 38

R v Phillips [1947] Criminal Appeal Reports 47

Webster v South Australia [2003] SASC 347

References

Armstrong S 1977 'Unconvicted prisoners: the problems of bail' in Armstrong S, Moss A & Sackville R *Essays on Law and Poverty: Bail and Social Security* AGPS Canberra

Australian Bureau of Statistics 2008 *Prisoners in Australia 1998-2008* (4517.0)

Bamford D, King S & Sarre R 1999a 'Remand in Custody in Three Australian Jurisdictions' *Research and Public Policy Series* No 23 Australian Institute of Criminology Canberra

Bamford D, King S & Sarre R 1999b *Report to the Criminology Research Council on Remand in Custody in SA, WA and Victoria* Criminology Research Council Canberra

Blackstone S W 1979 *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765 –1769* Clarendon Press Oxford

Brignell, G 2002 'Bail: An Examination of Contemporary Issues' *Sentencing Trends and Issues* Judicial Centre of NSW 24

Dhami M & Ayton P 2001 'Bailing and Jailing the Fast and Frugal Way' *Journal of Behavioural Decision Making* vol 14 pp 141-168

Doherty M & East R 1985 'Bail decisions in magistrates courts' *British Journal of Criminology* vol 25 pp 251-266

DUMA 2008 *Drug Use Monitoring in Australia* AIC Canberra <www.aic.gov.au/research/duma/stats/index.html>

Freiberg A 2003 ‘Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism?’ *Law in Context* vol 20 no 2 pp 6-23

Freiberg A & Morgan N 2004 'Between Bail and sentence: the conflation of dispositional options' *Current Issues in Criminal Justice* vol 15 no 3 pp 220-236

Hucklesby A 1996 'Bail or Jail? The practical operation of the Bail Act 1976' *Journal of Law and Society* vol 23 no 2 pp 213-233

Jones P 1987 'Police Bail Decision in England and Wales' *Police Studies* vol 10 no 4 pp 155-164

King M 1971 *Bail or custody* Cobden Trust London

King S, Bamford D & Sarre R 2008 'The Remand Strategy: assessing outcomes' *Current Issues in Criminal Justice* vol 19 no 3 pp 327-344

Lulham R & Fitzgerald J 2008 'Trends in bail and sentencing outcomes in New South Wales Criminal Courts: 1993-2007' BOCSAR *Crime and Justice Bulletin* Number 124 pp 1-8

Mather S 2008 'Bail Supervision and Young People: Pathway or Freeway?' *Flinders Journal of Law Reform* vol 10 pp 675-691

Metzmeier KX 1996 'Preventive detention: A comparison of Bail refusal practices in the United States, England, Canada and other common law nations' *Pace International Law Review* vol 8 pp 399-438

Morgan PM & Henderson PF 1998 *Remand decisions and offending on bail: evaluation of the Bail Process* Home Office Research and Statistics Directorate London

Roth L 2006 'Law and order legislation in the Australian states and territories: 2003-2006' *Briefing paper (New South Wales Parliamentary Library Research Service)* Sydney Number 12, pp1-78

Sarre R, King S & Bamford D 2006 'Remand in Custody: Critical factors and key issues' *Trends and Issues in Crime and Criminal Justice* No 310 Australian Institute of Criminology Canberra pp 1-6

SCRGSP 2009 *Report on Government Services 2009* Steering Committee for the Review of Government Service Provision, Productivity Commission, Canberra

Victorian Law Reform Commission 2007 *Review of the Bail Act* VLRC, Government of Victoria Melbourne